Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 28308/2013
MOTION DATE: 6/12/2018
MOTION SEQ. NO.: #002 MG
#003 MD
CASE DISP

----------X

DEUTSCHE BANK NATIONAL TRUST COMPANY

Plaintiff,

-against-

MELISSA CARLIN, PAUL CARLIN

Defendants.

----------X

PLAINTIFF'S ATTORNEY:
GROSS POLOWY, LLC
1775 WEHRLE DRIVE, SUITE 100
WILLIAMSVILLE, NY 14221

DEFENDANTS' ATTORNEY:
PETER PANARO, ESQ.
4216 MERRICK ROAD
MASSAPEQUA, NY 11758

Upon the following papers numbered 1 to 32 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-23 (#002) ; Notice of Cross Motion and supporting papers 24-30 (#003) ; Answering Affidavits and supporting papers 31-32 ; Replying Affidavits and supporting papers ___; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Deutsche Bank National Trust Company, for an order confirming the referee's report of sale dated February 17, 2018 and for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendants Melissa Carlin and Paul Carlin seeking an order vacating the short form Order dated August 31, 2017 granting plaintiff's summary judgment motion and dismissing plaintiff's complaint based upon the court appointed referee's failure to conduct a hearing or, in the alternative, denying plaintiff's motion and directing the referee to conduct a hearing to determine the amount of damages due the plaintiff as a result of the defendants failure to make timely mortgage payments for more than seven (7) years is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $242,400.00 executed by defendants Melissa Carlin and Paul Carlin on January 30, 2006 in favor of Fremont Investment & Loan. Both defendants signed a promissory note promising to re-pay the total sum of money the mortgagors borrowed from the mortgage lender within thirty (30) years. Defendants thereafter defaulted in making payments beginning April 1, 2011 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 22, 2013. Defendants Carlins' served an answer dated November 19, 2013 containing five (5) affirmative defenses and ten (10) counterclaims. By short form Order dated August 31, 2017, 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 and opposition consists of an attorney's affirmation claiming that defendants federal and state constitutional due process rights were violated by the

referee's refusal to conduct a hearing and therefore the foreclosure action should be dismissed. In the alternative defendants claim that plaintiff's motion must be denied and that the court must direct the referee to conduct a hearing required pursuant to CPLR 4313.

With respect to defendant's claims concerning the 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 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons,* 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015)). While this 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 (2nd Dept., 2017); *Matter of Cincotta,* 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case, the referee submitted sufficient evidence in the form of a "supplemental affidavit of merit and amounts due and owing" from a vice president of loan documentation of the mortgage servicer (Wells Fargo) dated December 21, 2017, 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 (2nd Dept., 2015)). As to defendants' claim that plaintiff's proof relies upon "hearsay", the admissibility of the business records maintained by the mortgage servicer was the subject of the August 31, 2017 Order awarding plaintiff summary judgment and appointing a referee to compute. The prior Order determined that the submission of an affidavit from a representative of the mortgage servicer testifying about the business records maintained by the mortgage lender was admissible as having satisfied the business records exception to the hearsay rule (CPLR 4518). Such determination is the "law of the case" and therefore the affidavit submitted by the mortgage servicer's representative confirming the contents of the business records maintained by the bank are admissible as proof of damages (*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 (2nd Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown,* 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.,* 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

With respect to the issue of whether a referee's hearing is required, the relevant statutes clearly grant the appointing court's the prerogative and authority to limit the powers of the referee.

CPLR 4311 provides:

R 4311. Order of reference.

An order of reference shall direct the referee to determine the entire action or specific specific issues, to report issues, to perform particular acts, or to receive and report evidence only. ***It may specify or limit the powers of the referee*** and the time for filing his report and may fix a time and place for the hearing (***emphasis supplied)***.

CPLR 4313 provides

R 4313. Notice.

Except where the reference is to a judicial hearing officer or a special referee, upon the entry of an order of reference, the clerk shall send a copy of th order to the referee. ***Unless the order of reference otherwise provides,*** the referee shall forthwith notify the parties of a time and place for the first hearing to be held within twenty days after the date of the order or shall forthwith notify the court that he declines to serve ***(emphasis supplied)***.

Relevant therefore are these statutory pronouncements that an order of reference may specify or limit the powers of the referee. "A referee has no power beyond that limited in the order of reference " *(L.H. Feder Corp. v. Bozkurtian,* 48 AD2d 701, 368 NYS2d 247 (2nd Dept., 1975) *citing In re Starr,* 245 AD 5, 289 NYS 753 (2nd Dept., 1935)) and his duty in a foreclosure action is purely ministerial with the referee deemed a ministerial officer bound to follow precisely the provisions of the order of appointment (*see O'Brien v. Spitzer,* 24 AD3d 9, 802 NYS2d 737 (2nd Dept., 2005) *reversed on other grounds,* 7 NY3d 239, 818 NYS2d 844 (2006)). *FN1

In this case defense counsel (at paragraph 20 of his affirmation) makes the provocative claim that the motion court's inclusion of language state that "no hearing is required" was error. If so, counsel's remedy is to seek to either to seek to reargue or to appeal this court's order, but it is not his authority to act as an appellate court and declare "error"where there is none. By the statutory pronouncements recited above, the court has the authority to limit the powers of the referee and the inclusion of the court's handwritten notation specifically providing that "no hearing is required" and that the referee "is to perform the ministerial act of computation" was done with the specific intent to limit the authority of the referee in this foreclosure action to the purely ministerial act of computation and to not hold a hearing (as authorized by CPLR 4311 & 4313). Defense counsel's claim that the failure to hold a referee's hearing is a violation of the defendants' federal and state constitutional due process rights is absurd and counsel cannot cite to any authority to support such baseless claims. Defendants retain every right to submit evidence in opposition to the referee's computations to provide a factual evidentiary basis of their claimed objections, but have wholly failed to do so, choosing instead to make generalized and conclusory claims about the evidence submitted by the mortgage servicer.

---

*FN1- Decisions dating back to 1853 confirm the court's authority to limit a referee's powers and duties. In *McCracken v. Valentine,* 9 NY 42, 9 NYS 42 (1853) the court stated: "where an order of reference is expressly limited to the subject of payments due on the mortgage obligation, the referee has no discretion and is bound to pursue only the directions contained in the decree."

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 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Zlotoff, et al.,* 77 AD3d 702, 908 NYS2d 612 (2nd Dept., 2010); *Shultis v. Woodstock Land Development Associates,* 195 AD2d 677, 599 NYS2d 340 (3rd Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House, Inc.,* 281 AD2d 778, 711 NYS2d 275 (3rd 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." This court's August 31, 2017 Order of Reference could not have been clearer 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 (2nd Dept., 2016)).

With respect to the referee's computations, the objections now raised by the defendants in opposition to plaintiff's motion state only defendants' generalized objections to the referee's computations due as a result of defendants' continuing default in excess of seven (7) years and defense counsel's claim of "entitlement" to a hearing. However, defendants have failed to submit any relevant, admissible evidence to contradict the proof submitted in support of the referee's computations. As this court has previously ruled on the admissibility of the affidavit detailing the business records maintained by the mortgage servicer, it is defendants' burden to submit their own relevant, admissible, contradictory proof to raise genuine issues of fact so that the court could consider alternative computations.

In point of fact, the computations primarily concern facts which are undisputed in this record:

First: Defendants do not dispute they defaulted making payments since April 1, 2011;

Second: The mortgage and promissory provide the interest rate (8.9%) to be computed stemming from the date of default– a purely ministerial computation of principal ($231,114.35) and interest ($139,912.83);

Third: The court takes judicial notice of the fact that it became the obligation of the mortgage lender to make payments for real estate taxes due which were not paid by the defaulting borrowers for the past seven (+) years (or lose title to the premises to the County as a consequence) and which are a matter of public record- a purely ministerial computation of payments totaling ($20,703.68);

Fourth: The court takes judicial notice of the obligation of the mortgage lender to make payments for hazard insurance during the period (7+ years) the mortgagors have failed to make such payments— a purely ministerial act of payments totaling ($7396.00);

Fifth: The remaining computations concern "pre-acceleration late charges" ($657.22)

recoverable under the terms of the mortgage, "PMI/MIP" ($80.00) and a credit of ($30.00)- purely ministerial acts of de minimis amounts.

While reimbursement for hazard insurance payments made (paragraph fourth above) could conceivably be the only subject of contradictory proof, defendants have provided no such evidence and 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. 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 and the evidence submitted provides sufficient proof of the amounts due and owing to the mortgage lender as a result of defendants' continuing default (*see Deutsche Bank National Trust v. Zlotoff et al., supra.; FDIC v. 65 Lenox Road Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 (2nd Dept., 2000); *Adelman v. Fremd,* 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking, Ltd.,* 216 AD2d 458, 628 NYS2d 162 (2nd Dept., 1995)).

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

HON. HOWARD H. HECKMAN, JR.

Dated: June 19, 2018

J.S.C.