Household Fin. Realty Corp. of N.Y. v Kessler
2015 NY Slip Op 32294(U)
November 24, 2015
Supreme Court, Queens County
Docket Number: 529/2013
Judge: David Elliot
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE David Elliot IAS Part 14
Justice

HOUSEHOLD FINANCE REALTY CORPORATION OF NEW YORK,
Plaintiff(s),

-against-

ABBE KESSLER, etc., et. al.,
Defendant(s).

Index No. 529 2013

Motion Date July 30, 2015

Motion Cal. No. 76

Motion Seq. No. 2

The following papers read on this motion by plaintiff pursuant to CPLR 2221 (d) and (e) for and order granting it leave to reargue and renew the branch of its prior motion for summary judgment against defendants Abbe Kessler a/k/a Abbe L. Kessler and Nathan Kessler a/k/a Nathan C. Kessler (defendants Kessler) (resulting in the order dated February 25, 2015) and, upon reargument and renewal, for an order granting it summary judgment against defendants Kessler or, in alternative, directing an immediate trial pursuant to CPLR 3212 (c) on the issue of whether plaintiff complied with RPAPL §§ 1304 and 1306; and this cross motion by defendants Kessler pursuant to CPLR 2221 (d) and (e) for an order granting them leave to reargue and renew their prior cross motion for summary judgment dismissing the complaint insofar as asserted against them and, upon reargument and renewal, for an order granting them summary judgment dismissing the complaint insofar as asserted against them or, in the alternative, directing an immediate trial on the issue of whether plaintiff complied with RPAPL §§ 1304 and 1306.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Notice of Cross Motion - Affidavits - Exhibits	6-9
Answering Affidavits - Exhibits	10-11

Reply Affidavits 12-14

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this foreclosure action, plaintiff previously moved pursuant to CPLR 3212 for summary judgment against defendants Kessler, and to dismiss the (fifteen) affirmative defenses and (four) counterclaims of defendants Kessler, including the third affirmative defense based upon failure to comply with the notice requirements of RPAPL § 1304, and the fourth affirmative defense based upon failure to comply with RPAPL § 1306. Defendants Kessler cross moved for, among other things, summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as asserted against them. In support of their cross motion, defendants Kessler asserted they had not received any RPAPL § 1304 notice from plaintiff by registered or certified mail and first-class mail.

By order dated February 25, 2015, the court granted the branch of the motion by plaintiff to dismiss the first, second, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth affirmative defenses and the counterclaims asserted by defendants Kessler in their joint answer, and denied those branches of the motion by plaintiff for summary judgment against defendants Kessler, and to dismiss the third affirmative defense asserted by defendants Kessler. The court determined that plaintiff failed to establish, *prima facie*, that plaintiff complied with RPAPL § 1304. The court held that the affidavit of Dana St. Clair-Hougham, a vice president and assistant secretary of the Administrative Divisions of plaintiff, dated July 14, 2014, did not constitute proof of actual mailing of the RPAPL § 1304 notices, or sufficient proof of a standard office practice or procedure designed to ensure that mailed items were properly addressed and mailed by certified mail and first class mail. The court determined that Ms. Clair-Hougham did not provide, in her affidavit, any details with respect to the process of actual mailing of the notices. The court additionally determined that plaintiff failed to present a certified mail receipt containing the names and addresses of defendants Kessler, and postmark or date of mailing. The court also denied that branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendants Kessler based upon failure to comply with RPAPL § 1306, because a question of fact existed as to whether plaintiff complied with RPAPL § 1304.

The court denied that branch of the cross motion by defendants Kessler for summary judgment dismissing the complaint insofar as asserted against them on the ground that they failed to satisfy their initial burden of establishing plaintiffs' failure to comply with RPAPL § 1304. The court noted that plaintiff alleged in the complaint it had complied with RPAPL § 1304, and defendants Kessler failed to submit evidence to disprove the allegation.

On a motion for leave to reargue, the movant must demonstrate matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d] [2]). A motion for leave to reargue is addressed to the sound discretion of the court (*see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]; *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2014]). Nevertheless, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced, or to present arguments different from those already presented (*see Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014]; *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]).

It is well established that a motion for leave to renew must be supported by "new or additional facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; *Carullo v Pistilli Const. and Development Corp.*, 64 AD3d 624 [2d Dept 2009]; *O'Connell v Post*, 27 AD3d 631 [2d Dept 2006]; *see also O'Dell v Caswell*, 12 AD3d 492 [2d Dept 2004]; *Williams v Fitzsimmons*, 295 AD2d 342 [2d Dept 2002]). A motion for leave to renew " 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*Renna v Gullo*, 19 AD3d 472, 473 [2d Dept 2005], quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 [1st Dept 1996]) (*Coccia v Liotti*, 70 AD3d 747 [2d Dept 2010]).

Plaintiff argues that the court overlooked, misapprehended, and misapplied RPAPL § 1304, and thus RPAPL § 1306, in denying the branch of its prior motion for summary judgment against defendants Kessler. Plaintiff asserts that its prior submissions established a *prima facie* showing of strict compliance with RPAPL §§ 1304 and 1306, and that the court improperly required it to submit a certified mail receipt in support of its prior motion.

To the extent plaintiff seeks reargument on the ground that nearly identical affidavits were used, *inter alia*, in two other foreclosure actions which appeared in this court before different Justices, same is unavailing, particularly since, as admitted by counsel, the RPAPL § 1304 defense was neither raised nor challenged by the defendants in those actions, whereas that issue was affirmatively raised as a defense and fully briefed herein by defendants Kessler. To the extent plaintiff seeks reargument on the ground that RPAPL § 1304 does not require plaintiff to submit a certified mail receipt, same is also denied. To the degree the court found that plaintiff failed to submit a certified mail receipt in support of its motion, the court is aware that RPAPL § 1304 requires that the lender, an assignee, or mortgage loan servicer use registered or certified mail and regular mail to send the 90-day pre-foreclosure notice, and does not require that the registered or certified mailing be made with a return receipt requested (*compare* Business Corporation Law § 307 [b][2] [requiring service of

process under the statute by "registered mail with return receipt requested"], CPLR 307 [2] [requiring service of summons under statute by "certified mail, return receipt requested"), CPLR 7503 [c] [requiring service of notice of intention to arbitrate by "certified mail, return receipt requested"], RPAPL § 1303 [4] [requiring notices by "certified mail, return receipt requested"). In its February 25, 2015 order, the court never suggested that plaintiff be required to submit a certified mail receipt together with return receipt requested, to the extent plaintiff contends that it did. Nor did the court impose a mandate or set a precedent that plaintiffs submit a certified mail receipt containing the recipients' names and addresses and postmark or date of mailing in order to establish compliance with RPAPL § 1304. The court cited to *TD Bank, N.A. v Oz Leroy* (121 AD3d 1256 [3d Dept 2014]), however, for illustrative purposes, to wit: the submission of a certified mail receipt as described therein is but one of the ways plaintiff could have supported an affidavit that did not otherwise amount to an affidavit of service submitted by a person with personal knowledge of actual service of the notice by one of the two methods required by the statute. It is noted that the Court in *TD Bank, N.A.* did not mandate the submission of a certified mail receipt; it only determined that the one submitted was insufficient to establish proof of proper mailing. The court notes that plaintiff did not otherwise establish that the former overlooked or misapprehended any law or fact in determining that plaintiff failed to meet its *prima facie* showing of establishing strict compliance with RPAPL § 1304 on the prior motion.

With respect to that branch of the motion by plaintiff for leave to renew the branches of its prior motion for summary judgment against defendants Kessler and to dismiss the third and fourth affirmative defenses asserted by defendants Kessler, plaintiff presents the affidavit dated May 19, 2015 of Byron J. Gifford, a vice president and director of CML Letters Strategy and Administration for plaintiff, and a barely legible copy of a computer printout (plaintiff's Exhibit "B" annexed to the affidavit of Byron J. Gifford) as new evidence.[1]

Mr. Gifford states in his affidavit that the 90-day pre-foreclosure notices were sent to defendants Kessler on April 3, 2012, by certified and first-class mail. His affidavit is not based upon his personal knowledge of the actual mailings. To the extent it is based upon his knowledge obtained from plaintiff's business records, such affidavit, even when considered with the copy of the computer printout, is insufficient to establish in what manner of office practice or procedure was used by plaintiff to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail (*see Frankel v Citicorp*

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1. The affidavit of Mr. Gifford, which is not fastened on the side, improperly contains writing on both sides. The court's rules provide that every paper filed in court, other than an exhibit or printed form, shall contain writing on one side only, except when the papers are fastened on the side (*see* 22 NYCRR 202.5 [a]). In the interest of judicial economy, the court, however, shall excuse such irregularity and defect, and shall consider the affidavit (*see* CPLR 2001, 2101 [f]).

Ins. Services, Inc., 80 AD3d 280 [2d Dept 2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]; *Smith v Palmeri*, 103 AD2d 739 [2d Dept 1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2d Dept 2015]). Under such circumstances, the affidavit and copy of the computer printout do not contain sufficient new facts to change the prior determination (*see* CPLR 2221 [e]; *Hackney v Monge*, 103 AD3d 844 [2d Dept 2013]; *Yebo v Cuadra*, 98 AD3d 504 [2d Dept 2012]). In addition, plaintiff has failed to show a reasonable justification for the failure to present such facts on the prior motion.

That branch of the cross motion by defendants Kessler for leave to reargue that branch of their prior cross motion for summary judgment dismissing the complaint insofar as asserted against them is denied. Defendants Kessler argue that the court misapprehended that the 90-day notice pursuant to RPAPL § 1304 purportedly mailed to defendants by plaintiff contained all of the statutorily-mandated content. They assert that such notice is deficient since it does not include a list of at least five housing counseling agencies as designated by the division of housing and community renewal (DHCR), that serve the region where the borrower resides (*see* RPAPL § 1304 [2]). Defendants Kessler claim they reside in Queens County, and the notice purportedly mailed by plaintiff included a list of six agencies. According to defendants Kessler, one of the listed agencies, i.e., the New York City Commission on Human Rights, is not a housing counseling agency designated by the DHCR to provide housing counseling services to homeowners in Queens County. They assert that GreenPath, Inc., one of the other listed agencies, serves Bronx County, and not Queens County, and hence may not be considered to be a housing counseling agency which serves the "region" where they reside. They contend that, as a consequence, only four of the six entities listed in the notice are housing counseling agencies which serve the region where they reside. Defendants Kessler argue because the 90-day notice relied upon by plaintiff is deficient, the court should have granted them summary judgment dismissing the complaint insofar as asserted against them. Defendants Kessler, however, did not present these arguments relative to the claimed deficiency of the notice vis-a-vis the housing counseling agency list on their prior cross motion. Under such circumstances, reargument is inappropriate (*see V. Veeraswamy Realty v Yenom Corp.*, 71AD3d 874 [2d Dept 2010]; *Woody's Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]).

That branch of the motion by defendants Kessler for leave to renew their prior cross motion is denied. The New York State Banking Department 90-day Pre-Foreclosure Notice Report, dated June 10, 2010, notes that New York State is made up of 10 regions, New York City – comprising of the five boroughs (which includes Bronx County) – being one of them. GreenPath, Inc., located in Bronx County, serves the New York City region. In any event, assuming that this agency did not serve the region where the defendants Kessler reside, they have failed to present any evidence in support of their assertion that the New York City

Commission on Human Rights is not a housing counseling agency designated by DHCR to provide housing counseling services to homeowners. Defendants Kessler consequently have failed to demonstrate the existence of any new facts which would alter the court's prior determination.

With respect to the alternative branches of the motion by plaintiff and defendants Kessler for an evidentiary hearing pursuant to CPLR 3212 (c) on the issue of whether plaintiff strictly complied with RPAPL § 1304, CPLR 3212 (c) allows that if it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in CPLR 3211 (a) or (b), a court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion. In this instance, plaintiff and defendants Kessler each previously moved for summary judgment, and neither sought an immediate trial pursuant to CPLR 3212 (c) when making such motion and cross motion. By moving at this juncture for an immediate trial on the issue of whether plaintiff strictly complied with RPAPL § 1304 and thereby RPAPL § 1306, plaintiff and defendants Kessler are, in effect, attempting to circumvent the strong policy against allowing successive motions for summary judgment (*see Baron v Charles Azzue, Inc.*, 240 AD2d 447 [2d Dept 1997]). In view of the failure by plaintiff and defendants Kessler to demonstrate newly discovered evidence or other reasonable justification for entertaining a successive motion for summary judgment (*see Vinar v Litman*, 110 AD3d 867 [2d Dept 2013]; *Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]), the alternative branches of the motion by plaintiff and defendants Kessler are denied.

Accordingly, plaintiff's motion is denied. The cross motion by defendants Kessler is denied.

Dated: November 24, 2015

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J.S.C.