

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ARNOLD N. PRICE IA Part 6
Justice

	x	Index	
REGENCY SAVINGS BANK, F.S.B.		Number <u>07653</u>	2001
- against -		Motion	
		Date <u>June 25,</u>	2002
TERRY-ROSS ASSOCIATES, et al.		Motion	
	x	Cal. Number <u>37</u>	

The following papers numbered 1 to 13 read on this motion by plaintiff Regency Savings Bank, F.S.B. for an order, inter alia, directing that a bid deposit in the amount of \$177,500 made by BRK Properties, Inc. and held by referee Lucille S. DiGirolomo be turned over to the plaintiff and on this cross motion by BRK Properties, Inc. for an order, inter alia, compelling the plaintiff and the referee to convey title to the premises known as 104-22 46th Avenue, Corona, New York and 105-05, 105-07, and 105-09 Otis Avenue, Corona, New York.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-6
Notice of Cross Motion - Affidavits - Exhibits ...	7-10
Reply Affidavits	11-13

Upon the foregoing papers it is ordered that:

The motion by the plaintiff is denied without prejudice to renewal in the event that BRK does not close title at a date, time, and place to be fixed in a notice to be sent by the plaintiff at least 10 days prior to the closing.

The cross motion by BRK Properties, Inc. for an order, inter alia, compelling the plaintiff and the referee to convey title to the premises known as 104-22 46th Avenue, Corona, New York and 105-05, 105-07, and 105-09 Otis Avenue, Corona, New York is denied.

Dated: September 30, 2002

J.S.C

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

REGENCY SAVINGS BANK, F.S.B. x

-against-

TERRY-ROSS ASSOCIATES, et al.

INDEX NO. 07653/01

MOTION DATE: JUNE 25, 2002

MOTION CAL. NO.: 37

BY: PRICE, J.

DATED: SEPTEMBER 30, 2002

x

Plaintiff Regency Savings Bank, F.S.B. has moved for an order, inter alia, directing that a bid deposit in the amount of \$177,500 made by BRK Properties, Inc. and held by referee Lucille S. DiGirolomo be turned over to the plaintiff. BRK Properties has cross-moved for an order, inter alia, compelling the plaintiff and the referee to convey title to the premises known as 104-22 46th Avenue, Corona, New York and 105-05, 105-07, and 105-09 Otis Avenue, Corona, New York.

On January 17, 2002, this court signed a judgment of foreclosure and sale in this action for the foreclosure of the subject property. On April 12, 2002, terms of sale were posted, and Lucille S. DiGirolomo, a substitute referee, conducted a foreclosure sale. Joseph Atarian, the president of BRK, successfully bid for the property at a price of \$1,775,000. Atarian, as agent of BRK, signed the memorandum of sale which had

annexed to it the terms of sale, and he gave a bid deposit amounting to \$177,500. BRK obligated itself to pay the balance of the purchase price "on the 13th day of May at 10:00 A.M. *** with time of the essence as to the purchaser only ***." BRK did not appear for the closing scheduled for that date. John C. Re, Esq., an attorney for the plaintiff, spoke to Atarian, who gave various reasons for BRK's inability to close title on that date. By letter dated May 15, 2002, the plaintiff notified BRK that it was in default and that its bid deposit of \$177,500 was forfeited pursuant to the terms of sale.

The plaintiff asserts that the judgment of foreclosure is silent about which party must pay transfer taxes and that paragraph 9 of the terms of sale provides: "All expenses of recording the Referee's Deed, including real property transfer tax and transfer stamps, shall be borne by purchaser." Transfer taxes total approximately \$40,000. The plaintiff and BRK have not been able to hold a successful closing because of a dispute about the responsibility for the payment of the transfer taxes.

BRK's cross motion for an order, inter alia, compelling the plaintiff and the referee to convey title to the premises known as 104-22 46th Avenue, Corona, New York and 105-05, 105-07, and 105-09 Otis Avenue, Corona, New York is denied. BRK must pay the transfer taxes to obtain title to the property. It is true that terms of sale which vary from the judgment of foreclosure and sale and RPAPL 1371(4) are void. (See, Renaissance Complex

Redevelopment Corp. v Renaissance Associates, 255 AD2d 274; Albany Sav. Bank v David Thum Realty, Inc., 97 AD2d 891; Morgan v Ellenville Sav. Bank, 55 AD2d 178.) In the case at bar, BRK argues that the clause in the terms of sale which requires the purchaser to pay the transfer taxes contradicts a paragraph in the judgment of foreclosure which requires the referee to pay from the proceeds of sale "the real estate and other taxes, assessments, water charges and sewer rentals which are or may become liens on the premises ***." However, BRK did not demonstrate that this paragraph in the judgment of foreclosure applies to transfer taxes. BRK cited no authority making unpaid transfer taxes a lien on real property, and the quoted section from the judgment of foreclosure seems to apply only to taxes and expenses imposed on owners of property. A transfer tax, an expense of recording a deed, is a different type of tax. In the absence of a contradiction between the terms of sale and the judgment of foreclosure, this court will apply the rule that where a purchaser of premises at a foreclosure sale agrees to terms and conditions of sale which make him responsible for the payment of transfer taxes, the purchaser must pay the transfer tax. (See, LaSalle National Bank v Taylor, New York State Supreme Court, County of Queens, Index No. 4604/96, [Kassoff, J.].) While Home Savings of America, FSB v Vonkrusenstierna (New York State Supreme Court, County of Queens, Index No. 775/93 [O'Donoghue, J.]) holds to the contrary, the case is subject to criticism. (See, Bergman on New York Mortgage

Foreclosures, § 30.05[1][f].) "Real estate contracts of sale will frequently shift the obligation to pay transfer taxes to the purchaser and the practice is unassailable." (Bergman on New York Mortgage Foreclosures, § 30.05[1][f].) Where property is sold pursuant to a judgment of foreclosure, the terms of sale may be treated as a contract. (See, Bergman on New York Mortgage Foreclosures, § 30.05[1][f].)

The motion by the plaintiff is denied without prejudice to renewal in the event that BRK does not close title at a date, time, and place to be fixed in a notice to be sent by the plaintiff at least 10 days prior to the closing. "It is true that paragraph 6 of the terms of sale provides for, inter alia, the retention of the bid deposit as liquidated damages by the seller in the event of the purchaser's default, and that precedent is in the plaintiff's favor. (See, e.g., Maxton Builders, Inc. v LoGalbo, 68 NY2d 373 [a vendee who defaults on a real estate contract without excuse cannot recover the down payment]; Bloor Corp. v Green Point Savings Bank, 10/22/97 NYLJ 34, col 3 [defaulting bidder for property at a foreclosure sale not entitled to recover down payment].) It is also true that paragraph 7 of the terms of sale permits the re-sale of the property and imposes liability upon BRK if the property is sold for less at the second sale. However, there appears to have been a genuine dispute between BRK and the plaintiff concerning the responsibility for the payment of the transfer taxes which prevented the closing from occurring. BRK

included in its motion papers a copy of an allegedly certified check for the balance owed on the property. Under the circumstances of this case pending on the equity side of the court, BRK should be provided with one additional opportunity to close title.

Short form order signed herewith.

J.S.C.