

JRK Capital Inc. v Gospel Way Church of God, Inc.

2021 NY Slip Op 31119(U)

March 25, 2021

Supreme Court, Kings County

Docket Number: 500717/12

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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JRK CAPITAL INC.,

Plaintiff,

- against -

Index No. 500717/12

GOSPEL WAY CHURCH OF GOD, INC., MARK LASHASEL, AS ADMINISTRATOR OF THE ESTATE OF LORNA PHYNN, KENNETH PHYNN A/K/A KENNETH R. PHYNN, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD.

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>482-486, 488-495</u>	<u>501-511</u>	<u>513-520</u>
Opposing Affidavits (Affirmations)_____	<u>514-520, 542</u>	<u>514-520, 524</u>	<u>529, 543-548</u>
Reply Affidavits (Affirmations)_____	<u>524, 529, 534-535</u>	<u>543-548</u>	<u>542</u>

Upon the foregoing papers in this action to foreclose a mortgage, plaintiff JRK Capital Inc. (JRK) moves (in motion sequence [mot. seq.] 13) for an order: (1) pursuant to RPAPI. 1355 (2), confirming the August 10, 2020 Report of Sale of the referee (Report of Sale), and declaring the sale was absolute and binding; (2) pursuant to the terms of the mortgage, awarding JRK its reasonable postjudgment attorneys' fees and expenses of \$119,638.30, plus interest, plus the attorneys' fees and expenses JRK incurs on the present motion. out of the surplus money, plus interest thereon at the contractual

default interest rate; (3) pursuant to RPAPL 1361 (2), authorizing and directing the New York City Department of Finance, Court and Trust Fund Division, or any other government entity in possession of the surplus money, to pay JRK the amount of its postjudgment attorneys' fees and expenses as a priority claim; and (4) amending the final judgment herein to add an award of postjudgment attorneys' fees and expenses with interest thereon.

Defendant Mark Lashasel, as Administrator of the Estate of Lorna Phynn (the Phynn Estate) cross-moves (in mot. seq. 14) for an order: (1) confirming the Report of Sale, and (2) directing the Kings County Clerk to distribute 100% of the surplus money, plus all accrued interest, to the Phynn Estate.

Defendant Gospel Way of Church of God, Inc. (the Church) cross-moves (in mot. seq. 15) for an order: (1) determining that the Notice of Appearance and Claim to Surplus Monies filed by the Phynn Estate is void and of no effect because it was neither an owner or a lien holder; (2) pursuant to RPAPL 1361, confirming the Report of Sale; and (3) awarding 100% of the surplus money to the Church.

JRK, the Phynn Estate and the Church all seek an order confirming the referee's Report of Sale of the property at 1060 Utica Avenue in Brooklyn (Property) at public auction for \$1,200,000.00, resulting in a surplus of \$115,888.20. Each of those parties, however, claims a right to the surplus funds.

JRK, as a preliminary matter, seeks an order amending the July 17, 2013 Judgment of Foreclosure and Sale to include an award of its postjudgment attorneys' fees and expenses, with interest, pursuant to section 22 of the mortgage. JRK asserts that it is

, entitled to reimbursement of its postjudgment attorneys’ fees and expenses, with interest, from the surplus funds on a priority basis because “[t]here is no other unsatisfied lien on the subject property which would be entitled to share in the surplus money, i.e., subordinate to the mortgage which was foreclosed, based on a title search . . .” JRK asserts that it “incurred and paid significant attorney’s fees and expenses (nearly \$120,000.000.00) in connection with extensive post-judgment litigation in this case . . .” which “already exceeds the surplus money arising from the public sale in this case (\$115,888.20).” JRK submits affirmations detailing the postjudgment attorneys’ fees and expenses that it incurred.

The Phynn Estate asserts that it is entitled to 100% of the surplus funds because “the estate incurred legal fees of \$40,900.00 in this action pursuant to litigation in this case, including the concurrent Surrogate’s Court case to ensure that Mark Lashasel was appointed the administrator of the Defendant Lorna Phynn’s Estate.” In addition, the Phynn Estate asserts that it is entitled to the surplus money because it “could not sell or refinance the property located at 4713 Avenue D, Brooklyn, N.Y. 11203 because [JRK] had a lien on this property throughout the entire litigation.”

The Church asserts that it is entitled to 100% of the surplus funds because the Property sold at the foreclosure auction was “bought by the Church in or around 2003.” The Church claims that it is entitled to the surplus funds as the owner of the Property because “[t]here are at present no other unsatisfied liens on the Church Property, which could impact the surplus funds.” The Church opposes that branch of JRK’s motion that seeks to amend the Judgment of Foreclosure and Sale to add an award of postjudgment

attorneys' fees and expenses on the grounds that JRK was a "predatory lender" and that the Judgment of Foreclosure and Sale "cannot be supplemented at the cost of the Church" because "[t]he mortgage note covenants have deemed to merge into the judgment . . ."

JRK, in reply, asserts that section 22 of the mortgage executed by the Church "explicitly provides for [JRK] to recover any attorney's fees it might incur *after* the entry of a final judgment in its favor, and to make an application to amend a judgment to add an award of attorney's fees . . ."

Section 22 of the mortgage (NYSCEF Doc No. 27) provides, in relevant part, that:

"If Mortgagee engages an attorney to enforce collection of the sums due under this Mortgage, the Note, or any other Loan Documents, whether or not a court action is commenced, or if any action is instituted to collect all or part of the indebtedness or to foreclose this Mortgage . . . or if a petition in bankruptcy is filed by or against any Mortgagor or Guarantor and the Mortgagee employs counsel to represent the interests of Mortgagee in such bankruptcy proceeding, or if Mortgagee must otherwise defend, establish or enforce the validity, priority or enforceability of the Note, this Mortgage, the Guaranty, the Collateral Mortgage, or any other Loan Documents, in any action or proceeding brought by or against the Mortgagee, then in any and all events . . . the Mortgagor, and any Guarantor, endorser or surety hereby severally agree to pay the reasonable attorney's fees incurred by the Mortgagee in connection with any and all such Enforcement Actions, together with the costs and disbursements as taxed or incurred, with interest thereon at the Default Interest Rate from the date or dates incurred, all of which shall be added to the amount found by the referee to compute in a foreclosure proceeding, or in the judgment in such foreclosure action . . . *and such additional post-judgment attorney's fees and expenses may be added to any such judgment by way of amendment thereof, upon application of Mortgagee to the court in which the action is pending.* The provisions of this section shall survive any foreclosure or other enforcement

hereof, the payment of the indebtedness and the termination of this Mortgage” (emphasis added).

Under the plain and unambiguous terms of section 22 of the Mortgage, the Church agreed that JRK would be entitled to postjudgment attorneys’ fees and expenses, which “may be added to any such judgment by way of amendment thereof . . .” For this reason, that branch of JRK’s motion seeking to amend the July 17, 2013 Judgment of Foreclosure and Sale to add postjudgment attorneys’ fees and expenses with interest is granted.

“The surplus funds of a foreclosure sale stand in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land” (*Emigrant Mortgage Co., Inc. v Biggio*, 110 AD3d 673, 675 [2013] [quoting *NYCTL 1999-1 Trust v N.Y. Pride Holdings, Inc.*, 68 AD3d 952, 952 (2009)]). The Second Department has held that:

“Accordingly, “[s]urplus money takes the place of the equity of redemption and only one who has a vested estate or interest in the land sold under foreclosure which was cut off by the foreclosure sale is entitled to share in the surplus money with priority in each creditor determined by the filing date of his lien or judgment” (*Emigrant Mortgage Co, Inc. v Biggio*, 110 AD3d at 675 [quoting *First Fed. Sav. & Loan Assn. of Rochester v Brown*, 78 AD2d 119, 123 (1980)]).

Here, JRK has established its entitlement to the surplus money to reimburse it for its postjudgment attorneys’ fees and expenses, pursuant to section 22 of the mortgage. The Phynn Estate and the Church, in contrast, have failed to establish any legal right to the surplus funds. Other than JRK’s judgment, which is amended to include postjudgment attorneys’ fees and expenses, there are no other known creditors or unsatisfied liens on the Property entitled to share in the surplus money. Accordingly, it is

ORDERED that JRK's motion (in mot. seq. 13) is granted to the extent that the Report of Sale is confirmed, the July 17, 2013 Judgment of Foreclosure and Sale is amended to add an award of postjudgment attorneys' fees and expenses with interest thereon at the default interest rate, JRK is awarded reasonable postjudgment attorneys' fees and expenses of \$119,638.30, plus interest, and the New York City Department of Finance, Court and Trust Fund Division, which is in possession of the surplus money, is directed to pay JRK the surplus funds of \$115,888.20; and it is further

ORDERED that the Fynn Estate's cross motion (in mot. seq. 14) is only granted to the extent that the Report of Sale is confirmed and the cross motion is otherwise denied; and it is further

ORDERED that the Church's cross motion (in mot. seq. 15) is only granted to the extent that the Report of Sale is confirmed and the cross motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.


HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE