

CIT Bank, N.A. v Cobb

2025 NY Slip Op 31843(U)

May 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 503937/2018

Judge: Carolyn Mazzu Genovesi

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At an IAS Part FRP-5 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 day of 202

MAY 08 2025

Present: Hon. Carolyn Mazzu Genovesi

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CIT BANK, N.A.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 503937/2018

Mot. Seq. 1 & 3

STEPHEN COBB et. al,

Defendants,

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF Numbered
Motion (MS # 1), Affirmation in Support Exhibits	<u>26-48</u>
Cross-Motion (MS # 3), Affirmation in Support Exhibits, Memorandum in Opposition to Motion and in Support of Cross Motion	<u>95-100</u>
Affirmation in Opposition to Cross-Motion, Exhibit	<u>105, 106</u>
Memorandum of Law in Reply	<u>108</u>

In an action to foreclose a consolidated mortgage, CIT Bank ("plaintiff") moves for summary judgment against Stephen Cobb ("defendant"), to amend the caption, for default judgment against non-appearing defendants, and to appoint a Referee to determine the amount due to plaintiff and whether the mortgaged property can be sold in parcels (MS #1). Defendant cross-moves to dismiss the complaint as time-barred, cancel the notice of pendency, and for costs and attorneys' fees incurred in defending this action.

Plaintiff's predecessor in interest, OneWest Bank FSB, commenced an action to foreclose the subject consolidated mortgage on January 6, 2010 (Index No. 265/2010). By Order dated September 14, 2015, Justice Johnny Lee Baynes discontinued the 2010 action. Plaintiff claims

OneWest Bank sent defendant a deacceleration letter on July 10, 2015. On July 14, 2016, plaintiff commenced an action in the United States District Court for the Eastern District of New York to foreclose the subject consolidated mortgage. The Federal case was dismissed on June 22, 2017, for lack of diversity jurisdiction. On February 26, 2018, more than eight years after commencing the 2010 action, plaintiff commenced this foreclosure action. Plaintiff previously moved for the appointment of a Referee, which Justice Larry Martin granted on defendant's default by Order dated June 21, 2022. Defendant moved, by Order to Show Cause, to vacate his default in opposing the motion (MS #2), which Justice Martin granted by Order dated February 20, 2024.

“An action to foreclose a mortgage is subject to a six-year statute of limitations.” *U.S. Bank Trust, N.A. v. Aorta*, 167 A.D.3d 807 (2d Dep't 2018); *see* CPLR 213(4). “When a mortgage is payable in installments, which is the typical practice, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt.” *Wells Fargo Bank, N.A. v. Rutty*, 206 A.D.3d 862, 863 (2d Dep't 2022) quoting *Deutsche Bank Trust Co. Ams. v. Marous*, 186 A.D.3d 669, 670 (2d Dep't 2020). “Acceleration occurs, *inter alia*, by the commencement of a foreclosure action wherein the plaintiff elects in the complaint to call due the entire amount secured by the mortgage.” *GMAT Legal Title Trust 2014-1 v. Kator*, 213 A.D.3d 915, 916 (2d Dep't 2023).

Under the applicable law when this action was commenced in 2018, a lender could unilaterally revoke the acceleration of a mortgage, “by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action.” *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069-1070 (2d Dep't 2017). A deacceleration letter constituted an affirmative act sufficient to deaccelerate a mortgage. *Milone v. U.S. Bank N.A.*, 164 A.D.3d 145, 153-154 (2d Dep't 2018). Additionally, in 2021, the Court of Appeals held “where acceleration occurred by virtue of the filing of a complaint in a

foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law." *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1, 32 (2021).

However, in 2022, the Legislature enacted the Foreclosure Abuse Prevention Act ("FAPA"), which amended CPLR 203 to add subdivision (h). CPLR 203(h) states in relevant part, "no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute." FAPA also amended CPLR 3217 to include subdivision (e), which states in relevant part, "[i]n any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action..."

Since the first action was commenced on January 6, 2010, the statute of limitations expired on January 6, 2016, unless the deacceleration letter or the discontinuance of the first action deaccelerated the loan. In opposition to the motion to dismiss, plaintiff argues that the statutory amendments under FAPA should not apply retroactively to this case which predates their enactment. Plaintiff further argues that retroactive application of FAPA would be unconstitutional, although plaintiff does not indicate which constitutional clause or doctrine FAPA would contravene. Since the filing of the plaintiff's summary judgment motion, the Appellate Division, Second Department has held that that the statutory amendments enacted under FAPA apply retroactively. *See 97 Lyman Avenue, LLC v. MTGLQ Investors, L.P.*, 233 A.D.3d 1038, 1042 (2d Dep't 2024); *Deutsche Bank National Trust Company v. Dagrín*, 233 A.D.3d 1065, 1067-1068 (2d

Dep't 2024). In *Dagrin*, even though the foreclosure action was commenced in 2018, like this action, before FAPA came into effect, the Second Department found FAPA to retroactively apply. Additionally, contrary to plaintiff's argument, in *Dagrin*, the Second Department found the retroactive application of FAPA to be constitutional. The Court therefore finds plaintiff's arguments regarding the retroactivity of FAPA unavailing. Under the current law, the statute of limitations expired on January 6, 2016, and this case is therefore time-barred.

Plaintiff also argues that the commencement of the first action did not accelerate the mortgage, as OneWest Bank FSB was not yet assigned the mortgage when the action was commenced on January 6, 2010. However, plaintiff provides no documentary evidence to support this argument. Moreover, since the consolidated note was endorsed in blank when the 2010 action was commenced, OneWest Bank FSB demonstrated it had standing to commence that action. *See Deutsche Bank National Trust Company v. Goldstone*, 197 A.D.3d 1148, 1149 (2d Dep't 2021)

In light of the Court's determination that this action was untimely commenced, plaintiff's motion for summary judgment, and to appoint a Referee, inter alia (MS #1) is DENIED. For the foregoing reasons, it is

ORDERED that plaintiff's motion (MS #1) is DENIED in all respects; and it is further

ORDERED that defendant cross-motion to dismiss the complaint as barred by the statute of limitations (MS #3) is GRANTED and the complaint is DISMISSED; and it is further

ORDERED that the Clerk of Kings County is directed to cancel of record the notice of pendency filed in this action on February 26, 2018, as against the parcel of real property situated in Kings County at 897 Thomas S. Boyland Street a/k/a 897 Thomas Boyland Street a/k/a 897 Hopkinson Avenue, Brooklyn, New York 11212 (Block 3612, Lot 20).

All other relief requested is DENIED.

This constitutes the Decision and Order of the Court.

ENTER



Hon. Carolyn Mazza Genovesi