Adler v DLJ Mtge. Capital, Inc.
2020 NY Slip Op 33809(U)
November 16, 2020
Supreme Court, New York County
Docket Number: 654812/2016
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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MEYER ADLER,

Plaintiff,

- v –

DLJ MORTGAGE CAPITAL, INC.
and SELENE FINANCE LP

Defendants.

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INDEX NO. 654812/2016

MOTION DATE 9/2/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 76, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 126

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action pursuant to RPAPL §1501(4) seeking a judgment declaring that a promissory note executed by the plaintiff, Meyer Adler, has been cancelled and discharged, the defendants, DLJ Mortgage Capital Inc. (DLJ) and Selene Finance LP (Selene), move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The defendants also seek, in the alternative, to strike the plaintiff's jury demand. The plaintiff opposes the portion of the defendants' motion seeking summary judgment. The motion for summary judgment is denied under the doctrine of law of the case, and the alternative relief is granted.

II.BACKGROUND

In 2005, the plaintiff executed a promissory note in favor of Mortgage Electronic Registration Systems, Inc., as nominee for First Financial Equities, Inc., (FFE), in the amount of $650,000, referable to a mortgage loan that financed the purchase of the property located at 56 West 126th Street in Manhattan. FFE purportedly assigned the note and mortgage to GMAC

Mortgage, LLC (GMAC). The plaintiff allegedly defaulted on the note as of January 1, 2009. The same year, GMAC elected to accelerate the debt and commenced an action against the plaintiff in this court under Index No. 112740/2009 to foreclose on the underlying mortgage. On July 2011, GMAC filed an affidavit giving notice that it was voluntarily discontinuing the foreclosure action as of right. See CPLR 3217(a)(1). The affidavit was silent as to the issue of debt acceleration or de-acceleration or any payments to be made by the plaintiff. In August 2011, the plaintiff sought a short sale of the property, which was denied by GMAC. GMAC and its servicing agent, Ocwen Loan Servicing, LLC, continued to send the plaintiff notices to cure his default by tendering only the amount past due as well as other potential loan modification options. In August 2013, GMAC assigned the note and mortgage to Residential Funding Company, LLC (Residential). In March 2014 Residential assigned the note and mortgage to the defendants. In May 2014, Selene began servicing the note and sent the plaintiff billing statements seeking periodic payments, less than the fully accelerated amount. Selene also sent the plaintiff a notice of default and an intent to accelerate the loan should the plaintiff not cure his default in 45 days. Additional default and pre-foreclosure notices were sent to the plaintiff through April 2016. Despite the servicers' various notices and billing statements, no payments were made by the plaintiff after the initial default in January 2009.

On September 12, 2016, the plaintiff commenced the instant action. The complaint alleges that since the plaintiff's obligations under the note were accelerated on September 8, 2009, the six-year limitations period on actions to recover for breach of the note began to run as of that date and expired on September 8, 2015. The plaintiff maintains that his obligations under the note have thus been discharged by operation of law. The only relief requested is that the court declare that "the note be cancelled, stricken and discharged of record with prejudice."

Several motions ensued.

III. DISCUSSION

A. Summary Judgment

The instant motion for summary judgment is barred by the doctrine of law of the case.

By an order dated June 5, 2018, the court denied the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and denied the plaintiff's cross-motion for summary judgment on the complaint (MOT SEQ 002). In so ruling, the court found that neither party established their right to a declaration in their favor but that their submissions presented a

contested issue of fact as to whether GMAC revoked its right to accelerate the repayment of the loan by discontinuing the foreclosure action. The court explained that:

> "[E]ven 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. 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, 1069-170 (2nd Dept. 2017)".

Indeed, "[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." Fed. Nat'l Mortg. Ass'n v Rosenberg, 180 AD3d 401 (1st Dept. 2020) citing NMNT Realty Corp. v Knoxville 2012 Trust, supra at 1068; see also; Milone v US Bank Nat'l Ass'n, 164 AD3d 145 (2nd Dept. 2018), lv dismissed 34 NY3d 1009 (2019). Mere voluntary discontinuance of a foreclosure action is insufficient to constitute an affirmative action of revocation. See Wells Fargo Bank, N.A. v Ferrato, 183 AD3d 529 (1st Dept. 2020); Vargas v Deutsche Bank Nat'l Tr. Co., 168 AD3d 630 (1st Dept. 2019), lv granted, 34 NY3d 910 (1st Dept. 2020). There must be some further action by the lender demonstrating a clear and unambiguous revocation. See Fed. Nat'l Mortg. Ass'n v Rosenberg, supra; Vargas v Deutsche Bank Nat'l Tr. Co., supra. While seeking an amount lower than the accelerated amount may evidence an intent to de-accelerate, it is not enough to establish, as a matter of law, that such an action "destroys the effect of the sworn statement…elect[ing] to accelerate the maturity of the debt." Fed. Nat'l Mortg. Ass'n v Rosenberg, supra at 402 citing Deutsche Bank Nat'l Tr. Co. v Adrian, 157 AD3d 934, 935 (2nd Dept. 2018).

In its June 5, 2018, order, this court noted that a motion to dismiss a declaratory judgment action is essentially a motion for judgment in the movant's favor on the merits. See Fillman v Axel, 63 AD2d 876, 876 (1st Dept. 1979), *quoting* Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 901 (1st Dept. 1969]). Thus, the defendant's motion was treated as a motion for judgment in their favor. Moreover, since the plaintiff then cross-moved for summary judgment, that relief could have been granted to either party on the same motion. See CPLR 3212(b). But both motions were denied, in light of the triable issues presented.

The following year, the plaintiff again moved for summary judgment (MOT SEQ 003). By an order dated March 4, 2020, the court denied the motion on the ground that "'[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovery evidence or other justification.' Jones v 636 Holding Corp., 73 AD3d at 409 (1st Dept. 2010); see Landis v 383 Realty Corp., 175 AD2d 1207 (1st Dept. 2019). No such showing was made by the plaintiff."

Now, by this motion, the defendants essentially make the same motion as their prior motion, raising the same issues presented on the two prior motions, this time moving pursuant to CPLR 3212, rather than 3211, to dismiss the complaint. They again argue that the six-year limitations period has not yet expired, as the 2009 acceleration of the amounts due under the note was effectively revoked. That branch of the motion is barred by the doctrine of law of the case since the issues were decided on the prior motions.

> "The doctrine of law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (Martin v City of Cohoes, 37 NY2d 162, 165). The doctrine "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (Baldasano v Bank of N.Y., 199 AD2d 184; see Gay v Farella, 5 AD3d 540; D'Amato v Access Mfg., 305 AD2d 447) "and to the same questions presented in the same case." (RPG Consulting, Inc. v Zormati, 82 AD3d 739, *citing* People v Evans, 94 NY2d 499, 502; see Matter of McGrath v Gold, 36 NY2d 406, 413; Erickson v Cross Ready Mix, Inc., 98 AD3d 717)."

The same issues were presented and ruled on by the court on no less than two prior motions. Nor do the defendants demonstrate, or even allege, that this successive motion for summary judgment should be entertained here based on "newly discovery evidence or other justification.' Jones v 636 Holding Corp., supra at 409.

B. Striking of Jury Demand

The alternative relief sought by the defendants, striking of the plaintiff's jury demand that was included in the Note of Issue filed July 31, 2019, is granted. CPLR 4101 provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only" or in "any other action in which a party is entitled by the constitution or

by express provision of law to a trial by jury." The plaintiff is seeking solely equitable relief, the cancellation of the subject promissory note, and no legal relief is sought. Indeed, the plaintiff states in his complaint that he "has no adequate remedy at law." New Media Holding Co., LLC v Kagalovsky, 118 AD3d 68, 79 (1st Dept. 2014); The plaintiff's "use in the prayer for relief of the language 'and such other relief as to this court seems just and proper', does not change the character of the [ ] relief demanded." Murphy v American Home Prod. Corp., 136 AD2d 229, 233 (1st Dept. 1988). Thus, he has no right to a jury trial pursuant to CPLR 4101(1). See New Media Holding Co., LLC v Kagalovsky, supra; Wathne Imports, Ltd. V PRL USA, Inc. 129 AD3d 555 (1st Dept. 2015); Posner v S. Paul Posner 1976 Irrevocable Family Trust, 260 AD2d 268 (1st Dept. 1999); Phoenix Garden Rest., Inc. v Chu, 234 AD2d 233 (1st Dept. 1996). The plaintiff offers no opposition to this relief.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is hereby,

ORDERED that the defendants' motion is granted to the extent that the plaintiff's jury demand is stricken; and the motion is otherwise denied, and it is further

ORDERED that counsel for the defendants shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to amend their records to reflect the striking of the jury demand in the Note of Issue filed on July 31, 2019.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/16/2020
DATE

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**