



IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

SunTrust Mortgage, Inc.,

Plaintiff,

v.

SouthPoint Bank, et al.,

Defendants.



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Shelby Cnty Judge of Probate, AL
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CIVIL ACTION NO.:

CV 2010-901046

ORDER

This cause is before the court on cross-motions for summary judgment filed by the two Banks who are competing for the priority of their respective mortgages. The facts are undisputed:

1. This case presents another miserable MERS mess.
2. MERS notwithstanding, Plaintiff SunTrust became the holder of a mortgage which had been recorded on February 1, 2006.
3. A subsequent equity line was established with Defendant SouthPoint who recorded its security interest in the subject property on April 30, 2007.
4. In June of 2007 the borrowers refinanced their original SunTrust loan. SunTrust was the underwriter and the note and mortgage were assigned to SunTrust contemporaneously with their execution.
5. SunTrust did not obtain a subordination agreement from SouthPoint.
6. As part of the June 2007, refinancing transaction, MERS released the 2006 SunTrust loan.
7. In June of 2010 MERS finally recorded the assignment to SunTrust of the 2007 refinanced mortgage and notes.
8. At present the earliest recorded mortgage is that belonging to SouthPoint.

At the time of the issuance and recording of the SouthPoint equity line, SouthPoint held a secondary position to the "first mortgage" held by SunTrust. The

documents evidence that the subsequent SunTrust note and mortgage was nothing more than a refinance of its existing mortgage. The MERS release of the first SunTrust mortgage, followed by its recording of the subsequent refinance, created the present circumstances of SouthPoint having the first recorded mortgage.

The court finds SouthPoint's current priority position to be an unexpected windfall and one for which it had not bargained. Under the facts of this case, as a matter of law, SouthPoint could not have either acted to its detriment or in any way relied upon the release of the original SunTrust mortgage. At its inception the SouthPoint mortgage was subordinate to the SunTrust mortgage. Equity demands that the parties be returned to the bargained for, secured positions as they existed prior to the MERS machinations. See, *Bay Minette Production Credit Assn. v. Citizens' Bank*, 551 So.2d 1046 (Ala. 1989).

Based upon the foregoing, the court finds that there exist no genuine issues of material fact and that Plaintiff SunTrust is entitled to judgment as a matter of law. Summary judgment is hereby entered in favor of Plaintiff and against Defendant SouthPoint. Accordingly, it is ORDERED that the current mortgage held by Plaintiff SunTrust Mortgage, Inc. is superior to, and has priority over, the mortgage held by Defendant SouthPoint Bank.

The court notes that the defendant Borrowers on the competing mortgages, James and Barbara Gunter, have been served with Plaintiff's complaint but have never answered or appeared in this case. Their appearance as parties to this action is not necessary for final adjudication of the disputed priority of the existing mortgagees which is the gravamen of this case. The Gunter Defendants are, therefore, dismissed without prejudice.

The costs of court are taxed as paid.

DONE and ORDERED this 17th day of July 2012.

s/Hub Harrington
Circuit Judge

Certified a true and correct copy
Date: 08/21/12
Mary H. Harris
Mary H. Harris, Circuit Clerk
Shelby County, Alabama