

US Bank v Schlesinger
2022 NY Slip Op 30987(U)
March 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 518929/17
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of March 2022.

PRESENT:

HON. CENCERIA P. EDWARDS,
A.J.S.C.

Index No.: 518929/17

_____ x

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

SCHLESSINGER
PEARL SCHLESSINGER, et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion (MS 3)	<u>1</u>
Opposition/Cross (MS 4)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This foreclosure action was commenced by Plaintiff on October 2, 2017, seeking to foreclose on 150 Skillman St, Unit 6R. Defendant Schlessinger timely answered, asserting sixteen affirmative defenses and a counterclaim seeking an order declaring the subject note and mortgage unenforceable and barred by the statute of limitations and for the lien to be discharged. The other defendants remain in default. Plaintiff now moves for summary judgment in its favor. Defendant cross-moves for summary judgment in her favor, arguing that the instant action is untimely.

"The law is well settled that with respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). A prior action was commenced on November 5, 2008, accelerating the lien. The instant action was not filed until October 2, 2017, more than six years later. As such, Defendant met her initial burden of showing that the instant action is untimely. The burden then shifted to Plaintiff to demonstrate that the prior action was not an acceleration or any other basis for the instant action to be timely (*U.S. Bank Nat. Ass'n v. Martin*, 144 A.D.3d 891 [2d Dept 2016]).

Plaintiff argues that a deacceleration letter was timely sent by PHH on October 28, 2014 on behalf of Plaintiff's predecessor, HSBC. In support of that contention, it proffers a copy of the letter and images of a certified mail receipt and return-receipt postcard both reflecting the addressee as Defendant. However, the receipt is not stamped by the US Postal Service and the post-card appears to have been imaged prior to use (rather than reflecting that the article was delivered and signed for). Plaintiff also offers subsequent monthly statements showing that Seterus was treating the loan as unaccelerated. The dates thereon, however, are significantly later than the alleged deacceleration and it is unclear whether those statements were actually sent.

Defendant takes the position that PHH was not authorized to deaccelerate the loan on behalf of HSBC. She further claims that the letter was never served upon her, Plaintiff offering no proof of mailing and her not receiving the letter. Additionally, she argues that the contents of the letter are ambiguous. Defendant also takes issue with the ability of a plaintiff to unilaterally deaccelerate a loan. (That last argument, however, seems to clearly fail in light of *Engel*, *Milone*, etc.)

In reply, Plaintiff proffers an affidavit from Mark Feliciano, a senior loan analyst at Ocwen (PHH's parent company), who claims to be authorized to act for both Ocwen and PHH. Feliciano provides a copy of the notice of service transfer from HSBC to PHH dated May 1, 2013 and a Power of Attorney from HSBC to Ocwen predating the Ocwen-PHH merger. While he claims to also have appended a Power of Attorney from HSBC to PHH, that document does not appear to have been provided. Feliciano states that (unproduced) business records reflect

that on October 28, 2014, PHH mailed the deacceleration letter to Defendant via certified mail return receipt requested. He also attaches copies of the same letter, receipt, and post-card that Plaintiff attached to its moving papers.

Defendant responds by reiterating that PHH was not authorized to send a deacceleration letter. She further accurately adds that, per the terms of the mortgage, any written notice given by means other than first class mail is effective only upon actual receipt – and Plaintiff offers no evidence that Defendant ever received the letter from PHH, let alone prior to the then-impending expiration of the statute of limitations.

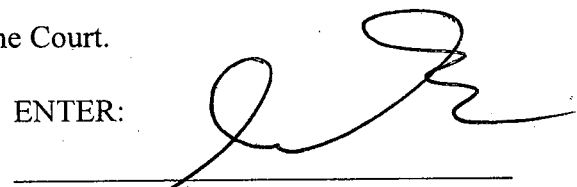
This Court agrees with Defendant that Plaintiff has failed to demonstrate that the loan was timely deaccelerated. It is unclear whether PHH was authorized to send correspondence relating to the subject loan on behalf of HSBC in 2014. Even were the Court to accept that PHH was the servicer of the loan at the relevant time (based on the notice of service transfer or Feliciano's representation coupled with the POA to Ocwen) and thus so empowered, no admissible evidence of actual mailing has been presented. Further, assuming arguendo that the receipt and postcard suggest that PHH did send the letter exactly as Feliciano claims, Plaintiff does not even argue that it was actually timely received by Defendant. As this Court finds the instant action to be untimely, summary judgment in favor of Defendant on Plaintiff's claims is granted.

“To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative” (*Acocella v Wells Fargo Bank, N.A.*, 139 AD3d 647 [2d Dept 2016]). It is undisputed that Defendant is the owner of real property upon which Plaintiff has a lien. As the Court has determined that the statute of limitations has passed on the lien and that it is thus unenforceable, judgment is granted in favor of the counterclaimant upon the first counterclaim.

Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted. Plaintiff's complaint is dismissed, Plaintiff's notice of pendency should be cancelled, and the mortgage is discharged as time barred.

The foregoing is the decision and order of the Court.

ENTER:



Hon. Cenceria P. Edwards, A.J.S.C.