

**Lubonty v U.S. Bank N.A.**

2015 NY Slip Op 31632(U)

August 17, 2015

Supreme Court, Suffolk County

Docket Number: 14-21853

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETTI  
Acting Justice Supreme Court

MOTION DATE 2-5-15  
ADJ. DATE 4-30-15  
Mot. Seq. # 001 - MG; CASEDISP

-----X	
GREGG LUBONTY,	LESTER & ASSOCIATES, P.C.
	Attorney for Plaintiff
	600 Old Country Road, Suite 229
	Garden City, New York 11530
Plaintiff,	
- against -	
	HINSHAW & CULBERTSON, LLP
	Attorney for Defendant
	800 Third Avenue, 1eth Floor
	New York, New York 10022
U.S. BANK NATIONAL ASSOCIATION, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A,	
Defendant.	
-----X	

Upon the following papers numbered 1 to 18 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 13 - 16; Replying Affidavits and supporting papers 17 - 18; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendant U.S. Bank National Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A, and American Home Mortgage Investment Trust 2005-4A ("US Bank"), for dismissal of plaintiffs' complaint, is considered under CPLR 3211 (a) (7) and is granted.

On August 2, 2005, plaintiff Gregg Lubonty ("Lubonty") executed an adjustable rate note in favor of American Home Mortgage Acceptance, Inc. (AHMA) agreeing to pay the sum of \$2,500,000.00. On even date, plaintiff executed a mortgage in the principal sum of \$2,500,000.00 on the subject premises located at 286 Montauk Highway, Southampton, New York ("premises"). The mortgage indicated AHMA to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of AHMA as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on August 18, 2005 in the Suffolk County Clerk's Office.

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Thereafter, the subject mortgage loan was allegedly pooled and securitized in the American Home Mortgage Invest Trust 2005-4A on or about October 7, 2005.

The premises was the subject of a mortgage foreclosure action commenced on July 11, 2007, in this Court, entitled *American Home Mortgage Acceptance, Inc. c/o American Home Mortgage Servicing v Gregg Lubonty, et al.* under Index Number 11749/2007 (“first foreclosure action”). However, on June 26, 2007, Lubonty filed a voluntary Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court, Southern District of Florida under Docket Number 07-14945-AJC (“first bankruptcy action”). The first bankruptcy petition was voluntarily dismissed on November 24, 2009, approximately 2 years, 4 months and 29 days after filing. Thereafter, on January 14, 2010, AHMA moved for a default judgment and an Order of reference. By Order dated September 27, 2010 (Costello, J.), the Court denied plaintiff’s motion and dismissed AHMA’s complaint premised on the fact that it did not seek a default judgment against Lubonty within one year of his default and failed to offer any explanation for the extensive delay (*see* CPLR 3215 [c]).

On May 9, 2011, the mortgage was transferred by an assignment of mortgage from American Home Mortgage Servicing as attorney in fact for AHMA to U.S. Bank National Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A. Thereafter, on June 9, 2011, U.S. Bank National Association as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A commenced a foreclosure action against Lubonty under Index Number 18893-2011 (“second foreclosure action”). Subsequently, on October 19, 2011, Lubonty filed a voluntary Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court, Eastern District of New York under Docket Number 8-11-77413 (“second bankruptcy action”). The premises was released from the bankruptcy estate by Order dated November 26, 2013 (Trust, J.), approximately 2 years, 1 month, and 8 days after filing. After the stay was lifted, by Order dated October 21, 2014, the Court (Whelan, J.) dismissed the second foreclosure action after a traverse hearing.

Lubonty commenced this action, pursuant to RPAPL 1501 (4), for a judgment declaring the mortgage on premises, currently held by U.S. Bank, to be invalid and directing the Suffolk County Clerk to cancel and discharge the mortgage of record. RPAPL 1501 (4) provides that where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage has expired, any person with an estate or interest in the property may maintain an action to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom as barred by the statute of limitations. Plaintiff asserts in his verified complaint “that the running of the statute of limitations for the commencement of an action to foreclose the Mortgage or to bring any action on the Note for principal or for any interest thereon has not been tolled or abated and that the Note and Mortgage has become outlawed and barred by the statute of limitations.”

Defendant now moves to dismiss the action for failure to state a cause of action pursuant to CPLR 3211 (a) (7) on the basis that the statute of limitations was tolled by the filing of plaintiff’s two bankruptcy petitions and that the statute of limitations has not expired. Plaintiff, through his attorney, opposes the application.



On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 756 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972 [1994]; *Sposato v Paboojian*, 110 AD3d 979, 974 NYS2d 251 [2d Dept 2013]; *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d 574, 971 NYS2d 48 [2d Dept 2013]). Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sposato v Paboojian*, 110 AD3d at 979; *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d at 574-575).

Pursuant to CPLR 213 (4), a six-year statute of limitations applies to any action based upon a bond or note, the payment of which is secured by a mortgage upon real property. "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" (*In re Strawbridge*, 2012 WL 701031 [SDNY 2012], citing *MesserPlaia v Safonte*, 45 AD3d 747, 748, 847 NYS2d 101 [2d Dept 2007]; *Zinker v Makler*, 298 AD2d 516, 517, 748 NYS2d 780 [2d Dept 2002]; *Notarnicola v Lafayette Farms*, 288 AD2d 198, 199, 733 NYS2d 91 [2d Dept 2001]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605, 720 NYS2d 161 [2d Dept 2001]; *Loiacono v Goldberg*, 240 AD2d 476, 477, 658 NYS2d 138 [2d Dept 1997]). Once a mortgage debt is accelerated by the commencement of a foreclosure action, the borrower's right to make monthly installments ceases, all sums become immediately due and payable, and the six-year statute of limitations begins to run on the entire mortgage debt (*see Federal National Mortgage Assn v Mebane*, 208 AD2d 892, 894, 618 NYS2d 88 [2d Dept 1994]; *Clayton Natl. v Guldi*, 307 AD2d 982, 763 NYS2d 493 [2d Dept 2003]).

CPLR 204 (a) provides as follows:

(a) Stay. Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced.

Furthermore, it has been held that under CPLR 204, the filing of a petition in bankruptcy results in a tolling for the entire period of the stay specifically imposed by the Bankruptcy Code (*see Mercury Capital Corp. v Shepherds Beach, Inc.*, 281 AD2d 604, 605, 723 NYS2d 48 [2d Dept 2001] [holding that the statute of limitations on mortgage note was tolled under CPLR 204 during federal bankruptcy proceeding]; *see also Zuckerman v 2346 W. 22st. Corp.*, 167 Misc 2d 198, 203, 645 NYS2d 967, 971 [Sup Ct, New York County 1996]).

In addition, the filing of a petition in bankruptcy invokes the provisions of 11 USC § 362. This automatic stay, specifically Section 362 (a) (1), operates as an injunction against the commencement or the continuation of specified actions against the both debtor and the debtor's estate (*see Midlantic Nat. Bank v New Jersey Dept. of Environmental Protection*, 474 US 494, 503, 106 SC 755 [1986]). The automatic stay becomes effective at the moment of the filing of the petition and applies to all entities, even to proceedings pending in state and federal courts (*see Maritime Elec. Co. v United Jersey Bank*, 959 F2d 1194, 22 Bankr Ct Dec 1309 [3rd Cir 1991]). Except for several enumerated situations not relevant to this action, the automatic stay operates as a prohibition against the continuation of certain actions such as those to collect a debt or to foreclose a mortgage.

Section 362 of the Bankruptcy Act provides in pertinent part:

Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of –

(1) the *commencement* or *continuation*, including the issuance or employment of process, of a *judicial*, administrative, or other action or *proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title (*see* 11 USC § 362 [a] [1] [emphasis added]).

A review of the submissions before the Court demonstrates that Lubonty filed two petitions for relief pursuant to Chapters 11 and 7 of the Bankruptcy Code (11 USC § 1301, *et. seq.*). The first bankruptcy action was filed under Docket Number 07-14945-AJC on June 26, 2007, and was dismissed on November 24, 2009. The second bankruptcy action was filed under Docket Number 8-11-77413 on October 19, 2011. The premises was released from the bankruptcy estate by Order dated November 26, 2013 (Trust, J.).

Where, as here, there has been a bankruptcy filing, the provisions of CPLR 204 (a) and 11 USC § 362 [a] [1] are effective and invoked as a matter of law. Under these sections, the applicable statute of limitations is tolled for the period of time during which a stay or prohibition is in effect (*see Zuckerman v 234-6 W. 22 Street Corp.*, 167 Misc 2d 198). Thus, Lubonty's Chapter 11 filing effectively tolled the statute of limitations for a period of two years, four months, and twenty nine days (from June 26, 2007 through November 24, 2009). Likewise, Lubonty's Chapter 7 filing tolled the statute of limitations for a period of two years, one month, and eight days). In total, Lubonty's bankruptcy filings tolled the statute of limitations for a period of approximately four years, five months and fourteen days.

Here, the filing of the summons and complaint and *lis pendens* in 2007 accelerated the note and mortgage (*see Clayton Natl. v Guldi*, 307 AD2d 982). Thus, the statute of limitations began to run upon acceleration of the mortgage debt (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605, 720 NYS2d



161 [2d Dept 2001]). As the first action was commenced on July 11, 2007, under normal circumstances, US Bank's right to commence a foreclosure action in this matter would have expired on July 11, 2013. However, due to plaintiff's two bankruptcy filings, CPLR 204 (a) and 11 USC § 362 (a) (1) effectively tolled the statute of limitation for a period of four years, five months and fourteen days, thereby extending the limitation period to December 25, 2017.

Accordingly, the motion to dismiss the complaint for failure to state a cause of action is granted and the complaint is dismissed in its entirety.

Dated: August 17, 2015

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

FINAL DISPOSITION     NON-FINAL DISPOSITION