

EverBank v Persaud

2025 NY Slip Op 33209(U)

July 9, 2025

Supreme Court, Kings County

Docket Number: Index No. 501840/2014

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP 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, 11201 on the 9th day of July, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Acting Justice.

✓ -----X
EVERBANK,
Plaintiff,

MS#10

- against -

Index No. 501840/2014 ✓

✓ DAVY PERSAUD; CAPITAL EQUITY
MANAGEMENT LLC; CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD; CITY OF
NEW YORK PARKING VIOLATIONS BUREAU;
CITY OF NEW YORK TRANSIT ADJUDICATION
BUREAU; MRS. "JANE" PERSAUD.

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed
Opposition Affirmation to Motion
Affirmation in Reply

124, 127
134, 135
141

Upon the foregoing papers in this action to foreclose on a mortgage encumbering the subject property at 1000 Crescent Street in Brooklyn, EverBank ("Plaintiff"), moves (under mot. seq. 10) for an order to (1) vacate the foreclosure sale held on March 21, 2024; (2) to relieve the successful bidder, Quality Spice Inc. ("Purchaser"), of its bid; (3) to direct the appointed referee to retain the purchaser's deposit until the completion of a new sale, after which the bid shall be returned minus the appropriate credits which shall be paid to plaintiff for its losses and costs in scheduling a new sale and; (4) to extend the

time by which to conduct a new foreclosure sale.

Background

On February 11, 2014, plaintiff commenced this foreclosure action. On November 20, 2018, judgment of foreclosure and sale was granted. A foreclosure sale was subsequently held on May 21, 2024. To secure its bid of \$365,000.00, Quality Spice Inc. ("Purchaser") deposited an amount of \$36,500.00 with the referee. A closing was to occur on or before April 20, 2024, pursuant to the terms of sale. Yet, as of date, no sale has been scheduled.

Plaintiff is now moving to hold the purchaser in default, to direct the referee to conduct a new sale, and to have the court direct the referee to retain in his IOLA account, the purchaser's deposit until a new sale is held. Plaintiff also requests that, after a new sale is held, the referee reimburse plaintiff for additional publication and scheduling costs, which shall be deducted from the purchaser's deposit before said deposit is returned. Further, plaintiff requests that should the new sale yield a final sales price that is lower than the amount bid by the purchaser, plaintiff requests that the referee also deduct the difference from purchaser's deposit, and remit said amount to plaintiff, prior to returning the deposit.

In opposition to plaintiff's motion, defendant contends that plaintiff's communication to conduct the time of essence closing was too limited to make it time of the essence and that plaintiff waived the requirement. Defendant further alleges that plaintiff sent correspondence to the wrong email address. Finally, defendant claims that purchaser was entitled to, but did not, receive clean marketable title.

2

In reply, plaintiff argues that both the terms of sale and initial contact letter sent to the purchaser, dated March 25, 2025, state that it is a time of the essence transaction required to close within 30 days of the date of sale. Additionally, plaintiff provides that purchaser made no attempts to contact the referee or plaintiff to close on the transaction until recently. Finally, plaintiff claims that purchaser has not demonstrated that he has the funds or a title commitment free of exceptions that would allow him to close.

Discussion

I. Time of the Essence

“When a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default” (*Donerail Corp. N.V. v. 405 Park LLC*, 100 A.D.3d 131, 137, 952 N.Y.S.2d 137). Where a seller seeks to hold a purchaser in breach of contract and retain the down payment, the seller must establish that they were ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for their failure to close (*Martocci v. Schneider*, 119 A.D.3d 746, 748, 990 N.Y.S.2d 240, quoting *Donerail Corp. N.V. v. 405 Park LLC*, 100 A.D.3d at 138, 952 N.Y.S.2d 137).

First, there is no question that plaintiff declared time to be of the essence with respect to the April 20, 2024, closing date. Plaintiff’s March 25, 2024, letter clearly and unequivocally stated that plaintiff was hereby making time of the essence, and the transaction is required to close within 30 days from the date of the foreclosure sale. The notice further provided that purchaser would be in default if it failed to perform its

obligations on the closing date. Second, in support of his motion, the plaintiff provides evidence to establish, prima facie, that it was ready, willing, and able to perform on the time-of-the-essence closing date. Plaintiff provides emails to purchaser regarding closing. The emails provide that plaintiff reached out to defendant on several occasions requesting a copy of purchaser's title commitment so plaintiff could proceed with closing. Plaintiff's emails went unanswered, and defendant contends this is due to an incorrect email address that purchaser claims he r does not regularly check as the Gmail storage capacity is nearly full. However, Exhibit C of plaintiff's motion provides an email from purchaser that states, "Apologies for the no response previously, I did not know if I wanted to close this transaction." As this shows that purchaser was in receipt of the emails and was not responding due to being unsure of whether he wanted to close, this court finds that plaintiff has sufficiently proven that they were ready, willing, and able to close, and purchaser failed to demonstrate a lawful excuse.

II. Clean Marketable Title

"As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title" (Jorgensen v. Endicott Trust Co., 100 A.D.2d 647, 648, 473 N.Y.S.2d 275). "A marketable title is 'a title free from reasonable doubt, but not from every doubt'" (Voorheesville Rod & Gun Club v. E.W. Tompkins Co., 82 N.Y.2d 564, 571, 606 N.Y.S.2d 132, 626 N.E.2d 917).

Here, purchaser failed to demonstrate that title to the subject property was unmarketable. Purchaser cites case law but makes no arguments or claims that specifically prove unmarketability. Absent any evidence of unmarketability or of

evidence of fraud, collusion, mistake, or misconduct, this court finds purchaser's argument unavailing.

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. ten) is granted in its entirety.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES

A. J. S. C.

5