

Carter v U.S. Bank Trust, N.A.
2021 NY Slip Op 30258(U)
January 27, 2021
Supreme Court, Kings County
Docket Number: 508243/2018
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 27th day of January, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

ANITA CARTER,

Plaintiff,

- against -

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST

Defendant.

Index No.: 508243/2018

Motion Seq. # 1 & 2

DECISION & ORDER

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

PAPERS NUMBERED

Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion and in Support of Motion	3
Memorandum of Law in Support of Cross-Motion	4
Defendant's Memorandum of Law in Reply	5

Upon the foregoing papers Anita Carter ("Plaintiff") moves this Court for an Order (1) pursuant to CPLR § 3212, granting judgment in favor of Plaintiff on the claim and for the relief set forth in the Complaint pursuant to RPAPL 1501.4; and (2) granting Plaintiff such other, further and different relief as to this Court deems just and proper. U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust ("Defendant") moves this Court for an Order (1) pursuant to CPLR § 3212 directing the entry of summary judgment in favor of Defendant and against Plaintiff; (2) dismissing Plaintiff's Complaint in its entirety, with prejudice; and (3) granting such other and further relief as may seem just and proper to the Court.

Background

On or about November 15, 2006, Plaintiff and non-party Shelly-Ann Carter mortgaged 814 E. 15th Street, Brooklyn, NY 11230 to non-party Household Finance Realty Corporation of New York, through a \$705,850.71 note. On May 28, 2014, the mortgage was assigned to Defendant, by recorded assignment. Plaintiff and non-party Shelly-Ann Carter defaulted on their payment obligations and Household Finance Realty Corporation of New York brought a foreclosure action on October 27, 2010 under Index No. 26659/2010. On October 12, 2016, the 2010 foreclosure action was dismissed. Defendant alleges that on October 25, 2016, two days before the statute of limitation on the mortgage would expire, Defendant's loan servicer, Caliber Home Loans, Inc., sent Plaintiff a de-acceleration notice.

On July 24, 2017, Plaintiff commenced a previous, similar action to quiet title under Index No. 514241/2017. The 2017 action was dismissed on Plaintiff's default. On April 23, 2018, Plaintiff commenced this action.

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 present case, the de-acceleration notice in question states, “Caliber Home Loans, Inc. (Caliber) acts as mortgage servicer for the owner of the above referenced mortgage loan

(Loan), U.S. Bank Trust, N.A., Trustee for LSF8 Master Participation Trust." The notice further notes:

**PLEASE BE ADVISED THAT TO THE EXTENT ANY PREVIOUS ACCELERATION MAY
BE APPLICABLE, WE HEREBY REVOKE ANY PRIOR AND CURRENTLY APPLICABLE
ACCELERATION OF THE LOAN, WITHDRAWING ANY PRIOR DEMAND FOR
IMMEDIATE PAYMENT OF ALL SUMS SECURED BY THE SECURITY INSTRUMENT
AND RE-INSTITUTE THE LOAN AS AN INSTALLMENT LOAN.**

In her affidavit, Danielle Owens attests to mailing the de-acceleration notice in question to Plaintiff on October 25, 2016—two days before the statute of limitations would expire— via first class mail. Plaintiff does not dispute timely receiving the notice in question.

The Court finds that the language of the de-acceleration notice in question is substantially identical to language in *Milone, supra*, which the Appellate Division, Second Department found clearly and unambiguously demanded a resumption of monthly installment payments. Moreover, Defendant provided monthly billing statements which list "Regular Monthly Payments" and indicate that the mortgage should be paid in monthly installments and not in lump sum. Accordingly, the Court finds that the notification in question was an affirmative act that effectively de-accelerated the mortgage, before the statute of limitations had run.

For the foregoing reasons it is HEREBY
ORDERED that Plaintiff's motion for summary judgment is DENIED; and it is
further

ORDERED that Defendant's cross-motion for summary judgment is GRANTED, dismissing the Complaint.

The Court has reviewed the parties' remaining contentions and finds them to be without merit

This is the Decision and Order of the Court.

ENTER



HON. LOREN BAILY-SCHIFFMAN