Albino v Citimortgage, Inc.
2018 NY Slip Op 33857(U)
December 5, 2018
Supreme Court, Kings County
Docket Number: 508544/15
Judge: Ellen M. Spodek

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of December, 2018.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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FAUSTINO ALBINO AND MARIA LOINAZ,

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Plaintiffs,

- against -

Index No. 508544/15

MS # 1

CITIMORTGAGE, INC.,

FILED

Defendant.

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COUNTY CLERK'S OFFICE

The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Supplemental Affirmation	4

Upon the foregoing papers, defendant Citimortgage, Inc. (Citi) moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint of plaintiffs Faustino Albino and Maria Loinaz and, pursuant to CPLR 6514 (a), cancelling the notice of pendency.

Plaintiffs commenced this action, pursuant to Article 15 of the Real Property Actions and Proceedings Law (RPAPL), to quiet title to the subject property at 19

Richmond Street in Brooklyn. The property is encumbered by a consolidated mortgage dated May 31, 2008 and recorded on September 22, 2008, in the name of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Hogar Mortgage and Financial Services, Inc. (Hogar). The consolidated mortgage was executed by plaintiffs Faustino Albino and Maria Loinaz to secure a consolidated note in favor of Hogar in the amount of six hundred eight thousand dollars ($608,000.00). By assignment dated June 26, 2009 and recorded October 27, 2009, the consolidated mortgage and underlying obligation were purportedly assigned from MERS to Citi. On August 25, 2009, Citi commenced an action to foreclose the consolidated mortgage. The foreclosure action was discontinued by stipulation dated August 20, 2014.

On July 10, 2015, plaintiffs commenced this action seeking cancellation and discharge of the mortgage under RPAPL 1501 (4), alleging that defendant is "time-barred from bringing a new foreclosure action because the statute of limitations of six years, beginning with the date of default [February 1, 2009], has passed." Plaintiffs also allege that Citi "cannot demonstrate its standing to sue to foreclose. . .because it cannot produce the Notes, nor can it establish a chain of title of Assignments of Mortgage."

In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the sole criterion is whether, from the complaint's "four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). To

succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002]).

Taking into consideration the allegations contained in the complaint, as well as the documentary evidence submitted, the court finds that plaintiffs do not have a cognizable claim for discharge of the mortgage on statute of limitations grounds. RPAPL 1501 (4) authorizes a person having an estate or interest in real property subject to a mortgage to maintain an action against another to secure the cancellation and discharge of record of such encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided, however, that the mortgagee or its successor is not in possession of the affected real property at the time of the commencement of the action (see RPAPL 1501[4]; *Kashipour v Wilmington Sav. Fund Socy.*, FSB, 144 AD3d 985, 986 [2d Dept 2016]). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 197 [2d Dept 2017]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *Wells Fargo*

Bank, N.A. v Cohen, 80 AD3d 753, 754 [2d Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept 1997]). Once a mortgage debt is accelerated, either pursuant to the terms of the mortgage or by the commencement of a foreclosure action, the borrower's right to make monthly installments ceases, all sums become immediately due and payable, and the six-year statute of limitations begins to run on the entire mortgage debt (*see Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892,894 [2d Dept 1994]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2d Dept 2003]).

In their complaint, filed on July 10, 2015, plaintiffs allege that the statute of limitations commenced on the date of default (February 1, 2009). However, plaintiffs do not allege that a default automatically triggers acceleration under the terms of the mortgage. In fact, the terms of the mortgage provide only that the lender "may" require repayment in full in the event of default after certain conditions are met. "Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983). Because plaintiffs do not allege nor provide evidence that a notice of acceleration was sent prior to the commencement of the foreclosure action on August 25, 2009, such date must be deemed to be the date of acceleration of the mortgage debt. Contrary to the contention of plaintiffs, the notice dated May 4, 2009 was not an

acceleration of the entire mortgage debt but rather a demand for past due payments. The notice merely states that if the default was not cured by June 2, 2009, Citi ***may*** require immediate payment in full. This was nothing more than a letter discussing acceleration as a possible future event which falls short of a clear and unequivocal notice of acceleration *(see 21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2d Dept 2017]). Even if Citi expressed an intent to accelerate in the event the default was not cured by the given date, such expression of future intent would not constitute an actual acceleration (*see Milone v US Bank N.A.*, 164 AD3d 145, 152 [2d Dept 2018]).

Because six years had not passed between the date of acceleration (August 25, 2009) and the date this action was commenced (July 10, 2015), the complaint does not set forth a ripe, justiciable claim for discharge and cancellation of the mortgage pursuant to RPAPL 1501 (4).

To the extent that plaintiffs challenge Citi's standing to commence an action to foreclose the subject mortgage, that contention is misplaced, as this is not an action to foreclose a mortgage, and standing is not an issue herein (*see Jahan v U.S. Bank N.A.*, 127 AD3d 926, 927 [2d Dept 2015]). In a RPAPL article 15 action,"'a plaintiff must allege actual or constructive possession of the property and the existence of a removable 'cloud' on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative'" *(Acocella v Bank of N.Y. Mellon*, 127 AD3d 891, 892-893 [2d Dept 2015] quoting *Barberan v Nationpoint*, 706 F Supp 2d 408, 418

[SDNY 2010]; *see* RPAPL 1515). The allegations in the complaint fail to set forth the existence of a bona fide justiciable controversy as to whether title to the subject property is wrongfully encumbered (*see Jahan v U.S. Bank N.A.*, 127 AD3d at 927; *Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 498 [2d Dept 2013]). While it is possible that Citi may not presently own the mortgage, there is no allegation that the mortgage itself is invalid.

As a result, Citi's motion to dismiss the complaint and for cancellation of the notice of pendency is granted.

The complaint is hereby dismissed without prejudice.

The Kings County Clerk is directed to cancel the notice of pendency filed against the subject property at 19 Richmond Street in Brooklyn.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

FILED

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