

**Fellowship for Advanced Comprehensive
Talmudics, Inc. v East 16th St. Realty, LLC**

2020 NY Slip Op 33619(U)

November 2, 2020

Supreme Court, New York County

Docket Number: 516690/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of November 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
THE FELLOWSHIP FOR ADVANCED COMPREHENSIVE
TALMUDICS, INC.,

Plaintiff,

- against -

DECISION & ORDER
Index No. 516690/19
Mot. Seq. No. 1, 2, & 3

EAST 16TH ST. REALTY, LLC, SIGNATURE BANK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND "JOHN DOE #1" THROUGH "JOHN DOE #10", the last ten names being fictitious and unknown to Plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged property described in the complaint,

Defendants.

-----X

The following e-filed papered read herein:

Papers Numbered

Notice of Motion and Affidavits (Affirmations) Annexed
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations/Affidavits)

11-12; 16-17, 20; 24-26
24-26
48; 39; 54

Upon the foregoing papers, defendant Signature Bank (Signature) moves (in motion sequence [seq.] number [no.] 1) for an order dismissing the complaint, pursuant to CPLR 3211 (a) (5), to the extent plaintiff The Fellowship for Advanced Comprehensive Talmudics,

Inc. (Fellowship) seeks recovery for installment payments due prior to July 30, 2013, thereby limiting Fellowship's claims to a maximum of \$510,340.

Defendant East 16th St. Realty, LLC (E. 16th LLC) moves (in motion seq. no. 2) for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7).

Fellowship moves (in motion seq. no. 3) for an order, amending the complaint and adding 10 O.K. L.P. as an additional party defendant.

Background

Fellowship commenced this commercial foreclosure action with the filing of a summons and complaint on July 30, 2019, seeking to foreclose a mortgage it allegedly holds on real property located at 1673-1683 East 16th Street, Brooklyn, New York (property). Specifically, Fellowship alleges that on January 5, 2019, Regina Ort Revocable Trust assigned the aforementioned mortgage and note to it, with an outstanding principle of \$374,000, with interest due and owing from April 23, 1993 through April 23, 2019 in the amount of \$616,501, for a total amount due of \$990,501. Fellowship further alleges that E. 16th LLC is the present owner of the property, that Signature holds a mortgage encumbering the property, and that defendant New York State Department of Taxation and Finance is a judgment creditor against E. 16th LLC and against a prior owner of the property, non-party East 16th Street Corp.

Signature now moves, in motion seq. no. 1, for an order dismissing the complaint and limiting damages on statute of limitations grounds. E. 16th LLC moves, in motion seq. no.

2, for an order dismissing the complaint based upon statute of limitations, failure to state a claim, and documentary evidence. Fellowship moves, in motion seq. No. 3, to amend the complaint to add non-party 10 O.K. L.P. as an additional party defendant and assert additional factual allegations related thereto.

The Parties' Positions

Signature's Motion to Dismiss

Signature argues portions of the complaint must be dismissed based upon the running of the statute of limitations. Specifically, Signature contends that Fellowship's claims seeking to recover installment payments due prior to July 30, 2013, must be dismissed as such claims are barred pursuant to CPLR 213 (4). Signature contends that on the face of the complaint, Fellowship affirmatively seeks to recover interest and installment payments for the period of time between April 1993 through July 2013, which are barred by the six-year statute of limitations.

In opposition, Fellowship initially highlights that Signature is not seeking dismissal of the action in totality, rather it only seeks partial dismissal, limiting potential recovery to \$510,340. Fellowship also contends that a motion to dismiss is not the proper procedural vehicle to dispute the amount of interest that is due in a mortgage foreclosure action, rather such contentions must be presented to the referee to make a final determination of the amount due and owing. Additionally, Fellowship asserts that Signature, as a mortgage holder of the property, does not have standing to assert the affirmative defense of statute of limitations.

Fellowship also proffers the “affidavit” of Abraham Ort, an executor of the trusts which executed the note and mortgage.¹ Mr. Ort states that the debt remains due and owing and his intention to repay the debt. Thus, Fellowship maintains that Signature’s statute of limitations argument is unavailing as the debtor reacknowledged the debt, restarting the statute of limitations. Beyond that, Fellowship asserts that various stays and restraining orders issued by numerous courts tolled portions of the statute of limitations, or otherwise made it imprudent to commence a foreclosure action. For these reasons, Fellowship maintains that no portion of the action should be dismissed.

In reply, Signature rejects Fellowship’s position that the substance of the motion is premature. Signature maintains that each installment payment represents a new claim and that the court can, and often does, dismiss mortgage foreclosure claims based upon statute of limitations grounds. Further, Signature contends that as a mortgagee on the subject property, it has standing to assert the defense of statute of limitations. Similarly, Signature argues that Mr. Ort’s acknowledgment of the debt does not restart the statute of limitations as against it, rather his acknowledgment only restarts the statute of limitations as to claims against him. Finally, Signature wholly rejects Fellowship’s position that various court procedures tolled or stayed the running of the statute of limitations.

¹ Mr. Ort’s affidavit is not notarized.

E. 16th LLC's Motion to Dismiss

In support of its motion, E. 16th LLC argues that the complaint must be dismissed based upon documentary evidence, statute of limitations, and failure to state a cause of action. As an initial matter, E. 16th LLC proffers a purported assignment of mortgage, dated February 3, 1997, wherein Fellowship's predecessor-in-interest (non-party Regina Ort Revocable Trust) assigned 50% of the mortgage that Fellowship purportedly holds to non-party 10 O.K. L.P. Based upon this documentary evidence, E. 16th LLC maintains that Fellowship cannot unilaterally accelerate the mortgage without the consent of the joint owner. Based upon similar grounds, E. 16th LLC contends that Fellowship's allegations of \$990,501 due and owing are miscalculated, as Fellowship, at most, is owed 50% of any principal and interest payments.

E. 16th LLC also argues, based upon the same grounds as Signature, that the statute of limitations bars recovery for any installment payment due prior to July 2013. E. 16th LLC maintains that each installment payment constitutes a separate claim, as such, those claims seeking installment payments due prior to July 2013 must be dismissed.

Finally, E. 16th LLC argues that Fellowship fails to state a cause of action as the note and mortgage it seeks to accelerate and foreclose are unrecorded. In this regard, E. 16th LLC maintains New York law does not permit a mortgage to be admitted into evidence in a foreclosure action unless the recording tax has been paid. As an unrecorded mortgage necessarily has not been subject to the recording tax, E. 16th LLC argues that Fellowship

cannot proceed with this action. Supporting its contention, E. 16th LLC points to the complaint failing to allege the mortgage was recorded or alleging that the recording tax was paid. Thus, the action must be dismissed based upon failing to state a cause of action.

In opposition, Fellowship presents the same arguments as it did to Signature's motion, to the extent E. 16th LLC seeks dismissal upon statute of limitations grounds. Fellowship maintains that whether it is entitled to the full amount due is a matter to be determined by the appointed referee and inappropriately presented in a motion for dismiss pursuant to CPLR 3211. Beyond this, Fellowship contends that Mr. Ort's acknowledgement of the debt restarts the statute of limitations and that E. 16th LLC does not have standing to assert the defense of the running of the statute of limitations, as it is not in privity with the borrower. Additionally, Fellowship asserts various stays and restraining orders issued by numerous courts tolled the portions of the statute of limitations and made it imprudent to commence a foreclosure action.

Turning to the purported assignment of mortgage, Fellowship maintains that such documentary evidence fails to wholly refute its allegations. Even accepting the alleged assignment as true, which Fellowship contests, asserting the assignment is a fraud, it maintains it is undisputed that it still independently possesses a mortgage accounting for 50% of the note. Thus, the existence of the alleged assignment does not wholly dispute its claims.

Finally, addressing E. 16th LLC's argument seeking dismissal for failure to state a claim, Fellowship rebuts this contention arguing that its positions are misplaced. While

Fellowship does not contest that it may not receive a judgment prior to the payment of the mortgage tax, it contends there is no precedent which prevents foreclosing an unrecorded mortgage. Further, Fellowship asserts New York tax law expressly permits late payment of the mortgage tax. As such, it maintains there is no basis to dismiss the action for failing to state a claim. Beyond this, Fellowship essentially argues that E. 16th LLC is estopped from raising these arguments as it has actual notice of the mortgage. Fellowship proffers a settlement document purportedly resolving a partition action, wherein E. 16th LLC acknowledged, among other information, the existence of E. 16th LLC's mortgage. Thus, Fellowship opposes all of E. 16th LLC's positions.

In reply, E. 16th LLC posits that Fellowship failed to challenge the documentary evidence. It maintains that Fellowship's bald assertion of forgery is insufficient to rebut the purported assignment of mortgage to 10 O.K. L.P. Therefore, E. 16th LLC argues that the action must be dismissed as Fellowship does not have the capacity to unilaterally accelerate the note and foreclose the mortgage. Turning to the statute of limitations, E. 16th LLC reasserts its initial contentions that any and all interest and installment payments due prior to and through July 2013 are time-barred and Fellowship failed to demonstrate any basis to refute this. Specifically addressing Mr. Ort's statements, E. 16th LLC argues that Mr. Ort has performed no overt acts demonstrating any intention to repay the debt outstanding, thus the statute of limitations has not restarted. Concerning standing to assert the defense of statute of limitation, E. 16th LLC relies on statutory authority which provides that any party

with interest in a property subject to a foreclosure action may assert the defense of the running of statute of limitations. Finally, E. 16th LLC wholly rejects Fellowship's opposition to its assertions that the complaint fails to state a cause of action. E. 16th LLC again argues that an unrecorded mortgage cannot be foreclosed upon, and that failure to pay the mortgage recording tax is fatal to Fellowship's claim. Accordingly, E. 16th LLC maintains the action must be dismissed.

Fellowship's Motion to Amend

Fellowship moves to amend the complaint by adding non-party 10 O.K. L.P. as party defendant and inputting various factual allegations against 10 O.K. L.P. based upon its purported interest in the property. In support of its position, Fellowship proffers a proposed redlined amended complaint. Fellowship argues that amendments to the pleadings should be liberally reviewed and granted if the proposed amendments are not palpably improper and do not prejudice any party. It presents that by adding 10 O.K. L.P. as a defendant and alleging the factual allegations in the proposed amendment, which simply reflect 10 O.K. L.P.'s purported interest in the property, no party is prejudiced and such amendments are not palpably improper.

In opposition, both E. 16th LLC and Signature essentially argue that such amendment does not warrant denial of the pending motions for dismissal. Thus, the core of the defendants' opposition to Fellowship's motion to amend is that such relief is mooted by their

entitlement to dismissal of the action.²

Discussion

Fellowship's Cross Motion to Amend

It is well settled that leave to amend pleadings “should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment” (*Koenig v. Action Target, Inc.*, 76 AD3d 997, 997 [2d Dept 2010] [internal quotation marks and citations omitted]; CPLR 3025 [b]). “Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (CPLR 3025 [b]). Where this standard is met, that is the movant presents a proposed amended pleading which is not palpably improper, insufficient as a matter of law, nor causes prejudice or surprise, “no evidentiary showing of merit is required in a motion to amend the complaint under CPLR 3025 (b)” (*US Bank N.A. v Murillo*, 171 AD3d 984, 985-986 [2d Dept 2019], citing *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]; *1259 Lincoln Place Corp. v Bank of N.Y.*, 159 AD3d 1004, 1006 [2d Dept 2018]).

Here, Fellowship's proposed amendment to add 10 O.K. L.P. and the factual assertions alleged in the complaint are neither palpably improper nor insufficient as a matter of law. Further, the addition of 10 O.K. L.P. as a party defendant does not cause prejudice

² In reply, Fellowship primarily reasserts its initial positions and states that defendants' opposition fails to present a basis to deny the motion.

to any party nor constitutes an unfair surprise (*see generally Mortgage Elec. Registration Sys., Inc. v Holmes*, 131 AD3d 680 [2d Dept 2015], *but cf. Countrywide Funding Corp. v Reynolds*, 41 AD3d 524 [2d Dept 2007]). Accordingly, Fellowship's cross motion is granted. As these amendments do not substantially alter the allegations as against Signature and E. 16th LLC, this court shall consider these defendants' motions for dismissal in context of the amended complaint.

Signature and E. 16th LLC's Motions to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court is to afford the pleading a liberal construction (*see CPLR 3026*), accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court of Appeals has explained that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v Barbera*, 96 AD3d 904, 906 [2d Dept 2012]). To successfully maintain a foreclosure action a plaintiff must allege it is the holder of a mortgage encumbering the property, it is the holder of an unpaid note, and the evidence of default (*see U.S. Bank N.A. v Moulton*, 179 AD3d 734, 736 [2d Dept 2020]; *Aurora Loan Servs., LLC v Vrienedes*, 167 AD3d 829, 830 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]).

Accepting all factual allegations as true, Fellowship successfully pleads a cognizable cause of action for commercial foreclosure (*see* Fellowship amended complaint ¶¶ 16 - 19). E. 16th LLC's contentions concerning the mortgage recording tax are premature and ultimately do not warrant the dismissal of the foreclosure action. To enter a judgment in a foreclosure action the appropriate mortgage record tax must be paid (*see* Tax Law § 258 [1]), however, the tax can be paid subsequent to the commencement of the action but prior to entry of the judgment of foreclosure and sale (*see generally* *Glenville & 110 Corp. v Tortora*, 122 AD2d 107, 109 [2d Dept 1986] [wherein plaintiff paid the mortgage tax on the increased indebtedness *after* the referee conducted the hearing]; *see also* *Bank of N.Y. Mellon v Samuels*, 55 Misc.3d 704, 706 [Sup Ct, Orange County 2017, Vazquez-Doles, J.] "failure to pay the mortgage tax is not a bar to a foreclosure proceeding because the bank may always pay the taxes after foreclosure to cancel the underlying note and mortgage"). Accordingly, E. 16th LLC's motion to dismiss to the extent it is brought pursuant to CPLR 3211 (a) (7) is denied.

Alternatively, CPLR 3211 (a) (5) recognizes dismissal of an action based upon the running of the statute of limitations. CPLR 213 (4) requires actions seeking to foreclose a mortgage of real property to be commenced within six years of the alleged default (*see* *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069 [2d Dept 2017]). "Where a mortgage is payable in installments, there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes

due, unless the mortgage debt is accelerated” (*U.S. Bank Trust, N.A. v Clark*, 178 AD3d 982, 983 [2d Dept 2019] [internal citations omitted]). “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’” (*HSBC Bank USA v Rinaldi*, 177 AD3d 583, 585 [2d Dept 2019] [internal quotation marks and citations omitted]).

Here, the complaint expressly states, “[Fellowship] hereby accelerates the amount due under the Note, Mortgage and extension agreements and declares the entire amount due” (Fellowship amended complaint ¶ 18). Accelerating the maturity of a debt by way of the commencement of a foreclosure action is sufficient to put the borrower on notice of the acceleration (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]). As such, the total outstanding amount of the alleged note is due and owing, along with any and all *recoverable* interest payments. To the extent that the amount recoverable may be reduced by the running of the statute of limitations on certain interest payments, such determination is not appropriately brought as a motion to dismiss, but must be presented when the court or referee determines the amount due and owing. Accordingly, defendants’ motions to the extent they seek dismissal pursuant to CPLR 3211 (a) (5) are hereby denied.

“Turning to defendant[’s] CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98

NY2d 314, 326 [2002]). Documentary evidence within the meaning of CPLR 3211 (a) (1) include “mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable” (*see Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012] [internal quotations marks and citations omitted]).

Here, E. 16th LLC’s proffered mortgage is documentary evidence within the meaning of CPLR 3211 (a) (1). However, the amended complaint alleges that such mortgage constitutes a fraud and is void. While there is historic precedent providing acceleration in a jointly held mortgage is only valid wherein all holders agree to acceleration (*see generally Cresco Realty Co v Clark*, 128 AD 144 [2d Dept 1908]), Fellowship’s amended complaint survives, as the mere presentation of the purported assignment of 50% of the mortgage does not utterly and wholly refute Fellowship’s allegations of fraud. At this junction, Fellowship need not prove that the alleged assignment of the mortgage to 10 O.K. L.P. is a fraud as “the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud” (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Accordingly, that branch of E. 16th LLC’s motion seeking dismissal pursuant to CPLR 3211 (a) (1) is denied.

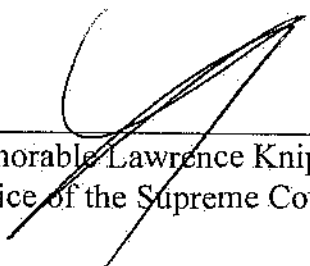
To the extent not specifically addressed herein, the parties’ remaining contentions have been considered and found to be either meritless and/or moot. Accordingly, it is

ORDERED that Signature’s motion to dismiss (motion seq. no. 1) is hereby denied, and it is further;

ORDERED that E. 16th LLC's motion to dismiss (motion seq. no. 2) is hereby denied, and it is furthered;

ORDERED that Fellowship's cross motion to amend (motion seq. no. 3) is hereby granted, and Fellowship is directed to file and serve the amended complaint within 20 days of the entry of this order.

This constitutes the decision and order of the court.



Honorable Lawrence Knipel
Justice of the Supreme Court

Justice Lawrence Knipel