The Bank of N.Y. Mellon v Moon
2018 NY Slip Op 30709(U)
March 8, 2018
Supreme Court, Columbia County
Docket Number: 10620-16
Judge: Richard M. Koweek
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE, F0R THE BENEFIT OF THE CERTIFICATE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-33CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-33CB,

Plaintiffs,

-against-

CHRISTOPHER P. MOON, KERRI A. KINNEY, MARGARET M. CONCRA, HSBC NEVADA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., QUICKEN LOANS, INC.,

"JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

Index No. 10620-16
RJI No. 10-17-0252

DECISION AND ORDER

This is a Motion by the Defendant Kerri A Kinney to dismiss a mortgage foreclosure action filed September 7, 2016, that names Christopher Moon, Kerri A. Kinney and Margaret M. Concra as Defendants. The Motion also seeks to award attorneys fees to Defendant Kinney against the Plaintiff and its current attorneys.

Plaintiff has made a Cross-Motion for sanctions as well as opposing Defendant's Motion.

For the reasons hereinafter set forth, the Motion of the Defendant is granted and the Cross-Motion of the Plaintiff is denied.

HISTORY

On April 28, 2005, Defendants Christopher Moon and Kerri A. Kinney executed a Promissory Note in the amount of $161,200.00 to Quicken Loans, Inc. The Note was secured by a Mortgage for a parcel of real property located at 1908 County Route 8, Elizaville, New York 12523. The Mortgage was recorded in the Columbia County Clerk's Office.

On January 18, 2007, an Assumption and Release Agreement was signed by Christopher Moon, Kerri A. Kinney and Margaret M. Concra with the consent of the then holder of the Note and Mortgage (Countrywide Home Loans, Inc.) releasing Kerri A. Kinney from all obligations associated with the Note and Mortgage. Margaret M. Concra assumed all liability created by the Note and Mortgage. This document was recorded in the Columbia County Clerk's Office on January 22, 2007, at Book 598, Page 2437.

Simultaneously, an Assumption Agreement with Release of Liability was also signed by Defendants Moon, Kinney and Concra and a representative of Countrywide

Home Loans, Inc., all of whose signatures were witnessed by a notary public, Anthony G. Buono.

On May 21, 2009, the Bank of New York Mellon, formally known as the Bank of New York as Trustee, commenced a mortgage foreclosure action against both Moon and Concra on the real property, to foreclose the mortgage executed in 2005 and modified in 2007. The Summons and Complaint, which were drafted by the law firm of Frankel, Lambert, Weiss, Wiseman & Gordon, LLP recited, in paragraph 4 of the Complaint, that the Defendant Kerri A. Kinney had been released from liability for the Mortgage and the Defendant Margaret M. Concra had assumed liability for her portion of the Mortgage. These documents were filed in the Columbia County Clerk's Office under the index number assigned to the file.

On May 20, 2010, the Defendant Margaret M. Concra-Moon filed a petition under Chapter 7 of the United States Bankruptcy Code. The holder of the Note and Mortgage, Bank of New York Mellon, formerly known as the Bank of New York as Trustee, moved, in Bankruptcy Court, for relief from the automatic stay. This creditor acknowledged the existence of and attached a copy of the 2007 Assumption Agreement with Release of Liability, signed by Countrywide Home Loans, Inc. This document is a public record in the United States Bankruptcy Court for the Northern District of New York under Case

Number 10-11917 and is described as document "14". At some point, this mortgage foreclosure action was apparently discontinued.

The current mortgage foreclosure action was commenced by the filing of a Summons and Complaint and Notice of Pendency on September 7, 2016. These papers were prepared by the law firm of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. and named Christopher P. Moon, Kerri A. Kinney and Margaret M. Concra, among others, as Defendants. The law firm of Druckman Law Group. PLLC was substituted as attorneys for the Plaintiff on or about December 28, 2016. In its current Complaint, the Plaintiff alleges that it has possession of said Note and the Note is secured by said Mortgage and is either made payable to the Plaintiff or has been duly endorsed (Paragraph 6 of Plaintiffs' Complaint). In the ad damnum clause, the Plaintiff seeks a deficiency judgment against Kerri A. Kinney.

Kinney was personally served with the Summons and Complaint and Notice of Pendency on September 14, 2016. The Defendants Margaret M. Concra and Christopher P. Moon were served pursuant to CPLR 308 (4). Ms. Kinney appeared by her attorneys, Corbally, Gartland and Rappeleyea, LLP, through Brooke D. Youngwirth, Esq. Ms. Youngwirth communicated with the Druckman law firm and advised them, through their counsel, Lisa Browne, that this loan had been assumed and that Kinney had been released

from liability. The first of these communications started in October 2016 and resulted in a series of 11 Stipulations extending Kinney's time to answer.

On February 21, 2017, Ms. Browne advised Ms. Youngwirth that her client had acknowledged the existence of the Assumption Agreement and was "looking into whether Countrywide had signed a copy of the Assumption Agreement." (Exhibit E to Affirmation of Brooke D. Youngwirth, Esq., dated September 12, 2017.) On March 19, 2017, Ms. Browne confirmed that her client had obtained a copy of the signed Assumption Agreement and that she was "waiting on management in [her] office to confirm that [they] could discontinue against this defendant." (Exhibit F to Youngwirth Affirmation). On March 22, 2017, Browne and Youngwirth executed a Stipulation with the expectation that the action would be discontinued against Kinney within 60 days because she was not a proper party to the action. In the event Plaintiff did not discontinue within that 60 day period, Defendant's time to answer or otherwise move was extended to July 1, 2017. (Exhibit F to Druckman Affirmation in Opposition dated October 3, 2017.)

No Stipulation of Discontinuance was received by Defendant between March 22 and June 20, 2017, at which point Youngwirth received notice that Browne had left the Druckman law firm. Efforts by Youngwirth to determine the status of the Stipulation were met with evasion or delay until, after she threatened to file a Motion for Sanctions

on June 28, 2017, it was revealed that Mr. Druckman was handling the file and had agreed to sign a Stipulation of Discontinuance. (Exhibit K to Youngwirth Affirmation). A proposed Stipulation was sent immediately by email and then, for the first time, Mr. Druckman asked, through a paralegal, if there was a copy of the signed release by Countywide. Youngwirth responded that this had already been verified by Attorney Browne of Druckman's office. Druckman then sent the Stipulation back signed, but altered by deleting the words "with prejudice". Efforts by Youngwirth to speak directly to Druckman were unsuccessful until later in the afternoon of June 28. Another Stipulation excusing a conference in Court was prepared and signed on June 30, 2017. No Stipulation emanating from the Plaintiff's law firm was supplied with the words "with prejudice". Additional extensions of time to submit such a Stipulation were granted to the Druckman lawfirm until September 12, 2017, at which point the Motion was filed

ARGUMENTS

Kinney argues that the Complaint be dismissed against her pursuant to CPLR 3211(a) (1) and (5) with prejudice. She also seeks an award of attorney's fees pursuant to 22 NYCRR 130-1.1

The Plaintiff does not oppose the Motion to Dismiss, only that it not be with

prejudice. The only reason offered by Plaintiff's counsel for such a condition, is that his client will not consent. No further explanation is supplied. In opposition to the request for attorney's fees, Plaintiff argues that it had been courteous in granting extensions to the Defendant so that she did not have to serve an Answer. It argues further, without citation to any authority, that the Defendant had the burden to supply proof the Plaintiff's predecessor had signed the release for Kinney. Druckman maintained this position on behalf of his client, even in the face of proof that a member of his own firm had confirmed that the client had the Assumption Agreement and Kinney was not a proper party to the current action.

Druckman also argues that it was only Kinney's impatience that resulted in this needless Motion. According to him, his firm and the Plaintiff attempted to move quickly and efficiently but were subjected to numerous baseless threats of sanctions in an attempt to bully Druckman to enter into a Stipulation of Discontinuance with Prejudice. Therefore, the Motion for attorney's fees should be denied because the Motion was "unnecessary". Further, his Cross-Motion for sanctions should be granted.

In reply, Youngwirth argues that because Plaintiff had the documents in its possession already, once Defendant alerted Plaintiff to the existence of the 2007 Release, it had an affirmative duty to discontinue against this Defendant, with prejudice.

Arguments by the Plaintiff that it did not have a duty to investigate and/or that the documents that were supplied were inadequate should be disregarded. She attaches copies of the signed Assumption Agreement, the Affidavit of prior counsel in the bankruptcy proceeding acknowledging the existence of the Release, a copy of the previous Summons and Complaint which also acknowledges the release of Kinney, and the credit report of Bank of America, the servicer of the loan, indicating Kinney was no longer responsible.

Except for the credit report, all of these documents were public records, obtainable by anyone.

Viewed in light of these facts, Defendant argues the Plaintiff's Cross-Motion can only be viewed as frivolous, should the Court consider it at all. It is otherwise untimely, not in compliance with the CPLR, and should be disregarded.

DISCUSSION

CPLR §3211(a) provides that a party may move for judgment dismissing one or more causes of action asserted against them on the ground that:

> 1. A defense is founded upon documentary evidence; or....
>
> 5. The cause of action may not be maintained because arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;.... .

Plaintiff does not dispute the allegations of the Defendant that an Assumption and Release Agreement was executed January 18, 2007, by Kerri A. Kinney, Margaret M. Concra and Christopher P. Moon, some of the Defendants in the current mortgage foreclosure action. Nor does counsel dispute that an authorized representative of his firm sent an e-mail to Defendant's counsel on March 19, 2017, indicating that the Plaintiff had the Assumption Agreement and Kinney should not be a party to the action. The subsequent Stipulation clearly sets forth that this Defendant "is not a proper party to this action and therefore the action will be discontinued against her within 60 days." (Exhibit G to Youngwirth Affirmation dated September 12, 2017.)

Plaintiff's counsel offers no excuse for Plaintiff's failure to locate the Release signed by Plaintiff's predecessor in 2007. Nor does it offer any excuse for its apparent lack of awareness of the previous mortgage foreclosure action filed in the Columbia County Clerk's Office in 2009. Finally, it offers no excuse for its failure to locate the Affidavit from counsel for the previous holder of the Mortgage who had commenced the prior foreclosure action stating that Defendant Kinney had been released in 2007. (Exhibit

C to Youngwirth Reply Affirmation dated October 16, 2017.) All of these documents are matters of public record. They establish, unambiguously, that this Defendant had been released and that, therefore, she should not have been named in the current mortgage foreclosure action. There was no legitimate justification by Plaintiff or its counsel to refuse to sign a Stipulation of Discontinuance with prejudice. Accordingly, the Motion to Dismiss the Plaintiff's Complaint against this Defendant is granted, with costs of the Motion.

What is more troubling to this Court is the Affirmation of the predecessor counsel who commenced this foreclosure action. Thomas Marasco asserted, pursuant to CPLR 3012-b, that there is a reasonable basis for the commencement of this action, and that the Plaintiff is the creditor entitled to enforce rights under these documents. He purports to attach, under Exhibit A, among other documents, "all instruments of assignment…; and any other instrument of indebtedness, including any modification, extension and consolidation." He expresses, in paragraph 8 of his Certification, his awareness of his obligations under New York Rules of Professional Conduct (22 NYCRR Part 1200) and 22 NYCRR Part 130.

The Druckman law firm inherited the file and cannot be blamed for the poor quality of the searches and allegations made in the Complaint. However, once the issue

of the Release was raised by Ms. Youngwirth, this firm, and its client, had an affirmative obligation to verify the existence of such an assertion. Both lawyer and client clearly failed to meet their obligations.

No information is offered to show attempts to communicate with the prior law firm who commenced this action. No attempts are shown to locate the documents from the prior foreclosure action. Nor is there information supplied regarding attempts to contact Countrywide to verify if they signed such a release. Finally, no explanation is offered to explain the refusal by Plaintiff and its attorneys to discontinue with prejudice for six months after another member of the same firm had confirmed the existence of the Release.

Section 130-1.1 of Chapter 22 of the New York Code of Rules and Regulations provides:

> (A) the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court ....costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys fees, resulting from frivolous conduct as defined in this part.
>
> (B) the court...may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both.... The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or

corporation with which the attorney is associated.

(C)... Conduct is frivolous if:

(1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) is undertaken primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another;

(3) it asserts material factual statements that are false.
Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider... the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was to continued when its lack of legal or factual basis was apparent, should have been apparent or was brought to the attention of counsel or the party.

CPLR §8303-a imposes a duty on a party and its attorney to act in good faith to investigate a claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis. Mitchell v. Herald Co., 137 A.D.2d 213, 219, appeal dismissed 72 N.Y.2d 952. The statute is intended to prevent waste of judicial resources and reduce expenses in imposing frivolous claim. Grasso v. Matthew, 164 A.D.2d 476, Lv dismissed 77 N.Y.2d 940. An action is deemed frivolous when it is commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. (CPLR §8303-a [c] [ii]. Smullens v. McVean, 183 A.D.2d 1105 (3d Dept 1992). This Court recognizes

that the statute is not directly applicable to a mortgage foreclosure action but the definitions in subdivision (c) are echoed in 130-1.1.

Plaintiff was alerted to the existence of the claimed release in October 2016. In February 2017, Plaintiff, through its counsel, confirmed that Plaintiff had acknowledged the existence of the Assumption Agreement and was attempting to verify whether Countrywide had signed a copy. On March 19, 2017, Plaintiff's counsel confirmed that they obtained a copy of the signed Agreement. Notwithstanding that fact, Plaintiff's counsel repeatedly refused to sign a Discontinuance with Prejudice and offered no legitimate reason for such refusal. Moreover, it had already stipulated that this Defendant was not a proper party to the action. This continued delay should not be countenanced and is frivolous conduct within the meaning of 22 NYCRR §130-1.1 [c]. See Levy v. Carol Management Corp., 260 A.D.2d 27, (1st Dept. 1999) ; see also Argent Mortgage Co. LLC v. Maitland, 28 Misc.3d 1224(A) (Sup Ct NY County 2010); Wells Fargo Bank, N.A. v. Hunte, 27 Misc.3d 1209(A) (Sup Ct, NY County 2010).

Moreover, Plaintiff's Cross-Motion for Sanctions is another example of frivolous conduct by this law firm. It has no reasonable basis in law or in fact and cannot be supported by a good faith argument for an extension modification or reversal of existing law. The Cross-Motion is denied.

Accordingly, Defendant is awarded attorneys' fees associated with this Motion. These attorneys' fees shall be measured from the time spent by Defendant's counsel from February 21, 2017, to the present. Additionally, Defendant is awarded costs associated with this Motion to Dismiss the Complaint which, as indicated earlier, is granted. The obligation to pay these fees is imposed upon the Plaintiff and its current counsel, jointly and severally.

Defendant's attorney is directed to supply an Affidavit of Services of Attorneys Fees and Costs for the time indicated within 30 days of the date of this Decision and Order, on notice to Plaintiff's counsel. Plaintiff counsel's sale shall have 10 days from service of the Affidavit of services within which to respond, after which Defendant's counsel shall have 7 additional days within which to reply. The Court shall, thereafter, fix a monetary award.

The original Decision and Order is being mailed to Corbally, Gartland and Rappleyea, LLP. The original Motion papers are being sent to the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry,

or notice of entry.

This is the Decision and Order of this Court.

DATED: January 22, 2018
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Notice of Motion dated September 13, 2017; Affidavit of Kerri A. Barrett (f/k/a Kerri A. Kinney) sworn to August 15, 2017; Attorney Affirmation of Brooke D. Youngwirth, Esq., dated September 12, 2017; together with Exhibits "A" through "K"

2. Notice of Cross-motion dated October 3, 2017; Affirmation in Opposition to Motion to Dismiss and in Cupport of Cross Motion of Jaymie Sabilia-Heffert, Esq., dated October 3, 2017; Affirmation in Opposition to Motion to Dismiss and in Support of Cross Motion of Stuart L. Druckman Esq., dated October 3, 2017; together with Exhibits "A" through "F"

3. Attorney Affirmation of Brooke D. Youngwirth, Esq., dated October 16, 2017; together with Exhibits "A" through "I"

STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE, F0R THE BENEFIT OF THE CERTIFICATE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-33CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-33CB,

Plaintiffs,

-against-

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"JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

Index No. 10620-16
RJI No. 10-17-0252

DECISION AND ORDER

By Decision and Order dated January 22, 2018, this Court awarded attorneys fees in connection with the granting of a Motion to Dismiss a mortgage foreclosure action against Defendant Kerri A. Kinney.

Defendant Kinney has submitted proof of the cost of attorneys fees incurred in accordance with the direction of this Court, on notice to Plaintiff, to which there has been no objection nor comment.

Accordingly, Defendant Kerri A. Kinney is hereby awarded attorneys fees in the sum of $5,516.72. The Plaintiff and the Druckman Law Group PLLC are jointly and severally liable for the payment of the same. Said sum shall be paid within 30 days from the date a copy of this Decision and Order are served upon counsel for the Plaintiff, with Notice of Entry.

The original Decision and Order is being mailed to Corbally artland and Reappleyea, LLP. The original Affirmation of Legal Fees is being sent to the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: March 8, 2018
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Affirmation of Legal Fees of Brooke D. Youngwirth, Esq., dated February 20, 2018, together with Exhibits "A" and "B"; Affidavit of Service sworn to February 20, 2018