

<b>Capital Bus. Credit LLC v Goyal</b>
2018 NY Slip Op 33106(U)
November 21, 2018
Supreme Court, New York County
Docket Number: 156453/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

INDEX NO. 156453/2016
MOTION SEQ. NO. 002

CAPITAL BUSINESS CREDIT LLC,

Plaintiff,

- v -

ATUL GOYAL, ANUJA GOYAL, BHUPENDRA YADUVANSHI,
DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE
FOR THE RESIDENTIAL ACCREDIT LOANS, INC. MORTGAGE
ASSET-BACKED PASS THROUGH CERTIFICATES, SERIES
2006-QS6, & OCWEN LOAN SERVICING, LLC,

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 90, 91, 92, 93, 94,
95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116,
117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this motion to/for

DISMISSAL

Hahn & Hessen LLP, New York (John Amato of counsel), for plaintiff
Houser & Allison LLP, New York (Daniel Park of counsel), for defendants

Gerald Lebovits, J.

In motion sequence 002, defendants Deutsche Bank Trust Company Americas (Deutsche
Bank), as Trustee for the Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass Through
Certificates, Series 2006-QS6 and Ocwen Loan Servicing, LLC (Ocwen), move under CPLR
3211 (a) (1), (3) and (7) to dismiss Capital Business's complaint under RPAPL article 15 for
quiet title, a declaratory judgment to cancel Deutsche Bank's consolidated mortgage due to the
expiration of statute of limitations and an unjustifiable delay in foreclosing its mortgaged
property, and to bar Deutsche Bank's from collecting payments and expenses under its
consolidated mortgage from March 1, 2008, until six years immediately before a future
foreclosure action brought by Deutsche Bank. Plaintiff cross-moves to amend the caption to
reflect the change of plaintiff's name from "Capital Business Credit LLC" to "White Oak
Commercial Finance, LLC."

Background

Atul Goyal and Anuja Goyal (Borrower-Defendants) obtained two loans. A note in the
principal sum of \$770,000 was secured by a mortgage encumbering the condominium located at
415 East 37th Street, Unit 39 J, New York, New York (Property), in favor of GreenPoint
Mortgage Funding, Inc. Another note in the principal sum of \$229,900.01 was secured by
another mortgage encumbering the Property in favor of Real Estate Mortgage Network Inc. In

May 2006, Borrower-Defendants executed a consolidation, extension, and modification agreement to consolidate these two mortgages for a total amount of \$999,900 encumbering the Property in favor of Real Estate Mortgage Network Inc. (Consolidated Mortgage). Anuja Goyal executed and delivered to RE Mortgage Network an InterestFirst Note in the amount of \$999,900 (Consolidated Note). The Consolidated Mortgage and Note were recorded in July 2006.

Borrower-Defendants obtained another loan and executed a mortgage in favor of plaintiff Capital Business Credit LLC. That mortgage was recorded on November 15, 2006, and modified by a mortgage modification agreement dated January 31, 2007, in plaintiff's favor, encumbering the Property in the amount of \$750,000 (Plaintiff's Mortgage). Plaintiff's Mortgage was recorded in February 2007.

The Consolidated Mortgage was assigned to Residential Funding Corp. (RFC). This assignment was recorded on June 17, 2008. On June 19, 2008, due to Borrower-Defendants' default, RFC brought a foreclosure action against Borrower-Defendants, under index number 108563/2008. Later, in April 2011, RFC voluntarily discontinued its foreclosure action and entered its stipulation of discontinuance with Borrower-Defendants. After RFC's discontinuance, defendant Ocwen, the servicer for the Consolidated Note and Mortgage, sent letters and issued account statements to Anuja Goyal, seeking the total accelerated principal with interest under the Consolidated Mortgage on RFC's behalf.

RFC assigned the Consolidated Mortgage to defendant Deutsche Bank. Trust Company Americas, as Trustee for the Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass Through Certificates, Series 2006-QS6. The timing of this assignment is unclear.

In August 2016, plaintiff commenced this action under RPAPL article 15 for quiet title, a declaratory judgment to cancel Deutsche Bank's Consolidated Mortgage due to the expiration of statute of limitations and an unjustifiable delay in foreclosing its mortgaged property, and to bar Deutsche Bank from collecting payments and expenses under the Consolidated Mortgage from March 1, 2008, until six years immediately before a future foreclosure action brought by Deutsche Bank. Defendants Deutsche Bank and Ocwen now move to dismiss this action under CPLR 3211 (a) (1), (3) and (7). Plaintiff cross-moves to amend the caption to reflect the change of plaintiff's name from "Capital Business Credit LLC" to "White Oak Commercial Finance, LLC."

*Discussion*

**I. Motion to dismiss for lack of standing**

A mortgagee who has an interest in a property is allowed to bring an action to quiet title or to obtain a declaratory judgment with regard to the priority or validity of mortgages on the property. (*See* RPAPL § 1501; *Deutsche Bank Nat. Tr. Co. v Fleurimond*, 2016 NY Slip Op. 30608 [U], \*2-3 [Sup Ct, Kings County 2016].) Here, plaintiff has standing to bring this action because it owns a mortgage on the Property.

Accordingly, defendants' motion to dismiss this action for lack of standing is denied.

**II. Motion to dismiss under CPLR 3211 (a) (3)**

“Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.” (*Silver v Pataki*, 96 NY2d 532, 537 [2001].) CPLR 3211 (a) (3) permits a defendant to move to dismiss a cause of action on the ground that the plaintiff lacks the legal capacity to sue. As a general rule, limited-liability companies have the legal capacity to sue and be sued and thus are proper parties to an action. (*See Limited Liability Company Law* § 202 [a].)

Accordingly, defendants’ motion to dismiss this action under CPLR 3211 (a) (3) is denied.

**III. Motion to dismiss under CPLR 3211 (a) (1)**

CPLR 3211 (a) (1) requires that documentary evidence “conclusively establish a defense to the asserted claims as a matter of law.” (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

Defendants argue that this action should be dismissed because the documentary evidence shows that Deutsche Bank’s Consolidated Note and Mortgage was properly and duly recorded prior to Plaintiff’s Mortgage and that the Consolidated Note and Mortgage remains a valid lien that has not been satisfied.

Plaintiff argues that this motion to dismiss should be denied because the Consolidated Mortgage and Note were not properly executed. This court disagrees. The consolidation, extension, and modification agreement, in which the Consolidated Mortgage and Note were included as exhibits, was signed by both Borrower-Defendants and recorded. If evidence could show that the Borrower-Defendants indeed received proceeds from the Consolidated Mortgage, this court could compel the Borrower-Defendants to re-execute the Consolidated Mortgage and Note. (*See Wells Fargo Home Mortg. v Moutopoulos*, 2011 NY Slip Op. 33374 [U], \*6 [Sup Ct, Nassau County 2011].)

A mortgage follows the note. When a note changes hands, its mortgage interest automatically follows. (*See Yoi-Lee Realty Corp. v 177th St. Realty Assocs.*, 208 AD2d 185, 190 [1st Dept 1995].) This court finds that the documentary evidence defendants provide establishes that Deutsche Bank’s Consolidated Mortgage is superior to Plaintiff’s Mortgage. But it does not rebut plaintiff’s allegation that the Consolidated Mortgage is defective. Therefore, defendants’ documentary evidence does not establish its defense as a matter of law.

Accordingly, defendants’ motion to dismiss this action under CPLR 3211(a) (1) is denied.

**IV. Motion to dismiss under CPLR 3211 (a) (7)**

In deciding a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion” and give plaintiff “the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Sokoloff*

*v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001].) A cause of action may be dismissed “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017].)

### **1. The first cause of action seeking quiet title**

Plaintiff’s first cause of action seeks to quiet title to the Property, under RPAPL article 15, to determine the validity of the Consolidated Note and Mortgage. Defendants’ motion under CPLR 3211 (7) to dismiss plaintiff’s first cause of action is denied.

Defendants argue that plaintiff’s first cause of action should be dismissed because the Consolidated Mortgage is superior to Plaintiff’s Mortgage, and therefore no actual or justiciable controversy exists.

According to RPAPL § 1501 (1),

“where a person claims an estate or interest in real property . . . such person . . . may maintain an action against any other person, known or unknown, . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make.”

Also, to maintain an action for quiet title, plaintiff must show that Deutsche Bank’s mortgage is “actually invalid or inoperative.” (*Acocella v Wells Fargo Bank, N.A.*, 139 AD3d 647, 649 [2d Dept 2016].)

Plaintiff owns an interest in the Property by holding its mortgage and seeks to discharge Deutsche Bank’s Consolidated Mortgage for the reason of invalidity. This court finds that plaintiff has shown that a controversy exists in this action.

Accordingly, defendants’ motion under CPLR 3211 (a) (7) to dismiss plaintiff’s first cause of action is denied.

### **2. The second cause of action seeking declaratory judgment that the Consolidated Mortgage is outside the statute of limitations**

Defendants’ motion under CPLR 3211 (7) to dismiss plaintiff’s second cause of action that the Consolidated Mortgage is unenforceable as outside New York’s statute of limitations pursuant to RPAPL § 1501(4) is denied.

A junior mortgagee may bring action to cancel and discharge another senior mortgage. (*Stewart Title Ins. Co. v Bank of New York Mellon*, 154 AD3d 656, 659-660 [2d Dept 2017].) RPAPL § 1501 (4) provides that

“Where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom.”

According to CPLR 213 (4), an action to foreclose a mortgage is subject to a six-year statute of limitations. Once a mortgage is accelerated, the entire amount of the mortgage is due, and the six-year statute of limitations begins to run. (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012].) Commencing a foreclosure action triggers an acceleration of the entire mortgage debt. (*E.g. Fannie Mae v 133 Mgmt., LLC*, 126 AD3d 670, 670 [2d Dept 2015].) Although a lender may revoke its acceleration, the revocation must be an “affirmative act” occurring within the statute-of-limitations period. (*EMC Mortg. Corp. v Paella*, 279 AD2d 604, 606 [2d Dept 2001].) A voluntary discontinuance of a foreclosure action does not revoke the acceleration of a mortgage if the voluntary discontinuance stipulation is “silent on the issue of the revocation of the election to accelerate, and [does] not otherwise indicate that the plaintiff would accept installment payments from the defendant.” (*Freedom Mortgage Corp. v Engel*, 163 AD3d 631, 633 [2d Dept 2018].) Therefore, “determining when a mortgage has been accelerated, and, thus, when the statute of limitations began to run, is an essential component of an action pursuant to RPAPL 1501(4).” (*Stewart Title Ins.*, 154 AD3d at 659.)

Defendants asserts that it has owned the Consolidated Mortgage since 2006. But the 2008 foreclosure action was brought by RFC, and RFC’s standing in that action was not challenged. Thus, regardless when Deutsche Bank got the Consolidated Mortgage, there is no dispute that RFC accelerated the entire amount due when it commenced its foreclosure action in 2008.

Later, on April 5, 2011, RFC voluntarily discontinued its foreclosure action and entered into a stipulation of discontinuance with Borrower-Defendants. If RFC’s voluntary discontinuance properly revoked its acceleration and reinstated the Consolidated Mortgage, the date of RFC’s voluntary discontinuance, April 5, 2011, is within six years from its acceleration, and therefore the Consolidated Note would be valid. If RFC did not reinstate the Consolidated Mortgage, the six-year statute of limitations would have been expired before this action began.

Defendants argue that RFC’s voluntary discontinuance reinstated the Consolidated Mortgage as a matter of law. This court disagrees. But a revocation must be an affirmative act. Mere “discontinuance of the foreclosure action, standing alone and without further proof” expressing the mortgagee’s intent to revoke the acceleration and reinstate the loan, does not constitute an affirmative act of revocation.” (*BSD 265, LLC v HSBC Bank USA N.A.*, 2017 NY Slip Op. 31373 [U], \*8 [Sup Ct, Kings County 2017].) Thus, the issue here is whether RFC’s voluntarily discontinuance constitutes an affirmative act of revocation.

The stipulation of discontinuance provides that RFC’s foreclosure action was “compromised and settled.” This term might mean that the parties in RFC’s foreclosure action

intended that the dispute in that case to be completely and finally resolved. Also, no language or act indicates that RFC intended to reinstate the Consolidated Mortgage. Further, the February 2013 letter, the April 2013 letter, and the May 2015 statement, in which Deutsche Bank attempted to collect the entire accelerated amount due under the Consolidated Note (see Complaint, Exs. 14 and 15), might prove that RFC's discontinuance of the foreclosure action did not revoke the earlier acceleration of the mortgage debt. (See *Vargas v Deutsche Bank Natl. Tr. Co.*, 2017 NY Slip Op 30948 [U], \*5 [Sup Ct, Bronx County 2017] [finding that letter from lender seeking full accelerated amount of mortgage debt after discontinuance of foreclosure action might indicate that the debt was not properly decelerated].) Therefore, this court finds that RFC's voluntarily discontinuance might not revoke the acceleration of the Consolidated Note and that plaintiff has sufficiently pleaded a cause of action under RPAL § 1501 (4).

Accordingly, defendants' motion under CPLR 3211 (7) to dismiss plaintiff's second cause of action is denied.

### **3. Fourth cause of action for a declaratory judgment to bar Deutsche Bank from collecting certain payments and expenses**

Plaintiff argues that if this court finds that RFC's voluntarily discontinuance revoked the acceleration of the Consolidated Mortgage, its fourth cause of action would be a valid cause of action. In its fourth cause of action, plaintiff seeks a declaratory judgment to bar Deutsche Bank from recovering Consolidated Mortgage payments and expenses occurring from the date of the Borrower-Defendants' first default through six years before a future foreclosure action brought by Deutsche Bank. Defendants' motion under CPLR 3211 (7) to dismiss plaintiff's fourth cause of action is granted in part and denied in part.

RPAL § 1501 (4) allows a plaintiff to challenge the validity of other's mortgage based on the expiration of statute of limitations. The six-year statute of limitations began to run on the date on which each installment became due and payable under promissory note. (*Cadlerock, L.L.C. v Remer*, 72 AD3d 454, 454 [1st Dept 2010].) In this case, if defendants could show that RFC's voluntarily discontinuance revoked the acceleration of the Consolidated Mortgage, the statute of limitations would still bar Deutsche Bank from recovering payments and expenses, on which Borrower-Defendants had defaulted over six years before this action began. (See *id.*)

However, plaintiff also asks this court to bar Deutsche Bank from collecting default payments and expenses that are less than six years old and which might be subject to the six-year statute of limitations after the commencement this action. This court disagrees. "Each payment default that is less than six years old creates a basis for a subsequent foreclosure or acceleration action." (*HSBC Bank, USA, NA v Margineanu*, 2018 NY Slip Op 28311, \*9 [Sup Ct, Suffolk County 2018].) This court refuses to bar Deutsche Bank from collecting default payments and expenses that are not subject to the statute of limitations when this action began.

Accordingly, defendants' motion under CPLR 3211(a) (7) to dismiss plaintiff's fourth cause of action is granted in part and denied in part. Defendant's motion to dismiss plaintiff's cause of action to bar Deutsche Bank from recovering default payments and expenses over six years before this action began is denied. Defendant's motion to dismiss plaintiff's cause of action

to bar Deutsche Bank from recovering default payments and expenses less than six years old when this action began is granted.

#### 4. Third cause of action for unreasonable delay to foreclose

This court grants defendants' motion to dismiss plaintiff's third cause of action, which seeks to discharge the Consolidated Mortgage based on Deutsche Bank's unreasonable and unjustified delay in prosecuting its foreclosure action.

"The essence of the equitable defense of laches is prejudicial delay in the assertion of rights" (*Jean v Joseph*, 117 AD3d 989, 990 [2d Dept 2014].) A junior mortgagee has the right to foreclose on mortgaged property and need not wait for the senior mortgagee to commence a foreclosure action. Documentary evidence shows that Deutsche Bank's mortgage is superior to plaintiff's. Plaintiff does not, however, show that Deutsche Bank must initiate a foreclosure action or that plaintiff has changed position to its irreversible detriment. (*Id.*)

Accordingly, defendants' motion under CPLR 3211 (a) (7) to dismiss plaintiff's third cause of action is granted.

#### V. Cross-motion to amend the caption

Granted without opposition. At oral argument, defendants consented to plaintiff's cross motion for leave to amend the caption to reflect the change of plaintiff's name from "Capital Business Credit LLC" to "White Oak Commercial Finance, LLC."

Accordingly, it is

ORDERED that defendants' motion to dismiss this action for lack of standing is denied; and it is further

ORDERED that defendants' motion to dismiss this action under CPLR 3211 (a) (1) is denied; and it is further

ORDERED that defendants' motion to dismiss this action under CPLR 3211 (a) (3) is denied; and it is further

ORDERED that defendants' motion under CPLR 3211 (a) (7) to dismiss plaintiff's first and second causes of action is denied; and it is further

ORDERED that defendants' motion under CPLR 3211 (a) (7) to dismiss plaintiff's third causes of action is granted; and it is further

ORDERED that defendants' motion under CPLR 3211 (a) (7) to dismiss plaintiff's fourth cause of action is granted in part and denied in part. Defendant's motion to dismiss plaintiff's cause of action to bar Deutsche Bank from recovering default payments and expenses over six



years before this action began is denied. Defendant’s motion to dismiss plaintiff’s cause of action to bar Deutsche Bank from recovering default payments and expenses less than six years old when this action began is granted; and it is further

ORDERED that plaintiff’s cross motion to amend caption is granted to reflect the change of plaintiff’s name from “Capital Business Credit LLC” to “White Oak Commercial Finance, LLC”; and it is further

ORDERED that defendants shall serve a copy of this decision and order with notice of entry on all parties and on the County Clerk and the General Clerk, who are directed to amend their records accordingly; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 20, 2019, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

11/21/2018

DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: