

<b>Island Holding, LLC v O'Brien</b>
2001 NY Slip Op 30017(U)
March 5, 2001
Supreme Court, Suffolk County
Docket Number: 0020743/0743
Judge: William L. Underwood
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**UPDATE**

SHORT FORM ORDER

INDEX NO.  
20743-1999**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART XIV - SUFFOLK COUNTY**

2

**PRESENT:****Hon. WILLIAM L. UNDERWOOD, JR.**

ISLAND HOLDING, LLC,

Plaintiff(s),

-against-

DENIS J. O'BRIEN a/k/a DENIS O'BRIEN, GEORGE HARRISON, ALLEGIANT BANK,, ALBERT J. O'BRIEN a/k/a ALBERT J. O'BRIEN, UNION BANK OF ILLINOIS AND DOUGLAS ALAN O'BRIEN, TTEE FBO DENIS J. O'BRIEN FAMILY, NOEL V. O'BRIEN, SWEZEY NEWINS d/b/a SWEZEYS DEPARTMENT STORES, COMMISSIONER OF TAXATION &amp; FINANCE, CHASE MANHATTAN BANK, USA n/k/a CHEMICAL BANK, BRUCE HUBERT,

Defendant(s).

**ORIG. RETURN DATE: 12/29/00****FINAL RETURN DATE: 02/09/01****MTN. SEQ. #: 005- CDISPO****#: 006- MD****PLTF'S/PET'S ATTORNEY:**BERKMAN, HONOCHE, PETERSON & PEDDY, P.C.  
BY: LISA M. STEPHAN  
100 Garden City Plaza  
Garden City, New York 11530**DEFT'S/RESP ATTORNEY:**COOPERMAN, LEVITT, WINIKOFF, LESTER & NEWMAN,  
P.C.  
Attorneys for Defendant Noel O'Brien  
800 Third Avenue  
New York, New York 10022JOSEPH J. MACCHIAROLA, ESQ.  
Attorney for Defendant George Harrison  
805 Third Avenue  
New York, New York 10022**ELIOT SPITZER**Attorney General of the State of New York  
Attorney for Defendant Commissioner of Taxation and Finance  
120 Broadway, Rm. No. 4-124  
New York, New York 10271  
Attn: Alan Gitter**BATZAR & WEINBERG, P.C.**Attorney for Swezey & Newins, Inc.  
184 Sunrise Highway  
Rockville Centre, New York 11570**ZACHARY MURDOCK, ESQ.**LAZAR, APHEKER, FELDMAN, ROSELLA & YEDID, LLP  
Attorneys for Defendants Denis J. O'Brien, Albert J. O'Brien a/k/a  
Albert J. O'Brien and Douglas Alan O'Brien  
225 Old Country Road  
Melville, New York 11747

Upon the following papers numbered 1 to 61 read on this motion to confirm report of sale and distribution of surplus monies; Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-32; Answering Affidavits and supporting papers \_\_\_\_; Replying Affidavits and supporting papers 33-39; Other 40-61; (and after hearing counsel in support of and opposed to the motion) it is,

**Island Holding v O'Brien, et.al.**

***Index No.: 20743-1999***

***Page Two***

ORDERED that the plaintiff, Island Holding LLC's motion for an order confirming the report of sale and directing the Suffolk County Treasurer to distribute the surplus monies, and the cross motion of claimant, The Union Illinois (1995) Investment Limited Partnership, also for an order directing the Suffolk County Treasurer to distribute the surplus monies deposited on account of the foreclosure sale in this action are determined as follows:

This is an action to foreclose on a mortgage held by the plaintiff on real property located at P.O. Box 516, Fishers Island, Suffolk County, New York. Pursuant to a Judgment of Foreclosure and Sale of this Court entered on June 20, 2000, the referee herein, Patricia Moore, Esq., sold said property on July 27, 2000 to the plaintiff as the highest bidder in the amount of \$3,200,000.00. That after such sale and the disposal of the proceeds, there remained a surplus in the amount of \$1,377,948.03. The referee retained \$1,245.00 in her escrow account for the cost of her escrow account bank processing fees (\$45.00) and the balance for which she would be seeking additional fees as referee due to the substantial time incurred on fulfilling her duties. On September 22, 2000 surplus monies in the amount of \$1,376,703.03 were forwarded to the Suffolk County Treasurer fo deposit.

The plaintiff, Island Holding is the owner of a second mortgage lien, in the amount of \$1,500,000.00, dated January 13, 1989 which was issued to George Harrison by the titled owner, Denis O'Brien. Said mortgage was assigned by Harrison to Island Holding by assignment of

**Island Holding v O'Brien, et.al.**

**Index No.: 20743-1999**

**Page Three**

mortgage dated July 25, 2000. Claimant, The Union Illinois (1995) Investment Limited Partnership (“UIILP”) is a successor in interest by assignment to the rights of defendant Allegiant Bank and is the owner of two mortgage liens: one mortgage dated June 5, 1995 in the amount of \$423,997.15 and the second dated June 14, 1995 in the amount of \$480,767.22 . “UIILP” has asserted that Island Holding’s second mortgage acquired from Harrison does not constitute a valid mortgage.

The original mortgage issued to George Harrison dated January 13, 1989, was recorded in the Suffolk County Clerk’s Office on April 24, 1995. Island Holding asserts that mortgage was issued in consideration of a loan to be procured and guaranteed by Harrison for the benefit of Handmade Films, a partnership formed by O’Brien and Harrison. On February 22, 1989, O’Brien executed a “counter indemnity” where he specifically agreed to be liable to Harrison for one half the loan from British and Commonwealth Bank guaranteed by Harrison. A loan in the amount of \$5,250,000.00 was obtained and Harrison refinanced the entire amount through American Express Bank. O’Brien has failed to make any payments under the mortgage or counter indemnity.

“UIILP” has asserted that aforesaid mortgage did not secure a liquidated sum advanced by Harrison to O’Brien but was solely to secure a potential obligation that may become due to a third party who was not directly involved in the mortgage arrangement. The purpose of the mortgage is specifically set forth on page one of the document which was partially altered by handwritten changes:

**Island Holding v O'Brien, et.al.**

**Index No.: 20743-1999**

**Page Four**

WITNESSETH that to secure payment of a possible indebtedness in the sum of One Million Five Hundred (\$1,500,000.00) lawful money of the United States, to be paid according to a certain bond, note or obligation with the British and Commonwealth Bank of approximately US \$6,000,000 (the "Note"), the Mortgagor hereby mortgages to the Mortgagee and grants to the Mortgagee a security interest.....

"There can be no doubt as to the validity of mortgages to secure future advances or liabilities as this has become a recognized form of security frequently used in the transaction of business (Ackerman v. Hunsicker, 85 N.Y. 43, 47; Knapp v. McGowan, 96 N.Y. 75, 86, supra ; 3A Warren's Weed, New York Real Property, Mortgages, § 1.05; Rasch, Real Property Law and Practice, § 1702)." (W.L. Development Corp. v. Trifort Realty, Inc. et al, 44 N.Y.2d 489, 406 N.Y.S.2d 437, 442 [1978]). The absence of a bond or note is not fatal to the validity of a mortgage because such bond or note is not the actual consideration, but merely evidence of the obligation. (Kawai American Corp. v. Hilton, 205 A.D.2d 1021, 613 N.Y.S.2d 989 [3<sup>rd</sup> Dept. 1994]). The claimant "UIILP"'s cross motion to direct the payment of its outstanding lien on such grounds is, as such, denied.

*Island Holding v O'Brien, et.al.*

*Index No.: 20743-1999*

*Page Five*

At issue, however, is whether the debt secured by the Harrison mortgage was previously satisfied. Accordingly, a hearing is directed to be held on April 24, 2001 at 9:30 am before this Court for such limited purpose. Decision is reserved with regard to the remaining claimants and the order of priority as to any and all other outstanding liens.

Settle order.

Dated: March 5, 2001

  
WILLIAM L. UNDERWOOD, JR.  
J.S.C.