

**Bank of New York v Resles**

2008 NY Slip Op 30171(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0105433/2006

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLIN Justice

PART 15

Bank of New York

INDEX NO. 105433/06

- v -

MOTION DATE 10/12/07

Open Resales

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IS DECIDED

FILED

JAN 22 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/16/08

9  
WALTER B. TOLIN S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
THE BANK OF NEW YORK, as Trustee on  
behalf of the Certificateholders of  
CWMBS, INC., CHL Mortgage Pass-Through  
Certificates Series 2004-29,

Plaintiff,

Index No. 105433/06  
Mtn Seq. 003

-against-

OFER RESLES, NEW YORK CITY PARKING  
VIOLATIONS BUREAU, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK  
CITY TRANSIT ADJUDICATION BUREAU, HAMARI  
VENTURES, LLC, THE BOARD OF MANAGERS OF  
WORLDWIDE PLAZA CONDOMINIUM,

Defendants.

**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x  
WALTER B. TOLUB, J.:

This motion arises in connection with the foreclosure sale ordered by this court on property known as Apartment 4-LL at 350 West 50<sup>th</sup> Street in Manhattan (the property).

Background

The property, like so many in this State, was mortgaged on more than one occasion. The first of these mortgages, in the amount of \$225,000.00 was executed by defendant Ofer Resles and delivered to Madison Home Equities ("Madison Home") on April 21, 2004 (the "April 2004 mortgage"). The April 2004 mortgage was duly recorded on June 1, 2004 in CRFN 2004000334763 (Affirmation in Opposition, Exhibit A).

By assignment dated November 2, 2004 ("the November 2004

assignment"), the April 2004 Mortgage was assigned to Countrywide Home Loans, Inc. ("Countrywide") (Affirmation in Opposition, Exhibit B). The November 2004 assignment was recorded on August 9, 2005 in CRFN 2005000446757 (id.). Less than one week later, defendant Resles, on November 8, 2004, executed a second mortgage with Countrywide in the amount of \$215,000.00 (the November 2004 Mortgage") (Affirmation in Opposition, Exhibit C) and a Consolidation, Extension and Modification agreement (the "CEM Agreement") (Affirmation in Opposition, Exhibit D). The CEM Agreement acted to consolidate the two mortgages issued in 2004 and now held by Countrywide into a single lien in the amount of \$440,000.00 (the "First Mortgage"). On August 9, 2005, Countrywide recorded the duly executed November 2004 Mortgage in CRFN 200500446758, and the executed CEM Agreement in CRFN 2005000446759 (Affirmation in Opposition, Exhibits C and D). The First Mortgage was subsequently assigned to plaintiff by an assignment dated April 18, 2006 and recorded on July 18, 2006 in CRFN 2006000406177 (Affirmation in Opposition, Exhibit E).

Subsequent to the execution and delivery of the November 2004 Mortgage and the CEM Agreement but before their recording, Defendant Hamari Ventures, LLC (Hamari) claims that on May 5, 2005, defendant Resles executed and delivered to Hamari a mortgage on the property in the amount of \$150,000 (Order to Show Cause, Exhibit 1) which was recorded in CRFN 2005000373445. By

this motion, defendant Hamari, seeks an order (1) enjoining the sale of the property pending the resolution of this motion and (2) directing the payment of funds realized on the sale of the property that are in excess of the amount of the first mortgage to Hamari, the claimed holder of the second mortgage of record on the property.

#### Discussion

The mere recording of a mortgage does not automatically entitle the holder of that mortgage to the benefits of the recording act. The benefits are only reaped when it is demonstrated that the mortgage meets the requisite formalities of execution (see, Greenpoint Bank v. Parissi, 256 AD2d 548 [2<sup>nd</sup> Dept 1998]) ("The requisite formalities of execution of a conveyance of an interest in real property must be observed for the instrument to obtain the benefits fo the recording act"); Real Property Law §291).

In the instant case, defendant Hamari recorded a mortgage that was unsigned by either party. While there is case law that supports the contention that a mortgage is not required to be signed by the mortgagee (see, Wranovics v. Finnerty, 277 AD2d 841 [3<sup>rd</sup> Dept 2000], the same cannot be said for the lack of signature by the mortgagor. There simply cannot be a valid conveyance of real property if it is not in writing, and signed by the mortgagor or by his or her lawfully authorized agent

