

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

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Argued - March 5, 2018

JOHN M. LEVENTHAL, J.P.
JEFFREY A. COHEN
BETSY BARROS
FRANCESCA E. CONNOLLY, JJ.

2015-08857
2016-04126

DECISION & ORDER

Never Used Cars, LLC, etc., plaintiff, v Nat Hoe
Equities Corp., et al., defendants.
(Action No. 1)

3615-15 Realty I, LLC, appellant, v Bedford Avenue
Associates I, LLC, et al., respondents, et al., defendant.
(Action No. 2)

(Index Nos. 1241/09, 27876/11)

Arnold J. Ludwig, Brooklyn, NY, for appellant.

Michael T. Sucher, Brooklyn, NY (Andrew M. Shabasson of counsel), for
respondents.

In two related actions, inter alia, for specific performance of a contract for the sale of real property, the plaintiff in Action No. 2, 3615-15 Realty I, LLC, appeals from an order of the Supreme Court, Kings County (Laura L. Jacobson, J.), dated June 4, 2015, and a judgment of the same court dated March 7, 2016. The order, insofar as appealed from, granted those branches of the motion of Never Used Cars, LLC, a defendant in Action No. 2, which were pursuant to CPLR 3211(a) to dismiss the complaint in Action No. 2 and to confirm a Referee's Report of Sale dated July 28, 2011, and denied the cross motion of the plaintiff in Action No. 2 to reject the Referee's Report of Sale. The judgment dismissed the complaint in Action No. 2.

ORDERED that the appeal from the order is dismissed; and it is further,

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ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to Never Used Cars, LLC, and Bedford Avenue Associates I, LLC, payable by 3615-15 Realty I, LLC.

In January 2009, Mendel Group, Inc. (hereinafter Mendel), commenced an action to foreclose a mortgage on the real property which is the subject of this litigation. Pursuant to a judgment of foreclosure and sale dated January 13, 2011, the subject property was offered for sale at a public auction, which was conducted on July 14, 2011. 3615-15 Realty I, LLC (hereinafter the plaintiff), alleged in its complaint in Action No. 2 that, at the auction, its representative, Judy Lebovits, was the highest bidder, with a bid of \$950,000, which was improperly disregarded, and that the property was sold to Mendel for an opening bid of \$100. Thereafter, Mendel assigned its bid to Bedford Avenue Associates I, LLC (hereinafter Bedford), which obtained a deed for the property. On July 28, 2011, Andrea Blair, who had been appointed as a Referee to oversee the auction, issued a Report of Sale.

The plaintiff commenced Action No. 2 against Mendel, Bedford, and Blair, seeking, inter alia, to compel Mendel and Bedford to accept the alleged \$950,000 bid (hereinafter Action No. 2). Mendel and Bedford moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them. In an order dated May 18, 2012, made after referral of the matter to a referee to conduct a hearing regarding the issues raised on the motion, the Supreme Court denied the motion, and thereupon issued a judgment dated July 31, 2012, in favor of the plaintiff on the issue of liability. On a prior appeal, this Court, among other things, reversed the judgment and remitted the matter to the Supreme Court, Kings County, for a new determination on the motion papers (*see 3615-15 Realty I, LLC v Bedford Ave. Assoc. I, LLC*, 120 AD3d 487).

In an order dated March 8, 2013, the Supreme Court, inter alia, amended the caption in Action No. 2 to substitute Never Used Cars, LLC (hereinafter Never Used Cars), in place of Mendel as a defendant. Thereafter, Never Used Cars moved, among other things, pursuant to CPLR 3211(a) to dismiss the complaint in Action No. 2 and to confirm the Report of Sale dated July 28, 2011, and the plaintiff cross-moved to reject the Report of Sale. Never Used Cars and Bedford opposed the plaintiff's cross motion. In an order dated June 4, 2015, the court granted Never Used Cars' motion and denied the plaintiff's cross motion. In a judgment dated March 7, 2016, the court dismissed the complaint in Action No. 2. The plaintiff appeals from the above stated portions of the order dated June 4, 2015, and the judgment dated March 7, 2016.

The appeal from the order dated June 4, 2015, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in Action No. 2 (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

“To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Wells Fargo Bank N.A. v E & G Dev. Corp.*,

138 AD3d 986, 987 [internal quotation marks omitted]). Here, we agree with the Supreme Court's determination that the documentary evidence conclusively established that no valid bid for \$950,000 was made at the auction on behalf of the plaintiff.

The plaintiff's remaining contentions are without merit.

Accordingly, we agree with the Supreme Court's determination to grant those branches of Never Used Cars' motion which were pursuant to CPLR 3211(a) to dismiss the complaint and to confirm the Report of Sale, and to deny the plaintiff's cross motion to reject the Report of Sale.

LEVENTHAL, J.P., COHEN, BARROS and CONNOLLY, JJ., concur.

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Motion by the respondents Bedford Avenue Associates I, LLC, and Never Used Cars, LLC, to strike page 124 of the record on the ground that it contains matter de hors the record.

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

ORDERED that the motion is denied.

LEVENTHAL, J.P., COHEN, BARROS and CONNOLLY, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court

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