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.: 31979/2012
MOTION DATE: 10/08/2019
MOTION SEQ. NO.: #003 MG
#004 MD
CASE DISP

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U.S. BANK N.A.,

Plaintiffs,

-against-

ROBERT H. KEPHART, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
LEOPOLD & ASSOCIATES, PLLC
80 BUSINESS PARK DRIVE, #110
ARMONK, NY 10504

DEFENDANT'S ATTORNEY:
FRED M. SCHWARTZ, ESQ.
317 MIDDLE COUNTRY ROAD
SMITHTOWN, NY 11787

Upon the following papers numbered 1 to 41 read on this motion 1-20 (#003) ; Notice of Motion/ Order to Show Cause and supporting papers 1-20 (#003) ; Notice of Cross Motion and supporting papers 21-27 (#004) ; Answering Affidavits and supporting papers 28-35 ; Replying Affidavits and supporting papers 36-39, 40-41 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff for an order: 1) confirming the referee's report dated June 6, 2019; 2) granting a judgment of foreclosure and sale; 3) directing the Clerk to re-index the assignment of mortgage recorded on September 15, 2003 at Liber M00020498, Page 502 to correct the description of the mortgaged premises as 14 13th Street, Holbrook, New York; 4) reforming the assignment of mortgage recorded on July 27, 2018 at Liber M00022837, Page 380 to correct the date of the mortgage as March 28, 2003; and 5) discontinuing the action against defendant Robert H. Kephart a/k/a Robert Kephart, is granted; and it is further

ORDERED that the cross motion by defendant Marion Kephart seeking an order pursuant to CPLR 4403, 4313 & 5015 & RPAPL 1304: 1) vacating the Order dated December 27, 2018 granting summary judgment in favor of the plaintiff; and 2) dismissing plaintiff's complaint or, in the alternative: 3) denying plaintiff's motion; 4) directing a hearing before the court appointed referee; and 5) denying plaintiff an award for interest and attorneys' fees is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $149,200.00 executed by defendant Robert Kephart and Marion Kephart on March 28, 2003 in favor of Continental Capital Corporation. On the same date both mortgagors executed a promissory note promising to re-pay the entire amount of the indebtedness to the lender. Plaintiff is the assignee of the note and mortgage by assignment dated March 14, 2017. The mortgagors have defaulted in making timely payments due under the terms of the mortgage since December 1, 2009. Plaintiff commenced this action by filing a summons, complaint, and notice of pendency in the Suffolk County Clerk's Office on October 15, 2012. Defendants/mortgagors served an answer dated November 19, 2012. Mortgagor Robert Kephart died on October 14, 2015. By Order dated December 27, 2018 plaintiff's unopposed motion for an order granting summary judgment and for the appointment of a referee to compute the sums due and owing to the plaintiff was granted.

Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendant's cross motion seeks an order vacating the December 27, 2018 Order and granting defendant leave to serve opposition to plaintiff's summary judgment motion. Defendant claims that once the prior Order is vacated, plaintiff's complaint must be dismissed since there is insufficient proof to establish the mortgage lender's compliance with RPAPL 1304. Defendant also claims that plaintiff's motion must be denied since the mortgagor has an absolute right to a hearing before the referee and since no interest and attorneys' fees should be awarded.

With respect to defendant's cross motion to vacate her default, the record shows that plaintiff's summary judgment motion was originally served on June 13, 2017 and made returnable on July 10, 2017. Court records indicate that plaintiff's motion was adjourned by counsel a total of thirteen times until it was submitted without opposition on the IAS Part 18 motion calendar on December 18, 2018. Records show that plaintiff served a second motion seeking to discontinue the action against defendant Robert Kephart on August 14, 2018 which was made originally returnable on September 18, 2018. This second motion was adjourned twice more on the same dates as plaintiff's original motion and was submitted without opposition on the IAS Part 18 motion calendar on December 18, 2018. Both motions were subsequently granted by separate Orders dated December 27, 2018.

The affidavit submitted by defendant Marion Kephart states that as a result of her husband's death (defendant Robert Kephart) she was in "a severe emotional state" and "was not made aware that any further proceedings or motions had been filed". Defendant states that she heard from an acquaintance that the attorney who represented her and her husband since November, 2012 "had suffered severe physical and emotional decline more than two years ago" and that "he (the attorney) had been hospitalized and has resided in a nursing home for nearly a year". Defendant claims that she consulted with another attorney (who presently represents her) in July, 2019 and learned for the first time from that attorney's "online search" that a motion for summary judgment had been granted. It is defendant's position that her former attorney's health problems provides a reasonable excuse for the failure to serve timely opposition to plaintiff's summary judgment motion and therefore the court should vacate the prior Order and dismiss plaintiff's complaint based upon the plaintiff's failure to prove service of the RPAPL 1304 90-day notices.

A defendant seeking to vacate her default in appearing in an action pursuant to CPLR 5015(a)(1) must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013)). Among the relevant factors to be considered are the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness. the public policy in favor of resolving cases on the merits and whether the untimely answer sets forth an arguably meritorious defense to the plaintiff's complaint (*see Dinstber v. Allstate Insurance Company,* 75 AD3d 957, 906 NYS2d 636 (3rd Dept., 2010); *Montgomery v. Cranes, Inc.,* 50 AD3d 81, 855 NYS2d 681 (2nd Dept., 2008)).

Defendant has failed to submit sufficient proof to establish a reasonable excuse for her default in serving timely opposition to plaintiff's original summary judgment motion. Defendant's excuse is premised upon a generalized claim of "law office failure" without any direct evidence creating a time line related to her former counsel's illness and/or documentary proof to support her

claim. Defendant's excuse is centered around claims that her husband primarily handled "this matter" and that upon his death she was in a "severe emotional state" which prevented her from being aware of the pendency of this action. However the facts show that the defendant's husband died nearly twenty one months before plaintiff served the summary judgment motion. Moreover, while the defendant's claim of "law office failure" is based upon her attorney's physical and emotional disability, there is no evidence submitted to document the time period during which defendant's counsel became disabled. In fact, the only documentary evidence submitted to establish a time line related to his disability was the submission by plaintiff of a copy of a stipulation signed by defense counsel in early September, 2018 consenting to the adjournment of plaintiff's motion until November 5, 2018 (with opposition due on October 23, 2018). And while defense counsel affirms that defendant's prior counsel "had been suffering from a long-term physical and emotional disability" and currently resides in a "nursing facility", there is no affidavit submitted either by former counsel (who present counsel concedes presently has an "improved mental state") or from former counsel's colleague, or any other individual who is familiar with former counsel's physical and mental condition including former counsel's physician, which could establish counsel's condition during the time period when plaintiff's motion was pending and thereafter submitted without opposition. Absent submission of such proof which would provide details to establish "law office failure" and/or documentary evidence which would show that his disability took place during the time period that the default occurred, there is insufficient evidence submitted to establish a reasonable excuse for defendant's months long default in serving any opposition to plaintiff's motions.

Having failed to provide any reasonable excuse for the prolonged delay in seeking to vacate her default, it is unnecessary to consider whether defendant has demonstrated the existence of an arguably meritorious defense (*Deutsche Bank National Trust Co. v. Rudman,* 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez,* 102 AD3d 825, 958 NYS2d 472 (2nd Dept.,2013); *Deutsche Bank National Trust Co. v. Pietranico,* 102 AD3d 724, 957 NYS2d 868 (2nd Dept.,2013); *Wells Fargo Bank, N.A. v. Russell,* 101 AD3d 860, 955 NYS2d 654 (2nd Dept.,2012)).

With respect to defendant's attempt to assert the non-jurisdictional defense of a failure to serve an RPAPL 1304 notice as a predicate for dismissing the complaint, defendant remains in default in serving timely opposition to plaintiff's original summary judgment motion and therefore cannot seek dismissal absent legal grounds to vacate that default. As recited above she has provided no reasonable excuse for her default and therefore this non-jurisdictional defense cannot be asserted at this juncture of this proceeding. Put simply, any alleged failure to comply with the statutory notice provision (RPAPL 1304) does not constitute a jurisdictional defect which would provide independent grounds for a defendant who was in default to vacate her default in appearing (*see Kondaur Capital Corp. v. McAuliffe,* 156 AD3d 778, 67 NYS3d 653 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Hasis,* 154 AD3d 832, 62 NYS3d 467 (2nd Dept., 2017); *Bank of America, N.A. v. Agarwal,* 150 AD3d 651, 57 NYS3d 153 (2nd Dept., 2017); *Deutsche Bank National Trust Company v. Lopez,* 148 AD3d 475, 49 NYS3d 123 (1st Dept., 2017); *PHH Mortgage Corp., v. Celestin,* 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Pritchard v. Curtis,* 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012); *Deutsche Bank National Trust Co. v. Posner,* 89 AD3d 674, 933 NYS2d 52 (2nd Dept., 2011)).

Plaintiff's unopposed summary judgment motion which was granted by Order dated

December 27, 2018 was a determination that plaintiff had made a prima facie showing of its entitlement to foreclose the mortgage and resulted in the dismissal of all affirmative defenses which were asserted (and which should have been asserted) in the defendant's answer. Having failed to oppose the summary judgment motion, defendant cannot now seek to assert an RPAPL 1304 defense for the first time in opposition to plaintiff's current motion seeking a judgment of foreclosure and sale. The court's determination awarding summary judgment to the plaintiff is the "law of the case" and such finding precludes further consideration of all non-jurisdictional defenses which have been waived as a result of defendant's failure to timely oppose plaintiff's summary judgment motion and which were dismissed by this court's prior order (*see Madison Acquisition Group, LLC v. 7614 Fourth Real Estate Development, LLC,* 134 AD3d 683, 20 NYS3d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Incorporated,* 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015)).

With respect to plaintiff's motion to confirm the referee's report, 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 evidence in the form of an "affidavit of payment default" from the mortgage servicer/attorney-in-fact's (Rushmore Loan Management Services LLC's) assistant secretary dated May 25, 2017, which testimony, together with copies of the note and mortgages and business records, provides sufficient admissible evidence to establish the accuracy of the referee's computations. The admissibility of the servicer/attorney-in-fact's representative's testimony and business records were established by this Court's prior Order dated December 27, 2018 granting summary judgment in favor of the plaintiff and with plaintiff's submission of the actual business records in compliance with this Court's September 12, 2019 (*see Bank of New York Mellon v. Gordon,* 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019) there is sufficient evidence to support the calculations of the referee and to confirm the finding that the mortgaged premises be sold in one parcel (*see CitiMortgage, Inc. v. Kidd, supra.; Hudson v. Smith,* 127 AD3d 816, 4 NYS3d 894 (2nd Dept., 2015)). Contrary to defense counsel's stated objection concerning plaintiff's submission of those business records, there is no proof that the records provided to the court and defendant were not the records which were reviewed and relied upon as set forth in the Rushmore representative's May 25, 2017 affidavit. The fact that there have been additional entries to those business records after May 25, 2017 as a result of the mortgagors' continuing default does not contradict plaintiff's representative's testimony that these records were the actual records reviewed by the Rushmore assistant secretary.

With respect to the issue of whether a referee's hearing is required, the relevant statutes clearly grant the appointing court 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 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 the 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 Corporation 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 the referee's 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 (*O'Brien v. Spitzer,* 24 AD3d 9, 802 NYS2d 737 (2nd Dept., 2005); *reversed on other grounds,* 7 NY3d 239, 818 NYS2d 844 (2006). Decisions dating to 1853 confirm a court's authority to limit a referee's duties as evidenced in *McCracken v. Valentine,* 5 Seld. 42, 9 NY 42 (1853) where 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."

In this case the authority of the referee was specifically defined by this Court's Order of Reference which limited the referee's power and authority and explicitly stated that: "No hearing shall be required..." By limiting the referee's duties, as statutorily authorized, the defendant retained the right to submit relevant, admissible evidence in opposition to the referee's computations directly to this Court. Instead defendant has chosen to make generalized and conclusory objections without providing any relevant, admissible evidence to either support her claims or to contradict the evidence presented by the plaintiff's representative. This court recognizes that the referee's report is advisory only which leaves the court as the ultimate arbiter of the issues referred. However the only relevant, admissible, and credible evidence submitted is the proof submitted by the plaintiff in support of the referee's computations. Based upon these circumstances the defendant has been afforded an opportunity to submit relevant, admissible evidence in opposition to the referee's findings sufficient to either contradict the referee's calculations or to provide sufficient credible proof for the court to modify the referee's computations. Absent the submission of any testimonial or documentary proof to contradict the referee's findings, the only relevant 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 Company v. Zlotoff et al.,* 77 AD3d 702, 908 NYS2d 612 (2nd Dept., 2010); *FDIC v. 65 Lenox Road Owners Corporation,* 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, with respect to defendant's remaining objections to plaintiff's application for interest and reasonable attorneys' fees, neither claim has legal merit. With respect to the interest to be awarded, the recovery of interest is within the court's discretion and the exercise of such discretion should be governed by the particular facts of the case including "wrongful" conduct on the part of either party (*see BAC Home Loan Servicing, LP v. Jackson,* 159 AD3d 861, 74 NYS3d 59 (2nd Dept., 2018); *Greenport Mortgage Corporation v. Lamberti,* 155 AD3d 1004, 66 NYS3d 32 (2nd Dept., 2018); *CitiCorp Trust Bank v. Vidaurre,* 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). In this record there is no proof of wrongful conduct on the part of either party. While there appears to have been a delay in seeking judgment, the record shows that one of the mortgagors died in October, 2015 causing a delay and thereafter the parties consented to adjourn plaintiff's summary judgment motion for a period in excess of eighteen months. Moreover the record shows that the mortgagors have been in default for nearly a decade causing the mortgage lender to subsidize their continued residence by payment for taxes and hazard insurance. Under such circumstances no legal or equitable grounds exist to deny the plaintiff an award of interest. As to attorneys' fees, plaintiff has submitted sufficient evidence for this court to award such fees as are reasonable and the amount is set forth in the judgment of foreclosure and sale signed on this date.

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

Dated: October 18, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.