

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

D25635
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_____AD3d_____

Submitted - November 10, 2009

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

2008-10951

DECISION & ORDER

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

(Index No. 13992/00)

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

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

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 16, 2008, as, upon reargument, in effect, vacated so much of an order of the same court dated October 1, 2007, as granted that branch of its motion which was to declare a judgment of foreclosure and sale dated October 19, 2001, null and void, adhered to its determination that the plaintiffs were entitled to bring a separate action pursuant to Real Property Actions and Proceedings Law § 1503, and, in effect, granted that branch of its motion which was to declare that the judgment of foreclosure and sale dated October 19, 2001, was null and void only as to it.

ORDERED that the appeal from so much of the order as, upon reargument, adhered to the determination in the order dated October 1, 2007, that the plaintiffs were entitled to bring a separate action pursuant to Real Property Actions and Proceedings Law § 1503 is dismissed, as that portion of the order 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,

January 5, 2010

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ORDERED that the order dated October 16, 2008, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs-respondents, payable by the appellant.

The Supreme Court, upon reargument, correctly determined that it had erred in granting that branch of Salem Realty's motion which was to declare the judgment of foreclosure and sale dated October 19, 2001, null and void as to all parties. Instead, as the Supreme Court correctly determined, upon reargument, that judgment was not null and void as to all parties, but rather, was null and void only as to Salem Realty. This determination was proper based upon Salem Realty's demonstration that it had not properly been served, and was not based on the merits (*see NYCTL 1998-2 Trust v Salem Realty*, _____AD3d_____ [Appellate Division Docket No. 2007-09886, decided herewith]).

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

ENTER:



James Edward Pelzer
Clerk of the Court