

U.S. Bank N.A. v Janes
2018 NY Slip Op 33393(U)
December 20, 2018
Supreme Court, New York County
Docket Number: 850065/2017
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH REEVES MCMAHON

PART

Justice

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U.S. BANK NATIONAL ASSOCIATION,
Plaintiff,
- v -

INDEX NO. 850065/2017
MOTION DATE 11/20/2018
MOTION SEQ. NO. 001

ALEXANDER JANES, NEW YORK ENVIRONMENTAL CONTROL BOARD, JOHN DOE #1 THROUGH JOHN DOE #12, THE LAST TWELVE NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY

This is an action whereby US BANK seeks to foreclose upon a mortgage encumbering a residence located at 240 Riverside Boulevard, Unit 11N, New York, NY 10023.

On or about November 7, 2005, JANES executed a note and mortgage in favor of America's Wholesale Lender.

On or about August 2010, JANES defaulted on the note.

A letter dated September 16, 2010, was sent to JANES from BAC Home Loans Servicing, LP, as servicer "on behalf of the holder of the promissory note". The letter was titled, "Notice of Intent to Accelerate". The letter stated that, [i]f the default is not cured on or before October 21, 2010, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time."

The default was never cured.

On or about November 11, 2011, the note was assigned to Bank of America, N.A. (“BOA”).

On or about January 20, 2012, BOA commenced a foreclosure action on the subject mortgage loan.

On or about August 15, 2013, the note was assigned to Nationstar Mortgage, LLC.

On or about April 22, 2014, the note was assigned to US BANK.

On or about December 19, 2016, a motion was granted to discontinue the original foreclosure action commenced by BOA. The reason given for the discontinuance was that, “a condition precedent to the foreclosure action was not met.”

US BANK alleges that the condition precedent not met was that BOA did not have standing to send the September 16, 2010 Acceleration Letter because the letter was sent fourteen months before the loan was assigned to BOA.

US BANK commenced the present foreclosure action on or about February 24, 2017, two months after the motion to discontinue.

Presently, BOA has made a motion seeking Summary Judgment and JANES has cross-moved seeking to dismiss on the grounds that the Statute of Limitation has expired.

The relevant statute, CPLR 213, states that,

the following actions must be commenced within six years...4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein. *CPLR 213(4)*.

“It is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of

limitations begins to run on the entire mortgage debt.” *CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 43 A.D.3d 45, 837 N.Y.S.2d 33, (N.Y.A.D. 1st Dept., 2007).

This Court rejects Plaintiff’s argument, pursuant to *Nationstar Mortgage v. MacPherson*, that acceleration does not occur until judgment is entered. *Nationstar Mortgage v. MacPherson* is not controlling and is counter to the current caselaw and statute.

“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. Acceleration occurs, inter alia, by the commencement of a foreclosure action.” *Deutsche Bank Nat’l Tr. Co. v. Adrian*, 157 A.D.3d 934, 69 N.Y.S.3d 706 (N.Y.A.D. 2nd Dept., 2018).

“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.” *Id.*

No proof was submitted demonstrating an affirmative act of revocation of the acceleration.

The date of the acceleration of the mortgage loan is disputed between the parties.

JANES argues that the September 16, 2010 Letter accelerated the loan, in which case the Statute of Limitations expired September 16, 2016.

US BANK argues that BOA did not have standing to send the September 16, 2010 Letter and therefore the mortgage loan was not accelerated until the commencement of the original foreclosure on or about January 20, 2012, in which case the Statute of Limitation expired January 20, 2018, which would be after the present foreclosure action was commenced.

BOA’s standing to have sent the September 16, 2016 Letter must be determined.

Therefore it is

ORDERED that the issue of **the standing of Bank of America and/or the authority of BAC Home Loans Servicing, LP to have sent the September 16, 2010 Notice of Intent to Accelerate Letter** is referred to a Special Referee to hear and report with recommendations, except that, in the event of a stipulation of the parties, the Special Referee shall determine the aforesaid issue; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the court's website at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, the motion and cross-motion shall be held in abeyance pending submission of the Report of the Special Referee and the determination of this court thereon.

12/20/18

DATE

JUDITH REEVES MCMAHON, J.S.C.

Hon. Judith N. McMahon
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE