

Wells Fargo Home Mtge., Inc. v Brightwell

2007 NY Slip Op 33503(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0104685/2004

Judge: Saralee Evans

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

PRESENT: HON. SARALEE EVANS
Justice

PART 51

Wells Fargo

INDEX NO. 104685/04

- v -

Kosha Bughtweel

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

The motion for counsel fees has been resolved in accordance with the court's October ²⁴ ~~14~~, 2007 decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

(Signature)

Dated: October ²⁴ ~~14~~, 2007

Saralee Evans

HON. SARALEE EVANS J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

-----X
WELLS FARGO HOME MORTGAGE, INC.,

Plaintiff,

Index No. 104685/04

-against -

DECISION and ORDER

(SEQ 008)

KOSHA BRIGHTWELL, CHERYL JORDAN,
MATHEW KING II, CRIMINAL COURT OF THE
CITY OF NEW YORK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY TRANSIT ADJUDICATIONS
BUREAU, PARK SLOPE PLUMBING SUPPLY CO.,
WELLS FARGO BANK, N.A.,

Defendants.

-----X
HON. SARALEE EVANS, J:

Recitation, as required by CPLR § 2219[a], of the papers considered in review of the three motions presented.

Motion	Papers	Numbered
Seq. 7:	Notice of Omnibus Motion, Affirmation & Exhibits	1
	Affirmation in Opposition.	2
	Reply Affirmation	3
	Supplemental Affirmation in Opposition	4
	Supplemental Reply Affirmation	5
Seq. 8	Notice of Motion, Affirmation and Exhibits	6
	Affirmation in Partial Support of Motion	7
Seq 9	Notice of Motion and Affidavit	8
	Answer to Motion	9

Upon the foregoing cited papers, the three motions are consolidated for decision, which is as follows:

Various entities have filed motions regarding the final accounting of the proceeds of this foreclosure action, in which the mortgaged property has been sold by the court appointed Referee. They are consolidated herein for decision.

Facts

On April 14, 2005, to conclude a partition action among the former owner-mortgagees, the property at issue in this action in foreclosure was sold at auction to movant We Buy Now, LLC. for \$7,000. It was sold subject to a mortgage held by plaintiff Wells Fargo Home Mortgage, Inc. and other liens. Thereafter, We Buy Now did nothing to bring the mortgage out of foreclosure or pay real estate taxes or other liens on the property, and the instant foreclosure proceeding, that had been commenced against the former owners, proceeded to judgment. One of the former owners appeared *pro se* in this action but did not inform the court of the partition sale. It further appears that We Buy Now never filed its deed with the County Clerk.

A judgment of foreclosure was granted on October 20, 2005, and a different Referee appointed by this court conducted the foreclosure sale. The property was auctioned by the Referee on July 6, 2006. Roajact, LLC was the highest bidder and it paid a down payment of \$73,500. It did not, however, complete the sale. Roajact was declared in default on September 21, 2006, and the property was thereafter reaucted and again sold to another entity for \$735,000 on January 25, 2007.

After paying the mortgage, outstanding liens and costs of sale (save an additional fee now sought by the Referee for her services) the Referee deposited surplus sale proceeds of \$59,452.98 with the County Clerk. The Referee additionally holds the \$73,500 down payment paid by Roajact, LLC in her escrow account.

Prior Motion

As a defaulting purchaser, in accordance with the terms of the initial unconsummated

foreclosure sale, Roajact, LLC was entitled repayment of its down payment, less “costs, expenses, and attorney’s fees occurring as a result of said resale.” Roajact moved for repayment of the deposit. That motion was unopposed and on May 21, 2007, the court authorized repayment to movant of the \$73,500 in the Referee’s escrow account. Thereafter, We Buy Now, LLC, the purchaser of the right of redemption, notified the Referee of a competing claim asserted herein. The Referee has not, therefore, released the funds she holds and awaits direction from this court.

We Buy Now seeks vacatur, or renewal and vacatur of this court’s order of May 21, 2007 authorizing the refund of the down payment to Roajact. It claims entitlement to \$22,497.17 of that amount and seeks payment to it of that sum from Roajact’s down payment, claiming that this amount represents additional interest that became due when satisfaction of the mortgage was delayed as a result of Roajact’s default, to which it is entitled.

We Buy Now also moves to intervene as a defendant in the foreclosure action as the owner of the right of redemption. As intervenor, it seeks to have the Referee’s Report of Sale confirmed, and an order directing payment of the surplus sale proceeds on deposit with the County Clerk to it.

There is no credible opposition to movant’s claim that it is entitled to intervene in this matter as the holder of the right of redemption on the mortgage. While prior owners Kosha Brightwell and Matthew King have each applied, *pro se*, for payment by the Clerk of the surplus to each of them, there is no factual or legal basis asserted in any papers that would support those claims. Ms. Brightwell’s motion is therefore denied, as is the application contained in Mr. King’s answering papers.

With respect to distribution of the sale surplus, the Referee appointed by the court has moved for additional compensation in the amount of \$2,250.00 to be paid to her from the surplus funds. In support of that motion, the Referee notes the time that she expended on the defaulted sale, which closing was adjourned five times at the defaulting purchaser’s request. She also notes the time she has

expended to handle the competing claims for the sale surplus and for the retained the defaulter's down payment.

It is the court's view that the additional time spent by the Referee at the four hour closing (less the \$500 already paid to her for the sale) as well as the time spent on the dispute as to who is entitled to payment of the surplus sales funds, should be paid to her from the surplus proceeds of sale. The referee is therefore entitled to the sum of \$1,125.00 to be paid from the funds deposited with the County Clerk . The balance on deposit should thereafter be distributed to the intervenor We Buy Now, LLC.

With respect to the down payment paid by the defaulting purchaser that is currently held in the referee's escrow account, the court is of the view that the time expended by the referee as a result of the prior purchaser's default should be charged against the down payment. The Referee is therefore entitled to deduct the sum of \$625.00, from the Roajact down payment she holds in escrow, and to pay that amount to herself.

With respect to We Buy Now's claim for a portion of the "Roajact" down payment, movant is not in privity with the Referee and lacks standing to enforce the terms of the foreclosure sale agreement between the Referee as seller and Roajact as buyer. See, *Scheckter v. Emigrant Savings Bank*, 237 AD2d 273 (2d Dept. 1997).

Movant, who invested a total of \$7,000 to obtain title to the property, never filed the deed, paid taxes, notified the mortgagor that it had taken title or took any action to stave off foreclosure. It now seeks equitable relief, in the absence of privity or of proof of entitlement, in order to increase its return on its investment from 700% to 1200%. Under the facts presented, the court declines to exercise its equitable power. Accordingly, that portion of the motion is denied.

In light of the foregoing, It is ORDERED that movant's application to intervene in this matter

is granted and it is further

ORDERED that, of the sale proceeds deposited by the Referee in the Office of the County Clerk, New York County, \$1,125.00 thereof is to be released to the referee as and for an additional fee for services, and it is further

ORDERED that, the balance of the sale proceeds deposited by the Referee in the Office of the County Clerk, New York County, be paid to intervenor We Buy Now, LLC, holder of the right of redemption, and it is further

ORDERED that the prior order of this court dated May 21, 2007, is vacated and it is further

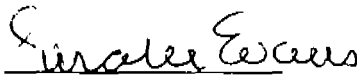
ORDERED that the Referee is authorized and directed to deduct from the funds received from Roajact, LLC and held in her escrow account, the sum of \$625.00 and to pay that amount over to herself as an additional fee in this matter, and it is further

ORDERED that the balance of the down payment held in the Referee's escrow account, that is, the sum of \$70,030.00, be paid over to Roajact, LLC.

This constitutes the decision and order of the court.

Settle Judgment.

Dated: New York, New York
October 24, 2007


Saralee Evans, J.S.C.

HON. SARALEE EVANS