

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**  
Justice

IAS PART 16

PATRIOT SECURED RECEIVABLE HOLDINGS  
LLC,

INDEX NO. 13980/2008

Plaintiff,

MOTION

DATE November 25, 2008

- against -

MOTION

CAL. NO. 12

41<sup>ST</sup> AVENUE REALTY ASSOCIATES, et al,

MOT. SEQ.

Defendants.

NUMBER 1

The following papers numbered 1 to 12 read on this motion by the plaintiff for summary judgment in its favor; and this cross-motion by defendant Choices Women’s Medical Center, Inc. for summary judgment dismissing the complaint asserted against it.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s)-Exhibits.....	5 - 8
Answering Affid(s)-Exhibits.....	9 - 12

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

The plaintiff commenced the action seeking foreclosure of a consolidated first mortgage lien on the real property known as 29-28 41st Avenue a/k/a 41-15 29th Street, Long Island City, New York. The defendant 41<sup>st</sup> Avenue Real Estate Associations, LLC (“41<sup>st</sup> Avenue”) is the record owner of the property and the mortgagor. The defendant Efthimios Zisimopoulos a/k/a Tim Ziss is the alleged principal and sole member of 41<sup>st</sup> Avenue and the guarantor of the mortgage indebtedness of 41<sup>st</sup> Avenue. The plaintiff is the holder and owner of the subject mortgage and underlying note and guarantee, pursuant to an assignment dated February 9, 2007, from Amaranth Partners LLC (“Amaranth”), the original mortgagee.

As concerns this litigation, the originating note and mortgage, dated April 24, 2006, was given to Amaranth as part a refinancing of the property so as to secure a principal sum of \$14,000,000.00 that was received by 41<sup>st</sup> Avenue. The note matured on May 1, 2007. After the assignment to the plaintiff, the plaintiff and 41<sup>st</sup> Avenue agreed, in

writing, on two occasions to modify the terms of the original note and extended the maturity date to October 1, 2007 and then April 1, 2008.

The defendant Choices Women's Medical Center, Inc. ("Women's Center") is a tenant of a portion of the subject premises pursuant to a lease agreement dated as of February 26, 1996 (as thereafter modified and amended), entered into with defendant 41st Avenue, as successor landlord. It is undisputed that the lease between Women's Center and 41<sup>st</sup> Avenue was entered into prior to the subject mortgage. The lease contains a standard subordination clause, at Article 7, whereby:

"This lease is subject and subordinate to all ground or underlying leases and to all mortgages which may now or hereafter affect such leases or the real property of which demised premises are a part and to all renewals, modifications, consolidations, replacements and extensions of any such underlying leases and mortgages. This clause shall be self-operative and no further instrument or subordination shall be required by any ground or underlying lessor or by any mortgagee, affecting any lease or the real property of which the demised premises are a part. In confirmation of such subordination, Tenant shall from time to time execute promptly any certificate that Owner may request."

Nevertheless, it also includes a non-disturbance provision at Lease Section 47. D. (i) that, in relevant part, provides:

"Notwithstanding the foregoing provisions of Article 7 and this Article 47, this lease shall not be subject and subordinate to any mortgage hereafter effected unless and until Owner shall have obtained for Tenant a Non-Disturbance Agreement (as hereinafter defined) from the mortgagee under such mortgage. As used herein, the term 'Non-Disturbance Agreement' shall mean an agreement by the holder of a mortgage, providing in substance that (A) Tenant shall not be named or joined as a party defendant or otherwise in any suit, action or proceeding to enforce any rights granted to such mortgagee under its mortgage (unless required by law), and (B) the possession of Tenant shall not be disturbed or evicted and this lease, Tenant's leasehold estate shall not be terminated as a result of any foreclosure of any such mortgage, and any sale pursuant to any such foreclosure or the delivery of a deed in lieu of foreclosure, or other acquisition of Owner's interest in the Demised Premises pursuant to the enforcement of the mortgagee's remedies ...."

As part of the April 24, 2006 refinancing, Women's Center executed a document entitled "Lease Estoppel Certificate and Tenant Agreement" ("Estoppel Certificate"), dated April 24, 2006. The Estoppel Certificate in relevant part states:

"11. That this certification is made knowing that the Lender is relying upon the representations herein made and Lender is a third party beneficiary.

12. The Lease, as amended, will be subject and subordinate to any Mortgage, lien or other encumbrance made by Landlord or its successor in favor [sic] Lender, its successors and/or assigns, including without limitation any extensions, modifications or amendments of such Mortgage, lien or other encumbrance in favor of Lender."

In connection with the modification of the note that occurred on or about May 4, 2007, Women's Center executed a document entitled "Estoppel Certificate Recertification" ("Recertification"), dated April 30, 2007 which states, in pertinent part:

"The undersigned Choices Womens Medical Center, Inc., as tenant, hereby certifies to [plaintiff], as lender, that attached hereto and made a part hereof is [the Estoppel Certificate] dated April 24, 2006, affecting the property..., which estoppel certificate remains in full force and effect.

This Certification is made to induce the Lender to make a certain loan to 41st Avenue Realty Associates, LLC, as owner, which loan is secured by, among other things, a mortgage and other security agreements encumbering the Property, knowing Lender will place reliance thereon."

41<sup>st</sup> Avenue defaulted under the loan documents by failing to pay the amount due and owing on or before April 1, 2008, the maturity date of the mortgage loan. By stipulation of settlement dated July 29, 2008, the plaintiff and 41<sup>st</sup> Avenue settled their claims in this action. The stipulation grants the plaintiff a judgment in the amount of \$15,707,173.62, plus interest, attorneys' fees and other amounts, and provides that 41<sup>st</sup> Avenue and Zisimopoulos further consent to the sale of the property at a foreclosure sale at the "earliest possible time after the date of [the] Stipulation . . ."

Generally, on a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by "the relevant mortgage, the underlying note, and evidence of a default" (Wells Fargo Bank Minnesota v Mastropaolo, 42 AD3d 239, 251; see also, EMC Mortgage

Corp. v Riverdale Assoc., 291 AD2d 370; IMC Mtge. Co. v Griggs, 289 AD2d 294; Paterson v Rodney, 285 AD2d 453; Republic Natl. Bank of N.Y. v Zito, 280 AD2d 657, 658; Federal Home Loan Mtge. Corp. v Karastathis, 237 AD2d 558, 559).

In support of its motion, the plaintiff offers, inter alia, a copy of the subject mortgage, underlying note, assignment and various other loan documents as well as the affidavit of Dan Harrington, the president of Patriot Group, LLC, the parent company of the plaintiff, which wholly owns plaintiff. According to the affidavit of Mr. Harrington, the plaintiff is the holder of the subject mortgage and underlying note, and 41<sup>st</sup> Avenue is in default in payment, having failed to make payment upon the maturity of the loan, which became due on April 1, 2008. Accordingly, the plaintiff established prima facie entitlement to judgment as a matter of law.

In opposition to the motion for summary judgment and in support of its cross-motion for summary judgment, Women's Center asserts that the lease was entered into prior to the subject mortgage, and therefore, its leasehold interest is paramount and not subject to the consolidated mortgage. Women's Center also argues that it is neither a necessary party nor a proper party defendant herein. It offers, among other things, an affidavit of Merle Hoffman, its president, and copy of the lease.

The plaintiff argues that Women's Center should be estopped from claiming that the Center's leasehold interest is paramount to the mortgage, having twice made written representations to the effect such leasehold interest is subordinate to the subject mortgage, by virtue of the Estoppel Certificate and the Recertification.

Women's Center claims that by executing and delivering the Estoppel Certificate and the Recertification, it never intended to waive its right under the lease to insist upon a non-disturbance agreement as a condition to subordinating its interest to any mortgage given by defendant 41<sup>st</sup> Avenue subsequent to the lease. Women's Center further argues that any lack of awareness on the part of plaintiff or plaintiff's assignor of the Center's right to condition any agreement to subordinate its leasehold upon 41<sup>st</sup> Avenue's obtaining a non-disturbance agreement, was due to lack of due diligence on the part of Amaranth when originating the subject mortgage loan, and on the part of plaintiff when accepting the assignment thereof, and originating the second mortgage loan.

The plaintiff asserts that its assignor, Amaranth, relied upon the Estoppel Certificate when agreeing to provide defendant 41<sup>st</sup> Avenue with the refinancing, and the plaintiff relied upon the Estoppel Certificate when accepting the assignment and upon the Recertification when agreeing on or about May 1, 2007, to modify the note to extend the maturity date and provide financing by virtue of a reserve fund and second mortgage in the principal amount of \$525,000.00, plus interest. The plaintiff also

asserts that it relied upon the Estoppel Certificate and Recertification when it further agreed on October 1, 2007 to modify the note to extend the maturity date and in executing a note modification agreement and delivering the sum of \$405,650.00, representing the reserves, fees and costs associated with the modification.

With respect to the issue of whether the lease or mortgage is superior in this case, it is established that "[i]f a landlord gives a mortgage covering the property after [it] has granted a lease on the property, the lease is superior to and in no way affected by the mortgage" (City Bank of Bayonne v Hocke, 168 App Div 83; see also, Metropolitan Life Ins. Co. v Childs Co., 230 NY 285, 290; 220 West 42 Associates v Ronbet Newmark Co., 84 Misc 2d 259, 262 judgment modified on other grounds, 53 AD2d 829, affd 40 NY2d 1000). Of course, a lessee may subordinate its lease to a subsequent mortgage (See, 220 West 42 Associates v Ronbet Newmark Co., supra).

As to who must be a party to a foreclosure action, section 1311 of the Real Property Actions and Proceedings Law sets forth those parties which must be named defendants in a foreclosure action. RPAPL 1311 provides that a necessary defendant is one "whose interest is claimed to be subject and subordinate to the plaintiff's lien." Conversely, those persons who have an interest in mortgaged premises paramount to the mortgagee are neither necessary nor proper parties to the foreclosure action, since they "did not acquire their rights under the mortgagor or the mortgagee subsequent to the execution of the mortgage" (1 Wiltsie, Real Property Mortgage Foreclosure, § 401, at 685 [5th ed]).

Here, it is undisputed that because the lease between Women's Center and 41st Avenue was entered into prior to the subject mortgage, and the plaintiff was aware of the lease, the leasehold interest held by Women's Center has priority over the subject mortgage in the absence of evidence that Women's Center agreed to subordinate its leasehold interest to the mortgage.<sup>1</sup>

However, it is apparent from the documentary evidence and other submissions that Women's Center affirmatively subordinated its lease to the mortgage via the execution of the Estoppel Certificate and Recertification. Women's Center argues the use of the future tense in the Estoppel Certificate --to wit "The Lease, as amended, *will be* subject and subordinate to any Mortgage" as opposed to "was subordinate to any mortgage"-- indicates the requirement that Women's Center receive a non-disturbance agreement before its lease became subordinate survived. Contrary to this assertion, by executing the Estoppel Certificate the lease was, as expressly stated therein, "amended" and the use of the term "will be" constituted recognition of the change as

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<sup>1</sup> It is unclear whether the lease or a memorandum of the lease between defendant Women's Center and defendant 41<sup>st</sup> Avenue was recorded (cf., Real Property Law §291-c).

applied going forward. Moreover, the inclusion of the term "will be" was appropriate given the time of the execution of the Estoppel Certificate since the Amaranth mortgage transaction had yet to close, and indeed, was dependent upon 41<sup>st</sup> Avenue obtaining a receipt of an estoppel certificate from defendant Women's Center, 41<sup>st</sup> Avenue's tenant.

Prior to the execution of the Estoppel Certificate, Women's Center was in the "driver's seat," insofar as its lease predated the mortgage, and the lease specifically provided that it agreed to subordinate its lease only upon the production of a non-disturbance agreement. Women's Center nevertheless executed and delivered the Estoppel Certificate, without first demanding the issuance of a non-disturbance agreement, or otherwise specifically reserving its right under the lease to so demand, and the plaintiff's assignor relied upon such representation in good faith. Thus, Women's Center cannot now claim, to plaintiff's detriment, that its right to priority under the lease remains in effect.

Under such circumstances, the plaintiff is entitled to summary judgment as against Women's Center, and Women's Center has failed to establish entitlement to summary judgment dismissing the complaint.

Women's Center's argument that the plaintiff's motion should be denied based upon the existence of outstanding discovery is unavailing as it failed to state with specificity what "facts essential to justify opposition may exist but cannot then be stated" (See, CPLR §3212[f]; see also, CPLR §3212[b]).

Accordingly, the motion by the plaintiff for summary judgment in its favor as against Women's Center is granted, and the cross-motion by Women's Center for summary judgment dismissing the complaint asserted against it is denied.

Dated: March 11, 2009

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**Peter J. Kelly, J.S.C.**