

Liberty Bank of N.Y. v Ohm

2009 NY Slip Op 31525(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 122909/2001

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FENMAN

PART 12

Index Number : 122909/2001
LIBERTY BANK OF NEW YORK
 VS.
OHM, ANDREW H.
 SEQUENCE NUMBER : 010
 OTHER RELIEFS

INDEX NO. 122909/2001

MOTION DATE 4/20/09

MOTION SEQ. NO. 010

MOTION CAL. NO. 6/

this motion to/for OR/cran

PAPERS NUMBERED

12

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
LIBERTY BANK OF NEW YORK,

Plaintiff,

against

ANDREW H. OHM, HANVIT AMERICA BANK f/k/a
KOREA COMMERCIAL BANK OF NEW YORK, THE
ELYSABETH CONDOMINIUM, EXPEDI PRINTING,
INC., CHOHUNG BANK OF NEW YORK, KENNEDY
FUNDING, INC., CITY OF NEW YORK DEPARTMENT
OF FINANCE, JANET YOUN, FUNDEX CAPITAL
CORPORATION, UNITED STATES OF AMERICA,

Defendants.
-----X

Index Number 122909/2001
Submission Date 4/20/09
Mot. Seq. No. 010
Cal. No. 61

DECISION AND ORDER

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this motion to set fees :

Papers

Notice of Motion, Affirmation, Exhibits Annexed
Report of Referee in Surplus Money Proceeding

Numbered

1
2

PAUL G. FEINMAN, J.

In this action to foreclose a condominium second mortgage and distribute the surplus funds remaining after the foreclosure sale, referee Lawrence H. McGaughey, Esq., who was originally appointed by the previously assigned Justice of this court, moves unopposed for an order setting his fee plus disbursements at \$35,125.00 for services as special referee in the action. For the reasons stated below, the motion is granted without opposition, pursuant to CPLR 4321 and 8003.

McGaughey also submits his report dated April 1, 2009, pertaining to the hearing concerning the surplus money, wherein, as directed by order of this court on June 21, 2006, he ascertains and reports as to the identity and priority of liens on the surplus moneys on deposit with the Clerk of the Court, and recommends distribution of the funds. According to the

affidavits of service, all parties were served with a copy of this report on April 1, 2009. None of the parties has submitted papers in opposition to or support of the Referee's Report in Surplus Money Proceeding. For the reasons set forth below, the Report is confirmed without opposition.

Report on Surplus Money

In Referee McGaughey's Report in Surplus Money Proceeding dated April 1, 2009, he sets forth the basis for his appointment on June 21, 2006 as a referee to determine and report as to the identity and priority of liens on the surplus funds resulting from the foreclosure sale that took place on November 16, 2005. After addressing the claims of the first mortgagee and other prior liens and expenses, McGaughey found a surplus of \$266,785.74; three claimants identified themselves for possible distribution: Kennedy Funding, Inc., Fundex Capital Corporation, and the United States of America. A hearing was held on April 18, 2007 whereby claimants were given the opportunity to present claims to the surplus funds to Referee McGaughey. (Referee's Report p. 3). Only Fundex Capital Corporation appeared at the hearing, but all three claimants filed memoranda supporting claims to the surplus funds. (*Id.*).

Referee McGaughey rejected Kennedy's claim for the following reasons. First, Kennedy failed to properly reform its loan from that of a "cooperative apartment share loan" to a "condominium mortgage" within the six-year statute of limitations. (Referee's Report, " p. 5). Second, Kennedy failed to provide proof that would warrant reformation of its loan into a mortgage, defaulting in appearance at the Referee's Hearing held on April 18, 2007 and leaving many questions "unaddressed." (*Id.* at 6). Referee McGaughey, noting that Kennedy's claim was one in equity, determined that the "apparent failure of due diligence" on behalf of Kennedy precluded the granting of equitable relief. (*Id.* at 7). Lastly, Referee McGaughey found that, in

any case, Kennedy's lien is inchoate as defined by federal tax law and does not take priority over the United States tax lien. (*Id.* at. 8).

In addressing the claims of Fundex Capital Corporation, Referee McGaughey found the lien asserted by Fundex to be equal to the Federal lien established by the United States of America. (Referee's Report, p. 8). Referee McGaughey then determined that since the United States of America asserted its lien before Fundex entered its claim as mortgagee, the United States of America held priority in claiming a right to the surplus funds. (*Id.*) Referee McGaughey rejected the claims made by Fundex that the Federal Tax Lien cannot apply to the surplus funds in this situation. (*Id.* at 9,10).

This court accepts and confirms the Referee's Report in Surplus Money Proceeding without opposition. Accordingly, the United States is awarded the full amount of its \$282,766.10 claim, along with the income tax liabilities that may have accrued. If any surplus remains after fulfilling the claims of the United States, it shall be awarded to Fundex Capital Corporation.

Motion to Set Referee's Fees

According to Referee McGaughey's affirmation, he was first appointed in early 2003 to compute the amount due the plaintiff for principal and interest on the mortgage on which the action was brought, and to examine and report whether the premises could be sold in parcels. (Mot. Ex. A, Am. Order Appointing Ref. to Compute, p. 2). Referee McGaughey determined that in fact the proper procedure would require computation of the real estate tax lien certificate and that the matter needed further addressing, resulting in an amended Judgment of Foreclosure and Sale, which was entered on August 22, 2003. (Mot. Aff. ¶¶ 2, 3). A foreclosure sale was scheduled for October 10, 2003, but cancelled due to an error in the advertisement of the sale and the notice of pendency. (Mot. Aff. ¶ 3). Following the service of a supplemental summons

and complaint and entry of a default judgment, McGaughey was again ordered to compute the amount due on the real estate tax lien certificate. Having conducted further review, McGaughey determined that an additional computation as to the first mortgage and taxes was also needed following the entering of a default judgment in favor of the second mortgagee. (Mot. Aff. ¶ 4).

During late 2004, McGaughey met on several occasions with the plaintiff's attorney to determine the priority of senior mortgages, liens, and real estate taxes before calculating the distribution of the proceeds of the foreclosure sale. (Mot. Aff. ¶¶ 5-7). McGaughey signed a revised oath and report of amount due and entered his recommendation on October 28, 2004. (Mot. Aff. ¶ 6). There followed further document review with the plaintiff's attorney. (Mot. Aff. ¶ 7). This court then entered the final Judgment and Sale which was filed on June 22, 2005. (Mot. Aff. ¶ 8).

In September 2005, McGaughey reviewed the final Judgment and Sale before further discussions concerning the bank's minimum bid, outstanding senior debt, and remaining real estate tax liens. (Mot. Aff. ¶ 9). The property in foreclosure was sold at auction on November 16, 2005. (Mot. Aff. ¶ 10). McGaughey then arranged for the proceeds of the sale to be deposited in an account at Citibank, awaiting disbursement to those parties claiming rights to the surplus funds. (*Id.*) He then coordinated the claims of the various parties in preparation for the closing and conducted research on closing issues. (*Id.*). At auction the property sold for \$440,000 (Mot. Ex. 11 [Aff. of Zebrowsky, Ex. C, ¶ 5]) and following the closing of title in January 2006, McGaughey prepared a Report of Sale. (Mot. Aff. ¶ 11). On May 16, 2006, an amended motion to confirm McGaughey's report was made. (Mot. Aff. ¶ 12). An order confirming the Referee's Report of Sale and appointing McGaughey as special referee to report on the surplus funds was made shortly thereafter, on June 22, 2006. (Mot. Ex. C.).

In late March 2007, McGaughey served a Notice to Attend Hearing and Memorandum pertaining to the distribution of the surplus funds. (Mot. Aff. ¶ 14). As described above, McGaughey held a hearing to address the various claims to the surplus funds remaining after the foreclosure sale and thereafter sought memoranda on the question of the priority of the claims to the funds. (*Id.*). McGaughey has filed his recommendation, on April 1, 2009, as set forth above. He now seeks reimbursement for his work on this entire matter. (Mot. Aff. ¶ 17).

CPLR 8003(a) states that, “[a] referee is entitled, for each day spent in the business of reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead.” Section (b) of CPLR 8003, which governs a referee’s compensation when he or she is “appointed to sell real property pursuant to a judgment,” provides the court with discretion to set the referee’s daily fees above and beyond the statutory limit of \$50 when “the property [is] sold for fifty thousand dollars or more.” Accordingly, “the statute which sets the statutory rate also authorizes the court to fix ‘a different compensation’ and does not require that it be established before the referred matter is heard.” (*Matter of O’Dwyer v Robson*, 103 AD2d 1036 [4th Dept 1984]). It is the goal of the court to “fix a fee fairly compensating the Referee.” (*Blake Terrace Associates v Sommers*, 176 AD2d 394, 395 [3d Dept 1991] [declaring that a fee of \$42 per hour was neither excessive nor unreasonable given the complexity of the case and the detail of the referee’s report]).

In *Garay v Soling*, the Court stated that it may “set a Referee’s fees beyond the statutory rate.” (169 AD2d 616, 618 [1st Dept 1991] [declaring that an award of \$20,000 to special referee was warranted when extensive services and research of complex legal issues were required]). Courts that have ordered fees above the statutory limit frequently cite the “complexity of the issues involved” (*Blake Terrace Associates v Sommers*, 176 AD2d 394, 395 [3d Dept 1991]), the

“extent of the services performed” and the submission of “extensive and complex memoranda of law requiring substantial research and analysis” when justifying such a decision. (*Garay v Soling*, 169 AD2d at 618).

The property sold at auction for well over \$50,000, leaving a surplus of \$266,785.74 to be distributed among the remaining claimants. Thus the court has discretion to grant McGaughey fees over the statutorily set amount of \$500. (CPLR 8003 [b]). McGaughey submitted detailed time sheets tracking the hours he spent on the action which serve as computation of his fees as required by CPLR 4321. (See *Albano v Albano*, 2003 NY Slip Op 51158[U] [Sup Ct, Suffolk County 2003]). Special Referee McGaughey states that he was required to do significant legal research before making his recommendation as to the distribution of the surplus funds. Multiple outstanding liens as well as a senior mortgage required him to compute the distribution of the sale proceeds to the parties holding senior debt before he could address the three claimants to the surplus funds. (Mot. Aff. ¶ 15). Furthermore, he indicated that the memorandum submitted by claimant Kennedy Funding, Inc. was incomplete and required considerable effort to discern the merits of the corporation’s claim to an equitable lien over the property. (Referee’s Report, pp. 3-4).

The matter was complicated by the presence of the United States of America as one of the three claimants, which required McGaughey to analyze the claims of each party under both New York State law and Federal law. (Referee’s Report, pp. 5-11). McGaughey was required to first determine whether each claimant could exert a property right over the surplus funds pursuant to New York state law before applying the Federal Tax Lien, 26 USC § 6321. (Referee’s Report, pp. 7-8). Furthermore, he was required to determine how much of the surplus

funds, if any, should be withheld from the United States due to the federal statute of limitations. (Referee's Report, p. 9).

McGaughey's worksheets show that he spent 116.66 hours in his duties as special referee in this litigation. (Mot. Ex. D). Applying his normal fee to real estate deals of \$300.00 per hour, plus disbursements totaling \$727.00 but less statutory fees already received of \$600.00, McGaughey seeks a total fee of \$35,125.00. (Mot. Ex. D). Given the complex nature of the case and the extensive services provided, and absent any objection having been raised, this court finds it appropriate to award Special Referee McGaughey fees totaling \$35,125.00, which includes \$727.00 in disbursements, minus the \$600.00 in statutory fees paid, as put forth in the itemized time sheet in Exhibit D of the submitted Affirmation in Support of Fees. It is

ORDERED that the Report on Surplus money, dated April 1, 2009, is confirmed without opposition in its entirety, and it is further

ORDERED that the motion by Referee McGaughey to set his fees in the instant matter is granted, and that the fees are calculated at \$300 an hour, for 116.66 hours of work, totaling \$34,998.00, minus \$600.00 in statutory fees already paid, and adding \$727.00 in disbursements, for a total of \$35,125.00, to be taxed appropriately; and it is further

ORDERED that movant shall serve a copy of the within decision and order upon all parties within 15 days from the date of entry.

Dated *July 9, 2009*
New York, New York

David H. Hoff

J.S.C.

