Nestor I LLC v Moriarty-Gentile
2023 NY Slip Op 31414(U)
May 2, 2023
Supreme Court, Suffolk County
Docket Number: 065328/2014
Judge: C. Stephen Hackeling

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

PRESENT:
HON. C. STEPHEN HACKELING, J.S.C.

INDEX NO.: 065328/2014
MOTION DATE: 3/20/23
MOTION SEQ. NO.: 009 MD

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NESTOR I LLC,

Plaintiff,

-against-

CATHY MORIARTY-GENTILE a/k/a CATHY MORIARTY GENTILE a/k/a CATHERINE MORIARTY, FIRST HORIZON HOME LOAN CORPORATION, FIRST HORIZON BANK, A DIVISION OF FIRST TENNESSEE BANK, ADVANTAGE FUNDING COMMERCIAL CAPITAL CORP., ALLSTATE INDEMNITY COMPANY, FRONTIER LEASING CORPORATION, JOSEPH GENTILE, JOY E. JORGENSEN, ONE WORLD JUDICIAL SERVICES, INC., EUROPEAN FOREIGN CLASSICS, LTD., AND HUNTINGTON HOSPITAL, JOHN DOE #1 through JOHN DOE #10,

Defendants.

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PLAINTIFF'S ATTORNEYS:
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DEFENDANTS' ATTORNEYS:
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UPON the reading and filing of defendants' Order to Show Cause and exhibits thereto (NYSCEF Doc. Nos. 287-297), plaintiff's Affirmation in Opposition and Memorandum of Law (NYSCEF Doc. Nos. 299, 300, 301-310, 312-317, 319); defendants' Reply Memorandum of Law (NYSCEF Doc. No. 320) and upon all the pleadings and proceedings heretofore had herein (NYSCEF Doc. Nos. 1-329), it is

ORDERED that defendants' application (motion sequence no. 009) is denied.

The above-captioned defendants Cathy Moriarity-Gentile, a/k/a Cathy Moriarity Gentile a/k/a Catherine Moriarity and Joseph Gentile, (hereinafter the "Defendants") bring this application seeking to undue many years of litigation before the Supreme and Appellate Courts asserting that the recently enacted Foreclosure Abuse Protection Act of 2022 (hereinafter "FAPA") vacated the Court of Appeals's holding as to the pre-FAPA law and invalidated the prior decision of this Court necessitating dismissal of plaintiff Nestor 1 LLC's (hereinafter the " Bank") complaint and voiding

its over $4,000,000.00 mortgage lien. The Bank opposes the requested relief and asserts assorted defenses including that Defendants lack standing to seek the requested FAPA dismissal relief; that Defendants are prohibited from collaterally attacking this Court's final order granting summary judgment which was decided on February 21, 2022; under the Separation of Powers doctrine which prohibits nunc pro tunc retroactive legislative readjudication of judicially resolved disputes, together with several seriously colorable additional constitutional challenges to FAPA concerning the violation of the "ex post facto prohibition on governmental interference with private contracts" and the requirement for "due process" when legislating away a vested right. It is also argued that FAPA's Senate sponsor is ethically compromised as personally benefitting by the new FAPA law.[1]

THE UNDISPUTED RELEVANT FACTS

The Bank commenced this residential foreclosure action on July 10, 2014 to foreclose a $4,000,000.00 consolidated mortgage which secures the debt evidenced by a promissory note dated September 15, 2003 as a mortgage lien against the premises located at 88 Fantasy Drive, Flanders, New York 11901, District 0900, Section 123.00, Block 02.00, Lot 001.003 (the "Property"). (NYSCEF Doc. Nos. 9, 147 and 148). Cathy Moriarity is the sole borrower under the consolidated mortgage loan. (NYSCEF Doc. Nos. 147-148). Joseph Gentile Sr. is Ms. Moriarity's husband and was the record owner of the Property when the action was commenced, pursuant to a deed from Ms. Moriarity dated April 14, 2014. Subsequent to the commencement of this action, Mr. Gentile Sr. (hereinafter "Gentile Sr.") conveyed the Property to their son, non-party Joseph J. Gentile (hereinafter "Gentile Jr."), by deed dated September 21, 2018.

Defendants failed to timely answer the complaint. On December 2, 2015, the Bank filed a motion for default judgment and an order of reference. (NYSCEF Doc. Nos. 50-62). On April 16, 2016, Defendants filed a cross-motion to dismiss the complaint as statute of limitations time-barred and for lack of personal jurisdiction. (NYSCEF Doc Nos. 63-77). By order dated April 13, 2017, the Court denied the Banks's motion and granted the branch of Defendants' cross-motion which sought to dismiss the complaint as asserted against them as time-barred. (NYSCEF Doc No. 90). The Bank appealed and the Appellate Division Second Department reversed the Supreme Court's holding stating it "should not have granted that branch of the Defendants' cross motion which was to dismiss the complaint insofar as asserted against them as time-barred". (NYSCEF Doc. No. 97).

Thereafter, by order dated December 14, 2020, this Court vacated Defendants' default and granted them leave to interpose a late answer. (NYSCEF Doc. No. 134). Defendants interposed

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[1]See page 14 of plaintiff's Memorandum of Law in opposition (Doc. #309). No authority is cited to support this argument. Accordingly, the Court determines it is not justicable. In point of fact, the Legislature has statutorally prohibited judicial imputations of bad faith to its statutory enactments. See McKinney's Cons. Laws Book 1, New York Statutes § 151.

their answer on December 23, 2020. (NYSCEF Doc No. 135). The answer included a counterclaim to quiet title and discharge the Bank's consolidated mortgage as time-barred. On December 21, 2021, the Bank moved for summary judgment and related relief. (NYSCEF Doc Nos. 144-173.) By order dated February 2, 2022, this Court granted the Bank's motion and dismissed Defendants' quiet title counterclaim with prejudice. (NYSCEF Doc No. 201.) With respect to the statute of limitations, this Court held:

> On February 18, 2021, the Court of Appeals rendered its decision in Freedom Mtge. Corp. v. Engel, 371 N.Y.3d 1. The Court in Engel resolved the circumstances under which the acceleration of amounts due under a note secured by a mortgage are "deaccelerated" or, in other words, an acceleration of a debt by a mortgage is revoked. The Engel Court held that the voluntary discontinuance of an action constitutes a revocation of the acceleration of a debt that had been accelerated by the commencement of a foreclosure action. That is the case here. Plaintiff has made a *prima facie* case that this action is ***not*** barred by the six-year statute of limitations.

The Judgment of Foreclosure and Sale was entered September 28, 2022. (NYSCEF Doc. No. 291.) After unsuccessfully seeking leave to renew this Court's February 2, 2022 order twice (NYSCEF Doc. Nos. 258 and 269), Defendants filed their instant application to renew and dismiss on January 5, 2023 (NYSCEF Doc. No. 279) based upon the newly enacted FAPA, which the Bank now opposes.

FAPA

FAPA amended six laws (CPLR §203, CPLR §205, CPLR §213, CPLR §3217, RPAPL §1301 and GOL §17-105) and added CPLR §205-a). FAPA's legislative sponsor has declared its purpose is to "overrule the Court of Appeals' recent decision in Freedom Mtge. v. Engel, 37 N.Y.3d 1 (2021)..." The reason given is "abuses of the Judicial foreclosure process...have been sanctioned by the Judiciary...[resulting] in perversion of long-standing law... an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers." NYS Senate Introducers Memorandum in Support #S5473(D), Sanders, revised 5-4-2022.

STANDING

Judicial construction in opinion making as to the import of these amendments directs that the issues of constitutionality must be bypassed if the constitutional issue can be avoided by deciding the matter by any other means. People of the State of New York v. Felix, 58 N.Y.2d 156 (1983), citing to *McKinney's Cons. Laws of New York*, Book 1 "Statutes" § 150. Accordingly, the threshold issue to be addressed is the Bank's assertion that Defendants lack standing to assert FAPA to reopen the statute of limitation's affirmative defense issue, by virtue of their pre and post complaint transfer of the Property from Cathy Moriarity to her husband, Gentile Sr. and eventually to her son, Gentile

Jr.. The Bank principally relies upon three recent Second Department cases for this proposition.

The Bank first argues that in Valiotis v. Bekas, 191 A.D.3d 1037 (2d Dept. 2021), the Court determined that the transfer of "all rights in the subject property **'prior'** to an 'Order of Reference'" revokes a borrower's standing to contest foreclosure. (Emphasis added).

Next, the Bank argues that PNC Bank Nat. Assn. v. Lefkowitz, 185 A.D.3d 1069 (2d Dept. 2020) held a defendant loses standing to contest a foreclosure after any transfer "unless a deficiency is sought."

The third case relied upon by the Bank is U.S. Bank v Davids, 188 A.D.3d 943 (2d Dept. 2020), where it determined that the loss of standing to contest foreclosure occurred upon a transfer **'after'** summary judgment and entry of an "Order of Reference" and after a waiver of a deficiency judgment. (Emphasis added.)

This Court notes that as recently as January of 2023, the Second Department Appellate Division reasserted that a party who makes an absolute conveyance of all his interest and against whom no deficiency is sought, is not a necessary party to a foreclosure action and has no standing to challenge a request for a Judgment of Foreclosure and Sale. See, Citimortgage Inc. v. Warsi , 212 A.D.3d 592 (2d Dept. 2023), citing to Nationstar Mtge., LLC v. Foltishen Inst., 199 A.D.3d 1011 (2d Dept. 2021).

In the instant case, all necessary nonstanding tests were met. Both deed transfers involved an absolute transfer of the total interest in the Property. The Cathy Moriarity to Gentile, Sr. transfer occurred April 14, 2014, prior to commencement of this action on July 10, 2014. The Gentile, Sr. to Gentile, Jr. transfer occurred September 21, 2018, after the Bank's Lis Pendens was filed, after commencement of the action, and prior to the Court's February 2, 2022, summary judgment/order of reference decision. The Bank's waiver of deficiency judgment was declared via its document filing with this Court on February 27, 2023.

During oral argument of the instant application, Defendants' counsel acknowledged and conceded that the Cathy Moriarity transfer and subsequent Gentile Sr. conveyance to Gentile Jr. divested Defendants of "standing" to assert any FAPA rights. Defendants instead limited their standing claim to Gentile, Jr., a non-party, by virtue of the fact that he now holds the deed to the Property. Inasmuch as the Gentile Jr. deed post dates the Bank's filing of a lis pendens, Gentile Jr. took title to the Property with notice of all prior proceedings. "A person whose conveyance or encumbrance is recorded after the filing [of a lis pendens] is bound by all proceedings taken in the action after such filing to the same extent as a party." New York CPLR § 6501. The purpose of a lis pendens is to create a finite class of parties who can effect the outcome of mortgage foreclosures proceedings. *See*, Siegel, *New York Practice* § 334 [6 ed], 2-15 Bergman, *New York Mortgage*

Foreclosures ¶ 15.02.

Here, it is undisputed that Gentile Jr. was not a deed-holder on the date the lis pendens was filed. He was not, and is not now, a named party to the subject complaint. All the rights of the named defendants were adjudicated upon the entry of the Judgment of Foreclosure and Sale. As Gentile Jr. is not a named party, his rights are limited to, at best, seeking to "intervene" as provided in New York CPLR §§ 1012 and 1013. As no such application is before the Court, Gentile Jr. lacks standing to assert any rights under FAPA. As none of the named Defendants have standing, this application must be denied. The stay issued by the Court in this matter is vacated.[2]

Dated: Riverhead, New York
May 22, 2023

HON. C. STEPHEN HACKELING, J.S.C.

[2]The Bank's alternative constitutional challenges to FAPA, for the purpose of this particular action, are now moot but will eventually have to be decided in other actions if raised by a party with standing. The claimed constitutional impediment to FAPA appears limited to its last sentence which provides for its retroactive application. Retroactive application of statutes is a constitutionally thorny area of the law. The Founding Fathers make two references to "ex post facto" law making prohibitions in Article 1, Sections 9 and 10 of the U. S. Constitution, in addition to laws which "impair the obligations of contract."

The first constitutional argument arises from selective "legislative adjudication" of private disputes which purport to overrule final orders of the Judicial Branch of government. It is well-established precedent that a "final" non-appealable judgment of the courts is not disturbable under a *res judicata* theory. Eddy v. U. S. Bank Nat. Assoc., 180 A.D.2d 756 (3d Dept. 2020). The summary judgment entered in the instant foreclosure case is such a final order which relied on the pre-FAPA existing law as determined by the New York Court of Appeals in its Engel decision. It appears that a "Separation of Powers" argument can be raised under both the United States and New York Constitutions.

Secondly, Appellate Courts have also determined that retroactively changing a statute of limitation which vitiates an existing valid cause of action impairs a vested right and is violative of "due process." See, Merz v. Seaman, 265 A.D.2d 305 (2d Dept. 1999); Vogel v. Lyman, 246 A.D.2d 422 (4th Dept. 1998); citing Ruffalo v. Gabarini & Sher, P.C., 239 A.D.2d 8 (1st Dept. 1998).

The third constitutional challenge involves legislative "interference in private contracts." A review of several centuries of American jurisprudence reveals a steady erosion of Article 1, Section 10's prohibition starting with the seminal case of Home Building & Loan Ass. v. Blaisdale, 290 U.S. 398, 54 S. Ct. 231 (1934) and running through the current times in Melendez v. City of New York, 16 F.4th 992 (2d Cir. 2021). Even under today's more lenient standards, any legislative retroactive change generally must give a contracting party with a vested right an opportunity to recoup any defeased contractual interest. The Court also notes that the New York Legislature itself has statutorily frowned upon retroactive application when it directed that "the legislature, however, may not enact retroactive statutes which will impair constitutional rights," i.e., impairs the obligation of a contract or interferes with a vested right. McKinney's Cons. Laws Vol. 1, New York Statutes § 51(e) "Validity of Retroactive Statutes." *See also*, Danks v. Quackenbush, 1 N.Y. 129 (1848); Philips v. Agway, Inc., 389 N.Y.S.2d 977 (Sup. Ct. Cattaraugus Cty. 1976).