

**Behette v Williams**

2009 NY Slip Op 33081(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 601942/08

Judge: Walter B. Tolub

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

PRESENT: TOUB

PART 15

Index Number : 601942/2008

BEHETTE, MADELEINE

VS.

WILLIAMS, TABATHA

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No


Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/12/09

TOUB  J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----x  
Madeline Behette,

Plaintiff,

Index No. 601942/08  
Mtn. Seq. 002

-against-

Tabatha Williams, US Bank National  
Association as Trustee for RLT 2008-2,  
New York City Parking Violations Bureau,  
City of New York Environmental Control  
Board and

"JOHN DOE" #1 through "JOHN DOE" #12 the  
last twelve names being fictitious and  
unknown to the plaintiff, the person or  
parties intended being the tenants, occupants,  
persons or corporations, if any, having or  
claiming an interest in lien upon the  
premises, described in the complaint,

Defendants.  
-----x

**WALTER B. TOLUB, J.:**

Defendant US Bank National Association as Trustee for RLT  
2008-2 (US Bank or Defendant) moves for summary judgment on its  
second counterclaim for Equitable Subrogation in the amount of  
\$531,224.36. Plaintiff partially opposes Defendant's motion and  
seeks summary judgment on Defendant's first counterclaim for  
Title Determination pursuant to RPAPL §15.

Facts

The underlying action is for foreclosure. Plaintiff Anthony  
Durant was the prior owner of the premises known as 210 West  
136<sup>th</sup> Street, New York, New York (Premises). Mr. Durant borrowed  
\$82,500 from Plaintiff. The loan was secured by a mortgage dated  
November 20, 2003 which was not recorded in the Office of the

**FILED**

NOV 17 2009

NEW YORK  
COUNTY CLERK'S OFFICE

City Registrar in New York County until December 2, 2005.

Mr. Durant also borrowed money for Mitchell Kaplan, Josef Fried and Josef Frost (KFF Mortgage) which was secured by a mortgage dated July 15, 2004 in the principal sum of \$325,000 and recorded on September 27, 2004 (Defendant's Ex J). It is undisputed that the KFF Mortgage was the first mortgage recorded and that it has priority over Plaintiff's mortgage.

On or about October 24, 2005, Mr. Durant conveyed the Premises to Tabatha Williams (Defendant's Ex. K). Ms. Williams financed the purchase with the proceeds of a mortgage she received from BNC Mortgage Inc. (BNC), in the sum of \$875,000.00. That mortgage was recorded on October 24, 2005.

A portion of the BNC proceeds was used to satisfy the mortgage held by KFF (Defendant's Ex. M). Although the mortgage was in the principal sum of \$325,000, BNC paid KFF \$531,224.36 for interests and costs associated with that mortgage (Defendant's Ex. N).

BNC assigned its mortgage to US Bank on September 12, 2008 (Defendant's Ex. G).

Ms. Williams has defaulted on her loan payments. Plaintiff commenced the underlying action to foreclose on the property.

Plaintiff and Defendant agree that although Plaintiff's mortgage was recorded prior to US Bank's mortgage, US Bank is entitled to priority to the extent that BNC paid off the

previously recorded KFF mortgage encumbering the Premises. However, the parties do not agree on the amount of the priority. Plaintiff argues that Defendant is entitled to a priority in the amount of \$345,220.80. Plaintiff arrived at this figure from the HUD-1 settlement statement which states that the KFF mortgage was satisfied by a payment of \$345,220.80 (Aff. In Opp to Cross-Motion Ex. L). The calculation is as follows.:

Principal Balance	\$325,000.00
Interest at 14% through September 15, 2005	\$15,291.98
Interest from September 16, 2005 through October 24, 2005 (39 days X \$126.38)	\$4,928.220.80

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**\$345,220.80**

Defendant argues that it paid \$531,224.36 and annexes three checks made to KFF; (1) to Josef Fried in the amount of \$105,000.00; (2) to Mitch Kaplan in the amount of \$229,349.36; and (3) to Joseph Frost in the amount of \$196,875.00.

#### Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005]), quoting Winegrad v New

York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

Defendant's Motion for Summary Judgement for Equitable  
Subrogation in the Amount of \$531,224.36

"Equitable" or "legal" subrogation, since it is a broad doctrine, is given a liberal application (American Jurisprudence, Second Edition, Kenneth W. Biedzynski, Subrogation §5). It applies where one who has discharged the debt of another may, under certain circumstances, succeed to the rights and position

of the satisfied creditor if: (1) payment was made by the subrogee to protect his or her own interest; (2) the subrogee did not act as a volunteer; (3) the debt paid was one for which the subrogee was not primarily liable; (4) the entire debt was paid; and (5) subrogation does not work any injustice to the rights of others (Id.).

Equitable subrogation is not a matter of contract and does not arise from any contractual relationship between the parties, but rather, it takes place as a matter of equity and it arises through the legal consequences of the acts and relationships of the parties (Id.). Thus, the doctrine of equitable subrogation requires no writing or agreement and, since it is a creature of equity and it depends upon the equities of the parties, rather than a contract, it arises by operation of law (Id.).

As mentioned, the parties agree that US Bank is entitled to equitable subrogation and priority with respect to the KFF first recorded mortgage. The issue is the amount and whether, once US Bank paid off the KFF mortgage, what rate of interest applies on the paid off amount.

US Bank argues that it is entitled to priority of its payoff with interest from the date of the payment at the same interest rate that was listed in the KFF mortgage in the sum of \$531,224.36. To the extent that BNC paid any amount in excess of the \$345,220.80, the amount required to satisfy the mortgage, the

payment was voluntary and the right of equitable subrogation will not attach.

Nor is there any merit to the contention that equity requires a higher rate of interest apply on the Ms. Williams BNC mortgage.

The BNC mortgage agreement provides that

2. Interest will be charged on unpaid principal until the full amount of the Principal is paid. I will pay interest at a yearly rate of 6.650%. The interest rate I will pay may change in accordance with Section 4 of this Note. . .  
\* \* \*

4. (D) Limits on Interest Rate Changes  
The interest rate I am required to pay at the first Change Date will not be greater than 9.650% or less than 6.650%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point(s) (1%) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater that 13.650% or less than 6.650%  
\* \* \*

7(A)Late Charges for Overdue Payments  
If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the note Holder. The amount of the charge will be 2% of my overdue payment of principal and interest...

(Defendant's Ex. H ¶2)

Defendant does not directly step into the shoes of the original lender. What Defendant holds is a priority claim in the amount used to satisfy the KFF mortgage. That amount is \$345,220.80, as expressly stated on the HUD-1 form. US Bank will

receive its interest payments under the BNC mortgage agreement, the mortgage that is third in time and therefore third in priority.

Defendant US Bank is entitled to the contracted for rate of interest on the BNC loan, however the aggregate amount has third priority. (see Defendant's Ex H and Plaintiff's Ex. 28).

As for Plaintiff's cross-motion, it is denied with leave to renew upon completion of discovery.

Accordingly, it is

ORDERED that Defendant's motion is granted to the extent stated in this memorandum decision; and it is further


ORDERED that Plaintiff's cross-motion is denied.

Counsel for the parties are directed to contact the Clerk of the Court for a status conference in this matter.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/10/09

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

  
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HON. WALTER B. TOLUB, J.S.C.