MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Deutsche Bank National Trust Company, as Trustee, in trust for registered holders of Long Beach Mortgage Loan Trust 2006-6 Asset Backed Certificates, Series 2006-6,

Plaintiff,

- against -

Emigdio Baquero, et.al.,

Defendants.

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Index Number: 713058/17

Motion Date: 7/16/18

Motion Seq. No.: 2

Motion by Baquero in this mortgage foreclosure action for summary judgment dismissing the complaint and for an order cancelling and discharging the mortgage of record, upon the ground that this foreclosure action is barred by the statute of limitations, is denied. Cross-motion by plaintiff for summary judgment against Baquero, for dismissal of his counterclaims and for an order of reference, is granted.

Plaintiff, the assignee of the note and mortgage, commenced a foreclosure action against Baquero on November 8, 2007 under a prior Index Number (Index No. 27816/07). The complaint alleged that the mortgagor defaulted on the payment of the loan commencing with the payment due on July 1, 2007. Paragraph 8 of that complaint alleged, "That the terms of the above described instrument provide: (1)that the whole of said principal sum and interest shall become due at the option of the Mortgagee after default in the payment of any installment of principal or of interest", and paragraph 9 of the complaint states, "Pursuant to the terms of said instrument[s] notice of default has been duly given to the defendants if required, and the period to cure, if any, has elapsed and by reason thereof, Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal."

Pursuant to the order of Justice Marguerite Grays issued on February 16, 2008, plaintiff's subsequent motion for an order of reference was denied without prejudice and with leave of plaintiff to move again for said relief upon an affidavit of a person with knowledge whether the loan is a subprime home loan. Justice Grays also noted, "Furthermore, the Court notes that it is unclear

whether plaintiff has standing to bring the instant action in light of the fact that the Assignment of Mortgage to plaintiff...post-dates the commencement of this action."

Less than four months later, and during the pendency of the first foreclosure action, plaintiff commenced a second foreclosure action on June 9, 2010 under Index Number 14761/10 and filed another notice of pendency. The complaint appears identical to the earlier one and contains the same acceleration paragraph, except that this second complaint also contains a paragraph stating, "That a prior action was commenced...under 27816/07. Plaintiff will undertake to discontinue said action." Thereafter, on August 4, 2010, plaintiff filed a stipulation of discontinuance, dated July 30, 2010, of the first action.

Pursuant to the order of Justice Grays issued on April 6, 2017, the second action was dismissed without prejudice and the Clerk of the Court was directed to cancel the notice of pendency, for failure of plaintiff to appear for a status conference, failure to file an affidavit of merit and failure to move for an order of reference as directed by the Court.

Plaintiff subsequently filed a new notice of pendency and commenced the instant, third, foreclosure action on September 20, 2017. Paragraph Eighth of the complaint again states that "plaintiff has duly elected and does hereby elect to call due the entire amount presently secured by the mortgage".

In his answer to the present action, Baquero interposes, inter alia, the affirmative defense of statute of limitations, upon the ground that plaintiff accelerated the loan in 2007 and, therefore, the present action, commenced more than 6 years thereafter, is time-barred.

Plaintiff's counsel, in his affirmation in support of the cross-motion, contends that the loan has not yet been accelerated and, therefore, the statute of limitations not only has not expired, but has not begun to run, based upon Paragraph 19 of the mortgage which affords the defaulting borrower a chance to have the foreclosure action discontinued and the loan reinstated by paying all arrears and expenses and satisfying other demands of the lender prior to the entry of a judgment of foreclosure and sale.

Plaintiff further argues, in the alternative, that even if the loan had been accelerated in the first or second action, the present action, commenced within 6 months of dismissal of the second action, is not time-barred by operation of the saving provision of CPLR 205(a).

The statute of limitations on a foreclosure action is six

years, pursuant to CPLR 213(4), and begins to run on the entire mortgage debt when the loan is affirmatively accelerated, since acceleration of the principal balance of the loan terminates the borrower's right and obligation to make monthly installments and renders the entire principal balance due and owing (see Wells Fargo Bank, N.A. v Burke, 94 AD 3d 980 [2nd Dept 2012]; EMC Mortgage Corp. v Patella, 279 AD 2d 604 [2nd Dept 2001]).

The option of the mortgagee under the terms of the mortgage to accelerate the loan must be exercised by clear and unequivocal notice to the mortgagor, which may be accomplished by the commencement of a foreclosure action (see Beneficial Homeowner Service Corp. v Tovar, 150 AD 3d 657 [2nd Dept 2017]). A plaintiff may also affirmatively revoke its election to accelerate a mortgage loan and at some subsequent time accelerate it once again, in which case an action commenced within the six-year period after a new acceleration of the mortgage is not barred by the statute of limitations, even though the original default occurred on a mortgage payment due over six years prior to the commencement of the foreclosure action (see, e.g., Federal National Mortgage Assn. v Mebane, 208 AD 2d 892 [2nd Dept 1994]; EMC Mortgage Corp. v Patella, 279 AD 2d 604 [2nd Dept 2001]). This is, as noted, due to the consequence of acceleration, since the plaintiff is not suing upon past due installments of principal and interest, but upon the entire loan and, therefore, the default, which triggers the accrual of the plaintiff's cause of action, becomes no longer merely the failure to make some past-due installment under the loan, but constitutes the failure of the mortgagor to satisfy the plaintiff mortgagee's demand for repayment of the entire loan. As long as the action is commenced within six years of the mortgagee's acceleration of the loan and demand for repayment of the entire loan, the action is timely. And as noted, acceleration of the loan may be declared in the complaint itself. In the present case, however, plaintiff has not argued that it ever revoked its acceleration of the loan, but argues that it has never accelerated the loan in the first place. Thus, no issue has been presented for this Court's determination as to whether plaintiff revoked its acceleration of the loan.

Plaintiff's counsel cites to Paragraph 19 of the mortgage as the basis for his argument that the statute of limitations has not begun to run. That paragraph provides that the borrower will have the right to have enforcement of the security agreement (i.e. foreclosure) discontinued up to 5 days before the sale or entry of a judgment, whichever comes first, if the borrower pays the lender the full amount that would have been due, pays the lender's expenses, including attorney's fees, and does whatever else the lender requires to assure compliance with the terms of the mortgage and the lender's interest, and only if all conditions are fulfilled would the mortgage remain in effect "as if immediate Payment in

Full had never been required." Plaintiff's counsel argues that this paragraph means that acceleration of the loan is only triggered by the entry of a judgment of foreclosure because plaintiff has no right, prior to the entry of a judgment of foreclosure, to reject the mortgagor's payment of arrears in order to reinstate the mortgage, and thus, since a judgment has not been entered, and the mortgagor still has the option to pay all arrears and reinstate the mortgage, the mortgage remains an installment contract and consequently there has been no clear and unequivocal acceleration of the loan. Counsel cites in support of this argument the cases of Nationstar Mortgage, LLC v MacPherson (56 Misc 3d 339 [Supreme Ct, Suffolk County 2017]), U.S. Bank Trust, N.A. v Monsalve (NY Slip Op 32764[U][Supreme Ct, Queens County 2017]) and HSBC Bank USA v Carll (2018 NY Slip Op 300565[U][Supreme Ct, Suffolk County 2018]). The orders issued in the first two cases reflect said position. The third case does not address this issue at all and is completely inapposite to the present matter.

This Court finds plaintiff's argument with regard to the issue of acceleration to be without merit.

This Court finds that plaintiff did not accelerate the loan in its first complaint in 2007, but that it accelerated the loan by the filing of the second complaint on June 9, 2010 in which it clearly, explicitly and unequivocally declared that it was electing thereby to accelerate the entire principal balance of the loan.

Although respective counsel do not address the issue, this Court is of the opinion that the acceleration of the loan did not occur with the commencement of the first action in 2007, because plaintiff did not have standing to commence that action. Justice Grays, in her order of February 16, 2008, denying without prejudice plaintiff's motion for an order of reference and with leave to move again upon submission of an affidavit of a person with knowledge whether the loan is a subprime home loan, also noted, "Furthermore, the Court notes that it is unclear whether plaintiff has standing to bring the instant action in light of the fact that the Assignment of Mortgage to plaintiff...post-dates the commencement of this action."

Examination of the court record in that first action reveals that the assignment of the mortgage together with the note was dated May 21, 2008, after commencement of that foreclosure action, and therefore, there is no question that plaintiff did not have standing to commence that action. Indeed, plaintiff's rush to commence a second action, even during the pendency of the first, in the aftermath of Justice Gray's order, rather than simply making a new motion for an order of reference and providing the proper affidavit together with proof of plaintiff's standing, is clear indication of plaintiff's awareness that it lacked standing in the

first action and of its tactical decision to abort the first action for that reason and commence the second one which, then having been commenced after the date of the assignment, would eliminate any standing problem. Since the undisputed record of the first action demonstrates that plaintiff commenced that action prior to the assignment to it of the note and mortgage, plaintiff lacked standing to commence that action, and since it had no authority to commence the 2007 action, it also could not elect, in that complaint, to exercise the option of its predecessor to accelerate the loan (see U.S. Bank Natl. Assn. v Gordon, 158 AD 3d 832 [2nd Dept 2018]).

However, since it had standing to commence the second action in 2010, after it had received the assignment to it of the note and mortgage in 2008, plaintiff's election in that second complaint to accelerate the entire unpaid principal balance of the loan and seek judgment upon the sum of the entire loan was effective, and thus, this Court determines that plaintiff's cause of action accrued on June 9, 2010. Plaintiff's lack of standing in the first action does not affect this Court's analysis, for July 1, 2007 was less than six years from June 9, 2010, and therefore a claim for the outstanding balance of the entire loan could still include the installments due for up to six years prior to the date of acceleration, and the present, third, action was commenced on September 20, 2017, more than six years from the effective date of acceleration of the loan on June 9, 2010, making the present action, but for CPLR 205(a), untimely. Notwithstanding, as will be discussed, infra, since the present action was commenced less than six months after the dismissal of the second action, it is entitled to the saving provision of CPLR 205(a).

Counsel's proposed interpretation of Paragraph 19 of the mortgage as indicating that acceleration does not occur until the entry of a judgment terminates the option to reinstate the loan and, therefore, that the mortgage remains an installment agreement until such time, is not suggested by the language of that paragraph, and is entirely inconsistent with the explicit notice of election made in the complaint to accelerate the loan and is incompatible with the very basis for commencement of the foreclosure action itself. To reiterate, plaintiff is not foreclosing on past monthly installments, but on the entire loan. The present complaint does not seek a judgment of foreclosure for past due monthly installments, but, pursuant to its declaration of election to accelerate the entire principal balance of the loan, it seeks judgment on, and presently demands, the entire balance of the loan, going back to September 2007 (although the original complaint seeks the balance from July 2007, an inconsequential difference that has no bearing on this Court's analysis).

When taken in the context of the explicit declaration made in

the complaint that plaintiff has elected and is electing to accelerate the entire loan and that it is seeking judgment upon that entire outstanding principal balance, in accordance with the terms of the mortgage, and mindful that the complaint would not state a cause of action at all if Paragraph 19 invalidated the very predicate upon which it has been brought, Paragraph 19 of the mortgage does not, and cannot logically, operate to defer acceleration of the loan until the date of entry of judgment, and plaintiff may not be heard to advance an argument in which it disavows its own central predicate allegation made in its complaint.

Rather, Paragraph 19 merely provides a final opportunity to the mortgagor to redeem the loan and save the mortgaged property by paying all arrears and costs and satisfying whatever other conditions plaintiff demands, up until the time a judgment of foreclosure and sale is entered. It thus provides for the de-acceleration of and reinstatement of the loan upon satisfaction of the conditions set forth in Paragraph 19 by the stated deadline.

It is undisputed that Baquero at no time satisfied the conditions for the de-acceleration and reinstatement of the loan. Paragraph 19 thus does not provide for the deferral of the acceleration of the loan until a judgment of foreclosure has been entered, since the acceleration of the loan was the very basis for commencement of the foreclosure action. This provision of the mortgage plainly operates merely as a revocation of the acceleration of the loan and reinstatement of the loan on an installment basis if all the conditions of that paragraph are met to plaintiff's satisfaction. There has been no allegation made that Baquero at any time since the commencement of the first action met the conditions for the de-acceleration and reinstatement of the loan, and it is neither alleged nor shown that plaintiff did, in fact, reinstate the loan on an installment basis thereafter and that Baquero again defaulted on some subsequent installment that resulted in plaintiff's calling the loan due once again and commencing a new foreclosure action upon the new default. Plaintiff does not show, and does not allege, that it revoked its election to accelerate the mortgage made in 2010 at any time prior to the expiration of the six-year period of limitation, and has not shown, and does not contend, that it sent any notice to defendant after either the termination of the first or second action that the mortgage loan has been reinstated and the installment schedule restored.

To the extent that the afore-cited opinions of courts of coordinate jurisdiction may hold otherwise, this Court declines to follow them.

Nevertheless, as noted, the action is timely by virtue of CPLR

205(a).

CPLR 205(a) provides, inter alia, "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff...may commence a new action upon the same transaction or occurrence...within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period." The termination date is measured from the date of entry of the order (see Tang v St. Francis Hosp., 37 AD 3d 690 [2nd Dept 2007]).

Since the second action was commenced within the 6-year period of limitation as measured from the acceleration of the loan in 2010, and since the present action was commenced on September 20, 2017, within six months after the entry of Justice Grays' order of dismissal of the second action on April 27, 2017, the present action is not time-barred but is afforded the benefit of the saving provision of CPLR 205(a).

Baquero's counsel contends that CPLR 205(a) does not apply because the dismissal of the second case was a dismissal for neglect to prosecute is without merit. However, this Court does not deem the dismissal of the second action pursuant to the order of dismissal entered on April 27, 2017 as one for neglect to prosecute.

In the residential foreclosure conference order issued by Court Attorney-Referee Tracy Catapano-Fox on June 24, 2016, plaintiff was directed to appear for a status conference on December 6, 2016 and to file an application for an order of reference and a certificate of merit by said date. It was further ordered that "failure to comply with the terms of this order may be grounds for dismissal without prejudice". Plaintiff failed to comply with said order.

Pursuant to the status conference order issued on December 6, 2016 by said referee, plaintiff was again directed to appear for a final status conference on March 21, 2017 and to file an application for an order of reference and a certificate of merit by said date. It was again ordered that the "failure to comply with the terms of this order may be grounds for dismissal without prejudice". Plaintiff again failed to comply and, pursuant to the hear and report of the referee issued on March 24, 2017, the referee recommended, based upon plaintiff's attorney having appeared for the conference and having failed to show good cause for the failure to file an order of reference as had been directed

by the two previous court orders, that the action be dismissed without prejudice and that the County Clerk be directed to cancel and discharge the notice of pendency. Pursuant to the aforementioned order of dismissal of April 6, 2017 issued by Justice Grays, the report of the referee was confirmed and the action was dismissed without prejudice, and the Clerk of the Court was directed to cancel and discharge the notice of pendency.

CPLR 205(a) provides, "Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." Although the dismissal confirmed the hear and report of the referee recommending dismissal of the foreclosure action based upon a finding that plaintiff, without good cause shown, failed to comply with the two prior status conference orders directing plaintiff to seek an order of reference, neither the hear and report recommended, nor the order of dismissal directed, that the action be dismissed for neglect to prosecute. Moreover, the action was dismissed "without prejudice". The specific direction that the action was dismissed without prejudice indicates that the dismissal was not one for neglect to prosecute but that the Court was permitting plaintiff to avail itself of the 6-month saving provision of CPLR 205(a) (see, e.g., Wells Fargo Bank v Eitani, 148 AD 3d 193 [2nd Dept 2017]; Bread & Butter, LLC v Certain Underwriters at Lloyd's, London, 78 AD 3d 1099 [2nd Dept 2010]). Therefore, the present action is timely and the motion is accordingly denied.

With respect to plaintiff's cross-motion, plaintiff has established an entitlement to summary judgment by proffering unrebutted evidence of the mortgage debt and Baquero's default in payment, and of its standing to commence this action by submitting unrebutted evidence that it was the assignee of both the note and the mortgage, and was in possession of the note, prior to commencement of this third foreclosure action. Moreover, Baquero's perfunctory denial of receipt of the summons and complaint and predicate notices is insufficient to rebut the presumption of service established by the process server's affidavit of service and thus fails to raise a traversable issue of fact. Baquero's remaining affirmative defenses are without merit as a matter of law. Finally, in light of the foregoing, Baquero's counterclaims fail to state any cognizable cause of action and are without merit as a matter of law, and are accordingly dismissed.

Settle order.

Dated: July 31, 2018

FILED
AUG 2 2018
COUNTY CLERK
QUEENS COUNTY

KEVIN J. KERRIGAN, J.S.C.