

42 W 35 LLC v +42 W 35th Prop. LLC

2022 NY Slip Op 32675(U)

August 5, 2022

Supreme Court, New York County

Docket Number: Index No. 850116/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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42 W 35 LLC,

Plaintiff,

- v -

+42 W 35TH PROPERTY LLC, MEADOW REAL ESTATE
FUND III LP, JOHN DOE,

Defendants.

INDEX NO. 850116/2021

MOTION DATE 07/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to CONFIRM AND AMEND REFEREE'S REPORT OF SALE.

Defendants +42 W 35th Property LLC and Meadow Real Estate Fund III LP

("Defendants") move (NYSCEF 60) pursuant to RPAPL 1355, CPLR 4403 and 22 NYCRR 202.44 to confirm the Referee's Report of Sale filed on April 4, 2022 ("Report") (NYSCEF 49) with two corrections to eliminate a "double recovery." Specifically, Defendants claim that the Report (i) awarded double post-Judgment interest and (ii) awarded recovery of an advance that Defendants re-paid. Plaintiff 42 W 35 LLC ("Plaintiff") as successor to AB Commercial Real Estate Debt – B2 S.A.R.L. ("AB") opposes and requests that the Report be confirmed or, in the alternative, that Plaintiff be permitted to introduce new evidence that it is entitled to an additional recovery.

Defendants' motion is conditionally GRANTED in part and the Report is confirmed except as to Paragraph 9 and the attached "Statement." The issues raised by Defendants, which

were not previously presented to the Referee, are referred to the Referee for review and recommendation and, if applicable, a revised Report.

BACKGROUND

This foreclosure action was commenced on April 30, 2021 (NYSCEF 2 [Verified Complaint]) to recover 42 West 35th Street in Manhattan (“Property”). Also on April 30, 2021, Plaintiff’s predecessor, AB, and Defendants entered a stipulation consenting to the entry of judgment of foreclosure and sale which was entered as an order on May 24, 2021 (“Stipulation” [NYSCEF 16]).

The Stipulation references a Loan Agreement, Promissory Note, Mortgage and Carry Guaranty (collectively the “Loan Documents”) which govern the parties’ relationship, and which were annexed to the Verified Complaint (NYSCEF 2-6). The Stipulation also references an April 29, 2021, Forbearance Agreement between the parties. Relevant here, the Stipulation provides that Defendants agree that they will not “assert any right to have the Court or any Court-appointed referee or judicial hearing officer determine the amounts due in the Judgment, and the filing of any report in connection therewith.” (Stipulation ¶5).

A Judgment of Foreclosure and Sale (“Judgment” [NYSCEF 33]) was entered on September 22, 2021. The Judgment appointed Mitchell D. Haddad, Esq. (“Referee”) to serve as referee and conduct a foreclosure sale of the Property. Relevant here, the Judgment provides for Plaintiff to recover “\$29,751,945.15. . .with interest at the Default rate as set forth in the Loan Documents, from the date of entry hereto until the date of the transfer of the Referee’s deed . . .” and “the payments which Plaintiff has made or hereinafter shall make for advances for taxes, insurance, principal, interest, and any other charges due to prior mortgages or any other lienors. .

.upon presentation of receipts or other satisfactory evidence for said expenditures to the Referee, all together with interest at the Default Rate as set forth in the Loan Documents. . .”

On February 22, 2022, the Referee sold the Property for \$32,800,000, resulting in a deficiency of \$297,190.53. (Report ¶¶ 1-5). The Referee awarded interest in the amount of \$2,386,676.58 “from September 11, 2021 to March 24, 2022 in the amount of \$2,386,676.58” and allowed fees including a “Tax Advance, plus interest (from 10/16/2020)” in the amount of \$586,805.05. (Report ¶8). The proofs submitted by Plaintiff and relief on by the Referee were, as required by the Judgment, annexed to the Report, and include an October 16, 2020 letter from Plaintiff’s predecessor, AB, signed by Yanshu Li to Defendants memorializing a \$477,194.20 tax advance (the “Protective Advance”). (Report Ex. F [NYSCEF 55]). The Report was filed on NYSCEF on April 4, 2022 and Plaintiff did not move to confirm or reject the Report.

On May 3, 2022, Defendants moved to correct and confirm the Report to eliminate a “double recovery” supported by the Affidavit of William Bossin (NYSCEF 61) but absent any legal argument. Mr. Bossin acknowledges that Defendants did not participate in the foreclosure proceedings before the Referee. (Bossin Aff. ¶4). Nevertheless, Mr. Bossin asserts that the report miscalculates interest because it is calculated from September 11, 2021, not September 22, 2021, the date of entry of the Judgment. (Bossin Aff. ¶7). Next, Mr. Bossin claims that, pursuant to the Forbearance Agreement, Defendants paid interest at the non-default rate during the post-Judgment period and annexes copies of wire confirmations indicating that payments were made from September of 2021 through January 2022. (Bossin Aff. ¶¶7-8 and Ex. A [NYSCEF 62]). Finally, Mr. Bossin asserts that the Protective Advance was repaid before this action was commenced and annexes an email exchange between him and AB’s Yanshu Li from

April 25, 2022 – May 2, 2022 indicating that the Protective Advance was repaid. (Bossin Aff. ¶¶9-10 and Ex. B [NYSCEF 63]).

Plaintiff filed an opposition (but no cross-motion) on June 13, 2022. (NYSCEF 67-74). Generally, Plaintiff argues that the Court’s review “should be limited to the record that was before the referee. . .” and that that Report is adequately supported by the Stipulation and Judgment. Plaintiff also argues that Defendant has not provided admissible evidence to warrant a modification of the Report. Finally, Plaintiff argues that – should the record be re-opened – that Plaintiff be permitted to seek additional monies for an “Exit Fee” and liens associated with the Property. (Plaintiff’s Memorandum of Law at 3 [NYSCEF 74]). Defendants submitted a reply on July 7, 2022 (NYSCEF 76).

DISCUSSION

CPLR 4403 provides, in relevant part, that “[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part. . .the report of a referee. . .may make new findings with or without taking additional testimony; and may order a new trial or hearing.” 22 NYCRR 202.44(a) provides that if the plaintiff does not move to confirm or reject within fifteen days of the filing of the report, that the defendant shall do so within thirty days. (*Fundus v Scarola*, 2021 N.Y. Slip Op. 32433[U], 22 [N.Y. Sup Ct, New York County 2021] citing *Gould v Venus Bridal Gown and Accessories Corp.*, 148 Misc 2d 589, 590 [Sup Ct New York County 1990]). Plaintiff did not move vis-à-vis the Report within fifteen days and Defendants’ motion made within thirty days is therefore timely.

The Court has broad authority under CPLR 4403. (*Campbell v New Way Life, Inc.*, 190 AD3d 928 [2d Dept 2021] [collecting cases]). For instance, the First Department has permitted

new evidence to be considered on a motion pursuant to CPLR 4403. (*Olstein v Olstein*, 309 AD2d 697, 700 [1st Dept 2003]).

The Judgment was entered on September 22, 2022 and the Report awards interest from September 11, 2022. Defendants assert this was a scrivener's error. Defendants also contend that the Report does not credit them for interest paid at the non-default rate under the terms of the Forbearance Agreement and improperly assesses interest at the Default-rate resulting in a double payment of interest. Finally, Defendants contend that they re-paid the Protective Advance prior to this litigation. If accepted, the evidence proffered by Defendants may indicate that the Report will confer an unintended "windfall double recovery" in favor of Plaintiff. (*Bamira v Greenberg*, 295 AD2d 206, 207 [1st Dept 2002]). The Referee should be given an opportunity to determine in the first instance what, if any, effect the new evidence has on the Report. The Referee need not consider the "Exit Fee" or lien issues raised by Plaintiff for the first time in its opposition.

* * * *

Accordingly, it is

ORDERED that Defendants' motion to confirm the Report as amended is conditionally **GRANTED IN PART**; it is further

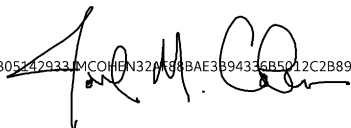
ORDERED that the Report is confirmed with the limited exceptions of Paragraph 9 and the Statement; it is further

ORDERED that this matter is remanded to the Referee for a hearing limited to the issues of (1) Post-Judgment interest and (2) the Protective Advance; it is further

ORDERED that the parties promptly advise the Court by letter filed on NYSCEF of the date set for the hearing.

This constitutes the Decision and Order of the Court.

8/5/2022
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE