Bank of Am. v Sands
2022 NY Slip Op 32875(U)
August 22, 2022
Supreme Court, New York County
Docket Number: Index No. 810068/2010
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** — *Justice*

PART 32

INDEX NO. 810068/2010

MOTION DATE

MOTION SEQ. NO. 009

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR WAMU 2005-AR7,

Plaintiff,

- v -

NICHOLAS J. SANDS AKA NICHOLAS SANDS JPMORGAN CHASE BANK, N.A. AS SUCCESSOR TO WASHINGTON MUTUAL BANK, F.A., BOARD OF MANAGERS OF 30 EAST 76TH STREET CONDOMINIUM HOMEOWNERS ASSOCIATION, LUCY G. SANDS, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE.

Upon the foregoing documents the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering a parcel of real property located at 30 East 76th Street, Unit 7-B, New York, New York. By decision and order dated June 12, 2019, Justice Arlene Bluth Plaintiff's motion for summary judgment and issuance of an order of reference was granted. Now, Plaintiff moves to *inter alia* confirm the referee's report of amounts due and for a judgment of foreclosure and sale. Defendant Nicholas J. Sands ("Sands"), the Mortgagor, opposes the motion and moves to renew the June 12, 2019, decision, and upon same, to deny Plaintiff's motion and grant summary judgment dismissing the complaint for failure to comply with RPAPL §1304. Plaintiff opposes the cross-motion.

As to the cross-motion, Defendant Sands asserts renewal should be granted based upon a purported change in the law that allegedly occurred when, after issuance of Justice Bluth's order, the Appellate Division, Second Department issued its decision in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept 2021]. In *Kessler*, the Second Department held in an appeal from an order that granted Defendant's cross-motion to dismiss for failure to comply with RPAPL §1304 that "inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)" (*id.* at 14). In that case, it was held that Plaintiff's inclusion of "notices pertaining to the rights of a debtor in bankruptcy and in military service" in its RPAPL §1304 notice rendered it deficient as a

matter of law and necessitated dismissal of the complaint. The Second Department reasoned that its literal construction of RPAPL §1304 was dictated by well-established precedent requiring strict construction of the statue and the Court of Appeals' decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021] which expressed a need for reliable and objective rules in foreclosure matters.

In the present case, Defendant posits that the inclusion of information by Plaintiff in the notices pursuant to the Fair Debt Collection Practices Act and regarding bankruptcy rights violated RPAPL §1304. Plaintiff argues that *Kessler* does not represent a definitive ruling as required by CPLR 2221[e] because it did not overrule or abrogate prior case law holding to the contrary, that, essentially, *Kessler* was wrongly decided, that the case is distinguishable and that RPAPL §1304 is inapplicable to this action.

Generally, "[r]enewal is granted sparingly" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]). As relevant here, CPLR §2221[e][2] provides that a motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination". Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, *citing* Siegel & Connors, New York Practice § 449 [6th ed. 2018]). A "clarification of the decisional law" can also qualify (*see Puello v City of New York*, 118 AD3d 492 [1st Dept 2014]; *Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272 [2d Dept 2003]; *see also Shatz v Chertok*, 203 AD3d 527 [1st Dept 2022]). Even if decisional law is changed, unless it would alter the prior determination, it is of no moment (*see 515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 44 AD3d 707, 708 [2d Dept 2007]).

The Second Department's ruling in *Kessler* is a clear edict that if in existence at the time the questioned decision was issued would have altered the outcome thereunder (*see generally U.S. Bank Natl. Assn. v DeJesus*, ____Misc3d____, 2022 NY Slip Op 50461[U][Sup Ct Putnam Cty 2022]; *see also Deutsche Bank Natl. Trust Co. v Dormer*, 60 Misc. 3d 550 [Sup Ct Suffolk Cty 2018]). Indeed, that decision undermines the determination that Plaintiff strictly complied with the requisites of RPAPL §1304. That the principle of strict construction of RPAPL §1304 was undoubtably in existence in the First and Second Departments when this Court issued its decision (*see eg Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103 [2d Dept 2011]; *HSBC Bank USA v Rice*, 155 AD3d 443 [1st Dept 2017]), is of no moment as the specific issue in *Kessler* had not been addressed by any appellate level court in New York. Any claim that *Kessler* cannot form the basis for renewal as it "merely clarifies existing law" is futile.

Plaintiff's attempt to distinguish *Kessler* substantively and procedurally is unavailing. The 90-day notice served herein contained notices pursuant to the Fair Debt Collection Practices Act and information regarding bankruptcy rights like those concerned in *Kessler*. Plainly, inclusion of this superfluous information falls within meaning of "any" additional information "not expressly delineated" in RPAPL §1304 and renders the 90-day notice served by Plaintiff before commencement of this action ineffective. Further, "[t]he niceties of the procedural distinctions between the cases and the precise arguments raised do not give the Supreme Court a basis for disregarding an on-point ruling of a department of the Appellate Division" (*Maple Med., LLP v Scott*, 191 AD3d 81, 90-91 [2d Dept 2020]). Thus, any argument concerning the efficacy of *Kessler* and the misgivings this Court may have

concerning the soundness of the reasoning and conclusions in *Kessler* [1] are of no moment since, absent divergent authority on the issue from another department in the Appellate Division, *Kessler* is binding precedent that this Court must follow (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]).

Plaintiff's assertion that RPAPL §1304 is inapplicable is without merit. At the outset, Plaintiff raises this claim for the first time herein more than a decade after Defendant Sands filed his initial answer, *pro se*, claiming, albeit generally, that a proper default notice was not served. In the answer, and on the envelope in which it was apparently mailed to Plaintiff's counsel, Sands listed his address as "Unit 7-B". Sands' amended answer, filed by counsel in 2015, contained an affirmative defense of non-compliance with RPAPL §1304. In the intervening years, Plaintiff participated in two hearings before referees regarding the sufficiency of the service of the required 90-day notice (NYSCEF Doc No 88). It also offered arguments on motions which concerned, in whole or in part, its service of RPAPL §1304 pre-foreclosure notices. Nevertheless, it does not appear the applicability of this statute was ever raised. These circumstances would seem ripe for a claim of equitable estoppel. However, Defendant Sands proffered no reply to Plaintiff's opposition to the cross-motion.

Despite Plaintiff's rank neglect on this issue, the Court will consider the merits of this argument. Compliance with RPAPL §1304 is limited to "home loans" where, *inter alia*, the "debt is incurred by the borrower primarily for personal, family, or household purposes" and "[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling" (*see* RPAPL §1304[6][a][1][ii] and [iii]).

Here, the premises at issue, 30 East 76th Street, Unit 7-B, was acquired by Sands in 2004. At that time, Sands owned another condominium in the same building designated as Unit 7-A. The consolidated mortgage at issue, which was executed on April 29, 2005, was given as part of a modification and extension of the initial note and mortgage on the premises. As noted by Plaintiff, annexed to the consolidated mortgage is a "SECOND HOME RIDER", executed by Sands, which provides, *inter alia*, that Section 6 of the mortgage is replaced by the following:

> Occupancy. Borrower shall occupy, and shall only use, the Property as Borrower's second home. Borrower shall keep the Property available for Borrower's exclusive use and enjoyment at all times, and shall not subject the Property to any timesharing or other shared ownership arrangement or to any rental pool or agreement that requires Borrower either to rent the Property or give a management firm or any other person any control over the occupancy or use of the Property.

Based solely on this document, Plaintiff asserts it establishes, as a matter of law, that Unit 7-B was not "borrower's principal dwelling" and, therefore, not within the definition of a "home loan" in RPAPL §1304. An identical rider has been determined to be *prima facie* proof that a mortgaged premises does not qualify as a home loan pursuant to RPAPL 1304 (*see U.S. Bank N.A. v Shereshevsky*, 198 AD3d 1000, 1001 [2d Dept 2021]; *see also MLB Sub I, LLC v Mathew*, 202 AD3d 1078, 1081 [2d Dept 2022]). However, in *Shereshevsky* and *Mathew* the mortgagors failed to proffer any evidence that upon executing the rider they "thereafter used the property as their principal dwelling" (*id.*; *Nationstar*

[1] *see CIT Bank, N.A. v. Neris*, ____F Supp3d ____, 2022 U.S. Dist. LEXIS 99040 [SDNY June 2, 2022]["[T]he Court concludes that the New York Court of Appeals would not follow the bright-line rule that the Second Department adopted in *Kessler*."]; *Bank of N.Y. Mellon v. Luria*, ___Misc3d____, 2022 NY Slip Op 50384[U][Sup Ct Putnam Cty 2022]).

Mtge., LLC v Jong Sim, 197 AD3d 1178, 1181 [2d Dept 2021][Mortgage qualified as "home loan" despite that Mortgagor no longer occupied the mortgaged property as his principal dwelling when the action was commenced]; *cf. Nationstar Mtge., LLC v Gayle*, 191 AD3d 1003, 1006 [2d Dept 2021]["the mortgage loan was not a 'home loan' for purposes of RPAPL 1304 because the subject property was not the defendant's principal dwelling *prior to the commencement of the action*" [emphasis added]).

In this case, there is unchallenged proof that Sands used Unit 7-B as his primary residence before this action was commenced. The modification agreement itself stated the "Borrower's address is 50 East 76th Street, #7B". More importantly, at a hearing before Special Referee Jeremy Feinberg on the issue of the propriety of the service of the pre-foreclosure notice, held on June 11, 2018 (NYSCEF Doc No 35), Sands testified on the issue of his residence. Sands acknowledged that when the subject mortgage was given, he did not reside at Unit 7-B, but he averred that it was his home and primary residence "since approximately 2005" and that Unit 7-A is his business address. Plaintiff did not challenge this assertion at the hearing.

Accordingly, it is

ORDERED that the branch of Defendant Sands' cross-motion which sought leave to renew Plaintiff's motion for summary judgment, is granted and upon same the motion is denied, and it is

ORDERED that the branch of Defendants' cross-motion motion for summary judgment dismissing Plaintiff's complaint for failure to comply with RPAPL §1304 is granted and Plaintiff's complaint is dismissed, and it is

ORDERED that Plaintiff's motion (Mot Seq No 9) is denied.

8/22/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
APPLICATION:		GRANTED		DENIED	X	GRANTED IN PART		OTHER
		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE