

Wells Fargo Bank, N.A. v Smart
2019 NY Slip Op 31741(U)
May 16, 2019
Supreme Court, Queens County
Docket Number: 700435/2016
Judge: Darrell L. Gavrin
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN IA Part 27
Justice

WELLS FARGO BANK, NATIONAL x
ASSOCIATION AS TRUSTEE FOR OPTION
ONE MORTGAGE LOAN TRUST 2007-2, ASSET
BACKED CERTIFICATES, SERIES 2007-2,

Index
Number 700435/2016
Motion
Date January 15, 2019

Plaintiff,

Motion Seq. No. 2

-against-

GLENFORD SMART, MARY BROWN, JANE
SMITH and "JOHN DOE #3" through "JOHN
DOE #12", et al.,

Defendants.

x

The following papers read on this motion by plaintiff for summary judgment against defendant Glenford Smart, to strike the answer of defendant Glenford Smart and dismiss the affirmative defenses and counterclaim of defendant Smart, to discontinue the action against those defendants sued herein as "John Doe #3" through "John Doe #12" and amend the caption accordingly, for leave to appoint a referee to ascertain and compute the amount due and owing plaintiff, and to examine and report whether the mortgaged premises can be sold in one or more parcels, and for leave to enter a default judgment against all non-appearing defendants.

Papers
Numbered

Notice of Motion - Affidavits - ExhibitsEF Doc. #56-#89
Answering Affidavits - ExhibitsEF Doc. #91-#92
Reply Memorandum of LawEF Doc. #93

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff previously moved for, among other things, summary judgment against defendant Glenford Smart, to strike Smart's answer and dismiss the affirmative defenses and counterclaims asserted therein, to discontinue the action against the "John Doe" defendants and for leave to amend the caption accordingly, for leave to appoint a referee, and for leave to enter a default judgment against the non-appearing defendants. By order dated November 8, 2017 and entered on December 5, 2017, the branch of the motion by plaintiff for leave to amend the caption was granted only to the extent of substituting Mary Brown and Jane Smith for defendants "John Doe #1" and "John Doe #2." The branches of the motion by plaintiff for summary judgment against defendant Smart, to dismiss the first, second and third affirmative defenses and first counterclaim asserted by defendant Smart in his answer, and for leave to enter a default judgment against the non-appearing defendants, were denied. The branch of the motion by plaintiff to dismiss the fourth, fifth, sixth and seventh affirmative defense, and the second, third and fourth counterclaims, asserted by defendant Smart in his answer, was granted.

Defendant Smart opposes the motion. The remaining defendants have not appeared in relation to the motion.

A status conference was held on April 11, 2018, resulting in an order of the Hon. Martin J. Schulman, J.S.C., of same date. Contrary to the assertion of plaintiff, such order did not direct plaintiff to file a "successive motion for an [o]rder of [r]eference by August 29, 2018." Rather, it directed plaintiff to appear for a final status conference on August 29, 2018 and "file an application seeking an Order of Reference *or the next applicable application*" by the August 29, 2018 conference date (emphasis supplied).

The branch of the instant motion by plaintiff for summary judgment against defendant Smart constitutes a successive motion for summary judgment against him. New York law has a "strong policy against allowing successive motions for summary judgment" (*Baron v Charles Azzue, Inc.*, 240 AD2d 447, 449 [2d Dept 1997]). This policy is especially true where the motion is based on legal grounds and factual assertions that were, or could have been, raised in an earlier motion (*see Abramoff v Federal Ins. Co.*, 48 AD2d 676 [2d Dept 1975]; *Powell v Trans-Auto Sys.*, 32 AD2d 650 [2d Dept 1969]).

To the extent plaintiff acknowledges that the instant motion is a renewal of the prior motion, the notice of motion does not identify it specifically as such (*see* CPLR 2221[e]), and in any event, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion"

(CPLR 2221[e][3]). “The new or additional facts 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” (*Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]; see *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 982 [2d Dept 2015]). “ ‘However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented’ ” (*Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept 2015], quoting *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d at 586).

The information set forth in the affidavits of Howard R. Handville, dated August 28, 2018, and Kevin Miller, dated August 27, 2018, submitted in support of this motion, was available at the time of the original motion, and plaintiff knew or should reasonably have known of its relevance at that time. Plaintiff submitted an earlier affidavit of Handville (dated February 13, 2017) with respect to the original motion (mot. Seq. No. 1). Moreover, in his August 28, 2018 affidavit, Handville indicates, in a footnote, that plaintiff's counsel has held the collateral file, including the original note with the allonge indorsed in blank, for the loan since August 18, 2011 (see n 4). Yet, Handville makes no averment that he has personal knowledge of the possession by plaintiff's counsel of the original note with allonge at the time of the commencement of the action, or that he, Handville, relied upon the books and records of plaintiff's counsel and was personally familiar with the record-keeping practices and procedures of plaintiff's counsel. In addition, the copy of the deed dated July 7, 2004 was recorded on January 7, 2005 and therefore was clearly available to plaintiff at the time of the making of the prior motion. Plaintiff has not set forth any reasonable justification for its failure to submit such information to establish prima facie entitlement to judgment as a matter of law in the first instance. Moreover, plaintiff has failed to establish that the new evidence would have changed the prior determination with respect to the issue of standing (see e.g. *41st Rd. Props., LLC v Wang Real Prop., LLC*, 164 AD3d 455, 458 [2d Dept 2018]; *Gall v Colon-Sylvain*, 151 AD3d 701, 703 [2d Dept 2017]; *Bank of N.Y. Mellon v Garrett*, 144 AD3d 621, 621 [2d Dept 2016]). The branches of the motion by plaintiff for summary judgment against defendant Smart and to strike the remaining affirmative defenses and counterclaim asserted by defendant Smart are denied.

That branch of the motion by plaintiff to discontinue the action against defendants sued herein as “John Doe #3” through “John Doe #12” and for leave amend the caption accordingly, is granted to the extent of granting plaintiff leave to amend the caption deleting reference to defendants “John Doe #3” through “John Doe #12.” Plaintiff utilized the fictitious names “John Doe #3” through “John Doe #12,” when naming defendants in the caption, indicating the actual names of such persons were unknown to it, and that they were intended to be the tenants, occupants or persons or corporations, having or claiming an

interest in or lien upon the subject premises (*see* CPLR 1024). Plaintiff has learned that those defendants are unnecessary party defendants.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
WELLS FARGO BANK, NATIONAL ASSOCIATION
AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2007-2, ASSET BACKED CERTIFICATES
SERIES 2007-2,

Plaintiff

Index No. 700435/2016

-against-

GLENFORD SMART, MARY BROWN and
JANE SMITH,

Defendant

-----X.

That branch of the motion by plaintiff for leave to enter a default judgment against all non-appearing defendants is granted to the extent of deeming defendants Mary Brown and Jane Smith to be in default in appearing or answering. That branch of the motion by plaintiff for leave to appoint a referee is denied.

Dated: May 16, 2019

J.S.C. 