

HSBC Bank USA, N.A. v Bluestein

2020 NY Slip Op 34020(U)

December 7, 2020

Supreme Court, Suffolk County

Docket Number: 27824/2013

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX No. 27824/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 08/29/19
ADJ DATE: 10/10/19
SUBMIT DATE: 10/24/19
Mot. Seq.: #004 - MG

-----X
HSBC BANK USA, N.A.

Plaintiff,

- against -

BETH BLUESTEIN; BOARD OF DIRECTORS
OF THE VILLAS AT WEST HILLS OWNER
ASSOCIATION, INC.; MAXWELL BLUESTEIN,

Defendants.
-----X

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Upon the following papers 1-84 read on this motion to confirm referee's report and for judgment of foreclosure and sale; Notice of Motion and supporting papers: 1-65; Affirmation in Opposition and supporting papers: 66-74; Reply and supporting papers: 75-84; and

UPON the court having held a phone conference on this action on November 6, 2020 in compliance with the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for both parties having appeared, compliance with the requirements of AO/157/20 has been met; it is further

ORDERED that pursuant to the provisions of AO/115/20 , AO/121/20 and AO/254/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF; and it is further

ORDERED that plaintiff HSCB Bank USA, N. A's application for an order confirming the referee's report and for judgment of foreclosure and sale (Mot. Seq. #004) is granted; and it is further

ORDERED that plaintiff's proposed order of judgment of foreclosure and sale, as modified by the court, is signed contemporaneously herewith.

This is an action to foreclose a mortgage on residential real property known as 5 Villas Circle, Melville, Suffolk County, New York given by defendant Beth Bluestein ("defendant") to plaintiff HSBC Bank USA, N. A. ("plaintiff"). The prior history of this action is contained in the court's decision and order set forth on the record on December 12, 2016 after oral argument of plaintiff's first summary judgment motion (Mot. Seq. # 001), the written decision dated February 4, 2019 which denied both plaintiff's successive motion for summary judgment (Mot. Seq. # 002) and defendant's cross-motion to dismiss (Mot. Seq. # 003) and the court's decision after trial dated April 1, 2019.

Plaintiff now submits its motion for a judgment of foreclosure and sale pursuant to RPAPL § 1351 in compliance with the conditions set forth in the court's decision of April 1, 2019 and the order of reference of the same date. Defendant submits opposition objecting to the issuance of the judgment claiming plaintiff violated the provisions of CPLR §§ 4313, 4320 and 4403, and that the submissions made by plaintiff to the referee were inadmissible pursuant to CPLR § 4518.

DEFENDANT'S OBJECTIONS DISMISSED

Under the procedures set forth in the order of reference issued by the court on April 1, 2019, defendant's claims are without merit.

In modifying plaintiff's proposed order of reference the court added, among other directives, the following provisions which are relevant here:

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's submissions); defendant(s) may submit written objections and proof in support thereof (defendant's objections) to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgment of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendant(s) objections raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant(s) objections have been submitted to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendant(s) objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendant's objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

Plaintiff has provided a copy of a notice of computation dated July 11, 2019 sent to defendant's counsel, along with an affidavit of service by mail. In his affirmation in opposition there is no claim by defendant's counsel that he did not receive the notice, nor that he filed "defendant's objections" with the referee as authorized by the order of reference.

The court added the above directives to its orders of reference in 2017, first to ensure all parties were provided with copies of the documents to be submitted to the referee, but also for an additional reason. At that time certain defendants' counsels had attempted to turn hearing before a referee pursuant to RPAPL § 1321 into "mini-trials," requiring the retention of stenographers from court reporting services, causing delay, as well as an unwarranted burden upon referees. To avoid such problems, the court designed these additional directives to strike a balance between protecting the rights of defendants, requiring counsel to submit reasonable objections and, if defendant challenged the sufficiency of plaintiff's submissions, having any necessary hearing before the court, not the referee, based upon framed issues, not speculation. Following the procedures set forth in the court's order of reference would avoid a report based upon conclusory and unsubstantiated affidavits, or records that were not produced, unless waived by defendant's failure to object, which would otherwise be denied (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *US Bank, N. A. v Calabro*, 175 AD3d 1451 [2d Dept 2019]).

It has long been recognized that a referee's report is only advisory and the court is the ultimate arbiter of the issues (*see Marshall v. Meech*, 6 Sickels 140, 51 NY 140, 143-4, [1872]; *In re Paul Jones & Co.*, 117 AD775 [2d Dept 1907]; *Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761 [2d Dept 2020]). It has been acknowledged that in engaging a referee to compute and report pursuant to RPAPL § 1321 (1), the court can define the scope of the referee's duties in the order of reference and may specify and limit the duty to hold a hearing, leaving that authority to the court, thereby relieving the referee from that responsibility under CPLR Article 43 (*see Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677,678 [2d Dept 1993]; *Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d at 1763).

Here, although the submissions show plaintiff followed the directives of the order of reference, defendant chose to ignore them. In failing to file objections with the referee, as the directives mandated and made clear, defendant has waived any objections she may have to the plaintiff's submissions.

In opposition to the present motion, defendant's affidavit does not contest the validity of the computation of amounts due, claim that she made any payments that were not credited, contest any of the claimed expenses, costs or legal fees. Instead she merely renews her claims concerning the sufficiency of the RPAPL § 1304 notices and proof of their mailing, issues which are not mentioned in her attorney's affirmation in opposition. Her counsel's affirmation in opposition also fails to offer any evidence to contest

plaintiff's submissions, only arguing that the referee failed to comply with provisions of the CPLR Article 43 in submitting his findings without holding a hearing and that plaintiff's submissions were insufficient to meet the requirements of CPLR § 4518. In his arguments, defendant's counsel acknowledges that a referee need not notice a hearing within 20 days if "the Order of Reference otherwise provides." If defendant's counsel had chosen to follow the directives of the court in the order of reference, his client would have been afforded a hearing on the issues before the court, providing the "due process rights" he claims she was deprived. Instead, he chose to ignore those directives and wait to delay the judgment of foreclosure through opposition that raises no substantive claims challenging the validity of the proof offered by plaintiff of the principal and interest due, costs, expenses and counsel fees.

Defendant's untimely complaints fail to establish that she has been prejudiced in any way by these proceedings, other than any prejudice that she has brought upon herself by failing to follow the directives of the order of reference and thereby waiving her rights. Defendant's counsel's argument that the affidavit of Teresa Magana, an officer of plaintiff, is inadmissible as it was "prepared solely in anticipation of litigation" is a confused interpretation of the principles set for in cases such as *Cornier v Spagna*, 101 AD2d 141 (1st Dept 1984); *National States Elec. Corp. v LFO Const. Corp.*, 203 AD2d 49 (1st Dept 1994); *76-82 St. Marks, LLC v Gluck*, 147 AD3d 1011 (2d Dept 2017) and *Deutsche Bank Natl. Trust Co. v Kenny*, 183 AD3d 865 (2d Dept 2020). In those cases documents which were specifically prepared for litigation were objected to and precluded because the documents were not made and maintained in the ordinary course of business and therefore not business records contemplated by CPLR § 4518. Here Ms. Magana's affidavit, signed May 16, 2019 after the trial, was obviously made for litigation, but that does not preclude her testimony. If the court were to accept defendant's counsel's argument, any affidavit prepared in support of a motion would be "inadmissible" as it was prepared for the litigation in which it was submitted.

Further, that affidavit establishes Ms. Magana's ability to testify to plaintiff's records and the records of other entities that had been incorporated therein (*see Bank of N. Y. Mellon v Gordon* at 209-211) and as further noted in *Gordon* at 202: "inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess" (*Rosenblatt v. St. George Health & Racquetball Assoc.*, 119 AD3d at 54-55, 948 N.Y.S.2d 401, quoting Jerome Prince, Richardson on Evidence § 8-108 [Farrell 11th ed 2008]; *see Matter of Findlay*, 253 N.Y. 1, 11, 170 N.E. 471; *Ford v. Snook*, 205 App. Div 194, 198, 199 N.Y.S. 630 *aff'd* 240 N.Y. 624, 148 N.E. 732)." As defendant defaulted in the procedures set by the order of reference to submit objections to the referee and then to the court, any objection that the Magana affidavit did not include copies of the actual records she reviewed has been waived.

Defendant's claim that the referees' report failed to assess whether this residential real property in a private residential community be sold as one parcel is unavailing as a reason to deny plaintiff's motion for a judgment of foreclosure and sale, as the court as the ultimate arbiter can make that determination on the record before it (*see LVB Props. v Greenport Dev. Corp.*, 188 AD2d 588 [2d Dept, 1992]; *Cenlar FSB v Glauber*, _AD3d_, 2020 NY Slip Op 07028 [2d Dept 2020]).

Any other available objections to these proceedings not raised by defendant in opposition have been waived.

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Accordingly, the court grants plaintiff's motion for a judgment of foreclosure and sale, and signs plaintiff's proposed order, as modified by the court, contemporaneously herewith.

This constitutes the decision and order of the court.

Dated: December 7, 2020



Hon. Robert F. Quinlan, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION