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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

	x	Index Number <u>21257</u> 1999
DAVID GUICHARD		
- against -		Motion Date <u>May 30,</u> 2000
NANCY J. NEEDHAM		Motion
	x	Cal. Number <u>11</u>

The following papers numbered 1 to 10 read on this motion by defendant to vacate the order dated April 26, 2000, which granted, without opposition, the motion by plaintiff for summary judgment to the extent of directing the Clerk of the court to enter judgment for plaintiff deeming the mortgage dated January 28, 1992 against the premises known as 15-64 Clintonville Street, Whitestone, New York (Block 4669, Lot 21) be cancelled and discharged against plaintiff, and upon vacatur, for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-8
Reply Affidavits	9-10

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

Plaintiff commenced this action pursuant to section 1501(4) of the Real Property Actions and Proceedings Law to secure cancellation and discharge of the subject mortgage as against his interest in the subject property on the ground that the Statute of Limitations for commencement of any foreclosure action has expired. Plaintiff and his brother, Ronald Guichard, allegedly own the property as tenants-in-common, and together, on January 28, 1992 they executed a mortgage note and mortgage in favor of the defendant in the principal amount of \$50,000, payable on July 27, 1992. Defendant served an answer, asserting as affirmative defenses that the mortgage is still enforceable by means of a foreclosure action inasmuch as the maturity date of the mortgage and note was extended until March 4, 1993, and that the period for commencement of any foreclosure action has been tolled as a consequence of Ronald Guichard's filing on March 1, 1999 for relief

under Chapter 13 of the Bankruptcy Code (11 USC § 362), and an order dated July 28, 1999 of the United States Bankruptcy Court.

Plaintiff moved for summary judgment seeking to declare that the note and mortgage dated January 28, 1992 are null and void and of no further force and effect as against him. Plaintiff originally noticed the return date of the summary judgment motion for March 20, 2000, but the court set the return date of the motion for March 27, 2000. The motion was adjourned to April 18, 2000 by written stipulation of the parties. The parties thereafter entered into a stipulation dated April 17, 2000, agreeing to the further adjournment of the motion to May 2, 2000, and requiring service of the answering papers by defendant on or before April 25, 2000. Notwithstanding the filing of the stipulation on April 18, 2000, during the calendar call, defendant learned on April 20, 2000, that the motion had been submitted without opposition. Defendant, thereafter, sent a letter dated April 21, 2000 to the court explaining the circumstances relative to the stipulation, along with a copy of her cross motion seeking to dismiss the complaint, and advised the clerk of her filing of the cross motion.

It appears that the motion should have been decided with consideration of the opposition papers and the cross motion, but due to an oversight, the court did not have the benefit of these papers when rendering the order dated April 26, 2000. Under such circumstances, the order is vacated and upon vacatur, the court shall determine both the original motion and the cross motion on their merits.

The Statute of Limitations for instituting an action for foreclosure is six years (see, CPLR 213[4]). It accrues upon the mortgagor's default under the terms of the mortgage and note. Although the subject mortgage and note terms permitted prepayment of principal and interest without penalty, they required a balloon payment of the outstanding balance, representing the principal and accrued interest, on July 27, 1992. Defendant admits that no payments were ever made pursuant to the subject mortgage and underlying note, including upon the stated July 27, 1992 maturity date. To the extent defendant claims that the mortgage and note terms were modified, extending the due date of the balloon payment from July 27, 1992 to March 4, 1993, the mortgage and note do not permit oral modification. Moreover, a modification of a mortgage term is governed by the Statute of Frauds and must be in writing to be enforceable (see, General Obligations Law § 5-703[1]; Hallaway Props. v Bank of New York, 155 AD2d 897, lv denied 75 NY2d 711; Pappas v Resolution Trust Corp., 255 AD2d 887, 889).

Defendant offers copies of letters and a facsimile transmission as evidence that requests were made by Laura Muratori, an attorney, on behalf of plaintiff and Ronald Guichard, her alleged clients, and by Ronald Guichard, on behalf of plaintiff and himself, for extensions of the maturity date of the mortgage until

March 4, 1993, which defendant granted in writing. Defendant, therefore, asserts that the accrual date of the Statute of Limitations for an action for foreclosure of plaintiff's interest in the property was extended until March 4, 1993. Plaintiff denies ever requesting or signing any document seeking an extension of the payment due date to March 4, 1993.

Letters can suffice to toll the limitation period (see, Sichol v Crocker, 177 AD2d 842; Mayer v Middlemiss, 187 Misc 482). The copies of the letters and facsimile transmission submitted herein by defendant, however, are insufficient to meet the Statute of Frauds insofar as plaintiff was not a signatory to them and they do not include any writing authorizing Ms. Muratori or Ronald Guichard to act as his agent in relation to modification of the mortgage (see, General Obligations Law § 5-703[1]; Pappas v Resolution Trust Corp., supra; see also, Hoover v Hubbard, 202 NY 289; Park Assocs. v Crescent Park Assocs., Inc., 159 AD2d 460; Lyons Natl. Bank v Moore, 14 AD2d 488). Under such circumstances, defendant may not rely upon the letters and facsimile transmission alone as proof that the mortgage due date was changed with respect to plaintiff, thereby extending the accrual date of the Statute of Limitations as to him. Although plaintiff denies requesting or signing any document seeking an extension of the payment due date to March 4, 1993, he has failed to provide a sworn denial that he ever authorized in writing either Ms. Muratori or Ronald Guichard to make such requests on his behalf.

Nevertheless, even assuming plaintiff authorized Ms. Muratori or Ronald Guichard to act as his agent, the filing of the bankruptcy petition by Ronald Guichard did not serve to toll the running of the Statute of Limitations with respect to plaintiff's interest in the property as a tenant-in-common with Ronald Guichard. Contrary to defendant's argument, the automatic stay (11 USC § 362) never applied to plaintiff's interest in the property, as is reflected by the fact that the bankruptcy court's order lifting the stay did not mention plaintiff (compare, Burritt Interfinancial Bancorporation v Wood, 33 Conn App 401; Matter of Cameron, 164 BR 428).

In addition, neither the filing of the petition in bankruptcy by Ronald Guichard (which petition listed the subject mortgage debt and stated that the debt would be paid out of the proceeds of sale), nor the execution of the contract of sale dated March 1998 by plaintiff, constitutes an implied promise on the part of plaintiff to pay the debt. The bankruptcy petition and the contract of sale are ineffectual to revive the Statute of Limitations with respect to plaintiff (see, Aleci v Virgie E. Tinsley's Enterprises, Inc., 102 AD2d 808; see also, Erlichman v Ventura, ___ AD2d ___, 706 NYS2d 907). Although plaintiff alleges in his complaint that he and Ronald Guichard hold the premises, clear from any claim, lien or encumbrance arising from the subject mortgage, the issue of the continued vitality and enforceability of

the mortgage with respect to the property interest of Ronald Guichard is not before this court. It is noted that Ronald Guichard has not been made a party to this action by either plaintiff or defendant, and it does not appear that Ronald Guichard is a necessary party (see, Real Property Actions and Proceedings Law § 1511).

To the extent that defendant asserts plaintiff is collaterally estopped from raising the Statute of Limitations by virtue of the order of the Bankruptcy Court, plaintiff was not a party to the bankruptcy proceedings, and the Bankruptcy Court did not make any findings of fact relative to the viability of any defenses that plaintiff may have had to a potential suit for foreclosure of his interest in the property, including the expiration of the Statute of Limitations. The order, resulting from an application by Ronald Guichard for permission to sell the property free and clear of liens, terminated the automatic stay (see, 11 USC § 362) with respect to the interest held by Ronald Guichard in the property, and directed the property to be sold free and clear of liens, with the liens attaching to the proceeds of the sale in accordance with their priority, and the proceeds be held in escrow until further order of the Bankruptcy Court. Again, the question of whether the mortgage lien held by defendant may attach to Ronald Guichard's interest in the proceeds of sale is not for this court to decide herein.

An action for foreclosure cannot be maintained as against the interest of plaintiff in the subject property because the Statute of Limitations ran on July 27, 1998, and defendant failed to commence suit for foreclosure by that date. Based upon these facts, plaintiff is entitled to summary judgment cancelling and discharging of record of the mortgage with respect to his interest in the property, and adjudging his interest free therefrom (CPLR 3212; Real Property Actions and Proceedings Law § 1501[4]).

The motion for summary judgment by plaintiff is granted to the extent of declaring the mortgage no longer an encumbrance or lien against plaintiff's interest in the premises and directing the Clerk of the court to enter judgment for plaintiff deeming the mortgage dated January 28, 1992 against the premises known as 15-64 Clintonville Street, Whitestone, New York (Block 4669, Lot 21) be cancelled and discharged against plaintiff, and the cross motion dismissing the complaint is denied.

Dated: August 4, 2000

J.S.C.