# Loreto v Wells Fargo Bank, N.A.

Supreme Court of New York, Monroe County

August 28, 2017, Decided

2010/14641

 **[\*\*1]**  Patrick Loreto, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC; and RICCARDO DURSI, IN RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, Plaintiffs, against Wells Fargo Bank, N.A., AS TRUSTEE FOR THE REGISTERED SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5; ENCORE PROPERTY MANAGEMENT OF WESTERN NEW YORK, LLC; TIMOTHY FOSTER, AS RECEIVER; ESTATE OF KENNETH P. RAY, DECEASED; and LINDA PALMER AS TRUSTEE OF THE PALMER FAMILY TRUST, Defendants.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

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**Prior History:** Loreto v. Wells Fargo Bank, N.A., 62 Misc. 3d 1202[A], 2016 NY Slip Op 51921[U], 2016 N.Y. Misc. LEXIS 7628 (N.Y. Sup. Ct., Sept. 27, 2016)

**Counsel:  [\*1]** For Loreto, Plaintiff: Joseph A. Taddeo, Jr., Esq.

For Dursi, Plaintiff: John G. Leonard, Esq.

For Estate of Ray, Defendant: Jay G. Williams, III, Esq.

For Foster, Defendant: Gregory McDonald, Esq., BOND SCHOENECK & KING, PLLC.

For Wells Fargo, Defendant/ Third Party Plaintiff: Michael R. O'Donnell, Esq., RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP.

**Judges:** Matthew A. Rosenbaum, Supreme Court Justice.

**Opinion by:** Matthew A. Rosenbaum

# Opinion

Matthew A. Rosenbaum, J.

Defendant Wells Fargo Bank, N.A., moves for an order confirming the June 12, 2017 Referee's Report of the Amount Due in its entirety and directing the Referee to conduct the sale of the property at issue as soon as possible pursuant to the Court's November 17, 2016 Order.

On November 17, 2016, the Court entered an Order which provided that the issue of the amount by which Wells Fargo is equitably subrogated in this matter be referred to Louis Cristo, Esq., the referee previously appointed in the Foreclosure Action, to re-ascertain and re-compute the amount due. The Order further provided that the mortgaged premises should be sold at public auction pursuant to the terms of the Judgment of Foreclosure and Sale dated January 29, 2010. The Court confirmed the **[\*2]**  preliminary report of the referee in part and rejected it in part,

ordering that the report was rejected to the extent it seeks additional discovery or a hearing regarding the actions or accounting of the Receiver. The matter was referred back to the Referee who was ordered to calculate the amount by which Wells Fargo is equitably subrogated, the total sum due under the Intervest Mortgages.

In the Report of the Amount Due, the Referee found and reported that $49,221,122.44 was due on the Intervest Notes and Mortgages as of May 25, 2017 plus interest.

Opposition to this motion has been received. The Estate of Ray opposes on two grounds: the Referee did not properly compute the amount to which Wells Fargo is equitably subrogated, and also argues that it is inappropriate to direct the sale of the property in this action. Opposition is also received from Plaintiffs. The Court notes that the majority of the arguments raised in opposition to this application relate to whether the Referee has the authority to determine the amount due in this matter, an issue which is not properly before the Court. On this motion, the Court is tasked with determining whether the determination of the amount due **[*3]** is supported by the record. Here, the record is adequately supported, and the motion to confirm is granted.

Although Plaintiffs and Estate of Ray claim that Wells Fargo cannot seek relief as to the foreclosure within the context of this action, Plaintiffs and the Estate of Ray were in fact the parties who raised allegations of the improprieties of the original judgment of foreclosure and sale in this action-after opting not to seek involvement in the Foreclosure action. Plaintiffs' Complaint alleges: fraudulent conduct; seeking to vacate the judgment of foreclosure and sale as to the Stone Road Property; discharging the Receiver appointed in the foreclosure; returning the collected rents to Plaintiffs for the benefit of Encore Properties of Rochester, LLC; finding Defendants' actions taken subsequent to obtaining fraudulent consents void and unenforceable; and seeking a money judgment in the sum of $5,625,000 for damages for the loss of Encore Property of Rochester, LLC's equity in the Stone Road Property. The pending action was commenced by Plaintiffs only after Wells Fargo obtained a judgment of foreclosure in the Foreclosure action. Both Palmer and EPMWNY appeared and challenged **[*4]** the Foreclosure action, and no appeal from Orders granted therein were taken. Despite being aware of the Foreclosure action and clearly believing they had an interest in the subject properties, Plaintiff chose not to appear or seek joinder in the Foreclosure action but sat back and waited to commence this action until the judgment of foreclosure was granted, and thus forced Wells Fargo to protect its interests within this action.

Plaintiffs have plotted the course of this litigation with full knowledge of the Foreclosure action and made the decision to not appear in the Foreclosure action. At this juncture in the litigation, the only conceivable resolution to these proceedings is to award the parties the relief to which they are entitled, including finality, and to address the foreclosure within the context of this action by granting the pending motion. The Court notes, as it has previously in this litigation, that it is undisputed that the EPR members fully mortgaged the Stone Road Property through the Intervest mortgages and did not contribute money toward the purchase or pay-off of the mortgages. Even if the claims of fraud are accurate, the obligation under the Intervest loans is **[*5]** undisputed and was paid off only through the Column refinance.

Signed at Rochester, New York this 28th day of August, 2017.

Matthew A. Rosenbaum

Supreme Court Justice