

HSBC Bank USA, NA v Afghani
2017 NY Slip Op 33260(U)
October 23, 2017
Supreme Court, Suffolk County
Docket Number: 601513/16
Judge: Thomas F. Whelan
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MEMO DECISION & ORDER

ORIGINAL

INDEX No. 601513/16

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/31/17
SUBMIT DATE 10/5/17
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MG
CDISP Y N X

HSBC BANK USA, NA,
Plaintiff,
-against-
FARID AFGHANI a/k/a FARID A. AFGHANI,
SHIMA AFGHANI, JPMORGAN CHASE BANK
NA and "JOHN DOE #1" to "JOHN DOE #10" the
last 10 names being fictitious and unknown to
plaintiff, the persons or parties intended being the
persons or parties, if any, having or claiming an
interest in or lien upon the mortgaged premises
described in the complaint,
Defendants.

McCABE, WEISBERG & CONWAY
Attys. For Plaintiff
145 Huguenot St. - Ste. 210
New Rochelle, NY 10801
DeLISA LAW GROUP, PLLC
Attys. For Defendants Afghani
630 Johnson Ave. - Ste. 006
Bohemia, NY 11716

Upon the following papers numbered 1 to 20 read on these motions for dismissal and the appointment of
a referee to compute, among other things; Notices of Motion/Order to Show Cause and supporting
papers 1 - 4; 5-11; Notice of Cross Motion and supporting papers: ; Opposing papers: 12; 13-14; 15
; Reply papers 16-17; 18-19; Other 20 (memorandum); (and after hearing counsel
in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the defendants, Farid Afghani and Shima Afghani, for
dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(5) and 213(4) or consolidation is
considered thereunder, and is denied in its entirety, and it is further

ORDERED that this motion (#002) by the plaintiff for, among other things, summary
judgment, amendment of the caption and the appointment of a referee to compute, is granted in its
entirety, and it is further

ORDERED that plaintiff's recovery is limited to all future installment payments and those
unpaid installments which accrued within the six-year period immediately preceding the
commencement of this action, that is, the unpaid installments which accrued on or after March 1, 2010,
and it is further

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ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith, and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

The matter was reassigned to this Part pursuant to Administrative Order No. 110-17, dated September 28, 2017 and submitted for decision on October 5, 2017. In essence, on November 19, 2004, defendant, Farid Afghani, borrowed \$562,500.00 from the plaintiff's related entity and executed a promissory note and mortgage with Shima Afghani, securing the real property located at 645 Durham Road, Islip, NY (the "Property"). Since June 1, 2007, the defendants failed to pay the monthly installments due and owing. A prior foreclosure action was commenced by filing on April 16, 2008 (Suffolk County Index Number 15182/2008) and assigned to this Court. The defendants defaulted in that action.

On October 27, 2009, this Court issued a Judgment of Foreclosure and Sale, which the defendants opposed. That Judgment was entered on November 4, 2009. On January 6, 2010, defendants filed for protection under Chapter 7 of the U.S. Bankruptcy Code. Thereafter, on March 31, 2010, the Bankruptcy Court (Eisenberg, USBJ), issued an unopposed Order lifting the automatic stay on the foreclosure action. The record before the Court shows that the defendants requested a loan modification, which was approved by plaintiff by letter dated August 19, 2010. The defendants eventually rejected that Trial Period Plan. By Order dated January 14, 2011, this Court signed an Order of Discontinuance and Vacatur of Judgment of Foreclosure and Sale, without prejudice, based upon the allegation "that the defendants/mortgagors entered into a workout agreement with the Plaintiff" (*see* Affirmation, Timothy P. Seibold, Esq., dated December 3, 2010).¹ Historically, this Court will not sign an Order of Discontinuance without an offered explanation therefor and has rejected such applications, if no reason is offered.

Thereafter, the Bankruptcy Court issued a Final Decree closing the Chapter 7 case on June 28, 2011. Shortly thereafter, the defendants, once again, requested a loan modification, which was approved by plaintiff by letter dated July 18, 2011. The defendants failed to accept this second Trial Period Plan.

Defendants do not deny the claim of a possible workout plan and defendant, Farid Afghani, submits an affidavit in support of the motion, that, in essence, agrees with the claim ("[a]lthough I had hoped to modify or reinstate the loan, I was never able to reach a resolution with HSBC" [par. 7]).

This foreclosure action was commenced by filing on February 2, 2016. By administrative rule and now by statute, all proceedings were stayed until the completion of CPLR 3408 conferencing. A foreclosure settlement conferences took place on May 13, 2016, but no agreement was reached and plaintiff was directed to proceed with this action. Defendants answered the complaint, alleging eleven

¹ The Court notes that the papers submitted on defendants' motion fails to include that page of the Seibold affirmation.

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Affirmative Defenses. By the instant motion in the present action (#001), defendants move for dismissal of plaintiff's complaint pursuant to CPLR 3211(a)(5) and 213(4). Plaintiff, by separate motion (#002), seeks an order granting summary judgment, striking the answer, dismissing the affirmative defenses and appointing a referee to compute.

Initially, defendants' motion is untimely as issue has been joined herein by an answer containing the claim of statute of limitations as an affirmative defense (Third Affirmative Defense) (*see* CPLR 3211[a]; [e]; [f]). Here, the Court finds that the demand for dismissal is, in effect, a demand for summary judgment dismissing the complaint pursuant to CPLR 3212 on the ground advanced, as such demand was interposed following the joinder of issue and was treated as a demand for summary judgment by the parties themselves.

Defendants claim that this action is time-barred. The Court must disagree. The contention is that the plaintiff's related entity accelerated the Note and Mortgage on April 16, 2008, when it commenced a prior, but subsequently discontinued action.

Defendants have failed to establish, *prima facie*, that this action is time-barred (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 39 NYS3d 491 [2d Dept 2016]). The only evidence submitted is a pleading. Such is insufficient.

In any event, an action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]; *NMNT Realty Corp. v Knoxville 2012 Tr.*, 151 AD3d 1068, 1069, 58 NYS3d 118, 120 [2d Dept 2017] [citations omitted]). "[O]nce a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt. ... A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*id.*, 1069-1070, [citations omitted]).

In their motion and in their opposition to plaintiff's motion, the moving defendants are incorrect in stating that there was no showing of a "deceleration." Here, the plaintiff's prior action was affirmatively discontinued by court order on January 14, 2011, at the plaintiff's request. When there is a validly filed stipulation of discontinuance resolving a case, it is as if the case "had never been begun" (*Yonkers Fur Dressing Co. Inc. v Royal Ins. Co. Ltd.*, 247 NY 435, 444, 160 N.E. 778 [1928]).

As noted by then Justice Daniel F. Luciano in *Housberg v Blake*, 146 Misc2d 960, 962, 553 NYS2d 280 (Sup Ct, Suffolk County 1990), quoting treatise on New York law:

When an action is discontinued, it is as if the action had never been; all prior orders in the case are nullified. Once an action has been discontinued, there can be no judgment or appeal, and no objection to another action for the same relief on the ground that a prior action is pending (citation omitted) ... once an action has been discontinued by consent or stipulation, it is [as though] the action never existed; ...

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Even in the ancient case of *Loeb v Willis*, 100 NY 231, 235, 55 Sickels 231 (1885) the Court of Appeals stated:

The foreclosure action was discontinued and all the proceedings therein thus annulled. There was no longer any record or adjudication in that action which bound any one. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been.

The Second Department has adhered to that rule. In *Newman v Newman*, 245 AD2d 353, 665 NYS2d 423 (2d Dept 1997) the court held “[w]hen 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.” Therefore, as noted by Justice Robert J. McDonald in *U.S. Bank Natl. Assn. v Wongsonadi*, 55 Misc3d 1207(A), (Sup Ct, Queens County April 5, 2017) “the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action. Accordingly, this Court finds that discontinuing the prior foreclosure action was an affirmative act of revocation.”² This Court agrees.

Here, the complaint alleges that the defendant borrowers have failed to pay the monthly installments due and owing since June 1, 2007. With the affirmative revocation of the acceleration set forth in the prior action, the statute of limitations has not run and plaintiff’s action is timely, with regard to all future installment payments and those that were due and owing for six years prior to the commencement of the action (see *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 852 NYS2d 791 [2d Dept 2008]). Therefore, plaintiff’s recovery is limited to only those unpaid installments which accrued within the six-year period immediately preceding its commencement of this action, that is, the unpaid installments which accrued on or after March 1, 2010.

Plaintiff affirmatively moved this Court to voluntarily discontinue the prior action, which serves as a revocation of the prior acceleration. Although a court dismissal of a prior action for failure to prosecute, failure to appear at a conference or lack of personal jurisdiction or the acceptance of additional payments after acceleration, do not constitute an act of revocation (see e.g. *Clayton Natl., Inc. v Guldi*, 307 AD2d 982, 763 NYS 493 [2d Dept 2003]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]). Here, plaintiff voluntarily discontinued the action before the six year statute of limitations expired.

This Court finds that the plaintiff’s abrogatory act of discontinuing the prior action, coupled with the resulting Order, was an affirmative act of revocation (see *U.S. Bank Natl. Assn. v Wongsonadi*, 55 Misc 3d 1207[A], 55 NYS3d 695 [Sup Ct Queens County 2017]; *U.S. Bank Natl.*

² Even the case relied upon by defendants acknowledges that “[t]he prior foreclosure action was never withdrawn by the lender” (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894, 618 NYS2d 88 [2d Dept 1994]).

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Assn. v Deochand, 2017 WL 1031942, 2017 NY Slip Op 30472(U) [Sup Ct Queens County 2017]; *Assyag v Wells Fargo Bank, N.A.*, 2016 WL 6138269 [Sup Ct Queens County, September 29, 2016, No. 707845-2015]; *4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust Co.*, 2016 WL 2839341 [Sup Ct New York County, May 11, 2016, No. 152225/2015]).

Under the circumstances of this case, where the defendants requested, not one but two loan modifications, both of which were approved by plaintiff, to now claim that such good faith efforts should be rewarded by claiming the plaintiff's action should be dismissed as untimely, is utterly without merit (*compare, NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 58 NYS3d 118 [2017]). Additionally evidence of de-acceleration is reflected in the letters from plaintiff to defendants offering a modified monthly payment plan.

The Court denies the defendants' motion (#001) and rejects the Third Affirmative Defense. In short, upon the issuance of the Order of Discontinuance by this Court, the prior acceleration of the loan was revoked by plaintiff's affirmative act of voluntarily discontinuing the prior foreclosure action, as they sought to accommodate the defendants with a modification of the loan.

The Court now turns to plaintiff's motion (#002).

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, *prima facie*, by the plaintiff's production of the mortgage and the unpaid note, and evidence of the default in payment (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]).

In the moving papers on the instant motion, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses and counterclaims of the answer. Therefore, plaintiff has satisfied its *prima facie* burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 962, 49 NYS3d 527 [2d Dept 2017]).

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses and counterclaims asserted in the answer or otherwise available to defendants (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses and counterclaims predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619, 858 NYS2d 260 [2d

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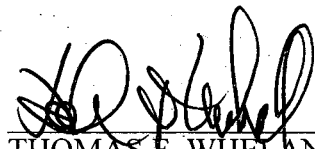
Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses or counterclaims in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

Defendants' motion (#001) and opposition to plaintiff's motion allege only one claim, that is, whether this action is within the applicable statute of limitations (Third Affirmative Defense). The Court, therefore, dismisses the remaining ten Affirmative Defenses in defendants' answer as abandoned.

For the reasons set forth above, the plaintiff is entitled to summary judgment. The request to consolidate with the quiet title action is rendered moot.

Therefore, the Court grants plaintiff's motion (#002) in its entirety, denies the defendants' motion (#001), and simultaneously signs the proposed Order, as modified.

DATED: 10/23/17


THOMAS F. WHELAN, J.S.C.