

2027 Deerfield, Ltd. v Homecomings Fin., LLC
2016 NY Slip Op 30172(U)
January 25, 2016
Supreme Court, Suffolk County
Docket Number: 07159/2015
Judge: Thomas F. Whelan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

executed by her attorney-in-fact, Ethan Ellner. The parcel was also the subject of a \$1,500,000.00 mortgage given on August 6, 2004 to Greenpoint Mortgage Funding, Inc., by Walter E. Guldi, to secure a mortgage note in that amount likewise given. Both the deed conveying title to Guldi and the mortgage he gave to Greenpoint Mortgage Funding, Inc., was recorded in the office of the Suffolk County Clerk on September 30, 2004.

On November 10, 2004, Walter E. Guldi conveyed the premises to the plaintiff. The deed containing such conveyance was recorded in the office of the Suffolk County Clerk at 12:00.17 P.M. on February 7, 2005 according to the face page of the Records Office Recording Page although the itemized second page thereof containing the Suffolk County Recording & Endorsement page is not attached (*see* Exhibit E of the moving papers). Also recorded with the Suffolk County Clerk at 12:00.17 P.M. on February 7, 2005, was a January 30, 2005 deed by Gladys Ellner to defendant Creative Residential Construction, Inc. (*see* Exhibit I attached to the moving papers following the affidavit of service). This deed was denominated as one "intended to correct the grantee" under the deed of August 6, 2004, recorded on September 30, 2004, by which Gladys Ellner, through her attorney-in-fact, conveyed title to Walter E. Guldi, thereby enabling him to encumber the premises with the 1.5 million dollar mortgage loan from Greenpoint Mortgage Funding, Inc., of the same date. In this "correction deed", Creative Residential Construction, Inc., was substituted as the grantee in the place and stead of Walter E. Guldi under the terms of the August 6, 2004 deed. As indicated above, this correction deed by Ellner was recorded simultaneously with Guldi's November 10, 2004 deed conveying the premises to the plaintiff.

The August 2004 mortgage by Guldi to Greenpoint went into default in December of 2004, a mere four months after its origination and less than one month from Guldi's conveyance of the premises to the plaintiff. Mortgage Electronic Registration Systems, Inc., [MERS], as nominee of the lender, Greenpoint Mortgage Funding, Inc., commenced a foreclosure action against Walter E. Guldi and others in May of 2005. On February 8, 2006, MERS assigned the mortgage to Homecomings Financial Network, Inc., who is now known as Homecomings Financial, LLC, and is the first named defendant in this action.

MERS continued to prosecute the foreclosure action in its own name as nominee of the original lender, Greenpoint Mortgage Funding Inc. until Walter E. Guldi died in November of 2007 and a stay of the foreclosure action arose by operation of law. By order dated April 30, 2008, the stay was lifted as the foreclosing plaintiff, MERS, was granted leave to substitute George O. Guldi, as administrator of the estate of Walter E. Guldi, the deceased obligor/mortgagor. MERS was further granted leave to add more defendants, including 2027 Deerfield Ltd., the plaintiff in this action and the owner of the subject premises under the deed dated November 20, 2004 together with Rescomm Holdings No. 2, LLC, a purported subordinate mortgagor. In addition, Homecomings Financial was substituted in the place and stead of MERS as the plaintiff in the foreclosure action.

On February 10, 2009, the appointment of George O. Guldi as administrator of the Estate of Walter E. Guldi was revoked as a last will and testament of his deceased father had been propounded. On February 18, 2009, Kathryn Showers and George O. Guldi were appointed co-executors of the estate

of the deceased Walter E. Guldi, but they never appeared nor were they substituted as party defendants in the foreclosure action in the place of George O. Guldi as administrator of the estate of Walter E. Guldi.

In February of 2011, George O. Guldi was convicted of one or more felonies. Those convictions rendered him ineligible to further serve as executor or other personal representative of the estate of his deceased father (*see* SCPA 707) and resulted in his disbarment from the practice of law as of February 16, 2011. Notwithstanding these circumstances, George O. Guldi continued to prosecute defenses to the foreclosure action as administrator of the estate of Walter E. Guldi and as counsel for one or more of the corporate defendants, even though he was without authority and capacity to so proceed.

By order dated May 19, 2010, Homecomings was awarded summary judgment on its complaint against Guldi, 2027 Deerfield Ltd., and default judgments against the others served with process. The motion was opposed by Guldi on, among other things, the standing defense asserted in the answer served. A judgment of foreclosure and sale issued on May 23, 2012 that was entered in favor of Homecomings Financial on June 20, 2012. Guldi filed an appeal from, among other things, that judgment of foreclosure and sale. While the appeal was pending, the premises were sold at public auction on September 12, 2012 by the referee named in the judgment of foreclosure and sale to the plaintiff, Homecomings Financial, who assigned its bid to Residential Funding Company, LLC on October 18, 2012. By deed dated, October 19, 2012, the referee conveyed the premises to Residential Funding, Company, LLC and such deed was recorded in the office of the Suffolk County Clerk on January 7, 2013.

On July 3, 2013, the Appellate Division, Second Department reversed the judgment of foreclosure and sale and the underlying award of summary judgment in favor of the plaintiff, Homecomings Financial, finding that the original plaintiff, MERS, was without standing to prosecute its claims for foreclosure and sale as there was no proof that it was the owner or holder of the note at the time of the commencement of the action or that it had the authority to assign it to the plaintiff, Homecomings. In an unusual move, the Appellate Division went on to award reverse summary judgment to Guldi as administrator of the estate of his deceased father, a capacity which had been lost to Guldi upon the revocation of his letters of administration in February of 2009 as described above. The foreclosure complaint was thus dismissed, but such dismissal was made expressly without prejudice (*see Homecoming Fin., LLC v Guldi*, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]).

In April of 2015, the plaintiff filed this action seeking a declaration that the August 6, 2004 mortgage in favor of Greenpoint Mortgage Banking, Inc., the January 30, 2005 correction deed in which Creative Residential Construction, Inc., was substituted as grantee in the place and stead of Walter E. Guldi, under the prior Gladys Ellner deed of August 6, 2004, and the October 19, 2012 deed by referee of sale, Stephen A. Grossman, Esq., are null and void as are the interests of those named therein and that such mortgage and the deeds should be expunged of record and the plaintiff declared the owner in fee of the subject premises. In response to the plaintiff's service of the summons and complaint, defendant, Homecomings Financial, and its bid assignee, defendant, Residential Funding Company LLC, the grantee of title under the October 19, 2012 deed of the referee of sale, filed a joint answer containing eight

affirmative defenses and a demand for dismissal of the complaint. Creative Residential Construction Company, Inc., defaulted in appearing herein by answer.

By the instant motion, the plaintiff seeks summary judgment on its complaint against the answering defendants and a default judgment against the non-appearing defendant, Creative Residential Construction, Inc. The motion is opposed by the answering defendants, Homecomings Financial and Residential Funding, who jointly cross move for a stay of this action pending the appointment of the personal representative of the estate of Walter E. Guldi, the grantor of the plaintiff's title.

For the reasons stated, the plaintiff's motion (#001) is denied as is the cross motion (#002) by the answering defendants for a stay of this action.

The plaintiff's claim for cancellation of the August 6, 2004 mortgage by Walter O. Guldi in favor of Greenpoint Funding, is premised upon allegations that the six year statute of limitations has run on any claim for foreclosure of the lien of such mortgage, and accordingly, the plaintiff is entitled to an expungement of record of such mortgage lien pursuant to RPAPL 1501(4). However, the plaintiff failed to demonstrate, prima facie, its entitlement to such relief.

It is well settled law that an indebtedness secured by a mortgage accrues as each installment becomes due unless the mortgage debt is duly accelerated by unequivocal notice of acceleration or commencement of an action (*see Koepfel v Carlandia Corp.*, 21 AD3d 884, 800 NYS2d 607 [2d Dept 2005]; *Loiacono v Goldberg*, 240 AD2d 476, 658 NYS2d 138 [2d Dept 1997]; *see also Goldman Sachs Mtge. Co. v Mares*, ___ AD3d ___, 2016 WL 155488 [3d Dept 2016]). Accordingly, the six year statute of limitations will serve as a complete bar to the prosecution of a claim to foreclose the lien of a mortgage debt payable in installments, some of which were not due at the time of the default, only where the debt was duly accelerated so as to make all unpaid amounts due and payable applicable to a claim for foreclosure of a lien arising on a secured debt (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2010]; *Saini v Cinelli Enter., Inc.*, 289 AD2d 770, 733 NYS2d 824 [3d Dept 2001]).

Where a claim for discharge of a mortgage on statute of limitations grounds is premised upon the dismissal of a prior foreclosure action, the plaintiff must demonstrate that such dismissal was on the merits and that the statute of limitations on any re-commencement has run (*see Caliguri v JPMorgan Chase Bank, N.A.*, 121 AD3d 1030, 996 NYS2d 73 [2d Dept 2014]). A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes (*see Landau P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 n. 3, 862 NYS2d 316 [2008]; *Caliguri v JPMorgan Chase Bank, N.A.*, 121 AD3d 1030, *supra*). Moreover, in the absence of a valid acceleration of a mortgage debt by one having authority to do so, the statute of limitations does not expire with respect to unpaid installments which accrue within the six year period immediately prior to the commencement of a foreclosure action (*see Wells Fargo, N.A. v Burke*, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 852 NYS2d 791 [2d Dept 2011]).

Here, the plaintiff claims an entitlement to a recorded discharge of the August 6, 2004 mortgage by Guldi to Greenpoint Mortgage Banking, Inc., due to the dismissal of the prior mortgage foreclosure action commenced by MERS as nominee of Greenpoint that was later prosecuted by defendant, Homecomings Financial, and the purported running of the statute of limitations. However, the mere fact that the prior foreclosure action was dismissed due to a lack of standing on the part of the original plaintiff in that action, which was commenced in 2005 on a mortgage loan that went into default in December of 2004, does not warrant a discharge of the recorded mortgage or the lien arising therefrom. The dismissal on standing grounds is not a dismissal on the merits which would preclude a second foreclosure action and the plaintiff failed to demonstrate that the debt was properly accelerated by the filing of the foreclosure complaint by MERS, an entity that was not the owner of the mortgage note and thus without authority to accelerate the mortgage debt. Indeed, the Appellate Division's dismissal of the MERS foreclosure complaint was made expressly, without prejudice. The plaintiff thus failed to demonstrate an entitlement to summary judgment against Homecomings Financial and Residential Funding on those portions of the complaint wherein the plaintiff seeks a discharge of record of the August 6, 2004 mortgage.

Nor did the plaintiff establish any grounds for an award of summary judgment in favor of the answering defendants on the plaintiff's claims for a discharge of record of the referee's deed of October 19, 2012 or of the January 30, 2005 correction deed by Gladys Ellner in favor of defendant, Creative Residential Construction, Inc. It is well established that in actions to quiet the plaintiff's title or other interest in real property, the plaintiff cannot succeed by relying upon defects in the title or the interest of the defendant, but instead, must establish good title in itself (*see LaSala v Terstiege*, 276 AD2d 529, 713 NYS2d 76 [2d Dept 2000]; *Bridgehampton Natl. Bank v Schaffner*, 47 AD2d 351, 667 NYS2d 938 [2d Dept 1998]; *Town of N. Hempstead v Bonner*, 77 AD2d 567, 429 NYS2d 739 [2d Dept 1980]). Here, there was no mention, let alone showing, of the plaintiff's superior title and/or interest to those of the answering defendants under the referee's deed or the plaintiff's superior title to defendant, Creative Residential Construction, Inc., under the correction deed which was recorded at the same moment in time as that of the plaintiff's deed according to the recording documents attached to the instant motion. Summary judgment on the claims to extinguish the referee's deed of October 19, 2012 and the correction deed is thus denied.

In addition, the court denies the plaintiff's demands for a default judgment against defendant, Creative Residential Construction, Inc., on the plaintiff's pleaded claims, only one of which appears to target said defendant directly, namely, those last claim wherein the plaintiff seeks a discharge of record the January 30, 2005 correction deed conveying title to the subject premises to said defendant. It is well established that entitlement to a default judgment rests upon a showing of due service of the summons and complaint, a default in answering and facts constituting the plaintiff's claim against the defaulting defendant (*see* CPLR 3215[f]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 985 NY2d 269 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]). The plaintiff's possession of a cognizable claim for relief is thus required for entry of a default judgment against any defendant duly joined in the action.

As indicated above, a quiet title claim, such as the one interposed against defendant Creative Residential Construction, Inc., is dependent upon a showing by the plaintiff of good title in itself rather than any defect in the title or interest of such defendant. A review of the moving papers and of the complaint reveals that the plaintiff failed to establish a superior title and a legal basis for the discharge of the January 30, 2005 deed in favor of Creative Residential Construction, Inc. or of the other instruments of record that are the subject of the complaint. No facts constituting legal grounds for the expungement of said instruments including the correction deed in favor of defendant Creative Residential Construction, Inc., were advanced in the complaint or the moving papers. The plaintiff thus failed to demonstrate its possession of a cognizable claim for the discharge of record of the correction deed dated January 30, 2005 by Gladys Ellner to defendant, which was recorded with the Suffolk County Clerk on February 7, 2005, at the very same moment as the recording of the plaintiff's deed. Those portions of the plaintiff's motion wherein it seeks a default judgment against defendant, Creative Residential Construction, Inc., are thus denied.

The court also denies the cross motion (#002) of the answering defendants for a stay of this action pending the appointment of a "new" personal representative of the estate of the deceased obligor/mortgagor, Walter E. Guldi. There is no evidence that there is no acting, duly appointed personal representative of the estate of the deceased mortgagor. Co-executors of such estate were appointed upon the admission of Mr. Guldi's last will and testament to probate in February of 2009 and only one, George O. Guldi, is known to be disqualified from serving as such. The necessity of a stay of this action pending the appointment of a "new" personal representative has thus not been shown to have any basis in law or in fact. Nor have the defendants demonstrated an entitlement to a stay premised on their pleaded defense that the plaintiff failed to join a necessary party to this action, such as the personal representative of the estate of the deceased obligor/mortgagor. There are no direct claims against the estate of Walter E. Guldi in any of the pleadings put before the court on these motions and none of the pleaded claims have been shown to have an adverse impact upon the rights and interests of the estate. Accordingly, the court denies the cross motion for a stay of all proceedings in this action as demanded by the cross moving defendants.

DATED: 1/25/16



THOMAS F. WHELAN, J.S.C.