Bush N Stuy Corp v Bayview Loan Servicing, LLC
2021 NY Slip Op 30436(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 517342/2016
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 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 16th day of February 2021.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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BUSH N STUY CORP,

Plaintiff

-against-

BAYVIEW LOAN SERVICING, LLC,

Defendants

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DECISION AND ORDER

The following papers numbered on this motion:

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Defendant BAYVIEW LOAN SERVICING, LLC moves to reargue the Decision and Order of the Court dated March 16, 2020, which granted Plaintiff BUSH N STUY CORP's, motion for summary judgment on its action to cancel a mortgage as beyond the statute of limitations for enforcement, and which denied Defendant's cross motion to dismiss the complaint.

Angela Charles, the prior owner of the property at 95 Harman Street Brooklyn New York, gave a mortgage on the property on August 8, 2006. Charles later defaulted on the payment of the loan.

The note was first accelerated by the commencement of a foreclosure action by JPMorgan Chase Bank on December 22, 2009.

On January 19, 2010, Charles entered into a Modification Trial Period Plan Agreement, also known as a forbearance agreement, in which she agreed to make monthly payments while her application to modify the loan was considered. Charles made payments until October of 2010 and thereafter stopped making payments. These payments were applied to outstanding payments through April 1, 2009.

After Charles stopped making payments, the loan was never modified.

JPMorgan Chase Bank then commenced a second foreclosure action on February 29, 2012 which was dismissed on June 7, 2106, pursuant to CPLR 3125[c] for failing to take a default judgement.

Charles conveyed the property to Plaintiff BUSH N STUY CORP. on November 7, 2013. JP Morgan Chase Bank assigned the mortgage and note to defendant BAYVIEW LOAN SERVICING LLC on March 27, 2014.

Defendant alleges it sent a notice of deceleration to Charles on February 28, 2018.

Plaintiff, BUSH N STUY CORP., commenced this action to cancel and discharge the mortgage.

The Court granted Plaintiff summary judgment discharging the mortgage on the grounds that any action to enforce the mortgage or note was barred by the six-year statute of limitations.

Defendant argues that the Court misapplied the law on three points: 1) in holding that the forbearance agreement did not constitute a revocation of acceleration, 2) in not holding that Charles payments pursuant to the forbearance agreement constituted a revocation of acceleration and 3) in failing to hold that the time to commence a foreclosure action tolled during the pendency of the 2012 action.

Defendants first argument that the forbearance agreement constituted a deceleration of the loan is not correct. Once the debt is accelerated, the election to accelerate may be revoked only through an affirmative act of revocation occurring within the statute of limitations period (*Cristiana Trust v Barua,* 184 AD3d 140, [2nd Dept 2020]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 720 NYS2d 161 [2d Dept 2001].)

While the forbearance agreement constituted reaffirmation of the debt and restarted the running of the statute of limitations period anew, by its terms, it did not revoke the acceleration the loan.

Section 2B of the forbearance agreement specifically provides that "any pending foreclosure action will not be dismissed and may be immediately resumed from the point at which it was suspended if this Plan terminates, and no new notice of default, notice of intent to accelerate, notice of acceleration or similar notice will be necessary to continue the foreclosure action".

Section 2E of the agreement explicitly provides that the acceptance of any payment during the trial period "will be without prejudice to and will not be deemed a waiver of the acceleration of the loan . . ." These sections make clear that the forbearance agreement was not intended to revoke the acceleration of the loan.

The forbearance agreement while it temporarily put the foreclosure on hold did not alter the fact that the entire balance was still due unless a loan medication was agreed to.

Section 2G of the forbearance agreement provides that "the Lender will not be obligated or bound to make any modification of the Loan Documents if the Lender determines that I do not qualify or if I fail to meet any one of the requirements under this Plan."

The parties could have entered into a loan modification agreement that would have restructured the loan so that the entire balance was not immediately due, however, they did not do so.

The lack of a loan modification agreement distinguishes the present case from those cited by Defendant in which it was held that a loan modification agreement constituted a revocation of acceleration. (*Bank of NY v Hutchinson,* 57 Misc.3d 1204(A), 2017 NY Slip Op 51224(U) [Su Ct Kings 2017]; *US Bank NA v Balderston,* 163 AD3d 1482, [4th Dept 2018], *see also Deutsche Bank Natl Trust Co., v Weininger,* 65 Misc 3d 410 [Su Ct Westchester 2019] where the Plaintiff discontinued the foreclosure action and granted defendant a loan modification *Id* at 412.)

Defendant's reliance on *Goshen v DePalma,* 186 AD3d 1203 (2nd Dept 2020), is misplaced. The decision in *Goshen* states that the borrowers entered into a forbearance agreement on October 31, 2005 and subsequently entered into a loan modification agreement on November 1, 2006. (*Id*. at 1205.)

Paragraph 2 of the loan modification agreement in *Goshen* restructured the loan so that the borrowers would make monthly payments until 2026, and paragraph 7 provided that if the borrowers defaulted then the entire amount would become due at the

option of the note holder. Clearly, that agreement, which established a new installment plan, constituted a revocation of acceleration.

Defendant's second argument that Charles' payments pursuant to the forbearance agreement constituted a revocation of acceleration is also unfounded. While the payments reaffirmed the debt and restarted the statute of limitations period, they did not constitute a revocation of acceleration.

The mere acceptance of a partial payment of the accelerated debt by the previous holder of the subject note was not an affirmative act revoking the acceleration (*see UMLIC VP, LLC v Mellace*, 19 AD3d 684, 799 NYS2d 61 [2d Dept 2005]; *Lavin v Elmakiss*, 302 AD2d 638, 754 NYS2d 741 [3rd Dept 2003].)

As mentioned above, section 2E of the forbearance agreement provided that the acceptance of any payment during the trial period "will be without prejudice to and will not be deemed a waiver of the acceleration of the loan . . ."

Defendant, for the first time in this motion to reargue, asserts that Charles made payments until November 4, 2011. This allegation is contained not in an affidavit but in Defendants memorandum of law and cites a "mortgage loan history" attached as an exhibit to the affidavit of Joceline Maurilus an employee of Defendant. However, Maurilus' affidavit does not state when the last payment was made by Charles nor does it explain how to interpret the entries in the annexed "mortgage loan history".

Further, the reply affirmation of Ruth O'Connor Esq., made in support of Defendant's original cross motion for summary judgment stated that Charles made payments through October 2010. Therefore, the statute of limitations began running again as of November 1, 2010 and ended on October 31, 2016.

However, even assuming arguendo that Charles' last payment was made November 4, 2011, the statute of limitations would have run on November 3, 2017, before the date of the February 28, 2018 letter of revocation of acceleration.

Lastly, Defendant argues that Real Property Actions and Proceedings Law §1301(3) acted as a statutory prohibition preventing a new action until the 2012 action was dismissed, and therefore tolled the statute of limitations pursuant to CPLR 204(a).

RPAPL § 1301(3) provides that while an action for foreclosure is pending no other action to recover the mortgage debt shall be commenced without leave of the court. However, it has been held that the section 1301(3) does not operate as a statutory prohibition for the purposes of tolling a statute of limitation pursuant to CPLR 204(a). (*Daldan Inc., v Deutsche Bank,* 188 AD3d 989, [2nd Dept 2020]; *Citimortgage Inc., v Ford,* 186 AD3d 1609 [2nd Dept 2020].)

To the extent that Defendant relies on *Torsoe Brother Construction Corp., v McKenzie,* 271 AD2d 682 (2nd Dept 2000), that decision was overturned by the Second Department in, *First Am Title ins Co., v Holohan,* 189 AD3d 1180 (2nd Dept 2020), in which the court stated,

> "...the time during which the prior foreclosure action was pending did not toll the running of the statute of limitation pursuant to CPLR 204(a). To the extent that this Court's prior decision in *Torsoe Bros. Const. Corp., v McKenzie* is to the contrary that decision should no longer be followed." (internal citations omitted), *Id.* at 1182.

WHEREFORE, it is hereby ORDERED that Defendant's motion to reargue is denied. This constitutes the Decision and Order of the Court.

E N T E R:

JSC