

Home Loan Inv. Bank, F.S.B. v Padilha

2024 NY Slip Op 33029(U)

August 26, 2024

Supreme Court, New York County

Docket Number: Index No. 850158/2019

Judge: Francis A. Kahn III

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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART **32**

Justice

-----X

HOME LOAN INVESTMENT BANK, F.S.B. F/K/A OCEAN BANK, F.S.B.,

Plaintiff,

INDEX NO. 850158/2019

MOTION DATE _____

MOTION SEQ. NO. 005

- v -

JOCELY MARIA PADILHA, JONICE PADILHA, SPECIALIZED LOAN SERVICING, LLC, 35 WEST REALTY CO., LLC, ANGELA PEREIRA, JUCIELE AMARAL, ML FACTORS LIMITED LIABILITY COMPANY, UNITED STATES OF AMERICA,

Defendant.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 170

were read on this motion to/for STAY.

Upon the foregoing documents, and after oral argument heard on the record, the motion is determined as follows:

In this action Plaintiff, Home Loan Investment Bank, F.S.B. f/k/a Ocean Bank, F.S.B. (“Home Loan”) sought to foreclose on a mortgage encumbering residential real property located at 210 East 47th Street, Unit 2C, New York, New York. The mortgage, dated January 24, 2007, was given by Defendants Jocely Maria Padilha and Jonice Padilha (“Padilhas”) to secure a loan which was memorialized by a note of the same date. At the time mortgage was given to Home Loan, it was subordinate to a first mortgage the Padilhas had given to the assignor of Defendant Specialized Loan Servicing (“SLS”). The Mortgagors defaulted in appearing in this action.

Issue was joined by SLS which pled, *inter alia*, a counterclaim for a judgment declaring its mortgage had priority over Home Loan’s lien. SLS claimed that its mortgage was originally given by the Padilhas to SLS’s assignor on October 27, 1998, and that after defaulting on same, the Padilhas and SLS entered into a loan modification agreement dated June 22, 2016. The modification increased the principal amount on loan by \$81,228.46 when compared with the principal balance at the time of the modification. By order dated November 5, 2021, Home Loan’s motion for summary judgment was partially granted and an order of reference was issued. SLS’s cross motion for summary judgment on its declaratory judgment claim for lien priority was also partially granted. As a result, the Court subordinated \$81,228.46 of SLS’s indebtedness to Home Loan’s lien, but otherwise sustained SLS’s priority over Home Loan’s mortgage. An amended judgment of foreclosure and sale was entered on July 21, 2022, and the

property was sold at a public sale on December 7, 2022. Non-party East Fork Funding, LLC (“East Fork”) was the successful bidder at the sale.

After the sale, East Fork moved for, *inter alia*, an order declaring that SLS is forever barred and foreclosed of all interest in the mortgaged premises and declaring the same shall be conveyed to East Fork free and clear of SLS’s lien. In support of that motion, East Fork peddled the specious argument that since the judgment did not expressly mention the Court’s prior adjudication of the issue of SLS’s priority, its lien was void. By order dated July 12, 2023, the Court denied East Fork’s motion and expressly reiterated that it has ordered and adjudged that \$81,228.46 of the lien held by SLS was subordinated to Home Loan’s mortgage. Thereafter, East Fork made a motion to vacate the sale on the basis that SLS’s partial priority was not adequately disclosed. The Court granted the motion, in an order dated January 2, 2024, finding the absence of express mention of SLS’s partial priority in the judgment or terms of sale constituted a lawful excuse to void the sale. The Court’s order also amended the judgment of foreclosure and sale to provide the subject premises be sold subject to the unsubordinated portion of SLS’s lien and directed that terms of sale shall include such notification.

Prior to the above events, a notice of appearance was filed in this action by US Bank Trust National Association, not in its Individual Capacity but Solely as Owner Trustee for VRMTG ASSET TRUST, assignee of Defendant Specialized Loan Servicing, LLC (“US Bank”). Concomitantly, US Bank commenced an action to foreclose on its mortgage (*see US Bank v Padilha*, Index No. 850132/2021). Home Loan joined issue in that action. By order dated October 27, 2022, US Bank’s motion for summary judgment and an order of reference was granted over Home Loan’s opposition. The Referee issued a report of the amount due, and US Bank moved for its confirmation as well as issuance of a judgment without accounting for the subordinated portion of its lien. US Bank withdrew this motion on July 25, 2024, without a stated reason.

Just prior to US Bank filing its motion, the premises was auctioned and purchased by non-party Elizabeth Bogdanova (“Bogdanova”) for a winning bid of \$277,000.00. The Referee accepted a deposit of \$35,000.00 and a memorandum of sale was executed. As of the date of this decision, neither the Referee’s report of sale nor a surplus monies form has been filed, so the final upset price is not known. Nevertheless, since the amount due, attorney’s fees and costs determined in the judgment over two years ago was \$302,506.28, it is clear there were no surplus monies from the sale.

Now, Bogdanova moves to set aside the sale, to intervene in this action and to vacate any default in the terms of sale. Home Loans opposes the motion. A successful bidder subjects themselves to the jurisdiction of the court (*see Matter of Matthew L.*, 78 AD3d 703, 704-705 [2d Dept 2010]). As part of the foreclosure process, it is within the equity power of the court to compel the successful bidder to close in accordance with the judgment and terms of sale (*see eg Nat’l Bank of Stamford v Van Keuren*, 184 AD2d 92, 96 [3d Dept 1992]). The court also possesses the inherent authority to vacate a sale where there is evidence showing the existence of fraud, collusion, mistake, or misconduct casting suspicion on the fairness of the sale (*see eg T11 Funding v Traynelis*, 166 AD3d 927, 928 [2d Dept 2018]).

Bogdanova claims as a basis to void the sale that marketable title cannot be given by the Referee. She avers that US Bank, through its servicer Fay Servicing, Inc. (“Fay”), has demanded satisfaction of its entire lien, including the sum this Court ordered subordinated. Attached to the motion was a payoff letter from Fay and an email from its counsel which stated as follows:

My client will not be releasing its lien unless the total amount is received by the date specified in the attached letter. Any subordination referenced in the related action would not reduce the payoff amount as it pertains to the foreclosure action commenced by my client under Index No. 850132/2021, which remains ongoing. Please be guided accordingly.

Contrary to what US Bank and its attorneys, Stern & Eisenberg, may believe, the subordination issue was raised and determined in *this action*, not US Bank’s foreclosure action. In its October 27, 2022, decision in US Bank’s action the Court recounted its partial subordination holding in this action and found that “[t]he issue of priority of these liens was decided and all the parties hereto are bound by that determination.” Indeed, the Court also noted that US Bank, via its counsel Stern & Eisenberg, “*acknowledged Home Loan’s partial priority in its reply*” (emphasis added). As to the finality of the subordination issue, despite service of notices of entry, no notice of appeal was filed in this case by US Bank, either from the interlocutory order determining the summary judgment motion or the final judgment of foreclosure and sale. As such, the subordination issue is ostensibly closed.

As to the effect of the above decision, the objective of any foreclosure action is “to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale” (*see Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, 404 [2d Dept 1983]). In other words, the outcome is a devolution of title leaving it in the same condition it was when the foreclosed mortgage was given (*see Scharaga v Schwartzberg*, 149 AD2d 578, 579 [2d Dept 1989]). Here, when the Court equitably subrogated the sum of \$81,228.46 of US Bank’s lien to Home Loan’s lien, that amount was, for all intents and purposes, severed and became an independent inferior lien. That new subordinate lien of \$81,228.46, as well as all interest accrued thereon, was therefore *extinguished* upon foreclosure of Home Loan’s superior lien, and it no longer encumbers the property or the purchaser at the sale, who took the property free of US Bank’s inferior lien of \$81,228.46.

US Bank’s insistence of full satisfaction of its lien despite the orders and judgment of this Court technically does not evidence the existence of fraud, collusion, mistake, or misconduct casting suspicion on the fairness of the sale chargeable to Plaintiff or the Referee. Further, there is no irregularity or omission from this Court’s judgment of foreclosure and sale which would inhibit the Referee from passing marketable title to Bogdanova. Given the foregoing, both cancellation of the sale or forfeiture of the deposit are, at this point, premature.

But Bogdanova’s position regarding the US Bank lien is entirely in accord with this Court’s judgment. US Bank and its counsel, by their appearances in this and its related litigation, are subject to the jurisdiction of this Court and answerable for flouting the directives of this Court. In that regard, US Bank, through its servicer and counsel, has taken a position that appears completely without merit in law, contrary to the determinations of this Court and smacks


of being undertaken primarily to delay transfer of title, and necessarily, the resolution of this litigation (*see* Part 130 of the Rules of the Chief Administrator [22 NYCRR]).

Accordingly, it is

ORDERED that non-party Elizabeth Bogdanova’s motion is held in abeyance, and it is

ORDERED that Defendant US Bank and Stern & Eisenberg shall show cause at a hearing before this Court on **October 1, 2024, at 10:00 a.m.** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street, why each should not be assessed sanctions and costs in this litigation based upon their seeming failure to acknowledge the partial subordination of its lien, and it is

ORDERED that in lieu of the above hearing, US Bank, via its servicer, may issue a corrected payoff letter to Elizabeth Bogdanova or her counsel recognizing subordination of \$81,228.46 of its lien and any accrued interest on that sum.

<u>8/26/2024</u> DATE			 FRANCIS KAHN, III, A.J.S.C. HON. FRANCIS A. KAHN III NON-FINAL DISPOSITION
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER J.S.C.
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		