

MTGLQ Invs., L.P. v Wentworth
2019 NY Slip Op 34087(U)
August 21, 2019
Supreme Court, Albany County
Docket Number: 903172-18
Judge: L. Michael Mackey
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MTGLQ INVESTORS, L.P.,

Plaintiff,

DECISION AND
ORDER

-against-

Index number 903172-18

ROBERT J. WENTWORTH;
BRANDIE M. WENTWORTH;
BANK OF AMERICA, NA,

“JOHN DOE #1” through “JOHN DOW #12,” the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended to be tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

(Supreme Court, Albany County, Special Term)
(Justice L. Michael Mackey, Presiding)

Appearances: Tracy Starasoler, Esq.
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Attorneys for Plaintiff
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Charles T. Kriss, Esq.
Kriss, Kriss & Brignola, LLP
Attorneys for Defendants Brandie and Robert Wentworth
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Mackey, J:

In this mortgage foreclosure action plaintiff moves for summary judgment and the appointment of a Referee to compute; defendants Robert J. Wentworth and Brandy M.

Wentworth (“defendants”) cross-move¹ for summary judgment dismissing the complaint on the ground that the action is barred by the statute of limitations. Defendants also seek an order discharging/canceling the subject mortgage pursuant to RPAPL Section 1501.

This action was commenced by filing of the summons and complaint on May 10, 2018.² Defendants claim that the action was commenced more than six years after the mortgage debt was accelerated and it is, therefore, barred by the statute of limitations. Plaintiff argues that the action was timely commenced.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Stonehill Capital Management, LLC v. Bank of the West* (2016) quoting *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) (other citations omitted); CPLR 3212 (b). “Once the movant makes the proper showing, ‘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.’” *Id.* quoting *Alvarez*, 68 NY2d at 324. The facts must be viewed in the light most favorable to the nonmoving party. *Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011). If the movant fails to meet his burden to establish a prima facie case, tendering sufficient evidence to eliminate material issues of fact, the motion must be denied regardless of the sufficiency of the opposing

¹ Plaintiff initially moved for summary judgment on November 20, 2018 and defendants cross-moved. On January 16, 2019 plaintiff filed a notice withdrawing its motion and, believing erroneously that such withdrawal also effected a withdrawal of defendants’ cross-motion, submitted no opposition to the cross-motion. On March 4, 2019 plaintiff made a second motion for summary judgment and the parties stipulated at a March 28, 2019 conference that all papers submitted on plaintiff’s second motion and defendants’ earlier cross-motion would be considered together.

² An earlier foreclosure action (Index number 1461 – 14) brought by plaintiff’s predecessor in interest was dismissed for failure to prosecute on February 7, 2017, pursuant to Conditional Order of Dismissal issued by the court (Platkin, J) on September 9, 2016.

papers. *Vega v. Restain Const. Corp.*, 18 NY3d 499 (2012); *Winegrad v. New York University Medical Center*, 64 NY2d 851 (1985). On a summary judgment motion the parties are obligated to lay bare their proof in evidentiary form. *Hanson v. Ontario Milk Producers Co-op, Inc.*, 58 Misc.2d 138 (Sup. Ct. Oswego Co. 1968). The Court is cognizant of these burdens as it analyzes the parties' respective motions.

Defendants argue that the mortgage debt was accelerated on December 8, 2011 when plaintiff's predecessor in interest ("Mortgagee") obtained an order ("Bankruptcy Order") in United States Bankruptcy Court for the Northern District of New York lifting the automatic bankruptcy stay and permitting them to foreclose the mortgage during the pendency of defendant Robert J. Wentworth's Chapter 13 bankruptcy proceeding. Plaintiff opposes the motion and argues that any acceleration of the mortgage debt occurred, at the earliest, in 2014 when Mortgagee commenced the earlier foreclosure action.

"[O]nce a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt. 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 ..." *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069–1070 (Second Dept 2017) (citations and internal quotations omitted). It is undisputed that the Bankruptcy Order was obtained more than six years before the commencement of this action. Thus, the question to be decided is whether the Bankruptcy Order obtained by Mortgagee accelerated the mortgage debt.³ This issue was specifically addressed in *In re PCH Associate*, 122 B.R. 181, 185 (S. D. New York 1990), where the court held that automatic acceleration of a mortgage "occurs not only where a creditor files a proof of claim for the entire accelerated

³ Plaintiff makes no argument that either it or Mortgagee took any affirmative action to revoke any acceleration of the mortgage debt.

amount but also where a creditor files a motion seeking relief from the automatic stay for the purpose of foreclosure.” Similarly, in *Matter of LHD Realty Corp.*, 726 F.2d 327, 331 (Seventh Circuit Court of Appeals 1992) the court stated “we think [mortgagee] exercised its option to accelerate no later than August 26, 1981, when it filed its request for relief from the automatic stay.” Here, Mortgagee filed a Proof of Claim with Bankruptcy Court on September 23, 2011, in which it listed the “amount of claim” as \$183,323.05⁴ and on December 8, 2011 obtained an order granting relief from the automatic bankruptcy stay. This proof, which plaintiff has not rebutted, clearly demonstrate that the mortgage debt was accelerated no later than December 8, 2011, more than six years prior to the commencement of this action. Plaintiff has submitted no proof that either it or Mortgagee took any action to revoke the acceleration and has failed to demonstrate the existence of any material issue of fact. Accordingly, defendants are entitled to summary judgment dismissing the complaint on the ground that the action is barred by the statute of limitations. For the same reasons, plaintiff’s motion for summary judgment must be denied. It is, therefore

ORDERED that plaintiff’s motion for summary judgment is **DENIED**; and it is further

ORDERED that defendants’ cross-motion for summary judgment is **GRANTED**; and it is further

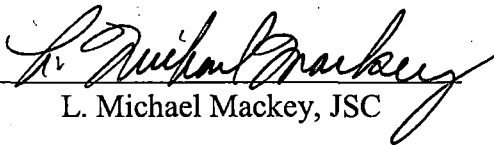
ORDERED that defendants’ motion for an order discharging/canceling the subject mortgage pursuant to RPAPL Section 1501 is **GRANTED**; and it is further

ORDERED that defendants’ counsel submit a proposed judgment consistent herewith on 10 days’ notice to plaintiff’s counsel.

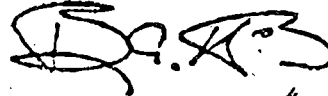
⁴ The Proof of Claim specifies that this amount represents the unpaid principal balance secured by the mortgage.

ENTER.

Dated: Albany, New York
August 21, 2019


L. Michael Mackey, JSC

Papers considered:

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8-29-19
1. Plaintiff's Notice of Motion dated March 4, 2019, Affirmation of Tracy Starasoler, Esq. dated March 4, 2019, with exhibits A-P.
 2. Defendants' Notice of Cross – Motion dated December 27, 2018, affirmation of Charles T. Kriss, Esq. dated December 28, 2018, Affidavit of Brandie M. Wentworth dated December 28, 2018, Affidavit of Robert J. Wentworth dated December 28, 2018, with exhibits 1 – 9.
 3. Affirmation of Charles T. Kriss, Esq. dated March 28, 2019, with exhibits A-E.
 4. Affidavit of Brandie M. Wentworth dated March 28, 2019.
 5. Affirmation of Lancelot E. Colquitt, Esq. dated April 3, 2019.
 6. Affirmation of Charles T. Kriss, Esq. dated June 4, 2019, with exhibit A.

This memorandum constitutes the Decision and Order of the court. The original Decision and Order is being forwarded to defendants' counsel. Copies of the Decision and Order together with all papers upon which it is granted are being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision in Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding filing, entry and notice of entry of the original Decision and Order.