

**Agrippa, LLC v Stanley Ho Family Trust LLC**

2012 NY Slip Op 31580(U)

June 12, 2012

Supreme Court, New York County

Docket Number: 101613/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

AGRIPPA, LLC,

INDEX No. 101613/12

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 002

STANLEY HO FAMILY TRUST LLC, et al.,  
Defendants.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits...

1, 1A

Answering Affidavits- Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

**FILED**

CROSS-MOTION: \_\_\_\_\_ YES  NO

JUN 15 2012

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/12/12

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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AGRIPPA, LLC,

Plaintiff,

- against -

STANLEY HO FAMILY TRUST LLC, HOWARD  
HO, AND BANK OF AMERICA,

Defendants.  
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INDEX NO.  
101613/12

**FILED**

JUN 15 2012

NEW YORK  
COUNTY CLERK'S OFFICE

DECISION/ORDER

DONNA M. MILLS, J:

Motion sequence 002 and 003 are consolidated for disposition.

In sequence 002 defendants Stanley Ho Family Trust LLC and Howard Ho (collectively, the "Ho Defendants") seek and order pursuant to CPLR §§ 3211(a)(1)(4)(5) and (7), dismissing the complaint filed by Plaintiff Agrippa, LLC ("Agrippa"). The Ho Defendants also seek sanctions against Agrippa for frivolous conduct. In sequence 003, defendant Bank of America, N.A. ("BOA"), seeks an order pursuant to CPLR §§ 1003 and 3211(a) (7), dismissing the complaint filed by plaintiff, Agrippa.

In this case, Agrippa seeks a declaratory judgment invalidating a UCC foreclosure sale, of Apartment 12 A (the "Premises") at 445 Lafayette Street, New York New York (the "Building"), to the Ho Defendants, for the price of \$2.8 million which it claims was commercially unreasonable.

The following facts are undisputed. BOA was the holder of a \$3.2 million loan made to Agrippa. After Agrippa defaulted under the terms of the note and mortgage, a foreclosure sale was scheduled for January 5, 2011. On December 20, 2010, Agrippa filed a complaint in the Supreme Court of the State of New York as well as a motion for a temporary restraining order and preliminary injunction. That action was removed by BOA to the United States District Court for the Southern District of New York. On January 11,

2011, Agrippa's motion for preliminary injunction was denied.

On January 24, 2011, Agrippa filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York for relief pursuant to Title 11, Chapter 11 of the United States Bankruptcy Code, thereby resulting in the imposition of a stay of the foreclosure proceedings. On October 3, 2011, the bankruptcy court granted BOA stay relief. On or about January 11, 2012, BOA completed the U.C.C. foreclosure sale of the Premises and the Stanley Ho Defendants were the successful bidders.

It is also undisputed that during an eight month period in which the Bankruptcy Court permitted Agrippa to retain a real estate broker to sell the Premises on the open market, Agrippa received several offers to purchase the Premises for a price higher than the \$2.8 million purchase price obtained at the UCC foreclosure sale. Agrippa reportedly refused offers as high as \$3.6 million.

Both defendants now argue that the sale was commercially reasonable and therefore the complaint should be dismissed as a matter of law, pursuant to CPLR § 3211 (a) (7). On the merits of a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the IAS court must determine whether, assuming that the allegations in the complaint are true, they state a cause of action upon which relief may be granted (see Becker v. Schwartz, 46 N.Y.2d 401, 408, 413 N.Y.S.2d 895, 386 N.E.2d 807). Here, plaintiff sought to annul a foreclosure sale alleging that the price paid at the foreclosure sale by the Ho Defendants is commercially unreasonable because it sold for less than the fair market value.

There is nothing in this record which would warrant the court to set aside the foreclosure sale. Courts have consistently declined to disturb a foreclosure sale upon a challenge to the amount recovered for the collateral, except in the narrow circumstance where the price alone is so inadequate as to shock the court's conscience. This is not such

a case (Thornton v Citibank, 226 A.D.2d 162, 163, 640 N.Y.S.2d 110, [noting that foreclosure sales often result in prices substantially less than market value]; Crossland Mtge. Corp. v. Frankel, 192 A.D.2d 571, 596 N.Y.S.2d 130, lv. denied 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305 [sales price of \$55,000 for property with market value of between \$160,000 and \$200,000 upheld]; Buttermark v Sagarese, 119 A.D.2d 540–541, 500 N.Y.S.2d 551, [sale at 30% of defendants' uncorroborated opinion as to fair market value upheld]; Dougherty v 425 Dev. Assoc., 93 A.D.2d 438, 447, 462 N.Y.S.2d 851, supra [question as to commercial reasonableness where property sold for less than 50% of purchase price one year earlier]).

Even assuming the truth of all of plaintiff's protestations, this Court finds that the purchase price paid for the subject premises at the UCC foreclosure sale by the Ho Defendants was commercially reasonable and therefore should not be set aside. The fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.

This Court also agrees with the BOA that the complaint must be dismissed for failure to join an indispensable party. A determination as to whether parties are so "indispensable" that in their absence a matter should not proceed is limited to those cases where the determination will adversely affect the rights of nonparties (see, 3 Weinstein–Korn–Miller, N.Y. Civ. Prac. § 1001.08). Here there can be no question that, in the event the foreclosure sale is invalidated, the rights of the cooperative association, Astor Place Owners, Inc. ("Astor"), will be adversely affected. Astor has already canceled Agrippa's stock and proprietary lease, and issued a new stock and proprietary lease to the Stanley Ho Family Trust LLC. Agrippa now essentially seeks to re-vest Agrippa with ownership of the cooperative shares at issue. This necessarily reflects a change in the membership of the cooperative association, and as such, complete relief cannot be accorded to the current

parties. Thus, the Complaint must be dismissed pursuant to CPLR § 1003.

Turning to the merits, I find that plaintiff's commencement of the proceeding herein does not rise to the level of frivolous conduct. To be so found, the proceeding must be, inter alia, "completely without merit in law or fact" (22 NYCRR 130-1.1[c][1] ) or commenced to "harass or maliciously injure another" (22 NYCRR 130-1.1[c][2] ). In my view, plaintiff's concern over the sale price of the premises alone sufficiently lends factual and legal plausibility to the proceeding such that the commencement thereof is not "completely without merit" (22 NYCRR 130-1.1[c][1]) to the point of frivolous conduct. Furthermore, defendants have failed to aver any proof that plaintiff commenced the proceeding in an effort to "harass or maliciously injure another" (22 NYCRR 130-1.1[c][2]).

Accordingly, it is

ORDERED that the motion of defendants Stanley Ho Family Trust LLC, Howard Ho and Bank of America to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court , and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion for sanctions is denied.

Dated: 6/12/12

**FILED**

**JUN 15 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

**DONNA M. MILLS, J.S.C.**