

Newrez LLC v Petersel

2024 NY Slip Op 30657(U)

March 4, 2024

Supreme Court, Greene County

Docket Number: Index No. EF2022-1

Judge: Richard Mott

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GREENE

NEWREZ LLC d/b/a SHELLPOINT MORTGAGE
SERVICING,

Plaintiff,

-against-

JOHN PETERSEL, GIZELA PETERSEL, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
ACTING SOLELY AS NOMINEE FOR
COUNTRYWIDE HOME AND JOHN DOE AND JANE
DOE #1 through #7,

Defendants.

Motion Return Date: January 18, 2024

APPEARANCES:

Plaintiff:

Christina A. Livorsi, Esq
Nathaniel T. N. Fleming, Esq.
Day Pitney LLP
605 Third Avenue
New York, NY 10158-0180

Barry Michael Weiss, Esq.
Pincus Law Group, PLLC
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Uniondale, NY 11556

Monique J. Arrington, Esq.
Jordan M. Smith, Esq.
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1251 Avenue of the Americas, 37th Floor
New York, NY 10020

Defendants:

Stuart Thalblum, Esq.
Legal Aid Society of Northeastern New York
Attorneys for Defendant, John Petersel
6 Market Street
Amsterdam, NY 12010

¹ By Consent to Change Attorney dated September 19, 2023, filed on September 25, 2023, Akerman LLP substituted as counsel for Plaintiff, replacing Day Pitney, LLP.

DECISION/ORDER

Index#: EF2022-1

Richard Mott, J.S.C.

Gizela Petersel
No appearance in this action

Mortgage Electronic Registration Systems, Inc.
Acting Solely as Nominee for Countywide Home
No appearance in this action

Mott, J.

In this residential mortgage foreclosure action, Plaintiff, Newrez, LLC d/b/a Shellpoint Mortgage Servicing, (“Newrez”), moves for summary judgment/default judgment, appointment of a referee and to amend the caption. Defendant, John Petersel, cross-moves for summary judgment dismissing the complaint on grounds that this action is barred by the statute of limitations and seeks a judgment on his counterclaim quieting title. Newrez opposes the cross-motion.

BACKGROUND

On or about October 21, 2005, Petersel and Gizela Petersel executed an adjustable rate note with America’s Wholesale Lender for the principal sum of \$180,000.00, secured by a mortgage on one of their 4 parcels of land in Freehold, NY. Following a default in payment which occurred on or before October 1, 2008, an action to foreclose was commenced by the filing of a summons and complaint (Index # 1616/2009) on October 9, 2009. On August 14, 2017, the foreclosure action was dismissed for neglecting to proceed. No appeal was taken from the dismissal. Almost four years later, on April 21, 2021, the mortgagee moved to vacate the dismissal, which was denied by Decision and Order dated July 22, 2021. No appeal was taken from denial of the motion. This action to foreclose was commenced by the filing of a summons and complaint on January 30, 2022.

PLAINTIFF’S CONTENTIONS

The 2009 foreclosure action, entitled *BAC Home Loans Servicing, L.P. v Petersel*, Greene County Index # 2009-1616 was dismissed, pursuant to CPLR § 3126 and 22 NYCRR § 202.27 on August 14, 2017, for failure of the Plaintiff to comply with the Court's discovery/scheduling orders, including the failure to obtain a survey² as directed and failing to make a motion for a Judgment of Foreclosure and Sale by the Court's imposed deadline. Nearly four years after the dismissal, a motion to vacate the dismissal was made. The motion to vacate the dismissal was denied on July 22, 2021. The current action was commenced within 6 months of the dismissal of the prior action and is, therefore, timely pursuant to CPLR § 205(a).

Newrez further contends that the recently enacted CPLR § 205-a, part of the Foreclosure Abuse Prevention Act (FAPA), which would render this action untimely, is inapplicable because it was enacted after the commencement of this action and is not given retroactive effect. If given retroactive effect, it would effectuate a deprivation of certain constitutional rights, including a taking of property without just compensation. Accordingly, this action is timely, and Plaintiff is entitled to summary judgment as against Petersel and a default judgment as to the non-appearing Defendants.

Additionally, Newrez filed a rejection of Petersel's Reply Memorandum of Law because it was due on November 9, 2023, and was not filed until the following day.

DEFENDANT'S CONTENTIONS

Petersel admits defaulting on the loan as of October 1, 2008. He contends that, as the prior action was dismissed for neglect to prosecute, pursuant to CPLR § 3126 and 22 NYCRR § 202.27, Newrez is not entitled to the protection of CPLR § 205(a). Additionally, he asserts that

² Petersel's property consists of four distinct lots. The house straddles the lot line of two of the four parcels. Petersel claims that the legal description in the complaint described only one lot, whereas Newrez claims the action pertained to the two lots upon which the house is situated, necessitating a survey to resolve the dispute.

the 2009 action effectuated an acceleration of the debt secured by the mortgage, thus commencing the six-year statute of limitations as to the entire principal balance due. Petersel also relies upon CPLR 205-a, enacted subsequent to the commencement of this action, as prohibiting the commencement of a second action. He asserts that CPLR 205-a may be applied retroactively. As this action was commenced on January 3, 2022, nearly 13 years post-acceleration, this action is time-barred. Furthermore, he is entitled to summary judgment on his counterclaim to quiet title declaring the mortgage unenforceable and cancelling same of record.

As to the late-filed Reply Memorandum of Law, counsel claims to have mis-calendared the date by one day, noted that November 10, 2023, was Veteran's Day, and needed the extra time to draft a table of contents and table of authorities.

DISCUSSION/LATE SUBMISSION

The Court accepts Petersel's Reply Memorandum of Law, pursuant to CPLR § 2004, and directs that Newrez accepts it as well. See, *Booker v McMIndes*, 220 AD3d 1026, 1027 (3d Dept., 2023).

DISCUSSION/SUMMARY JUDGMENT

The proponent of a summary judgment motion 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. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure of the moving party to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposition papers. *Id.*, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Id.; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

"When considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations. Furthermore, summary judgment can only be granted when the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action" (*American Food & Vending Corp. v Amazon.com, Inc.*, 214 AD3d 1153, 1154-1155 [3d Dept., 2023] [internal quotation marks and citations omitted]; see *Davis v Zeh*, 200 AD3d 1275, 1278 [3d Dept., 2021]); *Stanhope v. Burke*, 220 A.D.3d 1122, 1123 [3d Dept., 2023]).

To obtain summary judgment in a foreclosure action, a plaintiff establishes entitlement to judgment as a matter of law through submission of the note, mortgage, and proof of default. *U.S. Bank, N.A. v Ionides*, 192 AD3d 1405, 1407 (3d Dept., 2021). Here, Newrez has done so, shifting the burden to Petersel to demonstrate an issue of fact.

Petersel's opposition and cross-motion begin with the assertion that the 2009 foreclosure action accelerated the debt, which has the effect of commencing the statute of limitations period. Mortgage foreclosure actions are governed by a six-year statute of limitations. CPLR § 213(4). Where a mortgage debt is payable in installments, there are "separate causes of action for each installment accrued and the Statute of Limitations [begins] to run on the date each installment [becomes] due". *U.S. Bank, N.A. v Atia*, 178 AD3d 747, 749 (2nd Dept., 2019); see also, *Khoury v Alger*, 174 AD2d 918, 919 (3d Dept., 1991). Once the debt has been accelerated, by a demand or by commencement of an action, the entire sum becomes due and the statute of limitations begins

to run on the entire mortgage. *Caprotti v Deutsche Bank Natl. Trust Co.*, 220 AD3d 1126, 1127 (3d Dept., 2023); *U.S. Bank, N.A. v Stewart*, 187 AD3d 1330, 1332 (3d Dept., 2020). The commencement of the 2009 action effectuated an acceleration of the debt and consequently began the running of the statute of limitations.

Pursuant to CPLR § 205(a), under certain circumstances, if a timely-commenced action is dismissed, a plaintiff may, within six months, commence a new action upon the same transaction or occurrence. Here, the 2009 action was dismissed, pursuant to CPLR § 3126 and 22 NYCRR § 202.27, due to Plaintiff's predecessor-in-interest's failure to comply with the Court's orders requiring Plaintiff to obtain a survey and to submit a motion for a Judgment of Foreclosure and Sale by July 31, 2017. Nearly four years later, on May 7, 2021, the prior plaintiff moved to vacate the dismissal order. That motion was denied on July 22, 2021, with entry of the order on October 6, 2021. This action was commenced on January 3, 2022.

One of the exceptions to the saving provisions of CPLR § 205(a) applies when a dismissal is granted for neglect to prosecute the action. CPLR § 205(a) further requires that, "[W]here a dismissal is one for neglect to prosecute...the judge shall set forth on the record the specific conduct constituting the neglect, which shall demonstrate a general pattern of delay".

Here, in its August 14, 2017, dismissal order, the Court did demonstrate a general pattern of delay. This delay consisted of (1) failure to comply with the conference order of September 9, 2016, despite several requests for adjournments, which directed Plaintiff to obtain a survey and file same with the Court on or before October 28, 2016; and (2) failure to comply with the Court's order of June 13, 2017, directing Plaintiff to file its motion for a Judgment of Foreclosure and Sale by July 31, 2017, and warning that failure to do so would result in dismissal for neglect to prosecute. By August 14, 2017, as the motion had not been made, the Court, *sua sponte*,

dismissed the action. This constitutes a dismissal for neglect to proceed, and because the Court's dismissal order described a pattern of delay, Plaintiff is precluded from the saving provisions of CPLR § 205(a). See, *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterria Assoc.]*, 5 NY3d 514, 518 (2005).

Having determined that this action is not protected by the saving provisions of CPLR § 205(a), it is clearly untimely in violation of the six-year statute of limitations set forth in CPLR § 213(4). Furthermore, this determination renders academic the remaining issues regarding the retroactivity of CPLR § 205-a and any constitutional issues which may apply in that event.

Consequently, Petersel has met his burden on these motions, requiring dismissal of the Plaintiff's complaint and granting Petersel's counterclaim to quiet title.

Accordingly, it is hereby

ORDERED, that the Plaintiff's complaint is dismissed; and it is further

ORDERED, that Petersel's counterclaim is granted; and it is further

ORDERED, that the Greene County Clerk is hereby directed to cancel of record the mortgage dated October 21, 2005, between John Petersel and Gizela Petersel, Borrowers, and MERS as nominee for America's Wholesale Lender, in the principal sum of \$180,000.00, recorded on November 23, 2005, as Document # 2005-00010286, at Book 2169 of Mortgages, Page 135; and it is further

ORDERED, that the Greene County Clerk is directed to cancel of record the mortgage dated August 12, 2006, between John Petersel and Gizela Petersel, Borrowers, and MERS as nominee for Countrywide Home Loans, Inc., Lender, in the principal sum of \$15,262.28, recorded on October 3, 2006, as Document # 2006-00008601 at Book 2327 of Mortgages, Page 72; and it is further

ORDERED, that the Greene County Clerk is directed to cancel of record the Consolidation, Extension and Modification Agreement dated August 12, 2006 between John Petersel and Gizela Petersel, Borrowers, and Countrywide Home Loans, Inc., Lender, in the principal sum of \$194,300.00, recorded on October 3, 2006 as Document # 2006-00008602 in Book 2327 of Mortgages, Page 87; and it is further

ORDERED, that the Notes associated with the above-referenced Mortgages are hereby declared unenforceable by operation of the statute of limitation applicable thereto; and it is further

ORDERED, that Plaintiff, Newrez LLC d/b/a Shellpoint Mortgage Servicing, its employees, agents, servants and/or assigns and any successors in interest, are permanently enjoined from enforcing the Notes and Mortgages involved herein.

This shall constitute the Decision/Order of the Court. The Court is e-filing this Decision/Order, relieving the parties of their obligations pursuant to CPLR § 2220 with respect to filing and entry thereof, but this does not relieve the parties of their obligations regarding service of same with notice of entry.

ENTER

Dated: March 4, 2024
Hudson, NY


Richard Mott, J.S.C.

Papers considered:

1. Notice of Motion dated May 19, 2023, Affidavit in Support of Paula Gonzalez, dated May 23, 2023, with Exhibits A-E, Affirmation in Support of Nathaniel T. N. Fleming, Esq., dated May 19, 2023, with Exhibits 1-19, Memorandum of Law in Support and Statement of Material Facts.
2. Notice of Cross-motion dated August 29, 2023, Affirmation of Stuart Thalblum, Esq., and Statement of Material Facts, dated August 29, 2023, with Exhibits 1-9, Memorandum of Law in Opposition and in Support of Cross-motion.
3. Plaintiff's Reply Memorandum of Law.
4. Defendant's Reply Memorandum of Law.

5. Notice of Rejection of Papers.
6. Letter of Stuart Thalblum, Esq. dated November 15, 2023.
7. Letter of Stuart Thalblum, Esq. dated December 27, 2023.
8. Letter of Monique J. Arrington, Esq., dated January 17, 2024.