

244 Lenox Avenue LLC v Bazelais

2013 NY Slip Op 32888(U)

April 22, 2013

Sup Ct, New York County

Docket Number: 810279/11

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

244 LENOX AVENUE LLC, et al

INDEX NO. 810279/11

-v-
EDGAR BAZELAIS, et al

MOTION DATE _____

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~to~~ by the municipal defendants to dismiss the First and Thirteenth causes of action is GRANTED; plaintiffs' cross motion to vacate transfer of the premises and grant it the right to redeem is DENIED, per the attached Decision and Order.

A status Conference is scheduled for 6-10-13
at 2:30 PM at 26 Broadway 10th Floor

Dated: April 22, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X

244 LENOX AVENUE LLC, RAKESH AGGARWAL,

Plaintiffs,

-against-

EDGAR BAZELAIS, DAREL MITCHEL,
DAVIS JAMES, WELLS FARGO BANK NA,
EUSTACE DAVIS, FITZROY JAMES, KEVIN JONES,
JOSEPH LEGIER; MASEKABUE MBU, FRIDAY
ONWOTUEBE, FREDERICK SAMUEL,
JEFF SULLIVAN, BEST MAZEL CORP.,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
NYC DEPARTMENT OF BUILDINGS, DEPARTMENT
OF FINANCE, DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT, AND
NEIGHBORHOOD RESTORE HOUSING
DEVELOPMENT FUND,

Defendants.

-----X

Index No. 810279/11

DECISION AND ORDER

Motion Sequence Nos. 002 and 003

MELVIN L. SCHWEITZER, J.:

Background

This is a motion by the municipal defendants in this case to dismiss the First and Thirteenth causes of action of the complaint; and a cross-motion by the plaintiff to vacate transfer of the Premises at issue here and grant plaintiff the right to redeem a tax lien which gave rise to the series of events described herein.

Note and Mortgage

On June 16, 2006, Edgar Bazelais (Mr. Bazelais) delivered to Wells Fargo Bank, N.A. (Wells Fargo) a \$1,808,000 promissory note (the Note). As security for the Note, Mr. Bazelais

delivered to Wells Fargo a \$1,808,000 mortgage encumbering certain property at 244 Lenox Avenue, New York City (Premises).

On June 21, 2011, nearly four months after the City of New York (City) obtained a Judgment of Foreclosure in *in rem* proceedings, Wells Fargo assigned the Note to 244 Lenox Avenue LLC (244 Lenox). Plaintiffs allege that Mr. Bazelais subsequently defaulted under the Note and Mortgage by failing to make required payments.

In Rem Tax Foreclosure Action

On January 4, 2008, the City commenced an *in rem* foreclosure action titled *In Rem Tax Foreclosure Action* No. 49, Borough of Manhattan (Sup. Ct. N.Y. Cnty, Index No. 580001/08) (Jaffe, J.) (*Manhattan 49*), pursuant to Title 11, Chapter 4 of the Admin. Code, as amended by Local Law 37 of 1996 and Title 28, Chapter 8 of the Rules of the City of New York (also referred to as the Third Party Transfer Program) by filing two duplicate original verified lists of delinquent taxes (the List of Delinquent Taxes) in the Office of the Clerk of New York County.

The List of Delinquent Taxes included all parcels of property designated on the Tax Map of the City for the Borough of Manhattan, Sections 2, 3, 4, 5, 6, 7 and 8, encumbered by tax liens, as such tax liens are defined by Admin. Code § 11-401, held and owned by the City, which were unpaid for the period required by Admin. Code § 11-404 on the date of filing. The Premises was included in the *in rem* foreclosure action due to outstanding real property taxes and other assessments.

As of the commencement of *Manhattan 49*, \$11,224.33 in outstanding charges, including statutory interest, was owed on the Premises. Statutory interest continued to accrue on the Premises' tax lien after the commencement of the *in rem* action.

The City followed the procedure set forth in Admin. Code § 11-401 *et seq.* to notify interested parties of *Manhattan 49*. The Department of Finance (Finance) mailed notice of foreclosure regarding *Manhattan 49* to interested parties in accordance with Admin. Code § 11-406. On January 14, 2008, copies of the Notice of Foreclosure were mailed, by certified and regular mail, to each and every owner, mortgagee, or lienor entitled to receive such notice by virtue of having provided Finance with a mailing address, at the specific address requested by such interested party to receive such notice, or, with respect to owners, in the event an owner had not made such a request, to the name and address, if any, appearing in the latest annual record of assessed valuations (i.e., the property address). In accordance with Admin. Code § 11-409, the Notice of Foreclosure fixed May 1, 2008, as the last date for the service of an answer.

The Notice of Foreclosure was published at least once a week for six weeks in two newspapers duly designated for that purpose by the Commissioner of Finance, as well as for the same period of time in the City Record, pursuant to Admin. Code § 11-406 (a), and publicly posted as required by law, *id.*, 11-406 (d).

The owner of the Premises did not serve or file an answer to *Manhattan 49* within the statutory time period fixed by statute and communicated to interested parties by the Notice of Foreclosure; nor did the owner or any other interested party redeem the property by paying the delinquent taxes or by entering into an installment agreement with Finance pursuant to Admin. Code §§ 11-405 and 11-409. Neither Wells Fargo nor plaintiffs redeemed the Premises, nor was there any challenge to the tax foreclosure action with respect to the Premises by any party until the allegations made by plaintiffs in the complaint.

A title search performed by Finance revealed that Wells Fargo was a lienor of the Premises as of January 23, 2009. Although not required by statute, on April 9, 2009, Finance mailed a Final Warning/Lienor Notice to Plaintiff's predecessor-in-interest, mortgagee Wells Fargo.

Judgment of Foreclosure

On February 15, 2011, following proof by the City that it had complied with all of the applicable provisions of Title 11, Chapter 4 of the Admin. Code with respect to *Manhattan 49*, the court granted the City a judgment of foreclosure (the Judgment of Foreclosure). The Judgment of Foreclosure was entered in the New York County Clerk's Office on February 23, 2011. Though not required, Finance also mailed an additional post-judgment notice to interested parties, including Wells Fargo, on or about March 11, 2011, advising them an *in rem* judgment had been entered.

Mandatory Redemption Period

Under Admin Code § 11-412.1 (d), a property owner or a party in interest has four months after the entry of a foreclosure judgment to repay the tax debt and other real property charges, such as water and sewer charges or emergency repair liens, on a tax delinquent parcel in order to redeem the property from foreclosure. Pursuant to the Notice of Foreclosure and Admin. Code § 11-407, any interested party could have redeemed the subject property during the mandatory redemption period by paying the delinquent taxes in full or entering into an installment agreement (with Finance, upon approval by the Department of Housing, Preservation and Development (HPD)) to pay the taxes over time. Either action will prevent transfer of the property to a third party under the provisions of the Administrative Code. The mandatory

redemption period during which interested parties had a right to redeem the Premises expired on June 23, 2011, four months after the date of entry of the judgment.

Third Party Transfer Program

Under a Third Party Transfer Program (Program), the City initiates foreclosure proceedings against tax delinquent buildings in poor condition and obtains foreclosure judgments. After City Council review, HPD oversees conveyance of the parcels. HPD, with private lenders, provides financial assistance to new owners to ensure the buildings are upgraded, thereby preserving the City's affordable housing stock.

Properties in the Program are typically initially to Neighborhood Restore, a non-profit entity which manages properties prior to the transfer to the ultimate third party.

The City has eight months from the date of final judgment authorizing the award of possession to transfer the property and must notify the City Council in advance of the proposed conveyance. There is a 45-day tolling of the transfer period for City Council review. Admin. Code §§ 412.1 (d); 11-412.2. Following City Council review, transfer of properties included in the *Manhattan 49 in rem* judgment took place on November 30, 2011.

Commencement of This Action

Plaintiffs commenced this action by summons and complaint dated September 26, 2011 (the Original Complaint). The Original Complaint did not seek any relief from Municipal Defendants (Department of Environmental Protection, NYC Department of Buildings, Department of Finance, and HPD), and alleged simply that "The CITY OF NEW YORK (Department of Finance, Department of Environmental Protection, Department of Buildings & Department of Housing Preservation & Development) is made a defendant herein on account of

possible unpaid business corporation taxes due and owing from 244 Lenox Ave., New York, NY 10027.” Finance did not serve an answer to the Original Complaint, but filed a Notice of Appearance and Waiver in Foreclosure, which neither admitted nor denied the allegations in the Original Complaint. Plaintiffs amended the Original Complaint to assert a cause of action seeking to invalidate *Manhattan 49*, as a result of Finance’s alleged failure to disclose the *in rem* tax foreclosure. The claims against the City are contained in the First and Thirteenth causes of action.

The municipal defendants move to dismiss the First and Thirteenth causes of action. Plaintiff cross-moves to vacate transfer of the Premises and grant plaintiff the right to redeem the tax lien.

Discussion

The First and Thirteenth Causes of Action are barred by documentary evidence¹ and fail to state a cause of action upon which relief may be granted. Any lien that plaintiffs may have had on the Premises was subordinate to the City’s tax lien, and was extinguished as a result of the Judgment of Foreclosure and subsequent transfer to Neighborhood Restore. Finance was under no obligation to give notice to plaintiffs of the *in rem* proceedings because Admin. Code § 11-406 (c) requires notice of foreclosure to be mailed only to the lienors who request such notice, which neither plaintiffs, nor their predecessor-in-interest, ever did. All statutorily required notice procedures were followed in *Manhattan 49*, including filing the List of

¹ Plaintiffs assert that Finance and DEP “waived” their right to file a motion to dismiss based upon documentary evidence because such defense was not asserted in their response to the Original Complaint. Plaintiffs’ service of the Amended Complaint, however, rendered the Original Complaint – and any responses thereto – a nullity. See *Halmar Distributors, Inc. v Approved Manufacturing Corp.*, 49 AD2d 841, 841 (1st Dept 1975) (“An amended complaint having been served, it superseded the original complaint and became the only complaint in the case. . . . Accordingly, the action herein must proceed as though the original pleading had never been served.”)

Delinquent Taxes, mailing the Notice of Foreclosure, publishing the Notice of Foreclosure, and posting the List of Delinquent Taxes and the Notice of Foreclosure. A presumption of validity attached to the proceedings in *Manhattan 49* when the granted Judgment of Foreclosure was entered on February 23, 2011, and became conclusive four months later on June 23, 2011. Plaintiffs fail to address, much less rebut, the majority of defendants' points, and have shown no valid claim to challenge the *in rem* Judgment of Foreclosure, or to overturn the transfer of the Property to Neighborhood Restore.

The First and Thirteenth Causes of Action are dismissed.

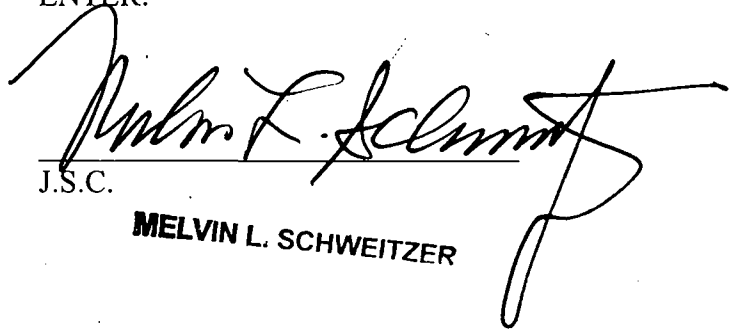
Plaintiffs' cross-motion is denied.

ORDERED that defendants' motion to dismiss is granted; and it further

ORDERED that plaintiffs' cross-motion is denied.

Dated: April 22, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER