

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	<u>x</u>		
DEUTSCHE BANK NATIONAL TRUST COMPANY		Index	
AS TRUSTEE FOR LONG BEACH MORTGAGE		Number <u>13005</u>	2005
LOAN TRUST 2004-2		Motion	
- against -		Date <u>November 15,</u>	2006
LAMBROS VOURLAMIS, etc., et al.		Motion	
	<u>x</u>	Cal. Number <u>30</u>	

The following papers numbered 1 to 15 read on this motion by defendant Fleet National Bank (Fleet) to dismiss the complaint asserted against it pursuant to CPLR 3211(a)(1), and to declare the priority of the mortgages filed against the subject premises; and this cross motion by plaintiff to consolidate the instant action with the action entitled Bank of America, N.A. v Vourlamis, (Supreme Court, Queens County, Index No. 17171/2005), for leave to amend the caption of this action substituting "Bank of America, as a successor by merger to Fleet National Bank" (Bank of America), for defendant Fleet, and for leave to amend the caption in the action under Index No. 17171/2005 substituting Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2004-2, as assignee of Long Beach Mortgage Company, for defendant Long Beach Mortgage Company.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits - Exhibits...	7-10
Answering Affidavits - Exhibits.....	11-13
Reply Affidavits.....	14-15

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

Plaintiff Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2004-2 (Deutsche Bank), commenced this foreclosure action alleging it was the holder of the subject mortgage dated January 30, 2004, and recorded on July 3, 2004, given to Long Beach Mortgage Company (Long Beach), by defendant Lambros Vourlamis a/k/a Lambros P. Vourlamis on the premises known

as 6-22 199th Street, College Point, New York. Plaintiff obtained a judgment of foreclosure and sale dated October 28, 2005 as against defendant Fleet based upon Fleet's default in serving an answer.

Bank of America, as successor by acquisition and merger to defendant Fleet, subsequently moved to vacate the default judgment, and to dismiss the action against defendant Fleet. Bank of America asserted that defendant Fleet was improperly named as a party defendant in the action, pursuant to RPAPL 1311, insofar as the Fleet credit-line mortgage was recorded against the property prior to the subject mortgage, and that Fleet lacked any knowledge of plaintiff's lien at the time of the making of the credit-line mortgage loan. By order dated June 12, 2006, the court granted the motion to the extent of vacating the judgment of foreclosure and sale and the default by defendant Fleet in answering the complaint, and permitting Bank of America to serve and file an answer as proposed. The court noted that Bank of America had set forth facts sufficient to make out a prima facie showing of a meritorious defense, based upon Fleet's improper joinder as a party defendant, and that the issue of whether Fleet was aware of the existence of the subject mortgage at the time of the making of its credit-line mortgage loan should be litigated on the merits.

Meanwhile, following the institution of this action, Fleet had commenced its own foreclosure action (Index No. 17171/2005), seeking to foreclose the credit-line mortgage, naming Long Beach Mortgage Company as a party defendant in that action. By order dated October 12, 2005, the caption in that action was amended substituting Bank of America, N.A., as successor by merger to Fleet National Bank, for Fleet. Bank of America obtained a judgment of foreclosure and sale dated December 13, 2005. Deutsche Bank, as assignee of defendant Long Beach, then moved, within the confines of that action, to vacate the judgment, dismiss the action as against Long Beach, and for leave to interpose an answer. By order dated September 14, 2006, the motion was granted to the extent set forth in a stipulation dated September 12, 2006 between Bank of America and Long Beach. The stipulation provided that the parties would litigate the issue of priority of the liens as ordered in the order dated June 12, 2006, issued by this court under this index number. In addition, the stipulation provided that the parties (to the stipulation) had the option to move, before this court, to consolidate the two foreclosure actions under the instant index number.

Defendant Fleet now seeks to dismiss the complaint herein asserted against it pursuant to CPLR 3211(a)(1), and to declare the priority of the mortgages filed against the subject premises.

Plaintiff opposes the motion asserting, that pursuant to the stipulation dated September 12, 2006 in the action under Index No. 17171/2005, defendant Fleet agreed to litigate the priority of the mortgage liens. Plaintiff also cross-moves to consolidate the instant action with the action under Index No. 17171/2005, for leave to amend the caption of this action substituting "Bank of America, as a successor by merger to Fleet National Bank" (Bank of America), for defendant Fleet, and for leave to amend the caption in the action under Index No. 17171/2005 substituting Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Trust 2004-2, as assignee of Long Beach Mortgage Company, for defendant Long Beach Mortgage Company.

With respect to that branch of the motion by defendant Fleet seeking to dismiss the complaint asserted against it pursuant to CPLR 3211(a)(1), Bank of America, the successor by merger to Fleet, previously moved, inter alia, to dismiss the complaint. By order dated June 12, 2006, Bank of America was granted leave to serve and file an answer. Neither Bank of America nor defendant Fleet made any motion for leave to reargue or renew the prior motion. Instead, on July 28, 2006, defendant Fleet served an answer, asserting the priority of its recorded mortgage lien. Under such circumstances, that branch of the instant motion seeking to dismiss the complaint is untimely, having been made after joinder of issue (CPLR 3211[e]). That branch of the instant motion seeking to dismiss the complaint asserted against defendant Fleet pursuant to CPLR 3211(a)(1) is denied.

Defendant Fleet also seeks, in effect, summary judgment establishing that its mortgage lien is superior to plaintiff's mortgage lien, and therefore, to estop plaintiff from foreclosing Fleet's interest in the property.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

Defendant Fleet asserts that its mortgage has priority over the subject mortgage, because its mortgage was recorded first, and that at the time of the making of its mortgage, it lacked any knowledge of the existence of the then unrecorded subject mortgage. In support of its assertions, it offers an affidavit of Thomas C.

McMahon, a vice-president of Bank of America, and copies of the Fleet credit-line mortgage in the maximum principal amount of \$250,000.00, plus interest, and the subject mortgage in the principal amount of \$408,500.00, plus interest, and various computer screen printouts. According to Mr. McMahon, the file regarding the Fleet mortgage loan's origination is unavailable, but the computer screen printouts from the origination system of Fleet reveal the subject property was appraised at \$390,000.00. Mr. McMahon opines that "[i]t is inconceivable that {Fleet} would permit a \$250,000 loan on an asset valued at \$390,000.00 if they (sic) knew it was already encumbered for \$408,500.00."

Plaintiff does not dispute that the subject mortgage was recorded after the Fleet credit-line mortgage. It asserts, however, that Fleet was aware of the existence of the subject mortgage at the time of the making of its credit-line mortgage loan, and thus, the Fleet mortgage is subordinate to its mortgage and subject to foreclosure herein. In support of such assertion, plaintiff offers, among other things, the affidavits of its counsel and defendant Vourlamis.

In New York, by statute, the priority of mortgage liens are determined by the order in which same are recorded (Real Property Law § 291). This procedure, commonly known as "race-notice," gives priority to the lienor which lacks knowledge of the outstanding lien and wins the race to record (see Goldstein v Gold, 106 AD2d 100 [1984], affd 66 NY2d 624 [1985]; Boston Trade Bank v Kuzon, 154 Misc 2d 217 [1992]). Viewing the evidence in the light most favorable to plaintiff and drawing all reasonable inferences in its favor (see Robinson Motor Xpress, Inc. v HSBC Bank, USA, ___ AD3d ___, 826 NYS2d 350 [2006]; Forte v Franklin Gen. Hosp., 185 AD2d 914 [1992]), plaintiff has sufficiently raised a question of fact as to whether defendant Fleet was aware of plaintiff's "prior in time" mortgage interest in the subject property.

Thus, that branch of the motion by defendant Fleet, which seeks, in effect, summary judgment establishing the priority of its mortgage lien recorded against the property over plaintiff's mortgage, is denied.

With respect to that branch of the cross motion by plaintiff to consolidate the instant action with the action under Index No. 17171/2005, the actions involve the same mortgagor and property, but different claims arising out of different obligations. The actions, however, raise common questions of law and fact regarding the priority of the mortgage liens. Furthermore, the parties have stipulated to litigate the issue of the priority of the respective mortgage liens. To save time and

expense of the parties and the court relative to those questions, a joint trial of this action and the action under Index No. 17171/2005 is appropriate. Under such circumstances, that branch of the cross motion seeking consolidation is granted only to the extent of directing that this action and the action under Index No. 17171/2005 be tried jointly in this court, and that the separate index numbers, requests for judicial intervention and notes of issue shall be filed for each action (CPLR 602).

That branch of the cross motion by plaintiff for leave to amend the caption as proposed in this action is granted. That branch of the cross motion for leave to amend the caption in the action under Index No. 17171/2005 is also granted.

Accordingly, it is ORDERED that the title of the actions combined for joint trial shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

DEUTSCHE BANK NATIONAL TRUST COMPANY
AS TRUSTEE FOR LONG BEACH MORTGAGE
LOAN TRUST 2004-2,

Plaintiff,

- against -

LAMBROS VOURLAMIS a/k/a LAMBROS P.
VOURLAMIS, BANK OF AMERICA, AS
SUCCESSOR BY MERGER TO FLEET NATIONAL
BANK,

Defendants.

BANK OF AMERICA, N.A., AS SUCCESSOR
BY MERGER TO FLEET NATIONAL BANK,

Plaintiff,

- against -

LAMBROS VOURLAMIS a/k/a LAMBROS P.
VOURLAMIS, DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE FOR LONG
BEACH MORTGAGE TRUST 2004-2, AS
ASSIGNEE FOR LONG BEACH MORTGAGE
COMPANY,

Defendants.

Action No. 1
Index No. 13005/2005

Action No. 2
Index No. 17171/2005

It is further ORDERED that a copy of this Order with Notice of Entry be served on all parties to the actions combined, the Clerk of Queens County and, at the time of filing of Notes of Issue, on the Clerk of the Trial Term Office.

Dated: February 23, 2007

J.S.C.