

U.S. Bank, N.A. v Rahimi

2024 NY Slip Op 30890(U)

February 9, 2024

Supreme Court, New York County

Docket Number: Index No. 850111/2020

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 850111/2020

U.S. BANK, NATIONAL ASSOCIATION AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

MOSHE RAHIMI, SIGNATURE BANK, BOARD OF MANAGERS OF THE ATELIER CONDOMINIUM

JUDGMENT OF FORECLOSURE AND SALE and DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 132, 133, 134, 135, 136, 137, 139, 140

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

Upon the foregoing papers, the motion is determined as follows:

The within action is to foreclose on a mortgage encumbering a parcel of real property located at 627 West 42nd Street, Unit 15J, New York, New York. The mortgage, dated October 9, 2007, was given by Defendant Moshe Rahimi ("Rahimi") to non-party Countrywide Bank, FSB and secures a loan with an original principal amount of \$548,000.00. The loan is memorialized by an adjustable rate note of the same date. Plaintiff commenced this action and alleged that Rahimi defaulted in repayment of the loan on or about December 18, 2018. Defendant Rahimi defaulted in appearing. By order of this Court dated June 23, 2023, Plaintiff's motion for inter alia a default judgment and an order of reference was granted and Defendant Rahimi's cross-motion to dismiss pursuant to CPLR §3211[a][8] was denied. Now, Plaintiff moves to confirm the October 2, 2023, report of Referee Paul R. Sklar, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant Rahimi opposes the motion and cross-moves to deny the motion and toll interest.

"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" (Citimortgage, Inc. v Kidd, 148 AD3d 767, 768 [2d Dept 2017]; see also Bank of N.Y. Mellon v Davis, 193 AD3d 803 [2d Dept 2021]). There is no requirement that any particular records support the Referee's findings so long as the proof is in evidentiary form and evinces the facts for which they are proffered (see eg Nationstar Mtge., LLC v Cavallaro, 181 AD3d 688 [2d Dept 2020]; Citigroup v Kopelowitz, 147 AD3d 1014, 1015 [2d Dept 2017]). A plaintiff may, therefore, rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (see eg U.S. Bank N.A. v Moulton, 179 AD3d 734, 738 [2d Dept 2020]). After issuance of the Referee's report, the court is authorized to reject the report, in whole or in part, and render its own findings (see eg Bank of Am., N.A. v Barton, 199 AD3d 625 [2d Dept 2021]).

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 with the affidavit of Anthony Younger ("Younger"), an Assistant Secretary employed by Nationstar Mortgage, LLC ("Nationstar"), sub-servicer for

Rushmore Loan Management Service LLC (“Rushmore”), Plaintiff’s servicer of the loan, as well as the annexed records (*see U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2nd Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2nd Dept. 2015]). Younger demonstrated personal knowledge of Plaintiff’s recordkeeping procedures and laid a proper foundation for the admission of its records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of prior servicers were also admissible since Younger attested those records were received from prior entities, incorporated into the records Fay kept and which were routinely relied upon in its businesses (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]; *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Further, the records attached to the affidavit supported Plaintiff’s claims as well as the Referee’s findings (*see U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2nd Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept 2015]).

In opposition, contrary to Defendants’ assertion, the out-of-state acknowledgement annexed to Jones’s affidavit sufficiently complied with RPL §309-b and CPLR §2309[c] (*see Christiana Trust v McCobb*, 187 AD3d 981 [2d Dept 2020]). The claim that the Referee was required to conduct a hearing is without merit. This Court, as is its right, delegated the authority and discretion to conduct a hearing to the Referee (*see CPLR* §§4301, 4311). Further, “absent the existence of a relevant factual dispute a referee is not required to hold a hearing prior to issuing a report in every case” and Defendants did not establish what disputed facts were required to be settled at a hearing (*see eg Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 492 [2d Dept 2019]; *Dune Deck Owners Corp. v J.J.&P. Assocs. Corp.*, 85 AD3d 1091 [2d Dept 2011]). In any event, “[w]here, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee’s report, the defendant is not prejudiced by any error in failing to hold a hearing” (*Bank of Am., N.A. v Scher*, 205 AD3d 989, 990 [2d Dept 2022]; *see also Bank of N.Y. Mellon v Viola*, 181 AD3d 767 [2d Dept 2020]).

On the issue of interest, “[i]n ‘an action of an equitable nature, the recovery of interest is within the court’s discretion. The exercise of that discretion will be governed by particular facts in each case,’ including wrongful conduct by either party” (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). Generally, lengthy unexplained delays and “egregious” wrongful conduct must exist for the Court to assess an interest toll (*see eg U.S. Bank, N.A. v Gendelman*, 214 AD3d 928 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Lee*, 208 AD3d 1384 [2d Dept 2022]; *Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017]).

Defendants have not established the existence of any significant delays in this matter solely attributable to Plaintiff. “Indeed, any delays in the prosecution of the action, which included, among other things, settlement negotiations, court imposed stays, adjournments, and COVID-19 and FEMA restrictions, were not solely due to the actions of the plaintiff or solely within the plaintiff’s control” (*Wells Fargo Bank, N.A. v Abakporo*, 221 AD3d 939, 940 [2d Dept 2023]).

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 Defendants’ cross-motion is denied; and it is further

ORDERED that the parcel subject to the lien described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the lien, the expense of sale and the costs of this

action as provided in the RPAPL be sold within 180 days¹ of this judgment, in one parcel via four sale, at a public auction, conducted on the same date, at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Paul R. Sklar, 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, and it is further

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 **New York Amsterdam News**; 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,

¹ The Foreclosure Auction Part is still experiencing significant waits for auction dates due to the near two-year moratorium on foreclosure sales that was a sequelae of the COVID-19 pandemic. As such, strict adherence to the 90-day deadline contained in RPAPL 1351[1] is simply not practical and the Court exercises its discretion under CPLR 2004 to extend that period.

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 each 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: \$570,028.95, together with interest at note rate interest from September 30, 2023, until the date of entry of this judgment until the date the deed is transferred; and Plaintiff may add to the amount due any and all inspection fees, maintenance charges, further accrued common charges, taxes, insurance premiums or other advances necessary to preserve the property provided proof is provided to the satisfaction of the Referee;
 - b. Costs and Disbursements: Waived.
 - c. The Court declines to award additional allowance.
 - d. Attorneys' Fees: \$2,900.00.
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 property subject to the lien 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 (except the common charges lien herein), title, and interest in the property after the sale of the property subject to the lien; 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 the deposit of the recalcitrant bidder forfeited and retained by Plaintiff as liquidated damages; 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 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 description of the four properties is annexed hereto as schedule A.

Mortgage Servicer: Nationstar Mortgage LLC -- Mortgage Servicer Phone #: 888-480- 2432

2/9/2024
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION: GRANTED IN PART OTHER REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

**SCHEDULE A
DESCRIPTION OF MORTGAGED PREMISES**

Block 1090 and Lot 1351

THE Condominium Unit (the "Unit") known as Unit No. 15J in the building designated as Arelier in the Declaration establishing a plan for Condominium Ownership of said premises under Article 9-B of the Real Property Law of the State of New York (the "New York Condominium Act"), dated 11/07/2006 and recorded in the Office of the Register of New York County (the "Register's Office") on 1/30/2007 as CRFN 2007000056263 and also designated as Tax Lot 1351 in Block 1090, of the Borough of Manhattan on the Tax Map of the Real Property Assessment Department of the City of New York and on the Floor Plans of said Building, certified by Costas Kondylis & Partners, LLP, Architect and filed with the Real Property Assessment Department of the City of New York as Condominium Plan No. 1630 and also filed in the City Register's Office as CRFN 2007000056264.

TOGETHER with an undivided 0.12612% interest in the common elements.

THE premises within which the Unit is located are more particularly described as follows:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the Northerly side of Forty Second Street, distant 250 feet Westerly from the corner formed by the intersection of the Northerly side of Forty Second Street and the Westerly side of Eleventh Avenue;

RUNNING THENCE Northerly parallel with Eleventh Avenue, 100 feet 5 inches to the centerline of the block;

THENCE Westerly along the centerline of the block and parallel with Forty Second Street, 200 feet to a line drawn parallel with and distant 450 feet from Eleventh Avenue;

THENCE Northerly parallel with the Westerly side of Eleventh Avenue, 100 feet 5 inches to the Southerly side of Forty Third Street;

THENCE Westerly along the Southerly side of Forty Third Street, 125 feet to a point;

THENCE Southerly and parallel with the Westerly side of Eleventh Avenue, 100 feet 5 inches to a point in the centerline of the block;

THENCE Westerly and parallel with Forty Second Street, 25 feet;

THENCE Southerly parallel with Eleventh Avenue, 100 feet 5 inches to the Northerly side of Forty Second Street;

THENCE Easterly along the Northerly side of Forty Second Street, 43 feet;

Firm File No. 201235-1

THENCE Northerly and parallel with Eleventh Avenue and part of the distance through a party wall, 100 feet 5 inches;

THENCE Easterly parallel with Forty Second Street, 21 feet;

THENCE Southerly parallel with Eleventh Avenue and part of the way through a party wall, 100 feet 5 inches to the Northerly side of Forty Second Street;

THENCE Easterly along the Northerly side of Forty Second Street, 286 feet to the point or place of BEGINNING.

Premises known as 635 West 42nd Street a/k/a 627-635 West 42nd Street, Unit 15J, New York, New York 10036

Firm File No. 201235-1

Supreme Court, New York County Auction Part Rules for Outdoor Auctions**An auction will not go forward if it is not on the Auction Calendar**

1. Prior to scheduling publication, the plaintiff and referee shall contact the Auction Part clerk at SFC-Forclosures@nycourts.gov to place the auction on the auction calendar.
2. The Referee and all interested parties must be present on the scheduled auction date at 2:15 p.m. on the portico at 60 Centre Street.
3. The Terms of Sale must be posted on the portico before the auction begins. The Referee shall afford prospective bidders time to review the Terms of Sale.
4. At his or her discretion, the Referee *may* choose not to accept cash.
5. A successful bidder must have in his/her possession at the time of the bid the full 10% of the sum bid, in cash (if accepted at the referee's discretion) or certified or bank check to be made payable to the Referee.
6. All persons wishing to bid on properties must register with the Referee and provide proof of identification.
7. Bidders will be required to stand and state their names at the time the bid is made.
8. Bidders are permitted to use cell phones to communicate with business partners via text messages only. Phone calls and video calls (such as FaceTime, Skype or Teams) are not permitted.
9. No sale will be deemed final until the full 10% deposit has been paid to the Referee and the Terms of Sale have been signed; this must be done immediately following the auction.
10. If a successful bidder fails to immediately pay the deposit and sign the Terms of Sale, the property will be promptly re-auctioned the same afternoon.
11. Bidders are cautioned that the failure to furnish the 10% deposit or sign the Terms of Sale after winning an auction may result in the loss of future bidding privileges. The Court reserves the right to impose penalties for inappropriate behavior or other misconduct as it sees fit.
12. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the amount of the successful bid (the purchase price) and the name and address of the successful bidder.
13. Within 10 days of the auction the Referee shall report to the auction clerk via email (SFC-Forclosures@nycourts.gov) the sale price, the amount awarded in the judgment of foreclosure and sale and the upset price. The clerk shall record and enter this information in the court's computer system.
14. The Referee conducting the sale shall complete a Surplus Monies Form immediately following the sale. All information must be completed; if there is no surplus, then that must also be indicated.
15. Within 10 days of the auction, the Referee shall deliver the signed Surplus Monies Form to the auction clerk via email (SFC-Forclosures@nycourts.gov). The auction clerk shall upload the form to NYSCEF (if an e-filed case) or provide it to the County Clerk (if a paper case).
16. All bidders must wear a face mask/shield at all times and social distancing must be observed by all bidders at all times. Bidders who do not comply with the face mask and/or the social distancing mandate will be removed from the auction.
17. A copy of these rules will be appended to all Judgments of Foreclosure and Sale.