

Van Dyke v U.S. Bank, N.A.
2024 NY Slip Op 35003(U)
July 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 806287/2022E
Judge: Marissa Soto
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 22-----X
PATTI VAN DYKE,

Plaintiff.

-against-

U.S. BANK, NATIONAL ASSOCIATION,

Defendant.
-----X

Honorable Marissa Soto, J.S.C.

DECISION AND ORDER

INDEX NO.: 806287/2022E

Motion Seq. #1

The following e-filed NYSCEF papers read herein:

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Notice of Cross Motion, Affidavits/Affirmations, Exhibits Annexed:	20-28
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U.S. Bank, National Association (hereinafter, "Defendant") moves to dismiss the present action pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) arguing that it was not time barred from bringing an action to enforce its mortgage because (i) the prior foreclosure action was voluntarily discontinued because the Court found the initiating entity of the original foreclosure lacked standing and (ii) the September 13, 2010 letter sent to Plaintiff was not an acceleration under the law or in fact. Plaintiff opposes the motion to dismiss and cross-moves for summary judgment arguing that the retroactive application of FAPA renders the Defendant's present action time-barred. In opposition to Plaintiff's cross motion, Defendant argues that the retroactive application of FAPA is unconstitutional. Specifically, Defendant contends that the retroactive application of FAPA affects the parties' dispute and because of the statute's language and legislative intent, FAPA

[1]

should have prospective application only. Defendant further argues that retroactivity would infringe upon vested rights, particularly in relation to mortgage rights (including foreclosure rights), thereby violating both Contract Clause and the Due Process Clauses of the United States Constitution.

This Court denied Defendant's motion to dismiss by Order, dated January 23, 2023, NYSCEF Doc. No. 36. However, this Court did not decide Plaintiff's cross motion for summary judgment instead requiring the parties provide additional briefing on the application of the Foreclosure Abuse Prevention Act of 2022 ("FAPA"). Such briefing was completed and an interim decision was issued by Justice Doris Gonzalez holding that (i) FAPA applies to this action and the related pending foreclosure action, (ii) the earlier discontinued 2009 foreclosure action was not discontinued as a result of a judicial determination, and (iii) pursuant to CPLR 1012 (b) (1) that the New York State Attorney General ("AG") had to be alerted and given time to intervene because of the constitutional question raised by the Defendant in connection with Plaintiff's suggested application of FAPA. NYSCEF Doc. No. 59. The AG's office declined to intervene. NYSCEF Doc. No. 62.

The Court will now reach the merits of the constitutionality of FAPA to cases currently pending at the time of its passage. Upon review, the Court determines that retroactive application of the FAPA does not contravene either the Due Process Clause or Contract Clause. Consequently, the Court concludes that Defendant's claim is time-barred and Plaintiff's motion for summary judgment is hereby granted.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On October 30, 2009, The Bank of New York Mellon Trust Company, National Association as Grantor Trustee of the Protium Master Grantor Trust (hereinafter, the "Bank") commenced a foreclosure action against Plaintiff. The Bank then filed a motion for summary

judgment in its favor. Plaintiff opposed the Bank's motion and cross-moved for summary judgement. The Court will not now go into the basis underlying each motion as none were adopted by the Court. The Court denied both movants' summary judgment finding that questions of fact existed and making no final determination as to any argument advanced. The fact that no side's argument was adopted was reiterated in the affirmance of the denial by the First Department. NYSCEF Doc. No. 14. On March 17, 2022, the parties to the 2009 foreclosure action then entered a stipulation discontinuing the action, which stated in a decretal paragraph that the parties acknowledged that the Bank's summary judgment motion had been denied and that the Bank had failed to demonstrate that it had standing. NYSCEF Doc. No. 15. The stipulation was so ordered. *Id.*

On April 24, 2022, Plaintiff initiated the present action to quiet title to the property. Plaintiff alleges in its Complaint that the statute of limitations on the breach of contract claim/foreclosure action had passed and was therefore time barred. The Complaint alleges two acceleration points (i) the 2009 foreclosure action and (ii) a letter sent by loan servicer, Ocwen, on September 13, 2010. On September 28, 2022, Defendant commenced a foreclosure action to foreclose on the mortgage encumbering Plaintiff's property by filing a Summons and Complaint, Certificate of Merit, and Notice of Pendency, in the Bronx County Clerk's Office ("Pending Foreclosure Action"). NYSCEF 814380/2022E. This action remains pending.

Defendant filed the present motion to dismiss in lieu of an answer and the Plaintiff cross moved for summary judgment. The Court issued an interim decision on January 23, 2023, denying the motion to dismiss and asking the parties to submit supplemental briefing addressing whether FAPA applied to this case and if so, how. On November 3, 2023, the Court issued a second interim decision finding that (i) FAPA applied retroactively, (ii) the March 17, 2022 so-ordered stipulation

was not a judicial determination that the former plaintiff in the 2009 foreclosure action lacked standing, (iii) Defendant in the present action was estopped from arguing that it lacked standing, (iv) the Pending Foreclosure Action was time barred, and (v) the only question remaining was FAPA's constitutionality in this context where the discontinuance was after the Court of Appeals decision in *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1 (2021).

On December 19, 2023, shortly after the last decision in this case was issued, the First Department squarely addressed the question of FAPA's retroactive application. *Genovese v. Nationstar Mtge. LLC*, 223 A.D.3d 37 (1st Dept 2023). In *Genovese*, the First Department found that based on the language of FAPA, it would "necessarily have retroactive effect in light of section 10's direction that the Act 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'". *Id.* at 44-45 (internal citations omitted). The First Department also considered that (i) FAPA was remedial in nature in that it was designed to correct an unintended judicial interpretation set forth in *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1 (2021) and to reaffirm its judgment as to the application of the statute of limitations in mortgage foreclosure actions, and (ii) the Legislature evinced a sense of urgency in it taking effect immediately. *Id.* The First Department, however, did not reach the constitutionality question because the Attorney General's office had not been notified and allowed to intervene. *Id.*

FAPA'S RETROACTIVE APPLICATION IS CONSTITUTIONAL

Strong Presumption That FAPA's Retroactive Application Is Constitutional

When addressing a constitutional challenge, "acts of the New York Legislature are accorded a strong presumption of constitutionality". *Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016], quoting *Cohen v Cuomo*, 19 NY3d 196, 201 [2012]); see also *Am. Econ. Ins. Co. v. State*, 30 N.Y.3d 136, 149 (2017). "This presumption can only be overcome when it

can be shown *beyond a reasonable doubt* that the law conflicts with a fundamental law, and ‘until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible’” *Id.* (citing *Matter of Fay*, 291 N.Y. 198, 207 [1943]) (emphasis added). Thus, until every reasonable avenue for reconciling the statute with the Constitution has been exhausted, the Court is obligated to maintain a strong presumption of constitutionality for the law. *Id.*

Sister Courts have Found FAPA’s Retro Application to be Constitutional

Third, several sister courts have addressed this issue of the constitutionality of FAPA’s retroactive application in recent decisions, *see, e.g., 195-197 Hewes LLC v. Citimortgage Inc.*, 2023 N.Y. Misc. LEXIS 14352 [N.Y. Sup. Ct. 2023]; *Ditech Fin. LLC v. Naidu*, 82 Misc. 3d 452 [N.Y. Sup. Ct. 2023]; *U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr. v. Miele*, 80 Misc. 3d 839 [N.Y. Sup. Ct. 2023]; *Wells Fargo Bank Na v. Haq*, 2023 NYLJ LEXIS 1431, *1 [N.Y. Sup. Ct. 2023]; *HSBC Bank USA as Tr. of Ace Sec. Corp. Home Equity Loan Tr. v. IPA Asset Mgmt., LLC*, 79 Misc. 3d 821, 190 N.Y.S.3d 622 [N.Y. Sup. Ct. 2023]; *Deutsche Bank Natl. Trust Co. v. Dagrín*, 79 Misc. 3d 393 [N.Y. Sup. Ct. 2023]; *US Bank Nat’l Ass’n as Tr. to Wachovia Bank, Nat’l Ass’n v. Williams*, 80 Misc. 3d 258, 263 [N.Y. Sup. Ct. 2023]; *Bayview Loan Servicing, LLC v. Dalal*, 80 Misc. 3d 1100, 196 N.Y.S.3d 640 [N.Y. Sup. Ct. 2023]), which all hold that the retroactive application of FAPA does not violate the mortgage lender’s constitutional rights. While none of these cases are binding, they are persuasive.¹

¹ *Cf., Deutsche Bank Natl. Trust Co. v. Warren*, 2023 NY Misc. LEXIS 7773, 2023 WL 6797673; *U.S. Bank v. Johns*, 2023 NYLJ LEXIS 2080; *HSBC Bank USA, N.A. v. Besharat* (an unreported decision) (hold that the retroactive application of FAPA does violate the mortgage lender’s constitutional rights).

Retroactive Applications of Law Have Been Upheld as Constitutional

It is well established that "consonant with the common law's policy-laden assumptions, a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process" *Gurnee v. Aetna Life & Cas. Co.*, 55 N.Y.2d 184, 191 [1982] (finding Court of Appeals interpretation of an existing statute applicable to all pending actions involving the relevant statute; *Gager v. White*, 53 N.Y.2d 475, 483-484 [1981], *cert. denied* 454 U.S. 1086, 102 S. Ct. 644, 70 L. Ed. 2d 621 [1981]). As a matter of fact, the decisional case relied on by Defendant as the foundation of their argument had the same effect of substantively altering the rights of the foreclosure action parties for all cases pending at the time it was decided. *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1 (2021). The retroactive application of new laws to pending actions is not merely a common practice but a fundamental aspect of a just and adaptive legal system. This approach ensures that laws remain relevant and reflective of contemporary societal values and needs.

For example, in *People ex rel. Rivera v. Superintendent, Woodbourne Corr. Facility*, 40 N.Y.3d 307, 221 N.E.3d 1 (2023), the retroactive application of the Sexual Assault Reform Act's (SARA) school grounds condition did not facially violate the Ex Post Facto Clause. In *Jaquan L. v. Pearl L.*, 179 A.D.3d 457 (1st Dept. 2020), while the First Department did not expressly address constitutionality, it did address one of the constitutional arguments raised by Defendant herein, that the amendment to the Subsidized Kinship Guardian Program statute could not be applied retroactively because it would impair vested contractual rights. In *Jaquan L.*, the Court held that even if the amended statute impaired vested contractual rights or increased financial liabilities, impairment of a contract will be upheld if the impairment 'is reasonable and necessary to accomplish a legitimate public purpose'. *Id.* at 460 citing *Association of Surrogates & Supreme*

Ct. Reporters Within City of N.Y. v State of New York, 79 NY2d 39, 46, 588 NE2d 51, 580 NYS2d 153 [1992]). Further, in *Caprio v. New York State Dep't of Tax'n & Fin.*, 25 N.Y.3d 744 (2015), the retroactive application of an amended tax statute to a deemed asset sale of an S corporation was found not to violate due process. Additionally, in *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 749 N.E.2d 724 (2001), a statute concentrating arbitration applications in one proceeding was applied retroactively. In *Matter of OnBank & Tr. Co.*, 90 N.Y.2d 725, 688 N.E.2d 245 (1997), a statute allowing trustees of common trust funds to pass on mutual management fees to trust funds was also applied retroactively.

Thus, the retroactive application of new or amended laws to pending cases is a well-entrenched practice, consistently upheld by the courts.

FAPA's Retroactive Application Does Not Run Afoul of the Contract Clause

Defendant argues that retroactive application of FAPA (i) impairs the contractual relationship between Defendant and Plaintiff by nullifying the long-standing contractual right to unilaterally accelerate and revoke acceleration of the debt; (ii) fails to serve a significant or legitimate purpose; and (iii) does not reasonably advance a legitimate public interest. To bolster this argument, the Defendant invokes the Contracts Clause of the United States Constitution, which "prohibits states from passing laws that impair the obligation of contracts." US Const, art I, § 10 [1]. See Def. Memo. of Law., NYSCEF Doc. No. 41.

To determine whether a law violates the Contracts Clause, a court follows a two-step analysis. First, it assesses if the state law substantially impairs a contractual relationship, as outlined in *Sveen v. Melin*, 584 U.S. 811 [2018]) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 [1978]). Second, it examines whether the law is reasonably designed to serve a legitimate public purpose, per *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459

U.S. 400, 411-412 [1983]). However, before determining substantial impairment, the court must establish if there is any impairment of a contractual relationship, per *American Economy Ins. Co.* 30 NY3d 136 at 150 (2017). This involves three components: identifying a contractual relationship, evaluating if a change in law impairs it, and determining if the impairment is substantial. *Id.*; see also *General Motors Corp. v. Romein* 503 U.S. 181, 186 [1992]).

In the present case, the Defendant's argument fundamentally fails to establish that FAPA adversely impacts any contractual relationship. Crucially, the Defendant points to no language in the mortgage contract that grants the mortgagee the right to unilaterally de-accelerate the debt or reset the statute of limitations. Further, there can be no claim that a mortgage lender's contractual right to circumvent the statute of limitations has been eliminated by FAPA because the RPAPL always contemplated the ability of borrowers to discharge mortgage debt that was not enforced within the applicable statute of limitations. RPAPL §1501 (4); *Deutsche Bank Natl. Trust Co. v. Deluca*, 225 A.D.3d 91, 97 (2d Dept 2024). Simply put, Defendant's argument that its vested rights under the contract have been altered is not supported by the evidence adduced because no contractual agreement regarding de-acceleration or the statute of limitations has been shown. In this case, the mortgage contract makes no express mention of a mortgagee's right to de-accelerate the mortgage or to reset the statute of limitations. Accordingly, FAPA does not impair any express contractual right of the Defendant.

Accordingly, the retroactive application of FAPA does not violate the Contract Clause of the United States Constitution.

FAPA's Retro Application Does Not Run Afoul of the Due Process Clause

No Violation of Substantive Due Process

The Defendant argues that retroactively applying FAPA violates the Due Process Clause of the United States. They claim it impairs their vested right to continue the action, which was started on time but would now be considered too late. Legal precedent says that for due process to be upheld, retroactive application of a new provision must have a legitimate legislative purpose supported by rational means. *American Economy Ins. Co.*, 30 N.Y.3d at 157-158 citing *General Motors Corp.*, 503 U.S. 181, 191 [1992]. The party challenging the retroactivity must show there is no rational basis justifying it. *Usery v. Turner Elkhorn Mining Co.*, 428 US 1, 15 (1976)]. Retroactive legislation faces a higher burden than prospective legislation and must justify its application with a rational legislative purpose. *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 730 [1984]; *Regina Metro. Co., LLC*, 35 N.Y.3d at 375.

The Court of Appeals acknowledges that retroactive legislation raises more serious fairness issues than prospective legislation. Thus, to meet due process standards, there must be a persuasive reason for the potentially harsh impacts of retroactivity. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 375 (2020) (internal citations omitted). The relationship between the length of the retroactivity period and its purpose is crucial, with courts generally upholding statutory retroactivity that aligns with the fundamental aim of the legislation. *Id.*

Here, the FAPA serves to enhance legal clarity, rectify judicial misapplications, and deter abusive litigation tactics employed by mortgage lenders and loan servicers (Senate Introducer's Mem in Support of 2021 NY Senate Bill S5473D [same-as bill to 2021 NY Assembly Bill A7737B, enacted as L 2022, ch 821]). It endeavors to uphold the equitable application of state

laws to all parties involved in foreclosure proceedings, promoting fairness and justice. *Id.* Considering that the retroactive enforcement of FAPA aligns with a legitimate legislative purpose—to counteract the exploitation of statutes of limitation by mortgage lenders and loan servicers, as articulated in the Senate Introducer's Mem in Support of 2021 NY Senate Bill S5473D [same-as bill to 2021 NY Assembly Bill A7737B, enacted as L 2022, ch 821]—and that retroactive implementation is indispensable to realize the legislation's remedial goals, FAPA's retroactive application stands as constitutionally sound. Further, the retroactivity period contemplated by FAPA is limited to those cases that are currently pending. *Cf Matter of Regina Metro*, 35 N.Y.3d at 379 (the retroactivity period was characterized as vast).

No Violation of Procedural Due Process

As to procedural due process, the Defendant argues that there should be a “grace period” where a statute's enactment shortens the existing statute of limitations. See Def. Supp. Memo., Pg. 20, NYSCEF Doc. 41. In the authority cited by the Defendant, *Brothers v Florence*, 95 NY2d 290 [2000], the statute involved an amendment to the statute of limitations provision. FAPA does not change the six year statute of limitations nor the time the cause of action accrues. It limits the methods by which a defendant in a foreclosure action can reset the accrual date. Therefore, the Defendant has not established a basis for finding a procedural due process violation nor a basis for a “grace period.” *Cf. Matter of County of Chemung v Shah*, 28 NY3d 244 [2016]. Consequently, Plaintiff's cross-motion for summary judgment must be granted.

CONCLUSION

Accordingly, it is hereby:

ORDERED that Plaintiff's motion for summary judgment discharging a mortgage on 448 East 142nd Street, Bronx, New York 10454 pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") §1501(4) is hereby **granted**; and it is further

ORDERED that the Defendant's motion to dismiss is denied; and it is further

ORDERED that a copy of this Decision and Order with Notice of Entry be served by the prevailing party upon all parties to the present action within thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: 7/11 /2024.

Hon. 
MARISSA SOTO, J.S.C.