NYCTL 2014-A Trust v 127 W138th St. LLC
2020 NY Slip Op 30415(U)
February 14, 2020
Supreme Court, New York County
Docket Number: 153796/2015
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 2014-A TRUST, THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL 2014-A TRUST,

Plaintiff,

- v -

127 W138TH STREET LLC,SEEDCO FINANCIAL SERVICES INC.,WACHOVIA BANK, NATIONAL ASSOCIATION, SUSTAINED EXCELLENCE ALLIANCE CORPORATION, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100 INCLUSIVE, THE NAMES OF THE LAST 100 DEFENDANTS BEING FICTITIOUS, THE TRUE NAMES OF SAID DEFENDANTS BEING UNKNOWN TO PLAINTIFF, IT BEING INTENDED TO DESIGNATE FEE OWNERS, TENANTS OR OCCUPANTS OF THE LIENED,

Defendant.

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INDEX NO. 153796/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 238, 239, 240, 241, 242, 243, 244, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 280

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 245, 246, 247, 248, 277, 278, 279, 281

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Motion sequence numbers 010 and 011 are consolidated for disposition. The motion by plaintiff (MS 010) to confirm the referee's report is granted and the cross-motion by defendant 127 W138th Street LLC ("Defendant") to reject the report is denied. The motion (MS 011) by non-party 127 West 138 Street NBA LLC ("Purchaser") to intervene is denied as moot.

Background

This action was brought to foreclose a tax lien totaling $6,799.12; the property is an empty lot. A judgment of foreclosure and sale was entered in December 2015 and the property was eventually sold to the Purchaser at auction in March 2017. The Purchaser received the deed in July 2017 after paying the bid price of $590,000.00. In November 2017, the Defendant brought a motion to set aside the deed and vacate the judgment on the ground that it was never served with the summons and complaint.

The judge then-assigned to this case referred "the issues of 1) traverse hearing and 2) the nature, extent, and seriousness of the conflict of interest faced by the law office of Windels, Marx, Lane & Mittendorf LLP in this matter and whether such conflict necessitates vacating/dismissing this action" to the special referee part (NYSCEF Doc. No. 138). The referee has issued his report and these motions were brought.

Plaintiff urges the Court to confirm the report and argues that its witness testified credibly that it served the defendant LLC by serving the Secretary of State. Plaintiff points out that any conflict of interest was cured when its current counsel substituted in place of the Windels firm. Plaintiff concludes that it was the Defendant's fault for never updating its address for service of process with the Secretary of State and there is no reason to vacate the judgment of foreclosure and sale or the auction.

The Defendant, on the other hand, emphasizes that it never received the service of process and claims that plaintiff knew in 2015 that the address on file with the Secretary of State was wrong. The Defendant points out that plaintiff purportedly sent various mailings throughout the course of this litigation to the incorrect address and, therefore, had actual knowledge that the address was wrong and that service was not effectuated. It also appeals to this Court to consider

the equity—namely, that the Defendant lost a property allegedly worth millions over a small tax lien.

Discussion

"The report of a referee should be confirmed if its findings are supported by the record" (*Baker v Kohler*, 28 AD3d 375, 375-76, 814 NYS2d 121 [1st Dept 2006]).

The plaintiff effectuated service by serving the Secretary of State pursuant to the relevant statute. At the hearing, it was revealed that the mailing from the Secretary of State to the Defendant was returned as undeliverable (NYSCEF Doc. No. 237 at 9). However, that address was the one on file and the Secretary of State did not prepare an affidavit about the returned process until 2018 (*id.* at 4). In other words, plaintiff had no idea until 2018 (long after the property was sold to the Purchaser) that the Defendant had not received service from the Secretary of State.

The JHO issued a decision in which he found that service was proper and the potential conflict of interest had no effect on this case (NYSCEF Doc. No. 237). He noted that "The testimony of the process server and the manager at the agency confirm that service was made in accordance with the LLCL. The secretary of state complied with the mailing requirement as set forth in the statute. There is no showing that the plaintiff at any time prior to the tax lien foreclosure and transfer of the deed to the bona fide purchaser had actual knowledge that process had been returned as 'undeliverable'" (*id.* at 12).

The JHO concluded that "Any address plaintiff could have checked would have disclosed the same no longer valid address for the defendant, whether that was with the secretary of state, the finance department, or recorded documents generated from a title search" (*id.* at 12). The

Court finds no justification to depart from the JHO's well-reasoned decision. The record makes clear that the Defendant had the wrong address on file when plaintiff effectuated service. And "[s]ervice of process [is] complete when plaintiff serve[s] the Secretary of State irrespective of whether the process subsequently reach [es] the corporate defendant" (*Fisher v Lewis Constr. NYC Inc.*, 2020 WL 20378 [1st Dept 2020] [internal quotations and citations omitted]). It was not plaintiff's responsibility to know that the Defendant did not have a valid address to receive service from the Secretary of State.

The Court also confirms the portion of the JHO's decision concerning the potential conflict of interest. This issue arose because "counsel for the plaintiff when the litigation commenced was the Windels firm, which was also the lawyer for defendant when the defendant was organized in April 2005" (NYSCEF Doc. No. 237 at 5). The JHO noted that "A witness for the Windels firm testified that it did its normal conflict search through client records when the litigation started, and nothing was generated indicating it had any relationship with the llc" (*id.* at 11). He added that if this conflict had been discovered, "Defendant would have been in the same position it finds itself now" (*id.*). Counsel for plaintiff "ceased representing plaintiff when the potential conflict was made known to the firm. In any case, defendant has not shown how it was adversely affected by the alleged conflict of interest. The reason it did not have notice of the lien or the litigation was because defendant llc cavalierly ignored all the rules and regulations put in place to give it notice. This has nothing to do with the Windels firm's activities in initially representing plaintiff" (*id.* at 12).

There is no question that the Windels firm erred in representing plaintiff after formerly providing counsel to the Defendant when it was formed. But, as the JHO correctly pointed out, there is no basis for this conflict to justify vacating the foreclosure judgment or the deed transfer.

It has nothing to do with the fact that the Defendant failed to update its address with the Secretary of State. This is not a case where the conflict was used to benefit one party at the expense of the other; rather, it was an oversight that was corrected once discovered.

This Court also declines to vacate the judgment of foreclosure and sale based on equitable grounds. The fact is that every property owner in New York City has an obligation to pay taxes, whether or not it receives the bill; here, the defendant LLC did not pay the taxes. Whether Defendant did not do so because - as suggested by the JHO—it did not keep a current address on file with the Department of Finance, which sends out the bills (just like it failed to keep a good address current with the Secretary of State) – or for any other reason, the fact is that the problem was completely of Defendant's own making. Defendant could have paid the taxes, it could have given the Department of Finance a good address to make sure it got the reminder bills, it could have paid attention to its corporate obligations and filed biennial statements and updated its address with the Secretary of State. The fact is that defendant ignored its corporate and property ownership obligations – *for years*. Defendant created the situation it now finds itself in. Under these circumstances, where the defendant wakes up almost two years after the judgment of foreclosure and sale is entered, eight months after the auction and four months after the successful bidder took title, it would be wholly inequitable to vacate a sale to a bona fide purchaser who paid just shy of $600,000 for the empty lot.

Having confirmed the JHO's report, the Purchaser's motion to intervene is moot. This litigation is resolved—the Purchaser submitted the winning bid at the foreclosure action, paid the bid price and received the deed in 2017.

Accordingly, it is hereby

ORDERED that the motion by plaintiff (MS010) to confirm the referee's report is granted and the cross-motion by defendant 127 W138th Street LLC to reject the report is denied; and it is further

ORDERED that the motion by non-party 127 West 138 Street NBA LLC to intervene is denied as moot.

2/14/2020
DATE

ARLENE P. BLUTH, J.S.C.

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