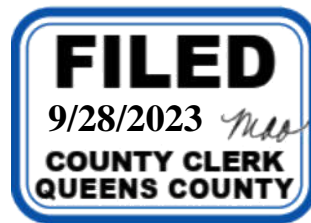


Bank of N.Y. Mellon Trust Co., N.A. v Huerta
2023 NY Slip Op 33862(U)
September 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 708034/2023
Judge: Kevin J. Kerrigan
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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10 Justice

The Bank of New York Mellon Trust Company, N.A., FKA The Bank of New York Trust Company, N.A., as trustee in trust for the benefit of the Certificateholders of Multi-Class Mortgage Pass-Through Certificates, Chaseflex Trust Series, 2007-M1,

Plaintiff,

- against -

Motion Date: 9/25/23

Octavio Huerta, Altagracia Huerta, et.al.,

Defendants.

Motion Seq. No.: 1

Application by Plaintiff for summary judgment, an order of reference and amendment of the caption is granted. Cross-motion by Defendants, Octavio Huerta, Altagracia Huerta, for an order to dismiss is denied.

In this foreclosure action, Defendant Octavia Huerta executed an interest only period adjustable rate to First Meridian bank in the amount of \$6000,000 on April 24, 2007. Thereafter, the mortgage was transferred two times, most recently to Plaintiff on September 15, 2014. Two prior foreclosure actions were commenced on the same mortgage, one in 2009, and one in 2017. Plaintiff's voluntarily discontinued the 2009 action. The 2017 action was dismissed for failure to properly comply with RPAPL Section 1304. Plaintiff commenced this action on August 21, 2023, pursuant to CPLR 205(a).

Allegations of Untimeliness

Defendants initially contend that the action must be dismissed, as the 2017 action was untimely and thus, the instant action is similarly untimely. The Court finds that the instant action is timely under two theories: 1) the parties stipulated to timeliness in the 2017 action and 2) Foreclosure Abuse Prevention Act (FAPA) does not apply retroactively.

First, the parties entered into a stipulation dated June 20, 2019 in the 2017 action where the parties agreed, inter alia, to

the timeliness of that action and waived any defense or claim alleging a violation of the statute of limitations. Thus, the 2017 action was deemed timely. The 2017 action was subsequently dismissed by the Honorable Allan B. Weiss by order issued April 13, 2022. Plaintiffs recommenced the action pursuant to CPLR 205-a on April 18, 2023.

In the 2017 action, Judge Weiss dismissed the case for Plaintiff's failure to comply with RPAPL Section 1304. Plaintiffs appealed the decision. The appeal was eventually dismissed for failure to perfect on November 12, 2022. Consequently, the action was not terminated for any of the reasons listed under CPLR 205-a or CPLR 205(a) and it was appropriate for Plaintiff to recommence the action within six months from the Appellate Division, Second Department's November 12, 2022 dismissal. Indeed, an appeal acts as a stall for the purposes of "termination" under CPLR 205(a) and CPLR 205-a (see U.S. Bank N.A. v. Coleman, 215 A.D.3d 780 [2d Dept. 2023]; Malay v. City of Syracuse, 25 N.Y.3d 323 [2015]). Therefore, the six month deadline ran from the dismissal of the appeal rather than Judge Weiss' dismissal.

Even without considering the stipulation signed by the parties in the 2017 action, the action is nonetheless timely, as FAPA does not apply retroactively.

On December 30, 2022, Governor Kathy Hochul signed FAPA into law. Per movant, the law was a direct response to the Court of Appeals decision in Freedom Mortg. Corp. V. Engel, which seemingly permitted lenders to restart foreclosure actions after the statute of limitations expired (see Freedom Mortg. Corp. V. Engel, 37 N.Y.926 [2021]). After its passage, the legislature amended and codified various statutes. CPLR 205-a was created and is entitled "termination of certain actions related to real property", and which is more stringent than CPLR 205(a). CPLR 203, entitled "method of computing periods of limitation generally," was modified to add (h). RPAPL 1301, entitled "separate action for mortgage debt" was modified to add (4). The most significant of the forgoing modifications is the newly promulgated CPLR 205-a, which provides that lenders may only take advantage of the "saving statute" if the matter was terminated in any manner *other than*: voluntarily discontinue the action, failure to obtain personal jurisdiction over the defendant, dismissal for any form of neglect including for violation of court rules or individual part rules, failure to comply with scheduling orders, by default due to nonappearance for conference or at calendar call, failure to submit an order or judgment, or upon a final judgment upon the merits. If a foreclosure action is dismissed for any of the

forgoing reasons, CPLR 205-a cannot be used to revive it and extend the limitations period.

Here, it appears Defendants contend, albeit not with specificity, that retroactive application of FAPA would render the instant action untimely. Indeed, if FAPA was given retroactive application, the voluntarily discontinuance in the 2009 action would act to bar the instant action. In contrast, prior to FAPA, a voluntary discontinuance by a Plaintiff within the statute of limitations could have operated to extend the statute of limitations (see Freedom Mtge. Corp. V. Engel, 37 N.Y.3d 1 [2021]; rev'd Bank of Am., N.A. v. Kessler, 39 N.Y.3d 317 [2023]).

Section 10 of FAPA provides that the act "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (see Foreclosure Abuse Prevention Act §10). The issue of whether §10 should be applied retroactively has not yet been heard by the Court of Appeals or any of the Appellate Divisions. However, several Supreme Courts across the State have heard the issue and found the answer to be no (see Wilmington Sav. Fund Socy., FSB v. Hack, 2023 NY Slip Op 31524[U] [Queens Cty., 2023]; U.S. Bank Trust, N.A. v. Leonardo, 2023 N.Y. Misc. LEXIS 2871 [Nassau Cty. 2023]; see United States Bank Trust NA v. Miele, 2023 NYLJ LEXIS 1580 [Westchester Cty. 2023]; see HSBC Bank United State NA v. Besharat, 2023 NYLJ LEXIS 1254 [Putnam Cty. 2023]). This Court agrees, in that permitting retroactive application would destroy rights already accrued by the Plaintiff (see HSBC Bank United State NA, 2023 NYLJ LEXIS 1254).

Accordingly, the Court finds that the instant action is timely.

Entitlement to Summary Judgment

To establish a prima facie entitlement to foreclose on a mortgage, the plaintiff must demonstrate the existence of the mortgage and note, ownership of the mortgage and the defendant's default in payment (see Campaign v. Barbra, 23 AD3d 327 [2d Dept. 2005]). Plaintiff has shown proof, in admissible form, that the Defendants Huerta were in default in payment of the subject mortgage, that they breached the agreement by failing to make timely payments in accordance with said agreement and that they failed to tender an amount sufficient to cure the default.

Defendants solely argue that Plaintiff is not entitled to summary judgment because: a) the action is time barred, and b) because Plaintiff lacks standing to foreclose on the subject property, there being no evidence that the allonges were firmly affixed to the note prior to commencement of the action.

Plaintiff submits three affidavits in support of the motion. The first affidavit is from Laura Lynn Dyson, the Document Control officer from Select Portfolio Servicing, Inc. ("SPS"), the servicer and attorney-in-fact for the Plaintiff. The second affidavit is from Karla Baxter, the Vice President of Document Execution of JP Morgan Chase Bank, the immediate predecessor in interest of the mortgage. The third affidavit is from Charles Miller, counsel for the Plaintiff.

A mortgage, being merely security for a loan debt, has no independent existence apart from the underlying debt, which consists of the note, and therefore, the mortgage passes as an incident to the note and a transfer of the note alone suffices to establish standing (see Bank of NY v Silverberg, 86 A.D.3d 274 [2d Dept. 2011]). It is well established that a mortgage debt may be transferred either by a written assignment of the note or by physical delivery of the note prior to commencement of the foreclosure action (see Deutsche Bank National Trust Co. v Spanos, 102 A.D.3d 909 [2d Dept. 2013]). Since the evidence on this record is that Plaintiff acquired physical possession of the original note on August 15, 2014, it has established its standing by showing uncontroverted proof that it was in physical possession of the note prior to the commencement of this action on April 18, 2023.

Dyson's affidavit includes the ultimate assignment to Plaintiff, dated August 15, 2014. The language contained therein is sufficient to establish that the note, and the allonges, were assigned along with the mortgage (see Matter of Stralem, 303 A.D.2d 120 [2d Dept 2003]). Thus, the assignments reflect that both the ownership of the debt (the note) and the security for it (the mortgage) were transferred to Plaintiff prior to the commencement of this action. Therefore, Plaintiff has demonstrated its standing to maintain this foreclosure action by proffering evidence that it was the assignee of the note and the mortgage at the time the action was commenced (see Bank of New York v Silverberg, 86 A.D.3d 274 [2d Dept. 2011]).

The allegation that the affiants have no power to make the representations included in their affidavits is without merit. The power of attorney annexed to Dyson's affidavit establishes that

SPS has limited power of attorney to act on behalf of Plaintiff. Defendants' argument that the power of attorney expires after a year, and is therefore somehow inadmissible or ineffective, is similarly without merit. The most recently executed limited power of attorney is dated February 1, 2023 and is effective for one year, or up until February 1, 2024.

Defendants' remaining contentions regarding the contents of the affidavits annexed to Plaintiff's motion are without merit.

Accordingly, the motion is granted.

Settle order.

Dated: September 28, 2023



KEVIN J. KERRIGAN, J.S.C.

