

Nationstar Mtge., LLC v Norton
2018 NY Slip Op 32434(U)
September 27, 2018
Supreme Court, Suffolk County
Docket Number: 1652/12
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/30/17
SUBMIT DATE 8/15/18
Mot. Seq. # 003 - MD
Mot. Seq. # 004 - MotD
Mot. Seq. # 005 - XMD

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NATIONSTAR MORTGAGE, LLC, :

Plaintiff, :

-against- :

ANN E. NORTON a/k/a ANNE E. NORTON a/k/a: :

ANN NORTON, PRECISION RECOVERY : :

ANALYTICS, INC., assignee in interest to GE : :

MONEY BANK, NEW YORK STATE DEPART- : :

MENT OF TAXATION AND FINANCE, : :

COMMISSIONER OF TAXATION AND : :

FINANCE CIVIL ENFORCEMENT CO-ATC, : :

LUCILLE GOLDER, NEW YORK STATE : :

DEPARTMENT OF TAXATION AND FINANCE : :

COMMISSIONER OF TAXATION AND : :

FINANCE TAX COMPLIANCE DIVISION : :

CHILD SUPPORT ENFORCEMENT SECTION : :

and CHRISTOPHER NORTON, : :

Defendants. : :

-----X

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Upon the following papers numbered 1 to 17 read on these motions to dismiss, separate motion for Judgment of Foreclosure and Sale and cross motion denying motion for Judgment of Foreclosure and Sale; Notices of Motion/Order to Show Cause and supporting papers 1 - 3; 4-7; Notice of Cross Motion and supporting papers: 8-11; Opposing papers: 12-13; 14-15; Reply papers 16-17; Other

Nationstar Mortgage v Norton
Index No. 12-01652
Page 2

___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#003) by the defendant, Anne Norton, for an Order granting leave to renew and/or reargue the Court's Order of June 20, 2016 and, upon renewal/reargument, dismissing the complaint pursuant to CPLR 3215(c) and RPAPL § 1304 or, in the alternative, granting defendant leave to file a late answer or restoring the matter to the calendar for a foreclosure conference, is denied; and it is further

ORDERED that those branches of plaintiff's motion (#004) for, inter alia, leave to enter a judgment of foreclosure and sale, pursuant to Real Property Actions and Proceedings Law (RPAPL) §1351, is granted, and it is further

ORDERED that the branch of plaintiff's motion (#004) seeking substitution of the plaintiff is denied, with leave to renew; and it is further

ORDERED that the cross motion (#005) by defendant, Anne Norton, for an Order of dismissal or, in the alternative, restoring the matter to the calendar for a foreclosure conference, is denied; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action for foreclosure on residential real property located in Northport, NY. Familiarity with the Court's Order June 20, 2016 (Ford, J.S.C.) is presumed, wherein plaintiff's motion (#001) for a default judgment and the appointment of a referee was granted, and defendant's cross motion (#002) to dismiss or, in the alternative, for leave to file a late answer, was denied. On January 5, 2017, defendant filed a motion (#003) which, according to the Notice of Motion, seeks dismissal pursuant to CPLR 3215(c) and RPAPL 1304 or, in the alternative, leave to file a late answer or to have the matter restored to the foreclosure settlement conference calendar. The supporting affirmation, however, seeks to support a motion to renew and reargue the Court's Order of June 20, 2016. The motion (#003) was adjourned several times and fully briefed as of February 22, 2017. For reasons unknown, the motion languished with the Court for some time. On January 19, 2018, plaintiff moved (#004) for confirmation of the referee's report and leave to enter a judgment of foreclosure and sale of the subject property incorporating the referee's findings. The defendant opposed the motion, and cross moved (#005) for dismissal of the action. The matter was reassigned to this Part pursuant to Administrative Order No. 71-18 dated August 3, 2018, and the three motions were submitted for decision on August 15, 2018.

The Court considers first the defendant's motion (#003) to renew/reargue as determination thereof may render determination of the remaining motions, academic. At the outset, the Court notes that the motion is procedurally defective to the extent that the moving papers submitted recite grounds for relief which differ from that of the supporting papers (*see* CPLR 2214[a]). Additionally, CPLR 2221, the provision upon which the affirmation in support relies, requires that "a combined

motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought” (CPLR 2221[f]). This the defendant has failed to do. While defendant’s motion should be denied on these bases, the Court addresses each herein.

A motion for leave to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry” (CPLR 2221[d]). Here, plaintiff served notice of entry of the Order on August 11, 2016, and the motion (#003) was served more than 30 days later, on January 5, 2017. Thus, the portion of defendant’s motion seeking leave to reargue is denied as untimely.

The motion for leave to renew pursuant to CPLR 2221(e) is also denied. Such a motion “shall be based upon new facts not offered on a prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion” (*Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]; see *National Loan Inv., L.P. v Ippolito*, 131 AD3d 951, 15 NYS3d 894 [2d Dept 2015]; *Wells Fargo Bank v Allen*, 130 AD3d 717, 11 NYS3d 876 [2d Dept 2016]; *Jacobson v Adler* 119 AD3d 902, 989 NYS2d 898 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Siegel v Morsey New Sq. Trails Corp.*, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). The motion must be predicated upon facts or materials in existence at the time of the original motion but not known or otherwise unavailable to the party seeking renewal (see *Nesternko v Starrett City Assocs., L.P.*, 123 AD3d 1099, 997 NYS3d 636 [2d Dept 2016]). The party seeking such relief must demonstrate a reasonable justification for the failure to present such facts on the original motion. If such is lacking, the Court lacks discretion to grant renewal (see *DLJ Mtge. Capital, Inc. v David*, 147 AD3d 1024, 48 NYS3d 234 [2d Dept 2017]; *Central Mtge. Co. v Resheff*, 136 AD3d 962, 26 NYS3d 323 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, *supra*; *Wells Fargo Bank v Allen*, 130 AD3d 717, *supra*; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 10 NYS3d 620 [2d Dept 2015]).

As noted in the Court’s Order of June 20, 2016 (Ford, J.S.C.), the defendant failed to provide a reasonable excuse for failing to answer the complaint or for her delay in moving to vacate her default and, therefore, her challenges to plaintiff’s standing and compliance with RPAPL 1304 were waived. The Court thus looks initially to whether the defendant is entitled to renewal of the Court’s prior determination that she failed to vacate her default. The Court holds that she is not. Aside from summarily stating that “Defendant’s Default is Excusable,” the defendant fails to set forth any new facts or materials which were in existence at the time the motion was filed, but that she was unaware of or were otherwise unavailable to her at that time (see *Nesternko v Starrett City Assocs., L.P.*, 123 AD3d 1099, *supra*). A motion for leave to reargue is not one which provides an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced. Nor is it one that provides a platform for the presentation of arguments different from those already presented (see *V. Veeraswamy Realty v Yenom Corp.*, 71AD3d 874, 895 NYS2d 860 [2d Dept 2010]; *Woody’s Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 817 NYS2d 391 [2d Dept 2006]; *Williams v Board of Educ. of City School Dist. of New York City*, 24 AD3d 458, 805 NYS2d 126 [2d Dept 2005]; *Simon v Mehryari*, 16 AD3d 543, 792 NYS2d 543 [2d Dept 2005]). As the defendant remains in default, the Court need not address the defendant’s issues of standing and RPAPL 1304 as raised in the instant motion, as those defenses have been waived by way of

defendant's default and failure to vacate same.

The defendant's request for renewal of that branch of the motion which sought dismissal of the complaint pursuant to CPLR 3215(c) is also denied. As noted above, the defendant fails to provide any new information or provide a change in law in connection with plaintiff's compliance with 3215(c).

The Court considers next the defendant's cross motion (#005) to dismiss, as determination thereof may render determination of plaintiff's motion (#004) academic. The defendant's cross motion (#005) seeks dismissal alleging lack of personal jurisdiction, that plaintiff failed to comply with RPAPL §§ 1303 and 1304, and that plaintiff lacked standing to commence the action. To the extent defendant's submissions rest on personal jurisdiction of the defendant, compliance with RPAPL § 1304 and CPLR 3215(c), these issues have been addressed above in connection the defendant's motion (#002) and the Court will not revisit these issues a third time. To the extent the defendant raises, for the first time, plaintiff's compliance with RPAPL § 1303, the defendant waived her right to assert this lack of compliance in failing to raise the allegation in a timely pre-answer motion to dismiss or answer (*see* CPLR 3018; *Emigrant Bank v Marando*, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; *Signature Bank v Epstein*, 95 AD3d 1199, 1200-01, 945 NYS2d 347 [2d Dept 2012]; *First N. Mortgagee Corp. v Yatrakis*, 154 A.D.2d 433, 546 N.Y.S.2d 9 [2d Dept 1989]). Where, as here, an issue is judicially determined, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue under the doctrine of the "law of the case," which applies to any legal determinations that were necessarily resolved on the merits in a prior decision (*see Martin v City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 689 [1975]; *Ahrorgulova v Mann*, 144 AD3d 953, 42 NYS3d 203 [2d Dept 2016]; *Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 29 NYS3d 398 [2d Dept 2016]). Under these circumstances, the law of the case doctrine is applicable and precludes any further consideration of these allegations (*see Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 134 AD3d 683, 20 NYS3d 418 [2d Dept 2015]; *Certain Underwriters at Lloyd's London v North Shore Signature Homes, Inc.*, 125 AD3d 799, 1 NYS3d 841 [2d Dept 2015]). For this reason, the cross motion (#005) is denied.

Turning then to plaintiff's motion (#004), the plaintiff's submissions include a Referee's Oath and Report of Amount Due to the Plaintiff dated September 20, 2017, copies of the note and mortgage, and an accounting of plaintiff's attorneys' costs in prosecuting this action. The Court has reviewed plaintiff's submissions which establish its entitlement to a judgment of foreclosure and sale, namely the referee's findings and report (*see US Bank N.A. v Saraceno*, 147 AD3d 1005, 48 NYS3d 163 [2d Dept 2017]; *Mortgage Elec. Registration Sys., Inc. v Holmes*, 131 AD3d 680, 17 NYS3d 31 [2d Dept 2015]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930, 5 NYS3d 175 [2d Dept 2015]). No hearing was required or requested (*see Wells Fargo Bank v Zelaya*, 56 Misc3d 1219[A], 2017 N.Y. Slip Op. 51068[U] [Sup. Ct. Suffolk County 2017]). There is no showing of prejudice.

The Court grants that branch of plaintiff's motion seeking attorney's fees, as the terms of the subject loan documents allows for same. Here, plaintiff has supplied the Court with an affirmation of services and requests a total of \$2,000.00. The Court finds \$2,000.00 to be reasonable, and awards plaintiff same (*see Vigo v 501 Second Street Holding Corp.*, 121 AD3d 778, 994 NYS2d 354 [2d Dept 2014]).

Nationstar Mortgage v Norton
Index No. 12-01652
Page 5

This constitutes the Decision and Order of this Court, and the Court signs the proposed Judgment, as modified.

DATED: 9/27/18



THOMAS F. WHELAN, J.S.C.