

**First Am. Capital, LLC v Williams**

2010 NY Slip Op 32473(U)

April 28, 2010

Supreme Court, Queens County

Docket Number: 25650/07

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X  
FIRST AMERICAN CAPITAL, LLC,

Index No.: 25650/07  
Motion Date: 3/3/10  
Motion Cal. No:14  
Motion Seq. No: 3

Plaintiff,

-against-

COURTNEY A. WILLIAMS, EULENE WILLIAMS,  
PATRICIA GOULDBOURNE, et al.,

Defendants.  
-----X

The following papers numbered 1 to 10 read on this motion for an order, pursuant to RPAPL §1371, directing that the Report of Sale be confirmed in all respects and granting leave to enter a deficiency judgment against defendant Courtney A. Williams for the residue of the mortgage debt remaining unsatisfied in the amount of \$55,869.17, with interest from October 9, 2009, and further directing the Clerk of the County of Queens to enter and docket the deficiency judgment, and providing that plaintiff have execution for that amount.

	PAPERS NUMBERED
Notice of Motion -Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition to Motion-Exhibits.....	5 - 7
Affirmation in Reply-Exhibits.....	8 - 10

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action to foreclose a credit line mortgage executed by defendant Courtney A. Williams (“defendant”), a joint owner with defendants Eulene Williams and Patricia Gouldbourne, of property located at 110-27 178<sup>th</sup> Street, Jamaica, New York 11433, which was executed and delivered on July 19, 2004, to Fleet National Bank in the amount of \$150,000.00, together with a credit line mortgage modification increasing the credit line mortgage by an additional \$30,000.00, which, on July 18, 2005, were consolidated into a single lien in the amount of \$180,000.00. The mortgage subsequently was assigned to Bank of America, then, on September 5, 2007, to UM Capital, LLC, and ultimately assigned on that same date to plaintiff First American Capital, LLC (“plaintiff”). Based upon defendants’ default in making the required payments on July 2, 2006, plaintiff commenced the instant foreclosure action on April 11, 2008. By order dated May 1, 2008,

plaintiff's motion was granted without opposition, for an order granting summary judgment striking the answer of pro se defendant Eulene Williams; amending the complaint to reflect the correct chain of assignment of the mortgage, to reflect defendants Eulene Williams and Patricia Gouldbourne as "the record owners and mortgagors;" and to reflect the correct principal balance of "\$149,954.07;" appointing a referee to determine the amount due and to ascertain whether the premises may be sold in parcels; amending the caption by substituting "Elaine Powell" and "Justin Powell," as party defendants in place of "John Doe," and deeming all non-appearing and non-answering defendants to be in default. By order of this Court dated March 20, 2009, plaintiff was granted a judgment of foreclosure and sale against the interest of defendant Courtney Williams (defendant") in the property located at 110-27 178<sup>th</sup> Street, Jamaica, NY 11433; the Court further declared that the lien held by Brooklyn Union Gas Company was invalid, and was extinguished. The property was sold at public auction on June 12, 2009, for \$135,000.00.

Plaintiff now moves for an order, pursuant to RPAPL §1371, directing that the Report of Sale be confirmed in all respects and granting leave to enter a deficiency judgment against defendant for the residue of the mortgage debt remaining unsatisfied in the amount of \$55,869.17, with interest from October 9, 2009, directing the Clerk of the County of Queens to enter and docket the deficiency judgment, and providing that plaintiff have execution for that amount. Defendant Courtney Williams ("defendant") opposes the application for a deficiency judgment on the grounds that the "Referee and Clerk, at the direction of the Plaintiff . . . made prejudicial statements at the foreclosure/judicial sale and as a result the terms of sale deviated from the judgment," and that plaintiff is not entitled to the deficiency judgment sought.

"CPLR 2003 authorizes the court to set aside a judicial sale 'for a failure to comply with the requirements of the civil practice law and rules as to the notice, time or manner of such sale, if a substantial right of a party was prejudiced by the defect' (citations omitted). In addition to the authority granted by statute, a court, 'in the exercise of its equitable powers, has the discretion to set aside a judicial sale where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale' (*Alkaifi v. Celestial Church of Christ Calvary Parish*, 24 A.D.3d 476, 477, 808 N.Y.S.2d 230; see *Bankers Fed. Sav. & Loan Assn. v. House*, 182 A.D.2d 602, 603, 581 N.Y.S.2d 858)." *Mortgage Elec. Registration Systems, Inc. v. Schotter*, 50 A.D.3d 983,984 (2<sup>nd</sup> Dept. 2008). See, also, *Alkaifi v. Celestial Church of Christ Calvary Parish*, 24 A.D.3d 476 (2<sup>nd</sup> Dept. 2005); *Long Island Sav. Bank of Centereach, F.S.B. v. Jean Valiquette, M.D.*, 183 A.D.2d 877 (2<sup>nd</sup> Dept. 1992). And, where, as here, the conduct of the referee is at issue, it is well recognized that a "referee lacks the authority to alter the terms of a judgment of foreclosure (citations omitted), and unauthorized variations between the terms of sale and judgment are void (citation omitted)." *Cicorelli v. Hickey's Carting, Inc.*, 66 A.D.3d 626 (2<sup>nd</sup> Dept. 2009). Thus, "[w]hen the unauthorized actions of a referee cause injury to the property rights of a party, . . . , the sale must be repudiated." *Id.* "A referee who is directed by a judgment to sell certain described real property cannot insert in the terms of sale, on his own motion or at the suggestion of the plaintiff or his agents, a provision that the premises are sold subject to a vague, indefinite, uncertain outstanding interest in another. The effect of such an act is to make the subject-matter of the sale uninviting to intending purchasers, and the probable result is an unjust and needless sacrifice of the property of the owner of the mortgaged premises."

Mullins v. Franz, 162 A.D. 316, 318 (2<sup>nd</sup> Dept. 1914). See, also, Rondack Const. Services, Inc. v. Kaatsbaan Intern. Dance Center, Inc., 54 A.D.3d 924 (2<sup>nd</sup> Dept. 2008)[Where the act [of a party conducting a judicial sale] is unauthorized and property rights of a party in interest are injured, the act must be repudiated,” citing Mullins v. Franz, 162 App.Div. 316, 318, and Greenwood Packing Profit Sharing Plan Trust v. Fournier, 181 A.D.2d 861, 862 (2<sup>nd</sup> Dept. 1992)]. This is because a defendant in a foreclosure action is “entitled to a sale which would yield the best price that could fairly and reasonably be obtained, and where it appears that the sale was not fairly conducted, the court may, and should, set it aside (citation omitted).” Empire State Development Co. v. Lambert, 15 A.D.2d 511 (2<sup>nd</sup> Dept.1961), aff’d, 11 N.Y.2d 913 (1962). However, it “is equally well established that the mere inadequacy of the price alone is insufficient reason to vacate an otherwise apparently fair judicial sale, unless it is found that the price is so inadequate as to shock the court’s conscience.” Long Island Sav. Bank of Centereach, F.S.B. v. Jean Valiquette, M.D., 183 A.D.2d 877 (2<sup>nd</sup> Dept. 1992); Mei Yun Li v. Qing He Xu, 38 A.D.3d 731 (2<sup>nd</sup> Dept. 2007).

Here, the judgment of foreclosure and sale granted plaintiff’s motion for a judgment of foreclosure and sale as to defendant Courtney Williams’ interest in the property, and authorized the Referee to sell the mortgaged premises described in the complaint in this action and as hereafter described, or such part thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of this action as provided by the Real Property Actions and Proceedings Law . . . in one parcel at public auction.” It further provided that “the Referee shall make a Report of Sale . . . and that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff. . . the Referee shall specify the amount of such deficiency in his Report of Sales;” [and that] Plaintiff shall recover from the defendant Courtney Williams the whole of the deficiency [or] so much thereof as the Court may determine to be just and equitable of the residue of the mortgage debt remaining unsatisfied after a sale of the mortgaged premises. . . .” Defendant argues that the Referee acted in excess of her authority at the Auction by announcing, at the direction of plaintiff’s attorney, that “Courtney Williams will litigate after sale,” which resulted in the retraction of a bid of \$155,000.00, the reopening of the sale, and the ultimate sale of the property for the purchase price of \$135,000.00, following the Clerk’s declaration: “Keep in mind the announcement that was read into the record that at the present time what’s being auctioned for sale is a 50-percent interest in the title pending further litigation.” Defendant contends that these statements were made without judicial authority, and did not conform to the sale terms contained in the judgment of foreclosure and sale, and cites to Zouppas v. Yannikidou, 16 A.D.2d 52, 55 (1<sup>st</sup> Dept. 1962), in which the Appellate Division, First Department, stated:

The judicial sale of real property must conform to the judgment to sell and the terms of sale may not deviate therefrom to provide for a sale subject to estate tax liens not mentioned in the judgment, vague and indefinite as to existence and amount. Such unauthorized terms of sale tend to discourage purchasers and to unjustly sacrifice the property of the owners thereof, such as the appellant. (Becker v. Muehlig, 221 App.Div. 512, 224 N.Y.S. 705, affd. 248 N.Y. 543, 162 N.E. 518; Mullins v. Franz, 162 App.Div. 316, 147 N.Y.S. 418; Civil

Practice Act § 1062.)

Defendant further relied upon the decision of the Appellate Division, Second Department, in Phelan v. Phelan, 148 A.D.2d 433, 434-435 (2<sup>nd</sup> Dept. 1989), in which the Court stated:

An interlocutory judgment of the Supreme Court, Dutchess County (Judice, J.), dated November 26, 1984, which, in pertinent part, directed the sale of the parties' former marital residence, confirmed the referee's report which discussed four liens that had been filed against the subject premises. Accordingly, the interlocutory judgment's direction that the public sale of the premises was to be "in accordance with the prior Report of the aforesaid Referee", should have been read as providing that the premises were to be sold subject to the four liens set forth in the Referee's report, and recited in the interlocutory judgment. However, the terms of the sale, as announced by the Referee at the sale, did not provide that the premises would be sold subject to only the four liens. Instead, the Referee orally announced, in pertinent part, that the premises would be sold "subject to any liens or judgments that \* \* \* may be on the record at this time". This statement by the Referee exceeded her authority as delineated in the interlocutory judgment. Further, the record indicates that the imposition of this unauthorized sale term necessarily had the effect of discouraging bidding, to the clear detriment of the plaintiff. Consequently, the sale should not have been confirmed and the defendant's bid should have been rejected. Under the circumstances, the appropriate remedy is to direct a new sale, rather than awarding the premises to the second highest bidder at the sale (see, Zouppas v. Yannikidou, 16 A.D.2d 52, 225 N.Y.S.2d 557, Empire State Development Co. v. Lambert, 15 A.D.2d 511, 936, 222 N.Y.S.2d 681, 227 N.Y.S.2d 891 affd 11 N.Y.2d 913, 228 N.Y.S.2d 669, 183 N.E.2d 75).

However, Appellate Division, Second Department, while not condoning unauthorized statements, in Moller v. Watts, 56 A.D. 562 (2<sup>nd</sup> Dept. 1900), recognized that even though a referee may have no "official power to make the statement in question," such statement may not render the sale void if the terms of the sale do not vary the judgment.

The unauthorized statements at issue here did not vary the judgment. Those statements disclosed to and placed prospective bidders on notice of the probability of post-sale litigation. Indeed, defendant, in prior, written communications to the Referee represented that he planned to litigate after the sale. Accordingly, that branch of the motion directing that the Report of Sale be confirmed in all respects is granted.

That branch of the motion seeking a deficiency judgment, however, stands on a different footing. It is well recognized that a mortgagee is entitled to a deficiency judgment equal to the amount of the indebtedness, less the sale price of the property or the fair market value, whichever is higher. Wand v. Beck, 262 A.D.2d 634 (2<sup>nd</sup> Dept.1999); Marine Midland Bank v. Harrigan Enters., 118 A.D.2d 1035, 1037 (3<sup>rd</sup> Dept. 1986). Section 1371 of the RPAPL, in pertinent part, provides that the court

shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

Thus, when calculating the amount of a deficiency judgment, the court must first determine “the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction.” Columbus Realty Inv. Corporation v. Gray, 240 A.D.2d 529 (2<sup>nd</sup> Dept. 1997). Since plaintiff submitted no evidence regarding the value of the mortgaged premises at the time of sale, and neither party presented an appraisal evaluating the market value of the premises on the date of the sale, an evidentiary hearing must be held to determine the amount of deficiency due. See, East Coast Properties v. Galang, 308 A.D.2d 431, 432 (2<sup>nd</sup> Dept. 2003); Sarasota, Inc. v. Homestead Acres at Greenport, Inc., 249 A.D.2d 290 (2<sup>nd</sup> Dept.1998); Columbus Realty Inv. Corporation v. Gray, *supra*..

The parties are directed to appear before this Court on June 30, 2010, at 10:30 A.M., in courtroom 63 of the Supreme Court, located at 88-11 Sutphin Blvd., Jamaica, New York, for a hearing to determine the amount of the deficiency judgment, if any.

Dated: April 28, 2010

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J.S.C.