Assyag v Wells Fargo Bank, N.A.
2016 NY Slip Op 32900(U)
September 7, 2016
Supreme Court, Queens County
Docket Number: 707845/15
Judge: Diccia T. Pineda-Kirwan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN** IA PART 36
Justice

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ZAHI ASSYAG,

Plaintiff(s),

-against-

WELLS FARGO BANK, N.A.,

Defendant(s).

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Index No.: 707845/15
Motion Date CMP:6/21/16
(Rcv'd Pt. 36 6/30/16)
Motion Cal. No CMP: 6
Motion Seq. No.: 1

Settlement Conference Date 9/7/16 #10

The following numbered papers read on this motion and cross motion for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavit-Exhibits	5 - 7
Answering-Affidavits-Exhibits	8 - 9
Replying	10 - 12
Order - Stipulation	*13 - 14*

In the interest of judicial economy, as well as the case being ripe for settlement, this matter was set down for a settlement conference for September 7, 2016, by order dated August 9, 2016. Despite the Court's best efforts, no settlement was reached.

Now, upon the foregoing cited papers and after conference, it is ordered that the motions are determined as follows:

Plaintiff, Zahi Assyag, gave a mortgage to defendant, Wells Fargo Bank, N.A. (Wells Fargo), on November 14, 2007 against the real property known as 150-08 Tahoe Street, Ozone Park, New York to secure a note evidencing a loan in the amount of $533,850.00. On March 24, 2009, Wells Fargo commenced a prior foreclosure action entitled *Wells Fargo Bank, NA v Assyag*, (Sup Ct, Queens County, Index No. 7322/09) based upon Assyag's alleged default on the monthly payment due on November 1, 2008 and thereafter. The prior action was dismissed by order dated December 17, 2013, which also directed the cancellation of the notice of pendency

Assyag commenced this action on July 24, 2015, seeking to cancel and discharge the mortgage as the statute of limitations to foreclose on it has run. Wells Fargo and Assyag now both move for summary judgment on the issue of whether Wells Fargo properly de-accelerated the loan via letter sent to Assyag on March 11, 2015, prior to the expiration of the statute of limitations.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213[4]). To the extent Assyag argues that the statute of limitations ran from the date of the first default of November 1, 2008, this argument is without merit. Where a mortgage is payable in installments, separate causes of action accrue for each unpaid installment and the statute of limitations begins to run on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2010]; *Loiacono v Goldberg*, 240 AD2d 476 [1997]). However, once a mortgage debt is accelerated the entire

amount is due and the statute of limitations begins to run on the entire debt (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2001]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt. Thus, the statute of limitations for the entire debt did not begin to run until Wells Fargo elected to accelerate under the acceleration clause of the mortgage, which occurred when the underlying action was commenced on March 24, 2009.

The statute of limitations for the entire mortgage action expired as of March 24, 2015. As more than six-years have passed since the acceleration in the complaint, without any further action by the lender, any foreclosure action would be barred by the statute of limitations. A lender, however, may revoke its election to accelerate all sums due provided that there is no change in borrower's position in reliance thereon. This must be done by an affirmative act occurring within the statute of limitations period (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606) and the court will only exercise its equity jurisdiction to prevent revocation of its election to accelerate where a mortgagor can show substantial prejudice (*see Golden v Ramapo Imp. Corp.*, 78 AD2d 648, 650 [1980]).

Although New York courts have not addressed the issue of what constitutes a proper revocation of acceleration, certain actions have been deemed insufficient, such as a court's *sua sponte* dismissal of the foreclosure action, or the bank's acceptance of additional payments after the borrower's initial default, or dismissal for failure to appear for a conference or to obtain personal jurisdiction (*see Fed. Nat. Mortgage Ass'n v Mebane*, 208 AD2d 892, 894 [1994]; *Lavin v Elmakiss*, 302 AD2d 638, 639 [2003]; *Clayton Nat., Inc. v Guldi*, 307 AD2d 982 [2003]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606). Some courts have found a voluntary discontinuance to be sufficient (*see* 4 *Cosgrove 950 Corp. v Deutsche Bank Nat. Trust Co.*, 2016 WL 2839341 [Sup Ct, New York County 2016]), and that a de-acceleration letter is sufficient on a motion to dismiss to raise an issue of fact as to an affirmative act of revocation (*see Bank of America, N.A. v Fachlaev,* NYLJ 1202754690793 [Sup Ct, Queens County 2016])

In support of its motion, Wells Fargo submits, among other things, a copy of the de-acceleration letter it allegedly sent to the borrower along with an affidavit from April H. Hatfield, its Vice President Loan Documentation, wherein she states that based upon her personal knowledge and review of the books and records maintained by defendant in the ordinary course of business, Wells Fargo sent Assyag a de-acceleration notice by certified mail on March 11, 2015. However, Wells Fargo has offered no proof of its office practices to ensure that the de-acceleration letter was properly mailed and received (*see Flagstar Bank, FSB v Mendoza*, 139 AD3d 898 [2016]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]), and has therefore failed to meet its *prima facie* burden. Conversely, Assyag has failed to establish that the letter was not properly sent, and, if it was properly sent, that this action did not constitute an affirmative act to revoke its prior acceleration.

Accordingly, the motions are denied.

Date: September 7, 2016

DICCIA T. PINEDA-KIRWAN, J.S.C.