

Mazzurco v Astoria Fed. Sav. Loan Assoc.

2015 NY Slip Op 30557(U)

April 15, 2015

Sup Ct, Queens County

Docket Number: 22257/2013

Judge: Robert J. McDonald

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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VINCENT MAZZURCO,

Index No.: 22257/13

Plaintiff,

Motion Date: 1/23/14

- against -

Motion No.: 64

ASTORIA FEDERAL SAVINGS LOAN
ASSOCIATION, PII SAM, LLC, SUSAN YEH,
AHIK SIKDER, THOMAS PERKINS, BRIAN
GOLDBERG, LAWRENCE KLEIN, MING RONG
REALTY, INC., XYZ CORP. 1-10,

Motion Seq.: 3

Defendants.

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The following numbered papers read on this motion by plaintiff pursuant to CPLR 2221(d) for leave to reargue the prior motions of defendants PII Sam, LLC (PII Sam), Thomas Perkins, Brian Goldberg, Lawrence Cline, Astoria Savings and Loan Association (Astoria) and Susan Yeh to dismiss the amended complaint insofar as asserted against them, and plaintiff's cross motion for leave to file and serve a proposed second amended complaint, and upon reargument, to deny defendants' motions, or in the alternative, to grant plaintiff's cross motion for leave to file and serve the proposed second amended complaint, in whole or part; this cross motion by defendant Astoria pursuant to 22 NYCRR 130-1.1 for an award of costs, including attorney's fees against plaintiff and his counsel and to impose sanctions, and to enjoin plaintiff from filing any further lawsuit against Astoria without first obtaining court approval; and this cross motion by defendants PII Sam and Secured Asset Management, LLC (Secured) pursuant to 22 NYCRR 130-1.1 for an award of attorneys' fees and costs as against plaintiff.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits 1-4
Notices of Cross Motion - Affidavits - Exhibits 5-10

Answering Affidavits - Exhibits
Reply Affidavits

11-17
18-19

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff asserted causes of action in the amended complaint for fraud, unjust enrichment, intentional misrepresentation, negligent misrepresentation, "unlawful" acceleration of mortgage, violation of General Business Law § 349, the Real Estate Settlement and Procedures Act (12 USC § 2601 *et seq.*), the Truth in Lending Act (15 USC § 1601 *et seq.*, and "New York Title 12 2605(e) (1) (B) (e) and Reg. X 3500.21(f)2 ... of the United States Code."

Defendants PII Sam, Perkins, Goldberg and Cline previously moved pursuant to CPLR 3211(a) (5) to dismiss the amended complaint insofar as asserted against them with prejudice and to impose sanctions pursuant to 22 NYCRR 130-1.1(d). Plaintiff opposed the motion and cross moved pursuant to CPLR 3025 for leave to serve and file a second amended and supplemental complaint as proposed. Defendant Yeh also cross moved pursuant to CPLR 3211(a) (1), (5) and (7) to dismiss the amended complaint insofar as asserted against her. Defendant Astoria separately moved pursuant to CPLR 3211(a) (1), (5) and (7) to dismiss the amended complaint insofar as asserted against it, to impose sanctions pursuant to 22 NYCRR 130-1.1(d) upon plaintiff and plaintiff's counsel, to enjoin plaintiff from filing any further lawsuit against Astoria without first obtaining court approval, and for an award of costs and attorneys' fees. Plaintiff cross moved pursuant to CPLR 3025 for leave to serve and file a second amended and supplemental complaint as proposed. By order dated October 23, 2014, the branch of the motions by defendants PII Sam, Perkins, Goldberg, Cline and Astoria to dismiss the complaint insofar as asserted against them was granted pursuant to CPLR 3211(a) (5), the cross motion by defendant Yeh to dismiss the complaint insofar as asserted against her was granted pursuant to CPLR 3211(a) (5), and the respective cross motions by plaintiff for leave to amend and supplement the amended complaint as proposed were denied. The branch of the motions by PII Sam, Perkins, Goldberg, Cline and defendant Astoria for an award of sanctions was denied. The court determined that the causes of action asserted in the amended complaint were barred by the doctrine of *res judicata* with respect to defendants Astoria and Yeah and by the doctrine of collateral estoppel with respect to defendant PII Sam, which is privity with Astoria. The court also determined that to the extent plaintiff sought to hold defendants Perkins, Goldberg and Cline liable based upon acts and

misrepresentations made in their alleged capacities as agents of defendant PII Sam in relation to the note, mortgage and stipulation of forbearance, and not in their individual capacities, such claims were precluded by the doctrine of collateral estoppel because those defendants are in privity with defendant PII Sam.

The court determined that the allegations restated from the amended complaint against defendants Astoria, PII Sam, Perkins, Goldberg, Cline and Yeh were barred by the doctrines of res judicata and collateral estoppel. The court also determined that the additional allegations set forth in the proposed second amended complaint defendants Astoria, PII Sam, Perkins, Goldberg, Cline and Yeh regarding the purported retaliatory nature of the foreclosure action entitled *Astoria Fed. Savs. & Loan Assn. v Mazzurco* (Supreme Court, Queens County, Index No. 5297/2007) (the *Astoria* action), invalidity of the assignment of the mortgage and note, the stipulation of forbearance and release, misapplication of mortgage payments, improprieties in connection with the commencement of the *Astoria* action and ex-parte application, and fraud, could have been raised by plaintiff in the *Astoria* action when he moved to enforce the purported oral modification of the stipulation of forbearance or vacate the judgment (of foreclosure and sale). The court concluded that such proposed additional causes of action were insufficient as a matter of law due to the doctrines of res judicata and collateral estoppel.

The court further determined that the proposed additional allegation that defendants Sikder, Yeh and Ming Rong are not bona fide purchasers for value was insufficient to state a cause of action against them. The court ruled that plaintiff lost his prior challenge to the propriety of the foreclosure sale, is bound by the foreclosure judgment and is precluded from making a claim against those defendants whose interests in the property proceeded from the sale. The court also ruled that the proposed claim based upon the alleged status of defendants Sikder, Yeh and Ming Rong as non-bona fide purchasers was palpably improper, and insufficient as a matter of law.

The court determined that the proposed claims as against Secured Asset and Palisades were barred by the doctrine of collateral estoppel and were insufficient as a matter of law. The court also determined that the proposed claims as against the Trust were insufficient as a matter of law.

In support of his motion, plaintiff contends that the court erred in concluding that res judicata and collateral estoppel precluded his claims in the amended complaint and proposed second

amended complaint. He argues the judgment in the *Astoria* action should not be considered to be on the merits, and that the forbearance agreement was unconscionable and thus unenforceable. He also argues that the court failed to evaluate properly the facts related to the amended complaint and proposed second amended complaint, and to apply a "pragmatic" test, when considering whether *res judicata* or collateral estoppel barred any claim. Plaintiff further argues that the court erred in concluding the restated allegations were barred by the doctrines of *res judicata* and collateral estoppel and the additional allegations setting forth the scheme to defraud could have been raised by him in the *Astoria* action.

Defendants PII Sam and Secured Asset oppose the motion by plaintiff and cross move for an award of costs, including attorneys' fees. Defendant *Astoria* opposes the motion by plaintiff and cross moves for an award of costs, including attorneys' fees and to impose sanctions. Defendant *Yeh* opposes plaintiff's motion. Plaintiff opposes the cross motions by PII Sam, Secured Asset and *Astoria*.

On a motion for leave to reargue, the movant must demonstrate matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[d][2]). A motion for leave to reargue is addressed to the sound discretion of the court (*see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]; *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2014]). Nevertheless, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced, or to present arguments different from those already presented (*see Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014]; *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]).

Plaintiff has failed to establish that the court overlooked or misapprehended any relevant facts or law, misapplied any controlling principles of law, or otherwise mistakenly arrived at its prior determinations with respect to the separate motions by defendants PII Sam, Perkins, Goldberg, Cline, *Astoria* and *Yeh* to dismiss the amended complaint insofar as asserted against them, and the cross motion by plaintiff for leave to file and serve a proposed second amended complaint. The motion by plaintiff seeking leave to reargue is denied.

The cross motion by defendants PII Sam and Secured and that branch of the cross motion by defendant *Astoria* for sanctions, and/or costs pursuant to 22 NYCRR 130.1-1 are denied. That

branch of the cross motion by defendant Astoria to enjoin plaintiff from filing any further lawsuit against Astoria without first obtaining leave of court is denied.

Dated: Long Island City, NY
April 15, 2015

ROBERT J. McDONALD
J.S.C.