U.S. Bank N.A. v Nail
2018 NY Slip Op 32897(U)
October 9, 2018
Supreme Court, Westchester County
Docket Number: 70652/2017
Judge: Helen M. Blackwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES AEG 2006-HE1 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES AEG 2006-HE1,

Plaintiff,

-against-

CYNTHIA NAIL AKA CYNTHIA HILL, JONATHAN NAIL AKA JONATHAN V. NAIL, CAPITAL ONE BANK USA, NA, NYS TAX COMMISSION, LVNV FUNDING LLC, INNER CITY CHECK CASHING & PAYROLL, and "JOHN DOE" and "JANE DOE" the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

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DECISION
and
ORDER

INDEX NO.:
70652/2017

BLACKWOOD, A.J.S.C.

The following papers (e-filed documents 13-24, 33-51) were considered on the E-filed motion by defendants CYNTHIA NAIL AKA CYNTHIA HILL, JONATHAN NAIL AKA JONATHAN V. NAIL in connection with their application to dismiss the action against them:

Papers

Notice of Motion/Affirmation in Support (Exhibits A-I)

Affirmation/Affidavit in Opposition, Memorandum of Law (Exhibits 1-9)

Affirmation in Reply (Exhibits A-F)

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ASSET BACKED SECURITIES CORPORATION HOME EQUITY

LOAN TRUST, SERIES AEG 2006-HE1 ASSET BACKED PASSTHROUGH CERTIFICATES, SERIES AEG 2006-HE1 ("plaintiff") filed a summons and complaint against CYNTHIA NAIL AKA CYNTHIA HILL, JONATHAN NAIL AKA JONATHAN V. NAIL ("defendants") alleging that the defendants defaulted on a mortgage on the home located at 421 South First Avenue, Mount Vernon, New York. This action was commenced on December 19, 2017. A prior foreclosure action was filed against the defendants for their default on the same mortgage on the property on June 20, 2008. However, that action was dismissed *sua sponte* on November 7, 2010 (J. Scheinkman), for failure to prosecute pursuant to section 3215(c) of the Civil Practice Law and Rules ("CPLR"). Defendants now move for an order dismissing the complaint against them, alleging that the action is barred by the statute of limitations.

Specifically, the defendants argue that prior to the filing of the original summons and complaint, AEGIS FUNDING CORPORATION ("Aegis"), sent the defendants a letter dated February 12, 2008, which stated that if the overdue amount of the mortgage, amounting to $36,206.31, was not paid to the loan servicer, Select Portfolio Servicing, Inc. ("SPS") within 30 days of the letter, "the entire unpaid balance, together with accrued interest, fees and expenses, may be accelerated" and a foreclosure action could be commenced (Affirmation in Support, Exhibit C). Defendants argue that the language of this letter effectively accelerated the loan. Alternatively, the defendants point out that because they did not fulfill the obligations set forth in the February letter, a summons and complaint was filed against them containing the following language, "plaintiff has elected to declare the unpaid principal sum of the NOTE and MORTGAGE in the amount of $467,979.61 with accrued interest at 7.55% per annum, from May 1, 2007, to be immediately due and payable" (Affirmation in Support, Exhibit D). The defendants argue that as a result of Aegis' filing of the summons and compliant containing the

quoted language, the mortgage was accelerated and the six year statute of limitations began to run the moment that the summons and complaint was filed and as such, the six year statute of limitations expired in June of 2014.

Plaintiff responds with several arguments. First, the plaintiff alleges that at the time that Aegis filed the summons and complaint, the note and mortgage had already been handed over to the plaintiff pursuant to an agreement entered into by the parties in January of 2006 and therefore, Aegis had no standing to initiate a foreclosure action against the defendants and could not have accelerated the mortgage. They note that the fact that the mortgage and the note were not assigned to the plaintiff until June 27, 2008, seven days after the foreclosure matter was filed, is of no consequence since the plaintiff was physically in possession of the mortgage and note as of May 14, 2008. In any event, plaintiff argues, the mortgage was never accelerated since no judgement of foreclosure and sale were ever ordered, as is required by the language in the mortgage document. For all of these reasons, plaintiff contends that the motion to dismiss should be denied in its entirety. If the court agrees with the defendants that the mortgage was accelerated and the statute of limitations has run, plaintiff asks the court to find that there are still payments owed to the plaintiff by the defendant that were secured by the mortgage that are not time-barred, such as the taxes and insurance on the property, as well as interest that has accrued on the principal debt.

When making a motion to dismiss a complaint on the grounds that the statute of limitations has expired pursuant to CPLR 3211(a)(5), "the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (Lake v. New York Hosp. Medical Center of Queens, 119 A.D.3d 843, 844 [2d Dept. 2014], citing Zabrowski v. Local 74, Service Employees International Union, AFL-CIO, 91 A.D.3d 768, 768 [2d Dept.

2012]). Once that burden is satisfied, it shifts to the nonmoving party to raise a question of fact as to whether the action was commenced within the applicable period, or whether the statue of limitations was tolled or otherwise inapplicable (Williams v. New York City Health and Hospitals Corp., 84 A.D.3d 1358 [2d Dept. 2011]).

The question of whether or not the mortgage was accelerated when Aegis filed the original summons and complaint seems to be answered by the plain language contained within the original complaint. The verified complaint is clear and unequivocal that the plaintiffs are electing to accelerate the mortgage upon the filing of the action by stating "plaintiff has elected to declare the unpaid principal sum of the NOTE and MORTGAGE . . . to be immediately due and payable" (Affirmation in Support, Exhibit D). However, the inquiry does not end there. In addition to the language contained in the complaint, the court must also examine the language contained in the mortgage, which allows the defendants to discontinue the foreclosure action under particular circumstances. Paragraph 19 of the mortgage indicates that the foreclosure will be stopped if the defendant meets a series of conditions, including the payment of the full amount that would have been due under the mortgage, and that the defendants have this right "at any time before the earliest of: (a) five days before sale of the Property under any power of sale granted by the Security Instrument; (b) another period as Applicable Law might specify for the termination of [defendants'] right to have enforcement of the Loan stopped; or (c) a judgment has been entered enforcing this Security Instrument" (Affirmation in Support, Exhibit H).

Other New York courts have address this identical issue (see Wells Fargo Bank, N.A. v. Elizabeth Fetonti, 2018 NY Slip Op 30193(U) [Sup. Ct. Westchester Ct. January 25, 2018]; Nationstar Mortg., LLC v. MacPherson, 56 Misc.3d 339 [Sup. Ct. Suffolk Co. 2017]). After reading each of those decisions, this court is persuaded by the reasoning contained therein. In

particular, the court notes that, as did Justice Ecker in the Wells Fargo Bank, N.A. v. Elizabeth Fetonti case, that "no where in the mortgage instrument (or the mortgage note) is there a mandate that plaintiff must provide a clear, unequivocal election to accelerate the debt. Nor is there any evidence that plaintiff, on its own accord and outside the four walls of the contract, advised the defendant in clear and unequivocal language at a time before the commencement of the prior action that the debt was being *irrevocably* accelerated" (emphasis added). Since the language of the mortgage mandates that the plaintiff accept the defendants' payment of arrears in order to cease the foreclosure action and reinstate the mortgage, the mortgage could not be fully accelerated simply by the filing of a foreclosure action. By entering into a contract with the defendants that gave them a right to reinstate the mortgage up until the moment a judgment is entered, the plaintiff lost the right to demand payment in full merely by filing a foreclosure action. As such, the court finds that the filing of the 2008 foreclosure action did not accelerate the mortgage and the defendant's motion to dismiss is denied. In light of the court's findings, the court need not determine the merits of the parties' remaining contentions.

THEREFORE, based upon the stated reasons, it is hereby:

ORDERED that the defendant's motion to dismiss the action is denied.

This constitutes the decision, and order of this Court.

Dated: White Plains, New York
October 9, 2018

HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

Via E-filing to the attorneys of record