

Rodriguez v Federal Natl. Mtge. Assn.
2020 NY Slip Op 33455(U)
October 15, 2020
Supreme Court, Kings County
Docket Number: 508453/19
Judge: Edgar G. Walker
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At an IAS Term, Part 90, of the Supreme Court of the State of New York, held in and for the County of Kings, on the 15th day of October, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice,

-----X
JOSE RODRIGUEZ,

Plaintiff,

- against -

Index No. 508453/19

FEDERAL NATIONAL MORTGAGE ASSOCIATION and CIT BANK, NATIONAL ASSOCIATION,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations)

and Exhibits Annexed _____

36-37

Opposing Affidavits (Affirmations) _____

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Reply Affidavits (Affirmations) _____

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Upon the foregoing papers, defendant Federal National Mortgage Association (Fannie Mae) moves for an order, pursuant to CPLR 2221 (d), granting it leave to reargue the decision and order of this court dated May 29, 2020, and upon the grant of reargument, restoring the counterclaims contained in its answer dated July 29, 2019.

Fannie Mae's motion is granted to the extent that reargument is granted and, upon reargument, this court's decision and order dated May 29, 2020 is vacated only to the extent

that: (1) the court dismissed the counterclaims premised on unjust enrichment and equitable lean causes of action relating to the payment of insurance costs and taxes on or after April 15, 2013; (2) those causes of action are reinstated to that limited extent; and (3) the May 29, 2020 decision and order is otherwise adhered to. This determination is made without prejudice to plaintiff moving, after issue has been joined, for summary judgment dismissing those counterclaims--including on grounds relating to the voluntary payment doctrine.

This action and counterclaims arise from a note (Note) and mortgage (Mortgage) executed on December 30, 2005 by plaintiff and predecessors in interest to Fannie Mae. The Mortgage served as a lien on a property purchased by plaintiff and the loan proceeds provided under the Note were used to by plaintiff to pay the purchase price for this property and satisfy liens encumbering the property. Plaintiff defaulted on payments due on the Note as of June 1, 2009, and, pursuant to the terms of the Note and Mortgage, Fannie Mae's predecessor in interest indicated in paragraph seven of the complaint in the prior foreclosure action that was commenced on December 6, 2009 that it had elected to accelerate the amount due under the Note and Mortgage. This prior action was conditionally dismissed pursuant to CPLR 3216 in an order dated March 10, 2015 (Knipel, J.). Subsequent motions to vacate the dismissals were denied in orders (Spodek, J.) dated February 14, 2017 and May 15, 2018.¹

¹The factual background is more fully detailed in this court's May 29, 2020 decision and order.

In a summons and complaint filed on April 15, 2019, plaintiff, pursuant to RPAPL Article 15, seeks to cancel and discharge the record of the mortgage encumbering a parcel of real property owned by him on the ground that the debt it secures is unenforceable pursuant to the applicable statute of limitations in CPLR 213 (4). In its answer, Fannie Mae, which has been assigned the mortgage and note at issue, has pleaded counterclaims for unjust enrichment, an equitable mortgage, an equitable lien, a constructive trust, and equitable subrogation all premised on plaintiff's failure repay the loan proceeds and interest due under the note. In addition, the unjust enrichment, equitable mortgage, equitable lien and equitable subrogation counterclaims are premised on allegations that Fannie Mae has continued to pay insurance and taxes for which plaintiff is liable.

Plaintiff thereafter moved, pursuant to CPLR 3211 (a) (5), for an order dismissing the counterclaims on the ground that they are barred by the statute of limitations. This court, in an order dated May 29, 2020, granted the motion, finding, for the most part, that Fannie Mae's counterclaims were untimely under the applicable statute of limitations of six years that applies to each of the respective counterclaims. The court, however, noted that the unjust enrichment and equitable lien causes of action are not untimely to the extent that they are premised on the payment of real estate taxes and insurance that occurred within six-years of the commencement of this action. Nevertheless, the court found that Fannie Mae failed to state a cause of action for unjust enrichment with respect to those payments based on the voluntary payment doctrine, and dismissed that cause of action pursuant to CPLR 3211 (a) (7). The court also found that Fannie Mae failed to plead essential elements of equitable lien cause of action, and dismissed it pursuant to CPLR

3211 (a) (7).² If the unjust enrichment cause of action is reinstated, Fannie Mae further contends that the equitable mortgage and equitable lien causes of action should likewise be reinstated.³

In moving for reargument, Fannie Mae argues that it was improper for the court to find that the unjust enrichment cause of action relating to the real estate tax and insurance payments to be insufficient based on the voluntary payment doctrine because plaintiff only moved to dismiss on statute of limitations ground pursuant to CPLR 3211 (a) (5) and did not raise an issue relating to the voluntary payment doctrine argument in moving to dismiss. In reaching the issue of the sufficiency of the complaint, the court relied on the proposition that, where there is a general relief clause, a court can decide the motion on a ground not specifically raised by the parties as long as that ground is not dramatically different from the relief requested (*see Matter of Velez v City of New York*, 174 AD3d 813, 814 [2d Dept 2019]). The Appellate Division, Second Department, however, has held that this rule only applies with respect to non-dispositive motions such as a motion relating to discovery (*compare Bowman v Bowman*, 130 AD3d 661, 663-664 [2d Dept 2015]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 52-55 [2d Dept 2014] *with North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 150 AD3d 865, 867-868 [2d Dept 2017]; *Tirado v Miller*, 75 AD3d 153, 157-158 [2d Dept 2010]). With respect to dispositive motions, the Second Department has emphasized that such motions should not

² The court also alternatively found that defendants pleadings failed to state causes of action for equitable mortgage, equitable lien, constructive trust and equitable subrogation.

³ Fannie Mae has made no arguments specifically addressing the counterclaims for a constructive trust and equitable subrogation.

be granted or denied on grounds that have not been raised or argued by the parties because it deprives the parties affected by the determination an opportunity to address the ground relied upon by the court (*see Grucci v Grucci*, 174 AD3d 790, 791 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Gambino*, 153 AD3d 1232, 1233 [2d Dept 2017]; *Rosenblatt*, 119 AD3d at 54).

In its own review of the parties' papers on the prior motion, the court notes that plaintiff did raise the issue of voluntary payment doctrine in his reply papers. However, just as with a court raising issues sua sponte, a court generally should not consider arguments raised for the first time in reply because the party opposing the motion does not have an opportunity to address those arguments (*see Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1022 [2d Dept 2019]; *Catnap, LLC v Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1105 [2d Dept 2019]; *Gottlieb v Wynne*, 159 AD3d 799, 801 [2d Dept 2018]; *Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 624-625 [2d Dept 2009]). In view of this caselaw, the court overlooked or misapprehended the applicable law to the extent that it decided portions of the motion on grounds not raised by plaintiff in his original motion papers and not addressed until his reply papers. Fannie Mae has thus demonstrated that reargument is warranted.⁴

⁴ The court notes that in opposing the instant motion, plaintiff asserts that the court had discretion to consider the voluntary payment doctrine in dismissing the counterclaims, citing to *Matter of Dental Socy. of State of N.Y. v Carey* (92 AD2d 263, 264 [3d Dept 1983], *affd* 61 NY2d 330 [1984]) and *Cheslowitz v Board of Trustees of the Knox Sch.* (156 AD3d 753, 756 [2d Dept 2017]). While the courts in *Matter of Dental Socy. of State of N.Y.* and in *Cheslowitz* state that a court has discretionary authority to decide motions on grounds not raised by the parties, the courts in both of those decisions found that the trial court abused its discretion in granting motions on grounds not raised by the parties where the opposing party did not have an opportunity to address the grounds relied upon by the court before the determination of the

Fannie Mae's counterclaims are all equitable claims for which the statute of limitations is six years, and for which the statute of limitations accrues upon the happening of the wrongful act giving rise to a duty of restitution (*see Saddharma Cakra Buddhist Assn., Inc. v Sheng Chien Chen*, 179 AD3d 728, 729 [2d Dept 2020]; *U.S. Bank N.A. v Salem*, 164 AD3d 1289, 1290 [2d Dept 2018]; *Wells Fargo Bank N.A. v Burke*, 155 AD3d 668, 670 [2d Dept 2017]; *U.S. Bank N.A. v Gestener*, 103 AD3d 962, 963 [3d Dept 2016]; *De Laurentis v De Laurentis*, 47 AD3d 750, 751-752 [2d Dept 2008]). With respect to the equitable mortgage and equitable subrogation causes of action, they accrued when Fannie Mae's predecessor in interest recorded the respective mortgage (*U.S. Bank N.A. v Salem*, 161 AD3d at 1290; *Wells Fargo Bank N.A. v Burke*, 155 AD3d at 670). Even if the equitable mortgage and equitable subrogation causes of action did not accrue at the time of the recording, they accrued no later than December 6, 2009, when Fannie Mae's predecessor in interest accelerated the payments due under the Note following plaintiff's default (*see Matter of Isensee*, 7 AD2d 224, 225-226 [1st Dept 1959]; *see also Ditech Fin. LLC v Naidu*, 175 AD3d 1387, 1389 [2d Dept 2019]).⁵ Similarly, for the unjust enrichment and equitable lien causes of action, to the extent that they are premised on the payments due under the note, and for the constructive trust claim (which, as pleaded by Fannie Mae,

motion (*see Cheslowitz*, 156 AD3d at 756; *Matter of Dental Socy. of State of N.Y.*, 92 AD2d at 264).

⁵ The fact that Fannie Mae has alleged that it made payments of taxes and insurance as part of the equitable mortgage and equitable subrogation causes of action cannot render those causes of action timely as both causes of action depend on rights emanating from the original note and mortgage or from equitable equivalents (*see Filan v Dellaria*, 144 AD3d 967, ___ [2d Dept 2016]; *see Patmos Fifth Real Estate v Mazl Building LLC*, 169 AD3d 453, 453 [1st Dept 2019]; *Hamlet at Willowcreek Dev. Co. LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 108 [2d Dept 2009]).

relates solely to payments due under the note), the wrongful act requiring restitution occurred no later than plaintiff's default and the subsequent acceleration of the payments due under the Note on December 6, 2009 (*cf. Saddharma Cakra Buddhist Assn., Inc.*, 179 AD3d at 729; *see also Ditech Fin. LLC v Naidu*, 175 AD3d at 1389; *Benedict v Whitman Breed Abbott & Morgan*, 77 AD3d 867, 869 [2d Dept 2010] [constructive trust not available to enforce a legal right that is itself barred by the statute of limitations]).

As plaintiff's action was not commenced until April 15, 2019, a date more than six years after any applicable accrual date, as Fannie Mae has not submitted any evidentiary proof that it or its predecessors in interest timely revoked the acceleration (*see Ditech Fin., LLC v Naidu*, 175 AD3d at 1389), and as Fannie Mae has failed to identify any applicable toll or exception to the statute of limitations, the unjust enrichment claim and the equitable lien claims are untimely to the extent that they relate to the payments due under the Note, and the equitable mortgage, constructive trust, and equitable subrogation causes of action are untimely. Accordingly, plaintiff is entitled to dismissal of the counterclaims to that extent on statute of limitations grounds.

While the unjust enrichment and equitable lien causes of action are untimely to the extent that they relate to tax and insurance payments made prior to April 15, 2013, those causes of action are timely with respect to such payments made on or after that date (*see Wells Fargo Bank, N.A. v Burke*, 155 AD3d at 671). Since the dismissal of those counterclaims with respect to tax and insurance payments made on or after April 15, 2013 rested solely on the sufficiency of the pleadings with respect to those causes of action, Fannie Mae is entitled to reinstatement of the counterclaim for unjust enrichment and the

declaration of an equitable lien, but only to the extent that they are premised on Fannie Mae's payment of taxes and insurance within the six years prior to the commencement of this action. In so ruling, the court makes no determination as to the sufficiency of those causes of action, and makes this ruling without prejudice to plaintiff moving for summary judgment dismissing the counterclaims (*see Pentacon, LLC v 422 Knickerbocker, LLC*, 165 AD3d 829, 830 [2d Dept 2018]; *Borawski v Abulafia*, 140 AD3d 817, 817-818 [2d Dept 2016]).

This constitutes the decision and order of the Court.

ENTER:



J. S. C.

HON. EDGAR G. WALKER

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