

FV-I, Inc. v Thomas
2019 NY Slip Op 34702(U)
March 29, 2019
Supreme Court, Queens County
Docket Number: Index No. 713298/2017
Judge: Pam Jackman Brown
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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

SHORT FORM ORDER

Present: Hon. Pam Jackman Brown, JSC

-----X
FV-I, INC., in trust for Morgan Stanley Mortgage
Capital Holdings LLC,

Plaintiff,

-against-

Pamela Thomas, Christie Winston, Carl Thomas,
Dionne Thomas, Wells Fargo Bank, NA, Criminal
Court of the City of New York, New York State
Department of Taxation and Finance, Queens Supreme
Court, LR Credit LLC, Internal Revenue Service
United States of America, New York City Transit
Adjudication Bureau, New York City Parking Violations
Bureau, New York City Environmental Control Board,
and "JOHN DOE #1" through "JOHN DOE #12," the
last twelve names being fictitious and unknown to
Plaintiff, the person or parties intended being the tenants,
occupants, persons or corporations, if any, having or
claiming an interest in or lien upon the premises being
foreclosed herein,

Defendants.

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Index No. 713298/2017

Motion Date: 11/5/18

Cal. No. 18

Mot. Seq. : 1

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COUNTY CLERK
QUEENS COUNTY

Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 35 to 57, and 61 to 80 read on this Notice of Motion by Plaintiff for an Order: (1) granting Plaintiff summary judgment pursuant to New York Civil Practice Law and Rules (CPLR) §3212, on its Verified Complaint against defendant Pamela Thomas and striking her Answer dated October 30, 2017 (the "Answer"), including the affirmative defenses therein, with prejudice; (2) granting Plaintiff default judgment pursuant to CPLR §3215, against the non-appearing and non-answering defendants; (3) appointing a Referee to ascertain the amount due and owing to Plaintiff, and to issue a report pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") §1321; (4) amending the caption of this action by striking "JOHN

DOE #1" through "JOHN DOE#12" as party defendants and amending the caption to substitute "John Doe#1" and "Carl Thomas" as party defendants in the place and stead of "JOHN DOE #1" AND "JOHN DOE #2", without prejudice to prior proceedings had herein; and (5) granting such other and further relief as the Court deems just and proper; and read on this Cross-Motion by Defendant Pamela Thomas for an Order :(1) dismissing this action pursuant to CPLR §3212 in favor of Defendant and against Plaintiff; and (2) any other relief the Court deems just.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Notice of Motion- Affidavits and Exhibits Annexed	34-35	36-54, 56-57
Memorandum of Law in Support of Motion	55	
Notice of Cross-Motion- Affidavits and Exhibits Annexed	61-63	64-66
Affirmation in Opposition to Cross-Motion and in Further Support of Motion	67-68	69-74
Affidavit in Further Support of Cross-Motion	75	76-77
Notice of Rejection	78	
Response to Plaintiff's Notice of Rejection	79	80

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is an action to foreclose a mortgage against real property known as 85-14 Palo Alto Street, Holliswood, New York 11423, Block 10505, Lot 85, situated within the County of Queens. Plaintiff commenced the instant proceeding with the filing of a summons, complaint and notice of pendency on September 20, 2017. On October 30, 2017, Defendant filed an answer asserting fourteen affirmative defenses.

Now, upon motion, Plaintiff seeks an Order: (1) granting Plaintiff summary judgment pursuant to New York Civil Practice Law and Rules (CPLR) §3212, on its Verified Complaint against defendant Pamela Thomas and striking her Answer dated October 30, 2017 (the "Answer"), including the affirmative defenses therein, with prejudice; (2) granting Plaintiff default judgment pursuant to CPLR §3215, against the non-appearing and non-answering defendants; (3) appointing a Referee to ascertain the amount due and owing to Plaintiff, and to issue a report pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") §1321; (4) amending the caption of this action by striking "JOHN DOE #1" through "JOHN DOE#12" as party defendants and amending the caption to substitute "John Doe#1" and "Carl Thomas" as party

defendants in the place and stead of "JOHN DOE #1" AND "JOHN DOE #2", without prejudice to prior proceedings had herein; and (5) granting such other and further relief as the Court deems just and proper. Defendant opposes the application and cross-moves for an Order :(1) dismissing this action pursuant to CPLR §3212 in favor of Defendant and against Plaintiff; and (2) any other relief the Court deems just.

Here, Plaintiff claims an entitlement to summary judgment. Defendant opposes the application and argues that the instant proceeding is time-barred, as the Statute of Limitations has expired. Defendant also argues that she was not served with a Notice of Default, or the required notices in accordance with RPAPL §§ 1303 and 1304.

Generally, a plaintiff moving for summary judgment in a foreclosure proceeding establishes its *prima facie* case through the production of the mortgage, unpaid note and evidence of default. Where, as here, a plaintiff's standing to commence the proceeding is at issue, plaintiff must prove standing as part of its *prima facie* showing (*US Bank National Association v Cohen*, 156 AD3d 844, 845 [2d Dept 2017]). The Court notes that Plaintiff produced the mortgage, unpaid note and submitted the affidavit of Nicholas J. Raab, Assistant Vice President for Specialized Loan Servicing LLC, acting as attorney-in-fact for Plaintiff, as evidence of default. Further, the Court notes that copies of the mortgage and note were annexed to the complaint. Plaintiff has also demonstrated compliance with RPAPL §§§ 1303, 1304 and 1306. By such documents, Plaintiff established *prima facie*, it's standing as holder of the note (*Id* at 846).

Defendant opposes the application and cross-moves seeking dismissal of the instant proceeding. Defendant argues, *inter alia*, that the instant action is time barred.

It is undisputed that Plaintiff's predecessor commenced a prior action against Defendant on May 6, 2011, under Queens Supreme Court Index 11079/2011 (hereinafter "prior action"). Pursuant to a Stipulation Discontinuing Action (hereinafter "the Stipulation"), dated December 16, 2016, the prior action was discontinued.

The Court now turns to the issues of acceleration and statute of limitation. Under New York Law, "even 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" (*EMC Mortg. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). "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" (*Deutsche Bank National Trust Company v Adrian*, 157 AD3d 934, 935 [2d Dept 2018] quoting *NMNT Realty Corp., v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]). In its

complaint in the prior action, Plaintiff declared the entire principal balance to be due and owing, in accordance with the terms of the note and mortgage. In accordance with Plaintiff's acceleration of the mortgage by its complaint in the prior action, the statute of limitations began to run on May 6, 2011, and expired on May 6, 2017. The Stipulation is dated December 16, 2016. The instant proceeding was commenced on September 20, 2017.

Defendant argues that the instant proceeding is time barred, as it was commenced after the expiration of the statute of limitations. It is undisputed that Plaintiff accelerated the mortgage debt by commencing the prior foreclosure proceeding on May 6, 2011. Since Plaintiff did not commence this action until September 20, 2017, after the expiration of the statute of limitations, Defendant sustained her prima facie burden on her cross-motion.

In opposition, Plaintiff raised a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the applicable statute of limitations. Although the Stipulation alone is insufficient to constitute an affirmative act to revoke the election to accelerate the mortgage, because it appears to be silent on the issue of revocation of the election to accelerate and did not indicate that Plaintiff's predecessor would accept installment payments from the Defendant (*Freedom Mortgage Corporation v Engel*, 163 Ad3d 631 [2d Dept 2018]), it is unclear whether Stipulation, considered with the Notice of Deceleration, dated December 29, 2016, constitutes an affirmative to revoke the election to acceleration of the mortgage.

The Court notes that the second paragraph of the Stipulation and the seventh paragraph of the Attorneys Affirmation in Support of Stipulation Discontinuing Action, include a sentence which reads, "A Verified Complaint for an Action to Foreclose a Mortgage was filed in connection with the property referred to above and the loan is de". The evidence presented is insufficient for the Court to determine whether the sentence is the result of a typographical error.

In light of the foregoing, Plaintiff's application seeking summary judgment and Defendant's application seeking dismissal is denied.

Plaintiff's application seeking to amend the caption is granted. Accordingly, the caption shall read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
FV-I, INC., in trust for Morgan Stanley Mortgage
Capital Holdings LLC,

Plaintiff,

Index No. 713298/2017

Motion Date: 11/5/18

-against-

Cal. No. 18

Pamela Thomas, Christie Winston, Carl Thomas,
Dionne Thomas, Wells Fargo Bank, NA, Criminal
Court of the City of New York, New York State
Department of Taxation and Finance, Queens Supreme
Court, LR Credit LLC, Internal Revenue Service
United States of America, New York City Transit
Adjudication Bureau, New York City Parking Violations
Bureau, New York City Environmental Control Board,
Carl Thomas, and John Doe,

Mot. Seq. : 1

Defendants.

-----X

All relief not specifically granted or denied is denied.

Dated: March 29, 2019
Jamaica, NY

HON. PAM JACKMAN BROWN, JSC



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