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Wells Fargo Bank, N.A. v Ostiguy
2014 NY Slip Op 50424(U)
Decided on February 24, 2014
Supreme Court, Columbia County
Zwack, J.
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Decided on February 24, 2014

Supreme Court, Columbia County

Wells Fargo Bank, N.A., Plaintiffs,

against

Pierre N. Ostiguy, ELAINE R. THOMAS, "JOHN DOE #1" to "JOHN DOE No.10,", the last 10 names being fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint, Defendants.

4064-12

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Henry F. Zwack, J.

DECISION/ORDER

Zwack, J. [*2]

Wells Fargo Bank, NA moves for an order pursuant to CPLR § 2221 for leave to renew and reargue its prior motion for summary judgment. That prior motion resulted in a Decision and Order dated August 27, 2013, which denied plaintiff's motion for summary judgment dismissing defendants Answer, and granted defendants' cross-motion for dismissal of the complaint for lack of standing. Defendants Pierre N. Ostiguy and Elaine R. Thomas oppose the motion to renew or reargue.

In its Decision and Order of August 27, 2013, this Court found that the plaintiff's ownership of in the loan was sold to Freddie Mac with insufficient evidence that plaintiff retained an interest in the mortgage sufficient to establish standing. Plaintiff's prior affidavit in support of summary judgment dismissing the Answer made no mention of the salient fact that the loan had been sold and or transferred, calling into question the entire affidavit. Plaintiff now seeks to renew based upon a more specific affidavit that addresses the very question that got the complaint dismissed in the first place—the issue of who is the holder of the note. Defendants argue that the introduction of this new affidavit is impermissible, as it is neither new information nor has a reasonable excuse been proffered for plaintiff's failure to produce it on the original summary judgment motion.

CPLR § 2221 governs motions affecting prior orders, and such motions are either motions to reargue or for leave to renew, and the statute requires that they be identified as one or the other. Here, according to plaintiff, the motion is both.

A motion to reargue is based upon matters or fact or law allegedly overlooked or misapprehended by the Court in determining a prior motion, but shall not include any mattersof *fact* not offered on the prior motion (*Diorio v City of New York*, 202 AD2d 625 [2d Dept 1994]; CPLR 2211 [d][2]). It is well established that reargument does not provide a party with the opportunity to advance arguments different from those tendered in the original application, and renewal is not a second chance freely given to parties who have not exercised due diligence in making their factual presentation (*Rubenstein v Goldman*, 225 AD2d 328 [lst Dept 1996]; *Tibbets v Verizon*, 40 AD3d 1300 [3d Dept 2007]).

As a motion for leave to renew, it "must be based upon new facts, not offered on the prior motion, that would change the prior determination and the party seeking renewal must have a reasonable justification' for the failure to present such facts on the original motion" (*Joseph v Simmons*, 979 N.Y.S.2d 675, 2014 NY Slip Op. 00634 [2d Dept 2014], citing CPLR 2221[e][3]; *Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884 [2d Dept 2009]). The moving party must articulate the specific reasons why the new evidence it seeks to introduce could not have been discovered at the time of the original motion (*Binghamton Plaza, Inc. v Fashion Bug No. 2470 of Binghamton, Inc.*, 252 AD2d 870 [3d Dept 1998]). It is also well established "that successive motions for summary judgment should not be made in the guise of motions to renew where the new' material' could have been submitted with the original motion for summary judgment'" (*Laxrand Construction Corp v R.S.C.A. Realty Corp.*, 135 AD2d 685, 686 [2d Dept 1987], quoting *Rose v La Joux*, 93 AD2d 817, 818 [2d Dept 1983]).

As a motion to renew, plaintiff urges the Court to accept as fact the information contained in the new affidavit of its Vice President of Loan Documentation, Angela Frye. Plaintiff asserts that it verily believed the affidavit it submitted on the original motion was sufficient to establish that it was the holder of the note, but as the Court was not satisfied with the original affidavit it proffered, it has now submitted a more detailed affidavit. The affidavit of Angela Frye avers that plaintiff has physical possession of the note, and has had possession with the exception of a period of time it was [*3]in the possession of

plaintiff's counsel. The Court is not persuaded by the new affidavit, finding that the failure to refer to the sale of the loan to Freddie Mac on the original motion was more than an insignificant oversight. Here, plaintiff was well aware that standing was a contested issue, having been raised in the Answer, and proof of the same having been requested by defendants through discovery.[FN1] When defendants cross-moved to dismiss the complaint for lack of standing, clearly plaintiff was on notice that it's affidavit was insufficient — and it was at that point that an affidavit such as Ms. Frye's (presenting the requisite facts then known to plaintiff) should have been produced (*Rose,* 93 AD2d 817).

That plaintiff got it wrong on the original motion — whether it believed it had sufficiently addressed standing — or, as it claims, "the evidentiary standing required to demonstrate standing in a mortgage foreclosure action is a relatively new issue and the case law is constantly evolving, however erroneous, are inadequate justification for leave to renew and allow the submission of the "new" information (*Whitaker v McGee,* 95 AD2d 984 [3d Dept 1983]).

Instead of proving its case on the original summary judgment motion, now plaintiff is impermissibly attempting to cure a defect in its prior moving papers which due diligence could have prevented (*Orchard Hotel, LLC v D.A.B. Group, LLC*, 2014 WL 593182 [N.Y.A.D. 1 Dept. 2014], citing *Weinstock v Handler,* 251 AD2d 184 [lst Dept 1998], *lv dismissed* 92 NY2d 946 [1998]).

As a motion to reargue, the Court is unpersuaded by the arguments that it overlooked or misapprehended the law. Plaintiff argues that as the holder of the note it was entitled to enforce it. The Court does not disagree, but again points out that plaintiff's summary judgment motion was denied because *plaintiff then failed to establish that it was the holder of the note.* Remarkably absent from Ms. Frye's affidavit is any explanation as to what the Court viewed as a serious discrepancy — that the loan was transferred or sold or no longer belonged to Wells Fargo, and yet the Note remained it its possession.

Accordingly, it is

ORDERED, that the motion by plaintiff Wells Fargo Bank, N.A. for leave to renew and reargue the prior motion for summary judgment, and for summary judgment on its Complaint is denied.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorney for the defendants. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated:February 24, 2014

Troy, New York

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Henry F. Zwack

Acting Supreme Court Justice

Papers Considered:

1.Notice of Motion dated October 31, 2013; Affidavit of Angela M. Freye, sworn to October 30, 2013, together with Exhibits "1" through "2"; Affirmation by Robin L. Muir, Esq., dated October 31, 2013, together with Exhibits "1" through "5"; Memorandum of Law by David Dunn, Esq., and Robin L. Muir, Esq., dated October 31, 2013;

2.Affirmation in Opposition by Kim DSouza, Esq., dated November 7, 2013;

3.Reply Memorandum of Law by David Dunn, Esq., and Robin L. Muir, Esq., dated November 19, 2013.

Footnotes

Footnote 1: Plaintiffs objected to the discovery request that it provide proof that it was the holder of the note.

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