

Wilmington Sav. Fund Socy., FSB v Balsky

2024 NY Slip Op 30675(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850261/2018

Judge: Francis A. Kahn III

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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. FRANCIS A. KAHN, III PART **32**

Justice

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INDEX NO. 850261/2018

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A
CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS
TRUSTEE FOR HILLDALE TRUST,

MOTION DATE _____

MOTION SEQ. NO. 005

Plaintiff,

- v -

SABRINA BALSKY, BOARD OF MANAGERS OF 188 EAST
70TH STREET, MEMBERS CREDIT UNION, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE

**JUDGMENT OF FORECLOSURE
AND SALE and DECISION +
ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188

were read on this motion to/for

JUDGMENT - FORECLOSURE & SALE

Upon the foregoing documents, the motion is determined as follows:

In this residential mortgage foreclosure action, Plaintiff moves, for a third time, to confirm the April 14, 2022, report of Referee Edward H. Lehner, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant Sabrina Balsky (“Balsky”), the Mortgagor, opposes the motion. By order of this Court dated September 9, 2022, the Referee’s report was confirmed and Defendant’s arguments concerning the amount of interest and attorney’s fees were found to be without merit. But the Court denied issuance of a judgment of foreclosure and sale as Plaintiff failed to demonstrate compliance with RPAPL §1304. By order dated April 27, 2023, Plaintiff’s second motion for a judgment of foreclosure and sale was denied for the same reason.

In support of this motion, Plaintiff relied on an affidavit from Jerrimie Allen (“Allen”), an Account Manager of Covius Document Services, LLC (“Covius”), f/k/a Walz Group, LLC (“Walz”), a division of Covius Services, LLC f/k/a LenderLive Services, LLC. Allen averred that Covius was “contracted by Fay Servicing, LLC” to mail notices on Fay’s behalf. Annexed to Allen’s affidavit were the documents referenced therein. Regarding the mailing of these notices, the proffered evidence demonstrated strict compliance with the notice requirements under RPAPL §1304 (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667 [2d Dept 2019]). Allen’s affidavit laid a proper foundation for the admission of Covius’ records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Allen described Covius’ standard office procedure, in detail, attached copies of the notices and USPS documents related to Defendant’s loan, including the utilization of a “TrackRight” system (*see Bank of Am., N.A. v Bloom*, 202 AD3d 736 [2d Dept 2022]; *HSBC Bank USA, N.A. v Butt*, 199 AD3d 662 [2d Dept 2021]). Allen explained that the TrackRight system is proprietary to Covius and referenced attached records of same. The attached contracts between Fay and Walz,

along with the explanation of the business relationship between Walz and Covius demonstrated the latter's authority to act. As such, Plaintiff established *prima facie* that it sent the statutory pre-foreclosure notices.

In opposition, Defendant Balsky failed to raise an issue of fact concerning mailing of the notices. Mere denial of receipt of same is insufficient (*see eg HSBC Bank USA, NA v Bermudez*, 175 AD3d 667 [2d Dept 2019]; *see also Federal Natl Mtge Assn v Adago*, 219 AD3d 1219 [1st Dept 2023]).

Accordingly, it is

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and to confirm the referee's report, insofar as modified infra, is granted; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, lien for common charges, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Edward H. Lehner, Esq.** who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **sfc-foreclosures@nycourts.gov** and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and serve it on the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

ORDERED that after receiving permission from the Auction Part Clerk, the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the **New York Amsterdam News**; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from receiving any funds without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 180 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100.00. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed.
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report: \$804,864.99, together with interest at the note rate from March 30, 2022, until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred.
 - b. Costs and Disbursements: _____ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: \$850.00.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable, and it is further

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that Defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may re-notice the property for sale with or without prior application to this Court, and the deposit of the recalcitrant bidder forfeited and retained by Plaintiff as liquidated damages; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950.00 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further identified:

A description of the premises is annexed hereto as schedule A.

Servicer: AMIP Management, LLC - Servicer Phone #: (800) 931-2424

3/1/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

F. G. W. III
FRANCIS KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

SCHEDULE A—LEGAL DESCRIPTION

The Unit the ("Unit") known as Unit No. 8B in the Condominium located at 188 East 70th Street, Borough of Manhattan, City, County and State of New York, said Unit being designated and described as Unit No. 8B in the Declaration establishing a plan for condominium ownership of said premises under Article 9B of the Real Property Law of the State of New York (the "New York Condominium Act") said Declaration dated July 17, 1986 and recorded in the New York County Office of the Register of the City of New York (the "City Register's Office") on September 3, 1986 in Reel 1111 Page 1692 as amended by 2nd Amendment under Doc. ID #2003021400842002 CRFN 2003000022995 and also designated as Tax Lot 1229 in Block 1404 of Section 5 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Department of The City of New York and on the Floor Plans of said building certified by A. E. Kohn, A.I.A., Architect on August 8, 1986 and filed in the City Register's Office on September 3, 1986 as Condominium Plan No. 332. The premises within which the Unit is located (the "Property") are more particularly described below.

ALL capitalized terms herein which are not separately defined herein shall have the meanings given to those terms in the Declaration in the By-Laws of the Condominium. (Said Declaration and By-Laws as the same may be amended from time to time, are hereinafter referred to the "Declaration" and the "By-Laws", respectively).

TOGETHER with an undivided .566169% interest in the Common Elements.

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, County, City and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southerly side of 70th Street with the westerly side of Third Avenue;

THENCE southerly along the said westerly side of Third Avenue, one hundred feet five inches;

THENCE westerly parallel with the southerly side of 70th Street and part of the way through a party wall, seventy-five feet;

THENCE northerly parallel with the westerly side of Third Avenue one hundred feet five inches to the said southerly side of 70th Street; and

THENCE easterly along the said southerly side of 70th Street seventy-five feet to the point or place of BEGINNING.

TOGETHER with the benefit of the negative covenants as to height and easement for light and air contained in the Single Zoning Lot and Development Agreement between Dupont Associates, Inc., and Trafalgar House Real Estate, Inc., recorded 4/29/83 in Reel 682 Page 1788.

Being the same property as conveyed from Peter S. Mason and Sabrina Balsky, as Husband and Wife to Sabrina Balsky as set forth in Deed Instrument #2009000077103 dated 02/26/2009, recorded 03/17/2009, NEW YORK County, NEW YORK.

Supreme Court, New York County Auction Part Rules for Outdoor Auctions**An auction will not go forward if it is not on the Auction Calendar**

1. Prior to scheduling publication, the plaintiff and referee shall contact the Auction Part clerk at SFC-Forclosures@nycourts.gov to place the auction on the auction calendar.
2. The Referee and all interested parties must be present on the scheduled auction date at 2:15 p.m. on the portico at 60 Centre Street.
3. The Terms of Sale must be posted on the portico before the auction begins. The Referee shall afford prospective bidders time to review the Terms of Sale.
4. At his or her discretion, the Referee *may* choose not to accept cash.
5. A successful bidder must have in his/her possession at the time of the bid the full 10% of the sum bid, in cash (if accepted at the referee's discretion) or certified or bank check to be made payable to the Referee.
6. All persons wishing to bid on properties must register with the Referee and provide proof of identification.
7. Bidders will be required to stand and state their names at the time the bid is made.
8. Bidders are permitted to use cell phones to communicate with business partners via text messages only. Phone calls and video calls (such as FaceTime, Skype or Teams) are not permitted.
9. No sale will be deemed final until the full 10% deposit has been paid to the Referee and the Terms of Sale have been signed; this must be done immediately following the auction.
10. If a successful bidder fails to immediately pay the deposit and sign the Terms of Sale, the property will be promptly re-auctioned the same afternoon.
11. Bidders are cautioned that the failure to furnish the 10% deposit or sign the Terms of Sale after winning an auction may result in the loss of future bidding privileges. The Court reserves the right to impose penalties for inappropriate behavior or other misconduct as it sees fit.
12. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the amount of the successful bid (the purchase price) and the name and address of the successful bidder.
13. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the sale price, the amount awarded in the judgment of foreclosure and sale and the upset price. The clerk shall record and enter this information in the court's computer system.
14. The Referee conducting the sale shall complete a Surplus Monies Form immediately following the sale. All information must be completed; if there is no surplus, then that must also be indicated.
15. Within 10 days of the auction, the Referee shall deliver the signed Surplus Monies Form to the auction clerk via email (SFC-Forclosures@nycourts.gov). The auction clerk shall upload the form to NYSCEF (if an e-filed case) or provide it to the County Clerk (if a paper case).
16. All bidders must wear a face mask/shield at all times and social distancing must be observed by all bidders at all times. Bidders who do not comply with the face mask and/or the social distancing mandate will be removed from the auction.
17. A copy of these rules will be appended to all Judgments of Foreclosure and Sale.