

U.S. Bank N.A. v Musnik

2024 NY Slip Op 34612(U)

December 5, 2024

Supreme Court, Nassau County

Docket Number: Index No. 602426/23

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 2

U.S. BANK NATIONAL ASSOCIATION, not in its
individual capacity but solely as TRUSTEE OF NRZ
PASS-THROUGH TRUST XVI,

X

Plaintiff,

Index No.: 602426/23
Motion Sequence...03
Motion Date...9/13/24

-against-

AVRUM I. MUSNIK, ARLENE MUSNIK, UNITED
STATES OF AMERICA (EASTERN DISTRICT),
“JOHN DOE” and “JANE DOE” said names being
fictitious, it being the intention of Plaintiff to designate
any and all occupants of premises being foreclosed
herein,

Defendants.

X

Papers Submitted:

- Notice of MotionX
- Memo of Law in Support.....X
- Affirmation in Opposition.....X
- Affidavit in Opposition.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiff seeking an Order for the following relief: (i) pursuant to CPLR 3212, granting the Plaintiff summary judgment; (ii) pursuant to CPLR 3215, granting a default judgment; (iii) pursuant to CPLR 3211(b), striking the answer and affirmative defenses filed by the Defendant, AVRUM I. MUSNIK;

(iv) pursuant to RPAPL 1321, appointing a referee to compute the total sums due and owing to the Plaintiff; and (v) amending the caption of this matter, is decided as provided herein.

The Defendant, AVRUM MUSNIK, submits opposition arguing that this matter is time barred under the Foreclosure Abuse Prevention Act (“FAPA”). The Defendant maintains that there were two prior foreclosure matters pertaining to the same note and mortgage at issue here. The first matter was commenced on February 6, 2009, whereby the Plaintiff accelerated the note. Thus, the Defendant argues that the six-year statute of limitations began to run on February 6, 2009. However, as acknowledged by the Defendant, AVRUM MUSNIK, the Defendant filed three separate bankruptcy petitions which tolled the SOL while the petitions were pending. The first bankruptcy petition was filed on July 30, 2009 and dismissed on July 7, 2011; the second was filed on August 12, 2011 and dismissed on October 11, 2013; and the third was filed on February 25, 2014 and dismissed on July 13, 2017. The Defendant concedes that during the pendency of these bankruptcy proceedings, the SOL was tolled.

In opposition, the Plaintiff asserts that, based on the various tolling periods, this action was timely commenced within six years and 2,930 days from when the initial foreclosure action was commenced.

Based on the Court’s calculations of the various tolling periods, it appears that the deadline by which to commence this action was in or about March 20, 2023, and this action was commenced on February 9, 2023, prior thereto. Accordingly, the Court finds that this action was timely commenced. The remaining arguments by the Defendant regarding the timeliness of this action are unavailing.

The Defendant also opposes the Plaintiff's application on various other grounds, including lack of standing, failure to proffer admissible evidence to establish its prima facie entitlement to summary judgment, and Plaintiff's purported failure to strictly comply with RPAPL 1304. However, none of these arguments warrant denial of Plaintiff's motion.

“The doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed” (*Davis v Citibank, N.A.*, 116 AD3d 819, 820 [2d Dept 2014]). Estoppel against inconsistent positions applies where a party to an action has secured a favorable judgment “by adopting a certain position and then has sought to assume a contrary position in another action simply because his interests have changed” (*Kimco of New York, Inc. v Devon*, 163 AD2d 573, 574 [2d Dept 1990], citing *Anonymous v Anonymous*, 137 AD2d 739, 741 [2d Dept 1988]).

In this matter, the doctrine of estoppel against inconsistent positions is most applicably as the Defendant voluntarily agreed to surrender the subject property to Plaintiff's predecessor in interest in the Chapter 13 bankruptcy proceeding in 2014 as part of his confirmed Chapter 13 Plan. In Schedule A denominated as “Real Property” the Defendant described the subject property in foreclosure that was “to be surrendered.” Further, the Defendant identified the subject mortgage in Schedule D which contained the list of creditors holding secured claims. In the Defendant's second proposed Chapter 13 Plan dated May 7, 2014, the Defendant proposed to surrender the property “in full

satisfaction of the secured claim”, and on June 11, 2014, the Bankruptcy Judge issued an Order Confirming Plan.

By “surrendering” the property, the Defendant, by definition, agreed to relinquish all rights, including the right to possess the collateral, and agreed to “make the collateral available so the secured creditor can...exercise its state law rights in the collateral” (*HSBC Bank USA, N.A. v Zair*, 550 BR 188, 192-193 [EDNY 2016], *appeal dismissed* [2d Cir. 16-1648, Nov 15, 2016]).

The Plaintiff, through this foreclosure action, seeks now to enforce its rights to the subject property. By contesting the foreclosure action, however, the Defendant is acting in contravention to the position he took in his bankruptcy case where his intentions were to give up his rights in the property to the Plaintiff’s predecessor. Because the Defendant secured the bankruptcy Plan by adopting one position and now takes a contrary position by contesting this foreclosure action and moving for dismissal, the doctrine of estoppel against inconsistent positions bars the Defendant from raising any issue with regards to the secured lien and from contesting the foreclosure action (*See, Kimco of New York, Inc. v Devon*, 163 AD2d 573, 574-575 [2d Dept 1990]).

The remaining arguments by Defendant AVRUM MUSNIK have been considered and the Court finds them to be without merit.

The Defendant, ARLENE MUSNIK, also submits opposition to the Plaintiff’s motion arguing, in pertinent part, that Plaintiff is not entitled to a default judgment because of its purported failure to proffer admissible evidence setting forth the facts constituting the claim; failure to submit proof of service of the summons and

complaint; and failure to comply with the additional notice requirements of 3215(g). Insofar as the Court has previously determined the Plaintiff's entitlement to a default judgment by its Short Form Order dated April 18, 2024 (NYSCEF Doc. No. 43), the issue of proper service of process has already been judicially determined. As such, the doctrine of "law of the case" is applicable here and the Defendant is barred from challenging the Plaintiff's entitlement to a default judgment. Moreover, this Court recently denied ARLENE MUSNIK's motion to reargue this Court's denial of her motion to vacate the prior default (*see* Short Form Order dated 11/7/24, NYSCEF Doc. No. 78).

Upon review of the papers submitted, the Court finds that the Plaintiff has established its prima facie entitlement to summary judgment and the appointment of a referee. The Plaintiff has demonstrated its right to a judgment of foreclosure by producing a copy of the unpaid note, mortgage, and evidence of the mortgagor's default, thereby shifting the burden to the Defendant to establish, by submission of admissible evidence, any defense that could raise a question of fact. In considering the Defendant's affirmative defenses and arguments in opposition to the Plaintiff's application, the Court finds that the Defendant has failed to raise a material issue of fact with respect to any of its defenses.

Accordingly, it is hereby

ORDERED, that the motion by the Plaintiff seeking an Order: (i) pursuant to CPLR 3212, granting the Plaintiff summary judgment; (ii) pursuant to CPLR 3215, granting a default judgment; (iii) pursuant to CPLR 3211(b), striking the answer and affirmative defenses filed by the Defendant, AVRUMI. MUSNIK; (iv) pursuant to RPAPL

1321, appointing a referee to compute the total sums due and owing to the Plaintiff; and (v) amending the caption of this matter, is **GRANTED**, in its entirety; and it is further

ORDERED, that this action is hereby referred to Oscar A. Prieto, Esq., Fiduciary No. 994574, 69 Beech Street, Floral Park, New York 11001, oscar@oprietolaw.com, (516) 457-4614, as Referee to ascertain and compute the amount due except as to attorney's fees upon the note and mortgage upon which this action was brought and to examine and report whether or not the mortgaged premises should be sold in one parcel; and it is further

ORDERED, that the proposed Order Granting Motion for Summary Judgment and Appointment of a Referee to Compute (NYSCEF Doc. No. 56), shall be forwarded to the Foreclosure Clerk for review, and if found consistent with the terms of this Order, shall be executed upon completion of such review.

This constitutes the decision and order of this Court.

DATED: December 5, 2024
Mineola, New York



Hon. Randy Sue Marber, J.S.C.