

Gross v MTGLQ Invs., L.P.

2023 NY Slip Op 34196(U)

December 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 506050/2019

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 4th day of December 2023

HONORABLE FRANCOIS A. RIVERA
-----X
YEHUDA GROSS,

Plaintiff,

DECISION & ORDER
Index No.: 506050/2019

- against -

MTGLQ INVESTORS, L.P.
-----X
Defendants.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on September 29, 2022, under motion sequence six, by plaintiff Yehuda Gross for an order pursuant to CPLR 3212 awarding summary judgment in the plaintiff's favor on the issue of liability. Defendant MTGLQ Investors, L.P. opposes this motion.

- Notice of Motion
- Affirmation of Plaintiff
- Additional Affirmation of Plaintiff
 - Exhibit A-K
- Affirmation in opposition
 - Exhibit A
- Affidavit in Opposition
- Additional Affidavit in Opposition
- Affirmation in Reply

BACKGROUND

On March 20, 2019, plaintiff Yehuda Gross (hereinafter plaintiff) commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office. The instant action seeks cancellation and discharge of a mortgage recorded

against a certain real property located in Brooklyn, New York (hereinafter the subject property). On May 14, 2019, defendant MTGLQ Investors, L.P. (hereinafter defendant) joined issue by interposing and filing a verified answer.

The verified complaint alleges the following salient facts. The plaintiff is the fee owner of the subject property having acquired it by deed dated July 29, 2003. The plaintiff has remained the fee owner through the present date. On July 29, 2003, the plaintiff executed a mortgage on the subject property in favor of ABN AMRO Mortgage Group, Inc. in the principal sum of \$320,000.00. This mortgage was recorded on November 17, 2003 (hereinafter the subject mortgage). The subject mortgage was then assigned to the defendant by an instrument dated February 1, 2016.

On February 4, 2013, CitiMortgage, Inc., as successor by merger to ABN AMRO Mortgage Group, Inc., commenced a foreclosure action, under Index Number 2138/2013, seeking to foreclose on the subject mortgage (hereinafter the Citi Mortgage Action). The complaint in the Citi Mortgage Action accelerated payments under the subject mortgage, demanding payment of the entire principal balance and interest due on the mortgage. On April 9, 2018, by order of the court, the Citi Mortgage Action action was dismissed, and the notice of pendency was canceled. The plaintiff alleges that more than six years have since the commencement of the Citi Mortgage Action in February 2013. The plaintiff further contends that the statute of limitations to foreclose on the subject mortgage has lapsed. At no time did the plaintiff reaffirm any debt owed on the subject mortgage. The plaintiff alleges entitlement to a judgment, pursuant to RPAPL 1501(4) that the subject

mortgage be canceled and discharged and that the New York City Register be directed to cancel and discharge the subject mortgage of record.

Procedural History

By motion filed on November 27, 2019, under motion sequence one, the plaintiff sought, among other things, an order pursuant to CPLR 3212 awarding summary judgment in the plaintiff's favor on the issue of liability.

By cross motion filed on December 17, 2019, under motion sequence two, the defendant sought, among other things, an order pursuant to CPLR 3212 awarding summary judgment in the defendant's favor on the issue of liability and dismissal of the complaint. This cross motion also served as opposition to the plaintiff's motion under sequence number one.

By decision and order dated November 16, 2020, the Court denied both the plaintiff's motion under sequence number one and the defendant's cross motion under sequence number two. The Court specifically found that there were triable issues of fact as to whether the payments allegedly made by the plaintiff on January 19, 2015, February 17, 2015, March 6, 2015, and June 10, 2015, served as an acknowledgment of the debt sufficient to re-set the statute of limitations (*Wells Fargo Bank, N.A. v Grover*, 165 AD3d 1541 [3rd Dept 2018]).

By motion filed on October 20, 2021, under motion sequence three, plaintiff Yehuda Gross sought an order: (1) pursuant to CPLR 2221 granting leave to reargue the Decision & Order of this Court dated November 16, 2020, which denied the plaintiff's motion for summary judgment under motion sequence number one and the defendant's

cross motion for summary judgment under motion sequence number two, and (2) upon re-argument, granting the plaintiff's motion for summary judgment in plaintiff's favor of plaintiff on the issue of liability. The defendant opposed the plaintiff's motion for re-argument under sequence number three.

By decision and order dated March 24, 2022, the Court granted the plaintiff leave to reargue, and, upon the granting of leave to reargue adhered to its initial determination denying the plaintiff's motion for summary judgment and the defendant's cross motion for summary judgment as set forth in the Court's decision and order dated November 16, 2020. The Court once again found that there existed a material issue of fact as to the surrounding circumstances of the payments allegedly made by the plaintiff on January 19, 2015, February 17, 2015, March 6, 2015, April 28, 2015, and June 10, 2015, and whether or not they served as an acknowledgment of debt sufficient to re-set the Statute of Limitations (*see HSBC Bank USA, N.A. v Macaulay*, 187 AD3d 721, 723 [2d Dept 2020]). The Court also disagreed with the plaintiff's contention that the case of (*Nationstar Mortg., LLC v Dorsin*, 180 AD3d 1054, 1056 [2d Dept 2020]) required a different result, as under the holding in *Macaulay* the intent of the payments made and the question of the re-acknowledgement of debt may be inferred by the intent of the parties making the payments.

LAW AND APPLICATION

Under RPAPL 1501(4), a person with an estate or interest in real property subject to an encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of

limitations for commencing a foreclosure action has expired (*Berger 3234 Holdings, LLC v. RCS Recovery Servs., LLC*, 219 AD3d 1295 [2d Dept 2023]).

The plaintiff's instant motion is a successive summary judgment motion. Such a motion should not be entertained in the absence of good cause, such as a showing of newly discovered evidence (*Deutsche Bank Natl. Trust Co. v Elshiekh*, 179 AD3d 1017, 1020 [2d Dept 2020]). Here, the plaintiff failed to present good cause.

Furthermore, the plaintiff's motion did not fit within the narrow exception to the successive summary judgment rule (*Kornblum v Blank Rome Tenzer Greenblatt, LLP*, 39 AD3d 482, 483 [2d Dept 2007]), which permits entertainment of a successive motion when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts (*Aurora Loan Servs., LLC v Yogev*, 194 AD3d 996, 997 [2d Dept 2021]). Here, entertaining a third summary judgment motion involves the review of multiple disputed issues, including whether the plaintiff re-set the statute of limitations by making multiple payments.

The plaintiff contends that the new evidence is the fact that the defendant has not yet attempted to foreclose on the debt and more than six years have passed since the last payment of June 10, 2015. In opposition, the defendants contend that the re-setting of the clock on the statute of limitations effectively used the unexpired time limit to send a notice of deceleration. These myriad issues do not eliminate a burden on the Supreme Court. Rather, the court's consideration of the instant motion actually imposes an additional burden on the court. Successive motions for the same relief burden the courts and contribute to the delay and cost of litigation. A party seeking summary judgment

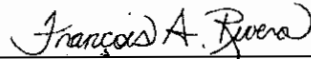
should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance (*Deutsche Bank Natl. Trust Co.*, 179 AD3d at 1020). Accordingly, the plaintiff's instant motion is denied as an impermissible successive summary judgment motion.

CONCLUSION

The motion by plaintiff Yehuda Gross for an order pursuant to CPLR 3212 awarding summary judgment in the plaintiff's favor on the issue of liability is denied as an impermissible successive summary judgment motion.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.