Martinez v Federal Natl. Mtge. Assn.
2017 NY Slip Op 32770(U)
June 13, 2017
Supreme Court, Nassau County
Docket Number: 8880/16
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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EDWARD MARTINEZ and NOE FLORES MANCIA,

Plaintiff,

-against-

FEDERAL NATIONAL MORTGAGE ASSOCIATION and SETERUS, INC.,

Defendants.

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TRIAL/IAS PART 13

INDEX # 8880/16
Mot. Seq. 1
Mot. Date 4.26.17
Submit Date 5.31.17

XXX

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1, 2, 3
Memorandum of Law..... 4

Defendant moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss plaintiff's complaint seeking to quiet title to certain property located at 91 Marvin Avenue, Uniondale, New York pursuant to RPAPL 1501(4) and CPLR 213(4). There is no opposition to this motion despite all necessary parties being properly served. The basis for plaintiff's action is that the six year statute of limitations to commence a foreclosure action pursuant to CPLR 213(4) has expired.

To succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby definitively disposing of the opposing party's claims. (*Leon v Martinez,* 84 NY2d 83, 88 [1994]; *see also Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1st Dept 1997]). A motion to dismiss based on documentary evidence may be granted only where the documentary evidence "utterly refutes" the plaintiff's factual allegations. (*Sabre Real Estate Group, LLC v. Ghazvini*, 140 AD3d 724, 724-725 [2d Dept 2016]; *Kolchins v. Evolution Markets, Inc.*, 128 AD3d 47, 57-58 [1st Dept 2015]).

In support of this motion is an affidavit from Kevin Foster, a mediation specialist for defendant Seterus who services the loan in question. He is fully familiar with all of the facts, circumstances and records maintained by Seterus. Servicing of the mortgage loan was transferred to Seterus on November 1, 2015. Fannie Mae has owned the mortgage loan since 2008. Plaintiff defaulted on the loan by failing to make the payments due on February 1, 2010 and thereafter. By letter dated August 8, 2016 (attached to Mr. Foster's affidavit), defendant Seterus sent a "De-Acceleration Notice" whereby it revoked the demand for immediate payment of all sums secured by the mortgage. As a result, the loan was reinstated as an installment loan.

CPLR 213(4) provides in relevant part that a mortgage foreclosure action must be commenced within six years. According to the instant complaint, on August 18, 2010, a foreclosure action was commenced against the plaintiffs in this action. Plaintiffs contend that by election in the complaint of the foreclosure action, the mortgage holder "accelerated" the loan, thereby triggering the limitations period.

However, the evidence submitted on the motion establishes that, even if the plaintiff is correct concerning acceleration of the mortgage within the six year statute of limitations period, a " De-Acceleration Notice" was sent by certified and first class mail to the plaintiffs in this action. Delivery of the notice was confirmed on August 10, 2016.

"The law is well settled that, even 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 (*see, Rols Capital Co. v. Beeten,* 264 AD2d 724; *Loiacono v Goldberg,* 240 AD2d 476, 477). As . . . stated in *Federal Natl. Mtge. Assn. v. Mebane* (208 AD2d 892), once a mortgage debt is accelerated, 'the borrowers' right and obligation to make monthly installments ceased 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)." (*EMC Mortg. Corp. v. Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Nevertheless, 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 the borrower's position in reliance thereon. (See, Mebane, at 894). In this case, the mortgage foreclosure action was dismissed without prejudice in January 2013. Furthermore, the lender thereafter revoked its acceleration of the mortgage loan within the 6 year statute of limitations. Accordingly, the documentary evidence in the form of the De-Acceleration Notice conclusively establishes a defense to the asserted claims and plaintiffs fail to demonstrate any viable cause of action. "Having failed to suggest, let alone demonstrate, any prejudice resulting from [defendants']

revocation of [their] election to accelerate, [plaintiffs] cannot invoke the court's equitable powers to restrict [defendants'] desired remedy. (*Golden v. Ramapo Imp. Corp.*, 78 AD2d 648, 650 [2d Dept. 1980]). As a result, the action is **dismissed**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 13, 2017

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
JUN 16 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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