

**Thompson v Seay**

2019 NY Slip Op 35242(U)

February 25, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 607630/2018

Judge: James Hudson

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Supreme Court of the County of Suffolk  
State of New York - Part XL

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X

RENEE HARRIS THOMPSON, Executrix of the  
ESTATE OF GEORGE HARRIS,

Plaintiff,

-against-

CARLTON H. SEAY, SEAY MEMORIAL  
CHAPEL, ZACARIAS MUZUS XLQUIN, SONIA  
DIAZ, and "JOHN DOE No. 1" through "JOHN  
DOE No. 10", inclusive, the names of the last ten  
defendants being fictitious, the true names of said  
defendants being unknown to plaintiff, it being intended  
to designate fee owners, tenants or occupants of the  
mortgaged premises and/or persons or parties having or  
claiming an interest in or a lien upon the mortgaged  
premises, if the aforesaid individual defendants are  
living, and if any or all of said individual defendants be  
dead, their heirs at law, next of kin, distributees,  
executors, administrators, trustees, committees, devisees,  
legatees, and the assignees, lienors, creditors and  
successors in interest of them, and generally all persons  
having or claiming under, by, through, or against the said  
defendants named as a class, of any right, title or interest  
in or lien upon the premises described in the complain  
herein,

Defendants.

X-----X

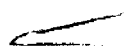
Upon the following E-filed documents numbered 30-42 read on this Motion/Order to Show Cause to Appoint  
a Receiver; (and after hearing counsel in support and opposed to the motion) it is,

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MOT. SEQ. NO.:001-MG

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**ORDERED** that the motion of Plaintiff Renee Harris Thompson, Executrix of the Estate of George Harris (“Plaintiff”) requesting an order appointing a receiver to collect the rents and income of the mortgaged premises, to wit: 711 Harrison Avenue, Riverhead, New York 11901, D: 0600, S: 102.00, B: 03.00, L: 031.000 (“Premises, Property”); for the purpose of using the sums collected to pay tax arrears due to the County of Suffolk; pay any necessary property maintenance, and, thereafter, to retain the sums collected until this action is resolved; and to grant the receiver the usual powers and duties of receivers in such cases, is granted in its entirety.

### **Preliminary Matters**

On June 12<sup>th</sup>, 2018, the attorneys for the Plaintiff and Defendant Carlton H. Seay (“Defendant”) executed a Stipulation adjourning Plaintiff’s instant motion (seq. no.:001) to July 25<sup>th</sup>, 2018 and stating that “Defendant shall serve opposition papers, if any, on or before July 13<sup>th</sup>, 2018.” Defendant failed to timely serve. The case file contains no extension of the stipulated dates. Where the movant cannot submit substantive response due to untimely submission of opposing papers, it may be an abuse of discretion for the court to consider the untimely submissions (*see Kavakis v. Total Care Sys.*, 209 AD2d 480, 619 NYS2d 634 [2d Dept 1994]; *Wallin v. Wallin*, 34 AD2d 870, 310 NYS2d 788 [3d Dept 1970]). Defendant’s opposition is untimely and will not be considered.

On May 30<sup>th</sup>, 2018, Plaintiff moved by order to show cause (“OSC”) for the relief requested in the instant motion (seq. no.:001). That OSC fails to assert a situation requiring expedited relief. On July 24<sup>th</sup>, 2018, Plaintiff filed a reply affidavit and affirmation in support of the motion (seq. no.:001). The parties will note that CPLR Rule 2214(d) is silent regarding a reply to a motion which requests relief by OSC. This Court only permits a reply to an OSC upon the Court’s permission. Permission to reply was not sought by Plaintiff nor granted by the Court. The Court will not consider the reply in this decision.

### **Background Facts and Circumstances**

Plaintiff Renee Harris Thompson by letters testamentary is the Executrix of the Estate of George Harris. Plaintiff alleges standing to file the instant foreclosure case. Plaintiff bases that assertion upon a mortgage loan made by George Harris, deceased to Carlton H. Seay, which Plaintiff claims is delinquent.

The following is uncontroverted: On July 27<sup>th</sup>, 1992, Mortgagor/Defendant Carlton H. Seay executed a \$130,000.00 purchase money note and associated mortgage against the subject premises in favor of George Harris/Mortgagee. Defendant received a Deed to the

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subject premises which was recorded August 7<sup>th</sup>, 1992. The mortgage loan matured on July 25<sup>th</sup>, 2012.

On or around May 23<sup>rd</sup>, 2006, the County of Suffolk acquired the subject premises by tax deed dated May 23<sup>rd</sup>, 2006, recorded May 31<sup>st</sup>, 2006. On or around December 7<sup>th</sup>, 2006 Defendant Seay purchased the property from the County of Suffolk and received a Quit Claim Deed to the premises. On July 9<sup>th</sup>, 2008, George W. Harris a/k/a/ George Harris a/k/a George Washington Harris, died a resident of Suffolk County. On January 25<sup>th</sup>, 2017 the Suffolk County Surrogate's court by letters testamentary, appointed Plaintiff Renee S. Harris Thompson Estate Executrix by Certificate No. 131123, Court File No. 2016-2887. Following his purchase of the subject premises from Suffolk County, Defendant made mortgage payments to George Harris and, upon his death, to his Estate until June 1<sup>st</sup>, 2014. Same date is beyond the maturity date of the mortgage loan. Defendant thereafter has not made any payments. On April 20<sup>th</sup>, 2018, Plaintiff Estate by its Executor filed the instant foreclosure case upon the aforesated 1992 mortgage loan, by note and associated mortgage.

The following is controverted: Plaintiff contends that 1992 mortgage is viable, having been restored by Defendant. Defendant having purchased the subject premises at a tax sale during 2006. Plaintiff contends that the 2006 purchase by Defendant restored that mortgage and the associated obligation of Defendant to make payments thereon until mortgage satisfaction. Plaintiff further contends that Defendant having continued to make loan payments to Plaintiff based upon that 1992 loan following the 2006 tax sale constitutes ratification of that mortgage by Defendant Seay. Plaintiff alleges that current failure of the Defendant to pay the property taxes due and owing on the subject premises imperils the property interests of the Estate in and to the subject premises. Plaintiff, has moved herein by OSC (seq. no.:001) for the appointment of a Receiver to marshal and collect rents and charges on the premises to pay the real property taxes, both delinquent and current and for the maintenance of the subject premises. Plaintiff makes that request to protect the interests of the Estate while the instant foreclosure case is litigated.

It is noted that by Order dated April 6<sup>th</sup>, 2018, Justice Howard H. Heckman, Jr., denied Plaintiff the identical relief requested herein: the appointment of a receiver to collect rents and income on the mortgaged premises (*Thompson/Estate of Harris v. Seay, et. al.*, Index Number:618301/2017). Judge Heckman denied the requested relief without prejudice. Defendant's cross-motion for summary judgment was granted upon Plaintiff's failure to prove proper service of an RPAPL §1303 notice.

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**Mortgage Restoration**

The Court must first consider Plaintiff's contention that Defendant's 2006 purchase of the subject premises from the County of Suffolk restored the contested 1992 mortgage loan. The purchaser of property at a tax sale, upon receiving a valid deed, acquires a new and complete title to the land under an independent grant from the sovereign, a title free of any prior claims to the property or interests in it and not merely the title of the prior owner or the party assessed for taxes (*Melahn v. Hearn*, 92AD2d 319, 460 NYS2d 103; *affd.*, 60 NY2d 944, 946, 471 NYS2d 47, 48, 459 NE2d 156, 157 [1983]; *citing Hefner v. Northwestern Life Ins. Co.*, 123 US 747, 751, 8 S Ct 337, 338-39, 31 L Ed 309; *Lee v. Farone*, 261 AD 674, 27 NYS2d 585, *affd.* 288 NY 571, 41 NE2d 927 [1941]). When the mortgagee failed to redeem property within a three-year period, tax sale purchaser's title became "absolute" (Real Property Tax Law §1024[1]), and the mortgage was extinguished and unenforceable (*Id.*). *Melahn v. Hearn* overturned the previous Court of Appeals ruling which followed the common law doctrine and upheld the mortgagee's lien over the tax title asserted by a delinquent purchaser even though the redemption period contained in the governing statute at that time had expired (*Olyphant v. Burns*, 101 Sickels 218, 146 NY 218, 40 NE 980 [1895]).

The mere fact that a property, taken by a municipality for the nonpayment of taxes, is then resold to the delinquent taxpayer/mortgagor, does not-without more-constitute a basis for finding that the mortgage lien remains valid thereafter (*First Nat. Bank of Downsville v. Atkin*, 183 Misc2d 425, 428, 704 NYS2d 440, 442 [Sup Ct Delaware Cty 2000]; *citing Melahn v. Hearn, supra.*). "Moreover, the court concluded that under circumstances akin to those presented here, the ensuing loss of rights by the mortgagee...was 'due to the mortgagee's own unexplained fault'" (*Atkin* at 428; *quoting Hearn* at 324). "The mortgages in this case were extinguished by the County on its tax proceeding. However, by virtue of the warranty clause in the mortgage, upon the defendant's purchase of these properties by the doctrine of after-acquired title brought the mortgages back into existence" (*Salamanca Federal Savings & Loan Ass'n v. Darrow*, 162 Misc2d 729, 732, 619 NYS2d 508, 510 [Cattaraugus County Ct 1994]). A review of the warranty clause contained within the subject mortgage fails to disclose an after-acquired property clause. This exception is not available to Plaintiff in the case at bar. "An intervening tax foreclosure has been held to constitute a 'special circumstance' sufficient to permit the interposition of a claim for recovery on the note, after the commencement of a mortgage foreclosure action (*see Bergman, New York Mortgage Foreclosures*, §7.12[1], at 7-21; RPAPL §1301[3]). Such a claim may be interposed by amendment, rather than commencement of a new action (*see Bank of New York v. Midland Ave. Dev. Corp.*, 248 AD2d 342, 343, 669 NYS2d 622), and will 'relate back' to the initial date of commencement for limitations period (*Atkin* at 429, *Midland* at 344).

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The ability to sue upon the note when the mortgage is unenforceable is one of long standing in New York. “The release of the land from the lien of the mortgage and judgment, it being security only, does not discharge the defendants from liability on the bond” (*Wadsworth v. Lyon*, 48 Sickels 201, 93 NY 201, 202, 45 AmRep 190 [1883]; citing *Jones on Mortgages*, §741; *Bentley v. Vanderheyden*, 35 NY 677; *Tripp v. Vincent*, 3 Barb. Ch. 613]). Although the Bank’s mortgage lien was extinguished by tax lien foreclosure, the Bank’s pending foreclosure action was not extinguished (*Bank of New York v. Midland Ave. Development Co.*, 248 AD2d 342, 669 NYS2d 622 [2d Dept 1998]). A dismissal of the foreclosure action on the mortgage did not preclude plaintiff from commencing a separate action on the note (*McSorley v. Spear*, 13 AD3d 495, 789 NYS2d 52 [2d Dept 2004]; see *RPAPL §1301[3]*; *Midland Ave. Dev. Co.*, *supra.*; *Lehman v. Roseanne Inv. Corp.*, 106 AD2d 617, 483 NYS2d 106 [2d Dept 1984]; see *14A Carmody-Wait 2d §92:163* [2018]).

In the case at bar, the subject mortgage has not been restored.

#### **Ratification of the Mortgage**

The Court must next consider whether Defendant’s continued payment of the subject mortgage after Defendant’s purchase at the 2006 tax sale constitutes ratification.

In the case at bar, Plaintiff alleges that Defendant made payments on the subject mortgage through June 1<sup>st</sup>, 2014, well beyond the July, 2012 loan maturity date and well beyond the May 23, 2006 Plaintiff re-purchase of the subject premises by tax deed. In the seminal case on mortgage ratification in New York, the Court of Appeals was faced with Plaintiff Executors suing upon a mortgage which they alleged decedent mortgagor had never signed (*Rothschild v. Title Guarantee & Trust Co.*, 204 NY 458, 41 L.R.A.N.S. 740, 97 NE 879 [1912]). Decedent, while aware that her errant son had forged her name upon the mortgage, proceeded to make payments for several years thereafter. The Court determined that decedent’s silence after learning of the forgery did not equitably estop her from impeaching the mortgage (*Id.* at 462, 880). The Court determined that decedent’s payments, with full knowledge of the forgery, prevented the “upspringing of right (to foreclose) and the exercise of it by the defendant” [*Id.* at 463, 881]; citing *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 NY 575; *Voorhis v. Olmstead*, 66 NY 113]).

“When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situations of the parties, he acquiesces in and assents to it and is equitably

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estopped from impeaching it, although it was originally void or voidable” (*Id.* at 464, 881); *citing Vohmann v. Michel*, 185 NY 420, 78 NE 156, 118 Am St Rep 921; *Pomeroy’s Equity Jurisprudence* [3d Ed] §§816-821, 965)).

“The essence of ratification ‘is that the beneficiary unequivocally declares that he does not regard the act in question as a breach of TRUST but rather elects to treat is as a lawful transaction under the TRUST” (*see Bogert, Law of TRUSTS and Trustees* §942 [2d ed]). Confirmation and ratification imply to legal minds, knowledge of a defect in the act to be confirmed, and the right to reject or ratify it” (*Hempstead Realty, LLC v. Sturrup*, 55 Misc3d 1219[A] 1, 6, 57 NYS3d 675 [Sup Ct Nassau Cty 2017]; *quoting Matter of Ryan*, 291 NY 376, 417, 52 NE 909 [1943]; *quoting Adair v. Brimmer*, 29 Sickels 539, 74 NY 539, 554 [1878]). Ratification is “in essence a waiver of existing rights” (*Matter of Ayzasian*, 153 Misc 467, 475, 275 NYS 123 [Surrogate’s Ct Kings Co 1934]). “Further, the Court of Appeals in *Rothschild* made clear that both void and voidable contracts and instruments may be ratified” (*Sturrup* at 6; *see Rosen v. Rosen*, 243 AD2d 618, 663 NYS2d 228 [2d Dept 1997] [voidable conveyances are subject to ratification]; *In re Simon’s Estate (Matter of Simon)*, 44 AD2d 570, 353 NYS2d 39 [2d Dept 1974] [executor’s improper sale of estate property to co-fiduciary impliedly ratified by beneficiary]; *DeTata v. Tress*, 3 NY2d 920, 167 NYS2d 934, 145 NE2d 877 [1957] [mortgage based on forged deed, which rendered mortgage void, was ratified]). “...silence alone does not constitute ratification” (*Id.* at 763).

“In our opinion, respondent ratified the mortgage by accepting and recording the deed from her husband with full knowledge of all the facts...Under these circumstances, despite appellant’s failure to specifically plead the estoppel, respondent is nevertheless estopped from denying the validity of the mortgage” (*Id.* at 764; *citing Rothschild, supra.*).

A review of the verified answer of Defendant Seay, discloses the following statement in paragraph 18, pled as his first counterclaim: “That the answering Defendants made additional payments on the note and mortgage over and above the amount due and owing in the amount of over \$30,000.00.” Same statement is an admission by the Defendant, despite, and in contravention of his denial, in paragraph 2 of that verified answer. Same, denying the allegation of paragraph 20 of the verified complaint, wherein Plaintiff alleged: “After making the first 206 payments on the Mortgage between 1992 and 2014, on or about June 1<sup>st</sup>, 2014, Mortgagor and owner Seay defaulted under the terms of the Mortgage by failing to pay the last 34 monthly payments.”

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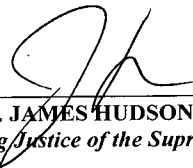
Seay, by his sworn answer has admitted to payment on the mortgage after his 2006 repurchase of the subject premises by tax deed. Same payment of "over \$30,000.00" constitutes his ratification of the subject mortgage. It is clear that Defendant's continued payment of the mortgage installment payments beyond his 2006 purchase of the subject premises by tax deed constitutes ratification of the subject mortgage.

What Plaintiff could not accomplish by assertion of mortgage restoration, Defendant has accomplished by his mortgage ratification. The 1992 mortgage has been ratified and is not therefore, extinguished according to case law. Examination of the subject mortgage discloses that paragraph 19 of that mortgage provides: "If Mortgagee sues to foreclose the Mortgage, Mortgagee shall have the right to have a Receiver appointed to take control of the property." Where a mortgage covenant providing for the appointment of a receiver exists, upon mortgagor's default, the plaintiff need not prove necessity for that appointment (*Naar v I.J. Litwak & Co., Inc.*, 260 AD2d 613, 688 NYS2d 698 [2d Dept 1999]). Plaintiff in its instant motion (seq. no.:001) has attached proof of tax arrears on the subject property and an October 12<sup>th</sup>, 2017 letter to Plaintiff from the Suffolk County Department of Finance & Taxation threatening the process of the County of Suffolk taking a tax deed. It is apparent that Defendant is not paying the taxes and the subject premises, encumbered by Plaintiff's note and mortgage, are in danger of being lost due to tax arrears.

Defendant has ratified the subject mortgage. Plaintiff has demonstrated financial malfeasance on the part of Defendant which imperils the subject premises. The underlying mortgage provides for Plaintiff/mortgagee moving for a Receiver in the event mortgagee sues in foreclosure. Plaintiff has filed its foreclosure action. The relief requested by Plaintiff in its motion is granted in its entirety for the aforesated reasons.

Submit Order appointing a receiver.

**DATED: FEBRUARY 25<sup>th</sup>, 2019  
RIVERHEAD, NY**

  
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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*