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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25
Justice

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HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR WELLS FARGO ASSET SECURITIES
CORPORATION, MORTGAGE ASSET- BACKED
PASS THROUGH CERTIFICATES, SERIES 2007-AR8

Index No.: 14333/2013
Motion Date: 3/5/2018
Motion Cal. No.: 64
Motion Seq. No.: 4

Plaintiff,

-against-

MANDEEP AKA MK SINGH AKA NIKKI SINGH
AKA MANDEEP NIKKI SINGH SINGH; SURINDER
SINGH; CORP.; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, NEW YORK CITY
PARKING VIOLATION BUREAU, COMMISSIONERS
OF STATE INSURANCE FUND; ASSET ACCEPTANCE
LLC AAO CITIBANK; ATLANTIC CREDIT & FINANCE
INC.; CACV OF COLORADO LLC; CAPITAL ONE BANK
USA, NA; CITIBANK SOUTH DAKOTA, NA; CRIMINAL
COURT OF THE CITY OF NEW YORK; DISCOVER BANK;
GE MONEY BANK; LVNV FUNDING LLC; METRO
PORTFOLIOS, INC.; MIDLAND FUNDING LLC DBA IN
NEW YORK AS MIDLAND FUNDING OF DELAWARE,
LLC; MONOGRAM CREDIT CARD BANK OF GEORGIA;
NEW CENTURY FINANCIAL SERVICES INC.; NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE;
PORTFOLIO RECOVERY ASSOCIATES, LLC; ROBERT
MALISZEWSKI AND NYPD; THE BROOKLYN UNION
GAS CO.; UNIFUND CCR PARTNERS (AAO); UNITED
STATES OF AMERICA - INTERNAL REVENUE SERVICE;
VELOCITY INVESTMENTS LLC; WORKERS
COMPENSATION BOARD OF NEW YORK STATE;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;

FILED
SEP 27 2018
COUNTY CLERK
QUEENS COUNTY

"JOHN DOES" and "Jane Does", said names being fictitious,
parties intended being possible tenants or occupants of premises,
and corporations, other entities or persons who claim or may
claim, a lien against the premises.

Defendants.

X

The following papers numbered 1 to 12 read on this motion for an order Judgment of Foreclosure and Sale; confirmation of Referee's Report; and Award of Legal Fees.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Plaintiff's Reply Affirmation in Support.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, HSBC Bank USA, National Association as trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-AR8 ("Plaintiff"), moves for an Order granting Plaintiff an order Judgment of Foreclosure and Sale; confirmation of Referee's Report; and Award of Legal Fees .

For the reasons set forth below, Plaintiff's motion for a judgment of foreclosure and sale is denied without prejudice to renew following the submission of a new referee's report.

Background

Plaintiff brought the within action to foreclose on a note and mortgage relating to the property located at 144-13 222nd Street, Springfield Gardens, New York 11413 ("Property"). Plaintiff submitted a copy of the executed note, dated August 8, 2007, wherein the Defendant promised to pay \$450,000.00. The Note was executed by Mandeep Singh only. Plaintiff submitted an Affidavit of April H. Hatfield ("Hatfield"), a Vice President Loan Documentation for Wells Fargo Bank, N.A. ("Wells Fargo") the servicer and custodian of the mortgage loan at issue for Plaintiff, which asserts that the Pooling and Servicing Agreement ("PSA"), dated as of November 29, 2007, governs the relationship between and among Wells Fargo and the Plaintiff. Pursuant to the PSA, Plaintiff retains

physical possession of the original note and mortgage for each mortgage loans, and on November 28, 2007, the original endorsed Note and Mortgage were physically delivered to Wells Fargo. Additionally, the Affidavit of Hatfield states that the Mortgage Loan was modified by agreement between the Defendant and the Plaintiff on December 28, 2009, and that the Wells Fargo's custodial department performed a certification review on January 11, 2012, confirming that the original Note was endorsed as required, and Wells Fargo, as custodian for the Trust, had physical possession of the collateral file with the original endorsed Note on July 26, 2013. Furthermore, Hatfield avers that the Defendant defaulted on the Mortgage Loan by failing to make the payment due March 1, 2012, and all payments thereafter.

On March 27, 2014, this court issued a Preliminary Conference Order directing Plaintiff to file a Note of Issue on or before October 3, 2014 and that all summary judgment applications were to be made no later than sixty days after the filing of the Note of Issue.

On July 2, 2014, this court issued a Compliance Conference Order directing Plaintiff to file a Note of Issue on or before October 10, 2014.

On October 10, 2014, Plaintiff timely filed a Note of Issue. However, on April 13, 2015, a stipulation was entered into by the parties vacating the Note of Issue with leave to Plaintiff to re-file the Note of Issue "within sixty days of completion of discovery" and so-ordered by the court. The parties agreed that discovery will be completed upon the deposition of Plaintiff on April 17, 2015.¹

On April 17, 2015, Plaintiff's agent was deposed.

On December 4, 2015, Plaintiff filed a Note of Issue.

On April 4, 2016, Plaintiff filed a motion for summary judgment that was denied by Order.

¹ The stipulation was silent as to when the Summary Judgment motion was to be made.

dated August 4, 2016.

On November 14, 2016, Plaintiff and Defendants Mandeep and Surinder Singh (collectively as "Defendants") entered into a So-Ordered Stipulation "to proceed to trial before a JHO (Judicial Hearing Officer)..."

On January 10, 2017, the parties appeared before a Special Referee for a non-jury trial wherein it was determined that Plaintiff established its entitlement to an Order of Reference.

On March 7, 2017, a Proposed Order Granting Summary Judgment and Default Judgment and Appointing a Referee, Jason Vishnick ("Referee") to Compute Amounts Due was signed by the Special Referee.

On August 22, 2017, the Referee issued his Referee's Report of Amount Due ("Referee's Report") premised on the Note and Mortgage set forth in the complaint. The Referee also relied upon the Affidavit of Merit of Armenia L. Harrell ("Harrell"), Vice President of Loan Documents for Wells Fargo, as servicing agent of the Plaintiff to determine the amount due to the Plaintiff.

Discussion

Defendants argue that the Referee's Report was not "substantially supported by the record." Defendants contend that Plaintiff has failed to introduce evidence establishing the proper foundation to determine the total amount due. In addition, Defendants argue that Plaintiff cannot, as a matter of law, move for a Judgment of Foreclosure and Sale without the Referee conducting a hearing following the submission of objections.

The Court will first address Defendants contention that the Referee's Report was not substantially supported by the record. "Although the court is entitled to reject the report of a referee and make new findings the report and recommendations of a referee should be confirmed if his or

her findings are supported by the record." (*Galasso, Langtone & Botter, LLP v. Galasso*, 89 A.D.3d 897, 898 [2nd Dept 2011][internal citations omitted]; *Flagstar Bank, F.S.B. v. Konig*, 153 A.D.3d 790 [2nd Dept 2017]; *Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767 [2nd Dept 2017]; *Thomas v. Thomas*, 21 A.D.3d 949 [2nd Dept 2005].) The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute. (*GEICO Ins. Co. v. AAMG Leasing Corp.*, 148 A.D.3d 703 [2nd Dept 2017].)

Here the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record. (*Citimortg., Inc. v. Kidd*, 148 A.D.3d 767 [2nd Dept 2017].) Ms. Harrell's affidavit is based solely upon a review of Well's Fargo's business records and does not include a Power of Attorney demonstrating the authority of the agent to act on behalf of the plaintiff. (*HSBC Bank USA, National Association v. Cooper*, 157 A.D.3d 775 [2nd Dept January 17, 2018]; *HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735 [2nd Dept 2009][holding that the Plaintiff's motion must be accompanied by an " affidavit submitted either by an officer of the plaintiff, or of a person acting with a valid power of attorney from the plaintiff, with personal knowledge of the relevant facts constituting the claim, the default, and the amount due.")

Plaintiff argues, in reply, that the Pooling and Servicing Agreements dated November 29, 2007 were annexed to the Plaintiff's Motion for Summary Judgment and therefore considered by the Referee, however, the Referee's Report of Amount due failed to indicate that it reviewed the Motion for Summary Judgment. Furthermore, Plaintiff failed to attach a copy of the Pooling and Servicing Agreement to the within Motion or as an Exhibit in Reply. Herein, the Referee's findings with respect to the amount due were not substantially supported by the record as the computation was premised on an affidavit of a servicing agent that was not accompanied by a power of attorney or the

servicing agreement. (*HSBC Bank USA, National Association v. Cooper*, 157 A.D.3d 775 [2nd Dept January 17, 2018]; *HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735 [2nd Dept 2009].)

Defendants also argue that since they appeared in the action, the Referee was required to hold a hearing on notice to the Defendants. The referee to compute is generally required to hold a hearing on notice to those who have appeared in the action and to take proofs with respect to the issue of amounts due the plaintiff under the terms of the loan documents. (CPLR 4313; *243 West 98th Condominium v. Shapiro*, 12 A.D.3d 591 [2nd Dept 2004].) Herein, the Referee failed to hold a hearing with respect to the issue of amounts due and the Referee's Report failed to indicate that the Defendants's Objections to the Proposed Referee Report and the Referee were duly considered.

Conclusion

For the reasons set forth above, it is

ORDERED, that the referee's report dated August 22, 2017 is vacated and the matter is remitted to referee Jason S. Vishnick, Esq. to hold an evidentiary hearing on notice to all parties concerning the amount owed to the Plaintiff by the Defendants, and it is further,

ORDERED, that the Plaintiff's motion for a judgment of foreclosure and sale is denied without prejudice to renew following the submission of the referee's report, the findings of which shall be based upon an evidentiary hearing for which Plaintiff as well as the Defendants and their counsel shall be provided with notice, and it is further,

ORDERED, that the plaintiff shall serve a copy of this order with notice of entry on the Defendants' attorney and on referee Jason S. Vishnick, Esq., and it is further

ORDERED that after the referee's hearing on remand, the Plaintiff shall move for a judgment of foreclosure and sale within thirty days after the issuance of a new referee's report computing the amount due to the Plaintiff.

Dated:


Bernice D. Siegal, J. S. C.

