

**Wells Fargo v Butters**

2024 NY Slip Op 32276(U)

January 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 515044/2015

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10<sup>th</sup> day of January 2024.

PRESENT:

HON. LARRY ~~Justice~~ Lawrence Knipel  
J.S.C.

Index No.: 515044/15

WELLS FARGO,

Plaintiff,

**DECISION AND ORDER**

-against-

TIMOTHY BUTTERS et al,

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this

Motion:

**Numbered**

- Papers**
- Motion (MS 5)
- Opp/Cross (MS 6)
- Opp to Cross
- Cross-Reply

- 1
- 2
- 3
- 4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This action was commenced on December 11, 2015. Defendants Butters and Waycross Vista separately answered through the same counsel, Bruce Richardson. On October 26, 2016, Plaintiff moved for summary judgment and an order of reference. The requested relief was granted without written opposition on February 15, 2017. Shortly thereafter, the answering defendants moved for vacatur of the order, alleging that the motion had not been properly served upon counsel. That motion was subsequently denied. Plaintiff's motion for judgment of foreclosure and sale was then granted – also without opposition – on March 27, 2018. Notice of entry was served and filed the following month.

Auctions were scheduled for July 5, 2018, February 14, 2019, and September 12, 2019. All three were cancelled when a defendant filed bankruptcy shortly beforehand. In the interim, Plaintiff's ex parte motion for an extension of time to hold the sale was granted – including a provision that if the sale were to be “further postponed or cancelled and rescheduled by proper notice of sale to any party entitled to such notice and the Court, the latter sale date is hereby confirmed valid *sine die* so long as no written objection is received from any party at least two-weeks prior to said scheduled sale date.” Following the dismissal of the third bankruptcy, Plaintiff states that it was unable to schedule a sale due to the moratoria occasioned by the COVID-19 pandemic.

On May 26, 2021, Plaintiff filed a motion seeking to amend the judgment to comply with the Kings County Foreclosure Auction Plan adopted due to the pandemic. The requested relief was granted by order dated November 23, 2022. During the pendency of the motion, Richardson e-filed a letter stating that Jean Weisbrod, the sole shareholder of Waycross, had died and that his representation had, thus, terminated.

Plaintiff scheduled an auction for July 13, 2023. However, the day before the sale “the Estate of Jean Weisbrod, owner of defendant Waycross Vista”<sup>1</sup> filed an order to show cause through its counsel Morris Fatcha. Therein, it sought to stay the sale, vacate the judgment of foreclosure and sale under RPAPL 1351, renew the denial of its prior motion to vacate the summary judgment (now citing a change of law), and for the action to be dismissed as untimely. The OSC was signed by the Honorable Cenceria Edwards but interim relief was denied as she made the motion returnable the morning of the 13<sup>th</sup>. As Plaintiff did not have an opportunity to file opposition<sup>2</sup>, the matter was adjourned to August 3<sup>rd</sup> to allow it to do so. As there was no stay in place, Butters then filed for bankruptcy, stopping the sale.

<sup>1</sup> The Court notes that the estate is not a party. Waycross, a corporate entity, is the record owner of the property. Even, assuming arguendo, that ownership of the company passed to the estate, that would not convene standing upon it to seek relief in this action in its own name – Waycross is a defendant and the motion should have been brought by it. Further, it is unclear from the record whom the movant, “the estate”, actually is. It seems that an administrator was already appointed but that individual appears to be Heath rather than Hewitt (see Kings County Surrogate's Court file 2022-1413) who put in an affidavit in support of the OSC.

<sup>2</sup> The signed OSC was uploaded at 456 PM on 7/12 and directed that service be made no later than 10 AM on the 13<sup>th</sup>. The appearance, however, was set for 930 AM.

for summary judgment – and the basis for the denial was the lack of reasonable excuse. As such, a change in law as to a potential defense to this action would have no effect on the prior determination. Third, the relief and basis therefor are totally different than that of the previous motion – instead of seeking to vacate its default and to be allowed to oppose summary judgment, movant now seeks dismissal due to a change in law. In sum, renewal is inapposite.<sup>4</sup>

Even were the foregoing deficiencies to be ignored, Plaintiff is correct that Waycross did not include a statute of limitations defense in its answer and, thus, cannot assert it (CPLR 3211[e]; *Nestor I v Moriarty-Gentile*, 179 AD3d 936, 938 [2d Dept 2020]). Further, its answer was already stricken and this matter is post-JFS – which is also fatal to its argument (see, for example, *Jones v Flushing Bank*, 212 AD3d 791, 793 [2d Dept 2023]). Finally, it appears that Plaintiff is correct that the instant action is timely, having been filed within six years of the earliest demonstrated acceleration.

The estate's tolling arguments are also availing. Pre-judgment tolling can no longer be considered as the judgment of foreclosure and sale was final as to all issues (see, *Jones*). Post-judgment delay was caused by Defendants and the pandemic. Plaintiff has repeatedly attempted to send this matter to auction, only to be thwarted by bankruptcy filings and the instant OSC.

Plaintiff seeks sanctions against “Defendant and Defendant’s Counsel” based upon “the utter lack of merit in Defendant’s arguments, and the shameless misinformation and obfuscation of the factual and procedural history in this action” from which “it can only be concluded that this order to show cause was brought only to impede Plaintiff from conducting a foreclosure sale and delay resolution of the litigation.” While Plaintiff is likely largely correct, the motion is not so clearly devoid of merit as to be frivolous and warrant monetary sanction. Nor does this Court opt to bar the estate, Waycross, Butters, Hewitt, and/or Fateha from filing further motions in this action. However, unless the future filings facially have a reasonable chance of success (in light

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<sup>4</sup> Even were the Court to treat the motion as seeking vacatur pursuant to CPLR 5015, insufficient basis has been granted for that relief.

of the record), this Court will seriously consider issuing monetary sanctions.

Motion and cross-motion denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D ~~Martin~~ JSC



HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE



KINGS COUNTY CLERK  
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