

Wells Fargo Bank, N.A. v Ghobrial

2012 NY Slip Op 32663(U)

September 18, 2012

Sup Ct, Richmond County

Docket Number: 100867/08

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WELLS FARGO BANK, N.A.
3476 Stateview Boulevard
Ft. Mill, SC 29715

TP - 12

Present:

Plaintiff,

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

MALAK GHOBRIAL, STEPHANIE NAVEJA-
GHAVRIAL, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, WELLS FARGO
BANK, N.A.

Index No. 100867/08

Motion No. 1344-005

JOHN DOE (said name being fictitious,
it being the intention of Plaintiff
to designate any and all occupants of
premises being foreclosed herein, and
any parties, corporations or entities,
if any, having or claiming an interest
or lien upon the mortgaged premises)

Defendants.

-----X

The following papers numbered 1 to 4 were marked fully
submitted on the 26th day of June, 2012.

Papers
Numbered

Notice of Motion to Renew and Reargue by Plaintiff, with Supporting Papers and Exhibits (dated April 27, 2012).....	1
Memorandum of Law by Plaintiff in Support of Motion to Reargue (dated April 27, 2012).....	2
Affirmation in Opposition by Defendants (dated May 23, 2012).....	3
Reply Memorandum of Law by Plaintiff (dated June 19, 2012).....	4
Sur-Reply Attorney Affirmation ((July 3, 2012).....	5

Upon the foregoing papers, plaintiff's motion, *inter alia*, for
leave to reargue the prior Decision and Order of this Court, dated
October 11, 2011, which dismissed the action as against defendants
Malak Ghobrial and Stephanie Naveja-Ghavriel (hereinafter
"defendants"), is granted to the extent of directing that a traverse
hearing be held on the sole issue of whether or not service of the

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underlying Notice of Acceleration was properly effectuated upon these defendants. The balance of the motion is denied.

This is an action to foreclose a mortgage in which plaintiff, Wells Fargo Bank, NA (hereinafter, "Wells Fargo"), claims that defendants are in default as a result of their having failed to make the required payments on their mortgage since November 1, 2007. The note and mortgage were originally executed by defendants on September 1, 2004. The within action was commenced by the filing and service of a summons and complaint on February 29, 2008. On October 11, 2011, this Court rendered a Decision and Order which dismissed the complaint as against these defendants on the ground that "Wells Fargo had failed to establish the proper mailing of the requisite acceleration notice, a sine qua non under the subject foreclosure contract" (see Plaintiff's Exhibit "6").

A motion for leave to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (Ito v 324 E. 9th St. Corp., 49 AD3d 816, 817). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (see Foley v Roche, 68 AD2d 558, 567), or to present arguments different from those originally tendered (Giovanniello v Carolina Wholesale Off. Mach. Co., Inc., 29 AD3d 737, 738).

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Here, a careful examination of the papers presently before the Court, along with a search and re-examination of the papers submitted on the prior motion and cross motion, reveals the apparent oversight of an affidavit by Barrett Herndon, a Vice President of Loan Documentation for Wells Fargo, wherein he avers (in paragraph 6) that a Notice of Default/Acceleration had been "sent timely [to defendants], in accordance with the provisions of the Note and Mortgage" (see Wells Fargo's Reply and Affidavit in Opposition to Cross Motion [dated May 19, 2010] , Plaintiff's Exhibit "F"). However, this assertion does not appear to be based either on personal knowledge or a "review of [plaintiff's] books and records [allegedly] kept in the regular course of [its] business" (*id.*, para [3]), and is unsupported by any documentary evidence to like effect. In addition, to whatever extent its omission in reply to defendants' denial of receipt may be viewed as excusable, the copy of the Notice of Default/Acceleration annexed to the present papers (Plaintiff's Exhibit "2" [dated November 12, 2007]) is likewise devoid of any acceptable proof of mailing and fails even to demonstrate that it was actually sent to co-defendant Stephanie Naveja-Ghavrial, who also executed the note and mortgage in the capacity of "Borrower" (see Plaintiff's Exhibit "1")¹.

¹This Court's alternate ground for dismissal, *i.e.*, that Wells Fargo had failed to prove that it had provided defendants with the notice required by RPAPL § 1304 has apparently been abandoned.

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Accordingly, there being an undeniable issue of fact in this case as to mailing of said notice, this Court, in the exercise of its discretion and in the interest of judicial economy, has concluded that justice can best be served by ordering a traverse hearing on the issue of proper service of the Notice of Default/Acceleration upon both defendants (*cf. Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 284-285).

In view of the foregoing, a consideration of plaintiff's motion for leave to renew has been rendered academic.

As a result, it is hereby

ORDERED that so much of plaintiff's motion as is for leave to reargue the Decision and Order of this Court dated October 11, 2011 is granted to the extent that a traverse hearing will be held on the issue of due service of the Notice of Default/Acceleration; and it is further

ORDERED that the parties are directed to appear for a pre-hearing conference in Trial Part 12 on the 4th day of October 2012 at 9:30 a.m.

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ORDERED that the balance of plaintiff's motion is denied.

E N T E R,

/s/
HON. THOMAS P. ALIOTTA,
J.S.C.

Dated: September 18, 2012