SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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OCWEN LOAN SERVICING, LLC,

Plaintiff,

- v -

CARMEN A. PACHECO, CARMEN J. PACHECO, AKAM ASSOCIATES INC, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, HSBC MORTGAGE CORPORATION (USA), DSS & DIVISION OF LIENS AND RECOVERY, JOHN DOE #1 THROUGH JOHN DOE #12

Defendant.

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INDEX NO. 850228/2015

MOTION DATE

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 255, 256, 270, 271, 272, 273, 274, 275, 276, 277, 278, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 304, 306

were read on this motion to/for MODIFY ORDER/JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 233, 234, 235, 236, 237, 238, 239, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 279, 280, 281, 282, 283, 284, 285, 286, 287, 302, 305

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Upon the foregoing documents, the motions and cross-motion are determined as follows:

This action concerns a mortgage, dated July 11, 2003, on residential real property located at 350 East 62nd Street, Unit 1A, New York, New York given by Defendants Carmen A. Pacheco and Carmen J. Pacheco ("Pachecos"). That encumbrance secured a consolidation, extension and modification of certain earlier notes and created a new principal balance of $200,000.00.

Plaintiff commenced this action on July 27, 2015 and pled two causes of action: [1] to foreclose on the above mortgage and [2] to cancel an alleged erroneous satisfaction of a mortgage dated June 6, 1995 given by the Pachecos to secure a loan of $65,600.00. That indebtedness was apparently consolidated into the mortgage Plaintiff seeks to foreclose. Filed concomitantly with the summons and complaint was a certificate of merit pursuant to CPLR §3012-b and attached thereto were purported copies of all the underlying notes and mortgages.[1] By stipulation dated August 1, 2016, the parties agreed to vacate the Pachecos' default and Plaintiff assented to accept their answer. In the Pachecos'

[1] By affidavit dated January 29, 2016, William L. Wright, Collateral Control Team Lead for Seterus, Inc., averred that the consolidated note was lost and could not be located despite a "thorough and diligent" search.

amended answer, they pled *fifty-four* [54] affirmative defenses, including that Plaintiff lacked standing prosecute this action, as well as *twelve* [12] counterclaims.

Thereafter, Plaintiff moved for, *inter alia*, summary judgment pursuant to CPLR §3212 (Motion Seq No 2) on both causes of action, striking out the Pachecos' answer and to appoint a referee to compute. The Pachecos' cross-moved for: [1] summary judgment dismissing Plaintiff's complaint, [2] dismissal of Plaintiff's complaint based on lack of standing to foreclose on the satisfied mortgage, [3] dismissal of Plaintiff's complaint for lack of capacity to sue because Plaintiff was not a holder of the satisfied mortgage, [4] dismissal of Plaintiff's complaint as barred by the statute of limitations, [5] "[p]ursuant to §§201, 213[4] dismissing plaintiff's cause of action as time-barred" [sic]; [6] "[d]ismissing plaintiff's complaint for lack of capacity to sue, failure to state a cause of action, and for lack of documentary evidence pursuant to CPLR §§ 3211(3), (5), (1)" [sic]; [7] dismissing Plaintiff's complaint for failure to provide disclosure and [8] precluding Plaintiff from introducing certain evidence at trial based upon failure to provide disclosure. Subsequently, Pachecos filed an amended cross-motion asserting a ninth request for relief, to wit dismissal of "plaintiff's complaint for failure to timely file motion for summary judgment within ninety days of Order of May 19, 2016" [sic].

By order dated February 13, 2018, Justice Judith N. McMahon issued a handwritten interim order which provided, in its entirety, as follows: "All parties to appear before a court attorney referee to determine if Plaintiff has [sic] possession of the note at the time of commencement of this action." Defendants filed an order to show cause on May 8, 2018 which sought the Court to clarify its order of reference to exclude any evidence outside of the motion. No challenge to Justice McMahon's reference to "determine" the issue was made. Indeed, Defendants acknowledged the Court referred the matter to hear and determine, but simply sought as follows: "the Court should advise the parties the Special Referee is to *determine* whether plaintiff had the original prior to the commencement of the foreclosure action within the boundarires [sic] of the summary judgment motions before the Court" [emphasis added]. By order of the same day, Justice McMahon declined to sign the order to show cause.

The hearing was held on June 6 and 7, 2018 before Special Referee Deborah E. Edelman who issued a decision dated September 27, 2019. Regarding the scope of the reference, Defendants offered no objection to the Referee's authorization to "determine" the issue at the commencement of the hearing. Defendants simply reiterated the arguments made in their order to show cause. The first objection to their lack of consent to the reference was lodged in their post-hearing memorandum.

At the start of the hearing, the Referee noted Defendants' objection to submission of any evidence not contained in the motion for summary judgment, their failure to proffer case law supporting this claim and Justice McMahon's denial of Defendants' motion on this point. However, the Referee made no express finding on this issue in her post-hearing decision. Nevertheless, it appears the Referee did consider evidence not contained in Plaintiff's motion for summary judgment by receiving testimony from Plaintiff's witnesses and a document from Defendants marked as Exhibit "B".

In her decision, Referee Edelman determined that Plaintiff proffered sufficient admissible and credible evidence to support its standing and found "plaintiff had possession of the note at the time of commencement of this action". Defendants' arguments to the Referee that she did not have authority to decide the issue referred for determination absent their consent and that the order of reference did not authorize a hearing or admission of new evidence were not ruled on by the Referee who stated in a footnote that "I only note that this issue is not for me to determine".

Now, Defendants move (Motion Seq No 5) for an order: [1] setting aside the Referee's determination pursuant to CPLR §4317, [2] granting their motion for summary judgment dismissing Plaintiff's complaint and [3] rejecting Plaintiff's sur-reply papers. Plaintiff opposes the motion and, by separate motion (Motion Seq No 6), moves to confirm the Referee's report. Defendants oppose this motion and cross-move for the same relief sought in Motion Seq No 5.

In their memorandum of law, Defendants asserted ten [10][2] supposed shows of "favor" to Plaintiff by judicial and non-judicial personnel assigned to this matter in the underlying proceedings. Defendants accuse two justices previously assigned to this matter of five [5] shows of "favor" to Plaintiff and the others against Referee Edelman which included an explicit claim of bias which was reported by letter to Administrative Judge Deborah A. Kaplan. The accusations of favoritism against the prior assigned justices merit context and comment.

The first and second claims of "favor" constitute the Court's acceptance of Plaintiff's allegedly untimely motion for summary judgment and late opposition to Defendants' cross-motion. Although Defendants do not identify which member of this Court committed these offenses, it seems Justice Schlomo S. Hagler took oral argument, adjourned and marked the motions submitted. At the outset, as it does not appear that any express ruling on either of these issues has been made, the Court is unable to discern the favoritism.

Defendants claim Plaintiff's motion for summary judgment was untimely because it was filed after the deadline set by Justice Anthony Cannataro[3] releasing this matter from the Mortgage Foreclosure Conference Part. In that edict, Justice Cannataro directed that Plaintiff file a motion for summary judgment within 90-days of that order. Defendants' counsel are apparently unaware that these are typically *pro forma* orders created by the Referee or Part Clerk assigned to the Mortgage Foreclosure Conference Part and forwarded to the assigned Justice for signature. That conclusion is corroborated by the fact that Justice Cannataro's order releasing the action to an IAS Part was occasioned by Defendants' then pending motion to compel acceptance of their late answer (NYSCEF Doc No 25) which made inclusion of a direction that a motion for summary judgment inapposite since issue was not actually joined at that point (CPLR §3212[a]). Defendants were not authorized to file an answer until August 1, 2016 when Justice Hagler so-ordered the parties' stipulation wherein Plaintiff assented to accept Defendant's answer (NYSCEF Doc No 57). Issue was not finally joined until September 7, 2016 when Defendants filed their amended answer. By then, the deadline in Justice Cannataro's order had already expired and the claim of untimeliness thereunder is pointless.

Defendant's claim that Plaintiff's opposition to their cross-motion is untimely is entirely inapposite. Defendants acknowledge in their memorandum of law that Justice Hagler, over their objection, adjourned both motions from August 21, 2017, the oral argument date, to November 17, 2017 to afford Plaintiff's additional time to proffer evidence of their standing. By adjourning the motions for the express purpose of affording Plaintiff additional time, any claim the cross-motion was untimely fails.

Defendants posit that a third show of "favor" occurred when Justice McMahon "violated" CPLR §3212 and §4317 and "disregarded Justice Hagler's decision the motions were fully submitted" by ordering the disputed reference. Defendants also speculate that "Plaintiff's summary judgment motion

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[2] The titles in the memorandum of law claim ten shows of "favor", but the Court could find no fourth or ninth.
[3] He does not appear to be accused of bias by Defendants.

was on the verge should have been [sic] denied of being denied due to plaintiff's failure to show the Court that Ocwen had standing to commence the action."

The latter claim is patently unfounded. That Plaintiff's motion was, in Defendants' estimation, on the "verge" of being denied is optimistic conjecture. For whatever reason, as was his prerogative, Justice Hagler did not deny Plaintiff's motion and adjourned it instead. That the motions were reassigned to Justice McMahon while *sub judice* is suggestive of absolutely nothing. Cases and motions are administratively reassigned routinely for a multitude of reasons. Here, it appears from the Court record that this matter was reassigned to Justice McMahon on January 1, 2018 (NYSCEF Doc No 138), the timing of which suggests that it was part of a normal year-end reassignment of cases, not some nefarious scheme as Defendants allude.

The suggestion that Justice McMahon violated CPLR §3212 and disregarded Justice Hagler's fully submitted marking when making the reference is entirely unsupported. CPLR §3212[c] specifically provides that when, as here, a motion is "based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may order an immediate trial . . . before a referee". This is precisely what occurred in this case.

The supposed fifth show of "favor" occurred when Justice McMahon, without the consent of the parties, directed "[a]ll parties to appear before a court attorney referee to determine if Plaintiff has [sic] possession of the note at the time of commencement of this action". This Court is unable to determine how Justice McMahon's reference, in and of itself, was favorable to Plaintiff. It was within Justice McMahon's discretion to refer a perceived factual issue related to Plaintiff's standing to a referee and both parties were necessarily affected by her decision to act without the parties' consent. Any claim that the Referee's ruling in Plaintiff's favor is evidence of Justice McMahon's bias is bootstrapping.

The Court is without the necessary evidence to offer any cogent remarks on the sixth, seventh, eighth and tenth accusations against Referee Edelman as neither party bothered to annex a complete copy of the hearing transcript to their motions.

In support of their claims against confirmation of the Referee's determination, Defendants assert that Justice McMahon "abused" her "discretion" when she ordered determination of an issue by a Referee without the parties' consent.[4] Trials of entire actions or particular issues by a referee on a hear and determine basis without consent of the parties are expressly limited to circumstances not presented here (CPLR §4317[b]; *cf. Marett v Pegalis & Wachsman, P.C.*, 176 AD2d 321 [2d Dept 1991]). There is no question the parties did not stipulate to the Referee hearing and determining the issue of Plaintiff's possession of the note. Nevertheless, Defendants' pre-hearing objections were restricted to the scope of the evidence the Referee was to consider. They did not object to Referee Edelman determining the issue until the hearing was completed, which was after they perceived her supposed bias and reached their ostensible conclusion that an outcome in their favor was in doubt. As such, any objection on this basis was waived (*see Aurora Loan Servs., LLC v Tobing,* 172 AD3d 975, 977 [2d Dept 2019]; *Chalu v Tov-Le Realty Corp.*, 220 AD2d 552 [2d Dept 1995]). In any event, had Defendants not waived this objection, it alone would not mandate setting aside the Referee's findings as the Court would still have

[4] As an aside, it should be noted that this Court is not the Appellate Division, First Department and absent a motion to renew or reargue under CPLR §2221, it has no authority in this procedural context to overrule another Justice's determination.

had the authority to review the decision as one to hear and report (*see Schanback v Schanback*, 130 AD2d 332, 344 [2d Dept 1987]).

As to the substantive findings and evidentiary rulings of the Referee, this Court lacks the authority to review same as the findings were made on a hear and determine basis (*see eg Bauer v Special Brands NY, Inc.*, 138 AD3d 1048 [2d Dept 2016]). Defendants' motion should have been directed to the Referee as a motion to renew and/or reargue (*id.*). While it is "proper for the Supreme Court to determine the issue of whether the [Referee] acted "beyond and in excess of [her] jurisdiction" (*Harris v City of Mount Vernon*, 99 AD3d 905 [2d Dept 2012]), it does not appear that occurred here. Upon the reference to hear and determine, the Referee had "all the powers of a court in performing a like function" (CPLR §3401). Therefore, inherent in the reference is the ability to take witness testimony and receive any evidence the Court could at a trial (*see* CPLR §§4301, 4311 4318; *Muir v Cuneo*, 267 AD2d 439 [2d Dept 1999]).

Defendants' reliance on CPLR §4403 and Uniform Rules for Trial Court §202.44 [22 NYCRR] is misplaced as those provisions are applicable to references to hear and report or the verdict of an advisory jury.

Accordingly, the branches of Defendants' motion and the cross-motion to set aside the Referee's report are denied. The branch of the motion for summary judgment is denied as duplicative of its cross-motion to Plaintiff's earlier motion for an order of reference (Motion Seq No 2). Plaintiff's motion to confirm the Referee's report is denied as unnecessary.

Motion Seq No 2 is *sub judice* and will be determined in a separate order based on the previously submitted moving and opposition papers as well as the determinations of the Referee in her September 27, 2019 report.

12/23/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE