UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

AMERICAN GENERAL FINANCE, INC.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: CIV-08-648-F
	)	
GEORGE L. KENT AND JUDITH A. KENT,	)	
	)	
Defendants.	)	

RESPONSE OF AMERICAN GENERAL FINANCE
TO MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW the Plaintiff, American General Finance, Inc., and for its response to the Motion for Partial Summary Judgment filed by the United States of America (the "USA") represents and shows unto the Court the following:

I. Introduction

The Plaintiff is the holder of a promissory note executed by the defendant George L. Kent and Judith A. Kent. The note is in the principal amount of $118,000.00. The note is secured by a first mortgage on certain real property owned by Mr. Kent that is located in Noble County, Oklahoma (referenced to herein as the "Subject Property").

The loan is in default. The Plaintiff commenced legal action in the District Court of Noble County, Oklahoma to recover the amounts due under the promissory note. In addition, the Plaintiff has prayed for judgment foreclosing the mortgage on the Subject Property.

On January 10, 2007, the state court granted partial summary judgment. The Court entered judgment against Mr. and Mrs. Kent for the sum of $117,615.77 together with interest, costs and attorney fees. The judgment specifically reserved determination of the issues regarding the foreclosure of the mortgage. The Court subsequently denied the motion for summary judgment relating to the foreclosure of the mortgage on the grounds that there were still material facts in

controversy.

The Plaintiff has filed a Statement of Judgment in the office of the County Clerk of Noble County, Oklahoma. In addition to the mortgage lien, the Plaintiff also claims a judgment lien against the Subject Property.

II. Issues.

The USA has been permitted to intervene and has removed this case from the state court. The USA has subsequently filed a motion for partial summary judgment directed at the validity of Plaintiff's mortgage.

In the motion, the USA does not dispute the validity of the debt, only the right of the Plaintiff to foreclose its mortgage. In general, the USA has submitted argument and authority in support of the proposition that Plaintiff's mortgage is invalid. In particular, the USA has alleged that; 1.) The subject property is held in Trust for George L. Kent, and 2.) Plaintiff's mortgage is invalid because it lacked approval by the Secretary of the Interior.

In response, it submitted that the Subject Property was placed in trust for a specific term of years. The term expired in 1999. The property was not held in trust at the time the mortgage was executed. In addition, the Plaintiff claims that it is entitled to the benefits and priorities of an existing mortgage that was paid. The prior mortgage was approved by the Secretary of the Interior. Under the doctrine of equitable subrogation, a lender that pays an existing lien, with the intent that the new mortgage will be a first lien, is entitled to the benefits of the lien that was paid.

III. Response to Statement of Uncontroverted Facts.

1.) There is no admissible evidence to support the claim that George L. Kent is an Indian as alleged in numbered paragraph 1. Furthermore, there is no evidence that George L. Kent is an heir or decedent of the original Otoe Alloltee, Hettie Green, other than the self-serving recitations in the Trust Deed.

2.) The Trust Deed specifically provides that the Subject Property is to be held in trust for a definite period of time. Pursuant to the terms of the trust patent, the property was to be held in trust for the benefit of George L. Kent for a period of 25 years from February 15, 1974 or until 1999.

Authority: A copy of the Trust Deed is attached as "Exhibit A".

3.) The Plaintiff does not have information sufficient to admit or deny the claim regarding the records of the Department of Interior as alleged in numbered paragraph 3.

4.) The Plaintiff admits that it has previously asserted that the trust expired by its terms in 1999.

5.) The Plaintiff states that the approval of the Bureau of Indian Affairs is not required for property that is no longer held in trust.

6.) The Plaintiff admits that the mortgage was not approved by the Bureau of Indian Affairs.

7.) The Plaintiff admits that a general law relating to the term of certain trusts was extended as stated in numbered paragraph 7. However, the particular grant in this case specifically stated that the Subject Property was held in trust for a period of 25 years. In addition, the conveyance states: "This patent shall not operate to extend the trust period declared in the patent for said land, dated August 30, 1900, as extended".

Authority: A copy of the Trust Deed attached as "Exhibit A".

8.) The Plaintiff denies that the property is still subject to the trust for the reasons previously stated.

9.) The Plaintiff admits that it did not obtain approval of its mortgage by the Department of Interior as stated in numbered paragraph 9.

IV. Statement of Facts in Controversy

The Plaintiff contends that there are material facts in controversy which preclude the granting of summary judgment at this time. In particular, these are controverted facts on the

following matters:

1.) Whether the subject property is still subject to the Trust.

2.) Whether the Plaintiff is entitled to the benefits and priority of the liens that it paid.

II. Argument and Authority.

A.) The Subject Property is not held in trust.

On December 5, 1899, the United States allotted 160 acres of land under the General Allotment Act to Hettie Green, a resident of the Otoe Reservation. Along with the land, the United States issued Hettie Green a trust patent whereby it would hold the allotted land for a period of twenty-five years. At the expiration of such period, the government would issue a fee patent to Hettie Green or her heirs.

On December 5, 1917, Hettie Green granted a "Deed Noncompetent Indian Lands" to her daughter Rachel Green (Rachel Kent), conveying all 160 of the allotted acres. According to the records of the Bureau of Indian Affairs, Rachel Green sold 80 of the 160 acres before she died on September 4, 1941. It was not until 1974 that the federal government partitioned the land originally allotted to Hettie Green. George L. Kent ("Kent") received thirty-five acres of the original allotment, accompanied by a trust patent (the "Trust Patent") issued by the United States on February 13, 1974. Pursuant to the terms of the conveyance, The Trust Patent was set to expire after twenty-five years - in the year 1999. A copy of the Trust Patent is attached as Exhibit A.

Although the 1934 enactment generally extended the trust provisions as to certain land held in trust, it did not extend the 25 years set forth in the conveyance to Kent in 1974. As a result, the time period set forth in the conveyance is controlling and the restriction terminated in 1999. Where by the terms of a trust it is to continue until the expiration of a certain time period, the trust terminates when the period expires. *Hauser v. Catlett*, 1946 OK 262, 173 P.2d 728.

6.) The Plaintiff is entitled to the benefits and priority of the mortgage that is paid.

Prior to the lapse of the restrictions in 1999, the Kents placed several mortgages on

the Subject Property. On August 13, 1974, the Kents executed and delivered a Real Estate Mortgage in favor of the Farmers Home Administration. Unlike the mortgage held by the Plaintiffs in this case, the mortgage was approved by the Secretary of the Interior. The mortgage was filed of record on August 27, 1974 in Book 199 at page 300. A copy of the mortgage is attached hereto as Exhibit B.

The amount due on the FHA loan was paid from the proceeds of various loans obtained by the Kents. Under the doctrine of equitable subrogation, a lender that pays an existing mortgage with the intent of being secured by a new lien is entitled to the benefits and priority of the lien that was paid. Subrogation is the substitution of one person or entity in place of another with reference to a claim, demand or right. It is purely an equitable doctrine. The substitution may occur through invocation of the doctrine of subrogation or it may be conferred by contract. *Jorski Mill v. Farmers Elevator*, 404 F.2d 143 (CA Okl. 1968).

The basis for the application of the doctrine is the concept that a prospective subrogee has assumed or satisfied an obligation for which another is primarily liable. By subrogation, he obtains the rights, priorities, remedies, liens and securities of the former obligee. The application of the doctrine of equitable subrogation is favored by the law. No general rule can be laid down which will afford a uniform test in all cases. This flexibility is often epitomized in the statement that legal subrogation is applicable to all cases where one not a volunteer pays an obligation which in justice and good conscience ought to have been paid by another. It has been held that no doctrine of equity jurisprudence is more beneficial in its operation than subrogation. *Richardson v. American ser*., 223 P. 389 (Okl. 1924); *Republic Underwriters v. Fire Ins Exchange*, 655 P.2d 544 (Okl. 1982). *In Re MacFarline*, 14 P.3d 557, 2000 OK 87.

It is generally recognized that a lender who pays the balance due on an existing mortgage is entitled to be subrogated to the rights of the original mortgage holder. The rule is stated in 73 AmJur. 2d ‘Subrogation’ § 92 as follows:

> "It is not regarded as necessary that there be an express agreement that the mortgage lien shall be kept alive for the benefit of the one advancing money to pay the mortgage, or that it shall be assigned, but if from all the facts and circumstances surrounding the transaction it is clearly to be implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged, then the court will so decree. But no agreement for subrogation will be implied unless the evidence shows that the lender believed in good faith that he was to have security of equal dignity and position with that discharge."

The doctrine of subrogation has been adopted in Restatement (Third) of Property (Mortgages) § 76(a) (1997):

> "One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee".

In the case of *G. E. Capital v. Leverson*, 657 A.2d 1170 (Md. 1995) the court conducted an extensive review of the doctrine of subrogation in other jurisdictions and came to the following conclusion:

> "The great majority of case law holds that one who pays the Mortgage of another and takes a new mortgage as security will be subrogated to the rights of the first mortgagee as against any intervening lienholder. The court in *Metropolitan Life Ins. Co. v. Craven*, 164 Or. 274, 279, 101 P.2d 237, 239 (1940), said:
>
> Our examination of the authorities leads us to the conclusion that, numerically, the greater weight of authority is to the effect that one, advancing money to discharge a prior lien on real or personal property and taking a new mortgage as security, is held to be entitled to subrogation to the prior lien as against the holder of an intervening lien of which he was excusably ignorant.
>
> See also @ G. Glenn, *Mortgages, Deeds of Trust, and Other Security Devices as to Land § 340, at 1424 (1943); see also E. Frank, title to Real and leasehold Estates and Liens* 181-83 (1918); 2 L. Jones, *Law of Mortgages of Real Property* § 1119, at 569-70 (8th ed. 1928); R. Kratovil & R. Werner, *Modern Mortgage Law and Practice* § 31.01, at 493 495 (2d ed. 1981); G.S. Nelson

> & D.A. Whitman, *Real Estate Finance Law* § 10.7, at 718-19 (2d ed. 1985); Osborne, § 282, at 571; 37 Cyclopedia of Law and Procedure, *Subrogation* 471-76 (1911); Comment, *Subrogation-An Equitable Device for Achieving Preferences and Priorities*, 31 Mich.L.Rev. 826, 834 (1933); Note, *Subrogation of One Paying Off a Mortgage to the Rights of the Mortgagee*, 21 colum. L.Rev. 470, 471, (1921); Note, *subrogation of Purchaser to Rights of Senior Mortgagee Against Junior Encumbrances*, 48 Yale L.J. 683, 688-89 (1939).

The general rule was adopted in Oklahoma in the case of *Home Owners' Loan Corporation v. Parker*, 73 P.2d 170, 172 (Okl. 1937).

> "In such cases equity, speaking from the standpoint of good conscience, substitutes the person paying the debt to the place of the original creditor, so far as to enable him to enforce the security for the purpose of reimbursement."

In the *Parker* case, the mortgage company had advanced money in favor of the property owner to refinance an existing mortgage on the property. The Oklahoma Supreme Court noted that it was not necessary for there to be an expressed agreement to assign the mortgage and that equity would subrogate the new lender to the position of the prior lender. Similarly, the court in *Landis v. State, ex rel Commissioner of the Land Office*, 66 P.2d 519, 521 (Okl. 1937) held:

> One who loans money upon real estate for the express purpose of paying and discharging valid encumbrances upon the same property, believing in good faith that his security will be substituted for the lien discharged, is not a volunteer or intermeddler and, upon failure to obtain a valid lien, is subrogated to the prior valid lien to the extent of the encumbrances discharged.

Id. At 521. See also *United Federal Savings and Loan Assn. Of Tulsa v. Johnson*, 73 P.2d 846 (Okla. 1937); *Marble Savings Bank v. First State Bank*, 261 P.913, 916 (Okla. 1927). (Courts of equity may decree that a subsequent mortgagee, believing its lien to be a first mortgage, should be subrogated to the priority of a lien paid.)

In the event that the court should determine that Plaintiff's Mortgage is invalid because it was not approved by the Secretary of Interior, the Plaintiff would still be subrogated to the priority of the mortgage and other liens that were paid.

Respectfully submitted,

s/MARK W. KUEHLING_____
MARK W. KUEHLING, OBA #5133
5613 N. Classen Blvd.
Oklahoma City, OK 73118-4015
Phone: (405) 608-0629
Fax: (405) 842-6132
Co-Counsel for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of August, 2008, mailed a true and correct copy of the above and foregoing pleading, with postage prepaid to:

Chad D. Burris, Esq.
Doerner Saunders Daniel & Anderson
320 S. Boston Ave., Ste 500
Tulsa, OK 74103

Robert Bartz
525 S. Main Street, Suite 800
Tulsa, OK 74103

H. Lee Schmidt
Assistant U.S. Attorney
210 Park Ave., Ste. 400
Oklahoma Tower
Oklahoma City, OK 73102

s/MARK W. KUEHLING____
Mark W. Kuehling