

NMNT Realty Corp. v Knoxville 2012 Trust
2017 NY Slip Op 32166(U)
February 28, 2017
Supreme Court, Suffolk County
Docket Number: 13-13279
Judge: Joseph C. Pastorella
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 008 - MD
009 - XMG; CASE DISP

-----X
NMNT REALTY CORP.,

Plaintiff,

- against -

KNOXVILLE 2012 TRUST, WELLS FARGO
BANK, NA and PORTFOLIO RECOVERY
ASSOCIATES, LLC,

Defendants.
-----X

MILLER, ROSADO & ALGIOS, LLP
Attorney for Plaintiff
320 Old Country Road, Suite 103
Garden City, New York 11530

HELFAND & HELFAND
Attorney for Defendant Knoxville 2012
Trust
350 Fifth Avenue, Suite 5330
New York, New York 10118

Upon the following papers numbered 1 to 5 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-2; Notice of Cross Motion and supporting papers 3-4; Answering Affidavits and supporting papers 5; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for summary judgment and the cross-motion by the defendant Knoxville 2012 Trust for summary judgment are determined as follows.

In January 2003, Seigmund Winter, Andre Mussenden and Juanita Mussenden (hereinafter the borrowers) executed a mortgage in favor of Washington Mutual Bank in connection with the purchase of a parcel of real property located at 136 Landing Meadow Road in Smithtown. At the same time, a note was executed by Winter that was secured by the mortgage. Thereafter, the mortgage was assigned to Homecomings Financial Network Inc. (Homecomings). It is undisputed that the borrowers defaulted under the note and mortgage by failing to make any monthly payments beginning on December 1, 2003. Winter filed a bankruptcy petition and was granted a discharge in 2005. On July 27, 2006, Homecomings commenced an action to foreclose the mortgage. The complaint alleged that the borrowers were in default and stated that Homecomings "has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal." A judgment of foreclosure and sale was obtained but Homecomings subsequently moved to discontinue the action and vacate the judgment. By order dated September 22, 2011, this Court (Kent, J.) granted the motion to discontinue the action. In February 2012, the plaintiff purchased

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the subject property from the borrowers. The mortgage was subsequently assigned to the defendant Knoxville 2012 Trust (Knoxville).

In May 2013, the plaintiff commenced this action, pursuant to RPAPL § 1501(4), to cancel and discharge the mortgage. The complaint alleges that the mortgage should be discharged because any action to foreclose is now barred by the statute of limitations. This Court denied prior motions by the parties for summary judgment. Following the completion of discovery, the parties again move and cross-move for summary judgment.

The statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated (*see Plaia v Safonte*, 45 AD3d 747; *Zinker v Makler*, 298 AD2d 516). Thus, even if a mortgage is payable in installments, once the mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (*see Wells Fargo Bank v Burke*, 94 AD3d 980; *EMC Mtge. Corp v Patella*, 279 AD2d 604). Where the acceleration of the mortgage debt is optional, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision (*see Wells Fargo Bank v Burke, supra; Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338). The commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised (*see Wells Fargo Bank v Burke, supra; EMC Mtge. Corp v Smith*, 18 AD3d 602).

Here, Homecomings commenced a prior foreclosure action and the complaint specifically stated that it was accelerating the entire debt. Thus, the statute of limitations began to run when the prior action was commenced in 2006 (*see EMC Mtge. Corp v Smith, supra*). Knoxville contends that the acceleration was revoked by the voluntary discontinuance of the foreclosure action. Once a debt has been accelerated, such an election may be revoked through an affirmative act by the holder occurring within the statute of limitations period (*see UMLIC VP, LLC v Mellace*, 19 AD3d 684; *Lavin v Elmakiss*, 302 AD2d 638). The dismissal of a prior foreclosure action by the court is generally insufficient to constitute an affirmative act by the lender to revoke its election to accelerate (*see Kashipour v Wilmington Savings Fund Society*, 144 AD3d 985; *Clayton National v Guldi*, 307 AD2d 982; *EMC Mtge. Corp v Patella, supra; Federal Natl. Mtge. Assn v Mebane*, 208 AD2d 892).

In this case, the prior action was dismissed based upon a motion by Homecomings to discontinue the action. The plaintiff claims that the prior action was discontinued because of procedural defects and submits affidavits from two of the borrowers who assert that the prior action was discontinued because of some unspecified "procedural problem." However, the Court did not issue an order dismissing the action for any alleged defect. Rather, Homecomings voluntarily moved to discontinue the action. In general, "when an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Stone Mountain Holdings v Spitzer*, 119 AD3d 548, 549 quoting *Newman v Newman*, 245 AD2d 353, 354). Under these circumstances, the voluntary discontinuance of the prior foreclosure action is sufficient to constitute an affirmative act of revocation (*see Federal Natl. Mtge. Assn v Mebane, supra; 4 Cosgrove 950 Corp v Deutsche Bank*, 2016 WL 2839341 [Sup Ct, NY County]; *Ditech Financial v Naidu*, 2016 WL 6432721 [Sup Ct, Queens County]).

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Accordingly, the plaintiff's motion is denied and the cross motion by Knoxville for summary judgment is granted.

Dated: February 28, 2017



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION