Maggi v Ditech Fin. LLC
2019 NY Slip Op 35269(U)
September 11, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 19-602384
Judge: Sanford Neil Berland
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SHORT FORM ORDER

INDEX NO.: 19-602384

E-FILE

SUPREME COURT - STATE OF NEW YORK
IAS PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

HALLIE E. MAGGI and STEVEN F. MAGGI,

Plaintiff(s),

-against-

DITECH FINANCIAL LLC,

Defendant(s).

ORIG. RETURN DATE: June 11, 2019
FINAL RETURN DATE: July 30, 2019
MOT. SEQ. #: 001 **MD**

PLAINTIFFS' ATTORNEY:
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DEFENDANT'S ATTORNEY:
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion, by defendant, filed May 17, 2019, and supporting papers; (2) Affirmation in Opposition, by plaintiffs, filed July 12, 2019, and supporting papers; (3) Reply, filed July 29, 2019, and supporting papers; it is

ORDERED that the defendant's motion pursuant to CPLR § 3211 (a)(1) and (a)(7) is denied.

This is an action to quiet title pursuant to RPAPL § 1501 . Plaintiffs are owners of a residence located at 32 Clifford Boulevard in Hauppauge. On June 9, 2005, plaintiff Hallie Magee executed a promissory note in favor of non-party FlagStar Bank, FSB ("Flagstar") in the amount of $342,000 (the "note"), secured by a mortgage upon the premises granted by both plaintiffs (the "mortgage"). At some point, Flagstar endorsed the note in blank. Payments on the notes ceased on or about March 1, 2009. On May 4, 2010, Everhome Mortgage Company ("Everhome"), the assignee of the mortgage and note at the time of the default, commenced a foreclosure action against the premises. A duplicative foreclosure action was subsequently filed on or about August 6, 2010. The first action was voluntarily discontinued. During the pendency of the second-filed action, plaintiffs filed a petition for Chapter 7 bankruptcy. The automatic stay in place in the second foreclosure action was lifted by order dated September 7, 2011, but that action was dismissed by order dated November 7, 2013 (Pines, J. (Ret.)) as a consequence of Everhome's failure to comply with a prior court order. No subsequent foreclosure was filed. On or about July 2, 2014, the note came into the possession of the defendant, endorsed in blank, and on or about July 19, 2016, the mortgage was assigned to defendant. Defendant avers that on August 8, 2016, it sent plaintiffs written notices that read, in pertinent part:

> **If you are in bankruptcy or have discharged this debt in bankruptcy, this letter is for informational purposes only and is not intended to collect a debt, or an act to collect, assess, or recover all or any portion of the debt from you personally.**
>
> . . .

> Under the terms of the Mortgage ("Security Instrument") securing your account, and/or Note, your account may have been previously accelerated by the prior Mortgage servicer or Ditech, and all sums secured by the Security Instrument declared immediately due and payable.
> **PLEASE BE ADVISED THAT TO THE EXTENT ANY PREVIOUS ALLELERATION MAY AT THIS TIME BE APPLICABLE, WE HEREBY DE-ACCELERATE THE ACCOUNT, WITHDRAWING ANY PRIOR DEMAND FOR IMMEDIATE PAYMENT OF ALL SUMS SECURED BY THE SECURITY INSTRUMENT AND RE-INSTITUTE THE ACCOUNT AS AN INSTALLMENT ACCOUNT.**

(Emphasis in original). By this action, plaintiffs seek an order and judgment cancelling and discharging the mortgage on the grounds, *inter alia*, that the time for defendant to commence an action for payment on the note and mortgage under the applicable statute of limitations has run and that any such action would be time barred.

It is undisputed that the mortgage was accelerated upon the filing of the first foreclosure action on May 4, 2010 and that the six-year six-year statute of limitations of CPLR § 213 (4) would apply to any action subsquently brought to foreclose upon it. It is also undisputed that the six-year statute of limitations was tolled for 104 days during the pendency of plaintiffs' bankruptcy proceeding, thereby extending the expiration of the statute of limitations from May 4, 2016 to August 16, 2016. The defendant now moves pursuant to CPLR § 3211 (a)(1) and (a)(7) to dismiss plaintiffs' complaint on the grounds that defendant's written notices to plaintiffs effectuated a de-acceleration of the mortgage and that, accordingly, defendant's mortgage upon the premises remains valid and enforceable and, thus, not subject to discharge under RPAPL § 1501 (4).

"[I]n considering a motion to dismiss pursuant to CPLR § 3211 (a)(7), the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (***Sinensky v. Rokowsky***, 22 A.D.3d 563,564, 802 NYS2d 491 [2d Dept. 2005] *quoting* ***Leon v. Martinez,*** 84 N.Y.2d 83,87-88, 614 NYS2d 972 [1994]; ***Simos v. Vic-Armen Realty, LLC***, 92 A.D.3d 760, 938 NYS2d 609 [2d Dept. 2012]). On a pre-answer motion to dismiss pursuant to CPLR § 3211 (a)(1), dismissal is proper only where the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law (***Goshen v. Mutual Life Ins. Co. of N.Y.***, 98 N.Y.2d 314, 746 NYS2d 858 [2002]; *see* ***Leon v. Martinez***, 84 N.Y.2d 83, 614 NYS2d 972 [1994]; ***Fleming v. Kamden Props., LLC***, 41 A.D.3d 781, 839 NYS2d 197 [2d Dept. 2007]). For a defendant to be successful on a motion to dismiss pursuant to CPLR § 3211(a)(1), the evidence the defendant offers must establish conclusively that the plaintiff has no cause of action and that in light of the evidence presented, no significant dispute exists (***Kaufman v. Int'l Bus. Machs. Corp***., 97 A.D.2d 925, 470 NYS2d 720 [3d Dept. 1983], *affd*, 61 N.Y.2d 930, 474 NYS2d 721 [1984]).

"A lender may revoke its election to accelerate [a] 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" ***(NMNT Realty Corp. v Knoxville 2012 Tr.***, 151

AD3d 1068, 1069-70 [2d Dept 2017]). "[D]e-acceleration notices must be clear and unambiguous to be valid and enforceable" ***(Milone v US Bank N.A.***, 164 AD3d 145, 153 [2d Dept 2018]). "Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note" (***Milone***, 164 AD3d 145, 154). "Specifically, a de-acceleration letter is not pretextual if . . . it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration" (***Milone***, 164 AD3d 145, 154). "In contrast, a 'bare' and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations" (***Milone***, 164 AD3d 145, 154).

Courts applying *Milone* have found de-acceleration letters to be possible pretexts to avoid the expiration of the statute of limitations period where the letter failed to demand monthly payments (*see* ***U.S. Bank N.A. v Papanikolaw***, 62 Misc 3d 1207(A) [Sup Ct, Rockland County 2019] [granting homeowner's motion for summary judgment and cancelling bank's mortgage on the grounds that the statute of limitations pursuant to CPLR § 213 [4] had expired]; ***Leib Feldman Inc. v Bank of Am.***, 2019 WL 3322049 [Sup Ct, Kings County, July 22 2019, No. 510385/2015]; ***Sterling Nat. Bank v Manheimer***, 2019 N.Y. Slip Op. 31457[U], 4 [Sup Ct, Kings County 2019]), failed to refer to any attached copies of invoices (*see* ***Papanikolaw***, 62 Misc 3d 1207(A) ; ***Leib Feldman Inc.***, 2019 WL 3322049; ***Manheimer***, 2019 N.Y. Slip Op. 31457[U]), explicitly stated that the letter was "not intended to be a demand for payment" and was "for informational purposes only"(*see* ***Leib Feldman Inc.***, 2019 WL 3322049), explicitly stated that a monthly statement would be sent "as soon as practical" without evidence that a statement was ever sent (*see* ***Manheimer***, 2019 N.Y. Slip Op. 31457[U] [denying plaintiff and defendant's motion and cross-motion for summary judgment on the grounds that homeowner raised an issue of fact as to whether the bank was truly seeking to de-accelerate its loan]).

Here, nothing in defendant's de-acceleration letter demanded monthly payments or referred to any attached copies of invoices or, for that matter, any other evidence that the defendant was "truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration" (***Milone***, 164 AD3d 145, 154). Moreover, the defendant sent its de-acceleration letter on August 8, 2016, just days before the undisputed expiration of the statute of limitations on August 16, 2016. Under these circumstances, it is clear that the defendant has failed utterly to refute the plaintiff's allegations that the subject mortgage was accelerated more than six years prior to the expiration of the statute of limitations to commence an action for payment on the note and mortgage and that defendant never decelerated the subject mortgage after its predecessor-in-interest commenced a foreclosure action against them. Accordingly, defendant's motion pursuant to CPLR § 3211 (a)(1) and (a)(7) is denied.

The court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

The foregoing constitutes the decision and order of the court.

Dated: 9/11/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.