

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART
Justice

IA Part 18

JONAH YAVNE, et al. x

Index
Number 27553 2001

- against -

Motion
Date March 17, 2004

JOSEPH STATMAN, et al.

x

Motion
Cal. Number 39

The following papers numbered 1 to 12 read on this motion by plaintiffs Jonah Yavne and Libby Yavne for summary judgment against defendants Joseph Statman and Ruth Statman, and to direct the discharge of the mortgage as of record in Reel 2535, Page 1801 in the office of the New York City Register for Queens County; and this cross motion by defendants Statman for summary judgment dismissing the complaint based upon lack of personal jurisdiction.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs Yavne commenced this action pursuant to RPAPL 1501(4) seeking to cancel and discharge a mortgage, dated December 30, 1987, of record, given by them to defendants Statman on the property located at 520 Meehan Avenue, Far Rockaway, New York. The mortgage called for installment payments commencing on January 1, 1989, and continuing until February 1, 1993. Plaintiffs Yavne allege that the mortgage no longer has any legal effect because its enforcement is barred by the six-year Statute of Limitations applicable to foreclosure actions (see, CPLR 213[4]).

Defendants Statman served an amended answer denying certain allegations of the complaint, and asserting affirmative defenses

based upon lack of personal jurisdiction and the doctrines of res judicata and collateral estoppel.

The cross motion by defendants Statman seeking summary judgment dismissing the complaint based upon lack of personal jurisdiction due to improper service is denied. Defendants Statman failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of their amended answer, and as a consequence, the defense is deemed waived (CPLR 3211[e]; DeSena v HIP Hosp., Inc., 258 AD2d 555; Wade v Byung Yang Kim, 250 AD2d 323; Fleet Bank, N.A. v Riese, 247 AD2d 276; see also, Zucco v Antin, 257 AD2d 421). Thus, the court need not reach the issue of whether service upon defendants Statman was properly effected (see, Amerasia Bank v Saiko Enterprises, Inc., 263 AD2d 519).

Plaintiffs Yavne seek summary judgment against defendants Statman.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557).

Plaintiffs Yavne admit that the Statmans brought an action against them, entitled Statman v Yavne (Supreme Court, Queens County, Index No. 18696/1995), to foreclose the subject mortgage alleging that they defaulted in payment of the monthly installment due on October 1, 1990 under the mortgage. Plaintiffs Yavne allege that the Statmans exercised their option to accelerate all sums due under the mortgage by making demand in the foreclosure complaint, and argue that the six-year Statute of Limitations began to run with respect to the accelerated debt upon the filing of such complaint. Plaintiffs Yavne allege that the Statman action was dismissed on February 18, 1999 at a status conference for lack of activity. Plaintiffs Yavne allege that the Statmans failed to bring a new action for foreclosure within six years of the acceleration of the mortgage debt, and thus, are barred from enforcing the subject mortgage. In support of their motion, plaintiffs Yavne offer a copy of a title search and a computer printout of the case management records filed in the Statman foreclosure action.

The computer printout apparently was generated at a time when no note of issue had been filed, and when no order had been issued pursuant to which the foreclosure case was conditionally dismissed, or dismissed outright, for failure on the part of the Statmans to

comply with an order or with obligations under the CPLR or the court rules (see, e.g., 22 NYCRR 202.27; see generally, Polir Construction, Inc. v Etingin, 297 AD2d 509; Wasilewicz v Village of Monroe Police Dept., 288 AD2d 377).¹ As this court previously noted in its prior order in this action, the foreclosure action was still pending as of April 30, 2002, notwithstanding it having been marked "inactive" in the court's computer records.

To establish a prima facie showing of entitlement to judgment as a matter of law under RPAPL 1501(4), a plaintiff must demonstrate that the defendant failed to bring an action to foreclose the subject mortgage within the applicable six-year Statute of Limitations (see, CPLR 213[4]; Rack v Rushefsky, ___ AD2d ___; Albin v Pearson, 266 AD2d 487). In this instance, at the time of the commencement of this action, in 2001, the foreclosure action brought by the Statmans was still pending against the Yavnes. Although the court did not address the issue of the sufficiency of the complaint herein in relation to the prior motions² in this case, the present motion by plaintiffs Yavne for summary judgment permits the court to search the record and look to the sufficiency of the underlying evidence (see, CPLR 3212[b]; Del Castillo v Bayley Seton Hosp., 232 AD2d 602). Consequently, plaintiffs Yavne have failed to state a cause of action pursuant to RPAPL 1501(4) (CPLR 3212[b], 3211[a][7]).

To the extent the foreclosure complaint was subsequently dismissed by order dated January 8, 2003, such dismissal occurred following the commencement of this action, and does not form the basis of any of the allegations of the complaint. The court declines to consider whether such dismissal could properly support a newly commenced action pursuant to RPAPL 1501(4) by the Yavnes, or whether the Statmans are entitled to the benefit of the tolling provision of CPLR 205(a) in the event they bring a subsequent

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Nor is there any proof that the action had been "marked off" pursuant to CPLR 3216 (see, Johnson v Sam Minskoff & Sons, Inc., 287 AD2d 233, 237).

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Plaintiffs Yavne previously moved for a default judgment against defendants Statman. By order dated April 30, 2002, that motion was denied pending submission of proper papers. Plaintiffs Yavne thereafter renewed their motion for a default judgment, and defendants Statman cross-moved for leave to serve and file an answer. By order dated July 7, 2003, the motion by plaintiffs Yavne was denied, and the cross motion by defendants Statman was granted.

foreclosure action. Under such circumstances, the motion is granted to the extent of granting reverse summary judgment, dismissing the complaint for failure to state a cause of action. Such dismissal is without prejudice to the bringing of any appropriate action to discharge and cancel of record the subject mortgage.

Dated: April 15, 2004

J.S.C.