[* 1]

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

PRESENT: KENNEY JOAN M. KENNEY J.S.C. Justice

PART 8

GRAND PACIFIC FINANCE CORP.

INDEX NO. 100018/09

MOTION DATE

- v -

ALEXANDER ASHKENAZI, ETAL.

MOTION SEQ. NO. 05

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 15 2012

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: 3-14-12

JOAN M. KENNEY J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 8

----------X

GRAND PACIFIC FINANCE CORP.,

Plaintiff,

Index # 100018/09

-against-

ALEXANDER ASHKENAZI, MURRAY W. BLYTT, ELIYAHU WEINSTEIN, PINE PROJECTS, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD AND THE NEW YORK CITY PARKING VIOLATIONS BUREAU,

Decision & Order

Defendants.

----------X

Kenney, J., M., J.

Zeichner Ellman & Krause LLP
Counsel for Plaintiff
575 Lexington Avenue
New York, New York 10022
(212) 223-0400

Richard Klass, Esq.
Counsel for Movant (004)
16 Court Street, 29th Fl.
Brooklyn, NY 11241
(718) 643-6063

Sol Mermelstein, Esq. (005)
Counsel for defendant
Alexander Ashkenazi
5521 New Utrecht Avenue
Brooklyn, NY 11219
(718) 436-8098

Motion sequences 004 and 005 are consolidated for decision.

In this foreclosure action, the allegedly successful bidder Amit Louzon (Louzon), moves in motion sequence 004, for an Order vacating a Memorandum of Sale, dated March 23, 2011, that was executed in connection with the auction of a lien attendant to a condominium unit known as 5D, located at 251 West 89th Street, New York, New York 10024.

Motion sequence 005, defendant, Alexander Ashkenazi (Ashkenazi), moves for: (1) an Order vacating his default in failing to answer or appear in the instant action; (2) an Order pursuant to CPLR 3211(a)(8) dismissing the instant action because

this Court lacks jurisdiction due to a failure to properly serve the pleadings, and (3) an Order vacating a stipulation dated December 30, 2009.

Factual & Procedural History

This action was commenced with the filing of the summons and complaint and notice of pendency on January 2, 2009. The case was commenced by the Board of Managers of The 251 Condominium (the condo), to foreclose a lien for unpaid common charges incurred by Ashkenazi, pursuant to Article 6, Section 6.2 of the condo by-laws.

Ashkenazi never appeared in the action and the condo entered a default judgment against him on December 30, 2007. This matter proceeded in the usual course with the appointment of a receiver and referee to compute. Ultimately, the condominium sold and assigned its perfected lien and this lawsuit to Grand Pacific Finance Corp. (Grand Pacific), Ashkenazi's mortgagee. The condo and Grand Pacific executed a stipulation of settlement on November 20, 2009, memorializing the foregoing. The consideration consisted of, *inter alia*, Grand Pacific paying the outstanding common charges, assessments and attorneys' fees the condo incurred relative to Ashkenazi's default in paying his common charges. Additionally, the Stipulation of Settlement specifically stated that plaintiff's mortgage lien was not extinguished and would remain a valid lien against the condo unit. The condo's common charge lien was being sold subject to the mortgage owned by

plaintiff.

On June 29, 2010, the final Judgment of Foreclosure and Sale was signed by Stallman, J.. The auction occurred on March 23, 2011. The hammer price of the foreclosed lien was $215,000.00. Immediately following the auction the referee determined that Louzon was the apparent successful bidder and Louzon signed a Memorandum of Sale which states in pertinent part as follows:

> "On acceptance of a bid at the [a]uction, the successful bidder ...shall deposit with the [r]eferee at least 10% of the bid price...at the time and place of the [auction].
>
> ... the successful bidder shall pay an additional payment of at least 40% of the [bid] price no later than March 28, 2011 by bank check...TIME IS OF THE ESSENCE, and the balance of the purchase price in cash or bank check payable to ... the [R]eferee on April 26, 2011...TIME IS OF THE ESSENCE."

It is undisputed that Louzon paid 10% of the hammer price ($215,000.00) or $21,500.00, in cash, to the referee on March 23, 2011, and never made any additional payments thereafter. Shortly after the auction, Louzon (through counsel) requested that the referee either extend his time to make the additional 40% ($86,000.00) payment or waive this requirement until closing.

In support of his application seeking, *inter alia*, to declare the Memorandum of Sale invalid, Louzon merely states that the amount of the additional payment is "unconscionable and should not be upheld." Louzon merely alleges that an open legal question

exists regarding the priority of the condo's lien and that of the mortgagee, the plaintiff herein. Specifically, Louzon does not allege that there was a disparity of bargaining power, or of duress, fraud, illegality or mutual mistake. Furthermore, Louzon states that the Memorandum of Sale he signed at the auction did not include any "time of the essence" clauses.

It is uncontested that on the day of the auction Ashkenzi was represented by counsel, who announced to those present that he had just filed pleadings and a lis pendens against the condominium unit about to auctioned. Notably, the foreclosure action was commenced on January 2, 2009, more than 27 months prior to the auction. Never once during this 2+ year period did Ashkenazi attempt to vacate his default in the foreclosure action. Ashkenazi's default in failing to pay the common charges to the condo was never challenged. Nor did Ashkenazi or his counsel ever attempt to challenge any of Hon. Michael Stallman's prior decisions or plaintiff's stipulation with the condo which clearly acknowledges the priority of the condo's lien over the underlying mortgage.[1]

Notwithstanding, Ashkenazi's allegation that he was never properly served with process in the originally captioned action brought by the condo to collect it's common charges, not once after

---

[1]Ashkenazi's application also seeks to "vacate" the stipulation entered into by plaintiff and the condo, dated November 20, 2009, without providing any authority for the Court regarding his standing to do so nor support for his request for "clarification" of the priority of the liens.

he states, he "found out" about the litigation, did he indicate that he or his counsel took any steps to assert any rights he might have had in the action as it proceeded prior to settlement of the claim, via the terms of the stipulation of November 20, 2009.[2] Ashkenazi baldly states that he intended to pay the common charges prior to the date of any auction of the unit, yet never reasonably explains why he did not attempt to cure his default before he made the current application. Ashkenazi finally asserts that because the caption changed substituting the instant plaintiff with the condo, he could not ascertain any way to intervene in the litigation.

Plaintiff supports its opposition to both applications with a veritable avalanche of documents refuting every one of the factual allegations made by both Louzon and Ashkenazi.

DISCUSSION

The threshold issue to be determined is whether this Court has properly acquired jurisdiction over Ashkenazi. The affidavit of service referred to in plaintiff's papers states in pertinent part, as follows:

---

[2]Ashkenazi's allegation that he was never served with process is belied by the admissions he has made in this action *and in a virtually identical action that was dismissed, see, Asheknazi v The Board of Mngrs. of the 251 Condominium and Grand Pacific Finance Corp.*, Index # 103530/11, New York County Supreme Court. In an affidavit opposing the motion to dismiss Ashkenazi admitted to seeing the pleadings herein and to defaulting in this action.

> Deponent went to subject premises [Ashkenazi's residence] and spoke with a person of suitable age and discretion. Deponent was advised that [Ashkenazi] was not available. Deponent left legal process with the person who answered the door.

CPLR 308 states in pertinent part as follows:

> Personal service upon a natural person shall be made by any of the following methods:
>
> 1. by delivering the summons within the state to the person to be served; or
>
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence ... .

A properly executed affidavit of service raises a presumption that a proper mailing occurred (*see, Engel v Lichterman*, 62 NY2d 943, 945 [1984]). Ashkenazi has failed to rebut this presumption. Any factual issues in relation to the service of the summons and complaint have been resolved on the papers submitted, thus obviating the necessity for any hearing; as the mere denial of receipt is insufficient to rebut the presumption of delivery (*Quantum Heating Services Inc. v Austern*, 100 AD2d 843, 844 [2nd Dept 1984]; *see also, Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 AD2d 706, 707 [1st Dept 1990]). Defendant's mere denial of receipt by mail at his home, without further probative

facts, is insufficient to overcome the presumption of delivery, which attaches to a properly mailed letter *(see, Colon v Beekman Downtown Hospital*, 111 AD2d 841 [2nd Dept 1985]).

Ashenazi's self-admitted intentional default does not satisfy the basic vacatur requirements set forth in CPLR 5015(a), which states in pertinent part as follows:

> The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: (1) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or (2) newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) lack of jurisdiction to render the judgment or order; or (5) reversal, modification or vacatur of a prior judgment or order upon which it is based.

Here, there is no issue as to default, newly-discovered evidence, fraud, misconduct, lack of jurisdiction, reversal, or vacatur of a prior judgment or order. Thus, the branch of his motion which seeks to vacate his failure to appear, which resulted in his default pursuant to CPLR 5015, must be denied.

The parties do not dispute that the memorandum of sale is a binding legal contract between the referee appointed by Hon.

Michael Stallman, and Louzon. It is hornbook law that one who enters into a written agreement is bound by it absent fraud or other wrongful conduct on the part of the other contracting party, not alleged here. The parties are presumed to know the contents of the agreements they have signed (*Superior Officers Council Health & Welfare Fund v Empire*, 85 AD3d 680 [1st Dept 2011], citing *Imero Fiorentino Assoc. v Green*, 85 AD2d 419, 420 [1st Dept 1982]). A person is usually bound by a contract which he or she signs even though his or her mind never gave assent to the terms expressed therein. An individual who signs or accepts a written contract, in the absence of fraud or other wrongful acts on the part of the other contracting party, is conclusively presumed to know its contents and to assent to them (*Imero, supra*, at 420).

Louzon's alternate theory in support of his motion also lacks any foundation in the law or facts of this case. Louzon contends that the payment of 40% of the hammer price prior to closing is "unconscionable" without providing the Court with any authority to support his argument. Whether a requirement that the purchaser shall pay 40% on prior to closing is so unreasonable as to justify a resale depends upon the surrounding circumstances. (*See, Portnoy v. Hill*, 10 Misc2d 1004, 1007 [NY SUP 1956]).

In the case at bar, taking into consideration such surrounding circumstances as the pending foreclosure action of the first mortgage, the existence of real estate tax liens amounting to

approximately $118,000.00, and additional liens that had already been reduced to judgments totaling about $2,800.00, it cannot be said that the referee's determination to require a deposit of 40% additional payment before closing was unreasonable. Nor was the price paid for the [lien] at the foreclosure sale so low as to shock the conscience of the court (*NYCTL-1 Trust v Liberty Bay Realty Corp.*, 21 AD3d 1013, 1015 [2d Dept 2005]). Louzon's motion is timely because such a motion must be made within one year after any sale made pursuant to a judgment or order, but not thereafter. This Court, upon such terms as may be just, may set aside a judicial sale for failure to comply with the requirements of the civil practice law and rules as to the notice, time or manner of such sale, or if a substantial right of a party was prejudiced by the defect (*see*, CPLR §2003). None of the foregoing has occurred here.

Finally, Louzon argues that the stipulation between the condo and plaintiff herein should be vacated. The Court has considered this allegation and determines that the record before this Court is devoid of any factual or legal support for such a contention. He party cannot rely upon his own ignorance of a condition in the contract which he could have discovered using ordinary care, e.g., not reading the contract or "not remembering TIME OF ESSENCE" clauses (*P.K. Development, Inc. v. Elvem Development Corp.*, 226 A.D.2d 200 [1st Dept 1996]). Consequently, and for the reasons set

forth above, both motion sequences 004 and 005 are denied in their entirety. Any argument not addressed herein was considered and deemed inadequate.

Accordingly it is,

ORDERED that the motions are denied in their entirety.

Dated: March 12, 2012.

E N T E R:

Hon. Joan. Kenney