

U.S. Bank N.A. v Battaglino

2019 NY Slip Op 32816(U)

September 18, 2019

Supreme Court, New York County

Docket Number: 850001/2015

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850001/2015

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR
NRZ PASS-THROUGH TRUST IV,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 003

- v -

JAMES BATTAGLINO, PROMETHEUS EQUITIES,
LLC, BOARD OF MANAGERS OF THE CIPRIANI CLUB
RESIDENCES AT 55 WALL CONDOMINIUM, JOHN DOE,

**DECISION + ORDER ON
MOTION, JUDGMENT OF
FORECLOSURE AND SALE**

Defendants..

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100,
101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

The motion for a judgment of foreclosure and sale is granted. Plaintiff moves to confirm the referee's report of Elaine Shay, which found that plaintiff is due \$1,092,987.02 as of October 30, 2018. In opposition, defendant Battaglino complains that plaintiff has not demonstrated support for the amount of real estate taxes it seeks. In reply, plaintiff claims it provided evidentiary support for the amount it seeks to the referee.

The Court grants the motion. Battaglino's opposition does not claim that a different amount was due or that he paid the real estate taxes. Obviously, Battaglino is in a position to know how much was due given that he owns the property. The Court will not reject the referee's report based on a vague and conclusory opposition.

Accordingly, it is hereby

ORDERED and ADJUDGED that the motion by plaintiff to confirm the Referee's report and for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 90 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Elaine Shay, Esq.** who is appointed Referee for this purpose; and it is further

ORDERED that the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the *New York Law Journal*; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 90 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale unless otherwise stipulated by all parties to the sale and the Referee; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed;
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report: \$1,092,987.07 with interest at the note rate from October 30, 2018 until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred

- b. Costs and Disbursements: _____ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment;
- c. The Court declines to award additional allowance.
- d. Attorneys' Fees: \$1,275.00 is hereby awarded to Plaintiff as reasonable legal fees with interest at the statutory rate from the date of entry of this judgment.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable;

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elects to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that plaintiff shall upload the notice of sale to NYSCEF at least 20 days before the sale and the Referee and plaintiff shall e-mail Thomas Maser (tmmaser@nycourts.gov) and Paul Golonka (pgolonka@nycourts.gov) at least 15 days before the auction date so the auction may be placed on the auction calendar; IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction may or may not be held, at the court's discretion*; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further

ORDERED that MTGLQ INVESTORS, LP be substituted in place of plaintiff and John Doe shall be removed as a judgment cannot be entered against a John Doe, and the new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MTGLQ INVESTORS, LP,

Plaintiff,

v.

JAMES BATTAGLINO, PROMETHEUS
EQUITIES, LLC, BOARD OF MANAGERS
OF THE CIPRIANI CLUB RESIDENCES AT
55 WALL CONDOMINIUM,

Defendant(s).

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed and substituted pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)).

A description of the premises is annexed hereto as schedule A. It is commonly known as 55 Wall Street, Unit 708, New York, NY 10005.

Next Conference: March 3, 2020 @ 2:15 p.m. If the report of sale and Foreclosure Action Surplus Monies Form have been e-filed prior to the conference by plaintiff or the referee, then plaintiff may request that the conference be canceled by e-filing a letter to the court at least 48 hours prior to the conference. Otherwise, plaintiff must come to the conference prepared to discuss the status of the case.

9/18/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

HON. ARLENE P. BLUTH

SCHEDULE A—LEGAL DESCRIPTION**Block 27 and Lot 1050**

THE Condominium Unit (hereinafter called the "Unit") in the building (hereinafter called the "Building") known as Cipriani Club Residences At 55 Wall Condominium and by the street address 55 Wall Street, Borough of Manhattan, City, County and State of New York, said Unit being designated and described as Unit 708 in that certain Amended and Restated Declaration, dated as of June 27, 2006, made by Grantor pursuant to Article 9-B of the Real Property Law of the State of New York (hereinafter called the "Condominium Act") establishing condominium ownership of the Building and the land (hereinafter called the "Land") upon which the Building is situate, which declaration was recorded in the New York County Office of the Register of The City of New York (the "City Register's Office") on July 13, 2006, as CRFN 2006000399727 (which declaration, and any amendments thereto, are hereinafter collectively called the "Declaration"). The Unit is also designated as Tax Lot 1050 in Block 27 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Bureau of The City of New York and on the Floor Plans of the Building certified by SLCE Architects on July 7, 2006, and filed with the Real Property Assessment Bureau of The City of New York on July 13, 2006 as Condominium Plan No. 1424-A and also filed in the City Register's Office on July 13, 2006 as CRFN 2006000399728;

TOGETHER with an undivided 0.3694% interest in the Common Elements (as such term is defined in the Declaration) of Cipriani Club Residences at 55 Wall Condominium;

TOGETHER with the appurtenances and all the estate and rights of Grantor in and to the Unit;

TOGETHER with, and subject to, all of the rights, obligations, easements, restrictions and other provisions set forth in the Amended and Restated Declaration and By-Laws of Cipriani Club Residences At 55 Wall Condominium, as each of the same may be amended from time to time (said By-Laws, and any amendments thereto are hereinafter collectively called the "By-Laws") including, without limitation, the restrictions and other provisions with respect to the permitted uses of the Unit; all of which shall constitute running with the Land and shall bind any person having at any time any interest or estate in the Unit, as though recited and stipulated at length herein.

Premises known as 55 Wall Street - Unit 708, New York, New York