

Wells Fargo Bank, N.A. v Braun
2018 NY Slip Op 30527(U)
March 29, 2018
Supreme Court, Suffolk County
Docket Number: 33940/2013
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:**HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 33940/2013

MOTION DATE: 02/20/2018

MOTION SEQ. NO.: 003 MD

004 MG

005 MD

CASE DISP

-----X
WELLS FARGO BANK, N.A., et.al.,

Plaintiff,

-against-

TINA BRAUN A/K/A TINA A. BRAUN A/K/A
TINA-ANTOINETTE BRAUN, JOHN BORIS,

Defendants.

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PLAINTIFF'S ATTORNEY:

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70 CROSSROADS BUILDING
2 STATE STREET
ROCHESTER, NY 14614

DEFENDANT'S ATTORNEY:

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Upon the following papers numbered 1 to 42 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 6 (3003) 7-23 (#004) 24-29 (#005) ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30-31, 32-38 ; Replying Affidavits and supporting papers 39-40, 41-42 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Tina Braun seeking an order pursuant to CPLR 2221(d) seeking leave to reargue plaintiff's motion and defendant's cross motion and the Order (Gazzillo, J.) thereon dated May 14, 2016 denying defendant's cross motion and granting plaintiff's motion for an order granting summary judgment and for the appointment of a referee is denied; and it is further

ORDERED the motion by plaintiff Wells Fargo Bank, N.A., for an order confirming the referee's report of sale dated August 15, 2017 and for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendant Denise Russo seeking an order: 1) rejecting confirmation of the referee's report and directing the referee to conduct a hearing; 2) dismissing plaintiff's complaint for failure to comply with RPAPL 1304 notice requirements; and 3) compelling the plaintiff to negotiate with the defendant for the purpose of offering a loan modification is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$225,000.00 executed by defendant Tina Braun on September 26, 2007 in favor of World Savings Bank, FSB. Defendant also executed a promissory note on the same date promising to re-pay the entire amount of the indebtedness to the mortgage lender. Braun defaulted in making payments beginning June 15, 2009 and the default has continued to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on December 27, 2013.

Defendant Braun served a timely answer containing seventeen affirmative defenses and five counterclaims. By Order (Gazzillo) dated May 14, 2016, plaintiff's motion for an order granting summary judgment and for the appointment of a referee was granted and defendant's cross motion to compel discovery and for an accounting was denied. Defendant's motion seeks an order granting leave to re-argue Acting Justice Gazzillo's May 14, 2016 Order and, upon granting reargument, dismissing plaintiff's complaint. Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendant's cross motion seeks an order rejecting confirmation of the referee's report, directing a hearing to compute the damages due the mortgage lender, dismissing the complaint for failing to prove that RPAPL 1304 notices were served, and compelling additional settlement negotiations.

Among the claims raised by the defendant in opposition to plaintiff's motion and in support of her motions are: 1) the re-argument motion should be granted based upon plaintiff's failure to submit sufficient admissible proof to prove service of the RPAPL 1304 notice and upon granting leave to reargue the complaint should be dismissed; 2) the referee's report should not be confirmed since defendant is entitled to a hearing; 3) a second identical argument concerning plaintiff's alleged failure to prove service of the 90-day RPAPL 1304 notice; and 4) plaintiff should be compelled to enter into additional negotiations so that defendant can obtain a loan modification.

The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated (*see* Siegel, "New York Civil Practice" Sects. 4442, 4443 pp. 585). The principle is grounded upon the premise that "once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." (*see Gramatan Homes v. Lopez*, 46 NY2d 484, 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull*, 138 AD3d 417, 27 NYS3d 867 (1st Dept., 2016); *Matter of JPMorgan Chase*, 135 AD3d 762, 24 NYS3d 667 (2nd Dept., 2016)). The related law of the case doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes*, 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown*, 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.*, 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

In Acting Justice Gazzillo's May 14, 2016 short form order each of five specific defenses asserted by the defendant in opposition to plaintiff's summary judgment motion were considered, and upon awarding plaintiff summary judgment, each of those defenses together with defendant's remaining seventeen affirmative defenses and five counterclaims were stricken. Although defendant's answer's thirteenth affirmative defense claims that plaintiff failed to comply with RPAPL 1304 notice requirements, a review of the defendant's opposition papers to plaintiff's original summary judgment motion shows that defendant failed to raise that defense which she now seeks to raise in opposition to plaintiff's motion for a judgment of foreclosure and sale. As a result the motion court's decision granting plaintiff's summary judgment motion is the "law of the case" and all defenses raised in her answer, or which should have been raised in defendant's opposition papers including the RPAPL 1304 defense, have been stricken (*see Madison Acquisition Group, LLC, v. 7614 Fourth Real Estate Development, LLC*, 134 AD3d 683, 20 NYS43d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Inc.*, 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015)) or have been waived (*see New York Community Bank v. J*

Realty F Rockaway, Ltd., 108 AD3d 756, 969 NYS2d 796 (2nd Dept., 2013); *Starkman v. City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 (2nd Dept., 2013)). Defendant's sole remedy is thus relegated to appeal the motion court's prior order.

With respect to defendant's application seeking leave to reargue, CPLR 2221(d) is clear that leave to reargue may only be granted "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Defendant never raised the claimed fact that plaintiff failed to prove service of the RPAPL 1304 90-day notice in her opposition/cross motion papers. Having failed to raise the defense, no legal basis exists to grant leave to reargue the prior motion and cross motion.

With respect to defendant's claims concerning procedural and substantive issues surrounding the referee's report and computations, no legal basis exists to deny confirmation of the referee's report. 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, 48 NYS3d 163 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015)). Whereas 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, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the referee submitted sufficient evidence in the form of a supplemental affidavit of merit and amount due an owing from the mortgage servicer/plaintiff's vice president of loan documentation, 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, 4 NYS3d 894 (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, 20 NYS3d 907 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Zlotoff, et al.*, 77 AD3d 702, 908 NYS2d 612 (2nd Dept., 2010); *Shultis v. Woodstock Land Development Associates*, 195 AD2d 677, 599 NYS2d 340 (3rd Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House, Inc.*, 281 AD2d 778, 711 NYS2d 275 (3rd Dept., 2001)). As the Court of Appeals stated more than 145 years ago in *Marshall v. Meech*, 6 Sickels 140, 143-144, 51 NY 140 (Sept., 1872): "This reference was merely to inform the conscience of the court. The finding of the referee did not conclude it. It could adopt and act upon it or could disregard it and draw its own conclusions from the evidence." A review of the May 14, 2016 Order of Reference reveals that the referee's authority was limited to ascertain the sums due and owing the mortgage lender, and to report whether the mortgaged premises could be sold in parcels. Such limitations authorized the referee to hear and report – a purely ministerial act which does not require a hearing (*see Zaslavskayav. Boyanzhu*, 144 AD3d 675, 41 NYS3d 237 (2nd Dept., 2016)).

A review of the evidence submitted by the plaintiff shows that referee's computations are supported by the documentary evidence submitted. As to the defendant's claim that she is entitled to a "hearing", there is no requirement to conduct a hearing particularly in view of the fact that the defendant has the opportunity to submit relevant, admissible evidence in opposition to the referee's

findings sufficient to contradict the calculations or to provide admissible credible proof for the court to modify the referee's computations. No admissible credible testamentary or documentary proof has been submitted by the defendant to contradict the referee's computations. Absent submission of any admissible evidence to contradict the referee's findings, the only relevant, admissible proof before this court has been submitted by the plaintiff and therefore no legal basis exists to deny plaintiff's motion to confirm the referee's report since the court is the ultimate arbiter of the amount of damages due the plaintiff (*see Deutsche Bank National Trust v. Zlotoff et al.*, *supra.*; *FDIC v. 65 Lenox Road Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 (2nd Dept., 2000); *Adelman v. Fremd*, 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking, Ltd.*, 216 AD2d 458, 628 NYS2d 162 (2nd Dept., 1995)).

With respect to defendant's repeated identical argument concerning plaintiff's alleged failure to prove service of the RPAPL 1304 90-day notices, as set forth hereinabove the law is clear that while such a defense may be raised by a non-defaulting defendant *any time* prior to judgment, such a defense is waived where a defendant fails to raise it in opposition to a plaintiff's summary judgment motion (*see New York Community Bank v. J Realty Far Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 (2nd Dept., 2013); *Starkman v. City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 (2nd Dept., 2013)). Moreover, even were this Court to consider the underlying merits of this defense, plaintiff has submitted sufficient proof to establish that it complied with RPAPL 1304 notice requirements through its submission of an affidavit of mailing dated January 11, 2018 from a Wells Fargo vice president of loan documentation (admissible as proof pursuant to CPLR 4518), confirming that from an examination of the lender's business records service was made by certified and first class mail to defendant's last known residence and to the mortgaged premises on August 30, 2013, which was more than 90 days prior to the commencement of this action on December 27, 2013, together with submission of copies of the 90-day notice, certified mail receipts containing the twenty digit tracking numbers and a copy of the RPAPL 1306 filing statement confirming mailing with the New York State Department of Financial Services. Such proof is sufficient to establish plaintiff's compliance with RPAPL 1304 requirements (*see HSBC Bank USA v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2nd Dept., 2017)).

As to defendant's remaining claim concerning her entitlement to additional foreclosure settlement conferences, case management records confirm this action was the subject of a foreclosure conference on August 1, 2014 and was thereafter remanded for assignment to an IAS part. While it is not entirely clear from court records, there is every indication from the proof submitted by the parties (in particular defendant's seventeenth affirmative defense) that the foreclosed premises are not occupied by the defendant. Under such circumstances, the statutes (CPLR 3408 & RPAPL 1304) requiring mandatory settlement conferences and service of 90-day notices would not apply, since the defendant/mortgagor does not reside in the premises. Regardless there is no legal or equitable basis for this court to compel any additional foreclosure settlement conferences given the undisputed fact that defendant has not made any payments, as required under the terms of her agreement with the lender, for the past eight and one-half years (and may be additionally profiting from continuously receiving rent payments during those years). Plaintiff has no obligation to enter into negotiations based upon this record and clearly this Court has no reason to compel it to do so.

Accordingly, defendant's motion and cross motion are denied, and plaintiff's motion is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with execution of this order.

Dated: March 29, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.