

**New York Community Bank v East 86th St., LLC**

2022 NY Slip Op 30417(U)

February 2, 2022

Supreme Court, New York County

Docket Number: Index No. 850085/2020

Judge: Barry Ostrager

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X

NEW YORK COMMUNITY BANK, successor by merger to NEW YORK COMMERCIAL BANK,

Plaintiff,

- v -

EAST 86TH STREET, LLC, MICHAEL APPELL, BOARD OF MANAGERS OF THE 225 EAST 86TH STREET CONDOMINIUM, and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

-----X

HON. BARRY R. OSTRAGER

INDEX NO.	850085/2020
MOTION DATE	
MOTION SEQ. NO.	002

**DECISION + ORDER ON MOTION**

Before the Court is the motion by plaintiff New York Community Bank, as Lender, to confirm the Referee’s Report determining the amount due on the mortgage naming defendant East 86<sup>th</sup> Street, LLC as Borrower and further naming defendant Michael Appell as Guarantor in connection with the commercial condominium unit at 223/229 East 86th Street in Manhattan (see NYSCEF Doc. Nos. 1-6). The Lender further seeks a Judgment of Foreclosure and Sale and an award of attorney’s fees. The Borrower and Guarantor (hereafter collectively referred to as “the Borrower”) have opposed the motion and have cross-moved to vacate their default and to give them an opportunity to be heard on the Referee’s calculations. For the reasons that follow, the Lender’s motion is granted, and the cross-motion by the Borrower is denied.

The procedural history is detailed in the motion papers and will only be summarized here as relevant to the motions. The action was commenced by filing on March 16, 2020, before any pandemic-related restrictions were imposed. The Borrower and Guarantor were served via the Secretary of State and by delivery to a person of suitable age and discretion (i.e., a relative

named Ms. Appell) at the Guarantor's residence, followed by a mailing (NYSCEF Doc. No. 31). The commencement of the action followed an alleged 2019 default by the Borrower on the mortgage and significant settlement negotiations between the parties (see Attorney Affirmation and Party Affidavit at NYSCEF Doc. Nos. 74 and 81). Although counsel for the Borrower first filed a Notice of Appearance on November 15, 2021 (NYSCEF Doc. No. 51), the Borrower was well aware of the ongoing proceedings and even participated in a status conference with this Court on September 14, 2021 (NYSCEF Doc. No. 50).

In the cross-motion, the Borrower alleges that the Referee's Report cannot be confirmed, and the Borrower's default in opposing the appointment motion must be vacated, because the Referee was appointed in violation of certain pandemic-related Executive Orders. Further, the Borrower contends it had a right to a hearing on the amounts allegedly due on the mortgage before the Referee issued his Report. Both claims fail.

No basis has been established to vacate the Borrower's default. The motion to appoint the Referee was made on January 5, 2021 and decided on default on February 26, 2021 (NYSCEF Doc. No. 35). The Referee was not appointed until March 4, 2021 (Doc. 45), and his Report was not filed until December 28, 2021 (Doc. 55). As indicated above, the Borrower was well aware of these proceedings and in fact participated well before the Referee issued his Report, but chose not to make any effort to participate in the proceedings before the Referee or to move to vacate the Borrower's default on the motion before this cross-motion was filed about a year later. The Borrower offers no excuse for that failure to act, nor even a suggestion of an alleged meritorious defense, other than the pandemic-related moratorium imposed by Executive Orders.

But, as the Borrower and Guarantor acknowledge, all Executive Orders relating to foreclosure evictions during the pandemic were rescinded effective June 25, 2021, well before

the Referee's Report was filed. Further, and quite significantly, as Justice Joel Cohen held in his detailed opinion in *Natixis, New York Branch v 20 TSQ Lessee LLC*, 71 Misc. 3d 1201(a) (Sup. Ct., NY Co. 2021), neither the pandemic-related Executive Order issued on March 20, 2020, which mandated that "[t]here shall be no enforcement of ... a foreclosure of any residential or commercial property for a period of ninety days," nor the subsequent May 7, 2020 Executive Order, which prohibited until August 20 "initiation of a proceeding or enforcement of . . . a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage," nor the subsequent extension of that Order to January 31, 2021, barred the Court from ruling on the Lenders' entitlement to judgment on the amounts due on the mortgage, an event distinct from the actual sale of the subject collateral (*see, also, Dumser v GSL Enters., Inc.*, 171 AD2d 583, 584 [1st Dep't 1991] [granting summary judgment to plaintiffs in foreclosure action but also granting defendants' cross-motion to stay *enforcement* of the foreclosure judgment]).

Thus, contrary to the Borrower's claim, none of the actions taken by the Lender or this Court contravened any of the Executive Orders, and the rescission of the Executive Orders allows the Court to proceed at this time and grant the Lender's motion to confirm the Referee's Report and issue a Judgment of Foreclosure and Sale. The Court also grants the Lender's motion for an award of attorney's fees based on the cited provision in the loan documents, the attorney invoices, and the discussion of attorney qualifications. The Borrower has not addressed the fee request in any manner, and the Court finds the requested fees reasonable, applying the factors set forth in *Jordan v Freeman*, 40 AD2d 656 (1st Dep't 1972) and its progeny.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and defendants' cross-motion is denied; and it further

ORDERED that the Report of Referee Jeffrey Miller efiled on December 28, 2021, determining that the sum of \$14,767,772.97 is due and owing to Plaintiff for unpaid principal, interest, late charges, real estate advances, and other fees plus default interest from September 21, 2021 accruing at the per diem rate of \$5,416.67 (NYSCEF Doc. No. 55), is confirmed, and plaintiff is awarded a Judgment of Foreclosure and Sale and an award of attorney’s fees in the amount of \$48,525.50 plus costs in the amount of \$5,000.00 and interest from the date of this Decision and Order for services rendered through the conclusion of this action; and it is further

ORDERED that Jeffrey Miller, the previously appointed Referee to Compute, is hereby appointed as the Referee for the Sale with compensation not exceeding \$7500.00, absent good cause shown, upon plaintiff’s e filing of a Proposed Judgment of Foreclosure and Sale with all necessary information included; and it is further

ORDERED that the Clerk is directed to enter a judgment for attorneys’ fees in favor of plaintiff New York Community Bank, successor by merger to New York Commercial Bank, against defendants East 86th Street, LLC, Michael Appell, jointly and severally, in the amount of \$48,525.50 plus costs in the amount of \$5,000.00 and interest from the date of this Decision and Order upon plaintiff’s e filing of a Proposed Judgment directed to the County Clerk. A status conference is scheduled for November 1. 2022 at 10:00 a.m.

Dated: February 2, 2022

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE