

Ballymena, LLC v Banfill
2021 NY Slip Op 31679(U)
May 13, 2021
Supreme Court, New York County
Docket Number: 850225/2016
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III

PART

IAS MOTION 32

Justice

X

INDEX NO. 850225/2016

BALLYMENA, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 006 007

- v -

ANDREW BANFILL, NATIONAL CITY BANK,
MANUFACTURERS AND TRADERS TRUST COMPANY,
BOARD OF MANAGERS OF THE 520 WEST 110TH
STREET CONDOMINIUM, ANNABELLE FISCHER,
AMERICAN EXPRESS CENTURION BANK, PARTNERS
DYNAMIC SECURITY TRANSPORTATION INC. DBA
PARTNERS EXECUTIVE TRANSPORTATION, HSBC
BANK USA NATIONAL ASSOCIATION, MIDLAND
FUNDING LLC, CITIBANK (SOUTH DAKOTA) NA, UNITED
STATES OF AMERICA O/B/O INTERNAL REVENUE
SERVICE, JOHN DOE #1 THROUGH #6, AND JANE DOE
#1 THROUGH #6, THE LAST TWELVE NAMES BEING
FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO
DESIGNATE ANY AND ALL OCCUPANTS, TENANTS,
PERSONS OR CORPORATIONS, IF ANY, HAVING OR
CLAIMING AN INTEREST IN OR LIEN UPON,

**DECISION + ORDER ON
MOTION and JUDGMENT OF
FORECLOSURE AND SALE**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 245

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

The following e-filed documents, listed by NYSCEF document number (Motion 007) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

Based upon the foregoing papers, the motions are determined as follows:

In this action to foreclose on a mortgage on residential real property, to wit a condominium, Defendant Mortgagor, Andrew Banfill, by so-ordered stipulation dated September 10, 2019, withdrew his answer and agreed that Defendant Board Of Managers of The 520 West 110th Street Condominium ("Board") was authorized to seek computation of its common charges and have same included in the judgment of foreclosure and sale without necessity of a surplus monies proceeding. Plaintiff and Board's motions for orders of reference were granted by orders dated November 7, 2019 and the same referee was appointed in both orders.

Now, Plaintiff moves to *inter alia* confirm the referee's report of amounts due under the mortgage and for a judgment of foreclosure and sale. Defendant Board moves to *inter alia* confirm the referee's report of the amounts due and owing for common charges, to amend the caption and for a judgment of foreclosure.

Plaintiff's motion is granted without opposition as the referee's findings concerning the amounts due and owing on the mortgage and the associated expenses are substantially supported by the record (*see generally Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]).

As to Defendant Board's motion, Plaintiff asserts that the referee's findings should be disregarded since he was not afforded the opportunity to submit evidence and arguments before the referee rendered his report. In a contested mortgage foreclosure action, it can constitute error to compute the amounts due without a hearing on notice to the Defendants (CPLR §4313; *243 West 98th Condominium v Shapiro*, 12 AD3d 591 [2d Dept 2004]).

Defendant Banfill is correct that he was not afforded an opportunity to be heard before the referee as the report was signed one day after Plaintiff mailed it and thirteen days before any response was due (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2nd Dept 2014]; *Sears v First Pioneer Farm Credit, Aca*, 46 AD3d 1282 [3rd Dept 2007]; *243 West 98th Condominium v Shapiro*, *supra*; *Shultis v Woodstock Land Dev. Assocs.*, 195 AD2d 677 [3rd Dept 1993]).

Nevertheless, the referee's failure to consider Banfill's evidence and arguments does not necessitate remittitur to the referee. The error was not prejudicial since Banfill proffered the arguments and evidence regarding the referee's calculation of the amounts due Defendant Board to this Court which is the ultimate arbiter of this issue (*see Aurora Loan Servs., LLC v Taylor*, *supra* at 630; *see also Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, *supra* at 1237 ["defendant was not prejudiced by its inability to submit evidence directly to the referee since it submitted evidence . . . when it opposed the plaintiff's motion"]; *Wells Fargo Bank N.A. v Javier*, 153 AD3d 1199 [1st Dept 2017] ["Both parties submitted evidence to the court . . . in their motions to confirm or vacate the referee's report"]).

That Defendant Banfill withdrew his answer does not preclude him from challenging the amount due Defendant Board as the parties' stipulation does not address that issue expressly. Further, by withdrawing his answer, Banfill was placed in the position of a defaulting Defendant who is permitted to challenge the amount due and owing despite the failure to appear (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890 [2d Dept 2021]).

The request to delay Defendant Board's application to a surplus monies proceeding is denied as Banfill expressly agreed to this procedure in the September 10, 2019 stipulation.

Defendant Banfill's argument that Defendant Board is attempting to "steal [Banfill's] equity" is remarkably hypocritical. As noted by the Appellate Division, First Department in its denial of Banfill's appeal of the appointment of a receiver in this matter, it was observed that "[i]t is undisputed that Banfill has not paid common charges since 2008" and that "his failure to pay the common charges caused a shortfall in the condominium's monthly income, creating a burden shouldered by the other unit owners" (*Capital One, N.A. v Banfill*, 177 AD3d 415 [1st Dept 2019]). That Banfill's default beginning in 2008 was allegedly occasioned by the then economic recession is not a basis to avoid contractual obligations (*see L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180 [2d Dept 2020]).

Banfill's arguments concerning the amount of the Board's 2010 and 2019 money judgments for common charges, entered on his default in appearing, are impermissible collateral attacks. In any event, the Court finds the arguments substantively without merit.

Banfill's assertion that legal fees for the within proceeding are unrecoverable since the Board has not asserted claims of its own is ineffective since, again, Banfill expressly agreed that Board could move for its common charges without a separate proceeding. His claim that the Board cannot recover legal fees for previous actions necessitated by his non-payment is unavailing based upon the applicable provisions of the by-laws (*see Bd. of Managers v. CC Ming (USA) Ltd. P'ship*, 308 AD2d 380 [1st Dept 2003]).

As to the reasonableness of the fees, the Court finds the amount requested justifiable given the number of litigations --apparently four-- occasioned by Banfill's non-payment of his mortgage and common charges, the length of this litigation --five years-- and Banfill's active opposition herein. Nevertheless, in its discretion the Board's recovery is limited to \$196, 217.05 and no further interest and attorney's fees shall accrue provided further litigation in this matter is not pursued.

Accordingly, it is

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and the motions to confirm the referee's reports is granted; and it is further

ORDERED that the caption is amended *nunc pro tunc* to reflect the correct name of Defendant "Board of Managers of The 520 West 110 Condominium" as same; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of Mark McKew, Esq., who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at foreclosures@nycourts.gov and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

ORDERED that after receiving permission from the Auction Part Clerk, the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the **New York Law Journal**; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in

compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 180 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed.
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report: \$1,193,844.06 with interest at the note rate from October 31, 2019 until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred.
 - b. Costs and Disbursements: _____ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: \$4,250.00.

5. The Referee shall also pay to The Board of Managers of The 520 West 110th Street Condominium or its attorneys the sum of \$196,217.05.
6. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable, and it is further

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elects to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, they shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further identified:

A description of the premises is annexed hereto as schedule A.

<u>5/13/2021</u>				<i>Francis A. Kahn III</i>	
<u>DATE</u>				FRANCIS A. KAHN, III, A.J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	HON. FRANCIS A. KAHN III	
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	J.S.C.	
	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> OTHER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	