

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' REPLY TO PLAINTIFF'S RESPONSE

Defendant/Intervenor United States of America, respectfully submits its Reply to Plaintiff's Response to its Motion for Partial Summary Judgment.

A. Issues Asserted in Reply

The subject property was held in trust at the time the Plaintiff's mortgage was executed.¹ As asserted by the Secretary, the term of trust did not expire in 1999.

Plaintiff is not entitled to benefits and priorities of a previously existing mortgage. The doctrine of equitable subrogation is not applicable in this case and plaintiff is not entitled to benefits or rights of the prior mortgage holder.

B. Defendant's Reply to Plaintiff's Response to Statement of Uncontroverted Facts

Defendant replies to plaintiff's response as follows:

Paragraph 1. Plaintiff's claim that Defendant produced no evidence, other than the

¹ Pursuant to Congress extending the trust period indefinitely, 25 U.S.C. Sections 462 and 478-1.

Trust Deed² that George L. Kent is an Indian or that he is an heir or decedent of the original Otoe Allottee, Hettie Green is inaccurate. Defendant's factual assertion in paragraph 1 is supported by a sworn statement by the Deputy Regional Director for the Southern Plains Regional Office, Bureau of Indian Affairs, U.S. Dept. of Interior, who states that the property at issue is held in trust for the benefit of George L. Kent (811U005086), who is an **heir or descendant** of the original Otoe Allottee: Hettie Green, Otoe 811 375-C. See Partial Motion for Summary Judgment [Dkt. #11] Exhibit 1, pg. 1, paragraph 4 (Bruce Maytubby's Declaration). Defendant George Kent is named in the Trust Deed an heir or descendant of the original Otoe Allottee: Hettie Green. At any rate, although the Trust Deed states that the property is held in trust "for the sole use and benefit of said Indian, George L. Kent", his individual status as an American Indian is not at issue in this lawsuit since the restrictions on mortgaging Indian trust land, by their plain language, follow the property.

Paragraph 2. Defendant disputes plaintiff's allegation that the trust expired in 1999, as the trust period for allotments was extended indefinitely by Congress in 1990 by 25 U.S.C. Sections 462 and 478-1.

Paragraphs 5, 7, 8. Again, Defendant asserts that the property is held in trust by the United States.

Plaintiff's "IV. Statement of Facts in Controversy" are not fact issues, but are

² Exhibit A to Plaintiff's Response [Dkt. No. 20].

questions of law which can be resolved without discovery or trial. [*See* Plaintiff's Response at pg. 3, Dkt. No. 20].

Argument and Authority

C. Plaintiff's Mortgage is Invalid

Allotment describes either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment).³ Congress codified a Supreme Court finding in 1948, defining Indian country to include "trust" and "restricted" allotments, and setting out that both types of allotments receive the same legal treatment for purposes of Indian country jurisdiction.⁴

Allotments are subject to federal restraints on encumbrance and alienation. The restrictions are not personal to the allottee, but generally run with the land to the allottee's Indian Heirs or devisees. *Bowling v. United States*, 233 U.S. 528, 535-536 (1914).

A restriction placed on Indian property by the government can only be lifted by action of the government. *United States v. Taunah*, 583 F.Supp. 1128, 1131 (Okla. 1983).⁵ Government restrictions run with the land and are not terminated by death.

³ Cohen's Handbook of Federal Indian Law 2005 Ed., Section 16.03 Allotments, pg. 1039.

⁴ *West v. Okla. Tax Comm'n*, 334 U.S. 717, 723-727 (1948) (Court renounced distinction between trust and restricted allotments).

⁵ Case reversed and remanded on different point of law, *see United States v. Taunah*, 730 F.2d 1360 (10th Cir.1984).

United States v. Taunah, 583 F.Supp. 1128, 1131 (Okla. 1983), citing *Board of Comm'rs v. Seber*, 318 U.S. 705, n. 3 at page 708, 63 S.Ct. 920, 922, 87 L.Ed. 1094 (1943), *Couch v. Udall*, 404 F.2d 97 (10th Cir.1968). “A reviewing federal court will not ordinarily overturn discretionary matters within the Secretary's area of administration.” *Udall v. Taunah*, 398 F.2d 795 (10th Cir. 1968) (Court upheld Secretary’s refusal to remove restrictions on allotted Indian land held by tribal members who were Mexican nationals). In *Udah*, the Secretary's refusal was found to be, “neither arbitrary nor capricious; the Congressional trust imposed upon the land in question is for the benefit of the Indians herein involved and the restriction is a covenant **which runs with the land.**” *Couch v. Udall*, 404 F.2d 97, 100 (10th Cir. 1968) (emphasis added).

Restrictions exist on the property at issue in this case. The extension granted by Congress in 1990, applies to the subject property in this case.⁶ Plaintiff’s mortgage is invalid, based on their failure to obtain the Secretary’s approval prior to executing their mortgage.

D. Plaintiff is Not Entitled to Benefits and Priority of Prior Mortgage

1. Plaintiff Alleges No Fraud or Misrepresentation in Execution of Mortgage

Equitable subrogation does not apply to this case. Plaintiff’s Response Brief at pg. 6 cites to *Metropolitan Life Ins. Co. v. Craven*, 164 Or. 274, 281, 101 P.2d 237, 240 (Or.

⁶ See 25 U.S.C. Sections 462 (1934) and 478-1 (1990).

1940), a case where **misrepresentation** was made by the owner of the property to the mortgagor that there was no junior lien. *Metropolitan Life Ins. Co. v. Craven*, 164 Or. 274, 283, 101 P.2d 237, 241 (Or. 1940) (emphasis added). The Court specifically noted that the plaintiff (mortgagor) was not lacking in diligence, and that the mistake made by plaintiff was in a large part induced by the owner's misrepresentation. *Id.*, 101 P.2d at 240.

Nothing in the case at bar was misrepresented to Plaintiff. Plaintiff admits it did not obtain approval from the Secretary⁷ and presents no basis for excusable neglect or ignorance. Clearly, plaintiff was aware of the prior mortgage and as such had notice of the approval requirements (by virtue of the Secretary's approval of the prior FHA mortgage). Equitable subrogation is not applicable to the case before the Court.⁸

2. Plaintiff's Case Citations Are Not Analogous To Case At Bar

Plaintiff cites cases that are not analogous to the case before the Court. Plaintiff's case cited on pg. 6, paragraph 2 of its Response, *G.E. Capital v. Levenson*, 657 A.2d 1170 (Md. 1995), is neither an Oklahoma or Indian case and deals specifically with a "new mortgage" which was presumably valid. Plaintiff's mortgage at issue here was not approved by the Department of Interior and is not valid. To allow a subsequent mortgage

⁷ Plaintiff's Response Brief, pg. 3, paragraph 6 [Dkt. No. 20].

⁸ Plaintiff's argument for equitable subrogation also cites cases which presume the mortgagor obtained a legally valid new mortgage. These cases are not relevant, as plaintiff lacks a valid mortgage.

holder to avoid the approval requirements through a subrogation agreement would defeat the whole purpose of Indian land trust status and the mortgage approval requirement.

Plaintiff's other cited cases deal with mortgage priority cases, not mortgage validity cases. None of plaintiff's cases address issues regarding Indian trust land and the necessary approvals of mortgages covering this type of property. On the other hand, Congress has spoken on this issue and plaintiff's attempt to "end run" Congress's extension of trust status via the doctrine of equitable subrogation should be denied.

Conclusion

Plaintiff's mortgage on the subject property is invalid. Any attempt to foreclose the trust property should be denied. Defendant's Motion for Partial Summary Judgment should be granted.

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CERTIFICATE OF SERVICE

 x I hereby certify that on Sept. 16, 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

Chad D. Burris, Esq.
DOERNER SAUNDERS DANIEL & ANDERSON

 I hereby certify that on Sept. 16, 2008, the attached document(s) were served by U.S. Mail on the following, who are not registered participants on the ECF System:

None

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