U.S. Bank N.A. v Ehrenthal
2019 NY Slip Op 32427(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 850341/2014
Judge: Arlene P. Bluth
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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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U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR DEUTSCHE ALT-A SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-2,

Plaintiff,

- v -

SAMUEL EHRENTHAL, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,GREENPOINT MORTGAGE FUNDING, INC.,ABE SALZMAN, 325 FIFTH AVENUE CONDOMINIUM, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, JOHN DOE #1 THROUGH #12

Defendants.

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INDEX NO. 850341/2014

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 112, 113, 115, 127, 128, 129, 130, 131, 132, 133, 134, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied and the cross-motion by defendant Ehrenthal for summary judgment dismissing this action is granted.

Background

This foreclosure action relates to an apartment owned by Ehrenthal located at 325 Fifth Avenue in Manhattan. Plaintiff claims that Ehrenthal defaulted by not making his monthly payments starting in August 1, 2008. Plaintiff moves for summary judgment and to appoint a referee to compute the amount due.

In opposition and in support of it cross-motion for summary judgment, Ehrenthal claims that the statute of limitations bars the instant action. He claims that a demand letter was sent to him on September 16, 2008 stating that he was in default (NYSCEF Doc. No. 134). The letter warned that Ehrenthal had to pay the arrears on or before October 16, 2008 and that the "failure to cure the default on or before [that date] shall result in the automatic acceleration of the sums secured by said security deed or mortgage without further notice" (*id.*). Ehrenthal admits he did not make the payment and insists that this case, commenced on November 10, 2014, is time barred because it was started more than six years after October 17, 2008.

In reply, plaintiff points out that there was a previous foreclosure case concerning this note and mortgage commenced on November 12, 2008 and that is when the statute of limitations began to run. Plaintiff also argues that the First Department's ruling in *Deutsche Bank v Royal Blue Realty Holdings, Inc.* (148 AD3d 529, 48 NYS3d 597 [1st Dept 2017]) should not apply retroactively as it was decided three years after the instant case was commenced. Plaintiff claims that that the 90-day notice sent in this action revoked the 2008 acceleration because it constituted an affirmative act of revocation. Plaintiff contends in the alternative that Hurricane Irene should compel this Court to toll the statute of limitations or that the Court should use its equitable powers to extend the statute of limitations.

Discussion

As an initial matter, the Court observes that although plaintiff mentions a previous foreclosure action, it did not discuss the details of that case in its papers. A review of the records for that Index Number (115170/2008) on the Supreme Court Records On-Line Library ("SCROLL") reveals that plaintiff obtained a judgment of foreclosure and sale on October 8, 2009 (this was filed on May 18, 2010). The Court does not understand why plaintiff brought the

instant case in 2014 if it had already obtained a judgment regarding the same note and mortgage four years earlier.

The Court observes that plaintiff alleged *in this action* that "no other proceedings have been had for the recovery of the mortgage indebtedness or if any such action is pending, a final judgment was not rendered in favor of Plaintiff and such action is intended to be discontinued" (NYSCEF Doc. No. 1, ¶ 14). That allegation was obviously not correct as plaintiff was entitled to sell the property in the previous case in accordance with applicable statutes after obtaining the judgment of foreclosure and sale.[1] On this basis, the Court grants the cross-motion—plaintiff cannot obtain two judgments based on the same note and mortgage.

Royal Blue

Even if the Court were to consider the remainder of plaintiff's arguments, the Court declines to apply *Royal Blue* prospectively only (as plaintiff argues).

"In the seminal case of *Gurnee v. Aetna Life & Cas. Co.*, 55 N.Y.2d 184, 448 N.Y.S.2d 145, 433 N.E.2d 128 [1982], cert. denied 459 U.S. 837, 103 S.Ct. 83, 74 L.Ed.2d 79 [1982], the Court of Appeals adopted the three-pronged test announced by the U.S. Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 [1971], for determining whether a ruling should be applied prospectively only. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, a court should consider the history of the prior rule and examine the impact of retroactive application on the rule's purpose. Third, any inequity that

[1] The Court makes no finding about whether plaintiff can sell the property in the 2008 case nearly a decade after obtaining a judgment of foreclosure and sale.

would result from retroactive application should be considered" (*Gersten v 56 7th Ave. LLC,* 88 AD3d 189, 196-97, 928 NYS2d 515 [1st Dept 2011] [internal quotations and citations omitted]).

Here, none of the factors are satisfied. In *Royal Blue*, the First Department found that a lender accelerated a loan when it sent a clear and unequivocal notice that the borrower's failure to cure its defaults within 30 days "will" accelerate the loan balance (*Royal Blue*, 148 AD3d at 530). The First Department did not establish new law. It merely found that a default notice meant what it stated—that the loan would be accelerated if the arrears were not paid within 30 days. Even assuming that this did constitute an overruling of past precedent, the fact is that there is no inequity that would result from retroactive application nor does precedent involving default letters compel the Court to apply *Royal Blue* prospectively. Simply put, *Royal Blue* interpreted the plain meaning of a lender's letter to a defaulting borrower. There is no reason not to apply *Royal Blue* retroactively.

Moreover, based on *Royal Blue*, the Court finds that the statue of limitations began to run on October 17, 2008 when Ehrenthal failed to cure his default. That makes the instant action time barred because it was not commenced until November 10, 2014, more than six years after the limitations period began.

Summary

The Court also rejects plaintiff's argument that the Court should extend the statute of limitations in the interest of justice or based on the effects of Hurricane Irene. Plaintiff had six years to commence a lawsuit. Setting aside the fact that plaintiff started a separate lawsuit in 2008, there is no excuse to extend a long limitations period even further. According to plaintiff, Ehrenthal has not made a payment since 2008—plaintiff should have commenced an action timely.

The Court denies the remaining branches of plaintiff's motion, including its contention that it is entitled to recover property taxes and insurance it has paid since 2013. Plaintiff made a strategic decision to pay the property taxes and insurance, presumably to preserve the value of the property and to prevent a tax foreclosure action while it pursued the instant foreclosure action. That decision—to pay the taxes—does not amount to a quasi-contract claim where Ehrenthal was enriched at plaintiff's expense (*see generally Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 950 NYS2d 333 [2012]).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied and the cross-motion by defendant Ehrenthal for summary judgment is granted and the Clerk is directed to enter judgment with costs and disbursements upon presentation of proper papers therefor and to cancel the notice of pendency filed on March 8, 2019 (NYSCEF Doc. No. 114).

8-13-19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE