

**135 W Gate Dr., LLC v Kahn Prop. Owner, LLC**

2024 NY Slip Op 34893(U)

September 25, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 609493/2016

Judge: James Hudson

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Supreme Court of the State of New York  
County of Suffolk  
Commercial Division Part XLVJ  
Memorandum Decision

**PRESENT:**

HON. JAMES HUDSON  
Acting Justice of the Supreme Court

MOTION DATE: 6/5/24  
SUBMIT DATE: 7/31/24  
Mot. Seq. #: **086 - MotD**

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135 W GATE DRIVE, LLC, as Successor by  
Assignment to U.S. BANK NATIONAL  
ASSOCIATION, as Trustee, Successor in Interest to  
Bank of America, National Association, as  
Successor by Merger to LaSalle Bank for the  
registered holders of J.P. Morgan Chase Commercial  
Mortgage Securities Trust 2007-LDP12,  
Commercial Mortgage Pass-through Certificates,  
Series 2007-LDP12,

Plaintiff,

-against-

KAHN PROPERTY OWNER, LLC; GARY  
MELIUS; OHEKA CATERING I, LLC; OHEKA  
MANAGEMENT, LLC; OHEKA CATERING,  
INC.; OHEKA MANAGEMENT CORP.; PEOPLE  
OF THE STATE OF NEW YORK; and JOHN DOE  
#1-50, said John Doe defendants being fictitious, it  
being intended to name all other parties who may  
have some interest in or lien upon the premises  
sought to be foreclosed,

Defendants,

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KAHN PROPERTY OWNER, LLC; GARY  
MELIUS; OHEKA CATERING I, LLC; and  
OHEKA MANAGEMENT, LLC,

Third Party Plaintiffs,

-against-

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LNR PARTNERS, LLC; STAN GALE; GALE INTERNATIONAL, LLC; and STARWOOD CAPITAL GROUP, LLC,

Third Party Defendants.

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The Plaintiffs, (“Plaintiff”, “135 W Gate”) requests an order: 1) pursuant to **RPAPL 1321**, confirming the May 22<sup>nd</sup>, 2024 referee’s report of David I. Rosenberg, Esq., and thereby determining that the sum of \$50,202,377.40 is due and owing to the plaintiff for principal, interest, late charges, tax, real estate advances, and other fees as of March 1<sup>st</sup>, 2024, plus interest accruing at \$6,747.04 per diem; 2) pursuant to **RPAPL 1351**, granting plaintiff a judgment of foreclosure and sale; 3) awarding plaintiff \$3,100,664.95 in attorneys’ fees; and 4) pursuant to **CPLR 3025**, amending the caption by striking defendants John Doe #1-50, and discontinuing the action against them.

This is a commercial foreclosure action involving improved real property located in the Town of Huntington, County of Suffolk, known as Oheka Castle. The property encompasses approximately 400 acres and is operated as a banquet and catering facility and hotel. Kahn Property Owner, LLC is the owner and Gary Melius owns the controlling interest in that entity. On February 23<sup>rd</sup>, 2023, Justice Emerson ordered summary judgment to 135 W Gate and appointed David I. Rosenberg, Esq. as Referee, directing him to ascertain the monies due and owing to the plaintiff. On May 22<sup>nd</sup>, 2024 the referee filed his report.

135 W Gate now moves for confirmation of the referee’s report, judgment of foreclosure and sale, an award of attorneys’ fees and amendment of the caption to strike and discontinue the action as against the fifty “John Doe” defendants.

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The Court will first consider the request for confirmation of the referee's report. Confirmation requires that the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (**RPAPL 1351**; *U.S. Rof III Legal Title Trust 2015-1 v. John*, 189 AD3d 1645, 1651, 140 NYS3d 59 [2d Dept 2020]; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 [2d Dept 2015] ). The referee's findings and recommendations are advisory, and subject to the decision by the Court, the ultimate arbiter of the dispute (*Citimortgage, Inc. v. Kidd*, 148 AD3d 767, 768, 49 NYS3d 482 [2d Dept 2017]).

On March 18<sup>th</sup>, 2024, Referee Rosenberg conducted a hearing attended by Defendant Gary Melius along with his counsel who also represents the LLC and corporate defendants. At that hearing, which was conducted following document production, the defendants did not present any witnesses. The plaintiff presented two witnesses: Eric Sitman, an officer of 135 W Gate, and Brett Mann, director of LNR Partners, the loan servicer. The hearing was held pursuant to the order of reference. The transcript details the records which were examined and considered in the generation of the referee's report (NYSCEF Doc No. 908). The report is supported by the record. Referee Rosenberg's computations were premised upon the business records produced. Referee Rosenberg determined that the mortgaged premises should be sold in one parcel. On May 22<sup>nd</sup>, 2024 he filed his report.

On September 9<sup>th</sup>, 2024, the Court denied the defendants' untimely motion to reject the referee's report pursuant to **CPLR 4403** (NYSCEF Doc No. 1018). The Court will grant the requested confirmation.

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The Court will next consider the plaintiff's request for judgment of foreclosure and sale ("JFS"). 135 W Gate has been awarded summary judgment and has obtained the pre-requisite order of reference required in this commercial foreclosure (*see US Bank, National Association v. Picone*, 170 AD3d 1070, 1072, 96 NYS3d 671 [2d Dept 2019]).

135 W Gate has filed its proposed JFS (NYSCEF Doc No. 988).

The Court notes that the Defendants do not contest the plaintiff's entitlement to a judgment of foreclosure and sale. Their counsel makes three (3) objections to its proposed content; on which bases the defendants request that the proposed JFS be denied.

Defendants' counsel first and primarily objects to granting the proposed judgment of foreclosure and sale due to what counsel alleges to be exorbitant attorneys' fees. The Court acknowledges plaintiff's argument that the fee request is considerable due to the eight (8) years litigation in this action; including counterclaims, third party claims, innumerable motions, multiple rearguments, and interlocutory appeals and Court hearings and conferences. 135 W Gate requests \$3,100,664.95 in attorneys' fees.

The determination of reasonable attorneys' fees is a matter left to the discretion of the trial court, which is often in the best position to determine the factors integral to the fixing of a reasonable fee (*Diggs v. Oscar De La Renta*, 169 AD3d 1003, 1005, 94 NYS3d 574 [2d Dept 2019]). The reasonableness of counsel fees is a question of fact. In determining a reasonable attorneys' fee, the Court must consider the time and labor expended, the difficulty of the questions involved, the amount involved, counsel's experience, ability and reputation and the customary fee charged for such services (*Matter of Freeman*, 34 NY2d 1, 9, 355 NYS2d 336, 311 NE2d 480 [1974]; *Board of Managers*

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*of Fishkill Woods Condominium v. Gottlieb*, 184 AD3d 792, 795, 126 NYS3d 698 [2d Dept 2020]).

The proposed JFS contains a blank provision for the entry of plaintiffs attorneys' fee. The Court, in its discretion, will schedule and conduct an attorneys' fee hearing to determine the appropriate award. The defendants' objection is not a sufficient basis to deny issuance of the proposed JFS.

Second, defendants' counsel argues that there is no legal basis to enter a deficiency judgment against Mr. Melius. Therefore, he contends, the plaintiff's request for a judgment of foreclosure and sale should be denied.

The proposed JFS does not award a deficiency judgment against Mr. Melius. It states:

. . .that if the proceeds of such sale be insufficient to pay the amount reported due to Plaintiff with interest and costs as aforesaid, to the extent Gary Melius is found personally liable pursuant to the Indemnity Agreement dated as of August 2, 2007, given by Gary Melius (NYSCEF Doc No. 108) (the "Indemnity Agreement") for a deficiency remaining after a sale of the property, Plaintiff may recover from defendant Gary Melius the whole deficiency or so much thereof as the Court may determine to be just and equitable of the Mortgage debt remaining unsatisfied after the sale of the property and the application of the proceeds thereof is determined and awarded by an order of the Court. For the avoidance of doubt, Plaintiff and defendant Gary Melius reserve all rights with respect to any motion or other proceedings, including but not limited to any motion brought pursuant to **RPAPL §1371**, concerning (i) defendant Gary Melius' liability under the Indemnity Agreement; and (ii) the amount of any deficiency that Plaintiff may seek to recover from defendant Gary Melius; . . . (NYSCEF Doc No. 988, P. 9-10).

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The proposed JFS neither declares a deficiency judgment nor states that Mr. Melius has been held responsible to make such payment. There has been no motion or other proceeding held to make that determination. Defendants' objection is premature; and does not constitute a sufficient basis for the Court to deny the issuance of the proposed JFS.

Third, defendants' counsel argues that the judgment should stay the foreclosure sale because of the "tenuous state of title to the Castle" and that the order should include "a sales process that will maximize the proceeds of the proposed sale for all stakeholders" (NYSCEF Doc No. 993, at 16).

Counsel asserts that a foreclosure auction should not be authorized because title to the subject property is uncertain, citing to *Golden Bridge, LLC v. Rutland Dev. Group, Inc.*, 218 AD3d 658, 194 NYS3d 490 (2d Dept 2023). That case may be distinguished. It concerned a foreclosure sale where there was a separate, ongoing quiet title action and a potentially forged deed (*Id.* at 662-663). Neither issue is present in this action.

The basis cited by the defendants for a stay is that they have appealed the order of reference. The defendants have not moved for a stay, nor filed an undertaking (CPLR 5519 [a] [6], [c], [d]). The filing of an appeal does not generate an automatic stay (*Tax Equity Now NY LLC v. City of New York*, 173 AD3d 464, 465, 104 NYS3d 50 [1st Dept 2019]). The appeal does not constitute a "tenuous state of title" to the foreclosed property.

Similarly, the defendants' argument that their appeal of the dismissal of the Article 78 action, in the case entitled *Cold Spring Country Club, Inc., et al. v. Town of Huntington, et al.*, Index No. 609827/2023, renders title to the subject premises uncertain,

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is not correct. The defendants have not demonstrated an issue which renders title as to the subject premises uncertain.

Finally, the defendants argue that the judgment of sale should include a sales process to maximize the proceeds of sale for all stakeholders. First, the defendants are not creditors. Second, **RPAPL Article 13** dictates the statutory procedure for the foreclosure sale. The defendants do not cite to any binding authority to deviate from that procedure. They allege, without substantiation, that “the uniqueness and the value of the [Oheka] Castle” warrant a “special sale and bidding process to ensure that all qualified bidders have adequate opportunity to maximize their bids and the auction maximizes the value received for the Castle” (NYSCEF Doc No. 993, at 3). Buyers at foreclosure auctions have an opportunity to conduct due diligence prior to the commencement of the advertised auction. The defendants’ objections regarding title issues and special auction procedures as bases to deny the issuance of judgment of foreclosure and sale are denied.

Finally, the Court will consider the plaintiff’s request to amend the case caption to strike the Defendants “John Doe #1-50”. The Court notes that the request is unopposed (see *Deutsche Bank Natl. Trust Co. v. Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Plaza Equities, LLC v. Lamberti*, 118 AD3d 688, 986 NYS2d 814 [2d Dept 2014]; *Jessabell Realty Corp. v. Gonzalez*, 116 AD3d 908, 985 NYS2d 897 [2d Dept 2014]).

When a motion request is unopposed, there effectively is a concession that no question of fact exists and that the request may be admitted (see *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 330 NE2d 624 [1975]; *HSBC Bank USA v.*

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*Simms*, 16 AD3d 930, 81 NYS3d 517 [2d Dept 2018]). The plaintiff's request to amend the caption will be granted.

The balance of the defendants' arguments were carefully considered by the Court and are each denied.

Accordingly, it is

**ORDERED**, that the motion (seq. no. 086) by the plaintiff, 135 W Gate Drive LLC, as successor by assignment to U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as successor by merger to LaSalle Bank for the registered holders of J.P. Morgan Chase Commercial Securities Trust 2007-LDP12, Commercial Mortgage Pass-Through Certificated Series 2007-LDP12 which requests, pursuant to **RPAPL 1321**, confirmation of the May 22<sup>nd</sup>, 2024 referee's report, is granted; and it is further

**ORDERED**, that the request, pursuant to **RPAPL 1351**, granting plaintiff a judgment of foreclosure and sale, is granted; and it is further

**ORDERED**, that the request, pursuant to **CPLR 3025**, amending the caption by striking the defendants John Doe #1-50, and discontinuing the action against them, is granted; and it is further

**ORDERED**, that the caption will now read:

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

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135 W GATE DRIVE, LLC, as Successor by Assignment to  
U.S. BANK NATIONAL ASSOCIATION, as Trustee,

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Successor in Interest to Bank of America, National Association, as Successor by Merger to LaSalle Bank for the registered holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007-LDP12, Commercial Mortgage Pass-Through Certificates, Series 2007-LDP-12,

Plaintiff,

-against-

KAHN PROPERTY OWNER, LLC; GARY MELIUS; OHEKA CATERING I, LLC; OHEKA MANAGEMENT, LLC; OHEKA CATERING, INC.; OHEKA MANAGEMENT CORP.; PEOPLE OF THE STATE OF NEW YORK,

Defendants.

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and it is further


**ORDERED**, that the Plaintiff notify the County Clerk of the caption amendment pursuant to 8019 (c).

**ORDERED**, that the request for an attorneys' fee award to the plaintiff is granted to the extent that a **Hearing will be held on October 22<sup>nd</sup>, 2024 at 10:30 am at the Courthouse, 1 Court Street, Part XLVI, Riverhead, New York 11901, for the purpose of determining the Plaintiffs Attorneys' Fees in this action.**

The proposed order and judgment has a caption that does not reflect the third decretal paragraph. Accordingly, plaintiff is directed to submit (on notice) an amended proposed judgment and order reflecting this decision.

This memorandum also constitutes the Order of the Court.

Dated: September 25<sup>th</sup>, 2024  
Riverhead, NY

  
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**HON. JAMES HUDSON**  
Acting Justice of the Supreme Court