

Federal Natl. Mtge. Assn. (Fannie Mae) v Prisco

2019 NY Slip Op 35070(U)

August 20, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 610097-2018

Judge: C. Randall Hinrichs

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E-FILE

SHORT FORM ORDER

INDEX NO. 610097-2018

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY**

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 001: 8-16-2018; 002: 11-29-2018
Adjourned Date: 001: 11-29-2018
Motion Sequence.: 001:MG; 002:MD

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FEDERAL NATIONAL MORTGAGE ASSOCIATION
(FANNIE MAE), A CORPORATION ORGANIZED
AND EXISTING UNDER THE LAWS OF THE
UNITED STATES OF AMERICA,

Plaintiff,

GROSS POLOWY, LLC
Attorneys for Plaintiff
1775 Wehrle Drive
Suite 100
Williamsville, NY 14221

-against-

CHARLES PRISCO A/K/A CHARLES F. PRISCO JR.,
JPMORGAN CHASE BANK, N.A., JOHN DOE (Those
unknown tenants, occupants, persons or corporations or
their heirs, distributees, executors, administrators,
trustees, guardians, assignees, creditors or successors
claiming an interest in the mortgaged premises.),

Defendants.

YOUNG LAW GROUP PLLC
Attorneys for Defendant PRISCO
80 Orville Drive
Suite 100
Bohemia, NY 11767

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Upon consideration of the notice of motion on behalf of the defendant Charles Prisco ["the defendant"], to dismiss the complaint, the supporting affirmation, affidavit, and exhibits (001), and the motion by order to show cause on behalf of the plaintiff Federal National Mortgage Association ("FANNIE MAE"), a corporation organized and existing under the laws of THE UNITED STATES OF AMERICA ["the plaintiff"], to vacate the plaintiff's default in opposing the defendant's dismissal motion and allowing plaintiff to submit an Affirmation in Opposition to the defendant's dismissal motion, the supporting affirmation and exhibits (002), it is

ORDERED that motion sequences 001 and 002 will be decided together for purposes of this determination; and it is further

ORDERED that the defendant's motion to dismiss the complaint in its entirety based upon the expiration of the statute of limitations (001), is granted; and it is further

ORDERED that the plaintiff's motion to vacate its default in opposing the defendant's dismissal motion and grant plaintiff leave to submit opposition to that motion is denied; and it is further

ORDERED that defense counsel shall serve a copy of this order with written notice of its entry upon plaintiff's counsel and any other party entitled to notice by first-class mail within 30 days of entry of the order.

The following facts have either been conceded by the parties or are undisputed. On January 6, 2006, the defendant executed a note payable to Citimortgage, Inc. ["Citi"], in the principal amount of \$220,000.00 secured by a mortgage encumbering premises located in Huntington Station, Suffolk County ["the subject premises"]. The defendant admits to having defaulted under the terms of the note and mortgage for the payment due on January 1, 2009 and the payments due thereafter. Citi, the original lender, commenced an action in Suffolk County Supreme Court against the defendant based upon the latter's default on May 8, 2009, under Index Number 016402-2009 ["the 2009 action"]. By order dated February 21, 2017, and entered on February 28, 2017, this court dismissed the 2009 action as abandoned pursuant to CPLR 3215 (c).

On May 25, 2018, the plaintiff, Citi's assignee, commenced this action based upon the defendant's default under the terms of the same note and mortgage. Attached to the complaint at the commencement of the action was a copy of the original note endorsed in blank by Citi. By notice of motion dated July 26, 2018, the defendant moved to dismiss the complaint based upon the expiration of the six-year statute of limitations for residential foreclosure actions. The dismissal motion and the supporting papers were e-filed in the NYSCEF system (*see* 22 NYCRR §202.5-b ([f][2][ii])). The defendant's dismissal motion was originally returnable on August 16, 2018. On September 27, 2018, plaintiff's counsel E-filed a letter to the court (NYSCEF Dkt. No. 26), advising that due to law office failure plaintiff's office was not aware of and was unable to submit opposition papers to the pending motion. Because plaintiff's firm was unable to obtain consent to an adjournment of the dismissal motion from defense counsel, plaintiff's counsel requested an extension of time to submit an affirmation in opposition to the pending dismissal motion. The letter further advised that plaintiff's counsel would also be filing an order to show cause.

An order to show cause seeking to vacate the plaintiff's default in opposing the defendant's dismissal motion and allow plaintiff to submit an affirmation in opposition was signed on November 9, 2018 (Ford, J.). The plaintiff's motion was made returnable on November 29, 2018. The dismissal motion was then administratively adjourned to November 29, 2018 to be considered together with the defendant's motion.

Based upon plaintiff counsel's affirmation in support of the order to show cause it appears that due to "law office failure" plaintiff's law firm failed to act on several e-filing notifications concerning the defendant's dismissal motion. Specifically, based upon the papers before the court, three attorneys in plaintiff's firm received electronic notice of the dismissal motion on July 27, 2018. On August 2, 2018, the court sent an electronic notification to plaintiff's counsel regarding the motion sequence assignment. The court sent a second electronic notification on August 2, 2018, informing the parties that this Court was assigned to the case. Plaintiff's counsel received notice of an initial settlement conference scheduled for August 15, 2018. According to defense counsel's affirmation dated November 28, 2018, defense counsel personally told plaintiff's counsel who appeared at the settlement conference that the defendant filed an unopposed pre-answer motion to dismiss the complaint. Nevertheless, the next day, on the return date of the dismissal motion on August 16, 2018, the motion was marked fully submitted without opposition.

The basis of the defendant's motion to dismiss the complaint is the expiration of the six-year statute of limitations for residential foreclosure actions, the mortgage debt having been accelerated at the commencement of the 2009 action on May 8, 2009. Since the current action was not commenced until 2018, the defendant asserts that the 2018 action must be dismissed as untimely. In support of its application for leave to file opposition to the dismissal motion, the plaintiff's sole argument is that the extinguishment of the borrower's right to de-accelerate the mortgage by paying all arrears and reinstating the mortgage prior to judgment was a condition precedent to acceleration of the mortgage. Thus, since the 2009 action never ended in a judgment, the plaintiff contends that the mortgage was not accelerated simply by the commencement of the 2009 action, principally relying on *Nationstar Mtge., LLC v. MacPherson* (56 Misc3d 339, 54 NYS3d 825 (Suffolk Sup. Ct. 2017)).

"To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*U.S. Bank N.A. v. Gordon*, 158 AD3d 832, 834-835, 72 NYS3d 156 [2d Dept 2019] [internal quotation marks omitted]; see *Campane v. Panos*, 142 AD3d 1126, 1127, 38 NYS3d 226 [2d Dept 2016]; *Stewart v. GDC Tower at Greystone*, 138 AD3d 729, 30 NYS3d 638 [2d Dept 2016]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*U.S. Bank N.A. v. Gordon*, 158 AD3d at 835, 72 NYS3d 156 [internal quotation marks omitted]; *Bank of New York Mellon v. Craig*, 169 AD3d 627, 628, 93 NYS3d 425, 427 [2d Dept 2019]).

Actions to foreclose upon a mortgage are governed by a six-year statute of limitations (see CPLR 213[4]; *Milone v. U.S. Bank N.A.*, 164 AD3d 145, 83 NYS3d 524 [2d Dept 2018]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (see *Nationstar Mtge., LLC v. Weisblum*, 143 AD3d 866, 867, 39 NYS3d 491 [2d Dept 2016]; *Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982, 943 NYS2d 540 [2d Dept 2012]; *Wells Fargo Bank, N.A. v. Cohen*, 80 AD3d 753, 754, 915 NYS2d 569 [2d Dept 2011]; *Loiacono v. Goldberg*, 240 AD2d 476, 477, 658 NYS2d 138 [2d Dept 1997]). However, even if a mortgage is payable in installments, once the entire amount of the debt becomes due, either by virtue of the terms of the mortgage or due to an acceleration of the debt, the statute of limitations begins to run on the entire debt (*Wilmington Tr., Nat'l Ass'n v. Dawson*, —AD3d—, 2019 WL 3038882 [2d Dept, decided July 10, 2019] [citations omitted]; *Fulton Holding Grp., LLC v. Lindoff*, 165 AD3d 1045, 1048, 87 NYS3d 66, 69 [2d Dept 2018] [citations omitted]).

An acceleration of a mortgage debt may occur in different ways. One way is in the form of an acceleration notice transmitted to the borrower by the creditor or the creditor's servicer. To be effective, the acceleration notice to the borrower must be clear and unequivocal (see *Nationstar Mtge., LLC v. Weisblum*, 143 AD3d 866, 867, 39 NYS3d 491 [2d Dept 2016]; *Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 983, 943 NYS2d 540 [2d Dept 2012]; *Sarva v. Chakravorty*, 34 AD3d 438, 439, 826 NYS2d 74 [2d Dept 2006]). A second form of acceleration, which is self-executing, is the obligation of certain borrowers to make a balloon payment under the terms of the note at the end of the pay-back period

(*Milone v. US Bank Nat'l Ass'n*, 164 AD3d 145, 152, 83 NYS3d 524, 529 [2d Dept 2018], citing *Trustco Bank N.Y. v. 37 Clark St.*, 157 Misc.2d 843, 844, 599 NYS2d 404 [Sup. Ct., Saratoga County]). A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due (*Milone v. US Bank Nat'l Ass'n*, 164 AD3d at 152).

The defendant established that the mortgage debt was accelerated by Citi upon the commencement of the 2009 action. Parenthetically, Citi presumably had both standing and the authority to accelerate the mortgage since Citi was the original lender (see *U.S. Bank N.A. v. Gordon*, 158 AD3d 832, 72 NYS3d 156 [2d Dept 2018]; see also *Emigrant Mortg. Co. v. Persad*, 117 AD3d 676, 677, 985 NYS2d 608, 610 [2d Dept 2014]). Notably, the defendant has not disputed Citi's standing or its authority to accelerate the mortgage. Since the plaintiff did not commence the second action until May 25, 2018, more than six years later, the defendant sustained his initial burden of demonstrating, prima facie, that the instant action is untimely (see *Deutsche Bank Nat'l Tr. Co. v. Adrian*, 157 AD3d 934, 935, 69 NYS3d 706, 708 [2d Dept 2018]; see also *U.S. Bank N.A. v. Martin*, 144 AD3d 891, 891-892, 41 NYS3d 550 [2d Dept 2016]). As set forth above, plaintiff's counsel failed to oppose the dismissal motion and seeks to be relieved of its default.

"In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion" (*Chase Home Fin., LLC v. Weinfeld*, 159 AD3d 867, 868, 70 NYS3d 72 [2d Dept 2018]; *New Century Mtge. Corp. v. Chimmiri*, 146 AD3d 893, 894, 45 NYS3d 209 [2d Dept 2017]; see also *Aurora Loan Servs., LLC v. Ahmed*, 122 AD3d 557, 557, 996 NYS2d 92 [2d Dept 2014]). While the court has the discretion to accept law office failure as a reasonable excuse (see CPLR 2005), a conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse (see *Onewest Bank, FSB v. Singer*, 153 AD3d 714, 716, 59 NYS3d 480, 482 [2d Dept 2017]). The plaintiff has not offered a factual explanation as to how three attorneys in the law firm all could have missed at least three separate e-filing notifications, not to mention an in-person notification the day before the return date except to state that it happened.

Even if the plaintiff had proffered a reasonable excuse for its default in not having opposed the defendant's dismissal motion, it failed to offer a potentially meritorious opposition to the motion (*Bank of New York Mellon Trust Co. v. Sukhu*, 163 AD3d 748, 83 NYS3d 70 [2d Dept 2018]). The only opposition to the defendant's dismissal motion is an argument that has been recently and explicitly rejected by the Appellate Division Second Department in *Bank of New York Mellon v Dieudonne* (171 AD3d 34, 96 NYS3d 354 [2d Dept 2019]). There the Appellate Division concluded that as a matter of first impression, the extinguishment of the borrower-mortgagor's right to de-accelerate the mortgage pursuant to a provision in the mortgage allowing the mortgagor to take such action by meeting certain conditions, was not a condition precedent to the lender-mortgagee's acceleration of the loan (*Bank of New York Mellon v Dieudonne*, *supra* at 359-60). The fact that the mortgagor could, under certain conditions described in the mortgage, reinstate the mortgage and effectively de-accelerate the maturity of the debt did not prevent the mortgagor from validly exercising its option to accelerate (*Id.* at 36). The commencement of the 2009 action by an entity with the authority to accelerate the loan triggered the running of the statute of limitations. Thus, the second foreclosure action commenced in 2018 was untimely.

Since the theory that the reinstatement provision in the mortgage prevented the plaintiff from accelerating the loan when it commenced the 2009 action has been unequivocally rejected by the Second Department, and since that is the plaintiff's only proffered opposition to the defendant's dismissal motion, the plaintiff's motion to vacate its default and file opposition to the dismissal motion is denied (*Bank of New York Mellon Trust Co. v Sukhu*, 163 AD3d at 751).

In summary, the defendant's motion to dismiss the complaint in its entirety based upon the expiration of the statute of limitations is granted. The plaintiff's motion to vacate its default in opposing the defendant's dismissal motion and grant plaintiff leave to submit opposition to that motion is denied.

DATED: Aug. 20, 2019


C. RANDALL HINRICHS, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION