

Everhome Mtge. v Aber
2017 NY Slip Op 33530(U)
June 6, 2017
Supreme Court, Kings County
Docket Number: Index No. 507839/15
Judge: Noach Dear
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of June 2017

P R E S E N T:

HON. NOACH DEAR,

J.S.C.

Index No.: 507839/15

_____ x

EVERHOME MORTGAGE,

Plaintiff,

DECISION AND ORDER

-against-

NUCHEM ABER et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Moving Papers and Affidavits Annexed	<u>1</u>
Opposition/Cross	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Equity moves for dismissal of Plaintiff's claim and summary judgment in its favor on its counterclaim for cancellation and discharge of the mortgage in suit. Plaintiff opposes and cross-moves for summary judgment in its favor on both parties' claims.

It is undisputed that a prior action was filed on 4/30/09 and that the instant action was filed on 6/24/15, slightly more than six years later.

"The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due' unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on

the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). As this action was not commenced with six years of April 30, 2009, Defendant met its initial burden of demonstrating, prima facie, that this action was untimely and the burden then shifted to Plaintiff to raise an issue of fact as to whether this action is timely (see, *U.S. Bank Nat. Ass'n v. Martin*, 144 AD3d 891 [2d Dept 2016]).

Plaintiff argues that 1) RPAPL 1304 tolls the statute of limitations 90-days (and, thus, this action is timely), 2) Defendant relies solely on an attorney affidavit in support of its motion, and 3) that Defendant failed to establish that the prior action was an acceleration.

The Court rejects Plaintiff's contentions: 1) The statute of limitations was not tolled. The commencement of the instant action was not "stayed by a court or by statutory prohibition." Plaintiff could have sent a 90-day notice and still timely filed the action. It failed to do so. 2) Defendant makes an argument based on law and (undisputed) public records. Counsel does not offer factual testimony that should have come from his client. 3) The burden of creating an issue of fact as to the plaintiff-in-the-prior-action's standing and/or ability to send notices is upon Plaintiff and Defendant has no obligation to prove the viability of the prior action (see, for example, *U.S. Bank Nat. Ass'n v. Martin*, 144 AD3d 891 [2d Dept 2016]). Plaintiff has failed to demonstrate the existence of an issue of fact.

Defendant's motion is granted. This action is dismissed, lis pendens filed in this action cancelled and discharged, and the mortgage and note asserted herein deemed unenforceable and the lien discharged. Plaintiff's cross-motion is denied as moot.

ENTER:



Hon. Noach Dear, U.S.C.

MG ✓
MD
MS# 2 | 3
Moot