

Boreshesky v U.S. Bank Trust, N.A.

2017 NY Slip Op 33552(U)

July 5, 2017

Supreme Court, Suffolk County

Docket Number: Index No. 620139/2016

Judge: John H. Rouse

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INDEX NO. 6201392016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 04/25/2017
ADJ. DATE: 06/07/2017
Mot. Seq. 001-MD

MOTION DATE: 04/25/2017
ADJ. DATE: 06/07/2017
Mot. Seq. 002-MD
e-filed full participation

SUSAN BORESHESKY,

Plaintiff

-against-

DECISION & ORDER

U.S. BANK TRUST, N.A., As Trustee for LSF9 MATER
PARTICIPATION TRUST,

Defendant

TO:

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff and Cross Motion by Defendant; and (2) All e-filed documents numbered 1-61, it is:

ORDERED that the motion (Seq. #001) by Plaintiff for summary judgment is denied with leave to renew after all discovery is certified as complete and a note of issue has been filed; and it is further

ORDERED that the motion (Seq. #002) by Defendant for summary judgment on its counterclaim is denied with leave to renew after all discovery is certified as complete and a note of issue has been filed; and it is further

ORDERED that on or before August 2, 2017 Plaintiff is directed to e-file a schedule of all payments she claims she made upon the note secured by the mortgage she seeks to discharge and the dates of such payments; and it is further

ORDERED that on or before August 2, 2017 Defendant is directed to e-file a schedule of all payments it claims it made for taxes and insurance for the subject property from the date it became the holder of the note to August 2, 2017; and a schedule of all past due payments of principal and interest that it contends first became due within the six year statute of limitations, as if a foreclosure action were to be commenced on August 2, 2017, and a schedule of all payments it contends will become due for principal and interest after August 2, 2017 until the note is paid; and it is further

ORDERED that the Plaintiff will personally appear with counsel and the Defendant will appear by counsel with complete authority to settle this case, before this Court on August 23, 2017 at 2:00 o'clock in the afternoon in Part 12 located on the second floor of the Supreme Court Annex, 1 Court Street Riverhead, NY.

DECISION

Plaintiff brings this action to quiet title to certain real property known as 54A Superior Street, Port Jefferson Station, New York. Plaintiff acknowledges that she granted and delivered a mortgage to Household Finance Realty Corporation dated May 22, 2007 that was recorded at Liber M00022588, Page 980 securing the original sum borrowed on a note being \$163,345.03. Defendant has made equitable counterclaims.

Plaintiff alleges that Household Finance Realty Corporation commenced a foreclosure action on July 27, 2010 against her. In that action Susan Boreshesky contended that Household Finance Realty Corporation did *not* have standing to commence that foreclosure action. *See e-filed document # 35 at page 88 being Boreshesky's Third Affirmative Defendant at par. 8 at page 88 of the e-filed document.* In Boreshesky's opposition to Household Finance Realty Corporation's motion for summary judgment in the foreclosure action she again asserted that Household Finance Realty Corporation did not have standing to foreclose the mortgage. *See e-filed document # 35 at page 4.* Household Finance Realty Corporation then by its own Notice of Motion, moved to discontinue the action. The motion to discontinue the action was granted by the Court by decision and order dated August 1, 2016.

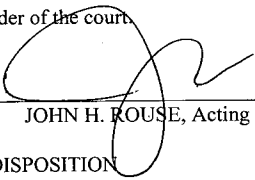
Now, upon this action to quiet title Plaintiff moves for summary judgment upon the contention that the note had been accelerated by Household Finance Realty Corporation on July 27, 2010 and that the six year statute of limitations has now passed and the mortgage should be cancelled and discharged in accordance with RPAPL § 1501(4). Plaintiff upon her motion for summary judgment has failed to provided competent evidence that makes out a *prima facie* case that Household Finance Realty Corporation had standing to accelerate the note alleged to be held by U.S. BANK TRUST, N.A., as Trustee for LSF9 MATER PARTICIPATION TRUST. Plaintiff's contention actually belied by her defense in that earlier foreclosure action. Accordingly, the

Court does not need to reach the question of whether Household Finance Realty Corporation's own motion to discontinue the action constituted a revocation of its claimed earlier acceleration of the note. See *NMNT Realty Corp. v Knoxville 2012 Trust*, __AD3d__ (2nd Dept. June 28, 2017). Plaintiff's motion for summary judgment is denied.

Defendant requests that upon its counterclaim alleges it is the holder of the note, that Plaintiff defaulted in repayment of this note on May 26, 2009 and has been in continuous default since that time while the Defendant has paid taxes and maintained insurance on the premises throughout, Plaintiff should be equitably estopped from having the use and occupancy of the premises for eight years without having paid for the use and occupancy and, if the note and mortgage are unenforceable,¹ seeks the appointment of a referee to hear and report to the court upon the amounts that are equitably due to Defendant. Upon this denial of the Plaintiff's motion for summary judgment the Defendant's conditional request for equitable relief is denied with leave to renew should circumstances require.

The foregoing shall constitute the decision and order of the court.

Dated: July 5, 2017



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION

¹See e-filed document 51, Defendant's Memorandum of Law at page 19.