

U.S. Bank Natl. Assn. v Lops
2012 NY Slip Op 30829(U)
March 15, 2012
Supreme Court, Nassau County
Docket Number: 21522-09
Judge: Steven M. Jaeger
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.

AMENDED SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

-against-

JOSEPH LOPS, THOMAS F. LIOTTI, LAW
OFFICE OF THOMAS F. LIOTTI, et al.,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 21522-09

MOTION SUBMISSION
DATE: 12-23-11

MOTION SEQUENCE
NOS. 002 & 003

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits (Seq. No. 002)	X
Plaintiff's Memorandum of Law in Opposition	X
Notice of Motion, Affirmation, and Exhibits (Seq. No. 003)	X

Motion by defendant Joseph Lops pursuant to CPLR 2221(d) to reargue the prior motion by plaintiff U.S. Bank, National Association (US Bank) to appoint a referee, to amend the caption and for summary judgment against defendants Thomas F. Liotti and The Law Office of Thomas F. Liotti is denied.

Motion by plaintiff US Bank pursuant to Real Property Law § 254 (a)(10) to appoint a receiver to collect rents is granted.

BACKGROUND

Pursuant to the short form order of this court entered September 20, 2011, the motion by US Bank, as successor in interest to the Federal Deposit Insurance Corporation (FDIC), receiver for Park National Bank, to appoint a referee to compute pursuant to the Stipulation of Settlement between US Bank and defendant Joseph Lops dated March 8, 2010, to amend the caption to delete defendants sued as “John Doe No. 1” through “Jane Doe No. 10,” to substitute U.S. Bank National Association as plaintiff in place of Park National Bank, and for other ancillary relief was granted. Thereafter, on November 1, 2011 an order of reference was entered which, *inter alia*, referred the matter to Howard S. Fensterman, Fiduc. No. 947370, to ascertain and compute the amount due and amended the caption to substitute U.S. Bank National Association as plaintiff in place of Park National Bank.

Defendant Joseph Lops now seeks to reargue the prior motion predicated on the grounds that 1) the Stipulation of Settlement on which the court relied in reaching its decision was executed at a time when a federal stay was in effect; 2) the court overlooked an alleged gap in the chain of custody *vis-a-vis* the mortgage and note; 3) the court failed to apprehend that the supporting affidavit of Matthew A. Howe, an assistant vice president of US Bank, is factually incorrect and not in

admissible form; and 4) the court improperly permitted plaintiff US Bank to rectify the deficiencies in the Howe affidavit in its reply papers.

ANALYSIS

A motion to reargue is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision. *Mudgett v Long Is. R.R.*, 81 AD3d 614 [2nd Dept 2011]; *Viola v City of New York*, 13 AD3d 439, 440 [2nd Dept 2004], *lv to app den.*, 5 NY3d 706 [2005]. A motion to reargue, however, is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted. *Matter of Anthony L. Carter, D.D.S., P.C., v Carter*, 81 AD3d 819, 820 [2nd Dept 2011] (citations and internal quotation marks omitted).

As a result of defendant Joseph Lops' default on his loan obligations, on or about October 19, 2009, Park Bank, as assignee¹ of Greenpoint Mortgage Funding Inc. (Greenpoint), commenced this action against defendant mortgagor based on a commercial mortgage, assignment of rents and security agreement made by

¹The mortgage and note were assigned and transferred to plaintiff Park Bank by Greenpoint by assignment of mortgage recorded June 18, 2008.

defendant in favor of Greenpoint dated June 8, 2007 with respect to commercial premises known as 3956 Merrick Road, Seaford, New York, to secure indebtedness in the principal amount of \$330,000 under a promissory note of same date.

On October 23, 2009, during the pendency of the foreclosure action commenced by Park Bank, the bank was closed by order of the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) was named receiver. Thereafter, US Bank purchased the subject loan from the FDIC as receiver, pursuant to a purchase and assumption agreement. It now seeks to enforce the Stipulation of Settlement it executed with the defendant mortgagor on March 8 and March 10, 2010, respectively. As part of its settlement with defendant mortgagor, US Bank agreed to terminate the receiver which had been appointed by order of the Hon. F. Dana Winslow entered October 28, 2009.

In the Stipulation of Settlement, defendant Joseph Lops unequivocally acknowledged that US Bank was the current owner and holder of the mortgage at issue, admitted his default and agreed that there was no defense to the foreclosure action. He further "ratified and confirmed that the Note and Mortgage granted in and to the Premises are valid, binding and in effect." Under the Stipulation of

Settlement, defendant Joseph Lops was to make monthly payments of principal and interest, and to pay an additional monthly amount as and for arrears.

Defendant mortgagor agreed that, in the event of default under the Stipulation of Settlement, plaintiff US Bank would be entitled to:

“the immediate appointment of a referee to compute the amounts due under the Loan Documents;

the entry of final judgment of foreclosure and sale; and

any such other or additional remedies, in Lender’s sole discretion, as may be permitted under the Loan Documents or available to it at law or in equity.”

Although he made two payments to US Bank on or about April 7, 2010, defendant Lops defaulted by failing to make the monthly payments due June 1, 2010 and July 1, 2010 and continuing thereafter.

Notably, defendant does not dispute the fact of his default and failure to comply with the terms of the Stipulation of Settlement.

It is well settled that where parties express their intent in a clear and complete contract, the writing must be enforced according to its terms. *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]. A written agreement which is complete, clear and unambiguous on its face must be enforced according to its plain meaning. *Willsey v Gjuraj*, 65 AD3d 1228, 1230 [2nd Dept 2009]

(citations and quotation marks omitted). The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court.

Rahman v Park, 63 AD3d 812, 813 [2nd Dept 2009].

Here, the Stipulation of Settlement executed by defendant Joseph Lops is clear and unambiguous. Thus, as true with respect to any unambiguous contract, plaintiff US Bank is entitled to enforcement of the agreement according to its terms. *Coldwell Banker Real Estate Servs., Inc. v 529 Atlantic, LLC*, 62 AD3d 822 [2nd Dept 2009]. When defendant Joseph Lops defaulted under the terms of the Stipulation of Settlement, plaintiff US Bank was entitled to proceed with the foreclosure action. *Deutsche Bank Natl. Trust Co. v Williams*, 62 AD3d 826, 827 [2nd Dept 2009].

Defendant argues, based on an unspecified section of 12 U.S.C. § 1821 (the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA))² that all proceedings related to the failed Park National Bank were stayed for a period of 180 days when the bank was closed by order of the OCC and the FDIC

²FIRREA established, among other things, administrative procedures for adjudicating claims against the receiver of a failed bank and defines the jurisdiction of federal district courts to review claims which were disallowed. Once a claim is submitted, with the requisite proof, the FDIC has 180 days to determine whether to allow or disallow it. 12 U.S.C. § 1821(d)(5)(A)(i). *Betancourt v F.D.I.C.*, 851 F. Supp. 129, 130 [S.D.N.Y. 1994].

was appointed as receiver on October 30, 2009. The argument lacks merit.

Defendants' reliance on 12 U.S.C. § 1821(j) to support the theory that the Stipulation of Settlement herein is a nullity is unavailing. Although the provision provides that:

“[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver,”

this does not mean, as defendant urges, that “all proceedings related to the failed bank (Park National) were stayed by the OCC seizure and appointment of FDIC-R.”

As set forth in 12 U.S.C. § 1821 (d)(5)(A)(i), the 180 day stay period refers to the period in which the FDIC shall determine whether to allow or disallow a claim filed against a depository institution with the FDIC as receiver. Defendant has failed to offer any specific provision of 12 U.S.C. § 1821 to support the theory that US Bank was stayed from entering into the Stipulation of Settlement with defendant Joseph Lops which is at issue herein.

The fact that the original affidavit of Matthew A. Howe, an officer of plaintiff US Bank, which was signed and notarized outside the state of New York, lacked a certificate of conformity (CPLR 2309[c]), is not a fatal defect or a basis

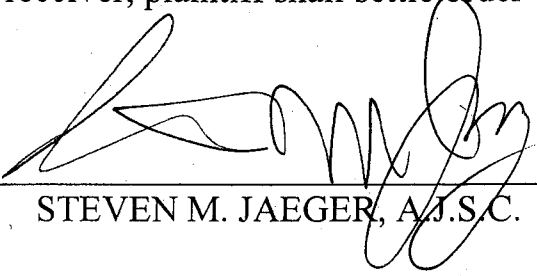
to grant reargument. It is well settled that the absence of a certificate of conformity for oaths taken in a sister state is a mere irregularity, which can be ignored in the absence of a showing of actual prejudice. *Betz v Daniel Conti, Inc.*, 69 AD3d 545 [2nd Dept 2010].

As long as the oath is duly given, authentication of the oath giver's authority can be secured later, and given *nunc pro tunc* effect if necessary. *Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010]; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009].

Defendant Joseph Lops has failed to show any manner in which the court overlooked or misapprehended relevant facts or misapplied the applicable law in reaching its prior decision which would warrant reargument. Therefore, the motion to reargue is denied.

As to the motion to appoint a receiver, plaintiff shall settle order on notice.

Dated: March 15, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED

MAR 20 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE