

Wells Fargo Bank, N.A. v Fernandez

2023 NY Slip Op 33396(U)

September 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 5640/2009

Judge: Cenceria P. Edwards

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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 6th day of September, 2023.

P R E S E N T:

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

Justice.

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WELLS FARGO BANK, N.A., AS TRUSTEE FOR POOLING AND
SERVICING AGREEMENT OPTION ONE MORTGAGE LOAN
TRUST 2004-1 ASSET-BACKED CERTIFICATES, SERIES 2004-
1,

Plaintiff(s),

-against-

ROBERT FERNANDEZ, et al.,

Defendant(s).

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ORDER

Calendar #(s): 23

Index #: 5640/2009

Mot. Seq. #(s): 8

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 _____

25-35

Opposing Affidavits (Affirmations) and Exhibits _____

Reply Affidavits (Affirmations) and Exhibits _____

In this action to foreclose on a mortgage encumbering real property at 5401 2nd Avenue in Brooklyn, New York, a judgment of foreclosure and sale was issued in July 2019, and the premises was sold at a public auction on February 24, 2002 to non-party Sunset Park 888, LLC (“Sunset Park”). Tamara Fernandez (“the movant”), the purported widow of defendant-borrower Robert Fernandez, now moves for an order confirming a referee’s report and directing defendant New York City Department of Finance (“Dept. of Finance”) to distribute the surplus funds.

The report of sale, filed April 11, 2022, indicates that the foreclosure sale yielded a \$717,805.73 surplus, which was deposited with the Clerk of this Court on April 20, 2022, and later transferred to the Dept. of Finance. The movant filed a notice of appearance and claim to

surplus monies dated March 1, 2022. The Dept. of Finance also filed a notice of claim, dated July 14, 2022, for \$7,822.56, representing amounts owed pursuant to two docketed judgments issued by defendant New York City Environmental Control Board. On August 9, 2022, the County Clerk certified that no exceptions to the Referee's Report of Sale had been filed.

On August 14, 2022, Sunset Park commenced an eviction proceeding in the Civil Court against, *inter alia*, the movant, who continues to reside in the subject premises. By so-ordered stipulation dated November 3, 2022, they settled the proceeding by agreeing that the movant would surrender the premises by April 30, 2023 and assign to Sunset Park \$2,500 per month from the foreclosure surplus, representing monthly use and occupancy, from November 1, 2022 until delivery of the premises (*see* NYSCEF doc. # 23). Hence, on April 13, 2023, Sunset Park filed a notice of claim in the instant action for \$15,000, apparently representing the total of the use and occupancy fees owed through that month.

The movant previously moved, in motion sequence #7, for an order ratifying and confirming the report of sale and appointing a referee to ascertain and report on: 1) the amount due to the movant and any others possessing a lien on the surplus funds, and 2) the priority of any such liens. By order dated March 16, 2023, and entered March 17, 2023, this Court granted the motion and appointed Domenick Napoletano, Esq., referee to conduct a surplus money proceeding (*see* NYSCEF doc. # 20). Mr. Napoletano's report, dated April 28, 2023, was filed on June 2, 2023. Shortly thereafter, the movant made the instant motion for an order confirming the report and directing the Dept. of Finance to distribute the monies in accordance therewith.

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2d Dept 2017]). In his report issued after the surplus money proceeding, Referee Napoletano stated that he reviewed the August 9, 2022 certificate of the Kings County Clerk, the papers submitted on the movant's prior motion to confirm the report of sale, and the three notices of claim submitted for the subject surplus funds (*see* NYSCEF doc. # 23, pp. 1-2). Mr. Napoletano further stated, in an annexed affirmation of legal services, that he "reviewed the Court file, the Referee's Report of Sale, [and] all submissions relating to the claims to the surplus funds in this case" (*id.*, p. 4). In said affirmation, he also explained that his legal billing rate is \$400 per hour, and he performed four hours of work on this matter. Hence, the report provides that the surplus funds should be

distributed as follows: \$1,600 to Mr. Napoletano, as special referee; \$7,822.56, plus any applicable interest, to the Dept. of Finance; \$15,000 to Sunset Park; and the remainder to the movant (*see id.*, pp. 2-3). While there is substantial support in the record for the first two of those disbursements to the referee and the Dept. of Finance, for the reasons articulated below, the Court finds that the record is inadequate, at this time, to justify the disbursements to Sunset Park and the movant.

The surplus funds report identifies the movant, Tamara Fernandez, as “the surviving spouse of Mr. Fernandez, the prior owner of the foreclosed upon property” (*see id.*). Indeed, as the record indicates that Robert Fernandez was the lone borrower and deeded owner of the mortgaged premises prior to the foreclosure sale, he was the sole owner of the equity of redemption entitled to recover the surplus funds generated from the sale. Hence, while it appears that the movant’s claim to the surplus funds derives solely from the purported marital relationship, there is no evidence in this record that the movant actually is Mr. Fernandez’s widow. The instant motion and the prior motion that yielded the order of reference to Referee Napoletano, each, lack copies of a marriage certificate or other proof that the movant is, or was, married to Mr. Fernandez. Nor does either motion include copies of a death certificate for Mr. Fernandez, or a judicial declaration that he is legally dead, much less any evidence that the movant was still his wife at the time of death. The movant failed to submit even a personal affidavit attesting to any of these critical facts. Moreover, even if Mr. Fernandez is dead, there is no proof in this record as to whether he left a last will and testament, or, if he died intestate, that the movant is his sole heir-at-law. Tellingly, there is no indication as to whether a Surrogate’s Court proceeding was ever commenced regarding Mr. Fernandez’s purported death, nor whether an executor or administrator was appointed. This Court, therefore, does not know whether any other persons may be entitled to a portion of the surplus funds.

In the absence of proof that the movant has any legal relationship to Mr. Fernandez, or by extension, a vested interest in the formerly mortgaged premises, there is no evidentiary basis upon which this Court can confidently find that she is entitled to the surplus funds owed to Mr. Fernandez, or his potential estate. It must also be noted that Sunset Park’s claim to the surplus funds, to the extent that is even recoverable in this proceeding, is predicated on the assumption that the movant is entitled to said monies as the successor-in-interest to Mr. Fernandez’s equity

of redemption. Hence, any determination of Sunset Park's claim must await resolution of the movant's claim to the funds.

In conclusion, the Court finds that Referee Napoletano's report can be confirmed only as to the disbursements for his fee and the amounts due to the Dept. of Finance, and to the extent that he determined that the remainder of the surplus funds belong to Mr. Fernandez, or, if he is deceased, to his estate or heirs-at-law. Whether the movant, or any other persons, qualify as the person (or persons) to whom said disbursement should be made cannot be determined until the evidentiary deficiencies discussed above are remedied.

Accordingly, the above-referenced motion by Tamara Fernandez (motion sequence #8) to confirm the Report of Surplus Money Proceeding by Domenick Napoletano, Esq., Referee, dated April 28, 2023, and filed in the Office of the Clerk of King's County on June 2, 2023, and to disburse the surplus funds in accordance with the report, is **GRANTED solely to the extent indicated below**, and it is hereby:

ORDERED that the New York City Department of Finance, after first deducting its legal fees, costs, and commission, disburse from the surplus funds **only** the amounts set forth below to the following entities/persons:

1. To Domenick Napoletano, Esq., \$1,600.00, for his fees as Referee herein;
2. To the City of New York, \$7,822.56, plus any applicable interest, to satisfy the two judgments issued by the New York City Environmental Control Board, which were duly recorded and docketed against the mortgaged premises; and it is further

ORDERED that the remaining surplus funds shall remain with the New York City Department of Finance, subject to the applicable laws governing retention of funds, until further order of this Court; and it is further

ORDERED that the remainder of the above-referenced motion (motion sequence #8) is **DENIED, with leave to renew**, upon submission of, *inter alia*, the following:

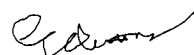
- (1) an affidavit from the purported claimant, movant Tamara Fernandez ("the movant"), demonstrating her entitlement to the surplus funds, including, but not limited to, proof of her relationship to the owner of the equity of redemption, defendant-mortgagor Robert Fernandez ("Mr. Fernandez"); and

- (2) a certified copy of a certificate of marriage between the movant and Mr. Fernandez; and
- (3) proof that Mr. Fernandez has died, including, but not limited to, certified copies of a **death certificate** or a judicial decree declaring that he is legally dead; and
- (4) certified copies of any orders, decrees, or judgments from the Surrogate’s Court, or another court of competent jurisdiction, pertaining to the administration of the estate of Mr. Fernandez, or the probate of his last will and testament; and
- (5) an affidavit from the duly appointed representative of the estate of Mr. Fernandez, if applicable, or from a relative of Mr. Fernandez, identifying his distributees, heirs, and/or next-of-kin; and
- (6) proof of service of the renewed motion upon the duly appointed representative of Mr. Fernandez’s estate, if applicable, and upon his distributees, heirs, and/or next-of-kin, if applicable.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: September 20, 2023



SCJ Cenceria P. Edwards, CPA

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