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| BMB Properties, LLC v Arandia |
| 2012 NY Slip Op 33023(U) |
| December 17, 2012 |
| Supreme Court, New York County |
| Docket Number: 102317/02 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden
Justice

PART II

Index Number : 102317/2002
BMB PROPERTIES, LLC.
vs.
ARANDIA, ALEX
SEQUENCE NUMBER : ~~012~~ 013
VACATE

INDEX NO. _____
MOTION DATE 11/14/12
MOTION SEQ. NO. 013

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 decided in accordance with
the attached Memorandum Decision Order.

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

FILED

DEC 19 2012

CLERK'S OFFICE

Dated: December 17, 2012

[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
-----X

JOAN A. MADDEN, J.:

Plaintiff BMB Properties, LLC (“BMB”) moves for an order vacating the Referee’s Report and Recommendation dated December 23, 2011, and for other related relief. Defendant Alex Arandia joins in the motion. Defendant Forcap LLC (“Forcap”), which was assigned the interest in this action, and was granted permission to intervene opposes the motion.

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 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 thus 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.”

[* 3]

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....”¹ 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 \$34,368.24 going to Mr. Arandia², 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

¹It 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.

²The parties’ share of the surplus add up to one cent less than the total surplus of \$71,992.29.

[* 4]

the stipulation writing that "I am going to vacate the stipulation that was entered into between Arandia and [BMB's counsel] to the extent of directing that this matter be referred back to Referee Lowenstein to make a determination and include within [counsel for Forcap's] application to allow Forcap's counsel to appear and make any representation. I will withhold judgment on the whole matter until Referee Lowenstein makes a determination to be forwarded to me for approval....Everyone is back to square one."

Judge Tolub also 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. It is unclear from the record what circumstances were involved in the proposed order never being signed or why Forcap failed to follow up after submitting the proposed order the court.

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. Forcap opposed the motion, asserting that most of the arguments made by BMB were previously made before Judge Tolub, prior to his issuance of the February order, and that BMB made the same argument before Judge Tolub that Forcap's counsel should be disqualified.

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 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.

Discussion

The issues raised on this motion to vacate the Referee's report are (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 repeats various arguments previously raise and rejected by this court.

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility...since the Special Referee is considered to be in the best position to determine the issues presented." Nager v. Panadis, 238 AD2d 135, 136 (1st Dept 1997).

In this case, the record supports the Referee's finding that BMB was in default. Notably, BMB had previously been given an adjournment over Forcap's objection, despite Mr. Bernstein's apparent failure to give advance notice of the need for such an adjournment. Furthermore, the record reveals that before finding BMB in default for not appearing at the December 22, 2011 hearing, Referee Crespo found that BMB had not notified Forcap's counsel that it was seeking an

adjournment and Referee Crespo noted that he had not received an affidavit or fax from Mr. Bernstein seeking an adjournment but rather, the only evidence of such a request was a "garbled" message left on the Referee's office answering machine. Under these circumstances, BMB was properly found in default.

Next, the court finds that the Referee properly considered Mr. Sorin's testimony despite his status as counsel for Forcap. In this connection, the court notes that the defendants' previous motions to disqualify Forcap's counsel have been denied. In addition, the Referee considered and rejected Mr. Arandia's argument that Mr. Sorin's testimony was not credible due to an alleged interest in the outcome of the action, noting that his testimony was supported by the documentary evidence.

As for Forcap's alleged breach of an April 19, 2005 Termination Agreement, the court notes that defendants first raised this issue in connection with BMB's motion to vacate the Referee's Report. Moreover, as Forcap points out, there is no mention of waiver of any rights to surplus funds under the agreement and, in any event, Forcap acquired its rights to the surplus funds via assignment from the Condominium eight months after the date of the Termination Agreement.

Next, Mr. Arandia's assertion that Forcap may not recover the surplus moneys as Mr. Arandia's debt was discharged in bankruptcy is disingenuous. As a preliminary matter, any order in the bankruptcy court discharging Mr. Arandia's debt would have no impact on Forcap's right to collect surplus moneys erroneously paid to BMB. As for Mr. Arandia, the court notes that he fails state the legal basis for his right to any funds which constitute the allegedly discharged debt. Moreover, the court notes that Mr. Arandia failed to raise the discharge order until the

December 2011 hearing before the Referee, even though the proper distribution of the surplus has been an issue in this action since at least February 2006.

In view of the above, it is

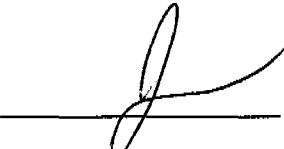
ORDERED that BMB's motion to vacate the Referee's Report is denied and the Referee's Report is confirmed; and it is further

ORDERED that 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 17, 2012



J.S.C.

FILED
DEC 19 2012
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