

Wells Fargo Bank, N.A. v Gooding

2023 NY Slip Op 31064(U)

March 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 502644/2018

Judge: Cenceria P. Edwards

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.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of June, 2022.

PRESENT:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

-----X
WELLS FARGO BANK, NATIONAL ASSOCIATION,
Successor by Merger to WELLS FARGO BANK
MINNESOTA, NATIONAL ASSOCIATION, not in its
individual or banking capacity, but solely as Trustee for
REPERFORMING LOAN REMIC TRUST
CERTIFICATES, SERIES 2003-R1,

Plaintiff(s),

-against-

DAYTOWNE GOODING, Individually and as Surviving
Joint Tenant with rights of survivorship of ROSALEE
GOODING, NEW YORK CITY PARKING
VIOLATIONS BUREAU, "JOHN DOE",

Defendant(s).
-----X

ORDER

Calendar #(s): 68

Index #: 502644/2018

Mot. Seq. #(s): 5

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/Petition/Cross-Motion and
Affidavits (Affirmations) and Exhibits _____

104-112

Opposing Affidavits (Affirmations) and Exhibits _____

115-117

Reply Affidavits (Affirmations) and Exhibits _____

118-121

This action was commenced against, *inter alia*, defendant Daytowne Gooding ("defendant") to foreclose on a mortgage on the real property known as 237 East 86th Street, Brooklyn, New York 11236. A judgment of foreclosure and sale was entered on or about May 20, 2019. On August 15, 2019, Leonard Spector, Esq., the appointed referee, sold the subject premises at a foreclosure auction, yielding a \$241,791.45 surplus, which was deposited into the court on February 18, 2020, and later transferred to the New York City Department of Finance.

The foreclosed premises was purchased by non-party Gold Menorah Properties, Inc. (“GMPI”), which subsequently received the referee’s deed, dated January 29, 2020. It is apparently undisputed that defendant has never vacated the premises, and on November 3, 2020, he filed a notice of claim to the surplus funds, upon which the instant application is based.

In October of 2020, GMPI moved by order to show cause, pursuant to RPAPL §221, for a writ of assistance directing the Sheriff to remove defendant and all other persons from the subject premises; defendant cross-moved for a stay due to the various executive orders and court moratoria issued due to the COVID-19 pandemic. By amended decision and order dated August 15, 2022, the court (Robin K. Sheares, J.), granted both motions to the extent of ordering the Sheriff “to remove defendant and any other persons residing in the premises and to return possession of the property to [GMPI]” (NYSCEF doc. no. 150). Justice Sheares found that defendant “has received the benefit of residing in the premises for approximately a year and a half,” as the court had been prevented from ruling on the matter while the foreclosure moratoria were in effect (*see id.*).

On September 17, 2020, GMPI commenced a separate action against defendant under Index No. 517483/2020 (“the 2020 action”), asserting causes of action for use and occupancy and tortious interference with prospective economic advantage. By orders dated January 14, 2021, the court (Pamela L. Fisher, J.) granted GMPI’s unopposed motion for a default judgment due to defendant’s failure to appear, and referred the case to a special referee to hear and determine the measure of damages. Defendant later moved to vacate his default, which the court (Carl J. Landicino, J.) denied by order dated January 6, 2022. Thereafter, the parties participated in a hearing before a special referee, who, in a decision and order entered June 29, 2022, found in favor of GMPI and directed entry of a judgment in the amount of \$350,000.00.

On the instant application before this court, defendant now moves to confirm the Referee’s Report of Sale and for an order directing the New York City Department of Finance to distribute the surplus funds (and accrued interest) to him. In opposition, GMPI recounts the long litigation history between the parties, as summarized above, and asks that the motion “be denied until after the July 21, 2021 OSC in the [2020 action] is decided.” Despite the inartful wording employed by GMPI, the court deems this a request to, in effect, hold the instant motion in abeyance pending the outcome of the inquest in the 2020 action. As noted above, however, the Special Referee issued her determination shortly before the instant motion by defendant was

submitted to this court. Accordingly, notwithstanding that GMPI cited no legal authority for this court to refuse to decide this motion pending the outcome of another action, as GMPI never moved for a stay, the sole basis of its articulated opposition has disappeared.

Since no exceptions have been filed against the Referee's Report of Sale, defendant, as the prior owner of the foreclosed upon property, has made a *prima facie* showing of entitlement to the surplus funds. It is noted that GMPI also filed a notice of claim, based on its then-pending claims against defendant in the 2020 action. However, it is well-settled that a judgment will not constitute a lien enforceable against the surplus funds derived from a foreclosure sale unless it was docketed prior to the delivery of the Referee's deed to the purchaser (*see Friesch-Groningsche Hypotheekbank v 349 Operating Corp.*, 245 AD2d 140, 141 [1st Dept 1997]; *Tupper Lake Natl. Bank v Magedson*, 187 AD2d 147, 150 [3d Dept 1993]; *First Fed. Sav. & Loan Assn. v Brown*, 78 AD2d 119, 123 [4th Dept 1980], app dismissed 53 NY2d 939 [1981]; *King v Pelkofski*, 34 AD2d 795, 795 [2d Dept 1970]). The judgment that GMPI eventually obtained against defendant in the 2020 action was not issued until more than two years after the Referee's deed was delivered and, thus, is not directly enforceable as a lien against the surplus funds. GMPI has since e-filed a letter (on notice to defendant) advising of the judgment and indicating its intent to serve a restraining notice upon the New York City Department of Finance and to commence turnover proceedings. It is noted that court records in the 2020 action show that defendant has filed a notice of appeal of the orders and judgment issued therein, but since the parties have not advised whether defendant has filed an undertaking to trigger an automatic stay pending the outcome of his appeal (*see CPLR § 5519[a][2]*), the enforceability of the judgment is unknown. In any event, this court has received no evidence that any of the above has occurred, and in the absence of a stay issued by this or another court, the undersigned is constrained to grant the instant motion. The awarding of relief is without prejudice to any other appropriate legal remedies which either party may seek.

Accordingly, the above-referenced motion is GRANTED to the extent that it is:

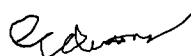
ORDERED, that the Report of Sale of Leonard Spector, Esq., Referee, dated October 3, 2019, and filed in the Office of the Clerk of King's County on January 31, 2020, be and the same hereby is in all respect ratified and confirmed; and it is further

ORDERED, that as to the monies deposited in this action, that the New York City Department of Finance first deduct its legal fees, costs and commission, and that it then pay to “Jay Markowitz, Esq., as attorney” for Daytowne Gooding, c/o Jay S. Markowitz, Esq., The Law Offices of Jay S. Markowitz, P.C., 185 Hillside Avenue, 1st Floor, Williston Park, New York 11596, 100% of the remaining surplus funds, plus all accrued interest.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: March 27, 2023



S.C.J. Cenceria P. Edwards, C.P.A.

2023 MAR 29 AM 9:44

KINGS COUNTY CLERK
FILED