

MEB Loan Trust VII v Wu

2024 NY Slip Op 33030(U)

August 26, 2024

Supreme Court, New York County

Docket Number: Index No. 850209-2016

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

INDEX NO. 850209/2016

MEB LOAN TRUST VII, U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE,

MOTION DATE

MOTION SEQ. NO. 008

Plaintiff,

- v -

LEWIS WU; BOARD OF MANAGERS OF THE ROYAL ELIZABETH CONDOMINIUM; HOSKIE CO. INC.; SST INT'L INC.; UNITED INTERNATIONAL BANK; ARMAND LASKY; MARINA DISTRICT DEVELOPMENT CO LLC T/A BORGATA; MIDLAND 59 LLC; UNITED STATES OF AMERICA O/B/O INTERNAL REVENUE SERVICE; WHAR TI WU,

JUDGMENT OF FORECLOSURE AND SALE and DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247

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

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

In this action, Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 80 Elizabeth Street, New York, New York. The mortgage, dated September 15, 2004, was given by Defendant Lewis Wu ("Wu") to non-party HSBC Mortgage Corporation (USA) to secure a loan with an original principal amount of \$300,000.00. The indebtedness is evidenced by a home equity line agreement of the same date as the mortgage. Plaintiff commenced this action alleging inter alia that Defendant Wu defaulted in repayment of the loan secured by the mortgage. Defendant Wu answered and pled seventeen affirmative defenses, including lack of standing. Plaintiff's motion for summary judgment, to strike Defendant's affirmative defenses and an order of reference was granted by order of this Court dated February 16, 2024. Now, Plaintiff moves to confirm the March 19, 2024, report of Referee Scott H. Siller, Esq. and for the issuance of a judgment of foreclosure and sale. Defendant Wu opposes the motion and, cross-moves to vacate the order of reference pursuant to CPLR § 5015(a)(1) and/or in the interest of justice. Plaintiff opposes Defendant's cross-motion.

As to the Plaintiff's motion, a Referee's report "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]).

Here, Plaintiff established that the the Referee's findings on the amount due under the note, accrued interest, and other expenses were substantially supported by the evidence (*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]). In opposition, Defendant's assertion that the affidavit submitted in support of the proposed report was supported by hearsay is meritless. Cynthia Wallace ("Wallace"), a Second Assistant Vice President of Specialized Loan Servicing LLC ("SLS"), attorney-in-fact and servicer for Plaintiff, laid a proper foundation for the admission of SLS's records into evidence under CPLR §4518 by sufficiently showing that the records SLS relied upon "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Wallace established that those records were received from the makers and incorporated into the records SLS kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the affirmation were the records referenced by Wallace (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). SLS's authority to act on Plaintiff's behalf was established with submission of a limited power of attorney, dated February 15, 2021 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Defendant's reliance on CPLR §5015[a][1] in support of his cross-motion is entirely misplaced as Wu did not default in opposing the motion for summary judgment. Any reliance on CPLR §5015[a][3] is unavailing as Movant's papers fail to demonstrate the existence of any intrinsic fraud (*see eg Capital One, N.A. v Mc Cormack*, 183 AD3d 644 [2d Dept 2020]; *Bank of N. Y. v Lagakos*, 27 AD3d 678 [2d Dept 2006]) nor evidence of any purposeful act committed by Plaintiff which prevented Wu from fully and fairly litigating this matter (*see Mortgage Elec. Registration Sys., Inc. v Schotter*, 50 AD3d 983 [2d Dept 2008]). To the extent Wu seeks this Court to "vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), that relief is also unavailable. The "court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], 'mistake, inadvertence, surprise or excusable neglect'" (*McKenna v County of Nassau*, 61 NY2d 739, 741 [1984], quoting *Ladd v Stevenson*, 112 NY 325, 332 [1889]), none of which are present here.

Accordingly, it is

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

ORDERED that 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, lien for common charges, 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 **Scott H. Siller, 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 **sf-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 serve it on the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; 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 receiving any funds 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 \$1,100.00. 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 Plaintiff the following:
 - a. Amount Due from the Referee's Report: \$679,679.31, together with interest at note rate from June 3, 2023, 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. Attorney's fees: \$1,485.00.
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 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 re-notice the property for sale with or without prior application to this Court, 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 \$950.00 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 premises is annexed hereto as schedule A.

Plaintiff's Servicer: Specialized Loan Servicing LLC- Phone Number: (800) 306-6062.

8/26/2024
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

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

HON. FRANCIS A. KAHN III

J.S.C.



1581 Main Street – Suite 200 – The Shops at Valley Square – Warrington, PA 18976- P: (215) 572-7750 – F: (215) 572-0539

Title No.: [REDACTED]

**SCHEDULE A
DESCRIPTION OF MORTGAGED PREMISES**

The Condominium Unit (the "Unit") known as Unit No. 6J in the building (the "Building") known as THE ROYAL ELIZABETH CONDOMINIUM (the "Condominium") and by the street number 80 Elizabeth Street, Borough of Manhattan, County, City and State of New York, said Unit being designated and described by the above Unit No. 6J, in a certain declaration dated September 12, 1990, made by 159 Hester Street Realty Associates, L.P., pursuant to Article 9-B of the Real Property Law of the State of New York (the "Condominium Act"), establishing a plan for condominium ownership of the Building and the land (the "Land") upon which the Building is situate (which land is more particularly described in Exhibit A annexed hereto and by this reference made a part hereof), which declaration was recorded in the New York County Office of the Register of The City of New York on November 30, 1990, in Reel 1747, Page 632 (the "Declaration"). This Unit is also designated as Tax Lot 1057 in Block 239 of Section 1 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 the Building, certified by Schuman, Lichtenstein, Claman & Efron, Architects, on October 12, 1990, and filed in the Real Property Assessment Department of The City of New York on November 28, 1990, as Condominium Plan No. 744, as amended, and also filed in the Office of the Register of the County of New York on November 30, 1990, as Map No. 5043;

Together with an undivided 0.8358% interest in the Common Elements;

Together with the appurtenances and all the estate and rights of the Grantor in and to the Unit;

Together with and subject to the rights, obligations, easements, restrictions, and other provisions set forth in the Declaration and the By-Laws of THE ROYAL ELIZABETH CONDOMINIUM, as the same may be amended from time to time (the "By-Laws"), all of which shall constitute covenants and running with the Land and shall bind any person having at any time any interest or estate in the Unit, as though recited and stipulated at length herein.

ALL THAT CERTAIN PLOT, PIECE OR PARCEL OF LAND, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, County, City and State of New York, more particularly bounded and described as follows:

BEGINNING at the corner formed by the intersection of the northerly side of Hester Street with the easterly side of Elizabeth Street;

THENCE northerly along the easterly side of Elizabeth Street, 175 feet;

THENCE easterly along a line forming an interior angle of 89 degrees 56 minutes 30 seconds on its southerly side with the preceding course, 110 feet;

THENCE southerly along a line forming an angle of 90 degrees 03 minutes 30 seconds on its westerly side with the preceding course, 25 feet;

THENCE westerly along a line forming an angle of 89 degrees 56 minutes 30 seconds on its northerly side with the preceding course, 10 feet;

THENCE southerly along a line forming an angle of 90 degrees 32 minutes 30 seconds on its westerly side with the preceding course 150 feet to a point on the northerly side of Hester Street;

THENCE westerly along the northerly side of Hester Street, 100 feet to Elizabeth Street, the point or place of **BEGINNING**.