

Avelo Mtge., LLC v Stewart

2025 NY Slip Op 34467(U)

November 17, 2025

Supreme Court, Kings County

Docket Number: Index No. 8633/2007

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of November, 2025.

PRESENT:

HON. CENCERIA P. EDWARDS, CPA,

Justice.

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AVELO MORTGAGE, LLC,

Plaintiff(s),

-against-

JENNIFER STEWART, KEY BANK, NATIONAL ASSOCIATION SUCESSOR BY MERGER TO KEY BANK USA, N.A. SUCESSOR BY MERGER TO CHAMPION MORTGAGE CO., INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FIRST NATIONAL BANK OF ARIZONA, NEW YORK CITY DEPARTMENT OF HOUSING AND PRESERVATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK PARKING VIOLATION BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, OSHIKANLU AND ASSOCIATES, PLLC, DAPHIE THOMAS, JANAI DOUAL, LITA BASNIGHT, ROLSTON PAUL, SHONETTE THOMAS, VALERIE HUNTER ET AL.,
Defendant(s).

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Cross-Motion/Petition/		
Order to Show Cause, Affidavits/Affirmations, and Exhibits _____		<u>34-42</u>
Opposing Affidavits/Affirmations and Exhibits _____		<u>43-44</u>
Reply Affidavits/Affirmations and Exhibits _____		<u>45-46</u>

Plaintiff Avelo Mortgage LLC (“Plaintiff”) commenced this action by Summons and Complaint against Defendant-Mortgagor Jennifer Stewart (“Stewart Defendant Mortgagor”) on March 13, 2007, to foreclose on the mortgaged property located at 175 Weirfield Street, Brooklyn, New York (Subject Property). On January 18, 2006, the prior deed owner, Defendant Daphne

Thomas (“Defendant-Thomas”) transferred¹ her home to the current mortgagor, Defendant-Stewart.

In this instant motion Plaintiff’s new law firm, Borchert & LaSpina, P.C. (“B&L”), moves this Court, inter alia, pursuant to CPLR 2221(d) for leave to reargue the Court’s denial of Plaintiff’s Summary Judgment motion, which was filed and argued by Plaintiff’s current attorney of record, Houser LLP. After Plaintiff’s attorney, Houser LLP, oral argument and the litigants’ submissions this Court denied Plaintiff’s motion for Summary Judgment and Order of Reference noting there were triable issues of fact, Order entered April 3, 2024, (*see NYSCEF Doc. #32*).

Procedural History

This is a complex foreclosure proceeding that has been pending in this court before varying judges since 2007, involving the Subject Property and multiple “straw buyers.” Defendant-mortgagor Stewart defaulted on her \$456,000 mortgage obligation (*NYSCEF Doc. #12*), on November 1, 2006, less than a year after obtaining it and to date has not appeared or answered.

Relevantly, Defendant-Thomas the original owner of this Subject Property is alleging Plaintiff bank committed fraud in the action herein; however, there is a related case under index **515187/2020** pending in this Courthouse where Defendant-Stewart is the Plaintiff and is seeking to quiet title and return of the no consideration deed from prior owner, Defendant-Thomas who is questionably the current owner of the Subject Property again via a “quit claim deed” while Defendant- Stewart is responsible for the mortgage herein, *see (NYSCEF Doc. #9, DEED 2)*. In action **515187/2020** it is alleged that Plaintiff-Stewart Mortgagor was a straw buyer who rescued original homeowner-Defendant Thomas, who was not making her mortgage payments. After Defendant-Stewart’s purchase of the Subject Property for \$456,000, the deed was allegedly transferred from Defendant-Stewart to a third person, Colette Paul on May 23, 2008, for no consideration (*NYSCEF Doc. #9, DEED 1*). Without explanation in the record, Colette Paul oddly transferred the deed back to the original homeowner Defendant Thomas herein for no

¹ The deed is presumed to have been “transferred” and not sold since in a separate action under index no. **515187/2020**, pending before another judge, it is alleged that the current mortgagor Defendant Stewart and the original owner, Defendant- Thomas engaged in a strawbuyer scheme. It is further alleged that Defendant-Thomas’ brother served as her real-estate broker and orchestrated the “rescue” scheme for the benefit of Defendant-Thomas who was not making her mortgage payments.

consideration, on July 8, 2015. Despite the subsequent two deed transfers albeit for no-consideration, from Defendant-Stewart and then to Colette Paul and then back to Defendant Thomas, Plaintiff has not received any mortgage for nearly twenty years.

CPLR 2221(d)- Instant Motion to Reargue

Before addressing Plaintiff's new law firm, Borchert & LaSpina, P.C. (B&L) substantive reasons to reargue denial of Plaintiff's attorney Houser LLP Summary Judgment motion, this Court must address whether Plaintiff has complied with CPLR 321 statutory mandates. Notwithstanding Defendant-Thomas' opposing procedural argument that "this Court should not entertain [the instant] motion" (*see NYSCEF Doc. #43 at ¶¶1-2*) or bluntly this Court lacks authority to determine Plaintiff's new attorney, B&L, substantive requests in its motion to reargue, CPLR 2221(d) since Plaintiff failed to comply with CPLR 321.

Plaintiff's new attorney B&L in this instant motion, upon re-argument of Plaintiff's prior attorney denied Summary Judgment motion, requests dismissal with prejudice of Defendant Daphne Thomas' third, fourth, and fifth counterclaims which allege, inter alia, that Plaintiff's mortgage is illegal and fraudulent. B&L asserts in its Reply papers, for the first time, that its appearance it limited under CPLR 321(d) as to this CPLR 2221(d) motion and as such this Court should determine its reliefs/requests sought.

CPLR 321

"[A]n attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by statute, by either by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party, with notice of the change given to the attorneys for all parties in the action, or by order of court upon notice to all parties. Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his [or her] authority as attorney of record for his [or her] client continues, as to adverse parties, unabated." *See, (GMAC Mtge., LLC v Galvin, 184 AD3d 750, 751 [2d Dept 2020])* [internal citations and quotations omitted]). "This rule protects adverse parties from the uncertainty of when or whether the authority of an opposing attorney has been terminated, even when the adverse party is informally aware that a discharge or substitution of an opposing counsel is pending or imminent." (*see Farage v Ehrenberg, 124 AD3d 159, 160 [2d Dept 2014]*). Also, this rule assists

the current attorney of record to finalize any outstanding legal and financial obligations with their client.

“New York courts have strictly interpreted N.Y. C.P.L.R. 321(b)(1) to require both filing with the court and notice to all parties of a change of attorney in order to ensure proper representation and transparency in the litigation process.. This principle has generally been applied to afford protection to adverse parties, by eliminating disputes and uncertainty as to whether and when the authority of an attorney representing an opponent terminated. *See, In re Brooklyn Hosp. Ctr. & Caledonian Health Ctr., Inc.*, 513 B.R. 810 [U. S. Bankruptcy Court E.D.N.Y].

DISCUSSION

Plaintiff’s attorney herein Borchert & LaSpina, P.C. (B&L) has not disputed that it failed to file a consent to change attorney. Also, the Court notes that the record does not reflect any consent or substitution of Plaintiff’s counsel of record, Houser LLP to B&L. Nor does B&L’s motion papers contain an affidavit/affirmation from Houser, LLP, or an affidavit/affirmation from Plaintiff acknowledging B&L’s authority to appear and act on its behalf in this action. The Court further notes that B&L did not address its lack of authority to appear in the action on Plaintiff’s behalf in its initial moving papers. However, on Reply, Movant B&L contends that it “filed a limited notice of appearance...on behalf of the Plaintiff solely for the purpose of defending against Defendant Thomas’ boilerplate allegations of fraud.” (*see NYSCEF Doc. #45 at ¶¶3-8*).

Compliance with statutory procedural rules is the swiftest “gateway” to the Courthouse. Procedural law is a set of rules and regulations that a Court ordinarily addresses before substantive law issues are determined. Procedural law determines whether a motion is properly before the court and if the court has authority to entertain, hear the arguments and determine the outcome of the movant’s request/relief sought. A court’s jurisdiction is contingent upon proper adherence to procedural requirements, which are established to ensure fairness and order in the legal process. Without following procedural rules, even a court with subject-matter or personal jurisdiction might be acting beyond its legitimate power. Unless there are extenuating circumstances or in the interest of justice, courts who adhere to procedural rules and fairness will maintain integrity in court processes, which helps to sustain transparency and public trust in the judiciary.

This Court does not take lightly its responsibility to adjudicate fairly and adhere to the statutory rules prescribed in CPLR 321. The statute is unambiguously clear that an attorney of record can only be changed/substituted upon strict compliance with CPLR 321 and if the statutory requirements are not complied with the attorney of record remains (*see GMAC Mtge., LLC v Galvin*, 184 AD3d 750 [2d Dept 2020]).

Here, Movant B&L Plaintiff's "new" counsel had sufficient time to file a consent to change or substitute attorney and did not do so. Moreover, B&L failed to submit an affidavit/affirmation from Plaintiff's counsel of record, Houser, LLP, or an affidavit/affirmation from Plaintiff acknowledging B&L's authority to appear and act on its behalf in this action, which would have assisted to some extent to cure their statutory defect.

B&L's Reply argument that its appearance is limited solely to the extent to reargue Plaintiff's prior Summary Judgment denial and that Defendant's counsel failed to allege any prejudice or malfeasance as a result of any dual representation is unavailing and not supported by any case or statutory law. Thus, Movant B&L's reliance on CPLR 321(d) to Defendant's opposition in its Reply and not in its initial moving papers where appropriate is futile. (*see Eujoy Realty Corp. v. Van Wagner Communications, LLC*, 22 NY3d 413, 423 (2013)).

CPLR 321 (d) was enacted in December 2022 and provides,

(d) Limited scope appearance. 1. An attorney may appear on behalf of a party in a civil action or proceeding for limited purposes. Whenever an attorney appears for limited purposes, a notice of limited scope appearance shall be filed in addition to any self-represented appearance that the party may have already filed with the court. The notice of limited scope appearance shall be signed by the attorney entering the limited scope appearance and shall define the purposes for which the attorney is appearing. Upon such filing, and unless otherwise directed by the court, the attorney shall be entitled to appear for the defined purposes.

The legislative intent of CPLR 321(d) was to support New York State's then Chief Justice Administrative Order A0/285/16 in its efforts to allow legal aid attorneys to provide needed legal services, via a limited appearance, in civil matters on behalf of pro-se, self-represented litigants. "The purpose of A0 285/16 was to expand the use of limited legal assistance by properly trained attorneys as away to broaden access to civil legal assistance to unrepresented litigants." (see, Patrick M. Connorsis, *New CPLR 321 (d) Allows for a Limited Scope Appearance by an Attorney*,

New York L. J. (2023). As such, CPLR 321(d) was envisioned to codify limited scope legal aid assistance appearances.

Plaintiff's new attorney B&L reliance on CPLR 321(d) is misplaced. Plaintiff herein is a corporation, not a pro se litigant who cannot afford to retain full-service counsel. The statute is intended to assist such parties in leveling the playing field in litigation. Further, CPLR 321(d) legislative history does not encourage judges to permit 'limited appearances' for attorneys to circumvent the rules of CPLR 321(b).

Since B&L seeks leave to re-argue a motion made by Plaintiff's current attorney of record and has failed to provide any excuse as to why it did not obtain consent from Plaintiff's attorney of record, Houser LLP, and failed to submit an affidavit/or affirmation from Plaintiff authorizing its appearance, at minimum, this Court has no support or rational to use its discretion to allow B&L to appear for this "limited appearance" motion to renew and reargue, CPLR 321(d), 2221(d), (*see Cippitelli v. County of Schenectady*, 284 AD2d 823 [3rd Dept 2001]).

Thus, Plaintiff's "new" attorney B&L motion to reargue, CPLR 221(d), herein is not properly before this Court. Moreover, Plaintiff's current counsel of record continues, as to adverse party- Defendant Thomas, unabated. (*see GMAC Mtge., LLC v Galvin*, 184 AD3d 750 [2d Dept 2020]).

For the above-mentioned reasons, Borchert & LaSpina, P.C. ("B&L") request to reargue Plaintiff's attorney-of-record, Houser LLP's, Summary Judgment motion pursuant to CPLR 2221(d) is **DENIED**.

The foregoing constitutes the Decision and Order of this Court.

ENTER:



Hon. Cenceria P. Edwards, JSC, C.P.A.