Wells Fargo Bank, N.A. v Portu
2018 NY Slip Op 33999(U)
July 27, 2018
Supreme Court, Greene County
Docket Number: 16-0842
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT GREENE COUNTY

WELLS FARGO BANK, N.A.,
Plaintiff,

- against -

VALERIE J. PORTU A/K/A VALERIE M. PORTU, UNITED STATES OF AMERICA BY THE INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE COMMERCIAL DRIVER'S LICENSE SCHOOL, INC., LEWIS & STANZIONE, and JOHN DOE,
Defendants.

DECISION & ORDER

Index No.: 16-0842
RJI No.: 19-16-9325

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Carol A. Wojtowicz, Esq.
Counsel for Plaintiff, movant
Hogan Lovells US LLP
875 Third Avenue
New York, New York 10022

John P. Kingsley, Esq.
Counsel for Defendant, cross movant
Valerie J. Portu
John P. Kingsley, P.C.
329 Main Street
Catskill, New York 12414

FISHER, J.:

This is a second attempt to foreclose a residential mortgage on property located in West Coxsackie, in the County of Greene, and State of New York. The prior action (Index No.: 10-0274) was dismissed on June 18, 2013 by Supreme Court (Ceresia, J.) for the plaintiff's failure to proceed pursuant to 22 NYCRR § 202.27. Same was not appealed or reargued. Plaintiff moved to restore the matter/vacate dismissal, and for a judgment of foreclosure and sale. This Court denied such application for several reasons, must notably because "none of Plaintiff's moving papers state it held both the note and the mortgage" at commencement. Further given that there was an assignment of the mortgage by a now defunct law firm renown for improper assignments, including by one of its counselors known as a "robo-signor," this Court's denial on August 17, 2015 was largely based on a lack of standing. However, this Court afforded Plaintiff 60 days to

move pursuant to CPLR R. 2221 to submit supplemental and competent evidence to remedy the noted defects, otherwise the motion would be denied with prejudice. Plaintiff did not so move. Plaintiff did not appeal.

Rather, Plaintiff decided to start over again by attempting to de-accelerating the mortgage debt and then re-accelerate it, thus renewing that statute of limitations period. The Court has observed this tactic being more common and is "an evolving issue of law" (*Bank of New York v Hutchinson*, 57 Misc3d 1204(A) [Sup Ct, Kings County 2017, Thompson, J.]), largely a creature of the Appellate Division, Second Department. Whereas the Appellate Division, Third Department, has only indirectly blessed this process and has yet to have the opportunity to decide a more substantive application. Trial courts encompassed within the Third Department have reviewed the de-acceleration of a mortgage and, while accepting the principle, viewed the scheme of de-accelerating a mortgage more critically and not as forgiving as matters in the Second Department. (*See Wells Fargo Bank, N.A. v Machell*, 55 Misc3d 1214(A) [Sup Court, Ulster County 2017, Fisher, J.; *Bank of New York Mellon v Slavin*, 54 Misc 3d 311, 315 [Sup Ct, Rensselaer County 2016, Zwack, J.], *reversed on other grounds* 156 AD3d 1073 [3d Dept 2017].)

Now, Plaintiff moves for summary judgment and to appoint a referee. Defendant Valerie J. Portu (hereinafter "Defendant") vehemently opposes same, and cross-moves to dismiss and for counsel fees. Plaintiff opposes the application. Oral argument was held in the matter, and both parties were permitted and duly submitted supplements.

The gravamen of these applications revolve around three arguments, two of which were resolved in Plaintiff's favor upon hearing oral argument. The first is Defendant's argument that this second action is barred by *res judicata*, which the Court rejects as the prior dismissal—which was by Supreme Court (Ceresia, J.) on June 18, 2013 and not this Court's denial of the motion to restore on August 17, 2015—was not on the merits but clearly procedural pursuant to 22 NYCRR § 202.27 due to Plaintiff's failure to proceed/for abandonment. (*See Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979] ["a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action."].) The second argument by Defendant was also dispelled by the affidavit of Kimberly Ann Mueggenberg which establishes standing, and most notably that Plaintiff's validly held the Note and Mortgage at the time of commencement which alleviates the Court's prior concerns over the now defunct law firm and a "robo-signor."

But where the Court does not agree with Plaintiff is the application of the statute of limitations period and the efforts to de-accelerate the subject Note and Mortgage. The crux of this argument raised by Defendant is that the notice of default dated November 9, 2008 provides that the Note "will" be accelerated if payment of the default is not received by December 9, 2008. Defendant argues that, since payment was not made by such date, acceleration was automatic and occurred before commencement of the prior action on March 8, 2010. Therefore, Defendant argues that this cause of action accrued on December 9, 2008, and the applicable statute of limitations period expired on December 9, 2014.

Plaintiff disagrees with Defendant's interpretation and argues that the acceleration occurred at commencement of the prior action on March 8, 2010 because the November 9, 2008 correspondence was not "clear and unequivocal" enough to accelerate by demand. Thus, Plaintiff contends its election to revoke its acceleration on March 3, 2016 was within the six-year statute of limitations period which allows them to timely recommence this action.

An action to foreclose a mortgage is governed by a six-year statute of limitations, (CPLR § 213 [4]), which "begins to run from the due date of each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations beings to run on the entire mortgage" (*Lavin v Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003]; *see Saini v Cinelli Enters.*, 289 AD2d 770, 771 [3d Dept 2001], *lv denied* 98 NY2d 602 [2002]). Once the debt is accelerated, such election "could be revoked only through an affirmative act occurring within the statute of limitations period (*Lavin*, 302 AD2d at 639, quoting *Federal Natl. Mtge. Assn v Mebane*, 208 AD2d 892, 894 [2d Dept 1994] [noting "once a mortgage debt is accelerated, 'the borrowers' right and obligation to make monthly installments ceased and all sums [become] immediately due and payable', and the six-year Statute of Limitations begins to run on the entire mortgage debt."]).

"Where, as here, it is alleged that the debt was accelerated by demand, that fact must be communicated to the mortgagor in a clear and unequivocal manner" (*Goldman Sachs Mortg. Co. v Mares*, 135 AD3d 1121, 1122 [3d Dept 2016]). This is achieved in a demand letter or default letter from the bank to the borrowers. Courts have evaluated these letters and found language such as "may" accelerate if the default is not cured within 30 days to be insufficient to constitute acceleration (*Mares*, *id.*, 135 AD3d at 1122), whereas language that the option to accelerate would be exercised unless the delinquency was cured within 60 days (*Colonie Block & Supply Co. v D.*

H. Overmyer Co., 35 AD2d 897, 897 [3d Dept 1970]) or language that the bank "will" accelerate the loan balance and proceed with a foreclosure sale unless the default was cured within 30 days (*Deutsche Bank Nat. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530 [2d Dept 2017], *lv denied* 30 NY3d 959 [2017], *lv denied* 30 NY3d 960 [2017]), to both be sufficient to constitute acceleration by demand. In the immediately above-cited *Deutsche Bank* matter, the trial court's decision found that the language the bank "will accelerate the Loan balance and proceed with foreclosure" to "mean that unless plaintiff gets the money within thirty days, the note comes due and foreclosure will be the next step" (*See Deutsche Bank*, 52 Misc3d 1210(A) [Sup Ct, New York County 2016, Bluth, J.]). The trial court further noted that "the record on this motion shows that there were no notices between the [date of the] default letter and the [date of the] foreclosure case commencement" (*Id.*, 52 Misc3d at *3).

Here, the default letter dated November 9, 2008 contains language mirroring *Colonie Block* and *Deutsche Bank*. It provides that "[u]nless the payments on your loan can be brought current by December 9, 2008, it *will* become necessary to accelerate your Mortgage Note and pursue remedies provided for in your mortgage or Deed of Trust" (emphasis added). It continues that "[y]our failure to pay this delinquency . . . *will* result in the acceleration of your Mortgage Note" (emphasis added). The default notice sets an ultimatum for the total due to cure default for December 9, 2008 in bold typeface and in a larger sized font than the rest of the letter, and further provides "[i]f funds are not received by the above stated time, we *will* proceed with acceleration" (emphasis added]). Additionally, the correspondence provides "[o]nce acceleration has occurred, a foreclosure action . . . may be initiated." Although Plaintiff argues that the acceleration in this case was the foreclosure action, to the Court the preceding sentence creates a clear distinction between "acceleration" and a "foreclosure action," and to hold otherwise would create a redundancy in the letter.

Like the trial court in *Deutsche Bank* (which was affirmed on very similar if not identical language), this Court does not find this to be a "wishy-washy notice," there was no further correspondence between the default notice and the foreclosure action, and the repeated threat that the debt "will" accelerate if the default is not cured by a date certain, which was in bold typeface and a larger sized font than the rest of the letter, is a clear and unequivocal manner to accelerate the debt by demand. Therefore, the Court agrees with Defendant that the statute of limitations period began to run on December 10, 2008 (the day *after* the default was not cured), and expired

on December 10, 2014. Thus, the attempt to de-accelerate the loan on March 2, 2016, was without effect.

To the extent that Plaintiff argues there are applicable tolls for administrative orders, FEMA, and other attenuated reasons, these have been evaluated and declined as inapplicable. The only palatable toll is the six-month toll for a dismissal under NY § 205 (a), which affording Plaintiff the benefit of the most forgiving termination date of August 17, 2015, this action commenced on October 11, 2016 was ten months late.

It is further noted that, even considering Plaintiff's argument that the statute of limitations did not run until March 8, 2016, Plaintiff would still be unsuccessful. As noted by this Court in *Wells Fargo Bank, N.A. v Machell* (*supra* 55 Misc3d 1214(A) [Sup Court, Ulster County 2017, Fisher, J.]), there has been no appellate-level decision noting the manner and formalities in which a de-acceleration letter shall be given. Within the third judicial district, which is where this Court is situated and which is encompassed by the Third Department, the trial court in *Bank of New York Mellon v Slavin* (*supra*, 54 Misc 3d at 315) built on the rule of law articulated by many of the trial courts in the Second Department by adding the requirement that "the revocation should be clear, unequivocal, and give actual notice to the borrower of the lender's election to revoke in sum, akin to the manner plaintiff gave notice to exercise the option to accelerate" (*Slavin*, 54 Misc3d at 315). In *Machell*, this Court agreed and rejected the attempt by the plaintiff—also Wells Fargo—to de-accelerate the debt as the borrowers did not receive "actual notice" within the statute of limitations period.

Here, Plaintiff provides the USPS tracking information for the two de-acceleration letters which, while claiming to have been mailed on March 2, 2016 were not actually received by the USPS until March 5, 2016, but nonetheless were not delivered to Defendant until March 14, 2016 and another on March 31, 2016. Whichever date that is chosen, neither were before Plaintiff's suggested date of March 8, 2016 that the statute of limitations would expire. This Court agrees with *Machell* and *Slavin* that the notice of de-acceleration, used herein as a scheme to re-start a foreclosure case which was dismissed in 2013 and for a default in 2008, must equally be clear, unequivocal, and give actual notice just as the notice of default and to accelerate is so required. Plaintiff failed to do that here. As such, the Court finds that the portion of the complaint which seeks to foreclose on the subject property is **DISMISSED**, thus this branch of Plaintiff's motion is **DENIED** and this branch of Defendant's cross-motion is **GRANTED**.

As it pertains to the remaining claims, the Court notes that Plaintiff alleges that Defendant failed to pay taxes and insurance on the subject property after her husband passed away in January of 2013. To the extent that Plaintiff's complaint also requests compensation for these monies paid for taxes and insurance under what is liberally construed as a claim for unjust enrichment and is still within the six-year statute of limitations period, and to the extent that Defendant does not contest that she has not paid such taxes and insurance in her application herein, the Court will **GRANT** this branch of Plaintiff's motion and **DENY** this branch of Defendant's cross-motion.

Inasmuch as this action is not frivolous due to the unpaid taxes and insurance, nor is Defendant the prevailing party at this juncture to warrant counsel fees, such present application for counsel fees is **DENIED**, but without prejudice to renew should Defendant become the prevailing party herein.

The matter will be set for a conference, wherein it will be discussed whether a referee shall be appointed to determine the amount of taxes and insurance owned on the subject property from the alleged date that Defendant stopped paying same to the present. In *Machell*, the parties were able to resolve the matter and discontinued the action. Thus, it is expected the parties will engage in settlement discussions prior to the conference. It would therefore be expected that Plaintiff submit a demand for the owed taxes and insurance paid to begin the negotiations, as Plaintiff is the holder of such information.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: July 27, 2018
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion, dated May 18, 2017; affidavit of Kimberly Ann Mueggenberg, with annexed exhibits, dated May 17, 2017; affidavit of Carol A. Wojtowicz, Esq., with annexed exhibits, dated May 4, 2017; affidavit of Kristin Corsi, Esq., with annexed exhibit, dated April 7, 2017; supplemental affirmation of Carol A. Wojtowicz, Esq., with annexed exhibit, dated May 15, 2017; Plaintiff's memorandum of law, with annexed exhibits, dated May 18, 2017;
2) Notice of cross-motion, dated July 14, 2017; affirmation of John P. Kingsley, Esq., with annexed exhibits, dated July 14, 2017; Defendant's memorandum of law, dated August 17, 2017;
3) Affidavit of Brandon McNeal, dated August 9, 2017; Plaintiff's reply memorandum of law, with annexed exhibits, dated August 9, 2017;
4) Oral argument notes;
5) Plaintiff's supplemental memorandum of law, with annexed exhibits, dated December 20, 2017;
6) Correspondence from Defendant's attorney, dated December 27, 2017; and
7) Oral argument transcript, received May 16, 2018.