NYCTL 2017-A Trust v Size
2019 NY Slip Op 33575(U)
December 4, 2019
Supreme Court, New York County
Docket Number: 153654/2018
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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NYCTL 2017-A TRUST AND THE BANK OF NEW YORK MELLON, AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiff,

- v -

DAVID E. SIZE aka DAVID SIZE, THE BOARD OF MANAGERS OF THE 65 NORTH MOORE CONDOMINIUM, FORCHELLI CURTO DEEGAN SCHWARTZ MIENO & TERRANA LLP, JOHN DOE, THE NAMES OF THE LAST 100 DEFENDANTS BEING UNKNOWN TO PLAINTIFF, IT BEING INTENDED TO DESIGNATE FEE OWNERS, TENANTS OR OCCUPANTS OF THE TAX LIEN PREMISES AND/OR PERSONS OR PARTIES HAVING OR CLAIMING AN INTEREST IN OR A LIEN UPON THE SUBJECT PROPERTY, LIENORS, CREDITORS AND SUCCESSORS IN INTEREST OF THEM, AND GENERALLY ALL PERSONS HAVING OR CLAIMING UNDER, BY, THROUGH, OR AGAINST THE SAID DEFENDANTS NAMED AS A CLASS,

Defendant.

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INDEX NO. 153654/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION, ORDER OF REFERENCE

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment and for an order of reference is granted.

Background

Plaintiff seeks to foreclose a tax lien relating to a property owned by defendant Size located at 65 North Moore Street in Manhattan.

In opposition, defendant Forchelli Deegan Terrana LLP ("Forchelli") complains that it is a judgment creditor and plaintiff failed to acknowledge that Forchelli has two, instead of one, judgments against Mr. Size. Forchelli also claims the caption should be amended to reflect its

correct name. Forchelli argues that its cross-claim against Size relating to these judgments should not be dismissed.

In reply, plaintiff observes that Forchelli can pursue its claims through a surplus monies proceeding after the property is sold. Plaintiff maintains that its tax lien has priority over Forchelli's judgments.

Discussion

The Court grants the motion. As plaintiff correctly points out, Forchelli can seek to recover any monies it claims it is owed at a surplus monies hearing. The Court also severs and dismisses Forchelli's answer. Forchelli does not offer opposition to plaintiff's claims and its cross-claim against Size merely seeks a judgment that the property is subject to a lien under Forchelli's judgments. As described above, plaintiff's tax lien is senior to Forchelli's judgments; therefore, its cross-claim to satisfy its judgments by selling Size's property will be foreclosed if plaintiff sells the property at a foreclosure auction. There is no reason to sever Forchelli's cross-claim when the relief it seeks—a "judgment that the property described above is subject to a lien under [Forchelli's] Judgments and decreeing foreclosure of the judgments"—will be eliminated by plaintiff's tax lien.

Accordingly, it is hereby

ORDERED that the motion for a default judgment and to appoint a referee is granted against the non-appearing defendants; and it is further

ORDERED that plaintiff is awarded summary judgment against Forchelli Deegan Terrana LLP and this defendant's answer and cross-claim are severed and dismissed; and it is further

ORDERED that Richard O. Tolchin 2 Overlook Road Suite 1B2 White Plains, NY 10605 914-949-7770 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiffs and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; and it is further

ORDERED that by accepting this appointment the Referee certifies that 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, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

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

ORDERED that plaintiffs shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall

promptly respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiffs must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiffs fail to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiffs to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiffs' failure to move this litigation forward; and it further

ORDERED that the John Doe defendants be removed from the caption and the caption should be amended to reflect defendant Forchelli as FORCHELLI DEEGAN TERRANA LLP FKA FORCHELLI, CURTO DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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NYCTL 2017-A TRUST AND THE BANK OF NEW YORK MELLON, AS COLLATERAL AGENT AND CUSTODIAN,
Plaintiffs,

v.

DAVID E. SIZE AKA DAVID SIZE, THE BOARD OF MANAGERS OF THE 65 NORTH MOORE CONDOMINIUM, FORCHELLI DEEGAN TERRANA LLP FKA FORCHELLI, CURTO DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP

Defendant(s).
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and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed and substituted pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiffs shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: April 7, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, plaintiff may seek an adjournment of the conference. Please consult this

part's rules for information on how to obtain an adjournment. If a motion has been made, then a conference is required to explore the reasons for the delay.

12/4/19
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			X	FIDUCIARY APPOINTMENT		REFERENCE