

**Board of Mgrs. of the Altavista Condominium v  
Lumpkin**

2024 NY Slip Op 32743(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 158019/2023

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. 158019/2023

BOARD OF MANAGERS OF THE ALTAVISTA  
CONDOMINIUM, acting on behalf of the unit owners of  
THE ALTAVISTA CONDOMINIUM,

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

Plaintiff,

- v -

JOHN ANDREW LUMPKIN, CRIMINAL COURT OF THE  
CITY OF NEW YORK, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, BANK OF AMERICA, N.A.,

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

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

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

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

This is an action to foreclose on lien for unpaid common charges encumbering a parcel of real property located at 92 Perry Street, Condominium Unit 20, New York, New York. Defendant John Andre Lumpkin ("Lumpkin") appeared *pro se*, filed an answer and pled, as best the Court can discern, three affirmative defenses. Plaintiff's motion for summary judgment and an order of reference was granted without opposition by order dated April 12, 2024. Now, Plaintiff moves to confirm the May 3, 2024, report of Referee Roberta Ashkin, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant Lumpkin opposes the motion and, cross-moves pursuant to CPLR §5015[a][1] to vacate his default in opposing the motion for summary judgment. Plaintiff opposes Defendant's cross-motion.

Since whether Defendant's default is vacated will necessarily affect the disposition of Plaintiff's motion, the Court will address the cross-motion first. Generally, to vacate a default in opposing a motion, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Bear Stern-Asset-Backed Sec. 1 Trust 2006 v Ceesay*, 180 AD3d 504 [1st Dept 2020]). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2<sup>nd</sup> Dept 2005]; *see also Glauber v Ekstein*, 133 AD3d 713, 713 [2d Dept 2015]). To demonstrate a meritorious defense, the movant must tender "an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1<sup>st</sup> Dept 1997]). The affidavit must make satisfactory factual allegations; it must do more than merely make "conclusory allegations or vague assertions" (*see Gorman v English*, 137 AD3d 556 [1<sup>st</sup> Dept 2015] [internal citations omitted]).

Lumpkin's conclusory claim that his default arose from his status as a *pro se* litigant, in and of itself, is insufficient (*see Tao Liu v Sobin Chang*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 02370 [1<sup>st</sup> Dept 2024]). A court may afford a *pro se* litigant latitude, but they do not acquire greater rights than represented litigants (*see Stewart v ARC Dev. LLC*, 138 AD3d 413, 414 [1st Dept 2016]). Even assuming this constituted a reasonable excuse, Lumpkin failed to proffer any meritorious defense to Plaintiff's *prima facie* case on the motion for summary judgment. His opposition was confined entirely to alleged evidentiary defects in the affidavit submitted to support the Referee's calculation. To the extent Lumpkin pled in his answer Board's purported failure to make repairs to his unit as a justification for non-payment, assuming this assertion was contained in his affidavit, which it was not, that would not constitute a defense to summary judgment (*see Board of Mgrs. of Villas on the Lake Condominium v Policicchio*, 228 AD3d 610 [2d Dept 2024]).

As to the Plaintiff's motion, a Referee's report "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]).

Here, Plaintiff established that the evidence before the Referee substantially supported the Referee's findings on the amount due in common charges, 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, Lumpkin's evidentiary protests were without merit, and he failed to proffer any argument concerning the accuracy of the Referee's calculations.

Accordingly, it is

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

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, lien for common charges, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Roberta Ashkin, 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 **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 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 \$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 Plaintiff the following:
  - a. Amount Due from the Referee's Report: \$50,354.13, together with interest at note rate from April 11, 2024, 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: The fees requested, \$21,455.81, are excessive. That amount is approximately 42% of the amount due and owing. Although an answer was filed in this matter, the issues raised herein were entirely prosaic and the hours the fees requested herein were, based on this Court's experience, disproportionate thereto. Accordingly, based on the review of the affirmation of legal services, invoices, facts of this case, as well as this Court knowledge and experience, Plaintiff is awarded a legal fee of \$15,000.00.
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 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 re-notice the property for sale with or without prior application to this Court, 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.

8/2/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

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

HON. FRANCIS A. KAHN III

NON-FINALE DISPOSITION

J.S.C.

EXHIBIT A  
TO  
CONDOMINIUM UNIT DEED

The Condominium Unit known as **Unit No. 20** (the "Unit") in the building designated as The Altavista Condominium in the Declaration establishing a plan for condominium ownership of said premises under article 9-B of Real Property Law of the State of New York (The "New York Condominium Act") dated March 9, 2007 and recorded in the City Register's Office on May 18, 2007, in CRFN# 2007000261199, the Unit also being designated Tax Lot **1120** in Section 2, Block 621 on the Tax Map of the Real Property Assessment Department of The City of New York for the Borough of Manhattan and County of New York and on the Floor Plans of the Building, certified by BKSK Architects, LLP, and filed with the City Register's Office on May 18, 2007 in CRFN#. 2007000261200.

Together with an undivided **3.6214%** interest in the Common Elements of the Condominium.

THE PREMISES WITHIN WHICH THE UNITS ARE LOCATED BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

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 the Southwesterly corner of Bleecker and Perry Streets and running thence Westerly along the Southerly side of Perry Street, seventy (70) feet;

THENCE Southerly parallel to Bleecker Street, forty-two (42) feet six (6) inches to the land whereof George Suckley died seized;

THENCE Easterly along the same parallel to Perry Street, seventy (70) feet to Bleecker Street; and

THENCE Northerly along Bleecker Street forty-two (42) feet, six (6) inches to the point or place of BEGINNING.

The premises are known as: 92 Perry Street a/k/a 382/384 Bleecker Street, New York, New York

END OF EXHIBIT A

DOC 3-6

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