US Bank v Horowitz
2022 NY Slip Op 33543(U)
August 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 515931/18
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP-1, 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 17th day of August 2022.

PRESENT:

HON. CENCERIA P. EDWARDS,
A.J.S.C.

515931
Index No.: ~~505931~~/18
M/S #1+2

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

NAFTALI HOROWITZ et al,

Defendant,

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

Papers	**Numbered**
Motion (MS 1)	1
Opp/Cross (MS 2)	2
Reply/Opp to Cross	3
Cross-Reply	4
Sur-reply	5
Letter dated 8/16/22	6

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

The instant action was commenced on August 6, 2018. Defendants Naftali Horowitz and Surie Horowitz jointly answered through counsel. Thereafter, the Defendants filed the instant motion for summary judgment in their favor, dismissing the action as having been filed beyond the applicable statute of limitations, discharging the mortgage, and awarding damages and attorney fees to them. Plaintiff opposed and cross-moved for summary judgment and an order of reference. Defendants opposed, reiterating their statute of limitations arguments and adding that

Plaintiff failed to comply with notice requirements. Both motions were fully briefed and decision was reserved.

I. Statute of Limitations

"The law is well settled that with respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept. 1997]). It is undisputed that a prior action was commenced on June 4, 2010 and dismissed pursuant to CPLR 3215[c] on November 14, 2013. As the instant action was not filed until August 14, 2018, Defendant has met its initial burden of showing that the instant action is untimely. The burden then shifted to Plaintiff to demonstrate that the prior action was not an acceleration or any other basis for the instant action to be timely (*US Bank Nat Ass'n v Martin*, 144 AD3d 891 [2d Dept 2016]).

Plaintiff argues that the then-servicer had its counsel send a de-acceleration letter prior to the expiration of the statute of limitations. In support, it proffers an affirmation signed by Andrew Morganstern, the general counsel of Rosicki, Rosicki & Associates, PC which ostensibly was tasked with the mailing. The affiant attests to his familiarity with Rosicki's procedures for creating and maintaining litigation records. Referring to a series of documents appended to his affirmation, Morgenstern attests that Seterus (which he states was the servicer of the loan at the relevant time) instructed Rosicki to send a de-acceleration letter (as shown by the included email) and that the notice (also appended) was sent to the property address and to 1236 48th Street[1] by first class mail and certified mail (as memorialized in the proffered excerpt from the "Case Aware" notes). Accordingly, Plaintiff maintains that the loan was de-accelerated and the instant action is timely.

Defendants argue that it is clear that the notice was pretextual. It was sent shortly before the expiration of the statute of limitations and the email requesting that it be generated explicitly

[1] Defendants claim that they have no association with that address and Plaintiff offers no explanation as to why correspondence was sent there.

invoked the potential untimeliness as the basis for the mailing. Defendants also suggest that the letter does not explicitly demand the resumption of monthly payments (or even provide sufficient information to allow them to be made). Plaintiff, however, correctly notes that the language of the notice herein is very similar to that deemed inherently non-pretextual and sufficient to deaccelerate in *Milone v. US Bank National Association*, 164 AD3d 145, 154 [2d Dept 2018].

Plaintiff has also demonstrated that Seterus was the servicer of the loan at the relevant time and, thus, authorized to deaccelerate the loan. It is clear from Naftali Horowitz' contemporaneous correspondence with Seterus that he knew it to be the servicer at the relevant time. Likewise, Morganstern attests that Rosicki's records reflect that Seterus was the servicer and that it authorized Rosicki to generate and send the notice.

The parties dispute whether the notices were sent to the correct address. Defendants argue that Naftali Horowitz[2] has resided at 1240 48th Street since 2004 and that Plaintiff was required to send the de-acceleration notice to that address. In support, they note that the face of the mortgage reflects "Naftali Horowitz whose address is 1240 48th Street" and that the summons and complaint were served upon him there. It is also the return address on the correspondence that he sent to Plaintiff. In response, Plaintiff argues that it only needed to mail the notice to the mortgaged property without regard to where Defendants actually resided.

Pursuant to paragraph 15 of the mortgage, "[a]ny notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means … The notice address is the address of the Property unless I give notice to Lender of a different address." The Court agrees with Plaintiff that the borrower's address at the time of the loan – as reflected on the first page of the mortgage – does not supersede the property address for the purpose of notices, merely reflecting where he was living at the time of the transaction. Were Defendants correct, paragraph 15 should have referred to the "borrower's address" (as specified earlier in that document) rather than the "address of the property" being the default. Any change of notice address must be in writing and actually be received by the Lender (*Id.*). In the absence of any evidence that the notice address was changed, Plaintiff correctly sent the de-acceleration letter to the property address.

[2] Only Naftali Horowitz signed the note and mortgage.

In light of the foregoing, the Court finds that the loan was deaccelerated and the instant action is timely. As the remainder of the relief sought by Defendants is predicated upon a finding that the statute of limitations had expired, it is denied.

II. Summary Judgment

It is well established that "[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default" (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). Plaintiff has done so.

As Defendants argue that they never lived at the property and made it clear at the time of the loan that they would not be living at the property, this matter does not involve a "home loan" and Plaintiff was not obligated to send RPAPL 1304 notices. Defendants' arguments as to the mailing of the notices[3], thus, fail.

As the 30-day notice was required to be sent to the notice address, mailing to the property address would have been sufficient herein. However, as noted by Defendants[4], the Cantu Affidavit is insufficient to demonstrate that the notice was sent. While the affiant attests to personal knowledge of Caliber's procedure for creating, mailing, and maintaining records of foreclosure notices, he neither describes those policies in sufficient detail to support his conclusion that they were followed here nor proffers the records he consulted showing that the mailing was done (see, *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2d Dept. 2001] ["The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed"]). As such, Plaintiff fails to demonstrate compliance with the pre-acceleration notice requirement.

[3] As RPAPL 1304 requires notices to be sent to the borrower's known addresses, the determination that the property address was the "notice address" would not have resolved the argument as to where the 1304 notices needed to be sent.

[4] Though only Naftali Horowitz is a borrower, the Court cannot foreclose on Surie Horowitz' interest absent acceleration. Unlike in a case where only a non-borrower raises the issue, here the mailing of the default notice is already before the Court. To grant summary judgment against Surie merely because she cannot herself assert non-compliance with a precondition to acceleration would be a ridiculous result.

Defendants have abandoned their remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

III. Conclusions

Defendants' motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted to the extent that Defendants' first and third through fourteenth affirmative defenses and first and second counterclaims are stricken. The Doe defendants are dropped from the action. Plaintiff's motion is otherwise denied. The parties are directed to complete discovery and proceed to trial on the remaining issue.

This constitutes the decision and order of the Court.

ENTER: C Edwards

Hon. Cenceria P. Edwards, A.J.S.C.

A.S.C.J. Cenceria P. Edwards

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