SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NYCTL 2012-A TRUST AND THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiff(s),

DECISION AND ORDER

Index No: 260242/13

- against -

ROCKWELL CONSULTING OF NY INC., COMMISSIONER OF LABOR STATE OF NEW YORK, RAUL SALAZAR, PELHAM WELDING & IRON FABRICATION, INC., FAARON MINGO, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, CITY OF NEW YORK DEPARTMENT OF FINANCE, THE PEOPLE OF THE STATE OF NEW YORK,

Defendant(s).

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In this action to foreclose on a tax lien and the sell it encumbers, non-party Avant Garde Development (Avant) moves seeking an order pursuant to CPLR §§2606 and 2607, directing the NYC Commissioner of Finance to disburse payment to Avant in the amount of $80,000. Avant avers that the sum sought represents its down payment in an unsuccessful attempt to purchase the property at issue at a public auction. Avant contends that it is entitled to the foregoing sum because the property ultimately sold at a subsequent auction for a sum higher than Avant's bid. Defendant RAUL SALAZAR (Salazar) opposes the instant motion averring that in failing to close on the property, Avant forfeited its down payment and that such monies are now surplus moneys against which Salazar

seeks to enforce a judgment.

For the reasons that follow hereinafter, Avant's Motion is granted.

The instant action is to foreclose on a tax lien and sell the property it encumbers. The complaint alleges that plaintiff is the collateral agent for the City of New York (the City) and received the City's rights to, *inter alia*, all real property tax liens. Defendant ROCKWELL CONSULTING OF NY INC. (Rockwell), was the owner of real property located at Mickle Avenue, Bronx, NY (Mickle). Prior to 2012, Rockwell failed to pay property taxes when due, giving rise to a tax lien. On November 18, 2012, Rockwell failed to pay semi-annual interest on the foregoing tax lien thereby entitling plaintiff to foreclose on the lien pursuant to New York City, N.Y., Code § 11-332, New York City, N.Y., Code § 11-332 and New York City, N.Y., Code § 11-335, New York City, N.Y., Code § 11-335.

Avant's motion seeking an order directing the NYC Commissioner of Finance to disburse payment to Avant in the amount of $80,000 is granted. As will be discussed below, the record establishes that while Avant failed to close on its attempt to purchase Mickle at a public auction, pursuant to well settled case law and the Terms of Sale governing the sale in this action, Mickle subsequently sold for an amount exceeding Avant's Bid. Thus, Avant is entitled to

recover its down payment.

It has long been held that absent a violation of law or some transgression of public policy people are free to enter into contracts, making whatever agreement they wish no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]) Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the

writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

In addition to the foregoing, it is also well settled that all material terms in a contract be given full meaning and effect (Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]; *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]), that a contract be "read as a whole . . . every part . . interpreted with reference to the whole . . . [so] as to give effect to its general purpose" (*Beal Sav. Bank* at 324-25; *Westmoreland Coal Co.* at 358), and that a contract ought to not be interpreted in a way which renders any portion meaningless (*Beal Sav. Bank* at 324-25; *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]).

With respect to the sale of a property at a foreclosure action, is it well settled that

> [a] purchaser who defaults at a foreclosure sale is generally liable to the mortgagee for any deficiency between its bid and the amount obtained at a resale, and thus the deposit paid by the defaulting purchaser at the first sale could have been used towards eliminating any such deficiency

(*Renaissance Complex Redevelopment Corp. v Renaissance Assoc.*, 255 AD2d 274, 274 [1st Dept 1998]; *see Ziede v Mei Ling Chow*, 94 AD3d 771, 772 [2d Dept 2012]; *Bertino v Kalmanash*, 94 AD2d 794, 794-95 [2d Dept 1983]; *Fed. Nat. Mortg. Ass'n v Walsh*, 259 AD2d 660, 661 [2d Dept 1999]).

In support of its application, Avant submits the Memorandum of Sale (Memorandum) and the Terms of Sale (Terms) governing the Mickle's sale to Avant. The Memorandum indicates that on July 14, 2014, Avant, upon offering the highest bid at the public auction, bought Mickle for $505,000. Paragraph 2 of the Terms states that

> if purchaser fails . . . pay the balance of the purchase price and receive the deed, the Plaintiff will have the option . . . to . . . elect to re-schedule the foreclosure sale and the ten percent (10%) deposit given by purchaser to the Referee will be retained by the Referee and applied to the proceeds of the rescheduled foreclosure.

Paragraph 4 of the Terms states

> in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale . . . and such purchaser will be held liable for any difference there may be between the sum for which said premises shall be struck down upon the sale and the price for which the premises may be purchased on the resale . . . and upon purchaser's default the bid deposit shall be automatically forfeited and applied to

the aforesaid deficiency.

Avant also submits another Memorandum indicating that on January 5, 2015, Mickle sold to another party for $620,000.

Based on the foregoing, Avant demonstrates entitlement to the return of its down payment in connection with its failed attempt to purchase Mickle. To be sure, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace* at 565). As such, in enforcing the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield* at 569). Moreover, while "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 47), all material terms of in a contract be given full meaning and effect (Beal Sav. Bank at 324; *Excess Ins. Co. Ltd.* at 582), and a contract ought to not be interpreted in a way which renders any portion meaningless (*Beal Sav. Bank* at 324-25; *God's Battalion of Prayer Pentecostal Church, Inc.* at 374).

Here, the Terms, read in its entirety makes it abundantly clear that the forfeiture of the down payment described in Paragraph 2 upon failure to close on a sale is only triggered by the circumstances described in Paragraph 4. As such, as per

Paragraph 4, forfeiture of a down payment is only warranted in the event a subsequent sale is for a sum less than the winning bid in the first sale failed sale, thereby giving rise to a deficiency. Clearly, the language in the Terms mirrors well settled case law, which holds that a purchaser who defaults at a foreclosure sale is generally only liable to the mortgagee for any deficiency between its bid and the amount obtained at a resale (*Renaissance Complex Redevelopment Corp.* at 274; *Ziede* at 772; *Bertino* at 794-95; *Fed. Nat. Mortg. Ass'n* at 661).

Accordingly, here, where Avant's winning bid was $505,000 and although unable to close, Mickle subsequently sold for $620,000 there was no deficiency as indicated in the Terms so as to warrant the forfeiture of Avant's $80,000 down payment.

Salazar's opposition is unavailing. While it is undisputed that Salazar has a lien against the surplus moneys in this action, such lien logically only extends to such funds properly comprising the surplus moneys. Thus, here, where Avant's $80,000 is money Avant is entitled to have returned, Salazar's lien cannot preclude that. It is hereby

ORDERED that Avant's down payment of $80,000 be returned. It is further

ORDERED that upon service of this Decision and Order, with

Notice of Entry, the NYC Commissioner of Finance disburse payment to Avant in the amount of $80,000 from the surplus moneys from the sale of Mickle. It is further

ORDERED that Avant serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : May 19, 2017

Bronx, New York

Ben Barbato, J.S.C.