

<b>E*Trade Bank v Spivey</b>
2019 NY Slip Op 30360(U)
February 7, 2019
Supreme Court, Suffolk County
Docket Number: 946/2014
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.: 946/2014  
MOTION DATE: 1/18/2019  
MOTION SEQ. NO.: #004 MD

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E\*TRADE BANK,

Plaintiff,

**PLAINTIFF'S ATTORNEY:**  
STIENE & ASSOCIATES, P.C.  
167 MAIN STREET  
NORTHPORT, NY 11768

-against-

CRAIG SPIVEY, et al.,

Defendants.

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

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Upon the following papers numbered 1 to 25 read on this motion 1-9 ; Notice of Motion/ Order to Show Cause and supporting papers\_\_\_; Notice of Cross Motion and supporting papers\_\_\_ ; Answering Affidavits and supporting papers 10-25 ; Replying Affidavits and supporting papers \_\_\_; Other\_\_\_ ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants Craig Spivey and Susan Spivey brought on by Order to Show Cause (Murphy, J.) dated March 10, 2017 seeking an order pursuant to CPLR 2103, 2214, 2221, 4313, 5015(a)(4) & 6301: 1) staying further prosecution of this foreclosure action including any scheduled foreclosure sale of the mortgaged premises; 2) granting leave to reargue plaintiff's motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale and the Judgment of Foreclosure and Sale (Murphy, J.) granted December 6, 2016 and, upon reargument, vacating the Judgment of Foreclosure and Sale which confirmed the referee's report; 3) rejecting the referee's report; and 4) compelling a referee's hearing is denied; and it is further

**ORDERED** that the temporary stay of prosecution of this action imposed by the Order to Show Cause (Murphy, J.) dated March 10, 2017 is hereby immediately vacated; and it is further

**ORDERED** that plaintiff is directed to notify the referee to forthwith reschedule a foreclosure sale of the mortgaged premises on notice to all parties who have appeared and not waived such notice.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$1,100,000.00 executed by defendants Craig Spivey and Susan Spivey on March 15, 2005 in favor of JPMorgan Chase Bank, N.A.. Defendant Craig Spivey also executed a promissory note on the same day promising to re-pay the entire amount of the indebtedness. The mortgage and note were assigned to plaintiff by assignment dated February 28, 2013. The Spiveys' defaulted in making timely monthly mortgage payments beginning October 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 January 14, 2014. Defendants served a timely answer. By short form Order (Murphy, J.) dated August 1, 2016, plaintiff's motion for an order granting summary judgment and for the appointment of a referee was granted. Plaintiff's subsequent motion seeking an order confirming the referee's report of the amounts due and owing to the mortgage lender and for a judgment of foreclosure and



sale was granted by Judgment of Foreclosure and Sale (Murphy, J.) dated December 6, 2016.

The sale of the mortgaged premises that was scheduled for March 20, 2017 was stayed as a result of Acting Justice Murphy's award of a temporary stay "pending a *hearing* of this motion". The original return date of the Order to Show Cause was March 24, 2017. Court records indicate that plaintiff served its opposition papers on March 20, 2017 and the motion was repeatedly adjourned until it was marked submitted on IAS Part 25's motion calendar on June 22, 2017. The motion and the temporary stay imposed by the Order to Show Cause remained sub judice until the action and the underlying motion were reassigned to this IAS Part by Administrative Order 114-18 (Hinrichs, J.) dated December 11, 2018. Upon assembling the motion papers, this motion was submitted on this court's motion calendar on January 18, 2019.

Among the "*jurisdictional*" claims set forth in defendants' motion papers are:

- 1- Plaintiff failed to serve counsel with a copy of the August 16, 2016 Order (Murphy, J.) granting summary judgment and appointing a referee to compute the sums due and owing the mortgage lender;
- 2- Plaintiff failed to serve counsel with its reply affirmation with respect to plaintiff's motion for an order confirming the referee's report and for a judgment of foreclosure and sale;
- 3- Defendants' counsel did not *receive* a copy of the notice of referee's hearing; and
- 4- Plaintiff failed to serve a copy with notice of entry of the December 6, 2016 Judgment of Foreclosure and Sale (which was entered in the Clerk's Office on December 20, 2016) until February 17, 2017.

Defense counsel claims that "Plaintiff's counsel intentionally failed to serve my office properly at every juncture since summary judgment, other than serving my office with its motion for judgment of foreclosure and sale." Defense counsel contends that plaintiff's counsel's intentional failure to serve his office with each of these applications, orders and notices has prejudiced (and in some instances) prevented counsel from timely filing a notice of appeal (with respect to the August 16, 2016 Order and the December 6, 2016 Judgment) and prevented counsel from scheduling a referee's hearing. Defendants' proposed remedy for plaintiff's negligence requires that this court vacate Acting Justice Murphy's Judgment of Foreclosure and Sale since that Judgment contained a specific "ORDERED, ADJUDGED AND DECREED" paragraph confirming the referee's report and, upon vacating the Judgment, compelling a referee's hearing while continuing to stay the sale of the premises.

Having reviewed the record in this case, this Court finds that there is no legal or equitable reason to stay further prosecution of this foreclosure action. Defense counsel's exposition of the facts underlying his arguments fails to support his conspiratorial claim of "intentional" deceit on the part of plaintiff's counsel and his legal conclusions are nowhere supported by the admissible proof submitted by the parties. The most that can be determined in this record is that plaintiff's counsel did in fact fail to serve a copy of Acting Justice Murphy's short form Order dated August 16, 2016 which granted plaintiff summary judgment and appointed the referee to compute the amount of

damages due the mortgage lender. The three remaining contentions (set forth above) regarding “*jurisdictional*” transgressions are either not accurate or are irrelevant to any significant issues related to the relief sought by the defendants. And the only significant legal outcome of plaintiff’s conceded failure to serve a copy of the August 16, 2016 to defense counsel at his proper law office address, is that defendants’ right to appeal that order has been extended.

As to defense counsel’s remaining claims with respect to service of orders/judgments, motions, and notices, plaintiff has submitted admissible evidence in the form of affidavits of service to prove that all other legally significant notices, motions and orders/judgments were served on defense counsel at the correct law office address. The record of service upon defense counsel is set forth below:

1- As to the August 16, 2016 Order granting summary judgment— the affidavit of service states that defense counsel was served a copy of the order with notice of entry on August 22, 2016 at 135 Pinelawn Road, Suite 120S, Melville, NY 11747. **This is an incorrect mailing address;**

2- As to the Notice of Referee’s Hearing with Referee’s Report of Amount Due- the affidavit of service states that defense counsel was served with a copy of the notice and report on September 30, 2016 at 115 Broadhollow Road, Suite 350, Melville, New York 11747. **This is the correct mailing address;**

3- As to the December 6, 2016 Judgment of Foreclosure and Sale— the affidavit of service states that defense counsel was served with a copy of the Judgment of Foreclosure and Sale on February 17, 2017 at 115 Broadhollow Road, Suite 350, Melville, New York 11747. **This is the correct mailing address.**

4- As to plaintiff’s motion for an order confirming the referee’s report and for a judgment of foreclosure and sale— the affidavit of service states that defense counsel was served with a copy of the notice of motion with support documents and the proposed Judgment of Foreclosure and Sale and Costs of Plaintiff on November 4, 2016 at 115 Broadhollow Road, Suite 350, Melville, New York 11747. **This is the correct mailing address.**

5- As to service of plaintiff’s reply affirmation— the service of this affirmation is irrelevant to the claimed “*jurisdictional*” issues related to defendants’ request for relief.

CPLR 2221 (d) provides:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and



3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

While defense counsel wholly fails to correctly and accurately identify this motion as one for leave to reargue, it can only be considered that based upon this record. Specifically, the legal issue presented is whether the referee's report should be confirmed. That issue was necessarily the subject of plaintiff's motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale. Court records show that defendants submitted papers on December 1, 2016 opposing plaintiff's motion and that by Judgment (Murphy, J.) dated December 6, 2016 plaintiff's motion was granted. It was therefore incumbent upon defendants to seek leave to reargue Acting Justice Murphy's Judgment or to seek leave to appeal it.

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 case the issue of whether the defendants were entitled to a hearing prior to the referee's submission of a report was necessarily determined by the December 6, 2016 Judgment of Foreclosure and Sale which contained a specific "**ORDERED, ADJUDGED AND DECREED**" paragraph confirming the referee's report and computations. Plaintiff's motion seeking that relief was opposed by the defendants and by granting Judgment, Acting Justice Murphy established the law of this case. Having failed to seek leave to reargue the Judgment, defendants cannot seek such relief related to the referee's findings in this motion, which is neither identified as one seeking leave to reargue as strictly statutorily required, and which fails to make any legal arguments upon which such relief can be granted.

Moreover, even were this court to address the "merits" of defendants' application related to defense counsel's claim that he was not served with notice of the referee's hearing, and that plaintiff's supporting affidavit fails to provide admissible evidence to prove the mortgage lenders damages, neither claim has merit. By granting summary judgment in favor of the plaintiff, Acting Justice Murphy determined that plaintiff had submitted sufficient admissible evidence to prove defendants' 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 defendants' default in payment, which was provided by the mortgage lender in the form of an affidavit from the servicing agent's (Bayview Loan Servicing LLC's) document coordinator (*see Wells Fargo Bank, N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> Dept., 2014)). The

admission of this evidence formed the basis for the court's award of summary 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 (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). Under such circumstances, this defendant cannot now seek to raise an issue concerning the admissibility of plaintiff's affidavit detailing defendants' default and the amount of damages resulting from the default since the affidavit detailing these issues was determined to be admissible by Acting Justice Murphy's Order granting plaintiff summary judgment and such finding is the "law of the case" (see *Gramatan Homes v. Lopez, supra.*; *Martin v. City of Cohoes, supra.*).

As to defense counsel's claim that he was not served with the notice of referee's hearing, plaintiff has submitted a copy of the affidavit of service of the notice of referee's hearing with referee's report of amount due, showing that service was mailed to the law firm's **correct** address on September 30, 2016. Defense counsel's claim that service of the notice was made to "an improper address is a nullity" is directly contradicted by plaintiff's affidavit which provides prima facie proof of service.

Based upon this record no legal or equitable grounds exist to further delay the sale of the mortgaged premises. Accordingly defendant's motion is denied in its entirety and the stay imposed by the Order to Show Cause is hereby vacated immediately and the plaintiff is directed to forthwith notify the referee to reschedule the sale and to notify all appropriate parties.

Dated: February 7, 2019

HON. HOWARD H. HECKMAN, JR.

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J.S.C.