

Wilmington Trust, N.A. v 153 Elizabeth St., LLC

2024 NY Slip Op 32855(U)

August 8, 2024

Supreme Court, New York County

Docket Number: Index No. 850275/2021

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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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE TRUST 2016-C34, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-C34, BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC,

Plaintiff,

- v -

153 ELIZABETH STREET, LLC, 153 ELIZABETH HOTEL LLC, 30 KENMARE MASTER, LLC, EDMOND LI, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK,

Defendant.

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JUDGMENT OF FORECLOSURE AND SALE and DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 225, 226, 227, 228, 229

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

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

The within action is to foreclose on a consolidated and modified mortgage encumbering a parcel of commercial real property located at 153 Elizabeth Street, New York, New York. The mortgage was given by Defendant 153 Elizabeth Street LLC ("Elizabeth") and 153 Elizabeth Hotel LLC ("Hotel") and secures a loan with an original principal amount of \$24,000,000.00 which is memorialized by a consolidated, amended and restated note. The note and mortgage, both dated April 8, 2016, were given to non-party Silverpeak Real Estate Finance LLC and were executed by Defendant Edmund Li ("Li"), as Authorized Signatory of both borrowers. Concomitantly with these documents, a "Guaranty of Recourse Obligations" securing the indebtedness was executed by Defendant Li. Plaintiff commenced this action alleging Defendants defaulted under the note. Defendants Elizabeth, Hotel and Li answered jointly.

By order of this Court dated January 13, 2023, Plaintiff's motion for summary judgment was denied on the basis that prima facie proof of the note, mortgage, Defendant's default, and Plaintiff's standing was not established. By order dated February 9, 2024, Plaintiff's second motion for summary judgment was granted and the matter was referred to a referee for calculation. Now, Plaintiff moves to inter alia confirm the Referee's report of the amounts due and for a judgment of foreclosure and sale. Defendants Elizabeth, Hotel and Li oppose the motion.

"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]).

In support of the calculation, Plaintiff submitted the affirmation of Josef Bittman, ("Bittman"), an Asset Manager of LNR Partners, LLC ("LNR"), which is the special servicer of the subject loan for Plaintiff. Bittman demonstrated personal knowledge of LNR's recordkeeping procedures and laid a proper foundation for the admission of its records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Bittman established that those records were received from the makers and incorporated into the records LNR kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were all the records referenced by Paterno (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Bittman's affidavit and the records attached to thereto sufficiently supported the Referee's calculation (*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, Defendants' 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 that any disputed factual issues existed. Defendants' arguments concerning whether the Court should impose an interest toll and cull excessive attorney's fees are misplaced as those issues were not part of the reference. Neither issue lends itself to a reference since tolling interest is an equitable consideration and setting counsel fees is part of a court's inherent authority (*see U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021]; *Matter of Thomas B. v Lydia D.*, 120 AD3d 446 [1st Dept 2014]). In any event, "[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]).

Concerning the interest calculation, "[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*, supra at 446, *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]).

Here, Defendants failed to demonstrate how Plaintiff's prosecution of this action was "so egregious" as to constitute wrongful conduct (*see Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017]). There is also no proof that Plaintiff, through act or omission, delayed prosecution, or resolution of the action or otherwise acted in bad faith (*see Bank of Am., N.A. v Lucido*, 114 AD3d 714 [2d Dept 2014]). Notably, Defendants' affirmative defense founded on Plaintiff's alleged lack of good faith was stricken. To the extent Defendants assert interest should be tolled solely because of delays occasioned by the COVID-19

pandemic is unavailing as these types of claims have repeatedly been “squarely rejected” by the Appellate Division, First Department (*see Pentagon Federal Credit Union v Popovic*, 217 AD3d 480 [1st Dept 2023]).

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]).

In this case, Plaintiff apparently seeks some \$454,768.58 as an award of counsel fees. Contrary to Defendant’s assertion this matter was not a “run-of-the mill mortgage foreclosure action”. The within action has been contested for nearly three years and has seen six motions, document discovery, a three-hour deposition of Plaintiff, a status conference, and contested submissions to the Referee. Unsurprisingly, such litigation resulted in the accumulation of significant legal costs. The present situation is an all-too-common occurrence in foreclosure actions. Many litigants fail to consider that attorney’s fees are contractually authorized when, for a variety of reasons, they persist in years of litigation despite not contesting the existence of the loan document and/or the default.

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. For instance, Plaintiff’s first motion for summary judgment was denied, in part, based upon a failure to submit documents in admissible form which is a well settled requirement in contested foreclosure actions. 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 \$375,000.00.

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 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 **Scott H. Siller, 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

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

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.

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 \$1,100.00. 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: \$35,767,489.10, together with interest at contract rate from March 6, 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: \$375,000.00.
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 property is annexed hereto as schedule A.

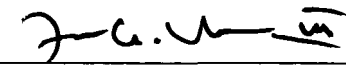
8/8/2024
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


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

Nolitan Hotel
New York, NY

EXHIBIT A
LEGAL DESCRIPTION

ALL THAT CERTAIN plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southerly side of Kenmare Street with the westerly side of Elizabeth Street;

RUNNING THENCE southerly along the westerly side of Elizabeth Street, 33 feet 5 3/4 inches;

THENCE westerly on a line forming an angle on its southerly side of 88 degrees 33 minutes 40 seconds with the westerly side of Elizabeth Street, 93 feet 2 inches;

THENCE northerly on a line forming an angle of 88 degrees 33 minutes 40 seconds on its easterly side with the last mentioned course, 24 feet 11 1/2 inches;

THENCE northerly on a line forming an angle of 180 degrees 40 minutes 50 seconds on its easterly side with the last mentioned course, 23 feet 2 1/4 inches to a point on the southerly side of Kenmare Street;

THENCE easterly along said southerly side of Kenmare Street, 94 feet 2 3/4 inches to the point or place of BEGINNING.

Said premises are known as 153 Elizabeth Street, New York, NY and designated as Block 479 Lot 29 as shown on the Tax Map of the City of New York County of New York