

BOFI Fed. Bank v Davis
2019 NY Slip Op 31078(U)
April 17, 2019
Supreme Court, New York County
Docket Number: 850394/2013
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

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INDEX NO. 850394/2013

BOFI FEDERAL BANK,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 008

- v -

KIM DAVIS, JPMORGAN CHASE BANK, N.A., BOARD OF MANAGERS OF PERLA'S PUEBLA CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, AMERICAN EXPRESS CENTURION BANK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 15,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 138, 139, 140, 141 were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the motion by plaintiff to confirm the Referee's report and for a judgment of foreclosure and sale is granted without opposition; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment (exhibit A), or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 90 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of Elaine Shay, Esq. who is appointed Referee for this purpose; and it is further

ORDERED that the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the following publication New York Law Journal; and the

referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 90 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale unless otherwise stipulated by all parties to the sale and the Referee; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the

property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may, become liens on the property, in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's statutory fees for conducting the sale, which are \$1,100.00. Plaintiff shall compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed;

3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report \$786,804.07 plus interest at the reduced note default rate of 4.125% per annum from December 1, 2018 through the date judgment is entered, and then at the statutory rate from entry of judgment until the deed is transferred, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale paid since the date of computation (and therefore not already included in the computation) upon presentation of receipts for said expenditures to the Referee,
 - b. Costs and Disbursements: _____ (to be filled in and taxed by the clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment;
 - c. Additional Allowance: none
 - d. Attorneys' Fees: to be determined, as requested by plaintiff, at a hearing before the special referee.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assigned is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment against defendant Kim Davis in accordance with RPAPL 1371 if applicable;

ORDERED that the property shall be sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the

date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person obtaining an interest in the property after the Notice of Pendency are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elect to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF; and it is

ORDERED that Plaintiff shall file a written report with the Court (via NYSCEF) within 5 months from the date of this judgment stating whether the sale has occurred and, if applicable, the outcome of the sale; and it is further

ORDERED that the Referee shall e-mail Thomas Maser (tmmaser@nycourts.gov) to inform the Court about the auction date; and it is further


ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is

ORDERED that the caption herein shall be changed to reflect the new name of the plaintiff, AXOS BANK, and within 20 days after this order appears on NYSCEF, plaintiff shall serve the County Clerk and Clerk of Trial Support, in accordance with e-filing protocols, with a copy of this order and those clerks are respectfully directed to amend the records accordingly (and, when the clerk enters the costs and other items in this judgment, the clerk is authorized to cross off the "BOFI" plaintiff in the caption of this judgment and replace it with AXOS BANK).

A description of the premises is annexed hereto as exhibit A.

4/17/2019

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Schedule A Description

All that certain piece or parcel of real property, with the improvements therein contained, situate and being a part of Perla's Pueblo Condominium in the City, County and State of New York, known and designated as Unit No. 6D together with a 3.85 undivided interest in the common elements of the Condominium hereinafter described as the same is defined in the Declaration of Condominium hereinafter referred to.

The real property above described is a Unit shown on the plans of a Condominium prepared and certified by Susan M. Melamud, LICENSED Professional Engineer, and filed in the Office of the Clerk of the County of New York on the 9th day of November, 2001 as Map No. 5043 defined in the Declaration of Condominium entitled, "Perla's Pueblo Condominium" made by Faldan Realty Co. under Article 9-B of the New York Real Property Law dated July 16, 2001 and recorded in the Office of the Clerk of the County of New York on the 9th day of November, 2001 in Liber 3388 of Conveyances, at page 1835 covering the property therein described. The land area of the property is described as set forth in Schedule A, annexed hereto and made a part hereof.

All that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, County, City and State of New York, bounded and described as follows:

Beginning at the corner formed by the intersection of the southerly side of East 6th Street and the westerly side of Avenue D;

Running thence southerly along the westerly side of Avenue D, 76 feet;

Thence westerly and parallel with the southerly side of East 6th Street and part of the distance to a party wall, 89 feet;

Thence northerly and parallel with the westerly side of Avenue D, 76 feet to the southerly side of East 6th Street;

Thence easterly along the southerly side of East 6th Street, 89 feet to the corner aforesaid at the point or place of Beginning.