

Bank of N.Y. Mellon v Izmirligil
2018 NY Slip Op 30154(U)
January 22, 2018
Supreme Court, Nassau County
Docket Number: 47361/09
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

THE BANK OF NEW YORK MELLON f/k/a
THE BANK OF NEW YORK, AS TRUSTEE
FOR CHASE MORTGAGE FINANCE TRUST
SERIES 2006-S2,

TRIAL / IAS PART 27
NASSAU COUNTY

Index No. 47361/09

Plaintiff,

Motion Sequence No. 021, 022,
023, 024, 025

- against -

ARIF IZMIRLIGIL, BOARD OF MANAGERS
FOR SAILOR'S HAVEN HOMEOWNERS
ASSOCIATION CORP., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC. AS NOMINEE FOR E-LOAN CENTER,
INC., MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS
NOMINEE FOR PNC MORTGAGE CORP. OF
AMERICA, "JANE DOE",

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3, 4, 5</u>
Answering Affidavits	<u>6, 7</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u>8, 9, 10, 11</u>
Defendant's / Respondent's	<u>12</u>

The motions by the defendant Arif Izmirligil and the plaintiff (motion sequence numbers 021, 022, 023, 024, 025) are consolidated for disposition and decided as follows.

The plaintiff filed this action in 2009 to foreclose a mortgage executed by the defendant to secure a \$1.1 million note. The defendant defaulted (*Bank of N.Y. Mellon v Izmirligil*, 88 A.D.3d 930, 931, 931 N.Y.S.2d 667 [2011]). The remaining procedural history of the underlying mortgage foreclosure action was detailed in several decisions and orders by the Supreme Court, Tenth Judicial District, Suffolk County and the Appellate Division of the Supreme Court, Second Judicial Department. The matter was assigned to this Court pursuant to administrative order 288/2016, and a hearing was subsequently held followed by the parties' related papers.

The Second Department ruled, in this matter:

The defendant does not dispute that there was a default, and this Court's determination on the prior appeal that he failed to establish a reasonable excuse for his default constitutes the law of the case. Absent a showing of subsequent evidence or change of law, or extraordinary circumstances warranting a departure from the law of the case—none of which is present here—the defendant is precluded from having this issue reconsidered [citations omitted]

(*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d 1067, 44 N.Y.S.3d 44 ([2d Dept 2016]), *appeal withdrawn*, 29 N.Y.3d 941, 73 N.E.3d 845 [2017])

The defendant/third-party plaintiff moves (Sequence 021) for an order (1) granting a new trial pursuant to CPLR 4403 and pursuant to CPLR 3408(a)-(m) and further to reject the referee's report in the 2009 action; (2) to declare that the previous rulings of the ex-disqualified Judges, among others, an order of reference and appointing a referee are nullities; (3) to statutorily disqualify/recuse the Judge Cohen, immediately and to stay all proceedings pending the assignment of another Judge out of the 10th Judicial District,

and pending the outcome of the recently amended CPLR 3408(a)-(m).

The branch of the motion (Sequence 021) seeking a new trial, under these circumstances, is academic. The branch of the motion (Sequence 021) seeking to declare that the previous rulings of the ex-disqualified Judges, among others, order of reference and appointing a referee are nullities were previously decided by the Second Department, and is academic, under the circumstances here. (*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d, *supra*). The branch of the motion (Sequence 021) seeking to statutorily disqualify/recuse the Judge Cohen, immediately and to stay all proceedings pending the assignment of another Judge out of the 10th Judicial District is moot due to the order dated December 13, 2016, by the Honorable Michael V. Coccoma, Deputy Chief Administrative Judge for the Courts outside of the City of New York and the Honorable Randall Eng, Presiding Justice of the Appellate Division, Second Judicial Department and the parties' stipulation in 2017. Moreover, the motion (Sequence 021) was enjoined by Justice C. Randall Hinrichs of the Supreme Court of the State of New York, Tenth Judicial District, County of Suffolk in a decision and order dated November 18, 2016, and reiterated in Justice Hinrichs' decision and order dated December 6, 2016.

The plaintiff moves (Sequence 022) for an order appointing a referee to ascertain and compute the amount due to the plaintiff, and to issue a report to the Court regarding the referee's findings pursuant to RPAPL § 1321. This Court determines the plaintiff satisfies the burden for an order appointing a referee to ascertain and compute the amount

due to the plaintiff, and to issue a report to the Court regarding the referee's findings pursuant to RPAPL § 1321. The plaintiff submitted documentary proof showing the defendant defaulted in this action; the plaintiff is the holder of the mortgage and note, as well as proof of the defendant's default as the mortgagor (*see HSBC Bank USA, N.A. v. Alexander*, 124 A.D.3d 838, 4 N.Y.S.3d 47 [2d Dept 2015]). In opposition, the defendant fails to make a satisfactory showing otherwise.

The defendant cross moves (Sequence 023) for an order pursuant to CPLR 3212(b), RPAPL § 1303 and RPAPL § 1304: dismissing the plaintiff's complaint in this action in its entirety, as a consequence of the plaintiff's failure to file the statutorily mandated notices required by RPAPL § 1303 and RPAPL § 1304. This defense motion cross motion is denied as moot, under these circumstances. There is no showing of "subsequent evidence or change of law, or extraordinary circumstances warranting a departure from the law of the case—none of which is present here—the defendant is precluded from having this issue reconsidered" (*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d at 1067).

The plaintiff moves (Sequence 024) for an order disallowing certain disbursements sought by the defendant pursuant to CPLR 8404. The defense attorney submitted a bill of costs to the plaintiff's attorney in the amount of \$13,120.88 for taxation by the Judgment Clerk of the Supreme Court of the County of Suffolk. The defendant is entitled to \$10,040.72 or \$13,120.88 minus \$2,840.96.

Sixty-five pages of the record on appeal for the 2014 Appeals were copies of those papers filed in the first motion for recusal sequence. However, the defendant abandoned the appellate challenge to an order dated May 20, 2014 (*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d, *supra*). Hence, that abandonment renders those 65 pages of the record on appeal as irrelevant, so \$239.20 consisting of a printing cost per page of \$3.68 which is subtracted from the defense submission.

In addition, 243 out of 885 pages were copies of those papers filed in the second motion for recusal sequence, 529 pages were copies of those papers filed in the motion for dismissal sequence. The defendant's abandonment of the appellate challenge the appellate challenge rendered 243 out of 885 pages irrelevant and unnecessarily incurred the appellate printing costs for those pages (*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d, *supra*). The defendant did not prevail on a large portion of the 2015 appeals that the defendant did not abandon (*Bank of New York Mellon v. Izmirligil*, 144 A.D.3d, *supra*). The defendant's inclusion of documents, 529 pages, filed in the motion for dismissal sequence within the record on appeal was clearly not required. Hence, 243 pages plus 529 pages equaling 772 pages at a printing cost per page of \$3.68 is subtracted from the defense submission. So, the defendant is entitled to \$2,840.96 consisting of a printing cost for the 772 pages at \$3.68 per page which is subtracted from the defense submission.

The defendant moves (Sequence 025) for an order pursuant to CPLR 6314 and this

Court's inherent common law power, vacating, nunc pro tunc, the "filing injunction" issued by Justice Hinrichs in that Court's decision and order dated November 18, 2016, and reiterated in Justice Hinrichs' decision and order dated December 6, 2016. The defendant also seeks an order declaring that any papers filed in any trial court or an appellate matter between November 18, 2016 and May 25, 2017, by the defendant either acting pro se or through counsel be deemed to have been filed with the approval of this Court.

"Public policy generally mandates free access to the courts. However, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will [citations omitted]" (*Vogelgesang v. Vogelgesang*, 71 A.D.3d 1132, 1134, 899 N.Y.S.2d 272 [2d Dept 2010]). Here, the record bears an ample basis to continue the orders dated November 18, 2016, and December 6, 2016 with respect to trial court applications in this matter before the Court (*see JP Morgan Chase Bank, N.A. v. Osuji*, 120 A.D.3d 1194, 991 N.Y.S.2d 775 [2d Dept 2014]; *see also Ram v. Torto*, 111 A.D.3d 814, 975 N.Y.S.2d 442 [2d Dept 2013]).

ORDERED that the branch of the defense motion (Sequence 021) is DENIED for a new trial pursuant to CPLR 4403 and pursuant to CPLR 3408(a)-(m) and further to reject the referee's report in the 2009 action, and it is also,

ORDERED that the branch of the defense motion (Sequence 021) is DENIED to declare that the previous rulings of the ex-disqualified Judges, among others, order of

reference and appointing a referee are nullities, and it is also,

ORDERED that the branch of the defense motion (Sequence 021) is DENIED to statutorily disqualify/recuse the Judge Cohen, immediately and to stay all proceedings pending the assignment of another Judge out of the 10th Judicial District, and pending the outcome of the recently amended CPLR 3408(a)-(m), and it is also,

ORDERED that the plaintiff's motion (Sequence 022) is GRANTED for an order appointing a referee to ascertain and compute the amount due to the plaintiff, and to issue a report to the Court regarding the referee's findings pursuant to RPAPL § 1321, and it is also,

ORDERED that the defense motion (Sequence 023) is DENIED for judgment dismissing the plaintiff's complaint in this action in its entirety, and it is also,

ORDERED that the plaintiff's motion (Sequence 024) is GRANTED disallowing certain disbursements sought by the defendant pursuant to CPLR 8404, to wit the defense submission of a bill of costs in the amount of \$13,120.88 for taxation by the Judgment Clerk of the Supreme Court of the County of Suffolk is reduced to \$10,040.72, and it is also,

ORDERED that the branch of the defense motion (Sequence 025) is DENIED for an order pursuant to CPLR 6314, and vacating, nunc pro tunc, the "filing injunction" issued by Justice Hinrichs in that Court's decision and order dated November 18, 2016, and reiterated in Justice Hinrichs' decision and order dated December 6, 2016, and it is

further,

ORDERED that the branch of the defense motion (Sequence 025) is DENIED for an order declaring that any papers filed in any trial court or an appellate matter between November 18, 2016 and May 25, 2017, by the defendant either acting pro se or through counsel be deemed to have been filed with the approval of this Court.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: **January 22, 2018**

ENTER:



J. S. C.

NON FINAL DISPOSITION