

NRZ Pass-Through Trust IV v Rouge

2021 NY Slip Op 30397(U)

February 9, 2021

Supreme Court, New York County

Docket Number: 810148/2011

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 14
	<i>Justice</i>		
-----X		INDEX NO.	<u>810148/2011</u>
NRZ PASS-THROUGH TRUST IV, U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE,		MOTION DATE	<u>N/A, N/A</u>
Plaintiff,		MOTION SEQ. NO.	<u>008 009</u>

- v -

FRANCOISE ROUGE, BOARD OF MANAGER OF THE ALLEGRO CONDOMINIUM, CITY OF NEW YORK BY PARKING VIOLATIONS BUREAU, CITY OF NEW YORK BY TRANSIT ADJUDICATION BUREAU, CITY OF NEW YORK BY ENVIRONMENTAL CONTROL BOARD, JOHN ROUGE

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 90

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 68, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Motion Sequence Numbers 008 and 009 are consolidated for disposition.

The motion (008) by plaintiff to renew the Court’s decision dismissing this case for lack of personal jurisdiction is denied. The cross-motion by defendant Rouge for certain relief in the event that defendant’s motion is successful is denied as moot. The motion (MS009) by defendant Rouge to *inter alia* reargue the branch of prior motions that sought legal fees pursuant to Real Property Law § 282 is granted and, upon reargument, the Court finds that a hearing is required to determine the reasonable legal fees to be awarded to Rouge.

Background

In this foreclosure action, the Court previously dismissed this case for lack of personal jurisdiction after a traverse hearing held before a JHO (NYSCEF Doc. No. 15). The borrower (Rouge) successfully argued that she was not at the apartment when service was allegedly effectuated in June 2011.

MS008

Plaintiff moves to renew/reargue/vacate the Court's decision confirming the referee's report and dismissing this case on the ground that defendant Rouge appeared in this case via her attorney's notice of appearance on August 2, 2016. Plaintiff maintains that Rouge submitted to the Court's jurisdiction and did not preserve her right to challenge personal jurisdiction. It argues that this notice of appearance was within the exclusive possession of defendant and was only recently unearthed in connection with Rouge's motion for legal fees (MS 009). Plaintiff characterizes this as "concealment" and as "fraud." It insists that the Court should, in the alternative, grant plaintiff's motion for leave to serve Rouge pursuant to CPLR 306-b.

In opposition and in support of her cross-motion, Rouge questions how the "evidence" relied on by plaintiff is newly discovered as it was a part of the Court's file since 2016.¹

The Court denies this motion to the extent it sought to reargue this Court's prior decisions.

With respect to the branch of the motion to renew or vacate, the motion is also denied. "Newly discovered evidence is evidence which was in existence but undiscoverable with due diligence at the time of the original order or judgment. In order to succeed on a motion pursuant to CPLR 5015(a)(2) to vacate an order or judgment on the ground of newly discovered evidence,

¹ For some reason, counsel for defendant decided to ignore this part's rules and common courtesy by filing a 49-page opposition.

the movant must establish that the evidence could not have been discovered earlier through the exercise of due diligence and that the newly discovered evidence would probably have produced a different result” (*Wall St. Mortg. Bankers, Ltd. v Rodgers*, 148 AD3d 1088, 1089 [2d Dept 2017][internal citations omitted]).

The Court is unable to find that a document filed with the Court in 2016 is “newly discovered evidence” sufficient to grant the motion to renew or to vacate. Due diligence involves reviewing a case’s file and, here, that would have revealed the existence of the notice of appearance. The Court does not see how defendant Rouge withheld a document that was, according to plaintiff, filed with the Court. That plaintiff never bothered to check the file does not constitute a reason why it was unable to raise this argument in connection with previous motions.

To the extent renewal and vacatur is sought concerning the Court’s denial of plaintiff’s motion for leave to extend the time to serve Rouge (MS006), that branch of the motion is also denied. As the Court stated previously, there is no basis to permit a plaintiff to serve a defendant nearly ten years after commencing a case. Obviously, plaintiff is concerned that its efforts to bring another case against Rouge will be barred by the statute of limitations. But that is a problem of plaintiff’s own making. It was incapable of prosecuting an unopposed (at least for the first half-decade) foreclosure case within the six-year limitations period. Inexplicably, plaintiff snatched defeat from the jaws of victory. But plaintiff’s blunders do not justify allowing it to be absolved of the obligation to timely serve a defendant.

MS009 Legal Fees

Defendant Rouge moves to reargue on the ground that the Court overlooked its claim for legal fees pursuant to Real Property Law § 282(1). She points out that the mortgage at issue in

this case contains a provision permitting plaintiff to seek legal fees and, therefore, there is an implied covenant allowing her to seek legal fees pursuant to the aforementioned provision.

In opposition, plaintiff claims that Rouge has not presented a complete copy of the underlying papers. It contends that the Court did not overlook anything from the prior motion because Rouge admits that the amount sought and the supporting evidence was not submitted in connection with the previous motion. Plaintiff also claims that Rouge has not prevailed because she withheld information about her attorney's notice of appearance until making the instant motion for attorneys' fees.

As an initial matter, the Court grants the motion to reargue. While counsel for defendant did not attach legal bills or request a specific amount of legal fees in connection with the underlying motion to dismiss, the fact is that the Court should consider whether she is entitled to recover such fees under Real Property Law § 282(1). And there is no prejudice to plaintiff.

“In New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties. . . . Real Property Law § 282 became effective December 19, 2010. As relevant here, that section provides that ‘[w]henever a covenant contained in a mortgage on residential real property shall provide that ... the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage ... there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor ... in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract.’” (*DKR Mortg. Asset Tr. I v Rivera*, 130 AD3d 774, 775, 14 NYS3d 414 [2d Dept 2015]).

“The language of Real Property Law § 282 that is at issue on this appeal was adapted from language contained in Real Property Law § 234, a similar statute applicable to landlord-tenant disputes. Although the parties do not cite, and research has not revealed, any appellate cases in which the language of Real Property Law § 282 has been analyzed, the Court of Appeals has analyzed the circumstances under which a tenant may recover an attorney's fee under the analogous provision contained in Real Property Law § 234” (*id.*).

“In this regard, the Court of Appeals has stated that ordinarily, only a prevailing party is entitled to attorney's fees. To be considered a prevailing party, a party must be successful with respect to the central relief sought. Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope” (*id.* at 776 [internal quotations and citations omitted]).

Upon reargument, the Court grants the branch of defendant Rouge’s motion for legal fees. There is no question that the underlying loan to Rouge contained provisions permitting the recovery of legal fees by the mortgagee. That means that there is an implied covenant allowing Rouge to recover reasonable legal fees in the event that she is the prevailing party.

The Second Department has found that a mortgagor who successful defends a residential foreclosure case on the ground that the case is time-barred is entitled to recover legal fees pursuant to Real Property Law § 282(1) (*21st Mtge. Corp., etc. v Nweke*, 165 AD3d 616, 619, 85 NYS3d 127 [2d Dept 2018]). That compels this Court to award Rouge reasonable legal fees. In both instances, the defenses (statute of limitations and improper service) raised by the borrower were not about whether the defendants defaulted under the terms of the mortgage. In other words, a borrower is entitled to recover legal fees pursuant to Real Property Law § 282(1) even

where it is undisputed that he or she failed to make monthly mortgage payments as long as a successful defense is asserted. That is the case here.


The Court will hold a hearing to determine the amount of legal fees due to defendant Rouge.

Accordingly, it is hereby

ORDERED that the motion (MS008) by plaintiff to reargue, renew and or vacate is denied and the cross-motion by Rouge is denied as moot; and it is further

ORDERED that the motion (MS009) by defendant Rouge is granted to the extent it sought rearguement and, upon rearguement, the Court finds that Rouge is entitled to reasonable legal fees to be determined at a hearing to be scheduled by the Clerk of this part.

2/9/2021
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE