

(SEAL)



COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

ESSEX ss.

07 MISC. 350750 (KCL)

_____)
AMTRUST BANK, f/k/a Ohio Savings))
Bank, and MORTGAGE ELECTRONIC))
REGISTRATION SYSTEMS, INC., as))
nominee for AmTrust Bank,))
))
))
Plaintiffs,))
v.))
))
TD BANKNORTH, N.A., FREDERIC J.))
ELIAS and RUTH ANN ELIAS,))
))
))
Defendants.))
_____)

DECISION

Introduction

Plaintiffs AmTrust Bank and Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee, (collectively, "AmTrust") are the current holders of two mortgages on the property at 4 Tally Ho Lane in Andover that were granted by defendants Frederic and Ruth Ann Elias. At issue in this case is whether those mortgages have priority over a prior, undischarged mortgage granted by the Eliases to defendant TD Banknorth, N.A. ("TD"). Although TD initially argued that AmTrust did not have any priority over TD's mortgage, TD subsequently presented an offer of judgment (pursuant to Mass. R. Civ. P. 68) to enter on the plaintiff's equitable subrogation claim (Count IV), resulting in the TD mortgage being subordinated to AmTrust's position to the extent of \$316,077.81 (plus interest to date and less principal payments made). Ex. 41. AmTrust accepted that judgment without prejudice to its right to litigate and seek judgment on the remaining counts, which included a claim that the additional amount of its mortgages should

have priority as well. *Id.*

Accordingly, the only remaining counts in this case are the following: (1) a request for entry of judgment declaring that the TD mortgage is discharged (Count I); (2) a request for entry of judgment declaring that TD is equitably estopped from claiming priority over AmTrust's mortgages (Count II); (3) a request for entry of judgment finding that TD violated G.L. c. 183, § 55 by not discharging the TD mortgage and awarding damages based upon that claim (Count III); and (4) a claim of unjust enrichment, arguing that TD would be unjustly enriched if it continued to hold a first mortgage of record.

The Eliases were duly served, did not respond, and were defaulted. A trial was held between the remaining parties, AmTrust and TD, jury-waived. Based upon the agreed facts contained in the parties' joint pre-trial memorandum, the testimony and exhibits admitted into evidence at trial, my assessment of the credibility, weight and inferences to be drawn from that evidence, and as more fully set forth below, I find and rule that TD is equitably estopped from claiming priority over AmTrust's mortgages. I further find and rule that the plaintiff either does not have standing to assert the remaining claims or (in light of the estoppel finding and the parties' agreement regarding the equitable subrogation claim) cannot show that it is damaged by TD's actions.

Accordingly, as agreed to by the parties, it is declared and adjudged "that the Plaintiff, AmTrust Bank, its successors and assigns, as the current holder of the First Drew Mortgage, is equitably subrogated to the rights and priorities of the Foundation First Mortgage and the Banknorth Second Mortgage; and that the TD Mortgage is subordinated to AmTrust Bank's position as equitable subrogee of the Foundation First Mortgage and Banknorth Second Mortgage to the extent of \$316,077.81 plus interest to date, less principal payments made,

together with costs, subject to further determination by the Court of whatever amounts would now be due on the Foundation First Mortgage and Banknorth Second Mortgage.” Exs. 41 & 42. In addition, it is further declared and adjudged that the TD mortgage is completely subordinated to AmTrust’s position based upon the doctrine of equitable estoppel. The plaintiffs’ remaining claims are dismissed in their entirety, with prejudice.

Facts

Defendants Frederic and Ruth Ann Elias acquired the property at 4 Tally Ho Lane in Andover as tenants by the entirety by deed dated October 4, 1984. They subsequently granted a first mortgage in the amount of \$280,500 to Foundation Mortgage Corp on May 21, 2002, a second mortgage (a home equity line) in the amount of \$148,000 to Banknorth, N.A., and a third mortgage to Banknorth, N.A. (the third mortgage secured two notes, totaling \$182,985.26, and all other debts via a cross-collateralization provision).¹

At some point prior to February 8, 2006, the Eliases applied to Drew Mortgage Associates, Inc. to refinance the existing mortgages on the property. Two mortgage loans totaling \$600,000 were approved (the first in the amount of \$417,000 and the second in the amount of \$183,000) and Drew Mortgage referred the matter to the law firm of Morris, Rossi & Hayes to conduct the closing.² The closing was scheduled for February 8, 2006. As of that date,

¹ Defendant TD is the successor in interest to Banknorth, which was the mortgagee for both the second and third mortgages. For clarity, I will refer to the second mortgage as the Banknorth mortgage and the third mortgage as the TD mortgage.

The promissory notes for the TD mortgage indicate that the borrower was RCL Learning Corp., the notes were “secured by All Business Assets,” and defendant Frederic Elias signed such notes (as President of RCL Learning Corp.). Exs. 5 & 6. The second note was a line of credit in the amount of \$35,000. Ex. 6.

² The money to fund the mortgages allegedly came from Ohio Savings Bank. *See* Ex. 12; Ex. 30 (first mortgage, which after recording was to be returned to Ohio Savings Bank); Ex. 34 (same). The two mortgages refer to the lender as Drew Mortgage Associates, Inc. and the mortgagee (as nominee for the lender) as MERS. Exs. 30, 34. The first mortgage was assigned by MERS to Wells Fargo Bank, which subsequently assigned it to AmTrust Bank (on December 3, 2007, after the date of the filing of this action). Exs. 32-33. So far as the record shows, MERS, as nominee for Drew Mortgage Associates, still holds the second mortgage. However, there is an Allonge to Note, which allegedly assigned the note to Ohio Savings Bank. Ex. 35. Ohio Savings Bank later was renamed to AmTrust. Ex. 36. For ease and clarity of reference, those mortgages are hereafter referred to as “the AmTrust

as indicated above, the property was subject to the following three mortgages, in order of record priority.

1. A first mortgage from the Eliases in the original principal amount of \$280,500 to Foundation Mortgage Corp. That mortgage, dated May 21, 2002, was recorded in the Essex (North) Registry of Deeds in Book 6850, Page 240³ and subsequently was assigned to HSBC Mortgage Corporation by instrument recorded in Book 6850, Page 253).
 2. A second mortgage from the Eliases in the original principal amount of \$148,000 to Banknorth, dated May 29, 2002, and recorded in Book 6909, Page 228 (the "Banknorth mortgage").
 3. A third mortgage from the Eliases to Banknorth (the recorded mortgage was directed to Banknorth's "Small Business Center") that was recorded in Book 8189, Page 272. This mortgage indicated that it secured "two Promissory Notes or credit agreements dated August 21, 2003 in the amounts of \$147,985.26 and \$35,000 which total \$182,985.26 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory notes or agreements" (the "TD mortgage").
- Ex. 4. The mortgage did *not* indicate that the second note was an equity line of credit. In addition to the two notes, the mortgage also secured, pursuant to a cross-collateralization clause, "all obligations, debts and liabilities, plus interest

mortgages" and Drew Mortgage, Ohio Savings, Wells Fargo, and AmTrust are referred to collectively as "AmTrust."

The plaintiffs have alleged that AmTrust currently holds the second mortgage, which has not been disputed in this action. For the purposes of this Decision, I thus assume that AmTrust holds the second mortgage and note. However, this Decision does *not* adjudicate the validity of the assignments and what entities hold the mortgages.

³ All book and page number references in this Decision are to recordings in the Essex (North) Registry of Deeds.

thereon, of Borrower to Lender, or any one or more of them, as well as all claims by Lender against Borrower or any one or more of them, whether now existing or hereafter arising” *Id.*

The TD mortgage also recites “Loan No.: 83500366” on the top of every page after the first. The two promissory notes secured by the TD mortgage list the borrower as RCL Learning Corp. Mr. Elias signed those notes as its president. Neither of the notes was ever recorded at the registry.

The Eliases did not list the TD mortgage or promissory notes on their loan application to AmTrust. AmTrust only became aware of those debts when the Morris, Rossi & Hayes law firm performed a title search on the property. The Eliases subsequently provided AmTrust with a billing statement for “RCL Learning[,] Account Number: 8388125110-83500366-000-99,” which reflected a principal balance of \$84,499.91. Ex. 15. This was followed up by the Eliases’ amended loan applications, which reflected an unpaid balance of \$82,486 and a representation that that amended application reflected all of their outstanding liabilities.

AmTrust had instructed Morris, Rossi & Hayes that it wanted its mortgages to have first and second priority. With the title rundown (with the three existing mortgages of record on the property) as a guide, Lisa Lee, a paralegal at the firm, began contacting lienholders to obtain payoff figures to ensure AmTrust’s priority. She contacted the banks for each of the three mortgages and requested the following, in writing: “Please prepare a mortgage payoff figure good through February 15, 2006 on the mortgage loan referenced below and FAX this **Payoff** to this office at (978) 474-0478.” Exs. 18, 19, & 21 (emphasis in originals).

HSBC and TD’s Loan Payoff Department provided Ms. Lee with their payoff figures for the first and second mortgages (the HSBC and Banknorth mortgages). Exs. 22-23. For the Banknorth mortgage, TD also indicated numerous times in bold writing that if the loan in

question was a home equity line, the borrower's signature was necessary to terminate the line of credit and that failure to provide it would result in the mortgage not being discharged. Ex. 23.

Mr. Elias thus provided his signature to close that equity line. *Id.*

As indicated above, Ms. Lee followed the same exact procedure for the TD mortgage by contacting Tracey Belinskas in TD's Small Business Center. In accordance with industry practice to provide as much information as possible,⁴ Ms. Lee took the information from the billing statement the Eliases had given her (in particular, the RCL Learning reference and the account number on that statement) and wrote as follows:

Please prepare a mortgage payoff figure good through February 15, 2006 on the mortgage loan referenced below and **FAX this Payoff** at this office at (978) 474-0478.

Borrowers: Frederic Elias and Ruth Ann Elias (RCL Learning)

Property: 4 Tally Ho Lane, Andover, MA

Account No.: 6388125110-83600366-000-99⁵

Social Security Nos.:⁶

Mortgage recorded with the Essex North Registry of Deeds at Book 8189, Page 272

Ex. 21 (emphasis in original).

Under TD's usual procedures, which (since there was no evidence to the contrary)⁷ I infer and find were followed in this case, Ms. Belinskas and Ms. Stengel brought up the customers'

⁴ See the unrebutted testimony of the plaintiffs' expert, Jane Pineau, Esq., which I credit.

⁵ Ms. Lee indicated that she obviously transcribed this number incorrectly. Based upon all of the exhibits in evidence and the testimony at trial, it is clear that the correct number should have been 8388125110-83500366-000-99 as listed on the Eliases' billing statement (Ex. 15). The numbers appear to correspond to the Eliases' customer number (8388125110) (Ex. 24) and the loan number listed on the mortgage ("Loan No. 83500366") (Trial Ex. 4). The loan number also apparently corresponds to TD's listed note number for the first note. Ex. 24. Although Ms. Lee's fax contained typographical errors (6388125110 rather than 8388125110 and 83600366 rather than 83500366), these errors were clearly immaterial since Ms. Belinskas and her Banknorth colleague Stephanie Stengel (neither of whom were called as witnesses at the trial) had no problem locating the correct RCL Learning Corp. customer and note number, as evidenced by their response to Ms. Lee. Ex. 24.

⁶ I am omitting the Eliases' social security numbers from this decision to protect their privacy, but they were included on the payoff request.

⁷ As previously noted, neither Ms. Belinskas nor Ms. Stengel were called as witnesses at trial.

“relationship screen” on their computers, which would have showed all loans and lines of credit for the small business relationship (including both of the outstanding RCL Learning promissory notes and the amounts owed on those notes).⁸ I infer and find that this was done. *See* Ex. 37. The physical file should have then been pulled and all documents “support[ing] the relationship” should have been reviewed by TD (including the mortgage, notes, credit information, loan proposal, loan application, and collateral documentation). *Id.* I infer and find that this was done. *See id.* After reviewing the file and relationship screen, Ms. Belinskas should have determined whether there was a “shadow note,” which would have reflected the activity of the note after it became “nonperforming.”⁹ *Id.* I infer and find that this was done. *See id.* After reviewing the screens and the files, the payoff amount was then calculated and sent to the person requesting the information (Ms. Lee). Since the payoff request was made by a third-party, Ms. Belinskas should have (but did not so far as the record shows) obtained an authorization signed by Eliases. *Id.*

In response to the mortgage payoff request, Ms. Belinskas faxed to Ms. Lee a “Commercial Loan Payoff Quote” on February 2, 2006. It listed the Account Name (RCL Learning Corp.), Customer Number (8388125110), Note Number (83500366),¹⁰ Draw # (0), Payoff Effective Date (February 15, 2006), Per Diem (\$13.68), Principal (\$82,069.26), Interest (\$341.96), and Discharge Fee (\$75). Ex. 24. Any possible ambiguity about what that Discharge Fee was for was eliminated by the entry “Fee Purpose: MTG discharge fee.” *Id.* The total

⁸ Mass. R. Civ. P. 30(b)(6) deposition of Banknorth, by and through its designated representative Shawn Babine (Apr. 22, 2008) (Ex. 37, including deposition exhibit (the “Standard Payoff Quote Procedures” is Ex. 3 to the deposition)). I have reviewed all relevant and admissible portions of the deposition (including the attached exhibits), and explicitly find that these were the procedures in place at the time of Ms. Lee’s inquiry. I further find that the computer screens were available to, and consulted by, Ms. Belinskas and Ms. Stengel in connection with Ms. Lee’s inquiry and Ms. Belinskas’ response. I infer and find that both Ms. Stengel and Ms. Belinskas reviewed these screens from Exhibit 24, which shows that its figures were “provided by Stephanie Stengel” and “verified by Tracey Belinskas.”

⁹ It is unclear whether there was a shadow note associated with the TD mortgage.

¹⁰ The same loan number listed on the TD mortgage.

amount for the payoff quote was \$82,486.22. Unlike TD's other mortgage (the Banknorth mortgage), TD did *not* request the Eliases to terminate the equity line of credit and did not provide a disclaimer in the payoff quote to indicate that failure to do so would result in the mortgage not being discharged.

The AmTrust mortgages closed on February 8, 2006 and were recorded. Morris, Rossi & Hayes used proceeds from that closing to pay off in full the HSBC mortgage and the Banknorth mortgage, which were subsequently discharged of record. In addition, by letter dated February 13, 2006, Morris, Rossi & Hayes sent TD (Commercial Loan Servicing) a payoff check in the amount of \$82,486.22 from the closing proceeds. That letter provided the customer name (RCL Learning Corp.) and Customer Number (8388125110) and indicated that the "check represents the payoff in reference to the above titled loan." Ex. 28. TD subsequently cashed the check, but never discharged the mortgage and has refused AmTrust's subsequent requests to discharge the mortgage. By the time AmTrust realized the discharge would not be sent, it had already disbursed all of the loan proceeds (\$600,000). Since the equity line of credit was never closed, the Eliases continued to draw funds from it.

Additional facts are outlined below.

Analysis

Equitable Estoppel

"In Massachusetts the principle of equitable estoppel functions to prevent one from benefiting from his own wrongdoing and to avoid injustice." *The Renovator's Supply, Inc. v. Sovereign Bank*, 72 Mass. App. Ct. 419, 426 (2008) (internal citations and quotations omitted). "It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law."

MacKeen v. Kasinskis, 333 Mass. 695, 698 (1956). “The essential factors giving rise to an estoppel are . . . (1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3.) Detriment to such person as a consequence of the act or omission.” *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 413 Mass. 119, 123 (1992) (quoting *Cleveland v. Malden Sav. Bank*, 291 Mass. 295, 297-98 (1935)); see also *Bongaards v. Millen*, 440 Mass. 10, 15 (2003). In addition, “the detrimental reliance by the party claiming estoppel must be reasonable.” *Weston Forest and Trails Assoc., Inc. v. Fishman*, 66 Mass. App. Ct. 654, 659 (2006).

All of these elements are met by the facts of this case and, accordingly, TD is equitably estopped from maintaining a priority position over AmTrust’s mortgages. Specifically, the events at issue here – the February 2, 2006 mortgage payoff request from Morris, Rossi & Hayes, the February 2, 2006 response by TD, the February 13, 2006 payoff check and letter, and TD’s acceptance of that payment – and the circumstances surrounding those events fully support a claim of equitable estoppel. Morris, Rossi & Hayes specifically communicated to TD that it was requesting a payoff of the *mortgage* and specifically provided the book and page number where such mortgage was recorded. It provided all of the additional information it acquired from the Eliases’ billing statement to further identify the mortgage.¹¹ In response, TD provided a payoff figure for the *loan* and explicitly included in that figure a fee to discharge the *mortgage*.

TD makes much of the fact that there were two promissory notes associated with the mortgage, as evidenced by the mortgage itself, and the payoff request letter only referred to a

¹¹ Again, the fact that there were some typographical errors in this information is immaterial since TD responded with the correct information. See n. 5, *supra*.

loan number associated with the first *note*. TD argues that since both note numbers were not provided, the request was incomplete and/or ambiguous. This argument fails for several reasons. Most importantly, Morris, Rossi & Hayes requested a payoff of the *mortgage*, provided the recording information for that mortgage, and thus reasonably expected a payoff figure for the mortgage. Although the loan number listed in both Ms. Lee's and Ms. Belinskas' letters corresponded only to the first note associated with the mortgage, Morris, Rossi & Hayes had no reason to know that since that number was the only one listed on the mortgage recorded at the registry. It was thus reasonable for Morris, Rossi & Hayes to assume that the number corresponded to the mortgage and would encompass both notes. Furthermore, the note number for the equity line of credit is simply a generic number (00000001) that is assigned to *all* of TD's customers' first equity lines of credit and such number was not a matter of public record (nor was it listed on the Eliases' billing statement). The information that was provided in the request (the customer number, loan number, social security numbers, and the mortgage recording information) would have revealed the existence of the two notes if TD's employees followed their own procedures. As a result, if the TD employees processing the request believed that the request was ambiguous, they were the only ones in a position to raise that issue and request additional information. Accordingly, I find that it was reasonable for Morris, Rossi & Hayes and, therefore AmTrust, to rely on the payoff figure as providing the amount due in order for the *mortgage* to be discharged.¹²

TD also makes much of the fact that the Eliases never signed a statement to terminate the equity line of credit. However, unlike TD's actions for the Banknorth mortgage, TD never requested those signatures and never made the disclaimer that failure to do so would result in the

¹² Indeed, as indicated earlier, the un rebutted expert testimony of Attorney Pineau likewise concluded that it was reasonable and in accordance with industry standards to rely on TD's payoff figure and that Morris, Rossi & Hayes complied with the standard of care necessary for the transaction at issue.

mortgage not being discharged. In addition, the fact that the second note was an equity line of credit was *not* a matter of public record. The mortgage simply notes that “[t]he word ‘Note’ means two Promissory Notes or credit agreements . . .” (again, unlike the Banknorth mortgage, which specifically identifies the loan as a home equity line mortgage). Ex. 4. As TD testified, if a *note* is satisfied (or assigned, etc.), such fact would not necessarily be a matter of public record either and, accordingly, the fact that TD only provided one payoff figure (versus two figures corresponding to the two notes) would not necessarily raise a red flag for Morris, Rossi & Hayes.

Finally, I note that there was no testimony from anyone at TD that had actual knowledge of the transactions involved in this case (Ms. Belinkas and Ms. Stengel). The only testimony offered by TD was regarding TD’s general practices and procedures for providing payoff figures. Here, based upon that testimony, it is clear such procedures either were not followed or the information acquired from such procedures was misinterpreted by TD’s employees or not divulged to Morris, Rossi & Hayes. Specifically, TD testified that if a third party requests a mortgage payoff figure, the mortgagors’ signatures are required before a payoff quote can be processed. There is nothing in the record to indicate such signatures were requested or obtained. TD also testified that the computer screens observed would have revealed both notes,¹³ as would the physical folder for the mortgage. Had Ms. Belinkas or Ms. Stengel reviewed the information required by such procedures, they would have been aware of the second note and would have had a duty to, at the very least, follow up with Morris, Rossi & Hayes to indicate that the information provided would only pay off the first note and clarify whether they were seeking a *mortgage* discharge (as I find their request reasonably seeks) or simply a payoff of the first

¹³ Exhibit 38 apparently is proof that the computer screen should have revealed the second note; however, there was no testimony regarding this exhibit and, since the date of the exhibit is October 24, 2007, I question its relevance to the transactions at issue in this case. Further, since there was no testimony regarding this exhibit and what any of the numbers means, I find that it is not material to this Decision.

note. See Kannavos v. Annino, 356 Mass. 42, 48 (1969). Simply put, TD was in the best position to avoid whatever errors and omissions occurred in providing the payoff figure.

Ultimately, TD's agent (Ms. Belinkas) represented to Ms. Lee (and, therefore, AmTrust) that the amount necessary to pay off the mortgage to obtain a discharge was \$82,486.22. In providing that payoff quote, Ms. Belinkas omitted the fact that there was a second note that was an equity line of credit and, in order to pay off the entire mortgage, the Eliases' signatures were required to terminate the line of credit. AmTrust relied on TD's representations, provided the funds required under the payoff figure, and reasonably expected that payment to result in the discharge of the TD mortgage. Due entirely to TD's omissions and failures, the discharge was never provided and AmTrust is thus injured due to its unexpected junior status. Accordingly, "to avoid injustice" and prevent "results contrary to good conscience and fair dealing," TD is hereby equitably estopped from asserting a priority position over AmTrust's mortgages.

Although I find that AmTrust's mortgages are ahead of the TD mortgage, I do not find that the TD mortgage should be discharged. Although the debt under the first note was fully satisfied when AmTrust paid the \$82,486.22, the record shows that the equity line of credit was never terminated and the Eliases continued to draw funds from it. Accordingly, TD would be injured if its mortgage was discharged when it has not received full payment and satisfaction of the debt. Since I find that AmTrust's mortgages (two mortgages with an original principle amount of \$600,000) are ahead of the TD mortgage in terms of priority, AmTrust is not damaged by the TD mortgage not being discharged.

G.L. c. 183, § 55

The plaintiff argues that TD violated G.L. c. 183, § 55 by not "provid[ing] a discharge or deed of release for the TD Banknorth Mortgage after issuing a pay-off statement and accepting

payment in full of the amount set forth in the pay-off statement . . .” Amended Substitute Complaint at 6, ¶ 29. There was some discussion at trial regarding what version of G.L. c. 183, § 55 applied to this action since it was amended in 2006. Under the earlier version,

[a] mortgagee, mortgage holder, mortgage servicer, or note holder, who has accepted full payment and satisfaction of the conditions of a mortgage in accordance with a payoff statement issued by such mortgagee, mortgage holder, mortgage servicer or note holder, as the case may be, and who refuses or neglects to provide a duly executed deed of release or written acknowledgement of payment or satisfaction of the debt thereby secured . . . shall be liable in damages to the owner of the equity of redemption or his successors in an amount equal to the actual damages sustained by said owner or his successors as the result of such refusal or neglect in addition to all other remedies available at law.

Similarly, effective October 1, 2006, G.L. c. 183§ 55(c)(1)(i) provides the following:

[a] mortgagee, mortgage servicer, note holder who has accepted full payment and satisfaction of the conditions of a mortgage in accordance with a payoff statement issued by such mortgagee, mortgage servicer or note holder, as the case may be, and who fails to record or provide to the closing attorney, settlement agent or other person transmitting the payoff a duly executed and acknowledged discharge of that mortgage, or partial release, . . . shall be liable in damages to the mortgagor, as that term is defined in section 54,¹⁴ in an amount equal to the greater of \$2,500 or the actual damages sustained by the mortgagor as the result of the failure, together with reasonable attorneys fees and costs, in addition to all other remedies available at law.

Regardless of what version applies, the plaintiff does not have standing to advance such arguments since it is neither the “mortgagor” (under the new version) nor the “owner of the equity of redemption or his successors” (under the earlier version) and, therefore, the mortgagee (TD) cannot be liable to AmTrust. G.L. c. 183, § 55. Under either version of the statute, TD would only be liable for damages sustained, if any, by the Eliases. AmTrust’s argument that it is the “successor” to the Eliases as the “owner of the equity of redemption” or the “mortgagor” is inapposite. It is obviously clear on the face of the documents that the Eliases are the mortgagors of the TD mortgage. Furthermore, under the transaction at issue in this case, it is clear that

¹⁴ “Mortgagor” is defined as “a grantor of a mortgage, the grantor’s heirs, successors or assigns, or any other person who is an obligor of a note or other obligation secured by a mortgage.” G.L. c. 183, § 54.

AmTrust was intended to be the holder of the *legal* interest in the property as the mortgagee and, under its theory, TD's *legal* interest in the property should have been discharged. Under no interpretation of the facts as argued by AmTrust would it be the holder of any *equitable* interest in the property. The Eliases remain the holders of the equitable interest in the property unless and until any one of the mortgagees of record forecloses on their mortgages, vesting both legal and equitable title in the same entity.¹⁵ Accordingly, even if the current version of G.L. c. 183, § 55 applied (resulting in attorneys' fees being considered as part of the damages contemplated by the statute),¹⁶ AmTrust is not entitled to any damages.

Conclusion

Based upon the foregoing, I find and rule (and it is therefore **ORDERED, ADJUDGED, and DECREED**) that AmTrust's mortgages have first priority over the TD mortgage based upon the doctrines of equitable subrogation and equitable estoppel. I further find and rule that AmTrust is not entitled to damages pursuant to G.L. c. 183, § 55 since it is neither a mortgagor nor the owner of the equity of redemption. All other claims in this case are dismissed, in their entirety. Judgment shall enter accordingly.

SO ORDERED.



Keith C. Long, Justice

Dated: 22 March 2010

¹⁵ TD argues that since AmTrust failed to comply with G.L. c. 183, § 54D, it is not entitled to rely on the provisions of G.L. c. 183, § 55. Specifically, § 54D(d) notes that the mortgagee is bound by an inaccurate payoff statement only if, "in the case of a mortgage securing a line of credit or future advances, the person or entity providing the payoff statement has received, either with the payoff request or on or before the payoff date specified in the payoff request, a written request signed by 1 or more obligors directing that the line of credit or right to future advances be frozen or terminated." However, that section only became effective on October 1, 2006, *after* the payoff request was made. Therefore, G.L. c. 183, § 54D does not apply to the transaction at issue in this case. This is true regardless of the fact that this amendment specifically applies retroactively to mortgages recorded prior to the effective date since that specific transaction (the request for a payoff amount for TD's mortgage) occurred prior to the date when AmTrust would have been aware of such requirements.

¹⁶ I note for the record that if the earlier version of the statute applied, I do not agree with AmTrust that attorneys' fees would be considered. The mere fact that the legislature amended the statute to now specifically include attorneys' fees suggest that it did so because the earlier version did not allow for the inclusion of attorneys' fees as damages under G.L. c. 183, § 55.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

ESSEX ss.

07 MISC. 350750 (KCL)

AMTRUST BANK, f/k/a Ohio Savings
Bank, and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as
nominee for AmTrust Bank,

Plaintiffs,

v.

TD BANKNORTH, N.A., FREDERIC J.
ELIAS and RUTH ANN ELIAS,

Defendants.

JUDGMENT

Plaintiffs AmTrust Bank and Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee, (collectively, "AmTrust") are the current holders of two mortgages on the property at 4 Tally Ho Lane in Andover that were granted by defendants Frederic and Ruth Ann Elias. At issue in this case is whether those mortgages have priority over a prior, undischarged mortgage granted by the Eliases to defendant TD Banknorth, N.A. ("TD"). Although TD initially argued that AmTrust did not have any priority over TD's mortgage, TD subsequently presented an offer of judgment (pursuant to Mass. R. Civ. P. 68) to enter on the plaintiff's equitable subrogation claim (Count IV), resulting in the TD mortgage being subordinated to AmTrust's position to the extent of \$316,077.81 (plus interest to date and less principal payments made). Ex. 41. AmTrust accepted that judgment without prejudice to its right to litigate and seek judgment on the remaining counts, which included a claim that the additional amount of its mortgages should have priority as well. *Id.*

The Eliases were duly served, did not respond, and were defaulted. A trial was held between the remaining parties, AmTrust and TD, jury-waived. For the reasons set forth in the court's Decision of this date, I find and rule (and it is therefore **ORDERED, ADJUDGED, and DECREED**) that AmTrust's mortgages (recorded at Book 10032, Page 34 and Book 10032, Page 48) have first priority over the TD mortgage (recorded at Book 8189, Page 272) based upon the doctrines of equitable subrogation and equitable estoppel. I further find and rule that AmTrust is not entitled to damages pursuant to G.L. c. 183, § 55 since it is neither a mortgagor nor the owner of the equity of redemption. All other claims in this case are **DISMISSED**, in their entirety, with prejudice.

SO ORDERED.

By the court (Long, J.)

Attest:

Deborah J. Patterson, Recorder

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER

Dated: 22 March 2010