

BMB Props., LLC v Arandia

2008 NY Slip Op 30099(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0102317/2002

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

BMB PROPERTIES, LLC,

INDEX NO. 102317/2002

Plaintiff,

MOTION DATE 6/8/07

- v -

MOTION SEQ. NO. 009

ALEX ARANDIA and ELIZABETH ARANDIA, et al.

Defendants.

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, this motion is decided in the accompanying memorandum decision.

This constitutes the decision and order of the court.

Dated: 1/16/08

W
WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
JAN 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

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 15

-----x
BMB PROPERTIES, LLC

Plaintiff,

Index No. 102317/02
Mtn Seq. 009

-against-
ALEX ARANDIA and
ELIZABETH ARANDIA, et al.,

Defendants.

-----x
WALTER B. TOLUB, J.:

FILED
JAN 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

By this application, this court revisits the seemingly endless litigation arising in connection with a parcel of real property known as Condo Unit #17A, 52-54 East End Avenue, New York NY, Lot: 1033, Block 1578 (the property). This parcel of property became subject to foreclosure by this Court's Judgment of Foreclosure and Sale entered on June 4, 2004. The instant application, made by non-party Forcap, LLC (Forcap), seeks an order pursuant to CPLR 5015 vacating the April 10, 2006 stipulation entered into as between BMB Properties and Alex Arandia distributing the surplus monies which have been in dispute since the early part of this decade. In addition, Forcap seeks an order pursuant to Judiciary Law §753(A) holding Barry Bernstein, Esq. and Alex Arandia, Esq., in contempt for purposely failing to notice Forcap and other interested non-parties of the surplus hearing held before Special Referee Lowenstein.

Briefly restating the most relevant aspects of the history of this action, the property at issue was ordered to be sold at a foreclosure auction, and, under the auspices of appointed Referee

Howard Baker, Esq., nonparty Forcap, LLC (Forcap) became the successful bidder on the property. Forcap took the property in "as is" physical order and condition, subject to a series of restrictions delineated in the terms of sale.¹

What occurred next marked the genesis of what this court believes to be one of its most contentious, and in some regards, disconcerting cases.

Following the sale of the property, Forcap made a *pro forma* request to Referee Baker for return of the funds it tendered at auction which were in excess of the 10% required at the sale. BMB Properties, LLC (BMB Properties) and their counsel, Barry M. Bernstein, Esq.² opposed the request. Forcap then brought an application by Order to Show Cause, in which this court issued a TRO so as to maintain the status quo and prevent BMB Properties, Mr. Bernstein, and Referee Baker from transferring the property at issue until the issues raised in that motion were resolved.

What this court did not know, however, was that in 2004, JP Morgan Chase, which was at that time the holder of the most senior mortgage instrument on the property, commenced an action against BMB Properties, Mr. Arandia, and the Board of Managers of the 52 East End Condominium (see, JP Morgan Chase Bank v. Alex Arandia,

¹ For a detailed discussion on these limitations, see this Court's decisions dated February 4, 2005 (Motion Sequence 004) and February 21, 2006 (Motion Sequences 005, 006, and 007).

² Mr. Bernstein is also a principal of BMB Properties, Inc.

BMB Properties, Inc., Board of Managers of the 52 East End Condominium, (New York County Index No. 101941/2004). The JP Morgan Chase action, which sought similar relief, was assigned to Hon. Joan Madden, who was not informed by either BMB Properties, Mr. Bernstein or Mr. Arandia of the earlier, similar, and still pending, action before this court.

This court was, in fact, unaware of the action before Judge Madden until after JP Morgan Chase moved for summary judgment in 2004. JP Morgan Chase's motion was, unbeknownst to this court, argued on August 19, 2004, and submitted in September, 2004. Forcap's application, brought by an Order to Show Cause now containing a TRO, was argued and submitted on August 20, 2004. However, Judge Madden rendered her decision first, and that decision, ultimately rendered this court's TRO worthless.

Left with the obligation of how to resolve the problems created by the failure of BMB Properties and its attorney to inform this court and Judge Madden of the two obviously similar cases seeking similar relief, this court determined that a clear and unequivocal mandate of this Court had been violated. BMB Properties and its attorney were sanctioned, and this court directed that Referee Baker release roughly \$39,9000 to Forcap, representing the excess of the deposited funds.

The next significant round of applications and motions in this action were decided in February of 2006. Again, this court

considered the issue of civil contempt, this time with respect to the actions of defendant Alex Arandia, Esq. (Motion Sequence 005). This court also considered an application seeking leave to intervene made by the Board of Managers of 52 East End Condominium, which included a request for an order (1) directing the Clerk of New York County to return certain funds arising out of the subject mortgage foreclosure action; (2) an order directing the referee to convey the funds to the proposed intervening party, and (3) an order directing the purchaser at the foreclosure to pay the balance of the lien due to the Board of Managers in the sum of \$43,000.78 (Motion Sequence 006). Last, but certainly not least, was nonparty Forcap's application, as foreclosure purchaser, for an order pursuant to §221 of the Real Property Actions and Proceedings Law directing the Sheriff to put Forcap, as purchaser, into possession of the property at issue.

By decision dated February 23, 2006, this court, among other things, determined that Mr. Arandia violated an unequivocal mandate of this court thereby prejudicing Forcap's rights as purchaser. As such, Mr. Arandia was found in civil contempt and sanctioned. The quitclaim deed that Mr. Arandia attempted to convey was declared null and void, and Forcap, who was recognized as having a considerable interest in the subject property was directed to settle an order directing the Sheriff to put them in possession. Forcap's interest in the subject property became greater when on

January 23, 2006, all of the parties, and this court, were notified that the Board of Managers had assigned its statutory claim of right to the surplus monies at the center of this litigation, to Forcap (Notice of Motion, Exhibit G). Inasmuch as it was clearly demonstrated that there were multiple entities not named as parties but potentially having an interest in the surplus monies, this court allowed the Board of Managers to intervene in this action, and directed a hearing to determine whether any other entities held a viable claim to the funds in dispute. The relevant portion of this court's decision reads as follows:

Motion Sequence 006

By motion sequence 006, the Board of Managers seek leave to intervene in this action pursuant to CPLR 1001, 1003, 1012(a)(2) and/or 1013. Specifically, the Board of Managers contends that it holds a substantial lien that is senior to the mortgage foreclosed upon in the instant action. This lien, it is argued, was required to be paid to the Condominium, and was neither paid either out of the foreclosure sale proceeds or by the grantee, Forcap, at the time of the closing on the subject property. The Board of Managers additionally seeks an order directing the release of certain funds presently held by the New York County Clerk's Office and the conveyance of those funds by the Referee to the Board of Managers.

Not surprisingly, Barry Bernstein, the attorney for plaintiff BMB properties, opposes the application, claiming entitlement to the funds.

With respect to the initial issue of whether the Board of Managers should be allowed to intervene in this matter, this court sees no reason to bar the Board of Managers from

intervening in this matter inasmuch as it appears that they have a lien on the subject property and could potentially be affected by the distribution of surplus monies presently held by the New York County Clerk. Accordingly, that portion of the application seeking permission to intervene in the above captioned action is granted. However, in light of the fact that there are numerous issues raised by the parties with respect to the distribution of the fees, that issue is held in abeyance pending a hearing and report by a referee to be assigned in this matter.

(Decision Dated February 23, 2006, emphasis added).

Notwithstanding the January 23, 2006 notice and this Court's February 26, 2006 order, there were several things that failed to happen. First, the Board of Managers of 52 East End Avenue Condominium ("Board of Managers") failed to serve a copy of the February 2006 order, with notice of entry, upon the Clerk of Court and the Clerk of Trial Support so as to amend the caption to reflect the intervening party. Second, Forcap never made an application to intervene and amend the caption predicated upon the contention that it now held the Board of Manager's interests, and potentially, a right to a portion of the surplus monies. Third, neither the Board of Managers nor Forcap were noticed of the hearing before Special Referee Lowenstein, either by this court because they did not (yet) appear in the County Clerk's records as actual parties to the action, or by BMB properties or Mr. Arandia. Fourth, and perhaps most glaring, is that it does not appear that Referee Lowenstein was ever informed by either BMB Properties or

Mr. Arandia that among other things, (1) this court had granted the Board of Managers leave to intervene in the same decision that set the hearing before the Special Referee; (2) the Board of Managers had transferred their rights to Forcap while the aforementioned motion was *sub judice*; (3) the Board of Managers had not yet served the Clerk of Court and the Clerk of Trial Support; and (4) neither party had taken it upon themselves to notice the Board of Managers or Forcap of the April 10, 2006 hearing. This is particularly egregious in light of the fact that **the sole purpose** of the hearing ordered by this court was to address **all of the claims advanced by the parties, non-party Forcap, and the Board of Managers, who had been granted leave to intervene.** These claims were to have been evaluated prior to determining who, if anyone, was entitled to what portion, if any, of the surplus monies.

The hearing before Special Referee Lowenstein was held on April 10, 2006. BMB Properties and Mr. Arandia appeared and presented a Stipulation to Referee Lowenstein. The Stipulation, entered into as between BMB Properties and Mr. Arandia, divided the \$71,992.29 surplus monies between the two parties, \$37,624.04 going to BMB Properties, and \$34,368.24 going to Mr. Arandia. The stipulation was signed by Referee Lowenstein, and later So-Ordered by this court (Notice of Motion, Exhibit I).

Forcap first learned of the hearing and distribution of funds on March 12, 2007 when it discovered the notice from the Court

noticing BMB Properties and Alex Arandia of the Hearing before the Special Referee (Notice of Motion, Exhibit J). Forcap's application, once again asserting that the deliberate actions and inactions of one or more of the parties to this action prejudiced their rights as purchaser, followed.

In opposition to this application, both BMB Properties and Mr. Arandia make the assertion, in one form or another, that notwithstanding this court's February 2006 decision, they had no obligation to notify either the Board of Managers or Forcap. Mr. Bernstein's argument focuses on his claim that he never received the notice from the Court indicating that there was a hearing before the Special Referee (Affidavit in Opposition, p. 3) and that neither the Board of Managers nor Forcap were a party to the action. In pertinent part, Mr. Bernstein's opposition reads as follows:

8. Even if I had received the notice, which I never did, to date, neither the Board of Directors of the 52 East End Avenue Condominium, nor Forcap appear in the New York County Clerk's records, as a "party" in this proceeding.

9. Forcap's counsel now claims that Forcap (a non-party) and the Board of Managers (a non-party) were entitled to a notice from plaintiff of the date for reference to a special referee. (Affidavit in Opposition of Barry Bernstein, p. 3).

Mr. Arandia's opposition is similar:

8. To date, neither the Board of Directors of 52 East End Avenue Condominium, nor Forcap LLC., ("Forcap") appear, in the New York County Clerk's records as a party in these proceedings [...]

9. Sorin, Forcap's counsel, now disingenuously claims that Forcap (a non-party) and the Board of Managers of 52 East End Condominium (also a non-party) were, irrespective of Bergman's violations of this court's notice directives, entitled to additional notice by plaintiff and defendant of the date for reference to the Special Referee (Affidavit in Opposition of Alex Arandia).

The court has reviewed all of the papers submitted by the parties and is very concerned with respect to the allegations and responses which have been made by each of the individuals and entities involved in this application. This court is additionally concerned because it was clear, at least to this court, that the hearing ordered in 2006 required notification of all of those entities, party or not, which expressed a potential claim to the surplus monies at the center of this litigation.

With this in mind, it is apparent to this court that a hearing is required to ascertain whether this court should vacate the April, 2006 stipulation of settlement entered into as between BMB properties and Mr. Arandia which purports to distribute the surplus monies. It is also apparent to this court, that pending the determination of the hearing, further inquiry may be necessary with respect to whether Mr. Bernstein and Mr. Arandia violated Judiciary Law §753(A). That inquiry, however, may be more appropriate in another forum. As such, the orders sought by Forcap in the instant application are held in abeyance until the completion of a hearing.

Moreover, so that there is absolutely no confusion, the

hearing to be held by this court **requires the notification and appearance of:**

- (1) Plaintiff;
- (2) Mr. Bernstein;
- (3) Defendant
- (4) Mr. Arandia
- (5) Non-party Forcap, LLC; and
- (6) A legal representative of the Board of Directors of the 52 East End Avenue Condominium, preferably one with knowledge of the transfer of interest which took place as between the Board of Directors and non-party Forcap.

The court further suggests that prior to the hearing in this action, counsel to the Board of Directors of the 52 East End Avenue Condominium settle an order allowing them to intervene in this action inasmuch as the relief sought and awarded in 2006 was not self-executing. As such, it is

ORDERED that the relief sought in the within application is held in abeyance pending the completion of a hearing; and it is further

ORDERED that counsel for all of the parties in this action, Mr. Bernstein, Mr. Arandia, and counsel for non-party Forcap LLC and 52 East End Avenue Condominium, appear³ for a hearing in IA

³The court emphasizes that in the event that either plaintiff or defendant obtain different legal counsel prior to this court's hearing on February 20, 2008, it does not obviate

Part 15, Room 335, 60 Centre Street, New York, New York on February 20, 2008 at 9:30 a.m.; and it is further

ORDERED that upon receipt of notice from the Court of this hearing, both plaintiff and defendant shall serve copies of said notice upon counsel for nonparty Forcap, LLC and nonparty the Board of Managers of 52 East End Avenue Condominium within 48 hours of receipt of said notice; and it is further

ORDERED that proof of service of notice of the hearing shall be presented to the Clerk of Part 15, Room 335, 60 Centre Street, New York, New York, within 48 hours after service upon nonparty Forcap, LLC and upon nonparty the Board of Managers of 52 East End Avenue Condominium.

Counsel for all of the individuals and entities required to appear on February 20, 2008 at 9:30 are further advised that in the event an adjournment date is sought, the application may not be made ex-parte; it requires the written consent of all of the aforementioned parties and nonparties, and is subject to judicial approval.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

1/16/08

FILED
JAN 18 2008
HON. WALTER B. TOLUB, J.S.C.
NEW YORK COUNTY CLERK'S OFFICE

this court's mandate that Mr. Berns and Mr. Arandia appear.