

**NYCTL 1998-2 Trust v 70 Orchard LLC**

2019 NY Slip Op 33605(U)

December 9, 2019

Supreme Court, New York County

Docket Number: 652883/2012

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

NYCTL 1998-2 Trust, and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian For the NYCTL 1998-2 Trust,

INDEX NO. 652883/2012  
MOTION DATE 10/23/2019  
MOTION SEQ. NO. 006  
MOTION CAL. NO. \_\_\_\_\_

**Plaintiffs,**

**-against-**

70 ORCHARD LLC, UNITED STATES OF AMERICA  
INTERNAL REVENUE SERVICE, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, WOODSTOCK  
PILGIRM INC. s/h/a JOHN DOE NO. 1, NICK TANNER s/h/a  
JOHN DOE NO.2, STEPHANIE HUI s/h/a JOHN DOE NO.3,  
KIM MOORE s/h/a JOHN DOE NO.4, DAVID BURNS s/h/a  
JOHN DOE NO.5, CHIN YIP s/h/a JOHN DOE NO.6, RICHARD  
VALENTE s/h/a JOHN DOE NO.7, KATHLEEN FANTO s/h/a  
JOHN DOE NO.8, ENRE SMITH s/h/a JOHN DOE NO.9, JAMES  
HUNT s/h/a JOHN DOE NO.10, JANE SMITH (NAME REFUSED)  
s/h/a JOHN DOE NO.11, MICHAEL | WELHOUSE s/h/a JOHN  
DOE NO.12, TERESA CHEND s/h/a JOHN DOE NO.13, KAM  
YING s/h/a JOHN DOE NO.14, JERMAINE MCCLURE s/h/a  
JOHN DOE NO.15, JANE SMITH s/h/a JOHN DOE NO.16,

**Defendants.**

The following papers, numbered 1 to 7 were read on this motion for Judgment of Foreclosure and Sale:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7</u>

**CROSS-MOTION**       **YES**       **NO**

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff’s motion for Judgment of Foreclosure and Sale, is granted.

Plaintiff, NYCTL 1998-2 Trust (hereinafter “NYCTL”), is a trust created between The City of New York and the Wilmington Trust Company. NYCTL is authorized to purchase, own, and manage the collateral of the trust. The agent and custodian for NYCTL is The Bank of New York Mellon (“BNY”). NYCTL is the holder of tax and other City of New York liens (“Tax Liens”). The Tax Liens cover real property located at 70 Orchard Street, New York, New York (the “Property”). The property had delinquent New York City water and sewer charges totaling \$44,444.02. The water and sewer charges were transferred into Tax Liens and sold

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

to NYCTL on August 11, 2011.

Plaintiff's complaint, dated August 16, 2012, requested sale of the Property and payment of the Tax Liens plus interest. Defendant's failed to pay the Tax Liens and interest balance on or before April 25, 2012, over 6 months after the sale of the Tax Liens. Defendant's did not file an answer to the complaint dated August 16, 2012.

Plaintiff's Motion Sequence No. 001 sought an order appointing a referee to compute the amount due the Plaintiff for the Tax Liens and interest based on Defendant's default.

Defendant submitted a cross motion to dismiss the action for failure to proceed within one year of default per CPLR § 3215(c). The Court denied Defendant's cross motion to dismiss the action and adjourned Plaintiff's motion to appoint a referee to allow Defendant to submit an answer within 10 days from the date of the Order, and for Plaintiff to submit new papers within 30 days thereafter. Motion Sequence No. 001 was later withdrawn, and Defendant submitted an answer to the Plaintiff's Complaint on November 24, 2014.

On September 9, 2015 and October 21, 2015, Plaintiff failed to appear for a preliminary conference. The failure to appear resulted in dismissal of the case. Plaintiff moved under Motion Sequence No. 002 to vacate the dismissal and restore the case to the calendar. Defendant opposed the Motion arguing they had paid the Tax Lien sum of \$44,444.02 to the City of New York on August 12, 2011; However, the City of New York had already sold the Tax Lien on August 11, 2011, one day prior to payment. The Court granted Plaintiff's motion, vacated the dismissal, and restored the case to the calendar.

On July 17, 2016 Plaintiff moved under Motion Sequence No. 003 for summary judgment against Defendant 70 Orchard LLC, to strike Defendant's answer, and to appoint a referee to compute the amount due to Plaintiff on the Tax Lien being foreclosed. This Court denied summary judgment against Defendant 70 Orchard and the appointment of a referee to compute the amount due to Plaintiff, due to Defendant's tender of payment of the entire amount of the Tax Liens to the City of New York. The money paid to the City was not returned, insinuating to the Defendant that the Tax Liens had been satisfied. However, the City of New York did not transfer the money paid by Defendant in satisfaction of the Lien to the current lienholder.

Plaintiff moved under Motion Sequence No. 004 to renew and reargue this Court's decision under Motion Sequence No. 003. Defendant cross moved for summary judgment against Plaintiff which was granted, and the complaint was dismissed. Plaintiff appealed to the Appellate Division First Department, which on December 27, 2018 reversed this Court and awarded Plaintiff summary judgment against Defendant 70 Orchard LLC. This Court appointed a referee to ascertain and

compute the amounts due to Plaintiff on the Tax Lien being foreclosed in accordance with the Appellate Division First Department's order dated December 27, 2018.

The court appointed referee, Thomas L. Tedeschi, Esq., who ascertained and computed that the sum of \$189,462.80, plus a per diem interest as of May 13, 2019, is due to the Plaintiff. To compute the sum owed to the Plaintiff, Mr. Tedeschi referred to (1) copies of the Tax Lien certificate and the assignment of the Tax Lien, (2) the summons and complaint, (3) the order appointing a referee to compute with notice of entry, and (4) Matthew Nims affidavit, who is the servicing agent for the Plaintiff. Mr. Tedeschi's computation schedule for the sum of \$189,462.80 included the \$44,444.02 water and sewage lien, a 5% surcharge on the water and sewage lien of \$2,232.05, a noticing fee for the water and sewer charges of \$196.00, the total principal due on the Tax Lien certificate of \$46,872.97, and lastly, the interest on the principal due with an 18% yearly interest compounded daily between August 11, 2011 and May 13, 2019.

Plaintiff now moves for a judgment of foreclosure and sale on the Property, reasonable attorneys' fees, costs, and disbursements.

Defendant opposes the motion and argues that (1) the motion should be denied, (2) the referee's report should not be confirmed for lack of evidentiary support, (3) the referee should conduct a hearing to determine the amount owed, (4) Plaintiff should not recover interest on the Tax Lien, and (5) Plaintiff should not recover attorneys' fees due to the Plaintiff's own delay.

Defendant argues that the referee's report should not be confirmed based on the lack of a referee hearing and the claim that Mr. Nims affidavit lacks foundation and evidentiary support. The Defendant focuses on Mr. Nims affidavit, when the Plaintiff had also submitted affidavits from Megan Meyer, another authorized signatory for the Plaintiff who lists in her affidavit her credentials and how she came to her conclusions, as well as an affidavit from Kayetrina Murchison (City of New York Department of Environmental Protection Collection Billing Analyst) and Pamela Parker-Cortijo (City of New York Department of Finance Tax Lien Ombudsman). The Defendant states that "it is... incumbent upon the referee to base his or her determination on admissible evidence which, in the absence of live testimony, must take the form of affidavits" (Affirmation in Opposition, pg. 4). Mr. Nims, Ms. Meyer, Ms. Murchison, and Ms. Parker-Cortijo have all submitted affidavits listing their positions, credentials, and evidentiary support for their findings. Mr. Tedeschi has also listed his computation schedule and supporting documentary evidence listing the appropriate tax and interest rates. The Defendant does not dispute or claim computational error, and thus, Mr. Tedeschi's report should be confirmed.

The Defendant goes on to claim that without affidavits with evidentiary support, a referee hearing must be held, and the denial of a right to a hearing

renders the referee report voidable. If the Defendant does not raise a triable issue of fact as to the Tax Lien amount, and the amount of the Tax Lien is not in dispute, the referee is not required to conduct a hearing before issuing his report. (*Capital One, NA v. Amid*, 174 A.D.3d 494, 104 N.Y.S.3d 186 [2<sup>nd</sup> dept. 2019]; *Wachovia Mortg. Corp. v. Lopa*, 129 A.D.3d 830, 13 N.Y.S.3d 97 [2<sup>nd</sup> dept. 2015]; *Blueberry Investors Co. v. Ilana Realty Inc.*, 184 A.D.2d 906, 585 N.Y.S.2d 564 [3<sup>rd</sup> dep't. 1992]). 70 Orchard LLC does not claim the referee report includes invalid computations and does not deny that they owe to NYCTL a Tax Lien on the Property.

Defendant's claim that the accrued interest would be unjust and goes against equity due to Plaintiffs delay, is in accordance with this Courts view on fairness. However, Plaintiff correctly states that New York City Administrative Code § 11-332(a) provides "any purchaser of a tax lien or tax liens shall stand in the same position as the city and shall have all the rights and remedies that the city would have had if the tax lien or tax liens had not been sold." As stated, NYCTL purchased the Tax Lien from the City of New York and equitable defenses, such as laches "cannot be invoked against a government agency to prevent it from discharging its statutory duties." (*A.C.Transp., Inc. v. Board of Educ. of City of New York*, 253 A.D.2d 330, 687 B.Y.S.2d 1 [1<sup>st</sup> dept. 1999]).

Lastly, the Plaintiff requests an award of reasonable attorneys' fees, costs, and disbursements. Fees are to be determined by the (1) time and labor required, (2) difficulty of the questions involved, and the skill required to handle the problems presented, (3) lawyer's experience, ability and reputation, (4) amount involved and benefit resulting to the client from the services, (5) customary fee charged by the Bar for similar services, (6) contingency or certainty of compensation, (7) results obtained, and (8) responsibility involved. (*In Re Freeman's Estate*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 [Court of Appeals, 1974]). The determination of reasonable attorneys' fees can also take into account whether a party has engaged in conduct or taken positions resulting in delay or unnecessary litigation. (*JK Two LLC v. Garber*, 171 A.D.3d 496, 98 N.Y.S.3d 37 [1<sup>st</sup> dept. 2019]).

Here, Plaintiff had engaged in conduct that unreasonably delayed the case for over a year and has not provided documentation to show time entries for the work done by the partners, associates, and paralegals to justify \$75,626 in legal fees. The Defendant has also shown a reasonable attempt to pay the Tax Liens and settle the case. The Defendant should not be required to pay the extraordinarily high attorneys' fees due to Plaintiff's unreasonable delay in prosecuting this action, lack of supporting documentation, and Defendant's attempt to settle the Tax Lien against them.

Accordingly, Plaintiff's Motion for Judgement of Foreclosure and Sale is granted, and it is further,

**ORDERED**, that the referee's report is confirmed, and it is further,

**ORDERED, that a hearing is ordered to determine reasonable attorneys' fees, and it is further,**

**ORDERED, that Plaintiff is granted a Judgement of Foreclosure and Sale as annexed to this Order, and it is further,**

**ORDERED, that Plaintiff serve a copy of this Order with Notice of Entry on the Defendant and the Trial Support Clerk located in the General Clerk's Office (Room 119) in accordance with e-filing protocol, who is directed to schedule this matter for a hearing before a Judicial Hearing Officer to determine reasonable attorneys' fees, and it is further,**

**ORDERED, that the Clerk of Court enter Judgement accordingly.**

**MANUEL J. MENDEZ  
J.S.C.**

**ENTER:**

  
\_\_\_\_\_  
**MANUEL J. MENDEZ  
J.S.C.**

**Dated: December 9, 2019**

**Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION**

**Check if appropriate:  DO NOT POST  REFERENCE**