

**Wilmington Sav. Fund Socy., FSB v Sotomayor**

2022 NY Slip Op 31298(U)

May 12, 2022

Supreme Court, Westchester County

Docket Number: Index No. 56555/2019

Judge: Nancy Quinn Koba

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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A  
CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS  
TRUSTEE FOR HILLDALE TRUST,

**DECISION AND ORDER**

Plaintiff(s),

Index No. 56555/2019  
Mot. Seq. No. 4

-against-

JOHN SOTOMAYOR, ALEXANDRA LOAIZA, SMR I LLC,<sup>1</sup>  
UNITED STATES OF AMERICA ACTING THROUGH THE  
IRS, JOHN DOE,

Defendants.

-----X  
QUINN KOBA, J.

By Notice of Motion (the "Motion"), defendants Sotomayor and Loaiza (the "Moving Defendants") seek an order: (1) granting them leave to renew their cross-motion for summary judgment, which was denied by this Court (Smith, J.) by order dated September 9, 2021 and entered September 13, 2021, and, upon renewal, granting the same; and (2) for such other and further relief as this court deems just and proper. Plaintiff opposes the Motion.

The following papers were considered in connection with the Motion:

<u>PAPER</u>	<u>NYSCEF DOC NOS.</u>
Notice of motion, affirmation, exhibits A through H, statement of material facts, notice of pendency	143-153, 158
Affirmation in opposition exhibit A, affidavit of service	154-156

<sup>1</sup>Windward Bora, LLC is the successor-in-interest to SMR I LLC.

Affirmation in reply

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Upon review and consideration of the foregoing papers, the Court makes the following determination on the Motion:

**RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

On April 26, 2019, plaintiff commenced this residential mortgage foreclosure action against the Moving Defendants upon their alleged default in making payments under a Note, dated January 19, 2007, as subsequently modified. On January 19, 2007, the Moving Defendants executed a mortgage on the property located at 2359 Maple Avenue, Cortlandt, New York 10567 as security for the Note. Thereafter, defendant Sotomayor executed the following documents: a Loan Modification, dated November 15, 2011, a Streamline Solicitation Loan Modification Agreement, dated July 19, 2016, and a Loan Modification Agreement, dated June 29, 2018 (the "Third Modification Agreement"). The original loan amount was \$313,125.00 and is now \$448,092.77 under the Third Loan Modification Agreement.

As is relevant here, this Court (Smith, J.) issued a Decision & Order, dated September 9, 2021 and entered September 13, 2021, which, *inter alia*, denied the Moving Defendants' cross-motion for summary judgment dismissing the complaint (the "Smith Order").<sup>2</sup> Therein, the Court found the plaintiff had complied with the RPAPL 1304 notice requirements, that the "separate piece of paper was not a separate Notice or Demand, but was a cover page containing the names and address of the [Moving Defendants] for mailing the 1304 Notice. And that it also - without a demand, but for informational purposes - stated the full amount of the debt . . ." (Exhibit F, NYSCEF Doc. No. 150). Subsequent to the issuance of the Smith Order, the Appellate Division, Second Department issued a decision, *Bank of Am., N.A. v Kessler*, 202 Ad3d 10 [2d Dept 2021] ("Kessler Decision"). In reliance on the foregoing decision, the Moving Defendants filed the subject motion arguing the same was a change in law or a clarification of decisional law on the "strict compliance" approach with respect to the separate envelope requirement in RPAPL Section 1304 which required the grant of their cross-motion summary judgment dismissing the complaint.

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<sup>2</sup>see, Exhibit F (NYSCEF Doc. No. 150).

**ANALYSIS**

As is relevant here, a motion for leave to renew . . . "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . and shall contain a reasonable justification for the failure to present such facts on the prior motion" CPLR 2221(e) (2) and (3). "A clarification of the decisional law is a sufficient change in the law to support renewal" (*Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]). "[A] motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired" (*id*).

Here, the Motion is timely as a final judgment has not been entered and the time to appeal has not expired in this action.<sup>3</sup> Contrary to the Moving Defendants' contention, however, the *Kessler* decision does not constitute a change in the law or a clarification of decisional law on the "strict compliance" approach with respect to the separate envelope requirement in RPAPL Section 1304. In fact, the Appellate Division, Second Department clearly stated in *Kessler* that it has (prior to the issuance of the Smith Order) "already implemented the strict compliance approach with respect to the separate envelope requirement [in RPAPL Section 1304]" (*Bank of Am., N.A., v Kessler*, 202 Ad3d at 16).<sup>4</sup> Thus, the Moving Defendants have not met their burden under CPLR 2221(e) to obtain leave to renew their prior cross-motion for summary judgment.

Based on the foregoing, it is hereby

ORDERED that the Motion for leave to renew is denied; and it is further

ORDERED that any remaining branches of the Motion not expressly addressed herein are without merit and are denied; and it is further

ORDERED that within five(5) days of the date of this decision and order, the Moving Defendants shall serve a copy of this decision and order on all parties with notice of entry; and it is further

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<sup>3</sup>The Moving Defendants' appeal of the Smith Order is currently pending in the Appellate Division, Second Department.

<sup>4</sup>See, *U.S. Bank, N.A. v Haliotis*, 185 AD3d 756 (2d Dept 2020), *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676 (2d Dept 2014).

ORDERED that proof of service of this decision and order with notice of entry shall be filed with the court within three (3) days after service has been completed.

The foregoing constitutes the Decision and Order of the Court in this matter.

DATED: White Plains, New York  
May 12, 2022

E N T E R,



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HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF