

U.S. Bank N.A. v Stanmore

2020 NY Slip Op 30388(U)

February 5, 2020

Supreme Court, New York County

Docket Number: 850193/2013

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

-----X

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
SUCCESSOR IN INTEREST TO WACHOVIA BANK, N.A.,
AS TRUSTEE, FOR J.P. MORGAN MORTGAGE TRUST
2005-A1,

INDEX NO. 850193/2013
MOTION DATE 01/29/2020
MOTION SEQ. NO. 004

Plaintiff,

- v -

ROGER STANMORE AKA ROGER D. STANMORE,
JPMORGAN CHASE BANK, N.A., BOARD OF MANAGERS
OF THE HORIZON HOMEOWNERS ASSOCIATION,
BRANCH BANKING AND TRUST COMPANY, UNITED
STATES OF AMERICA, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, CITY OF NEW
YORK PARKING VIOLATIONS BUREAU, CITY OF NEW
YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE,

DECISION + ORDER ON
MOTION, JUDGMENT OF
FORECLOSURE AND SALE

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100,
101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 123,
127, 128, 129, 130, 131, 132, 133, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151,
152, 153

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

The motion by plaintiff for a judgment of foreclosure and sale is granted and the cross-
motion by defendant Stanmore to vacate his default and to dismiss the complaint is denied.

Background

In this mortgage foreclosure action, plaintiff moves to confirm the report of the referee,
which found that plaintiff is due \$587,165.83 as of June 30, 2019. Stanmore opposes and cross-
moves to vacate his default on the ground that he was never served. Stanmore admits that he did
not live in the apartment when service was purportedly effectuated and denies that he was served
at his Alabama residence in 2013. He contends that the affidavit of service for this purported

service is false and stresses the purported discrepancies between himself and the description contained in the affidavit of service.

In opposition to the cross-motion, plaintiff contends that Stanmore has not met his burden to rebut the affidavit of service. Plaintiff points out that Stanmore clearly knew about the instant action because plaintiff appeared in his bankruptcy case in 2014. Plaintiff complains that he is appearing at this late date despite knowing about this case for years.

In reply to the cross-motion, Stanmore argues that a traverse hearing is required because of the discrepancies between his personal appearance and the description on the affidavit of service. He contends that improper service is a reasonable excuse for his default.

Discussion

“Where, as here, a defendant seeks vacatur of a default under both CPLR 5015(a)(1) (excusable default) and CPLR 5015(a)(4) (lack of jurisdiction), the court should determine whether or not it has personal jurisdiction over the defendant before reaching the 5015(a)(1) ground, since the defendant's lack of a reasonable excuse is obviated if the court is without personal jurisdiction over defendant, and all subsequent proceedings would be rendered null and void” (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522, 32 NYS3d 95 [1st Dept 2016] [internal quotations and citations omitted]). A “[p]laintiff’s affidavit of service constitute[s] prima facie evidence of proper service” (*Wells Fargo Bank, N.A. v Javier*, 2020 WL 201240 [1st Dept 2020]).

The affidavit of service submitted by plaintiff contends that service was effectuated on August 3, 2013 at an address in Huntsville, Alabama (NYSCEF Doc. No. 18). The process server claims that he served the defendant personally and described Stanmore as a black male, aged 45, between five feet eight inches and five feet eleven inches tall and between 175 and 199 pounds

(*id.*). In his affidavit, Stanmore does not deny that he lives at the address in Huntsville, Alabama identified in the affidavit of service; instead, he asserts that in 2013, he was six feet two inches tall and weighed 225 pounds (NSYCEF Doc. No. 129, ¶ 18). He also describes his skin as “brown” instead of black (*id.*).

Here, the Court finds that Stanmore failed to rebut plaintiff’s affidavit of service demonstrating that service was effectuated at Stanmore’s residence in Alabama. Stanmore fails to contest that the address identified in the affidavit of service is not his residence nor does he claim that he was elsewhere on the day service was purportedly effectuated. His denial amounts to a discrepancy of a few inches and pounds and the difference between describing skin color as black versus brown. These are not sufficient to raise an issue of fact requiring a traverse hearing. Minor inaccuracies in a process server’s affidavit do not compel the Court to hold a hearing (*PNC Bank, National Association v Bannister*, 161 AD3d 1114, 1115-16, 77 NYS3d 452 [2d Dept 2018] [holding that “A minor discrepancy between the appearance of the person allegedly served and the description of the person served contained in the affidavit of service is generally insufficient to raise an issue of fact warranting a hearing”]).

Summary

The Court observes that in October 2014 plaintiff made a motion to lift the automatic stay imposed by Stanmore’s bankruptcy (NYSCEF Doc. No. 144). That motion details that plaintiff had a mortgage lien on the property that is the subject of this action (*id.* ¶ 3). That motion was denied and Stanmore was directed to make monthly payments of \$2,525.83 to plaintiff (NYSCEF Doc. No. 145). Despite the motion practice in bankruptcy court, Stanmore waited until plaintiff moved for a judgment before seeking to vacate and claim he was never served.

In fact, Stanmore admits he learned about this case in 2016 (*id.* ¶ 14). Although he claims that he did not know what these documents were, the docket of Stanmore's bankruptcy filing makes clear he owns property all around the country (*see* NYSCEF Doc. No. 142). The Court questions why Stanmore waited until right before plaintiff moved for a judgment to move to vacate and dismiss. It may be that he was waiting until the statute of limitations became a potential issue before making the instant motion (although that issue is unclear given Stanmore's bankruptcy). In any event, the Court finds that service was proper, Stanmore failed to offer a reasonable excuse for his default or a meritorious defense.

Accordingly, it is hereby

ORDERED and ADJUDGED the motion to confirm the referee's report and for a judgment of foreclosure and sale is granted and the cross-motion by defendant Stanmore is denied; 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 on a Wednesday at 2:15 p.m. under the direction of **Elaine Shay**, 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; 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: \$587,165.83 with interest at the note rate from June 30, 2019 until entry of judgment together with any advances as provided for in the note and mortgage which Plaintiff has 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 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: \$4,950.00 is awarded as 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 are recoverable as a cost of litigation; 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 21 days before the sale and the Referee and plaintiff shall e-mail SFC-Foreclosures@nycourts.gov at least 21 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 will not go forward; 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.

A description of the premises is annexed hereto as schedule A. The property is commonly known as 415 East 37th Street, 10a, New York, NY 10016.

2/5/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

NYSCEF DOC. NO. 90

INDEX NO. 850193/201
RECEIVED NYSCEF: 10/09/201
1

Clonting USA, LLC

SCHEDULE A

DESCRIPTION OF MORTGAGED PREMISES

THE NEW YORK STATE

This condominium unit (the "Unit") known as the Unit No. 10A in the building (the "Building") known as The Herkman Condominium and by the street number 415 East 57th Street, Borough of Manhattan, City, County and State of New York, said Unit being designated and described as the Unit No. 10A in a certain Declaration dated May 9, 1988, made by sponsor pursuant to Article 9-B of the Real Property Law of the State of New York, establishing a plan for condominium ownership of the Building and the land (the "Land") upon which the Building is situate (which Land is more particularly described herein), which Declaration was recorded in the New York County Office of the Register of The City of New York (the "Register's Office") on August 11, 1988, in Real 1447 page 1307 and amended by Correction Amendment to Declaration of Condominium dated October 7, 1988 and recorded in the Register's Office dated October 21, 1988 in Real 1482 page 1325 (which Declaration and amendments therein are hereinafter collectively referred to as the "Declaration"). The Unit is also designated as the Tax Lot 1066 in Block 969 of Section 3 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Department of The City of New York and on the Floor Plans of the Building, certified by Constantine A. Krasnytski, P.C., on May 5, 1988, and filed with the Real Property Assessment Department of The City of New York on August 5, 1988, as Condominium Plan No. 570 and also filed in the Register's Office on August 11, 1988, as Condominium Map No. 4804;

TOGETHER with an undivided 21.64% interest in Common Elements (shown on the annexed schedule) (as said term is defined in the Declaration).

The Land upon which the Building is situated and within which the Unit is located is more particularly described as follows:

PARCEL A

ALL that certain lot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of East 38th Street (distance 125 feet 2 1/4 inches easterly from the corner formed by the intersection of the southerly side of East 38th Street with the easterly side of First Avenue;

RUNNING THENCE easterly along the southerly side of East 38th Street, 24 feet 9/4 inches;

THENCE southerly at right angles to the southerly side of East 38th Street, 37 feet;

THENCE easterly and parallel with the southerly side of East 38th Street, 25 feet;

THENCE northerly at right angles to the last mentioned course, 9 feet 1 inch;

THENCE easterly parallel with the southerly side of East 38th Street, 58 feet 1/4 of an inch;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 72 degrees 38 minutes 35 seconds, 17 feet 6 1/4 inches;

THENCE easterly on a line which forms an exterior angle with the last mentioned course of 85 degrees 48 minutes 40 seconds, 2 feet 9 inches;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 81 degrees 1 minute 40 seconds, 61 feet 7 inches;

THENCE westerly on a line which forms an interior angle with the last mentioned course of 112 degrees 8 minutes 25 seconds, 5 feet of 3/4 an inch;

THENCE southerly on a line which forms an interior angle with the prolongation westerly of the last mentioned course of 88 degrees 23 minutes 50 seconds, 95 feet 2 1/4 inches to the northeasterly side of East 37th Street;

THENCE westerly along the northerly side of East 37th Street, 74 feet 6 2/3 inches;

THENCE northerly and parallel with the easterly side of First Avenue, 92 feet 8 1/4 inches;

THENCE easterly parallel with East 37th Street, 1 1/4 inches; and

THENCE northerly on a line which forms an exterior angle with the southerly side of East 38th Street of 89 degrees 58 minutes 20 seconds, 104 feet 9 1/4 inches to the southerly side of East 38th Street, the point or place of BEGINNING.

TOGETHER with a perpetual easement for light and air over and above the existing improvements on the premises described in a Zoning Lot and Development Agreement made between Six-Sixty Associates, 660 Land Associates and KCILG Manhattan Corp., dated as of May 6, 1981 recorded May 22, 1981 in Real 567 page 770; and

TOGETHER with a perpetual easement for light and air over and above the existing improvements on the premises described in a Zoning Lot and Development Agreement made between Bldg-A-West Home Association, Gluck Development Affiliates and 660 Land Associates, dated as of June 12, 1986 and recorded November 12, 1986 in Real 11411, Page 1921; and

TOGETHER with the benefits of an Easement Agreement made by and between 660 Land Associates and Bldg-A-West Home Association dated as of June 12, 1986 and recorded November 20, 1986 in Real 11446, Page 174; and

TOGETHER with easements for light and air as limited and defined in a Declaration of Restrictions and Easements made by and between Kips Bay Farm Realty Partners and Gluck Development Affiliates dated May 28, 1987 and recorded June 26, 1987 in Real 1282, Page 229.

PARCEL B

THE Benefits of Easements for the use, possession and maintenance on and over the following described parcels which use, possession and maintenance is more fully described in the Declaration:

Parcel 1

ALL that portion of the following described parcel lying below the elevation of 59.53 feet above the datum used by the Department of Highways, Borough of Manhattan which is 2.75 feet above the U.S. Coast and Geodetic Survey Datum of Mean Sea Level at Sandy Hook, New Jersey:

ALL that certain lot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point 79 feet 5/4 inches westerly along the southerly side of East 38th Street from the intersection of the southerly side of East 38th Street with the westerly side of Marginal Street;

THENCE southerly on a line which forms an interior angle with the westerly prolongation of the last mentioned corner, of 86 degrees 30 minutes 40 seconds, 28 feet 5/8 inches to a point;

THENCE westerly and parallel to East 38th Street, 14 feet 4 1/4 inches to a point;

THENCE northeasterly on a line which forms an interior angle with the last mentioned course of 72 degrees 38 minutes 35 seconds, 3 feet 0-3/4 inches to a point;

THENCE northerly on a line which forms an exterior angle with the last mentioned course of 162 degrees 18 minutes 35 seconds, 25 feet 0 inches to a point on the southerly side of East 39th Street; and

THENCE easterly 14 feet 8 inches along the southerly side of East 39th Street to the point or place of BEGINNING.

Page 2

ALL that portion of the following described parcel lying above the elevation of 40.47 feet and lying below the elevation of 41.48 feet above the datum used by the Department of Highway, Borough of Manhattan which is 2.75 feet above the U.S. Coast and Geodetic Survey Datum of Mean Sea Level at Sandy Hook, New Jersey:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

COMMENCING at a point 79 feet 3 1/4 inches westerly along the southerly side of East 39th Street from the intersection of the southerly side of East 39th Street with the westerly side of Adelphi Street;

THENCE southerly on a line which forms an interior angle with the prolongation westerly of the last mentioned course of 86 degrees 30 minutes 40 seconds, 28 feet 5/8 inches to the point or place of BEGINNING.

THENCE RUNNING easterly and parallel to East 39th Street 4 feet 3 1/8 inches to a point;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 135 degrees, 4 feet 2 7/8 inches to a point;

THENCE southerly and at right angles to East 39th Street, 3 feet 0 inches to a point;

THENCE easterly and parallel to East 39th Street, 9 feet 0 inches to a point;

THENCE southwesterly on a line which forms an interior angle with the last mentioned course of 135 degrees, 4 feet 2 7/8 inches to a point;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 135 degrees, 45 feet 0 inches to a point;

THENCE southwesterly on a line which forms an interior angle with the last mentioned course of 135 degrees, 4 feet 2 7/8 inches to a point;

THENCE westerly and parallel to East 39th Street, 9 feet 0 inches to a point;

THENCE easterly and at right angles to the last mentioned course 3 feet 0 inches to a point;

THENCE southwesterly on a line which forms an interior angle with the last mentioned course of 133 degrees, 4 feet 2 7/8 inches to a point;

THENCE westerly and parallel to East 3rd Street, 38 feet 10 1/4 inches to a point;

THENCE northeasterly on a line which forms an interior angle with the last mentioned course of 67 degrees 51 minutes 35 seconds, 49 feet 4 1/8 inches to a point;

THENCE northeasterly on a line which forms an exterior angle with the last mentioned course of 81 degrees 01 minutes 40 seconds, 2 feet 9 inches to a point;

THENCE northeasterly on a line which forms an exterior angle with the last mentioned course of 274 degrees 11 minutes 20 seconds, 17 feet 6 1/4 inches to a point; and

THENCE easterly and parallel to East 3rd Street, 14 feet 4 1/4 inches to the point or place of BEGINNING.

Parcel 3

ALL that portion of the following described parcel lying above the elevation of 38.92 feet and lying below the elevation of 48.50 feet, above the datum used by the Department of Highways, Borough of Manhattan which is 2.75 feet above the U.S. Coast and Geodetic Survey Datum of Mean Sea Level at Sandy Hook, New Jersey:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

COMMENCING at a point on the southerly side of East 3rd Street distant 125 feet 2 1/4 inches easterly from the corner formed by the intersection of the southerly side of East 3rd Street with the easterly side of First Avenue;

RUNNING THENCE easterly along the southerly side of East 3rd Street, 24 feet 9 1/4 inches;

THENCE southerly at right angles to the southerly side of East 3rd Street, 37 feet;

THENCE easterly and parallel with the southerly side of East 3rd Street, 25 feet;

THENCE northerly at right angles to the last mentioned course, 9 feet 1 inch;

THENCE easterly and parallel with the southerly side of East 3rd Street, 58 feet 1/4 of an inch;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 72 degrees 38 minutes 35 seconds, 17 feet 6¼ inches;

THENCE easterly on a line which forms an exterior angle with the last mentioned course of 85 degrees 48 minutes 40 seconds, 2 feet 9 inches;

THENCE southerly on a line which forms an interior angle with the last mentioned course of 81 degrees 1 minute 40 seconds, 61 feet 7 inches;

THENCE westerly on a line which forms an interior angle with the last mentioned course of 112 degrees 8 minutes 25 seconds, 5 feet ¼ of an inch;

THENCE southerly on a line which forms an interior angle, with the prolongation westerly of the last mentioned course of 88 degrees 23 minutes 50 seconds, 38 feet 2¼ inches to the point or place of BEGINNING.

THENCE southerly, along the last mentioned course, 14 feet 0 inches; and

THENCE on an arc to the left with a radius of 7.0 feet and an arc length of 49 feet 11¼ inches to the point or place of BEGINNING.