2008 NY Slip Op 52132(U)
FREMONT INVESTMENT & LOAN, Plaintiff,
v.
GUY SESSIONS, CRYSTAL NURSE, JACINTA NURSE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, MIDLAND CREDIT MANAGEMENT INC., ET. AL., Defendants.
31105/07
Supreme Court of the State of New York, Kings County.
Decided October 28, 2008.

Helmut Borchert, Esq., Borchert Genovesi LaSpina & Landicino PC, Whitestone NY, Plaintiff.

Regina A. Matejka, Esq., Simonetti & Associates, Jericho NY, Defendants — The Nurses.

ARTHUR M. SCHACK, J.

Plaintiff FREMONT INVESTMENT & LOAN (FREMONT), in this foreclosure actionfor the premises located at 129 East 35th Street, Brooklyn New York (Block 4872, Lot 61, County of Kings), moves for: dismissal of the first and second affirmative defenses in the verified answer of defendants CRYSTAL NURSE (CRYSTAL) and JACINTA NURSE (JACINTA), pursuant to the CPLR Rule 3211 (b) and CPLR Rule 3212; partial summary judgment on plaintiff's third cause of action, for a declaratory judgment that plaintiff has an equitable lien on the premises and is equitably subrogated to the position of the prior lien held by CHASE MANHATTAN MORTGAGE CORPORATION [CHASE], pursuant to CPLR Rule 3212; and, a default judgment against defendants GUY SESSIONS (SESSIONS), NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC., for failing to interpose an answer. Defendants CRYSTAL and JACINTA cross-move to: consolidate the instant action with a prior pending action in Supreme Court, Kings County, *Crystal Nurse and Jacinta Nurse v Jovanka Princivil, Roger Khaliq, Guy Sessions and Fremont Investment & Loan, et. al.,* Index Number 7931/04; and, to dismiss the third, fifth and sixth causes of action in plaintiff FREMONT's complaint against CRYSTAL and JACINTA.

The Court, for the reasons following, grants plaintiff FREMONT the relief it seeks and denies the Nurse defendants' cross-motion.

Background

It is uncontroverted that CRYSTAL and JACINTA, who are daughter and mother, purchased the subject premises, by deed, dated September 10, 1999, which was recorded on January 26, 2000, at Reel 4736, Page 703, in the Office of the New York City Register, Kings County [exhibit D of motion]. At the September 10, 1999 closing, the Nurse defendants executed a mortgage and borrowed $153,600.00 from FIRST FUNDING MORTGAGE BANKERS CORPORATION [FIRST FUNDING], which was also recorded on January 26, 2000, at Reel

4736, Page 706, in the Office of the New York City Register, Kings County [exhibit E of motion]. Then, on the same day as the closing, September 10, 1999, FIRST FUNDING assigned the Nurse mortgage to FIRSTAR BANK, N.A., which also was recorded on January 26, 2000, at Reel 4736, Page 713, in the Office of the New York City Register, Kings County [exhibit F of motion]. FIRSTAR BANK, N.A., on May 2, 2000, assigned the Nurse mortgage to CHASE MANHATTAN MORTGAGE CORPORATION [CHASE], which was recorded on August 7, 2000, at Reel 4935, Page 1142 in the Office of the New York City Register, Kings County [exhibit G of motion].

CRYSTAL and JACINTA fell behind in their mortgage payments. CHASE sent JACINTA an acceleration warning, dated August 14, 2003 [exhibit I of motion], stating that as of that date "[y]ou are in default under the terms of the Note . . . and the Mortgage securing the note and encumbering the real property located at 129 E. 35TH STREET, BROOKLYN NY" and that "[a]s of the date hereof, principal, interest, escrow, late charges, and fees of $6,616.11 are due on the loan." Almost three months earlier, on May 16, 2003, JACINTA signed a contract to sell the premises to SESSIONS [exhibit H of motion] for $260,000.00. This was later reduced to $245,000.00, in an amendment to the contract of sale, on July 14, 2003 [exhibit H of motion].

CRYSTAL and JACINTA attended a closing on August 22, 2003 and conveyed the premises to SESSIONS, pursuant to an unrecorded deed. Plaintiff submitted a partial copy of the deed [exhibit J of motion], claiming, in ¶ 12 of its affirmation in support of the motion, that "[t]he original deed has been lost and cannot be located." SESSIONS, at the closing, executed a note by which he borrowed $220,000.00 from plaintiff FREMONT, with variable interest at the initial rate of 7.8% per annum [exhibit K of motion]. SESSIONS, to secure the note, executed a mortgage to plaintiff FREMONT for the premises, which was recorded in the Office of the City Register, Kings County, at City Register File Number (CRFN) 2005000064270, on February 1, 2005 [exhibit L of motion].

The HUD-1 Settlement Statement [exhibit Q of motion] for the August 22, 2003 closing shows that it took place at the office of plaintiff's settlement agent, Stephen J. Caputo, P.C., 744 Nesconset Highway, Smithtown, New York. The "certification" at the bottom of the second page states that the signatories have reviewed the document "and to the best of my knowledge and belief, it is a true and accurate statement of receipts and disbursements made on my account . . . I further certify that I have received a copy of the HUD-1 Settlement Statement." It was signed by SESSIONS as "buyer" and CRYSTAL and JACINTA as "sellers." Further, the HUD-1 Settlement Statement, in § 504, states "Payoff of first mortgage loan CHASE $157,782.28." Mr. Caputo issued Check No. 30503, from his "closing account," dated "8/22/03," for $157,782.28 to CHASE [exhibit M of motion], with the CHASE mortgage loan number written on the front of the check. This check cleared on August 27, 2003. Subsequently, a CHASE Vice President, on September 24, 2003, executed a satisfaction of the Nurse mortgage, and it was recorded in the Office of the City Register, Kings County, at CRFN 200300049516, on December 18, 2003 [exhibit P of motion].

CRYSTAL and JACINTA, in their cross-motion, allege that they were defrauded into believing that they were refinancing their home and not selling it. They blame various mortgage brokers for scamming them, including Jovanka Princivil, Aubrey Dancy, and Roger Khaliq.

JACINTA, in ¶ 4 of her affidavit in support of the cross-motion, claims that these brokers operated under various corporate names, including "Action Funding," "USA Equities and Investment Corp." and "J.P. Solutions." She alleges, in ¶ 6, that her home was never listed with a broker and never shown to anyone. Further, "I do not know who Guy Sessions was either prior to or during the closing. I had never met him nor been told of him. In fact, during the closing, he was never introduced to me and I had no idea who he was until well after the fact." In ¶ 8, she claims that she and CRYSTAL did not have an attorney to represent them at the closing and "the mortgage brokers told us we did have to be [represented by an attorney]."

JACINTA admits, in ¶ 3, that in early 2003 "I was having financial difficulties." She decided to refinance her house and filled out a loan application [exhibit A of cross-motion], which was signed on January 31, 2003. According to the preprinted loan application form, the application was with "Jericho Mortgage Associates, Inc." of Syosset, New York. It was not for "Action Funding," "USA Equities and Investment Corp." or "J.P. Solutions." Further, it was executed three and one-half months prior to the May 16, 2003-contract of sale with SESSIONS. The August 22, 2003 HUD-1 Settlement Statement shows payments to "Action Funding" of: $60.00 for a credit report; $30.00 for a courier fee; and, $3,900.00 for a broker's fee. At the closing, Mr. Caputo issued Check # 30504, from his "closing account," dated "8/22/03," for $41,260.01 to "USA Equities" [exhibit M of motion]. It cleared on August 25, 2003. There were no payments out of the closing proceeds to "Jericho Mortgage Associates, Inc."

After the closing, plaintiff FREMONT sent monthly loan statements addressed to SESSIONS at the premises [exhibit R of motion and exhibit D of cross-motion — September 11, 2003-loan statement]. JACINTA admits, in ¶ 10 of her affidavit in support of the cross-motion, that she initially made monthly loan payments to FREMONT, even though the statements were addressed to SESSIONS. She claims to have called FREMONT about SESSIONS' name on the statements, and was informed by a customer service representative that since her social security number did not match the SESSIONS mortgage they wouldn't discuss it with her. She then "demanded my money back. To my great chagrin, I was told that this was not possible."

Then, CRYSTAL and JACINTA, in February 2004, commenced an action in Supreme Court, Kings County, *Crystal Nurse and Jacinta Nurse v Jovanka Princivil, Roger Khaliq, Guy Sessions and Fremont Investment & Loan, et. al.,* Index Number 7931/04 [exhibit S of motion — summons and complaint], alleging, *inter alia,* a fraudulent conveyance and unjust enrichment, and sought several million dollars in damages.

It is undisputed that Roger Khaliq died on September 2, 2004, and the action was stayed in the Default Judgment Motion Part on November 19, 2004. Mr. Khaliq's death certificate [exhibit E of cross-motion] states that he was a mortgage broker and his firm was USA Equities of Melville, New York. As noted above, Mr. Caputo, at the closing, issued a check for $41,260.01 to "USA Equities" [exhibit M of motion], Mr. Khaliq's firm. CRYSTAL and JACINTA claim that they unsuccessfully attempted to become Administrators of Khaliq's Estate in Surrogate's Court, Suffolk County. JACINTA states, in ¶ 14 of her affidavit in support of the cross-motion, that "the Surrogates Court returned the documentation to us because we simply did not have sufficient information about the decedent to properly proceed."

Essentially, CRYSTAL and JACINTA allege that the late Mr. Khaliq committed fraud upon them in a "mortgage rescue" scheme. JACINTA, in ¶ 14 of her affidavit in support of the cross-motion, claims "it is simply unfair and inequitable to permit Fremont. . . to foist its loss upon my daughter and me while the perpetrators of the fraud . . . [are] left unscathed." She then claims, in ¶ 20, that "this Court should consolidate the prior pending action with the present action commenced by Fremont and effectuate a global resolution of all the issues here involved."

FREMONT alleges that the Nurses used SESSIONS as a straw man to obtain a new mortgage from FREMONT. Further, FREMONT's counsel, in ¶ 24 of his affirmation in support of the motion, argues that the delay in substituting a representative for Mr. Khaliq's estate in the earlier action "is so that the Nurses could enjoy the delays and obstructions that they received by reason of that action without actually having to defend their position on the merits and so they could continue to live for free in the home that Fremont's money saved for them." Then, plaintiff's counsel points out, in ¶ 25 of his affirmation in support of the motion, that the Nurses in alleging that they were refinancing "admit that Fremont's mortgage is a legitimate mortgage against whomever the real owner of the Premises may be," and, in ¶ 26, that the Nurses never allege that their signatures were forged at the closing "or that the amount of terms of the Fremont mortgage were incorrect. Rather, the Nurses only complain that they were supposed to remain the owners and seek money damages even though Fremont's loan money paid their debts."

Even if the Nurses were fraud victims, it is clear that $157,782.28 of the FREMONT loan proceeds paid off the prior CHASE loan. The Nurses have not made any payments to FREMONT since May 2004, and the FREMONT loan then went into default, according to ¶ 28 of the instant complaint, on June 1, 2004. Plaintiff claims, in ¶ 30 of the instant complaint, that as of August 2, 2007, the Nurses owed to FREMONT principal of $219,288.08, plus interest from May 1, 2004, accumulated late charges, and escrow payments.

The Court does not comprehend why the Nurses believe that they do not owe loan payments to FREMONT. Prior to the August 22, 2003 closing the Nurses had to make payments to CHASE. It is undisputed that the CHASE loan was paid off out of the FREMONT loan proceeds. Therefore, CRYSTAL and JACINTA, the owners of the premises, owe loan payments to FREMONT, which equitably replaced CHASE as the mortgagee for the premises.

Dismissal of Nurses' first affirmative defense

The Nurse defendants, in their verified answer [exhibit C of motion] claim four affirmative defenses. Plaintiff moves to dismiss the first two affirmative defenses for lack of any basis in law.

The first affirmative defense is nothing more than an unspecified laundry list of recognized affirmative defenses, stating that "[u]pon information and belief, this action is barred by arbitration and award, collateral estoppel, culpable conduct of plaintiff, statute of fraud, statute of limitations, release, res judicata, accord and satisfaction, failure to name a necessary party." In determining if this Court should dismiss the Nurse defendants' first affirmative defense, the Court is mindful of CPLR §§ 3013 and 3018 (b). CPLR § 3013 states with respect to pleadings that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice

of the transactions, occurrences of series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense." CPLR § 3018 (b) states, with respect to affirmative defenses, that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or raise issues of fact not appearing on the face of a prior pleading." While the days of courts strictly construing pleadings ended with the CPLR's liberalization of pleading requirements, the above cited minimum requirements still apply today, so that parties and courts will have notice of each defense. In *Foley v D'Agostino* (21 AD2d 60 [1st Dept 1964]), the Court analyzed the then new CPLR liberalized pleading requirements, holding, at 63, that "it is clear that, under CPLR, the statements in pleadings are still required be factual, that is, the essential facts required to give notice must be stated," and "a party may supplement or round out his pleading by conclusory allegations . . . if the facts upon which the pleader relies are also stated." The first affirmative defense of the Nurse defendants fails to present more than mere conclusory statements and bald allegations. There is no recitation of any facts, as required by CPLR §§ 3013 and 3018 (b). "Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken." (*Petracca v Petracca,* 305 AD2d 566, 567 [2d Dept 2003]). (*See* CPLR § 3018 (b); *Bruno v Santella,* 52 AD2d 556, 557 [2d Dept 2008]; *Cohen Fashion Optical, Inc. v V & M Optical, Inc.,* 51 AD3d 619 [2d Dept 2008]; *Plemmenou v Arvanitakis,* 39 AD3d 612, 613 [2d Dept 2007]; *Bentivegna v Meenan Oil Co., Inc.,* 126 AD2d 506, 508 [2d Dept 1987]; *Glenesk v Guidance Realty Corp.,* 36 AD2d 852, 853 [2d Dept 1971]). Therefore, the first affirmative defense of defendants CRYSTAL and JACINTA is dismissed.

Dismissal of Nurses' second affirmative defense and denial of consolidation

The second Nurse affirmative defense [exhibit C of motion] states that "[u]pon information and belief this action should be consolidated with the prior pending action entitled Crystal Nurse and Jacinta Nurse v Jovanka Princivil, Roger Khaliq, Neal Greenberg, and Fremont Investment & Loan, Index Number 6931/2004, Supreme Court of the State of New York, County of Kings." This is inaccurate. "Neal Greenberg" is not a defendant in that case's caption. However, SESSIONS is a defendant. Further, consolidation of the instant case with another case is not an affirmative defense. Consolidation of actions is not enumerated in the CPLR § 3018 (b) list of affirmative defenses.

Consolidation, pursuant to CPLR § 602 (a), is appropriate when two actions "arise from the same transaction, concern the same parties, and involve common questions of law and fact." (*Viafax Corp. v Citicorp Leasing, Inc.,* 54 AD3d 846 [2d Dept 2008]). (*See Mas-Edwards v Ultimate Services, Inc.,* 45 AD3d 540 [2d Dept 2007]). Further, "where common questions of fact or law exist, a motion to consolidate pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion." (*Gam Property Corp. v Sorrento Lactalis, Inc.* 41 AD3d 645, 646 [2d Dept 2007]). (*See Mas-Edwards v Ultimate Services, Inc., supra*; *Perini Corp. v WDF, Inc.,* 33 AD3d 605 [2d Dept 2006]). However, where parties would appear as both plaintiff and defendant, the action cannot be consolidated because it would lead to jury confusion. Instead, if appropriate in the interests of judicial economy, the actions are brought together for joint trial. (*Geneva Temps, Inc. v New World Communities, Inc.,* 24 AD3d 332 [1st Dept 2005]; *M & K Computer Corp. v MBS Industries, Inc.,* 271 AD2d 660 [2d Dept 2000]).

The Court, in the instant case, cannot order a joint trial, with FREMONT as plaintiff and CRYSTAL and JACINTA as defendants in the instant foreclosure action, and CRYSTAL and JACINTA as plaintiffs and FREMONT as a defendant in the fraudulent conveyance case. Common questions of law and fact do not exist because each of the two actions have separate questions of law and fact. In *Dollar Dry Dock Bank v Piping Rock Builders, Inc.* (181 AD2d 709, 710 [2d Dept 1992]), the Court held that:

an action to set aside a fraudulent conveyance is not "an action to recover any part of the mortgage debt" (RPAPL 1301 [1]). The two actions involve different questions of law and fact and, ultimately, different remedies (i.e., money damages in one and reconveyance of the property in the other). Furthermore, the purpose of RPAPL 1301 is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action.

(*See Citibank (Mid-Hudson), N.A. v Rohdie,* 82 Misc 2d 372 [Sup Ct, Ulster County 1975]).

Even if common questions of law and fact are present, a joint trial would be prejudicial to FREMONT. The Nurses, in their fraudulent conveyance action, have failed or refused for four years to make the substitution for the late Mr. Khaliq, to relieve the death stay. (CPLR § 1021). A joint trial order would delay both actions from being tried, and reward CRYSTAL and JACINTA for their delay, while the interest on the FREMONT loan, which is equitably subrogated to the position of the prior CHASE loan, as explained below, continues to run, and the equity in the premises diminishes each day.

Also, similar to the first affirmative defense, the second affirmative defense presents only conclusory statements, which incorrectly seek a consolidation of the instant foreclosure action with the Nurses' fraudulent conveyance action. The second affirmative defense fails to recite sufficient facts, as required by CPLR §§ 3012 and 3018 (b). (*See Petracca v Petracca, supra*; *Bruno v Santella, supra*; *Cohen Fashion Optical, Inc. v V & M Optical, Inc., supra*; *Plemmenou v Arvanitakis, supra*; *Bentivegna v Meenan Oil Co., Inc., supra*; *Glenesk v Guidance Realty Corp., supra*). Therefore, the second affirmative defense of defendants CRYSTAL and JACINTA is dismissed. The branch of the Nurses' cross-motion to consolidate their action against Roger Khaliq, FREMONT, *et. al.* for fraudulent conveyance and other causes of action, in Index # 7931/04, alleging common questions of law and fact, is denied.

Partial summary judgment for plaintiff's third cause of action

Plaintiff FREMONT moves for partial summary judgment on its third cause of action, for a declaratory judgment that: plaintiff FREMONT has an equitable lien encumbering the entire premises in an amount to be determined by the Court, but at least $157,782.28, with interest from August 22, 2003 and continuing; and, that plaintiff FREMONT is equitably subrogated to the position of the prior CHASE lien that was discharged as a result of the August 23, 2003-payoff by plaintiff FREMONT, in an amount to be determined by the Court, but at least $157,782.28, with interest from August 22, 2003 and continuing.

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 eliminate any material issues of fact from the case. (*See Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.,* 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty,* 43 AD2d 968, 969 [2nd Dept 1974]; *Winegrad v New York University Medical Center,* 64 NY2d 851 [1985]).

CPLR 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (*Friends of Animals, Inc., v Associated Fur Mfrs.,* 46 NY2d 1065 [1979]).

Plaintiff makes a *prima facie* showing that the CHASE mortgage lien was paid out of the proceeds of the FREMONT mortgage loan at the August 22, 2003 closing. The HUD-1 Settlement Statement shows that a check was issued to CHASE for $157,782.28. The Court has been presented with a copy of this cancelled check from the closing account of FREMONT's settlement agent, Mr. Caputo. Subsequently, CHASE issued and recorded a satisfaction of their mortgage for the premises. Prior to the August 22, 2003 closing, CRYSTAL and JACINTA were obligated to make payments to CHASE. They were behind in their payments and CHASE threatened to foreclose in the August 14, 2003 acceleration warning letter. As a result of the August 22, 2003 closing, the FREMONT lien replaced the CHASE lien. "Where, as here, the funds of a mortgagee are used to discharge a prior lien upon the property of another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder." (*Great Eastern Bank v Chang,* 227 AD2d 589 [2d Dept 1996]). (*See Bank One v Mui,* 38 AD3d 809, 811 [2d Dept 2007]; *Zeidel v Dunne,* 215 AD2d 472 [2d Dept 1995]). The Nurses' June 1, 2004 and continuing default in making payments to FREMONT unjustly enriched CRYSTAL and JACINTA. The doctrine of equitable subrogation developed to prevent unjust enrichment by debtors at the expense of creditors. Its "governing principle has been stated as follows: Where 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.' (Restatement, Restitutions § 162)." (*King v Pelkofski,* 20 NY2d 326, 333 [1967]). (*See La Salle Bank Nat. Ass'n v Ally,* 39 AD3d 597, 600-601 [2d Dept 2007]; *Bank One v Mui, supra* at 812; *Bermuda Trust Co. Ltd. v Ameropan Oil Corp.,* 266 AD2d 251 [2d Dept 1999]; *R.C.P.S. Associates v Karam Developers, Inc.,* 238 AD2d 492 [2d Dept 1997]; *Zeidel v Dunne, supra*).

Additionally, the awarding of interest from the date the prior lien was paid off is appropriate in cases in which a Court finds the existence of an equitable lien and equitably subrogates a new

lienholder to the position of the prior lienholder. (*King v Pelkofski, supra* at 335; *Wagner v Maenza,* 223 AD2d 640 [2d Dept 1996]; *Whitestone Savings & Loan Association v Moring,* 286 AD 1042 [2d Dept 1955]).

"Rooted in equity, the purpose of the subrogation doctrine is to afford a person who pays a debt that is owed primarily by someone else every opportunity to be reimbursed in full." (*Chemical Bank v Meltzer,* 93 NY2d 296, 304 [1999]). Even if the Nurse defendants were fraudulently induced into conveying their premises, the valid new FREMONT lien took the place of the older valid CHASE lien. In a case of alleged forgery, "partial summary judgment was properly granted to plaintiff on the theory of equitable subrogation, based on its pay off of prior mortgages against appellant's property at the closing of the subject mortgage." (*Federal Nat. Mortg. Ass'n v Woodbury,* 254 AD2d 182 [2d Dept 1998]). In *Long Island City Sav. & Loan Ass'n v Skow* (25 AD2d 880 [2d Dept 1966], plaintiff lender took a forged mortgage from an imposter posing as defendant, and paid off defendant's old mortgage loan. The Court held, at 881, "[t]hough plaintiff accepted an impostor as Skow, it would be plainly unjust to confer a windfall upon Skow to deny subrogation to plaintiff. In short, Skow cannot convert the victimization of plaintiff into a magical gift for himself."

Counsel for the Nurse defendants, in opposing plaintiff's motion for partial summary judgment to declare that FREMONT has an equitable line on the premises and that the FREMONT lien is equitably subrogated to the position of the prior CHASE lien, argues that the Nurses were defrauded into believing that they were refinancing their house, not conveying the premises. This is the legal equivalent of comparing apples to oranges. Whether the Nurses refinanced their mortgage or sold the premises is irrelevant to the existence of an equitable lien and the doctrine of equitable subrogation because CRYSTAL and JACINTA still owe money to a creditor. It is uncontroverted that the Nurses have not made any mortgage payments to FREMONT for more than four years. Thus, CRYSTAL and JACINTA are presently the beneficiaries of their own unjust enrichment, at the expense of FREMONT. To paraphrase the Court in *Long Island City Sav. & Loan Ass'n v Skow,* at 881 "it would be plainly unjust to confer a windfall upon [the Nurse defendants] to deny subrogation to plaintiff. In short, [the Nurse defendants] cannot convert the victimization of plaintiff into a magical gift for [themselves]."

Therefore, the Court grants plaintiff FREMONT partial summary judgment on its third cause of action, declaring that: plaintiff FREMONT has an equitable lien encumbering the entire premises located at 129 East 35th Street, Brooklyn New York (Block 4872, Lot 61, County of Kings) in an amount to be determined by the Court, that is at least $157,782.28, with interest from August 22, 2003 and continuing; and, that plaintiff FREMONT is equitably subrogated to the position of the prior CHASE lien, that was discharged as a result of the payoff at the August 22, 2003 closing, in an amount to be determined by the Court, that is at least $157,782.28, with interest from August 22, 2003 and continuing.

Plaintiff granted default judgment against defaulting defendants

The other defendants in this action, SESSIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC., failed toanswer or appear. Plaintiff has submitted affidavits of

service [exhibit B of motion]. Therefore, plaintiff FREMONT is entitled to a default judgment, pursuant to CPLR § 3215. Pursuant to CPLR § 3215 (d), the entry of a judgment against the defaulting defendants is stayed until the conclusion of a trial against the Nurse defendants or a disposition of this matter with the Nurse defendants. At such time, an inquest shall be conducted.

Denial of dismissal of plaintiff's third, fifth and sixth causes of action

With respect to that branch of the Nurse defendants' cross-motion to dismiss plaintiff's third, fifth and sixth causes of action, the Court has granted plaintiff FREMONT summary judgment on its third cause of action, for the declaration of an equitable lien on the premises and that the FREMONT lien is equitable subrogated to the position of the CHASE lien. Thus, the Court denies dismissal of plaintiff's third cause of action.

The sixth cause of action was pled only against SESSIONS and not against the Nurse defendants. Therefore, that part of the cross-motion to dismiss FREMONT's sixth cause of action against CRYSTAL and JACINTA is denied as a nullity.

The fifth cause of action, pled against CRYSTAL, JACINTA and SESSIONS is for fraud. ¶ 69 of the complaint states that the Nurses and SESSIONS:

knowingly, willingly and intentionally represented to . . . to plaintiff that Crystal Nurse and Jacinta Nurse irrevocably conveyed the premises to Guy Sessions and that Guy Sessions was the sole owners of the Premises in fee simple. Said defendants made these representations to plaintiff to induce plaintiff to provide the aforesaid loan money and other funds and to avoid and discharge liens and potential foreclosure and other claims by creditors.

Further, in ¶ 71, plaintiff alleges that the "representations by said defendants were material representations" and, in ¶ 72, that the "representations by said defendants were knowingly, willingly and intentionally false" and that SESSIONS and the Nurses "did not intend for Guy Sessions to truly own or occupy the Premises but instead was being used to be a merely nominal owner of the Premises to borrow money from plaintiff." Further, plaintiff alleges, in ¶ 73, that the defendants made the representations "with the intention to deceive and harm plaintiff," and, in ¶ 75, that FREMONT "acted in reliance upon such representations and was thus deceived thereby to its detriment and damage." Plaintiff also alleges, in ¶'s 77-79, that it is a "financial institution," pursuant to 18 USC § 1344, and the wilful defrauding of it by CRYSTAL, JACINTA, and SESSIONS is a Federal crime. FREMONT claims damages, in ¶ 80, of the amount of the loan, $220,000.00, with interest, and, in ¶ 82, "to protect the public at large from future harm . . . an award of reasonable attorneys' fees, costs, disbursements and punitive damages against defendants . . . in an amount to be determined by this court which plaintiff requests to be at least $500,000.00.

The Court, in determining whether to dismiss plaintiffs' fifth cause of action for fraud must liberally construe the pleadings and accept the facts as alleged in the complaint as true, in determining if the alleged facts fit into any cognizable legal theory. (*Leon v Martinez,* 84 NY2d 83, 87 [1994]; *Morone v Morone,* 50 NY2d 481, 484 [1980]; *Guggenheimer v Ginzberg,* 43 NY2d 268, 275 [1977]; *Doria v Masucci,* 230 AD2d 764, 765 [2d Dept 1996]).

In examining plaintiff's fifth cause of action, it is clear that plaintiff has recited all of the elements of a fraud claim: misrepresentation of a material fact; falsity; scienter; reasonable reliance; and, damages. The Court of Appeals, in *Channel Master Corp. v Aluminum Limited Sales, Inc.* (4 NY2d 403, 406-407 [1958]), instructed:

To maintain an action based on fraudulent representations, whether it be for the rescission of a contract or, as here, in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged . . . The essential constituents of the action are fixed as representation of a material existing fact, falsity, scienter, deception and injury . . . Accordingly, one "who fraudulently makes a misrepresentation of * * * intention * * * for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction" is liable for the harm caused by the other's justifiable reliance upon the misrepresentation. (3 Restatement, Torts, § 525, p. 59.)

The Court of Appeals has continued to hold that to prove fraud, there must be:

a misrepresentation of fact by the defendant; known to be untrue or recklessly made; to deceive the plaintiff to rely upon it; and, causing injury to the plaintiff. (*See Small v Lorillard Tobacco Company, Inc.,* 94 NY2d 43, 57 [1998]; *Held v Kaufman,* 91 NY2d 425, 431 [1998]; *Barclay Arms, Inc. v Barclay Arms Associates,* 74 NY2d 644, 646-647 [1989]; *Jo Ann Homes at Bellmore, Inc. v Dworetz,* 25 NY2d 112119 [1969]).

The Appellate Division, Second Department, in *Giurdanella v Giurdanella* (226 AD2d 342, 343 [1996], held: to establish a prima facie case of fraud, the plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representation.

The Second Department continues to follow that standard. (*See Shovak v Long Island Commercial Bank,* 50 AD3d 1118 [2d Dept 2008]; *Sellinger Enterprises, Inc. v Cassuto,* 50 AD3d 766 [2d Dept 2008]; *Williams v Eason,* 49 AD3d 866 [2d Dept 2008]; *McMorrow v Dime Sav. Bank of Williamsburg,* 48 AD3d 646, [2d Dept 2008]; *Heaven v McGowan,* 40 AD3d 583 [2d Dept 2007]).

The Nurse defendants, in their motion papers, allege that a fraud was committed, but they deny their knowing participation in it. It is undisputed that CRYSTAL and JACINTA signed numerous documents, including the deed to SESSIONS, and the HUD-1 Settlement Statement as "sellers," which induced FREMONT to lend money to SESSIONS and induced FREMONT to pay off their debts. There is no doubt that CRYSTAL and JACINTA received the benefit of $157,782.28 of FREMONT's money to pay off the CHASE mortgage loan and avoid CHASE from foreclosing on them.

Moreover, the Nurse defendants are presumed to have understood the various documents they signed at the August 23, 2003 closing. "[A] signatory to the contract . . . is presumed to

know the contents of the instrument she signed and to have assented to such terms. (*Imero Fiorentino Assoc. v Green,* 85 AD2d 419 [1d Dept 1981)." (*British West Indies Guaranty Trust Co., Ltd. v Banque Internationale A Luxembourg,* 172 AD2d 234 [1d Dept 1991]). (*See Poplar Realty, LLC v Po,* 3 Misc 3d 22, 23 [App Term, 2d & 11th Jud Dists 2003]). "He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them." (*Metzger v Aetna Ins. Co.,* 227 NY 411, 416 [1920]). (*See Pimpinello v Swift & Co.,* 253 NY 159 [1930]).

The Nurse defendants have failed to demonstrate that FREMONT's fifth cause of action should be dismissed. FREMONT's allegations fit into a cognizable legal theory of fraud, and there are triable issues of fact as to whether or not CRYSTAL and JACINTA committed fraud. Therefore, the Court denies that branch of the Nurse defendants' cross-motion to dismiss plaintiff's fifth cause of action.

Conclusion

Accordingly, it is

ORDERED, that the branch of plaintiff FREMONT INVESTMENT & LOAN's motion for dismissal of the first and second affirmative defenses in the verified answer of defendants CRYSTAL NURSE and JACINTA NURSE, pursuant to CPLR Rule 3211 (b) and CPLR Rule 3212 is granted, and it is further

ORDERED, that the branch of plaintiff FREMONT INVESTMENT & LOAN's motion for partial summary judgment, pursuant to CPLR Rule 3212, on plaintiff FREMONT INVESTMENT & LOAN's third cause of action, for a declaration of an equitable lien and equitable subrogation, is granted, in that plaintiff FREMONT INVESTMENT & LOAN advanced money to defendants CRYSTAL NURSE and JACINTA NURSE, on August 22, 2003, to discharge a prior lien upon the premises, located at 129 East 35th Street, Brooklyn New York (Block 4872, Lot 61, County of Kings), and plaintiff FREMONT INVESTMENT & LOAN is declared to have an equitable lien encumbering the premises located at 129 East 35th Street, Brooklyn, New York (Block 4872, Lot 61, County of Kings) for at least $157,782.28, with interest from August 22, 2003 and continuing, and that plaintiff FREMONT INVESTMENT & LOAN's lien is declared to be equitably subrogated to the position of CHASE MANHATTAN MORTGAGE CORPORATION'S prior lien for the premises located at 129 East 35th Street, Brooklyn, New York (Block 4872, Lot 61, County of Kings) for at least $157,782.28, with interest from August 22, 2003 and continuing; and it is further

ORDERED, that the branch of plaintiff FREMONT INVESTMENT & LOAN's motion for a default judgment in its favor, pursuant to CPLR § 3215, against defendants GUY SESSIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC., for their failure to answer or appear is granted; and it is further

ORDERED, that entry of a default judgment against defendants GUY SESSIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC.,

is stayed until an inquest is conducted against defendants GUY SESSIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC., after the conclusion of a trial against defendants CRYSTAL NURSE and JACINTA NURSE, or a disposition of this matter with defendants CRYSTAL NURSE and JACINTA NURSE; and it is further

ORDERED, that plaintiff FREMONT INVESTMENT & LOAN, pursuant to

CPLR § 3215 (d) shall serve this order on defaulting defendants GUY SESSIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU and MIDLAND CREDIT MANAGEMENT INC. within thirty days of entry of this order; and it is further

ORDERED, that the cross-motion of defendants CRYSTAL NURSE and JACINTA NURSE to: consolidate the instant action with a prior pending action in Supreme Court, Kings County, *Crystal Nurse and Jacinta Nurse v Jovanka Princivil, Roger Khaliq, Guy Sessions and Fremont Investment & Loan, et. al.,* Index Number 7931/04; and, to dismiss plaintiff FREMONT INVESTMENT & LOAN's third, fifth and sixth causes of action in its complaint against defendants CRYSTAL NURSE and JACINTA NURSE, is denied.

This constitutes the Decision and Order of the Court.