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SHORT FORM ORDER INDEX NO. 14877/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS PURCHASER OF THE LOANS AND OTHER ASSETS OF WASHINGTON MUTUAL BANK, FORMERLY KNOWN AS WASHINGTON MUTUAL BANK, FA (THE "SAVINGS BANK") FROM THE FEDERAL DEPOSIT INSURANCE CORPORATION, ACTING AS RECEIVER FOR THE SAVINGS BANK AND PURSUANT TO ITS AUTHORITY UNDER THE FEDERAL DEPOSIT INSURANCE ACT,
12 U.S.C. § 1821 (D)
3415 Vision Drive
Columbus, OH 43219

Plaintiff,

-against-

BETTE KALPAKIS, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION SUCCESSOR BY MERGER TO THE LONG ISLAND SAVINGS BANK, FSB, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR GREENPOINT MORTGAGE FUNDING, INC.,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendants.

-and-

LYTHIA ROUSSEAS, BARBARA KALPAKIS and MARK KALPAKIS,

Intervenor-Defendants.

ORIG. RETURN DATE: SEPTEMBER 16, 2011
FINAL SUBMISSION DATE: JUNE 7, 2012
MTN. SEQ. #: 004
MOTION: MD

ORIG. RETURN DATE: OCTOBER 27, 2011
FINAL SUBMISSION DATE: JUNE 7, 2012
MTN. SEQ. #: 005
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 12 read on this motion FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation in Response and supporting papers 5, 6; Notice of Cross-motion and supporting papers 7-9; Reply Affirmation 10; Reply Memorandum of Law 11; Reply Affirmation 12; it is,

ORDERED that this motion (seq. #004) by intervenor-defendants, LYTHIA ROUSSEAS, BARBARA KALPAKIS and MARK KALPAKIS ("intervenors"), for an Order, pursuant to CPLR 3212, granting intervenors summary judgment:

(1) dismissing the complaint upon the ground that there is no issue of fact preventing the entry of such judgment summarily; and

(2) granting judgment on their counterclaims and cross-claims upon the ground that there is no issue of fact preventing the entry of such judgment summarily,

is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #005) by plaintiff for an Order:

(1) pursuant to CPLR 3212 (e), granting partial summary judgment on plaintiff's Third and Fourth causes of action and, *inter alia*, declaring that plaintiff is the holder of an equitable first mortgage lien on the premises commonly known as 237 West Pulaski Road, Huntington Station, New York and designated as District 0400, Section 138.00, Block 2.00, Lot 36.000 on the Tax Map of Suffolk County in the principal amount of $89,004.60, plus interest from July 21, 2003, reasonable attorney's fees, late charges and escrow advances, superior to the liens and interests of the defendants and intervenors herein; and

(2) pursuant to CPLR 3124, compelling the intervenors to appear for depositions in this action by a date certain,

is hereby **GRANTED** solely to the extent set forth hereinafter.

In this foreclosure action commenced on or about April 23, 2010, plaintiff seeks to foreclose a certain mortgage executed by defendant BETTE

KALPAKIS ("defendant") on or about January 11, 2008, in the principal amount of $263,250.00 ("Mortgage"), in connection with the real property commonly known as 237 West Pulaski Road, Huntington Station, New York ("Premises"). Plaintiff alleges that the Mortgage has been in default since December 1, 2009.

Intervenors have now filed a motion for summary judgment seeking dismissal of plaintiff's complaint and granting the relief requested by their counterclaims, to wit: to declare the Mortgage void and to cancel it of record, and their cross-claims, to wit: to declare a certain deed void and to cancel it of record. Intervenors allege that the deed upon which the Mortgage is based is a forgery, and therefore the deed and Mortgage should be declared void and canceled of record.

On April 2, 2003, George Kalpakis, the father of the intervenors and non-party James Kalpakis, deeded his interest in the Premises to defendant ("Deed"). However, George Kalpakis died intestate on July 2, 1995.[1] As such, defendant has claimed that James Kalpakis, her former husband, forged George Kalpakis' name on the Deed. Defendant alleges that James Kalpakis thereafter requested she execute the Mortgage that is being foreclosed herein, and that the loan proceeds therefrom went to James Kalpakis. Based upon the foregoing, defendant argues that she never obtained title to the Premises, and therefore the Mortgage is null and void.

Intervenors allege that when their father died, title to the Premises passed to them by operation of law, to hold as tenants in common. The Court notes that intervenor LYTHIA ROUSSEAS was issued Letters of Administration of George Kalpakis' Estate on March 8, 2011, by the Queens County Surrogate's Court. Intervenors contend that the Deed was undeniably forged, as their father died approximately eight years earlier.

Thus, intervenors argue that the subsequent mortgages on the property are also void. In addition to the Mortgage being foreclosed herein, a prior mortgage was given in connection with the Premises. Specifically, on or about July 31, 2003, defendant gave a mortgage on the Premises to GreenPoint Mortgage Funding ("GreenPoint") in the principal amount of $200,000.00.

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[1] George Kalpakis was predeceased by his wife, Frances Kalpakis, who died on April 24, 1993.

Intervenors claim that they had no knowledge of the GreenPoint mortgage, and received none of the proceeds therefrom. Moreover, intervenors inform the Court that there was yet another earlier mortgage on the Premises given to Long Island Savings Bank by George Kalpakis in 1987 that pre-dated the Deed ("LISB Mortgage"), which was satisfied by the proceeds of the GreenPoint mortgage. The GreenPoint mortgage was thereafter satisfied by the subject Mortgage. Accordingly, plaintiff seeks to be put in the position of first lien holder, superior to the interests of defendant and intervenors, and has moved for partial summary judgment on this issue. However, intervenors argue that the funds provided by plaintiff's predecessor-in-interest (Washington Mutual Bank) were not used to satisfy the LISB Mortgage, but rather the funds came from GreenPoint, if from anywhere. Further, intervenors allege that there was no intervening mortgage that was unknown when the first priority mortgage was satisfied by a new lender and that would otherwise be superior to the new mortgage. Thus, intervenors argue that the doctrine of equitable subordination is inapplicable herein, as they claim ownership of the Premises as heirs of George Kalpakis, not as superior lien holders. Finally, intervenors contend that both GreenPoint and plaintiff's predecessor-in-interest failed to exercise due diligence when they loaned defendant "significant" amounts of money without confirming that she held good title to the Premises.

With respect to plaintiff's cross-motion for partial summary judgment, a vice president of plaintiff avers that as a condition of the Mortgage loan, the existing GreenPoint mortgage loan was to be satisfied. As such, from the proceeds of the Mortgage, the amount of $161,506.24 was used to pay off the GreenPoint mortgage. In support thereof, plaintiff has submitted a copy of the HUD-1 statement from the Mortgage closing dated January 11, 2008. Plaintiff alleges that it did not have knowledge of the claims of fraud herein with respect to the Deed and GreenPoint mortgage, as it relied upon the recorded Deed to determine the state of title.

Moreover, plaintiff seeks discovery herein prior to a ruling on the intervenors' instant motion for summary judgment. Notwithstanding the foregoing, plaintiff seeks summary judgment on its Third and Fourth causes of action which are based upon equitable subrogation. Plaintiff argues that there are no issues of fact relative to its request for an equitable first mortgage lien on the Premises in the amount paid from the proceeds of the GreenPoint mortgage to satisfy the LISB mortgage, to wit: $89,004.60. In support thereof, plaintiff has submitted a copy of the HUD-1A statement from the GreenPoint mortgage

closing dated July 31, 2003, as well as a copy of a check made payable to "Astoria Federal Savings."[2] Notably, plaintiff indicates that the LISB loan was still outstanding when George Kalpakis died, and therefore his heirs took title to the Premises subject to the LISB lien (*see* EPTL 3-3.6). Plaintiff seeks equitable subrogation so that the intervenors will not be unjustly enriched to the detriment of plaintiff, "an innocent lender in this matter."

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment 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 (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, 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 (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Here, the intervenors' application is **DENIED**, without prejudice and with leave to renew at the completion of discovery in this matter. While the Court is aware that a deed based on forgery or obtained by false pretenses is void *ab initio*, and a mortgage based on such a deed is likewise invalid (*see ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801 [2012]; *First Natl. Bank of Nev. v Williams*, 74 AD3d 740 [2010]; *Cruz v Cruz*, 37 AD3d 754 [2007]), the Court finds that plaintiff is entitled to conduct discovery as contemplated by CPLR 3212 (f), prior to opposing the intervenors' dispositive motion. The history of this matter is

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[2] Astoria Federal Savings and Loan Association acquired LISB by merger.

fact specific, and a great portion of the allegations of forgery involve not plaintiff, but rather defendant and non-party James Kalpakis. CPLR 3212 (f) provides in pertinent part that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order . . . disclosure to be had" (CPLR 3212 [f]). The Court notes that plaintiff has asserted numerous affirmative defenses to intervenors' counterclaims, to wit: laches, estoppel, waiver, and ratification. Under the circumstances presented, plaintiff may conduct discovery of defendant, intervenors, and any other party with knowledge of this matter for the purpose of obtaining facts essential to oppose the intervenors' claims (*see* CPLR 3212 [f]; *Matter of Fasciglione*, 73 AD3d 769 [2010]; *Gates v Easy Living Homes, Inc.*, 29 AD3d 733 [2006]).

With respect to plaintiff's cross-motion, the doctrine of equitable subrogation provides that "[w]here property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder" (*King v Pelkofski*, 20 NY2d 326, 333 [1967] [internal quotation marks omitted]). A claim for equitable subrogation "is one of the mechanisms by which the law of restitution and unjust enrichment will reallocate the burden of a given liability from one who has originally discharged it to another whom the law considers more appropriate to bear it" (Restatement [Third] of Restitution and Unjust Enrichment § 24, Comment a). Furthermore, the doctrine of equitable subordination has been applied to grant a lender a lien on real property in circumstances where a deed was determined to be a forgery, thereby rendering any subsequent mortgages invalid (*see King v Pelkofski*, 20 NY2d 326, *supra*; *Cashel v Cashel*, 94 AD3d 684 [2012]; *Bank of N.Y. v Spadafora*, 92 AD3d 629 [2012]; *Federal Natl. Mtge. Assn. v Woodbury*, 254 AD2d 182 [1998]; *Great Eastern Bank v Chang*, 227 AD2d 589 [1996]).

However, in this matter, there has been no judicial determination that the Deed was a forgery. At this juncture, the Mortgage is not yet void, nor is the lien cancelled against the Premises. Wherefore, the Court finds that plaintiff's cross-motion for an equitable lien against the Premises is premature before the resolution of the claims seeking to declare that the Deed is null and void and that the Mortgage is cancelled (*see Cashel v Cashel*, 94 AD3d 684, *supra*; *Williams v Mentore*, 2012 NY Slip Op 31965[U] [Sup Ct, Queens County]; *Scott v Doyle*, 12 Misc 3d 1163[A] [Sup Ct, Queens County 2006]).

Based upon the foregoing, that branch of plaintiff's cross-motion for partial summary judgment is **DENIED**, without prejudice and with leave to renew in the event plaintiff's lien against the Premises is found to be void and is cancelled of record.

Finally, regarding plaintiff's request to compel the intervenors to appear for depositions by a date certain, this matter is set down for a preliminary conference, pursuant to 22 NYCRR § 202.8 (f), on **June 20, 2013, at 9:30 a.m., Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**.

The foregoing constitutes the decision and Order of the Court.

Dated: April 30, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**