

Kirschenbaum v Wells Fargo Bank, N.A.

2019 NY Slip Op 32876(U)

September 30, 2019

Supreme Court, New York County

Docket Number: 151236/2019

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

JOSHUA KIRSCHENBAUM,
Plaintiff,

- v -

INDEX NO. 151236/2019

MOTION DATE _____

MOTION SEQ. NO. 001

WELLS FARGO BANK, N.A., AS TRUSTEE
UNDER THE POOLING AND SERVICING
AGREEMENT RELATING TO IMPAC SECURED
ASSETS CORP., MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-2,

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-17, 19-37, 39-40 were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment, striking defendant’s affirmative defenses, and dismissing defendant’s counterclaims. Defendant opposes and cross-moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On October 20, 2005, plaintiff executed a note and mortgage to non-party First Financial Equities, Inc. (First Financial) against the property located at 400 Central Park West, Unit 6J, New York, New York. The note requires, as pertinent here, that all notices sent by the lender to the borrower be in writing and deemed given to the borrower “when mailed by first class mail” or, if sent by other means, when they are “actually delivered,” and that if the borrower defaults, the lender may require immediate payment of the entire amount remaining unpaid under the note

without any further demand for payment. On July 21, 2009, First Financial assigned the mortgage to defendant. (NYSCEF 9).

Non-party GMAC Mortgage, LLC (GMAC), the former loan servicer, by letter to plaintiff dated November 2, 2010, advised that he was in default, that he “may cure the default by paying the total amount due [...] within thirty (30) days from the date this letter,” and that “[u]nless we receive full payment of all past-due amounts, we will accelerate the maturity of the loan, declare the obligation due and payable without further demand, and begin foreclosure proceedings.” (NYSCEF 8).

By letter to plaintiff dated December 2, 2010, GMAC observed that plaintiff had not cured the default that and as a result, his “account may be sent to an attorney to initiate foreclosure action” (NYSCEF 22), and on December 9, 2010, July 19, 2011, and July 27, 2012, GMAC sent plaintiff 90-day notices pursuant to RPAPL 1304 (NYSCEF 23, 24, 25).

By letter dated February 7, 2013, GMAC informed plaintiff that it had transferred his mortgage to non-party Ocwen Loan Servicing, LLC (Ocwen). (NYSCEF 26). On September 19, 2013, Ocwen sent plaintiff a 90-day notice (NYSCEF 27), and on March 17, 2014, April 16, 2014, and May 16, 2014, Ocwen sent him monthly billing statements demanding payment of his outstanding his monthly payments, not the entire balance of the loan. (NYSCEF 28). On March 24, 2014, May 20, 2014, and June 24, 2014, Ocwen sent plaintiff delinquency notices demanding payment of his outstanding monthly payments, not the entire balance of the loan (NYSCEF 29), and on July 16, 2014, it sent him a billing statement demanding payment of all amounts due, as well as the entire balance of the loan. (NYSCEF 30).

By summons and complaint dated December 9, 2015, defendant initiated a foreclosure action against plaintiff, alleging, among other things, that “[i]n order to protect its security

interest” it “has paid or may be compelled to pay during the pendency of this action, taxes, assessments, water rates, insurance premiums, and other charges.” Defendant attached a copy of the November 2, 2010 default notice as evidence that it complied with all requirements of the Banking Law, UCC, and RPAPL. (NYSCEF 9). By order dated December 4, 2017, action was dismissed for lack of personal jurisdiction over plaintiff. (NYSCEF 10).

By summons and complaint dated February 5, 2019, plaintiff commenced this action, advancing causes of action to “secure the cancellation and discharge of record of the mortgage,” for attorney fees incurred in defending the foreclosure action, and attorney fees in this action. (NYSCEF 11). On March 4, 2019, defendant filed its answer, asserting affirmative defenses and counterclaims for unjust enrichment and a declaration of an equitable lien against the property for real estate taxes and hazard insurance premiums defendant had paid during the six years preceding the commencement of the action. (NYSCEF 12).

By affidavit dated April 25, 2019, Ocwen’s senior loan analyst states that the November 2, 2010 default notice is in its loan records, and that there is no record of how or if the notice was delivered to plaintiff. (NYSCEF 20).

II. CONTENTIONS

A. Plaintiff (NYSCEF 6-15)

Plaintiff contends that as the November 2, 2010 notice of default, which was attached to the foreclosure complaint, gave plaintiff until December 2, 2010 to pay or the loan would be accelerated, and as he did not pay, defendant’s time to commence a foreclosure action expired December 2, 2016. He characterizes as surplusage defendant’s first and fourth affirmative defenses, for respectively, failure to state a claim and documentary evidence, and argues that the second affirmative defense of waiver, laches, unclean hands, and estoppel fatally lack supporting

facts. Defendant's third affirmative defense, for lack of standing is also without merit, according to plaintiff, because an action pursuant to RPAPL § 1501(4) may be advanced by him as a fee owner of the subject property. Plaintiff also maintains that the fifth affirmative defense should be stricken as plaintiff has met the pleading requirements of RPAPL § 1515, and relying on CPLR 3211(e), maintains that defendant's sixth affirmative defense, by which it reserves the right to amend its answer and assert additional defenses, is improper as a matter of law.

Defendant's counterclaim for unjust enrichment should be dismissed, plaintiff argues, because defendant did not pay the real estate taxes or insurance premiums in reliance on any claim advanced by him due to fraud, mistake of fact or law. Rather, he claims, the payments were intended by defendant to protect its own lien.

B. Defendant (NYSCEF 19-32)

Defendant observes that plaintiff fails to offer evidence that the November 2, 2010 notice of default was mailed or delivered to him, and that the notice submitted by plaintiff is not printed on letterhead, does not indicate how or if it was delivered, and is identical to the publicly available notice attached to defendant's foreclosure complaint. Even if the notice of default was delivered to plaintiff, it maintains, it was only a statement of potential future action, and thus, is insufficient to demonstrate that the loan was accelerated.

Moreover, defendant asserts, after the notice of default was drafted, GMAC continued to create and mail similar default letters and billing statements which sought payment of less than the total amount of indebtedness, referencing the letter dated December 2, 2010, which is the day plaintiff alleges the mortgage was accelerated. Nothing in that letter, defendant argues, demands immediate payment of all amounts due under the mortgage. It also claims that the evidence demonstrates that the loan was not accelerated until Ocwen sent the July 16, 2014 billing

statement, by which payment of all amounts due was demanded.

Defendant also alleges that plaintiff fails to demonstrate that it paid his real estate taxes and insurance premiums knowing that the mortgage may not be enforceable, and observes that he never notified it of his belief that that it was unenforceable. Moreover, it seeks only to recover amounts paid before plaintiff filed his complaint, in which he notified defendant that its mortgage may not be enforceable.

C. Reply and opposition to cross-motion (NYSCEF 33-37)

Plaintiff observes that defendant does not refute his default on the mortgage and that the notices it sent were condition precedents to the commencement of a foreclosure action and did not de-accelerate the mortgage. Rather, the notices confirm that the mortgage was in foreclosure. He denies that he bears the burden of showing that the November 2, 2010 letter was mailed to him, as defendant must establish that the letter was not mailed, and observes that as defendant did not raise the issue as an affirmative defense, it is waived. He also claims that the notices defendant sent indicate that he was in foreclosure, and thus, it is estopped from denying that the loan was accelerated.

To the extent that defendant denies having paid his real estate taxes and insurance premiums knowing that the mortgage was not enforceable, plaintiff observes that it does not explain why it advanced the payments. Plaintiff reiterates his earlier arguments.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form

demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. RPAPL 1501(4)

As pertinent here, 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 having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons [...] 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

Pursuant to CPLR 213(4), the statute of limitations to foreclose on a mortgage is six years. An acceleration of the entire amount due under a mortgage triggers the start of the statute of limitations. (*Deutsche Bank Nat. Tr. Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530 [1st Dept 2017], *lv denied* 30 NY3d 959 [2017]). However, in order to accelerate a mortgage, the lender must take some “affirmative action” evidencing its election to do so. (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982–983 [2d Dept 2012]).

As defendant had attached the November 2, 2010 default letter to its foreclosure complaint in support of its contention that it complied with statutory foreclosure notice requirements, it is precluded from denying its authenticity. In the letter, GMAC advises that plaintiff is in default and that a failure to cure within 30 days will result in the acceleration of the loan without further demand. As it is undisputed that plaintiff did not timely cure, plaintiff demonstrates, *prima facie*, that the loan was accelerated over six years ago and that the

limitations period expired. (*See e.g., Vargas v Deutsche Bank Nat'l Tr. Co.*, 168 AD3d 630 [1st Dept 2019] [letter stating that loan would be accelerated within 32 days constituted affirmative act to accelerate, and the borrower's failure to cure within 32 days triggered running of statute of limitations]; *Deutsche Bank*, 148 AD3d at 530 [same]).

Provisions in a mortgage requiring that notices to the borrower be sent in a particular manner constitute conditions precedent to a lender's right to accelerate a mortgage debt. (*Capital One, N.A. v Saglimbeni*, 170 AD3d 508, 508 [1st Dept 2019]). Compliance with conditions precedent need not be pleaded, but a denial that the conditions were complied with must be specifically pleaded or the denial is waived. (*Id.*; CPLR 3015[a]).

As defendant did not raise its failure to comply with the service provisions of the mortgage in its answer, the argument is waived. Moreover, in its opposition, it does not contend or offer evidence that the default notice was not mailed in compliance with the note. Accordingly, defendant fails to raise an issue of fact as to whether the loan was accelerated.

Defendant's arguments pertaining to the mailing of additional notices, while used in support of its contention that the loan was never accelerated, concern mortgage de-acceleration. For the purposes of RPAPL 1501(4), an election to accelerate a mortgage may be revoked, but only by "an affirmative act of revocation occurring during the six-year statute of limitations period." (*NMNT Realty Corp. v. Knoxville 2012 Tr.*, 151 AD3d 1068, 1069–1070 [2d Dept 2017]). As the December 2, 2010 letter does not address acceleration of the mortgage and provides only that plaintiff may take steps to avoid the initiation of a foreclosure proceeding, it did not de-accelerate the mortgage. In addition, the mailing of mortgage statements and notices, absent a clear and unambiguous revocation of the election to accelerate, is insufficient, as is the mailing of 90-day notices pursuant to RPAPL 1304 which do not constitute affirmative acts that

revoke the election to accelerate a mortgage debt. (*See U.S. Bank Tr., N.A. v Aorta*, 167 A.D.3d 807, 809 [2d Dept 2018] [bank’s “contention that it affirmatively revoked the election to accelerate the mortgage debt by serving the defendant with various notices, including the 90–day notices pursuant to RPAPL 1304, is also without merit”]; *Milone v US Bank Nat’l Ass’n*, 164 AD3d 145, 153 [2d Dept 2018] [“de-acceleration notices must also be clear and unambiguous to be valid and enforceable”]). Accordingly, defendant fails to raise an issue of fact as to whether the loan was de-accelerated.

B. Affirmative defenses

To dismiss a defense pursuant to CPLR 3211(b), the movant bears the burden of demonstrating that the defense is not stated or is without merit as a matter of law. (*S. Point, Inc. v Redman*, 94 AD3d 1086, 1087 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443, 443-444 [1st Dept 2011]). In deciding the motion, the court must give the defendant the benefit of every reasonable intendment of the pleading, which is to be liberally construed. (*Id.*; *Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018] [“On a motion pursuant to CPLR 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true”]).

The dismissal of an affirmative defense is warranted where only conclusions of law are pleaded without supporting facts. (*Bank of Am., N.A. v 414 Midland Ave. Assocs., LLC*, 78 AD3d 746, 750 [2d Dept 2010]; *Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996] [“bare legal conclusions are insufficient to raise an affirmative defense”]). Defendant’s affirmative defenses are unsupported by facts and thus constitute legal conclusions only.

C. Counterclaims

A claim for unjust enrichment may be advanced where one party is enriched at the other's expense, and "it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]).

Where a lender voluntarily pays real estate taxes and insurance premiums, with full knowledge of the facts, absent fraud or mistake of material fact or law, it cannot advance a claim for unjust enrichment. (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 671 [2d Dept 2017]). In the prior foreclosure action, defendant pleaded that the payments were intended to protect its security interest. Thus, plaintiff demonstrates, *prima facie*, that the payments were voluntary. (*Id.*).

Absent citation to supporting case law, defendant's contention that plaintiff's failure to inform defendant that he believed the mortgage was unenforceable renders it not fully knowledgeable raises no factual issue.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on its first cause of action is granted, and plaintiff is direct to submit a proposed order forthwith; it is further

ORDERED, that defendant's affirmative defenses and counterclaims are dismissed; it is further

ORDERED, that defendant's cross-motion is denied in its entirety; and it is further

ORDERED, that the parties appear for a preliminary conference on November 20, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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9/30/2019

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE