

**Bank of Am., N.A. v Dix McBride, LLC**

2013 NY Slip Op 32166(U)

September 11, 2013

Supreme Court, Queens County

Docket Number: 9607/2009

Judge: James J. Golia

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This opinion is uncorrected and not selected for official publication.

## SHORT FORM ORDER

SUPREME COURT : QUEENS COUNTY

IA PART 33PRESENT: JAMES J. GOLIA, JSC

\_\_\_\_\_X  
 BANK OF AMERICA, N.A., AS SUCCESSOR  
 BY MERGER TO LASALLE BANK NATIONAL  
 ASSOCIATION AS TRUSTEE FOR THE  
 REGISTERED HOLDERS OF JP MORGAN  
 CHASE COMMERCIAL MORTGAGE SECURITIES  
 CORP., COMMERCIAL MORTGAGE PASS-  
 THROUGH CERTIFICATES, SERIES 2006-  
 CIBC14,

INDEX NO. 9607/2009

DATED: February 13, 2013

MOTION  
CAL. NO. 24

MOTION SEQ. NO. 11

Plaintiff(s),

- against -

DIX MCBRIDE, LLC, NIR SHALIT, MOSHE  
 APELBAUM, AN EXCELSIOR ELEVATOR  
 CORP., DEPARTMENT OF HOUSING  
 PRESERVATION AND DEVELOPMENT OF  
 THE CITY OF NEW YORK, CITY OF NEW  
 YORK DEPARTMENT OF HIGHWAYS, THE  
 CITY OF NEW YORK ENVIRONMENTAL  
 CONTROL BOARD AND JOHN DOES 1 -100,  
 the Latter names being fictitious but intending to  
 designate Tenants and persons in possession or  
 persons having an Interest in portions of the  
 premises described in the Complaint herein,

Defendant(s).

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Pursuant to a memorandum dated June 28, 2013, this motion was held in abeyance to allow the parties an opportunity to obtain approval to retain Joseph Licata, C.P.A., through Ross Strent & Co., LLP, to provide accounting services. By order dated September 10, 2013, the approval was granted. Therefore, the court will now decide this motion.

Plaintiff commenced this action to foreclose a mortgage against the real property known as 2229-2259 Dix Avenue, Far Rockaway, New York and sought the appointment of a temporary receiver. A temporary receiver was appointed pursuant to an order dated June 9, 2009. An order dated September 9, 2009 was issued authorizing the temporary Receiver to retain counsel.

Plaintiff obtained a judgment of foreclosure and sale dated June 10, 2011, whereby a referee was appointed to sell the mortgaged premises. On February 10, 2012, the Referee filed his report of sale dated January 17, 2012. In his report, the Referee states that the premises were sold on August 26, 2011 to plaintiff as the successful bidder for the sum of \$1,210,000.00, and that the Referee executed, acknowledged and delivered a deed to JPMCC 2006-CIBC14 Dixs Avenue, LLC, as plaintiff's nominee. The Referee also states that there is a deficiency of \$19,661,922.29 arising from the sale of the premises.

The temporary Receiver now moves to settle her final account and fix the balance of her commission in the amount of \$16,587.00. The Receiver also seeks approval to pay the balance of the legal fees incurred, the accounting fees for the firm of Ross Strent & Company, LLP and the outstanding balance due on an audit earned premium for a workers' compensation policy issued to defendant Dix McBride, LLC. Plaintiff cross moves to confirm the Referee's report of sale dated January 17, 2012 and filed on February 10, 2012, discharge the court-appointed receiver, cancel the Receiver's bond and direct that any and all moneys and assets left in the Receiver's hands, following the distributions and payments that approved by the court, be paid to plaintiff or the Referee's transferee. No other parties have appeared in relation to the motion or cross motion.

With respect to the motion by the Receiver, the Receiver collected rents and profits totaling \$3,969,134.00 for the mortgaged premises during the period commencing June 9, 2009 through August 31, 2012, and disbursed \$3,752,902.00 towards expenses in relation to the property. Based on the Receiver's final accounting, as of August 21, 2012, the balances in her accounts are as follows: cash in the amount of \$296,608.00; security deposits totaling \$113,604.00; and, utility deposits in the amount of \$10,155.00.

The movant seeks an order approving the final accounting and the following payments in the aggregate amount of \$86,849.50: (1) \$16,587.00 to herself as and for the balance<sup>1</sup> of the total commissions due to her pursuant to CPLR 8004 for the period beginning January 1,

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The prior first, second and third interim applications by the Receiver for commissions were approved in the amounts of \$29,476.00, \$78,153.00 and \$74,241.00 respectively (*see* memorandum dated June 27, 2012) totaling \$181,870.00 ( $\$29,476.00 + \$78,153.00 + 74,241.00 = \$181,870.00$ ). The court directed submission of an order together with a copy of a Statement of Approval of Compensation required by the Rules of the Chief Judge.

2012 through August 31, 2012; (2) \$59,958.50 to her counsel for the balance of the legal fees incurred at the rate of \$350.00 per hour for 67.83 billable hours of services rendered for the period January 1, 2010 through December 31, 2010<sup>2</sup> and 103.48 hours for the period January 3, 2011 through December 31, 2011; (3) \$4835.00 to the accounting firm of Ross Strent & Company, LLP for 25.25 hours of accounting services rendered, and (4) \$5469.00 to the State of New York for the outstanding amount due towards the audit earned premium for a workers' compensation policy issued to Dix McBride LLC in effect for the period October 28, 2010 through October 28, 2011.

Plaintiff has raised no objection to the Receiver's final accounting or request for payment. Therefore, based on the record before the court, the Receiver's final accounting is approved.

With respect to the request for payemnt, pursuant to CPLR 8004, a receiver is entitled to commissions not to exceed the five percent (5%) of the monies received and disbursed by the receiver. As stated above, during the period June 9, 2009 through August 31, 2012, the Receiver collected \$3,969,134.00 in rents and profits. Applying a five percent commission rate, the receiver is entitled to a total commission of \$198,456.70. To date, the Receiver has been awarded interim fees totaling \$181,870.00 (*see* n 1). Therefore, the Receiver's request for a final award of fees in the amount of \$16,587.00, is granted.

With respect to the request for legal fees, the court has previously approved the appointment of Joseph Mattone, an eligible fiduciary and finds that Attorney Mattone has complied with Part 26. The court has also approved the appointment of Joseph Licata, C.P.A, as accountant and finds that has complied Part 26. The Receiver's request for approval of legal fees in the amount of \$59,958.50, accounting fees in the amount of \$4,835.00 is granted.

With respect to the request for approval to disburse funds to the State of New York Insurance Division in payment of an Audit Earned Premium related to an audit of the Worker's Compensation policy of defendant Dix McBride LLC, is granted in the amount of \$5,469.00 .

We turn now to plaintiff's cross motion, to confirm the Referee's report of sale, discharge the court-appointed receiver, cancel the Receiver's bond and direct that any and all moneys and assets left in the Receiver's hands, following the payments approved by the court, be paid to plaintiff or the Referee's transferee.

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The invoices for counsel's services reflect payment of an interim amount of \$32,301.50 for services rendered at the rate of \$350.00 per hour for 92.29 billable hours for the period August 1, 2009 through December 31, 2009.

Although the request to confirm the report of sale is untimely, having been made more than four months after the filing of the Referee's report (*see* RPAPL 1355[2]), the failure to confirm a referee's report of sale within the time limit is a mere irregularity which, in the absence of prejudice to any substantial right of a party, may be disregarded (*see Fidelity Bond & Mtge. Co. v Lucas*, 135 AD2d 778 [2d Dept 1987]). As there has been no showing of prejudice here, the court exercises its discretion in disregarding the statutory time limitations (*see* CPLR 2001) and extends the time limit to bring a motion to confirm the Referee's report of sale until January 10, 2013, the date of the service of the notice of cross motion and supporting papers (CPLR 2004). Therefore, the branch of the cross motion by plaintiff to confirm the Referee's report of sale is granted, without opposition,

The branch of the motion seeking to discharge the court appointed Receiver and cancel the Receiver's bond is granted, without opposition.

The branch of the motion seeking the court to direct that any and all moneys and assets left in the Receiver's hands, following the payments approved by the court, be paid to plaintiff or the Referee's transferee is granted, without opposition. Under RPAPL 1371(4), a mortgagee is entitled to recover funds held by a receiver without having to seek a deficiency judgment. The funds are paid over to the mortgagee in reduction of principal (*see Empire Props. Corp. v Manufacturers Trust Co.*, 254 App Div 507 [1st Dept 1938]).

Accordingly, the motion by the Receiver is granted to the extent of approving and settling the Receiver's account, fixing the outstanding balance of the Receiver's commissions and expenses in the amount of \$16,587.00, granting leave to the Receiver to pay herself the sum of \$16,587.00, fixing and allowing the disbursement of the amount of \$59,958.50 as legal fees to Joseph M. Mattone, Jr. as counsel to Receiver for services rendered during the period January 2010 through December 2012, fixing and allowing the disbursement of the amount of \$4835.00 as accounting fees to the accounting firm of Ross Strent & Company, LLP for accounting services rendered pursuant to invoice number 00126844, and allowing the disbursement of the amount of \$5469.00 to the State of New York for payment of the outstanding amount due towards the audit earned premium for a workers' compensation policy issued to defendant Dix McBride, LLC for the period October 28, 2010 to October 28, 2011. The branches of the cross motion by plaintiff to direct the Receiver to distribute the balance of the funds on hand in the Receiver's account to plaintiff, to direct the Receiver to turn over the security deposits held by the Receiver and the right to the utility deposit to plaintiff's nominee JPMCC 2006-CIB14 Dixs Avenue, LLC, discharge the Receiver of her duties as receiver and cancel the Receiver's bond are granted.

This constitutes the order of the court.

Dated: September 11, 2013

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James J.Golia, J.S.C.