

US Bank v Sofer

2022 NY Slip Op 34527(U)

November 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 514909/15

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 22nd day of November 2022.

P R E S E N T:

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

Index No.: 514909/15

_____ x

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

MICHAELLA SOFER 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 4)	<u>1</u>
Opposition	<u>2</u>
Reply	<u>3</u>
Motion (MS 5)	<u>4</u>
Opposition	<u>5</u>
Reply	<u>6</u>

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

The instant action was commenced on December 9, 2015. Defendants Joseph and Michaela Soffer timely answered through counsel. On October 17, 2017, Plaintiff moved for summary judgment and an order of reference. Defendants cross-moved for summary judgment of dismissal, alleging that Plaintiff failed to comply with the notice requirements of RPAPL 1304 and filing requirements of RPAPL 1306. By order dated March 28, 2018, the Honorable Noach Dear granted Plaintiff's motion in its entirety and denied Defendants' cross-motion. A notice of entry of that order was filed the following month. On August 9, 2018, Plaintiff filed a motion for

judgment of foreclosure and sale. On January 2, 2019, an order granting JFS was issued on default¹. Notice of entry was filed on February 12, 2019. Shortly thereafter, a notice of sale was uploaded reflecting an auction date of April 11, 2019. Upon Defendants filing a notice of appeal from the JFS, the auction did not go forward. It is undisputed that the appeal was dismissed for failure to perfect.

On August 3, 2022, Plaintiff filed the instant motion for an order directing the referee to conduct the foreclosure sale in accordance with the 2nd Judicial District's auction rules² in effect as of the date of the sale and providing the name and telephone number of the loan servicer³. While neither the moving papers nor the proposed order provide for an extension of time pursuant to CPLR 2004 to hold the auction, Defendants suggest that relief is also (inherently) being requested⁴. Defendants opposed, arguing that the JFS required the auction to be held within 90 days of the judgment – and that it was not – and that the Court cannot extend the time to do so. Defendants further posited that the proposed changes to the JFS are not ministerial and should not be treated as such by the Court. In reply, Plaintiff suggested that no extension of time is necessary but that the delay was justified based on an appellate stay issued at Defendants' request which ended amidst the COVID-induced halt to foreclosure auctions. The changes, it argued, are ministerial.

Defendants also cross-moved for renewal of the motion and cross-motion for summary judgment and the motion for judgment of foreclosure and sale. Accurately noting that following the issuance of the JFS in this action the Appellate Division, Second Department issued decisions in *Wells Fargo Bank, N.A. v Yapkowitz*, 199 AD3d 126, 128 [2d Dept 2021] and *Bank of Am., N.A. v Kessler*, 202 AD3d 10 [2d Dept 2021] both of which constitute material changes in binding decisional law, Defendants argued that renewal is appropriate and would lead to a different result. Plaintiff, in opposition, accurately noted that Defendants' time to appeal from the JFS had run and, thus, the instant cross-motion to renew based upon a change in law would

¹ Though Defendant's then-counsel appears to have attempted to file a cross-motion under this index number, it was returned for correction by Motion Support -- and was erroneously filed, relating to an unrelated foreclosure action between different parties. As such, Defendants' (new) counsel's assertion that the JFS was opposed is inaccurate.

² Auction rules were modified as a result of the COVID-19 pandemic.

³ The provision of this information became required following the issuance of the JFS herein.

⁴ Plaintiff alleges that the JFS allows the sale to be held as soon as practical but argues, in the alternative, that the delay in holding the sale was justified. In their cross-motion, Defendants seek to strike the paragraph of the JFS allowing the sale to occur beyond ninety days.

appear untimely. The parties dispute, however, whether Plaintiff's proposed amendment of the JFS would give rise to a new right of appeal of the underlying orders such to also render the instant cross-motion timely.

i. Renewal

- a. A decision issued on default is not subject to renewal

As Defendants failed to oppose Plaintiff's motion for JFS, renewal of that motion is inapplicable⁵ (*US Bank v Fuller-Watson*, 197 AD3d 764, 767 [2d Dept 2021]; *Singh v Reddy*, 161AD3d 1121, 1121 [2d Dept 2018]). As JFS would need to be vacated to allow renewal of the underlying summary judgment motion⁶, that relief also must be denied.

- b. Even were renewal applicable, it would be untimely

The Appellate Division, Second Department has consistently held that a motion to renew based upon change in law made after judgment was entered and the time to appeal had expired must be denied as untimely absent circumstances set forth in CPLR 5015 (*Opalinski v City of NY*, 205 AD3d 917, 919 [2d Dept 2022]; *Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]; *Glicksman v Bd of Ed*, 278 AD2d 364, 366 [2d Dept 2000]). However, as noted by Defendants, if a resettled order materially changes the rights of the parties, it is appealable even though the time to appeal from the original order has expired (*Kaehler v Phoenix Ins Co*, 38 AD2d 683, 684 [4th Dept 1971]). If, however, the change is not material, the time to appeal continues to be measured from the original order with notice of entry (*Singer v Board of Ed of City of NY*, 97 AD2d 507, 507 [2d Dept 1983]; see also, *Robert Martin Co v Town of Greenburgh*, 74 NY2d 701 [1989]; *Pioneer Sav Bank v Audubon Quality Homes*, 188 AD2d 711, 712 [3d Dept 1992]). Likewise, if the new order only clarifies the original order, the time to appeal is not restarted (*Matter of Jennifer G.*, 190 A.D.2d 1095 [4th Dept 1993]).

Herein, Plaintiff seeks an order directing the referee to conduct the foreclosure auction in accordance with the auction rules in place at the time of the sale – which he would be obligated

⁵ Were the Court to view the cross-motion as a motion to vacate Defendants' default in opposing the motion for JFS, it would fail in the absence of any excuse for the default.

⁶ "A judgment of foreclosure and sale is final as to all questions at issue between the parties, and concludes all matters of defense which were or could have been litigated in the foreclosure action" (*Ciraldo v JP Morgan Chase Bank, NA*, 140 AD3d 912).

to do even without the requested order. As such, that relief is not a material change to the judgment.

Likewise, the proposed inclusion of the servicer's name and telephone number is non-substantive, merely providing additional information tangential to the judgment (see, similarly, *Pioneer*, 188 AD2d at 712 [resetting of JFS to attach description of property not a material change]). As such, it would not restart the time to appeal.

To the extent that Plaintiff is seeking an extension of time to hold the auction⁷, that would not affect the judgment. Pursuant to CPLR 2004, "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." Put differently, Plaintiff is seeking additional time to comply with the JFS, rather than seeking to modify the order. Thus, any resulting appeal would only address the propriety of the extension and not the underlying non-final determinations as would be the case if it were the judgment being appealed (see, CPLR 5501[a][1]).

- c. Even were Plaintiff seeking material changes to the judgment, Defendants' ability to appeal would be constrained by *Bray v Cox*

Even assuming, arguendo, that the grant of Plaintiff's requested relief would generate a materially amended judgment, Defendants failed to perfect their appeal from the JFS order. It is well established that "a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal" (*Bray v Cox*, 38 NY2d 350, 353 [1976]). Further, "[a]s a general rule, [Appellate Courts] do not consider any issue raised on a subsequent appeal that could have been raised in an earlier appeal which was dismissed for lack of prosecution, although [they have] the inherent jurisdiction to do so." (*Directional Lending v Guerrero*, 147 A.D.3d 909 [2d Dept 2017]). Herein, per the notice of appeal, Defendants were appealing "from the Judgment of Foreclosure and Sale" as to "[w]hether the Supreme Court erred in granting judgment, notwithstanding the fact that Plaintiff failed to comply with the notice requirements of RPAPL 1304." As such, Defendants' 1304 arguments –

⁷ At least in the alternative.

which were the stated basis for the dismissed appeal⁸ – are not appealable as of right⁹ and would not serve as the basis for a motion to renew.

II. Plaintiff's requested relief

Plaintiff's motion is granted. The Court sees no legal basis for preventing it from complying with the requirements propounded following the issuance of the JFS. Defendants claim no prejudice from the inclusion of the servicer's information and the directive for the referee to comply with the rules applicable at the time of sale – nor does the Court see any.

To the extent that the parties dispute whether an extension of time to hold the sale is necessary, the JFS order did provide for additional time. Though Defendants are correct that Plaintiff did not explicitly request that relief in the related moving papers, it did request that an order be issued in the form appended to its papers – which included the extension. Though the order appears to have been marked up by chambers prior to being signed, the extension was not stricken.

Even were an extension of time necessary¹⁰, Plaintiff has provided a reasonable justification for its delay in holding the sale. It is undisputed that an auction was timely scheduled but was cancelled following Defendants' appeals in this and the related quiet title actions. An appellate stay was in place until September 2020 and the COVID-induced moratorium on auctions prevented holding the sale thereafter. As such, to the extent necessary, the Court extends Plaintiff's time to hold an auction.

⁸ Defendants' arguments in their cross-motion for summary judgment fell squarely within *Yapkovitz*.

⁹ See, similarly, *US Bank v Daskal*, 164 AD3d 709, 710 [2d Dept 2018] where the Second Department declined to review issues raised by a defendant as to a re-settled judgment of foreclosure and sale, stating: "The dismissal of Daskal's prior appeal from the judgment of foreclosure and sale entered July 23, 2014, for failure to perfect, constituted an adjudication on the merits as to Daskal with respect to all issues that could have been reviewed therein, and this Court declines to review those issues on this appeal to the extent they are raised by Daskal." It is worth noting that, in *Daskal*, the JFS was re-settled based upon a page of the original order having been omitted from the entered copy – though the defendants therein fought the re-settlement arguing, as Defendants do here, that resettlement cannot be used to extend the time for a sale (which was an additional effect of the resettlement).

¹⁰ Defendants' position that extensions cannot be granted is incorrect. There is no basis for the supposition that CPLR 2004 is unavailable. Were Defendants correct, the filing of a bankruptcy or the signing of an order to show cause would require Plaintiff to, at a minimum, seek a new JFS – a ridiculous outcome.

III. Conclusions

Plaintiff's motion for an order directing the referee to sell the property pursuant to the applicable auction rules and to provide the servicer's contact information is granted (see accompanying order). Defendants' cross-motion to renew is denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin, JSC

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**