At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of September, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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GOLDEN BRIDGE LLC, d/b/a GOLDEN BRIDGE FUNDING LLC,

Plaintiff,

- against -

RUTLAND DEVELOPMENT GROUP, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN WILLIAMS, and LEN SMITH,

Defendants,

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DECISION AND ORDER

Index No. 505934/18

Mot. Seq. No. 8-9

The following e-filed papers read herein:	Papers Numbered:
Notice of Motion/Cross Motion, Affirmations, and Exhibits Annexed	84-86; 87-95
Affirmation (Affidavit) in Opposition and Exhibits Annexed	96-98
Reply Affirmation and Exhibits Annexed	99-100

In the post-judgment, post-auction phase of this commercial foreclosure case, the following motion and cross motion have been consolidated for disposition:

In Seq. No. 8, plaintiff Golden Bridge LLC, doing business as Golden Bridge Funding LLC (plaintiff), moves for an order: (1) pursuant to Judiciary Law § 753 (A) (3), punishing nonparty 176 Brooklyn NYC DBYC LLC (the bidder) by fine or imprisonment, or both, for contempt for its failure to close the transaction on the two underlying properties located at 1024 Rutland Road and 1026 Rutland Road in Brooklyn, New York (the 1024 property and the 1026 property, respectively; collectively, the properties) in accordance with the Court's order, dated Mar. 13, 2020 and entered by the Kings County Clerks Office on June 11, 2020 (NYSCEF #82) (the prior order); and/or (2) in the alternative, directing Referee Jeffrey R.

Miller, Esq. (the referee), to pay to plaintiff the bidder's down payment of $165,000 (the down payment) forthwith as a result of the bidder's failure to close the sale of the properties in violation of the prior order and directing the referee to re-auction the properties forthwith; and/or (3) awarding costs and/or punitive sanctions against the bidder, in a sum of not less than $1,500, as a result of plaintiff preparing and serving its motion.

In Seq. No. 9, the bidder cross-moves for leave, in effect pursuant to CPLR 2221 (d), (1) to reargue its motion, by order to show cause, dated Feb. 24, 2020, in Seq. No. 6 for an order directing the referee to return the down payment to the bidder (NYSCEF #76) (the prior motion), which prior motion was denied by the prior order; and (2) to reargue plaintiff's cross motion, by notice of motion, dated Mar. 6, 2020, in Seq. No. 7 for an order compelling the bidder to close on the properties "within 7 days, time of the essence of the closing date," and in the event that the bidder failed to close within that deadline, directing the referee to disburse the down payment to plaintiff (NYSCEF #79) (the prior cross motion), which prior cross motion was granted by the prior order to extent that the "closing [was] to take place [within] 10 days from service of a copy of th[at] order"; and, upon reargument, vacating the prior order, granting the prior motion, and denying the prior cross motion.

Background

On Mar. 13, 2020 when the Court issued the prior order, the complaint in the quiet-title action captioned *Alleyne v Rutland Dev. Group Inc. and Golden Bridge LLC, d/b/a Golden Bridge Funding, LLC*, index No. 505513/19 (Sup Ct, Kings County) regarding the 1024 property (the quiet-title action) had already been dismissed by order, dated Oct. 16, 2019 (the dismissal order), and the notice of pendency against the 1024 property had already been vacated by order, dated Dec. 18, 2019. The plaintiff in the quiet-title action did not seek

a stay of the dismissal order. What remained outstanding at the time of the prior order – and which remains outstanding as of the date of this decision and order – is the as-yet unperfected appeal by the plaintiff in the quiet-title action from the unstayed dismissal order. The time to perfect that appeal (2019-13512) currently expires on Sept. 23, 2020,[1] unless further extended.

The parties disagree as to whether the bidder is obligated to close notwithstanding the pendency of the appeal from the unstayed dismissal order in the quiet-title action. The bidder contended in its prior motion that it was not obligated to close and that it was entitled to the return of the down payment because the title to the properties was (and still is) uninsurable without exception for the appeal as to the 1024 property. Plaintiff, on the other hand, maintained in its prior cross motion that the appeal's existence was (and still is) immaterial to the bidder's obligation to close because the notice of pendency underlying the dismissal order had been vacated. The Court, in the prior order, rejected the bidder's contention and agreed with plaintiff's position to the extent of directing that the closing take place within ten days from the date of service of that order. The closing did not occur, and the instant motion practice ensued.

Discussion

It is well established that "a purchaser at a foreclosure sale is entitled to a good, *marketable* title" (*Jorgensen v Endicott Trust Co.*, 100 AD2d 647, 648 [3d Dept 1984] [citing (*Heller v Cohen*, 154 NY 299, 306 [1897], *reargument denied* 155 NY 625 [1898] [emphasis

[1] *See* Second Judicial Department's Administrative Order No. 2020-0707.

added]). As Justice David B. Vaughan observed in the decision and order previously issued in this action:

> "A *marketable* title is one that may be freely made the subject of resale. It is one which can be readily sold or mortgaged to a person of reasonable prudence, the test of the marketability of a title being whether there is an objection thereto such as would interfere with a sale or with the market value of the property. *The law assures to a buyer a title free from reasonable doubt, but not from every doubt, and the mere possibility or suspicion of a defect, which according to ordinary experience has no probable basis, does not demonstrate an unmarketable title.* If the only defect in the title is a very remote and improbable contingency, a slender possibility only, a conveyance will be decreed. Stated another way:
>
> > The test is not the hazard of possible litigation, for, as has been pointed out, it seems to be the inalienable right of any person to start a law[]suit. The test is rather the chance of successful attack."

(Decision and Order, dated July 1, 2019 [NYSCEF #51], at 3 [internal quotation marks and citations omitted; emphasis added]).

At the time of Justice Vaughan's decision and order, the quiet-title action was active, and the notice of pendency remained in effect. Therefore, Justice Vaughan ruled – and the parties have not challenged his ruling – that the then-effective notice of pendency against the 1024 property precluded plaintiff, *at that time*, from compelling the bidder to close on both properties (*see* Decision and Order, dated July 1, 2019, at 4). Justice Vaughan, however, did not direct the referee to return the down payment to the bidder because, *at that time*, the bidder sought no such relief by way of a motion or cross motion (*id.*).

Since then, the status of the quiet-title action has changed dramatically. The quiet-title action has been dismissed; no stay of such order has been sought; and the notice of pendency has been vacated. All that remains at this point is an appeal from the unstayed dismissal

order. The pendency of the appeal of the unstayed order dismissing the quiet-title action does not render title to the properties unmarketable (*see Da Silva v Musso*, 76 NY2d 436, 438 [1990]; *Singh v Ahamad*, 154 AD3d 683, 684 [2d Dept 2017]; *425 E. 26th St. Owners Corp. v Beaton*, 128 AD3d 766, 767-768 [2d Dept 2015]; *Malco Realty Corp. v Westchester Condos, LLC*, 114 AD3d 413, 415 [1st Dept 2014]). That the bidder's title insurer has refused to issue an insurance policy on the title without exception for the pending appeal, is not a valid basis for the bidder's refusal to close. There is a fundamental difference between marketable title and insurable title. Whereas marketable title is "a title free from reasonable doubt, but not from every doubt" (*Regan v Lanze*, 40 NY2d 475, 482 [1976]), insurable title, *when required as a contractual condition for title delivery*, is a "title that a reputable title insurance company is willing to insure" (*Ardi v Martin*, 24 Misc 3d 1219[A], 2009 NY Slip Op 51525[U], *4 [Sup Ct, Suffolk County 2009], *reargument denied* 2009 NY Slip Op 32407[U] [Sup Ct, Suffolk County 2009], *affd* 79 AD3d 1078 [2d Dept 2010], *lv denied* 23 NY3d 904 [2014]). No requirement that the referee provide the bidder with an insurable title is set forth in either the Order Confirming Referee Report and Judgment of Foreclosure and Sale, dated Dec. 6, 2018 (the JFS), the Terms of Sale executed by the referee (the terms of sale), or the Memorandum of Purchase and Agreement to Comply with the Annexed Terms of Sale executed by the bidder (the purchase memorandum). It is clear that the bidder breached the purchase memorandum when it failed to close in accordance with the prior order.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion is *granted to the extent* that the referee is directed (1) to disburse to plaintiff the bidder's down payment of $165,000 within 20 days after service of this decision and order with notice of entry, and (2) to re-auction the properties in accordance with the JFS and the terms of sale; and it is further

ORDERED that the bidder's cross motion is *denied in its entirety*; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the bidder's counsel and on the referee, and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH

J.S.C.

Justice Lawrence Knipel