

SRP 2012-5 LLC v Aboutboul
2019 NY Slip Op 33328(U)
October 21, 2019
Supreme Court, Kings County
Docket Number: 503251/13
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October, 2019.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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SRP 2012-5 LLC,

Plaintiff,

MS# 4.7 #5

- against -

Index No. 503251/13

JOSEPH ABOUTBOUL, IRIT ABOUTBOUL, HSBC BANK NEVADA, DEPARTMENT STORES NATIONAL BANK, GREEN TREE SERVICING LLC AS SERVICER FOR COUNTRYWIDE HOME LOANS, INC. and GUY ABOUTBOUL,

Defendants.

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The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-3 4-6

Opposing Affidavits (Affirmations) _____

7-8

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Upon the foregoing papers in this foreclosure action, defendant Joseph Aboutboul (Aboutboul) moves, in motion sequence 4, for an order: (1) granting him leave, pursuant to CPLR 2221, to reargue the summary judgment motion (motion sequence 3) filed by plaintiff, SRP 2012-5 LLC (SRP), which resulted in a December 14, 2017 decision and order granting SRP summary judgment and an order of reference (December 2017 Order), and (2) staying the

enforcement of SRP's order of reference until Aboutboul's instant motion for reargument is decided, pursuant to CPLR 2201.

Plaintiff SRP cross-moves, in motion sequence 5, for an order: (1) restoring this matter to the court's active calendar, and (2) confirming the referee's October 5, 2018 report and granting SRP a judgment of foreclosure and sale.

Background

The December 2017 Order

By the December 2017 Order, this court granted SRP's motion for summary judgment.

Regarding SRP's standing to foreclose, the court held that:

“Here, plaintiff in support of its motion submitted the affidavit of Michael L[a]mando, manager of the plaintiff, which established plaintiff had standing to commence this action. L[a]mando affirms that he received the note being foreclosed upon, with an endorsement to plaintiff on October 7, 2012, and the plaintiff has been in exclusive control of the note since that date.

Thus, this court held that SRP established its standing to commence this foreclosure action, and granted SRP's summary judgment motion in the December 2017 Order, based on Lamando's affidavit testimony that SRP had exclusive possession of the note since October 7, 2012.

On August 15, 2018, Aboutboul filed an appeal from the December 2017 Order.

Aboutboul's Motion to Reargue

Aboutboul moves for leave to reargue SRP's underlying motion for summary judgment. Aboutboul argues that SRP's “alleged possession of the note prior to commencement of the instant action raises a significant issue of triable fact regarding standing.” Specifically,

Aboutboul asserts that “[i]nconsistencies between Mr. Lamando’s affidavit and the documentary evidence presented calls in[to] question the reliability of Plaintiff’s evidence . . .” The Lamando affidavit submitted in support of SRP’s underlying summary judgment motion attested that:

“[s]ince October 7, 2012, SRP . . . has maintained exclusive continuous physical possession of the collateral file and Prior Note No. 1, Prior Note No. 2, Prior Note No. 3, the Note, and the Lost Note Affidavit for Prior Note No. 4, including on the date of commencement of this action.”

Aboutboul asserts that “a close examination of the Lost Note Affidavit offered by Plaintiff reveals that it is dated on *October 25, 2012*, indicating [its] creation over two weeks after it was allegedly delivered to plaintiff.” According to Aboutboul, “[t]his clear factual discrepancy introduces a question of fact as to the possession of the note affirmed by Mr. L[a]mando.”

SRP, in opposition, argues that “Defendant is improperly seeking to argue a new theory which was not offered on the prior motion, in direct violation of CPLR § 2221 (d) (2).” Importantly, SRP explicitly admits that the Lamando affidavit contained a “scrivener’s error” regarding the date on which the collateral file was actually delivered to SRP:

“Admittedly, the Lamando Affidavit contained a scrivener’s error as Mr. Lamando mistakenly stated that the Lost Note Affidavit for Prior Note No. 4 was received on October 7, 2012, whereas the actual Lost Note Affidavit was executed on October 25, 2012.”

SRP asserts that “Mr. Lamando has since corrected the scrivener’s error,” and submits a new affidavit from Lamando in opposition to Aboutboul’s reargument motion, in which he attests that SRP “received the original collateral file on *November 7, 2012*, and not October 7, 2012.” SRP

argues that “the scrivener’s error is harmless, does not change the outcome of the prior motion, and the Court, in its discretion, can ignore this harmless error . . .”

SRP’s Cross Motion for Judgment of Foreclosure and Sale

SRP cross-moves for a judgment of foreclosure and sale, an order ratifying and confirming the referee’s report, directing the sale of the premises as one parcel and awarding SRP attorney’s fees.

Discussion

“A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*Haque v Daddazio*, 84 AD3d 940, 942 [2011]; *Mazinov v Rella*, 79 AD3d 979, 980 [2010]).

As a preliminary matter, Aboutboul’s motion for leave to reargue is based on a factual discrepancy in SRP’s underlying papers in support of its prior summary judgment motion, which Aboutboul previously raised in opposition to the motion. Contrary to SRP’s assertion, Aboutboul previously argued that SRP failed to make a prima facie showing that it has standing to foreclose because SRP attests that it purchased the notes on *October 7, 2012*, despite the fact that the Affidavit of Lost Note in the record was not prepared by the previous owner of the notes, Webster National Bank, until *October 25, 2012*. Specifically, Aboutboul’s counsel argued that

“[p]laintiff claimed to have all the purchased notes and mortgages at the time of starting this case, although this is directly contradicted by [its] own exhibits . . .”

Aboutboul has established that a factual discrepancy in the record, which was overlooked, warrants reargument here. SRP submitted the Lamando’s “Possession Affidavit” in support of its summary judgment motion to establish that it was the owner of the notes when this action was commenced. While Lamando attested that “[o]n October 7, 2012, SRP . . . received the original collateral file” and “on October 7, 2012, SRP . . . received the original Prior Note No. 1, Prior Note No. 2, Prior Note No. 3 and the *Lost Note Affidavit for Prior Note No. 4*[,]” the Lost Note Affidavit annexed to SRP’s summary judgment motion reflects that it was not executed by the prior owner of the notes *until October 25, 2012*. This factual discrepancy regarding the date on which SRP actually received the notes raised an issue of fact regarding SRP’s standing to foreclose.

Importantly, SRP now admits that Lamando’s “Possession Affidavit,” upon which its summary judgment motion was based, is factually inaccurate due to a “scrivener’s error” regarding the date on which SRP actually obtained the underlying notes. Thus, as SRP admits, this court’s December 2017 Order, which held that SRP established its standing to foreclose in the Lamando affidavit, was based entirely on Lamando’s factually inaccurate affidavit testimony. SRP’s attempt to correct the record on its prior summary judgment motion by submitting a revised fact affidavit from Lamando in opposition to Aboutboul’s instant motion to reargue is rejected because it is procedurally improper.

Because the December 2017 Order was based on the factually inaccurate Lamando affidavit, Aboutboul's instant motion for leave to reargue warrants being granted and, upon reargument, the December 2017 Order warrants being vacated. Consequently, SRP's cross motion for a judgment of foreclosure and sale is denied as premature. Accordingly, it is hereby

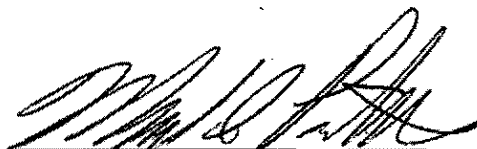
ORDERED that the branch of Aboutboul's motion seeking leave to reargue, in motion sequence 4, is granted, and, upon reargument, the December 2017 Order (in motion sequence 3), which granted SRP summary judgment, is hereby vacated; and it is further

ORDERED that the branch of Aboutboul's motion, in motion sequence 4, seeking a stay of the enforcement of SRP's order of reference until Aboutboul's motion for reargument is decided is denied as moot; and it is further

ORDERED that SRP's cross motion, motion sequence 5, is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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