

Bank of Am. v Gee

2023 NY Slip Op 32682(U)

June 8, 2023

Supreme Court, Kings County

Docket Number: Index No. 507823/16

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 8th day of June 2023.

P R E S E N T:

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

Index No.: 507823/16

_____ x

BANK OF AMERICA,

Plaintiff,

DECISION AND ORDER

-against-

ZURI GEE 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>

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

Plaintiff moves for renewal of its motion for summary judgment and Defendant’s cross-motion for dismissal. Defendant opposes, suggesting that denial of Plaintiff’s motion for summary judgment upon one of its other previously-advanced arguments is appropriate.

Renewal is granted. Defendant’s cross-motion and the resulting dismissal stemmed from the Appellate Division’s decision in *Bank of Am, NA v Kessler*, 202 AD3d 10 [2d Dept 2021]. However, the Court of Appeals has now reversed that decision holding that “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’” and that “section 1304 does not prohibit the inclusion of additional information that may help borrowers avoid

foreclosure and is not false or misleading” (*Bank of Am, NA v Kessler*, 2023 NY Slip Op 00804 [2/14/2023]). Upon a review of the notice herein, the additional language is clearly permissible under the newly propounded standard. As such, Defendant’s “*Kessler*” arguments are unavailing.

Defendant accurately notes that she raised additional arguments in opposition to summary judgment that were not reached by the Court previously. As the dismissal is vacated, the Court does so now.

Defendant is correct that Plaintiff unsuccessfully sought summary judgment in 2017. However, “[a]lthough successive motions for summary judgment are disfavored, a subsequent summary judgment motion may be properly entertained when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts” (*Graham v City of New York*, 136 AD3d 747, 748 [2d Dept 2016]). As the 2018 order denying the initial motion does not address most of the defenses raised in the answer, this Court will consider the instant motion to – at a minimum – narrow the issues for trial.

It is well established that “[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default” (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). Plaintiff has done so.

Plaintiff has also demonstrated its standing. It is the “lender” in the loan modification agreement previously entered into by Defendant (see *Wells Fargo v Graffioli*, 167 AD3d 969 [2d Dept 2018]). The Court further notes that the copy of the note appended to the complaint includes a dated allonge to it and a subsequent endorsement to blank.

Defendant is correct, however, that Plaintiff has still not proven that it complied with 24 CFR 203.604. The Gonzalez Affidavit is insufficient to demonstrate that the necessary letter was sent. The affiant appears to rely on unproduced business records. Further, while counsel claims that the servicer is headquartered more than 200 miles from the property address, no admissible evidence has been proffered to demonstrate that “the mortgaged property is located more than 200 miles from the mortgagee, its servicer, or a branch office of either” such to fall into the

exception within 203.604[d]. As such, issues of fact remain as to Plaintiff's compliance with HUD regulations.

It is undisputed that the RPAPL 1303 notice received by Defendant failed to include the most up to date phone number for the Department of Financial Services, instead including the number for its predecessor, the New York State Department of Banking. No evidence has been proffered as to whether the number provided would also have reached DFS. As such, Defendant has raised an issue of fact as to whether Plaintiff complied with RPAPL 1303.

Defendant's arguments as to RPAPL 1306 are unavailing. Plaintiff has demonstrated that the 1304 notices were mailed and acknowledged by the USPS— even if not yet at the postal facility – on the date provided on the proof of filing statement. Thus, the date on the proof of filing statement is correct pursuant to the mailbox rule. Further, contrary to Defendant's position that Plaintiff's filing needed to reflect that the loan was previously modified, "[t]he plaintiff's failure to indicate that the loan was modified does not render the filing insufficient to satisfy the requirements of RPAPL 1306" (*US Bank v Adams*, 202 AD3d 867, 870 [2d Dept 2022]).

Defendant has abandoned her remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

Plaintiff's motion for renewal is granted and, upon renewal, Defendant's cross-motion to dismiss (MS 3) is denied and Plaintiff's motion for summary judgment (MS 2) is granted the extent that that Defendant's affirmative defenses other than RPAPL 1303 and 24 CFR 203.604 are stricken. Default judgment is granted against the defaulting defendants. The caption is amended to substitute Alex Thompson, Antonio Thompson, Christian Thompson, and Alison Williams in place of the Doe defendants and shall now read:

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Bank of America, N.A.,

Plaintiff,

-against-

Zuri Gee a/k/a Zuri M. Gee; Wells Fargo Financial National Bank; Secretary of Housing and Urban Development; City of New York Environmental Contal Board; City of New York Parking Violations Bureau; City of New York Transit

Adjudication Bureau; Alex Thompson; Antonio Thompson;
Christian Thompson; Alison Williams,

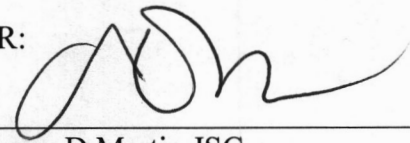
Defendants.

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Parties to proceed to trial on the remaining issues.

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
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