Emigrant Bank v Greene
2015 NY Slip Op 31712(U)
September 9, 2015
Supreme Court, Queens County
Docket Number: 703522/14
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

EMIGRANT BANK,

Plaintiff,

-against-

GAIL GREENE f/k/a GAIL S. LEE, DWAYNE T. KIRKLAND, THE BROOKLYN UNION GAS CO. d/b/a NATIONAL GRID NY, DEBRA S. TURNER, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, "JOHN DOE # 1" TO "JOHN DOE # 10" inclusive, the names of the ten last name Defendants being fictitious, real names unknown to Plaintiff, the parties intended being persons or corporations, having an interest in or tenants or persons in possession of, portions of the mortgaged premises described in the complaint,

Defendants.

Index No: 703522/14

Motion Date: 6/16/15

Motion Seq. No.: 2

The following papers read on this motion by defendant Gail Greene f/k/a Gail S. Lee pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against her based upon the expiration of the applicable statute of limitations.

	Papers EF Numbered
Notice of Motion - Affidavits - Exhibits	50 - 64
Answering Affidavits - Exhibits	66 - 78
Reply Memorandum of Law-Affidavit	79 - 80

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

Defendants Greene and Dwayne T. Kirland gave the mortgage dated June 11, 2007 against the real property known as 23-62 95th Street, East Elmhurst, New York to secure a note executed by defendant Greene, evidencing a loan from Emigrant Mortgage Co., Inc. in the principal amount of $492,000.00, plus interest. On February 21, 2008, Emigrant Mortgage Co., Inc. commenced a foreclosure action entitled *Emigrant Mortgage Co., Inc. v Greene*, (Sup Ct, Queens County, Index No. 4509/2008) (the 2008 action) against various defendants, including Greene and Kirkland based upon the alleged default in payment by Greene of the monthly mortgage installment due on November 1, 2007 and monthly thereafter.

Greene moved in the 2008 action to vacate her default in answering and to dismiss the complaint insofar as asserted against her based upon lack of personal jurisdiction. By order dated February 1, 2010, the court directed a traverse to be held on the issue of proper service of process. Prior to holding the rescheduled traverse hearing, Emigrant Mortgage Co., Inc. moved pursuant to CPLR 3217 to discontinue the action without prejudice against Greene and for leave to amend the caption to reflect the deletion of Greene as a named defendant. The court issued an order dated August 9, 2010, discontinuing the action against all the named defendants. On August 25, 2011, Emigrant Mortgage Co., Inc. moved to "resettle" the August 9, 2010 order, asserting that the court erred in dismissing the entire foreclosure action, and sought to have the foreclosure action reinstated against all named defendants except Greene. By order dated November 17, 2011, the motion by Emigrant Mortgage Co., Inc. was denied.

Plaintiff commenced this action on May 22, 2014 seeking to foreclose the mortgage which was the subject of the 2008 action, based upon the same alleged default in payment of the monthly mortgage installment due on November 1, 2007 and monthly thereafter. In the complaint herein, plaintiff alleges that the note and mortgage were assigned to it as evidenced by an allonge to the note and as shown by a written assignment dated December 11, 2009, and that it elects to accelerate the mortgage debt. Defendant Kirkland appeared by a *pro se* answer, and defendant Greene, appearing by counsel and moved by a pre-answer motion to dismiss the complaint insofar as asserted against her, or alternatively, to stay the action pending the outcome of a federal action (*Greene v Emigrant Mortgage Co., Inc.* [ED NY Index No. 10-CV-2653]). By order dated February 24, 2015, the motion by defendant Greene was denied. Defendant Greene thereafter served an answer, asserting various affirmative defenses, including the expiration of the statute of limitations.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]). An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213[4]) and begins to run upon acceleration of the mortgage debt (*see Clayton National, Inc. v Guldi*, 307 AD2d 982 [2d Dept 2003]; *EMC Mortgage Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892 [2d Dept 1994]).

Defendant Greene asserts that the instant action is untimely, having been brought more than six years after Emigrant Mortgage Co., Inc., the alleged predecessor in interest of plaintiff, accelerated the mortgage debt through the November 27, 2007 notice served in compliance with section 22 of the subject mortgage and the allegations in the complaint filed in the prior action on February 21, 2008.

In support of her motion, defendant Greene offers, among other things, a copy of the pleadings, the mortgage and underlying note, an affirmation of her counsel, a copy of the first amended complaint in the federal action, and the complaint, notice of motion dated June 16, 2010, supporting affirmation dated June 16,2010, the August 9, 2010 order and November 17, 2011 order in the 2008 action.

As a preliminary matter, an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment, and therefore, the court may consider defendant Greene's motion notwithstanding she did not also submit an affidavit of fact on personal knowledge (*see Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985]; *Weingarten v Marcus*, 118 AD2d 640 [2d Dept 1986]; *see also Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324 [1st Dept 2004).

The subject note and mortgage provides that the payment of the mortgage debt can be accelerated on default at the lender's option. Section 22 of the subject mortgage requires the lender to give the borrower notice of default prior to demanding payment of the loan in full, and that such notice must warn that in the event the default is not corrected, "[l]ender may require [i]mmediate [p]ayment in [f]ull." Although Emigrant Mortgage Co., Inc. alleged in the complaint filed in the 2008 action that it sent a notice on November 27, 2007 to defendants Greene and Kirkland in compliance with the notice requirement of section 22 of the subject mortgage, such allegation alone does not constitute proof of the election to accelerate the mortgage. Defendant did not submit a copy of the November 27, 2007 notice to support her claim that the notice contained an election by the lender to accelerate the mortgage debt. The mere allegation in the complaint in the 2008 action regarding compliance with the notice requirement pursuant to section 22 of the mortgage is insufficient to establish that there was an election to accelerate in the body of the notice.

On the other hand, it is undisputed that Emigrant Mortgage Co., Inc. exercised its option to accelerate all sums due under the mortgage by making demand in the complaint filed in the action commenced on February 21, 2008 (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472 [1932]; *Clayton Nat., Inc. v Guldi*, 307 AD2d 982). Thus, after discontinuance of the 2008 action, Emigrant Mortgage Co., Inc., or its assigns, had until February 21, 2014 to commence an action to foreclose the subject mortgage. Defendant Greene consequently has made a prima facie showing that this action, commenced on May 22, 2014, was not commenced within the six-year statute of limitations, which began to run, at the latest, upon the filing of the complaint in the 2008 action (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604).

The burden shifts to plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is otherwise inapplicable or whether it actually commenced the action within the applicable limitations period (*see Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014]; *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56 [2d Dept 2013]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]).

Plaintiff asserts that the limitations period has not passed because the election to accelerate the mortgage debt was, in effect, revoked when Emigrant Mortgage Co., Inc. moved to discontinue the 2008 action, or when, on February 7, 2014, it provided defendant Greene with notices pursuant to section 22 of the subject mortgage and RPAPL 1304. Plaintiff also asserts that the service of the notice pursuant to RPAPL 1304 on February 7, 2014 tolled the running of the statute of limitations for a period of 90 days pursuant to CPLR 204(a). Plaintiff further asserts that the entire mortgage debt has been revived insofar as defendant Greene made an absolute and unqualified acknowledgment of the mortgage debt in writing in the federal action.

CPLR 204(a) provides that, "[w]here the commencement of an action has been stayed by court or statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced." This provision has been applied to extend the statute of limitations in actions against municipalities, public authorities (*see Burgess v. Long Island R.R. Authority*, 79 NY2d 777,[1991] ; *Giblin v. Nassau County Med. Center*, 61 NY2d 67 [1984]; *Barchet v New York City Tr. Auth.*, 20 NY2d 1, 5 [1967]) as well as actions stayed pursuant to the automatic stay provision of the bankruptcy code (*see Mercury Capital Corp. v. Shepherds Beach, Inc.*, 281 AD2d 604 [2d Dept 2000]).

Service of a notice pursuant to RPAPL §1304 is a statutory condition precedent which the plaintiff must plead and prove as an element of the foreclosure claim itself thus, prohibiting a plaintiff from commencing an action to foreclose until compliance (*RPAPL §1302; Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 105 [2d Dept 2011]; *cf. Torsoe*

Bros. Const. Corp. v McKenzie, 271 AD2d 682 [2d Dept 2000] [statute of limitations period tolled where the mortgagee was prohibited from commencing a foreclosure action by court order and RPAPL §1301]). As a result, CPLR 204 served to extend the statute of limitations applicable to this case for an additional 90 days, that is until May 22, 2014, the day on which this action was commenced.

Accordingly, the motion by defendant Greene for summary judgment dismissing the complaint insofar as asserted against her as barred by the statute of limitations is denied.

Dated: September 9, 2015 +-_____
J.S.C.