

MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 22

FIRST NATIONAL BANK OF NEVADA
600 E. Las Colinas Blvd.
Suite 620
Irving, TX 75039

Plaintiff,

-against-

ROBERT KEITH WILLIAMS, et al.,
Defendants.

A. GAY EVELYN, individually and as
Administrator of the Estate of
KATHY L. BRIGGS, deceased, ANTHONY
CAIN, MICHAEL CAIN and DIANE CAIN,
Plaintiffs,

-against-

ROBERT KEITH WILLIAMS, et al.,
Defendants.

ACTION NO. 2

By: **LANE, J.**

Index No. 4983/08

Motion Date:
October 28, 2008

Motion Cal. No. 15

Motion Seq. No. 1

Date: January 26, 2009

ACTION NO. 1

Index No. 28012/04

Plaintiff moves for an order: granting summary judgment and striking and dismissing the answer of defendant, A. Gay Evelyn, pursuant to CPLR 3212; and dismissing defendant's counterclaims pursuant to CPLR 3211 against the defendant, A. Gay Evelyn, as to the facts and issues described in the plaintiff's complaint, on the ground that the answer contains no valid

defenses and no triable issues of fact exist in this case; substituting Evelyn Jasper and Michael Jasper as party defendants in place of "John Doe"; amending the caption to reflect such substitution; directing that the action be referred to a referee to compute the amount due to the plaintiff, and to ascertain whether the premises being foreclosed may be sold in parcels.

Defendant A. Gay Evelyn a/k/a Evelyn A. Gay (hereinafter "Defendant Evelyn"), opposes plaintiff's summary judgment motion and cross-moves to consolidate Action No. 1 (Index No. 28012/04) and Action No. 2 (Index No. 4983/08). Defendant Evelyn contends that an issue of fact exists as to whether plaintiff First National Bank of Nevada has standing to bring the current action. Defendant argues that at the time of the commencement of this action to foreclose the mortgage, plaintiff was no longer the holder of the mortgage. Defendant also argues that an issue of fact exists as to whether the foreclosure should be allowed to proceed as the transfer of title to the property in question was allegedly obtain through fraud. Defendant contends that both the foreclosure action and the prior action brought by the defendant involve an "overarching identity" of issues that are common to both actions and therefore the two actions should be consolidated.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the

burden of persuasion (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e. with the proponent of the issue. Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. at 272; *300 East 34th Street Co. v. Habeeb*, 248 AD2d 50 [1st Dept 1997]). A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or

debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century Fox Film Corp.*, *supra*).

To establish a *prima facie* entitlement to foreclose on a mortgage, the plaintiff must demonstrate the existence of the mortgage and note, ownership of the mortgage and the defendants' default in payment (*see, Campaign v. Barbra*, 23 AD3d 327 [2d Dept 2005]). It is then incumbent upon the defendant to assert any defenses which would properly raise a question of fact as to the default (*see, Home Savings Bank v. Schorr Brothers Dev. Corp.*, 213 AD2d 512 [2d Dept 1995]).

Further, "a dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321 and the existence of such a dispute does not preclude the issuance of summary judgment directing the sale of the mortgaged property" (*Crest/Good Mfg. Co. v. Baumann*, 160 AD2d 831, 831-832 [2d Dept 1990]).

It is well settled that "[w]here common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Mas-Edwards v. Ultimate Services, Inc.*, 845 NYS2d 414, 415 [2d Dept 2007][internal citations omitted]).

Here, plaintiff has made a *prima facie* showing of its

entitlement to judgment as a matter of law under CPLR 3212. In this foreclosure action plaintiff has submitted a mortgage and note which unequivocally demonstrates the existence of such documents. The aforementioned note was executed by defendant Robert Williams and duly recorded. Plaintiff has also submitted an Assignment of the Mortgage document which unequivocally shows the Mortgage being assigned to plaintiff granting right, title, and interest in the Note and Mortgage. Plaintiff has also established the default of the defendant as well as ownership of the Note.

Defendant Evelyn asserts that plaintiff is not the holder of the current Mortgage. However, defendant has not submitted any evidence to support this contention, which is belied by the undisputed documentary evidence submitted by plaintiff showing the assignment and the county records indicating plaintiff as the record holder of the Note and Mortgage. Defendant Evelyn also argues that summary judgment should be denied as the underlying deed transferred to defendant Williams was allegedly obtained through fraud. However, it is well settled that

"a fraudulent purchaser of real or personal property obtains the legal title to the property purchased, and he may convey a good title to any bona fide purchaser from him for value. He may not only convey the property, but he may deal with it as owner, and may mortgage it; and whoever purchases the property or takes a mortgage thereon from him or under him, in good faith, for value, or deals with him in good faith in reference thereto will be protected against the claims of

the defrauded vendor. The real estate may be conveyed, or a mortgage thereon may be assigned to several successive participants in the fraud, or several successive mala fide purchasers. But the moment the real estate or the mortgage reaches the hands of a bona fide purchaser for value, the rights and equities of the defrauded owner are cut off" (*Simpson v. Del Hoyo*, 94 NY 189 [1883]).

Defendant here has not alleged that plaintiff had any knowledge of any fraudulent activity, and thus as a bona fide purchaser plaintiff's instant action will not be precluded.

Accordingly, plaintiff presented sufficient evidence to warrant summary judgment and the requested relief pursuant to RPAPL 1321.

Defendant Gay's cross motion is denied as defendant has not satisfied the legal standard for consolidation. The foreclosure action should not be consolidated pursuant to CPLR 602(a), as these two actions are not actions involving common questions of law or fact, and consolidation here could prejudice plaintiff's rights (*see, In re Elias* 29 AD2d 118 [2d Dept 1967]; *Nationwide Assocs. v. Targee St. Internal Med. Group, P.C.*, 286 AD2d 717 [2d Dept 2001]).

Plaintiff's motion is therefore granted to the extent that plaintiff is awarded summary judgment in its favor; the answer of defendant Evelyn A. Gay a/k/a A. Gay Evelyn is stricken and deemed a notice of appearance; plaintiff is granted leave to submit an order of reference; and the caption is amended

substituting Evelyn Jasper and Michael Jasper as party defendants
in place of "John Doe".

Settle order.

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Howard G. Lane, J.S.C.