HSBC Bank USA, N.A. v Besharat
2022 NY Slip Op 34564(U)
October 26, 2022
Supreme Court, Putnam County
Docket Number: Index No. 500836/2021
Judge: Victor G. Grossman

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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HSBC BANK USA, N.A.,

Plaintiff,

-against-

WALID BESHARAT; CINDY BESHARAT a/k/a CINDY ANN BESHARAT; et al.,

Defendants.

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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. 500836 / 2021
Mot. Seq. No. 1, 2

DECISION AND ORDER

The following papers numbered 1 to 13 were read on Plaintiff's motion for summary judgment of foreclosure, an order of reference and other relief, and Defendants' cross motion for dismissal of the complaint:

Amended Notice of Motion – Affirmations (2) / Exhibits – Affidavits (3) / Exhibits -- Memorandum 1-7

Notice of Cross Motion – Affirmation / Exhibits Affidavits (2) -- Memorandum 8-11

Affirmation in Opposition and Further Support 12

Reply Affirmation 13

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

This is a residential mortgage foreclosure action. Plaintiff HSBC Bank USA, N.A. moves for summary judgment of foreclosure and an order of reference. Plaintiff established its *prima facie* entitlement to judgment as a matter of law. Defendant homeowners Walid and Cindy Besharat cross move for dismissal of the complaint on the purported grounds that Plaintiff

failed to comply with the requirements of RPAPL §1304 and that the action is barred by the Statute of Limitations.

RPAPL §1304

Defendants contend that Plaintiff violated RPAPL §1304 as interpreted by the Second Department in *Bank of America v. Kessler,* 202 AD3d 10 (2d Dept. 2021) by including "Hardship Declarations" mandated by the Covid-19 Emergency Eviction & Foreclosure Prevention Act of 2020 (the "Act") in the same envelope as the Section 1304 90-day notices. However, the plain language of the Act expressly requires that the Hardship Declaration be provided with every 90-day notice. The Act states:

> The foreclosing party shall include a "Hardship Declaration" in 14-point type, with every notice provided to a mortgagor pursuant to sections 1303 and 1304 of the Real Property Actions and Proceedings Law.

The Act further provides that a court shall not accept for filing any action to foreclose a mortgage unless the foreclosing party or its agent files an affidavit indicating that the Hardship Declaration was provided with the 1304 notice. In *BCMB1 Trust v. Rubio,* 75 Misc.3d 1238(A) (Sup. Ct. Suffolk Co. 2022), the Court read the Act *in pari materia* with RPAPL §1304 and, given the "plain unambiguous language" of the Act, held that "the inclusion of the Hardship Declaration does not violate the strict requirements of *Kessler.*" *See, id.,* at *1-2. *BCMB1 Trust v. Rubio* is squarely on point, and the Court's reasoning is sound. Following *Rubio,* this Court rejects Defendants' contention that Plaintiff violated Section 1304 by including a Hardship Declaration with the 90-day notices in accordance with the dictates of the Act.

Defendants further contend that Plaintiff is not in compliance with Section 1304 because the 90-day notices were mailed not by Plaintiff itself or by Selene, its mortgage servicer, but instead by an employee of Plaintiff's law firm on behalf of the mortgage servicer. However, 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).

Therefore, Defendants' contention that Plaintiff violated RPAPL §1304 and thus failed to satisfy a condition precedent to the commencement of this foreclosure action is wholly without merit.

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]), and continues to run on the entire debt unless and until the acceleration is revoked within the limitations period. *See, Freedom Mortgage Corp. v. Engel,* 37 NY3d 1 (2021).

The relevant procedural history of this action is as follows.

A prior foreclosure action was commenced on January 18, 2013. The complaint therein alleged that Defendants had defaulted as of July 1, 2010 and demanded the entire amount due under the mortgage. This demand constituted an acceleration of the mortgage debt; indeed, a demand for the entire amount due under a mortgage upon the mortgagor's default is the very definition of an acceleration of a debt otherwise payable in installments. Contrary to Defendants' suggestion, no express statement of an "election" to "accelerate" was required.

As per the Court of Appeals' decision in *Freedom Mortgage Corp. v. Engel, supra,* then, the voluntary discontinuance of the 2013 action by stipulation dated March 22, 2016 constituted a timely "revocation" of the acceleration effectuated by the complaint in that action. *See, id.* At that point, the statute of limitations continued to run with respect Defendants' default on individual monthly installment payments due but ceased to run with respect to the entire mortgage debt.

A second foreclosure action was commenced on March 30, 2018. Under the applicable six (6) year statute of limitations, this action was timely interposed with respect to any default occurring after March 30, 2012. The 2018 action was dismissed without prejudice by court order dated December 21, 2020. However, the grounds for dismissal were such that Plaintiff was entitled to invoke the savings provision of CPLR §205(a), which provides that:

> the plaintiff…may commence a new action upon the same transaction…within six months after the termination [of the prior action] 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.

The Complaint in the present action was thereafter duly filed on June 11, 2021 and served on Defendants on June 17, 2021 – all within the six-month period prescribed by Section 205(a). Per CPLR §205(a), then, the present action is in effect deemed to have been interposed as of March 30, 2018, such that it is timely with respect to all defaults occurring after March 30, 2012. Inasmuch as the default date alleged in the present Complaint is April 1, 2012, the Plaintiff's claim is in all respects timely interposed.

As a matter of law, then, the Defendants' statute of limitations defense is without merit.

It is therefore

ORDERED, that Defendants' cross-motion for dismissal is denied, and it is further

ORDERED, that Plaintiff's motion for summary judgment, an order of reference and other relief 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.