

TIAA, FSB v Mayer

2024 NY Slip Op 32894(U)

August 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 506487/18

Judge: Cenceria Edwards

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At an IAS Term, Part FRP 1 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 13th day of August, 2024.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X
TIAA, FSB d/b/a EVERBANK,

Plaintiff,

- against -

Index No. 506487/18

MS 3+4

CHAIM MAYER a/k/a CHAIM Z. MAYER; LEAH MAYER; JOSEPH BRUNNER; WELLS FARGO BANK, N.A.; 845 ROCKAWAY AVENUE, LLC; BANK OF AMERICA, N.A.; EQUABLE ASCENT FINANCIAL LLC; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK PARKING VIOLATIONS BUREAU; CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU; MEIR MAYER; LEIVY MAYER; CHANA MAYER,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

75, 77-84 86-92
87-92 93
93

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1882 60th Street in Brooklyn (Block 5519, Lot 42) (Property), plaintiff TIAA, FSB d/b/a Everbank (Plaintiff or TIAA) moves (in motion sequence [mot.

seq.] three) for an order confirming the March 9, 2022 Referee Report (2022 Referee Report) and granting it a judgment of foreclosure and sale (NYSCEF Doc No. 75).

Defendant Chaim Mayer (Mayer or Defendant Borrower) cross-moves (in mot. seq. four) for an order dismissing the complaint bason on Plaintiff's noncompliance with RPAPL 1304 (NYSCEF Doc No. 86).

Background

On March 30, 2018, Plaintiff commenced this action to foreclose a \$322,700.00 mortgage encumbering Defendant Mayer's residential Property by filing a summons, a complaint verified by counsel and a notice of pendency against Mayer's Property (NYSCEF Doc Nos. 1-3). The complaint alleges that Mayer executed a May 12, 2003 note secured by a \$322,700.00 mortgage encumbering his Property and that he defaulted on April 1, 2012 (NYSCEF Doc No. 2 and Schedule C). Regarding RPAPL 1304's 90-day notice requirement, the complaint alleges that:

“[i]f the subject note and mortgage fall within the prescribed definition of a subprime home loan or high-cost home loan as identified under section six-l or six-m of the New York State Banking Law, then Plaintiff has complied with all the provisions of . . . section thirteen hundred four of New York State Real Property Actions and Proceedings Law (RPAPL)”
(*id.* at ¶ 18).

On May 7, 2018, Mayer answered the complaint, denied the material allegations therein and asserted several affirmative defenses, including that Plaintiff failed to comply with RPAPL 1304, a condition precedent to foreclosure (NYSCEF Doc No. 23 at 2).

By a January 14, 2020 order (January 2020 Order of Reference), the court (Dear, J.) granted Plaintiff summary judgment, struck and dismissed Mayer's answer to the complaint and referred the action to a referee to hear and report the amount due and owing (NYSCEF Doc No. 56). Notably, the January 2020 Order of Reference specifically ordered that:

“a copy of this Order with Notice of Entry shall be served upon the designated Referee, **owner of the equity of redemption**, any **tenants** named in this action and any other party entitled to notice within 20 days of entry and no less than 30 days *prior to any hearing before the Referee*. The Referee shall not proceed to take evidence as provided herein without proof of service, which proof must accompany any application for Final Judgment of Foreclosure and Sale” (*id.* at 4 [emphasis added]).

Thus, the January 2020 Order of Reference contained language specifically indicating that a referee's computation hearing on notice to Mayer was required.

Plaintiff's Instant Motion

On April 11, 2022, Plaintiff filed the instant motion to confirm the 2022 Referee Report and for a judgment of foreclosure and sale (NYSCEF Doc No. 75). Plaintiff submits an attorney affirmation annexing and referencing the 2022 Referee Report, which was not separately filed by the Referee (NYSCEF Doc Nos. 79 at ¶ 5).

The 2022 Referee Report, which only consists of three paragraphs, states that:

“[b]ased upon *the documentary evidence introduced before me*, I have computed, and ascertained the amount due to the Plaintiff under said Note and Mortgage, and I find, and accordingly report, that there is due to the Plaintiff for principal, interest and advances on said Note and Mortgage, as of March 15, 2022, the sum of \$593,951.27, plus a per diem for each day thereafter.

“Annexed hereto and made a part hereof is *Schedule A of the documentary evidence introduced before me*, Schedule B showing the amounts due for principal and interest respectively, and the period of the computation of the interest and its rate, and Schedule C, the affidavit of Darcle Lyle, the Assistant Secretary of Plaintiff/Plaintiff’s servicing agent, containing information regarding the amount due Plaintiff herein” (NYSCEF Doc No. 81 at ¶¶ 2-3 [emphasis added]).

Notably, there was no evidentiary hearing held on notice to Defendant Mayer, as required by the January 2020 Order of Reference.

Schedule A, the ‘documentary evidence’ that Plaintiff submitted to the Referee, is a one-page, unsigned document containing *only* the following paragraph:

“[t]his residential mortgage foreclosure action was commenced by filing the summons and complaint in the Kings County Clerk’s Office on March 30, 2018 in the County where the mortgage property is located. the action was brought to foreclose a residential Mortgage executed by Chaim Z. Mayer to Mortgage Electronic Registration Systems, Inc. [MERS], as a nominee for BNY Mortgage Company, LLC on May 12, 2003, in the original amount of \$322,700.00, and was recorded in the Kings County Office of the City Register on June 27, 2003 in CRFN 2003000197071. The Mortgage was transferred from BNY Mortgage Company, LLC to Wells Fargo Bank, N.A, and said transfer was memorialized by an Assignment of Mortgage executed on April 7, 2010 and recorded May 6, 2010 in CRFN 2010000152403. The Mortgage was subsequently transferred to EverBank, and said transfer was memorialized by an Assignment of Mortgage executed on March 3, 2016 and recorded March 14, 2016 in CRPN 2016000087706” (*id.* at Schedule A).

Schedule C to the 2022 Referee Report is the February 18, 2022 affidavit of Darcle Lyle (Lyle), the Assistant Secretary of LoanCare, LLC (LoanCare), “an attorney in fact

under a limited power of attorney for TIAA . . .”¹ who attests to “the delinquent amount of the Defendant” based entirely on her review of LoanCare’s business records annexed as “Exhibit A” (*id.* at Schedule C at ¶ 1). Exhibit A, most of which is illegible, is a 10-page computer printout labeled “Payoff/Paydown Quote Information,” “Account History” and “Corporate Advance History” on non-consecutively numbered pages without any heading or company letterhead. Notably, Exhibit A reflects (in the lower right-hand corner of the last page) that it was “[g]enerated: 02/11/2022 3:13:19 PM[,]” the week prior to the execution of Lyle’s affidavit. This fact creates an issue as to whether LoanCare’s purported “business records” were prepared *in the normal course of LoanCare’s business* or for presentation to the Referee to calculate the amount due and owing.

Mayer’s Opposition and Dismissal Cross-Motion

On May 16, 2022, Mayer opposed Plaintiff’s motion to confirm the 2022 Referee Report and for a judgment of foreclosure and sale and cross-moved to dismiss the complaint based on Plaintiff’s noncompliance with RPAPL 1304 (NYSCEF Doc No. 86).

Mayer submits an attorney affirmation opposing Plaintiff’s motion to confirm the 2022 Referee Report “as its findings are based upon inadmissible hearsay evidence and are not supported by documentary evidence” (NYSCEF Doc No. 78 at ¶ 27). Defense counsel argues that the 2022 Referee Report was based on Lyle’s affidavit, which is “unsubstantiated hearsay and cannot be relied upon as evidence of the amounts allegedly

¹ Plaintiff’s instant motion does not include a copy of LoanCare’s limited power of attorney, and thus, there is no evidence that Lyle of LoanCare is authorized to appear and/or speak for Plaintiff.

due and owing” because “the affiant did not produce any of the business records she purportedly relied upon in making her calculations” (*id.* at ¶¶ 35 and 50). Defense counsel notes that while Lyle attests that the principal amount due on the mortgage as of March 1, 2012 is \$277,766.07, “there is no document that was proffered by Ms. Lyle and before the Referee that addresses and substantiates the number of \$277,766.07” and “Plaintiff did not produce a payment history under the loan” (*id.* at ¶¶ 38 and 39). Defense counsel asserts that “[t]he referee’s determination of the amount of principal owed is unsubstantiated and should not be confirmed” (*id.* at ¶ 48).

In support of Mayer’s cross-motion, defense counsel asserts that dismissal is warranted because Plaintiff’s 90-day notice improperly included the following additional notice about debt collection and bankruptcy in bold print:

“[f]or regulatory and legal purpose, Everbank is required to disclose that it may be a debt collector. This may be an attempt to collect a debt and any information obtained will be used for that purpose. In the event that you have filed for bankruptcy protection and are covered by the Automatic Stay, discharge or any other bankruptcy protection, this communication is not an attempt to collect a debt from you personally and is for informational purposes only” (NYSCEF Doc Nos. 41 and 89 at 2).

Defense counsel asserts that “adding information and language about debtor’s rights in bankruptcy in the same envelope as a RPAPL § 1304 notice contravenes the ‘separate envelope’ rule and said notice is *per se* defective, noncompliant with RPAPL § 1304 and the case must be dismissed” (NYSCEF Doc No. 87 at ¶ 16). Defense counsel further asserts that Plaintiff’s 90-day notice also improperly includes notification about military service (*id.* at ¶¶ 21-24).

Plaintiff's Opposition and Reply

Plaintiff in opposition to Mayer's cross-motion and in further support of its motion submits an attorney affirmation (NYSCEF Doc No. 93). Plaintiff's counsel asserts that "additional disclosures" regarding bankruptcy and military service included with the 90-day notice does not constitute a defect requiring dismissal (*id.* at ¶¶ 17-21).

Plaintiff's counsel asserts that this court should confirm the 2022 Referee Report and grant Plaintiff a judgment of foreclosure and sale, with minimal discussion of the "evidence" of the amount due and owing that Plaintiff provided to the Referee. Plaintiff's counsel asserts that Mayer was not entitled to notice of a computation hearing before the Referee because the January 2020 Order of Reference struck and dismissed his answer to the complaint (NYSCEF Doc No. 93 at ¶¶ 23-26). Plaintiff's counsel further argues that the 2022 Referee Report should be confirmed because it was based on Lyle's affidavit:

*"which lays a textbook foundation for the admission of the documents filed as Exhibit A thereto as **business records** under CPLR 4518 (a), as the affiant attest that same were 'made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.'*

"The Lyle Affidavit 'was sufficient to establish that the plaintiff's employees were under a business duty to enter information regarding receipt of payments with respect to loans serviced by the plaintiff . . . [and] that the information contained in the payment history was information contained in the systematic, routine, day-by-day records which are the focus of the business records exception' (Bank of Am., N.A. v Bloom, 202 AD3d 736, 737 [2d Dept 2022] [internal citations and quotation marks omitted])" (*id.* at ¶¶ 28-29 [emphasis added]).

Discussion

(1)

Mayer's Dismissal Cross-Motion

As a preliminary matter, Mayer is not precluded from cross-moving to dismiss for Plaintiff's failure to comply with RPAPL 1304 at this juncture. The Second Department has held that "noncompliance with RPAPL 1304 may be raised *at any time* during the action" (*Bank of N.Y. Mellon v Weber*, 169 AD3d 981, 985 [2019] [emphasis added]). Indeed, the "failure to comply with RPAPL 1304 is a defense that may be raised *at any time prior to the entry of judgment of foreclosure and sale*" and may properly be raised in opposition to a motion to confirm a referee report and for judgment of foreclosure and sale (*U.S. Bank Nat'l Assoc. v Krakoff*, 199 AD3d 859, 862 [2021] [emphasis added]; *see also Wells Fargo Bank, N.A. v Davidson*, 202 AD3d 880, 882 [2022]). Thus, Mayer's cross-motion to dismiss the complaint based on Plaintiff's failure to comply with RPAPL 1304 is not precluded since a judgment of foreclosure and sale has not yet been entered.

RPAPL 1304 provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower." Proper service of such notice is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing strict compliance with RPAPL 1304 (*Citibank, N.A. v Wood*, 150 AD3d 813, 814 [2017]).

RPAPL 1304 (2) provides that “[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer *in a separate envelope from any other mailing or notice*” (emphasis added). The Second Department has held that dismissal for noncompliance is warranted when “additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 . . .” (*HSBC Bank USA Nat’l Assoc. v DiBenedetti*, 205 AD3d 687, 690 [2022] [holding that “plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304, since additional material was sent in the same envelope as the 90–day notice required by RPAPL 1304”]).

In *Citimortgage v Dente*, a case that is nearly identical to this one, the Second Department held that the addition of language regarding the debtor’s bankruptcy status in the 90-day notice renders the statutory notice defective (*Citimortgage, Inc. v Dente*, 200 AD3d 1025 [2021]). While Mayer’s dismissal cross-motion relies on the Second Department’s holding in *Dente*, that holding was subsequently overturned by the Court of Appeals in *Bank of America, N.A. v Kessler*, 39 NY3d 317 (2023) (*Kessler*), which was decided after Mayers cross-motion was fully submitted. In *Kessler*, which involved a 90-day notice that included additional information regarding the debtor’s bankruptcy status and military service, the Court of Appeals held that “[p]rohibiting lenders from concisely informing borrowers of additional rights they may have to avoid foreclosure is manifestly at odds with th[e] purpose” of RPAPL 1304, “a remedial statute that should be read broadly to help borrowers avoid foreclosure[,]” and thus, “the notice need not consist exclusively of the statutory text” (*id.* at 325-326).

Applying the Court of Appeals' holding in *Kessler*, Mayer's dismissal cross-motion based on Plaintiff's failure to strictly comply with RPAPL 1304 is denied. Plaintiff's 90-day notice, which included the mandatory statutory notices, was not rendered defective merely because it contained additional information about the debtor's bankruptcy status and military service.

(2)

***Plaintiff's Motion To Confirm The 2022 Referee Report
And For A Judgment Of Foreclosure And Sale***

Contrary to Plaintiff's contention, Mayer was entitled to notice of a computation hearing before the Referee, even though his answer was stricken and dismissed, because the 2020 Order of Reference contained language indicating that a referee's computation hearing was required upon notice to the owner of the equity of redemption (NYSCEF Doc No. 56 at 4). Indeed, CPLR 4313 explicitly provides that “[u]nless the order of reference otherwise provides, the referee shall forthwith notify the parties of a time and place for the first hearing to be held within twenty days after the date of the order” (emphasis added). However, “as long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, *by itself*, a basis to . . . remit the matter for a hearing and a new determination of amounts owed” (*U.S. Bank, N.A. v Glasgow*, 218 AD3d 717, 720 [2023] [emphasis added] [internal quotation marks omitted]).

It is well-established that “[t]he 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” (*U.S. Bank Nat’l Assoc. v 292 DeKalb Assocs., LLC*, 217 AD3d 801, 802 [2023] [internal quotation marks omitted]).

Here, the 2022 Referee Report of the amount due and owing is not substantially supported by the record because it is based entirely on Lyle’s affidavit testimony, which is inadmissible hearsay. Lyle’s affidavit testimony is not based on her review of LoanCare’s contemporaneous business records, but rather, on Lyle’s review of a computer printout that appears to have been “generated” specifically for presentation to the Referee and not created in the normal course of LoanCare’s business of servicing Mayer’s mortgage. Moreover, the 10-page computer printout annexed to Lyle’s affidavit, which is largely illegible, does not support the Referee’s calculation of the amount due and owing to Plaintiff contained in the 2022 Referee Report. For these reasons, Plaintiff’s motion to confirm the 2022 Referee Report and for a judgment of foreclosure and sale is denied, and this action is remitted back to the Referee who shall conduct an evidentiary hearing, on notice to Mayer, regarding the amount due and owing to Plaintiff under the 2003 mortgage as of the April 1, 2012, the date of Mayer’s payment default. Accordingly, it is hereby

ORDERED that Plaintiff’s motion (mot. seq. three) to confirm the 2022 Referee Report and for a judgment of foreclosure and sale is denied without prejudice to renewal based on proper papers after an evidentiary hearing before the Referee; and it is further

ORDERED that this matter is remitted back to the Referee who shall conduct a full evidentiary hearing, within _____ days of service of this decision and order with notice of entry thereof, to determine the amount of principal and interest due and owing under the

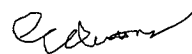
subject mortgage with notice to Defendant Mayer, the owner of the equity of redemption;
and it is further

ORDERED that Defendant Mayer's cross-motion (mot. seq. four) to dismiss the
complaint for failure to comply with RPAPL 1304 is denied.

This constitutes the decision and order of the court.

E N T E R,

August 16, 2024



J. S. C. ~~Concetta P. Edwards~~ **Concetta P. Edwards**