

U.S. Bank Natl. Assn. v Stein
2011 NY Slip Op 32477(U)
September 13, 2011
Sup Ct, Nassau County
Docket Number: 016919/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

X

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR ASSET BACKED PASS
THROUGH CERTIFICATES, SERIES 2006-HE1

Index No.: 016919/08
Motion Sequence...04
Motion Date...08/11/11

Plaintiffs,

-against-

ALAN C. STEIN, ESQ., GASTWIRTH, MIRSKY
& STEIN, L.L.P., LAW OFFICE OF ALAN C.
STEIN, P.C., ROBERT M. STEINERT and
CHICAGO TITLE INSURANCE COMPANY,

Defendants.

X

ALAN C. STEIN, ESQ., GASTWIRTH, MIRSKY
& STEIN, L.L.P. and LAW OFFICE OF ALAN C.
STEIN, P.C.,

Third-Party Plaintiffs,

-against-

STEVEN J. BAUM, P.C., and STEVEN J. BAUM,
ESQ.,

Third-Party Defendants.

X

Papers Submitted:

Notice of Motion (Mot. Seq. 04).....x

Notice of Cross-Motion (Mot. Seq. 05)¹.....x
 Reply Affirmation.....x

Upon the foregoing papers, the Defendant/Third-Party Plaintiffs, ALAN C. STEIN, ESQ., GASTWIRTH, MIRSKY & STEIN, L.L.P. and LAW OFFICE OF ALAN C. STEIN, P.C.'s (hereinafter collectively referred as the "Stein Defendants"), motion to reargue (Mot. Seq. 04), brought pursuant to CPLR §2221 (d) (2), seeking reargument of this Court's Short Form Order, dated May 13, 2011 (Marber, J.), and, upon reargument, seeking an order pursuant to CPLR § 3212, granting them summary judgment on all claims in the Third-Party Complaint, is decided as hereinafter provided. The Third-Party Defendants, STEVEN J. BAUM, P.C. and STEVEN J. BAUM, ESQ.'s (hereinafter collectively referred to as the "Baum Firm"), cross-motion (Mot. Seq. 05), seeking to compel Stein to submit for an examination before trial, was resolved by a "So-Ordered" Stipulation, dated July 14, 2011.

Relevant Factual and Procedural Background:

On or about September 11, 2008, the Plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR ASSET BACKED PASS THROUGH CERTIFICATES, SERIES 2006-HE1 ("US Bank"), commenced this action against the Stein Defendants for legal malpractice alleging that the Defendants were negligent in failing to properly record a mortgage executed in favor of the Plaintiff on a certain parcel of land located at 112 Irving Avenue, Deer Park , New York (hereinafter "Premises"). The Stein

¹ The affirmative relief sought in Motion Sequence 05 was resolved by "So-Ordered" Stipulation dated July 14, 2011, however, said papers included opposition to the instant and are therefore referenced above.

Defendants subsequently commenced a third-party action against the Baum Firm for contribution alleging that the Baum Firm failed to timely intervene in the action which could have secured the Plaintiff an equitable lien on its incorrectly recorded mortgage. The basis of the Stein Defendants' claim for contribution is that the Baum Firm was negligent/guilty of malpractice in that it knew or should have known of another mortgage on the same Premises in favor of T&V Construction Corp. (hereinafter the "T&V Mortgage"), and the Baum Firm's failure to timely intervene in the T&V Mortgage foreclosure proceeding proximately caused damages to the Plaintiff, US Bank. The Order denying US Bank's motion to intervene in the T&V foreclosure action is annexed to the Stein Defendants' underlying cross-motion for summary judgment as Exhibit "2". (*See* Decision, Sgroi, J., March 13, 2009). For a full recitation of the facts, reference is made to the decision and order of the Hon. Sandra L. Sgroi and this Court's previous Order. (*See* Short Form Order, Marber, J., May 13, 2011, attached to Stein's Notice of Motion as Exhibit "F").

The Baum Firm moved to dismiss the third-party complaint, pursuant to CPLR § 3211 (a) (7), claiming that there was no basis for a malpractice action since it was retained in a different matter and for a different purpose than were the Stein Defendants. Justice William R. LaMarca, prior to his retirement from the bench, denied the motion to dismiss, relying on *Schauer v. Joyce*, 54 N.Y.2d 1 (1981) and *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143 (1972), finding that the third-party complaint validly stated a claim for contribution.²

²Justice LaMarca granted the motion to dismiss as to all claims asserted against Third-Party Defendant, Steven J. Baum, Esq., individually.

(See Short Form Order, LaMarca, J., 12/04/09). In affirming Justice LaMarca's Order, the Appellate Division, Second Department, held that, "[t]he Supreme Court properly determined that the Stein defendants stated a cause of action against the third-party defendant Steven J. Baum, P.C., by asserting, among other things, that Steven J. Baum, P.C., failed to timely correct the legal errors allegedly committed by the Stein defendants in their representation of the plaintiff's predecessor in interest, despite having sufficient time and an opportunity to do. The third-party complaint alleged sufficient facts which, if true, would establish that Steven J. Baum, P.C., may be liable to the Stein defendants for causing or contributing to the plaintiff's alleged damages".

On or about November 29, 2010, prior to the completion of discovery in this matter, the Baum Firm moved for summary judgment, pursuant to CPLR § 3212, seeking dismissal of the third-party complaint. The Stein Defendants cross-moved for summary judgment, seeking judgment as a matter of law in their favor against the Baum Firm on all claims asserted in the third-party complaint. The Court denied both the motion and cross-motion for summary judgment. (See, Short Form Order, Marber, J., 05/13/11). The Stein Defendants now seek reargument, and, upon reargument, seek an order pursuant to CPLR § 3212, granting them summary judgment.

Stein Defendants' Cross-Motion for Summary Judgment:

The Stein Defendants argued in their cross-motion that the Baum Firm made several admissions in its motion for summary judgment that warranted granting the Stein

Defendants summary judgment on their third-party complaint, namely, the admission that US Bank's mortgage was superior to the T&V mortgage based upon principles of equitable subordination. As such, the Stein Defendants contend that the Baum Firm was required to assure US Bank's first position by intervening in the T&V foreclosure action before the subject Premises was foreclosed upon and sold by another. The Stein Defendants further assert that since a lien search would have revealed the existence of the lis pendens filed when the T&V mortgage foreclosure proceeding was commenced (five months prior to the commencement of the foreclosure proceeding on the US Bank's foreclosure proceeding on the same Premises), the Baum Firm's failure to timely intervene and secure US Bank's interests was malpractice per se.

In opposition to the Stein Defendants' cross-motion, the Baum Firm insisted that the Stein Defendants failed to demonstrate that the Baum Firm's decision to commence its own foreclosure action naming T&V Construction as a defendant, rather than intervening in the T&V foreclosure action, was nothing more than an "error in judgment" that cannot support a claim for malpractice.

This Court, in considering the arguments raised by counsel, found that, "[t]he Baum Firm's intentional decision not to intervene despite there being a lis pendens filed against the Premises, must be examined by a trier of fact to determine whether that was an exercise of sound judgment". (See Short Form Order, Marber, J., 5/13/11, page 10). In determining that neither party was entitled to summary judgment, this Court further found

that, “the question of whether the Baum Firm’s failure to timely intervene in the T&V foreclosure action was conduct that fell below accepted standards of care within the legal profession, is an inquiry to be determined by the trier of fact”. *Id.* at page 11.

The Stein Defendants’ Motion to Reargue:

In moving to reargue, the Stein Defendants submit that this Court overlooked and/or misapprehended the fact that the Appellate Division, Second Department, confirmed the Decision and Order of this Court and the Baum Firm was “successor counsel” to the Stein Defendants. The Stein Defendants further submit that once that issue was determined, the Baum Firm’s admission that it did not timely intervene in the T&V foreclosure action eliminated any issue of fact warranting summary judgment in favor of the Stein Defendants on the third-party complaint.

In support of the motion to reargue, the Stein Defendants contend that it is the law of this case that the Baum Firm was successor counsel to the Stein Defendants and that the Court overlooked that the Appellate Division held that, if the allegations in the third-party complaint were true, the Baum Firm may be liable to Stein for causing or contributing to the Plaintiff’s alleged damages. Further, the Stein Defendants contend that this Court misapprehended the issues by finding issues of fact as to whether or not the Baum Firm’s conduct rose to the level of malpractice. It is further contended that the malpractice issue is only relevant to the underlying action and should not have been considered in their cross-motion for summary judgment. The Court disagrees.

The right to contribution generally arises when “multiple wrongdoers ... each owe a duty to plaintiff or to each other and by breaching their respective duties they contribute to plaintiff’s ultimate injuries.” *Trustees of Columbia University in City of N.Y. v. Mitchell/Giurgola Associates*, 109 A.D.2d 449, 454 (1st Dept. 1985); *see Raquet v. Braun*, 90 N.Y.2d 177, 182 (1997).

The Stein Defendants’ argument, that this Court does not have to find that the Baum Firm breached a duty of care to the Plaintiff, which in turn means finding the Baum Firm guilty of legal malpractice, in order to grant judgment as a matter of law on the third-party complaint, is erroneous. The third-party complaint clearly states that “if plaintiff was damaged as alleged in the complaint, it was as a result of the negligence, recklessness, carelessness, culpable conduct or breach of contract by the third-party defendants”. *See Third-Party Complaint*, dated June 25, 2009, page 5. The Stein Defendants are correct in their assertion that according to *Schauer v. Joyce*, 54 N.Y.2d 1 (1981), the facts as alleged in the third-party complaint, do in fact state a viable claim upon which relief may be granted. However, summary judgment is warranted where there are no issues of fact with respect to the claims alleged in the third-party complaint. The burden is on the third-party plaintiffs, the Stein Defendants, to eliminate any issues of fact.

It is well settled that to prevail on a motion for summary judgment, the movant must establish its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See*

CPLR 3212 (b); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

The affidavit of Mr. Gross, together with the fact that the Baum Firm commenced its own foreclosure action naming T&V as a defendant to secure the interests of its client, raise issues of fact as to whether or not the Baum Firm breached a duty owed to the Plaintiff. Notably, several of the cases cited by counsel for the Stein Defendants involve the issue of whether or not the allegations give rise to a claim for contribution, not the issue of whether or not judgment as a matter of law should be granted on liability.

A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. *Ito v. 324 East 9th Street Corp.*, 49 A.D.3d 816, 817 (2d Dept. 2008). It is not designed, however, as a vehicle to provide an unsuccessful party with successive opportunities to rehash issues previously decided (*Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979)), or to present arguments different from those originally presented. *Giovanniello v. Carolina Wholesale Office Mach. Co.*, 29 A.D.3d 737, 738 (2d Dept. 2006).

The Court finds that, in rendering its previous decision, all of the arguments raised by the Stein Defendants herein were considered. Stein failed to show that the Court

overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. As such, the Court adheres to its original decision and Stein's motion to reargue is **DENIED**.

Accordingly, it is hereby

ORDERED, that the Stein Defendants motion to reargue (Mot. Seq. 04), pursuant to CPLR §2221 (d) (2), seeking reargument of this Court's Order, dated May 13, 2011 (Marber, J.), and, upon reargument, seeking an order pursuant to CPLR § 3212, granting Stein summary judgment on all claims in the Third-Party Complaint, is **DENIED**.

All applications not specifically addressed herein are **DENIED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
September 13, 2011



Hon. Randy/Sue Marber, J.S.C.

ENTERED
SEP 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE