

Summertime Done Come and Gone My Oh My

August 29, 2024

Fool Me Once, Shame on You; Fool Me Twice, Shame on Me: *Res Judicata* and Ownership Claims Post Foreclosure



By **Steven M. Herman**
Senior Counsel | Real Estate

The Supreme Court of the State of New York, County of Westchester, recently held that the doctrine of *res judicata* bars a lender's claim that a borrower's subsequent transfers of property are void, if the claim is brought after an order and judgment of foreclosure.^[1]

Luis Almonte (Lender) loaned \$220,000 to Medardo A. Palma (Palma) and Victor Abreu (Abreu) for their acquisition of a commercial property through Avaar Advisory Group, Inc. (Avaar). As security for the loan, Palma and Abreu pledged 100 percent ownership in Avaar to Lender and delivered the original stock certificate. Avaar purchased the property on November 20, 2015. At the request of Palma and Abreu, who wanted to save on mortgage recording tax, Lender did not record a mortgage against the acquired property.

The 2015 purchase kickstarted a series of subsequent transfers and mortgages. On July 12, 2017, Palma, claiming to be the president of Avaar, executed a mortgage in favor of Southbridge RE, LLC (Southbridge) securing a \$160,000 loan. Again claiming to be the president, as well as the secretary, of Avaar, Palma executed a deed transferring the property to Grenache Holding Corp. (Grenache). Grenache financed the acquisition with a \$246,000 loan from ABL One, LLC and satisfied the Southbridge mortgage. On January 30, 2018, Grenache transferred the property by deed to Southbridge. LendingHomes Funding, Corp. (LendingHome) financed Grenache's acquisition with a loan in the amount of \$320,000.

On December 30, 2019, LendingHome filed a foreclosure action against the property. Almonte and Avaar were served with process, but did not appear. The court issued a Default Judgement and Judgement of Foreclosure and Sale. The property was sold at public action on January 21, 2022. Nicole Stern, the auction's highest bidder, assigned her interest in the property to Kiavi Properties, Inc. (Kiavi). Kiavi then transferred the property to Anjali Properties Inc. (Anjali).

Almonte and Avaar (Plaintiff) commenced an action to set aside the July 26, 2017, transfer from Avaar to Grenache and to have the subsequent transfers and mortgages determined null and void because Palma, having delivered 100% ownership in Avaar to Almonte, had no legal ability to execute documents on Avaar's behalf. Anjali, as the current record owner of the Property, was joined as a defendant (Defendant) and moved to dismiss Plaintiff's complaint on the basis that the doctrine of *res judicata* barred Plaintiff's claims.

Under New York law, collateral estoppel, a narrower form of *res judicata*, "precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action and decided against that party or those in privity" and applies when "first, the identical issue must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination." Here, the questions before the court were whether the ownership of the property had been determined in the foreclosure action and whether Plaintiff had an opportunity to litigate the question of ownership.

Plaintiff – a named defendant in such action – could have appeared and raised numerous theories as to Plaintiff's rightful claim to the property. However, Plaintiff did not appear nor did Plaintiff attempt to stay the foreclosure and

assert its claims in another action. Once an order was entered, Plaintiff did not make any effort to renew the pendency of the foreclosure. Further, the court noted that the Appellate Division, Second Department has previously held “a judgement of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and . . . all defenses which were or which might have been litigated in the foreclosure are concluded.”^[2] Because Plaintiff had ample opportunity to litigate its claim to the property, made no such attempt, and the foreclosure proceeding determined the ownership of the property, Plaintiff’s claims were barred by the doctrine of *res judicata*.

This case is yet another example of the finality of foreclosure proceedings. The real estate markets, title insurance companies, lenders and investors, all rely on the certainty of title and ownership of property, which is a necessity for the continued proper functioning of the real estate markets. It is conceivable that if ownership disputes and claims could survive a foreclosure, chaos would ensue, and real estate markets would freeze due to uncertainty.

^[1] See *Almonte et al v. Palma et al*, 2024 NY Slip Op 51005(U) (Supt Ct, Westchester County 2024)

^[2] *Broadway Corp. v. DebCon Fin. Servs., Inc.*, 39 AD3d 584-585 (2d Dept 2007)