960 Realty LLC v Wilmington Sav. Fund Socy., FSB
2018 NY Slip Op 33491(U)
December 13, 2018
Supreme Court, Kings County
Docket Number: 503545/16
Judge: Mark I. Partnow

At an IAS Term, Part FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of December, 2018.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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960 REALTY LLC,

Plaintiff,

- against -

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR BCAT 2015-14ATT,[1]

Defendant.

Action #1
Index No. 503545/16

MS#3 & MS#4

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WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR BCAT 2015-14ATT,

Plaintiff,

- against -

960 REALTY, LLC; IONE SHEPHERD-WASIE; NATIONSTAR MORTGAGE LLC; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY DEPARTMENT OF FINANCE; STATE OF NEW YORK; BANK OF AMERICA, N.A.; NATIONAL CITY MORTGAGE CO. DBA COMMONWEALTH UNITED MORTGAGE COMPANY; "JOHN DOE #1" through "JOHN DOE #10" inclusive the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendants,

Action #2
Index No. 517699/16

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[1] Action #1 was commenced against Federal National Mortgage Association (Fannie Mae). By a November 29, 2016 stipulation, the parties amended the caption to eliminate Fannie Mae and add Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as Trustee for BCAT 2015-14ATT (Wilmington) as defendant.

The following papers numbered 1 through 15 read herein:	Papers Numbered	
	Action #1	Action #2
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 4-6	8-10 11-13
Opposing Affidavit (Affirmation)	5-6 7	12 14-15
Reply Affidavit (Affirmation)		14-15

These related actions involve the property at 960 Pacific Street in Brooklyn (Property). In Action #1, 960 Realty LLC (960 Realty), the owner of the Property, seeks to quiet title. In Action #2, Wilmington seeks to foreclose a mortgage encumbering the same Property. The following motions – which involve the same legal issues and facts – are hereby joined for a single disposition.

In Action #1, 960 Realty moves for an order, pursuant to CPLR 3212 and RPAPL §1501 (4), granting it summary judgment canceling and discharging the mortgage encumbering its Property "on the grounds that the period allowed by the applicable statute of limitation for the commencement of an action to foreclose said mortgage has expired." Wilmington cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint.

In Action #2, Wilmington moves for an order: (1) granting it summary judgment and striking 960 Realty's answer, pursuant to CPLR 3212; (2) appointing a referee to compute the amount due, pursuant to RPAPL 1321; (3) granting it a default judgment against all non-appearing defendants, pursuant to CPLR 3215; and (4) amending the caption to strike the "John Doe" defendants. 960 Realty cross-moves for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint "on the ground that the cause of action may not be maintained because of the statute of limitations . . ."

Background

The Note and Mortgage

On January 12, 2006, Ione Shepherd-Wasie (Shepherd-Wasie), executed a $480,000.00 note in favor of First Financial Equities, Inc. (First Financial), which was secured by a mortgage on Shepard-Wasie's Property. The mortgage was recorded in the name of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for First Financial.

The record reflects that the mortgage was assigned four times: (1) on August 3, 2006, MERS, as nominee for First Financial, assigned the mortgage to Countrywide Home Loans, Inc. (Countrywide); (2) on April 7, 2008, Countrywide assigned the mortgage to Fannie Mae; (3) on July 26, 2016 Fannie Mae assigned the mortgage to Bank of America, N.A. (BOA); and (4) on July 26, 2016 BOA assigned the mortgage to Wilmington.

The 2008 Foreclosure Action

On April 18, 2008, Fannie Mae commenced an action to foreclose the mortgage against Shepherd-Wasie and others in Kings County Supreme Court under index number 12262/08 (2008 Foreclosure Action).[2] The complaint in the 2008 Foreclosure Action alleged that Shepherd-Wasie "failed to comply with the terms, covenants and conditions of said note and mortgage by defaulting in the payment of . . . principal, interest, plus installments for taxes, etc., which became due on the first day of November, 2007, and on the first day of each month thereafter" (2008 Complaint at ¶ 8). The 2008 foreclosure complaint further alleged that "by reason of such defaults, the plaintiff . . . does hereby elect to declare the balance of the principal indebtedness immediately due and payable" (*id.* at ¶ 9). Subsequently, by a March 20, 2014 order, Fannie Mae voluntarily discontinued the 2008 Foreclosure Action.

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[2] *Federal National Mortgage Association v Shepherd Wasie, et al.*, index No. 12262/08.

The 2014 Delinquency Notices, Monthly Mortgage Statements and 90-Day Notice

During the pendency of the 2008 Foreclosure Action, Ocwen Loan Servicing, LLC (Ocwen), the former servicer of the First Financial Mortgage, mailed Shepherd-Wasie a March 18, 2014 "Delinquency Notice" setting forth the monthly mortgage payments that were delinquent and advising her that:

> "You are late on your mortgage payments. As of 03/18/14, you are 2329 days delinquent on your mortgage loan. Failure to bring your loan current may result in fees and foreclosure – the loss of your home."

One month after the 2008 Foreclosure Action was discontinued, Ocwen mailed Shepherd-Wasie another "Delinquency Notice," dated April 26, 2014, setting forth the monthly mortgage payments that were delinquent and advising her that:

> "**You are late on your mortgage payments**. As of 04/26/14, you are 2370 days delinquent on your mortgage loan. Your account first became delinquent on 11/02/07. Failure to bring your loan current may result in fees and foreclosure – the loss of your home."

In addition to the delinquency notices, Selene Finance LP (Selene), the servicer of the mortgage since September 8, 2015, mailed monthly mortgage statements to Shepherd-Wasie dated 10/16/15, 11/16/15, 12/16/15 and 02/16/16,which requested monthly mortgage payments of principal, interest and escrow and the past due payments under the mortgage. The record also reflects that Selene, on January 26, 2016, separately mailed Shepherd-Wasie a "Notice of Default and Intent to Accelerate" and a 90-day foreclosure notice.

Action #1 – The Quiet Title Action

Meanwhile, on March 10, 2016, 960 Realty, which acquired the Property by a November 5, 2015 deed, commenced Action #1 seeking to quiet title to the Property and cancel the mortgage based on the expiration of the 6-year statute of limitations.

Wilmington answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that: (1) "the Mortgage debt referenced in the Complaint was never accelerated"; (2) "even assuming arguendo that the Mortgage debt was accelerated, Defendant revoked any acceleration of the Mortgage debt"; (3) "Plaintiff's claims and/or causes of action are barred by applicable tolling and/or abatement of the statute of limitations"; and (4) "Plaintiff's Complaint is without merit, because during periods of time applicable to this action, Defendant has been in possession of the Property."

Action #2 – The 2016 Foreclosure Action

Thereafter, on October 7, 2016, Wilmington commenced Action #2 against 960 Realty, Shepherd-Wasie and others, in which Wilmington seeks to foreclose the mortgage. The foreclosure complaint alleges that Shepherd-Wasie "has defaulted in making the monthly payment due *on June 1, 2011* and monthly thereafter" (2016 Complaint at ¶ 11 [emphasis added]). Regarding acceleration, the complaint alleges:

> "[t]hat by reason of the default of the Defendant Wasie, and pursuant to the acceleration provisions of said note and mortgage, the Plaintiff has elected and does elect that the whole of the principal sum secured hereby become immediately due and payable and there is now justly due and payable to the Plaintiff by virtue of such acceleration, the principal sum of $455,431.95 plus interest at the contract rate from May 1, 2011" (*id.* at ¶ 14).

The complaint further alleges that 960 Realty "is made a party to this action by virtue of any possible fee interest . . ." (*id.* at ¶ 20).

960 Realty answered the complaint, denied the material allegations therein and asserted affirmative defenses, including the statute of limitations. All other defendants failed to answer or otherwise appear in the foreclosure action.

Action #1 – the Motion and Cross Motion

A. 960 Realty's Summary Judgment Motion

In Action #1, 960 Realty moves for summary judgment canceling and discharging the mortgage on the ground that the 6-year statute of limitations expired. 960 Realty asserts that Fannie Mae "clearly and unequivocally elected to accelerate the entire amount that was due on the loan and secured by the mortgage by commencing the Foreclosure Action on April 18, 2008" and thus "the six year statute of limitation began to run on that date." 960 Realty contends that "[a]t the time of the commencement of this action on April 4, 2016, the Statute of Limitations period had expired almost two years earlier . . ." 960 Realty submits an affirmation from its president, Levi Myski, who affirms that 960 Realty "is the owner in fee simple and in possession . . ." of the Property.

B. Wilmington's Summary Judgment Cross Motion

Wilmington opposes 960 Realty's summary judgment motion and cross-moves for summary judgment dismissing the complaint in Action #1. Wilmington argues that "Plaintiff's Complaint must be dismissed because the Mortgage debt cannot be accelerated prior to foreclosure judgment, and therefore, the statute of limitations to enforce the Mortgage has not expired." Alternatively, Wilmington contends that "acceleration was revoked by the voluntary discontinuance of the 2008 Foreclosure" or "the voluntary dismissal *combined* with the subsequent notices sent to the Borrower by the mortgagee" citing this court's decision in *The Bank of New York Mellon v Yacoob, et al.*, Sup Ct, Kings County, Nov. 4, 2016, Partnow, J., index No. 510132/14. In addition, Wilmington argues that "even if the Mortgage debt was accelerated in April 2008, the six-year statute of limitations was re-set while Defendant was in possession of the Property, which constituted an on-going reaffirmation of the debt."

In support of its cross motion, Wilmington submits an affidavit from Amy Intorcia, Selene's Legal Title Specialist. Although Wilmington only produced copies of the March

18, 2014 and April 26, 2014 delinquency notices that Ocwen mailed to Shepherd-Wasie, Intorcia attests that:

> "[t]he Loan Records reflect that, on March 18, 2014, April 26, 2014, May 20, 2014 and June 24, 2014 the servicer of the Mortgage Loan mailed letters . . . to the Borrower via first class mail at the Borrower's address designated for such notices, wherein the servicer advised the Borrower of the delinquent sums due under the Mortgage Loan."

Intorcia further attests that "between November 1, 2015 and December 1, 2016, Selene mailed monthly mortgage statements . . . to the Borrower . . . which requested that the Borrower make the monthly mortgage payments of principal, interest and escrow and the past due payments under the Mortgage Loan." Wilmington submits copies of monthly mortgage statements dated 10/16/15, 11/16/15, 12/16/15 and 02/16/16.

Additionally, Intorcia attests that "on January 26, 2016, Selene mailed notices of default . . . to the Borrower at the Premises and to the Borrower's last known address," copies of which were submitted in support of Wilmington's cross motion. Intorcia also attests that on January 26, 2016 Selene mailed a 90-day foreclosure notice to Shepherd-Wasie, which is also included in the record. Notably, the default notices and the 90-day notice only demanded that the Borrower pay the arrears and late charges due under the loan.

Action #2 – the Instant Motion and Cross Motion

A. Wilmington's Summary Judgment Motion

In Action #2, Wilmington moves for an order granting it a judgment of foreclosure and sale and striking 960 Realty's answer, an order of reference, a default judgment against the non-appearing defendants and to amend the caption. In support of its motion, Wilmington submits the mortgage, the note and an affidavit from Anthony D'Addona, the Foreclosure Manager of Selene, who attests to Shepherd-Wasie's payment default.

Wilmington also submitted copies of its affidavits of service upon defendants, which reflect that all defendants were served with process on or before December 10, 2016.

B. 960 Realty's Cross Motion to Dismiss

On the same grounds set forth in its summary judgment motion in Action #1, 960 Realty opposes Wilmington's motion and cross-moves, pursuant to CPLR 3211 (a) (5), to dismiss the foreclosure complaint as barred by the 6-year statute of limitations.

Discussion

(1)

Action #1 – The Quiet Title Action

960 Realty's cause of action to cancel and discharge the mortgage is governed by RPAPL 1501 (4). The statute provides that a person with an estate or interest in real property subject to an encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired (*see* RPAPL 1501[4]; *see also Lubonty v U.S. Bank N.A.*, 159 AD3d 962 [2018]; *53 PL Realty, LLC v U.S. Bank N.A.*, 153 AD3d 894 [2017]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]).

"As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action" (*Wells Fargo Bank N.A. v Burke,* 94 AD3d 980, 982 [2012] [citing CPLR 213 (4)]). "The statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated (*Plaia v Safonte*, 45 AD3d 747, 748 [2007]). It 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" (*EMC Mortgage Corporation v Patella*, 279 AD2d 604, 605 [2001] [internal citations omitted]).

The Appellate Division, Second Department has repeatedly held that "acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" (*Milone v US Bank National Association*, 164 AD3d 145, 152 [2018]; *see also Freedom Mortgage Corporation v Engel*, 163 AD3d 631 [2018] [holding that "defendant established that the six-year statute of limitations began to run on the entire debt . . . when the plaintiff accelerated the mortgage debt by commencing the prior foreclosure action"]; *Deutsche Bank National Trust Company v Adrian*, 157 AD3d 934, 935 [2018] [holding that "[t]he filing of the summons and complaint seeking the entire unpaid balance of principal in the prior foreclosure action constituted a valid election by the plaintiff to accelerate the maturity of the debt"]). Thus, there is no merit to Wilmington's contention that the mortgage debt cannot be accelerated prior to a foreclosure judgment.

Under the circumstances here, the loan was accelerated by the commencement of the 2008 Foreclosure Action on April 18, 2008 and, without any further action by the lender, any subsequent foreclosure action would be barred by the 6-year statute of limitations. However, a lender may revoke its election to accelerate by an affirmative act occurring within the statute of limitations period (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

In *Milone*, the Second Department recently held that "[t]o the extent this Court has held that acceleration notices must be clear and unambiguous to be valid and enforceable . . . we likewise hold here that de-acceleration notices must also be clear and unambiguous to be valid and enforceable" (*Milone*, 164 AD3d at 153). Importantly, in *Milone*, the Second Department held that a "de-acceleration letter containing a clear and unequivocal demand

that the homeowner meet her prospective monthly payment obligations constitutes a de-acceleration in fact . . ." (*id.* at 154).

Here, following the discontinuance of the 2008 Foreclosure Action, Shepherd-Wasie was sent delinquency notices, monthly mortgage statements, a default notice and a 90-day notice advising her of Wilmington's intention to accelerate, all of which stated that Shepherd-Wasie's payment default may be cured and the loan made current upon payment of arrears and late charges. The discontinuance of the 2008 Foreclosure Action combined with the notices that were subsequently mailed to Shepherd-Wasie unequivocally demonstrate that Wilmington intended to revoke the 2008 acceleration (*see The Bank of New York Mellon v Yacoob, et al.*, Sup Ct, Kings County, Nov. 4, 2016, Partnow, J., index No. 510132/14).

Accordingly, Wilmington is entitled to summary judgment dismissing 906 Realty's quiet title action since the prior acceleration was revoked within the 6-year limitations period. For the same reason, 960 Realty's summary judgment motion is denied.

(2)

Action #2 – The 2016 Foreclosure Action

In support of Wilmington's motion for judgment of foreclosure and sale, an order of reference and a default judgment against the non-appearing defendants in the 2016 foreclosure action, Wilmington has demonstrated its prima facie entitlement to judgment as a matter of law by submitting: (1) the mortgage, the note and an affidavit attesting to Shepherd-Wasie's payment default; (2) proof of service of a copy of the summons and complaint; and (3) proof of the facts constituting its causes of action (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]). Additionally, Wilmington has demonstrated, prima facie, that it was the holder of the note before the 2016 foreclosure action was commenced (*see Castle Peak 2012-1 Loan Trust Mtge. Backed Notes, Series*

2012-1 v Sottile, 147 AD3d 720, 722 [2017]; *JP Morgan Chase Bank v Schott*, 130 AD3d 875, 876 [2015]). In opposition, 960 Realty has failed to raise an issue of fact to preclude summary judgment. 960 Realty's cross motion to dismiss Wilmington's complaint in Action #2 is denied. For the reasons previously discussed, the 2016 foreclosure action is not time-barred by the 6-year statute of limitations because Wilmington revoked the prior acceleration. Accordingly, it is

ORDERED that 960 Realty's summary judgment motion in Action #1 is denied; and it is further

ORDERED that Wilmington's summary judgment cross motion seeking to dismiss the complaint in Action #1 is granted and the complaint in Action #1 is hereby dismissed; and it is further

ORDERED that those branches of Wilmington's motion in Action #2 seeking summary judgment, an order of reference, a default judgment against the non-appearing defendants (Shepherd-Wasie, Nationstar Mortgage LLC, New York City Environmental Control Board, New York City Department of Finance, State of New York, Bank of America, N.A., National City Mortgage Co.) and an order amending the caption to strike the "John Doe" defendants are granted, long form order to follow; and it is further

ORDERED that 960 Realty's cross motion to dismiss the complaint in Action #2 is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

2018 DEC 24 AM 11:39
KINGS COUNTY CLERK
FILED

HON. MARK I PARTNOW
SUPREME COURT JUSTICE