

<b>Wells Fargo Bank, N.A. v Seung Hoon Oh</b>
2020 NY Slip Op 30726(U)
March 4, 2020
Supreme Court, New York County
Docket Number: 850168/2016
Judge: Arlene P. Bluth
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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. 850168/2016

WELLS FARGO BANK, N.A.,

MOTION DATE: \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 011

- v -

SEUNG HOON OH, SANG RAE KO, THE BOARD OF  
MANAGERS OF GRAMERCY CONDOMINIUMS, CITY OF  
NEW YORK DEPARTMENT OF TRANSPORTATION  
PARKING VIOLATIONS BUREAU, BRANDON OH,

DECISION + ORDER ON  
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 113- 157  
were read on this motion to/for VACATE SALE

The motion by plaintiff to vacate the sale and to return the winning bidders' deposit is granted in part and denied in part. The cross-motion by defendant the Board of Managers of Gramercy Condominium (the "Condo") for an order directing plaintiff to pay the referee \$89,854.51, accept the referee's deed and pay the Condo the monthly common charges from June 5, 2019 is granted in part and denied in part.

**Background**

In this foreclosure action, plaintiff seeks to rescind a sale held on June 5, 2019. The winning bidders paid \$56,000 (ten percent of the purchase price) to the referee but failed to close. Plaintiff observes that the Terms of Sale provide that plaintiff may reschedule the foreclosure sale and retain the deposit from the sale. Plaintiff acknowledges that this Court directed plaintiff to request the return of the deposit to the winning bidders via order to show

cause by December 3, 2019 but that it failed to comply (this motion was brought on December 13, 2019).

In opposition and in support of its cross-motion, the Condo points out that the sale yielded \$89,854.51 in surplus funds. The Condo also notes that plaintiff and the winning bidders entered into a stipulation dated September 18, 2019 in which plaintiff accepted assignment of the winning bid in exchange for the return of the bidders' deposit.

The Condo argues that plaintiff's acceptance of the bid requires plaintiff to pay the surplus to the referee under the terms of the judgment. The Condo also claims that plaintiff now stands in the shoes of the winning bidder and there is no reason for the Court to set aside the sale. According to the Condo, the sale was conducted fairly, it generated surplus funds and plaintiff should be required to pay the Condo monthly common charges that have accrued since the sale.

In reply and in opposition to the cross-motion, plaintiff admits that it agreed to return the deposit in exchange for an assignment of the bid but that this stipulation was withdrawn. Plaintiff also claims that the Condo lacks standing and has suffered no prejudice from plaintiff's failure to finalize the sale with the winning bidders.

In reply to its cross-motion, the Condo emphasizes that plaintiff gave up any right it may have had to conduct a new sale when it accepted an assignment of the bid.

### **Discussion**

"In the exercise of its equitable powers, a court has the discretion to set aside a foreclosure sale where there is evidence of fraud, collusion, mistake, or misconduct" (*Astoria Fed. Sav. & Loan Assoc. v Hartridge*, 58 AD3d 584, 869, NYS2d 921(Mem) [2d Dept 2009]).

The judgment of foreclosure and sale entered in this case provides that “if the Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at such sale and the terms of the sale under this judgment shall be assigned to and be acquired by the Plaintiff . . . that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee” (NYSCEF Doc. No. 79 at 8).

The stipulation filed by plaintiff provides that plaintiff agreed to an assignment of the bid in exchange for the return of the winning bidders’ deposit (NYSCEF Doc. No. 110). Six days later, plaintiff filed a letter in which it “requests that the pending motion [sic] be withdrawn” and asked the Court to no longer consider the stipulation (NYSCEF Doc. No. 111).

This curious series of events raises more questions than answers and leaves this Court with a mess. “[A]n action to foreclose a mortgage is addressed to a court of equity, which should determine the rights of the parties to the suit according to equity and good conscience” (*Blomgren v Tinton 763 Corp.*, 18 AD2d 979, 980, 238 NYS2d 435 [1st Dept 1963]). The equities in this case require this Court to rescind the sale but also require plaintiff to pay common charges to the Condo from July 5, 2019 (30 days after the auction) until the deed is transferred after the next sale. Moreover, plaintiff shall not recover any more interest after July 5, 2019.

This decision is justified based on plaintiff’s inexcusable conduct after the judgment was entered. This property sold at auction on June 5, 2019 and plaintiff waited until September 18, 2019 to send in a stipulation agreeing to an assignment of the bid from the winning bidders. The judgment of foreclosure and sale provides that there should be a closing within 30 days “unless otherwise stipulated by all parties to the sale” (NYSCEF Doc. No. 79 at 6). Plaintiff provided no evidence that there was a stipulation to hold the closing at a later date. Instead, it appears plaintiff just ignored this provision.

The assignment agreement entered into by plaintiff and the winning bidder conditions the return of the deposit to the winning bidders on the successful recording of the referee's deed, the successful recording of the assignment of the bid and on the Court's "so-ordering" of the stipulation (NYSCEF Doc. No. 110 at 3). However, plaintiff's later attempted withdrawal did not contain the signatures of the winning bidders (NYSCEF Doc. No. 111). Instead, it was a one-sided letter filed without providing any explanation for the withdrawal. Even stranger is that plaintiff did not mention the agreement or the withdrawal in its moving papers nor did it sufficiently explain why it tried to back out of the agreement in its reply. And while plaintiff is correct that the Condo cannot force plaintiff to abide by this agreement because the Condo was not a party to it (and because the bidders failed to submit any opposition on this motion), that does not prevent this Court from taking equitable action based on plaintiff's bizarre behavior.

Next, plaintiff sent a letter to the Court in November 2019 that was not e-filed and asked for an order directing the referee to turn over the bidders' deposit to the plaintiff. The Court responded with a Court Notice dated November 14, 2019 in which plaintiff was directed to bring an order to show cause by December 3, 2019 or face appropriate penalties (NYSCEF Doc. No. 112). The Court questioned why plaintiff thought an order would be issued based on an ex parte letter and without allowing the winning bidders to be heard (*id.*).

Despite this clear order, plaintiff did not bring a motion by December 3, 2019 and claims it was not aware of this Court notice. However, the confirmation notice for this message shows it was sent via email to *two* lawyers for plaintiff's counsel. The insufficient excuse that two lawyers didn't check their email for weeks shows that plaintiff wants to proceed as it sees fit regardless of directives from this Court or the effect of its actions on the other parties in this case.

Rather than bringing a motion to vacate the sale once the transaction failed to close within 30 days, plaintiff let the case drag along until it reached an agreement more than four months later (an agreement which it sought to withdraw just six days later). Meanwhile, monthly common charges continue to accrue. While condos often suffer a loss when apartments are foreclosed, that does not mean that a condo should have to wait indefinitely, especially after a valid foreclosure sale. That is an untenable and inequitable position for the Condo. It has to wait until plaintiff gets around to finalizing the transaction and see month after month of common charges go unpaid. It is also unfair because the Condo has no recourse—its common charge lien is junior to the plaintiff's interest and is cut off once the property is sold.

It may be that plaintiff agreed to accept assignment of the bid without fully comprehending that it would have to pay the referee the surplus and now wants to get out of that agreement. Setting aside whether the winning bidders have rights with respect to this agreement, the fact is that they did not oppose the instant motion. And the Court cannot force plaintiff to abide by an agreement that was conditioned on Court approval where plaintiff wants to back out and the other parties to the stipulation are silent.

But that does not mean that this Court will pretend that nothing happened and let plaintiff re-sell the property without any consequences. Plaintiff decided to do what it wanted, when it wanted and that is unacceptable in a foreclosure action. As this case demonstrates, junior lien holders suffer serious harm when a plaintiff decides to ignore the terms of the judgment and tries to vacate a sale. Although a lender might not suffer any prejudice from vacating the sale, parties with junior interests are forced to wait to recover surplus funds (if any exist) after a subsequent sale. Moreover, a plaintiff (in most instances) can recover interest for the entire time before the deed is transferred. That's a double blow to the Condo—plaintiff's recovery increases due to the

accruing interest while more months of unpaid common charges pile up. And, of course, holding a new sale in this case presents the risk that the bid will be significantly lower and reduce or eliminate the surplus funds.

Therefore, the Court vacates the sale and finds that the ten percent deposit (\$56,000) shall be held by the referee pending the new foreclosure sale. If the property is sold for more than the previous purchase price (\$560,000) then the winning bidders shall have their deposit returned. If the property sells for less than \$560,000, the deposit shall be used to make up the difference between the new bid and previous bid. This could mean that the bidders will lose their entire deposit if the winning bid at the new auction is below \$504,000.

The Court also finds that plaintiff is not entitled to recover any more interest after July 5, 2019 (when the sale from the previous auction should have closed) and must pay common charges to the Condo starting from July 5, 2019 until the deed is transferred. Enough is enough— if plaintiff decides to drag this case along, it will not be at the expense of the Condo. These common charges must be paid by the plaintiff, and not from surplus funds (if any). If there is a third party buyer, then the common charges will be an adjustment at closing – that is, either the referee shall take the accrued common charges out of the down payment or the buyer will deduct the accrued common charges from the amount to which plaintiff is otherwise entitled and pay it to the condo instead. If there is no third party buyer, then the referee shall only transfer the deed to the plaintiff after the accrued common charges are paid. The amount in this paragraph just refers to common charges and interest and late fees – any of the condo's claimed attorney's fees accrued since July 5, 2019 will be the subject of a surplus monies proceeding.


Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted only to the extent that the sale is rescinded and that the deposit by the winning bidders shall be held by the referee pending the new sale in accordance with the directives described above; and it is further

ORDERED that plaintiff shall not recover any further interest from July 5, 2019; and it is further

ORDERED that the cross-motion by defendant the Board of Managers of Gramercy Condominium is granted only to the extent that plaintiff shall pay to defendant the Board of Managers of Gramercy Condominium monthly common charges (plus late fees and interest) from July 5, 2019 until the date the deed is transferred and denied as to the remaining relief requested.

3/4/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE