Bank of N.Y. Mellon v Bissessar

2016 NY Slip Op 32245(U)

October 31, 2016

Supreme Court, Queens County

Docket Number: 706482/2016

Judge: David Elliot

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This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice | IAS Part 14

THE BANK OF NEW YORK MELLON, etc.,
Plaintiff(s),

- against -

TARAMATTIE BISSESSAR, et al.,
Defendant(s).

Index No. 706482 2016

Motion Date August 8, 2016

Motion Cal. No. 123

Motion Seq. No. 1

The following papers read on this motion by defendant Taramattie Bissessar (defendant) for an order dismissing the complaint insofar as asserted against her pursuant to CPLR 3211 (a) (5) on the ground that the action is barred by the applicable statute of limitations.

	Papers Numbered[1]
Notice of Motion - Affirmation - Exhibits....................................	EF19-22
Answering Affirmation - Exhibits...	EF24-30
Reply..	EF31-32

By prior order dated September 6, 2016, the instant motion was held in abeyance pending the conclusion of the residential foreclosure settlement conference (22 NYCRR § 202.12-a [c] [7]). Per residential foreclosure conference order dated October 11, 2016 (Evans, CA-R), "this matter . . . will proceed with litigation as opposed to a modification effort, per se." As it appears therefrom that the matter could not be resolved, the court will make a determination on the motion.

1. Both counsel should take note that they are required to omit or redact confidential personal information, which includes defendant's social security number and the loan account number, except the last four digits thereof, in papers submitted to the court for filing, as mandated by 22 NYCRR § 202.5 (e) (1).

On April 12, 2007, defendant gave to America's Wholesale Lender a mortgage against the real property known as 105-41 88th Street, Ozone Park, New York, to secure a note of even date, evidencing a loan given to defendant in the principal amount of $432,000.00, plus interest.

On August 26, 2008, The Bank of New York as Trustee, for the Benefit of the Certificateholders, CWABS, Inc. Asset-Backed Certificates, Series 2007-8, 400 Countrywide Way, Simi Valley, CA 93065, as alleged holder of the note and mortgage, commenced a foreclosure action in this court under Index No. 21432/2008 (the 2008 action) against, among others, defendant, based upon her alleged default in payment of the monthly mortgage installment that became due on April 1, 2008. As a result of the default, the plaintiff therein "elect[ed] to call due the entire amount secured by the mortgage."

The 2008 action was then discontinued by Notice of Voluntary Discontinuance filed with the County Clerk on July 2, 2015. Thereafter, on June 2, 2016, plaintiff commenced the instant action to foreclose the mortgage which was the subject of the 2008 action, based upon an alleged default in payment of the monthly mortgage installment that became due on July 1, 2008.

Defendant now makes this pre-answer motion to dismiss the complaint insofar as asserted against her on the ground that this action is barred by the applicable statute of limitations (CPLR 3211 [a] [5]). As such, she has the initial burden to demonstrate, prima facie, that the time to commence the action has expired by establishing, inter alia, when plaintiff's cause of action accrued (*see Campone v Panos*, 142 AD3d 1126 [2d Dept 2016]; *Shah v Exxis, Inc.*, 138 AD3d 970 [2d Dept 2016]; *Matteawan On Main, Inc. v City of Beacon*, 109 AD3d 590 [2d Dept 2013]; *Jalayer v Stigliano*, 94 AD3d 702 [2d Dept 2012]). Once that burden is met, plaintiff must raise an issue of fact to show that the statute was tolled or was otherwise inapplicable, or that it commenced the action within the applicable limitations period (*Campone*, 142 AD3d at 1126; *Shah*, 138 AD3d at 971; *Matteawan On Main, Inc.*, 109 AD3d at 590; *Jalayer*, 94 AD3d at 703).

An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213 [4]). With respect to a mortgage which is payable in installments, the six-year statute of limitations begins to run from the date each installment becomes due (*Wells Fargo, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *Wells Fargo v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). However, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (*see Burke*, 94 AD3d at 982; *Loiacono*, 240 AD2d at 477; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]).

Defendant has demonstrated that the mortgage debt was accelerated by the commencement of the 2008 action, at which time plaintiff elected to call the entire amount secured by the mortgage due, and, as such, the statute of limitations began to run on the entire debt on the commencement date, to wit: August 26, 2008 (*see e.g. Keoppel v Carlandia Corp.*, 21 AD3d 884 [2d Dept 2005]; *Clayton Natl., Inc. v Guldi*, 307 AD2d 982 [2d Dept 2003]; *Patella*, 279 AD2d at 605-606; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892 [2d Dept 1994]). Since plaintiff commenced this action on June 2, 2016, nearly two years after the expiration of the six-year limitations period, defendant has established, prima facie, that the action is time-barred (CPLR 213 [4]). Contrary to the contention made by plaintiff's counsel in opposition to the motion, it is not defendant's burden, on her motion, to "definitely prove . . . that no tolling or retriggering occurred, that no subsequent payments have been tendered, that the mortgagee is not in possession of the premises, etc." (*see Campone*, 142 AD3d at 1126; *Shah*, 138 AD3d at 971; *Matteawan On Main, Inc.*, 109 AD3d at 590; *Jalayer*, 94 AD3d at 703).

In opposition to the motion, plaintiff first contends that, since defendant made a payment which was received on June 21, 2010, the six-year limitations period began to run anew as of that date, thereby making the instant action as having been timely commenced. In support, plaintiff annexes a paper to which its counsel refers as a copy of "the business record, which makes evident that the 'last pmt' made by Defendant was received for this loan account was June 21, 2010 [sic]." The exhibit consists of an apparent photocopy of a computer screen shot entitled "Customer/Loan Inquiry" which indicates, inter alia, defendant as the borrower, the property address, and a "Last Pmt" of "06/21/10." Plaintiff's counsel also points out that the 2008 action and the instant action have different default dates (April 1, 2008 versus July 1, 2008, respectively), ostensibly as further evidence that subsequent payments were made by defendant.

In reply, defense counsel states that plaintiff has failed to submit proof of payment by way of canceled check or otherwise; rather, the paper submitted by plaintiff was not authenticated as a business record and plaintiff's counsel does not provide any foundation for her interpretation of said paper. Defendant also submits her own affidavit in which she: (1) denies the allegation that she made a payment in connection with the loan, which forms the basis of this foreclosure action, which would have been received on or about June 21, 2010; and (2) states that any and all payments she made in connection with the loan were made prior to the commencement of the 2008 action. Defense counsel also contends that, assuming, arguendo, a subsequent payment was made, same does not revive the statute of limitations since, on the date the purported payment was made, the debt was not barred by the statute of limitations. Defense counsel also points out that plaintiff has not claimed reinstatement of the loan, plaintiff having admitted that it accelerated on August 26, 2008.

Plaintiff has failed to raise an issue of fact that the statute was either revived or ran afresh beginning with the date of its apparent receipt of defendant's June 21, 2010 payment. Since counsel does not claim to have personal knowledge that, inter alia, defendant made such a payment or that she made it on or about that date, nor does she claim to have personal knowledge of the paper to which she refers as a business record or who created it, counsel cannot properly authenticate the paper as a business record or as competent evidence of defendant's payment (CPLR 4518).

In any event, as correctly pointed out by defense counsel in reply, "[w]hen part payment of an obligation, which would otherwise be unenforceable under the statute of limitations, is made, longstanding common law holds that the statute will run afresh beginning with the date of that payment, provided it may be inferred from the payment that an intention arose therefrom to honor the entire obligation to which it relates" (1-5 Bergman on New York Mortgage Foreclosures § 5.11 [6] [b]; *see National Heritage Life Ins. Co. v Hill St. Assoc.*, 262 AD2d 378 [2d Dept 1999], citing *Roth v Michelson*, 55 NY2d 278 [1982]; *see also* General Obligations Law § 17-107; *Big Chief Lewis, Inc. v Stim*, 99 AD2d 501 [2d Dept 1984]). Since the payment was alleged to have been made at a time when the statute of limitations had not yet expired, the revival rule does not apply herein.

In contrast, "[i]n order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Lew Morris Demolition Co. v Board of Educ.*, 40 NY2d 516 [1976]; *see* GOL § 17-107 [2] [b]; *Petito v Piffath*, 85 NY2d 1 [1994]; *Comerica Bank, N.A. v Benedict*, 39 AD3d 456 [2d Dept 2007]). In addition to this court's finding that the photocopy of the screen shot as submitted by plaintiff is not evidence of defendant's part payment on or about June 21, 2010, plaintiff has provided nothing further to establish these additional requisite facts in opposition to defendant's motion, particularly those facts which would suggest defendant's "absolute and unqualified acknowledgment" that more was due under the loan such that the limitations period would have been renewed as of that date (*cf. National Heritage Life Ins. Co.*, 262 AD2d at 378).

Plaintiff next argues that defendant re-acknowledged the mortgage debt in a writing. To that end, counsel states that the statute of limitations was reset when defendant submitted a hardship letter to plaintiff's loan servicer on October 29, 2010. The letter, dated and post-marked October 29, 2010 and marked received, presumably by the servicer, on November 3, 2010, asks that the servicer "reconsider my application for a modification on the [mortgaged premises]. I submitted an application in August of 2009, but was decline[d] in

June of 2010 due to low NPV. I am appealing to you for a chance to save my home. . . . Please give me a 4% or less interest rate on the current value of the property."[2] In addition, plaintiff submits another letter, dated January 1, 2011, thanking the servicer for considering her application for a modification or interest rate reduction; defendant also indicated that she was enclosing additional documentation as requested. Thus, plaintiff avers that the earliest date the statute of limitations began to run was October 29, 2010, rendering this action timely.

In reply, defense counsel contends that the two letters are insufficient to renew the limitations period since neither letter expressly and unconditionally promises to pay the debt; rather, by those letters, defendant merely requested that the servicer reconsider a prior loan modification request.

GOL § 17-105, Promises and waivers affecting the time limited for action to foreclose a mortgage, at subdivision (1) thereof, states, in relevant part, that

> "a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the . . . promise." (*see Aleci v Tinsley's Enters.*, 102 AD2d 808 [2d Dept 1984]).

Here, while the letters may have, arguably, acknowledged the existing mortgage debt, they were accompanied by a condition precedent, to wit: the preparation and execution of a modification agreement, which provided for, in particular, a 4% or less interest rate on the current value of the property (*see Sichol v Crocker*, 177 AD2d 842 [3d Dept 1991]; 1-5 Bergman on New York Mortgage Foreclosures § 5.11 [6] [a]). Any promise to pay was conditional and, therefore, ineffectual to run the limitations period anew (*id.*)

Accordingly, defendant's motion is granted. The complaint insofar as asserted against her is dismissed.

Dated: October 31, 2016

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J.S.C.

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2. It is noted that the account number listed on the face of defendant's letter differs from the account number listed on the screen shot.