

Berkshire Bank v Fawer
2022 NY Slip Op 32227(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 850250/2017
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

INDEX NO. 850250/2017

BERKSHIRE BANK, SUCCESSOR BY MERGER TO FIRST CHOICE BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 005

- v -

MELISSA FAWER, MARK FAWER, SANTERDER BANK, N.A., KEY GROWTH INVEST LP, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, BOARD OF MANAGERS OF 52 EAST END AVENUE CONDOMINIUM, AMK CAPITAL CORP., MRK SALES CORP.,

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 220, 221, 222, 223, 224, 225, 226, 233, 234, 235, 236, 237, 238, 239, 240, 242, 243

were read on this motion to/for

RENEWAL

Upon the foregoing documents, the motion is determined as follows:

In this action to foreclose on a mortgage encumbering real property located at 52 East End Avenue, Units 12A, 12C, 14B and 14C, New York, New York, Defendant mortgagors, Melissa Fawer and Mark Fawer (“Fower”) move pursuant to CPLR §2221[e] to renew an order of the Court (Bluth, J), dated July 23, 2019, to vacate the order pursuant to CPLR §2221[a] and §5015 and to dismiss the complaint for failure to comply with RPAPL §1304. Plaintiff opposes the motion.

By order dated July 23, 2019, Justice Arlene Bluth granted the Plaintiff’s motion for summary judgment and an order of reference (Mot. Seq. No. 1). In that decision (NYSCEF Doc No 83), Justice Bluth determined as follows on Plaintiff’s compliance with RPAPL §1304:

As an initial matter, the Omolino affidavit (NYSCEF Doc. No. 47) establishes plaintiff’s prima facie burden to show the 90-day notice was sent. Omolino, a VP for Berkshire Bank, contends that the RPAL 1304 notice was sent by regular first-class mail and by certified mail, return receipt requested on May 31, 2017 (*id.* ¶ 4). He attaches a certified mail bar code and a print out purporting to show it was sent to the Fawers’ address (*id.* exh 1).

The Court observes that the Fawers do not specifically state that they did not receive the RPAPL 1304 notice in their affidavits (see NYSCEF Doc. Nos. 59, 60). Rather, the Fawers complain plaintiff has not met its burden to demonstrate the admissibility of the

records. But including an affidavit from an employee of plaintiff stating the 90-day notice was sent and attaching records supporting that contention is sufficient.

Moreover, once the Fawers complained about the 90-day notice, plaintiff included more details about sending the 90-day notice (see NYSCEF Doc. Nos. 71, 77). Plaintiff was entitled to provide more detail once the Fawers complained about this issue.

Defendants did not raise, and Justice Bluth did not rule, whether the contents of the 90-day notice complied with RPAPL §1304. Defendants' appeal of Justice Bluth's order was denied by the Appellate Division, First Department (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]). A review of the record on that appeal revealed that Defendants' brief did not address Plaintiff's compliance with RPAPL §1304.

Now, Fawer Defendants assert renewal should be granted based upon a purported change in the law that allegedly occurred when, after issuance of Justice Bluth's order, the Appellate Division, Second Department issued its decision in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept 2021]. Upon renewal, Defendants seek denial of Plaintiff's motion for summary judgment and dismissal of the complaint. Plaintiff opposes the motion.

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' decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021] which expressed a need for reliable and objective rules in foreclosure matters.

In the present case, Defendants posit that the inclusion of information by Plaintiff in the notices pursuant to the Fair Debt Collection Practices Act and regarding bankruptcy rights violated RPAPL §1304. Plaintiff argues that *Kessler* does not represent a definitive ruling as required by CPLR 2221[e] because it did not overrule or abrogate prior case law holding to the contrary and since that case is distinguishable.

Generally, "[r]enewal is granted sparingly" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]). As relevant here, CPLR §2221[e][2] provides that a motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination". Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, *citing* Siegel & Connors, New York Practice § 449 [6th ed. 2018]). A "clarification of the decisional law" can also qualify (*see Puello v City of New York*, 118 AD3d 492 [1st Dept 2014]; *Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272 [2d Dept 2003]; *see also Shatz v Chertok*, 203 AD3d 527 [1st Dept 2022]). Even if decisional law is changed, unless it would alter the prior determination, it is of no moment (*see 515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 44 AD3d 707, 708 [2d Dept 2007]).

The Second Department's ruling in *Kessler* is a clear edict that if in existence at the time the questioned decision was issued would have altered the outcome thereunder (*see generally U.S. Bank Natl. Assn. v DeJesus*, ___ Misc3d ___, 2022 NY Slip Op 50461[U][Sup Ct Putnam Cty 2022]; *see also Deutsche Bank Natl. Trust Co. v Dormer*, 60 Misc. 3d 550 [Sup Ct Suffolk Cty 2018]). Indeed, that decision entirely undermines Justice Bluth's determination that Plaintiff complied with the requisites of RPAPL §1304. That the principle of strict construction of RPAPL §1304 was undoubtably in existence in the First and Second Departments when Justice Bluth issued her decision (*see eg Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103 [2d Dept 2011]; *HSBC Bank USA v Rice*, 155 AD3d 443 [1st Dept 2017]), is of no moment as the specific issue in *Kessler* had not been addressed by any appellate level court in New York. Any claim that *Kessler* cannot form the basis for renewal as it "merely clarifies existing law" is futile. The cases relied on by Plaintiff to support this proposition, *D'Alessandro v Carro*, 123 AD3d 1, 7 [1st Dept 2014] and *Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 7 [1st Dept 2014], are distinguishable. Those cases involved rulings that discussed prior holdings but left existing precedent unaltered. Whereas *Kessler* issued a determination not previously reached by any appellate level court in New York.

Plaintiff's attempt to distinguish *Kessler* substantively and procedurally is unavailing. The 90-day notice served herein contained notices pursuant to the Fair Debt Collection Practices Act and information regarding bankruptcy rights like those concerned in *Kessler*. Plainly, inclusion of this superfluous information falls within meaning of "any" additional information "not expressly delineated" in RPAPL §1304 and renders the 90-day notice served by Plaintiff before commencement of this action ineffective. Further, "[t]he 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]). Thus, 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]).

Plaintiff's reliance on "law of the case" is unavailing. Where, as here, change of law is demonstrated (*see Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]; *Wells Fargo Bank Minn., N.A. v Perez*, 70 AD3d 817 [2d Dept 2010]), even after appellate review of the decision (*see Tishman Constr. Corp. v City of New York*, 280 AD2d 374, 374 [1st Dept 2001]; *see also Foley v Roche*, 86 AD2d 887 [1st Dept 1982]), the Court is not bound by a prior resolution in the case. Likewise, the claim Defendants waived or abandoned a defense of non-compliance with RPAPL §1304 by not asserting it on appeal fails.

Accordingly, it is

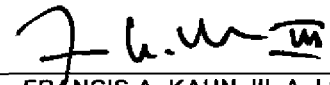
ORDERED that the branch of Fawer Defendants' motion (Mot. Seq. No. 5), which sought leave to renew Plaintiff's motion for summary judgment (Mot. Seq. No. 1) is granted, and it is

ORDERED that, upon renewal, the Plaintiff's motion for summary judgment is denied, and it is

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]).

ORDERED that the branch of Fawer Defendants' motion to dismiss Plaintiff's complaint is granted.

7/7/2022
DATE



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

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NOT FOR DISPOSITION

HON. FRANCIS A. KAHN III

GRANTED IN PART

OTHER J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE