

Wells Fargo Bank, N.A. v Veras
2021 NY Slip Op 32705(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 504495/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of December, 2021.



P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

Index No. 504495/17

ALGENIS VERAS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NYC PARKING VIOLATIONS BUREAU, NYC TRANSIT ADJUDICATION BUREAU AND "JOHN DOE #1" THROUGH "JOHN DOE #10," THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE PERSON OR PARTIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE MORTGAGED PREMISES DESCRIBED IN THE COMPLAINT,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

122-129 147-148
147-148 149-151
149-151

Upon the foregoing papers in this action to foreclose a residential mortgage on the property at 688 Jefferson Avenue in Brooklyn (Block 1656, Lot 37) (Property), plaintiff Wells Fargo Bank, N.A. (Wells Fargo) moves (in motion sequence [mot. seq.] six) for an order, pursuant to CPLR 2221 (d), granting it leave to reargue its motion (mot. seq. five)

for summary judgment, an order of reference and other relief, which the court (Dear, J.) denied by a March 2, 2020 decision and order, and, upon reargument, granting Wells Fargo's prior motion.

Defendant Algenis Veras (Veras) cross-moves (in mot. seq. eight) for an order (1) dismissing this action, pursuant to RPAPL 1304 (2) "as Plaintiff's failure to mail [a] pre-foreclosure notice to Defendant's last known address warrants dismissal of the instant action[,]"¹ or, alternatively, (2) denying Wells Fargo's motion to reargue."

Background

On March 7, 2017, Wells Fargo commenced this residential foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on or about June 16, 2010, Veras executed and delivered a promissory note in the principal amount of \$424,297.00 in favor of the original lender, National Bank of Kansas City (National Bank), which was secured by a mortgage on the Property in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for National Bank (complaint at ¶¶ 2-3). The complaint, which annexes a copy of the note with an allonge endorsed by National Bank in favor of Wells Fargo, alleges that "plaintiff is in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note" (*id.* at ¶ 5). The complaint alleges that Veras "failed to comply with the terms, covenants and conditions of said note and mortgage by failing and omitting to pay, to the

¹ See NYSCEF Doc No. 147.

plaintiff, payments due on February 1, 2011 and said default has continued for a period in excess of fifteen (15) days” (*id.* at ¶ 9). The complaint alleges that “there currently [is] a pending proceeding at law or otherwise to collect or enforce said note and mortgage which was filed under Index No. 501414/2014 and will be consolidated with the instant action” (the 2014 Foreclosure Action) (*id.* at ¶ 15). Notably, the complaint also alleges “[u]pon information and belief, plaintiff has complied with the provisions of Real Property Actions and Proceedings Law §1304 and §1306 *unless exempt from doing so*” (*id.* at ¶ 17 [emphasis added]).

Defendant Veras filed a pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (4), on the ground that there was another action pending (i.e., the 2014 Foreclosure Action). By an April 23, 2018 “Consolidation Order,” the court (Dear, J.) consolidated this action and the 2014 Foreclosure Action for all purposes.

On May 22, 2018, Veras answered the complaint, denied the material allegations therein, asserted twelve affirmative defenses, including lack of standing, and asserted eight counterclaims for: (1) predatory lending; (2) violation of the Truth in Lending Act (TILA); (3) violation of General Business Law § 349 for deceptive business practices; (4) fraudulent inducement; (5) an award of attorneys’ fees; (6) estoppel; (7) fraud; and (8) economic damages. On June 11, 2018, Wells Fargo responded to Veras’ counterclaims.

Wells Fargo’s 2019 Summary Judgment Motion

On May 8, 2019, Wells Fargo moved (in mot. seq. five) for an order granting it summary judgment, striking Veras’ answer, granting it an order of reference appointing a

referee to compute, granting it a default judgment against all non-answering and non-appearing defendants and amending the caption to remove the “John Doe” defendants.

Wells Fargo, in support of its motion, submitted an affidavit from Shae Smith (Smith), a Vice President Loan Documentation for Wells Fargo (*see* NYSCEF Doc No. 73).

Regarding the RPAPL 1304 pre-foreclosure 90-day notice, Smith attested that:

“[b]y letters *dated April 29, 2013* addressed to Algenis Veras at 688 Jefferson Ave, Brooklyn, NY 11221-2101, the subject property address, he was provided with a notice in advance of the commencement of this action that his loan was in default, and was provided with the amount due to cure the total delinquency (‘90-day Notice’). It is Wells Fargo’s regular practice to generate and mail such notices to defaulted borrowers on the date of the notice, but no later than two business days, and once mailed, to place a copy of the notice in Wells Fargo’s file for that mortgage loan, as a record that the 90-day notice was mailed. Two copies of each 90-day Notice are printed: one is sent by first class mail (reflected in the copy with the 10-digit tracking code affixed to the top of the first page of the notice), and the other is sent by certified mail (reflected in the copy with the 20-digit United States Postal Service tracking code affixed to the top of the first page of the notice). A list of at least five government-approved housing counseling agencies is appended to each copy of the 90-day Notice that is sent to a borrower. I am familiar with such practices in my capacity as Vice President Loan Documentation for Wells Fargo. Based upon this knowledge and my review of Wells Fargo’s file for this mortgage loan, Wells Fargo’s regular practice was adhered to here with respect to the 90-day Notice. A copy of the (1) letters sent via certified and first-class mail, as maintained in Wells Fargo’s business records; (2) unclaimed certified mail envelope and return of receipt; (3) Trackright screens verifying the certified and first class mailings; and (4) Proof of Filing Statement [are] attached hereto as **Exhibit E**” (emphasis added).

Thus, in its initial moving papers, Wells Fargo took the position that it complied with RPAPL 1304 by mailing Veras a pre-foreclosure 90-day notice at the Property address.

On January 17, 2020, Veras opposed Wells Fargo's summary judgment motion on the grounds that triable issues of fact exist regarding Wells Fargo's strict compliance with RPAPL 1304's pre-foreclosure mailing and notice requirements, Wells Fargo's standing to foreclose and the statute of limitations. Regarding RPAPL 1304, Veras argued that Wells Fargo failed to submit sufficient proof of its compliance with the statute, "failed to mail the section 1304 notice to Defendant's *last known address* as required under the law at any point in this action . . ." and claims that "[t]he only notice sent was to the subject property address [in advance of the commencement of the 2014 Foreclosure Action], when Plaintiff should have been aware that Defendant did not live at that address" (emphasis added). Veras argued that "[p]laintiff never sent an updated section 1304 notice to Defendant with the new amounts owing, even though it used his correct address [1895 Second Avenue] in serving the 2017 complaint." Veras argued that Wells Fargo's summary judgment motion should be denied because Wells Fargo failed to meet a condition precedent to foreclosure.

Wells Fargo, in reply, submitted an attorney affirmation arguing that "Plaintiff has established its compliance with RPAPL § 1304 by way of the testimonial and documentary evidence in the Smith Affidavit." Regarding the RPAPL 1304 issue, Wells Fargo's counsel further asserts that:

"The Smith Affidavit establishes compliance with RPAPL §

1304 by (1) establishing that the affiant is familiar with the relevant mailing practices and procedures, (2) swearing under oath based on a review of the relevant records that copies of the notice were sent to Defendants at the Property on November 28, 2016 by both first-class and certified mail, and (3) attaching documentary proof of mailing of the 90-day notice by first-class and certified mail. *Id.* Accordingly, Plaintiff has conclusively established its compliance with the 90-day notice requirements set forth in RPAPL § 1304.

“Defendant's challenge to Plaintiff's compliance with RPAPL § 1304 arguing that Plaintiff did not mail the notices to the borrower's last known address is without merit. Specifically considering the Defendant provides no evidence that Defendant notified Plaintiff of their change in address to receive notices. Plaintiff properly mailed the RPAPL § 1304 notice to the property address - the address on record to receive notices.

“Pursuant to the foregoing, Plaintiff has proffered competent and admissible proof that the required RPAPL § 1304 notice was mailed to Defendant as required, and Defendant - who does not even deny receipt of the subject notice - does not offer any evidence, let alone evidence in admissible form, sufficient to rebut Plaintiff's showing of proper mailing.”

Thus, Wells Fargo argued, throughout its summary judgment motion, that it fully complied with RPAPL 1304's 90-day pre-foreclosure notice requirement by mailing the 90-day notice to Veras at the Property.

The Court's March 2, 2020 Decision and Order

By a March 2, 2020 decision and order, the court (Dear, J.) denied Wells Fargo's motion for summary judgment, an order of reference and other relief, and directed the parties to complete discovery and proceed to trial. Regarding the RPAPL 1304 issue, the court specifically held that:

“[p]laintiff has not demonstrated compliance with RPAPL 1304 (and does not appear[] to have complied therewith). It is undisputed that Plaintiff relies upon notices sent prior to the 2014 action – despite learning during that action that Defendant lived at a different address. As such, it does not appear that Plaintiff complied with the ‘last known address’ provision of 1304.”

Notice of entry of the March 2, 2020 decision and order was never served.

On or about June 15, 2021, this action was administratively reassigned to this court following the unfortunate passing of Justice Dear.

Wells Fargo’s Instant Motion to Reargue

Meanwhile, on June 11, 2021, Wells Fargo filed the instant motion for an order granting it leave to reargue its earlier motion for summary judgment and an order of reference and, upon reargument, granting its prior motion. Wells Fargo submits an attorney affirmation asserting that the court misapprehended and misapplied the law regarding Veras’ ability to assert a defense to foreclosure under RPAPL 1304. Specifically, Wells Fargo’s counsel argues that:

“the Court overlooked that, as a matter of law, Defendant cannot assert an RPAPL 1304 defense, because he has repeatedly admitted – in sworn statements, submitted documents, and live testimony – that he has not lived at the mortgaged property since at least 2012, which is at least two years before this foreclosure commenced, meaning the subject loan is not a ‘home loan’ and is not protected by RPAPL 1304 notice requirements as conditions precedent to foreclosure.

Thus, Wells Fargo now asserts *for the first time* in its motion to reargue that RPAPL 1304’s pre-foreclosure notice requirement is not applicable and that Justice Dear

“overlooked” that contention, despite the fact that Wells Fargo never raised that argument on its prior motion.

Wells Fargo submits Veras’ November 16, 2015 affidavit, which was previously submitted in support of Veras’ 2015 motion to dismiss the 2014 Foreclosure Action, and notes that Veras explicitly admitted that on February 18, 2014 (the day that the 2014 Foreclosure Action was commenced) he did not live at the Property, but resided at 1895 Second Avenue, Apt. 12F in Manhattan, and was still living at that address as of November 16, 2015. Wells Fargo notes that Veras previously submitted proof of his residency at 1895 Second Avenue, Apt. 12F, by submitting copies of his driver’s license, New York City housing records, a utility bill and a lease. Wells Fargo further notes that the documents annexed to Veras’ 2015 affidavit included a New York City Housing Authority (NYCHA) Admission/Income Review Transcript, dated May 19, 2015, which reflects that Veras was admitted to public housing, and that he moved into his NYCHA apartment on March 17, 2008. Wells Fargo also notes that Veras’ May 19, 2015 “Lease Addendum and Rent Notice” from NYCHA states that Veras’ address in public housing was at 1895 Second Avenue, Apt. 12F, in New York. In addition, Wells Fargo submits the transcript of the February 27, 2017 traverse hearing in the 2014 Foreclosure Action, during which Veras testified that his address was his NYCHA apartment at 1895 Second Avenue, Apt. 12F, in Manhattan, where he resided throughout 2013 and 2014.

Veras' Opposition and Cross Motion

Veras cross-moves for an order dismissing the complaint, pursuant to RPAPL 1304 (2), based on Wells Fargo's "failure to mail a pre-foreclosure notice to [his] last known address[.]"² or, alternatively, an order denying Wells Fargo's motion for leave to reargue. Veras submits an attorney affirmation arguing that Wells Fargo conceded that it did not send the RPAPL 1304 notice to Veras at his last known address. Defense counsel argues that "RPAPL § 1304 is applicable here because Defendant resided at the Subject Property at the time the loan agreement was entered into [June 16, 2010] and the Subject Property was used primarily for residential purposes." Defense counsel cites to the transcript of the 2017 traverse hearing and the documentary evidence of Veras' residency submitted in the 2014 Foreclosure Action and asserts that "[d]efendant resided at the Subject Property from June 16, 2010, at the same time the loan agreement between the parties was executed, until 2012." Defense counsel contends that "RPAPL §1304 applies to the case at bar despite the fact that Defendant did not reside at the Subject Premises at the time Plaintiff commenced its foreclosure action [in 2017]" because residency is determined at the time the loan was originated.

Discussion

"A motion for leave to reargue 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[d] [2]). "While

² See NYCSEF Doc No. 147.

the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, *or to present arguments different from those originally presented*” (*Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 840 [2017] [quoting *Ahmed v Pannone*, 116 AD3d 802, 805 (2014)] [emphasis added]; *Mazinov v Rella*, 79 AD3d 979, 980 [2010] [same]; *see also Haque v Daddazio*, 84 AD3d 940, 942 [2011] [holding that trial court improvidently exercised its discretion in granting plaintiff’s motion for leave to reargue his opposition to defendant’s summary judgment motion because “he improperly presented arguments not previously advanced”]). The Court of Appeals has held that “[i]t is well settled that a motion to reargue ‘is not an appropriate vehicle for raising new questions . . . which were not previously advanced’” since “where a new argument is presented on the motion [pursuant to CPLR 2221 (d)], that argument could not have been ‘overlooked or misapprehended’” (*People v D’Alessandro*, 13 NY3d 216, 219 [2009]).

Proper service of the RPAPL 1304 90-day pre-foreclosure notice on the borrower is a condition precedent to the commencement of a residential foreclosure action regarding a “home loan,” and the plaintiff has the burden of establishing satisfaction of this condition (*U.S. Bank Trust, N.A. v Sadique*, 178 AD3d 984, 985 [2019]). RPAPL 1304 (2) requires that such notice be sent by registered or certified mail, and also by first-class mail, to “the last known address of the borrower.”³ “Alternatively, the plaintiff

³ Thus, by its plain language, RPAPL 1304 contemplates that a homeowner may no longer

bears the burden of establishing, prima facie, that RPAPL 1304 inapplicable, as the loan is not subject to the notice requirements set forth in RPAPL 1304” (*id.*, see also *U.S. Bank Nat. Assoc. v Richard*, 151 AD3d 1001, 1002-1003 [2917]). Wells Fargo’s underlying motion for summary judgment and an order of reference was properly denied because Wells Fargo failed to establish its strict compliance with RPAPL 1304.

Importantly, in support of its summary judgment motion, Wells Fargo *only argued* that it complied with RPAPL 1304’s pre-foreclosure notice requirements by serving Veras with a 90-day notice at the Property, and Wells Fargo *never raised the argument* that RPAPL 1304 was inapplicable. However, Wells Fargo now, for the first time, argues that “the Court overlooked that, as a matter of law, Defendant cannot assert an RPAPL 1304 defense” because “the subject loan is not a ‘home loan’ and is not protected by RPAPL 1304 notice requirements as conditions precedent to foreclosure.” Thus, Wells Fargo’s instant motion for leave to reargue its summary judgment motion is improperly based on an argument that was not previously advanced on its underlying summary judgment motion. For that reason alone, Wells Fargo’s motion for leave to reargue its motion for summary judgment and an order of reference is denied.

In any event, contrary to Wells Fargo’s new argument, the Second Department has indicated that a loan may be a “home loan” subject to the pre-foreclosure notice requirements of RPAPL 1304 if the borrower resided at the Property at the time that he executed the residential mortgage (*see HSBC Bank USA, Nat. Assoc. v Ozcan*, 154 AD3d

reside at the mortgaged property (*see supra*).

822, 825 [2017] [holding that foreclosure action did not involve a “home loan” subject to the notice requirements of RPAPL 1304 since “the record shows that the subject property is a multi-unit apartment building with several tenants, *the defendant did not reside at the property at the time he signed the mortgage* or at the time the action was commenced, and the deed transferring the property to the defendant was a commercial property deed”] [emphasis added]; *see also Accredited Home Lenders, Inc. v Hughes*, 22 Misc.3d 323, 326-327 [Sup Ct Essex County 2008] [holding that “residency” for purposes of RPAPL 1304 is determined at the time the loan was entered into]). Here, the record reflects that Veras resided at the Property from June 16, 2010, the date on which the mortgage loan was executed, until he moved to NYCHA housing at 1895 Second Avenue, Apt. 12F, in New York in 2012.

Since Wells Fargo failed to meet its prima facie burden of proving either that it complied with RPAPL 1304 or that RPAPL 1304 is inapplicable, its motion for an order granting it summary judgment, an order of reference and other relief was properly denied, and this court will not disturb the March 2, 2020 decision and order of the court. Accordingly, it is hereby

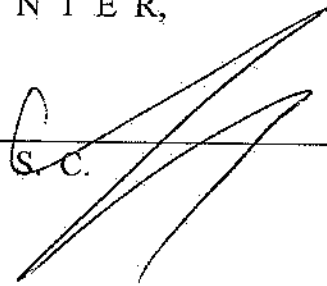
ORDERED that Wells Fargo’s motion for leave to reargue (mot. seq. six) is denied; and it is further

ORDERED that Veras’ cross motion (mot. seq. eight) is granted to the extent that

Wells Fargo's motion is denied.

This constitutes the decision and order of the court.

ENTER,



A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a cursive 'K' and 'N', is written over a horizontal line.

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE