

Greenpoint Bank v Sofia

2023 NY Slip Op 31644(U)

March 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 16906/04

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 21st day of March 2023.

P R E S E N T:

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

Index No.: 16906/04

_____ x

GREENPOINT BANK,

Plaintiff,

DECISION AND ORDER

-against-

ELVIRA SOFIA 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>2,3</u> |
| Reply/Opp to Cross | <u>4</u> |

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

The instant action was commenced on May 27, 2004. All defendants defaulted in answering. An order of reference was issued on March 7, 2005. That order also substituted Theresa Bavaro in place of "John Doe #1." A conference was then scheduled for January 18, 2006 and, upon the nonappearance of the Plaintiff, the action was marked dismissed by the Honorable Gerald Held. No written dismissal order was issued and it does not appear that the parties were aware of the disposition.

On December 14, 2010 – after several changes of counsel for Plaintiff¹ – Plaintiff moved for judgment of foreclosure and sale. As it was apparently unaware that the case had been dismissed, it did not seek to restore the action to active status. Additionally and seemingly also unbeknownst to it, Defendant Sofia had died two months earlier. When it learned of her passing the following year, Plaintiff moved for the appointment of a temporary administrator of her estate, leave to serve that individual, and permission to serve the unknown heirs by publication. Bavaro, stating that she was Sofia’s daughter and not merely a tenant, then opposed the motion for judgment of foreclosure and sale and cross-moved for dismissal pursuant to CPLR 3215[c]².

The matter was then repeatedly conferenced before the Honorable Kenneth P Sherman. By order dated January 11, 2012, Judge Sherman granted Plaintiff’s second motion to the extent that Bavaro was substituted into the action as the administrator of the estate of Sofia. Following additional conferences, Judge Sherman denied Plaintiff’s motion for judgment of foreclosure and sale and Bavaro’s motion to dismiss without prejudice on November 13, 2013 based upon the apparently newly discovered 2006 dismissal.

Six months later, Plaintiff moved to vacate Judge Held’s disposition of this action. After the motion was repeatedly adjourned, it was withdrawn. It is unclear from the record why Plaintiff did so.

Another change of attorney and, seemingly, ownership of the loan was recorded in late 2017 and an application for the appointment of a receiver appears to have been filed in 2018³.

In October 2022, new counsel appeared for the entity that allegedly acquired the loan in 2017. The instant motions followed. Plaintiff seeks to restore this action to the active calendar. It suggests that, thereafter, the grant of judgment of foreclosure and sale upon the referee’s report appended to the 2010 motion would be appropriate. In the alternative, it requests that the order of reference be ratified and, if necessary, a new referee appointed. Bavaro’s counsel then moved to

¹ Seemingly due to changes in ownership of the loan.

² As Plaintiff moved for an order of reference within one year of commencement of the action, that section is inapplicable.

³ Only a small portion of it can be found in the County Clerk Minutes and it was not assigned a motion sequence number. As such, it was likely an ex parte application which does not appear to have been ruled upon.

withdraw from this action but also filed opposition to Plaintiff's motion.

As both motions are fully briefed and counsel's motion to withdraw is moot if the action remains dismissed, the Court will begin by addressing the relief requested by Plaintiff. It is unclear from the record why there was a conference scheduled for January 18, 2006 and whether the parties were notified of it. Neither the parties nor the Court appear to have been aware of the disposition for seven years thereafter. Both Plaintiff and Bavaro filed motions that failed to address that the action was no longer active and Judge Sherman held more than a dozen conferences and granted substitution of the estate in place of the decedent prior to recognizing that there was a prior dismissal. Under these circumstances, restoration is warranted.

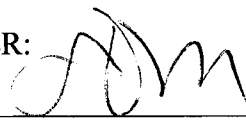
However – Plaintiff filed a motion to restore back in 2014 and, after withdrawing it, took no further action to resurrect this case until 2022. As recognized by counsel when the instant motions were conferenced, to allow Plaintiff to collect interest for the period of inactivity would be inequitable. As such, interest is tolled from November 7, 2014 (the day after the prior motion was withdrawn) until January 9, 2023 (when the instant motion was filed). Additionally, to the extent that the substitution of Bavaro in her capacity as administrator in place of Sofia occurred while the action was disposed, the Court now again orders both it and the accompanying amendment of the caption. Though the 2005 order of reference remains valid, the Court reminds Plaintiff that it will need to comply with the requirements of AO 548/10 and 431/11 (see, *BNY v Izmiriligil*, 144 AD3d 1063, 1066-1067 [2d Dept 2016]) and may not be able to do so here. Nonetheless, as the referee appointed in 2005 is no longer on the Part 36 list, this Court appoints Jeffrey R Miller of 32 Broadway Fl 13 New York, NY 10004 (212-227-4200) as substitute referee to compute. The order of reference is also amended to provide that the statutory fee of \$350 shall be paid to the referee upon the submission of his report. Further and in light of the below, the time for the referee to issue his report is extended until one hundred and twenty days following the entry of this order.

Leichtung's motion to withdraw as counsel for Bavaro is, post-restoration, granted without opposition. This matter is stayed for sixty days from the entry of this order to allow Bavaro to find new counsel. Outgoing counsel is directed to serve a copy of this order upon

Bavaro by first-class mail within ten days of entry of this order.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

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

KINGS COUNTY CLERK
FILED
2023 MAY 10 AM 10:00