

U.S. Bank N.A. v Evans
2018 NY Slip Op 33066(U)
November 28, 2018
Supreme Court, Suffolk County
Docket Number: 41815/2009
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

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

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR J.P. MORGAN MORTGAGE
ACQUISITION TRUST 2006-WMC4, ASSET
BACKED PASS-THROUGH CERTIFICATES
SERIES 2006-WMC-4,

Plaintiff,

-against-

BRET A. EVANS, MERS, INC., AS NOMINEE
FOR WMC MORTGAGE CORP.,

Defendants.

X-----X

INDEX NO.: 41815/2009**MOT. SEQ. NO.: 008-MD****009-MG****010-MD**

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Upon the following papers numbered 1 to 78 read on these Motion Sequence Nos: 008 to Renew; 009 For a Judgment of Foreclosure and Sale and 010 Cross-Motion Denying the Order of Judgment of Foreclosure and Sale; Notice of Motion/ Order to Show Cause and supporting papers Mot. Seq. No.008) 1-8; (Mot. Seq. No.009) 44-58 ; (Cross Mot. Seq. No.010) 71-72; Answering Affidavits and supporting papers (Mot. Seq. No.008) 9-10; 17-20; 21-39; 40-43; Mot. Seq. No.009) 59-65; 66-70; (Cross Mot. Seq. No.010) 73-78;(Cross Mot. Seq. No.010) Reply Affidavits and supporting papers Mot. Seq. No.008) 11-16; ;(and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq. no.:008) of Defendant Bret A. Evans ("Defendant") requesting leave to reargue his motion asserting lack of personal jurisdiction pursuant to RPAPL §1303; dismissal of the foreclosure complaint; and requesting leave to reargue

seeking vacatur of the July 16th, 2010 order of reference and summary judgment based upon lack of service pursuant to CPLR §2103 (c) is denied in its entirety, with prejudice; and it is further

ORDERED that motion (seq. no.:009) of Plaintiff requesting confirmation of the Referee's report and judgment of foreclosure and sale is granted in its entirety; and it is further

ORDERED that the cross motion (seq. no.:010) of Defendant requesting summary judgment to Defendant pursuant to CPLR Rule 3212 (b) and dismissing Plaintiff's 2009 foreclosure claim pursuant to RPAPL §§1303, 1304, with prejudice and denial pursuant to RPAPL §§1321, 1351, 1354 of Plaintiff's motion (seq. no.:009) for confirmation of the Referee's report and judgment of foreclosure and sale, is denied in its entirety, with prejudice.

Preliminary Matters

This case has been the subject of ten (10) motions. Nine (9) motions were filed after the July 16th, 2010 Order of Summary Judgment to Plaintiff. Of the nine (9) post-summary judgment motions, six (6) were filed by the Defendant.

All six (6) motions filed by Defendant followed summary judgment being awarded to Plaintiff on 7/16/2010. Each has sought vacatur of that summary judgment order. Defendant's motions (seq. nos.:002, 003, 006 and 007) were each carefully considered by a predecessor Court, and denied. Each denial has been elaborated upon at length in respective orders.

Defendant's instant motion (seq. no.:008) and cross motion (seq. no.:010) are decided herein. Motion (seq. no.:008) and cross motion (seq. no.:010) are presented upon identical allegations as those previously presented by Defendant, which previous motions were denied. Motion sequence numbers 008 and 010 were afforded careful and thorough consideration by this Court. Defendant cannot deny that he has had his day in Court and been afforded every courtesy by each Court which reviewed his motion and cross-motion requests for relief.

Defendant's Motion Sequence 008 : Requesting Reargument & Case Dismissal, Lack of Personal Jurisdiction - RPAPL §1303, Vacatur of July 16th, 2010 Order of Reference and Summary Judgment - CPLR §2103 (c)

It is noted at the inception of this decision, that the arguments presented by Defendant in the instant motion (seq. no.:008), are identical to those which Defendant has previously

alleged and which allegations have previously been denied. There is nothing for this Court to review. There are no new facts or legal arguments or meritorious defenses presented to justify renewal nor reargument. Nothing new is presented by Defendant in the instant motion for this Court to consider. The Defendant is referred to the decisions denying his prior motions (mot seq. nos.:002, 003, 006 and 007) which have been served upon him, and the Order from motion sequence no.:001 which struck Defendant's answer and awarded Summary Judgment to Plaintiff on July 16th, 2010. "Contrary to the plaintiff's contention, it was precluded from making a motion to vacate...on the same ground as its prior motion" (*47 Thames Realty, LLC v. Robinson*, 85 AD3d 851, 852, 925 NYS2d 585, 587 [2d Dept 2011]; see *New York State Higher Educ. Servs. Corp. v. Adeniyi*, 72 AD3d 1387, 898 NYS2d 377 [3d Dept 2010]; *Robert Marini Bldr. v. Rao*, 263 AD2d 846, 848, 694 NYS2d 208 [3d Dept 1999]; *Peck v. Ernst Bros.*, 86 AD2d 692, 446 NYS2d 517 [3d Dept 1982]; *Bianco v. Dougherty*, 54 AD2d 681, 387 NYS2d 263 [2d Dept 1976]).

"Conduct during litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument, it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or it asserts material factual statements that are false" (*Mascia v. Maresco*, 39 AD3d 504, 505, 833 NYS3d 207, 208 [2d Dept 2007]).

Defendant's RPAPL §1303 argument was presented, considered, addressed and rejected and Defendant's request for relief thereunder denied in the November 29th, 2017 Order (mot. seq. no.:007) of Justice Whelan. That same Order addressed and rejected Defendant's CPLR Rule 2103 (c) argument. This Court will not revisit nor disturb the November 29th, 2017 Order of Justice Whelan. The relief requested by Defendant in his motion (seq. no.:008), requesting leave to reargue his motion asserting lack of personal jurisdiction pursuant to RPAPL §1303 and dismissal of the foreclosure complaint and requesting leave to reargue seeking vacatur of the July 16th, 2010 Order of Reference and Summary Judgment based upon lack of personal service pursuant to CPLR §2103 (c) is denied in its entirety, with prejudice.

Plaintiff's Motion Sequence No.:009: Requesting Confirmation of the Referee's Report and Judgment of Foreclosure and Sale

It is noted that Justice Whelan in his November 29th, 2017 Order (mot. seq. no.:007), determined that Plaintiff had failed to provide the Defendant with notice of Plaintiff's motion

(seq. no.:005) seeking judgment of foreclosure and sale in accordance with CPLR Rule 2103. Plaintiff, in its instant motion (seq. no.:009) has filed again for judgment of foreclosure and sale. The instant motion corrects the two (2) motion deficiencies noted by Justice Whelan in his November 29th, 2017 Order, to wit: filing of an affirmation as part of the motion (seq. no.:009) which confirms the accuracy of the filed pleadings in accordance with Administrative Order 208/13 (attached to the motion as **Exhibit K**); and, timely service of the notice of motion upon the borrower/Defendant.

The balance of Plaintiff's request for confirmation of the Referee's report and judgment of foreclosure and sale is unchanged from that previously submitted in motion sequence no.:005. Upon review of Plaintiff's instant motion (seq 009), Plaintiff is compliant with the requirements of the November 29, 2017 Order. Plaintiff's instant motion is in proper form. It's content clearly demonstrates that Plaintiff has standing, is compliant with conditions precedent previously adjudicated and upheld, and is entitled to entry of judgment and foreclosure and sale.

The relief requested by Plaintiff in motion sequence no.:009, an order confirming the Referee's report and granting Plaintiff final judgment of foreclosure and sale, is granted in its entirety.

Defendant's Cross-Motion Sequence 010: Requesting Summary Judgment - CPLR Rule 3212(b), Dismissal of Plaintiff's Complaint - RPAPL §§1303, 1304, and Denial of Plaintiff's Motion (Seq 009) - RPAPL §§1321, 1351, 1354

A *de novo* standard of review applies on appeal from a ruling on a summary judgment motion (*Duane Reade, Inc. v. Cardtronics*, 54 AD3d 137, 863 NYS2d 14 [1st Dept 2008]). Thus, issue finding, rather than issue determination, is the standard for reviewing a motion for summary judgment. On review, the court will apply the principles that where a court entertains any doubt as to the existence of a triable issue of fact, the motion for summary judgment should be denied (*Daniels v. Judelson*, 215 AD2d 623, 628 NYS2d 314 [2d Dept 1995]; *Dougherty v. Kinard*, 215 AD2d 521, 626 NYS2d 554 [2d Dept 1995]). Where defendant unsuccessfully moved for summary judgment and later made a second motion for summary judgment, the Supreme Court was compelled to deny a second motion by rule of law of the case (*Hoffman v. Landers*, 146 AD2d 744, 537 NYS2d 228 [2d Dept 1989]).

In the case at bar, Defendant in his instant cross motion (seq. no.:010) pleads for summary judgment pursuant to CPLR Rule 3212 (b). Defendant previously unsuccessfully pled for summary judgment pursuant to CPLR Rule 3211 in motion sequence no.:003. Defendant previously unsuccessfully pled for reargument and/or renewal of the matter of summary judgment in motion sequence nos.:002 and 007. Defendant is precluded from this

argument in the instant cross motion. This argument is law of the case.

Defendant, by cross-motion (seq. no.:010) has pled for dismissal of Plaintiff's complaint pursuant to RPAPL §§1303, 1304. This argument was pled by Defendant and rejected in motion sequence nos.:007 and 008. It is addressed in this decision, *supra.*

This Court refuses to entertain Defendant's repeated motions for relief which were previously considered and denied. This Court will not permit Defendant to abusively plead *ad infinitum* for relief in an attempt to delay the foreclosure sale.

The Defendant will take notice that any further litigation must be taken on appeal to the Appellate Division, Second Department.

The remaining arguments of Defendant have been considered and are hereby rejected.

Defendant's answer has been dismissed. Summary judgment has been awarded to Plaintiff. This matter is *res judicata*.

Judgment of foreclosure and sale will be signed simultaneously with this decision.

The foregoing decision constitutes the Order of the Court.

DATED: NOVEMBER 28th, 2018
RIVERHEAD, NY


HON. JAMES HUDSON
Acting Justice of the Supreme Court