

**Bankers Trust Company of California, NA v Wen
Zhou**

2005 NY Slip Op 30378(U)

February 22, 2005

Supreme Court, New York County

Docket Number: 108129/01

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Bankers Trust Co. of Cal.
NA as Trustee

INDEX NO.

108129101

MOTION DATE

Wen Zhou, Bd of Mangers of
225 E. 86 St. Condo., R. Tiederman

MOTION SEQ. NO.

003

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

FEB 25 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/22/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x

Bankers Trust Company of California, NA
As Trustee,

Plaintiff,

-against-

Wen Zhou, Board of Managers of 225
East 86th Street Condominium,
Robert Tiederman,

Defendant.

-----x

DECISION/ORDER

Index No.: 108129/01
Seq. No.: 003

Present:
Hon. Judith J. Gische

FILED

FEB 25 2005

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pl's Notice of Motion w/Affirm. (E.C.K.), exhs.	1
Def's Notice of Cross-Motion w/Affirm. (S.S.), exhs.	2
Def's Amended Notice of Cross-Motion w/Sup. Affirm. (S.S.)	3
Pl's Affirm. (E.C.K.) In Op. to Cross-Motion w/exhs.	4
Def's Reply Affirm. (S.S.) w/exhs.	5

Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action was brought by the plaintiff bank after the named mortgagee, Mr. Zhou, failed to make the payments required in connection with a mortgage obtained on condominium unit 202 located at 225 East 86th Street in Manhattan ("unit 202"). Plaintiff bank obtained a Judgment of Foreclosure and Sale after defendants defaulted in appearing in this action. It now moves to amend the Judgment of Foreclosure and Sale, the Order of Reference, the Summons and

Complaint and the Lis Pendens to correct a "typographical error" contained in the property description. The error is that although the correct unit number, "202", is referred to in the street address in the papers, the meets and bounds description incorrectly designates the unit as "501".

Movant, Michael Wong, is a business associate of the mortgagee, Mr. Zhou. Mr. Wong became the titled owner only after this foreclosure action was commenced. He cross-moves to vacate the summons and complaint, Lis Pendens and Judgment, based upon the incorrect description of the property. He also claims that plaintiff bank has no standing, the Judgment was obtained in violation of a bankruptcy stay and that no new judgment can be entered now that the Lis Pendens has expired.

For the reasons that follow the motion is granted and the cross-motion is denied.

The undisputed facts are as follows:

In 1998 Mr. Wong purchased unit 202.

On November 13, 2000, Mr. Wong deeded unit 202 to defendant Zhou.

On November 13, 2000, Mr Zhou obtained a mortgage on unit 202 from Business Mortgage Inc. On the same day Business Mortgage, Inc. assigned the mortgage to Impac Funding.

On September 5, 2000, Impac Funding assigned the mortgage to plaintiff bank.

The mortgage fell into default.

On April 19, 2001, this foreclosure action was commenced and a Lis Pendens was duly filed.

On September 19, 2001, Mr. Wong filed for bankruptcy in the Southern District of New York. Although in the petition filed he listed unit 202 among his assets and the

instant mortgage as his debt, at the time of filing neither representation was true. He was neither the titled owner of unit 202 nor was he obligated under the mortgage.

On January 7, 2002, after this action was filed and subsequent to Mr. Wong filing a bankruptcy petition, Mr. Zhou deeded unit 202 to Mr. Wong.

Mr. Wong and Mr. Zhou have been, and continue to be, business associates since at least 1998.¹

A Judgment of Foreclosure and Sale was granted by this court on August 22, 2002.

The bankruptcy court dismissed Mr. Wong's petition on June 4, 2003. The reason for the dismissal is not apparent. There is no indication that if any plan was made, provisions were included as to the instant mortgage.

A new Notice of Pendency was filed by plaintiff on March 12, 2004.

The foreclosure sale was originally scheduled for February 10, 2004. The sale was postponed because of the error in the property description.

These motions ensued.

The correction of the description of the property in the court papers is a ministerial matter. The error was de minimus, especially in view of the fact that the unit number appears correctly in part of the property description and only later appears incorrectly. This correction does not affect a substantial right of any party since the pleadings and original Notice of Pendency, as a whole, give appropriate notice to the parties and the world at large about the actual condominium unit involved.

¹ Indeed Mr. Wong's attorney stated to the court at the last appearance, that he also represents Mr. Zhou.

The cross-motion is a virtual smorgasbord of technical arguments designed to prevent unit 202 from being foreclosed upon. None of them, however, claim payment or willingness to pay. While certainly there are circumstances when technical arguments are valid, the ones raised by movant are not.

Mr. Wong first argues that the error in the description of the property cannot be corrected and warrants a dismissal of the case. This is incorrect. Ministerial errors in foreclosure papers, including minor typographical errors in the property description, may be corrected. Directly on point is the recent Appellate Division case of Key Bank Nat. Assn. v. Stern, ___ AD3d ___ (2nd dept. 2005), 2005 WL 225 385 (January 31, 2005). The description in this case was sufficient to notify the world about the location of the property and the error may be corrected.

Mr. Wong claims that the plaintiff is not a proper party because the assignment of the mortgage from Impac Funding to it did not take place until after this action had been commenced. He is wrong. The assignment is dated September 5, 2000. This action was commenced in 2001.

Mr. Wong claims that this action was improperly prosecuted in violation of the stay in bankruptcy. 11 USC §362. This action was commenced before the bankruptcy was filed in September 2001. Thus anything done before then could not have violated any stay.

More significantly, when the bankruptcy was filed, Mr. Wong did not own unit 202 and was not in any way legally obligated to plaintiff bank under the terms of the mortgage. Notwithstanding that the bank may have been listed in the petition, this action was commenced against the titled owner, Mr. Zhou, who was not then (or subsequently) in bankruptcy and there was simply no legal impediment to this action

proceeding against the appropriately named mortgagee. Since at the time of the bankruptcy proceeding Mr. Wong was not the titled owner, there was no impediment to the action going forward against unit 202.

Mr. Wong did not obtain title to unit 202 until January 7, 2002. There is no indication that the bank was notified of such change in title. Nor is there any indication that such transfer could have occurred without the outstanding mortgage being satisfied or such obligation being assumed and assigned. This likewise would have required plaintiff bank's approval.

The bankruptcy petition was eventually dismissed in June 2003. Whatever stay existed was extinguished at that time. The only litigation occurring between the time Mr. Wong obtained title and the vacature of the bankruptcy stay was the issuance of a judgment of foreclosure and sale.

While this court does not believe that the stay prevented the court from issuing the judgment, even if it did, there is no basis preventing the court from issuing such judgment now. It is undisputed that no monies have been paid to extinguish the debt which formed the basis for the underlying judgment.

Finally Mr. Wong argues that because the Notice of Pendency has expired, no judgment of foreclosure can be issued, CPLR 6513, RPAPL § 1331. The Judgment was obtained when the original Lis Pendens was still effective. In any event, a new Notice of Pendency was filed in March 2004, which is still valid. Such new filing renders this argument moot.

Accordingly the court grants the motion and denies the cross-motion. The summons and complaint and notices of pendency are all hereby amended nunc pro tunc to reflect, consistent with the street address, that the unit number on the subject

condominium property is "unit 202" and not "unit 501." An amended judgment of foreclosure and sale shall be settled by the plaintiff-bank, on Notice to the named defendants and Mr. Wong. This constitutes the decision and order of the court.

Dated: New York, New York
February 22, 2005

SO ORDERED:



U.S.C.

HON. JUDITH J. GISCHE

FILED
FEB 22 2005
COUNTY OF ... OFFICE