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# **Ramapo Realty LLC, Plaintiff v. 1236 Rogers Avenue, LLC, Rahim Siunykalimi, et al, Defendants, 15083/08**

December 24, 2014

Cite as: Ramapo Realty LLC v. 1236 Rogers Avenue, LLC, 15083/08, NYLJ 1202713072087, at \*1 (Sup., KI, Decided December 12, 2014)

15083/08

Justice Debra Silber

[Read Summary of Decision](#)

Decided: December 12, 2014

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to confirm the corrected Referee's report of sale and for leave to enter a deficiency judgment, and defendants 1236 Rogers Avenue, LLC and Rahim Siunykalimi's cross-motion to reject the Referee's report of sale, and for an order directing that no deficiency may be claimed by plaintiff.

Papers Numbered

Notice of Motion, Affirmation and Exhibits 1-4

Notice of Cross-Motion, Affirmation in Support and Exhibits 5-9

Affidavit in Further Support of Motion and in Opposition to Cross-Motion and Exhibits 10-12

Affirmation in Support of Cross-Motion and in Reply to Plaintiff's Opposition and Exhibits 13-14

Other: Defendants' Memo of Law 15

## **DECISION & ORDER**

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Upon the foregoing cited papers, and following a hearing, the Decision/Order on this application is as follows:

Plaintiff moves to confirm the corrected Referee's report of sale and for leave to enter a deficiency judgment, and defendants 1236 Rogers Avenue, LLC (the debtor)

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and Rahim Siunykalimi (the guarantor) cross-move to reject the Referee's report of sale, and for an order directing that no deficiency may be claimed by plaintiff. The motion and cross-motion are both granted in part and denied in part as detailed below.

## Procedural History

This foreclosure action concerns a property which is a four-family house at 222 East 39th Street, Brooklyn, New York, and was commenced on May 22, 2008. No answer was submitted on behalf of the defendant borrower and a Judgment of Foreclosure and Sale was issued on default on June 17, 2010. Following issuance of the judgment, an auction sale was held on August 19, 2010, at which an upset price of \$880,258.42 was announced to prospective bidders. Plaintiff was the high bidder, with a bid of \$1,000, and plaintiff took title by deed dated April 18, 2012, almost two years after the auction.

Thereafter, plaintiff timely moved for a deficiency judgment. Defendants 1236 Rogers Avenue, LLC and Rahim Siunykalimi (as guarantor) were personally served with plaintiff's notice of motion to confirm the report of sale and for leave to enter a deficiency judgment. The motion was granted on default, by order dated September 20, 2012. The deficiency in the Referee's report, before deducting the value of the property, was \$1,057,548.36.

The defendants subsequently moved to vacate the deficiency judgment, on the grounds that the Referee's Report overstated the interest due by nearly \$185,000. Plaintiff conceded the deficiency amount was not calculated correctly with respect to the accrued interest and taxes, due to the two years' delay in closing title. The court granted that branch of defendants' motion which sought to correct the calculation of the deficiency, and directed that the Referee correct the report of sale, by order dated February 7, 2014. The Referee subsequently issued a Corrected Report of Sale, which

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was filed with the County Clerk on March 10, 2014. In the corrected report, the deficiency,

before deducting the value of the property, is \$867,707.76

Plaintiff then moved to confirm the Corrected Referee's Report of Sale and for leave to enter a deficiency judgment. Defendants cross-moved, pursuant to RPAPL §1355 and §1371, for an order rejecting the Corrected Report of Sale and directing that no deficiency may be claimed by plaintiff, as plaintiff's announced upset price at the auction sale was in excess of the amount owing on the judgment of foreclosure and sale. In the event such relief was denied, defendants requested that the matter be set down for a hearing to determine the fair market value of the real property at the time of auction and the appropriate deficiency amount.

The defendants established that a hearing was necessary as to the fair and reasonable market value of the property, with one appraisal submitted on behalf of plaintiff in the amount of \$365,000 for the property's value on April 23, 2012, and another submitted on behalf of the defendants in the amount of \$600,000 for the property's value on August 19, 2010.

On July 28, 2014, the court issued a decision and order rejecting defendants' argument concerning the upset price, but directing that, in light of the conflicting appraisals submitted by the parties, an evidentiary hearing be held as to the fair market value of the subject property and the proper amount of the deficiency. See *TPZ Corp. v. Block 7589 Corp.*, 233 AD2d 496 [2d Dept 1996]. It is noted that Jericho sold the property on June 21, 2013 to Rickey Marks for \$690,000, according to ACRIS, after purchasing it from plaintiff for \$255,000 on April 18, 2012, the same day plaintiff closed with the Referee. This latest sale clearly raised an issue of fact as to the proper valuation.

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## The Hearing

The hearing took place on September 8, 2014. Three witnesses testified for the plaintiff and one for the defendants. The plaintiff introduced three exhibits into evidence; they are Mr. Cheng's three appraisal reports. Defendant introduced one, Mr. Neglia's appraisal.

At the conclusion of the hearing, the court reserved decision.

## Plaintiff's Witnesses

Raymond Mordekhai

Raymond Mordekhai testified that he does home purchasing for Jericho Homes. He's done it for ten years. As part of his work, he looks for foreclosure listings.

Jericho purchased the subject property from the plaintiff for \$255,000. The contract was signed in August of 2010 and the closing took place in April of 2012.

Mr. Mordekhai visited the property before the auction. It is a two story brick building. After the closing, he went inside and saw it was in fair condition, but required some work. He did not

testify that it required a complete renovation, or that it couldn't be occupied as it was. Jericho wanted to "flip" the property, so they renovated it. He acted as the broker to sell it and he showed it in late 2012 or early 2013. The listing price was \$695,000. When he went back to show the property, it had been totally renovated. There were four new kitchens and four new bathrooms, new windows and a new front door. He did not know how much was spent by his client on the renovation.

Mr. Mordekhai stated that he went to the auction in 2010 and had authority and instructions to bid when he went to the auction. He did not bid because the upset price (of \$880,000) was too high.

Edmund Chang

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Edmund Chang testified that he has been a real estate appraiser since 2002; he started his own company in 2004.

Mr. Chang stated that in November of 2009, James Orford of plaintiff Ramapo asked him to do a fair market value appraisal of the property, but without access to the interior. He was told by Mr. Orford to assume the property would require a "gut" renovation. Mr. Chang selected comparable properties and determined that the property at issue was worth \$400,000.

In April of 2012, Mr. Chang was asked by Rob Margolin of plaintiff Ramapo to do another appraisal. This time, he had interior access from Mr. Dilmanian, a principal of Jericho, the new owner. He did a walk through of the property. It consists of a basement and two floors. The lot was 30 feet by 100 feet. The building was 22 feet by 80 feet (which presumably means there was a driveway and two apartment per floor). There was demolition going on inside the building. It did not seem structurally sound to him. He saw old tile, old fixtures, worn joists and studs, the floor was soft and there was old paint. He took pictures and did the appraisal. He admitted that he did not know if the items torn out of the house were operable before they were removed. He estimated the property to be worth \$365,000 as of April 23, 2012, which was less than the value he included in his earlier appraisal report with a valuation date of November 2, 2009.

In August of 2014, Mr. Chang was retained to do another appraisal of the the property, valued as of August 19, 2010, the date of the auction. This was after the court scheduled the hearing to determine the value. He visited the outside of the house on September 2, 2014; he did not go inside. He never saw the interior after Jericho finished its renovations. He picked the comparables. He concluded that the value was \$385,000 as of August 2010. He guessed/estimated that the value of the renovation was \$195,000. He calculated the cost of renovating the 3,520 square feet at \$55 per square

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foot to obtain this figure. He did not see the interior of the house before the demolition nor did he see the renovation after Jericho took title. He has no training in architecture or engineering. He does not know if what was torn out was operable. He estimated the renovation he never saw as "low level, cheap work." He testified that the property was worth \$565,000 renovated.

Mr. Chang then testified that there were not many four-family properties in the area, so the comparables he used in 2014 are not really comparable. He explained that comparable #3, a four-family, was sold for \$620,000, and he took \$7,500 off because it was a little larger and most significantly, he took \$200,000 off for the renovations needed to the subject property, even though he had no idea whether the comparable property was recently renovated or was, as was the subject property, in "fair condition." Mr. Chang also opined that, for these comparables, at the time he prepared his second appraisal, the market was in decline, and values had gone down 4 percent to 6 percent in the prior six months. As a result, the actual sales price listed for these comparables were 4 percent to 6 percent higher than if they went to contract on the valuation date utilized in his appraisal.

Mr. Chang testified that all three appraisals were conducted in accordance with all guidelines and regulations for New York State appraisers. He noted that appraisers are not required to go inside of the homes they use as comparables.

Robert Margolin

Robert Margolin testified he is the managing member of Ramapo Realty LLC. The company makes six-to-12 month loans to real estate professionals. In the instant matter, the loan to defendant resulted from a referral by a Queens-based mortgage broker.

Mr. Margolin stated that he never personally visited the subject property. The loan in question had a six-month maturation and was never paid. They did not have an

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appraiser when they made the loan, but they considered the high bid at the auction in the prior foreclosure sale, \$525,000. They bailed defendant out of the prior foreclosure by lending him \$482,000. This was before the 2008 "crash."

Mr. Margolin said that he met Mr. Dilmanian of Jericho at the auction and discussed a sale to Jericho with him. To convey the property, he had to get approval from an entity called Leaf Funding and it took 20 months to do so. They re-sold the property mostly "as is," as soon as they could, with a \$5,000 cap for violations. It was a negotiated sale.

## Defendants' Witness

Dominick Neglia

Dominick Neglia testified he has been a real estate appraiser since 1985. He is licensed by New York State to appraise both commercial and residential real estate. He has published articles in the field and has taught courses about both residential and commercial appraisals

and has received awards. He's testified as an expert 18 to 20 times before. He's done appraisals for the public administrator. He's on the court's Part 36 list for court appointments as an appraiser.

Mr. Neglia stated that he did his appraisal by valuing the property as of August 19, 2010, the auction date. He did research on market trends and comparable sales. He saw the exterior of the property only. He estimated the value of the property as \$600,000.

Mr. Neglia testified that he read the Chang appraisal (2012) and it doesn't explain the discrepancies with the contract price. He disputed the appraisal point by point. He said Chang's neighborhood boundaries for his comparables are too large and that they are wrong. For his appraisal report, he called brokers or used Multiple Listing Service records to find his comparables.

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Mr. Neglia opined that Mr. Chang had adjusted the appraisal by \$200,000 for "gut renovations" without any evidence of the basis for this figure. He noted that, in 2012, there were building permits filed with the NYC Department of Buildings by the buyer (Jericho) with a cost estimate of \$80,000. In his opinion, the buyer (Jericho) took a \$600,000 property, made \$80,000 in upgrades and sold it for \$690,000. He said the cost of renovations affects the value upwards, but how much the renovations affect the value depends upon market conditions, not just the amount expended.

Mr. Neglia acknowledged that he never went inside the property. He described the property as structurally sound, in average condition and said it was properly maintained. He assumed the property was livable and habitable, with older systems (boiler, plumbing, etc.).

## Discussion

RPAPL 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of the judgment and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher. See, *BTC Mortg. Investors Trust 1997-SI v. Altamont Farms, Inc.*, 284 AD2d 849 [3rd Dept 2001]; *Columbus Realty Inv. Corp. v. Gray*, 240 AD2d 529, 530 [2nd Dept 1997]; *Marine Midland Bank v. Harrigan Enters.*, 118 AD2d 1035, 1037 [3rd Dept 1986]. The statute says, in relevant part:

### §1371. Deficiency judgment

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

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2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

The trial court enjoys broad discretion in that it can reject expert testimony and arrive at a determination of value that is either supported by expert testimony or supported by other evidence so long as adequately explained by the court. *BTC Mortg. Investors Trust 1997-SI v. Altamont Farms, Inc.*, 284 AD2d 849; *ARC Machining & Plating v. Dimmick*, 238 AD2d 849, 850 [3rd Dept 1997]. Generally, a court must determine the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction. *RPAPL 1371* [2]; *Columbus Realty Inv. Corp. v. Gray*, 240 AD2d 529 [2nd Dept 1997]; *Farmers Natl. Bank v. Tulloch*, 55 AD2d 773 [3rd Dept 1976]; *Crossland Mtge. Corp. v. Frankel*, 192 AD2d 571 [2nd Dept 1993].

In making its determination herein, the court found Mr. Margolin (Ramapo) and Mr. Mordekhai (Jericho) to be credible fact witnesses, but the crucial determination is with regard to the credibility of the competing appraisers. In this, the court found Mr.

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Neglia far more credible than Mr. Chang.

This conclusion is not merely a matter of Mr. Neglia's more impressive credentials, including his work doing appraisals for the Courts and the Public Administrator. It is a matter of the diligence Mr. Neglia displayed in describing how he came to his findings in comparison with the guesswork and estimates upon which Mr. Chang based his appraisal.

Mr. Neglia established that he did research on market trends and comparable sales. He also researched the property's Building Code violations and building permits. Further, in choosing his comparables, Mr. Neglia used a more concentrated geographic area than that chosen by

Mr. Chang and he documented his efforts as regards his chosen comparables, by calling brokers and using the records of the Multiple Listing Service.

Further, Mr. Neglia's conclusions concerning the condition of the property was in relative accord with that of Mr. Mordekhai, the only witness who had any knowledge of the building who was not paid by one of the parties, or is a principal of a party. Like Mr. Neglia, Mr. Mordekhai stated that the property was in "fair" condition.

By contrast, Mr. Chang first relied upon Mr. Orford's instruction that he was to presume the property was to be gutted. Then, in his 2012 inspection, he visited the building in the midst of demolition and drew conclusions about the building's structure even though he is not trained as an architect or engineer or contractor and did not know if the items being torn out of the building were still operable before they were removed.

Additionally, Mr. Neglia based the adjustments he made to the building's value on the basis of renovations using actual (sworn to) cost estimates for the property in the Building Department's records, as opposed to Mr. Chang's use of a formula presented without any foundation. In addition, Mr. Neglia recognized that while the cost

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of renovations affects the value upwards, how much the renovations affect value depends upon market conditions, and noted that not every cent spent on renovations is necessarily a cent of added value. Mr. Chang's testimony and report display no such understanding of this crucial fact. In fact, Mr. Chang admitted that he reduced the value of a comparable to account for presumed renovation costs, without knowing himself whether the comparable he chose actually was renovated.

The Court thus rejects plaintiff's appraisal of fair market value, which is within the court's discretion to do. See, *BTC Mortg. Investors Trust 1997-SI v. Altamont Farms, Inc.*, 284 AD2d 849; *Adirondack Trust Co. v. Farone*, 282 AD2d 910 [3rd Dept 2001]. The Court is entitled to reject the opinion of the plaintiff's appraiser as being without probative value in light of his insufficient evidentiary foundation. See, *Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544, [2002]; *Flushing Sav. Bank, FSB v. Bitar*, 106 AD3d 690; *BTC Mtge. Invs. Trust 1997-SI v. Altamont Farms*, 284 AD2d 849, 850; *Adirondack Trust Co. v. Farone*, 282 AD2d 910, 912-913 [2001]. As such, the court necessarily determines that the fair market value has been established by defendants' appraiser, the only other evidence of auction date fair market value provided at the hearing. *BTC Mortg. Investors Trust 1997-SI v. Altamont Farms, Inc.*, 284 AD2d 849; *Adirondack Trust Co. v. Farone*, 282 AD2d 910.

The court accepts the appraisal done by Mr. Neglia, which reports that the fair and reasonable value of the premises on the date of the auction was \$600,000. The referee's computation of the deficiency deducts the purchase money (\$1,000.00), and the deficiency, as set forth in the referee's corrected report, is the sum of \$867,707.76. After deducting the appraised value of the property of \$600,000, instead of the \$1,000, the deficiency, pursuant to the terms of RPAPL §1371, is \$267,707.76. It is assumed that the corrected real estate taxes indicated in the Referee's corrected report, in the



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sum \$39,966.05 were due and owing on September 18, 2010, as they were reduced as requested by defendant's counsel.

Plaintiff may enter a deficiency judgment for \$267,707.76, plus interest at the statutory rate from September 18, 2010.

This is the decision and order of the court. Settle judgment on notice.

Dated: December 12, 2014

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