

**Bank of N.Y. Mellon v Miller**

2019 NY Slip Op 33645(U)

December 11, 2019

Supreme Court, New York County

Docket Number: 850163/2014

Judge: Kelly A. O'Neill Levy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KELLY O'NEILL LEVY PART IAS MOTION 19**

*Justice*

X

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF  
NEW YORK AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE  
LOAN TRUST 2005-60T1 MOTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2005-60T1,

**INDEX NO. 850163/2014**

**MOTION DATE 05/29/2019**

**MOTION SEQ. NO. 004**

Plaintiff,

- v -

R. TARA MILLER, ADAM P10TCH, LLC, BOARD OF  
MANAGERS OF THE OCTAVIA CONDOMINIUM,  
CRIMINAL COURT OF THE CITY OF NEW YORK, NEW  
YORK CITY DEPARTMENT OF FINANCE, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK  
CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU, NEW YORK COUNTY  
CLERK, NEW YORK PRESBYTERIAN HOSPITAL,  
PEOPLE OF THE STATE OF NEW YORK, UNITED  
STATES OF AMERICA ACTING THROUGH THE IRS,  
WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER  
TO WACHOVIA BANK, NATIONAL ASSOCIATION,  
WORKER COMPENSATION BOARD OF NEW YORK  
STATE, JOHN DOE

**INTERIM  
DECISION / ORDER**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

HON. KELLY O'NEILL LEVY:

The residential mortgage foreclosure underlying this action was executed September 26, 2005 and was recorded in the Office of the City Register of the City of New York on October 19, 2005. On March 1, 2009, defendant defaulted in payment of the monthly installment and plaintiff initiated a foreclosure action under index number 109741/2009. However, plaintiff voluntarily discontinued that action and the present action was initiated on April 9, 2014.

Plaintiff was granted summary judgment by Order dated October 16, 2015. This court subsequently appointed Daniel Marotta, Esq. as a Referee to compute the amount owed on December 5, 2017. On October 29, 2018 the Referee executed an Oath and Report of Amount Due which computed the amount due to Plaintiff as of September 1, 2018 to be \$1,297,965.70. Plaintiff moves to confirm the Referee's Report pursuant to RPAPL § 1321 for a Judgment of Foreclosure and Sale pursuant to RPAPL § 1351 that directs the distribution of sale proceeds pursuant to RPAPL § 1354.<sup>1</sup> A referee report is not binding on the court. *See, e.g., Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767 (2d Dep't 2017). Defendant opposes and cross-moves to toll the interest due pursuant to CPLR § 5001(a).

At the referee hearing, plaintiff produced a Litigation manager from Bayview Loan Servicing for testimony. Plaintiff established via a 2017 Power of Attorney that the Litigation Manager had authority to service the mortgage—although the specific mortgage at issue here was not specified in the documents and the mortgage predates 2017. Nonetheless, the Litigation Manager had records relied upon in the regular course of business relating to the amount currently due. Although neither the Litigation Manager or Bayview Loan Servicing produced the documents, “a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it relied upon those records in the regular course of business.” *Wells Fargo Bank, N.A. v. Pinnock*, 55 Misc.3d 1216(A) (Sup. Ct. Suffolk Cty. 2017) (citing *Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 A.D.3d 418 (1st Dept., 2012); *Portfolio Recovery Associates, LLC v. Lall*, 127 A.D.3d 576 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 A.D.3d 336 (1st

---

<sup>1</sup> Such requests require the attachment of the Referee transcript, which Plaintiff's original papers did not include. *See* CPLR § 4320(b); *see also St. Clement v. Casale*, 29 A.D.3d 367 (1st Dep't 2006). The error has been remedied.

Dept., 2006)); *see also* CPLR § 4518(a). The Litigation Manager indicated that there had been no payments made in satisfaction of the mortgage. *See* Hearing Transcript 28:16-23.

Defendant then produced the managing member of Adam Plotch, LLC who alleged that the proceeds of two separate sales of condominiums resulted in payments of \$71,711 and \$117,018.81 that were applied directly to the mortgage at issue in this case and should be credited towards the principal. Defendant produced a ledger purporting to indicate the payments occurred, however the ledger was not Defendant's and so could not be properly verified and the referee correctly sustained the objection to it. Defendant then produced an affirmation of regularity, but it did not indicate that payments had actually been made. The Referee correctly determined that Defendant did not establish that a payment was made. The documents submitted post-hearing did not conclusively establish that a payment was made either. There is even a letter which appears to return the check for \$71,711. The court will not assume payments that have not been sufficiently established.

However, the Referee then proceeded to credit Plaintiff with payments that were also insufficiently established. Plaintiff did not submit sufficient evidence to establish the \$207,213.76 for Escrow Advances, \$85.60 for Property Insurance/Preservation, and \$4,728 for Force Placed Insurance. Plaintiff has subsequently submitted an attorney affirmation requesting \$11,664.75 and a list of costs and disbursements totaling \$5,024.57, but these are additional requested funds and do not help establish the Escrow Advances, Property Insurance / Preservation, or Force Placed Insurance.

Rather than confirm or deny the Referee report with such a limited evidentiary record, it is hereby:

ORDERED that the parties shall submit all evidence relating to the amount owed by January 31, 2020. For judicial economy, the parties should not submit any evidence that has already been submitted; and it is further

ORDERED, that the parties may submit an accompanying affirmation explaining how the evidence demonstrates the amounts owed; and it is further

ORDERED, that plaintiff may submit an affirmation by January 17, 2020 explaining the delay in bringing litigation from the default on March 1, 2009 and the initiation of this action on April 9, 2014. Defendant shall then have an opportunity to respond by January 31, 2020.

December 11, 2019  
DATE

*Kelley O'Neill Levy*  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: