

Bankers Trust Co. of California, Inc. v Wen Zhou

2007 NY Slip Op 31244(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0108129/2001

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

BANKERS TRUST COMPANY
OF CALIFORNIA, INC.

INDEX NO.

108129/01

MOTION DATE

MOTION SEQ. NO.

6

MOTION CAL. NO.

- v -

Wen Zhou ET AL.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: MAY 09 2007

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION


HON. JUDITH J. GISCHE

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

Bankers Trust Company of California, Inc.
Plaintiff,

-against-

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

DECISION/ORDER
Index# 108129/01
Mot. Seq. #006,007,008

Present:
Hon Judith J. Gische, JSC

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

| PAPERS | NUMBERED |
|--|-----------------|
| OSC dated 1/11/07, MSM affirm., WZ affd., exhibits..... | 1 |
| MTO affirm., exhibits..... | 2 |
| OSC dated 1/16/07, SS emergency affirm., SS affirm., exhibits..... | 3 |
| MTO affirm., exhibits..... | 4 |
| SS reply affirm., exhibits..... | 5 |
| OSC dated 2/5/07, SS emergency affirm., SS affirm., exhibits..... | 6 |
| MTO affirm., exhibits..... | 7 |
| SS reply affirm., exhibits..... | 8 |

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Gische, J.:

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

This is an action to foreclose a mortgage held on a residential condominium apartment 202 located at 225 East 86th Street in Manhattan ("apartment"). It was started in 2001. Defendant Zhou ("Zhou") defaulted in the underlying action and Michael Wong ("Wong") intervened only after a judgment of foreclosure was authorized by the court. Due to problems with the original judgment, an amended judgment of foreclosure, authorizing a sale, was not signed until June 16, 2005. The sale was

stopped at least once before the present motions were brought.

There are three motions before the court at this time. Zhou moves to vacate his underlying default in this action and to set aside the judgment of foreclosure. He also seeks to interpose claims against Wong and another individual, Roman Chiu, who is not a party to this action (Mot. Seq. #006). Wong has, by two separate motions, sought to stop/set aside the sale based upon defects in the Notice of Sale and other documentation filed by plaintiff with the County Clerk (Mot. Seq. #007 and 008).

The sale went forward on January 17, 2007. Plaintiff, itself, was the successful bidder at \$625,000. It claims, without dispute, that there were at least 35 other bids at the sale. This court ordered that pending the decision on these motions that the apartment be held and not be further transferred. Consequently, to the extent that any of the movants seek to stop the sale, the relief is denied as moot. The court, however, still has the power to set aside the sale, which relief is considered. Dime Savings Bank of New York v. Paiazini, 198 AD2d 746 (3rd dept. 1993). The three motions are consolidated for consideration and determination in this one decision and order.

Certain facts are undisputed.

Intervenor Wong owned the apartment prior to August 2000. On August 9, 2000 Zhou obtained title to the apartment from Wong and Zhou obtained a mortgage in his own name from Business Mortgage, Inc., plaintiff's predecessor in interest. Zhou is the mortgagee under the mortgage that is the subject of this foreclosure action. By November 2000 the mortgage was in default. This action was commenced in 2001. Zhou knew at or about the time this action was brought that the mortgage was in default. After this action had already begun, Zhou transferred title to the apartment

back to Intervenor Wong. In September 2002 Intervenor Wong filed for Chapter 11 bankruptcy protection, listing the apartment as his asset. The bankruptcy petition was dismissed on June 4, 2003. Since this foreclosure action began no one has stepped forward to redeem the mortgage and no payments have been made.

Motion to Vacate Default Judgment

Zhou seeks to set aside the default judgment obtained against him. He also seeks leave to interpose claims against Intervenor Wong and a real estate broker named Roman Chiu. Zhou claims that at the time he purchased the apartment he was defrauded and induced to enter into the contract by misrepresentations, made by Wong and broker Chiu, that Wong would continue to live in the apartment and pay all the carrying costs. Zhou claimed that these representations were false. Zhou also claims that he did not know how to read or write English at the time and that he was not a U.S. citizen. Zhou claims that when he discovered that the mortgage and other carrying costs were in arrears, Chiu advised him to begin eviction proceedings against Wong. Zhou claims that under the guise of signing what he thought were papers to evict Wong, that Chiu presented to him, he instead signed title back to Wong. Zhou claims he was also told that Wong would take care of the instant foreclosure action. Zhou states that when he raised concerns to Chiu about this matter, Chiu threatened to enforce a separate note Zhou had signed and that Chiu made veiled threats about Zhou's legal status in this country.

Zhou further claims that this is the first time he is represented by counsel in the matter. While the court file indicates that he was previously jointly represented with Wong in connection with prior applications by Attorney Solney on their behalf, Zhou

claims the attorney did not, in fact, have any authority to represent Zhou.

The legal standard for setting aside a default judgment in a mortgage foreclosure proceeding is the same standard for such relief as any other proceeding. The standard is excusable default and meritorious defense. CPLR §5015; Fleet Finance Inc. v. Nielsen, 234 AD2d 728 (3rd dept. 1996). Zhou argues that his forbearance from action due to representations by Wong and Chiu and his concern about his legal status in the court constitute excusable default. He further argues that elaborate scheme by which he was defrauded constitutes a meritorious defense.

This court disagrees. Even taking Zhou representations to be true, it is uncontested that he knew about the foreclosure action at or about the time it was commenced, but he did not step forward to protect his own rights. While this may have been grounded in his concerns about how this would affect his immigration status and/or another debt he owed to Chiu, he made a conscious decision, albeit in hindsight a poor one, not to independently or timely defend his rights in this foreclosure action.

More importantly the facts alleged do not form a basis to defend against non-payment of the mortgage. It is apparent that whatever fraudulent scheme Zhou may have been a victim of, it was perpetrated by Wong and Chiu. It was not perpetrated by the Bank that made the initial mortgage loan to him. Indeed if Zhou is right, that this was an elaborate ruse to use his credit to get a mortgage for an apartment, then the bank may also have been a victim of fraud.

Zhou may or may not have claims against Wong and Chiu. He may or may not have claims against Attorney Solney. These disputes do not impact the foreclosure or sale going forward, and they are not considered on their merits here. They may be

pursued by Zhou (and defended) in separately commenced plenary actions. If that is what he decides to do.

Zhou's motion to vacate the default judgment against him is, therefore, denied.

Motion to Set Aside Sale

Wong claims that there are a myriad of defects in the Notice of Sale and Terms of Sale. He also claims that recent actions taken by plaintiff to correct information contained in ACRIS were improper and, indeed, fraudulent. He claims that all of these defects have negatively impacted the price that was obtained at the foreclosure sale.

The Notice and procedures attendant to a foreclosure sale are intended to make sure that the sale is fair. Dime Savings Bank v. Zapala, 255 AD2d 547 (2nd dept. 1998). The property is required to be sold at a public auction to the highest bidder. RPAPL §232.1. Wong identifies four categories of defects that he argues have artificially depressed the purchase price.

First he claims that the terms of sale improperly inform a purchaser that she is responsible for outstanding condominium charges. In fact the Court of Appeals has ruled that foreclosing a first mortgage on a condominium extinguishes any lien for outstanding pre-existing common charges. Bankers Trust Co. V, Board of Managers of Park 900 Condominium, 81 NY2d 1033 (1995) affg. 181 AD2d 274 (1st dept. 1992). See also: Dime v. Kakar, 203 AD2d 50 (1st dept. 2004). Consequently it was an error for the terms of sale to provide that any purchaser would have to pay the outstanding common charges.

The second error claimed is that the terms of sale improperly stated that the risk of loss of the property passes to the bidder, with only a right of abatement. This

contravenes GOL §5-1311 which makes a seller responsible for a risk of loss until title closes, unless there is an agreement to the contrary. The provision permits a vendee faced with material damage to the property to elect whether to rescind the sale or proceed with the purchase, subject to an abatement. GOL §5-1311 has been applied to foreclosure sales. Citibank v. Liebeskind, 237 AD2d 478 (2nd dept. 1997); Onondaga Savings Bank v. Wagner, 101 Misc2d 109 (NY Sup., On Co. 1979). Since the Terms of Sale were not a "contract," the referee cannot unilaterally set terms in contravention of the statute. Since the Terms of Sale restricted the bidder only to the remedy of abatement, they contravened the statute. This is a defect.

The third defect concerns the publication of the Notice of Sale. See: RPAPL § 231(2). The Notice of Sale is required to be published once each week in the four weeks preceding the original date fixed for sale. If the sale is postponed, then notice of postponement shall be published at least three days before the postponed date in the same publication. Here the sale was first noticed to be held on January 10, 2007. It was then postponed until January 17, 2007. Plaintiff claims that this postponement was at the behest of the Referee. There is no affidavit from the referee confirming this fact or otherwise indicating the reason for the postponement. Arbitrary adjournments of judicial sales are not permitted. Long Island City Savings & Loan Assn. V. Suggs, 78 Misc.2d 16 (NY Sup. Nass. Co. 1974). The abbreviated postponement Notice is permitted when the referee fails to appear at the originally scheduled sale and the mortgagor needs to apply to have a new referee appointed. That was not the case here, because the original referee conducted the sale. Under the language of the statute, the new sale date should have been published in the same manner as an

original sale date.

The last category of claimed defects concerns the fact that ACRIS listed a first mortgage against the apartment held by Northeastern Mortgage Investment Corp. ("Northeastern"). The mortgagee on that mortgage was Wong. Both Wong and the plaintiff believe that the Northeastern mortgage was satisfied; however, it does not appear as such to the outside world. Since Northeastern is not a party to this foreclosure, whatever interest it has is not extinguished by this action. Polish Nat. Alliance v. White Eagle Hall Co., Inc. 98 AD2d 400 (2nd dept. 1983). In a prior motion the court held that Northeastern, however, was not a necessary party. Polish Nat. Alliance v. White Eagle Hall Co., Inc., supra. The court otherwise held that plaintiff should represent in its Notice of Sale that it believes that the mortgage was previously satisfied and that its title company has indemnified it against such risk. Plaintiff has complied with that prior order.

Wong's claim that any indemnification does not flow to a prospective purchaser at foreclosure is besides the point. The information was offered only so that a potential bidder would have some reason to believe that the prior mortgage had been satisfied. Plaintiff, however, also tried to get a satisfaction. Delta Funding Company ("Delta") filed the satisfaction. Delta claimed that the prior mortgage had been assigned to it by Northeastern and that it serviced the mortgage at the time of the satisfaction. Delta does not, however, have any written assignment of mortgage from Northeastern made at or about the time such assignment is claimed to have taken place and Northeastern is now out of business. Delta has now, acting as Northeastern, signed an assignment to itself. Wong questions the validity of such an assignment and Delta's authority to

sign an assignment to itself, on Northeastern' behalf. These concerns are valid. Wong also points out that a proceeding could have been brought against Northeastern to straighten this title matter out. Wong, who was the mortgagor on the Northeastern mortgage, never indicates efforts undertaken by him to locate the missing documentation. Whatever impediment to title this presents, however, is beyond this proceeding.

While Wong has pointed out a myriad of defects in the terms and procedures of sale, his ultimate argument is that they collectively and individually had a "chilling effect" on the bidders at the sale. He has failed to offer any proof of the fair market value of the apartment at the time of sale or any basis for a conclusion that the price was depressed at all due to the identified mistakes.

In general, the court has discretion to set aside a judicial sale where there has been fraud, collusion or mistake that casts suspicion on the sale. Guardian Loan Co. Inc. v. Early, 47 NY2d 515 (1979). Nevertheless, such discretion must be exercised sparingly, and only if the facts warrant it. In re: Superintendent of Banks of the State of New York, 207 NY 11 (1912). Insufficiency of the purchase price will not by itself be a basis to void a sale unless the price was so low as to shock one's conscience. Long Island Bank of Centerreach v. Valicquette, 183 AD2d 877 (2nd dept. 1992); Polish Nat. Alliance v. White Eagle Hall Co., Inc. supra. Moreover, mistakes that do not affect the sale price in a significant way are considered irregularities that are insufficient to set aside a sale. CME Group v. Cellini, 173 Misc2d 404 (NY Sup. Ct. West. C. 1997).

While Wong has identified several defects in the sale procedure, he has not shown that he was prejudiced and/or that the sale did not fetch fair value for the

apartment. Consequently, Wong's motions to set aside the sale are denied. The temporary stays are vacated.

Conclusion

In accordance herewith:

ORDERED that Zhou's motion (seq. #006) to vacate his default judgment and for related relief is denied in its entirety, and it is further


ORDERED that Wong's motions (seq. #s 007 & 008) to set aside the sale after judgment of foreclosure and for related relief are denied in their entirety, and it is further

ORDERED that any and all temporary stays are hereby vacated, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, New York
May 9, 2007

SO ORDERED:



J.G. J.S.C.

FILED
MAY 17 2007
NEW YORK
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