NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

FNBN I, LLC,	Index No. 706925/14
Plaintiff,	Motion Date July 24, 2017
- against-	
ANAND PERSAUD, VALINE N. BALRAM, HAMILTON EQUITY GROUP LLC, HSBC BANK USA, NATIONAL ASSOCIATION, TLC HEALTHCARE FINANCE, A DIVISION OF TELERENT LEASING CORPORATION, COLUMBIA UNIVERSITY DEPT. OF OB-GYN, NYC DEPARTMENT OF FINANCE-PARKING VIOLATIONS BUREAU PAYMENT AND ADJUDICATION CENTER OF QUEENS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and POORAN BALRAM	Motion Cal. No. 47 Motion Seq. No. 3
Defendants.	

The following papers read on this motion by plaintiff pursuant to CPLR 2221(d) and (e) for leave to reargue and renew its prior motion for summary judgment and to strike the answer of defendants, Anand Persaud and Valine N. Balram, and upon reargument and renewal for summary judgment against defendants, Anand Persaud and Valine N. Balram, including reformation of the loan modification agreement dated February 13, 2009 by adding defendant, Valine N. Balram as a party thereto as a co-mortgagor with no liability under the note, or in the alternative, to declare that the debt due by Anand Persaud and Valine N. Balram in the principal sum of $814,683.85 is secured by an equitable lien/constructive trust on the premises as of February 13, 2009, and to direct the mortgage be amended, *nunc pro tunc*, substituting the legal description as set forth in the mortgage with the one as proposed, and grant leave to appoint a referee.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits .....EF Doc. #88-#108
Answering Affidavits - Exhibits .....EF Doc. #109
Reply Affidavits .....EF Doc. #110-#111

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

In 2006, Anand Persaud executed a note in favor of First National Bank of Arizona (FNBA) (the subject note) in the principal amount of $800,00.00, plus interest. The note was secured by a mortgage on the real property known as 86-16 Pinto Street, Jamaica, New York (the subject property), given by defendants, Anand Persaud and Valine N. Balram in favor of Mortgage Electronic Registration Systems, Inc., as nominee for FNBA (the subject mortgage). Thereafter, Anand Persaud entered into a loan modification agreement dated February 13, 2009, at that time capitalizing arrears into the principal balance, and creating a new principal balance of $814,683.85. The mortgage was assigned to plaintiff by virtue of an assignment of mortgage executed on February 7, 2014. Plaintiff commenced this action on September 25, 2014 to foreclose on a mortgage on the subject property, alleging that defendants, Anand Persaud and Valine N. Balram defaulted under the terms of the mortgage and note as modified, by failing to pay the monthly installment due on May 1, 2012. Plaintiff also alleged that it elected to accelerate the mortgage debt. Plaintiff also asserts a cause of action to reform the loan modification agreement to include Valine N. Balram as a party thereto as a co-mortgagor with no liability under the note, and to reform the property description in the subject mortgage *nunc pro tunc*.

Defendants, Anand Persaud and Valine N. Balram served a joint answer. The defendant's answer asserted lack of standing as an affirmative defense. Defendant, Hamilton Equity Group, LLC, served a notice of appearance. The remaining defendants have not appeared or answered.

Plaintiff previously moved for summary judgment against defendants, Anand Persaud and Valine N. Balram, to strike the answer of defendants, Anand Persaud and Valine N. Balram, for leave to amend the caption, for an order of reference, to amend the loan modification agreement, adding defendant, Valine N. Balram as a party to the agreement in her capacity solely as a co-mortgagor. In support of its motion, plaintiff submitted, among other things, the affidavit of Michael Drawdy, Senior Vice President of PennyMac Loan Services, LLC (PennyMac), plaintiff's servicer, a copy of the note with allonges, and of the notice of default. Plaintiff asserted that it had standing to bring the action insofar as the note, by allonge, contains an endorsement in blank, and it physically possessed the note as of the date the action was commenced. Plaintiff also asserted that the notice of default required under the mortgage was

properly mailed to defendants, Anand Persaud and Valine N. Balram. Defendants, Anand Persaud and Valine N. Balram cross moved to dismiss the complaint insofar as asserted against them. Defendants, Anand Persaud and Valine N. Balram asserted that plaintiff lacked standing to bring the action and failed to provide them with a notice of default prior to commencing the action.

By order dated November 16, 2016, the motion by plaintiff was granted only to the extent of granting it leave to amend the caption, substituting Pooran Balram for defendants, "John Doe" and "Jane Doe." The cross motion by defendants, Anand Persaud and Valine N. Balram was denied. The court determined that plaintiff failed to make a *prima facie* showing that it (1) had standing to bring the action, and (2) complied with the condition precedent contained in the mortgage, requiring the borrowers be provided with a notice of default prior to demanding payment of the loan in full. The court also determined defendants, Anand Persaud and Valine N. Balram failed to establish *prima facie* (1) that plaintiff lacked standing to bring the action, and (2) their entitlement to dismissal of the complaint based upon non-compliance with the condition precedent set forth in section 15 of the mortgage. The court found that the Drawdy affidavit did not state the date, or give any other factual details, as to when plaintiff came into possession of the note. The court also found that plaintiff's submission of a copy of two allonges, dated December 29, 2008, with different endorsements, failed to eliminate a triable issue of fact as to whether plaintiff was in possession of the original note when the action was commenced. The court further found that Drawdy's affidavit was conclusory and unsubstantiated with respect to the sending of the notice of default, and even when considered with the copies of such notice, failed to show the required notice was mailed by first class mail or actually delivered if sent by other means, as required by the mortgage.

Plaintiff moves pursuant to CPLR 2221 for leave to reargue and renew its motion for summary judgment. Defendants, Anand Persaud and Valine N. Balram oppose the motion. The remaining defendants have not appeared in relation to the motion.

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]).

Defendants, Anand Persaud and Valine N. Balram assert that the branch of the motion for leave to reargue is untimely, having been made more than 30 days after the November 16, 2016 order was scanned and e-filed by the clerk. However, a motion for leave to reargue must be made within 30 days after service of a copy of the prior order with notice of entry (*see* CPLR 2221[d][3]; [e]). Defendants, Anand Persaud and Valine N. Balram have failed to demonstrate that a copy of the November 16, 2016 order was served upon plaintiff with notice of entry. In the absence of proof of such service, the time to move for leave to reargue cannot be said to have begun to run. As a consequence, defendants, Anand Persaud and Valine N. Balram have failed to demonstrate untimeliness. The court, therefore, shall entertain that branch of the instant motion.

Plaintiff contends that the court misapprehended that there were only two allonges. Plaintiff asserts that there were three allonges affixed to the note, the first one bearing an undated endorsement by FNBA to the First National Bank of Nevada (FNBN), the second allonge bearing an endorsement dated December 29, 2008 by Federal Deposit Insurance Corp. (FDIC) as Receiver for FNBN to plaintiff, and the third allonge bearing a blank endorsement also dated December 29, 2008. Plaintiff also contends that the court misapprehended that the Drawdy affidavit was insufficient to establish plaintiff's standing to bring this action as a holder of the note with an allonge with a blank endorsement, and compliance with the condition precedent set forth in the mortgage. Plaintiff asserts that the Drawdy affidavit constituted proper proof of its standing, and satisfaction of the contractual condition precedent to demand for the balance due under the mortgage.

The court misapprehended that the copy of the note submitted by plaintiff included two, rather than three, allonges. Such error, however, does not warrant a change in the determination of the original motion. Drawdy averred in relevant part, that his affidavit was based upon his review of unspecified records, indicating that plaintiff was in possession of the note on the date of the action's commencement. Plaintiff has failed to demonstrate that the records relied upon by Drawdy were admissible under the business records exception to the hearsay rule (*see* CPLR 4518[a]). In addition, plaintiff submits in support of the instant motion, an affidavit dated April 21, 2017 of Harold Galo, a litigation specialist employed by PennyMac, which indicates that based upon Galo's review of business records maintained by or on behalf of PennyMac, Deutsche Bank National Trust Co. (Deutsche Bank) was in possession of the original wet-ink note on September 18, 2014 as document custodian for plaintiff, and "remains" in possession of the original at a specified California address. Based upon the Galo affidavit, it is unclear whether plaintiff or Deutsche Bank had possession of the note with the three allonges on September 25, 2014. Plaintiff, furthermore has failed to demonstrate that the court overlooked or misapprehended any matter of fact or law when determining that plaintiff failed to make a *prima facie* showing that the required default notice was mailed by first class mail or actually delivered if sent by other means, as required by the mortgage. Likewise, plaintiff has failed to

show that the court overlooked or misapprehended any matter of fact or law when denying the branch of the prior motion seeking, in effect, summary judgment against defendants, Anand Persaud and Valine N. Balram on the causes of action for reformation of the loan modification agreement and the legal description of the mortgage.

Accordingly, that branch of the motion by plaintiff for leave to reargue its prior motion for summary judgment and to strike the answer of defendants, Anand Persaud and Valine N. Balram, is denied.

With respect to that branch of the motion by plaintiff for leave to renew its prior motion for summary judgment and to strike the answer of defendants, Anand Persaud and Valine N. Balram, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]). The new or additional facts either must have not been known to the party seeking renewal or may, in the court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (*see Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 982 [2d Dept 2015]; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]). "However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented" (*Deutsche Bank Trust Co. v Ghaness*, 100 AD3d at 586 [internal quotation marks omitted]; *see DLJ Mortg. Capital, Inc. v David*, 147 AD3d 1024 [2d Dept 2017]). " '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' " (*Kamden–Ouaffo v Pepsico, Inc.*, 133 AD3d 828, 828 [2d Dept 2015], quoting *Elder v Elder*, 21 AD3d 1055, 1055 [2d Dept 2005]) (*see Central Mortg. Co. v Resheff*, 136 AD3d 962, 963 [2d Dept 2017]). What constitutes a "reasonable justification" is within the court's discretion (*see Dervisevic v Dervisevic*, 89 AD3d 785 [2d Dept 2011]; *Heaven v McGowan*, 40 AD3d 583, 586 [2d Dept 2007]).

In this instance, plaintiff offers the Galo affidavit to show that it had constructive possession of the note with the three allonges, including the third allonge, endorsed in blank, and to prove that the required notice of default was in fact mailed to defendant borrowers by first-class mail addressed to the borrowers at the mortgaged premises and by certified mail to the borrowers at the last known address provided by the borrowers. Plaintiff asserts that in making its original motion, it did not include these additional facts, because it believed the information included in the Drawdy affidavit was sufficient. According to plaintiff's counsel, affidavits with the same level of detail, as is contained in the Drawdy affidavit, routinely have been accepted by New York courts. Plaintiff has failed to cite to any instance where this is the case, and it is doubtful that there have been many cases where a lender has sought reformation of a loan modification agreement to add a party thereto as a co-mortgagor with no liability under the note.

In any event, the court is not required to follow decisions rendered by courts of coordinate jurisdiction, but rather must follow those legal precedents set by the Appellate Division and the Court of Appeals. This court followed the precedents set by the appellate courts in rendering its prior decision on the issue of whether plaintiff established a *prima facie* case of entitlement to summary judgment as against defendants, Anand Persaud and Valine N. Balram. As a consequence, plaintiff has failed to offer a reasonable justification for its failure to present the new evidence set forth in the Galo affidavit on its prior motion (*see Federal Nat. Mortg. Assn. v Sakizada*, 153 AD3d 1236 [2d Dept 2017]).

Accordingly, that branch of the motion by plaintiff for leave to renew its prior motion for summary judgment against defendants, Anand Persaud and Valine N. Balram and to strike their answer, is denied.

Dated: December 4, 2017

DARRELL L. GAVRIN, J.S.C.