

Jacob v US Bank NA
2019 NY Slip Op 30448(U)
February 25, 2019
Supreme Court, New York County
Docket Number: 158443/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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NILIE JACOB and RACHEL JACOB

Plaintiff,

- v -

US BANK NA AS TRUSTEE FOR THE HOLDERS OF THE ASSET
BACKED PASS THROUGH CERTIFICATES SERIES 2006,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for

DISMISS

DECISION AND ORDER

In this action pursuant to RPAPL article 15 to discharge a mortgage on a condominium unit and for related declaratory and injunctive relief, the defendant mortgagee, US Bank, N.A. (hereinafter the bank), moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. The bank argues that the complaint was not pleaded with sufficient particularity, as required by CPLR 3013. The plaintiffs (hereinafter the owners), who are joint owners of the condominium unit, oppose the motion. The motion is denied. RPAPL 1501(4) provides that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired," any person with an estate or interest in the property may maintain an action "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." Contrary to the bank's contentions, the complaint states a cause of action for declaratory relief pursuant to RPAPL 1501(4) (see generally Milone v US Bank Natl. Assn., 164 AD3d 145, 156 [2d Dept 2018]), and the bank has not shown entitlement to a contrary declaration at this juncture.

In their complaint, the owners specifically allege that they jointly own the subject unit, they gave the bank a mortgage on the unit in consideration of a loan, they concededly defaulted on the mortgage by failing to pay their obligations thereunder, and their obligations were accelerated, but the bank failed to provide them with any statements of account for more than 10 years. They further allege that the bank failed to take any action to foreclose on the mortgage in the six years prior to the commencement of this action, i.e., from 2012 forward. In support of its motion, the bank submits only the complaint and an attorney's affirmation. In opposition, the owners argue that the complaint was sufficiently specific and that, in any event, the event triggering the acceleration of the owners' mortgage obligation was the bank's 2006 commencement of a foreclosure action that was effectively abandoned. In reply, the bank submits a copy of a printout of an ECF status page referable to the 2006 foreclosure action.

When assessing the adequacy of a complaint in the context of a CPLR 3211(a)(7) motion to dismiss, the court's role is "to determine whether plaintiffs' pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). On such a motion, the pleading is to be afforded a liberal construction, the facts alleged in the complaint must be deemed true, and the plaintiffs must be accorded the benefit of every possible favorable inference (*see id.*; *see also Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 887 [2013]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]; CPLR 3026). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 887; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 275 [1977]). Thus, the court should determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88).

With certain exceptions set forth in CPLR 3016 that are not applicable to the instant matter, New York adheres to notice pleading standards, requiring that a complaint need only

place the defendant on notice of the transactions and occurrences giving rise to a claim (see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]; CPLR 3013). Although a complaint must allege the material elements of each cause of action asserted (see *Mee Direct, LLC v Automatic Data Processing, Inc.*, 102 AD3d 569 [1st Dept 2013]), the plaintiff may nonetheless submit an affidavit in opposition to a motion to dismiss in order to remedy any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]).

Generally, “where a cause of action is sufficient to invoke the court’s power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied” (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013], quoting *Matter of Tilcon, Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]; see *Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]). It is well established in declaratory judgment actions that “on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him [or her]” *Fillman v Axel*, 63 AD2d 876, 876 [1st Dept 1979], quoting *Law Research Serv. v Honeywell, Inc.*, 31 AD2d 900, 901 [1st Dept 1969]).

Nor has the bank shown that the 2006 foreclosure action is still pending and unresolved, which would defeat the owners’ claims here (*cf. Mizrahi v US Bank, Natl. Assn.*, 156 AD3d 617 [2d Dept 2017]). The bank commenced the foreclosure action (Index No. 116294/06) on October 30, 2006, thus accelerating the owners’ obligations under the mortgage, but, to date, it has never effected service of process upon the owners. By order dated September 3, 2008, the Supreme Court (Davis, J.), in accordance with CPLR 306-b, extended the bank’s time to serve process upon the owners for 120 days, or until about January 3, 2009, but the bank did not serve process within that time. By order dated June 30, 2016, the Supreme Court (Hagler, J.)

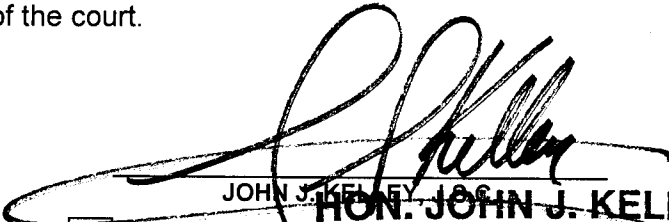
denied the bank's next motion to extend the time for service of process, concluding that, after the action was commenced, "no service was completed in the ensuing 9 years and no explanation was given to explain why a 9 year extension for service should be granted." By order dated December 7, 2018, the Supreme Court (McMahon, J.) denied the bank's subsequent motion to extend the time for service of process and permit service by publication, "with leave to renew upon the submission of an updated affidavit of efforts to serve." The 2006 foreclosure action has been marked "disposed," and it appears unlikely that the bank will be able to revive it. Moreover, the bank has not taken any affirmative act of revocation of its right to accelerate the mortgage debt so as to defeat the owners' claims here (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]), and its mere failure to prosecute the prior foreclosure action cannot be deemed an affirmative act of revocation.

Hence, the owners' allegations that the debt was accelerated by virtue of the commencement of the 2006 foreclosure action, and that it is entitled to a discharge of the mortgage because the bank effectively abandoned that action and took no other steps to foreclose the mortgage after 2012, is sufficiently specific to state a cause of action for relief under RPAPL 1501(4).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is denied.

This constitutes the Decision and Order of the court.


 JOHN J. KELLEY
 HON. JOHN J. KELLEY
 J.S.C.

2/25/2019
 DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER REFERENCE

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT