

Ditech Fin. LLC v Rector 70 LLC
2019 NY Slip Op 31641(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 850330/2018
Judge: Arlene P. Bluth
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850330/2018

DITECH FINANCIAL LLC FKA GREEN TREE SERVICING LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

RECTOR 70 LLC, PEOPLE OF THE STATE OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, BOARD OF MANAGERS OF THE COCOA EXCHANGE CONDOMINIUM, NEW YORK CITY PARKING VIOLATIONS BUREAU, JPMORGAN CHASE BANK, N.A., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57

were read on this motion to/for.

DISMISSAL

The motion to dismiss by defendant Rector 70 LLC ("Movant") is granted.

Background

This foreclosure action asks this Court to consider the application of the statute of limitations. Here, there was a prior mortgage foreclosure case commenced in 2008 alleging that the former property owners (Scott and Valerie Ross) stopped making their monthly payments in September 2007. That prior foreclosure action was discontinued in May 2012 (NYSCEF Doc. No. 26).

In connection with the prior foreclosure action, the lender (then Countrywide) sent a letter dated October 17, 2007 to the borrowers stating that the full amount due on the loan would be accelerated if payments were not made on or before November 21, 2007 (NYSCEF Doc. No.

24). Movant claims that this action should be dismissed as time barred because it was brought more than six years after the loan was accelerated on November 21, 2007. (Movant purchased the property at a common charge lien foreclosure sale.) Movant argues that plaintiff did nothing to evidence its intent to de-accelerate the loan.

In opposition to the motion to dismiss, plaintiff argues that under the terms of the mortgage, the loan was not accelerated until judgment is entered and it did not have the right to demand all sums due. Plaintiff also claims that Countrywide (the plaintiff in the 2008 foreclosure action) had no standing to bring the 2008 case because the Mortgage Electronic Registration System (“MERS”) held the loan until 2012.

Discussion

“[A]ctions are time-barred [where] they were commenced more than six years from the date that all of the debt on the mortgages was accelerated” (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530, 48 NYS3d 597 (Mem) [1st Dept 2017]). “When the borrower did not cure his defaults . . . all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgages pursuant to the letter” (*id.*).

Here, there is no question that the October 2007 letter gave the borrower until November 21, 2007 to cure the default. When that did not happen, the statute of limitations began to run from that date. The fact that the 2008 foreclosure action was discontinued is of no moment; there is no evidence on this record that plaintiff ever made an affirmative act to de-accelerate the loan.

Plaintiff’s claim that the allegation accelerating the loan in the 2008 complaint had no effect is preposterous. Plaintiff offers nothing to dispute the fact that its predecessor sent a letter

unequivocally stating that the loan would be accelerated on November 21, 2007 if the default was not cured—that means the loan was accelerated (*see id.*). Whether or not the provisions of the mortgage provided for acceleration only after judgment was entered, the fact is that plaintiff (via its predecessor) accelerated the amount due in the letter and in the 2008 foreclosure complaint. Plaintiff cannot take clear steps to accelerate the loan, commence a foreclosure action and then pretend that these actions had no meaning when it is convenient.

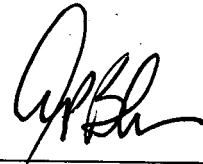
Moreover, the case plaintiff relies on for the proposition that it could not accelerate until judgment was entered, *Nationstar Mtge., LLC v MacPherson* (56 Misc3d 339, 54 NYS3d 825 [Sup Ct, Suffolk County 2017]), is inapposite. There is no evidence in that case that the lender sent a letter notifying the borrower that the loan would be accelerated if defaults were not cured. And, as Movant points out, the ruling in *MacPherson* is no longer the law in that Department (see *Bank of New York Mellon v Dieudonne*, 171 AD3d 34, 39-40, 96 NYS3d 354 [2d Dept 2019] [abrogating *MacPherson*]).

Plaintiff's claim that MERS held the mortgage is a red herring; the issue of standing only concerns the possession of the note (see *Bank of New York Mellon v Knowles*, 151 AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017]). Whatever role MERS had with the mortgage is irrelevant (*Wilmington Sav. Fund Socy., FSB v Hayes*, 167 AD3d 440, 441, 87 NYS3d 876 (Mem)).

Accordingly, it is hereby

ORDERED that the motion by defendant Rector 70 LLC to dismiss is granted, and this case is dismissed with costs and disbursements and the clerk is directed to enter judgment accordingly.

6/3/19
DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINANCIAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: