Pryce v Nationstar Mtge. LLC
2019 NY Slip Op 34033(U)
January 7, 2019
Supreme Court, Orange County
Docket Number: EF004283-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART- ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CASSIUS PRYCE,

Plaintiff,

-against-

NATIONSTAR MORTGAGE LLC et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF004283-2017
Motion Date: November 7, 2018

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The following papers numbered 1 to 5 were read on Plaintiff's motion for reargument and renewal of this Court's prior order of June 5, 2018 insofar as it denied Plaintiff summary judgment on his action for a judgment cancelling and discharging a mortgage:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition - Affidavit / Exhibits 3-4

Reply Affirmation 5

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

Plaintiff Cassius Pryce commenced this action for a judgment cancelling and discharging a mortgage, enforcement of which he claims is barred by the Statute of Limitations. By prior Decision and Order dated June 5, 2018, this Court *inter alia* denied Plaintiff's motion for summary judgment, as follows.

A. This Court's Prior Decision and Order dated June 5, 2018

Factual Background

Pursuant to a Deed dated January 3, 2005, Plaintiff acquired title to real property in Newburgh, New York. Plaintiff executed and delivered a Promissory Note dated January 18, 2005 whereby he promised to pay the principal sum of $327,952.00 to non-party NBA Mortgage Group. As collateral security for the Note, Plaintiff executed and delivered a Mortgage, also dated January 18, 2005, on the Newburgh property.

On December 31, 2009, NBA Mortgage Group's assignee, Aurora Loan Services LLC, commenced a foreclosure action, alleging that Plaintiff had defaulted on his obligations under the Note and Mortgage. The Complaint specifically accelerates the mortgage debt, alleging: "Plaintiff elects to call due the entire amount secured by the mortgage." In 2014, the Note and Mortgage were reassigned to defendant Nationstar Mortgage LLC. In May of 2015, the foreclosing plaintiff moved for an order cancelling the lis pendens, vacating the order of reference and discontinuing the action without prejudice. The supporting affirmation asserted: "Due to an issue with the Affidavit of Merit, on 04/15/15 we were directed to discontinue the foreclosure action and cancel the Notice of Pendency. Plaintiff respectfully requests that this action be discontinued and the Notice of Pendency be cancelled." By Order dated June 11, 2015, the motion was granted by the Hon. Debra J. Kiedaisch, and the foreclosure action was thereby discontinued without costs.

On June 8, 2017, Plaintiff commenced this action pursuant to Article 15 of the Real Property Actions and Proceedings Law to cancel and discharge the Mortgage, asserting that enforcement of the Mortgage is now barred by the Statute of Limitations. On July 28, 2017 a second action to foreclose the Mortgage was commenced under the name *The Bank of New York Mellon v. Cassius Pryce et al.*, Orange County Index No. EF005923-2017.

The Parties' Contentions

Plaintiff contends that the six (6) year Statute of Limitations commenced running on the entire mortgage debt upon its acceleration on December 31, 2009, and expired at the latest on March 29, 2016. He moves for summary judgment in this action, and in the alternative for a joint trial of this action and the newly commenced foreclosure action. Defendant contends *inter alia* that the Statute of Limitations does not bar foreclosure of the Mortgage because the mortgage debt was "de-accelerated" upon the discontinuance of the prior foreclosure action in 2015. Defendant consents to a joint trial of Plaintiff's RPAPL Article 15 action and the newly commenced foreclosure action.

Legal Analysis

The issue here is governed by the Second Department's decision in *NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 AD3d 1068 (2d Dept. 2017).

The *NMNT* Court began by laying out the relevant legal framework under Article 15 of the Real Property Actions and Proceedings Law:

> 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 with an estate or interest in the property may maintain an action "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" (RPAPL 1501[4]); [cit.om.]. An action to foreclose a mortgage is subject to a six-year statute of limitations [cit.om.]. "'[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'" [cit.om.].

Id., 151 AD3d at 1069.

However, enforcement of a mortgage is not barred in its entirety simply by virtue of the passage of six years from acceleration of the mortgage debt where the lender has in the interim affirmatively revoked its election to accelerate the debt. *NMNT Realty Corp., supra,* 151 AD3d at 1069-70. "[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon." *Federal National Mortgage Assoc. v. Mebane,* 208 AD2d 892, 894 (2d Dept. 1994). The lender may do so only 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., supra,* 151 AD3d at 1069-70 (emphasis added). *See also, EMC Mortgage Corporation v. Patella,* 279 AD2d 604, 606 (2d Dept. 2001).

"New York courts have acknowledged that the law has not specified exactly which act or acts are sufficient to revoke acceleration." *In re Taylor,* –B.R.–, 2018 WL 2113959 at *4 (Bkrtcy. E.D.N.Y., May 4, 2018). However, the Second Department in *NMNT* as well as a number of lower courts have held that the voluntary discontinuance of a foreclosure action (as opposed to an involuntary dismissal by the court) constitutes, or may constitute, an affirmative act of revocation. *See, NMNT Realty Corp., supra,* 151 AD3d at 1070; *Bank of New York Mellon v. Kantrow,* 57 Misc.3d 1024(A) at *5 (Sup. Ct. Suffolk Co. 2017); *U.S. Bank National Assoc. v. Deochand,* 2017 WL 1031942 at *5 (Sup. Ct. Queens Co., March 1, 2017); *Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.,* 2016 WL 2839341 at *3 (Sup. Ct. N.Y. Co., May 11, 2016). *Cf., EMC Mortgage Corp. v.*

Patella, supra, 279 AD2d at 606 (court's *sua sponte* dismissal of foreclosure action does not constitute affirmative revocation of lender's election to accelerate); *Federal National Mortgage Assoc. v. Mebane,* 208 AD2d 892, 894 (2d Dept. 1994) (same).

More particularly, the *NMNT* Court held:

> In opposition to plaintiff's showing [that the statute of limitations had expired], 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 [cit.om.] as to whether Homecomings' motion "constituted an affirmative act by the lender to revoke its election to accelerate" [cit.om.].

Id., 151 AD3d at 1070.

Plaintiff argues that *NMNT* is distinguishable from the case at bar because, in this case, the foreclosure action was only discontinued (per the attorney's affirmation) "due to an issue with the Affidavit of Merit," and there was no express indication of the lender's intent to revoke its acceleration of the mortgage debt. However, the *NMNT* Court pointedly rejected the very argument Plaintiff proffers here, stating:

> 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 [cit.om.].

Id., 151 AD3d at 1070.

Thus, the lender's voluntary discontinuance of a foreclosure action (like a de-acceleration letter or the execution of a loan modification agreement) may constitute *per se* an affirmative act revoking acceleration of the mortgage debt. *See, In re Taylor, supra* (surveying caselaw). Indeed, certain lower courts have, in the absence of any other evidence, held that a lender's voluntary discontinuance of the foreclosure action worked a revocation of the election to accelerate the mortgage debt as a matter of law. *See, Bank of New York Mellon v. Kantrow, supra*; *U.S. Bank National Assoc. v. Deochand, supra*; *Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co., supra.*

Inasmuch as Defendant did not herein cross move for summary judgment, this Court follows the letter of *NMNT Realty Corp. v. Knoxville 2012 Trust* and holds that Defendant's proof that the lender in 2015 moved for, and was granted, an order voluntarily discontinuing the prior foreclosure action, canceling the notice of pendency and vacating the order of reference within the six (6) year Statute of Limitations raised

> triable issues of fact (1) whether that motion constituted an affirmative act by the lender to revoke its election to accelerate, and hence (2) whether the pending mortgage foreclosure action was in whole or in part timely brought within the applicable Statute of Limitations period.

(Decision and Order dated June 5, 2018, pp. 1-6)

B. Plaintiff's Motion For Reargument and Renewal

Plaintiff Cassius Pryce now moves for reargument and renewal of the June 5, 2018 Decision and Order insofar as it denied his motion for summary judgment. Plaintiff's motion for reargument and renewal is granted, and upon reargument and renewal, the Court adheres to its prior determination with the following supplemental memorandum.

1. The Record Herein Gives Rise To Unresolved Issues Of Fact Whether Aurora Loan Services LLC Had Standing To Accelerate Plaintiff's Mortgage Debt And To Commence The 2009 Foreclosure Action, And Hence Whether The Six Year Statute Of Limitations Started Running On The Entire Debt Upon Commencement Of The 2009 Action

In *NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 AD3d 1068 (2d Dept. 2017), the Second Department observed:

> 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 with an estate or interest in the property may maintain an action "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" (RPAPL 1501[4]); [cit.om.]. An action to foreclose a mortgage is subject to a six-year statute of limitations [cit.om.]. "'[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'" [cit.om.].

Id., 151 AD3d at 1069.

Plaintiff's contention that enforcement of the mortgage at issue in this proceeding (the "Mortgage") is barred by the Statute of Limitations is predicated on his assertion that the

entire Mortgage debt was accelerated upon the commencement by Aurora Loan Services LLC ("Aurora") of the prior foreclosure action on December 31, 2009.

However, the Second Department has repeatedly held that where the plaintiff lacks standing to commence a foreclosure action because it was not the holder of the note and mortgage at the time of commencement, service of the complaint is ineffective to constitute a valid exercise of the option to accelerate the mortgage debt. In such circumstances, the purported acceleration is deemed a nullity, and it does not cause the six-year Statute of Limitations on enforcement of the entire mortgage debt to begin to run. *See, U.S. Bank National Ass'n v. Gordon,* 158 AD3d 832, 836 (2018); *Stewart Title Ins. Co. v. Bank of New York Mellon,* 154 AD3d 656, 662-663 (2d Dept. 2017); *Wells Fargo Bank, N.A. v. Burke,* 94 AD3d 980, 983 (2d Dept. 2012); *EMC Mortgage Corporation v. Suarez,* 49 AD3d 592, 593(2d Dept. 2008). *See also, Milone v. U.S. Bank National Ass'n,* 164 AD3d 145, 153 (2d Dept. 2018). *Cf., Beneficial Homeowner Service Corp. v. Tovar,* 150 AD3d 657, 658-659 (2d Dept. 2017).

It is well established that "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." *Bank of New York v. Silverberg,* 86 AD3d 274, 279 (2d Dept. 2011). As Aurora's voluntary discontinuance of the prior foreclosure action in 2015 due to a problem with the Affidavit of Merit suggests, and as Plaintiff's own documentary evidence confirms, there are unresolved material issues of fact as to whether Aurora was the holder or assignee of the Note at issue here, and thus, whether it had standing to commence the prior foreclosure action on December 31, 2009.

The evidence of record reveals facts as follows:

(1) The Mortgage at issue in this action is dated January 18, 2005. It was executed by plaintiff Cassius Pryce, as Mortgagor, to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for NBA Mortgage Group, as Mortgagee, to secure the sum of $327,952.00. (Exhibit C)

(2) By "Corporate Assignment of Mortgage" dated December 23, 2009, MERS, as nominee for NBA Mortgage Group, purported to assign the Mortgage together with the Note to Aurora Loan Services, LLC. (Exhibit D)

(3) One week later, on December 31, 2009, Aurora, by its attorney, Steven J. Baum, P.C., [1] commenced an action to foreclose the Mortgage. The complaint alleges that Aurora is the owner and holder of the note and mortgage being foreclosed, and further states that "[Aurora] elects to call due the entire amount secured by the mortgage." (Exhibit E)

(4) No copy of the Note is attached to the foreclosure complaint proffered by Plaintiff. However, what Plaintiff proffers as a true and correct copy of the Note bears neither an indorsement to Aurora, nor an indorsement to bearer or in blank, but rather an indorsement by NBA Mortgage Group "to the order of Lehman Brothers Bank, FSB without recourse." (Exhibit B)[2]

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[1]The Court takes judicial notice that the Steven J. Baum, P.C. law firm "was subject to highly publicized scrutiny for its foreclosure practices, including allegations of "robo-signing" that led to an investigation by the U.S. Attorney's Office for the Southern District of New York, that resulted in an agreement on October 6, 2011 requiring the Baum firm to pay $2 million and significantly change its servicing practices." 2011 WL 10619463 at *1 (New York Banking Department, Dec. 19, 2011).

[2]By way of contrast, the copy of the Note proffered by The Bank of New York Mellon on its companion action to foreclose the Mortgage bears, in addition, (1) an indorsement by Lehman Brothers Bank, FSB to Lehman Brothers Holdings Inc., and (2) an indorsement in blank by Lehman Brothers Holdings Inc.

Aurora's reliance on the MERS assignment to assert standing to foreclose in the 2009 foreclosure action was fatally undermined by the Second Department's decision in *Bank of New York v. Silverberg, supra.* The Court held that, while MERS as the original lender's nominee was mortgagee of record and had the right to assign the mortgage, "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it." *Id.,* at 280. Inasmuch as MERS was never the lawful holder or assignee of the promissory note, MERS was without authority to assign the note, and hence the MERS assignment could not confer standing on the plaintiff bank to foreclose on the mortgage. *Id.,* at 282-283. Here, then, MERS' "Corporate Assignment of Mortgage" dated December 23, 2009 was ineffective to assign the Note at issue here to Aurora and to confer on Aurora the power to foreclose.

Neither could Aurora's standing to foreclose be predicated on its physical possession of the Note proffered by Plaintiff, since that Note was specially indorsed to the order of Lehman Brothers Bank, FSB, and not to Aurora, or to bearer or in blank. The Note is a negotiable instrument, and hence Aurora's standing would be governed by the pertinent provisions of the Uniform Commercial Code.

> A "holder" is "a person who is in possession of ... an instrument ... issued or indorsed to his order or to bearer or in blank. UCC §1-201[20].
>
> "Negotiation is the transfer of an instrument in such form that the transferee becomes a holder." UCC §3-202[1].
>
> "If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." UCC §3-202[1].
>
> "An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." UCC §3-204[2].

See, generally, Bank of New York Mellon v. Deane, 41 Misc.3d 494 (Sup. Ct. Kings Co. 2013).

Under the UCC, then, Aurora would not by virtue of delivery and physical possession of the Note proffered by Plaintiff have become its "holder", with standing to foreclose, since it was not issued or indorsed to his order or to bearer or in blank. *See,* UCC §§ 1-201[20], 3-202[1].

In view of the foregoing, there are unresolved material issues of fact (1) whether Aurora was possessed of standing to commence the 2009 foreclosure action, and thus (2) whether service of the complaint therein was effective to constitute a valid exercise of the option to accelerate Plaintiff's Mortgage debt, and (3) whether the six-year Statute of Limitations commenced running on the entire Mortgage debt on December 31, 2009 as alleged by Plaintiff. Therefore, the Court adheres to its original determination denying Plaintiff's motion for summary judgment.

2. Recent Second Department Caselaw Does Not Overrule *NMT Realty Corp.* Or Compel As A Matter Of Law The Conclusion That Aurora's Voluntary Discontinuance Of The Prior Foreclosure Action Did Not Revoke The Purported Acceleration Of The Mortgage Debt

This Court, in denying Plaintiff's motion for summary judgment, followed *NMNT Realty Corp. v. Knoxville 2012 Trust, supra,* 151 AD3d 1068 (2d Dept. 2017), wherein the Second Department held:

> In opposition to plaintiff's showing [that the statute of limitations had expired], 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 [cit.om.] as to whether Homecomings' motion "constituted an affirmative act by the lender to revoke its election to accelerate" [cit.om.].

Id., 151 AD3d at 1070. Since this Court's decision was issued on June 5, 2018, the Second Department has twice confronted the issue whether the voluntary discontinuance of a foreclosure action may constitute "an affirmative act by the lender to revoke its election to accelerate." On

both occasions, that Court acknowledged the continuing validity of *NMNT Realty Corp.* with a "cf." citation in the context of holdings that do not require the modification of this Court's decision on Plaintiff's motion. *See*, *Freedom Mortgage Corporation v. Engel,* 163 AD3d 631 (2d Dept. 2018); *U.S. Bank Trust, N.A. v. Aorta,* 2018 WL 6518941 (2d Dept., Dec. 12, 2018).

In *Freedom Mortgage Corporation v. Engel,* the defendant mortgagor moved to dismiss the prior foreclosure action due to improper service of process. In a "so ordered" stipulation entered to resolve the issues raised upon that motion, the defendant agreed to withdraw his motion and the plaintiff agreed to voluntarily discontinue the action without prejudice. In those circumstances, the Second Department held that the "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." *Id.,* 163 AD3d at 633. The holding of *Engel* is consistent with prior cases wherein the Second Department had held that a dismissal occasioned by lack of personal jurisdiction or improper service of process does not in itself give rise to a revocation of the election to accelerate. *See, MSMJ Realty, LLC v. DLJ Mortgage Capital, Inc.,* 157 AD3d 885, 886-887 (2d Dept. 2018); *Beneficial Homeowner Serv. Corp. v. Tovar,* 150 AD3d 657, 658 (2d Dept. 2017); *Clayton National, Inc. v. Guldi,* 307 AD2d 982 (2d Dept. 2003). As that Court observed in *Beneficial Homeowner Serv. Corp. v. Tovar, supra,* "the failure to properly serve the summons and complaint upon the defendant homeowner did not as a matter of law destroy the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt." *Id.,* 150 AD3d at 658. Here, in contrast, as is shown in Section "1" above, the asserted ground for Aurora's motion for a voluntary discontinuance *does*

tend to implicate the validity of Aurora's acceleration of the debt and its commencement of the prior foreclosure action.

In *U.S. Bank Trust, N.A. v. Aorta*, the Second Department adopted the reasoning of *Beneficial Homeowner Serv. Corp. v. Tovar*, *supra*, while continuing to distinguish *NMNT Realty Corp. v. Knoxville 2012 Trust, supra*. Supreme Court therein granted a motion by the plaintiff's predecessor in interest to voluntarily discontinue the prior foreclosure action. The Second Department, observing that the plaintiff bank had failed to demonstrate the basis for its predecessor's motion, held that the order of discontinuance was "insufficient, in itself, to evidence an affirmative act to revoke the election to accelerate the mortgage debt", as "nothing in the order itself served to 'destroy the effect of the sworn statement that the [plaintiff's predecessor in interest] had elected to accelerate the maturity of the debt'." *Id.*, 2018 WL 6518941 at *2 (quoting *Beneficial Homeowner Serv. Corp. v. Tovar, supra*).

Inasmuch as the asserted ground for Aurora's motion for a voluntary discontinuance *does* tend to implicate the validity of Aurora's acceleration of the debt and its commencement of the prior foreclosure action, this Court concludes (1) that *Engel* and *Aorta* are properly distinguishable, and (2) that as per *NMNT Realty Corp. v. Knoxville 2012 Trust, supra*, the circumstances here are such that there is a triable issue of fact whether Aurora's motion for a voluntary discontinuance constituted an affirmative act by the lender to revoke its election to accelerate.

It is therefore

ORDERED, that Plaintiff's motion for reargument and renewal of this Court's prior Decision and Order of June 5, 2018 is granted, and it is further

ORDERED, that upon reargument and renewal, the Court adheres to its original determination with the supplemental memorandum set forth hereinabove.

The foregoing constitutes the decision and order of this Court.

Dated: January 7, 2019 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE