To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

---x

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO WACHOVIA BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P. MORGAN MORTGAGE TRUST 2005-A6

Plaintiff,

– against –

ALLEN J. MORTON AKA ALLEN MORTON INDIVIDUALLY AND AS CO-TRUSTEE OF THE ALLEN J. MORTON REVOCABLE TRUST 1, PATSY J. MORTON AKA PATSY MORTON INDIVIDUALLY AND AS CO-TRUSTEE OF THE ALLEN J. MORTON REVOCABLE TRUST 1, JP MORGAN CHASE BANK, N.A. FKA JP MORGAN CHASE BANK, SBC, 2010, LLC,

Defendants.

---x

Index No. 67501/2016

Sequence 7

DECISION & ORDER

In this action to foreclosure a mortgage, the plaintiff moves for a judgment of foreclosure and sale and to confirm the referee's report:

Papers Considered

1. Notice of Motion/Affirmation of Steven Rosenfeld, Esq./Affidavit of Cristina Diaz De Leon/Exhibits A-Y;
2. Affirmation of Michael Kennedy Karlson, Esq./Affidavit of Patsy Morton/Exhibits 1-6;
3. Reply Affirmation of Steven Rosenfeld, Esq./Exhibits A-C.

Factual and Procedural Background

The defendants Allen J. Morton and Patsy J. Morton originally obtained a loan in the principal amount of $465,000, and executed a note dated February 10, 1992 in favor of Chemical Bank which was secured by a mortgage on the property located at 692 Croton Lake Road, Mt. Kisco, New York. Thereafter, they obtained a loan from JP Morgan Chase Bank, N.A, and executed a note dated May 17, 2005, in the amount of

$11,606.65, secured by a mortgage of the same date. These notes and mortgages were consolidated pursuant to a Consolidation, Extension and Modification Agreement ("CEMA"), dated May 17, 2005, between defendants and JP Morgan Chase, for a combined amount of $386,000.00. The consolidated note and mortgage was subsequently assigned to plaintiff on August 12, 2015, pursuant to a Pooling and Servicing Agreement that existed between plaintiff and JP Morgan.

The defendants failed to make the payment due on June 1, 2014, and each payment thereafter. Plaintiff commenced this action to foreclose on the mortgage with the filing of a summons and complaint on November 22, 2016. Attached to the complaint is a copy of the signed note and mortgage as well as a lost note affidavit from Chase Home Finance LLC, dated June 9, 2005, indicating that the original note was lost or destroyed and had not been paid or satisfied.

Defendants Allen Morton and Patsy Morton ultimately joined issue with the service of their answer.

Plaintiff now moves for a judgment of foreclosure and sale.

In opposition, the Mortons provide a laundry list of arguments including that the referee's report does not indicate how the interest rate was computed, does not identify the affidavit of merit and amounts due by name or date, makes no mention of the Consolidation, Extension and Modification Agreement (CEMA), does not include documentation of alleged escrow advances or a breakdown of the amount charged, and does not identify the lost note affidavit.

Discussion

The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]; *Matter of Cincotta*, 139 AD3d 1058 [2d Dept 2016]). The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute (*see Citimortgage, Inc. v Kidd*, 148 AD3d at 768). However, the referee's recommendations and report will not be disturbed when they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility (*see Matter of Cincotta*, 139 AD3d at 1059; *Hudson v Smith*, 127 AD3d 816 [2d Dept 2015]).

Here, a referee was appointed by order of this Court dated August 6, 2018. This action was thereafter transferred to the Mandatory Appearance Part – Foreclosure. By order dated October 4, 2018 (Davidson, J.), the matter was transferred by MAP to the Foreclosure Settlement Conference Part and the action was stayed pending release from FSCP. On December 20, 2018, the matter was released from FSCP without a settlement.

By correspondence dated January 3, 2019, the referee notified all parties of a computational hearing to be held on January 17, 2019, requesting contested or uncontested facts and amounts, supporting proof, and a proposed computation if different than plaintiffs.

In response, the Mortons improperly rejected the referee's notice as untimely pursuant to CPLR 4313, which provides that the referee shall notify the parties of the hearing within twenty-days after the order of reference. The record establishes that after the referee was appointed, the matter was transferred to the FSCP and the action was stayed pending its release therefrom. Immediately upon release from FSCP, the referee properly noticed the hearing. The Mortons declined to appear at the referee's hearing. As a result, the referee properly canceled the hearing.

The referee filed his oath and report of amounts due, dated January 14, 2019. The referee relied upon the note and mortgage, affidavit of merit and amounts due, as well as the summons and complaint. The referee found the total amount due plaintiff to be $476,833.78, based upon the following: principal balance $328,228.05; interest through September 24, 2018 $55,774.63; escrow advances $92,309.78; advances made on defendants' behalf $388; and late charges of $133.32.

The referee's computation is based upon the affidavit of amounts due executed by Cristina Diaz de Leon, an officer of Select Portfolio Servicing, Inc., the attorney in fact for plaintiff and servicer. The Court finds this affidavit is admissible pursuant to CPLR 4518(a). Ms. Diaz de Leon attests that the current interest rate was 5% and per diem interest of $38.57 accrues on the principal unless there was an interest rate change. Ms. Diaz de Leon further attests that the business records supporting the account data are attached as exhibit A, however, there are no attached exhibits to her affidavit.

Ms. Diaz de Leon also attests that her affidavit supplements the affidavit dated February 16, 2017. The Court finds this to refer to an affidavit of Laura Lynn Dyson, document #48 on NYSCEF. The Court finds that the Dyson affidavit does not provide any information relative to the amounts due.

However, plaintiff also submits an affidavit of Mark Syphus, dated February 15, 2018, in support of the instant motion. Syphus is also an officer of Select Portfolio Servicing. The Court finds that the Syphus affidavit to be admissible pursuant to CPLR 4518(a). The Syphus affidavit sufficiently details the loan records, the lost note affidavit, and the CEMA.

In response to the defendant's arguments, the plaintiff submits a spreadsheet of Select Portfolio Servicing documents showing the annual interest rates and detailing the escrow balance with dated transactions for taxes and insurance payments. These records establish an escrow balance as of August 6, 2018, for $92,309.78, supporting the referee's findings. These records also include property inspection fees totaling $388 through August 2018, which also supports the referee's findings. Attorneys fees and

foreclosure costs although documented in the records were not included in the escrow balance or the advanced fees balance.

Moreover, contrary to the defendants' contention, the borrowers were credited with interest on the escrow account and with payment of school taxes for September 2015, January 2016, and September 2016. The borrowers were also credited with payment of town taxes for April 2016.

The defendant submits bank statements from February through August 2018 and a paid invoice from Keystone Insurance Company for February 2016 through February 2017. However, while Patsy Morton submits an affidavit, there is no explanation of what these documents represent. The Court finds that they are not sufficient to contravene the findings of the referee or this Court.

Accordingly, the Court finds that the plaintiff has demonstrated entitlement to a judgment of foreclosure and sale (*see US Bank N.A. v Saraceno*, 147 AD3d 1005 [2d Dept 2017]). The Court finds that the plaintiff submitted sufficient evidence which substantially supports the referee's computations.

The defendant chose not to attend the referee's scheduled hearing and failed to provide the Court with any evidence contradicting the referee's findings.

Accordingly, the plaintiff's motion for a judgment of foreclosure and sale is GRANTED and the judgment is signed herewith.

Dated: White Plains, New York
May 7, 2019

HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/US Bank National Association v. Morton