

**SHORT FORM ORDER****SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

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MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. MIN NO. 1000254 4000130537 1,

Plaintiff,

- against -

CALVIN DARDEN A/K/A CALVIN DARDEN, JR.  
A/K/A CALVIN RAMARRO DARDEN, WELLS  
FARGO BANK, BOARD OF DIRECTORS OF  
LEGEND YACHT & BEACH CLUB HOMEOWNERS  
ASSOCIATION, INC., IRA JUDELSON, AIC LIMITED  
& WACHOVIA SECURITIES FINANCIAL NETWORK,  
LLC,

Defendants.

- against -

INTERCOUNTY HOME SALES, INC., PB 60 CORP.,  
and PEMBROKE ASSETS CORP.,

Intervening Defendants.

TRIAL/LAS PART 22  
NASSAU COUNTY

INDEX NO. 3688/05

MOTION SUBMISSION  
DATE: 8/29/07MOTION SEQUENCE  
NOS. 008, 009

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The following papers read on this motion:

|  |              |
|--|--------------|
| Notice of Motion and Affidavits.....       | <u>  X  </u> |
| Notice of Cross-Motion and Affidavits..... | <u>  X  </u> |
| Affirmations in Opposition.....            | <u>  X  </u> |
| Reply Affirmations.....                    | <u>  X  </u> |

The plaintiff moves for an order pursuant to CPLR §3211 and §3212(a) granting plaintiff summary judgment against the intervening defendants, InterCounty Home Sales, Inc., PB 60 Corp., and Pembroke Assets Corp., (hereinafter collectively referred to as "InterCounty"), (b) striking Inter County's affirmative defenses and counterclaim upon the grounds that there are no triable issues of fact and no merit of law to the defenses and counterclaim. The plaintiff submits a Memorandum of Law in Support of plaintiff's Motion for Summary Judgment. InterCounty cross-moves for an order pursuant to CPLR §3212 granting summary judgment against the plaintiff dismissing plaintiff's

Verified Complaint to foreclose a mortgage upon the grounds that no material questions of fact exist requiring a trial on the merits, and submits opposition to the plaintiff's motion. The plaintiff submits a Memorandum of Law in further support of plaintiff's motion, and in opposition to InterCounty's cross-motion.

### BACKGROUND

Sterling National Bank loaned Calvin Darden the sum of \$1,995,000.00, evidenced by a note and secured by a purchase money mortgage, (the "First Mortgage"), on real property located at 60 Pembroke Drive, Glen Cove, New York, on or about October 6, 2003. The First Mortgage was assigned to Mortgage Electronic Registration Systems, Inc., (hereinafter referred to as "MERS"), plaintiff herein. On or about October 6, 2003, Calvin Darden obtained a second loan from Sterling National Bank in the amount of \$285,000.00, secured by a "Credit Line Mortgage" on the subject property, (the "Second Mortgage"). The Second Mortgage was assigned to Wells Fargo Bank. Thereafter, both loans went into default and plaintiff, MERS, and Wells Fargo Bank commenced separate foreclosure actions.

In this action, as well as the separate Wells Fargo action pending in Supreme Court, County of Nassau, it was alleged that Calvin Darden, Jr. had signed the First Mortgage and the Second Mortgage pursuant to fraudulent powers-of-attorney from Calvin Darden, Sr. A Judgment of Foreclosure and Sale was entered in the Wells Fargo Bank action, (Wells Fargo Bank, N.A. v. Calvin Darden, Nassau County, Index Number 6207/05).

In this action, by way of this Court's Order dated February 8, 2006, the action as and against defendant, Calvin Darden, Sr., was dismissed. Thereafter, this Court granted plaintiff leave to file and serve an amended complaint naming Calvin Darden, Jr., as a defendant in this action, That by way of this Court's Order dated March 23, 2007, InterCounty Home Sales, Inc., PB 60 Corp., and Pembroke Assets Corp., (hereinafter referred to as "Intervening Defendants"), were granted permission to serve and file the proposed intervention pleading.

### DISCUSSION

It is well settled that a purchaser, at a foreclosure sale under a junior mortgage, subject to the lien of a prior mortgage, could not challenge the validity of the prior mortgage from an incumbrance which the grantee had expressly agreed it should be subject to. (*Cottle v. County of Erie*, 57 AD 443). A purchaser at a judicial sale who took his interest expressly "subject to" prior liens, was equitably estopped from later challenging the validity of those liens even if the liens were concededly invalid. (*Sands v. Church*, 6 NY 347). A purchaser at a foreclosure sale of second mortgage who agreed to take his interest "subject to" a prior mortgage was estopped from challenging the validity of the first mortgage, even where the first mortgage was arguably void. (*Welche v. Schoenberg*, 45 Misc 126).

Upon the applications herein, the Intervening Defendants do not deny that they received a copy of, and were present for the reading aloud of, the specific "Terms of Sale" under which the subject auction sale was conducted. The "Terms of Sale" expressly notified all bidders, including the Intervening Defendants, that the property being auctioned was encumbered by a "senior" mortgage, to wit, the First Mortgage, and that the Referee, at closing, would be delivering title to the

property "subject to" and subordinate to plaintiff's senior mortgage. The Intervening Defendants do not dispute that their successful bid of \$362,000.00 was a mere fraction of the estimated \$3 million market value of the subject property. The Intervening Defendants do not dispute that they executed a "Memorandum of Sale" documenting and affirming their express agreement to comply with the "Terms of Sale" by which they agreed to purchase the property subject to plaintiff's senior mortgage. The Intervening Defendants had also received a title report, prior to the delivery of the Referee's Deed, which raised the existence of plaintiff's senior mortgage and noted the pendency of this action.

Upon the foregoing, the Intervening Defendants are estopped from raising any challenge to the First Mortgage which they were made acutely aware of.

Therefore, it is hereby

ORDERED that the plaintiff's motion for summary judgment against the Intervening Defendants, on the grounds that there are no triable issues of fact and no merit of law to the defenses and counterclaim is granted, and it is further

ORDERED that the Intervening Defendants' motion for summary judgment against the plaintiff on the grounds that no material questions of fact exist requiring a trial on the merits is denied, and it is further

ORDERED that plaintiff is hereby granted leave to renew its prior motion for a default judgment against the defendant, Calvin Darden a/k/a Calvin Darden, Jr., a/k/a Calvin Ramarro Darden.

ENTER:

J.S.C.

Dated: October 9, 2007

cc: Herrick, Feinstein LLP  
Dollinger, Gonski & Grossman, Esqs.  
Bienenfeld & Wertman, P.C.  
Paduano & Weintraub, LLP  
Jay L. Yackow, Esq.  
Steven J. Baum, P.C.  
Ira Judelson  
Calvin Darden a/k/a Calvin Darden, Jr. a/k/a Calvin Ramarro Darden

**ENTERED**

OCT 12 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**