

Rhineback, Bank v WA 319 Main LLC

2019 NY Slip Op 33947(U)

August 12, 2019

Supreme Court, Dutchess County

Docket Number: 50957/2017

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on August 12 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X

RHINEBACK, BANK

Plaintiff,

Index No.: 50957/2017

-against-

DECISION AND ORDER
(Motion Sequence 4)

WA 319 MAIN LLC, JACOB FRYDMAN, THE
NEW YORK STATE COMMISSIONER OF
TAXATION AND FINANCE and CENTRAL
HUDSON GAS & ELECTRIC CORP.

Defendant

-----X

Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Plaintiff's Notice of Motion to Confirm Report of Sale and for Leave to Enter Deficiency Judgment:

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Notice of Motion/ Affirmation of Brooke Youngwirth, Esq./Affidavit of Andrew Ward /Exhibits A-D	1
Defendant, Jacob Frydman's Memorandum of Law in Opposition	2
Reply Affirmation of Brooke Youngwirth, Esq./Affidavit of Andrew Ward /Exhibits E-I	3

RELEVANT BACKGROUND

Pursuant to an Order to Restore Action and Judgment of Foreclosure (Brands, J.) dated July 31, 2018, the subject property was sold at a public auction on October 10, 2018 for the sum of \$795,001.00. The Referee's Report of Sale was filed on December 5, 2018, indicating that the amount due to Plaintiff per the Judgment was not acquired, thus the amount of deficiency after sale and disposal of proceeds is \$361,375.51.

On or about February 5, 2019, Plaintiff filed a Notice of Motion for leave to enter a deficiency judgment against Defendants, WA 319 Main LLC and Jacob Frydman, for a total of \$366,343.12, inclusive of additional disbursements and attorney fees, with interest thereon from December 5, 2018.

Defendants oppose Plaintiff's motion, arguing that (1) Defendants were not properly served with motion for deficiency judgment; (2) the Referee's Report of Sale should not be confirmed as there are errors the report, as it not based on the fair market value of the property; (3) Plaintiff's appraisal of the subject property is erroneous as the fair market value is undervalued and (4) that the Referee's Report of Sale contains computational errors.

DISCUSSION

Personal Service

It is well settled that the personal service requirement of RPAPL§ 1371 (2), is substantially complied with when an attorney has timely received actual notice of a motion to recover deficiency. *See, Sarasota, Inc. v Homestead Acres at Greenport, Inc.*, 249 A.D. 2d 290, 290-91 [2d Dept 1998].

Defendant do not argue that they did not have timely notice of the motion, but only that it was not personally served. As it appears that Plaintiff provided notice within the ninety-day period, the Court deems that Plaintiff has substantially complied with the notice requirement of the statute, therefore service is deemed good, and does not defeat Plaintiff's motion.

Referee's Report & Fair Market Value

Pursuant to CPLR 4403, after the Referee filed the Report of Sale, Defendants had fifteen days, to file the necessary motion to reject the report of the Referee. *See* CPLR 4403. The Referee's Report was filed on December 5, 2018. Defendants failed to make any motions, until this opposition to reject the report. Thus, the application to reject the report is untimely and **denied**.

A deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's

fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. *See*, RPAPL §1371(2).

Defendants argue that the fair market value of the subject property is undervalued, inflating the amount of deficiency, and the Court determine the fair market value to be in the range of \$1,394,848.48 to \$1,920,000.00. However, Defendants do not present a current appraisal for the subject property.

Plaintiff states that both the opinion of market value and the liquidation value given by the appraiser were significantly lower than the previous 2010 appraisal. Plaintiff used the auction sale price, rather than the liquidated value of the property (which was less than the sale price) or the opinion market value. Plaintiff noted that its appraiser noted the condition of property in March 2018 was inferior to the condition of the property in 2010, impacting the property's value. Plaintiff also indicates that the property would not have sold for \$1,030,000.00, as it was on the market for quiet some time and shortly after the appraisal, was in contract for only \$800,000.00.

In the absence of an appraisal to confirm the opinion market value or demonstrate that the property was of higher market value than the auction sale price. Plaintiff's proof demonstrates that the opinion market value would be lower than \$1,030,00.00 and as the liquidated market value, is lower than the actual sale price, it is appropriate to use the sale price to determine the deficiency judgment. To that extent, Plaintiff's application to confirm the sale and grant leave to enter the deficiency judgment is **granted**.

Accordingly, it is hereby,

ORDERED, that Plaintiff's Motion to Confirm Sale and Leave to Enter Deficiency Judgment is granted; and it is further

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HGG/JSC

ORDERED, that Plaintiff shall submit to this Court, a proposed order with notice of settlement within thirty (30) days of this Decision and Order.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: August 12 2019
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.