

U.S. Bank, N.A. v Buco
2022 NY Slip Op 32224(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 850025/2015
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

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U.S. BANK, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A. AS SUCESSOR TO LASALLE BANK, N.A. AS TRUSTEE FOR THE HODLERS OF THE MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-FF2,

Plaintiff,

- v -

JOSE BUCO, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC, AS NOMINEE FOR NATIONPOINT A DIVISION OF NATIONAL CITY BANK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE BOARD OF MANAGERS OF THE ORION CONDOMINIUM, JOHN DOES AND JANE DOES, NATIONPOINT A DIVISION OF NATIONAL CITY BANK

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126, 133, 137, 141, 142, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 161, 162, 166, 167, 168, 169, 170, 171, 172, 173, 174

were read on this motion to/for RESTORE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 163, 164, 165, 176, 177, 178, 179, 180, 182, 183

were read on this motion to/for DISMISSAL

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage encumbering residential real property located at 350 West 42nd Street, Unit 57D, New York, New York. The mortgage secures a loan with an original principal of \$1,069,250.00 which is memorialized by a note dated January 4, 2007. Plaintiff commenced this action to foreclose based upon an alleged default in repayment that

allegedly occurred on July 1, 2011. Defendant Jose Buco (“Buco”) answered *pro se* and raised seven counterclaims but pled no express affirmative defenses.

Now, Plaintiff moves (Motion Seq No 1) for, *inter alia*, summary judgment against Defendant Buco on its cause of action for foreclosure. Defendant Buco opposes the motion and cross-moves to dismiss for failure to comply with RPAPL §1303 and, in the alternative, for leave to serve an amended answer. Buco also moves (Motion Seq No 3), by separation notice of motion, to dismiss the complaint pursuant to CPLR §3211[a][1] and [7] for failure to comply with RPAPL §1304. Plaintiff opposes the motion.

Defendant Buco asserts dismissal should be granted based upon the decision of the Appellate Division, Second Department in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept 2021]. In *Kessler*, the Second Department held in an appeal from an order that granted Defendant’s cross-motion to dismiss for failure to comply with RPAPL §1304 that “inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)” (*id.* at 14). In that case, it was held that Plaintiff’s inclusion of “notices pertaining to the rights of a debtor in bankruptcy and in military service” in its RPAPL §1304 notice rendered it deficient as a matter of law and necessitated dismissal of the complaint. The Second Department reasoned that its literal construction of RPAPL §1304 was dictated by well-established precedent requiring strict construction of the statute and the Court of Appeals’ recent decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021] which expressed a need for reliable and objective rules in foreclosure matters.

The Second Department’s ruling in *Kessler* is a clear edict addressing an issue not reached by any other appellate level court in New York. Despite Plaintiff’s argument that *Kessler* was wrongly decided and the misgivings this Court may have concerning the soundness of the reasoning and conclusions in *Kessler*¹, absent divergent authority on the issue from another department in the Appellate Division, *Kessler* is binding precedent that this Court must follow (*see D’Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). “The niceties of the procedural distinctions between the cases and the precise arguments raised do not give the Supreme Court a basis for disregarding an on-point ruling of a department of the Appellate Division” (*Maple Med., LLP v Scott*, 191 AD3d 81, 90-91 [2d Dept 2020]).

Plaintiff’s assertion that contrary precedent has been issued by the Appellate Division, First Department (*see U.S. Bank v James*, 180 AD3d 594 [1st Dept 2020]) is without merit. The First Department made no express ruling on the content of the RPAPL §1304 notice in *James* and the record on appeal reveals that the Defendant/Appellant abandoned that issue. The trial court rejected Defendant’s argument that the inclusion of “additional language” in the RPAPL §1304 notice vitiated same. However, in its brief, Defendant/Appellant only challenged the Supreme Court’s findings that RPAPL §1304 was inapplicable and that sufficient proof of mailing of the 90-day notice was provided.

¹ *see CIT Bank, N.A. v Neris*, ___ F Supp3d ___, 2022 U.S. Dist. LEXIS 99040 [SDNY June 2, 2022][“[T]he Court concludes that the New York Court of Appeals would not follow the bright-line rule that the Second Department adopted in *Kessler*.”]; *Bank of N.Y. Mellon v Luria*, ___ Misc3d ___, 2022 NY Slip Op 50384[U][Sup Ct Putnam Cty 2022]).

In the present case, Defendant Buco raises issue with the following language that is undisputably contained in the 90-day notice served herein:

Foreclosure Prevention Counseling

If you are having trouble paying your mortgage or are at risk of foreclosure, contact a not-for-profit housing counselor in your area. Not-for-profit housing counselors provide free, professional advice. They can help you assess your options, negotiate with your lender and find free legal services and other resources in your area. The following not-for-profit housing counseling organizations have received some type of public funding to provide foreclosure prevention services. It's always a good idea to call in advance to see if an appointment is necessary and what, if any, documents you should bring with you.

Be wary of companies and individuals who promise to help save your home from foreclosure in exchange for the payment of fees upfront. New York law prohibits the collection of such fees except in limited circumstances.

If you live in New York City, you can contact the Center for New York City Neighborhoods (CNYCN) at 646-786-0888. CNYCN partners with more than 50 agencies and coordinates foreclosure prevention and intervention services in all five boroughs. It can help you find the right services for your needs.

Please note that the State cannot guarantee the advice of any individual housing counseling agency. However, many of these agencies have adopted National Industry Standards for Homeownership Counseling to ensure that homeowners receive quality and professional counseling.

Also note that the list may not include all publicly funded agencies in New York that are providing foreclosure counseling services. The New York Division of Homes & Community Renewal is continually working to add new agencies to the list.

For more information on avoiding foreclosure visit the New York Department of Financial Services website at www.dfs.ny.gov.

The U.S. Department of Housing and Urban Development (HUD) also sponsors housing counseling agencies that can provide advice on preventing foreclosure. HUD approved home ownership counseling may be available to you. You should call (800) 569-4287 or TDD (800) 877-8339, or go to HUD's website at www.hud.gov to find the HUD-approved housing counseling agency nearest you

Plaintiff's argument that this material is distinguishable from that concerned *Kessler* is unavailing. In *Kessler* the additional material concerned the Fair Debt Collection Practices Act and information regarding bankruptcy rights. That the information here is not identical to that in *Kessler* and arguably assists the mortgagor misconstrues the issue at hand. The Second Department in *Kessler* clearly stated that the inclusion of "any" additional information "not expressly delineated" in RPAPL §1304 and renders a 90-day notice action ineffective. It also expressly rejected prior trial court opinions that advocated "that a court should evaluate whether the additional material contained in the envelope sent by the lender pursuant to RPAPL 1304 prejudices or assists the borrower" or is a "*de minimus* deviation from the requirements of the

statute” (*Bank of America, N.A. v Kessler*, supra at 16-17). Moreover, the majority also disagreed with the dissent’s finding that the inclusion of “clarifying language” does not require a separate envelope.

Accordingly, it is

ORDERED that Defendant Bucu’s motion (Mot. Seq. No.23) pursuant to CPLR §3211[a][1] and RPAPL §1304 is granted and Plaintiff’s complaint is dismissed, and it is

ORDERED that Plaintiff’s motion (Mot Seq No 1) for summary judgment and Defendant Bucu’s cross-motion are denied as moot.

7/7/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION J.S.C.