

**Sisk v Flushing Sav. Bank**

2017 NY Slip Op 30080(U)

January 11, 2017

Supreme Court, New York County

Docket Number: 850156/16

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
JOHN SISK and TODD TULS,

INDEX NO. 850156/16

Plaintiffs,

-against-

FLUSHING SAVINGS BANK, CAROL LILIENFELD,  
LOUIS ZAZARINO, JASPAN SCHLESSINGER, LLP  
and THE BOARD OF MANAGERS OF 75 WALL ST.,

Defendants.  
-----X

JOAN A. MADDEN, J.:

Motion sequence nos. 001, 002 and 003 are consolidated for determination herein.

Plaintiffs commenced this action by order to show cause (motion seq. 001) seeking to enjoin the closing of the foreclosure sale of a condominium unit at 75 Wall Street, Unit 20M, New York, New York (the "property"), which was the subject of a mortgage foreclosure action entitled Flushing Savings Bank f/k/a Flushing Savings Bank, FSB v. Enver Alijaj, et al, Index No. 810517/12, Supreme Court, New York County. On July 20, 2016 a foreclosure auction was held and the property sold was sold to the highest bidder, Louis Zazarino (the "purchaser") for \$1,310,000. The purchaser paid a deposit of \$131,000 to Referee Carol Lilienfeld and executed the Terms of Sale.

Defendant The Board of Managers of 75 Wall St. (the "Condominium") moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action (motion seq. 002). Defendant Flushing Savings Bank also moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action and an order pursuant to

[\* 2]  
CPLR 6414 cancelling plaintiffs' notice of pendency (motion seq. 003).

The complaint in the instant action asserts one cause of action for vacatur of the foreclosure sale. Plaintiffs are judgment creditors of the mortgagor Enver Alijaj and allege that their judgments were recorded before the judgment of foreclosure was entered. Plaintiff Sisk obtained his judgment of more than \$829,000 in October 2013, and plaintiff Tuls obtained his judgment of nearly \$600,000 in December 2014. They argue that by operation of law, each judgment is a lien on the property. Plaintiffs allege their attorney contacted the mortgagee's attorney, informing them of their "clients' liens and offering to purchase their interest in the mortgage." They object that they were not joined as necessary parties to the foreclosure action pursuant to RPAPL 1311, and for that reason the sale should be vacated, "since non-joinder permits a party's interest to survive the judgment," quoting Jorgenson v. Endicott Trust Co, 100 AD2d 647 (3<sup>rd</sup> Dept 1984). The complaint further alleges that neither plaintiffs, their attorney, Alijaj nor his attorney, Roy Lester Esq., were provided with notice of the sale, and that Flushing Bank and the Condominium "conspired" to prevent Alijaj from receiving notice of the sale.

The motions to dismiss are granted and the action is dismissed in its entirety. Contrary to plaintiffs' assertion, they were not necessary parties to the mortgage foreclosure action under RPAPL 1311. Rather, as the Appellate Division Second Department holds, "RPAPL 1311 codifies the principal that persons holding title to the premises or acquiring any right to or lien on the property subsequent to the mortgage should be made defendants in the foreclosure action. . . . Necessary parties include persons with title to the premises, tenants, and those holding subordinate liens, or subordinate judgments, unless the interest in the property was obtained after the mortgagee filed a notice of pendency" (internal citations omitted). Polish National Alliance

of Brooklyn, USA v. White Eagle Hall Co, Inc, 98 AD2d 400, 404 (2<sup>nd</sup> Dept 1983); accord CitiMortgage, Inc v. Dulgeroff, 138 AD3d 419 (1<sup>st</sup> Dept), lv app disp \_\_\_ NY3d \_\_\_, 2016 WL 6827039 (2016). Moreover, CPLR 6501 explicitly states that “[a] person whose conveyance or incumbrance is recorded after the filing of the notice [of pendency] is bound by all proceedings taken in the action after such filing to the same extent as a party.” CPLR 6501; CitiMortgage, Inc v. Dulgeroff, supra; Novastar Mortgage, Inc v. Mendoza, 26 AD3d 479 (2<sup>nd</sup> Dept 2006). In other words, the filing of a notice of pendency “provides constructive notice of an action in which the judgment demanded may affect the title to real property.” Id at 479.

Here, Flushing Bank filed the notice of pendency on October 24, 2012, but the Sisk and Tuls judgments were not entered until October 29, 2013 and December 16, 2014, respectively. Since plaintiffs’ judgments were not docketed against the property until after the filing of the notice of pendency, they were not necessary parties to the foreclosure action and are bound to the outcome of the foreclosure action as if they were named defendants. See CitiMortgage, Inc v. Dulgeroff, supra; Polish National Alliance v.. White Eagle Hall Co, supra; Novastar Mortgage, Inc v. Mendoza, supra.

As to the notice of the sale, since plaintiffs were not necessary parties, they were not entitled to notice of the sale. Moreover, plaintiffs lack standing to raise any issue as to whether the notice of sale was served on mortgagor Alijaj. In any event, Flushing Savings Bank submits an affidavit of service stating that the notice of sale was mailed to Alijaj at two separate addressees on June 8, 2016, approximately 42 days prior to the sale, and one of the addresses was the foreclosed premises, where Alijaj admittedly resides.

Plaintiffs' bare and conclusory allegation that the bank and the Condominium engaged in fraud and collusion to prevent them and Alijaj from attending the sale is not pleaded with sufficient particularity. Notably, plaintiffs were on notice all along by virtue of the bank's notice of pendency that their interest could be extinguished in the foreclosure action, and their failure to intervene in that action, while on notice that their "rights were at stake, undermines any claim of injustice." CitiMortgage, Inc v. Dulgeroff, *supra* at 419-420.

Plaintiffs' remaining objections to the sale and the foreclosure proceedings fail to provide a factual or legal basis for vacating the sale, at least to the extent such objections are raised in the instant action by plaintiffs who were not parties to the foreclosure action. The court makes no determination as to the merits of such objections if raised in the foreclosure action by party to that action.

Based on the foregoing, the complaint is dismissed in its entirety and plaintiffs' notice of pendency is vacated.

Finally, given such dismissal, the stay of the closing of the sale issued in this action is no longer effective. The court, however, is issuing a separate order amending the decision and order issued in the mortgage foreclosure action on December 1, 2016, which directed a traverse hearing on the issue of service of process on the mortgagor Enver Alijaj. The amended order will add a stay of the closing of the sale, which shall remain in effect until further order of the court in that action.

Accordingly, it is

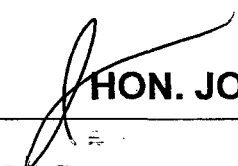
ORDERED that plaintiffs' motion is denied (motion seq. no. 001); and it is further

ORDERED that defendants' motions (motion seq. nos. 002 and 003) are granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and is further

ORDERED that plaintiffs' Notice of Pendency in this action is vacated.

DATED: January 11, 2017

ENTER:

  
HON. JOAN A. MADDEN  
J.S.C.  
HON. J.S.C. MADDEN  
J.S.C.