

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

AMERICAN GENERAL FINANCE,)
Plaintiff(s),)
)
v.) CIV-08-648-F
)
GEORGE L. KENT and JUDITH A.)
KENT,)
Defendant(s).)

**UNITED STATES' MOTION FOR
PARTIAL SUMMARY JUDGMENT
WITH BRIEF IN SUPPORT**

COMES NOW the United States of America and pursuant to Fed.R.Civ.P. 56(c) respectfully submits its motion for partial summary judgment. The United States asserts that there is no genuine issue as to any material fact (on the only issue in which it has an interest) and it is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c).

STATEMENT OF THE CASE

Plaintiff American General Finance, Inc. filed a Petition for Foreclosure against George and Judith Kent on June 16, 2006, in Noble County, State of Oklahoma. [*Removal, Pacer Doc. #1, Ex. 2* - Petition, pg. 1, paragraph 2] asserting that George L. Kent made and executed a certain line of credit in the amount of \$118,000.00, including closing fee costs, together with interest at the rate of 10.50% per annum, until paid. [*Removal, Pacer Doc. #1, Ex. 2* - Petition, pg. 1, paragraph 2]. Plaintiff states that Defendants George and Judith Kent secured their Line of Credit with a real estate mortgage covering the property identified in the Petition. [*Removal, Pacer Doc. #1, Ex. 2* - Petition, pg. 1, paragraph 3].

Plaintiff asserts that Defendants George and Judith Kent defaulted on their Line of Credit and real estate mortgage by failing to pay the installment due and owing March 15, 2006. [*Removal*, **Pacer Doc. #1, Ex. 2** - Petition, pg. 2, paragraph 5]. Plaintiff's Petition asserts that the Kent's interest is subject to and inferior to Plaintiff's mortgage, and that any person or organization with claims against the subject property are subject to and inferior to its mortgage. [*Removal*, **Pacer Doc. #1, Ex. 2** - Petition, pg. 1, paragraph 9].

The United States' filed a Motion to Intervene in Noble County [*Removal*, **Pacer Doc. #1, Ex. 28**], then removed the case to federal court. [*Removal*, **Pacer Doc. #1**]. In this Motion for Partial Summary Judgment the United States asserts that Plaintiff cannot foreclose against the subject property because it is held in trust by the United States for the Indians of the Otoe-Missouria Tribe of Oklahoma,¹ specifically for the benefit of George L. Kent, who is an heir or descendant of the original Otoe Allottee: Hettie Green, Otoe 811 375-C.² The United States does not dispute the validity of Plaintiff's debt, only Plaintiff's ability to execute on its mortgage.

SUMMARY OF ARGUMENT

The United States seeks partial summary judgment based on its interest in the subject property which is held in trust by the United States. The United States requests that the Court

¹ See 18 U.S.C. § 1151.

² See **Exhibit 1 ¶s 2 & 4, Declaration of Bruce Maytubby**, Deputy Regional Director, Southern Plains Regional Office, Bureau of Indian Affairs, United States Department of Interior.

grant partial summary judgment by finding that Plaintiff's mortgage interest in the subject property is invalid.³

STATEMENT OF UNCONTROVERTED FACTS

1. Defendant George L. Kent, an Indian male, is an heir or descendant of the original Otoe Allottee: Hettie Green, Otoe 811 375-C. **Exhibit 1**, paragraph 4, **Declaration of Bruce Maytubby, Deputy Regional Director**, Southern Plains Regional Office, Bureau of Indian Affairs, United States Department of the Interior; *also see Removal, Pacer Doc. #1, Ex. 6 Defendants' Motion to Dismiss* filed in *American General, Inc. v. Kent, et al.*, CJ-2006-35, Noble County, Okla., pg. 2 ¶ 4-5 [filed Aug. 15, 2006].

2. The following described real property is currently held in trust by the United States for the benefit of George L. Kent:

E/2 NE/4 NW/4 and E/2 W/2 NE/4 NW/4 and the E/2 W/2 W/2 NE/4 NW/4 all in Section 29, T-22-N, R-1-E, of the Indian Base and Meridian, Noble County, Oklahoma, a/k/a 14450 Old John Deere Road, Perry, Oklahoma.

Exhibit 1, paragraph 3, Declaration.

3. Records of the Department of Interior ("DOI") reveal **NO evidence** that a mortgage or "Line of Credit" covering the above-described real property between George L. Kent and American General Financial Services has been approved by the Department

³ Plaintiff American General Finance asserts a mortgage interest in Indian land which is held in trust by the United States for the benefit of George L. Kent.

- of Interior as required by 25 U.S.C. § 483a. **Exhibit 1**, pg. 2 ¶ 5, Declaration.
4. Plaintiff asserted in its Response to Defendants' Motion to Dismiss filed Sept. 1, 2006, in CJ-2006-35, Noble County, Okla, that the terms of trust patent to Defendant George L. Kent filed Feb. 26, 1974, expressly limits the time during which the United States will hold the land in trust for George Kent to twenty-five (25) years, or until 1999. **Removal**, Pacer Doc. #1, Ex. 7, **Plaintiff's Response to Motion to Dismiss with Exhibit A** (Trust Patent) filed in *American General, Inc. v. Kent, et al.*, CJ-2006-35, Noble County, Oklahoma. The Trust Patent is also attached as **Exhibit 2** to this motion.
 5. Plaintiff asserted in its foreclosure action that the land is no longer trust land, therefore, the Bureau of Indian Affairs was not required to approve Plaintiff's mortgage. **Removal**, Pacer Doc. #1, **Ex. 7**, pg. 2, **Plaintiff's Response to Motion to Dismiss** filed in *American General, Inc. v. Kent, et al.*, CJ-2006-35, Noble County, Oklahoma.
 6. Plaintiff admits they did not obtain approval for their mortgage on restricted Indian land pursuant to 25 U.S.C. § 483(a). **Exhibit 1**, Declaration; **Removal**, Pacer Doc. #1, **Ex. 7**, **Plaintiff's Response to Motion to Dismiss**, pg. 2 ¶ 2; **Ex. 11**, pg. 2, **Defendants' Response to Plaintiff's Motion for Summary Judgment** both pleadings filed in *American General, Inc. v. Kent, et al.*, CJ-2006-35, Noble County, Okla., filed Sept. 22, 2006.

7. The Trust Patent issued February 14, 1974, regarding the restricted Indian land at issue in this case was extended by the United States Congress by the Indian Reorganization Act of 1934:

25 U.S.C. § 462. Existing periods of trust and restrictions on alienation extended.

The existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof are extended and continued until otherwise directed by Congress.

See **Exhibit 2, Trust Patent and Removal**, Pacer Doc. #1, **Ex. 11**, pg. 2, **Defendants' Response to Plaintiff's Motion for Summary Judgment** filed in *American General, Inc. v. Kent, et al.*, CJ-2006-35, Noble County, Okla., filed Sept. 22, 2006.

8. The real property at issue in this case is restricted Indian land held in trust by the United States. **Exhibit 1**, pg 1 ¶ 's 2-4, Declaration.
9. Plaintiff American General did not obtain approval by the Department of Interior pursuant to 25 U.S.C. § 483(a), for their mortgage on the real property at issue in this lawsuit. **Exhibit 1**, pg. 2 ¶ 5, Declaration.

ARGUMENT AND AUTHORITIES

PLAINTIFF DOES NOT HAVE A SECURED INTEREST IN THE REAL PROPERTY AT ISSUE

1. Restricted Indian Land

Restricted Indian land is "land or any interest therein, the title to which is held by an individual Indian, subject to Federal restrictions against alienation or encumbrance." 25

C.F.R. § 152.1(c). *Estate of Bruner v. Bruner*, 338 F.3d 1172, 1173 -1174 (10th Cir. 2003).

Lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151. *See Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 668 (10th Cir.1980) (state hunting and fishing laws do not apply on trust lands located within a disestablished reservation because “lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)”).

The United States holds title to trust land only as trustee. *United States v. Roberts*, 185 F.3d 1125, 1132 (10th Cir. 1999).

Similarly, trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, 25 C.F.R. § 151.9 (1992), who must consider, among other things, the Indian's need for the land, 25 C.F.R. § 151.10(b), and the purposes for which the land will be used, 25 C.F.R. § 151.10(c). If the request is approved, the United States holds the land as trustee. 25 C.F.R. § 151.2(d). Thus, land is “validly set apart for the use of Indians as such” only if the federal government takes some action indicating that the land is designated for use by Indians. *United States v. Roberts*, 185 F.3d 1125, 1132 (10th Cir. 1999), citing *Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073, 1076 (10th Cir.1993).

Official declaration of reservation status is not necessary for property to be treated as Indian Country under 18 U.S.C. § 1151. *United States v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999), citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991). It is enough that the property has been validly set apart for the use of the

Indians, under federal superintendence. *Id.*

2. Plaintiff's Failure to Secure Its Mortgage Interest On Restricted Indian Land Allows Partial Summary Judgment To Be Granted for the United States

A. Subject Property Is Currently Held in Trust by the United States

Acts of Congress authorizing alienation of restricted Indian land must be construed in favor of the congressional policy to promote the welfare of the Indians as wards of the United States. *Begay v. Albers*, 721 F.2d 1274, 1280 (10th Cir. 1983) citing *Drummond v. United States*, 131 F.2d 568 (10th Cir. 1942).

25 U.S.C. § 348 specifically provides that upon allotments selected by the Indians (or the Secretary if an Indian so entitled fails to make a selection) effected under 25 U.S.C. § 332, and approved by the Secretary of the Interior, patents shall issue therefor in the names of the allottees which shall declare “[t]hat the United States does and will hold the land thus allotted, for the period of twenty-five years, *in trust for the sole use and benefit of the Indian to whom such allotment shall have been made ...* the President of the United States may in any case in his discretion extend the period.” [Emphasis supplied]. Thus, title to Indian lands is held in trust by the United States, *United States v. Sutton*, 215 U.S. 291, 30 S.Ct. 116, 54 L.Ed. 200 (1909), and restrictions on alienation remain until a patent is issued carrying full and unrestricted title. *Monson v. Simonson*, 231 U.S. 341, 34 S.Ct. 71, 58 L.Ed. 260 (1913). The purpose of 25 U.S.C. § 348, *supra*, was to render it impossible for an Indian allottee to sell, convey or in anywise encumber trust lands during the continuance of the trusteeship. We observe that the trust period of 25 years was extended indefinitely by virtue of 25 U.S.C. § 462 enacted in 1934.⁴

⁴ The Court further stated that under this statutory design, the United States is an indispensable party in any action determining a dispute arising over the possession of allotted land by virtue of its trust relationship and state courts do not have any jurisdiction over such disputes. *Begay v. Albers*, 721 F.2d 1274, 1279-1280 (10th Cir.1983), citing *McKay v. Kalyton*, 204 U.S. 458 (1907). Questions of ownership of fee title to an Indian allotment involves the application of federal law. *Begay*, 721 F.2d at 1280, citing *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979).

Begay v. Albers, 721 F.2d 1274, 1279-1280 (10th Cir.1983).

The Trust Patent issued February 14, 1974 (see **Exhibit 2, Trust Patent**) regarding the restricted Indian land at issue in this case, was extended by the United States Congress by the Indian Reorganization Act of 1934 which states:

25 U.S.C. § 462. Existing periods of trust and restrictions on alienation extended.

The existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 462 [emphasis added] and *see* Statement of Facts, No. 7.

Plaintiff attempts to foreclose on land that is held in trust by the United States.

B. Plaintiff's Mortgage on the Subject Real Property is Invalid Due to Failure to Obtain The Necessary Approval by the Secretary of Interior

Secretarial approval is required before placing an incumbrance on trust land, as in securing a mortgage, deed of trust, or other loan the security for which is the real property. *See* Approval of Mortgages and Deeds of Trust, 25 C.F.R. § 152.34 (2002). The real property in question is Indian restricted land that cannot be encumbered without the express consent of the United States. *See* 25 U.S.C. § 483(a).

Federal law allows an individual Indian land owner to execute a mortgage on trust land **only** with the approval of the Secretary of Interior. 25 U.S.C. 483(a) [emphasis added]. The Department of Interior records show no evidence of a mortgage or "Line of Credit" covering the property at issue, which has been approved as required by 25 U.S.C. § 483(a).

Exhibit 1, pgs. 1-2, ¶ 5, Declaration.

Since Plaintiff American General did not obtain prior approval from the Secretary, their attempt to foreclose the subject property held in trust should be deemed invalid,⁵ and the United States should be granted partial summary judgment invalidating Plaintiff's mortgage interest in the subject property.

CONCLUSION

The United States hereby requests that it be granted partial summary judgment, denying Plaintiff's asserted mortgage interest in the real property at issue in this case.

JOHN C. RICHTER
United States Attorney

s/ H. Lee Schmidt

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Attorney for Defendant United States of America

⁵ Records of the Department of Interior reveal **no** evidence that a mortgage or "Line of Credit" covering the property described in this lawsuit between George L. Kent and American General Financial Services has been approved by the Department of Interior as required by 25 U.S.C. § 483a. **Exhibit 1 ¶ 5, Declaration of Bruce Maytubby.**

CERTIFICATE OF SERVICE

x I hereby certify that on July 17, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a notice of Electronic Filing to the following ECF registrants:

Robert J. Bartz, Esq.
BARBER & BARTZ

Mark W. Kuehling, Esquire

x I hereby certify that on July 17, 2008, the attached document(s) was served by U.S. Mail on the following, who is not a registered participant on the ECF System:

Chad D. Burris, Esq.
DOERNER SAUNDERS DANIEL & ANDERSON
320 S. Boston Ave., Ste. 500
Tulsa, OK 74103
Tel: 918-749-7739

/s/ H. Lee Schmidt
Assistant U.S. Attorney

Exhibit Index:

Exhibit 1 - Declaration of Bruce Maytubby, Deputy Regional Director,
Southern Plains Region, Dept. of Interior

Exhibit 2 - Trust Patent

DECLARATION

I, Bruce Maytubby, Deputy Regional Director, Southern Plains Regional Office, Bureau of Indian Affairs, United States Department of the Interior, upon information and belief state that to the best of my knowledge, the following is true and correct.

1. The Southern Plains Regional Office is the principal administrative office in the State of Oklahoma regarding the government to government relationship between the United States and the Indians of the Otoe-Missouria Tribe of Oklahoma.

2. The Southern Plains Regional Office is the field administrative office with primary responsibility and jurisdiction over the administration of Department of the Interior programs within the Indian country of the Otoe-Missouria Tribe of Oklahoma, and the custodian of federal records that relate to, and are evidence of, lands held in trust by the United States for the Indians of the Otoe-Missouria Tribe of Oklahoma. 18 U.S.C. § 1151.

3. At my direction, the relevant records of the Department of the Interior were examined regarding the following described real property:

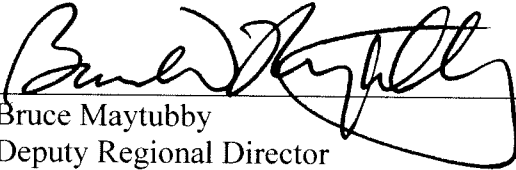
E/2 NE/4 NW/4 and E/2 W/2 NE/4 NW/4 and the E/2 W/2 W/2 NE/4 NW/4 all in Section 29, T-22-N, R-1-E, of the Indian Base and Meridian, Noble County, Oklahoma, a/k/a 14450 Old John Deere Road, Perry, Oklahoma.

4. The above-referenced examination of the relevant records of the Department of the Interior revealed that pursuant to Public Law No. 101-301, May 24, 1990, and 25 U.S.C. § 462, the above-described real property is held in trust by the United States for the benefit of the George L. Kent (811U005086), who is an heir or descendant of the original Otoe Allottee: Hettie Green, Otoe 811 375-C.

5. The above-referenced examination of the relevant records of the Department of the Interior also revealed no evidence that a mortgage or "Line of Credit" covering the described real property between the said George L. Kent and American General Financial Services (DE)

has been approved by the Department of the Interior as required by 25 U.S.C. §483a (or for that matter, any other federal statute).

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 30, 2008.


Bruce Maytubby
Deputy Regional Director
Southern Plains Regional Office, BIA

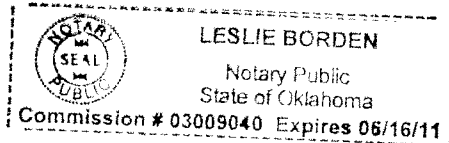
ACKNOWLEDGMENT

State of Oklahoma)
)
County of Caddo) ss.

Before me the undersigned, a Notary Public in and for said County and State on this 30th day of April, 2008, personally appeared Bruce Mayhobby, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

Leslie Borden
Notary Public



My Commission expires: 6/16/2011

Form 1860-8
(January 1965)
(formerly 4-1640)
New Mexico 20481
375 Otoe

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The United States of America, SOUTHWEST TITLE PLANT
INDIAN AFFAIRS
MEX

To all to whom these presents shall come, Greeting:

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, partitioning the allotment of Hattie Green, an Indian of the Otoe Tribe, and directing that, pursuant to the Act of May 18, 1916 (39 Stat. 123, 127), a trust patent issue to George L. Kent for the following described land:

Indian Meridian, Oklahoma.

T. 22 N., R. 1 E.,

Sec. 29, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$,
E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$.

Containing 35.00 acres;

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, hereby declares that it does and will hold the land above described for the period of twenty-five years in trust for the sole use and benefit of said Indian, George L. Kent, subject to all statutory provisions and restrictions as declared in the original trust patent covering the said land.

This patent shall not operate to extend the trust period declared in the patent for said land, dated August 30, 1900, as extended.

FILED

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NOBLE COUNTY, OKLA.
ETHEL D. GROOM, CO. CLK
Ethel D. Groom
CLERK



IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 478), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.