

<b>Nationstar Mtge. LLC v Russo</b>
2018 NY Slip Op 30275(U)
February 14, 2018
Supreme Court, Suffolk County
Docket Number: 43184/2009
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:****HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 43184/2009

MOTION DATE: 01/30/2018

MOTION SEQ. NO.: #003 MG

#004 MD

CASE DISP

-----X  
NATIONSTAR MORTGAGE LLC,

Plaintiff,

-against-

VINCENT RUSSO, et.al.,

Defendants.  
-----X**PLAINTIFF'S ATTORNEY:**

SHAPIRO, DICARO &amp; BARAK, LLC

175 MILE CROSSING BLVD.

ROCHESTER, NY 14624

**DEFENDANT'S ATTORNEY:**

CHRISTOPHER THOMPSON, ESQ.

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WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 25 read on this motion \_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1- 11 (#003) ; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 12-22 (#004) ; Replying Affidavits and supporting papers 23-25 ; Other \_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Nationstar Mortgage, LLC for an order confirming the referee's report of sale dated October 25, 2017 and for a judgment of foreclosure and sale is granted; and it is further

**ORDERED** that the cross motion by defendant Denise Russo seeking an order: 1) granting renewal of plaintiff's prior motion and defendant's cross motion and the Order thereon dated October 24, 2016 granting plaintiff's motion for summary judgment and an order of reference and denying defendant's cross motion and, upon such renewal, vacating the October 24, 2016 Order and dismissing the complaint; 2) rejecting confirmation of the referee's report and directing the referee to conduct a hearing; 3) expunging computation of interest from the judgment of foreclosure; 4) dismissing plaintiff's complaint for failure to comply with mortgage (paragraph 22) and RPAPL 1304 default notice requirements; 5) dismissing the complaint for failure to comply with AO 431/11; and 6) validating defendant's homestead exemption is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$240,000.00 executed by defendant Vincent Russo on January 18, 2007. Defendant Vincent Russo defaulted in making payments beginning September 1, 2008 and the default has continued to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on October 29, 2009. Defendant Denise Russo is the former wife of the mortgagor who obtained title to the mortgaged premises during divorce proceeding in May, 2009. Defendant Denise Russo served a timely answer. By Order dated October 24, 2016, plaintiff's motion for an order granting summary judgment and for the appointment of a referee was granted. Plaintiff's motion

seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendants' cross motion seeks an order granting leave to renew plaintiff's prior summary judgment motion and defendant's cross motion, and upon renewal, vacating the October 24, 2016 Order, dismissing the complaint, rejecting confirmation of the referee's report, and striking plaintiff's application for an award of interest in the judgment of foreclosure and sale.

Among the claims raised by the defendant in opposition to plaintiff's motion and in support of her cross motion are: 1) the renewal application should be granted based upon a change in the law with respect to the proof required to prove service of an RPAPL 1304 notice; 2) the referee's report should not be confirmed since defendant is entitled to a hearing and since six payments made by Denise Russo were not credited to reduce the principal amount due and owing; 3) plaintiff's unreasonable delay in prosecuting this action requires that it forfeit the interest due the mortgage lender; 4) plaintiff failed to act in good faith and to offer Denise Russo a loan modification; 5) plaintiff's counsel failed to submit an attorney's affirmation in compliance with AO 431/11 requiring that the complaint be dismissed; and 6) defendant retains a homestead exemption in the mortgaged premises.

The doctrine of *res judicata* prevents a party from litigating a claim which has already been litigated or which ought to have been litigated (*see* Siegel, "New York Civil Practice" Sects. 4442, 4443 pp. 585). The principle is grounded upon the premise that "once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." (*see Gramatan Homes v. Lopez*, 46 NY2d 484, 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull*, 138 AD3d 417, 27 NYS3d 867 (1<sup>st</sup> Dept., 2016); *Matter of JPMorgan Chase*, 135 AD3d 762, 24 NYS3d 667 (2<sup>nd</sup> Dept., 2016)). The related law of the case doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes*, 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 847 NYS2d 130 (2<sup>nd</sup> Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown*, 102 AD2d 868, 477 NYS2d 40 (2<sup>nd</sup> Dept., 1984); *Holloway v. Cha Laundry, Inc.*, 97 AD2d 385, 467 NYS2d 834 (1<sup>st</sup> Dept., 1983)).

In this Court's October 24, 2016 short form order each of the defenses asserted by the defendant in opposition to plaintiff's summary judgment motion were considered, and upon awarding the plaintiff summary judgment, each of those defenses was stricken. A review of the defendant's answer and her opposition papers to plaintiff's original summary judgment motion shows that defendant raised the identical defenses she now seeks to raise in opposition to plaintiff's motion for a judgment of foreclosure and sale. Each of those defenses and claims were considered by this court and rejected. Each of those defenses were stricken. As a result this court's decision granting plaintiff's summary judgment motion is the "law of the case" and all defenses raised in her answer, or which should have been raised in her answer and/or opposition, have been stricken (*see Madison Acquisition Group, LLC, v. 7614 Fourth Real Estate Development, LLC*, 134 AD3d 683, 20 NYS43d 418 (2<sup>nd</sup> Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Inc.*, 125 AD3d 799, 1 NYS3d 841 (2<sup>nd</sup> Dept., 2015)) or have been waived (*see New York Community Bank v. J Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 (2<sup>nd</sup> Dept., 2013); *Starkman v. City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 (2<sup>nd</sup> Dept., 2013)). Defendant's sole remedy is thus relegated to appeal this Court's prior Order.

With respect to defendant's application seeking renewal, the October 24, 2016 Order clearly provided that since defendant Denise Russo never signed the underlying promissory note or the mortgage, she has not the capacity to raise defenses which are personal to the individual who, in fact, was obligated under those instruments to make the required payments—namely, defendant Vincent Russo. Thus defendant's "change in the law" claim has no application to the prior October 24, 2016 Order as it relates to the fact that defendant Denise Russo is not a borrower under terms of the note and mortgage, and is therefore not entitled to raise the mortgage notice or the RPAPL 1304 defense on her own behalf. Moreover, this Court does not agree that a "change in the law" occurred as a result of the appellate decisions recited by the defendant concerning the proof required to show proper service of a 1304 notice (*see HSBC v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2<sup>nd</sup> Dept., 2017)).

With respect to defendant's claims concerning procedural and substantive issues surrounding the referee's report and computations, no legal basis exists to deny confirmation of the referee's report. Plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (*see U.S. Bank, N.A. v. Saraceno*, 147 AD3d 1005, 48 NYS3d 163 (2<sup>nd</sup> Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2<sup>nd</sup> Dept., 2015)). Whereas the court is not bound by the referee's report of the damages due the plaintiff, the report of a referee should be confirmed in circumstances where the findings are substantially supported by the evidence in the record (*CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2<sup>nd</sup> Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2<sup>nd</sup> Dept., 2016)). In this case the referee submitted sufficient evidence in the form of an affidavit from the mortgage servicer/plaintiff's document execution specialist, together with sufficient documentary proof to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel (*CitiMortgage, Inc. v. Kidd, supra.*; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 (2<sup>nd</sup> Dept., 2015)).

As to defendant's claim that she is entitled to a hearing, the law is clear that unlike references to hear and determine, references to hear and report are advisory only which leaves the court as the ultimate arbiter of the issues referred (CPLR 4311; RPAPL 1321; *see Deutsche Bank National Trust Co. v. Williams*, 134 AD3d 981, 20 NYS3d 907 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Zlotoff, et al.*, 77 AD3d 702, 908 NYS2d 612 (2<sup>nd</sup> Dept., 2010); *Shultis v. Woodstock Land Development Associates*, 195 AD2d 677, 599 NYS2d 340 (3<sup>rd</sup> Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House, Inc.*, 281 AD2d 778, 711 NYS2d 275 (3<sup>rd</sup> Dept., 2001)). As the Court of Appeals stated more than 145 years ago in *Marshall v. Meech*, 6 Sickels 140, 143-144, 51 NY 140 (Sept., 1872): "This reference was merely to inform the conscience of the court. The finding of the referee did not conclude it. It could adopt and act upon it or could disregard it and draw its own conclusions from the evidence." A review of the October 24, 2016 Order of Reference reveals that the referee's authority was limited to ascertain the sums due and owing the mortgage lender, and to report whether the mortgaged premises could be sold in parcels. Such limitations authorized the referee to hear and report—a purely ministerial act which does not require a hearing (*see Zaslavskayav. Boyanzhu*, 144 AD3d 675, 41 NYS3d 237 (2<sup>nd</sup> Dept., 2016)).

A review of the evidence submitted by the plaintiff shows that referee's computations are supported by the documentary evidence submitted. While the defendant claims that she made six payments to the mortgage lender subsequent to defendant Vincent Russo's original default in making payments due beginning May 1, 2008 (as reflected in the complaint), she provides no admissible

documentary evidence to support her claim (defendant has submitted copies of documents which include an illegible TD Bank account check and a variety mailing receipts addressed to the mortgage lender which appear to be irrelevant). However the referee's computations do reveal that five additional payments were credited to Vincent Russo's account after the default date, resulting in the default date being advanced to October 1, 2008 with a reduction of principal balance. There is no proof submitted to support defendant's self-serving claim that she made a sixth payment and in response to that assertion plaintiff has explained that although a payment was attempted it was returned for insufficient funds. As to the defendant's claim that she is entitled to a "hearing", there is no requirement to conduct a hearing particularly in view of the fact that the defendant has the opportunity to submit relevant, admissible evidence in opposition to the referee's findings sufficient to contradict the calculations or to provide admissible credible proof for the court to modify the referee's computations. No admissible credible testamentary or documentary proof has been submitted by the defendant to contradict the referee's computations. Absent submission of any admissible evidence to contradict the referee's findings, the only relevant, admissible proof before this court has been submitted by the plaintiff and therefore no legal basis exists to deny plaintiff's motion to confirm the referee's report since the court is the ultimate arbiter of the amount of damages due the plaintiff (*see Deutsche Bank National Trust v. Zlotoff et al.*, *supra.*; *FDIC v. 65 Lenox Road Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 (2<sup>nd</sup> Dept., 2000); *Adelman v. Fremd*, 234 AD2d 488, 651 NYS2d 604 (2<sup>nd</sup> Dept., 1996); *Stein v. American Mortgage Banking, Ltd.*, 216 AD2d 458, 628 NYS2d 162 (2<sup>nd</sup> Dept., 1995)).

As to defendant's remaining claims concerning the plaintiff's failure to act in good faith, its failure to offer a loan modification to Denise Russo, and its claimed unreasonable delay in prosecuting this action, none of these claims are supported in this record. Case management records confirm this action was the subject of court mandated foreclosure conferences and that three CPLR 3408 foreclosure conference dates were scheduled. On March 22, 2010 the action was marked by the court attorney/referee responsible for conducting the foreclosure settlement conference as "conference held". As a result the foreclosure action was remanded to an IAS Part for further prosecution. Records indicate that two conferences were scheduled before Supreme Court Justice Hinrichs (Part 49) on March 17, 2013 and May 3, 2013. The March 17, 2013 conference was adjourned with a notation that defendant was then represented by counsel. Court records show that the foreclosure action was thereafter reassigned to Acting Supreme Court Justice Quinn. Six conference dates were scheduled beginning July 18, 2013 and April 1, 2014. Records show that conferences were held on four of these dates (July 18, 2013; August 28, 2013 ("not settled" marking); October 10, 2013 & April 1, 2014). Two additional conference dates on December 5, 2013 and February 28, 2014 reflect an adjournment of the conference. There is no notation in court records to support defendant's assertion that plaintiff continuously failed to appear for any of these conferences and the final conference date marking before Acting Justice Quinn was "CaseDisp Deed in Lieu/Forelos". There is no indication in the records that the mortgage lender's representatives failed to act in good faith and the record shows that defendant Denise Russo was not obligated under the terms of the mortgage to make payments and was therefore an individual to whom the mortgage representatives would be obligated to negotiate with or to offer a loan modification. Nor does the record show that plaintiff's unduly delayed prosecuting this action with an intent to recover additional interest.

Finally, with respect to defendant's argument that she is entitled to a "homestead exemption", the law is clear that the purpose of the statute (CPLR 5206) is to protect a homeowner from seizure

of her home to satisfy a **money judgment** and to protect a debtor's home in the event of bankruptcy (*Wyoming Co. Bank v. Kiley*, 75 AD2d 477, 479, 430 NYS2d 900 (4<sup>th</sup> Dept., 1980); *In Re Ellerstein*, 105 BR 214 (U.S. Bankruptcy Ct., W.D., New York)). However, the exemption does not apply to a mortgage foreclosure action because it is a suit in equity which does not result in a **money judgment** within the meaning of the statute (*Citibank, N.A. v. Cambel*, 119 AD2d 720, 501 NYS2d 133 (2<sup>nd</sup> Dept., 1986); *Wyoming Co. Bank v. Kiley*, *supra.*). As the Appellate Division, Second Department recently reiterated in *Wells Fargo Bank, N.A. v. Goans*, 136 AD3d 709, 24 NYS3d 386 (2<sup>nd</sup> Dept., 2016): "Where a creditor holds both a debt instrument and a mortgage which is given to secure the debt, the creditor may elect to sue at law to recover on the debt, or to sue in equity to foreclose on the mortgage"(citations omitted). In this case plaintiff has sued in equity and the homestead exemption does not apply. As to AO 431/11, plaintiff has submitted a copy of an attorney's affirmation which complies with the requirements then existing for commencing a foreclosure action.

Accordingly, defendant's cross motion is denied and plaintiff's motion is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with execution of this order.

Dated: February 14, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.