SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In Re: Estate of Abraham Lincoln Calhoun, File No. 318282

Deceased. Dec. No. 254

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Abraham Robinson and Tiffany Robinson,
Individually and as Co-Administrators of
Estate of ABRAHAM LINCOLN CALHOUN
a/k/a ABRAHAM L. CALHOUN, Deceased.

Plaintiffs,

-against-

Amar Singh and Valarie Singh, his wife,
and Countrywide Home Loans, Inc., Old Republic
National Title Insurance Company
and Stewart Title Insurance Company,

Defendants.

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Amar Singh and Valarie Singh, his wife,
Third Party Plaintiffs,

-against-

Central Properties Holding, Inc.,
Third Party Defendant.

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In an action transferred to this court from Supreme Court, Nassau County, defendant Countrywide Home Loans, Inc. (Countrywide), one of several defendants, moves the court for an order dismissing the complaint as against Countrywide. Plaintiffs Abraham Robinson and Tiffany Robinson oppose Countrywide's motion and cross-move for summary judgment dismissing Countrywide's answer, or, in the alternative, striking Countrywide's fourth and seventh affirmative defenses.

This action emanates from a foreclosure proceeding involving property located at

198-200 Wellesley Street, Hempstead, New York. That property was owned by Rose Rainey who died intestate on July 13, 1986. Her brother, William Simpkins, administered her estate as voluntary administrator pursuant to SCPA Article 13. It appears, although it is not entirely clear, that Simpkins was Rainey's sole distributee and that the subject property vested in him immediately upon his sister's death (*Matter of Roberts,* 214 NY 369, 377 [1915]; *Matter of Dombrowski,* NYLJ, Feb 1, 2007 at 33 [Sur Ct Queens County]; *Matter of Corbett,* NYLJ, Feb. 13, 1996 at 34 [Sur Ct Nassau County]). William Simpkins then died testate on June 9, 1994. Abraham Calhoun was appointed the voluntary administrator of Simpkins' estate. The court's file contains Simpkins' original will which devises and bequeaths all of his property to his cousin, Abraham Calhoun. Abraham Calhoun died August 1, 2000. There was no deed executed from the estate of Rose Rainey to William Simpkins, nor was there a deed from the estate of William Simpkins to Abraham Calhoun. Although Simpkins' original will was filed in the court by Calhoun incident to the voluntary administration of the estate of Simpkins, the will was never offered for, or admitted to, probate. The plaintiffs Abraham Robinson and Tiffany Robinson are the non-marital children of Abraham Calhoun, the administrators of his estate, and claim to be his only distributees.

The real estate taxes at the subject property were delinquent and one Florence Toledano purchased a tax lien from the County of Nassau. In April 2002, she commenced a tax lien foreclosure action on the tax lien. The notice required to be sent pursuant to Nassau County Administrative Code § 5-51.0 was sent to the person occupying the property and to the Public Administrator of Nassau County as the administrator of the estate of Rose Rainey, the Public Administrator having been appointed as such pursuant to a creditor's petition filed by Toledano.

The underlying action by plaintiffs Abraham Robinson and Tiffany Robinson is to vacate the tax lien foreclosure sale, the deed by which the current owners of record, defendants Amar Singh and Valarie Singh, obtained title, and the mortgage placed on the property by the defendant Countrywide incident to the purchase of the property by defendants Amar Singh and Valarie Singh. Plaintiffs contend that as the fee owners of the subject property at the time the foreclosure action was commenced, they were entitled to notice of the proceeding and the failure of Toledano to provide that notice requires the vacating of the judgment in the foreclosure action and all subsequent deeds and mortgages.

Defendant Countrywide now moves to dismiss the complaint as against Countrywide on two grounds. First, Countrywide contends that it has not been established that plaintiffs are the distributees of Abraham Calhoun and thus have no standing to bring the Supreme Court action; the court disagrees. Plaintiffs were appointed the administrators of the estate of Abraham Calhoun by decree of this court and letters of administration issued to them on November 13, 2002. "Letters granted by the court are conclusive evidence of the authority of the persons to whom they are granted until the decree granting them is reversed or modified upon appeal or the letters are suspended, modified or revoked by the court granting them" (SCPA 703[1]). The plaintiffs thus clearly have standing to commence and maintain the action in their capacities as the administrators of the estate of Abraham Calhoun.

Countrywide also contends that plaintiffs have made claim to the surplus monies from the tax lien foreclosure sale and that they have therefore "ratified" the tax foreclosure sale they are seeking to vacate. Countrywide cites one 1932 case (*Flatbush Investing Corporation v Curren,* 235 AD 817 [2d Dept 1932])for that proposition which is clearly distinguishable on the facts

because, unlike the case now before this court, in *Flatbush* the claimant had consented to the distribution of some of the surplus monies to other persons claiming an interest in the surplus fund. Countrywide's motion is therefore denied.

With regard to the plaintiffs' cross-motion for summary judgment dismissing Countrywide's answer, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Here, plaintiffs have failed to establish that they are entitled to judgment, let alone judgment as a matter of law. Even assuming that either the plaintiffs, individually, or the estate of Abraham Calhoun were, at the time of the foreclosure action, the fee owners of the property, the issue is whether the notice given by Toledano to the administrator of the estate of Rose Rainey was "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v Central Hanover Bank & Trust Co.,* 339 US 306, 314 [1950]). Nassau County Administrative Code § 5-51.0 requires that notice be sent to, among others, "the occupant, owner in fee...and the heirs, legal representatives and assigns of any of either of them...appearing of record on the premises affected by such sale. The words 'appearing on (sic) record' shall be construed to refer to any person on whom a notice is hereby required to be served, the nature and degree of whose

interest appears from the records kept by the County Clerk, County Treasurer, Surrogate of the County and receiver of taxes for the town or city in which the property is located."

At the time the foreclosure action was commenced, the records of the County Clerk indicated that the last deed of record affecting the property named Rose Rainey as the owner and there is no dispute that the Public Administrator of Nassau County, as the administrator of the estate of Rose Rainey, was properly served with notice of the foreclosure action. The records of this court are less clear regarding who the owner of the property was and whether the notice sent by Toledano was adequate. As indicated above, Rose Rainey died intestate. Her brother, William Simpkins, was appointed voluntary administrator of her estate. He identified himself in the affidavit submitted in connection with his appointment as voluntary administrator as the sole distributee of Rose Rainey. Also as indicated above, the court's file contains William Simpkins' original will which bequeaths and devises all his property to his cousin, Abraham Calhoun. Although the will has not been admitted to probate, it appears to have been drafted by an attorney, witnessed by two people, and contains an attestation clause, which may be sufficient to constitute a valid devise even absent the will's admission to probate (*Irving v Bruen,* 97 NYS 180 [3d Dept 1906]).

Nevertheless, neither of the plaintiffs had petitioned for appointment as administrator of Calhoun's estate until June 2002, two months after the commencement of the foreclosure action and nearly two years after Calhoun's death. Also, it does not appear that either of the plaintiffs notified the County Treasurer of their claim of ownership or directed that the Treasurer send

future tax bills to them. Thus, it is entirely unclear whether Toledano or the Treasurer had any knowledge of the plaintiffs' claims, their identities, or their whereabouts. "Where the names and addresses of interested parties are known, due process requires notice reasonably calculated , under all the circumstances, to apprise that party of the foreclosure action, so that the party may have an opportunity to appear and be heard. The key word is 'reasonably,' which balances the interests of the State against the rights of the parties" (*Kennedy v Mossafa,* 100 NY2d 1, 9 [2003][internal quotation and citations omitted][former owner of property received adequate notice of foreclosure where notice was sent to address of owner on assessment role, and owner had moved to new address without advising tax authority to amend its records]).

The uncertainty regarding the plaintiffs' claim to the property is further revealed in the affirmation of one of their attorneys, Perry Ian Tischler, in his affirmation in support of the plaintiffs' cross-motion for summary judgment. In paragraph 6 of his affirmation he avers that "I was unable to come to a definite legal conclusion whether or not the ownership interests of Abraham L. Calhoun in the Property had been properly extinguished in the foreclosure action..." The court is similarly unable to reach a conclusion on the state of the record as it now stands. Since the plaintiffs have failed to established their right to summary judgment dismissing the answer as a matter of law, the court need not consider the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Accordingly, the cross-motion to dismiss the answer is denied.

The plaintiffs have also cross-moved to dismiss Countrywide's fourth affirmative defense

to the extent that the plaintiffs' claim to the surplus monies be deemed a ratification of the foreclosure sale. As indicated above, the court concludes that their claim to the surplus monies does not constitute a ratification of the tax lien foreclosure sale and the cross-motion is therefore granted to that extent.

The plaintiffs have also cross-moved to dismiss Countrywide's seventh affirmative defense that the plaintiffs do not have standing to prosecute this action. The court has already concluded that plaintiffs have standing, at least in their capacity as administrators of the estate of Abraham Calhoun to prosecute the action. To that extent, the motion is granted. It is denied with respect to whether plaintiffs have standing to prosecute the action in their individual capacities.

Settle order.

Dated: June 18, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court