Deutsche Bank Natl. Trust Co. v Unknown Heirs of the Estate of Souto
2016 NY Slip Op 31274(U)
July 5, 2016
Supreme Court, New York County
Docket Number: 850119/15
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSET TRUST 2007-1, MORTGAGE-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-1,

Plaintiff,

-against-

UNKNOWN HEIRS OF THE ESTATE OF SERGE SOUTO, ROYAL BLUE REALTY HOLDINGS, INC., JOHN SOUTO AS VICE PRESIDENT OF ROYAL BLUE REALTY HOLDINGS, INC., JOHN SOUTO AS HEIR OF THE ESTATE OF SERGE SOUTO, THE BOARD OF MANAGERS OF 130 BARROW STREET CONDOMINIUM, CORNICELLO TENDLER & BAUMEL-CORNICELLO, UNITED STATES OF AMERICA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE EAST NEW YORK SAVINGS BANK KATZ EQUITIES and, "JOHN DOE #1" TO "JOHN DOE #10,"the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

Index No. 850119/15
Motion Seq: 001

DECISION/ORDER
ARLENE P. BLUTH, JSC

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The motion for summary judgment by defendant Royal Blue Holdings, Inc. (Royal Blue) for summary judgment on all causes of action in plaintiff's complaint, to discharge the mortgage as null and void and to cancel the notice of pendency is granted.

The cross-motion by plaintiff is denied.

This mortgage foreclosure action arises out of a dispute over a property located at 162-174 Christopher Street a/k/a 130-132 Barrow Street, Unit 162 TH3, New York, NY.[1] On or about September 21, 2006, defendants Serge Souto and Royal Blue secured a mortgage from American Home Mortgage Servicing, Inc. Plaintiff alleges that defendant Serge Souto as guarantor and defendant Royal Blue breached the terms of the mortgage by failing to pay an installment which became due on June 1, 2008 and by failing to pay subsequent installments. Plaintiff claims that they sent notice of defendants' default via a letter dated July 8, 2008. When no payment was made, plaintiff filed a foreclosure action, which it thereafter discontinued without prejudice. Plaintiff allegedly filed the instant action on March 16, 2015.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's

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[1]Plaintiff has filed multiple foreclosure actions relating to various units and properties at this address.

task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"There is no dispute that the statute of limitations period applicable to an action on a bond or note, the payment of which is secured by a mortgage upon real property is six years" (*CDR Creances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51, 837 NYS2d 33 [1st Dept 2007] [citing CPLR 213[4]]). "Further, it is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt" (*id.* [internal quotations and citation omitted]).

Royal Blue claims that the instant action is time-barred by the six-year statute of limitations. Royal Blue argues that the statute of limitations began to accrue from the day that American Home Mortgage sent a letter (July 8, 2008) declaring that if the default was not cured within 30 days, the loan balance would be accelerated. Royal Blue also observes that a previous foreclosure action filed on March 13, 2009 was later discontinued in 2010.

In opposition to Royal Blue's statute of limitations argument, plaintiff claims that the July 8, 2008 letter is merely a reference to a possible future event and, therefore, does not constitute an acceleration sufficient to start the statute of limitations. Plaintiff argues that "the cause of

action for foreclosure against the Defendant began to accrue upon Plaintiff's filing of the 2009 foreclosure action on March 17, 2009" (affirmation in support of the cross-motion ¶ 41). Plaintiff also argues that "The only acceleration that ever occurred on this Loan is upon Plaintiff's commencement of a foreclosure action on March 16, 2015" (affirmation of plaintiff's counsel in further support ¶ 8).

Neither of plaintiff's arguments is correct.

Acceleration of the Note

Because the statute of limitations begins to run on the date that the note was accelerated, this Court must determine whether the note accelerated after the expiration of the thirty-day cure period in mid-August 2008, or whether it occurred when plaintiff commenced a foreclosure action in March 2009 or whether it occurred when plaintiff commenced the instant action in March 2015 (as plaintiff makes both arguments). The motion turns on whether the letter dated July 8, 2008 constitutes unequivocal notice that the note accelerated without the need for any other action or notices if payment was not received within thirty days.

The July 8, 2008 letter states in relevant part:

> "If American Home Mortgage Servicing, Inc is not in possession of the amount that is necessary to cure the default within 30 days of the date of this notice, American Home Mortgage Servicing, Inc will accelerate the Loan balance and proceed with foreclosure. In such case, the Encumbered Property, as referenced above, will be sold at a duly held foreclosure sale or sheriff's sale and all occupants will be required to vacate"

(affirmation of Royal Blue's counsel, exh F).

This is not a wishy-washy notice. The Court finds that the phrase "will accelerate the Loan balance" means that plaintiff will accelerate the loan balance. It means that unless plaintiff

gets the money within thirty days, the note comes due and foreclosure will be the next step. There is no indication that plaintiff is only kidding about the thirty day deadline, and that as long as the payment is received before the foreclosure action is commenced, the default will be cured. There is no indication that there will be any other notices between the letter in the borrower's hands and the commencement of the foreclosure case. The thirty days is the last chance to cure. Indeed, the record on this motion shows that there were no notices between the July 8, 2008 default letter and the March 2009 foreclosure case commencement.

This court finds that the July 8, 2008 notice was sufficient, and the statute of limitations began to run on the 31st day after the notice if payment was not received. Therefore, the loan accelerated and the statute started to run on the 31st day, August 8, 2008.

Having missed the deadline, plaintiff now argues, in essence, that the letter was merely a warning, and that plaintiff had to do something else to actually accelerate the debt even if no payment was received by the deadline. The cases cited by plaintiff in support of this argument, that the letter merely warns of a possible future event rather than set in motion the countdown to the acceleration, are inapposite. The cited cases stand for the proposition that the phrase "may accelerate" does not constitute a clear and unequivocal notice to defendants that an entire mortgage is being accelerated (*Goldman Sachs Mortg. Co. v Mares*, 135 AD3d 1121, 1122, 23 NYS3d 444 [3d Dept 2016]) and that mentioning a possible future event does not meet the standard of clear and unequivocal notice (*Pidwell v Duvall*, 28 AD3d 829, 831, 815 NYS2d 754 [3d Dept 20006]). Those cases would be controlling if the letter warned that plaintiff "may accelerate" but the instant notice said "will accelerate".

In support of its argument that the 2009 foreclosure action itself constituted the acceleration, plaintiff cites to *Wells Fargo Bank, N.A. v Burke* (94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]). In *Burke*, the Court held that the loan was not accelerated because a predecessor "had not been assigned the note or the mortgage at the time the 2002 complaint was served" and, therefore, this predecessor "did not have the authority to accelerate the debt" (*id.* at 983). Here, the parties do not dispute that plaintiff had the authority to properly accelerate the debt and foreclose on the property. Moreover, the instant letter said "American Home Mortgage Servicing, Inc will accelerate the Loan balance and proceed with foreclosure"; it did not say "American Home Mortgage Servicing, Inc will accelerate the Loan balance *by proceeding* with foreclosure." Besides, while commencing a foreclosure action might be sufficient to accelerate a debt in some cases, the issue in the instant matter is whether the July 8, 2008 letter was sufficient. It was.

Cases that are more analogous to the instant action suggest that the July 8, 2008 letter properly accelerated the mortgage. The *Mares* case cites to another Third Department case, which found that a loan balance was accelerated when a letter was sent "stating that past due interest on the note by reason of late payments amounted to $326.23 and advising appellants that the option to accelerate would be exercised unless the delinquency was cured within 60 days" (*Colonie Block & Supply Co. v D.H. Overmyer Co.*, 35 AD2d 897, 897, 315 NYS2d 713 [3d Dept 1970]). In *Colonie*, the acceleration clause in the underlying note stated that if payment was not made to cure a default within 60 days that "the remaining amount of the note with all interest shall, at the option of the holder of this note, at once become due and payable" (*id.*).

Further, written notice of a future acceleration can properly accelerate a mortgage (*see U.S. Bank Natl. Assn. v Murillo*, 48 Misc3d 1216(A), 18 NYS3d 581 (Table) [Sup Ct, Nassau County 2015] [holding that a mortgage was accelerated and plaintiff's cause of action began to accrue on January 23, 2008 where a default letter sent on December 24, 2007 stated that "it would become necessary to accelerate the Mortgage Note unless payments on the loan could be brought current by January 23, 2008" and where "Defendants did not cure the default by January 23, 2008."]).

Here, the July 8, 2008 letter notified its recipient that the loan "will accelerate" if the default was not cured within 30 days. There is no indication that plaintiff was debating whether or not to accelerate the mortgage - the letter did not employ verbs such as "might" or "may," or suggest that a future step would be taken before the loan would be accelerated. Nor did it indicate that the acceleration would be declared by commencing a foreclosure action. Instead, the letter uses the term "will," which indicates that a future event is going to take place rather than that it might *possibly occur*.

The July 8, 2008 letter is a clear and unequivocal statement that the loan "will accelerate" in 30 days if the delinquency was not cured. Therefore, it is not a possible future event, but a future event that is guaranteed to occur if the money wasn't paid. When the payment was not made within 30 days (by August 7, 2008), the loan accelerated the next day (August 8, 2008). Because the instant action was filed more than six years from August 8, 2008, plaintiff's case is time-barred and the action is dismissed.

Accordingly, it is hereby

ORDERED that Royal Blue's motion is granted and plaintiff's complaint is dismissed as time-barred and the cross-motion is denied; and it is further

ORDERED that the New York County Clerk, upon presentation of a copy of this Order, is respectfully directed to enter upon its books and records the discharged mortgage and canceled notice of pendency as reflected in the next two paragraphs, and it is further

ORDERED that pursuant to RPAPL 1921(8), the subject mortgage is discharged as null and void, of no force and effect and expunged from the public record; and it is further

ORDERED that pursuant to CPLR 6514, the notice of pendency filed by plaintiff is canceled.

This is the Decision and Order of the Court.

Dated: July 5, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC