

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

2009 NY Slip Op 32356(U)

October 2, 2009

Supreme Court, Kings County

Docket Number: 40966/2000

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 2<sup>nd</sup> day of October, 2009.

P R E S E N T:

HON. GLORIA DABIRI,

Justice.

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RONALD JAMES D'ANGELO,

Plaintiff,

- against -

Index No. 40966/2000

1432 86<sup>TH</sup> STREET REALTY CORP. ET ANO,

Defendant.

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Ronald James D'Angelo, pursuant to CPLR 2221, seeks reargument of his motion to confirm portions of the report of Referee Michael Mondschein, dated October 19, 2007. By order of September 2, 2008 the court, effectively, confirmed the referee's finding that plaintiff is due \$768,832.51 on the mortgage and note and that defendants are entitled to a set-off for use and occupancy in the amount of \$91,000.

The court directed that \$75,000 be held in escrow to ensure removal of building code violations and for repairs, and denied plaintiff's request for attorney's fees.

### ***Facts and Procedural History***

This action was commenced by plaintiff in October 2000 to foreclose the mortgage held on a commercial building owned by defendant 1432 86<sup>th</sup> Street Realty Corp. Defendants John F. Gangemi, Joseph P. Grancio and Dominick Gangemi are principals and officers of 1432 86<sup>th</sup> Street Realty Corp. and personally guaranteed re-payment of the mortgage note.

The procedural history of this matter is set forth in this court's decision and order of September 2, 2008 (Dabiri, J.), and is, in part, as follows:

“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 [of the property] 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 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 use[] and occupancy of the building.'

In lieu of testimony the parties, per stipulation, provided Referee Mondschein with the following document submissions: the affidavit of Williams Yurus, Esq., dated November 3, 2006, supplemented by his letter of February 21, 2007; the affidavit of John F. Gangemi, dated June 4, 2007, annexed to which were the report of architect Constance Gangemi Slampiak along with her curriculum vitae, the report of the President of Qualcon Construction, Peter Edward Slampiak, and the report and curriculum vitae of licensed real estate appraiser Dominick Negli; the affirmation in reply of Mr. Yurus, dated July 2, 2007; and the amended affirmation of Mr. Yurus, dated June 5, 2007, annexed to which was the affidavit of Mark Hertz, President of the Mark Hertz Company.

In his report of October 19, 2007 Referee Mondschein reported that \$202,866.76 in principal, \$539,295.77 interest and \$27,669.98 for "taxes, water/sewer and insurance" is due on the mortgage and note. With respect to plaintiff's occupancy of the premises from August 1998 through March 2001, a period of 32 months, the referee found Mr. Neglia's appraisal of \$91,000 to be a fair estimate. Thus, the referee concluded that, after reduction for use and occupancy, the plaintiff was due \$678,832.51 (\$769,832.51 less \$91,000).

The court previously had determined that plaintiff was liable for damages caused by his renovation of the second floor of the property. The referee concluded that while plaintiff's renovations of the second floor — from two office units to one large unit — , performed without a permit, impaired the property's marketability, the damage was correctable. Thus, the referee recommended that an escrow of \$40,000 be held by either the purchaser's title company or bank to ensure removal of the violations.

On or about March 7, 2008 plaintiff moved, pursuant to CPLR 4403, to confirm the referee's report only to the extent of his finding that "defendant owes to the plaintiff a sum to be computed pursuant to the terms of the subject note and mortgage." In support of his motion, plaintiff argued that the affidavits submitted by defendants in support of the offset for damages should have been excluded because they contained expert opinions not based upon facts in evidence. Plaintiff argued that the property should be sold at a foreclosure sale "as is," with the purchaser taking it subject to any building violations. With respect to use and occupancy, plaintiff argued that the affidavit of defendants' expert, Mr. Neglia, was legally insufficient to establish rent values. Plaintiff claimed, based upon a 2000 lease agreement which required monthly rent of \$1,000, that, at most, the defendants were entitled to an offset of \$32,000.

The court scheduled a further hearing on plaintiff's motion and defendants' cross-motion to confirm, permitting the parties an opportunity to present witnesses and other evidence. The parties, however, once again agreed to document submissions in lieu of a

hearing. The resulting September 2, 2008 order of this court confirmed the referee's report to the extent that he reported that the mortgage amount due was \$769,832.51 and that \$91,000 should be deducted for use and occupancy. The court also found that the sum of \$75,000 constituted a reasonable set aside for the damage to the second floor, taking into consideration the estimated cost of curing outstanding Environmental Control Board (ECB) and Department of Building (DOB) violations, bringing the property to current code and the Americans with Disabilities Act (ADA) requirements, as necessary, filing for a new Certificate of Occupancy (CO), satisfying DOB and ECB penalties, and retaining an architect, electrician, plumber and HVAC specialist as required.

Further, the court concluded that plaintiff was not entitled to attorney's fees incident to his defense of the counterclaim for a set-off, and awarded \$22,000 to plaintiff for the services of his former counsel, Mr. Christopher Panny, pursuant to a May 21, 2004 so-ordered stipulation.

### ***Motion to Reargue***

In support of the motion to reargue, plaintiff first argues that the record before the referee and the court was devoid of legally sufficient evidence to support the \$91,000 award for use and occupancy, in that the appraisal by Mr. Neglia did not contain "detailed discussions of the data, reasoning, and analyses" used to develop his "opinion of value." Plaintiff maintains that because "supporting documentation concerning the data, reasoning and analyses [was] retained in the appraiser's work file" and not a part of defendant's

submissions, the appraiser's opinions and conclusions could not be understood.

Plaintiff argues that the only legally sufficient evidence before the referee establishing the value of plaintiff's use and occupancy was a lease under which plaintiff was charged \$1,000 per month in rent for the entire second floor of a "nearly identical" property located two doors from the subject property. Thus, plaintiff maintains, the record supports an award of \$32,000 (32 months x \$1,000).

Plaintiff next argues that in ordering that \$75,000 be set aside for violations the court overlooked the fact that he could only be responsible for 2 of the 23 violations, as most of the violations pre-dated his occupancy. To support this argument, plaintiff points to the June 28, 2007 affidavit of his expert, Mr. Hertz, in which he avers that 12 of the 20 DOB violations are dismissible without penalty, that one consists of a construction violation issued in 1984, and that 7 are violations of Local Law 62, relating to annual boiler inspections and are removable with either a \$500 fine (per violation) or by filing the delinquent reports and paying a late fee of approximately \$50.00 per violation.<sup>1</sup> Plaintiff argues that because the Local Law 62 violations resulted from the owner's failure to report annual boiler inspections, curing these violations is the responsibility of the owner, 1432 Corp.

With respect to the ECB violations, Mr. Hertz stated that they were for unauthorized installation of a rooftop air-conditioning unit (one violation), and for work done without a

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<sup>1</sup>Plaintiff also argues that the 12 old violations and the violation issued in 1984 cannot be his responsibility because they occurred prior to his occupancy.

permit (two violations), and are curable for approximately \$10,000.<sup>2</sup> He concluded that the cost of curing all violations is approximately \$15,000-\$20,000, and that the defendants' claim that the violations rendered the property unmarketable is "grossly inaccurate."

As to the unauthorized rooftop air-conditioning unit, plaintiff points out that when deposed Mr. Gangemi testified that the air-conditioning and heating unit were in place, on the roof, when plaintiff took possession of the second floor. As to violations resulting from the removal of a hatch and ladder leading to the roof, plaintiff argues that he (plaintiff) testified that prior to his occupancy Mr. Gangemi had sealed the hatch and removed the ladder. Plaintiff concludes that since he is responsible for only 2, at most, of the 23 violations, a reduction in the \$75,000 set-aside is warranted.

Plaintiff next argues that the court erred in denying his request for attorney's fees resulting from his defense of defendants' counterclaim, in that the claim for a set-off is inextricably intertwined with the foreclosure action. Further, he contends, since defendants sought a 100% offset on the mortgage, he was required to defend the mortgage lien. Plaintiff relies upon Paragraph 15 of the July 15, 1988 mortgage which provides in part:

"If the holder of this Mortgage shall become a party in any action or proceeding in which it becomes necessary to defend or uphold the lien of this Mortgage, all sums paid by said holder in

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<sup>2</sup>Mr. Hertz states that resolution of violation number 34222517H (unauthorized installation of air-conditioner) can be accomplished by applying for an equipment-use permit, at a cost of approximately \$3,500.00 in filing fees and obtaining a licensed HVAC professional. He also states that resolution of violation numbers 34480222M and 34528613J (work done without a permit), could be had by applying for a permit to legalize the work done, the cost of which would be approximately \$1,500.00-\$3,500.00 and a fine equal to fourteen (14) times the filing fee. Alternatively, the owner can file an Alteration Repair Application (ARA) to legally remove the illegal work, at a cost of approximately \$2,800.00.

connection therewith, including reasonable counsel fees, shall be paid by the Mortgagor and said amount shall be a lien on the Mortgaged Property.”

Plaintiff argues that he is entitled to a credit for all fees paid to his former attorney, Mr. Christopher Panny, because the amount awarded to Mr. Panny’s pursuant to a May 21, 2004 so-ordered stipulation did not represent the total fees earned and paid. Plaintiff maintains that an additional \$42,548.32 is due to him for Mr. Panny’s fees and, in support, plaintiff supplies the February 7, 2008 affirmation of Mr. Panny, (supplied on the motion to confirm), annexed to which are billing statements for August 2000 through December 2003. Thus, plaintiff contends, he is entitled to a total of \$64,548.32 (\$22,000 plus \$42,548.32).

Finally, plaintiff argues that the court, in error, twice subtracted the \$91,000 set-off from the amount due on the mortgage note. In this regard, the September 2, 2008 decision and order states, (at page 10), “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, the decretal paragraph states that the referee’s report 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.”

In opposition to the motion, defendants assert that the award of \$91,000 for plaintiff’s use and occupancy was proper in that Mr. Neglia detailed the facts upon which he relied in reaching his opinion, while plaintiff, on the other hand, relied solely upon a copy of a 1991

lease agreement for another property. Defendants maintain that this lease was an inappropriate basis upon which to base rent estimates for 1998 through 2000 in that there is no proof that the supplied lease was for comparable, commercial space.

As to the \$75,000 set-aside for violations, defendants argue that the violations were only one of the many factors considered by the court. Defendants point out that it was plaintiff's expert who enumerated the violations and provided an initial estimate of the cost of curing them, and argue that plaintiff cannot now retract the concession that he is responsible for curing these violations. Moreover, assert defendants, plaintiff's failure to argue that certain violations predated his occupancy precludes him from raising this claim upon reargument.

On the issue of attorney's fees defendants note, once again, that plaintiff improperly presents arguments which were not raised on the original motion. Defendants point out that it was the court, not plaintiff, which raised the question of whether the foreclosure action and counterclaims were inextricably intertwined. In both his motion and reply plaintiff merely argued that he was entitled to counsel fees as a result of the defendants' default under the terms of the mortgage. Defendants also assert that the November 29, 2004 order specifically separated the claims by staying the foreclosure until the damages and use and occupancy claims were determined.

As to plaintiff's further claim that he is entitled to a credit for legal fees previously paid to Mr. Panny, defendants point out that plaintiff submits no evidence that the charges stated

in Mr. Panny's affirmation were *paid*.

### ***Discussion***

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law" (*Singleton v Lenox Hill Hosp.*, 61 AD3d 956 [2009], quoting *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2005]; see CPLR 2221[d][2]). "A motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked" (*Simon v Mehryari*, 16 AD3d 664, 665 [2005]).

On the question of use and occupancy, plaintiff's argument that the record before the referee and the court was devoid of legally sufficient evidence to support an award is without merit. By letter dated June 12, 2008 defendants provided plaintiff and the court with a second affidavit by Mr. Neglia, dated June 11, 2008, along with supporting documentation. This documentation includes the rental data used by Mr. Neglia in determining the average rent per square.

Although the leases from which Mr. Neglia drew his information are not provided, the property addresses, lease dates, square footage and cost are provided for each location. Mr. Neglia affirms that "[i]n order to assemble historical comparable rental information for the subject, rental information from the appraiser's files were analyzed; the sources of these comparable rentals included actual leases, and information from mortgages, lessees, and

brokers.” He avers that “[i]nvestigation of comparable rentals was conducted by interviewing principals, mortgagees and lessees in the area, application of historical data from the appraiser’s files, and by our experience in the area over the last 20 years.” Moreover, while the average rent per square foot for the three relevant years as reflected in the documentation provided is slightly higher than the average rents used by Mr. Neglia to calculate the offset, Mr. Neglia explains that “[m]arket rents for those years are . . . estimated.” Accordingly, Mr. Neglia’s appraisal, which itself contains a thorough analysis of the subject property and neighboring area, and a description of the appraisal process, is sufficiently supported by facts in evidence (*Racwell Const., LLC v Manfredi*, 61 AD3d 731 [2009] [expert opinion must be based on facts in the record or personally known to the witness]). An expert is permitted to rely upon out-of-court material if “it is of a kind accepted in the profession as reliable in forming a professional opinion” (*Hambash v. New York City Transit Authority*, 63 NY2d 723, 725 [1984]; *People v. Angelo*, 88 NY2d 217, 222-223 [1996]; *Jemmott v. Lazofsky*, 5 AD3d 588 [2004]; *Wagman v. Bradshaw*, 292 AD2d 84, 87 [2002]). Here, the details provided by Mr. Neglia regarding the comparable rental properties considered in reaching his opinion offers sufficient means with which to test the reliability of the comparable rents upon which he relied (*Wagman v. Bradshaw*, 292 AD2d at 85-86).

Plaintiff argues that the offset of \$75,000 for violations is in error as the bulk of the violations were imposed before he took possession of the property in August, 1998. However, the court did not award \$75,000 solely to cure building violations. The award also includes

“bringing the property to current code and ADA requirements, as necessary; filing for a new CO; satisfying DOB and EC[B] penalties and retaining an architect, electrician, plumber and HVAC specialist, as required.” In addition, having failed to raise this issue on the original motion, plaintiff is precluded from raising it now (CPLR 2221[d][2]). Further, while Mr. Hertz asserts that 12 of the violations are old and dismissable without penalty, the dates of these violations, with the exception of the 1984 violation, are unknown.<sup>3</sup> There, also, is no evidence that the remaining seven Local Law 62 violations are not plaintiff’s responsibility.

As noted, plaintiff argues that he is entitled to attorney’s fees incident to his defense of defendants’ counterclaim for renovations to the building and use and occupancy as the claims and counterclaims are inextricably intertwined. However, plaintiff failed to make this argument on the original motion to confirm. In any event, as the court noted in its September 2, 2008 decision and order, where, as here, 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 Condo. I v Jagwani*, 276 AD2d 517, 518 [2000]; *Granada Condo. I v Morris*, 225 AD2d 520, 522 [1996]). Moreover, there is no dispute as to plaintiff’s lien. By a September 22, 2004 order (Garson, J.), plaintiff was granted summary judgment on the foreclosure claim and a referee appointed to compute the amount due.

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<sup>3</sup>Mr. Hertz provided the New York City building records regarding the violations referred in his affidavit, but did not identify the age of the violations.

As to plaintiff's claim for additional legal fees, *inter alia*, Mr. Panny's affirmation does not indicate that the fees were paid.


Finally, as to the misstatement in the decretal paragraph, that portion of the decision and order of September 2, 2008 which granted the motion to confirm the referee's report "to the extent of his finding that \$678,832.40 is due 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." is amended to read as follows:

"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 \$769,832.51 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."

Accordingly, it is

ORDERED, that plaintiff's motion is granted and upon reargument the court amends the first decretal paragraph as indicated herein, and otherwise adheres to its original determination.

**E N T E R,**

  
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**J. S. C.**

**HON. GLORIA DABIRI**