

Gallant v Bank of Am., N.A.
2019 NY Slip Op 32878(U)
September 30, 2019
Supreme Court, New York County
Docket Number: 159785/2016
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

BRENDA GALLANT and JOHN GALLANT,

Plaintiffs,

- v -

BANK OF AMERICA, NATIONAL ASSOCIATION,
et al.,

Defendants.

-----X

INDEX NO.	<u>159785/2016</u>
MOTION DATE	_____
MOTION SEQ. NO.	<u>002</u>
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43-69, 71-83, 85, 86 were read on this motion for summary judgment.

Defendants Bank of America, National Association (BOA), as Successor by Merger to LaSalle Bank NA, as Trustee for WaMu Mortgage-Pass Through Certificates Series 2007-HY06 Trust, Select Portfolio Servicing, Inc. (SPS), and U.S. Bank N.A (US Bank), Successor Trustee to The Bank of America, N.A., Successors in Interest to LaSalle Bank, NA, as Trustee, on the behalf of the Holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-HY6 move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose.

I. BACKGROUND

On July 25, 2005, plaintiffs executed a note and mortgage in the amount of \$650,000 to nonparty Wells Fargo Bank, N.A. on the property located at 40 Sutton Place in Manhattan. (NYSCEF 45). On March 6, 2006, Wells Fargo Bank, N.A. assigned the mortgage to nonparty Washington Mutual Bank, F.A. (WaMu) (NYSCEF 46).

On March 6, 2006, plaintiff Brenda Gallant executed a note and gap mortgage in the

amount of \$352,888.89 to WaMu on the property. (NYSCEF 47). By consolidation, extension, and modification agreement dated March 20, 2006, Brenda and WaMu agreed to consolidate the two mortgages, creating a single lien of \$1,098,900. (NYSCEF 48).

On March 26, 2007, Brenda executed a second gap mortgage to WaMu in the amount of \$14,271.70 (NYSCEF 49), and thereupon, she and WaMu entered into an agreement to consolidate the second gap mortgage with the March 20, 2006 consolidated mortgage, resulting in a single lien of \$1,040,000, the loan at issue here (the loan). (NYSCEF 50).

By purchase and assumption agreement dated September 25, 2008, former defendant JPMorgan Chase Bank, National Association (Chase)¹ acquired from the Federal Deposit Insurance Corporation (FDIC), as receiver of WaMu, all of the assets and substantially all of the liabilities of WaMu, including the loan. (NYSCEF 51).

On November 13, 2009, BOA, as successor by merger to LaSalle Bank NA, initiated a foreclosure action in this court against plaintiffs with respect to the property and “declare[d] immediately due and payable the entire unpaid balance of principal” of the loan. (NYSCEF 56). By stipulation dated December 14, 2012, the foreclosure action was discontinued without prejudice. (NYSCEF 59).

On May 6, 2016, Chase, as successor in interest by purchase from the FDIC as receiver of WaMu, assigned the loan to Chase (NYSCEF 52, 54), and then, by corrective assignment of mortgage dated June 22, 2017, assigned it to US Bank, as successor trustee to BOA, successor in interest to LaSalle Bank FA, as trustee, on behalf of the Holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-HY6. (NYSCEF 55).

¹ By order dated March 21, 2018, plaintiffs’ claims against Chase were dismissed. (NYSCEF 66).

On November 21, 2016, plaintiffs initiated this action by filing a summons with notice and a verified complaint against BOA, as successor by merger to LaSalle Bank NA as trustee for WaMu mortgage pass-through certificates series 2007-HY06 Trust, SPS, US Bank, successor in interest to LaSalle Bank NA, and Chase, in which they allege that as the six-year statute of limitations to collect on the loan expired no later than July 1, 2009, the date of their default, they are the lawful owners of the property, vested with an absolute and unencumbered title in fee to the property. (NYSCEF 61).

By summons and complaint dated December 1, 2017, US Bank as successor trustee to BOA, successor in interest to LaSalle Bank NA as trustee, on behalf of the holders of the WaMu mortgage pass-through certificates, series 2007-HY6, initiated a foreclosure proceeding against plaintiffs in this court. (NYSCEF 73). On December 1, 2017, US Bank filed a notice of pendency in the foreclosure action. (NYSCEF 74).

II. CONTENTIONS

A. Defendants (NYSCEF 43-69)

Defendants take issue with plaintiffs' assertion that BOA and/or SPS purportedly accelerated the loan on November 13, 2009, with the filing of the prior foreclosure action, which resulted in the expiration of the statute of limitations, thereby preventing the enforcement of the loan. Rather, neither SPS nor BOA has a recorded, dischargeable interest in the loan, nor has either filed an encumbrance against the property, which they claim is essential to bringing an action to quiet title against them. Moreover, absent a recorded interest in the loan when it commenced the foreclosure action, BOA could not have accelerated it in order to trigger the commencement of the limitations period. And even if there was an acceleration occasioned by the foreclosure action, its voluntary discontinuance de-accelerated it, and thus, the limitations

period had not commenced. Defendants also argue that controlling loan documents show that the mortgage originator negotiated away the right to accelerate the loan until a judgment of foreclosure was entered, which has not occurred. Thus, defendants maintain, the statute of limitations has not commenced.

In support, defendants submit a mortgage foreclosure certificate which reflects that the chain of title of the loan contains no interest held by BOA or SPS. (NYSCEF 67). Thus, BOA and SPS claim entitlement to an order granting them a summary dismissal of plaintiffs' action against them.

While BOA's attempt to accelerate the loan in the prior foreclosure action could have "amount[ed] to an acceleration of the [loan]," defendants argue, here, absent an assignment of the loan to BOA or a delivery of the note to it, the loan was not accelerated, and observe that a copy of the note had not been filed with the prior foreclosure action.

B. Plaintiffs (NYSCEF 71-76)

Plaintiffs observe that the assignment dated May 6, 2016 reflects that the assignee is US Bank as successor trustee to BOA, thereby demonstrating that BOA was "a party in interest" on the loan. They observe that because the ACRIS records do not reflect an assignment to or from BOA other than the May 6, 2016 assignment, BOA lacks a "recorded interest." They continue that if defendants are correct in denying that BOA was a trustee holder of the loan, then it was the "undisclosed holder's agent," which was empowered to foreclose, accelerate, and de-accelerate the loan, a factual issue which, they maintain, arises from defendants' papers, and which they seek to prove upon obtaining discovery of the records of the entities in the chain of title or who are named in pertinent documents.

Moreover, plaintiffs rely on the notice of pendency that BOA filed when it initiated the

foreclosure action, claiming that it should have informed the actual holder of the mortgage and any trustee from which BOA claims to have authority that BOA was “claiming authority to foreclose on the [loan].” However, as the “real party in interest” did nothing, BOA must have had the authority to foreclose. And as BOA’s act of foreclosing was open, obvious, and significant, and defendants had notice of it, plaintiffs assert that BOA is now estopped from denying that BOA had an interest in the mortgage, notwithstanding the lack of a recorded assignment.

According to plaintiffs, the loan was accelerated when BOA filed the foreclosure complaint, and that BOA never revoked it nor did any other entity holding an interest in it, because the discontinuance of a foreclosure action, without more, does not revoke an acceleration of the debt. Plaintiffs observe that the stipulation of discontinuance is silent as to de-acceleration, and that there was no finding from the court that BOA lacked standing to accelerate the loan. Thus, they maintain, defendants are precluded from arguing it now. Plaintiffs also observe that they received no communication from BOA stating or suggesting that the loan was de-accelerated, nor do defendants submit evidence of such communications. At best, they maintain, an issue of fact exists as to whether the election to accelerate the loan had been revoked.

Plaintiffs add that defendants’ motion must be dismissed because they did not include with it a copy of the pleadings or a supporting affidavit from someone with personal knowledge of the facts.

C. Reply (NYSCEF 77-83)

In reply, defendants claim that any acceleration of the loan was revoked within the statute of limitations. In support, they submit the affidavit of SPS’s document control officer, who states

that SPS, as the loan servicer, sent Brenda updated monthly mortgage statements (NYSCEF 80) indicating that SPS was no longer seeking the total amount due. (NYSCEF 78). Additionally, defendants offer the ninety-day pre-foreclosure notices dated August 18, 2016 (NYSCEF 82) and the notice of default dated May 7, 2017 (NYSCEF 81) that SPS sent Brenda, arguing that such notices would be unnecessary if the mortgage had been accelerated. Moreover, they observe, the notice of default states that SPS may accelerate all payments if the default is not cured, demonstrating again that any acceleration of the loan was revoked.

Moreover, as plaintiffs sought no discovery from them during the pendency of this action, defendants argue that they should be precluded from claiming that discovery is necessary. Defendants also observe that as plaintiffs do not argue that SPS had an interest in the loan, SPS is entitled to summary judgment in its favor.

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. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). 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]).

Having attached a copy of the pleadings (NYSCEF 61), and as the proof on which they rely is properly annexed to their attorney's affirmation (*Kapilevich v City of New York*, 103 AD3d 548, 549 [1st Dept 2013], citing *Olan v Farrell Lines Inc.*, 64 NY2d 1092, 1093 [1985]), defendants comply with CPLR 3212(b).

A. SPS and BOA

As pertinent here, RPAPL 1501(4) provides in pertinent part 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.

Thus, an action to quiet title pursuant to RPAPL 1501(4) is properly brought against one who may currently advance a claim against the subject property.

As the mortgage foreclosure certificate reflects that as of 2016, only US Bank is a current interest holder of the mortgage, defendants establish, *prima facie*, that neither BOA nor SPS has a current interest in the loan. In their opposition, plaintiffs do not contest that neither BOA nor SPS currently has an interest in the loan, and thus, fail to raise an issue of fact as to whether they are proper defendants in this action.

B. US Bank

1. BOA's authority to accelerate the debt

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 commencement of the limitations period (*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, where a party purporting to accelerate debt on a mortgage lacks an interest in it, the acceleration is a nullity and

does not trigger the commencement of limitations period (*EMC Mortg. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]).

As the mortgage foreclosure certificate reflects that at the time the foreclosure proceeding was commenced, neither BOA nor SPS had a recorded interest in the loan, defendants also demonstrate, *prima facie*, that the statute of limitations never commenced. (*See Deutsche Bank Nat'l Tr. Co. v Bd. of Managers of the 225 E. 86th St. Condo.*, 162 AD3d 547 [1st Dept 2018] [as plaintiff lacked standing to commence foreclosure action, its purported acceleration of debt was nullity, and statute of limitations did not commence]; *21st Mortg. Corp. v Adames*, 153 AD3d 474, 475 [1st Dept 2017]).

Nevertheless, that a party's interest in a mortgage is recorded is not dispositive as to whether it has standing to bring a foreclosure action, because an assignment of a mortgage may also be accomplished by physical delivery of the note. (*See Bank of New York v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]). That BOA initiated a foreclosure action and as US Bank is listed as the successor trustee to it, an issue of fact is raised as to whether BOA physically held the note when the loan was purportedly accelerated, which would have given it standing to accelerate the loan and initiate the foreclosure proceeding. No party offers evidence as to the physical possession of the note at the time the foreclosure proceeding commenced.

Given that issue, as plaintiffs state a need for more discovery on it, and as a preliminary conference has not yet been held, summary judgment is premature at this time.

2. Acceleration of the debt

An acceleration of a mortgage debt may be triggered "when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due." (*Milone v US Bank Nat'l Ass'n*, 164 AD3d 145, 152 [2d Dept 2018]).

In the foreclosure complaint, BOA declared immediately due and payable the entire unpaid balance of principal. Thus, assuming that it had an interest in the mortgage, the loan was thereby accelerated. That plaintiffs retained the right to stop foreclosure proceedings did not prevent BOA from validly accelerating the debt. (*See Bank of New York Mellon v Dieudonne*, 171 AD3d 34, 40 [2d Dept 2019] [extinguishment of borrower's right to de-accelerate mortgage debt is not condition precedent to lender's right to accelerate it]). Accordingly, defendants do not meet their *prima facie* burden of establishing that the debt was not accelerated by the commencement of the foreclosure action.

3. De-acceleration of the debt

An election to accelerate a mortgage is revocable, but for the purposes of RPAPL 1501(4), the lender “must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action.” (*NMNT Realty Corp. v Knoxville 2012 Tr.*, 151 AD3d 1068, 1069–1070 [2d Dept 2017]).

The discontinuance of the foreclosure action is not, in and of itself, sufficient to revoke an election to accelerate where the stipulation of discontinuance is “silent on the issue of the election to accelerate, and [does] not otherwise indicate that the plaintiff would accept installment payments from the defendant.” (*Bank of New York Mellon v Craig*, 169 AD3d 627, 629 [2d Dept 2019]; *U.S. Bank Tr., N.A. v Aorta*, 167 AD3d 807, 809 [2d Dept 2018]).

Here, the stipulation of discontinuance between BOA and plaintiffs is silent as to acceleration. Accordingly, the discontinuance of the foreclosure action did not effect a revocation of the acceleration of the debt. Moreover, the mortgage statements and notices sent by SPS to plaintiffs are not sufficiently “clear and unambiguous” as to revoke the acceleration of the debt. (*Milone*, 164 AD3d at 153). The mailing of mortgage statements, absent a clear and

unambiguous revocation of the election to accelerate, is insufficient, and the mailing of 90-day notices pursuant to RPAPL 1304 does not constitute an affirmative act that revokes 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”]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motion to dismiss is granted to the extent that plaintiffs’ claims asserted against BOA and SPS are dismissed, and is otherwise denied; 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, New York, New York.


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BARBARA JAFFE, J.S.C.

9/30/2019
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE