

MTGLQ Invs., L.P. v Browne

2023 NY Slip Op 34069(U)

October 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 508937/2014

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 19th day of May, 2022.

PRESENT:

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

Justice.

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MTGLQ INVESTORS, L.P.,

Plaintiff(s),

-against-

ANN BROWNE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, CRIMINAL COURT OF THE CITY OF NEW YORK, UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH CAROLINA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, CFSC CAPITAL CORP. LXIV, KIM BROWNE, BISHOP DOE (LAST NAME REFUSED), JOHNATHAN DOE (LAST NAME REFUSED), BRYAN DOE (LAST NAME REFUSED), SANDRA DOE (LAST NAME REFUSED), DEIDRA DOE (LAST NAME REFUSED), DAPHNE DOE (LAST NAME REFUSED),

Defendant(s).

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ORDER

Calendar #(s): 34

Index #: 508937/2014

Mot. Seq. #(s): 4

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/Petition/Cross-Motion and Affidavits (Affirmations) and Exhibits _____

96-126, 129

Opposing Affidavits (Affirmations) and Exhibits _____

Reply Affidavits (Affirmations) and Exhibits _____

On September 30, 2014, the prior plaintiff, Green Tree Servicing, LLC ("Green Tree"), commenced this action to foreclose on a mortgage encumbering the residential property at 2461 Linden Boulevard, a/k/a 2459 Linden Boulevard in Brooklyn, New York. It is alleged that defendant-borrower Ann Browne failed to make the monthly installment payments, starting with

the payment due on June 1, 2009. By order entered November 15, 2017, the Court (Noach Dear, J.) granted Green Tree's motion for, *inter alia*, an order of reference ("ORef") and leave to enter a default judgment against the defendants who were in the case at that time (*see* NYSCEF doc.#s 62 and 114). By order entered on or about May 15, 2019, the Court (Dear, J.) granted the motion by the present plaintiff to be substituted in place of Green Tree and, *inter alia*, for leave to file and serve a supplemental summons and amended complaint for the purpose of adding CFSC Capital Corp. LXIV ("CFSC Capital") as a party-defendant (*see* NYSCEF doc. # 82).¹

Plaintiff now moves pursuant to CPLR § 3215 and RPAPL §§ 1321, 1351, and 1354, for an order, *inter alia*, granting a default judgment against defendant CFSC Capital, confirming the referee's report, and for a judgment of foreclosure and sale ("JFS"). For the reasons articulated below, the Court denies this motion in its entirety.

DEFAULT JUDGMENT

Contending that defendant CFSC Capital has failed to timely appear and answer the amended complaint, Plaintiff seeks a default judgment on its cause of action to declare invalid and extinguish CFSC Capital's lien which, according to Plaintiff, appears to be prior and adverse to the mortgage which is the subject of this foreclosure action. "A plaintiff seeking leave to enter a default judgment under CPLR 3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default" (*CitiMortgage, Inc. v Weaver*, 197 AD3d 1087, 1088 [2d Dept 2021] [internal quotation marks omitted]; *see* CPLR 3215[f]). As the May 2019 order provided that if CSFC defaulted, it would

¹ In the interim, in an order dated November 13, 2018, Justice Dear found that "[t]here ha[d] been a significant period of inactivity in prosecuting this action," ordered Green Tree to resume prosecution within 90 days, and stated that the Court might toll interest for the period of inactivity, absent a sufficient explanation (*see* NYSCEF doc. #68).

be bound by all of the terms and conditions set forth in the previously granted ORef (*see* NYSCEF doc. # 82, pp. 2-3), only the first and third prongs are relevant to this motion.

The proponent of a motion always bears the burden to affirmatively demonstrate entitlement to the relief sought, and this includes articulating coherent legal arguments supported by admissible evidence. In the affirmation of its attorney submitted in support of this motion, Plaintiff sparsely recites the case's procedural history and then asserts, in conclusory fashion, that it is entitled to a default judgment because CFSC Capital failed to timely answer the complaint. Although Plaintiff's counsel stated that CFSC Capital was served on July 8, 2019, at no point in this affirmation does she specifically articulate the method of service, whether it complied with the rules and laws of the jurisdiction where it purportedly occurred, when service was deemed complete, and when CFSC Capital's answer was due. Rather than present specific facts and legal arguments in support of its position, Plaintiff has simply appended to its motion a series of affidavits of service for multiple defendants², with no page reference to each defendant, and does not even attempt to qualitatively verify that CFSC Capital was properly served with the summons and complaint, and that its time to answer or appear expired.

It is not this Court's responsibility to sift through Plaintiff's submissions in order to identify and substantiate the factual and legal assertions upon which Plaintiff's motion is, or should be, predicated, and then determine the veracity and accuracy thereof. The paucity of Plaintiff's attorney affirmation, including its failures to present the supporting facts and to apply the relevant law, is improper and requires denial of the branch of the motion seeking to declare CFSC Capital in default. Moreover, since an enforceable JFS must extinguish all of the named defendants' claimed interest in the mortgaged premises, Plaintiff's failure to establish entitlement

² The May 2019 order granting Plaintiff leave to serve and file a supplemental summons and amended complaint directed Plaintiff to serve the documents on all defendants, not just the newly added CFSC Capital.

to judgment against CFSC Capital precludes awarding this relief at this time. In any event, as discussed below, the motion must also be denied because Plaintiff failed to demonstrate that the referee's report should be confirmed.

CONFIRM REFEREE'S REPORT

Plaintiff also moves to confirm the report of amount due issued on September 13, 2019 by Referee Leonard Specter, Esq., and thereupon, for a JFS. "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 Brotzman*, 173 AD3d 1139, 1141 [2d Dept 2019]).

Here, the record lacks evidentiary support for the computations reflected in the report of amount due. Referee Specter stated in the report that in addition to the documentary evidence introduced before him, as listed in Schedule A, he reviewed "the complaint and the supporting affidavit submitted by the plaintiff's attorneys," although he fails to identify the affiant (*see* NYSCEF doc. #116, p. 3). Schedule A lists the following documentary evidence presented to the referee: the note; the mortgage and assignment of mortgage; the plaintiff's affidavit of merit and amount due, sworn to on August 19, 2019; and the summons and complaint (*see id.*, p. 4). Plaintiff included, as a separate exhibit to the motion, a document titled "Affidavit of Merit and Amounts Due," but it was executed and sworn to on a different date, September 26, 2019 (*see*

NYSCEF doc. #112). Plaintiff also included a “Supplemental Affidavit of Merit and Amounts Due,” executed and sworn to on the August 19, 2019 date referenced by Referee Spector (*see* NYSCEF doc. #126). Regardless of which affidavit was presented to the referee, both are insufficient, as each is only a few pages long, and while the respective affiants provide the purported amounts due, neither bothers to specifically reference or cite any record or document in particular, much less append any such papers to their affidavit.

Absent the records upon which the computations were purportedly based, each affiant’s summary of the contents of said records constitutes inadmissible hearsay. Moreover, as it seems apparent that the underlying records were never presented to Referee Spector, he could not have reviewed them, rendering his claim to have verified the amounts described in the August 19, 2019 affidavit without probative value (*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”]). Since Referee Spector’s findings are not substantially supported by the record, the Court cannot confirm the report of amount due, and, therefore, cannot issue a JFS in favor of Plaintiff.

Accordingly, the above-referenced motion by Plaintiff is **DENIED** in its entirety, **with leave to renew** upon proper papers addressing the deficiencies articulated herein.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: October 27, 2023



Hon. Cenceria P. Edwards, JSC, CPA

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FILED