

95CV04017-EHN-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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INTERNATIONAL HOUSE OF PANCAKES, INC.,

95 CV 4017

Plaintiff,

MEMORANDUM

-against-

AND
ORDER

BERTRAM MERTZEL, ALICE MERTZEL,
BERT FOOD CORP., THE CITY OF NEW YORK,

Defendants.

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DINA R. JANENSON
Flemming, Zulack & Williamson, LLP
One Liberty Plaza
New York, New York 10006
for plaintiff

DANIEL A. ZIMMERMAN
624 Oakwood Court
Westbury, New York 11590-5927
for defendants Bertram Mertz el and Alice Mertz el

NICKERSON, District Judge:

Plaintiff International House of Pancakes, Inc.
brought this action to foreclose a second mortgage lien
encumbering real property located at 160-20 Union
Turnpike, Flushing, New York. After granting plaintiff
a default judgment, this court issued a Judgment of
Foreclosure and Sale dated October 22, 1996. Plaintiff

now moves to confirm the Report of Sale by Referee Richard J. Montelione dated June 30, 1997 and for leave to enter a deficiency judgment pursuant to section 1371 of the New York Real Property Actions and Proceedings Law ("the Law").

The court's Judgment of Foreclosure and Sale, among other things, 1) awarded plaintiff the sum of \$257,938.42 plus interest and costs, 2) provided for the sale of the Premises "as is" at auction, 3) ordered the referee to pay out of the sale proceeds the taxes, assessments, and certain other liens on the premises and the amount due plaintiff, and 4) directed that if the remaining proceeds of the sale were insufficient to pay the amount due, plaintiff shall recover from defendants Bertram Mertz, Alice Mertz and Bert Food Corp. "the whole deficiency or so much thereof as the court may determine to be valid and equitable"

According to the referee's Report of Sale, the premises were sold for \$386,000.00 on June 24, 1997. The referee paid tax liens totaling \$251,056.05 and awarded plaintiff a total of \$295,176.42. The Report indicates a deficiency remaining of \$160,232.47.

Defendants object to the Report, saying that the referee artificially created a deficiency by applying the proceeds of the sale to the tax liens and arguing that the Judgment ordered the premises sold "as is," subject to taxes and any prior liens.

Defendants' Response and Objection is rejected as untimely. Under Local Civil Rule 6.1(b), relating to the service and filing of motions, "any opposing affidavits and answering memoranda shall be served within ten business days after service of the moving papers" Plaintiffs served defendants with moving papers on October 24, 1997. Defendants served their Response and Objection on November 14, 1997, seven days late.

In any event, defendants' objections are without merit. The Judgment ordered "that the referee on receiving the proceeds of such sale forthwith pay therefrom, in accordance with their priority according to the law, the taxes, assessments, water rates or sewer rents which are or may become liens on the Mortgaged Premises at the time of sale with such interest or penalties which may have lawfully accrued

thereon to the date of payment; and that the referee then deposit the balance of the proceeds . . . and shall thereafter make the following payments [itemizing the award to the plaintiff]" (emphasis added).

- The court's order is in accordance with section 1354(2) of the Law, which states that "the officer conducting the sale shall pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments, and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute." The referee properly applied the proceeds of the sale to both the outstanding tax liens and to plaintiff's award.

Plaintiff's motions are granted. The court confirms the referee's Report of Sale and directs the Clerk of the Court to enter a deficiency judgment in favor of plaintiff International House of Pancakes, Inc. and against defendants Bertram Mertz, Alice Mertz and Bert Food Corp. in the amount of \$160,232.47.

So ordered.

Dated: Brooklyn, New York
September 4, 1998

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.