

Adler v DLJ Mtge. Capital, Inc.
2018 NY Slip Op 31152(U)
June 5, 2018
Supreme Court, New York County
Docket Number: 654812/16
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. Nancy Bannon
*Justice***

PART 42

MEYER ADLER

INDEX NO. 654812/16

- v -

MOTION DATE 12/6/17

**DLJ MORTGAGE CAPITAL, INC., and SELENE
FINANCE, L.P.**

MOTION SEQ. NO. 002

The following papers were read on this motion to dismiss the complaint and cross motion for summary judgment or for leave to amend:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law-----	No(s). <u>1</u>
Notice of Cross Motion----Answering Affirmation(s) — Affidavit(s) — Exhibits -----	No(s). <u>2</u>
Replying Affirmation — Affidavit(s) — Exhibits -----	No(s). <u>3</u>

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):**

In this action pursuant to RPAPL 1501(4) for a judgment declaring that a promissory note executed by the plaintiff has been discharged, the defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. The plaintiff cross-moves pursuant to CPLR 3212 for summary judgment on the complaint or, in the alternative, pursuant to CPLR 3025(b) for leave to serve a second amended complaint. The motion is denied since, among other things, the complaint states a cause of action and the defendants have not established their entitlement to a contrary declaration. The cross motion is denied, without prejudice to renewal upon proper papers as to the request for leave to amend.

On June 25, 2005, the plaintiff executed a promissory note in favor of Mortgage Electronic Registration Systems, Inc., as nominee for First Financial Equities, Inc. (FFE), in the face value of \$650,000.00, referable to a mortgage loan that financed the purchase of property at 56 West 126th Street in Manhattan. FFE purportedly assigned the note and mortgage to GMAC Mortgage, LLC (GMAC). The plaintiff allegedly defaulted on the note as of January 1, 2009. On September 8, 2009, GMAC commenced an action against the plaintiff in the Supreme Court, New York County, under Index No. 112740/09, to foreclose on the underlying mortgage. In its complaint, GMAC elected to accelerate the plaintiff's obligations under the note. On July 27, 2011, GMAC filed an affidavit giving notice that it was voluntarily discontinuing the foreclosure action as of right. See CPLR 3217(a)(1). The affidavit was silent as to the issue of debt acceleration. For five years thereafter, it appears that the only activity on the matter was an assignment by GMAC to the defendants herein, DLJ Mortgage Capital, Inc. and its servicing agent, Selene Finance, L.P.

On September 12, 2016, the plaintiff commenced the instant action seeking declaratory relief under RPAPL 1501(4). That statute provides that “[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired,” any person with an estate or interest in the property may maintain an action “to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom.” The plaintiff asserts, in his first amended complaint, that, inasmuch as his obligations under the note were accelerated on September 8, 2009, the six-year limitations period on actions to recover for breach of the note expired on September 8, 2015, and, hence, his obligations thereunder have been discharged by operation of law. The defendants oppose the motion, submitting the affidavit of voluntary discontinuance in the 2009 foreclosure action. They argue that GMAC, by discontinuing that action, undertook an affirmative act to revoke its right to accelerate the amount due under the note, and that such act was undertaken during the relevant six-year limitations period. They thus contend that any limitations period to recover under the note, which requires installment payments through 2035, has not expired, and that the plaintiff is not entitled to a declaration that the note has been discharged.

Contrary to the defendants’ contentions, the complaint states a cause of action for declaratory relief, and they have not shown entitlement to a contrary declaration at this juncture, as their submissions merely present contested facts as to whether GMAC revoked its right to accelerate the repayment of the loan by voluntarily discontinuing the foreclosure action. “[E]ven 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. 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.” NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d 1068, 1069-1070 (2nd Dept. 2017).

In NMNT, a lender that accelerated a borrower’s obligation was granted permission to voluntarily discontinue a foreclosure action and vacate its judgment. The borrower thereafter commenced an action pursuant to RPAPL 1501(4) for a judgment declaring that the mortgage and underlying note were discharged by virtue of the lapse of the limitations period. The Supreme Court denied both the lender’s motion for summary judgment dismissing the complaint and the borrower’s cross motion for summary judgment on the complaint. On appeal, the Appellate Division held that the lender raised a triable issue of fact as to whether the discontinuance “constituted an affirmative act by the lender to revoke its election to accelerate.” Id. at 1070. The Court did not hold that the discontinuance was dispositive of that issue.

Generally “where a cause of action is sufficient to invoke the court’s power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied.” DiGiorgio v 1109-1113

Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2nd Dept. 2013), quoting Matter of Tilcon, Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 (2nd Dept. 2011); see Minovici v Belkin BV, 109 AD3d 520 (2nd Dept. 2013). It is well established in declaratory judgment actions that “on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him [or her].” Fillman v Axel, 63 AD2d 876, 876 (1st Dept. 1979), quoting Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 901 (1st Dept. 1969)]. “This does not mean, however, that the courts may not reach the merits of a declaratory judgment on a motion to dismiss. . . . ‘If no issue of fact is raised by the pleadings, or if the facts are conceded, a proper case is presented for judgment on the merits on defendant’s motion to dismiss the complaint.’” Fillman v Axel, *supra*, at 876, quoting Law Research Serv. v Honeywell, Inc., *supra* at 901; see Hoffman v City of Syracuse, 2 NY2d 484 (1957); Plaza Drive Group of CNY, LLC v Town of Sennett, 115 AD3d 1165 (4th Dept. 2014). Matter of Tilcon, Inc., *supra*. Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action “should be taken as a motion for a declaration in the defendant’s favor and treated accordingly.” Siegel, NY Prac § 440 (5th ed); see Lanza v Wagner, 11 NY2d 317 (1962); Minovici v Belkin BV, *supra*; Fillman v Axel, *supra*; Law Research Serv., Inc. v Honeywell, Inc., *supra*. Thus, where the court, upon deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in its favor, the court may enter a judgment making the appropriate declaration. See Pilgrim v Pantorilla, 144 AD2d 882 (2nd Dept. 2016); Minovici v Belkin BV, *supra*.

Here, the complaint states a cause of action for declaratory relief. Moreover, since GMAC’s affidavit of discontinuance in the foreclosure action did not expressly address the issue of debt acceleration, and the parties vigorously contest the question of whether that discontinuance as of right constituted an affirmative act of revocation, the defendants did not show, as a matter of law, that they are entitled to a declaration in their favor. In addition, the documentary evidence here, consisting of the affidavit of discontinuance, does not dispose of that issue. See CPLR 3211(a)(1). Dismissal is thus inappropriate. Since, as explained above, GMAC’s discontinuance of the foreclosure action presents a triable issue of fact as to whether it revoked its acceleration of the plaintiff’s obligation, the plaintiff is not entitled to summary judgment on the complaint.

Finally, although leave to amend a pleading should be freely granted, the plaintiff failed to submit a proposed second amended complaint with its motion papers, as required by CPLR 3025(b). Thus, the request for leave to amend must be denied. See Dragon Head LLC v Elkman, 102 AD3d 552 (1st Dept. 2013).

Accordingly, it is

ORDERED that the defendants’ motion is denied, and it is further,

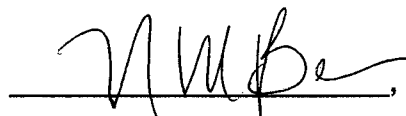
ORDERED that the defendants are directed to serve an answer to the complaint within 10 days after service upon them of a copy of this order with notice of entry (see CPLR 3211[f]); and it is further,

ORDERED that the plaintiff's cross motion is denied, without prejudice to renewal upon proper papers as to that branch of the cross motion which is for leave to serve a second amended complaint, and it is further,

ORDERED that the parties shall appear for a preliminary conference on August 23, 2018, at 2:30 p.m..

This constitutes the Decision and Order of the court.

Dated: June 5, 2018

 JSC

HON. NANCY M. BANNON

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: CROSS MOTION IS: GRANTED DENIED GRANTED IN PART