

CitiMortgage, Inc. v Treston

2007 NY Slip Op 32967(U)

September 12, 2007

Supreme Court, Nassau County

Docket Number: 2370-06/

Judge: James P. McCormack

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

_____x

CITIMORTGAGE, INC.,

Plaintiff(s),

Index No. 2370/06

-against-

Motion Seq. No.: 002

Motion Submitted: 8/1/07

JOHN P. TRESTON, A/K/A JOHN TRESTON, INA TRESTON, RALPH W. KERN, SHAPIRO FAMILY REALTY ASSOCIATES, and "John Doe" #1-10 inclusive, the last ten names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Notice of Cross Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by plaintiff CitiMortgage, Inc. (CitiMortgage) to strike the answers interposed by defendant John P. Treston a/k/a John Treston and defendant Ina Treston and by defendant Ralph W. Kern and Shapiro Family Realty Associates; for summary judgment of foreclosure against the Treston defendants; for an order declaring the order

of the priority of the mortgage and judgment and to appoint a referee pursuant to Real Actions and Proceedings Law § 1321 to ascertain and compute the amount due to plaintiff and examine and report whether the premises be sold in one parcel is granted as hereinafter provided.

Cross motion by the Treston defendants to dismiss the complaint pursuant to CPLR 3211(a)(8) is denied.

The underlying action is brought to foreclose a mortgage held by plaintiff CitiMortgage on premises known as 82 McKee Street, Floral Park, New York by reason of the default by defendant mortgagors, John P. Treston and his mother, defendant Ina Treston, in the payment of the principal balance due and owing thereunder in the amount of \$313,000. commencing September 1, 2005 and continuing to date.

The chronology of relevant events is as follows: On December 8, 2004, defendant John P. Treston (a/k/a John Treston) executed a note whereby he agreed to pay CitiMortgage the sum of \$313,000. plus interest. Previously, the Treston defendants had executed two mortgages to CitiMortgage. The first mortgage, in the amount of \$285,000., was executed on October 10, 2003 and recorded in the Nassau County Clerk's office on May 11, 2004; a second mortgage in the amount of \$29,904.33, was executed on December 8, 2004 and recorded in the Nassau County Clerk's office on July 14, 2005. These two mortgages were later consolidated to form a single lien in the amount of \$313,000. pursuant to a Consolidation Extension and Modification Agreement which was executed on December 8, 2004 and recorded on July 14, 2005.

Defendant mortgagors, having failed to make the requisite payments under the terms and conditions of the Note and Consolidated Mortgage since September 1, 2005, plaintiff CitiMortgage now seeks summary judgment of foreclosure.

In response to plaintiff's motion, which is unopposed by defendant Ralph Kern and defendant Shapiro Family Realty Associates (Kern/Shapiro), the Treston defendants have cross-moved to dismiss the complaint based on plaintiff's purported failure to effectuate proper service on defendant Ina Treston in accordance with CPLR 308(a).

Ordinarily, a process server's properly executed affidavit of service constitutes *prima facie* evidence of proper service. *Rox Riv 83 Partners v Ettinger*, 276 AD2d 782, 783 [2nd Dept. 2000]. Where, however, there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of the evidence at a hearing. *Verille v Kopic*, 304 AD2d 823 [2nd Dept. 2003]. While defendant John P. Treston alleges that process was not served on defendant Ina Treston in accordance with the strictures of CPLR 308(2), the record is devoid of a sworn denial of service by defendant Ina Treston and there is no affidavit by said defendant setting forth specific facts in support of a denial of service. *European American Bank v Abramoff*, 201 AD2d 611, 612 [2nd Dept. 1994].

The plaintiff bank, having made a *prima facie* showing of entitlement to summary judgment of foreclosure by offering proof that the mortgagors executed the loan documents and defaulted in making the prescribed monthly payments (*FGH Realty*

Credit Corp. v VRD Realty Corp., 231 AD2d 489, 490 [2nd Dept. 1996], *lv to app disp.* 89 NY2d 981 [1997]), the burden shifted to the Treston defendants to demonstrate, by admissible evidence, that there are genuine issues of material fact that require a trial. *Chiarelli v Kotsifos*, 5 AD3d 345, 346 [2nd Dept. 2004]. Significantly, defendant mortgagors do not dispute their default under the subject mortgage documents. The conclusory allegations by defendant John P. Treston regarding plaintiff's failure to properly effectuate service on defendant Ina Treston, whom he claims "has not resided at McKee Street in many years" and "had been a full time resident of the State of Florida for approximately three years," and his reliance on a purported pending amended forbearance agreement (after failing to comply with the forbearance agreement dated March 12, 2006 by failing to make the June 2000 payment), are insufficient to defeat plaintiff's motion.

It is well settled that the protection of the Recording Act (Real Property Law §§ 290, 291) can be relied upon only by subsequent purchasers and mortgagees; not by judgment creditors. *Heithaus v Heithaus*, 229 AD2d 421, 422 [2nd Dept. 1996]; *Savings and Loan Association of Kingston v Berberich*, 24 AD2d 187, 189 [3rd Dept. 1965]. A judgment creditor is not a subsequent purchaser in good faith within the meaning of § 291 of the Real Property Law. Until its judgment is docketed, a judgment creditor is given no protection under the Recording Act for being the first to file as against a prior bona fide mortgagee since a judgment is not a lien on real property until it is docketed. The money judgment becomes a lien on the judgment debtor's real property, and secures a

priority for the judgment creditor, when the judgment is docketed with the county clerk of the county in which the real property is located. Siegel, Practice Commentaries, McKinney's Consol. Laws of New York, Book 7B 5203:2 p. 110. Pursuant to CPLR 5203(a) conveyances (i.e., transfers of interest in real property by way of a mortgage), made prior to the docketing of a judgment, are effective and take priority over the judgment even if recorded after the docketing. *Sullivan v Corn Exchange Bank*, 154 App Div 292 [2nd Dept. 1912]; *Dime Savings Bank of N.Y., FSB v Roberts*, 167 AD2d 674, 675 [3rd Dept. 1990], *app. dismissed*. 77 NY2d 939 [1991].

While defendants Kern/Shapiro do not oppose the relief requested by plaintiff, they correctly contend, and plaintiff agrees, that their judgment against defendant Ina Treston in the amount of \$268,160.68 dated December 19, 2003 and docketed March 17, 2004, has priority over the second CitiMortgage mortgage dated December 8, 2004, and recorded July 14, 2005 in the amount of \$29,904.33.

Accordingly, plaintiff's motion to appoint a referee and for summary judgment against the defendants is granted and the answers interposed by the defendants are hereby stricken. The order of priority of the mortgage and judgment is as follows:

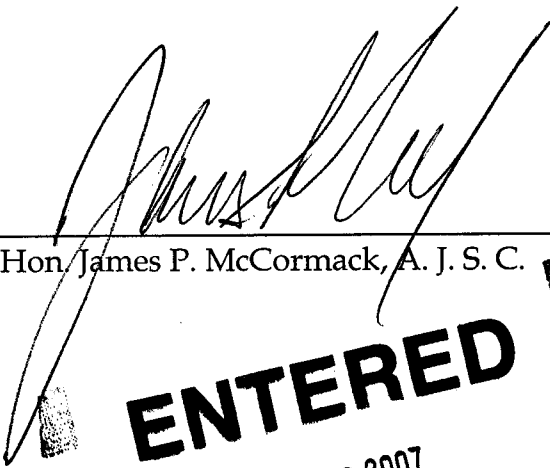
1. CitiMortgage's mortgage dated October 10, 2003, in the amount of \$285,000 plus interest as stated in the note and costs as provided in its mortgage;
2. Ralph W. Kern/Shapiro Family Realty Associates judgment in the amount of \$268,160.68 plus interest;
3. CitiMortgage's mortgage dated December 8, 2004 in the amount of \$29,904.33 plus interest as stated in the note and costs as provided in its mortgage;

Keith W. Lavalley, Esq. with an office at 4 Westgate, Farmingdale, NY 11735, (516) 756-5100, is hereby appointed referee to ascertain and compute the amount due upon the note and mortgage herein and to examine and report whether the mortgaged premises can be sold in one parcel.

Cross motion by the Treston defendants to dismiss the complaint pursuant to CPLR 3211(a)(8) is denied in light of the disposition of the motion in chief.

This constitutes the Decision and Order of the Court.

Dated: September 12, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

SFP 19 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**