

**Board of Mgrs. of the 491-497 Greenwich St.
Condominium v Inchauspe**

2023 NY Slip Op 34674(U)

August 2, 2023

Supreme Court, New York County

Docket Number: Index No. 153737/2022

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 A. KAHN, III PART 32

Justice

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INDEX NO. 153737/2022

THE BOARD OF MANAGERS OF THE 491-497
GREENWICH STREET CONDOMINIUM, suing on behalf of
the unit owners,

MOTION DATE _____

MOTION SEQ. NO. 002

Plaintiff,

- v -

GABRIEL INCHAUSPE, BRIGITTE BRANCONNIER,
WELLS FARGO BANK NA, ANTONIO INCHAUSPE, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, JEREMY SISTO,

**JUDGMENT OF FORECLOSURE
AND SALE and DECISION +
ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for

JUDGMENT - FORECLOSURE & SALE

Upon the foregoing papers, the motion is determined as follows:

Plaintiff commenced this action to foreclose on a lien for common charges encumbering a condominium unit located at 491-497 Greenwich Street, Unit 2C, New York, New York. Defendants Gabriel Inchauspe and Brigitte Branconnier, the unit owners, answered and pled six affirmative defenses. By decision and order dated August 2, 2023, Plaintiff's motion for summary judgment and issuance of an order of reference was granted. Now, Plaintiff moves to *inter alia* confirm the Referee's report of the amounts due and for a judgment of foreclosure and sale. Defendants Gabriel Inchauspe and Brigitte Branconnier oppose the motion.

In support of the motion, Plaintiff established that the evidence before the Referee substantially supported the Referee's findings on the amount due under the lien, accrued common charges, interest, and other expenses (*see generally U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2d Dept 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept 2015]).

In opposition, Defendants' assertion Plaintiff failed to adhere to the deadlines contained in the order of reference is unavailing as it is within the Court's discretion to waive this defect, especially where, as here, no prejudice has been demonstrated (*see US Bank v Hadar*, 206 AD3d 688 [2d Dept 2022]). In any event, any claim Defendants lacked an opportunity to submit information to the Referee is of no moment since "[w]here, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing" (*Bank of Am., N.A. v Scher*, 205 AD3d 989, 990 [2d Dept 2022]; *see also Bank of N.Y. v Viola*, 181 AD3d 767 [2d Dept 2020]).

Defendants' also object to the Referee's finding concerning interest. On that issue, "[i]n '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 [1st Dept 2021], citing *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). Generally, lengthy unexplained delays and "egregious" wrongful conduct must exist for the Court to assess an interest toll (*see eg U.S. Bank, N.A. v Gendelman*, 214 AD3d 928 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Lee*, 208 AD3d 1384 [2d Dept 2022]; *Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017]). Here, Defendants have not established the existence of any significant delays in this matter solely attributable to Plaintiff.

With respect to Defendants' objection to Plaintiff's requested award of counsel fees, it is well settled 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 [1st 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 [1st 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]).

Plaintiff seeks an award of \$53,574.07 in counsel fees for recovery of \$103,867.06, per the Referee's report. This amount represents approximately 52% of the common charges found due and owing. Requests for attorney's fees that do not bear a reasonable relationship to the amount sought to be recovered can be suspect (*cf. Emery v Fishmarket Inn of Granite Springs*, 173 AD2d 765, 766 [2d Dept 1991]). However, such an award is not *per se* prohibited (*see JK Two LLC v Garber*, 171 AD3d 496 [1st Dept 2019]).

The present situation is an oft occurrence in common charge lien foreclosure actions where litigants fail to consider the principle of diminishing returns when, for a variety of reasons, they engage in protracted litigation even where the existence of unpaid common charges is certain. As a result, an originally modest amount of arrears blossoms into a much larger sum because of attorney's fees and

interest. The within action has been verily contested for over two years. Defendants filed an answer, opposed each motion herein, filed a notice of appeal of the order of reference and a status conference with the Court was held. Nevertheless, the Court is not persuaded, based upon a consideration of all the relevant factors, that the full amount requested by Plaintiff is reasonable under the circumstances. Plaintiff initially named Wells Fargo Bank, NA as a claimed subordinate lien holder when in fact their lien was a first mortgage, and its joinder was unnecessary (RPAPL §1311). The unnecessary joinder of Wells Fargo resulted in increased litigation and attorney's fees. Accordingly, Plaintiff is awarded a total of \$40,000.00 as attorney's fees and expenses in this matter.

Accordingly, it is

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and to confirm the referee's report is granted; and it is further

ORDERED that the parcel subject to the lien described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the lien, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days¹ of this judgment, in one parcel via four sale, at a public auction, conducted on the same date, at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Elaine Shay, Esq.** who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **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 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 the **New York Amsterdam News**; and the referee need not conduct the sale unless plaintiff shall provide 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 she/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

¹ Presently, the Foreclosure Auction Part has a five month wait for auction dates. The backlog is due to the near two-year moratorium on foreclosure sales that was a sequelae of the COVID-19 pandemic. As such, strict adherence to the 90-day deadline contained in RPAPL 1351[1] is simply not practical and the Court exercises its discretion under CPLR 2004 to extend that time period.

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 180 days 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 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 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; 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 each 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 the Referee 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: \$103,867.06, together with interest at contract rate from November January 3, 2023, until the date of entry of this judgment until the date the deed is transferred; and Plaintiff may add to the amount due any and all inspection fees, maintenance charges, further accrued common charges, taxes, insurance premiums or other advances necessary to preserve the property provided proof is provided to the satisfaction of the Referee;
 - b. Costs and Disbursements: _____.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: \$40,000.00.
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 the property is sold, subject to any superior liens of record, including by not limited to mortgage liens, 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 property subject to the lien 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 (except the common charges lien herein), title, and interest in the property after the sale of the property subject to the lien; 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 if it is an e-filed case; 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 the deposit of the recalcitrant bidder forfeited and retained by Plaintiff as liquidated damages; 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 if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 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:

A description of the four properties is annexed hereto as schedule A.

8/2/2023

DATE

Francis A. Kahn III

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
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

CHICAGO TITLE INSURANCE COMPANY
SCHEDULE A DESCRIPTION

The Condominium Unit (in the Building located at and known as and by Street Number 491-497 GREENWICH STREET, NEW YORK, NEW YORK), designated and described as Unit 2C (hereinafter called the "Unit") in the Declaration (hereinafter called "Declaration") made by the Sponsor under the Condominium Act of The State of New York (Article 9-B of the Real Property Law of the State of New York), dated 5/20/2004 and recorded 7/27/2004 in the Office of the Register The City of New York, County of NEW YORK, in CRFN 2004000462082 establishing a plan for Condominium ownership of said Building and the land upon which the same is erected (hereinafter sometimes collectively called the "Property") and also designated and described as Tax Lot No. 1206 Block 594 Section 2, Borough of MANHATTAN on the Tax Map of the Real property assessment department of the City of New York and on the floor plans of said Building certified by Michael Zenreich on 6/4/2004 and filed as Condominium Plan No. 1379 on 7/27/2004 in the aforesaid Register's Office.

The land upon which the Building containing the Unit is erected as follows:

PARCEL 1

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, County of New York, City and State of New York, being all of Lot No. 597 and part of Lot No. 598 on the map made by the Commissioners who divided the Estate of Anthony Lispenard among his heirs, which map was filed in the Office of the Register of the City and County of New York by James A. Hamilton, Master in Chancery on the 13th day of January 1818, the said parcel of land hereby described being bounded and described as follows:

BEGINNING at a point on the easterly side of Greenwich Street at the distance of 130 feet 6 inches northerly from the corner formed by the intersection of the easterly side of Greenwich Street with the northerly side of Canal Street;

RUNNING THENCE easterly at right angles to Greenwich Street, 90 feet;

THENCE northerly, parallel with Greenwich Street, 44 feet to Lot No. 596 on said map now or lately belonging to James Owens;

THENCE westerly along said Lot No. 596, 90 feet to the easterly side of Greenwich Street; and

THENCE southerly, along the easterly side of Greenwich Street, 44 feet to the point or place of BEGINNING.

--CONTINUED--

CHICAGO TITLE INSURANCE COMPANY

Title No.: 3104-00028

LEGAL DESCRIPTION -- CONTINUED

PARCEL 2:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, County of New York, City and State of New York, bounded and described as follows:

BEGINNING at a point on the easterly side of Greenwich Street, distant 174 feet 6 inches or thereabouts northerly from the corner formed by the intersection of the easterly side of Greenwich Street, with the northerly side of Canal Street;

THENCE easterly and parallel with Spring Street 90 feet;

THENCE northerly and parallel with Greenwich Street 24 feet 9 inches;

THENCE westerly and again parallel with Spring Street, 90 feet to the easterly side of Greenwich Street; and

THENCE southerly and along the easterly side of Greenwich Street 24 feet 9 inches to the point or place of BEGINNING.