JPMorgan Chase Bank, N.A. v Gerasimowicz
2016 NY Slip Op 31029(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 850125/14
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7
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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

- against -

WALTER V. GERASIMOWICZ; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK CITY DEPARTMENT OF FINANCE; BOARD OF MANAGERS OF 220 RIVERSIDE BOULEVARD AT TRUMP PLACE; GERALD FINKEL; FIRST CENTRAL SAVINGS BANK; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; SIGNATURE BANK; and WITHERS BERGMAN LLP,

Defendants.
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Index No. 850125/14
DECISION &ORDER
(Motion Seq. 004)

GERALD LEBOVITS, J.:

Plaintiff JPMorgan Chase Bank, National Association moves, pursuant to RPAPL 1351, for a Judgment of Foreclosure and Sale and for an award of legal fees. Defendant Withers Bergman LLP is a junior lienor who opposes the motion on two grounds. First, Withers Bergman contends that certain language in the proposed judgment is unauthorized and prejudicial. The second objection is that the Referee computed the amount due plaintiff without holding a hearing and his computation is allegedly incorrect.

Withers Bergman argues that certain provisions of the proposed judgment regarding the payment of taxes creates an ambiguity. In the third decretal paragraph on page 3 thereof, the proposed judgment states that the mortgaged premises are to be sold "subject to any real estate taxes, assessments, water rents and sewer rents, unless same are due and payable on the date of

the sale . . . *irrespective of the date upon which same have become or may be a lien upon said premises* (emphasis added)."[1] However, on page 4 it states:

> "if the property is located within the five boroughs of New York City, that the Referee on receiving the proceeds of sale shall forthwith pay therefrom the taxes, assessments, water rates and sewer rents or environmental liens *which are liens on the premises as of the date of sale* with such interest or penalties which may lawfully have accrued thereon to the day of payment provided, however, that none of the aforesaid charges shall be allowed out of the proceeds unless same shall have been due and payable on the date of the sale[.]"

Withers Bergman argues that the first provision makes the lien date irrelevant, while the second makes it relevant.

RPAPL 1354 (2) requires that "[t]he officer conducting the sale *shall* pay out of the proceeds, all taxes, assessments, and water rates *which are liens upon the property sold* (emphasis added)." A tax lien, in order to be entitled to preferential payment as an expense of sale, must be a lien at the time of the sale (*NYCTL 1996-1 Trust v EM-ESS Petroleum Corp.*, 19 Misc 3d 240 [Sup Ct, Bronx County], *affd* 57 AD3d 304 [1st Dept 2008]). "[T]he statute was amended in 1997 by deleting the language 'unless the judgment otherwise directs' (L 1997, ch 232, § 1), thereby eliminating the option that the property could be sold subject to any tax liens" (*St. Denis v Blakesley*, 70 AD3d 1078, 1079 [3d Dept 2010]). Accordingly, the proposed judgment must be modified to take out the words "irrespective of the date upon which same have become or may be a lien upon said premises" as appearing in the first decretal paragraph on page 3 and the fourth decretal paragraph on page 6 thereof.

Objection is also made to the language on page 7 of the proposed judgment regarding what happens if plaintiff is the purchaser and there is a surplus after the payment of the Referee's fee, the expenses of sale and advertising expenses, plaintiff's debt, and costs and disbursements.

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[1] This language again appears in the fourth decretal paragraph regarding the payment of taxes by plaintiff in the event it is the successful bidder.

Withers Bergman argues that the proposed language would reduce the surplus due to junior encumbrancers and direct the payment of taxes which need not be paid, taxes to which a bidder would apparently "take subject to," and which is standard. The court agrees that the language creates an ambiguity about what taxes must be paid by the Referee from a surplus. The following change should be made to the language of page 7 of the proposed judgment (insertion in italics, deletions in brackets):

> "that if, after so applying the balance of the amount bid, there shall be a surplus over and above the said amounts due to the plaintiff, the plaintiff shall pay to the Referee upon delivery to it of the said Referee's deed, the amount of such surplus; that the Referee on receiving said amounts from the plaintiff shall forthwith pay therefore said taxes, assessments, water rates, sewer rates *which are liens on the premises as of the date of sale with such* [, and] interest and penalties thereon, unless the same shall have already been paid, the Referee shall then deposit the balance in said depository as hereinabove directed[.]"

Withers Bergman also objects to the provision on page 5 allowing for the payment of $250 to the Referee for each adjournment or cancellation of the auction unless the Referee has requested the delay. These types of provisions are routinely deleted by this court from proposed judgments, and so shall herein.

Withers Bergman's second objection to this motion is that the Referee computed the amount due without holding a hearing. Withers Bergman filed a notice of appearance in this action on July 17, 2014, but did not serve an answer contesting any of plaintiff's claims. Indeed, plaintiff's motion for summary judgment was granted without opposition from any defendant. The court's August 5, 2015 order specifically states that: "ORDERED, that, if required, said Referee take testimony pursuant to RPAPL § 1321." RPAPL 1321 only requires that the Referee examine the plaintiff under oath where a defendant is an infant or absentee, and referee hearings are otherwise required only to settle disputed issues of fact (*Deutsche Bank Natl. Trust Co. v*

Jackson, 68 AD3d 805 [2d Dept 2009]; *Blueberry Invs. Co. v Ilana Realty*, 184 AD2d 906, 908 [3d Dept 1992]).

Furthermore, defense counsel fails to raise any material issues with respect to the amounts computed by Referee Jackson to be due and owing to plaintiff. The fact that the affidavit of merit prepared by plaintiff's vice president used a form affidavit, that is partially typed and partially filled-in in pen, does not affect the merit of her sworn statements. Likewise, defense counsel's challenge to the interest calculation is based solely on speculation. The note had had a variable rate of interest, based upon the prime rate as published by the Wall Street Journal. No evidence challenging the 2.99% rate over the term of the default is offered.

For the foregoing reasons, plaintiff's motion is granted. Plaintiff shall be entitled to collect legal fees in the amount of $3,500, and the report of Referee M. Randolf Jackson dated August 24, 2015 is confirmed in all respects. Plaintiff is directed to settle a Judgment of Foreclosure and Sale in accordance with this decision and order in Rm. 119, 60 Centre Street, New York, New York.

The foregoing constitutes the decision and order of this court.

Dated: May 31, 2016

ENTER: