82-96 Lorraine LLC v Midwood Gardens LLC
2015 NY Slip Op 31107(U)
June 29, 2015
Supreme Court, Kings County
Docket Number: 500178/13
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of June, 2015.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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82-96 LORRAINE LLC,

Plaintiff,

- against -

Index No. 500178/13

MIDWOOD GARDENS LLC, et al.,

Defendants.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5-6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff 82-96 Lorraine LLC moves for an order 1) granting a judgment of foreclosure and sale, 2) confirming the referee's report of the amount due, dated November 24, 2014 and 3) fixing attorneys fees and costs.

Community Preservation Corp. (CPC), plaintiff's predecessor-in-interest, commenced this action on January 10, 2013 to foreclose a consolidated mortgage encumbering the property at 1537, 1541 and 1543 East 19th Street in Brooklyn. On October 17, 2007, CPC

issued a loan to defendant Midwood Gardens LLC (Midwood) in the principal amount of $14,300,000, the proceeds of which were to be used toward the acquisition of the subject property and the construction of a condominium project thereon. The loan is evidenced by a note previously executed by Midwood on September 20, 2006 in the principal sum of $2,565,000; and a gap note, dated October 17, 2007, in the principal sum of $11,735,000. These notes were consolidated, amended and restated pursuant to a Consolidated, Amended and Restated Building Loan Note (Consolidated Note), dated October 17, 2007. The Consolidated Note is secured by mortgages on the properties consisting of a mortgage dated September 20, 2006, in the principal sum of $2,565,000, which was recorded on October 10, 2006 and a gap mortgage, dated October 17, 2007, in the principal sum of $11,735,000, which was recorded on November 5, 2007. The mortgages were consolidated, extended and modified so that together they form a single first priority mortgage lien on the premises in the amount of $14,300,000, pursuant to the Building Loan Mortgage Modification, Consolidation, Extension, Assignment of Leases and Rents and Security Agreement (Consolidated Mortgage) dated October 17, 2007. The Consolidated Note provided, inter alia, that funds would be advanced pursuant to the terms of the Building Loan Agreement entered into by CPC and Midwood and that the outstanding principal amount, along with all interest accrued thereon, shall become due and payable on November 1, 2009 (the "Maturity Date"). As additional security for the loan, defendant Donald Fishoff, the managing member of Midwood, signed a personal guaranty for the repayment of loan. Pursuant to a

Modification and Extension Agreement between CPC and Midwood dated May 28, 2010, the Maturity Date of the loan was extended from November 1, 2009 to June 1, 2012.

According to the complaint, Midwood defaulted under the loan documents by, inter alia, failing to pay to plaintiff the principal, together with all accrued and unpaid interest thereon, that matured and became due and payable in full on the Maturity Date of June 1, 2012. By order dated August 15, 2014, this court granted CPC summary judgment, among other relief, and appointed a referee to compute the amount due under the mortgage. In his report, dated November 24, 2014, the referee stated that the sum of $8,308,138.72, plus interest and any escrow advances, was due under the mortgage from October 7, 2014, exclusive of counsel fees. Plaintiff, the assignee of CPC, now moves for confirmation of the referee's report, a judgment of foreclosure and sale and an award of attorneys fees and costs.

Defendants oppose that part of plaintiff's motion to confirm the referee's report, arguing that the referee used an incorrect default rate of interest, a static 8.5%, in calculating the amount due. Defendants contend that pursuant to the terms of the consolidated note, the formula for calculating the default rate adds 4% to a fluctuating LIBOR base interest rate. In their opposition papers, defendants submit printouts of loan statements issued by CPC purporting to show that the interest rates for the years 2012 and 2013 (when the loan was in default) fluctuated from 8.05% to 7.978750%.

Pursuant to CPLR 4403, the Supreme Court has the power to "confirm or reject, in whole or in part . . . the report of a referee" and may "make new findings with or without

taking additional testimony" or "order a new trial or hearing" (*see Matter of Frontier Ins. Co.*, 73 AD3d 36, 42-43 [3d Dept 2010]; *Stein v American Mtge. Banking*, 216 AD2d 458 [2d Dept 1995]). Generally, the recommendations and report of a referee should be confirmed as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility (*see IG Second Generation Partners, L.P. v Kaygreen Realty Co.*, 114 AD3d 641, 643 [2d Dept 2014]; *Spodek v Feibusch*, 55 AD3d 903, 903 [2d Dept 2008]; *Matter of County Conduit Corp.*, 49 AD3d 641, 641 [2d Dept 2008]).

The evidence before the referee consisted of the Consolidated Note with a certain allonge evidencing plaintiff as the holder, Consolidated Mortgage, Modification and Extension Agreement, Assignment of Mortgage from CPC to plaintiff and Testimony Before Referee, sworn to by Shoshana Carmel, a director of plaintiff, on October 15, 2014. The referee adopted Ms. Carmel's statement of the amount due and owing, which utilized a static 8.5% default rate of interest.

Upon review of the evidence before the referee, the court finds that the referee's calculation as to the amount due, including his application of the static 8.5% default rate, is supported by the record. The documents submitted by defendants in their opposition papers were not before the referee, and there is no allegation that defendants were not given notice of the referee's hearing.

The default rate of interest is established under section 4 (b) of the Consolidated Note, which provides, in relevant part:

> (b) if any installment due under this Note or Mortgage remains past due for thirty (30) calendar days or more, the outstanding principal balance of this Note shall bear interest during the period in which the undersigned is in default at a rate equal to the lesser of 4% above the interest rate then in effect hereunder, or the maximum interest rate which may be collected from Maker under applicable law (the "Involuntary Rate"). If the unpaid principal balance and all accrued interest are not paid in full on the Maturity Date, the unpaid principal balance and all accrued interest shall bear interest from the Maturity Date at the Involuntary Rate.

Thus, the default interest rate, or "Involuntary Rate" to be applied on and after the Maturity Date is the "interest rate" then in effect on the Maturity Date plus 4% (assuming this rate is less than the maximum rate allowable by law). Under section "1" of the Consolidated Note the interest rate is based on a fluctuating rate per annum "equal to two and eight-tenths percent (2.80%) above the LIBOR Rate" plus any additional interest defined in the Consolidated Note for periods during extension of the Maturity Date. However, this section "I" of the Consolidated Note predicating the interest rate on LIBOR was deleted and replaced by paragraph 2(c) of the Modification and Extension Agreement, which provides, in relevant part:

> "From February 1, 2011 through and including the Maturity Date, the Principal Amount shall bear interest for any Interest Accrual Period. . .at an aggregate, fluctuating interest rate per annum equal to the amount that is two hundred (200) basis points above CPC's Cost of Funds. As used herein CPC's Cost of Funds shall mean the interest rate payable by CPC under that

certain Revolving Credit Agreement (the 'Agreement') dated as of June 1, 1998. . ."

Thus, contrary to the contention of defendants, the correct default rate of interest is not based on a fluctuating LIBOR rate, but the rate of interest as determined under paragraph 2 (c) of the Modification and Extension Agreement utilizing CPC's Cost of Funds rate. According to the supplemental affidavit of Ms. Carmel, dated March 19, 2015, beginning in November 2011, and through December 2012 (when the default rate was first applied by the referee), the rate of CPC's Cost of Funds was made subject to a 2.5% floor. Accordingly, the default interest rate was properly calculated by adding 200 basis points (2%) to the 2.5% CPC's Cost of Funds rate to establish the interest rate in effect on the Maturity Date (4.5%), and then adding the 4% supplement stated in section 4 (b) of the Consolidated Note to this Maturity Date interest rate (8.5% total).

Accordingly, the report of the referee is hereby confirmed.

Those unopposed parts of plaintiff's motion for a judgment of foreclosure and to fix attorneys fees at $15,727.50 and costs and disbursements at $1012.85 are granted.

A signed judgment of foreclosure in the form submitted by plaintiff shall be issued by this court after review.

The forgoing constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. LAWRENCE KNIPEL

NANCY T. SUNSHINE
Clerk