

Horizons Investor Corp. v Brecevich

2013 NY Slip Op 32600(U)

October 7, 2013

Supreme Court, New York County

Docket Number: 114600/2009

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: How Joan A. Miller
Justice

PART 11

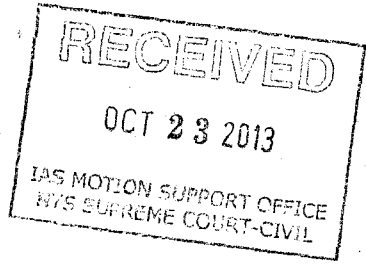
Index Number : 114600/2009
HORIZONS INVESTORS CORP.
vs.
BRECEVICH, JOHN
SEQUENCE NUMBER : 004
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for confirm report
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
unrecorded Memorandum Decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):



Dated: October 7, 2013

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

S/D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
HORIZONS INVESTOR CORP.,

INDEX #: 114600/09

Plaintiffs

- against -

JOHN BRECEVICH a/k/a GIOVANNI BRECEVICH &
ROSEMARY BRECEVICH & WARMINSTER INVESTMENTS
CORP., & NYC ENVIRONMENTAL CONTROL BOARD,

Defendants.

-----X
JOAN A. MADDEN, J

In this mortgage foreclosure action, plaintiff mortgagee Horizons Investors Corporation (“Horizons”) moves for an order (1) confirming the Referee’s Report of Computation, and (2) issuing a Judgment of Foreclosure and Sale. Defendants John and Rosemary Brecevich oppose the motion.

Background

This is an action for foreclosure of a consolidated mortgage held by defendants in the amount of \$1,175,000 on a building located at 2283 First Avenue, New York, NY, a mixed use residential and commercial building (hereinafter “the premises”). Defendant John Brecevich, as mortgagor, defaulted on the mortgage by not making payments that became due and owing, commencing June 1, 2007. Horizons moved for summary judgment to foreclose the mortgage. Defendants John Brecevich and Rosemary Brecevich opposed the motion and cross-moved for an order to dismiss. By decision and order dated July 13, 2011, the court held that Horizons established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage, and the default by John Brecevich. Also pursuant to its July 13, 2011

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decision and order, the court appointed Special Referee Francis D. Terrell, Esq. to ascertain and compute the amount due to plaintiff. Following the issuance of the Referee's report, Horizons moved to confirm the report and for the issuance of a Judgment of Foreclosure and Sale.

In opposition, defendants asserted, *inter alia*, that: 1) the documents listed by the referee as "note and mortgage" do not match the documents furnished to the court, 2) a default rate of 24% is not mentioned in the mortgage or note, which only permits it to be "19% or the highest rate allowed," so the default rate would have to be 19%, 3) interest should be disallowed from April 28, 2008, the date plaintiff wrongfully recorded a deed to the premises in an attempt to allegedly circumvent the statutory scheme and eviscerate defendant's constitutional right to the equity of redemption, 4) Horizons' act in recording the deed after the date of the mortgage supersedes the mortgage and served to create an equitable mortgage, which revises and supersedes the terms of the original mortgage, 5) the determination in this case must await the adjudication of the damages sought by defendant Brecevich in the deed case, as those damages would properly serve as a setoff or credit to be applied towards the equity of redemption, 6) an examination of the signature page of the mortgage allegedly indicates that plaintiff either intentionally omitted or altered pages in the mortgage, and 7) Horizons was aware that the entire premises is being used as a one to four family dwelling by Mr. Brecevich and his family, which would confirm that Horizons' prosecution of this action as a commercial mortgage foreclosure is in contravention of the notice requirements of RPAPL § 1304.

In its decision and order dated October 22, 2012 ("October 2012 decision"), the court found that defendants' arguments did not provide a basis for rejecting the Referee's report as they were outside the only issue here which is the amounts due on the note. The court further noted that many of the defendants' arguments were previously raised and decided against

defendants in the court's decision and order dated July 13, 2011, and therefore the doctrine of collateral estoppel barred defendants from relitigating them. See Barcov Holding Co. v. Bexin Reality Corp., 16 A.D.3d 282, 283 (1st Dept 2005)(mortgagor was barred by the doctrine of collateral estoppel from relitigating the defenses of payment and statute of limitations as these issues were previously decided against it).

On January 12, 2011, the Referee filed his report, together with an abstract of the documentary evidence introduced during the proceeding. In his report, the Referee recommended:

(1) "...I have computed and ascertained the amount due to Plaintiff upon said note and mortgage as of the day of December 31, 2012 the date that interest was computed in my report the sum of \$2,430,433.12, including allowed expenditures made by Plaintiff," and

(2) The mortgaged premises should be sold in one parcel.

At oral argument, defendants argued that the Referee incorrectly computed the taxes in the Referee's Report, which were listed as \$11,515.78. Horizons conceded that the computation was incorrect. Defendants also argued that the fines paid by Horizons to the Environmental Control Board should not have been added to the mortgage, and that, in any event, Horizons failed to submit with the papers the evidence and documentation constituting the record of environmental assessment charges and defendants dispute said record, so it is not possible for the court to determine whether the Referee's findings with respect to such charges are in fact supported by the record.

In its October 2012 decision the court found that environmental assessment costs were recoverable by the mortgagee based on the terms of the mortgage under which defendant/mortgagor John Breceovich covenanted in the Mortgage, "I will pay all taxes, *assessments*, water

charges, sewer rents and other similar charges, and any other charges or fines that may be imposed on the property...” (Mortgage, para. 4, at 7)(emphasis supplied). The court also noted that Horizons submitted as evidence receipts from the Environmental Control Board. However, while holding that the environmental assessment costs were recoverable by the mortgagee, as defendants disputed such costs, the court found that before awarding them to Horizons, the assessments should be explained by Horizons in an affidavit from a person with knowledge attaching any relevant documents. See Centerbank v. D’Assaro, 158 Misc.2d 92 (Sup. Ct. Suffolk Co. 1993)(finding that amount of environmental assessments were properly awarded to plaintiff based upon plaintiff’s explanation for such assessments). The court then directed that Horizons provide this additional evidence to the Referee for his consideration. In addition, in light of the above tax computation defect in the Referee’s report, the court directed the Referee to recalculate the amount of taxes and issue a new report with regard to the taxes, and to determine if the amount of environmental assessment is appropriate.

In compliance with the court’s order, Horizon submitted to the Referee the November 13, 2012 affidavit of its Vice President, Aureo I. Cardona, who states that the fines involved work performed on the premises by John Breceovich, who failed to obtain permits to construct new partitions and new electric and plumbing lines in the third floor apartment at the premises, and that the ECB also found that Mr. Breceovich failed to obtain proper permits for the construction of a wall in the rear of the premises. According to Mr. Cardona the fines totaled \$20,400, and were paid by Horizons. Horizons also submitted to the Referee the ECB determination regarding these violations and fines. Horizons also submitted to the Referee proof of payment of water and sewer charges, including an additional \$21,597.79 paid by it on November 13, 2012.

On November 30, 2012, the Referee issued a report in which it determined that a total of \$2,707,205, was due and owing, including \$20,375 in taxes, \$43,049 in sewer and water assessments, and \$20,400 for ECB fines (hereinafter “the November 2012 Report”).

The Motion

Horizons now moves for an order confirming the November 2012 Report and issuing a Judgment of Foreclosure and Sale. In support of the motion, Horizons submits the materials submitted to the Special Referee, including an affidavit from Mr. Cardona.

Defendants oppose the motion on various grounds including that the Referee failed to comply with the October 2012 decision as he did not make a determination as to whether the amount of ECB assessments was appropriate, the Referee doubled the water and sewer charges, and the taxes were increased from \$11,515.78 to \$20,375, even though plaintiff only attaches two checks for payment of taxes totaling \$12,003.99. Defendants also argue that they should not be required to pay the ECB violations as such violations were issued to owner Warminster Investments Corporation and there is no indication in Mr. Cardona’s affidavit who paid the violation. Defendants further argue that the Referee acted improperly by recalculating the amounts owed with respect to water and sewer charges, as the Referee was not ordered to recalculate these charges.

Defendants also raise various arguments previously rejected by the court, including that interest should be disallowed from April 28, 2008, the date plaintiff wrongfully recorded a deed to the premises in an attempt to allegedly circumvent the statutory scheme and eviscerate defendant’s constitutional right to the equity of redemption; the determination in this case must await the adjudication of the damages sought by defendant Brecevich in the deed case, as those damages would properly serve as a setoff or credit to be applied towards the equity of

redemption; and that an examination of the signature page of the mortgage allegedly indicates that plaintiff either intentionally omitted or altered pages in the mortgage. These arguments will not be again considered, as they are without merit for the reasons previously stated by the court.

In reply, Horizons argues that the court did not specifically limit the Referee's authority with respect to the issuance of a new report and that a Referee is free to amend a previously issued Report prior to its confirmation. Horizons also submits a reply affidavit from Aureo I. Cardona, Vice-President of Horizons and Warminster, who submits copies of checks made out to the New York Department of Finance totaling \$8,371.70, as further proof that Horizons paid the amount of taxes determined by the Referee to be due and owing.

The court finds that the November 2012 Report should be confirmed for the reasons below. First, the Referee's recalculation of tax assessments in the amount of \$20,375 is based on (1) statements from the Department of Finance totaling \$8,371.70 and (2) copies of checks paid to the Department of Finance totaling \$12,003.99. The Referee's determination that Horizons is entitled to collect tax assessments is supported by the statements from the Department of Finance and included in the November 2012 Report as well as Mr. Cardona's reply affidavit in which Mr. Cardona includes copies of checks totaling \$8,371.70, an amount which is consistent with the Department of Finance statements submitted to the Referee. As such, the court finds that Horizons is entitled to \$20,375.00 for payment of tax assessments.¹

Next, the court finds that the Referee's determination of the amount of the ECB assessments is supported by the record, which includes Mr. Cardona's affidavit in which he verifies the amounts of the fines, states that such fines were caused by Mr. Breceovich's

¹While the amount due and owing for taxes is \$20,375.69, as opposed to \$20,375, Horizons does not seek this additional, de minimus, amount.

violations, and indicates that the fines were paid by Horizons. The determination is also supported by ECB decisions assessing the fines. To the extent defendants argue that the November 2012 Report is insufficient as it does not specifically find the amount of the ECB violations to be appropriate, the court rejects this argument as such a finding is implicit in the Referee's decision to award the sums requested by Horizons as supported by Horizons' submissions that are attached to the November 2012 Report.

With respect to the recalculation of the water and sewer charges, the court finds that while such recalculation was not required by the October 2012 decision, as the Referee's Report has not yet been confirmed, the Referee was within his authority to amend the report to include \$21,451.34 in water and sewer charges paid by Horizons after the October 2012 decision and before the Report was amended in November 2012. See Fourth Federal Savings Bank v. National Bank Associates, Inc., 183 Misc2d 165 (Sup Ct NY Co. 1999)(Referee to compute amount due and owing in mortgage foreclosure is without jurisdiction to amend the report once the original report had been confirmed). Similarly, as the Referee's report has not yet been confirmed, the recalculation of interest by the Referee was appropriate.

Conclusion

In view of the above, it is

ORDERED that the motion to confirm the Referee's Report dated November 30, 2012 is granted; however as the Judgment of Foreclosure and Sale annexed to Horizon's moving papers is not in the proper form, Horizon is directed to re-submit a proposed Judgment and Foreclosure and Sale on notice in a format consistent with the sample provided by the court.

DATED: ~~September 10, 2013~~ *October 7, 2013*



J.S.C.