

Schmidt v Capone

2022 NY Slip Op 35037(U)

April 25, 2022

Supreme Court, Queens County

Docket Number: Index No. 717310/2021

Judge: Lourdes M. Ventura

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

-----X
JOHN SCHMIDT, JR.,

Index
Number: 717310/2021

Plaintiff,

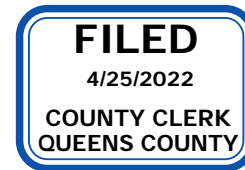
-against-

Motion
Date: November 1, 2021

BARBARA M. CAPONE INDIVIDUALLY AND AS LIMITED ADMINISTRATOR OF THE ESTATE OF MARIE SCHMIDT AND AS SUCCESSOR TRUSTEE OF THE SCHMIDT TRUST AND AS TRUSTEE OF THE M. SCHMIDT TRUST, ARLEEN KROPF, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WALTER KROPF, EXCEL ABSTRACT INC., CLEARLIGHT MORTGAGE CORP. F/K/A COASTAL CAPITAL CORP. D/B/A THE MORTGAGE SHOP, COUNTRYWIDE HOME LOANS, INC., AND BANK OF AMERICA, N.A.,

Motion
Seq. No.: 7 & 8

Defendants.



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Motion sequence number 7:

The following electronically filed (EF) papers read on this motion by defendant Barbara M. Capone, for and Order: granting defendant's motion for summary judgment and dismissing any and all plaintiff's verified complaints and verified amended complaints and, in the alternative, disqualifying Plaintiff's attorney.

	Papers
	<u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 7-17
Affirmation in Opposition – Exhibits.....	EF 74-97
Affirmation in Reply.....	EF 104-105

Motion sequence number 8:

The following electronically filed (EF) papers read on this motion by defendants Countrywide Home Loans, Inc. and Bank of America, N.A., for an Order: pursuant to CPLR 3212 for summary judgment dismissing with prejudice each of the claims asserted by plaintiff John Schmidt, Jr. against defendants, pursuant to CPLR 2004, extending defendants' time to file a motion for summary judgment beyond the May 29, 2020 date set forth in the Court's order dated March 11, 2020 and deeming the motion timely filed, and for such other and further relief as the Court deems proper.

	Papers
	<u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 18-48
Affirmation in Opposition – Exhibits.....	EF 47-72
Affirmation in Reply.....	EF 107-110

Upon the foregoing papers, defendant Barbara M. Capone’s motion is granted in part and denied in part, and defendant Countrywide Home and Bank of America’s motion is denied as follows:

Plaintiff commenced this action by summons and verified complaint seeking to recover for damages and to set aside, vacate and reform allegedly fraudulent documents including deed, mortgage and other documents that were recorded in March 2005 pertaining to real property known as 63-07 Forest Avenue, Ridgewood, Queens.

Here, defendant Barbara M. Capone (“defendant Capone”) seeks an Order *inter alia* granting defendant's motion for summary judgment pursuant to Civil Procedure Law and Rules (“CPLR”) and dismissing any and all plaintiff's verified complaints and verified amended complaints and, in the alternative, disqualifying plaintiff's attorney.

On March 11, 2020, Justice Maureen A. Healy ordered in relevant part that the “motions for summary judgment shall be filed no later than May 29, 2020, before the assigned judge”.

Here, defendant Capone e-filed motion sequence number 7 seeking summary judgment on September 2, 2021. It is well settled that an untimely motion for summary judgment may be considered by the court only if the movant demonstrates “good cause for the delay in making the motion - a satisfactory explanation for the untimeliness” (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2014]). “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment” (*Bivona v. Bob's Discount Furniture of N.Y., LLC*, 90 A.D.3d 796, 796, 935 N.Y.S.2d 605 [internal quotation marks omitted]).

Here, defendant Capone’s moving papers fail to demonstrate good cause for the delay in making its summary judgment motion (*Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866, 868 [2d Dept 2016]; *Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 1146 [2d Dept 2020]). Thus, the branch of defendant Capone’s motion sequence number 7 seeking summary judgment pursuant to CPLR 3212 is denied as untimely.

Defendant Capone’s motion sequence number 7 also seeks to disqualify plaintiff’s attorney and avers that plaintiff s counsel Mr. Steven Greenfield, Esq. (“Mr. Greenfield”) was the same attorney that represented plaintiff at the closing on July 3, 2003. Defendant Capone also avers that Mr. Greenfield is the attorney listed in the certificate of acknowledgment in the "return by mail" section. Defendant Capone further avers that Mr. Greenfield was the attorney listed on the

Recording and Endorsement Cover Page and both have the return to address as "Steven Greenfield, Esq, 869 Dune Road, West Hampton Dunes, NY 11978." Defendant Capone further avers that Mr. Greenfield was personally present at the closing and was providing legal representation to the plaintiff throughout the preparation to the closing. Lastly, the facts and circumstances with respect to the recording of the documents are likewise part of the current fraud action, and because plaintiff's counsel was responsible for representing plaintiff at both of these key events, he is a necessary witness and must be disqualified pursuant to New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7(a).

Plaintiff opposes defendant Capone's application to have plaintiff's counsel disqualified. Plaintiff's counsel avers that he has never heard any complaint from any of the defendants concerning his continued representation of plaintiff in this matter nor did any of them request that the Court disqualify him.

"The determination whether or not disqualification of an attorney is warranted is a matter committed to the sound discretion of the trial court. Disqualification is warranted if the attorney's testimony is necessary" (*Bentvena v Edelman*, 47 AD3d 651, 651-52 [2d Dept 2008]). "The burden of demonstrating necessity falls upon the challenging party" (*id.*).

This Court finds that defendant Capone has met its burden in establishing that Mr. Greenfield testimony is necessary by demonstrating that Mr. Greenfield represented plaintiff, was present at the time of the closing, and was the attorney listed on the documents in which plaintiff alleges were fraudulently altered (see *Biegel v Gangemi*, 54 AD3d 887, 889 [2d Dept 2008]; *Nationscredit Fin. Services Corp. v Turcios*, 41 AD3d 802 [2d Dept 2007]; *Chadrjian v Purcell*, 293 AD2d 699, 700 [2d Dept 2002]). Thus, the branch of defendant Capone's motion seeking to disqualify plaintiff's attorney is granted.

Defendants Countrywide Home Loans, Inc. ("defendant Countrywide") and Bank of America, ("defendant Bank of America") N.A. submit motion sequence number 8 seeking *inter alia* pursuant to CPLR 3212 for summary judgment dismissing with prejudice each of the claims asserted by plaintiff against Defendants and pursuant to CPLR 2004, extending defendants' time to file a motion for summary judgment beyond the May 29, 2020 date set forth in the Court's Order dated March 11, 2020 and deeming the motion timely filed. Specifically, defendants Countrywide and Bank of America submit an affidavit from Christine L. Andreoli, who avers that this motion should be deemed timely submitted and that statutory or court-ordered deadlines that were due to expire during the ongoing Covid-19 state of emergency have frequently been extended to accommodate the "new normal." Christine L. Andreoli further avers that the restrictions implemented by Administrative Orders and the disruptions caused by the ongoing health crisis made it impossible to meet the May 29, 2020 date for filing motions for summary judgment in the March 11, 2020 Order. Christine L. Andreoli affidavit also states that defendants have been trying to convert this matter to e-filing on consent since early May 2020 -- before the expiration of the deadline in the March 11, 2020 Order and at every step of the way, plaintiff's counsel has obstructed defendants' efforts to file a summary judgment motion as the March 11, 2020 Order expressly contemplated. Christine L. Andreoli's affidavit further avers that there is no prejudice to any party in accepting this motion and plaintiff's counsel has known since at least the March 11, 2020 conference that defendants intended to file a summary judgment motion and that any claim

by plaintiff that he will be prejudiced by an extension of time is disingenuous. Lastly, Christine L. Andreoli 's affidavit further avers that plaintiff's counsel has actively contributed to the delay by unreasonably withholding his consent to conversion of this case to e-filing and forcing defendants to apply for a court order.

CPLR 2004 governs extensions of time and in relevant part states:

“Except where otherwise expressly prescribed by law, 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, whether the application for extension is made before or after the expiration of the time fixed.”

The Administrative Order 267/20 of the Chief Administrative Judge of The Courts dated November 6, 2020, in relevant part states:

“Pursuant to the authority vested in me, at the direction of the Chief Judge, and in light of the ongoing public health and commercial concerns raised by the COVID-19 health emergency. I hereby direct that, effective November 4, 2020. unless otherwise prohibited by gubernatorial Executive Order:

I . Parties may commence new matters and proceed in pending matters by any means of filing and service normally permitted under statute and court rule.”

Administrative Order 267/20 further states that “all parties are strongly urged to avoid in-person filing and service wherever possible during the ongoing COVID-19 health emergency, and to rely instead on NYSCEF, EDDS, and mail filing and/or service, where permitted”.

Notwithstanding the following, Administrative Order 267/20 dated November 6, 2020, permitted parties to proceed in pending matters by any means of filing and service normally permitted under statute and court rule including mailing filing and in-person filing. In addition, although A/O 267/20 urged parties to avoid in-person filings, in-person filings was nonetheless permissible as of November 6, 2020.

Here, while this Court acknowledges that defendants Countrywide and Bank of America were unable to file a summary judgment motion by May 29, 2020, due to the Covid-19 health crisis, this Court is unpersuaded by defendants Countrywide and Bank of America remaining averments. Irrespective of whether or not plaintiff consented to this action being converted to e-filing after November 6, 2020, defendants were permitted to file motions in-person as of November 6, 2020.

Defendants Countrywide and Bank of America did not file their summary judgment motion until almost ten (10) months after they were permitted to file motions. In addition, this action was converted to e-filing on August 2 , 2021 and defendants Countrywide and Bank of America waited until September 2, 2021, to e-file their summary judgment motion.

This Court finds that defendants Countrywide and Bank of America's moving papers failed to demonstrate good cause for the delay in making its summary judgment motion (*Nationstar*

Mortg., LLC v Weisblum, 143 AD3d 866, 868 [2d Dept 2016]; *Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 1146 [2d Dept 2020]). Thus, defendants Countrywide and Bank of America motion for an extension to file their summary judgment motion is denied as defendants seeking *inter alia* pursuant to CPLR 3212 for summary judgment dismissing with prejudice each of the claims asserted by plaintiff against defendants and pursuant to CPLR 2004, extending defendants' time to file a motion for summary judgment beyond the May 29, 2020, failed to demonstrate good cause.

Accordingly, the branch of defendant Capone's motion sequence number 7 seeking summary judgment pursuant to CPLR 3212 is denied as untimely. The branch of defendant Capone's motion seeking to disqualify plaintiff's attorney is granted and plaintiff is granted a six 60-day stay from the date of entry of this Order to retain a new attorney. Defendants Countrywide and Bank of America's motion sequence number 8 for an extension to file their summary judgment motion is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: April 25, 2022



LOURDES M. VENTURA, J.S.C.

