

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X  
DEUTSCHE BANK TRUST COMPANY AS  
TRUSTEE FOR LONG BEACH MORTGAGE LOAN  
TRUST 2006-11,

Plaintiff,

-against-

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

CHRISTOPHER G. KELLY, BRADCO SUPPLY CORP., d/b/a WICKES LUMBER CO., CARLTON CONTRACTING CORP., UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL.,

Defendants.

Index No. 8625/2008  
Motion Date: April 20, 2010

-----X

The following papers numbered 1 to 10 were read on this motion by non-party New Life Properties of the Hudson Valley, LLC for an order directing the plaintiff or the referee to return a down payment in the sum of \$32,000.00:

Notice of Motion-Affirmation-Affidavit-Exhibits A-D.....	1-4
Affirmation in Opposition-Exhibits A-C.....	5-6
Reply Affirmation <sup>1</sup> -Exhibits A-B.....	7-8
Affirmation (Schisano) <sup>2</sup> .....	9
Sur-reply Affirmation.....	10

Upon the foregoing papers it is ORDERED that this motion is granted.

<sup>1</sup> The reply affirmation the court received has not been signed. To the extent necessary, the court has considered it as a memorandum of law since it is essentially legal argument and it is conceded that a certificate of occupancy had not been issued at the time concerned.

<sup>2</sup> This paper was labeled as an "affidavit" but was not sworn before a notary. It has been considered inasmuch as the referee has sworn under penalty of perjury.

The movant was the successful bidder at a foreclosure sale, having bid \$233,581.00 for the premises which are the subject of this mortgage foreclosure action. Movant tendered \$32,000.00 as a deposit to the referee. Thereafter, it was discovered that the premises, evidentially residential in nature, did not have a certificate of occupancy and movant began efforts to obtain one. Meanwhile, because the parties did not close, plaintiff declared movant in default and scheduled a second sale.

At the second sale, movant was again the successful bidder at the price of \$233,581.00 (see affirmation of Edward Rugino, Esq., dated March 18, 2010, paragraph 10).

This motion concerns the deposit from the first sale. The movant claims that title was unmarketable and that its deposit should be refunded.

The terms of sale provided "[p]laintiff makes no representation or warranties with respect to the marketability or insurability of the title being sold.... In the event that the Referee is unable to convey title subject as set forth herein and/or in the Judgment of Foreclosure and Sale, ... purchaser's remedy shall be limited to the return of those sums actually paid on account of the purchase price" (paragraph 10).

The sellers of residential property who do not possess a certificate of occupancy cannot convey marketable title (see Lightle v Becker, 18 AD3d 449 [2005]).

The referee is directed to refund the monies to movant if he is still holding them in escrow. If not, plaintiff is directed to apply

the funds to the amount bid at the second sale and, if necessary, to refund the monies to the extent plaintiff has overpaid.

The foregoing constitutes the decision and order of the court.

Dated: April 27, 2010  
Goshen, New York

E N T E R

Elaine Slobod  
HON. ELAINE SLOBOD, J.S.C.

TO: ROSICKI, ROSICKI & ASSOCIATES  
Attorneys for Plaintiff  
51 E. Bethpage Road  
Plainview, New York 11803

PAULA A. MILLER, ESQ.  
Attorneys for Non-Party Movant  
308 West Main Street  
Smithtown, New York 11777

RICHARD SCHISANO, ESQ.  
Referee  
3250 Route 9W  
New Windsor, New York 12553