

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. DAVID P. SULLIVAN
Supreme Court Justice

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LB-CABANA SERIES IV TRUST,

Plaintiff,

-against-

FORECLOSURE PART

Index No. 14266/2013
Motion Seq. No. 027
Motion Submitted: 2/28/23

JOSEPH P. LEONARDO, et.al.,

Defendant.

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The following papers were read on this motion:

Order to Show Cause and Supporting Documents	1
Affirmation in Opposition and Supporting Documents	2
Correspondence from Defendant’s Counsel dated March 24, 2023	3
Correspondence from Plaintiff’s Counsel dated March 24, 2023	4

Defendant Joseph P. Leonardo (hereinafter “Defendant”) has moved by order to show cause seeking leave to renew, pursuant to CPLR §2221(e), with respect to the Judgment of Foreclosure entered November 30, 2015 (hereinafter the “2015 Order”) and, upon renewal, for an order dismissing the underlying action based on the expiration of the applicable statute of limitations pursuant to CPLR §1001, 1003, and RPAPL 1311(1) based upon the enactment of the Foreclosure Abuse Prevention Act. Plaintiff opposed and the motion was deemed submitted on February 28, 2023.

This action was commenced on November 26, 2013, to foreclose with respect to a note and mortgage executed by Joseph Leonardo and Audrey Leonardo on June 10, 2008 in the amount of \$504,000.00 for real property known as 2848 Riverside Dr, Wantagh, New York 11793 (hereinafter the “Property”) based on Defendants’ default on the loan as of February 22, 2010 and continuing thereafter without exception, as conceded in Defendant’s moving papers.

On or about August 5, 2010, plaintiff’s predecessor-in-interest commenced a foreclosure action in this court (hereinafter the “2010 Action”) under Index No. 014885/2010. Defendant appeared and participated in the 2010 Action by, *inter alia*, serving an answer.

The 2010 Action was voluntarily discontinued by Order Discontinuing Action and Cancelling Notice of Pendency entered December 21, 2015 which granted plaintiff’s predecessor’s unopposed motion for voluntary discontinuance.

On or about November 23, 2013, while the 2010 Action remained active, new counsel for plaintiff's same predecessor-in-interest commenced the instant foreclosure action in this court.

Defendant filed a motion to dismiss which was denied for defective service. Plaintiff moved for summary judgment, and Defendant cross-moved to dismiss. On February 23, 2015, this court granted Plaintiff summary judgment and denied Defendant's cross motion.

Defendant filed a third motion to dismiss, which was denied by the Court on February 20, 2015. Defendant moved to reargue that decision, which motion was denied on August 3, 2016.

Plaintiff moved for judgment of foreclosure and sale and Defendant cross-moved to dismiss for the fifth time. Judgment of Foreclosure and Sale was entered on November 24, 2015 (hereinafter the "2015 JFS") and Defendant's cross-motion was denied.

On November 24, 2015, Defendant moved to dismiss for the sixth time, which motion was denied by Order dated March 10, 2016. Defendant's wife Audrey ("Audrey"), also named as a defendant herein, then filed two motions to dismiss which were later withdrawn.

Audrey moved in March of 2016 to vacate the 2015 JFS by order to show cause, and Defendant moved to reargue the 2015 JFS. Both motions were jointly denied by Order dated September 22, 2016.

Defendant moved again for dismissal in August of 2016 and Plaintiff cross-moved for sanctions. Defendant and Audrey then further moved for, *inter alia*, reargument with respect to the September 22, 2016 Order, and for vacatur of the 2015 JFS. By Order dated April 11, 2017 (hereinafter the "2017 Order"), this court (Adams, J.) granted two motions by Plaintiff for sanctions (Motion Sequences 15 and 19) to the extent that "any future motions by defendants shall be by submission of an Order to Show Cause submitted on thirty-six (36) hours written notice to counsel for plaintiff of the time of submission", and denied Defendant's then-pending motions (Motion Sequences 16, 17, 18, 19, 20).

The 2017 Order was appealed, and the Appellate Division Second Department denied all pending appeals, including reargument thereof (*Wells Fargo Bank, N.A. v. Leonardo*, 167 A.D.3d 816 [2d Dept 2018]). Defendant then filed a motion to appeal to the Court of Appeals which was denied by the Court of Appeals on January 14, 2020, and reargument was thereafter denied as well (*Wells Fargo Bank, N.A. v. Leonardo*, 34 N.Y.3d 908 [2020]; *Wells Fargo Bank, N.A. v. Leonardo*, 35 N.Y.3d 984 [2020]).

Defendant now moves, by Motion Sequence 27, some eight years post-judgment, for an order vacating the 2015 JFS and dismissing the action arguing that the instant case is barred by the statute of limitations in light of the enactment of the Foreclosure Abuse and Prevention Act (hereinafter "FAPA") on December 30, 2022 and its retroactive application.

Plaintiff argues that FAPA does not apply retroactively in this matter, and that, if it does, they have, in any event, "enforced" the 2015 JFS through their attempts to schedule

sales. Plaintiff further contends that the retroactive application would render FAPA unconstitutional.

FAPA amended six laws (CPLR § 203, CPLR § 205, CPLR § 213, CPLR § 3217, RPAPL § 1301 and GOL § 17-105 and added CPLR § 205-a). According to the Bill Jacket, the stated purpose and intent of FAPA, *inter alia*, is to “ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions” and “to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs” (Sponsor Memo, Bill Jacket, L. 2022, ch 821). FAPA recognized that “the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage”. (*Id.*).

Defendant now argues that he is entitled to renewal pursuant to CPLR §2221(e) based upon a change in the law.

Plaintiff argues that FAPA cannot be applied retroactively in the instant matter, however this claim is belied by the express language of the statute. (See, *Deutsche Bank National Trust Company as Trustee for Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE5 v. Dagrín*, 2023 N.Y. Slip Op. 23103 [Sup Ct, Queens County 2023]).

FAPA (§10) states that “This act 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”.

As a general matter, enforcement of a foreclosure judgment occurs upon the conducting of the sale. (CPLR §5240; See, *Guardian Loan Co., Inc. v. Early*, 47 N.Y.2d 515 [1979]). However, it is well-settled that property rights that are vested by the action of the court are placed beyond the reach of legislative power to affect (*Gilman v Tucker*, 13 L.R.A. 304 [1891]). “After adjudication the fruits of the judgment become rights of property” (*Id.*). “[V]ested property rights under a final judgment or determination in the nature of a judgment cannot be affected by subsequent legislation” (*People ex rel. H.D.H. Realty Corp. v Murphy*, 194 A.D. 530 [1st Dept 1920], citing *Gilman v. Tucker, supra*).

In the instant matter, Plaintiff has been attempting to schedule a sale for nearly a decade and has been thwarted over and over again by Defendant’s vexatious motion practice and delay tactics. This Court (Adams, J.) imposed limitation on further motion practice in the 2017 Order.

In circumstances where a motion is pending seeking the vacatur of a judgment of foreclosure and sale, or any other relief that would impact the validity of the judgment, but no temporary restraining order is issued, a plaintiff is left with a quagmire. Plaintiff may conduct the sale at their peril, thus risking that the sale is ultimately cancelled, or that the subsequent transfer of the property while decision is pending potentially divests them of their investment at the eleventh hour and could leave them owing restitution. The choice does not always lie with the plaintiff, as is the case here, where multiple sales have been cancelled as a result of temporary restraining orders issued in connection with repeated orders to show cause ultimately determined to be meritless. Thus, a defendant,

through the mere filing of a motion when a sale is already scheduled, regardless of its merits, is empowered to thwart plaintiff's efforts to enforce their judgment and, if FAPA is to be retroactively applied at this very particular stage of the proceedings, deny a plaintiff the fruits of their judgment which by virtue of the adjudication are vested property rights. Those vested property rights are beyond the reach of subsequent legislative alteration, and thus an interpretation of FAPA that results in an impairment of already vested rights cannot be inferred to be the legislative intent of the statute. (see, *Newrez LLC v. Kalina*, 78 Misc.3d 1217(A) [Sup Ct, Albany County 2023]; *MTGLQ Investors, L.P. v. Gross*, 2023 N.Y. Slip Op. 23082 [Sup Ct, Westchester County 2023]; *Gilman v. Tucker, supra*.)

As cited in FAPA's Sponsor Memo as it pertained to the effective date of the legislation, and thus its retroactivity, the Court of Appeals articulated the standard for statutory retroactivity analysis in *Matter of Gleason (Michael Vee, Ltd.)* (96 N.Y.2d 117 [2001]) stating that:

In determining whether a statute should be given retroactive effect, we have recognized two axioms of statutory interpretation. Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be. (internal citations omitted)

“Retroactivity is generally disfavored in the law” (*Eastern Enterprises v. Apfel*, 524 U.S. 498 [1998]). However, courts defer to the legislature where the applicable legislation contains express language pertaining to retroactivity “unless it reaches so far into the past or so unfairly as to constitute a deprivation of property without due process” (*Varrington Corp. v. City of New York Dep't of Fin.*, 85 N.Y.2d 28, 32 [1995]; *Deutsche Bank v. Dagrín, supra*).

“An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent and some other construction should be placed upon the statute, if possible, without violation of its language” (McKinney's Cons Laws of NY, Statutes §143).

In articulating the justification for FAPA, the Sponsor notes that:

Thus, while the Legislature fully agrees with the judiciary that “clear” and “bright line” rules should govern actions involving real property related instruments (see *Bank of Am., N.A. v. Kessler*, 202 AD3d 10, 14 (2d Dept 2021); citing *Engel*, 37 NY3d at 19, 20, 24), the rules pronounced in *Engel* contravene the legislative purpose and express language of numerous statutes and undermine ***the important public policy of giving repose to human affairs.***

Accordingly, this remedial legislation seeks to level the playing field for all parties engaged in litigation involving mortgage related real property instruments and ***ensure the statute of limitations not only applies equally to all, but is impervious to unilateral manipulation.*** (Sponsor Memo, Bill Jacket, L. 2022, ch 821 [emphasis added])

In the instant matter the application of FAPA retroactively at the specific moment in the timeline of the action where a plaintiff has undertaken affirmative steps toward the enforcement of the judgment by scheduling the sale would effectively take the proverbial sword from the hands of a plaintiff and rather than shielding the defendant, hand them the sword. This flies in the face of the legislature's stated intent to thwart unilateral manipulation of statutory limitations and would be directly contrary to the public policy of giving repose to human affairs by denying plaintiff, rather than defendant, repose.

In this case, Plaintiff's near-decade long efforts to sell the subject property have been forestalled due to a series of ultimately denied motions such that the 2015 JFS has not been "enforced". A statute explicitly intended to level the playing field and ensure that plaintiffs do not have access to the perpetual ability to reset their own statute of limitations cannot be reasonably construed as to have been intended to instead provide a savvy and/or litigious defendant the infinite opportunity to prevent a plaintiff from enforcing their judgment and reaching the case's conclusion. Beyond a retroactive deprivation of vested rights, such a construction would reward dilatory tactics and lead to patently unreasonable results.

Therefore, to the extent that Defendant seeks renewal based upon the retroactive application of FAPA where Plaintiff has already scheduled a sale, despite the fact that the sale was not actually conducted, the court finds that such would not be a reasonable interpretation of FAPA. For the purposes of the retroactive applicability of FAPA, once a sale has been scheduled the judgment is deemed enforced, and therefore Defendant is not entitled to renewal.

It is axiomatic that a constitutional question must be bypassed if the constitutional issue can be avoided by deciding the matter in some other fashion. (*People of the State of New York v. Felix*, 58 NY2d 156 (1983), citing to McKinney's Cons Laws of NY, Statutes §150; *Nestor I LLC v. Moriarty-Gentile*, 78 Misc.3d 1233(A) [Sup Ct, Suffolk County 2023]). Inasmuch as the instant matter is resolved on other grounds, this court need not reach the issue of constitutionality.

Accordingly, it is hereby:

ORDERED, that the motion is hereby denied in its entirety. Plaintiff may proceed.

This constitutes the decision and order of the Court.

JUNE 12, 2023



HON. DAVID P. SULLIVAN, J.S.C.