

<b>US Bank N.A. v Merchant</b>
2019 NY Slip Op 33905(U)
August 13, 2019
Supreme Court, Westchester County
Docket Number: 51150/2017
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X  
**US BANK NATIONAL ASSOCIATION, NOT IN ITS  
INDIVIDUAL CAPACITY BUT SOLELY AS  
TRUSTEE OF SW REMIC TRUST 2015-1,**

Plaintiff,

-against-

**DECISION & ORDER  
Index No. 51150/2017  
Sequence No. 4**

**ANTHONY MERCHANT, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE;  
AUTOONE SELECT INSURANCE CO; UNITED  
STATES OF AMERICA INTERNAL REVENUE  
SERVICE CCP LIEN UNIT; KIRBY ROWE,**

Defendants.

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers through 78-108, 121-129, were read in connection with plaintiff’s motion for a Judgment of Foreclosure and Sale of the mortgaged premises, and Confirmation of the Referee’s Report, and includes in its papers, among other things, a Proposed Judgement of Foreclosure and Sale, together with the Referee’s Report and Oath. Anthony Merchant (“defendant”), opposes the motion on the grounds that the Referee’s Oath and computation were without proper notice of hearing, and unsupported by documentary evidence.

This is an action to foreclose a mortgage on premises known as 158 Tenth Avenue South, Mount Vernon, New York 10550. Defendant breached his obligations under the terms of the Note and Mortgage by failing to make the required monthly payments. The amount due and owing as of

May 1, 2012, was the principal amount of \$297,017.37. On January 26, 2017, plaintiff commenced this foreclosure action. On plaintiff's motion to reargue, the court granted summary judgment and an order of reference on October 5, 2018.

NOW based upon the foregoing, the motion is decided as follows:

In support of its motion, plaintiff has demonstrated prima facie entitlement to judgment of foreclosure and sale by tendering proof of the mortgage, the note, and defendant's default in payment (Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [2d Dept 1997]).

As to defendant's opposition that the referee was required to provide notice to the parties of a time and place for a hearing in order to comply with CPLR 4313. This statute provides that 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, unless the order of reference provides otherwise (CPLR 4313). Generally, "[a] referee has no power beyond that limited in the order of reference." (See CPLR 4311; Feder Corp. v Bozkurtian, 48 AD2d 701 [2d Dept. 1975]; First Data Merch. Servs. Corp. v One Sol. Corp., 14 AD3d 534, 535 [2d Dept 2005]).

In considering the parties' submissions, the court finds that the order of reference does not otherwise provide for a hearing, and it is uncontroverted that the referee did not hold a formal hearing in connection with the order of reference. The court, which is the ultimate arbiter of the dispute and had the power to reject the Referee's report and make new findings (CPLR 4403), considered defendant's evidence and concludes that defendant's contention is without merit. While it may have been an error for the referee not to provide defendant with notice of a hearing, or not to hold a formal hearing, in opposing this motion, defendant submitted no evidence, other than

conclusory allegations, that the referee's calculations are incorrect. Counsel for defendant was served with a copy of the Order of Reference, and no appeal has been taken from that order. Subsequently, counsel for defendant was also provided with a copy of the proposed Oath and Report of the Referee to Compute. Of significance, included in the mailing to counsel for defendant, was a Notice of Opportunity to Object to Proposed Computation, yet defendant raised no objection. Defendant fails to dispute the figures in the Referee's Report specifically. Rather, defendant makes bald, conclusory allegations based upon the failure to conduct a hearing on notice. The record is also devoid of any sufficient evidence (as defendant had received notice of the referee's findings) that defendant was unable to submit evidence directly to the referee, a hearing on the issue of the principal sum due is not necessary (Adelman v Fremd, 234 AD2d 488, 489 [2d Dept 1996]). Since there has been no showing that the referee improperly calculated the amounts due, the defendant's contention is without merit. No prejudice was demonstrated by this inability to submit evidence directly to the Referee, so a hearing on the issue of the principal sum due is not necessary (Adelman v Fremd, 234 AD2d 488, 489 [2d Dept 1996]).

Plaintiff provided defendant and the referee with its proof by affidavit from plaintiff's servicer stating that he had personal knowledge of the facts, matters, and circumstances in his affidavit, he swore that he was familiar with plaintiff's business records, kept in the ordinary course of business and that he examined those records regarding the mortgage at issue.

Further, it is well-settled that the court is entitled to reject the report of a referee and make new findings, however, the report and recommendations of a referee should be confirmed if his or her findings are substantially supported by the evidence in the record (CitiMortgage, Inc. v Kidd, 148 AD3d 767 [2d Dept. 2017]). Here, the referee submitted ample documentary evidence to support the

amounts due and owing, as the referee attached Schedules A through C to his report, including the referee's calculations showing the amounts due for principal and interest, the note and mortgage, and the Affidavit of Computation of Plaintiff's representative containing information regarding the amount due plaintiff.

Defendant has not submitted any credible testamentary or documentary proof to contradict the Referee's computations. Absent submission of any admissible evidence to contradict those findings, the only relevant, admissible proof before this Court has been submitted by plaintiff, and therefore, no legal basis exists to deny plaintiff's motion to confirm the Referee's Report. The referee considered all the admissible evidence the parties submitted and reached a reasoned determination.

Thus, plaintiff's submissions are sufficient to establish its entitlement to confirmation of the referee report and the Judgment of Foreclosure and Sale.

All other contentions raised by defendant has been considered and are deemed to be without merit. This constitutes the Decision and Order of the court.

Accordingly, based upon the totality of the circumstances presented, and the equities involved, the court orders the following relief: It is hereby

ORDERED, that this motion by plaintiff for an order granting it a Judgment of Foreclosure and Sale and all other relief is granted in its entirety; and it is further

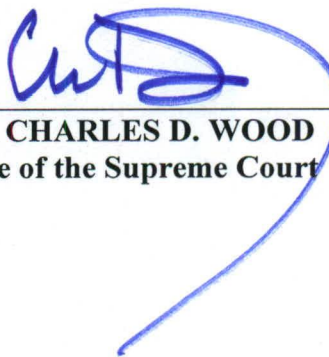
ORDERED, that the proposed Judgment of Foreclosure and Sale is signed simultaneously herewith as modified by the court; and it is further

ORDERED, that plaintiff is directed to serve a copy of this order with Notice of Entry upon the Clerk, and upon the parties to this action, within five days of entry of this Decision and Order, and the Clerk shall mark his records accordingly, in accordance with NYSCEF protocols.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

ORDERED, that the Clerk shall mark his records accordingly.

Dated: August 13, 2019  
White Plains, New York



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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

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