

**LBUBS 2005-C2 N.Y. Retail, LLC v AC 1 Southwest
Broadway LLC**

2015 NY Slip Op 31224(U)

July 13, 2015

Supreme Court, New York County

Docket Number: 850074/2012

Judge: Anil C. Singh

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X

LBUBS 2005-C2 NEW YORK RETAIL, LLC, and
LBUBS 2005-C2 FOURTEEN MILE ROAD LLC,

DECISION AND
ORDER

Plaintiff,

Index No.
850074/2012

-against-

AC 1 SOUTHWEST BROADWAY LLC, et al.,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Motion sequence 005 and 006 are consolidated for disposition.

In motion sequence 005, a non-party to this foreclosure action, proposed plaintiff RREF FE Loan, LLC (“RREF”), moves for an order: 1) pursuant to CPLR 1018 and 1021, substituting RREF as plaintiff in place of its predecessors-in-interest, LBUBS 2005-C2 New York Retail, LLC, and LBUBS 2005-C2 Fourteen Mile Road LLC (collectively, “LBUBS”); 2) amending the caption to reflect such change; and c) substituting Cole, Schotz, Meisel, Forman & Leonard P.A. as attorneys of record in the place and stead of Herrick, Feinstein LLP. Defendants AC I Southwest Broadway LLC (“AC I Southwest”), Benjamin O. Ringel (“Ringel”) and AC I Sterling Heights LLC (“AC I Sterling”) oppose the motion.

In motion sequence 006, RREF moves for an order confirming the referee's report and for a judgment of foreclosure and sale. Defendants oppose the motion in part and cross-move to partially reject and modify the referee's report.

Plaintiff LBUBS 2005-C2 New York Retail, LLC commenced the instant action against defendants/obligors AC I Southwest, Ringel, and AC I Sterling to foreclose a mortgage encumbering commercial real property located at 250 West 90th Street in Manhattan. The mortgage secures an amount due under a promissory note in the original principal amount of \$18,060,000 made by AC I Southwest. The mortgage also secures amounts due under a guaranty of payment made by AC I Southwest in connection with a loan made to AC I Sterling Heights LLC in the original principal amount of \$3,440,000.

Lehman Brothers Bank, FSB ("Original Lender") loaned AC I Southwest the principal sum of \$18,060,000. AC I Southwest executed and delivered to Original Lender a promissory note dated February 18, 2005. To secure repayment of the note, AC I Southwest executed and delivered to Original Lender a Mortgage and Security Agreement dated February 18, 2005, in which AC I Southwest mortgaged the property to Original Lender. To further secure repayment of the note, AC I Sterling and Ringel executed and delivered to Original Lender a Guaranty of Payment dated February 18, 2005, and a Guaranty of Recourse

Obligations of Borrower dated on or about February 18, 2005.

By assignments dated February 22, 2005, but effective as of April 20, 2005, Original Lender assigned all of its right, title and interest in and to the loan documents to LaSalle Bank National Association, in its capacity as trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C2, Commercial Mortgage Pass-Through Certificates, Series 2005-C2 (Assignee #1). By assignments dated April 27, 2012, Bank of America, N.A., as successor by merger to Assignee #1, assigned all of its right, title and interest in and to the loan documents to U.S. Bank National Association (Assignee #2). By assignments dated as of June 21, 2012, Assignee #2 assigned all its right, title and interest in and to the loan documents to LBUBS New York, the named plaintiff in this foreclosure action.

In a memorandum opinion dated November 7, 2013, Justice Schweitzer awarded summary judgment to plaintiffs on liability, and appointed a referee to compute the amounts due on the loans.

Motion to Substitute

CPLR 1018 states, “Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.”

CPLR 1021 states in pertinent part:

A motion for substitution may be made by the successors or representatives of a party or by any party.

An assignee of a mortgage can continue an action in the name of the original mortgagee, even in the absence of a formal substitution (Central Federal Savings, F.S.B. v. 405 W. 45th St., 242 A.D.2d 512 [1st Dept., 1997]). Conversely, an original mortgagee can continue an action even though it assigned its interest in the mortgage and note to another entity during the pendency of an action, unless the court directs a substitution of parties pursuant to CPLR 1018 (Indymac Bank F.S.B v. Thompson, 99 A.D.3d 669 [2d Dept., 2012]). “The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court” (Nationscredit Home Equity Services v. Anderson, 16 A.D.3d 563, 564 [2d Dept., 2005]).

RREF asserts that it is the successor in interest to LBUBS’s rights and interests in the loans; all of LBUB’s rights, title and interest in the loans have been assigned to RREF by allonges, which establish the physical delivery of the notes; and LBUBS no longer has any interest in the subject matter of this action. Accordingly, RREF asserts that LBUBS should be substituted out of the action, and RREF should be substituted in as plaintiff.

RREF exhibits the sworn affidavit of James Egan, who states that he is the asset manager of RREF, successor in title to the mortgage and two promissory notes. Mr. Egan asserts that Benjamin O. Ringel executed a guaranty dated February 18, 2005; on October 3, 2014, LBUBS assigned the AC I Southwest Broadway mortgage to RREF and, by allonge, which became part of the note, LBUBS endorsed the note to RREF. Further, he asserts that also on October 3, 2014, LBUBS assigned the AC I Southwest Broadway guaranty and the AC I Sterling note to RREF and, by allonge, which became part of the note, LBUBS endorsed the note to RREF. Copies of the AC I Southwest Broadway Ringel Guaranty, the AC I Southwest Broadway Assignment of Mortgage, the AC I Southwest Broadway Allonge, the AC I Southwest Broadway Guaranty and the AC I Sterling Note, and the AC I Sterling Allonge are attached as exhibits to Mr. Egan's affidavit. Mr. Egan states that RREF is in possession of the allonges and the original note.

The Court in its discretion finds that the sworn affidavit of James Egan and the exhibits establish that RREF is the rightful holder of the notes and mortgage and the entity in possession of the original notes and mortgage. As such, the Court finds that RREF has made out a prima facie showing that it acquired rights sufficient to confer standing and to substitute for plaintiff in this action (U.S.

Bank, N.A. v. Collymore, 68 A.D.3d 752 [2d Dept., 2009] (holding that plaintiff has standing to foreclose when it holds both the subject mortgage and the underlying note)).

Defendants contend that RREF has failed to establish the effective assignment to it of the mortgage, notes or the AC Southwest Guaranty for the following reasons:

1) the purported AC Southwest allonge is annexed to the Egan affidavit as a completely separate document, but a transfer is not valid or effective unless it is “written on the instrument or on a paper so firmly affixed thereto as to become a part thereof (UCC 3-202(2));

2) the purported AC Southwest allonge states that it is “made to that certain promissory note dated as of February 18, 2005, in the original principal amount of \$18,000,000 made by AC I Southwest Broadway LLC, a Delaware limited liability company, to Lehman Brothers Bank, FSB, a federal stock savings bank” (emphasis added). However, the original principal amount of the AC Southwest note was \$18,060,000. Thus, on its face, the purported AC Southwest allonge appears to relate to an altogether different note, which has never been presented and is not being sued upon in this action;

3) even if the purported AC Southwest allonge is found to relate to the AC

Southwest note, because it purports to assign less than the entire AC Southwest note, it does not provide a proper basis for RREF's substitution for plaintiff;

4) the "evidence" submitted by RREF raises questions as to when – or even whether – any of the purported assignments became, or will become, effective.

The purported AC Southwest allonge and the purported AC Sterling allonge are undated, Mr. Egan merely states in conclusory fashion that RREF is "now in possession" of the original notes, and the "effective date" on the assignments of the AC Southwest Mortgage and the AC Southwest guaranty are left blank.

Defendants assert that, in similar circumstances, courts have repeatedly found such evidence to be insufficient to establish assignment of the necessary instruments to a putative foreclosure plaintiff; and

5) RREF does not even claim that plaintiff LBUBS assigned or otherwise transferred its rights under the Ringel recourse guaranty to it. Defendants contend that guaranty constitutes the sole basis for seeking relief against Ringel in this action, and, thus, as the claims and prayer for relief in this action presently stand, RREF cannot step into plaintiffs' shoes.

In short, the Court finds that defendants have failed to produce any evidence sufficient to rebut RREF's prima facie showing that it has standing and, thus, be substituted as plaintiff in this matter. The Court is satisfied that RREF is the

holder in due course of the mortgage, the notes and the other related documents.

Motion to Confirm Referee's Report

Plaintiff moves for an order confirming the report of the Special Referee and entering a judgment of foreclosure and sale. Defendants oppose the motion and cross-move to partially reject and modify the referee's report.

Special Referee Lauren J. Wachtler conducted an evidentiary hearing on March 4, 2014. During the course of the hearing, eleven exhibits were introduced into evidence, and the testimony of Richard Le was taken on behalf of plaintiff. The referee's report recites that the referee received submissions from plaintiff's counsel and defendants' counsel, including numerous exhibits relating to the mortgage, notes and guarantees, as well as various affidavits, with exhibits, payment histories and summaries of the parties' respective calculations of amounts due and owing on each of the notes.

The referee prepared and circulated her report on August 26, 2014. Subsequently, the referee issued an addendum that was filed on October 20, 2014.

"The report of a referee should be confirmed if its findings are supported by the record" (Baker v. Kohler, 28 A.D.3d 375, 375-376 [1st Dept., 2006]).

"Generally, New York courts will look with favor upon a referee's report inasmuch as the referee as trier of fact is considered to be in the best position to

determine the issues presented” (European American Bank & Trust Co. v. H. Frenkel, Ltd., 163 A.D.2d 154, 154 [1st Dept., 1990] (internal citation omitted)). It is well settled that a special referee’s findings of fact and credibility will generally not be disturbed where substantially supported by the record (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dep’t 2003; see also Namer v. 152-54-56 W. 15th St Realty Corp., 108 A.D.2d 705, 706 [1st Dept., 1985]; Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept., 2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept., 1982]). The court, in confirming a referee’s report, properly defers to the findings of the referee, who was in the best position to weigh the evidence and make credibility determinations (Winopa International, Ltd. v. Woori America Bank, 59 A.D.3d 203, 204 [1st Dept., 2009]; Jones v. Blake, 120 A.D.3d 415, 415 [1st Dept., 2014]).

Defendants’ first contention is that the referee’s report should be modified to increase the credits due on both of the subject loans. Specifically, defendants assert that: 1) the AC Southwest loan should be credited for lockbox payments of \$3,210,794.03 through 8/31/14; \$645,838.35 for lockbox payments 9/1/14-present, and credits for all payments until foreclosure; and 2) the AC Sterling loan should be credited with the \$1,530,000 fair market value of the Michigan property,

not \$1,200,000 proceeds of the foreclosure sale.

The Referee's addendum to the Report states in part:

In the report, at page 8, I found that the defendants were entitled to a credit in the amount of \$2,188,336.58 minus applicable bank service charges, representing payments made into a lockbox account, and that credit should be given for such lock-box payments through and including the date of foreclosure.

The parties were unable to agree on the amount of the lock-box credits to be given to the defendants and provided additional submissions on September 15, 17, and 18, 2014.

On September 15, 2014, I received a submission from the plaintiff, accompanied by the lock-box bank statements during the applicable period as well as transaction histories showing the manner in which the monies were applied toward the reduction of the debt. The credit was in the amount of \$1,483,352.14. Mr. Segal, in his email his September 17, email [sic.] had calculated a credit of \$3,210,794.03, set forth in greater detail in the "Calculation of Credit" attached to Ms. Podesta's email dated September 18, 2104 [sic.], responding to Mr. Segal's email dated September 17, 2014 itemized the application of the lock-box payments in greater detail.

I have reviewed all three of these submissions and find that the plaintiffs' calculation, with one exception, is correct. As Ms. Podesta correctly points out, the lock-box payments were credited to the defendants in that they were applied to reduction of amounts otherwise due. The Report provided for defendants to be credited for all of the lock-box payments – through and including the date of foreclosure. The documents provided by the plaintiffs demonstrate that this was the case. Credit means credit. It does not mean that defendants are entitled to have the credit applied to reduce the debt, and to be credited again after those payments had already been applied to reduce the debt.

Plaintiff, however, included in the itemization of how the lock-box payments were applied, an item for legal fees in the amount of \$81,858.88. The legal fees to which I found the plaintiff entitled was the subject of my prior report. The plaintiff should not be allowed to a “double credit” either. Therefore, I find that the amount of \$81,858.88 should be included in the calculation of the credit or that the amount of attorney’s fees to which I found plaintiff entitled; \$244,870.56, should be decreased by an amount of \$81,858.88.

(Addendum to Referee’s Report of August 26, 2014, pp. 2-3).

In short, the Court declines to deviate from the referee’s findings regarding the lock-box payments, for the detailed report and the addendum reflect that the referee carefully considered whether defendants were credited appropriately for lock-box payments made by the tenant. There is ample support in the record to support the referee’s findings.

Defendants’ second contention is that documents considered by the referee were not authenticated or verified by a party with personal knowledge and, thus, have no evidentiary value.

The arguments the defendants are making to the court at this stage were made directly to the referee. The referee addressed the evidentiary issues as follows in her report:

The defendants raised an issue with respect to the admissibility of summaries prepared by plaintiff. Over defendants’ objection, I admitted into evidence at the hearing exhibits 8, 9, 10 and 11. The basis of defendants’ objection was that these exhibits failed to comply

with the “Best Evidence” rule and did not meet the business records exception to the hearsay rule, and therefore lacked foundation. They also objected to the testimony of Mr. Le on that basis.

At the hearing, Mr. Le testified on behalf of the plaintiff as to the amounts due and owing under the two notes. Mr. Le testified that he based his testimony relating to the amounts owed, on computer print-outs and loan histories maintained by the lender, to which he had access via a password.

Mr. Le testified that he provided the information contained in the computer-generated documents to the lenders’ attorneys from which the summaries set forth in exhibits 8-11 were created. The computer-generated data is kept in the regular course of the bank’s business and made contemporaneously with payments on the account. The summary charts merely reflect the compilation of that data. Moreover, defendants requested at the hearing, and were provided with additional back-up data supporting the summaries contained in those exhibits.

I do not agree with the defendants’ contention that the Best Evidence Rule precludes the admission of these exhibits, or the testimony of Mr. Le. The Best Evidence Rule is rarely, if ever applied with respect to such records and in fact is generally relegated to use in will contests or where the writing itself is the focus of the litigation. Moreover, the rule applies only if the party must prove the contents of the writing to establish the claim. That was not the case here.

I also reject defendants’ contention that the summaries based on the computerized data maintained by the plaintiff do not fall within the business records exception to the hearsay rule. The data to which Mr. Le testified were routinely entered in the lender’s database and made in the regular course of the lenders’ business. It was the obligation of the lender to create truthful and accurate record for the purpose of conducting that business. The plaintiff laid a sufficient foundation for the admission of those records and the summaries prepared by the plaintiffs’ attorney were a compilation of data based on those

business records kept in the ordinary course of the business to which Mr. Le testified at the hearing. Moreover, Mr. Le, who had access to the books and records, testified to the accuracy of the summary and print-out upon which the summaries were based. *Financials Restructuring Partners III, Ltd. v. Riverside Banking Co.*, 2014 N.Y.Misc. LEXIS 36; 2014 N.Y. Slip Op. 30013(U). Therefore, I adhere to my original ruling that the summaries and charts provided by the plaintiff in support of their application set forth in exhibits 8-11 were properly admitted.

(Referee's Report, pp. 5-6).

In short, the Court finds that the referee supported her evidentiary rulings with sound legal analysis. Accordingly, we will defer to such rulings.

Defendants third contention is that the attorneys' fees awarded by the referee are not reasonable.

Regarding attorneys' fees, the referee's report states:

Plaintiff's counsel, Herrick Feinstein has submitted an affidavit of Scott Tross with invoices attached reflecting time charges made for an approximate six year period seeking fees and disbursements totaling \$283,129.91. Michigan counsel, Dykema Gossett PLLC ("Dykema") has also submitted bills totaling \$68,255.28 from the period October 2010 and March 2014, with expenses of \$6,271.70.

Defendants argue that plaintiff should not be entitled to recover anything more than the sum of \$75,000 based on myriad reasons, among which are duplicative billing, failure to properly identify tasks performed and that this foreclosure involved "one straightforward non-judicial foreclosure which had no discovery...." Defendants suggest that if there is a finding of more than \$75,000 for legal fees that they want a hearing to examine witnesses on each of the time entries.

I do not agree that this involved a straightforward judicial foreclosure, or that plaintiff was not entitled to have Michigan and other counsel involved in this matter, particularly where there were at least two, and tangentially a third state involved in these proceedings. Nor do I find it a reason to deny attorney's fees because the loan documents were the same for each of the loans and therefore did not require review of analysis. I also do not think that there was inadequate description of the tasks performed. I did, however, review each of the bills of both Herrick and Dykema. I find the charges on the Dykema bills reasonable and necessary. With respect to the Herrick bills, I did find duplication of work and at times billing which was not warranted, and although the loan documents did require analysis and plaintiff was certainly entitled to and had an obligation to carefully review all of them, there did appear to be an inordinate and excessive review of the loan documents on a frequent basis which did not appear to be justified. While noting that the Herrick bills reflected a courtesy discount of 15% commencing in 2010 as rates increased significantly over time, (See Tross rate which went from \$530/hour in 2008 to \$890/hour by 2014), which effectively lowered the billing rate of the attorneys at Herrick, there were time charges which I believe merited further reduction in the fees charged as being duplicative, in some instances duplicative even by a single attorney, and excessive, particularly by some of the associates involved in the matter. A spreadsheet reflecting the reductions on the bills from Herrick where fees were reduced is attached. This resulted in a reduction from \$283,129.91 to \$244,870.56, an approximate 13.5% to the Herrick fees over and above the 15% discount they gave the lender.

Thus, I find that plaintiff should be entitled to recover fees in the amount of \$319,396.04 which includes the reduction made to the Herrick bills, which appear to include the disbursements on the invoices themselves and includes the Dykema bills totaling \$74,525.48 inclusive of disbursements as the total amount for invoices I reviewed. The amount of \$319,396.04 should be added to the total fees due and owing upon sale.

(Referee's Report, pp. 11-12).

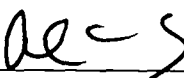
Defendants assert that the referee failed to inquire and determine whether the fees charged by the Michigan and New York firms were in line with the customary fee charges by the bar for similar services. Further, defendants point out that nearly all of the entries in the Dykema and Herrick bills use "block billing, but defendants assert that such billing makes it impossible to determine whether the time billed for a given task is reasonable and appropriate.

In short, the court will defer to the referee's findings of fact regarding reasonable attorneys' fees. It is clear to the court that the referee considered the billing records carefully. The referee's findings are reasonable and supported by the record.

Finally, defendants contention that the proposed judgment is materially defective is without merit. The proposed judgment is consistent with the referee's report that has now been confirmed.

This decision constitutes the order of the Court.

Date: July 13, 2015
New York, New York



Anil C. Singh