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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE BANK OF EAST ASIA (U.S.A.)
N.A.,

Plaintiff, Cross-defendant
and Appellant,

v.

FARIBA JAVAHERIAN et al.,

Defendants, Cross-complainants and
Respondents.

B242079

(Los Angeles County Super. Ct.
No. BC459344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed with directions.

Anderson, McPharlin & Connors, Jesse S. Hernandez and Vanessa H. Widener for Plaintiff, Cross-defendant and Appellant.

Kousha Berokim for Defendants, Cross-complainants and Respondents.

Plaintiff, cross-defendant, and appellant The Bank of East Asia (U.S.A.), N.A., appeals from a judgment following an order granting summary judgment in favor of defendants, cross-complainants, and respondents Fariba Javaherian and Ierra Venture, LLC, in this action arising out of two deeds of trust on the same properties. The Bank contends that its deed of trust is entitled to priority, because it was recorded before Javaherian's deed of trust was indexed. We agree and reverse with directions.

FACTS

On December 23, 2004, Javaherian loaned \$2.55 million to Chabad of California (COC). On February 7, 2005, Javaherian made a second loan to COC in the amount of \$1.5 million. Saeed Kohanoff also made loans to COC totaling \$900,000.

On February 7, 2005, Rabbi Boruch Cunin executed a deed of trust on behalf of Chabad Housing Corporation encumbering two real properties in Los Angeles to secure repayment of the loans totaling \$4.95 million from Javaherian and Kohanoff. Javaherian declared that she required a first priority deed of trust, but Cunin declared that he told Javaherian and Kohanoff their deed of trust would need to be subordinated to a loan that Chabad Housing was negotiating with the Bank. On February 10, 2005, Chabad Housing sent the February 7, 2005 deed of trust to the Los Angeles County Recorder's Office for recordation.

On February 28, 2005, Cunin executed a deed of trust encumbering the same properties to secure repayment of a loan from the Bank to Chabad Housing in the amount of \$2.2 million. The Bank's loan to Chabad Housing was made on the condition that the Bank would have a first priority deed of trust on the property. The Bank was not aware of Javaherian's prior loans or the February 7, 2005 deed of trust. Javaherian has declared that she was not aware of the deed of trust executed in favor of the Bank.

The February 7, 2005 deed of trust was recorded in the recorder's office on March 2, 2005. The Bank's deed of trust was recorded in the recorder's office on

March 3, 2005. The February 7, 2005 deed of trust was indexed in the recorder's office records on March 5, 2005, and the Bank's deed of trust was indexed on March 7, 2005.

COC repaid \$500,000 to Kohanoff and provided a new unsecured note for the remainder of Kohanoff's loan. On April 1, 2005, COC executed a new note in favor of Javaherian in the amount of \$4,050,000, which was the total amount of her loans. The April 1, 2005 note superseded and voided any previous notes between COC and Javaherian. On December 26, 2006, COC executed a loan modification agreement extending the due date of the April 1, 2005 note by one year and increasing the interest rate from 9.75 percent to 12.5 percent. COC also executed a new deed of trust securing repayment of the April 1, 2005 note, which was recorded on January 27, 2006.

PROCEDURAL BACKGROUND

On April 15, 2011, the Bank filed a complaint against Javaherian, Kohanoff, and Chabad Housing for quiet title and declaratory relief. The Bank caused a notice of pending action to be recorded on April 19, 2011.

Javaherian is the President of Ierra. On May 26, 2011, Javaherian assigned the February 7, 2005 deed of trust to Ierra. Ierra conducted a nonjudicial foreclosure sale on May 27, 2011, and was the successful bidder for the properties. Ierra's successful bid was \$1.7 million.

On June 3, 2011, Javaherian, on behalf of Ierra, caused deeds of trust to be recorded on the properties in favor of Vahid Vahdat and Saman Fakheri securing repayment of loans totaling in excess of \$3 million.

The Bank added Vahdat, Fakheri, and Ierra to the complaint as Doe defendants. Javaherian and Ierra filed a cross-complaint against COC, Cunin, the Bank, and other individuals. The causes of action alleged in the cross-complaint against the Bank were for quiet title and declaratory relief.

On November 21, 2011, the Bank filed a motion for summary judgment, or in the alternative, summary adjudication, as to the quiet title and declaratory relief causes of

action. The Bank argued that it was a bona fide encumbrancer, because it had no notice of the Javaherian deed of trust that had not been indexed when the Bank recorded its deed of trust. The Bank also filed a motion for summary judgment of the cross-complaint.

Javaherian and Ierra filed a motion for summary judgment on their cross-complaint of the causes of action against the Bank for quiet title and declaratory relief. Javaherian and Ierra argued that Javaherian was the first to record and the first to be indexed, and therefore, the February 7, 2005 deed of trust was entitled to priority. They opposed the Bank's motions on the same grounds.

The Bank opposed Javaherian and Ierra's motion for summary judgment and filed replies as to its motions for summary judgment arguing that the Bank was entitled to priority because it had no constructive notice of the February 7, 2005 deed of trust. In addition, Javaherian's deed of trust should lose priority because the December modification of the Javaherian loan had a material adverse effect on junior liens. Javaherian and Ierra filed a reply arguing that the loan modification was not material and the loan was exempt from usury laws.

On May 30, 2012, the trial court entered an order granting Javaherian and Ierra's motion for summary judgment on the cross-complaint. The court found that there were no triable issues of fact. The Bank was not a bona fide encumbrancer for value, because the Javaherian deed of trust was recorded and indexed prior to the Bank's deed of trust being recorded and indexed. That same day, the court entered judgment quieting title in favor of Javaherian and Ierra, subject to the deeds of trust recorded in favor of Vahdat and Fakheri.

The Bank filed a timely notice of appeal.

DISCUSSION

Standard of Review

“We review the grant of summary judgment de novo. [Citation.] We make “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” [Citation.] A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. [Citation.] Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. [Citation.]’ [Citation.]” (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1113.)

Constructive Notice

The Bank contends that its deed of trust has priority over the February 7, 2005 deed of trust, because the Bank had no actual or constructive notice of the February 7, 2005 deed of trust when it received and recorded its deed of trust. The Bank is correct.

In general, the first conveyance of real property to be recorded assumes priority over subsequently recorded conveyances. (*First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1313.) “An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder’s office, with the proper officer, for record.” (Civ. Code, § 1170.)

“Although courts conflate the two duties, recording and indexing are separate and distinct functions. [Citations.]” (*First Bank v. East West Bank, supra*, 199 Cal.App.4th at p. 1316.) Priority between instruments that are deemed to have been recorded at the

same time is not determined by indexing. (*Id.* at p. 1317.) “[I]t would disrupt the statutory scheme to make priority turn on the random act of indexing, . . . especially where banks and title insurers have no influence over when the recorder indexes trust deeds. [Citation.]” (*Ibid.*)

However, indexing determines whether a subsequent purchaser or encumbrancer is charged with constructive notice. A property conveyance is conclusive against the grantor and anyone claiming under the grantor, “except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.” (Civ. Code, § 1107.) “It is well established that a bona fide purchaser for value who acquires his interest in real property without notice of another’s asserted rights in the property takes the property free of such unknown rights. [Citations.]” (*Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 451.) ““The elements of bona fide purchase are payment of value, in good faith, and without actual or constructive notice of another’s rights. [Citation.]’ [Citation.]’ [Citation.] “The absence of notice is an essential requirement in order that one may be regarded as a bona fide purchaser.” [Citation.]’ [Citation.]” (*First Bank v. East West Bank, supra*, 199 Cal.App.4th at pp. 1313-1314.)

A conveyance of property “recorded as prescribed by law” gives constructive notice of its contents to subsequent purchasers and mortgagees from the time that it is filed with the recorder for record. (Civ. Code, § 1213.) “[A] subsequent purchaser obtains priority for a real property interest by (1) acquiring the interest as a bona fide purchaser for valuable consideration with neither actual knowledge nor constructive notice of (2) a previously-created interest; and (3) ‘first duly record[ing]’ the interest, i.e., recording before the previously-created interest is recorded. [Citations.]” (*First Bank v. East West Bank, supra*, 199 Cal.App.4th at p. 1313, italics omitted.)

“Constructive notice is a legal ‘fiction.’” [Citation.] For constructive notice to be conclusively presumed, the instrument or document must be ‘recorded as prescribed by law.’ [Citations.] The phrase ‘recorded as prescribed by law’ means the instrument must be indexed. [Citations] ‘“A document not *indexed* as required by statute (see Gov.

Code, §§ 27230-27265), does not impart constructive notice because it has not been recorded ‘*as prescribed by law.*’” [Citation.]’ [Citation.] For more than a century it has been the law in California that a party does not have constructive notice of a recorded instrument until that document has been properly indexed so it can be located through a search of the public records. [Citations.]” (*First Bank v. East West Bank, supra*, 199 Cal.App.4th at p. 1314, footnotes omitted.)

“Stated otherwise, constructive notice of an interest in real property is imparted by the recording *and* proper *indexing* of an instrument in the public records. [Citations.] The *recording* of a document does not impart constructive notice; ‘[t]he operative event [for purposes of constructive notice] is actually the indexing of the document[.]’ [Citation.]” (*First Bank v. East West Bank, supra*, 199 Cal.App.4th at pp. 1314-1315.)

The undisputed facts show Javaherian’s interest in the properties was created first and the Bank was a subsequent encumbrancer. Although the February 7, 2005 deed was recorded first, it failed to provide subsequent purchasers and encumbrancers with constructive notice until it was indexed. Therefore, when the Bank’s deed of trust was duly recorded, the Bank was not charged with constructive notice of the prior deed of trust and the Bank’s interest is not subject to the February 7, 2005 deed of trust. The date that the Bank’s deed of trust was indexed is irrelevant, because there is no notice issue concerning the Bank’s deed of trust. Between the two innocent parties in this case, Javaherian was in the best position to protect her interest by promptly recording the February 7, 2005 deed of trust and verifying that it had been properly indexed. The judgment and order granting summary judgment in favor of Javaherian and Ierra must be reversed.

DISPOSITION

The judgment and the order granting summary judgment on the cross-complaint are reversed. The trial court is directed to enter a new and different order granting the Bank’s motions for summary judgment of the complaint and cross-complaint as against

Javaherian and Ierra. Appellant The Bank of East Asia (U.S.A.), N.A., is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.