

<b>Comito v Z &amp; N Enters. Corp.</b>
2022 NY Slip Op 32659(U)
July 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 511236/15
Judge: Lawrence Knipel
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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 21st day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
ANTHONY COMITO, MARK FLYER, individually,  
and MARK FLYER, as Executor of the ESTATE OF  
MORRIS FLYER,

Plaintiffs,

- against -

Index No. 511236/15

Z AND N ENTERPRISES CORP., ZION TARAZI,  
SHAUL TARAZI, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY DEPARTMENT  
OF FINANCE, NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, HOLLYWOOD AUTO  
BODY & REPAIR INC., ATLANTIC CREDIT & FINANCE  
a/p/o HSBC, NEW YORK CITY DEPARTMENT OF  
FINANCE – PARKING VIOLATIONS BUREAU, “JOHN  
DOE” #1 through “JOHN DOE” #5, the last five  
names being fictitious and unknown to plaintiff,  
the person, entities or parties intended being the  
persons, parties, or entities, if any, having or  
claiming any interest in or lien upon the mortgaged  
premises described in the verified complaint,

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 \_\_\_\_\_  
Opposition Affidavits (Affirmations) Annexed \_\_\_\_\_  
Reply Affidavits (Affirmations) Annexed \_\_\_\_\_

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172-183  
\_\_\_\_\_  
188  
\_\_\_\_\_  
189-191  
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Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 1917 and 1919 Coney Island Avenue in Brooklyn (Block 6758, Lots 61 and 62) (Property), plaintiffs Anthony Comito and Mark Flyer, individually, and Mark Flyer, as Executor of the estate of Morris Flyer (collectively, plaintiffs) move (in motion sequence [mot. seq.] eight) for an order confirming the October 13, 2020 referee report (Referee Report) and granting them a judgment of foreclosure and sale and a bill of costs, pursuant to RPAPL 1351.

### *Background*

#### *This Foreclosure Action*

On September 14, 2015, plaintiffs commenced this action by filing a summons and a verified complaint seeking to foreclose three commercial mortgages on the Property: (1) a \$70,000.00 mortgage; (2) a \$100,000.00 mortgage; and (3) a \$60,000.00 mortgage.

On October 29, 2015, defendants Z and N Enterprises Corp. (Z&N), Zion Tarazi (Zion) and Hollywood Auto Body & Repair Inc. (Hollywood) (collectively, the Tarazi Defendants) answered the complaint. Defendants New York City Department of Finance and New York City Environmental Control Board served notices of appearance. By a March 28, 2017 order, plaintiffs were granted a default judgment against defendants Shaul Tarazi and Atlantic Credit & Finance a/p/o HSBC because they failed to answer or otherwise appear in the action.

On October 23, 2019, plaintiffs moved for summary judgment, an order of reference and an order striking the Tarazi Defendants' answer. The Tarazi Defendants

opposed plaintiffs' summary judgment motion on the merits and cross-moved to dismiss the complaint. By a January 24, 2020 order, this court granted plaintiffs' motion for summary judgment and an order of reference, denied the Tarazi Defendants' cross motion to dismiss the complaint and held that "[p]atrial payment(s) on the debt revived the obligation for statute of limitations purposes" and "Defendants' other arguments are without merit." An August 6, 2020 order of reference was subsequently issued in which this court appointed a referee to compute the amounts due to plaintiffs for principal, interest, legal fees and other disbursements due and owing under the mortgages.

On October 13, 2020, the referee issued the Referee Report, which determined that \$373,620.60 is due and owing to plaintiffs as of September 23, 2020, inclusive of late accrued interest through September 23, 2020, and that plaintiffs are entitled to an award of \$43,821.70 in attorneys' fees under the terms of the mortgages.

***Plaintiffs' Instant Motion***

Plaintiffs now move for an order confirming the Referee Report and granting it a judgment of foreclosure and sale and a bill of costs, pursuant to RPAPL 1351. Plaintiffs submit copies of: (1) the October 13, 2020 Referee Report; (2) the mortgages; (3) the pleadings; (4) this court's January 24, 2020 order granting plaintiffs summary judgment; and (5) the August 6, 2020 order of reference.

***Tarazi Defendants' Opposition***

The Tarazi Defendants, in opposition, assert that plaintiffs' motion should be denied "because Plaintiff failed to comply with the directives of the . . . Order of Reference in this action, and the referee in this action did not follow proper procedure."

Defense counsel asserts that "by explicit directives of the Order of Reference, Plaintiff was to serve Notice of Entry upon Defendants and the referee, the failure of which necessarily results in denial of Plaintiffs' motion." Defense counsel notes that the order of reference "did not make any reference to service of the Notice of Entry upon the referee . . ." and "the Plaintiff did not serve Defendant ZION TARAIZI, the owner of the equity of redemption. He purported to serve Defendants' attorney."

Defense counsel further argues that the Referee Report should be rejected because the referee did not properly compute the amount due. Specifically, defense counsel notes that the referee did not hold a hearing before issuing the Referee Report, and therefore, "Defendants had no chance to dispute or even review the [attorneys' fees] Plaintiff claims to have incurred." Defense counsel asserts that \$43,821.70 is "an exorbitant amount that should be able to be reviewed by Defendants" and "Defendants have not had a chance to review any documents which provides a proper admissible foundation for the referee's report that there is \$43,821.70 due in attorney's fees to Plaintiff." Defense counsel also challenges the amounts due on the mortgages and notes on the ground that the referee relied on plaintiff Anthony Comito's affidavit of facts (which was submitted in support of plaintiffs' summary judgment motion).

***Plaintiffs' Reply***

Plaintiffs, in reply, submit an affidavit from Kathryn Passero (Passero), a paralegal for plaintiffs' counsel, who attests that "[o]n August 10, 2020, I electronically filed the Notice of Entry of the Order of Reference and my affidavit of service on the Court's docket as NYSCEF Doc. 168 and 169." Passero further attests that she subsequently contacted the referee, advised him that he was appointed by the court and confirmed his address. Passero attests that she sent the referee, via Federal Express, a package containing: (1) the proposed referee report; (2) referee's oath; (3) a check; (4) a copy of the order of reference; (5) the notices of pendency filed against the Property; (6) Anthony Comito's August 30, 2019 affidavit with all exhibits; (7) the September 5, 2019 affirmation of plaintiffs' counsel, Allen Perlstein, Esq., with all exhibits; (8) this court's January 24, 2020 order granting plaintiffs summary judgment; (9) the pleadings; (10) a September 23, 2020 affirmation of attorneys' fees with copies of all legal bills; and (11) copies of all three mortgages, notes and assignments.

#### *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 and, thereafter, to "render decision directing judgment in the action."


Here, plaintiffs have made a timely motion to confirm the October 13, 2020 Referee Report, which appears to be substantially supported by the record. Defendants

have failed to establish that the Referee Report is not substantially supported by the record or should otherwise be rejected. In addition, the Tarazi Defendants' mere contention that \$43,821.70 is an "exorbitant" amount for attorneys' fees to prosecute this commercial foreclosure action is unavailing since this action has been pending since 2015 and the referee determined that the legal fees incurred by plaintiffs are reasonable. Accordingly, it is hereby

**ORDERED** that plaintiffs' motion (in mot. seq. eight) is granted, the Referee Report is hereby confirmed and plaintiffs are entitled to a judgment of foreclosure and sale, including an award of \$\$43,821.70 in attorneys' fees and a bill of costs, which shall be settled on notice.

This constitutes the decision and order of the court.

E N T E R,

  
\_\_\_\_\_  
J. S. C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**