

U.S. Bank Trust N.A. v Kenig

2023 NY Slip Op 33563(U)

October 16, 2023

Supreme Court, Rockland County

Docket Number: Index No. 033411/2022

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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U.S. BANK TRUST NATIONAL ASSOCIATION, NOT
IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS
TRUSTEE OF THE TRUMAN 2021 SC9 TITLE TRUST,

Plaintiff,

DECISION & ORDER

Index No.: 033411/2022

- against -

Mot. Seqs. 001 & 002

BENJAMIN KENIG, PEARL KENIG, THE CHASE
MANHATTAN BANK, “JOHN DOE #1” through
“JOHN DOE #12” the last twelve names being fictitious
and unknown to plaintiff, the persons or parties intended
being tenants, occupants, persons or corporations, if any,
having or claiming an interest in the or lien upon the
premises, described in the Complaint,

Defendants.

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ZUGIBE, J.

The papers filed electronically as NYSCEF Document numbers 37- 57, 59-70, 73-81, 83 and 84 were read on this Notice of Motion by Plaintiff (Motion Seq. 001) for an Order (i) pursuant to CPLR 3212 granting Plaintiff summary judgment and pursuant to CPLR 3215 granting a default judgment against non-answering Defendants; (ii) striking the affirmative defenses and counterclaim asserted in the Answer of Defendants BENJAMIN KENIG and PEARL KENIG; (iii) appointing a referee to compute the amount due to Plaintiff; and (iv) amending the caption of this action and Notice of Cross-Motion by Defendant (Motion Seq. 002) for an Order (i) granting Defendant summary judgment and granting judgment on Defendants’ Counterclaim Cancelling and Discharging the subject Mortgage.

Upon the foregoing papers, and all prior papers and proceedings in this action, these motions are hereby determined as follows:

In this residential foreclosure action concerning real property located at 4 Underwood Road, Monsey, New York 10952 (“Mortgaged Premises”), it is alleged that the Property was encumbered by a Mortgage (“Mortgage”) dated June 8, 1998, in the face amount of \$161,000.00. A Promissory Note dated June 8, 1998 (“Note”) identifying Flagstar Bank, FSB as named Payee,

and payable in successive monthly installments on the first day of each month commencing August 1, 1998, was duly executed by the Defendants. A lost note affidavit dated February 22, 2013, together with a copy of the Note was duly filed as NYSCEF Doc. 2. The Mortgage was assigned to Nationsbanc Mortgage Corporation on February 21, 2001, and following a series of successive transfers, the Mortgage was ultimately transferred to Plaintiff on April 27, 2022. Plaintiff submits in support of its application copies of the Note and lost note affidavit, Mortgage, assignments of Mortgage, and recordation instruments for the foregoing, as well as default notices.

Respondent cross-moves for summary judgment alleging that this action is time barred. The relevant procedural history pertinent to this issue is as follows.

On July 21, 2014, the Mortgagee at that time, Ocwen Loan Servicing, LLC, commenced a foreclosure action against the Mortgaged Premises which, by its terms, accelerated the entire unpaid principal balance then due and owing under the Mortgage. On a motion to reargue the denial of Plaintiff's motion for summary judgment, the Court (Loehr, J.), by Decision and Order dated August 30, 2017, granted Defendants' motion for summary judgment based upon the failure to serve a notice of default and the Complaint was dismissed.

The Mortgage was, thereafter, assigned to New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") which commenced a second foreclosure action against the Mortgaged Premises on November 20, 2018, under Rockland County Supreme Court Index No. 036885/2018. By Decision and Order of the undersigned dated February 7, 2022, Defendants' cross motion for summary judgment was granted and the Complaint was dismissed based upon the Appellate Division Second Department's holding in *Bank of America, N.A. v. Kessler*, 202 A.D.3d 10 (2d Dept. 2021) finding that material included within the same envelope as the 90-day notice that was not "expressly delineated in these provisions" was a violation of RPAPL § 1304. Although *Kessler* was subsequently reversed by the Court of Appeals (*see, Bank of America v. Kessler*, 39 NY3d 317 (2023)), no motion for reargument or notice of appeal was filed with respect to the February 7, 2022 Decision and Order.

Instead, following the termination of the action in February of 2022, on April 27, 2022, the Mortgage was assigned to Plaintiff, U.S. BANK TRUST NATIONAL ASSOCIATION, and a new action for foreclosure was commenced by the filing of a Complaint on August 1, 2022. Defendants, in reliance on CPLR § 205(a), not CPLR § 205-a, allege that although this matter was admittedly (1) commenced within six months of the termination of the prior action, and (2) the

prior action was timely commenced, the instant action is time barred because the Plaintiff is not the Plaintiff from the dismissed 2018 action. While CPLR § 205-a of the Foreclosure Abuse Prevention Act (“FAPA”), enacted December 20, 2022, is the controlling statutory authority for new actions, it is the retroactive effect of this legislation, if any, that is central to the resolution of the issues herein. If not retroactive, CPLR 205(a), relied upon by Defendants herein, would apply as the applicable authority in this case.

CPLR § 205(a) states “the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months... after the termination...”. Defendant contends that the Plaintiff herein is an assignee *only* and not the “Plaintiff” from the dismissed action, and that therefore, the safe-harbor provision set forth in CPLR § 205(a) is not available to the Plaintiff here. This precise issue, however, was settled by the Second Department in *Wells Fargo Bank. N.A. v. Eitani*, 148 AD3d 193 (2d Dept. 2017). In *Eitani*, the Court held that “a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note”. If the matter, *sub judice*, is governed by CPLR § 205(a), the Complaint herein was timely filed insofar as it was filed 26 days before the statute of limitations would have expired on August 27, 2022.

Although the newly enacted CPLR § 205-a, like CPLR § 205(a), similarly provides a six-month safety net for a plaintiff to recommence a dismissed action that was originally timely, CPLR § 205-a modifies the term “plaintiff” by the addition of the adjective “original” and expressly proscribes the initiation of a new action by “a successor in interest or an assignee of the original plaintiff... unless pleading and proving that such assignee is acting on behalf of the original plaintiff” [CPLR § 205-a (1)].

As noted hereinabove, following the dismissal of the complaint on February 27, 2022, the Mortgage was assigned on April 27, 2022 to Plaintiff, U.S. BANK TRUST NATIONAL ASSOCIATION, and a new action for foreclosure was commenced by the filing of a Complaint on August 1, 2022. Eight months after the assignment, and nearly four months after the expiration of the six-month tolling date, FAPA was enacted prohibiting the application of the tolling provision if the rights of the Plaintiff in the dismissed action were assigned and such assignee was not expressly “acting on behalf of the original plaintiff”. No such relationship is

plead or proven by Plaintiff. Dispositive of the central issue herein, therefore, is whether FAPA is retroactive for all cases pending at the time of its enactment.

New York State Senate Bill S5473D Sponsor Memorandum cogently articulated the rationale for the FAPA amendments, explaining that “[t]he Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage.” A growing body of state and federal court decisions have concluded that the application of the statute retroactively is necessary to achieve the legislation's remedial objective, (See *Article 13, LLC v. Ponce De Leon Federal Bank, et al*, 2023 WL 5179626 (2023); *Deutsche Bank Nat'l Tr. Co., as Tr., in Tr. for the Registered Holders of Morgan Stanley ABS Cap. I Inc. Tr. 2006-HE5 v. Dagrín*, 79 Misc.3d 393, 399, 190 N.Y.S.3d 582 [Sup. Ct., Queens Cty., 2023, Catapano-Fox, J.]), while other courts have recently taken a contrary approach.

In *HSBC Bank USA, N.A. v. Besharat*, 80 Misc.3d 269 (Supreme Court, Putnam County, 2023) in reliance on the provisions of CPLR § 205(a) in effect at the time service of process was initiated, Plaintiff “*effected*” service of process within the specified six-month extension period on June 17, 2021, but service of process was not “*completed*” within that six-month period until July 1, 2021, a date after the close of the six-month window dictated by CPLR § 205-a, a statute enacted over eighteen months *after* service was effected consonant with the existing statute. Following an exhaustive analysis of the constitutional effect of retroactivity, the Court in *Besharat*, in determining that § 205-a was not retroactive in this case, explained as follows:

The Court's holding is a narrow one, confined by the factual circumstances presented in this case. If and to the extent that the Legislature intended CPLR § 205-a to apply retroactively to deprive a mortgagee of the benefit of the pre-existing CPLR “savings provision” on account of its having failed to “complete” service of process on the mortgagor in accordance with **the after-enacted requirements of Section 205-a, such retroactive application of the statute would deprive the mortgagee of a vested right to enforce its claim on the note and mortgage against the mortgagor in violation of its federal and state constitutional right to due process of law.**

Besharat, 80 Misc.3d at 284-85 (emphasis added).

It is beyond cavil that in the case at bar, the retroactive application of the statute would, likewise, “deprive the mortgagee of a vested right ... in violation of its federal and state

constitutional right to due process of law”. When Plaintiff assigned the Mortgage and commenced the new action on August 1, 2022, the action was timely and otherwise consonant with existing law. A finding of retroactivity would result in the imposition of a harsh and inequitable outcome. As noted, the legislative intent of FAPA was to prevent lending institutions from engaging in conduct designed “to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage.” Here, there are no assertions of abuse by Plaintiff. Indeed, the second action was dismissed based upon *Kessler* prior to its reversal, and the alleged infirmities in the current action were entirely lawful and appropriate according to the law existing at the time the conduct was undertaken. It is inconceivable that such a draconian outcome could have been within the legislative intent when enacting the consumer-oriented provisions of FAPA. This court, therefore, finds that the current action was timely commenced pursuant to CPLR § 205(a), the controlling statute in effect at the time.

Plaintiff further argues that the 2014 foreclosure action did not cause an acceleration of the mortgage since the action was dismissed upon a finding that a notice of default, a condition precedent to the commencement of this action, was not served. Based upon the Court’s determination hereinabove that this action was timely commenced, this argument is deemed moot and, therefore, need not be addressed on this motion.

Addressing the merits of Plaintiff’s motion for summary judgment, the evidence demonstrates that borrowers first defaulted in payment as of May 1, 2013, and for each successive month thereafter. Plaintiff also proves service on all Defendants and the additional mailing that CPLR 3215(g) requires to proceed on a default judgment with respect to the non-answering Defendants.

A foreclosure plaintiff carries its burden to prove entitlement to judgment by producing the mortgage, the unpaid note and competent evidence of borrowers’ default on the loan (*see e.g. Bank of New York Mellon v Gordon*, 171 A.D.3d 197, 203 (2d Dept. 2019); *U.S. Bank Nat. Ass’n v Denaro*, 98 A.D.3d 964 (2d Dept 2012)). In the present action, as noted hereinabove, Plaintiff attaches the lost note affidavit dated February 22, 2013, together with a copy of the original Note (NYSCEF Doc. 2) to the Complaint as “Exhibit A”. Plaintiff’s affiant also attests to the borrower’s default through the affidavit of Joshua Nelms (“Nelms Affidavit”), (NYSCEF Doc. 53), an Assistant Secretary of Rushmore Loan Management Services, attorney-in-fact and loan servicer for the named Plaintiff. Plaintiff attaches and authenticates primary evidence of the

default in the form of loan payment records with adequate proof of incorporation of prior servicer records under *Gordon, supra* and produces proof of a valid assignment through the production of the Mortgage and Assignments. Also submitted in support of this application is the Nelms Affidavit attesting that the original lost note affidavit was physically delivered to Plaintiff, custodian or its Servicer on or before November 13, 2019, and that the Note has continuously remained in its possession since delivery including at the time the action was commenced.

Defendants oppose summary judgment on the basis of statute of limitations only. As defendants oppose this relief only on this ground, all other affirmative defenses are waived as a matter of law (*see e.g., New York Comm'l Bank v J Realty F. Rockaway Ltd.*, 108 A.D.3d 756, 757 (2d Dept. 2013); *Starkman v City of Long Beach*, 106 A.D.3d 1076, 1078 (2d Dept 2013)).

Finally, Plaintiff moves pursuant to CPLR 3025(b) for an order amending the caption by substituting Noemi King in place and stead of John Doe #12. This application is based upon the affidavit of service (NYSCEF Doc. 48) establishing that Noemi King resides at the Mortgaged Premises. This application is granted.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED, that Defendants' motion for summary judgment on the Counterclaim seeking a cancellation and discharge of the Mortgage is denied; and it is further

ORDERED, that Plaintiff is awarded default judgment against all non-answering defendants, and it is further

ORDERED, that Plaintiff's motion pursuant to CPLR 3025(b) for an order amending the caption is granted, and it is further

ORDERED, that, within five days hereof, plaintiff shall serve via NYSCEF and U.S. Mail on the borrower defendants, and file via NYSCEF an affidavit of such service, an instrument consistent with RPAPL 1321(1) specifying the name and telephone number of Plaintiff's current loan servicer; and it is further

ORDERED, that Alden H. Wolfe, Esq., with an address of 20 Squadron Blvd., Suite 330, New City, New York 10956-5245, telephone number: (845) 634-6760 is hereby appointed Referee to ascertain and compute the amount due to plaintiff for principal and interest on the note and mortgage sued upon and set forth in the complaint for payments made by plaintiff for

taxes, assessments, water charges, insurance premiums and any other expenses that plaintiff has paid or may pay in connection with the protection of its security hereunder against the mortgaged premises, including, but not limited to, watchman or caretaker fees, water and sewer rents, insurance premiums, and any other advances to protect the lien of the subject mortgage during the pendency of this action and to examine whether the mortgaged premises can be sold in one parcel, and it is further

ORDERED, that by accepting this appointment, the said Referee certifies that he or she is in compliance with Part 36 of the Rules of the Chief Judge, including, but not limited to, 22 NYCRR sections 36.2(c) and 36.2(d), and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify this Court; and it is further

ORDERED, that pursuant to CPLR 8003(a), the fee of \$350.00 shall be paid to the Referee for the computation of the amount due and upon the filing of his or her report, plus an additional fee of \$750.00 upon sale of the property; provided, however, that if a scheduled sale is cancelled by any party to this action within 24 hours of such scheduled sale, the Referee will be entitled to a cancellation fee of \$250.00. The Referee shall not request or accept additional compensation for the computation unless it has been fixed by the Court in accordance with CPLR 8003(b); and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for himself or herself or paying funds to herself without compliance with Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that within thirty (30) days of the date of entry of this Order, Plaintiff shall serve upon the Referee all documents necessary for the Referee to ascertain and compute the amounts due plaintiff; and it is further

ORDERED, that the Referee shall ascertain and compute the amounts due Plaintiff within sixty (60) days of entry of this Order, unless extension is granted by the Court for good cause shown; and it is further

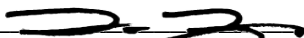
ORDERED, that Plaintiff shall make application for Judgment of Foreclosure and Sale within ninety (90) days of the date of entry of this Order of Reference, unless extension is granted by the Court for good cause shown; and it is further

ORDERED, that the Referee shall complete and submit to the County Clerk, with a copy to the chambers of the undersigned a “FORECLOSURE ACTION SURPLUS MONIES FORM” within thirty (30) days of the sale; and it is further

ORDERED, that, within 10 days of the date of entry hereof, Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties, each owner of the equity of redemption, any tenants named in the action, the Referee appointed herein, and any other party entitled to notice, and by such date file by NYSCEF a suitable affirmation of such service.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
October 16, 2023


THOMAS P. ZUGIBE
Justice of the Supreme Court

To: All counsel of record via NYSCEF