

**Santander Bank, N.A. v Jefferson**

2022 NY Slip Op 33005(U)

September 6, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 601493/2019

Judge: Christopher Modelewski

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SHORT FORM ORDER

INDEX NO. 601493/2019

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY**

**PRESENT: Hon. CHRISTOPHER MODELEWSKI  
Justice of the Supreme Court**

**MOTION DATE: 6/13/2022 (003)  
Mot. Seq. # 003-MD**

-----X  
SANTANDER BANK, N.A.,

Plaintiff,

- against -

ISAAC JEFFERSON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; CLERK OF THE SUFFOLK COUNTY TRAFFIC & PARKING VIOLATIONS AGENCY; THE CHASE MANHATTAN BANK AS TRUSTEE OF IMC HOME EQUITY LOAN TRUST 1997-5 UNDER THE POOLING AND SERVICING AGREEMENT AND DATED AS OF SEPTEMBER 1, 1997; SUFFOLK COUNTY CLERK; DLJ CAPITAL MORTGAGE, INC.; "JOHN DOE #1" through and including "JOHN DOE #25", the defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,

Defendants.  
-----X

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Upon the E-file document list numbered 75 to 81 read and considered on the motion by defendant Isaac Jefferson for, inter alia, an order pursuant to CPLR 2221 (e) granting him leave to renew his opposition to plaintiff's prior motion for summary judgment and his prior motion for dismissal of the complaint; it is

**ORDERED** that the motion by defendant Isaac Jefferson pursuant to CPLR 2221(e) for, inter alia, an order granting him leave to renew his opposition to plaintiff's prior motion for summary judgment and his prior motion for dismissal of the complaint, is denied, for the reasons set forth herein; and it is further

**ORDERED** that plaintiff shall promptly serve a copy of this Order pursuant to CPLR 2103 upon counsel for defendant Isaac Jefferson and thereafter file the affidavit of service with the Suffolk County Clerk.

Familiarity with this matter is presumed, the facts having been fully set forth in this Court's prior order dated March 1, 2022 (Modelewski, J.) (the "prior order"). In the prior order, a motion by Santander Bank, N.A. ("plaintiff") for summary judgment on the complaint insofar as asserted against defendant Isaac

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Jefferson (“defendant”) was granted in part and denied in part, and a motion by defendant for dismissal of the complaint was denied.

In rendering the prior determination, this Court, among other things, dismissed all of the affirmative defenses asserted in the answer of defendant with prejudice, except for the portion of the statute of limitations defense which asserts that plaintiff’s recovery is limited to the six-year time period immediately preceding this action, and the defense asserting non-compliance with the 90-day notice requirements of section 1304 of the Real Property Actions and Proceedings Law (“RPAPL 1304”). As a result, plaintiff’s motion for summary judgment was denied without prejudice to renewal within sixty (60) days from the entry date of the order.

Defendant now moves pursuant to CPLR 2221(e) for leave to renew his opposition to plaintiff’s prior motion for summary judgment and his prior motion for dismissal of the complaint. In support of his motion, defendant submits, inter alia, an attorney affirmation and various exhibits. Defendant requests renewal based upon recent case law emanating from the Appellate Division, Second Department, namely, *Bank of Am., N.A. v Kessler*, 202 AD3d 10, 160 NYS3d 277 [2d Dept 2021] (“Kessler”)<sup>1</sup> and its progeny. The Second Department held in *Kessler* that any additional material contained in an RPAPL 1304 notice sent to the borrower that is not expressly delineated under the statute is a violation of the separate envelope requirement of RPAPL 1304 (2) (*id.* at 14, 160 NYS3d 277). In cases decided since *Kessler*, the Second Department has found that the inclusion of separate notices in the RPAPL 1304 notice also violates the separate envelope statutory requirement (*see e.g. Wells Fargo Bank N.A. v Bedell*, 205 AD3d 1064, 166 NYS3d 905 [2d Dept 2022]). The Court notes that in defendant’s prior motion to dismiss, however, he did not make the arguments that were raised in *Kessler* or its progeny but rather attacked the RPAPL 1304 notice solely on the basis that it did not contain a list of at least five housing counseling agencies serving the county where the property is located.

In opposition, plaintiff submits an affirmation of its counsel. Plaintiff argues, inter alia, that renewal should be denied on the grounds that the language in the RPAPL 1304 notice is federally mandated by the federal Fair Debt Collections Practices Act (“FDCPA”), 11 USC §1692, and the Bankruptcy Disclosure is required pursuant to the Bankruptcy Code. To that end, plaintiff argues that the FDCPA and Bankruptcy Code preempt RPAPL 1304.

A motion for leave to renew is addressed to the sound discretion of the Supreme Court (*see Matter of Swingearn*, 59 AD3d 556, 873 NYS2d 165 [2d Dept 2009]). A motion for leave to renew “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]; *see Gall v Colon-Sylvain*, 151 AD3d 701, 54 NYS3d 659 [2d Dept 2017]; *Detoni v McMinkens*, 147 AD3d 1018, 48 NYS3d 208 [2d Dept 2017] *Matter of Grande v City of NY*, 133 AD3d 752, 20 NYS3d 143 [2d Dept 2015]). A motion to renew “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e][3]). It is “not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Union Temple of Brooklyn v Seventeen Dev., LLC*, 162 AD3d 710, 713, 79 NYS3d 194 [2d Dept 2018], quoting *Kio Seob Kim v Malwon, LLC*, 155 AD3d 1017, 1018, 66 NYS3d 318 [2d Dept 2017]).

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<sup>1</sup>This Court is aware that by decision and order dated May 23, 2022, the Second Department granted the appellants’ motion for leave to appeal the *Kessler* opinion and order to the Court of Appeals.



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Here, defendant never made a Kessler argument and as such, the decision in Kessler and those decided thereafter, do not change this Court's prior determination (*see* CPLR 2221 [e]). Notwithstanding, this Court agrees with plaintiff's arguments and in doing so, follows the decisions of *CIT Bank, N.A. v Neris*, FSupp3d \_\_\_, 18 Civ. 1511, 2022 WL 1799497 (SDNY 2022) and *Bank of New York Mellon v Luria*, 171 NYS3d 807, 2022 WL 2797776 (Sup Ct. Putnam County 2022).

Accordingly, defendant's motion for leave to renew pursuant to CPLR 2221(e) is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: September 6, 2022

  
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HON. CHRISTOPHER MODELEWSKI, J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION