

U.S. Bank Trust, N.A. v Wellbrock
2019 NY Slip Op 32446(U)
August 13, 2019
Supreme Court, Suffolk County
Docket Number: 609596/2015
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX NO. 609596/2015

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

**HON. JOSEPH FARNETI
Acting Justice Supreme Court**

**U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF8 MASTER PARTICIPATION TRUST,**

**ORIG. RETURN DATE: APRIL 7, 2016
FINAL SUBMISSION DATE: JULY 7, 2016
MTN. SEQ. #: 001
MOTION: MD**

Plaintiff,

-against-

**JOHN WELLBROCK A/K/A JOHN H.
WELLBROCK, KATHLEEN M. WELLBROCK
a/k/a KATHLEEN WELLBROCK a/k/a
CATHERINE WELLBROCK, BENEFICIAL
HOMEOWNER SERVICE CORPORATION,
GREENBROOK ASSOCIATES, LLC, NEW
YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, ASSET
ACCEPTANCE, LLC, CAPITAL ONE BANK
USA, N.A., HSBC APO ATLANTIC CREDIT &
FINANCE, INC., TARGET NATIONAL BANK,
"JOHN DOE #1" to "JOHN DOE #10," the last
10 names being fictitious and unknown to
plaintiff, the persons or parties intended being
the persons or parties, if any, having or
claiming an interest in or lien upon the
mortgaged premises described in the
complaint,**

**PLAINTIFF'S ATTORNEYS:
MCCABE, WEISBERG & CONWAY, P.C.
145 HUGUENOT STREET - SUITE 210
NEW ROCHELLE, NEW YORK 10801-5252
914-636-8900**

**GROSS POLOWY, LLC
1775 WEHRLE DRIVE - SUITE 100
WILLIAMSVILLE, NEW YORK 14221
716-204-1700**

**ATTORNEY FOR DEFENDANTS
JOHN H. WELLBROCK AND
KATHLEEN M. WELLBROCK:
KLEIN & VIZZI, LLP
370 SUNRISE HIGHWAY - SUITE B
WEST BABYLON, NEW YORK 11704
631-587-2300**

Defendants.

Upon the following papers numbered 1 to 9 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Amended Notice of Motion 4; Memorandum
of Law in Support 5; Affirmation in Opposition and supporting papers 6, 7; Reply
Affirmation and supporting papers 8, 9; it is,

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ORDERED that this motion by defendants JOHN H. WELLBROCK and KATHLEEN M. WELLBROCK ("defendants") for an Order, pursuant to CPLR 3212:

(1) dismissing plaintiff's foreclosure complaint with prejudice as time-barred pursuant to CPLR 213 (4) and cancelling plaintiff's Notice of Pendency;

(2) granting the counterclaim of defendants cancelling and discharging of record the mortgage which is the subject of this action pursuant to RPAPL 1501 (4); and

(3) awarding defendants actual and reasonable attorneys' fees, costs and disbursements pursuant to Real Property Law § 282,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff.

Due to defendants' alleged default in payment in January of 2008, plaintiff's predecessor-in-interest, Beneficial Homeowners Service Corporation, commenced a foreclosure action on June 15, 2009 ("Prior Action"), to foreclose the mortgage which is the subject of the instant action. Defendants indicate that the complaint in Prior Action alleged that plaintiff elected "to call due the entire amount secured by the mortgage." Thereafter, the Court (Pitts, J.) issued an Order dated March 6, 2013, directing the parties to appear at a Foreclosure Compliance Conference on April 25, 2013, and warning "[t]he Plaintiff's failure to appear for the scheduled compliance conference will result in the dismissal of this action (see 22 NYCRR 202.27)."

Subsequent thereto, plaintiff's counsel sent a letter to Justice Pitts, dated April 17, 2013, which acknowledged receipt of the aforementioned Order and advised that "[a] consent to discontinue the action and cancel the lis pendens was previously filed with the clerk, however I am unable to locate a copy of same in my file. As such, it is respectfully requested that the matter be removed from Your Honor's calendar." Based on the foregoing, defendants argue that the Prior Action was dismissed by the Court on April 25, 2013.

Thereafter, on September 4, 2015, the within plaintiff commenced the instant action by the filing of a summons and complaint. Defendants interposed an answer which, among other defenses, asserted that plaintiff's

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action was barred by the applicable statute of limitations. Defendants also interposed a counterclaim pursuant to RPAPL article 15 requesting the mortgage be discharged in the records of the Suffolk County Clerk, as well as other relief including, but not limited to, the recovery of reasonable attorneys' fees.

Defendants have filed the instant motion for summary judgment seeking dismissal of the complaint and other relief based upon statute of limitations grounds pursuant to CPLR 213 (4). On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). However, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]). That limitations period begins to run on the entire debt when the mortgagee elects to accelerate the mortgage (see *U.S. Bank, N.A. v Martin*, 144 AD3d 891 [2016]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602 [2005]; *Loiacono v Goldberg*, 240 AD2d 476 [1997]). "Acceleration occurs, *inter alia*, by the commencement of a foreclosure action" (*Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2018]; see *Fannie Mae v 133 Mgt., LLC*, 126 AD3d 670 [2015]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]). "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

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to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2017]).

The Court of Appeals has held that when there is a validly filed stipulation of discontinuance resolving a case, it is as if the case "had never been begun" (*Yonkers Fur Dressing Co. Inc. v Royal Ins. Co. Ltd.*, 247 NY 435, 444 [1928]). The Second Department has adhered to that rule. In *Newman v Newman*, 245 AD2d 353, 354 (1997), the court held that "[w]hen an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified." Furthermore, in *U.S. Bank N.A. v Wongsonadi*, 55 Misc 3d 1207 (A) (Sup Ct, Queens County 2017), the court noted that "the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action" and the discontinuance of the prior foreclosure action was therefore "an affirmative act of revocation."

Here, the Court finds that questions of fact exist with respect to the termination of the Prior Action which preclude summary judgment at this juncture. Defendants rely on the self-executing language in the Order issued by Justice Pitts on March 6, 2013 to argue that the Prior Action was dismissed by the Court. However, as noted, plaintiff's counsel sent a letter to the Court dated April 17, 2013, which indicated that a consent to discontinue the action and cancel the lis pendens was previously filed with the Clerk. Defendants contend that no such voluntary discontinuance was ever filed with the Clerk. Notwithstanding the foregoing, the Prior Action was marked "discontinued" and "OFDPN" (other final disposition pre-note) in the Court's computerized records on April 25, 2013, not dismissed.

In view of the foregoing, this motion by defendants for summary judgment dismissing plaintiff's complaint is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: August 13, 2019


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION