

Newtek Small Bus. Fin., LLC v DBMS Consulting, Inc.
2023 NY Slip Op 34679(U)
August 27, 2024
Supreme Court, New York County
Docket Number: Index No. 850623/2023
Judge: Francis A. Kahn III
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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. 850623/2023

NEWTEK SMALL BUSINESS FINANCE, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

DBMS CONSULTING, INC., SUNIL G. SINGH, EVELYN M. SINGH, BOARD OF MANAGERS OF THE FREMONT CONDOMINIUM, WELLS FARGO BANK, NATIONAL ASSOCIATION, CITY OF NEW YORK DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

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) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

Upon the foregoing documents, the motion and cross-motion are determined ss follows:

This is an action to foreclose on a mortgage encumbering multiple parcels of improved real property located at 164 West 83rd Street, Units CF1 and CF2, New York, New York. The mortgage secures a restated note that memorializes a loan of \$1,850,000.00 made by Plaintiff to Defendant DBMS Consulting, Inc. ("DBMS"). Concomitantly with the note, Defendants Sunil G. Singh and Evelyn M. Singh ("Singh") executed a personal guaranty of the loan. Plaintiff's motion for a default judgment and an order of reference was granted by order of this Court dated April 26, 2024. Now, Plaintiff moves to inter alia confirm the Referee's report and for the issuance of a judgment of foreclosure and sale. Singh Defendants oppose the motion and cross-move for an order, inter alia, declaring the valuation by referee as invalid and dismissing the action.

"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 [2d Dept 2017]; see also Bank of N.Y. Mellon v Davis, 193 AD3d 803 [2d Dept 2021]). A Plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (see eg U.S. Bank N.A. v Moulton, 179 AD3d 734, 738 [2d Dept 2020]). After issuance of the Referee's report, the Supreme Court is authorized to reject the report, in whole or in part, and render its own findings (see eg Bank of Am., N.A. v Barton, 199 AD3d 625 [2d Dept 2021]).

Here, Plaintiff established that the evidence before the Referee substantially supported the Referee's findings on the amount due under the note, accrued interest, and other expenses (see 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, Singh Defendants' cross-motion is entirely defective as no basis to vacate their default in appearing in this action was proffered or even sought (*see Deutsche Bank Natl. Trust Co. v O'Connor*, 223 AD3d 872 [2d Dept 2024]). Absent vacatur of a default, a defendant is generally precluded from raising any non-jurisdictional defenses (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). Although even a defaulting defendant in a foreclosure argument can contest the amount due, the Singh Defendants failed to demonstrate any defect in the Referee's calculation (*see U.S. Bank N.A. v Ashon*, 226 AD3d 941 [2d Dept 2024]).

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 cross-motion by Defendants Sunil G. Singh and Evelyn M. Singh is denied in its entirety; and it is further

ORDERED that the four parcels 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 four parcels 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 **Matthew D. Hunter III, 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

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 sequela 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.

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 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 \$1,100. 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: \$2,015,909.37 together with interest at note rate interest from April 30, 2024, 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: \$16,055.71.
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 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

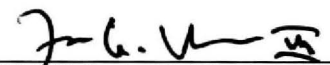
ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

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.

<u>8/27/2023</u> DATE		 FRANCIS A. KAHN, III, A.J.S.C. HON. FRANCIS A. KAHN III J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

NSBF Loan # [REDACTED]
SBA Loan No.: [REDACTED]

Exhibit "A"
(Legal Descriptions)

The Units known as Unit Nos. CF-1 and CF-2 in the Building known as The Fremont Condominium, a condominium located at 164 West 83rd Street, in the Borough of Manhattan, New York County, City and State of New York and also designated and described as Unit Nos.: CF-1 and CF-2 in the Declaration establishing The Fremont Condominium (hereinafter called the "Property") made by the Sponsor under the Condominium Act of the State of New York, as amended (Article 9-B of the Real Property Law of the State of New York), dated May 26, 2005, and recorded in the New York County Office of the Register of the City of New York, on the 29th day of June, 2005, as CRFN 2005000370708, as amended by First Amendment to the Declaration recorded in the New York County Office of the Register of the City of New York, on the 7th day of November, 2008 in CRFN 2008000433535 (hereinafter called the "Declaration"), which Units are also designated as Block No. 1213, Tax Lot Nos. 1303 & 1304, respectively, on the Tax Map of the Real Property Assessment Department of the City of New York and on the Floor Plans and Site Plan (the "Floor Plans") of the Building, certified by Andrew Caracciolo, Architect, and filed in the Real Property Assessment Department of the City of New York on the 29th day of June, 2005, Condominium Plan No. 1455, and filed simultaneously with said Declaration in the said Office of the Register of the City of New York, New York County, as Map CRFN 2005000370709 Condominium Plan No. 1455, (hereinafter called the "Unit"). The land area of the Property is described as follows:

TOGETHER with an undivided 9.0027% interest in Common Elements appurtenant to Unit CF1 and the 4.5414% interest in Common Elements appurtenant to Unit CF2 of the Condominium as described in the Declaration.

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

BEGINNING at a point on the southerly side of 83rd Street, distant 130 feet easterly from the corner formed by the intersection of the easterly side of Amsterdam Avenue with the southerly side of 83rd Street;

RUNNING THENCE southerly and parallel with the said easterly side of Amsterdam Avenue, a part of the distance through a party wall, 109 feet 8 inches;

THENCE southeasterly in a straight line, 20 feet 0-3/4 inch to a point distant 111 feet 3 inches South of 83rd Street;

THENCE northerly parallel with the said easterly side of Amsterdam Avenue, 111 feet 3 inches to the said southerly side of 83rd Street; and

THENCE westerly along said southerly side of 83rd Street, 20 feet to the point or place of BEGINNING.