

D'Angelo v 1432 86th St. Realty Corp.

2008 NY Slip Op 32867(U)

September 2, 2008

Supreme Court, Kings County

Docket Number: 40966/00

Judge: Gloria Dabiri

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At an IAS Term, Part 2 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 2nd day of September 2008.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X
RONALD JAMES D'ANGELO,

Plaintiff(s),

- against -

Index No.: 40966/00

1432 86TH STREET REALTY CORP., JOHN F. GANGEMI, JOSEPH P. GRANCIO, DOMINICK M. GANGEMI, NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK ET. AL.,

Defendant(s).

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed _____	1 - 3
Opposing Affidavits (Affirmations) _____	4
Reply Affidavits (Affirmations) _____	_____
Affidavit (Affirmation) of <u>Dominick Neglia</u> _____	5
Other Papers <u>Referee's Report of October 19, 2007</u> _____	6

Upon the forgoing papers, plaintiff Ronald James D' Angelo seeks an order, pursuant to CPLR 4403, confirming the report of the Referee, dated October 19, 2007, and for a Judgment of Foreclosure and Sale. Defendants 1432 86th Street Realty Corp. and John

Gangemi cross-move for an order confirming in part and rejecting in part the October 19, 2007 report of the referee. The former Receiver of the property, Gerald Resnick, Esq., moves separately for an order directing payment of his commission and payment of his attorney's fees from the funds held by the newly appointed receiver, Hon. William Thompson.¹

Order of Reference

In October 2000 plaintiff Ronald D'Angelo, the assignee of the mortgage, commenced this action to foreclose on a mortgage encumbering property located at 1432 86th Street in Brooklyn, New York. The property consists of a two-story commercial building containing approximately 1,425 square feet of ground floor retail area and approximately 1,425 square feet of second floor office space ("the subject building").

In an August 11, 2003 order, Michael Mondschein was appointed as referee to hear and report on the amount of the set-off for any damage caused by plaintiff's renovations to the second floor and for plaintiff's use and occupancy of such floor. By order of September 22, 2004 plaintiff was granted summary judgment on the foreclosure claim and Gregory Cerchione, Esq., was appointed "referee to ascertain and compute the amount due to Plaintiff for principal, interest [sic] and other disbursements advanced as provided for in the Note and Mortgage upon which this action was brought, [and] to examine and report whether or not

¹Such portion of the former receiver's motion as seeks payment of his commission was granted by short form order dated April 1, 2008. By such order Resnick was granted a commission of \$1,210.63. The issue of fees for the former receiver's attorney, Steven Jay Feinstein, is now before the court.

the mortgaged premises can be sold in parcels.”

By so-ordered stipulation dated August 7, 2004 the parties set forth a discovery schedule and agreed that the matter would be referred to only one referee. Pursuant to the stipulation the parties agreed to a hearing with respect to “the amount of set-off, if any, for damages caused by the repairs made by plaintiff to the subject premises and for use and occupancy during the time period plaintiff occupied the second floor of the subject premises.” Thereafter, by order of November 29, 2004 Michael Mondschein was appointed as referee “to compute the amount due on plaintiff’s mortgage, which shall not commence until completion of the hearing on the issues of plaintiff’s repairs at and uses and occupancy of the building.”

A so-ordered stipulation of August 17, 2005 provides for completion of discovery, including depositions, by October 12, 2005, and an order of March 24, 2006 (Dabiri, J.) denied plaintiff’s request for a protective order prohibiting defendants from deposing Fred Martorell as employee of the plaintiff’s law firm.

By order of April 4, 2007 (Dabiri, J.), Mr. Mondschein’s appointment as referee to compute the amount due on the mortgage, the amount of any offset and the net amount due plaintiff, was continued. The order also provides that all parties “submit affidavits in support of their positions with documentation within thirty (30)” and replies “within fifteen (15) days thereafter.” The time for submissions was extended by order of May 11, 2007.

Hearing and Referee's Report

Prior to receiving testimony Referee Mondschein was duly sworn, on March 16, 2005, to faithfully and fairly hear and report on the questions referred to him, and filed the required notice of appointment and certificate of completion with the Fiduciary Clerk of this court. The parties made the following submissions to the Referee in lieu of testimony: (1) the affidavit of William Yurus, Esq., dated November 3, 2006, supplemented by his letter of February 21, 2007; (2) the affidavit of defendant John F. Gangemi, dated June 4, 2007, annexed to which were the report of architect Constance Gangemi Slampiak and her curriculum vitae, the report of President of Qualcon Construction, Peter Edward Slampiak, and the report of licensed real estate appraiser Dominick Neglia along with his curriculum vitae; (3) the affirmation in reply by William Yurus, Esq. dated July 2, 2007; and (4) the amended affirmation of William Yurus, Esq. dated June 5, 2007 annexed to which was the affidavit of Mark Hertz, President of Mark Hertz Company.

Following his review of these submissions, Referee Mondschein reported that the following amounts are due on the mortgage and note: Principal in the amount of \$202,866.76; Interest in the amount of \$539,295.77 (calculated based upon a rate of 24.00% per annum from September 1, 1996 through September 20, 2007); and Taxes, Water/Sewer and Insurance in the amount of \$27,669.98. The Referee found that plaintiff's occupancy of the premises from August 1998 through March 2001, a period of thirty-two (32) months, was undisputed and that based upon a "detailed discussion of the data, reasoning and analysis

that developed the [appraiser's] opinion of value" \$91,000 was a fair estimate of the cost of use and occupancy. As such, the Referee concluded that, after reduction for use and occupancy, the plaintiff is due \$678,832.51 (\$769,832.51 less \$91,000.00).

The Referee denied the plaintiff's claim for \$18,414.71 in repair and improvement costs. In this regard he stated:

"I find it difficult to comprehend under what authority the plaintiff made alleged repairs and/or improvements ... In fact the Plaintiff had no ownership in the property. He did have the Defendants approval to make such repairs in general. But no agreement had been made regarding the costs."

The court previously determined that the plaintiff was liable for damage caused by his renovations to the second floor of the premises.² In this regard, Referee Mondschein concluded that the plaintiff's renovation of the second floor, from two office units to one large unit, which was performed without a permit, seriously impairs the property's marketability. He concluded that this damage, however, could be corrected.

The Referee rejected the appraisal of licensed real estate appraiser Dominick Neglia, offered by Defendants, who valued the building at \$0 as a result of the unlicensed alterations. Defendants' maintained that \$216,795.00 was required to restore the building so as to conform with its existing Certificate of Occupancy and approved building plans. In this regard the Referee concluded that "the report of CGS Architect and Design and a

²See decision and orders of August 11, 2003, November 29, 2004 and June 6, 2006 and so ordered stipulation dated August 7, 2004.

construction proposal from Qualcon Construction reeks of nepotism. Constance Gangemi is the daughter of Defendant John Gangemi and was at one time a holder of the mortgage at issue. Peter Edward Slampiak is the husband of Constance Gangemi and son-in-law of [a] defendant.” The Referee found that, on the other hand, plaintiff offered the affidavit of Mark Hertz, President of Mark Hertz Company, a company which is “regularly engaged in the business of providing property owners ... building code consulting services which includes conducting violation research as well as obtaining dismissals of same.” Hertz affirmed that the defendants’ assertions were “grossly exaggerated” and that the actual cost of curing the outstanding building violations is approximately \$15,000.00 to \$20,000.00. He points out that the property was assessed by the New York City Department of Finance at a value of \$826,000.00. In conclusion, the Referee stated:

As a real estate attorney, I agree . . . that commercial mortgage lenders regularly [engage] in holding money in escrow from the mortgage proceeds to cure violations. The property is marketable . . . It is my recommendation that an escrow of \$40,000.00 be held by either the purchaser’s title company or bank to ensure the removal of the violations. Thereafter the costs for such removal will be paid from the escrow and the balance divided equally among the defendants.

***Motions to Confirm /Reject
the Referee’s Report [CPLR 4403]***

Parties’ Contentions

Plaintiff seeks confirmation of referee’s report of October 19, 2007 to the extent of the Referee’s finding that \$678,832.50 is due on the mortgage, plus interest at the rate of 24

per cent per annum.” Plaintiff initially contends that the referee exceeded his authority in making findings regarding partition, publication and an offset. Plaintiff argues that the affidavits submitted by defendants in support of an offset should be excluded because they contain expert opinions which are not based upon facts in evidence or facts properly assumed. Plaintiff argues that the property should be sold at a foreclosure sale “as is” with the purchaser taking the property subject to any building violations. With regard to use and occupancy, plaintiff contends that the affidavit of Dominick Neglia is legally insufficient to establish rent values and that at most defendants are entitled to an offset of \$32,000, based upon the 2000 lease agreement which required monthly rent of \$1,000. Furthermore, plaintiff argues that under the theory of unjust enrichment, he is entitled to be reimbursed for repairs and improvements made to the property.

Defendants 1432 86th Street Realty Corp. and John F. Gangemi seek confirmation of that portion of Referee’s report as determined that the amount due is \$769,832.51 and that \$91,000.00 be deducted for use and occupancy. Defendants also assert that in an order of April 2007 the court directed that the receiver list the property for sale on the open market, rather than at a foreclosure sale.³

Defendants argue that Mark Hertz does not state his qualifications, that he did not inspect the building and that he does not provide a statement of the work to be performed in order to remedy the violations. Defendants further argue that the issue is not the cost of

³The referenced April 2007 order is not supplied by defendants. Although the court is supplied with two orders dated April 4, 2007, neither addresses the sale of the property.

legalizing renovation work performed by plaintiff, but rather the cost of restoring the building to its prior condition. Defendants contend that they must be placed in the position they would have been in had the plaintiff not materially altered the building, even if such remedy is more expensive. According to the defendants, this restorative work includes reinstalling a bathroom, walls, fire doors and fire exits, and any work needed to meet Department of Building code requirements and to obtain a Certificate of Occupancy.

Defendants further argue that Hertz does not take into consideration fees charged by an architect, contractor, plumber or electrician. Defendants also maintain that the replacement of a bathroom now requires compliance with the Americans with Disabilities Act (ADA). Finally, defendants argue that, pursuant to CPLR 4512,⁴ the reports of Constance Gangemi Slampiak and Peter Edward Slampiak are supported by ample evidence and should not be disregarded simply because of their relationship to the defendants. Defendants maintain that while issues of credibility are normally committed to the discretion of the trier of fact, in this case there was no witness testimony to evaluate and the Referee supplies no valid grounds for his assertion that these reports are not credible. Defendants seek \$216,795.00, plus 9 % interest from March 12, 1998 to present, as a set-off against the amount due on plaintiff's mortgage.

⁴CPLR 4512 provides that "[e]xcept as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party."

Discussion

Upon a motion to confirm or reject the report of a referee, a court may confirm or reject the report, in whole or in part, “may make new findings with or without taking additional testimony” or “order a new trial or hearing” (CPLR 4403). The report of the referee should be confirmed whenever the findings are substantially supported by the record, the referee has clearly defined the issues and has resolved matters of credibility (*Thomas v Thomas*, 21 AD3d 949, 949 [2005]; *Freedman v Freedman*, 211 AD2d 580, 580 [1995]). When, however, a referee’s finding is unsupported by the record, the court is within its authority to rejecting such portion of the report (*Borenstein v Rochel Properties, Inc.*, 216 AD2d 34 [1995]), and may do so upon its own independent review of the record without taking additional testimony (*Jacynicz v 73 Seaman Associates*, 270 AD2d 83, 86 [2000]).

“In cases involving references to report, the Referee’s findings and recommendations are advisory only; they have no binding effect” on the Court (*Shultis v Woodstock Land Development Associates*, 195 AD2d 677, 678 [1993]; see *Common Council of the City of Middletown v Town Board of the Town of Wallkill*, 143 AD2d 215, 216 [1988]). Moreover, in a foreclosure action the court is the ultimate arbiter of the issue of the principal sum due on the mortgage and has the power to reject the Referee’s report and make new findings (*Adelman v Fremd*, 234 AD2d 488, 489 [1996]; *Stein v American Mortgage Banking, Ltd.*, 216 AD2d 458, 459[1995]; *Cohen v Four Way Features, Inc.*, 215 AD2d 341, 341 [1995]; see also RPAPL 1321 [the court shall ascertain and determine the amount due, or direct a

referee to compute]).

Here, the orders of August 11, 2003, September 22, 2004 and April 4, 2007, directed Referee Mondschein to hear and report on both the *foreclosure* and *set-off matters*. Thus, plaintiff's contention that the referee exceeded his authority in reporting on partition and on the offset is without merit. Moreover, although not required to, this court scheduled a further hearing to take additional evidence on all issues raised by the instant motions before this court.⁵ At such further hearing the parties had an opportunity to present witnesses as well as other evidence relevant to the issues before the Referee. The parties, however, in lieu of presenting witness testimony, agreed to documentary submissions.

Upon review of both the record before Referee Mondschein and that presented to the court, the Referee's report is confirmed to the extent of his determination that the amount due on the mortgage is \$769,832.51 and that \$91,000.00 be deducted from that amount for plaintiff's use and occupancy. However, while the defendants are entitled to be compensated for renovations which rendered the premises hazardous or in violation of a Certificate of Occupancy, here there is evidence that the defendants were aware of the renovations and consented to same. In an August 3, 2000 Stipulation and Order (Jones, J.), in a related action entitled *D'Angelo v Gangemi* (Index No. 14239/99), defendants assigned their interest in the subject mortgage to Ronald D'Angelo "in consideration of the fact that plaintiff advanced \$230,000 of the purchase price of said mortgage (said purchase price was \$250,000) and in

⁵By order of April 11, 2003, the parties were directed to "supply to opposing parties and to the court [prior to the hearing] copies of all documents and affidavits they intend to offer into evidence."

consideration of \$20,000 in repairs to the subject real property made by plaintiff.”⁶

On May 25, 2005 the New York City Department of Building (DOB) issued a violation, in the amount of \$800, for work performed at the premises without a permit, *to wit* “at 2nd floor — removed hatch and ladder leading to the roof, removed bathroom and doors with partitions at staircase, built partitions with doors at front and rear. At offices, creating one office instead of two.” The notice indicated that the violation could be remedied by either obtaining a permit or restoring the premises to its prior legal condition under certificate of occupancy (CO) # 226753 and having the plans approved. Having received no indication that this violation was remedied, the Environmental Control Board (ECB), on June 24, 2000, issued a violation in the amount of \$5,000. Constance M. Gangemi Slampiak, a licensed architect, opines that to render the building safe it is necessary to restore the layout to comply with the existing CO (the layout noted on the 1986 approved plans), to bring the premises up to current codes and to file with the DOB for a new CO. Ms. Slampiak contends that the cost of this work is approximately \$42,000:

- \$ 10,000 architectural fees, drawings, application and sign off;
- \$ 2,000 expediting fees for application process, filing, securing permits and close out;
- \$ 2,000 DOB filing fees;

⁶When deposed John Gangemi testified that Ronald D’Angelo never asked his permission to make any changes to the building and that he had no idea what alterations were made during the two and a half year period. Gangemi testified that the first time he saw the premises was when D’Angelo moved out. However, Ronald D’Angelo testified: “Mr. Gangemi told me that I could do whatever I wanted up there”; “I was told by John F. Gangemi that I could do the work that I told him that I wanted to do up there, and [Mr. Gangemi] said that it’s cosmetic in nature. I had nothing to be concerned about.”

\$ 28,000 DOB penalty fee prior to issuance of permits (14 times the filing fee times the percentage of job completed)

Defendants' contractor, Edward Slampiak, estimates that construction and labor costs, based upon Slampiak's architectural drawings, will be approximately \$174,795.00 exclusive of permit costs.

Plaintiff supplies the affirmation of Mark Hertz, President of Mark Hertz Company, a company which provides building code consulting services, including conducting violation research and assistance in obtaining a dismissal of violations. Mr. Hertz contends that the 23 open ECB and DOB violations on the premises can be cured for approximately \$15,000 - \$20,000. Specifically, Mr. Hertz opines that the \$2,500 violation for unauthorized installation of a roof top air-conditioner unit can be resolved by applying for an equipment-use permit which would cost \$3,500 for filing fees and a licensed HVAC professional. According to Hertz, to remove the \$5,000 and \$800 violations for work performed without a permit, the property owner could either (1) apply for a permit to legalize the work done, the cost of which would be approximately \$1,500 - \$3,500, and pay a fine equal to fourteen times the filing fee or (2) file an Alteration Repair Application (ARA) to remove the illegal work, the cost of which would be approximately \$2,800. Notably, Mr. Hertz does not include in his assessment the cost of architectural plans, licensed plumbers and electricians to certify new work or of labor to remove the illegal work. Mr. Hertz, also does not include an estimate for additional fines which, according to Ms. Slampiak, could be upwards of \$20,000. Mr. Hertz opines that the seven Local Law 62 violations, for not performing annual

boiler inspections, can be removed by either paying \$500 for each violation or by filing reports for the years that were missed, including a \$50 late filing fee. Mr. Hertz contends that compliance with the ADA is not required because the current CO was issued prior to the enactment of the ADA that after curing the violations the current CO would be in effect.

Defendants seek an off-set of 100% on the mortgage on the grounds that plaintiff's alterations render the property unmarketable. Dominick Neglia, a licensed real estate appraiser, avers that the marketability of the premises is negatively affected by (1) the physical configuration of the premises in violation of the existing CO; (2) the unlikelihood that a prospective buyer would obtain a conventional mortgage or insurance due to violations on file with the DOB; (3) the need for an all cash sale in view of the improbability of obtaining a conventional mortgage;⁷ (4) the time required to remove violations; and (5) the difficulty in leasing the premises while the violations remain unresolved. Mr. Neglia, avers that based upon rentable square footage and comparable rents from 1998 to 2000, the second floor would have rented for an average of \$30,400 per year. However, no evidence has been presented that once the premises is brought to code, with all violations removed, the rental value of the second floor in its existing configuration would be of less than had it remained in its two-unit configuration. Indeed, whether the second floor should be maintained as one unit or two is a determination which can be made by the purchaser. As there is a lack of

⁷The court is supplied with a February 2, 2006 letter from The Mortgage Zone, Inc., signed by Loan Officer Adam Dispirito, which states that there are no banks willing at this time to issue a first mortgage on this property due to the violations found on the title search and the issues concerning the Certification of Occupancy.

evidence that once marketable title is restored the property would be less valuable in its new configuration than in its prior configurations, the defendants fail to demonstrate entitlement to complete restoration of the second floor to its prior form.

In view of the foregoing, the sum of \$75,000 constitutes a reasonable set aside. This sum takes into consideration the estimated cost of curing outstanding ECB and DOB violations; bringing the property to current code and ADA requirements, as necessary; filing for a new CO; satisfying DOB and ECP penalties and retaining an architect, electrician, plumber and HVAC specialist as required.

Plaintiff's Motion for Reasonable Attorney's Fees

Plaintiff seeks reasonable attorneys fees pursuant to the mortgage in connection with this foreclosure action in the sum of \$168,117.05 as follows:

Legal fees generated by Christopher J. Panny, Esq. plaintiff's counsel, from October 2000 to April 2004	\$65,585.05
Legal fees generated by The Law Offices of David M. Namm, Esq. for work previously performed, 280.95 hours @ \$350 per hour	\$98,332.50
Estimated legal fees to be generated by The Law Offices of David M. Namm, Esq. for work to complete this matter, 12.0 hours @ \$350.00 per hour	\$4,200.00

Plaintiff argues that defendants engaged in dilatory tactics, including motions to reargue, appeals and other proceedings, to delay meeting their obligation under the mortgage. In

support plaintiff supplies the February 7, 2008 affirmation of his former counsel Christopher Panny. Mr. Panny attaches a detailed bill itemizing his work for the three and one half years.⁸ William Yurus, of counsel to The Law Offices of David M. Namm, Esq., also supplies an affirmation of legal services rendered.

Defendants contend that plaintiff is only entitled to fees associated with the foreclosure action which was resolved by the August 2003 court order determining the validity of the mortgage. Defendants submit that any legal fees incurred by plaintiff after this order relate to his defense of their counterclaims for an offset due to destruction of the property and use and occupancy. Defendants also argue that plaintiff waived all claims for legal fees having failed to raise the matter before the Referee. In addition, defendants argues that plaintiff fails to provide a copy of a retainer agreement and that his counsel's hourly rate of \$300.00 is excessive. Finally, defendants maintain that because they were not parties to an action by Christopher Panny, Esq. against plaintiff for legal fees, they should not be made to pay such fees, especially since the fee dispute was settled for an amount less than that billed by Mr. Panny.⁹

Paragraph 15 of the July 15, 1988 mortgage provides that the mortgagee "shall be entitled to recover the reasonable fees and expenses of its counsel incurred in connection

⁸Mr. Panny's legal fees were billed up until September 2002 at a courtesy/agreed at a rate of \$150 per hour and thereafter at the rate of \$250 per hour.

⁹By so-ordered stipulation of May 21, 2004 in this action plaintiff and Attorney Christopher J. Panny, who was withdrawing as plaintiff's counsel, settled Mr. Panny's motion for attorney fees "for the agreed sum of twenty two thousand (\$22,000.00) dollars, which sum is to be paid, \$11,000 upon signing this agreement and \$11,000.00 within 30 days."

with any default under the Note or this Mortgage including fees and expenses incurred in any foreclosure proceeding pursuant to this Mortgage.” Plaintiff’s complaint seeks

“(g) ... Advances and legal fees heretofore expended by mortgagee prior to this action as shown on statement of account annexed hereto as Exhibit F, and interest thereon at the default rate of 24% per annum.

(h) Plus Advances heretofore made by the plaintiff herein for the repair of the premises in the amount of \$20,000.00.

(i) In addition to legal fees and expenses incurred with respect to a previous foreclosure action, pursuant to Section 15 of the Mortgage, Plaintiff is entitled to recover from the Defendants the attorney’s fees and expenses incurred in connection with this foreclosure action and any other steps taken as a result of the default, together with interest thereon at the default rate.”

As previously noted, on September 22, 2004 Justice Michael Garson, *inter alia*, granted plaintiff summary judgment on the foreclosure action and referred the matter to a referee to ascertain the amount due on the mortgage. By decision of November 29, 2004, defendant Grancio’s motion to reargue the summary judgment motion was denied. An amended order of summary judgment was issued February 3, 2005 (Garson, J.) substituting Michael Mondschein, Esq. as referee and discharging Gregory Cerchione, Esq. Thereafter litigation continued with respect to, *inter alia*, (1) the counterclaims and set-offs asserted by Joseph P. Grancio and 1432 86th Street Realty Corp. against the plaintiff, (2) appointment of a receiver and payment of the receiver’s fees, (3) the receiver’s application for an order of contempt against Ursula A. Gangemi, (4) a protective order in connection with requested discovery and (5) a motion to amend the answer to add a claim for punitive damages.

Attorney’s fees are merely an incident of litigation and thus are not recoverable absent

a specific contractual provision or statutory authority (*Levine v Infidelity, Inc.*, 2 AD 3d 691, 692 [2000]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). Here, the mortgage document obligates the mortgagor to pay fees and expenses incurred in connection with any foreclosure proceeding (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989])[words in a contract are to be construed to achieve the apparent purpose of the parties and should be restrained to the particular occasion and to the particular object which the parties had in view]). However, where a large portion of a mortgagee's legal fees is expended in defending a counterclaim for an offset, the mortgagee is not entitled to be reimbursed for such portion of the fees (*Board of Managers of Dickerson Pond Condominium I v Jagwani*, 276 AD2d 517, 517 [2000]; *Granada Condominium I v Morris*, 225 AD2d 520, 522 [1996]). Here, the foreclosure action and the claims for an offset are not so inextricably intertwined as to warrant the recovery of attorney's fees for all claims (*cf. Binghamton Precast & Supply v A. Servidone, Inc./B. Anthony Construction Corp.*, 257 AD2d 731, 733 [1999]). Stated otherwise, the claims for an offset could have been severed from the foreclosure action or maintained as a separate plenary action and are not integral to the foreclosure action. Thus, plaintiff must bear those costs as an incident of litigation (see *Board of Managers of Dickerson Pond Condominium I*, 276 AD2d at 517).

What constitutes reasonable attorneys' fees is committed to the sound discretion of the court, based upon such factors as the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel (*SO/Bluestar, LLC v Canarsie Hotel*

Corp., 2006 NY Slip Op 7864, 2 [2006]); *M. Sobol, Inc. v Wykagyl Pharm., Inc.*, 282 AD2d 438, 439 [2001]; *Granada Condominium I*, 225 AD2d at 522). Here plaintiff seeks \$98,332.50 for 280.95 hours of work at a rate of \$350 per hour. Mr. Yurus fails to establish the reasonableness of his request for fees at the rate of \$350 per hour. In addition, as indicated herein the plaintiff is not entitled to attorney's fees incident to his defense of defendants' counterclaim for renovations to the building and use and occupancy.

Plaintiff is therefore awarded reasonable attorney fees, at this time, in the amount of \$22,000.00 for the services of his former counsel Christopher Panny, Esq., [per the March 21, 2004 so-ordered stipulation], and \$14,375.00 for legal fees of plaintiff's current counsel up until January 21, 2005 (57.5 hours @ \$250 per hour). Finally, upon the completion of this action, plaintiff's current counsel is directed to submit, on notice, an affirmation of legal services rendered in relation to the foreclosure proceeding only, so that the court may determine the reasonable additional fee due.

Referee's Commission

The referee seeks compensation for 33.7 hours of services rendered at a rate of \$300.00 per hour. In addition the referee seeks \$190.00 for disbursements, for a total of \$10,300.00. In support of his application the referee annexes to his October 19, 2007 report an itemized statement of services rendered. Defendants object to the conclusory bill of services provided by Referee Mondschein and seek a hearing to be conducted to determine

the true amount of legal fees due and owing to the referee. Plaintiff does not object to the referee's request for additional compensation.

A referee's compensation is fixed by CPLR 8003(a) which provides that "a referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead" (CPLR 8003 [a]). Generally, where, as here, there is no stipulation by the parties or a specific rate set forth by the court in the order of reference, a Referee's fee must be limited to the statutory per diem fee of \$50, provided for by CPLR 8003 [a] (*Al Moynee Holdings, Ltd. v Deutsch*, 254 AD2d 443, 444 [1998]; *Green Point Sav. Bank v Miller*, 233 AD2d 292, 295 [1996]; *Pittoni v Boland*, 278 AD2d 396, 397 [2000], *In re Popper*, 242 AD2d 297, 298 [1997]). However, where the Referee renders unusual and exceptional services he or she may receive such additional compensation as the court may deem proper (*NYCTL 1996-I Trust v Zarum*, 292 AD2d 577 [2002], citing *Osborn v DeGraaf Bldg. Corp.*, 236 App Div 172, *Chisholm v Hopson*, 182 App Div 856 [1918]; see also *O'Dwyer v Robson*, 103 AD2d 1036 [1984]).

In view of his responsibility to hear and report on multiple complex issues, lengthy, ongoing disputes among the parties and the number of court appearances required, compensation is approved in the amount of \$6,930.00 (33.7 hours @ \$200 per hour + \$190 for disbursements).

Receiver's Attorney's Fees

By order of August 22, 2002 (Garson, J.) the court (1) pursuant to BCL 1202, appointed Gerald A. Resnick, Esq. as temporary receiver of defendant 1432 86th Street Realty Corp. and its property; and (2) appointed Stephen J. Feinstein, Esq. "as attorney for the receiver herein, with the usual powers of an attorney."

In its order of April 4, 2007, this court approved the final accounting of the former receiver Gerald Resnick and ordered "payment of the sum of \$36,738.38 to Steven Jay Feinstein, Esq. as and for their legal services rendered to the Receiver, all of which remains earned and billed, but unpaid [calculated 40.70 hrs in court @ \$250 & 129.55 hrs out of court @ \$200]." Accordingly, it is

ORDERED, that the plaintiff's motion is granted to the extent that Referee Mondschein's Report of October 19, 2007 is confirmed to the extent of his finding that \$678,832.50 is due to the plaintiff, as principal and interest *et al* on the mortgage, less \$91,000 for plaintiff's use and occupancy, and the report is otherwise rejected; it is further

ORDERED, that the portion of plaintiff's motion as seeks reasonable attorneys fees is granted to the extent indicated herein, and otherwise denied; it is further

ORDERED, that the motion of the former receiver is granted to the extent that Steven Jay Feinstein, Esq. is granted reasonable attorneys fees in the amount of \$36,738.38; and it is further

ORDERED, that the property shall be sold at a public auction in accordance with the Judgment of Foreclosure and Sale to be issued by the court; and it is further

ORDERED, that the cross-motion of defendants is granted to the extent that upon the sale of the property, the sum of \$75,000 shall be set aside in escrow to be held by the purchasers' title company or bank to ensure removal of the violations described herein, that the cost of such removal be paid from the escrow and that the balance be returned to the plaintiff.

E N T E R,



J.S.C.

HON. GLORIA DABIRI