

BSD 265, LLC v HSBC Bank USA N.A.
2017 NY Slip Op 31373(U)
June 27, 2017
Supreme Court, Kings County
Docket Number: 504656/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of June, 2017

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

BSD 265, LLC,

Plaintiff,

- against -

Index No. 504656/16

HSBC BANK USA N.A. AS TRUSTEE FOR
ELLINGTON LOAN ACQUISITION TRUST
SERIES 2007-1,

Defendant.

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1-4

Opposing Affidavits (Affirmations)_____

5

Reply Affidavits (Affirmations)_____

_____Affidavit (Affirmation)_____

Other Papers_____

Upon the foregoing papers, defendant HSBC Bank USA, N.A., as Trustee for Ellington Loan Acquisition Trust Series 2007-1 (HSBC) moves, by way of order to show cause, for an order: 1) pursuant to CPLR 5015 (a) (1) and in the interests of justice, vacating the default order of this court dated November 10, 2016 which directed the discharge of the subject mortgage; 2) reinstating the subject mortgage; 3) directing the Kings County Clerk

to record the order or judgment reinstating the subject mortgage in the records of the City Register; 4) pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint of plaintiff BSD 265, LLC; and 5) staying enforcement of the November 10, 2016 order.

A stay of enforcement of the November 10, 2016 order was issued upon the signing of the instant order to show cause on March 13, 2017.

Plaintiff commenced this action, pursuant to Real Property Actions and Proceedings Law [RPAPL] § 1501 (4), to discharge and cancel of record a mortgage encumbering plaintiff's property at 760 Sheridan Avenue in Brooklyn. The mortgage was executed by the previous owner of the property, Desmond Sterling, on February 14, 2007 to secure a loan by Fremont Investment & Loan (Fremont) in the amount of \$457,920.00. The mortgage was recorded on April 19, 2007 in the name of Mortgage Electronic Registration Systems, Inc. (MERS). On March 7, 2008, HSBC, the purported assignee of the mortgage, commenced a foreclosure action against Sterling. On May 14, 2013, HSBC moved to discontinue the foreclosure action. strike Sterling's answer and cancel the notice of pendency filed against the property. On June 28, 2013, Justice Gloria M. Dabiri issued an order discontinuing the foreclosure action, withdrawing Sterling's answer and cancelling the notice of pendency. By deed dated April 22, 2015, Sterling conveyed the property to plaintiff.

On March 29, 2016, plaintiff commenced the instant action to discharge and cancel the mortgage pursuant to RPAPL 1501 (4), claiming that more than six years have passed since the acceleration of the mortgage debt by the commencement of the now discontinued

2008 foreclosure action.* According to the affidavit of plaintiff's process server, HSBC was served with the summons and complaint on April 4, 2016. On May 4, 2016, plaintiff moved for an order granting a default judgment in favor of plaintiff and cancelling and discharging of record the subject mortgage. By order dated November 10, 2016, this court granted plaintiff's motion. The instant order to show cause to vacate HSBC's default and to dismiss this action ensued.

A party seeking to vacate a default pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the failure to appear and answer the complaint and a potentially meritorious defense to the action (*see Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 1049 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 875 [2d Dept 2015]). "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (*BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 791 [2d Dept 2015]). In making that discretionary determination, the court should

*RPAPL 1501 (4) provides:

"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."

consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*see Oller v Liberty Lines Tr., Inc.*, 111 AD3d 903, 904 [2d Dept 2013]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2d Dept 2013]; *Moore v Day*, 55 AD3d 803, 804 [2d Dept 2008]; *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]).

HSBC asserts that when it is named in a foreclosure-related action as a litigation defendant, it is the servicer of the loan, rather than HSBC, who is responsible for defending HSBC in that litigation. HSBC states that upon receipt of the complaint by its legal department on April 4, 2016, it sought to determine the servicer to whom HSBC would tender its defense. HSBC claims that according to the records on hand, BAC Servicing (BAC) was the servicer for the loan secured by the subject property and accordingly, on June 8, 2016, HSBC tendered its defense to BAC. However, HSBC asserts that since the creation of those records referenced, the servicing rights and duties had been assigned from BAC to Nationstar Mortgage LLC (Nationstar). HSBC claims it did not receive a response from BAC that BAC would not be defending the action as servicer of the loan and HSBC received no further information regarding the matter until it was contacted by Nationstar after the default order was issued in this action.

The court finds the foregoing explanation constitutes a reasonable excuse for the default, especially since there is no showing that the failure to answer was intentional or part

of a pattern of neglect, and there is a lack of demonstrable prejudice to plaintiff if the default were vacated (*see Dimitriadis v Visiting Nurse Serv. of N.Y.*, 84 AD3d 1150, 1151 [2d Dept 2011]).

However, while a reasonable excuse has been presented, the court finds that HSBC has failed to demonstrate a potentially meritorious defense to the action. In its motion to vacate, HSBC maintains that it possesses a meritorious defense to the instant RPAPL 1501 (4) action insofar as the statute of limitations has not expired on a new foreclosure action. Specifically, HSBC argues that the limitations period is tolled under RPAPL 1301, that the limitations period was effectively reset by the voluntary discontinuance of the prior foreclosure action and that the statute of limitations has not expired on “other defaults” under the mortgage terms.

“As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding ... the action” (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *see* CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept 1997]). However, “even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins

to run on the entire debt” (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]; see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982). The filing of a summons and complaint and notice of pendency in a foreclosure action constitutes a valid election to accelerate the maturity of the debt (see *Fannie Mae v. 133 Mgt., LLC*, 126 AD3d 670 [2d Dept 2015]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]).

More than six years have passed since the loan was accelerated by the commencement of the prior foreclosure action in 2008 and, accordingly, any new foreclosure action would be barred by the statute of limitations. Contrary to the contention of HSBC, there was no “toll” of the statute of limitations under RPAPL 1301 since there was never any separate action commenced by HSBC to recover on the note (*cf. Phalen-Sobolevsky v Mullin*, 26 AD3d 806 [4th Dept 2006]). Further, the voluntary discontinuance of the foreclosure action alone did not revoke the acceleration of the mortgage debt and reset the statute of limitations period. A lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower’s position in reliance thereon (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2nd Dept 1994]). After the mortgage debt has been accelerated, the acceleration may only “be revoked through an affirmative act occurring within the limitations period” (*Lavin v Elmakiss*, 302 AD2d 638, 639 [3rd Dept 2003]). Courts have found that the mere acceptance of a partial payment of the accelerated debt is *not* an affirmative act revoking an acceleration (see *UMLIC VP, LLC v Mellace*, 19 AD3d 684 [2d Dept 2005]; *Lavin v Elmakiss*, 302 AD2d at

639), nor are dismissals of actions by the court (*see Clayton Nat., Inc. v Guldi*, 307 AD2d 982 [2d Dept 2003]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606; *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d at 894). In *Lavin*, the court stated that “the acceptance of such payments is not inconsistent with defendants’ insistence that the entire debt immediately be paid. Hence, the mere acceptance of such payments does not, in our view, constitute proof of an affirmative act of revocation” (*Lavin v Elmakiss*, 302 AD2d at 639).

While some lower courts have held otherwise (*see U.S. Bank N.A. v Wongsonadi*, 55 Misc 3d 1207[A] [2017 NY Slip Op 50452[U] [Sup Ct, Queens County 2017]; *U.S. Bank N.A. v Deochand*, 2017 NY Slip Op 30472[U] [Sup Ct, Queens County 2017]), there is no controlling authority holding that the voluntary discontinuance of a foreclosure action, without more, constitutes an affirmative act revoking the acceleration of a mortgage debt. Here, the discontinuance of the foreclosure action only evinced the intent of HSBC to not immediately seek a judgment of foreclosure and sale. However, such act is otherwise “not inconsistent with [HSBC’s] insistence that the entire debt immediately be paid” (*Lavin v Elmakiss*, 302 AD2d at 639). Presumably, HSBC remains committed to recovering the entire mortgage debt and any accumulated interest. HSBC has not produced any evidence that it sent Sterling or plaintiff a notice expressly revoking the acceleration and reinstating the loan. Accordingly, the court finds that the mere discontinuance of the foreclosure action, standing alone and without further proof expressing HSBC’s intent, does not constitute an affirmative

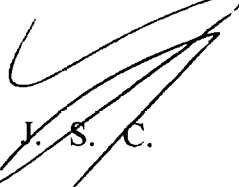
act revoking the acceleration (*see U.S. Bank, N.A. v Crockett*, 55 Misc 3d 1222[A], 2017 NY Slip Op 50741[U] [Sup Ct, Kings County 2017], *4).

HSBC's remaining arguments are unavailing. Because the mortgage debt was accelerated by the foreclosure action and the acceleration was not revoked, the statute of limitations does not run on each new monthly installment due (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605). Also, the court does not find meritorious HSBC's argument, in essence, that the statute of limitations may begin anew upon any subsequent event of default under the mortgage terms (i.e., Sterling's sale of the property without HSBC's permission).

As a result, HSBC's motion to vacate its default in answering and vacate the November 10, 2016 default order of this court is denied. As a consequence, the remaining parts of HSBC's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) & (7) and for other relief is denied. All stays are hereby vacated.

The foregoing constitutes the decision and order of the court.

E N T E R,



HON. LAWRENCE KNIPEL