

U.S. Bank N.A. v Mercer 111 Retail, LLC

2025 NY Slip Op 31495(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 850031/2023

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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INDEX NO. 850031/2023

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF COMM 2013-CCRE12 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC,

MOTION DATE _____

MOTION SEQ. NO. 003

Plaintiff,

- v -

MERCER 111 RETAIL, LLC, EDMOND LI, THE BOARD OF MANAGERS OF THE MERCER 111 CONDOMINIUM, NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK,

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

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

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

The within action is to foreclose on an amended, restated and consolidated mortgage encumbering a parcel of real property located at 111 Mercer Street, New York, New York. The encumbrance was given to non-party Cantor Commercial Real Estate Lending, LP. (“Cantor”), by Defendant Mercer 111 Retail, LLC (“Mercer”) and secures an indebtedness of \$5,650,000.00. The indebtedness is memorialized by an amended, restated and consolidated mortgage note. Both the note and mortgage, dated October 13, 2013, were executed by Defendant Edmond Li (“Li”) as President of non-party Mercer 111 Special, Inc. (“Special”), the Manager of Mercer. Concomitantly with these documents, Li executed a guaranty of recourse obligations. The loan transaction is governed by a loan agreement executed by Li on the same date as all the other documents.

By order of this Court dated April 12, 2024, Plaintiff’s motion for summary judgment was denied on the basis that *prima facie* proof of Plaintiff’s standing was not established. By order dated September 19, 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 Special and Li oppose the motion.

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 lien, accrued common charges, interest, and other expenses (*see generally 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. 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 the action or otherwise acted in bad faith (*see Bank of Am., N.A. v Lucido*, 114 AD3d 714 [2d Dept 2014]).

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 seeks \$132,815.16 as an award of counsel fees. The within action was contested for nearly two years and has seen three motions and submissions to the Referee. Such litigation often results in the accumulation of significant legal costs. 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 establish its standing and authority to act which is a oft contested issue 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 \$85,000.00.

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 **Tom Kleinberger, 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

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.

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

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: \$6,417,204.41, together with interest at contract rate from September 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: \$85,000.00.
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.

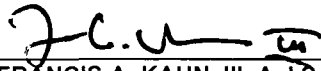
<u>4/3/2025</u> DATE			 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	HON. FRANCIS A. KAHN III
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> OTHER J.S.C.
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

EXHIBIT A**LEGAL DESCRIPTION**

THE CONDOMINIUM UNIT (hereinafter referred to as the "Unit") in the building (hereinafter referred to as the "Building") known as The 111 Mercer Condominium and by the Street Number 111 Mercer Street, County of New York, State of New York, said Unit being designated and described as Commercial Unit C in a Declaration dated 5/14/2013 made by Mercer 111 LLC, pursuant to Article 9-B of the Real Property Law of the State of New York (hereinafter referred to as the "Condominium Act") establishing a Plan for condominium ownership of the Building and the Land (hereinafter referred to as the "land") upon which the building is situate (which land is more particularly described in Exhibit A annexed hereto and by this reference made a part hereof), which Declaration was recorded in the Office of the City Register of the City of New York, County of New York, on 7/17/2013 as CRFN 2013000282553, (which Declaration and Amendments (if applicable) thereto are hereinafter collectively referred to as the "Declaration"). This Unit is also designated as Tax Lot 1601 in Block 499 of the County of New York on the Tax Map of the Real Property Assessment Department and on the Floor Plans of the Building, filed with the Real Property Assessment Department on 7/11/2013 as Condominium Plan No. 2265 and also filed in the Office of the City Register of the City of New York, County of New York, on 7/17/2013 as Condominium Map No. CRFN 2013000282554.

TOGETHER with an undivided 25.9319% interest in the Common Elements (as such term is defined in the Declaration).

TOGETHER with and SUBJECT to the rights, obligations, easements, restrictions and other provisions set forth in the Declaration, Floor plans and the By-Laws of The 111 Mercer Condominium, as the same may be amended from time to time (herein after referred to as the "By-Laws"), all of which shall constitute covenants running with the Land and shall bind any person having at any time any interest or estate in the Unit, as though recited and stipulated at length herein.

The land on which the building and unit is located is situated in the County of New York and State of New York and is more fully described in the Declaration of Condominium recorded in the Office of the City Register of the City of New York, County of New York, on 7/17/2013, as CRFN 2013000282553.

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, being part of the farm formerly called "Bayard's Farm" and which said lot is known and distinguished on a map made by Casimer Th. Goerck one of the sworn surveyors of said City by lot No. 130 and is bounded and described as follows:

BEGINNING at a point on the westerly side of Mercer Street, distant 125 feet northerly from the corner formed by the intersection of the westerly side of Mercer Street and the northerly side of Spring Street;

RUNNING THENCE westerly and parallel with Spring Street, 100 feet;

THENCE northerly and parallel with Mercer Street, 25 feet;

THENCE easterly and again parallel with Spring Street and part of the way through a party wall, 100 feet to the westerly side of Mercer Street;

THENCE southerly along the westerly side of Mercer Street, 25 feet to the point and place of BEGINNING.

Said premises also being described as follows:

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, being part of the farm formerly called "Bayard's Farm" and which said lot is known and distinguished on a map made by Casimer Th. Goerck one of the sworn surveyors of said City by lot No. 130 and is bounded and described as follows:-

Easterly in front by Mercer Street;

Southerly by Lot No. 129 on said map;

Westerly by Lot No. 157 on said map;

Northerly by Lot No. 131 on said map;

For Information Only: Said premises are known as 111 Mercer Street, New York, New York and designated as Section 2 Block 499 Lot 32 as shown on the Tax Map of the City of New York, County of New York.