

HCNP v Bains

2023 NY Slip Op 34624(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 503861/14

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 31st day of October 2023.

P R E S E N T:

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

Index No.: 503861/14

_____ x

HCNP,

Plaintiff,

DECISION AND ORDER

-against-

GWEN BAINS et al,

Defendant,

_____ x

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KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of the Motion:

Papers	Numbered
Motion (MS 7)	<u>1</u>
Opp/Cross (MS 8)	<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:

A prior action was commenced on May 6, 2008. On September 26, 2013, Plaintiff filed a motion to discontinue that case. As reflected in the comments and on the face of the original motion, the Honorable Leon Ruchelsman orally granted the motion on November 15, 2013 and directed that the plaintiff settle an order on notice. The requested order was settled on March 4, 2014 and signed three months later. The discontinuance order was signed on July 18, 2014 and entered the following month. Meanwhile, the instant action was commenced on May 1, 2014.

This action has been heavily litigated by both parties. Defendant successfully moved for dismissal based upon Plaintiff's alleged lack of standing. After renewal and reargument were denied, the Appellate Division reversed and the action was restored to active status. The parties moved for summary judgment, Defendant raising RPAPL 1304, statute of limitations, and laches, among other things. The Court granted Plaintiff's motion subject to a finding that the collection of installments due more than six years prior to the commencement of this action was time-barred. Defendant's counsel then informed the Court that his client's father, co-defendant/borrower Alexander Everette, has been deceased since 2010. Counsel for both parties then sent further letters addressing that issue. After the Court elected not to act based upon the correspondence, Plaintiff moved for judgment of foreclosure and sale and Defendant cross-moved for dismissal of this action as a "legal nullity" in light of Everette's death. Both motions were denied by order dated August 16, 2022.

Plaintiff now moves for judgment of foreclosure and sale. Defendant again opposes and cross-moves for dismissal, this time alleging that the prior action was still pending when this one was commenced and that the instant action must be dismissed pursuant to RPAPL 1301[3]. Plaintiff opposes, noting that Defendant failed to raise such a defense in her answer (over which summary judgment was already granted) and taking issue with Defendant's assertion that the prior action was still pending.

It is well established that the defense that there is another action pending between the same parties to collect on the same debt is waived if not raised in a pre-answer motion to dismiss or as an affirmative defense in the answer (CPLR 3211[e]; *US Bank v Brown*, 213 AD3d 717, 718 [2d Dept 2023]). As such, Defendant – who now raises the issue for the first time – can no longer seek dismissal on that basis. Contrary to Defendant's argument, the co-pendency of the two actions could have been raised prior to FAPA – even if it would not have been as (potentially) strong a defense.

Even were Defendant's 1301[3] arguments properly before this Court, they would fail. The plaintiff in the prior action not only timely moved for discontinuance, that motion was

already orally granted by the Court prior to the commencement of this action. The discontinuance order had already been settled – albeit, not yet signed – when Plaintiff filed this case on what appears to have been the last day of the statute of limitations.

In light of the foregoing, Defendant’s cross-motion is denied.¹

Plaintiff’s prior motion for judgment of foreclosure and sale was denied without prejudice upon a finding that the affidavit relied upon by the referee was based upon unproduced business records and, thus, was inadmissible hearsay. The Court also noted that the referee failed to take into account the order barring Plaintiff from collecting installments due more than six years prior to the commencement of the instant action.

Plaintiff now claims to have remedied those deficiencies. Defendant disagrees, noting that the business records were not actually uploaded as an attachment to the copy of the report appended to the moving papers. Admitting that the exhibits to the report had already been uploaded along with the report shortly before the motion was filed, Defendant argues in the alternative that the documentary evidence does not support the “Escrow Advances prior to 6/6/14” and interest thereon sought by Plaintiff. She does not challenge the remainder of the referee’s conclusions.

Upon a review of the parties’ submissions, it is clear that Plaintiff uploaded a complete copy of the report including all of the proffered records in advance of the motion and noted in its moving papers that it had done so. The Court agrees with Defendant, however, that the proffered documents do not appear to support the escrow advances related findings of the referee. Though Plaintiff’s counsel asserts that those figures are substantiated by the prior servicer’s ledgers that were produced, this Court has reviewed those pages and does not agree. As such, the referee’s

¹ To the extent it appears that Defendant may also be seeking the tolling of interest since 2019, that relief is also denied. Though the prior motion for judgement of foreclosure and sale was denied, it was not frivolous. There also does not seem to be any unreasonable delay attributable to Plaintiff. Plaintiff’s motion and Defendant’s cross-motion – though filed in 2019 – were not decided until August 2022. Thereafter, Plaintiff noticed a hearing (on submission) before the referee and secured an updated referee’s report before filing the instant motion in August 2023.

report – other than as to the enumerated items – is confirmed and judgment of foreclosure and sale is granted (see accompanying order).

Motion granted. Cross-motion denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**

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