

Deutsche Bank Natl. Trust Co. v Sanford
2018 NY Slip Op 33807(U)
May 2, 2018
Supreme Court, Sullivan County
Docket Number: 0879-2017
Judge: Stephan Schick
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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DEUTSCHE BANK NATIONAL TRUST CO., AS
TRUSTEE FOR AMERIQUEST MORTGAGE
SECURITIES, INC. ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2005-R10,

Plaintiff,

DECISION & ORDER

- against -

SHANNON SANFORD, ALLAN SANFORD, et al.

Defendant.
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Motion Return Date: May 1, 2018
RJI No.: 52-39244-17
Index No.: 0879-2017

Appearances:

For Plaintiff
Marianne Sanchez
Leopold & Associates, PLLC
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Armonk, NY 10504

For Defendant Allan Sanford
Allan Sanford, *pro se*
25 McClay Road
Wurtsboro, NY 12790

Schick, J.:

Before the Court is defendant Allan Sanford's ("defendant's") motion pursuant to CPLR 3104(d) for review of a decision by a referee. By way of Order dated February 2, 2018, I referred this residential real estate foreclosure action to Court Attorney-Referee David J. Galalis pursuant to CPLR 3104 for supervision of disclosure and resolution of two pending motions by defendant to compel plaintiff to give further responses to a request for production of documents and interrogatories and for sanctions. Plaintiff opposed and cross-moved for a protective order striking defendant's request for production of documents and interrogatories, and barring defendant from serving additional requests to produce in connection with any noticed deposition.

The referee issued his Decision & Order on April 2, 2018 granting in part and denying in part all three motions. Specifically, the referee ordered that plaintiff was to produce all non-privileged documents responsive to requests 5, 26, 32, 48, 58, and 69 and was to respond to interrogatories 2, 4, 13, and 20. The referee granted plaintiff's motion for a protective order as to all other requests and interrogatories, and granted plaintiff's motion for a protective order barring defendant from serving any document requests in connection with any notices of deposition.

Defendant moved on April 16, 2018 pursuant to CPLR 3104(d) to reconsider the decision of the referee.¹ On April 20, 2018, defendant filed a "Supplemental Addendum" to his notice of motion. Plaintiff has filed opposition.

I note initially that the motion is untimely. CPLR 3104(d) states that a motion for review "shall be . . . made . . . within five days after the order is made." Though appellate caselaw is extremely limited on the meaning of "made" in the context of CPLR 3104(d), there is authority holding that the referee's order is "made" when signed, not when entered by the Clerk of Court. *See, e.g., Nasir v. Tait*, 128 A.D.3d 1033, 1034 (2d Dep't 2015). Nevertheless, considering defendant's *pro se* status, I exercise my discretion under CPLR 2004 to extend the time *nunc pro tunc* for the making of defendant's motion, having construed defendant's paragraph eight to the notice of motion as essentially a request for such an extension. Accordingly, I proceed to address the merits of defendant's motion.

Though there is a lack of clear appellate authority as to the standard of review to be applied on a CPLR 3104(d) motion, there is well-reasoned authority by the Supreme Court, New York County, analogizing to the standard of review under CPLR 4001 and Fed. R. Civ. P. 72, that "the corresponding review standard should be whether the referee's decision or order, is

¹ Although defendant's motion was notarized and served April 6, 2018, the Sullivan County Clerk's motion fee receipt page is dated April 13, 2018, and the notice of motion itself is stamped as having been received by the Office of the Court Clerk on April 16, 2018.

clearly erroneous or contrary to law.” *CIT Project Fin. v. Credit Sussie First Boston LLC.*, 7 Misc. 3d 1002(A) at * 2 (Sup. Ct. New York Cnty. 2005). I hereby adopt that standard, and upon a review of the instant motion, opposition thereto, the underlying motions to compel and for a protective order, defendant’s 72 Requests for Production of Documents and 25 Interrogatories (both dated November 3, 2017), and the referee’s detailed decision dated April 2, 2018, it cannot be said that the referee’s decision is clearly erroneous or contrary to law.

A few observations on the current motion are necessary. First, two of the document requests that defendant asks me to compel the production of have already been compelled by the referee’s decision. *See* points 5 and 17 to the Supplemental Addendum in support of the instant motion, corresponding to Document Requests 5 and 26 which the referee already ordered plaintiff to respond to at pages 4 and 8 of the referee’s Decision and Order.

Defendant requested production of the original note at Document Request No. 9. Plaintiff, in its December 13, 2017 Objections and Responses, stated that it would “produce the original ‘wet ink’ note for inspection by defendant at plaintiff’s counsel’s office on a mutually convenient date and time to be determined upon agreement by the parties.” Defendant, nevertheless, withdrew this request in his December 21, 2017 Response to Plaintiff’s Objections and Responses by noting that the request was “delete[d].” Plaintiff renews his request for the original note in the instant motion. Considering that plaintiff has already acceded to this request, I will deem that defendant’s previous withdrawal of the request was made in error, and will order plaintiff to produce the original note for inspection and copying.

In the instant motion, defendant also asks me to compel production of Document Requests No. 6 and 8. Both of these requests were withdrawn in defendant’s December 21, 2017 Response to Plaintiff’s Objections and Responses. Even if the withdrawal of these requests could be deemed to have been an inadvertent oversight (defendant does not argue such) both of these

requests are duplicative of other requests. Request No. 6 (“all documents and records in the plaintiff’s loan servicing file”) is duplicative of Request No. 5, which the referee ordered plaintiff to respond to at pages 4 and 8 of his Decision and Order. Request No. 8 (“all original endorsements and transfers of the mortgage note including allonges”) is encompassed in Request No. 9, which I am now compelling plaintiff to comply with, for the reasons explained above.

Lastly, upon a review of the file in this action, I note with some concern that defendant included document requests in his notice of deposition dated April 6, 2018. This was in direct contravention of the referee’s decision, which clearly granted plaintiff’s motion for a protective order by “barring defendant from serving any additional document requests in connection with any future noticed deposition.” Referee’s Decision and Order at p. 7. Defendant is admonished to refrain from serving any document requests that might be incorporated into, or accompany, any notice of deposition. In the interests of judicial economy, should defendant again include document requests in a subsequent notice of deposition, plaintiff is permitted to disregard those requests, but is prohibited from rejecting said notice of deposition on those grounds alone, and shall instead produce its witness to be examined under oath.

The Court has considered all other arguments and found them to be without merit. Accordingly, it is hereby:

ORDERED that defendant’s motion is **GRANTED IN PART** only to the extent of **MODIFYING** the April 2, 2018 Decision & Order of Referee David J. Galalis to additionally compel plaintiff to make available for inspection and copying at their offices at a mutually agreeable date and time, but by no later than May 16, 2018, the original note underlying this action, along with all original endorsements and allonges thereto, and the motion is otherwise **DENIED**, and it is further

ORDERED that plaintiff shall comply with the April 2, 2018 Decision & Order of the Referee, as herein modified, by no later than May 16, 2018, and it is further

ORDERED that all depositions in this action are to be completed by no later than June 8, 2018, and it is further

ORDERED that depositions may be noticed pursuant to CPLR 3107 on no less than 14 days' notice, and it is further


ORDERED that should defendant again include document requests in any notice of deposition, plaintiff is hereby permitted to disregard such document requests, and is hereby prohibited from rejecting said notice of deposition in its entirety on those grounds alone, but shall instead produce its witness to be examined under oath, and it is further

ORDERED that the parties shall appear for a compliance conference before Referee Galalis on June 12, 2018 at 10:00 a.m.

This shall constitute the Decision and Order of the Court. The original Decision and Order, along with all papers submitted for consideration, are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: May 2, 2018
Monticello, New York

ENTER



HON. STEPHAN G. SCHICK, JSC

Papers considered: (1) Notice of Motion and Motion by Defendant Allan Sanford Under CPLR 3104(d) to Reconsider Certain Specified Rulings, (2) Supplemental Addendum to Notice of Motion and Motion by Defendant Allan Sanford Under CPLR 3104(d) to Reconsider Certain Specified Rulings, (3) Affirmation of Marianne Sanchez in Opposition