

Davis v Allard

2007 NY Slip Op 30256(U)

March 16, 2007

Supreme Court, New York County

Docket Number: 0109284

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C. Justice

PART 1

Index Number : 109284/2005
DAVIS, JOCELYN CADE
vs
ALLARD, GISELE BROUILLETTE
Sequence Number : 002
CONFIRM/REJECT REFEREE REPORT

INDEX NO. 109284/05
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____
this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
*Cross-Motion **
Answering Affidavits — Exhibits _____
Replying Affidavits _____

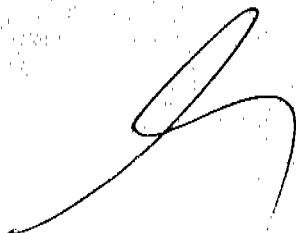
PAPERS NUMBERED	
1, 2	_____
3	_____
4, 5	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED
MAR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 16, 2007


MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
JOCELYN CADE DAVIS, as Executrix of the
Estate of ROBERT ROBINSON, Deceased,

Plaintiff,

Index No. 109284/05

-against-

GISELE BROUILLETTE ALLARD, 50 EAST 126
STREET, INC., The CITY OF NEW YORK, THE
STATE OF NEW YORK, "JANE DOE", "SAM FOE",
"BILL MOE", and "HARRY TOE", the last
four names being fictitious, but are
intended to refer to persons who may
have an interest in the premises under
foreclosure, their true names being
unknown to the Plaintiff,

Defendants.
-----X

FILED
MAR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

Plaintiff Jocelyn Cade Davis, as Executrix of the Estate of Robert Robinson ("plaintiff"), moves for an order pursuant to CPLR 4403: (1) confirming the Referee's Report and Computation (the "Referee's Report") of Charles E. Boulbol, Esq. ("Referee Boulbol"), dated October 18, 2006; (2) for an award of counsel fees; and (3) for a final Judgment of Foreclosure and Sale. Defendants Gisele Broulette Allard ("Allard") and 50 East 126th Street, Inc. ("50 East") (collectively the "defendants"), cross-move for an order pursuant to CPLR 4403, rejecting the Referee's Report, together with an order denying plaintiff's motion for Final Judgment of Foreclosure.

The facts of this case are set forth in the decision and order of this court, dated March 30, 2006 (the "Prior Decision and Order"), but are repeated in relevant part herein. Plaintiff commenced this foreclosure action seeking to recover on a mortgage note (the

"Note"), executed by Allard on October 29, 1998, evidencing a loan in the principal amount of \$100,000. The loan was secured by a purchase money mortgage (the "Mortgage") in the same amount, given to decedent Robert Robinson (the "Mortgagee")¹ on property located at 50 East 126th Street, New York, New York (the "Premises").

The Note provided for Allard's payment of monthly installments of interest and principal, commencing November 1, 1998 and terminating on October 1, 2008. By letter dated June 20, 2005, plaintiff advised Allard of her election to declare the entire unpaid amount of principal and interest under the Note to be immediately due and payable, pursuant to paragraph 4 of the Note. On July 5, 2005, plaintiff commenced the instant action², and moved for summary judgment on the complaint. Defendants cross-moved for summary judgment dismissing the complaint, and for an order discharging the Mortgage.

In the Prior Decision and Order, this court granted plaintiff's motion for summary judgment, based upon Allard's default in tendering installment payments to plaintiff commencing August 1, 1999. Defendants' cross motion to discharge the Mortgage was rendered moot, and this court granted that branch of the cross motion which sought summary judgment dismissing the complaint with respect to the installment payments due for the period November 1, 1998 through July 1, 1999. This time period was barred due to the six-year statute of limitations.

¹ The Mortgagee died on April 27, 1999.

² Plaintiff alleged that defendant 50 East was owned and controlled by Allard, and was the current fee title holder of the Premises.

The Prior Decision and Order directed Plaintiff's counsel to settle an order on notice granting summary judgment to plaintiff in accordance therewith, and to provide for the appointment of a referee to compute the amounts due and owing to plaintiff under the Note and Mortgage. Thereafter, this court referred this matter to Referee Boulbol, who, after examining the record of this action, together with an affirmation of plaintiff's attorney dated August 21, 2006,³ computed the amount due to plaintiff as \$570,100.51.

Defendants' counsel affirms that, prior to plaintiff's instant motion, he never received: (1) a copy of the signed Order and Judgment appointing Referee Boulbol, with or without notice of entry; (2) notice of the Referee's Hearing; (3) the calculations and memorandum plaintiff's counsel submitted to Referee Boulbol; or (4) the Referee's Report or the Oath of the Referee.

Defendants argue that the Referee's Report should be rejected because, *inter alia*, plaintiff failed to notify defendants of the above, thus depriving Allard of the opportunity to present evidence in her defense with regard to the amount owed to plaintiff on the Note and Mortgage. It is further argued that Referee Boulbol erred in his computation of the amount due and owing to plaintiff, and that the Referee's Report is defective in that the Referee's Oath is dated one day after the date of the Referee's Report.

Plaintiff does not address defendants' counsel's contention that he never received notice of the signed Order and Judgment appointing the Referee, nor Notice of the

³ Plaintiff's counsel concedes that Referee Boulbol did not conduct a hearing. Kleinman Opp. Aff. at ¶2.

Referee's Hearing. Plaintiff merely argues that the Referee's computation of monies due and owing to plaintiff was correct.

CPLR 4313 provides in relevant part: "[u]nless the order of reference otherwise provides, the referee shall forthwith notify the parties of a time and place for the first hearing to be held within twenty days after the date of the order" Since this was a mortgage foreclosure action, Referee Boulbol was required to hold a hearing on notice to defendants prior to computing the amounts owed to plaintiff (*243 West 98th Condominium v. Shapiro*, 12 A.D.3d 591, 786 N.Y.S.2d 67 [2nd Dept., 2004]). Here, not only was no notification of a hearing sent to defendants, and no hearing held, but defendants were clearly prejudiced by their inability to submit evidence directly to Referee Boulbol to support their argument regarding the sum due to plaintiff (see, e.g., *Adelman v. Fremd*, 234 A.D.2d 488, 651 N.Y.S.2d 604 [2nd Dept., 1996]).

Furthermore, pursuant to CPLR 4315, "[a] referee ... **before** entering upon his duties, shall be sworn faithfully and fairly to do such acts and make such determination and report as the order requires The oath may be waived upon consent of all parties." (Emphasis added). The attached exhibit evidences that Referee Boulbol's "Oath of Referee" is dated October 19, 2006, while the Referee's Report is dated October 18, 2006. There are no allegations that defendants waived the oath, either explicitly or by their actions (see, e.g., *Flotteron v. Steinberg*, 106 A.D.2d 427, 482 N.Y.S.2d 521 [2nd Dept., 1984]).

Based upon the foregoing, there is support for defendants' cross motion for an order rejecting the Referee's Report, and for the appointment of a new referee to hold a hearing on the amount of monies due to plaintiff.

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motion is granted, and counsel is directed to settle an order on notice appointing a referee to hear and determine the amounts due and owing to plaintiff under the Note and Mortgage.

Dated: March 16, 2007

ENTER:



Martin Shulman, J.S.C.

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