

Sum

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 17

NASSAU COUNTY

CITIBANK, N.A.,

Plaintiff,

MOTION DATE: 9/13/02

- against -

**MOTION SEQ. NO. 003, 004,
005, 007**

**JAMES F. KENNEY JR. a/k/a JAMES F.
KENNEY, NU WAVE MARINE, INC.
LONG ISLAND MARINA
LONG ISLAND LIGHTING CO.,
RENATE KENNEY, ADMINISTRATOR OF
THE SMALL BUSINESS ADMINISTRATION,
SEAFORD MARINA, ISLAND WATERCRAFT,**

INDEX NO.: 016062/00

Defendants.

The following papers read on this motion (numbered 1-13)

| | |
|--|-----------|
| Notice of Motion (Seq. 003) | 1 |
| Plaintiff's Memorandum of Law in Support Of Motion for Summary Judgment..... | 2 |
| Affidavit in Support of Motion for Summary Judgment, Appointment of a Referee And Other Relief..... | 3 |
| Reply Affirmation in Support of Motion for Summary Judgment..... | 4 |
| Sur-Reply Affirmation in Opposition to Motion for Summary Judgment..... | 5 |
| Reply Affirmation in Support of Motion For Summary Judgment..... | 6 |
| Notice of Cross-Motion (Seq. 004)..... | 7 |
| Order to Show Cause (Seq. 005) | 8 |
| Affidavit in Support of Order to Show Cause..... | 9 |
| Affirmation in Opposition to Motion..... | 10 |
| Reply Affirmation in Support of Order to | |

| | |
|-------------------------------------|----|
| Show Cause..... | 11 |
| Order to Show Cause (Seq. 007)..... | 12 |
| Affirmation in Opposition..... | 13 |

Upon the foregoing papers, upon the oral argument and conferences held before the Court in several sessions and completed on September 13, 2002 and upon all of the pleadings and prior proceedings had herein, the Court determines the following motions as set forth below:

- | | |
|----------------------|---|
| Motion Sequence 003: | Motion by plaintiff CITIBANK, N.A. for summary judgment pursuant to CPLR §3212 ; |
| Motion Sequence 004: | Cross-motion by defendant RENATE KENNEY for summary judgment pursuant to CPLR §3212 ; |
| Motion Sequence 005: | Motion by plaintiff CITIBANK, N.A. to consolidate this action with the foreclosure action at Index No. 16354/00; |
| Motion Sequence 007: | Motion by defendant RENATE KENNEY to postpone the foreclosure sale and to enjoin the referee from rescheduling or holding such sale until further order of the Court. |

This is an action to foreclose a mortgage on real property located at 3650, 3660 and 3672 Ocean Avenue, Seaford, New York (the "Property"). The Property, historically and currently, has been used as a marina. The subject mortgage is one in a series of mortgages given on the Property by defendant JAMES F. KENNEY, JR. ("JAMES KENNEY") over a period of eleven years. An outline of the mortgages and agreements affecting the Property is set forth below, as relevant to this determination.

1. Mortgage, dated 12/23/86 and recorded 3/25/87, to CITIBANK, N.A. ("CITIBANK") in the amount of \$150,000. Pursuant to a Mortgage, Modification, Consolidation and Spreader Agreement dated 9/10/92 and recorded 1/4/93, this \$150,000 mortgage was consolidated with a new mortgage of \$30,602.73, to form a single first mortgage of \$122,156.58. The consolidated mortgage was again modified and extended pursuant to a Modification and Extension Agreement dated 4/29/97 and recorded 5/12/97. The modified and extended mortgage, in the amount of

\$113,150.95, is the subject of the instant foreclosure action and is referred to herein as "Citibank's First Mortgage".

2. Mortgage, dated 8/14/87 and recorded 9/25/87, to CITIBANK in the amount of \$750,000 ("Citibank's \$750,000 Mortgage"). Citibank's \$750,000 Mortgage initially covered only lots 51-61 of the Property. Pursuant to a Modification, Extension and Spreader Agreement, dated 9/10/92 and recorded 1/4/93, Citibank's \$750,000 Mortgage was extended to cover the entire Property, lots 51-64. On June 6, 1994, an agent of Citibank erroneously filed a Discharge of Mortgage in the office of the County Clerk of Nassau County that discharged and cancelled Citibank's \$750,000 Mortgage. It is undisputed that the discharge was in error and that the underlying debt had not been paid.
3. Mortgage dated 1/18/93 and recorded 3/10/93, to RENATE KENNEY in the amount of \$170,000 (the "Renate Kenney Mortgage").
4. Two mortgages, dated 3/5/93 and recorded 4/29/93 and 6/6/94, respectively, to the Small Business Administration, in the amounts of \$20,000 and \$143,400, respectively (the "SBA Mortgages"). The SBA Mortgages were assigned to LPP Mortgage Ltd., c/o Beal Bank, ssb ("Beal Bank") on or about January 18, 2001.
5. Mortgage, dated 4/29/97 and recorded 5/12/97, to CITIBANK in the amount of \$694,753.73 (the "Citibank Replacement Mortgage"). This mortgage was given to replace Citibank's \$750,000 Mortgage, which had been erroneously discharged on June 6, 1994. This mortgage is the subject of the separate foreclosure action at Index No. 16354/00 (the "Related Action").

The instant foreclosure action was commenced in October 2000. RENATE KENNEY was named as a defendant by virtue of her status as a subordinate mortgage holder. SEAFORD MARINA, a company owned by RENATE KENNEY, was a tenant operating a marina on the Property and also named as a defendant. Upon the default of defendants, including RENATE KENNEY and SEAFORD MARINA, Leslie Feifer, Esq. of the law firm Jaspán, Schlesinger, Hoffman, LLP (the "Receiver" and/or "Referee") was appointed as Referee to Compute, and Receiver of rents and profits of the Property, in two separate Orders of the Court dated March 2, 2001. CITIBANK obtained a Judgment of Foreclosure and Sale, dated June 5, 2001 and entered on July 11, 2001 (the "2001 Judgment"). Because Citibank had not named itself as a defendant with respect to

the Citibank Replacement Mortgage, and had not named Beal Bank as a defendant by virtue of its status as assignee of the SBA Mortgages, the 2001 Judgment directed that the Property be sold subject to the \$143,400 SBA Mortgage and the Citibank Replacement Mortgage.

A foreclosure sale was scheduled for August 21, 2001. In the interim, RENATE KENNEY brought an action against the Receiver, and by Order to Show Cause, moved to stay the pending foreclosure sale as well as an eviction proceeding pending against SEAFORD MARINA in the Nassau County District Court. After hearings, this Court dismissed RENATE KENNEY's action against the Receiver. However, this Court granted RENATE KENNEY an opportunity to defend the instant action, vacating her default and compelling CITIBANK to accept her answer.

The series of motions listed above were brought before the Court, all essentially seeking a determination as to the validity and priority of the respective mortgages and the manner in which the pending foreclosure actions should proceed. The crux of RENATE KENNEY's argument was that CITIBANK should not be permitted to sell the Property pursuant to the 2001 Judgment because CITIBANK failed to name itself as a defendant with respect to the Citibank Replacement Mortgage and CITIBANK was a necessary defendant in this action. According to RENATE KENNEY, allowing CITIBANK to sell the Property subject to the Citibank Replacement Mortgage would prejudice RENATE KENNEY in that it would defeat any chance for her to recover on the Renate Kenney Mortgage. (This is because the purchase price obtainable on property subject to a \$694,000 mortgage would not generate sufficient surplus, after payment of Citibank's First Mortgage, to cover the Renate Kenney Mortgage.) Thus, she argued, allowing Citibank's Replacement Mortgage to survive foreclosure effectively elevates Citibank's Replacement Mortgage to a position superior to that of the Renate Kenney Mortgage, reversing the priorities attributable to such mortgages by virtue of their recording order.

CITIBANK disputed the validity of the Renate Kenney Mortgage, and attempted to demonstrate, by circumstantial evidence, that RENATE KENNEY subordinated her mortgage to the Citibank Replacement Mortgage. (CITIBANK showed that RENATE KENNEY was given two Subordination Agreements at the same time, one agreement subordinating her mortgage to the Citibank First Mortgage, as modified and extended on April 29, 1997, and the other subordinating her mortgage to the Citibank Replacement Mortgage. However, CITIBANK could find no signed subordination agreement relating to the Citibank Replacement Mortgage, and none was recorded in the office of the Nassau County Clerk.) Essentially, CITIBANK sought (i) to reinstate the 2001 Judgment and to sell the Property subject to the Citibank Replacement Mortgage, or (ii) to find the Citibank Replacement Mortgage superior to the Renate Kenney Mortgage by virtue of the

alleged subordination, and to consolidate this action with the Related Action to allow both foreclosures to proceed simultaneously, or, alternatively, (iii) to reinstate the original Citibank \$750,000 Mortgage which was erroneously discharged.

In proceedings held before the Court on September 13, 2002, the minutes of which have been so-ordered by the Court, the Court made the following determinations, which are affirmed herein.

(1) Citibank's First Mortgage had first priority in relation to all other mortgages. The mortgage was not a new mortgage, but a modification and extension of a mortgage that was recorded prior to all subsequent mortgages.

(2) The Citibank \$750,000 Mortgage, although no longer enforceable, should have second priority in relation to the Renate Kenney Mortgage; i.e., the Citibank \$750,000 Mortgage should be subordinate to the Citibank First Mortgage, but superior to the Renate Kenney Mortgage. In making this determination, the Court invoked its equitable powers and considered the relative priority of the respective mortgages in terms of fairness and the interest of justice. The original Citibank \$750,000 Mortgage was superior to the Renate Kenney Mortgage. RENATE KENNEY was on notice of the Citibank \$750,000 Mortgage when she accepted her mortgage. One year after RENATE KENNEY took her mortgage, the Citibank \$750,000 Mortgage was discharged in error, while the underlying debt remained outstanding. RENATE KENNEY in no way changed her position in reliance upon the discharge of the Citibank \$750,000 Mortgage. The Court reasoned that RENATE KENNEY should not be permitted to improve her position by taking advantage of CITIBANK's error. Reinstating the Citibank \$750,000 Mortgage would restore the parties to the original bargained-for positions that they held prior to the erroneous discharge. However, it was unnecessary to do so, because the Citibank Replacement Mortgage could serve as an enforceable equivalent. Upholding the 2001 Judgment, which permitted CITIBANK to foreclose upon Citibank's First Mortgage subject to the Citibank Replacement Mortgage (the fifth mortgage), was the functional equivalent of restoring the Citibank \$750,000 Mortgage to its original second position, superior to the Renate Kenney Mortgage. This was not prejudicial to RENATE KENNEY, as she had claimed, but rather was the result that most closely approximated the parties' original expectations and satisfied the interest of justice.

(3) The Citibank Replacement Mortgage remains subordinate to the SBA Mortgages assigned to Beal Bank; i.e., the SBA Mortgages are in a second position directly following the Citibank First Mortgage, and are prior to the Citibank Replacement Mortgage. The Court reasoned that, although the SMALL BUSINESS ADMINISTRATION was on notice of the prior Citibank \$750,000 Mortgage when it took the SBA

Mortgages, Beal Bank had no such notice when it took the SBA Mortgages. The Citibank \$750,000 Mortgage had been discharged (as of June 1994) by the time Beal Bank accepted assignment of the SBA Mortgages (in January 2001). The Citibank Replacement Mortgage was junior to the SBA Mortgages by virtue of the recording statute. Thus, to reinstate the Citibank \$750,000 Mortgage, or to advance the Citibank Replacement Mortgage, to a position prior to the mortgages held by Beal Bank would be to reverse the priorities relied upon by Beal Bank when it accepted the mortgages, and would thus be inequitable. The 2001 Judgment authorized the sale of the Property subject to the \$143,400 SBA Mortgage, as well as the Citibank Replacement Mortgage, and thus preserved the relative priority of these mortgages. (Upon information and belief, CITIBANK had paid, or agreed to pay, the \$20,000 SBA Mortgage.) The Court acknowledges that this determination effectively reverses the original priority of the Renate Kenney Mortgage over the SBA Mortgages. However, such determination will have no practical effect on the Renate Kenney Mortgage, in view of the fact that such mortgage has been deemed subordinate to the Citibank \$750,000 Mortgage (or its enforceable equivalent, namely, the Citibank Replacement Mortgage), and the value of the Property does not exceed the sum of the outstanding debt on the two CITIBANK mortgages. Thus the proceeds of any sale of the Property would unlikely extend to the Renate Kenney Mortgage in any event.

(4) The Property should be sold as one parcel, with the three lots to be sold collectively, as opposed to individually.

(5) Any surplus proceeds from the sale of the Property, after the payment of the balance due on the Citibank First Mortgage plus reasonable costs, should be deposited with the Nassau County Treasurer within five days of the sale.

(6) The Receiver/Referee should continue to act in this capacity with respect to the sale of the Property and the determination of the appropriate distribution of proceeds to each of the mortgagees in accordance with the priorities determined herein.

(7) The Renate Kenney Mortgage was valid when obtained in 1993. The Court based this determination upon the evidence submitted by the parties, including the Renate Kenney Mortgage and the agreement between RENATE KENNEY and JAMES KENNEY that gave rise to the underlying obligation. The Court found that a hearing was unwarranted at this time on CITIBANK's assertion that such mortgage had been satisfied in 1997.

Accordingly, it is

ORDERED, that the motion by plaintiff CITIBANK, N.A. (Seq. 003) for summary judgment pursuant to **CPLR §3212** is **granted** to the extent that the Court hereby reaffirms and reinstates the Judgment of Foreclosure and Sale, dated June 5, 2001 and entered on July 11, 2001, and permits CITIBANK to proceed with its foreclosure sale pursuant to such judgment. The Referee/Receiver is directed to conduct such sale and distribute the proceeds therefrom in accordance with the determinations numbered (1) through (7) above. It is further

ORDERED, that the cross-motion by defendant RENATE KENNEY (Seq. 004) for summary judgment pursuant to **CPLR §3212** is **denied**; it is further

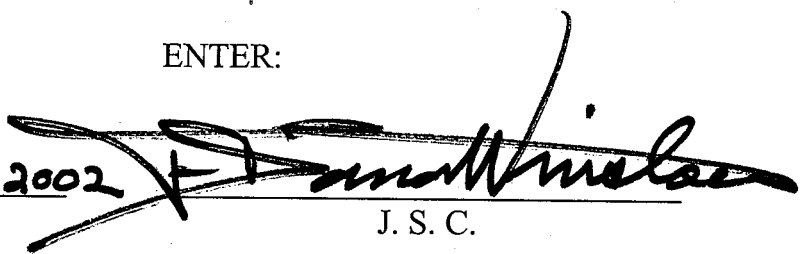
ORDERED, that the motion by CITIBANK, N.A. (Seq. 005) to consolidate this action with the foreclosure action at Index No. 16354/00 is **denied**; it is further

ORDERED, that the motion by defendant RENATE KENNEY (Seq. 007) to postpone the foreclosure sale is **denied**.

This constitutes the Order of the Court.

ENTER:

Dated:

November 15, 2002 
J. S. C.

