

**U.S. Bank Natl. Assn. for the Benefit of Credit Suisse  
First Boston Mtge. Sec. Corp. Adjustable Rate v  
Leary**

2017 NY Slip Op 30785(U)

April 10, 2017

Supreme Court, Westchester County

Docket Number: 67289/2016

Judge: Alan D. Scheinkman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
FORECLOSURE SETTLEMENT CONFERENCE PART

-----X  
U.S. BANK NATIONAL ASSOCIATION FOR THE  
BENEFIT OF CREDIT SUISSE FIRST BOSTON  
MORTGAGE SECURITIES CORP. ADJUSTABLE  
RATE MORTGAGE TRUST 2005-2006A,  
ADJUSTABLE RATE MORTGAGE-BACKED PASS-  
THROUGH CERTIFICATES, SERIES 2005-6A,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 67289/2016  
Motion Date: January 27, 2017

MICHAEL R. LEARY,

Defendant.

-----X  
Scheinkman, J.

The following documents were read on this motion by plaintiff pursuant to rule 2221(e) and (d) of the Civil Practice Law and Rules for leave to renew and reargue a prior order of the Hon. Robert M. DiBella dated June 30, 2015 and entered July 1, 2015 and pursuant to rule 2221(d) to reargue a prior order of this Court signed October 11, 2016 and entered October 13, 2016:

- Notice of Motion - Affirmation in Support - Exhibits
- Affirmation in Opposition - Exhibits
- Affirmation in Reply - Exhibits

Upon consideration of all of the foregoing, and for the following reasons, the motion is decided as follows:

### Factual and Procedural Background

This action to foreclose a mortgage on real property was commenced by the filing of a summons and verified complaint with the Westchester County Clerk on December 28, 2009. In the complaint, plaintiff alleges, inter alia; that the note at issue was executed by defendant Michael R. Leary (hereafter "borrower") on May 19, 2005 and delivered to America's Wholesale Lender. Plaintiff further alleges as collateral security for the aforementioned debt, borrower and defendant Kimberly A. Leary duly executed, acknowledged and delivered a mortgage to America's Wholesale Lender which was duly recorded in the Office of the County Clerk of Westchester on June 16, 2005. Plaintiff further alleges in the complaint that it is the holder of the note and was assigned the mortgage which was to be recorded with the County Clerk of Westchester. Plaintiff avers that borrower defaulted on the terms of the note and mortgage by failing to make the monthly payment due on January 1, 2009 and thereafter. Borrower interposed a verified answer dated February 3, 2010 with affirmative defenses. Kimberly A. Leary failed to answer the complaint.

On April 8, 2010, plaintiff filed a specialized request for judicial intervention indicating that this action was eligible pursuant to CPLR 3408(a) for a mandatory settlement conference in the Foreclosure Settlement Conference Part (hereafter "FSCP"). Plaintiff also filed a motion for summary judgment on April 8, 2010 which plaintiff subsequently withdrew. The first conference held in the FSCP was on June 2, 2010. There were several conferences in the FSCP until the matter was released from the FSCP without settlement on February 4, 2014, with a thirty day stay.

On July 31, 2014, plaintiff filed a motion for summary judgment against borrower, for an order striking the answer of borrower, an order awarding plaintiff default judgment as against non-answering parties, for an order appointing a referee to compute the sum due and owing plaintiff and for an order amending the caption. On September 19, 2014, borrower filed a cross-motion seeking dismissal of the action, leave to amend the answer and opposition to the summary judgment motion. On October 16, 2014, plaintiff filed opposition to borrower's cross motion and reply to borrower's opposition to plaintiff's application for summary judgment. Plaintiff's motion for summary judgment was denied by decision and order signed by Hon. Robert M. DiBella on June 30, 2015,

entered on July 1, 2015 (hereafter "1<sup>st</sup> Summary Judgment Motion"). Pursuant to that same order, borrower's cross motion to dismiss the complaint and amend the answer were denied and the complaint as against defendants Kimberly A. Leary, United States of America, Richard's Home Center & Lumber, Inc. and Edith Avani were dismissed pursuant to CPLR 3215(c).

Pursuant to the decision on the 1<sup>st</sup> Summary Judgment Motion, the parties were referred back to the FSCP for a preliminary conference, which was held on September 14, 2015. The matter was certified as ready for trial pursuant to an order signed by this Court on April 29, 2016 and entered on May 2, 2016 (Scheinkman, J.). A trial was scheduled to commence on July 26, 2016. On July 25, 2016, one day before the trial was to commence, plaintiff filed another motion for summary judgment against borrower, to strike the answer, for an order awarding default judgment against the non-answering defendants and appointing a referee to compute sums due and owing to plaintiff. Borrower filed an affirmation in opposition on August 22, 2016. By order dated October 11, 2016 and entered October 13, 2016 (hereafter "2<sup>nd</sup> Summary Judgment Motion"), this Court denied plaintiff's 2<sup>nd</sup> Summary Judgment Motion and directed the parties to appear for trial on November 22, 2016 (Scheinkman, J.).

One day before the trial was set to commence, on November 21, 2016, plaintiff filed the instant motion to renew and reargue. Parties filed a stipulation to adjourn the motion on December 15, 2016. Borrower filed opposition to the motion on January 13, 2017. Plaintiff filed reply papers on January 27, 2017.

### Discussion

#### Renewal of 1<sup>st</sup> Summary Judgment Motion

Plaintiff moves for renewal of the decision and order of the Hon. Robert M. DiBella, signed on June 30, 2015 and entered on July 1, 2015 pursuant to CPLR 2221(e). Such a motion "...shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it..." (CPLR 2221[a]). This Court notes that Justice Robert M. DiBella is not presently assigned to hear matters in Westchester County and is thus unable to hear this motion to renew and reargue as it pertains to the 1<sup>st</sup> Summary Judgment Motion. Furthermore, this Court is assigned to

this matter for trial and decided the 2<sup>nd</sup> Summary Judgment Motion in this matter, which is also the subject of the instant motion. Therefore, in the interest of judicial economy and to avoid “vexatious litigation contraproductive to the orderly administration of justice” it is appropriate for this Court to decide the renewal and reargument motions on both matters (*see Dalrymple v Martin Luther King Community Heath Center*, 127 AD2d 69 [2d Dept 1987], *internal citations omitted*).

A motion to renew based on a change in the law “.....shall demonstrate that there has been a change in the law that would change the prior determination” (*see* CPLR 2221[e][2]). Plaintiff argues that there has been a change in the law that would affect the prior decision on the 1<sup>st</sup> Summary Judgment Motion (*see* Plaintiff’s Affirmation in Support at ¶18-25). Plaintiff argues that based on new case law emanating from the Second Department that “[p]laintiff established its standing to commence this Foreclosure Action by annexing copies of the Note and Mortgage to its Verified Complaint at the time that this action was commenced” (*id* at ¶25). Plaintiff’s position is “...there was a clear change in the law in that the Appellate Division-Second Department, adopted the clear-cut position that annexing a copy of the Note to the complaint or Certificate of Merit establishes a plaintiff’s standing to commence a foreclosure action (*see* Plaintiff’s Reply at ¶20). Borrower’s argument in opposition is that, “...it would be absurd to think that the sole act of attaching a copy of a document to the summons and complaint would indicate possession” (*see* Borrower’s Opposition at ¶5).

Whether the Court finds plaintiff’s argument that the act of annexing a copy of a note to the complaint in and of itself is sufficient to confer standing when standing is brought into issue does not affect the outcome of the 1<sup>st</sup> Summary Judgment motion as plaintiff contends. To prevail on a summary judgment motion, the motion “shall be supported by affidavit....[t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show there is no defense to the cause of action or that the cause of action or defense has no merit” (CPLR 3212[b]). In support of its 1<sup>st</sup> Summary Judgment Motion, plaintiff annexed the affidavit of Fay Janati, who identifies herself as a “litigation Resolution” (*sic*) of Nationstar Mortgage LLC, the “servicer” of plaintiff (*see* Plaintiff’s Affirmation in Support, “Exhibit A”, Janati Affidavit at ¶1). Ms. Janati attests, *inter alia*, that plaintiff had physical possession of the note at the commencement of the action and that borrower defaulted on the mortgage by failing to make payments due and

owing on January 1, 2009 and thereafter (*id* at ¶2-5).

Plaintiff failed to provide evidence, such as a power of attorney, to demonstrate that Nationstar Mortgage LLC had authority to act on behalf of plaintiff. Furthermore, Ms. Janati did not attest that she was personally familiar with the record keeping practices of plaintiff. Therefore, her reliance on those records is inadmissible hearsay (*see Arch Bay Holdings v. Albanese*, 146 AD3d 849 [2d Dept 2017]; *Aurora Loan Services v Mercius*, 138 AD3d 650, [2d Dept 2016], *Aurora Loan Services v, LLC v Baritz*, 144 AD3d 618 [2d Dept 2016]). This matter is akin to the recent decision in *Arch Bay Holdings, LLC v. Albanese*, 146 AD3d 849, decided by the Second Department on January 18, 2017 in that plaintiff produced the mortgage, unpaid note and evidence of default. However, the Court found that the affidavit of plaintiff's servicer did not demonstrate that the affiant was personally familiar with the record keeping practices and procedures of plaintiff. Therefore, plaintiff failed to demonstrate the admissibility of records relied upon by the affiant and thus failed to provide prima facie evidence of entitlement to judgment as a matter of law (*see Arch Bay Holdings v. Albanese*, 146 AD3d 849).

To support its claim that renewal of its 1<sup>st</sup> Summary Judgment Motion will result in the granting of said motion, plaintiff cites to, inter alia, the matter of *JP Morgan Chase Bank, Nat.Ass'n v Weinberger*, 142 AD3d 643 [2d Dept 2016]. As is noted above, standing was not the sole issue upon which the Court denied plaintiff summary judgment on its 1<sup>st</sup> Summary Judgment Motion. Plaintiff's reliance on the *Weinberger* matter is misplaced. In that case, in addition to the annexation of the note and mortgage, plaintiff also submitted an affidavit from plaintiff's employee stating that plaintiff had possession of the note prior to the commencement of the action. These facts are distinguishable from the instant action in that plaintiff's moving papers on the 1<sup>st</sup> Summary Judgment Motion, which also sought default judgment against the non-answering defendants, did not include an affidavit from its employee. Rather, plaintiff submitted an affidavit from plaintiff's purported servicer, with no proof that the servicer had authority to speak on behalf of plaintiff and which relied upon inadmissible hearsay in that the affiant failed to demonstrate that she was familiar with the record keeping practices of plaintiff (*see Arch Bay Holdings, LLC v Albanese*, 146 AD3d 849; *Aurora Loan Services v Mercius*, 138 AD3d 650; *see also HSBC Bank USA, N.A. v Betts*, 67 AD3d 735 [2d Dept 2009]).

In another of the matters to which plaintiff cites, *Federal Nat'l Mtge. Assn. v Yakaputz II, Inc.*, 141 AD3d 506, (2d Dept 2016), plaintiff demonstrated that the note had been specifically endorsed to plaintiff and also provided affidavits in admissible form from plaintiff to prove standing (see *Federal Nat'l Mtge. Assn. v Yakaputz II, Inc.*, 141 AD3d 506). Contrast those facts to the instant action in which the note was endorsed in blank, not specifically to the plaintiff and there was no affidavit in admissible form provided by plaintiff.

Even if plaintiff had sufficiently demonstrated its standing on the 1<sup>st</sup> Summary Judgment Motion by virtue of its having annexed the note to the complaint, plaintiff did not provide sufficient proof to entitlement of summary judgment as required by CPLR 3212(b). Therefore, plaintiff's motion to renew is denied as plaintiff has failed to demonstrate that any change in the law relating to standing would change the prior determination (see CPLR 2221[e][2]).

#### Reargument of 1<sup>st</sup> Summary Judgment Motion

Plaintiff seeks to reargue the 1<sup>st</sup> Summary Judgment Motion, entered on June 30, 2015, pertaining to the dismissal of the complaint as to the non-appearing defendants. Plaintiff's motion is denied. A motion for leave to reargue pursuant to CPLR 2221(d) is addressed to the sound discretion of the court (*Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d 822, 823 [2d Dept 2011]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). Plaintiff argues that its application to reargue is timely in that Notice of Entry of the decision was never served (Plaintiff's Affirmation in Support at ¶15). Plaintiff's argument is wholly unavailing. Plaintiff fails to offer any explanation, reason or excuse as to why it waited over (17) seventeen months to make this motion. Assuming this motion is technically timely, granting reargument at this stage of the litigation would be prejudicial to defendants.

Furthermore, following the decision on the 1<sup>st</sup> Summary Judgment Motion dismissing the complaint, rather than seeking reargument or moving to vacate said dismissal in a timely manner, plaintiff improperly moved for default judgment against the non-appearing defendants when the complaint as against those defendants had been dismissed. As this Court held in its decision on the 2<sup>nd</sup> Summary Judgment Motion, "Plaintiff's motion for default judgment against the non-answering defendants is denied. The complaint as against these defendants was dismissed



pursuant to CPLR 3215(c) as per decision of and order of Hon. Robert M. Dibella, signed on June 30, 2015 and entered on July 1, 2015. Plaintiff did not move to renew or reargue this decision and order pursuant to CPLR 2221. Plaintiff did not move to vacate the order. Plaintiff did not move pursuant to CPLR 5015 for relief from the order, which was entered a year before plaintiff filed the instant motion” (see Plaintiff’s Affirmation in Support, “Exhibit I”). Based on the foregoing, plaintiff’s motion to reargue the dismissal of the complaint as against the non-answering defendants in the 1<sup>st</sup> Summary Judgment Motion is denied.

Additionally, although discussed under the heading “Renewal of Plaintiff’s 1<sup>st</sup> Motion For Summary Judgment Pursuant to CPLR 221(e)”, plaintiff also seeks to reargue the portion of the 1<sup>st</sup> Summary Judgment Motion on the basis Nationstar was the holder of the note at the time it filed said motion. Therefore, plaintiff argues, Nationstar did not need to demonstrate its authority to act on behalf of the plaintiff because Nationstar itself was entitled to enforce the terms of the note and mortgage as holder of the note (see Plaintiff’s Affirmation in Support at ¶31-32).

Even had plaintiff moved to reargue in a timely fashion, rather than inexpably bringing this application approximately (17) seventeen months after the decision had been rendered, plaintiff’s motion would have been denied. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Mazino v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]). In its affirmation in support of its 1<sup>st</sup> Summary Judgment Motion, plaintiff stated “Plaintiff has been in continuous possession of the note (and mortgage) since prior to the commencement of the action (see Exhibits A&B, Affidavit of Fay Janati). Accordingly, Plaintiff is holder of the note under the foregoing statutory authority. Plaintiff is, therefore, entitled to enforce the terms of the note” (see Plaintiff’s Affirmation in Support, “Exhibit A” at ¶17). In its affirmation in support of the present motion, plaintiff argues that its servicer, Nationstar is holder of the note and therefore has standing to sue. Plaintiff states, “[h]ere, it is undisputed that Nationstar Mortgage LLC was the holder of the Note at the time that Plaintiff’s first Motion for Summary Judgment was re-filed....As the holder of the Note, Nationstar was and is entitled to enforce the terms of the Note



and Mortgage” (see Plaintiff’s Affirmation in Support at ¶29-31) Plaintiff is not permitted to present an entirely different argument in a motion to reargue. Therefore, plaintiff’s application to reargue its entitlement to summary judgment is denied ( *Mazino v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]).

#### Reargument of 2<sup>nd</sup> Summary Judgment Motion

Plaintiff moves to reargue the 2<sup>nd</sup> Summary Judgment Motion. Plaintiff’s motion to reargue is denied as untimely. Borrower furnished proof that plaintiff was served with a Notice of Entry by mail on October 13, 2016 by providing an affidavit of service sworn to by AnnMarie Gjertsen (see Borrower’s Affirmation in Opposition, “Exhibit B”). Pursuant to CPLR 2221(d)(3), a motion to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry” (see also *Lo Pinto v Lo Pinto*, 87 AD2d 85 [2d Dept 1982]). Plaintiff contends that “[d]efendant served Plaintiff with Notice of Entry filed on October 17, 2016 and received by Plaintiff’s counsel on October 18, 2016. As such, Plaintiff’s application is timely in all respects” (see Plaintiff’s Affirmation in Support at ¶16). Plaintiff is incorrect. The Notice of Entry was served on October 13, 2016 via mail, therefore, plaintiff had until November 17, 2016 to file its motion to reargue. Plaintiff did not do so until November 21, 2016, therefore, plaintiff’s motion to reargue the 2<sup>nd</sup> Summary Judgment Motion is denied.

Additionally, plaintiff argues that the Notice of Entry that was served was defective in that plaintiff alleges it received only pages one through five of the seven page decision. Plaintiff annexes a copy of a Notice of Entry it alleges it received as “Exhibit I” to this motion and the Court notes it contains the decision at issue up to page five. However, plaintiff cites no authority to support its contention that the Notice of Entry is therefore defective, thus negating the requirements of timely filing pursuant to CPLR 2221(d)(3). Furthermore, even assuming *arguendo*, that the Notice of Entry had been defective, plaintiff waived objection to any defect by failing to return the Notice of Entry within two days of receiving it (see, eg, *Deygoo v Eastern Abstract Corp.*, 204 AD2d 596 [2d Dept 1994]).

Furthermore, even if plaintiff were granted leave to reargue the 2<sup>nd</sup> Summary Judgment Motion, plaintiff's motion would be denied for the reasons articulated above. Additionally, the Court notes that plaintiff cites to the power of attorney that it submitted in its moving papers on its 2<sup>nd</sup> Summary Judgment motion to support its contention that Nationstar had the authority to act on behalf of plaintiff. The Court reiterates its finding in the prior decision that plaintiff's submission fails to establish that Nationstar had the authority to act on behalf of plaintiff. As borrower points out in his opposition to the instant motion, "[p]laintiff points to line number 191 of said limited power of attorney, which lists "CSFB Mortgage-Backed Pass-Through Certificates, Series 2005-6", however, this line does not match the named Plaintiff herein. Plaintiff has again failed to provide any explanation as to this discrepancy" (see Borrower's Affirmation in Opposition at ¶12). Borrower is correct. Plaintiff asserts that the power of attorney it submitted contained an abbreviation of "CSFB" which stands for Credit Suisse First Boston (see Plaintiff's Affirmation in Support at ¶51). Even accepting plaintiff's contention, line 191 in the power of attorney still does not reflect the named plaintiff in this action.

Finally, the Court notes that while plaintiff addresses the issue of standing in its application to reargue the 2<sup>nd</sup> Summary Judgment Motion, plaintiff fails to address the following finding within the decision, "[f]urthermore, the court notes that this is the second summary judgment motion filed by plaintiff to be denied, *inter alia*, because of plaintiff's failure to prove it had standing to commence the action. There is a 'policy' against multiple motions for summary judgment" (*Piro v Macura*, 92 Ad3d 658 [2d Dept 2012] *emphasis added*). Therefore, plaintiff's motion to reargue its 2<sup>nd</sup> Summary Judgment Motion is denied and the matter will be scheduled for trial.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to renew the decision of Hon. Robert M. DiBella signed on June 30, 2015 and entered on July 1, 2015 is denied; and it is further

ORDERED that plaintiff's motion to reargue the portion of the decision of the Hon. Robert M. DiBella dated June 30, 2015 and entered July 1, 2015 is denied; and it is further

ORDERED that plaintiff's motion to reargue the Order of this Court dated October 11, 2016 and entered October 13, 2016 is denied; and it is further

ORDERED that all parties are directed to appear for trial on May 18, 2017 at 2p.m.,  
Courtroom 1803; and it is further

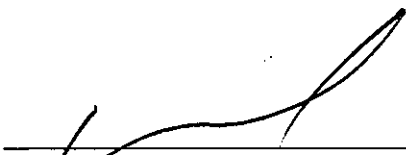
ORDERED that Court-Attorney Referee Albert J. Degatano/Erin Noelle Guven/Sheila  
Gabay is hereby appointed to conduct said trial and report to this Court; and it is further

ORDERED that all other relief requested herein and not decided is denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York

April 10, 2017 ENTER:

  
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HON. ALAN D. SCHEINKMAN  
Justice of the Supreme Court

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