U.S. Bank N.A. v Speller
2022 NY Slip Op 33711(U)
October 26, 2022
Supreme Court, Putnam County
Docket Number: Index No. 500088/2022
Judge: Victor G. Grossman
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SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM
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U.S. BANK NATIONAL ASSOCIATION, etc.,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS, et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 500088 / 2022
Mot. Seq. No. 2

---x **DECISION AND ORDER**

The following papers numbered 1 to 7 were read on Plaintiff's motion for summary judgment of foreclosure and an order of reference:

Notice of Motion – Affirmation / Exhibits – Affidavit / Exhibits -- Memorandum 1-4

Affidavit in Opposition / Exhibit -- Memorandum 5-6

Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a residential mortgage foreclosure action. Plaintiff U.S. Bank National Association (not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT) moves for summary judgment of foreclosure and an order of reference. Plaintiff established its *prima facie* entitlement to judgment as a matter of law. In opposition, Defendant homeowners Michael Speller and Ellen Fitzsimmons contend *inter alia* that Plaintiff failed to comply with the requirements of RPAPL §1304, that Plaintiff lacks standing to foreclose, and that the action is barred by the Statute of Limitations.

RPAPL §1304

Defendants contend that (1) the Section 1304 90-day notice was not sent by a lender, lender's assignee or mortgage servicer as required by RPAPL §1304(1, 2); (2) the foreclosure action was not commenced within one year of the mailing of the 90-day notice as purportedly required by RPAPL §1304(4); (3) the 90-day notice was not composed in at least 14-point typeface as required by RPAPL §1304(1); and (4) the 90-day notice contained a "mini-Miranda" warning per 15 U.S.C. 1692e in violation of *Bank of America v. Kessler,* 202 AD3d 10 (2d Dept. 2021). Defendants' contentions are all without merit.

The 90-day notice was mailed by an employee of Plaintiff's law firm on behalf of the Plaintiff's mortgage loan servicer. The Second Department has expressly held that this procedure comports with the requirements of RPAPL §1304. *See, Flagstar Bank, FSB v. Mendoza,* 139 AD3d 898, 900 (2d Dept. 2016).

RPAPL §1304(4) "stands for the proposition that where there are multiple defaults in [a] 12-month period, only one RPAPL 1304 notice is required." *Deutsche Bank Natl. Trust Co. v. Webster,* 142 AD3d 636, 639 (2d Dept. 2016). It does not require that the foreclosure action be commenced within 12 months of the Section 1304 notice. *See, id.; U.S. Bank Trust N.A. v. Auxila,* 189 AD3d 1514, 1516 (2d Dept. 2020).

The Section 1304 notices mailed to Defendants, copies of which the Plaintiff has proffered in support of its motion, quite clearly comply with the 14-point typeface requirements of RPAPL §1304(1).

The conflict between the requirements of RPAPL §1304 as interpreted by the Second Department in *Bank of America v. Kessler, supra,* and those of the Federal Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (FDCPA), was previously addressed by this Court in

Bank of New York Mellon v. Luria, 76 Misc.3d 724, 171 NYS3d 807 (Sup. Ct. Putnam Co. 2022). The Court therein held that "insofar as *Kessler* and its progeny prohibit inclusion of the FDCPA "mini-Miranda" warning and bankruptcy advisory in a Section 1304 90-day notice, the rule promulgated by those cases is inconsistent with the provisions of the FDCPA and is preempted by virtue of 15 U.S.C. §1692n." *See, id.,* 171 NYS3d at 823. The record herein clearly shows that Plaintiff's mortgage servicer was a "debt collector" subject to the requirements of the FDCPA because the Defendants' mortgage was in default long before it commenced servicing the loan on Plaintiff's behalf. *See, Roth v. Citimortgage Inc.,* 756 F.3d 178, 183 (2d Cir. 2014); *Jones v. New Penn Financial, LLC, supra,* 2020 WL 8771252 at *4-5; *Zirogiannis v. Seterus, Inc.,* 221 F.Supp.3d 292, 302 (E.D.N.Y. 2016), *aff'd* 707 Fed. Appx. 724 (2d Cir. 2017); *JPMorgan Chase Bank, N.A. v. Mantle,* 134 AD3d 903 (2d Dept. 2015); 15 U.S.C. §692a, subd. 4, 6(F). Contrary to Defendants' suggestion, then, the inclusion of a FDCPA "mini-Miranda" warning in the 90-day notice was required and may not be deemed a violation of RPAPL §1304.

PLAINTIFF'S STANDING TO FORECLOSE

Plaintiff established *prima facie* its standing to foreclose by virtue of its physical possession of the Note at the time this action was commenced. *See, Aurora Loan Services, LLC v. Taylor,* 25 NY3d 355, 361-362 (2015); *JPMorgan Chase Bank, N.A. v. Weinberger,* 142 AD3d 643, 645 (2d Dept. 2016). Defendant Speller's unsubstantiated observation, proffered without any documentary support, that the Note annexed to the complaint in a prior foreclosure action was different in appearance from that tendered by Plaintiff here is insufficient to demonstrate the existence of any triable issue of fact.

STATUTE OF LIMITATIONS

The statute of limitations governing mortgage foreclosure actions is six (6) years. *See,* CPLR §213(4); *Lubonty v. U.S. Bank, N.A.,* 34 NY3d 250, 261 (2019). Where the mortgage debt is payable in installments, a separate cause of action accrues for each unpaid installment, and the limitations period begins to run on the date each installment becomes due. *See, Wells Fargo Bank, N.A v. Cohen,* 80 AD3d 753, 754 (2d Dept. 2011). However, once a mortgage debt is accelerated, the entire amount becomes due and the statute of limitations begins to run on the entire debt. *See, EMC Mtge. Corp. v. Patella,* 279 AD2d 604, 605 (2d Dept. 2001).

Defendants claim -- based on accelerations of the mortgage debt that occurred in connection with prior foreclosure actions commenced in 2009, 2010 and 2015 -- that the six (6) year limitations period ran on the entire debt prior to the commencement of the present action on January 26, 2022.

However, the voluntary discontinuance of the 2009 and 2010 actions resulted in timely revocations of the election to accelerate, and the limitations period thereafter continued to run only as to individual monthly installments due, and not as to the entire debt. *See, Freedom Mortgage Corp. v. Engel,* 37 NY3d 1 (2021).

The third foreclosure action was commenced on December 9, 2015 and dismissed on October 27, 2020 for the plaintiff's failure to appear at a court conference. As that dismissal did not result in a revocation of the election to accelerate, the limitations period continued to run on the entire debt. However, on February 15, 2021 – within the six (6) year limitations period -- defendant Speller signed a Covid-19 Hardship Declaration. The effect of Defendants' Hardship Declaration, pursuant to the Covid-19 Emergency Eviction & Foreclosure Prevention Act of 2020, was to prevent the initiation of foreclosure proceedings until the expiration of the Act on

January 14, 2022. CPLR §204(a) provides that "where the commencement of an action has been stayed by…statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Since the statute of limitations was thereby tolled for a period of 333 days between February 15, 2021 and January 14, 2022, Plaintiff's commencement of the present action on January 26, 2022 was timely.[1]

OTHER ISSUES

The Court has considered the remaining issues raised by Defendants and finds them to be without merit. Most particularly, the Court observes that "a dispute as to the total amount of indebtedness does not preclude an award of summary judgment to the plaintiff on the issue of foreclosure, but is properly raised before the referee in computing the amount due." *Emigrant Bank v. Cohen,* 205 AD3d 103, 108-109 (2d Dept. 2022). It is therefore

ORDERED, that Plaintiff's motion is granted in its entirety. An order of reference is issued herewith.

The foregoing constitutes the decision and order of the Court.

Dated: October 26, 2022 ENTER
Carmel, New York

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

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[1] Insofar as Defendants assert that the statute of limitations bars Plaintiff's action with respect to their default on individual installment payments, that claim too is unavailing. The "default date" alleged by Plaintiff is January 15, 2010. The 2015 foreclosure action was timely commenced within six (6) years of that date on December 9, 2015. When the 2015 action was dismissed on October 27, 2020 for failure to appear at a conference, Plaintiff was entitled pursuant to CPLR §205(a) to commence a new foreclosure action "within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period." A period of 111 days elapsed prior to February 15, 2021, when that six-month period was extended pursuant to CPLR §204(a) by virtue of the statutory prohibition effected by the Covid-19 Emergency Eviction & Foreclosure Prevention Act of 2020. An additional period of 18 days elapsed after the statutory prohibition ended on January 14, 2022 and before Defendants were served with process in this action on February 1, 2022. Inasmuch as the total of 129 days is well within the six-month period allowed by CPLR §205(a) for recommencement, the present action was timely interposed with respect to all alleged defaults in payment of the mortgage debt.