

Wells Fargo v Weisz

2022 NY Slip Op 34526(U)

October 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 509043/14

Judge: Larry D. Martin

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At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of October 2022.

P R E S E N T:

HON. LARRY D MARTIN,
J.S.C.

Index No.: 509043/14

_____ x

WELLS FARGO,

Plaintiff,

DECISION AND ORDER

-against-

Duplicate original

TEMMA M WEISZ et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion (MS 5)	<u>1</u>
Opp/Cross (MS 6)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant moves for dismissal of the instant action, alleging that Plaintiff failed to comply with RPAPL 1304 in light of *Kessler* and its progeny. Plaintiff opposes and cross-moves for reargument and/or renewal of its previous motions for summary judgment as (it suggests) this action does not involve a home loan. Defendant opposes.

I. Reargument

Plaintiff seeks to reargue its denied motions for summary judgment. "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]). “Motions for reargument are addressed to the sound discretion of the court that decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law” (*BNY v Mor*, 201 AD3d 691 [2d Dept 2022]). “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” (*Flanagan v Delaney*, 194 AD3d 694, 698 [2d Dept 2021]).

In moving for summary judgment for the second time¹, Plaintiff alleged (without elaborating further) that RPAPL 1304 notices were not required “as the premises is not borrower occupied” (Palermo Aff ¶8). After Defendant cross-moved for dismissal based on RPAPL 1304, Plaintiff again suggested that the statute “only applies to home loans where the premises is borrower occupied” and that “Defendant has conceded that she does not reside at the premises being foreclosed” (Grapensteter Aff ¶14; see also ¶17). It has, however, subsequently become clear that the borrower’s non-occupancy of the premises at the time of commencement of the action does not obviate the need to send the notices (*Nationstar Mtge., LLC v Jong Sim*, 197 AD3d 1178 [2d Dept 2021]).

Plaintiff now argues² that “Defendant was simply not entitled to the RPAPL § 1304 90-day notice because she clearly was not occupying the mortgaged premises at the commencement of this action, and indeed she no longer owned the property... As Defendant was not even a necessary party at the commencement of this action, then [stet] Plaintiff respectfully submits that the Court overlooked and/or misapprehended this fact when arriving at its prior determinations herein” (Oster Aff ¶17). That Defendant did not live there at the time of commencement is, however, irrelevant (*Jong Sim*). Additionally, notices are required even when Plaintiff’s claims as against a borrower are only to recover monetary damages (*Deutsche Bank v Webster*, 142 AD3d 636, 639 [2d Dept 2016]) – as was the case when this action commenced³.

Plaintiff is correct that there is a bit of complexity engendered by the unusual history. Defendant, the borrower, transferred ownership of the property to a corporate entity (3908

¹ Plaintiff’s first motion did not argue that the instant action does not involve a home loan.

² In reply, Plaintiff proffers for the first time the loan application and argues that it is clear that the property was an investment property. As that evidence was not previously before the Court, it will be addressed in the context of renewal.

³ Defendant did not own the property and Plaintiff’s sole claim against her was for deficiency

Cypress LLC) that she allegedly controlled. The LLC was the owner of the property at the commencement of the action in 2014 but transferred its interest back to Defendant in 2017. Thereafter, the LLC sought dismissal against it pursuant to CPLR 3215[c] and/or because there were no longer any claims against it. Plaintiff did not oppose that relief and the LLC was dropped from the case as it “is not the borrower and no longer has an interest in the property” (2/13/18 order). In issuing such an order, the Court presumably found that, as Weisz was already a defendant, the foreclosure claims could continue with her stepping into the LLC’s shoes. At that point, Defendant was effectively in this action in two capacities. On one hand, she was named as a Defendant from commencement and answered the complaint – but only as a non-owner borrower, rendering her defenses effective only as to the monetary claims as to her but not as to the foreclosure claims. On the other hand, she acquired an ownership interest during the pendency of the litigation and replaced the defaulting (but appearing) LLC in this action – now also participating as a non-borrower owner affected by the foreclosure claims but with the attendant limitations on available defenses⁴. Put differently, Defendant is now effectively both a non-owner borrower and a non-borrower owner and her answer and defenses still only apply to the deficiency claim and not to the foreclosure claims. As that distinction appears to have been missed in addressing the prior motion, reargument of the second⁵ motion for summary judgment is granted.

As to the foreclosure claims, all affected defendants are in default. Plaintiff proffered copies of the note and mortgage and the Berryman Affidavit, demonstrating its entitlement to a default judgment on its foreclosure claims. Default judgment is, thus, granted.

The Court misapprehended neither law nor fact in denying summary judgment, however. Upon the record before it, issues of fact remained (and still remain) as to whether the default and RPAPL 1304 notices were properly mailed. Additionally, Defendant’s assertion (in opposition to the MSJ) that Plaintiff failed to demonstrate that she defaulted by admissible evidence is correct. The business records upon which Berryman based her assertion that Defendant defaulted were not appended to her affidavit. As such, Plaintiff failed to prove its prima facie

⁴ As the LLC did not answer the complaint, the limitations as to available defenses are theoretical rather than practical.

⁵ At the time the first motion for summary judgment was filed, the LLC was still a party and the posture was different.

case (*Wells Fargo Bank, National Association v. Salazar*, 177 A.D.3d 819, 821 [2d Dept 2019]). Defendant's abandoned affirmative defenses (first-third, fifth-thirteenth, fifteenth-seventeenth) are stricken, however (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

II. Renewal

“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” (CPLR 2221[e]). Plaintiff argues that the Appellate Division's decision in *MLB Sub I, LLC v. Mathew*, 202 A.D.3d 1078 (2d Dept. 2022) is an outcome-determining change in law. Therein, the Second Department held that the loan in question was not a home loan based (at least in part) on a “‘1-4 Family Rider’ which deleted the occupancy-by-borrower requirement in the mortgage” (*Id.*, at 1080). Upon a review of the record in that case, however, it is clear that there were additional factors leading to the conclusion that it was not a home loan (the defendant did not claim to have resided there, she had a multitude of other properties, etc.). As such, this Court is not prepared to conclude that the (somewhat common) rider removing the residency requirement is alone sufficient to place a loan outside the ambit of RPAPL 1304 especially where, as here, Defendant claims to have resided in the property subsequent to the mortgage.

In reply, Plaintiff proffers Defendant's Uniform Residential Loan Application which led to the subject loan. Therein, Defendant stated under penalty of law that the purpose of the loan was to refinance an investment property (§II), that she resided on East 5th Street at that time rather than the property-in-suit which she already owned (§§III,VI), and that she did not intent to occupy the property as her primary residence (§VIII). Put differently, the UCRA would (were it properly before the Court) appear to demonstrate that this action does not involve a home loan.

However, “a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and *must set forth a reasonable justification for the failure to present such facts on the prior motion*. It is well settled that a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Indeed, the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to

present the new facts on the original motion” (*Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1020 [2d Dept 2020][emphasis added]). As Plaintiff fails to offer any justification for its failure to previously proffer the UCRA, renewal thereupon cannot be granted⁶.

In light of the foregoing, renewal is denied.

III. Motion to Dismiss

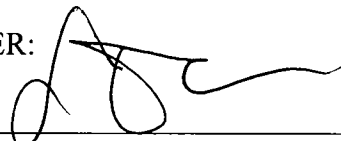
Defendant seeks dismissal based upon Plaintiff’s failure to strictly comply with RPAPL 1304. As noted by Plaintiff (and as the totality of the record makes very clear), issues of fact remain as to whether this action involves a home loan. Though Defendant claims to have intended to reside (and to actually have resided) at the property following the mortgage, no supporting evidence has been proffered and Plaintiff has sufficiently called the veracity of that assertion into question. Consequently, dismissal must be denied.

IV. Conclusions

Defendant’s motion to dismiss (MS 5) is denied. Plaintiff’s cross-motion to reargue and/or renew (MS 6) is granted to the extent that reargument of its second motion for summary judgment (MS 3) is granted and, upon reargument, default judgment is granted on the foreclosure claims and Defendant’s first-third, fifth-thirteenth, and fifteenth-seventeenth affirmative defenses are stricken. In light of the foregoing, an order of reference will be issued (see accompanying order) and, if necessary, the parties are directed to proceed to trial as to Plaintiff’s monetary claims against Defendant.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

HON. LARRY MARTIN

JUSTICE OF THE SUPREME COURT

⁶ The Court also notes that the UCRA was first produced *in reply* and that the burden by submitting evidence for the first time in reply (*Wells Fargo v Murray*, 208 AD3d 924, 926 [2d Dept 2022]). Nor do the exceptions to that rule apply – the allegation to which the UCRA is relevant (Defendant’s claim that the loan was a home loan) was already before the Court at the time Plaintiff filed its cross-moving papers (which addressed the issue without reference to the UCRA) and Defendant did not have an opportunity to respond to the reply (which was filed late on the business day prior to the appearance).