Wilmington Sav. Fund Socy., FSB v Heampstead Prop. Ventures II LLC
2019 NY Slip Op 33868(U)
November 22, 2019
Supreme Court, Nassau County
Docket Number: 606272/19
Judge: Julianne T. Capetola
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Wilmington Savings Fund Society, FSB D/B/A Christiana Trust, Not Individually But As Trustee For Hilldale Trust,

Plaintiff(s),

- - against - -

Heampstead Property Ventures II LLC, Derek Johnson, New York State Department Of Taxation And Finance, "John Doe" And "Jane Doe," said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendant(s).

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Index № 606272/2019

Notice Of Entry

PLEASE TAKE NOTICE that the attached is a true copy of the Decision and Order on Motion in this matter entered by the Honorable Julianne T. Capetola on November 22, 2019 and filed with the Clerk's Office of the County of Nassau on November 25, 2019.

Dated: New York, New York
November 26, 2019

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At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 22nd day of November 2019

PRESENT:
HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court
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WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST,

Plaintiffs,

- against -

HEAMPSTEAD PROPERTY VENTURES II LLC, et.al.,

Defendants.
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DECISION AND ORDER ON MOTION
Index No: 606272/19
Motion Sequence: 001

The following papers were read on this Motion:
Plaintiff's Notice of Motion and Supporting Documents
Defendant Heampstead Property Ventures II LLC's Affirmation in Opposition and Supporting Documents
Plaintiff's Reply Affirmation

Plaintiff has moved by notice of motion for an order pursuant to CPLR §3212 granting summary judgment, striking and dismissing the answer of Defendant Heampstead Property Ventures II LLC (hereinafter "HPV"), appointing a referee to compute amounts due and owing and amending the caption. HPV has opposed the motion, Plaintiff replied and the motion was deemed submitted November 18, 2019.

The underlying complaint seeks foreclosure with respect to the subject mortgage. HPV opposes the motion arguing that the statute of limitations has expired. The statute of limitations argument must be addressed first.

On or about June 6, 2007, Defendant Derek Johnson executed a Note secured by a Mortgage on the subject Property located at 152 Graham Avenue, Hempstead, NY. Plaintiff is the holder of the Note and assignee of the Mortgage. HPV is the record owner of the Property pursuant to a Deed executed April 13, 2013 and recorded March 9, 2015.

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Plaintiff commenced the instant action by filing the Summons and Complaint with Notice of Pendency on or about May 7, 2019.

The procedural history that preceded the commencement of the instant action is relevant to the statute of limitations inquiry. Plaintiff's predecessor in interest commenced a foreclosure action on or about December 11, 2007 (hereinafter the "Prior Foreclosure Action") under Index #22114/2007 as against Defendant Derek Johnson and, in conjunction with the commencement thereof, accelerated the debt owed under the Mortgage. Plaintiff's predecessor moved for, and was granted, an Order Discontinuing Action, Vacate Order of Reference, Discharge Law Guardian and Cancelling Notice of Pendency dated June 10, 2013 (hereinafter the "2013 Order") with respect to that action. In support of the motion, Plaintiff's predecessor in interest submitted their Attorney's Affirmation in support which states, in relevant part, "After the commencement of this action plaintiff requested that the action be discontinued due to administrative reasons. Therefore, affirmant is requesting the discontinuance of this action, vacate order of reference, discharge law guardian and discharge of the referee appointed to sell there-under and cancellation of the notice of pendency". Both the Attorney's Affirmation and the 2013 Order are silent as to the issue of deceleration of the debt.

"A mortgage foreclosure action is subject to a six-year statute of limitations (see CPLR 213[4]). '[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' (Nationstar Mtge., LLC v. Weisblum, 143 A.D.3d 866, 867, 39 N.Y.S.3d 491 [internal quotation marks omitted]; see Wells Fargo Bank, N.A. v. Burke, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540). Acceleration occurs, inter alia, by the commencement of a foreclosure action (see Fannie Mae v. 133 Mgt., LLC, 126 A.D.3d 670, 670, 2 N.Y.S.3d 361; Clayton Natl. v. Guldi, 307 A.D.2d 982, 982, 763 N.Y.S.2d 493). '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 to the initiation of the prior foreclosure action' (NMNT Realty Corp. v. Knoxville 2012 Trust, 151 A.D.3d 1068, 1069–1070, 58 N.Y.S.3d 118; see Fed. Natl. Mtge. Assn. v. Schmitt, 172 A.D.3d 1324, 99 N.Y.S.3d 717 [2d Dept. 2019]; EMC Mtge. Corp. v. Patella, 279 A.D.2d 604, 606, 720 N.Y.S.2d 161)". *HSBC Bank, N.A. v. Vaswani*, 174 A.D.3d 514 (2d. Dept. 2019).

Plaintiff argues that the voluntary discontinuance of the action constituted an affirmative act of deceleration or, in the alternative, that the voluntary discontinuance creates a triable issue of fact such that the complaint should not be dismissed. Plaintiff

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further argues that "subsequent to the discontinuance, Plaintiff, its predecessors and representatives have sent multiple notices to the Defendant seeking to payment [sic] of the amount of the default, but not in any way demanding complete payment of the full debt, only the reinstatement amount". Notably, all of these "multiple notices" have been sent in the year 2019.

The case law is somewhat in conflict.

Plaintiff cites the unreported decision in the matter of *U.S. Bank National Association v. Guastella* wherein the United States District Court for the Eastern District of New York held that "As other courts have held, when the Mortgage holder voluntarily dismisses a foreclosure action of its own accord—whether for administrative reasons or otherwise—this "raises a triable issue of fact" as to whether there was an affirmative act to discontinue the acceleration. See Cortes-Goolcharran, 2018 WL 3748154, at *3 (quoting NMNT Realty, 58 N.Y.S. 3d at 120)". 2018 WL 4344976 (E.D.N.Y. September 11, 2018). The Court in *Guastella* cites another unreported decision in the matter of *Cortes-Goolcharran v. Rosicki, Rosicki & Associates, P.C.*, also a United States District Court for the Eastern District New York case, which held, in relevant part, that "Discontinuance of a foreclosure action does not necessarily constitute such an affirmative act. Rather, it may, as in NMNT Realty, 'raise[ ] a triable issue of fact' as to the intent behind the discontinuance". 2018 WL 3748154 (E.D.N.Y. August 7, 2018). *Cortes-Goolcharran* refers to the Appellate Division Second Department matter of *NMNT Realty Corp. v. Knoxville 2012 Trust*, also cited in Plaintiff's papers, wherein the Court held that

> "In opposition to the plaintiff's showing, the defendant submitted proof that, on August 16, 2011, Homecomings moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted. The defendant thereby raised a triable issue of fact (see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718) as to whether Homecomings' motion 'constituted an affirmative act by the lender to revoke its election to accelerate' (Federal Natl. Mtge. Assn. v. Mebane, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88) . . . The Supreme Court properly found that the mortgagors' conclusory statements that the 'Order of Discontinuance was the result of procedural deficiencies in the proceedings,' contained in the affidavits submitted by the plaintiff in support of its cross motion, do not disprove an affirmative act of revocation (see Zuckerman v. City of New York, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)". 151 A.D.3d 1068 (2d. Dept. June 28, 2017).

As recently as September 18, 2019, the Appellate Division Second Department held, in *Ditech Financial, LLC v. Naidu*, that

> "In opposition, the plaintiff failed to raise a question of fact as to whether it, or any of its predecessors, revoked its election to accelerate the mortgage within six years from July 28, 2009. Contrary to the Supreme Court's determination, the plaintiff's execution of the February 2014 stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation, which discontinued the prior foreclosure action, was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the appellant (see Bank of N.Y. Mellon v. Craig, 169 A.D.3d 627, 93 N.Y.S.3d 425; U.S. Bank Trust, N.A. v. Aorta, 167 A.D.3d 807, 89 N.Y.S.3d 717; Freedom Mtge. Corp. v. Engel, 163 A.D.3d 631, 81 N.Y.S.3d 156, lv granted in part 33 N.Y.3d 1039, 103 N.Y.S.3d 12, 126 N.E.3d 1052; cf. NMNT Realty Corp. v. Knoxville 2012 Trust, 151 A.D.3d at 1070, 58 N.Y.S.3d 118)". 175 A.D.3d 1387 (2d. Dept. September 18, 2019).

Notably, the Court cites *NMNT Realty Corp. V. Knoxville 2012 Trust* in support of their determination.

A nearly identical holding came from the Appellate Division Second Department on July 11, 2018 in the matter of *Freedom Mortgage Corporation v. Engel*:

> "In opposition, the plaintiff failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period. Contrary to the Supreme Court's determination, the plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (see Federal Natl. Mtge. Assn. v. Mebane, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88; cf. NMNT Realty Corp. v. Knoxville 2012 Trust, 151 A.D.3d at 1070, 58 N.Y.S.3d 118). 163 A.D.3d 631 (2d. Dept. 2018).

On July 8, 2019, the Appellate Division Second Department held in *HSBC Bank, N.A. v. Vaswani*, that

> "The plaintiff failed to raise any question of fact as to the statute of limitations period (see HSBC Bank USA, N.A. v. Gold, 171 A.D.3d 1029, 1031, 98 N.Y.S.3d 293; 21st Mtge. Corp. v. Osorio, 167 A.D.3d 823, 90 N.Y.S.3d 274). The plaintiff's contention that it affirmatively revoked its election to accelerate the debt by voluntarily discontinuing the prior action, without more, is without merit (see Freedom Mtge. Corp. v. Engel, 163 A.D.3d 631, 633, 81 N.Y.S.3d 156). 174 A.D.3d 514 (2d. Dept. July 8, 2019).

The Appellate Division Second Department holding in *Milone v. US Bank National Association* is particularly significant in that it clearly articulates the reasoning behind requiring clear and unambiguous deceleration notices, holding that,

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> "To the extent this Court has held that acceleration notices must be clear and unambiguous to be valid and enforceable (see Nationstar Mtge., LLC v. Weisblum, 143 A.D.3d at 867, 39 N.Y.S.3d 491; Wells Fargo Bank, N.A. v. Burke, 94 A.D.3d at 983, 943 N.Y.S.2d 540; Sarva v. Chakravorty, 34 A.D.3d at 439, 826 N.Y.S.2d 74), we likewise hold here that de-acceleration notices must also be clear and unambiguous to be valid and enforceable". 164 A.D.3d 145 (2d. Dept. August 15, 2018).

Though there has been some inconsistency between the holdings of the United States District Court for the Eastern District of New York and the Appellate Division Second Department, the most recent cases out of the Appellate Division Second Department, binding on this Court, clearly hold that a voluntary discontinuance of a foreclosure action, silent as to deceleration, with nothing more, does not constitute a valid deceleration of mortgage debt. Therefore the action must be dismissed.

HPV included a counterclaim with their answer which was not addressed by Plaintiff's motion. However, inasmuch as HPV has failed to cross-move for summary judgment with respect to their counterclaim, that request for relief is not properly before the Court and cannot, therefore, be granted at this time.

In light of the forgoing, it is hereby:

ORDERED, that Plaintiff's motion is hereby denied in its entirety and the complaint filed under Index #606272/2019 is hereby dismissed; and it is further

ORDERED, that Plaintiff shall serve a copy of this order and the accompanying order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Dated: 11/22/19

HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED
NOV 25 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE