

Humboldt Indus. LLC v Zen Restoration, Inc.

2021 NY Slip Op 31672(U)

May 6, 2021

Supreme Court, Kings County

Docket Number: 513343/19

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 6th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

HUMBOLDT INDUSTRIAL LLC,
Plaintiff,

- against -

Index No. 513343/19

ZEN RESTORATION, INC., BERNARD SOBUS,
UNITED STATES OF AMERICA, KRZYSZTOF
ROSTEK, NEW YORK STATE DEPARTMENT OF
LABOR, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE and TWE MARBLE
STONE INC.,
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 _____

115, 117-150

Opposition Affidavits (Affirmations) Annexed _____

153-155

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 818-824 Humboldt Street a/k/a 824/828 Humboldt Street in Brooklyn (Block 2605, Lot 13) (Property), plaintiff Humboldt Industrial LLC (Humboldt) moves (in motion sequence [mot. seq.] three) for an order: (1) confirming and ratifying the January 27, 2021 Referee's Report of Amount Due (Referee Report), pursuant to RPAPL 1321; (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.

Background

The Loan

A promissory note was executed by defendant Zen Restoration, Inc. (Zen or borrower) on or about December 4, 2014 in favor of Signature Bank to secure a line of credit in the principal amount of \$500,000.00. As security for the loan, defendant Bernard Sobus (Sobus or guarantor) executed a December 4, 2014 guarantee wherein he guaranteed repayment of all sums due under the loan. On or about November 20, 2015, Zen executed a promissory note in favor of Signature Bank, which replaced and superseded the December 4, 2014 note. On or about March 29, 2016, Zen executed a term note in favor of Signature Bank, which converted the line of credit into a term loan. On or about August 30, 2017, Zen executed a \$340,000.00 mortgage note in favor of Signature Bank secured by a mortgage encumbering the Property, which was recorded on September 6, 2017 under CRFN 2017000331417. As further security for the loan, Sobus executed a continuing guaranty and a continuing general security agreement. On or about August 1, 2018, Zen executed a certain note modification allonge in favor of Signature Bank, which amended and supplemented the \$340,000.00 mortgage note.

On or about July 1, 2019, Signature Bank assigned the \$340,000.00 mortgage to Humboldt by an Assignment of Mortgage, which was recorded on July 30, 2019 under

CRFN 2019000239708. By a July 1, 2019 allonge, Signature Bank endorsed the \$340,000.00 promissory note to Humboldt.

The Instant Action

Meanwhile, on June 17, 2019, Signature Bank commenced this action to foreclose the August 30, 2017 mortgage in the amount of \$340,000.00 encumbering the Property by filing a summons, a verified complaint and a notice of pendency against the Property. On July 8, 2019, Signature Bank filed an amended complaint.

Defendants United States of America and Krzysztof Rostek (Rostek) each filed a notice of appearance. The remaining defendants, including Zen, the borrower, and Sobus, the guarantor, failed to answer or otherwise appear in the action.

On or about August 1, 2019, Humboldt moved for an order substituting it as plaintiff in place of Signature Bank. By an October 17, 2019 order, the court (Vaughan, J.) granted Humboldt's motion and Humboldt was substituted as the plaintiff.

On or about November 19, 2019, Humboldt moved for an order of reference, a default judgment against the non-answering defendants and other relief. By a July 31, 2020 order, this court granted Humboldt's motion for an order of reference on default, granted Humboldt a default judgment against the defaulting defendants, amended the caption and appointed a referee to compute the amount due and owing under the loan documents and to determine if the Property should be sold in one parcel. Notably, the July 31, 2020 order of reference provided that:

“**ORDERED**, that a copy of this Order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, *any tenants named in this action* and any other party entitled to notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which proof must accompany any application for Final Judgment of Foreclosure and Sale” (emphasis added).

On August 10, 2020, Humboldt timely served notice of entry of the July 31, 2020 order of reference upon Zen, counsel for Rostek, counsel for the United States of America and the appointed referee.

However, Humboldt claims that it “inadvertently failed to comply with the Order of Reference and serve a copy of the Order of Reference with Notice of Entry upon [TWE Marble Stone Inc.] the tenant named in this action.” To correct this error, on February 18, 2021, Humboldt served a supplemental notice of entry of the July 31, 2020 order of reference upon TWE Marble Stone Inc. (TWE).

On January 15, 2021, the referee issued her oath and the Referee Report. The Referee Report reflects that the referee determined the amount due and owing by considering the loan documents and plaintiff’s sworn testimony. The Referee Report stated that \$1,755,288.07 is due and owing to Humboldt under the loan documents as of January 15, 2021, for principal, interest, late charges, protective advances and interest on protective advances. According to the referee’s Statement of Amount Due and Owing annexed to the Referee Report, the total amount due and owing under the \$340,000.00

mortgage note (\$386,388.41) is comprised of: (1) \$300,898.35 for the unpaid principal; (2) \$127,581.60 for default interest (18.00% per annum from May 4, 2018 through August 28, 2020); (3) late charges of \$1,213.43; and (4) a credit of \$43,304.98. The total amount due and owing under a \$1.125 million senior mortgage note (\$1,327,399.44) is comprised of: (1) \$1,003,722.21 for the unpaid principal; (2) \$425,577.28 for default interest (18.00% per annum from May 4, 2018 through August 28, 2020); (3) late charges of \$4,102.81; and (4) a credit of \$106,002.86. The referee determined that \$38,124.09 in protective advances (for taxes, insurance and water charges) were made with \$3,376.13 in interest on those protective advances. The Referee Report also concluded that the Property should be sold as one parcel.

Humboldt's Instant Motion

Humboldt now moves for an order confirming the Referee Report and granting it a judgment of foreclosure and sale regarding the \$340,000.00 mortgage, pursuant to RPAPL 1351. In addition to the pleadings, evidence of standing, the default letter, the loan documents and the court's July 31, 2020 decision and order granting plaintiff an order of reference, Humboldt submits: (1) its August 10, 2020 notice of entry; (2) its February 18, 2021 supplemental notice of entry served upon TWE; (3) the referee's computation schedule and the January 15, 2021 Referee Report; and (4) the September 28, 2020 affidavit of amounts due by Jason Leibowitz, Humboldt's manager, which Humboldt submitted to the referee.

Humboldt's counsel affirms that "[a]s a result of an inadvertent law-office error my office inadvertently failed to comply with the Order of Reference and serve a copy of [it] with Notice of Entry upon [TWE] the tenant named in this action" and served TWE with a supplemental notice of entry on February 18, 2021. Humboldt notes that TWE "will be served a copy of this motion to provide the tenant an opportunity to dispute the referee's report of amount due." Humboldt's counsel asserts that:

"At this time none of the defendants . . . claim to have been prejudiced by the minimal delay involved with the late service of the Order of Reference with Notice of Entry. Furthermore, there is no evidence on the record of a pattern of persistent neglect and delay on Plaintiff's behalf in prosecuting this Foreclosure Action, or of any intent to abandon the action."

Humboldt's counsel explains that while the referee calculated the amounts due under both the \$340,000.00 mortgage and a senior loan, Humboldt only seeks to confirm the report of amount due (\$386,388.41, plus interest thereon from August 28, 2020) on the \$340,000.00 mortgage that is the subject of this action.

Humboldt's counsel argues that "[i]n conjunction with the Motion for Order of Reference previously granted by this Court, Plaintiff established all the required elements for a foreclosure." Humboldt also asserts that it is entitled to a judgment of foreclosure and sale that includes reimbursement for its reasonable attorneys' fees, disbursements and costs, pursuant to the terms of the \$340,000.00 mortgage and note. 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 February 1, 2021, Humboldt

incurred \$10,883.65 in attorneys' fees, and estimates that Humboldt will incur another \$3,570.00 in attorneys' fees through the conclusion of this action for a total of \$14,453.65. Humboldt also seeks reimbursement of \$3,748.15 for its disbursements and costs, pursuant to CPLR 8201, and provides a bill of costs.

TWE's Opposition

TWE, the tenant at the Property, opposes Humboldt's motion to confirm the Referee Report and for a judgment of foreclosure and sale on the grounds that:

“(a) plaintiff admittedly violated this Court's summary judgment Order (and never properly moved to renew or reargue that Order in accord with CPLR 2221 but instead now asks that it be rewritten or ignored) in failing to provide TWE . . . with the expressly required notice of entry so as to provide that party in interest with the timely, full and fair opportunity to appear at the hearing or otherwise provide evidence to the referee and/or object to the evidence tendered to the referee by plaintiff; [and] (b) the fees now demanded are not justified, explained or reasonable.”

Defense counsel asserts that “[i]t is not a mere technicality that plaintiff here violated but instead a necessary and vital procedural safeguard to ensure that the evidentiary hearing before the referee be fair and even-handed.” Although TWE did not make a cross motion for any relief, defense counsel argues that “[w]hat should happen here as a matter of CPLR procedure and fundamental fairness is that the referee's report should be vacated, and a new and fair hearing should be scheduled.” Notably, while defense counsel asserts that the referee's computation “should be challenged” at a new hearing, TWE fails to provide any evidence that the calculations in the Referee Report are inaccurate.

Humboldt's Reply

Humboldt, in reply, notes that neither Zen, the borrower, nor Sobus, the guarantor, oppose the instant motion, and therefore, “conced[e] both the accuracy of the Referee’s calculations and Plaintiff’s accounting of reasonable legal fees under the subject loan.” Humboldt asserts that TWE’s opposition is “no defense to the Motion and [is] nothing more than a transparent effort to further delay . . . at the behest of the Borrower and/or Guarantor” because they have the same defense counsel. Humboldt argues that “TWE’s claim of an alleged procedural defect is, as a matter of law, insufficient to disturb the Referee’s findings or to warrant a Referee’s hearing” since “[i]t is legal dogma that where there is no dispute as to the referee’s calculations a formal hearing is unnecessary.” Humboldt also argues that the legal fees sought are reasonable.

Humboldt argues that a hearing was not necessary, since the borrower defaulted and was served with a copy of the proposed Referee Report. Humboldt asserts that “[a]s such, no formal hearing was required and the Referee was justified in relying upon the submitted documentary evidence and Plaintiff’s sworn testimony in calculating the amounts due and owing under the Loan Documents.” Humboldt argues that the Referee Report should be confirmed because it was substantially supported by the record and “TWE does not set forth how the Referee’s Report is allegedly erroneous.” Humboldt

further contends that its failure to timely serve TWE with the order of reference is a “mere technical omission that can be cured pursuant to CPLR § 2001 . . .” Humboldt also asserts that “there is no prejudice to TWE, a tenant (not a party to the Loan) that does not even claim that it seeks to redeem the Property – and is not otherwise liable to plaintiff for the amounts due.”

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]). Contrary to TWE’s assertion, a hearing was not required under the circumstances here because there were no disputed facts to settle, since the borrower and guarantor failed to appear and have not disputed that they owe Humboldt the principal and interest due under the \$340,000.00 mortgage (*Blueberry Investors Co. v Ilana Realty, Inc.*, 184 AD2d 906, 908 [1992]). TWE, the tenant at the Property, has failed to present any evidence that the Referee Report is inaccurate, or that it was prejudiced by Humboldt’s service of the supplemental notice of entry of the order of reference. Accordingly, it is hereby

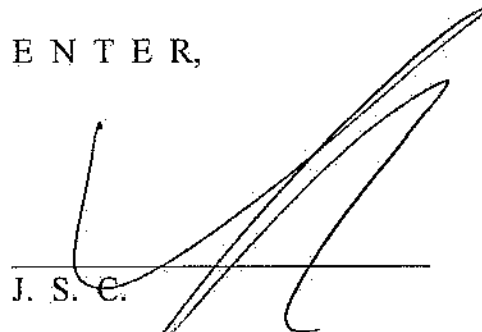
ORDERED that Humboldt’s motion (in mot. seq. three) is granted, the January 27, 2021 Referee Report is hereby confirmed, Humboldt is granted a judgment of foreclosure and sale in the amount of \$386,388.41, plus interest thereon from August 28, 2020, \$10,883.65 for reasonable attorneys’ fees actually incurred through February 1,

2021 and \$3,748.15 for costs and disbursements, which shall be distributed from the sale proceeds, pursuant to RPAPL 1354; 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,

A handwritten signature in black ink, appearing to be 'L. Knipel', is written over a horizontal line. The signature is stylized and cursive.

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE