

Eastern Capital Group, LLC v 113th St. Richmond Realty Co.
2014 NY Slip Op 30317(U)
January 28, 2014
Sup Ct, Queens County
Docket Number: 9442/10
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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EASTERN CAPITAL GROUP, LLC,

Plaintiff(s),

Index No.: 9442/10
Motion Date: 09/04/13
Motion Cal. No.: 41
Motion Seq. No: 4

- against -

113TH STREET RICHMOND REALTY CO., INC.,
191 HURON REALTY CO., INC., WEST HILL
TOWERS INC., GEORGE CZACHOR F/K/A ZDZISLAW
CZACHOR, SAMUEL FELDMAN LUMBER CO. INC.,
STANTEC CONSULTING SERVICES INC., NEW YORK
CITY DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, and
TERESA CZACHOR,

Defendant(s).

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The following papers numbered 1 to 9 read on this motion by third-party purchaser Qing Hu Hui for leave to intervene, and for an order directing the return of her bid deposit.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1-4
Affirmation in Opposition- Exhibits-Service.....	5-7
Reply Affirmation-Service.....	8-9

Upon the foregoing papers it is **ORDERED** that the motion is determined as follows:

That branch of third-party purchaser Quing Hu Hui's motion for leave to intervene in this action, is granted.

Plaintiff commenced this commercial mortgage foreclosure action on April 15, 2010, and sought to foreclose on certain mortgages encumbering certain real property including 95-19 113th Street, Richmond Hill, New York (Block 9415, Lot 81) and 95-21 113th Street, Richmond Hill, New York (Block 9415, Lot 80). A judgment of foreclosure and sale, dated February 15, 2013, was entered on

February 25, 2013, and the court-appointed Referee conducted a public auction on April 12, 2103, at which time Qing Hu Hui was the successful bidder, with a bid of \$500,000.00, with respect to the real properties known as 95-19 113th Street, Richmond Hill, New York (Block 9415, Lot 81) and 95-21 113th Street, Richmond Hill, New York (Block 9415, Lot 80).

Ms. Hui executed a memorandum of sale, and tendered a deposit of \$50,000.00 to the Referee on April 12, 2013. Ms. Hui, pursuant to the terms of sale, was required to pay the balance with interest to the Referee, on or before the closing date of May 13, 2013, with time being of the essence as to the purchaser. Ms. Hui did not contact the Referee or the plaintiff to schedule the closing. Counsel for plaintiff, in a letter dated May 1, 2013, reminded Ms. Hui that she was obligated to schedule and appear at the closing, no later than May 12, 2013, and informed her that if she failed to close the plaintiff would direct the Referee to place the foreclosed property up for sale and to apply her bid deposit to any and all costs and expenses incurred in connection with her breach of the terms of sale. Ms. Hui's counsel, in a letter dated May 8, 2013, acknowledged receipt of the May 1 letter, and requested that the terms of sale be cancelled and that her deposit refunded, due to a misunderstanding as to the legal status of one of the parcels.

Ms. Hui did not close on May 13, 2013, and a second foreclosure sale of the subject real properties was scheduled for June 28, 2013, at which time plaintiff was the successful bidder, with a bid of \$405,000.00.

Ms. Hui asserts that the notice of sale and terms of sale describe the subject real property as Lots 80 and 81 on Block 9415 and that prior to the auction, she searched the Department of Buildings website with respect to these lot and block numbers, but did not conduct a search of the properties based upon their street addresses. Ms. Hui states that based upon her research she reasonably believed that the auction sale covered the structure located at 95-19 113th Street (Lot 81), plus the structure located at 95-25 113th Street (Lot 80). Following her bid and execution of the memorandum of sale, Ms. Hui ordered a title search and learned that the Department of Finance records showed the property located at 95-21 113th Street as a separate Lot 81, and that the tax map records were not in agreement with the Department of Buildings records.

Ms. Hui claims that the Department of Buildings mis-indexed the real property located at 95-21 113th Street, and either attributed, or transferred, the records for said real property to the real property located at 95-25 113th Street. She asserts that

the Department of Buildings Information System has no records for the real property located at 95-21 113th Street, and accordingly said real property has no certificate of occupancy, or any legal status with the Department of Buildings. Ms. Hui states that she would not have bid on the subject real properties, if she had the correct information with respect to Lot 80, and asserts that as she received incorrect information from the Department of Buildings, the terms of sale should be canceled and her \$50,000.00 deposit refunded.

Plaintiff, in opposition, asserts that pursuant to the terms of sale, Ms. Hui's failure to timely close resulted in the forfeiture of the bid deposit; that the sale of the property was made "time of the essence"; that she has no lawful excuse for her default; that the property was sold "as is"; that the purported lack of a certificate of occupancy has no bearing on the marketability or insurability of the title to the subject premises; and that the purchaser had constructive notice of the legal status of the subject property.

Ms. Hui's claim that she reasonably believed that the sale of the real properties covered the structure located at 95-19 113th Street, as well as the located at 95-25 113th Street, based upon her review of the Department of Buildings' website, is unavailing. The properties advertised for sale, as well as the terms of sale, listed the block and lot numbers, as well as the street addresses. It is undisputed that the notice of sale and terms of sale set forth the street addresses as 95-19 and 95-21 113th Street, and do not make any mention of the real property located at 95-25 113th Street.

"As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title (*Heller v Cohen*, 154 NY 299, 306 [1897])" (*Jorgensen v Endicott Trust Co.*, 100 AD2d 647 [1984]). The failure to have a certificate of occupancy is not an objection to title and does not affect the marketability or insurability of title. The issue of whether a premises can be legally occupied is not a title issue. Although this status is included in most title reports, it is provided for "information purposes only" (see *Caira v Bell Bay Properties, Inc.*, 143 AD2d 870 [2d Dept 1988]; *Howard v Berkman, Henoch, Peterson & Peddy, P.C.*, 5 Misc 3d 1020 [A] [N.Y. Civ. Ct. 2004]). With respect to the real property known as 95-19 113th Street, the title report provided to Ms. Hui states that the subject property is improved by a two-story, one-family, frame dwelling and a garage, and does not have a certificate of occupancy, as it is pre-Code structure. The lack of a certificate of occupancy, however, does not render title to this property unmarketable or uninsurable. With respect to the real property

known as 95-21 113th Street the fact that the title report states that it is vacant land and does not have a certificate of occupancy, as well as a lack of Building Department records, does not render title to this property unmarketable or uninsurable.

The court further finds that Ms. Hui's pre-bid search of the Department of Buildings records with respect to the real property identified as Block 9415 Lot 80, should have raised red flags. Clearly the records for Lot 80 did not match the address for the mortgaged premises known as 95-21 113th Street. Furthermore, to the extent that the Department of Building records lists the property address as 95-25 for Block 9415, Lot 80, it also states under DOB Building Remarks, "TENTATIVE LOT 179." The inclusion of a tentative lot number, thus, indicates the possibility that Lot 80 had been subdivided. Although Ms. Hui and her counsel speculate that the records for 95-21 113th Street were mis-indexed by the Department of Buildings, no evidence has been submitted in support of this claim.

Ms. Hui did not view the real properties. Nor did she conduct a search of the court's public records with respect to the within mortgage foreclosure action, which would have revealed the metes and bounds for the properties, as well as their street addresses. The court notes that plaintiff herein did not at any time claim to hold a mortgage with respect to the premises located at 95-25 113th Street, nor did it claim that any of the named defendants were the deed owners of said premises. Ms. Hui's assumption that the real properties listed in the notice of sale included the premises located at 95-25 113th Street was not reasonable under the circumstances presented, and does not warrant the cancellation of terms of sale and a return of the bid deposit.

In view of the foregoing, that branch of Ms. Hui's motion which seeks leave to intervene is granted, and upon intervention, that branch of her motion which seeks a return of her bid deposit is denied.

Dated: January 28, 2014

JANICE A. TAYLOR, J.S.C.

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