

Bank of N.Y. Mellon v Dematteis

2021 NY Slip Op 33994(U)

December 2, 2021

Supreme Court, Westchester County

Docket Number: Index No. 54252/2021

Judge: Janet C. Malone

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

-----X

Index No. 54252/2021

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR REGISTERED HOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-23,

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence: 1

JOSEPH DEMATTEIS A/K/A JOSEPH A. DEMATTEIS, JR., HUNTER STREET PROPERTIES, LLC, NEW CENTURY MORTGAGE CORPORATION and JOHN DOE,

Defendants.

-----X

MALONE, J.

On November 17, 2006, Joseph Dematteis a/k/a Joseph A. Dematteis, Jr. (“Defendant Dematteis”) executed and delivered an Adjustable Rate Note (Exhibit A, at NYSCEF Doc. No. 40) wherein Defendant Dematteis agreed to pay \$500,000, plus interest, and as security for repayment of the Note, he executed a mortgage (Exhibit B, at NYSCEF Doc. No. 40) as a lien upon real property referred to as 15 Agate Avenue, Ossining, New York 10562 (the “Premises”).

On April 8, 2021, Plaintiff commenced this action to foreclose on the Premises (“Instant Action”) with the filing of a Summons and Complaint (Exhibit G, at NYSCEF Doc. No. 40) and Notice of Pendency (Exhibit A, NYSCEF Doc. No. 43). The Complaint in the Instant Action alleges a first cause of action for foreclosure against Defendant Dematteis and Defendant Hunter Street Properties, LLC¹ (“Defendant Hunter Street”), a second cause of action for the reformation of the subject mortgage, and third, fourth and fifth causes of action for declaratory relief and to quiet title as against New Century Mortgage Corporation. Defendants Dematteis and Hunter Street

¹ Although alluded to by Defendants’ counsel, and not addressed by Plaintiff’s counsel, it is unclear when Defendant Dematteis ceased being “the record owner of the property being foreclosed.” See, Reply Affirmation of Eric R. Sharp, Esq. at paragraphs 12-13, at NYSCEF Doc. No. 49).

interposed an Answer dated May 17, 2021, with twenty-eight (28) affirmative defenses, including statute of limitations (Exhibit H, NYSCEF Doc No. 41).

Now, upon papers filed with NYSCEF Doc. Nos. 32-41 and 49-50, Defendants move for an order dismissing Plaintiff's Complaint, arguing that the causes of action are time barred as of June 19, 2020 (CPLR R 3211 [a] [5]), as the Statute of Limitations began to run on June 19, 2014.

As background, on June 19, 2014, Plaintiff commenced a foreclosure proceeding against Defendants with the filing of a Summons and Complaint [the Prior Action], Index Number 59611/2014, to foreclose on the Premises and accelerate the mortgage. *See*, Complaint in Prior Action, paragraph 8, as Exhibit A, at NYSCEF Doc. No. 34.

"The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt." CPLR § 213 [4], [1] and [6]). *EMC Mortg. Corp. v. Patella*, 279 A.D. 2d 604, 605 (2d Dept. 2001), *citing Rols Capital Co. v. Beeten*, 264 A.D. 2d 724 (2d Dept. 1999); *Loiacono v. Goldberg*, 240 A.D. 2d 476, 477 (2d Dept. 1997); *see also, Arbisser v. Gelbelman*, 286 A.D. 2d 693 (2d Dept. 2001).

"To dismiss a cause of action pursuant to CPLR R 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period." *See U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834-835 (2d Dept 2018) [internal citations omitted].

Here, Defendants argue that Plaintiff's first cause of action for foreclosure and second cause of action for reformation of the legal description of the Premises contained in the mortgage, should be dismissed as untimely because the six-year Statute of Limitations commenced upon acceleration of the mortgage debt. However, as Defendants' counsel correctly contend that CPLR § 205 (a) does not apply to the Prior Action against Defendants, the motion to dismiss the Complaint in the Instant Action, as time barred, is denied.

CPLR § 205(a) sets forth that "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the

defendant, a dismissal of the complaint for neglect to prosecute the action, or final judgment upon the merits...[the plaintiff] may commence a new action upon the same transaction or occurrence...within six months after the termination provided that the new action...would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six -month period.”

The Prior Action against Defendant Hunter was dismissed on October 25, 2017, for lack of personal jurisdiction over Defendant Hunter Street, therefore, as the Prior Action did not commence, the mortgage was not accelerated against Defendant Hunter Street and the Statute of Limitations did not start to run as there was no action commenced with an acceleration of the mortgage. *See, Fry v Vil. of Tarrytown*, 89 NY2d 714, 727 (1997); *see also*, Decision and Order dated October 25, 2017, Exhibit D, at NYSCEF Doc. No. 37. Similarly, the Prior Action was dismissed against Defendant Dematteis due to the failure of Plaintiff’s counsel to appear and to make a motion for an order of reference thereby neglecting to prosecute the Prior Action (CPLR R 3216). Plaintiff’s later motion to vacate the dismissal, restore the action and extend Plaintiff’s time to serve Defendants was denied on November 5, 2018 (Decision and Order dated November 5, 2018, as Exhibit F, at NYSCEF Doc. No. 39). *See also*, Decision and Order dated May 23, 2016, Exhibits B, and Decision and Order dated February 27, 2017, Exhibit C, at NYSCEF Doc. Nos. 35 and 36, respectively; Order of Dismissal, as Exhibit E, at NYSCEF Doc. No. 38, and Affirmation in Support of Eric R. Sharp, Esq, paragraph 17, at NYSCEF Doc. No. 33.

As to the second cause of action for reformation of the mortgage, the six-year Statute of Limitations applies, running from the date the mistake was made. *See Taintor v. Taintor*, 50 A.D. 3d 887 (2d Dept. 2008), *citing Amalgamated Dwelling v. Hillman Housing Corp.*, A.D. 2d 199 (1st Dept. 2002); *Ta Chun Wang v. Chun Wong*, 163 A.D. 2d 300 (2d Dept. 1990). (21). Here, the mistake or “typographical error” in the subject Mortgage was made on November 17, 2006, the date of the mortgage, and when the Instant Action was filed on April 8, 2021, more than six years had passed. Therefore, Defendants’ motion to dismiss the second cause of action as time barred, is granted. *See*, Affirmation in Support of Eric R. Sharp, Esq, paragraph 21, at NYSCEF Doc. No. 33. Accordingly, it is hereby

ORDERED, that motion of Defendants Joseph Dematteis a/k/a Joseph A. Dematteis, Jr. Hunter Street Properties, LLC to dismiss the Complaint as time barred by the Six-Year Statute of Limitations is DENIED; and it is further

ORDERED, that the motion of Defendants Joseph Dematteis a/k/a Joseph A. Dematteis, Jr. Hunter Street Properties, LLC to dismiss the second cause of action for reformation of the Mortgage is GRANTED; and it is further

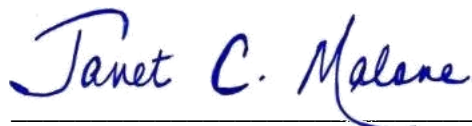
ORDERED, that the Preliminary Conference Part is to be contacted at PreliminaryConferenceWestchester@nycourts.gov. to arrange for a preliminary conference.

To the extent relief was not addressed herein, it is denied.

This constitutes the Decision and Order of this Court.

Dated: December 2, 2021
White Plains, New York

ENTER:



HON. JANET C. MALONE, J.S.C.

TO ALL VIA NYSCEF