

Royal Blue Realty Holdings, Inc. v Deutsche Bank Natl. Trust Co.
2016 NY Slip Op 31259(U)
July 6, 2016
Supreme Court, New York County
Docket Number: 150187/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ROYAL BLUE REALTY HOLDINGS, INC.,

Plaintiff,

-against-

Index No. 150187/2016
Mot. Seq: 002

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR AMERICAN HOME MORTGAGE
ASSET TRUST 2007-01, MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES SERIES 2007-1,
NEW YORK CITY DEPARTMENT OF FINANCE,
OFFICE OF THE CITY REGISTER OF THE
CITY OF NEW YORK, COUNTY OF NEW YORK,

Defendants.

DECISION/ORDER
ARLENE P. BLUTH, JSC

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The motion by defendant Deutsche Bank to dismiss plaintiff's amended complaint pursuant to CPLR 3211(a)(7) (failure to state a cause of action) and 3211(8) (lack of jurisdiction) is denied.

This action arises out of a dispute over property located at 162-174 Christopher Street a/k/a 130-132 Barrow Street, Unit 166, New York, NY.¹ Plaintiff brings this action to expunge and cancel the mortgage held by Deutsche Bank on this property pursuant to RPAPL 1501(4) on the ground that it has not made payments toward the mortgage for more than six years after the mortgage was accelerated. Plaintiff alleges in the complaint that the mortgage was accelerated pursuant to a default letter dated July 8, 2008.

¹Although Deutsche Bank has filed multiple foreclosure actions relating to various units and properties at this address, it never filed a foreclosure action on this unit.

Deutsche Bank, before filing an answer, moves to dismiss on two grounds. First, on CPLR 3211(a)(7), for failure to state a cause of action. This is denied because plaintiff did in fact state a cause of action in the complaint; plaintiff pleaded that there was a note, that the note was accelerated and that more than six years have passed since the alleged acceleration without any payments being made or action to foreclose commenced.

The second ground, lack of jurisdiction, was opposed by proof of service on the address claimed in the motion as not served. As movant failed to address this proof in reply, this branch of the motion also fails.

Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

Acceleration of the Mortgage

RPAPL 1501(4) provides that:

Where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage, or to enforce a vendor's lien, has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons, known or unknown, including one under disability as hereinafter specified, to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom; provided, however, that no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them shall be in possession of the affected real property at the time of the commencement of the action. In any action brought under this section it shall be immaterial whether the debt upon which

the mortgage or lien was based has, or has not, been paid; and also whether the mortgage in question was, or was not, given to secure a part of the purchase price

“There is no dispute that the statute of limitations period applicable to an action on a bond or note, the payment of which is secured by a mortgage upon real property is six years” (*CDR Creances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51, 837 NYS2d 33 [1st Dept 2007] [citing CPLR 213[4]]). “Further, it is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt” (*id.* [internal quotations and citation omitted]).

Deutsche Bank moves to dismiss on the ground that the six-year statute of limitations in a mortgage foreclosure action has not expired and, therefore, plaintiff cannot maintain an action pursuant to RPAPL 1501(4). Deutsche Bank claims that because it never accelerated the subject mortgage, the statute of limitations never began to run on the property. Deutsche Bank alleges that plaintiff continues to remain in default under the mortgage and that the statute of limitations begins to run on the date that each installment is due. Therefore, there is a new default each month. Deutsche Bank claims that the July 8, 2008 letter did not accelerate the mortgage and only indicates that possible future event might take place.

In opposition, plaintiff alleges it has stated a cause of action because the July 8, 2008 letter accelerated the mortgage, which means that the six-year statute of limitations has expired. Plaintiff further claims that Deutsche Bank does not deny that no payments have been made by plaintiff toward the mortgage for more than six years. Plaintiff alleges that more than seven years

and five months have passed since that acceleration, and therefore the mortgage should be expunged and canceled.

Although the motion papers treat the motion as one for summary judgment or even for a declaratory judgment as to whether or not the July 8, 2008 notice accelerated the note, this is a pre-answer motion to dismiss. Therefore, at this juncture, it would be improper for this Court to determine whether the July 8, 2008 notice accelerated the note. The Court need only determine whether the plaintiff has pleaded a cause of action. Clearly, plaintiff has. Plaintiff alleges a note, a default, a July 2008 letter which plaintiff alleges began the countdown to acceleration of the note, that no payment was made within the cure period, that the note was accelerated and that no payment has been made in more than six years (the statute of limitations). The only thing that is disputed is whether the July 2008 notice began the countdown to accelerate the note. Because plaintiff pleaded it, for purposes of this motion the Court must accept it as true. Therefore, plaintiff has stated a cause of action Deutsche Bank's motion on this ground is denied.

Service

Deutsche Bank also claims that the action must be dismissed because plaintiff attempted service upon the Defendant at an improper address. Deutsche Bank claims that service should have been made to Ocwen Loan Servicing LLC, 1661 Worthington Road, Suite 100, West Palm Beach, Florida.

In opposition to this branch of the motion, plaintiff claims that it did serve Deutsche Bank at the proper address in West Palm Beach, FL and attaches an affidavit of service supporting this claim (affirmation of plaintiff's counsel, exh C).

Deutsche Bank submits a reply that purports to be in further support of this branch of its motion (*see* affirmation of Deutsche Bank's counsel in further support ¶ 2), but Deutsche Bank does not respond to plaintiff's argument that it did properly serve defendant.

Therefore, based on plaintiff's affidavit of service and Deutsche Bank's failure to respond, this branch of the motion is denied.

Accordingly, it is hereby

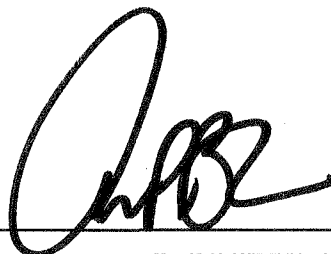
ORDERED that Deutsche Bank's motion to dismiss is denied and it is directed to file and serve an answer to the complaint in accordance with the CPLR; and it is further

ORDERED that the parties are directed to appear for a conference on November 1, 2016 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: July 6, 2016

New York, New York

A handwritten signature in black ink, appearing to read 'Arlene P. Bluth', is written over a horizontal line.

HON. ARLENE P. BLUTH, JSC