Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17594
O/kmg

_____AD3d_____ Argued - December 13, 2007

A. GAIL PRUDENTI, P.J.
STEPHEN G. CRANE
STEVEN W. FISHER
WILLIAM E. McCARTHY, JJ.

2006-10982 DECISION & ORDER

Lois Merritt, appellant, v Travis Merritt,
et al., defendants, Berkshire Financial Group, Inc.,
et al., respondents.

(Index No. 10091/05)

Isabel K. Lee, Yonkers, N.Y., for appellant.

Banks Shapiro Gettinger & Waldinger, LLP, Mount Kisco, N.Y. (Mona D. Shapiro of counsel), for respondent Berkshire Financial Group, Inc.

Feldman Weinstein & Smith, LLP, New York, N.Y. (Eric S. Weinstein and David J. Galais of counsel), for respondent Indy Mac Bank, F.S.B.

In an action, inter alia, to recover damages for unjust enrichment and for a judgment declaring that certain mortgages are null and void, the plaintiff appeals from an order of the Supreme Court, Westchester County (Colabella, J.), entered October 5, 2006, which granted the separate motions of the defendants Berkshire Financial Group, Inc., and IndyMac Bank, F.S.B., pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against each of them.

ORDERED that the order is affirmed, without costs or disbursements.

The Supreme Court correctly granted the separate motions of Berkshire Financial Group, Inc. (hereinafter Berkshire), and IndyMac Bank, F.S.B. (hereinafter IndyMac), pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against each of them. The first cause

of action for declaratory relief insofar as asserted against Berkshire and IndyMac failed to allege any facts that these defendants were on notice of the fraud allegedly committed by the plaintiff's son, Travis Merritt, so as to deprive Berkshire and IndyMac of the status of good faith encumbrancers for value (*see* Real Property Law § 266; *Simonds v Simonds*, 45 NY2d 233, 242; *Istel v Istel*, 258 AD2d 506, 507; *Emerson Hills Realty v Mirabella*, 220 AD2d 717; Restatement of Restitution § 172, Comment c, & Illustration 5; *cf. Diamond v Wasserman*, 8 AD2d 623, 624). The amended complaint actually alleges that these defendants granted their mortgage loans based on their belief that Travis Merritt was the proper owner of the premises. In fact, Travis Merritt was the true owner at the times Berkshire and IndyMac made their loans and took mortgages from Travis. Moreover, as acknowledged by the plaintiff, the IndyMac lien had already been discharged by the time the action was commenced.

The amended complaint failed to adequately plead a cause of action to recover damages for unjust enrichment insofar as asserted against Berkshire and IndyMac, as it did not allege that either of them was unjustly enriched.

PRUDENTI, P.J., CRANE, FISHER and McCARTHY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court