

Korakis v Carlton Boiler Repair, Inc.

2004 NY Slip Op 30327(U)

June 10, 2004

Sup Ct, NY County

Docket Number: 603202/00

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Angie Korakis

INDEX NO. 603202/00

Gregory Baruch Reforah Inc.

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/10/04

EMILY JANE GOODMAN c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 17

-----X

ANGIE KORAKIS & KATHERINE MAMANAKIS,

Plaintiffs,

–against–

Index No.: 603202/00

CARLTON BOILER REPAIR, INC.,
 THE ENVIRONMENTAL CONTROL BOARD,
 THE PEOPLE OF THE CITY OF NEW YORK,
 THE NEW YORK CITY DEPARTMENT OF
 FINANCE, THE NEW YORK STATE DEPARTMENT
 OF TAXATION AND FINANCE, THE OFFICE OF
 THE CONTROLLER OF THE STATE OF NEW YORK,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C:

Defendant Carlton Boiler Repair, Inc. (Carlton Boiler) moves, by order to show cause, for an order (a) declaring that, pursuant to **CPLR** 5016(a) and 5017(a), a purported sale of the real property, which is the subject of this mortgage foreclosure proceeding, on January **27, 2004**, was null and void on the ground that the Judgment of Foreclosure and Sale signed on November **14, 2003** has not been entered by the Clerk of the Court; (b) staying the enforcement of the judgment, pursuant to RPAPL §§ 1341(2) and 1053(3), so that Carlton Boiler may redeem its property from the mortgage held by the plaintiffs; and (c) directing a hearing to determine the amount required to be deposited into court by Carlton Boiler to effectuate the redemption of its property.

Plaintiffs, Angie Korakis and Katherine Mamanakis, cross-move for an order directing that the Clerk of the Court enter the judgment nunc pro tunc as of November **18, 2003**.

FACTUAL ALLEGATIONS

The facts upon which this motion and cross motion are based are undisputed. The real property in question is a single parcel of commercial real property located at 303 West 149th Street, New York, New York. The property has been, and continues to be, used by Carlton Boiler for its business since its purchase in **1995**. The plaintiffs herein are two elderly sisters; they are holders of a first mortgage of the property, having taken a purchase money mortgage when the property was sold to Carlton Boiler on May **5**, 1995.

Carlton Boiler defaulted on payment of the mortgage by its failure to pay the installment due August 1, **1995** and each subsequent payment thereafter. Indeed, this defendant has failed to make any mortgage payments for over eight years. As a result of this default, the instant mortgage foreclosure action **was** commenced on July **26,2000**. After defendants Carlton Boiler **and** Alfonso Greaves defaulted in appearance, the Court, upon motion of the plaintiffs, appointed Richard Sussman, Esq. referee to compute the amount due the plaintiffs upon the note and mortgage. The Referee thereafter filed his report dated April 30,2002. A judgment was signed by this Court on June 5,2002, but was never presented to the County Clerk for entry.

On the eve of the foreclosure sale, after still not making any mortgage payments, Carlton Boiler filed a Chapter 11 proceeding in the Southern District of New York, In Re Carlton Boiler Repair, Inc., Case No. 02-42426, which had the effect, pursuant to 11 USC § **362**, of staying the foreclosure sale. After the debtor failed to take the necessary steps towards moving for reorganization, i.e, file operating reports and keep current post-petition obligations, plaintiffs moved for an order, pursuant to 11 **USC** § 1112(b), dismissing the Chapter 11 case as a bad faith filing. The Bankruptcy Court granted the motion, with no opposition by the debtor, by order

dated November **20**, 2002. This order specifically lifted the automatic stay as to the plaintiffs in this action so they could complete their foreclosure sale, **and** delayed actual dismissal of the case for 90 days so as to prevent a re-filing by Carlton Boiler before the foreclosure proceeding could be completed.

In January **2003**, defendants Carlton Boiler and Alfonso Greaves moved in this Court for **an** order vacating the entire action on the grounds of improper service. Again, the foreclosure sale was delayed, and Carlton Boiler, although still utilizing the property to operate its business, was still refusing to make any mortgage payments, water and sewer charges or taxes on the property. **By** order dated March **13,2003**, the Court set this matter down for a traverse hearing before a Referee. In his report dated June 24,2003, the Referee found that Carlton Boiler had been properly served, but that the service on Alfonso Greaves was defective because the certificate of service filed with the Court contained a partial zip code, **By** order dated July **31**, 2003, this court confirmed the Referee's report in its entirety, ruling that it was in the province of the Referee to resolve issues of credibility in favor of the plaintiffs.

However, a second dilatory Chapter 11 petition was filed by Carlton Boiler on September 22,2003 in the Bankruptcy Court of the Southern District of New York under Case No. 03-**42252**. Once again, the debtor corporation failed to comply with **any** of the lawful obligations of a Chapter 11 proceeding. On November **5,2003**, the Bankruptcy Court (U.S. B.J. Robert D. Drain) signed an order dismissing the second Chapter 11 case "with prejudice," and the order provides that the debtor may not re-file for a period of 180 days.

Defendants Carlton Boiler and Alfonso Greaves then moved, by order to show cause, to vacate the judgment dated June **5, 2002** and stay foreclosure. This motion was granted as to

Alfonso Greaves, and denied as to Carlton Boiler by order dated October 10, 2003. This order directed the plaintiffs to “submit an amended judgment of foreclosure and sale within **30** days” deleting Alfonso Graves as a defendant. By letter dated November 3, 2003, counsel for the plaintiffs submitted to this Court a proposed Judgment of Foreclosure and Sale. This judgment was signed by this Court on November **14, 2003**, and received in the Motion Support Office on November 18, 2003. From there, it was sent to the County Clerk’s office and placed in the file in Rm. 103B to await the preparation of a judgment-roll and entry by the judgment clerk.

Despite the fact the judgment signed on November **14, 2003** was never entered by the Clerk of the Court, Referee Sussman conducted a Referee’s sale of the mortgaged property on January 27, 2004. The plaintiffs were the successful bidders. The conveyance, which was scheduled for March 2, 2004, was stayed by the instant order to show cause.

DISCUSSION

CPLR 5016(a) provides, in relevant part, that “[a] judgment is entered when, after it has been signed by the clerk, it is filed by him.” Counsel for the plaintiffs claims that for some inexplicable reason, the entry of the judgment appears not to have occurred. The reason, however, is not so mysterious. The plain fact is that judgments are not automatically entered by the Clerk after they are signed by the Court. This is due to the simple fact that further input by counsel for the prevailing party is required. A bill of costs needs to be prepared; otherwise, the judgment clerk could not tax costs and disbursements. See CPLR 8101, 8301 and 8401 (“The clerk shall insert in the judgment the total amount taxed as costs, disbursements and additional allowances.”) In addition, a judgment-roll must be prepared. CPLR 5017(a) specifically requires the party seeking entry of a judgment to prepare a judgment-roll, and the Clerk file the judgment-

roll when the judgment is entered.

Having placed the failure to enter the judgment on the correct party, the question remains as to whether the Referee's sale of the property is a nullity because entry of a judgment is a prerequisite to execution, as Carlton Boiler contends, or whether the defect may be cured by the Court pursuant to CPLR 5019(a), as plaintiffs contend.

CPLR 5019(a) provides that “[a] judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers and procedures in the action not affecting a substantial right of a party,” and provides express permission for a trial court to cure the mistake. Where no vested rights of either party will be impaired, the court may order the entry of a judgment nunc pro tunc. Jayson v Jayson, 54 AD2d 687,688 (2d Dept 1976).

It is well settled that the entry of a judgment is merely a ministerial act of signing and filing a statement of the Court's pronouncement, thus spreading it on the record. Yogel v Edwards, 283 NY 118, 121 (1940); Voccola v Shilling, 88 Misc 2d 103, 107 (Sup Ct, Kings County 1976), affd 57 AD2d 931 (2d Dept 1977); Huot v Dworman, 13 Misc 2d 104, 105 (Sup Ct, Kings County 1958), affd 8 AD2d 829 (2d Dept 1959). Nevertheless, the right to enforce a judgment commences at the time of its entry and docketing, Donaghy v Donaghy, 203 AD2d 803 (3d Dept 1994), citing Siegel, NY Prac § 485, at 741 (2d ed). Carlton Boiler argues that, since entry of the judgment is a prerequisite to execution, the Referee's sale of the mortgaged premises is a nullity, relying on the Appellate Division's decision in Firststar Equip. Finance v Jonathan Travel & Tours, Inc. (292 AD2d 275 [1st Dept 2002]). In that case, a prior action between the defendants and the lessor of the vehicle had resulted in a judgment awarding possession of the motor vehicle to the defendants. Although the judgment had been signed by a

referee assigned to hear and determine the issue, and filed with the Clerk of the Court, it was never signed by the latter and a judgment-roll never prepared. Nevertheless, the defendants' attorney issued a property execution to a City Marshall, who seized the vehicle. Firststar Equipment Finance moved, by order to show cause, to recover possession from the City Marshall, claiming that it was the rightful owner of the vehicle. The Supreme Court granted the motion, ruling that Firststar Equipment Finance **was** the rightful owner of the vehicle, that the filings in the prior action *did* not constitute entry of a judgment under CPLR 5016(a) **and** 5017(a), and thus the City Marshall's seizure of the vehicle was improper. On appeal, the First Department affirmed, ruling that since "there was no valid document of execution, the seizure of the vehicle by the City Marshall was a nullity." Id. at 275.

Plaintiffs argue that Firststar is distinguishable on its facts because, in the instant case, nothing has been seized. There has been no conveyance, transfer of title or possessory interest taken by the plaintiffs. Specifically, plaintiffs accept the defendant's contention that the latter's right to exercise its right **of** redemption continues until the actual conveyance of the property to the plaintiffs **as** the successful bidders at the auction sale. Were this to be the law in New **York**, the Court would be inclined to issue a nunc pro tunc order. Since, however, the sale of the property cuts off a mortgagor's equity of redemption, entering the judgment nunc pro tunc would impair a substantial right of the defendant to redeem the mortgage, and therefore, the Court will not enter issue nunc **pro** tunc order.

As stated by the Second Circuit Court of Appeals, "[t]his principle--that a mortgagor's interest in and right to redeem a mortgaged property is terminated by a valid foreclosure sale--whether or not a deed has been delivered to the purchaser--has been part of New York law

for over a century.” In re Rodgers, 333 F3d 64, 67 (2d Cir 2003)(emphasis in original); see also Tuthill v Tracy, 31 NY 157, 160-161 (1865); Brown v Frost, 10 Paige 243 (1843); NYCTL 1996-1 Trust v LFJ Realty Corp., 307 AD2d 957,958 (2d Dept 2003), lv dismissed 1 NY3d 622 (2004); EMC Mortgage Corp. v Bobb, 296 AD2d 476,477 (2d Dept 2002); Trustco Bank, N.A. v Eakin, 256 AD2d 778,780 (3d Dept 1998); United Capital Corn, v 183 Lorraine St. Assocs., 251 AD2d 400,400 (2d Dept 1998); Finance Investment Co. (Bermuda) Ltd. v Gossweiler, 145 AD2d 463,463 (2d Dept 1988), appeal dismissed 74 NY2d 650 (1989); Belsid Holding Corp. v Dahm, 12 AD2d 499,500 (2d Dept 1960); Brandt v 47-49 Charles Street, Inc., 157 Misc 2d 299, 301-302 (Sup Ct, NY County 1993); Citibank, N.A. v Press Realty Corp., 139 Misc 2d 558, 559-561 (Sup Ct, NY County 1988); Barnard v Jersey, 39 Misc 212, 213-14 (Sup Ct, NY County 1902); Bergman, New York Mortgage Foreclosures § 4.07, at 4-34.9; cf. RPAPL 1341(2) dealing with partial foreclosures, discussed infra. Even the fact that the plaintiffs were the successful purchasers at the auction sale, and no rights of any third parties would be effected if a redemption occurs post-sale, but prior to the conveyance, does not change the rule. Tuthill v Tracy, 31 NY at 162, citing Brown v Frost, 10 Paige 243, supra. Therefore, the Court finds that the plaintiffs’ failure to enter the judgment cannot be cured nunc pro tunc, as it would validate the Referee’s sale of the property **and** extinguish defendant’s equity of redemption, thereby affecting a substantial right of a **party**. See CPLR 5019 (a). Accordingly, the plaintiffs’ cross motion must be denied.

With respect to Carlton Boiler’s right to redeem the property, the defendant argues that, based upon sections 1341(2) and 1353(3) of the Real Property Actions and Proceedings Law, it has the right to redeem the property by moving for a stay and depositing the necessary funds into

court, after a hearing to determine the amount of money to be deposited to effectuate the redemption. RPAPL § 1341 provides:

§ 1341 Payment into court of amount due.

Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:

1. Dismiss the complaint without costs against plaintiff, if the payment is made before judgment directing sale; or

2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the **sum** then due [emphasis added].

As the underlined language indicates, this statute appears to apply only to partial foreclosures, wherein the mortgagor elects, usually because the mortgage note bears an above-market rate of interest, not to accelerate the mortgage balance, and the action is commenced based on the breach in failing to pay installments, with the property to be sold subject to the continuing lien of the mortgage. See Bergman, Another Misapplication of RPAPL § 1341, NYLJ, Dec 31, 2003, at **5**, col 2 (Bergman Article). **As** explained by Bergman, a noted expert in the field of mortgage foreclosures,

Although the terms "redemption" **and** "partial foreclosure" are not found in RPAPL § 1341, it is to partial foreclosure that the statute applies -- and its application should now be more readily discernible. In essence, in the event of partial foreclosure, if the defendant pays into court the principal **and** interest past due -- together with the costs of the action and, if applicable, the expenses of sale, then the court must take one of two courses of action, depending upon the time of payment.

When the payment is made prior to judgment, the complaint must be

dismissed without costs being assessed against the plaintiff. When the payment is made subsequent to the judgment, but prior to the auction sale, the court must stay the action. However, should there be a later default in paying principal or interest, the court can direct enforcement of the judgment for the purpose of collecting the sums then due. (Again, none of this **has** anything to do with the “usual” foreclosure case where the full balance has been declared due.)

The somewhat elaborate procedures attendant to partial foreclosure (RPAPL §1341) certainly have their place, albeit almost never encountered -- which is precisely the point. Because RPAPL § 1341 is labeled “Payment into court of the amount due,” it understandably appears on its face to be the statute that controls mortgage redemption procedures. It does -- but only for partial foreclosure actions.

If the case is not a partial foreclosure, then performe § 1341 does not apply.

Bergman Article, supra.

However, notwithstanding Bergman’s reasoning based on the language of the statute, this Court is bound by First Department precedent. In Gabriel v 351 St. Nicholas Equities, Inc. (168 AD2d 338 [1st Dept 1990]), the Appellate Division ruled that this statute applied to a mortgage foreclosure where the entire debt had been accelerated, and that the only way the trial court could have allowed the defendant to avoid the entry of a judgment of foreclosure and sale, or the ultimate sale of the property, would have been for defendants to have complied with **RPAPL § 1341**. Citing the First Department’s earlier decision in Pessin v Baumann (130 AD2d 354 [1st Dept 1987]), “the governing statute, **RPAPL § 1341**, is mandatory in nature, and does not allow for a discretionary interpretation or application.” See also NYCTL 1996-1 Trust v LFI Realty Corp., 307 AD2d at 959 (“a court is without discretion to set aside a sale of foreclosure unless the requirements of **RPAPL 1341** are met”); Green Point Savings Bank v Oppenheim, 237 AD2d 409 (2d Dept 1997).

Here, Carlton Boiler has complied with RPAPL § 1341(2) in that it has moved for a stay prior to the sale, since the sale undertaken in January 2004 is a nullity, but **has** not deposited any

funds into court. Defendant contends that it does not **know** the amount to deposit, and even plaintiffs' counsel was not able to articulate an exact amount at oral argument of this motion, estimating the amount needed to redeem the property to be between \$350,000.00 and \$370,000.00. Unlike **CPLR** 3219, which specifically allows a litigant "without court order" to deposit an amount deemed by him to be sufficient to satisfy the claim, **RFAPL** 1341 is silent as to how the full amount of the debt plus accrued interest, costs and expenses is to be determined. Nevertheless, the amount necessary to redeem is, at a minimum, the amount found to be due for principal and interest per Referee Sussman's report. That amount is \$220,553.33. In addition, interest on the unpaid balance of the mortgage (\$105,000.00) at the rate of 16% per annum from **April** 30, 2002 to November 14, 2003 is approximately \$26,000.00. In addition, the judgment signed on November 14, 2003 provides for the payment of \$6,000.00 in legal fees together with costs totaling at least \$500.00 pursuant to **CPLR** 8201(1) and 8303(a)(1). Finally, there is the \$500.00 statutory fee of the Referee. Finally, while plaintiffs' counsel avers that his clients have paid an additional \$25,000.00 for taxes, \$40,000.00 in water and sewer charges, and \$12,000.00 for insurance premiums, he submits documentary evidence showing only the payment of \$13,262.73 to New **York** City in June **2003**.

Accordingly, the Court finds that any further stay on enforcement of the judgment is dependent upon Carlton Boiler's deposit with the Clerk of the Court the sum of \$266,816.06 (the Clerk accepts only cash or a certified check). If the parties cannot stipulate *to* the balance of the amount needed to fully redeem the mortgage, the matter will be referred to Referee Sussman.

One final point needs to be addressed. The judgment signed by this Court on November 14, 2003 neglected to vacate the earlier judgment dated June 5, **2002**, and the following order

takes care of this.

It is hereby

ORDERED that defendant's motion is granted to extent of declaring that, pursuant to CPLR 5016(a) and 5017(a), a purported sale **of** the real property (which is the subject of this mortgage foreclosure proceeding) on January **27,2004**, is null and void, on the ground that the Judgment of Foreclosure and Sale signed on November 14, 2003 has not been entered by the **Clerk**; and it is further

ORDERED that defendant's motion for a stay on enforcement of the judgment is granted to the extent of staying enforcement of the judgment, including advertising or conducting a second sale of the property, expressly conditioned upon defendant's deposit of the sum of **\$266,816.06** with the Clerk of the Court on or before July 9, 2004 and it is further

ORDERED that unless *the* parties can stipulate in writing as to the balance of the amount needed to fully redeem the mortgage on before the next scheduled court conference, the matter will be referred to Referee Sussman to hear and report, for which **he** will be entitled to additional statutory fees; and it is further

ORDERED that plaintiffs' cross motion for an order directing entry of the Judgment of Sale and Foreclosure signed by this Court on November **14,2003** nunc **pro** tunc as of November 2003 is denied, and plaintiffs' counsel is directed to forthwith seek entry of the judgment by the Clerk of the Court (which **is** not stayed **by** this Decision and Order); and it is further

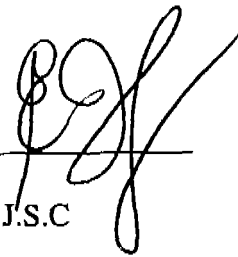
ORDERED that the Judgment of Foreclosure and Sale signed by this Court on June **5**, 2002 is vacated in its entirety; and it is further

ORDERED that the parties and their counsel are to be **appear** for a conference on July 15, 2004 at 2 p.m. to discuss the status of the case, including whether the required deposit has been made **and any** further stay on enforcement of the judgment.

This Constitutes the Decision and Order of the Court.

Dated: June 10,2004

ENTER:



J.S.C

EMILY JANE GOODMAN

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK