

<b>Berriman Funding LLC v Top Gen. Mdse., Inc.</b>
2021 NY Slip Op 30410(U)
February 1, 2021
Supreme Court, Kings County
Docket Number: 521862/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice,

-----X

BERRIMAN FUNDING LLC,

Plaintiff,

- against -

Index No. 521862/16

TOP GENERAL MERCHANDISE, INC., 728 BERRIMAN LLC, RACHEL MINSKY, SHALOM MINSKY, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and "SMITH" COMMERCIAL TENANT,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

196-204 207-212

Opposition Affidavits (Affirmations) Annexed \_\_\_\_\_

208-212 213-219

Reply Affidavits (Affirmations) Annexed \_\_\_\_\_

213-219

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 728 Berriman Street in Brooklyn (Property), plaintiff Berriman Funding LLC (Berriman Funding) moves (in motion sequence [mot. seq.] seven) for an order confirming the February 3, 2020 referee report (Referee Report) on the ground that it comports with the overwhelming weight of the evidence and granting Berriman

Funding a judgment of foreclosure and sale.

Defendants Top General Merchandise, Inc., 728 Berriman LLC, Rachel Minsky and Shalom Minsky (collectively, defendants) cross-move (in mot. seq. eight) for an order, pursuant to CPLR 3211 (a) (7) and (a) (8), dismissing the complaint.

### *Background*

#### *This Foreclosure Action*

On December 8, 2016, Banco Popular North America (Banco Popular), Berriman Funding's predecessor, commenced this action to foreclose a commercial mortgage encumbering the Property by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleged that the mortgage matured on May 7, 2016, and the full principal amount of the mortgage loan was due and owing.

By a December 30, 2017 assignment, the note and mortgage were assigned from Banco Popular to Berriman Funding. Berriman Funding was substituted for Banco Popular as plaintiff in this action by a June 21, 2017 order.

On August 3, 2017, defendants collectively answered the complaint, asserted several affirmative defenses and asserted two counterclaims.

On or about February 8, 2018, Berriman Funding moved for summary judgment, an order of reference, an order striking and dismissing defendants' answer, affirmative defenses and counterclaims and for other relief, which was returnable on October 10, 2018 (after several adjournments at defendants' request). Defendants opposed Berriman

Funding's motion on the merits. On the October 10, 2018 return date of the motion, defendants argued that they never received the proceeds of the mortgage loan.

On October 10, 2018, the court (Vaughan, J.) issued an order holding Berriman Funding's motion in abeyance pending a framed-issue hearing before a special referee to hear and determine the limited issue of "whether the defendants received the principal amount due on the mortgage [and] if so the motion for summary judgment should be granted." After hearings before the special referee on March 11, 2019, April 11, 2019 and June 27, 2019, the referee issued a November 4, 2019 decision determining that Berriman Funding had "substantiated the principal amount due on the mortgage and according to Justice Vaughan's order summary judgment should be granted to the Plaintiff."

By a December 17, 2019 order, the court (Vaughan, J.) confirmed the referee's report, granted Berriman Funding's summary judgment, struck and dismissed defendants' answer, affirmative defenses and counterclaims and referred the foreclosure to a referee to ascertain and compute the amount due and owing and to determine whether the Property could be sold in parcels. Notably, defendants did not move to reargue or appeal from the court's December 17, 2019 order granting Berriman Funding summary judgment.

On January 30, 2020, the referee held a hearing to determine the amount due and owing and whether the Property could be sold in parcels, and defendants failed to appear.

On February 3, 2020, the referee issued the Referee's Report, which determined that \$541,320.85 was due and owing under the mortgage loan as of December 31, 2019, plus interest until the entry of judgment, and that the Property should be sold as one parcel.

***Berriman Funding's Instant Motion***

Berriman Funding now moves for an order confirming the Referee's Report and granting it a judgment of foreclosure and sale, including an award of costs, disbursements and reasonable legal fees. Berriman Funding submits copies of: (1) the December 17, 2019 order of reference; (2) its notice of the referee's January 30, 2020 hearing upon defense counsel; and (3) the Referee's Report.

Berriman Funding contends that its motion should be granted because "[t]he Referee's Report comports with the overwhelming weight of the evidence adduced before the Referee." Berriman Funding's counsel affirms that in preparation for the hearing before the referee his "firm prepared an affidavit of computation and forwarded same to the Plaintiff for review and signature[,] but defendants and their counsel failed to appear for the hearing.

Berriman Funding also submits an "Affirmation of Services Rendered" by its counsel in support of its request for \$68,199.17 in attorneys' fees (for services rendered through November 5, 2020), estimated future attorneys' fees of \$10,000.00, plus disbursements of \$594.00, in accordance with the terms of the mortgage.

***Defendants' Opposition and Cross Motion***

Defendants, in opposition and in support of their cross motion to dismiss, submit an attorney affirmation generally arguing that this matter should be dismissed “based on Plaintiff’s abandonment thereof . . .” Defense counsel further asserts that defendants Shalom and Rachel Minsky executed a \$500,000.00 promissory note and a credit line mortgage for a ten-year term and “much to their surprise the loan was only for a one (1) year period.” Defense counsel also argues that “Plaintiff failed to show that the note was negotiated or assigned directly from any prior mortgage-holder to Plaintiff” and that Berriman Funding lacks standing to foreclose. Defense counsel also argues that Berriman Funding continued this action in bad faith because defendants sought a loan modification. Finally, defense counsel argues that Berriman Funding’s motion to confirm the Referee Report should be denied because plaintiff failed to serve defendants with pre-foreclosure notices pursuant to RPAPL 1304.

Defense counsel argues that the complaint should be dismissed because “Defendants were not served at all with [the] Referee[’s] transcript of the hearing for the referee’s report dated November 4, 2019 . . .” and “Plaintiff never served any papers upon Defendants and submitted false affidavits of service of a notice of hearing on referee’s report for January 30, 2020 . . .”

Regarding the Referee’s Report, defense counsel claims that “the Referee never informed the Defendants about the computation, nor afforded them the opportunity to present evidence, documentary or oral *other than a notice of hearing* for January 30, 2020

. . . which was never docketed with the court and neither Plaintiff nor Referee showed up” (emphasis added). In addition, defense counsel asserts that “the Referee Report failed to specify the amount of the accelerated princip[al] balance of the loan and the amount of interest . . .” Defense counsel asserts that “[t]he computation *may well be flawed* unless the referee has taken into account the cash received by Banco Popular when they froze the Defendants’ account and seized all those funds” (emphasis added). Defense counsel also argues that the referee “fails to take into account the amounts that were paid under a previous modification and extension agreement.”

***Berriman’s Opposition to the Cross Motion and Reply***

Berriman Funding, in opposition to defendants’ cross motion and in further support of its motion to confirm the Referee Report, asserts that by a December 17, 2019 order Berriman Funding was awarded summary judgment, defendants’ affirmative defenses were dismissed, defendants’ answer was stricken and the court held that there were no triable issues of fact. Berriman Funding asserts that “Defendants’ Cross Motion is merely a poorly veiled attempt to reargue previously adjudicated and rejected allegations and defenses[,]” including lack of standing and failure to serve pre-foreclosure notices pursuant to RPAPL 1304. Berriman Funding asserts that the December 17, 2019 order granting it summary judgment is res judicata, and it is “improper and frivolous for the Defendants to seek dismissal of the complaint after Plaintiff was granted summary judgment.”

Berriman Funding's counsel also affirms that defense counsel's claims "that he was not served with the Notice of Hearing for the referee's computation of amount[s] due are completely false" because such notice was served upon defense counsel on January 17, 2020 along with correspondence. Berriman Funding submits copies of the January 17, 2020 notice of hearing and the correspondence to defense counsel enclosing the notice of hearing. Berriman Funding argues that since defendants failed to appear for the January 30, 2020 hearing, "the numerous arguments and citations in [defense counsel's] Affirmation regarding [the] referee's hearings are irrelevant and without merit."

#### *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" (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2017]). CPLR 4403 authorizes a court to confirm or reject a referee's report and, thereafter, to "render decision directing judgment in the action."

Here, Berriman Funding made a timely motion to confirm the February 3, 2020 Referee Report and has demonstrated that the Referee Report is substantially supported by the record. Defense counsel's mere assertion that the Referee Report "may well be flawed" is insufficient to establish that the Referee Report is not substantially supported by the record. Contrary to defense counsel's contention, the record reflects that defense counsel was served with notice of the January 30, 2020 referee hearing, yet defendants



and their counsel failed to appear.

Berriman Funding has also demonstrated its entitlement to \$594.00 in disbursements and \$68,199.17 in attorneys' fees for services rendered through November 5, 2020, pursuant to the terms of the loan documents. Following the foreclosure sale of the Property, Berriman Funding can submit a further application detailing and updating the total amount of reasonable attorneys' fees and disbursements that it has incurred from November 6, 2020 through the conclusion of this action.

Defendants' cross motion to dismiss the complaint is denied since Berriman Funding was previously awarded summary judgment and defendants' answer, affirmative defenses (including lack of standing) and counterclaims were already adjudicated, dismissed and stricken, pursuant to the December 17, 2019 decision and order. Defendants never moved to reargue the December 17, 2019 decision and order; the dismissal of their answer and affirmative defenses is res judicata, and consequently, their attempt to relitigate defenses which were finally adjudicated in Berriman Funding's favor is rejected. Accordingly, it is hereby

**ORDERED** that Berriman Funding's motion (in mot. seq. seven) is granted to the extent that: (1) the Referee Report is confirmed; (2) Berriman Funding is entitled to a judgment of foreclosure and sale, and an order and judgment shall be settled on notice; and (3) Berriman Funding is awarded \$68,199.17 in attorneys' fees (for services rendered through November 5, 2020) and disbursements of \$594.00. Berriman Funding's request

for \$10,000.00 for estimated attorneys' fees (from November 6, 2020 through the conclusion of this action) is denied with leave to renew after the Property is sold, based on the actual attorneys' fees it incurs; and it is further

**ORDERED** that defendants' cross motion (in mot. seq. eight) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE