

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

D25543
H/prt

_____AD3d_____

Submitted - October 30, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2008-04880

DECISION & ORDER

Countrywide Home Loans Inc., plaintiff-respondent,
v Michael Dombek, defendant-respondent, Mortgage
Electronic Registration Systems, Inc., etc.,
defendant-appellant, et al., defendants; RBC
Mortgage Company, nonparty-appellant.

(Index No. 12306/07)

Christopher P. Kohn, New York, N.Y., for defendant-appellant and nonparty-appellant (one brief filed).

Frenkel Lambert Weiss Weisman & Gordon, LLP, Bay Shore, N.Y. (Linda P. Manfredi of counsel), for plaintiff-respondent.

In an action to foreclose a mortgage, the defendant Mortgage Electronic Registration Systems, Inc., and the nonparty RBC Mortgage Company appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Brandveen, J.), dated April 18, 2008, as granted those branches of the plaintiff's motion which were for summary judgment on the complaint and to strike the affirmative defense of equitable subrogation asserted in the answer, and denied their cross motion for summary judgment on the affirmative defense of equitable subrogation.

ORDERED that the order is modified, on the law, by deleting the provisions thereof granting those branches of the plaintiff's motion which were for summary judgment on the complaint and to strike the affirmative defense of equitable subrogation asserted in the answer, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

December 22, 2009

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COUNTRYWIDE HOME LOANS INC. v DOMBEK

On July 28, 2005, the defendant Michael Dombek gave a mortgage to the plaintiff, which was secured by certain real property. The mortgage was recorded on August 25, 2005, which was nine days after Dombek gave another mortgage secured by the same real property to the defendant Mortgage Electronic Registration Systems, Inc., as a nominee for the nonparty RBC Mortgage Company (hereinafter together the appellants), which mortgage was recorded on September 14, 2005. The proceeds of the appellants' mortgage were used to satisfy a prior and more senior purchase money mortgage given by Dombek First National Bank of Arizona in 2004, which mortgage the plaintiff also held by virtue of an assignment.

In this foreclosure action commenced by the plaintiff after Dombek defaulted under the July 2005 mortgage, the appellants contend that the doctrine of equitable subrogation applies so that their lien is to be given priority over the plaintiff's lien (*see Bank One v Mon Leang*, 38 AD3d 809, citing *King v Pelkofski*, 20 NY2d 326). Given the existence of triable issues of fact as to whether the appellants were on notice of the July 2005 mortgage at the time they executed their mortgage, the Supreme Court erred in granting those branches of the plaintiff's motion which were for summary judgment on the complaint and to strike the affirmative defense of equitable subrogation asserted in the answer (*see King v Pelkofski*, 20 NY2d 326; *Roth v Porush*, 281 AD2d 612; *cf. LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597).

SKELOS, J.P., ENG, AUSTIN and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court