

<b>USR Group, Inc. v Wells Fargo Home Mtge., Inc.</b>
2007 NY Slip Op 32048(U)
June 27, 2007
Supreme Court, Albany County
Docket Number: 0023162/0051
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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USR GROUP, INC.,

*Plaintiff,*

-against-

WELLS FARGO HOME MORTGAGE, INC.,

*Defendant.*

**DECISION and ORDER**

**RJI NO.: 0105083243**

**INDEX NO.: 2726-05**

**2316-05**

**2669-05**

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WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER  
TO WELLS FARGO HOME MORTGAGE, INC.,

*Plaintiff,*

-against-

USR GROUP, INC., DENNIS L. WILLIAM, CITIBANK,  
N.A. SUCCESSORS BY MERGER TO CITIBANK  
(NEW YORK STATE), NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, PEOPLE OF THE STATE  
OF NEW YORK,

*Defendants.*

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CITIBANK (NEW YORK STATE),

*Plaintiff,*

-against-

USR GROUP, INC.,

*Defendant.*

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Albany County Supreme County All Purpose Term, June 12, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

All parties to this action have jointly filed this motion for consideration, reconsideration and/or reargument and have stipulated this constitutes a refiling of motions filed in each of the above actions prior to consolidation that this Court denied without prejudice in the May 9, 2007 Decisions consolidating the above actions. Pursuant to this stipulation, USR Group, Inc. (hereinafter USR), brings a motion for summary judgment pursuant to CPLR § 3212 regarding the action to quiet title against Wells Fargo Home Mortgage, Inc. (hereinafter Wells Fargo) (Index No. 2316-05). Wells Fargo brings a cross-motion for summary judgment against USR to foreclose (Index No. 2726-05). Citibank, brings this motion striking answer interposed by USR, awarding summary judgment against USR to Citibank, appointing a Referee to ascertain and

compute the amount due to Citibank herein for principal and to commute the amount due to Citibank herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels, vacating the Order of this Court, signed on August 1, 2005, discontinuing this action against "John Doe," "Mary Doe," and "Jane Doe" without prejudice to the proceedings had and taken herein against the remaining Defendants and amending accordingly the captions of the summons and complaint, notice of pendency and all other papers filed in this action (Index # 2669-05). USR brings a cross-motion for summary judgment against Citibank, for attorney's fees pursuant to the terms and conditions of the underlying promissory note and mortgage

After fully reviewing the record, this Court, in an exercise of discretion, opts to resolve the motions submitted for reconsideration by stipulation of all parties on the merits. Accordingly, this Court denies USR's motions for summary judgment against Wells Fargo and Citibank, grants Wells Fargo's motion for summary judgment in its action to foreclose on USR, grants Citibank's motion for summary judgment against USR in its foreclosure action and appoints

*for*  
*Michael Basile Esq*  
 1430 Balltown Rd Schenectady, NY 12309 518-374-3399  
 Wells Fargo and Citibank herein for principal and to commute the amount due to Wells Fargo

and Citibank herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels.

This action began as three separate lawsuits before the New York State Supreme Court, Albany County, each regarding the rights and liabilities of two mortgages on the 318 Osborne Street property as opposed to USR Group, Inc.'s fee interest in the property. Dennis L. Williams, the original owner of the 318 Osborne Street property, entered into an agreement with



Homestead Funding Corporation to refinance the property on October 15, 2003. This transaction created the Wells Fargo mortgage on the above property. As part of this transaction, Citibank subordinated its existing mortgage (executed on July 7, 2003 for \$67,000.00 and recorded on September 3, 2003) on the property to the Wells Fargo mortgage. On October 31, 2003, Mr. Williams filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of New York (hereinafter Bankruptcy Court). Thereafter, the Wells Fargo mortgage, along with the subordination agreement, were recorded on December 26, 2003. In Schedule D to the bankruptcy petition, however, Mr. Williams identified Citibank as holding a secured claim of \$67,000.00 and Wells Fargo Home Mortgage, Inc. as holding a secured claim of \$102,000.00, even though the Wells Fargo mortgage was not recorded at that point. The Bankruptcy Court appointed Gregory Harris, Esq. as Bankruptcy Trustee. The Trustee made a motion to approve transfer of title of the 318 Osborne Road property (valued at \$160,000.00 in the Bankruptcy Petition) to USR Group, Inc. on October 1, 2004. Judge Littlefield approved the sale on November 22, 2004 to be effective after January 31, 2005. The deed was recorded on March 24, 2005. USR Group, Inc. paid \$12,500.00 for the property, but specifically took it subject to all existing liens.

Wells Fargo commenced a action to foreclose against USR with regards to its first position mortgage (Index No. 2726/05- J. Spargo), Citibank commenced a foreclosure action with regard to its junior mortgage against USR (Index No. 2669/05- J. Teresi) and USR commenced an action to quiet title against Wells Fargo (Index No. 2316/05- J.Doyle). Additionally, Wells Fargo brought a motion in bankruptcy court before Judge Littlefield seeking an Order clarifying the November 22, 2004 Order granting the Trustee's motion to sell. Despite a

prolonged adjournment awaiting the clarification by Judge Littlefield, no party has provided this Court with any further information.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court’s main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). In the current case, there are no factual disputes between the parties, who merely disagree on the application of the law. Accordingly, the case is ripe for summary judgment.

USR Group, Inc. contends that because the Wells Fargo mortgage and the subordination agreement were not recorded until after Mr. Williams declared Bankruptcy, the Trustee obtained title free of those liens as a bona fide purchaser pursuant to 11 USC § 544(a)(3) and transferred that status to defendant. Further, USR Group, Inc. contends that because the Wells Fargo lien was not recorded and the Citibank lien is subordinate to that unrecorded lien, neither are valid liens of the type to which Defendant’s interest in the 318 Osborne Street property is subject.

USR’s arguments fail on multiple points. First, 11 USC § 544(a)(3) gives the Trustee the power avoid any transfer that is voidable by a bona fide purchaser without knowledge, such as unrecorded liens. Although, there is a meritorious argument to be made that the Trustee could

have voided the unrecorded Wells Fargo mortgage (Wells Fargo contends that this is not the case), USR's contention the Trustee automatically takes title free of unrecorded liens and passes that on to subsequent purchasers is without basis. A Trustee is not a bona fide purchaser, but merely has an analogous power to void unrecorded liens. While someone obtaining title from a bona fide purchaser takes free of unrecorded liens notwithstanding personal knowledge of the liens (*Wood v. Chapin*, 13 NY 509 [1856]), there is no case law demonstrating that a Trustee who has not acted to void unrecorded liens passes on the status of a bona fide purchaser to the subsequent owner. To the contrary, in order to void an unrecorded security interest, the trustee must bring an adversarial proceeding pursuant to Bankruptcy Rule 7001(2). Here, the Trustee's Motion to Sell explicitly acknowledges the Wells Fargo and Citibank mortgages. Additionally, contextual evidence regarding the price at which USR purchased the parcel as opposed to the value of the parcel makes it clear that all parties understood USR to be purchasing the parcel subject to both the Wells Fargo and Citibank mortgages.

Further, USR's contention that it has superior title to the Citibank mortgage is entirely without basis. Neither the Wells Fargo mortgage or the subordination agreement were recorded when bankruptcy proceedings were commenced. Even if the Trustee had acted to void the Wells Fargo mortgage that would have no impact on the Citibank mortgage. Even if USR were an actual bona fide purchaser without knowledge of the Wells Fargo mortgage, USR would be bound by the terms of the properly recorded Citibank mortgage. The subordination agreement controls the respective rights and liabilities of Wells Fargo and Citibank, it does not make the validity of the Citibank mortgage contingent on the validity of the Wells Fargo mortgage.

Accordingly, this Court, in an exercise of discretion, opts to resolve the motions



submitted for reconsideration by stipulation of all parties on the merits. Accordingly, this Court denies USR's motions for summary judgment against Wells Fargo and Citibank, grants Wells Fargo's motion for summary judgment in its action to foreclose on USR, grants Citibank's motion for summary judgment against USR in its foreclosure action and appoints

Michael Bassele, Esq. as a Referee to ascertain and compute the amount due to Wells Fargo and Citibank herein for principal and to commute the amount due to Wells Fargo and Citibank herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels.

All papers, including this Decision and Order, are being returned to the attorney for the Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: June 27 2007

Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Joint Motion for Consideration, Reconsideration and/or Reargument, dated June 5, 2007
2. Stipulation by All Parties, dated June 5, 2007.
3. Original Record as Unattached Exhibit