U.S. Bank Trust, N.A. v Green
2022 NY Slip Op 30279(U)
January 26, 2022
Supreme Court, Kings County
Docket Number: Index No: 501633/17
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST,

Plaintiff(s),

-against-

Index No: 501633/17

JUDGMENT, DECISION AND ORDER AFTER NON-JURY TRIAL

ERNEST GREEN, NEW YORK CITY DEPARTMENT OF HOUSING ORIGINAL FILED WITH THE PRESERVATION & DEVELOPMENT, CLERK ON: RELIABLE FAST CASH LLC DBA KCG, NEW YORK STATE DEPARTMENT MORTGAGED PREMISES: TAXATION AND FINANCE, NEW YORK 1178 STERLING PLACE CITY TRANSIT ADJUDICATION BUREAU, BROOKLYN, NY 11213 NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, BL #: 1251 - 29 JOHN DOE

Defendant(s)
X

A virtual non-jury trial was conducted before this court on November 10, 2021 in this action to foreclose a mortgage relating to the premises located at 1178 Sterling Place, Brooklyn, New York 11213 [Block 1251; Lot 29].

This is the second action to foreclose on the subject mortgage loan. A prior action was commenced on November 13, 2009 by plaintiff's predecessor in interest and was later dismissed by the court on December 18, 2013. A de-acceleration letter was later sent to defendant Ernest Green [Green] by both first-class and certified mail allegedly on November 13, 2015. Subsequently, plaintiff commenced this action by the filing of a Summons and Complaint on January 27, 2017. Green moved for summary judgment dismissal in this matter, twice, and those motions were denied by orders of the Hon. Noach Dear as issues remained as to the timeliness of the mailing of the de-acceleration letter dated November 13, 2015.

Alexandria Kaminski, Esq. appeared for plaintiff and Austin Brown, Esq. appeared for defendant Green. Before the trial commenced, the parties agreed that the issue in controversy had been narrowed, by the motion practice and the resulting orders, as to whether a de-acceleration of the debt was properly effected prior to the expiration of the Statute of Limitations on November 13, 2015.

At trial, the plaintiff called Letycia Lopez and Andrew Morgenstern, Esq. as witnesses. The defendant did not call any witnesses to testify.

Letycia Lopez

Letycia Lopez testified that she has been employed by Caliber Home Loans [Caliber] for the past 6 years as a default servicing officer. As part of her job duties she reviews loans for loss mitigation and she testifies at hearings and trials. Lopez is familiar with the business records of Caliber and has received training in the Sagent System, where all transactions are recorded, and Carboncopy, where all documents are stored. Sagent System, which is updated at or near the time of the events depicted on the system by a person with firsthand knowledge of the transactions, cannot be retroactively changed. Carboncopy is also updated at or near the time of the uploading of documents into its system by a person with firsthand knowledge of each document being entered into the system. Both Sagent and Carboncopy are updated and maintained in the ordinary course of business, and Lopez relied upon both systems for the information she was providing to the court.

Lopez testified that Caliber became the servicer for Green's loan on May 1, 2014, receiving the records and documents from the prior servicer, JP Morgan Chase, on that same date. All records and documents were fully reviewed and then were boarded into their systems, thereby becoming Caliber's records. A limited power of attorney dated December 4, 2013, giving Caliber the right to service the loan, was admitted into evidence as Plaintiff's Exhibit 1. The Consolidation Extension and Modification Agreement [CEMA] dated December 19, 2007, and Note, of the same date, relating to this mortgage, were admitted into evidence as Plaintiff's Exhibits 2 and 3, respectively.

Lopez testified that the transaction notes for this loan [Plaintiff's 5 in evidence], which were entered into the Sagent system at the time of the events depicted on the document, indicate, inter alia, that this loan came to be in default and, as is relevant here, was subsequently de-accelerated by Caliber's attorney. The de-acceleration notice was logged into the system in an entry dated December 9, 2015.

On cross-examination Ms. Lopez indicated that she worked for Caliber on December 9, 2015 and that Sagent was, prior to last year, known as Fiserve. There was no change to the program other than the name.

Andrew Morgenstern, Esq.

Andrew Morgenstern testified that he has been an attorney at Rosicki, Rosicki & Associates since 2002. He is presently Senior Counsel in the litigation department. He is fully familiar and has been trained on the record keeping system used by the firm. All documents,

e-mails, transactions and letters are entered and scanned into the system in the ordinary course of their business at the time they are received.

Morgenstern testified as to certain documents that were introduced into evidence. Plaintiff's 7 was a referral letter indicating that on October 30, 2009, the client, JP Morgan Chase, requested that a summons and complaint be prepared in order to commence a foreclosure for this loan. Plaintiff's 9 was an e-mail sent by Caliber on November 13, 2015 at 2:22 P.M asking that this loan be de-accelerated. Plaintiff's 10 revealed an e-mail sent on November 13, 2015 at 2:32 P.M. from a paralegal at the Rosicki firm, Victoria Basdeo, asking for an attorney review of the de-acceleration letter. Plaintiff's 11 was a copy of a de-acceleration letter sent out by the Rosicki firm to Mr. Green advising him that the prior acceleration of the loan was revoked and that the loan was reinstated as an installment loan.

Morgenstern testified that it was office procedure for the paralegal to bring an approved de-acceleration letter to the firm's mail room for same day mailing at the Plainview post office; which would occur each day at approximately 4:30 P.M. Plaintiff's Exhibit 12 was a copy of a note made by Ms. Basdeo, and entered into the law firm's record keeping system at 3:40 P.M., reflecting that the de-acceleration letter was mailed to Mr. Green at the property by both first-class and certified mail and referenced the mail tracking numbers. Plaintiff's Exhibit 13 was a copy of a note created by Ms. Basdeo on November 13, 2015 at 3:52 P.M. indicating that she sent copies of the mailed de-acceleration letters to the client. Plaintiff's Exhibit 14, in evidence, was a copy of a note reflecting that the client asked that the Rosicki firm close its foreclosure file for this matter since the loan was de-accelerated.

On cross examination the witness indicated that there were 6 employees in the mail room.

At the conclusion of the witness testimony, U.S. Bank Trust rested. Defendant rested without calling any witnesses. Neither side made any motions at the conclusion of the trial.

Findings of Fact and Conclusions of Law

The controlling statute of limitation for breach of contract is six years (*see* CPLR 213[4]), and the first action resulted in an acceleration of the balance of the debt owed on Green's note, triggering the limitations period (*see Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). Where a debt has been accelerated, a lender may revoke the acceleration so long as it is accomplished through an affirmative act occurring within the six-year statute of limitations period (*see Christiana Trust v Barua,* 184 AD3d 140 [2d Dept 2020] *revd on other grounds by Freedom Mortgage Corp.*). Here, the sufficiency of the de-acceleration letter is not in dispute, other than as to its transmittal.

Paragraph 15 of the mortgage provides, in relevant part, that any notice to the borrower is given "when mailed by first class mail or when actually delivered to [the borrower's] notice

address if sent by other means" and that "[t]he notice address is the address of the Property unless [the borrower] give[s] notice to Lender of a different address." As to the de-acceleration letter sent to Green, Mr. Morgenstern credibly testified as to his familiarity with the mailing practices and procedures of the Rosicki firm that are designed to ensure that items are properly addressed and mailed, and that the de-acceleration letter was mailed to Green on November 13, 2015 at the property by both first-class and certified mail in accordance with those practices and procedures (*see Deutsche Bank National Trust Company v Bucicchia*, 193 AD3d 682 [2d Dept 2021]). Through Mr. Morgenstern's testimony, plaintiff established that the de-acceleration letter was, in fact, sent by first-class mail in compliance with the terms of the mortgage (*see Assyag v Wells Fargo Bank, N.A.,* 186 AD3d 1302 [2d Dept 2020]). Mr. Morgenstern's testimony further established that the de-acceleration letter was mailed within six years from the debt acceleration (*id.*).

Green failed to offer any rebuttal by cross-examination or by production of witnesses.

Counsel's assertion in his post-trial memorandum of law that Green did not receive notice of the de-acceleration, despite the fact that there was no testimony from Green denying receipt of the de-acceleration letter, is of no consideration. Even if there was testimony by Green to that effect, the mere denial of receipt of a notice by regular mail is insufficient to overcome the legal presumption of delivery (*see Wells Fargo Bank, N.A. v Yapkowitz*, 199 AD3d 126 [2d Dept 2021]). Furthermore, because plaintiff established regular mailing of the de-acceleration letter, whether Green actually received the certified mailing is of no consequence.

In view of the above, plaintiff established, by a fair preponderance of the credible evidence, its entitlement to judgment in this matter.

Accordingly, it is

ORDERED that the plaintiff is granted judgment on its complaint; and it is further

ORDERED that the matter shall be referred to a referee to compute the amount due plaintiff pursuant to RPAPL 1321. Within 15 days of this dated order, plaintiff shall submit to the court a proposed order of reference for the court's review and signature; and it is further

ORDERED that plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's submissions); defendant(s)

may submit written objections and proof in support thereof (defendant's objections) to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgment of foreclosure and sale; and it is further ORDERED that the referee's duties are defined by the court's order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by the order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further

ORDERED, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further.

This constitutes the decision and order of the Court after trial.

Dated: January 26, 2022

ENTER,

Hon. Karen B. Rothenberg
J.S.C