

Son Fong Lum, Appellant, v. Domenico Antonelli et al., Respondents, and The Long Island Savings Bank, Appellant. (And Third-Party Actions.) (And Another Proceeding.)

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

64 N.Y.2d 1158; 480 N.E.2d 347; 490 N.Y.S.2d 733; 1985 N.Y. LEXIS 15862

February 14, 1985, Argued
May 2, 1985, Decided

PRIOR HISTORY: Appeals from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 18, 1984, which (1) reversed, on the law and the facts, a judgment of the Supreme Court, entered in Queens County, upon a decision of the court at a Trial Term (Howard E. Levitt, J.), *inter alia*, canceling of record two deeds and two mortgages upon certain real property, and barring defendants Yee Woo Lum, Po Wah Lum, The Long Island Savings Bank and Domenico Antonelli and any person claiming under them from any claim or interest in said property, (2) dismissed the complaint, counterclaims, cross claims and third-party complaints in the above-entitled action brought pursuant to *RPAPL article 15*, (3) vacated a stay of summary proceedings, and (4) remitted the summary proceedings to Civil Court for further proceedings in accordance with the Appellate Division opinion.

By deed dated August 4, 1976 and recorded August 6, 1976, plaintiff and her husband, Chung Lum, purportedly conveyed their interest as tenants by the entirety in certain real property to their son and daughter-in-law, defendants Yee Woo Lum and Po Wah Lum. The instrument was signed by Chung Lum, whose signature was not disputed. The deed also bears an "X" as the purported mark of plaintiff; certificates of acknowledgment of third-party defendant Alfonso Duarte, a notary public, were affixed to the deed. On March 22, 1978, defendants Lum, representing themselves as owners of the subject property, gave a mortgage to defendant The Long Island Savings Bank; that mortgage was duly recorded on March 24, 1978. By deed dated January 9, 1980 and recorded on January 16, 1980, defendants Lum conveyed the property to defendant Antonelli. As part of that transaction, Antonelli executed a second, purchase-money mortgage to defendants Lum, executed an extension and modification agreement pursuant to which Antonelli assumed the mortgage previously executed by defendants Lum in favor of The Long Island Savings Bank, and made various cash payments. Plaintiff, who maintained that the 1976 deed purporting to convey her interest in the property to defendants Lum was a forgery inasmuch as she never signed or made any mark on the instrument, commenced an action pursuant to *RPAPL article 15* to bar defendants and anyone claiming under them from any interest in the property, and to direct the cancellation of the aforesaid deeds and mortgages. Meanwhile, Antonelli commenced a holdover summary proceeding against plaintiff and her husband; that proceeding was removed from Civil Court to Supreme Court for joint trial with plaintiff's action. Plaintiff asserted no cause of action against the notary in the complaint; he was brought into the action as a third-party defendant by Antonelli and The Long Island Savings Bank.

Trial Term concluded, without specifically finding that plaintiff's purported mark upon the deed was a forgery, that the deed to defendants Lum had not been acknowledged in the manner required by law; that the notary's certification of plaintiff's "signature" was false; that the failure to obtain a proper acknowledgment constituted misconduct under *Executive Law § 135*, thereby entitling plaintiff to judgment in her favor, and that even if plaintiff had affixed her mark to the deed, the deed was invalid since she clearly had no intention of conveying the property and her ability to speak and understand English had never been established. The Appellate Division concluded that there was no basis for nullifying the respective deeds and mortgages; that, therefore, none of the parties was liable in damages to the others; that plaintiff failed to come forward with proof of the nature required to rebut the presumption of due execution arising from the notary's certificate of acknowledgment; that a total of five witnesses contradicted plaintiff's testimony that she was not present when the deed was signed; that the fact that one day after the execution of the deed plaintiff changed her address on an official bank account signature card showed that she intended to move and circumstantially supported defendants' contention that she knowingly signed the deed, and that even had her acknowledgment been improperly taken, there would be no basis for setting aside the conveyance since a conveyance of realty is effective to pass title as between the parties thereto even though the deed be unacknowledged or improperly acknowledged. In addition, the Appellate Division stated that at a minimum, plaintiff's husband's limited interest in the property held by the entirety was transferred to

his son and daughter-in-law, who became tenants in common with plaintiff, thereby rendering it improper to have set aside the deed in its totality.

In the Court of Appeals, The Long Island Savings Bank contended, *inter alia*, that it was entitled to attorneys' fees against defendants Lum and Antonelli.

Lum v Antonelli, 102 AD2d 258.

DISPOSITION: Order affirmed, etc.

HEADNOTES

Deeds -- Presumption of Due Execution -- Attorneys' Fees

In an action to bar defendants or anyone claiming under them from any interest in certain real property and to set aside various deeds and mortgages on the ground that plaintiff's signature on a deed was a forgery, an order of the Appellate Division, which reversed a judgment in favor of plaintiff and dismissed the complaint, should be affirmed since the weight of the evidence more nearly comports with the findings at the Appellate Division. There was no basis for recovery of attorneys' fees by defendant mortgagee bank against the individual defendant mortgagors, since any such liability the original mortgagors might have had under the original mortgage was discharged when the mortgage was assumed, with an increased rate and term, by the subsequent mortgagor, and the bank cannot now recover such fees against the later mortgagor since it asserted no such claim against him below.

COUNSEL: *Joseph Schutzman* for Son Fong Lum, appellant.

Matthew Dollinger for The Long Island Savings Bank, appellant.

Samuel Kirschenbaum for Domenico Antonelli, respondent.

Michael Permut for Yee Woo Lum and another, respondents.

Richard T. Farrell for Alfonso Duarte, respondent.

JUDGES: Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur in memorandum.

OPINION

[*1161] [**348] [***734] **OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be affirmed, with costs to defendants Domenico Antonelli, and Yee Woo Lum and Po Wah Lum (the "defendants Lum"), against plaintiff and defendant The Long Island Savings Bank.

The weight of the evidence more nearly comports with the findings at the Appellate *Division* (102 AD2d 258). We add only that there is no basis for recovery of attorney's fees by the bank against the defendants Lum, or against defendant Antonelli. As to the defendants Lum, any such liability they might have had under the original mortgage was discharged when the mortgage was assumed, with an increased interest rate and term, by Antonelli (*see*, 38 NY Jur, Mortgages and Deeds of Trust, § 183). Nor can the bank now recover attorneys' fees against Antonelli, since it asserted no such claim against him below.

Order affirmed, etc.