

**Anglestone Real Estate Venture Partners Corp. v
Bank of N.Y. Mellon**

2020 NY Slip Op 34287(U)

December 23, 2020

Supreme Court, Kings County

Docket Number: 524129/2018

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 23 day of December, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

ANGLESTONE REAL ESTATE VENTURE PARTNERS CORP.,

Plaintiff,

- against -

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC., ASSET BACKED CERTIFICATES, SERIES 2005-9; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; HOME HEATING OIL CORP.; and "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to the plaintiffs intended as persons or entities having some claim or interest in the premises described in the Complaint,

Defendants.

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Motion Seq. # 1 & 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Memorandum of Law in Support of Motion	2
Notice of Cross-Motion, Affirmation and Exhibits in Support of Cross-Motion and in Opposition to Motion	3
Defendant's Memorandum of Law in Reply to Motion and in Opposition to Cross-Motion	4
Osterman Affirmation in Reply to Motion and Exhibits	5
St. John Affirmation in Reply to Motion and Exhibit	6
Reply Affirmation to Cross-Motion	7

Upon the foregoing papers Defendant, The Bank of New York Mellon F/K/A The Bank of New York as Trustee for Certificateholders CWABS Inc., Asset Backed Certificate Series 2005-9 ("BoNYM"), moves this Court for an Order granting summary judgment in its favor as to all the

claims in Plaintiff, Anglestone Real Estate Venture Partners Corp.'s ("Plaintiff"), Complaint. Specifically, BoNYM moves for summary judgment on the cause of action to cancel and discharge the subject mortgage under RPAPL § 1501(4) and the cause of action requesting injunctive relief. Plaintiff cross-moves for an Order (a) pursuant to CPLR § 3212, granting summary judgment on the Complaint against BoNYM, further striking BoNYM's Answer and discharging the underlying mortgage as timed barred; (b) pursuant to CPLR §3212, granting Plaintiff summary judgment on BoNYM's counterclaim of unjust enrichment; and (c) pursuant to 22 NYCRR 130-1.1(a) sanctioning BoNYM and awarding costs to Plaintiff from BoNYM's assertions of false statements of material fact in an amount to be determined by the Court.

Background

On March 6, 2003, non-party Ronald Vicars ("Vicars") became the fee owner of 1651 Saint Marks Avenue, Brooklyn, NY ("the Premises.") On September 9, 2005, Vicars mortgaged the Premises through a \$400,000 note to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Countrywide Home Loans, Inc. On October 20, 2005, the mortgage was recorded in the Office of the City Register of the City of New York as CRFN. 2005000586301. On May 20, 2011, MERS, as Countrywide Home Loans, Inc.'s nominee, assigned the mortgage to BoNYM. The assignment of mortgage was recorded on June 17, 2011.

On August 24, 2011, BoNYM commenced a foreclosure action against Vicars. On October 24, 2013, BoNYM voluntarily discontinued the 2011 action. On October 26, 2015, BoNYM commenced a second foreclosure action against Vicars. The 2015 action was discontinued on April 26, 2017. On February 15, 2017, Ditech Financial LLC, the mortgage servicer for BoNYM sent Vicars a letter purporting to de-accelerate the subject mortgage. On

November 11, 2017, Vicars conveyed title to the Premises to Plaintiff. The deed conveying title to Plaintiff was recorded on September 14, 2018. On November 30, 2018, Plaintiff commenced this action seeking to discharge and cancel the subject mortgage as time barred.

Discussion

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. **CPLR §3212 (b); Gilbert Frank Corp.v. Federal Ins. Co., 70 N.Y.2d 966, 967 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).** On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. **Spinelli v. Procassini, 258 A.D.2d 577 (2d Dep't 1999); Tassone v. Johannemann, 232 A.D.2d 627, 628 (2d Dep't 1996); Weiss v. Garfield, 21 A.D.2d 156, 158 (3d Dep't 1964).**

"An action to foreclose a mortgage is subject to a six-year statute of limitations." **HSBC Bank USA, N.A. v. Gold, 171 A.D.3d 1029, 1030 (2d Dep't 2019); see CPLR § 213(4).** "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." **U.S. Bank N.A. v. Joseph, 159 A.D.3d 968, 970 (2d Dep't 2018).** "Once a mortgage debt is accelerated, however, the statute of limitations begins to run on the entire debt." **Id.** One way a mortgage can be accelerated is by a creditor commencing an action to foreclose upon a note and mortgage and seeking payment of the full balance of the mortgage in the complaint. **Milone v. U.S. Bank N.A., 164 A.D.3d 145, 152 (2d Dep't 2018).** "A lender may revoke its election to accelerate the mortgage, but it 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.” *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069-1070 (2d Dep’t 2017).

Courts must “be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations.” *Milone at 154*. “In contrast, a ‘bare’ and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.” *Id.*

In the instant case, the statute of limitation for the entire debt of the mortgage began to run on August 24, 2011, when BoNYM commenced its first foreclosure action and accelerated the mortgage. The statute of limitation thus expired on August 24, 2017, six years later.

BoNYM argues that the February 15, 2017 letter its servicer sent Vicars de-accelerated the mortgage and shielded the mortgage from the statute of limitations. The letter in question reads in relevant part “**PLEASE BE ADVISED THAT TO ANY PREVIOUS ACCELERATION MAY AT THIS TIME BE APPLICABLE, WE HEREBY DE-ACCELERATE THE AMOUNT, WITHDRAWING ANY PRIOR DEMAND FOR IMMEDIATE PAYMENT OF ALL SUMS SECURED BY THE SECURITY INSTRUMENT AND RE-INSTITUTE THE ACCOUNT AS AN INSTALLMENT ACCOUNT.**” Notably, the language of the letter is nearly identical to language of a de-acceleration letter, which the Appellate Division, Second Department ruled in *Milone, supra* created a question of fact as to whether a mortgage had been de-accelerated.

However, because of the circumstances of the present case, the Court finds that the purported de-acceleration letter was a pretextual attempt at avoiding the statute of limitations and did not de-accelerate the mortgage. Specifically, monthly billing statements issued by BoNYM's servicer and sent to Vicars after the purported de-acceleration letter do not indicate that a different, lesser, amount is due. Moreover, the monthly billing statement for March 2017, after the letter in question was issued, continues to list the "Accelerated Amount" of the mortgage and does not indicate that amount is no longer due. Accordingly, summary judgment is granted in Plaintiff's favor, canceling and discharging the subject mortgage.

BoNYM contends that the statute of limitations does not apply because by transferring the Premises to Plaintiff in November 2017, Vicars violated the mortgage's due-on-sale clause. The clause in question states, "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" the "Lender may require Immediate Payment in Full of all Sums Secured by this Security Instrument." However, this argument is unavailing. Since the February 15, 2017 letter did not de-accelerate the subject mortgage, the statute of limitations had expired by August 24, 2017. Accordingly, by November 2017 neither the due-on-sale clause nor any other provision of the subject mortgage was enforceable.

Turning now to the branch of Plaintiff's cross-motion for summary judgment on BoNYM's counterclaim for unjust enrichment, BoNYM alleges that by it paying taxes and insurance on the Premises, Plaintiff has been enriched at BoNYM's expense. However, BoNYM has not provided any authority to prove that this constitutes unjust enrichment when the

statute of limitation on a mortgage has expired. Accordingly, the branch of Plaintiff's cross-motion for summary judgment on BoNYM's counterclaim for unjust enrichment is granted.

Turning now to Plaintiff's request for sanctions, Plaintiff moves for sanctions pursuant to 22 NYCRR 130-1.1(a). This section allows a court to impose sanctions if a party's conduct was completely without merit in law, undertaken primarily to delay or prolong the resolution of litigation, or asserts material statements that are false. In the case at bar, there is no indication that BoNYM's conduct was dilatory. Moreover, although this Court granted summary judgment against BoNYM, its conduct falls short of completely lacking merit. Under difference circumstances, the Second Department found that a similar letter raised a question of fact as to whether a loan was de-accelerated. Finally, Plaintiff lists certain representations in Defendant's papers that Plaintiff believes are false. However, they all concern whether or not the mortgage was de-accelerated and billing statements after the purported de-acceleration letter—the core issue of this case. As there was a legitimate question as to whether the subject mortgage was de-accelerated, the branch of the cross-motion requesting sanctions is denied. For the foregoing reasons, it is HEREBY

ORDERED that BoNYM's motion for summary judgment is DENIED in its entirety; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is GRANTED and the mortgage on 651 Saint Marks Avenue, Brooklyn, NY, CRFN. 2005000586301 is hereby discharged and canceled; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment dismissing BoNYM's counterclaim of unjust enrichment is GRANTED; and it is further

ORDERED that Plaintiff's cross-motion for sanctions is DENIED.

This is the Decision and Order of the Court.

ENTER



LOREN BAILY-SCHIFFMAN

JSC