

**Board of Mgrs. of 50 Pine St. Condominium v
Midownik**

2013 NY Slip Op 32272(U)

September 23, 2013

Sup Ct, NY County

Docket Number: 110020/2009

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 110020/2009
50 PINE STREET
vs.
MIODOWNNIK, HELA
SEQUENCE NUMBER : 014
CONFIRM/REJECT REFEREE REPORT

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 *decided in accordance with the attached memoranda decision and order*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/22/13

hcs, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 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 61

-----X
BOARD OF MANAGERS OF 50 PINE STREET
CONDOMINIUM,

Plaintiff,

-against-

HELA MIDOWNIK, WASHIGTON MUTUAL
BANK a/k/a JP MORGAN CHASE, et al.

Defendants.
-----X

DECISION AND
ORDER
Index No. 110020/2009

Mot. Seq. 014

HON. ANIL C. SINGH, J.:

Plaintiff moves for an order confirming a referee's report of sale and to enter a deficiency judgment against defendant, Hela Miodownik. Defendant, Hela Midownik, opposes the motion.

Plaintiff obtained a Judgment of Foreclosure and Sale, dated November 4, 2011, ordering the liened premises be sold at public auction. Pursuant to this judgment, on November 28, 2012, the premises was sold at auction to the Plaintiff in this action for the sum of \$20,000. The total amount due to the plaintiff was \$116,889.49. Therefore, there is a deficiency of \$96,889.49. The deed was signed on March 22, 2013. The present motion was made on June 20, 2013. On June 21, 2013 the Notice of Motion was returned to Plaintiff for correction with instructions to re-file. The reason a correction was needed is that the notice of motion did not state that the motion was "returnable in submission part room 130 @ 9:30 am." The correction was made and the notice of motion was re-filed on June 21, 2013. This is an E-filed case and the present motion was submitted via E-filing. The confirmation notice from NYSCEF indicates that an e-mail notification of the filing was sent to Adam Allan, attorney for the plaintiff, on June 20, 2013.

Defendant offers three arguments as to why the motion should not be granted. First, that the motion was not timely. Second, that the motion was not properly served. Third, that the valuation of the property was incorrect. These arguments are without merit.

RPAPL 1371(2) states as follows:

Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

Defendant argues that she was required to be served by hand. This argument is without merit. RPAPL § 1371(2) requires service personally or in such other manner as the court may direct. In e-filed cases, service is permitted or required by electronic means.

“After commencement of an action wherein e-filing is authorized, documents may be electronically filed and served, but only by, and electronic service shall be made only upon, a party or parties who have consented thereto.” 22 NYCRR § 202.5-b. In mandatory E-file cases “filing and service of all documents in an action that has been commenced electronically in accordance with this section shall be by electronic means.” 22 NYCRR § 202.5-bb.

In the present case, service upon Defendant's attorney was accomplished in accordance with the rules for e-filed cases via email notification on June 20, 2013. Therefore, Defendant was properly served.

Defendant argues that the motion was untimely because the corrected version of the notice of motion was submitted ninety-one (91) days from the date the deed was delivered. However, Defendant's attorney, Adam Allan, has attached as exhibits to his affirmation copies of the notification he received from NYSCEF, the notification stating that the notice of motion was returned for correction on June 21, the June 21 notification of the corrected notice of motion, and the corrected notice of motion. These documents are consistent in showing that the date the notice of motion was filed was June 20, 2013. The only inconsistency is that the corrected notice of motion shows that it was received 06/21/2013. The Supreme Court Records On-Line Library (SCROLL) website reveals that the motion was filed on 6/20/2013. Therefore, the motion was timely filed.

Furthermore, the notice of motion was returned to correct a mere ministerial error, the defective notice of motion provided Defendant with notice of Plaintiff's claim. Therefore, entry of a deficiency judgment is appropriate. *See Roosevelt Sav. Bank v. Tsotsos*, 215 A.D.2d 547 (2d Dep't 1995) ("[T]he defendants here were served with and had notice of the bank's claim. The statute "was not designed to provide loopholes to a mortgagor to escape an obligation assumed by him" (*Catholic Women's Benevolent Legion v Burke*, 253 AD 261, 264[1st Dep't 1938])). Accordingly, the bank's motion to confirm the Referee's report of sale and to direct the entry of a money judgment for the deficiency is granted.")

Defendant argues that the deficiency judgment cannot be confirmed because the motion

lacks an affidavit regarding the reasonable market price of the property at the time of the sale. Plaintiff provides the affirmation of its attorney, Steven Einig, Esq., to establish the value of the property at the date of sale. Attached as Exhibits to the affirmation of Steven Einig, Esq. are copies of the deeds reflecting the sale of another, larger, unit on the same floor as Defendant's apartment and evidence of the mortgage debt on the premises. The larger apartment sold in June, 2013 for \$1,230,000. Plaintiff calculates the mortgage debt on the property to be at least \$1,207,483. Plaintiff contends that, taken in conjunction, these establish that the property has no value. Nevertheless, Plaintiff is willing to concede a value of \$20,000, the amount it bid at auction, to the property. No affidavit regarding the value of the property having been submitted, there is a question as to the value of the property at the time of sale.

For the above stated reasons, upon all of the papers submitted in support of and opposition to the motion, it is hereby

ORDERED that the motion of the plaintiff be granted to the extent provided herein, and it is further,

ORDERED, that the Report of Sale of Godfrey Murrain, Esq., Referee, dated March 19, 2013, and filed herein be, and the same hereby is, approved, confirmed and ratified, and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. The issue of the value of the property at the time the premises was bid at auction, and

2. The amount, if any, of any deficiency;

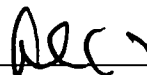
and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that counsel for plaintiff shall within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, upon the Special Referee Clerk in the Motion Support Office (Room 119M) who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes the decision and order of the court.

Date: 9/23/13
New York, New York



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE