

NYCTL 1997-1 Trust v Steed-Bright

2010 NY Slip Op 32977(U)

October 12, 2010

Supreme Court, Queens County

Docket Number: 9202/1999

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x	Index Number <u>9202</u> 1999
NYCTL 1997-1 TRUST and THE BANK OF NEW YORK, etc. <div style="text-align: center;">Plaintiffs,</div> <div style="text-align: center;">-against-</div>		Motion Date <u>June 23,</u> 2010 Motion Cal. Numbers <u>18, 19, 20</u> Motion Seq. Nos. <u>2, 3, 4</u>
DOTTIE M. STEED-BRIGHT, et al., <div style="text-align: center;">Defendants.</div>	x	

The following papers numbered 1 to 41 read on this motion by Life Asset Locator, as the purported assignee of the interest of defendant/claimant Dottie M. Steed-Bright in the surplus moneys, to confirm the Referee's report of sale dated September 24, 2009, and upon confirmation, to direct the New York City Department of Finance to disburse all surplus moneys plus accrued interest, currently on deposit, to Life Asset Locator, by distributing the moneys to the attorney escrow account of Daniel S. Berke, Esq., c/o Life Asset Locator and Dottie M. Steed-Bright; this motion by claimant Vision Abstract, LLC (Vision) to confirm the Referee's report of sale, and for leave to appoint a referee to ascertain and determine the priorities of the several liens on the surplus moneys, and for the distribution of the surplus moneys; this cross motion by claimant Herbert Alfanso Steed, appearing pro se, to confirm the Referee's report of sale and upon confirmation, to ascertain and determine the priorities of the several liens on the surplus moneys, and for the distribution of the surplus moneys to claimant Herbert Alfanso Steed; this motion by claimant HPD, LLC, as purported assignee and successor in interest to defendant Dottie M. Steed-Bright, for leave to intervene to confirm the Referee's report of sale and upon confirmation, for leave to appoint a referee in the surplus moneys proceeding in accordance with RPAPL 1355 and 1361.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-10
Notice of Cross Motion - Affidavits - Exhibits	11-15
Order to Show Cause - Affidavits - Exhibits	16-20
Answering Affidavits - Exhibits	21-36
Reply Affidavits	37-39
Letter dated January 26, 2010 of Eric Nelson, Esq. and attachment.....	40-41
Letter dated March 31, 2010 of Dottie M. Steed and attachment.....	42-43

Upon the foregoing papers it is ordered that the motions numbered 18, 19 and 20 on the motion calendar for June 23, 2010, and cross motion are considered together and determined as follows:

In the tax lien foreclosure action, plaintiffs obtained a judgment of foreclosure and sale dated May 2, 2001, and entered on June 18, 2001. The Referee appointed pursuant to the judgment to conduct the foreclosure sale, issued a report of sale dated September 24, 2009, and filed it on October 23, 2009.

At the outset, the court notes it is unclear from the submissions who is the attorney of record for plaintiffs. The action was commenced on behalf of plaintiffs by the law firm of Fischbein Badillo Wagner Harding, but the affidavit of service of the motion by Life Asset Locator indicates service upon the Fischbein firm as attorneys for “plaintiff” (singular) and upon Windels Marx Lane & Mittendorf as attorneys for Bank of New York. A consent to change attorney form dated March 2009 on file with the County Clerk, however, indicates the substitution of the Windels firm as attorneys of record for plaintiffs in place and stead of the law firm of Cozen O’Connor. The clerk’s records, however, do not indicate whether such change of counsel form was served upon any party. In addition, the court’s computer records indicate that Cozen O’Connor is the attorney of record. The affidavits of service presented by the other movants do not indicate service of a copy of their motion papers upon plaintiffs and the affidavit of service of the motion by Vision lacks a signature of the notary public. These defects may explain the reason that neither plaintiffs nor the Referee have appeared in relation to the motions.

In addition, a motion to confirm a report of sale may not be made within three months after the filing of the report and must be made no later than four months after the filing of the report (RPAPL 1355[2]). The motions by Life Asset Locator and Vision are premature, having been prior to the expiration of the three-month period after the Referee’s filing of the report on October 23, 2009 (RPAPL 1355[2]). The cross motion by claimant

Herbert Alfanso Steed and the motion by claimant HPD, LLC were untimely, having been made more than four months after the filing of the Referee's report (*see* RPAPL 1355[2]; 1361[2]). The failure to move to confirm a referee's report of sale in a timely fashion and to appoint a referee in a surplus money proceeding in accordance with the time limits prescribed by RPAPL 1355(2) and 1361(2) is an irregularity which, in the absence of prejudice to any substantial right of a party, may be disregarded (*see Associated Fin. Servs. v Davis*, 183 AD2d 686 [1992]; *Fidelity Bond & Mtge. Co. v Lucas*, 135 AD2d 778 [1987]). The court is aware from the certificate of the clerk dated March 18, 2010, submitted by claimant HPD, LLC, that no exceptions to the report were filed during the period since October 23, 2009. As there has been no showing of prejudice here regarding the timing of the motions, the court exercises its discretion in considering the motions and cross motion by claimant Herbert Alfanso Steed (*see* CPLR 2001).

According to the report, the Referee conducted the foreclosure sale of the subject property known as 176-16 145th Drive, Springfield Gardens, New York, on November 8, 2002. The report indicates Queens LLC was the successful bidder at the sale, having bid the amount of \$340,000.00. The bid thereafter was assigned to One 76 I Corp., the grantee named on the Referee's deed dated September 24, 2009. The report indicates that the Referee paid to plaintiffs the sum of \$15,728.61, plus costs in the amount of \$3,430.00, as the amounts directed in and by the judgment, attorneys' fees in the amount of \$2,636.82, and interest on the judgment, in the amount of \$14,266.60 for the period from June 18, 2001 to September 24, 2009 at the rate of 9% per annum (the statutory rate of interest) for a total sum of \$36,062.03. The report also indicates the Referee paid out of the proceeds of the sale the amount of \$61,000.47 for subsequent tax liens ($[\$7,822.05 + \$18,735.22 + \$34,447.20 = \$61,000.47]$), the amount of \$4,428.14 for emergency repair liens, the amount of \$2,215.63 for current and open real estate taxes, the amount of \$1,601.86 for an unidentified expense to First American Title, and the amount of \$500.00 for his referee's fee. These total payments equal \$105,812.13 ($\$36,062.03 + \$61,000.47 + \$4,428.14 + \$2,215.63 + \$1,601.86 + \$500.00 = \$105,812.13$). The total surplus amount should have been \$234,187.87 ($\$340,000.00 - \$105,812.13 = \$234,187.87$), but the Referee's report states the total surplus amount was \$230,987.87. Such amount is \$3,200.00 less than the total surplus amount of \$234,187.87 ($\$340,000.00 - \$105,812.13 = \$234,187.87$).

The court is aware that subsequent to the Referee's alleged deposit of \$230,987.87 into court and filing of his report, the Referee sought (by notice of motion dated October 2, 2009) and was granted a further allowance of fees in the amount of \$3,000.00 related to the sale and closing (*see* memorandum decision dated November 18, 2009). Nevertheless, even considering that the approved additional allowance was \$3,000.00, there still is a discrepancy of \$200.00 ($\$3,200.00 - \$3,000.00 = \200.00), which is not explained in the report. It is also unclear from the report as to the reason the Referee allowed plaintiffs the amount of

\$2,636.82 in legal fees rather than the \$2,000.00 amount provided for in the judgment. The Referee's report also fails to identify the nature of the First American Title expense.

To the extent the Referee in his report makes reference to an annexed affidavit of publication and publication invoice, no such copies of these annexed items have been provided to the court. Nor have the movants provided copies of the Referee's receipts for the payment of the advertising expense, the tax liens, the emergency repair lien, the advertising expense, the tax liens, the real estate taxes, and the First American Title expense. None of the movants have provided the court with a voucher from the County Clerk, indicating the deposit by the Referee, to the credit of this action.

As this is an equitable action, the court has the discretion to determine whether plaintiffs are entitled to recover interest on the amount of the judgment (*see Dayan v York*, 51 AD3d 964 [2008], *lv to appeal dismissed* 12 NY3d 839 [2009]). Resolution of this issue depends on the particular facts of each case, including any wrongful conduct by any party (*see e.g., South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [1976]; *Bosco v Alicino*, 37 AD2d 552 [1971]). It is unclear from the submissions the reason for the seven-year delay in the closing of the sale, and the accumulation of \$14,266.60 in interest post judgment. The papers do not indicate that the successful bidder at the sale, or any party obtained a stay of the closing for any purpose (*cf. Sloane v Gape*, 216 AD2d 285 [1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *see also Chase Manhattan Mtge. Corp. v Harper*, 54 AD3d 987 [2008]). In addition, none of the movants have submitted a copy of the terms of sale, and any signed memorandum of sale, and, thus, it is unclear whether the successful bidder was entitled to any adjournment or extension of the closing date, or should have been responsible for the payment of any interest on the bid amount during any adjournment or extension period. The court notes that a purchaser at foreclosure is not excused from completing performance on account of an apparent defect in title of which it had notice at the time the bid was made (*see Riggs v Pursell*, 66 NY 193 [1876]; *Aaron v Kent*, 182 AD2d 960 [1992]).

Under such circumstances, the Referee is directed to file, within 20 days of service of a copy of this order, a further report with explanations regarding the \$3,200 discrepancy in the surplus amount, the allowance of \$2,636.82 in legal fees, the payment to First American Title and the reason for the seven-year delay in closing the sale, and proper exhibits, including the terms of sale, the affidavit of publication, receipts, and memorandum of sale in accordance with this order. The motions and cross motion are denied without prejudice to renewal following the filing of the further report of the Referee, upon proper papers, including a copy of this order, and the original and further report of the Referee, and upon proper notice to plaintiffs, the Referee, the purchaser at the sale, the claimants to the

surplus moneys, all parties who have appeared in the action, and Dottie Steed-Bright at 87 Pearson Lane, Henderson, North Carolina 27537.

A copy of this order is being sent, as of this date, to the Referee, and to the law firms of:

Cozen O'Connor
16th Floor, 45 Broadway
New York, New York 10006

Windels Marx Lane & Mittendorf
156 West 56th Street
New York, New York 10019

Fischbein Badillo Wagner Harding
909 Third Avenue
New York New York 10022.

Dated: October 12, 2010

J.S.C.