[* 1]

SHORT FORM ORDER

INDEX No. 07-33098

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-26-12
ADJ. DATE 9-6-12
Mot. Seq. # 007 - MotD

----------X

E*TRADE BANK
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

- against -

DONALD MACPHERSON, 982 NOYACK CO., INC., ATLANTIC BLUE POINT ASSOCIATES, CAPITAL ONE BANK, CLIFFORD GIBBONS, COLORADO CAPITAL INVESTMENTS SUCCESSOR BY MERGER TO IN INTEREST TO DISCOVER CARD, CONSOLIDATED ENERGY, INC., MAJEDA KAMAL, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FIRST MEDIAN MORTGAGE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE DEPARTMENT OF LABOR, PEOPLE OF THE STATE OF NEW YORK, SEARS ROEBUCK & CO., WORKERS COMPENSATION BOARD OF THE STATE OF NEW YORK and JOEL I. SHER, CHAPTER 11 TRUSTEE FOR TMST HOME LOANS, INC., f/k/a THORNBURG MORTGAGE HOME LOANS, INC.,

Defendants.

----------X

KEVIN J. VERNICK PLLC
Attorney for Plaintiff
708 Third Avenue, 5th Floor
New York, New York 10017

Donald Macpherson, Pro Se
80 Varick Street, #10A
New York, New York 10013

BALFE & HOLLAND, P.C.
Attorney for Defendant Sher
135 Pinelawn Road, Suite 125 North
Melville, New York 11747

Upon the following papers numbered 1 to 8 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 6 - 8 ; Replying Affidavits and supporting papers ____; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for summary judgment is granted to the extent that the affirmative defenses and counterclaim in the answer of intervening defendant Joel I. Sher, Chapter 11

Trustee for TMST Home Loans, Inc., f/k/a Thornburg Mortgage Home Loans, Inc., are stricken, and the intervening defendant's answer is dismissed; it is further

ORDERED that the branches of the motion seeking a default judgment against the non-answering, non-appearing defendants and for the appointment of a referee are denied as moot as same was previously granted by Order dated September 26, 2011 and entered on October 13, 2011; and it is further

ORDERED, ADJUDGED AND DECLARED, that the plaintiff's mortgage lien on the premises recorded in the Suffolk County Clerk's office on May 23, 2006, has priority over and is senior to the intervening defendant's, Joel I. Sher, Chapter 11 Trustee for TMST Home Loans, Inc., f/k/a Thornburg Mortgage Home Loans, Inc., mortgage lien on the premises which was recorded in the Suffolk County Clerk's office on March 28, 2008.

Plaintiff E*Trade Bank commenced the instant foreclosure action on October 22, 2007, and on the same day filed a Notice of Pendency. In its complaint the plaintiff alleged that on April 28, 2006, defendant Donald MacPherson ("MacPherson") executed a note and mortgage to its predecessor in interest MERS as nominee for Amnet Mortgage, encumbering the property known as 982 Noyack Path in Bridgehampton, New York (the "Property"). The mortgage was recorded in the Suffolk County Clerk's Office on May 23, 2006 and thereafter assigned to plaintiff; the assignment was recorded on November 14, 2007. The plaintiff alleged that despite due demand therefor, MacPherson had failed to make all payments due from July 1, 2007, and thus was in default under the terms of the note and mortgage.

MacPherson interposed an answer to plaintiff's complaint with affirmative defenses and counterclaims. Defendant Atlantic Blue Point Associates filed a Notice of Appearance dated November 15, 2007. Defendant New York State Workers Compensation Board filed a Notice of Appearance dated November 2, 2007, waiving all but certain notices.

By order dated May 26, 2010 and entered with the Suffolk County Clerk on June 21, 2010, the plaintiff's motion for summary judgment on its complaint was granted in its favor, MacPherson's answer was stricken, the action was discontinued against the "John Doe" defendant and the caption amended to reflect same, the default was fixed as to the non-appearing, non-answering defendants, and a referee was appointed to compute the amount due under the note and mortgage and to report thereon to this Court. By Order and Judgment of the undersigned, dated September 26, 2011 and entered on October 13, 2011 (the "Judgment"), the referee's report dated April 20, 2011 was ratified and confirmed and a Judgment of Foreclosure and Sale of the subject Property was granted. A Notice of Appeal dated December 12, 2011 was filed by MacPherson with this Court, but there is no indication that it was perfected with the appellate court. The Property has not yet been sold, and no motion has been made to vacate the Judgment.

By Order to Show Cause signed on October 14, 2011 [Martin, J.], Joel I. Sher, Chapter 11 Trustee for TMST Home Loans, Inc., f/k/a Thornburg Mortgage Home Loans, Inc. (the "Trustee" or "Thornburg Mortgage"), sought leave to intervene in this action as an interested party, and to file an answer with counterclaims. In support of the motion to intervene, the Trustee alleged that Thornburg Mortgage is the holder of a mortgage on the Property pursuant to an assignment from Luxury Mortgage Corporation ("Luxury"). The Luxury mortgage securing a $2,000,000 loan to non-party Visilios Gregoriadis for the

purported purchase of the Property from MacPherson was recorded on March 28, 2008. The Trustee also alleged in support of the motion to intervene that the title report did not reveal the plaintiff's mortgage on the Property. Subsequent to taking the assignment from Luxury, the Trustee alleges, Thornburg Mortgage discovered that the Gregoriadis transaction was fraudulent, that the plaintiff's mortgage had been fraudulently hidden at the closing of title, and that the transaction may have been part of a larger scheme of fraudulent real estate transactions involving Gregoriadis, McPherson, the bank attorney and the title closer.[1] On January 23, 2012, the Trustee's motion to intervene as a defendant was granted, and he was given an opportunity to submit an answer to the plaintiff's complaint.

The answer submitted by the Trustee on behalf of Thornburg Mortgage, contains general denials as to knowledge or information with regard to the note and mortgage held by the plaintiff, and affirmative defenses and a counterclaim. The first affirmative defense seeks dismissal of the action for failure to name a necessary party, i.e., Thornburg Mortgage. In the second affirmative defense and related fourth affirmative defense, it is alleged that Thornburg Mortgage holds a mortgage lien on the Property which is superior to that of the plaintiff's and seeks a declaration that such mortgage is superior, and that any sale or transfer thereof remains subject to its valid superior mortgage lien. Alternatively, Thornburg Mortgage seeks an equitable mortgage on the Property (third affirmative defense).

A counterclaim has also been asserted in the answer on behalf of Thornburg Mortgage and against the plaintiff for unjust enrichment alleging that from December 2008 through May 2011, Thornburg Mortgage paid $30,241.97 in property taxes to the Town of Southampton which, upon information and belief, was refunded. However, Thornburg Mortgage alleges that it never received the property tax refunds and believes that the plaintiff received the benefit of the monies. The Trustee on behalf of Thornburg Mortgage seeks, a money judgment against the plaintiff for $30,241.97.

Plaintiff now moves for summary judgment striking the affirmative defenses and dismissing the answer and counterclaim of Thornburg Mortgage, directing that the answer be treated as a limited notice of appearance, and a declaration that plaintiff's mortgage is superior to that held by Thornburg Mortgage. The Trustee has submitted opposition to the motion.

First, as to the priority of the mortgage liens (second and fourth affirmative defenses), in support of its motion for summary judgment, the plaintiff points out that its mortgage dated April 28, 2006 was recorded on May 23, 2006, prior to the time MacPherson executed the mortgage dated January 31, 2008 held by Thornburg Mortgage. Thus, the plaintiff asserts, its mortgage clearly has priority over and is superior to that held by Thornburg Mortgage. In opposition, the Trustee states that the plaintiff did not extend the notice of pendency that expired on October 22, 2010 pursuant to CPLR 6513, choosing instead to file a subsequent notice of pendency on September 30, 2010. According to the Trustee, the mortgage held by Thornburg Mortgage was recorded on March 28, 2008, prior to the time the second notice of pendency was

---

[1]On November16, 2011, MacPherson pled guilty to the majority of a 45 count indictment for a mortgage fraud scheme and was sentenced to four to twelve years in prison. Several of the counts in the indictment related directly to the subject Property and the mortgages held by the plaintiff and by Thornburg Mortgage.

filed. Thus, the Trusteee maintains, Thornburg Mortgage, as the holder of an intervening lien, is not subject to the outcome of the instant foreclosure action as it holds a superior mortgage.

It has been a longstanding rule that successive notices of pendency or a new notice may be filed in a mortgage foreclosure action for purposes of prosecuting the action to final judgment despite the cancellation, expiration or vacatur of a previous notice (***Horowitz v Griggs***, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]; *see also* ***Campbell v Smith***, 309 AD2d 581, 768 NYS2d 182 [1st Dept 2003]). Although CPLR article 65 precludes the refiling of a notice of pendency, in a mortgage foreclosure action brought pursuant to RPAPL article 13, a notice of pendency must be filed at least 20 days before the entry of final judgment, and thus is a statutory prerequisite essential to the cause of action (*see* ***Horowitz v Griggs***, *supra;* ***Campbell v Smith***, *supra;* ***Slutsky v Blooming Grove Inn, Inc.***, *supra*). "Moreover, because 'the recorded mortgage itself gives notice of an encumbrance on the property...concerns regarding the notice of pendency restricting the alienability of property are eliminated'" (***Horowitz v Griggs***, *supra* at 406, quoting ***Campbell v Smith***, *supra* at 582). Thus, the plaintiff's mortgage retains its position as a superior lien. Therefore, the Trustee's argument is unavailing, and the second and fourth affirmative defenses are stricken.

The first affirmative defense of failure to name a necessary party must also be stricken. RPAPL 1311 requires a plaintiff in a mortgage foreclosure action to join, as a party defendant, any person "whose interest is claimed to be the subject and subordinate to the plaintiff's lien." Under this statute, a necessary party includes all junior lienholders (RPAPL 1311[1]). The action herein was commenced on October 22, 2007, prior to the existence of the mortgage held by Thornburg Mortgage. Indeed, the Trustee concedes that while the instant mortgage foreclosure action was pending, MacPherson obtained the loan from Luxury Mortgage. Thus, any search conducted by the plaintiff could not have revealed Thornburg Mortgage as a lienholder. In any event, as stated above, Thornburg Mortgage is a subordinate lienholder; failure to join it as a necessary party does not mandate dismissal of the action (*see* ***Glass v Estate of Gold***, 48 AD3d 745, 853 NYS2d 159 [2d Dept 2008]). Therefore, the first affirmative defense cannot be sustained and is stricken.

Furthermore, as the mortgage held by Thornburg Mortgage does not "fail[] for the want of some solemnity" (***Payne v Wilson***, 74 NY 348, 351 [1878], and is junior to that of the plaintiff's, it is not entitled to the imposition of an equitable mortgage on the Property (*see* ***Mailloux v Spuck***, 87AD2d 736, 737, 449 NYS2d 69 [3d Dept 1982], *lv denied* 56 NY2d 507, 453 NYS2d 1025 [1982] ["An equitable mortgage...is a transaction which has the intent but not the form of a mortgage, and which a court will enforce in equity to the same extent as a mortgage (citation omitted)"]). Thus, the third affirmative defense for the imposition of an equitable mortgage is also stricken.

As to the counterclaim for unjust enrichment, to prevail the party asserting such a claim must demonstrate that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (***Zamor v L&L Assocs. Holding Corp.***, 85 AD3d 1154, 1156, 926 NYS2d 625 [2d Dept 2011]). A party may be unjustly enriched and a benefit conferred where its debit is satisfied or where it has been spared an expenditure or loss at the expense of another (*see* ***Carriafielio-Diehl & Assocs., Inc. v D & M Elec. Contr., Inc.***, 12 AD3d 478, 784 NYS2d 617 [2d Dept 2004]; ***Blue Cross of Cent. New York v Wheeler***, 93 AD2d 995, 461 NYS2d 624 [4th Dept 1983]). The burden is on the party asserting the claim to demonstrate that services were

performed for the other party resulting in the latter's unjust enrichment (*see* ***Kagan v K-Tel Entertainment***, 172 AD2d 375, 568 NYS2d 756 [1st Dept 1991]). "[T]he mere fact that the [party]'s activities bestowed a benefit on the [other party] is insufficient to establish a cause of action for unjust enrichment" (***Clark v Daby***, 300 AD2d 732, 732, 751 NYS2d 622 [3d Dept 2002]). "Generally, courts will look to see if a benefit has been conferred on the [other party] under a mistake of fact or law, if the benefit still remains with the [other party], if there has been otherwise a change of position by the [other party], and whether the [other party]'s conduct was tortious or fraudulent" (***Zamor v L&L Assocs. Holding Corp.***, *supra* at 1156-1157; ***Clark v Daby***, *supra* at 732).

In the case at bar, other than conclusorily stating that Thornburg Mortgage paid the real property taxes on the Property from 2008/2009, no evidence has been submitted by the Trustee in support thereof. The computer printouts purportedly from the Town of Southampton do not bear the requisite certification or authentication and thus are not admissible (*see* CPLR 4418[c]). Even if they were admissible, the computer printouts do not establish that property tax payments were made by Thornburg Mortgage. Moreover, it is clear that if Thornburg Mortgage paid the real property taxes, its motivation in doing so was to protect its own interest in the Property, and not because of any mistake or fraudulent conduct on behalf of the plaintiff. Under such circumstances, "any benefit to [plaintiff] was purely incidental, thereby defeating [Thornburg Mortgage's] claim of unjust enrichment" (***Clark v Daby***, *supra* at 732).

It is also noted, the Trustee's argument that the Property was used by MacPherson to defraud numerous lenders is insufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment. Pursuant to Real Property Law § 266, a mortgagee's, as well as its assignee's, interest in property is protected unless it has notice of a previous fraud affecting the title of its grantor (***Thomas v LaSalle Bank Natl. Assn.***, 79 AD3d 1015, 913 NYS2d 742 [2d Dept 2010]; ***LaSalle Bank Natl. Assn. v Ally***, 39 AD3d 597, 835 NYS2d 264 [2d Dept 2007]). Here, no evidence has been presented to raise an issue of fact that the plaintiff had such notice (*see* ***Emerson Hills Realty, Inc. v Mirabella***, 220 AD2d 717, 633 NYS2d 196 [2d Dept 1995]).

Accordingly, the plaintiff's motion for summary judgment is granted in its entirety, and the intervening defendant's answer is dismissed.

Dated: February 26, 2013

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**