

**Wells Fargo Bank, N.A. v Kravetskiy**

2015 NY Slip Op 32118(U)

October 27, 2015

Supreme Court, Richmond County

Docket Number: 130861/2010

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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PART 12

WELLS FARGO BANK, N.A.

INDEX NO.: 130861/2010

Plaintiffs,

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

ARKADIY KRAVETSKIY, MILA KRAVETSKAYA, NEW YORK  
CITY TRANSIT ADJUDICATION BUREAU, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC., AMERICA'S  
WHOLESALE LENDER, SANDSTONE POINTE HOMEOWNERS  
ASSOCIATION, INC., NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD,

Motions Nos. 001, 002

"JOHN DOE #1" through "JOHN DOE #12", the last twelve  
names being fictitious and unknown to plaintiff, the  
persons or parties intended being the tenants, occupants,  
persons or corporations, if any, having or claiming an  
interest in or lien upon the premises, described in  
the complaint,

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The following numbered 1 to 4 were used on this motion on the 3<sup>rd</sup> day of June, 2015.

Papers Numbered

Notice of Motion by Plaintiff WELLS FARGO BANK, N.A. for  
Summary Judgment against defendants  
KRAVETSKIY AND KRAVETSKAYA and for an Order of Reference with Supporting  
Papers and Exhibits (dated March 6, 2015).....1

Affirmation in Partial Opposition by Defendant COUNTRYWIDE HOME LOANS,  
with Supporting Papers and Exhibits (dated March 25, 2015)<sup>1</sup>.....2

Cross Motion to Dismiss the action and granting Defendants permission to serve  
and file a late answer to Plaintiff's Complaint with Supporting Papers and Exhibits  
dated May 1, 2015.....3

Affirmation in Opposition to the Cross Motion with Supporting Papers and Exhibits.....4

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Upon the foregoing papers, plaintiff's motion for summary judgment is granted and the cross motion is denied.

This is an action to foreclose a residential mortgage lien for premises known as 22 Quincy Avenue, Staten Island, New York 10305. On June 19, 2002, MCS Mortgage Bankers, Inc. made a mortgage loan to defendants Arkadiy Kravetskiy and Mila Kravetskaya in the amount of \$229,900.00. This loan was assigned to Countrywide Home Loans Inc. On July 25, 2003 defendants refinanced the Countrywide Mortgage with Countrywide and executed a consolidated Note and mortgage in the amount of \$248,800.00 (the "CEMA" mortgage).

WELLS FARGO BANK, N.A. (hereinafter WELLS FARGO) filed a motion for summary judgment to foreclose on a mortgage executed by defendants ARKADIY KRAVETSKIY and MILA KRAVETSKAYA on July 3, 2003 in order to secure the payment of a HELOC (Home Equity Line of Credit) in the principal sum of \$61,300.00 with interest as set forth in the Note. Subsequently, defendants signed a Loan Modification Agreement dated June 30, 2008, which set forth terms wherein the Mortgage and Note were modified to reflect a new unpaid principal balance of \$57,414.86 (Exhibit G of movant's papers). Defendants defaulted under the terms of the Loan Modification Agreement by failing to make the payment due on October 20, 2009 and any subsequent payment. This action was commenced by the filing of a Summons, Verified Complaint (see Plaintiff's Exhibit B), Notice of Pendency on May 26, 2010 and refiled on August 8, 2013, and also by the filing of the required 90 day pre-foreclosure notice to defendants via certified mail with certified mail receipt numbers for the foregoing pursuant to RPAPL 1304. The Court also notes that an Affidavit dated June 22, 2010 affirms service of Summons and Verified Complaint with additional service requirements in accordance with RPAPL Section 1320 along with a copy of the Homeowner's Foreclosure Notice as required by RPAPL Section 1303.

On a motion for summary judgment in an action to foreclose a mortgage, a plaintiff/mortgagee, as here, establishes it prima facie right to judgment as a matter of law through the production of the

relevant mortgage, the unpaid note and an affidavit attesting to the mortgagor's default (see Flagstar Bank v Bellafiore, 94 AD3d 10441045 [2<sup>nd</sup> Dept 2012]; HSBC Bank USA, NA v Schwartz, 88 AD3d961). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (see Homecomings Fin, LLC v Guldi, 108 AD3d 506). Plaintiff has submitted an Affidavit in Support in this action (see Exhibit D of moving papers) in which it is affirmed that plaintiff is, as the original lender, in possession of the Note and that as of the date the complaint was filed in the herein action, it was in possession of the Note and Mortgage of record.

In view of the foregoing, plaintiff has established its prima face right to judgment as a matter of law through the production of the relevant Note and Mortgage and the affidavit of plaintiff's Vice President of Loan Documentation attesting that the total amount due on the underlying Note as of October 22, 2014 was \$77,788.34 and proof of default in the form of the Bernard Affidavit (Plaintiff Exhibit D).

In opposition defendants KRAVETSKIY and KRAVETSKAYA, filed a cross motion to dismiss the complaint in which it is claimed that (1) Plaintiff abandoned by the action by waiting over three years after settlement conferences were held to move for a default judgment, and thus abandoned the case; (2) plaintiff does not have a meritorious claim of action and (3) plaintiff should be compelled to accept a late answer. In the absence of any opposition, that portion of plaintiff's motion as seeks to discontinue the action against defendants sued as "John Doe #1" through "John Doe #12" and deleting the language appearing thereafter is granted.

To the extent that the cross motion seeks to compel plaintiff to accept a late answer, defendants were required to demonstrate a justifiable excuse for their default and the existence of a potentially meritorious defense to the action. Here, defendants failed to substantiate either requirement.

As stated, defendants filed the pending cross motion to dismiss the complaint, based in part on equitable grounds, i.e., laches and abandonment of the case. A review of the record indicates that after several appearances in the Foreclosure Conference Part the parties were directed to appear in TP 12 on March 8, 2012 for the purpose of a conference, at which time a settlement offer was put forth and rejected. After several other appearances the matter was “released” for foreclosure and permitted to proceed on December 13, 2012. The instant motion was dated March 6, 2015. Laches, being an equitable remedy may be properly applied to a foreclosure case. However, the “unreasonable delay” required to warrant the invocation of the doctrine would have to be of a degree sufficient to mislead the mortgagor, e.g., to change its position or fail to take some action as a result of the delay that operated to its prejudice (see First Fed. Sav. & Loan Assn. v Capalongo, 152 AD2d 833, *lv dismissed* 74 NY2d 945). No such circumstances exist herein. Moreover, case law (see First Fed. Sav. & Loan Assn. v Capalongo, 152 AD2d 833, *lv dismissed* 74 NY2d 945) is indicative of the proposition that if a foreclosure action is initiated within the limitations period for the commencement of suit, the doctrine of laches in no defense to a foreclosure action.

In view of the foregoing, plaintiff has established its prima face right to judgment as a matter of law. Defendants’ assertion of legal principals put forth in the guise of affirmative defenses are insufficient to raise a triable issue of fact.

Accordingly, it is

ORDERED that the motion by Plaintiff WELLS FARGO BANK for Summary Judgment against defendants KRAVETSKIY and KRAVETSKAYA and for an Order of Reference is granted, and it is further

ORDERED that the cross motion by Defendants KRAVETSKIY and KRAVETSKAYA is denied.

Dated: Staten Island, NY  
October 27, 2015

/s/  
HON. THOMAS P. ALIOTTA,  
J.S.C.

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<sup>1</sup> Issues of priority of loan raised in this Affirmation were resolved by Stipulation of Settlement dated May 1, 2014 in which the parties agreed, *inter alia*, to resolve all matters relating to the priority of the mortgages as follows: the Wells Fargo Mortgage is subordinate to the CEMA (referred to above as Countrywide) mortgage.