

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

	x	Index
AGNES E. IFILL		Number <u>12040</u> 2007
		Motion
-against-		Date <u>October 31,</u> 2007
		Motion
CHARLOTTE BOYD, et al.		Cal. Number <u>24</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 11 read on this motion by defendant, Charlotte Boyd, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and granting defendant's counterclaim.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-5
Answering Affidavits - Exhibits .....	6-9
Reply Affidavits .....	10-11

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

Plaintiff commenced this action to foreclose a mortgage on the real property commonly known as 140-23 183<sup>rd</sup> Street in Queens County.

The subject note and mortgage were entered into between defendant and the original mortgagee, Cuthbert M. Ifill (Ifill), on October 5, 1992. On September 2, 1994, Ifill assigned the subject note and mortgage to plaintiff. The assignment was recorded on October 13, 1992. According to defendant, Ifill took ill in North Carolina during 2004, and could no longer cash defendant's checks. At the advice of Ifill's alleged wife, defendant agreed to suspend payments until Ifill had recovered and was able to negotiate defendant's payments. It is undisputed that defendant

suspended payments as of September 1, 2004. Ifill subsequently died on February 15, 2005. Plaintiff, as assignee of the subject note and mortgage, elected to declare the entire balance on the note immediately due and payable, and commenced the instant action. Defendant, however, contends that upon Ifill's death, the subject note and mortgage were forgiven and discharged pursuant to paragraph 24 of the rider to the mortgage which provides:

24. The balance then due on the note and upon this mortgage shall be forgiven in its entirety upon the death of the mortgagee. By signing this instrument, the mortgagee does hereby certify that this mortgage is satisfied upon the above event, and does hereby consent that the same be discharged.

As the movant, it is defendant's burden to establish her prima facie entitlement to summary judgment as a matter of law. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) Upon making a showing of her entitlement to summary judgment, the burden then shifts to plaintiff to produce evidence, in admissible form, to demonstrate the existence of a material issue of fact which requires a trial of the action. (Id.)

Defendant has satisfied her initial burden. The court turns first to the assignment of the subject note and mortgage from Ifill to plaintiff. It is well-established that a grantor may not convey a greater interest than that which he possesses. (See Sparrow v Kingman, 1 NY 242 [1848].) Therefore, it is necessary to first determine the interest that Ifill possessed prior to his assignment of that interest to plaintiff. Although an exhaustive review of New York case law has not revealed a case that is on point to the instant facts, it strikes this court that Ifill's interest was no different in substance from a life estate. Pursuant to the written terms of the agreement, the subject note and mortgage vested in Ifill the right to receive monthly payments on the debt from defendant until the date of Ifill's death, an interest akin to a life estate. When Ifill assigned the subject note and mortgage to plaintiff, he could not convey any greater interest. Therefore, plaintiff acquired, by assignment, an interest analogous to a life estate measured by the life of the original mortgagee, Ifill. Such an interest is commonly known as an "estate pur autre vie." (See Morgan v Helmer, 106 AD2d 884, 884 [1984].) To apply plaintiff's logic, that because of the assignment, the debt would not be forgiven and the mortgage extinguished until her death, would be to enlarge the interest conveyed to her by Ifill. (See Intl. Ribbon Mills, Ltd. v Arjan Ribbons, 36 NY2d 121, 126 [1975].)

Moreover, it is this court's duty to give effect to the mutual intent of Ifill and defendant upon entering the subject note and mortgage. "The question of intent is for the court to decide as a matter of law if the language employed is unambiguous; if, however, it is not free from ambiguity and resort must be had to extrinsic evidence, then intent must be determined by the finder of fact. Where the parties' intention to be bound is evidenced by a document's language and terms, then it is such manifestation of the parties' intention, rather than actual or real intention, which controls." (Keis Distribs. v Northern Distrib. Co., 226 AD2d 967, 968 [1996].) In reviewing the submitted evidence, it is clear that the original intent of Ifill and defendant was that the debt be extinguished upon Ifill's death. If this were not the case, then including paragraph 24 of the rider to the mortgage would have been of no avail, as the current holder of the note and mortgage could simply assign the instruments, thereby continually renewing its term and never extinguishing the debt.

The court now addresses that portion of plaintiff's complaint alleging a default in payments and accelerating the principal balance of the debt. The parties agree that defendant ceased making mortgage payments in September 2004, subsequent to the assignment, but prior to Ifill's death. It is also undisputed that although the assignment was recorded in Reel 3420, Page 1516 in the Queens County Register on October 13, 1992, defendant did not receive notice of the assignment from either Ifill or plaintiff. It has long been held "that a mortgagor may continue to deal with the mortgagee in making payments until he has received notice of the assignment of the mortgage, or notice of facts sufficient to put him upon inquiry as to the continuance of the mortgagee's title. When he has received notice of such facts then it becomes a question of good faith. If he has received notice of facts which would enable him, if he made the requisite inquiry, to ascertain the truth, then he is bound to make such inquiry, and if he omits to do so he is chargeable with bad faith, and is not protected in thereafter making payments to the mortgagee." (See Stoddard v Gailor, 90 NY 575, 579 [1882]; see Chittick v Thompson Hill Dev. Corp., 230 AD 410 [1930]; see Barnes v Long Island Real Estate Exch. & Inv. Co., 88 AD 83 [1903].) Here, there is no evidence that defendant received actual notice of the assignment, nor is there any evidence that defendant put on inquiry notice. As such, defendant was justified in continuing to deal with Ifill and in making arrangements regarding the suspension of payments.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is hereby dismissed; and it is further

ORDERED that within thirty (30) days of service upon plaintiff of a copy of this order with notice of entry, plaintiff shall discharge the subject note, pursuant to UCC 3-605, by renunciation of her rights to the subject note in a signed writing, and shall deliver such signed writing to defendant; and it is further

ORDERED that within thirty (30) days of service upon plaintiff of a copy of this order with notice of entry, plaintiff shall, pursuant to RPL § 321, execute an acknowledged certificate of discharge of the subject mortgage, which defendant may record, along with the discharge of the note, in the office of the recording officer of Queens County; and it further

ORDERED that defendant may record a copy of this order pursuant to RPL § 297-b.

Dated: February 5, 2008

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J.S.C.