

State Bank of Long Is. v Ranalli

2012 NY Slip Op 32265(U)

July 30, 2012

Supreme Court, Nassau County

Docket Number: 600867/11

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

STATE BANK OF LONG ISLAND,

Plaintiff,

- against -

ERNEST RANALLI,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 600867/11

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves pursuant to CPLR 2221(d) for leave to reargue a December 10, 2011 order granting the plaintiff summary judgment in lieu of a complaint. The defendant also seeks to vacate the January 4, 2012 judgment against him because the plaintiff did not comply with CPLR 5019, and the interest was calculated improperly by the plaintiff or the plaintiff's attorney. The defendant further moves to set this matter down for a preliminary conference for settlement purposes.

The plaintiff opposes this motion. The plaintiff asserts the defendant fails to show the Court overlooked or misapprehended facts or law or mistakenly arrived at the

December 10, 2011 order granting the plaintiff summary judgment in lieu of a complaint. The plaintiff points out the defendant previously alleged, in his third affirmative defense of his September 7, 2011 verified answer, the plaintiff did not submit a true and correct copy of the note and argued, in the fifth paragraph of his September 7, 2011 affidavit in opposition to the plaintiff's motion, the Court should not grant summary judgment. The plaintiff maintains it produced for the Court the small business line of credit and proof of nonpayment, and showed the principal balance due, payment history, and the interest rate. The plaintiff avers it was incumbent upon the defendant to produce admissible evidence of an issue of fact, but the plaintiff failed to provide any triable issue of fact. The plaintiff notes the defendant previously argued in his first affirmative defense an identical argument which he now makes that the plaintiff fails to establish a default by him. The plaintiff argues the Court decided that issue in the December 10, 2011 order. The plaintiff contends the defendant reiterates the plaintiff did not supply the Court with a valid demand notice, however the defendant made that allegation in his second affirmative defense which the Court decided in the December 10, 2011 order. The plaintiff disagrees with the defendant's arguments the plaintiff could not, as a matter of law record the judgment because it was no longer in existence, and the money calculated as due and owing were improperly calculated by its attorney. The plaintiff points out that argument is without merit, and based on new facts not included with respect to the prior motion. The plaintiff submits the merger with Valley National Bank occurred on

January 1, 2012, and the plaintiff is permitted to enforce the January 4, 2012 judgment. The plaintiff indicates, in a plenary action filed in Suffolk County Supreme Court on April 23, 2012 to enforce the instant judgment against the defendant, the caption reads "Valley National Bank, successor by merger to State Bank of Long Island." The plaintiff also indicates the amount calculated in the judgment was based on the plaintiff's submission of facts and the December 10, 2011 order, and the Nassau County Clerk calculated the principal sum due and owing to the plaintiff together with interest from April 15, 2011 plus costs and disbursements. The plaintiff avers CPLR 5019(a) provides no basis to vacate the judgment here; notes the defendant had full knowledge of the judgment creditor's merger; and the defense request for a preliminary conference is unnecessary.

The defendant reiterates his contentions in a reply to the plaintiff's opposition. The defendant asserts the note if signed and exists was not produced by the plaintiff. The defendant takes with the plaintiff's argument concerning a default by him. The defendant maintains the plaintiff's submissions regarding a default are incorrect, and the Court overlooked the fact the defendant was not delinquent at the time of his bankruptcy filing. The defendant argues the plaintiff has still not produced a demand notice, and the plaintiff did not send a demand notice before commencing the underlying action. The defendant contends CPLR 5019(a) is applicable an oral assignment of the judgment is ineffective, and the plaintiff failed to submit anything to reflect the change of ownership

regarding the merger between State Bank of Long Island and Valley National Bank. The defense discounts the Suffolk County action as without merit, and it should be disregarded by this Court.

“To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms” (*Lugli v. Johnston*, 78 A.D.3d 1133, 1135, 912 N.Y.S.2d 108, citing *Gullery v. Imburgio*, 74 A.D.3d 1022, 1022, 905 N.Y.S.2d 221). Once the plaintiff submits evidence establishing these elements, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (see *Jin Sheng He v. Sing Huei Chang*, 83 A.D.3d 788, 789, 921 N.Y.S.2d 128)

Sound Shore Medical Center of Westchester v. Maloney, 96 A.D.3d 823, 947 N.Y.S.2d 317 [2d Dept, 2012].

The plaintiff made that showing here by submitting the note signed by the defendant which contained an unequivocal and unconditional obligation to pay and showing the defendant failed to pay. The defendant here failed to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (see *Ness v. Fellus*, 92 A.D.3d 551, 939 N.Y.S.2d 25 [1st Dept, 2012]). The Court determines here the defendant fails to show the Court overlooked or misapprehended facts or law or mistakenly arrived at the December 10, 2011 order granting the plaintiff summary judgment in lieu of a complaint (see *American Realty Corp. of NY v. Sukhu*, 90 A.D.3d 792, 934 N.Y.S.2d 504 [2d Dept, 2011]). Moreover, the defense motion for leave to reargue, as is done here, cannot be used by an unsuccessful party to obtain a second

chance to reargue issues already decided (*McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 [2d Dept, 1999]). “CPLR 5019(a) provides a court with the discretion to correct a technical defect or a ministerial error, and may not be employed as a vehicle to alter the substantive rights of a party [citations omitted]” (*Mount Sinai Hosp. v. Country Wide Ins. Co.*, 81 A.D.3d 700, 701, 916 N.Y.S.2d 228 [2d Dept, 2011]). This Court determines the defendant here in seeking modification is not trying to correct a clerical error, and under those circumstances CPLR 5019(a) is not the proper procedural vehicle (*see Greenstein v. Greenstein*, 65 A.D.3d 607, 884 N.Y.S.2d 458 [2d Dept, 2009]). In view of this entire decision, the defense request for a preliminary conference is moot.

Accordingly, the defense motion is denied.

So ordered.

Dated: **July 30, 2012**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED
AUG 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE