

Yakte Props., LLC v Rattoo

2023 NY Slip Op 30721(U)

March 6, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 600470/2020

Judge: Christopher Modelewski

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme Court

MOTION DATE 11/19/2020 (001)
ADJ DATE 04/25/2022
Mot. Seq. # 001-MD

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YAKTE PROPERTIES, LLC,,

Plaintiff,

-against-

ASTHMA ZAHEER RATTOO, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., AS NOMINEE FOR HARTFORD
FUNDING, LTD., CLERK OF THE SUFFOLK
COUNTY TRAFFIC & PARKING
VIOLATIONS AGENCY, NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE, LVNV FUNDING, LLC,

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.

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Upon the E-file document list numbered 31 to 44 and 48 to 57 read and considered on the application by defendant Asthma Zaheer Rattoo for an order pursuant to CPLR 3211 (a)(10) and 3211 (a)(7) dismissing the action as against defendant and pursuant to CPLR 213 (6) due to the expiration of the statute of limitations on the second cause of action; it is

ORDERED that the motion by defendant Asthma Zaheer Rattoo for an order pursuant to CPLR 3211 (a)(10) and 3211 (a)(7) dismissing the foreclosure action as against defendant and dismissing the second cause of action for reformation of the mortgage pursuant to CPLR 213 (6) due to the expiration of the statute of limitations, is denied for the reasons set forth herein.

This is an action to foreclose a mortgage on real property located in Suffolk County, New York. Plaintiff commenced this action by the filing of a summons and complaint on January 8, 2020 and on February 28, 2020 the complaint was amended ("the complaint"). Issue was joined by defendant Asthma

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Zaheer Rattoo (“defendant”). This matter was released from the foreclosure settlement part on September 10, 2020. Defendant now moves to dismiss the complaint as against her and to dismiss the second cause of action for reformation of the mortgage on the ground that the statute of limitations has expired. As to the foreclosure cause of action, defendant alleges that the original borrower on the note and mortgage, who no longer holds any interest in the subject property, should be named as a defendant and plaintiff’s failure to do so warrants dismissal of this action. Defendant further asserts that the complaint fails to state a cause of action. Plaintiff opposes the motion and defendant replies.

Inasmuch as the original borrower, Hajnalka K. Klein, (“borrower”), transferred all of her interest in the subject property to defendant by deed executed on August 18, 2017 and recorded with the Suffolk County Clerk on October 5, 2017 under Liber 12932 at page 676, borrower is not a necessary party defendant (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 101 NYS3d 363 [2d Dept 2019] citing RPAPL 1311). Defendant acquired the subject property prior to the commencement of this foreclosure action and thus took ownership subject to the plaintiff’s mortgage interest in the subject property. For that reason defendant, not borrower, is a necessary party to this foreclosure action (RPAPL 1311).

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; *see also Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is “ ‘whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments’ ” (*Hampshire Prop. v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; *see also (JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [its] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11,19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; *see also DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]).

Here, the complaint alleges there is a recorded mortgage against the subject property, that there is an unpaid note, and that there was a default under the terms of the mortgage following a failure to pay. As such, the complaint states a cause of action in foreclosure (*see HSBC Bank USA, N.A. v Bhatti*, 186 AD3d 817, 130 NYS3d 474[2d Dept 2020]; *KeyBank N.A. v Barrett*, 178 AD3d 800, 114 NYS3d 451 [2d Dept 2019]).

The statute of limitations on a claim to reform a recorded instrument based upon mistake is six years and applies to scrivener’s errors (*see Federal Deposit Ins. Corp. v Five Star Mgmt., Inc.*, 258 AD2d 15, 20, 692 NYS2d 69 [1st Dept 1999]). Notwithstanding, plaintiff would still be entitled to foreclose on the subject property to enforce its mortgage despite the scrivener’s error, as equity would

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impress an equitable lien in plaintiff's favor upon proof that there was an express or implied agreement that there should be a lien on the subject property (*id.* at 21, 692 NYS2d at 73; *see also U.S. Bank N.A. v Alleyne*, 187 AD3d 1236, 131 NYS3d 223 [2d Dept 2020]; *see generally Caridi v Tanico*, 188 AD3d 636, 135 NYS3d 121 [2d Dept 2020]; *Bank of N.Y. Mellon v George*, 186 AD3d 661, 127 NYS3d 310 [2d Dept 2020]; *U.S. Bank Natl. Assn. v Losner*, 145 AD3d 935, 937, 44 NYS3d 467 [2d Dept 2016]; *LNV Corp. v Forbes*, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]). Thus, the Court invokes its equitable powers in denying this branch of defendant's application (*see U.S. Bank N.A. v Alleyne, supra; Federal Deposit Ins. Corp. v Five Star Mgmt., Inc., supra*).

Accordingly, the motion by defendant to dismiss the complaint is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: March 6, 2023



HON. CHRISTOPHER MODELLEWSKI, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION