

U.S. Bank Natl. Assn. v Mayala
2011 NY Slip Op 06347
Decided on August 23, 2011
Appellate Division, Second Department
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Decided on August 23, 2011

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT
REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
ANITA R. FLORIO
PLUMMER E. LOTT, JJ.

2010-00422

2010-00454

2010-08578

(Index Nos. 12884/06, 13809/07)

[*1]U.S. Bank National Association, etc., appellant,

v

Wentz Mayala, et al., defendants, Juan Vega, et al., respondents. (Action No. 1)

Juan Vega, et al., respondents,

v

**Wentz Mayala, et al., defendants, MERS, etc., et al., appellants (and a third-party action).
(Action No. 2)**

Moss & Kalish, PLLC, New York, N.Y. (Mark L. Kalish, Gary N. Moss, and James Schwartzman of counsel), for appellants.
Simon & Gilman, LLP, Elmhurst, N.Y. (Barry Simon of counsel), for respondents.

DECISION & ORDER

In an action to foreclose mortgages on certain real property (Action No. 1), and a related action, inter alia, for declaratory relief and the partition and sale of that real property (Action No. 2), which have been consolidated for appeal, (1) the plaintiff in Action No. 1 appeals, as limited by the appellants' brief, from so much of an order and judgment (one paper) of the Supreme Court, Kings County (Schmidt, J.), dated September 25, 2009, as granted those branches of the motion of the defendants Juan Vega and Sonia Martinez which were for summary judgment on their counterclaim to quiet title to the extent of declaring that they are the owners of a two-thirds interest in the subject real property and that the subject mortgages are invalid in their entirety, and to dismiss the complaint in Action No. 1, and, thereupon, in effect, declared that those defendants are the owners of a two-thirds interest in the subject real property and that the subject mortgage is invalid, and dismissed the complaint in Action No. 1, and (2) MERS and First Central Savings Bank, defendants in Action No. 2 appeal, as limited by the appellants' brief, from (a) so much of an order and judgment (one paper) of the same court, also dated September 25, 2009, as granted the motion of the plaintiffs in Action No. 2, in effect, for summary judgment on the complaint to the extent of, in effect, declaring that the plaintiffs in Action No. 2 are the owners of a two-thirds interest in the subject real property and that certain mortgages held by MERS on the subject real property are invalid in their entirety, and, thereupon, declared that the plaintiffs in Action No. 2 are the owners of a two-thirds interest in the subject real property and that the mortgages are invalid in its entirety, and (b) so much of an order of the same court dated July 7, 2010, as directed the sale of the subject real property and that two-thirds of the net proceeds of such sale be distributed to the plaintiffs. [*2]

ORDERED that the orders and judgments, and the order, are affirmed insofar as appealed from, with one bill of costs.

Contrary to the appellants' contention, in opposition to the respondents' prima facie showing in both Action No. 1 and Action No. 2 that they are and have been the owners of a two-thirds interest in the subject real property since September 1991, the appellants, in their respective opposition papers, failed to raise a triable issue of fact as to the affirmative defenses of

adverse possession (*see* RPAPL 541; *Myers v Bartholomew*, 91 NY2d 630, 633-635; *Culver v Rhodes*, 87 NY 348, 355; *Perez v Perez*, 228 AD2d 161, 162; *Perkins v Volpe*, 146 AD2d 617, 617-618; *Knowlton Bros. v New York Air Brake Co.*, 169 App Div 324, 334) or laches (*see Kraker v Roll*, 100 AD2d 424, 432-435). Also contrary to the appellants' contention, under the circumstances, the Supreme Court properly declared the subject mortgages invalid in their entirety (*see Cruz v Cruz*, [37 AD3d 754](#), 754; *see also First Natl. Bank of Nev. v Williams*, [74 AD3d 740](#), 742; *Johnson v Melnikoff*, [65 AD3d 519](#), 520-521; *see generally Filowick v Long*, 201 AD2d 893, 893).

RIVERA, J.P., COVELLO, FLORIO and LOTT, JJ., concur.

ENTER:

Matthew G. Kiernan

Clerk of the Court

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