

<b>Grand Palm (NY) LLC v Kamhi</b>
2014 NY Slip Op 30877(U)
April 7, 2014
Sup Ct, New York County
Docket Number: 111981/2009
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER  
Justice

PART 15

GRAND PALM (N.Y.) LLC

INDEX NO. 111981/09

STEPHEN KASHI,  
-v-  
ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 15

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
<u>1, 2</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

APR 08 2014

COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 4/7/2014

  
HON. EILEEN A. RAKOWER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
GRAND PALM (NY) LLC,

Plaintiffs,

- v -

STEVEN KAMHI, MAURICE ENBAR, 23-123RD  
STREET LLC, 60 WEST 124 LLC, CRAIG MARX,  
BOARD OF MANAGERS – THE SARATOGA  
CONDOMINIUM, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD LIENS,  
NEW YORK CITY DEPARTMENT OF HOUSING  
& PRESERVATION & DEVELOPMENT, BANK  
OF AMERICA, N.A., MICHELE GOODSTEIN,  
CITY NATIONAL BANK, and CLAIRE M. KAMHI,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.  
111981/2009

**DECISION  
and ORDER**

Mot. Seq. 15

**FILED**

APR 08 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff-mortgagee, Grand Palm (NY) LLC (“Grand Palm” or “Plaintiff”), the purchaser at a foreclosure sale held on January 22, 2014, brings this action to obtain possession of the foreclosed premises, located at 330 East 75th Street, Unit 11J, New York, New York, 10021, Block 01449, Lot 1100, Borough of Manhattan, City, State, and County of New York (the “Premises”). Plaintiff claims that defendant-mortgagor, Steven Kamhi (“Kamhi”), and Craig Marx (“Marx”) (collectively, “Defendants”), the Premises’ occupant, refuse to surrender the Premises to Plaintiff, even though Defendants’ interests in the Premises were extinguished upon the foreclosure judgment and sale.

The underlying foreclosure action was brought to foreclose a mortgage made

by Plaintiff's predecessor in interest to Kamhi. Although Kamhi appears to have occupied the Premises, from time to time, along with Marx, Marx now claims to be the sole tenant and occupant at the Premises.

Grand Palm now moves, pursuant to RPAPL § 221 and CPLR § 5107, for a Writ of Assistance directing the Sheriff to put Plaintiff in possession of the Premises and/or ejecting defendants Craig Marx and/or Steven Kamhi therefrom, and for an Order directing Marx and/or Kamhi to pay Plaintiff use and occupancy during their unlawful possession of the Premises and holding Kamhi and/or Marx in contempt for their willful violation of the Court's Order directing that Plaintiff be let into possession.

Marx appeared, *pro se*, for oral argument in opposition to the writ of assistance on March 18, 2014.

"The writ of assistance, so far as foreclosures are concerned . . . may be had to enforce any judgment or order awarding the possession of real property other than the common judgment in a direct action for land. A writ of assistance is, in ordinary cases, the process for giving possession of land under an adjudication and will be granted upon the sale being confirmed, and proof that the purchaser has received a deed of conveyance from the master, which has been shown to the party in possession accompanied by a demand of possession, which has been refused." (*Kilpatrick v. Argyle Co.*, 199 A.D. 753, 758 [1st Dep't, 1922]) (citations omitted); (*Hudson Riv. Park Trust v. Basketball City USA, LLC*, 22 A.D.3d 422, 423 [1st Dep't 2005]) ("Inasmuch as the court's final order and judgment affected the possession, enjoyment or use of real property, and directed delivery of possession of the property to the party entitled to it, the court's issuance of a writ of assistance pursuant to RPAPL § 221 was appropriate.").

Section 221 of the Real Property Actions and Proceedings Law provides, in relevant part:

Where a judgment affecting the title to, or the possession, enjoyment or use of, real property allots to any person a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it also may direct the delivery of the

possession of the property to the person entitled thereto, subject to the rights and obligations set forth in thirteen hundred five of this chapter.

If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, by order, in its discretion . . . may require the sheriff to put that person into possession.

A purchaser at a foreclosure sale may properly be granted a writ of assistance under RPAPL § 221 where the defendant was party to the underlying foreclosure action, has been served with a copy of the judgment of foreclosure and sale, and was duly apprised of the sale of the property. (*Tri-Land Properties, Inc. v. 115 West 28th St. Corp.*, 267 A.D.2d 142 [1st Dep't 1999]). However, where a purchaser at a foreclosure sale accepts rent for premises so purchased, he recognizes the person paying rent as a tenant, and his right to a writ of assistance is gone. (*Blackmer v. Dargan*, 189 N.Y.S. 582 [N.Y. Sup. Ct. 1921]). "The determination whether to grant a writ of assistance lies within the discretion of the trial court, and it must give consideration to the relative equities of the particular situation." (*Morgan v. Morgan*, 2 Misc. 3d 1011(A) (N.Y. Sup. Ct. 2004).

Additionally, RPAPL § 1305(2), effective January 14, 2010, changes prior law by giving residential tenants a right to remain in foreclosed premises, for the remainder of the lease or 90 days, whichever is greater, so long as the rent is not substantially less than the fair market rent. Thus, the rights of a residential tenant cannot be cut off by serving the tenant as a party to the foreclosure proceeding, although the tenant of one unit which is not subject to regulatory control may be removed after 90 days if the ultimate purchaser desires the unit as his or her primary residence. For purposes of this provision, the term "tenant" is defined as "any person who at the time the notice required by subdivision four of section thirteen hundred three of this article . . . is a party to an oral or implied rental agreement with the mortgagor and obligated to pay rent to the mortgagor or such mortgagor's representative, for the use or occupancy of one or more dwelling units of a residential real property." RPAPL § 1305(1)(c).

Here, Plaintiff argues that it obtained a judgment of foreclosure and sale on

October 21, 2013, which “extinguishes all rights, claims, liens, and interests that any defendant may have had in the Premises.” Plaintiff argues that Defendants were named as parties to the underlying foreclosure action, and were served with Judgement of Foreclosure and Sale, and were duly apprised of the sale of the property. Plaintiff further argues that Defendants have refused Plaintiff’s demands for possession, which were sent by letter, dated February 21, 2014, to Marx and to counsel for Kamhi, and received on February 25, 2014. As a result, Plaintiff contends, Plaintiff is entitled to a writ of assistance. Kamhi has failed to respond to Plaintiff’s demand for possession, or to appear on Plaintiff’s motion.

Marx, in turn, claims to occupy the Premises as a residential tenant with no ownership interest in the residential property at issue, based on the terms of a purported lease agreement with Kamhi. Marx claims to have entered into a lease agreement, as tenant, with Kamhi, as landlord, whereby Marx was obligated to pay Kamhi \$2,000 in rent for the Premises, plus an additional \$500 for an option to purchase the Premises. Marx claims that his tenancy was not extinguished by the Judgement of Foreclosure and Sale because Marx is a residential tenant whose tenancy came into existence before Plaintiff purchased the Premises upon foreclosure, and that, as a result, Plaintiff cannot compel possession. The claimed lease agreement has not yet expired by its alleged terms.

Here, the purported lease agreement was not disclosed until years after the foreclosure proceeding was commenced. Indeed, Kamhi repeatedly represented that he resided at the Premises, and not that he leased them. Furthermore, although Marx was named as a defendant in the underlying foreclosure action, Marx failed to appear in that action and made no attempt to assert the legitimacy of his tenancy in opposition to the foreclosure proceedings underlying Plaintiff’s claim. (*Coronet Capital Co. v. Spodek*, 202 A.D.2d 20, 28 [1st Dep’t 1994]) (“The inordinate and unexplainable delay in asserting the presence of a lease by defendant casts serious doubts as to the authenticity of the agreement”). While there is a question as to whether the rent purportedly owed under the lease agreement in question is substantially less than fair market value for the Premises, it is undisputed that Marx has paid no rent or use and occupancy for the subject premises for quite some time, and Marx does not contend that he has tendered any such payment.

Accordingly, the parties are directed to appear for a prompt hearing to examine the validity of the purported lease agreement, and if Marx is determined to be a

legitimate residential lessee, Plaintiff may present evidence, in admissible form, establishing the fair market value of the premises.

Wherefore, it is hereby,

ORDERED that the parties are to appear on April 23, 2014, at 9:30 A.M. to be heard on this matter.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: April 7, 2014



Eileen A. Rakower, J.S.C.

**FILED**

APR 08 2014

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NEW YORK