

Bank of N.Y. Mellon v Gooya
2018 NY Slip Op 32424(U)
June 19, 2018
Supreme Court, Suffolk County
Docket Number: 608163/2015
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX NO. 608163/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

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THE BANK OF NEW YORK MELLON-AS TRUSTEE FOR
CITI MORTGAGE LOAN TRUST 2007,

Motion Date: 2/20/2018
Sequence No. 003
CASE DISP.

Plaintiff,

- against -

**DECISION AND
ORDER**

ALI GOOYA, CLERK OF THE SUFFOLK COUNTY
DISTRICT COURT AND JOHN DOE #1 through JOHN
DOE #10, the last 10 names being fictitious and unknown
to the Plaintiff, the person or parties intended being the persons
or parties, if any, having or claiming an interest in or lien upon
the mortgaged premises described in the verified complaint,

Defendant(s).

-----X

The following papers have been read upon this application:

Plaintiff's Application for Judgment of Foreclosure and Sale	1
Defendant Ali Gooya's Affirmation in Opposition to Plaintiff's Motion for Judgment of Foreclosure and Sale.....	2
Plaintiff's Reply Affirmation.....	3

The motion is decided as follows:

Facts and Allegations

Plaintiff's action seeks to foreclosure a residential mortgage in the original sum of \$221,000.00 executed by Defendant Ali Gooya (hereinafter Defendant), on December 13, 2006, for property located at 92 Marshall Drive, Selden, New York (subject property). On the same date, Defendant executed a promissory note promising to repay the entire amount of the

indebtedness to the mortgage lender. Defendant does not dispute having defaulted on his mortgage payments starting on July 1, 2014, and continuing to date.

This case was commenced on August 3, 2015, with the service of a Summons and Complaint; Defendant filed an Answer with Affirmative Defenses on or about August 22, 2015. A Foreclosure Settlement Conference was held on December 5, 2015. Defendant claims he did not attend because he was not notified of the date.¹ The case was discharged from the Settlement Conference Part thereafter.

Plaintiff eventually brought two motions: (Seq. 001) for Summary Judgment and an Order of Reference, initiated on December 26, 2015, resulting in an Order dated April 17, 2017 (Pitts, J.), denying the requested relief with leave to renew; and (Seq. 002) a Motion to Renew initiated July 13, 2017, which Defendant opposed, resulting in an Order dated October 20, 2017 (Pitts, J.), granting Summary Judgment, striking Defendant's Answer, and appointing a Referee. The October 20, 2017 Order directed the Referee to, among other things, determine whether the mortgaged premises should be sold in one or more parcels, as well as:

to ascertain and compute the amount due to the Plaintiff herein for principal, interest, real estate taxes, assessments, water charges, and sewer rents, insurance premiums, and all other charges under the Note and Mortgage which this action was brought to foreclose, except attorney's fees, including the cost of preserving or protecting the mortgaged premises, and that the Referee make his report to this Court with all convenient speed.

Plaintiff now moves (Seq. 003) for a Judgment of Foreclosure and Sale and Confirmation of the Referee's Report, and includes in its papers, among other things, a Proposed Judgment of Foreclosure and Sale along with the Referee's Report and Oath. Plaintiff also provided an Affidavit of Sums Due prepared by Naomi Fiestel, who works for the loan servicer, and an Account Summary detailing the amounts Defendant owes Plaintiff. Finally, Plaintiff had previously provided a copy of the Note and Mortgage in conjunction with the Motion to Reargue (Seq. 002, e-file document No. 23).

In Opposition, Defendant argues that the Referee's Report is defective because Defendant was not afforded a hearing, and because the business records relied upon by the Referee were not adequately authenticated. Defendant also argues that Attorney's Fees should be denied because Plaintiff failed to provide adequate information warranting such an award.

In its Reply, Plaintiff asserts that criticism of its business records is incorrect because they have met the admissibility requirement of CPLR §4518(a). Plaintiff also asserts that Defendant was served a copy of the proposed Referee Report before it was signed by the Referee and submitted to the Court, and Defendant did not challenge any of the calculations either before

¹ Notice of a Foreclosure Settlement Conference is sent by the Court. See generally NY CLS Unif Rules, Civil Cts §202.12-a. The Request for Judicial Intervention, from which the Court takes the parties' addresses and mails a letter giving notice of the Conference, shows that Defendant's address was properly listed.

the Report was finalized or in this motion. Plaintiff leaves to the discretion of this Court the awarding of Attorneys' Fees.

Analysis

I. Judgment of Foreclosure and Sale and Confirmation of Referee's Report

Plaintiff has established its prima facie entitlement to judgment as a matter of law, for a Judgment of Foreclosure and Sale, against Defendants based on the production of the mortgage, the unpaid note, evidence of default, and there being no opposition offered in response to the material allegations surrounding the default (see *Bank of America, N.A. v. Barton*, 149 AD3d 676, 60 NYS3d 546 [2d Dept 2017], citing *U.S. Bank N.A. v. Godwin*, 137 AD3d at 1261-1262; *HSBC Bank USA, N.A. v. Espinal*, 137 AD3d at 1079; *Plaza Equities, LLC v. Lamberti*, 118 AD3d at 689; see also *Perez v. New York City Hous. Auth.*, 47 AD3d 505, 850 NYS2d 75 [1st Dept 2008] [judicial notice taken of the court's computerized records]; *Nationstar Mtge., LLC v. MacPherson*, 56 Misc.3d 339, 54 NYS3d 825 [Sup Ct, Suffolk County 2017] [judicial notice of the electronic records of the court maintained by NYSCEF]). In fact, Defendant does not deny having defaulted on his mortgage payments, which as of the date of this Decision and Order are more than 1,400 days in arrears.

Next, Plaintiff's submissions further establish entitlement to a Judgment of Foreclosure and Sale based upon the Referee's Report (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]). Even though this Court is not bound by the Referee's Report of the damages due Plaintiff, such a report 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 an Affidavit of Sums Due from Naomi Feistel, an authorized officer 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*, 148 AD3d 767, 49 NYS3d 82 [2d Dept 2017]; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 [2nd Dept., 2015]).

Regarding 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."

As is clear from a review of the October 20, 2017 Order recited above, the Referee's authority was limited to calculating 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, which is a purely ministerial act that does not require a hearing (*see Zaslavskayav. Boyanzhu*, 144 AD3d 675, 41 NYS3d 237 [2nd Dept., 2016]).

A review of Plaintiff's evidence shows that the Referee's computations are supported by the documentary evidence submitted. Moreover, Defendant is not entitled to a hearing as the facts are not in issue. There is no requirement to conduct a hearing in view of the fact that the defendant had the opportunity to submit relevant, admissible evidence in opposition to the Referee's findings in order to rebut those findings. Defendant has not submitted any credible testamentary or documentary proof to contradict the Referee's computations. Absent submission of any admissible evidence to contradict those findings, the only relevant, admissible proof before this Court has been submitted by Plaintiff, and therefore no legal basis exists to deny Plaintiff's motion to confirm the Referee's Report (*see Deutsche Bank National Trust v. Zlotoff et al.*, 77 AD3d 702, 908 NYS2d [2d Dept 2010]; *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]).

Finally, the doctrine of "the law of the case" provides that, once an issue is judicially determined, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue, and it applies to any legal determinations that were resolved on the merits in a prior decision (*see Martin v City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 689 [Ct App 1975]; *Ahrorgulova v Mann*, 144 AD3d 953, 42 NYS3d 203 [2d Dept 2016]; *Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 29 NYS3d 398 [2d Dept 2016]). The Plaintiff's business records were determined on the merits in the October 20, 2017 Order. Therefore, this Court is bound by the terms of that Order and it will not revisit this determination. *Id.*

Accordingly, the Judgment of Foreclosure and Sale is granted and the Referee's Report is confirmed.

II. Request for Attorneys' Fees

Attorney's fees may be recovered if the mortgage document obligates the mortgagor to pay attorney's fees as part of the costs associated with a mortgage foreclosure action. (*see Levine v. Infidelity, Inc.*, 2 AD2d 691, 770 NYS2d 670 [2003]; *Vigo v. 501 Second St. Holding Corp.*, 121 AD3d 778, 994 NYS2d 354 [2014]; *Vardy Holding Co. v. Metric Resales*, 131 AD2d 564, 516 NYS2d 490 [1987]). An award of counsel fees is in the sound discretion of the court, (*SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 AD3d 986, 825 NYS2d 80 [2d Dept. 2006]). But a court may not award legal fees absent an explicit provision in the mortgage for same (*Cross v Zybuero*, 185 AD2d 967, 587 NYS2d 610 [2d Dept. 1992]). To award reasonable fees, a court must possess sufficient information to make an informed and reasoned assessment, and thus consider such factors as "the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation." (*People's United Bank v Patio*

Gardens III, LLC, 143 AD3d 689, 38 NYS3d 262 [2^d Dept. 2016]). Accordingly, an award of reasonable counsel fees requires an Affidavit/Affirmation of Services including details of the hours expended warranting the services actually rendered (*id.*), and “whether the hours listed were expended by the affirmant rather than a predecessor firm,” and should not include “anticipatory services to be rendered.” (*Citicorp Trust Bank, FSB v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 [2d Dept. 2017]). Whereas a hearing may not be required if the court has sufficient information, a hearing may be appropriate in other circumstances such as when issues of fact are properly raised in opposition, (*Banker’s Fed. Sav. Bank FSB v. Off W. Broadway Developers*, 224 AD2d 376, 638 NYS2d 72 [1st Dept. 1996]), or when the court needs more information to render a determination on the reasonableness of the fees (*Citicorp Trust Bank, FSB*, 65 NYS3d 237).

Here, Plaintiff’s Attorney provides a six-paragraph Affirmation of Legal Services (ALS) with an attached Schedule of Services Rendered (Schedule), and the affirmant correctly cites to the Mortgage paragraph that authorizes an award of attorneys’ fees. Although the Schedule sets forth “Attorney Time,” the ALS does not identify what attorney performed the work or whether a predecessor firm had performed any work. Moreover, even though the Schedule correlates time spent or to be spent per task, the mathematical calculation of costs does not reflect the actual services rendered. Further, there is no statement offered regarding the effort, skill, difficulty of questions posed, name or experience of the attorney in handling residential mortgage foreclosure cases, the attorney’s ability and reputation, and the customary fees charged for similar services.

Plaintiff specifically asks this court to award a total of \$4,950.00 as Attorneys’ Fees. Nevertheless, the itemized legal fees in the ALS are greater than that requested. Plaintiff further states that the reduced amount requested is “legal fees billed to and recoverable by our client.” The meaning of this is unclear. Affirmant does not affirmatively state whether a flat fee was charged and paid by the client, but nevertheless, the Court would need the information set forth above in order to award Plaintiff reasonable attorney’s fees. Finally, anticipatory fees are not permitted (see *Citicorp Trust Bank, FSB, v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 [2d Dept 2017]).

In conclusion, in applying the criteria set forth above, at this time the court is constrained from granting an award of reasonable Attorneys’ Fees because insufficient evidence has been submitted.

Therefore, upon the foregoing papers, it is hereby

ORDERED, that except for the request for Attorneys’ Fees, Plaintiff’s Motion (Seq 003) for a Judgment of Foreclosure and Sale and Confirmation of the Referee’s Report, is **GRANTED** to the extent herein and in conjunction with this Court’s Judgment of Foreclosure and Sale signed simultaneously with this Order; and it is further,

ORDERED, that Plaintiff’s application for Attorneys’ Fees is **DENIED** with leave to renew upon proper papers, and such application shall be brought by Order to Show Cause within 30 days of the date of this Order; and it is further,

ORDERED, that if Plaintiff renews its motion, by Order to Show Cause, for Attorneys' Fees, it must attach a copy of this Order with the moving papers for such application and request that the Justice sitting Special Term schedule a Tuesday return date; and it is further

ORDERED, that the Referee is directed to hold \$4,590.00 in escrow following the Foreclosure Sale, pending the resolution of Plaintiff's renewed motion for Attorneys' Fees; and it is further


ORDERED, that if Plaintiff does not renew its motion for Attorneys' Fees, the Referee shall not hold \$4,950.00 in escrow as aforesaid; and it is further

ORDERED, that a motion by Plaintiff to renew its request for Attorneys' Fees must be on notice to all parties who have not waived further notice, as well as upon the Referee; and it is further

ORDERED, that Plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties who have not waived further notice, as well as upon the Referee, and to file the Affidavits of Service with the Clerk of the Court immediately thereafter.

This constitutes the Order of the Court.

Dated: June 19, 2018



Linda Kevins, J.S.C.