

350 E. 10th St. LLC v 9th & 10th St. L.L.C.

2022 NY Slip Op 34411(U)

December 23, 2022

Supreme Court, New York County

Docket Number: Index No. 850273/2018

Judge: Melissa Crane

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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. MELISSA CRANE PART 60M

Justice

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350 EAST 10TH STREET LLC,

Plaintiff,

INDEX NO. 850273/2018

MOTION DATE 06/21/2022

MOTION SEQ. NO. 003

- v -

9TH & 10TH STREET L.L.C., GREGG SINGER, ONYX
ASSET MANAGEMENT, LLC, MYLES WITTENSTEIN,
CHICKAREE CHICK, LLC, MICHAEL BLOOMBERG, CITY
OF NEW YORK, NEW YORK CITY DEPARTMENT OF
BUILDINGS, NEW YORK CITY BOARD OF STANDARDS
AND APPEAL, LANDMARKS PRESERVATION
COMMISSION, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, MYLES WITTENSTEIN AS TRUSTEE
OF THE MYLES WITTENSTEIN REVOCABLE TRUST,
JOHN DOE #1 THROUGH JOHN DOE #12,

**DECISION + ORDER +
JUDGMENT ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 237, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250

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

Plaintiff 350 East 10th Street LLC seeks to foreclose on a \$44 million commercial mortgage encumbering the real property located at 605-615 East 9th Street a/k/a 350-360 East 10th Street, New York, NY 10009 (the “Property”).

I. The Mortgage, Note, Guarantee and Event of Default

In 2016, defendant 9th & 10th Street LLC (the “Borrower”) executed a Consolidated, Amended and Restated Note (the “Note”) in plaintiff’s favor “to secure an indebtedness in the principal amount of up to \$44,000,000.00...” (the “Loan”) (NYSCEF Doc. No. 213, ¶ 4). The Borrower also executed an Agreement of Spreader, Consolidation and Modification of Mortgage (the “Mortgage”) in plaintiff’s favor to secure the Note (*id.*, ¶ 5). The Mortgage was recorded against the Property on June 16, 2016 under CRFN #: 2016000203329 (*id.*). As additional security, defendant Gregg Singer (the “Guarantor” or “Singer”) executed a Conditional Guarantee

(the “Guarantee”) (NYSCEF Doc. No. 22). In the Guarantee, Singer “guaranteed the repayment of all sums due [to plaintiff] under the Loan” (NYSCEF Doc. No. 213, ¶ 6). The Note, Mortgage, and Guarantee were all dated April 21, 2016 (*id.*, ¶¶ 4-6).

The Borrower eventually defaulted by failing to make a monthly payment by the January 1, 2018 due date and failing to pay the principal before the May 1, 2018 Maturity Date (NYSCEF Doc. No. 189, ¶¶ 9-10). As a result, the Loan was accelerated by its own terms, and the amounts became immediately due and payable to plaintiff (*id.*, ¶ 11).

On January 18, 2022, the court granted summary judgment on all causes of action in the Amended Complaint, ordered an inquest¹, and appointed Mark McKew, Esq. as referee (the “Referee”) “in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the [Property] [could] be sold in parcels” (*id.*, pg. 4). The decision’s decretal language provided the following:

(1) “the Referee shall hold no hearing and take no testimony or evidence other than by written submission”; (2) “the Court is the ultimate arbiter and the Referee’s report is merely an advisory finding...”; (3) “plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and [that] [plaintiff] shall promptly respond to every inquiry made by the Referee...”; (4) “if defendants have objections, they must submit them to the Referee within 14 days of the mailing of plaintiff’s submissions; and [must] include these objections to the Court if opposing the motion for a judgment of foreclosure and sale...”; (5) “[defendants’ failure] to submit objections to the Referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale”; (6) “plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the Referee’s report”; and (7) “all other requests for relief are denied as moot.”

(*id.*, pgs. 3-5).

II. The Referee’s First Report

The Referee’s Report of Amount Due (the “Report”) was dated February 25, 2022 and was first filed on NYSCEF on February 28, 2022 for all parties to review (NYSCEF Doc. Nos. 192-195). In the Report, the Referee found that the Property should be sold as one parcel, and that plaintiff was due \$89,983,925.72 for principal, interest on principal, late charges, miscellaneous charges, protective advances, and interest on protective advances, plus accrued interest on the principal balance and protective advances from January 20, 2022 (NYSCEF Doc. No. 192). The

¹ This was not the appropriate procedure, so the court subsequently cancelled it.

Report also contained a documentary schedule, as well as a computation schedule, that provide additional information concerning the Referee's determinations (*id.*, pgs. 4-7).

III. Plaintiff Delivers the Necessary Documents

On February 7, 2022, 10 days before the deadline provided in the decision on MS 01, plaintiff's counsel sent the Referee a letter, via FedEx overnight mail, that included necessary documents as enclosures (NYSCEF Doc. No. 200, pgs. 2-3). Counsel for Defendants' and the other parties were copied on the letter (*id.*, pg. 3). On February 28, 2022, two weeks later, plaintiff filed an Affidavit of Service, dated February 7, 2022, that confirmed these necessary documents were sent, in the same manner (FedEx overnight mail), to the same parties, on that same date (NYSCEF Doc. No. 196).

IV. Defendants' Objections to the Referee's Report

A few days later, Defendants raised their first "objections" to the Report in a letter, dated March 1, 2022, that was addressed to the Referee (NYSCEF Doc. No. 197). Defendants argued that the Report was premature, that plaintiff was "required to furnish all counsel for defendant with its proposed computations for [the Referee's] review and signature, and that [Defendants] [had] the absolute right to furnish [the Referee] with any disputes [they] may have regarding those figures...no later than May 17, 2022..." (*id.*). Defendants also argued that the Referee could not sign off on plaintiff's proposed figures before that date, and "certainly not before having reviewed [Defendants'] opposition submission to Plaintiff's calculations" (*id.*).

In the roughly eight letters that followed, Defendants continued arguing the same thing: that they were never served with the documents, computations or proposed figures provided to the Referee, that the Report should not have been issued until the their objections and oppositions had been reviewed, that the Referee had to reject his "rubber stamped" Report and reissue a new one in light of Defendants' objections, and that, in any event, the Referee was not authorized to sign off on final numbers before the May 17, 2022 inquest (NYSCEF Doc. Nos. 198-202, 204, 236-237). Defendants contended that once the foregoing had occurred, "[the Referee]...[was] free to re-file [the Report] and accompanying documents assuming they properly [addressed] and [took] into account Defendant's objections to the documents and numbers originally furnished" (NYSCEF Doc. No. 202).

Following the letter exchanges, the Referee considered Defendants' objections, re-evaluated the Report, concluded that that no subsequent changes were necessary, and reissued a second Report, this time dated April 1, 2022, containing findings that were identical to those set forth in the first Report (NYSCEF Doc. No. 206).

DISCUSSION

Now, in Motion Sequence #003 ("MS 03"), plaintiff moves for an order: entering a default judgment as against non-appearing defendant New York City Environmental Control Board ("NYCECB"); dismissing defendants John Doe #1-12 from this case and removing them from the caption; confirming and ratifying the April 1, 2022 Referee's Report of Amount Due (the "Referee Report" or "Report") pursuant to RPAPL 1321; granting a Judgment of Foreclosure and Sale, pursuant to RPAPL 1351; fixing attorneys' fees and costs; and directing the distribution of the sale proceeds pursuant to RPAPL 1354(3) (NYSCEF Doc. No. 243, ¶ 2).

To further support its motion, and in response to Defendants' objections, plaintiff has submitted a subsequent affidavit of its Director, Shoshana Carmel, dated April 4, 2022 (the "Affidavit") (NYSCEF Doc. No. 231). As discussed below, the Affidavit reinforces the Report's findings, answers the Defendants' objections, and provides a walkthrough for calculating the amounts due and owing to plaintiff under the relevant document.

I. Taxes and Insurance

Defendants argue that the Report is "deeply flawed" because "[n]one of the math is shown to ascertain the totals in each category, there are no receipts, no bills, and no explanation of time periods covered for certain expenses, [specifically,] real estate taxes and insurance," and "expenses are listed as a category without indicating if it is an allowed expense or not" (NYSCEF Doc. No. 240, ¶ 5). Defendants also argue that "the Referee accepted Plaintiff's claim of having paid \$1,186,672.35 for 'insurance and taxes', but...no backup [was] provided to substantiate this number; nor was any proof provided that Plaintiff paid 24% interest in connection with the insurance and taxes" (*id.*, ¶ 9).

The Affidavit and its accompanying exhibits resolve these concerns (NYSCEF Doc. No. 231). The Affidavit contains a breakdown chart listing the dates, descriptions, and totals for the "advances [plaintiff] made to pay the taxes and/or insurance on the property" (*id.*, ¶ 21). The

Affidavit also includes, in Exhibit 5, “copies of the advances and/or the payments made on [the] account” (*id.*, pgs. 44-60). It also identifies the provision in the Mortgage that permits the protective advances, as well as the specific language in that provision that entitles plaintiff to the interest on those advances (*id.*, ¶ 23).

Exhibit 7 to the Affidavit provides further proof of the advances (*id.*, pgs. 67-72). That exhibit includes a copy of the Emergency Advance Agreement which memorialized a \$40,000.00 advance at the Borrower’s request (*id.*, ¶ 25). The Affidavit also explains how these protective advances fit into the overall transaction (*id.*, ¶ 22).

Finally, Exhibit 6 to the Affidavit provides a copy of the February 6, 2019 dated Tax Default Notice (*id.*, pgs. 61-65). The Tax Default Notice demonstrates that the defendants knew about the event of default under the loan documents, and that they were advised that plaintiff made a protective advance for the outstanding property taxes (*id.*, ¶ 234).

The court confirms the portion of the Report addressing taxes and insurance.

II. Interest Charges

The court rejects defendants’ argument that the Report “fails to explain how interest was calculated” because “[t]here is no breakdown by month of the Prime and LIBOR rates, making it impossible to verify the accuracy of the calculations ...” (NYSCEF Doc. No. 240, ¶ 6). The Note explains the method for calculating the relevant interest rate in its first paragraph:

The term “Interest Rate” as used in this Note shall mean interest at the annual rate equal to the greater of (a) Six and 50/100 Percent (6.50%) per annum plus the Prime Rate, (b) Nine and 57/100 Percent (9.57%) per annum plus LIBOR, and (c) Ten and 00/100 Percent (10.00%) per annum (the “Floor Rate”), from the date of this Note to the Maturity Date, except as otherwise expressly provided herein.

(NYSCEF Doc. No. 215, ¶ 1).

The Report also contains a chart listing interest at 10.931% per annum between December 1, 2017 and December 12, 2017, and between December 13, 2017 and December 31, 2017, and provides per diem rates for those periods as well (NYSCEF Doc. No. 206, pg. 4). The 10.931% rate is also provided in Exhibit 3 to the Affidavit, that provides Interest Invoices (the “Invoices”) for various periods, including December 2017, and lists beginning balances, draws, payments, ending balances, interest rates, and per diem rates (NYSCEF Doc. No. 231, pgs. 21-41).

As for explaining the calculations, the Note's first page states that interest payments "shall be due monthly and shall be paid monthly in arrears, commencing on June 1, 2016, and monthly thereafter on the first (1st) day of each month...until the Maturity Date..." (NYSCEF Doc. No. 215, pg. 3, ¶ B). Because payments are paid as arrears, the proper starting date is November 29, 2017. The rounded 1-month LIBOR rate for that date was 1.361%, and the Prime rate for that month was 4.25%, both of which could be verified through publicly available resources (NYSCEF Doc. No. 242, ¶ 10). Plaintiff further demonstrates this in its moving papers by providing a link to a free, public website that publishes these rates and their histories (NYSCEF Doc. No. 243, ¶ 9). Finally, adding the 4.25% Prime rate to the 6.5% rate in the Note's first paragraph provides 10.75%. As the Note uses the higher rate, the 10.931% rate was properly used in the Report.

The court confirms the portion of the Report addressing interest charges.

III. Late Charges

Defendants' argument that the "Referee approved Plaintiff's claim of \$41,191.53 in 'late charges', [without proffering a] breakdown as to how those 'later [sic] charges' were calculated..." is also without merit (NYSCEF Doc. No. 240, ¶ 7). The Mortgage explains the late charges' calculations in Section 25 (NYSCEF Doc. No. 216, pg. 25). That section provides the following:

If any portion of the Debt is not paid when due (excluding, however, the payment due on the Maturity Date), Mortgagor shall pay to Mortgagee upon demand an amount equal to ten percent (10%) of such unpaid portion of the Debt, to defray the expense incurred by Mortgagee in handling and processing such delinquent payment and to compensate Mortgagee for the loss of the use of such delinquent payment, and such amount shall be secured by this Mortgage and the Other Security Documents.

(*id.*, pg. 25).

The Note also addresses and explains the late charges' calculations on pages 3 and 4:

"If any installment of principal, interest or other sums due hereunder or under the Mortgage or any Other Security Document are not paid on the date on which same are due (excluding, however, the payment due on the Maturity Date), the Maker shall pay to the Payee a late charge of ten percent (10.00%) of such unpaid installment as a late payment charge, such late charge to be immediately due and payable without demand by the Payee..."

(NYSCEF Doc. No. 215, pgs. 5-6).

Plaintiff's moving papers and Affidavit explain that the Borrower failed to make a \$411,915.30 monthly payment due on January 1, 2018 (NYSCEF Doc. No. 231, ¶ 17). The Interest Invoices sent to the Borrower support that number, and not only list a \$411,915.30 balance due as of December 31, 2017, but also clearly state that the "[f]ailure to pay [the] total due by [the] due date will result in a 10% late fee" (NYSCEF Doc. No. 231, pg. 41).

Under the Note and Mortgage, the 10% late charge is applied to the total payment that was not received (NYSCEF Doc. Nos. 215-216). Applying the 10% late charge to the balance due (\$411,915.30 multiplied by .10) provides late charges totaling \$41,191.53 the same number contained in the Report (NYSCEF Doc. No. 206, pg. 4). Plaintiff concedes that these "late charges were not assessed to [the Borrower's] account once the Loan went into default" (NYSCEF Doc. No. 231 ¶ 17).

The court confirms the portion of the Report addressing late charges.

IV. Exit Fee

The court also rejects defendants' argument that "[t]he Referee... approved an 'Exit Fee' charge of \$440,000 without...providing an explanation as to what constitutes an 'Exit Fee'" (NYSCEF Doc. No. 240, ¶ 7). The Note explains the Exit Fee's purpose, applicable circumstances, and manner in which it can be paid (NYSCEF Doc. No. 231). On page 4, the Note provides:

As additional consideration to Payee for the making of the loan evidenced by this Note, Maker shall remit to Payee, due, owing and earned on the earlier of (i) the Maturity Date (subject to extension as contained herein), (ii) the date of the acceleration of the Principal Balance in accordance with the Loan Documents, (iii) the date upon which this Note is prepaid in full, (iv) the date a bankruptcy is filed by Maker or (v) the date an involuntary bankruptcy is filed against Maker in which Maker colludes with or assists the party filing the petition, TIME BEING OF THE ESSENCE, in addition to the entire Principal Balance then remaining unpaid, all accrued and unpaid interest, any Prepayment Premium due and owing and all others sums due and owing under the Loan Documents, the sum equal to \$440,000.00 (the "Exit Fee"). The Exit Fee is to be paid in accordance with the terms hereof in addition to, and separate from, any other fee, cost or sum due hereunder or under the Mortgage or Loan Documents, including the Prepayment Premium. Payment of the Exit Fee is an absolute obligation of the Maker, and the Exit Fee shall be paid regardless of whether the Maturity Date is as stated herein, or earlier due to acceleration of the Principal Sum by Payee in accordance with the terms hereof.

(NYSCEF Doc. No. 215, pg. 6).

The Note clearly explains plaintiff's entitlement to the \$440,000.00 Exit Fee and the Exit Fee's purpose.

The court confirms the portion of the Report addressing exit fees.

V. Servicing Fee

The court also rejects the Defendants' argument that "the Referee approved 'servicing fees' [totaling] \$167,200... [without providing an]... explanation or breakdown for this fee" (NYSCEF Doc. No. 240, ¶ 7). The Note clearly explains how the Servicing Fee is calculated on page 5 by providing the following:

"Separate and in addition to all other payment obligations of Maker contained herein, Maker shall be required to pay a servicing fee equal to eight (8) basis points per annum on the Principal Sum of this Note payable in equal monthly installments ("Servicing Fee"). The Maker acknowledges and agrees that the Servicing Fee shall be due on the date hereof, and the obligation to pay the Servicing Fee shall be secured by the Mortgage."

(NYSCEF Doc. No. 215, pg. 7).

Additionally, the Affidavit also provides a step-by-step walkthrough explaining how the Servicing Fees are calculated under the Note (NYSCEF Doc. No. 231, ¶ 20). 8 basis points (.0008 or .8%) of the principal sum (\$44,000,000) equates to \$35,200 in servicing fees per year (.8% or .0008 x \$44,000,000 = \$35,200). Dividing this figure by 12, to account for the 12 calendar months in a year, ($\$35,200 \div 12$), equates to a \$2,933.33333333 or \$2,933.33 Servicing Fee per month after rounding to the nearest hundredth.

The period from May 1, 2017 to May 1, 2021 spans 4 years. To calculate the Servicing Fees for this 4-year time period, the yearly Servicing Fee rate (\$35,200) is then multiplied by the relevant number of years (4), which provides a total of \$140,800 for Servicing Fees between May 1, 2017 to May 1, 2021 ($\$35,200 \times 4 = \$140,800$).

The period between May 1, 2021 to January 1, 2022 spans 9 months. To calculate the Servicing Fees for this 9-month time period, the monthly Servicing Fee rate (\$2,933.33) is then multiplied by the relevant number of months (9), which provides a total of \$26,399.97 for Servicing Fees between May 1, 2021 to January 1, 2022 ($\$2,933.33 \times 9 = \$26,399.97$).

Adding the total Servicing Fees for the 4-year time period between May 1, 2017 to May 1, 2021 (\$140,800) to the total Servicing Fees for 9-month time period between May 1, 2021 to

January 1, 2022 (\$26,399.97) provides a combined total of \$167,200 in Servicing Fees for those two time periods (\$140,800 + \$26,399.97 = \$167,200).

This \$167,200 Servicing Fee is the same figure listed in Report (NYSCEF Doc. No. 206, pg. 4). It is also the same total that is provided in the Affidavit's breakdown chart, that lists the time period, totals for each time period, and a \$167,200 grand total (NYSCEF Doc. No. 231, pg. 7).

The court confirms the portion of the Report concerning servicing fees.

VI. Consulting, Appraisal and Monitoring Fees

The court declines to confirm the portion of the Referee's Report awarding plaintiff the \$2,500 Consultant Fee, the \$7,500 Appraisal Fee, and the \$4,042.37 Monitoring Fee, as Miscellaneous Charges (NYSCEF Doc. No. 206, pg. 4).

Plaintiff's argument, that the Affidavit "makes clear that...the \$2,500 consulting fee was paid to Fisher Harris Shapiro for insurance monitoring...the \$7,500 appraisal fee was paid to Joseph J. Blake and Associates...and the \$4,042.37 monitoring fee...was paid to both SiteCompli, LLC & SS&C Technology for tax monitoring during the life of the subject Loan," is unavailing (NYSCEF Doc. No. 243, ¶ 14). While plaintiff may be entitled to compensation for the Consulting, Appraisal and Monitoring Fees as Miscellaneous Charges under Section 22(b) of the Mortgage, plaintiff has not demonstrated its entitlement to the full amount sought as it failed to provide adequate proof that these amounts were actually tendered for the services alleged.

Plaintiff has submitted an April 12, 2017 dated invoice (Invoice #: 13011) listing a \$2,500 charge for "consulting" services (NYSCEF Doc. No. 246). Additionally, plaintiff has also submitted a May 1, 2017 dated check for \$43,000 that was made payable to Fisher Harris Shapiro Inc (NYSCEF Doc. No. 248). However, these two documents do not provide any details about the alleged consulting services that were purportedly rendered.

The invoice, that merely lists the amount allegedly paid, omits crucial and pertinent information by leaving the boxes for "TERMS," "PROJECT," and "[HOURS]" unmarked or unfilled (NYSCEF Doc. No. 246). The check also lists three different dates and various numbers, all of which lack explanation. Further, the amount listed on the invoice and the amount listed on the check do not align. Plaintiff's conclusory and barebones explanation that the \$43,000 payment includes "other additional payments...which do not implicate the Borrower in this case," does not

suffice on its own, and does not provide any further clarity on the amounts paid, and the services rendered (NYSCEF Doc. No. 242, pg. 4, fn 4).

Plaintiff has also failed to demonstrate its entitlement to the \$7,500 Appraisal Fee. Plaintiff claims that “the \$7,500 appraisal fee was paid to Joseph J. Blake and Associates” (NYSCEF Doc. No. 243, pg. 7). It further claims that three appraisals each cost \$2,500, and were allegedly completed in 2018, 2020 and 2021, for a total of \$7,500 in fees (NYSCEF Doc. No. 231, pg. 9, fn. 3). However, plaintiff only provided two \$2,500 invoices, dated February 26, 2018 and March 25, 2021 (NYSCEF Doc. No. 247). Plaintiff did not attempt to demonstrate further entitlement to these fees by explaining these invoices or their contents.

Additionally, while plaintiff alleges that “[p]ayment to Joseph J. Blake and Associates [was] made by both check and by wire transfer on May 13, 2021 in the amount of \$2,500.00 (Fed Reference #: 20210513B6B7261F001386),” plaintiff only submitted a single \$2,500 check dated April 3, 2018, and did not provide any further details or verification of the wire transfer (NYSCEF Doc. No. 249). This proof is simply insufficient and does not adequately demonstrate plaintiff’s entitlement to the \$7,500 Appraisal Fee.

The alleged “\$4,042.37 monitoring fee paid to both SiteCompli, LLC & SS&C Technology for tax monitoring during the life of the subject Loan” fares no better (NYSCEF Doc. No. 243, ¶ 14). Plaintiff has not provided any invoices or proof of payment for these services. Plaintiff’s papers state that the “[Affidavit] contains invoices for Fisher Harris Shapiro and Joseph J. Blake and Associates as well as proof of payment of those invoices” (NYSCEF Doc. No. 243, ¶ 14). However, plaintiff neither mentions any documents or proof that this tax monitoring service was actually rendered and paid for, nor does plaintiff provide any invoices or checks that support its entitlement to the same.

Due to the omissions and ambiguities concerning the Consulting Fees, Monitoring Fee, and Appraisal Fee totaling \$14,042.37, the court reduces the total found by the Referee for Miscellaneous Fees from \$621,242.37 to \$607,200.

VII. Plaintiff’s Request for Attorneys’ Fees

Plaintiff also requests \$39,282.50, consisting of \$35,292.50 for attorneys’ fees and \$3,990 for anticipated fees that will allegedly be incurred following the entry of the judgment of foreclosure and sale in this case (NYSCEF Doc. No. 233, ¶¶ 7-8, 11).

Plaintiff has not demonstrated that these fees are reasonable. In assessing whether attorneys' fees are reasonable, the court must consider, *inter alia*, the requisite time, labor and skill, difficulty of the matter, the lawyer's experience, ability and reputation, the amount involved and the result (*STA Parking Corp. v Lancer Ins. Co.*, 128 AD3d 479, 480 [1st Dep't 2015]). Additionally, the court must also consider the "the customary fee charged by the bar for similar services" (*Matter of Freeman*, 34 NY2d 1, 9 [1974]).

Here, the Affirmation of Services Rendered submitted by plaintiff's counsel demonstrates that plaintiff's counsel's expended 74.50 hours prosecuting this case, which, in turn, has cost \$35,292.50 in legal fees (NYSCEF Doc. No. 233, ¶ 7). However, plaintiff's counsel did not provide any supporting documentation showing how these legal fees were calculated, and did not provide any explanation as to how those fees are reasonable.

Additionally, plaintiff's request also includes "\$3,990.00 [for] fees anticipated to be incurred by Kriss & Feuerstein LLP after the entry of the Judgment of Foreclosure and Sale through and including the transfer of the Referee's Deed in this action" (NYSCEF Doc. No. 233, ¶ 8).

To support its request, plaintiff's Affirmation of Services includes a chart, attached as Exhibit 2, which lists the prospective work and tasks, the estimated hours, and the total estimated costs (NYSCEF Doc. No. 233, pg. 14). However, as the chart's title suggest, these fees are prospective in nature, and are submitted without any supporting documentation.

The invoices for the rendered services also indicate excessive block billing on plaintiff's counsel's part. For instance, the 8/6/2018 entry on Invoice #25616 states that 8.80 hours were expended to "Prepare default letters; meet with borrower regarding possible forbearance; prepare Summons and Complaint." (NYSCEF Doc. No. 233, pg. 6).

Another example is the 4/8/2019 entry on Invoice # 27264, which states that 26.50 hours were expended to "Review Answer and Counterclaims and prepare Reply to Counterclaims; prepare motion for summary judgment addressing multiple defenses and counterclaims; address stipulation regarding adjournment; calls with court regarding briefing schedule due to defendant attorney illness (NYSCEF Doc. No. 233, pg. 10).

The most troubling is the 10/31/2019 entry on Invoice #28719, which provides that 29.50 hours were expended to: "Prepare opposition to cross motion and reply with respect to motion for summary judgment; review order permitting additional time; prepare for and court appearance for

motion for summary judgment; prepare agreement regarding protective advances and subsequent amendment; calls with subordinate creditor to purchase claim; review letter regarding recusal and file response; review response from court regarding recusal; review motion to recuse and file opposition” (NYSCEF Doc. No. 233, pg. 12).

For the above reasons, the court denies the motion to the extent that it seeks an award for attorneys’ fees.

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Motion Sequence No. 003 is granted in part and denied in part; and it is further

ORDERED that the portion of plaintiff’s motion for an order confirming the report of the referee is granted in part, to the extent of modifying the Referee’s Report as set forth above, and is otherwise denied; and it is further

ORDERED that the portion of plaintiff’s motion seeking attorneys’ fees is denied; and it is further

ORDERED AND ADJUDGED that the portion of plaintiff’s motion for a judgment of foreclosure and sale is granted to the extent set forth below; and it is further

ORDERED that pursuant to the relief requested in Plaintiff’s Motion for Summary Judgment, a default judgment be entered against the non-appearing defendant NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; and it is further

ORDERED that pursuant to the relief requested in Plaintiff’s Motion for Summary Judgment, the defendants captioned as “JOHN DOE #1” through and including “JOHN DOE #12” are not necessary parties to this action and are excised from the caption herein, and the caption is amended as follows:

the sale and serve it on 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 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 **amNY**; and the Referee need not conduct the sale unless Plaintiff provides 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 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 1 year 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 if the Referee does not conduct the sale within 90 days of the date of the judgment, in accordance with CPLR 2004, the time fixed by RPAPL 1351 (1) is extended for the Referee to conduct the sale as soon as reasonably practicable; 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, if the successful bidder is not plaintiff, 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; or, if the foregoing is not possible, coordinate with the successful bidder to find an acceptable banking institution, 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 \$750.00. 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 it is the Referee who 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: \$89,969,883.35, at the per diem rate of \$30,026.75 from January 20, 2022 (the date the interest was calculated to in the Report), until the date of entry of this 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.
 - c. The Court declines to award additional allowance at this time. If the Referee intends to apply for a further allowance for his/her fees, an application shall be made to the Court therefor upon due notice to those parties entitled thereto;
5. 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; 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

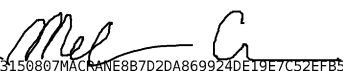
ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950.00 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:

The Property is commonly known as: 605-615 East 9th Street a/k/a 350-360 East 10th Street, New York New York 10009 (Block: 392, Lot: 10). A description of the Property will be made a part hereof as Schedule A no later than January 4, 2022; and it is further

ORDERED that, should any party desire a different location to hold the auction, and after meeting and conferring with the other parties, is unable to come up with a mutually agreeable location, that party can make a motion for the court to order an alternative location.


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<u>12/23/2022</u> DATE					<u>MELISSA CRANE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE