

Bayview Loan Servicing, LLC v Gbenebitse

2025 NY Slip Op 31834(U)

May 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 502909/15

Judge: Cenceria Edwards

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At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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BAYVIEW LOAN SERVICING, LLC,

Plaintiff,

- against -

Index No. 502909/15

EDWIN GBENEBITSE; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; BELLCO DRUG CORP.; ELLA LOBON; CLINT CHASTEAU; CLIFTON GREFF; KLEINE ROBERTS; NADYA WATTS; KODI DOE; KATRINA PRUMMOND; KAREEN JOHNSON,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) _____

178-182, 184 186-197

Opposing Affidavits (Affirmations) _____

186-197 199-202, 204

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 335 New Lots Avenue in Brooklyn (Block 3838, Lot 64) (Property), plaintiff Bayview Loan Servicing, LLC (Bayview or Plaintiff) moves (in motion sequence [mot. seq.] eight) for an order: (1) granting it an extension to conduct a foreclosure sale, pursuant to RPAPL § 1351, and (2) amending the caption to substitute Wilmington Savings Fund Society FSB, as Owner Trustee of the Residential Credit Opportunities Trust VII-A Trustee (Wilmington) for Bayview (NYSCEF Doc No. 184).

Defendant Edwin Gbenebitse (Gbenebitse or Defendant) cross-moves (in mot. seq. nine) for an order: (1) granting him leave to renew from the court’s October 23, 2019

[*1]

decision and order, pursuant to CPLR 2221 (e), and, upon renewal, granting his cross-motion to vacate his default; or (2) denying Plaintiff's motion and vacating the December 6, 2018 Judgment of Foreclosure and Sale and the August 14, 2017 Order of Reference (NYSCEF Doc No. 186).

Background

On March 13, 2015, Bayview commenced this action to foreclose a mortgage encumbering the Property by filing a summons, an unverified complaint and a notice of pendency (NYSCEF Doc Nos. 1-8). The complaint alleges that on or about December 17, 2008, Edwin Gbenebitse borrowed \$562,772.00 by executing a consolidated note in favor of Countrywide Bank, FSB, which was secured by a consolidation, extension and modification agreement (CEMA) encumbering the Property (NYSCEF Doc No. 1 at ¶¶ 1-3). The complaint alleges that Gbenebitse defaulted under the consolidated note and CEMA by "fail[ing] to make monthly payments on May 1, 2011 to date" (*id.* at ¶ 9).

On April 24, 2015, Defendant Gbenebitse answered the complaint, admitted executing the consolidated note and CEMA and asserted affirmative defenses, including that Gbenebitse is prepared to surrender the Property to Plaintiff (NYSCEF Doc No. 33).

On April 28, 2015, the City of New York e-filed a notice of appearance (NYSCEF Doc No. 34). The remaining defendants failed to answer or otherwise appear in this action.

On April 11, 2017, Bayview moved for summary judgment, an order striking Defendant Gbenebitse's answer and an order of reference (NYSCEF Doc No. 36). The court issued an August 14, 2017 Order of Reference on default, which granted Bayview

summary judgment, struck and dismissed Gbenebitse's answer to the complaint and appointed a referee to compute the amount due to Plaintiff (NYSCEF Doc No. 60).

On July 26, 2018, Bayview moved for an order confirming the referee's report and for a judgment of foreclosure and sale (NYSCEF Doc No. 64). On December 6, 2018, the court (Dear, J.) granted Bayview's motion without opposition, confirmed the referee's report and issued a Judgment of Foreclosure and Sale (NYSCEF Doc No. 92).

On February 8, 2019, Bayview moved for an order vacating the December 6, 2018 Judgment of Foreclosure and Sale, confirming a referee's report and issuing a new judgment of foreclosure and sale (NYSCEF Doc No. 107). On May 9, 2019, Defendant Gbenebitse cross-moved (in mot. seq. seven) for an order vacating his default in opposing Plaintiff's prior motion for summary judgment and for a judgment of foreclosure and sale and/or vacating the December 6, 2018 Judgment of Foreclosure and Sale and the August 14, 2017 Order of Reference (NYSCEF Doc No. 146).

By an October 23, 2019 decision and order, the court denied Defendant Gbenebitse's motion (in mot. seq. seven) to vacate his defaults based on his defense counsel's law office failure holding that "mere neglect will not be accepted as a reasonable excuse" (NYSCEF Doc No. 169 at 1-2). The court further noted that "the contradictory prior affidavits of Stewart and Demaio do not support Defendant's theory of what occurred – Stewart believed himself to be (and was) attorney of record throughout and has not asserted that the failure to oppose the prior motions was in error" (*id.* at 2). The court further held that there was insufficient basis to vacate the Judgment of Foreclosure and Sale that was previously issued, and thus, the court denied Bayview's motion as well (*id.*).

Plaintiff's Motion for Extension of Time to Conduct Sale

On October 5, 2021, Bayview moved for an order granting it an extension of time to conduct a foreclosure sale, pursuant to RPAPL § 1351, and amending the caption to substitute Wilmington as plaintiff (NYSCEF Doc No. 184). Wilmington's counsel submits an affirmation asserting that Plaintiff seeks an extension of time to schedule a foreclosure sale, pursuant to RPAPL § 1351 (1), because it will "occur in excess of one year from the date of entry of the Judgment of Foreclosure and Sale" (NYSCEF Doc No. 179 at ¶¶ 2 and 5). Plaintiff's counsel further asserts that substitution is warranted because the mortgage action was assigned to Wilmington "by an assignment of mortgage executed on August 30, 2021 and recorded on September 8, 2021 in CRFN: 2021000353713 in the Office of the City Register of the City of New York of Kings County" (*id.* at ¶ 7).

Defendant Gbenebitse's Renewal Motion

On May 24, 2022, Defendant Gbenebitse opposed Plaintiff's motion and cross-moved for leave to renew his cross-motion (in mot. seq. seven) to vacate his default in failing to oppose Bayview's motions for an order of reference and a Judgment of Foreclosure and Sale (NYSCEF Doc No. 186). Gbenebitse submits an attorney affirmation arguing that "[t]he Motion is based upon the landmark Opinion in *Bank of Am., N.A. v Kessler*, 202 AD3d 10 (2d Dept 2021), a case of first impression, which clarified that any additional language included in a RPAPL § 1304 notice renders it defective . . ." (NYSCEF Doc No. 187 at ¶ 2). Defense counsel asserts that "[t]he fact that *Kessler* represents new law supporting a motion to renew is evident from the language of the decision itself, more

specifically, the portion allotted to the analysis of the flexible standard applied *ante factum* by some of the lower courts, and now completely repudiated by *Kessler*” (*id.* at ¶ 19).

Discussion

(1)

Gbenebitse’ Renewal Cross-Motion

CPLR 2221 (e) (2) provides that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been *a change in the law* that would change the prior determination” (emphasis added). “Therefore, ‘[a] motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law’” (*JPMorgan Chase Bank, Nat’l Ass’n v Eze*, 232 AD3d 865, 866 [2d Dept 2024], quoting *Sharan v Christiana Trust*, 219 AD3d 1549, 1551 [2d Dept 2023]).

Gbenebitse’s renewal motion is denied because the Second Department holding in *Kessler* was reversed by the Court of Appeals’ subsequent decision in *Kessler* issued on February 14, 2023, after Gbenebitse’s renewal cross-motion was *sub judice* (*see JPMorgan Chase Bank, Nat’l Ass’n v Eze*, 232 AD3d at 866 [holding that defendant was not entitled to leave to renew based on the Second Department’s holding in *Kessler* and its progeny because he failed to establish that there was a change in the law regarding strict compliance with RPAPL § 1304 that would have altered the trial court’s prior determination because the Court of Appeals issued the *Kessler* decision reversing the Second Department’s holdings]).

In *Bank of Am. v Kessler*, the Court of Appeals specifically rejected the bright-line rule imposed by the Second Department, and held that statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute “other notices” that must be sent in a separate envelope and “application of a bright-line rule would contravene the legislative purpose” of RPAPL § 1304 (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 326 [2023]). Consequently, in light of the Court of Appeals’ holding in *Kessler*, Gbenebitse’s renewal cross-motion has no merit and is denied.

(2)

Plaintiff’s Motion

“RPAPL 1351 (1) was amended, effective December 20, 2016, to provide that a judgment of foreclosure and sale shall direct that the subject property be sold ‘within ninety days of the date of the judgment’” (*U.S. Bank, N.A. v Peralta*, 191 AD3d 924, 925 [2d Dept 2021]). Here, however, the December 6, 2018 Judgment of Foreclosure and Sale proactively ordered that the 90-day statutory period is extended:

“if the Referee does not conduct the sale within 90 days of the date of the judgment, in accordance with CPLR 2004, *the time fixed by RPAPL § 1351 (1) is extended for the Referee to conduct the sale as soon as reasonably practicable . . .*” (NYSCEF Doc No. 92 at 9 [emphasis added]).

While this court may grant Plaintiff an extension of time to schedule a foreclosure sale in its discretion (*see, e.g., Bank of Am., N.A. v Cord*, 214 AD3d 934, 935 [2d Dept 2023] [holding that “the Supreme Court providently exercised its discretion in granting the plaintiff’s cross-motion pursuant to CPLR 2004 for an extension of time to hold the

foreclosure sale”)), the December 6, 2018 Judgment of Foreclosure and Sale already provided for an extension for Plaintiff to conduct the sale as soon as reasonably practicable. Consequently, that branch of Plaintiff’s motion seeking an extension is denied as moot.

That branch of Plaintiff’s motion to amend the caption to substitute Wilmington for Bayview as Plaintiff is granted without opposition. Accordingly, it is hereby

ORDERED that Plaintiff’s motion (mot. seq. eight) is only granted to the extent that the caption is amended to substitute Wilmington in place of Bayview as Plaintiff; the motion is otherwise denied as moot; and it is further

ORDERED that the caption is amended and hereinafter shall read:

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WILMINGTON SAVINGS FUND SOCIETY FSB, AS OWNER
TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES
TRUST VII-A TRUSTEE,

Plaintiff,

- against -

EDWIN GBENEBITSE; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; BELLCO DRUG CORP.; ELLA LOBON;
CLINT CHASTEAU; CLIFTON GREFF; KLEINE ROBERTS;
NADYA WATTS; KODI DOE; KATRINA PRUMMOND;
KAREEN JOHNSON,

Defendants.

-----X; and it is further

ORDERED that Gbenebitse’s cross-motion (mot. seq. nine) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C. Cenceria P. Edwards, CPA