Vargas v Deutsche Bank Natl. Trust Co.
2017 NY Slip Op 30948(U)
April 5, 2017
Supreme Court, Bronx County
Docket Number: 302647/16
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 302647/16**

Juan Vargas,

Plaintiff,

-against-

DECISION and ORDER

Deutsche Bank National Trust Company,

Defendant.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), and plaintiff's cross-motion for summary judgment.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Notice of Cross-Motion, Affirmation & Exhibits	**2**
Affirmation in Opposition to Cross-Motion & Exhibits	**3**
Reply Affirmation & Exhibits	**4**

In the instant complaint, plaintiff alleges that, on or about May 9, 2005, he entered into a mortgage, in the principal amount of $308,000, secured by premises located at 530 Coster Street, Bronx, NY. The complaint further alleges the following: After several prior assignments, the mortgage was assigned to defendant Deutsche Bank National Trust Company ("Deutsche Bank") on March 6, 2015. "[O]n or about 2007, Plaintiff allegedly defaulted on his mortgage payments and a prior owner of the mortgage, IndyMac, commenced a foreclosure action . . . on January 16, 2009." Thereafter, IndyMac discontinued the action and cancelled the notice of pendency. On or about January 16, 2009, the entire debt owed on the mortgage was accelerated by the filing of the Summons and Complaint wherein the request for payment of the entire outstanding debt was made. "Upon information and belief, the plaintiff, nor anyone acting on his behalf, has reaffirmed this mortgage debt." The subject mortgage loan remained accelerated for more than six (6) years. The period of time to commence an action to foreclose the mortgage has not been tolled or abated, and "therefore has expired, and any and all claims under the bond and mortgage are barred by the Statute of Limitation imposed in such cases." The defendant, Deutsche Bank,

might claim an estate of interest in the subject property adverse to plaintiff. Upon information and belief, absent a judicial order, Defendant will attempt to foreclose on the property and seek to sell the subject property at a public sale. "This action is brought in equity, at law and under the provisions of Article 15 of the Real Property Actions and Proceedings Law." Plaintiff seeks judgment "to the effect that Defendant and every person claiming under them are barred from all claims to an estate or interest in the Premises . . . superior to Plaintiff's interest and also a judgment declaring the subject note and mortgage unenforceable."

Defendant now moves to dismiss the complaint, pursuant to CPLR 3211(a)(7), on the grounds that the complaint fails to state a cause of action against defendant.

Plaintiff cross-moves for summary judgment, pursuant to CPLR 3212, on the grounds that: (1) the 2009 case was discontinued due to defendant's own errors, (2) there was no affirmative and unambiguous act revoking the acceleration of the mortgage, (3) there was no intention on the part of defendant to revoke the acceleration, and (4) plaintiff's payments in 2016 have no bearing on the statute of limitations.

In support of dismissal, defendant submitted, *inter alia,* court various judicial decisions/court documentation and a statement of plaintiff's payment history on the mortgage debt. Plaintiff's payment history indicates that three "forebearance" payments in the amount of $1,961.64 each were made by plaintiff in April, May and June of 2016, respectively. In his affirmation, defendant's counsel asserts that "Plaintiff's complaint is utterly devoid of merit given recent case law concerning the applicable statute of limitations to New York foreclosure actions." Plaintiff's counsel also states that "[w]hen this Court examines the case law in relation to the facts in the case at bar, this Court must determine that Plaintiff's complaint is ripe for dismissal as Defendant's prior discontinuance constituted a prior action of revocation of the debt acceleration" and, therefore, "there is no statute of limitations bar preventing Defendant from commencing a new foreclosure action."

In opposition to defendant's motion and in support of summary judgment in his favor, plaintiff submitted, *inter alia,* copies of pages 2 through 15 of the mortgage, an Adjustable Rate Rider to the mortgage, the note, a portion of plaintiff's HAMP application, and various

correspondence. Notably, plaintiff failed to submit an affidavit of merit. *See* 3212(b). The copy of plaintiff's HAMP application includes pages 13, 14 and 15, only, plaintiff's "Streamline HAMP Affidavit," which is not notarized and is otherwise insufficient to substantiate plaintiff's claims herein. Page 15 bears plaintiff's signature and is dated March 25, 2016. Plaintiff submitted no evidence as to whether this application was submitted, granted and/or accepted. Nor does the affidavit specifically address the subject mortgage loan. The correspondence includes a letter, dated September 12, 2013, entitled "Notice Required By The Fair Debt Collection Practices Act," sent to plaintiff by a law firm on behalf of Deutsche Bank indicating that they had been retained to begin foreclosure procedures against him for outstanding debt in the amount of $443,207.65. The other letter, sent by the same law firm, dated July 8, 2014 and addressed to plaintiff's counsel, sets forth itemized payoff figures with interest calculated through August 1, 2014, and states that a check in the amount of $475,261.87 must be received by August 1, 2014 and that any funds received thereafter would be returned.

Plaintiff also submitted a letter dated August 5, 2008 from IndyMac to plaintiff in which IndyMac states that it is the servicer of plaintiff's loan, which is in "serious default." The total amount required to be paid to reinstate the loan is listed as $7903.96. The letter also states that plaintiff may cure the default by paying that amount "on or before 32 days from the date of the letter." The letter also states that if plaintiff does not cure his default, "[IndyMac] will accelerate your mortgage with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. Failure to cure your default may result in the foreclosure and sale of your property."

In opposition to summary judgment, defendant submitted the affirmation of counsel, a copy of the summons and complaint in this action, and a copy of the E-Courts Motion Detail. In his affirmation, counsel asserts that defendant's "[a]ffirmative act of discontinuance revokes acceleration" of the mortgage debt, the prior acceleration of the mortgage by IndyMac is a nullity because IndyMac lacked standing, and payments made by plaintiff in 2016 restart the applicable statute of limitations.

In reply papers, plaintiff submitted, *inter alia,* a single-page document from Ocwen Loan Servicing, LLC entitled "Additional Trial Period Plan Information And Legal Notices" and a complete copy of the mortgage. The Ocwen Loan Servicing document states, among other things: "If you accept this offer as described above and otherwise comply with the terms of the trial period plan, we will not proceed to foreclosure sale during the trial period" and that "[t]he servicer's acceptance and posting of your new payment during the trial period will not be deemed a waiver of the acceleration of your loan (or foreclosure actions) and related activities."

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On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *See Maas v. Cornell,* 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999). Affidavits submitted by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action." *See Rovello v. Orofino Realty Co., Inc.,* 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976). On its face, the complaint states a cause of action under Article 15 of the RPAPL. Defendant submitted no affidavits in support of its motion to dismiss the complaint.

The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt. *See EMC Mortgage Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161 (2nd Dept. 2001). The filing of the summons and complaint and lis pendens in an action accelerates the debt. *See Albertina v. Rosbro Realty Corp.,* 258 N.Y. 472, 180 N.E. 176 (1932); *Clayton Nat'l v. Guldi,* 307 A.D. 2d 982, 763 N.Y.S.2d 493 (2nd Dept. 2003). In any event, an intent to accelerate a debt must be clear and unequivocal. *See Sarva v. Chakravorty,* 34 A.D.3d 438, 826 N.Y.S.2d 74 (2nd Dept. 2006).

While a lender may revoke its acceleration, it must be an affirmative act of revocation by

the lender occurring within the statute of limitations period. *See EMC Mortgage Co. v. Patella,supra*; *Federal Natl. Mtge. Assn. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88 (2nd Dept. 1994). Unfortunately, the law is unsettled, and the caselaw is sparse, as to the types of affirmative acts that are sufficient to revoke an election to accelerate a mortgage debt. Here, Deutsche Bank contends that the discontinuance of the 2009 foreclosure action by IndyMac on November 25, 2013 (due to a lack of standing issue) revoked IndyMac's acceleration of plaintiff's mortgage debt and restarted the statute of limitations. However, the July 8, 2014 letter sent to plaintiff's attorney stated that its purpose was to collect a debt in the amount of $475,61.87, and that that amount must be received by August 1, 2014. As such, in July of 2014, Deutsche Bank was still attempting to collect the accelerated amount of the mortgage debt from plaintiff. Alternatively, Deutsche Bank contends that the prior acceleration of the mortgage by IndyMac is a nullity because IndyMac lacked standing to sue. However, no evidence was submitted that establishes that IndyMac lacked standing to sue plaintiff at that time. Plaintiff contends that even if the prior acceleration of the mortgage by the commencement of the 2009 foreclosure action were a nullity, that is of no moment because the debt was accelerated when plaintiff fail to cure the default within the 32-day period set forth in the August 5, 2008 letter. Hence, according to plaintiff, the statute of limitations began to run at that time. However, the Court does not find the August 5, 2008 letter to be sufficient, in itself, to establish as a matter of law that the debt was accelerated in September of 2008 rather than on January 16, 2009, when the foreclosure action was commenced by the filing of a summons and complaint.

Finally, Deutsche Bank contends that payments made by plaintiff in 2016 (under a loan modification) restart the applicable statute of limitations. General Obligations Law §17-101 provides that an "acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations in time for commencing actions under the civil practice law and rules other than an action for the recovery of real property." Such a writing must recognize an existing debt and must contain nothing inconsistent with

intention on the part of the debtor to pay it. *See Banco Do Brasil S.A. v. State of Antigua and Barbuda*, 268 A.D.2d 75, 707 N.Y.S.2d 151 (1st Dept. 2000). While plaintiff submitted a portion of his HAMP loan modification application, no other evidence was submitted as to whether the terms of a loan modification agreement, if any, was obtained. As such, issues of fact exist as to whether plaintiff entered into a loan modification in connection with the instant mortgage debt, the terms of any such agreement and whether any such agreement constitutes a revocation by Deutsche Bank of its election to accelerate plaintiff's mortgage debt.

Based upon the foregoing, Deutsche Bank's motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), is **denied**. Plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212, is also denied.

Dated: Bronx, New York
April 5, 2017

Hon. Julia I. Rodriguez, J.S.C.