

**CIT Lending Servs. Corp. v 654 Broadway Partners
LLC**

2010 NY Slip Op 34102(U)

November 23, 2010

Supreme Court, New York County

Docket Number: 112833/2009

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CIT LENDING SERVICES CORPORATION,

Plaintiff,

Index No. 112833/2009

-against-

DECISION/ORDER

654 BROADWAY PARTNERS LLC, KYLE RANSFORD,
TREVOR STAHELSKI, GRUBB & ELLIS NEW YORK,
INC., NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, NEW YORK CITY
DEPARTMENT OF FINANCE, AND JOHN DOE #1
THROUGH JOHN DOE #10,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, CIT Lending Services Corporation ("CIT") moves for an Order confirming the Report of Court Appointed Referee Roberta Ashkin, Esq., dated October 11, 2010 (the "Referee's Report").

On July 7, 2010, this Court granted CIT's motion for summary judgment against defendants 654 Broadway Partners LLC ("654 Broadway"), Kyle Ransford, and Trevor Stahelski's (collectively, "defendants") and directed the Referee to ascertain and compute the amount due to CIT upon the Note and Mortgage being foreclosed upon in this action (the "Order"). The Order also directed the parties to furnish the Referee with all documents necessary to perform the computations.

The Referee "computed and ascertained the amount due to CIT" based upon the "Loan Documents upon which this action was brought, the Affidavit of Sums Due, sworn to by Bobby C. Kim of Parallel Asset Management, LLC . . . with exhibits annexed thereto (the "Kim

Affidavit"), and the Affirmation of Charles Biener [Mr. Biener] . . . with exhibits annexed thereto (the "Biener Affirmation") . . ." Attached to the Report is "Schedule A," which "consists of a Statement of Sums Due" and shows "the amount due for principal and interest respectively, together with the other sums secured by the said mortgage, [and] the period of the computation of the interest and its rate, as detailed in the accompanying Kim Affidavit and Biener Affirmation.

In support of its motion, CIT contends that on September 2, 2010, it submitted to defendants a copy of the proposed Referee's Report, along with the documents supporting the calculations (the "September 2, 2010 Letter"). In the September 2, 2010 Letter, CIT informed defendants that it was their "intention that Ms. Ashkin sign the Referee's Oath and Report of Amount Due in the form that is being submitted with th[e] letter." CIT requested defendants to "advise us and Ms. Ashkin in writing, within five business days of the date of this letter [*i.e.*, September 9], whether [defendants] believe there are any errors contained in the papers and the nature of any alleged errors." On September 8, 2010, defendants requested an extension of time to respond to the September 2, 2010 Letter. CIT granted defendants an extension until September 15, 2010 to respond to the September 2, 2010 Letter. Defendants did not respond to the September 2, 2010 Letter. Thus, CIT requested the Referee to review the proposed Referee's Report, which she signed on October 11, 2010.

In opposition, defendants argue that a referee's report should not be confirmed unless its findings are supported by the record. Even where there is support for such findings in the record, "the court is not bound by the referee's recommendation and his/her determination. The Referee's Report lacks any analysis of the computations provided by plaintiff. Instead of holding

a hearing to determine the amounts due, as required under CPLR 4313, the Referee rubber stamped plaintiff's calculations. The Referee adopted plaintiff's interest calculations in their entirety even though the interest rate applied by plaintiff is not the LIBOR-based rate set forth in the applicable Loan Agreement, but rather the prime rate, a rate designated as the alternative interest rate under that agreement. Neither the plaintiff nor the Referee provide any analysis of whether or why the alternative rate is applicable here. Nor does the Referee's Report demonstrate whether prime rate-based charges were permitted, and whether notice was required of same and/or provided to the borrower. Data publically available during the applicable period under the Loan Agreement indicates that the prime rate was higher than LIBOR, based upon any one of the LIBOR-based criteria (*i.e.*, 1, 3, 6, 12 months).

There is also no support or analysis for the inclusion of the so called "Exit Fee." The only reference to this fee appears in Section 1.1 of the Loan Agreement and the Referee makes no effort determine its applicability in a foreclosure setting.

The Referee's Report also adopts plaintiff's \$311,288.14 claim for attorney's fees despite the fact that plaintiff did not provide itemized bills, the affidavits submitted by plaintiff are insufficient to determine whether the fees incurred are reasonable and at least two of the motions plaintiff seeks fees on, one of which resulted in a full day court hearing, were denied by this Court. Mr. Biener provides non-detailed summaries that do not explain the work performed by each biller. The bill summaries annexed thereto are likewise inadequate in that they provide only dollar amounts and no insight as to the work actually performed.

While plaintiff provided defendants with notice of the proposed Referee's Report and invited comment, the nature of the issues raised above do not present themselves to a consensual

resolution in the limited period of time afforded by plaintiff. Defendants are entitled to a hearing and to present evidence on the amounts due under the loan documents and a referee's report should not be confirmed in the absence of such a hearing.

In reply, CIT contends that caselaw holds that defendants waived any right to a hearing. Defendants fail to fully explain that they were provided ample notice and an opportunity to object to the proposed Referee's Report and to request that the Referee conduct a hearing, but they opted not to object or request such hearing. Defendants even failed to object after CIT granted the defendants' request for an extension of time to submit such objections. CIT argues that the Referee's Report can be confirmed in the absence of a hearing, even if a hearing was not conducted, because defendants waived their right to a hearing. The cases cited by defendants in opposition are inapposite, in that they do not concern situations where a party was provided with advance notice and an opportunity to object to a proposed Referee's report.

Discussion

CPLR 4403 provides that the court has the power to confirm or reject "in whole or in part . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing" (*In the Matter of the Application of RBC Capital Markets Corp.*, 24 Misc 3d 728, 877 NYS2d 877 [Sup. Ct., New York County 2009] citing *Matter of Galiber v Previte*, 40 NY2d 822, 824 [1976] and *Barrett v Stone*, 236 AD2d 323, 324 [1st Dept 1997]). The report and recommendations of a Special Referee should be confirmed if its findings are supported by the record (*Sichel v Polak*, 36 AD3d 416, 828 NYS2d 310 [1st Dept 2007] citing *Baker v Kohler*, 28 AD3d 375, 814 NYS2d 121 [1st Dept 2006]). However, the court is not bound by the Referee's recommendation or his or her

determination (*In the Matter of the Application of RBC Capital Markets Corp.*).

According to the Kim Affidavit, upon which the Referee's Report was partly based, Broadway Partners made and delivered to CIT a Loan Agreement and a Note, both dated August 15, 2007. Under the Note, CIT agreed to advance up to the maximum principal amount of \$12,000,000.00 and Broadway Partners unconditionally promised to pay to CIT (i) the principal sum of the Note, (ii) interest on the unpaid principal sum of the Note from time to time outstanding, and (iii) additional interest (if any), at the rates and at the times and in the manner specified in the Loan Agreement (as that term is defined herein); and (iv) the outstanding balance of the principal sum of the Note, and all accrued and unpaid interest and all other charges relating thereto, on August 13, 2009 (the "Maturity Date"). On August 15, 2007, as collateral security for the payment, fulfillment and performance of its obligations evidenced by the Loan Agreement, the Note and the other Loan Documents, Broadway Partners executed and delivered to CIT a Mortgage, Assignment of Leases and Rents and Security Agreement, dated August 15, 2007 (the "Mortgage"), granting CIT a security interest in the Mortgaged Property, pursuant to which Broadway Partners mortgaged, among other things, the Mortgaged Property to CIT. Pursuant to the terms of the Note, CIT advanced \$11,999,927.61 to Broadway Partners (the "Loan"). This entire amount is currently due and outstanding. The Loan Agreement details that the interest rate on the Loan shall be payable on the unpaid principal on the first business day on the first calendar month following August 15, 2007 (the "Closing Date") and, thereafter, monthly on the first business day of each calendar month during the term of the Loan at the prime rate, plus the Reference Rate Margin. See Loan Agreement at § 2.2. [Emphasis added] Post default, the interest rate accrues at a contractual default rate of the prime rate, plus an additional 5%. See 1.1

[Emphasis added]. Broadway Partners is also responsible for a monthly late fee equivalent to 5% of the monthly interest due for that particular month. § 2.4.3. The Loan Agreement also provides that Broadway Partners will pay on the Maturity Date an Exit Fee in the amount of one quarter of one percent (.25%) of the principal amount of the loan due. § 1.1 The Loan Agreement further provides that the Exit Fee will be deemed to be interest on the principal balance of the loan. § 2.4.2. The Affidavit also explained the details contained in a spreadsheet, which was also submitted to the Referee, of the calculations of the interest on the Loan, the resulting late fees for non-payment, and the Exit Fee. The total interest due as of August 1, 2010, plus the one time Exit Fee of \$29,999.82 were calculated as \$1,975,412.94. The total late charges due were calculated as \$98,770.65. Finally, the property tax detail from the New York City Department of Taxation, indicated the amount of unpaid property taxes for the period of July 1, 2009 through July 1, 2010, as \$95,675.34.

Therefore, the Referee's findings as to the amounts due under the Note and Mortgage, including interest and the Exit Fee, were supported by the record. Further, the Referee's Report was also based on the affirmation of Mr. Biener. Mr. Biener, the attorney overseeing this matter for CIT, details the monthly legal fees and expenses CIT paid pursuant to invoices attached to his affirmation. It bears noting that although the invoices only detail the numbers of hours each attorney worked, and the billable rate, CIT *paid* the legal fees it incurred as a result of defendants' default.

The cases cited by defendants are factually distinguishable (*Donovan v Empire Ins. Group*, 49 AD3d 589, 591, 856 NYS2d 139 [2d Dept 2008]) (holding that plaintiff's delay in notifying insurer of the occurrence after receipt of the claim letter violated the insurance policy;

referee's report was not supported by the record where plaintiff's belief in nonliability after receiving the claim letter, which clearly stated that that attorneys were retained to pursue a claim against the plaintiff, was unreasonable); *Surgical Design Corp v Correa*, 21 AD3d 409, 799 NYS2d 584 [2d Dept 2005] (referee's report that was not supported by the record where all but the three letters were related to the rendering of "sound legal advice," and, thus, the Referee should not have directed the plaintiff to produce them; Referee also erred in directing plaintiff to produce the three letters of client communications in furtherance of a fraudulent scheme, not protected by the attorney-client privilege, since the collateral issue of the plaintiff's fraudulent scheme is not material and relevant to the remaining issues in the litigation)).

It has been held that it is error to confirm a referee's report without either conducting a hearing on notice or otherwise affording the contesting party an opportunity to present its own proof or challenge the referee's computations (*Sears v First Pioneer Farm Credit*, 46 AD3d 1282, 850 NYS2d 219 [3d Dept 2007] citing *Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678-679 [1993]; 243 West 9811 *Condominium v Shapiro*, 12 AD 3d 591, 592, 786 NYS2d 67 [2d Dept 2004] (holding that it was "error for the referee to compute the amount due to the plaintiff without holding a hearing on notice to the appellants"))).

However here, such caselaw is inapplicable. First, the Court's July 10, 2010 order directing the appointment of the Referee did not direct a hearing, but instead, provided as follows:

ORDERED that Roberta Ashkin, Esq., 580 Broadway, Suite 906, New York, New York 10012, (212) 965-0010 is hereby appointed referee to ascertain and compute the amount due upon the Note and Mortgage being foreclosed upon in this action.

The parties are directed to cooperate with the referee and furnish him/her with all documents necessary to perform the computations. Upon a successful motion to confirm

the referee's report, CIT may move for summary judgment on damages and a final judgment of foreclosure. . . .

Second, defendants did not appeal, or seek leave to renew or reargue the branch of the Court's order to the extent it did not grant a hearing. Third, the failure of the Referee to hold a hearing prior to the issuance of her Report is not automatically fatal to an application to confirm the Report (*see Blueberry Investors Company v Ilana Realty, Inc.*, 184 AD2d 906, 585 NYS2d 564, 566 [3d Dept 1992] (rejecting defendants' claim that Supreme Court erred by confirming the Referee's report because the Referee failed to hold a hearing prior to issuance of the report; such hearings are appropriate to settle disputed facts and defendants admitted in their answer that they owed plaintiff \$1,350,000 "with interest from November 1, 1989"). Moreover, it is undisputed defendants were given ample opportunity to submit evidence and its objections to the Referee prior to her Report, and failed to avail themselves of such opportunity.

Citibank v Grunfield (188 Misc 2d 327, 328, 728 NYS2d 632, 633 (Sup. Ct., Kings County 2001) is instructive. *Citibank* involved plaintiff's motion for a judgment of foreclosure and sale and a confirmation of the Referee's report dated October 26, 2000. Summary judgment was granted, and the matter was referred to Robert P. Kern, as Referee, "to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided in the note and mortgage which this action brought." Defendants requested, by letter to Mr. Kern, dated September 3, 2000, that a trial/hearing be scheduled on the issues set forth in the order of reference, pursuant to CPLR 4318 and 4320. A letter, dated October 20, 2000, was sent to defendants, which contained a proposed report of the amount due, along with an affidavit in support thereof. "The letter advised defendants that they should notify plaintiff if there were any

errors in the papers. If plaintiff did not receive a writing within five days of the date of the letter, it indicated that it would proceed on the assumption that defendants agreed with the computation as set forth in the proposed report and letter.” On October 24, 2000, defendants faxed a letter to plaintiff, demanding a hearing and objecting to proposed Referee's report, and claiming that they did not believe that Citibank would be able to meet its burden of proof with respect to the notification of the interest rate changes and calculations of the interest rate charges. On October 26, 2000, Mr. Kern signed the Referee's report. Defendants, unaware that Mr. Kern signed the Referee's report, faxed a letter to plaintiff, indicating that they wanted a hearing to be scheduled. Plaintiff's motion was granted. The Court held that “Since the defendants failed to timely reply to the plaintiff in response to its October 20, 2000 letter and proposed Referee's report, they waived their right to a hearing. Thus, the Referee's report need not be vacated on the ground that no hearing was held.

Here, on September 8, 2010, defendants requested an extension of time to respond to the September 2, 2010 Letter, which was granted until September 15, 2010. It is undisputed that defendants did not respond to the September 2, 2010 Letter. There is no indication that defendant ever sought a hearing or sought further time to submit objections or evidence disputing the amounts sought. Having failed to object to the contents of the proposed Referee's Report, and having failed to request any hearing before the Referee, defendants cannot now argue that the Referee's Report is unsupported by the record before the Referee, or should otherwise be rejected. Defendant's belated objections to the Referee's Report, at this juncture, are insufficient.

Conclusion

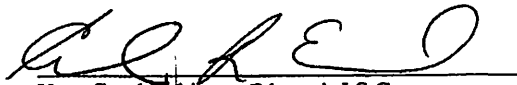
Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff to confirm the Report of Court Appointed Referee Roberta Ashkin, Esq., dated October 11, 2010 is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor plaintiff and against respondent pursuant to the Report of Court Appointed Referee Roberta Ashkin, Esq., dated October 11, 2010.

This constitutes the decision and order of the Court.

Dated: November 23, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD