

NYCTL 1998-2 Trust v Quadrozzi Realty Corp.

2007 NY Slip Op 33127(U)

September 20, 2007

Supreme Court, Queens County

Docket Number: 0015746/2005

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

	<u>X</u>	INDEX NO. 15746/05
NYCTL 1998-2 TRUST, et al.		MOTION SEQ. NO. 2
- against -		BY: ELLIOT, J.
QUADROZZI REALTY CORP., et al.		DATED: SEPTEMBER 20, 2007
	<u>X</u>	
QUADROZZI REALTY CORP.		
- against -		
KENNETH TULLY, SR., et al.		
	<u>X</u>	

In this action to foreclose on real property tax liens, plaintiffs NYCTL 1998-2 Trust (Trust) and Bank of New York, as the owner of the subject tax liens and holder of the tax lien certificate, respectively, previously moved for summary judgment in their favor and against defendants Quadrozzi Realty Corp. (Quadrozzi Realty) and KGP Holding Corp. (KGP), to strike the answers of defendants Quadrozzi Realty and KGP, for leave to appoint a referee to ascertain and compute the sums due and owing plaintiffs, and to examine and report whether the subject property can be sold in one or more parcels, to substitute Quadrozzi Concrete Corp. (Quadrozzi Concrete) for defendant "John Doe #1" and for leave to amend the caption reflecting that substitution and deleting reference to defendants "John Doe #2"

through "John Doe #100." Defendant/third-party plaintiff Quadrozzi Realty opposed the motion by plaintiffs and cross-moved for summary judgment in its favor against third-party defendants. It appeared based upon the papers before the court, that defendant KGP opposed only the cross motion.

By memorandum decision dated March 14, 2007, the court granted the motion by plaintiffs to the extent of dismissing the affirmative defenses asserted by defendant KGP in its answer, granting summary judgment against defendants Quadrozzi Realty and KGP, and granting leave to appoint a referee. The court denied the cross motion of third-party plaintiff Quadrozzi Realty for summary judgment as against the third-party defendants.

Defendant KGP, the holder of a mortgage on the property, now moves for "leave to reargue" the prior motion of plaintiffs resulting in the March 14, 2007 memorandum decision, and upon reargument, to deny plaintiffs' motion. It asserts that the court, in making its determination, did not consider its opposition papers submitted in relation to plaintiffs' motion. Counsel for defendant KGP states that copies of the opposition papers were served upon the other parties, and submitted to the court on October 24, 2006 in opposition to plaintiffs' motion.

Defendant Quadrozzi Realty appears in support of the instant motion of defendant KGP, and cross-moves to stay this action, pending the finalization of a proposed settlement in a

related tax certiorari proceeding entitled Matter of Quality Concrete of New York, Inc. (Supreme Court, Queens County, Index No. 104988/1996). Defendant Quadrozzi Realty asserts that it and third-party defendant Kenneth Tully, Sr. are awaiting final approval by the City of New York of a proposed settlement consolidating tax certiorari proceedings into one proceeding, and reducing and fixing the actual assessed valuations to amounts set forth in a column entitled "Corrected Actual Assessed Valuation," on a chart included in an "offer to allow judgment." According to defendant Quadrozzi Realty, if approved, the settlement will result in a reduction of the liability under the tax liens at issue in this action, and, therefore, make it possible for it to redeem the property.

With respect to the instant cross motion by defendant Quadrozzi Realty for a stay, it is unclear whether plaintiffs herein received a copy of the notice of cross motion and supporting papers. The affidavit of service merely indicates service of such notice of cross motion and supporting papers by ordinary mail, to "Attorneys for Plaintiff [sic]," at 499 Park Avenue, New York, New York 10022. The address does not include any name of the attorneys representing plaintiffs (CPLR 2103[b][2]; see Hesselbarth v Paredes, 110 AD2d 818 [1985]; see also Anthony v Schofield, 265 App Div 423 [1943]; Van Salisbury v Elliot-Lewis, 13 Misc 3d 1213[A] [2006]). To the extent the affidavit of service

accurately recites the addressee, the failure to use an actual name may explain plaintiffs' failure to appear in relation to the cross motion for the stay.

In any event, defendant Quadrozzi Realty has failed to inform this court of the present procedural juncture of the tax certiorari proceeding (Index No. 104988/1996), aside from the existence of settlement negotiations (cf. National Mgt. Corp. v Adolphi, 277 AD2d 553 [2000]). Under such circumstances, the court cannot properly assess the merits of the cross motion for a stay (see Green Tree Financial Servicing Corp. v Lewis, 280 AD2d 642 [2001]; see also National Mgt. Corp. v Adolphi, 277 AD2d 553, supra). The cross motion by defendant Quadrozzi Realty for a stay is denied.

When determining plaintiffs' motion for summary judgment, the court did not consider defendant KGP's opposition papers thereto, because they were inadvertently separated from the other motion papers, and became lost or misplaced by the clerk. Under such circumstances, the court recalls its March 14, 2007 memorandum decision. It shall consider, and determine anew, the motion by plaintiffs for summary judgment against defendants Quadrozzi Realty and KGP, and ancillary relief, and the cross motion by defendant/third-party plaintiff Quadrozzi Realty for summary judgment in its favor against third-party defendants, based upon

the papers originally submitted to the court, and the papers submitted herein, as follows:

Plaintiffs commenced this action seeking tax lien foreclosure. Plaintiff Trust allegedly purchased and became the beneficial owner of the subject tax liens on the property known as Block 2611, Lot 35 on the Tax Map of Queens County, also known as 46-73 Metropolitan Avenue, Maspeth, New York, as evidenced by a tax lien certificate in the total amount of \$1,177,777.45 from the City of New York. At the time of the sale of the tax lien certificate, the owner of the real property allegedly owed delinquent real estate taxes levied against the property. Plaintiffs alleged that the semi-annual payment of interest due on the tax lien balance was not paid and because the default in payment continued for a period of 30 days, they elected to foreclose the tax liens.

Defendant Quadrozzi Realty served an answer admitting that it is the owner of the subject property and denying the material allegations of the complaint. It asserts an affirmative defense based upon its claim that the amount set forth in the tax lien is excessive and greater than the real estate taxes allegedly owed. Defendant/third-party plaintiff Quadrozzi Realty also interposed third-party claims as against third-party defendants Kenneth Tully, Sr., Richard A. Grace, Vincent A. DeIorio Law Firm, and Vincent A. DeIorio, individually and as executor of the Estate of Anthony Grace alleging, among other things, that third-party

defendants Tully and Grace breached an agreement to indemnify Quadrozzi Realty for outstanding real estate taxes and tax liens in the amount of \$2,713,470.81, by failing to pay a real estate tax lien.

Defendant KGP, a holder of a mortgage on the property, served an answer denying allegations of the complaint, asserting various affirmative defenses, including the pendency of tax certiorari proceedings, and interposing a counterclaim for a stay of the foreclosure action pending a determination of the tax certiorari proceedings. It is unclear whether plaintiffs served a reply to the counterclaim.

Defendants New York City Department of Finance and New York State Department of Taxation and Finance served notices of appearance in the action and waived service of various papers. Defendant York Properties, Ltd. (York) is in default in appearing and answering the complaint.

Plaintiffs move for summary judgment in their favor and against defendants Quadrozzi Realty and KGP, to strike the answers of defendants Quadrozzi Realty and KGP, for leave to appoint a referee to ascertain and compute the sums due and owing plaintiffs, and to examine and report whether the liened property can be sold in one or more parcels, to substitute Quadrozzi Concrete Corp. (Quadrozzi Concrete) for defendant "John Doe #1" and for leave to amend the caption reflecting the substitution and deleting

reference to defendants "John Doe #2" through "John Doe #100." Defendant/third-party plaintiff Quadrozzi Realty opposes the motion by plaintiff and cross-moves for summary judgment in its favor on its third-party claims against third-party defendants. Defendant KGP opposes both the motion and cross motion.

At the outset, the court shall address the fourth affirmative defense based upon lack of subject matter jurisdiction raised by defendant KGP in its answer. Such defense is without merit (see NY Const, art VI, § 7[a]; Administrative Code of the City of New York § 11-335; see also Security Pacific Nat. Bank v Evans, 31 AD3d 278 [2006]). That branch of the motion by plaintiffs seeking to dismiss the fourth affirmative defense asserted by defendant KGP in its answer is granted.

That branch of the motion by plaintiffs for leave to amend the caption substituting Quadrozzi Concrete in the place and stead of defendant "John Doe #1" and deleting references to defendants "John Doe #2" through "John Doe #100" is granted.

With respect to that branch of the motion by plaintiffs for summary judgment as against defendants Quadrozzi Realty and KGP, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v

Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Plaintiffs have submitted evidentiary proof of default by submitting the affidavit of Albert Fiorello, assistant vice-president of Xspand, Inc., the servicing agent for plaintiffs, who states that defendants failed to pay any interest on the tax liens which accrued against the premises (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d 668 [2005]; NYCTL 1996-1 Trust v Westmoreland Associates, 2 AD3d 811 [2003]). Plaintiffs, therefore, have made a prima facie showing of entitlement to summary judgment as against defendants Quadrozzi Realty and KGP (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d at 668). The burden shifts to defendants Quadrozzi Realty and KGP to establish a triable issue of fact (see Zuckerman v City of New York, 49 NY2d at 557; First Nationwide Bank, FSB v Goodman, 272 AD2d 433 [2000]).

The sixth affirmative defense asserted by defendant KGP is based upon lack of proper service. Defendant KGP failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of its answers, and as a consequence, the defense is deemed waived (CPLR 3211[e]; Wade v Byung Yang Kim, 250 AD2d 323 [1998]; Fleet Bank, N.A. v Riese, 247 AD2d 276 [1998]). That branch of the motion by plaintiffs seeking to dismiss the sixth affirmative defense raised by defendant KGP is granted.

To the extent defendant KGP asserts that plaintiffs' claims are barred by the statute of limitations, such assertion is without merit. An action to foreclose a City tax lien is not subject to a time limitation. The City Charter expressly states that all tax shall "become liens on the real estate affected thereby ... and shall remain such liens until paid" (New York City Charter § 1519[2]; see Real Property Tax Law § 102[21]). Section 11-301 of the New York City Administrative Code likewise provides that all real estate taxes and assessments are liens upon the real estate and "shall continue to be, until paid."

Plaintiffs Trust and Bank of New York, as the owner and holder of the tax lien certificate, respectively, stand in the same position as the City of New York with respect to their rights and remedies (Administrative Code of the City of New York §§ 11-332[a]; 11-335; NYCTL 1996-1 Trust v 209 Holding Corp., 269 AD2d 580 [2001]; Matter of Maspeth 5718 Assocs. Inc. v City of New York, 292 AD2d 453 [2002]). Thus, their remedy of foreclosure is not subject to a statute of limitations (see NYCTL 1996-1 Commercial Reo, LLP v El Pequeno Restaurant Food Corp., 1 Misc 3d 574, 577 [2003]).

In addition, because the tax is a perpetual claim (see L.K. Land Corp. v Gordon, 1 NY2d 465, 467-471 [1956], cert denied sub nom Greenfield v L.K. Land Corp., 352 US 989 [1957]; see also Russell v City of New York, 22 AD2d 706 [1964],

affd 16 NY2d 641 [1965]; Matter of Ploss v Board of Assessors, 17 Misc 2d 283, 284 [1959], appeal dismissed 13 AD2d 498 [1961]]), laches is not a defense to a tax lien foreclosure proceeding (see generally New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc., 191 AD2d 151 [1993]; see also Wesselman v Engel Co., 309 NY 27 [1955]).

That branch of the motion by plaintiffs seeking to dismiss the third and seventh affirmative defenses asserted by defendant KGP based upon the expiration of the statute of limitations and the doctrine of laches is granted.

To the extent defendant KGP asserts lack of capacity to sue as a first affirmative defense, the doctrine of legal capacity concerns a litigant's power to appear and bring its grievance before the court (see Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 [1994]). Legal capacity to sue often depends on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or a business corporation (see Security Pacific Nat. Bank v Evans, 31 AD3d 278 [2006]). Defendant KGP has failed to allege a basis for its objection to plaintiffs' status, and, thus, its affirmative defense is insufficient (see Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971]). Furthermore, to the extent defendant KGP is, in fact, questioning the standing of plaintiffs, plaintiffs have standing to maintain this action (see Administrative Code of the

City of New York §§ 11-332, 11-335; NYCTL 1996-1 Trust v 209 Holding Corp., 269 AD2d at 580; NYCTL 1996-1 Trust and Bank of New York v Railroad Maintenance Corp., 266 AD2d 39 [1999], lv to appeal dismissed 94 NY2d 899 [2000]). That branch of the motion by plaintiffs seeking to dismiss the first affirmative defense asserted by defendant KGP is granted.

The second affirmative defense asserted by defendant KGP is based upon failure to state a cause of action. That branch of the motion by plaintiffs seeking to dismiss such affirmative defense is granted (see Propoco, Inc. v Birnbaum, 157 AD2d 774 [1990]; Bentivegna v Meenan Oil, Inc., 126 AD2d 506 [1987]; Glenesk v Guidance Realty, 36 AD2d 852 [1971]).

Defendant KGP asserts a fifth affirmative defense based, in part, upon its claim that plaintiffs have failed to join Quality Concrete as a necessary party defendant. Plaintiffs, however, joined it as a defendant by service of a copy of the summons and complaint, and have been granted leave to amend the caption substituting Quality Concrete for defendant "John Doe #1." Defendant Quality Concrete is in default in appearing or answering the complaint.

Defendant KGP also asserts as part of its fifth affirmative defense, that plaintiffs failed to plead performance with a statutory condition precedent to suit, i.e.

service of notice of intention to sell the tax lien on all registered parties.

Defendant KGP has failed to cite to any statutory or appellate authority, requiring that a holder of a tax lien certificate allege in its complaint that the City served notice of its intention to sell tax liens as a condition precedent to the institution of a cause of action for tax lien foreclosure under the New York City Administrative Code (Administrative Code). Nevertheless, to the extent defendant KGP also asserts the City failed to provide Quality Concrete, its tenant then in possession of the subject property, with such notice of intention, it offers the affidavit of Kenneth A. Tully, the sole officer of defendant KGP, who states that Quality Concrete had registered as an interested party pursuant to the Administrative Code.

Section 11-320(b) of the Administrative Code, in relevant part, provides that:

"A tax lien shall not be sold unless the commissioner of finance, or his or her designee, notifies the owner of record at the address of record and any other person who has registered pursuant to section 11-309 of this chapter, or pursuant to section 11-416 ... of this code, by first class mail, of the intention to sell the tax lien"

(emphasis supplied).

Section 11-309(a) of the Administrative Code permits an owner of property in the City of New York, or "any person interested in such lot, piece or parcel," to file with the

department of finance, a statement identifying the applicant's interest in the property, and providing other information, and designating a post office address to which notices must be sent.

Section 11-416(d) provides that "[a]n owner who files an owner's registration card may also designate thereon the full name and post office address of a mortgagee, lienor or other person to receive bills and notices. Where such designation is made, the commissioner of finance shall not mail any bills and notices to the owner but shall mail all bills and notices to the owner's designee."

This court is aware of only one prior decision addressing the issue of whether the failure by the City to provide notice of intention to sell a tax lien constitutes a valid defense to a tax lien foreclosure sale. In the case NYCTL 1998-2 Trust v Schurr, (Sup Ct, Kings County, Index No. 14073/2000), Justice Lawrence Knipel determined that failure to provide such notice to a defendant property owner constituted a meritorious defense warranting vacatur of the default judgment obtained against such owner (see order dated June 2, 2004). Insofar as this decision was rendered by a court of coordinate jurisdiction, it is not binding on this court. However, even assuming this court were to adopt the reasoning therein, defendant KGP has failed to provide a copy of any registration card filed with the City, showing that

it designated Quality Concrete as its agent for receipt of notices.¹

To the extent defendant Quality Concrete was not so designated, but rather was merely a registered "interested party," any failure by the City to mail it a copy of a notice of intention to sell would constitute, in this court's view, at most, an affirmative defense which is personal to defendant Quality Concrete. Nothing in the motion papers, however, indicates that defendant Quality Concrete has appeared in this action, and asserted such failure as an affirmative defense. (Mr. Tully states he was a former officer of defendant Quality Concrete, but does not assert he is appearing on behalf of it). Nor does defendant KGP claim lack of receipt, on its own part, of any notice of intention to sell the tax liens in violation of the Administrative Code. Under such circumstances, defendant KGP has failed to raise a triable issue of fact based upon a defense of failure to comply with a statutory condition precedent.

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A property owner is obligated to pay the real property taxes assessed against its non-exempt property (see generally Real Property Tax Law § 300 et seq.). An owner who has designated someone else to receive bills and notices is not entitled to be sent a notice of any bills or notices (see Administrative Code of the City of New York § 11-416[d]). Nevertheless, under section 11-417 of the Administrative Code, such owner may file an "in rem" card, which entitles it to be sent a notice of foreclosure (see generally Marver Realty Corp. v City of New York, 117 Misc 2d 763 [1983]).

Under such circumstances, that branch of the motion by plaintiffs seeking to dismiss the fifth affirmative defense asserted by defendant KGP is granted.

Defendant KGP asserts as an eighth affirmative defense that plaintiffs incorrectly and unlawfully computed the amount and value of the lien, including the principal tax amount owed and the rate of interest accrued on the tax owed. Defendant Quadrozzi Realty likewise asserts as its first affirmative defense that the amount claimed in the tax lien is excessive and greater than the amount allegedly owed for real estate taxes. Defendant KGP further asserts as its ninth and eleventh affirmative defenses that this action must be held in abeyance pending, and subject to, the determination of a certiorari proceeding, and payment and discharge of the tax liens.

Defendant KGP contends that defendants KGP and York previously owned the subject property and that Kenneth A. Tully made repeated tenders of payments in the amount of \$486,000.00 for the tax arrears underlying the subject tax liens for the period 1996 through 1998. Mr. Tully states that the City nevertheless refused his tenders, demanding as a condition of a discharge of the tax arrears (or the recalling of the tax certificates or a direction to halt enforcement of the liens), a payment in the amount of \$2,770,000.00, representing the \$486,000.00 amount, plus accrued and compounded interest over six years, for unpaid real

property taxes for the years 1991 through 1996. Defendant KGP asserts that such demand was wrongful, because payments in the total sum of \$1,000,000.00 already had been made to the City in 1996 in settlement, and full satisfaction of, all real property taxes due and owing on July 1, 1991 through June 30, 1996. According to defendant KGP, the City had "lost" track of the payments, by failing to credit them on the City's books and ledgers to the account established for the property, and consequently, caused the commencement of a tax lien foreclosure action entitled NYCTL 1998-2 Trust v Quadrozzi Realty Corp., (Supreme Court, Queens County, Index No. 21045/2000) based upon a tax lien certificate No. 4A dated August 31, 1998 in an amount of approximately \$2,500,000.00.

Defendant KGP further asserts that although the City later removed the subject property from foreclosure (as of October 3, 2002), and caused the discontinuance of the action under Index No. 21045/2000, the City nevertheless maintained that there remained outstanding tax arrears on the property for the period from July 1, 1996 through December 31, 1998, and interest thereon, totaling \$1,023,722.37 as of November 8, 2002. Defendant KGP argues that the accumulation of interest was the fault of the City for failing to have accounted for the earlier payments totaling \$1,000,000.00 and delaying in adjusting the assessed values of the property.

Plaintiffs dispute that the City lost track of the payments totaling the sum of \$1,000,000.00, and failed to credit them to the property owners' account. They offer the affidavit of Margaret Donadio, the New York City, Department of Finance, tax lien ombudsman, who admits that in 1996, when the payments were made, the City had agreed, in principle, to settlement of the certiorari proceedings. She states, however, that since the taxpayers had yet to execute and submit the document denominated as an "Offer and Order to Allow Judgment" for processing, those payments were applied to the pre-settlement tax liability for July 1, 1991 through June 30, 1993. Ms. Donadio further states that because the payments (totaling \$1,000,000.00) only partially satisfied the pre-settlement tax liability, the City included the outstanding balance on the liens in a portfolio of delinquent tax liens which were sold to plaintiff Trust in August 1998.

Ms. Donadio explains that as a matter of accounting practice, once a tax lien is sold, the Department of Finance "removes" the liability from a taxpayer's account on its books regarding the corresponding tax period. Ms. Donadio states that upon the sale of the tax liens in August 1998, the tax liability for some of the periods incorporated in the settlement, were removed from the account for the subject property. Ms. Donadio further states that because of the removal, it was impossible, at the time of the submission of the offer and order in 1999, for the

Department of Finance to apply the terms of the offer and order to the tax periods covered therein, since some of those periods no longer reflected a tax liability. As a consequence, the Department of Finance applied the credits (which had resulted from the application of the settlement payments) to a subsequent tax period (in addition to the part of the period reflected in the settlement).

Defendant KGP has failed to raise a triable issue of fact as to its defense based upon unconditional tender of payment. Defendant KGP has failed to demonstrate that the City improperly or unlawfully delayed in effectuating such settlement until the offer was approved by the Supreme Court by order dated March 21, 2000 (cf. RCNY Tit 19, Ch 34 [effective February 19, 2004]). In addition, defendant KGP has failed to show the City did not properly apply the payment totaling \$1,000,000.00 to the account for the property (cf. Matter of Maspeth 5718 Assoc. v City of New York, 292 AD2d 453, lv denied 98 NY2d 614, supra). Defendant KGP also has failed to present any checks or other documentary evidence, indicating tender of the amounts due with respect to the tax liens after receipt of the November 13, 2002 letter, from Joseph Carino, Assistant Corporation Counsel, to counsel for Quality Concrete, which set forth a breakdown of the amounts of the arrears due and owing on July 1, 1996 through July 1, 1998.

Contrary to defendant KGP's further arguments, the maintenance of the separate tax lien foreclosure proceeding entitled NYCTL 1998-2 Trust v KGP Holding Corp. (Supreme Court, Queens County, Index No. 21045/2000) and the delay by the City in adjusting the assessed values, do not excuse the failure by defendant KGP to tender payment unconditionally. It is well established that one challenging a tax assessment must continue to pay taxes and the commencement of a certiorari proceeding does not stay the collection of taxes or enforcement proceedings instituted by the taxing authority (see W.T. Grant Co. v Srogi, 52 NY2d 496 [1981]; see also Brookmar Corp. v Tax Commr. of City of New York, 13 Misc 3d 772, 778 [2006] ["Where the taxpayer elects not to pay the disputed revenue charges while disputing the taxes in a RPTL article 7 proceeding, it runs the risk of the loss of the property through tax foreclosure prior to a determination of its overassessment claim and a possible tax reduction"]). Furthermore, any dispute as to the amount of the lien may be resolved after a reference pursuant to RPAPL 1321 (see NYCTL 1999-1 Trust v Stark, 21 AD3d 402 [2005]; Colonial Fin. Corp. v Nelson, 148 Misc 55 [1933]).

That branch of the motion by plaintiffs seeking to dismiss the eighth, ninth and eleventh affirmative defenses asserted by defendant KGP is granted. That branch of the motion by

plaintiffs seeking to dismiss the first affirmative defense asserted by defendant Quadrozzi Realty is granted.

As a tenth affirmative defense, defendant KGP asserts that this action constitutes an unlawful taking in violation of the Fifth Amendment of the United States Constitution. Such assertion is without merit (see Nelson v City of New York, 352 US 103 [1956]). That branch of the motion by plaintiffs to dismiss the tenth affirmative defense asserted by defendant KGP is granted.

Under the circumstances, defendants KGP and Quadrozzi Realty have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense. Plaintiffs are entitled to summary judgment as against them (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d 668, supra; NYCTL 1996-1 Trust v Westmoreland Assoc., 2 AD3d at 811).

That branch of the motion by plaintiffs for leave to appoint a referee to ascertain and compute the sums due and owing plaintiffs and to examine and report whether the property can be sold in one or more parcels is granted.

The cross motion by third-party plaintiff Quadrozzi Realty seeking summary judgment in its favor and against third-party defendants on its third-party complaint is denied. Third-party plaintiff Quadrozzi Realty has failed to demonstrate that issue has been joined with any named third-party defendant

(see CPLR 3212[a]). The copies of the answers provided to the court in support of the cross motion do not relate to the third-party complaint herein and refer to index numbers of other actions.

Settle order.

J.S.C.