SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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VFC PARTNERS 4, LLC,

Plaintiff,

-against-

SYZ HOLDINGS, LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, YAKOOV GOLDFEDER, JOEL BERKOWITZ, NEW YORK STATE, "JOHN DOE #1" through "JOHN DOE #60",
Inclusive, the true names of said Defendants being intended to be those persons having or claiming an interest in the mortgaged premises described in the complaint by virtue of being tenants, occupants, owners, judgment creditors, or lienors of any type or nature, and/or their heirs, successors, or assigns in all or part of said premises,

Defendants.

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TP-9
Present:
Hon. Anthony I. Giacobbe

DECISION AND ORDER

Index No. 131523/10
Motion Nos. 003, 004

The following papers numbered 1 to 6 were marked fully submitted on the 4th day of May, 2012:

Plaintiff's Notice of Motion for Judgment of Foreclosure and Sale and to Confirm Report of Referee with supporting papers (dated April 2, 2012).....1

Affirmation in Opposition by Defendant SYZ Holdings LLC, Yakoov Goldfeder and Joel Berkowitz with supporting papers (dated April 10, 2012).....2

Plaintiff's Reply Affirmation (dated April 22, 2012).....3

Receiver's Notice of Motion to Consolidate with Supporting Papers (dated April 11, 2012).....4

Affirmation in Opposition by Defendant SYZ Holdings LLC, Yakoov Goldfeder and Joel Berkowitz (dated April 20, 2012).....5

Receiver's Reply Affirmation (dated April 27, 2012).....6

Upon the foregoing papers, the motions are decided as follows:

Plaintiff VFC Partners 4, LLC ("VFC") commenced this action to foreclose two mortgages relating to certain commercial premises located at 120 Stuyvesant Place, Staten Island, New York. In the pending application to confirm the Referee's Report dated February 23, 2012, the appearing defendants, SYZ Holdings, LLC, the mortgagor, and Yakoov Goldfeder and Joel Berkowitz, its guarantors (collectively, "defendants"), maintain that it was an error on the part of the court-appointed referee to render his report without "either conducting a hearing on notice or otherwise affording the contesting party an opportunity to present its own proof or challenge [his] computations" (*Sears v. First Pioneer Farm Credit*, 46 AD3d 1282, 1286 [3rd Dept. 2007]; *see*, CPLR 4313). In this regard, it is further alleged that absent a hearing wherein the appropriate witnesses can be examined under oath in order to ascertain the amount due, the proposed Referee's Report should not be confirmed.[1] Finally, defendants contend that the referee, in his discretion, should not have awarded the plaintiff/mortgagee interest at the default rate. Based on the foregoing, defendants argue that the instant application for a Judgment of Foreclosure and Sale must be denied as premature.

At the outset, it is worthy to note that the Court's Order dated June 29, 2011 granted summary judgment in favor of plaintiff and appointed a referee "...to take proof

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[1] The Referee's Report pending before the Court for confirmation is based upon the documentary evidence submitted for his consideration, which included the underlying mortgages, the related consolidation, modification and extension agreements, along with the affidavit of plaintiff's senior vice president, Jeff Coupe, dated February 6, 2012, indicating the amount claimed to be due. Interest on the outstanding principal balance of both mortgages was calculated at the default rate of 24%.

of the facts and circumstances stated in the complaint and to examine the plaintiff or its agents on oath as to any payments which may have been made, *or in lieu thereof, to do so on documentary evidence and affidavits submitted to said Referee* and all other parties entitled thereto ..." (emphasis added). Hence, this Court rejects the objectants' claim that the Referee was not authorized to render his report without conducting a hearing (*see*, CPLR 4318). In any event, "[i]n cases involving references to report, the Referee's findings and recommendations are advisory only []; they have no binding effect and the court remains the ultimate arbiter of the dispute. In keeping with the nature of these reports, CPLR 4403 expressly authorizes a court not only to reject the report but to make its own findings, to take or retake testimony or to order a new trial or hearing before the Referee prior to rendering a decision" (*Shultis v. Woodstock Land Development Associates*, 195 AD2d 677, 678-679 [3rd Dept. 1993] [citation omitted]).

Although, in the Court's opinion, the Referee's failure to conduct a hearing would likely be characterized as harmless error (*see*, *Deutsche Bank National Trust Co. v. Zlotoff*, 77 AD3d 702 [2nd Dept. 2010]), and there has been no showing that he improperly calculated the amounts due, defendants should nevertheless have been afforded the opportunity to contest or contradict the Referee's computations by the submission of proof, if any exists, in the form of affidavits and, where applicable, documentary evidence (*see*, CPLR 4318, 4320[a]; *Sears v. First Pioneer Farm Credit, supra* at 1286; *Shultis v. Woodstock Land Development Associates, supra* at 678-679). Accordingly, the matter is remanded to the referee for *de novo* proceedings and a new report. In the absence of any factual issues, there will be no need to conduct an evidentiary hearing (*see*, *NYCTL 1996-1 Trust v. Westmoreland Associates*, 33 AD3d

900, 902 [2nd Dept. 2006]; *cf.*, *Preferred Group of Manhattan, Inc. v. Fabius Maximus*, Inc., 51 AD3d 889, 890 [2nd Dept. 2008]). As the matter is to be remanded, it may worthy to confirm defendants' assertion that the determination of the rate of interest to be charged is a matter committed in the first instance to the sound discretion of the referee (*see*, *Preferred Group of Manhattan, Inc. v. Fabius Maximus, Inc.*, supra at 890).

Turning to the Receiver's motion to remove a pending nonpayment proceeding (*Tzanz Properties, LLC v. Educational Data Systems, Inc.*, L&T Index No. 54443/2011) from the Richmond County Civil Court for consolidation with the instant foreclosure action, it is pertinent to note that the Receiver, who has collected rents from "the tenants in possession of said premises" pursuant to this Court's Order dated June 29, 2011, has intervened in the Civil Court action and filed an answer to the nonpayment petition.

Insofar as it appears on the papers before the Court, Tzanz Properties, LLC ("Tzanz") is the prime tenant of defendant SYZ pursuant to a written lease providing for a monthly rental payment of $10,000.00. Tzanz subsequently subleased the mortgaged premises to Educational Data Systems, Inc. pursuant to an oral agreement requiring the latter to pay monthly rent in the amount of $29,000.00. In Civil Court, although Tzanz has conceded that its subtenant is obligated to pay to the Receiver the base monthly rental of $10,000.00 that is due to defendant SYZ, it maintains that the balance of $19,000.00 per month which has been collected since approximately October of 2011 represents repayment for the structural improvements made by it to the subject premises, including the installation of a complex electrical and HVAC system. According to Tzanz, the cost of these improvements is being recouped from its subtenant at the rate of $19,000.00 per month.

It is well settled that "[c]onsolidation is mandated by judicial economy where two lawsuits are intertwined with common questions of law and fact" *(see, Teitelbaum v. PTR Co.*, 6 AD3d 254, 255 [1st Dept. 2004]). According to the Receiver, since the seminal issue in the nonpayment proceeding is whether or not he was granted the authority to collect the entire subrent of $29,000.00 from Educational Data Systems, Inc. on behalf of the mortgagor (SYZ), it is argued that this Court, from whose order his power devolves, is in a superior position to interpret the extent of his authority than Civil Court.

Nevertheless, the law in this area is unambiguous, "absent fraud or collusive action in anticipation of foreclosure or receivership, pending a judgment of foreclosure and sale the receiver 'may not collect a higher rent from a tenant than is stipulated in a lease, nor may he collect any other sum than the normal rents and profits from the premises to which the owner would be entitled if there were no receivership'" *(Central Savings Bank v. Chatham Associates, Inc.*, 54 AD2d 873, 874 [1st Dept. 1976] [internal citation omitted]; *see, New York City Community Preservation Corp. v. Michelin Associates*, 115 AD2d 715, 717-718 [2nd Dept. 1985], *lv denied*, 8 NY2d 604 [1986]; *see also, Bank of Tokyo Trust Co. v. Urban Food Malls, Ltd.*, 229 AD2d 14, 27-28 [1st Dept. 1996]). The implications for the case pending in Civil Court are clear. There is no identity among the parties to this proceeding and that pending before the Civil Court, nor is the purported "differential" in rents sought by Tzanz unmistakably "intertwined" with any of the issues in this mortgage foreclosure action (*see*, CPLR 602[b]). Hence, the motion for removal and consolidation is denied.

Accordingly, it is

ORDERED, that the motion (003), *inter alia*, to confirm the Referee's Report is denied; and it is further

ORDERED, that the matter is remanded to the Referee in foreclosure, Phillip Mancuso, Esq., for *de novo* proceedings and a new report in accordance herewith; and it is further

ORDERED, that the Referee shall file his report with all due diligence; and it is further

ORDERED, that the motion by the Receiver (004), Thomas K. Penett, Esq., for removal and consolidation of a pending nonpayment proceeding in Richmond County Civil Court under L&T Index No. 54443/2011 with the within foreclosure action is denied; and it is further

ORDERED, that the motion by the Receiver (005), held in abeyance at the request of the Receiver and respondents/defendants pending the resolution of the motions (003, 004) at issue herein, shall be heard at 10:00am on September 21, 2012.

E N T E R,

Dated: September 5, 2012

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J.S.C.