FILED: ROCKLAND COUNTY CLERK 12/12/2017 03:54 PM INDEX NO. 034121/2015
NYSCEF DOC. NO. 93 RECEIVED NYSCEF: 12/12/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

JOSEPH HELLER; ESTHER HELLER; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; MIDLAND CREDIT MANAGEMENT INC.; MID HUDSON VALLEY FEDERAL CREDIT UNION; CAPITAL ONE BANK (USA), N.A.; "JOHN DOE#1" THROUGH "JOHN DOE #10,"

Defendants.

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DECISION AND ORDER ON MOTION TO RENEW

Index No.: 034121/2015

Motion #3 - MD
DC - N
Adj: 2/8/18

Thomas E. Walsh II, J.

The following papers, numbered 1 to 3, were considered in connection with Defendants' motion for leave to renew this Court's Decision and Order dated June 1, 2017, pursuant to *Civil Practice Law and Rules* § 2221(e), (b) upon renewal, an order finding that Plaintiff failed to prove that it strictly complied with RPAPL § 1304, (c) an Order pursuant to *Civil Practice Law and Rules* §§ 3212 (b) and 213[4] granting summary judgment in Defendants' favor, (d) an Order granting reasonable attorneys' fees pursuant to RPL § 282 and 22 NYCRR § 130-1.1(a) and (e) an Order granting to the Defendant such other or different relief as this Court deems just and proper:

PAPERS	NUMBERED
Notice of Motion to Renew and for Summary Judgment/Affirmation of David R. Smith, Esq./Affidavit of Esther Heller/Affidavit of Joseph Heller/Exhibits (A-K)	1
Affirmation of Anthony P. Scali, Esq. In Opposition/Exhibits (A-L)	2
Reply Affirmation of David R. Smith, Esq./Exhibit A	3

Upon the foregoing papers, the Court now rules as follows:

Upon the foregoing papers, the Court now rules as follows:

Briefly, this action is to foreclose on a Note and Mortgage covering the real property known as 17 Albert Drive Monsey, New York 10952 executed by Defendants. Plaintiffs allege that Defendants breached their obligations under the terms of the note and mortgage by

failing to tender payments as required. As a result of the default, on September 10, 2015 Plaintiff commenced the instant foreclosure action. Defendant JOSEPH HELLER was served with the Summons and Complaint pursuant to *Civil Practice Law and Rules* § 308(1) and Defendant ESTHER HELLER was served with process pursuant to *Civil Practice Law and Rules* § 308(2). Defendants failed to answer or appear and Plaintiff moved for an Order of Reference which was granted by the undersigned on October 28, 2016. Defendant subsequently moved for an Order to Show Cause to vacate the Order of Reference. Plaintiff opposed the Defendant's Order to Show Cause. The undersigned granted Defendants' Order to Show Cause in part in that Defendant was granted leave to serve and file a late answer pursuant to *Civil Practice Law and Rules* § 3012(d). Defendants filed their Answer with counter claims via the NYSCEF system on June 14, 2017. Plaintiff filed their reply to the counter claims via the NYSCEF system on July 3, 2017.

Defendant filed the instant Motion to Renew part of their Order to Show Cause regarding the Plaintiffs failure to prove compliance with *Real Property Actions and Proceedings Law* § 1304. Specifically, Defendants submit that since the submission of their Order to Show Cause in December 2016 there have been several Appellate Division, Second Department cases that "have shed additional light on a Plaintiff's requirements for proof of compliance with RPAPL 1304." Further, Defendant's assert that these decisions require a reversal of the undersigned's prior determination that found that the Plaintiff strictly complied with *Real Property Actions and Proceedings Law* § 1304 on several distinct grounds. Defendant directs the Court to *Citimortgage, Inc. v. Pappas*, 147 AD3d 900, 901 (2d Dept 2017) which Defendant avers "firmly established the requirement that if a Plaintiff wishes to prove compliance with RPAPL 1304 through the production of admissible business records, the Plaintiff's affiant must adduce proof that he or she is familiar with the mailing practices and procedures of the sender of the notice, so as to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed."

Defendant directs the Court to the Affidavit of David Nilsen stating that it is devoid of any testimony which discusses the standard office practice or procedures employed by Plaintiff

to ensure that items, such as the 90 day notice, are properly addressed and mailed. Also of issue raised by the Defendant is the fact that Mr. Nilsen is an employee of Caliber Home Loans, Inc., and the 90-day notice that was sent by Wells Fargo Home Mortgage on their letterhead and therefore any statements made by Mr. Nilsen in his Affidavit are not based on his own personal knowledge of Wells Fargo's business practices. According to Defendant, Plaintiff has failed to provide any documentation of the Plaintiff's mailing practices, proof of mailing of the 90 day notices or offered any documentation in support of their Affidavit if Merit demonstrating a database or some record of the mailings.

Defendant is also seeking dismissal of the Complaint based on the alleged expiration of the Statute of Limitations.

In Opposition, Plaintiff submits that Defendant filed a Notice of Entry of the Prior Order on June 14, 2017. Plaintiffs state that within thirty (30) days of serve of the Notice of Entry the Defendants failed to file a Notice of Appeal preserving any appeal of the undersigned's determination regarding the Plaintiff's compliance with *Real Property Actions and Proceedings Law* § 1304 in the prior Decision and Order. As such, Plaintiffs assert that Defendants are seeking a "second bite at the apple" due to their failure to timely preserve their appeal. Based on Defendants' failure to seek an appeal, the Plaintiffs aver that Defendants are bound by the Court's decision regarding the 90-day Notice, as it is the law of the case.

Further, Plaintiffs assert that the *Pappas* case cited by Defendants does not reflect a change in the law regarding the compliance requirements of *Real Property Actions and Proceedings Law* § 1304, but rather offers suggestions as to the type of documents that can prove the mailing of the 90-day Notice. Plaintiffs also submit that Defendant's reliance on *Wells Fargo Bank, N.A. v. Trupi*, 150 AD3d 1049 (2d Dept 2017) as "new binding precedent" is baseless. According to Plaintiff, *Trupi* is similar to the Appellate Division Second Department's Decision in *Pappas*, in that it does not reflect a change in the law that requires a reversal of this Court's prior determination regarding the Plaintiff's compliance with *Real Property Actions and Proceedings Law* § 1304.

As to Defendant's assertion that the Statute of Limitations has expire on the

instant action, the Plaintiffs assert that the loan has not yet been accelerated. Specifically, Plaintiffs argue that the acceleration terms in the mortgage result in the Statute of Limitations defense being stricken. Paragraph 19 of the subject mortgage states that a lender cannot reject borrower's payment of arrears to reinstate the mortgage until judgment was entered, which makes the terms of the mortgage the determining factor in acceleration and not the commencement of the foreclosure action. Therefore, Plaintiff opines that the subject mortgage in this action remains an installment contract until a judgment is entered and that acceleration is not accomplished by the filing of the foreclosure action.

Civil Practice Law and Rules § 2221(e) refers solely to motions for leave to renew, stating that they "shall be identified specifically as such," [CPLR § 2221(e)(1)], "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination;" [CPLR § 2221(e)(2)], and "shall contain a reasonable justification for the failure to present such facts on the prior motion." [CPLR § 2221(e)(3)].

Civil Practice Law and Rules § 2221 was amended effective July 20, 1999 by adding new subdivisions (d), (e) and (f) which codify and clarify the rules regarding motions for leave to reargue and renew. [*Glicksman v. Board of Education/Central School Bd. Of Comsewogue Union Free School District*, 278 AD2d 364, 365 (2d Dept 2000)]. The amended statute did not impose a time frame for which a motion for leave to renew is to be made, but does limit the time to make a motion to reargue within 30 days after service of a copy of the prior order with notice of entry. [*Civil Practice Law and Rules* § 2221[d][3]and [e]]. Prior to the amendment of the statute in 1999 a motion that sought relief based on the change in law generally was considered on for reargument. [*Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School District*, 278 AD2d at 365]. Further, motions seeking relief based on a change in law needed to be made before the time to appeal the prior order had expired. [*Id.*]. The exception to this were "motions to reargue" based on an intervening change in the law and the original order was an intermediate one which would be subject to review upon appeal from the final judgment or the matter was on appeal. [*Matter of Barnes (Council 82,*

AFSCME, on Behalf of Monrop, 235 AD2d 826 (3d Dept 1997)]. Case law dictated that in a circumstance in which a judgment had been entered and no appeal was pending, then a motion for leave to reargue based on a change in the law should not be granted. [*Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School District*, 278 AD2d at 366]. The basis for this was that there must be an end to lawsuits, and therefore absent the circumstances codified in *Civil Practice Law and Rules* § 5015, then a determination of a court in which no appeal has been taken must remain untouched based on a change in law. [*Matter of Huie [Furman]*, 20 NY2d 568 (1967)]. The changes in *Civil Practice Law and Rules* § 2221(e) did not impose a time limit for the making of a motion to renew and there is nothing within the legislative history which indicates their intention of changing the rules regarding the finality of judgments. [*Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School District*, 278 AD2d at 366].

The Court notes that the Defendant's did not file an appeal in the instant matter within thirty (30) days of the Notice of Entry on June 14, 2017. Therefore, the Defendant's Motion to Renew is untimely and will not be considered by the Court. Further, the Court finds that the Decision and Order regarding the Plaintiff's compliance with *Real Property Actions and Proceedings Law* § 1304 is the law of the case and the Court declines to disturb the prior Decision.

As to the Defendant's application to dismiss the instant action based on expiration of Statute of Limitations, the Court finds that the instant action was commenced timely based on paragraph 19 of the subject mortgage. The Court need not reach any of the Defendant's other arguments.

Accordingly, it is hereby

ORDERED that Defendants' motion to Renew is denied; and it is further

ORDERED that the parties shall appear for a status conference on **THURSDAY FEBRUARY 8, 2018 at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision and Order of this Court on Motion #3.

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Dated: New City, New York
December 12, 2017

HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

STERN & EISENBERG, P.C.
Attorney for Plaintiff
(via e-file)

DAVID SMITH, ESQ.
PETROFF AMSHEN, LLP
Attorney for Defendants JOSEPH HELLER and ESTHER HELLER
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