

Gravesend LLC v Wells Fargo Bank, N.A.

2020 NY Slip Op 33725(U)

November 6, 2020

Supreme Court, Kings County

Docket Number: 520412/2016

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of NOVEMBER, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X
GRAVESEND LLC,

Plaintiff,

Index No.: 520412/2016
Decision and Order

-against-

WELLS FARGO BANK, N.A.

Defendants,
-----X

The following papers NYSCEF Doc #'s 81 to 113 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	81-86; 87-100
Opposing Affidavits (Affirmations)_____	105-109; 111
Reply Affidavits(Affirmations)_____	112
Memorandum of Law_____	101; 110; 113

After having heard Oral Argument on SEPTEMBER 9, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 2221(d) granting leave to reargue the August 26, 2019 Decision issued by this Court, upon granting leave, granting summary judgment to Plaintiff to the extent of vacating and discharging the December 16, 2002 mortgage (the "First Mortgage") recorded against the property known as and located at 1805 Gravesend Neck Road, Brooklyn, New York (the "Property"). (MS#4). Defendant

opposes the same. Defendant cross-moves moves pursuant to CPLR 2221(e) granting leave to renew their prior motion for summary judgment dated October 31, 2018. (MS#5). Plaintiff opposes the same.

ANALYSIS

CPLR 2221 in pertinent part states: “(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: “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.

Under the caselaw existing prior to the 1999 amendments, a motion for re-argument was often used when there was a change in the law after the prior order. CPLR 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue, is the proper expedient when the motion is based on a change in the law that occurs while the case is still subjudice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. See *Siegel, New York Practice* 449 (4th ed. 2005). The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to

change its mind. NY CPLR 2221.

In the present case, plaintiff contends that in deciding the previous motion, the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law regarding the acceleration of the first mortgage, and the right of reinstatement clause. The Court agrees.

Defendant in opposition contends that the First Mortgage was not accelerated and statute of limitations was not triggered by the filing of the complaint in the Wachovia Foreclosure Action because no judgment of foreclosure was issued. Additionally, they contend without the issuance of a judgment of foreclosure in the Wachovia Foreclosure Action, the right of reinstatement was not extinguished, the First Mortgage was not accelerated and the statute of limitations did not begin to run.

The statute of limitations on a mortgage foreclosure is six (6) years (See NY CPLR 213). The facts of the present case establish, the first mortgage was properly accelerated by Wachovia when it filed the Complaint in the Wachovia Foreclosure Action on August 25, 2009. The Statute of Limitations to enforce the first mortgage expired on August 25, 2015, six years after acceleration of the first mortgage, and defendant first asserted its claims regarding the first mortgage in this action in 2016, after the time do so had expired. As such, defendant is time-barred from enforcing the First Mortgage.

Contrary to the defendants contentions, the Appellate Division, Second Department recently rejected the reasoning defendant relies on regarding the right to reinstatement. In *Bank of New York Mellon v. Dieudonne*, 171 AD3d 34, 40, 96 NYS3d 354 (2 Dep't 2019), the Appellate Division, Second Department granted defendant's

motion to dismiss the foreclosure action as time barred finding that “the right of reinstatement is not a condition precedent to acceleration unless the mortgage specifically conditions reinstatement upon acceleration or upon reinstatement” *Id.* The Second Department went on to state “**to the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed**” (see *U.S. Bank N.A. v Nail*, 2018 NY Slip Op 32897 [U] [Sup Ct, Westchester County 2018]; *Wells Fargo Bank, N.A. v Fetonti*, 2018 NY Slip Op 30193[U] [Sup Ct, Westchester County 2018]; *HSBC Bank, USA, NA v Margineanu*, 61 Misc 3d 973 [Sup Ct, Suffolk County 2018]; *U.S. Bank Trust, N.A. v Monsalve*, 2017 NY Slip Op 32764[U] [Sup Ct, Queens County 2017]; *Nationstar Mtge., LLC v MacPherson*, 56 Misc 3d 339 [Sup Ct, Suffolk County 2017]); Quoting, *Bank of New York Mellon v. Dieudonne*, 171 AD3d 34, 40, 96 NYS3d 354 (2019), leave to appeal denied, 34 NY3d 910, 141 NE3d 956 (2020).

In the present case, the default provision does not provide that it is a condition precedent to acceleration (See Articles 15 and 16 of the first Mortgage). Nor does the reinstatement provision in the mortgage include any language indicating that it serves as a condition precedent to the right to accelerate the outstanding debt. (See Articles 15 and 16 of the first Mortgage); (see generally *Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d at 771-772). As such, it is clear the first mortgage should be vacated and discharged as the statute of limitations has expired.

Defendants further contends even if the first mortgage should be discharged they still would have a claim for an equitable lien. This is the first time defendant attempts to request such relief in opposition to a motion filed by the plaintiff, and such relief cannot be requested for the first time in a opposition to another parties motion to re-argue.

Therefore, the court will not address this argument.

Next, the Court shall address defendants cross-motion to renew. It is well established that a party seeking leave to renew shall provide new or additional evidence which was not presented in support of its initial motion and justification for failure to include it (See CPLR 2221(e)). In the present case, defendant has failed to proffer any new or additional evidence that was not presented in support of its initial motion. As such, defendant's motion to renew is hereby denied.

Accordingly, plaintiff's motion to reargue is hereby granted and upon re-argument, plaintiff's request for summary judgment is hereby granted to the extent that the December 16, 2002 mortgage (the "First Mortgage") recorded against the property known as and located at 1805 Gravesend Neck Road, Brooklyn, New York (the "Property") is hereby vacated and discharged. (MS#4). Defendants cross-motion pursuant to CPLR §2221(e), to renew their prior motion for summary judgment dated October 31, 2018 is hereby denied, for the reasons stated above. (MS#5).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
November 6, 2020


HON. RICHARD VELASQUEZ