

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25634
G/hu

_____AD3d_____

Submitted - November 10, 2009

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2007-09886

DECISION & ORDER

NYCTL 1998-2 Trust, et al., plaintiffs-respondents-appellants, v Salem Realty, appellant-respondent, et al., defendants; St. Marks Place Condominium LLC, et al., intervenors-respondents-appellants; Builders Bank, intervenor-respondent.

(Index No. 13992/00)

Edward S. Kanbar, New York, N.Y., for appellant-respondent.

Shapiro & DiCaro, LLP, Commack, N.Y. (John Dello-Iacono of counsel), for plaintiffs-respondents-appellants.

Sol Mermelstein, Brooklyn, N.Y., for intervenors-respondents-appellants.

In an action to foreclose a tax lien, the defendant Salem Realty appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Rothenberg, J.), dated October 1, 2007, as, upon granting that branch of its motion which was to declare a judgment of foreclosure and sale dated October 19, 2001, null and void, determined that the plaintiffs were entitled to bring a separate action pursuant to Real Property Actions and Proceedings Law § 1503, the plaintiffs cross-appeal, as limited by their briefs, from so much of the same order as granted that branch of the motion of the defendant Salem Realty which was to declare the judgment of foreclosure and sale dated October 19, 2001, null and void as to Salem Realty, and the intervenors St. Marks Place Condominium, LLC, and St. Marks Place Condominium II, LLC, separately cross-appeal, as limited by their brief, from so much of the same order as granted that branch of the motion of the defendant Salem Realty which was to declare the judgment of foreclosure null and void.

January 5, 2010

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ORDERED that the appeal by the defendant Salem Realty is dismissed, without costs or disbursements, as the portion of the order appealed from by that defendant did not grant or deny any relief or have any effect in this action (*see Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473); and it is further,

ORDERED that the cross appeal by the intervenors St. Marks Place Condominium, LLC, and St. Marks Place Condominium II, LLC, is dismissed as academic, without costs or disbursements, as the portion of the order from which they cross-appeal was superseded by an order dated October 16, 2008, made upon reargument; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from by the plaintiffs, without costs or disbursements.

The plaintiffs obtained a judgment of foreclosure and sale against the subject property located at 136 St. Marks Place in Brooklyn. The plaintiffs acknowledge that the defendant Salem Realty was not properly served. Contrary to the plaintiffs' contention on appeal, the Supreme Court properly determined, in effect, that the judgment of foreclosure and sale was not binding upon Salem Realty (*see 1426 46 St., LLC v Klein*, 60 AD3d 740, 742; *6820 Ridge Realty v Goldman*, 263 AD2d 22, 26; *Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223). The plaintiffs' service of process on the defendants in a separate action does not cure the lack of jurisdiction in this action.

FISHER, J.P., ANGIOLILLO, LOTT and SGROI, JJ., concur.

2007-09886

DECISION & ORDER ON MOTION

NYCTL 1998-2 Trust, et al., plaintiffs-respondents-appellants, v Salem Realty, appellant-respondent, et al., defendants; St. Marks Place Condominium LLC, et al., intervenors-respondents-appellants; Builders Bank, intervenor-respondent.

(Index No. 13992/00)

Separate motions by the plaintiffs-respondents-appellants and the intervenors-respondents-appellants to dismiss an appeal by the defendant Salem Realty from an order of the Supreme Court, Kings County, dated October 1, 2007, on the ground that it has been rendered academic. By decision and order on motion of this Court dated January 27, 2009, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the

argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the motions are denied as academic in light of our determination on the appeal (*see NYCTL 1998-2 Trust v Salem Realty*, _____AD3d_____ [Appellate Division Docket No. 2008-10951, decided herewith]).

FISHER, J.P., ANGIOLILLO, LOTT and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court