SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

----------X

PATMOS FIFTH REAL ESTATE INC, PATMOS WESTBURY LLC,

Plaintiffs,

- v -

MAZL BUILDING LLC, RABA HAIM ABRAMOV, NYA BUILDING CONSTRUCTION CORP, SHIMON WOLKOWICKI, and HIGH LINE HOLDINGS LLC,

Defendants.

----------X

INDEX NO.	108421/2011
MOTION DATE	
MOTION SEQ. NO.	013 014 015

DECISION + ORDER ON MOTION

----------X

MAZL BUILDING LLC, HIGH LINE HOLDINGS LLC,

Third-party Plaintiffs,

-against-

Third-Party
Index No. 590836/2013

AUGUSTO REITANO, A.T.A. CONSTRUCTION CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, JOHN DOE # 1-50, SAID JOHN DOE DEFENDANTS BEING FICTITIOUS, IT BEING INTENDED TO NAME ALL OTHER PARTIES WHO MAY HAVE SOME INTEREST IN OR LIEN UPON THE PREMISES SOUGHT TO BE FORECLOSED,

Third-party Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 013) 478-561 were read on this motion to confirm/disapprove report.

By decision and order dated June 21, 2016, I ordered a reference to compute the amount due to mortgagee defendant/third-party plaintiff Mazl Buildings, LLC (Mazl), not including

attorney fees, on the consolidated mortgage being foreclosed in this action (NYSCEF 139).

In motion sequence 013, defendants/third-party plaintiffs Mazl and High Line Holdings (High Line) move for an order confirming in part and rejecting in part the referee's report, dated December 30, 2019 (NYSCEF 481), and remanding to him certain aspects of the report with directions to modify. Plaintiffs cross-move for the same relief.

In motion sequence 014, Mazl and High Line move for an order appointing a referee to compute the attorney fees and costs due them in this litigation. Plaintiffs cross-move for an order imposing sanctions on Mazl for engaging in frivolous conduct. In motion sequence 015, plaintiffs move for an ordering granting them attorney fees incurred in this litigation.

I. PERTINENT BACKGROUND

On June 21, 2006, Mazl, a company wholly owned by defendant Abramov, sold to plaintiffs the multiple dwelling at 214-216 East 52nd Street, in Manhattan. Mazl took three mortgages to secure the sums borrowed by plaintiffs, memorialized in three promissory notes, to purchase the property. Two mortgages were on the 52nd Street property and one was on a condominium unit owned by plaintiffs on 69th Street in Manhattan. The instant foreclosure concerns the 52nd Street property and not the condominium.

In February 2008, Mazl and Patmos entered into a consolidation, extension, and modification agreement (CEMA), whereby the three mortgages were consolidated into one in the amount of $16 million, covering the property and the condominium unit, and pursuant to which a paydown of principal in the amount of $6 million was to be made on March 21, 2008. Plaintiffs made a paydown of $5,331,066.77 but defaulted on December 31, 2008. Mazl and plaintiffs then entered into another agreement, the deed in lieu agreement, which extended the maturity date of the loan to October 1, 2009, and provided that plaintiffs would sign a deed to the 52nd Street

property which would be held in escrow by Mazl's attorney who would record it if plaintiffs defaulted. The deed conveyed 62.5 percent of the interest in the 52nd Street property to defendant Wolkowicki.

Plaintiffs defaulted and the deed was released from escrow and recorded. Wolkowicki executed another deed, conveying to High Line the 62.5 percent interest in the title to the 52nd Street building that he had purportedly acquired under the deed signed by plaintiffs. In March 2011, the property was converted into a condominium with a restaurant and 21 residential units. Mazl and High Line "assumed ownership of the condominium, and began selling apartment units over [plaintiffs'] objection" (*Patmos Fifth Real Estate Inc. v Mazl Bldg. LLC*, 2019 NY Slip Op 33382[U], **2 [Sup Ct, NY County 2019], Jaffe, J.). Construction work was performed at the building before and after Mazl took possession.

Plaintiffs commenced this action for a judgment declaring that defendants had violated Real Property Law (RPL) § 320 by illegally taking possession of the property. Mazl and High Line advanced counterclaims for: 1) foreclosure; 2) breach of guaranty; 3) a declaratory judgment; 4) unjust enrichment; and 5) legal fees.

It was eventually held by the appellate division, upon modifying my decision (*Patmos Fifth Real Estate Inc. v Mazl Bldg. LLC*, 2015 NY Slip Op 30861[U] [Sup Ct, NY County 2015], Jaffe, J.), that the deed did not confer ownership of the property on Mazl but, pursuant to RPL § 320, constituted security for plaintiffs' mortgage debt. Thus, the "deed" did not extinguish plaintiffs' ownership interest in the property and Mazl remained the mortgagee, obliged to proceed by foreclosure and sale to extinguish the mortgagor's interest, the same as any other mortgagee (*Patmos Fifth Real Estate Inc. v Mazl Bldg.*, 124 AD3d 422, 426 [1st Dept 2015]).

Mazl and High Line had initially alleged that they owned 100 percent of the consolidated

mortgage, as acknowledged and credited in the June 2016 order of reference. (NYSCEF 139). Plaintiffs then moved for an order amending the order of reference, asserting that the alleged 100 percent ownership was erroneous. Based on Mazl and High Line's subsequent admission that they do not hold a 100 percent ownership interest in the mortgage, plaintiffs' motion was granted and the June 2016 order of reference was changed to reflect that Mazl is entitled to judgment only to the extent of its 37.5 percent interest in the subject consolidated mortgage (*Patmos*, 2019 NY Slip Op 33382[U], **10). The referee was therein directed to: (a) compute the amount of the mortgage debt only as to Mazl's 37.5 percent interest in the CEMA and notes, and (b) if the credits to plaintiffs exceed the debt owed to Mazl under its 37.5 percent interest in the CEMA and notes, ascertain and compute the amount of the overpayment amount as a refund to plaintiffs. I also held in the 2019 order that plaintiffs had no reason to suspect that Mazl and High Line's interest in the condominium was less than 100 percent, and that they had set forth a sufficient basis for the requested relief (*id.* at **7), observing as follows:

> The matter presently pends before the Special Referee, largely due to Mazl's and High Line's dilatory conduct which obligated Patmos to seek orders compelling defendants' compliance with the hearing process and to oppose defendants' unwarranted procedural applications . . . .
>
> I observed that Mazl had repeatedly engaged in dilatory conduct in the production of evidence . . .

(*Id.* at **4, **9).

Mazl appealed the 2019 decision and asserts that it owns all of the CEMA. Beginning in February 2008, partial interests in the CEMA were transferred by assignments between Mazl, High Line, Wolkowicki, and four nonparties (the Weisses). That Mazl owns 37.5 percent of the CEMA (52nd Street property and condominium unit) has been determined. The Weisses allege that they own 62.5 percent of the condominium unit (NYSCEF 497). It is not clear who owns

62.5 percent of the CEMA as it relates to the 52nd Street property.

II. GOVERNING STANDARD

Upon the motion of any party or on the court's initiative, the report of a referee may be confirmed or rejected, in whole or in part (CPLR 4403). A "special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (*RC 27th Ave. Realty Corp. v New York City Hous. Auth.*, 305 AD2d 135, 135 [1st Dept 2003]), and where the referee clearly defined the issues and resolved matters of credibility (*Rosenbloom v Gurary*, 59 AD3d 274 [1st Dept 2009]). Nonetheless, the court has discretion under the statute and is not bound by the referee's recommendation or determination (*Garrick-Aug Assocs. Store Leasing, Inc. v Shefa Land Corp.*, 270 AD2d 68, 69 [1st Dept 2000]).

A. Analysis

A mortgage lien generally consists of the outstanding principal of the debt, with interest due thereon to the date of the referee's computation, together with any amounts paid by the mortgagee to protect its security such as taxes and assessments, plus the costs and disbursements incident to the foreclosure action (*Grady v Utica Mut. Ins. Co.*, 69 AD2d 668, 674–675 [2d Dept 1979]). Certain reimbursements owed to Mazl were added to the mortgage debt. Credits owed to plaintiffs were subtracted from the debt.

A mortgagee in possession is a "mortgagee who takes control of mortgaged land by agreement with the mortgagor . . . upon default of the loan secured by the mortgage." (Black's Law Dictionary [11th ed 2019]). The title to the mortgaged property does not pass to the mortgagee but remains in the mortgagor (*Mortimer v East Side Sav. Bank*, 251 App Div 97, 99 [2d Dept 1937]).

While Mazl may have taken possession of the property in the belief that it was an owner,

it remained a mortgagee (*Patmos,* 124 AD3d 422). A mortgagee in possession is entitled to reimbursement for necessary expenses incurred in maintaining the premises while in possession (1 Drussel, Foran and Baum, Mortgages and Mortgage Foreclosure in New York § 21:9). "The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor. . . . They are applied in equity as an equitable set off to the amount due on the mortgage debt. . . ." (*Gasco Corp. & Gordian Group. of Hong Kong v Tosco Props. Ltd.*, 236 AD2d 510, 512 [2d Dept 1997], quoting *Hubbell v Moulson*, 53 NY 225, 228 [1873]; *see Mandel v Strickland,* 287 AD2d 695, 696 [2d Dept 2001]). Necessary expenditures by the mortgagee include taxes, assessments, and expenditures for such improvements as are required for the preservation and beneficial occupancy of the property (*Nansen v Holloway,* 266 App Div 1045, 1045-46 [3d Dept 1943]; *Gordon v Krellman*, 207 App Div 773, 780 [1st Dept 1924]; *see also Gomez v Bobker*, 124 AD2d 703, 704 [2d Dept 1986] [mortgagee in unlawful possession entitled to reimbursement]). The mortgagee in possession may not burden the estate by unnecessary expenditure (2 Rasch, New York Law and Practice of Real Property § 33:105 [2d ed]). If the property is income producing, the mortgagee in possession is entitled to be reimbursed for repairs and renovations necessary for the upkeep of the property or to secure tenants (*id.*).

Items chargeable against income by a mortgagee in possession of mortgaged property, in the absence of an agreement, are "not exclusive, unalterable, or inflexible, but may be changed or enlarged whenever equities between the parties so require" (11PT2 West's McKinney's Forms Real Property Practice § 5A:157). The application of rents and profits to the payment of the mortgage debt is generally accomplished by an accounting based on equitable principles (*id.*; *Gasco Corp. & Gordian Group. of Hong Kong*, 236 AD2d at 512).

The referee included as recoverable expenses for the preservation of the property before

and after the conversion to condominium status, real estate taxes, water charges, elevator repair, insurance premiums, and expenditures related to the building structure and systems, in addition to expenses for managing the building until the condominium conversion and then for managing the restaurant and residential units, such as brokerage fees and utility payments (NYSCEF 481, ¶ 203).

1. Fees paid to real estate broker

Mazl sought reimbursement for $798,831.83, which it paid to a real estate broker as commissions for procuring tenants for the building and for managing the building. Although the referee allows $28,000 in brokerage commissions paid in connection with the restaurant lease, he does not allow the full amount of commissions paid by Mazl for procuring tenants for the residential units in the building.

Abramov testified that Mazl and the broker had a written property management agreement which provided that the broker was responsible for "supervising," subcontracts, hiring a superintendent, cleaning the common areas and the sidewalk, inspecting the elevator, in short, tbjhe usual duties (NYSCEF 487, deposition tr at 415-416), and that the broker managed the residential units and procured tenants for a series of short-term rentals for which Mazl paid it monthly commissions of 10 percent of the monthly rents, as well as reimbursing it for cleaning and other outlays. Notwithstanding Abramov's testimony that the broker had provided Mazl with monthly breakdowns of the rental income and expenses (NYSCEF 489, deposition tr at 1001-1002), Mazl offered no evidence that would permit the referee to distinguish the commissions from the reimbursements, thereby stymying his effort to assess its entitlement to the commissions (NYSCEF 481, ¶ 101-102). Nor did Mazl offer evidence of the reasonableness of the 10 percent commission or any expert evidence that such an arrangement for rentals of a few

months is common in the industry or that the broker's results justified the amount of the commissions (*id.*, ¶ 104). In light of Abramov's testimony that the rents for the residential units were very high, even at a 10 percent commission rate, the arrangement was very lucrative for Mazl. Consequently, the referee did not credit Abramov's testimony that the commissions were justified (*id.*).

Moreover, given the relevance of the broker's written lists of the monthly rental income, expenses, and written calculations of the commissions, and Abramov's knowledge of, or reason to anticipate, the relevance of such evidence, the referee also found that Abramov's failure to retain the broker's monthly itemizations of the rental income constituted spoliation, and that the latest date from which Abramov should have saved such lists was in October 2013, when Mazl had filed its counterclaims for foreclosure, observing that "[a]t a minimum, for six years since then, on a regular basis, Abramov has been destroying or discarding documents that are obviously relevant to Mazl's claim for reimbursement of broker commissions and reimbursements paid to [the broker]." (NYSCEF 481, ¶ 105).

The referee consequently found that given the lack of evidence that would permit him to distinguish the actual commissions from the reimbursements, the failure to offer expert evidence as to the reasonableness of the 10 percent commission, and Abramov's spoliation of evidence, it was appropriate to "allow recovery by Mazl for the cost of brokerage commissions for every month in which it received rental income from the Residential Units, in an amount equal to 4% of the said rental income" (NYSCEF 481, ¶ 106).

Mazl denies the existence of evidence that it intentionally spoliated evidence, observing that a finding of spoliation must be supported by evidence that the party with control over the evidence must have been under an obligation to preserve it, that it must have destroyed the

evidence with a culpable state of mind, and that the destroyed evidence must have been relevant to the other side's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. Absent any evidence that it harbored a culpable state of mind, Mazl argues, it was inappropriate to impose sanctions where the loss of evidence was "evidently inadvertent." It also maintains that the missing broker's calculations were not crucial to plaintiffs' case, as plaintiffs had failed to demonstrate any prejudice resulting from the lack of the evidence.

To impose sanctions for the spoliation of evidence, a "culpable state of mind" includes ordinary negligence (*see Strong v City of New York*, 112 AD3d 15, 21 [1st Dept 2013]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010]). Mazl concedes that it was negligent in not preserving records and does not deny that the records are relevant to plaintiffs' case. As the unproduced records hindered the referee in determining the amount of the commissions, there was a sufficient basis in the record for his finding that the records had been spoliated by Mazl.

Mazl also argues that, in finding that the records had been spoliated and imposing discovery sanctions, the referee exceeded the order of reference. A referee's jurisdiction is limited to matters which are part of the order of reference, and a determination that is beyond the scope of the reference is in excess of jurisdiction and must be considered a nullity (*Semigran Enters., Inc. v Noren*, 285 AD2d 409, 409 [1st Dept 2001]).

The referee's duty was to determine the appropriate commission rate. He duly considered the evidence that was produced but could not consider other evidence that had concededly, but no more, existed. Notwithstanding his use of the term spoliation, the referee did not impose a discovery sanction. Rather, he duly weighed the quality of the evidence supporting Mazl's claim

in reaching his reasonable determination.

2. Real estate transfer taxes

Mazl sought reimbursement of $416,470 for real estate transfer taxes that it had paid to record the deed conveying ownership of the property to it, arguing that, had it not done so, it could not have sold six units in the building, the proceeds of which permitted it to reduce the mortgage debt by almost $7 million. Moreover, it claimed, plaintiffs willingly agreed to execute the deed.

In light of the adjudication that the alleged deed was no deed and that it conveyed no title, the referee had a sufficient basis for denying Mazl's claim for reimbursement of the transfer taxes (NYSCEF 481, ¶ 93). Moreover, as mortgagees in possession are not entitled to receive allowances for the payment of taxes that they are not obliged to pay (3 Rasch New York Law & Practice of Real Property § 39:62 [2d ed]; 90 NY Jur 2d Real Property—Possessory Actions § 428), and absent the purported deed, Mazl would have had no obligation to pay any taxes.

3. Litigation expenses

Mazl claimed some $101,000 in litigation expenses. Section 12 of the CEMA provides that in any action or proceeding in which Mazl is a made a party, excepting a foreclosure, "or in which it becomes necessary to defend or uphold the lien of this mortgage," plaintiffs will reimburse it "for the expense of any litigation or to prosecute or defend the rights and lien created by this mortgage (including reasonable counsel fees)," with annual interest at six percent (NYSCEF 365, ¶ 12). It is also provided therein that the sum with interest will be a lien on the mortgaged premises (*id.*).

According to the referee, the expense incurred in foreclosing a lien on a mortgaged property is reimbursable only if the lien is or would be superior to the mortgage lien and, if not,

the lien may be foreclosed by joining the lienor as a defendant in the foreclosure action (NYSCEF 481, ¶ 109).

Evidence was presented to the referee of an action that had been brought against Mazl and High Line based on a mechanic's lien filed against the property (*A.T.A. Constr. Corp. v Mazl Build. LLC and High Line Holding LLC*, Sup Ct, NY County, index No. 150226/12), and of an action for attorney fees incurred by Mazl in a successful suit against an insurer for reimbursement of a personal injury settlement that Mazl had paid in 2013 (*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944 [2d Dept 2013]). The referee found that Mazl had failed to show that the A.T.A. lien was superior to Mazl's lien for legal fees and costs (NYSCEF 481, ¶ 112) and that, had Mazl lost the personal injury case, a resulting judgment lien would have been subordinate to the CEMA lien and thus would have had no adverse impact on Mazl's security (*id.*, ¶ 142 [c]). Thus, the referee determined that Mazl was not entitled to recover legal fees and expenses.

4. Payroll expenses

Mazl also sought reimbursement for $211,636.58 in payroll expenses paid to Abramov and his son. Abramov testified that his son had played a key role in the collection of rent and the upkeep and maintenance of the rental units so that they could be rented, for which he was monthly paid approximately $5,000. Mazl contends that these expenses were necessary to generate the credits which plaintiffs now claim and to protect, maintain, and operate the property.

A mortgagee in possession is normally not entitled to compensation for his or her personal services in managing and caring for the mortgaged property, unless provided for in a previous agreement (*Phoenix Mut. Life Ins. Co. v Tuddington Holding Corp.*, 249 App Div 766,

766 [2d Dept 1936]). A mortgagee in possession, however, "may charge for the services of an agent employed by him to collect rents, when a prudent owner acting for himself would probably have done so" (*Gordon,* 207 App Div at 780).

The referee denied recovery for all items of payroll expenses, deeming salaries and payroll taxes as overhead (NYSCEF 481, ¶ 85 [e]), observing that there was a lack of "evidence in the record as to the reasonableness of the son's salary," and finding that the monthly $5,000 raised a question as to the existence of "an arms-length arrangement" (*id.*, ¶ 124). Mazl also failed to account for the performance by Abramov's son of the same functions as the broker. Thus, the referee's determination has a firm basis.

5. Fees paid to project construction manager

Mazl sought reimbursement of over $110,000 paid to the project construction manager, relying on Abramov's testimony that the manager had worked exclusively at the property from July 2009 through May 2013, and that post-construction, he represented Mazl at the property. The referee found that Abramov's testimony on this issue "contradictory and confusing" (NYSCEF 481, ¶ 132 [manager in building every day, although no payment made to him between September 11, 2009 and February 3, 2010, between August 11, 2010 and January 13, 2011, between June 15, 2011 and October 11, 2011, between July 24 and October 24, 2012 (*id.*, ¶ 132 [a]). And, while Abramov testified that there was no agreement with the manager, and that he '"just gave him a fee for his work,'" he also testified, although he was not sure, that the manager was on the payroll (*id.*, ¶ 132 [b]). He was not sure whether the manager was an employee or independent contractor (*id.*). As there was "too much uncertainty surrounding the [manager's] payments," the referee had a firm basis for disallowing them (*id.*, ¶ 135).

6. Interest rate

The referee determined that (i) Mazl can accrue interest at 12.5 percent until October 1, 2009 and 9 percent thereafter, (ii) interest accrual is tolled from August 23, 2017 until December 30, 2019, (iii) Mazl can recover 9 percent interest on the allowed preservation expenses but no interest on the mortgagee-in-possession expenses, and (iv) Mazl is entitled to per diem interest at 9 percent after December 30, 2019 (NYSCEF 481, ¶¶ 190-231, 253.1).

The CEMA provides that plaintiffs pay interest at the annual rate of 12.5 percent, and is silent as to the interest rate after the maturity date of the loan or in the event of a breach. If the parties fail to include a provision in the contract addressing the interest rate that governs after the principal is due or in the event of a breach, New York's statutory rate will be applied as the default rate (*NML Capital v Republic of Argentina,* 17 NY3d 250, 258 [2011]). The statutory rate of interest is 9 percent per annum (CPLR 5004). The referee duly applied the contract rate of 12.5 percent until October 1, 2009, the date of maturity, and 9 percent thereafter.

Abramov testified that, although the parties intended to apply a 12.5 percent rate after default, that term was omitted from the CEMA as plaintiffs did not know when they would be able to repay the loan. According to Mazl's attorney, it was the parties' intent to apply the CEMA interest rate until the mortgage was paid. The referee duly declined to consider the parol evidence to fill in the blanks in the CEMA. "An omission or mistake in a contract does not constitute an ambiguity [and] ... the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted]). Contractual language is ambiguous as a matter of law when, on the face of the writing alone, the contract is reasonably susceptible to more than one interpretation (*id.*; *LoFrisco v*

Winston & Strawn LLP, 42 AD3d 304, 307 [1st Dept 2007]).

Here, the referee correctly decided that the CEMA was not ambiguous and observed that, had the parties wanted, they could have but did not provide for a post-default interest rate. Consequently, there was no need for the referee to consider Mazl's extrinsic evidence to glean the parties' intent (*Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 56 [1979]). Moreover, when asked by the referee why the attorney did not include a post default interest provision in the CEMA, the attorney replied that he had no reason for it (NYSCEF 481, ¶ 199).

For these reasons, the referee's rejection of Mazl's argument that the deed in lieu agreement provides for a 12.5 percent interest rate (NYSCEF 424) is warranted, absent any provision for a particular rate of interest (NYSCEF 481, ¶ 197).

7. Interest on mortgagee-in-possession expenses

The referee determined that Mazl is entitled to recover nine percent interest on the preservation expenses, but no interest on the mortgagee-in-possession expenses (NYSCEF 481, ¶ 203-205).

Although Mazl acted as mortgagee in possession, plaintiffs never consented to its status as such (NYSCEF 481, ¶ 205). The referee, in his report, relies on a treatise for the propositions that in order to become a mortgagee in possession, the mortgagor must consent, and that generally, such consent must arise from an express agreement conferring the right of possession in the event of default; an entry without the fee owner's consent is a trespass (*id.*; 1 Drussell, Foran and Baum, Mortgages and Mortgage Foreclosure in New York § 21:1).

According to Mazl, consent is irrelevant to its entitlement to interest on the mortgagee-in-possession expenses as commercial lenders, as a rule, are entitled to interest even if not expressly provided for in the governing contract.

Per the referee, plaintiffs signed the deed in lieu agreement and deed, thereby signaling their consent to Mazl's status. However, as the basis of their consent constituted a violation of RPL § 320, the referee, in an effort to do equity and balance the parties' claims, decided that Mazl, although having acted wrongly, was entitled to some, but not all, of the interest sought.

The referee did not prorate the preservation expenses by 37.5 percent but awarded Mazl 100 percent, given its retention of a duty to preserve all of the property and its obligation to pay the real estate taxes on the entire property, not just 37.5 percent. (NYSCEF 481, ¶ ¶ 241-243).

8. Tolling of interest

The referee tolled the accrual of interest on Mazl's recovery from August 23, 2017 to December 30, 2019, and rejected plaintiffs' argument that the interest should be tolled from June 23, 2011, the day after their attorney advised Mazl that it was violating RPL § 320 and should not be in possession, finding that to do so would be unduly harsh (NYSCEF 481, ¶ 206), and noting that plaintiffs were represented by counsel in the negotiation of the deed in lieu agreement, and claim no disadvantage or inequity therein (*id.*, ¶ 208). Moreover, the deed in lieu agreement was entered into due to plaintiffs' default on the CEMA, with the deed being released and recorded because Patmos had again defaulted (*id.*, ¶ 209).

"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]).

Mazl agreed to toll interest on the amount due on the mortgage from January 29, 2019 to April 16, 2019 (NYSCEF 481, ¶ 231), and asserts that the referee's report should be modified so that interest is tolled from August 23, 2017 through September 12, 2018 and from January 29,

2019 through April 16, 2019, as the referee had acknowledged that not all of the delays of the hearing before him were its fault (NYSCEF 481, ¶ 212). Mazl argues that interest should accrue following the hearing, which began on April 16, 2019, absent a showing that the reference was delayed after that date.

The referee described in detail the various reasons why the hearing before him was delayed, observing that most of the delay was attributable to Mazl and to the contradictions and inconsistencies of its evidence. He found that certain aspects of Abramov's testimony were inaccurate and implausible (NYSCEF 481, ¶¶ 226-228), such as that concerning the assignments to the Weisses and to Wolkowicki which Abramov had claimed constituted security for a $10 million loan to Mazl intended to be funded by Wolkowicki but that ultimately was funded by the Weiss parties to enable Mazl to purchase other property, with the assignments being then released in consideration of Mazl paying off the $10 million loan (*id*., ¶225). The referee found that the testimony contradicted the position articulated by Mazl in its motion to amend, namely, that it had paid Weiss $10 million to rid the building of the burden of the Weisses's 62.5 percent interest in the CEMA (*id.*).

The referee also noted the confusion sown by Mazl concerning its ownership of the property, first alleging that it and High Line owned 100 percent of the CEMA, whereas 14 months later, on August 23, 2017, it moved for leave to amend, disclosing that it owned a 37.5 percent interest in the CEMA and that High Line owned no interest. The referee found "dubious" Mazl's explanation of the change in position and opined that the motion to amend and subsequent appeal "threw a cloud of uncertainty over the reference" (NYSCEF 481, ¶ 223). Thus, he concluded that Mazl should be sanctioned for advancing four different positions with respect to its standing over several years of litigation, in succession and not in the alternative,

and all the while advancing "dubious factual allegations" (*id.*, ¶ 228). The referee thus reasonably tolled the interest from August 23, 2017, the date on which Mazl filed its motion to amend in which it first disclosed that it had only a 37.5 percent interest in the CEMA, through the date of the instant report, based on Mazl's "less-than-straightforward conduct" (*id.*, ¶¶ 223, 229).

9. Calculations

In its motion to amend, Mazl sought an order allowing it to enforce the entire amount of the mortgage instead of the 37.5 percent interest. An appeal of the denial of that motion pends. Here, Mazl argues that, as it has possession of all the notes, it should be allowed to foreclose on the entire mortgage.

A party has standing to foreclose a mortgage where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*GRP Loan, LLC v Taylor,* 95 AD3d 1172, 1173 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). The assignments to Wolkowicki and the Weisses include the mortgage and the underlying notes. Thus, physical possession of the notes alone does not give Mazl the right to enforce the entire CEMA.

Given Mazl's pending appeal as to whether it can enforce the entire CEMA or 37.5 percent thereof, and even though the order of reference authorizes the referee to consider only 37.5 percent (*Patmos,* 2019 NY Slip Op 33382[U], **9-10; NYSCEF 452), the referee wisely performed two calculations, one based on ownership of the full $16 million mortgage under the CEMA and one based on ownership of $6 million, which is 37.5 percent of $16 million (NYSCEF 481, ¶ 233).

From the $16 million due under the CEMA, the referee subtracted the revenues earned by

Mazl while in possession of the building and the $5.3 million payment by plaintiffs, arriving at $3,895,940.41. After calculating 37.5 percent of that amount, which is $1,460,977.65, he added to it 37.5 percent of the mortgagee-in-possession expenses, 100 percent of the preservation expenses, and interest on the preservation expenses, which totals $4,735,310.08 (NYSCEF 481, ¶ 240, NYSCEF 470). According to the referee, this calculation, based on $16 million, should govern if the appeal yields a finding that Mazl may enforce only 37.5 percent of the CEMA (*id.*, ¶ 235).

Plaintiffs object to the referee's calculation, arguing that the final determination of the amount due Mazl should commence with a principal balance of $6 million instead of $16 million. They maintain that the assignments divided the mortgage debt into two debts and that the debt owed to Mazl is $6 million. There is substantial evidence in the record warranting the use of the original amount borrowed by plaintiffs as the mortgage debt.

Plaintiffs also object to the referee's methodology on the ground that he ignored the economic reality, as testified to by Abramov, that Mazl had received $19 million in credits from the sales of condominiums and rental income for apartments and a restaurant, and over $5 million from plaintiffs, and that the assignees received none of these payments. They fail, however, to demonstrate that the referee's finding is not substantially supported by the record. Thus, these items were properly credited to the mortgage debt.

As the referee did not adhere to the CEMA's requirement to apply credits to all expenses before applying them to interest and principal, plaintiffs object, claiming that he applied credits toward interest and principal and then to the preservation expenses, while acknowledging that it is arguable that credits should be applied to preservation expenses and interest thereon before being applied to interest on the loan principal and loan principal itself (NYSCEF 481, ¶ 244).

The referee prepared alternative calculations based on the methodology favored by plaintiffs, which resulted in a finding that the mortgage debt was $2,747,308.81. (NYSCEF 474).

Under section 13 of the CEMA, the rents, issues, and profits of the mortgaged premises are security for the mortgage debt, and such items must be applied, "after payment of all necessary charges and expenses, on account of the mortgage debt" (NYSCEF 582). The CEMA also provides that plaintiffs have the right to collect those amounts, that Mazl waives the right to collect them, and that Mazl may revoke plaintiffs' right on five days' notice if plaintiffs default under any covenant of the CEMA. In the event of a default by plaintiffs, they must pay the items to Mazl or to a receiver appointed to collect said items.

Mazl argues that section 13 concerns only those circumstances where a receiver or lender enters onto the property pursuant to that section's procedures. Rather, section 13 clearly provides that whoever collects the rents, the mortgagee, the mortgagor, or the receiver, must apply the rents as stated in the CEMA. That Mazl collected the rents in circumstances where its possession of the building was not according to section 13 does not change how the calculations must be made. Thus, the calculations must be changed so that credits are applied to the preservation expenses and interest thereon before being applied to interest on the loan principal and loan principal itself.

10. Motion for attorney fees

Mazl and High Line move for a reference to determine costs, disbursements, and fees incurred in the foreclosure.

Attorney fees are not recoverable absent a specific contractual provision or statutory authority (*Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491 [1989]). There is no statute authorizing attorney fees in foreclosure proceedings (*Levine v Infidelity, Inc.*, 2 AD3d 691, 692

[2d Dept 2003]), nor does the CEMA authorize the recovery of attorney fees in a foreclosure. Mazl relies on the June 2008 promissory note as authorizing attorney fees (NYSCEF 193).

The June 2008 promissory note, one of three included in the CEMA, provides that, in the event the mortgagee is required to employ counsel to foreclose "this Mortgage," the "reasonable attorney's fees" of the mortgagee's attorney must be included in the judgment of foreclosure and be added to the recovery of costs, disbursements, and allowances pursuant to the applicable provisions of law.

Attorney fees provided for in a promissory note are not, however, recoverable in an action to foreclose a mortgage; to recover them, the mortgagor must sue on the note (*Watertown Sav. Bank v Delaney,* 23 Misc 3d 838, 840 [Sup Ct, Jefferson County 2009]). Costs and disbursements, while mandated by statute in actions at law, are discretionary in equitable actions (2 Drussell, Foran and Baum, Mortgages and Mortgage Foreclosure in New York § 36:8). Here, costs are denied due to Mazl's dilatory, bad faith conduct during the pendency of the reference, as identified in the report.

Plaintiffs cross-move for a sanction against Mazl for ongoing bad faith and frivolous conduct, including Mazl's motion for costs, and they move for an award of attorney fees based thereon. As the denial and tolling of interest in the foreclosure constitute sufficient acknowledgements of Mazl's conduct, sanctions are denied.

III. CONCLUSION

As the referee clearly defined the issues and resolved matters of credibility, and as his findings of fact and credibility are substantially supported by the record, it is hereby

ORDERED, that the motion (sequence number 013) by defendants/third-party plaintiffs Mazl Building LLC and High Line Holdings, LLC to confirm in part and reject in part the

December 30, 2019 report of referee and to remand to the referee certain aspects of the report with directions to modify his report in accordance with the modifications set forth in the movants' memorandum of law is granted and denied as set forth in this opinion; it is further

ORDERED, that the cross motion by plaintiffs Patmos Fifth Real Estate Inc. and Patmos Westbury, LLC to confirm in part and reject in part the December 30, 2019 report of the referee and to remand to the referee certain aspects of the report with directions to modify his report in accordance with the modifications set forth in the movants' memorandum of law is granted and denied as stated in this opinion; it is further

ORDERED, that the motion (sequence number 014) of defendants/third-party plaintiffs Mazl Building LLC and High Line Holdings, LLC for an order appointing a referee to determine the attorneys' fees and costs is denied; it is further

ORDERED, that the cross motion by plaintiffs Patmos Fifth Real Estate Inc. and Patmos Westbury, LLC to sanction defendants/third-party plaintiffs Mazl Building LLC and High Line Holdings, LLC for frivolous conduct is denied; and it is further

ORDERED, that the motion (sequence number 015) by plaintiffs Patmos Fifth Real Estate Inc. and Patmos Westbury, LLC for an order awarding them attorney fees is denied.

20200813131640BAFFE22E049598A3845989662A31EE9EA16C4

8/13/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE