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.: 16512/2013
MOTION DATE: 3/3/2020
MOTION SEQ. NO.: #003 MG
CASE DISP

----------X

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

-against-

WILLIAM FOWKES, et al.,

Defendants.

----------X

PLAINTIFF'S ATTORNEY:
ECKERT SEAMANS CHERIN & MELLOT
10 BANK STREET, STE 700
WHITE PLAINS, NY 10601

DEFENDANT'S ATTORNEY:
ABRAMS FENSTERMAN FENSTERMAN
THREE DAKOTA DRIVE, STE 300
LAKE SUCCESS, NY 11042

Upon the following papers numbered 1 to 31 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-20 (#001) ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21-25 ; Replying Affidavits and supporting papers 26-31 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. for an order confirming the referee's report of sale dated October 3, 2019 and for a judgment of foreclosure and sale is granted.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $1,400,000.00 executed by defendant William Fowkes Jr. on May 26, 2005 in favor of Eastern Savings Bank, FSB. On the same date mortgagor Fowkes executed a promissory note promising to re-pay the total amount of monies borrowed from the mortgage lender. Fowkes subsequently executed a loan consolidation modification agreement (CEMA) dated August 22, 2006 creating a single lien in the sum of $1,900,000.00. The mortgage and note were assigned to plaintiff by assignment dated December 14, 2011. Fowkes defaulted under the terms of the CEMA beginning May 1, 2010 and continuing to date. Plaintiff commenced this foreclosure action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on June 24, 2013.

Court records indicate that beginning November 15, 2013 and concluding on February 2, 2016 a total of fourteen (14) CPLR 3408 court mandated settlement conferences were held. During each conference the defaulting borrower was represented by counsel. Prior to scheduling the first CPLR 3408 conference this defendant had served a motion to dismiss plaintiff's complaint on July 24, 2013 with an original return date of August 22, 2013. That motion was assigned to IAS Term Part 6. The motion remained sub judice and was adjourned six times until this action and the underlying motion were reassigned to this IAS Term Part 18 in January, 2017. Upon assemblage of the motion papers defendant's motion to dismiss was submitted on the IAS Term Part 18 motion calendar on January 17, 2017 and was denied by short form Order dated April 25, 2017. The defaulting mortgagor thereafter served an answer dated June 21, 2017 asserting twelve (12) affirmative defenses and one (1) counterclaim.

Plaintiff served its summary judgment motion on January 24, 2019 with an original return date of February 20, 2019. The motion was adjourned on consent until March 19, 2019 and was granted by short form Order dated May 22, 2019.

Plaintiff's current motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. In opposition, defendant claims that plaintiff's motion must be denied since: 1) plaintiff failed to submit sufficient admissible evidence to prove that borrower Fowkes has defaulted in making mortgage payments for nearly ten years; 2) defendant is entitled to a hearing before the referee; and 3) plaintiff is not entitled to the amount of damages computed to be due the mortgage lender in the referee's report concerning the amount of interest to be awarded and the amount of escrow advances sought, based upon a lack of documentary evidence and based upon plaintiff's unreasonable delay in prosecuting this foreclosure action.

With respect to the issue of defendant's default, 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" Sections 4442 & 4443, page 585).* The principle is ground 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" (*Gramatan Homes v. Lopez,* 46 NY3d 484, 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull,* 138 AD3d 417, 27 NYS3d 867 (2nd 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 cours of the same litigation (*see Martin v. City of Cohoes,* 37 NY2d 162, 371 NYS2d 687 (1987); *J-Mar Service Center, Incorporated v. Mahoney, Connor & Hussey,* 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Incorporated v. Town of Yorktown,* 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Incorporated,* 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

In the May 22, 2019 short form Order granting plaintiff's summary judgment motion, the defendant raised two affirmative defenses— plaintiff's alleged failure to prove standing and plaintiff's alleged failure to serve RPAPL 1304 90-day notices. Defendant never contested the fact that he had defaulted in making payments due under the terms of the promissory note and mortgage (CEMA) since May 1, 2010. The May 22, 2019 determination made specific findings that sufficient admissible evidence was submitted to establish plaintiff's right to foreclose the mortgage which included sufficient admissible proof of defendant's default, plaintiff's standing, and plaintiff's compliance with RPAPL 1304. As a result all defenses asserted in defendant's answer were stricken and plaintiff was awarded summary judgment. The determination is the "law of the case" and such findings— which necessarily included a finding that defendant has defaulted in making payments since May 1, 2010– cannot be contested again by this defendant in opposition to plaintiff's motion seeking a judgment of foreclosure and sale (*see Madison Acquisition Group, LLC. v. 7614 Fourth Real Estate Development, LLC,* 134 AD3d 683, 20 NYS3d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Incorporated,* 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015)).

Based upon the evidence presented 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 has submitted sufficient evidence in the form of two affidavits from the current mortgage servicer/attorney-in-fact's (Select Portfolio Servicing, Incorporated's) (SPS's) document control officers dated August 22, 2019 ("Guzman affidavit") and dated December 18, 2018 ("Syphus affidavit") which, together with the documentary proof submitted, in the form of internal business records, provides the evidentiary and factual basis for the referee's computation of the sums due and owing to the mortgage lender. The affidavits provide admissible testimony obtained from mortgage servicer/attorney-in-fact's business records, which includes records compiled by a prior servicer which were integrated and boarded into SPS's business records and relied upon in it regular course of business. Such testimony and records are admissible pursuant to CPLR 4518 and comport with the requirements recently enunciated in the Appellate Division, Second Department's decision in *Bank of New York Mellon v. Gordon,* 171 AD3d 197, 97 NYS3d 286 (2nd Dept., 2019) in which the Court specifically determined that "such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, **or** establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in is own business (citations omitted)(*Gordon at page 209*), In this case the servicer/attorney-in-fact's representative's affidavits set forth the fact that the records of the prior servicer were incorporated and relied upon by SPS, and based upon the affidavits together with plaintiff's submission of copies of the actual business records (attached to the affidavit) together with copies of the note and mortgage— sufficient testimonial and documentary proof has been submitted 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 this Court's Order of Reference which limited the referee's power and *explicitly* stated that: "No hearing shall be required..." This Court's Order also specifically provides that: "Objections, if any, shall be the subject of applications made directly to the court." The statutes clearly provide this court with authority to execute its own order of reference with its own specific directives. There is no requirement that a defaulting borrower be afforded a hearing before the referee or that the referee "take testimony" and the statutes recited hereinabove clearly authorize an appointing Court to limit the powers of the referee which includes obviating any "requirement" to conduct a referee's hearing. The Order of Reference signed by this court specifically states that no hearing is required and the statute (CPLR 4313) specifically states that the referee shall notify the parties of the first hearing..."**Unless the order of reference otherwise provides..."** Such language is unequivocally clear. By limiting the referee's duties, as statutorily authorized, this defendant retained the right to submit relevant, admissible evidence in opposition to the referee's computations directly to this court. Instead, the defendant has chosen to merely have his attorney seek further delay and submits an affirmation making generalized and conclusory objections without providing any relevant, admissible evidence to support those 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.

Based upon this record defendant, having been served with copies of the actual business records reflecting Fowkes Jr.'s default and the mortgage lender's payments made on his behalf, 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. The Order of Reference specifically provides for such objections and this court, sitting as a court of equity, would give full consideration to any objections

which are supported by relevant, admissible and credible evidence. Defendant has provided no such evidence. Having failed to submit any relevant admissible evidence to contradict the referee's findings as set forth in his report, 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 Fowkes Jr.'s remaining objection concerning forfeiture of an award for interest based upon plaintiff's "unreasonable and extensive" delay, no legal or equitable grounds exist to support defendant's contention. The issue of interest to be awarded in an equity action is within the court's discretion and the exercise of such discretion is 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); *CitiCorp Trust Bank v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). Plaintiff has provided a time-line of its prosecution of this foreclosure action and the court takes judicial notice of the numerous CPLR 3408 settlement conferences which were held (fourteen (14) in total) over a three year period prior to defendant's ultimate service of an answer in June, 2017. There is no credible evidence to support defendant's random claim of "unreasonable" delay attributable to the plaintiff, nor is there any proof of "wrongful" conduct on the part of the mortgage lender which would justify any forfeiture of interest in this case. Based upon this record and in view of the near decade-long default which has occurred, there is no legal or equitable reason to further delay prosecution of this action.

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.

HON. HOWARD H. HECKMAN, JR.

Dated: March 12, 2020

J.S.C.