Nationstar Mtge. LLC v Holtzer
2023 NY Slip Op 35006(U)
January 8, 2026
Supreme Court, Kings County
Docket Number: Index No. 517516/17
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of July, 2023.

P R E S E N T:
HON. CENCERIA P EDWARDS,
Justice.

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NATIONSTAR MORTGAGE LLC

Plaintiff,

-against-

Index No.: 517516/17
Mot. Seq.: 1-3
Calendar No.: 22-24

SAMUEL HOLTZER et al,

Defendant,

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The following e-filed papers read herein:	NYSEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	41-49 54-73 77-84
Opposing Affidavits (Affirmations)	85 86-87
Affidavits/ Affirmations in Reply	

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 202 Division Avenue Unit 11 in Brooklyn (Block 2183, Lot 1111), Plaintiff Nationstar Mortgage LLC moves [MS 1] for leave to amend the caption to drop Samuel Holtzer as a defendant and for an extension of time to file a Note of Issue. Defendants Samuel Holtzer and Rov Dagen Inc jointly oppose.

Plaintiff also moves [MS 2] to discontinue the action as to Holtzer only, for summary judgment against Rov Dagen and default judgment against the defaulting defendants, and for an order of reference. Defendants oppose and cross-move [MS 3] for dismissal of this action as

barred in its entirety by the statute of limitations, discharge of the subject mortgage, and the award of attorney's fees to Holtzer. Plaintiff opposes.

Background Facts and Procedural History

On August 5, 2009, HSBC Mortgage Corporation filed an action to foreclose upon the instant lien (Index Number 19821/09). Though an ex parte motion for an order of reference was filed in 2010, it does not appear to have been decided. Settlement conferences were held from February 2012 until May 2013. On May 19, 2013, the Court issued a post-conference order directing Plaintiff to file a motion either for an order of reference or to discontinue the action within 180 days. If it did not do so, the order states that the action would be dismissed without prejudice. No motion was filed but it does not appear that the case was marked disposed. Plaintiff filed a Statement to Cancel Lis Pendens dated December 20, 2014.[1] Though it did not explicitly discontinue the action, Holtzer's counsel signed an accompanying statement that he "consents to the discontinuance of the action, and the dismissal of any and all counterclaims and cross claims; and to cancel the Notice of Pendency" and HSBC's counsel wrote that "there was no opposition to the discontinuance of this action." The action was administratively marked "Other Final Disposition Pre-Note" on March 5, 2015.

Plaintiff commenced the instant foreclosure action on September 11, 2017. Defendants timely answered through counsel, asserting twenty affirmative defenses and a quiet title counterclaim. Conferences were then held in the Foreclosure Settlement Conference Part. The matter was released on August 9, 2018, the Referee noting that Plaintiff had rejected Defendants' short payoff offer.

The Court held a post-release conference on October 16, 2018 and ordered Plaintiff to "either file a motion for summary/default judgment (no motions to extend time to file a substantive motion will be accepted) or a note of issue within 60 days of the date of this order." Plaintiff attempted to file a Note of Issue on December 31, 2018 but it was returned for correction.

[1] Holtzer's counsel appears to have consented on January 3, 2015 and the documents do not appear to have been filed until March 20, 2015.

Defendants uploaded discovery demands – document requests, interrogatories, a notice of deposition, and a demand to inspect the "wet-ink" note – on January 2, 2019. Counsel for both sides attended a Preliminary Conference two days later and stipulated to a discovery schedule. At a subsequent conference on June 4, 2019, the Court set a final deadline for the deposition of Plaintiff's witness to be taken. Two more discovery conferences then appear to have been held.

Plaintiff's Initial Motion [MS 1]

On February 28, 2020, Plaintiff filed a motion seeking to drop Holtzer as a party and for an extension of time to file a Note of Issue. Noting that Holtzer deeded the property to Rov Dagen in 2008 and that it was now waiving its right to seek a deficiency judgment against him, Plaintiff argued that he is no longer a necessary party and that he should be dropped from the caption. As the mortgage was transferred from Plaintiff to Specialized Loan Servicing ("SLS") during the pendency of the action, it sought to further amend the caption to reflect SLS as the plaintiff. It also noted that "Does" were served at the property and should be substituted in place of "John Doe" in the caption. Finally, Plaintiff explained that it had attempted to timely file a Note of Issue and that discovery was still ongoing as of the (subsequent) date when the PC Order provided that one must be filed. As such, it argued that it should be granted an extension of time to file a Note of Issue.

Defendants' Opposition

In opposition, Defendants argued that Plaintiff defaulted on two orders directing it to file the Note of Issue by dates certain. Agreeing that there was a deposition outstanding as of the later deadline, Defendants asserted that the delays resulted from Plaintiff's failure to produce a knowledgeable witness and that the prior witness' availability need to leave his deposition early. Defendants further questioned Plaintiff's more than six-month delay in making the instant motion after discovery was completed. Finally, Defendants argued that Plaintiff was impermissibly seeking to drop Holtzer from the action to avoid an adverse outcome as to him.

Plaintiff's Second Motion [MS 2]

On April 19, 2022, Plaintiff filed a second motion. Again seeking to discontinue against Holtzer, Plaintiff now also sought summary judgment against Rov Dagen, default judgment against the non-appearing defendants, to amend the caption, and an order of reference.

In support of its motion, Plaintiff proffered an affidavit signed by Ami McKernan, an officer and employee of SLS, the servicer and assignee of Plaintiff. Therein, she introduced, among other documents, copies of the note, mortgage, and assignments of mortgage. McKernan also proffered "business records" which allegedly showed that the loan has been in default since February 1, 2012. The affiant further asserted that Plaintiff was the holder of the note at the time that this action was commenced. She also stated that mortgage default and RPAPL 1304 notices were sent.

Plaintiff also submitted the affidavit of Minh Nghiem, a Document Execution Associate employed by it. Asserting a familiarity with Plaintiff's mailing practices, the affiant attested that the mortgage default and RPAPL 1304 notices were sent herein. Copies of the notices and the documentary evidence upon which Nghiem based her assertions were also proffered.

In light of the affidavits and documentary evidence, Plaintiff asserted that it proved its prima facie case and demonstrated that Defendants' affirmative defenses lacked merit. Of relevance, Plaintiff argued that the instant action was timely filed as the prior action was discontinued which – per *Freedom Mortgage v Engel*, 37 NY3d 1 [2021]– deaccelerated the loan.

In the alternative, Plaintiff noted that Rov Dagen had transferred title to the property to Abraham Gold & Family Trust and, thus, Rov Dagen no longer had standing to defend this action. Holtzer – now that there is no claim directed at him – also could not defend. Finally, Plaintiff asserts that the current owner took subject to a valid notice of pendency and is bound by all proceedings in this action.

Defendants' Opposition/Cross-Motion [MS 3]

Arguing that the 2009 action accelerated the loan and that the Foreclosure Abuse Prevention Act (FAPA) overruled *Engel*, Defendants[2] asserted that the loan was not deaccelerated and, thus, that the instant action was filed beyond the applicable statute of limitations. As such, Defendants maintained that Plaintiff's claims must be dismissed and the loan discharged pursuant to RPAPL 1501 as requested in their counterclaim.

Defendants also noted that CPLR 1018 permits a successor-in-interest to continue to defend an action in its predecessor's name. As such, they suggest, the current owner of the property could step into Rov Dagen's shoes and assert its defenses to this action.

Citing to RPL 282, Defendants argued that – upon dismissal – Holtzer would have successfully defended this action and would be entitled to reasonable attorney's fees.

Defendants also asserted additional grounds for denial of Plaintiff's motion, arguing that Plaintiff failed to demonstrate a default through the "illegible and facially incomprehensible" records proffered by McKernan and challenging Plaintiff's evidence that the mortgage default and RPAPL 1304 notices were sent. Though Nghiem claimed to have produced copies of Walz TrackRight records regarding the relevant mailings, Defendants asserted that none were actually uploaded. Nor, they claimed, did the affiant have knowledge of Walz' mailing procedures, business records practices, and actual compliance therewith.

Plaintiff's Reply/Opposition to Defendants' Cross-Motion

Also raising several unavailing technical arguments, Plaintiff argued that Defendants lack standing to continue to defend this action. Further, the current owner could not raise borrower-oriented defenses such as non-compliance with notice requirements. In Plaintiff's view, statute of limitations is also a defense personal which also is unavailable to the current owner. Plaintiff also asserted that the property was transferred subject to this litigation, leaving the transferee bound. Noting that a trustee rather than the trust itself can defend an action, Plaintiff argued that no trustee of the current owner has been identified, and that Defendant's counsel claimed to represent the trust itself.

[2] Counsel also claimed to be representing the current owner and litigating in Rov Dagen's name on its behalf.

Plaintiff argued that it was seeking to discontinue the action against Holtzer and, thus, he cannot be the "prevailing party" such to be entitled to fees. Further, he asserted no counterclaim for attorney's fees in his answer and is barred from recovering them.

Even assuming that the Court would consider Defendants' arguments as to the merits, Plaintiff argued that FAPA does not apply retroactively. It further asserted that Defendants did not assert a payment defense in their answer and, thus, that it did not need to affirmatively demonstrate their default and that it nonetheless did so. Likewise, it suggested that no RPAPL 1304 notices were required as the premises were not borrower occupied and that Holtzer waived the right to assert non-compliance with the mortgage default provisions of the mortgage by not raising such a defense in his answer. Plaintiff argued that it still demonstrated the mailing of the notices and that only the borrower could raise such defenses – but even Holtzer cannot here as it seeks to discontinue against him.

Assuming that the Court does not dismiss the action or grant summary judgment in its favor, Plaintiff argued that the Court should extend its time to file a Note of Issue. It attempted to do so in a timely manner and, thereafter, ongoing discovery led to a failure to again do so.

Analysis

Preliminarily, Abraham Gold & Family Trust may continue to defend this matter in place of Rov Dagen and can assert its statute of limitations defense (*Wells Fargo v Robinson-John*, 220 AD3d 974, 976 [2d Dept 2023]; *Wells Fargo v McKenzie*, 183 AD3d 574, 575 [2d Dept 2020]).

It is undisputed that a prior action was commenced on August 5, 2009 and that the instant case was filed on September 11, 2017, more than six years later. While Plaintiff argues that the loan was deacceleration upon the discontinuance of the 2009 action, that is inaccurate in light of FAPA (see CPLR 3217[e]). Also contrary to its contentions, the statutory amendments within FAPA are retroactive (see, for example, *Van Dyke v US Bank, NA*, 2025 NY Slip Op 06537 [Ct of Appeals November 25, 2025]). As such, the instant action is untimely.

"To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an

apparent title, such as in a deed or other instrument, that is actually invalid or inoperative" (*Acocella v Wells Fargo Bank, NA*, 139 AD3d 647 [2d Dept 2016]). The Trust is the owner of real property upon which Plaintiff has a lien. As the statute of limitations has passed on the lien and that it is thus unenforceable, judgment is granted in favor of the counterclaimant upon the quiet title counterclaim.

In the absence of a counterclaim for attorney's fees, such relief is unavailable (*US Bank NA v Onuoha*, 216 AD3d 1069, 1073 [2d Dept 2023]).

Conclusion

Accordingly, it is

ORDERED that Defendants' motion [MS **3**] is granted to the extent that summary judgment is granted in their favor on Plaintiff's claims and their quiet title counterclaim; and it is further

ORDERED that Plaintiff's motion for summary judgment, default judgment, and an order of reference [MS **2**] is denied; and it is further

ORDERED that Plaintiff's motion to discontinue as to Holtzer and to extend its time to file a note of issue [MS **1**] is denied.

January 8, 2026 **ENTER**:

Hon. Cenceria P. Edwards, J.S.C., CPA