

**RCN Capital Funding, LLC. v Gordon**

2021 NY Slip Op 32601(U)

November 24, 2021

Supreme Court, New York County

Docket Number: Index No. 850284/2018

Judge: Francis A. Kahn III

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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. FRANCIS A. KAHN III PART 32**

*Justice*

-----X

INDEX NO. 850284/2018

RCN CAPITAL FUNDING, LLC.,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 004

- v -

CLEMENT GORDON, CLEMENT GORDON, 278 W. 127  
PROP, LLC, TORRI CLAYTON, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
PARKING VIOLATIONS BUREAU, NEW YORK STATE  
DEPARTMENT OF TAXATION & FINANCE, JOHN DOES,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161

were read on this motion to/for EXTEND - TIME

Upon the foregoing documents, the motion is determined as follows:

In this action to foreclose on a residential mortgage, the property was auctioned pursuant to a judgment of foreclosure and sale entered December 30, 2019. The sale was conducted on February 5, 2020 and Shahrar Sadaghati ("Sadaghati") purchased the property with a bid of \$804,000.00. Sadaghati paid a deposit of \$81,000.00 to the Referee and executed the terms of sale which included the following provisions:

**FOURTH:**

...

The failure of Purchaser's title insurance vendor or leader to be ready to close in accordance with these Terms of Sale is not a valid reason to adjourn the closing date and constitutes a default. Purchaser agrees to provide Plaintiff with a title examination not more than 14 days after sale and if not provided Purchaser waives any objections to title.

**FIFTH:**

An adjournment of the closing date stated in paragraph FOURTH, for any reason including but not limited to title clearance, litigation or any of the items listed in Paragraph EIGHTH, shall be at the sole discretion of Plaintiff and Referee . . . Any adjournment shall be subject to interest at the rate of nine percent (9%) per annum on the entire purchase price from the date set forth in paragraph FOURTH until the transfer of the Referee's deed . . .

EIGHTH: The Purchaser agrees that this sale is subject to the following items, which are neither valid exceptions to clear or marketable title nor valid reasons to adjourn the closing:

...  
(d). Prior mortgages, liens or encumbrances not provided for in the judgment or any transfer of title, mortgage lien or encumbrance that is recorded after the Notice of Pendency;

...  
(f). Any rights pursuant to CPLR § 317, § 2003 and § 5015, an appeal of the foreclosure, or additional litigation brought to contest the validity of the foreclosure or this sale including any notice of pendency, whether filed before or after the sale;

...  
(j). Title exception(s) raised by a title insurance company for underwriting reasons that are not valid liens or encumbrances pursuant to law.

ELEVENTH: If the Purchaser fails to comply with any of the above terms, then the Purchaser is in default and the premises shall be resold by the referee. In the event of Purchaser's default and a resale, Purchaser's deposit shall be forfeit to Plaintiff as liquidated damages . . .

It is undisputed that Sadaghati refused to close title on the premises on March 5, 2020, the date set in the terms of sale. Sadaghati attempted to justify his failure to close on an alleged inability to obtain satisfactory title insurance. Plaintiff and the Referee extended Sadaghati's time to close pursuant to paragraph fifth of the terms of sale. When he again demurred, Plaintiff's counsel emailed Sadaghati's counsel that Plaintiff extended the time of the essence provision to April 19, 2020. Presently, Sadaghati indicates a willingness to close but rejects Plaintiff's insistence that he pay accrued interest on the judgment amount.

Now, Plaintiff moves for an order *inter alia* declaring Sadaghati in default, directing forfeiture of the deposit and authorizing the Referee to re-auction the property. Sadaghati opposed the motion.

“As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title. A purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title,’ and, ‘if it was bad or doubtful, he should, on his application, be relieved from completing the purchase’” (*SRP 2012-4, LLC v Darkwah*, \_\_\_ AD3d \_\_\_, 2021 NY Slip Op 05740 [2d Dept 2021][internal citations omitted]). “However, ‘something more than a mere assertion of a right is essential to create an unmarketable or doubtful title’” (*Bank of N.Y. v Segui*, 91 AD3d 689, 690 [2d Dept 2012], quoting *Nasha Holding Corp. v Ridge Bldg. Corp.*, 221 App Div 238, 243 [2d Dept 1927]; see also *Saxon Mtge. Servs., Inc. v Coakley*, 145 AD3d 699 [2d Dept 2016]).

Sadaghati suggests he was not in default because Plaintiff could not convey “good title” on April 21, 2020, Plaintiff's alleged default date. He posits that since the terms of sale did not permit Plaintiff to adjourn the closing a second time, he could not have defaulted on April 21, 2020. That argument is nothing more than bootstrapping. If Plaintiff's second rescheduling of the closing was a nullity, then there was no extension of time to close and Sadaghati was in default when he failed to proceed on the first adjourn date for the closing.

Sadaghati objects to the provision in the judgment that the property is taken subject to “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”. A provision which requires a successful bidder to take title notwithstanding a subsequent motion by a defendant to vacate their default is not unique and does not render the title unmarketable (*see Argent Mtge. Co., LLC v Leveau*, 46 AD3d 727, 728 [2d Dept 2007]). The assertion that the other terms of the judgment of foreclosure and sale subject him to the risk of future litigation is unsubstantiated and, also, does not affect the marketability of the title (*see 97TH St. Holdings, LLC v East Side Tenants Corp.*, 82 AD3d 473, 474 [1<sup>st</sup> Dept 2011]).

Sadaghati’s claim that a *lis pendens* filed in a pending quiet title action (*see 278 W 127 Prop LLC v Gordon, et al*, NY Cty Index No 153369/2016) affects the marketability of the property is without merit. That notice of pendency, filed on April 21, 2016, automatically expired three years later and no motion to extend same was filed (CPLR §6513). Further, the parties in that action stipulated that the mortgage lien in this action would not be “invalidated or impaired” by that litigation (NYSCEF Doc No 56). In any event, that action was “dismissed with prejudice” by order dated January 28, 2020 (NYSCEF Doc No 104) and the *lis pendens* would be subject to mandatory cancellation (CPLR §6514[a]) were it not several years expired.

Any reliance on the other purported exceptions to title as justification for failing to close is unavailing based upon the expressly assented to terms of sale (*see Republic Natl. Bank of N.Y. v Zaccoli*, 46 AD3d 656 [2d Dept 2007]).

Regarding Sadaghati’s liability for accrued interest under the judgment, “[i]n an action of an equitable nature, the recovery of interest is within the court’s discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party” (*Dayan v York*, 51 AD3d 964, 965 [2d Dept 2008] [citations omitted]; *see also U.S. Bank N.A. v Beymer*, 190 AD3d 445, 446 [1<sup>st</sup> Dept 2021]).

Contrary to Sadaghati’s assertion, the Court may direct him to pay accrued interest based as part of its equitable powers (*see South Shore Fed. S&L Ass’n v. Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]; *see also Chase Manhattan Mtge. Corp. v Harper*, 54 AD3d 987 [2d Dept 2008]). Under the circumstances, requiring Plaintiff to forego its judicially awarded interest or, potentially, for the owner of the equity of redemption or subordinate lienors to bare the additional costs in the form of a reduced surplus, would be inequitable. Based upon the Court’s determination, *supra*, Sadaghati’s failure to close was not justified and he should be responsible for the results of same. Moreover, the fact that the appellant could now be overpaying for the property does not provide an equitable basis to void the sale (*see Bank of N.Y. v Segui*, *supra* at 691).

Accordingly, Plaintiff’s motion is granted to the extent that it is

ORDERED that the Shahrhan Sadaghati shall close on the property for the purchase price along with any expenses per the judgment of foreclosure and sale, including accrued interest on the judgment, within 30 days of e-filing of this order, and it is

ORDERED that if Sadaghati fails to timely close, he is automatically in default, the sale is automatically vacated and his deposit is automatically forfeited and shall be immediately paid by the Referee to Plaintiff, and it is

ORDERED that Plaintiff's time to conduct the foreclosure sale is extended for 180 days from filing of this decision, and it is

ORDERED that in the event of Sadaghati's default, the Referee Edward Lehner, Esq. shall reacquire the property in accordance with the terms of the judgment of foreclosure and sale as well as this decision and order, and it is

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **sfc-foreclosures@nycourts.gov** and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. **IF THE AUCTION IS NOT ON THE CALENDAR, then the auction will not go forward;** and it is

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions, and it is

ORDERED, that Referee Lehner shall retain his compensation as referee for the foreclosure sale conducted in this action on February 5, 2020 in the amount of \$1,100.00, and shall be compensated as Referee for the subsequent sale in the same amount, and it is

ORDERED that all other terms and conditions of said Judgment shall remain in full force and effect.

11/24/2021  
DATE

Francis A. Kahn, III  
FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE:

- FIDUCIARY APPOINTMENT
  - OTHER REFERENCE
- MON. FRANCIS A. KAHN III**  
**J.S.C.**