

**1180 President Funding, LLC v 2201 7th Ave. Realty
LLC**

2016 NY Slip Op 30401(U)

March 10, 2016

Supreme Court, New York County

Docket Number: 650956/2010

Judge: Marcy Friedman

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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 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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1180 PRESIDENT FUNDING, LLC,

Plaintiff,

Index No.: 650956/2010

– against –

2201 7TH AVENUE REALTY LLC, TREVOR
WHITTINGHAM, GLOBAL INVESTMENT
STRATEGIES TRUST, WA INTEGRITY TRUST,
GALAXY GENERAL CONTRACTING CORP.,
INDUSTRIAL FIRE DOOR & HARDWARE
SUPPLY, INC., ALL CITY GLASS & MIRROR
CORP., NORTHERN BUILDING PRODUCTS,
INC., JNP CONTRACTORS, LTD., RELIANT
ELECTRIC CONTRACTING, INC., KATZ
METAL FABRICATORS, INC., INDEPENDENT
TEMPERATURE CONTROL SERVICES, INC.,
BORO KITCHEN CABINETS, INC.,
ARCHITECTURAL ENTRANCE SYSTEMS, INC.,
CORE TECH ASSOCIATES CORP.,
METALOCKE INDUSTRIES INC., TWO A'S
MECHANICAL INC., SPECTOR GROUP II, LLP,
JG ELEVATOR, LLC, TREVOR
WHITTINGHAM, INC., NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE,

DECISION/ORDER

Defendant.

_____ x

In this commercial mortgage foreclosure action, plaintiff moves for an order confirming the referee's Report of Amount Due, granting a judgment of foreclosure and sale, and entering defaults against the following defendants who either never appeared or subsequently withdrew their answers: WA Integrity Trust; Industrial Fire Door & Hardware Supply, Inc.; All City Glass & Mirror Corp.; Northern Building Products, Inc.; JNP Contractors, Ltd.; Reliant Electric

Contracting, Inc.; Katz Metal Fabricators, Inc.; Independent Temperature Control Services, Inc.; Boro Kitchen Cabinets, Inc.; Architectural Entrance Systems, Inc.; Core Tech Associates Corp.; Metalocke Industries Inc.; Two A's Mechanical Inc.; JG Elevator, LLC; Trevor Whittingham, Inc.; New York State Department of Taxation and Finance; and New York City Department of Taxation and Finance (collectively, the "non-appearing defendants").¹ Defendants 2201 7th Avenue Realty LLC, Trevor Whittingham, and Global Investment Strategies Trust separately move for an order "imposing sanctions against Plaintiff for its egregious conduct . . . that stays and discharges all accumulated interest since May 7, 2012" on the mortgage debt, and to compel plaintiff to issue a payoff letter to and accept redemption from 2201 7th Avenue LLC.

By orders dated December 19, 2013, the court awarded plaintiff summary judgment as to liability against defendants 2201 7th Avenue Realty LLC, Trevor Whittingham, Global Investment Strategies Trust, and Spector Group II, LLP, and appointed Harold B. Beeler as referee to compute the amount due to plaintiff on the notes and mortgages and to report on whether the premises can be sold in one parcel. The court denied the branch of plaintiff's motion seeking entry of defaults against the non-appearing defendants, without prejudice to a new motion addressing technical deficiencies specified in the December 19 short form order.

The branch of plaintiff's motion for entry of defaults will be granted. Certain of the non-appearing defendants' defaults occurred more than one year before the prior motion for summary judgment and for entry of defaults was brought by plaintiff, after its substitution for the original mortgagee. (See Stipulation of Substitution, so ordered Apr. 3, 2012.) The court does not find

¹ Although the caption lists the "New York City Department of Finance" as a defendant in this proceeding, the record shows that the summons and complaint and the instant motion were served on the "New York City Department of Taxation and Finance." (See Horowitz Affirmation dated Aug. 28, 2015, Exh. R; Boggio Aff. of Service sworn to on Sept. 2, 2015.)

that plaintiff abandoned the request for such relief, under these circumstances in which plaintiff continued to pursue its claims against the borrower defendants and waited, until it moved to confirm the referee's Report and for entry of a final judgment of foreclosure, to again seek entry of judgment against the defaulting defendants. Sufficient cause therefore exists not to dismiss the complaint. (See CPLR 3215 [c].) It is noted that the non-appearing defendants are neither mortgagors nor obligors, but were named as necessary parties due to their respective claims of an interest in or lien upon the mortgaged premises. (Id. ¶ 39.) No person has objected to the entry of the defaults. The affidavits of service of the instant motion and of the summons and complaint are regular on their face. The other deficiencies identified in the December 19, 2013 order have been adequately addressed.

With respect to the branch of plaintiff's motion to confirm the referee's report and for a final judgment of foreclosure and sale, the court accepts as opposition the motion by 2201 7th Avenue Realty LLC, Mr. Whittingham, and Global Investment Strategies Trust (hereafter "defendants") to stay and discharge all accumulated interest on the mortgage debt since May 7, 2012, and to compel plaintiff to issue a payoff letter to and accept redemption from 2201 7th Avenue LLC.

Mr. Whittingham asserts that he has made several demands for a payoff letter from plaintiff specifying the amounts necessary to redeem the premises, and that plaintiff has not responded. (Whittingham Aff., sworn to on July 8, 2015, ¶¶ 13-18.) The earliest document submitted by Mr. Whittingham, dated May 7, 2012, is labeled a "RESPA Qualified Written Request, Complaint, and Dispute of Debt and Validation of Debt Letter" (the RESPA Request). The letter, written by Mr. Whittingham on behalf of 2201 7th Avenue Realty LLC, states that he is "disputing the validity of the current debt you [plaintiff] claim that I owe," and is writing "to

request specific itemized information about the accounting and servicing of my construction/mortgage loan . . . from its inception to the present date before I pay you.”

(Whittingham Aff., Exh. F [emphasis omitted].) The second purported request, dated September 17, 2013, is labeled a “Request for Debt Validation Pursuant to Fair Debt Collection Practices Act, 15 USC § 1601, et seq.” (Id., Exh. G.) In this letter, Mr. Whittingham seeks documents and information to validate the claimed mortgage debt.

Neither of these requests may fairly be construed as a demand for a payoff letter.

Defendants’ recently retained attorney, Andre Ramon Soleil, did request a payoff letter from plaintiff, by letters dated March 11, 2015 and March 23, 2015. (Whittingham Aff., Exhs. H & I.)

By letter dated May 19, 2015, counsel for plaintiff, Kenneth Horowitz, provided the amount of principal and interest due, as well as a per diem interest rate. (Id., Exh. J; Tress Aff., Exh. A.)

Mr. Horowitz provided updated figures by letter dated August 11, 2015. (Tress Aff., Exh. C.)

Mr. Horowitz and defendants’ former counsel, Joseph Sanchez, also exchanged “an updated payoff” document summarizing the amounts due on the mortgage debt, by email dated May 1, 2012, one week before defendants’ RESPA Request. (Id., Exh. B.)

Under these circumstances, there is no basis for this court to award injunctive relief compelling plaintiff to issue a payoff letter. Nor is there any basis for the court to compel plaintiff to accept redemption, as there is no evidence that defendants ever made an offer to redeem that plaintiff rejected. Plaintiff also acknowledges that defendants have “a right to redeem the Property in this foreclosure action at any time prior to the acceptance of the final bid by the court-appointed Referee at a foreclosure sale.” (Horowitz Aff., dated Aug. 17, 2015, ¶ 11.)

The court will also deny the branch of defendants' motion seeking "sanctions" in the form of an order staying and discharging all accumulated interest on the debt from May 7, 2012, which is the date of the RESPA Request. For the reasons detailed above, the record does not support the contention that plaintiff frustrated defendants' efforts to redeem during the period in which defendants seek to cancel accrued interest. Defendants offer no other legally sufficient basis for their request to discharge interest accrued over such a lengthy period.

The court does find, however, that under the circumstances of this case, defendants are entitled to reasonable relief from the accumulation of interest on the mortgage debt. "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party." (Danielowich v PBL Dev., 292 AD2d 414, 415 [2d Dept 2002].) As previously noted, this court granted plaintiff summary judgment against defendants and referred the matter for a hearing on the amount due on December 19, 2013. Plaintiff did not bring the matter before the referee for a hearing until more than one year later. (Notice of Hearing on Feb. 23, 2015 [Aug. 28, 2015 Horowitz Aff., Exh. Q].) After the referee issued his Report of Amount Due, dated Feb. 27, 2015, plaintiff again delayed by failing to move to confirm until September 4, 2015, over six months later.

In attempting to justify the delay in proceeding to the hearing before the referee, plaintiff's counsel asserts that "preparation of various documents in this case . . . [was] compromised or delayed" as a result of Hurricane Sandy in 2012. (Aug. 28, 2015 Horowitz Aff., ¶ 25.) Counsel fails, however, to provide any examples of documents submitted to the referee that were not already in plaintiff's possession when the court ordered the reference on December 19, 2013. Nor does he give any detail as to his efforts to obtain such documents. Plaintiff does,

however, offer a viable explanation for its delay in proceeding with the reference based on settlement negotiations. In particular, counsel represents that, following protracted settlement negotiations, the parties were “close to a final settlement” in the winter of 2014-2015. (Id. ¶ 26.) Defendants do not dispute that such negotiations took place. The court therefore finds that plaintiff did not impermissibly delay in proceeding with the reference. (Compare Yagamo Acquisitions, LLC v Baco Dev. 102 St. Inc., 278 AD2d 134, 134 [1st Dept 2000] [where plaintiff delayed for more than one year in pursuing reference following summary judgment, finding that it would be “unconscionable” to hold defendants responsible, and permitting post-summary-judgment interest for one year, “which we deem sufficient for the first referee in this matter to have complied with the summary judgment court’s mandate to report with ‘all convenient speed’”]; see also Dayan v York, 51 AD3d 964, 965 [2d Dept 2008], lv dismissed 12 NY3d 839 [2009] [cancelling all interest and penalties accrued after judgment of foreclosure and sale entered in 2006, where action was commenced in 1994, and plaintiff did not take action for five years to enforce the judgment].)

The court reaches a different result with respect to plaintiff’s delay in moving to confirm the referee’s report. It is undisputed that settlement discussions terminated early in 2015, when defendants engaged Mr. Soleil. (See Notice of Appearance, dated Feb. 17, 2015 [NYSCEF No. 305].) Plaintiff does not provide a reasonable excuse for its sixth-month delay in moving to confirm the referee’s Report of Amount Due.² The court therefore holds that interest on the mortgage debt should not accrue at the default rate specified in the mortgage notes, but should be limited to the statutory rate of nine percent (9%) per annum, from January 5, 2015, the date as of

² It is noted that plaintiff has also delayed in responding to the receiver’s reasonable requests for payment of commissions and expenses necessary to maintain the premises (see Kingsley Affirmation dated Jan. 9, 2015, ¶ 7 [NYSCEF No. 281]), and has on several occasions requested extensions of deadlines to submit papers in opposition to various motions. (See NYSCEF Nos. 301, 375, 390, 440.)

which the referee's determination of the amount due was calculated, until the date of entry of the judgment of foreclosure and sale. (See CPLR 5004; Danielowich, 292 AD2d at 415 [where "[t]he respondent was in possession of the original Referee's report sworn to April 11, 2000, but did not move to confirm the report until five months later," holding that "it would be unconscionable" to charge the appellant the default rate of interest after May 16, 2000, and instead charging the statutory rate of 9% per annum].)

Accordingly, it is hereby

ORDERED that plaintiff's motion to confirm the referee's Report and for other relief (Seq. 018) is granted to the following extent: (1) the Report is confirmed, except that the accumulation of interest on the mortgage debt shall be limited to the statutory rate of nine percent (9%) per annum, from January 5, 2015, the date as of which the referee's determination of the amount due was calculated, until the date of entry of the judgment of foreclosure and sale; (2) the branch of the motion for a judgment of foreclosure and sale is granted; and (3) a default is hereby entered against each of the following non-appearing defendants: WA Integrity Trust; Industrial Fire Door & Hardware Supply, Inc.; All City Glass & Mirror Corp.; Northern Building Products, Inc.; JNP Contractors, Ltd.; Reliant Electric Contracting, Inc.; Katz Metal Fabricators, Inc.; Independent Temperature Control Services, Inc.; Boro Kitchen Cabinets, Inc.; Architectural Entrance Systems, Inc.; Core Tech Associates Corp.; Metalocke Industries Inc.; Two A's Mechanical Inc.; JG Elevator, LLC; Trevor Whittingham, Inc.; New York State Department of Taxation and Finance; and New York City Department of Taxation and Finance; and it is further

ORDERED that the motion of defendants 2201 7th Avenue Realty LLC, Trevor Whittingham, and Global Investment Strategies Trust for sanctions and other relief (Seq. 017) is granted solely to the extent of limiting the accumulation of interest as aforesaid; and it is further

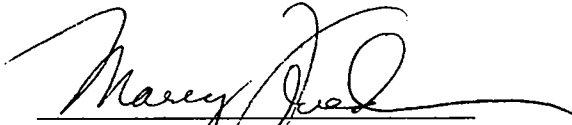
ORDERED that defendant New York City Department of Taxation and Finance is substituted as defendant in this action in place and stead of New York City Department of Finance; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon all appearing parties by regular mail, and upon the County Clerk and on the General Clerk's Office (Room 119), who are directed to amend their records to reflect such change in the caption herein.

Settle judgment consistent with this order, on or before April 11, 2016, with service upon all appearing parties.

This constitutes the decision and order of the court.

Dated: New York, New York
March 10, 2016



MARCY FRIEDMAN, J.S.C.