

SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. JOHN P. DUNNE, Justice

FILED
APR 23 2004
CLERK

TRIAL/IAS, PART 8

WASHINGTON MUTUAL BANK, FA

Plaintiff(s)

Index No. 15810/02
Motion Seq. No. 2
Motion Submission: 4/23/04
OTSC for
Temporary Restraining Order

-against-

GERALD KIRLEW, et al.

Defendant(s)

The following papers read on this motion:

- Order to Show CauseX
- Answering AffidavitsX
- ReplyX
- Memo.....

Upon the foregoing papers, it is hereby ordered that Defendant's application for a Restraining Order to prevent the foreclosure sale of the premises at **30 Pierson Avenue, Hempstead, New York**, is decided as follows:

Defendant states that he intends to redeem his property prior to the foreclosure sale which was scheduled and held prior to the submission of the motion (4/13/04). Defendant states that he wants to sell his home, has a buyer, and he is awaiting a payoff statement.

Plaintiff opposes Defendant's application by stating that the original Judgment of Foreclosure and Sale was entered on or about June 17, 2003. Defendant successfully delayed the instant action by filing bankruptcy petitions on the eves of sale and has caused the sales previously scheduled for August 19, 2003 or December 29, 2003, to be cancelled.

Plaintiff also points out that the Plaintiff has not alleged or established a contract of sale with his "buyer", nor indicates a closing date is scheduled or will even be held. In any event, even with proof of a contract of sale, Plaintiff argues that is not sufficient to stay the foreclosure sale.

Plaintiff informs the Court that the sale was held on April 13, 2004, and it resulted in a successful bid of \$258,000.00.

In reply, Defendant submits a copy of a Contract of Sale with a mortgage contingency clause, and an expired closing date (4/30/04). The date of the contract was April 8, 2004. Likewise, the Court notes that the down payment on a \$270,000 sale is \$6,750.00. Proof of payment/acceptance has not been provided.

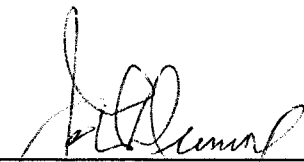
The Courts have held that the existence of a contract for the sale of the premises is not a defense to a foreclosure action. The Courts cannot compel the Plaintiff to await a closing of title which is speculative at best. **Pierce Associates, Inc. V. Citizens Casualty Co.**

of New York, 32 A.D.2d 495).

In light of the foregoing, and history of the case, Defendant's application is **denied in all respects**.

It is, so Ordered.

Dated: June 1, 2004



Hon. John P. Dunne

ENTERED
JUN 07 2004
NASSAU COUNTY
COUNTY CLERK'S OFFICE