

**U.S. Bank, NA v Gallant**

2023 NY Slip Op 33848(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 850284/2017

Judge: Francis A. Kahn III

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART **32**

*Justice*

INDEX NO. 850284/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

U.S. BANK NA, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NA, SUCCESSOR IN INTEREST TO LASALLE BANK N.A. AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-HY6,

Plaintiff,

- v -

BRENDA GALLANT, JOHN GALLANT, BOARD OF DIRECTORS OF THE FORTY SUTTON PLACE CONDOMINIUM, BOARD OF MANAGERS OF THE FORTY SUTTON PLACE CONDOMINIUM, JP MORGAN CHASE BANK, NATIONAL ASSOCIATION

Defendant.

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 189, 190, 191, 192, 193, 195, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 209, 210, 211, 212, 213, 214, 215, 216, 217, 219

were read on this motion to/for

STAY

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property located at 40 Sutton Place, Units 2D, 2E and 2F, New York, New York. Issue was joined by Defendants Brenda Gallant and John Gallant ("Gallants"), who raised numerous affirmative defenses in their answer, including expiration of the statute of limitations. Prior to commencement of this action, Plaintiff's purported assignor, Bank of America ("BOA"), commenced an action to foreclose the same mortgage (*see Bank of America v Gallant*, NY Cty Index No. 116043/2009). By stipulation of the parties dated January 15, 2014, "so ordered" on February 11, 2014, the 2009 action was voluntarily discontinued. The within action was commenced by Plaintiff, U.S. Bank NA, Successor Trustee to Bank of America, NA, Successor in Interest to Lasalle Bank N.A. as Trustee, on Behalf of the Holders of the WAMU Mortgage Pass-Through Certificates, Series 2007-HY6 ("US Bank"), on December 1, 2017. Also previously commenced, was an action by the Gallants pursuant to RPAPL §1501[4] to discharge the mortgage encumbering units 2E and 2F (*see Gallant v Bank of America, et al*, Index No. 159785/2016). US Bank is a Defendant in that action.

Plaintiff's motion for summary judgment against Gallants and an order of reference was granted by order of this Court dated May 24, 2021. In that decision, Gallants' affirmative defense of expiration of the statute of limitations was dismissed. By order dated September 20, 2021, Justice Barbara Jaffe granted Plaintiff's motion for renewal and reargument and dismissed Gallants' RPAPL §1501[4] action. A judgment of foreclosure and sale herein was granted without opposition and entered on October 19,

2021. Notice of entry of that judgment was served on Defendant Gallants' counsel and a review of the record does not reveal a notice of appeal from that judgment was ever filed.

Now, Gallants move to stay the foreclosure sale herein, for renewal pursuant to CPLR §2221[e] and [d] of the orders dated May 24, 2021, and October 12, 2021, and to dismiss the complaint based upon expiration of the statute of limitations. Defendants assert renewal should be granted based upon a change in the law that occurred with the enactment of the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]). Plaintiff opposes the motion.

FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in *Freedom Mtge. Corp. v Engel*" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA's legislative "response" which "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

As relevant here, the applicable statute of limitations, CPLR §213[4], was amended to provide that "[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." (CPLR §214[4][a]). Further, CPLR §3217 was amended to add a new subdivision [e] which states that "[i]n any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" (CPLR §3217[e]).

Initially, the branch of the motion for renewal of the Court's October 12, 2021, decision is defective. CPLR §2221[e] is inapplicable to that decision as Defendants failed to oppose Plaintiff's motion for a judgment of foreclosure and sale (*see US Bank v Fuller-Watson*, 197 AD3d 764, 767 [2d Dept 2021]; *Singh v Reddy*, 161AD3d 1121, 1121 [2d Dept 2018]).

Regarding the May 24, 2021, decision and judgment, "[r]enewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD2d 190, 210 [1<sup>st</sup> Dept 1987]). As relevant here, CPLR §2221[e][2] provides that a motion for leave to renew "shall demonstrate that there has been a change in

the law that would change the prior determination". Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, *citing* Siegel & Connors, New York Practice § 449 [6th ed. 2018]).

Prior to the amendment of CPLR §2221, a motion based on a change in law was considered a motion to reargue and was, pursuant to the express provisions of that section, required to be made before the time to appeal the prior order expired (*see Glicksman v Board of Education/Central Sch. Bd.*, 278 AD2d 364, 365 [2d Dept 2000]). The addition of CPLR §2221[e] reclassified a motion based on a change of law to be one for renewal but did not contain the time limitation attached to a motion to reargue. Nevertheless, subsequent appellate decisions have confirmed that CPLR §2221[e] "did not change the rule regarding the finality of judgments" (*see Matter of 160 E. 84th St. v. New York State Div. of Hous. & Community Renewal*, 203 AD3d 501 [1<sup>st</sup> Dept 2022]). That edict provides that "[a]fter entry of a final judgment, a motion for leave to renew pursuant to CPLR 2221 (e) (2) based upon 'a change in the law that would change the prior determination' must be made, absent circumstances set forth in CPLR 5015, before the time to appeal the final judgment has expired" (*Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357 [2d Dept 2003], *quoting* CPLR 2221 [e] [2]). This finding comports with the Court of Appeals' holding that "a determination of a court from which no appeal has been taken ought to remain inviolate" (*In re Huie*, 20 NY2d 568, 572 [1967]). Despite being seemingly "harsh", this principle is justified as "there must be an end to lawsuits and the time to take an appeal cannot forever be extended" (*id.*).

The enactment of FAPA is undeniably a substantial change in the law from what existed when this Court issued its May 24, 2021, decision and its application herein would ostensibly change the prior determination. Specifically, the 2009 action accelerated the indebtedness and was voluntarily discontinued, as opposed to being dismissed via judicial determination on a joined issue that the instrument was not validly accelerated. As such, the above amendments, if applied, could render this action time barred as it was commenced more than six-years after the 2009 action was filed. Accordingly, the Court grants leave to renew Plaintiff's motion for summary judgment (CPLR §2221[e][2]).

With respect to the application of newly enacted civil legislation to conduct that has already occurred, a tension exists between the ordinarily recognized presumption against retroactive application of a statute and the basic principle that a court should apply the law in existence when rendering its decision (*see eg Landgraf v Usi Film Prods.*, 511 US 244, 272 [1994]; *see also Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 365 [2020]). The concerns that arise when reviewing these two construction canons include, but are not limited to, giving proper effect to remedial legislation, disturbing a party's reliance on previously existing legal principles and recognition of fundamental fairness. But not all newly enacted statutes have retroactive effect despite apparent facial applicability to existing actions. As such, the initial inquiry here is whether FAPA causes retroactive effect under the circumstances. The Court of Appeals has adopted a "framework" established by the United States Supreme Court for analyzing this issue which is as follows:

A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights. On the other hand, a

statute that affects only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct.

(*Regina*, supra at 366 [internal citations and quotations omitted]).

Plainly, the portions of FAPA that are applicable here have retroactive *effect* upon this and many other existing foreclosure actions. The applicability of the so-called “savings provision” under CPLR §205 was substantially altered if not virtually eliminated in foreclosure actions. A response by the Legislature to the Court of Appeals’ decision in *Engel*, as well as multiple decisions of the Appellate Division interpreting CPLR §205, was not unexpected but the scope of the new procedures enacted in FAPA are significant (*see* Bruce J. Bergman, *Foreclosure Abuse Prevention Act: Time and Settlement*, NYLJ, August 29, 2023, at 5, col 2). The question therefore becomes whether retroactive *application* is justified.

For a statute to be afforded retroactive application, there must be a clear expression of the legislative purpose demonstrating that the legislature contemplated the potential unfairness of retroactive application and assessed that the benefits of application to existing cases and past conduct is an acceptable price to pay (*Regina*, supra at 366, 370). The inquiry to be resolved is “whether the legislature has expressed a sufficiently clear intent to apply the . . . amendments retroactively to these pending appeals. There is certainly no requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation” (*id.*).

Based on the express terms of the statute, the overall remedial construction of the legislation and the multiple unambiguous statements of legislative intent in FAPA’s history as recounted supra, FAPA was plainly intended to apply retroactively. In the NY State Senate version of the bill, citation is made to *Gleason v Michael Vee, Ltd.*, 96 NY2d 117 [2001]. In that case, the Court of Appeals held that retroactive application of an amendment to CPLR §7502[a], which was intended to overrule a precedent<sup>1</sup> established by the Court of Appeals to cases dismissed in the interval between disputed decision and the legislative response, was intended despite the Legislature’s silence on retroactivity. The Court of Appeals reasoned that retroactive application was intended by the immediate effectiveness of the statute and its purpose “to clarify what the law was always meant to do and say”. Both those intents were undoubtedly expressed by the Legislature in support of FAPA.

Additionally, the Appellate Divisions for the First and Second Departments have tacitly acknowledged this conclusion by applying FAPA to various existing cases (*see U.S. Bank N.A. v Santos*, 218 AD3d 827 [2d Dept 2023]; *Deutsche Bank Natl. Trust Co. v Wong*, 218 AD3d 742 [2d Dept 2023]; *U.S. Bank N.A. v Simon*, 216 AD3d 1041 [2d Dept 2023]; *Bank of N.Y. Mellon v Stewart*, 216 AD3d 720 [2d Dept 2023]; *U.S. Bank N.A. v Fox*, 216 AD3d 445 [1<sup>st</sup> Dept 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]). The Appellate Division, First Department’s decision in *U.S. Bank N.A. v Fox*, supra is particularly telling. In *Fox*, this Court, dismissed Plaintiff’s complaint as untimely reasoning that the savings provision under CPLR §205 did not apply since a prior 2010 action for foreclosure was dismissed by Justice Mary V. Rosado for failure to prosecute at trial (*see U.S. Bank N.A. v Fox*, \_\_\_ Misc3d \_\_\_, 2022 NY Slip Op 30555[U][Sup Ct NY Cty 2022][Kahn III, J.]). On appeal, but after the enactment of FAPA, the First Department initially reversed this Court’s decision, and reinstated Plaintiff’s complaint (*see U.S. Bank N.A. v Fox*, 212 AD3d 422, 424 [1<sup>st</sup> Dept 2023]).

<sup>1</sup> *Solkav Solartechnik, G.m.b.H. v. Bescicorp Group Inc.*, 91 NY2d 482 [1998].

II

The First Department reasoned, under then applicable precedent, that CPLR §205 was applicable since Justice Rosado failed to set forth a “general pattern of delay” by the lender in her decision (*id.*)<sup>2</sup>. Soon thereafter, the First Department permitted the parties “to brief the effect of FAPA on [that] case”. Upon such further briefing, the First Department “recalled and vacated” its earlier decision and “unanimously affirmed” this Court’s decision reasoning that FAPA “applie[d] to [that] foreclosure action” and that “plaintiff [was] statutorily barred from commencing [that] action” (*see U.S. Bank N.A. v Fox*, 216 AD3d at 446-447). Were FAPA not intended to have retroactive application, the First Department certainly would not have reversed itself so expediently.

The inquiry therefore becomes, given the procedural posture of this case, whether FAPA can be retroactively applied herein. This case falls within the express parameters of FAPA as the judgment of foreclosure herein has not been “enforced” through a public sale of the encumbered premises. Also, summary judgment dismissing Defendants’ statute of limitations defense, as well as issuance of the judgment of foreclosure and sale, occurred in the period between issuance of *Engel* and the enactment of FAPA. Yet, this matter is post-judgment and the time to appeal the judgment of foreclosure expired before FAPA became effective.

Regarding the finality of judgments in this context, “[a] judgment of foreclosure and sale is not only final by statutory definition but by the decisions of this court [it] has been held to be final and an adjudication of all questions at issue” (*Feiber Realty Corp. v Abel*, 265 NY 94, 98 [1934]) as well as “all matters of defense which were or could have been litigated in the foreclosure action” (*Ciraldo v JP Morgan Chase Bank, N.A.*, 140 AD3d 912 [2d Dept 2016]). Resultantly, issuance of a final judgment can circumscribe application of subsequent legislative enactments. As stated by the Court of Appeals, “[w]hile the Legislature has control of remedies by which final judgment may be obtained, it ‘cannot confiscate, recall or put again in jeopardy the rights and property established by judgments already obtained’” (*Feiber Realty Corp. v Abel*, *supra* at 99, *citing Matter of Greene*, 55 App Div 475 [4<sup>th</sup> Dept 1900]; *affd.*, 166 N Y 485, 492 [1901]). Conversely, “[a] judgment, whether it relates to public or private rights does not create a vested interest while an appeal is pending therefrom” (McKinney’s Cons Laws of NY, Book 1, Statutes, § 58). Only “after the exhaustion of all avenues of review by appeal, [does the judgment become] . . . an inviolable property right and may not be affected by subsequent legislation” (*id.*). Applied herein, the expiration of Defendants’ time to appeal the judgment was a watershed event and substantial rights vested in the Plaintiff thereby which could not be undone, even via legislative act (*see Feiber Realty v Abel*, *supra*; *see also New York ex rel. H. D. H. Realty Corp. v Murphy*, 194 AD 530, 538 [1st Dept 1920]).

The distinction between this case and *Gleason*, cited by the Legislature, as well as all the Appellate Division decisions applying FAPA, *supra*, is that Defendants’ right to appeal in those cases had not expired. Absent from the legislative history is any indication or expression that those august bodies intended to revoke the bestowed benefits enjoyed by lenders in Plaintiff’s position. Similarly unexpressed is any intent to overturn the applicable prohibitions generally against motions to renew based on a change in the law where no appeal is pending or possible from an entered judgment (*see eg Matter of 160 E. 84th St. v. New York State Div. of Hous. & Community Renewal*, 203 AD3d 501 [1<sup>st</sup> Dept 2022]). Indeed, one of the stated justifications of FAPA was to stave off a “flurry” of motions<sup>3</sup> to

<sup>2</sup> This finding was despite the First Department’s own affirmance of Justice Rosado’s dismissal for “failure of plaintiff to litigate its case at trial as scheduled for December 16, 2019” (*Onewest Bank, FSB v Fox*, 191 AD3d 481 [1st Dept 2021]).

<sup>3</sup> Parenthetically, the Court notes that in its experience, the enactment of FAPA generated just as many motions to renew as *Engel*.

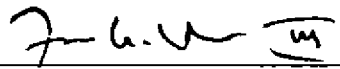
“renew” by lenders, based on *Engel*, seeking to revive actions dismissed years ago (NY State Senate Bill S5473 and S5473D at Sponsor Memo, Justification). Certainly, permitting reconsideration of actions terminated with finality in lenders’ favor years ago is not in furtherance of the Legislature’s stated intent of leveling the playing field and affording equality to all litigants (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill).

Accordingly, retroactive application of FAPA in this action, through a motion to renew after the time to appeal an entered judgment of foreclosure has expired, is impermissible. The conclusion in this case by no means stands for the proposition that retroactive application is unsound, or unconstitutional, when applied in a different set of circumstances (*cf. Watson v Buck*, 313 U.S. 387; *Matter of Westchester Reform Temple v Brown*, 22 NY2d 488; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton*, 1 NY2d 508). Concerning the constitutionality of the application of FAPA to this matter, this Court must bypass those issues since it decided the matter in some other fashion (*see People of the State of New York v Felix*, 58 NY2d 156 [1983]).

Accordingly, based on the foregoing it is

ORDERED that the Defendant Gallants’ motion for renewal is denied.

10/23/2023  
DATE

  
FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NO FURTHER ACTION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE