

**Security Pac. Natl. Bank v Evans**

2001 NY Slip Op 30083(U)

July 9, 2001

Supreme Court, New York County

Docket Number: 22899/92

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
SHERRY KLEIN HEITLER

PRESENT: \_\_\_\_\_  
Justice

PART 30

Security Pacific National Bank  
INDEX NO.

22899/92

Tracie Evans Arnold  
Legislat. Melvin Gordon  
et al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the  
memorandum decision dated 7-9-01

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 7-9-01

Sherry Klein Heitler  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 30

-----X

SECURITY PACIFIC NATIONAL BANK,

Plaintiff,

- against -

Index No. 22899/92

Sequence No. 005

DECISION

TRACIE EVANS; ARNOLD LEPELSTAT;  
MELVIN GORDON; PEOPLE OF THE STATE OF  
NEW YORK; NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD; UNITED STATES OF AMERICA;  
BOARD OF MANAGERS GRAMERCY PLACE  
CONDOMINIUM,

Defendants.

-----X

SHERRY KLEIN HEITLER, J.:

In this mortgage foreclosure action, plaintiff, Security Pacific National Bank ("Security Pacific"), moves, pursuant to CPLR 2221, for leave to reargue the prior motion by defendant Tracie Evans ("Ms. Evans"), which sought to vacate the Judgment of Foreclosure and Sale regarding Apartment 22A at 280 Park Avenue South, New York, New York (the "subject premises"), granted on default on July 21, 1994, and the Referee's Deed of Sale, dated June 1, 1995.

Security Pacific commenced this action to foreclose on a mortgage issued to Ms. Evans by Nationwide Bank and secured by the subject premises. The mortgage was assigned to Security Pacific in 1989.

By order, entered on July 25, 1994, this Court (Beverly S. Cohen, J.) granted Security Pacific a Judgment of Foreclosure and Sale on default. In addition, Security Pacific obtained a Referee's Deed of Sale for the subject premises on June 1, 1995. Thereafter, Security Pacific brought several proceedings in Housing Court seeking possession. Security Pacific eventually obtained a warrant of eviction against Ms. Evans and subtenant Steven O'Keefe, and the eviction was scheduled for October 7, 1999.

In the prior motion, Ms. Evans sought to vacate the Judgment of Foreclosure and Sale entered on default, and the Referee's Deed of Sale. Ms. Evans argued, in essence, that vacatur was warranted because of newly discovered evidence. Specifically, she claimed that Security Pacific misrepresented its status as a separate entity by commencing the action after it closed and ceased to exist, and the law firm of Shapiro and Kriesman fraudulently obtained the Referee's Deed on behalf of a closed bank.

In opposition, defendants submitted documents relating to another matter involving different parties, with a separate index number, and did not address the issues raised by Ms. Evans.

On October 6, 1999, this Court (Beverly S. Cohen, J.) granted a temporary restraining order enjoining Security Pacific from transferring any interest in the subject premises pending the hearing on this motion. On October 19, 1999, Justice Cohen extended the temporary restraining order until a determination of the motion.

By order, dated July 7, 2000, this Court rejected the claim based on newly discovered evidence, but granted the motion to vacate concluding that since Security Pacific merged with, and was completely absorbed by, Bank of America prior to the commencement of this mortgage foreclosure action, it ceased to exist as a separate entity and could not properly be named as a party.

Security Pacific now seeks to reargue the prior motion to vacate, asserting that the Court clearly misapprehended the circumstances regarding the merger. Security Pacific essentially argues that it and Bank of America were one and the same entity, and that it was a simple oversight and typographical error that plaintiff's name was not modified to reflect the merger.

Security Pacific also contends that Ms. Evans is barred by principles of collateral estoppel and res judicata from relitigating the foreclosure action in any way. Security Pacific argues that Ms. Evans failed to plead as an affirmative defense, and thus waived the right to assert that Security Pacific lacked the legal capacity to sue. Security Pacific further claims that an order in a separate Housing Court proceeding should have a collateral estoppel and res judicata effect in this action.

It is well-settled that a motion to reargue, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the Court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v Roche, 69 AD2d 558, 567 (1<sup>st</sup> Dept. 1979)).

Here it appears that the granting of reargument is warranted. Upon an examination of Plaintiff's Exhibit E, a decision/order of Hon. Rubin A. Martino (Housing Court) dated May 24, 1999, the court ruled that:

This newly discovered evidence [that the petitioner had merged with and became Bank of America National Trust & Savings Assn] does not rise to the level of fraud or misrepresentation since petitioner may have sought to amend the pleadings to reflect 'Bank of America National Bank' as the petitioner.

Said action, entitled Security Pacific National Bank v. Tracie Evans and Stevan O'Keefe, involved the possession rights to this premises. This decision addressed the very issue raised in the underlying application. Said issue was litigated between the same parties and decided. Accordingly, the Housing Court has already determined that such a defect does not constitute fraud and thus this court is collaterally estopped from finding otherwise (see, Kaufman v. Eli Lilly and Company, 65 NY2d 449 [1985]).

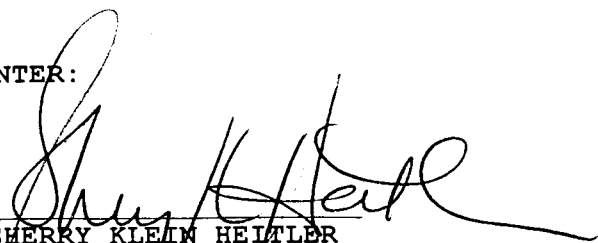
The court further finds that defendant is barred from raising the defense of lack of standing. In the underlying foreclosure action, the defendant submitted an answer to the complaint and the plaintiff was thereafter awarded summary judgment. In her answer, the defendant failed to plead as an affirmative defense that plaintiff lacked the legal capacity to sue. As a result, such defense is waived (see, CPLR §§211(a) 3), 3211(e); MacCaull v. Brown, 261 AD2d 829 [4<sup>th</sup> Dept., 1999]). Although she argues that her answer was never filed, an answer is considered effective upon service (see, CPLR 320). Accordingly, her argument that the answer was not filed is without merit and does not constitute a bar to the waiver of this defense.

The court notes that the default of this mortgage has been ongoing for more than eight years. Although there were discussions about attempts to resolve this litigation, no serious effort has been made to pay off this mortgage.

In light of the foregoing, the court grants plaintiff's motion for reargument and, upon reargument, the court vacates its decision of July 7, 2000 so as to reinstate the Judgment of Foreclosure and Sale granted on July 21, 1999, and the Referee's Deed of Sale dated June 1, 1995.

Accordingly, the Warrant of Eviction shall be subject to execution. Settle Order.

Dated: JULY 9, 2001

ENTER:  
  
 SHERRY KLEIN HEITLER  
 J.S.C.