

Deutsche Bank Natl. Trust Co. v Lubonty
2019 NY Slip Op 34796(U)
June 19, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 617778/2018
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

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DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS INDENTURE TRUSTEE FOR
AMERICAN HOME MORTGAGE INVESTMENT
TRUST 2006-1,

Plaintiff,

-against-

GREGG LUBONTY; FLORENCE H.
GRUNBERG; "JOHN DOE #1" to "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 described in the complaint,

Defendants.

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MOT. SEQ. NO.:001-MD

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Upon the following E-file documents numbered 19 to 47, read on this motion to Dismiss (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that the motion (seq. no.:001) of Defendant Gregg Lubonty ("Defendant") which requests an order pursuant to CPLR Rule 3211(a)(5) dismissing the Plaintiff's Complaint in its entirety with prejudice due to expiration of the statute of limitations; and/or pursuant to CPLR Rule 3211(a)(8) dismissing this action for lack of personal jurisdiction is denied in its entirety.

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This is a matter seeking foreclosure and sale of residential real property situate in Southampton, Town of Southampton, Suffolk County, New York. On November 29th, 2005 mortgagor/Defendant Gregg Lubonty closed on a residential property loan secured by a Note and Mortgage on 61 Middle Pond Road, Southampton, New York 11968, more properly known and designated as D: 0900; S: 234.00; B: 01.00; L: 008.003. That loan was assigned to Plaintiff. On February 1st, 2007, Defendant defaulted on that loan which default continues through the present. On August 3rd, 2007 Plaintiff's predecessor, American Home Mortgage, filed a foreclosure action against Defendant in Suffolk County Supreme Court under Index No.:015484/2007 before Judge Spinner. That foreclosure case was stayed by Defendant filing for Chapter 11 Bankruptcy relief on June 26th, 2007 before the Southern District of Florida under Case No.:07-14945-AJC. On November 24th, 2009 that bankruptcy case was dismissed. On June 25th, 2009, the 2007 foreclosure action was terminated. On June 9th, 2011, Plaintiff's predecessor filed a second foreclosure action against the Defendant. On October 19th, 2011, Defendant filed a second Chapter 11 Bankruptcy petition in the U.S. Bankruptcy Court for the Eastern District of New York under Case No.:11-77413-AST, before Judge Trust. On July 2nd, 2013 the Defendant converted that bankruptcy case to one seeking Chapter 7 Bankruptcy relief, liquidation bankruptcy. Debtor received a discharge on November 3rd, 2014 and on January 23rd, 2017 that bankruptcy case was closed. In or around October of 2014, Plaintiff's 2011 foreclosure case was dismissed for lack of personal jurisdiction. On September 12th, 2018, Plaintiff filed its instant foreclosure action. On October 26th, 2018, Defendant filed its instant Motion to Dismiss (seq. no.:001) pursuant to CPLR Rule 3211(a)(5), (8).

Motion to Dismiss Pursuant to CPLR Rule 3211(a)(5)

CPLR Rule 3211. Motion to dismiss, provides, in pertinent part:

“(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

5. the cause of action may not be maintained because of the arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or...” McKinney’s CPLR Rule 3211 [2019].

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Defendant has moved (McKinney's CPLR Rule 3211 [2019]) for dismissal of the case with prejudice. Defendant asserts, pursuant to CPLR Rule 3211(a)(5), that Plaintiff cannot maintain its instant foreclosure case due to the expiration of the statute of limitations. Defendant alleges, in paragraph 9 of Attorney Kamran's October 26, 2018 Affirmation in Support:

"9. As more than six years have elapsed (indeed, more than eleven [11] years have elapsed) since the debt due to Plaintiff's Mortgage Loan was accelerated, Plaintiff's claim and foreclosure cause of action, as set forth in the Complaint is clearly barred by the statute of limitations pursuant to NY CPLR §213(4), and, as a result, the Court should dismiss this Instant Action with prejudice."

On February 10th, 2015, Defendant, then filing as Plaintiff, filed a Request for Judicial Intervention (RJI) in an action seeking cancellation and discharge of record of the subject mortgage, entitled **Gregg Lubonty v. U.S. Bank National Association N.A.**, under Index No.:021853/2014. The Complaint alleged that the enforcement of the subject mortgage (the same mortgage complained of in the instant case) was barred by the applicable six (6) year statute of limitations pursuant to CPLR §213(4). This is the identical argument which has been pled by Gregg Lubonty in the instant foreclosure action.

In that earlier case, under Index No.:021853/2014, Justice Farneti denied the relief sought by Gregg Lubonty. Judge Farneti noted that shortly after the commencement of each foreclosure action upon the subject mortgage, Gregg Lubonty filed for bankruptcy relief. Judge Farneti held that each bankruptcy filing had activated automatic stays which tolled the running of the statute of limitations pursuant to CPLR §204(a). Judge Farneti held, that contrary to the contentions of Gregg Lubonty, the statute of limitations was tolled and had not expired. Judge Farneti dismissed the 2014 case to dismiss the mortgage on motion by Defendant U.S. Bank pursuant to CPLR Rule 3211(a)(7), finding that Mortgagor Gregg Lubonty had failed to state a cause of action upon which relief could be granted.

On March 28th, 2018 the Supreme Court, Appellate Division for the Second Judicial Department of the State of New York issued a Decision & Order on the appeal of that August 17th, 2015 Order of Judge Farneti. That Order was appealed by Gregg Lubonty under Docket No.:2015-10458. On appeal, the Order of Justice Farneti was upheld.

Defendant Lubonty has included a copy of that Appellate Decision & Order as "Exhibit 5" attached to his Reply in the instant motion (seq. no.:001), being E-filed as Document No.:44 in the instant case record. For the sake of brevity herein, the Court

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declines to elaborate upon the Appellate Court's detailed discussion of the interplay between RPAPL §1501(4) and 11 USC Section 362, the "Automatic Stay" provision of the United States Bankruptcy Code. The Parties are referred to that erudite Decision for that discussion. The Court notes that Gregg Lubonty has filed a Brief on that Appellate Order to the Court of Appeals under Docket No.:APL-2018-00166. That appeal is not yet decided.

This Court is bound by the noted previous Decision & Order on the identical issue. The issue of "Whether Respondent was stayed from commencing a foreclosure action within the meaning of CPLR 204(a), thus tolling the running of the statute of limitations, when foreclosure actions had already been commenced by Respondent prior to Appellant's bankruptcy filings" is currently awaiting review by and decision of the New York State Court of Appeals. Notwithstanding Defendant's instant argument for relief pursuant to CPLR Rule 3211(a)(5) now on for review by the Court of Appeals, it is settled law that the statute of limitations in foreclosure does not run in the absence of a sworn, verified complaint. "A sworn, verified complaint should be the starting point for any claim of acceleration, or even, the limitation on revocation of a long term installment mortgage to six (6) years from a claimed acceleration" (*HSBC Bank USA, N.A. v. Margineanu*, 61 Misc3d 973, 86 NYS3d 694, 700, 2018 Slip Op. 28311 [Sup Ct Suffolk Cty 2018]; *citing Albertina Realty Co. v. Rosbro Realty Corp.*, 258 NY 472, 180 NE 176 [1932]; *see Deutsche Bank Natl. Trust Co. v. Adrian*, 157 AD3d 934, 69 NYS3d 706 [2d Dept 2018]).

The complaint filed in the foreclosure action is unverified. The filing of an unverified complaint cannot serve as a basis for Defendant's argument for dismissal due to expiration of the statute of limitations pursuant to CPLR §§ 204(a), 213.

Defendant's request for relief in his instant motion (seq. no.:001) pursuant to CPLR Rule 3211(a)(5) due to expiration of the applicable six year statute of limitations pursuant to CPLR §204(a) is denied.

Motion to Dismiss Pursuant to CPLR Rule 3211(a)(8)

CPLR Rule 3211. Motion to dismiss, provides, in pertinent part:

"(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

8. the court has not jurisdiction of the person of the defendant; or..." McKinney's CPLR Rule 3211 [2019].

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“...Defendant’s conclusory and unsubstantiated denial of service lack specificity and detail required to rebut the prima facie proof of proper service set forth in the process server’s affidavit of service, which was filed before the defendant made her motion to dismiss...for lack of personal jurisdiction” (*Board of Managers of Foundry at Washington Park Condominium v. Foundry Development Co., Inc.*, 111 AD3d 776, 975 NYS2d 456, 457 [2d Dept 2013]; *see ACT Props., LLC v. Garcia*, 102 AD3d 712, 713, 957 NYS2d 884 [2d Dept 2013]; *Indymac Fed. Bank FSB v. Quattrochi*, 99 AD3d 763, 952 NYS2d 239 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v. Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010] ; *Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983, 984, 912 NYS2d 96 [2d Dept 2010]).

Defendant has moved (seq. no.:001) for dismissal of the case due to lack of personal jurisdiction pursuant to CPLR Rule 3211(a)(8). Defendant has provided nothing other than his unsubstantiated allegation in an Affidavit in Support (Document No.:21) that he resides in “the State of New Jersey.” An unsubstantiated allegation is insufficient to provide grounds for dismissal pursuant to CPLR Rule 3211(a)(8). Defendant relies on the statement that Defendant once received a check from a mortgage servicer at a New Jersey address. Defendant has provided no proof of any residence address in the State of New Jersey. Defendant has never provided proof of residence other than the two (2) New York addresses utilized by Plaintiff to deliver service of process. Defendant has not challenged the statement of “Steve Doe,” resident of 61 Middle Pond Road, Southampton, NY 11968, “Gender: Male, Skin: White, Hair: Gray, Age: 60-70, Height: 5ft 9in - 6ft 2in, Weight: 190-210, Other: Did not provide last name” who “verified that the intended recipient actually resides at this location” (Affidavit of Service of Summons, Complaint and ancillary foreclosure documents, Document Nos.:4, 5, 6, 7). An additional service was made by Plaintiff’s Process Server upon Defendant’s second New York address: 288 Montauk Highway, Southampton, NY 11968 (Document Nos.:12, 13).

Defendant fails to refer to any of the filed Affidavits of Service noted in his general statement: “I categorically deny ever having received a copy of the Complaint in the manner set forth in Plaintiff’s affidavits of service” (Defendant’s Affidavit, Document No.:21, Paragraph 4). In Paragraph 5 of that Affidavit, Defendant Gregg Lubonty opines: “The reason for this is simple - I do not reside at either to the addresses recited in Plaintiff’s affidavits of service, rather I reside in the state of New Jersey.” Defendant is reminded of his affirmative duty to notify the Mortgagee of any change of his residence address pursuant to Paragraph 8 of the subject note:

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"Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or mailing it by first class mail to me at the Property Address above [61 Middle Pond Road, Southampton, NY 11968] or at a different address if I give the Note Holder a notice of my different address." [Case Document 1].

Defendant has failed to allege or state in his sworn-to Affidavit (Document No.:21) that he ever advised the Mortgagee of any change of address. Defendant's request for dismissal pursuant to CPLR Rule 3211(a)(8) due to lack of personal jurisdiction, where legal service of process has been proved by Plaintiff as required by law, and has failed to be sufficiently challenged or refuted by the Defendant, is denied.

The foregoing decision constitutes the Order of the Court.

DATED: JUNE 19th, 2019
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court