Tarter v Specialized Loan Servicing, LLC
2015 NY Slip Op 32784(U)
August 11, 2015
Supreme Court, Nassau County
Docket Number: 601133/15
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 12

X

MARY E. TARTER a/k/a MARY ELIZABETH TARTER,

Plaintiff,

Index No.: 601133/15
Motion Sequence...01
Motion Date...07/10/15
XXX

-against-

SPECIALIZED LOAN SERVICING, LLC, BANK OF AMERICA, N.A.; and THE BANK OF NEW YORK MELLON CORPORATION,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affidavit in Opposition.....x
Memorandum of Law.....x
Reply Memorandum of Law.....x

Upon the foregoing papers, the Defendants, Specialized Loan Servicing, LLC and The Bank of New York Mellon Corporation's Motion, pursuant to CPLR § 3211 (a) (1) and (a) (7), seeking an Order dismissing the Plaintiff's Verified First Amended Complaint, is determined as hereinafter provided.

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]), the underlying facts are as follows:

This action is brought pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") Article 15 seeking to cancel and discharge a mortgage (*See* Notice of Motion, Exhibit 2 [Verified First Amended Complaint], ¶ 1).

The Plaintiff is the sole owner in fee simple of the real property located at 19 Croydon Drive, Bellmore, Town of Hempstead, County of Nassau, State of New York 11710, and legally described as Section 56, Block R02, Lot 179 (hereinafter referred to as the "Property" or the "Subject Premises") (*Id.* at ¶¶ 2, 9).

The Defendant, The Bank of America, N.A. ("Bank of America"), is the former owner and holder of a subordinate, second mortgage on the Property (*Id.* at ¶ 3). The Defendant, The Bank of New York Mellon Corporation ("BONY"), is the current holder of the note and subordinate second mortgage on the Property (*Id.* at ¶ 4). The Defendant, Specialized Loan Servicing, LLC ("SLS"), is the servicer of the note and second mortgage held by BONY (*Id.* at ¶ 5).

The Plaintiff purchased the Property and acquired her interest by bargain and sale deed in an arms length transaction in May 2005 (*Id.* at ¶ 7). To finance the purchase of the Property, the Plaintiff executed and delivered a note and mortgage, both dated May 13, 2005, to American Home Mortgage Acceptance Inc. ("AHM") (*Id.* at ¶ 10).

In 2006, the Plaintiff obtained a line of credit from Countrywide Home Loans ("Countrywide") by executing a promissory note in the approximate amount of $159,900 (*Id.* at ¶ 11). The promissory note to Countrywide and the payment obligation thereunder was secured by a mortgage (the "Countrywide Mortgage" or the "Junior Mortgage") on the

Property that was executed by the Plaintiff (*Id.* at ¶ 12). The Countrywide Mortgage was junior in position to the mortgage held by AHM (*Id.* at ¶ 13).

In June 2007, the Plaintiff defaulted under the Countrywide Mortgage by not making her monthly payment in accordance with the terms of the underlying promissory note and mortgage (*Id.* at ¶ 14).

On December 26, 2008, the Plaintiff filed a Chapter 7 Bankruptcy Petition, listing AHM and Countrywide, among others, as creditors in her bankruptcy case (*Id.* at ¶ 15).

On March 24, 2009, the Plaintiff was discharged of all of her dischargeable debts, including her personal obligation under the notes held by AHM and Countrywide (*Id.* at ¶ 16). However, the first and second mortgages held by AHM and Countrywide, respectively, were not discharged by the Plaintiff's bankruptcy (*Id.* at ¶ 17).

Subsequently, the Countrywide Mortgage was assigned or otherwise acquired by the Defendant, Bank of America (*Id.* at ¶ 19).[1] Bank of America, in turn, assigned or otherwise conveyed its interest in said Junior Mortgage to BONY, which remains the current owner of the mortgage (*Id.* at ¶ 20).

At all relevant times herein, the Plaintiff has been in default under the Junior Mortgage while it was held by Countrywide, as well as by its assignees or successors, including Bank of America and BONY (*Id.* at ¶ 21). Specifically, the length of default under

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[1]The AHM mortgage was assigned from time to time and is presently held and/or serviced by an entity called Homeward Residential, Inc. (*Id.* at ¶ 18).

the Junior Mortgage has exceeded six years, excluding any applicable period of time where her default would be tolled (*Id.* at ¶ 22). During the time of the Plaintiff's default, neither the Defendants nor any of their predecessors-in-interest have brought a proceeding to enforce their rights under the Junior Mortgage (*Id.* at ¶ 23). Further, the Plaintiff's default under the Junior Mortgage has not been cured or excused by the Defendants, and the alleged amount under said mortgage remains due and unpaid (*Id.* at ¶ 24).

In bringing this action, the Plaintiff claims that the Junior Mortgage, having been in default in excess of six years, can no longer be enforced (*Id.* at ¶ 27). Accordingly, the Plaintiff's sole cause of action herein, pursuant to RPAPL § 1501 (4), is predicated upon her claim that the Junior Mortgage, now held by its current owner, BONY, can be canceled and discharged and the title to the Property can be cleared of the Junior Mortgage (*Id.* at ¶ 31).

The Defendants, SLS and BONY, move, pre-answer, pursuant to CPLR § 3211 (a) (1) and (7), seeking to dismiss the Plaintiff's "Verified First Amended Complaint." The Defendants claim that as the Plaintiff has failed to allege that the lender on the Junior Mortgage ever accelerated the full amount of the debt, the Plaintiff is precluded from the relief that she seeks.

In opposition, the Plaintiff submits her own affidavit, wherein she attests that:

> "After my last payment under the note, I received multiple notices from Countrywide, regarding the loan default. On or about October 28, 2008, I received a notice from Countrywide...[which] states, in pertinent part, that it is being sent pursuant [to] 'New York Law,' and that I am 'at risk of

> losing [my] home' if I do not pay. The letter further threatens 'legal action' if 'this matter is not resolved within 90 days from the date of this notice was mailed...' " (Aff. In Opp., ¶¶ 5-6).

The Plaintiff argues that "whether there was acceleration of the note, as a matter of law, is not an issue for determination on a motion to dismiss [...] [r]ather the issue here is whether the Complaint states a cause of action under applicable law" (*Id.* at ¶ 9).

The law is clear. 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 (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]; *Sposato v. Paboojian*, 110 A.D.3d 979 [2d Dept. 2013]). Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR § 3211 (a) (7), and the motion is not converted into one for summary judgment, 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 (*Guggenheimer v. Ginzburg*, supra at 275; *Sposato v. Paboojian*, supra at 979).

RPAPL § 1501 (4) provides that "[w]here the period allowed by the applicable statute of limitation 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" (RPAPL § 1501 [4]).

Pursuant to CPLR § 213 (4), a foreclosure action must be commenced within six years of a default under the terms of the note and mortgage (*Id*; see also, RPAPL § 1501 [4]; *see e.g., Rack v. Rushefsky*, 5 A.D.3d 753 [2d Dept. 2004]). "[W]ith respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due' unless the mortgage debt is accelerated" (*Loiacono v. Goldberg*, 240 A.D.2d 476 [2d Dept. 1997] *citing Pagano v. Smith*, 201 A.D.2d 632, 633 [2d Dept. 1994]). Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt (*Federal Natl. Mtge. Assn. v. Mebane*, 208 A.D.2d 892, 894 [2d Dept. 1994]). As the Second Department stated in *Federal Natl. Mtge. Assn. v. Mebane, supra*, once a mortgage debt is accelerated, "the borrowers' right and obligation to make monthly installments cease[s] and all sums [become] immediately due and payable," and the six-year Statute of Limitations begins to run on the entire mortgage debt (*Federal Natl. Mtge. Assn. v. Mebane*, supra at 894; *see also*, *EMC Mortgage Corp. v. Patella*, 279 A.D.2d 604, 605 [2d Dept. 2001]). Thus, ultimately, the Statute of Limitations does not begin to run on the entire mortgage debt unless and until there has been an acceleration of the mortgage debt.

In addition, the Second Department explained in *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980 [2d Dept. 2012] that the acceleration of a mortgage debt is

accomplished through a demand made by the holder to the borrower. The Court stated therein that:

> Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation ***As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage ***. Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan*** and such notice must be "clear and unequivocal"*** (*Id.* at 982-983 [internal citations omitted]).

While the commencement of a foreclosure action and a written demand for the entire amount due constitute typical methods of accelerating a mortgage debt (see, e.g, *EMC Mortgage Corp. v. Patella*, supra at 605; *Federal Natl. Mtge. Assn. v. Mebane*, supra at 894; *Lavin v. Elmakss*, 302 A.D.2d 638 [3rd Dept. 2003]; *Business Loan Center Inc. v. Wagner*, 31 A.D.3d 1122 [4th Dept. 2006]), this Court cannot find that the mere payment default by the borrower – by itself – constitutes an acceleration of the entire mortgage debt. Specifically, this Court finds that mere payment default, alone, does not fall in line with the "affirmative action" that is required to be undertaken by the lender to notify the borrower that the entire amount due has been accelerated (*Wells Fargo Bank, N.A. v. Burke*, *supra*).

Given the foregoing, this Court finds that the Plaintiff's claim is fatally flawed. Indeed, even under the most liberal construction and reading of the Plaintiff's Complaint, this Court cannot read there to be any allegation that either Defendants or any of their

predecessors in interest accelerated the entire amount of the mortgage debt under the subject loan, at any time.

While the Plaintiff attempts to correct this deficiency in her pleading by submitting, in opposition, an affidavit and a notice purportedly sent to her in October 2008 by the prior servicer of the Subject Loan, these submissions, the substance of which this Court accepts as true on this CPLR § 3211 motion, nonetheless fails to establish a claim under RPAPL § 1501, as a matter of law.

Indeed, based upon a plain and simple reading of the notice appended to the Plaintiff's Affidavit in Opposition, this Court finds that such notice is nothing more than a "90-Day Notice" statutorily required by RPAPL § 1304.

Specifically, RPAPL § 1304 provides, in relevant part, that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" (RPAPL § 1304 [1]; *Deutsche Bank Natl. Trust Co. v. Spanos*, 102 A.D.3d 909, 910 [2d Dept. 2013]). "RPAPL 1304 sets forth the requirements for the content of such notice (RPAPL § 1304 [1]), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (RPAPL § 1304 [2])" (*Id*). Fundamentally, the 90-Day Notice pursuant to RPAPL § 1304 serves two purposes: 1) to inform the borrower of the payment default and its amount, and the right to cure; and 2) to inform the borrower that if the default is not cured within 90 days, the lender *may* commence

foreclosure proceedings. Indeed, this Notice is not discretionary; rather it is statutorily mandated by RPAPL § 1304.

Based upon a plain and simple reading of the Notice, submitted by the Plaintiff in opposing the Defendants' instant motion, it is clear to this Court that the language contained therein is identical to the form language required by the statute, RPAPL § 1304. Therefore, even under the most liberal construction of the Plaintiff's submissions, this Court finds that the notice submitted by the Plaintiff is nothing more than the statutorily required 90-Day Notice which ultimately fails to support the Plaintiff's theory of acceleration of the mortgage debt. Indeed, the substance of the 90-Day Notice reveals that it does not purport to accelerate the mortgage debt, expressly or otherwise, and is intended for entirely different purposes.

Furthermore, as stated above, acceleration of the mortgage debt, where the loan instrument provides that the acceleration is at the option of the holder, must be "clear and unequivocal" (*Wells Fargo Bank, N.A. v. Burke*, supra; *Sarva v. Charavorty*, 34 A.D.3d 438, 439 [2d Dept. 2006]). A statutorily required pre-foreclosure notice does not qualify.

Finally, this Court cannot overlook the fact that the Plaintiff alleges that her payment default remains ongoing. Thus, as a matter of law, the Statute of Limitations has not run on *any* monthly installment that the Plaintiff has failed to remit within the past six years.

Ultimately, the Plaintiff's failure to allege an acceleration of her mortgage debt, whether in the Complaint or through her submissions in opposition, is fatal to establishing

a claim pursuant to RPAPL § 1501.

Accordingly, it is hereby

ORDERED, that the Defendants' Motion seeking to dismiss this action, in its entirety, pursuant to CPLR § 3211 (a) (1) and (a) (7), is **GRANTED**.

All applications not specifically addressed are denied.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

DATED: Mineola, New York
August 11, 2015

Hon. Randy Sue Marber, J.S.C.
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