SHORT FORM ORDER

INDEX NO. 30057-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 11-8-2018
Adjourned Date: 12-13-2018
Motion Sequence: 005: MotD

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FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

-against-

JENNIFER HOLLIEN; STEVEN KOSIN and JASON HOLLIEN,

Defendants.

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SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, NY 14624

ABRAMS FENSTERMAN
Attorneys for Defendants
JENNIFER HOLLIEN and STEVEN KOSIN
3 Dakota Drive, Suite 300
Lake Success,. NY 11042

JASON HOLLIEN, Defendant Pro Se
252 River Road
Shirley, NY 11967

Upon consideration of the notice of motion by the plaintiff Federal National Mortgage Association ["the plaintiff"], for an order confirming and ratifying the report of the referee and for a judgment of foreclosure and sale, the supporting affirmation, affidavit, and exhibits; the affirmation, affidavits, and exhibits in opposition to the motion on behalf of defendants Jennifer Hollien and Steven Kosin [collectively "the defendants"], and the plaintiff's reply affirmation and supporting exhibits; it is

ORDERED that the plaintiff's motion for a judgment of foreclosure and sale is held in abeyance in accordance herewith; and it is further

ORDERED that the parties shall appear for a conference to schedule a hearing on the issue of the amount due the plaintiff on **January 15, 2020 at 9:30 a.m.** at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York; and it is further

ORDERED that at least twenty days prior to the hearing, the parties shall exchange any documents including but not limited to business records, loan/payment histories, invoices, and/or receipts that the party intends to introduce at the hearing; and it is further

ORDERED that defense counsel shall serve a copy of this order with written notice of its entry upon plaintiff's counsel and any party entitled to notice within twenty days of entry by first class mail.

By order dated March 15, 2017, the plaintiff's motion for summary judgment, an order of reference and related relief was granted to the extent of striking the affirmative defenses in the defendants' answer alleging a lack of standing and the plaintiff's motion was otherwise denied, without

prejudice and with leave to renew. There, the Court concluded that the submission of the affidavit of merit failed to demonstrate the admissibility of the records relied on to prove the defendants' default under the terms of the note and mortgage and the plaintiff's strict compliance with statutory and contractual notice requirements. The same order granted the defendants' cross motion to the extent of allowing discovery on the limited issue of the plaintiff's compliance with RPAPL 1304 and 1306 and otherwise denied the defendants' cross motion for summary judgment dismissing the complaint.

By order dated December 5, 2017 ["the December '17 order"], the Court granted the renewal of the plaintiff's motion for an order granting summary judgment, striking the defendants' answer and dismissing the remaining affirmative defenses and counterclaim, fixing the default of the non-answering defendant, appointing a referee to compute and examine and report whether the subject premises should be sold in one parcel or multiple parcels, and amending the caption. Plaintiff's renewal motion was based on, among others, the affidavit of Nathan Abeln, Document Management Specialist of Seterus, Inc. dated May 25, 2017 ["the Abeln affidavit"]. The Abeln affidavit attached a copy of defendants' payment history with Seterus dating back to June of 2010, prior to the defendants' default. The same order concluded that a second affidavit from Abeln dated June 28, 2017, detailing the standard business practices and procedures for mailing statutory notices in addition to other documentary evidence of mailing raised the presumption that the 90-day notice was received. On renewal of summary judgment, the plaintiff also proffered an affidavit from Aneetra Harris, foreclosure specialist of Seterus, Inc. dated January 16, 2018 ["the Harris affidavit"]. According to the Harris affidavit, the loan was due for the January 1, 2013 installment and all subsequent installments; the amount due as of January 15, 2018 was $290,440.54. The December '2017 order denied the defendants' cross motion to renew their prior motion seeking dismissal as defendants failed to bring forth any new facts or change in the law that would change the prior determination.

In making his report, the referee relied on the Harris affidavit to establish the amount due as of January 15, 2018. Notably, on the motion to confirm and ratify the referee's report, no business records were annexed to the Harris affidavit. Although the parties make reference to "Objections" that were apparently filed by the defendants to the referee's report, a copy of the Objections was not included in the motion papers.

In opposing the motion to confirm and ratify the referee's report, the defendants make a number of arguments. First, the defendants argue that since the referee who issued his report dated September 22, 2018, has been discharged,[1] the referee's sworn report is invalid. Second, the defendants argue that the plaintiff failed to demonstrate the admissibility of the records relied upon by Harris under the business records exception to the hearsay rule (*see* CPLR 4518[a]), and, thus, failed to establish the defendants' default in payment under the note, *citing* ***HSBC Mortg. Servs., Inc. v. Royal***, 142 AD3d 952, 954, 37 NYS3d 321, 323 [2d Dept 2016]). According to the defendants, Harris, an employee of the plaintiff's loan servicer, didn't allege that she was personally familiar with the plaintiff's record keeping practices and procedures. The defendants also maintain that the Harris affidavit was insufficient

[1] The original referee was released and discharged from all further obligations due to his election as a Judge of the Second District Court-Town of Babylon.

to demonstrate compliance with statutory and contractual notice requirements including RPAPL 1304. Third, the defendants argue that the claims for tax and insurance advances are disputed and that the defendants were entitled to a hearing pursuant to CPLR 4313. Finally, the defendants argue that the Court should exercise its equitable discretion and toll interest on the debt due to the plaintiff's undue delay in prosecuting this foreclosure action which was commenced on November 12, 2013.

At the heart of the motion is the sufficiency of the Harris affidavit upon which the referee relied in making his report. The defendants are correct that the Harris affidavit, standing alone, was not a sufficient basis for the referee's calculation- but not for the reason proffered by the defendants. The defendants argue that the Harris affidavit, offered by an employee of the loan servicer, did not allege that the affiant was personally familiar with the plaintiff's record keeping practices and procedures, relying on *HSBC Mortg. Servs., Inc. v. Royal* (***HSBC Mortg. Servs., Inc. v. Royal***, 142 AD3d 952, 954, 37 NYS3d 321, 323 [2d Dept 2016]). This argument misconstrues the import of *Royal* which requires that a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures. There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon (***Citigroup v. Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223, 224–25 [2d Dept 2017], *citing* ***North Am. Sav. Bank, FSB v. Esposito–Como***, 141 AD3d 706, 35 NYS3d 491 [2d Dept 2016]). Thus, if the loan servicer's business records establish the mortgagor's default, as distinguished from the plaintiff's business records, and the affiant is familiar with the creation and maintenance of the loan servicer's records, then the loan servicer can lay the foundation for the admission of the loan servicer's records to establish the underlying loan default (*see e.g.s.*, ***Wells Fargo Bank Nat'l Ass'n v. Johnson***, 172 AD3d 1278, 1280, 98 NYS3d 903, 904 [2d Dept 2019]; ***Wells Fargo Bank, NA v. Thomas***, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]; ***Pennymac Holdings, LLC v. Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]).

That said, while Harris's affidavit was sufficient to establish a proper foundation for the admission of the loan servicer's business records pursuant to CPLR 4518(a) (*see* ***People v. Kennedy***, 68 NY2d 569, 579, 510 NYS2d 853, 503 NE2d 501 [1986]), the plaintiff failed to submit copies of the business records themselves. "[T]he business record exception to the hearsay rule applies to a 'writing or record' (CPLR 4518[a]) ... [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (***Bank of N.Y. Mellon v. Gordon***, 171 AD3d 197, 205, 97 NYS3d 286 [2d Dept 2019] [citation omitted]; ***JPMorgan Chase Bank, Nat'l Ass'n v. Grennan***, 175 AD3d 1513, 1516, 109 NYS3d 436, 440–41 [2d Dept 2019]).

"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" (***Flagstar Bank, F.S.B. v Konig***, 153 AD3d 790, 790-791, 60 NYS3d 360 [2d Dept 2017]). 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* ***Shultis v Woodstock Land Dev. Assoc.***, 195 AD2d 677, 678, 599 NYS3d 340 [3d Dept 1993]).

Harris's assertions as to the amounts due constituted inadmissible hearsay (*see* ***Hypo Holdings, Inc. v. Feuer***, 68 AD3d 722, 722, 888 NYS2d 904 [2d Dept 2009]), since the records themselves were not provided to the referee (*see* ***Nationstar Mortg., LLC v. Durane-Bolivard***, 175 AD3d 1308, 109 NYS3d 99 [2d Dept 2019]; ***Bank of N.Y. Mellon v. Gordon***, 171 AD3d 197, 208–209, 97 NYS3d 286 [2d Dept 2019]; ***Citimortgage, Inc. v. Kidd***, 148 AD3d 767, 768–769, 49 NYS3d 482 [2d Dept 2017]). The omission was not cured by the inclusion of loan records annexed to plaintiff attorney's affirmation submitted in reply for several reasons. First, a moving party can not meet its burden by submitting evidence for the first time in reply (***Wells Fargo Bank, N.A. v. Lefkowitz***, 171 AD3d 843, 844, 97 NYS3d 696, 698 [2d Dept 2019]). Second, the plaintiff's attorney does not allege personal knowledge of the record-keeping practices and procedures of the entity that created these payment records (***Bank of New York Mellon v. Gordon***, 171 AD3d at 210). Finally, although the plaintiff submits these records at the eleventh hour, the referee never had the benefit of the records.

Because the referee's report was based on the Harris affidavit, and the Harris affidavit was not accompanied by the business records relied upon by the affiant, so much of the plaintiff's motion for an order confirming and ratifying the report of the referee is denied. A Court-Attorney Referee will be selected by the Court who will hear and report on the issue of the amount due the plaintiff (*see* CPLR 4311). On the day of the conference, a date will be selected for the hearing. At least twenty days prior to the hearing, the parties shall exchange any documents including but not limited to business records, loan/payment histories, invoices, checks, bank statements, and/or receipts that the party intends to introduce at the hearing. Each party shall also submit a proposed calculation of amount due under the terms of the note and mortgage, clearly showing each of the steps in arriving at the calculation. At the hearing, the Court Attorney Referee may accept documentary proof in the way of affidavits and business records in lieu of live witness testimony so long as there is a proper foundation laid for the introduction of the affidavit/evidence sought to be introduced (*see* ***Bank of N.Y. Mellon v. Gordon***, *supra*; *see also* ***Nationstar Mortg., LLC v. Durane-Bolivard***, 175 AD3d at 1311). The parties may consent to the hearing being conducted by the Court-Attorney Referee on papers without a personal appearance. A Report of Amount Due will be submitted by the Court Attorney-Referee to the Court for confirmation or rejection. A copy of the Court-Attorney-Referee's report will be provided to counsel prior to the entry of a final judgment. At the hearing the parties shall address the issue of whether the subject premises should be sold in one parcel or multiple parcels.

Regarding the defendants' argument that the plaintiff's motion should be denied because the plaintiff failed to comply with statutory and contractual notice requirements, those arguments are either without merit or have already been determined and constitute the law of the case. On the issue of the sufficiency of the proof of mailing of the notices, the defendants argue that the Harris affidavit is insufficient and conclusory. The Court's review of the December '17 order indicates that on summary judgment the mailing proof was introduced through the affidavit of Nathan Abeln dated June 28, 2017, detailing the standard business practices and procedures for mailing statutory notices in addition to other documentary evidence of mailing, not through the Harris affidavit. Although a defense based on noncompliance with RPAPL 1304 may be raised at any time during the action (***JPMorgan Chase Bank, Nat'l Ass'n v. Akanda***, — AD3d — , 2019 WL 5950777, at *2 [2d Dept, *decided* Nov. 13, 2019]), the 1304 mailing issue was already raised and decided in the December '17 order. Plaintiff may not raise it again in opposition to plaintiff's application for a judgment of foreclosure.

The defendants' argument that the Court should exercise its equitable discretion and toll interest on the debt due to the plaintiff's undue delay in prosecuting this foreclosure action is not supported by the record. Most of the delay can be attributed to the delay in processing the parties' motions at the height of the foreclosure crisis in Suffolk County, not any particular delay by the plaintiff (*compare* ***Bank of New York Mellon v. Graffi***, 172 AD3d 1148, 1149, 102 NYS3d 61 [2d Dept 2019]; ***BAC Home Loans Servicing, L.P. v Jackson***, 159 AD3d 861, 863, 74 NYS3d 59 [2d Dept 2018]; ***Greenpoint Mtge. Corp. v Lamberti***, 155 AD3d 1004, 1005, 66 NYS3d 32 [2d Dept 2017]; ***Deutsche Bank Trust Co., Ams. v Stathakis***, 90 AD3d 983, 984-985, 935 NYS2d 631[2d Dept 2011]; ***Dayan v York***, 51 AD3d 964, 965, 859 NYS3d 673 [2d Dept 2008]).

The plaintiff's motion for a judgment of foreclosure and sale is held in abeyance pending the hearing and service of the Report of Amount Due.

DATED: NOV. 27, 2019

C. RANDALL HINRICHS, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION