

Bayview Loan Servicing LLC. v Khan

2018 NY Slip Op 33181(U)

March 12, 2018

Supreme Court, Queens County

Docket Number: 700118/2015

Judge: David Elliot

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

BAYVIEW LOAN SERVICING LLC.,

Plaintiff,

-against-

KENNETH KHAN, et. al.,
Defendants.

Index No. 700118/2015

By: **ELLIOT, J.**

Date: March 12, 2018

Motion Cal. No. 8

Motion Seq. No. 3

Motion Date: January 2, 2018

This action was commenced on January 7, 2015. An order of reference was granted in an order dated December 7, 2016, appointing Barry M. Goldstein, Esq., as Referee to compute the amount due. A hearing by the referee was held on April 26, 2017. In his report dated November 22, 2017, the Referee determined that there remains a balance due and owing to plaintiff in the sum of \$720,015.11 plus interest as of November 3, 2017. The plaintiff has now moved to confirm the Referee's report and for an order of judgment and foreclosure.

The motion by the plaintiff to confirm the Referee's report and for an order of judgment and foreclosure is granted, as defendant 104-31 25th Street LLC, failed to raise any issue warranting denial of the motion.

The report of the referee should be confirmed, whenever the findings are substantially supported by the record, the referee has clearly defined the issues and has

resolved matters of credibility (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]; *Thomas v Thomas*, 21 AD3d 949 [2d Dept 2005]; *Pittoni v Boland*, 278 AD2d 396 [2d Dept 2000]). Here, the referee relied upon ample evidence to support the amounts due and owing to plaintiff (*see Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897 [2d Dept 2011]). Contrary to the argument put forth by defendant, the testimony of plaintiff's witness, along with the business records upon which she relied, were properly considered by the Referee (*see Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 [2015]; *Johnson v Lutz*, 253 NY 124 [1930]).

The argument that the evidence submitted at the hearing including documents and the testimony of the witness should not have been considered as it was hearsay is without merit. The Referee properly relied on evidence submitted pursuant to the business records exception to the hearsay rules. Under CPLR 4518, a business record will be admissible if that record was made in the regular course of business, it was the regular course of such business to make such records, and the records were made at the time of the act, transaction, occurrence or event or a reasonable time thereafter (*CitiMortgage v McKinney*, 144 AD3d 1073 [2d Dept 2016]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494 [2d Dept 2007]).

While the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or if the records provided by the maker were incorporated into the recipient's own records

or routinely relied upon by the recipient in its business (*People v Cratsley*, 86 NY2d 81 [1995]; *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293 [3d Dept 2012]).

There is no requirement that the affiant or witness have personal knowledge of every entry, particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (*Citibank, NA v Abrams*, 144 AD3d 1212 [3d Dept 2016]). A loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff's case on records it maintains in the regular course of its business as servicer of the subject mortgage loan (*PennyMac Holdings, LLC v Tomanelli*, 139 AD3d 688 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Naughton*, 137 AD3d 1199 [2d Dept 2016]). This includes records and materials generated by predecessors-in-interest that have been incorporated into its records and relies upon those records (*see Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737 [3d Dept 2016]; *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). Here, both the witness and the affiant demonstrated that records from prior servicers were incorporated into the business records of Caliber Home Loans, Inc. (Caliber), and further that Caliber uses those records in its regular course of business, and were, thus, admissible and properly considered by the Referee.

To the extent defendant references a failure to produce, inter alia, a Power of Attorney or proof of loan transfer, those arguments are insufficient to warrant denial of the

motion. Issues of, among other things, standing, have been litigated and decided and are law of the case. Otherwise, plaintiff has adequately established the affiant's/witness' authority to speak as to amounts due and owing pursuant to the loan documents, as discussed, *supra*.

Furthermore, defendant failed to submit any documentation or calculations of its own which would tend to show that the principal balance, total interest, or any other costs were improperly calculated by the Referee or that there is an issue of fact regarding the amounts owed to the plaintiff pursuant to the terms of the note and mortgage (*see Capital One, N.A. v Knollwood Props., II, LLC*, 98 AD3d 707 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Zlotoff*, 77 AD3d 702 [2d Dept 2010]; *Washington Mut. Bank v Fisette*, 66 AD3d 1287 [3d Dept 2009]).

Accordingly, the motion is granted.

Submit Order. Provide therein for counsel fees in the amount of \$4,950.00.



J.S.C.

FILED
MAR 12 2018
COUNTY CLERK
QUEENS COUNTY