

At a term of the Supreme Court of the
State of New York, held in and for the
County of Nassau, at 100 Supreme Court
Drive Mineola, New York 11501, on
the 5th day of January, 2021

PRESENT:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

.....X
CHRISTIANA TRUST, A DIVISION OF
WILMINGTON SAVINGS FUND SOCIETY, FSB
NOT IN ITS INDIVIDUAL CAPACITY BUT
SOLELY AS SHAP NR TRUSTEE,
Plaintiff,

- against -

CHRISTINA VASTO A/K/A CHRISTINA S.
VASTO, et.al.

Defendants.

..... X

**DECISION AND
ORDER ON MOTION**

Index No: 1613/14

Motion Sequence: 004

The following papers were read on the instant motion:

Plaintiff's Notice of Motion and Supporting Documents and Memorandum of Law
Defendant Christina Vasto's Affirmation in Opposition and Supporting Documents
Plaintiff's Memorandum of Law in Further Support

Plaintiff moves by notice of motion for an order pursuant to CPLR §2221(d) and/or (e) permitting renewal and/or reargument of this Court's Decision and Order on Motion dated July 29, 2019 (hereinafter "Prior Decision") and, upon renewal/reargument, for an order granting them summary judgment and the striking of the answer filed by Defendant Christina Vasto. Defendant Vasto opposed the motion, and Plaintiff submitted a reply memorandum of law. Pursuant to A.O. 157/20, and based upon the ongoing impact of the Covid-19 pandemic on Court operations, a virtual conference was held on November 18, 2020 via Microsoft Teams and attended by all counsel. The instant motion was deemed fully submitted on consent at the conclusion thereof.

CPLR §2221(d) states that,

"A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals".

CPLR §2221(e) states that,

“A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion”.

Plaintiff argues first that the instant motion is timely inasmuch as Defendant Vasto never served the Prior Decision or notice of entry and Plaintiff actually filed and served Notice of Entry on October 6, 2020 and filed the instant motion October 7, 2020. Plaintiff is correct as Defendant Vasto’s failure to serve notice of entry never started the clock on the time for Plaintiff to file the instant motion. *Matter of Reynolds v Dustman*, 1 N.Y.3d 559 (2003).

Defendant Vasto argues in opposition that the motion is untimely, which argument is without merit as noted. Defendant Vasto further argues that Plaintiff is not entitled to leave to renew inasmuch as their newly submitted evidence, to wit, the affidavit of Marc DiTomaso, Esq. which sufficiently establishes that the omission of his signature as notary with respect to the Mortgage was merely a scrivener’s error which correct the defect referred to by the Court in the Prior Order. The Court stated that “the Mortgage, which is signed by both Christina Vasto and Rita Trimble, bears a notary stamp but is missing the signature of the notary public and therefore the notary certification is defective”. Though Defendant Vasto argues that Plaintiff does not demonstrate a reasonable justification for their failure to present this affidavit with respect to the underlying motion, Plaintiff correctly notes that the Court brought this issue forth in the Prior Decision and the instant motion was Plaintiff’s first attempt to address this matter. Therefore, Plaintiff is entitled to leave to renew with respect to this issue and, upon renewal, it is determined that the validity of the notary certification is demonstrated sufficiently through the affidavit of Marc DiTomaso, Esq..

The remainder of Defendant Vasto’s opposition to the substance of instant motion is predicated upon two conclusory statements unsupported by any statutory or case precedent. Defendant Vasto states that,

“At the time of the execution of the mortgage, the Defendant Vasto, the only signature on the note, only held a life estate interest in the subject property and, as was argued in the original motion, could only surrender her life estate as collateral for this note . . . It is submitted herein that the owner of the property, Rita Trimble, had not guaranteed or otherwise participated in the note and so had no obligation to the lender as was required to perfect an interest in the property to the lender”.

A plaintiff's right to judgment of foreclosure is established as a matter of law through the production of the unpaid note, mortgage and evidence of the mortgagor's default, thereby shifting the burden to the defendant to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact. *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895 (2nd Dept. 2013); *Solomon v Burden*, 104 AD3d 839 (2nd Dept. 2013); *US Bank N.A. v Denaro*, 98 AD3d 964 (2nd Dept. 2012).

Plaintiff argues that they are entitled to leave to reargue inasmuch as they assert that the Court overlooked and/or misapprehended matters of law and fact with respect to Plaintiff's right to foreclose on the subject property based upon Defendant Vasto's status as holder of a life estate. As correctly argued by Plaintiff, "nothing about the fact that the recipient of the loan and the mortgagor are not the same person impairs the validity of an otherwise valid mortgage-secured loan transaction", and therefore the Mortgage may be enforced and foreclosed upon regardless of the parties' rights and obligations under the Note. *Amherst Factors, Inc. V. Kochenburger*, 4 N.Y.2d 203 (1958). Accordingly, Plaintiff has met its burden of demonstrating an entitlement to leave to reargue and, upon reargument, an entitlement to summary judgment thus shifting the burden to Defendant Vasto to demonstrate a triable issue of fact.

Defendant Vasto's opposition to the instant motion contains no such demonstration or argument. Resurrecting their opposition papers with respect to the underlying motion, Defendant Vasto had abandoned nearly all of the affirmative defenses contained in her answer as the opposition was predicated entirely upon the argument related to their assertion that Plaintiff lacked standing to foreclose based upon the absence of Rita Trimble's signature on the Note, which argument has been deemed meritless. *See, Kronick v. L.P. Thebault Co., Inc.*, 70 A.D.3d 648 (2d. Dept. 2010).

Accordingly, it is hereby:


ORDERED, that Plaintiff's motion is hereby granted in its entirety and, upon renewal and reargument, Plaintiff's underlying motion seeking summary judgment is granted and the answer filed by Defendant Christina Vasto is hereby stricken. Plaintiff shall submit a proposed order on notice; and it is further

Plaintiff shall serve a copy of this order upon all defendants within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Date: 1/15/2021



HON. JULIANNE T. CAPETOLA
J.S.C.