Soffer v U.S. Bank, N.A.
2016 NY Slip Op 32697(U)
September 23, 2016
Supreme Court, Kings County
Docket Number: 513961/2015
Judge: Edgar G. Walker

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS

----------X

JOSEPH SOFFER,

Plaintiff,

-against-

U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR RESIDENTIAL ASSET SECURITIES CORPORATION, HOME EQUITY MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-EMX8,

Defendant.

----------X

Hon. Edgar G. Walker
Part 90

Index No. 513961/2015

The plaintiff's motion is denied. The defendant's cross motion is granted.

In this case, the plaintiff obtained a mortgage in July 2006 and defaulted in 2009. As a result of refunds and adjustments made to the plaintiff's account by Wells Fargo, as servicer for the trust, the loan was brought current through January 1, 2010 and the plaintiffs then owed the payment due February 1, 2010 and all future monthly payments outstanding and advanced escrow due thereafter.

On June 30, 2009, the defendant commenced a foreclosure action. On June 3, 2015 the defendant moved to discontinue the foreclosure action. On June 9, 2015 the defendant sent the plaintiff a letter notifying him that it was de-accelerating the mortgage loan, withdrawing any demand for immediate payment in full of sums secured by the mortgage at issue, and reinstating the mortgage loan as an installment debt. The defendant's motion to discontinue was granted in August of 2015, in which the Court ordered that the action be discontinued "without prejudice to recommencement pursuant to CPLR 205(a) or otherwise." In December of 2015, the defendant

commenced a new foreclosure action, seeking sums that came due on the mortgage loan from February 1, 2010 onward, which is currently pending.

In support of the plaintiff's motion for summary judgment and discharge of the mortgage, the plaintiff argues that "notwithstanding the discontinuance of the 2009 foreclosure action, the entire amount secured by the mortgage remained due," and at no time did the defendant "restore the mortgage or the debt secured thereby." The plaintiff contends that "there has been no payment upon the said note, mortgage or indebtedness whether by way of principal or interest at any time since June 30, 2009," when the foreclosure action was commenced. The plaintiff further contends that "no acknowledgment of any indebtedness on the note or mortgage has been made since June 30, 2009." Finally, the plaintiff argues that the 6-year statute of limitations "has not been tolled or abated;" that " the note and mortgage have become outlawed and barred by the statute of limitations;" that "any estate or interest that defendant ever had or claims to have had" in the subject premises, as well as "any and all liens or encumbrances thereon that may have existed or be claimed to have existed in favor of the defendant are null and void and of no force and effect as against the estate and interest of the plaintiff in and to these premises;" and that "plaintiff now holds these premises in fee absolute, free and clear from any claim, lien or encumbrance arising from the mortgage or the ownership thereof" and that as a result a default judgment should be granted to the plaintiff.

In support of its cross motion and in opposition to the plaintiff's motion for summary judgment, the defendant argues that the 2015 foreclosure action was timely commenced, contending that even if the June 30, 2009 foreclosure complaint did accelerate the mortgage, it unequivocally revoked the election before the six year statutory period had run. The defendant

notes that the statute of limitations was due to run on June 30, 2015, however as a result of its moving to discontinue the 2009 foreclosure action on June 3, 2015 and a de-acceleration notice having been sent on June 9, 2015, the June 30, 2015 statute of limitations was no longer applicable. The defendant points to the August 2015 Court Order granting its motion to discontinue the 2009 foreclosure action which clearly states that the action was dismissed "without prejudice to recommencement pursuant to CPLR 205(a) or otherwise." The defendant argues that the 2009 foreclosure complaint did not "truly" accelerate the loan because under the terms of the contract the plaintiff could have reinstated the mortgage and ended the foreclosure action by repaying only all past due installments, and as such "the statute of limitations for the trust to bring a foreclosure action against Soffer" could not have accrued with the filing of the 2009 foreclosure complaint. The defendant further argues that because the mortgage was not accelerated, the limitations period accrues based on the plaintiff's breach of each individual monthly obligation for the past six years and while the defendant may be barred from collecting payments prior to December 2009, it is not barred from recovering the remainder of the debt in the foreclosure action. Finally, the defendant argues that "even if the statute of limitations ran before the Trust commenced the 2015 foreclosure action, and it did not, at least some of the time that passed during the pendency of the 2009 foreclosure action should be tolled from the statute of limitations in the interest of justice" because the case was delayed for a variety of reasons including mandatory settlement conferences, changes in attorneys, a FEMA hold following Superstorm Sandy and motion practice. If the Court does not grant its motion, the defendant contends that, in the alternative, this action should be consolidated with the currently pending foreclosure action involving the same property in the interests of judicial economy and to avoid

inconsistent decisions.

In opposition to the defendant's cross motion for summary judgment the plaintiff argues that the defendant failed to revoke its acceleration of the subject loan. Specifically, the plaintiff contends that the defendant's filing of a motion to voluntarily discontinue the 2009 foreclosure action was not a revocation of the acceleration of the subject mortgage; that the sending of a de-acceleration letter by the defendant while the 2009 foreclosure action was still active did not serve to revoke the acceleration; and that the Court's order discontinuing the 2009 foreclosure action did not allow it to avoid the exclusion in CPLR 205(a) regarding voluntarily discontinued actions. The plaintiff additionally argues that the defendant fails to allege that the de-acceleration letter was sent prior to the expiration of the statutory period.

In reply to plaintiff's opposition to their cross motion, and in further support thereof, the defendants reiterate the arguments made in their cross motion and additionally contend that the plaintiff concedes that any applicable statute of limitations should be tolled and that if the Court does not dismiss the plaintiff's complaint, this action should be consolidated with the 2015 foreclosure action.

With leave of the Court, the defendant provides an additional a reply affidavit from Richard L. Penno, who is Vice President Loan Documentation for Wells Fargo Bank, which services the loan at issue in this foreclosure action on behalf of the defendant. In his affidavit Mr. Penno attests that the de-acceleration notice was dated June 9, 2015 and mailed to the plaintiff on June 10, 2015. Mr. Penno states that "[i]n 2015 it was Wells Fargo's regular business practice to create and maintain a certified manifest . . . to memorialize its mailing by certified mail of de-acceleration notices for loans that Wells Fargo services. The Manifest reflects that Wells Fargo

mailed the De-Acceleration Notice to the Borrowers at the Property by certified mail under Certified Article Number '70143490000035153230." A copy of the manifest for June 10, 2015 demonstrating the mailing of the de-acceleration letter by certified mail is annexed as an exhibit to Mr. Penno's affidavit, as is a copy of the United States Post Office Product and Tracking Information record for Certified Article Number 70143490000035153230, which was retrieved by Mr. Penno from the USPS website, demonstrating that the de-acceleration notice arrived at the USPS facility in Charlotte, NC on June 11, 2015 and was delivered in Brooklyn on June 15, 2015.

Upon review of the papers submitted, the Court finds that a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in borrower's position in reliance thereon" Fed. Nat. Mortgage Ass'n v. Mebane, 208 A.D. 2d 892 (2'd Dept. 1994). *See also* EMC Mortgage Corp. v. Patella, 279 A.D.2d 604 (2'd Dept. 2001). However, absent an affirmative act of revocation occurring within the six year statutory period after the service of the complaint in the prior foreclosure action, a previously accelerated mortgage will not be de-accelerated. Fed. Nat. Mortgage Ass'n v. Mebane, *supra*; EMC Mortgage Corp. V. Patella, *supra*. It has been established that the court's *sua sponte* dismissal of a prior foreclosure action, which was never withdrawn by the lender does not constitute an affirmative act to revoke its election to accelerate by the lender. Fed. Nat. Mortgage Ass'n v. Mebane, *supra*.

In this case, the Court finds that the defendant has revoked its election to accelerate by both affirmatively moving to discontinue the 2009 foreclosure action as well as affirmatively sending the plaintiff a de-acceleration notice prior to the lapse of the six year statutory period.

Based upon the foregoing, the plaintiff's motion is denied and the defendant's cross motion is granted.

This constitutes the Decision and Order of the Court.

Dated : 9-23-16

Hon. Edgar G. Walker, J.S.C.