

**52 Monitor St. Lender LLC v 52 Monitor St. Realty,
LLC**

2021 NY Slip Op 30581(U)

February 10, 2021

Supreme Court, Kings County

Docket Number: 502405/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

52 MONITOR STREET LENDER LLC,

Plaintiff,

- against -

Index No. 502405/19

52 MONITOR STREET REALTY, LLC, FRANCISZKA
CIELEPAK, MIECZYSŁAW CIELEPAK, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

122-145 148-165

Opposition Affidavits (Affirmations) Annexed_____

149-165 169-179

Reply Affidavits (Affirmations) Annexed_____

169-179

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 52 Monitor Street in Brooklyn (Block 2829, Lot 43) (Property), plaintiff 52 Monitor Street Lender LLC moves (in motion sequence [mot. seq.] four) for an order: (1) confirming the October 15, 2020 referee report of amounts due (Referee Report); (2) granting it a judgment of foreclosure and sale, including attorneys' fees and

costs, pursuant to RPAPL 1351; and (3) directing the distribution of the sale proceeds, pursuant to RPAPL 1354.

Defendants 52 Monitor Street Realty, LLC, Franciszka Cielepak and Mieczyslaw Cielepak (collectively, defendants) cross-move (in mot. seq. five) for an order: (1) rejecting the Referee Report, and (2) calculating the amount due and owing under the mortgage loan.

Background

This Foreclosure Action

On February 4, 2019, plaintiff commenced this action by filing a summons and a verified complaint seeking to foreclose a September 5, 2014 consolidated mortgage in the amount of \$1,975,000.00 encumbering the Property. The restated mortgage note and consolidated mortgage were executed by defendant 52 Monitor Street Realty, LLC on or about September 5, 2014 in favor of Signature Bank. As further security for the loan, defendants Franciszka Cielepak and Mieczyslaw Cielepak executed a September 5, 2014 guarantee wherein they guaranteed repayment of all sums due under the loan and performance of all obligations under the loan. On or about January 11, 2019, about one month prior to the commencement of this action, Signature Bank assigned the mortgage to plaintiff and endorsed the note to plaintiff by an allonge affixed to the note.

The complaint alleges that “[t]he Borrower defaulted under the Note and Mortgage by, among other things, (i) failing to make the monthly installment payments which were due on December 1, 2018 and January 1, 2019, respectively; (ii) failing to

maintain sufficient, cleared funds in Borrower’s operating account to pay the foregoing installment payments; and (iii) *failing to obtain and deliver a permanent and unconditional certificate of occupancy on or before December 5, 2014* (the ‘**Events of Default**’)” (complaint at ¶ 11 [emphasis added]). The complaint further alleges that “[u]nder the terms and conditions of the Loan, the following amounts are now due and owing:

UNPAID PRINCIPAL BALANCE:	\$1,969,247.76
INTEREST ON THE UNPAID PRINCIPAL BALANCE:	At the Default Rate of 24.00% per annum from December 5, 2014, and thereafter, with an interest credit for payments made” <i>(id. at ¶ 15).</i>

On or about April 8, 2019, defendants 52 Monitor Street Realty, LLC, Franciszka Cielepak and Mieczyslaw Cielepak collectively answered the complaint and asserted affirmative defenses, including that “Plaintiff failed to provide proper notice of default under the Loan Documents[,]” “[o]ne or more of Plaintiff’s claims are barred as usurious” and “Plaintiff is equitably precluded from seeking some or all of the pre-judgment interest sought in the Complaint” (answer at ¶¶ 36, 42 and 45). Defendant New York City Environmental Control Board (NYCECB) failed to answer or otherwise appear in this action.

On or about May 28, 2019, plaintiff moved for summary judgment, an order of reference, a default judgment against NYCECB and other relief. By an August 4, 2020

decision and order, this court: (1) granted plaintiff's motion for summary judgment; (2) granted plaintiff a default judgment against NYCECB; (3) appointed a referee to ascertain and compute the amount due under the mortgage loan for principal, interest and other disbursements advanced and to determine whether the Property should be sold in one parcel; and (4) struck and dismissed defendants' answer and affirmative defenses. Notably, the order of reference specifically ordered that "the Referee appointed herein shall determine the date [o]n which Default Interest began to accrue on the Loan."

The record reflects that plaintiff served defendants with a notice of hearing on September 23, 2020. The notice of hearing advised that the matters referred to the referee "will be brought on for a virtual hearing via Zoom hosted by Jaguar Reporting on October 22, 2020, at 10:00 a.m. . . ." The notice of hearing further advised that "unless written objections hereto are received by the Referee and the Attorneys for Plaintiff, no later than 7 days prior to the Referee's Hearing, the Referee reserves the option to sign the Referee's Report of Amount Due without a hearing." Thus, defendants' objections were due to be received by the referee no later than October 15, 2020.

On October 15, 2020, the referee issued the Referee Report without holding a hearing. Schedule A of the Referee Report reflects that the referee determined the amount due and owing by considering the loan documents, the mortgage assignment and plaintiff's sworn testimony. The Referee Report stated that \$4,326,567.70 is due and owing to plaintiff under the loan documents as of September 2, 2020, for principal, interest, advances and interest on advances. According to the referee's Statement of

Amount Due and Owing, which is annexed to the Referee Report, the total amount due and owing is comprised of: (1) \$1,969,247.76 for the outstanding principal balance, and (2) \$2,252,283.84 for the contract interest (3.75% per annum from December 1, 2014 through December 5, 2014) and default interest (24.00% per annum from December 6, 2014 through September 2, 2020). The Referee Report also concluded that the Property should be sold as one parcel.

Plaintiff's Instant Motion

Plaintiff now moves for an order confirming the Referee Report and granting it a judgment of foreclosure and sale, pursuant to RPAPL 1351. In addition to the pleadings, evidence of standing, default letters and the court's August 4, 2020 decision and order granting plaintiff summary judgment and an order of reference, plaintiff submits: (1) the September 23, 2020 notice of hearing before the referee and the referee's oath; (2) the referee's computation schedule and the October 15, 2020 Referee Report; and (3) the September 22, 2020 affidavit of amounts due by Jason Leibowitz, plaintiff's manager, which plaintiff submitted to the referee and served upon defendants with the September 23, 2020 notice of hearing. Plaintiff asserts that it previously "established all the required elements for a foreclosure" in its prior motion for summary judgment. Plaintiff also asserts that the referee, having received no written objections from defendants, determined that a hearing was unnecessary.

Plaintiff argues that it is entitled to a judgment of foreclosure and sale that includes reimbursement for its reasonable attorneys' fees, disbursements and costs,

pursuant to paragraph 19 of the mortgage. Plaintiff submits a detailed affirmation of legal services rendered by Michael J. Bonneville, Esq., with copies of all legal invoices. Attorney Bonneville affirms that as of November 5, 2020, plaintiff incurred \$20,745.30 in attorneys' fees. Plaintiff's counsel estimates that plaintiff will incur another \$3,570.00 in attorneys' fees through the conclusion of this action. Plaintiff also seeks reimbursement of \$2,478.89 for its disbursements and costs, pursuant to CPLR Article 83, and provides a bill of costs detailing those amounts.

Defendants' Opposition and Cross Motion

Defendants oppose plaintiff's motion to confirm the Referee Report and cross-move for an order rejecting the Referee Report and calculating the amount due and owing under the mortgage loan.

Defendants submit an affidavit from defendant Franciszka Cielepak (Frances), who attests that she and her husband, defendant Mieczyslaw Cielepak (Joseph), "own" defendant 52 Monitor Street Realty LLC. Frances attests that she was always in charge of paying the mortgage on the Property, that Karen Hinnaoui, an assistant, brought mortgage checks to Signature Bank for her and that in September 2018, when she was having medical issues, "it is possible I forgot to give Karen a check." Frances further attests to conversations she had with Karen about the October 2018 mortgage payment being returned as "unpaid" and Signature Bank's claim that the December 2018 mortgage payment was late. Frances attests that "[o]ther than the single missed payment described above, Signature [Bank] never notified us of any problem with the loan."

Frances further attests that the final statement that she and her husband received from Signature Bank “is \$1,822,525.58 in principal, plus any interest that has accrued since December 2018 and fees.” Frances asserts that:

“I am advised that Plaintiff is now claiming that we owe it \$4.2 million. We do not understand how Plaintiff can assert that we owe \$4.2 million on a \$1.9 million loan that we diligently paid every month for 4 years and that we have been offering to repay in full since early 2019. We therefore object to the Statement of Amount Due and Owing submitted by Plaintiff.”

Defense counsel submits an affirmation and annexes his October 14, 2020 cover letter to the referee with defendants’ objections to plaintiff’s proposed calculations. Defendants’ objections consisted of Frances’ affidavit (the same affidavit submitted in support of defendants’ instant cross motion) and a memorandum of law. In the October 14, 2020 objection letter, which defense counsel sent via Federal Express overnight delivery, defense counsel reminded the referee that “in addition to calculating the principal and interest due on the Note, the Court has specifically instructed you to determine the date that Default Interest began to accrue on the Loan . . .”

Defendants submit a memorandum of law arguing that “Default Interest could not have begun to accrue on Plaintiff’s loan until December 1, 2018, when Defendant first missed a payment due on the loan.” Defendants claim that the referee “simply signed a calculation prepared for him by Plaintiff’s counsel without holding a hearing mandated by the CPLR and, by his own admission, without considering the documentary evidence or affidavit submitted by Defendants.” Defendants contend that “[t]he Referee’s gross

failure to perform his duties here – rendering a determination without holding a hearing required by CPLR 4313, and without considering the documentary evidence and affidavit submitted by Defendants – mandates rejection of his Report.”

Defendants further argue that under paragraph 18 of the mortgage “the lender cannot declare the Note due and payable and impose Default Interest due to the borrower’s failure to deliver a certificate of occupancy [on or before December 5, 2014] without first providing 30 days written notice to the borrower.” Defendants argue that plaintiff failed to establish its right to default interest running from December 2014 because it did not show that it provided the requisite notice of default to the borrower.

Plaintiff’s Opposition to the Cross Motion and Reply

Plaintiff, in opposition to the cross motion and in reply, asserts that “[p]aragraph 16 of the Mortgage provides that until requested documents [such as the certificate of occupancy] are furnished, interest payable under the Mortgage shall accrue at the Default Rate . . .” Plaintiff asserts that the certificate of occupancy was due on December 5, 2014, and still has not been obtained, and therefore, default interest was triggered and began to accrue on December 6, 2014, pursuant to the terms of the mortgage.

Plaintiff argues that the referee “agreed with Plaintiff’s calculations of the amount due and owing under the Note and Mortgage by the Referee’s Report wherein [the] Referee . . . calculated interest at the Default Rate from December 6, 2014, the occurrence of the C of O Default . . .” Plaintiff asserts that “[w]hile a Referee’s hearing was not conducted, because the Referee apparently deemed the Defendants’ objections to

be untimely or unpersuasive, for all the reasons set forth herein, the Referee's Report is correct and should be confirmed . . ."

Discussion

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2017]). CPLR 4403 authorizes a court to confirm or reject a referee's report. The Second Department has repeatedly held that a referee report should be rejected where the referee computed the amount due to the plaintiff without holding a hearing on notice to the defendant, as required by CPLR 4313 (*see Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1763 [2020]; *243 West 98th Condominium v Shapiro*, 12 AD3d 591, 592 [2004]; *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 629 [2014], *affd*, 25 NY3d 355 [2015]).

Here, the referee erred in computing the amount due plaintiff without holding a hearing in accordance with CPLR 4313. In addition, the referee issued the Referee Report without considering defendants' October 14, 2020 objections, which defense counsel timely sent to the referee by Federal Express overnight delivery. Rather than holding a hearing on October 22, 2020, in accordance with the notice of hearing, the referee adopted plaintiff's proposed calculations and issued the Referee Report without a hearing. A hearing was necessary because defendants timely objected to plaintiff's proposed calculation based on the accrual of default interest from December 6, 2014.

Indeed, the order of reference specifically ordered that “the Referee appointed herein shall determine the date [o]n which Default Interest began to accrue on the Loan.” Under these circumstances, the matter is referred back to the referee for a hearing and a new report computing the amount due to plaintiff, including a determination of the date on which Default Interest began to accrue. Accordingly, it is hereby

ORDERED that plaintiffs’ motion (in mot. seq. four) to confirm the Referee Report and for other relief is denied; and it is further

ORDERED that defendants’ cross motion (in mot. seq. five) is granted only to the extent that the Referee Report is rejected; and it is further

ORDERED that the matter is remitted back to the referee for a hearing (via Zoom) on notice to defendants regarding the amount due and owing to plaintiff under the loan documents, including a determination of the date on which default interest began to accrue on the mortgage loan, and the issuance of a new referee report that considers plaintiff’s proposed calculations, defendants’ objections and any evidence produced during the hearing; and it is further

ORDERED that a copy of this decision and order shall be served on the referee with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

10 HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE