Van Dyke v U.S. Bank, N.A.
2023 NY Slip Op 35024(U)
November 3, 2023
Supreme Court, Bronx County
Docket Number: Index No. 806287/2022E
Judge: Doris M. Gonzalez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

file:///LRB-ALB-FS1/Vol1/ecourts/Process/covers/Van%20Dyke%20v%20US%20Bank_2023_DFP.html[04/15/2026 3:47:53 PM]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 24

-- X

PATTI VAN DYKE

Plaintiff,

- against -

U.S. BANK, NATIONAL ASSOCIATION,

Defendant.

-- X

Index №. 806287/2022E

Hon. Doris M. Gonzalez

DECISION AND ORDER

Doris M. Gonzalez, J.

In a Decision and Order dated January 24, 2023, entered January 25, 2023, this Court (Marissa Soto, J.) denied the defendant's motion to dismiss the complaint.[1] Plaintiff's cross motion for summary judgment was held in abeyance pending briefing by the parties on the applicability of CPLR 213(4) as amended by the Foreclosure Abuse Prevention Act of 2022 ("FAPA"). The present decision addresses the open cross-motion.[2]

On October 30, 2009, the Bank of New York Mellon Trust Company, National Association as Grantor Trustee of the Protium Master Grantor Trust ("BONY") commenced an action to foreclose the subject mortgage under Index Number 382422/2009. In a Decision and Order dated February 14, 2019, this Court (Gonzalez, J.) found that issues of fact existed as to whether the plaintiff had possession of the note at the time of the commencement of the action, noting numerous inconsistencies in plaintiff's evidence of standing. The Appellate Division unanimously

[1] Justice Soto found that although "the Defendant argues that the September 13, 2010, letter did not accelerate the loan as it did not demand the full payment of the entire debt, [and]instead the letter was an informational letter [which]... informed the Plaintiff of the total amount due on the loan as of a date certain,' nevertheless "Defendant's motion seeking dismissal based on documentary evidence asks the Court to go beyond the scope of a motion to dismiss with respect to both the motion to dismiss for failure to state a cause of action and on documentary evidence, and, accordingly, is denied."

[2] There was a previously discontinued prior foreclosure proceeding against the same property in this court under Index Number 382422/2009, and a subsequent foreclosure action is now pending under Index Number 814380/2022E.

affirmed, holding that that "issues of fact exist as to whether plaintiff had possession of the note when the action was commenced." (*Bank of N.Y. Mellon Trust Co. v Van Dyke*, 180 A.D.3d 480, 480 [1st Dept. 2020].) On March 24, 2022, the parties executed a Stipulation of Discontinuance which was "so ordered" by the Court. The stipulation recited that as per the Court's Order, which was affirmed on appeal, plaintiff failed to demonstrate standing.

On April 24, 2022, the borrower commenced the present action seeking to secure the cancellation and discharge of the mortgage (now held by defendant U.S. Bank) and to quiet title to the property. The plaintiff borrower now argues that FAPA applies to this action, as FAPA is effective December 30, 2022, and applies to all actions commenced on an instrument described under CPLR 213(4) in which a final judgment of foreclosure and sale has not been enforced. CPLR 3217 (voluntary discontinuance), was amended by FAPA by adding a new subdivision (e). CPLR 3217 (e) provides:

> "(e) Effect of discontinuance upon certain instruments. In 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."

This provision overrules the holding of *Freedom Mortgage Corp. v. Engel* (37 N.Y.3d 1 [2021]), to the extent that the case held that a voluntary discontinuance of an action constitutes a revocation of the election to accelerate.

FAPA also amended CPLR 213 (4). A new sub-paragraph CPLR 213 (4)(b) provides:

> "(b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, 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."

Plaintiff in essence argues that under the above-cited sections of FAPA, in the absence of "an expressed judicial determination ... that the instrument was not validly accelerated," the defendant is estopped from arguing that the 2009 action did not accelerate the mortgage, rendering any new action to collect the mortgage time barred. Defendant U.S. Bank argues, to the contrary, that documentary evidence establishes that there was a prior judicial determination that the initial Foreclosure Action was initiated by a party lacking standing, and thus U.S. Bank is not estopped from asserting that the instrument was not validly accelerated.

This Court assumes without finding that a stipulation that is "so ordered" constitutes a judicial determination. (*But see Jazilek v. Abart Holdings, LLC,* 72 A.D.3d 529, 532 [1st Dept. 2010] ["a representation in a stipulation--even a so-ordered stipulation—'is not to be equated with a judicial finding'"].) But while the defendant repeatedly urges this Court to find that it previously determined that BONY lacked standing to commence the prior foreclosure action when it denied BONY's motion for summary judgment, the fact remains that the Court did not find that BONY lacked standing. Rather, the Court found that there existed issues of fact as to standing. Moreover, the stipulation did not contain any statement or agreement of fact that the plaintiff could not prove standing, but merely recited that BONY had "failed to demonstrate that it had standing." Contrary to defendant's arguments, the issue of standing was not determined in denying summary judgment.

It is clear, then, under FAPA, which by its terms applies to this action, and which by its terms applies to the pending related foreclosure action, that the pending foreclosure action is not timely. BONY was not shown to lack standing, and there was no express determination of same under CPLR 213 (4)(b). Accordingly, under FAPA, the defendant is estopped from arguing that

BOMA had no standing; therefore, the BOMA action commenced the running of the 6-year statute of limitations governing the right to foreclose the subject mortgage, and the pending foreclosure action is untimely.

Defendant, of course, is aware that under pre-FAPA law, the pending foreclosure action would likely be deemed timely for either one of two reasons. First, under *Engel*, the discontinuance of the BOMA action would result in the automatic revocation of the acceleration. Second, under pre-FAPA law, defendant would be free to argue and establish that BOMA lacked standing to accelerate the mortgage. Defendant argues that FAPA does not apply to this action because the application of FAPA would retroactively void U.S. Bank's pending foreclosure action, and such a retroactive application would constitute an unconstitutional interference with contract and destroy U.S. Bank's alleged "vested right" in the related pending foreclosure action. Defendant argues that "FAPA may apply immediately to the Pending Foreclosure Action to the extent it affects proceedings going forward, but it cannot be applied to undo what has already been done."

The Court notes that CPLR 1012 (b) (1) provides as follows:

> "(b) Notice to attorney-general, city, county, town or village where constitutionality in issue.
> "1. When the constitutionality of a statute of the state, or a rule and regulation adopted pursuant thereto is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality."

Similarly, the Executive Law precludes consideration of the constitutionality of a state law where the Attorney General has not been notified. The court "shall not consider any challenge to the constitutionality of such statute, rule or regulation unless proof of service of the notice required by this section or required by [CPLR 1012 (b)] is filed with such court." (Executive Law § 71 [3].)

The Executive Law sets forth the following procedure when a constitutional challenge is advanced. The Court "shall make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general, and providing that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute, or rule or regulation adopted pursuant thereto." (Executive Law § 71 [1].)

Defendant did not provide proof that the Attorney General was notified as required by CPLR 1012(b) and Executive Law § 71. The plaintiff has submitted the briefs filed by the Attorney General in three cases which were pending in the Appellate Division, i.e., *U.S. Bank National Association v. Corcuera*, No. 2020-06138 (2d Dept), *Deutsche Bank National Trust Co. v. DeLuca*, No. 534805 (3d Dep't), and *U.S. Bank National Association v. Simon*, No. 2020-09391 (2d Dep't). In each case, the Attorney General argued that FAPA applied retroactively, and was not unconstitutional. *U.S. Bank National Association v. Corcuera*, No. 2020-06138 (2d Dept) and *Deutsche Bank National Trust Co. v. DeLuca*, No. 534805 (3d Dep't) each concerned retroactive application of CPLR 205-a, and thus does not address the precise issue presented here. *U.S. Bank National Association v. Simon*, No. 2020-09391 (2d Dep't) concerned a voluntary discontinuance in 2008, when the prevailing law was contrary to *Engel.* Here, on the other hand, the discontinuance was effectuated in 2022, after *Engel* was decided, and accordingly, again, the precise issue presented in the Appellate Division is not the precise issue presented here. Therefore, even if the Court were to opine that notice to the Attorney General is not required where the position of the Attorney General has already been made known, here, the precise issue presented was not presented in any of the preceding cases so as to obviate the requisite statutory notification.

Accordingly, it is

ORDERED that the Court finds that there was no prior judicial determination that the 2009 foreclosure action was initiated by a party lacking standing, and thus it is necessary to consider the issue of the constitutionality of FAPA as applied to the foregoing facts, and it is further

ORDERED that the defendant shall notify the Attorney General and provide proof that the Attorney General was notified as required by CPLR 1012(b) and Executive Law § 71 within 15 days following the entry hereof by filing same in NYSCEF, and it is further

ORDERED that in the evet the Attorney General so chooses, the Attorney General shall be permitted to appear and argue and/or submit memoranda in support of the constitutionality of FAPA, in such manner and at such time as shall be determined by the Court, and it is further

ORDERED that the motion is otherwise held in abeyance subject receipt of notification as to the potential intervention of the Attorney General.

ENTER:

Date: November 3, 2023

HON. DORIS M. GONZALEZ, J.S.C.