

U.S. Bank N.A. v Chait
2020 NY Slip Op 32904(U)
September 2, 2020
Supreme Court, New York County
Docket Number: 850037/2015
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE
FOR CMLAT REMIC 2007-A4 PRAA-REMIC PASS-
THROUGH CERTIFICATES, SERIES 2007 A4,

Index № 850037/2015
Motion Seq. № 003

DECISION AND ORDER

Plaintiffs,

-against-

MINDY N. CHAIT AKA MINDY CHAIT, *et al.*,

Defendants

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GEORGE J. SILVER, J.S.C.:

In this mortgage foreclosure action, plaintiff mortgagee U.S. Bank National Association (“plaintiff”) moves to confirm a referee’s report and for a judgment of foreclosure and sale. Defendant Mindy N. Chait (“defendant”) opposes the application. Plaintiff’s application is granted as follows:

This residential mortgage foreclosure action was commenced on February 12, 2015 in New York County, where the mortgaged property is located. The action was brought to foreclose on a residential mortgage made by GFI Mortgage Bankers, Inc. to defendant and recorded on April 23, 2007 in the New York County Clerk's Office, in CRFN 2007000208502 in the original principal sum of \$602,000.00, and secured by a note executed by defendant on February 22, 2007, and delivered to GFI Mortgage Bankers, Inc.

The mortgage was assigned to CitiMortgage, Inc. by an assignment of mortgage dated February 22, 2007, which was recorded in the Office of the City Register of New York County on April 23, 2007 in CRFN 2007000208503. The mortgage was further assigned to plaintiff by an

assignment of mortgage dated September 16, 2013, which was recorded in the Office of the City Register of New York County on October 2, 2013 in CRFN 2013000408633.

On February 12, 2015, plaintiff filed a notice of pendency in accordance with RPAPL §1331 and CPLR Article 65. On February 1, 2018 plaintiff re-filed the notice of pendency in accordance with RPAPL §1331 and CPLR Article 65.

The summons, complaint, and notice of pendency are in the form prescribed by statute and contain all of the particulars required by law. The summons complies with the requirements of RPAPL §1320, contains the required notice in boldface type and is in the format required by statute.

The certificate of merit required pursuant to CPLR §3012-b was filed together with supporting documents. According to the affidavit of service filed in the New York County Clerk's Office, the summons was served with the complaint. Defendant was served with the notice required by RPAPL §1303 printed on colored paper together with the summons and complaint printed on white paper. The RPAPL §1303 notice complies with the requirements of that statute, with the title in bold, 20-point type and the text in bold, 14-point type. The RPAPL §1303 notice was delivered to defendant on its own separate page, together with the summons and complaint. Defendant was timely served with the 90-Day Pre-Foreclosure notice required by RPAPL § 1304. Plaintiff filed the name, address and telephone number of defendant, the amount claimed to be due, and the type of loan at issue with the superintendent of banks within three business days of the mailing of the 90-day Pre-Foreclosure notice as required by RPAPL § 1306.

Notably, plaintiff has served defendant with copies of the summons in compliance with CPLR § 3215(g)(3). Plaintiff served defendants with an additional copy of the summons in

compliance with CPLR § 3215(g)(3)(iii). Defendant is not an infant, and is not in the armed services of the United States of America.

Defendant served an answer on March 27, 2015. On February 12, 2015, plaintiff was assignee of the subject note. On January 8, 2016, plaintiff moved for summary judgment and an order of reference. The answer and affirmative defenses raised by defendant were stricken. Plaintiff's motion was granted by the court by order dated July 10, 2018.

Plaintiff mailed notice of entry of the order of reference to defendant on August 8, 2018 and filed the notice of entry with the New York County Clerk on August 8, 2018. Thereafter, I appointed Charles Gordon Berry, Esq. ("referee Berry") as referee to compute the amount due to plaintiff, and to examine and report whether the mortgaged property can be sold in parcels.

On December 17, 2018, referee Berry executed an oath and report of amount due which computed the amount due to plaintiff to be \$852,506.13 as of March 25, 2018, and determined that the property should be sold as one parcel. In conjunction with the motion for an order of reference previously granted by me, plaintiff has established all the required elements for a foreclosure. Plaintiff now requests that this court confirm referee Berry's report, and issue an order directing that the property be sold pursuant to RPAPL §1351 and that the sale proceeds be distributed in accordance with RPAPL §1354.

RPAPL §1354(2) requires the referee conducting the sale to pay out of the proceeds all taxes, assessments, and water rates that are liens upon the property and to redeem the property from any sales for unpaid taxes, assessments, or water rates that have not become absolute. Plaintiff submits that that in addition to a judgment in this action, plaintiff is entitled to reimbursement for plaintiff's attorney fees, as well as reimbursement for plaintiff's costs,

allowances, and disbursements in this matter in accordance with the terms of the note and mortgage and CPLR Article 83.

The merit of this foreclosure action is not in dispute, as plaintiff has established its right to foreclosure by producing the unpaid note and mortgage and proof that defendant has been in default for nearly a decade. Further, defendant has never denied her default, and has made no serious effort to establish a bona fide defense. Indeed, defendant's opposition to the instant motion is premised entirely on defendant's desire to relitigate issues that were previously addressed and decided by this court. To be sure, defendant suggests that a prior action remains pending, despite the fact that this court has heard and previously rejected that argument.

Similarly, defendant's suggestion that a further hearing needs to be held on procedural grounds regarding referee Berry's calculations is unpersuasive. Indeed, any opposition to a referee's calculations can be properly heard on a motion to confirm (see *Shultis v. Woodstock Land Dev.*, 195 AD2d 677 [3d Dept. 1993][absence of referee's hearing was harmless where defendant had opportunity to oppose the referee's calculations on plaintiff's motion to confirm]).

Here, defendant fails to highlight any deficiencies in referee Berry's calculations, and instead focuses on a "100 day delay" in the issuance of referee Berry's report. However, the delay occasioned here was by no means willful, and is therefore an unworthy challenge to the findings within referee Berry's report (see *TD Bank, N.A. v. Clinton Court Dev., LLC*, 105 AD3d 1032, 1034 [2d Dept. 2013][“Referee's failure to file his report within 60 days after the date the order of reference was a mere irregularity which the court properly disregarded”]). As defendant fails to show any prejudice resulting from the hearing or its timing and makes no

substantive challenge to referee Berry's report, defendant's claimed entitlement to a further hearing is rejected.

Similarly, defendant's challenge to an affidavit considered by referee Berry is without merit. The affiant defendant takes issue with is an employee of CitiMortgage, plaintiff's servicer. Defendant does not explain why further "documentation that [the affiant] is authorized to act for [plaintiff]" would be required under such a circumstance. Indeed, the record is replete with proof of CitiMortgage's right to service plaintiff's loans, as a power of attorney from plaintiff to CitiMortgage was submitted with plaintiff's motion for summary judgment. Accordingly, defendant's attempt to undermine the affidavit submitted to referee Berry, is denied in its entirety.

Finally, defendant's challenges to plaintiff's request for fees is without merit.

The court therefore turns to the merits of referee Berry's report itself. In an action to foreclose a mortgage, RPAPL § 1321 allows the court to assign a referee to compute the amount due to the plaintiff (*Bd. of Directors of Hunt Club at Coram Homeowners Ass'n, Inc. v. Hebb*, 72 AD3d 997, 999 [2nd Dept 2010]). A referee's powers and duties cannot go beyond the scope of the order of reference (*see CPLR § 4311; First Data Merch. Services Corp. v. One Solution Corp.*, 14 AD3d 534, 535 [2nd Dept 2005]). However, findings of the referee are not final. The court has the final decision in the dispute and can confirm or reject the referee's report, and make its own findings (*see CPLR § 4403; Fed. Deposit Ins. Corp. v. 65 Lenox Rd. Owners Corp.*, 270 AD2d 303, 304 [2d Dept. 2000]).

Pursuant to CPLR § 4403, the court has the power to "confirm or reject, in whole or in part ... the report of a referee" and may "make new findings with or without taking additional testimony" or "order a new trial or hearing" (*see Matter of Frontier Ins. Co.*, 73 AD3d 36, 42-43

[3d Dept. 2010]; *Stein v. American Mortg. Banking*, 216 AD2d 458 [2d Dept. 1995]). “Generally, the recommendations and report of a referee should be confirmed as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility” (*IG Second Generation Partners, LP. v Kaygreen Realty Co.*, 114 AD3d 641, 643 [2d Dept. 2014] citing *Spodek v Feibusch*, 55 AD3d 903 [2d Dept. 2014]; *Matter of County Conduit Corp.*, 49 AD3d 641 [2d Dept. 2008]; *Stone v. Stone*, 229 AD2d 388 [2d Dept. 1996]).

Here, referee Berry’s report dated December 17, 2018 indicates that the amount due to plaintiff upon the mortgage and note is \$852,506.13 as of March 25, 2018, the date interest was computed to in the report. The referee’s report further indicates that the property should be sold in one parcel. As defendant’s procedural opposition to the report is without merit, and as defendant has advanced no persuasive opposition to the instant motion to confirm referee Berry’s report, and based upon the papers submitted to the court, plaintiff’s motion to confirm referee Berry’s report and for a judgment of foreclosure and sale is hereby granted to the extent as follows:

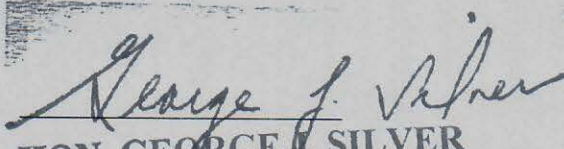
It is hereby ORDERED that referee Berry’s report is confirmed pursuant to CPLR § 4403; and it is further

ORDERED that plaintiff’s application for judgment of foreclosure and sale and bill of costs in granted in accordance with the attached **Order Confirming Referee Report and Judgment of Foreclosure and Sale**; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in accordance with this court’s directives herein and within the attached **Order Confirming Referee Report and Judgment of Foreclosure and Sale**

This constitutes the decision and order of the court.

Dated: 9/2/20


HON. GEORGE J. SILVER