Deutsche Bank Natl. Trust Co. v Barquero
2016 NY Slip Op 32114(U)
June 6, 2016
Supreme Court, Queens County
Docket Number: 702181/2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

DEUTSCHE BANK NATIONAL TRUST COMPANY, etc.,
Plaintiff(s),

- against -

WILFREDO BARQUERO, et al.,
Defendant(s).

Index No. 702181 2014

Motion Date May 19, 2016

Motion Cal No. 40

Motion Seq. No. 3

The following papers read on this motion by plaintiff for an order, *inter alia*, granting it leave to renew and/or reargue its prior motion for summary judgment and, upon such renewal/reargument, for summary judgment in its favor against defendants Barquero.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF62-70

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 (CPLR2221 [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*, 117AD3d 674 [2014]; *HSBC Bank USA, N.A. v Halls*, 98AD3d 718 [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 [2014]; *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2011]).

Further, it is well established that a motion for leave to renew must be supported by "new or additional facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; *Carullo v Pistilli Const. and Dev. Corp.*, 64 AD3d 624 [2009]; *O'Connell v Post*, 27 AD3d 631 [2006]; *see also O'Dell v Caswell*, 12 AD3d 492 [2004]; *Williams v Fitzsimmons*, 295 AD2d 342 [2002]). A motion for leave to renew " 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*Renna v Gullo*, 19 AD3d 472 [2005], quoting *Rubinstein v Goldman*, 225 AD2d 328 [1996]; *see Coccia v Liotti*, 70 AD3d 747 [2010]).

In support of that branch of the motion seeking reargument, plaintiff first argues that the court raises the issue of compliance with RPAPL § 1304 *sua sponte*. As such, plaintiff avers that it was not required to demonstrate compliance with RPAPL § 1304 as part of its prima facie case since that defense was not raised as an affirmative defense within defendants' answer. To that extent, and citing *Aurora Loan Servs., LLC v Weisblum* (85 AD3d 95 [2011]), *Deutsche Bank Natl. Trust Co. v Spanos* (102 AD3d 909 [2013]), and *HSBC Mtge. Corp. (USA) v Gerber* (100 AD3d 966 [2012]), plaintiff asserts that "appellate jurisprudence clearly provides that proof of compliance with conditions precedent to suit only become an element of a plaintiff's prima facie case, which must be affirmatively demonstrated, when the denial or dispute of same is timely pleaded which Defendants failed to do."

Plaintiff has failed to establish that this court overlooked and/or misapprehended the facts and/or law with respect to its analysis pursuant to RPAPL § 1304. First, plaintiff's contention that this court raised the issue *sua sponte* is without merit inasmuch as this court specifically stated, in its order dated December 14, 2015, that defendants addressed plaintiff's alleged noncompliance with the statute "in opposition to the motion and in support of their cross motion." Second, while it is true that defendants in *Weisblum* and *Spanos*, *supra*, raised noncompliance with the statute as an affirmative defense in their answers, plaintiff fails to account for the fact that the Second Department has also made a determination – to which the court cites in its prior order – that such a defense is not, in fact, waived for failure to assert it as an affirmative defense in the answer – since it is one that may be raised at any time prior to judgment (*see e.g. First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2010]; *Citimortgage, Inc. v Pembelton*, 39 Misc 3d 454 [Sup Ct., Suffolk Co 2013] [failure to comply with statutory conditions precedent may be raised at any time during the action by a non-defaulting defendant provided no judgment has been entered]; *cf. PHH Mortg. Corp. v Celestin*, 130 AD3d 703 [2015] [defendant precluded from raising RPAPL § 1304 defense since he was not entitled to an order vacating his default pursuant to CPLR 5015 [a]). It appears, thus, from controlling precedent that plaintiff must establish compliance with the statute either when raised as an affirmative defense *or* when raised by

an answering defendant at any time prior to judgment. The latter circumstance applied in this action.

The Appellate Division, Second Department case of *Citimortgage, Inc. v Espinal* (134 AD3d 876 [2015]), decided two days after this court's December 14, 2015 order, is illustrative on this issue. In that case, the defendant answered and raised affirmative defenses, which answer did *not* include noncompliance with RPAPL § 1304 as a defense. In support of the plaintiff's motion, its employee averred that the 90-day pre-foreclosure notice pursuant to RPAPL § 1304 was sent to the defendant. In opposition to the motion, defendant stated that the employee's affidavit was insufficient to prove that the 90-day notice was mailed to her. In reply to the motion, the plaintiff submitted an affidavit from another employee, who produced the USPS tracking number for the notice, along with a copy of the plaintiff's correspondence log, and explained that it was standard business procedure regarding all notices to the borrower to enter mailing information in the correspondence log.

Despite the fact that the defendant in *Espinal* did not affirmatively assert noncompliance with RPAPL § 1304 as a defense, the Second Department, nevertheless, holding that "failure to comply with RPAPL 1304 constitute[s] a defense to the mortgage foreclosure action, which could be raised at any time" (*id.* at 879), considered same in determining whether the plaintiff had successfully established its entitlement to summary judgment against the defendant. In that respect, the Court noted that, though the affidavit submitted on the motion was too conclusory to establish proper service of the notice, the lower court properly considered the affidavit submitted in reply to the defendant's opposition even though, generally, evidence submitted for the first time in reply papers is to be disregarded for purposes of considering whether to award summary judgment. The Court reasoned that it was proper in that instance since the defendant raised the allegation of noncompliance with RPAPL § 1304 for the first time in her opposition papers.

This court is of the opinion that its prior order of December 14, 2015 is consistent with the determinations made in *Espinal*; namely: (1) a defendant may raise noncompliance with RPAPL § 1304 for the first time in opposition to a motion for summary judgment notwithstanding the fact that it was not raised as a defense in the answer; (2) once raised, plaintiff has an affirmative obligation to establish compliance with the statute; and (3) to that end, plaintiff is permitted to submit evidence in reply (assuming the evidence proffered in support of the motion-in-chief is insufficient to establish strict compliance) so as to establish compliance with the statute. In the case at bar, plaintiff chose to stand on the facts as set forth in the affidavit of Gabriel Montoya, initially submitted in support of the summary judgment

motion, which this court found was too conclusory to establish strict compliance with the statute.[1]

As to that branch of the motion for renewal, plaintiff now submits the affidavit of Diondra Doublin, Document Execution Specialist of plaintiff's servicer. Plaintiff is correct that Ms. Doublin need not have personal knowledge of the actual mailings. However, to the extent her knowledge is based upon a review of business records, such affidavit, even when considered with the annexed copies of the 90-day notices,[2] is insufficient to establish what manner of office practice or procedure was used by plaintiff to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail (*see Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Smith v Palmeri*, 103 AD2d 739 [1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]; *Wells Fargo Bank, N.A. v Tessler*, 2016 NY Misc LEXIS 636 [Sup Ct, Kings County 2016]); this legal concept was addressed in this court's prior order. Ms. Doublin does not speak at all as to what office practice or procedure is used by the sender of the notice to ensure that they are properly mailed.

It would appear that *Espinal* also sheds light on the issue of what, if not an affidavit of service, is needed so as to establish compliance with the statute (*id.* at 878 [an affidavit which at addresses the "standard business procedure regarding all notices to the borrower(s)" is sufficient]). As discussed, *supra*, the *Espinal* Court determined that the affiant therein, who produced the postal service tracking number for the notice, a copy of the plaintiff's correspondence log, and explained that it was standard business procedure regarding notices to borrowers to enter mailing information in the correspondence log, sufficiently established proper service pursuant to RPAPL § 1304 (*id.* at 879). In reaching that conclusion, the Court cited to, *inter alia*, *Bossuk v Steinberg* (58 NY2d 916 [1983]) and *Nassau Ins. Co. v Murray* (46 NY2d 828 [1978]), which cases stand for the proposition that evidence of office practice and procedure *specifically* with respect to addressing and mailing of an item is sufficient to demonstrate actual mailing of that item. *Burr v Everady Ins. Co.* (253 AD2d 650 [1998]), cited by plaintiff, similarly holds that evidence as to an office practice or procedure in the regular course of business as to the mailing of notices creates a presumption that a specific item was properly mailed (compare with the affidavit submitted herein, which details only

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1. It does not appear from the instant motion that plaintiff seeks reargument with respect to the court's determination as to the insufficiencies noted in Mr. Montoya's affidavit.

2. Annexing a copy of the notice does not establish proof of proper mailing of same (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]).

the regular practice and procedure for making business records [CPLR 4518]) (*see also Flagstar Bank, FSB v Mendoza*, 2016 NY Slip Op 03849 [2016] [attorney for the plaintiff described the firm's standard business practice with regard to sending RPAPL 1304 notices, in addition to submitted domestic return receipts]).

Accordingly, the motion is denied.

Dated: June 6, 2016

J.S.C.