M & Q Estates Corp. v Bank of N.Y.
2018 NY Slip Op 32674(U)
September 28, 2018
Supreme Court, Kings County
Docket Number: 504314/2017
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

M & Q ESTATES CORP.,

Plaintiff,

against

THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF CWALT, INC. ALTERNATIVE LOAN TRUST 2007-OA11 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007 OA11 AND NATIONAL CITY BANK,

Defendants.

Index Number 504314/2017
SEQ #004

DECISION/ORDER

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

	Papers Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

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Upon review of the foregoing documents, plaintiff's motion for summary judgment and default judgment is decided as follows:

Defendant The Bank of New York as Trustee for the Benefit of CWALT, Inc. Alternative Loan Trust 2007-OA11 Mortgage Pass-Through Certificates Series 2007-OA11 ("BoNY") previously commenced an action on July 3, 2008, in Kings County Supreme Court, to foreclose a $480,000 mortgage, executed by non-party Denholm Wong on August 17, 2007, secured by property located at 2 Campus Place, Brooklyn, New York. Mr. Wong failed to make the December 1, 2007 payment and subsequently defaulted. By order, dated September 12, 2013, the court (Knipel, J.) dismissed that action for failure to prosecute.

Plaintiff purchased the property from Mr. Wong on or about September 9, 2008 and commenced this action to cancel and discharge the mortgages held by defendant BoNY and National City Bank ("NCB"), and for judgment declaring itself the lawful owner of the property. Plaintiff moves for summary judgment on its claim to cancel the mortgage with BoNY and to

dismiss defendant BoNY's counterclaim for unjust enrichment. Plaintiff also moves for default judgment against NCB. Additionally, plaintiff moves: (1) to bar defendants and all the persons claiming under them from all claim or claims to an estate in the subject property; (2) to declare that the subject property is free from all liens and encumbrances held by such parties; and (3) to declare that plaintiff is the lawful owner of said premises.

Plaintiff's Motion for Summary Judgment on Its Claim to Discharge the Mortgage Held by Defendant BoNY

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In order to discharge a mortgage pursuant to RPAPL 1501(4), the plaintiff must prove: (1) that it has an estate or interest in the subject property; and (2) that the applicable statute of limitations for a foreclosure action has expired (*Kashipour v Wilmington Sav. Fund Soc'y, FSB*, 144 AD3d 985, 986–87 [2d Dept 2016]). The applicable statute of limitations is 6 years (*id.*). In opposition, defendant BoNY must raise a triable issue of fact as to whether the statute of limitations was tolled or revived (*JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 [2d Dept 2010]).

First, plaintiff establishes, through the submission of relevant court documents, that defendant BoNY commenced a foreclosure action related to the subject mortgage agreement on July 3, 2008, wherein defendant BoNY declared a default against the borrower and accelerated the mortgage payment to make all amounts due. "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" (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]). Plaintiff establishes that defendant BoNY's 2008 foreclosure action was dismissed for failure to prosecute, and that it has been over six years since the entire debt was accelerated (when the foreclosure action commenced). Accordingly, any action to enforce the mortgage held by BoNY would be barred by the statute of limitations.

Defendant BoNY argues that the mortgage loan's acceleration was revoked when the action was dismissed. However, the Second Department has found that dismissal of a prior foreclosure action by the court does not constitute an "affirmative act by the lender to revoke its election to accelerate" (*Fed. Nat. Mortg. Ass'n v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]). Defendant BoNY next argues that it decelerated the loan by sending the borrower a 90-day monthly mortgage statement, dated April 24, 2014, which reflected an amount less than the fully accelerated amount. A lender, such as BoNY, may revoke acceleration of a mortgage only by "an affirmative act of revocation occurring during the six-year statute of limitations period and subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]).

The mortgage statement-default notice did not affirmatively state that the loan had been decelerated, but rather only stated that the subject property was 2274 days in default and that payment of approximately $168,000 by July 23, 2014 would cure the default (*Deutsche Bank Natl. Tr. Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018] [a mortgagee's 90-day-notice to the borrower, which was coupled with the mortgagee's voluntary discontinuance of its prior foreclosure action, was not an affirmative act that sufficiently decelerated the mortgage]).

Accordingly, BoNY has failed to raise a triable issue of fact as to whether its 90-day default notice constitutes an affirmative act sufficient to decelerate the mortgage loan.

Defendant BoNY also incorrectly argues that time to enforce the mortgage has not run because the statute of limitations was tolled throughout the pendency of the prior foreclosure action. BoNY had the opportunity to initiate a separate foreclosure action in the year following the dismissal of the prior foreclosure action in 2013, yet chose to send notices to the borrower in an attempt at an alternative collection method (*Citimortgage, Inc. v Ramirez* NY Slip Op 50525[U], 2018 WL 1749899 at *5 [Sup Ct, NY County 2018] [tolling the statute of limitations during the pendency of a prior foreclosure would improperly extend the statute of limitations ad infinitum]).

Based on the foregoing, plaintiff has met its burden and defendant BoNY has failed to raise a triable issue of fact. Therefore, the portion of plaintiff's motion for summary judgment on its claim to discharge the mortgage because the statute of limitations to enforce the mortgage has expired is granted.

Plaintiff's Motion for Summary Judgment to Dismiss
Defendant BoNY's Unjust Enrichment Counterclaim

Plaintiff moves for summary judgment to dismiss defendant BoNY's counterclaim for unjust enrichment. Defendant BoNY argues that the court should sever the unjust enrichment claim pursuant to CPLR 603.

Defendant BoNY argues that, pursuant to its contractual obligations with the borrower, it has paid nearly $92,000 in real estate taxes and insurance on the property since the borrower defaulted on the mortgage loan, and that plaintiff benefitted from the absence of any tax liens on the property and insurance against any damage on the property. While defendant BoNY asserts

that it has made the payments continuously for over 10 years, the exhibit that it references for this proposition only shows the loan history from October 12, 2012, until July 6, 2018.

BoNY also attaches the mortgage agreement and references the relevant provisions which state that "I will pay to Lender all amounts necessary to pay for taxes, assessments, water charges, sewer rents and other similar charges…" and that "I will pay all of these amounts to Lender unless Lender tells me, in writing, that I do not have to do so, or unless Applicable Law requires otherwise." Plaintiff argues that defendant BoNY elected to pay carrying costs while pursuing its interest in the property, and not as a result of any mistake or fraud against BoNY.

To prevail on a claim for unjust enrichment, a party must show that: (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). BoNY must also establish that it performed its services for the purpose of benefitting the plaintiff, resulting in the latter's unjust enrichment (*Clark v Daby*, 300 AD2d 732, 732 [3d Dept 2002]). Additionally, the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 671 [2d Dept 2017]; *quoting Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]).

Here, defendant BoNY elected to pay the carrying costs for its own benefit — simultaneously fulfilling its contractual obligations with the borrower, Mr. Wong, and preventing tax foreclosure on the property. BoNY contends that this case is distinguished from *Burke* because, even if BoNY benefitted from protecting its lien, it made the payments continuously

pursuant to its contractual obligations. However, BoNY does not claim it made such payments due to fraud or mistake. Rather, it made the insurance and tax payments despite Mr. Wong's default in 2008.

Based on the foregoing, the taxes and insurance defendant BoNY paid do not form the basis of an unjust enrichment claim because they were not paid to benefit plaintiff. Accordingly, plaintiff's motion for summary judgment to dismiss defendant BoNY's counterclaim of unjust enrichment is granted.

Plaintiff's Motion for Default Judgment

To obtain default judgment, plaintiff must establish that defendant was properly served with process, that defendant failed to appear or answer the complaint, and that plaintiff has a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]). In order to establish that it has a viable cause of action, plaintiff must submit prima facie proof of its claim via someone with personal knowledge of the facts underlying that claim (*Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2d Dept 2015]; *Triangle Properties 2*, 73 AD3d at 1032).

Plaintiff submits an affidavit of service to establish that it served process on defendant NCB on March 27, 2017 by delivering the summons and verified complaint to Martineta Celiku. The process server, in the affidavit of service, stated that he knew Ms. Celiku to be an authorized legal agent of NCB and that she stated that she was authorized to accept legal papers on behalf of the corporation.

Plaintiff states in his complaint that, on May 20, 2008, the borrower entered into a mortgage agreement with defendant NCB.[1] The complaint is verified by Eli Cohn, the president of plaintiff. The complaint states that this mortgage "has either been satisfied or is currently in default and no amounts have been paid since default, maturity, or acceleration . . . . If unsatisfied, it is now over six years since the date of default, maturity, or acceleration for said mortgage and note."[2] However, the statute of limitations for a mortgage foreclosure action accrues following the default of each unpaid installment or when the entire debt is due or accelerated (*Zinker v Makler*, 298 AD2d 516, 517 [2d Dept 2002]).

According to the mortgage agreement, the mortgage's maturity date is August 17, 2022. There is no evidence or indication in the record that NCB has filed a foreclosure action against the borrower, nor that NCB has otherwise elected to accelerate the mortgage. Importantly, there is no indication in the record that the borrower defaulted on his mortgage with NCB, or whether the loan has been satisfied. As such, this court finds that plaintiff has not met its burden in establishing proof of the underlying facts against NCB.

Based on the foregoing, plaintiff's motion for default judgment against NCB is denied.

<u>Additional Relief</u>

Plaintiff also moves for "judgment against the defendants and all persons claiming under them that they be forever barred from all claim or claims to an estate in the premises hereinbefore

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[1] According to the certified copy of the mortgage agreement that plaintiff submits, the agreement was executed on August 17, 2007.

[2] Plaintiff also submits an affidavit from David Cohn, who describes himself as the plaintiff in this action. Of course, the plaintiff is M & Q Estates Corp. While Mr. Cohn might be an owner or an officer of this corporation, he does not say so, and so it is unclear how he has personal knowledge of the information he provides. In any event, he largely repeats the allegations in the complaint concerning the purported satisfaction of the NCB mortgage.

described, or lien or encumbrance thereupon of any kind or nature whatsoever; and that it be adjudged and decreed that the above plaintiff is the lawful owner of said premises in fee simple and is entitled to the lawful, peaceable and uninterrupted possession thereof as against the defendants herein . . . ."

As to the first portion of the request, plaintiff has submitted evidence only as to the mortgage held by BoNY, but not as to any other persons asserting any claims or liens. Because this court is granting plaintiff's motion for summary judgment that requests cancellation and discharge of defendant BoNY's mortgage, this judgment would necessarily remove that lien on the property, and all persons claiming under that mortgage and lien.

This court declines to declare that plaintiff is the lawful owner of the subject property, as there is no controversy about ownership of the subject property. Likewise, this court declines to cancel any lis pendens currently encumbering the subject property, except as to any lis pendens by BoNY or any person claiming under them.

Conclusion

The portion of plaintiff's motion for summary judgment on its claim for cancellation and discharge of a mortgage held by defendant BoNY, and to dismiss defendant's counterclaim of unjust enrichment, is granted. To that end, any lien or lis pendens asserted by BoNY or any person claiming under BoNY is hereby also discharged. The remainder of plaintiff's motion, including its request for default judgment, is denied.

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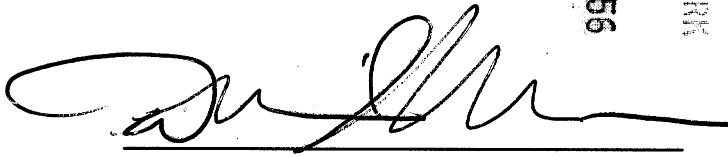
This constitutes the order of the court.



September 28, 2018
DATE

DEVIN P. COHEN
Acting Justice, Supreme Court