

<b>HSBC Bank USA, N.A. v Proctor</b>
2021 NY Slip Op 31491(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 850039/2015
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32
Justice

INDEX NO. 850039/2015
MOTION DATE N/A
MOTION SEQ. NO. 008

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR19,

Plaintiff,

- v -

SUSAN PROCTOR, RON HILLMAN, KAY MEDRANO, ROBERT SHEMIN, BOARD OF MANAGERS OF ORION CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOE,

Defendant.

DECISION + ORDER ON MOTION and JUDGMENT OF FORECLOSURE AND SALE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 300, 301, 302, 303, 304, 305, 306, 307, 308, 318

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

Upon the foregoing documents, the motion and cross-motions are determined as follows:

In this residential foreclosure action, Plaintiff moves to inter alia confirm the July 16, 2018 report of Referee Mark Arthur Berman, Esq. and for the issuance of judgment of foreclosure and sale. Defendants Ron Hillman ("Hillman") and Robert Shemin ("Shemin") cross-moved separately to stay the action pending the appeal of Justice Arlene Bluth's decision and order dated August 13, 2019, dismissal of this action since Hillman and Shemin are indispensable and/or necessary parties, and to schedule a referee's hearing pursuant to CPLR §4403.

Previously, Hillman and Shemin, two of the four fee owners of Unit #35C located at 350 West 42nd Street in Manhattan, moved to dismiss this action for failure to properly serve them with process. Plaintiff also moved to extend its time to serve these parties. In its August 13, 2019 decision and order, the Court (Bluth, J.) dismissed this case as against Hillman and Shemin and denied Plaintiff's motion for an extension of time to serve them. In rendering this decision, the Court noted the case would continue against the remaining Defendants.

Subsequent to the motion and cross-motions being made, the Appellate Division, First Department issued a decision in this case affirming Justice Arlene's Bluth's dismissal and severance of the claims against Defendant Ron Hillman (HSBC Bank USA, N.A. v Proctor, 190 AD3d 603[1st Dept 2021]). Further, the Appellate Division determined that Hillman's claim that the action cannot proceed

without him was without merit since his absence would simply leave his rights unaffected by the judgment of foreclosure and sale (*id.*).

As the above decision rendered the cross-motions moot, the cross-motions were withdrawn at a conference with the court that was held pursuant to Administrative Order 157/20.

Turning to Plaintiff's motion, the report of a referee to compute should be confirmed whenever the findings are substantially supported by the record (*see eg Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]). In support of the motion, Plaintiff established that the evidence before the referee substantially supported the referee's findings on the amount due under the note, accrued interest, and other expenses (*see U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2d Dept 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept 2015]). In particular, the evidence submitted to the referee constituted the summons and complaint, affidavit of regularity, affidavit of merit executed by Renee Hicks, a Vice President of Loan Documentation of Wells Fargo Bank, N.A., the promissory note and mortgage. This material provided sufficient documentary proof to establish the accuracy of the referee's computations and confirm the findings that the mortgaged premises should be sold in one parcel (*cf. Bank of New York Mellon v Fontana*, 186 AD3d 445 [2d Dept 2020]).

In opposition, only Hillman offered any specific arguments on the merits of Plaintiff's motion. Hillman makes no argument as to the propriety and/or sufficiency of the referee's report. Instead, he has chosen to make generalized and conclusory objections without providing any relevant, admissible evidence to either support his claims or to contradict the referee's calculations. Absent the submission of any testimonial or documentary proof to contradict the referee's findings, the only relevant 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 Plaintiff (*see Bank of New York Mellon v George*, 186 AD3d 661 [2d Dept 2020]; *Deutsche Bank National Trust Company v Zlotoff et al.*, 77 AD3d 702 [2d Dept 2010]). Therefore, Hillman's argument for denying the referee's report and requesting a hearing is without merit.

Accordingly, the branches of Plaintiff's motion for to confirm the referee's report and for an order of judgment of foreclose are granted. Further, the branches of Plaintiff's motion to amend the caption to remove Hillman, Shemin and the John Doe as Defendants are granted.

Accordingly, it is

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and to confirm the referee's report is granted; and it is further

ORDERED that **only the interests of Defendants Susan Proctor and Kay Medrano** in the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Mark Arthur Berman, Esq.**, who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **foreclosures@nycourts.gov** and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the

Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

ORDERED that after receiving permission from the Auction Part Clerk, the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the **Algeminer Journal**; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 180 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed.
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
  - a. Amount Due from the Referee's Report: \$1,006,071.43 inclusive of interest at the note rate from October 6, 2015 until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the

property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred.

- b. Costs and Disbursements: \_\_\_\_\_ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment.
  - c. The Court declines to award additional allowance.
  - d. Attorneys' Fees: \$13,771.00 pursuant to the affirmation of legal services.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable, and it is further

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within 14 days after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elects to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that the caption be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

-----X

HSBC BANK USA, NATIONAL ASSOCIATION,  
AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES  
CORPORATION, MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2006-AR19,

Index No. 850039/2015

Plaintiff,

-against-

SUSAN PROCTOR, KAY MEDRANO, BOARD OF  
MANAGERS OF ORION CONDOMINIUM,  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,  
and NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

-----X

and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further identified:

A legal description of the mortgaged property referred to herein is annexed hereto as Schedule A as is the name and telephone number of Plaintiff's servicer.

4/27/2020  
DATE

CHECK ONE:  CASE DISPOSED  DENIED

APPLICATION:  GRANTED  SETTLER ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

*Francis A. Kahn III*  
FRANCIS A. KAHN, III, A.J.S.C.  
NON-FINAL DISPOSITION  
FRANCIS A. KAHN III  
J.S.C.

GRANTED IN PART  OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT  REFERENCE