

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

2017 NY Slip Op 33553(U)

October 16, 2017

Supreme Court, Suffolk County

Docket Number: Index No. 620139/2016

Judge: John H. Rouse

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INDEX NO. 620139/2016

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

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 08/23/2017
ADJ. DATE: 10/04/2017
Mot. Seq. 003-MG
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) Order to Show Cause granted on August 1, 2017 requiring Plaintiff to show cause why Defendant's motion to renew and reargue its motion for summary judgment that resulted in a denial of that motion with Exhibits A-J and Memorandum of Law in Support; (2) Affirmation in Opposition for Plaintiff by counsel filed on August 10, 2017; (3) all e-filed documents numbered 1-86, it is:

ORDERED that the motion (Seq. #003) by Defendant to reargue its prior cross motion is granted to the extent that Defendant shall have partial summary judgment on the issue of liability for all amounts paid for taxes and insurance within the six year period of commencement of this action.

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.

Upon this action to quiet title Plaintiff moved 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 passed prior to the commencement of this action, and the mortgage should be cancelled and discharged in accordance with RPAPL § 1501(4). Plaintiff upon her motion for summary judgment failed to provide competent evidence to make out a *prima facie* case that Household Finance Realty Corporation had standing to accelerate the note now alleged to be held by U.S. BANK TRUST, N.A., as Trustee for LSF9 MATER PARTICIPATION TRUST. The original action commenced by Household Finance Realty Corporation was upon an unverified complaint, and while that complaint alleged the loan had been accelerated, see *e-filed document # 3 at the NINTH paragraph of that complaint*, and Household Finance Realty Corporation later moved to discontinue that action and the motion was granted by decision and order of the Hon. Joseph Pastoressa on August 1, 2016. see *e-filed document # 4*. Plaintiff's contention in this present action is belied by her defense in that earlier foreclosure action wherein she contended Household Finance Realty Corporation did not have standing to foreclose, and therefore did not have standing to accelerate the loan. *21st Mge. Corp. v Adames, 153 A.D.3d 474 (2nd Dept. 2017) citing EMC Mtege. Corp. v Suarez, 49 A.D.3d 592*. This Court denied Plaintiff's motion for summary judgment based upon her failure to make a *prima facie* case that payments on the loan had all been accelerated by a party with authority to accelerate the loan and that all payments were beyond the statute of limitations.

Defendant cross moved for summary judgment on its counterclaims. The Court denied the Defendant's cross motion for summary judgment, directed mutual disclosure by the parties concerning the amounts paid and unpaid, and put the case on for conference before the court, and granted Defendant permission to renew the motion at a later date. Defendant then, by order to show cause, obtained a stay of the disclosure that had been ordered by this Court to advance settlement discussions, and moved to reargue its prior motion for summary judgment.

Motion (003) to Reargue by U.S. BANK TRUST, N.A., As Trustee for LSF9 MATER PARTICIPATION TRUST Its Cross Motion for Summary Judgment.

Defendant moves to reargue its counterclaims. Its first counterclaim is for unjust enrichment for eight years Plaintiff has enjoyed the use of the premises without making payments due under the loan; the second counterclaim was for unjust enrichment for the recovery of taxes and property insurance advanced on the Plaintiff's behalf. Defendant upon its cross motion contends that the acceleration of the loan had been revoked within the statute of limitations. See *e-document #29 Affirmation of Rachel G. Packer, Esq. at par. 23*. "It cannot be said that a dismissal by the court of a lender's foreclosure action constitutes an affirmative act by the lender to revoke its election to accelerate." *Federal Nat'l Mortgage Ass'n v. Mebane, 208 A.D.2d 892 (2nd Dept. 1994)*. Plaintiff offers no other evidence that the acceleration of the loan had been revoked within the statute of limitations. Under these circumstances the Defendant has failed to make a *prima facie* case that payments it claims are still due under the loan are within the statute of limitations. Defendant, on its counterclaim for unjust enrichment, for amounts paid for taxes and insurance, has made a *prima facie* case that Plaintiff has been unjustly enriched for payments made for taxes and insurance, to the extent they are within the six year period prior to the commencement of this action on December 13, 2016. *Federal Nat'l Mortgage Ass'n v. Mebane, 208 A.D.2d 892 (2nd Dept. 1994)*. Accordingly, Defendant is granted summary judgment on question of liability for these amounts paid for insurance and taxes the quantum of this amount to be presented upon competent proof.

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

Dated: October 16, 2017



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

NON-FINAL DISPOSITION