US Bank Trust, N.A. v Green-Stevenson
2023 NY Slip Op 31803(U)
May 16, 2023
Supreme Court, Kings County
Docket Number: Index No. 523542/17
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 Civic Center, Brooklyn, New York, on the 25th day of May, 2022.

PRESENT:

HON. CENCERIA P. EDWARDS,
Justice.

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US BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

- against -

Index No. 523542/17

Motion Sequence: 9, 10, 11 & 12

DELOISE GREEN-STEVENSON, ANTHONY STEVENSON III, NANCY T. SUNSHINE COMMISSIONER OF JURORS, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, ADVANTA BANK CORP., MIDLAND FUNDING LLC D/B/A IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC, WORKERS COMPENSATION BOARD OF NY STATE, and "JOHN DOE #1" through "JOHN DOE #10," the last 10 names being fictitious and Unknown to the Plaintiff, the persons or parties Intended being the persons or parties, if any, having Or claiming an interest in or lien upon the mortgaged Premises described in the verified complaint,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	212-214, 216-233 235-236 238-242 257-258, 260-293, 308 310-334, 338-366, 370-375
Opposing Affidavits (Affirmations)	235-236, 245-254, 296-305, 377-386

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1534 Eastern Parkway in Brooklyn (Block 1471, Lot 76) (Property),

plaintiff U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (US Bank Trust) moves (in motion sequence [mot. seq.] nine) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) striking the answer of pro-se defendants Deloise Green-Stevenson and Anthony Stevenson III (Stevenson Defendants); and (3) granting it an order of reference to compute the amount due to it, pursuant to RPAPL § 1321.

The Stevenson Defendants, self-represented litigants, cross-move (in mot. seq. 10) for an order: (1) granting them summary judgment dismissing the complaint based on the statute of limitations, lack of subject matter jurisdiction, lack of standing, among other grounds, pursuant to CPLR 3212; (2) dismissing all claims asserted against them, pursuant to CPLR 3211 (a) (1);[1] (3) cancelling the notice of pendency filed against the Property; and (4) awarding them sanctions and fees because plaintiff allegedly "submitted fraudulent commencement documents . . . to the Court" (NYSCEF Doc No. 235).

The Stevenson Defendants also move (in mot. seq. 11) for an order: (1) dismissing all causes of action asserted against them based on the statute of limitations, pursuant to CPLR 212 and 213 (4), and/or (2) dismissing all causes of action asserted against them with prejudice, pursuant to CPLR 3211 (a) (1); and/or, alternatively, (3) scheduling a "trial" of the issue of whether plaintiff and/or its agent(s) are barred by the statute of limitations, pursuant to CPLR 2218; and/or (4) awarding sanctions and attorneys' fees and/or administrative fees to them (*see* NYSCEF Doc No. 238).

[1] Since issue was joined years prior to the Stevenson Defendants' cross motion and motions, those branches of mot. seq. 10, 11 and 12 seeking dismissal of all claims, pursuant to CPLR 3211 (a), are, in effect, additional requests for summary judgment.

The Stevenson Defendants, once again, move (in mot. seq. 12) for an order: (1) striking scandalous or prejudicial matter in the complaint, pursuant to CPLR 3024 (b); (2) excluding "evidence" of any conduct or statement made during "compromise negotiations," pursuant to CPLR 4547; and/or (3) dismissing plaintiff's claims based on the statute of limitations; and/or (4) dismissing all causes of action asserted against them with prejudice, pursuant to CPLR 3211 (a) (1); and/or, alternatively, (5) directing a "trial" of the issue of whether plaintiff and/or its agent(s) foreclosure claims are barred by the statute of limitations, pursuant to CPLR 2218; and/or (6) awarding them sanctions and attorneys' fees and/or administrative fees because plaintiffs' "claims are without fact or law as they served and filed barred documents in Court . . ." (NYSCEF Doc No. 257).

Background

On December 7, 2017, US Bank Trust commenced this foreclosure action against the Stevenson Defendants by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on or about April 19, 2007 defendant Deloise Green-Stevenson executed a promissory note in the principal amount of $570,400.00 in favor of Quicken Loans, Inc. (Quicken), which was secured by a mortgage on the Stevenson Defendants' residential Property (NYSCEF Doc No. 1 at ¶¶ 3-4). The complaint further alleges that the Stevenson Defendants defaulted under the mortgage by failing to pay the monthly installment that came due and payable as of March 1, 2012 and that interest is due from February 1, 2012 (*id.* at ¶¶ 7 and 11).

The complaint alleges that "Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal" (*id.* at ¶ 10). However, the complaint also alleges that there was a prior 2009 foreclosure action, which US Bank Trust claims to have discontinued:

> "That no other action has been commenced at law or otherwise for the recovery of the sum or any part thereof secured by said instrument[s] [other than] by filing summons and complaint in the Office of the City Register of the City of New York, County of Kings, on June 15, 2009, bearing Index #14823/2009. Plaintiff has discontinued said action" (*id.* at ¶ 14).

On January 17, 2018, the Stevenson Defendants e-filed a pro se answer to the complaint in which they deny the material allegations therein and asserted affirmative defenses, including the statute of limitations (NYSCEF Doc No. 18).

The Stevenson Defendants' Prior Motions

On January 22, 2018, five days after answering the complaint, the Stevenson Defendants moved for an order canceling the notice of pendency filed against the Property (NYSCEF Doc No. 20). Thereafter, the Stevenson Defendants e-filed five additional motions seeking to dismiss the complaint for lack of standing and based on the successive notices of pendency filed against the Property, a default judgment on the counterclaims asserted in their proposed third amended answer and leave to serve a fourth amended answer, pursuant to CPLR 3025 (b) (*see* NYSCEF Doc Nos. 33, 34, 36, 47, 58, 71, 79, 90 and 117).

The Stevenson Defendants subsequently moved (in mot. seq. seven) to dismiss the complaint as time-barred based on the six-year statute of limitations, amongst other things

(NYSCEF Doc No. 138). The Stevenson Defendants also moved (in mot. seq. eight), pursuant to CPLR 3124, to compel discovery (NYSCEF Doc Nos. 126 and 132).

By a December 5, 2018 decision and order, the court (Dear, J.) denied the Stevenson Defendants' motions to dismiss the complaint (mot. seq. one and three) based on a lack of standing and improper notices of pendency (NYSCEF Doc No. 158). By a January 23, 2019 decision and order, the court (Dear, J.) denied the Stevenson Defendants' dismissal motions (mot. seq. two, four, five and six), which sought dismissal of the complaint based on improper notices of pendency and leave to amend their answer (NYSCEF Doc No. 199). By a May 14, 2019 decision and order, the court (Dear, J.) denied the Stevenson Defendants' subsequent dismissal motions (mot. seq. seven and eight) and held that:

> "This Court's prior decisions have already addressed and rejected Defendants' arguments regarding the notice of pendency. Defendants ha[v]e not shown that Plaintiff failed to comply with RPAPL 1304 which requires sending the notices only to obligors under the note. While the prior action was commenced more than six years prior to the instant case, *Defendants admit that they received a timely 'de-acceleration' letter [dated June 12, 2015] and, while they question its efficacy, it suffices to raise an issue of fact as to the timeliness of this action*" (NYSCEF Doc No. 210 [emphasis added]).

The Stevenson Defendants appealed the foregoing decisions and orders to the Appellate Division, Second Department.

By a September 14, 2022 decision and order (208 AD3d 1205 [2022]), the Second Department affirmed the denial of the Stevenson Defendants' motions, including their seventh motion seeking dismissal based on the statute of limitations on different grounds. Specifically, the Second Department held that:

> "In an order dated May 14, 2019, the Supreme Court denied the seventh and eighth motions, finding, among other things, that triable issues of fact existed as to whether the action was time-barred. The defendants appeal from so much of the order dated May 14, 2019, as denied that branch of the seventh motion which was, in effect, for summary judgment dismissing the complaint insofar as asserted against them. We affirm, albeit on a ground different from that relied upon by the Supreme Court.
>
> "'Successive motions for summary judgment *should not be entertained* in the absence of good cause, such as a showing of newly discovered evidence . . .
>
> "Here, the defendants' prior motion denominated as one to dismiss the complaint insofar as asserted against them for lack of standing, which was made after issue was joined, was, in effect, a motion for summary judgment dismissing the complaint insofar as asserted against them. The seventh motion, denominated as one, inter alia, to dismiss the complaint insofar as asserted against the defendants on the ground, among other things, that the action was time barred, was also, in effect, a motion, inter alia, for summary judgment dismissing the complaint insofar as asserted against them. *Since the defendants made no showing of newly discovered evidence or other sufficient cause, the subject branch of the seventh motion should have been denied as an improper successive summary judgment motion* (*see Wells Fargo Bank, NA v Carpenter*, 189 AD3d 1124, 1125-1126)" (NYSCEF Doc No. 388 [emphasis added]).

US Bank Trust's Instant Summary Judgment Motion

Meanwhile, on January 10, 2020, US Bank Trust filed the instant motion for summary judgment, an order of reference and to strike the Stevenson Defendants' answer (NYSCEF Doc No. 212).

US Bank Trust submitted a fact affidavit from Kolette Modlin (Modlin) of Caliber Home Loans, Inc. (Caliber) as "attorney-in-fact" for US Bank Trust and servicer of the

subject loan based on her review of Caliber's unidentified "business records" regarding the Stevenson Defendants' loan (NYSCEF Doc No. 225 at ¶¶ 1-3). Without referencing any particular business records, Modlin attests that "Defendant(s) Deloise Green-Stevenson and Anthony Stevenson III, breached the obligations owed under the terms of the Note and Mortgage by failing to tender the installment which became due and payable on March 1, 2012 and by failing to tender subsequent installments" (*id.* at ¶ 10). Modlin further attests that "[t]here is presently due and owing to Plaintiff the sum of $570,400.00, together with interest thereon from February 1, 2012" (*id.* at ¶ 17).

US Bank Trust's counsel claims that plaintiff has made a prima facie showing of its right to summary judgment and an order of reference based on Modlin's fact affidavit, the exhibits submitted, including a June 12, 2015 deacceleration letter from Scott Reel, Esq. of Kozeny, McCubbin & Katz, LLP, attorney for Bank of America, N.A., the then mortgage servicer for Countrywide (US Bank Trust's predecessor), and plaintiff's memorandum of law (*see* NYSCEF Doc No. 214 at ¶ 16 and NYSCEF Doc No. 229). Plaintiff's counsel submits an affirmation making the conclusory assertion that "[t]he Plaintiff revoked the prior acceleration of the debt [in June 2009] within the six-year statute of limitation period. The letter revoking the acceleration [is] annexed hereto as Exhibit M" (NYSCEF Doc No. 214 at ¶ 22 and NYSCEF Doc No. 229).

Without providing any foundation whatsoever, and without any personal knowledge, US Bank Trust's counsel submits a copy of US Bank Trust's predecessor's counsel's June 12, 2015 deacceleration letter as Exhibit M, which states that it was mailed

to the Stevenson Defendants by First Class and Certified Mail, yet is submitted without any affidavit of service upon the Stevenson Defendants (NYSCEF Doc No. 229). The June 12, 2015 deacceleration letter in the record states that:

> "Bank of America, NA, the mortgage servicer for the above referenced account has decided to rescind the prior acceleration of the mortgage. We are sending this letter on behalf of the servicer, Bank of America, NA.
>
> "As you know, a Complaint for an Action to Foreclosure a Mortgage was filed against you in connection with the property referred to above. As a result of the commencement of the action, the plaintiff exercised its right to 'immediate payment in full,' and the entire amount owed pursuant to the mortgage, was accelerated in full and became due and payable. That complaint has been dismissed/ discontinued and the acceleration of the indebtedness referred to in the Complaint is hereby rescinded. Although the mortgage debt is no longer accelerated, the account remains severely delinquent.
>
> "**We are hereby writing to notify all parties that the Plaintiff is hereby revoking the aforementioned acceleration of the debt, effective immediately**" (*id.*).

The Stevenson Defendants' Cross Motion and Motions

The Stevenson Defendants oppose US Bank Trust's summary judgment motion and cross-move (in mot. seq. 10) for summary judgment dismissing the complaint based on the statute of limitations (which the Stevenson Defendants assert is under appellate review) and lack of standing. Thereafter, the Stevenson Defendants filed two more dismissal motions (mot. seq. 11 and 12), both of which are supported by jointly executed fact affidavits in support of dismissal and both seek a "trial" regarding the timeliness of this action and the efficacy of the June 12, 2015 deacceleration letter.

Discussion

(1)

US Bank Trust's Motion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower's payment default (*Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta,* 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). "A

plaintiff may establish a payment default by an admission made in response to a notice to admit (*see* CPLR 3212[b]; 3123), by an affidavit from a person having personal knowledge of the facts (CPLR 3212[b]), or by other evidence in admissible form" (*Bank of New York Mellon v Mannino*, 209 AD3d 707, 708 [2022] [internal citations omitted] [holding that plaintiff failed to establish defendant's payment default and strict compliance with RPAPL 1304 by submitting an affidavit of a servicer based only on the servicer's review of unspecified business records]).

Here, US Bank Trust is not entitled to summary judgment or an order of reference because it failed to tender sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact. Indeed, the allegation in the complaint regarding the June 15, 2009 commencement of the prior foreclosure action and the June 12, 2015 deacceleration letter in the record raise issues of fact regarding the timeliness of this action and the efficacy of the June 2015 deacceleration by former counsel of a former servicer of the loan.

US Bank Trust admits that the loan was previously accelerated by its predecessor in June 2009 with the commencement of the 2009 Foreclosure Action, but claims that acceleration was timely revoked by a June 12, 2015 deacceleration letter from a prior servicer's former litigation counsel without submitting any proof of service of the June 2015 deacceleration letter upon the Stevenson Defendants, proof of the date of the purported service upon the Stevenson Defendants and proof that such service was made in accordance with the notice requirements under the subject mortgage. Even if US Bank

Trust had submitted proof of service and appropriate fact affidavits from those with personal knowledge of the deacceleration, the timing of the June 12, 2015 deacceleration letter – within days of the six-year anniversary of the commencement of the 2009 foreclosure action – warrants additional scrutiny. "Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations . . ." (*Milone v US Bank Nat'l Ass'n*, 164 AD3d 145, 154 [2018]).

US Bank Trust has also failed to demonstrate its prima facie entitlement to foreclose based on the fact affidavit of Modlin, a Caliber agent, who attests that her affidavit is based on her review of Caliber's business records yet fails to identify or submit any business records evidencing the Stevenson Defendants' alleged payment default. While Modlin attests that "Defendant(s) Deloise Green-Stevenson and Anthony Stevenson III, breached the obligations owed under the terms of the Note and Mortgage by failing to tender the installment which became due and payable on March 1, 2012 and by failing to tender subsequent installments" (NYSCEF Doc No. 225 at ¶ 10), that sworn statement, standing alone, is inadmissible hearsay, without submission of the business records upon which Modlin's knowledge is admittedly based (*see Bank of New York Mellon v Mannino*, 209 AD3d at 708).

For the foregoing reasons, US Bank Trust's motion is denied without prejudice and with leave to renew upon proper papers with admissible evidence after the conclusion of a framed-issue hearing regarding the timeliness of this action and the efficacy of the June 12,

2015 deacceleration letter, which may dispose of this potentially untimely action if US Bank Trust cannot substantiate the proper and timely deacceleration of the loan with admissible proof.

(2)

The Stevenson Defendants' Cross Motion and Motions

The Stevenson Defendants cross-move in mot. seq. 10 for summary judgment dismissing the complaint based on the statute of limitations, plaintiff's lack of standing and other grounds that are identical to their previous, successive summary judgment motion (mot. seq. seven), the denial of which was affirmed by the Second Department because it "should not [have] be[en] entertained in the absence of good cause, such as a showing of newly discovered evidence" (*U.S. Bank Trust, N.A. v Green-Stevenson*, 208 AD3d 1205, 1206 [2022]). Because the Stevenson Defendants, once again, made no showing of newly discovered evidence or other sufficient good cause, their summary judgment cross motion (mot. seq. 10) is denied as another improper, successive summary judgment cross motion.

The Stevenson Defendants also redundantly move in mot. seq. 11 and 12 for an order dismissing all causes of action asserted against them based on the statute of limitations or, alternatively, directing a "trial" of the factual issue of whether plaintiff's foreclosure claims are barred by the statute of limitations, pursuant to CPLR 2218 (NYSCEF Doc Nos. 238 and 257). These motions, however, seek the same relief as mot. seq. 10, and, in effect, are also improper successive summary judgment motions seeking

dismissal based on the statute of limitations without newly discovered evidence that this action is time-barred.

In mot. seq. 11, the Stevenson Defendants' request a framed-issue hearing regarding the timeliness of this action based on their joint affidavit testimony that they were not given actual notice of plaintiff's 2015 deacceleration of the debt (NYSCEF Doc No. 258 at ¶ 25) and that plaintiff's "attempted revocation was not clear and unequivocal" because plaintiff's June 12, 2015 deacceleration letter uses "buzz words" which:

> "may appear at first blush to be clear and unequivocal, but when the entire contents of the letter are read, a very different message is being sent that is not inconsistent with the Plaintiff[']s intention to continue to insist on immediate payment of the entire debt" (*id.* at ¶ 26).

The Stevenson Defendants further argue that paragraph 11 of the complaint specifically alleges that interest runs from the date of their alleged payment default, February 1, 2012, which is inconsistent with plaintiff's June 12, 2015, deacceleration letter (*id.* at ¶ 27). However, the Stevenson Defendants previously made those identical arguments regarding the expiration of the statute of limitations and the efficacy of a June 12, 2015 deacceleration letter in their joint affidavit submitted in support of mot. seq. seven, the Stevenson Defendants' prior, improper successive summary judgment motion, and thus, it is not newly discovered (*see* NYSCEF Doc No. 160 at ¶¶ 41, 46, 53 and 56).

The Stevenson Defendants will have ample opportunity to raise these arguments and present evidence at a framed-issue hearing regarding the statute of limitations issues raised by US Bank Trust's own summary judgment motion. Accordingly, it is

ORDERED that US Bank Trust's motion (mot. seq. nine) is denied without prejudice and with leave to renew based on proper papers with admissible evidence after the parties appear for a framed-issue hearing as to whether this action is time-barred; and it is further

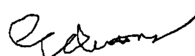
ORDERED that the parties shall appear before referee Helene E. Blank, 387 New Lots Ave, Brooklyn, NY 11207 (718) 498-3333 HBlank @blankstar.net on or before Aug. 31, 2023 at a date & time TBD by the referee for a framed-issue hearing regarding the timeliness of this foreclosure action and the efficacy of the June 12, 2015 deacceleration letter; and it is further

ORDERED that the Stevenson Defendants' summary judgement cross motion (mot. seq. 10) and summary judgment motions (mot. seq. 11 and 12) are denied as improper successive summary judgment cross motion and motions.

This constitutes the decision and order of the court.

E N T E R,

May 16, 2023



J. S. C.
S.C.J. Cenceria P. Edwards

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