

U.S. Bank N.A. v Speller
2024 NY Slip Op 34982(U)
May 16, 2024
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

-----X
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. 9

-----X **DECISION AND ORDER**

The following papers numbered 1 to 7 were read on Defendants’ motion for leave to amend their answer to assert the affirmative defense of judicial estoppel:

Notice of Motion – Affidavits (2) / Exhibits – Memorandum – Proposed Amended Answer	1-5
Affirmation in Opposition / Exhibits	6
Affidavit of Correction / Exhibits	7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

FACTUAL AND PROCEDURAL BACKGROUND

This is a residential mortgage foreclosure action.

Plaintiff’s predecessor-in-interest -- U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust -- commenced a foreclosure action under Index No. 02137/2015 on December 9, 2015. By Order dated November 29, 2018, U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT (i.e., the Plaintiff in the present action, hereinafter “U.S. Bank”) was substituted as plaintiff in the 2015 foreclosure action. U.S. Bank was thereafter, by Order dated July 16, 2019, awarded summary

judgment of foreclosure predicated *inter alia* on a finding that it had standing to foreclose by virtue of its possession of the Note with an allonge endorsed in blank by the original lender. However, by Order dated February 27, 2020, the action was dismissed on account of U.S. Bank's failure to appear at a conference.

U.S. Bank commenced the present foreclosure action under Index No. 500088/2022 on January 26, 2022. By Order dated October 26, 2022, U.S. Bank was awarded summary judgment of foreclosure predicated, once again, on a finding that it had standing to foreclose by virtue of its possession of the Note with an allonge endorsed in blank by the original lender. However, the Order granting summary judgment was subsequently vacated on the ground that defendant Michael Speller *pro se*, who is not authorized to practice law, had unlawfully appeared on behalf of his wife, defendant Ellen M. Fitzsimmons. Ms. Fitzsimmons was granted leave to answer on her own behalf.

U.S. Bank moved again for summary judgment of foreclosure. This time, however, it asserted standing to foreclose based on its possession of the Note together with (i) an allonge bearing an endorsement from the original lender to HSBC Mortgage Services, Inc., (ii) an allonge bearing an endorsement from HSBC Mortgage Services, Inc. to the LSF8 Master Participation Trust (on whose behalf U.S. Bank Trust, N.A. commenced the 2015 foreclosure action), and (iii) an allonge bearing an endorsement in blank by the LSF8 Participation Trust. This motion is now pending before the Court.

Defendants move for leave to amend their answer to assert the affirmative defense of judicial estoppel. Defendants assert:

- U.S. Bank having obtained a favorable judgment in the 2015 foreclosure action predicated on its assertion of standing based on possession of the Note with the single allonge endorsed in blank, it is now judicially estopped from asserting standing based on possession of the Note with the three allonges identified above; and

- U.S. Bank having obtained a favorable judgment in the present foreclosure action predicated on its assertion of standing based on possession of the Note with the single allonge endorsed in blank, it is now judicially estopped from asserting standing based on possession of the Note with the three allonges identified above.

LEGAL ANALYSIS

Although applications for leave to amend pleadings under CPLR 3025(b) are freely granted in the absence of prejudice or surprise, they should be denied where the proposed amendment is “palpably insufficient or patently devoid of merit.” *See, Edwards v. 1234 Pacific Management, LLC*, 139 AD3d 658, 659 (2d Dept. 2016); *Favia v. Harley-Davidson Motor Co., Inc.*, 11 AD3d 836 (2d Dept. 2014); *Lucido v. Mancuso*, 49 AD3d 220, 226-227, 229 (2d Dept. 2008).

Under the doctrine of judicial estoppel, “a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his interests have changed.” *Joseph v. Granderson*, 2024 WL 1545667 at *1 (2d Dept., April 10, 2024). *See, McGlynn v. Burns & Harris*, 223 AD3d 733, 735 (2d Dept. 2024); *Wells Fargo Bank, N.A. v. Temlyak*, 221 AD3d 750, 752 (2d Dept. 2023); *Capital One, N.A. v. Trubitsky*, 206 AD3d 608, 610 (2d Dept. 2022); *Bank of America, N.A. v. Ali*, 202 AD3d 726, 731 (2d Dept. 2022); *H&R Block Bank v. Page*, 199 AD3d 780 (2d Dept. 2021); *Bihn v. Connelly*, 162 AD3d 626, 627 (2d Dept. 2018); *State Farm Mut. Auto Ins. Co. v. Allston*, 300 AD2d 669, 670 (2d Dept. 2002); *Ford Motor Credit Company v. Colonial Funding Corp.*, 215 AD2d 435, 436 (2d Dept. 1995); *Tilles Investment Co. v. Town of Oyster Bay*, 207 AD2d 393, 394 (2d Dept. 1994).

The doctrine of judicial estoppel is not applicable in the circumstances presented here because (1) U.S. Bank has not assumed a contrary position because its interests changed; and

(2) neither in the 2015 action nor in the present case has U.S. Bank secured a favorable judgment based on a position contrary to that it now asserts.

Judicial estoppel requires a true inconsistency between positions taken in two legal proceedings. *See*, 57 N.Y. Jur.2d Estoppel §60; *McGlynn v. Burns & Harris, supra*; *HSBC Bank USA, National Ass'n v. Russo*, 205 AD3d 647 (1st Dept. 2022). Here, U.S. Bank has consistently asserted standing to foreclose predicated on its status as a holder in due course of the Note. To be sure the *evidentiary basis* for the Bank's position has changed, but its current reliance on the three allonges (as opposed to its prior reliance on a single allonge) does not amount to a "contrary position" adopted because "its interests changed." Regardless, it is eminently clear that U.S. Bank has not "secure[d] a favorable judgment" – either in the 2015 action, which was dismissed, or in the present case, where the order granting summary judgment has been vacated – based on its prior assertion of standing predicated on the single allonge. *See*, *Wells Fargo Bank, N.A. v. Temlyak, supra*; *Capital One, N.A. v. Trubitsky, supra*; *Bank of America, N.A. v. Ali, supra*; *State Farm Mut. Auto Ins. Co. v. Allston, supra*; *Tilles Investment Co. v. Town of Oyster Bay, supra*. Therefore, the doctrine of judicial estoppel does not apply.

Consequently, Defendants' application to amend their answer to assert the affirmative defense of judicial estoppel is patently devoid of merit. The application is accordingly denied.

It is therefore

ORDERED, that Defendants' motion for leave to amend their answer is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 16, 2024 ENTER
Carmel, New York


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