

BMB Props, LLC v Arandia

2013 NY Slip Op 33268(U)

December 16, 2013

Supreme Court, New York County

Docket Number: 102317/02

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 12/27/2013
[* 1]
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Joan A. Wadler
Justice

PART 11

Index Number : 102317/2002
BMB PROPERTIES, LLC.
vs.
ARANDIA, ALEX
SEQUENCE NUMBER : 014
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is ~~is~~ *and cross motion are decided*
in accordance with the annexed Memorandum Decision + Order

FILED

DEC 18 2013

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COUNTY CLERK'S OFFICE

DEC 18 2013

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

Dated: December 16, 2013

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BMB PROPERTIES, LLC,

Plaintiff,

INDEX NO. 102317/02

-against-

ALEX ARANDIA, ELIZABETH ARANDIA,
ET AL,
Defendants

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JOAN A. MADDEN, J.:

Plaintiff BMB Properties, LLC ("BMB") moves for an order granting reconsideration of the court's decision and order dated December 17, 2012 ("the original decision") which denied BMB's motion to vacate the Referee's Report and Recommendation dated December 23, 2011.¹ Defendant Forcap LLC ("Forcap"), which was assigned the interest in this action, and was granted permission to intervene opposes the motion and cross moves for an order, to compel BMB to comply with the direction in the original decision that BMB deposit the \$37,624.04 it received in surplus moneys with the Clerk of the Court, and to compel defendant Alex Arandia to deposit \$34,368.24 in surplus moneys with the Clerk of the Court. There is no opposition to the cross motion. For the reasons below, the motion is denied and the cross motion is granted².

Background

This dispute concerns the proper distribution of surplus moneys from a mortgage foreclosure sale. BMB was the holder of a junior mortgage secured by condominium unit 17-A

¹BMB moved to vacate the Report instead of seeking to reject it.

²On November 8, 2013, almost four months after the July 15, 2013 submissions date defendant Alex Arandi, as attorney representing himself pro se, submitted a cross motion, without seeking court permission to do so, for an order dismissing this action and to vacating the original order. Under these circumstances, the court will not consider Arandi's cross motion.

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at 52-54 East End Avenue, New York, NY (“the Unit”). The mortgagors were Mr. Arandia, and his wife, defendant Elizabeth Arandia. On or about July 22, 2004, Forcap, as the highest bidder in the foreclosure sale, purchased the Unit for \$201,000, which was in excess of the junior mortgage and there was a surplus of \$71,992.29. The surplus was deposited with the Clerk of the Court by the referee appointed to sell the property. Under the terms of sale, the Unit was sold subject to, *inter alia*, “the lien of the 52 East End Avenue Condominium for common charges, assessments, utility charges.” However, the lien for common charges was not paid out of the proceeds of the sale.

On November 4, 2005, Forcap sold the Unit to a third-party. However, before the Condominium would agree to waive its right of first refusal to purchase the Unit, the Condominium required Forcap to pay the \$171,076.38 in outstanding amounts due and owing it for common charges on the Unit. The Condominium then assigned to Forcap all of its right, title and interest in the subject matter of the instant action, including the right to intervene and to obtain an order directing the Clerk of this Court to return the surplus moneys deposited in connection with the sale.

By decision and order dated February 21, 2006, Justice Walter Tolub ordered that “the issue of what monies, held by the New York County Clerk’s office, if any, are owed to any of the parties in this action is referred to a Special Referee to hear and report with recommendations....³” On April 10, 2006, a hearing was held before Special Referee Les Lowenstein to address the distribution of the surplus. Only BMB and Mr. Arandia appeared at the hearing and stipulated to divide the \$71,992.29 surplus, with \$37,624.04 going to BMB and

³It appears that at the time the order was made Judge Tolub may not have been aware that Forcap had paid the lien and the parties he referred to in the order were Arandia, BMB and the Condominium. However, this has no impact on the merits of Forcap’s claim to the surplus since, as indicated below, it was subsequently clarified that Forcap has a right to go before the Special Referee.

\$34,368.24 going to Mr. Arandia⁴, and the stipulation was so-ordered (hereinafter “the April 10 stipulation”). On or about April 24, 2007, Forcap moved to vacate the April 10 stipulation, asserting that it had not been notified of the hearing.

On February 20, 2008, after hearing oral argument, Justice Tolub issued an order vacating the stipulation. Judge Tolub required Forcap to settle an order on notice embodying the court’s decision to vacate the April 10 stipulation. On April 16, 2008, counsel for Forcap served all parties with a proposed order and submitted it to the court. Justice Tolub retired in December 2009 without signing the proposed order.

Forcap then moved to have this court enforce Judge Tolub’s February order and send the issue regarding the distribution of surplus back to a Special Referee. BMB opposed the motion, arguing that (1) as the common charges were paid fully to the Condominium it had nothing to assign, (2) that under Real Property Law section 339-z, Forcap as the purchaser was obligated to pay the common law charges at the closing, and that (3) the liens for the common charges were removed from the record so that there was nothing left to pay. Mr. Arandia, who appeared *pro se*, opposed the motion on similar grounds, and also argued that Forcap lacks standing as it was never formally added as an intervenor and should be held in contempt for its failure to comply with Judge Tolub’s order. BMB also separately moved for reargument of Judge Tolub’s order, asserting many of the same arguments made in opposition to Forcap’s motion, and for disqualification of Forcap’s attorneys.

By decision and order dated May 12, 2011, this court granted Forcap’s motion to enforce Judge Tolub’s order to the extent of referring the legal and factual issues regarding the entitlement of BMB, Arandia and Forcap to the surplus of the relevant foreclosure sale to a

⁴The parties’ share of the surplus add up to one cent less than the total surplus of \$71,992.29.

Special Referee to hear and report and to make recommendations, and denied BMB's motion for reargument of Judge Tolub's February 28, 2008 order or for disqualification of Forcap's attorneys.

The matter was then referred to Special Referee Louis Crespo. The matter was originally scheduled for September 8, 2011 and was adjourned by the Referee Clerk to November 17, 2011. On that date, the attorney for Forcap appeared but neither BMB nor Mr. Arandia were present. On November 17, 2011, Mr. Barry Bernstein, Esq., telephoned and made an oral application for an adjournment on the ground of an office conflict. Over Forcap's objection an adjournment was granted until November 28, 2011. The attorneys for both Forcap and BMB as well as Mr. Arandia appeared on November 28, 2011, but the matter was adjourned so that the County Clerk's file could be obtained. The matter was adjourned to December 22, 2011 and the parties all confirmed their availability on that date.

On December 22, 2011, Forcap appeared at the hearing by counsel and Mr. Arandia appeared *pro se* on behalf of himself and Elizabeth Arandia. However, BMB was not present at the hearing. Referee Crespo found him in default. Referee Crespo stated "[I]et the record reflect that plaintiff's attorney has not appeared, Mr. Barry Bernstein, I have learned this morning that he attempted to call offices yesterday; a message was left but it was garbled and I now presume, that it was his call regarding his unavailability today. I have not received an affidavit or fax from Mr. Bernstein with respect to his inability to be present." (Transcript of 12/22/11 hearing at 4). The record shows that Mr. Bernstein notified Mr. Arandia of his need for adjournment but did not contact counsel for Forcap. Referee Crespo then stated "I'm going to deem him (i.e. Mr. Bernstein) in default in the absence of a fax or affidavit to this court. He may make his application to vacate the default before Judge Madden." (*Id.*).

During the hearing, testimony was taken from Boris Sorin, Esq. counsel for Forcap. Mr.

Sorin testified in a narrative form and was questioned by Mr. Arandia. Mr. Arandia raised several issues during the hearing that the Special Referee stated were reserved for this court, including whether a January 26, 2006 discharge order issued by the bankruptcy court of the Southern District of New York, which Mr. Arandia asserts discharges all claims of the condominium against the bankrupt estate and would thus preclude Forcap from recovering the surplus from the sale. In his report, Referee Crespo also noted, however, that the “bankruptcy filing claimed by Mr. Arandia was known by Mr. Arandia as far back as mid-2005, but no mention of the filing was made before Judge Madden in support of the various arguments that the hearing should not go forward.” Referee’s Report at 4.

After hearing testimony from Mr. Sorin, and considering the documents in the court file, Referee Crespo found that Forcap was entitled to the monies held by Mr. Arandia and BMB and that the money “should be returned to the court to be distributed to Forcap as the assignee of the liens for unpaid common charges that were duly purchased by Forcap. In reaching this conclusion, Referee Crespo rejected Mr. Arandia’s argument that Mr. Sorin’s testimony was not credible due to an alleged interest in the outcome of the action, writing “I find his testimony credible and supported by an extensive record, which I note consist of two file folders pulled from the County Clerk.” Referee’s Report at 7.

BMB then moved to vacate the report raising various issues including (1) whether the Referee properly held Mr. Bernstein in default, (2) whether January 26, 2006 discharge order issued by the bankruptcy court precludes Forcap’s recovery of the mortgage surplus, (3) whether Forcap’s alleged breached of an April 19, 2005 Termination Agreement made in connection with the sale of the Unit at auction prevents Forcap’s recovery, (4) whether Sorin should have been precluded from testifying at the hearing since he is an attorney for Forcap. The motion to vacate the report also repeated various arguments previously raise and rejected by this court.

Oral argument on BMB's motion to vacate was originally scheduled for November 1, 2012 and was adjourned to November 14, 2012, appearing due to Hurricane Sandy. Counsel for Focap appeared for oral argument of the motion. However, Mr. Bernstein failed to appear on behalf of BMB.

The court denied the motion finding that (1) the record supported the Referee's finding that BMB was in default, (2) the Referee properly considered Mr. Sorin's testimony despite his status as counsel for Forcap, (3) that Forcap's alleged breach of an April 19, 2005 Termination Agreement, did not affect its rights to surplus funds, and (4) that the discharge of Mr. Arandi's debt in bankruptcy did not affect Forcap's right to surplus moneys. The court then ordered that within 20 days of the date of the order that (1) BMB Properties, LLC deposit the \$37,624.04 it received in surplus moneys with the Clerk of the Court, and that (2) Alex Arandia deposit \$34,368.24 in surplus moneys with the Clerk of the Court. Neither defendant has complied with the court's order.

Five months after the issuance of the court's order, BMB filed this motion seeking reconsideration. BMB argues that the court erred in hearing oral argument on the motion as BMB's counsel did not receive notice of oral argument which was rescheduled from the original hearing date due to Hurricane Sandy. In addition, BMB argues that the court erred in not addressing Real Property Law § 339-z under which BMB asserts that Forcap, as seller, was obligated to pay the common charges at the sale of the property, and that by failing to pay such charges Forcap violated the statute. BMB also asserts that under RPL 339-aa, which provides that a lien for a condominium unit expires six years from the date it is filed, Forcap's application to recover outstanding common charges is untimely as the liens at issue were filed on September 23, 2003 and February 25, 2005.

Forcap opposes the motion, asserting that BMB made no attempt to adjourn the motion

and waited five months after the original decision was issued to seek relief. As for the merits of the motion, Forcap notes that the court has rejected BMB's argument that Forcap is not entitled to surplus funds based on RPL § 339-z on numerous occasions, and that in any event, Forcap as an assignee of the common charges held by the Condominium, has priority over BMB. As for the statute of limitations argument, Forcap asserts that this argument is being raised for the first time on this motion and that it is without merit as its right to surplus funds has not expired.

BMB's motion to reconsider is denied. As a preliminary matter, even assuming *arguendo* that BMB's counsel was unaware of the adjourned date for oral argument on its motion to vacate, BMB provides no explanation for its failure to seek reconsideration until five months after the original decision was issued. Moreover, the arguments raised by BMB are unavailing. RPL § 339-z, which imposes a lien for unpaid common charges and provides that such charges shall be paid prior to all other charges except for the first mortgage of record, does not provide a basis for denying Forcap recovery for unpaid common charges assigned to it. As an assignee of the common charges, its claim would be superior to that of BMB which had a second mortgage on the property. Furthermore, the fact that Referee erroneously applied the proceeds of the sale first to pay off BMB's junior mortgage before paying the common charges does not deprive Forcap of its right to recover the surplus.

Next, contrary to BMB's belated statute of limitation argument, which is waived in any event, the six-year limitations period provided under RPL § 339-aa for seeking recovery on lien for common charges does not apply here where the enforcement of the lien has been timely achieved through a foreclosure sale and the only issue is the entitlement to the surplus moneys from such sale.

Finally, as the court adheres to its original decision, the cross motion to compel is

granted.

In view of the above, it is

ORDERED that BMB's motion for reconsideration of the original decision is denied; and it is further

ORDERED that the cross motion is granted and within 20 days of the date of this order (1) defendant BMB Properties, LLC is directed to deposit the \$37,624.04 it received in surplus moneys with the Clerk of the Court, (2) defendant Alex Arandia is directed to deposit \$34,368.24 in surplus moneys with the Clerk of the Court; and it is further

ORDERED that in the event that defendants do not comply with the immediately proceeding paragraph, Forcap may apply to the court for relief; and it is further

ORDERED that after defendants deposit the surplus moneys with the court, Forcap may submit an order to this court applying for the release of the surplus moneys to it.

DATED: ~~December 18, 2013~~ *December 16, 2013*



J.S.C.

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