

<b>Wells Fargo Bank, NA v Smart</b>
2020 NY Slip Op 30783(U)
March 10, 2020
Supreme Court, Queens County
Docket Number: 700435/16
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN  
Justice

IA PART 27

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

Index No. 700435/16

Motion

Date November 19, 2019

Plaintiff,

Motion

Cal. No. 42

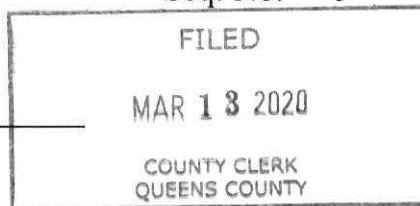
- against-

GLENFORD SMART, MARTY BROWN, and  
JANE SMITH,

Motion

Seq. No. 3

Defendants.



The following papers read on this motion by plaintiff, pursuant to CPLR 2221(e), for leave to reargue its prior motion for summary judgment, and upon reargument, for summary judgment.

Papers  
Numbered

- Notice of Motion - Affirmation - Exhibits..... EF Doc. #97-#139
- Affirmation in Opposition - Exhibits..... EF Doc. #147
- Reply Affirmation..... EF Doc. #148

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

In December 2006, Glenford Smart executed a note in favor of Option One Mortgage Corp. (Option One) in the principal amount of \$561,000.00, plus interest. As security for the note, Smart executed and delivered a mortgage to Option One on his real property known as 146-12 223<sup>rd</sup> Street, Springfield Gardens, New York (the subject property). The mortgage was assigned to plaintiff by assignment of mortgage executed on February 25, 2011.

Plaintiff commenced this action on January 14, 2016,<sup>1</sup> seeking foreclosure based upon a

<sup>1</sup>

Plaintiff previously commenced a foreclosure action against defendant, Smart, entitled *Wells Fargo Bank, N.A. v Smart* (Supreme Court, Queens County, Index No. 12439/2011). The complaint in that action was dismissed as asserted against all defendants (*see* order entered August 17, 2015).

claimed default in payment of the monthly mortgage installment due under the note and mortgage on December 1, 2009, and in addition, to reform the legal description of the subject property contained within the subject mortgage.

Defendant, Smart, served an answer, asserting various affirmative defenses and interposing counterclaims. Plaintiff served a reply to the counterclaims. The remaining defendants have not appeared or answered.

On February 13, 2017, plaintiff moved (Mot. Seq. No. 1) for summary judgment against defendant, Smart, to strike his answer and dismiss the affirmative defenses and counterclaims asserted therein, for leave to discontinue the action against the “John Doe” defendants and for leave to 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 the non-appearing defendants and against defendant Smart for his failure to appear at the settlement conference held on April 13, 2016.

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 defenses, and the second, third and fourth counterclaims, asserted by defendant Smart in his answer, was granted.

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. By that order, plaintiff was directed to appear for a final status conference on August 29, 2018, and “to file an application seeking an Order of Reference or the next applicable application by said conference date.”

On August 28, 2018, plaintiff moved (Mot. Seq. No. 2) for summary judgment against defendant, Smart, to strike the answer of defendant, Smart, and the remaining affirmative defenses and counterclaim, 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.

By order dated May 16, 2019, and entered on June 14, 2019, 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, were denied. The 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 to amend the caption accordingly, was granted to the extent of granting plaintiff leave to amend the caption deleting reference to defendants, “John Doe #3” through “John Doe #12.” That branch of the motion by plaintiff for leave to enter a default judgment against all non-appearing defendants was 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 was denied. The court determined that the branch of the motion by plaintiff for summary judgment against defendant, Smart, constituted a successive motion for summary judgment. The court also noted that to the extent plaintiff sought renewal of its first motion for summary judgment (Mot. Seq. No. 1), predicated upon additional evidence, plaintiff had failed to demonstrate a reasonable justification for its failure to present such information to establish *prima facie* entitlement to judgment as a matter of law in the first instance. The court further noted that plaintiff failed to show the new evidence would have changed the prior determination with respect to the issue of standing.

Plaintiff now moves for leave to reargue its prior motion (Mot. Seq. No. 2). Defendant, Glenford Smart, opposes the motion. The remaining defendants have not appeared in relation to the motion.

On a motion for leave to reargue, the movant must demonstrate matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[d][2]). A motion for leave to reargue is addressed to the sound discretion of the court (*see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]; *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2014]).

Plaintiff contends the court overlooked or misapprehended facts and law, when denying the prior motion (mot. Seq. No. 2), insofar as the order of J. Schulman dated April 11, 2018, in effect, directed plaintiff to file a motion for summary judgment. In addition, plaintiff asserts that the court improvidently exercised its discretion in denying the motion (mot. Seq. No. 2) as a successive motion. According to plaintiff, the court should have considered the motion on its merits, because it was substantively valid, and would have furthered of the ends of justice and eliminated an unnecessary burden on the resources of the court.

The court did not misapprehend the facts or law (*see* CPLR 2221[a]). The April 11, 2018 order did not reference anything regarding the first motion by plaintiff (Mot. Seq. No. 1) and resulting order, and did not direct, or grant leave, to plaintiff to make another motion for summary judgment. Based upon the procedural history of the case up to April 11, 2018, plaintiff was obliged, pursuant to the order of that date, to file a note of issue by August 29, 2018, as the next applicable step. Furthermore, successive motions for the same relief burden

the courts and contribute to the delay and cost of litigation (*see Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017 [2d Dept 2020]). “A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance” (*id.*).

Accordingly, the motion by plaintiff for leave to reargue the prior motion (Mot. Seq. No. 2) is denied.

Dated: March 10, 2020

  
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DARRELL L. GAVRIN, J.S.C.

FILED  
MAR 13 2020  
COUNTY CLERK  
QUEENS COUNTY