

**531 Kosciusko Partners, LLC v Montesdeoca**

2017 NY Slip Op 31931(U)

September 12, 2017

Supreme Court, Kings County

Docket Number: 500521/2013

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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531 KOSCIUSKO PARTNERS, LLC,

Plaintiff(s),

- against -

DECISION AND ORDER

Index # 500521/2013

ERIKA MONTESDEOCA, et. al.,

Defendant(s).

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Mot. Seq. # 11

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-6 _____
Opposing Affidavits (Affirmations) _____	7, 8 _____
Reply Affidavits (Affirmations) _____	9 _____

Plaintiff 531 KOSCIUSKO PARTNERS, LLC brings the instant motion to reargue this Court's Orders dated January 5, 2017 and January 9, 2017, which, respectively, denied its motion for summary judgment ("2017 Summary Judgment Denial Order") and denied the application for the appointment of a receiver, and upon reargument, granting Plaintiff summary judgment and the appointment of a receiver.

A truncated version of this action's procedural history is as follows: on or around August 31, 2005, Defendant, Erika Montesdeoca ("Montesdeoca") executed a note in favor of Greenpoint Mortgage Funding, Inc. ("Greenpoint") in the amount of \$468,750.00 secured by a mortgage on real property known as 531 Kosciusko Street in Brooklyn, New York ("Property"). On February 1, 2013, 650 Brooklyn LLC, the assignee of the note and mortgage from

Greenpoint and Plaintiff's predecessor-in-interest, commenced this foreclosure action against, among others, Montesdeoca and ERAM Properties, LLC ("ERAM")<sup>1</sup> (together referred to as "Defendant Borrowers"), for Montesdeoca's alleged default on the loan starting from February 2012 and every month thereafter.

On August 29, 2014, Plaintiff moved for summary judgment which was decided by the Hon. Carolyn Demarest by Decision and Order dated March 23, 2015 (hereinafter referred to as the "First Summary Judgment Denial Order"). In support of said summary judgment motion, Plaintiff proffered the affidavits of Menachem Gold ("Gold Affidavit"), Plaintiff's managing member, and Douglas Bottner ("Bottner Affidavit"), Vice President of Greenpoint when it entered into the note and mortgage with Montesdeoca. Justice Demarest denied Plaintiff's motion for summary judgment holding that "although [plaintiff] has demonstrated standing, plaintiff fails to make a prima facie showing supporting summary judgment in its favor, as it does not submit any admissible evidence establishing Montesdeoca's purported defaults under the terms of the Note and Mortgage." Justice Demarest further explained that "[a]lthough Gold avers that the copy of the loan-payment history included with the motion is "true and correct," such statement is insufficient to lay a foundation under CPLR 4518[a] as nothing indicates that Gold, a member of plaintiff, possesses first-hand knowledge of the truth or accuracy of the loan-history documents apparently created by, or on behalf of, Greenpoint and Capital One. Conversely, Bottner, who worked for Greenpoint and Capital One, makes no mention in his affidavit of the loan-payment history."

Having failed to establish its right to foreclose, Plaintiff's application for a receiver was also denied in the First Summary Judgment Denial Order.

On October 13, 2015, Plaintiff moved for a default judgment against Defendant Borrowers, having been granted leave to do so by Justice Demarest in an Order dated July 8,

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<sup>1</sup> Montesdeoca transferred the Property to ERAM sometime in February 2011.

2015.<sup>2</sup> In support of its motion for default judgment, Plaintiff submitted the Gold and Bottner Affidavits that were previously submitted in its initial summary judgment motion but also proffered affidavits from Johnnie Hudson (“Hudson Affidavit”), the Asset Manager for Situs Holdings, LLC, servicer for 650 Brooklyn LLC, and Jacqueline Suarato (“Suarato Affidavit”), the Assistant Vice Principal of Capital One, the servicer of the loan when it originated with Greenpoint. However, according to Plaintiff, in an attempt to settle the matter with Defendant Borrowers, Plaintiff withdrew its motion for default judgment at a motion hearing on December 15, 2015.

However, the matter did not settle. On April 22, 2016, Plaintiff filed its second motion for summary judgment which resulted in this Court’s 2017 Summary Judgment Denial Order. In denying Plaintiff summary judgment, this Court found that Plaintiff’s second motion was “primarily based on the very same affidavits and inadmissible hearsay that was submitted in support of its unsuccessful 2014 Summary Judgment Motion” before Justice Demarest. This Court also found that Plaintiff’s motion was procedurally barred as Plaintiff “failed to raise newly discovered evidence of Montesdeoca’s payment default that was unavailable when it filed the 2014 Summary Judgment Motion” and that “to the extent that the court’s June 2015 Preliminary Conference Order granted [Plaintiff] leave to file a second summary judgment motion on or before the October 14, 2015 deadline for dispositive motions, [Plaintiff] failed to do so by the court-imposed deadline.”

Now, with the instant motion, Plaintiff moves to reargue the 2017 Summary Judgment Denial Order contending that the Court erred insofar as it denied Plaintiff summary judgment on the basis that Plaintiff had previously proffered the same evidence when Justice Demarest issued the First Summary Judgment Denial Order. Plaintiff states that the Hudson and Suarato Affidavits did not exist when it filed its initial motion for summary judgment and thus were not considered at that time. Although the Hudson and Suarato Affidavits were attached to Plaintiff’s subsequent default motion, that motion had been withdrawn for settlement purposes.

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<sup>2</sup> According to this Order, Defendant Borrowers failed to appear for a mediation session before a court-appointed mediator.

Additionally, Plaintiff argues that the First Summary Judgment Denial Order did not preclude a second summary judgment motion and that, in fact, the First Summary Judgment Denial Order set the roadmap of proof needed for Plaintiff to obtain summary judgment. Further, that the June 2015 Preliminary Conference Order contemplated future dispositive motion practice and set the deadline for October 14, 2015. However, that the October 14, 2015 deadline no longer applied when the Court struck Defendant Borrowers' answer by Decision and Order dated July 8, 2015, at which point Plaintiff proceeded to file a motion for default judgment. Plaintiff submits that it filed its second motion for summary judgment seven days before the note of issue deadline and well within the 120-day period set forth in CPLR 3212[a] and that, therefore, its motion was timely.

Upon reconsideration of its motion for summary judgment, Plaintiff contends that the Hudson and Suarato Affidavits cure the deficiency noted in the First Summary Judgment Denial Order by laying the foundation necessary to admit the mortgage loan history as a business record. Specifically, that Ms. Suarato, associated with Capital One, Greenpoint's servicer, explains Montesdeoca's default and references the mortgage loan history created by Capital One confirming that the exhibits attached to her affidavit were made and kept in the course of the regular business activity of Greenpoint and/or Capital One. Further, that as part of the regular course of Capital One's business, it serviced the loans originated by Greenpoint, and, in furtherance of its servicing responsibilities, assisted Greenpoint with creating and keeping documents including payment ledgers and loan history reports. Also, that the records were made at or near the time of the events that they record by people with knowledge, or from information transmitted by a person with knowledge and who reported such knowledge in the regular course of business. Plaintiff also argues that Mr. Hudson, associated with Situs, the servicer for 650 Brooklyn LLC, similarly laid the foundation for the records created by 650 Brooklyn LLC, the assignee of the loan from Greenpoint and Plaintiff's predecessor-in-interest. Plaintiff argues that the foregoing proof, as well as the previously submitted affidavits, provide uncontroverted evidence of Defendant Borrowers' default meriting summary judgment in its favor and the appointment of a receiver.

In opposition, Defendant Borrowers argue that the Hudson and Suarato Affidavits fail to cure the deficiency noted in the First Summary Judgment Denial Order because Mr. Hudson and Ms. Suarato do not have any connection to 650 Brooklyn LLC and Greenpoint, respectively, and they do not attest to being personally familiar with the record-keeping practices of the respective entities. Defendant Borrowers also argue that Plaintiff's second attempt to obtain summary judgment is improper because leave of court was not obtained and the standard for renewal was not met because Plaintiff failed to explain its failure in providing this evidence when first moving for summary judgment.

### *Discussion*

Upon consideration of the foregoing, the Court finds that reargument is warranted. In the 2017 Summary Judgment Denial Order, the Court overlooked the fact that the Hudson and Suarato Affidavits were not proffered when the First Summary Judgment Denial Order was decided. Therefore, the determination therein that Plaintiff failed to submit admissible evidence establishing Montesdeoca's default under the terms of the note and mortgage did not apply to the Hudson and Suarato Affidavits. In addition, the Court overlooked the procedural history of this case when determining that Plaintiff's motion was untimely for being filed past the October 14, 2015 deadline set forth in the Preliminary Conference Order.

Upon reconsideration of the parties' submissions, the Court finds that Plaintiff's motion for summary judgment was not untimely. The October 14, 2015 deadline was rendered impracticable given the procedural history of the case, namely, Defendant Borrowers' failure to appear for court appearances during a brief period of time and Plaintiff's subsequent attempt to obtain a default judgment as a result. Because Plaintiff filed the second summary judgment motion prior to the note of issue deadline, it cannot be deemed to be untimely.

With regards to the substance of Plaintiff's motion for summary judgment, it is well established that "[e]ntitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment" (*see Wells Fargo Bank N.A. v Eroboba*, 127 AD3d 1176, 1177

[2nd Dept 2015]). Based on the First Summary Judgment Denial Order, the only disputed issue before the Court is whether Plaintiff has established Defendant Borrowers' purported default under the terms of the note and mortgage with admissible proof. In this regard, the Court finds that the affidavits submitted lay the necessary foundation under CPLR 4518[a] to admit the loan payment history and establish the Defendant Borrowers' default in payment. Contrary to Defendant Borrowers' contentions, the Hudson and Suarato Affidavits provide the necessary evidentiary foundation to admit the records. Among other things, both Mr. Hudson and Ms. Suarato attest to Montesdeoca's default based upon review of payment records kept in the regular course of the loan servicer's business which were maintained or created in furtherance of its servicing responsibilities and which actually evince the facts underlying Montesdeoca's default (*see Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). In opposition, Defendant Borrowers failed to raise an issue of fact.

Having established its entitlement to summary judgment, there is no dispute that Plaintiff is entitled to the appointment of a receiver under the terms of the note and mortgage.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to reargue this Court's Decision and Order dated January 5, 2017 is hereby granted, and upon reargument, this Court reverses its previous decision and hereby grants Plaintiff summary judgment and the appointment of a receiver; and it is further

ORDERED that Plaintiff is directed to submit a proposed long-form order in accordance with the foregoing directly to chambers within 45 days of notice of entry.

This constitutes the Decision and Order of the Court.

E N T E R,

  

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Sylvia G. Ash, J.S.C.