

<b>U.S. Bank NA v Gallant</b>
2021 NY Slip Op 31907(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 850284/2017
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32
Acting Justice

U.S. BANK NA, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NA, SUCCESSOR IN INTEREST TO LASALLE BANK N.A. AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-HY6,

INDEX NO. 850284/2017
MOTION DATE
MOTION SEQ. NO. 003

Plaintiff,

- v -

BRENDA GALLANT, JOHN GALLANT, BOARD OF DIRECTORS OF THE FORTY SUTTON PLACE CONDOMINIUM, BOARD OF MANAGERS OF THE FORTY SUTTON PLACE CONDOMINIUM and JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 1, 56, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion/cross-motion to/for SUMMARY JUDGMENT/CONSOLIDATION

Upon the foregoing documents, the motion and cross-motion are decided as follows:

In this action, Plaintiff seeks to foreclose on a mortgage on real property located at 40 Sutton Place, Units 2D, 2E and 2F, New York, New York. Issue was joined by Defendants Brenda Gallant and John Gallant ("Gallants"), who raised numerous affirmative defenses in their answer, including statute of limitations. Prior to commencement of this action, Plaintiff's purported assignor, Bank of America, brought an action to foreclose on the same mortgage which was discontinued (see Bank of America v Gallant, NY Cty Index No. 116043/2009). Also previously commenced, but still pending, is an action by the Gallants pursuant to RPAPL Article 15, to discharge the mortgage encumbering units 2E and 2F (Gallant v Bank of America, et al, Index No. 159785/2016). Plaintiff, U.S. Bank NA, Successor Trustee to Bank of America, NA, Successor in Interest to Lasalle Bank N.A. as Trustee, on Behalf of the Holders of the WAMU Mortgage Pass-Through Certificates, Series 2007-HY6 ("US Bank"), is a Defendant in that action.

Now, Plaintiff moves for summary judgment against the Gallants, for a default judgment against the non-appearing Defendants and for an order of reference. Gallants cross-move for consolidation.

In moving for summary judgment, Plaintiff was required to establish prima facie entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of the Gallants' default in repayment (see U.S. Bank, N.A., v James, 180 AD3d 594 [1st Dept 2020]; Bank of NY v Knowles, 151 AD3d 596 [1st Dept 2017]; Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577 [1st

Dept 2010)). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (see CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1<sup>st</sup> Dept 2019]). Plaintiff was also required to demonstrate its standing as well as compliance with the conditions precedent in the mortgage since the Gallants raised these as affirmative defenses in their answer (see eg *Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]; *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582 [2d Dept 2020]). Likewise, Plaintiff was required to demonstrate compliance with RPAPL §1303 as that affirmative defense was also raised (see *U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]). Lastly, Plaintiff was obligated to demonstrate Defendants' statute of limitations defense is without merit (see *Wells Fargo Bank, N.A. v Edwards*, 186 AD3d 1455 [2d Dept 2020]).

In this case, the motions were made and fully briefed before the Court of Appeals issued its decision in *Freedom Mtge. Corp. v Engel*, \_\_\_NY3d\_\_\_, 2021 NY Slip Op 01090 [2021]. As such, the Court permitted the parties to submit supplemental memorandums of law as to the applicability of that decision to this case.

In *Freedom Mtge. Corp. v Engel*, supra, the Court of Appeals issued its decision in an attempt to adopt "a clear rule that will be easily understood by the parties and can be consistently applied by the courts". In that vein, the court determined that where the debt has been "validly" accelerated through the commencement of a foreclosure action, "the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary".

Defendants' argument that *Engel* should not be applied retroactively and their reliance on *Regina Metropolitan Co. LLC, v New York State Division of Housing and Community Renewal*, 35 NY3d 332 [2020] is misplaced. *Regina* concerned the constitutionality of retroactive application of a newly enacted statute whereas in *Engel* the Court resolved a dispute in decisional law between Appellate Divisions. The Court in *Regina* expressly noted the distinction between the two concepts (see *Regina*, supra at 370; ["As opposed to a decisional change in the common law — which typically but not invariably applies 'to all cases still in the normal litigating process'"]; see also *Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 446 [1<sup>st</sup> Dept 2011] ["The background or default rule is that judicial decisions have retrospective effect [and] . . . [p]rospective application is an exception which should not be permitted to swallow the rule"]). Here, given the dispute in existing authorities prior to *Engel* retroactivity is not in question as it "settle[ed] a question in a manner that was clearly foreshadowed" (*People v Favor*, 82 NY2d 254, 263 [1993]).

It is undisputed that in paragraph fifteen of the complaint filed in the 2009 foreclosure action, Plaintiff therein expressly accelerated the payments due under the note. Also certain is that the 2009 foreclosure action was, contrary to Defendants' assertions, voluntarily discontinued by stipulation and order of the court dated February 11, 2014. On these facts, Plaintiff asserts that the within action was timely commenced since the discontinuance revoked the acceleration.

Gallants posit that in their declaratory judgment action, US Bank, Defendant therein, argued in support of its motion for summary judgment that Bank of America, Plaintiff in the 2009 action, lacked standing to commence the action and, therefore, the acceleration was a nullity (Index No.159785/2016, NYSCEF Doc No. 87). They further note that Justice Barbara Jaffe denied US Bank's motion for summary judgment in that action finding there was an issue of fact as to whether Bank of America held the note at the time the action was commenced and that the motion was premature since discovery on that issue was necessary (*id.*). It should be noted that Justice Jaffe also concluded that the voluntary

discontinuance of the action did not de-accelerate the loan. The rule pronounced in *Freedom Mtge. Corp. v Engel*, supra renders Justice Jaffe's conclusion regarding de-acceleration untenable.

Assuming Bank of America had standing to commence the 2009 action, absent proof it concomitantly disavowed de-acceleration, the loan was de-accelerated and the within action is timely since it was commenced within six years of the 2014 voluntary discontinuance (see *Capizzi v Brown Chiari LLP*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 02956 [3d Dept 2021]; see also *HSBC Bank USA, N.A. v King*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 02137 [2d Dept 2021]). Even if Bank of America lacked standing to commence the action, this does not assist the Gallants since, without standing, there was no "valid" acceleration of the debt<sup>1</sup>, the statute of limitations never accrued in 2009 and the within action is timely.

Accordingly, the Gallants' affirmative defense that the action is barred by the statute of limitations is dismissed.

Plaintiff established its standing to bring the action through physical possession of the note by annexing a copy of the note, endorsed in blank, to the complaint (see *Bank of NY v Knowles*, supra at 597; see also *Federal Natl. Mtge. Assn. v Nugent*, 187 AD3d 716 [2<sup>nd</sup> Dept 2020]; *Wells Fargo Bank, N.A. v Tricario*, supra). Any argument regarding discrepancies in the validity and timing of assignments of the mortgage fail to raise an issue of fact (*JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643 [2016]).

Concerning Defendants' default, in support of the motion Plaintiff proffered the affidavit of Mark Syphus ("Syphus"), an officer of Select Portfolio Servicing, Inc. ("Select"). Syphus avers his employer is the servicing agent and attorney-in-fact for Plaintiff. Syphus's affidavit established the mortgage, note, and evidence of mortgagor's default. Syphus' affidavit was sufficiently supported by admissible business records as he averred that his knowledge was based upon his employer's business records and prior servicers' records which were incorporated into Select's records and normally relied upon in Select's business (see CPLR 4518; *Bank of Am., NA v Brannon*, 156 AD3d 1 [1<sup>st</sup> Dept 2017]; see also *U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, Plaintiff demonstrated that the required notices under the terms of the mortgage were given (see *HSBC Bank USA, N.A. v Nelson*, 190 AD3d 842 [2d Dept 2021]). Plaintiff also demonstrated compliance with RPAPL §1303 with the affidavit of the process server (*US Bank v Nathan*, 173 AD3d 1112 [2<sup>nd</sup> Dept 2019]).

In opposition, the Gallant Defendants failed to raise an issue of fact and the other affirmative defenses in their answer were abandoned by failing to address same in their opposition (see *One W. Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]).

Accordingly, the branch of the motion for summary judgment and the appointment of a referee to compute are granted.

<sup>1</sup> "However, the acceleration of a mortgage debt by commencement of an action 'is only valid if the party making the acceleration had standing at that time to do so'" (*Bank of N.Y. Mellon Trust Co., N.A. v Lagasse*, 188 AD3d 775, 777 [2d Dept 2020], citing *Milone v US Bank N.A.*, 164 AD3d 145, 153 [2d Dept 2018]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1<sup>st</sup> Dept 2016]).

The branch of Plaintiff's motion to amend the caption to strike Doe defendants from the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Gallants' cross-motion to consolidate this matter with their action under New York County Index Number 159785/2016 is denied since with the grant of summary judgment and the striking of their statute of limitations affirmative defense, the matters no longer present common issues of law and fact.

Accordingly, it is

ORDERED that the motion by plaintiff for summary judgment is granted and the answer, affirmative defenses of Defendants Brenda and John Gallant are severed and dismissed; and it is further

ORDERED that Plaintiff is awarded a default judgment against the non-appearing Defendants; and it is further

ORDERED that **Tom Kleinberger, Esq., 411 5<sup>th</sup> Avenue, New York, New York 10016 (917) 326-5523** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the mortgage property 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 they are 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 45 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 is further

ORDERED that the caption is amended, and the Doe defendants are removed, 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 substituted 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 (ww.nycourts.gov/supctmanh)); 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.

All parties are to appear for a virtual conference via Microsoft Teams on **September 8, 2021 at 12:40 p.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright ([tswright@nycourt.gov](mailto:tswright@nycourt.gov)) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

5/24/2021

DATE

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.