U.S. Bank N.A. v Speller
2025 NY Slip Op 35222(U)
April 2, 2025
Supreme Court, Putnam County
Docket Number: Index No. 500088/2022
Judge: Victor G. Grossman
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SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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U.S. BANK NATIONAL ASSOCIATION, etc.,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS, et al.,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 500088 / 2022
Mot. Seq. No. 10

----------x **DECISION AND ORDER**

The following papers numbered 1 to 5 were read on Defendants' motion for renewal of this Court's prior decision and order awarding Plaintiff summary judgment on all issues except standing, and upon renewal, vacating the said decision and order, awarding Defendants summary judgment on their statute of limitations defense, and cancelling and discharging the mortgage on the subject premises:

Notice of Motion – Affidavit / Exhibits -- Memorandum 1-3

Affirmation in Opposition 4

Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff U.S. Bank National Association (the "Bank") commenced this action in January 2022 to foreclose a mortgage on residential property owned by defendants Michael M. Speller and Ellen M. Fitzsimmons. The Defendants, answering, asserted *inter alia* that the Bank's claim was barred by the statute of limitations and counterclaimed under RPAPL Article 15

for cancellation and discharge of the mortgage. By prior Decision and Order dated October 31, 2023, the Court awarded summary judgment to the Bank on all issues except standing and dismissed the Defendants' statute of limitations defense. The Court thereafter awarded the Defendants summary judgment on the issue of the Bank's standing to prosecute this action and dismissed the Complaint.

THE DECISION AND ORDER OF OCTOBER 31, 2023

In ruling that the Bank's action had been timely commenced within the applicable limitations period, the Court held *inter alia* that:

- Upon the discontinuance of a 2009 foreclosure action on the same mortgage debt, the debt was validly de-accelerated pursuant to an agreement of the parties whereby the foreclosure action was discontinued and the Defendants' right to make monthly mortgage payments was reinstated.

- After a 2010 foreclosure action on the same debt was voluntarily discontinued in 2013, a new foreclosure action was timely commenced, within six years of the 2010 acceleration of the debt, in 2015.

- Although the 2015 action was dismissed for the Bank's failure to appear at a conference, the 2022 foreclosure action was thereafter timely commenced within the grace period afforded by CPLR §205(a).

- The Foreclosure Abuse Prevention Act ("FAPA") was not retroactively applicable to either (a) the discontinuance of the 2009 foreclosure action or (b) the commencement per CPLR §205(a) of the 2022 foreclosure action.

- Alternatively, FAPA's retroactive application to the discontinuance of the 2009 foreclosure action would violate the Contract Clause of the United States Constitution; and FAPA's retroactive application to the commencement per CPLR §205(a) of the 2022 action would violate the Due Process Clause of the United States Constitution.

(*See,* Decision and Order dated October 31, 2023)

DEFENDANTS' MOTION FOR RENEWAL

Defendants now move for renewal of the October 31, 2023 Decision and Order, for reinstatement of their statute of limitations defense, and for summary judgment on their RPAPL Article 15 counterclaim for cancellation and discharge the mortgage. The Defendants contend,

in effect, that the Second Department's recent decision in *Deutsche Bank National Trust Co. v. Dagrin,* 233 AD3d 1065 (2d Dept. 2024) constitutes a change in the law that would alter this Court's prior determination on the statute of limitations issue. *See,* CPLR §2221(e)(2).

THE *DAGRIN* CASE

In *Dagrin,* the Second Department, applying FAPA retroactively to the plaintiff bank's voluntary discontinuance of a 2008 mortgage foreclosure action, held that (1) "the voluntary discontinuance of the 2008 action did not serve to de-accelerate the mortgage debt, or revive, or rest the statute of limitations", wherefore (2) a second foreclosure action commenced in 2018, more than six years after the mortgage debt was initially accelerated, was time-barred. *See id.,* 233 AD3d at 1067.

The *Dagrin* Court held that FAPA's retroactive application in those circumstances did not violate the Contract Clause of the United States Constitution. The Court wrote:

> "The Contract[] Clause prohibits states from enacting 'laws impairing the Obligation of Contracts'" [cit.om.]. "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship" [cit.om.]. "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial: [cit.om.].
>
> Here, the plaintiff notes that the mortgage agreement provides it with "those rights that Applicable Law gives to lenders who hold mortgages on real property" and "is governed by federal law and the law of New York State." The plaintiff also identifies New York decisional law that allows a mortgagee to unilaterally de-accelerate a mortgage loan absent a showing of substantial prejudice [cit.om.]. Taking these provisions of the mortgage agreement together with the decisional law, the plaintiff contends that, prior to the enactment of FAPA, it possessed a contractual right to unilaterally de-accelerate the mortgage debt at issue. However, even assuming that these provisions of the mortgage agreement and New York's decisional law, taken together, granted the plaintiff such a contractual right, the plaintiff has failed to identify any contractual provision "that entitles it either to de-accelerate the loan *by discontinuing a foreclosure action* or to reset the statute of limitations once it has already expired" [cit.om.]. Notably, section 19 of the mortgage agreement, which is the only provision that appears to address de-acceleration, grants the *borrower* the right to have enforcement of the mortgage agreement stopped "even if Lender has required immediate Payment in Full," provided the borrower meets

> certain conditions. Additionally, at the time of the mortgage loan closing in 2006 and the commencement of the 2008 action, the issue of whether the voluntary discontinuance of an action, alone, constituted an affirmative act revoking an earlier acceleration of the mortgage debt had not yet been addressed by any of the Appellate Divisions of the Supreme Court or the Court of Appeals [cit.om.]. Moreover, at the time that this action was commenced in 2018, the issue remained somewhat unsettled in this Court's jurisprudence [cit.om.]. Therefore, FAPA, which overturned *Engel's* holding to the contrary, could not be said to work a substantial impairment on the parties' contractual rights.

See id., 233 AD3d at 1069-71.

As for the Due Process issue, neither CPLR §205(a) nor FAPA's newly enacted variant thereof – CPLR §205-a – were at issue in the *Dagrin* case.

LEGAL ANALYSIS

A. Plaintiff Has Failed To Demonstrate Grounds For Renewal

Renewal is governed by CPLR §2221. Subdivision (e)(2) thereof provides that "[a] motion for leave to renew…shall demonstrate that there has been a change in the law that would change the prior determination." As the Second Department's decision in *Dagrin* is patently distinguishable from the case at bar, it compels no modification of the conclusion reached by this Court in its October 31, 2023 Decision and Order that the Bank's January 2022 foreclosure action was timely commenced within the applicable statute of limitations.

Preliminarily, as neither CPLR §205(a) nor FAPA's newly established grace provision – CPLR §205-a – were at issue in *Dagrin*, the Defendants have failed to demonstrate that there has been a change in the law that would alter this Court's determinations that the January 2022 foreclosure action was timely commenced within the grace period afforded by CPLR §205(a), and that FAPA's retroactive application to the commencement per CPLR §205(a) of the 2022 action would violate the Due Process Clause of the United States Constitution. Indeed, while the Second Department has in certain contexts applied FAPA's CPLR §205-a retroactively, this Court is aware of no appellate decision wherein it has been held that a dismissal pursuant to

retroactive application of Section 205-a's altered definition of what constitutes a "neglect to prosecute" is consonant with due process of law.

Regarding the Contract Clause issue: As may readily be observed from the extended quotation of *Dagrin* above, the Second Department therein rejected the plaintiff bank's claim that it possessed a contractual right, grounded upon the *terms of the mortgage* construed in light of the decisional law in New York, to *unilaterally* de-accelerate the mortgage debt and thereby restart the Statute of Limitations. In contrast, the Bank's claim here is predicated on a *bilateral Repayment Plan agreement* to revoke the acceleration and restore the parties to their pre-acceleration rights and obligations. As this Court observed in its prior Decision and Order:

> ***There are two contracts at issue here: the Mortgage and the Repayment Plan agreement***. Under pre-FAPA law:
>
> Once Defendants bargained and paid consideration for the reinstatement of their rights under the mortgage, HSBC had no legal right to demand payment of the entire mortgage balance based on a *pre-agreement default*, wherefore no such claim had accrued and the statute of limitations was not running. In the event of a *post-agreement default*, HSBC "might again accelerate the maturity of the then-outstanding debt, at which point a new foreclosure claim on that outstanding debt would accrue with a six-year limitations period." *Freedom Mortgage Corp. v. Engel, supra,* 37 NY3d at 28.
>
> (*see,* p. 18, above). Retroactive application of FAPA, and particularly of GOL §17-105 as amended, would wholly destroy the lender's rights:
>
> The Repayment Plan agreement coupled with HSBC's discontinuance of the 2009 foreclosure action unquestionably effected a valid revocation of the prior acceleration of the mortgage debt under pre-FAPA law. Insofar as ***the Repayment Plan agreement reflects a bilateral agreement of both parties, and not just unilateral action by HSBC, to revoke the acceleration and restore the parties to their pre-acceleration rights and obligations***, it passes muster even under CPLR §§ 3217(e) and 203(h) as amended by FAPA. However, since the Repayment Plan agreement – though fully performed by both parties -- is not embodied in a writing signed by Defendants, applying GOL §17-105 as amended would have the incongruous effect of causing the statute of limitations to continue to run on a cause of action that no longer existed. (*see,* pp. 25-26, above).
>
> In other words, by working a sea change in the law regarding a lender's right to revoke a prior acceleration of mortgage debt and the effect of such revocation upon the operation

> of the statute of limitations, FAPA would plainly undermine the parties' contractual bargain, interfere with their reasonable expectations under the law at the time those contracts were made, and wholly destroy the lender's rights under the Mortgage. That would unquestionably constitute a severe impairment of the contractual relationship.

(Decision and Order dated October 31, 2023, pp. 32-33 [boldface emphasis added]).

Since the nature of the contractual right asserted here is distinguishable in what this Court's regards as dispositive respects from that asserted in *Dagrin,* the Second Department's decision in *Dagrin* does not compel any modification of this Court's conclusion that FAPA's retroactive application to the discontinuance of the 2009 foreclosure action would violate the Contract Clause of the United States Constitution. Indeed, this Court is aware of no appellate decision that would dictate a holding to the contrary.

B. Defendants' Article 15 Claim Is Not Presently Viable

In *Davis v. Wilmington Savings Fund Society, FSB,* 219 AD3d 798 (2d Dept. 2023), the Second Department wrote:

> Pursuant to RPAPL 1501(4), "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage…has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons…to secure the cancellation and discharge of record of such encumbrance." However, "[b]ecause the expiration of the statute of limitations is an essential element of an action pursuant to RPAPL 1501(4), the existence of a pending foreclosure action precludes a RPAPL 1501(a) action." (*4 Stella Mgt., LLC v. Citimortgage, Inc.,* 204 AD3d 868, 869 [2022]). Further, an action is not considered terminated until appeals as of right have been exhausted (*see Malay v. City of Syracuse,* 25 NY3d 323, 328 [2015]; *Lehman Bros. v. Hughes Hubbard & Reed,* 92 NY2d 1014, 1016-1017 [1998]; *Deutsche Bank Natl. Trust Co. v. Gouin,* 194 AD3d 479, 480 [2021]).

Davis v. Wilmington Savings Fund Society, FSB, supra, 219 AD3d at 799.

Here, Defendants cannot presently establish the expiration of the statute of limitations on foreclosure -- an essential element of their RPAPL Article 15 claim – first, because this Court's holding that the January 2022 foreclosure action was timely commenced within the applicable

statute of limitations remains the law of the case; and second, because the January 2022 action though dismissed for the Bank's lack of standing nevertheless remains "pending" and has not been "terminated", since the Bank timely filed a notice of appeal from the dismissal and its appeals as of right have not been exhausted.

There is an additional problem with Defendants' RPAPL Article 15 claim in its current posture, to wit, the claim may have been asserted against the wrong party. Defendants having herein established *prima facie*, and this Court having found, that the Bank lacks standing to prosecute the January 2022 foreclosure action, the Bank may not be the real party in interest on Defendants' action for cancellation and discharge of the mortgage.

It is therefore

ORDERED, that Defendants' application for renewal of this Court's Decision and Order dated October 31, 2023 is in all respects denied.

The foregoing constitutes the decision and order of the Court.

Dated: April 2, 2025
Carmel, New York

ENTER

HON. VICTOR G. GROSSMAN, J.S.C.