HSBC Bank USA v Sandoval

2017 NY Slip Op 32443(U)

November 17, 2017

Supreme Court, Rockland County

Docket Number: 031782/2015

Judge: Thomas E. Walsh II

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
--X
HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR MERRILL LYNCH ALTERNATIVE NOTE ASSET TRUST, SERIES 2007-A2

Plaintiff,

- against -

MORRIS SANDOVAL, DAISY SANDOVAL, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WEICHERT FINANCIAL SERVICES,

Defendants.
--X

DECISION AND ORDER

Index No.: 031782/2015

Motion #2 - M D
Motion #3 - M D
DC - N
Adj: 1/25/18

Thomas E. Walsh II, J.S.C.

The Court has considered the following papers 1- 4 on the Notice of Motion (Motion #2) filed by Plaintiff seeking AN Order pursuant to *Civil Practice Law and Review* § 3211(b) and § 3211(b) granting the following to the movant: (a) order granting summary judgment pursuant to *Civil Practice Law and Rule* § 3212, (b) dismissing defenses asserted in the answer pursuant to *Civil Practice Law and Rules* § 3211(b) and for permission to treat the answer as a limited notice of appearance entitling the Defendant MORRIS SANDOVAL through his attorney Joseph M. Becker, Esq, to receive, without prior notice, a copy of the notice of sale, notice of discontinuance, and notice of surplus money proceedings, if any, that this court appoint a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels, and that the caption be amended to substitute Carlos "Doe", Mr. Marleny, Mrs. Marleny and Ruth "Doe", as party Defendants in place of "John Doe" without prejudice to the previous proceedings in this case, that all non-appearing and non-answering defendants be deemed in default and the defaults be fixed and determined, that the caption be amended to

reflect the Plaintiff as HSBC Bank USA National Association as Trustee for Merrill Lynch Mortgage Investors Inc. Mortgage Pass-Through Certificates Mana Series 2007-A2 and for such other and further relief as to the Court may deem just and proper; the Court also considered Defendant's Notice of Cross Motion (Motion #3) for an Order (a) denying the relief requested by Plaintiff in its Notice of Motion against Defendant MORRIS SANDOVAL, (b) granting summary judgment in favor of Defendant MORRIS SANDOVAL holding that this action is barred by the statute of limitations and dismissing the action with prejudice, (c) and for such other and further relief as this Court deems just and proper, together with the costs and disbursements of this Motion:

PAPERS	**NUMBER**
Notice of Motion (Motion #2)/Affirmation of Alexandra R. Heaney, Esq./ Exhibits (A-O)/Memorandum of Law in Support	1
Notice of Cross Motion (Motion #3)/Affirmation of Joseph M. Becker, Esq./ Exhibits (A-G)	2
Affirmation of Laura M. Strauss, Esq. in Opposition/Exhibits (A-O)	3
Reply Affirmation of Joseph M. Becker, Esq.	4

By way of history, the underlying property, 47 West Hickory Street Ramapo, New York 10977 is the subject of a foreclosure action which was commenced by the filing of a Summons and Verified Complaint on April 23, 2015. Defendants MORRIS SANDOVAL and DAISY SANDOVAL were served pursuant to Civil Practice Law and Rules § 308(4) at the subject premises on May 9, 2015. Defendant MORRIS SANDOVAL joined issue with the filing of a pro se Answer on July 25, 2015. The Answer submitted by MORRIS SANDOVAL raised seven (7) affirmative defenses including: (1) lack of standing to sue, (2) improper service of the Summons and Complaint, (3) Failure to give Notice of Default and/or Notice fo Acceleration, (4) Failure to comply with *Real Property Actions and Proceedings Law* § 1303, (5) Failure to comply with *Real Property Actions and Proceedings Law* § 1304, (6) Violation of *General*

Business Law § 349 and (7) The Certificate of Merit does not comply with _Civil Practice Law and Rules_ § 3012-b. Plaintiff rejected Defendant MORRIS SANDOVAL's Answer on July 31, 2015 as untimely since it was filed after Defendant's time to answer had expired on June 28, 2015.

Plaintiff filed an ex-parte motion for summary judgment and order of reference and Defendant filed a Notice of Motion to dismiss the action pursuant to _Civil Practice Law and Rules_ § 3211(a)(8). Upon consideration of both parties motions the Court denied Plaintiff's ex-parte motion and granted Defendant's Motion to Dismiss. However, the Plaintiff was granted leave to re-serve the Defendant within one hundred twenty (120) days of the date of this Court's Decision and Order. Defendant MORRIS SANDOVAL interposed a new ANSWER on January 11, 2017 asserting nine (9) affirmative defenses: (1) lack of standing, (2) unconscionability of the terms and conditions of the mortgage and note, (3) failure to comply with _Real Property Actions and Proceedings Law_ §§ 1304 and 1306, (4) failure to comply with _Banking Law_ § 595-a and its regulations and _Banking Law_ § 6-1 and § 6-m, (5) statute of limitations, (6) violation of _General Business Law_ § 349, (7) failure to provide requisite pre-foreclosure notice required under the mortgage, (8) lack of capacity to sue and (9) failure to state a claim.

Plaintiff filed the instant Notice of Motion seeking an Order, pursuant to _Civil Practice Law and Rules_ § 3212, granting summary judgment to Plaintiff, an Order of Reference to compute the sums due Plaintiff, striking the answers and affirmative defenses by Defendants, awarding a default judgment to Plaintiff as to all other Defendants, appointing a referee to compute the amount due, related relief, and for such other and further relief as to the Court may seem just and proper. In Plaintiff's motion for summary judgment (Memorandum of Law), Plaintiff addresses each and every affirmative defense raised by Defendant MORRIS SANDOVAL and offers arguments, authority, and documentary evidence to show their lack of merit.

Defendant MORRIS SANDOVAL filed a cross motion for summary judgment and also opposed the Plaintiff's motion for summary judgment. In his opposition Defendant MORRIS SANDOVAL asserts the following reasons the Plaintiff's motion for summary judgment should

be denied : (1) Plaintiff's claim is barred by statute of limitations, (2) Plaintiff failed to prove that it has standing and (3) Plaintiff failed to prove that the Real Property Actions and Proceedings Law § 1304 notice was properly mailed. The Court will note that at no point in the opposition papers does Defendant MORRIS SANDOVAL deny the fact that the underlying note and mortgage was executed by him, that the obligation to pay was his, or that he defaulted in payments. Additionally, Defendants raised seven (9) affirmative defenses in his Answer filed in January 2017 and has abandoned all of those except the 1st (standing), the 5th (statute of limitations) and a portion of the 3rd (failure to comply with *RPAPL* § 1304). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists. [*Argent Mtge. Co., LLC v. Mentesana*, 79 AD3d 1079 (2d Dept 20100]. Further, the failure to raise pleaded affirmative defenses or counterclaims in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy. [*New York Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 AD3d 756 (2d Dept 2013)]. The Court, therefore dismisses all the affirmative defenses raised by Defendant MORRIS SANDOVAL except the 1st, 5th and a portion of the 3rd.

It is well-settled that a plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of the default. [*Village Bank v. Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept 1993); *Home Sav. Bank v. Schorr Bros. Development Corp.*, 213 AD2d 512, 512-13 (2d Dept 1995)]. Once a plaintiff does that, it is incumbent upon the defendant to assert any defenses which could properly raise a viable question of fact as to his default. [*Village Bank v. Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept 1993); *Home Sav. Bank v. Schorr Bros. Development Corp.*, 213 AD2d 512, 512-13 (2d Dept 1995)]. Further, a defendant is required to offer evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact. [*Hecht v. Vanderbilt Associates*, 141 AD2d 696, 699 (2d Dept 1988)]. Conclusory and

unsubstantiated assertions that are not supported by competent evidence are insufficient to defeat a plaintiff's motion for summary judgment. [Home Sav. Bank v. Schorr Bros. Development Corp., 213 AD2d 512, 513 (2d Dept 1995)].

"The issue of standing requires an inquiry into whether a litigant has an interest in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request.'" [Bank of New York v. Silverberg, 86 AD3d 274, 279 (2d Dept 2011) quoting Caprer v. Nussbaum, 36 AD3d 176 (2d Dept 2006)]. Where a defendant raises the issue of standing, a plaintiff must prove its standing in order to be entitled to relief. [Bank of New York v. Silverberg, 86 AD3d 274, 279 (2d Dept 2011); Citimortgage, Inc. v. Stosel, 89 AD3d 887, 888 (2d Dept 2011); U.S. Bank, N.A. v. Adrian Collymore, 68 AD3d 752, 753 (2d Dept 2009)]. It is well-settled that in order to establish standing in a foreclosure action, a Plaintiff must demonstrate that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. [Bank of New York v. Silverberg, 86 AD3d 274, 279 (2d Dept.2011); Citimortgage, Inc. v. Stosel, 89 AD3d 887, 888 (2d Dept 2011); U.S. Bank, N.A. v. Adrian Collymore, 68 AD3d 752, 753 (2d Dept 2009)]. 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. Adrian Collymore, 68 AD3d 752, 754 (2d Dept 2009); Aurora Loan Servs., LLC v. Weisblum, 923 NYS2d 609, 618 (2011); Kondaur Capital Corporation v. McCary et al., 981 NYS2d 547 (2d Dept 2014); Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 361-362 (2d Dept 2015)]. The validity of a purported assignment of mortgage is not relevant to the issue of the Plaintiff's standing because the mortgage passes as an incident to the note. [Wells Fargo Bank N.A. v. Charlaff, 134 AD3d 1099 (2d Dept. 2015); LNV Corporation v. Francois, 22 NYS3d 543 (2d Dept. 2015)]. Additionally, where the exact date of delivery of the note to the Plaintiff is demonstrated by admissible evidence then there is no further detail necessary for the Plaintiff to establish

standing. [*Aurora Loan Servs., LLC v. Taylor*, 980 NYS2d 475, 477 (2d Dept 2014)].

Here the Plaintiff produced the mortgage, unpaid note and attempted to produce evidence of default through the Affidavit of Cynthia Wallace, Second Vice President of Specialized Loan Servicing, LLC the Servicer for Plaintiff, HSBC Bank USA, N.A.

The Court finds that Plaintiff's moving papers are insufficient based on the Affidavit of Merit submitted by the Plaintiff's servicer, and specifically as to those documents referenced by Ms. Wallace that must have been incorporated into the servicer, SLS's records from the prior servicers. The affidavit submitted by Ms. Wallace indicates that her statements are based on the review of the records maintained by Specialized Loan Servicing, LLC which includes "data compilations, electronically imaged documents and others." Based on Ms. Wallace's affidavit the assumption is that the records have all been made by employees of Specialized Loan Servicing, LLC and that as such she as an employee of Specialized can attest to their veracity. However, a review of the documents submitted by Plaintiff in support of their application indicate that the Notice of Default and the 90-day Notice were issued by another servicer, ACS, for which Ms. Wallace is not employed. There is also no reference within Ms. Wallace's Affidavit that the records of the prior servicer(s) were incorporated into Specialized's records and subsequently relied upon by Specialized in prosecution of the instant foreclosure action. Therefore, the statements made by Ms. Wallace fail to full under the business records exception to hearsay rule and since Ms. Wallace did not attest that she was personally familiar with the record-keeping practice and procedures of the prior servicers or that the documents from prior servicers were incorporated into Specialized's records and relied upon by them. [*Wells Fargo Bank, N.A. v. Talley*, 59 NYS3d 743, 745 (2d Dept 2017); *Arch Bay Holdings, LLC v. Albanese,* 146 AD3d 849, 853 (2d Dept 2017); *Aurora Loan Services, LLC v. Mercius*, 138 AD3d 650, 652 (2d Dept 2016); *Aurora Loan Services, LLC v. Komarovsky*, 151 AD3d 924, 926 (2d Dept 2017); *HSBC Mortg. Services, Inc. v. Royal*, 142 AD3d 952 (2d Dept 2017)]. As such, the Plaintiff's Motion for Summary Judgment is denied with leave to re-file.

Turning now to the Defendant's argument in their cross motion that the action should be dismissed because it is barred by the statute of limitations, the threshold issue raised between the parties is when and if the mortgage in this action was accelerated. Defendant concedes that the applicable statute of limitations for a mortgage foreclosure action is six (6) years and that even though a mortgage is payable in installments once a mortgage debt is accelerated the entire amount comes due and the Statute of Limitations begins to run on the entire debt. [*Civil Practice Law and Rules* § 213(4); *Emc Mortgage Corporation v. Patella*, 279 AD2d 604, 605 (2d Dept 2001)]. Further, Defendant submits citing *Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 983 (2d Dept 2012), that acceleration is defined as occurring when the borrower is provided "clear and unequivocal notice of the note holder's election to accelerate the loan. Defendant asserts that a summons and complaint is not needed to accelerate a loan, but rather a demand letter can accelerate a loan. In this vein, Defendant argues that the Default Notice sent to Defendants on March 22, 2009 states three (3) separate times that the if the Defendant does not cure the default by April 21, 2009 that the loan "will be" accelerated. As such, Defendant argues that the Plaintiff's March 22, 2009 Notice fo Default accelerated the mortgage in the instant action and that the Statute of Limitations began to run at that time.

In opposition Plaintiff submits that the 2010 foreclosure action (Index # 2600/2010) was voluntarily discontinued by Plaintiff by Order signed by the honorable Victor J. Alfieri, AJSC on October 2, 2014 and that action revoked the election to accelerate made at the time of the commencement of that action. Further, Plaintiff asserts that upon the voluntary discontinuance of the 2010 foreclosure action, the statutory period is halted unless a mortgagor can show substantial prejudice in allowing the Plaintiff to revoke its election to accelerate. Plaintiff continues stating that a voluntary discontinuance, as was done in 2014 in the prior foreclosure action is an affirmative act that is sufficient to revoke acceleration, citing *NMNT Realty Corp. V. Knoxville 2012 Trust*, 2017 NY Slip Op 05230 (2d Dept June 28, 2017). Additionally, the Plaintiff argues that the new acceleration notices sent to the Defendants in the instant

foreclosure action in 2014 only sought payment of the arrears and late charges, allowed the Defendant to bring the loan current and did not require payment of the entire amount due to bring the loan current. As such, the Plaintiff submits that the original acceleration was revoked by the voluntary discontinuance of the prior foreclosure action halting the statue of limitations and that as a result the instant action is not barred by the statute of limitations.

The six year statute of limitations in a mortgage foreclosure action begins to run from the due date of each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage. [*Civil Practice Law and Rules* § 213(4); *Loicano v. Goldberg*, 240 AD2d 476, 477 (2d Dept 1977); *Saini v. Cinelli Enterprises*, 289 AD2d 770, 771 (3d Dept 2001); *Kashipour v. Wilmington Sav. Fun Socy, FSB*, 144 AD3d 985, 986 (2d Dept 2016); *Nationstar Mtge, LLC v. Weisblum*, 143 AD3d 866, 867 (2d Dept 2016); *EMC Mtge. Corp v. Patella*, 279 AD2d 604, 605 (2d Dept 2001)]. A lender can revoke its election to accelerate a mortgage by an affirmative act of revocation occurring during the six (6) year period subsequent to the initiation. [*Federal Natl. Mtge. Assn. v. Mebane*, 208 AD2d 892, 894 (2d Dept 1994); *Kashipour v. Wilmington Sav. Fund. Socy., FSB*, 144 AD3d at 987; *Clayton Nat. v. Guldi*, 307 AD2d 982 (2d Dept 2003); *EMC Mtge. Corp v. Patella*, 279 AD2d at 606]. An affirmative act is one that will notify the borrower of the revocation of the acceleration and actions such as a *sua sponte* dismissal or a dismissal due to personal jurisdiction are not considered affirmative acts. [*Kashipour*, 144 AD3d at 987; *Clayton*, 307 AD2d at 982]. The acceleration begins at the filing of a summons and complaint and notice of pendency, as long as the summons and complaint clearly demonstrate the plaintiff's intent to accelerate the mortgage. [*Steward Title Ins. Co. v. Bank of New York Mellon*, 2017 NY Slip Op 06929 (2d Dept 2017); *Beneficial Homeowner Serv. Corp v. Tovar*, 2017 NY Slip Op 03471 (2d Dept 2017)].

The Court finds that Plaintiff's distinct intention to discontinue the prior foreclosure

action (Index #2600/2010) was an affirmative act of revocation which decelerated the loan upon issuance of the Order dated October 2, 2009. Further, the demand letter sent to the Defendant in 2009 does not contain a clear and unequivocal notice to the Defendants that the entire mortgage debt was being accelerated. Specifically, the letter states "[u]nless the payments on your loan can be brought current by April 21, 2009, it will become necessary to accelerate your mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust." It is clear that the March 22, 2009 did not accelerate the mortgage, but stood as a warning to the Defendants that if they did not come current on their mortgage that the Plaintiff could accelerate the loan. Therefore, the original acceleration of the mortgage only occurred upon the commencement of the first foreclosure action in 2010. That acceleration was revoked by the discontinuance signed on October 2, 2009. Therefore, Defendant's cross-motion for dismissal due to expiration of the statute of limitations is denied in its entirety.

Accordingly, it is hereby

ORDERED that the Plaintiff's Notice of Motion (Motion #2) is denied with leave to re-file within the time frame allotted by the Court; and it is further

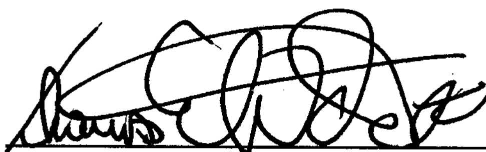
ORDERED that the Defendant's Cross Motion (Motion #3) is denied in its entirety; and it is further

ORDERED that this matter is scheduled for a conference on **THURSDAY JANUARY 25, 2018 at 9:30 a.m.**. No appearances are required on that date if an application for Order of Reference and Summary Judgment has been e-filed through the NYSCEF system prior to that date. If an application for Summary Judgment/Order of Reference has not been e-filed through the NYSCEF system prior to that date, and the date has not been adjourned by the Court, then appearances are **required** and Plaintiff's counsel will be **required** to provide an explanation for the delay. If the Court is not satisfied with the explanation, the Court will consider dismissing the matter without prejudice; and it is further

ORDERED that the Plaintiff is to serve a copy of the Decision and Order in the instant action on all named parties within thirty (30) days of the date hereof.

The foregoing constitutes the Decision and Order of this Court on Motions #2 and #3.

Dated: New City, New York
November 17, 2017



HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:
GROSS POLOWY, P.C.
Attorney for Plaintiff
(via e-file)

JOSEPH M. BECKER, ESQ.
ZERILLI & ASSOCIATES, P.C.
Attorney for Defendant MORRIS SANDOVAL
(via e-file)