

BAC Home Loans Servicing, LP v Giaramita
2018 NY Slip Op 32706(U)
October 16, 2018
Supreme Court, Suffolk County
Docket Number: 042592/2009
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

COPY

PRESENT:**HON. JAMES HUDSON***Acting Justice of the Supreme Court*

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BAC HOME LOANS SERVICING, LP,

Plaintiff,

-against-

THOMAS GIARAMITA,
BLUE WAVE ENTERPRISES, LLC,
COUNTRYWIDE HOME LOANS, INC.,
"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,

Defendants.

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MOT. SEQ. NO.:002-MD

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Upon the following papers numbered 1 to 17 read on this Motion/Order to Show Cause to Reargue; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. no.:002) of Plaintiff for an order granting leave to renew pursuant to CPLR Rule 2221(e) and, if granted, an order of summary judgment pursuant to CPLR Rule 3212, and striking the answer with affirmative defenses, substituting Germella Curry as John Doe #1 as a necessary party Defendant, discontinuing the action as to John Doe #2 through John Doe #12, adding the New York State Commissioner of Taxation and Finance and New York State Commissioner of Labor as necessary party Defendants, substituting Green Tree Servicing, LLC in place of Plaintiff in the caption, appointing a referee to ascertain and compute the amount due to Green Tree, finding default against all non-answering defendants, awarding the costs of this motion to Green Tree is denied in its entirety; and it is further

ORDERED that the relief requested by Defendant Thomas Giaramita ("Defendant") in opposition, to have discovery with respect to the issue of standing and that Plaintiff be directed to produce the original promissory note and mortgage is granted; and it is further

ORDERED that Plaintiff produce the original promissory note and mortgage for discovery and inspection by Defendant within thirty (30) days of the date of this Order, and that Defendant have discovery with respect to the issue of standing.

Preliminary Statement

Plaintiff, as a condition precedent in its motion (seq. no.:002) has pled for an order granting the Plaintiff leave to renew. The Court will therefore first address Plaintiff's entitlement to renew pursuant to CPLR Rule 2221(e). In order to satisfy the elements of CPLR Rule 2221(e), the Plaintiff must demonstrate reasonable justification for its failure to present new facts not offered on the prior motion or that a change in the law has occurred which would change the prior determination by the Court. In the event Plaintiff is found entitled to renew, the Court will consider its request for summary judgment pursuant to CPLR Rule 3212 and other further relief requested in Plaintiff's motion (seq. no.:002). The Court notes that Plaintiff's prior motion (seq. no.:001) requesting identical relief (other than the request to renew) was denied on June 17th, 2016 by Justice Daniel Martin.

The instant motion is therefore a narrow consideration as to: 1) whether there are new facts not offered on the prior motion that would change the prior determination or that there has been a change in the law that would change the prior determination; and 2) the motion shall contain reasonable justification for the failure to present such facts on the prior motion.

Case History

This is a matter seeking foreclosure and sale of rental real property situate in Huntington Station, Suffolk County, New York. On February 27th, 2004 Defendant/Mortgagor Thomas Giaramita ("Defendant") closed on a first mortgage loan secured by a note and mortgage on 73 Northridge Street, Huntington Station, New York 11746. Defendant ceased payment April 1st, 2009. On October 23rd, 2009 Plaintiff commenced its foreclosure action. On October 30th, 2009 Plaintiff effected service of its summons and complaint pursuant to CPLR § 308(1) by in-hand service upon the Defendant. Defendant appeared and filed his answer on November 18th, 2009.

On June 17th, 2010 and again on August 10th, 2010, a CPLR Rule 3408 mandatory settlement conference was scheduled. Defendant did not appear at either scheduled conference and was determined ineligible as the subject premises are rental real estate.

On or about September 11th, 2014, Plaintiff filed a motion for summary judgment pursuant to CPLR Rule 3212 (seq. no.:001) and other relief. Defendant opposed the motion. On June 17th, 2016 Justice Daniel Martin denied Plaintiff's motion (seq. no.:001).

On July 28th, 2017, Plaintiff filed the instant motion (seq. no.:002) to renew pursuant to CPLR Rule 2221(e), and repeated its request for *inter alia*, summary judgment pursuant to CPLR Rule 3212. Plaintiff has filed evidentiary proof not presented in its prior summary judgment motion (seq. no.:001). Defendant has opposed the motion and requested discovery and production of the original note and mortgage and further discovery as to the issue of standing.

Motion for Leave to Renew

CPLR Rule 2221. Motion Affecting Prior Order states, in pertinent part:

“(e) A motion for leave to renew:

1. shall be specifically identified as such;
2. 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 an change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.” McKinney’s CPLR Rule 2221 [2018].

It is acknowledged that Plaintiff has filed new facts not offered on its prior motion.

It is noted that CPLR Rule 2221(e) requires that motion to renew shall be based upon new facts not previously offered, and shall contain reasonable justification for the failure to present such facts on the prior motion.

On an appeal from an order granting a motion to renew:

“The Second Department emphasized that the Supreme Court ‘lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion’” (Connors, Supplemental Practice Commentaries, C:2221:9, McKinney’s CPLR Rule 2221(e) [2018]; *quoting Cioffi v. S.M. Foods, Inc.*, 129 AD3d 888, 891, 10 NYS3d 620, 625 [2d Dept 2015]).

“The new or additional facts presented “either must have not been known to the party seeking renewal or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion” (*Id. at 891, 625 quoting Deutsche Bank Trust Co. v. Ghaness*, 100 AD3d 585, 586, 953 NYS2d 301 [2d Dept 2012]).

“The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion” (*Jovanovic v. Jovanovic*, 96 AD3d 1019, 1020, 947 NYS2d 554 [2d Dept 2012]; *see Rowe v. NYCPD*, 85 AD3d 1001, 1003, 926 NYS2s 121 [2d Dept 2011]).

“Reasonable justification does not exist where the ‘new evidence’ consists of documents which the [moving party] knew existed and were in fact in his own possession at the time the initial motion was made” (*Cioffi at 891, 625; quoting Rowe at 1003, 121; see Jovanovic at 1020*).

In a recent Second Department case, the Appellate Division, on Plaintiff’s appeal of a denial of Plaintiff’s motion for leave to renew and reargue affirmed the Supreme Court’s denial for failure to set forth any justification for his failure to submit the purported new facts in his opposition to Defendant’s prior motion (*Braxton v. Plaza Housing Development Fund Company, Inc.*, 163 AD3d 756,—NYS3d— 2018 WL 3451528 [2d Dept 2018]).

“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” (*Serviss v. Incorporated Village of Floral Park*, 164 AD3d 512, —NYS3d *2, 2018 WL 3637681 [2d Dept 2018]; *see JP Morgan Chase Bank, N.A. v. Novis*, 157 AD3d 776, 70 NYS3d 211 [2d Dept 2018]; *Kio Seob Kim v. Malwon, LLC*, 155 AD3d 1017, 66 NYS3d 318 [2d Dept 2017]; *Federal Natl Mgt. Assn. v. Sakizada*, 153 AD3d 1236, 1237, 60 NYS3d 466 [2d Dept 2017]; *Joseph v. Simmons*, 114 AD3d 644, 979 NYS2d 675 [2d Dept 2014]).

In his motion (seq. no.:002), Plaintiff has filed an affirmation in support and an affirmation in reply. The Court will review each in the order presented on the question of what reasonable justification is offered for failing to present the new facts stated when it previously pled for summary judgment relief (seq. no.:001).

In his affirmation in support, Plaintiff's Counsel avers in reference to the facts now offered as proof of physical delivery of the duly endorsed note to Plaintiff prior to the commencement of this action: "The information was not previously submitted because Green Tree reasonably believed its prior evidentiary submissions were sufficient to demonstrate standing."

It is noted that Plaintiff does not assert that its new facts were unavailable or unknown at the time of its first motion for summary judgment (seq 001).

Justice Martin, in his June 17th, 2016 Order denying Plaintiff summary judgment, on the issue of standing, stated:

"In the instant case, the plaintiff failed to establish, *prima facie*, that it had standing as its evidence did not adequately demonstrate that the note was physically delivered to it prior to the commencement of the action (citations omitted)...The plaintiff's representative however, did not provide any factual details concerning when the note was endorsed or when the plaintiff received physical possession of the note, and, thus, the plaintiff failed to establish that it had physical possession of the note prior to commencing this action (citations omitted). Furthermore, in this case, the note contains an undated endorsement, and the plaintiff's representative did not allege when the endorsement was placed on the note. It is, therefore, not clear whether the endorsement was effectuated prior to the commencement of this action (citations omitted). Moreover, the plaintiff's representative neither addressed the relevance of the merger between the plaintiff and Bank of America, nor the relationship, if any, between these entities and the lender, in any event, if MERS, as nominee of the lender was not the owner of the note, as it appears, it would have lacked the authority to assign the note to the plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to the plaintiff would be a nullity (citations omitted). Thus, the issue of

standing cannot be determined as a matter of law on this record. In view of the plaintiff's incomplete evidentiary submissions, an issue of fact remains as to whether it had standing to commence this action."

It is difficult for this Court to find Plaintiff's excuse for its previous failure as stated in its affirmation in support of this motion (seq. no.:002) as "reasonable justification." Simply stating "reasonable belief" without further elaboration is insufficient. Plaintiff has admitted possession and/or knowledge of the new facts submitted herein at the time of commencement of this action.

The Court will now consider Plaintiff's reply affirmation for reasonable justification for its previous failure to submit adequate facts to prove standing in its first motion for summary judgment (seq. no.:001).

The reply affirmation asserts that the new facts offered in this motion sequence 002 establish its standing to commence the action. The reply affirmation does not assert reasonable justification for its failure to present those facts in motion sequence 001. The reply affirmation merely "respectfully requests that this Court exercise its discretion and grant its motion."

The Court is constrained to follow the Second Department on the question of reasonable justification pursuant to CPLR Rule 2221(e)(3) (*see Braxton, Cioffi, Jovanovic, Rowe, supra*).

The reply affirmation fails to provide reasonable justification for Plaintiff's previous failure to offer the facts contained within the instant motion (seq. no.:002). It is also necessary to examine both the affirmation in support and the reply affirmation to determine whether Plaintiff asserts a change in the law which will change the prior determination and presumably also by such change in the law offer its own reasonable justification to satisfy the two (2) prongs of CPLR Rule 2221(e)(2), (3).

It is noted that the examination of both the affirmation in support and the affirmation in reply fails to disclose any assertion by Plaintiff of a change in the law which would change the prior determination of failure to prove standing and resultant refusal of a finding of summary judgment pursuant to CPLR Rule 3212.

Plaintiff, in its reply affirmation relies upon a statement that the new facts presented will result in the ability to find standing and therefore satisfy its motion for relief of summary judgment pursuant to CPLR Rule 3212. Same statement fails to aver a change in the law and fails to provide reasonable justification for failure to offer those facts in its previous motion (seq. no.:001).

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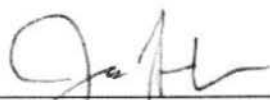
The Plaintiff has failed to demonstrate a basis of entitlement to renew pursuant to CPLR Rule 2221(e). Same granting of entitlement to renew is stated as a condition precedent in Plaintiff's motion for further relief, including *inter alia*, summary judgment pursuant to CPLR Rule 3212.

Plaintiff's motion for further relief is therefore denied.

Plaintiff will produce the original promissory note and mortgage for discovery and inspection by Defendant within thirty (30) days of the date of this Order.

The foregoing decision constitutes the Order of the Court.

DATED: OCTOBER 16th, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court