

JYBGAD L.P v West 26th St. Realty LLC

2024 NY Slip Op 32909(U)

August 13, 2024

Supreme Court, New York County

Docket Number: Index No. 850024/2023

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

-----X INDEX NO. 850024/2023

JYBGAD L.P., Plaintiff, MOTION DATE _____

- v -

MOTION SEQ. NO. 004

WEST 26TH STREET REALTY LLC, 35 WEST 26TH
STREET REALTY LLC, OSMAN BESSA, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,

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

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

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 mortgage encumbering two parcels of real property located at 33 West 26th Street and 35 West 26th Street, New York, New York. Defendants West 26th Street Realty LLC, 35 West 26th Street Realty LLC, and Osman Bessa, answered and pled twelve affirmative defenses and a counterclaim. By decision and order dated December 1, 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 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 affidavit of Julian Cokro, ("Cokro"), an Assistant Vice President of Plaintiff. Cokro demonstrated personal knowledge of Plaintiff'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]). Cokro'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' assertion that Plaintiff failed to lay a proper foundation under CPLR §4518[a] is without merit (*see U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Also, 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]).

Concerning whether the mortgaged premises should be sold as one or two parcels, the Referee recommended the property be sold as two parcels. That conclusion was the suggestion contained in the proposed oath and report Plaintiff sent to the Referee. On this motion, Plaintiff reverses course and asks that the property be sold as one parcel. But in support of this request, Plaintiff submitted two entirely conclusory affirmations from Plaintiff and its counsel which speculate a single sale will generate the most income "in light of the fact that the loan covers two properties that are adjacent to another, the Properties would be best sold as a single parcel to bring the most value". In opposition, Defendants also failed to proffer any evidence to support a viable conclusion, rather they simply posited the Referee's conclusion is not supported by the record.

Whether an encumbered property should be sold as a single or multiple parcels is apparent in most situations (*see 2 Bergman, New York Mortgage Foreclosures § 20.03[3] [2024]*). This case is not an exception (*cf. Shaker Cent. Trust Fund v. Crusade for Christ, Inc.*, 16 AD2d 854 [3d Dept 1962]). The mortgaged property consists of two distinct, albeit contiguous, parcels. Each lot is improved by a discrete structure, have independent addresses, are owned by different limited liability companies, and there is no indication the properties were used and operated as an entirety. Also, the rent roll provided to the Court as part of the motion for the appointment of a receiver does not reveal any overlapping tenancies. That the property is presently encumbered by a single mortgage, has no demonstrable affect on the market value of same. As such, the property will be sold as two parcels, on the same day via separate consecutive sales.

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

-----X
JYBGAD L.P.,

Plaintiff,

-against-

WEST 26TH STREET REALTY LLC,35 WEST
 26TH STREET REALTY LLC,OSMAN BESSA,
 NEW YORK CITY DEPARTMENT OF FINANCE,
 NEW YORK STATE DEPARTMENT OF
 TAXATION AND FINANCE,

Defendants.

-----X

and it is further

ORDERED that the 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 at a public auction within 180 days¹ of this judgment, in **two** parcels via **two** consecutive sales conducted on the same date, at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Clark Whitsett, 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

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 sequalee 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 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 \$1,100.00. 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: \$8,934,402.69, together with interest at contract rate from December 6, 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: \$12,677.59.
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.

8/13/2023
DATE


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

ADVANTAGE FORECLOSURE SERVICES, INC.

Title No. FCL-170822-22 (File No. 05243.8347)

**SCHEDULE A
DESCRIPTION**

Block 828 and Lots 13 and 14

Parcel 1

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 a point on the Northerly side of 26th Street, distant 300 feet Easterly from the Easterly side of Sixth Avenue;

RUNNING THENCE Northerly parallel with Sixth Avenue and part of the way through a party wall, 98 feet 9 inches;

THENCE Easterly parallel with 26th Street, 25 feet;

THENCE Southerly and part of the distance through another party wall, 98 feet 9 inches to the Northerly side of 26th Street;

THENCE Westerly along the Northerly side of 26th Street, 25 feet to the point or place of BEGINNING.

TOGETHER with the benefits, if any and SUBJECT to the terms and conditions of a certain party wall agreement dated November 20, 1855, recorded November 21, 1855 at Liber 691 Cp. 520.

Parcel 2

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 a point on the Northerly side of 26th Street, distant 275 feet Easterly from the Easterly side of Sixth Avenue;

RUNNING THENCE Northerly parallel with Sixth Avenue and part of the way through a party wall, 98 feet 9 inches;

THENCE Easterly parallel with 26th Street, 25 feet;

THENCE Southerly and part of the distance through another party wall, 98 feet 9 inches to the Northerly side of 26th Street;

THENCE Westerly along the Northerly side of 26th Street, 25 feet to the point or place of BEGINNING.

Premises known as 33 West 26th Street and 35 West 26th Street, New York, New York