

**Aurora Loan Servs., LLC v Seudharry**

2009 NY Slip Op 30743(U)

April 3, 2009

Supreme Court, Queens County

Docket Number: 28804/2007

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

<p>_____ x</p> <p>AURORA LOAN SERVICES, LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>NEILCHAND SEUDHARRY, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOES and JANE DOES said names being fictitious parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim or may claim a lien against the premises,</p> <p style="text-align: center;">Defendants.</p> <p>_____ x</p>	<p>Index Number <u>28804</u> 2007</p> <p>Motion Date <u>December 3,</u> 2008</p> <p>Motion Cal. Number <u>1</u></p> <p>Motion Seq. No. <u>1</u></p>
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The following papers numbered 1 to 14 read on this motion by plaintiff for leave to amend the caption substituting Rajpattie Permiswardeen as a party defendant in the place and stead of defendant "John Doe #1," and deleting defendants "John Doe #2 through "John Doe #10" as party defendants, to strike the answer and counterclaim of Permiswardeen, for summary judgment against Permiswardeen pursuant to CPLR 3212, and for leave to appoint a referee to compute the sum due and owing plaintiff.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Answering Affidavits - Exhibits.....	8-11
Reply Affidavits.....	12-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this foreclosure action by filing a copy of the original summons and complaint and notice of pendency on November 20, 2007. Plaintiff alleged it is the holder, pursuant to an assignment, of a mortgage dated May 31, 2007, executed, acknowledged and delivered by defendant Neilchand Seudharry, the record fee owner of the premises known as 104-44 92<sup>nd</sup> Avenue, Richmond Hill, New York, bearing tax map designation Block 9312, lot 22, to First Magnus Corporation (First Magnus), to secure repayment of a note, evidencing a loan in the principal amount of \$618,450.00, plus interest. Plaintiff further alleged that defendant Seudharry defaulted under the terms of the mortgage and note by failing to make the monthly mortgage installment payment which became due and owing on August 1, 2007, as well as all subsequent installments, and as a consequence, it elected to accelerate the entire mortgage debt. Plaintiff subsequently filed a supplemental summons and amended complaint, asserting a second cause of action for reformation of the mortgage to include the correct legal description as appears on a schedule denominated as "Schedule A," annexed to the amended complaint.

Plaintiff originally used fictitious names in the caption for certain unknown defendants, having or claiming an interest in or liens upon the subject premises. Plaintiff identified Rajpattie Permiswardeen as one of the parties originally named as a "John Doe" defendant, and caused counsel for Permiswardeen to be served with a copy of the supplemental summons and amended complaint.

Permiswardeen served an answer denying the material allegations of the complaint and interposing a counterclaim based upon her claim that her interest in the subject property has priority over the subject mortgage. Permiswardeen makes no jurisdictional objection, but rather alleges that she, as a prospective purchaser, entered into a contract of sale of the subject real property, dated July 26, 2005, with Waheeda Nizam and Saladin Nizam, the then record fee owners, as the sellers, and that the Nizams wrongfully attempted to cancel the contract. She also alleges that she commenced an action against the Nizams entitled Permiswardeen v Nizam, (Sup Ct, Queens County, Index No. 21785/2005) seeking, among other things, specific performance of the contract of sale, or in the alternative, an award of monetary damages for alleged breach of contract. Permiswardeen filed a notice of pendency in relation to that lawsuit, but because the notice described the property as bearing tax map designation Block 9312, lot 27, it was indexed against Block 9312, lot 27, and not appear in the index for the subject property. Defendant Permiswardeen further alleges that she later discovered that the Nizams subsequently transferred title to the subject property to

Neilchand Seudharry, and as a consequence, Permiswardeen joined Seudharry as a party defendant in the action under Index No. 21785/2005, and obtained an order dated August 15, 2008, granting her motion for a default judgment on the issue of liability against Seudharry. Plaintiff served a reply to the counterclaim.

Plaintiff asserts that the other named defendants in the action have failed to appear, answer or move in relation to the amended complaint.

That branch of the motion by plaintiff seeking leave to amend the caption substituting Permiswardeen as a party defendant in the place and stead of defendant "John Doe #1" is granted.

With respect to that branch of the motion for summary judgment as against defendant Permiswardeen, it is well established that 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]; Zuckerman v City of New York, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (see Zuckerman v City of New York, 49 NY2d 557 [1980], supra; see also Alvarez v Prospect Hosp., 68 NY2d 320 [1986], supra).

Plaintiff asserts that any claim of right by defendant Permiswardeen to the property is subordinate to its interest as a holder of a valid, recorded mortgage. Plaintiff alternatively asserts that the proceeds of the subject mortgage loan were used to pay off pre-existing mortgages against the property, and as a consequence, it is equitably subrogated to the first lien position. In support of its motion for summary judgment against defendant Permiswardeen, plaintiff offers a copy of the pleadings, an affirmation of its counsel, a copy of the subject mortgage, underlying note and assignment, and an affidavit of Stephen Broviak, vice-president of plaintiff, indicating, among other things, that defendant Seudharry is in default in payment of the monthly mortgage installment due under the mortgage, and that plaintiff lacked any notice of the alleged claim of rights to the subject property by defendant Permiswardeen.

Plaintiff has submitted evidentiary proof of the existence of the mortgage and note executed by defendant Seudharry, the assignment of the mortgage documents to it, and the default in payment by defendant Seudharry under the mortgage documents (see

Miller v Planning Corp. with Delta Funding Corp. v Wells, 253 AD2d 859 [1998]; Votta v Votta Enters., 249 AD2d 536 [1998]; Mahopac Natl. Bank v Baisley, 244 AD2d 466 [1997]). In addition, plaintiff offers evidence establishing that First Magnus gave valuable consideration for the subject mortgage, which was recorded on June 18, 2007, and the title search obtained by First Magnus in connection with the making of its loan to Seudharry, contained no indication that any contract of sale was recorded against the subject property, or any notice of pendency in the action under Index No. 21785/2005 was filed against the subject property.

Plaintiff, therefore, has established its rights under the mortgage have priority over the claim of rights to the property by defendant Permiswardeen under the contract of sale (see Real Property Law § 291). The burden shifts to defendant Permiswardeen to establish a triable issue of fact (see First Nationwide Bank, FSB v Goodman, 272 AD2d 433 [2000]).

Defendant Permiswardeen asserts that she is a contract vendee who is entitled to superior rights in the property. She, however, does not dispute that she never recorded the contract of sale. Nor does she dispute that at the time the subject mortgage was made and recorded, the notice of pendency in the specific performance action (Index No. 21785/2005) was indexed as against lot 27, which lot number did not correspond to the lot number for the subject property, i.e. lot 22. Defendant Permiswardeen also makes no claim that First Magnus gave valuable consideration, or that she was in possession or occupancy of the subject premises at the time of the making of the mortgage loan.

Rather, defendant Permiswardeen asserts that plaintiff's assignor cannot be considered to have been a bona fide encumbrancer for value. She claims that if a lien and judgment search had been performed in advance of the making of the mortgage loan, it would have revealed that the Nizams were named defendants in the action under Index No. 21785/2005. She further asserts that an examination of the pleadings filed in that action would have alerted First Magnus of Permiswardeen's claimed right to ownership of the subject property. She offers the affidavit of Ron Covelli, the president of Lawyers Land Service, Inc., a title abstract company, in support of her assertions. Mr. Covelli states that it is standard practice, when searching title in connection with a sale with real property located in a county which utilizes a block indexing method, to conduct a lien and judgment search against the named seller. Mr. Covelli states that in searching the names of the Nizams, he discovered the notice of pendency filed by defendant Permiswardeen on October 7, 2005, and that a copy of the summons

and complaint in the action under Index No. 21785/2005 was readily attained.

Queens County utilizes the "block and lot" method of indexing recorded conveyances (see Administrative Code of City of New York § 7-625; Real Property Law §§ 316, 328; see also County Law §§ 918-920; Andy Associates, Inc. v Bankers Trust Co., 49 NY2d 13 [1979]). "This indexing method, unlike the traditional 'grantor-grantee' and 'mortgagor-mortgagee' system (see Real Property Law § 316) enables the title searcher readily to find all conveyances within a given time frame which affect a particular parcel of land (see 6A Powell, Real Property, par 916)" (see Andy Associates, Inc. v Bankers Trust Co., 49 NY2d at 23-24). In this instance, the title searcher for First Magnus did not find recorded any contract of sale, and did not find the notice of pendency in the Index No. 21785/2005, because it was indexed against another lot. Defendant Permiswardeen has failed to cite to any statute or case law which would impose a duty upon a lender to go beyond the title search, where no contract of sale is recorded, no notice of pendency is indexed against the lot sought to be mortgaged (see generally Da Silva v Musso, 76 NY2d 436 [1990]), and the contract vendee was not in actual possession or occupancy (see Greenpoint Sav. Bank v Pennolino, 136 AD2d 600 [1988]). Under such circumstances, defendant Permiswardeen has failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense.

Plaintiff, therefore, is entitled to summary judgment against defendant Permiswardeen (see Fed. Home Loan Mtge. Corp. v Karastathis, 237 AD2d 558 [1997]; DiNardo v Patcam Serv. Station, 228 AD2d 543 [1996]). That branch of the motion for summary judgment as against defendant Permiswardeen establishing that its rights under the mortgage are superior to Permiswardeen's claim of rights to the property under the contract of sale, and that branch of the motion for summary judgment dismissing the counterclaim of defendant Permiswardeen, are granted.

With respect to that branch of the motion for leave to appoint a referee, plaintiff has failed to present the affidavits of service of process upon defendants New York City Transit Adjudication Bureau, New York City Environmental Control Board, and New York City Parking Violations Bureau. It also appears from the affidavits of service on file with the County Clerk, that other persons were served as "John Doe" and "Jane Doe" defendants. Plaintiff, however, has failed to explain the reason it now asserts that the "John Doe" and "Jane Doe" defendants (other than "John Doe #1" as defendant Permiswardeen) are unnecessary party defendants. Under such circumstances, that branch of the motion

seeking leave to amend the caption deleting reference to the remaining "John Doe" and "Jane Doe" defendants, and that branch of the motion for leave to appoint a referee are denied without prejudice to renewal based upon proper papers (see Real Property Actions and Proceedings Law § 1321).

Dated: April 3, 2009

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J.S.C.