

Emigrant Mtge. Co., Inc. v Biggio
2008 NY Slip Op 31618(U)
May 15, 2008
Supreme Court, Nassau County
Docket Number: 0494-06/
Judge: F. Dana Winslow
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SUM

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

EMIGRANT MORTGAGE COMPANY, INC.

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

-against-

**JACQUELINE BIGGIO; LAWRENCE BIGGIO;
NORTH SHORE UNIVERSITY HOSPITAL AT
MANHASSET; NCPD FEDERAL CREDIT UNION;
MARIE HOLDINGS, INC., E*TRADE, THE ROSYLN
SAVINGS BANK; NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE; UNITED STATES OF
AMERICA/INTERNAL REVENUE SERVICE; THE
PEOPLE OF THE STATE;**

**MOTION DATE: 03/26/08
MOTION SEQ. NO.: 004, 005,
006**

INDEX NO.: 010494/06

Defendant(s).

The following papers having been read on the motion (numbered 1-4):

Notice of Motion to Confirm Report of Sale.....	1
Notice of Cross Motion.....	2
Affirmation in Partial Opposition to Motion.....	3
Affirmation in Partial Opposition to Cross Motion.....	4

These motions by defendant Marie Holdings, Inc., and defendant E*Trade Bank, for, *inter alia*, an order pursuant to Real Property Actions & Proceedings Law ("RPAPL") § 1355, 1361, confirming the Referee's Report of Sale of Stephen G. Frommer, Esq., dated August 9, 2007, and appointing a Referee to: (1) ascertain and report the amount due lienholders on surplus monies; (2) determine the lienholders' priorities; and (3) direct the distribution of surplus monies, are granted as provided herein.

This cross- motion by defendant Lawrence Biggio for an order pursuant to

CPLR 2201 staying this proceeding pending a final determination of his equitable distribution rights in the matrimonial action Lawrence G. Biggio v Jacqueline Biggio (Index No. 20354/03) is determined as provided herein.

This action was brought to foreclose a mortgage on property located at 3 Ryan Court, Syosset, N.Y. A Judgment of Foreclosure & Sale was entered on May 4, 2007, and Stephen G. Frommer, Esq., was appointed Referee to sell the mortgaged premises. The property was sold on July 3, 2007 to defendant Marie Holdings for \$805,000. The Referee's Report of Sale filed in the Nassau County Clerk's office on August 9, 2007 reflects \$490,793.09 in surplus funds, which amount was paid into this court on August 20, 2007. A Notice of Claim for Surplus Monies has been filed by defendants E*Trade Bank, Marie Holdings, Inc., the United States of America, a/k/a the Internal Revenue Service, the New York State Department of Taxation and Finance and Lawrence Biggio. A lien search of the property has revealed that numerous entities have filed judgments against the defendant owner of the property Jacqueline Biggio, to wit: the Nassau County Police Department Federal Credit Union, the Internal Revenue Service, Lawrence Biggio, Long Island Lighting Co., Global Financial, New York State Department of Taxation and Ford Motor Credit Union.

“[T]he surplus realized at a foreclosure sale is not a general asset of the mortgagor whose property was divested by the foreclosure (the owner of the equity of redemption).” NYCTL 1998-1 Trust v Gabbay, 16 Misc3d 732, 735 (Supreme Court Bronx Co. 2007 [Renwick, J.]). “[T]he surplus stands in the place of the land for purpose of distribution among persons who have vested interests or liens on the property.” NYCTL 1998-1 Trust v Gabbay, *supra*, at p. 735, citing Chase Manhattan Mortg. Corp. v Hall, 18 AD3d 413 (2nd Dept. 2005), citing

Shankman v Horoshko, 291 AD2d 441 (2nd Dept. 2002); see also, Restatement [Third] of Property § 7.4. “Thus, surplus monies take place of the equity of redemption and for purpose of distribution are regarded as land.” NYCTL 1998-1 Trust v Gabbay, supra, at p. 735, citing Dunning v Ocean Nat’l Bank of New York, 61 NY 497 (1875); Ellis v Salomon, 57 AD 118 (2nd Dept. 1901). Thus, “only a party who has a vested interest or estate in the land which is the subject of the foreclosure and which is extinguished as to the property by the foreclosure is entitled to share in the surplus. “ NYCTL 1998-1 Trust v Gabbay, supra, at p. 735 citing Witter v Taggart, 78 NY2d 234 (1991); Victoria Woods Homeowners Assn. v Gonyo, 192 AD2d 1107 (4th Dept. 1993). “[A] claimant’s right to any portion of the surplus monies must be supported by either an interest in the land foreclosed or some lien upon it.” NYCTL 1998-1 Trust v Gabbay, supra, at p. 736.

“Ultimately, liens and other vested interests terminated by the foreclosure sale attach to the surplus in the order of priority they enjoyed prior to the foreclosure.” NYCTL 1998-1 Trust v Gabbay, supra, citing CPLR 5018(a), 5023(a); RPL § 290-291; Bergman, Mortgage Foreclosure. While “the owner of the equity of redemption (that is, the owner whose title on the property was extinguished by the foreclosure), may assert a claim to surplus monies . . . th[at] claim . . . is junior to those other valid interest terminated by the foreclosure.” NYCTL 1998-1 Trust v Gabbay, supra, citing Chase Manhattan Mortg. Corp. v Hall, supra. “[A]nything less than an interest which the court construes as vested will not be sufficient to support a pursue of surplus monies.” NYCTL 1998-1 Trust v Gabbay, supra, at p. 735; Shankman v Horoshko, supra.

Pursuant to RPAPL § 1361(2) the court must ascertain the amount due the claimants with liens on the surplus money and the priority of the liens in order to

distribute the surplus money. Furthermore, a “referee may inquire into and determine all questions of law and fact, usury, fraud or the like, and every question tending to show the equities of the claimant, to the end that it may be decided in such proceedings finally and on the merits to whom such surplus money belong” Shankman v Horoshko, *supra*, citing Wilcox v Drought, 36 Misc. 351, 352 (1901), *aff’d*. 71 AD 402 (1902); *see also*, Chase Manhattan Mortg. Corp. v Hall, *supra*; Citibank, N.A. v Schroeder, 266 AD2d 332, 333 (2nd Dept. 1999); Corporate Investing Co. v Mt. Vernon Metal Prods. Co., 206 App.Div. 273 (2nd Dept. 1923).

E*Trade has established that as an assignee, it holds a mortgage on the subject property in the principal amount of \$175,000 which was executed on June 24, 2002 and recorded in the Nassau County Clerk’s Office on October 23, 2002. It has also established that it filed a Notice of Claim to Surplus Monies in this action on October 31, 2006, as is reflected in the County Clerk’s Amended Certificate of Claims and Appearances dated December 28, 2007. Darnella Ganaway, Assistant Vice President of PNC Bank, the servicing agent for E*Trade, has established that as of January 31, 2008, \$210,125.60 plus interest accruing at the rate of 10.25% per annum is owing.

Marie Holdings has established that it also holds a mortgage on the subject property in the principal amount of \$280,000 which was executed on May 20, 2005 and recorded in the County Clerk’s Office on June 6, 2005. It has also established that it filed a Notice of Claim to Surplus Monies in this action on October 11, 2007, as is reflected in the County Clerk’s Certificate of Claims and Appearances dated November 20, 2007 and the County Clerk’s Amended Certificate of Claims and Appearances dated December 28, 2007. Marie Holdings’ President Thomas Gulitosi has established that as of December 12, 2007,

\$391,625.44 was due and owing, plus interest at \$145.97 per day.

Both Marie Holdings and E*Trade seek the appointment of a Referee to determine the amounts owed them as lienholders as well as their priority. While Marie Holdings' mortgage is subordinate in time to E*Trade's, it seeks precedence over E*Trade's priority on the ground that E*Trade filed its Notice of Claim "prematurely" on October 31, 2006.

Defendant Lawrence Biggio seeks to stay this proceeding pending the resolution of his equitable distribution rights in the related matrimonial action between him and his ex-wife defendant Jacqueline Biggio. Lawrence and Jacqueline Biggio were awarded an Interlocutory Judgment of Divorce on July 20, 2007. Lawrence Biggio filed a Notice of Claim in this action on July 3, 2007. Lawrence Biggio alleges that while the mortgaged property was in Jacqueline Biggio's name, it was marital property since the down payment came from the sale of the prior marital residence which was jointly owned. Lawrence Biggio further maintains that he is entitled to 50% of the equity in the marital residence, which, prior to the execution of Marie Holdings mortgage, was approximately \$469,000. He maintains that the distribution of surplus funds prior to the determination of his equitable distribution rights would be prejudicial to him because it would defeat his ability to collect. He explains that the determination of his equitable distribution rights has been delayed due to the delay in valuating the businesses owned by him and Jacqueline, to wit; He alleges that while Anthony F. Altimari was appointed Receiver of those businesses and orders were issued directing Altimari to pay his forensic accountant's fees, he alleges that the businesses ceased their operations on June 7, 2007, in effect crippling his valuation efforts. In fact, by order dated August 2, 2007, the Receiver was directed to sell Jacqueline

Biggio's BMW which she had bought with the proceeds of the Marie Holdings mortgage. Lawrence Biggio's counsel has sought the release of those funds to pay his forensic accountant.

In addition, Lawrence Biggio has established that Marie Holdings' mortgage was procured by Jacqueline Biggio in violation of this court's order dated March 9, 2004, which provided "both parties are restrained and enjoined from disposing, dissipating, removing or transferring any marital property except in the ordinary course of business or for day to day living expenses." In fact, by this court's order dated April 13, 2006, which was affirmed by the Appellate Division, Second Department, by order dated June 26, 2007, Jacqueline Biggio was found in contempt of court for taking that \$280,000 mortgage on the marital premises. Lawrence Biggio has also established that proceeds from the mortgage were used by Jacqueline Biggio to pay off a loan to USAA in the amount of \$24,825.29, which loan secured a BMW owned by Marie Holdings' lawyer, Gregory W. Carman, Jr., as well as \$2,796.00 to reimburse Carman for insurance expenses. All of this, Lawrence Biggio alleges, was done in connection with Jacqueline Biggio's purchase of Carman's 2001 BMW, which Carman has admitted. In fact, Carman admitted at his examination-before-trial that he maintained the excess Marie Holdings mortgage funds in his IOLA account at Jacqueline Biggio's request and that he disbursed them pursuant to her directions.

The circumstances surrounding Marie Holdings and its attorneys' actions in extending and disbursing the mortgage funds while the temporary restraining order was in effect are unclear. This may affect the validity and priority of its lien. When Lawrence Biggio's lien accrued also presents an issue.

Since distribution of the surplus funds will not occur until the Referee's

report is confirmed by this court and Lawrence Biggio is a party to this proceeding, a stay at this juncture is unnecessary. It is denied without prejudice to renewal.

This matter is accordingly referred to Referee Dominic Villoni, ESQ
80 Brook St, Garden City, NY 11530 ^{(516) 2644741} to ascertain and determine the priority as well as the amounts, if any, owed the lienholder claimants. Should the Referee be unable to determine the amount owed a claimant, the validity as well as the priority of the lien should nevertheless be determined.

This constitutes the Order of the Court.

Dated: 5/15/08

ENTER:

[Signature]
J.S.C.

ENTERED
JUN 06 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE