Chase Home Fin., LLC v Lyall
2018 NY Slip Op 31506(U)
July 5, 2018
Supreme Court, Suffolk County
Docket Number: 22446/2008
Judge: Howard H. Heckman

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.: 22446/2008
MOTION DATE: 6/26/2018
MOTION SEQ. NO.: #003 MG
#004 MD
CASE DISP

----------X
CHASE HOME FINANCE, LLC

Plaintiff,

-against-

MATTHEW LYALL, ANGELA LYALL, SLOMINS, INC.,

Defendants.
----------X

PLAINTIFF'S ATTORNEY:
KNUCKLES, KOMOSINSKI, & MANFRO, LLP
565 TAXTER ROAD, SUITE 590
ELMSFORD, NY 10523

DEFENDANT'S ATTORNEY:
CHARLES WALLSHEIN, ESQ.
35 PINELAWN ROAD, STE 106E
MELVILLE, NY 11747

Upon the following papers numbered 1 to 38 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-10 (#003) ; Notice of Cross Motion and supporting papers 11-17 (#004) ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 18-26, 27-38 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Chase Home Finance, LLC for an order confirming the referee's report of sale dated July 18, 2017 and for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the motion by defendant Matthew Lyall seeking an order pursuant to CPLR 2004 granting defendant leave to serve late opposition papers to plaintiff's motion is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $203,000.00 executed by defendants Matthew Lyall and Angela Lyall on December 9, 2004 in favor of Somerset Investors Corporation. . Defendant Matthew Lyall also executed a promissory note on the same day promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were subsequently assigned to the plaintiff. Defendants/mortgagors Lyalls' defaulted in making timely monthly mortgage payments since January 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 June 12, 2008. Defendants defaulted in serving a timely answer. By Order (Farneti, J.) dated February 1, 2010, plaintiff's unopposed motion for an order granting a default judgment and for the appointment of a referee was granted. Court records reveal that beginning July 19, 2012 and ending on May 16, 2013 a series of seven (7) foreclosure settlement conferences were scheduled. Defendant failed to appear at the final conference scheduled on May 16, 2013. Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale.

In support of defendant Lyall's motion seeking leave to serve late opposition papers to plaintiff's motion, defendant claims that he will be severely prejudiced if he is not permitted to serve late opposition papers. Defendant's proposed opposition claims that there is insufficient admissible

evidence submitted in support of the amount of damages claimed to be due the plaintiff as computed by the referee. Defendant claims that the referee has merely "rubber stamped" the amounts suggested by the plaintiff as due and owing, and argues that he is entitled to a hearing prior to confirmation of the referee's computations.

With respect defendant's motion seeking leave to serve late opposition papers, court records indicate that plaintiff's underlying motion seeking a judgment of foreclosure and sale was received by the Clerk's Office on August 18, 2017, entered on August 21, 2017 with an original return date of September 12, 2017. Defendant concedes timely receipt of the motion and the motion papers submitted to the court contain a "Stipulation to Adjourn Motion" dated August 29, 2017 which is signed by attorneys representing both parties. The Stipulation reads in return for plaintiff's consent to adjourn its motion from September 12, 2017 to September 26, 2017, "defendant will serve their (sic) opposition papers on or before September 19, 2017." Defendant defaulted in serving timely opposition papers.

Court records indicate that defendant's motion seeking leave to serve late opposition papers was received by the Clerk's Office on October 17, 2017, entered October 25, 2017 with an original return date of November 3, 2017. Interestingly the copy of the "Notice of Motion" papers submitted to this court contain no affidavit of service of the original motion papers. Moreover the "Notice of Motion" introductory page is dated "October 6, 2017" with an attorney's affirmation dated "October 3, 2017". The "proposed late opposition papers" also contain an attorney's affirmation dated "October 3, 2017" together with a copy of defendant Lyall's signed affidavit which is dated "September 26, 2017". Defendant's excuse for not submitting his opposition papers in accordance with the prior stipulation is that defendant Lyall was "unexpectedly called out of state" for "several weeks due to his *sudden* departure" and as a result "the affidavit in question was not received back in a signed and notarized form until after the return date."

At issue is whether defense counsel's breach of a written stipulation requiring service of opposition papers to be made on a date certain, and counsel's subsequent submission of such late opposition in the form of a "cross motion" mandates the court's rejection of such opposition so that plaintiff's motion is considered unopposed and, if so, whether the submission of evidence submitted by the plaintiff is sufficient to establish an order confirming the referee's report and for a judgment of foreclosure and sale. Or, if the court considers such opposition despite defense counsel's failure to comply with his prior agreement, whether plaintiff's motion must be denied for the purpose of directing a referee's hearing.

The undisputed facts reveal that counsel for both parties executed a written stipulation requiring that defense counsel serve his opposition papers by September 19, 2017. Defense counsel breached the parties agreement and subsequently served a motion many days later. Absent a reasonable explanation for defense counsel's failure to abide the written agreement, this court will not consider the opposition papers offered by the defendant since the written stipulation is binding upon both parties to the agreement, just as a signed mortgage and/or promissory note is a binding obligation requiring re-payment of the amount loaned over a stated period of time (*see Turko v. Daffy's Inc.*, 111 AD3d 615, 974 NYS2d 126 (2nd Dept., 2013)).

Defendant's explanation for late service raises more questions than it answers such as:

1) by entering into a stipulation adjourning the original return date of plaintiff's motion seeking a judgment of foreclosure and sale, defendant/mortgagor must have been aware of the gravity of such an application and the need for submission of opposition to it. Defense counsel's excuse that Lyall's "sudden departure" for "several weeks" provides no details as to why an individual facing the entry of a foreclosure judgment would abruptly disappear leaving counsel no way to contact him, and for this reason alone counsel's excuse is not credible, nor reasonable;

2) the dates set forth on defendant's "cross" motion papers and defense counsel's attorney affirmations in opposition to plaintiff's motion and in support of the "cross" motion are identical (October 3, 2017) which is extremely curious since defendant Lyall's affidavit is dated September 26, 2017. Apparently counsel prepared two affirmations on the same date: the first as opposition to plaintiff's motion and the second in support of a "cross motion" which motion was apparently held in abeyance without any explanation from counsel for additional weeks;

3) the New Jersey notarized affidavit submitted by the departed mortgagor is dated September 26, 2017, yet there is no explanation why it took days after the return date to obtain defendant's notarized affidavit and to serve it on opposing counsel and to submit it to the court.

Based upon defense counsel's breach the opposing papers are jurisdictionally defective as "the failure to provide proper service of motion papers deprives the court of jurisdiction to entertain the contents of such papers" (*Lee v. I-Sheng Li,* 129 AD3d 923, 10 NYS3d 451 (2nd Dept., 2015); *Crown Waterproofing, Inc. v. Tadco Construction Corp.,* 99 AD3d 964, 953 NYS2d 254 (2nd Dept., 2012)). Under these circumstances the opposition papers are untimely and a nullity and defendant's motion seeking leave to serve late opposition papers is denied.

With respect to plaintiff's motion for an order confirming the referee's report and for a judgment of foreclosure and sale, plaintiff has submitted sufficient proof to provide an admissible evidentiary foundation to confirm the referee's report and to execute a judgment of foreclosure and sale. Plaintiff's motion is therefore granted in its entirety.

Moreover, even were this court to consider the opposition papers untimely submitted by the defendant's counsel, plaintiff's motion would nonetheless be granted. 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 (1st Dept., 2016); *Matter of JPMorgan Chase,* 135 AD3d 762, 24 NYS3d 667 (2nd 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 (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)).

The Order (Farneti, J.) dated February 1, 2010 granting plaintiff's unopposed motion for a

default judgment struck any and all defenses the defendant could have raised had he appeared in this action. Moreover by granting judgment in favor of the plaintiff, the court determined that plaintiff had submitted sufficient admissible evidence to prove defendant's default and plaintiff's right to foreclose the mortgage. Such a determination was necessarily supported by plaintiff's production of the mortgage and unpaid note, and admissible evidence of the defendant's default in payment, which was provided by the mortgage lender and servicer in the form of an affidavit from the servicing agent (*see Wells Fargo Bank, N.A. v. Erobobo,* 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali,* 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). The admission of this evidence formed the basis for the court's award of a default judgment and the court's findings constitute the "law of the case". (*see Madison Acquisition Group, LLC, v. 7614 Fourth Real Estate Development, LLC,* 134 AD3d 683, 20 NYS43d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Inc.,* 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015). Under such circumstances, this defendant cannot now seek to raise an issue concerning the admissibility of plaintiff's affidavit of merit, nor the capacity of the mortgage servicer, since the affidavit was determined to be admissible by granting plaintiff a default judgment and since it established plaintiff's capacity to maintain this action and such finding is the "law of the case" (*see Gramatan Homes v. Lopez, supra.; Martin v. City of Cohoes, supra.*).

With respect to the 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 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons,* 125 AD3d 930, 5 NYS3d 175 (2nd 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 (2nd Dept., 2017); *Matter of Cincotta,* 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the plaintiff submitted sufficient admissible evidence in the form of an "affidavit of amount due" from a representative of the mortgage servicer, 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)). To the extent that the defendant raises arguments concerning the "admissibility" of the business records and the affidavit submitted by the mortgage servicer who reviewed those records, the doctrine of "the law of the case" again applies. Implicit in the February 1, 2010 Order was a legal determination that the plaintiff's business records were admissible as proof of the defendant's continuing default and with respect to all other relevant issues. Having made such determination, the defendant is foreclosed from seeking to raise this "admissibility" issue again in the same litigation (*see Martin v. City of Cohoes, supra.; Ahrorgulova v. Mann,* 144 AD3d 953, 42 NYS3d 203 (2nd Dept., 2016)).

As to defendant's claim that he 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 (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." A review of the February 1, 2010 Order of Reference (Farneti, J.) 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 (2nd Dept., 2016)).

With respect to the referee's computations, the objections raised by the defendant in his late opposition papers state only defendant's generalized objections to the referee's computations based upon his more than decade long default in making any payments. However, defendant has failed to submit any relevant, admissible evidence to contradict the proof submitted in support of the referee's computations. As the court has previously ruled on the admissibility of the affidavit detailing the business records maintained by the mortgage servicer, it is the defendant's burden to submit his own relevant, admissible, credible, contradictory proof to raise genuine issues of fact so that the court could consider alternative computations and/or findings. In point of fact the computations primarily concern facts which remain undisputed in this record:

First: The default date as established in the February 1, 2010 Order (Farneti, J.) was January 1, 2008;

Second: The mortgage and promissory note provided an interest rate (6.750%) to be computed stemming from the established date of default– a purely ministerial computation of principal ($210,574.59) and interest ($129,053.16) from December 1, 2017 through December 30, 2016;

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 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 reimbursement payments;

Fourth: The court takes judicial notice of the obligation of the mortgage lender to make payments for hazard insurance (or risk losing the value of their "investment") during the period the mortgagors defaulted in making any payments– a purely arithmetic ministerial act; and

Fifth: The remaining computations concern "Property Inspections" ($33.00); "Property Preservation ($425.00); "Appraisals B/P/O" ($320.00) & "MI/PMI Insurance" ($947.56)– purely ministerial computations of de minimis amounts.

While reimbursement for hazard insurance payments (paragraph fourth above) as well as insurance rates for "MI/PMI" could conceivably the subject of contradictory proof (comparison rates, etc.), defendant has provided no such evidence (just a generalized complaint about these amounts) 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 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 (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 defendant's 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: July 5, 2018

J.S.C.