1425 Peak Corp. v Deutsche Bank Natl. Trust Co.

2025 NY Slip Op 35383(U)

January 29, 2025

Supreme Court, Queens County

Docket Number: Index No. 717709/2023

Judge: Denise N. Johnson

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENISE N. JOHNSON IAS Part 11
Justice

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1425 PEAK CORP.

Plaintiff(s),

- and -

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2006-OPT3, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3

Defendant(s).

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Index No.: 717709/2023

Motion Date:9/24/24

Motion Seq. No: 3

The following papers numbered EF 48-68 read on this motion by defendant pursuant to CPLR 3211 to dismiss the complaint and on the cross- motion by plaintiff pursuant to CPLR 3215(c) for a default judgment against the defendant.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 48-52
Notice of Cross-Motion- Affidavits- Exhibits	EF 53-65
Answering Affidavits - Exhibits	EF 66-67
Reply Affidavits	EF 68

Upon the foregoing papers it is **ORDERED** that this motion and cross-motion are determined as follows:

On August 25, 2023, 1425 Peak Corp. commenced this action pursuant to RPAPL 1501(4) seeking to cancel and discharge a mortgage of record dated March 6, 2006, given by Linda R. Daughtry Bozeman on the property known as known as 1425 Point Breeze Place, Far Rockaway, New York, to secure a loan in the amount of $535,000. 1425 Peak Corp. alleges that the mortgage no longer has any legal effect because its enforcement is barred by the six-year statute of limitations applicable to an accelerated installment loan (CPLR 213[4]).

On or about June 22, 2015, Deutsche Bank National Trust Company commenced an action to foreclose the subject mortgage entitled *Deutsche Bank Natl. Trust Co. v Linda R. Daughtry Bozeman, et al.* (Sup Ct, Queens County, Index No. 706511/2015). That action was dismissed in a short form order dated June 8, 2023, and filed on June 8, 2023.

The defendant Deutsche Bank has moved to dismiss the action. The defendant, however, is in default as they failed to answer or move timely after service. Pursuant to a stipulation, the defendant's time to answer or respond to the complaint was extended to October 20, 2023. On October 20, 2023, the defendant moved to dismiss the case. That motion, however, was marked off. More than four months later, the defendant moved again to dismiss. On July 23, 2023, this motion was marked off. The defendant then made this motion, its third application, however, the defendant did not seek leave of court to vacate its default or for an extension of time to file and serve a late answer. To the extent the defendant has moved for such relief in its reply paper, even if the court were to consider such request it would be denied. A defendant moving to vacate its default or file a late answer must establish that the default was excusable and the existence of an arguably meritorious defense (*Santos v Penske* Truck Leasing Co., 105 AD3d 1029 [2d Dept 2013]; *Oyebola v Makuch*, 10 AD3d 600 [2d Dept 2004]). The determination of whether the excuse is reasonable is within the discretion of the court (*see SS Constantine & Helen's Romanian Orthodox Church of Am. v Z. Zindel, Inc.*, 44 AD3d 744 [2d Dept 2007]). In appropriate circumstances a court has the discretion to find that law office failure is a reasonable excuse (*see Sarcona v J&J Air Container Sta., Inc.*, 111 AD3d 914 [2d Dept 2013]; *Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380 [1st Dept 2007]). The excuse must be supported by detailed allegations of fact explaining the law office failure (*see HSBC Bank USA, N.A. v Wider*, 101 AD3d 683 [2d Dept 2012]). Here, the defendant alleges law office failure due to the fact that this case was not assigned to an IAS Part and the defendant was not privy to the part rules and did not know that its case was marked off. These allegations, however, were conclusory and unsubstantiated and did not rise to the level of a reasonable excuse (*see U.S. Bank, N.A. v Dorvelus*, 140 AD3d 850 [2d Dept 2016]; *Staples v v Jeff Hunt Devs., Inc.*, 56 AD3d 459 [2d Dept 2008]; *Murray v New York City Health & Hosps. Corp.*, 52 AD3d 792 [2d Dept 2008]). Additionally, this does not explain the delay in making the second motion or why the second motion was marked off. Furthermore, as is discussed below, the defendant does not have a meritorious defense to this action.

Turning to the plaintiff's cross-motion for a default judgment, RPAPL 1501(4) provides that "[w]here the applicable statute of limitations for the commencement of an action to foreclose a mortgage...has expired," any person with an estate or interest in the property may maintain an action "to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom" (RPAPL 1501[4]). The plaintiff alleges that inasmuch as the first foreclosure action has been dismissed and the loan was accelerated by the commencement of the original action commenced more than six years ago, the mortgage must be declared, adjudged, and deemed cancelled as a matter of law.

An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). However, once a mortgage debt is accelerated the entire amount is due and the statute of limitations begins to run on the entire debt (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt.

A default judgment on a property owner's claim to cancel and discharge a mortgage pursuant to RPAPL 1501(4) is warranted where the mortgagee has been served with notice of such claim, failed to timely answer or reply and the subject mortgage is time-barred (see 53 PL Realty, LLC v US Bank N.A., 153 AD3d 894 [2d Dept 2017]). The plaintiff has submitted proof of service upon the defendant. The plaintiff has also submitted a copy of the pleadings including the complaint in the prior action and the order dismissing the prior action. The plaintiff has established that the loan was accelerated by the commencement of the first foreclosure action and that more than six-years has run after the acceleration in the first complaint. The plaintiff, thus, made a showing that this action was not commenced within the six-year statute of limitations, which began to run upon the filing of the complaint in the 2015 action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 605).

In opposition, the defendant argues that the commencement of the prior action did not amount to an acceleration of the debt. This argument is without merit. Under the Foreclosure Abuse Prevention Act the defendant is estopped from asserting that the debt was not validly accelerated by the commencement of the 2015 action because that action was not dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated (CPLR 213[4]; *Wells Fargo Bank, N.A. v Edwards*, 231 AD3d 1189 [2d Dept 2024]; *Reveres Mtge. Solutions, v Gipson*, 230 AD3d 813 [2d Dept 2024]; SYCP, LLC v Evans, 217 AD3d 707 [2d Dept 2023]; *Bank of New York Mellon v Stewart*, 216 Ad3d 720 [2d Dept 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]). The prior action was dismissed because it was commenced against a deceased defendant, and was thus a nullity. First, there was not a timely interposed defense that the instrument was validly accelerated. Addutuibakkym there was no express judicial determination that the instrument was validly accelerated. To the extent the order in the prior action states that there was not a valid acceleration, this is dicta, and cannot be relied upon by the defendant, and, is contrary to the precedent of the 2nd Department (*see Wilson 3 Corp. v Deutsche*, 219 AD3d 870 [2d Dept 2023]; *Deutsche Bank v Rivera*, 200 AD3d 1006 [2d Dept 2021]).

Accordingly, the defendant's motion to dismiss the action is denied. The cross-motion by plaintiff for a default judgment is granted and it is hereby:

ORDERED, ADJUDGED and DECREED, that the subject mortgage dated March 6, 2006, and recorded in the Office of the City Register of the City of New York on June 16, 2006, under CRFN 2006000340023, is hereby canceled and discharged and the County Clerk is directed to enter such cancellation upon the margin of the record.

The foregoing shall constitute the decision and order of this court.

Dated: January 29, 2025

Denise N. Johnson

DENISE N. JOHNSON
J.S.C.

FILED & RECORDED
1/30/2025
2:30PM
COUNTY CLERK
QUEENS COUNTY

Clerk