

JP Morgan Chase v. Twersky

Supreme Court of New York, Appellate Division, Second Department

February 9, 2022, Decided

2017-04268 (Index No. 32760/08)

Reporter

2022 N.Y. App. Div. LEXIS 848 *; 2022 NY Slip Op 00855 **; 2022 WL 385958

(Stephen J. Vargas of counsel), for appellant.

[**1] JP Morgan Chase, etc., appellant, v Esther
Twersky, respondent, et al., defendants

Lambert & Shackman, PLLC, New York, NY (Thomas
C. Lambert of counsel), for respondent.

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FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT
TO REVISION BEFORE PUBLICATION IN THE
OFFICIAL REPORTS.

Judges: HECTOR D. LASALLE, P.J. COLLEEN D.
DUFFY, WILLIAM G. FORD, DEBORAH A. DOWLING,
JJ. LASALLE, P.J., DUFFY, FORD and DOWLING, JJ.,
concur.

Opinion

Prior History: [*1] In an action to foreclose a mortgage,
the plaintiff appeals from an order of the Supreme
Court, Kings County (Francois A. Rivera, J.), dated
January 27, 2017. The order, insofar as appealed from,
denied those branches of the plaintiff's motion which
were for summary judgment on the complaint insofar as
asserted against the defendant Esther Twersky, to strike
her answer, and for an order of reference.

DECISION & ORDER

ORDERED that the order is affirmed insofar as
appealed from, with costs.

Core Terms

mortgage, home loan, origination, dwelling, conventional
loan, conforming, limits, notice, burden of establishing,
amount of principal, sufficient evidence, summary
judgment, reference order, mortgage loan, make
payment, no evidence, comparable, defaulted,
borrower, jumbo

In 2006, in exchange for a loan that she received, the
defendant Esther Twersky (hereinafter the defendant)
executed a note in which she promised to repay
\$960,000. The note was secured by a mortgage on a
three-family dwelling in Brooklyn. On or about
December 4, 2008, the plaintiff commenced this action
to foreclose the mortgage. The plaintiff subsequently
moved, among other things, for summary judgment [*2]
on the complaint insofar as asserted against the
defendant, to strike her answer, and for an order of
reference. The Supreme Court denied those branches
of the motion on the ground that the plaintiff failed to
provide sufficient evidence that the defendant had
defaulted in making payment on the loan. We affirm,

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albeit on a different ground.

"[P]roper service of [RPAPL 1304](#) notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition. Alternatively, the plaintiff bears the burden of establishing, prima facie, that [RPAPL 1304](#) is inapplicable, as the loan is not subject to the notice requirements set forth in [RPAPL 1304](#)" ([U.S. Bank Trust, N.A. v Sadique, 178 AD3d 984, 985, 114 N.Y.S.3d 398](#) [citations and internal quotation marks omitted]; see [U.S. Bank N.A. v Powell, 187 AD3d 1238, 1240, 131 N.Y.S.3d 558](#)).

At the time this action was commenced, [RPAPL 1304](#) provided, as relevant, that a 90-day preforeclosure notice was required with respect to "a high-cost home loan, as such term is defined in section six-l of the banking law, a subprime home loan or a non-traditional home loan" ([RPAPL former 1304\[1\]](#); see L 2008, ch 472, § 2). The statute, as then in effect, defined a "home loan" as a mortgage loan in which "[t]he principal amount of the loan at origination did not exceed [***3**] the conforming loan size that was in existence at the time of origination for a comparable dwelling [****2**] as established by the federal national mortgage association" ([RPAPL former 1304\[5\]\[b\]](#); see L 2008, ch 472, § 2). [Banking Law § 6-l\(1\)\(e\)](#) defines a "home loan" as, a mortgage loan in which, among other things, "[t]he principal amount of the loan at origination does not exceed the conforming loan size limit (including any applicable special limit for jumbo mortgages) for a comparable dwelling as established from time to time by the federal national mortgage association" ([Banking Law § 6-l\[1\]\[e\]\[i\]](#)).

Here, the plaintiff failed to establish that the [RPAPL 1304](#) requirement is inapplicable on the ground that the loan was not a "home loan" within the meaning of

[RPAPL former 1304\(5\)\(b\)](#). The plaintiff submitted evidence showing that, as per a chart of "Historical Conventional Loan Limits" purportedly published on a website of the Federal National Mortgage Association (hereinafter Fannie Mae), the conventional loan size limit for three-unit dwellings was \$645,300 in 2006. However, the plaintiff "submitted no evidence showing that these historical conventional loan limits constitute the definition of a 'conforming' loan under former [RPAPL 1304\(5\)\(b\)](#). The plaintiff also submitted no evidence as to any Fannie Mae limits for 'jumbo' mortgages [***4**] as of the date of origination of the subject loan" ([U.S. Bank Trust, N.A. v Sadique, 178 AD3d at 986](#)).

Accordingly, since the plaintiff failed to present any evidence that it complied with [RPAPL 1304](#), we affirm the Supreme Court's determination to deny those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference.

In light of our determination, we need not reach the plaintiff's contention that it provided sufficient evidence that the defendant defaulted in making payment on the loan.

LASALLE, P.J., DUFFY, FORD and DOWLING, JJ., concur.

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