

JP Morgan Chase Bank, NA v Gwinn
2017 NY Slip Op 33211(U)
July 7, 2017
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

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

Plaintiff,

INDEX NO. 107422/09

-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.

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JOAN A. MADDEN, J.:

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 and originally asserted that the amount due should be reduced by not less than \$64,371.05.

On October 20, 2016, this Court issued an Interim Decision and Order agreeing in part with defendant Gwinn's objections to the amount reported by the Referee, as due and owing. Rather than reducing the reported amount, the Court provided plaintiff with an opportunity to submit additional papers addressing three specific issues, and defendant Gwinn was given an opportunity to respond. After several extensions of the date for the parties' submissions, the court received the final submission, a Reply Affirmation from plaintiff, on May 17, 2017. In accordance with the Court's Interim Decision and Order, plaintiff has now submitted

Supplemental Affidavit of Merit and Amounts Due 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 JPMorgan Chase Bank, NA f/k/a/ JPMorgan Chase Bank, plaintiff herein. Mr. Nilsen supplied the original affidavit of merit on which the Referee relied.

The first issue concerns the amount of interest due and owing on the loan. The Court's Interim Decision and Order directed plaintiff to 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 his Supplemental Affidavit, Nilsen explains that defendant Gwinn breached her obligations under the note and mortgage by failing to tender the installment due and payable on August 1, 2008 and by failing to tender subsequent installments. Nilsen further explains that the "amount due for the August 1, 2008 installment consisted of the interest that accrued between July 1, 2008 and July 31, 2008 plus additional sums to be applied to reduce the principal balance due on the mortgage," and "[c]onsequently, defendant's default in paying the August 1, 2008 installment left the interest that accrued between July 1, 2008 and July 31, 2008 unpaid, due and owing." Based on foregoing, plaintiff has sufficiently shown that it is entitled to interest for the month of July 2008.

The second issue relates to the amounts for five specific items (late charges, property inspection, BPO [Brokers Price Opinion], taxes and insurance) that were included in the total amount reported as due, but were not mentioned in plaintiff's original affidavit of merit. The Interim Decision and Order directed plaintiff to submit "an additional affidavit based on firsthand knowledge addressing each of the five items, 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.”

Nilsen’s Supplemental Affidavit addresses the five items. With respect to late charges, Nilsen explains that pursuant to the terms of the note, a 2% late fee is charged on any payment received more than 15 days after the due date, and that the late charges in the total amount of \$1,134.23 were “assessed from August 1, 2008 through May 13, 2009, which payments have not been received.” He submits the dates and amounts of late charges imposed each month during that period. With respect to interest, Nilsen states that as of December 14, 2016, a total of \$425,026.31 is due and owing, and provides the interest rate and amount of accrued interest for each month from July 2008 to December 2016. With respect to property inspection costs, he states that a total of \$210.00 is due and owing as of December 14, 2016, and provides the date and amount of the disbursements for that item. With respect to taxes and assessments, Nilsen states that as of December 14, 2016, the sum of \$66,055.63 is due and owing, and provides the date and amount of each disbursement from March 2009 through December 2016. With respect to insurance, he states that the sum of \$11,892.00 was disbursed on September 14, 2016, and that the “\$6,709.00 in hazard insurance premiums appears in the account records for this loan as a bulk disbursement, which cannot be correlated to any specific date(s), and consequently the amount is being withdrawn from plaintiff’s computations of amount due.” Nilsen also states that the “amounts for Broker’s Price Opinions (BPO) and/or appraisals appears in the account records for this loan as a bulk disbursement, which cannot be correlated to any specific date(s) and consequently, this amount is being withdrawn from plaintiff’s computations of amount due.”

Based on the foregoing statements in Nilsen's Supplemental Affidavit of Merit, plaintiff has established that as of December 14, 2106, the amount of \$425,026.31 is due and owing for interest; the amount of \$1,134.23 is due and owing for late charges; the amount of \$210.00 is due and owing for property inspection; and the amount of \$77,947.63 is due and owing for escrow taxes (\$66,055.63) and insurance (\$11,892.00).

The third issue concerns the evidentiary basis for plaintiff's original Affidavit of Merit and Amount Due from David Nilsen, on which the Referee relied in reporting the monies due and owing to plaintiff. In the affidavit, Nilsen stated that he was "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." The Interim Order determined that since "the business records about which Nilsen attests were made prior to the June 2015 assignment [to Caliber], they were neither made in the regular course of Caliber's business nor within Nilsen's personal knowledge." Quoting the evidentiary standard in Deutsche Bank National Trust Co v. Monica, 131 AD3d 737, 739 (3rd Dept 2015) ("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 recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business."), the Court directed plaintiff to submit an affidavit laying the proper foundation for any business records provided to Caliber by another entity.

Nilsen's Supplemental Affidavit of Merit satisfies the standard in Deutsche Bank National Trust Co v. Monica. Nilsen now states that he "is fully familiar with the facts and circumstances hereinafter set forth based upon a review and examination of the records made and maintained by Caliber Home Loans, Inc." and "[i]t is Caliber Home Loans, Inc.'s regular course of business to keep, maintain and rely upon such records." He additionally states that such records include "the records of Washington Mutual Bank, F.A. and Chase Home Finance LLC, the prior servicers of this mortgage loan, relating to this loan, which have been incorporated in Caliber Home Loans, Inc.'s records for this loan and are relied upon in the course of business activity conducted regularly by Caliber Home Loans, Inc." Nilsen further states that he "personally reviewed" Caliber's records for this loan and is "familiar with how the records are made and maintained," and that the "records concerning the subject loan were kept, maintained and relied upon in the regular course of business." Thus, based on additional statements in Nilsen's Supplemental Affidavit, a proper foundation has been laid for the business records Caliber received from the prior loan servicers and which have been incorporated into Caliber's own records.

The Court has considered's defendant Gwinn's arguments in opposition to plaintiff's supplemental submissions, and finds that they are not persuasive.

Finally, the Court notes that plaintiff's reply affirmation repeats its prior argument that defendant Gwinn waived her right to contest the referee's computations. The Court's Interim Decision and Order expressly rejected that argument. The Court determined that "[e]ven 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 [the January 19, 2016 letter from

plaintiff's counsel to defendant Gwinn's counsel enclosing the referee's report and advising that she if she did not notify plaintiff's counsel within 10 days, "the hearing shall be deemed waived"], 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 (2nd Dept 1996); Stein v. American Banking, Ltd., 216 AD2d 458 (2nd Dept 1995); Shultis v. Woodstock Land Development Assocs., 195 AD2d 677 (3rd Dept 1993)."

Thus, plaintiff's motion to confirm the referee's report is granted, and the amounts reported as due are confirmed to the extent of confirming the principle balance due in the amount of \$1,593,808.93 and late charges due in the amount of \$1,134.23, and based on plaintiff's Supplemental Affidavit of Merit, the Court determines that as of December 14, 2016, the amount due for interest is \$425,026.31, the amount due for property inspection is \$210.00, the amount due for escrow taxes and insurance is \$77,947.63 (\$66,055.63 for taxes and \$11,892.00 for insurance), making in all the amount of \$2,098,127.10 as the total amount due and owing to plaintiff.

Accordingly, it is hereby

ORDERED that plaintiff's motion to confirm the referee's report is granted and the amounts reported as due are confirmed and determined by the Court in accordance with this Decision and Order, and the Court is signing the proposed judgment annexed to plaintiff's motion papers.

DATED: July 7, 2017

ENTER:



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

FILED

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