

<b>Lanin Law P.C. v McGaughey</b>
2015 NY Slip Op 31077(U)
June 10, 2015
Supreme Court, Kings County
Docket Number: 505433/2014
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9

LANIN LAW. P.C.,

*Petitioner,*

DECISION / ORDER

*-against-*

Index No. 505433/2014  
Motion Seq. No. 2

LAWRENCE H. MCGAUGHEY, ESQ., AS REFEREE,  
and 234 8<sup>th</sup> STREET CORP.,

*Respondent(s).*

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for reargument.*

Papers	Numbered
Notice of Motion and Affidavits Annexed .....	<u>1-6</u>
Order to Show Cause and Affidavits Annexed .....	<u>          </u>
Answering Affidavits .....	<u>          </u>
Reply Affidavits .....	<u>          </u>
Other: _____	<u>          </u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

Petitioner moves, by notice of motion dated February 20, 2015, for an order pursuant to CPLR § 2221, granting reargument of the court's decision and order dated January 22, 2015 which dismissed petitioner's petition for an order pursuant to CPLR § 5225 and 5227, and upon reargument, for the requested turnover order. The court grants the motion for reargument and upon reargument, despite the lack of opposition, adheres to its original decision.

To summarize the facts briefly, this court issued a judgment of foreclosure and sale on January 18, 2013 in an action entitled *FTBK Investor LLC v 234 8<sup>th</sup> Street Corp.* [Index # 22055/2009]. The property was sold at a foreclosure sale held on February 20, 2014. Petitioner in the instant action filed a notice of claim to the surplus proceeds of the sale on February 27, 2014 and another party filed a notice of claim on March 20, 2014. The referee's deed is dated April 7, 2014. The Referee has filed his Report of the Sale and has deposited the surplus money from the sale (\$67,721.36) into court. A motion to confirm the referee's report of sale and for the appointment of a Referee to determine how the surplus funds should be distributed has been filed, but as of this date, it has not been given a date on the court's motion calendar.

Petitioner's notice of claim in that action states that the claim amounts to \$98,382.73 with interest thereon from the 19<sup>th</sup> of September, 2012 at the statutory rate of 9% and arises out of a judgment recovered in the Supreme Court of New York, County of Kings, entered on the 19<sup>th</sup> day of September, 2012 against Nicholas Gordon, as debtor, and that said judgment is a lien against the premises known as 234 8<sup>th</sup> Street, Brooklyn New York [Block 1004, Lot 16] and is a lien upon any surplus funds and upon Nicholas Gordon's interest in any surplus funds as he is the 100% shareholder of 234 8<sup>th</sup> Street Corp. Petitioner's basis for moving for the turnover order in this special proceeding is based upon the exact same set of facts.

In denying petitioner's prior motion and dismissing the petition, this court found that a creditor cannot use a turnover proceeding as an end-run around a surplus money proceeding, certainly not by naming and serving as respondent the court-appointed

referee to sell.

The court notes that judgments docketed prior to the delivery of the Referee's deed in a mortgage foreclosure are liens on the realty which are deemed transferred to be liens on the surplus funds. *Warwick Sav. Bank v Long Is. Ch. Knights of Columbus Social Serv.*, 253 App Div 276 [2<sup>nd</sup> Dept 1938]; *Long Island Sav. Bank, FSB v Ostro*, 155 Misc 2d 982 [Sup Ct Nassau 1992]. Section 1361 of the Real Property Actions and Proceedings Law provides:

"1. Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name, or by his attorney, at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of sale is filed, a written notice of such claim, stating the nature and extent of his claim and the address of himself or his attorney.

2. On the motion for confirmation, or at any time within three months thereafter, on notice to all parties who have appeared in the action or filed claims, on motion of any party to the action, or any person who has filed a notice-of-claim on the surplus moneys, the court, by reference or otherwise, shall ascertain and report the amount due to him or any other person who has a lien on such surplus moneys, and the priority of the several liens thereon and order distribution of surplus moneys.

3. The owner of the equity of redemption, or any party who has appeared in the action or any person who files a notice of claim or who has a recorded lien against the property shall be given notice by mail or in such other manner as the court shall direct, to attend any hearing on disposition of surplus money."

Anyone filing a timely notice of claim is entitled to participate in the surplus money proceeding. RPAPL§ 1361[2]. See also, *Eastern Federal Savings & Loan Assn. v Sabatine*, 76 AD2d 899 [2<sup>nd</sup> Dept 1980], *app. dismiss.*, 53 NY2d 839 [2<sup>nd</sup> Dept 1981]; *Long Is. Sav. Bank v Ostro*, 155 Misc2d 982; *Marine Midland Bank, N.A. v Cleanthes*,

216 NYLJ. 7 [Sup Ct Westchester 1996].

Turning to the instant motion to reargue the petition for a turnover order, CPLR § 5225 provides in pertinent part:

***Payment or Delivery of Property of Judgment Debtor***

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff."

*Eastern Federal Sav. and Loan Ass'n. v Sabatine*, 76 AD2d 899, is especially instructive. In *Eastern*, real property was sold pursuant to mortgage foreclosure action and the surplus funds were deposited with the county treasurer. After some of the money was paid to judgment creditors who properly filed notices of claim, the *money remaining was money belonging* to the judgment debtor and it was then a proper subject for a turnover proceeding. The court directed the surplus money referee to hold the funds for 60 days so a turnover petition could be brought. See also, *Long Island Sav. Bank, FSB v Ostro*, 155 Misc 2d 982. In this matter, the petitioner's claims will be determined in the surplus money proceeding.

Finally, as the surplus funds in the foreclosure action are on deposit with the

court, the petition was not properly brought against "the person in possession of the funds." Neither named respondent, the Referee to Sell nor the mortgagor in the foreclosure are proper respondents for this CPLR 5225(b) proceeding. It is improper to try to intercept the funds after the closing and before the referee is able to deposit the funds with the court as is required.


As both a judgment creditor who has docketed its judgment with the County Clerk and as a claimant who has filed a notice of claim in the foreclosure action, there is no need to bring a turnover proceeding with regard to the same funds. In this petition, it was also brought against the wrong parties.

Accordingly, upon reargument, the court adheres to its original decision.

This shall constitute the decision and order of the court.

Dated: June 10, 2015

**ENTER :**

  
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**Hon. Debra Silber, A.J.S.C.**  
**Hon. Debra Silber**  
**Justice Supreme Court**

  
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