

**Wells Fargo Bank, N.A. v Thalakkottur**

2007 NY Slip Op 31605(U)

June 6, 2007

Supreme Court, Queens County

Docket Number: 0004858/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

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| WELLS FARGO BANK, N.A. FOR THE | No. 4858/06         |
| BENEFIT OF ASSET BACKED        |                     |
| SECURITIES CORPORATION HOME    | Motion              |
| EQUITY LOAN TRUST, SERIES      | Date March 13, 2007 |
| 2005-HE3, ASSET BACKED         |                     |
| PASS-THROUGH CERTIFICATES,     |                     |
| SERIES-HE3, C/O COUNTRYWIDE    |                     |
| HOME LOANS, INC., 400          | Motion              |
| COUNTRYWIDE WAY, SIMI VALLEY,  | Cal. No. 40         |
| CA 93065,                      |                     |
| Plaintiff,                     | Motion              |
| -against-                      | Seq. No. 2          |

THOMAS THALAKOTTUR, BIBI RAJJAB,  
 COUNTRYWIDE HOME LOANS, INC.,  
 FREMONT INVESTMENT & LOAN,  
 MORTGAGE ELECTRONIC REGISTRATION  
 SYSTEMS, INC., NEW YORK CITY  
 ENVIRONMENTAL CONTROL BOARD,  
 NEW YORK CITY TRANSIT  
 ADJUDICATION BUREAU,

Defendants.

|                                   |                 |
|-----------------------------------|-----------------|
| -----                             | <u>PAPERS</u>   |
|                                   | <u>NUMBERED</u> |
| Notice of Motion-Affid-Exhib..... | 1-4             |
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Plaintiff Wells Fargo Bank, N.A. for the benefit of Asset Backed Securities Corporation Home Equity Loan Trust, Series 2005-HE3 Asset Backed Pass-Through Certificates, Series-HE3 (Wells Fargo) commenced this action seeking to foreclose on a mortgage dated January 27, 2005, which was recorded on September 7, 2005.

It appears from the papers presented that Bebe A. Ali (Ali) was the owner of certain real property located at 94-20 109<sup>th</sup> Street in Richmond Hill, County of Queens (the property). A short form power of attorney dated

January 24, 2005 purported to appoint Imvan Ishmile Badoolah (Badoolah) as attorney in fact for Ali. The signature of the principal was notarized by Parbatie Singh on January 24, 2005. An affidavit signed by Badoolah on that day, and apparently notarized on the same day, attests that the purported power of attorney was still in force and effect as of January 24, 2005.

It appears that on January 27, 2005, Badoolah, as attorney in fact for Ali, transferred the property to defendant Thomas Thalakottur (Thalakottur). The deed was notarized by Sabrina Graham. The real property transfer report recites a consideration of six hundred thousand (\$600,000) dollars for the transfer.

The documents signed in connection with the transfer were not, however, signed by defendant Thalakottur. It appears that defendant Thalakottur signed a form giving power of attorney to Imtiaz Ali, also dated January 24, 2005 and notarized by Parbatie Singh. The affidavit as to the power of attorney being in full force and effect was sworn to on January 27, 2005, the date of the transfer. Plaintiff Wells Fargo gave a mortgage in the sum of four hundred and forty thousand (\$440,000) dollars, based upon the aforesaid documents and a mortgage and note signed by Imtiaz Ali, as attorney in fact for Thomas Thalakottur, and notarized by Sabrina Graham.

As stated, the Wells Fargo mortgage, though signed on January 27, 2005, was not recorded until September 7, 2005. On September 2, 2005 Ali transferred the same real property to Bibi Rajjab (Rajjab) who obtained a mortgage from defendant Fremont Investment & Loan in the sum of five hundred thirty six thousand (\$536,000) dollars. The mortgage was recorded on October 6, 2005.

On March 2, 2006 plaintiff Wells Fargo commenced the within action, naming their own mortgagor defendant Thalakottur, defendant Rajjab, whose deed had by that time been recorded, and defendant Fremont. Counsel for defendant Fremont served a "notice of appearance by subordinate mortgagee" on March 28, 2006.

By this motion, served on November 20, 2006 and adjourned several times on the consent of the parties, counsel for defendant Fremont asks the court for permission to withdraw the notice of appearance and to serve an answer with affirmative defenses and counterclaims. Further,

defendant Fremont asks the court to withdraw an order of reference dated August 3, 2006. It is the position of defendant Fremont that the purchase by defendant Thalokottur was a fraudulent transaction. Counsel for defendant Fremont contends that based upon all of the facts and circumstances herein, there is an issue of fact as to whether the Wells Fargo mortgage is part of a fraud and a forgery.

In opposition, plaintiff's counsel asserts that plaintiff would be prejudiced due to the passage of time and that what is stated to be a meritorious defense is nothing more than speculation. Counsel complains that no discovery demands have been served and that defendant is on a fishing expedition. As plaintiff Wells Fargo's mortgage was recorded prior to defendant Fremont's, plaintiff's mortgage is a valid first lien upon the property.

In reply, defendant Fremont's counsel states that plaintiff's counsel does not address the merits of the proof submitted in connection with the mortgage, and that most of the delay was due to the three adjournments requested by plaintiff's counsel.

The motion by defendant Fremont is granted to the extent that defendant Fremont is granted leave to withdraw its notice of appearance and to serve an answer with affirmative defenses and counterclaim in the form as annexed to the papers within 30 days of the entry date of this order. In addition, the order of reference dated August 3, 2006 is hereby stayed pending further order of the court.

The issues raised by defendant Fremont include, but are not limited to, whether the power of attorney from Bebe A. Ali to Imam Ishmile Badoolah was in full force as of the date of the transfer of title from Ali to defendant Thalokottur. The affidavit with respect thereto was sworn to on January 24, 2005 while the closing occurred on January 27, 2005. As noted by the court in LaSalle Bank National Assoc. v. Ally, 390 AD3d 597: "LaSalle nonetheless established, prima facie, that Goggins lacked actual authority to sign a deed on New Era's behalf, and Nationscredit failed to offer any evidence to rebut LaSalle's prima facie showing (see, 56 E. 87<sup>th</sup> Units Corp. v. Kingsland Group, Inc., 30 AD3d 1134, 815 NYS2d 576). Additionally, Nationscredit failed to offer evidence demonstrating that Goggins was cloaked with apparent authority to sign the Williams Deed on New Era's behalf

(see, Hallock v. State of New York, 64 NY2d 224, 231, 485 NYS2d 510, 474 NE2d 1178). Nationscredit also failed to offer evidence that it lacked knowledge of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue (see, generally Anderson v. Blood, 152 NY 285, 46 NE 493; Royce v. Rymkevitch, 29 AD2d 1029, 1030, 289 NYS2d 598). Under the circumstances, Nationscredit possessed facts that would lead a prudent lender to investigate Goggins' purported corporate status and authority to act on New Era's behalf, and it is undisputed that Nationscredit did not do so."

In the instant case, in the interests of justice, this court finds that the defendant Fremont should be granted the opportunity to interpose an answer given the asserted circumstances concerning the Wells Fargo transaction which was based on the power of attorney of Ali to Badoolah which could affect the priority of the liens herein.

Dated: June 6, 2007

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HON. DAVID ELLIOT