

Horizons Inv. Corp. v Breceovich
2012 NY Slip Op 33081(U)
December 14, 2012
Sup Ct, New York County
Docket Number: 114600/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

5A
1921B
FILE

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 114600/2009
HORIZONS INVESTORS CORP.
vs.
BRECEVICH, JOHN
SEQUENCE NUMBER : 003
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 24 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: October 22, 2012

HON. JOAN A. MADDEN J.S.C.
J.S.C.
☒ NON-FINAL DISPOSITION

1. CHECK ONE: ☐ CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
HORIZONS INVESTOR CORP.,

INDEX #: 114600/09

Plaintiffs

- against -

JOHN BRECEVICH a/k/a GIOVANNI BRECEVICH &
ROSEMARY BRECEVICH & WARMINSTER INVESTMENTS
CORP., & NYC ENVIRONMENTAL CONTROL BOARD

Defendants.

-----X
JOAN A. MADDEN, J

FILED **RECEIVED**
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In this mortgage foreclosure action, plaintiff mortgagee Horizons Investors Corporation ("Horizons") moves for an order (1) confirming the Referee's Report of Computation, and (2) issuing a Judgment of Foreclosure and Sale. Defendants John and Rosemary Breceovich oppose the motion

Background

This is an action for foreclosure of a consolidated mortgage held by defendants in the amount of \$1,175,000 on a building located at 2283 First Avenue, New York, NY, a mixed use residential and commercial building. Defendant John Breceovich, as mortgagor, defaulted on the mortgage by not making any of the payments that became due and owing, commencing June 1, 2007. Horizons moved for summary judgment to foreclose the mortgage. Defendants John Breceovich and Rosemary Breceovich opposed the motion and cross-moved for an order to dismiss. By decision and order dated July 13, 2011, the court held that Horizons established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage, and the default by John Breceovich. Also pursuant to its July 13, 2011 decision and order, the court appointed

Special Referee Francis D. Terrell, Esq. to ascertain and compute the amount due to plaintiff. Following the issuance of the Referee's report, Horizons moved to confirm the report and for the issuance of an a Judgment of Foreclosure and Sale.

In opposition, defendants assert, inter alia, that: 1) the documents listed by the referee as "note and mortgage" do not match the documents furnished to the court, 2) a default rate of 24% is not mentioned in the mortgage or note, which only permits it to be "19% or the highest rate allowed," so the default rate would have to be 19%, 3) interest should be disallowed from April 28, 2008, the date plaintiff wrongfully recorded a deed to the premises in an attempt to allegedly circumvent the statutory scheme and eviscerate defendant's constitutional right to the equity of redemption, 4) Horizons' act in recording the deed after the date of the mortgage supersedes the mortgage and served to create an equitable mortgage, which revises and supersedes the terms of the original mortgage, 5) the determination in this case must await the adjudication of the damages sought by defendant Breceovich in the deed case, as those damages would properly serve as a setoff or credit to be applied towards the equity of redemption, 6) an examination of the signature page of the mortgage allegedly indicates that plaintiff either intentionally omitted or altered pages in the mortgage, and 7) Horizons was aware that the entire premises is being used as a one to four family dwelling by Mr. Breceovich and his family, which would confirm that Horizons' prosecution of this action as a commercial mortgage foreclosure is in contravention of the notice requirements of RPAPL § 1304.

Defendants' arguments do not provide a basis for rejecting the Referee's report as they are outside the only issue here which is the amounts due on the note. Moreover, many of these arguments were previously raised and decided against defendants in the

court's decision and order dated July 13, 2011, and therefore the doctrine of collateral estoppel bars defendants from relitigating them. See Barcov Holding Co. v. Bexin Reality Corp., 16 A.D.3d 282, 283 (1st Dept 2005)(mortgagor was barred by the doctrine of collateral estoppel from relitigating the defenses of payment and statute of limitations as these issues were previously decided against it)

On January 12, 2011, the Referee filed his report, together with an abstract of the documentary evidence introduced during the proceeding. In his report, the Referee recommended:

(1) "...I have computed and ascertained the amount due to Plaintiff upon said note and mortgage as of the day of December 31, 2012 the date that interest was computed in my report the sum of \$2,430,433.12, including allowed expenditures made by Plaintiff," and

(2) The mortgaged premises should be sold in one parcel.

At oral argument, defendants argued that the Referee incorrectly computed the taxes in the Referee's Report, which were listed as \$11,515.78. Horizons conceded that the computation was incorrect. Defendants also argued that the fines paid by Horizons to the Environmental Control Board, which totaled \$22,400, should not have been added to the mortgage, and that, in any event, Horizons fails to submit with the papers the evidence and documentation constituting the record of environmental assessment charges and defendants dispute said record, so it is not possible for the court to determine whether the Referee's findings with respect to such charges are in fact supported by the record.

Discussion

The terms of the mortgage note and mortgage control the referee's computation, to the extent they are legally authorized. *See, 2-20 Bergman on New York Mortgage Foreclosures § 20.04.* The amount due on the mortgage generally consists of outstanding principal balance; interest to the date of the referee's computation; late charges up to acceleration; amounts paid by mortgagee to protect the lien of the mortgage, such as taxes; costs and disbursements incident to the foreclosure, and environmental assessment costs. (*See, Id.; Centerbank v. D'Assaro*, 158 Misc2d 92 (Sup. Ct. Suffolk Co. 1993)).

Here, the mortgagor John Breceovich covenanted in the Mortgage, "I will pay all taxes, *assessments*, water charges, sewer rents and other similar charges, and any other charges or fines that may be imposed on the property..." (Mortgage, para. 4, at 7)(emphasis supplied). Moreover, Horizons submits as evidence receipts from the Environmental Control Board (Attorney Affirmation, Exhibit B). While under these circumstances, environmental assessment costs are recoverable by the mortgagee, as defendants dispute such costs, the court finds that before awarding them to Horizons, the assessments should be explained by Horizon in an affidavit from a person with knowledge attaching any relevant documents. *Centerbank v. D'Assaro*, 158 Misc2d 92 (finding that amount of environmental assessments were properly awarded to plaintiff based upon plaintiff's explanation for such assessments). Horizons should provide this additional evidence to the Referee for his consideration and it should also be annexed to Horizons' renewed motion to confirm the Referee's report.

In addition, in light of the above tax computation defect in the Referee's report, the Referee shall recalculate the amount of taxes and issue a new report with regard to the taxes, and to determine if the amount of environmental assessment is appropriate.

Accordingly, it is

ORDERED THAT the motion to confirm the Referee's report and for the issuance of a Judgment of Foreclosure and Sale is denied without prejudice to renewal upon the Referee's recalculation of the amount of taxes and consideration of evidence explaining the environmental assessments sought to be recovered by Horizons; and it is further

ORDERED THAT Horizons shall provide the additional evidence regarding the environmental assessments within 20 days of the date of this order, a copy of which is being mailed by chambers to counsel for the parties; and it is further

ORDERED THAT the Referee shall issue a new report within 15 days of the receipt of the above information from Horizons.

DATED: ~~October, 2012~~

ENTER:

December 14, 2012

none provided

October 22, 2012

FILED

HON. JOAN A. MADDEN

J.S.C.

J.S.C.

JAN 02 2013

**NEW YORK
COUNTY CLERK'S OFFICE**