

<b>JP Morgan Chase Bank, NA v Gwinn</b>
2016 NY Slip Op 33087(U)
October 20, 2016
Supreme Court, New York County
Docket Number: 107422/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
JP MORGAN CHASE BANK, NA F/K/A JPMORGAN  
CHASE BANK,

Plaintiff,

-against-

LOVELYNN GWINN; NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD; NEW YORK CITY PARKING  
VIOLATIONS BUREAU; NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE; "JOHN  
DOES" and "JANE DOES," said names being fictitious, parties  
intended being possible tenants or occupants of premises, and  
corporations, other entities or persons who claim, or may claim,  
a lien against the premises,

Defendants.

-----X  
JOAN A. MADDEN, J.:

**INTERIM DECISION  
AND ORDER**

INDEX NO. 107422/09

**FILED**  
NOV 02 2016  
COUNTY CLERK'S OFFICE  
NEW YORK

In this mortgage foreclosure action, plaintiff moves to confirm the referee's report and for a judgment of foreclosure and sale. Defendant Gwinn opposes the motion on the grounds that the Affidavit of Merit and Amount Due on which the referee relies is inadmissible hearsay, incorrect and conclusory, and for those reasons, defendant asserts, the total amount reported as due should be reduced by not less than \$64,371.05.

The court agrees in part with defendant Gwinn's objections, but instead of reducing the amount reported as due, the court will provide plaintiff with an opportunity to submit additional papers addressing the issues discussed below, and defendant Gwinn will have an additional opportunity to respond to plaintiff's additional papers.

At the outset the court rejects plaintiff's argument that defendant Gwinn "waived" her

right to contest the referee's report and computations. On or about January 19, 2016, plaintiff's counsel sent defendant Gwinn's counsel a letter enclosing the referee's report and advising that "[o]ur firm is prepared to set-up a referee's hearing, however, please be advised that there will be no hearing unless you notify us of your intent to attend. . . . If you do not advise our office in writing (fax acceptable) within ten days of the date of this letter then the hearing shall be deemed waived." Even assuming without deciding that defendant waived her right to a hearing before the referee by not responding to the foregoing letter and requesting a hearing, this court is not bound by the referee's report, as the referee's findings and recommendation are advisory only and the court remains the ultimate arbiter of the dispute. See Adelman v. Fremd, 234 AD2d 488 (2<sup>nd</sup> Dept 1996); Stein v. American Banking, Ltd, 216 AD2d 458 (2<sup>nd</sup> Dept 1995); Shultis v. Woodstock Land Development Assocs, 195 AD2d 677 (3<sup>rd</sup> Dept 1993).

Turning to defendant's objections to the referee's report, defendant Gwinn correctly points out that the Affidavit of Merit and Amount Due on which the referee relies, contains inconsistent information as to the amount of interest due and owing on the loan. While paragraph 9 of the affidavit states that defendant Gwinn breached her obligations under the note and mortgage "by failing to tender the installment which became due and payable on August 1, 2008," the affidavit contains a chart listing, on a month-by-month basis, the interest rate and the amount of interest due on the principal balance, beginning with the month of July 2008, rather than August 2008. Plaintiff shall submit an affidavit based on firsthand knowledge explaining why the calculations include interest for the month of July 2008, even though the default did not occur until August 1, 2008.

In addition to the principal balance of the loan and the interest thereon, the Affidavit of

Merit and Amount Due includes a list of five separate items with amounts as due, but other than such list, the affidavit is silent as to all those items. The items are listed in the affidavit as follows:

Late Charges \$1,134.23  
Property Inspection \$241.40  
BPO [Brokers Price Opinion] \$1,800  
Taxes \$55,620.65  
Insurance \$6,709.00

Plaintiff shall submit an affidavit based on firsthand knowledge addressing each item listed above, specifically stating the amounts paid or advanced, when those payments or advances were made, and the factual and legal basis for seeking reimbursement as part of the judgment of foreclosure and sale. Plaintiff shall also provide any available documentary support for the items, such as invoices, receipts or cancelled checks.

Defendant Gwinn also objects to plaintiff's Affidavit of Merit and Amount Due as inadmissible hearsay. The affidavit is from David Nilsen, the authorized signatory of Caliber Home Loans, Inc., as attorney in fact for U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, successor in interest to plaintiff JPMorgan Chase Bank, NA f/k/a JPMorgan Chase Bank, pursuant to an assignment dated June 15, 2015. Nilsen states he is "fully familiar with the facts and circumstances hereafter set forth based upon a review and examination of the records maintained by Caliber Home Loans," and "[i]t is Caliber Home Loans, Inc.'s regular course of business to keep and maintain such records."

Since plaintiff did not assign the loan until June 2015, Nilsen presumably reviewed and examined records that were created and maintained by another entity or entities prior to the assignment. "While the mere filing of papers received from other entities, even if they are

retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipients can establish personal knowledge of the maker's business practices and procedures, or the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business [internal quotation marks and citations omitted]." Deutsche Bank National Trust Co v. Monica, 131 AD3d 737, 739 (3<sup>rd</sup> Dept 2015). For such documents to be admissible, they "should carry the indicia of reliability ordinarily associated with business records." Id.

Here, as the business records about which Nilsen attests were made prior to the June 2015 assignment, they were neither made in regular course of Caliber's business nor within Nilsen's personal knowledge. Under these circumstances, plaintiff must submit an affidavit(s) in compliance with the standard quoted above and lays the proper foundation for any business records provided to Caliber by other entities.

Accordingly, it is

ORDERED that plaintiff shall submit its additional papers on or before November 17, 2016, and defendant Gwinn shall submit her responsive papers on or before November 30, 2016; and it is further.


ORDERED that the parties shall submit all papers directly to the Clerk of Part 11, Room 351, 60 Centre Street.

This constitutes the Interim Decision and Order of this Court.

DATED: October 20, 2016

**FILED**  
 NOV 02 2016  
 COUNTY CLERK'S OFFICE  
 NEW YORK

ENTER:

  
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 J.S.C.  
**HON. JOAN A. MADDEN**  
 J.S.C.