

U.S. Bank N.A. v Ingber

2025 NY Slip Op 31809(U)

May 12, 2025

Supreme Court, Kings County

Docket Number: Index No. 510361/16

Judge: Cenceria P. 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 12 day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-11,

Plaintiff,

- against -

Index No. 510361/16

LEA INGBER; NEW YORK CITY PARKING VIOLATIONS BUREAU; CAPITAL ONE BANK (USA), N.A.; THE BOARD OF MANAGERS OF THE BOTHEY YISROEL CONDOMINIUM; JANE DOE; JOHN DOE; JOHN DOE,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

61, 63-72, 78 80-91
81-91 92-93
92-93 94

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 470 Malbone Street in Brooklyn (Property), plaintiff U.S. Bank National Association, Successor-in-interest to Bank of America, N.A., Successor by Merger to LaSalle Bank, N.A., As Trustee for Structured Asset Investment Loan Trust,

Mortgage Pass-Through Certificates, Series 2004-11 (US Bank or Plaintiff) moves (in motion sequence [mot. seq.] four) for an order confirming the Referee's Report and granting it a judgment of foreclosure and sale (NYSCEF Doc No. 61).

Defendant Lea Ingber (Ingber or Defendant) moves (in mot. seq. five) for an order: (1) dismissing this action as against her for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8); (2) dismissing this action as against her for lack of standing, pursuant to CPLR 3211 (a) (5); and (3) dismissing this action for failure to comply with RPAPL § 1304 (NYSCEF Doc No. 80).

Background

On June 20, 2016, US Bank commenced this action to foreclose a consolidated mortgage in the principal amount of \$250,000.00 encumbering the Property, which was allegedly executed by defendant Lea Ingber f/k/a Lea Judkin (NYSCEF Doc No. 1 at ¶¶ 1-5). The complaint alleges that Lea Ingber “defaulted under the consolidated note for \$250,000.00 owing to plaintiff and no payment thereof has been made to plaintiff from said LEA INGBER F/K/A LEA JUDKIN despite demand, by having failed to make monthly payments on February 1, 2009 to date” (*id.* at ¶ 13).

US Bank's affidavit of service in the record reflects that Ingber was allegedly served with process on October 17, 2016, at 4:36 p.m. by affixing the documents to the door of the Property and subsequently mailing them to Ingber at the Property on October 18, 2016 (NYSCEF Doc No. 17).

None of the defendants answered or otherwise responded to the complaint.

On August 23, 2017, US Bank moved for an order of reference, a default judgment against defendants and to amend the caption (NYSCEF Doc No. 24). On October 20, 2017, Defendant Ingber cross-moved for an order vacating her appearance default, pursuant to CPLR 5015 (3) and 317, and granting her an extension of time within which to answer the complaint, pursuant to CPLR 3012 (d) (NYSCEF Doc No. 34). Essentially, Ingber asserted that “I did not understand the foreclosure process, I never physical[ly] have seen the ‘complaint’, and I did not know, until I retained an attorney, that I was in ‘default’” (NYSCEF Doc No. 36 at ¶ 5).

By a May 10, 2018 decision and order, the court (Dear, J.) denied Ingber’s cross-motion and held that Ingber “did not demonstrate a reasonable excuse for her default” and that her “proffered excuse that she is ‘inexperienced’ and did not know that she needed to answer the complaint is insufficient” (NYSCEF Doc No. 47 at 2). In light of the foregoing, the court granted US Bank’s motion for a default judgment and an order of reference (*id.* and NYSCEF Doc No. 46).

On July 3, 2018, Ingber moved for leave to reargue her motion to vacate her default (NYSCEF Doc No. 49). By an April 16, 2019 decision and order, the court (Dear, J.) denied Ingber’s motion to reargue on the ground that “[t]he Court misapprehended neither fact nor law in rendering the prior determination” (NYSCEF Doc No. 60).

US Bank's Instant Motion

On October 28, 2019, US Bank moved for a judgment of foreclosure and sale (NYSCEF Doc No. 61). Although not referenced in US Bank's Notice of Motion,¹ US Bank also seeks confirmation of the October 1, 2019, Referee's Report,² which provides, in relevant part, that:

"I received evidence in the form of a duly sworn affidavit, executed by Vanessa Giorgiani, a Vice President of PHH Mortgage Corporation successor by merger to Ocwen Loan Servicing, LLC servicer for of U.S. Bank . . . and the documentary evidence listed in Schedule B attached hereto.

"I have computed and ascertained the amount due upon the said Note and Mortgage, and I find, and accordingly report, that there is due to the plaintiff on the said Note and Mortgage, as of July 26, 2019, the total sum of \$445,477.23, which includes interest through and including July 26, 2019, and all other total advances, costs and expenses, all as more fully set forth in Schedule A attached hereto. . . ." (NYSCEF Doc No. 69 at 1-2).

Schedule B to the Referee's Report merely *lists* (and does not annex) the documentary evidence submitted to the Referee, including "Affidavit of Amount Due of Vanessa Giorgiani and annexed exhibit: copies of Mortgage and Note" (*id.* at 4). Importantly, US Bank's motion to confirm the Referee's Report *does not include* a copy of the Affidavit of Vanessa Giorgiani and any documentary evidence upon which the Referee relied.

¹ NYSCEF Doc No. 61.

² NYSCEF Doc No. 67 at ¶ 4

Defaulting Defendant Ingber's Cross-Motion

Defendant Ingber, despite the prior court order denying her motion to vacate her default, opposes US Bank's motion and cross-moves to dismiss the complaint for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), for lack of standing, pursuant to CPLR 3211 (a) (5), and for failure to comply with RPAPL § 1304 (NYSCEF Doc No. 80).

Discussion

(1)

Defendant's Dismissal Cross-Motion

Defendant Ingber remains in default, and thus, is barred from seeking any affirmative relief from the court without first vacating her default (*Wells Fargo Bank, N.A. v. Laporte*, 235 AD3d 936, 938 [2d Dept 2025] [holding that trial court “properly denied that branch of the defendant’s motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred” because “the defendant did not seek to vacate his default in failing to appear or answer the complaint”]).

By a May 10, 2018 decision and order, issued *more than seven years ago*, the court denied Ingber’s motion to vacate her appearance default because the court determined that her “proffered excuse that she is ‘inexperienced’ and did not know that she needed to answer the complaint [was] insufficient” (NYSCEF Doc No. 47 at 2). Defendant Ingber’s motion for leave to reargue her motion to vacate her default was also denied (NYSCEF Doc No. 60). Having failed to move for vacatur of her default on sufficient grounds, Ingber cannot now seek dismissal of the complaint, as a matter of law.

(2)

US Bank's Motion

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” “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]). While CPLR 4403 authorizes a court to confirm or reject a referee’s report, “[t]he referee’s findings and recommendations are advisory only and have no binding effect on the court . . .” (*Indymac Federal Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2020]). “[T]he Supreme Court is the ultimate arbiter of the dispute and has the power to reject the referee’s report and make new findings” (*Bank of America, N.A. v Barton*, 199 AD3d at 627 [quoting *Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 (2020)]; see also *HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2019]).

Here, the court cannot review the propriety of the calculations in the Referee’s Report because it is based on the Affidavit of Amount Due of Vanessa Giorgiani, which was not annexed to the Referee’s Report and was not submitted with US Bank’s motion. Because US Bank’s motion *does not include* a copy of the Giorgiani Affidavit and any documentary evidence upon which the Referee relied, it is denied. Accordingly, it is hereby

ORDERED that US Bank's motion (mot. seq. four) is denied without prejudice;
and it is further

ORDERED that Defendant Ingber's cross-motion (mot. seq. five) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C. Cenceria P. Edwards, CPA