

HSBC Bank, USA, N.A. v Bresler
2021 NY Slip Op 33693(U)
December 14, 2021
Supreme Court, Ulster County
Docket Number: Index No. EF2018-4400
Judge: James P. Gilpatric
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DECISION AND ORDER OF HONORABLE JAMES P. GILPATRIC,
DATED DECEMBER 14, 2021 [4-9]

STATE OF NEW YORK
SUPREME COURT

ULSTER COUNTY

HSBC BANK, USA, N.A.,

Plaintiff,

Decision and Order
Index No.: EF2018-4400

- against -

GERRY-LYNN BRESLER A/K/A GERRY-LYNN
STOHR; STEVEN BRESLER, "JOHN DOE #1-5" and
JANE DOE #1-5s, said names being fictitious, it
Being the intention of Plaintiff to designate any
and all occupants, tenants, persons or corporation,
if any, having or claiming an interest in or lien
upon the premises being foreclosed herein,

Defendants.

Supreme Court, Ulster County
RJI # 55-19-00114

Present: James P. Gilpatric, J.S.C.

Appearances:

FEIN SUCH & CRANE, LLP
Attorneys for Plaintiff
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Westbury, New York 11590
By: Richard D. Femano, Esq.

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Attorneys for Defendant Steven Bresler
3 Academy Street, P.O. Box 280
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By: Bruce Blatchly, Esq.

PETER F. MATERA, ESQ.
Attorney for Defendant Gerry-Lynn Stohr
P.O. Box 95
West Park, New York, 12493

Gilpatric, J.:

This is an action to foreclose action commenced by the filing of a Summons and Complaint in the Ulster County Clerk's Office on December 28, 2018. The plaintiff has filed a prior foreclosure action on November 13, 2012, based upon the same note and mortgage. Both Defendant Steven Bresler and Defendant Gerry-Lynn Stohr have moved, in separate motions, to dismiss the action based upon the expiration of the statute of limitations. The plaintiff opposes both motions.

It is undisputed that this is an action to foreclose a mortgage dated March 16, 2007, covering real property located at 2 Rock Ledge a/k/a 3 Rock Ledge Road, Woodstock, New York, (hereinafter "premises") executed by defendants Gerry-Lynn Bresler and Steven Bresler to Mortgage Electronic Registration Systems, Inc., (hereinafter "MERS") as Nominee for HSBC Mortgage Corporation (USA) to secure the sum of \$650,000. Said mortgage was recorded in the Ulster County Clerk's Office on April 24, 2007. Said Mortgage was thereafter assigned by MERS to HSBC Bank USA, NA by Assignment executed March 20, 2012 and recorded in the Ulster County Clerk's Office on April 4, 2012. Said mortgage was further assigned by HSBC Bank USA, NA to the plaintiff Hudson City Savings Bank and memorialized in a written assignment on August 15, 2012 and recorded in the Office of the Ulster County Clerk on September 5, 2012, which is the mortgage that is now being foreclosed upon. The plaintiff's Complaint, dated November 9,

2012, and filed on November 13, 2012, alleged that the defendants defaulted in payment of the note and mortgage on December 1, 2011. A January 4, 2012 letter was sent to the defendants noting their default on the loan. Defendant Steven Bresler submitted his Answer on December 19, 2012. After the commencement of this action, said mortgage was further assigned from Manufacturers and Traders Trust Company a/k/a M&T Bank s/b/m to Hudson City Savings Bank to HSBC Bank USA, NA by assignment executed June 9, 2016 and recorded in the Ulster County Clerk's Office on June 21, 2016.

It is further undisputed that this Court held an initial Residential Foreclosure Conference on August 26, 2013, with all parties represented by attorney, and by Order adjourned the matter to the Foreclosure Special Term calendar scheduled for November 25, 2013. On November 25, 2013, this Court adjourned the matter by Decision /Order until February 24, 2014. This matter was again brought in for a Residential Foreclosure Conference on August 25, 2014 with the defendant Steven Bresler appearing with his own counsel, separate and apart from defendant Gerry-Lynn Bresler. The matter was once more adjourned to the Foreclosure Special Term calendar scheduled for November 14, 2014. By Amended Decision/Order, dated July 20, 2015, this Court thereafter adjourned the matter to September 28, 2015 in order to give the parties an opportunity to reach their expressed desire for a settlement. Said Decision/Order notified plaintiff that failure to proceed with the action on or before September 28, 2015, **which date shall constitute a scheduled call of the calendar** [emphasis added], shall be considered grounds for dismissal or default pursuant to 22 NYCRR §202.27. Since there was no motion filed by the plaintiff, this Court issued a Dismissal Order on November 14, 2016, and the matter was dismissed pursuant to the July 29, 2015 Residential Foreclosure Conference Order since the plaintiff failed to proceed with the action.

It also undisputed that the plaintiff moved to restore the matter to the calendar on April 12, 2017. The Court held a further residential Foreclosure Conference on June 26, 2017 and scheduled Oral Argument on the motion to restore for November 27, 2017. After Oral Argument, the Court received the transcript of said argument on January 31, 2018 and, upon receipt, issued a Decision and Order, dated February 1, 2018, which denied the plaintiff's application to restore the matter to the calendar. This action thereafter ensued, which is the subject of the instant motions.

Both defendants argue that the instant action is beyond the six-year statute of limitations,

and that the matter must be dismissed. Additionally, both defendants argue that although the 2018 action alleges that the default occurred on January 1, 2013, it is only an attempt by the plaintiffs to bring the present action within the six-year statute of limitations. In support of their motions, the defendants submit, *inter alia*, a copy of the pleadings and a copy of a printout from HSBC, dated December 18, 2017. The defendants argue that it is clear from plaintiff's complaint that the default of the note and mortgage occurred on December 1, 2011 and a letter of default, dated January 4, 2012, was sent to the defendants. Or, at the very least, the defendants argue that the latest date that the default that would have occurred would be on November 9, 2012, the date of the plaintiff's filing the first Complaint. As such, the defendants assert that pursuant to CPLR § 213 (4) the instant action is barred by the application of the statute of limitations.

The plaintiff, in opposition to the motions argue that, *inter alia*, that the January 4, 2012 letter was not considered to be an acceleration date of the debt. Plaintiff further argues that, in any event, there was a de-acceleration of the loan on September 27, 2018. Plaintiff submits a copy of said letter to support their argument.

“The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage” (*see Deutsche Bank Natl. Trust Co. v DeGiorgio*, 171 AD3d 1267 [3rd Dept 2019]). A lender's election to accelerate a mortgage debt may “be revoked only through an affirmative act occurring within the statute of limitations period” (*see Lavin v Elmakiss*, 302 AD2d 638 [2003]).

Initially, the Court begins by noting that the statute of limitations began to run, at the very latest, in November of 2012 when the first foreclosure action was commenced. The defendants correctly point out, the plaintiff did not commence the instant foreclosure action until December 28, 2018, more than six-years after the initial action and beyond the statute of limitations. The Court finds that the plaintiff's submissions do not establish that it moved to voluntarily discontinue either action, as this Court dismissed the previous action. Additionally, the plaintiff's submission of a letter purporting to de-accelerate the loan, dated September 27, 2018, by PHH Mortgage Service, does not contain language that is clear and unambiguous as to the de-acceleration and

does not adequately establish that PHH Mortgage Services had the ability to de-accelerate the loan when it sent the letter. The Court finds that the plain reading of said letter, after mentioning de-acceleration, goes on to state that the defendants had the “right to pay the monthly payments that came due prior to and would have come due during the prior acceleration, which has not been revoked”, clearly contradicting plaintiff’s assertion that it had de-accelerated the loan. The Court further finds that, in any event, the plaintiff has failed to establish that either defendant ever received said letter. Additionally, the Court notes that the monthly statements sent to the defendants by HSBC, and submitted in opposition by the plaintiff, require the defendants to pay past-due amounts, contrary to plaintiff’s assertion the loan had been reinstated (*see Milone v US Bank, National Association*, 164 AD3rd 145 [2n Dept. 2018]).

As such, the Court determines that the defendants, in their separate motions, demonstrated that the November 2012 action, dismissed by this Court, called due the entire debt and that since the plaintiff did not commence the instant action until December 2018, the defendants have established that the action was untimely (*see Deutsche Bank Ntl. Tr. Co v Baquero*, 192 AD3d 660). Additionally, the Court finds that the plaintiff has failed to submit any evidence to establish that the statute of limitations was tolled or otherwise inapplicable. Here, the Court determines that the de-acceleration letter, sent by PHH Mortgage Services, did not contain clear and unambiguous language to establish that it was, in fact, an actual de-acceleration of the loan, regardless of whether either defendant received said letter. Therefore, the Court finds that the plaintiff’s arguments have no merit.

Therefore, based upon the abovementioned reasoning, the defendants’ motions to dismiss the foreclosure must be granted. The Court has reviewed the remaining arguments and find them to be unpersuasive and/or unnecessary to reach.

Accordingly, it is hereby

ORDERED, that Defendant Steven Bresler’s motion to dismiss the action based upon the expiration of the statute of limitations is granted, and it is further

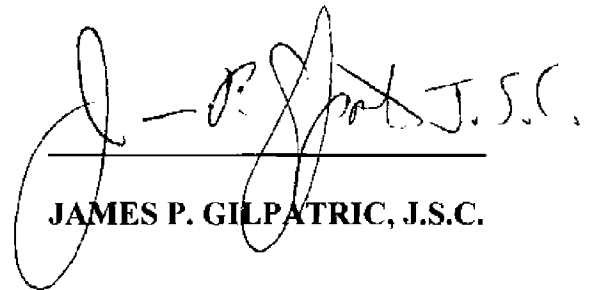
ORDERED, that Defendant Gerry-Lynn Stohr' s motion to dismiss the action based upon the expiration of the statute of limitations is granted.

This shall constitute the decision and order of the Court. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: December 14, 2021
Kingston, New York

ENTER,



JAMES P. GILPATRIC, J.S.C.

Papers Considered: Notice of motion, dated July 3, 2019; affirmation of Bruce D. Blatchly, Esq., dated July 3, 2019, with exhibits; notice of motion, dated August 6, 2019; affirmation of Peter M. Matera, Esq., dated August 6, 2019; affidavit of Gerry-Lynn Bresler a/k/a Gerry-Lynn Stohr, dated August 6, 2019, with exhibits; affirmation in opposition of Richard D. Femano, Esq., dated September 16, 2019, with exhibits; reply affirmation of Peter M. Matera, Esq., dated September 20, 2019; affidavit of Gerry-Lynn Bresler a/k/a Gerry-Lynn Stohr, dated September 20, 2019, with exhibits; affirmation of Bruce D. Blatchly, Esq., dated October 21, 2019; oral argument transcript, received December 7, 2020.