

**Board of Mgrs. of the Residential Unit Owners of the
Orion Condominium v Fang**

2023 NY Slip Op 33888(U)

October 27, 2023

Supreme Court, New York County

Docket Number: Index No. 158167/2019

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH

PART

12

Justice

-----X

BOARD OF MANAGERS OF THE RESIDENTIAL UNIT
OWNERS OF THE ORION CONDOMINIUM,

Plaintiff,

INDEX NO.

158167/2019

MOTION DATE

N/A

MOTION SEQ. NO.

003

- v -

NING FANG, NINA FANG

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for

ORDER/JUDGMENT NUNC PRO TUNC

Plaintiff Board of Managers of the Residential Unit Owners of the Orion Condominium (Plaintiff) seeks to resolve its foreclosure action with respect to its continuing common charge lien against the residential unit owned by defendant Ning Fang, also known as Nina Fang (Defendant), by moving for *nunc pro tunc* relief or, in the alternative, for an order vacating the auction sale and amending the judgment of foreclosure and sale.

I. Background

Defendant owned Unit 27D of the Orion Condominium (the Premises), located at 350 West 57th Street in Manhattan (*see* complaint [NYSCEF Doc No. 2]). Plaintiff commenced this action by filing its summons, complaint, a copy of its common charge lien, and notice of pendency, together with proofs of service, on Aug 21, 2019 (NYSCEF Doc Nos. 1-6). In the complaint, Plaintiff seeks, among other relief, to foreclose on the \$13,713.59 common charge lien it filed with the office of the City Register of the County of New York on August 1, 2019 (NYSCEF Doc No. 3).

After initial attempts to serve the summons, complaint and notice of pendency upon Defendant personally at her place of abode on September 19, September 20, and October 5, 2019, in accordance with CPLR 308 (2), Plaintiff served the summons, complaint, and notice of pendency on Defendant by “nail and mail”¹ service under CPLR 308 (4), completed on October 8, 2019, as reflected the affidavit of Plaintiff’s process server, sworn to October 8, 2019 (NYSCEF Doc No. 5).²

Defendant defaulted throughout this action (*see* supporting affirmation of Stewart E. Wurtzel, Esq., executed January 17, 2023 [Wurtzel affirmation], ¶5 [NYSCEF Doc No. 73]). On July 20, 2022, this Court granted Plaintiff’s motion on default for an order confirming the referee’s report and entering judgment for foreclosure and sale of the Premises (NYSCEF Doc No. 55). The judgment of foreclosure and sale was signed by this Court and countersigned and filed by the New York County Clerk on August 9, 2022 (NYSCEF Doc No. 78). On October 19, 2022, the Premises was sold at public auction to Xie Biaojun for the sum of \$705,000 (Wurtzel affirmation, ¶5).

In connection with the closing of the sale, Mr. Biaojun sought title insurance for the Premises from Hudson One Title Agency (Title Agency). By e-mail dated December 5, 2022, however, Title Agency informed counsel for Mr. Biaojun and Plaintiff that:

In the case of the foreclosure in our title matter, the Notice of Pendency was filed on 8/21/2019 but service, in this instance via nail and mail, was not completed until 10/8/2019. Service was not even attempted for the first time until 9/19/2019 – right before the 30 day period was to expire. At that time, the Notice of Pendency should have been refiled, thereby extending the time for service an additional 30 days. Unfortunately, absent a court order affirming the sufficiency of the late service, which order was not obtained in the current action, title finds this matter uninsurable. (*See* Wurtzel affirmation, ¶6, quoting NYSCEF Doc No. 79).

¹ CPLR 308 (4) permits service when attempts under CPLR 308 (1), (2), and (3) are unsuccessful, “by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode... and by either mailing the summons to such person at this or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business...”

² Plaintiff also filed an affidavit of service, sworn to October 28, 2019, attesting to its service of the summons and complaint by mail, addressed to Defendant at the Premises, in accordance with CPLR Section 3215 (g) (3).

II. Plaintiff's Motion

By notice of motion, e-filed on January 17, 2023, Plaintiff requests that the Court issue a *nunc pro tunc order*, either (i) extending its time to serve the summons and complaint from September 20, 2019 to October 9, 2019, thereby correcting its service defect, under RPAPL Section 1331 and CPLR 6512; or (ii) deeming Plaintiff's successive notice of pendency to have been timely filed under CPLR 6517 (NYSCEF Doc No. 72). Should the Court deny such *nunc pro tunc* relief, Plaintiff requests that the auction sale held on October 19, 2022 be vacated and that the judgment of foreclosure and sale entered on August 9, 2022 be amended to allow a new auction to be scheduled within six months of the granting of its motion.

RPAPL § 1331, entitled "Notice of Pendency," requires that:

The plaintiff, *at least twenty days before a final judgment directing a sale is rendered*, shall file in the clerk's office of each county where the mortgaged property is situated a notice of pendency of the action, which shall specify, in addition to other particulars required by law, the date of the mortgage, the parties thereto and the time and place of recording. (Emphasis added).

Further, CPLR 6511(a) permits the filing of a notice of pendency before or after the service of process. Where, as here, the notice of pendency was filed before service of process, CPLR 6512 requires that such service be made no later than 30 days after the notice of pendency was filed ("A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed. . .").

CPLR 6516 (a) provides, in pertinent part, that:

In a foreclosure action, a successive notice of pendency may be filed to comply with section thirteen hundred thirty-one of the real property actions and proceedings law, notwithstanding that a previously filed notice of pendency in such action or in a previous foreclosure action. . . has become ineffective because service of a summons had not been completed within the time limited by section 6512 of this article, whether or not. . . such ineffectiveness has been determined by the court...

Reading this CPLR provision together with RPAPL § 1331, the filing of a successive notice of pendency will be effective, even if service of the earlier notice of pendency became ineffective

because service of the summons had not been complete within 30 days thereafter, if the successive notice of pendency is filed “at least twenty days before the final judgment directing a sale is rendered” (*Bank of Am., N.A. v Green*, 208 AD3d 1143, 1145 [2d Dept 2022]).

Consequently, Plaintiff’s filing of its successive notice of pendency on January 10, 2023 (NYSCEF Doc No. 70) could not cure its failure to complete service within the time required by CPLR 6512 because Plaintiff failed to file its successive notice of pendency at least 20 days before the final judgment directing a sale was rendered – that is, on or before July 1, 2022 – as required by RPAPL § 1331.

Therefore, Plaintiff is not entitled to *nunc pro tunc* relief in this matter. “Courts may correct mistakes, defects, or irregularities in judgments and orders. However, for that statutory authority to be invoked, the judgment or order must truly involve only a ‘mistake, defect, or irregularity’ perpetrated by the court” (Hon. Mark C. Dillon, 2023 Supp Prac Commentaries, McKinney’s Consl Laws of NY, CPLR C5019:1 [emphasis added], discussing *Kuliarchar Sea Foods (Cox’s Bazar) Ltd. v Soleil Chartered Bank*, 77 Misc 3d 1225[A], 2023 NY Slip Op 50037[U] [Sup Ct, NY County 2023]). Plaintiff identifies no mistake, defect, or irregularity on the part of the Court, and, as such it cannot obtain the *nunc pro tunc* relief it seeks.

Even if this were not the case, Plaintiff would still be unable to obtain such *nunc pro tunc* relief because such an order “cannot record a fact as of the prior date when the fact did not then exist” (*Merrick v Merrick*, 266 NY 120, 122 [1934], citing *Guarantee Trust & Safe Deposit Co. v Philadelphia, Reading & New England R. R. Co.*, 160 NY 1, 7 [1899]; see also *Cornell v Cornell*, 7 NY2d 164, 167 [1959], quoting *Merrick*, 266 NY at 122 [“When a ruling has in fact been made but is improperly evidenced by a defective mandate, or by no mandate at all, an appropriate and

suitable order or judgment which manifests the existence of a determination may subsequently be granted to take effect as of the date of such determination”)]).

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion for *nunc pro tunc* relief is denied; and it is further

ORDERED that Plaintiff's motion to vacate the auction sale and to amend the Judgment of Foreclosure and Sale is granted to allow a new auction to be scheduled within six months of the date of this decision and order; and it is further

ORDERED that Plaintiff file, within two weeks of the date of this Decision and Order, its proposed amended judgment of foreclosure and sale, in the form Plaintiff submitted with this motion (NYSCEF Doc No. 81), which incorporates the findings of this Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

10/27/2023

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

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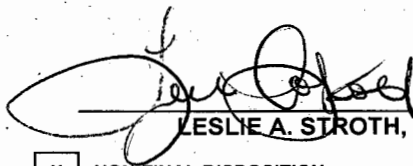
OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


LESLIE A. STROTH, J.S.C.