

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

	x	
DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.,		Index Number <u>17175</u> 2005
Plaintiffs,		Motion Date <u>July 2</u> 2008
- against -		Motion Cal. Numbers <u>7&amp;8</u>
EUCHARIA IWUCHUKWU, et al.,		Motion Seq. No. <u>3</u>
Defendants.		
	x	

The following papers numbered 1 to 23 read on this motion by defendants Nationwide Associates, Inc. (Nationwide) and Targee Street Internal Medicine Group, P.C. (Targee), pursuant to CPLR 3212, for summary judgment in their favor and against plaintiff on their counterclaim, and dismissing the complaint; and this cross motion by plaintiff Deutsche Bank National Trust Company (Deutsche) for summary judgment striking the answer of defendant Walter Morris, and the combined answer of defendants Nationwide and Targee; for summary judgment declaring that the Nationwide mortgage is subject and subordinate to plaintiff Deutsche's mortgage; for leave to appoint a referee to compute the amount due and owing plaintiff Deutsche and to examine and report the manner in which the mortgaged premises should be sold; for leave to amend the caption deleting the names "John Doe #2" through "John Doe #12" without prejudice; and on this motion by plaintiff Deutsche for summary judgment striking the answer of defendant Walter Morris, for leave to appoint a referee to compute the amount due and owing plaintiff Deutsche and to examine and report the manner in which the mortgaged premises should be sold, and for leave to amend the caption deleting the names "John Doe #2" through "John Doe #12" without prejudice.

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Upon the foregoing papers it is ordered that the motions numbered 7 and 8 on the motion calendar for July 2, 2008 are determined together herein, along with the cross motion as follows:

Plaintiff Deutsche commenced this action seeking to foreclose a mortgage dated February 25, 2004, and recorded on May 9, 2005, which was executed, acknowledged and delivered by defendant Eucharia Iwuchukwu, as the purported owner of the real property known as 113-17 Delevan Street, Queens Village, New York. The mortgage secured a note in the principal amount of \$288,000.00, plus interest, evidencing a loan made by Long Beach Mortgage Company (Long Beach). Plaintiff Deutsche alleges it is the holder of the subject mortgage and underlying note pursuant to an assignment dated July 29, 2005 and recorded on September 30, 2005. Plaintiff Deutsche also alleges that at the time of the making of the subject mortgage loan, Long Beach also provided a second mortgage loan in the principal amount of \$72,000.00, plus interest, to defendant Iwuchukwu.

In addition to the cause of action for foreclosure, plaintiff asserts a claim pursuant to RPAPL Articles 15 and 19 and CPLR 3001, for a declaration that a mortgage dated December 26, 1989 (the Nationwide mortgage), appearing as a lien against the subject premises, is subject to plaintiff Deutsche's mortgage. Plaintiff Deutsche admits the Nationwide mortgage was recorded on February 20, 1990, prior to the recording of the subject mortgage, but alleges that the Nationwide mortgage debt was accelerated no later than on April 11, 1991, when the foreclosure action entitled Targee Street Internal Medicine Group, P.C. v Harley (Supreme Court, Queens County, Index No. 6818/1991) (the Targee action) was commenced. Plaintiff Deutsche was not named as a party in the Targee action, and has never been joined as a party defendant therein. Plaintiff Deutsche alleges that it is not bound by the Targee proceedings. Plaintiff Deutsche asserts that its mortgage interest came into being after the commencement of the Targee action, but at a time when the notice of pendency, which had been filed in connection with that action, had already expired by operation of law on April 11, 1994. It further asserts that the notice of pendency in the Targee action has never been refiled, extended or renewed. Plaintiff Deutsche further alleges that the Nationwide mortgage is now unenforceable as against it by virtue of the expiration of the applicable statute of limitations.

Defendants Targee and Nationwide joined issue herein by service of their answer with a counterclaim and cross claim against defendants Iwuchukwu and Long Beach pursuant to Article 15 of the RPAPL and CPLR 3001. They claim that Targee is the present holder of the Nationwide mortgage pursuant to an assignment, and that plaintiff Deutsche's mortgage is void, because defendant Iwuchukwu

never acquired any valid ownership interest in the subject premises. Defendants Targee and Nationwide allege that defendant Iwuchukwu's title to the property was defective. They assert that a certain deed dated July 23, 2003 (the Emeka deed), appearing in the chain of Iwuchukwu's title, did not serve to convey any ownership interest in the property to Frank Emeka, the named grantee, and therefore, Emeka, in turn, was incapable of conveying any ownership interest in the subject premises to defendant Iwuchukwu by means of the deed dated February 25, 2004. Defendants Targee and Nationwide also allege that defendant Iwuchukwu, having no ownership interest in the property, could not have encumbered it with the subject mortgage and the second Long Beach mortgage (the \$72,000.00 mortgage). Defendants Targee and Nationwide also allege that the subject mortgage, which was recorded after the Nationwide mortgage, is subject, and subordinate, to the Nationwide mortgage. They claim that plaintiff Deutsche cannot seek to enforce the subject mortgage against them because Deutsche is not a bona fide encumbrancer.

Defendants Targee and Nationwide seek a judgment declaring that the subject mortgage, the Iwuchukwu deed, and the second Long Beach mortgage (the \$72,000.00 mortgage) are void, and that the Nationwide mortgage is a valid first mortgage lien against the subject premises, superior to the interests of plaintiff Deutsche, defendants Long Beach and Iwuchukwu, in the property. Plaintiff Deutsche served a reply. Defendant Walter Morris served an answer denying that defendant Iwuchukwu is, or was, an owner of the premises.<sup>1</sup> Defendant Long Beach, as assignee of GMAC Mortgage, LLC, d/b/a Ditech.com, filed a notice of appearance and waiver. (The second Long Beach mortgage [the \$72,000.00 mortgage] had been assigned to GMAC MORTGAGE, LLC d/b/a Ditech.com pursuant to assignment dated April 5, 2007). Defendant Iwuchukwu served a notice of appearance.

Plaintiff has submitted an affirmation of regularity of its counsel, and an affidavit of Tracey Brown, a section manager of Washington Mutual Bank, the servicing agent for plaintiff in connection with the subject mortgage loan attesting to the default by the mortgagor.

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Defendant Morris intervened as a party defendant in the Targee action, wherein he has asserted his claim that he is the owner of a one-half interest in the subject property pursuant to an unrecorded deed from Henry Harley. The Targee action is still pending, and a hearing was held before a special referee on April 7, 8 and 11, 2008 on the issue of the claim of ownership of Morris. According to the court's files, the Special Referee has not yet issued a report.

In support of its motion for summary judgment dismissing the complaint, and in their favor on their counterclaim, defendants Targee and Nationwide assert that Targee holds the Nationwide mortgage, which has record priority over the subject mortgage. They further assert that the Emeka deed conveyed no ownership interest in the subject premises, and therefore, the purported ownership interest of defendant Iwuchukwu, derived through the chain of title proceeding from the Emeka deed, and the purported mortgage interests of plaintiff Deutsche and defendant Long Beach, derived through the same chain, are void.

Plaintiff Deutsche opposes the motion, and cross-moves, inter alia, to strike answers of defendants Morris, Targee and Nationwide, and for summary judgment in its favor. Plaintiff Deutsche separately moves for summary judgment against defendant Morris.<sup>2</sup>

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]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557, supra). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

That branch of the motion by defendant Nationwide for summary judgment dismissing the complaint asserted against it is granted. That branch of the cross motion by plaintiff Deutsche to strike the answer of defendant Nationwide is denied. Defendant Nationwide has established a prima facie case that it assigned its interest in the Nationwide mortgage by assignment dated February 1, 1990, and has no other right, title or interest in the subject premises.

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Plaintiff Deutsche admits that it makes the separate motion as against defendant Morris in an exercise of caution, i.e. defendant Morris did not move for relief in the first instance (see CPLR 2215; see e.g. Williams v Sahay, 12 AD3d 366 [2004]).

Defendants Deutsche and Morris have failed to raise a triable issue of fact.

Henry Harley and his son, Henry Harley, Jr. acquired title to the subject premises as tenants in common by a deed dated August 12, 1966, and recorded on August 19, 1966. It is also undisputed that the next deed which appears in the record for the subject premises is the Emeka deed. Plaintiff Deutsche relies upon the Emeka deed and the chain of title proceeding forth therefrom, to prove defendant Iwuchukwu had an ownership interest in the subject premises at the time of the making of the Deutsche mortgage. The Emeka deed names Henry Harley and Henry Harley, Jr. as the grantors, and Frank Emeka as the grantee. However, as noted on the face of the Emeka deed itself, Henry Harley had died intestate on May 6, 1994, nine years prior to the date of the Emeka deed.

Plaintiff Deutsche and defendants Targee and Morris each assert in their papers that Henry Harley, III, the grandson of Henry Harley and son of Henry Harley, Jr., executed the Emeka deed, and was the sole signatory, but dispute the effect thereof. It is unclear, however, the basis of their assertion, since the copies of the Emeka deed provided herein do not contain a fully legible signature. Although the City Register recording and endorsement cover page to the Emeka deed states that the "GRANTOR/SELLER" was "Henry Harley III," the actual signature on the deed is only legible in part. The legible portion of the signature on the Emeka deed reads "Henry Harley," but is followed by an illegible suffix. The court cannot discern whether the suffix is a "II," a "IID" or "IIID" or something else. The acknowledgment annexed to the Emeka deed, and signed by Edwin E. Drakes, a notary public, fails to resolve the issue as to the name or identity of the signatory on the Emeka deed, because the acknowledgment recites that two persons, i.e. "Henry Harley † Henry Harley, Jr," appeared before Drakes and acknowledged their "signature(s)." Clearly, Henry Harley (deceased) did not appear before Drakes. Nevertheless, it is not uncommon for persons, whose surnames include a suffix reflecting a kinship with their fathers and grandfathers, to use the suffix intermittently, or drop the use of the suffix altogether, upon the death of their own father.

Additionally, above the signature, appears the phrase, printed by hand, "Henry Harley by Henry Harley III, his attorney in fact," and the name "Henry Harley Jr," in typed form. The phrase "Henry Harley by Henry Harley III, his attorney in fact," and the typed name "Henry Harley Jr," add to the confusion, particularly since a power of attorney, purporting to authorize Henry Harley, III to act on behalf of Henry Harley, Jr., relative to the subject premises,

was allegedly executed by Henry Harley, Jr. on January 7, 2003, six months prior to the date of the execution of the Emeka deed.

Under such circumstances, summary judgment is unwarranted at this time. That branch of the motion by defendant Targee for summary judgment dismissing the complaint, and in its favor on its counterclaim, and that branch of the cross motion by Deutsche for summary judgment striking the answers of defendants Targee and Morris, and declaring the Nationwide mortgage is subordinate to plaintiff Deutsche's mortgage, are denied. That branch of the motion by plaintiff Deutsche for summary judgment striking the answer of defendant Morris is denied.

That branch of the cross motion by plaintiff Deutsche for leave to amend the caption deleting defendants "John Doe #2" through "John Doe #12" without prejudice is granted. In view of this ruling granting leave to delete defendants "John Doe #2" through "John Doe #12" from the caption, that branch of the separate motion by plaintiff Deutsche for leave to amend the caption deleting the names "John Doe #2" through "John Doe #12" is denied as moot.

That branch of the cross motion by plaintiff Deutsche for leave to appoint a referee, and that branch of the motion by plaintiff Deutsche for leave to appoint a referee are likewise denied at this juncture.

Dated: October 15, 2008

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J.S.C.