

(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
Land Court  
Department of the Trial Court  
02 MISC 278920 (AHS)

WASHINGTON MUTUAL BANK, F.A.,  
Plaintiff,

vs.

JOHN L. SPENCER, TRUSTEE OF ROCKLAND LOAN SERVICE TRUST,  
u/d/t dated February 17, 1995,  
Defendant.

**ORDER**

On February 25, 2002, Washington Mutual Bank, F.A., ("Plaintiff") filed its Verified Complaint, seeking a determination that Plaintiff, mortgagee under a third mortgage (the "Washington Mutual Mortgage") is entitled to be equitably subrogated to the position of a first mortgage granted to Sentry Federal Savings Bank (Sentry) in the amount of \$113,649.39 (the "Sentry Mortgage") on property located at 19 Edith Holmes Drive, Scituate, Plymouth County, Massachusetts (the "Property"), as a result of payments made by Plaintiff in full satisfaction of the Sentry Mortgage.<sup>1 2</sup> Plaintiff further requested that this court order John L. Spencer, Trustee of Rockland Loan Service Trust ("Defendant"),<sup>3</sup> which is the present holder of a second

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<sup>1</sup> On August 11, 2000, Norman Fougere, Sr. and his wife Janet J. Fougere (the "Fougeres") granted a mortgage (the Washington Mutual Mortgage) on the Property to Plaintiff to secure a loan of \$242,250. The Washington Mutual Mortgage was recorded with the Registry in Book 18788 at Page 304. The Sentry Mortgage was discharged for the sum of \$113,649.39 from the closing proceeds. The closing attorney did not discover the Rockland Trust Mortgage.

<sup>2</sup> Washington Mutual Bank, F.A. has subsequently assigned the Washington Mutual Mortgage to JPMorgan Chase Bank, National Association.

<sup>3</sup> On August 9, 2002, Defendant filed its Motion to Substitute Norman R. Fougere, Jr., for John L. Spencer as Trustee of Rockland Loan Service Trust, which was allowed on August 15, 2002.

mortgage on the Property granted to the Rockland Trust Company (the "Rockland Trust Mortgage"), to make a full and complete accounting of all amounts owed on the Rockland Trust Mortgage, and enjoin Defendant from exercising its statutory power of sale under the Rockland Trust Mortgage.

The parties filed cross-motions for summary judgment. A hearing on both motions was held on November 4, 2005, and this court issued a Decision and Judgment on December 11, 2006. The Judgment was appealed by both parties but both appeals were withdrawn. One of the findings in the Decision was as follows:

I find that Plaintiff holds a first priority mortgage in the amount of \$113,649.39, which amount was paid to discharge the Sentry Mortgage, reduced by any subsequent payments made by the Fougères to Plaintiff since the mortgage was discharged on August 11, 2000, with each payment to be applied first to the interest due on the principal balance owed at the time of discharge (or the reduced balance after each payment), and the remainder to the reduction of the principal balance.<sup>4,5</sup>

The Fougères made payments to Plaintiff from October 2000 to October 2009 of varying amounts as shown on Schedule A (supplied by Defendant) attached to this Order.<sup>6</sup> The remaining issue is the allocation of these payments between the Sentry Mortgage and the Washington Mutual Mortgage.

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<sup>4</sup> The summary judgment record does not contain sufficient information concerning subsequent payments made by the Fougères to Plaintiff to make a more specific finding as to the amount the \$113,649.39 principal balance at the time of discharge has been reduced.

<sup>5</sup> Plaintiff should apply any amounts received from the Fougères to reduce the amount of the subrogated mortgage to the same extent as if the Sentry Mortgage had not been discharged and Sentry Federal Savings Bank were collecting the payments itself. In other words, the amounts allocated between interest and principal should be applied to reduce the outstanding balance of the subrogated mortgage in accordance with the amortization schedule for a \$135,000.00 loan over 30 years at the interest rate of 8.75% per annum.

<sup>6</sup> There is no dispute between the parties as to these payments.

Defendant filed a Complaint for Contempt on September 21, 2010, stating that Plaintiff had made improper allocation of the mortgage payments made by the Fougères. On December 15, 2010, both parties filed their memorandum relative to the Complaint for Contempt. Plaintiff filed a reply on December 31, 2010, and at that time the matter was taken under advisement.

Defendant argues that the Judgment requires Plaintiff to apply all payments received from the Fougères to reduce the Sentry Mortgage before applying any payments to the Washington Mutual Mortgage. Plaintiff argues that the Judgment requires it to apply payments to the Sentry Mortgage based on the amortization schedule for that loan, i.e. payments on the loan over a thirty year period at a rate of 8.75% (which totals \$1,062.05 per month), and apply the balance of the Fougères' monthly payments to the Washington Mutual Mortgage. Under Defendant's theory, the Sentry Mortgage would have been paid off in October 2008, and the Rockland Trust Mortgage would now be the first mortgage of record. Under Plaintiff's theory, the Sentry Mortgage has not been fully paid down yet, leaving it as the first mortgage of record.

The Judgment language requires that "each payment [since 2000] to be applied first to the interest due on the principal balance owed at the time of discharge (or the reduced balance after each payment), and the remainder to the reduction of the principal balance." A related footnote states that the payments should be applied "to the same extent as if the Sentry Mortgage had not been discharged and Sentry Federal Savings Bank were collecting the payments itself."

The underlying purpose of the doctrine of equitable subrogation is to guard "against the unjust enrichment of either party by granting to the later mortgagee the priority status intended by the parties to that transaction, only so long as the interests of the intervening mortgagee are not prejudiced." East Boston Savings Bank v. Ogan, 428 Mass 327, 329 (1998). "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 against unjust enrichment.”

East Boston Savings Bank, 428 Mass. App. Ct. at 330 (quoting Restatement (Third) of Property (Mortgages) Section 7.6(a).

Courts have often exercised the doctrine of equitable subrogation to guard against unjust enrichment to junior lienholders. Plaintiff has been collecting and applying the Fougères' monthly payments pursuant to the terms of the loan agreement Plaintiff has with the Fougères. Plaintiff has been applying \$1,062.05 to the principal and interest of the Sentry Mortgage according to the amortization schedule of the Sentry Mortgage, and applying the residual balance to the third priority Washington Mutual Mortgage. Applying the monthly payments due Plaintiff in this manner is consistent with Defendant's expectation as a junior lienholder. Defendant is in the exact same position as it was when it initially made its loan to the Fougères and took a junior security interest in the Property. If the Sentry Mortgage had never been paid off and Sentry was collecting payments on its own behalf, Sentry would only require that the Fougères pay monthly payments of \$1,062.05, pursuant to the amortization schedule, the exact figure that Plaintiff has been applying to the Sentry Mortgage. Such application of the Fougères' monthly payments is consistent with Defendant's expectation of when the Sentry Mortgage would be paid off and discharged, and consequentially when Defendant would become first mortgagee of record.

Defendant asks the court to order Plaintiff to apply the monthly payment due Plaintiff to interest due under the Sentry Mortgage and then the entire residual balance of the monthly payment to the principal of the Sentry Mortgage. Applying the residual balance of these monthly payments to the principal of the Sentry Mortgage would accelerate the payoff thereof. By

accelerating the payoff of the Sentry Mortgage, Defendant would become first mortgagee of record faster than it would have if Plaintiff never refinanced the Sentry Mortgage and never became subrogee to first position.<sup>7</sup> Under Defendant's payment application method, Defendant would hasten its ascent to first position, which it otherwise would not have achieved so quickly. As such, Defendant is asking this court to unjustly enrich Defendant because of Plaintiff's negligence in not discovering the Rockland Trust Mortgage. See Provident Co-Operative Bank v. Talcott, 358 Mass. 180, 186 (1970) (allowing subrogation to prevent junior lienholder from being unexpected beneficiary in priority resulting from subrogee's 'innocent unfortunate neglect'). This unjust enrichment which Defendant seeks is the exact outcome which the doctrine of equitable subrogation guards against.

As a result of the foregoing, I ORDER that each monthly payment from the Fougères to Plaintiff since October of 2000 shall be applied as follows:

1. \$1,062.05 to be applied to the Sentry Mortgage with each payment to be applied first to the interest due on the principal balance owed at the time of discharge of the Sentry Mortgage (or the reduced balance after each payment), and the remainder to the reduction of the principal balance of the Sentry Mortgage.
2. The residual amount of each monthly payment made to Plaintiff to be applied to the Washington Mutual Mortgage with each payment to be applied first to the interest due on the principal balance of the Washington Mutual Mortgage owed at the time of discharge of the

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<sup>7</sup> The parties stipulate that if the entire payment under the Washington Mutual Mortgage was applied to the Sentry Mortgage, then the obligation due Plaintiff under the Sentry Mortgage would be satisfied. Plaintiff, however, has been applying \$1,062.05 per month of the total payment pursuant to the amortization schedule under the initial Sentry Mortgage. Under this amortization schedule the Sentry Mortgage obligation would not yet be satisfied.

Sentry Mortgage (or the reduced balance after each payment), and the remainder to the reduction of the principal balance of the Washington Mutual Mortgage.

As a result of the foregoing, I do not find Plaintiff in contempt of the Judgment, and no fees will be assessed.

So ordered.

ATS  
By the court (Sands, J.)

Attest:

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Deborah J. Patterson  
Recorder

Dated: February 17, 2011

A TRUE COPY  
ATTEST:

Deborah J. Patterson  
RECORDER

## SCHEDULE A

### TOTAL PAYMENTS (Inclusive of P.I. Escrows)

October, 2000 – October 2009

Per the terms of the note executed in connection with the Washington Mutual mortgage, the monthly payment became adjustable on a monthly basis on 9/1/05. The new interest rate was determined by adding 2.6% to the current index. The index was the 12 Month Average of the annual yields on United States Treasury Securities.

The principal and interest payment due for each of the first 60 months was \$1,798.70.

Payments were made in the following manner:

- 2000: Three timely payments of \$2,086.72.
- 2001: Seven timely payments of \$2,086.72 and five timely payments of \$2,181.82.
- 2002: Seven timely payments of \$2,181.82 and five timely payments of \$2,144.51.
- 2003: Seven timely payments of \$2,144.51 and five timely payments of \$2,182.19.
- 2004: Seven timely payments of \$2,182.19 and five timely payments of \$2,215.60.
- 2005: Seven timely payments of \$2,215.60, two timely payments of \$2,186.72, and three timely payments of \$1,789.53.
- 2006: Seven timely payments of \$1,798.53, two timely payments of \$1,765.83, one timely payment of \$1,589.73, one timely payment of \$1,588.89 and one timely payment of \$1,588.05.
- 2007: Timely payments of \$1,587.21, \$1,586.36, \$1,585.50, \$1,584.65, \$1,583.78, two timely payments of \$1,582.91 and five timely payments of \$1,658.04.
- 2008: Seven timely payments of \$1,658.04 and five timely payments of \$1,678.69.
- 2009: Seven timely payments of \$1,678.69 and three timely payments of \$1,669.60.
- 2010: The last payment appears to have been made in October of 2009.