

HSBC Bank USA N.A. v Smith

2023 NY Slip Op 34773(U)

August 30, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 611408/2016

Judge: James Hudson

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Supreme Court of the State of New York
County of Suffolk
JAS Part XL
Memorandum Decision

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

HSBC BANK USA NATIONAL ASSOCIATION, TRUSTEE
FOR THE ELLINGTON TRUST SERIES 2007-1,

Plaintiff,

-against-

JAMES L. SMITH; HSBC USA NATIONAL ASSOCIATION
FOR THE HOLDERS OF THE ELLINGTON LOAN
ACQUISITION TRUST 2007-2 MORTGAGE PASS-
THROUGH CERTIFICATES SERIES 2007-2; GREGORY F.
BLASS AS COMMISSIONER OF SOCIAL SERVICES OF
SUFFOLK COUNTY; COMMISSIONER OF TAXATION
AND FINANCES TCD CHILD SUPPORT ENFORCEMENT
SECTION; TCM FUNDING CORP.; PEOPLE OF THE
STATE OF NEW YORK; HAZEL ORGAN; RAB
PERFORMANCE RECOVERIES,LLC; TOWN
SUPERVISOR TOWN OF ISLIP; BETHESDA SDA
ELEMENTARY SCHOOL; LIBERTY MUTUAL INSURANCE
COMPANY ASO JACK FLAX; LUIS WARN; NORMAN
SCHEIDER d/b/a ALL INFORMATION STORAGE
SOLUTIONS; CROWN ASSET MANAGEMENT LLC;
TEACHERS FEDERAL CREDIT UNION; CLERK OF THE
SUFFOLK COUNTY DISTRICT COURT;
INTERNATIONAL AIRLINES EMPLOYEES FCU;
PORTFOLIO RECOVERY ASSOCIATES LLC;
ENFORCEMENT CO. ATC; TWIMONISHA A.
ALEXANDER; CAPITAL ONE BANK; MIDLAND
FUNDING LLC; SAG HARBOR VILLAGE COURT; US
BANCORP EQUIPMENT FINANCE, INC.; CAPITAL ONE
BANK USA NA; LUFTHANSA EMPLOYEE FEDERAL
CREDIT UNION; HELP AT HOME, INC.; CACH OF
COLORADO LLC; SUPERVISOR, TOWN OF
BROOKHAVEN; and "JOHN DOE" said name being
fictitious, it being the intention of the plaintiff to designate any
and all occupants, tenants, persons or corporations, if any,
having or claiming an interest in or lien upon the premises
being foreclosed herein,

Defendants.

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Defendant James L. Smith (“Defendant”) requests an Order pursuant to **CPLR 2221 (a), (e), 5015 (a)** and/or in the interest of substantial justice, renewing the April 7th, 2022 Decision and Order (“Order”), and upon that renewal: 1) vacating the Order and dismissing the Complaint as time-barred; and 2) directing the Suffolk County Clerk to cancel and discharge the underlying mortgage instruments pursuant to **RPAPL 1501 (4)**.

As discussed in the prior order, the underlying case is an action to foreclose upon a Note and Mortgage which encumbers residential real property at 17 Dorothy Lane, Holbrook, NY. The Defendant/mortgagor executed a purchase money mortgage with the predecessor in interest of the Plaintiff/mortgagor HSBC Bank USA National Association as Trustee for the Ellington Trust Series 2007-1 (“Plaintiff”). Upon the Defendant’s alleged default, on July 15th, 2008 the Plaintiff commenced a foreclosure proceeding. On July 8th, 2013 that foreclosure was voluntarily discontinued (Doc. 117). On July 27th, 2016 a second foreclosure action was filed; which is the subject of this action.

A motion for renewal requires that the movant demonstrate a change in the law or new facts which were not offered on the prior motion; either of which would change the prior decision (*HSBC Bank USA, N.A. v. Halls*, 98 AD3d 718, 950 NYS2d 172 [2d Dept 2012]). The new evidence must have been unavailable to the movant at the time of the initial motion (*GLND 1945, LLC v. Ballard*, 209 AD3d 993, 995, 177 NYS3d 315 [2d Dept 2022]; *Hillrich Holding Corp. v. BMSL Management, LLC*, 175 AD3d 474, 475, 103 NYS3d 846 [2d Dept 2019]). The new evidence must support facts which could not have been previously established through alternative evidentiary means (*Vina v. Litman*, 110 AD3d 867, 972 NYS2d 704 [2d Dept 2013]).

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The Defendant moves for renewal of the Order; alleging a change in the law as his basis – specifically the December 22nd, 2022 **Foreclosure Abuse Prevention Act** (“**FAPA**”). The Defendant argues that the FAPA legislatively reverses the Court of Appeals decision in *Freedom Mortgage Corporation v. Engel*, 37 NY3d 1, 146 NYS3d 542, 169 NE3d 912 [2021]); warranting dismissal of this action as time-barred on statute of limitations grounds and a judgment dismissing the Plaintiff’s mortgage and note. The *Engel* Decision abrogated prior law which required that a mortgagee affirmatively revoke its acceleration of the mortgage debt in order to toll the running of the six (6) years prescribed by **CPLR 213 (4)**.

Engel established a new interpretation that a mortgagee revokes its acceleration of a mortgage debt by voluntary discontinuance of its foreclosure action within six years from the date of acceleration by the commencement of that action (*Id.* at 547).

FAPA overruled *Engel* ; and it amends **CPLR 3217 (FAPA §8, CPLR 3217 [e])**. By its terms, a voluntary discontinuance neither revokes the acceleration on the debt nor stops the accrual of the statute of limitations (*Article 13, LLC v. Ponce de Leon Federal Bank*, 20-CV-03553, 2023 WL 5179626, *3 [EDNY August 11, 2023]).

FAPA §10 provides that it “shall apply to all actions commenced on a mortgage in which a final judgment of foreclosure and sale has not been enforced.” The clear intention of the legislature was to grant retroactive application to **FAPA** under those conditions (*2022 NY ALS 821 §10, 2022 NY Laws 821, 2022 NY Ch. 821, 2022 NY AB 7737*).

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“Retroactivity is generally disfavored in the law...however the courts will defer to the legislature when it creates retroactive legislation” (*Varrington Corp. v. City of New York Dep’t. of Fin.*, 85 NY2d 28, 32, 623 NYS2d 534, 647 NE2d 746 [1995]).

“A statute’s retroactive application must be ‘supported by legitimate legislative purpose furthered by rational means’ [*United States v. Carlton*, 512 U.S. 26, 30-31 (1994)].

The New York Legislature specifically articulated the purpose of the **FAPA** as follows:

‘The 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 of limitation to their advantage; and that the purpose of the present remedial legislation is to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof’ [New York State Senate Bill S5473D Sponsor Memorandum] ” (*Article 13, LLC* at *4).

Recent caselaw has determined that the Legislature, in enacting **FAPA**, had a rational basis in protecting homeowners from dilatory tactics in foreclosure litigation (*HSBC Bank, USA, N.A. as Trustee on Behalf of Ace Securities Corp. v. IPA Asset Management, LLC*, 79 Misc3d 821, 190 NYS3d 622 [Sup Ct, Suffolk County May 16, 2023]; *Deutsche Bank National Trust Company as Trustee for the Registered Holders of Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE5 v. Dagrín*, 79 Misc3d 393, 190 NYS3d 582 [Sup Ct Queens County April 12, 2023]).

“It is well settled that the acts of the Legislature are entitled to a strong presumption of constitutionality” (*American Economy Ins. Co. v. State of New York*, 30 NY3d 136, 149, 65 NYS3d 94, 87 NE3d 126 [2017]). Whether a rational basis exists for the New York

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State Legislature enacting **FAPA** is a determination subject to a strong presumption of constitutionality (*Dagrin*, at 588, citing *Matter of Calverton Manor, LLC v. Town of Riverhead*, 160 AD3d 829, 76 NYS3d 75 [2d Dept 2018]).

It has been determined that the **FAPA** does not violate a defendant's due process rights, nor does it violate a defendant's constitutional right to freedom of contract (*East Fork Funding, LLC v. U.S. Bank, N.A.*, WL 2660645, *2 [EDNY March 23, 2023]).

In the case at bar, a judgment of foreclosure and sale has not been awarded; and therefore, none has been enforced. The **FAPA** is applicable to the case at bar.

The statute of limitations runs from the initial July 15th, 2008 commencement of the first foreclosure action, which on July 8th, 2013 was ordered voluntarily discontinued (Doc. 117). The six (6) year statute of limitations is a bar to the action (*see U.S. Bank National Association v. Fox*, 216 AD3d 445, 188 NYS3d 52 [1st Dept May 4, 2023]).

The Court has carefully considered each of the Defendant's arguments in opposition and rejects each as inapplicable or insufficient to overcome the provisions of the **FAPA**.

Accordingly, it is

ORDERED, that the motion (seq. no. 004) by the Defendant, James L. Smith, which requests, pursuant to **CPLR 2221(e)**, renewal of the April 7th, 2022 Decision and Order, is granted; and it is further

ORDERED, upon renewal the request that the April 7th, 2022 Decision and Order be vacated, is granted; and it is further

ORDERED, that the request that the Complaint be dismissed as time-barred, is granted; and it is further

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ORDERED, that the request that the Suffolk County Clerk be directed to cancel and discharge the underlying mortgage instruments, is granted.

This memorandum also constitutes the Order of the Court.

Dated: August 30th, 2023
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court