

Indymac Fed. Bank, FSB v Vantassel

2018 NY Slip Op 30263(U)

January 17, 2018

Supreme Court, Suffolk County

Docket Number: 18371-09

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/29/17
ADJ. DATES 12/8/17
Mot. Seq. # 005 - MotD
Mot. Seq. # 006 - XMD
CDISP - Yes

-----X		
INDYMAC FEDERAL BANK, FSB,	:	RAS BORISKIN, LLC
	:	Attys. For Plaintiff
Plaintiff,	:	900 Merchants Concourse, Suite 106
	:	Westbury, NY 11590
-against-	:	
	:	CHARLES WALLSHEIN, ESQ.
KIMBERLY VANTASSEL a/k/a KIMBERLY	:	Attys. For Defendant Vantassel
VAN TASSEL, ET ALS,	:	35 Pinelawn Road, Suite 106E
	:	Melville, NY 11747
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 10 read on this motion for judgment of foreclosure and cross motion to vacate; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers: 7-10; Opposing papers: _____; Reply papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#005) by the plaintiff to restore the matter to the active court calendar and for, inter alia, leave to enter a judgment of foreclosure and sale, pursuant to Real Property Actions and Proceedings Law (RPAPL) §1351, is granted in part and denied in part, and it is further

ORDERED that the cross motion (#006) by the defendant, Kimberly Vantassell, for leave to renew or reargue plaintiff's motion (#001) for summary judgment and, upon renewal or reargument, to dismiss the complaint, is denied in its entirety; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

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ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

This is an action to foreclose a mortgage on residential property situate in Suffolk County, New York. The action was commenced by filing on May 11, 2009. Defendant, Kimberly Vantassell, filed an answer through counsel on June 3, 2009. The plaintiff thereafter moved (#001) for summary judgment against Kimberly Vantassell, accelerated judgments against the non-answering defendants, and for appointment of a referee to compute. The defendant, Kimberly Vantassell, opposed the motion and cross moved for dismissal. An Order was issued on April 14, 2010 granting plaintiff's motion (#001) and denying defendant's cross motion (#002) in its entirety. On September 27, 2010, the plaintiff moved (#003) for judgment of foreclosure and sale and the defendant cross moved (#004) for leave to renew and reargue plaintiff's motion for summary judgment. Both motions were subsequently withdrawn pursuant to correspondence received from the respective parties. Thereafter, court administrators undertook an initiative to purge hundreds of mortgage foreclosure cases from the civil case inventories of the Justices of this court and, on December 29, 2014, the instant action was purged from the case inventory of this court in the appearance screen of the court's electronic file system. A comment therein indicates that a final disposition of this action occurred on that date by "PURGE." Notably, this took place without any order or other directive of this court.

The plaintiff now moves (#005) to restore the matter to the active calendar and for confirmation of referee, William Wexler, Esq.'s report and leave to enter a judgment of foreclosure and sale of the subject property incorporating the referee's findings. The defendant opposes the motion and cross moves (#006) for leave to renew plaintiff's motion for summary judgment and, upon renewal, vacatur of the resulting order and dismissal of the action.

At the outset, the Court notes that Court personnel cannot "purge" a case from a Judge's inventory (*see JPMorgan Chase Bank, N.A. v Mehrnia*, 143 AD3d 946, 39 NYS3d 801 [2d Dept 2016]). This case has always been active and certainly not abandoned. Thus, the branch of the plaintiff's motion seeking to restore this action is granted.

The Court will next consider the cross motion (#006) by the defendant, as determination thereof may render determination of the plaintiff's motion, academic.

Initially, the Court notes that there are several deficiencies with defendant's motion, which seeks renewal pursuant to CPLR 2221(e) and vacatur pursuant to CPLR 5015(a). First, the failure to submit all the prior motion papers is a critical defect (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 957 NYS2d 361 [2d Dept 2012]; *see also Plaza Equities, LLC v Lamberti*, 118 AD3d 687, 986 NYS2d 347 [2d Dept 2014]). The same holds true for the branch of the motion seeking vacatur (*see Morgan Stanley Mtge. Loan Trust (2007-8XS) v Harding*, 131 AD3d 511, 35 NYS3d 235 [2d Dept 2016]). Additionally, the defendant's papers do not identify the motion as one for leave to renew, which, pursuant to CPLR 2221(e) must be specified and "identified as such" (CPLR 2221[e][1]).

Notwithstanding the defective pleading, the motion is still denied. A motion for leave to renew pursuant to CPLR 2221(e) "shall be based upon new facts not offered on a prior motion that would

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change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion” (see *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]; *National Loan Inv., L.P. v Ippolito*, 131 AD3d 951, 15 NYS3d 894 [2d Dept 2015]; *Wells Fargo Bank v Allen*, 130 AD3d 717, 11 NYS3d 876 [2d Dept 2016]; *Jacobson v Adler* 119 AD3d 902, 989 NYS2d 898 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Siegel v Morsey New Sq. Trails Corp.*, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). The motion must be predicated upon facts or materials in existence at the time of the original motion but not known or otherwise unavailable to the party seeking renewal (see *Nesternko v Starrett City Assocs, L.P.*, 123 AD3d 1099, 997 NYS3d 636 [2d Dept 2016]). The party seeking such relief must demonstrate a reasonable justification for the failure to present such facts on the original motion. If such is lacking, the Court lacks discretion to grant renewal (see *DLJ Mtge. Capital, Inc. v David*, 147 Ad3d 1024, 48 NYS3d 234 [2d Dept 2017]; *Central Mtge. Co. v Resheff*, 136 AD3d 962, 26 NYS3d 323 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, *supra*; *Wells Fargo Bank v Allen*, 130 AD3d 717, *supra*; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, *supra*).

The defendant’s cross motion challenges plaintiff’s standing, alleging that the copy of the note submitted with plaintiff’s summary judgment motion (#001) differs from the copy of the note submitted with plaintiff’s current motion (#005). Because the defendant has not attached all prior pleadings with the instant submission, however, the defendant has failed to demonstrate and the Court is unable to discern how the evidence differs (see *Biscone v JetBlue Airways Corp.*, 103 AD3d 158, *supra*; *Plaza Equities, LLC v Lamberti*, 118 AD3d 687, *supra*). Further, the defendant raised the defense of standing in her answer and the issue was considered and determined in connection with the plaintiff’s summary judgment motion. As noted in this Court’s resulting Order, “the moving papers submitted by the plaintiff sufficiently established each of the elements required to establish a prima facie case for foreclosure and sale [and] further established, prima facie, that none of the affirmative defenses nor the counterclaims set forth in the answer of Vantassell have merit” (see Whelan, J., Memo Decision dated April 4, 2010 [citations omitted]). Where, as here, an issue is judicially determined, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue under the doctrine of the “law of the case,” which applies to any legal determinations that were necessarily resolved on the merits in a prior decision (see *Martin v City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 689 [1975]; *Ahrorgulova v Mann*, 144 AD3d 953, 42 NYS3d 203 [2d Dept 2016]; *Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 29 NYS3d 398 [2d Dept 2016]).

The Court now turns to plaintiff’s submissions, which include a Referee’s Report of Amount Due dated August 3, 2017, copies of the note and mortgage agreement, and an accounting of plaintiff’s attorneys’ costs in prosecuting this action. The defendant opposes the application, contending that a referee’s hearing is required and challenging the amounts in the referee’s report and propriety of the information relied upon by the referee in his report.

First, CPLR 4313 does not require the scheduling of a hearing. Rather, same is at the Court’s discretion (CPLR 4313). Here, the Court’s April 14, 2010 Order provided directives to the appointed referee to compute the amount due to the plaintiff and to examine and report whether the mortgaged premises could be sold in parcels. The Court did not direct a hearing. Thus, there was no obligation, at law or otherwise, for a hearing to be held.

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Notwithstanding the above, the plaintiff has submitted an affidavit of service indicating that a Notice of Computation was served on the defendant's prior counsel of record, thus providing the defendant with the opportunity to review and respond to the evidence before the Referee. The submission of the affidavit of mailing raises the presumption that the Notice of Computation was properly mailed and received by defendant's attorney. "The burden then falls upon the addressee to present evidence sufficient to overcome the presumption and establish nonreceipt" (*see Sport-O-Rama Health & Fitness Ctr., Inc. v Centennial Leasing Corp.*, 100 AD2d 584, 584, 473 NYS2d 525 [2d Dept 1984] *citing Vita v Heller*, 97 AD2d 464, 467 NYS2d 652 [2d Dept 1982]). Notably, the record contains no affirmation from the defendant's prior counsel upon whom the notice was served denying receipt of the notice. That the defendant's current counsel of record denies is of no merit. Even so, the mere denial of receipt of the notice of the computation, in the face of the affidavit of mailing, does not raise an issue of fact that would require denial of the motion or a hearing (*see Flushing Sav. Bank, FSB v Colmar Realty, LLC*, 121 AD3d 1040, 994 NYS2d 311 [2d Dept 2014]).

Further, defendant's allegations regarding the evidence relied upon by the referee in ascertaining the amounts due to plaintiff are unsupported. The Affidavit of Merit and Amount Due, which included copies of the note, mortgage, and assignment as exhibits, was submitted with the plaintiff's motion for summary judgment. As the issue of the admissibility of plaintiff's business records was thus determined on the merits by the April 10, 2017 Order, the Court is bound by same and will not revisit this determination (*see Martin v City of Cohoes*, 37 NY2d 162, *supra*; *Ahrorgulova v Mann*, 144 AD3d 953, *supra*; *Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, *supra*).

Based on the record before the Court, the defendant's request for a hearing is denied. Under the circumstances of this case, the referee was not required to conduct a hearing prior to issuing the report (*see Deutsche Bank Natl. Trust Co. v Williams*, 134 AD3d 981, 20 NYS3d 907 [2d Dept 2015]; *Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, 13 NYS3d 97 [2d Dept 2015]; *Capital One, NA v Knollwood Prop. II, LLC*, 98 AD3d 707, 950 N.Y.S.2d 482 [2d Dept 2012]). Furthermore, defendant has had the opportunity to raise and submit proof on all issues before this Court (*see Deutsche Bank Natl. Trust Co. v Zlotoff*, 77 AD3d 702, 908 NYS2d 612 [2d Dept 2010]; *Federal Deposit Ins. Corp. v 65 Lenox Road Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 [2d Dept 2000]; *Adelman v. Fremd*, 234 AD2d 488, 651 NYS2d 604 [2d Dept 1996]; *Stein v American Mtge. Banking, Ltd.*, 216 AD2d 458, 628 NYS2d 162 [2d Dept 1995]). The defendant's challenge to the calculation of interest is without merit for the reasons correctly noted in plaintiff's reply affirmation, which includes a further breakdown of the amounts owed.

The record demonstrates ample documentary evidence to support the amounts due and owing the plaintiff as attested to by the referee. The computation was premised upon business records produced by plaintiff in support of its initial motion for summary judgment and in support of the instant motion (*see Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897, 933 NYS2d 73 [2d Dept 2011]; *cf. Citimortgage, Inc. v Kidd*, 148 AD3d 767, 49 NYS3d 482 [2d Dept 2017]). Moreover, the referee attested to his review of the Affidavit of Merit and Amount Due on Schedule A of his Report of Amount Due. Although the court is not bound by the referee's findings, the report of a referee should be confirmed whenever the findings are substantially supported by the record (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767, *supra*; *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 [2d Dept 2016]; *Hudson v Smith*, 127 AD3d 816, 4 NYS3d 894 [2d Dept 2015]).

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The portion of plaintiff's motion seeking attorney's fees is also granted, as the terms of the subject loan documents allows for same. Here, plaintiff has supplied the Court with an affirmation of services for \$5,612.50, and requests a total of \$3,500.00. The Court finds this to be reasonable, and will award plaintiff \$3,500.00 (*see Vigo v 501 Second Street Holding Corp.*, 121 AD3d 778, 994 NYS2d 354 [2d Dept 2014]).

That branch of plaintiff's motion seeking to replace the current plaintiff, Indymac Federal Bank, with a subsequent assignee, is denied. Where a plaintiff in a mortgage foreclosure action transfers the note by physical delivery to a non party during the pendency of such action or by written assignment, the transferee may continue to prosecute the action in the name of the original plaintiff or it may seek leave to have itself formally substituted for the named plaintiff pursuant to CPLR 1018 (*see U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; *Woori America Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). Nevertheless, it is now well settled law that a written assignment of a mortgage not containing a concomitant assignment of the mortgage note does not effect a transfer of the note, which is the controlling document in determining who may prosecute claims for foreclosure and sale (*see Aurora Loan Serv., LLC v Taylor*, 25 NY3d 355, 12 NYS2d 612 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 12 NYS3d 118 [2d Dept 2015]). Here, the written assignment relied upon contains no assignment of the mortgage note and no proof of the delivery of such note to the named assignee in the form of an affidavit is included in the moving papers (*see U.S. Bank Nat. Assn. v Akande*, 136 AD3d 887, *supra*; *Woori America Bank v Global Universal Group Ltd.*, 134 AD3d 699, *supra*; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, *supra*). The Court thus denies the plaintiff's request.

The Court, therefore, grants plaintiff's motion (#005) as indicated, denies defendant's cross motion (#006) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 1/17/18


THOMAS F. WHELAN, J.S.C.