

MC77th St. LLC v 1475 1st Ave LLC

2024 NY Slip Op 32729(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850020/2022

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

INDEX NO. 850020/2022

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MC77TH STREET LLC,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 008

1475 1ST AVE LLC, THOMAS MAKKOS,
GEORGE MAKKOS A/K/A GEORGIOS MAKKOS, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY DEPARTMENT OF
FINANCE, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, DENIS O., NICHOLAS
BENETIS, AND GREEN KITCHEN REST. CORP. D/B/A
GREEN KITCHEN,

**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 008) 214, 215, 216, 217, 218, 219, 220, 224, 227, 228, 229, 238, 239, 240, 241

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

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

This is an action to foreclose on a consolidated, extended, and modified mortgage encumbering a parcel of real property located at 354 East 77th Street a/k/a 1475 First Avenue, New York, New York. The mortgage secures an indebtedness of \$4,824,250.00 which is memorialized by a consolidated and restated mortgage note dated September 12, 2016. Plaintiff commenced this action alleging Defendant, 1475 1st Ave, LLC ("1475 1st"), *inter alia*, defaulted in making installment payments under the note. Plaintiff's motion for summary judgment and an order of reference was granted by order of this Court dated October 12, 2023. Now, Plaintiff moves for *inter alia* to confirm the Referee's report and for the issuance of a judgment of foreclosure and sale. Defendants oppose the motion and cross-move for an order rejecting the Referee's report and directing that the Referee conduct a hearing.

"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]). There is no requirement that any particular records support the Referee's findings so long as the proof is in evidentiary form and evinces the facts for which they are proffered (*see eg Nationstar Mtge., LLC v Cavallaro*, 181 AD3d 688 [2d Dept 2020]; *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). A plaintiff may, therefore, 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 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]).

In support of the calculation, Plaintiff submitted the affidavit of Matthew Contreras (“Contreras”), an authorized signatory of Plaintiff’s as well as Scott Milchuk (“Milchuk”), a Senior Vice President of non-party BankUnited, N.A. (“BankUnited”). These affidavits and the records attached thereto 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 [2nd Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2nd Dept. 2015]).

In opposition, the claim that the Referee was required to conduct a hearing with live witnesses is meritless since “absent the existence of a relevant factual dispute a referee is not required to hold a hearing prior to issuing a report in every case” (*Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 492 [2d Dept 2019]; *see also Dune Deck Owners Corp. v J.J.&P. Assocs. Corp.*, 85 AD3d 1091 [2d Dept 2011]). In support of this claim, Defendants failed to identify what disputed factual issues required a hearing. In any event, the claim that Defendant 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. Mellon v Viola*, 181 AD3d 767 [2d Dept 2020]).

Defendants’ argument that the *Referee* was required to include in his calculation the rents collected by the *Receiver* is entirely inapposite. The Referee was charged with calculating the amount due under the mortgage, not all income and expenses tangentially related to the operation of the property. Whether any net rents exists and the disposition of same are issued to be attended when the Receiver settles their final account.

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 caption is amended *nunc pro tunc* and shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MC77TH STREET LLC,

Plaintiff,

-against-

1475 1ST AVE LLC, THOMAS MAKKOS,
GEORGE MAKKOS A/K/A GEORGIOS
MAKKOS, NEW YORK CITY
ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY DEPARTMENT OF
FINANCE, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, DENIS O.,

NICHOLAS BENETIS, AND GREEN KITCHEN
 REST. CORP. D/B/A GREEN KITCHEN,
 Defendants.

-----X

and it is further

ORDERED that the request that JEWEL "DOE", DIANA "DOE", "JOHN/JANE" FADAEI be added as defendants is denied as the New York County Clerk will not accept a judgment with any "Doe" party in the caption; and it is further

ORDERED that the mortgaged properties described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of appointed Referee, Mark McKew, 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 sfc-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 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 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 **Chelsea Clinton 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 receiving any funds 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 the sale, which are \$1,100.00. 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: \$6,846,701.21, together with interest at the note rate from November 1, 2023, until entry of 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 with interest at the statutory judgment rate from the date of entry of this judgment.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: Plaintiff's counsel failed to submit an affirmation of legal services, addressing 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 (*see Jordan v Freeman*, 40 AD2d 656 [1st Dep't 1972]). Accordingly, the issue of attorney's fees is severed and shall be awarded in a separate order of the Court which will be issued upon Plaintiff's motion, on notice, supported by the necessary information.
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 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 \$950.00 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:

A description of the premises is annexed hereto as schedule A.

7/2/2024
DATE

Francis A. Kahn III

FRANCIS 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

EXHIBIT B
(Legal Description)

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

BEGINNING at a point formed by the intersection of the Southerly side of 77th Street with the Westerly side of First Avenue;

RUNNING THENCE Westerly and along the Southerly side of 77th Street, 75 feet;

THENCE Southerly parallel with First Avenue, 27 feet 2 inches to the center party wall;

THENCE Easterly and parallel with 77th Street and partly through a party wall, 75 feet;

THENCE Northerly and along the Westerly line of First Avenue, 27 feet 2 inches to the point or place of BEGINNING.