

Citibank, N.A. v Feustel
2020 NY Slip Op 33925(U)
November 23, 2020
Supreme Court, Suffolk County
Docket Number: 035293/2012
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 035293/2012

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

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 11/04/19
ADJOURN DATES: 11/14/19;
12/19/19; 02/02/20; 03/20/20;
Mot. Seq.: # 008 -MD

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CITIBANK, NATIONAL ASSOCIATION AS TRUSTEE
FOR GSAA HOME EQUITY TRUST 2007-9, ASSET-
BACKED CERTIFICATES SERIES 2007-9,

GROSS POLOWY, LLC
Attorneys for Plaintiff
900 Merchants Concourse, Ste 412
Westbury, NY 11590

Plaintiff,

- against -

NOEL FEUSTEL; VICTORIA PETERSON; BRUCE A.
RICH AS TRUSTEE OF THE VILLAGE OF
SALTAIRE, SUFFOLK COUNTY, CAPITAL ONE
BANK USA, NA, GEORGE ROY HILL III, HILLARY
RICHARD AS TRUSTEE OF THE VILLAGE OF
SALTAIRE, SUFFOLK COUNTY; JENNIFER
FRIEDBERG; MIDLAND FUNDING OF DELAWARE
LLC AS SUCCESSOR IN INTEREST TO A CHASE
ACCOUNT, PATRICIA LAMA; ROBERT LYNN COX
II AS TRUSTEE OF THE VILLAGE OF SALTAIRE,
SUFFOLK COUNTY; SCOTT S. ROSENBLUM AS
MAYOR OF THE VILLAGE OF SALTAIRE,
SUFFOLK COUNTY SUSAN OKON, THE
INCORPORATED VILLAGE OF SALTAIRE,
SUFFOLK COUNTY, WELLS FARGO BANK, N.A.;

RONALD D. WEISS, ESQ.
Attorney for Defendant, Noel Feustel
734 Walt Whitman Road, Ste 203
Melville, NY 11747

Defendant(s).

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Upon the following papers numbered 1 to 56 read on this order to show cause by defendant to stay the foreclosure sale and reargue its prior cross-motion and opposition to plaintiff's motion for a judgment of foreclosure and sale; defendant's order to show cause and supporting papers: 1-37; and plaintiff's affirmation in opposition and supporting papers: 38-56; and

UPON the court having held a virtual phone conference on this action on October 15, 2020 in compliance with the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for both parties having appeared; it is further

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

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action into one in conformity with the requirements for electronic filing pursuant to NYSCEF; and it is further

ORDERED that defendant Noel Feustel's order to show cause to stay the foreclosure sale and to reargue his motion (Mot. Seq. #007) to "contest the referee's report oath and computations," for a hearing upon the referee's report, to discharge the referee, and in opposition to plaintiff Wells Fargo Bank, N.A.'s motion for a judgment of foreclosure and sale is denied.

PROCEDURAL HISTORY

This is an action to foreclose a mortgage on residential real property known as 39 South Snedecor Avenue, Bayport, Suffolk County, New York ("the property") given by defendants Noel Feustel and Victoria Petersen ("defendant-mortgagors") to Wells Fargo Bank, N.A. ("Wells"), a predecessor in interest to plaintiff Citibank, National Association as Trustee for GSAA Home Equity Trust 2007-9, Asset-Backed Certificate Series 2007-9 ("plaintiff") on May 23, 2007 to secure a note given the same day to Wells by defendant Noel Feustel ("defendant"). The prior history of this action is set forth in the court's prior decisions and orders in this action: the decision placed on the record after oral argument on August 1, 2016 granting plaintiff partial summary judgment (Mot. Seq. # 001) and denying defendant's cross-motion to dismiss (Mot. Seq. #002)(a copy of the transcript or the court's decision placed on the record was signed "So Ordered" by the court and filed with the Suffolk County Clerk on September 12, 2016); the decision and order of December 28, 2017 denying plaintiff's successive motion for summary judgment seeking to dismiss the issues set for a limited issue trial by the order of August 1, 2016 (Mot. Seq. #004) and denying defendant's motions to vacate the note of issue (Mot. Seq. #003) and for renewal and reargument (Mot. Seq. # 005); the court's decision of May 9, 2018 after the limited issue trial held on March 2, 2018 and April 12, 2018 granting judgment to plaintiff; and the court's decision and order of July 10, 2019 granting plaintiff a judgment of foreclosure and sale (Mot. Seq. #006) and denying defendant's motion to reject the referee's report, discharge the referee and to reduce interest, as well as defendant's opposition to plaintiff's motion (Mot. Seq. #007). As noted in the decision of July 10, 2019, defendant's present counsel substituted for prior counsel after the decision after trial of May 9, 2018, but before the filing of the motion for judgment of foreclosure and sale.

The court initially notes that although defendant's counsel's affirmation states that he represents both defendant-mortgagors, only defendant filed an answer in this action (see Defendant's Exhibit "D") and as Victoria Petersen is in default and has not moved to vacate that default, this motion is considered only as to defendant.

Defendant now moves by order to show cause to stay the foreclosure sale and to renew his opposition thereto and to reject the referee's report (Mot. Seq. #008), although he does not appear to attempt to reargue his claims for discharge of the referee or for a reduction of interest made in Mot. Seq. # 007. As set forth in defendant's counsel's affirmation (par. 23) defendant's counsel presented a prior order to show cause seeking the same relief before this court on October 4, 2019, which the court did not sign as upon review the court advised counsel on the record that the submission was insufficient to allow it to be granted, and as defendant represented that he had a potential short sale available, the court suggested that it would be in the best interests of all parties to explore such an opportunity before proceeding with the foreclosure sale

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scheduled for October 15, 2019. Subsequently, defendant presented the order to show cause (Mot. Seq. #008) to another justice of this court (Hudson, J.), having amended counsel's affirmation, submitted an "affirmation" from another attorney in defendant's counsel's firm and submitted an affidavit from defendant, all dated October 9, 2019.¹

Originally returnable November 4, 2019, the court scheduled oral argument on the application for November 7, 2019, which was then adjourned to November 14, 2019. On November 14, 2019 it appeared that there may still be a possible loss mitigation solution through a "short sale" and the oral argument was adjourned to December 19, 2019. By letters to the court the parties further adjourned the argument first to February 3, 2020 and then March 20, 2020. As a result of the courts closing operations because of the Covid-19 Crisis on March 16, 2020, the case was adjourned by the clerk's office to May 11, 2020; July 20, 2020 and September 9, 2020. Upon the lifting of the prohibition against deciding issues in foreclosure actions, the action was scheduled for a virtual phone conference with this court on October 15, 2020, at which time counsel for plaintiff and defendant appeared and compliance with the requirements of AO/157/20 were had. At that conference it was learned that the possible "short sale" had not been accomplished as a result of an issue with the valuation of the home, and although the court encouraged both parties to continue towards a "short sale," it was determined that the motion should be decided.

REARGUMENT DENIED

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 is to be denied (*see J. P. Morgan Chase Bank, N.A. v Novis*, 157 AD3d 776 [2d Dept 2018]). Defendant's submissions fail to meet this standard, and the court denies reargument.

In paragraph 16 of his affirmation counsel attempts to argue that the court misapprehended the facts as argued in defendant's prior motion, but clearly states that rather than the court misapprehending the facts defendant's counsel acknowledges that he misapprehended the facts and failed to set them forth in Mot. Seq. #007, stating "the underlying facts were not specifically spelled out, or perhaps even understood by Defendant's (*sic*) upon filing their opposition motion, prior to further investigatory research into Plaintiff's compliance with the Court's scheduling order of May 18, 2018 ("Scheduling Order")." That is not reargument, rather it is renewal.

It appears to the court that defendant's counsel only reflected upon the possible failure of plaintiff to comply with the terms of the court's decision of May 8, 2018 and the order of reference of August 16, 2018 after the court's decision denying defendant's motion to reject the referee's report (Mot. Seq. # 007) and his opposition to plaintiff's motion for a judgment of foreclosures (Mot. Seq. #006). The decision of July 10, 2019 addressed at length the conditions that the court set forth in the decision of May 8, 2018, and again in the order of reference dated August 16, 2018, to ensure that a fair process for issuing the judgment of foreclosure and sale was followed. The orders set forth a schedule for the submission of the order of reference, required plaintiff to provide defendant with the documents submitted to the referee, required defendant to file objections to those submissions with the referee, and stated that if defendant did not file

¹ The order to show cause in error refers to counsel's affirmation as dated October 1, 2019.

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objections with the referee he waived the opportunity to contest them in opposition to the judgment of foreclosure and sale before the court. The court set forth these directives to set a balance between protecting the rights of a defendant, requiring counsel to submit reasonable objections based upon facts, not speculation, having any necessary hearing before the court as the final arbiter based upon framed issues, and recent attempts by some defense counsel to turn a referee's hearing into a "mini-trial," causing unwarranted delay, as well as an unwarranted burden upon the referee. Upon a proper objection to plaintiff's failure to comply with the directives of the court, this court has denied a number of motions for judgment of foreclosure, with the right to renew upon complying with the directives. Following the procedures set forth in the court's order of reference would avoid a report based upon conclusory and unsubstantiated affidavits, or records that were not produced, unless waived by defendant's failure to object (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019] *Bank of New York Mellon v Graffi*, 172 AD3d 1148 [2d Dept 2019]; *Nationstar Mtge. LLC v Durante-Bolivard*, 175 AD3d 1308 [2d Dept 2019]; *US Bank, N. A. v Calabro*, 175 AD3d 1451 [2d Dept 2019]).

But, as noted in the decision of July 10, 2019, defendant's counsel made no claim that he did not receive a copy of the decision after trial, the order of reference, or the submissions by plaintiff to the referee, nor did defendant's counsel aver that plaintiff had not complied with the court's directives, nor was there any claim that defendant had complied with the directive of the order to submit objections to the referee.

Now, having read the court's decision of July 10, 2019, defendant appears to have read and understood the requirements of the directives of the decision after trial and the order of reference, attempting to set forth arguments in this order to show cause that defendant should have submitted in its opposition to plaintiff's motion for a judgment of foreclosure. Defendant's counsel now affirms that his office did not receive the submissions made to the referee and provides an affidavit from defendant to the same effect. Additionally, defendant's counsel submits an inadmissible hearsay copy of an email between one of his associates and a paralegal at defendant's prior counsel claiming that prior counsel never received a copy of plaintiff's submissions in error, as well as a defective "affirmation" from another associate concerning his investigation of the Suffolk County Clerk's file on this action.

Even if the court was to deem defendant's motion as one to renew, the submissions are insufficient to grant such an application and would be denied.

It must be presumed that defendant's present counsel received the file from prior counsel upon substitution, as any incoming attorney would, which would have included copies of the decision of May 8, 2018 and the order of August 16, 2018, especially as there is no mention in either the submissions on Mot. Seq. #007 or in the present submissions stating that he never received copies of those documents. Additionally, defendant's counsel's review of plaintiff's submissions on its motion for a judgment of foreclosure (Mot. Seq. #006) would have included a review of those documents as they were among the documents submitted by plaintiff in support of its motion. Under these circumstances it is hard to conceive that defendant's counsel did not have an opportunity to review the decision of May 8, 2018 and the order of August 16, 2018 and the requirements therein, nor can the court conceive of a reasonable justification for failing to do so. The court notes that there is no reasonable justification offered in defendant's counsel's affirmation for failing to review those documents, only his statement that in his prior submissions "the underlying facts were not specifically spelled out, or perhaps even understood by Defendant's (*sic*) upon

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filing their opposition motion, prior to further investigatory research into Plaintiff's compliance with the Court's scheduling order of May 18, 2018 ("Scheduling Order")."

A review of the file, including the decision of May 8, 2018 and the order of reference, as well as plaintiff's submissions in support of its motion for a judgment of foreclosure and sale before filing counsel's opposition and cross-motion (Mot. Seq. #007) would have allowed defendant's counsel to "specifically spell out" and "perhaps even understand" the issues before filing his opposition. Law office failure is not a basis for reargument because counsel did not understand the issues that were there before him.

In this regard, the court is compelled to point out that on this motion defendant's counsel submits as Exhibit "A" the supposed notice of sale in this action, which in reality is a notice of sale in a completely different action filed in Nassau County. Also, Exhibit "L" is supposedly an affirmation of Anthony Bonomo, Esq., an associate at defendant's counsel's law firm. That affirmation is defective and cannot be considered by the court because Mr. Bonomo does not provide a valid affirmation. Although signed by Mr. Bonomo, it starts out "RONALD D. WEISS, attorney duly admitted to practice before this Court affirms as follows:," there is no such statement made by Mr. Bonomo. Although these defects are not essential to the court's decision on this motion, it seems to indicate what may be an unintentional failure to pay attention to legal submissions. Having spent almost forty years in practice before joining the courts, the court is well aware that law offices may often make mistakes because of the pressures of their practice. Unfortunately, when lawyers do, often they, and their clients, must bear the burden thereof.

As defendant's arguments are in reality an attempt to present facts that defendant's counsel should have known at the time that he originally cross-moved and opposed plaintiff's motion, it is one to renew, not reargue. 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 under such circumstances the movant must establish reasonable justification for not presenting those facts originally (CPLR 2221 [e] [3]; see *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980 [2d Dept 2015]; *Fed. Natl. Mtge. Assn. v Sakizada*, 153 AD3d 1236 [2d Dept 2017]; *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]; *Wells Fargo Del. Trust Co., N. A. v De Los Santos*, 186 AD3d 900 [2d Dept 2020]).

Defendant could offer no reasonable justification for not presenting these facts it should have known at the time of the Mot. Seq. #006 and #007, and without establishing a reasonable justification for not originally submitting these facts that were known, or should have been through ordinary care and diligence, the court lacks discretion to grant renewal (see *Worrell v Parkway Estates, LLC*, 43 AD3d 436 [2d Dept 2007]; *Sobin v Tylutki*, 59 AD3d 701 [2d Dept 2009]; *Wells Fargo Bank, N.A. v Mone*, 185 AD3d 626 [2d Dept 2020]; *HSBC Bank USA, NA v Nemorin*, 167 AD3d 855 [2d Dept 2018]). Law office failure has been found not to be reasonable justification for not submitting evidence on the original motion or opposition (see *HSBC Bank USA, NA v Nemorin*, 167 AD3d 855 [2d Dept 2018]).

As defendant clearly cannot establish the necessary basis for renewal, his attempt to "shoehorn" what is at best renewal into a motion to reargue fails.

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Additionally, although the court is sympathetic to defendant's argument that plaintiff should not move forward with a foreclosure sale as defendant appears to have a reasonable opportunity to provide a viable "short sale" that would satisfy the interests of both parties, defendant presents no legal authority which would support his claim that such an opportunity gives the court authority to stay the foreclosure action.

Accordingly, defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: November 23, 2020



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

X FINAL DISPOSITION NON-FINAL DISPOSITION

The decision of July 10, 2019 sets forth in detail the reasons for denying defendants' cross-motion and the insufficiency of their opposition to plaintiff's motion which provided no specific objections even as to such things like taxes which are public records, the waiver of claims, the fact that under the