

**U S. Bank N.A. v Speller**

2022 NY Slip Op 34811(U)

December 21, 2022

Supreme Court, Putnam County

Docket Number: Index No. 500088/2022

Judge: Victor G. Grossman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT – STATE OF NEW YORK  
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF PUTNAM

-----x  
U.S. BANK NATIONAL ASSOCIATION, etc.,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS,  
et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 500088 / 2022  
Mot. Seq. Nos. 3, 4, 5, 6

-----x **ORDER**

This is a residential mortgage foreclosure action. By prior Decision and Order dated October 26, 2022, the Court granted Plaintiff’s motion for summary judgment and an order of reference. Defendant Michael Speller *pro se* thereafter filed four (4) separate motions for reargument and renewal of that Decision and Order.

Among Mr. Speller’s arguments in opposition to Plaintiff’s motion for summary judgment was that Plaintiff had failed to strictly comply with RPAPL §1304 in that the 90-day notice contained a “mini-Miranda” warning per 15 U.S.C. 1692e in violation of *Bank of America v. Kessler*, 202 AD3d 10 (2d Dept. 2021). In its Decision and Order, the Court wrote:

The conflict between the requirements of RPAPL §1304 as interpreted by the Second Department in *Bank of America v. Kessler*, *supra*, and those of the Federal Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (FDCPA), was previously addressed by this Court in *Bank of New York Mellon v. Luria*, 76 Misc.3d 724, 171 NYS3d 807 (Sup. Ct. Putnam Co. 2022). The Court therein held that “insofar as *Kessler* and its progeny prohibit inclusion of the FDCPA “mini-Miranda” warning and bankruptcy advisory in a Section 1304 90-day notice, the rule promulgated by those cases is inconsistent with the provisions of the FDCPA and is preempted by virtue of 15 U.S.C. §1692n.” *See, id.*, 171 NYS3d at 823. The record herein clearly shows that Plaintiff’s

mortgage servicer was a “debt collector” subject to the requirements of the FDCPA because the Defendants’ mortgage was in default long before it commenced servicing the loan on Plaintiff’s behalf. *See, Roth v. Citimortgage Inc.*, 756 F.3d 178, 183 (2d Cir. 2014); *Jones v. New Penn Financial, LLC*, *supra*, 2020 WL 8771252 at \*4-5; *Zirogiannis v. Seterus, Inc.*, 221 F.Supp.3d 292, 302 (E.D.N.Y. 2016), *aff’d* 707 Fed. Appx. 724 (2d Cir. 2017); *JPMorgan Chase Bank, N.A. v. Mantle*, 134 AD3d 903 (2d Dept. 2015); 15 U.S.C. §692a, subd. 4, 6(F). Contrary to Defendants’ suggestion, then, the inclusion of a FDCPA “mini-Miranda” warning in the 90-day notice was required and may not be deemed a violation of RPAPL §1304.

(Decision and Order dated October 26, 2022, p. 3).

On his motion for reargument, Mr. Speller argues for the first time that (1) co-defendant Ellen Fitzsimmons is a party to the mortgage but not to the promissory note; (2) as a party to the mortgage she qualifies as a “borrower” entitled to an RPAPL §1304 notice; (3) since she is not a party to the note, she is not a “consumer” owing a “debt” within the meaning of the FDCPA; and thus (4) as to Ms. Fitzsimmons, then, the FDCPA “mini-Miranda” warning included in the 90-day notice was not required by Federal law, wherefore its inclusion violated Section 1304 as interpreted by the Second Department in *Bank of America v. Kessler*, *supra*.

Mr. Speller, representing himself *pro se*, is not entitled to assert Ms. Fitzsimmons’ rights under RPAPL §1304. More broadly, as Mr. Speller does not claim to be an attorney-at-law his purported representation of Ms. Fitzsimmons in answering the Complaint and otherwise in this action constituted the unauthorized practice of law in violation of Judiciary Law §478. *See, Discover Bank v. Gilliam*, 199 AD3d 645 (2d Dept. 2021); *Whitehead v. Town House Equities, Ltd.*, 8 AD3d 369 (2d Dept. 2004); *Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP*, 93 AD3d 452 (2012); *People ex rel. Field on Behalf of Field v. Cronshaw*, 138 AD2d 765 (2d Dept. 1988). “New York law prohibits the practice of law in this State on behalf of anyone other than himself or herself by a person who is not an admitted member of the Bar...”

*Discover Bank v. Gilliam, supra; People ex rel. Field on Behalf of Field v. Cronshaw, supra.*

Mr. Speller's marriage to Ms. Fitzsimmons does not permit him to appear *pro se* on her behalf. *See, id.* Although Plaintiff never objected to Mr. Speller's unlawful appearance and filings on behalf of Ms. Fitzsimmons, the defect is not waivable because it involves the practice of law in violation of Judiciary Law §478. *See, Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP, supra*, 93 AD3d at 453.

Accordingly, the Defendants' Answer to the Complaint and opposition to Plaintiff's motion for summary judgment, insofar as they purport to be asserted on behalf of Ms. Fitzsimmons, are stricken. The Court's October 26, 2022 Decision and Order as well as the associated Order of Reference are vacated to afford Ms. Fitzsimmons an opportunity to appear and participate in this action, either *pro se* or with appropriate counsel. *See, Discover Bank v. Gilliam, supra. See also, Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645, 650 (2019); *Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP, supra.* Defendant Michael Speller's motions for reargument are accordingly denied as moot.

It is therefore

ORDERED, that the Defendants' Answer, insofar as it purports to be asserted on behalf of defendant Ellen Fitzsimmons, is stricken, and it is further

ORDERED, that the Defendants' opposition to Plaintiff's motion for summary judgment, insofar as it purports to be asserted on behalf of defendant Ellen Fitzsimmons, is stricken, and it is further

ORDERED, that the time for defendant Ellen Fitzsimmons to appear and answer the Complaint, either *pro se* or by appropriate counsel, is extended to January 10, 2023, and it is further



ORDERED, that the Court's prior Decision and Order dated October 26, 2022 and the Order of Reference of even date therewith are vacated, and the defendant Michael Speller's four motions for reargument are denied as moot, and it is further

ORDERED, that the time for defendant Ellen Fitzsimmons to file opposition to Plaintiff's motion for summary judgment, either *pro se* or by appropriate counsel, is extended to January 24, 2023, and it is further

ORDERED, that the return date of Plaintiff's motion for summary judgment is adjourned to January 31, 2023.

The foregoing constitutes the interim order of the Court.

Dated: December 21, 2022    ENTER  
Carmel, New York

  
HON. VICTOR G. GROSSMAN, J.S.C.