

Nationstar Mtge. LLC v Saintval
2020 NY Slip Op 33171(U)
September 28, 2020
Supreme Court, Suffolk County
Docket Number: 27699/2012
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX NO. 27699-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN
Justice of the Supreme Court

Motion Date: 07/25/19
Adj. & Submit Date: 08/29/19
Mot. Seq. #006 - MD
Mot. Seq. #007 - MD

-----X

NATIONSTAR MORTGAGE, LLC,

Plaintiff,

against

DIEULA SAINTVAL,

Defendant.

-----X

SHAPRIO, DICARO & BARAK, LLC
Attorneys for Plaintiff
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Rochester, N. Y. 14624

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Upon the following papers read 1-86 on plaintiff's motion for a judgment of foreclosure and sale and defendant's cross-motion and in opposition; plaintiff's notice of motion and supporting papers: 1-50; defendants cross-motion, opposition and supporting papers: 51-77; plaintiff's reply affirmation, opposition and supporting papers 78-86; it is,

UPON the telephone conference in this action held on September 8, 2020 between the court and counsel for the parties in compliance with the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020; it is

ORDERED that this motion by plaintiff Nationstar Mortgage, LLC for a judgment of foreclosure and sale is denied, subject to renewal pursuant to the conditions set forth in the court's order dated February 1, 2019 as modified by this order; and it is further

ORDERED that within 30 days of the date of entry of this order, plaintiff is to serve a further copy of the order of reference dated February 1, 2019 upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of entry of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's submissions); defendant(s) may submit written objections and proof in support thereof (defendant's objections) to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

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ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgment of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by the order of reference of February 1, 2019 (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by that order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendant(s) objections raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant's objections have been submitted to the referee, defendant shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendant's objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendant's objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of entry of this order; and it is further

ORDERED that defendant Dieula Saintval's cross-motion is denied; and it is further

ORDERED that this action shall be calendared for a status conference on January 25, 2021 at 9:30 AM for the court to monitor the progress of this action. If a motion for a judgment of foreclosure and sale pursuant to the terms of the order of February 1, 2019, as modified by this order, is filed before that date, no appearance will be necessary; and it is further

ORDERED that pursuant to the provisions of AO/115/20 and AO/121/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF.

This is an action to foreclose a mortgage on residential real property known as 180 Howard Street, Port Jefferson Station, Suffolk County, New York ("the property") given by defendant Dieula Saintval ("defendant") to a predecessor in interest to plaintiff Nationstar Mortgage, LLC ("plaintiff"). The prior history of this action is set forth in the court's decisions dated August 3, 2016 (Mot. Seq. # 001 and #002); its decision placed on the record dated December 16, 2016 (Mot. Seq. #003), its decision

dated May 25, 2018 (Mot. Seq. # 004), its decision after trial placed on the record on September 19, 2018, as well as in the order of reference dated February 1, 2019.

Plaintiff now submits its motion for a judgment of foreclosure and sale (Mot. Seq. #006) pursuant to RPAPL § 1351. Defendant opposes and cross-moves for a reduction of interest and fees, that “good faith settlement efforts” are needed, as well as asking for the scheduling of a referee’s hearing in opposition to plaintiff’s motion (Mot. Seq. #007).

Before discussing both motions the court wishes to clarify the record as to the history of the prior proceedings as they relate to the court’s decisions in this action, as they are not correctly reflected by either counsel’s recitation of that history. By the decision dated August 3, 2016 the court denied defendant’s motion to compel discovery or to dismiss (Mot. Seq. #002), granted plaintiff’s motion (Mot. Seq. #001) to amend the caption, fixed and set the defaults of the non-appearing, non-answering defendants, dismissed defendant’s counterclaims and all her affirmative defenses except her 12th which raised issues of compliance with the mailing requirements of RPAPL § 1304, granted plaintiff partial summary judgment and set the issues raised by defendant’s 12th affirmative defense for trial. Pursuant to that order plaintiff filed a note of issue on September 7, 2016, but then entered into a series of motions to renew/re-argue (Mot. Seq. #003 & 004), the first of which the court denied by a decision placed upon the record on December 1, 2016 after oral argument, the second being denied by a decision dated May 22, 2018. The action then proceeded to trial on September 19, 2018 after which the court found that plaintiff had established compliance with the mailing requirements of the notices required RPAPL § 1304, dismissed defendant’s 12th affirmative defense, dismissed and struck defendant’s answer and granted plaintiff judgment to the extent of granting an order of reference pursuant to RPAPL § 1321. As the court had marked over as “Not Signed” all prior proposed orders of reference submitted by plaintiff, and plaintiff’s trial counsel did not have a proposed order of reference to submit at the conclusion of the trial, the court directed plaintiff to submit a new proposed order of reference. When plaintiff did so, the Clerk’s Office entered it as if it were a new motion for “Appointment of a Referee” (Mot. Seq. #005), and the court signed that proposed order on February 1, 2019 making certain modifications which are essential to the decision of plaintiff’s present motion (Mot. Seq. # 006).

JUDGEMENT OF FORECLOSURE DENIED FOR FAILURE TO FOLLOW ORDER

Plaintiff’s Order of Reference, as modified by the court, contained in pertinent part the following directions to counsel:

ORDERED that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff’s “submissions”); defendant(s) may submit written objections and proof in support thereof

(defendant's "objections") to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgment of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if the objections by defendant(s) raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant(s) has submitted objections and proof to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit the objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further

ORDERED that this action shall be calendared for a status conference on Wednesday, June 12, 2019 at 9:30 AM in Part 27 for the court to monitor the progress of this action. If a judgment of foreclosure and sale is filed with the court before that date, no appearance will be necessary; and it is further

ORDERED that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined.

In opposition to plaintiff's motion, defendant's counsel affirmed that plaintiff failed to serve defendant with notice of a "referee's hearing," or a "notice of the amount calculated to allow defendant to object." A review of plaintiff's submissions and its counsel's affirmation on its present motion shows that although plaintiff's counsel acknowledged the court's order of reference (see paragraphs 14 and 15), neither the affirmation or other submissions provide a statement that the mailings required by the court's modifications to order of reference were complied with by plaintiff. In reply to defendant's counsel's assertions that he received no notice of the submissions to the referee, rather than providing proof of mailing in compliance with the court's order, plaintiff's counsel attempts to avoid the issue by resorting to arguments that it was unnecessary for the referee to hold a hearing, that there is no prejudice to defendant, that defendant pointed to no substantive errors in the submissions made to the referee or in

the referee's determinations. The cases plaintiff's counsel relies upon are fact specific, and in making his argument plaintiff's counsel avoids the fact that he ignored the direct orders of this court.

The court is faced with the reverse of the situation where a claim of non-receipt of the notice by defendant's counsel is refuted by plaintiff's proof of mailing, and therefore defendant's objections are insufficient to defeat the motion or require a hearing (*see Engel v. Lichterman*, 62 NY2d 943 [1984]; *Kihl v. Pfeffer*, 94 NY2d 118 [1999]; *Terlizze v Robinson's Custom Service, Inc.* 25 AD3d 457 [2d Dept 2006]; *Mei Yun Li v Qing He Xu*, 38 AD3d 731 [2d Dept 2007]; *Flushing Sav. Bank, FSB v. Colmar Realty, LLC*, 121 AD3d 1040 [2d Dept 2014]). Here there is no proof of mailing and no proof of compliance with the directives in the court's order, and therefore the obverse of the results in those cases should be reached here and plaintiff's motion denied.

The court set forth its directives in the order of February 1, 2019 to avoid the problems that have resulted here, as well as to avoid another problem, an attempt by some defense counsel to turn a referee's hearing into a "mini-trial," causing unwarranted delay and burden upon the referee. These additional directives struck a balance protecting the rights of a defendant and allow for a hearing before the court based upon framed objections, not speculation. Following the procedures set forth by the court's order of reference would avoid a report based upon conclusory and unsubstantiated affidavits, or records that were not produced, unless waived by defendant's failure to object (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019] *Bank of New York Mellon v Graffi*, 172 AD3d 1148 [2d Dept 2019]; *Nationstar Mtge. LLC v Durante-Bolivard*, 175 AD3d 1308 [2d Dept 2019]; *US Bank, N. A. v Calabro*, 175 AD3d 1451 [2d Dept 2019]). Plaintiff's disregard of these directives warrants denial of its motion at this time.

Plaintiff's motion for a judgment of foreclosure and sale is denied, with leave to renew by complying with the terms of the court's order of February 1, 2019, as modified by the conditions of this order set forth above.

DEFENDANT'S MOTION DENIED AS UNSUPPORTED BY PROOF

Defendant's cross-motion seeking a reduction of interest and fees and further "good faith settlement efforts" is denied. Defendants' counsel's claim for a reduction of interest or counsel fees based upon the wrongful conduct or inordinate delay of plaintiff is without factual basis, as the only factual basis presented by defendant is inaccurate. Defendant's claim that plaintiff delayed moving for summary judgment for two years and seven months after release for the Foreclosure Settlement Conference Part ("FSCP") is contradicted by the court's records showing that plaintiff's first motion for summary judgment (Mot. Seq. #001) was submitted on January 28, 2015, just under two years after release from FSCP on February 1, 2013. Although the court does not condone this delay, it does not find it so unusual as to warrant a reduction of interest or counsel fees, especially as defendant waited to move to dismiss the complaint until March 23, 2015 (Mot. Seq. #002). Similarly, the fact that plaintiff twice unsuccessfully moved to renew/reargue this court's decision of August 3, 2016 is not a basis for reduction of interest or counsel fees. Although defendant reviews cases where a plaintiff's failure to

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negotiate in good faith may lead to a reduction of interest, or even a penalty, no facts relevant to such a claim are presented. Similarly, there is no basis presented by defendant that plaintiff's motion should be denied pending "good faith settlement efforts," especially as the court's records show compliance with CPLR 3408, and defendant's counsel offers no facts to show that good faith negotiations were not entered into.

This action shall be calendared for a status conference on January 27, 2021 at 9:30 AM for the court to monitor its progress. If a motion for a judgment of foreclosure and sale pursuant to the terms of the order of February 1, 2019, as modified by this order, is filed before that date, no appearance will be necessary.

This constitutes the decision and order of the court.

ENTER

Dated: September 28, 2020


HON. ROBERT F. QUINLAN
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION