

HSBC Bank USA, National v Coryat

2016 NY Slip Op 30812(U)

April 28, 2016

Supreme Court, New York County

Docket Number: 850320/2013

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 850320/2013
HSBC BANK USA, NATIONAL
vs.
CORYAT, EDDIE A.
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO. _____
MOTION DATE 3/22/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

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

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

Motion sequence 003 and 004 are consolidated for joint disposition as follows:
In this residential foreclosure action, defendant Eddie A. Coryat aka Eddie Coryat (“defendant”) moves first to renew and reargue and to vacate this Court’s order dated November 18, 2015 in which plaintiff was granted summary judgment and defendant’s answer was stricken, or in the alternative, to dismiss the foreclosure complaint, toll interest accrued on the loan as of the date this action was commenced, and to enjoin plaintiff from collecting attorneys’ fees and other costs (motion seq. 003).

By separate motion, defendant moves for dismissal of the complaint, to vacate said order, toll interest since the beginning of this action and to bar further accrual of interest until the parties enter into a final loan modification, and to enjoin plaintiff from collecting attorneys’ fees related to this action and until the loan modification agreement is entered (motion sequence 004).

Factual Background

According to defendant, previously in 2009, HSBC as Trustee, brought a foreclosure against him, which was dismissed in March 2010 by the Court (Friedman, J.) on the ground that HSBC lacked standing.

Thereafter, the Servicer, Everhome, offered defendant a permanent loan modification (but not a HAMP loan modification for which defendant qualified) on May 7, 2010. Shortly after Mr. Coryat entered into this “loan modification,” he became unemployed and was unable to afford the new “loan modification.”

On October 28, 2013, plaintiff commenced the instant lawsuit and when the parties were unable to settle this action, the Court directed plaintiff to move for summary judgment within 90 days or face dismissal of the action.

Defendant asserts that although plaintiff did not file a motion for summary judgment until September 24, 2015, this Court granted plaintiff summary judgment.

Dated: _____, J.S.C.

Page 1 of 6

- 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

In support of renewal and reargument, defendant argues that this Court's order stated that, the earlier dismissal order was "premised on the assignment alone." However, it would be impossible to know that Judge Friedman based her decision "on the assignment alone," as Judge Friedman does not state that she dismissed the case based solely on the fact that mortgage was not assigned prior to commencement of the action. Therefore, plaintiff's contention that the only reason the first case was dismissed was because the mortgage was not assigned to the plaintiff prior to the commencement of the action, does not comport with the law or Judge Friedman's decision. The note in this case does not indicate that plaintiff is the owner as there is no indorsement to the plaintiff. Plaintiff's claim of ownership of the note is through physical possession only – the same claim that it made in the first foreclosure action.

A review of the verified complaint from the first action shows that plaintiff submitted the same note and mortgage that were submitted in this second foreclosure action. Thus, plaintiff's claim that it "commenced said prior foreclosure action on April 9, 2009 and only demonstrated it had standing through an assignment of mortgage dated June 29, 2009," is incorrect.

Although this Court stated that plaintiff adequately explained that the assignments were executed and recorded for the purposes of memorializing the transfer of the note that had already occurred, a review of the assignment itself shows that April 27, 2016MERS, who allegedly assigned the mortgage to plaintiff, lacked the authority to assign the mortgage as it never had possession; nowhere on the note is there an indorsement to MERS. The inconsistent statements made by plaintiff regarding its standing raises issues of fact sufficient to defeat plaintiff's summary judgment motion. Plaintiff essentially had possession of the mortgage and note since August 26, 2005, but chose in the first foreclosure not to use such evidence of physical possession of the note, as it did in the second foreclosure action. Thus, plaintiff's position is not creditable. And, even if true, this case should be dismissed based on plaintiff's frivolous conduct pursuant to Section 130-1.1.

Further, plaintiff's claim that "No previous application has been made for the same or similar relief" is untrue, as this is plaintiff's second foreclosure action.

And, plaintiff's affidavit fails to explain any details as to when it came into possession of the mortgage, and the complaint fails to state when plaintiff came into possession of the Note. Discovery is necessary to determine the facts surrounding when plaintiff came into physical possession of the note and mortgages.

In support of defendant's separate motion to, *inter alia*, vacate the Court's order and dismiss the action, defendant argues that plaintiff waited over one year to move for judgment and plaintiff failed to provide any explanation for its prolonged delay in seeking judgment or provide "good cause" for the Court not to dismiss the complaint as abandoned as required under CPLR § 3215(c). Plaintiff not only failed to bring a timely motion for summary judgment, but brought two foreclosure actions wherein it lacked standing causing the first action to be dismissed. Plaintiff has also failed to expeditiously work with defendant so that he can receive loss mitigation, including but not limited to, a HAMP loan modification.

During the entire one year period, and beyond, from September 12, 2014, plaintiff took no action in this case, including evaluating defendant for loss mitigation. Plaintiff only agreed to consider defendant for loss mitigation on September 29, 2015, after it filed its motion for summary judgment and at defendant's counsel's request. Even after a completed application was

submitted to plaintiff's servicer, there has been no response to defendant's application. When missing documents were sent to the servicer, the servicer denied any loss mitigation on the basis that missing documents were not sent in – even though they were.

Furthermore, defendant, at the Servicer's request, delivered a written authorization allowing his attorney to speak with the Servicer. The Servicer thereafter claimed that it takes 30 days for the authorization to be uploaded to the system, thereby creating another delay and causing documents to become stale. When documents become stale, the document production process begins again, thus the Servicer through its "policies" creates a document production treadmill. Plaintiff's purported evaluation has been an empty gesture as plaintiff has taken no action on defendant's application other to deny it based upon false pretenses.

Plaintiff also failed to comply with the Consumer Financial Protection Bureau regulations wherein a servicer must acknowledge receipt of a homeowner's application and state in writing what documents, if any are missing.

In the alternative, the Court should dismiss the complaint pursuant to CPLR 3216 for lack of prosecution. Issue was joined when the defendant filed an Answer on November 5, 2013. Since issue was joined on November 5, 2013 and one year has elapsed since joinder of issue, this Court may dismiss this action for lack of prosecution. Plaintiff was on notice that this case may be dismissed when on September 12, 2014, the Court issued an Order requiring plaintiff to file a motion for "summary judgment and appointment of a referee to calculate with the Motion Support Office within 90 days of this order. Failure to file a timely application/motion may result in dismissal." Plaintiff failed to comply with this Court Order.

Further, interest on defendant's loan should be retroactively tolled due to plaintiff's unconscionable delay, failure to comply with this court's order and failure to comply with CPLR §§ 3215(c) and 3216.

Plaintiff opposes both motions procedurally and on the merits.

Discussion

At the outset, defendant's failure to include the underlying motion papers with his instant motion to renew and reargue is not fatal to his motion, as he corrected same by submission of such papers in reply. In any event, defendant's failure to submit all the original motion papers in support of reargument does not "render the latter procedurally defective" (*see Rostant v Swersky*, 79 AD3d 456, 912 NYS2d 200 [1st Dept 2010]). "CPLR 2221 does not specify the papers that must be submitted on a motion for reargument, and the decision whether to entertain reargument is committed to the sound discretion of the court (*Rostant v Swersky*, 79 AD3d at 457, *citing William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 at 27). And, plaintiff's reliance on CPLR 2214(c) and related caselaw¹ for the proposition that defendant's motion to renew and reargue and separate motion for dismissal are procedurally defective for failure to submit the underlying motion papers is misplaced, as such section contains no such express requirement and the

¹ CPLR 2214(c), Effective July 22, 2014, provides, *inter alia*, that "Each party shall furnish to the court all papers served by that party. The moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system."

caselaw is inapplicable and/or distinguishable.

A motion for leave to renew pursuant to CPLR 2221 “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476, 823 NYS2d 25 [1st Dept 2006]).

A motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, “is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Leave to renew is granted based on defendant’s submission of the complaint filed in the prior foreclosure action. Although such complaint existed at the time the previous motion was considered, defendant explained that he was unable to present the complaint and argue its import because the previous foreclosure action was not e-filed, and he was unable to obtain such document from the disbarred attorney who possessed the document. According to defendant, plaintiff’s then possession of the note at the time the first foreclosure action was filed discredits plaintiff’s claim in the second action that it now has standing due to possession of the note.

Further, leave to reargue is granted based on defendant’s contention that the Court overlooked the conclusory nature of plaintiff’s affidavit and the misinterpretation of Judge Friedman’s order.

However, upon renewal and reargument, the Court declines the relief sought by defendant on renewal and reargument. Judge Friedman’s dismissal order clearly stated:

The instant action was commenced by filing with the County Clerk on April 9, 2009. HSBC subsequently obtained the mortgage by assignment dated on or about June 29, 2009. Thus, at the time of commencement of the action, HSBC did not own the mortgage, and did not have standing to bring the present action.

Thus, consistent with plaintiff’s contention, the basis of dismissal was the fact that the mortgage was not assigned to the plaintiff prior to the commencement of the action. It cannot be said that it is impossible to know that Judge Friedman based her decision “on the assignment alone.” Although the complaint from the first action indicates that plaintiff submitted the same note and mortgage that were submitted in this second foreclosure action and that standing by virtue of possession the note as compared with an assignment theory does not raise an issue of fact as to standing to defeat plaintiff’s summary judgment motion. Indeed, the affidavit of plaintiff indicating the date on which delivery of the note was made is sufficient to support its claim of standing to commence this action (*Aurora Loan Services, LLC v. Taylor*, 114 A.D.3d 627, 980 N.Y.S.2d 475 [2d Dept 2014] (“It can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff by Deutsche Bank Trust Company Americas, and since the exact delivery date was provided, there is no further detail necessary for

the plaintiff to establish standing”) *affd*, 25 N.Y.3d 355, 34 N.E.3d 363, 12 N.Y.S.3d 612 [2015]).

Consequently, dismissal of the complaint pursuant to Section 130-1.1 for purported frivolous conduct is unwarranted. And, that plaintiff’s claim that “No previous application has been made for the same or similar relief” is incorrect, does not rise to the level of sanctionable conduct.

That plaintiff’s affidavit does not explain the details as to when it came into possession of the mortgage, or the complaint’s failure to state when plaintiff came into possession of the Note, is insufficient to defeat summary judgment in favor of plaintiff.

And, discovery is unnecessary to determine the facts surrounding when plaintiff came into physical possession of the note and mortgages.

Thus, on renewal and reargument, the Court adheres to its earlier determination and denies defendant’s request to dismiss the complaint, toll interest, and enjoin the collection of attorneys’ fees and costs.

As to dismissal, defendant’s reliance upon CPLR 3215(c) is misplaced. CPLR 3215(c) provides:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Here, and as plaintiff points out, defendant did not default in this action and plaintiff did not seek judgment based on any default in appearance by defendant in this action. In any event, it cannot be said that plaintiff failed to move within one year of the September 12, 2014 order that directed plaintiff to move for summary judgment within 90 days (or by December 11, 2014). Although plaintiff waited until September 24, 2015 to move for summary judgment, in June 2015 (six months after the deadline to move for summary judgment), defendant’s counsel moved to be relieved as counsel, and this Court granted the motion by order dated July 6, 2015. The Court also stayed the action for 45-days after service of the order. Plaintiff’s motion for summary judgment was made approximately two months thereafter. Thus, in light of the stay, it cannot be said that plaintiff abandoned the action.

Further, defendant failed to establish entitlement to dismissal pursuant to CPLR 3216. CPLR 3216 provides:

- (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof . . . the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party’s pleading on terms
- (b) No dismissal shall be directed . . . unless the following conditions precedent have been complied with:

* * * * *

- (3) The court or party seeking such . . . shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand,

Here, defendant failed to establish that the conditions above were satisfied, namely, that any 90-day notice was served upon plaintiff.

The balance of defendant's arguments lack merit.

Therefore, dismissal of the complaint, vacatur of the Court's order, tolling interest and enjoining plaintiff from collecting fees and costs are unwarranted.

Conclusion

In light of the above, it is hereby

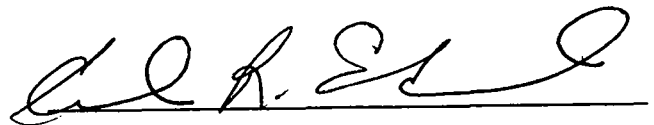
ORDERED that the motion by defendant Eddie A. Coryat aka Eddie Coryat to renew and reargue and to vacate this Court's order dated November 18, 2015, or in the alternative, to dismiss the foreclosure complaint, toll interest accrued on the loan as of the date this action was commenced, and to enjoin plaintiff from collecting attorneys' fees and other costs (motion seq. 003) is granted solely as to renewal and reargument, and upon renewal and reargument, the Court adheres to its earlier determination; and it is further

ORDERED that the motion by defendant for dismissal of the complaint, to vacate said order, toll interest since the beginning of this action and to bar further accrual of interest until the parties enter into a final loan modification, and to enjoin plaintiff from collecting attorneys' fees related to this action and until the loan modification agreement is entered (motion sequence 004) is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 4/28/16



J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

- CASE DISPOSED
- NON-FINAL DISPOSITION
- MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE