

BMB Props. v Arandia
2011 NY Slip Op 31277(U)
May 12, 2011
Sup Ct, NY County
Docket Number: 102317/02
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *HON Joan A. Madden*

PART 11

Index Number : 102317/2002

BMB PROPERTIES, LLC.

vs
ARANDIA, ALEX

Sequence Number : 010

OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

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

FILED

MAY 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: May 12, 2011

[Signature]
HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BMB PROPERTIES,

Plaintiff,

INDEX NO. 102317/02

-against-

FILED

ALEX ARANDIA, ELIZABETH ARANDIA,
ET AL,

Defendants

MAY 16 2011

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Forcap LLC (“Forcap”), which was assigned the interest in this action of intervenor 52 East End Condominium (the Condominium”), moves for an order enforcing the February 20, 2008 order of Justice Walter Tolub¹ (hereinafter “the February order”) which vacated a stipulation which distributed the surplus of a mortgage foreclosure sale between plaintiff BMB Properties (“BMB”) and defendant Alex Arandia (“Arandia”)(motion seq. no. 010). BMB and Arandia oppose the motion and BMB separately moves for reargument and vacatur of Judge Tolub’s February order, and to disqualify Forcap’s counsel (motion seq. no. 011).²

Background

This dispute concerns the proper distribution of surplus moneys from a mortgage foreclosure sale. BMB was the holder of a junior mortgage secured by condominium unit 17-A at 52-54 East End Avenue, New York, NY (“the Unit”). The mortgagors were Arandia, and his wife, defendant Elizabeth Arandia.. On or about July 22, 2004, Forcap, as the highest bidder in

¹Justice Tolub is now retired.

²Motion seq. nos. 010 and 011 are consolidated for disposition.

the foreclosure sale, purchased the Unit for \$201,000, which was in excess of the junior mortgage, and thus there was a surplus of \$71,999.29, which was deposited with the Clerk of the Court by the referee appointed to sell the property. Under the terms of sale, the Unit was sold subject to, *inter alia*, “the lien of the 52 East End Avenue Condominium for common charges, assessments, utility charges.”

On November 4, 2005, Forcap sold the Unit to a third-party. However, before the Condominium would agree to waive its right to first refusal to purchase the Unit, the Condominium required Forcap to pay the \$171, 076.38 in outstanding amounts due and owing it for common charges on the Unit. The Condominium then assigned to Forcap all of its right, title and interest in the subject matter of the instant action including the right to intervene and to obtain an order directed the Clerk of this Court to return the surplus moneys deposited in connection with the sale.

By decision and order dated February 21, 2006, Justice Tolub ordered that “the issue of what monies, held by the New York County Clerk’s office, if any, are owed to any of the parties in this action is referred to a Special Referee to hear and report with recommendations...³” On April 10, 2006, a hearing was held before Special Referee Les Lowenstein to address the distribution of the surplus. Only BMB and Arandia appeared at the hearing and stipulated to divide the \$71,992.20 surplus, with \$37,624.04 going to BMB and \$34,368.24 going to Arandia, and the stipulation was so-ordered (hereinafter “the April 10 stipulation”). On or about April 24,

³It appears that at the time the order was made Judge Tolub may not have been aware that Forcap had paid the lien and the parties he referred to in the order were Arandia, BMB and the Condominium. However, this has no impact on the merits of Forcap’s claim to the surplus since, as indicated below, it was then clarified that Forcap has a right to go before the Special Referee.

2007, Forcap moved to vacate the April 10 stipulation, asserting that it had not been notified of the hearing.

On February 20, 2008, after hearing oral argument, Justice Tolub issued an order vacating the stipulation writing that “I am going to vacate the stipulation that was entered into between Arandia and [BMB’s counsel] to the extent of directing that this matter be referred back to Referee Lowenstein to make a determination and include within [counsel for Forcap’s] application to allow Forcap’s counsel to appear and make any representation. I will withhold judgment on the whole matter until Referee Lowenstein makes a determination to be forwarded to me for approval....Everyone is back to square one.”

Judge Tolub also required Forcap to settle an order on notice embodying the court’s decision to vacate the April 10 stipulation. On April 16, 2008, counsel for Forcap served all parties with a proposed order and submitted it to the court. Justice Tolub retired in December 2009 without signing the proposed order. It is unclear from the record what circumstances were involved in the proposed order never being signed or why Forcap failed to follow up after submitting the proposed order the court.

Forcap now moves to have this court enforce Judge Tolub’s February order and send the issue regarding the distribution of surplus back to a Special Referee. BMB opposes the motion, arguing that (1) as the common charges were paid fully to the Condominium it had nothing to assign, (2) that under Real Property Law section 339-z, Forcap as the purchaser was obligated to pay the common law charges at the closing, and that (3) the liens for the common charges were

removed from the record so that there was nothing left to pay.⁴ Arandia, who appears *pro se*, opposes the motion on similar grounds, and also argues that Forcap lacks standing as it was never formally added as an intervenor and should be held in contempt for its failure to comply with Judge Tolub's order.

BMB also separately moves for reargument of Judge Tolub's order asserting many of the same arguments made in opposition to Forcap's motion. In addition, BMB asserts that Judge Tolub's February order should be vacated as Forcap committed fraud to undermine the bidding process by "overbidding at the foreclosure sale...and thereby creating a surplus with no intention of paying the Condominium's common charges." BMB also argues that Forcap's motion should be denied based on its failure to submit a proposed order within 60 days of Judge Tolub's decision as required under 22 NYCRR section 202.48. BMB also seeks disqualification of Forcap's counsel on the grounds that one of its partners is a managing member of Forcap and may be called to testify at any hearing ordered by the court.

Forcap opposes the motion, asserting that most of the arguments made by BMB were previously made before Judge Tolub, before he issued the February order, and that Forcap made the same argument before Judge Tolub that Forcap's counsel should be disqualified. Forcap also points out that it complied with 22 NYCRR section 202.48 since it submitted the proposed order on April 16, 2008.

The court finds that the arguments of BMB and Arandia are unavailing. A motion for reargument is addressed to the discretion of the court, and is intended to give a party an

⁴BMB also raises an issue related to vacating to order of contempt entered by Judge Tolub. However, it provides an insufficient basis for this court to do so.

opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979).

Under this standard, there is no basis for granting reargument as nothing in the record suggests that Judge Tolub overlooked or misapprehended any controlling principle of law. Rather, faced with conflicting claims to the surplus, Judge Tolub properly referred the matter to a Special Referee to hear and report and to make recommendations. Notably, the arguments made by BMB and Arandia were previously made before Judge Tolub and rejected as a basis for denying Forcap's claim to the surplus. Furthermore, contrary to BMB's position, nothing in the record indicates that Forcap engaged in fraud in connection with the bidding process, and there is no ground for vacating Judge Tolub's order on that ground. Likewise, as the party receiving an assignment of the Condominium's claim to the surplus based on its purchase of the liens, Forcap has standing. However, as Forcap has never been officially added as a party, it shall be granted leave to intervene.

Next, the court finds that Forcap timely submitted the proposed order under the applicable rule. Furthermore, while Forcap apparently failed to diligently seek to have the proposed order signed, nothing in the record suggests that it waived its right to the surplus, and the suggestion by BMB and Arandia that Judge Tolub did not sign the order due to later events is unsupported by the record.

Accordingly, the court finds that Justice Tolub's February order should be enforced to the extent of directing that the issues relating to the proper distribution of the surplus be referred to a Special Referee in accordance with the ordering language below

Finally, there is no basis for disqualifying Forcap's attorneys based on BMB's unsubstantiated assertion that one of the attorneys in the law firm is a managing member of Forcap and may be called to testify before the Special Referee. The party seeking disqualification "carries a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification.'" Broadwhite Associates v. Truong, 237 AD2d 162, 163 (1st Dept 1997), quoting, Martinez v. Suozzi, 186 AD2d 378, 379 (1st Dept 1992). In addition, "[u]nder New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of other evidence and the weight of the testimony." Brooks v. Lewin, 48 AD3d 289 (1st Dept), lv dismissed in part and denied in part, 11 NY3d 826 (2008). Here, BMB has not met the standard for disqualification of Forcap's attorneys.

In view of the above, it is

ORDERED that Forcap shall be permitted to intervene in the above-entitled action as a party defendant with respect a claim for recovery of surplus moneys from the foreclosure sale; and it is further

ORDERED THAT the summons and complaint in the action shall be amended by adding Forcap as a party defendant; and it is further

ORDERED THAT the Forcap shall serve a copy of this order with notice of entry on the Clerk of the Court and the Clerk of Trial Support (room 158) who are directed to amend their

records to reflect such change in the caption; and it is further

ORDERED that the motion by Forcap to enforce Judge Tolub's February order (motion seq. 010) is granted to the extent of referring the legal and factual issues concerning the entitlement of BMB, Arandia and Forcap to the surplus of the relevant foreclosure sale to a Special Referee to hear and report and to make recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), and for assignment of this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Forcap shall on or before June 3, 2011 submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that any failure by Forcap to timely comply with the immediately preceding paragraph shall result in the waiver of Forcap's right to the surplus; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and

evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

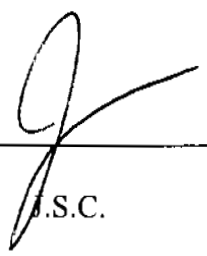
ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that BMB's motion for reargument and or to vacate Judge Tolub's February 20, 2008 and for disqualification of Forcap's attorneys (motion seq. 011) is denied; and it is further

ORDERED that this matter shall be placed in the Part 11 calendar for August 18, 2011 for control purposes only and by such date the parties shall contact the court to appraise it of the status of the matter before the Special Referee.

DATED: May 10 2011


J.S.C.

HON. JOAN A. MADDEN
J.S.C.

FILED

MAY 16 2011

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