

NYCTL 2018-A Trust v Izumrud Realty Corp.

2024 NY Slip Op 32105(U)

June 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 506468/2019

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP 2 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 18th day of June, 2024.

P R E S E N T:

HON. DEREKIM B. NECKELS,

Acting Justice.

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NYCTL 2018-A TRUST AND THE BANK OF NEW YORK
MELLON, AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiffs,

- against -

Index No. 506468/19

IZUMRUD REALTY CORP., CITIBANK, N.A., NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY PARKING VIOLATIONS BUREAU AND NEW
YORK CITY TRANSIT AUTHORITY ADJUDICATION
BUREAU,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Sur-Reply Affidavit (Affirmation) _____

94-115
118-130
131-135
139

Upon the foregoing papers in this tax lien foreclosure action, GF Judgments LLC (GF Judgments) moves (in motion sequence [mot. seq.] three), on behalf of defendant Izumrud Realty Corp. (Izumrud), the former owner of the foreclosed property, for an order, pursuant to CPLR 5015 (a) (3) and the court's inherent authority: (1) vacating the court's

April 24, 2023 Order Confirming the Referee's Report on Surplus Moneys and Directing the Distribution of Surplus Moneys (the Surplus Moneys Order) (NYSCEF Doc No. 92); (2) directing that all surplus moneys distributed to Citibank, N.A. (Citibank) be returned; and (3) directing that the surplus moneys be delivered to GF Judgments, to be held in escrow on defendant Izumrud's behalf, until resolution of Citibank's action pending in New York County Supreme Court, *Citibank, N.A. v East 65th Street Owners LLC. et al.*, New York County index No. 651089/19 (the Citibank Action).

Background

The Surplus Moneys Order

On April 24, 2023, the Surplus Moneys Order, which ratified and confirmed the referee's Surplus Moneys Report, was granted *without opposition* (NYSCEF Doc No. 92). The Surplus Moneys Order directed the distribution of \$347,915.88 in surplus moneys from the sale of Izumrud's foreclosed real property as follows: (a) \$4,350.00 to the surplus moneys referee; (b) \$15,000.00 to Izumrud; and (c) the balance to Citibank (*id.* at 3).

GF Judgment's Instant Motion to Vacate

On October 18, 2023, GF Judgments, successor creditor to Sterling National Bank (Sterling) regarding \$25 million in loans given to Evgeny Friedman (Friedman) and his tax medallion companies, filed the instant motion to vacate the Surplus Moneys Order (NYSCEF Doc No. 94 and 95 at ¶ 3).

GF Judgments asserts that "the Referee's surplus moneys determination, and this Court's Surplus Moneys Order confirming that determination are based upon a series of

knowingly false factual predicates supplied by Citibank” (NYSCEF Doc No. 116 at 4).

According to GF Judgments:

“Citibank filed an attachment notice against Izumrud’s property without having first sued or obtained a judgment against Izumrud. Indeed, as Citibank’s purported attachment was pre-judgment against a non-party, and because Citibank never obtained a judgment against Izumrud, Citibank was not entitled to a distribution of surplus moneys in the present action as a matter of settled law.

* * *

“Citibank never advised this Court that ownership control of Izumrud had been ordered turned over to GF Judgments *before this action was even filed*, much less before this Court confirmed a distribution of surplus moneys to which Citibank was not entitled as a matter of law” (*id.* at 5 and 7).

GF Judgments asserts that “Izumrud was the owner of the real property in this action and was entitled to any surplus moneys after payment of any confirmed liens on, and any expenses associated with the sale of, the real property” (*id.* at 4).

GF Judgments asserts that “as security for the loans [it made to Friedman], Sterling received Friedman’s March 25, 2014 pledge of all ‘right, title and interest’ in certain LLCs and corporations that, in turn, owned real property, including Izumrud . . .” (NYSCEF Doc No. 95 at ¶ 4). When Friedman defaulted under the loans, Sterling commenced an action in New York County Supreme Court entitled *Sterling v Evgeny Friedman*, index No. 160715/17 (the Sterling Action), seeking the turnover of Friedman’s interests in the real estate entities, including Izumrud, which was granted on July 25, 2018 (*id.* at ¶¶ 5-6). GF Judgments notes that Citibank was not only a named party defendant, but also participated

in the Sterling Action. On January 27, 2023, the court in the Sterling Action entered an order confirming GF Judgments' ownership control over the real estate entities, including Izumrud (*id.* at ¶ 10).

Meanwhile, on February 21, 2019, Citibank, which loaned money to Friedman and his taxicab medallion companies,¹ commenced the Citibank Action against Friedman's real estate entities, including Izumrud (*id.* at ¶ 13). In the Citibank Action, Citibank sought to validate its purported lien upon which it based its entitlement to a distribution of surplus moneys in this action based on a theory of reverse alter ego piercing. In July 2022, GF Judgments moved for summary judgment in the Citibank Action (*id.* at ¶¶ 17-18).

GF Judgments now seeks an order vacating the Surplus Moneys Order, directing Citibank to return the surplus money and ordering that the surplus moneys be held in escrow on Izumrud's behalf pending a resolution of the Citibank Action.

The October 2023 Order in The Citibank Action

On October 24, 2023, less than a week after GF Judgments moved to vacate the Surplus Moneys Order, the court in the Citibank Action issued a decision and order rejecting Citibank's alter ego claim against Izumrud and dismissing Citibank's complaint (NYSCEF Doc No. 132). The court, in the Citibank Action, described the issue as follows:

“[t]he issue here is whether Citibank, N.A.'s . . . attachments have priority over other financial institutions which turns on Citibank's reverse veil piercing theory. Citibank contends that if the borrower's real estate entities are the borrower's alter

¹ While Citibank loaned \$31.5 million to Friedman and certain taxicab medallion companies, it did not receive a pledge of Friedman's interest in Izumrud (*see Citibank, N.A. v Bombshell Taxi LLC*, 543 BR 365, 368 [EDNY 2016]) (NYSCEF Doc No. 100).

egos, then Citibank would collect from the proceeds of any sale of that real property ahead of other creditors.”

Citibank's Opposition

Citibank, in opposition to GF Judgments' instant motion to vacate, submits an attorney affirmation challenging GF Judgments' standing (NYSCEF Doc No. 118 at ¶¶ 16-17). Citibank's counsel argues that it had no legal obligation to provide GF Judgments with notice of the surplus moneys proceeding in this action (*id.* at ¶ 24). Citibank further argues that “[t]he Motion, effectively, seeks to undo the settlement of a simple lien validity dispute entered into by sophisticated parties represented by counsel” (*id.* at ¶ 4). Counsel argues that the surplus moneys dispute was “settled” with Izumrud, which did not oppose the distribution of surplus moneys to Citibank. However, Citibank admits that a “decision on the validity of Citibank's lien (the alter ego decision) was issued on October 24, 2023 . . .” (*id.* at ¶ 5).

GF Judgments' Reply

GF Judgments, in reply, submits a copy of the New York County Supreme Court's October 24, 2023, decision and order rejecting Citibank's alter ego theory in the Citibank Action (NYSCEF Doc No. 132).

Discussion

“Surplus money . . . stands in the place of the land for all purposes of distribution among persons *having vested interests or liens upon the land*” (*Shankman v Horoshko*, 291 AD2d 441, 442 [2d Dept 2002] [emphasis added]). Only judgments and liens that existed

upon the property at the time of a foreclosure sale constitute liens against surplus moneys (*Mortg. Elec. Registration Sys., Inc. v Levin*, 63 AD3d 890, 891 [2d Dept 2009]).

It is axiomatic that “[a] court has an inherent discretionary power to vacate its own decree ‘for sufficient reason and in the interests of substantial justice’” (*Matter of Phillips*, 163 AD3d 821, 823 [2018], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; see also CPLR 5015). Here, based on the record and in the interests of substantial justice, vacatur of the Surplus Moneys Order is warranted because (1) Citibank never obtained a judgment against Izumrud, the former owner of the foreclosed property, or a lien upon the foreclosed property, and (2) the court, in the Citibank Action, rejected Citibank’s claim that Izumrud was the alter ego of Citibank’s debtor, Friedman, to warrant a lien for surplus moneys against Izumrud’s foreclosed property (NYSCEF Doc No. 132). Accordingly, it is hereby

ORDERED that GF Judgment’s motion (mot. seq. three) is granted to the extent that: (1) the April 24, 2023 Surplus Moneys Order (NYSCEF Doc No. 92) is vacated; (2) Citibank shall return the surplus moneys erroneously distributed to it; and (3) Citibank shall remit such surplus moneys to Izumrud, the former owner of the foreclosed property, within 60 days after service of a copy of this decision and order with notice of entry; that branch of the motion seeking an order directing that GF Judgments hold the surplus moneys in

escrow until resolution of the Citibank Action is denied as moot.

This constitutes the decision and order of the court.

E N T E R,



A. J. S. C.

HON. DEREKIM B. NECKLES

A.J.S.C.