Bayview Loan Servicing, LLC. v Dalal

2017 NY Slip Op 33561(U)

February 14, 2017

Supreme Court, Bronx County

Docket Number: Index No. 32090/2016E

Judge: Mary Ann Brigantti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 15

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

BAYVIEW LOAN SERVICING, LLC.,

Index №. **32090/2016E**

-against-

Hon..**MARY ANN BRIGANTTI**

DANY DALAL, et als.
---X

The following papers numbered 1 to _7____ Read on this motion,_**REFEREE TO COMPUTE**
Noticed on **July 29, 2016** and duly submitted on the Motion Calendar of **October 28, 2016:**

	PAPERS NUMBERED	
Notice of Motion- Exhibits and Affidavits Annexed	1	2
Answering Affidavit and Exhibits	3	4
Replying Affidavit and Exhibits	5	6
_____________________ Affidavits and Exhibits	7	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		

Respectfully Referred to: ____________
Dated: ____________

Upon the foregoing papers, the plaintiff Bayview Loan Servicing, LLC. ("Plaintiff") moves for an order (1) pursuant to CPLR 3212, striking the Answer and defenses of defendant, Link Point Realty, Inc. ("Defendant"), on the grounds that the Answer has no merit; and that Plaintiff be granted judgment by default against the remaining non-answering defendants: Dany Dalal; First American Homes Inc., a/k/a First America Homes, Inc.; Bruner Homes, Inc.; GF1 Mortgage Bankers, Inc.; City of New York - Environmental Control Board; and New York State Department of Taxation and Finance (the "Defaulting Defendants"); (2) substituting the names of Yonathan A. Peralta; Claribel Munoz; Shatina Miller; and Taylor Sannyel as defendants "JOHN DOE #1 and JANE DOE #1-3" and striking from the caption of this action the fictitiously named defendants captioned as "JOHN DOE #2-5" and "JANE DOE #4-5," inclusive, and that the title of this action be amended accordingly, all without prejudice to any of the proceedings heretofore had herein or to be had herein; (3) referring this matter to a Referee, to ascertain and compute the amount due upon the Note and Mortgage being foreclosed and to report whether the mortgaged premises should be sold in one parcel; and (4) for such other and further relief as this Court may deem just and equitable. Defendant opposes the motion and cross-moves for an order, pursuant to CPLR

3212, granting Defendant summary judgment, dismissing the Plaintiff's complaint as barred by the statute of limitations, and granting such further relief as may be just. Plaintiff opposes the cross-motion.

Applicable Law and Analysis

"A prima facie showing to warrant summary judgment foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment." (*Witelson v. Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]). Here, Plaintiff has produced the mortgage, consolidated note, and evidence of a written assignment. The consolidated note itself contains an endorsement in "blank" signed by an authorized assistant secretary of JP Morgan Chase Bank, N.A., as well as an allonge directing payment to the order of JP Morgan Chase Bank, N.A. Plaintiff also provides an affidavit from Leticia Sanchez, a Senior Document Coordinator, who contends that upon review of Plaintiff's business records, Plaintiff acquired possession of the original note on February 27, 2014. Ms. Sanchez also states that, the borrowers Dany Dalal and First American Homes, Inc. defaulted on the loan by failing to make the payment due and owing on August 1, 2008, and any subsequent payment. Plaintiff's submissions, as a whole, satisfied its initial burden of proving entitlement to summary judgment (see *Bank of Smithtown v. 264 W.124 LLC.*, 105 A.D.3d 468 [1st Dept. 2013]; *Bank of New York Mellon Trust Co. NA v. Sachar*, 95 A.D.3d 695 [1st Dept. 2012]). It therefore became incumbent upon Defendant to demonstrate the existence of a triable issue of fact as to its affirmative defenses (*see, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1957], supra; *Barcov Holding Corp. v. Bexin Realty Corp.*, 16 A.D. 3d 282 [1st Dept. 2005]).

Defendant opposes the motion and cross-moves for summary judgment, dismissing the complaint as untimely. In moving to dismiss a cause of action as barred by the applicable statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired (*see City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635 [2d Dep't 2014]). "The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period." (*Id.*).

Generally, "an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action" (*Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982 [2nd Dept. 2012]; 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" (*Nationstar Mortg. LLC v. Weisblum*, 143 A.D.3d 866 [2nd Dept. 2016][internal citations omitted]). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt" (*EMC Mortgage Corp. v. Patella*, 279 A.D.2d 604, 605 [2nd Dept. 2001];

see also CDR Creances SA v. Euro-American Lodging Corp., 43 A.D.3d 45 [1st Dept. 2007]). "[O]nce a mortgage debt is accelerated, 'the borrowers' right and obligation to make monthly installments cease[s] and all sums [become] immediately due and payable'" (*EMC Mortgage Corp. v. Patella*, 279 A.D.2d at 605, quoting *Federal Natl. Mtge. Ass'n v. Mebane*, 208 A.D.2d 892, 894 [2nd Dept. 1994]). A lender's election to accelerate a mortgage may be subsequently revoked – thus halting the statute of limitations – only by an affirmative, unambiguous act by the lender during the limitations period, provided that there has been no change in the borrower's position in reliance thereon (*see Lavin v. Elmakiss*, 302 A.D.2d 638 [3rd Dept. 2003]; *see UMLIC VP v. Mellace*, 19 A.D.3d 684 [2nd Dept. 2005]). Absent such an act, the acceleration remains undisturbed and the statute of limitations continues to run. Courts have stressed that the lender must make an intentional, affirmative act to revoke a prior acceleration. A court's *sua sponte* dismissal of a foreclosure action (*see Federal Nat. Morg. Ass'n v. Mebane*, 208 A.D.2d 892 [2nd Dept. 1994]), or dismissal of a prior action for lack of personal jurisdiction (*see Clayton National, Inc. v. George O. Guldi*, 307 A.D.2d 982 [2nd Dept. 2003]), are insufficient to establish revocation.

In this case, Defendant established, prima facie, that the time in which to commence this action had expired. Defendant demonstrated that the statute of limitations on this debt began to run when Plaintiff's predecessor in interest, Chase Home Finance LLC. ("Chase"), accelerated the debt by commencing a foreclosure action on January 9, 2009. While Chase subsequently discontinued the prior action for inability to "verify compliance with pre-acceleration notice requirements," there is no evidence that the acceleration was affirmatively revoked or the loan reinstated. Plaintiff commenced the instant action on February 1, 2016, more than six years after the prior acceleration of the debt. The burden therefore shifted to Plaintiff to raise a question of fact in opposition, as to whether the statute of limitations is tolled or is otherwise inapplicable (*see U.S. Bank, N.A. v. Martin*, 144 A.D.3d 891 [2nd Dept. 2016]).

In opposition to the cross-motion and further support of its motion for summary judgment, Plaintiff does not deny that this mortgage debt was previously accelerated on January 9, 2009. Plaintiff, however, contends that it revoked that acceleration by letter sent to the borrower on October 30, 2014. The letter, annexed to Plaintiff's opposition papers along with proof of mailing, states "...your loan obligations may have been previously accelerated..." but it advises that "to the extent any previous acceleration may at this time be applicable, we hereby de-accelerate the loan, withdrawing any prior demand for immediate payment of all sums by the security instrument and re-institute the loan as an installment loan." Plaintiff argues that this letter was a valid revocation of the loan within the limitations period. Further, Plaintiff alleges that Defendant cannot allege any substantial prejudice, because Defendant cannot speak on behalf of the borrower, and the 2011 transfer of the premises from the borrower to this Defendant was in contravention of the terms of the note and mortgage. In reply, the Defendant argues that the alleged revocation is a nullity because Plaintiff lacked the authority to revoke Chase (its predecessor in interest)'s acceleration. Plaintiff hadn't yet been assigned the note and mortgage and was not the holder of the loan documents at that time.

Further, the subsequent motion to discontinue was made after expiration of the statute of limitations, and was brought by Chase rather than Plaintiff. Where the prior acceleration was invoked by Chase, only Chase possessed the ability the revoke it. Defendant alleges that if Plaintiff was the holder of the note and mortgage with the authority to revoke Chase's prior acceleration, Plaintiff should have substituted itself as a party plaintiff in the prior foreclosure action.

While Defendant was not a signatory to the note or mortgage, it nevertheless has the capacity to raise the statute of limitations defense to this action, contrary to Plaintiff's contentions (RPAPL §1501[4]). As noted *supra*, once a loan is accelerated, a lender may only revoke the acceleration by an "intentional," "affirmative," and unambiguous action during the limitations period (*see Lavin v. Elmakiss*, 302 A.D.2d 638). Plaintiff's position is that the October 30, 2014 letters constitutes such an affirmative intentional act revoking the January 2009 acceleration. First, since Plaintiff's employee affidavit competently alleged that Plaintiff was in possession of the note and mortgage on February 27, 2014 – months before the October letter was sent – this Court declines to find that Plaintiff had no authority to issue it, as argued by Defendant. Possession of the endorsed-in-blank note established Plaintiff's ability to enforce it (*see* N.Y. U.C.C. §3-301), even though Plaintiff was never formally substituted in the prior action. Furthermore, this Court agrees with Plaintiff's argument that Defendant cannot argue detrimental reliance or prejudice on behalf of the borrower, who defaulted in this action.

However, the October 2014 letter, when considered along with Plaintiff's moving papers, raises factual issues concerning the alleged revocation of the prior loan acceleration that cannot be resolved as a matter of law. Plaintiff's motion papers include a letter dated July 17, 2014 issued to the borrower indicating that the loan was in default and "subject to acceleration" if no payment was received within 30 days. However, as of July 2014, the January 2009 foreclosure action was still pending and thus the loan had already been "accelerated" and the entire mortgage debt was due and owing. Once the loan was accelerated, the borrower's installment obligations ceased (see *EMC v Patella*, 279 AD3d at 605), and therefore the July 2014 letter notifying the borrower that the mortgage debt was "subject to acceleration" is in direct conflict with the commencement of the 2009 action. While Plaintiff now alleges that the October 2014 letter de-accelerated the January 2009 acceleration and reinstated the loan, it submits no documentary proof that monthly installments were in fact reinstated after the letter was sent. The affidavit from Plaintiff's employee Leticia Sanchez refers to the July 2014 "notice of default" letter and a subsequent August 2015 90-day pre-foreclosure notice, but she does not explain that, in the interim, Plaintiff decided to de-accelerate and reinstate the mortgage loan, and discontinue a prior acceleration. Plaintiff's moving papers, in fact, do not mention the January 2009 action at all, despite readily acknowledging in its opposition to the cross-motion that it constituted a prior acceleration. There is therefore an lack of proof that the acceleration of this loan debt was actually revoked in October 2014 and reinstated, thus halting the applicable statute of limitations. Notably, the present action continues to seek foreclosure on the entire debt pursuant to the acceleration

clause (*see Federal Nat. Morg. Ass'n v. Mebane*, 208 A.D.2d 892, 894). Plaintiff here does not take the position that the discontinuance of the prior action by its predecessor-in-interest, Chase, constituted an affirmative act revoking the acceleration. In sum, the circumstances surrounding the January 9,2009 acceleration and subsequent attempted revocation and discontinuance must be clarified with admissible evidence before this issue may be resolved in favor of either party. For those reasons, Plaintiff's motion for summary judgment, and Defendant's cross-motion to dismiss, are both denied.

Defendant's opposition papers also allege that Plaintiff has failed to submit any admissible proof of the borrower's default. "[I]n seeking to enforce a loan, an assignee may use an original loan file prepared by its assignor, when it relies upon such records in the regular course of business" (*see Wells Fargo Bank, NA v. Jones*, 139 A.D.3d 520, 521 [1st Dept. 2016], citing *Landmark Capital Investments, Inc. v. Li-Shan Wang*, 94 A.D.3d 418 [1st Dept. 2012]). Here, the employee competently attested that she was familiar with Plaintiff's record keeping practices and procedures, and she reviewed records that included "those records acquired by [Plaintiff] from any prior loan servicers of the subject loan, including the loan origination and servicing files and servicing records arising out of and/or related to the subject loan" (*cf. Wells Fargo Bank, NA v. Jones*, 139 A.D.3d 520, 521; *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861 [2nd Dept. 2015]). Accordingly, the employee's attestations adequately demonstrated that the borrower defaulted under the terms of the loan documents.

Defendant's cross-motion and opposition papers also alleged that Plaintiff lacks standing. A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note prior to commencement of the action with the filing of the complaint. (*GRP Loan, LLC. v. Taylor*, 95 A.D.3d 1172 [2nd Dept. 2012]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*Id.*, citing *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274 [2nd Dept. 2011]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." (*LaSalle Bank Nat'l Assn. v. Ahern*, 59 A.D.3d 911, 912 [2nd Dept. 2009]). A party has standing to foreclose under a "pay to the order" promissory note that was indorsed in blank—like the note at issue here—by evidencing that the note was negotiated by the indorser's physical delivery of the note to the foreclosing party, or where there is written evidence of a proper assignment prior to commencement of the action (*GRP Loan, LLC. v. Taylor*, supra.). Plaintiff must therefore demonstrate physical delivery and its possession of the note prior to commencement of this action. In order to do so, a plaintiff must give "factual details of a physical delivery" of the note, and at the very least, provide something more than "conclusory statements regarding the plaintiff's physical possession

of the note" (*see U.S. Bank N.A. v. Faruque*, 120 A.D.3d 575 [2nd Dept. 2014]; see also *Deutche Bank v. Barnett*, 88 A.D.3d 636 [2nd Dept. 2011]; *Deutche Bank v Tanibajeva*, 132 A.D.3d 430 [1st Dept. 2015]).

In this case, Plaintiff established its pre-action possession of the consolidated note by annexing a copy of that document to its Summons and Complaint and Certificate of Merit at the time this action was commenced (*see Nationstar Mortgage, LLC. v. Catizone*, 127 A.D.3d 1151 [2nd Dept. 2015]). This established Plaintiff's standing as a matter of law, even assuming that there are infirmities with the assignment from Chase to Plaintiff, or assuming that the affidavit from Plaintiff's emplyoee lacked sufficient detail concerning physical delivery of the note, as argued by Defendant (*id., see JPMorgan Chase Bank NA v. Roseman*, 137 A.D.3d 1222 [2nd Dept. 2016]; *see also Deutche Bank Nat. Trust Co. v. Umeh*, 145 A.D.3d 497 [1st Dept. 2016]). Accordingly, Defendant's affirmative defense asserting that Plaintiff lacks standing must be dismissed.

Because Plaintiff's motion has been denied as outlined above, the court does not reach Defendant's remaining contention that the motion is premature for want of discovery. Defendant did not oppose dismissal of its Second, Third, of Fifth Affirmative Defenses. Accordingly, those defenses are also dismissed. Moreover, Defendants did not oppose those branches of Plaintiff's motion seeking amendment of the caption, or fixing the default of the Defaulting Defendants. Accordingly, those branches of Plaintiff's motion are granted.

Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on its foreclosure action against Defendant, and to appoint a Referee to compute, is denied, and it is further,

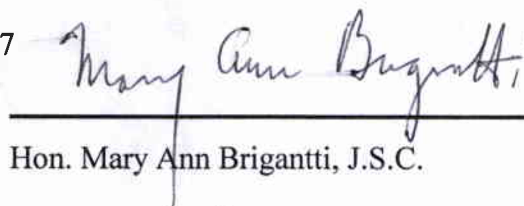
ORDERED, that Plaintiff's motion to strike Defendant's Answer is only granted to the extent that Defendant's First, Second, Third and Fifth Affirmative Defenses are stricken, and it is further,

ORDERED, that Plaintiff's motion to amend the caption, and for a default judgment against the Defaulting Defendants, is granted, and the caption is hereby amended accordingly, and it is further,

ORDERED, that Defendant's cross-motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 2/14, 2017



Hon. Mary Ann Brigantti, J.S.C.