Wilmington Sav. Fund Socy. v Brophy
2017 NY Slip Op 31811(U)
July 27, 2017
Supreme Court, Suffolk County
Docket Number: 15-610774
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 15-610774

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 05-31-16 (001, 002)
ADJ. DATE 07-08-16 (001,002)
Mot. Seq. # 001 -MotD
Mot. Seq. # 002-MD

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WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR BCAT 2014-6TT

Plaintiff,

- against -

MARGARET BROPHY, ASSET RECOVERY FUND I, LLC, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, STATE OF NEW YORK ON BEHALF OF UNIVERSITY HOSPITAL I/P, STATE OF NEW YORK ON BEHALF OF UNIVERSITY MC I/P, PALISADES COLLECTION LLC ASSIGNEE OF AT&T, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT,

JOHN DOE (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors.)

Defendants.

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated April 19, 2016, and supporting papers, (including Memorandum of Law dated April 19, 2016; (2) Notice of Cross Motion by the defendant Asset Recovery Fund I, LLC, dated May 24, 2016, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated July 6, 2016, and supporting papers; (4) Other: stipulations adjourning the motions; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (#001) by the plaintiff, and the motion (#002) by the defendant Asset Recovery Fund I, LLC, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

ORDERED that this motion (#001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Asset Recovery Fund I, LLC, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the plaintiff is awarded partial summary judgment in its favor dismissing all affirmative defenses asserted in the defendant Asset Recovery Fund I, LLC's answer; and it is

ORDERED that this motion (#002) by the defendant Asset Recovery Fund I, LLC, for, inter alia, an order awarding summary judgment in its favor dismissing the complaint pursuant to CPLR 3211(a)(5) and CPLR 213 (4) on the ground that this action is untimely; or, in the alternative, for an order dismissing the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacks standing is denied in its entirety; and it is further

ORDERED that the moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date herein, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage and note executed by ("the mortgagor") in favor Greenpoint Mortgage Funding, Inc. ("Greenpoint") on September 30, 2002, on the property known as 13 Dolphin Way, Riverhead, New York 11901.

By way of a undated, specific endorsement with physical delivery, the note was allegedly transferred to Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity but solely as Trustee for BCAT 2014-6TT ("the plaintiff"). The transfer of the note also memorialized by a series of assignments and a corrective assignment, all of which were subsequently duly recorded in the Suffolk County Clerk's Office.

The note provides, in relevant part, that if the note holder does not require the mortgagor to pay immediately in full upon a default, it will still have the right to do so if the mortgagor is in default at a later

time (Note § 6 [D]). The note also provides, in sum and substance, that the lender may require immediate payment in full of all sums secured by the security instrument "if all or any part of the [p]roperty, or if any right in the [p]roperty, is sold or transferred without the lender's prior written permission" (Note § 10). The mortgage provides, in relevant part, that the lender cannot reject the mortgagor's payment of arrears in order to reinstate the mortgage, until a judgment is entered (*see*, Mtge § 19[c]).

The mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on June 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, Greenpoint commenced a prior action entitled, ***Greenpoint v Brophy***, and filed under Index No.: 39005/2008 by the filing of a summons and complaint on October 27, 2008.

In the prior action, Greenpoint filed a motion on January, 29, 2009 for an order fixing the defendants defaults and appointing a referee to compute and determine. By order dated June 10, 2009 (Cohalan, J.), Greenpoint's motion was granted and a referee was appointed. Greenpoint then moved for a judgment by motion filed on September 8, 2009, and a judgment of foreclosure was subsequently entered on or about November 6, 2009. Thereafter, Greenpoint moved for an order discontinuing the prior action with the consent of the appearing defendants in that action, namely, United States of America ("USA") and State of New York on behalf of University Hospital I/P ("New York"). By order dated September 16, 2013 (MacKenzie, J.), Greenpoint's motion was granted as unopposed; the prior action was discontinued, the judgment of foreclosure and sale was vacated and the Suffolk County Clerk was directed to cancel the notice of pendency filed on October 27, 2008.

By way of further background, while the motion for an order of reference in the prior action was pending, the mortgagor transferred her interest in the property by bargain and sale deed executed and acknowledged on June 23, 2009 for "Ten Dollars and other valuable consideration" to the defendant in this action, Asset Recovery Fund I, LLC ("ARF"). The recording sheet, however, reflects that no consideration or transfer taxes were paid in connection with this property transfer.

The plaintiff commenced the instant action by the filing of the lis pendens, summons and complaint on October 8, 2015. Issue was joined by the interposition of ARF's answer dated November 19, 2015, with an attached verification of the same date. By its answer, ARF admits that it is the owner of the property, but denies the remaining allegations in the complaint. By its answer, ARF also fourteen affirmative defenses, including the statute of limitations and the plaintiff's alleged lack of standing. The defendant United States of America appeared herein and waived all, but certain defenses. The remaining defendants have neither timely answered nor appeared herein, and thus, are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against ARF, striking its answer and dismissing the affirmative defenses asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. In support of the motion, the plaintiff submitted, inter alia, the note, mortgage and assignments; a certificate of merit pursuant to CPLR 3012-b; and the affidavit of Angie Farmer, a Vice

President of Rushmore Management Services LLC attorney-in-fact for the plaintiff.

The defendant ARF now moves for, inter alia, an order awarding summary judgment in its favor dismissing the complaint pursuant to CPLR 3211(a)(5) and CPLR 213 (4) on the ground that this action is untimely; or, in the alternative, for an order dismissing the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacks standing to commence and prosecute this action. In its moving papers, ARF reasserts its previously pleaded affirmative defenses pertaining to the statute of limitations and the plaintiff's alleged lack of standing. In support of the cross motion, ARF has submitted, inter alia, an affidavit from David Derosa, its "managing member." In his affidavit, Mr. Derosa alleges that ARF was a "bona fide purchaser of the property for valuable consideration provided to [the mortgagor]." The motions by ARF is opposed by the plaintiff in papers which also serve as reply papers to its motion-in-chief.

The court turns first to the branch of the motion by ARF for summary judgment dismissing the complaint pursuant to CPLR 3211(a)(5) and CPLR 213(4) on the ground that this action is untimely. On a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (***Kitty Jie Yuan v 2368 W. 12th St., LLC***, 119 AD3d 674, 988 NYS2d 898 [2d Dept 2014]; ***Beizer v Hirsch***, 116 AD3d 725, 983 NYS2d 615 [2d Dept 2014]).

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 commencement of the action (***Wells Fargo Bank, N.A. v Burke***, 94 AD3d 980, 982, 943 NYS2d 540 [2d Dept 2012]). With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due (***Wells Fargo Bank, N.A. v Cohen***, 80 AD3d 753, 754, 915 NYS2d 569 [2d Dept 2011]). Once a mortgage debt is accelerated, however, the borrowers' right and obligation to make monthly installments ceases, all sums become immediately due and payable, and the six-year statute of limitations begins to run on the entire mortgage debt (*see*, CPLR 213[4]; ***EMC Mtge. Corp. v Patella***, 279 AD2d 604, 720 NYS2d 161 [2d Dept 2001]; ***Federal Natl. Mtge. Assn. v Mebane***, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]). Nevertheless, a lender may revoke its election to accelerate the mortgage through an affirmative act of revocation occurring during the six-year statute of limitations (*see*, ***EMC Mtge. Corp. v Patella***, 279 AD2d 604, *supra*).

In this case, the debt was accelerated by the filing of the summons and complaint in prior action on October 27, 2008 (*see*, CPLR 213[4]; *see also*, ***Federal Natl. Mtge. Assn. v Mebane***, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]; *cf.*, ***Nationstar v MacPherson***, 2017 NY Slip Op 30677 [U], 2017 NY Misc LEXIS 1261, ___WL___ [Sup Ct, Suffolk County 2017] [holding that mortgage remains an installment contract until judgment is entered based upon provisions in mortgage]). Greenpoint's discontinuance of the prior action within the statute of limitations, however, was an affirmative action of revocation (*see*, ***U.S. Bank N.A. v Deochand***, 2107 NY Slip Op 30472 [U] [Sup Ct, Queens County 2017]; ***Ditech Fin. LLC v Naidu***, 2016 NY Slip Op 32110 [U] [Sup Ct, Queens County 2016]; ***4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust Co.***, 2016 NY Misc LEXIS 4901, 2016 WL 2839341 [Sup Ct, New York County 2016][finding that withdrawing the prior foreclosure action is an act of revocation]; *cf.*, ***Kashipour v Wilmington Sav. Fund Socy., FSB***, 144 AD3d 985, 41 NYS3d 737 [2d Dept 2016] [record barren of any act of revocation in action commenced pursuant to RPAPL 1501[4]). "When an action is discontinued, it

is as if had never been; everything done in the action is annulled and all prior orders in the case are nullified" (***Newman v Newman***, 245 AD2d 353, 354, 665 NYS2d 423 [2d Dept. 1997]). Therefore, the statute of limitations has not run, and this action is timely. Accordingly, the third affirmative defense is dismissed. The plaintiff's recovery, however, is limited to only those unpaid installments which accrued within the six-year period immediately preceding its commencement of this action (*see*, ***EMC Mtge. Corp. v Suarez***, 49 AD3d 592, 852 NYS2d 791 [2d Dept 2008]; ***Wells Fargo Bank, N.A. v Cohen***, 80 AD3d 753, *supra*; ***Sce v Ach***, 56 AD3d 457, 867 NYS2d 140 [2d Dept 2008]).

The branch of the motion for an order granting it summary judgment dismissing the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacks standing to commence and prosecute this action is denied. By its submissions, the plaintiff demonstrated its standing as holder of the note on the date of commencement (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; *see also*, ***Deutsche Bank Trust Co. Americas v Garrison***, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Burke***, 52 Misc3d 944, 34 NYS3d 865 [Sup Ct, Suffolk County 2016] [copy of endorsed note attached to the complaint as an exhibit]). In this case, the endorsed note was attached to the complaint on the date of commencement and to the certificate of merit made pursuant to CPLR 3012-b, both of which were e-filed. Therefore, the plaintiff demonstrated that the note was in its possession at the time of commencement.

In response, the defendant mortgagor has not come forward with any evidence to raise a triable issue of fact as to the plaintiff's standing or the validity of the assignments (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS2d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Accordingly, the tenth affirmative defense is dismissed.

Turning to the motion-in-chief, the plaintiff failed to demonstrate its prima facie case as to the alleged default in payment because the affidavit in support of the motion is partially supported by inadmissible hearsay (*see*, CPLR 4518 [a]; ***Citibank, N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Palisades Collection, LLC v Kedik***, 67 AD3d 1329, 890 NYS2d 230 [2d Dept 2009]; *see also*, ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). More specifically, the plaintiff's representative did not allege that she is familiar with the plaintiff's and/or the lender's and/or the prior servicer's record keeping practices and procedures as to the payment history since the time of the default (*see*, ***HSBC Mtge. Servs., Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]). Nor did she allege that the lender's and/or prior servicer's records were incorporated into its own records (*see*, ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]).

To the extent that the statements made by the affiant are based documents that were in the possession of the lender or the another servicer prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119, 810 NYS2d 100 [2005]).

The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495, 834 NYS2d 239 [2d Dept 2007] [internal quotation marks omitted]). Because the plaintiff's representative failed to lay a proper foundation for the admission of the records relating to the payment history preceding Rushmore's retention as servicer, under the business records exception to the hearsay rule (*see*, CPLR 4518 [a]), those of her assertions that were based on these records are inadmissible (*see*, ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*).

The court next turns to the remaining affirmative defenses asserted in the answer. The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015][those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract or assignments]).

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In opposition to the motion, ARF has offered no proof or arguments in support of any of the pleaded defenses in the answer, except as noted above. The failure by ARF to raise and/or assert each of the remaining pleaded defenses in the answer in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses asserted in the answer are thus dismissed. The third and tenth affirmative defenses are dismissed, as indicated above.

The plaintiff is therefore awarded partial summary judgment in its favor solely to the extent that all affirmative defenses asserted in the answer are dismissed. In view of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issue of fact relates to the issue of the payment history for the subject loan. The branch of the plaintiff's motion for an order appointing a referee to compute is thus denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein. The plaintiff's renewed motion, if any, shall include proof by way of, inter alia, an affidavit from one with personal knowledge of the payment history for the subject loan. The ancillary relief requested in the plaintiff's moving papers is also denied with leave to renew within 120 days of the date herein.

In view of the above determination, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: 7/27/17

Hon. PETER H. MAYER, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**