

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: September 17, 2020

529153

FLAGSTAR BANK, FSB,
Respondent,

v

MEMORANDUM AND ORDER

PATRICIA STEWART, Also Known
as PATRICIA A. STEWART,
et al.,
Appellants.

Calendar Date: August 20, 2020

Before: Garry, P.J., Lynch, Aarons, Reynolds Fitzgerald and
Colangelo, JJ.

Mann Law Firm, PC, Latham (Matthew J. Mann of counsel),
for appellants.

Gross Polowy, LLC, Williamsville (Douglas C. Weinert of
counsel), for respondent.

Aarons, J.

Appeal from an order of the Supreme Court (Fisher, J.),
entered February 8, 2019 in Greene County, which granted
plaintiff's motion to vacate a prior order.

Plaintiff commenced this mortgage foreclosure action after
defendants failed to make required payments due under the loan.
Plaintiff moved for a judgment of foreclosure and sale, but
Supreme Court, in a June 2017 order, denied the motion without
prejudice due to an incorrect amount being reflected in the

affidavit of amount due. Plaintiff was also instructed to remove for a judgment of foreclosure and sale within 120 days of the June 2017 order. Plaintiff failed to do so, and the court sua sponte dismissed the complaint without prejudice in a November 2017 order. Plaintiff thereafter moved to vacate the November 2017 order. In a February 2019 order, the court granted plaintiff's motion. Defendants appeal.

This Court has been advised that a judgment of foreclosure and sale, of which we take judicial notice (see U.S. Bank Natl. Assn. v Reyes, 174 AD3d 423, 423 [2019]), was entered in November 2019. In view of this, defendants' appeal from the February 2019 order must be dismissed given that it is a nonfinal order and the right to appeal from it terminated upon the entry of the November 2019 judgment (see US Bank Trust, N.A. v Lynch, 168 AD3d 1242, 1243 [2019]; Augusta v Kwortnik, 161 AD3d 1401, 1403 [2018]). Although an appeal from the November 2019 judgment would bring the February 2019 order up for review (see CPLR 5501 [a] [1]; US Bank Trust, N.A. v Lynch, 168 AD3d at 1243; Artibee v State of New York, 165 AD3d 1575, 1576 [2018]), there is no notice of appeal from that judgment before us. Defendants' contention that the November 2019 judgment is a nullity has been considered and is without merit.

Garry, P.J., Lynch, Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the appeal is dismissed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert D. Mayberger
Clerk of the Court