Wells Fargo Bank N.A. v Mullings
2019 NY Slip Op 31697(U)
June 12, 2019
Supreme Court, Suffolk County
Docket Number: 15348/2011
Judge: Howard H. Heckman
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 15348/2011
MOTION DATE: 6/11/2019
MOTION SEQ. NO.: #004 MG
CASE DISP

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WELLS FARGO BANK N.A.,

Plaintiff,

-against-

DAUDREY MULLINGS, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
HOGAN LOVELLS US,LLP
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 26 read on this motion 1-22 : Notice of Motion/ Order to Show Cause and supporting papers___; Notice of Cross Motion and supporting papers__ ; Answering Affidavits and supporting papers 23-26 ; Replying Affidavits and supporting papers___; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank N.A. for an order confirming the referee's report of sale dated January 5, 2018 and for a judgment of foreclosure and sale is granted.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $280,000.00 executed by defendant Daudrey Mullings on January 20, 2006 in favor of World Savings Bank, FSB. On the same date Mullings executed a promissory note promising to re-pay the total amount of monies borrowed from the lender. Plaintiff is the successor by merger to the original mortgage lender. Plaintiff claims that the defaulted in making timely monthly mortgage payments beginning November 16, 2009 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on May 10, 2011. Defendant/mortgagor served an answer dated January 19, 2012 asserting twelve (12) affirmative defenses and four (4) counterclaims. By short form Order (Murphy, J.) dated December 11, 2015 plaintiff's motion for an order granting summary judgment and for the appointment of a referee was granted.

Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. In opposition defendant, who hasn't made a mortgage payment in nearly a decade, claims that the referee's computations are not supported by sufficient evidence to establish the amount of interest due under the terms of the adjustable rate promissory note; that defendant is entitled to a referee's hearing; that interest should be tolled based upon the plaintiff's delay; and that attorneys' fees should not be awarded since the mortgage does not provide for such fees.

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 plaintiff submitted sufficient evidence in the form of two "affidavits of merit and amounts due and owing" from plaintiff's (Wells Fargo's) vice presidents of loan documentation dated November 28, 2017 and August 2, 2018 which testimony, which is supported by the mortgage lender's business records, is admissible pursuant to CPLR 4518 (as originally determined in Acting Justice Murphy's prior December 11, 2015 Order granting summary judgment), 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)).

With respect to the issue of whether a referee's hearing is required, the relevant statutes clearly grant the appointing court the prerogative and authority to limit the powers of the referee.

CPLR 4311 provides:

R 4311. Order of reference.

An order of reference shall direct the referee to determine the entire action or specific issues, to report issues, to perform particular acts, or to receive and report evidence only. ***It may specify or limit the powers of the referee*** and the time for filing his report and may fix a time and place for the hearing.. (***emphasis supplied***).

CPLR 4313 provides:

R 4313. Notice.

Except where the reference is to a judicial hearing officer or a special referee, upon the entry of an order of reference, the clerk shall send a copy of the order to the referee. ***Unless the order of reference otherwise provides,*** the referee shall forthwith notify the parties of a time and place for the first hearing to be held within twenty days after the date of the order or shall forthwith notify the court that he declines to serve (***emphasis supplied***).

Relevant therefore are these statutory pronouncements that an order of reference may specify or limit the powers of the referee. "A referee has no power beyond that limited in the order of reference." (*L.H. Feder Corp., v. Bozkurtian,* 48 AD2d 701, 368 NYS2d 247 (2nd Dept., 1975) *citing In re Starr,* 245 AD 5, 289 NYS 753 (2nd Dept., 1935)) and his duty in a foreclosure action is purely ministerial with the referee deemed a ministerial officer bound to follow precisely the provisions of the order of appointment (*see O'Brien v. Spitzer,* 24 AD3d 9, 802 NYS2d 737 (2nd Dept., 2005), *reversed on other grounds,* 7 NY3d 239, 818 NYS2d 844 (2006)). Decisions dating to 1853 confirm a court's authority to limit a referee's duties as evidenced in *McCracken v. Valentine,* 9 NY 42, 9 NYS42 (1853) wherein the court ruled: "where an order of reference is expressly limited to the subject of payments due on the mortgage obligation, the referee has no discretion and is bound to pursue only the directions contained in the decree."

In this case the authority of the referee was specifically defined by the prior Order of Reference which limited the referee's power to "ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel..." By limiting the referee's duties, as statutorily authorized, the defendant retained the right to submit relevant, admissible evidence in opposition to the referee's computations directly to this court. Instead, defendant has chosen to merely make generalized and conclusory objections without providing any relevant, admissible evidence to support his claims. This court fully recognizes that the referee's report is 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)). However, the only relevant, admissible and credible evidence submitted is the proof submitted by the plaintiff in support of the referee's computations.

In point of fact, the computations concern facts which are not in dispute:

First: Defendants defaulted in making mortgage payments under the terms of the mortgage loan as of November 16, 2009;

Second: The mortgage and promissory note provide a variable interest rate to be computed from November 2, 2009 through July 24, 2018- plaintiff has submitted a detailed breakdown of the effective interest rates for each period of default up to July 24, 2018 -- a purely ministerial computation of principal ($309,440.72) and interest ($119,185.22); ;

Third: The court takes judicial notice of the fact that it became the obligation of the mortgage lender to make payments for real estate taxes and hazard insurance due which were not paid by the defaulting borrowers/mortgagors since November 16, 2009 (or lose title for to the premises for failure to pay taxes to the County as a consequence) and which yearly realty taxes are a matter of public record; and insurance premiums which had been established since the inception of the mortgage– a purely ministerial computation of payments totaling ($61,428.91 for "Tax Disbursements" & $21,671.00 for "Hazard Insurance Disbursements");

Fourth: The remaining computations concern: "Property Inspection/Preservation" totaling ($400.00) less a credit to the borrower totaling ($100.00). which is self explanatory.

Based upon these circumstances defendant has been afforded an 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 testamentary or documentary proof has been submitted by the defendant. While defense counsel makes random, generalized claims that the interest rate calculations are inaccurate and therefore no interest should be awarded, plaintiff has in fact

submitted not only the exact interest rate charged each period for the defaulting mortgagor's continuing default– but it has also attached and submitted internal business records setting out Mullings' entire "Mortgage Loan History" to supplement its interest and principal calculations, together with copies of the property tax invoices the mortgage lender was forced to pay to maintain title to the premises (and to permit the defaulting mortgagor to remain for "free" in the mortgaged premises without making any payments). Defense counsel is not entitled to a hearing, nor is he entitled to a seminar in interest rate calculation of this mortgage loan— he retains the authority to dispute the calculations by submission of relevant, admissible evidence to contradict the referee's findings, but his random generalized statements provide no proof to raise any genuine issue of fact relevant to the referee's computations. And 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)).

Finally, with respect to defendant's claims that plaintiff should not be awarded interest based upon its delay in prosecution and that plaintiff's counsel is not entitled to an award of or reasonable attorneys fees, no legal or equitable grounds exist to deny plaintiff's request for interest or attorneys' fees. While the issue of interest to be awarded in an equity action such as this proceeding is within the court's discretion, the exercise of such discretion must be governed by the particular facts of the case including "wrongful" conduct on the part of either party (*see BAC Home Loans Servicing, LP v. Jackson,* 159 AD3d 861, 74 NYS3d 59 (2nd Dept., 2018); *Greenport Mortgage Corp. v. Lamberti,* 155 AD3d 1004, 66 NYS3d 32 (2nd Dept., 2017); *CitiCorp Trust Bank v. Vidaurre,* 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). Other than to suggest that plaintiff be denied its right to interest, defendant has submitted absolutely no proof of "wrongful conduct" on the part of the plaintiff which would justify any forfeiture of interest in this case. Defense counsel goes to great lengths to propose and calculate the terms which require the mortgage lender's forfeiture of interest based "un-excused delays" including a first forfeiture term of 1295 days, then 706 days, followed by 335 days— and argues that concepts of "equity" mandate such forfeitures— curiously, he fails to calculate the more significant tally of days which have accumulated since his client made her last mortgage payment which total three thousand five hundred nine (3509) days (November 2, 2009). Recognizing that this is a court of equity, it would seem that the balancing of the equities weight heavily favor of Wells Fargo based upon the undisputed facts that this mortgage lender loaned the sum of $280,000.00 to the borrower and has not received a payment in return for nearly ten years, while at the same time the lender was forced to make property tax payments and hazard insurance payments so that the defaulting mortgagor and her family can remain freely residing in the premises for nearly ten years. Based upon this record there is no reason to deny plaintiff the interest that has accrued as a result of this defendant's continuing default. Under these undisputed facts, no legal or equitable grounds exist to justify denying plaintiff mortgage interest or to further delay this foreclosure action.

With respect to the award of reasonable attorneys' fees, the promissory note signed by the defaulting mortgagor provided for such an award and this court has made an appropriate award in the judgment of foreclosure and sale.

Accordingly, plaintiff's motion seeking an order confirming the referee's report of sale and for a judgment of foreclosure and sale is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with the execution of this order.

Dated: June 12, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.