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| NYCTL 2015-A Trust v Masin |
| 2019 NY Slip Op 33522(U) |
| November 26, 2019 |
| Supreme Court, New York County |
| Docket Number: 650351/2016 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 650351/2016

NYCTL 2015-A TRUST and THE BANK OF NEW YORK
MELLON AS COLLATERAL AGENT AND CUSTODIAN
FOR THE NYCTL 2015-A TRUST,

MOTION SEQ. NO. 003 and 004

Plaintiffs,

- v -

GEORGE MASIN, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, and BOARD OF MANAGERS OF THE
GALLERY HOUSE CONDOMINIUM,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 95, 96, 97, 98, 99, 100, 101

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for MISCELLANEOUS

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This action to foreclose on a tax lien was commenced by NYCTL 2015-A Trust (“the trust”) and the Bank of New York Mellon (“BONY”) as Collateral Agent and Custodian for the NYCTL 2015-A Trust (collectively “plaintiffs”) against George Masin (“Masin”), the New York City Environmental Control Board (“ECB”), Board of Managers of the Gallery House Condominium (“GHC”), and John Does No. 1 through 100 (collectively “defendants”). In motion sequence 003, Masin moves, by order to show cause (“OSC”), to: 1) vacate a default judgment of foreclosure and sale against him entered January 9, 2019 (Doc. 46); 2) stay

enforcement of the said default judgment pending the determination of this application; 3) providing Masin 30 days to serve an answer in this action; 4) vacating and setting aside the foreclosure sale conducted by Referee Kenneth J. Glassman (“Referee Glassman”) on June 5, 2019; 5) staying the transfer of the Referee’s Deed pending the determination of this application; 6) granting a traverse hearing to determine whether Masin was properly served in this action; and 7) for such other and further relief as this Court deems just and proper.

In motion sequence 004, Masin moves for an order: 1) vacating and canceling the foreclosure sale; 2) directing plaintiffs or their attorneys to accept the funds being held in escrow by Masin’s attorney to satisfy the tax lien on the property; 3) rescheduling the foreclosure sale if Masin does not satisfy the outstanding tax liens within 10 days of a court order directing him to pay the same; 4) authorizing Referee Glassman to tender the defaulted auction escrow deposit to plaintiffs; 5) sanctioning plaintiffs and/or their attorneys for frivolously prolonging this litigation by refusing to accept payment from Masin; and 6) for such other relief as this Court deems just and proper. Doc. 92.

Defendant Masin and nonparty Adam Plotch oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the applications are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This is an action to foreclose a tax lien on real property located in New York County known as Block 1271, Lot 509, also known as 77 West 55th Street, Unit 5J (“the property” or “the apartment”). Plaintiffs the trust and BONY, the holder and servicer of a New York City tax lien on the apartment, respectively, commenced this action by filing a summons and complaint

against defendants on January 21, 2016. Doc. 1. In their complaint, plaintiffs alleged that Masin, the owner of the property, owed them, inter alia, the tax lien balance of \$28,903.64, plus 9% interest compounded daily since May 26, 2015. Doc. 1 at par. 12. Plaintiff named the ECB and GHC as defendants because they “have or may claim to have a mortgage lien, judgment lien, or possible interest against the property which is subordinate to the [p]laintiffs’ lien.” Doc. 1. John Does 1 – 100 were named as persons or entities who might have a claim to the property. Doc. 1.

ECB was served with process on February 4, 2016. Doc. 5. Masin was served with the summons and complaint pursuant to CPLR 308(4) (“affix and mail”) on February 19, 2016, the fifth occasion on which the process server attempted to serve him. Doc. 7. GHC was served on March 4, 2016. Doc. 9. Of these defendants, only GHC answered the complaint.

In September 2016, plaintiffs moved (motion sequence 001), pursuant to RPAPL 1321, to appoint a referee to compute the amounts owed to them based on the foreclosure of the tax lien on the property, to determine whether the parcel could be sold in one or more parcels, to excise John Does 1 – 100 from the caption, and, in effect, for a default judgment against Masin and ECB. Doc. 10. By order entered November 28, 2016 (“the 11/28/16 order”), this Court granted a default judgment against Masin and ECB, appointed Referee Glassman to compute the amount owed by Masin, and ordered that John Does 1 – 100 be deleted from the caption. Doc. 22. On November 30, 2016, plaintiffs served the 11/28/16 order with notice of entry on Masin, GHC, and Referee Glassman. Doc. 24.

In a report filed December 30, 2016, Referee Glassman represented that, as of December 1, 2016, Masin owed \$33,240.15, including interest, on the tax lien. Doc. 26.

On January 16, 2017, plaintiffs moved (motion sequence 002) for entry of a judgment of

foreclosure and sale, to confirm Referee Glassman's report, as well as for legal fees, costs and disbursements. Doc. 30. On January 9, 2019, this Court issued an amended judgment of foreclosure and sale directing Referee Glassman to sell the property, in one parcel, at a public auction. Doc. 46.¹ A second amended judgment of foreclosure and sale, directing that notice of the foreclosure sale be published in Crain's New York Business ("Crain's") instead of in the Village Voice, as initially ordered, was filed on April 15, 2019. Doc. 56.

On April 25, 2019, plaintiffs served a notice of sale on the defendants. Doc. 75. The notice advised that the property was to be auctioned at 60 Centre Street, Room 130, on June 5, 2019 at 2 p.m. Doc. 75. Plaintiffs also published notice of the sale in Crain's on several dates during May 2019. Doc. 76.

On June 5, 2019, nonparty Nisan Badalov purchased the property for \$600,000 at a public auction conducted by Referee Glassman. Docs. 86, 115. At the time of the sale, Badalov tendered a down payment of \$60,000, which Referee Glassman placed in escrow. Doc. 86. Badalov also executed a Memorandum of Sale, pursuant to which he "promise[d] and agree[d] to comply with the terms and conditions of the sale of said premises." Docs. 77, 115.

The Terms of Sale, dated June 5, 2019, provided, inter alia, that the purchaser was to pay Referee Glassman 10% of the purchase price at the time of the sale, and that the remainder of the purchase price was to be paid to Referee Glassman "on or before **July 8, 2019**, when and where the said [r]eferee's [d]eed will be ready for delivery", and that "time is of the essence regarding the aforesaid closing date, as to the [p]urchaser only" (emphasis in original). Docs. 77, 115.

The Terms of Sale also provided that:

The [r]eferee is not required to send any notice to the [p]urchaser and, if the [p]urchaser neglects to call or fails to appear, ready, willing and able to complete

¹ In a separate judgment entered February 22, 2019, this Court (Gammerman, J.) determined that the defendants owed plaintiffs \$6,562 in legal fees. Doc. 49.

the purchase at the time and place above specified to receive the [r]eferee's [d]eed, the [p]urchaser will be in default of its obligations hereunder. Any delay or adjournment of the closing date beyond the date above specified may be stipulated among the parties, with the [r]eferee's consent, up to ninety days from the date of sale, but any adjournment beyond ninety days may be set only with the approval of this Court.

Docs. 77, 115.

Additionally, the Terms of Sale provided that, if the purchaser failed to comply with the same, the premises would be put up for resale under the Referee's direction, without application to the court, and that the initial purchaser was to be liable for any deficiency between the initial sale price and the resale price, plus any costs arising from the resale, and that such monies were to be paid, to the extent possible, from the money deposited by the initial buyer. Doc. 115. Any surplus remaining from the initial buyer's deposit was to be returned to him or her. Doc. 115.

Pursuant to an "Assignment Of Rights Under Memorandum Of Sale" dated June 17, 2019, Badalov purported to assign his rights to the property to nonparty Adam Plotch. Ex. 1 to Plotch Aff. in Opp.²

On or about June 14, 2019, Masin moved, by OSC (motion sequence 003), for the relief set forth at pages 1 and 2 above. Doc. 62. In an affirmation in support of the motion, counsel for Masin argues that service of process on Masin was improper because the process server did not exercise due diligence before resorting to affix and mail service. Doc. 58. Thus, argues counsel, this Court never obtained jurisdiction over Masin and the judgment it rendered is a nullity. Doc. 58. At the very least, maintains counsel, Masin is entitled to a traverse hearing to determine whether service of process was proper. Masin further argues that the equities dictate that the default against him be vacated since he has lived in the apartment for over 40 years, his

²As noted above, Plotch is a not a party to this action. Thus, he was unable to efile the papers he submitted in connection with this matter.

default was not willful, and vacating the default would result in “little prejudice to any related party.” Doc. 58. Additionally, Masin argues that the sale must be set aside pursuant to CPLR 2003 due to the prejudice against him arising from the fact that he was not notified of the time or manner of the sale. Doc. 58.

In an affidavit in support of the motion, Masin states, inter alia, that he is a senior citizen; that he has lived in his apartment since 1975; that he was never handed legal papers relating to this action; that he never saw legal papers relating to this action affixed to his door or under his door; that no doorman ever told him that someone came to the building looking for him during February 2016; that the doorman would never allow someone access to his apartment without his authorization; and that he was unaware of the existence of this action before June 5, 2019, when Badalov advised Masin that he had purchased the apartment. Doc. 59. He also represents that he has “the financial means to immediately redeem the premises and/or satisfy all of the arrears on the premises.” Doc. 59.

In opposition to the motion, plaintiffs’ attorney argues that Masin failed to rebut the presumption of valid service of process. Doc. 64. Counsel further asserts that, since Masin fails to establish a reasonable excuse for his default or a meritorious defense, he is not entitled to vacate the default judgment against him pursuant to CPLR 5015. Doc. 64.

In reply, Masin reiterates his argument that he was not properly served with process. Doc. 78. He also asserts that Badalov defaulted by breaching the Terms of Sale, and that Referee Glassman’s cancellation of the sale was thus proper. Doc. 78.

In a sur-reply affirmation, plaintiffs’ attorney argues, inter alia, that Masin improperly raises for the first time in his reply affirmation the argument that the sale must be voided due to Badalov’s breach of the Terms of Sale arising from his failure to close by July 8, 2019. Doc. 81.

On or about August 21, 2019, Masin moved, by OSC (motion sequence 004), for the relief set forth at page 2 above. Doc. 92. In support of the motion, Masin argues that: Referee Glassman properly canceled the sale due to Badalov's breach of the Terms of Sale; since the sale was canceled, he should be permitted to redeem the tax lien; Referee Glassman should be ordered to apply the \$60,000 he is holding in escrow to the amount of taxes he owes; and plaintiffs and/or their attorneys should be sanctioned in the amount of \$10,000 for forcing him to make this motion.

Referee Glassman submits an affidavit in support of the application in which he states, inter alia, that: Badalov was the winning bidder at an auction of the property he conducted on June 5, 2019; the Terms of Sale directed that the closing date of July 8, 2019 was to be "time is of the essence" as to Badalov; that he never consented to, and Badalov never requested, an adjournment of the July 8, 2019 closing date; that the July 8, 2019 closing date was never stayed or extended by court order; that Badalov made a 10% down payment of \$60,000; that the down payment was placed in escrow; that Badalov executed a Memorandum of Sale in which he agreed to comply with the Terms of Sale; that Badalov's failure to tender the balance of the purchase price on or before July 8, 2019 "resulted in a default of the Terms of Sale"; and that, as a result of Badalov's default, he canceled the sale and notified the parties of such cancellation by letter dated August 5, 2019. Docs. 82 and 86. Referee Glassman added that, since the cancellation of the sale, Masin has been attempting to pay plaintiffs the amount owed on the tax lien but that they have refused to accept his payment, and that, if this Court directed him to do so, he would pay the \$60,000 down payment to plaintiffs towards the satisfaction of the said lien. Doc. 86.

In opposition to Masin's application, Plotch argues, inter alia, that: Masin lacks standing

to allege a breach of the contract of sale; Referee Glassman lacked the authority to declare Badalov in default; Badalov could not be found in default for failing to close by July 8, 2019 since Masin's motion to vacate the judgment of foreclosure (motion sequence 003) was filed on June 14, 2019 and was pending on the scheduled closing date; and that once the foreclosure sale to Badalov took place, Masin's right to redeem was extinguished.

In opposition to the motion, plaintiffs argue, inter alia, that: Referee Glassman improperly cancelled the sale without the approval of this Court; Masin's right to redeem the tax lien "is currently extinguished" "until such time as this Court decides the issue of whether or not to set aside the [f]oreclosure [s]ale"; Masin does not have standing to enforce the terms of sale; Masin's request for sanctions must be denied; and that, although a court has the equitable power to set aside a judicial sale due to fraud, collusion, mistake or misconduct, such factors are not present here. Doc. 102.

In reply to Plotch's opposition, Masin argues, inter alia, that Plotch has no standing to appear in this matter. He further asserts that Plotch's papers should not be considered by this Court since the cancellation of the sale rendered moot the issues raised therein. Doc. 95.

CONCLUSIONS OF LAW:

Motion Sequence 003

Masin's Motion To Vacate The Default Judgment

That branch of Masin's motion seeking to vacate the default judgment is denied. In order to vacate a default, a party must establish a reasonable excuse for the default as well as a meritorious defense. See CPLR 5015. Here, Masin's excuse for his default is that he was not properly served with process in this action. However, as discussed in detail below, this Court

deems service on Masin to have been proper. Thus, it is unnecessary to consider Masin's proffered meritorious defenses, i.e., that the equities dictate that he be permitted to remain in the apartment since he has lived there for over 40 years, and that he is ready and willing to pay the monies owed to plaintiffs.

Masin's Motion For A Stay

That branch of Masin's motion seeking to stay enforcement of the default judgment pending the determination of this application is denied as moot since any such stay would be terminated by this decision. Similarly, that branch of his motion seeking to stay the transfer of the referee's deed is denied on the same ground.

Masin's Motion For An Extension Of Time To Answer

That branch of Masin's motion seeking an extension of time to answer is denied as moot, since the default judgment entered against him precludes him from answering.

Masin's Motion to Set Aside The Foreclosure Sale

That branch of Masin's motion seeking to set aside the foreclosure sale is denied. "A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and all matters of defense which were or which might have been litigated in the foreclosure action are concluded." *Taron Partners, LLC v McCormick*, 173 AD3d 927, 930 (2d Dept 2019) (citations omitted). Since Masin failed to establish that he is entitled to an order vacating the default judgment against him, he is precluded from raising any defenses he could have presented in the foreclosure action, such as his contention that he was not notified of the

time or place of the sale. *See Taron Partners*, 173 AD3d at 930.

Additionally, although not raised in opposition to the motion, Masin lacks standing to set aside the foreclosure sale.³

Motion For A Traverse Hearing

Although Masin maintains that he was never properly served with process in this action, this contention is belied by the motion papers. Plaintiff submits the affidavit of a process server who attested to the fact that he visited Masin's residence on five different occasions between February 4 and 19, 2016, at different times of the day, and on weekdays and a weekend, when the defendant could reasonably have been expected to be found at home, but the process server was unable, "with due diligence to find defendant or a person of suitable age and discretion." Doc. 7.⁴ The process server also represented in his affidavit that he was unable to ascertain whether Masin was in the military. Accordingly, the affidavit constituted prima facie evidence that the due diligence requirement was satisfied. *See Bank of America, N.A. v Budhan*, 171 AD3d 622 (1st Dept 2019); *HSBC Bank USA, N.A. v Hanchard*, 170 AD3d 599 (1st Dept 2019); *Taron Partners, LLC*, 173 AD3d at 929; *Nationstar Mtge., LLC v Dekom*, 161 AD3d 995, 996-997 (2d Dept 2018). The affidavit also constituted prima facie evidence that the process server properly affixed a copy of the summons and complaint to the door of the defendant's residence and mailed a copy to the residence by first class mail on February 26, 2016. Doc. 7. *See Nationstar Mtge., LLC v Dekom*, 161 AD3d at 996-997. Contrary to Masin's contention, he failed to rebut the presumption of proper service arising from the process server's affidavit and is therefore not

³ This Court notes, however, that in opposition to the motion filed by Masin in motion sequence 004, plaintiffs assert that Masin lacks standing to set aside the foreclosure sale.

⁴ Masin does not deny that he resided at the address where the attempts to serve him were made.

entitled to a traverse hearing.

Motion Sequence 004

Motion To Vacate The Foreclosure Sale

As plaintiffs argue, that branch of Masin's motion seeking to vacate the foreclosure sale must be denied on the ground that he lacks standing to move for this relief. *See Bardi v Estate of Morgan*, 61 AD3d 624 (2d Dept 2009); *Ocwen Fed. Bank, FSB v Bassi*, 294 AD2d 478 (2d Dept 2002).

Motion To Direct Plaintiffs To Accept Escrow Funds

That branch of Masin's motion seeking to direct plaintiffs or their attorneys to accept the funds being held in escrow is denied as well. As noted above, the Terms of Sale specifically required that the escrow money paid by Badalov be used to satisfy any shortfall and/or expenses resulting from a resale of the premises. Doc. 115. Thus, this Court declines to order plaintiffs to accept the escrow monies and apply them to the amount of the tax lien.

Additionally, as plaintiffs assert, once the foreclosure sale occurred, Masin's right to redeem the tax lien was extinguished. *See Wells Fargo Bank, N.A. v Carney*, 50 AD3d 287 (1st Dept 2008); *GMAC Mortgage Corp. v Tuck*, 299 AD2d 315 (2d Dept 2002). Specifically, plaintiffs argue that Masin's right to redeem the tax lien "is currently extinguished" "until such time as this Court decides the issue of whether or not to set aside the [f]oreclosure [s]ale." Doc. 102.

Motion To Reschedule The Foreclosure Sale

As stated above, the Referee is empowered by the Terms of Sale to resell the premises,

without court approval, in the event of a default by the purchaser. Doc. 115. Since Masin does not have standing to vacate the foreclosure sale and his right of redemption terminated with the sale to Badalov, he clearly lacks the standing to compel a new sale or to direct plaintiffs to apply Badalov's down payment towards the payment of his tax lien.

Motion For Sanctions

This Court declines to grant that branch of Masin's application seeking sanctions against plaintiffs. Although he claims that plaintiffs have prolonged this litigation by refusing to accept from him payment of the amount owed on the tax lien, this argument clearly fails to take account of the authority cited above establishing that his ability to redeem the lien was extinguished when Badalov purchased the premises.

Vacating The Sale

As discussed in detail above, the parties sharply contest whether Referee Glassman had the authority to vacate the foreclosure sale.

There can be little dispute that it is the court, not the parties, who is in absolute control of the workings of a judicial foreclosure (*see*, 73 NY Jur 2d, Judicial Sales, § 1, at 517). The appointed Referee is an officer of the court and must perform his duties impartially without regard to the interests of any particular person in the proceeding (*Riggs v Pursell*, 66 NY 193, 198; *Goldberg v Feltman's of Coney Is.*, 205 Misc 858, 864; 73 NY Jur 2d, Judicial Sales, § 5, at 519-520). A court has broad discretion in setting aside a foreclosure sale and ordering a resale (79 NY Jur 2d, Mortgages, § 706, at 64) and, significantly, almost any individual, even a nonparty, who has a legitimate interest in the outcome can move to set it aside (79 NY Jur 2d, Mortgages, § 707, at 65-66).

Natl. Bank of Stamford v Van Keuren, 184 AD2d 92, 95 (3d Dept 1992).

The court-appointed referee, charged with the duty to supervise the sale of the premises, is responsible for conducting the sale upon terms in conformity with the judgment and applicable statutes (*see Long Is. City Sav. & Loan Assn. v Suggs*, 78 Misc 2d 16, 18, 355 NYS2d 550 [Sup Ct, Nassau County 1974]; *see also Zouppas v Yannikidou*, 16 AD2d 52, 55, 225 NYS2d 557 [1st Dept 1962]). In the absence of any specific directions in the judgment, he or she may impose conditions which are ministerial in nature, and customarily and normally relate to closing of title, such as reasonable conditions with respect to the form of payment and the time and place of the closing (*see e.g. E. Q. C. Co. v Plainview Country Club*, 23 AD2d 769, 258 NYS2d 567 [2d Dept 1965]). A referee, however, may not, in the absence of any specific directions in the judgment, impose conditions of sale which involve substantive matters (*see Home Sav. of Am. v Vonkrusenstierna*, [*458] Sup Ct, Queens County, Oct. 17, 1995, O'Donoghue, J., index No. 775/1993; *see also E. Q. C. Co. v Plainview Country Club*, 23 AD2d 769, 258 NYS2d 567, *supra*; [***5] *Zouppas v Yannikidou*, 16 AD2d 52, 55, 225 NYS2d 557 [1962], *supra*; *TMS Mtge., Inc. v Lee*, Sup Ct, Queens County, Sept. 25, 1998, Golar, J., Index No. 6042/1997).

U.S. Bank, N.A v Persaud, 29 Misc 3d 455, 457-458 (Sup Ct, Queens County 2010).

It is well settled that a buyer at a foreclosure sale takes the property subject to the terms of sale. *See Kingsland v Fuller*, 157 N.Y. 507, 510-511 (1899). The Terms of Sale herein provide that the purchaser, Badalov, was to be in default if he did not close on or before July 8, 2019, and that time was of the essence as to him. Docs. 77, 115. Although the Terms of Sale authorized Referee Glassman to extend the closing date for up to 90 days past July 8, 2019 pursuant to stipulation between plaintiffs and Badalov without court approval, any adjournment exceeding 90 days required leave of court. Docs. 77, 115. As Referee Glassman represents in his affidavit, Badalov did not close by July 8, 2019 and never sought to extend the closing date. Thus, Referee Glassman wrote to Badalov on August 5, 2019 to cancel the sale based on the latter's failure to close by July 8, 2019 or to seek an extension of time to close. Doc. 96. Although this Court agrees with Referee Glassman that Badalov breached the Terms of Sale by failing to close by July 8, 2019, it finds that Referee Glassman exceeded his authority by

determining a substantive matter within the purview of this Court, i.e., that vacating the foreclosure sale was warranted.

Given the foregoing, this Court finds, on its own motion and pursuant to CPLR 4403⁵, confirms Referee Glassman's finding that the foreclosure sale was properly vacated based on Badalov's failure to close on or before July 8, 2019, the deadline set for the closing by the Terms of Sale which, as noted previously, made time of the essence in closing as to Badalov only. Doc. 89.

Since plaintiffs maintain that Masin's right to redeem the tax lien was extinguished "until such time as this Court decides the issue of whether or not to set aside the [f]oreclosure [s]ale" (Doc. 102), this Court will permit Masin 20 days from the date on which he serves this order with notice of entry to redeem the tax lien, which he claims he is ready, willing and able to do. The amount to be paid by Masin to redeem the tax lien shall include \$33,240.15, the amount of the lien including interest, as calculated by Referee Glassman in his report filed December 30, 2016, plus interest at 9% from that date, as well as the costs incurred by plaintiffs. Should Masin fail to redeem the entire amount of the tax lien along with such interest within the said 20-day period, then Referee Glassman shall re-sell the premises in accordance with the Terms of Sale dated June 5, 2019 (with the exception of the July 8, 2019 closing deadline set forth therein).

⁵ Although plaintiffs did not make a formal application regarding a re-sale, they requested, at oral argument of the instant motions, that this Court determine whether the foreclosure sale should be vacated based on Badalov's breach of the Terms of Sale.

Plotch's Arguments

This Court declines to consider the arguments made by Plotch. Initially, he is not a party and has not filed a motion to formally intervene. Although he claims that he has an interest in this action because Badalov assigned the premises to him, this contention is without merit. "A conveyance of real property must be in writing (N.Y. Gen. Oblig. Law § 5-703[1]); must be subscribed by the grantor; and does not take effect against a subsequent purchaser or incumbrancer if the conveyance is not duly acknowledged before its delivery, unless a witness attests to its execution and delivery. N.Y. Real Prop. Law § 243." *Grehan v Natl. Asset Loan Mgt. Ltd.*, 2014 NY Slip Op 31131(U), *5-6 (Sup Ct, NY County 2014). "The statutory language for the finding of an acknowledgment in the form of a deed can be found in Real Property Law §§ 291 'Recording of conveyances' and 309 'Uniform forms of Certificates of acknowledgment or proof within this state'". *RJS v ZAG*, 8 Misc 3d 1013 (A), 2005 NY Slip Op 51074(U), *7 (Sup Ct, Kings County 2005).

Here, the purported assignment of the premises from Badalov to Plotch, in exchange for consideration of a mere \$10 for an apartment sold at auction for \$600,000, lacks an acknowledgement as required by statute. Ex. 1 to Plotch Aff. in Opp. Also absent from the assignment, which is not even notarized, is proof that it was ever filed with the County Clerk. Moreover, there is no indication that Plotch ever advised plaintiffs of the purported assignment. Thus, this Court declines to consider Plotch's motion papers.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendant George Masin seeking to vacate the default judgment against him (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking a stay of enforcement of the default judgment (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking permission to serve an answer (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking to set aside the foreclosure sale conducted by Referee Kenneth Glassman (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking a stay of the transfer of the Referee's Deed (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking a stay of enforcement of the default judgment (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking a traverse hearing (motion sequence 003) is denied; and it is further;

ORDERED that the branch of the motion by defendant George Masin seeking to vacate the foreclosure sale (motion sequence 004) is denied; and it is further

ORDERED that the branch of the motion by defendant George Masin seeking to direct plaintiffs or their attorneys to accept funds being held in escrow to satisfy the tax lien on the premises (motion sequence 004) is denied; and it is further

ORDERED that the branch of the motion by defendant George Masin seeking to reschedule the foreclosure sale if he does not satisfy the tax lien on the property within 10 days of a court order directing him to do so (motion sequence 004) is denied; and it is further

ORDERED that the branch of the motion by defendant George Masin seeking to authorize Referee Kenneth Glassman to tender the escrow deposit paid by Nisan Badalov to plaintiffs (motion sequence 004) is denied; and it is further

ORDERED that the branch of the motion by defendant George Masin seeking sanctions against plaintiffs (motion sequence 004) is denied; and it is further

ORDERED that this Court, on its own motion, affirms the finding of Referee Kenneth Glassman, dated August 5, 2019, that Nisan Badalov breached the Terms of Sale by failing to close on or before July 8, 2019; and it is further

ORDERED that, within 20 days of the filing of this order with NYSCEF, counsel for defendant George Masin is to serve this order, with notice of entry, on all parties to this action via NYSCEF, as well as on Referee Kenneth Glassman by email at kjg3007@aol.com and on Adam Plotch at adampaulplo@gmail.com; and it is further

ORDERED that within 30 days after service of this order with notice of entry, defendant George Masin may redeem the tax lien by paying plaintiffs the amount of \$33,240.15, the amount of the tax lien plus interest as of December 1, 2016, as calculated by Referee Kenneth Glassman in his report filed December 30, 2016, plus interest at the rate of 9% from the date of the report and costs, as calculated by the Clerk, plus attorneys' fees in the amount of \$6,562, as awarded by this Court by order dated February 22, 2019, plus interest on the attorneys' fees at the rate of 9% from the date of the said order, to be calculated by the Clerk; and it is further

ORDERED that if defendant George Masin satisfies the tax lien by paying the sum as set forth in the preceding paragraph within 30 days after service of this order with notice of entry, then plaintiffs shall file a stipulation discontinuing this action; and it is further

ORDERED that, on the 31st day of the period following service of this order with notice of entry, plaintiffs are to notify this Court and Referee Kenneth Glassman whether defendant George Masin has paid the amount of the tax lien, plus the costs and interest as set forth above; and it is further

ORDERED that if defendant George Masin redeems the tax lien, plus costs and interest, within the time period set forth above, the Referee Kenneth Glassman shall return the \$60,000 down payment made by Nisan Badalov to said individual forthwith; and it is further

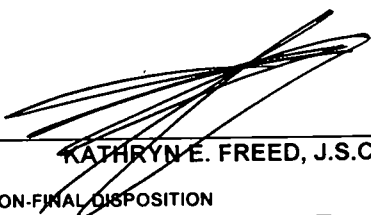
ORDERED that, in the event that defendant George Masin fails to pay the entire amount of the tax lien, plus costs and interest as set forth above, within the said 30-day period, then Referee Kenneth Glassman is directed to re-sell the premises in accordance with the Terms of Sale dated June 5, 2019 (with the exception of the July 8, 2019 closing deadline set forth therein); and it is further

ORDERED that the \$60,000 deposit made by Nisan Badalov is to remain in escrow until Referee Kenneth Glassman determines whether George Masin will redeem the tax lien or the premises are to be resold; and it is further

ORDERED that, in the event the premises are resold, then Referee Kenneth Glassman is to reimburse plaintiffs for the costs of the resale, as well as any cost deficiency between the initial sale price and the resale price, to the extent possible, from the \$60,000 deposit made by Nisan Badalov, and any money remaining in escrow after these expenses are paid shall be returned to Nisan Badalov by Referee Kenneth Glassman; and it is further

ORDERED that this constitutes the decision and order of the court.

11/26/2019
DATE


KATHRYN E. FREED, J.S.C.

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|-----------------------|-------------------------------------|----------------------------|--------------------------|-----------------------|-------------------------------------|-----------|
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | |