

NYCTL 2011-A Trust v 70 Orchard LLC
2017 NY Slip Op 30076(U)
January 11, 2017
Supreme Court, New York County
Docket Number: 652883/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

NYCTL 2011-A TRUST, and THE BANK OF NEW YORK
MELLON as collateral Agent and Custodian for the
NYCTL 2011-A TRUST,

Plaintiff

INDEX NO. 652883/12

MOTION DATE 11-23-2016

- Against -

70 ORCHARD LLC, UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
JOE ERLICHSTER, ESTATE OF LEON ERLICHSTER
and "JOHN DOE No.1" through "JOHN DOE No. 100"
inclusive, the names of the last 100 defendants being
fictitious, the true names of said defendants being
unknown to plaintiff, it being intended to designate fee
owners, tenants or occupants of the liened premises
and/or persons or parties having or claiming an
interest in or a lien upon the liened premises, if the
aforesaid individual defendants are living, and if any or
all of said individual defendants be dead, their heirs at
law, next of kin, distributees, executors, administrators,
trustees, committees, devisees, legatees, and the assignees,
lienors, creditors and successors in interest of them
and generally all persons having or claiming under, by,
through, or against the said defendants named as a
class, of any right, title, or interest in or lien upon the
premises described in the complaint herein,

MOTION SEQ. NO. 003
MOTION CAL. NO.

Defendant.

The following papers, numbered 1 to 6 were read on this motion for partial summary judgment and
appointment of a referee to compute on a foreclosure action.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
_____	<u>1-2</u>
_____	<u>3-4</u>
_____	<u>5-6</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary
judgment and appointment of a Referee to compute on this foreclosure action is denied,
the remainder of the motion is granted without opposition, plaintiff to settle order on
Notice.

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

In this action to foreclose on a tax lien Plaintiff makes a motion for an order: (1) Granting plaintiff's motion for summary judgment against the defendant 70 Orchard LLC and striking the answer of said defendant, (2) pursuant to RPAPL § 1321 appointing a Referee to compute the amounts due plaintiff upon the tax lien being foreclosed, (3) excising from the caption defendants Joe Erlichster and Estate of Leon Erlichster and discontinuing the action as against them, (4) substituting certain defendant in stead and in place of defendants John Doe No. 1 through John Doe No. 16 and excising from the caption and discontinuing the action without prejudice as against defendants John Doe No. 17 through John Doe No. 100, (5) amending the caption to substitute 1998-2 Trust and the Bank of New York Mellon as Collateral Agent and Custodian for the NYCTL 1998-2 Trust in Place and Stead of NYCTL 2011-A Trust as Plaintiffs herein, and (6) such other and further relief as this court deems just and proper.

Plaintiff alleges that summary judgment should be granted because it is the holder of a tax lien that was purchased from the City of New York. In support of its motion plaintiff submits the affidavits of Kayetrina Murchison and Pamela Parker Cortijo.

Ms. Parker-Cortijo states that the city was the holder of two tax liens for delinquent water and sewer charges on the property subject to foreclosure. That defendant was given notice of a tax lien sale by publication in the Daily News on May 2, and July 21, 2011, and by mail on September 22, 2011 to three different address on file for the defendants. That the defendants did not cure their default in payment and the tax liens were sold after complying with the notice requirements of the Administrative Code.

Ms. Murchison an employee with the Department of Environmental Protection and its current Legal Liaison in its Bureau of Customer Services states that the property in question (70 Orchard Street New York, N.Y. described on the tax map of the city of New York as Block 408 Lot 2) had delinquent charges on two water meters totaling \$24,968.91 on account ending 5001 and \$19,475.11 on account ending 4001. That the delinquent charges on these accounts were converted into the tax liens sold to the plaintiff on August 11, 2011. She acknowledges that on August 15, 2011 DEP accepted two checks one for \$24,968.91 covering all the arrears on account ending in 5001 and another for \$19,475.11 covering all the arrears on account ending in 4001. DEP did not apply the monies paid on account 5001 to cover the arrears, instead it applied it toward subsequent charges that accrued on the account. Similarly it did not apply the \$19,475.11 payment to cover the arrears of account ending in 4001.

DEP did not forward the payments to the holder of the liens or advise the defendant that the liens were still outstanding. Plaintiff argues that since the amounts to cover the liens were paid to DEP after the liens had been purchased and transferred to it, they have not been paid and are therefore entitled to foreclosure. Defendants argue that it is inherently unfair and unjust to cause it to lose its property after it had paid to DEP the obligations reflected in the liens . Plaintiff alleges that the satisfaction of the obligation vitiates any purported assignment and subsequent foreclosure.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing

contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

There is no dispute that defendant made an unconditional tender to pay-off the entire amount of the tax lien, which was accepted by DEP. The money was not returned to the defendant (creating the impression that the lien had been satisfied), or forwarded to the holder of the tax lien thereby satisfying the obligation. This placed the defendant in the untenable position in which it finds itself today, is inherently unfair and raises issues precluding summary judgment (see NYCTL 1999-1 Trust v. 573 Jackson Ave. Realty Corp., 13 N.Y.3d 573, 921 N.E. 2d 195, 893 N.Y.S.2d 503 [2009]; NYCTL 1998-2 Trust v. McGill, 138 A.D.3d 1077, 30 N.Y. 3d 308 [2nd. Dept. 2016];NYCTL 2011-A Trust v. Da'Jue Properties, Inc., 132 A.D.3d 569, 18 N.Y.S.3d 57 [1st. Dept. 2015]).

Therefore, the motion for summary judgment and for the appointment of a referee to compute is denied.

There is no opposition to the remainder of the plaintiff's motion. Therefore that part of the motion which is to (1) excise from the caption defendants Joe Erlichster and Estate of Leon Erlichster, and discontinuing the action as against them, (2) substituting certain defendant in stead and in place of defendants John Doe No. 1 through John Doe No. 16 and excising from the caption and discontinuing the action without prejudice as against defendants John Doe No. 17 through John Doe No. 100, (3) amending the caption to subsitute 1998-2 Trust and the Bank of New York Mellon as Collateral Agent and Custodian for the NYCTL 1998-2 Trust, in Place and Stead of NYCTL 2011-A Trust as Plaintiffs herein, is granted without opposition.

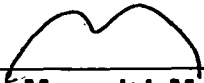
Accordingly, it is ORDERED that the portion of the motion which is for summary judgment and for the appointment of a referee to compute the amounts owed is denied, and it is further

ORDERED that the remainder of the motion is granted without opposition, and it is further

ORDERED that plaintiff within 30 days from the date of entry of this order settle order on notice by submitting a copy of this order and a copy of the settled order to the clerk of the order section at the General Clerk's office in Room 119A.

ENTER:

Dated: January 11, 2017



Manuel J. Mendez
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**