

HSBC Bank v Brach

2023 NY Slip Op 30938(U)

January 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 510925/14

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

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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 4th day of January 2023.

P R E S E N T:

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

Index No.: 510925/14

_____ x

HSBC BANK,

Plaintiff,

DECISION AND ORDER

-against-

RACHEL BRACH 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 3) | <u>1</u> |
| Opp/Cross-Motion (MS 4) | <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:

The instant action was commenced on November 19, 2014. Defendants Rachel and Albert Brach timely answered through counsel. On April 12, 2017, Plaintiff moved for summary judgment and an order of reference. Defendants opposed, alleging that Plaintiff failed to demonstrate its standing and that it failed to comply with the Pooling and Servicing Agreement governing the plaintiff trust. By order dated September 25, 2017, the Honorable Noach Dear granted Plaintiff's motion in its entirety. A notice of entry of that order was filed the following month. On July 13, 2018, Plaintiff filed a motion for judgment of foreclosure and sale. On February 6, 2019, an order granting JFS was issued on default. Notice of entry was filed on March 4, 2019. Shortly thereafter, a notice of sale was uploaded reflecting an auction date of

May 9, 2019. Upon Defendant Albert Brach's filing of a Chapter 7 bankruptcy petition, the auction did not go forward. The automatic stay was lifted on January 7, 2020 and Plaintiff noticed a new sale for April 20, 2020. Prior to that date, however, auctions were halted as a result of the COVID-19 pandemic.

On August 5, 2021, Plaintiff filed the instant motion for an order amending the JFS order nunc pro tunc to include language that requires compliance with the Kings County Foreclosure Auction Plan and the Kings Supreme Civil Covid-19 Policies.¹ 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 requested². 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. In reply, Plaintiff suggested that no extension of time is necessary but that the delay was justified based on the stay resulting from Albert's bankruptcy filing and the subsequent COVID-induced halt to foreclosure auctions.

Defendants also cross-moved for renewal of 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 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.

¹ Auction rules were modified as a result of the COVID-19 pandemic.

² 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.

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 inapplicable³ (*US Bank v Fuller-Watson*, 197 AD3d 764, 767 [2d Dept 2021]; *Singh v Reddy*, 161AD3d 1121, 1121 [2d Dept 2018]).

- 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 amending the JFS nunc pro tunc to include language that requires compliance with the Kings County Foreclosure Auction Plan and the Kings Supreme Civil Covid-19 Policies – which the referee would be obligated to comply with 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 number⁴ is non-substantive, merely providing additional information tangential to the judgment (see, similarly,

³ 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.

⁴ Which are added in the proposed order.

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 auction⁵, 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 change its terms. 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]).

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 necessary⁶, 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 Albert’s bankruptcy filing. Another sale was promptly scheduled after the stay was lifted, but the COVID-induced moratorium on auctions forced its

⁵ At least in the alternative.

⁶ 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.

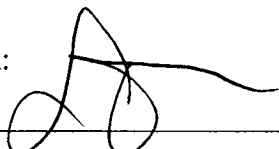
cancellation. As such, to the extent necessary, the Court extends Plaintiff's time to hold an auction.

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 and dismiss 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**