

**Aurora Loan Servs., LLC v Clarke**

2020 NY Slip Op 33926(U)

November 27, 2020

Supreme Court, Suffolk County

Docket Number: 035652/2010

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX NO. 035652/2010

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:02/08/18  
Adj. Date: 02/22/18  
Mot. Seq. #003 - MotD

-----X

AURORA LOAN SERVICES, LLC

Plaintiff,

against

RAS BORISKIN, LLC  
*Attorneys for Plaintiff*  
900 Merchants Concourse, Suite LL5  
Westbury, NY 11590

KEISHA CLARKE, LANCE L. CLARKE A/K/A  
LANCE CLARKE, CITIMORTGAGE INC.,  
DISCOVER BANK, MIDLAND FUNDING NCC  
2 CORP, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. AS NOMINEE  
FOR 1<sup>ST</sup> REPUBLIC MORTGAGE BANKERS  
INC., JOHN DOE (Said name being factitious, it  
being the intention of Plaintiff to designate any and  
all occupants of premises being foreclosed herein,  
and any parties, corporations or entities, if any,  
having or claiming an interest or lien upon the  
mortgaged premises.)

MEANEY & MEANEY, PC  
*Attorneys for Defendant Clarke*  
27 Fairview Street  
Huntington, NY 11743

Defendants.

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Upon the following papers read 1-51 on this application by plaintiff to reargue/renew the court's decision of November 6, 2017 pursuant to CPLR 2221; Notice of Motion and supporting papers 1-25; Affirmation in opposition and supporting papers 26-45; Reply Affirmation and supporting papers 46-51; and

**UPON** the court having held a phone conference on this action on November 6, 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

**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 the portion of plaintiff Aurora Loan Services, LLC's motion seeking reargument pursuant to CPLR 2221 (d) of the court's decision placed on the record after oral argument on November 6, 2017 is denied, and it is further

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.2

**ORDERED** that the portion plaintiff Aurora Loan Services, LLC's motion seeking renewal pursuant to CPLR 2221(e) of the court's decision placed on the record after oral argument on November 6, 2017 is granted, and it is further

**ORDERED** that upon renewal, the court withdraws that part of its decision and order placed on the record on November 6, 2017 after oral argument of plaintiff Aurora Loan Services, LLC's motion for summary judgment (Mot. Seq. #001) and defendants Keisha Clarke and Lance L. Clarke, a/k/ Lance Clarke's cross-motion to dismiss plaintiff's action (Mot. Seq. #002), as well as the order of December 4, 2017, which granted defendants' cross-motion to dismiss the action for plaintiff's failure to comply with the requirements of RPAPL § 1306, and in place and instead denies defendant's cross-motion to dismiss; and it is further

**ORDERED** that upon renewal being granted, the default of the non-appearing, non-answering defendants are fixed and set; and it is further

**ORDERED** that upon renewal being granted, and in accordance with the court's decision placed on the record after oral argument on November 6, 2017, plaintiff Aurora Loan Services, LLC's is granted partial summary judgment pursuant to CPLR 3212 (g) dismissing and striking all of defendants Keisha Clarke and Lance L. Clarke, a/k/a Lance Clarke's affirmative defenses except their first and fifth affirmative defenses which raised the issue of plaintiff's standing, which issue is set for a limited issue trial pursuant to CPLR § 2218 ; and it is further

**ORDERED** that upon renewal, and in accordance with the court's decision placed on the record after oral argument on November 6, 2017, as plaintiff's submissions failed to establish the default in payment of defendants, and defendants raised the issue of plaintiff's compliance with the requirements of RPAPL §§ 1304 and 1306 in their cross-motion and opposition to plaintiff's motion for summary judgment, those issues are also set for a limited issue trial pursuant to CPLR § 2218 ; and it is further

**ORDERED** that as plaintiff Aurora Loan Services, LLC's submissions have failed to establish its standing to prosecute the action, the court denies that portion of plaintiff's motion seeking to substitute another party as plaintiff; and it is further

**ORDERED** that plaintiff Aurora Loan Services, LLC's proposed order submitted with its motion is marked "Not Signed;" and it is further

**ORDERED** that upon renewal the court denies defendants Keisha Clarke and Lance L. Clarke, a/k/a Lance Clarke's cross-motion to dismiss plaintiff's action; and it is further

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.3

**ORDERED** that the parties are authorized a limited period of further discovery on the issues set for the limited issue trial, all discovery demands, including any request to view the original note, are to be served within 45 days of the date of the filing of this decision and order with the Suffolk County Clerk, and all discovery is to be completed within 120 days of the date of the filing of this decision and order with the Suffolk County Clerk; and it is further

**ORDERED** that action will appear for a compliance/certification conference on March 31, 2021 at 9:30 A.M. before another justice of this court to be assigned, at which time the court will direct the filing of the note of issue and set a pre-trial conference to determine a trial date; and it is further

**ORDERED** that the trial of this matter will remain with the IAS part assigned and will not be placed in the inventory of the Calendar Control Part; and it is further

**ORDERED** that upon the filing of a note of issue, the court will entertain successive summary judgment motions from the parties upon the limited issues only, which motions are to be filed pursuant to CPLR 3212 (a); and it is further

**ORDERED** that the court will entertain no further motions, other than those referred to above, in this action without the movant first obtaining the permission of the court.

The prior history of this action to foreclose a mortgage on residential real property known as 385 Half Hollow Road, Deer Park, Suffolk County, New York ("the property") given by defendants Keisha Clarke and Lance L. Clarke, a/k/a Lance Clarke ("defendants") on August 4, 2006 to a predecessor in interest to plaintiff Aurora Loan Services, LLC ("plaintiff") to secure a note given to such predecessor in interest of the same date is set forth in the court's decision placed on the record after oral argument of plaintiff's motion for summary judgment (Mot. Seq. #001) and defendant's cross-motion for dismissal, and in opposition (Mot. Seq. #002), on November 6, 2017.<sup>1</sup>

That decision granted defendant's cross-motion to the extent of dismissing plaintiff's action for its failure to comply with the filing requirements of RPAPL § 1306, a statutory condition precedent to suit; although at the same time the court addressed and determined the other issues raised by both plaintiff's motion for summary judgment and defendants' cross-motion to dismiss, as well as defendant's opposition. The court signed defendant's order dismissing plaintiff's action on December 4, 2017, which was entered with the Suffolk County Clerk on December 11, 2017.

Plaintiff timely moved to reargue and renew the court's decision through its present motion.

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<sup>1</sup>Transcripts of the decision are submitted as plaintiff's Exhibit "7" and defendant's Exhibit "G."

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.4

### REARGUMENT DENIED

On a motion to reargue, movant must show the court overlooked, misapprehended relevant facts or misapplied the law at the 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]). Plaintiff's submissions fail to establish that the court either overlooked, misapprehended the facts or misapplied the relevant law, and having failed to establish this, plaintiff's motion to reargue must be denied.

In attempting to differentiate the principle of law and the holding in *Hudson City Sav. Bank v Seminario*, 149 AD3d 706 (2d Dept 2017) from this case, plaintiff's motion for reargument ignores the fact that unlike *Hudson City Sav. Bank v Seminario* where defendant never moved, or cross-moved, to dismiss the complaint pursuant to CPLR 3212 for failure to comply with the condition precedent of the filings required by RPAPL § 1306 ("the filings"), defendants here did.

Further, in *Hudson City Sav. Bank v Seminario*, the court noted that plaintiff failed to provide *prima facie* proof of compliance with the filings, denying its summary judgment motion. Here plaintiff alleged compliance with the filings in paragraph 11 of its complaint, which was denied in defendants' answer, places that claim in issue. Rather than addressing this issue in support of its motion for summary judgment through either counsel's affirmation or the affidavit of the servicer, plaintiff ignores it, although both counsel's affirmation and the servicer's employee's affidavit did address the mailings of the RPAPL § 1304 notices, also not raised as an affirmative defense, but denied by defendant's answer. When the issue of compliance with the filings was raised in defendants' cross-motion, rather than arguing that defendant's motion was insufficient to meet defendants' burden of proof, plaintiff argued in reply only that RPAPL § 1306 was not in effect at the time that the action was commenced and therefore there was no need to comply. Counsel's argument was based upon his erroneous reading of the history of the statute, claiming that it was enacted on October 23, 2011. In fact that date was the date when the name of the Department of Financial Services ("DFS") was substituted for the then defunct State Banking Department; the statute had been in effect since February 13, 2010, prior the commencement of this action. The argument and lack of submissions by the plaintiff on the record before the court was a tacit concession that plaintiff had not complied with the filings as it determined they were not needed.

Even though the motion had been set for oral argument, giving plaintiff ample opportunity to correct what its present motion points to as counsel's error in reading the statute, and to find the documents it now submits to raise a factual issue of compliance, that was not done. When the court inquired of plaintiff before the argument on November 6, 2017, counsel indicated that he was unaware if there were records of the filing, there might have been, but that was not known. Defendant opposed an adjournment and the argument went forward.

The facts before the court on November 6, 2017 were a tacit admission by plaintiff that it did not

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.5

comply with the filings. Such an admission provided defendant with *prima facie* proof establishing that compliance with RPAPL § 1306 had not been made. The holding in *Hudson City Sav. Bank v Seminario* made it clear that compliance with RPAPL § 1306 was a condition precedent to suit which must be complied with; plaintiff has provided no case law to the contrary. Plaintiff's reliance in its reply upon this court's decision in *M & T Bank v Rice*, 57 Misc.3d 1214 (A), 2017 N.Y. Slip Op 51427 (U) (Sup. Ct, Suffolk County 2017) is misplaced. There, in opposition to defendant's cross-motion to dismiss for plaintiff's failure to comply with RPAPL § 1304, that plaintiff incorrectly argued that it did not need to comply with RPAPL § 1304 because the plaintiff had filed a previous bankruptcy, misinterpreting RPAPL § 1304 (3). But, unlike plaintiff here, that plaintiff also submitted some proof of mailing of the RPAPL § 1304 notices. Dismissing the bankruptcy argument, the court denied defendant's cross-motion as there was an issue of proof of mailing of the RPAPL § 1304 notices and set that for a limited issue trial. At that trial plaintiff presented sufficient proof of mailing and was granted judgment (*see M & T Bank v Rice*, 59 Misc.3d 1217 [A], 2018 N.Y. Slip Op 50601 [U] [Sup. Ct, Suffolk County 2018]).

Considering the evidence before the court, and the law at the time of the decision of November 6, 2017, the court did not misapprehend the facts or misapply the law. Reviewing subsequent decisions of the Second Department, the holding in *JPMorgan Chase Bank, N.A. v Lyon*, 176 AD3d 693 (2d Dept 2019) reaffirmed this court's reliance upon *Hudson City Sav. Bank v Seminario*. Other decisions of the Second Department finding defendants' submissions insufficient to warrant dismissal do not deal with the peculiar facts of this case, generally dealing with situations where defendant did not establish its *prima facie* obligation to prove plaintiff's failure to file, as examples *see U.S. Bank, N.A. v Nathan*, 173 AD3d 112 (2d Dept 2019); *Nationstar Mtge., LLC v Maties*, 185 AD3d 703 (2d Dept 2020); *Wells Fargo v Gleichman*, 186 AD3d 535 (2d Dept 2020) and *JPMorgan Chase Bank, N.A. v Gold*, \_AD3d\_, 2020 NY Slip Op 06765 (2d Dept 2020). Unlike the holding in *Deutsche Bank Natl. Trust Co. v Spanos*, 180 AD3d 997 (2d Dept 2020), here defendant did not need to submit subpoenaed evidence from DFS to show plaintiff's lack of compliance because of plaintiff's tacit concession of non-compliance.

### RENEWAL GRANTED

Generally, leave to renew must be on new facts not available at the time of the prior motion (CPLR 2221 [e] [2]), or, in the court's discretion, upon facts known at the time to the movant but not presented, but usually the movant must establish reasonable justification for not presenting them 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]; *Wells Fargo Del. Trust Co., N. A. v De Los Santos*, 186 AD3d 900 [2d Dept 2020]). However, the court's discretion to entertain renewal under CPLR 2221 (e) (2), (3) is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*see Citimortgage, Inc. v Espinal*, 136 AD3d 857, 858 [2d Dept 2016]).

The court is aware that there are cases which hold that "law office failure" may be an insufficient basis to form a reasonable excuse for failing to present available evidence upon the original motion (*see HSBC Bank USA, NA v Nemorin*, 167 AD3d 855 [2d Dept 2018]; *Countrywide Home Loans, Inc. v*

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.6

*Ward*, 167 AD3d 842 [2d Dept 2018]). Unlike in *Countrywide Home Loans, Inc. v Ward*, where the purported “new facts” had always been in movant’s possession and their submission would not have changed the trial court’s decision, the record here on the original motion and oral argument, as well as plaintiff’s submission on this motion, show that plaintiff’s counsel’s file did not contain copies of the RPAPL § 1306 filings, buttressing plaintiff’s counsel’s erroneous interpretation of the statute’s inapplicability. The record shows that the file had been transferred a number of times, and plaintiff’s counsel had searched the file before the motion and oral argument and there were no copies of the RPAPL § 1306 filing therein. Also unlike in *Countrywide Home Loans, Inc. v Ward*, submission of the copy of the filing in compliance with RPAPL § 1306 now submitted to the court would have changed the court’s decision on defendants’ motion, as it would have removed the admission of non-filing which provided the *prima facie* proof upon which defendant’s motion had been granted and raised a question of fact requiring denial of summary judgment. Nor is the court faced with a situation as in *HSBC Bank USA, NA v Nemorin*, where defendant’s counsel’s personal problems caused him to be ineffective in his representation of his client. Under the circumstances before the court, the court finds that the interests of justice require it to exercise its discretion in granting plaintiff renewal of its motion.

#### PLAINTIFF GRANTED PARTIAL SUMMARY JUDGEMENT

Upon granting renewal, for the reasons stated in the court’s decision placed on the record after oral argument on November 6, 2017, the court grants plaintiff partial summary judgment pursuant to CPLR 3212 (g) dismissing all of defendant’s affirmative defenses except their first and fifth affirmative defenses which raised the issue of plaintiff’s standing to bring the action. As plaintiff’s submissions were insufficient to establish its standing to bring the action, those affirmative defenses, along with the issues of proof of defendants’ default in payment and plaintiff’s compliance with the requirements of RPAPL § 1304, for the reasons set forth in the decision placed on the record, are set for a limited issue trial pursuant to CPLR § 2218.

Although plaintiff has submitted proof of the filing required by RPAPL § 1306 as to defendant Keisha Clarke, there is no similar document submitted as to defendant Lance L. Clarke, a/k/a Lance Clarke. As both defendants signed the note and mortgage, they are both borrowers (RPAPL § 1306 [2]; see *Charles Schwab Bank v Winitch*, 179 AD3d 1003 [2d Dept 2020]), so compliance with the condition precedent of RPAPL § 1306 must be established as to both (see *Hudson City Savings Bank v Seminario*). Plaintiff’s submission of the filing as to defendant Keisha Clarke is insufficient to require dismissal of defendants’ claims raised in opposition, but it does raise a question of fact as to the issue of compliance with RPAPL § 1306. Accordingly, the issue of compliance with RPAPL § 1306 is also set for the limited issue trial.

As set forth above in the “ORDERED” paragraphs, the parties are authorized a period of discovery on the issues remaining for the limited issue trial, and after the completion of discovery and the filing of the note of issue, they are authorized to file successive summary judgment motions on these remaining issues. A court may properly entertain a subsequent summary judgment motion when it is substantively valid and when granting the motion will further the ends of justice while eliminating an unnecessary burden on court resources (see *Deiko v McDonald’s Restaurants of New York, Inc.*, 198

Aurora Loan Services v Clarke  
Index # 035652/2010  
p.7

Ad2d 208 [2d Dept 1993]; *Valley National Bank v INI Holding, LLC*, 95 AD3d 1108 [2d Dept 2012]; *Graham v City of New York*, 136 AD3d 754 [2d Dept 2016]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept 2016]). It is clearly appropriate to consider a second summary judgment motion where, as here, the court has already granted a party partial summary judgment and limited the issues to a few, or where such a motion would correct a simple defect, eliminating the burden on judicial resources which would otherwise require a trial (*see Rose v Horton Med. Ctr.*, 29 AD3d 977 [2d Dept 2006]; *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 [1<sup>st</sup> Dept 2012]).

As this court is being involuntarily retired as of December 31, 2020, the action will proceed before another justice yet to be assigned.

This constitutes the order and decision of the court.

Dated: November 27, 2020

  
HON. ROBERT F. QUINLAN  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION