

Bank of N.Y. Mellon v Simpson
2020 NY Slip Op 33757(U)
November 12, 2020
Supreme Court, Suffolk County
Docket Number: 35068-2012
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 35068-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

Mot. Dates: 02/26/18 (Mot. Seq. #005 & 006)

03/12/18 (Mot. Seq. #007)

03/26/18 (Mot. Seq. #008)

05/18/18 (Mot. Seq. #009)

Submit Date: 05/31/18 (All); Conf. Date: 07/29/19 (All)

Mot. Seq.: #005 - MD

#006 - MotD

#007 - MD

#008 - MD

#009 - MD

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THE BANK OF NEW YORK MELLON FKA THE
BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWALT, INC.,
ALTERNATIVE LOAN TRUST 2006-27CB,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-27CB,

Plaintiff,

- against -

JEAN S. SIMPSON, GEORGE SIMPSON,
NASSAU EDUCATORS FEDERAL CREDIT UNION,
PALISADES ACQUISITION XVILLC HOUSEHOLD
GE ORCHARD, MYRNA GOLDEN, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
ACTING SOLELY AS A NOMINEE FOR
METROPOLITAN NATIONAL BANK MORTGAGE
COMPANY, LLC, LEWIS OIL COMPANY INC.,

Defendants.
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(Additional Parties - See Attached)

Upon the following papers read on these motions which are consolidated for the purpose of this decision, for orders granting decedent's application to file a late answer (Mot. Seqs. #005,007 and 009), defendant and decedent's motion for dismissal (Mot. Seq. # 006) and an application to intervene or consolidate (Mot. Seq. #008); Mot. Seq. # 005: decedent's Notice of transmittal of Dr. Moreta Letter: 1-7; Mot. Seq. # 6: Notice of Motion and supporting papers: 1-20; opposition and supporting papers: 21-34; reply (termed "opposition to opposition"): 35-42; and plaintiff's letter and sur-reply: 43-50; Motion Seq. #7 & 9: decedent's notice of motion and supporting papers: 1-18; plaintiff's affirmation in opposition and supporting papers: 19-30; Mot. Seq. #008: Notice of motion and supporting papers: 1-13; plaintiff's affirmation in opposition and supporting papers: 14-37; decedent 38-42; affirmation in opposition of counsel to Charlotte Simpson a defendant in Index # 620355/2016: 43-50; and Plaintiff's letter of August 1, 2019, supplemental affirmation and supporting papers: 1-8; and Defendant's email of November 12, 2020 and attached notices: 1-3; and

UPON an in court, in person conference scheduled and held pursuant to the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, on October 29, 2020 at

11:15 AM at which plaintiff's counsel appeared but self-represented defendant Jean S. Simpson failed to appear, and a second in court, in person conference held on November 10, 2020 at 11:15 AM at which self-represented defendant Jean S. Simpson again failed to appear, the court having complied with the requirements of AO/157/20; and

UPON an emailed communication from defendant Jean S. Simpson dated November 12, 2020 belatedly requesting an adjournment of the AO/157/20 conferences set for October 29, 2020 and November 10, 2020, which is denied by the court; it is

ORDERED that pursuant to the provisions of AO/115/20, AO/121/20 and AO/254/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF; and it is further

ORDERED that as evidence presented to the court establishes that self represented defendant in default, George Simpson, decedent, passed away on April 2, 2019 and that counsel for plaintiff The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-27CB, Mortgage Pass-Through Certificates, Series 2006-27CB has applied to the court by its supplemental affirmation to discontinue the action against decedent George Simpson, representing that it does not seek to continue such claims against decedent's estate, that application is granted and the caption is accordingly amended, as set forth below; and it is further

ORDERED that as plaintiff The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-27CB, Mortgage Pass-Through Certificates, Series 2006-27CB's action against decedent George Simpson, or his estate, has been discontinued and dismissed, decedent's motions seeking to file a late answer (Mot. Seq. #005, 007 and 009) are denied as moot; and it is further

ORDERED that the portion of the combined motion of decedent and his wife, self-represented defendant Jean S. Simpson (Mot. Seq. #006), seeking reargument/renewal of their prior motion to dismiss (Mot. Seq. #002) plaintiff The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-27CB, Mortgage Pass-Through Certificates, Series 2006-27CB's complaint as to decedent is denied as moot; and it is further

ORDERED that the portion of Mot. Seq. #006 by self represented defendant Jean S. Simpson seeking reargument/renewal of her prior motion to dismiss plaintiff The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-27CB, Mortgage Pass-Through Certificates, Series 2006-27CB's complaint is denied, as is her request for sanctions against plaintiff raised for the first time in reply; and it is further

ORDERED that the motion by Alan R. Feurstein, a judgment creditor of decedent George Simpson to intervene in this action or to consolidate this action with another action he has pending under Index # 620352/2016 (Mot. Seq. #008) is denied; and it is further

ORDERED that in light of the discontinuance against decedent George S. Simpson, the caption in this action is amended, and shall now appear as follows:

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THE BANK OF NEW YORK MELLON FKA THE BANK OF
NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS
CWALT, INC., ALTERNATIVE LOAN TRUST 2006-27CB,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-27CB,

Plaintiff,

- against -

JEAN S. SIMPSON, NASSAU EDUCATORS FEDERAL
CREDIT UNION, PALISADES ACQUISITION XV LLC
HOUSEHOLD GE ORCHARD, MYRNA GOLDEN,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., ACTING SOLELY AS A NOMINEE FOR
METROPOLITAN NATIONAL BANK MORTGAGE
COMPANY, LLC, LEWIS OIL COMPANY INC.,

Defendants.

-----X
;and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of this order, and all further proceedings are to be under the amended caption; and it is further

ORDERED that as this court is being involuntarily retired as of December 31, 2020, in order to schedule the limited issue trial set by the order of November 17, 2017, this action is set for a conference before another justice of this court to be assigned on **January 14, 2021 at 9:30 AM.**

This is an action to foreclose a mortgage on residential property known as 18 Netz Place, Flanders, Suffolk County, New York ("the property") given by defendants Jean S. Simpson ("defendant") and George Simpson ("decedent") to Metropolitan National Bank Mortgage Company, LLC ("Metropolitan"), a predecessor in interest to plaintiff The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-27CB, Mortgage Pass-Through Certificates, Series 2006-27CB ("plaintiff"), to secure a note given by defendant to Metropolitan at the same time. The prior history of this action is set forth in the court's decision and order of November 17, 2017, which denied defendant and decedent's motion to dismiss (Mot. Seq. #002) and granted plaintiff's motion seeking to set the default of the non-answering, non-appearing defendants, including decedent, but only granted plaintiff partial summary judgment dismissing all of defendant's affirmative defenses except her sixth affirmative defense, setting the action for trial limited to proof of compliance with mailing of the notice required by RPAPL §1304 and compliance with the filing requirements of RPAPL § 1306 as they relate to defendant.

Plaintiff filed a note of issue on January 9, 2018, and subsequently Alan R. Feurstein ("Feurstein"), a judgment creditor of decedent George Simpson moved to intervene in this action or to consolidate this

action with another action he had pending under Suffolk County Index #620352/2016 to enforce his judgment against decedent and defendant for an alleged invalid transfer of decedent's interest in the property to defendant in 2010. The court rejected Feurstein's motion by order dated March 14, 2018 for failure to submit affidavits of service (Mot. Seq. #004). Rather than attempting to remedy this defect, Feurstein instead filed another motion requesting the same relief on March 26, 2018 (Mot. Seq. #008).

The sequence of the actual filings of what the Clerk has denominated as Mot. Seq. #005, #007 and #009 by decedent and Mot. Seq. #006 by decedent and defendant are unclear. First, the stamped receipt by the Supreme Court of "Mot. Seq. # 005" is February 26, 2018, and it does not appear to be a separate motion, although termed "Notice of motion Transmittal of Dr. Moreta Letter," but rather a document in support of decedent's Mot. Seq. #007 seeking to file a late notice. But, although both "motions" were made returnable February 27, 2018, Mot. Seq. # 007 bears a court date stamp on the back of its last page of March 12, 2018. Meanwhile, decedent and defendant's "Notice of Motion Affecting Prior Order Dated November 17, 2017," (Mot. Seq. # 006) also returnable February 27, 2018, bears a Supreme Court stamp with the same time and date as "Mot. Seq. #005," February 26, 2018. Decedent's Motion Seq. # 009, also seeking to allow decedent to submit a late answer, and also stating in its notice of motion that it was returnable on February 27, 2018, bears three set of stamps, two dated February 15, 2018, the next April 27, 2018 and the third, May 18, 2018.

Whatever the sequence of Mot. Seq. #005, #007 and #009, plaintiff filed one opposition to all three, as well as filing separate opposition to Mot. Seq. #006, the joint motion of decedent and defendant pursuant to CPLR 2221 seeking reargument/renewal of their prior motion to dismiss. The court's computer records show Mot. Seqs # 0005 thru #009 were all submitted on May 31, 2018. After a series of conferences, by an order dated June 11, 2019 the court joined all the motions for a final conference on July 29, 2019. Having learned that decedent had passed away on April 2, 2019, all further action was stayed until either a personal representative of decedent was appointed, or plaintiff determined to discontinue the action against decedent, waiving any claim for a deficiency judgment against decedent's estate and continue it only against defendant as the remaining tenant by the entireties (*see* CPLR 1015[a]; *Manto v. Cerbone*, 71 AD3d 1099 [2d Dept 2010]; *Federal Natl. Mtge Assoc. v Connelly*, 84 AD2d 805 [2d Dept 1981]; *U.S. Bank, N.A. v Esses*, 132 AD3d 847 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Baymack*, 176 AD3d 905 [2d Dept 2019]).

BELATED APPLICATION TO ADJOURN AO/157/20 CONFERENCE DENIED

Before addressing the substantive issues in the motions before the court, the court addresses the email received today from defendant requesting an adjournment of the conferences set pursuant to AO/157/20 on October 29, 2020 and November 10, 2020 at 11:15 AM in person. The email does not indicate that defendant had any Covid related issues which prevented her from appearing or that would have an affect upon the disposition of the motions presently before the court. She enclosed with the email the notices she received which were dated October 7, 2020 and does not explain why there was no attempt to contact the court, or plaintiff, before either conference to advise that she would be unavailable other than to state that she has been "in and out" of medical facilities starting October 17, 2020. As the requirements of AO/157/20 were met upon her failing to appear for the second conference on November 10th, the court finds that the requirements of the AO have been met. Additionally, considering the fact that plaintiff is discontinuing against decedent, that the remaining issues before the court in this 2012 foreclosure action are

resolved below without any relationship to the Covid Crisis or issues involved therein, that there is no merit to defendant's arguments in her only motion (Mot. Seq. #006), which is in no way affected by the Covid Crisis, and that the limited issue trial set by the order of November 17, 2017 remains to be held, the court denies her belated application.

DISCONTINUANCE AGAINST DECEDENT GRANTED

By supplemental affirmation, dated August 1, 2019 plaintiff determined not to proceed against decedent's estate, agreeing to dismiss the action against decedent, in part as it was only defendant who signed the underlying note and as such was the only party against whom a deficiency judgment could be obtained. In support of its application, plaintiff submitted a copy of decedent's death certificate, a copy of the deed to the property dated July 5, 2006 executed to decedent and defendant, a copy of the mortgage executed by decedent and defendant, and the note executed by defendant. Although the copy of the deed does not refer to decedent and defendant as husband and wife, the copy of the mortgage does, as does decedent's death certificate (albeit by her maiden name). There is no issue raised by any party that decedent and defendant were not husband and wife at the time that title was taken in the property and that they took title as such as tenants by the entireties.

The court grant's plaintiff's application to discontinue the action against decedent and amends the caption as indicated above to reflect the same. As the action against decedent is discontinued, decedent's pending motions, Mot. Seq. #005, #007 and #009 are denied as moot.

That portion of the joint motion of decedent and defendant (Mot. Seq. #006) as to decedent's interests, seeking reargument and renewal, and upon the same, dismissal of plaintiff's complaint, is denied as moot. The court will address that portion of this motion relating to defendant's claims.

MOTION TO DISMISS DENIED

To the extent that defendant's motion (Mot. Seq. #006) seeks renewal addressing the court's decision and order of November 17, 2017, which denied defendant and decedent's motion to dismiss (Mot. Seq. #002), it is denied. Leave to renew must be on new facts not available at the time of the prior motion or a change in the law since the original decision that would change the court's determination (CPLR 2221 [e] [2]), or, in the court's discretion, upon facts known at the time to the movant but not presented, but for which movant must establish reasonable justification for not having presented those facts originally (CPLR 2221 [e] [3]; see *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585 [2d Dept 2012]; *J. P. Morgan Chase Bank, N.A. v Novis*, 157 AD3d 776 [2d Dept 2018]; *JPMorgan Chase Bank v Rosa*, 169 AD3d 887 [2d Dept 2019]). As defendant's submission meets none of these criteria it is denied.

To the extent that defendant's motion seeks to reargue the court's decision and order of November 17, 2017, on a motion to reargue, movant must show the court overlooked, misapprehended relevant facts or misapplied the law at time of the prior motion (CPLR 2221 [d]). If movant fails to demonstrate that, the motion should be denied (see *J. P. Morgan Chase Bank, N.A. v Novis*, 157 AD3d 776 [2d Dept 2018]). Here, upon granting reargument, the court reaffirms its prior decision.

Defendant fails to understand that the decision in Mot. Seq. #001 by Justice Mackenzie denying plaintiff's application merely held that upon the proof submitted to her plaintiff had not established its standing as a matter of law so as to entitle it to summary judgment dismissing that affirmative defense (see *HSBC Bank USA, National Association v Gilbert*, 120 AD3d 756 [2d Dept, 2014]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *US Bank, N. A. v Echevarria*, 171 AD3d 979 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Conrado*, 179 AD3d 639 [2d Dept 2020]). Defendant incorrectly equates Justice Mackenzie's finding with a holding that plaintiff had no standing. In order for a defendant to successfully dismiss an action on the issue of plaintiff's standing, defendant bears the burden of establishing that plaintiff's lack of standing as a matter of law (see *US Bank, N. A. v Cohen*, 156 AD3d 844 [2d Dept 2017]), failure to do so requires denial of defendant's motion (see *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Lefkowitz*, 171 AD3d 843 [2d Dept 2019]). Defendant's submissions in Mot. Seq. #001 and #002 failed to meet this standard, as do her submissions on this motion. As pointed out in the decision and order of November 17, 2017, plaintiff's submissions on that motion did establish its standing through an affidavit of a representative plaintiff's servicer, based upon personal knowledge of the business practices and procedures of plaintiff and review of books and business records maintained by plaintiff in the ordinary course of business that established facts of plaintiff's possession of the note and assignment on a date prior to commencement of the action. To the extent that some of that testimony may have been considered hearsay, as that was not objected to, such an argument is waived (see *Bank of New York Mellon v Gordon*, 171 AD3d at 202).

As to arguments made by defendant's submissions claiming that as plaintiff failed to establish its compliance with the requirements of RPAPL §§ 1304 and 1306 dismissal is required, defendant again misinterprets the law. In its decision of November 17, 2017, the court agreed that plaintiff failed to establish compliance with the requirements of those statutes, which is why the court set those issues for trial, but to succeed in dismissing plaintiff's complaint for failure to comply with those statutes defendant must do more than raise questions of fact as to that compliance, she must establish as a matter of law that they were not complied with (see *Wells Fargo Bank, N.A. v Moran*, 168 AD3d 1128 (2d Dept 2019); *CitiBank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Dennis*, 181 AD3d 864 [2d Dept 2020]). As defendant failed to do that in Mot. Seq. #002, and again in this motion, she has failed to meet this standard and, her motion to dismiss based upon non-compliance with these statutes must be denied. Those issues will be determined at trial.

INTERVENTION/CONSOLIDATION DENIED

The court's computer records show that Feurstein filed his action against defendant and decedent on December 14, 2016. He should have been aware of this action filed four years before at that time, and if he believed he had a valid basis to intervene in this action, he should have moved to do so promptly instead of waiting until February 27, 2018 to file his first motion to intervene, which was rejected by the court for a deficiency. Where a proposed intervenor with actual notice of the pending foreclosure action waited at least a year before moving to intervene, the intervenor's motion should be denied (see *JPMorgan Chase Bank, N.A. v Edelson*, 90 AD3d 996 [2d Dept 2011]; *US Bank National Assoc., Inc. v Bisono*, 98 AD3d 608 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Golding*, 123 AD3d 757 [2d Dept 2014]; *Castle Peak 2012-1 Loan Trust v Sattar*, 140 AD3d 2016 [2d Dept 2016]; *Federal Natl. Mtg. Assoc. v Sanchez*, 172 AD3d 1005 [2d Dept 2019]).

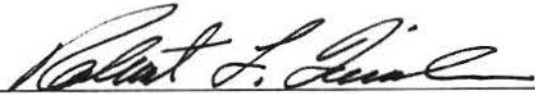
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Feurstein is not claiming an interest in title to the property, but is instead seeking to use its sale to satisfy a judgment against decedent and defendant, realizing full well that any claim he may have is well subordinate to that of plaintiff and will likely be subsumed if plaintiff is granted a judgment of foreclosure and sale. Further, unlike plaintiff, he is determined to proceed against decedent's estate to satisfy his judgment, having instituted proceedings in the Suffolk County Surrogate's Court for the appointment of an estate representative to do so. Further, Feurstein's action does not involve common questions of law or facts which would encourage the court to exercise its discretion to consolidate the actions pursuant to CPLR 602 (a) or grant intervention pursuant to CPLR 1013 (*see North Side Sav. Bank v Noyack Waterfront Associates*, 203 AD2d 439 [2d Dept 1994]). Additionally, the delay in the trial of the action brought about by inserting a representative of the estate into the Feurstein action, a party not necessary in this action, also militates against the court exercising its discretion in favor of intervention or consolidation. Finally, a review of the court's computer records show that Feurstein's action, pending before the Hon. Sanford Berland, A.S.J., is marked "stayed" (likely as a result of decedent's death and the need to substitute an estate representative) and there has been no active appearance date since May 9, 2019. Accordingly Feurstein's motion (Mot. Seq. #008) is denied.

That as this court is being involuntarily retired as of December 31, 2020, in order to schedule the limited issue trial set by the order of November 17, 2017, this action is set for a conference before another justice of this court to be assigned on January 14, 2021.

This constitutes the decision and order of the Court.

Dated: November 12, 2020



Hon. Robert F. Quinlan, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION

Additional Parties to be served:

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