

Bank of Am., N.A. v Bartons
2018 NY Slip Op 30422(U)
March 6, 2018
Supreme Court, Suffolk County
Docket Number: 010965/2012
Judge: John H. Rouse
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INDEX NO. 010965/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 12/13/2017
ADJ. DATE: 202/21/2018
Mot. Seq. 005-MG

MOTION DATE: 12/13/2017
ADJ. DATE: 202/21/2018
Mot. Seq. 006-MD
CASEDISP

BANK OF AMERICA, N.A., successor by merger to BAC HOME
LOANS SERVICIN, LP,

Plaintiff

-against-

DECISION & ORDER

REBECCA BARTONS, RAYMOND BARTO, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee
for Quicken Loans, Inc., Mortgage Electronix Registration
Systems, Inc., as nominee for Countrywide Home Loans, Inc.
Town of Brookhaven, Hann Financial Service Corp., Keyspan Gas
East Corporation d/b/a National Grid, Chase Manhattan Bank USA
NA, Tony Sann's Music Store d/b/a Sound Beach Music, Aaron
Woskoff, Spacely LLC, Long Island Lighting Company d/b/a
LIPA; and the United States Security and Exchange Commission

9 Fowler Lane,
Mount Sinai, NY 11766

DISTRICT: 0200
SECTION: 140.00
BLOCK: 01.00
LOT: 011.000

Defendants

TO:

FRENKEL LAMBERT WEISS WEISMAN
53 GIBSON STREET
BAY SHORE, NY 11706
631-969-3100

CHARLES WALLSHEIN, ESQ.
35 PINELAWN ROAD, STE 106E
MELVILLE, NY 11747
631-824-6555

HOWARD M. BERGSON, ESQ.
AS REFEREE
194 MAIN ST,
SETAUKET, NY 11733

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff for Judgment of Foreclosure and Sale dated October 24, 2017, Affirmation of Regularity by Stephen Wallace, Esq. affirmed on October 24, 2017 with Exhibits A-K, including the decision of the Appellate Division of the Supreme Court for the Second Department affirming the determination of summary judgment in favor of the Plaintiff; (2) Notice of Computation dated August 14, 2017, with Affidavit of Service of Notice of Computation as served upon Counsel for Defendants; (3) Notice of Cross Motion by Defendants, Affirmation of Charles Wallshein, Esq. affirmed on January 23, 2018, Affidavit of Rebecca Barton sworn to on January 24, 2018, with Exhibits A-C attached thereto; (4) Reply Affirmation of Shawn Speilberg, Esq. affirmed on February 2, 2018 with Exhibits A-D attached thereto; and (5) Proposed Judgment of Foreclosure and Sale; it is:

ORDERED that the motion (Seq. #005) by Plaintiff for Judgment of Foreclosure and Sale is granted; and it is further

ORDERED that the cross motion (Seq. #006) by requesting the court to reject the referee's computation and mandate a hearing be held is denied; and it is further

ORDERED that Howard M. Bergson, Esq. with an office 194 Main St, Setauket, NY 11733 Phone: (631) 675-6996 is appointed Referee to have a notice of sale published in

APM Port Time Record and to conduct a public auction of the property, in accordance with RPAPL §231; and it is further

APM **ORDERED** that the sale be held on the *front steps of the Brookhaven Town Hall located at 1 Independence Hill, Farmingville, New York*; and it is further

ORDERED that the property be sold in accordance with RPAPL § 1351(1), and the date of the Judgment is deemed the date it is entered; and it is further

ORDERED that the Referee shall deposit the down payment and proceeds of sale, as necessary, in an IOLA account in his/her own name as Referee, in accordance with CPLR § 2609; and it is further

ORDERED that after the property is sold the Referee shall execute a deed to the purchaser, in accordance with RPAPL § 1353 and the terms of sale, which shall be deemed a binding contract; and it is further

ORDERED that the Referee shall pay from the sale proceeds the expenses of sale, and pay to the Plaintiff or its attorney, the amount of the debt, interest and costs, in accordance with RPAPL § 1354, as follows:

FIRST: The statutory fees of the Referee for conducting the sale, in accordance with CPLR § 8003(b), **\$500.00**, or in the event a sale was cancelled or postponed, Plaintiff shall compensate the Referee in the sum of \$250.00 for each adjournment or cancellation, unless the Referee caused the delay.

SECOND: The expenses of the sale including posting and publishing.

THIRD: The Referee shall also pay to the Plaintiff or its attorney the following:

- DAK*
ASB
- A. Costs and Disbursements. *Amount to be determined by the County Clerk* \$_____ adjudged to the Plaintiff for costs and disbursements in this action, to be taxed by the clerk and inserted herein, with interest at the statutory rate from the date of entry of this judgment.
- B. Amount due as determined by the Court upon this motion of \$537,891.69 with interest added thereto at the rate of \$77.37 per day beginning on July 1, 2017 through and including the date judgment is entered by the Clerk of the court, and upon this sum of principal and interest shall be added interest at the rate of nine percent per annum until such amount is paid in full to Plaintiff after the closing of the sale of the subject premises.
- DAK*
ASB
- C. Attorney's Fees of *# 4,950⁰⁰* is hereby awarded to the Plaintiff as reasonable legal fees herein, with interest at the statutory rate from the date of entry of this judgment.

FOURTH: That the Referee shall pay from the sale proceeds all taxes, assessments and water rates that are liens upon the property and redeem the property from any sales for unpaid taxes, assessments, or water rates that have not apparently become absolute, and any other amounts due in accordance with RPAPL § 1354(2).

FIFTH: Surplus monies arising from the sale shall be paid into Court by payment to the Suffolk County Comptroller by the referee conducting the sale within five days after receipt, in accordance with RPAPL § 1354(4); and it is further

ORDERED that if the Plaintiff is the purchaser of the property, the Referee shall not require a down payment or that the amount bid be paid in cash, but shall execute and deliver a deed to the Plaintiff upon payment to the Referee of the amounts specified in items "First", "Second", AND "Fourth" above. The Referee shall allow the Plaintiff to pay the amounts in item "Fourth" above when it is recording the deed. The balance of the bid, after deducting the amounts paid by the Plaintiff, shall be applied to the amount due Plaintiff as specified in item "Third" above. If there

is surplus after applying the balance of the bid, the Plaintiff shall pay that amount to the Referee, who shall deposit it in accordance with paragraph "Fifth" above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer tax, which is not a lien upon the property at the time of sale, shall be paid by the purchaser, not by the Referee from sale proceeds. Transfer Tax shall be paid by the Purchaser in accordance with Tax Law § 1404(b)(1). Purchaser shall be responsible for interest and penalty due on any real property taxes accruing after the sale; and it is further

ORDERED that the property is sold in "as is" condition as of the date of sale, the Purchaser assumes all risk of loss or damage to the property from the date of the sale until the date of closing, and the sale is subject to the following items, which are neither valid exceptions to clear title nor valid reasons to adjourn the closing:

- A. Any facts that a survey or physical inspection of the property would disclose;
- B. Rights of the public to any part of the property that is within the bounds of any street, alley, or highway
- C. Any covenants, restrictions, easements, public utility agreements of record, building and zoning ordinances and violations of same;
- D. Rights of tenants or persons in possession of the property. It shall be the
- E. responsibility of the Purchaser to evict or remove any tenants or persons in possession of the property.
- F. The right of redemption of the United States of America, to redeem the property within 120 days of sale.
- G. Any rights pursuant to CPLR § 317, § 2003, and § 5015 or any appeal of the underlying action;

and it is further

ORDERED that the purchaser be let into possession on producing the Referee's Deed; and it is further

ORDERED that the Defendants in this action and all persons claiming through them are barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the property; and it is further

ORDERED that if the Referee does not appear at the place and time appointed for the sale, the Court may appoint a Substitute Referee; and it is further

ORDERED that the Referee is subject to the requirements of Rule 36.2(c) of the Chief Judge, and if the Referee is disqualified from receiving appointment pursuant to provisions of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is further

ORDERED that within thirty days after completing the sale and executing the proper conveyance to the purchaser, unless the time is extended by the Court, the officer making the sale shall file with the clerk a report under oath of the disposition of the proceeds of the sale in accordance with RPAPL § 1355(1); and it is further

ORDERED that the Referee appointed herein shall file the completed and signed Foreclosure Surplus Monies Form, in accordance with the Suffolk County Administrative Order # 41-13, with both the Suffolk County Clerk and the Supreme Court Calendar Clerk within 30 days of the foreclosure sale date; and it is further

ORDERED that a copy of this Judgment with Notice of Entry shall be served upon any party entitled to service and upon the Referee appointed to sell. The legal description of the property being foreclosed is:

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Town of Brookhaven, County of Suffolk and State of New York, known and designated as Lot No. 72, on a certain map entitled, "Map of Pleasant Hills, Section 2", and filed in the Office of the Clerk of the Comity of Suffolk on September 17, 1964, as Map No. 4158, more particularly bounded and described as follows:

BEGINNING at a point on the easterly side of Fowler Lane distant 226.59 feet southerly as measured along the easterly side of Fowler Lane from the southerly end of a curve connecting the southerly side of Hilltop Drive with the easterly side of Fowler Lane;

RUNNING THENCE south 77 degrees 40 minutes 50 seconds east 176.93 feet;

THENCE south 13 degrees 24 minutes 13 seconds west 83.01 feet;

THENCE north 85 degrees 04 minutes 24 seconds west 170.00 feet to the easterly side of Fowler Lane;

THENCE along the easterly side of Fowler Lane, along the arc of a curve bearing to the right having a radius of 815.00 feet a distance of 105.16 feet to the point or place of BEGINNING.

said property also being known as 9 Fowler Lane, Mount Sinai, NY 11766, County of Suffolk, State of New York; SCTM: DISTRICT: 0200; SECTION: 140.00; BLOCK: 01.00; LOT: 011.000

ENTER JUDGMENT

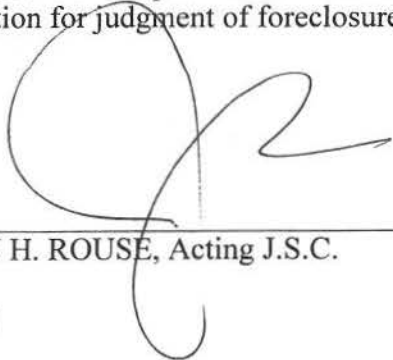
DECISION

Plaintiff moves for the confirmation of the report of computation by the referee in foreclosure and for the judgment of foreclosure and sale. Defendants Rebecca Barton and Raymond Barton cross move for an order rejecting the computation and directing that a hearing be held. Plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings. See *U.S. Bank, N.A. v. Saraceno*, 147 AD3d 1005 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930 (2nd Dept., 2015). While the court is not bound by the referee's report of the damages due the plaintiff, the report of a referee should be confirmed in circumstances where the findings are substantially supported by the evidence in the record. *CitiMortgage, Inc. v. Kidd*, 148 AD3d 767 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058 (2nd Dept., 2016). In this case the referee submitted sufficient evidence in the form of an affidavit from the mortgage servicer/plaintiff's document execution specialist, together with sufficient documentary proof to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel. *CitiMortgage, Inc. v. Kidd*, *supra.*; *Hudson v. Smith*, 127 AD3d 816 (2nd Dept., 2015).

As to defendant's claim that she is entitled to a hearing, the law is clear that unlike references to hear and determine, references to hear and report are advisory only which leaves the court as the ultimate arbiter of the issues referred. *CPLR 4311*; *RPAPL 1321*; see *Deutsche Bank National Trust Co. v. Williams*, 134 AD3d 981 (2nd Dept., 2015); *Deutsche Bank Natl. Trust Co. v. Zlotoff*, 77 A.D.3d 702 (2nd Dept., 2010). A review of the evidence submitted by the plaintiff shows that referee's computations are supported by the documentary evidence submitted. Notably, a notice of computation was served upon the Defendants and they were given an opportunity to submit to the referee such evidence that might contradict the evidence submitted by the Plaintiff, or offer such computations as they contend correctly reflect the amounts due. They did neither. Accordingly, after a review of the evidence and computations the court confirms the report of the referee, grants the Plaintiff's motion for judgment of foreclosure and sale and denies the cross motion in every single respect.

ENTER JUDGMENT

Dated: March 6, 2018



JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION