

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present: Hon. Edward G. McCabe,  
Supreme Court Justice**

**FORECLOSURE PART  
NASSAU COUNTY**

SUZANNE RICHTER,

**INDEX NO. 19397/07**

Plaintiff,

**MOTION SEQ. NO.: 1**

-against-

BARRY RICHTER,

Defendants.

X

The following papers were reach on this application:

Notice of Motion.....	1
Defendant Barniak Memorandum of Law.....	2
Notice of Cross-Motion.....	3
Reply Affirmation.....	4
Supplemental Affirmation in Support of Cross-Motion.....	5

Motion by plaintiff mortgagee (Seq. # 1) for summary judgment and an Order of Reference (RPAPL §1321) is granted, cross-motion by Peter Barniak subordinate lien holder (Seq. # 2) for an order dismissing the complaint (CPLR §3211) is denied.

Defendant mortgagor Sportsmans Properties, Inc. has not opposed the motion. The \$150,000.00 mortgage purchase money in question was obtained by Barry Richter, plaintiff's husband, from Sun NLF in September of 1997. On August 19, 1999 the mortgage and presumably the note, were assigned to plaintiff Suzanne Richter. Prior thereto, on August 2, 1999 Barry Richter, President of Sportsmans Properties, Inc. deeded the premises to defendant Sportsmans Properties, Inc. In November of 2004, Peter Barniak obtained the judgment against Sportsmans in the amount of \$91,000.00+. In August 2004, Sportsmans, three months prior to such judgment, conveyed the property to Suzanne Richter by deed in lieu of foreclosure, that deed was subsequently set aside by Judge Martin of this court as being in violation of the Debtor Creditor Law when Judge Martin struck defendants' answer for failing to disclose. (See, **Barniak vs. Richter, et al.**, Index No. 3647/05 S/F/O dated March 23, 2007, Martin J.).

Defendant Barniak argues that because an issue of "pre-existing indebtedness" (i.e. the August 1999 Sun NLF/Suzanne Richter assignment of the mortgage) was before Judge Martin in the prior action involving the 2004 Sportsmans/Suzanne Richter deed transfer, in lieu of foreclosure the doctrines of res judicata and/or collateral estoppel mandate that his lien on the property which was obtained after the mortgage, be considered superior to the lien created by the mortgage. The difficulty with such an argument is that Judge Martin struck such a provision from the proposed judgment submitted by Barniak in the prior action evidencing a clear indication that the issue of the validity and/or the property of the Sun NLF/Suzanne Richter mortgage assignment in 1999 was not being determined. Defendant has submitted no evidence on this motion which would indicate that the mortgage held by plaintiff should not given priority over the judgment obtained by cross-movant.

Submit Order on **10** days notice.

ENTER:

Dated: May 27, 2009  
Mineola, NY



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HON. EDWARD G. McCABE  
Supreme Court Justice

**ENTERED**

JUN 01 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

EGM/jt/hh