

<b>Bank of N.Y. Mellon v 11 Bayberry St., LLC</b>
2019 NY Slip Op 33937(U)
June 28, 2019
Supreme Court, Dutchess County
Docket Number: 2017-51838
Judge: Peter M. Forman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

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THE BANK OF NEW YORK MELLON, f/k/a  
The Bank of New York as Trustee for First Horizon  
Alternative Mortgage Securities Trust 2005-FA11,

DECISION AND ORDER

Index No.: 2017-51838

Plaintiff,

- against -

Motion Sequence(s): 2, 3

11 BAYBERRY STREET, LLC; THE BOARD OF  
DIRECTORS OF FOUR CORNERS HOMEOWNERS  
ASSOCIATION; STATE OF NEW YORK; and "JOHN  
DOE," said name being fictitious, it being the intention of  
Plaintiff to designate any and all occupants of premises being  
foreclosed herein, and any parties, corporations or entities, if  
any, having or claiming an interest or lien upon the  
mortgaged premises,

Defendants.

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FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding this motion:

	<b>Papers Numbered</b>
<b>Order to Show Cause .....</b>	<b>1</b>
<b>Affirmation of Austin Shufelt in Support .....</b>	<b>2</b>
<b>Notice of Cross-Motion .....</b>	<b>3</b>
<b>Affirmation of Jeffrey Rogan in Support .....</b>	<b>4</b>
<b>Affidavit of Man Yi Cindy Ng in Support .....</b>	<b>5</b>
<b>Exhibits (A-D) .....</b>	<b>6-9</b>
<b>Affirmation of Austin Shufelt in Opposition &amp; Reply .....</b>	<b>10</b>
<b>Affirmation of Jeffrey Rogan in Opposition &amp; Reply .....</b>	<b>11</b>

By Decision and Order dated December 17, 2018 (ECF Docket #40, hereinafter "the Order"), the Court granted Defendant 11 Bayberry Street, LLC's motion to dismiss the complaint in this foreclosure proceeding due to the expiration of the statute of limitations. On or about January 24, 2019, Plaintiff moved, by order to show cause, for a stay of enforcement of the Order pending the outcome of Plaintiff's appeal to the Appellate Division, Second Department. On

January 25, 2019, the Court, after giving the parties an opportunity to be heard, granted Plaintiff's request to the extent that it temporarily stayed enforcement of the Order pending the determination of Plaintiff's motion for a stay, and set a briefing schedule.

Defendant opposed Plaintiff's motion and cross-moved for an order: pursuant to CPLR §6514(a) cancelling any notice of pendency; (b) pursuant to CPLR 5019[a], modifying the third decretal paragraph of the Order; (c) awarding attorney's fees; and (d) directing the imposition of sanctions pursuant to 22 NYCRR 130-1.1. Defendant also argues that, in the event the Court grants Plaintiff a stay pending appeal, it should condition any such stay on the posting of an undertaking. For the reasons set forth herein, Plaintiff's motion is denied and Defendant's cross-motion is granted in part and denied in part.

#### Plaintiff's Motion for a Stay Pending Appeal

The instant case does not fall under the automatic stay provisions of CPLR 5519(a) or (b)<sup>1</sup>. The Court will therefore evaluate Plaintiff's request for a stay under CPLR 5519(c), which states:

(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

"In considering whether to grant a stay under subdivision (c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." Reilly, Practice Commentaries McKinney's Cons Laws of NY, CPLR C:5519:4. "Under [CPLR 5519(c)], there is no entitlement to a stay and,

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<sup>1</sup> See January 24, 2019 Affirmation of Austin Shufelt, ¶13.

indeed, the court considering the stay may consider the merits of the appeal.” *DaSilva v. Musso*, 76 NY2d 436, 443 n 4 (1990). “[S]tays pending appeal will not be granted ... in cases where the appeal is meritless.” *Herbert v. City of New York*, 126 AD2d 404, 407 (1st Dept. 1987).

Plaintiff, relying on *Nationstar Mtge, LLC v. MacPherson* [56 Misc3d 339 (Sup. Ct., Suffolk Cty., 2017)], argues that because Plaintiff’s right to accelerate the entire outstanding mortgage debt was subject to the borrower’s right, under certain circumstances, to de-accelerate that portion of the debt, Plaintiff’s right to accelerate the debt was subject to a condition precedent and the statute of limitations did not begin to run until the borrower’s right to de-accelerate was extinguished in accordance with the terms of the mortgage. This is the same position advanced by Plaintiff in opposition to the motion to dismiss and ultimately rejected by the Court. Plaintiff, in seeking a stay, asserts that it has a meritorious appeal, relying on *U.S. Bank N.A. v. Nail* [\_\_\_ Misc 3d \_\_\_, 2018 NY Slip Op. 32897[U] (Sup. Ct., Westchester Cty.)], *Wells Fargo Bank, N.A. v. Fetonti* [\_\_\_ Misc 3d \_\_\_, 2018 NY Slip Op. 30193[U] (Sup. Ct., Westchester Cty.)], *U.S. Bank Trust, N.A. v. Monsalve* [\_\_\_ Misc 3d \_\_\_, 2017 NY Slip Op. 32764[U] (Sup. Ct., Queens Cty.)], and *Nationstar, supra*.

While this motion was pending, any uncertainty about the merits of Plaintiff’s appeal was removed by the Appellate Division in *Bank of New York Mellon v. Dieudonne*, 171 AD3d 34 (2d Dept. 2019). In *Dieudonne*, the Court, in affirming Supreme Court’s dismissal of a foreclosure complaint as time-barred, unequivocally rejected the same argument made by Plaintiff herein. Moreover, the Second Department explicitly referenced the four cases relied upon by Plaintiff and instructed that they should no longer be followed. In light of *Dieudonne*, the Court finds that Plaintiff’s appeal lacks merit and, therefore, declines to grant a stay pending appeal.

Defendant's Cross-Motion

On or about January 25, 2019, subsequent to the Order, Plaintiff filed with the County Clerk an additional notice of pendency [*see* NYSCEF Docket No. 47]. Defendant cross-moves, pursuant to CPLR 6514(a) to cancel any current and/or additional notice of pendency. In light of the Court's denial of Plaintiff's motion for a stay pursuant to CPLR 5519(c), vacatur of the notice of pendency is mandatory. *See* CPLR 6514(a); *Da Silva, supra* at 442-443 [CPLR 6514(a) conditions a plaintiff's right to continuance of a notice of pendency during the pendency of an appeal upon the issuance of a discretionary stay under 5519(c)]. Accordingly, any notice of pendency filed by Plaintiff in this matter is hereby cancelled.

Defendant's cross-motion for sanctions and/or attorney's fees is denied. There has been no showing that Plaintiff's motion was made primarily to harass or maliciously injure or was undertaken primarily to delay or prolong the litigation [*see* 22 NYCRR §130-1.1(c)]. Moreover, Plaintiff's motion was not completely without merit in law because, at the time Plaintiff filed its motion, the argument and cases relied upon by Plaintiff had not yet been invalidated by *Dieudonne*.

The Defendant's motion for an award of attorney's fees and costs pursuant to CPLR 6514(c) is also denied. At the time the notice of pendency was filed by Plaintiff, this Court had temporarily stayed enforcement of the Order and Plaintiff had filed a notice of appeal. Under these circumstances, including the fact that Plaintiff's filing of the additional notice of pendency was not improper at the time of the filing, and that Defendant first raised its request for relief under 6514(c) in its reply papers, the Court finds that an award of costs and expenses pursuant to CPLR 6514(c) is not warranted. *DeCaro v. East of East, LLC*, 95 AD3d 1163 (2d Dept. 2012).

Finally, Defendant's cross-motion to resettle or amend the Order by removing the clause "pursuant to RPAPL §1521(1)" from the third decretal paragraph is denied. The statute under

which Defendant seeks relief – CPLR 5019(a) – permits the Court to correct a judgment which contains a mistake or defect not affecting a substantial right of a party. It does not permit the type of substantive change to the Order sought by Defendant. *See Joseph v. Baksh*, 137 AD3d 1220, 1221 (2d Dept. 2016) (“Resettlement is generally intended to remedy clerical errors or clear mistakes in an order or judgment when there is no dispute about the substance of what that order or judgment should contain”); *Simon v. Mehryari*, 16 AD3d 664 (2d Dept. 2005) (resettlement cannot be used to obtain a ruling not adjudicated on the original motion or to modify the decision which has been made).

Based upon the foregoing, it is hereby

ORDERED, that Plaintiff’s motion is denied in its entirety; and it is further

ORDERED, that the temporary stay issued by this Court on January 25, 2019 is hereby vacated; and it is further

ORDERED, that Defendant’s cross-motion is granted to the extent that any notice of pendency filed by Plaintiff in this matter is hereby cancelled; and it is further

ORDERED, that, pursuant to CPLR 6514(a), the Dutchess County Clerk shall cancel any notice of pendency filed by Plaintiff in this matter; and it is further

ORDERED, that Defendant’s cross-motion is in all other respects denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 28, 2019  
Poughkeepsie, New York

  
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Hon. Peter M. Forman, A.J.S.C.

To: Austin Shufelt, Esq.  
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