

TD Bank, N.A. v Jones
2012 NY Slip Op 30467(U)
February 23, 2012
Sup Ct, NY County
Docket Number: 109215/10
Judge: Joan M. Kenney
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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 109215/2010
TD BANK, N.A.
VS.
JONES, MICHAEL
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 109215/10
MOTION DATE 10/9/12
MOTION SEQ. NO. 003

Motion to Reargue / Renew
No(s). 1-8
2 papers in opposition No(s). 9-23
No(s). 24

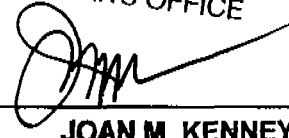
Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 01 2012

NEW YORK
COUNTY CLERK'S OFFICE



_____, J.S.C.
JOAN M. KENNEY

Dated: February 23, 2012

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
TD BANK, N.A. f/k/a TD BANKNORTH, N.A., successor
by merger to HUDSON UNITED BANK,

Plaintiff,

-against-

MICHAEL JONES a/k/a MICHAEL JONES,
MARTIN Gottlieb et al.,

Defendants.
-----X

JOAN M. KENNEY, J.:

DECISION & ORDER

Index No.: 109215/10

Motion Seq. 003

FILED

MAR 01 2012

NEW YORK

COUNTY CLERK'S OFFICE

In this foreclosure action, defendant Martin Gottlieb (Gottlieb), seeks an Order pursuant to CPLR 2221, to renew/re-argue this Court's decision and order dated April 27, 2011 and the subsequent Order of Reference dated July 12, 2012. Movant further seeks an Order: (1) dismissing the complaint for plaintiff's failure to supply promissory notes and adequately prove "chain of title"; and (2) for plaintiff's improper filing of a case before a different justice and/or not properly designating this matter as a related case to another pending matter in this Court.

Alternatively, Gottlieb seeks: (1) a declaration that his answer be deemed valid and accepted; (2) leave to amend said answer; (3) transfer this case to Justice Fried; and (3) awarding costs, sanctions and attorneys fees against plaintiff, co-defendant and their counsels.

PROCEDURAL AND FACTUAL BACKGROUND

Briefly, on or about December 15, 2010, plaintiff interposed a motion pursuant to CPLR 305 and CPLR 3025 to amend the caption; and pursuant to CPLR 3212, granting plaintiff summary judgment against defendants, Michael Jones a/k/a Michael E. Jones and Martin Gottlieb (Motion Sequence 001). The motion was returnable in the Motion Support Part and was adjourned on numerous occasions upon consent of the parties.

In accordance with the Motion Support administration rules, once a motion is filed, the parties have 60 days from the original return date to adjourn the motion on consent. After the 60 day period has expired, the movant must seek judicial approval of any further adjournments. This is usually accomplished by submitting a stipulation to the Court to be "So Ordered." Accordingly, on March 18, 2011, the parties executed a stipulation setting forth a briefing schedule for submission of opposition papers and reply papers which was "So Ordered" by this Court (the first stipulation). The last date for submission of papers regarding Motion Sequence 001, was to be April 13, 2011. On or about April 13, 2011, however, the parties executed yet another stipulation, seeking additional time to submit opposition, and/or cross motions and/or reply papers to Motion Sequence 001 (the second stipulation). This second stipulation was not "So Ordered" by this Court.

Immediately after the execution of this second stipulation, on April 14, 2011, an application was proffered by Order to Show Cause, seeking, inter alia, to vacate and set aside any judgment that may have been entered against defendants (Motion Sequence 002). This Court declined to sign the Order to Show Cause. The application appeared to have been premature in that a judgment had not yet been entered. This Court was unaware at the time that the application being interposed by a defendant (Gottlieb) was not a party to the aforementioned stipulations. Nevertheless, on April 21, 2011 Motion Sequence 001, which had been pending in the Motion Support Part since December, 2010, was finally marked "submitted on default" and referred to this Court for final disposition¹.

By decision and order dated April 27, 2011, this Court granted plaintiff's summary judgment

¹One of the defendants asserts that this Part rejected its cross motion as untimely. It is questionable whether or not said cross motion was, however, timely served absent a "So Ordered" stipulation permitting further papers on the summary judgment application. Notably, plaintiff did not confirm and/or stipulate to its timeliness.

Motion Sequence 001, on default, and directed that plaintiff settled an order. The Order was presented to this Court on or about July 12, 2011, and on that same date, this Court issued an Order of Reference appointing a Referee in this Foreclosure action.

Soon after, on or about July 19, 2011, defendant(s) filed the instant motion seeking to renew/re-argue this Court's order dated April 27, 2011 (Motion Sequence 003). For a period of about four months, Motion Sequence 003 was adjourned and finally marked fully submitted to this Court on October 19, 2011. Unfortunately, although this Court was able to confirm that it was marked "submitted" as of said date, the motion papers were not physically in chambers although it was docketed as such. In the interim, this Court's appointed Referee was moving forward with the directives assigned in accordance with the Order dated July 12, 2011, since there was no stay of the proceeding pending determination of the this motion.

On February 9, 2012, this Court had a telephone conference, at the behest of the Referee, to ascertain the status and determination, if any, of Motion Sequence 003. This Court communicated with all of the parties that the motion was not in chambers and directed the movant to ascertain its whereabouts and the actual location of the motion papers. After ending the conference call, my staff decided to try and locate the file, believing it would be more efficient use of everyone's time. The motion was located inside the case file at 60 Centre Street. A decision and Order was not rendered on said motion because this Court never received the motion papers nor had any knowledge of how the motion ended up in the County Clerk's office, rather than it being submitted directly to chambers for final determination. Nevertheless, the motion papers are now properly before this Court and the decision and Order is as follows:

In sum, this is an action to foreclosure upon a certain mortgage against the property known

as 771 St. Nicholas Avenue, New York, New York 10031 (the Property), owned by defendant, 771 St. Nicholas Avenue LLC. It is alleged in the complaint that on or about August 25, 2004, Juanita Iddrisu (Iddrisu) executed a note ("Note #1") in the amount of \$574,000.00 evidencing a loan by WMC Mortgage Corp, (WMC) to Iddrisu. As security for repayment of Note #1 , Iddrisu also executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for WMC a mortgage on 771 St. Nicholas Avenue, New York, New York 10031 (the Property) dated August 25,2004 ("Mortgage #1"). On or about December 9, 2005, Mortgage #1 was assigned by MERS as nominee for WMC to HSBC Bank USA (HSBC), by an Assignment of Mortgage dated December 9, 2005 (Assignment #1) and Mortgage #1 was further assigned by Wells Fargo Bank, N.A. successor by merger to Wells Fargo Home Mortgage, Inc. as attorney in fact for HSBC to NY Realty Funding LLC (NY Realty) by an Assignment of mortgage dated December 9, 2005 (Assignment #2). On about February 17, 2006, Mortgage #1 was further assigned by NY Realty to TD Bank, N.A. f/k/a TD Banknorth, N.A., successor by merger to Hudson United Bank (plaintiff, TD Bank) (Assignment #3).

On or about February 15, 2006, defendants Jones and Gottlieb executed a Gap Note (Note #2) in the amount of \$176,000.00 as evidence of a loan in like amount made by plaintiff to defendants Jones and Gottlieb. As security for repayment of Note #2, Jones and Gottlieb executed and delivered to plaintiff, TD Bank, a Gap Mortgage on the Property dated February 17, 2006 (Mortgage #2). The defendants also executed and delivered to plaintiff: (1) a Restated Note (the Restated Note) evidencing the consolidation of Note #1 and Note #2 into a single obligation in favor of plaintiff in the face principal amount of \$750,000.00; and (2) a Mortgage Spreader, Consolidation and Modification Agreement (the Consolidated Mortgage) consolidating Mortgage #1 and Mortgage

#2 into a single lien against the Property in the principal amount of \$750,000.00.

Plaintiff further asserts in the complaint, that it is the owner and holder of the aforementioned Note #1, Mortgage #1, Note #2, Mortgage #2, Restated Note and Consolidated Mortgage together with all of the other underlying instruments, documents or agreements otherwise evidencing or securing the obligations of defendants Jones and Gottlieb to plaintiff (the Loan Documents). Plaintiff claims that on or about March 15, 2010, Jones and Gottlieb defaulted pursuant to the terms of the Loan Documents by failing to make payments when due. Plaintiff asserts that it sent a letter to both Jones and Gottlieb, dated March 21, 2010 demanding payment of the amounts allegedly due and owing. When both Jones and Gottlieb failed to make payments as demanded, plaintiff commenced the within Foreclosure Action on or about July 13, 2010.

On or about October 18, 2010, defendant, Jones, served an answer, generally denying all the allegations in the complaint.

On or about June 6, 2011, defendant Gottlieb, served his responsive pleading which also generally denied the allegations asserted in the complaint and asserted numerous cross-claims against defendant Jones.

Unbeknownst to this Court, prior to commencing this action, plaintiff commenced an action against Michael E. Jones, MD, PC and Michael E. Jones, a defendant in the within foreclosure, seeking payment of a Promissory Note and Security Agreement and subsequent Promissory Note & Security Agreement Modification with an original principal amount of \$250,000.00 (the breach of contract action). It was asserted in the breach of contract action that because Michael E. Jones breached his obligations in accordance with the Loan Documents which are the subject of the within foreclosure action, his default triggered an acceleration provision wherein all the principal and

interest outstanding under the Note(s) which were the subject of the breach of contract action, became immediately due and payable to plaintiff.

The breach of contract action was assigned to Justice Bernard Fried, who made a factual determination that both the breach of contract action and the within foreclosure action were unrelated and specified by decision and order dated, August 8, 2011, that: "The foreclosure action seeks to foreclose a first priority mortgage lien (the "Mortgage") in real property located in New York County owned jointly by Jones and Gottlieb ... Other than Jones being named as a defendant in the foreclosure action, there is no connection between that proceeding and this one. The debts on which each action is predicated arose out of two entirely different transactions and necessarily involved different issues."

ARGUMENTS

Defendant Gottlieb contends that this action must be dismissed because: (1) there is another related action pending; and (2) plaintiff failed to produce the promissory notes attendant to this foreclosure action. In the alternative, movant seeks to proceed, on the merits and amend his answer. Sanctions and costs against plaintiff and co-defendant Jones, is also sought.

Plaintiff argues that movant's application must be denied because: (1) defendant failed to set forth any entitlement to renew/reargue this Court's decision; (2) movant lacks standing to interpose the within motion as he is in default and never sought to vacate same; (3) this foreclosure action is not related to the breach of contract action; and (3) this foreclosure action is not defective for failure to submit the promissory notes.

Co-defendant, Michael Jones, interposed limited opposition to movant's motion arguing that sanctions, costs and attorneys fees against Michael Jones, is not warranted. Additionally, Michael

Jones supports movant's application to vacate the Order dated April 27, 2011 granted on default, and permit the parties to proceed on the merits.

DISCUSSION

This Court is not inclined to dismiss this foreclosure action for plaintiff's purported failure to produce promissory notes. First, any judgment awarded and/or Order of Reference granted, was issued on default, prior to disclosure ever taking place in this action. Second, movant did not demonstrate that a demand for production of said promissory notes was ever made of plaintiff. Moreover, Justice Fried already determined that the prior breach of contract action was properly before him and was not related to the within foreclosure action so that a dismissal on those grounds, is neither warranted nor substantiated.

This action shall proceed, on the merits. As a matter of public policy, a trial on the merits is strongly favored on a proper showing of reasonable excuse, the absence of willfulness, lack of prejudice to the non-defaulting party, and the existence of a meritorious defense (see *Framapac Delicatessen, Inc. v Wolf*, 160 AD2d 168, [1st Dept 1990]; *Shure v Village of Westhampton Beach, Inc.*, 121 AD2d 887, [1st Dept 1990]). Plaintiff has not demonstrated any prejudice were this matter tried on the merits. More to the point, plaintiff had agreed to adjourn its own motion to allow defendant(s) to interpose opposition papers. The fact that the second stipulation was not "So Ordered" resulting in both Motion Support and this Part to reject any papers past the first stipulation deadlines, does not change the fact that plaintiff had every intention of accepting late papers in opposition to its motion (Motion Sequence 001).

To the extent that a determination on the merits is preferable, Gottlieb's answer shall be deemed served upon all parties and accepted. The relief seeking to amend said answer, however, is

denied. Gottlieb failed to submit the proposed amended answer.

The application to transfer this matter to Justice Fried, is also denied. Justice Fried has disposed the breach of contract matter, awarding judgment to plaintiff in that action. There is no other action "pending" that could be deemed "related" to the within foreclosure action. Additionally, Justice Fried has retired from the bench.

Movants' application for costs, sanctions and attorneys' fees, is denied, within this Court's discretion. Accordingly, it is

ORDERED that movant's application for dismissal of this action, is denied; and it is further

ORDERED that this Court's decision and order dated April 27, 2011 and subsequent Order of Reference dated June 9, 2011, issued on default, is hereby vacated; and it is further

ORDERED that Gottlieb's answer filed with the County Clerk's office on or about May 2011, is deemed accepted and served upon all parties; and it is further

ORDERED that the application for leave to file and serve and amended answer, is denied; and it is further

ORDERED that Gottlieb's alternative relief seeking to transfer this matter to Justice Fried, is denied, as moot; and it is further

ORDERED that Gottlieb's alternative relief for costs, sanctions and attorneys' fees, is denied at this juncture and within this Court's discretion; and it is further


ORDERED that plaintiff's motion for summary judgment (Motion Sequence 001) is restored to the Motion Support Office Courtroom (Room 130) calendar for March 22, 2012 at 9:30 a.m. and plaintiff shall serve a copy of this Order to said Part and follow whatever instructions are issued in order to make sure the motion is restored; and it is further

ORDERED that defendants shall serve and file opposition papers so as to be received by the Motion Support and moving counsel on or before March 29, 2012 and that plaintiff shall serve and file reply papers so as to be received by the Motion Support and opposing counsel on or before April 5, 2012 and all of the papers shall be marked submitted to this Court on April 5, 2012. No Adjournments or stipulations to adjourn shall be permitted by either Motion Support or "So Ordered" by this Court. Cross motions are also not permitted in response to motion Sequence 001. If defendants seek additional reliefs, they shall interpose same separately, by Notice of Motion, but not as a Cross Motion and/or together with Plaintiff's summary judgment motion sequence 001; and it is further

ORDERED that this matter shall be marked "adjourned without a date" on this Court's calendar, pending determination of plaintiff's summary judgment motion.

Dated: February 23, 2012

ENTER:



Joan M. Kenney, J.S .C.

FILED
MAR 01 2012
NEW YORK
COUNTY CLERK'S OFFICE