

**1180 President Funding, LLC v 2201 7th Ave. Realty
LLC**

2017 NY Slip Op 31454(U)

July 7, 2017

Supreme Court, New York County

Docket Number: 650956/2010

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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1180 PRESIDENT FUNDING, LLC,

Plaintiff,

Index No.: 650956/2010

-- against --

2201 7TH AVENUE REALTY LLC, TREVOR WHITTINGHAM, GLOBAL INVESTMENT STRATEGIES TRUST, WA INTEGRITY TRUST, GALAXY GENERAL CONTRACTING CORP., INDUSTRIAL FIRE DOOR & HARDWARE SUPPLY, INC., ALL CITY GLASS & MIRROR CORP., NORTHERN BUILDING PRODUCTS, INC., JNP CONTRACTORS, LTD., RELIANT ELECTRIC CONTRACTING, INC., KATZ METAL FABRICATORS, INC., INDEPENDENT TEMPERATURE CONTROL SERVICES, INC., BORO KITCHEN CABINETS, INC., ARCHITECTURAL ENTRANCE SYSTEMS, INC., CORE TECH ASSOCIATES CORP., METALOCKE INDUSTRIES INC., TWO A'S MECHANICAL INC., SPECTOR GROUP II, LLP, JG ELEVATOR, LLC, TREVOR WHITTINGHAM, INC., NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

DECISION/ORDER

Defendants.

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Pursuant to an Interim Decision and Order, dated February 22, 2017 (the Interim Decision), this court held an evidentiary hearing on June 12, 2017 in this commercial mortgage foreclosure proceeding brought by plaintiff 1180 President Funding, LLC (1180 President), the successor of the lender. The issues addressed at the hearing were (a) whether 1180 President and/or its counsel, Mr. Kenneth P. Horowitz, should be sanctioned, pursuant to 22 NYCRR 130-

1.1, for engaging in conduct undertaken primarily to harass or maliciously injure defendant 2201 7th Avenue Realty LLC (Seventh), including but not limited to representing in this proceeding that Seventh had a right to redeem the mortgaged premises until a foreclosure sale, while failing to disclose the pendency of an application for a judgment of foreclosure and sale in a related mechanic's lien foreclosure proceeding; and (b) whether 1180 President and/or its counsel perpetrated a fraud upon the court by means of the aforesaid representations and omissions.

The facts and circumstances warranting the hearing are detailed in the Interim Decision and are summarized briefly as follows: In July 2015, Seventh moved for an order compelling 1180 President to issue a payoff letter and to accept redemption. (See NYSCEF No. 360 [the motion to compel redemption].) In support of the motion, Seventh claimed that 1180 President was frustrating Seventh's right to redeem the mortgaged premises. In opposition, Mr. Horowitz and Mr. Moishe "Mark" Tress, a member and manager of 1180 President, represented to the undersigned that injunctive relief was unnecessary because, among other things, Seventh had "a right to redeem the Property in this foreclosure action at any time prior to the acceptance of the final bid by the court-appointed Referee at a foreclosure sale.'" (Interim Decision, at 2.) At the time, a motion by 1180 President for a judgment of foreclosure and sale had been submitted to, but not yet decided by, the undersigned. There thus did not appear to be any imminent possibility of a "final bid . . . at a foreclosure sale" that would cut off Seventh's redemption rights. Seventh also failed to show that 1180 President had refused to issue a payoff letter or to accept redemption. By Decision and Order dated March 10, 2016, the undersigned accordingly denied Seventh's motion to compel redemption. (March 10, 2016 Decision, at 4; Interim Decision, at 1-2.)

As set forth in detail in the Interim Decision, without notice to the undersigned, during the pendency of Seventh's motion to compel redemption and prior to the filing of the affirmations in which Mr. Horowitz and Mr. Tress made the representations described above, Harlem Contracting LLC (Harlem)—another entity managed by Mr. Tress—applied to Justice Edmead of this Court for a judgment of foreclosure and sale of Seventh's premises. This application was made in a related mechanic's lien foreclosure proceeding (the mechanic's lien proceeding), commenced in 2010 in the name of the original plaintiff/lienholder, Galaxy General Contracting Corp. (Galaxy).¹ As further set forth in the Interim Decision, in 2012, Justice Edmead had transferred the mechanic's lien proceeding to Justice Fried of this Court (whose docket the undersigned subsequently assumed), pursuant to a stipulation in which the parties agreed to consolidate the instant mortgage foreclosure proceeding and the mechanic's lien proceeding for joint discovery and trial. (Interim Decision, at 3-4; Order, dated Mar. 26, 2016, mechanic's lien proceeding [NYSCEF No. 42].) After the transfer, the parties to the mechanic's lien proceeding continued to litigate an appeal to the Appellate Division of a 2011 order by Justice Edmead denying the plaintiff/lienholder's motion for a default judgment against Seventh. In 2012, the Appellate Division reversed the order and directed entry of a judgment for the plaintiff/lienholder. (Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC, 95 AD3d 789 [1st Dept 2012].)

In July 2015, three years after the Appellate Division's decision, and notwithstanding the transfer of the mechanic's lien proceeding and the pendency of the instant mortgage foreclosure proceeding before the undersigned, Harlem filed the proposed judgment of foreclose and sale

¹ The mechanic's lien proceeding was originally captioned Galaxy General Contracting Corp. v 2201 7th Ave. Realty LLC (Index No. 102131/2010). Harlem acquired the lien from Galaxy in 2012. (Stipulation, dated Feb. 1, 2016, at 1, mechanic's lien proceeding [NYSCEF No. 67].) Harlem was not formally substituted in the caption of the mechanic's lien proceeding until February 3, 2016. (*Id.*)

before Justice Edmead. (Interim Decision, at 2-3.) At that time, the mechanic's lien proceeding had been dormant for nearly two years. Mr. Andre R. Soleil, Seventh's counsel of record in the instant mortgage foreclosure proceeding as of July 2015, had never filed a notice of appearance in or registered for NYSCEF notifications in the mechanic's lien proceeding.

Despite their involvement in the mechanic's lien proceeding, neither Mr. Horowitz nor Mr. Tress informed the undersigned of Harlem's application for a judgment of foreclosure and sale in that proceeding, which led to an auction sale of the property on December 23, 2015—again, without notice to the undersigned. (*Id.*, at 2, 4.)

Subsequent to the foreclosure sale, Seventh again moved before the undersigned for an undated payoff letter and for other relief related to the premises (motion sequence 20).² In response to that motion, the details of the December 23, 2015 foreclosure sale for the first time came to the undersigned's attention, as 1180 President opposed the motion on the grounds that the foreclosure sale had extinguished Seventh's right to redeem. Seventh then brought parallel motions in the instant proceeding (motion sequence 22) and the mechanic's lien proceeding for sanctions and relief from Justice Edmead's judgment of foreclosure and sale.³ The undersigned referred the motion in the mechanic's lien proceeding to Justice Edmead, and held motion sequences 20 and 22 in abeyance pending her decision. Justice Edmead denied the referred motion, reasoning that the mechanic's lien proceeding had not been subsumed by the instant proceeding, and that she had been obligated by the Appellate Division decision to enter a default judgment against Seventh. (Interim Decision, at 5.) Seventh subsequently moved again, on

² In motion sequence 20, Seventh and defendant Trevor Whittingham moved for an order granting them access to the premises, directing 1180 President to issue an updated payoff letter, and staying auction proceedings for four months to allow Seventh to redeem the mortgage debt.

³ In motion sequence 22, Seventh and defendants Trevor Whittingham, Global Investment Strategies Trust, and Trevor Whittingham, Inc. moved for sanctions and vacatur of the judgment of foreclosure and sale in the mechanic's lien proceeding based on fraud, unclean hands, and civil contempt.

different grounds, for relief from the foreclosure sale in the mechanic's lien proceeding. The undersigned again referred the motion to Justice Edmead, who, following an application by Seventh to withdraw the motion without prejudice, issued an order providing that the motion was withdrawn with prejudice, and that the matter was closed. (See Order, dated June 6, 2017, mechanic's lien proceeding [NYSCEF No. 175].)

The above orders by Justice Edmead plainly preclude the undersigned from granting Seventh any relief from the judgment of foreclosure and sale in the mechanic's lien proceeding. The Interim Decision, however, held that Justice Edmead's determination did not bar this court's consideration of the separate issue of whether 1180 President and/or its counsel engaged in sanctionable or other otherwise improper conduct by means of their representations to the undersigned regarding Seventh's right of redemption and their failure to keep the undersigned apprised of the status of the mechanic's lien proceeding. The Interim Decision therefore directed an evidentiary hearing on the issues described at the outset of this decision. (Interim Decision, at 5.)

At the evidentiary hearing, Mr. Horowitz testified that, although he was counsel of record for 1180 President in the mechanic's lien proceeding and registered for NYSCEF notifications in that proceeding, he was not following the docket in July 2015, when the proposed judgment was filed, or at any time leading up to the foreclosure sale. Mr. Horowitz explained that, in his view, he had accomplished everything he wanted in the mechanic's lien proceeding when he secured a stipulation, dated August 1, 2013 (the Stipulation), with the original plaintiff and holder of the mechanic's lien, Galaxy. This Stipulation provided that 1180 President's mortgage liens had priority over Galaxy's mechanic's lien, and that the sale of the property in the mechanic's lien proceeding would "not affect the lien status of 1180 President . . ." (Stipulation of Settlement

as to Priority of Liens, §§ 2-3, mechanic's lien proceeding [NYSCEF No. 57].) According to Mr. Horowitz, following the Stipulation, there was no reason for him to pay attention to the mechanic's lien proceeding, because no further acts could be taken in that proceeding that could adversely affect 1180 President's interest in the premises. Mr. Horowitz further testified that, although he was retained by and dealt primarily with Mr. Tress in connection with his representation of 1180 President in the instant and mechanic's lien proceedings, he has never represented Harlem and had no knowledge of the application to Justice Edmead for a judgment of foreclosure and sale in the mechanic's lien proceeding. Finally, Mr. Horowitz argued that his representation to the undersigned concerning Seventh's right of redemption was not untrue.

Although Mr. Horowitz's representation to the undersigned that Seventh would have a right to redeem the premises in the instant proceeding until acceptance of a final bid at "a foreclosure sale" may not, strictly speaking, have constituted an inaccurate statement, there can be no genuine dispute that the statement left out the crucial detail that a foreclosure sale of the premises was likely to be ordered by another justice of this Court in a very short period of time. This detail was reasonably ascertainable by Mr. Horowitz, given his appearance in the mechanic's lien proceeding. This court cannot condone Mr. Horowitz's decision to ignore NYSCEF notifications related to the mechanic's lien proceeding. Even assuming that no further acts in that proceeding could have harmed 1180 President's interest in the premises, Mr. Horowitz, as an officer of the court, was obligated to inform himself of critical and reasonably ascertainable facts before making representations to the court about Seventh's redemption rights. His failure to do so was unjustifiable. The court nonetheless finds credible Mr. Horowitz's testimony that he was unaware of Harlem's application for a judgment in the mechanic's lien proceeding at the time of his representation. Consequently, the court does not find that he

engaged in any act or omission with intent to mislead the court or to harass or maliciously injure Seventh. (See generally 22 NYCRR 130-1.1; CDR Creances S.A.S. v Cohen, 23 NY3d 307 [2014].)

It bears noting that Seventh has never claimed that it was unaware of the Appellate Division decision against it in the mechanic's lien proceeding (95 AD3d 789, supra), which directed entry of a default judgment against Seventh in that proceeding. The Appellate Division's decision indicates that Seventh was represented by separate appellate counsel in that appeal. Seventh fails to explain why it could not have kept itself apprised of proceedings to enter judgment based on the Appellate Division Decision.⁴ Under these circumstances, the representations of Mr. Horowitz and Mr. Tress cannot be found to have been the sole contributing factor to confusion over Seventh's right to redeem.

As to 1180 President, despite an extended opportunity to subpoena Mr. Tress or any other witness to provide testimony at the hearing, Seventh failed to do so. There does not appear to be any dispute that Mr. Tress manages both 1180 President and Harlem, although there is evidence that the two entities do not have identical members. (See Aff. of Charles Wertman, Officer of Harlem, dated September 8, 2016 [NYSCEF No. 581].) Mr. Tress's managerial role in both 1180 President and Harlem supports an inference that he was aware, or should have been aware, of Harlem's application to Justice Edmead for a judgment of foreclosure and sale at the time of his representation to the undersigned about Seventh's right of redemption. It is undisputed, however, that Harlem was represented by its own, separate counsel in the mechanic's lien

⁴ Electronic notice of the filing of the proposed judgment in the mechanic's lien proceeding was given to Mr. Joseph Sanchez, Seventh's former attorney, whose motion for leave to withdraw had been denied by the undersigned in early 2013 due to noncompliance with the conditions for withdrawal, and who therefore remained Seventh's counsel of record in the mechanic's lien proceeding. (Interim Decision, at 4.) Seventh had, however, previously accused Mr. Sanchez of malpractice in this litigation, and does not assert that it took any steps to keep apprised of proceedings following the Appellate Division decision.

proceeding. There is no evidence that Mr. Tress apprised Mr. Horowitz of the application for a judgment of foreclosure and sale at or before Mr. Horowitz prepared Mr. Tress's affirmation regarding Seventh's right to redeem, or that Mr. Tress himself is familiar with legal nuances of the right to redeem. Although the surrounding circumstances raise a spectre of fraudulent intent on Mr. Tress's part, Seventh fails to submit evidence that Mr. Tress in fact held such intent, or that would support a determination that 1180 President acted in this proceeding to maliciously injure Seventh's rights.

The court accordingly declines to award sanctions against 1180 President and/or its counsel. The balance of the relief sought in motion sequence 22, including but not limited to relief from the judgment of foreclose and sale issued by Justice Edmead in the mechanic's lien proceeding, is foreclosed by Justice Edmead's recent orders. Motion sequence 22 will therefore be denied in its entirety.

As to motion sequence 20, the parties agree that the December 23, 2015 foreclosure sale terminated Seventh's right to redeem. 1180 President will, however, be directed to provide Seventh with an accurate and up-to-date payoff letter. Moreover, on its own motion, the court determines that relief should be afforded Seventh in the form of a further discharge of interest on the mortgage debt. As explained in the undersigned's Decision and Order dated March 10, 2016, "[i]n an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party." (Danielowich v PBL Dev., 292 AD2d 414, 415 [2d Dept 2002].) Although the undersigned does not find that 1180 President or its counsel acted maliciously in connection with the litigation of this proceeding, and although Seventh may bear some responsibility for confusion over its right to redeem, the highly unusual circumstances

detailed above warrant a further discharge of interest on the mortgage debt. In the March 10, 2016 decision, the undersigned limited the accrual of interest to the statutory rate of nine percent (9%) per annum from January 5, 2015 until the date of entry of the judgment of foreclosure and sale. The undersigned now modifies that decision to the extent of holding that 1180 President shall not be entitled to any interest from January 5, 2015 until the date of entry of the judgment of foreclosure and sale.

In addition, 1180 President has represented that, “if the sale proceeds arising from the foreclosure sale of the Property in this Action do not satisfy, in full, the amount set forth in the submitted judgment of foreclosure and sale herein . . . , Plaintiff will not seek any such deficiency judgment”⁵ (Pl.’s Hearing Memo., at 5 [internal citation omitted].) Even if this statement did not constitute a waiver of 1180 President’s interest in or entitlement to a deficiency judgment, the undersigned finds that a deficiency award would not, under the usual circumstances presented, be “just and equitable.” (See NY RPAPL § 1371 [1].)

It is accordingly hereby ORDERED that the motion of defendant 2201 7th Ave. Realty, LLC (Seventh) and Trevor Whittingham for a payoff letter and for other relief (motion sequence 20) is granted to the extent that it is

ORDERED that plaintiff 1180 President Funding, LLC (1180 President) shall provide to Seventh an accurate and complete payoff letter within seven days of service of a copy of this order with notice of entry; and it is further

ORDERED, upon the court’s own motion, that 1180 President shall not be entitled to any interest on the mortgage debt from January 5, 2015 until the date of entry of the judgment of foreclosure and sale; and it is further

⁵ 1180 President stated that this concession was based upon its “understanding that [defendants] are essentially judgment-proof, and that any effort to collect such deficiency would be futile.” (Pl.’s Hearing Memo., at 5.)

ORDERED that 1180 President shall not be entitled to a deficiency judgment; and it is further

ORDERED that the motion of defendants Seventh, Trevor Whittingham, Global Investment Strategies Trust, and Trevor Whittingham, Inc. to vacate the July 28, 2015 judgment in Harlem Contracting LLC v 2201 7th Ave. Realty LLC (Index No. 102131/2010) and for other relief (motion sequence 22) is denied; and it is further

This constitutes the decision and order of the court.

Dated: New York, New York
July 7, 2017


MARCY FRIEDMAN, J.S.C.