

**Deutsche Bank Natl. Trust Co. v Carrion**

2013 NY Slip Op 30257(U)

January 25, 2013

Supreme Court, Suffolk County

Docket Number: 06-26022

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 8-3-11  
ADJ. DATE 8-2-12  
Mot. Seq. # 010 - MD

-----X  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, as Trustee for LONG BEACH  
MORTGAGE LOAN TRUST 2005-WL2,

Plaintiff,

- against -

DENNIS CARRION, SHANNON-KELLY  
MANAGEMENT, INC., ROBERT  
SCHLUETER, THOMAS ZACHARIA, "JOHN  
DOE #1-5" and "JANE DOE #1-5", said names  
being fictitious, it being the intention of plaintiff  
to designate any and all occupants, tenants,  
persons or corporations, if any, having or  
claiming an interest in or lien upon the premises  
being foreclosed herein,

Defendants.  
-----X

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Upon the following papers numbered 1 to 44 read on this motion for partial summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits  
and supporting papers 28 - 38; 39 - 41; Replying Affidavits and supporting papers 42 - 44; Other \_\_\_\_; (~~and after hearing  
counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by plaintiff for partial summary judgment on the first cause of  
action of its amended complaint and for an order of reference appointing a referee to compute the  
amount due and owing to plaintiff or, in the alternative, for partial summary judgment on its second  
cause of action for equitable subrogation declaring that a portion of its mortgage lien is superior to any  
interest of defendants, and to dismiss the affirmative defenses and counterclaims of defendant Robert  
Schlueter is denied.

This is an action to foreclose a mortgage on premises known as 502 10<sup>th</sup> Avenue, East Northport, New York. Defendant Dennis Carrion (Carrion) executed a note dated April 15, 2005 promising to pay the lender, non-party Long Beach Mortgage Company (Long Beach Mortgage), \$365,500 in return for a loan that he received. Defendant Carrion also executed a mortgage dated April 15, 2005 on the subject premises in favor of the lender Long Beach Mortgage as security for the loan.

On April 15, 2005, defendant Robert Schlueter (Schlueter) deeded the subject premises to defendant Carrion and executed a lease/option to purchase agreement as well as a “full disclosure document” and a “settlement agreement and mutual release.” The premises had been owned by defendant Schlueter since 1994 and was his primary residence. By early April 2005, defendant Schlueter was in default on his mortgage payments to non-party EMC Mortgage Corp., which had succeeded his original lender Washington Mutual, and had obtained a loan from non-party Shannon-Kelley Management to repay some of his arrears.

According to defendant Schlueter’s deposition testimony, following inquiries to friends concerning refinancing options, he was approached by defendant Carrion, whom he was told was a mortgage broker who could assist him in refinancing his mortgage. Defendant Schlueter testified that it was not until the closing of the transaction that he realized that he was not refinancing but rather selling his home to defendant Carrion in return for an agreement to repurchase his home in one year for \$365,000 with rental payments to defendant Carrion of \$2,700 per month that were to be applied to the purchase price. He understood that he would be living in the house and paying said rental amount as well as the maintenance, utilities and upkeep for one year. He also testified that he received only \$35,000 from the sale of the premises to defendant Carrion and was told that the remainder, after satisfaction of the outstanding mortgages, was to be held in escrow for his repurchase of the property. Defendant Schlueter further testified that he did not know Long Beach Mortgage or Bart D. Kaplan, and that defendant Carrion and his attorney Ethan Ellner, defendant Thomas Zacharia (Zacharia) whom defendant Schlueter was told was his attorney, and a title insurance company executive were present at the closing. He explained that five or six months after the transaction, defendant Carrion commenced an eviction proceeding against him and that he was subsequently evicted from the premises. The home is now vacant.

Long Beach Mortgage assigned the mortgage to plaintiff, Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2005-WL2, on September 19, 2006, the day that the instant action was commenced.<sup>1</sup> Plaintiff’s amended complaint contains a first cause of action to foreclose the subject mortgage. It also contains a second cause of action to impose an equitable lien in the amount of \$224,451.19 plus interest at the rate of nine percent per year from April 15, 2005 on the property, equaling the \$149,451.19 loan proceeds used to satisfy the prior recorded mortgage of non-party Washington Mutual and the \$75,000 loan proceeds used to satisfy the prior recorded mortgage non-party Shannon-Kelly Management Mortgage, and for equitable subrogation to the rights of said prior mortgagees.

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<sup>1</sup> This action was joined for trial with a related action entitled Robert Schlueter v Dennis Carrion with Index number 26285/2005 by order of this Court (Burke, J.) dated July 16, 2007. Said related action is currently pending.

In his answer, defendant Schlueter asserts a fourth affirmative defense that plaintiff through its assignors committed a fraud against him by falsely filing a HUD-1 settlement statement misleading defendant to believe that the loan was a temporary refinancing arrangement to stop a foreclosure and that he would recover his property prior to year's end and by distributing loan proceeds to parties other than defendant Schlueter. He also asserts a fifth affirmative defense of unclean hands alleging that defendants Carrion and Zacharia committed fraud and were employees or agents of plaintiff's predecessor in interest. Defendant Schlueter further asserts a first counterclaim for surplus money proceeds and a second counterclaim for rescission of the deed and mortgage based on the fraud of plaintiff's predecessor, assignor or agents in that defendant Carrion and defendant Zacharia misrepresented their status as broker and attorney, respectively, for plaintiff's predecessor and assignor.

Plaintiff now moves for partial summary judgment on its first cause of action to foreclose the subject mortgage. Plaintiff asserts that defendant Schlueter, as the former owner of the premises, has no enforceable rights against plaintiff inasmuch as defendant Schlueter fully understood the nature of his transaction with defendant Carrion. Plaintiff also asserts that its predecessor, Long Beach Mortgage cannot be responsible for any fraud allegedly perpetrated by defendant Carrion inasmuch as defendant Schlueter did not communicate with the closing agent of Long Beach Mortgage, Bart Kaplan, Esq., and defendant Carrion was not an agent of Long Beach Mortgage. Plaintiff emphasizes that defendant Carrion admitted at his deposition that he signed the subject note and mortgage and thereafter defaulted.

In the alternative, plaintiff seeks summary judgment on its second cause of action to impose an equitable lien and for equitable subrogation based on the satisfaction of the prior existing mortgages with \$224,451.19 of the Long Beach Mortgage loan proceeds. Plaintiff argues that satisfaction of the two prior liens is indisputable as evidenced by the HUD-1 Settlement Statement and the copies of checks submitted herein. In support of its motion, plaintiff submits, among other things, the supplemental summons and amended complaint, the answer of defendant Schlueter, the answer of defendant Carrion containing general denials, the note, the mortgage, the assignment, portions of the deposition transcripts of defendants Schlueter and defendant Carrion, the subject deed, the HUD-1 settlement statement, the lease/option to purchase agreement, full disclosure document, settlement agreement and mutual release, and the affidavit of Donna Hardy.

A party seeking summary judgment must establish its position by evidentiary proof in admissible form sufficient to warrant judgment for it as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986], citing to *Zuckerman v City of New York*, 49 NY2d at 562).

"A mortgagee's interest in the property is protected unless it has notice of a previous fraud affecting the title of its grantor" (*Thomas v LaSalle Bank, N.A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; *see* Real Property Law § 266; *Mathurin v Lost & Found Recovery, LLC*, 65 AD3d

617, 884 NYS2d 462 [2d Dept 2009]). “[A] mortgagee is under a duty to make an inquiry where it is aware of facts ‘that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue’ ” (*Stracham v Bresnick*, 76 AD3d 1009, 1010, 908 NYS2d 95 [2d Dept 2010], quoting *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600, 835 NYS2d 264 [2d Dept 2007]). “A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value” (*Booth v Ameriquet Mtge. Co.*, 63 AD3d 769, 769, 881 NYS2d 152 [2d Dept 2009]).

Where, as here, there is a claim of priority interest based on an earlier fraudulent conveyance, plaintiff bears the initial burden on its motion for summary judgment to establish its prima facie entitlement to protection as an assignee of a good faith mortgage (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 927 NYS2d 364 [2d Dept 2011]; *Morris v Adams*, 82 AD3d 946, 919 NYS2d 36 [2d Dept 2011], *lv denied* 17 NY3d 715, 933 NYS2d 655 [2011]). Plaintiff must demonstrate that its assignor, Long Beach Mortgage, had no knowledge of the alleged fraud or of facts that would have lead a reasonable mortgagee to inquire of the possible fraud at the time the mortgage was entered into with defendant Carrion (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 927 NYS2d 364 ). The affidavit dated September 25, 2006 of Donna Hardy, vice president “by Washington Mutual Bank, successor in interest to Long Beach Mortgage Company, it’s [sic] attorney-in-fact of” plaintiff, merely indicates that defendant Carrion defaulted on his loan payments and failed to timely cure after plaintiff gave notice. The affidavit fails to provide an adequate and full description of the contents of the loan file and the information known or not known to Long Beach Mortgage at the closing of the loan (*see id.*). Thus, plaintiff failed to meet its prima facie burden of establishing that its assignor was a bona fide mortgagee (*see id.*). It so follows that the Court need not consider the sufficiency of the opposing papers on this issue (*see id.*). Therefore, plaintiff’s request for summary judgment on its first cause of action is denied.

The doctrine of equitable subrogation applies “where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance” (*King v Pelkofski*, 20 NY2d 326, 333-334, 282 NYS2d 753 [1967]; *see Arbor Commercial Mtge., LLC v Assoc. at the Palm, LLC*, 95 AD3d 1147, 1149, 945 NYS2d 694 [2d Dept 2012]).

Here, although plaintiff provides the HUD-1 settlement statement executed by defendant Carrion as borrower and defendant Schlueter as seller indicating that part of the loan proceeds were to be used to pay off a first mortgage loan of EMC Mortgage Corp. and a second mortgage loan of Shannon-Kelley Management and provides copies of checks dated April 15, 2005 payable to said entities remitted by Bart D. Kaplan, P.C. and drawn from a Citibank account, plaintiff fails to submit proof that said prior loans were actually paid off, such as by proffering copies of the satisfactions of said prior mortgages (*compare LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600, 835 NYS2d 264; *Federal Natl. Mtge. Assn. v Woodbury*, 254 AD2d 182, 679 NYS2d 116 [1st Dept 1998]; *Zeidel v Dunne*, 215 AD2d 472, 626 NYS2d 509 [2d Dept 1995]). Thus, plaintiff failed to demonstrate that a portion of its mortgage had priority over any interest in the subject property of defendants as a result of an equitable lien (*see Private Capital Group, LLC v Hosseinipour*, 86 AD3d 554, 927 NYS2d 665 [2d Dept 2011]). Therefore,

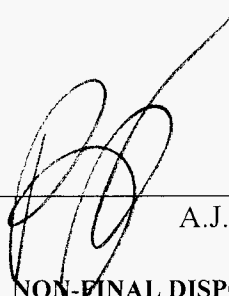
Deutsche Bank v Carrion  
Index No. 06-26022  
Page No. 5

plaintiff's request for summary judgment on its second cause of action for equitable subrogation is denied.

Accordingly, the instant motion is denied.

Dated: \_\_\_\_\_

1/25/13

  
\_\_\_\_\_  
A.J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION