

U.S. Bank N.A. v Speller
2023 NY Slip Op 35010(U)
March 3, 2023
Supreme Court, Putnam County
Docket Number: Index No. 500088/2022
Judge: Victor G. Grossman
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SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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U.S. BANK NATIONAL ASSOCIATION, etc.,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS,
et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 500088 / 2022
Mot. Seq. No. 2

-----x **DECISION AND ORDER**

This is a residential mortgage foreclosure action. Plaintiff U.S. Bank National Association moved for summary judgment of foreclosure and an order of reference. By prior Decision and Order dated October 26, 2022, the Court awarded Plaintiff summary judgment and an Order of Reference. Upon defendant Michael Speller’s four (4) motions for reargument and renewal, the Court wrote:

On his motion for reargument, Mr. Speller argues for the first time that (1) co-defendant Ellen Fitzsimmons is a party to the mortgage but not to the promissory note; (2) as a party to the mortgage she qualifies as a “borrower” entitled to an RPAPL §1304 notice; (3) since she is not a party to the note, she is not a “consumer” owing a “debt” within the meaning of the FDCPA; and thus (4) as to Ms. Fitzsimmons, then, the FDCPA “mini-Miranda” warning included in the 90-day notice was not required by Federal law, wherefore its inclusion violated Section 1304 as interpreted by the Second Department in *Bank of America v. Kessler, supra*.

Mr. Speller, representing himself *pro se*, is not entitled to assert Ms. Fitzsimmons’ rights under RPAPL §1304. More broadly, as Mr. Speller does not claim to be an attorney-at-law his purported representation of Ms. Fitzsimmons in answering the Complaint and otherwise in this action constituted the unauthorized practice of law in violation of Judiciary Law §478. *See, Discover Bank v. Gilliam*, 199 AD3d 645 (2d Dept. 2021); *Whitehead v. Town House Equities, Ltd.*, 8 AD3d 369 (2d Dept. 2004); *Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP*, 93 AD3d 452 (2012); *People ex rel. Field on Behalf of Field v. Cronshaw*, 138 AD2d 765 (2d Dept. 1988). “New York law prohibits the practice of law in this State on behalf of anyone other than himself or herself by a

person who is not an admitted member of the Bar...” *Discover Bank v. Gilliam, supra*; *People ex rel. Field on Behalf of Field v. Cronshaw, supra*. Mr. Speller’s marriage to Ms. Fitzsimmons does not permit him to appear *pro se* on her behalf. *See, id.* Although Plaintiff never objected to Mr. Speller’s unlawful appearance and filings on behalf of Ms. Fitzsimmons, the defect is not waivable because it involves the practice of law in violation of Judiciary Law §478. *See, Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP, supra*, 93 AD3d at 453.

Accordingly, the Defendants’ Answer to the Complaint and opposition to Plaintiff’s motion for summary judgment, insofar as they purport to be asserted on behalf of Ms. Fitzsimmons, are stricken. The Court’s October 26, 2022 Decision and Order as well as the associated Order of Reference are vacated to afford Ms. Fitzsimmons an opportunity to appear and participate in this action, either *pro se* or with appropriate counsel. *See, Discover Bank v. Gilliam, supra*. *See also, Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645, 650 (2019); *Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP, supra*.

(Decision and Order dated December 21, 2022)

Thereafter, Ms. Fitzsimmons on her own behalf filed an Answer with Counterclaims and opposition to the Plaintiff’s motion for summary judgment. Neither Ms. Fitzsimmons nor Mr. Speller may now rely on the Second Department’s decision in *Bank of America v. Kessler, supra*, 202 AD3d 10 (2d Dept. 2021), as *Kessler* has been unanimously overruled by the Court of Appeals. *See, id.*, 2023 WL 1972994 (Feb. 14, 2023). However, inasmuch as Ms. Fitzsimmons’ Answer raises other defenses and claims above and beyond those asserted in the original Answer to which Plaintiff’s motion for summary judgment was addressed, this action cannot properly be resolved on the basis of the motion currently before the Court.

It is therefore

ORDERED, that Plaintiff’s motion for summary judgment is denied without prejudice, and it is further

ORDERED, that Counsel for the Plaintiff (not *per diem* counsel) and both *pro se* Defendants are directed to appear for an in person conference in this matter scheduled for MARCH 29, 2023 at 9:30 a.m./~~p.m.~~ in Courtroom No. 201 at the Putnam County Courthouse, 20 County Center, Carmel, New York.

The foregoing constitutes the decision and order of the Court.

Dated: March 3, 2023 E N T E R
Carmel, New York


HON. VICTOR G. GROSSMAN, J.S.C.