

**Beneficial Homeowner Serv. Corp. v
Remington**

2007 NY Slip Op 32700(U)

August 27, 2007

Supreme Court, Rensselaer County

Docket Number: 0217172/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

BENEFICIAL HOMEOWNER SERVICE CORPORATION,

Plaintiff,

-against-

JAMES REMINGTON, BERNADETTE M.
REMINGTON, NYS DEP'T OF TAXATION &
FINANCE, US INTERNAL REVENUE SERVICE,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-0220-06 Index No. 217172

Appearances: Jeffrey A. Kosterich & Associates, P.C.
Attorneys For Plaintiff
68 Main Street
Tuckahoe, NY 10707
(Jeffrey A. Kosterich, Esq.,
of counsel)

Jo M. Katz, Esq.
Referee
68 Second Street
Troy, NY 12180

Farer & Schwartz, P.C.
Attorneys For
Arnold J. Greenberg and Karen Garewal
12 Century Hill Drive
Latham, NY 12110
(Steven D. Farer, Esq.,
of counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiff, in the above action to foreclose a mortgage, had applied to vacate and set aside a foreclosure sale held on March 23, 2007. The application is opposed by the successful bidders at the sale.

The foreclosure judgment dated January 31, 2007, confirmed the report of the referee to compute, who found that there was \$63,701.28 due and owing on the underlying promissory note as of December 8, 2006. Plaintiff thereafter made arrangements with the court-appointed Referee, Jo M. Katz, Esq., to auction off the subject real property on March 23, 2007 at 1:00 p.m. On March 9, 2007, plaintiff, by facsimile transmission, sent Referee Katz the following bidding instructions (as relevant here):

“The foreclosure sale with regard to the above referenced matter is scheduled for March 23, 2007 at 1:00 p.m.

“You have agreed to bid on our behalf for the plaintiff Beneficial Homeowners Service Corporation of NY. Please be advised the maximum bid for the foreclosure sale is \$101,410.28. Please start bidding at \$50,000.00 and increase in \$10,000.00 increments. Do not exceed the maximum bid.”

At the foreclosure sale, Referee Katz opened the bidding at \$50,000.00. She asked if there was a bid of \$60,000.00. She received a bid of \$60,000.00 from Arnold Greenberg and Karen Garewal. At that point, there being no further bids, she closed the bidding and accepted the sum of \$60,000.00 from Greenberg and Garewal as a deposit. The plaintiff maintains that the \$60,000.00 sale price was far below market value of the property, and that

acceptance of a bid in that amount violated plaintiff's bidding instructions.

As stated in National Bank of Stamford v Van Keuren (184 AD2d 92 [3rd Dept., 1992]):

“There can be little dispute that it is the court, not the parties, who is in absolute control of the workings of a judicial foreclosure (see, 73 NY Jur 2d, Judicial Sales, § 1, at 517). The appointed Referee is an officer of the court and must perform his [or her] duties impartially without regard to the interests of any particular person in the proceeding (Riggs v Pursell, 66 NY 193, 198; Goldberg v Feltman's of Coney Is., 205 Misc 858, 864; 73 NY Jur 2d, Judicial Sales, § 5, at 519-520). A court has broad discretion in setting aside a foreclosure sale and ordering a resale (79 NY Jur 2d, Mortgages, § 706, at 64) and, significantly, almost any individual, even a nonparty, who has a legitimate interest in the outcome can move to set it aside (79 NY Jur 2d, Mortgages, § 707, at 65-66).” (National Bank of Stamford v Van Keuren, supra, at 95).

In addition, as stated in Harbor Financial Mortgage Corporation v Hurry (277 AD2d 693 [3rd Dept., 2000]):

“[A] court may set aside a foreclosure sale ‘to relieve of oppressive or unfair conduct’ (Guardian Loan Co. v Early, 47 NY2d 515, 521), and ‘[in] the absence of fraud, collusion or other irregularity, the foreclosure sale will not be set aside unless the inadequacy of the sale price is so great that it shocks the conscience of the court’ (Trustco Bank v Collins, 213 AD2d 819.” (Harbor Financial Mortgage Corporation v Hurry, supra, at 694).

The instant case has strong similarities to that in Chase Manhattan Mortgage Corp. v Julian (12 Misc3d 1152(A) [Sup. Ct., Monroe Co., 2006]), where the Court concluded that it was improper for a foreclosure plaintiff to direct the referee to interpose a series of bids

on plaintiff's behalf. As the Court stated:

“This request by counsel from the bank, for the Referee to start bidding at a certain price and continue bidding up to a final bid, is improper. The Referee may not act as the bidder for a Plaintiff and must exercise his [or her] duties impartially (Nat'l. Bank of Stamford [v Van Keuren, 184 AD2d 92] at 95; cf Citicorp Mortg., Inc. v Strong, 227 AD2d 818 [3rd Dept., 1996]. The Referee had no authority to accept numerous bid amounts or to submit various bids on behalf of the Plaintiff.” (Chase Manhattan Mortgage Corp. v Julian, at 5; see also 3-30 Bergman on New York Mortgage Foreclosures, § 30.03 [3] [b]).

This Court agrees. The referee's responsibility, as an officer of the court, is to accept bids, not submit bids. It was inappropriate and improper for the plaintiff to request and/or direct the court-appointed referee to take any action as its agent. Any instruction provided by the plaintiff, whether not properly given or not clearly understood, was beyond the province of the plaintiff, as a party to the action. The only instructions to be followed with respect to the conduct of the sale were those (if any) set forth in the judgment of foreclosure. While there may have been (and obviously was) a misunderstanding between the plaintiff and Referee Katz, the misunderstanding was not with respect to her status as referee. The misunderstanding was not sufficient to warrant voiding the sale, and constituted no more than a unilateral mistake on the part of the plaintiff, predicated upon its mis-perception of the role of a referee to sell real property (see Chase Manhattan Mortgage Corp. v Julian, supra). The sale was conducted in good faith and in a proper fashion. If the plaintiff desired to actively engage in the bidding process, then it was incumbent upon the plaintiff to make

appropriate arrangements for a bidding agent to be present at the time and place of the sale. Moreover, on the instant record, in view of the amount found to be due and owing on the note and mortgage (which, as set forth in the judgment of foreclosure, totaled \$63,701.28), the sale price is not so low as to shock the conscience of the Court (see Harbor Financial Mortgage Corporation v Hurry, *supra*).

Under all of the circumstances, the Court finds that plaintiff's application to set aside the foreclosure sale held on March 23, 2007 must be denied. The Court, pursuant to the terms of the judgment of foreclosure and sale, will grant the referee's request for an order directing payment of her fee.

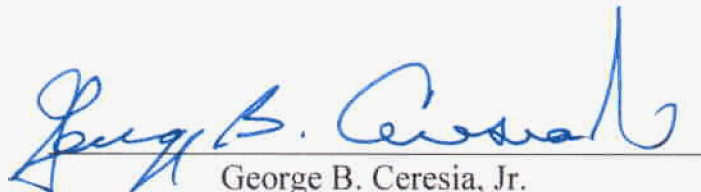
Accordingly, it is

ORDERED, that plaintiff's application to set side the foreclosure sale held on March 23, 2007 be and hereby is denied; and it is further

ORDERED, that plaintiff is directed, within ten (10) days, to forward to Jo M. Katz, Esq., a check in the sum of Five Hundred (\$500.00) Dollars, as and for her fee as referee herein.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for Arnold J. Greenberg and Karen Garewal, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: August 27, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 22, 2007, Supporting Papers and Exhibits
2. Affirmation of Jo M. Katz, Esq., dated May 24, 2007
3. Reply Affirmation of Jeffrey A. Kosterich, Esq., dated May 31, 2007
4. Affirmation of Steven D. Farer, Esq. dated June 6, 2007 and Exhibit
5. Reply Affirmation of Jeffrey A. Kosterich, Esq., dated June 11, 2007