

West 45th St. Venture LLC v Ladera Partners, LLC

2012 NY Slip Op 31834(U)

July 6, 2012

Supreme Court, New York County

Docket Number: 108893/10

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

PRESENT: _____
Justice

PART 1b

West 45th Street
Venture LLC
- v -

Ladena Partners, LLC
ET AL

INDEX NO. 108893/10
MOTION DATE _____
MOTION SEQ. NO. 8
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to vacate a judicial foreclosure sale is denied in accordance with the accompanying memorandum decision.

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

FILED

JUL 11 2012

NEW YORK COUNTY CLERK'S OFFICE

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Dated: July 6, 2012

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
WEST 45TH STREET VENTURE LLC,

Plaintiff,

- against -

Index No. 108893/10
Motion Seq. No. 008

LADERA PARTNERS, LLC; THE CITY OF NEW YORK
DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.
-----X

FILED

JUL 11 2012

SCHLESINGER, J:

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Ladera Partners, LLC has moved to vacate the transfer of title to the premises 351-357 West 45th Street, New York, NY, from Ladera to the plaintiff lender that occurred on January 23, 2012 pursuant to this Court's September 6, 2011 Judgment of Foreclosure and Sale. Ladera contends that the transfer is a nullity because the Referee failed to send notice of the sale to its offices, and neither the Referee nor plaintiff's counsel sent notice of the sale to Ladera's counsel who has appeared in this action. The lack of notice, Ladera contends, deprived it of the opportunity to exercise its right of redemption.

Plaintiff vigorously opposes the motion, asserting that it is undisputed that Ladera received notice of the sale directly from the plaintiff's counsel and that Ladera also was aware from motion practice that the plaintiff was proceeding with a sale. Plaintiff further asserts that Ladera has in any event failed to establish that any notice deficiency deprived it of a substantial right so as to justify vacating the sale.

Background Facts

According to various documents submitted by the plaintiff in this case, defendant Ladera acquired the subject property at 351-357 West 45th Street, New York, NY, in

May of 2006 for approximately \$10 million. The property consists of four five-story residential buildings. At that time of the purchase, Ladera obtained a mortgage loan from New York Community Bank for \$6,250,000.00. In or about April 2010, Ladera defaulted on the loan when the outstanding principal balance was \$6,195,502.33. After due notice, the Bank commenced this foreclosure action in July 2010. Shortly thereafter, the Bank assigned the mortgage to the plaintiff West 45th Street Venture LLC and the caption of this action was amended.

This Court has decided several motions in this case, some of which were entertained on Ladera's default and some of which were decided after Ladera had asserted its opposition. Of particular significance is the October 27, 2010 decision granting plaintiff's motion to appoint a Receiver based on Ladera's failure to pay real estate taxes and its serious neglect of the building which led to the City's issuance of an extraordinary number of hazardous violations at the premises. Also significant is this Court's August 9, 2011 decision granting the plaintiff's motion for summary judgment and the entry of a Judgment of Foreclosure and Sale. Ladera did not oppose the summary judgment motion, although duly notified.

Pursuant to the Judgment, plaintiff advertised the October 26, 2011 sale in the New York Law Journal once a week for four consecutive weeks. In addition, plaintiff's counsel affirms that it sent a separate notice of sale to Ladera at its offices in Sherman Oaks, California. The address used was the one listed with the Secretary of State and also had been used repeatedly by the plaintiff for other correspondence and documents, none of which had ever been returned. Additionally, plaintiff's agent had himself visited the office and confirmed the address.

Multiple parties attended the sale, but the plaintiff ultimately outbid the others and acquired the property for \$8.5 million, an amount greater than the debt. On January 23, 2012, the Referee delivered the deed to the plaintiff. On February 22, the Referee filed the Report of Sale with the court.

It was not until some five months later that Ladera moved by Order to Show Cause to set aside the sale. The motion is supported by an affidavit from Daniel Shalom, the borrower's managing member. As plaintiff's counsel correctly notes in the opposition papers, Mr. Shalom indicates *only* that he did not receive notice of the foreclosure sale from the Referee; at no point does he deny receipt of notice directly from the plaintiff. Regarding his alleged interest in exercising his right of redemption, Mr. Shalom indicates only in the most general terms that he was attempting to negotiate financing. The affidavit of Ladera's counsel Mark Lindenberg adds little; there counsel indicates that he did not receive notice of the sale from the Referee or any party.

The plaintiff's opposition papers are thorough and precise. While it is undisputed that the Referee did not send notice to Ladera or its counsel and that the plaintiff did not send notice to Ladera's counsel due to a clerical error, the plaintiff demonstrates that it notified Ladera directly of the sale so that Ladera, in fact, had ample opportunity to exercise its right of redemption.

To establish these points, the plaintiff submits extensive papers. The first document offered to prove notice is the Affidavit of Jacqueline Grant, an attorney admitted to practice law in New York who is employed by plaintiff's counsel as a paralegal. While acknowledging that she did not send notice to Ladera's counsel due to a clerical error, Ms. Grant confirms in detail the steps she took to send a copy of the

Notice of Sale directly to Ladera at the California address on file with the Secretary of State.

Also offered by plaintiff is the Affidavit of Jeffrey Jaeger, an investor in the plaintiff company. Jaeger confirms that the mailing address that Grant used for Ladera is a correct and valid mailing address, as Jaeger himself had personally gone to that address and seen Mr. Shalom there in Ladera's offices. Jaeger also casts serious doubt on Shalom's claim that he wished to exercise Ladera's right of redemption, recounting in detail the many efforts he had made to negotiate a settlement with Ladera to no avail due to Ladera's lack of funds.

The plaintiff also submits the Affidavit of Daniel Wrublin, a principal of Dalan Management and Associates, Inc., an established company that manages the property at issue. Mr. Wrublin is also one of the investors in plaintiff West 45th Street Venture LLC. Mr. Wrublin recounts how Ladera neglected the building and allowed it to develop serious conditions of disrepair that led to the City's issuance of more than 360 violations against the four buildings at the premises, including 35 immediately hazardous "Class C" violations. This conduct by Ladera belies its claimed interest, and implied ability, to obtain the necessary funds to exercise its right of redemption. It further casts doubt on Ladera's claim that the price paid at the sale was far less than the value of the property.

Lastly, plaintiff submits an Affidavit and Memorandum of Law from its counsel Daniel R. Milstein. There, plaintiff persuasively argues that Ladera received notice of the foreclosure sale and that any alleged deficiency in notice did not deprive Ladera of a substantial right.

Discussion

As demonstrated above, Ladera's claim of a notice deficiency is a limited one. Both sides agree that Ladera was entitled to receive notice of the sale, beyond the notice by publication, because it appeared in the foreclosure action, even though it defaulted on the motion for summary judgment. See, e.g., *Shaw v Russell*, 60 NY2d 922 (1983); *Home Sav. Bank v Chiola*, 203 AD2d 525 (2nd Dep't 1994), *lv denied* 84 NY2d 813 (1995). The plaintiff's papers demonstrate that Ladera did, in fact, receive notice of the sale directly from the plaintiff. Ladera did not directly dispute that point. Even if it had, the conclusory denial of receipt is insufficient to rebut the presumption of receipt raised by the affidavit of service by mail provided by Jacqueline Grant. See *Grieco v Walker*, 8 AD3d 66 (1st Dep't), citing *Kihl v Pfeffer*, 94 NY2d 118, 122 (1999).

The claimed deficiency based on the Referee's failure to send notice is wholly without merit. Ladera has not cited a single statute or court decision that imposes a duty of notice on the Referee. Notice sent by the plaintiff or its counsel is sufficient.

Also lacking in merit is Ladera's claim that the sale must be vacated because its counsel did not receive notice of the sale. Although not argued in its papers, counsel asserted at oral argument that CPLR §2103(b) mandates that all papers be served on a party's counsel once a notice of appearance has been filed. That section provides that:

Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney.

By its own terms, the statute permits the court to provide for other service. What is more, the purpose of the statute is not to restrict the means of service, but rather to

offer a means of service that is reasonably calculated to provide notice. This interpretation is consistent with the various statutes cited by the plaintiff, such as RPAPL §1371, which provides that a motion for a deficiency judgment in a foreclosure action can be served either on the debtor or the attorney. Similarly, post-judgment restraining notices must be served directly on the judgment debtor, even if it has retained counsel. See CPLR §5222 *et seq.*

This Court finds that the notice sent directly to Ladera was sufficient. Ladera's counsel received a copy of the plaintiff's motion for summary judgment as well as this Court's decision granting a Judgment of Foreclosure and Sale and a copy of the Judgment providing for service by publication. Counsel was on notice that the plaintiff was proceeding with the sale. He cannot reasonably claim otherwise.

Even assuming *arguendo* that the notice was deficient, Ladera's motion must still be denied. "The failure to give proper notice of a sale, as required by RPAPL 231, is a mere irregularity and is not a jurisdictional defect ... Absent a showing that a substantial right of a party was prejudiced, the failure to give proper notice will not require that a sale be vacated ..." *Amresco New England II v Denino*, 283 AD2d 599 (2nd Dep't 2001) (citations omitted). Indeed, CPLR §2003 is explicit in stating that a judicial sale may only be set aside based on a claimed notice deficiency "if a substantial right of a party was prejudiced by the defect."

Ladera's claim that it was deprived of a substantial right, in that it was unable to exercise its right of redemption, rings hollow when the facts of this case are considered. Ladera defaulted on its mortgage in early 2010, and the plaintiff has been actively

pursuing this litigation since that time. Ladera failed to pay taxes and failed to maintain the building, allowing serious conditions of disrepair to develop in occupied residential buildings. Due to these problems, this Court granted the plaintiff's request to appoint a Receiver to collect the rents and make repairs. Plaintiff asserts, and this Court has witnessed, various efforts by counsel to resolve issues in this case. At no point — even now — has Ladera demonstrated a serious intent or a true ability to exercise its right of redemption. Mr. Shalom's wish to retain the property, while certainly understandable, appears not to be backed by the necessary funds.

Accordingly, it is hereby

ORDERED that the motion by defendant Ladera Partners, LLC to set aside the foreclosure sale is in all respects denied.

Dated: July 6, 2012

FILED

JUL 11 2012

NEW YORK
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J.S.C.
ALICE SCHLESINGER