SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

21st Mtge. Corp. v. Nodumehlezi

2022 NY Slip Op 07212 (App. Div. 2022) · No. 2020-03349; 2021-03824 · Decided December 21, 2022

SUMMARY

The New York Appellate Division, Second Department reversed an order and judgment of foreclosure and sale and dismissed the foreclosure complaint against Kwaku Nodumehlezi. The court held that the plaintiff failed to establish at trial compliance with RPAPL 1303, which requires delivery of a specified foreclosure notice, and that the trial court improperly relied on documents submitted or previously filed outside the trial evidence.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Angela G. Iannacci, J.P.; Reinaldo E. Rivera, J.; Joseph A. Zayas, J.; Janice A. Taylor, J.
JURISDICTION	New York
DECIDED	December 21, 2022
DOCKET	2020-03349; 2021-03824
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendant Kwaku Nodumehlezi appealed from an order appointing a referee to compute the amount due and from an order and judgment of foreclosure and sale entered after a nonjury trial in a mortgage foreclosure action.
STANDARD OF REVIEW	In reviewing a determination made after a nonjury trial, the Appellate Division's power is as broad as that of the trial court and it may render the judgment warranted by the facts, while giving consideration in a close case to the trial court's opportunity to see and hear the witnesses.
PRECEDENTIAL VALUE	published
PARTIES	Kwaku Nodumehlezi v. 21st Mortgage Corporation

TOPICS

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PRACTICE AREAS

real estate foreclosure civil procedure appellate procedure evidence

QUESTIONS PRESENTED

1. Whether the appeal from the order appointing a referee remained directly appealable after entry of the order and judgment of foreclosure and sale.
2. Whether the plaintiff established at trial that it complied with RPAPL 1303's requirements for delivering the statutory foreclosure notice.
3. Whether the Supreme Court could rely in its posttrial decision on previously e-filed documents that had not been introduced at trial and that the defendant had no opportunity to rebut.
4. Whether noncompliance with RPAPL 1303 required dismissal of the foreclosure complaint insofar as asserted against Nodumehlezi.

HOLDINGS

1. The appeal from the order appointing a referee was dismissed because the right to take a direct appeal from that order terminated upon entry of the order and judgment of foreclosure and sale; the issues raised on that appeal were reviewable on the appeal from the later judgment.
2. A foreclosing plaintiff must establish compliance with RPAPL 1303 at trial, including delivery of the required notice with the summons and complaint and compliance with the statute's formatting and colored-paper requirements. Failure to sustain that burden requires dismissal of the foreclosure complaint.
3. A trial court may not rely on previously e-filed documents to establish a disputed element after trial when the documents were not properly introduced and the opposing party had no opportunity to rebut them.

KEY QUOTATIONS

> *"In reviewing a determination made after a nonjury trial, this Court's power is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into account that, in a close case, the trial court had the advantage of seeing and hearing the witnesses"* (*1)

> *"The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type"* (*2)

> *"Proper service of an RPAPL 1303 notice is a condition precedent to the commencement of a foreclosure action, and noncompliance mandates dismissal of the complaint"* (*3)

FACTUAL BACKGROUND

Nodumehlezi executed a $417,000 note in favor of the plaintiff's predecessor, secured by a mortgage on Brooklyn real property. The plaintiff commenced foreclosure proceedings in November 2014. At the nonjury trial, the plaintiff's witness testified about office procedures for mailing certain notices but gave no testimony establishing compliance with RPAPL 1303, and Nodumehlezi testified that he did not recall receiving the notices. The plaintiff first submitted an affidavit of service concerning the RPAPL 1303 notice with its posttrial memorandum, but the trial court relied instead on previously e-filed documents to find compliance.

PROCEDURAL HISTORY

The plaintiff commenced a mortgage foreclosure action in 2014. After a 2019 nonjury trial, the Supreme Court found that the plaintiff had complied with RPAPL 1303 and 1304 and the mortgage's notice-of-default provision, appointed a referee, confirmed the referee's report, and entered a judgment of foreclosure and sale. The Appellate Division dismissed the appeal from the earlier order, reversed the order and judgment of foreclosure and sale, denied the plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale, and dismissed the complaint insofar as asserted against Nodumehlezi.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The order and judgment of foreclosure and sale was reversed, the plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale was denied, and the complaint was dismissed insofar as asserted against Nodumehlezi. One bill of costs was awarded to Nodumehlezi.

CASES CITED

- Matter of Aho, 39 NY2d 241, 248
- Countrywide Home Loans, Inc. v. Gibson, 157 AD3d 853, 855
- Citimortgage, Inc. v. Leitman, 201 AD3d 864, 865
- Eastern Sav. Bank, FSB v. Tromba, 148 AD3d 675, 676
- Bank of Am., N.A. v. Keefer, 204 AD3d 970, 971-972
- OneWest Bank, FSB v. Cook, 204 AD3d 1025, 1026
- Lull v. Van Tassell, 171 AD3d 1155, 1157
- Caffrey v. North Arrow Abstract & Settlement Servs., Inc., 160 AD3d 121, 127
- Meenan Oil Co. v. Long Is. Light Co., 39 AD2d 233, 239