Wilmington Sav. Fund Socy., FSB v East Fork Capital Equities, LLC
2023 NY Slip Op 33847(U)
October 24, 2023
Supreme Court, New York County
Docket Number: Index No. 850236/2021
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

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INDEX NO. 850236/2021

MOTION DATE

MOTION SEQ. NO. 002

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff,

- v -

EAST FORK CAPITAL EQUITIES, LLC,BOARD OF MANAGERS OF STRIVERS GARDENS CONDOMINIUM, CITY OF NEW YORK, A MUNICIPAL CORPORATION ACTING BY AND THROUGH ITS DEPARTMNT OF PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 THROUGH JOHN DOE #12,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property located at 300 West 135th Street, New York, New York. The mortgage, dated June 2, 2005, was given by non-party Martin Peters ("Peters") to non-party BNY Mortgage Company ("BNY"). The mortgage secures a loan with an original principal amount of $352,000.00 which is evidenced by a note of the same date as the mortgage. Plaintiff pleads that Peters defaulted in repayment of the loan on or about December 1, 2008. Non-party JP Morgan Chase Bank, NA ("JP Morgan"), the alleged noteholder at the time, commenced an action to foreclose the mortgage on May 5, 2009, by filing a summons and complaint. In that complaint, Plaintiff pled that it "elected to declare the entire principal balance due and owing and notified the Mortgagor of this election". While that action was pending, Defendant East Fork Capital Equities, LLC ("East Fork") became and remains the owner of the property. East Fork took title to the premises via a referee's deed dated January 20, 2016. The referee was appointed in a judgment and foreclosure and sale, dated November 5, 2015, issued in an action brought by Board of Managers of Strivers Gardens Condominium, a Defendant in this action, to foreclose on a lien for common charges (NY Cty Index No 153717/2013).

By order dated June 12, 2019, Justice Arlene Bluth dismissed the 2009 action pursuant to Uniform Rules for Trial Courts §202.48 [22 NYCRR]. Plaintiff's appeal of that order was denied by the Appellate Division, First Department in an order dated May 4, 2021 (*JP Morgan Chase Bank, N.A. v Peters*, 194 AD3d 415 [1st Dept 2021]). That Court reasoned that "[a]fter multiple opportunities to follow the court's directives, and after being fined, plaintiff was unable to properly settle an order on notice" (*id.*).

Plaintiff commenced this action on October 12, 2021, again seeking foreclosure on the 2007 mortgage. Prior to answering, Defendant East Fork moved to, *inter alia*, dismiss pursuant to CPLR §3211[a][2], [7] and [8]. That motion was denied by order of this Court dated July 15, 2022, and issue was joined by Defendant East Fork, which raised numerous affirmative defenses in their answer, including expiration of the statute of limitations.

Now, Plaintiff moves for summary judgment against Defendant East Fork, to strike its answer and affirmative defenses, for an order of reference and to amend the caption. East Fork opposes the motion and requests reverse summary judgment dismissing the complaint based upon expiration of the statute of limitations and the amendments made to the applicable statutes under the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]). Plaintiff opposes the request for reverse summary judgment positing, *inter alia*, that FAPA has neither retroactive effect nor application as well as that retroactive application of FAPA would violate the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Takings Clause thereof.

At the outset, Plaintiff's claim that the Defendant lacks standing to rely on provisions of FAPA is and its reliance on COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381) ("CEEFPA") as analogous authority is without merit. The express terms of CEEFPA provided it only applied when the "owner or mortgagor of such property is a natural person". FAPA contains no such limiting language. Indeed, the legislative history reveals that FAPA was intended to apply to "all actions". Further, FAPA's purpose was not only to protect residential homeowners, but to relieve "burdens on the courts".

The following inquiry must be whether the enactments in FAPA are retroactively applicable to this action.

FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in Freedom Mtge. Corp. v Engel" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA's legislative "response" which "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision

four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

FAPA's enactments relevant here include, CPLR §213[4], the applicable statute of limitations, which was amended to provide that "[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." (CPLR §214[4][a]). Further, FAPA added CPLR §205-a which provides, in pertinent part, that where a foreclosure action:

> is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, *a dismissal of the complaint for any form of neglect*, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, *or by failure to timely submit any order or judgment, or upon a final judgment upon the merits*, the original plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period.
>
> CPLR §205-a[a][emphases added].

That section also provides that "a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff".

With respect to the application of newly enacted civil legislation to conduct that has already occurred, a tension exists between the ordinarily recognized presumption against retroactive application of a statute and the basic principle that a court should apply the law in existence when rendering its decision (*see eg Landgraf v Usi Film Prods.*, 511 US 244, 272 [1994]; *see also Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332, 365 [2020]). The concerns that arise when reviewing these two construction canons include, but are not limited to, giving proper effect to remedial legislation, disturbing a party's reliance on previously existing legal principles and recognition of fundamental fairness. But not all newly enacted statutes have retroactive effect despite affecting past actions. But not all newly enacted statutes have retroactive effect despite apparent facial applicability to existing actions. The Court of Appeals has adopted a "framework" established by the United States Supreme Court for analyzing this issue which is as follows:

> A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights. On the other hand, a

> statute that affects only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct.

(*Regina,* supra at 366 [internal citations and quotations omitted]).

Plainly, the portions of FAPA that are applicable here have retroactive *effect* upon this and many other existing foreclosure actions. The applicability of the so-called "savings provision" under CPLR §205 was substantially altered if not virtually eliminated in foreclosure actions. A response by the Legislature to the Court of Appeals' decision in *Engel*, as well as multiple decisions of the Appellate Division interpreting CPLR §205, was not unexpected but the scope of the new procedures enacted in FAPA are significant (*see* Bruce J. Bergman, *Foreclosure Abuse Prevention Act: Time and Settlement*, NYLJ, August 29, 2023, at 5, col 2). The question therefore becomes whether retroactive *application* is justified.

For a statute to be afforded retroactive application, there must be a clear expression of the legislative purpose demonstrating that the legislature contemplated the potential unfairness of retroactive application and assessed that the benefits of application to existing cases and past conduct is an acceptable price to pay (*Regina*, supra at 366, 370). The inquiry to be resolved is "whether the legislature has expressed a sufficiently clear intent to apply the . . . amendments retroactively to these pending appeals. There is certainly no requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation" (*id.*).

Based on the express terms of the statute, the overall remedial construction of the legislation and the multiple unambiguous statements of legislative intent in FAPA's history as recounted supra, FAPA was plainly intended to apply retroactively. In the NY State Senate version of the bill, citation is made to *Gleason v Michael Vee, Ltd.*, 96 NY2d 117 [2001]. In that case, the Court of Appeals held that retroactive application of an amendment to CPLR §7502[a], which was intended to overrule a precedent[1] established by the Court of Appeals to cases dismissed in the interval between disputed decision and the legislative response, was intended despite the Legislature's silence on retroactivity. The Court of Appeals reasoned that retroactive application was intended by the immediate effectiveness of the statute and its purpose "to clarify what the law was always meant to do and say". Both those intents were undoubtedly expressed by the Legislature in support of FAPA.

Additionally, the Appellate Divisions for the First and Second Departments have tacitly acknowledged this conclusion by applying FAPA to various existing cases (*see U.S. Bank N.A. v Santos,* 218 AD3d 827 [2d Dept 2023]; *Deutsche Bank Natl. Trust Co. v Wong*, 218 AD3d 742 [2d Dept 2023]; *U.S. Bank N.A. v Simon*, 216 AD3d 1041 [2d Dept 2023]; *Bank of N.Y. Mellon v Stewart*, 216 AD3d 720 [2d Dept 2023]; *U.S. Bank N.A. v Fox*, 216 AD3d 445 [1st Dept 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]). The Appellate Division, First Department's decision in *U.S. Bank N.A. v Fox*, supra is particularly telling. In *Fox*, this Court, dismissed Plaintiff's complaint as untimely reasoning that the savings provision under CPLR §205 did not apply since a prior 2010 action for foreclosure was dismissed by Justice Mary V. Rosado for failure to prosecute at trial (*see U.S. Bank N.A. v Fox*, ___Misc3d___, 2022 NY Slip Op 30555[U][Sup Ct NY Cty 2022][Kahn III, J.]). On appeal, but after the enactment of FAPA, the First Department initially reversed this Court's decision,

[1] *Solkav Solartechnik, G.m.b.H. v. Besicorp Group Inc.*, 91 NY2d 482 [1998].

and reinstated Plaintiff's complaint (*see U.S. Bank N.A. v Fox*, 212 AD3d 422, 424 [1st Dept 2023]). The First Department reasoned, under then applicable precedent, that CPLR §205 was applicable since Justice Rosado failed to set forth a "general pattern of delay" by the lender in her decision (*id.*)[2]. Soon thereafter, the First Department permitted the parties "to brief the effect of FAPA on [that] case". Upon such further briefing, the First Department "recalled and vacated" its earlier decision and "unanimously affirmed" this Court's decision reasoning that FAPA "applie[d] to [that] foreclosure action" and that "plaintiff [was] statutorily barred from commencing [that] action" (*see U.S. Bank N.A. v Fox,* 216 AD3d at 446-447). Were FAPA not intended to have retroactive application, the First Department certainly would not have reversed itself so expediently.

Plaintiff also posits that retroactive application of FAPA is violative of its due process rights under the US Constitution as well as the Takings Clause thereunder. As a rule, "[l]egislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002] [citations omitted]). The United States Supreme Court recognized almost 30 years ago that the constitutional impediments to retroactive application of civil legislation are "modest" and that without a violation of an explicit constitutional proclamation "the potential unfairness of retroactive civil legislation is not [in and of itself] a sufficient reason for a court to fail to give a statute its intended scope" (*Landgraf*, supra at 267 and 272; *see also Regina*, supra at 365 [Noting the Court of Appeals adoption of the *Landgraf* analytical framework in *American Economy Ins. Co. v State of New York*, 30 NY3d 136 [2017]]).

While entitled to the presumption of constitutionality, retroactive legislation must meet a burden not faced by entirely prospective legislation, specifically that the questioned statute is supported by "'a legitimate legislative purpose furthered by rational means'" (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 157-158 [2017], *citing General Motors Corp. v Romein*, 503 US 181, 191 [1992]). Explained differently, constitutional muster is passed when "the retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corporation v R. A. Gray & Co.*, 467 US 717, 730 [1984]). When applying this standard, the Court of Appeals has "suggested that, in order to comport with due process, there must be a 'persuasive reason' for the 'potentially harsh' impacts of retroactivity" (*Regina,* supra at 375). The question presented is one of degree requiring consideration of: [1] the length of the retroactivity period as affecting a party's repose, [2] the forewarning of legislative change relevant to reliance on existing law and [3] the public purpose for the statute (*see Replan Dev., Inc. v Department of Housing Preservation & Dev.*, 70 NY2d 451, 456 [1987]; *see also Regina*, supra at 376).

In this case, any claim of reliance by Plaintiff on the pronouncements in certain New York appellate decisions that approved application of the "savings provision" under CPLR §205 in circumstances such as those here is unavailing, despite the lengthy period of retroactivity posed by making FAPA applicable to all unenforced foreclosure actions –ie. those where are sale has not occurred. The claim that the amendments to the "savings provision" contained in FAPA shortened the statute of limitations is factually incorrect. The limitations period provided for under CPLR §213[4] was, and remains after FAPA, at six-years. As such, any reliance on cases which hold that it is

[2] This finding was despite the First Department's own affirmance of Justice Rosado's dismissal for "failure of plaintiff to litigate its case at trial as scheduled for December 16, 2019" (*Onewest Bank, FSB v Fox*, 191 AD3d 481 [1st Dept 2021]).

impermissible to retroactively apply a statute of limitations which renders a timely commenced action, time barred[3] is misplaced. CPLR §205 is not a statute of limitations but rather a "grace period so as to extend, *if applicable*, the time within which an action can be commenced" (*United States Fidelity & Guaranty Co. v. E. W. Smith Co.*, 46 NY2d 498, 505 [1979][emphasis added]; *see also Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]). The legislative history of FAPA, particularly from the NY State Senate, makes plain that limiting the applicability of the "savings provision" to the original plaintiff in the prior action, or one acting on behalf of same, was intended clarify certain judicial misinterpretations of the existing statute[4] as well as to codify the Court of Appeals' decision in *Reliance Ins. Co. v Polyvision Corp.*, 9 NY3d 52 [2007], which the Legislature states contains the correct interpretation of its intent with respect to CPLR §205. Indeed, in discussing the holding in *Reliance*, the Court of Appeals recently observed that limiting invocation of CPLR §205[a] to only the original plaintiff in an earlier terminated action was a principle founded in "precedent" in existence for "over a century" (*see ACE Sec. Corp. v DB Structured Prods., Inc.*, 38 NY3d 643, 652 [2022]).

The political resolve which gave rise to FAPA is far from new. The Legislature's statutory forays into the area of foreclosure law, particularly residential foreclosures, has been ubiquitous over the last fifteen years. In that period, and before, multiple perceived ills in the home lending and foreclosure arenas have been addressed with the institution of various procedural and substantive requirements that did not exist at common-law[5] as well as the amendment of existing laws. Further, these novel statutes have been routinely amended when application of these edicts were found ineffective or insufficiently expansive. Legislative enactments have also been accompanied by the adoption of various codes, rules and regulations by both executive agencies and the judiciary. Ongoing uncertainty in foreclosure law has been injected by the judiciary as well. In addition to the titanic shift *Engel* caused, the Appellate Division, Second Department's decision in *Bank of America, N.A. v Kessler*, 202 AD3d 10 [2nd Dept. 2021], and its subsequent reversal by the Court of Appeals[6], also generated a flurry of litigation machinations. The upshot of all this is that forewarning to the lending industry of the likelihood of change in any portion of this area of law has not been just heralded these many years, but virtually foregone.

The public purpose of FAPA is well documented in the statute's history and the intention of the legislature that it be applied to all existing cases is express. FAPA's purpose is broadly stated as to protect homeowners from "abuses of the judicial foreclosure process" through "an onslaught of successive foreclosure actions that would otherwise be barred by the statute of limitations". To accomplish this aim, the legislature clearly stated its intention to undo judicial pronouncements which permitted lenders to "manipulate the statutes of limitation to their advantage through clarification and restoration of "long standing law". The desire to protect property owners from foreclosure abuses is rationally based on well documented wide-spread misconduct by certain mortgage lenders (*see eg* Jackie Calmes and Sewell Chan, *President Presses Bid To Rein In Loan Abuse*, NY Times, Jan. 20, 2010 §B at 1, col 0) as well as entities in the mortgage foreclosure business (*see eg* Barry Meier, *A Foreclosure Mess Draws In the Filing Lawyers, Too*, NY Times, Oct. 16, 2010 §B at 1, col 1). The Legislature's

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[3] *see eg Ruffolo v Garbarini & Scher, P.C.*, 239 AD2d 8, 12 [1st Dept 1998].
[4] *see eg Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017].
[5] Since 2000, the following are some of the New York statutes that have been enacted in response to perceived ills, inequities and abuses in the mortgage and foreclosure businesses" CPLR §§3021-b and 3408; RPAPL §§1302, 1302-a, 1303, 1304, 1305, 1306, 1307, 1308, 1393; RPL §§265-a, 265-b, 280-b, 280-d; 22 NYCRR §202.12-a. The federal legislative and regulatory enactments are too legion to recount in this footnote.
[6] *Bank of America, NA v Kessler*, 39 NY3d 317 [2023].

repeated references to toppling judicial decisions which it views misinterpreted its intent and to codify opinions in accord therewith, evidence that retroactivity was central to the enactment of FAPA (*see Regina* at 366). Based on the foregoing analysis, the Court determines that, under the circumstances presented, retroactive application of FAPA does not violate Plaintiff's constitutional due process rights.

Based on the foregoing analysis, the Court determines that under the circumstances presented, retroactive application of FAPA does not violate Plaintiff's constitutional due process rights. As such, the Plaintiff's claim that the Court must impose a "grace period" before applying FAPA fails.

Plaintiff also asserts that retroactive enforcement of FAPA would violate the Takings Clause of the Fifth and Fourteenth Amendments to the US Constitution. This right proscribes "the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation'" (*Landgraf*, supra at 266). "The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified" (*American Economy Ins. Co. v State of New York*, supra at 155). No person has a vested interest or constitutional right in any rule of law entitling them to have the precept remain unaltered (*see I. L. F. Y. Co. v Temporary State Housing Comm.*, 10 NY2d 263, 270 [1961]; *J. B. Preston Co. v Funkhouser*, 261 NY 140, 144 [1933]). Similarly, "[p]arties obtain no vested rights in the orders or judgments of courts while they are subject to review" (*Boardwalk & Seashore Corp. v Murdock*, 286 NY 494, 498 [1941]). Resultantly, Plaintiff in this case had no vested right in either the "savings statute" or any finding of this Court since no unappealable final judgment has been issued (*see U.S. Bank Trust, N.A. v. Miele*, ___Misc3d___, 2023 NY Slip Op 23186 [Sup Ct West. Cty. 2023]).

As one of the branches of relief sought by Plaintiff was summary judgment, the Court is authorized to search the record and grant accelerated judgment to the non-moving party with respect to a cause of action or issue that it a subject of the motion (*see Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425 [1996]). Here, the application of FAPA to the present action was raised by Defendant, which requested reverse summary judgment, and briefed extensively in reply by Plaintiff. Therefore, the Court finds it is appropriate to search the record and upon same it finds FAPA is applicable herein, and that this action is barred by the statute of limitations. The prior action was commenced in 2009 and the limitations period expired before the action was dismissed. Plaintiff may not avail itself of the "savings provision" under CPLR §205-a since Plaintiff herein was not a party in the 2009 action and that action was dismissed based upon "neglect" of the Plaintiff therein (CPLR §205-a[a]).

Accordingly, it is

ORDERED that Plaintiff's motion is denied and that upon searching the record, summary judgment is granted to Defendant and this action is dismissed as time barred.

10/24/2023
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		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE