Sterling Natl. Bank v Manheimer
2019 NY Slip Op 31457(U)
May 13, 2019
Supreme Court, Kings County
Docket Number: 502763/2018
Judge: Noach Dear

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of May 2019.

PRESENT:

HON. NOACH DEAR,

J.S.C.

Index No.: 502763/2018

x

STERLING NATIONAL BANK,

MS 1+2

Plaintiff,

DECISION AND ORDER

-against-

FAY MANHEIMER, et al.,

Defendants.

x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Moving Papers and Affidavits Annexed (MS-1)	1
Cross-Motion (MS-2)	2
Opposition to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for summary judgment. Defendants oppose and cross-move for summary judgment dismissing the action and for default judgment on their counterclaim seeking to cancel and discharge Plaintiff's mortgage.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to remove any triable issues of fact." *Knopff v. Johnson*, 29 A.D.3d 741, 742 (2d Dep't 2006) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Where a defendant raises the issue of standing, the plaintiff must establish its standing by presenting evidence that it was the holder or assignee of the subject mortgage and underlying note at the time the action was commenced. *Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 628 (2d Dep't 2014), *aff'd* 25 NY3d 355 (2015); *Bank of N.Y. v. Silverberg*, 86 AD3d 274, 279 (2d Dep't 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." *U.S. Bank, N.A. v Collymore*, 68 A.D.3d 752, 754 (2d Dep't 2009); *see Deutsche Bank Natl. Trust Co. v. Whalen*, 107 A.D.3d 931, 932 (2d Dep't 2013).

In support of their cross motion, Defendants argue that Plaintiff lacks standing, has not strictly complied with conditions precedent including mailing the default and 1304 notices, and that the statute of limitations has expired.

With respect to standing, Defendants contend that since the note is a home equity line of credit agreement (HELOC), it is not a bearer instrument and thus must be assigned to Plaintiff in order for Plaintiff to have standing. Plaintiff argues that although the note was not assigned to it, it is successor by merger to Astoria Bank, who originally issued the HELOC. Contrary to Defendants' contention that Plaintiff must demonstrate it assumed or retained Astoria's assets (including the HELOC), ownership of the assets of the merged corporation necessarily follows the merger. As such, Plaintiff has established its standing.

With respect to the conditions precedent, Plaintiff submitted the affidavit of David Nolan, who averred that he is employed by Plaintiff and primarily responsible for mailing out notices to

delinquent borrowers. Mr. Nolan described the procedure for mailing the default and 1304 notices and averred that he mailed the notices to Defendants by first-class and certified mail. His affidavit is sufficient to demonstrate that Plaintiff complied with the conditions precedent.

Finally, Defendant argues that Plaintiff's de-acceleration notice is pretextual and thus invalid. Plaintiff accelerated this loan on March 1, 2011 through the commencement of a prior foreclosure action (index #8062/2011). Accordingly, the statute of limitations would have expired on March 1, 2017 (prior to the commencement of the instant action) without a valid de-acceleration notice.

Defendant has raised an issue of fact as to whether the November 20, 2015 letter is insufficient to de-accelerate the loan. The Second Department has held that a valid notice of de-acceleration must be clear, unambiguous, and not pretextual. A notice is not pretextual if

> it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration.

Milone v. US Bank Nat'l Ass'n, 164 A.D.3d 145, 154 (2d Dep't 2018).

In this Court's view, a clearly non-pretextual de-acceleration letter gives notice to a borrower that the lender is waiving its right to accelerate based on the original default. A lender may do so by allowing the borrower to return to making monthly payments, as this is a genuine benefit that protects the borrower against a subsequent foreclosure action unless the borrower defaults again on the new payments. Where the lender only allows the borrower to pay arrears, the borrower would remain in the prior default and the lender could, at any time, re-accelerate based on that default.

Herein, the November 20, 2015 notice clearly states that Plaintiff's prior election to accelerate "is hereby rescinded." However, as Plaintiff admits, the notice did not

contain "an express demand for monthly payments" but instead gave Defendants an opportunity to pay "full or partial arrears." Although the de-acceleration letter stated that a monthly statement would be sent "as soon as practical," it is unclear whether a statement was ever sent.

In addition, Defendants point to the affidavit of Plaintiff's Vice President, Walter Krzyminski, who averred that after the dismissal of the prior foreclosure action, counsel recommended that Plaintiff de-accelerate the loan "before a new foreclosure started, so that the prior acceleration would not serve as a bar date for the majority of the principal and interest in the event of a later dismissal."

Defendant has raised an issue of fact as to whether Plaintiff was "truly seeking to de-accelerate" or issued the notice "as a pretext to avoid the onerous effect of an approaching statute of limitations." *Milone*, 164 A.D.3d at 154. As Defendants have not proven the statute of limitations expired, they are not entitled to default judgment on their counter-claim to cancel and discharge the mortgage.

In light of the foregoing, Plaintiff's motion and Defendants' cross-motion are both denied. Parties to complete discovery and proceed to trial.

ENTER:

Hon. Noach Dear, J.S.C.

KINGS COUNTY CLERK FILED 2019 MAY 20 AM 8:28