

US Bank v Baptiste

2023 NY Slip Op 32798(U)

July 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 523132/17

Judge: Larry D. Martin

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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 25th day of July 2023.

P R E S E N T:

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

Index No.: 523132/17

_____ x

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

VERNON BAPTISTE 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 (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 30, 2017 and Defendants answered through counsel. Thereafter, both sides moved for summary judgment. By order dated August 1, 2019, the Honorable Noach Dear granted Defendants' motion and dismissed the action, finding that this case is untimely in light of a prior action filed in 2010. Upon Plaintiff's appeal, the Appellate division reversed – applying the Court of Appeals' intervening decision in *Engel* and, thus, finding that the discontinuance of the 2010 action revoked the acceleration of the loan.¹

¹ The applicability of *Engel* appears questionable as a second action was already pending prior to the motion to discontinue – and, thus, the loan remained in an accelerated state even following the discontinuance.

Plaintiff now again moves for summary judgment and an order of reference. Defendants oppose and cross-move² for summary judgment in light of FAPA's supersession of *Engel*. Plaintiff opposes arguing, among other things, that law of the case bars this Court from revisiting issues determined by the Appellate Division.

The relief requested by Defendant – essentially to reverse the Appellate Division's finding based upon a new statute – cannot be granted by this Court. While “[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court ... [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or *change of law*” (*Norton v Town of Islip*, 167 AD3d 624, 626 [2d Dept 2018], quoting *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 [2d Dept 2007])[citations and internal quotation marks omitted][emphasis added] – and FAPA is a newly enacted law³ – Defendants' motion is, in effect, for renewal of the Appellate Division's decision based upon a change in law. As such, the relief should be sought from that court.

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 demonstrated its standing through the Verdoren Affidavit and appended records. A copy of the note was appended to the complaint. Though Defendants are correct that the endorsement is to “US Bank as Trustee” without specifying the trust, the corrective assignment of mortgage filed in 2011 clarifies that it was transferred to Plaintiff.

Contrary to Plaintiff's contention, the instant action involves a home loan. The Uniform Residential Loan Application makes it clear that the purpose of the loan was to re-finance the mortgage on Defendants' primary residence. As such, Plaintiff was required to comply with RPAPL 1304. It fails to demonstrate that it did so – Verdooren offers excerpts from the

² While both motions are technically successive motions for summary judgment, they are permissible in light of the Appellate Division's reversal of the prior dismissal order.

³ Case law appears to focus on the more common scenario of intervening appellate decisions, rather than new statutes (see, for example, *US Bank v Moss*, 186 AD3d 1753 [2d Dept 2020]; *Frankson v Brown & Williamson Tobacco Corp*, 67 AD3d 213 [2d Dept 2009]).

Trackright documents upon which he relies but fails to proffer copies of the documents themselves. For the same reason, Plaintiff fails to demonstrate compliance with the mortgage default notice requirements.

Contrary to Defendants’ contention, the affidavit of service of the summons and complaint suffices to demonstrate compliance with RPAPL 1303. Therein, the server attests that he delivered “a copy of the Homeowner’s Foreclosure Notice as required by RPAPL §1303, which notice was printed on a colored piece of paper, which color differed from that on the color of the NOTICE REGARDING AVAILABILITY OF ELECTRONIC FILING & SUMMONS & COMPLAINT & CERTIFICATE OF MERIT and the notice was in bold, fourteen-point type, with the title of the notice in bold, twenty-point type...” In response, Defendants offer no evidence of non-compliance.

Plaintiff does not address Defendants’ contention that the RPAPL 1306 notice is defective as it does not include the borrowers’ phone number – and that defense appears to be potentially meritorious.

Defendant has abandoned her remaining affirmative defenses and counterclaims 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 summary judgment is granted the extent that that Defendants’ first, fourth through eighth, and tenth through fifteenth affirmative defenses and first counterclaim are stricken. Default judgment is granted against the defaulting defendants. The caption is amended to substitute “John Doe (refused name)” and “Jane Doe (refused name)” in place of the Doe defendants and shall now read:

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
RESIDENTIAL ASSET SECURITIES CORPORATION, HOME
EQUITY MORTGAGE ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-KS2,

Plaintiff,

vs

VERNON BAPTISTE; NEVLYN BAPTISTE; STERLING

NATIONAL BANK SUCCESSOR BY MERGER TO ASTORIA
FEDERAL SAVINGS & LOAN ASSOC; John Doe (name refused);
Jane Doe (name refused)

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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