

**RA Showers LLC v Townhouse 308W78 LLC**

2021 NY Slip Op 32480(U)

November 9, 2021

Supreme Court, New York County

Docket Number: 850166/2016

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS KAHN, III PART **32****

*Justice*

-----X INDEX NO. 850166/2016

RA SHOWERS LLC,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 008

- v -

TOWNHOUSE 308W78 LLC, ALAN NISSELSON, THE  
PLAN COMMITTEE, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, JOHN DOE #1-10, JANE DOE #1-10,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198

were read on this motion to/for ATTORNEY - FEES

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage on commercial real property that is post-judgment, but not post sale. A judgment of foreclosure and sale was issued by this Court [Bluth, J] on August 2, 2019. In that judgment, the Court directed that a hearing be held to determine the amount of attorney’s fees due Plaintiff. By order dated January 14, 2020, Justice Arlene Bluth tolled interest under the judgment of foreclosure and sale from the date of the judgment to the closing based upon “plaintiff ignoring this case”. The parties attempted, but failed, to settle the attorney’s fee issue. Thereafter, the parties stipulated that this Court would render a decision on the issue based upon written submissions.

Now, Plaintiff moves for an order: [1] setting reasonable attorney’s fees, [2] extending the time to conduct the foreclosure sale, [3] modifying Justice Bluth’s order tolling interest pursuant to CPLR §2221[a][2] and [4] adding the sum of \$170,269.10 to the judgment which allegedly represents advances Plaintiff made to protect the property. Defendant Lester Kirshenbaum, as the Responsible Officer for MarketXT Holdings Corp. and the Plan Committee opposed the motion and cross-moved for an order reinstating the interest toll in the event Justice Bluth’s order is vacated. Defendant Townhouse 308W78 LLC opposed the motion.

As to the branch of the motion for attorney’s fees, the Court has inherent authority to set legal fees charged for services in an action before it and determination of same is within its sound discretion (*see eg Matter of Thomas B. v. Lydia D.*, 120 AD3d 446 [1<sup>st</sup> Dept 2014]). “An award of an attorney’s fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered” (*Citicorp Trust*

*Bank, FSB v Vidaurre*, 155 AD3d 934, 935 [2d Dept 2017]). In assessing a request for legal fees, the Appellate Division, First Department held in *Jordan v Freeman*, 40 AD2d 656 [1st Dept 1972] as follows:

The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved . . . [The] court may consider its own knowledge and experience concerning reasonable and proper fees and in the light of such knowledge and experience, the court may form an independent judgment from the facts and evidence before it as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof [Internal citations omitted].

“While it is not necessary to conduct a hearing in all circumstances in order to afford due process, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered” (*Bankers Fed. Sav. Bank FSB v Off W. Broadway Developers*, 224 AD2d 376 [1<sup>st</sup> Dept 1996]; see also *SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986 [2d Dept 2006]). “The burden of proof was upon the plaintiff to establish the necessity for and the reasonable value of the legal services rendered” (*Centre Great Neck Co. v Penn Encore, Inc.*, 255 AD2d 543 [2d Dept 1998]).

This branch of the motion is supported by an affirmation from Dani Schwartz, Esq., a partner at Wachtel Missry, LLP, counsel for Plaintiff, and invoices for the services for which Plaintiff seeks recompense. Plaintiff argues that although it could bill for services totaling \$120,000.00, it only seeks \$98,000.00 as compensation for services in this litigation. Only Defendant Townhouse opposed this branch of the motion and argued that only \$59,758.13 in legal fees should be awarded.

Review of the foregoing evidence revealed that the parties engaged in some four years of verily contested litigation which including eight motions and eight conferences with the Court. It appears that dozens of interactions outside of court occurred between the parties as well. The action concerned a commercial loan and mortgage which exceeded \$3,000,000.00 which generated extraneous litigation by subordinate lien holders. Accordingly, the Court is persuaded that \$90,000.00 for attorney’s fees and disbursements is fair and reasonable compensation under the circumstances.

The branch of the motion to extend the time to conduct the foreclosure sale, including re-advertising of the property, is granted without opposition.

Concerning modification of Justice Bluth’s order tolling interest, CPLR §2221[a][2] permits this Court to hear re-argument of an order issued “without notice”. Here, it is unchallenged that Justice Bluth issued her order at a conference, not as the result of a motion, and there is no indication that the parties were heard on the record concerning this issue. As such, the Court grants re-argument and upon same finds as follows.

“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 particular facts in each case,’ including wrongful conduct by either party” (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1<sup>st</sup> Dept 2021], citing *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). “It is also well settled that a debtor may not be held responsible if the delay in completing the foreclosure action was due to the plaintiff’s failure to expedite the action” (see *Gasco Corp. & Gordian Group v. Tosco Props.*, 236 AD2d 510 [2d Dept 1996]).

Justice Bluth justified the tolling of interest on the basis that five months had passed from issuance of the judgment and Plaintiff did “nothing to advance this foreclosure case”. Plaintiff’s claim that it was unaware of the issuance of the judgment until after the Court scheduled conference date on attorney’s fees and ignorant of the need to file a bill of costs is suspect. The NYSCEF confirmation data indicates that the judgment was uploaded, and an email notice was sent to Plaintiff’s counsel on August 2, 2019, eleven days prior to the scheduled attorney’s fee conference. An August 22, 2019 comment to the judgment filed on NYSCEF directs Plaintiff to “[u]pload either an affirmed bill of costs and disbursements OR an affirmation waiving costs and disbursements.” A bill of costs was not filed until two days after Justice Bluth issued the disputed order. On the other hand, Plaintiff has proffered proof by affidavit, corroborated by emails, of its counsel’s efforts to schedule a hearing on attorney’s fees in this matter in the period between the issuance of the judgment and the issuance of Justice Bluth’s order.

Based on the foregoing, the Court is persuaded that tolling interest from August 2, 2019, the date of issuance of the judgment, to March 13, 2020, the date of entry of the judgment, and lifting toll thereafter is the appropriate remedy under the circumstances.

The cross-motion by Defendant Lester Kirshenbaum, as the Responsible Officer for MarketXT Holdings Corp. and the Plan Committee to reinstate the interest toll is denied. The primary reason for the delay in auctioning the premises after entry of the judgment is plainly the COVID-19 pandemic, not wrongful conduct by Plaintiff.

The branch of the motion to add the sum of \$170,269.10, which represents advances Plaintiff made to protect the property, is expressly authorized by the judgment herein based upon the terms of the note and mortgage and statute (see RPL §254[6]).

Accordingly, the motion is granted, the cross-motion is denied and it is

ORDERED that is awarded legal fees of \$90,000.00, including disbursements and expenses, and it is

ORDERED that the foreclosure sale shall be conducted within 1 year of the date of this order, and it is

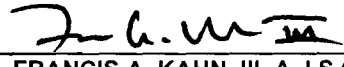
ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at [sfc-foreclosures@nycourts.gov](mailto:sfc-foreclosures@nycourts.gov) and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF 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, and it is further

ORDERED that upon re-argument, Justice Bluth's order dated January 14, 2020 is modified to the extent that interest on the judgment is tolled only from August 2, 2019 to March 13, 2020, and it is

ORDERED that the cross-motion to reinstate the interest toll is denied.

<u>11/9/2021</u>					
DATE			FRANCIS A. KAHN, III, A.J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<b>HON. FRANCIS A. KAHN III</b>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<b>J.S.C.</b>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>			<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>			<input type="checkbox"/>	SUBMIT ORDER