Bank v Johnson
2018 NY Slip Op 32076(U)
August 8, 2018
Supreme Court, Kings County
Docket Number: 505259/16
Judge: Noach Dear

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 8th day of August 2018.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.:505259/16

_____ x

DEUTSCHE BANK,

MS 1 & 2

Plaintiff,

DECISION AND ORDER

-against-

STEVEN JOHNSON 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 (MS#1)	1
Opposition/Cross (MS#2)	2
Reply/Opp to Cross	3
Cross-Reply	4

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

Plaintiff moves for summary judgment and an order of reference. Defendant opposes and cross-moves for summary judgment in his favor, alleging that the instant action is untimely and that Plaintiff failed to demonstrate compliance with RPAPL 1304.

I. SOL

"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]). A prior action was filed on 9/4/09, accelerating the debt. The instant action was filed on 4/6/16, more than six years later.

Plaintiff argues that it de-accelerated the debt by its servicer sending a letter to Defendant's (then former, now current) counsel stating that Plaintiff "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Interest and re-institutes the Loan as an installment loan."

"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" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]). In the absence of appellate guidance as to what constitutes an "affirmative act of revocation," this Court finds that the same standard should be used for de-acceleration as utilized for acceleration.

As the Second Department has noted: " Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action[1] must be taken evidencing the holder's election to take advantage of the accelerating provision... As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage. Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan and such notice must be 'clear and unequivocal'" (*Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982-983 [2d Dept 2012][citations and internal quotation marks omitted]). Put

[1] Note the similar language...

differently, acceleration (and, by extension, de-acceleration) requires a "clear and unequivocal" affirmative act on notice to the borrower, compliant with the terms of the note and mortgage and evidencing the holder's intention to accelerate (or, by extension, de-accelerate).

Defendant argues that the contents of the letter is insufficient to de-accelerate the loan. The Court disagrees. The letter explicitly states that Plaintiff "de-accelerates", "withdraws its prior demand for immediate payment", and "re-institutes the Loan as an installment loan." Though the amount of the next due payment (presumably all of the arrears) is not provided, the letter is sufficiently clear and unequivocal that the loan was no longer accelerated.

Defendant is correct, however, that the letter needed to be sent to the "notice address" as specified in paragraph 15 of the mortgage. As noted therein, "[t]he notice address is the address of the Property unless [Borrower] give written notice to Lender of a different address." Plaintiff claims that it was instructed to correspond with counsel – both in writing and orally. However, the written authorization allowing the servicer to release information to counsel's office does not even imply that Defendant's notice address had changed – merely that counsel was authorized to see information regarding Defendant's account which would have been otherwise confidential. Insufficient information has been provided to allow the Court to determine what (if anything) Defendant said to lead a Wells Fargo employee to write that "RCVD VERBAL OTIFICATION FROM STEVEN ... ALL COMM. TO ATY." If he specifically requested that his address for all communications should be counsel's office, then it would seem that he changed his notice address. If the conversation were directed solely to loss-mitigation , it would seem that he did not.

Issues of fact, thus, exist whether Plaintiff properly de-accelerated the loan.

II. 1304

Plaintiff has demonstrated compliance with RPAPL 1304 through the Parker Affidavit and

appended exhibits.

III. Conclusion

Motion and cross-motion both denied. Parties to complete discovery and proceed to trial.

ENTER:

Hon. Noach Dear, J.S.C.