

Federal Natl. Mtge. Assn. v Berquin

2022 NY Slip Op 34716(U)

April 30, 2024

Supreme Court, Kings County

Docket Number: Index No. 507882/2014

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1 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 24th day of May, 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

-----X
FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff(s),

-against-

JUDE BERQUIN, et al.,

Defendant(s).
-----X

ORDER

Calendar #(s): 11

Index #: 507882/2014

Mot. Seq. #(s): 6

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affidavits (Affirmations) and Exhibits _____

_____168-183_____

Opposing Affidavits (Affirmations) and Exhibits _____

_____184-185_____

Reply Affidavits (Affirmations) and Exhibits _____

_____186_____

This is an action to foreclose on the mortgage encumbering the residential real property located at 1057 East 83rd Street in Brooklyn, New York. By order dated September 17, 2019, this Court (Noach Dear, J.), *inter alia*, granted Plaintiff’s prior motion for summary judgment on the complaint and an order of reference, and denied the cross-motion by defendant-mortgagor Jude Berquin (“Defendant”) for summary judgment dismissing the complaint.

Defendant now cross-moves¹ for leave to renew the prior motion and cross-motion, and upon renewal, for an order denying Plaintiff’s motion and granting the cross-motion. 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][2]). “A clarification of the decisional

¹ Plaintiff initially moved, in mot. seq. #5, for an order confirming the Referee’s report and granting a judgment of foreclosure and sale but withdrew the motion after Defendant’s partially successful appeal of the challenged order.

law is a sufficient change in the law to support renewal” (*McLaughlin v Snowlift, Inc.*, 214 AD3d 720, 721 [2d Dept 2023]). Justice Dear rejected Defendant’s RPAPL § 1304 defense, finding that the subject mortgage loan did not qualify as a home loan under the statute because “[t]he evidence suggests that Defendant has been residing at [an address other than the subject premises] throughout.” Defendant argues that he is entitled to renewal due to the subsequently issued decisions of the Appellate Division, Second Department, regarding the applicability of RPAPL § 1304 (*see Nationstar Mtge., LLC v Jong Sim*, 197 AD3d 1178 [2d Dept 2021]) and the substantive content of the pre-foreclosure notices mandated by the statute (*see Bank of Am., N.A. v Kessler*, 202 AD3d 10 [2d Dept 2021], *rev’d* 39 NY3d 317 [2023]). The Court, thus, grants leave to renew but for the reasons discussed below, adheres to the challenged order insofar as it denied Defendant’s prior cross-motion for summary judgment dismissing the complaint.

According to Defendant, Justice Dear’s reasoning for rejecting his RPAPL § 1304 defense was undercut by *Sim*, in which the Second Department held that a borrower’s ceasing to occupy the mortgaged premises as their principal dwelling does not relieve a plaintiff of its obligation to send the RPAPL § 1304 notices to the borrower before commencing a foreclosure action, but only of the requirement to do so at least 90 days prior (*see* 197 AD3d at 1180-1181). Defendant appealed the September 17, 2019 order, and by decision dated February 22, 2023, the Second Department modified and denied summary judgment to Plaintiff, albeit for a different reason not relevant to this issue. Importantly, the Second Department agreed with Justice Dear that: 1) Plaintiff established *prima facie* that the subject loan was not a “home loan” within the meaning of RPAPL § 1304, thereby rendering the statute’s notice requirement inapplicable; and 2) in opposition to this showing, Defendant failed to raise a triable issue of fact. Although the Second Department did not cite or discuss the *Sim* case in its decision on Defendant’s appeal, it must be presumed to have been aware of its own precedent, since *Sim* was issued more than a year earlier. Hence, in the face of this binding appellate ruling which speaks directly to the applicability of RPAPL § 1304 to the case at bar, this Court cannot grant Defendant’s request to render a contrary finding on the very same issue.

In any event, the applicability of RPAPL § 1304 appears to be academic, at least for purposes of the instant motion. The sole ground articulated in Defendant’s moving papers for dismissing the complaint is his assertion that Plaintiff included additional language in the pre-foreclosure notices, in violation of RPAPL § 1304(2)’s “single envelope” requirement, as

interpreted by the Second Department in *Kessler, supra*. However, in reversing the Second Department, the Court of Appeals rejected that bright line rule, holding: “accurate statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute an ‘other notice’” (*Kessler*, 39 NY3d at 326), and, thus, do not violate the separate envelope requirement. As set forth in his attorney’s supporting affirmation, Defendant identifies the following paragraph at the end of Plaintiff’s pre-foreclosure notice as the purportedly impermissible extraneous language:

“If you do not understand this letter, you are urged to seek the advice of your attorney if you have one. Otherwise, you are urged to call us immediately at the number shown below” (NYSCEF doc. #169, ¶38, quoting NYSCEF doc. #183, at pp. 3, 8, 13, 18)

This paragraph exemplifies the type of concise, potentially helpful information that the Court of Appeals has held may permissibly be included in an RPAPL § 1304 pre-foreclosure notice. This Court further finds that the notice as a whole “contained no ‘false, misleading, obfuscatory, or unrelated information’” (*Wilmington Sav. Fund Socy., FSB v Sotomayor*, 222 AD3d 702 [2d Dept 2023], quoting *Kessler*, 39 NY3d at 328), and Defendant does not contend otherwise. Since Defendant proffers no other legal arguments in support of his request for summary judgment dismissing the complaint, this branch of his cross-motion must be denied.

The branch of Defendant’s cross-motion which seeks, upon renewal, an order denying Plaintiff’s prior motion for summary judgment and an order of reference (mot. seq. #3), is moot because the Second Department granted said relief on the direct appeal of the challenged order.

Accordingly, the above-referenced cross-motion by Defendant for leave to renew the prior motion and cross-motion (mot. seq. #3 and #4), is **GRANTED solely to the extent** that leave to renew is granted, and upon renewal, the Court adheres to its September 17, 2019 order insofar as it denied mot. seq. #4, and the cross-motion is **DENIED in all other respects.**

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: April 30, 2024



Hon. Cenceria P. Edwards, JSC, CPA