

MTGLQ Invs., L.P. v Vazquez
2023 NY Slip Op 34047(U)
November 13, 2023
Supreme Court, New York County
Docket Number: Index No. 810148/2012
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

-----X

INDEX NO. 810148/2012

MTGLQ INVESTORS, L.P.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 008

- v -

JAMES VAZQUEZ, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, CITY OF NEW
YORK PARKING VIOLATIONS BUREAU, DEPARTMENT
OF HOUSING PRESERVATION AND DEVELOPMENT,
UNITED STATES OF AMERICA

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45

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 355 Pleasant Avenue, New York, New York. Issue was joined by Defendant James Vazquez ("Vazquez"), who pled nine affirmative defenses in the answer, but not expiration of the statute of limitations. Prior to commencement of this action, one of Plaintiff's purported assignors, Ohio Savings Bank ("Ohio"), commenced an action to foreclose the same mortgage (*see Ohio Savings Bank v Vazquez*, NY Cty Index No. 103077/2005). After the issuance of a judgment of foreclosure and sale, Plaintiff's motion in the 2005 action pursuant to CPLR §3217 to discontinue the action was granted by order dated August 24, 2011. The within action was commenced by non-party Amtrust-NP SFR Venture, LLC ("Amtrust"), on October 9, 2012.

Plaintiff's motion in this action for summary judgment against Vazquez and an order of reference was granted by decision of Justice Joan M. Kenny dated January 6, 2015. Defendant Vazquez's motion to renew and reargue that decision was denied. Defendant Vazquez's appeal of that order was also denied (*see Amtrust-NP SFR Venture, LLC v Vazquez*, 140 AD3d 541 [1st Dept 2016]). A judgment of foreclosure and sale herein was granted and entered on September 24, 2019. Notice of entry of that judgment was served on Defendant Vazquez's counsel and an appeal from that judgment was denied (*see MTGLQ Invs., L.P. v Vazquez*, 190 AD3d 616 [1st Dept 2021]). In neither appeal did Defendant Vazquez raise the issue of expiration of the statute of limitations.

Now, Vazquez moves to stay the foreclosure sale herein, to void the notice of sale, to vacate the judgment of foreclosure and sale pursuant to CPLR §5015, and to dismiss the complaint based upon expiration of the statute of limitations. Defendant asserts vacatur and dismissal is warranted 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.

Initially, the branch of the motion pursuant to CPLR §5015 is procedurally defective. None of the grounds set forth in CPLR 5015 (a) for vacatur of an order or judgment applies here (*see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Although CPLR §5015[a] does not provide an exhaustive list of the grounds for vacatur, Vazquez's contention that there are sufficient reasons to vacate the prior orders in the interests of substantial justice is meritless (*see Redeye v Progressive Ins. Co.*, 158 AD3d 1208, 1209 [4th Dept 2018]).

Even if the Court were to consider the motion as one for renewal based upon a change in the law, it would nonetheless fail. "Renewal 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 [1st 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". Here, there is no prior decision concerning the expiration of the statute of limitations. More importantly, there is no proof Defendant Vazquez ever raised the issue of expiration of the statute of limitations in a pre-answer motion to dismiss or as an affirmative defense in the answer. As such, that issue was waived (CPLR §3211[e]).

Resort to renewal is also futile in this matter as it is post-judgment and the time to appeal the judgment of foreclosure expired long before FAPA became effective (*see U.S. Bank, NA v Gallant*, ___ Misc3d ___, 2023 NY Slip Op 33848[U][Sup Ct NY Cty 2023]). That 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]) does not change the above result (*see U.S. Bank, NA v. Gallant*, *supra*). Ultimately, "[a]bsent the sort of circumstances mentioned in CPLR 5015, such as newly discovered evidence, fraud, lack of jurisdiction, etc., a determination of a court from which no appeal has been taken ought to remain inviolate" (*In re Huie*, 20 NY2d 568, 572 [1967]).

To the extent the parties raised issue with 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 Vazquez's motion is denied in its entirety and the temporary restraining order granted in the order to show cause is vacated, and it is

ORDERED the foreclosure sale shall be conducted within 180 days of the date of this order, and it is

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **sfc-foreclosures@nycourts.gov** and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted according to the NY County Auction Part Rules for Outdoor Auctions (<http://ww2.nycourts.gov/courts/1jd/supctmanh/foreclosures.shtml>).

11/13/2023

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

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

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