32 Misc.3d 1243(A), 938 N.Y.S.2d 226, 2011 WL 4346679 (N.Y.Sur.), 2011 N.Y. Slip Op. 51693(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 32 Misc.3d 1243(A), 2011 WL 4346679 (N.Y.Sur.))

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Surrogate's Court, Queens County, New York.
In the Matter of the Application of Marcia FITZ-SIMMONS, as Preliminary Executor of the Estate of Lillian Hill, Deceased.

Aug. 10, 2011.

Marcia Fitzsimmons, Petitioner, Pro Se.

David K. **Fiveson**, Esq., Butler, Fitzgerald, **Fiveson** & McCarthy, P .C., for Respondent MERS, Inc.

Constantine A. Despotakis, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, for Respondent Bank of America, N.A.

Jack L. Glasser, Esq., Jack L. Glasser, P.C., for Respondent Brenda Watson.

PETER J. KELLY, J.

***1** Decedent, Lillian Hill, executed a Last Will and Testament dated February 3, 2003 devising her real property to her two daughters, petitioner Marcia Fitzsimmons (hereinafter Marcia) and respondent Brenda Watson (hereinafter Brenda), in equal shares, subject to a life estate to Brenda.

At the time of the making of her Will, decedent also executed a durable general power of attorney appointing Brenda as her attorney-in-fact, with Marcia as an alternate in the event Brenda was unable or unwilling to serve. The power of attorney also authorized the attorney-in-fact to make gifts, including gifts to herself.

On April 21, 2008, Brenda, as attorney-in-fact, executed a deed transferring decedent's real property located at 31–28 Dwight Avenue, Far Rockaway, New York to herself. The deed and power of attorney were recorded on May 8, 2008. On July 29, 2008, Lillian Hill died; and her Will was admitted to probate on May 5, 2009.

Approximately eight months after decedent's death, on January 22, 2009 Brenda obtained a loan from United Northern Mortgage Bankers, Ltd. in the sum of $101,750.00, secured by a mortgage on the subject premises.

Subsequently on April 20, 2009 petitioner, as preliminary executor of decedent's estate, commenced the instant SCPA Article 21 proceeding against Brenda seeking the discovery and turnover of estate assets, including the subject real property and the proceeds of the United Northern mortgage. Petitioner filed an amended petition two months later limiting her request to the turnover by Brenda of the real property unencumbered by the mortgage, and any rents Brenda had collected.

Brenda filed a verified answer wherein she alleges that she obtained title to the subject real property “with the full consent and authority of the decedent” pursuant to the valid power of attorney for the “valid consideration of love and affection.” Essentially, Brenda claims the real property was a gift to her and that she acted as donor and donee.

During the pendency of the instant proceeding, on September 23, 2009 Brenda refinanced the property with a mortgage from Fleet National Bank, respondent Bank of America's predecessor in interest, in the sum of $215,000.00. This mortgage was recorded on December 18, 2009.

Petitioner was given leave to further amend the petition, and a verified second amended petition was filed naming Bank of America and MERS, Bank of America's nominee, as additional respondents. The verified second amended petition alleges that Brenda lacked authority to transfer the property to herself and that Brenda deceived Lillian Hill when she transferred the property to herself. It de-

mands the turnover of the real property free from the conveyance to Brenda and the mortgages; the cancellation and discharge of record of the deed and mortgages; and the turnover from Bank of America of the sum of $79,403.40, representing alleged unauthorized checks and transfers made by Brenda between February, 2004 and September, 2008 from the decedent's bank accounts with Bank of America.

***2** Respondent Bank of America filed an answer with a counterclaim against Marcia and cross-claims against Brenda. It now moves for summary judgment dismissing the petition asserted against it and for judgment on its counterclaim. Petitioner Marcia cross-moves for summary judgment on her claims for turnover against respondent Bank of America, for dismissal of Bank of America's answer, and for sanctions.

Summary judgment will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Andre v. Pomeroy,* 35 N.Y.2d 361, 362 N.Y.S.2d 131, 320 N.E.2d 853). The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York University,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718). Once a party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572).

In deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference that can be drawn from the evidence (*Negri v. Stop & Shop, Inc.,* 65 N.Y.2d 625, 491 N.Y.S.2d 151, 480 N.E.2d 740). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Freese v. Schwartz,* 203 A.D.2d 513, 611 N.Y.S.2d 37).

With respect to the branch of Bank of America's motion for summary judgment dismissing that part of the petition which requests cancellation and discharge of the mortgage loan against the property, Bank of America contends that the power of attorney and deed recorded on May 8, 2008 establish that Brenda had the authority to make the mortgage loan transaction, and thus, the mortgage is valid and enforceable.

Contrary to respondent's contention, the issue of whether the mortgage is valid and enforceable is not determined by whether the power of attorney and deed were duly recorded. Rather, the issue of whether the mortgage is valid and enforceable is determined by whether the deed is valid. A deed that is obtained by forgery or false pretenses is void *ab initio,* and a mortgage based upon such a deed is likewise invalid (*see First Nat. Bank of Nevada v. Williams,* 74 A.D.3d 740, 904 N.Y.S.2d 707; *GMAC Mortgage Corp. v. Chan,* 56 A.D.3d 521, 867 N.Y.S.2d 204; *Cruz v. Cruz,* 37 A.D.3d 754, 832 N.Y.S.2d 217). If the documents purportedly conveying a property interest are void, they convey nothing, and a subsequent bona fide encumbrancer for value receives nothing (*see First Nat. Bank of Nevada v. Williams,* 74 A.D.3d 740, 742, 904 N.Y.S.2d 707).

In contrast, a deed transferred by fraud on the part of the grantee of the property is voidable, not void (*see JP Morgan Chase Bank v. Kalpakis,* 30 Misc.3d 1236); and the issue of fraudulent intent by the grantee is an issue of fact, not an issue of law (Real Property Law § 265).

***3** Therefore, since the branch of the motion seeking cancellation and discharge of the mortgage against the property is determined by whether the

deed transfer to Brenda is void *ab initio*, voidable, or otherwise a valid gift, the mere fact that a deed and power of attorney were recorded does not establish Bank of America's prima facie entitlement to summary judgment as a matter of law.

Bank of America further contends that it should be granted summary judgment dismissing that part of the petition requesting the cancellation and discharge of the mortgage loan against the property because it is a protected third party, i.e., a bona fide encumbrancer for value.

A bona fide purchaser or encumbrancer for value is protected in its title unless the deed is void and conveys no title (*see Marden v. Dorthy*, 160 N.Y. 39, 54 N.E. 726; *Yin Wu v. Wu*, 288 A.D.2d 104, 733 N.Y.S.2d 45); or it had previous notice of the alleged fraud (Real Property Law § 266; *see Anderson v. Blood*, 152 N.Y. 285, 46 N.E. 493; *Karan v. Hoskins*, 22 A.D.3d 638, 803 N.Y.S.2d 666); or it had knowledge of facts or circumstances that would have lead a reasonably prudent person to make inquiry into a possible defect of title (*see Anderson v. Blood*, 152 N.Y. 285, 293, 46 N.E. 493; *Royce v. Rymkevitch*, 29 A.D.2d 1029, 289 N.Y.S.2d 598).

Based upon the salient facts, it is clear Bank of America had knowledge of facts and circumstances that would have lead a reasonably prudent person to make inquiry into a possible defect of title. Bank of America establishes it had by submission of such knowledge an affidavit of its employee who asserts that Brenda had provided it with the power of attorney prior to it issuing the mortgage, that the power of attorney authorized Brenda to make gifts, including gifts to herself, and that Bank of America relied upon the power of attorney.

Initially it is not clear to the Court how, or why, Bank of America relied upon the power of attorney herein since its grantor, Lillian Hill, was already deceased when the mortgage was issued and since Brenda was already the record owner of the property pursuant to a previously recorded deed. In any event, the deed could only have been transferred by Brenda to herself, as a gift, to the extent it was in the best interests of the principal (*see Matter of Ferrara*, 7 N.Y.3d 244, 254, 819 N.Y.S.2d 215, 852 N.E.2d 138; *In re Audrey Carlson Revokable Trust*, 59 A.D.3d 538, 540, 873 N.Y.S.2d 669); and Brenda's gifting of the property to herself via the power of attorney carried with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with "the clearest showing of intent" on the part of the principal to make a gift (*In re Audrey Carlson Revokable Trust*, 59 A.D.3d 538, 540, 873 N.Y.S.2d 669; *Semmler v. Naples*, 166 A.D.2d 751, 752, 563 N.Y.S.2d 116; *Mantella v. Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715).

Seemingly, although it had knowledge of facts or circumstances that would have lead a reasonably prudent person to make inquiry into a possible defect of title, it appears from the papers submitted that Bank of America did not make even a rudimentary inquiry into possible defects in title. No evidence has been presented that Bank of America ordered a title report, or determined whether any exceptions to title existed, or requested a contemporaneous affidavit from Brenda stating that the power of attorney recorded was in effect at the time the deed was executed (General Obligations Law § 5–1504[5]), or investigated whether the deed transfer was in the best interest of the principal, or, most egregiously, even bothered to investigate the facts of the instant proceeding in which a notice of pendency had been filed by petitioner on February 6, 2009 and in which Bank of America had already been served with a motion for issuance of a judicial subpoena on May 7, 2009.

***4** Bank of America therefore has failed to make a prima facie showing of its entitlement to summary judgment as a matter of law dismissing the part of the petition seeking cancellation and discharge of the mortgage loan as against the estate. Accordingly, that branch of its motion is denied.

With respect to the branch of Bank of America's motion for summary judgment on its counter-

claim seeking indemnification from petitioner and the estate for claims arising out of the mortgage transaction, Bank of America contends it is entitled to indemnification because it relied upon the indemnification clause contained in the power of attorney when it issued the mortgage, and that it did not receive notice that the power of attorney had terminated, as required by General Obligations Law § 5–1511(5), prior to issuance of the mortgage on September 23, 2009. General Obligations Law § 5–1511(5) provides that:

> Termination of an agent's authority or of the power of attorney is not effective as to any third party who has not received actual notice of the termination and acts in good faith under the power of attorney ... A financial institution is deemed to have actual notice after it has had a reasonable opportunity to act on a written notice of the revocation or termination ...

As previously stated, it is not clear to the Court on the papers presented how, or even why, Bank of America relied upon the power of attorney in making its decision to issue the mortgage. The power of attorney had previously terminated, by operation of law, upon Lillian Hill's death on July 29, 2008 (General Obligations Law § 5–1511[1][a]), and Brenda was already the record owner of the property pursuant to a deed at the time in question. While Bank of America argues that it did not receive notice of the termination as required by General Obligations Law § 5–1511(5), they, in fact, did receive actual notice of Lillian Hill's death at least as early as May 7, 2009, when petitioner served it with a motion for a judicial subpoena duces tecum in this proceeding. Those moving papers alerted respondent to the fact that decedent had died, and that a discovery proceeding had been commenced against Brenda regarding decedent's assets including certain bank accounts and the real property located at 31–28 Dwight Avenue, Far Rockaway, New York. Under these circumstances, it is difficult to fathom how Bank of America can claim it did not have actual notice of the termination of the power of attorney.

Accordingly, the branch of Bank of America's motion for summary judgment on its counterclaim seeking indemnification from petitioner and the estate for claims arising out of the mortgage transaction is denied, and the branch of petitioner's cross motion for summary judgment dismissing respondent's counterclaim for indemnification is granted.

With respect to the branch of petitioner's cross-motion against Bank of America seeking the turnover of the real property free from the conveyance and mortgage, petitioner contends that the deed is void because Brenda had no authority to act as agent for the decedent. Petitioner alleges that Brenda resigned her authority under the power of attorney, which was used to record the deed, in a letter four years earlier on March 26, 2004. Petitioner submits a copy of this letter, allegedly signed by Brenda, which reads:

***5** "To Whom It May Concern:

> With regards to the Durable Power of Attorney dated February 3, 2003, (granted to me by my mother, Lillian Hill), I, Brenda Watson, am currently unable to act as Power of Attorney for Lillian Hill. As per the agreement, my sister, Marcia Fitzsimmons will act as Power of Attorney, effective immediately."

In order to establish an effective resignation, however, there must be evidence that Brenda gave notice of her resignation to Lillian Hill or, if Lillian Hill was incapacitated at that time, to a government agency authorized to protect her welfare (General Obligations Law § 5–1505[3]). Since there is no evidence submitted that Brenda did this, the letter dated March 26, 2004 can not be deemed a resignation of the power of attorney. In addition, there is no evidence in these papers that the power of attorney was otherwise terminated in a manner proscribed by General Obligations Law § 5–1511 prior to decedent's death.

Petitioner further contends that Brenda should be compelled to turn over the subject real estate to petitioner free from the conveyance and the mortgage since Brenda was only authorized to make gifts to herself that were in the best interests of the principal (*see Matter of Ferrara*, 7 N.Y.3d 244, 254, 819 N.Y.S.2d 215, 852 N.E.2d 138), and Brenda's deeding the property to herself was not in the best interest of their mother.

However, petitioner's notice of cross motion for summary judgment against Bank of America does not demand relief against Brenda and a request for relief against Brenda by cross motion would, in any event, be improper since it would be seeking affirmative relief against a non-moving party (CPLR § 2215; *see Terio v. Spodek*, 25 A.D.3d 781, 809 N.Y.S.2d 145; *Mango v. Long Island Jewish–Hillside Medical Center*, 123 A.D.2d 843, 507 N.Y.S.2d 456). Moreover, on the evidence presented there is an issue of fact regarding the alleged gift of the real property since respondent Brenda claims in her verified answer that the real property was gifted to her.

Accordingly, the branch of petitioner's cross-motion for summary judgment seeking turnover of the real property free from the conveyance and mortgage is denied.

With respect to the branch of respondent Bank of America's motion for summary judgment dismissing the part of the petition seeking turnover of the sum of $79,403.40, Bank of America contends that the petitioner is precluded from asserting any claims for turnover of these monies because no reports of any unauthorized signatures or transfers were made to it within the time periods set forth in Uniform Commercial Code § 4–406(4) and 12 CFR 205.6(b)(3).

Uniform Commercial Code § 4–406(4) bars claims to recover amounts paid on an unauthorized signature where the customer fails to give notice of the unauthorized signature within one year of the time the account statement was made available (*see Woods v. MONY Legacy Life Ins. Co.*, 84 N.Y.2d 280, 617 N.Y.S.2d 452, 641 N.E.2d 1070; *Vantrel Enterprises, Inc. v. Citibank*, 272 A.D.2d 609, 708 N.Y.S.2d 452). This section codifies the common law duty of a depositor to examine bank drafts and statements furnished by the bank and report alterations or forgeries within a reasonable time (*see Woods v. MONY Legacy Life Ins. Co.*, 84 N.Y.2d 280, 284, 617 N.Y.S.2d 452, 641 N.E.2d 1070). With respect to electronic fund transfers, 12 CFR 205.6(b)(3) requires that a consumer report an unauthorized electronic fund transfer that appears on a periodic statement within 60 days after transmittal of the account statement.

***6** In the instant proceeding, Bank of America has provided an employee affidavit stating that "Bank of America as part of their usual and ordinary course of business sent by mail to these customers regular monthly account statements for each and every month reflecting all transactions, and ... at no time during the entire time period to date did [Lillian] or William Hill [her husband] ever report any alleged forged or unauthorized check or other transaction." Copies of the monthly statements are annexed to the moving papers.

Respondent Bank of America has established its prima facie entitlement to judgment as a matter of law dismissing this claim for turnover since the evidence is undisputed that it provided monthly bank statements, and it did not receive any notice of alleged unauthorized signatures or transactions within the time periods required by Uniform Commercial Code § 4–406(4) and 12 CFR 205.6(b)(3). In opposition, petitioner has failed to come forward with any evidence to rebut respondent's showing or raise a triable issue of fact. Therefore, petitioner is precluded from seeking reimbursement from Bank of America for paying out any funds over unauthorized signatures (*see Monreal v. Fleet Bank*, 95 N.Y.2d 204, 713 N.Y.S.2d 301, 735 N.E.2d 880) or electronic transfers.

Accordingly, the branch of Bank of America's motion for summary judgment dismissing the part

of the petition seeking the turnover of $79,403.40 for alleged unauthorized checks, withdrawals and transfers is granted, and the branch of petitioner's cross motion for summary judgment seeking such turnover from Bank of America is denied.

The branch of Bank of America's motion for summary judgment on its counterclaim seeking indemnification from petitioner and the estate on the claim for turnover of the funds alleged to have been wrongly withdrawn or transferred from decedent's accounts is denied as moot.

The branch of petitioner's cross motion for summary judgment dismissing Bank of America's answer which pertains to the twenty-nine affirmative defenses enumerated in the answer is denied. Petitioner bears the initial burden of demonstrating that the affirmative defenses are without merit as a matter of law (*see Greco v. Christoffersen,* 70 A.D.3d 769, 896 N.Y.S.2d 363; *Vita v. New York Waste Services, LLC.,* 34 A.D.3d 559, 824 N.Y.S.2d 177). Petitioner failed to meet her burden since the moving papers fail to specifically address any of the affirmative defenses.

With respect to the branch of petitioner's cross motion for summary judgment granting that part of the petition which seeks to compel respondent Bank of America to turnover rents and profits from the subject real property, petitioner has failed to submit any evidence in support of this claim for turnover from Bank of America. Having failed to make a prima facie showing of entitlement to judgment as a matter of law, that branch of petitioner's cross motion for summary judgment is denied.

The branch of petitioner's cross motion for sanctions against Bank of America is denied. Petitioner has failed to identify any frivolous conduct that would be grounds for sanctions.

***7** This is the decision and order of the Court.

N.Y.Sur.,2011.
In re Fitzsimmons

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