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

HSBC Bank USA, National Association v. DiBenedetti

2022 NY Slip Op 02983 (N.Y. Ct. App. 2022) · No. 2019-10054 · Decided May 4, 2022

SUMMARY

The Appellate Division, Second Department, reversed a judgment of foreclosure and sale and vacated the portion of an order granting the mortgagee summary judgment upon renewal. The court held that Denis DiBenedetti qualified as a borrower under RPAPL 1304 because the mortgage identified him as a borrower, and that HSBC failed to establish strict compliance with the statute's notice requirements because additional material accompanied the 90-day notice and a single notice was jointly addressed to both defendants.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Francesca E. Connolly, J.P.; Sheri S. Roman, J.; Joseph J. Maltese, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	May 4, 2022
DOCKET	2019-10054
DISPOSITION	reversed
PROCEDURAL POSTURE	Defendants appealed from a judgment of foreclosure and sale entered after the Supreme Court granted the plaintiff's renewed motion for summary judgment, struck the defendants' answer, and granted an order of reference.
STANDARD OF REVIEW	The Appellate Division reviewed the Supreme Court's exercise of discretion in granting leave to renew and reviewed, upon renewal, whether HSBC established entitlement to summary judgment as a matter of law.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Denis DiBenedetti, Cheryl DiBenedetti v. HSBC Bank USA, National Association

TOPICS

foreclosure · mortgages · summary judgment · appellate procedure · civil procedure

PRACTICE AREAS

real estate · mortgage foreclosure · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether the Supreme Court properly granted HSBC leave to renew its prior motion for summary judgment, to strike the defendants' answer, and for an order of reference.
2. Whether Denis DiBenedetti was a borrower subject to the notice requirements of RPAPL 1304 despite not signing the note.
3. Whether HSBC established strict compliance with RPAPL 1304 where additional material accompanied the 90-day notice and a single notice was jointly addressed to both defendants.

HOLDINGS

1. The Supreme Court providently exercised its discretion in granting HSBC leave to renew its prior motion.
2. A person who did not sign the note is nevertheless a borrower within the meaning of RPAPL 1304 when the mortgage identifies that person as a borrower on its first page and beneath the person's signature.
3. HSBC failed to establish prima facie strict compliance with RPAPL 1304 because additional material was sent in the same envelope as the required 90-day notice and one notice was jointly addressed to both defendants.

KEY QUOTATIONS

> *“"Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action"”* (at 1)

> *“Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304, since additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304”* (at 1)

FACTUAL BACKGROUND

In February 2007, Cheryl DiBenedetti executed a $903,000 note payable to Wells Fargo Bank, N.A., secured by a mortgage on Suffolk County property signed by both Cheryl and Denis DiBenedetti. Although Denis did not sign the note, the mortgage identified him as a borrower on its first page and beneath his signature. HSBC, Wells Fargo's successor in interest, commenced foreclosure in February 2014, and the defendants asserted that HSBC had not complied with RPAPL 1304. HSBC submitted a 90-day notice addressed jointly to both defendants, with additional material sent in the same envelope.

PROCEDURAL HISTORY

HSBC commenced a mortgage foreclosure action in February 2014. The Supreme Court, Suffolk County, initially denied HSBC's motion for summary judgment, to strike the answer, and for an order of reference because HSBC failed to establish compliance with RPAPL 1304. The court later granted leave to renew and, upon renewal, granted the previously denied relief, ultimately entering a judgment of foreclosure and sale. The Appellate Division reversed the judgment and vacated the renewed grant of relief, adhering to the original denial.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The judgment of foreclosure and sale was reversed; the portion of the January 30, 2018 order that vacated the February 7, 2017 determination and granted HSBC's prior motion was vacated, and the February 7, 2017 determination denying HSBC's motion was adhered to.

CASES CITED

- Citimortgage, Inc. v. Espinal, 136 AD3d 857, 858
- Bank of N.Y. Mellon v. Forman, 176 AD3d 663, 665
- Charles Schwab Bank v. Winitch, 179 AD3d 1003, 1006
- Citibank, N.A. v. Conti-Scheurer, 172 AD3d 17, 20
- Bank of Am., N.A. v. Kessler, 202 AD3d 10
- Wells Fargo Bank, N.A. v. Yapkowitz, 199 AD3d 126, 134

OPINION

PER CURIAM.

HSBC Bank USA, N.A. v DiBenedetti (2022 NY Slip Op 02983) HSBC Bank USA, N.A. v DiBenedetti 2022 NY Slip Op 02983 Decided on May 4, 2022 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on May 4, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department FRANCESCA E. CONNOLLY, J.P.

SHERI S. ROMAN JOSEPH J. MALTESE LINDA CHRISTOPHER, JJ. 2019-10054 (Index No. 61153/14) [*1]HSBC Bank USA, National Association, etc., respondent, vDenis DiBenedetti, et al., appellants, et al., defendants. John J. Caracciolo, East Northport, NY, for appellants. Shapiro, DiCaro & Barak, LLC (Reed Smith, LLP, New York, NY [Andrew B. Messite and Joseph S. Jacobs], of counsel), for respondent.

DECISION & ORDER In an action to foreclose a mortgage, the defendants Denis DiBenedetti and Cheryl DiBenedetti appeal from a judgment of foreclosure and sale of the Supreme Court, Suffolk County (C. Randall Hinrichs, J.), entered July 26, 2019.

The judgment of foreclosure and sale, upon an order of the same court dated January 30, 2018, inter alia, granting that branch of the plaintiff's motion which was for leave to renew those branches of its prior motion which were for summary judgment on the complaint insofar as asserted against the defendants Denis DiBenedetti and Cheryl DiBenedetti, to strike their answer, and for an order of reference, which had been denied in an order of the same court dated February 7, 2017, and, upon renewal, in effect, vacated the determination in the order dated February 7, 2017, denying those branches of the prior motion, and thereupon granted those branches of the prior motion, among other things, confirmed the referee's report and directed the sale of the subject property.

ORDERED that the judgment of foreclosure and sale is reversed, on the law, with costs, so much of the order dated January 30, 2018, as, upon renewal, in effect, vacated the determination in the order dated February 7, 2017, denying those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendants Denis DiBenedetti and Cheryl DiBenedetti, to strike their answer, and for an order of reference, and thereupon granted those branches of the prior motion is vacated, and, upon renewal, the determination in the order dated February 7, 2017, denying those branches of the plaintiff's prior motion is adhered to.

In February 2007, the defendant Cheryl DiBenedetti executed a note in the amount of $903,000 in favor of nonparty Wells Fargo Bank, N.A. (hereinafter Wells Fargo). The note was secured by a mortgage on certain real property located in Suffolk County.

The mortgage was signed by both Cheryl DiBenedetti and the defendant Denis DiBenedetti (hereinafter together the defendants). Denis DiBenedetti was identified as a "borrower" on both the first page of the mortgage, and below his signature.

In February 2014, the plaintiff, the successor in interest to Wells Fargo, commenced the instant action to foreclose the mortgage against the defendants, among others. In their answer, the defendants alleged that the plaintiff failed to comply with the notice requirements of RPAPL article 13.

The plaintiff subsequently moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference. In an order dated February 7, 2017, the Supreme Court, among other things, denied those branches of the plaintiff's motion, finding that the plaintiff failed to establish that it complied with RPAPL 1304.

In September 2017, the plaintiff moved, inter alia, for leave to renew those branches of its prior motion. In support of that branch of the motion which was for leave to renew, the plaintiff submitted a copy of the 90-day notice sent to the defendants pursuant to RPAPL 1304.

The notice, which was addressed to both Cheryl DiBenedetti and Denis DiBenedetti, stated, among other things, that "[t]his communication is an attempt to collect a debt and any information obtained will be used for that purpose.

However, if you have received a discharge of this debt in bankruptcy or are currently in a bankruptcy case, this notice is not intended as an attempt to collect a debt and, this company has a security interest in the property and will only exercise its rights as against the property."

In an order dated January 30, 2018, the Supreme Court granted that branch of the plaintiff's motion which was for leave to renew and, upon renewal, in effect, vacated the determination in the order dated February 7, 2017, denying those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference, and thereupon granted those branches of the plaintiff's prior motion.

In a judgment of foreclosure and sale entered July 26, 2019, the court, among other things, confirmed the referee's report and directed the sale of the subject property. The defendants appeal. The Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to renew those branches of its prior motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference (see Citimortgage, Inc. v Espinal, 136 AD3d 857, 858).

Upon renewal, however, the Supreme Court should have adhered to its determination in the order dated February 7, 2017, denying those branches of the plaintiff's prior motion. Initially, contrary to the plaintiff's contention, although Denis DiBenedetti did not sign the note, he is considered a "borrower" within the meaning of RPAPL 1304 because he was identified as such, both on the first page of the mortgage and beneath his signature (see Bank of N.Y.

Mellon v Forman, 176 AD3d 663, 665; cf. Charles Schwab Bank v Winitch, 179 AD3d 1003, 1006). Thus, the notice requirements of RPAPL 1304 apply to Denis DiBenedetti. RPAPL 1304(1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower."

"Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action" (Citibank, N.A. v Conti-Scheurer, 172 AD3d 17, 20). RPAPL 1304(2) states that "[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice."

Here, the plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304, since additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 (see Bank of Am., N.A. v Kessler, 202 AD3d 10), and a single notice was jointly addressed to both defendants (see Wells Fargo Bank, N.A. v Yapkowitz, 199 AD3d 126, 134).

Thus, upon renewal, the Supreme Court should have adhered to its determination in the order dated February 7, 2017, denying those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference.

In view of the foregoing, we need not reach the defendants' remaining contentions in support of reversal. Moreover, there has been no specific request from the defendants that this Court search the record and award them summary judgment dismissing the complaint insofar as [*2]asserted against them, and, in any event, we decline to do so. CONNOLLY, J.P., ROMAN, MALTESE and CHRISTOPHER, JJ., concur.

ENTER: Maria T. Fasulo Clerk of the Court

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