14 Fillm Corp. v Mid-Island Mtge. Corp.
2020 NY Slip Op 31911(U)
June 16, 2020
Supreme Court, Kings County
Docket Number: 500014/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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14 FILLM CORP.,

Plaintiff,

-against-

MID-ISLAND MORTGAGE CORP.,

Defendant.

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DECISION/ORDER

Index No. 500014/2019
Motion Seq. No. 1 & 2
Date Submitted: 6/11/2020

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment and defendant's cross motion for summary judgment

Papers	NYSCEF Doc.
Notices of Motion, Affirmations and Exhibits Annexed.....	6-16, 19-32
Affirmation in Opposition and Exhibits Annexed.....	34-35
Reply Affirmation and Exhibit annexed.....	36

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff moves pursuant to CPLR 3212 for an order granting plaintiff summary judgment and directing that the subject mortgage be cancelled and discharged of record. Defendant opposes and cross-moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

BACKGROUND

On July 6, 2010, non-party Pincus Frankel executed a mortgage on the subject Property, a condominium in Orange County, New York, in favor of Mortgage Electronic Registrations System ("MERS"), as nominee for Mid-Island Mortgage Corp. Said mortgage was recorded by the Orange County Clerk on July 27, 2010 in Liber 13034, Page 208. The condominium is located at 14 Fillmore Court, Unit D, Monroe,

New York, Orange County (Section 329, Block 4, Lot 1.2-4).

Frankel transferred title to the condominium to plaintiff, by deed dated November 18, 2010. The deed is E-file Doc. #10. Plaintiff thus took title subject to the mortgage.[1] On December 14, 2011, MERS, as nominee for Mid-Island Mortgage Corp., assigned the mortgage to defendant. The assignment was recorded on July 26, 2012 by the Orange County Clerk.

On July 19, 2012, defendant commenced a foreclosure action seeking to foreclose on said Property and it was assigned Orange County Index Number 6100/2012 ("2012 Action"). The commencement of this action accelerated the mortgage, as a matter of law, by requiring payment of the entire principal and interest due on the mortgage in full. In the 2012 action, both Frankel and plaintiff were named as defendants, as well as the condominium association and other parties. On February 20, 2014, the Court dismissed the action upon affirmation of counsel (presumably the lender's) without specifying any reason, and the order also cancelled the Notice of Pendency [E-file Doc. 13].

On July 31, 2014 defendant commenced a second foreclosure action seeking to foreclose on said property and it was assigned Orange County Index Number 5994/2014 ("2014 Action"). In the 2014 action, both Frankel and plaintiff were again named as defendants, as well as the condominium association and other parties. On

[1] The transfer of the property was a default under the terms of the mortgage, but it seems the lender did not take any action in that regard. Paragraph 18 provides "Lender may require Immediate Payment in Full of all Sums Secured by this Security Instrument if all or any part of the Property, or if any right in the Property, is sold or transferred without Lender's prior written permission."

September 20, 2017, the Court issued an Order "upon affirmation of counsel," (presumably the lender's) that states "it is ordered that this action be and the same hereby is discontinued" [E-file Doc. 15].

On December 31, 2018, more than six years since the first foreclosure action was commenced, plaintiff commenced this action, averring that no further foreclosure action in connection with the mortgage was commenced since the dismissal (actually discontinuance) of the 2014 action in 2017, that more than six years have elapsed since defendant demanded payment of the full sum due under the mortgage, and that the statute of limitations for foreclosing the subject mortgage had lapsed.

Defendant answered the complaint and asserted eighteen affirmative defenses, including "[p]laintiff's claims are barred, in whole or in part, based upon the principles of waiver, ratification, novation, res judicata and/or estoppel."

These motions followed shortly thereafter.

CONTENTIONS

Plaintiff contends that it is entitled to summary judgment as there are no facts in controversy and the mortgage must be cancelled and discharged of record as the acceleration in 2012 was never de-accelerated, and thus the statute of limitations has run.

Defendant contends (Memo of Law - E-File Doc. 20) that the second foreclosure action was discontinued because Pincus Frankel had entered into a permanent loan modification agreement, after first complying with a trial modification agreement, thereby reaffirming the debt and revoking the acceleration. To be clear, the loan modification agreement was signed by Pincus Frankel, and notarized, seven years after he signed

the deed to plaintiff 14 Fillm Corp. The loan modification agreement was not recorded.

Defendant contends that the execution of the Loan Modification Agreement on June 19, 2017 by Frankel (E-File Doc. 31) re-affirmed the debt, and thus the acceleration was revoked by the lender, who offered the modification to Frankel in lieu of proceeding in the foreclosure action on the accelerated debt. Counsel argues that "[a]s a consequence, New York General Obligations Law ("GOL") § 17-101 is applicable to this action. . . . Moreover, the statute effectively revives a time-barred claim when the debtor has signed a writing that validly acknowledges the debt", citing *Lynford v. Williams*, 34 AD3d 761 (2d Dep't. 2006).

The court notes that the letters from both parties, e-filed after oral argument, have not been read or considered.

ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 96 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every

favorable inference" (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

RPAPL §1501 (4)

As pertinent here, 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 having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons . . . 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."

Pursuant to CPLR 213(4), the statute of limitations to foreclose on a mortgage is six years. An acceleration of the entire amount due under a mortgage triggers the start of the statute of limitations (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530 [1st Dept 2017], 30 NY3d 959 [2017]). If the mortgage document contains the boilerplate language contained in most standard mortgage documents, such as the New York - Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 3033 on Freddiemac.com) the thirty-day notice provided for therein is all that is required as a condition precedent to foreclose.[2] The mortgage

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[2] Paragraph 22 provides, in pertinent part, that "If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. . . . Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met:

(a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;

(b) Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states:

(1) The promise or agreement that I failed to keep or the default that has

herein contains that language. Thus, the purchase of the Index number for the Summons in a foreclosure action is sufficient to accelerate the mortgage, provided 1) the complaint expressly accelerates the mortgage, 2) any statutory requirements, such as pre-foreclosure notices, have been sent, and 3) any provisions in the mortgage document have been complied with, such as service of a notice of default (*MSMJ Realty, LLC v DLJ Mtge. Capital, Inc.*, 157 AD3d 885 [2d Dept 2018]).[3] The acceleration starts even if the borrower is never served with the summons and complaint in the foreclosure action, as the notice of default, sent to the address as specified in the mortgage document (unless changed by proper notice) is all that is required. *Id.,* citing *Beneficial Homeowner Serv. Corp. v Tovar,* 150 AD3d 657, 658 [2d Dept 2017]).

A lender may de-accelerate a mortgage's acceleration. However, in order to de-accelerate a mortgage, also referred to as revoking the acceleration, "[a] lender . . . 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" (*Milone v US Bank N.A.*, 164 AD3d 145, 154 [2d Dept 2018]). This has been interpreted to mean the commencement date of the action, that is, the purchase of the Index number.

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occurred;
(2) The action that I must take to correct that default;
(3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;
(4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale

[3] Provisions in a mortgage requiring that notices to the borrower be sent in a particular manner constitute conditions precedent to a lender's right to accelerate a mortgage debt. (*Capital One, N.A. v Saglimbeni*, 170 AD3d 508 [1st Dept 2019]).

Here, the record only contains the court orders, one dismissing the foreclosure action and one permitting it to be discontinued. Neither of these court orders indicates an affirmative act of revocation of the acceleration of the mortgage, an acceleration which occurred in 2012. The court orders, or even the papers in support, could provide for revocation of the acceleration, but there is nothing in this record that indicates such affirmative act was taken.

Therefore, plaintiff demonstrates, *prima* facie, that the loan was accelerated over six years prior to the commencement of this action, and that the statute of limitations expired, so it is entitled to the relief provided for in RPAPL §1501(4) (*See e.g., Vargas v Deutsche Bank Natl. Trust Co.*, 168 AD3d 630 [1st Dept 2019]).

GOL §17-105

Defendant claims the lender did not need to revoke the acceleration, as the execution of a notarized Loan Modification Agreement by the borrower constitutes a re-affirmation of the debt by the borrower. This is true, but the borrower did not own the condominium when he executed the "permanent modification agreement" during the pendency of the second foreclosure action. He had transferred title to plaintiff herein prior to the commencement of the first foreclosure action. Why Frankel executed the modification agreement in 2017 is not explained in the record, and he is not a party to this action.[4] Neither is the question of why the lender agreed to modify the mortgage when they knew he was no longer in title as it had named both Frankel and plaintiff 14 Fillm Corp. as defendants in both foreclosure actions. Further, while defendant alleges

[4] As he was no longer the owner when this action was commenced, he was a permissible party, but not a necessary one.

as an affirmative defense that plaintiff is an "alter ego" of Frankel, there is nothing in the motion papers to support this claim. Thus, the court is required to treat Pincus Frankel and 14 Fillm Corp. as two separate entities.

Defendant is arguing, in essence, that Frankel bound plaintiff to the revised loan obligation when he signed the Loan Modification Agreement. That is not the conclusion the court reaches, after considering these unusual facts. The court concludes that defendant may sue Frankel on the Note, but the statute of limitations has run on the mortgage as against plaintiff.

GOL §17-105(3)(a) provides:

"3. A waiver or promise made as provided in this section is effective

a. against (1) the person who made it, to the extent of any interest held by him at the date thereof and (2) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the waiver or promise, to the extent of the interest so acquired."

Here, not only did plaintiff acquire its interest prior to the execution of the Loan Modification Agreement, there is no indication in the record that plaintiff had "actual notice of the making of the . . . promise." If the Agreement had been recorded, that would not make a difference, as it was a promise made seven years after plaintiff took title. To hold otherwise, then, would bind a subsequent owner to an agreement that was not in existence at the time it obtained a title search and took title. Plaintiff took title based upon the facts he was able to ascertain at the time it took title and it has a right to rely on those facts. Otherwise, if the seller could change the terms of the liens on the property after the closing, all transactions would become uncertain.

There is little authority on this point, although common sense requires this conclusion as well. In *Roth v Michelson*, 55 NY2d 278 [1982], where a purchaser at a Bankruptcy sale had no actual notice that the debtor in bankruptcy had made a payment toward the mortgage, which the lender accepted, the court found that the payment could not revive the statute of limitations with regard to the purchaser.

As defendant fails to overcome plaintiff's prima facie showing and raise a triable issue of fact, the court must grant plaintiff's motion for summary judgment.

CONCLUSION

Accordingly, it is hereby **ORDERED**, that plaintiff's motion for summary judgment is granted, and plaintiff is directed to settle a proposed judgment on notice; and it is further

ORDERED, that defendant's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: June 16, 2020

ENTER:

Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER
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