Pryce v Nationstar Mtge. LLC
2018 NY Slip Op 33851(U)
June 5, 2018
Supreme Court, Orange County
Docket Number: EF004283-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART- ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CASSIUS PRYCE,

Plaintiff,

-against-

NATIONSTAR MORTGAGE LLC et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF004283-2017
Motion Date: April 24, 2018

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The following papers numbered 1 to 6 were read on Plaintiff's motion for summary judgment and other relief, and in the alternative for an order granting a joint trial:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Affirmation in Opposition / Exhibits 4

Reply Affirmation / Exhibits - Reply Affidavit 5-6

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

Plaintiff commenced this action for a judgment cancelling and discharging a mortgage, enforcement of which he claims is barred by the Statute of Limitations. He moves for summary judgment, and in the alternative for joint trial with the related mortgage foreclosure action.

Factual Background

Pursuant to a Deed dated January 3, 2005, Plaintiff acquired title to real property in Newburgh, New York. Plaintiff executed and delivered a Promissory Note dated January 18,

2005 whereby he promised to pay the principal sum of $327,952.00 to non-party NBA Mortgage Group. As collateral security for the Note, Plaintiff executed and delivered a Mortgage, also dated January 18, 2005, on the Newburgh property.

On December 31, 2009, NBA Mortgage Group's assignee, Aurora Loan Services LLC, commenced a foreclosure action, alleging that Plaintiff had defaulted on his obligations under the Note and Mortgage. The Complaint specifically accelerates the mortgage debt, alleging: "Plaintiff elects to call due the entire amount secured by the mortgage." In 2014, the Note and Mortgage were reassigned to defendant Nationstar Mortgage LLC. In May of 2015, the foreclosing plaintiff moved for an order cancelling the lis pendens, vacating the order of reference and discontinuing the action without prejudice. The supporting affirmation asserted: "Due to an issue with the Affidavit of Merit, on 04/15/15 we were directed to discontinue the foreclosure action and cancel the Notice of Pendency. Plaintiff respectfully requests that this action be discontinued and th Notice of Pendency be cancelled." By Order dated June 11, 2015, the motion was granted by the Hon. Debra J. Kiedaisch, and the foreclosure action was thereby discontinued without costs.

On June 8, 2017, Plaintiff commenced this action pursuant to Article 15 of the Real Property Actions and Proceedings Law to cancel and discharge the Mortgage, asserting that enforcement of the Mortgage is now barred by the Statute of Limitations. On July 28, 2017 a second action to foreclose the Mortgage was commenced under the name *The Bank of New York Mellon v. Cassius Pryce et al.,* Orange County Index No. EF005923-2017.

The Parties' Contentions

Plaintiff contends that the six (6) year Statute of Limitations commenced running on the entire mortgage debt upon its acceleration on December 31, 2009, and expired at the latest on March 29, 2016. He moves for summary judgment in this action, and in the alternative for a joint trial of this action and the newly commenced foreclosure action. Defendant contends *inter alia* that the Statute of Limitations does not bar foreclosure of the Mortgage because the mortgage debt was "de-accelerated" upon the discontinuance of the prior foreclosure action in 2015. Defendant consents to a joint trial of Plaintiff's RPAPL Article 15 action and the newly commenced foreclosure action.

Legal Analysis

The issue here is governed by the Second Department's decision in *NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 AD3d 1068 (2d Dept. 2017).

The *NMNT* Court began by laying out the relevant legal framework under Article 15 of the Real Property Actions and Proceedings Law:

> RPAPL 1501(4) 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" (RPAPL 1501[4]); [cit.om.]. An action to foreclose a mortgage is subject to a six-year statute of limitations [cit.om.]. "'[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'" [cit.om.].

Id., 151 AD3d at 1069.

However, enforcement of a mortgage is not barred in its entirety simply by virtue of the passage of six years from acceleration of the mortgage debt where the lender has in the interim

affirmatively revoked its election to accelerate the debt. *NMNT Realty Corp., supra,* 151 AD3d at 1069-70. "[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon." *Federal National Mortgage Assoc. v. Mebane,* 208 AD2d 892, 894 (2d Dept. 1994). The lender may do so only 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., supra,* 151 AD3d at 1069-70 (emphasis added). *See also, EMC Mortgage Corporation v. Patella,* 279 AD2d 604, 606 (2d Dept. 2001).

"New York courts have acknowledged that the law has not specified exactly which act or acts are sufficient to revoke acceleration." *In re Taylor,* –B.R.–, 2018 WL 2113959 at *4 (Bkrtcy. E.D.N.Y., May 4, 2018). However, the Second Department in *NMNT* as well as a number of lower courts have held that the voluntary discontinuance of a foreclosure action (as opposed to an involuntary dismissal by the court) constitutes, or may constitute, an affirmative act of revocation. *See, NMNT Realty Corp., supra,* 151 AD3d at 1070; *Bank of New York Mellon v. Kantrow,* 57 Misc.3d 1024(A) at *5 (Sup. Ct. Suffolk Co. 2017); *U.S. Bank National Assoc. v. Deochand,* 2017 WL 1031942 at *5 (Sup. Ct. Queens Co., March 1, 2017); *Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.,* 2016 WL 2839341 at *3 (Sup. Ct. N.Y. Co., May 11, 2016). *Cf., EMC Mortgage Corp. v. Patella, supra,* 279 AD2d at 606 (court's *sua sponte* dismissal of foreclosure action does not constitute affirmative revocation of lender's election to accelerate); *Federal National Mortgage Assoc. v. Mebane,* 208 AD2d 892, 894 (2d Dept. 1994) (same).

More particularly, the *NMNT* Court held:

> In opposition to plaintiff's showing [that the statute of limitations had expired], the defendant submitted proof that, on August 16, 2011, Homecomings moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted. The defendant thereby raised a triable issue of fact [cit.om.] as to whether Homecomings' motion "constituted an affirmative act by the lender to revoke its election to accelerate" [cit.om.].

Id., 151 AD3d at 1070.

Plaintiff argues that *NMNT* is distinguishable from the case at bar because, in this case, the foreclosure action was only discontinued (per the attorney's affirmation) "due to an issue with the Affidavit of Merit," and there was no express indication of the lender's intent to revoke its acceleration of the mortgage debt. However, the *NMNT* Court pointedly rejected the very argument Plaintiff proffers here, stating:

> The Supreme Court properly found that the mortgagors' conclusory statements that the "Order of Discontinuance was the result of procedural deficiencies in the proceedings," contained in the affidavits submitted by the plaintiff in support of its cross motion, do not disprove an affirmative act of revocation [cit.om.].

Id., 151 AD3d at 1070.

Thus, the lender's voluntary discontinuance of a foreclosure action (like a de-acceleration letter or the execution of a loan modification agreement) may constitute *per se* an affirmative act revoking acceleration of the mortgage debt. *See, In re Taylor, supra* (surveying caselaw). Indeed, certain lower courts have, in the absence of any other evidence, held that a lender's voluntary discontinuance of the foreclosure action worked a revocation of the election to accelerate the mortgage debt as a matter of law. *See, Bank of New York Mellon v. Kantrow,*

supra; *U.S. Bank National Assoc. v. Deochand, supra*; *Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co., supra.*

Inasmuch as Defendant did not herein cross move for summary judgment, this Court follows the letter of *NMNT Realty Corp. v. Knoxville 2012 Trust* and holds that Defendant's proof that the lender in 2015 moved for, and was granted, an order voluntarily discontinuing the prior foreclosure action, canceling the notice of pendency and vacating the order of reference within the six (6) year Statute of Limitations raised triable issues of fact (1) whether that motion constituted an affirmative act by the lender to revoke its election to accelerate, and hence (2) whether the pending mortgage foreclosure action was in whole or in part timely brought within the applicable Statute of Limitations period.

Since Plaintiff's RPAPL Article 15 action and Defendant's mortgage foreclosure action plainly involve common questions of law and fact, Plaintiff's application for joinder pursuant to CPLR §602(a) is granted. The Court has considered the parties' remaining contentions and finds them to be without merit.

It is therefore

ORDERED, that Plaintiff's motion for summary judgment is denied, and it is further

ORDERED, that *Pryce v. Nationstar Mortgage LLC et al.,* Index No. EF004283-2017, and *The Bank of New York Mellon v. Cassius Pryce et al.,* Index No. EF005923-2017, are joined for the purposes of discovery and trial, and it is further

ORDERED, that counsel for all parties are directed to appear for a Conference in Supreme Court, Orange County, Courtroom #5, on **July 19, 2018 at 9:00 a.m.**

The foregoing constitutes the decision and order of this Court.

Dated: June 5, 2018 ENTER
Goshen, New York

Cath M Bartlett

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE