

U.S. Bank Trust, N.A. v Stewart
2020 NY Slip Op 30336(U)
January 10, 2020
Supreme Court, New York County
Docket Number: 850292/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9
MASTER PARTICIPATION TRUST,

Plaintiff,

INDEX NO. 850292/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

- v -

DORIS E. STEWART, COMMISSIONER OF JURORS,
EMDIN & RUSSELL LLP, CRIMINAL COURT OF THE CITY
OF NEW YORK, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, COMMISSIONER OF SOCIAL
SERVICES OF THE CITY OF NEW YORK, ROBANI
ENERGY INC, JOHN DOE

Defendant.

**DECISION + ORDER ON
MOTION, ORDER OF
REFERENCE**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for RENEW/REARGUE

The motion to reargue and renew by plaintiff is denied to the extent it seeks to reargue and granted to the extent it seeks renewal and, upon renewal, plaintiff is awarded summary judgment. The cross-motion by defendant Stewart to reargue and renew is denied.

Background

In this foreclosure action, both plaintiff and defendant Stewart seek to reargue and renew this Court's decision dated June 17, 2019 which denied both parties' motions. The Court declined to grant Stewart's motion to dismiss the case as time barred because plaintiff produced a letter evidencing its intent to de-accelerate the mortgage in April 2016. This letter was sent prior to the expiration of the statute of limitations in December 2016 (six years after plaintiff had commenced a prior foreclosure action).

However, the Court denied plaintiff's cross-motion for summary judgment because plaintiff failed to produce monthly statements demonstrating that it had starting billing Stewart again. The Court was concerned that simply sending a letter claiming to revoke an acceleration could be an effort to evade the statute of limitations and that evidence of monthly bills was needed to confirm that plaintiff had actually de-accelerated the loan.

Plaintiff moves to reargue and renew. Plaintiff contends that case law does not require it to attach the monthly statements. Nevertheless, plaintiff now attaches the monthly statements it sent to Stewart (NYSCEF Doc. No. 101).

Stewart now claims that she received notices of intent to accelerate from the lender dated May 20, 2008 and July 21, 2008. The July 21, 2008 letter instructed Stewart to bring her mortgage current by August 2008 or "foreclosure proceedings will commence" (NYSCEF Doc. No. 114). This document also states that "Failing to cure the default by the above date may result in Washington Mutual requiring immediate payment in full" (*id.*). Stewart admits she did not make any payments in response to these letters.

Stewart argues that these letters demonstrate that the instant action is time barred because the notice of de-acceleration was sent in April 2016 (more than six years after the debt was accelerated pursuant to the 2008 letters).

Discussion

As an initial matter, the Court denies plaintiff's motion to reargue. "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" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-70, 58 NYS3d 118 [2d Dept 2017]).

While there aren't many cases discussing what constitutes "an affirmative act of revocation" the Court finds that a revocation letter, standing alone, is not enough to demonstrate that there was a proper revocation. Sending a revocation letter without monthly bills puts a borrower in an untenable position. The borrower has no idea what is due and has no opportunity to bring the mortgage current without a statement because when the lender "accelerated," it sought the entire amount of the loan. Obviously, once that loan is de-accelerated, a lesser amount is owed. If the borrower does not know how much is due, then it creates an opportunity for a plaintiff to do an "end run" around the statute of limitations. It could simply send a revocation letter, not tell the borrower how much is due, wait a few months and then bring another foreclosure case based on borrower's nonpayment.

However, the Court grants plaintiff's motion to renew and, upon renewal, grants plaintiff summary judgment. "A motion to renew simply requires a showing of new facts not offered on the prior motion that would change the prior determination or a change in the law that would change the prior determination, and a reasonable justification for the failure to present such facts on the prior motion" (*Ramos v City of New York*, 61 AD3d 51, 54, 872 NYS2d 128 [1st Dept 2009] [internal quotations and citations omitted]).

Here, plaintiff attached monthly statements it sent to Stewart starting in May 2016 (the revocation of the acceleration was in April 2016). The instant circumstances provide a clear basis for renewal—plaintiff had no idea the Court would require it to produce these statements and, therefore, equity demands that this Court consider these documents which show that plaintiff took an affirmative act to revoke a prior acceleration. The monthly bills establish that the instant action is timely and compels the Court to grant plaintiff summary judgment.

Stewart's Cross-Motion

Stewart previously moved to dismiss based on statute of limitations on the ground that there was a prior foreclosure action (commenced in 2010) and that this action was started more than six years later. Stewart now produces letters from the lender which she claims shows that the acceleration took place in 2008, thereby rendering the 2016 de-acceleration as time barred.

As an initial matter, the Court questions why Stewart did not attach these documents to her previous motion. She claims that "I was specifically advised by her [sic] prior attorney . . . that there was no need to use the acceleration letters issued in May 2008 and July 2008 to show proof as acceleration and that use of the prior action filed December 9, 2010 was sufficient for acceleration" (NYSCEF Doc. No. 109, ¶13). A strategic choice about what documents to use is not a reasonable justification to grant renewal. Stewart admits she had these documents and chose not to use them. This is distinct from plaintiff who had no idea it should attach monthly invoices.

Even if the Court were to consider Stewart's notices to accelerate, they do not compel the Court to dismiss the case. In order to accelerate a mortgage, acceleration notices from a lender must provide "clear and unequivocal notice that it "will" accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cure[s] his defaults" (*Deutsche Bank Nat. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530, 48 NYS3d 597(Mem) [1st Dept 2017]). Here, the May 2008 notice demanding payment by June 2008 can be disregarded because plaintiff sent another letter in July 2008—that renders the May 2008 notice moot. And the July 2008 letter is not unequivocal. While the first sentence says "foreclosure proceedings will commence" if payment is not made by August 20, 2008, the third paragraph states the failure to pay arrears "may" result in the lender "requiring immediate payment" (NYSCEF Doc. No. 114).

This is not a valid acceleration under *Royal Blue*, where the notice stated only that the debt “will” be accelerated. The notice here is internally inconsistent. One paragraph contains a promise to accelerate while another states the lender “may” accelerate. Therefore, the Court finds that the loan was accelerated when the foreclosure action was commenced in December 2010.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is denied to the extent it seeks to reargue and granted to the extent it seeks renewal and, upon renewal, the Court grants plaintiff summary judgment; and it is further

ORDERED that the cross-motion by defendant Stewart to reargue and renew is denied and her answer, affirmative defenses and counterclaim are severed and dismissed; and it is further

ORDERED that plaintiff is entitled to a default judgment against all non-appearing defendants; and it is further

ORDERED that Ed H. Lehrer, Esq., with an address of 180 Cabrini Blvd NY NY 10033 2129284402 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee’s report is merely an advisory finding; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not

limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff’s submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale

within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the John Doe defendants be removed in this action and Richard Nichols, Jennifer Jager and Bruce Levinson be added and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF9 MASTER PARTICIPATION TRUST,
Plaintiff,

v.

DORIS E. STEWART, COMMISSIONER OF
JURORS, EMDIN & RUSSELL LLP, CRIMINAL
COURT OF THE CITY OF NEW YORK, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD, COMMISSIONER OF SOCIAL
SERVICES OF THE CITY OF NEW YORK,
ROBANI ENERGY INC., RICHARD NICHOLS,
JENNIFER JAGER, BRUCE LEVINSON,

Defendant(s).
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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added and removed pursuant hereto; and it is further

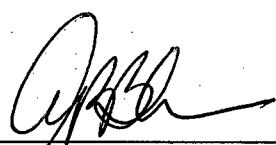
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse*

and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/suptctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: May ⁵ 12, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, plaintiff may seek an adjournment of the conference. Please consult this part's rules for information on how to obtain an adjournment. If a motion has been made, then a conference is required to explore the reasons for the delay.

1/10/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	DENIED
		<input checked="" type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: