Federal Natl. Mtge. Assn. ("Fannie Mae") v Marshall
2022 NY Slip Op 34763(U)
September 28, 2022
Supreme Court, Columbia County
Docket Number: Index No. E012018012979
Judge: Richard M. Koweek

STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,

Index No. E012018012979

Plaintiff,

-against-

DECISION AND ORDER

LAWRENCE C. MARSHALL; JOHN DOE (Those Unknown tenants, occupants, persons or corporations or their heirs, distributes, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an Interest in the mortgaged premises.),

Defendants.

This is a Motion by the Plaintiff in a mortgage foreclosure action for summary judgment, dismissing Defendant's Answer with affirmative defenses and counterclaim and for an Order of Reference. The Motion is opposed by the Defendant. For the reasons that follow, Plaintiff's Motion is granted and the Defendant's Answer is stricken.

BACKGROUND

Defendant gave a Promissory Note in the principal sum of $343,000.00 to Greenpoint Mortgage Funding (hereinafter "Greenpoint"). As security for the Note, Defendant gave a first Mortgage to Mortgage Electronic Registration Services, Inc., (hereinafter "MERS"), as nominee for Greenpoint, on residential real property located at 738 Warren Street, City of Hudson, County of Columbia

and State of New York. The Mortgage was recorded in the Columbia County Clerk's Office on June 21, 2007.

The Mortgage was thereafter assigned on several occasions, as recited by the Plaintiff and undisputed by Defendant. Fannie Mae, the current Assignee and Plaintiff, through its custodian, has possession of the original Note.

Greenpoint commenced a mortgage foreclosure action is 2009. The Defendant opposed the action. On March 22, 2013, Greenpoint moved for a discontinuance of the 2009 foreclosure action. No order granting or denying the application, which was unopposed, is annexed to the Motion. Nevertheless, Plaintiff asserts that such an order was signed in 2013.

Plaintiff commenced the instant action on or about May 29, 2018, by filing a Summons and Complaint and Notice of Pendency. Prior to commencing this second action, Plaintiff sent notices by regular and certified mail in separate envelopes to the Defendant pursuant to RPAPL §1304. Defendant interposed an Answer with affirmative defenses and counterclaims. The affirmative defenses include: 1) that the Statute of Limitations bars the action because the mortgage was first accelerated in 2009; 2) Plaintiff lacks standing; 3) the Complaint fails to state a cause of action; 4) Plaintiff failed to comply with RPAPL §1304; 5) Plaintiff failed to comply with RPAPL §1306; 6) Plaintiff failed to comply with RPAPL §1303 and; 7) Plaintiff's action should be barred by the doctrine of unclean hands.

In addition, Defendant interposed two counterclaims: 1) to quiet title based upon claimed running of the Statute of Limitations; and 2) for attorney's fees and costs pursuant to RPAPL §282. Plaintiff filed a Reply to the counterclaim on or about July 29, 2018.

Certain limited discovery has taken place, but no motions or issues regarding the questions posed or responses thereto have come before the Court for adjudication.

ARGUMENTS

Plaintiff claims that it is entitled to a judgment as a matter of law because it has submitted the Mortgage and unpaid Note along with evidence of default. Defendant does not deny these allegations. Further, in support of its Motion for Summary Judgment, Plaintiff submitted a Statement of Material Facts in compliance with NYCRR §202.8-g. Defendant has failed to submit a Statement of Material Facts in opposition and, therefore, the facts as listed are deemed admitted, citing Rios v. ETC Hous. Corp., 72 Misc.3d 479, (Clinton County 2021), aff'd, 203 A.D.3d 1281 (3d Dept. 2022).

Plaintiff also asserts each of Defendant's affirmative defenses lack merit. With regard to Defendant's first affirmative defense, Statue of Limitations, Defendant argues that the discontinuance of the 2009 foreclosure action in 2013 did not revoke acceleration of the Mortgage. Plaintiff argues that the case of

Freedom Mortgage Corp v. Engel, 37 N.Y.3d 1 (2021) stands for the proposition that a noteholder's voluntary withdrawal of an action revokes the election to accelerate absent the noteholder's contemporaneous statement to the contrary. Engel, 37 N.Y.3d at page 32. This case also held that only an explicit and contemporaneous statement that discontinuance did not revoke acceleration would be sufficient to overcome the automatic revocation of acceleration caused by discontinuance of an action. This new rule has been recognized by the Third Department in the case of United States Bank National Association v. Creative Encounters Ltd., 194 A.D.3d 1135 (3d Dept. 2021). The Second Department has likewise recognized this rule in a number of cases.

In this case, Plaintiff argues that the 2009 foreclosure action was discontinued on April 16, 2013. This occurred within six years of the April 9, 2009, commencement. Based upon the holding in Engel and related cases, defendants may no longer viably assert a Statute of Limitations defense. This is so, asserts Plaintiff, even if there is no order following the Motion to Discontinue. Although it asserts such an order exists[1], it claims case law holds that the mere making of such a Motion to Discontinue is sufficient to deaccelerate the mortgage debt. Penny Mack Corp. v. Holcomb, 198 A.D.3d 978, 980-981 (2d Dept. 2021);

[1] Supplemental Affirmation of Harold L. Kofman, Esq., dated June 16, 2022, at Exhibits "A" and "B".

U. S. Bank National Association v. Lynch, 2022 N.Y.Misc. LEXIS 754 (Rensselaer County Ct., February 23, 2022). A similar recent holding also supports this argument in the case of Solomon v. HSBC Bank NA, 2022 N.Y.Misc. LEXIS 1974 (Kings Cty. April 12, 2022).

Concerning Defendant's second affirmative defense, lack of standing, record evidence attached to the Plaintiff's Motion conclusively establishes Plaintiff's standing in that it has submitted undisputed proof that it was the holder of the Note and the Mortgage at the time the action was commenced. Wells Fargo Bank NA v. Pauley, 172 A.D.3d 1559, 1560 (3d Dept. 2019). Indeed, Defendant's answering papers abandoned all other affirmative defenses, other than the Statute of Limitations defense.

Failure to state a cause of action, the third affirmative defense, similarly lacks merit because Plaintiff has established it was the holder of the Note and Mortgage at the time of the commencement of the action and Defendant's default is admitted.

Claimed noncompliance with RPAPL §1304, as contained in Defendant's fourth affirmative defense, also lacks merit, says Plaintiff. Defendant claims, that because Plaintiff sent out two different RPAPL §1304 notices, one in 2015 and the second in 2018, that the second one is defective because its default date is different from the date listed in the 2015 notice of default. In the first instance, Plaintiff

notes that Defendant concedes receiving both notices. Secondly, the 2018 notice seeks payment of unpaid installments that accrued within six years of commencement of the second action. Therefore, the January 29, 2018, 90 day notice only sought recovery for payments missed during the preceding six years, and not the full amount owed. Since the 2015 notice sought a larger sum, Defendant cannot be heard to assert that the 2018 notice should have included time barred payments.

Concerning Defendant's fifth affirmative defense, Plaintiff complied with RPAPL §1306 by mailing to the Office of the Columbia County Clerk a notice of the mailing of the RPAPL §1304 notice, within three days of sending the notice. The attachments to Plaintiff's Motion for Summary Judgment clearly established this was done and the defense has no merit.

Defendants' sixth affirmative defense is likewise meritless. Documentary evidence clearly establishes that the Plaintiff sent out notice to all mortgagors with the service of the Summons and Complaint and to all tenants of the mortgaged properties. Proof that the Summons and Complaint notice was sent had been filed, as contained in Exhibit "F" to the Motion. Defendant's assertion to the contrary has no evidentiary basis.

Finally, Defendant cannot establish that the foreclosure action is barred by the doctrine of unclean hands. Defendant seems to assert this defense based upon the

fact that Plaintiff issued two 90-day notices, one in 2015 and one in 2018. Each one had different default dates and different cure amounts. Plaintiff argues that this does not amount to unclean hands in the form of immoral or unconscionable behavior, since the later notice contained a smaller amount sought and was measured against only 5 years and 7 months of payments sought. It also argues that the doctrine of unclean hands is not a defense to a foreclosure action, citing a series of cases. Finally, Defendant suffered no harm from the use of the second default date.

Defendant's counterclaim for attorney's fees sought, pursuant to RPAPL §282, is not a cause of action but is only successful if Defendant succeeds in the defense of the action. His action to quiet title is dependent upon the success of the Statute of Limitations defense.

In opposition, Defendant submits his own Affidavit, admitting that he defaulted on his loan. The Affidavit of his attorney asserts that there is no signed Order of Discontinuance in the Columbia County Clerk's Office with regard to the Motion to Discontinue the 2009 foreclosure action. The Affidavit of counsel and his Memorandum of Law appears to address only the defense of Statute of Limitations and does not submit any arguments regarding the other six affirmative defenses contained in his Answer.[2]

[2] See Memorandum of Law in Opposition to Plaintiff's Motion of Marlene Morales Mello Esq.,

His principal argument is that the 2009 action was not properly discontinued in 2013 because no Order of Discontinuance was entered. As a result, the 2009 action was not effectively withdrawn. Therefore, the new action commenced in 2018 is beyond the Statute of Limitations as it relates to the first action. He argues that material questions of fact exist as to the affirmative defenses and counterclaims based upon the Statute of Limitations. The Memorandum of Law, but not Mr. Marshall's Affidavit, asserts that once Plaintiff accelerated the entire mortgage debt, he received correspondence from various mortgage services indicating he had to pay over $200,000.00 and that such servicers would not accept his regular monthly payment. Even the Memorandum of Law, however, does not contend that he was ready, willing and able to resume the making of his monthly payments.

In reply, Plaintiff points out that Defendant failed to submit a statement admitting or disputing Plaintiff's material allegations of fact in accordance with NYCRR §202.8-g. Therefore, all of Plaintiff's allegations are deemed admitted. Counsel for Plaintiff also submits an Affirmation annexing some evidence that an order granting the Motion to Dismiss was in fact decided by Judge George Ceresia Jr. on April 16, 2013.[3]

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dated June 3, 2022.

[3] Reply Affirmation in Support of Motion for Summary Judgment of Harold L. Kofman, Esq., dated June 16, 2022.

Alternatively, case law supports the argument that the mere making of a Motion to Discontinue constitutes a revocation of the acceleration of the mortgage debt. Deutsche Bank Trust Co. Ams v. Morocho, 202 A.D.3d 1055 (2d Dept. 2022); Pennymac Corp. v. Holcomb, 198 A.D.3d 978, 980-981 (2d Dept. 2021). Several miscellaneous cases are also cited for the same proposition.

Finally, Defendant's argument that he suffered prejudice as a result of the change in acceleration has been rejected by the holding in the Engel's case cited earlier and the case cited by Defendant, Federal Mortgage Association v Mebane, 208 A.D.2d 892 (2d Dept. 1994) is a readily distinguishable decision, that has been effectively overruled by Engel.

DISCUSSION

> "An action to foreclose a mortgage is governed by a six-year statute of limitations" (*Mardenborough v U.S. Bank N.A.*, 201 AD3d 641, 643; *see* CPLR 213[4]). "'[E]ven 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'" (*Mardenborough v U.S. Bank N.A.*, 201 AD3d at 643, quoting *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963, *affd* 34 NY3d 250). However, "where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder" (*Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 32).

The question presented in this case is whether Plaintiff successfully discontinued the prior 2009 action in 2013. An examination of the records in the Columbia County Clerk's Office under the first foreclosure action reveals the filing of a Motion to Discontinue by Plaintiff's counsel, together with a submittal of a proposed Order granting the relief. Also revealed, although not mentioned by either party, is a letter of transmittal by the principal law clerk for Judge George Cersesia, Jr., dated April 8, 2013, of an original order, apparently granting the relief sought, sent to Plaintiff's lawyer. However, no record of the Order, with Notice of Entry upon the Defendant, is contained in the file.

Nevertheless, appellate authority states conclusively, that:

> "the motion to voluntarily discontinue the foreclosure action which was made less than six years after the foreclosure action was commenced, constituted an affirmative act of revocation of the acceleration of the mortgage debt as a matter of law absent evidence of an express, contemporaneous by the [mortgagee] to the contrary." Boreshesky v. U.S. Bank Trust, N.A., August 10, 2022, 2022 WL 32221644, 2022 NY Slip Op 04892 (2d Dept. 2022); Freedom Mortgage Corp. v. Engel, 37 N.Y.3d at 32; Pennymac Corp. v. Holcomb, 198 A.D.3d 978 980-981 (2d Dept. 2022); U.S. Bank National Association v. Clair, August 10, 2022, WL 322073 2022 NY Slip Op 04927 (2d Dept 2022); cf. 53 Street LLC v. U. S. Bank National Association, 2021 WL 9405234 (US Dist. Ct E.D NY Dec 20, 2021).

Defendant has abandoned all of its affirmative defenses other than its first one by failing to address them in his answering papers. Furthermore, he has not submitted a responsive paper pursuant to 22 NYCRR 202.8-g (b). However, the

Third Department has recently called into question whether the failure to do so means a court must automatically deem the facts admitted that have not been specifically controverted, as urged by the Plaintiff. Leberman as Trustee for Estate of Hathaway v. Instantwhip Foods, Inc., 207 A.D.3d 850, 851 (3d Dept. 2022). Nevertheless, in this case Plaintiff has met his burden.

> "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *see U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753–754, 890 N.Y.S.2d 578). (*see* CPLR 3211[e]; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 A.D.3d 239, 244, 837 N.Y.S.2d 247). The plaintiff established its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default *(see Archer Capital Fund, L.P. v. GEL, LLC*, 95 A.D.3d 800, 944 N.Y.S.2d 179; *Washington Mut. Bank v. Valencia*, 92 A.D.3d 774, 939 N.Y.S.2d 73).
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> The burden of a party moving for summary judgment is to "make a prima facie showing of entitlement to judgment as a matter of law" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, [1986]). The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case. Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320 (2009). Fannie Mae's showing here was adequate to shift the burden to defendant "to produce evidentiary proof ... sufficient to establish the existence of material issues of fact" (Alvarez v Prospect Hosp. *id.*).

Defendant has not carried that burden.

Plaintiff's Motion for Summary Judgment is granted. Defendant's Answer

with counterclaims is stricken. Plaintiff shall submit a proposed Order of Reference with the name of the person appointed left blank, on notice to Defendant.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry and filing by the Columbia County Clerk. Upon such entry, counsel for the Plaintiff shall promptly serve notice of entry on all other parties entitled to such notice and is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

This is the Decision and Order of this Court.

DATED: September 28, 2022
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Notice of Motion of Plaintiff for an Order of Summary Judgment and an Order of Reference, Default Judgment as to Liability and Further Relief dated April 26, 2022 (NYSCEF Doc. #7)

2. Plaintiff's Statement of Material Facts in Support of Motion for Summary Judgment, Order of Reference and Related Relief (NYSCEF Doc. #8)

3. Affidavit in Support of Motion for Summary Judgement, Order of Reference and Related Relief of A.J. Loll sworn to April 6, 2022; together with Exhibits "A" through "I" (NYSCEF Docs. # 9 through "18)

4. Affidavit of Plaintiff, Federal National Mortgage Association in Support of Motion for Summary Judgment, Order of Reference and Related Relief of Alan Bryant sworn to March 16, 2022; together with Exhibits "A" through "C" (NYSCEF Doc. #19 through 22)

5. Attorney Affirmation in Support of Motion for Summary Judgment, Order of Reference and Related Relief of Harold L. Kofman, Esq., dated April 26, 2022; together with Exhibits "A" through "K" (NYSCEF Doc. #23 through 34)

6. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and an Order of Reference of Harold L Kofman, Esq., dated April 26, 2022 (NYSCEF Doc. #35)

7. Laurence C. Marshall's Affidavit in Opposition to Plaintiff's Summary Judgment Motion and Order of reference sworn to June 3, 2022 (NYSCEF Doc. #38)

8. Attorney Affirmation in Opposition to Plaintiff's Motion for Summary Judgment and Order of Reference of Marlene Morales Melo, Esq., dated June 3, 2022; together with Exhibits "A" through "I" (NYSCEF Doc. #39 through 48)

9. Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and Order of Reference of Marlene Melo Morales, Esq., of The Legal Aid Society of Northeastern New York, Inc., sworn to June 3, 2022 (NYSCEF Doc. #49)

10. Reply Attorney Affirmation in Further Support of Motion for Summary Judgment, Order of Reference and Related Relief of Harold L Kofman, Esq., dated June 16, 2022; together with Exhibits "A" and "B" (NYSCEF Doc. #51 through 53)

9. Reply Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment and an Order of Reference of Harold L Kofman, Esq., dated June 16, 2022 (NYSCEF Doc. #54)