

95 A.D.3d 889, 943 N.Y.S.2d 558, 2012 N.Y. Slip Op. 03449
(Cite as: **95 A.D.3d 889, 943 N.Y.S.2d 558**)

H

Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Lillian HILL, deceased.
Marcia Fitzsimmons, petitioner-respondent;
Mortgage Electronic Registration Systems, Inc., appellant, et al., respondent.

May 1, 2012.

Background: In a turnover proceeding to recover real property, mortgager holder appealed from an order of the Surrogate's Court, Queens County, Kelly, S., denying its motion for summary judgment.

Holding: The Supreme Court, Appellate Division, held that fact issue as to whether mortgage holder had knowledge of facts that would have excited suspicion of ordinarily prudent person and failed to make any investigation precluded summary judgment.

Affirmed.

West Headnotes

[1] Judgment 228 ↪ 181(15.1)

[228](#) Judgment

[228V](#) On Motion or Summary Proceeding

[228k181](#) Grounds for Summary Judgment

[228k181\(15\)](#) Particular Cases

[228k181\(15.1\)](#) k. In general. [Most Cited](#)

[Cases](#)

Judgment 228 ↪ 181(25)

[228](#) Judgment

[228V](#) On Motion or Summary Proceeding

[228k181](#) Grounds for Summary Judgment

[228k181\(15\)](#) Particular Cases

[228k181\(25\)](#) k. Mortgages and secured transactions, cases involving. [Most Cited Cases](#)

Genuine issue of material fact existed as to whether mortgage holder had knowledge of facts that

would have excited suspicion of ordinarily prudent person and failed to make any investigation, precluding summary judgment in turnover proceeding to recover real property. [McKinney's SCPA 2101 et seq.](#)

[2] Liens 239 ↪ 12

[239](#) Liens

[239k12](#) k. Priorities. [Most Cited Cases](#)

Secured Transactions 349A ↪ 138

[349A](#) Secured Transactions

[349AIII](#) Construction and Operation

[349AIII\(B\)](#) Rights as to Third Parties and Priorities

[349Ak138](#) k. Priorities in general. [Most Cited Cases](#)

Vendor and Purchaser 400 ↪ 229(1)

[400](#) Vendor and Purchaser

[400V](#) Rights and Liabilities of Parties

[400V\(C\)](#) Bona Fide Purchasers

[400k225](#) Notice

[400k229](#) Constructive Notice, and Facts Putting on Inquiry

[400k229\(1\)](#) k. In general. [Most Cited Cases](#)

If a purchaser or encumbrancer knows facts that would excite the suspicion of an ordinarily prudent person and fails to investigate, the purchaser or encumbrancer will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed.

[3] Mortgages 266 ↪ 154(2)

[266](#) Mortgages

[266III](#) Construction and Operation

[266III\(D\)](#) Lien and Priority

[266k152](#) Mortgagees as Bona Fide Purchasers

[266k154](#) Notice

[266k154\(2\)](#) k. Constructive notice

95 A.D.3d 889, 943 N.Y.S.2d 558, 2012 N.Y. Slip Op. 03449
(Cite as: **95 A.D.3d 889, 943 N.Y.S.2d 558**)

and facts putting on inquiry. [Most Cited Cases](#)

Mortgagee who knows facts that would excite the suspicion of an ordinarily prudent person and fails to investigate will not be considered a bona fide encumbrancer for value.

*558 Butler, Fitzgerald, **Fiveson** & McCarthy, New York, N.Y. ([David K. Fiveson](#) and [Mark J. Krueger](#) of counsel), for appellant.

Marcia Fitzsimmons, New Windsor, N.Y., petitioner-respondent pro se.

[WILLIAM F. MASTRO](#), A.P.J., [RUTH C. BALKIN](#), [SANDRA L. SGROI](#), and [JEFFREY A. COHEN](#), JJ.

In a turnover proceeding pursuant to SCPA article 21, inter alia, to recover real property, Mortgage Electronic Registration Systems, Inc., appeals from an order of the Surrogate's Court, Queens County (Kelly, S.), dated April 12, 2011, which denied that branch of its motion which was for summary judgment dismissing the petition insofar as asserted against it.

ORDERED that the order is affirmed, with costs.

This appeal involves real property in Queens which was previously owned by the decedent, Lillian Hill. The petitioner, Marcia Fitzsimmons, and the respondent Brenda Watson are the surviving children of the decedent. Watson allegedly improperly obtained sole title to the subject property. In her petition, Fitzsimmons seeks, inter alia, to direct Watson to turn over the property. The petition also named as a respondent Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), which holds a mortgage on the property in *559 connection with a \$215,000 loan made to Watson in September 2009. MERS moved, inter alia, for summary judgment dismissing the petition insofar as asserted against it on the basis that it was a bona fide encumbrancer for value. The Surrogate's Court denied the motion.

[\[1\]\[2\]\[3\]](#) “[I]f a purchaser or encumbrancer knows facts that would ‘excite the suspicion of an ordinarily prudent person’ and fails to investigate, the purchaser or encumbrancer will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed” ([Booth v.](#)

[Ameriquest Mtge. Co.](#), 63 A.D.3d 769, 769, 881 N.Y.S.2d 152, quoting [Anderson v. Blood](#), 152 N.Y. 285, 293, 46 N.E. 493). A mortgagee who does not make such inquiry will not be considered a bona fide encumbrancer for value (see [Vitale v. Pinto](#), 118 A.D.2d 774, 500 N.Y.S.2d 283). Here, MERS submitted documentary evidence in support of its motion for summary judgment which established its prima facie entitlement to judgment as a matter of law (see generally [Leandre v. Sharperson](#), 96 A.D.2d 883, 466 N.Y.S.2d 38). However, in opposition thereto, the petitioner raised a triable issue of fact as to whether MERS had knowledge of facts of such nature that would have “excit[ed] the suspicion of an ordinarily prudent person” ([Anderson v. Blood](#), 152 N.Y. at 293, 46 N.E. 493), and yet failed to make any investigation. Therefore, that branch of MERS's motion which was for summary judgment dismissing the petition insofar as asserted against it was properly denied (see [Booth v. Ameriquest Mtge. Co.](#), 63 A.D.3d 769, 881 N.Y.S.2d 152; see generally [Alvarez v. Prospect Hosp.](#), 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572).

N.Y.A.D. 2 Dept., 2012.

In re Hill

95 A.D.3d 889, 943 N.Y.S.2d 558, 2012 N.Y. Slip Op. 03449

END OF DOCUMENT