

Nationstar Mtge. LLC v Durandisse

2022 NY Slip Op 34953(U)

May 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 500770/2016

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of July, 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

-----X
NATIONSTAR MORTGAGE LLC,

Plaintiff(s),

-against-

JEAN CAMILLE DURANDISSE, YVELINE DURANDISSE, et al.,

Defendant(s).
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ORDER

Calendar #(s): 40

Index #: 500770/2016

Mot. Seq. #(s): 3

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion Affidavits (Affirmations) and Exhibits _____

96-121

Opposing Affidavits (Affirmations) and Exhibits _____

122-125

Reply Affidavits (Affirmations) and Exhibits _____

126-127

In this action to foreclose a mortgage encumbering the residential property at 1821 Nostrand Avenue in Brooklyn, New York, it is alleged that the borrowers and mortgagors, defendants Jean Camille Durandisse and Yveline Durandisse, failed to make the monthly installment payments, starting in June of 2015. By separate orders entered on or about July 18, 2017, the Court (Noach Dear, J.) granted Plaintiff’s motion for, *inter alia*, default judgment and an order of reference (“ORef”), and appointed Helene Blank, Esq., as referee to ascertain and compute the amount due to Plaintiff (*see* NYSCEF doc. #114). By order dated April 4, 2019 and entered April 10, 2019, Justice Dear denied Plaintiff’s prior motion to confirm the referee’s report and for a judgment of foreclosure and sale (“JFS”) on the ground that the findings were

“unsupported by admissible evidence” because the business records purportedly produced to Referee Blank “[were] not reflected in the referee’s report” (*see* NYSCEF doc. #123).

Plaintiff now moves, again, to confirm the referee’s report and for a JFS, and defendant Yveline Durandisse (“Defendant”) opposes the motion. At the outset, the Court must address Plaintiff’s contention that Defendant’s opposition is procedurally and substantively defective. First, Plaintiff argues that the Court cannot accept the opposing papers submitted by Defendant’s purported present counsel, Avinoam Yackov Rosenfeld, Esq., as he is not Defendant’s attorney of record. Plaintiff notes that Defendant appeared in this action by the service and e-filing of an answer by Abraham Hoschander, Esq., on March 3, 2016 (*see* NYSCEF doc. #28), who also e-filed her opposition to Plaintiff’s motion for a default judgment and ORef (*see* NYSCEF doc. #s 50-54).¹ Plaintiff is also correct that the Court’s files do not indicate that an order was issued permitting Mr. Hoschander to withdraw as Defendant’s attorney of record, nor that Defendant submitted a duly executed change-of-attorney form reflecting that Mr. Rosenfeld succeeded Mr. Hoschander as counsel (*see generally* CPLR 321 [b]). However, the files also show that Mr. Rosenfeld has acted as Defendant’s attorney in this case since his February 10, 2019 e-filing of her opposition to Plaintiff’s prior motion for a JFS. In light of the outcome of this motion, rather than summarily reject Defendant’s opposing papers filed by Mr. Rosenfeld, the Court shall direct him to submit proof of his authority to appear on her behalf, in accordance with CPLR 321.

Second, Plaintiff argues that even accepting the opposing papers filed by Mr. Rosenfeld, Defendant cannot oppose the instant motion for a JFS because she has never vacated her default in answering the complaint. However, “where a judgment against a defaulting defendant is

¹ As the answer was e-filed four days late, Plaintiff rejected it (*see* NYSCEF doc. #s 28-29). In granting Plaintiff’s motion for default judgment, the Court noted that while Defendant had opposed the motion, she had never moved to vacate the default and compel acceptance of her late answer (*see* NYSCEF doc. #56).

sought by motion to the court, the defendant is entitled, at an inquest, to determine damages, cross-examine witnesses, give testimony, and offer proof in mitigation of damages” (*Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 126 [2d Dept 2015]). The hearing before the referee is the functional equivalent to the inquest at which Defendant is entitled to appear and contest Plaintiff’s claimed damages. Hence, contrary to Plaintiff’s contention, despite having failed to vacate her default, Defendant may, nonetheless, oppose the instant motion to confirm the referee’s report issued after said hearing.

In any event, the Court must deny the instant motion to confirm the referee’s report and for a JFS, as Plaintiff has not remedied the evidentiary deficiencies which caused the Court to deny its prior application for the same relief. “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]). “A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures” (*Autovest v Cassamajor*, 195 AD3d 672, 673 [2d Dept 2021]). “Evidence of the contents of business records is admissible only where the records themselves are introduced. Without their introduction, a witness’s testimony as to the contents of the records is inadmissible hearsay” (*Fed. Natl. Mtge. Assn. v Brottman*, 173 AD3d 1139, 1141 [2d Dept 2019]).

Plaintiff submits an updated report from Referee Blank, dated September 4, 2019, finding a total amount of \$721,456.01 due as of June 18, 2019 (*see* NYSCEF doc. #115). The report, included as Exhibit “O” to Plaintiff’s motion, explicitly references four sets of documents, denominated as Schedule “A,” Schedule “B,” Schedule “C,” and Schedule “D” (*see id.*, pp. 4-5). However, while Referee Blank states in the report that each schedule was “hereto annexed,”

Exhibit “O,” which consists of 124 pages, contains only Schedule “A,” and none of the other exhibits to the motion are denominated as Schedules “B,” “C,” or “D.” It is not this Court’s responsibility to peruse the various papers comprising Plaintiff’s motion in the hope of finding the schedules specifically referred to by the referee, on the off chance that they may have been included amongst other exhibits. Moreover, that would be especially inappropriate in the case at bar due to the lack of specificity in the descriptions given in the referee’s report. For example, the report described Schedule “B” as “an abstract of the documentary evidence produced before [the referee],” but is silent as to what documents were produced, and it is unclear whether Referee Blank was presented with only the abstract, or the underlying records, as well.²

In addition, Schedule “A” annexed to the referee’s report consists of the July 17, 2019 affidavit of Rebecca C. Wallace, Plaintiff’s “Doc Execution Associate,” who states that she “can confirm” the amounts currently due and owing after having “review[ed] the computerized records relating to the Mortgage Loan” (*see* NYSCEF doc. # 115, p. 6). Although more than 100 pages of documents are appended to her affidavit, it is devoid of any substantive discussion of them, as Ms. Wallace did not cite or identify any specific documents as a source of information for the amounts and calculations to which she attested. These deficiencies take on added significance in light of Defendant’s contention that her written response to the Notice of Computation, wherein she challenged the amounts claimed to be owed and demanded a hearing, was ignored, in that the report appeared to have been based solely on whatever documents were submitted to Referee Blank, which, as discussed, this Court cannot ascertain.

² Schedule “C” is identified as “the Summons, Complaint, Notice of Pendency, Affidavits of Service, and Order of Reference”; and Schedule “D” is identified as “a copy of the Notice of Computation, with proof of mailing on all Defendants requiring notice of same” (*see* NYSCEF doc. #115, p. 5).

As the record fails to identify the evidence purportedly reviewed by the referee, and much of said evidence was not included with the referee's report, the Court cannot possibly determine whether Referee Blank's findings are substantially supported by admissible evidence in the record. The Court, therefore, cannot confirm the referee's report of the amount due (*see U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022] [order confirming referee's report reversed; new computation required because "computations based on the review of unproduced business records amount to inadmissible hearsay and lack probative value"]).

Accordingly, the above-referenced motion by Plaintiff to, *inter alia*, confirm the referee's report and for a judgment of foreclosure and sale, is **DENIED** in its entirety, **with leave to renew** upon proper papers addressing the deficiencies articulated herein; and it is

ORDERED that Avinoam Yackov Rosenfeld, Esq., **shall not** submit any further papers in this matter on behalf of defendant Yveline Durandisse until there has been filed with the Court proof of compliance with CPLR 321 (b), including, but not limited to: 1) a duly executed change-of-attorney form evincing that Mr. Rosenfeld has been properly substituted for Abraham Hoschander, Esq., as Yveline Durandisse's attorney-of-record; or 2) documentation that Yveline Durandisse formally terminated Mr. Hoschander's legal representation, followed by the filing and service of a proper notice of appearance by Mr. Rosenfeld.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: May 12, 2023



Hon. Cenceria P. Edwards, JSC, CPA