

<b>Fieldpoint Private Bank &amp; Trust v 2017 Holdings LLC</b>
2021 NY Slip Op 30280(U)
January 28, 2021
Supreme Court, Kings County
Docket Number: 513780/19
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.  
-----X

FIELDPOINT PRIVATE BANK & TRUST,  
  
Plaintiff,  
  
- against -  
  
2017 HOLDINGS LLC, MICHAEL ISRAEL, et al.,  
  
Defendants.  
-----X

DECISION AND ORDER

Index No. 513780/19

Mot. Seq. No. 2-3

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion/Cross Motion, Supporting Affirmations,  
and Exhibits Annexed \_\_\_\_\_

45-50; 51-55

Affirmation in Opposition, Memorandum of Law,  
and Exhibits Annexed \_\_\_\_\_

56-61

In this action to foreclose a mortgage, defendant 2017 Holdings LLC (the borrower) moves in Seq. No. 2 for an order: (1) in effect, pursuant to RPAPL 1301 (3), dismissing the complaint of Fieldpoint Private Bank & Trust (plaintiff) as against it; and (2) pursuant to CPLR 6514 (a), canceling the notice of pendency filed by plaintiff with respect to the underlying property. Plaintiff cross-moves in Seq. No. 3 for an order: (1) pursuant to RPAPL 1351, granting it a judgment of foreclosure and sale; (2) appointing a referee to conduct an auction sale of the underlying property; (3) pursuant to RPAPL 1354, directing the distribution of the sale proceeds; and (4) in effect, pursuant to CPLR 4403, confirming the Referee's Report of Amount Due, dated Oct. 9, 2020.

### Background

In August 2016, the borrower obtained a loan from plaintiff secured by the first mortgage on defendant's mixed-use building located at 2017 Fulton Street in Brooklyn (Block 1537, Lot 2) (the underlying property). The borrower's obligations to plaintiff are guaranteed by defendant Michael Israel (the guarantor). Two years later in August 2018, after the borrower and guarantor defaulted on the note and guaranty, respectively, plaintiff elected to accelerate the debt. In September 2018, plaintiff commenced an action against the borrower and guarantor (collectively, defendants) by filing a summons and motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, in Supreme Court, New York County, to recover the amount due of \$1,195,502.33, together with costs of collection, including attorneys' fees, pre- and post-judgment interest, as well as the costs and disbursements (*see Fieldpoint Private Bank & Trust v 2017 Holdings, LLC and Michael Israel* [Sup Ct, NY County, index No. 654458/2018]) (the NY County action). In January 2019, plaintiff's motion was granted in the NY County action without opposition. In March 2019, a judgment was entered in the NY County action in favor of plaintiff and against defendants in the amount of \$1,331,756.77, excluding plaintiff's attorney's fees (the NY County judgment). Later in the same month, plaintiff caused the NY County judgment to be served with notice of entry on defendants. The remainder of plaintiff's motion which was for an award of its attorney's fees was severed for an inquest to be held in the NY County action (*see Decision/Order*, dated Jan. 18, 2019, filed under NYSCEF #17 in NY County action). No inquest has been held to date, according to the docket of the NY County action.

In June 2019, plaintiff commenced the instant action against defendants, among others, to foreclose on the underlying property. Plaintiff alleged (in ¶ 21 of its complaint) that “after due diligence, [it] has not been able to collect under [the NY County] judgment” (NYSCEF #2). In December 2019, plaintiff obtained, without opposition from defendants, an Order Granting Default Judgment and the Appointment of a Referee (NYSCEF #40).

In September 2020, the borrower, in lieu of an answer, moved to dismiss to complaint as against it, contending that plaintiff’s claims as against were barred by RPAPL 1301 (3). In October 2020, the referee issued his report finding that plaintiff was due the amount of \$1,574,566.93 as of Aug. 31, 2020, representing the sum of: (1) the principal amount of the NY County judgment of \$1,331,756.77; (2) post-judgment interest at 9% per annum from Mar. 19, 2019 to Aug. 31, 2020 in the amount of \$173,461.32; (3) late fees in the amount of \$7,402.43; and (4) plaintiff’s costs of maintaining the underlying property in the amount of \$61,946.41. Thereafter, plaintiff opposed the borrower’s motion and, concurrently, cross-moved for a judgment of foreclosure and sale, and to confirm the referee’s report (*see* RPAPL 1351; CPLR 4403).

### Discussion

RPAPL 1301 (1) provides that “[w]here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county

where he resides . . . and has been returned wholly or partly unsatisfied.” “Stated another way, an action for foreclosure cannot be maintained where the plaintiff has previously pursued a separate action on the note and recovered a money judgment against the defendant which has not been satisfied” (*VNB New York Corp. v Paskesz*, 131 AD3d 1235, 1236 [2d Dept 2015]).

In contrast, “RPAPL 1301 (3) . . . prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court in which the foreclosure action was brought” (*VNB New York Corp. v Paskesz*, 131 AD3d 1235, 1236 [2d Dept 2015] [internal quotation marks omitted]). Considering that plaintiff commenced the action to recover on the indebtedness first in the New York County and, thereafter, commenced this foreclosure action in Kings County, RPAPL 1301 (1), rather than RPAPL 1301 (3), applies to this matter (*see VNB New York Corp.*, 131 AD3d at 1236).

Inasmuch as the borrower erroneously relies on RPAPL 1301 (3) as the sole basis for its motion,<sup>1</sup> it has waived its defense under RPAPL 1301 (1). It would be inappropriate for the Court, *sua sponte*, to determine that a triable issue exists as to whether plaintiff complied with RPAPL 1301 (1) (*see Sudit v Roth*, 35 Misc 3d 1237[A], 2012 NY Slip Op 51030[U], \*6 [Sup Ct, Kings County 2012, Schmidt, J.] [“Since section 1301 (1) bar is not jurisdictional, it can be waived, cannot be raised at any time, and does not warrant action by

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<sup>1</sup> See Affirmation in Support, dated Sept. 9, 2020, ¶¶ 9-10 (NYSCEF #46).

the court sua sponte.”]; compare *New York Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 756-757 [2d Dept 2013] [“The Supreme Court should not have, sua sponte, concluded that a triable issue of fact existed as to whether the plaintiff had complied with RPAPL 1301 (3), since the defendants never raised that affirmative defense in their opposition papers and, thus, by their failure to do so, waived it.”]). Accordingly, the borrower’s motion is denied in its entirety.

Turning to plaintiff’s cross motion, the Court notes that “[t]o establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default” (*Wells Fargo Bank, N.A. v Reed*, \_\_\_ AD3d \_\_\_, 2021 NY Slip Op 00202, \*1 [2d Dept 2021]). Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by submitting copies of the subject mortgage, the note, and evidence of defendants’ defaults. Defendants have offered no opposition to plaintiff’s prima facie showing.

“The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” (*Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2d Dept 2017]). Here, the referee’s findings with regard to the amount due under the note and mortgage are supported by the record (*see 33-37 Farrington, LLC v Glob. Univ. Group, Ltd.*, 165 AD3d 1018, 1020 [2d Dept 2018]). Defendants have not opposed either the confirmation of the referee’s report or any of the remaining branches of plaintiff’s motion.

Conclusion

Based on the foregoing, it is

ORDERED that the borrower's motion in Seq. No. 2 is *denied in its entirety*; and it

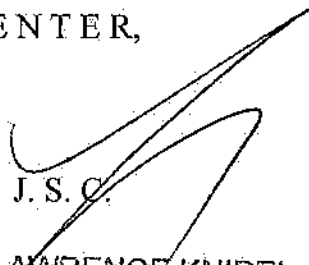
is further

ORDERED that plaintiff's cross motion in Seq. No. 3 is *granted in its entirety*.

Settle long-form order on notice.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE