

**Valley National Bank v Congregation Shira
Chadasha, Inc.**

2012 NY Slip Op 30131(U)

January 9, 2012

Sup Ct, Nassau County

Docket Number: 018562/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 14

_____ X

VALLEY NATIONAL BANK,

Plaintiff,

Index No. 018562/09
Motion Sequence...07, 08, 09
Motion Date... 11/17/11

-against-

CONGREGATION SHIRA CHADASHA,
INC.,

Defendant.

_____ X

- Papers Submitted:
- Notice of Motion (Mot. Seq. 07).....x
 - Affirmation in Support.....x
 - Affirmation in Opposition.....x
 - Memorandum of Law in Opposition.....x
 - Reply Affirmation.....x
 - Sur-Reply Affirmation.....x
 - Notice of Motion (Mot. Seq. 08).....x
 - Memorandum of Law in Opposition.....x
 - Reply Affirmation.....x
 - Notice of Cross-Motion (Mot. Seq. 09).....x
 - Affirmation in Opposition.....x

Upon the foregoing papers, the motion (Mot. Seq. 07) by the attorneys for the Plaintiff, Valley National Bank (Valley) seeking an order pursuant to RPAPL § 221 granting it a Writ of Assistance directing the Sheriff of Nassau County to put SAR I, Inc., the

Plaintiff's assignee, into possession of the premises and the motion (Mot. Seq. 08) by the attorneys for the Plaintiff, Valley, seeking an order pursuant to RPAPL § 1355 confirming the Referee's Report of Sale and the Cross-motion (Mot. Seq. 09) by the attorneys for the Defendant, Congregation Shira Chadasha, Inc. (the Congregation) seeking an order pursuant to CPLR § 3211 (a) (10) dismissing this action for failure to join a necessary party and CPLR § 5015 setting aside the Judgment of Foreclosure and Sale are decided as provided herein..

On July 13, 2004, Valley and the Congregation, a not-for-profit religious corporation, entered into a Building Loan Agreement for \$2,000,000 to construct a Synagogue for the Congregation at 695 Middle Neck Road, Great Neck, New York. On March 26, 2006, in order to complete the Synagogue, the bank extended additional financing to the Congregation in the amount of \$1,500,000, bringing the total amount of indebtedness to \$3,500,000, secured by a new first mortgage on the property. The Congregation, as required by law, obtained the approval of the Attorney General for these loans. On or about September 11, 2009, the bank started a foreclosure action against the Congregation. On November 13, 2009, the Congregation answered by their attorneys, Jaspan Schlesinger LLP. On June 30, 2010, the Court granted Valley's motion for summary judgment against the Congregation. On March 29, 2011, the Court entered a Judgment of Foreclosure and Sale. On May 10, 2011, the property was auctioned. The bank placed the highest bid of \$2.8 million at the auction. This bid was later assigned to SAR I, Inc., a New Jersey Corporation. On August 26, 2011, and pursuant to the Referee's Deed, the subject property was conveyed

to SAR I, Inc. On September 5, 2011, the Referee's Report of Sale was filed with the Court. On October 10, 2011, the Congregation executed a Consent to Change of Attorney agreement and retained Itkowitz and Harwood as counsel in place of Jaspan Schlesinger LLP.

The Congregation asserts that the Attorney General is a necessary party and the Plaintiff's failure to have named the Attorney General warrants the dismissal of the action. The Congregation's assertion that the Attorney General is a necessary party is misplaced. There is no statutory requirement that the Attorney General be made a party to a foreclosure action.

Section 12 of the Religious Corporation Law (RCL) provides that:

(1) A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court therefor pursuant to section (511) of the not-for-profit corporation law...

(10) The provision of this section shall not apply to real property heretofore or hereafter acquired on a sale in an action or proceeding for the foreclosure of a mortgage owned by a religious corporation...

Section 511 of the Not-For-Profit Corporation law (N-PCL) requires that a religious corporation submit a petition seeking leave of court to "sell, lease, exchange or otherwise dispose of all or substantially all its assets," and that such petition be presented upon fifteen days notice to the Attorney General. N-PCL §§ 511 (a)-(b). The court may authorize a sale or mortgage "[i]f it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted." *Id.*

at § 511 (d). Pursuant to the March 20, 2006 Order entered by Nassau County Supreme Court Justice Daniel Martin, the underlying mortgage was authorized as required under RCL § 12. Notice was given to the Attorney General. While it is clear from the statutory provisions that the Attorney General has oversight authority with respect to the encumbrance of real property by a religious corporation, once approved, the Attorney General's role in the transaction ceases, and there is no obligation to involve or notify the Attorney General of an action to foreclose on a mortgage held by the religious corporation. See *Church of Nativity v. Fleming*, 20 N.Y.S.2d 597, 598 (N.Y. Sup. Ct. 1940) ("It may be that a voluntary sale of church property was prohibited by the common law and can now be made only upon certain conditions as provided in § 12 of the Religious Corporations Law, but that section does not, expressly or by inference, exempt church property from sale under execution, nor has any other statutory provision been found that does."); *Bernstein v. Friedlander*, 296 N.Y.S. 2d 409, 413 (N.Y. Sup. Ct. 1968) ("A religious corporation is liable on its contracts the same as any other corporation.").

The underlying mortgage was authorized by the Court, and the subject premises was sold pursuant to a judgment of foreclosure. There is no requirement that the Attorney General be notified of the foreclosure action, let alone be joined as a necessary party to the proceedings. *The Park Ave. Bank v. Cong. & Yeshiva Ohel Yehoshea*, 29 Misc. 3d 446, 907 N.Y.S.2d 571, 2010 N.Y. Misc LEXIS 3547, 2010 NY Slip Op. 20304 (2010). This is consistent with the purpose and intent of the statutory requirement which is to ensure that the

conveyance of real property by the religious corporation is in the best interests of the religious corporation and its membership and to protect the corporation from imprudent loans, not to give the religious corporation an opportunity to avoid the consequences owing to its failure to make payments under a valid and properly authorized loan agreement.

In opposition to the Plaintiff's motion to confirm the Referee's Report of Sale, the Congregation argues that the motion is untimely. The sale of the property did not result in a surplus. RPAPL § 1355 (2) provides that where the sale of the property resulted in no surplus money, "an application for confirmation of the report of sale may be made at any time after the report shall have been filed in eight days." The Referee's Report of Sale was filed on September 15, 2011. The Plaintiff filed its motion to confirm the Referee's Report of Sale on September 21, 2011, six days later, rather than waiting the required eight days. The motion by the Plaintiff was filed two days earlier than required by the statute. There are numerous cases that hold that an untimely motion to confirm that was filed after the statutory period expired and therefore late was a mere irregularity and may be excused in the absence of prejudice. *See Fidelity Bond & Mortg. Co. v. Lucas*, 135 A.D.2d 778; *Chemical Mortg. Co. v. Collier*, 227 A.D.2d 302; *Washington Mut Home Loans, Inc. v. Jones*, 27 A.D.3d 728. There are no reported cases dealing with whether the early filing of the motion to confirm should be treated as a mere procedural irregularity in the absence of prejudice. The Court will apply the same reasoning to the within action where there was an early filing as in those actions where a late filing of the motion to confirm was excused as being non-prejudicial.

Except for the fact that the motion to confirm the Referee's Report of Sale was inadvertently filed two days earlier than the statutorily provided time set forth in RPAPL § 1355 (2), nowhere else in the Congregation's opposition papers is there any allegation or suggestion that the sale of the subject property was conducted in anything but full conformity with the Judgment of Foreclosure and Sale and the rules and practices of this Court. The Congregation claims that it was prejudiced by the Plaintiff's premature filing of its motion because the effect of the early filing was to shorten the Congregation's statutorily proscribed period to respond to the Plaintiff's motion and formulate a plan of action. However, there is no dispute that pursuant to the parties' stipulation, the Plaintiff's motion was adjourned on consent until November 17, 2011, and that the time period for the Congregation to respond to the motion was extended by three weeks until October 26, 2011. It is apparent that rather than wrongfully accelerating the foreclosure process beyond what had been provided for by law, the actual time the Congregation had to respond to the motion exceeded the statutorily proscribed period by several weeks and did not prejudice the Congregation. On the contrary, it would be prejudicial to the Plaintiff and an unnecessary burden on the Court's calendar to require the Plaintiff to submit another motion to rectify a technical defect that was *de minimis* and not prejudicial to the Defendant.

The Plaintiff moves for a Writ of Assistance seeking an order removing the Congregation from the premises pursuant to RPAPL § 221. The Defendant argues in opposition to the application that the Court should deny the Writ because the Plaintiff did not

properly exhibit the Referee's Deed to the Congregation or make a prior demand for possession of the premises. The Plaintiff has established by credible evidence that it mailed a copy of the Referee's Deed on September 14, 2011, a week before the motion was filed and possession was demanded. Assuming *arguendo* that no demand was made as asserted by the Defendant, RPAPL § 221 contains no requirement of the personal exhibition of the Referee's Deed prior to making a motion for the Writ. See *Lincoln First Bank*, 86 A.D.2d 652; *Novastar Mortgage Inc. v. LaForge et al.*, 2006 N.Y. Slip Op. 51306U; 12 Misc 3d 1179(A); 824 N.Y.S.2d 764; 2006 N.Y. Misc LEXIS 1797; Bergman, *New York Mortgage Foreclosures* § 33.02[2] (2006) compare, *Lincoln Savings Bank v. Warren*, 156 A.D.2d 510.

The determination of whether to grant a Writ of Assistance lies with the discretion of the trial court. It must give consideration to the relative equities of the particular situation. See *Barrett v. Barrett*, 284 A.D.2d 423; *Niman v. Niman*, 284 A.D.2d 423.

In opposition to the motion for a Writ of Assistance (Mot. Seq. O7) and based on the perceived unique communal and religious concerns of the Defendant, the attorney for the Congregation in his Memorandum in Opposition, as well as his Affirmation in Opposition, adopts verbatim the following historical contextual material from the Affirmation of Isaac Soleimani, the President of the Congregation. The subject property being foreclosed upon is used as a house of worship for an entire community and the community invested a large amount of its assets into the property. A mikveh – a sacred ritual

bath essential to Orthodox Jewish practice – is operated at the subject premises. The Congregation represents a small subset of the Jewish community, the Mashadi Jewish Community, comprised primarily of Persians (sic) Jews whose freedom and lives would be in danger in Iran. Their culture is unique and centered around the Synagogue. The Mashadi Jewish Community is a Jewish community whose history goes back more than two hundred years in Iran. This group of Jews started off by living in Mashad, which is the second largest city in Iran. Life in Iran was very difficult for the Jews of Mashad. They were constantly oppressed but despite all the struggles they came across, these Mashadi Jews never let go of their faith. They risked their daily lives in order to preserve their culture and religion. After the revolution in 1979, they realized it was too dangerous to live in Iran any longer so they risked a long and dangerous journey to America and Israel in hopes of better lives. They left with nothing but the clothes on their backs and a few valuables they were able to carry.

In the next to the penultimate paragraph in Mr. Soleimani's and the attorney's Affirmation and Memorandum of Law is the following assertion: If the Writ of Assistance is not denied "it will force the Congregation to abruptly cease the religious practices it has fought hard to preserve." This assertion is incredulous at best, and disingenuous at worst. It stretches the credibility to contemplate that the Defendant finds it necessary to remonstrate that the results of this proceeding would impede the religious practices of a community that has withstood 200 years of religious bigotry in Iran. The law does not countenance the mantra of "freedom of religious worship" to be used as a shield to wrongfully deprive a

creditor from collecting a valid contractual debt.

Accordingly, it is hereby

ORDERED, that the motion (Mot. Seq. 08) seeking an Order Confirming the Referee's Report of Sale sworn to on September 13, 2011, and filed on September 15, 2011 in the within action is **GRANTED** and the Referee's Report of Sale is **CONFIRMED**; and it is further

ORDERED, that the motion (Mot. Seq. 07) by the Plaintiff seeking a Writ of Assistance is **GRANTED**. The Writ of Assistance shall provide for a stay up to thirty (30) days after the entry of this Order (*See Mykap Realty Corp. v. Goodman*, 5 AD2d 780); and it is further

ORDERED, that the motion (Mot. Seq. 09) by the Defendant seeking the dismissal of this action is **DENIED**.

Settle Order to Confirm the Referee's Report of Sale and the Order for a Writ of Assistance on Notice.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
January 9, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED

JAN 11 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE