SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

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THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2005-60T1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-60T1,

Plaintiff,

-against-

R. TARA MILLER, ADAM P10TCH, LLC, BOARD OF MANAGERS OF THE OCTAVIA CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENTOF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSITADJUDICATION BUREAU, NEW YORK COUNTY CLERK, NEW YORK PRESBYTERIAN HOSPITAL, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER TO WACHOVIA BANK, NATIONAL ASSOCIATION, WORKERS COMPENSATION BOARD OF NEW YORK STATE, JOHN DOE,

Defendants.

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Index No.: 850163/2014
DECISION

Mot. Seqs. 004 and 005

KELLY O'NEILL LEVY, J:

Defendant Adam P10tch, LLC moves to reargue this Court's December 11, 2019 Interim Order ordering the parties to submit evidence relating to the amount owed and ordering Plaintiff, The Bank of New York Mellon, to explain the delay in initiating this action. The court has reviewed the supplemental materials and now resolves Plaintiff's motion to confirm the referee report and Defendant's cross-motion to toll the interest due (Motion Sequence 004), along with Defendant's motion for reargument (Motion Sequence 005).

The residential mortgage underlying this foreclosure action was executed on September 26, 2005. Defendant defaulted on payments for the monthly installments on March 1, 2009, and Plaintiff initiated a foreclosure action under index number 109741/2009. Plaintiff voluntarily discontinued that action and the present action was initiated on April 9, 2014. On January 12, 2017, this Court granted Plaintiff's motion for summary judgement for a default judgment against Defendant and appointed a referee to determine the amount due on the underlying mortgage. On October 29, 2018, the Referee executed an Oath and Report of Amount Due to Plaintiff as of September 1, 2018 to be $1,297,965.70 based in part on servicing documents furnished by Bayview Loan Servicing ("Bayview"), the servicer of the mortgage since 2017. Defendant produced a ledger purporting to show payments of $71,711.00 and $117,018.81 applied directly to the mortgage at issue, but the Referee correctly objected to the documents that sought to establish these payments and this Court declined to assume that the payments had been made.

This Court entered an Interim Order on December 11, 2019 which neither confirmed nor denied the Referee's Report, but instead ordered the parties to submit additional evidence to establish the amount owed to Plaintiff. The Interim Order stated, in relevant part:

> ...The Referee correctly determined that Defendant did not establish that a payment was made...Rather than confirm or deny the Referee report with such a limited evidentiary record, it is hereby:
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> ORDERED that the parties shall submit all evidence relating to the amount owed by January 31, 2020. For judicial economy, the parties should not submit any evidence that has already been submitted; and it is further
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> ORDERED, that the parties may submit an accompanying affirmation explaining how the evidence demonstrates the amounts owed;

Defendant moved to reargue the Interim Order "to the extent it is deemed a ruling on the admissibility of documents" and submitted an "Affirmation Regarding Evidence of Amount Owed and in Support of Motion to Reargue". By combining the requested affirmation explaining the

submitted evidence and the affirmation in support of the motion to reargue, Defendant has included arguments that are not properly included in a motion for reargument.[1] Once the court separates the matters properly discussed in the affirmation in support of the motion for reargument from the matters that are only properly discussed in the affirmation explaining the submitted evidence, Defendant's motion for reargument only argues that—based *solely* on the evidence that the Referee was presented with—the Court should disallow the evidence from Bayview and allow the payments of $71,711.00 and $117,018.81 to be credited.[2] The court did indicate in its December 11, 2019 Order that the evidence presented to the referee was insufficient, but only to explain why the court was allowing the parties to supplement the evidence freely. Considering the parties have now submitted supplemental evidence per the Court's Order, the issue of whether the original evidence was sufficient is moot and the motion for reargument is denied.

Having now reviewed the supplemental evidence and affirmations requested by the December 11, 2019 Interim Order, and upon further review of the underlying motion papers, the Referee's report is now confirmed except as modified below. "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." *Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768 (2nd Div. 2017). The main points of contention in this matter relate to (1) whether

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[1] While the affirmation explaining the evidence properly includes certain issues discussed in the underlying motion, the affirmation in support of the motion for reargument must not. Motions for reargument are "not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted." *Setters v. Al Props. & Devs. (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dep't 2016); *see also, e.g., DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) ("Reargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced.'"); *Simon v. Mehryari*, 16 A.D.3d 664, 665 (2d Dep't 2005) ("A motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked."); *William P. Pahl Equip. Corp.*, 182 A.D.2d 22, 27 (1st Dep't 1992).

[2] Defendant also argues that the court overlooked NYSCEF Doc. Nos. 233-238 because those documents were not listed on a list of documents included with the Court's decision. The court did not overlook NYSCEF Doc. Nos. 233-238, but overlooked including them on the list of documents considered.

the servicing documents and testimony of Bayview Loan Servicing are admissible – which also bears on whether Plaintiff's alleged payments of escrow advances, property insurance, and numerous other miscellaneous payments should be admissible; (2) whether either or both of the payments of $71,711.00 and $117,018.81 should be credited against the amount duel; and (3) whether interest should be calculated from 2009 considering the delay between default and the start of this action.

Bayview Loan Servicing's Testimony is Admissible

The Referee in this matter relied on the testimony of Bayview Loan Servicing to determine the amount due on the mortgage for the subject property. Defendant argues that the testimony of the employee from Bayview Loan Service is inadmissible because Bayview Loan Service only began servicing the loan in September 2017, over eight years after the default occurred in March 2009, and therefore is basing its figures on previously created figures that it did not have a hand in creating.

CPLR 4518 requires that "[a]ny writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds [a] that it was made in the regular course of any business and [b] that it was the regular course of such business to make it, [c] at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." CPLR 4518(a). Defendant acknowledges that it is not necessary to have the original creators of a document testify in order to have those documents be admissible. *See, e.g., Merrill Lynch Bus. Fin. Servs. v. Trataros Constr., Inc.*, 30 A.D.3d 336, 337 (1st Dep't 2006) (documents deemed admissible even when they were "prepared not by plaintiff."). Defendant acknowledges the holding in *Trataros*, but distinguishes the present situation because the documents in *Trataros* were

prepared "for plaintiff by a sister company" whereas here they are being relied upon by an assignee uninvolved in the original production of the documents. *See id.* at 337; *see also People v. Cratsley*, 86 N.Y.2d 81, 90 (1995); *see generally State of N.Y. v. 158th St. & Riverside Dr. Hous. Co.*, 100 A.D.3d 1293 (3d Dep't 2012). However, Defendant's interpretation is unsupported by subsequent rulings which are directly on point to the testimony in dispute. The issue of mortgages being assigned to a loan servicer is not novel. The question of whether a loan servicer's employee may testify on behalf of the mortgage lender and whether a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims on recovery of amounts due has already been resolved by courts of appropriate jurisdiction:

> [W]ith respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it relied upon those records in the regular course of business.

Wells Fargo Bank, N.A. v. Pinnock, 55 Misc.3d 1216(A) (Suffolk Cty. Sup. Ct. 2017); *see also Landmark Capital Invs., Inc. v. Li-Shan Wang*, 94 A.D.3d 418, 418 (1st Dep't 2012) ("Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business."); *Portfolio Recovery Assoc., LLC v. Lall*, 127 A.D.3d 576 (1st Dep't 2015). The Referee properly admitted the testimony of the representative of Bayview Loan Servicing as to the amounts due.

The $117,018.81 Should Not Be Credited Against the Amount Due

Defendant has not established that the payment of $117,018.81 has been applied to the 216 East 47th Street Unit 6A at issue in this matter. It is undisputed that the $117,018.81 representing

the proceeds from the condominium foreclosure was paid, but Defendant has not presented sufficient documentation to establish that it was applied to the mortgage at issue and Plaintiff has produced an affidavit from the mortgage servicer that states that it was not applied to the mortgage at issue. Defendant has now twice had the opportunity to establish that this payment went to the Unit 6A mortgage and failed to do so. However, to the extent that the $117,018.81 is considered to have been paid to the Unit 6B mortgage, Defendant may enforce that determination if necessary.[3]

The Payments of $71,711.00 Should Be Credited Against the Amount Due

Plaintiff's Affirmation in Opposition states that "to avoid further delay in obtaining the executed Referee's oath and report, Plaintiff reduced the amount due and owing by $71,711 and is not seeking this amount from defendant." The Court has subtracted this amount from the amount owed.[4]

Interest Should Be Calculated From 2014

The December 11, 2019 Order stated that "plaintiff may submit an affirmation by January 17, 2020 explaining the delay in bringing litigation from the default on March 1, 2009 and the initiation of this action on April 9, 2014." On January 17, 2020, the court received an affirmation

[3] Defendant has submitted a judgment of foreclosure that appears to indicate the amount paid towards that mortgage should be applied to the mortgage at issue in this action, not to Unit 6B's mortgage. Defendant has not established that this occurred, despite multiple opportunities to do so, and Plaintiff has submitted evidence indicating that it did not occur. However, this payment does not disappear as Defendant should have rights to this amount on the Unit 6B mortgage. *See generally 83-17 Broadway Corp. v. Debcon Fin. Servs., Inc.*, 39 A.D.3d 583, 584-85 (2d Dep't 2007).

[4] An account Summary for a Capital One Bank Account titled "ATTORNEY TRUST ACCT/IOLA ACCOUNT" which indicates that $71,711 were withdrawn on October 3, 2012 along with a copy of the corresponding check. Defendant also submits an "Affirmation of Eric Goldberg" and accompanying documents indicating the $71,711 was paid. A "Supplemental Affidavit of Merit and Amounts Due and Owing" sworn by Sandra Burgess, the Document Coordinator of Bayview Loan Servicing, LLC also indicates that "the amount due and owing sought by BONYM in the instant foreclosure has been reduced by the surplus funds amount of $71,711.00." However, a careful review of the documentation does not establish if or how this deduction was made. The original mortgage was for $764,960 and the principal balance on February 1, 2009 was $732,059.23. The interest was calculated by taking the interest rate of 6.125% and dividing it by 365 to get $122.85 per day and then multiplying that by the 4,016 days between February 1, 2009 and January 31, 2020 to reach the interest total (although the court's own calculation of $493,224.91 is slightly more than Plaintiff's $493,173.41 for an unknown reason).

from Plaintiff explaining the delay: Plaintiff originally brought an action on July 9, 2009 but discontinued it May 22, 2014 due to "Plaintiff's inability to verify compliance with pre-acceleration notice requirements." The Defendant should not be obligated to pay interest for this period when it was Plaintiff's delay in conforming to notice requirements. Interest should be calculated from the initiation of the present action in April 2014. *See, e.g., BAC Home Loan Servicing, L.P. v. Jackson*, 159 A.D.3d 861 (2d Dep't 2018) ("Jackson was prejudiced by this unexplained delay, during which time interest had been accruing, the interest on the loan should have been tolled…through the date that the plaintiff filed the subsequent RJI.").

Upon careful consideration of how to apply the $71,711 reduction and on what date, the court shall apply the reduction directly to the principal on October 3, 2012. Reducing the principal balance by this amount results in a new balance of $660,348.23. Calculating the interest from April 9, 2014 on this balance results in a total interest owed through October 29, 2020 of $270,923.69. The balance plus interest through the date of this Order is therefore $931,271.92. Plaintiff also establishes (through January 31, 2020) recoverable amounts of $5,934.40 in insurance payments, $257,423.66 in taxes, $39,895.99 in legal fees, $11 in property inspections, $13 in property preservation, and $180.60 in Appraisals and BPO. These amounts may have increased since January 31, 2020, so the ultimate total may be higher but adding these amounts to the balance plus interest through October 29, 2020 yields **a total amount owed of $1,234,730.57**.

Upon consideration of the Report of Daniel Marotta, Esq. dated October 29, 2018, and except as modified above, the Referee's Report is confirmed. The mortgaged property described in the complaint and as hereinafter described, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of the sale, and the costs of this action as provided by

the RPAPL be sold within 90 days of the date of this Judgment, in one parcel, by and under the direction of Daniel Marotta, Esq. who is appointed Referee for that purpose. Said Referee shall give appropriate public notice of the time and place of sale in accordance with RPAPL § 231. By accepting this appointment, the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge. If the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge. The Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge. If the Referee cannot conduct the sale within ninety (90) days of the date of the Judgment, in accordance with CPLR § 2004, the time fixed by RPAPL § 1351(1) is extended for the Referee to conduct the sale as soon as reasonably practicable. At the time of sale, the Referee shall accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid. The Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee, in cash or certified or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff in which case no deposit against the purchase process shall be required. In the event that the first successful bidder fails to execute the Terms of Sale immediately following the bidding upon the subject property or fails to immediately pay the ten percent (10%) deposit as required, the property shall immediately and on the same day be reoffered at auction. The Referee shall deposit the down payment and proceeds of sale, as necessary, in accordance with CPLR § 2609. After the property is sold, the Referee shall execute a deed to the purchaser, in accordance with RPAPL § 1353 and the terms of sale, which shall be deemed a binding contract. If a party other

than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than thirty (30) days after the date of such sale unless otherwise stipulated by all parties to the sale. If Plaintiff (or its affiliate, as defined in paragraph (a) subdivision 1 of section six-1 of the Banking Law) is the purchaser, such party shall place the property back on the market for sale or other occupancy either within 180 days of the execution of the deed of sale or within ninety (90) days of the completion of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided however, that a court of competent jurisdiction may grant an extension for good cause. The Referee, on receiving the proceeds of such sale, shall forthwith pay therefrom, in accordance with their priority according to law, all taxes, assessments, sewer rents, or water rates which are, or may become, liens on the property at the time of sale, with such interest or penalties which may have lawfully accrued thereon to the date of payment. The Referee shall then deposit the balance of said proceeds of sale in his own name as Referee and shall, in accordance with RPAPL § 1354, pay the Referee's statutory fees for conducting the sale (in accordance with CPLR § 8003(b), not to exceed $500 unless the property sells for $50,000) along with all taxes, assessments and water rates that are liens on the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments, or water rates that have not apparently become absolute, and any other amounts due in accordance with RPAPL § 1354(2) – the Purchaser shall be responsible for interest and penalties due on any real property taxes accruing after the sale and the Purchaser shall hold the Referee harmless for any such penalties or fees assessed and the Referee shall not be responsible for the payment of same. The Referee shall also pay to the Plaintiff the amount due per this Decision and Order, together with any advances as provided for in the note and mortgage which Plaintiff has made for taxes,

insurance, principal and interest, along with any other charges due to prior mortgages or to maintain the property pending consummation of this foreclosure sale, not previously included in the computation, upon presentation of receipts for said expenditures to the Referee, all together with interest thereon pursuant to the note and mortgage and this Decision and Order, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred. The Referee shall also pay Plaintiff $5,024.57 adjudged to the Plaintiff for costs and disbursements in this action, with interest at the statutory judgment rate from the date of entry of this judgment and $11,664.75 as reasonable legal fees, with interest at the statutory rate from the date of entry of this judgment. Any surplus monies arising from the sale shall be paid into court by the officer conducting the sale within five days after receipt in accordance with RPAPL § 1354(4) and in accordance with local County rules regarding Surplus monies. All expenses of recording the Referee's deed, including real property transfer tax, which is not a lien upon the property at the time of sale, shall be paid by the purchaser, not by the Referee from sale proceeds, and any transfer tax shall be paid in accordance with Tax Law § 1404. The property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, rights of way, public utility agreements of record, any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same, any rights of tenants or persons in possession of the subject property, prior liens of record – if any – except those liens addressed in RPAPL § 1354, and any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, and any rights pursuant to CPLR §§ 317, 2003 and 5015, or any appeal of the underlying action or additional litigation brought by

any defendant or its successor or assignee contesting the validity of this foreclosure. The purchaser shall be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR § 308. The Defendants in this action and all persons claiming through them and any person obtaining an interest in the property after the Notice of Pendency are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property. Within 30 days after completing the sale and executing the proper conveyance to the purchaser, unless the time is extended by the Court, the officer making the sale shall file with the clerk a report under oath of the disposition of the proceeds of the sale in accordance with RPAPL § 1355(1) and follow all local County rules regarding handling of Surplus Monies. If the purchaser or purchasers at said sale default(s) upon the bid and/or the terms of sale the Referee may place the property for resale without prior application to the Court. Plaintiff shall serve a copy of this Judgment with Notice of Entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein. Nothing herein shall be deemed to relieve the Plaintiff of any obligation imposed by RPAPL §1307 and RPAPL § 1308 to secure and maintain the property until such time as ownership of the property has been transferred and the deed duly recorded. When the Referee files a report of sale, he shall concurrently file a Foreclosure Action Surplus Monies Form. To ensure compliance herewith, Plaintiff shall file a written report with the Court within six months from the date of entry of this judgment stating whether the sale has occurred and the outcome thereof. The liens which appear to be prior and adverse to the mortgage being foreclosed, namely the liens of defendants Criminal Court of the City of New York and United States of America Acting Through the IRS, are hereby declared invalid and extinguished pursuant to RPAPL Article 15, as follows:

Criminal Court of the City of New York:

July 22, 2004, Control No. 001877593-01;

December 20, 2004, Index Number: 2004NY09255101;

May 23, 2005, Index Number: 6243-04

United States of America Acting Through the IRS:

January 20, 2005, CRFN: 200500007227

All defendants and all persons or entities claiming by, through, or under them, be and are hereby forever barred and foreclosed of and from all right, claim, lien, interest, or equity of redemption in and to said mortgaged premises. The New York County Clerk upon the payment of its requisite fees, shall record and index a certified copy of this Order/Judgment in the same manner as the lien being extinguished. Said property is commonly known as 216 EAST 47TH STREET UNIT 6A, A/K/A 216- 218 EAST 47TH STREET UNIT 6A, NEW YORK, NY 10017.

This constitutes the decision and order and decree of this Court.

Date: October 29, 2020

ENTER:

Kelly O'Neill Levy

Kelly O'Neill Levy, J.S.C.

KELLY O'NEILL LEVY
JSC