

Flushing Bank v Cabrera Realty Corp.

2024 NY Slip Op 33352(U)

September 19, 2024

Supreme Court, New York County

Docket Number: Index No. 850134/2019

Judge: Francis A. Kahn III

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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 motion, 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, New Sower's opposition and cross-motion are rejected as untimely (CPLR §2214[b]). Plaintiff's motion was returnable July 12, 2024, but New Sower did not file its papers until the day before at 6:30pm. Even were the Court to consider the cross-motion and opposition, it does not establish a basis to deny the motion.

Defendants' assertions that the foundational statements in the affidavit in support of the of amount due were too generalized to lay a proper foundation under CPLR §4518[a] and are not supported by corroborating documentation are without merit (*see U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Any 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]). This Court apprised Defendants of this legal principle and delegated the authority and discretion to determine whether to take testimony to the Referee (*see CPLR* §§4301, 4311). 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]).

The claim that the motion is defective as the relief sought must be framed as a motion to renew under CPLR §2221 is meritless. Plaintiff is not offering new facts to change the outcome of the motion to confirm the Referee's first report. Plaintiff seeks to confirm a different report based upon different submissions.

On the issue of Defendants' claim to an interest toll, "[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*, 190 AD3d 445 [1st Dept 2021], *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]; *Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017]). Defendants have not established the existence of any significant delays in this matter solely attributable to Plaintiff (*see Wells Fargo Bank, N.A. v Abakporo*, 221 AD3d 939, 940 [2d Dept 2023]; *see also US Bank NA v Beymer*, 190 AD3d 445 [1st Dept 2021]). Indeed, much of the delay in this action resulted from Defendant's vigorous defense and the COVID-19 pandemic (*see Deutsche Bank Natl. Trust Co. v Fresh*, 224 AD3d 405 [1st Dept 2024]; *Wells Fargo Bank v Abakporo*, 221 AD3d 939 [2d Dept 2023]; *Bank of N.Y. Mellon v*

Davis, 219 AD3d 420 [1st Dept 2023]; *see also Pentagon Fed. Credit Union v Popovic*, 217 AD3d 480 [1st Dept 2023]).

The branch of the cross-motion to dismiss based upon expiration of the statute of limitations is denied as it violates the single-motion rule (*see* CPLR §3211[e]; *Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694 [1st Dept 2016]). Defendant made a previous motion pursuant to CPLR §3211[a][1]. In any event, that affirmative defense was waived when Plaintiff failed to raise same in either a pre-answer motion to dismiss or in its amended answer (CPLR §3211[e]).

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 Defendants' 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 **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 **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 the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

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 \$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: \$944,009.39, together with interest at the note rate from May 22, 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: \$95,000.00.
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.

9/19/2024
DATE


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

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

STATEWIDE REAL ESTATE SERVICES, LLC

TITLE NO. FC19-LY264

SCHEDULE 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, known and distinguished upon a certain map entitled, "Map of Property belonging to the Jumel Estate, North of 159th Street, made by Stevenson Towels, City Surveyor, dated 5/31/82 and filed in the Register's Office in the City and County of New York as Map No. 898 by Lot 391, more particularly described as follows:

BEGINNING at a point on the westerly side of Amsterdam Avenue (formerly 10th Avenue) distant 50 feet Northerly from the corner formed by the intersection of the northerly side of West 168th Street and the Westerly side of Amsterdam Avenue;

RUNNING THENCE Westerly and parallel with said Northerly side of West 168th Street, 100 feet;

THENCE Northerly and parallel with said Westerly side of Amsterdam Avenue 25 feet;

THENCE Easterly and parallel with the Northerly side of West 168th Street, 100 feet to the Westerly side of Amsterdam Avenue;

THENCE Southerly along said Westerly side of Amsterdam Avenue, 25 feet to the point or place of BEGINNING.

FOR INFORMATION ONLY 2184 Amsterdam Avenue
Premises also known as: New York NY 10032

Block:2125 Lot:47

County of: NEW YORK