EFiled: Aug 30 2018 08:14PM EDT
Filing ID 62400404
Case Number 285,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE EDWARD KENNEDY, Defendant-Below, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR3 TRUST, ASSIGNEE OF WASHINGTON MUTUAL BANK, F.A., Plaintiff-Below, Appellee.	No. 285, 2018 Appeal from the Court of Chancery of the State of Delaware C.A. No. 10361-MG (VCS)

APPELLANT'S REPLY BRIEF

O'KELLY ERNST & JOYCE, LLC
Ryan M. Ernst, Esquire (No. 4788)
Daniel P. Murray, Esquire (No. 5785)
901 N. Market Street, Suite 1000
Wilmington, DE 19801
(302) 778-4000
(302) 295-2873
rernst@oelegal.com
dmurray@oelegal.com

Counsel to Defendant-Below/Appellant George Edward Kennedy

Dated: August 30, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. A QUESTION OF FACT REMAINS REGARDING THE AMOUNT OF THE EQUITABLE LIEN, IF IT IS ALLOWED.

Under Rule 56(c), summary judgment is granted if "there is no genuine issue as to any material fact…." Ch. Ct. R. 56(c). If a material fact exists, or the Court desires to inquire "more thoroughly into the facts to clarify" how to apply the law to the circumstances in the case, then summary judgment will not be granted. *E.g.*, *Williams v. Geier*, 671 A.2d 1368, 1388–89 (Del. 1996) (citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *2 (Del. Ch. Sept. 3, 1996)). Evidence must be viewed "in the light most favorable to the non-moving party." *Williams*, 671 A.2d at 1388–89 (citing *Merrill v. Crothall–American, Inc.*, 606 A.2d 96, 99 (Del. 1992)).

The broker's price option – obtained by the Bank's predecessor, Chase, in October 2011 – showed the actual value of the Property in its distressed condition was approximately $1.4MM. (*See* A420.) As a result of Kennedy's continued hard work and investment into the Property, its value rose to approximately $2.15MM (per the appraisal conducted in May 2016).

The lower court recognized Kennedy's expenditures on the Property as reflected in the profit and loss statements. (A361-362.) And, the lower court even calculated net income (and loss) for years 2011 through 2016, which accounted for

the yearly reinvestment of income Kennedy made into the Property. (A380.) However, those expenditures by Kennedy were never given the due consideration they deserved. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against fundamental principles of justice or equity or good conscience." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (*quoting Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)). The Bank would be unjustly enriched if it obtains an equitable lien for an amount that retains the value Kennedy has imparted to the Property, to his detriment.

Kennedy spent much time and money improving and maintaining the Property. When Kennedy agreed to acquire the Property, it was done on his reliance of Chase's promise that the Hines note and mortgage would be modified. (A408.) This reliance was reasonable given that spread between the Property's value and outstanding mortgage balance. (*Id.*)

An equitable lien in the full amount claimed by the Bank will reward it inducing Kennedy to acquire the Property and then backing out of its agreement. Kennedy's hard work and investment will turn supply the Bank with the benefit generated by, and belonging to, Kennedy. Rather, any equitable lien should be discounted for an amount that accounts for the value imparted by Kennedy. Accordingly, a factual dispute remains as to the fair value of an equitable lien if

one is allowed to stand. A factual issue remains as to what value he imparted on the Property and whether the Bank would be unjustly enriched by receiving an equitable lien that transfers that value from Kennedy to the Bank as a result of inducing Kennedy to purchase the Property and make repairs to it.

II. A QUESTION OF FACT REMAINS REGARDING KENNEDY'S INDUCEMENT TO PURCHASE THE PROPERTY.

As consideration for the Property, Kennedy included the payment of $10,500 and the assumption of a modified note and mortgage. Chase's own broker's price option showed how the Property was under water: it was valued around $1,400,000, but the outstanding loan amount was $1,910,865. (A361, A382.) Kennedy only moved forward with acquiring the Property, in reliance on Chase's representations that a loan modification would be forthcoming. The disparity between the loan amount and Property value supports such an assertion.

It is correct that Kennedy did not present a written modification to the mortgage or other written evidence that he purchased the Property subject to a modified mortgage. What was not considered, however, was the series of events surrounding Kennedy's negotiations with Chase and agreement to purchase the Property subject to a modified mortgage. (A423-426.) There remains an issue of fact that needs to be addressed through discovery as to what evidence Chase has in its records regarding representations made to Kennedy in connection with the mortgage modification. At least three different Chase employees participated in this process. Chase's records were all processed through a proprietary 'INTAKE' system that logs every document, every telephone conversation, copy of notes, etc. Those records would include any facts showing Chase's actions and promises to

have Kennedy go to settlement on the Property and to assume a modified mortgage.

There was no case scheduling order entered in the lower court case and, therefore, no discovery deadline set. While the Bank conducted some discovery, Kennedy, acting *pro se*, did not pursue any discovery from the Bank or third parties by the time the Bank filed its motion for summary judgment. As discovery in the case was still open, and Kennedy did not obtain Chase's records, there remains a factual issue regarding the inducement issue.

CONCLUSION

For the reasons set forth in Appellant's Opening Brief and in this Reply Brief, factual disputes remain in this case, which precludes entry of summary judgment in favor of the Bank. Accordingly, this Court should overrule the trial court's order and remand the case.

O'KELLY ERNST & JOYCE, LLC

Dated: August 30, 2018

/s/ Ryan M. Ernst

Ryan M. Ernst, Esquire (No. 4788)
Daniel P. Murray, Esquire (No. 5785)
901 N. Market Street, Suite 1000
Wilmington, DE 19801
(302) 778-4000
(302) 295-2873
rernst@oelegal.com
dmurray@oelegal.com

Counsel to Defendant-Below/Appellant George Edward Kennedy