

U.S. Bank N.A. v Rowe
2017 NY Slip Op 32819(U)
October 25, 2017
Supreme Court, Queens County
Docket Number: 700507/17
Judge: Diccia T. Pineda-Kirwan
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IAS PART 36

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U.S. BANK NATIONAL ASSOCIATION, ETC.,

Plaintiff(s),

-against-

NICOLE ROWE, ET AL,

Defendant(s).

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INDEX NO.: 700507/17
BY: PINEDA-KIRWAN, J.

MOTION DATE *CMP*: 9/18/17

(*Rev'd Pt. 36 9/20/17*)

MOTION CAL. NO. *CMP*: 164

MOTION SEQ. NO.: 1

Settlement Conference
Date 10/25/17 #9

In the interest of judicial economy, as well as the case being ripe for settlement, this matter was set down for a conference by order dated September 22, 2017 for October 6, 2017, which was ultimately adjourned for today. Despite the Court's best efforts, no settlement was reached.

Now, upon the foregoing cited papers, and after conference, it is ordered that the motions are determined as follows:

Defendant Nicole Rowe executed a mortgage in favor of Mortgage Lenders Network USA, Inc., on May 5, 2006 against the real property known as 189-01 Williamson Avenue, Springfield Gardens, New York to secure a note evidencing a loan in the amount of \$392,000. The mortgage was thereafter assigned to LaSalle Bank, N.A., as Trustee for the MLMI Trust Series 2006-MLN1 (LaSalle), who in March of 2007 commenced a foreclosure action in the Supreme Court, Queens County, under Index No.: 8266/07 (Prior Action) based upon the alleged default in payment of the monthly mortgage installment due on November 1, 2006 and monthly thereafter.

By order dated April 22, 2014, the Prior Action was voluntarily discontinued. On or about January 11, 2017, plaintiff, the successor by merger to LaSalle, commenced the instant action seeking to foreclose the mortgage which was the subject of the Prior Action

based upon the alleged default in payment of the monthly mortgage installment due on May 1, 2011 and monthly thereafter. Plaintiff now moves for, among other things, an order of reference, and defendant Mayon Buckley cross-moves to dismiss the action with prejudice and cancel the notice of pendency based upon the expiration of the statute of limitations and to cancel and discharge the mortgage pursuant to RPAPL 1501(4).

An action to foreclose a mortgage is governed by a six-year statute of limitations (*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 Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). A default date begins the statute of limitations as to the installment payment that becomes due on that date. 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 Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2012]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt. Thus, the statute of limitations for the entire debt began to run when the Prior Action was commenced in March of 2007, as in its complaint in the Prior Action, LaSalle "elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal" (*see Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657, 658 [2017]).

This action was not commenced until January 11, 2017, which is more than six-years after the acceleration in the Prior Action's complaint and, thus, without any further action by the lender, is barred by the statute of limitations. While 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 borrower's position in reliance thereon, such an act must be done by an affirmative act occurring within the statute of limitations period (*see Kashipour v Wilmington Sav. Fund Soc'y, FSB*, 144 AD3d 985, 987 [2016]). Here the plaintiff fails to establish, that it took any action to de-accelerate the loan within the statute of limitations period. To the extent that the voluntary discontinuance of the Prior Action can be accepted as such an act, this occurred more than seven years after the acceleration of the loan. Consequently, this action is time-barred (*see* CPLR 213[4]; *U.S. Bank Nat. Ass'n v Martin*, 144 AD3d 891, 892 [2016]).

As this action is time-barred, Buckley is also entitled to relief under RPAPL 1501(4), which states in relevant part that “any person having an estate or interest in the real property subject” to a mortgage may maintain an action to cancel and discharge such mortgage where “the period allowed by the applicable statute of limitation[s] for the commencement of an action to foreclose a mortgage... has expired.” Buckley however has not established any entitlement to an order directing plaintiff to record a satisfaction of the mortgage.

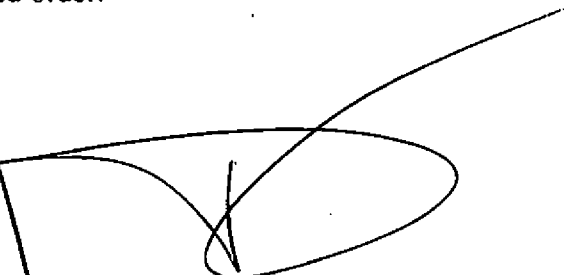
Plaintiff’s argument that the debt was not accelerated in the Prior Action because the acceleration language in the complaint was inconsistent with the mortgage, which did not allow the mortgagee to reject a tender of arrears until the entry of judgement, is without merit. It is well-established that the filing of a summons and complaint and notice of pendency constitutes a valid election to accelerate the maturity of a debt (see *Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657, 658 [2017]; *U.S. Bank N.A. v Crockett*, 55 Misc3d 1222[A][Sup Ct, Kings County 2017]). Additionally, the cases plaintiff cites for the proposition that a bank’s election to accelerate the debt in a prior action is ineffective, are distinguished as the plaintiffs in those cases lacked standing to bring the prior actions, and therefore were not in a position to accelerate the debt (see *21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2017]; *DLJ Mortg. Capital, Inc. v Pittman*, 150 AD3d 818, 819 [2017]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2012]).

Accordingly, the motion is denied and the cross motion is granted except for the portion seeking an order directing plaintiff to record a satisfaction of mortgage.

Motion support to review the proposed order.

Submit order.

Dated: October 25, 2017


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DICIA T. PINEDA-KIRWAN, J.S.C.

FILED
JAN - 3 2018
COUNTY CLERK
QUEENS COUNTY