

Willett v HSBC Mtge. Corp. (USA)

2020 NY Slip Op 32097(U)

May 27, 2020

Supreme Court, Suffolk County

Docket Number: 10752/2015

Judge: Martha L. Luft

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ORIGINAL

Short Form Order

Index No. 10752/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

**DECISION AND ORDER
CASE DISP**

_____ x
ROBERT WILLETT and LISA WILLETT,

Mot. Seq. No.: 002 - MD
Orig. Return Date: 09/18/17
Mot. Submit Date: 09/19/17

Plaintiffs,

Mot. Seq. No.: 003 - MG
Orig. Return Date: 09/17/19
Mot. Submit Date: 09/17/19

-against-

PLAINTIFFS' ATTORNEY

HSBC MORTGAGE CORPORATION
(USA) and PHH MORTGAGE
CORPORATION, their officers, directors,
agents, servants, employees, managers,
administrators, successors, and assigns,

Ronald Lenowitz, Esq.
7600 Jericho Turnpike, Suite 300
Woodbury, NY 11797

Defendants.

DEFENDANT'S ATTORNEY

_____ x

Phillips Lytle LLP
340 Madison Avenue, 17th Floor
New York, NY 10173
Attorney for HSBC Mortgage Corporation
(USA)

DEFENDANT PRO SE

PHH Mortgage Corporation
1 Mortgage Way,
Mt. Laurel, NJ 08053

Upon the following papers numbered 1 to 25 read on this motion for leave to renew; to dismiss: Notice of Motion/ Order to Show Cause and supporting papers, 1 - 6; 7 - 18; Answering Affidavits and supporting papers, 19 - 23; Replying Affidavits and supporting papers, 24 - 25; it is,

ORDERED that the motions by the plaintiffs and by the defendant are hereby consolidated for the purposes of this determination; it is further

ORDERED that the motion by the plaintiffs Robert Willett and Lisa Willett (#002) for, *inter alia*, an order granting them leave to renew their prior motion for leave to enter a default judgment is denied; it is further

ORDERED that the motion by the defendant HSBC Mortgage Corporation (USA) ("HSBC") (#003) for, *inter alia*, an order dismissing the complaint as asserted against it is granted; and it is further

ORDERED that the complaint as asserted against the defendant PHH Mortgage Corporation is dismissed as abandoned, pursuant to CPLR 3215 (c).

The plaintiffs commenced this action to cancel and discharge a mortgage upon residential real property located in Holbrook, New York. By order dated April 6, 2016, this Court (Tarantino, J.) denied the plaintiffs' motion for leave to enter a default judgment against the defendants, finding, among other things, that, although the plaintiffs' submissions demonstrated that there had not been payment on the note in over six years, their submissions failed to establish that the mortgage debt had been accelerated, and thus, that the statute of limitations had expired on the entire debt.

The plaintiffs now move to renew their prior motion for leave to enter a default judgment against the defendants, arguing, among other things, that there new facts that would change the prior determination. In support, the plaintiffs submit an affidavit of Robert Willett, a copy of a letter from HSBC, dated March 4, 2009, and an affirmation of their attorney. HSBC also moves to dismiss the complaint as asserted against it, arguing, *inter alia*, that it is not a proper party to the proceeding, as it assigned the underlying mortgage to HSBC Bank USA, N.A., that the plaintiffs failed to join this necessary party to the action, and that there is currently a foreclosure action pending in Suffolk County Supreme Court, under index number 617485/2018, involving the same mortgage debt. In support, HSBC submits, among other things, copies of printouts from the New York State Department of State, Division of Corporations, an affidavit of service, dated October 6, 2015, a copy of an assignment of mortgage, recorded with the Suffolk County Clerk on February 8, 2012, and copies of the pleadings in the 2018 foreclosure action. In opposition, the plaintiffs submit, among other things, an affidavit of Mr. Willet. In reply, HSBC submits a memorandum of law.

A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination," and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][2], [3]; see *Candlewood Holdings, Inc. v Valle*, 134 AD3d 872, 23 NYS3d 266 [2d Dept 2015]; *Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 934 NYS2d 467 [2d Dept 2011]; *Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565, 892 NYS2d 194 [2d Dept 2010]; *Ramirez v Khan*, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]). Renewal must be denied when the moving party fails to present a reasonable justification for not submitting the additional evidence on the previous motion (see *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 953 NYS2d 301 [2d Dept 2012]; *Yebo v Cuadra*, 98 AD3d 504, 949 NYS2d 451 [2d Dept], *lv dismissed* 20 NY3d 905, 956 NYS2d 477 [2012]; *Bazile v City of New York*, 94 AD3d 929, 943 NYS2d 141 [2d Dept 2012]; *Rowe v NYCPD*, 85 AD3d 1001, 926 NYS2d 121 [2d Dept 2011]), as it is "not a second

chance freely given to parties who have not exercised due diligence in making their first factual presentation” or who failed to assert a legal theory due to a mistaken belief that what was submitted was sufficient (*Matter of Beiny*, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; see *Jovanovic v Jovanovic*, 96 AD3d 1019, 947 NYS2d 554 [2d Dept 2012]; *Zito v Jastremski*, 84 AD3d 1069, 925 NYS2d 91 [2d Dept], *lv dismissed in part, denied in part*, 17 NY2d 885, 933 NYS2d 641 [2011]; *Hlenski v City of New York*, 51 AD3d 974, 858 NYS2d 789 [2d Dept 2008]; *Hart v City of New York*, 5 AD3d 438, 772 NYS2d 574 [2d Dept], *lv denied* 3 NY3d 601, 782 NYS2d 404 [2004]).

Generally, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action (see CPLR 213[4]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 58 NYS3d 118 [2d Dept 2017]; *Nationstar Mortgage, LLC v Weisblum*, 143 AD3d 866, 39 NYS3d 491 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982, 943 NYS2d 540, 542 [2d Dept 2012]). 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 Mortgage, LLC v Weisblum*, *supra*; *Wells Fargo Bank, N.A. v Burke*, *supra*; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754, 915 NYS2d 569 [2d Dept 2010]). However, 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 (see *NMNT Realty Corp. v Knoxville 2012 Trust*, *supra*; *Beneficial Homeowner Service Corp. v Tovar*, 150 AD3d 657, 55 NYS3d 59 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Cohen*, *supra*).

On a motion to dismiss a complaint for failure to state a cause of action, the court must assume to be true the facts pleaded, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (see CPLR 3211 [a][7]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the petitioner has a cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *E & D Group, LLC v Violet*, 134 AD3d 981, 21 NYS3d 691 [2d Dept 2015]; *Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). In determining if a pleading states a cause of action, the sole criterion for the courts is whether, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law (see *Guggenheimer v Ginzburg*, *supra*; *Esposito v Noto*, 90 AD3d 825, 935 NYS2d 105 [2d Dept 2011]). Whether a petitioner can ultimately establish his or her allegations is not part of the calculus in determining a motion to dismiss (see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *Neuman v Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept 2019]; *E & D Group, LLC v Violet*, *supra*). Nevertheless, bare legal conclusions and factual claims which are flatly contradicted by the record will not presumed to be true (see *Gawrych v Astoria Fed. Sav. & Loan*, *supra*; *International Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, 132

AD3d 811, 812, 18 NYS3d 645 [2d Dept 2015]; *Gershner v Eljamal*, 111 AD3d 664, 665, 974 NYS2d 576 [2d Dept 2013]).

In support of their motion, the plaintiffs submit a notice of default purportedly sent to them by HSBC dated March 4, 2009, arguing that this notice accelerated the mortgage debt, and that the statute of limitations on any foreclosure action began to run on that date. However, the plaintiffs failed to present a reasonable justification for not submitting this additional evidence on the previous motion (see *Deutsche Bank Trust Co. v Ghaness*, *supra*; *Yebo v Cuadra*, *supra*; *Bazile v City of New York*, *supra*; *Rowe v NYCPD*, *supra*). Nevertheless, this notice is merely a letter discussing acceleration as a possible future event, and it does not constitute an exercise of the mortgage's optional acceleration clause (see *U.S. Bank National Association v Vitolo*, 182 AD3d 627, 120 NYS3d 791 [2d Dept 2020]; *21st Mortgage Corp. v Adames*, 153 AD3d 474, 60 NYS3d 198 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]). As such, this additional evidence fails to establish that the underlying mortgage debt was accelerated and that the statute of limitations has run on the entire debt (see *NMNT Realty Corp. v Knoxville 2012 Trust*, *supra*; *Beneficial Homeowner Service Corp. v Tovar*, *supra*; *Wells Fargo Bank, N.A. v Cohen*, *supra*), and the plaintiff's motion is denied.

As to HSBC's motion, its submissions, namely the February 2012 mortgage assignment establish that the plaintiffs' complaint fails to state a cause of action as asserted against it (see CPLR 3211 [a][7]). The February 2012 mortgage assignment demonstrates that the underlying mortgage was assigned by HSBC to HSBC Bank USA, N.A. on January 20, 2012, more than three years before the plaintiffs commenced this action. As such, HSBC no longer had any interest in this mortgage debt and the plaintiffs' causes of action to quiet title and to discharge the mortgage of record cannot be maintained against it. Although the Court must give every favorable inference to the plaintiffs' allegations (see *Leon v Martinez*, *supra*; *Dickinson v Igoni*, *supra*; *Tsutsui v Barasch*, *supra*), the Court finds same to be bare legal conclusions and factual claims which are flatly contradicted by the record, and thus, it will not presume them to be true (see *Gawrych v Astoria Fed. Sav. & Loan*, *supra*; *International Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, *supra*; *Gershner v Eljamal*, *supra*). As such, HSBC's motion to dismiss the complaint as asserted against it is granted.

Moreover, a plaintiff seeking a default judgment must seek such relief within one year of the defendant's default (see CPLR 3215 [c]), or the plaintiff must proffer a reasonable excuse for its delay in seeking a default judgment and show a potentially meritorious cause of action (see *Bank of New York Mellon v Izmirtigil*, 144 AD3d 1067, 1069, 44 NYS3d 44 [2d Dept 2016]; *DLJ Mortg. Capital, Inc. v United General Title Ins. Co.*, *supra*; *Giglio v NTIMP, Inc.*, 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]). Where a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and shall dismiss the claim pursuant to CPLR 3215 (c) (see *HSBC Bank USA, National Association v Uddin*, 74 AD3d 689, 102 NYS3d 472 [2d Dept 2019]; *U.S. Bank, Nat. Ass'n v Dorvelus*, 140 AD3d 850, 32 NYS3d 631 [2d Dept

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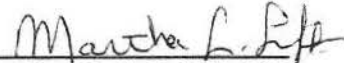
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2016]; *Giglio v NTIMP, Inc., supra*). As the plaintiffs fail to submit any evidence of a reasonable excuse for their failure to seek a default judgment against the defendant PHH Mortgage Corporation within one year of its failure to answer the complaint, the Court may not excuse the lateness and the complaint as asserted against it must be dismissed as abandoned (see CPLR 3215 [c]; see *HSBC Bank USA, National Association v Uddin, supra*; *U.S. Bank, Nat. Ass'n v Dorvelus, supra*; *Giglio v NTIMP, Inc., supra*).

Accordingly, the plaintiffs' motion is denied, HSBC's motion is granted., and the complaint is dismissed in its entirety.

ENTER

Dated: May 27, 2020
Riverhead, NY


The Hon. Martha L. Luft, AJSC

FINAL DISPOSITION

NON-FINAL DISPOSITION