

Countrywide Home Loans, Inc. v Dombek

2008 NY Slip Op 31241(U)

April 18, 2008

Supreme Court, Nassau County

Docket Number: 2306-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

- against -

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 12306/07

MICHAEL DOMBEK, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., acting solely as a nominee for RBC
Mortgage Company, its successors and assigns, and
"JOHN DOE 31" through "JOHN DOE #10", the
last ten names being fictitious and unknown to the
plaintiff, the person or parties, if any, having or
claiming an interest in or lien upon the Mortgage
premises described in the Complaint,

Motion Sequence No. 001 & 002

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5, 6</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order awarding the plaintiff summary judgment; striking the answers interposed on behalf of the defendants Michael Dombek and Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company and sever the cross-claim asserted by Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company; appointing a Referee to compute the total sums due and owing to the plaintiff; and discontinuing this action against the defendants sued as "John Doe #2" through "John

Doe #10” and that Fumi Sakai be substituted as party defendants in place and instead of “JOHN DOE #1” all without prejudice to the proceedings and the caption of this action be amended. The defendants Mortgage Electronic Registration Systems Inc and RBC Mortgage Company oppose this motion.

The attorney for the plaintiff states, in a supporting affirmation dated November 14, 2007, this is an action to foreclose a Mortgage, securing an indebtedness of \$328,528.00, on the premises known as 207 Jericho Turnpike Old Westbury, NY 11568. The attorney for the plaintiff states a note and mortgage were executed by the defendant, Michael Dombek on July 28, 2005, in favor of Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Countrywide Bank, a Division of Treasury Bank, N.A., and that mortgage was recorded on August 25, 2005, in Liber M 29293, at Page 817, with the mortgage tax paid at the time of recording. The plaintiff’s counsel states the note and the mortgage were assigned to the plaintiff by an assignment dated July 2, 2007 and recorded on September 4, 2007 in Liber 32286, Page 376, and pursuant to the terms of the Note and Mortgage, the defendant covenanted and agreed to repay the indebtedness commencing September 20, 2005, and continuing monthly thereafter through and including August 20, 2030. The plaintiff’s attorney points to the affidavit dated July 26, 2007, of Alejandra Romo, the plaintiff’s foreclosure tech submitted here, where Romo states the defendant, Michael Dombek, breached his obligation with plaintiff by failing to tender the installment which became due and payable on July 20, 2006, and by failing to tender subsequent installments. By reason of the default, the plaintiff elected to accelerate the Mortgage debt and declare all sums secured, as of July 26, 2007, together with interest from June 20, 2006 as \$328,528.00 to be due and payable.

The plaintiff’s attorney traces the procedural history of the underlying litigation, and contends the plaintiff is entitled to summary judgment. The plaintiff’s attorney points out the answers interposed on behalf of the defendants, Michael Dombek and Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage

Company, fail to set forth the existence of a triable issue of fact or a valid defense to this proceeding and should be stricken as a matter of law. The plaintiff's attorney notes, as his sole affirmative defense, the defendant Michael Dombek alleges lack of jurisdiction, however, the defendant was properly served with the summons and complaint on July 24, 2007 in accordance with CPLR §308. The plaintiff's attorney quotes case authority as holding it is well established that a bald denial of the receipt of the summons and complaint, in and of itself, is insufficient to contradict a properly executed affidavit of service, and such a denial, by itself, does not even warrant a traverse hearing on the issue of proper service. The plaintiff's attorney provides the decisions in *96 Pierrepont, LLC v. Mauro* (304 A.D.2d. 499 [2nd Dept. 1996], *lv. app.den.*, 91 N.Y.2d. 802 [1997]); *Colon v. Beekman Downtown Hospital* (490 N.Y.S.2d 581 [2nd Dept. 1985]); (*Prometheus Books v. Russica Book & Art Shop, Inc.* (482 N.Y.S.2d 639 [4th Dept. 1984]), as examples. The plaintiff's attorney contends the defendant Michael Dombek's defense must be stricken as a matter of law pursuant to CPLR §3211(e) because the statute provides in pertinent part:

an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served, is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

The plaintiff's attorney notes the defendant's answer was served on or about September 5, 2007 and the defendant failed to move for judgment on his lack of jurisdiction defense

The plaintiff's attorney asserts the defendant Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company, as its first affirmative defense, alleges failure to state a cause of action, however, plaintiff's counsel submits this defense should be stricken as a matter of law. The plaintiff's attorney states

it is apparent after review of the complaint it does state a cause of action since it names all parties, states the obligation, the default and the remedy sought. The plaintiff's attorney states it is clear the complaint satisfies the criteria in its four corners, as factual allegations are stated which taken together manifest a cause of action cognizable at law, and cites *Foley v. D'Agostino* (21 A.D.2d. 60, 248 N.Y.S.2d. 121 [2nd Dept. 1964]) as legal authority. The plaintiff's attorney reports it has been repeatedly held a defense that a complaint fails to state a cause of action cannot be interposed in an answer, under such rulings as *Bazinet v. Lorenz* (70 A.D.2d 582, 416 N.Y.S.2d 55 [2nd Dept. 1979]) and *Glenesk v. Guidance Realty Corp.* (36 A.D.2d 582, 321 N.Y.S.2d 685 [2nd Dept. 1971]), so the defendant Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company's first affirmative defense should be stricken.

The plaintiff's attorney states, as for this defendant's second, third, fourth and fifth affirmative defenses, the defendant alleges it is a bona fide lender for value with no knowledge of the mortgage being foreclosed and as such, the plaintiff has no relief against this defendant. The plaintiff's counsel counters this defendant is a second mortgage holder for the sum of \$660,000.00 which mortgage is dated August 16, 2005 and was recorded on September 14, 2005 in Liber 29392 page 147, but the plaintiff holds a mortgage which is dated July 28, 2005 and recorded on August 25, 2005, so the plaintiff's attorney submits that the defendant's allegations must fail as a matter of law since CPLR §5203 directs as follows:

(a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after the filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except: (2) a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property

The plaintiff's attorney avers, as shown by the documentary evidence, the defendant Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company's mortgage is clearly subordinate to the Plaintiff's mortgage lien being foreclosed here. The plaintiff's counsel argues, despite the defendant's allegation to the contrary, the complaint is seeking to extinguish the lien of the defendant, therefore relief can be granted against this defendant, so the defendant's second, third, fourth and fifth affirmative defenses are baseless. The plaintiff's attorney submits, though the defendant's judgment was prior in time, it, nonetheless, is subordinate to the purchase money mortgage held by the plaintiff.

The plaintiff's attorney asserts, as a sixth affirmative defense the defendant defendant Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company alleges the Plaintiff's action is barred by the doctrine of estoppel, laches, waiver and release. The plaintiff's attorney challenges that position, and states it has been held the doctrine of laches is not a defense to foreclosure as a statute of limitations controls, and cites CPLR §213(4) and the holding in *Jamaica Say. Bank v.*

Sutton (42 A.D.2d 856, 346 N.Y.S.2d 847 [2nd Dept. 1973]), to wit the statute of limitations for a foreclosure action is six years from the date of default, and notes the mortgagor defendant here defaulted on July 20, 2006. The plaintiff's counsel remarks this action was brought well within the statutory time frame and the defense should be stricken as a matter of law, as should the defendant's allegation of estoppel which is also without merit. The plaintiff's attorney points out as shown by the defendant's answer, the defendant sets forth no basis to support its claim of estoppel, and under the doctrine of election of remedies and pursuant to the mortgage, one of the remedies available to the plaintiff upon the default of the mortgage is to accelerate the loan. The plaintiff's attorney reiterates, as stated in Romo's affidavit, the defendant Michael Dombek has been in default under the terms of the note and mortgage by failing to remit the required mortgage payment since July 20, 2006. The plaintiff's attorney states, upon the defendant's default, the plaintiff elected to accelerated the subject loan and commence the instant foreclosure proceeding, and the defendant has failed to provide evidence to dispute the actuality of the default and will not be able to do, so it is submitted the defendants have failed to introduce any evidence whatsoever to support the claim of estoppel, making this defense wholly without merit. The plaintiff's attorney also contends the defendant's defense of waive and release is baseless because it has been held that merely asserting waiver without satisfactory proof is insufficient to support the defense quoting from *Nassau Trust Co. v. Montrose Concrete Prod. Corp.* (56 N.Y.2d. 175, 451 N.Y.S2d. 663, 436

N.E.2d. 1265 [1985]) The plaintiff's attorney observes unsubstantiated allegations and conclusory, contradictory materials are also unavailing under the authority of *Chemical Bank v. Econ* (87 A.D.2d. 706, 448 N.Y.S.2d. 898 [3rd Dept. 1982]) and *Federal Land Bank of Springfield v. Azapian* 98 A.D.2d. 760, 469 N.Y.S2d. 474 [2nd Dept. 1983]). The plaintiff's attorney notes, in the affidavit of Romo, the defendant Michael Dombek is shown to have failed to cure his default, therefore, the lien has not been released despite the defendant's allegations to the contrary, so the defendant's sixth affirmative defense should be stricken.

The plaintiff's attorney asserts the defendant's seventh affirmative defense alleges negligence and omission by the plaintiff, but the attorney for the plaintiff submits the defendant's allegations are completely without merit because the defendant cannot establish a prima facie case of negligence, to wit the defendant cannot demonstrate, as a matter of law: the existence of a duty on the plaintiff-mortgagee's part as to the defendant; a breach of this duty, and an injury to the defendant as a result. The plaintiff's attorney cites the holdings in *Gaeta v. City of New York* (213 A.D.2d. 509, 624 NYS2d 47, 48 [2nd Dept. 1995]) and *Marine Midland Bank v. Lafferty* (174 A.D.2d. 932, 571 NYS2d 628, 632 [3rd Dept. 1991]), and states in a contractual relationship, negligence must arise out of a positive duty that the law imposes upon the parties by virtue of the contract or from some act provided for in the contract was performed in a negligent matter. The plaintiff's attorney contends here no relationship exists between this

defendant and plaintiff, but the relationship that does exist between the plaintiff and the defendant is by virtue of the note and mortgage. The plaintiff's attorney avers, since there is no duty of the mortgagee to a subordinate mortgagee and no cause of action as against a mortgagee in negligence, the defendant's allegations is baseless and its answer should be stricken.

The plaintiff's attorney states, as an eighth affirmative defense the defendant Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company alleges equitable subrogation, but that doctrine only applies where funds of the mortgagee are used to satisfy the lien of an existing, known encumbrance when, and unbeknownst to mortgagee, another lien on property exists which is senior to mortgagee's lien but junior to the one satisfied with his funds; the doctrine applies to prevent unjust enrichment of intervening, unknown lienor under *Pawling Say. Bank v. Jeff Hunt Properties, Inc.* (225 A.D.2d 678, 639 N.Y.S.2d 462 [2nd Dept. 1996]). The plaintiff's attorney argues this defendant is not entitled to equitable subrogation since it was indisputably on record notice of plaintiff's mortgage, and cites *Green Tree Credit LLC v. Hopkins* (9 Misc.3d 1122(A), 2005 WL 2782579 [NY Supreme 2005]) and *Roth v. Porush* (281 A.D.2d 612, 722 N.Y.S.2d 566 [2nd Dept. 2001]), so the defendant's eighth affirmative defense should be stricken.

The plaintiff's attorney states, as a ninth affirmative defense the defendant alleges culpable conduct by the plaintiff, but the plaintiff's counsel submits the defendant's ninth

affirmative defense is baseless. The plaintiff's attorney states it has been held that when pleading affirmative defenses, a defendant must set forth facts supporting the affirmative defenses., so here the defendant's failure to plead supporting facts renders his affirmative defenses defective as a matter of law. The plaintiff's attorney contends defenses which merely plead conclusions of law without supporting facts are insufficient under the Appellate Division ruling in *Glenesk v. Guidance Realty Corp.* (36 AD2d 852, 321 NYS2d 685 [2nd Dept. 1971]), hence the defendant's ninth affirmative defense is without merit.

The plaintiff's attorney asserts the defendant's cross-claim against the co-defendant Michael Dombek has no place in the instant foreclosure action because such a claim, as to the plaintiff is a *non-sequitur*, and cannot under any circumstances serve to intercept foreclosure; rather, that cross-claim must be severed under CPLR 603, which provides: "in furtherance or convenience or to avoid prejudice the Court may order a severance of claims, or may order a separate trial of any claim or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the other." The plaintiff's counsel contends severance is allowed where undue prejudice is not present and where severance enables the foreclosure action to be disposed of more quickly as shown in (*Marine Midland Bank v. Berley*, 90 AD2d 646, 456 NYS2d [3rd Dept., 1982]).

The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, in an opposing affirmation dated

December 14, 2007, to the motion of the plaintiff, Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company is the holder of a mortgage in the amount of \$660,000.00 granted by the defendant Michael Dombek on August 16, 2005 against the premises known as 207 Jericho Turnpike, Old Westbury, New York. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, at the closing of that mortgage, a prior purchase money mortgage granted by Dombek against the premises to First National Bank of Arizona and assigned to Countrywide Home Loans Inc. dated March 4, 2004 in the principal amount of \$638,350.00 was paid off for \$636,967.55 by a payoff letter and check made payable to Countrywide Home Loans Inc. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company claims, unbeknownst to Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, Dombek granted a home equity credit line to the plaintiff on July 28, 2005 in the amount of \$328,528.00, and that mortgage was recorded in the Office of the Nassau County Clerk's Office on August 25, 2005, nine days after Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company was granted the mortgage against the Premises. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company maintains, at the time of the RBC mortgage closing on August 16, 2005, Mortgage Electronic Registration Systems Inc acting solely

as nominee for RBC Mortgage Company was unaware of the mortgage alleged to be held by the plaintiff, which mortgage forms the basis of plaintiff's complaint. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company provides, in detail, the procedural background of the instant litigation.

The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company asserts the plaintiff cannot dispute that mortgage proceeds for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company satisfied the prior the superior mortgage held by Countrywide via assignment by National Bank of Arizona to be equitably subrogated to Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's Rights for \$636,967.55. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states on August 16, 2005, Dombek, executed a mortgage to Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company for \$660,000.00 against the premises, and the plaintiff admits in its verified complaint that Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company was joined in this action as a result of the above-described mortgage. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage

Company avers, prior to the closing of Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage, a payoff request was sent to Countrywide mortgage in which Countrywide provided the payoff amount, and at no time prior to the closing of that mortgage did the plaintiff advise Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company that the plaintiff held a credit line mortgage against the premises that was in the mortgage being recorded. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company contends because Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage was used to satisfy the mortgage of a prior, senior lien on the premises, and was unaware that the plaintiff was in the process of recording a credit line mortgage against the Premises, Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company is entitled to take the lien position of the prior mortgagee, Countrywide, giving it priority over the plaintiff's mortgage.

The defense attorney for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company counters, irrespective of the plaintiff assertion that despite the record priority held by Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, its mortgage should be declared to have priority. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company responds against the

plaintiff's allegation that Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company had notice of the plaintiff's mortgage, even though it was recorded nine days after Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company 's mortgage closed, is inaccurate as shown from the plaintiff's statements and the documents offered here by the defense.

The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, as Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company 's mortgage paid off a prior purchase money mortgage, the defendant is entitled to equitable subrogation because the intent of the doctrine of equitable subrogation is to place subsequent mortgagees in the position of the mortgage that was satisfied. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company notes the defendant was unaware of Plaintiff's mortgage at the time of the Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's closing, and the payoff amount from Countrywide did not disclose the credit line mortgage. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company reiterates the plaintiff admits, in its supporting affirmation, its credit line mortgage was recorded after Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage closed, and the plaintiff has not alleged any facts to

indicate the Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company had actual or constructive knowledge of the plaintiff's alleged interest in the premises or that Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company did not satisfy a prior senior mortgage against the premises. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company argues the plaintiff's admission its mortgage was recorded after Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company's mortgage requires a finding that, under RPL § 291, Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company is entitled to equitable subrogation. The defense attorney for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company RBC requests the Court declare, pursuant to the eighth affirmative defense in Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company's answer with affirmative defenses and counterclaims. Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company RBC shall be subrogated to the rights of Countrywide in the amount of \$636,967.55 plus interest, costs and penalties pursuant to RBC's mortgage and that lien shall be superior to plaintiff's credit line mortgage, and for the costs and expenses of this motion, including reasonable attorneys' fees.

The attorney for the defendant Michael Dombek, in an affirmation dated January

29, 2008, in opposition to the plaintiff's motion for summary judgment, it is well-settled the drastic remedy of summary judgment is not to be granted unless there are no issues of fact to be determined by the trial Court, and submits a review of the totality of the circumstances here makes it absolutely clear there are numerous factual issues which preclude granting the plaintiff any relief. The attorney for the defendant Michael Dombek contends an initial reading of the complaint demonstrates the plaintiff does not possess the requisite standing to maintain this action. The attorney for the defendant Michael Dombek asserts, although the plaintiff claims the mortgage which forms the subject matter here was assigned to it, it is not clear whether such an assignment actually transpired and, if so, whether same pre-dates the commencement. The attorney for the defendant Michael Dombek argues since, as the cross-motion of the Defendant, Mortgage Electronic Registration Systems, Inc. indicates, there is an issue of the priority of alleged liens against the subject property, the issues here cannot be resolved based upon reading sets of papers, so it is requested the plaintiff's motion for summary judgment be denied.

The plaintiff's attorney states, in a reply affirmation dated January 31, 2008, the plaintiff submits this affirmation in future support of the plaintiff's application for summary judgment, and points out the affirmative defense of an entitlement to equitable subrogation by Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company is unsupported by competent evidence. The plaintiff's attorney states equitable subrogation is unavailable to a mortgagee with actual knowledge

of the superior lien which the mortgagee seeks to have deemed a junior lien through the doctrine of equitable subrogation. The plaintiff's attorney points out Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company admits the plaintiff's mortgage was recorded prior to the defendant's mortgage, so the plaintiff is entitled to the protections of the recording statute under RPL § 291, and summary judgment.

The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, in a supporting affirmation dated January 2, 2008, to the cross motion for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, reiterates the assertions contained in an opposing affirmation dated December 14, 2007, to the motion of the plaintiff. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, based upon the assertions contained in a supporting affirmation dated January 2, 2008, to the cross motion for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, this defendant requests the mortgage for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company be declared to be surrogated to the rights of Countrywide Home Loans, Inc. for \$636,967.55.

Laura McCann, Aurora Loan Services, LLC states, in a supporting affidavit dated December 18, 2007, Aurora Loan Services, LLC is the assignee and holder of a mortgage

for \$660,000.00 granted by the defendant Michael Dombek on August 16, 2005 against the subject premises. McCann states, at the closing of the mortgage for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company a prior purchase money mortgage granted by Dombek against the Premises to First National Bank of Arizona and assigned to Countrywide Home Loans Inc. dated March 4, 2004 in the principal amount of \$638,350.00, was paid off for the amount of \$636,967.55.4. McCann states, unbeknownst to Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, Dombek granted a Home Equity Credit Line to the plaintiff on July 28, 2005 in the amount of \$328,528.00, and that mortgage was recorded in the Office of the Nassau County Clerk's Office on August 25, 2005, nine days after Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company was granted the mortgage against the premises. McCann claims, prior to the closing of the mortgage for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company, a payoff request was sent to Countrywide closing to which Countrywide provided the payoff amount, and at no time prior to the closing of the mortgage for Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company did the plaintiff advise Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company that the plaintiff held a credit line mortgage against the premises that was in the process of being recorded. McCann requests Aurora Loan

Services, LLC, the current holder of the RBC mortgage pursuant to the above-referenced assignment, respectfully requests that the Court declare that Aurora Loan Services, LLC as assignee of the the mortgage for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company be subrogated to the rights of Countrywide in the amount of \$636,967.55 plus interest, costs and penalties pursuant to RBC's mortgage and that the lien be superior to plaintiff's credit line mortgage, and for the costs and expenses of this motion, including reasonable attorneys' fees.

The attorney for the plaintiff states, in an opposing affirmation dated January 31, 2008, to the cross motion of Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, the defense application is procedurally defective since it never asserted a counterclaim against the plaintiff. The attorney for the plaintiff notes the cross motion fails to establish a prima facie case with any evidence from a party with actual knowledge. The attorney for the plaintiff points out the defendant submits an attorney's affirmation who does not profess to have any personal knowledge regarding the relevant facts, and also relies on an affidavit from McCann who does not profess to have actual knowledge of the relevant facts nor custody of the books and records of Mortgage Electronic Registration Systems, Inc. nor RBC Mortgage Company. The attorney for the plaintiff states McCann does not profess to have reviewed the records of Mortgage Electronic Registration Systems, Inc. nor RBC Mortgage Company; McCann's affidavit fails to establish any connection whatsoever among that

affiant, Aurora Loan Services, LLC and the subject loan; and, the affidavit of McCann neglects to provide any basis whatsoever for McCann 's authority for Aurora Loan Services, LLC to execute an affidavit on behalf of Mortgage Electronic Registration Systems, Inc. or RBC Mortgage Company. The attorney for the plaintiff argues loan servicers typically handle the billing and payments upon loans, and a loan servicer would not have possession of the loan origination documents, much less have actual knowledge of what the originating lender knew or did not know at the time of origination. The attorney for the plaintiff asserts the failure to offer evidence in the form of an affidavit of a party with actual knowledge of the facts asserted mandates denial of the defendant's cross motion for summary judgment. The attorney for the plaintiff avers equitable subrogation is not available to a mortgagee with actual knowledge of the superior lien which the mortgagee seeks to have deemed a junior lien through the doctrine of equitable subrogation, and the defendant also has failed to offer the loan application or credit reports obtained in connection with underwriting the defendant's mortgage. The attorney for the plaintiff points to the Uniform Residential Loan application used in the origination of all mortgage loans which contains a section where the proposed borrower lists all assets and liabilities, including all outstanding mortgage debts; and, notes credit reports obtained by the defendant in order to verify the proposed borrower's credit worthiness would also list any outstanding mortgages and the outstanding balances. The attorney for the plaintiff states yet the defendant has failed to submit this documentation in support of

its equitable subrogation defense, so the logical assumption for the defendant's failure to supply such critical evidence in support of its equitable subrogation defense is the loan application and credit reports placed the defendant on actual notice of plaintiff's mortgage, or in the alternative, it confirms McCann is not a person with actual knowledge of the relevant facts nor is in possession of the relevant records. The attorney for the plaintiff notes the defendant admits the plaintiff's mortgage was recorded prior to the defendant's mortgage, so the plaintiff is entitled to the protections of the recording statute. See RPL §291. The defendant has failed to establish any element of its equitable subrogation defense, and as such, plaintiff is entitled to summary judgment.

The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, in a reply affirmation dated February 8, 2008, challenges the plaintiff's assertion the defendant may not be granted summary judgment because the issue was joined, and the plaintiff's mortgage document acknowledges that loan is secondary to the mortgage dated July 20, 2005, which is the same mortgage satisfied by Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, because that mortgage for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company was used to satisfy the mortgage of a prior senior lien on the premises, Mortgage Electronic Registration Systems Inc acting solely as

nominee for RBC Mortgage Company is entitled to take the lien position of the prior mortgagee giving it priority over the plaintiff's mortgage. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states, as the plaintiff's mortgage was recorded nine days after the mortgage for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company, a credit check would not have disclosed the plaintiff's mortgage, and Dombek did not list the plaintiff's mortgage in his loan application. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company states it is clear from the plaintiff's statements and the annexed documents Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company is entitled to equitable subrogation in the amount of \$636,967.55 as Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage paid off a prior purchase money mortgage and the plaintiff's own mortgage acknowledges that it is secondary to a prior mortgage, Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company is entitled to equitable subrogation. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company asserts the payoff amount for the prior mortgage supplied by Countrywide never indicated Countrywide was also the holder of an unrecorded credit line mortgage, and the intent of the doctrine of equitable subrogation is to place

subsequent mortgagees in the position of the mortgage that was satisfied. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company avers the defendant was unaware of plaintiff's mortgage at the time of the closing as it was not on record at that time, and Dombek did not list it on his loan application, and the payoff amount from Countrywide did not disclose the credit line mortgage. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company claims the plaintiff's arguments are specious given the plaintiff's loan anticipated its own secondary position and Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company paid off a prior first lien mortgage, and the plaintiff's mortgage was not recorded until after Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage closed. The defense attorney for Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company requests the Court declare, pursuant to the eighth affirmative defense in Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's Answer with Affirmative Defenses and Counterclaims, that Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company be subrogated to the rights of Countrywide for \$636,967.55 plus interest, costs and penalties pursuant to Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company's mortgage and the lien be superior to the plaintiff's credit line

mortgage, and for the costs and expenses of this motion, including reasonable attorneys' fees.

The attorney for the plaintiff responds, in a sur-reply affirmation dated February 14, 2008, to new arguments and evidence raised by the cross movant for the first time in its reply, and states if the Court chooses to reject this sur-reply, the plaintiff requests the Court likewise reject the defense reply to the extent it raises new arguments and evidence. The attorney for the plaintiff points out the cross movant fails to address the fact that equitable subrogation is not available to a mortgagee with actual knowledge of the superior lien which the mortgagee seeks to have deemed a junior lien through the doctrine of equitable subrogation. The attorney for the plaintiff notes the cross movant does not submit an affidavit from anyone denying that the defendant had actual knowledge of plaintiff's lien at the time the defendant granted its mortgage., and reiterates the origination files typically contain the original handwritten loan application, the typed loan application signed at closing, and the credit reports. The attorney for the plaintiff states, in response to the affirmation of the plaintiff's attorney in opposition, the defendant has produced the typed loan application signed at closing, but the defendant does not provide the original handwritten loan application, the logical assumption being that the original loan application makes reference to plaintiff's lien. The attorney for the plaintiff asserts the defendant's excuse for failing to provide the credit report is the plaintiff's mortgage was recorded after the defendant's mortgage closed, however whether a mortgage has

been recorded has nothing to do with whether a lender has begun providing credit information to the credit reporting agencies, and again the logical assumption for the defendant's refusal to provide the credit reports is they make reference to plaintiff's lien. The attorney for the plaintiff requests the Court deny the defendant's cross-motion for summary judgment.

This Court has carefully reviewed and considered all of the papers submitted by the parties on the motion and cross motion. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d

235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). The plaintiff here has met its burden, as a matter of law, and shown it is entitled to judgment as a matter of law. The plaintiff has demonstrated there is no defense to the cause of action and the defense has no merit. The defendant Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company has failed to show facts sufficient to require a trial of any issue of fact. The defendant Mortgage Electronic Registration Systems Inc acting solely as nominee for RBC Mortgage Company has failed to meet its burden on the cross motion, as a matter of law, and has not shown it is entitled to judgment on the cross motion as a matter of law. The plaintiff’s request to sever the cross-claim asserted by Mortgage Electronic Registration Systems Inc. acting solely as nominee for RBC Mortgage Company is granted. The plaintiff’s request to discontinue this action is granted as against the defendants sued as “John Doe #2” through “John Doe #10” and that Fumi Sakai be substituted as party defendants in place and instead of “JOHN DOE #1” all without prejudice to the proceedings and the caption of this action


be amended. The plaintiff's request to appoint a Referee to compute the total sums due and owing to the plaintiff is granted.

Accordingly, the plaintiff's motion is granted in all respects, and the cross motion by the defendant is denied in all respects.

So ordered.

Dated: April 18, 2008

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEER

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

APR 22 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE