

Junik v Nationstar Mtge., LLC
2022 NY Slip Op 34033(U)
November 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 500623/2017
Judge: Debra Silber
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At an IAS Part Term, Part 9 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 29th day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

DOV JUNIK,

Plaintiff,

-against-

NATIONSTAR MORTGAGE, LLC,
VLADIMIR SUDIT, and
FREHA EZAGUI,

Defendants.

-----X

DECISION / ORDER

Index No.: 500623/2017
Mot. Seq. # 3

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion and Affidavits (Affirmations) _____

62-78

Opposing Affidavits (Affirmations) _____

79

Reply Affidavits (Affirmations) _____

80

This is an action to quiet title, filed on January 11, 2017. It was commenced without filing a Notice of Pendency. Two of the three defendants answered, but defendant Freha Ezagui did not. In 2022, defendant Freha Ezagui conveyed the property to non-party C2L Holdings, LLC. The mortgage on the unit, which was held by defendant Nationstar until 2018, when it was assigned to U.S. Bank National Association as Trustee for the RMAC Trust, was not satisfied. Plaintiff claims, in his complaint, which is verified by his lawyer, that a person named Eliyahu Ezagui defrauded him, and, in some one hundred numbered paragraphs, he explains that he is entitled to an order quieting title. As plaintiff has never

been in title, an order cancelling the deed to Freya Ezagui is an odd form of relief to request. There is no claim for damages in the complaint, other than for attorney's fees.

The property at issue is a condominium, Unit 2L, at the Lefferts Gardens Condominium, located at 768-784 Lefferts Boulevard, Brooklyn, NY, and known as Block 1429. Lot 1254. The complaint alleges that Eliyahu Ezagui improperly transferred the condo unit to his mother, defendant Freha Ezagui, and that Eliyahu Ezagui was convicted of various crimes relating to this property in federal court.

Motion Sequence #1, brought by plaintiff for summary judgment solely as against defendant Sudit, sought an order declaring that he had no interest in the property which is the subject of plaintiff's action. That motion was granted by Justice Partnow without any opposition from Sudit, on January 3, 2018, [Doc 41], and essentially declares that Mr. Sudit has no lien on this condominium unit. Thereafter, on July 19, 2021 Justice Sweeney issued a judgment, which is recorded against this unit, in another action, brought by a lender, Deutsche Bank as Trustee of Ameriquest Mortgage Securities, under Index No. 511386/2020, which essentially adjudges that Sudit's mortgage is no longer a lien against any part of the building or its 30 condominium units. This judgment also bars Sudit from "all claims to any estate or interest in the premises adverse to or in derogation of Deutsche's mortgagee interest in the premises." Thus, this action has been concluded with regard to defendant Sudit.

In Motion Sequence #2, defendant Nationstar moved for leave to amend its answer. This motion was granted on November 13, 2018, [Doc 56] and an amended answer was electronically filed the next day.

Now, in Motion Sequence #3, defendant Nationstar moves for summary judgment dismissing the complaint. Counsel provides, in support of the motion, an affirmation in support [Doc 69], an affidavit from a Vice President of Nationstar which recites the assignment history of the mortgage[Doc 64], and various documents from other litigation involving some of these parties. Plaintiff opposes the motion with an affirmation of counsel.

Plaintiff's complaint alleges that Nationstar holds an unenforceable mortgage on the unit, and seeks to "Quiet Title Against Nationstar" in his first cause of action. This is the only cause of action against Nationstar. The complaint avers that Olympia Mortgage gave a mortgage to defendant Ezagui, which was assigned to Aurora Loan Services, who commenced a foreclosure action on it under Index Number 1106/2007, which was discontinued by the lender in 2012, so the mortgage is no longer valid as the statute of limitations ran. Plaintiff bases this argument on the legal theory that the foreclosure complaint accelerated the loan in 2007 and that, after six years, the statute of limitations ran. Therefore, plaintiff argues, the mortgage should be declared to be unenforceable, cancelled, expunged, etc.

Nationstar's counsel avers that the statute of limitations has not expired, as the discontinuance of the action de-accelerated the mortgage. Document 4 is a copy of a court order granting Aurora's motion to dismiss the complaint. In addition, Nationstar's counsel asserts that Aurora lacked standing to commence that foreclosure action in 2007, as it was not assigned the mortgage until 2008. Therefore, he argues, its attempt to accelerate the loan was not effective.

Thus, the basis of the motion is that Nationstar holds a valid mortgage on the condominium unit, and plaintiff's claims to "quiet title" should be dismissed.

An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* 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 (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]). However, "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 Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]; *see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]; *Nationstar Mtge., LLC*, 143 AD3d at 867; *Wells Fargo Bank, N.A.*, 94 AD3d at 982). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]; *see Milone v US Bank N.A.*, 164 AD3d 145, 154 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]). The voluntary discontinuance of a foreclosure action by the plaintiff qualifies as such an affirmative act of revocation (*see Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021]). Here, the court's order is dated January 3, 2012, which dismissed the foreclosure action at the lender's request, and thus was within six years of

the commencement of the foreclosure action, which was in 2007, based on the index number. There is no evidence the mortgage was accelerated prior to the commencement of the action.

In opposition, plaintiff's counsel asserts that the cause of action to impose a constructive trust on Freha Ezagui directly affects Nationstar, because if it was granted, it would undermine Nationstar's mortgage. The cause of action for constructive trust is improperly asserted against Ezagui, and in any event, must be dismissed. "The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment" (*see Minzer v Rauch*, 206 AD3d 721 [2d Dept 2022]). Plaintiff was not in a fiduciary or confidential relationship with Freha Ezagui. Nor was the deed for the condominium to her made in reliance on a promise. Plaintiff provides no evidence in opposition to the motion, just legal argument. The court concludes that plaintiff's claims against Nationstar must be dismissed.

In order for a plaintiff to successfully pursue an action pursuant to RPAPL Article 15, the plaintiff must affirmatively establish that his or her claim is based upon a claim of an estate or interest in real property (*see 2 Warren's Weed New York Real Property § 24.06* [2022]). Here, plaintiff asserts that he dealt with defendant Freha Ezagui's son Eliyahu Ezagui, but he is not named as a party. The sponsor of the condominium conversion, which was declared effective in 1998, and the Declaration of Condominium recorded in 1999, was a corporation known as Lefferts Homes Inc., which has been dissolved by proclamation since 2009. The deed to Freha Ezagui was signed by a person

who was the Sponsor's attorney, according to the Declaration of Condominium, and he signed it as "Vice President" of Lefferts Homes Inc. The property is no longer held by Freha Ezagui, and plaintiff does not allege that he paid her any funds for a condominium. In fact, plaintiff specifically states that it was Eliyahu Ezagui who defrauded him, but he did not sue him. Further, a quiet title action which seeks to cancel a deed is ordinarily brought by someone who was in title, so that if the allegedly void deed is canceled, the plaintiff is returned to ownership.

Here, plaintiff was never in title. Perhaps he should have sued for conversion, fraud, or specific performance. In any event, he did not sue the party he claims defrauded him. Plaintiff's attorney provides the docket number for the federal case, EDNY, 2009-185, so he must have been aware that Mr. Ezagui had finished his sentence and his probation before this case was commenced. Why plaintiff did not sue Eliyahu Ezagui or the Sponsor entity which transferred the condo unit to Freha Ezagui, Lefferts Homes, Inc., is not explained anywhere. The indictment accused Eliyahu Ezagui of the same scheme alleged in the complaint herein. According to the document list in Pacer, the federal court's website, a jury trial was held in the federal criminal action, and Eliyahu Ezagui was sentenced to time in prison.

The court must note that defendant Freha Ezagui was served in January 2017 with the complaint and has not answered. Therefore, as plaintiff has not taken a default against defendant Freha Ezagui, and more than a year has passed since her default, the court must, *sua sponte*, dismiss this action as against her as abandoned, pursuant to CPLR 3215(c).

Accordingly, the motion is granted, and the complaint is dismissed as against defendant Nationstar and defendant Ezagui. As the claims against defendant Sudit have already been resolved, this matter is now disposed.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.