

Solomon v HSBC Bank USA, N.A.

2017 NY Slip Op 32370(U)

November 9, 2017

Supreme Court, Kings County

Docket Number: 500037/17

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP3 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 9th day of November, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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JILLIAN SOLOMON AND
GRAND NATIONAL REALTY I LLC,

PLAINTIFFS,

- AGAINST -

Index No. 500037/17

HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR NOMURA ASSET
ACCEPTANCE CORPORATION MORTGAGE
PASS-THROUGH CERTIFICATES,
SERIES 2007-3 AND WELLS FARGO BANK, N.A.
AS ATTORNEY- IN- FACT FOR HSBC BANK USA,
NATIONAL ASSOCIATION, AS TRUSTEE FOR
NOMURA ASSET ACCEPTANCE CORPORATION
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2007-3,

DEFENDANTS.

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The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers _____

Papers Numbered

1-3, 4-6
7
7

Upon the foregoing papers, plaintiffs Jillian Solomon and Grand National Realty 1 LLC (GNR) move for an order, pursuant to CPLR 3212, granting summary judgment in their favor. Defendants HSBC Bank USA, National Association, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2007-3 (HSBC) and Wells Fargo Bank, N.A. as Attorney-in-Fact for HSBC Bank USA, National Association, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2007-3 (WFB) cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint.

Plaintiffs commenced this action to discharge and cancel of record a mortgage encumbering the property at 527 Cleveland Street in Brooklyn. The mortgage was executed by Solomon on December 13, 2006 to secure a note in favor of First United Mortgage Banking Corp. (FUMBC) in the amount of \$488,000.00. On December 17, 2007, FUMBC commenced a foreclosure action against Solomon (*First United Mortgage Banking Corp. v Solomon, et al.*, Sup Ct, Kings County, Index No. 45848/07) (first foreclosure action). According to the complaint, Solomon defaulted under the terms of the mortgage and note by failing to make the monthly payment due on September 1, 2007. As the result of Solomon's failure to timely answer or appear, an order of reference was issued on March 11, 2009. The order further amended the caption to substitute "HSBC Bank USA, National Association, as Trustee for NAAC 2007-3," as plaintiff. By deed dated November 3, 2011, Solomon conveyed the subject property to GNR. On November

15, 2012, the court (Hon. Karen B. Rothenberg) issued an order granting the substituted plaintiff's motion to cancel the notice of pendency and to voluntarily discontinue the first foreclosure action. The day prior, on November 14, 2012, HSBC commenced a second foreclosure action against Solomon and GNR (*HSBC Bank USA, National Association, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2007-3 v Solomon, et al.*, Sup Ct, Kings County, Index No. 22015/12)(second foreclosure action). GNR raised an affirmative defense of lack of personal jurisdiction and the issue of service was submitted to a special referee for a traverse hearing. The special referee issued a report wherein she found that service was not properly effectuated against GNR. By order dated May 29, 2015, the court (Hon. Edgar G. Walker) granted GNR's motion to confirm the referee's report and dismiss the second foreclosure action. On August 24, 2015, plaintiffs commenced an action against HSBC to cancel and discharge of record the subject mortgage under RPAPL 1501 (4) (*Solomon, et ano. v HSBC Bank USA, National Association, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2007-3*, Sup Ct, Kings County, Index No. 510433/15). By order dated December 22, 2016, the court (Hon. Edgar J. Walker) granted HSBC's motion to dismiss the complaint on the ground that plaintiff failed to timely file proof of service pursuant to CPLR 306-b (a). Plaintiffs subsequently commenced the instant action to cancel and discharge of record the subject mortgage.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation (*see Smith v Johnson Prods.*, 95 AD2d 675, 676 [1st Dept 1983]).

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]; *see JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 [2d Dept 2010]). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see CPLR 213* [4]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]; *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]). “[E]ven 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” (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867, quoting *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]; see *Wells Fargo Bank, N.A. v Burke*, 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 (see *EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

In support of their motion for summary judgment, plaintiffs argue that the loan was accelerated as of August 1, 2007 and, therefore, the six-year statute of limitations to foreclose has expired. However, the court notes that Solomon was alleged to have defaulted in payment on September 1, 2007 and August 1, 2007 is the date from which interest accrued. There is no proof provided that the mortgage loan was deemed accelerated on the default date or interest accrual date pursuant to its terms or that FUMBC otherwise explicitly accelerated the loan at any time prior to the commencement of the first foreclosure action on December 17, 2007. Nonetheless, even accepting December 17, 2007 as the earliest date the loan was accelerated, plaintiffs have established prima facie that the statute of limitations to foreclose is expired and, therefore, plaintiffs have established their prima facie entitlement to a discharge and cancellation of the subject mortgage pursuant to RPAPL 1501 (4) (see *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *Clayton*

Natl. v Guldi, 307 AD2d 982 [2d Dept 2003]). The burden thus shifts to defendants to raise a factual issue that the statute of limitations is tolled or is otherwise inapplicable (*see Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 205 [2d Dept 2017]; *Torah v Dell Equity, LLC*, 90 AD3d 746, 746 [2d Dept 2011]).

In their cross motion, defendants contend that FUMBC was no longer the holder or owner of the note and mortgage when the default was declared in August 2007 and/or when the first foreclosure action was commenced in December 2007 and, consequently, FUMBC had no authority to accelerate the loan at said times. Defendants assert that the loan was first accelerated on November 14, 2012 when the second foreclosure action was commenced by HSBC and, therefore, that statute of limitations is still running. Defendants further maintain that any acceleration occurring in 2007 was effectively revoked by HSBC within the limitations period by the mailing of new notices of default to Solomon on June 15, 2012 and by the discontinuance of the first foreclosure action on November 15, 2012.

The commencement of a foreclosure action by a plaintiff without standing does not constitute a valid acceleration (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder, or the assignee, of the underlying note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361–362 [2015]; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d at 987; *LGF Holdings, LLC v Skydel*, 139 AD3d at 814; *Wells*

Fargo Bank, N.A. v Rooney, 132 AD3d 980, 981 [2d Dept 2015]). “Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [3d Dept 2015]; see *U.S. Bank, N.A. v Zwisler*, 147 AD3d 804 [2d Dept 2017]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*U.S. Bank N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; see *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d at 987; *LGF Holdings, LLC v Skydel*, 139 AD3d at 814).

In support of their cross motion for summary judgment, defendants submit the affidavit of Andrea Krause (previously submitted in plaintiffs’ 2015 action to cancel and discharge the mortgage), who identifies herself therein as a “Vice President Loan Documentation” for WFB, the servicer and custodian of HSBC. Krause states that she reviewed WFB’s records with respect to the mortgage loan at issue and that such records were “(1) made in the regular course of [WFB’s] business and it was the regular practice for [WFB] to make, maintain, and keep such records concerning these loans; (2) made contemporaneously with the occurrence of any act, transaction, or event described in the records or within a reasonable time thereafter; and 3) created by individuals with personal knowledge of the act, transaction, or event in the record.” Krause avers:

10. On June 1, 2007, 'all the right, title and interest' in and to Solomon's Loan, and the other mortgage loans identified on the Mortgage Loan Schedule, were 'transfer[red], assign[ed], set[] over and otherwise convey[ed]' to [HSBC] by [a Pooling and Servicing Agreement dated June 1, 2007 (PSA)]. . The Note and Mortgage have not been further assigned since.

11. In anticipation of that assignment, the original Note, endorsed in blank by [FUMBC], and the original Mortgage were physically delivered to [WFB] on or about December 28, 2006 to hold on [HSBC's] behalf. [WFB], as custodian for [HSBC], had physical possession of the original endorsed Note and the original Mortgage on June 1, 2007, as provided in the PSA, and remained in physical possession of those documents at all material times thereafter, including December 17, 2007.

The affidavit of Krause establishes that at the time FUMBC declared a default and commenced the first foreclosure action it no longer possessed an interest in the note and mortgage and therefore lacked standing to commence the first foreclosure action and accelerate the loan (*see National Fin. Co. v Uh*, 279 AD2d 374, 375 [1st Dept 2001]; *GE Capital Mtge. Servs., Inc. v Powell*, 18 Misc 3d 228, 232 [Sup Ct, Kings County 2007]). In opposition to defendants' cross motion, plaintiffs have not submitted proof sufficient to raise an issue of fact as to FUMBC's standing and authority to accelerate the loan on or before December 17, 2007.

The record indicates that the earliest date a valid acceleration of the loan occurred was the commencement of the second foreclosure action by HSBC on November 14, 2012. As six years have not passed from this date, plaintiffs cannot maintain the instant action to cancel and discharge the mortgage under RPAPL 1501 (4).

As a result, plaintiffs' motion for summary judgment is denied and defendants' cross motion is granted. The complaint is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL