236 A.D.2d 510, 653 N.Y.S.2d 687, 1997 N.Y. Slip Op. 01559
(Cite as: 236 A.D.2d 510, 653 N.Y.S.2d 687)

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Supreme Court, Appellate Division, Second Department, New York.
GASCO CORP. & GORDIAN GROUP OF HONG KONG, INC., Respondent,
v.
TOSCO PROPERTIES LTD., et al., Defendants,
Nasrami Realty Co., et al., Appellants.
Feb. 18, 1997.

In mortgage foreclosure action, appeal was taken from order and judgment of the Supreme Court, Queens County, Posner, J., which granted motion by holder of first mortgage to confirm referee's amended report. The Supreme Court, Appellate Division, held that both property owner and holder of second mortgage had standing to challenge alleged delay by holder of first mortgage in completing foreclosure action and its alleged mismanagement of the premises.

Reversed and remitted.

West Headnotes

[1] Mortgages 266 ⚿426

266 Mortgages
266X Foreclosure by Action
266X(E) Parties and Process
266k426 k. Parties in General. Most Cited Cases
In foreclosure action, property owner, which had taken mortgaged premises subject to first mortgage and had executed second mortgage, had standing, in opposing confirmation of referee's amended report, to raise issues of first-mortgage holder's alleged delay and mismanagement.

[2] Mortgages 266 ⚿426

266 Mortgages
266X Foreclosure by Action
266X(E) Parties and Process
266k426 k. Parties in General. Most Cited Cases
In foreclosure action, holder of second mortgage had standing to oppose confirmation of referee's amended report, and such right was not extinguished by its assignor's failure to oppose referee's initial report, which lacked detailed information upon which well-founded opposition could be based.

[3] Mortgages 266 ⚿246

266 Mortgages
266V Assignment of Mortgage or Debt
266k246 k. Rights of Assignee in General. Most Cited Cases
Absolute assignment of bond and mortgage transfers to assignee all rights previously conferred upon assignor-mortgagee to enforce bond and mortgage.

[4] Mortgages 266 ⚿199(3)

266 Mortgages
266IV Rights and Liabilities of Parties
266k199 Rents and Profits
266k199(3) k. Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received. Most Cited Cases

Mortgages 266 ⚿467(1)

266 Mortgages
266X Foreclosure by Action
266X(I) Receiver
266k466 Appointment of Receiver
266k467 In General
266k467(1) k. In General. Most Cited Cases
Fundamental difference exists between mortgagee in possession and court-appointed receiver of rents and profits.

[5] Mortgages 266 ⚿199(3)

266 Mortgages
266IV Rights and Liabilities of Parties
266k199 Rents and Profits
266k199(3) k. Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received. Most Cited Cases
Mortgagee in possession takes rents and profits in quasi character of trustee or bailiff of mortgagor, and such rents and profits are applied in equity as equitable setoff to amount due on mortgage debt; thus, mortgagee in possession may be charged with rents and profits he or she might have received, if his or her failure to recover them is attributable to fraud or willful default.

[6] Mortgages 266 ⚿580

266 Mortgages
266X Foreclosure by Action
266X(Q) Fees and Costs
266k580 k. Costs of Action. Most Cited Cases
Debtor-mortgagor may not be held responsible if delay in completing foreclosure action was due to mortgagee's failure to expedite the action.

[7] Mortgages 266 ⚿489

266 Mortgages
266X Foreclosure by Action
266X(K) Judgment or Decree
266k485 Scope and Extent of Relief
266k489 k. Amount of Indebtedness. Most Cited Cases
Mortgagor is entitled to be charged only with amount actually due on mortgage and not amount which mortgagee asserts is due when it takes judgment.
****688** Kapson & Ginsburg, Queens Village (Hal R. Ginsburg, of counsel), for appellant Nasrami Realty Co.

Sweeney, Gallo & **Reich**, Sunnyside (**Michael** H. **Reich**, of counsel), for appellant Steeplechase Realty Corp.

Goodman, Saperstein & Cuneo, Garden City (Martin I. Saperstein, of counsel), for respondent.

Before COPERTINO, J.P., and JOY, KRAUSMAN and McGINITY, JJ.

MEMORANDUM BY THE COURT.

***510** In a mortgage foreclosure action, the defendant Nasrami Realty Co., and Steeplechase Realty Corp., assignee of the defendant Federal Deposit Insurance Corp., separately appeal from an order and judgment (one paper) of foreclosure and sale of the Supreme Court, Queens County (Posner, J.), dated December 22, 1995, which, *inter alia*, granted the motion by Bankers Federal Savings FSB f/k/a Bankers Federal Savings and Loan Association to confirm the referee's amended report dated June 14, 1995.

ORDERED that on the court's own motion, and on the stipulation of the parties, the caption of the action is amended to reflect the substitution of Gasco Corp. & Gordian Group of ***511** Hong Kong, Inc., for Bankers Federal Savings FSB f/k/a Bankers Federal Savings and Loan Association; and it is further,

ORDERED that the order and judgment is reversed, with costs, and the matter is remitted to the Supreme Court, Queens County, for the recomputation of the amount owed by Nasrami Realty Co., taking into ****689** consideration the appellants' claims of delay and mismanagement.

In November 1985 the defendant Tosco Properties Ltd. (hereinafter Tosco) obtained a $650,000 loan from the plaintiff's predecessor-in-interest, Bankers Federal Savings FSB f/k/a Bankers Federal Savings and Loan Association (hereinafter Bankers). As security, Tosco executed a mortgage on the premises. Tosco also executed a collateral assignment of rents agreement in favor of Bankers. Subsequently, Tosco conveyed the premises to the appellant Nasrami Realty Co. (hereinafter Nasrami), which took the

property subject to the mortgage, but did not assume the mortgage. Thereafter, Nasrami obtained a second-mortgage loan from Capital National Bank (hereinafter Capital). The Federal Deposit Insurance Corporation, the receiver of Capital, assigned Capital's second mortgage to the appellant Steeplechase Realty Corp. (hereinafter Steeplechase). When a default occurred in the payment of the first mortgage in June 1991 Bankers commenced an action to foreclose the mortgage, and also took possession of the premises. Although the foreclosure action was not opposed by any of the defendants, Bankers did not obtain the order and judgment of foreclosure and sale until December 22, 1995.

[1][2][3] Contrary to the Supreme Court's conclusions, both Nasrami and Steeplechase have standing to challenge the alleged delay by Bankers in completing the foreclosure action and its alleged mismanagement of the premises. The right of Bankers to take possession of the mortgaged premises upon default in payment derived not from the mortgage but from Paragraph B(2) of the Collateral Lease Assignment, which provided, in pertinent part, that "[u]pon or at any time after default in the payment of any indebtedness secured hereby or in the performance of any obligation, covenant or agreement herein, or in said mortgages, as consolidated * * * the Assignee, without in any way waiving such default, may at its option, take possession of the mortgaged premises". By its terms, this assignment was binding upon and inured to the benefit of Nasrami as owner. Since Bankers became a mortgagee in possession pursuant to the exercise of its rights under the assignment, and the assignment, *inter alia*, "inure[d] to the benefit of * * * any owner of the mortgaged premises", Nasrami, as the owner of the property,***512** had standing to raise the issues of delay and mismanagement.

As the holder of the second mortgage on the premises, Steeplechase also has standing to oppose confirmation of the referee's amended report. "An absolute assignment of a bond and mortgage transfers to the assignee all rights heretofore conferred upon the assignor-mortgagee to enforce the bond and mortgage" (78 N.Y. Jur 2d, Mortgages & Deeds of Trust, § 270, at 101). Nor was the right of Steeplechase to raise the issues of delay and mismanagement extinguished because its assignor, FDIC, failed to oppose the referee's initial report, which, in any event, did not provide any detailed information upon which a well-founded opposition could be based.

[4][5][6][7] The Supreme Court erred by equating a mortgagee in possession with a court-appointed receiver. Here, no receiver was ever appointed. Although there is a similarity between a mortgagee in possession and a court-appointed receiver of rents and profits, there is a fundamental difference between the two (*see*, *Mortimer v. East Side Savings Bank,* 251 App.Div. 97, 295 N.Y.S. 695). "The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor. * * * They are applied in equity as an equitable set off to the amount due on the mortgage debt. * * * So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default" (*Hubbell, Trustee, etc. v. Moulson,* 53 N.Y. 225, 228; *see also*, *Aetna Life Ins. Co. v. Avalon Orchards,* 118 A.D.2d 297, 505 N.Y.S.2d 216).

At bar, paragraph B(2) of the Collateral Lease Assignment provided, in pertinent part, that upon taking possession of the premises, Bankers was to "have, hold, manage, *lease* and operate the same on such terms and for such period of time as the Assignee may deem proper" (emphasis added). Thus, Bankers, unlike a court-appointed ****690** receiver, had full power to lease vacant apartments after it took possession of the premises. Moreover, "when premises can be made to yield a pecuniary income the mortgagee may be charged with the loss of any rentals he might have received if the loss be due to his fraud or negligence" (*Phoenix Mut. Life Ins. Co. v. Tuddington Holding Corp.,* 249 App.Div. 766, 291 N.Y.S. 1012; *see also*, *Aetna Life Ins. Co. v Avalon Orchards,* supra, at 300-301, 505 N.Y.S.2d

216). It is also well settled that a debtor may not be held responsible if the delay in completing the foreclosure action was due to the plaintiff's failure to expedite the action (*see*, *Dollar Fed. Sav. & Loan Assn. v. Herbert Kallen, Inc.*, 91 A.D.2d 601, 456 N.Y.S.2d 430).

Contrary to Bankers' contentions, paragraph B(3) of the Collateral***513** Lease Assignment is not an unconditional indemnification clause in its favor. Clearly, the clause is intended to exonerate Bankers, as assignee in possession, for its failure to perform any obligation owed by Nasrami, pursuant to the leases, to the tenants in the premises. The clause does not exonerate Bankers from its own negligent or intentional conduct which results in inflation of the debt owed under the mortgage. A mortgagor is entitled to be charged only with the amount actually due on the mortgage and not the amount which the mortgagee asserts is due when it takes a judgment (*see*, *Osinoff v. Gert Realty Corp.*, 233 App.Div. 266, 251 N.Y.S. 624, *mod.* 260 N.Y. 36, 182 N.E. 238).

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