

Wilmington Sav. Fund Socy., FSB v Madden

2021 NY Slip Op 33851(U)

September 8, 2021

Supreme Court, Putnam County

Docket Number: Index No. 501454/2019

Judge: Victor G. Grossman

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This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period for appeals as of right (CPLR 5512 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

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WILMINGTON SAVINGS FND SOCIETY, FSB,
A TRUSTEE OF THE UPLAND MORTGAGE
LOAN TRUST B.,

Plaintiff,

-against -

DECISION & ORDER

Index No. 501454/2019
Sequence No. 1
Motion Date: 7/14/2021

KATHRYN C. MADDEN A/K/A KATHRYN
MADDEN, RONALD F. MADDEN A/K/A
RONALD MADDEN, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR HOME LOAN CENTER, INC., DBA
LENDING TREE LOANS and JOHN DOES AND
JANE DOES Said names being fictitious and
unknown to the plaintiff, the persons or parties
intended being the tenants, occupants, persons or
parties, if any, who claim or may claim a lien
against the premises,

Defendants,

-----X
GROSSMAN, J.S.C.

The following papers, numbered 1 to 15, were considered in connection with Defendants' Notice of Motion, dated October 15, 2019, seeking Order, dismissing the complaint as being barred by the statute of limitations.

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exh. A	1-3
Affirmation in Opposition/Exhs. A-G	4-11
Affirmation in Further Support of Motion/Exhs. A-C	12-15

On March 1, 2012, JP Morgan Chase Bank, N.A. notified Defendant Ronald Madden, in writing, that he had defaulted by failing to pay the required monthly payment installments on his loan, commencing with the payment due January 1, 2012. Chase stated that if Mr. Madden failed to cure the default on or before April 5, 2012, Chase “will accelerate the maturity of the Loan, * * * declare all sums secured by the Security Instrument immediately due and payable, and commence foreclosure proceedings, all without further notice to you” (Notice of Motion; Exh. A).

Apparently, the prior action was commenced on October 5, 2012 (Affirmation in Reply at ¶3) but was dismissed on September 6, 2016 by Hon. Paul Marx for lack of standing (Affirmation in Reply at ¶5).¹ Neither party proffered a copy of Judge Marx’s Decision and Order for this Court to review.²

Sometime in 2019, current Plaintiff purportedly sent the borrowers a notice of acceleration, but a copy of that notice was not provided to the Court (NYSCEF Doc. No. 38). On August 29, 2019, Plaintiff commenced this instant action, alleging that the date of Defendants’ default in payment was March 1, 2013 (2019 Verified Complaint at ¶9).

Defendants are moving to dismiss the 2019 Verified Complaint on the ground that the action is barred by the statute of limitations, as the loan was accelerated on October 5, 2012 (the date the prior action was commenced), and therefore, the time to commence the current action expired on October 5, 2018. Defendants also argue that the original notice of acceleration was

¹ Neither party proffers any documentation with respect to the prior action, other than the first page of the Summons (Putnam County Index Number 2731/2012), and a copy of the 2012 letter at issue.

² The Court took it upon itself to retrieve Judge Marx’s Decision and Order from the County Clerk.

filed March 1, 2012, promising acceleration on April 5, 2012, and therefore, April 5, 2018 was the last date to file this new action. Utilizing any of these dates, Defendants are wrong.

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]). “[U]nder CPLR 231(4), a mortgage foreclosure claim is governed by a six-year statute of limitations . . . in each case, the timeliness dispute turns on whether or when the noteholders exercised certain rights under the relevant contracts, impacting when each claim accrued and whether the limitations period expired, barring the noteholders’ foreclosure claims” (*Freedom Mortgage Corp. v Engel*, 37 NY3d 1, 19-20 [2021] [internal citation omitted]). “With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due” (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012] [citations omitted]). But, “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” (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982, quoting *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]; *U.S. Bank N.A. v Sopp*, 170 AD3d 776 [2d Dept 2019]). The act of acceleration must be accomplished by an unequivocal overt act (*see Freedom Mortgage Corporation v Engel*, 37 NY3d at 22). Furthermore, once a mortgage debt is accelerated, a borrowers’ right and obligation to make monthly installments cease, and all sums become immediately due and payable (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]). The issue of whether acceleration has occurred – whether through the commencement of a foreclosure action

or by other type of a notice – may be a question of fact (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983). Finally, “[n]otice to the borrower to accelerate the entire amount of the mortgage debt must be ‘clear and unequivocal’” (*Nationstar Mtge., LLC v MacPherson*, 56 Misc3d 339, 347 [Sup Ct, Suffolk County 2017], quoting *Sarva v Chakravorty*, 34 AD3d 438, 439 [2d Dept 2006]). However, if a party did not have standing to commence an action in the first instance, no acceleration can have occurred (see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983).

Here, because the prior action was dismissed for lack of standing, the loan was not accelerated. As such, the purported acceleration in 2012 was a nullity and the six-year statute of limitations did not begin to run on the entire debt (see *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]). As such, the current action is not time barred.

Accordingly, it is hereby

ORDERED that Defendants’ motion is denied; and it is further

ORDERED that any arguments not directly addressed herein are denied; and it is further

ORDERED that due to the COVID-19 health emergency, the Putnam County Foreclosure Part is operating virtually for the purpose of conducting conferences pursuant to Administrative Order 157/20. In lieu of physical appearances, the Court will be conducting virtual conferences in all residential foreclosure matters. The participation by a party by video or telephone at a virtual conference shall constitute an appearance pursuant to 22 NYCRR 202.16(f). **You are required to appear at a virtual court conference on October 13, 2021 at 10:00 a.m. before Court Attorney Referee Lisa Rubenstein. Please ensure that you log onto the virtual platform promptly.**

One week prior to the conference, Plaintiff’s counsel must contact the Court at ForeclosurePutnam@nycourts.gov to confirm attendance. Plaintiff’s counsel must include in

the message an e-mail address to which the Court will forward a digital invitation to the virtual conference. Plaintiff's attorney must forward the digital invitation to borrower/homeowner or his/her/their counsel. **If borrower/defendant does not have an E-mail address, please call 845-208-7854.**

Help with virtual court appearances is available Monday through Friday from 9:00 a.m. to 5:00 p.m. Phone: 914-824-5289 option 6; E-mail: VirtualCourtHelp9JD@nycourts.gov.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
September 8, 2021


HON. VICTOR G. GROSSMAN, J.S.C.

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