

<b>Generation Mtge. Co. v Gotsch</b>
2019 NY Slip Op 32648(U)
September 5, 2019
Supreme Court, Suffolk County
Docket Number: 01015/2014
Judge: Linda Kevins
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY

**PRESENT:**

Hon. LINDA KEVINS  
Justice of the Supreme Court

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GENERATION MORTGAGE COMPANY

Plaintiff,

-against-

DECISION AND ORDER  
MOTION Seq. # 005 – MG/MD

STEPHEN E. GOTSCH A/K/A STEPHEN GOTSCH;  
SECRETARY OF HOUSING AND URBAN DEVELOPMENT;  
NEW YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE-CIVIL ENFORCEMENT; AMERICAN EXPRESS  
BANK, FSB; HSBC BANK USA NATIONAL ASSN.  
GUADALUPE MORALES

Defendant.

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The following papers have been read on Plaintiff's unopposed Motion:

Notice of Motion, Affirmation, & Exhibits..... 1

Upon the foregoing papers, it is ordered that this Motion is decided as follows:

In a foreclosure action, Plaintiff's January 22, 2019 Motion seeks to: (i) substitute Nationstar Mortgage LLC d/b/a Champion Mortgage Company for Generation Mortgage as Plaintiff *nunc pro tunc*; (ii) reaffirm all other provisions in the Judgment of Foreclosure and Sale dated May 17, 2018; (iii) extend the time fixed by RPAPL 1351(1) for the Referee to conduct the sale, *nunc pro tunc*, 90 days from the date of this Order; (iv) award Plaintiff its reasonable attorneys' fees; and (v) reform the mortgage to reflect the most accurate legal description of the property.

With regard to Plaintiff's Motion to Amend the Pleadings, CPLR 3025(b) provides that:

A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

CPLR 3025(c) provides, in pertinent part, that “[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.”

“Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit.” *Favia v. Harley-Davidson Motor Co.*, 119 AD3d 836 [2014]. “Absent prejudice, CPLR 3025 authorizes amendment to pleadings at any time,” (*Morales v. Cty. of Nassau*, 94 NY2d 218 [1999] [internal citations and quotation marks omitted]), including *nunc pro tunc*. “The party seeking leave to amend a pleading is not required to make an evidentiary showing of merit.” *In re Eshaghian*, 144 A.D.3d 1155 [2nd Dept 2016]. “The court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit.” *Edwards v. 1234 Pac. Mgmt., LLC*, 139 AD3d 658 [2nd Dept 2016] (internal citations and quotation marks omitted).

The Court of Appeals has held that:

Under CPLR 3025, a party may amend a pleading at any time by leave of court, before or after judgment to conform the pleading to the evidence. A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's direction that leave shall be freely given upon such terms as may be just. This favorable treatment applies even if the amendment substantially alters the theory of recovery.

*Kimso Apartments, LLC v. Gandhi*, 24 NY3d 403 [2014] (internal citations and quotation marks omitted).

Trial courts have broad discretion in deciding whether to grant 3025(b) applications, and the exercise of that discretion will not be lightly disturbed (see *Id.*; *Greco v Christoffersen*, 70 AD3d 769 [2d Dept 2010]; *Sidor v Zuhoski*, 257 AD2d 564 [2nd Dept 1999]; *Leibowitz v Plaza 400 Owners' Corp.*, 226 A.D.2d 681 [2nd Dept 1996]; *Scott v General Motors Corp.*, 202 A.D.2d 570 [2nd Dept 1994]).

“Under CPLR 1003, the court, on motion of any party, may add or drop parties upon terms as may be just. The right to join parties to an action is subject to the exercise by the court, in the interest of justice, of its discretionary powers.” *State v. Park*, 204 A.D.2d 531 [2nd Dept

1994] (internal citations and quotation marks omitted).

Defendant's mortgage was executed on May 2, 2011 and duly recorded on May 24, 2011. The original holder of Defendant's mortgage was Mortgage Electronic Registration Systems, Inc. ("MERS") solely as nominee for First National Bank (hereinafter "MERS"). MERS assigned Defendant's mortgage to Plaintiff, Generation Mortgage Company, on November 26, 2013. This assignment was duly recorded on March 4, 2014. Plaintiff subsequently assigned Defendant's mortgage to Nationstar Mortgage LLC d/b/a Champion Mortgage Company on May 6, 2015. This assignment was duly recorded on August 20, 2015. The Record discloses that Champion Mortgage Company is the current holder of the note. In light of the circumstances, the proposed amendment to the pleadings is not only just, but necessary in order to conform the pleadings to the evidence. Thus, Plaintiff's Motion to amend the pleadings, *nunc pro tunc*, is hereby GRANTED, and Champion Mortgage Company shall be the Plaintiff in this foreclosure action.

With respect to Plaintiff's application for attorney fees, in order to make any fee or cost award, "the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986 [2d Dept 2006] quoting from, *Bankers Fed. Sav. Bank FSB v Off W. Broadway Developers*, 224 AD2d 376 [1st Dept 1996]; see, *Olim Realty v Lanaj Home Furnishings*, 65 AD3d 1318 [2d Dept 2009]; *NYCTL 1998-1 Tr. v Oneg Shabbos, Inc.*, 37 AD3d 789 [2d Dept 2007]).

"An award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered" (*Yonkers Rib House, Inc. v 1789 Cent. Park Corp.*, 63 AD3d 726 [2d Dept 2009]; *Kamco Supply Corp. v Annex Contr. Inc.*, 261 AD2d 363 [2d Dept 1999]) and "[t]he movant bears the burden of proof 'to establish the necessity for and the reasonable value of the legal services rendered'" (*Ctr. Great Neck Co. v Penn Encore, Inc.*, 255 AD2d 543 [2d Dept 1998] see, *Ctr. Great Neck Co. v Penn Encore, Inc.*, 277 AD2d 415 [2d Dept 2000]; *Chase Manhattan Bank v Bekerus*, 276 AD2d 461 [2d Dept 2000]; *Sand v Lammers*, 150 AD2d 355 [2d Dept 1989]).

In determining the reasonable value of an attorney's services, the following factors should be considered:

1. the difficulty of the questions involved;
2. the skill required to handle the problem;
3. the time and labor required;
4. the lawyer's experience, ability, and reputation;
5. the customary fee charged by the Bar for similar services and the amount involved (*Matter of Ury*, 108 AD2d 816 [2d Dept 1985]).

Here, Plaintiff's papers are insufficient to warrant the relief requested. Accordingly, Plaintiff's application for attorney's fees is Denied with leave to renew upon proper papers.

The branches of Plaintiff's motion seeking reformation of the mortgage and deed property descriptions are denied. While a court may reform an agreement, the relief must be based on submitted evidence showing that the language of the agreement did not accurately express the parties agreement. "The burden is on the proponent of reformation to establish cause for such relief by clear and convincing evidence" (*Kaliontzakis v Papadakos*, 69 AD3d 803 [2nd Dept 2010], *citing Shults v Geary*, 241 AD2d 850 [3d Dept 1997]). In order to establish cause to reform a mortgage property description, the plaintiff here is required to show that the agreement entered into did not reflect the true intent of the parties at that time (*see Kaliontzakis v Papadakos*, 69 AD3d at 804, *supra*, *citing M.S.B. Dev. Co., Inc. v Lopes*, 38 AD3d 723 [2nd Dept 2007]). This Plaintiff has failed to do, as no supporting documentation or affidavits were provided with this motion to demonstrate the intent of the parties. Plaintiff's submission of an affirmation of counsel having no personal knowledge of the facts is without evidentiary value in this regard (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). This branch of Plaintiff's motion is therefore DENIED.

Accordingly, it is

**ORDERED**, that Plaintiff's request to substitute Nationstar Mortgage LLC d/b/a Champion Mortgage Company for Generation Mortgage as Plaintiff *nunc pro tunc*, is GRANTED; and it is further

**ORDERED**, that Plaintiff shall, within 20 days from the entry of this Order, serve its Amended Judgment of Foreclosure and Sale upon Defendant(s) pursuant to CPLR 308 or BCL sections 306 and/or 308, and file same promptly with the Clerk of the Court; and it is further

**ORDERED**, that upon the filing of the Amended Judgment of Foreclosure and Sale, and payment of all requisite fees, the Caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X  
NATIONSTAR MORTGAGE LLC d/b/a  
CHAMPION MORTGAGE COMPANY,

Plaintiff,

Index No. 01015/2014

-against-

STEPHEN E. GOTSCH A/K/A STEPHEN GOTSCH;  
SECRETARY OF HOUSING AND URBAN  
DEVELOPMENT; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE-  
CIVIL ENFORCEMENT; AMERICAN EXPRESS

BANK, FSB; HSBC BANK USA NATIONAL ASSN.  
GUADALUPE MORALES,

Defendants.

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; and it is further

**ORDERED**, that the Plaintiff shall serve a copy of this Order upon the Clerk of the Court within 20 days of the entry of the Order; and it is further

**ORDERED**, that the Clerk of the Court, upon the entering of this Order, is hereby directed to amend the docket(s) of these action(s) to reflect the caption as amended herein; and it is further

**ORDERED**, that all other provisions in the Judgment of Foreclosure and Sale, dated May 17, 2018, and entered with the Suffolk County Clerk on May 21, 2018, are hereby affirmed; and it is further

**ORDERED**, that the time fixed by RPAPL § 1351(1) for the Referee to conduct the sale in above noted action is hereby extended, *nunc pro tunc*, 90 days from the date of this Order; and it is further

**ORDERED**, that Plaintiff’s application for attorney fees is DENIED as insufficient with leave to resubmit an application within 20 days from Notice of Entry of this Order for claimed attorney’s fees upon proper proof including the explicit provision in the mortgage warranting reasonable fees, and an Affirmation of Services setting forth details of the hours expended **and by whom** warranting services **actually rendered**, stating whether the hours were expended by the affirmant rather than a predecessor firm (*Citicorp Trust Bank, FSB v. Vidaurre*, 155 AD3d 934 [2nd Dept. 2017]), as well as setting forth “the difficulty of the questions presented; counsel’s experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation” (*People’s United Bank v. Patio Gardens III, LLC*, 143 AD3d 689 [2nd Dept. 2016]), so as to provide the Court with a valid basis upon which to render a decision regarding the award of reasonable attorney’s fees in accordance with the terms of the mortgage, and requested in the Complaint, keeping in mind anticipated legal services are not to be awarded (*Citicorp Trust Bank, FSB v Vidaurre*, [2nd Dept 2017]; and it is further

**ORDERED**, that the branch of Plaintiff’s Motion seeking reformation of the mortgage and deed property descriptions are DENIED; and it is further

**ORDERED**, that the Plaintiff is directed to immediately serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2015, upon the Suffolk County Clerk; and it is further

**ORDERED**, that upon Entry of this Order by the Suffolk County Clerk, Plaintiff is directed to serve, forthwith, a copy of this Order with Notice of Entry, upon all parties and to

promptly file the Affidavit(s) of Service with the Clerk of the Court

Any requested relief not specifically granted herein is hereby DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 5, 2019  
Riverhead, New York

  
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HON. LINDA KEAVINS  
J.S.C.

\_\_\_\_\_ **FINAL DISPOSITION**      **X**   **NON-FINAL DISPOSITION**