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| <b>U.S. Bank N.A. v Crockett</b>                                                                                                                                                                                               |
| 2017 NY Slip Op 32572(U)                                                                                                                                                                                                       |
| November 22, 2017                                                                                                                                                                                                              |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 516625/2016                                                                                                                                                                                                     |
| Judge: Francois A. Rivera                                                                                                                                                                                                      |
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At an IAS Term, Part 52 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  
22nd day of November, 2017<sup>1</sup>

HONORABLE FRANCOIS A. RIVERA

-----X  
U.S. BANK N.A., AS LEGAL TITLE TRUSTEE  
FOR TRUMAN 2013 SC3 TITLE TRUST,

Plaintiff,

**DECISION & ORDER**

Index No. 516625/2016

- against -

GERARD CROCKETT,

Defendant.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the motion of plaintiff U.S. BANK N.A., as legal title trustee for Truman 2013 SC3 title trust (hereinafter USBNA), filed on August 25, 2017, under motion sequence number three, for an order (1) pursuant to CPLR 2221 (e) granting leave to renew its opposition to defendant Gerard Crockett's motion (hereinafter Crockett) filed under motion sequence number one; and (2) vacating the June 5, 2017 decision and order of this court which granted Crockett's motion and dismissed the complaint pursuant to CPLR 3211 (a) (5); and (3) denying Crockett's motion filed under motion sequence number one.

- Notice of Motion
- Affirmation in support
- Affidavit in support
- Exhibits A-G
- Affirmation in opposition

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<sup>1</sup>This is also the date that the decision and order was mailed to the parties.

- Exhibits A-B
- Affirmation in reply

## **BACKGROUND**

On September 21, 2016, USBNA commenced the instant residential mortgage foreclosure action by electronically filing a summons, complaint and a notice of pendency (hereinafter the commencement papers) with the Kings County Clerk's office. Crockett is moving to dismiss rather than interposing an answer to the complaint.

The complaint alleges in pertinent part, that on October 31, 2006, Elka Shereshevsky executed and delivered a note (hereinafter the subject note) in favor of Bank of America (hereinafter BOA), USBNA's assignor, in the amount of \$1,200,000.00. On the same date, Elka Shereshevsky and Chana Shereshevsky executed and delivered a mortgage (hereinafter the subject mortgage) in favor of BOA on certain real property known as 4809 14th Avenue, Brooklyn, New York 11219, also known as Block 5636 Lot 6 (hereinafter the subject property) as security for the amounts due under the subject note. The borrowers failed to comply with the conditions of the subject note and mortgage by not making payments that were due on October 1, 2010 and subsequent payments. Defendant Crockett was sued because he claims an interest in the subject property by virtue of a deed dated February 25, 2016.

A separate action is pending in Kings County Supreme Court under index number 512070/2014 to foreclose on the subject mortgage and USBNA intends to consolidate both actions.

**UNDISPUTED FACTS**

By notice of motion filed on December 27, 2016, under motion sequence number one, Crockett moved for an order dismissing the complaint pursuant to CPLR 3211 (a) (5) as time barred. By decision and order issued June 5, 2017 (hereinafter the prior subject order), Crockett's motion for an order dismissing the instant complaint pursuant to CPLR 3211 (a) (5) was granted. USBNA's instant motion seeks to renew its opposition to Crockett's motion. On June 19, 2009, BOA commenced a prior action in Kings County Supreme Court under index number 15259/2009 to foreclose on the subject note and mortgage (hereinafter the 2009 foreclosure action). On July 31, 2013, BOA filed a stipulation discontinuing the 2009 foreclosure action. On August 8, 2014, BOA assigned the mortgage to USBNA. By deed dated September 17, 2014, Elka Shreshevky conveyed her 50% interest in the subject property to Shabsi Pfeiffer and Gerard Crockett. On December 19, 2014, USBNA commenced an action in Kings County Supreme Court under index number 512070/2014 to foreclosure the subject mortgage and subject note (hereinafter the 2014 foreclosure action). On January 22, 2015, USBNA filed a supplemental summons and amended complaint naming Crockett as a defendant.

On May 18, 2015, Crockett moved to dismiss the 2014 foreclosure action pursuant to CPLR 3211 (a) (8) on the basis that he was not served with the summons and complaint. USBNA opposed the motion. By order dated July 17, 2015, a traverse hearing was ordered. By order dated October 20, 2015, the Court dismissed the 2014

foreclosure action as against Crockett based on its findings after the traverse hearing that USBNA had failed to properly serve the commencement papers upon him.

## LAW AND APPLICATION

CPLR 2221 sets forth the procedure for making a motion affecting a prior order and states the following:

CPLR Rule 2221. Motion affecting prior order.

(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

(e) A motion for leave to renew: 1. shall be identified specifically as such; 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Crockett had moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the grounds that the action was barred by the statute of limitations. Crockett contended that BOA, USBNA's predecessor in interest, accelerated the subject note and mortgage on June 19, 2009 with the commencement of the 2009 foreclose action. He further contends

that pursuant to CPLR 213 (4), the six-year statute of limitations for commencing a new action had expired June 19, 2015, over a year prior to September 21, 2016, the date the instant action was commenced.

The filing of the summons and complaint and notice of pendency in the 2009 foreclosure action constituted a valid election to accelerate the maturity of the debt (*Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657 [2nd Dept 2017] citing *Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Fannie Mae v 133 Mgt., LLC*, 126 AD3d 670 [2nd Dept 2015]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2nd Dept 2005]).

Crockett's evidentiary showing demonstrates that the instant action was commenced on September 21, 2016, more than six years after BOA accelerated the subject note and mortgage by the commencement of the 2009 foreclosure action. Crockett met his burden of demonstrating, prima facie, that the time within which to commence the instant action has expired (*Beroza v Sallah Law Firm, P.C.*, 126 AD3d 742 [2nd Dept 2015] citing *Kitty Jie Yuan v 2368 W. 12th St., LLC*, 119 AD3d 674 [2nd Dept 2014]).

Consequently, the burden shifted to USBNA to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period (*Id.*).

USBNA does not dispute that BOA accelerated the subject note and mortgage on

June 19, 2009, when it commenced the 2009 foreclosure action. Crockett does not dispute that on July 31, 2013, BOA filed a stipulation discontinuing the 2009 foreclosure action. USBNA contends that the voluntary discontinuance of the action in 2013, constituted a revocation of the acceleration of the note. USBNA further contends that, at the very least, the 2013 voluntary discontinuance raises a triable issue of fact on whether BOA properly revoked the acceleration of the note. In support of this contention, USBNA has cited (*NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068 [2nd Dept 2017]). The *NMNT* case was issued by the Appellate Division Second Department on June 28, 2017, three weeks after, the subject prior order.

USBNA has demonstrated that there has been a change in the law that would change the Court's prior determination. The *NMNT* decision had not been issued at the time Crockett's motion was being considered and its holding would change the Court's prior determination. Contrary, to this Court's prior decision and order and Crockett's arguments in opposition to the instant motion, the 2013 voluntary discontinuance of the 2009 foreclosure action alone raises a triable issue of fact on whether BOA effectuated a revocation of the acceleration of the subject note. Moreover, in the context of a CPLR 3211 motion, Crockett's prior and instant evidentiary submission did not conclusively establish that the voluntary discontinuance did not effectuate a revocation of the acceleration of the subject note. Accordingly, USBNA's motion is granted in its entirety.

## CONCLUSION

USBNA's motion for an order pursuant to CPLR 2221 (e) granting leave to renew its opposition to defendant Gerard Crockett's motion filed under motion sequence number one is granted.

USBNA motion for an order vacating the June 5, 2017 decision and order of this court which granted Crockett's motion and dismissed the complaint is granted.

USBNA motion for an order denying Crockett's motion filed under motion sequence number one is granted.

The foregoing constitutes the decision and order of this Court.

Enter:

  
J.S.C.

HON. FRANCOIS A. RIVERA  
J.S.C.

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FILED