

MEMORANDUM

SURPEME COURT-QUEENS COUNTY
IAS PART 23

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WILMINGTON TRUST, NATIONAL
ASSOCIATION, NOT IN ITS INDIVIDUAL
CAPACITY, BUT SOLELY AS TRUSTEE FOR
MFRA TRUST 2014-2,

Plaintiff,

Index No.: 708461/19
BY: ALOMAR, K.

Motion Dated: 10/27/22
Motion Seq. No.: 3

-against-

NARINDER SINGH; LVNV FUNDING LLC; NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE; NEW YORK CITY DEPARTMENT OF
FINANCE; PARKING VIOLATIONS BUREAU;
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; TD BANK; BALA SINGH; BALWINDER
SINGH; CHIRAG RISHI; GUCHARAN SINGH;
MANDEEP KAUR; MARTHA PESANTES;
MENELAOS LAZARIS; POONAM BALA,

Defendants.



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Plaintiff's action seeks to foreclose a Mortgage executed by Narinder Singh to Mortgage Electronic Registration Systems, Inc. ("MERS"), AS NOMINEE FOR SunTrust Mortgage, Inc. on November 17, 2006 on real property known as 18-52 21st Drive, Astoria, NY 11105 ("mortgaged premises"), made in the original amount of \$735,000.00, recorded in Queens County Clerk's Office on January 2, 2007 in CRFN Number 2007000001081. Thereafter, on August 4, 2011, MERS assigned the mortgage to SunTrust Bank. On MARCH 26, 2015, SunTrust Bank assigned the mortgage to Barclays Bank PLC. On February 3, 2016, Barclays Bank PLC assigned the mortgage to plaintiff.

On October 28, 2021, an Order was made an entered with the Queens County Clerk's office granting plaintiff summary judgment and striking the defendant's answer, and referring the matter to Helmut Borchert, Esq. as referee, to ascertain and compute the amount due on the Note and the Mortgage which are the subject of this action. The Referee's Oath and Report dated February 11, 2022, and filed in the Queens County Clerk's Office on February 16, 2022 shows the amount of

principal, interest and other charges accruing under the Note and Mortgage then due Plaintiff to be the sum of \$1,400,686.36 as of January 1, 2022, plus a per diem interest for every day thereafter. A successive Notice of Pendency was filed on February 23, 2022.

Here, plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (see *U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005, 48 NYS3d 163 [2nd Dept 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930, 5 NYS3d 175 [2nd Dept 2015]). While this court is not bound by the referee's report of the damages due the plaintiff, the report of a referee should be confirmed in circumstances where the findings are substantially supported by the evidence in the record (*CitiMortgage, Inc. v Kidd*, 148 AD3d 767, 49 NYS3d 482 [2nd Dept 2017]; *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 [2nd Dept., 2016]). In this case, the referee submitted sufficient evidence in the form of a "affidavit of merit and amounts due" executed by Priscilla Serrato, Assistant Secretary of Fay Servicing, LLC, attorney-in-fact for the named plaintiff, sworn to on the January 21, 2022, together with sufficient documentary proof, to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold as one parcel (*CitiMortgage, Inc. v Kidd*, supra.; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 [2nd Dept., 2015]).

With respect to defendant's cross motion for an order granted leave to renew. A motion for leave to reargue is addressed to the sound discretion of the trial court and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]; *Haque v Daddazio*, 84 AD3d 940, 942 [2d Dept 2011]). It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously determined, or to present arguments different from those originally presented to the court (*Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010] [internal quotations omitted]).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion...or shall demonstrate that there has been a change in the law that would change the prior determination (see *Rowe v NYCPD*, 85 AD3d 1001 [2d Dept 2011]). It is within the court's discretion to determine whether the failure to present the new facts in the original motion constitutes a reasonable justification (*Rose v Levine*, 98 AD3d 1015, 106 [2d Dept 2012]).

On October 28, 2021, plaintiff was granted a summary judgment order. On December 15, 2021, the Appellate Division Second Department made its decision on *Bank of Am., N.A. v Kessler*, 202 A.D.3d 10, 160 N.Y.S.3d 277 (2021), rev'd, No. 4, 2023 WL 1972994 (N.Y. Feb. 14, 2023). The Appellate Division in *Bank of Am., NA. v Kessler* (202 AD3d 10 [2d Dept 2021]) had held that "inclusion of any material in the separate envelope sent to the borrower under RPAPL §1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL §1304(2)."

Here, defendant argues that plaintiff violated RPAPL §1304(2) by including additional language in the 90-day notice, specifically debt collection notices. "Where a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, a party moving for summary judgment is required to make a prima facie showing of strict compliance with RPAPL 1304" (see *US Bank Nat. Assn. v Mendelovitz*, 189 AD3d 1307 [2d Dept 2020]). Where plaintiff fails to

establish compliance with the condition precedent of RPAPL 1304, the motion for summary judgment must be denied (*Wells Fargo v Trupia*, 150 AD3d 1049 [2d Dept 2017]). Strict compliance with the RPAPL 1304 notice requirement is a condition precedent to the commencement of a foreclosure action. (*Citibank, NA. v Conte-Sheurer*, 172 AD3d 17 [2d Dept 2017]).

However, on February 14, 2023, the Court of Appeals of New York reversed the Appellate Division's bright-line rule. (*see, Bank of Am., N.A. v. Kessler*, No. 4, 2023 WL 1972994 [N.Y. Feb. 14, 2023] [holding that a bright-line rule would be both unfair and contrary to the statutory purpose, as it would deprive borrowers of information that could help them avoid foreclosure and penalize lenders who attempt to ensure their customers are better informed. It could also result in windfalls to borrowers resulting from clerical errors and bona fide attempts by lenders to assist borrowers in avoiding foreclosure.]).

Plaintiff's motion for an order granting judgment of Foreclosure and Sale is granted in its entirety.

Defendant's cross-motion for an order granting defendant leave to renew the December 18, 2020, Memorandum Order and/or the accompanying October 27, 2021, Order of Reference, is denied.

Motion Support to review the proposed order/judgment.

Settle order/judgment on notice.

Dated: February 21, 2023



A handwritten signature in black ink, appearing to read "Karina E. Alomar".

Karina E. Alomar, J.S.C.