

**Board of Mgrs. of the Regatta Condominium v
Delucia**

2021 NY Slip Op 30474(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 150524/2017

Judge: Shawn T. Kelly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X

THE BOARD OF MANAGERS OF THE REGATTA
CONDOMINIUM,

Plaintiff,

- v -

RICHARD DELUCIA, NEW YORK CITY PARKING
VIOLATIONS BUREAU, JOHN DOE NO. 1 THROUGH
JOHN DOE NO. 15

Defendant.

-----X

INDEX NO. 150524/2017

MOTION DATE 01/08/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40,
41, 42, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

In this foreclosure matter, defendant Richard DeLucia moves, pursuant to CPLR
5015(a)(3), to vacate the Judgment of Foreclosure and Sale dated November 20, 2019
(hereinafter, the Judgment) on the grounds that the plaintiff, Board of Managers of the Regatta
Condominium, obtained the Judgment through misrepresentation or other misconduct.

BACKGROUND

On October 29, 2019, Referee Michael J. Roberts, Esq. (hereinafter, the Referee) in
his Amended Combined Oath of Referee's Report of Computation, awarded plaintiff the sum of
\$270,283.02 for unpaid common charges at 21 South End Avenue, Apt. 432, New York, New
York, 10280 (Amended Combined Oath of Referee's Report of Computation, NYSCEF Doc No.
39).

ARGUMENTS

DeLucia does not dispute that he owes outstanding common charges but avers that the Referee miscalculated the sum awarded to plaintiff based on plaintiff's misrepresentations (DeLucia aff, NYSCEF Doc No. 37). Specifically, DeLucia argues that the Referee did not take into account the prior payments he made to plaintiff in the amount of \$132,268.02 and that plaintiff failed to alert the Referee regarding same (*id.* ¶ 5).

Plaintiff does not deny that the Referee miscalculated the amount, nor that DeLucia made the payments; instead, plaintiff argues that DeLucia's objection is untimely, and instead of an order vacating the judgment, the matter should be returned to the Referee (plaintiff's affirmation in opposition, NYSCEF Doc No. 44).

DISCUSSION

To prevail on a motion pursuant to CPLR 5015 (a) (3) to vacate an order in a foreclosure action and a judgment of foreclosure and sale, the proponent must establish that the opponent procured the order and the judgment of foreclosure and sale by fraud, misrepresentation, or other misconduct (see *Golden First Bank v Tal*, 136 AD3d 974, 974-975 [2d Dept 2016]; see *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 753 [2d Dept 2013]). "[I]t is well established that a party seeking to set aside a judgment on the basis of fraud 'will not prevail by merely showing fraud in the underlying transaction but must show fraud in the very means by which the judgment was procured' "(*Cofresi v Cofresi*, 198 AD2d 321, 321 [2d Dept 1993] quoting *Bell v Town Bd. of Town of Pawling*, 146 AD2d 729, 730 [2d Dept 1989]).

Here, DeLucia has failed to establish that the Judgment of foreclosure and sale were procured by fraud, misrepresentation, or other misconduct. At most, DeLucia's allegations point

to an inadvertent miscalculation that even he did not discover. Moreover, DeLucia had multiple opportunities to review and object to the miscalculation but failed to do so.

Accordingly, DeLucia's allegations are insufficient to warrant vacating the Judgment under CPLR 5015 (a) (3).

Nevertheless, a court has the common-law authority to, in its discretion, grant relief from a judgment or order in the interest of justice, considering “the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief” (*Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 226 [2013][citation omitted]). “A motion to vacate a prior judgment or order is addressed to the court’s sound discretion, subject to reversal only where there has been a clear abuse of that discretion” (*Pritchard v Curtis*, 101 AD3d 1502, 1503 [3d Dept 2012][internal quotation marks and citation omitted]). “A court’s inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect” (*Matter of McKenna v. County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742 [1984] [internal quotation marks and citation omitted]; see *CitiMortgage, Inc. v Maldonado*, 171 AD3d 1007, 1008-1009 [2d Dept 2019]).

Here, defendant has provided evidence of an inadvertent or mistaken calculation that failed to take into account prior payments by defendant totaling \$132,268.02 (NYSCEF Doc No. 39). Indeed, a review of the Amended Combined Oath of Referee’s Report of Computation, its attached ledger, and affidavit of the President of the Board of Managers of the Regatta Condominium, reveal that defendant’s prior payments were not accounted for in the Judgment (*id.*). Therefore, in the interest of substantial justice, the court hereby directs a Judicial Hearing Officer or Special Referee to recalculate the amounts due and owing, provide an

amended report, and for the parties to move to confirm/reject the Judicial Hearing Officer or Special Referee's amended report and issue an amended judgment.

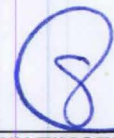
CONCLUSION

Based upon the foregoing, it is

ORDERED that the motion is granted to the extent of directing a referee to recalculate the amount due and owing and directing the parties to settle order on notice.

2/18/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE