

Bank of New York v Hunt

2009 NY Slip Op 33150(U)

December 30, 2009

Supreme Court, New York County

Docket Number: 103303/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

BANK OF NEW YORK

INDEX NO. 116822/06

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -
JONATHAN M. HUNT, ETAL.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This judgment is to be entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 12/30/09


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

BANK OF NEW YORK, as Trustee for the
Certificateholders of CWALT 2005-38

Index No.
103303/09

Plaintiff,

-against-

**DECISION
and ORDER**

JONATHAN M. HUNT

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).
N.Y.C. Cr. Ct. 001

HON. EILEEN A. RAKOWER:

Plaintiff brings this action to foreclose a mortgage on property located at 26 West 74th Street, Unit #1, in New York, New York ("the premises"). By order dated November 21, 2008, this court rendered a Judgment of Foreclosure and Sale in favor of Plaintiff. A foreclosure sale was subsequently conducted on May 20, 2009 pursuant to a duly published Notice of Sale.

Amalfi Abstract, Inc. ("Amalfi") was the successful purchaser at the May 20th sale for the sum of \$756,000.00. Pursuant to the Terms of Sale, Amalfi delivered a down payment of \$76,000.00 to the Referee, that amount representing ten percent of the purchase price. The Terms of Sale provided that Amalfi was required to close on or before June 20, 2009.

Plaintiff now moves by order to show cause for an order (1) holding Amalfi in default under the Terms of Sale and pursuant to the Judgment of Foreclosure and Sale; (2) directing the Referee to reschedule, re-advertise and conduct the foreclosure auction of the premises pursuant to the Judgment of Foreclosure and Sale; and (3) Holding Amalfi liable for any deficiency, over and above the down payment, that may exist between the Amalfi's successful bid, and the successful bid at the second auction, together with costs and expenses incurred on the resale. Alternatively, Plaintiff seeks an order directing Amalfi to close within ten days of the date of this order; and further directing Amalfi to pay per diem interest to the date of the closing

of title as well as taxes and/or other outstanding charges. Plaintiff submits an affirmation with the copies of the following annexed as exhibits: the Judgment of Foreclosure and Sale; the Notice of Sale and Affidavit of Publication; the Terms of Sale; and an 8/17/09 letter to Amalfi demanding that Amalfi close pursuant to the conditions of the Terms of Sale.

Amalfi submits an affirmation in opposition. Amalfi asserts that the only reason title has not closed is that Plaintiff is unable to convey marketable title, despite Amalfi's numerous requests that it do so. Amalfi states that, in response to Plaintiff's August 17, 2009 letter, it sent a letter to Plaintiff on August 21, 2009 requesting that Amalfi's bid deposit be returned based upon Plaintiff's failure to remedy defects in title. Amalfi states that the following title issues remain unresolved, according to its title report from Ameriserv Abstract Inc.:

- a copy of the trust agreement for the certificate holder of SWALT 2005-38 is required, but has yet to be disclosed by Plaintiff; and
- a copy of the service agreement and/or power of attorney granting authority to Countrywide Home Loans, Inc. to take action on behalf of the trust and/or trustee is required, but has yet to be disclosed by Plaintiff.

Annexed to Amalfi's affirmation as exhibits are copies of the Terms of Sale with Memorandum of Sale and Amalfi's 8/21/09 letter. In addition, Amalfi argues that Plaintiff's failure to pursue a judgment against Nancy Sue Winston, an occupant of the premises, excuses Amalfi from closing.

Plaintiff submits a reply affirmation. Plaintiff states that, by letter dated June 9, 2009, Plaintiff provided various documentation requested by Amalfi's insurance company. On June 18, 2009, Plaintiff provided yet more information to the insurance company. Plaintiff states that no further requests were received from either Amalfi or Amalfi's insurance company. Accordingly, Plaintiff tendered its "time is of the essence letter" on August 17, 2009. Thereafter, Amalfi's insurance company requested information as to five exceptions on August 28, 2009. Plaintiff states that it provided responsive documentation by letter dated August 31, 2009.

On September 17, 2009, Plaintiff send a letter to Amalfi detailing the foregoing events and demanding that Amalfi close. By letter dated October 6, 2009, Plaintiff forwarded additional documents to Amalfi's insurance company. Three days later, Plaintiff sent a letter to Amalfi stating that it has responded to Amalfi's insurance

company's requests and has not received any further response from same, and that Plaintiff intends to file the instant order to show cause. All of the above correspondence and documentation are annexed to the reply affirmation as exhibits.

As for the two exceptions which Amalfi asserts render title unmarketable, Plaintiff states that the trust agreement is a public document filed with the SEC as part of the pooling and servicing agreement; and that the power of attorney was provided in Plaintiff's August 31, 2009 correspondence, which is contained as an exhibit. In any event, Plaintiff contends, the exceptions are "invalid and baseless" since the court has already ruled on the enforceability and validity of the mortgage, and the Terms of Sale hold that the purchaser takes the premises subject to the "Rights of any defendants, pursuant to [CPLR] §317, §2003, and §5015, if any." In addition, Plaintiff notes that Amalfi does not mention whether or not it made any efforts to obtain insurance through another carrier. Further still, Plaintiff had Amalfi's title search reviewed by another insurance company, which indicated via correspondence dated December 7, 2009 (annexed hereto as an exhibit) that the exceptions cited by Amalfi "are not industry standard exceptions" and would not thwart the issuance of title insurance.

With respect to Ms. Winston, the occupant of the premises, Plaintiff states that Amalfi fails to note whether Ms. Winston took possession before or after issuance of the judgment; and that, in any event, the Terms of Sale provide that the sale is subject to "Any and all tenancies, possessory interests and/or leases affecting said premises not made party defendants." It further provides that "It shall be the responsibility of the purchaser to evict or remove any parties in possession of the premises being foreclosed herein."

The court finds that Plaintiff is entitled to the relief requested. Amalfi's objections are predicated on documents which speak to whether the commencement of the foreclosure action (in which the aforementioned Judgment of Foreclosure and Sale was rendered) was properly authorized. Plaintiff correctly notes that such an objection would have to be raised by the Estate of the Mortgagor by way of a motion to vacate pursuant to CPLR §5015, and that the terms of sale explicitly provide that the purchaser (Amalfi) takes the premises subject to the rights of any defendants under, *inter alia*, CPLR §5015. As the possibility of Judgment of Foreclosure and Sale being vacated is speculative at best, the court cannot say that title in the premises is unmarketable (*see Regan v. Lanze*, 40 N.Y.2d 475, 482 [1976]) ("The law assures to a buyer a title free from reasonable doubt, but not from every doubt and the mere

possibility or suspicion of a defect, which according to ordinary experience has no probable basis, does not demonstrate an unmarketable title.”).

As for Amalfi’s claim that Ms. Winston’s occupancy of the premises renders title to the premises defective, under the Terms of Sale, the purchaser of the premises took to the property subject to any tenancies affecting the premises, irrespective of whether such tenant was named a defendant in the foreclosure action.


Wherefore, it is hereby

ADJUDGED that Amalfi is in default under the Terms of Sale and the court’s Judgment of Foreclosure and Sale; and it is further

ORDERED that the Referee is directed to place the premises up for sale again, with Amalfi liable for any deficiency, over and above Amalfi’s down payment, that may exist upon the resale, together with the costs and expenses incurred upon the resale.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December ³⁰~~29~~, 2009



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).