

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

Decided and Entered: November 25, 2020

529149

MTGLQ INVESTORS, L.P.,
Respondent,

v

WILLIAM THOMPSON,
Appellant,
et al.,
Defendants.

MEMORANDUM AND ORDER

Calendar Date: October 22, 2020

Before: Garry, P.J., Clark, Devine, Aarons and Reynolds
Fitzgerald, JJ.

William Thompson, Delhi, appellant pro se.

Freidman Vartolo LLP, New York City (Oran Schwager of
counsel), for respondent.

Aarons, J.

Appeal from an order and judgment of the Supreme Court
(Northrup Jr., J.), entered March 29, 2019 in Delaware County,
which, among other things, granted plaintiff's motion to confirm
the referee's report and for a judgment of foreclosure and sale.

Defendant William Thompson (hereinafter defendant)
executed a note in favor of HSBC Bank USA, N.A. that was secured
by a mortgage on real property located in Delaware County. In
2013, HSBC commenced this mortgage foreclosure action against
defendant, among others, after he failed to make the requisite

payments due under the note. HSBC thereafter moved for summary judgment and an order of reference. In an April 2015 order, Supreme Court granted the motion and appointed a referee to compute the amount due. Defendant then took an appeal from the April 2015 order granting HSBC's motion. The appeal, however, was never perfected and was subsequently dismissed. After the referee issued a report, HSBC moved to confirm it and for a judgment of foreclosure and sale. Defendant opposed the motion to confirm and also responded with a motion to dismiss. In March 2019, the court granted HSBC's motion and denied defendant's motion. The court also substituted plaintiff, who was eventually assigned the mortgage, for HSBC and amended the caption to reflect this substitution. Defendant appeals. We affirm.

As an initial matter, we note that defendant devotes most of his brief to arguments challenging issues regarding the April 2015 order. Although defendant served and filed a notice of appeal from that order, his appeal was dismissed for failure to prosecute (see HSBC Bank USA, N.A. v Thompson, 2018 NY Slip Op 80766[U] [2018]; HSBC Bank USA, N.A. v Thompson, 2018 NY Slip Op 73959[U] [2018]). He also never moved to vacate that dismissal. In view of this, and because we decline to exercise our discretion in the interest of justice, defendant is barred from raising issues with respect to the April 2015 order (see Bray v Cox, 38 NY2d 350, 353 [1976]; Matter of Sawhorse Lbr. & More v Amell, 2 AD3d 1082, 1083 [2003]).

As to the arguments properly before us, defendant contends that Supreme Court erred in confirming the referee's report in the absence of a hearing. The record reflects that a notice of computation provided that, if the parties had objections, they were to submit written objections to the referee. The notice also stated that the determination of whether a hearing was warranted based upon any objections would be left to the discretion of the referee and that if no objections were submitted, the referee's report would be based solely on submissions (compare Excel Capital Group Corp. v 225 Ross St. Realty, Inc., 165 AD3d 1233, 1236 [2018]). Although defendant submitted objections, the objections took the form of legal

arguments and, as the referee noted, did not address any errors in the computations. Accordingly, the referee did not err in summarily reaching his computations (see Blueberry Invs. Co. v Ilana Realty, 184 AD2d 906, 908 [1992]; compare Sears v First Pioneer Farm Credit, ACA, 46 AD3d 1282, 1286-1287 [2007]).

Furthermore, even if the referee erred, any error was harmless. The referee's report was merely advisory, and Supreme Court was the ultimate arbiter of the dispute (see CPLR 4403). Upon plaintiff's motion to confirm the referee's report, defendant submitted an opposition, as well as a motion to dismiss. Defendant thus had another opportunity to contest the referee's computations (see Deutsche Bank Natl. Trust Co. v Zlotoff, 77 AD3d 702, 702 [2010]). Defendant, however, did not submit admissible proof to raise a factual issue regarding the computations and, instead, reiterated legal arguments. The court considered defendant's submissions and, under these circumstances, we cannot say that remittal for a hearing is necessary (see Shultis v Woodstock Land Dev. Assoc., 195 AD2d 677, 678-679 [1993]). Defendant's remaining contentions have been considered and are without merit.

Garry, P.J., Clark, Devine and Reynolds Fitzgerald, JJ.,
concur.

ORDERED that the order and judgment is affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court