

Babalola v Indymac Bank, F.S.B.

2011 NY Slip Op 31016(U)

April 5, 2011

Supreme Court, Nassau County

Docket Number: 20881/10

Judge: Denise L. Sher

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ANNE I. BABALOLA,

Plaintiff,

- against -

INDYMAC BANK, F.S.B. and ONEWEST BANK, F.S.B.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 20881/10
Motion Seq. No.: 01
Motion Date: 02/04/11
XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion to Dismiss, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation and Exhibit</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant OneWest Bank, F.S.B. (“OneWest”) moves, pursuant to CPLR §§ 3211(a)(4) and (5), for an order dismissing the above captioned matter in its entirety and with prejudice as against the moving defendant OneWest. Plaintiff Anne I. Babalola (“Babalola”) opposes the motion.

Defendant OneWest seeks dismissal of the instant action on two grounds. First, it asserts that plaintiff Babalola commenced this action against defendants IndyMac, F.S.B. (“IndyMac”) and OneWest on or about November 15, 2010, seeking, *inter alia*, a declaratory judgment preventing the co-defendants from foreclosing on a certain mortgage, while at the same time there was another prior action pending between the same parties for the same cause of action,

IndyMac Bank, F.S.B. v. Beejay Ikoumola, Anne I. Babalola, New York State Department of Taxation and Finance, and "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the Mortgaged premises described in the complaint, Index No. 17887/07 ("IndyMac Action"), which seeks foreclosure of the same mortgage. Secondly, defendant OneWest asserts that an Order was issued in the IndyMac Action by this Court on June 6, 2008, by the Honorable Joseph P. Spinola, Justice of the Supreme Court, granting IndyMac Bank, F.S.B. summary judgment for foreclosure and sale and striking the Answer filed in the action by the plaintiff herein, Anne I. Babalola, thus precluding the instant action by plaintiff Babalola under the principles of collateral estoppel.

Defendant OneWest argues that dismissal of the instant action is appropriate under CPLR § 3211(a)(4) which states that a party may move for judgment dismissing a cause of action when there is a prior action pending between the same parties and for the same cause of action. Defendant OneWest asserts that, although it was not a party in the IndyMac Action, both plaintiff Babalola and defendant IndyMac were parties in the IndyMac Action and that defendant OneWest is the successor in interest by assignment of defendant IndyMac with respect to the mortgage at issue in both matters. Defendant OneWest adds that the IndyMac Action concerns the same foreclosure on the same mortgage that plaintiff Babalola is seeking to challenge through a declaratory judgment in the instant action. In the instant action, the subject of the relief requested by plaintiff Babalola - to halt the foreclosure of the mortgage at issue - is exactly the same relief plaintiff Babalola requested in the IndyMac action where the foreclosure is being litigated. Defendant OneWest contends that the two parallel actions are both seeking the same adjudication of the foreclosure of the same mortgage at issue thereby risking inconsistent determinations. Defendant OneWest argues that plaintiff Babalola already had her day in Court

with respect to the defenses she attempts to assert in the instant action against the foreclosure of the mortgage and that her defenses have already been summarily rejected by this Court more than two years ago. Plaintiff Babalola never appealed from the Order granting summary judgment in favor of IndyMac and striking Babalola's Answer.

Defendant OneWest further argues that dismissal of the instant action is appropriate under CPLR § 3211(a)(5) pursuant to collateral estoppel principles. Invoking the doctrine of collateral estoppel requires (1) that the issue as to which preclusion is sought to be identical with the issue decided in the prior proceeding; (2) that the issue has been necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present proceeding have had a full and fair opportunity to litigate the issue in the prior proceeding. The burden of establishing the first two elements rests upon the proponent of preclusion, but as to the lack of a full and fair opportunity to contest, the burden is on the opponent. Defendant OneWest submits that, in this case, the first two elements of the sought preclusion are met. "There is (1) identity of issue in the instant action and prior action. The issue as to which preclusion is sought is the foreclosure of the mortgage on premises 855 Sharon Lane, Westbury, New York, in which Plaintiff claims an interest. Further, (2) the issue was necessarily decided in the prior proceeding pursuant to the Order granting summary judgment to IndyMac....The Order for summary judgment qualifies as a necessarily decided issue because it is a final judgment on the merits as to the issue of the foreclosure....Accordingly, both requirements of which the proponent has the burden are met....Moreover, the summary judgment Order granted by this Court in the IndyMac Action expressly struck the answer filed by Plaintiff herein, Ms. Babalola, thus terminating her defenses to foreclosure with prejudice, as a matter of law. Babalola never appealed from that order, and it therefore stands as the conclusive determination of (a) the lender's (i.e. OneWest's) right to foreclose the mortgage at issue and (b) the lack of merit of Babalola's defenses to the

foreclosure.”

Defendant One West submits that plaintiff Babalola’s defense in the instant action is the very same defense that she asserted in her Answer in the IndyMac Action, specifically that plaintiff Babalola allegedly did not execute the mortgage or the Note. Defendant OneWest adds that the Complaint in the instant action alleges that the mortgage and Note at issue were executed on October 27, 2004, by Beejay Ikoumola, the then-record owner of the premises 855 Sharon Lane, Westbury, New York, in conjunction with a conveyance of title to that property to Ikoumola by Olukayode Babalola, Esq., plaintiff Babalola’s attorney in the IndyMac Action, as grantor. It further adds that “Justice Spinola’s March 31, 2008 Order makes clear, 22 days after Ikoumola took title to the mortgaged premises from attorney Babalola, Ikoumola conveyed title to the mortgaged premises, 10% to Ikoumola and 90% to Anne I. Babalola. As grantee Anne I. Babalola obviously took title subject to any mortgages and liens...That defense was properly rejected by Justice Spinola in the IndyMac Action and has no more merit here.”

In opposition to defendant OneWest’s motion, plaintiff Babalola argues that the IndyMac Action is completely different from the instant action. Plaintiff Babalola claims that the parties are completely different and the cause of action is also completely different. Plaintiff Babalola contends that the IndyMac Action is a foreclosure action against mortgagor Ikoumola whereas the instant action is seeking a declaration of rights of the parties based on the admission by the defendants that plaintiff Babalola is a ninety (90%) owner of the property. Plaintiff adds that dismissal under CPLR § 3211(a)(4) is discretionary and the Court has a broad latitude to enter a different order to meet the interest of justice and disposition on the merits.


Plaintiff Babalola further argues that the doctrine of collateral estoppel is not applicable in this case because the issue raised in this action (the ownership of the property in question) has not been previously litigated or decided on the merits in any court of law. Plaintiff Babalola asserts that “[w]hat was previously litigated is whether or not IndyMac can foreclose on its note against Ikoumola.”

The Court finds that both plaintiff Babalola and defendant OneWest (as successor in interest by assignment of defendant IndyMac with respect to the mortgage at issue in the instant matter and the IndyMac Action) are parties to the IndyMac Action and that the rights of the parties in the instant action with respect to the subject mortgage have already been adjudicated in the IndyMac Action and determined in Justice Spinola's Order. The Court also finds that IndyMac Action concerns the same foreclosure on the same mortgage premises that plaintiff Babalola is seeking to challenge through a declaratory judgment in the instant action.

The Court holds that defendant OneWest has met the requirements of both CPLR § 3211 (a)(4) and (5) in seeking to dismiss plaintiff Babalola's complaint in the instant action. Plaintiff Babalola's opposition to defendant OneWest's motion is completely without merit and fails to refute defendant OneWest's arguments and evidence.

Therefore, defendant OneWest's motion to dismiss the instant action is hereby granted.

This constitutes the Decision and Order of this Court.

ENTER : 
DENISE L. SHER, A.J.S.C.

XXX
ENTERED
APR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
April 5, 2011