To Be Argued By:
BRIAN A. SUTHERLAND
Time Requested: 20 Minutes

APL-2019-00114
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Court of Appeals

STATE OF NEW YORK

FREEDOM MORTGAGE CORPORATION,

Plaintiff-Appellant,

—against—

HERSCHEL ENGEL,

Defendant-Respondent,

BOARD OF MANAGERS OF THE
FOREST WAY CONDOMINIUM, CITIBANK N.A.,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f), Freedom Mortgage Corporation states that it has the following subsidiaries: Freedom Small Business Lending BIDCO, Inc., FCRE REL, LLC, Freedom Loan Services Corporation, and Freedom Alternatives, LLC.

STATUS OF RELATED LITIGATION

Pursuant to Court of Appeals Rules 500.13(a), Freedom Mortgage Corporation states that it is unaware of any litigation related to this appeal.

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PRELIMINARY STATEMENT

Herschel Engel defaulted on a loan secured by a mortgage on real property. Freedom Mortgage commenced a foreclosure action against Engel in 2008. The complaint stated that Freedom Mortgage had elected to demand immediate full payment of all principal and interest, *i.e.*, it elected to "accelerate" the loan. In January 2013, the parties stipulated to discontinue the action and, a few months later, Freedom Mortgage sent a letter to Engel stating that he had failed to make monthly payments and would need to pay the monthly amounts then due to avoid a future acceleration of the loan.

Engel did not make the required monthly payments. In 2015, Freedom Mortgage commenced a second foreclosure action. Engel moved to dismiss, arguing that the six-year statute of limitations began to run in 2008, when Freedom Mortgage accelerated the loan, and that the second foreclosure action was untimely. Freedom Mortgage cross-moved for summary judgment, arguing that the parties' stipulation to discontinue the action revoked its election to accelerate, such that Engel no longer owed it the full amount of the debt under the loan agreement. Because Freedom Mortgage had discontinued enforcement of the first

foreclosure action, the statute of limitations was *not* running on the full amount of the debt until Freedom Mortgage accelerated the loan for a second time. Thus, the second foreclosure action was timely.

New York Supreme Court, Orange County (Sciortino, J.) agreed with Freedom Mortgage, granted its motion for summary judgment, and denied Engel's motion to dismiss. But the Appellate Division, Second Department, reversed, holding that the stipulation to discontinue the first foreclosure action was insufficient as a matter of law to revoke Freedom Mortgage's election to accelerate the loan. In other words, according to the Second Department, no reasonable jury could find that Freedom Mortgage was *not* demanding immediate full payment on the loan from 2008 onwards, even though it had settled with the borrower and discontinued the only action in which it had sought to enforce its discretionary right to demand immediate full payment.

This Court should reverse. A lender may revoke its discretionary election to accelerate unless the revocation would be inequitable. A voluntary discontinuance nullifies the action brought to enforce the right to accelerate and is manifestly inconsistent with any intent to enforce a demand for immediate full payment. Thus, the voluntary discontinuance

here revoked the demand so that Freedom Mortgage was no longer requiring immediate full payment, and Freedom Mortgage thereafter stated that it would accept a payment in the amount of past monthly installments then due to cure the default. Engel did not make the payment and, under the parties' contract, Freedom Mortgage was entitled to accelerate and foreclose again. It thereafter timely commenced its second foreclosure action. The Second Department erred in concluding that the action was time-barred.

The Second Department's legal error adversely affects the public interest in promoting settlement of foreclosure actions. Lenders and note holders will be reluctant to settle and discontinue foreclosure actions if doing so creates a risk that the statute of limitations will bar a subsequent action based on the borrower's default. For this reason, as in this case, the note and mortgage typically follow forms that are drafted to emphasize that the lender retains its right to foreclose even if it does not require immediate full payment or delays or adjusts monthly installments. The Second Department's ruling upsets the settled expectations of borrowers and note holders, such as the parties here, which had enabled them to resolve their disputes short of trial.

The Second Department's legal error also led to an unjust result. It is undisputed that Engel defaulted on his loan. And the property is not his home. Engel rented the mortgaged unit to others, collecting rental income even as he declined to make monthly payments on the loan. He has known for many years that Freedom Mortgage sought to enforce the parties' loan agreement and mortgage and cannot claim that Freedom Mortgage's 2015 foreclosure action surprised him or interrupted his repose. If this Court's decision and order stands, he will reap an undeserved windfall of hundreds of thousands of dollars and will escape his undisputed contractual obligations under the loan documents. For all these reasons, this Court should correct the Second Department's error and rectify this injustice.

QUESTION PRESENTED

Whether the parties' voluntary stipulation to discontinue a foreclosure action revoked the plaintiff's election to accelerate a loan (demand immediate full payment), so that the statute of limitations was *not* running on the full amount of the debt under the loan agreement until the plaintiff accelerated the loan for a second time.

JURISDICTION

This Court has jurisdiction under CPLR 5602 because the Court granted Freedom Mortgage's motion for leave to appeal. (A. 221) Freedom Mortgage argued in the lower courts that it was entitled to summary judgment because Engel defaulted and its second foreclosure action was timely. (Freedom Mortgage Second Dep't Br. 8-16; A. 157-65)

STATEMENT OF THE CASE

I. The First Loan Acceleration and Foreclosure Action

A. 2005: Engel Executes a Note and Promises to Pay $224,806 to the Note Holder

In May 2005, Engel executed a promissory note in the amount of $225,000 in favor of mortgage lender Fairmont Funding, Ltd. (A. 52 [¶ 3]) The loan financed Engel's purchase of real property located in Monroe, New York. (A. 53 [¶ 8]) A recorded mortgage in favor of Mortgage Electronic Registration Systems, as nominee for Fairmont Funding, secured the note. (A. 63-83)

Soon thereafter, on July 22, 2005, Engel and Fairmont Funding executed an "extension and modification agreement," in which they agreed that they would "combin[e] into one set of rights and obligations" all of the parties' prior promises and agreements stated in notes and

mortgages. (A. 85-86) The modified agreement obliged Engel to pay $224,806 to the holder. (A. 85) The parties concurrently executed an amended note to substitute for the May 2005 note. (A. 56-60) The mortgage instrument remained the same, except to the extent that the parties modified it to secure the slightly lower loan amount.

The July 22, 2005 note provided that if Engel failed to pay each monthly payment on the date it was due, he would be "in default." (A. 57 [¶ 6(B)]) In the event of default, the note holder was entitled to send written notice to Engel stating that if he did not pay overdue amounts by a certain date, the note holder could require him to pay immediately the full amount of principal and interest then owed (A. 57 [¶ 6(C)]), *i.e.*, the holder could "accelerate" the loan. Engel also agreed that even if he defaulted on his loan and the note holder did not require him to pay immediately in full, the note holder would still have the right to require such payment if he defaulted again. (A. 57 [¶ 6(D)])

The note states:

> Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, *the Note Holder will still have the right to do so if I am in default at a later time*.

(A. 57 [¶ 6(D) (emphasis added)])

The note further provides that in addition to the protections given to the note holder under the note, a security instrument in the form of a mortgage would protect the holder from possible losses in the event that the borrower did not keep the promises made in the note. (A. 58 [¶ 10]) The mortgage describes how and under what conditions the note holder may require the borrower to make immediate payment in full of all amounts owed under the note. (A. 58 [¶ 10])

Like the note, the mortgage obliged Engel to make timely payments of principal and interest. (A. 67 [¶ 1]) It provides that the note holder may delay or change the amount of periodic payments under the note. (A. 74 [¶ 12(a)]) Even if the note holder did so, however, Engel would "still be fully obligated under the Note and under [the mortgage]" unless the note holder agreed, "in writing," to release Engel from his obligations. (A. 74 [¶ 12(a)]) Moreover, even if the note holder did not exercise any of its

rights under the mortgage, it would "still have all of those rights and may exercise and enforce them in the future." (A. 74 [¶ 12(b)])

One of the note holder's rights under the mortgage, as under the note, was the right to demand "immediate payment in full," *i.e.*, to accelerate the loan, if specified conditions were met. (A. 77 [¶ 22 (capitalization omitted)]) A note holder could require immediate payment in full if (a) Engel defaulted, (b) the holder provided notice of the default and at least 30 days to correct the default, and (c) Engel did not correct the default by the date stated in the notice. (A. 78 [¶ 22(a)-(c)]) If the holder required immediate payment in full, it could bring a foreclosure action to force a sale of the property. (A. 77-78 [¶ 22])

Even after the note holder demanded immediate payment in full, Engel had a contractual right to discontinue enforcement of the mortgage. Under paragraph 19, entitled "Borrower's Right to Have Lender's Enforcement of this Security Instrument Discontinued," if Engel paid the amounts that would have been due if the note holder had never required immediate full payment, along with other expenses and fees, then the mortgage would remain in "full effect as if Immediate Payment in Full had never been required." (A. 76 [¶ 19])

B. 2008: After Engel Defaults, Freedom Mortgage Commences a Foreclosure Action Against Him

In July 2008, Mortgage Electronic Registration Systems delivered the note and mortgage to Fairmont Funding (A. 95-97), which in turn delivered the note and mortgage to Freedom Mortgage (A. 99-101). Shortly thereafter, on or about July 16, 2008, Freedom Mortgage commenced a foreclosure action against Engel, alleging that Engel defaulted on payments due on March 1, 2008, and thereafter. (A. 37 [¶ 9]) Freedom Mortgage stated in its complaint that it "has duly elected and does hereby elect to declare the entire balance … to become immediately due and payable." (A. 37 [¶ 10]) It sought an order directing sale of the property and recovery of the sale proceeds to pay the amount due under the note, among other amounts. (A. 38-39)

C. 2010-2012: Freedom Mortgage Obtains a Foreclosure Judgment, but Engel Moves to Vacate the Judgment

In 2010, Freedom Mortgage obtained a judgment of foreclosure and sale based on Engel's failure to answer the complaint. (A. 42) The referee appointed in the judgment scheduled a foreclosure sale to occur in May 2012, but before the scheduled sale date, Engel appeared and moved to vacate the judgment on the ground that the trial court lacked personal

jurisdiction over him because he had never been served. (A. 42, 129-30, 132-33) The trial court scheduled a traverse hearing for August 2012 to aid in determining whether Engel had been served in 2008. (A. 129-30)

II. The Revocation of the First Loan Acceleration and Notice of Engel's Failure to Make Monthly Payments

A. January 2013: The Parties Stipulate to Vacate the Judgment and Discontinue the Foreclosure Action

Instead of litigating the question whether Freedom Mortgage served the complaint on Engel, the parties sought to resolve their dispute "amicably" and "without further delay, expense or uncertainty." (A. 42) Freedom Mortgage and Engel executed a stipulation providing that the judgment of foreclosure was vacated and that Freedom Mortgage's foreclosure action "will be discontinued without prejudice." (A. 42-43) The trial court "so ordered" the stipulation, thereby effectuating the parties' joint request to vacate the judgment and discontinue enforcement of the first foreclosure action. (A. 43)

B. May 2013: Freedom Mortgage Provides Notice to Engel of His Failure to Make Monthly Payments

On May 16, 2013, Freedom Mortgage—through its loan subservicer, LoanCare—mailed a notice of default to Engel by first-class

mail at the address that is the subject of the mortgage. (A. 115 [¶ 20], 207-08; *see* A. 57 [¶ 7]) The default notice informed Engel that he breached the terms of his loan by failing to make "monthly payments." (A. 207) The notice did *not* demand immediate payment in the full amount of the loan. Rather, it required payment of $117,613.03—the past monthly amounts due. (A. 207) The notice states that the principal balance is $218,053.56. (A. 207)

The May 16, 2013 letter confirmed that the loan was *not* "accelerated" as of that date because it stated that "[f]ailure to cure the default on or before [June 15, 2013] shall result in acceleration of the sums secured by the mortgage or deed of trust and result in a foreclosure sale of the property." (A. 207)

III. The Second Loan Acceleration and Foreclosure Action

A. August 2013: Freedom Mortgage Provides Notice of Its Election to Accelerate the Loan

Engel did not cure his default. On August 7, 2013, Freedom Mortgage, through counsel, mailed a letter to Engel stating that because of the default, Freedom Mortgage had "elected to accelerate your loan and declare the full amount due and payable at once." (A. 135-38) The total

amount due was then $310,713.21, an amount that included the principal balance, interest, escrow advances, and late charges. (A. 135) The letter notified Engel that Freedom Mortgage had directed counsel to commence foreclosure proceedings to collect the amount that Engel owed. (A. 135)

B. February 2015: Freedom Mortgage Commences a Second Foreclosure Action Against Engel

Less than two years after Freedom Mortgage notified Engel of his failure to make monthly payments on his loan and its subsequent election to accelerate the loan, Freedom Mortgage commenced a second foreclosure action in Supreme Court, Orange County. As alleged in the complaint and demonstrated in the record, the note and mortgage were assigned to Freedom Mortgage and the assignment was recorded before Freedom Mortgage commenced the second foreclosure action. (A. 22 [¶¶ 8-12], 95-101)

The complaint alleged that Engel had not made any monthly payments since March 1, 2008, and that Freedom Mortgage had elected to accelerate the loan. (A. 22 [¶¶ 13-14]) As before, Freedom Mortgage sought an order directing sale of the property and recovery of the sale proceeds to pay the amount due under the note, among other amounts.

(A. 24) Engel filed an answer asserting a statute of limitations defense and other purported defenses. (A. 27-29)

Engel also filed a motion to dismiss on the ground that the second foreclosure action was time-barred. (A. 30-32) Engel noted that Freedom Mortgage commenced a foreclosure action on July 16, 2008, and that the "complaint accelerated the payment of the mortgage." (A. 32 [¶ 5]; *see also* A. 32 [¶ 9 ("The commencement of the 2008 action accelerated the note and mortgage.")]) He argued that the statute of limitations began to run on the date of the filing of the complaint and expired six years later, on July 15, 2014. (A. 32 [¶¶ 7-8]) Therefore, according to Engel, the second foreclosure action filed in 2015 was untimely. (A. 32 [¶ 10])

Freedom Mortgage cross-moved for summary judgment. (A. 44-45) The cross-motion showed that Engel had defaulted and had not cured the default after proper notice. Therefore, Freedom Mortgage was entitled to foreclose. (A. 150-54) As for Engel's statute-of-limitations argument, Freedom Mortgage first argued that if Engel had never been served, as he had previously sworn, then it had never effectuated a demand for immediate payment in full and the statute of limitations never began to run on the full amount of the debt. (A. 163)

If Freedom Mortgage accelerated the loan by commencing the foreclosure action, it argued, then it also revoked the acceleration by discontinuing the action. (A. 163-64) The stipulation of discontinuance was an affirmative and voluntary act that canceled the instrument that had been used to effectuate the acceleration. Thus, the discontinuance affirmatively revoked the acceleration. (A. 163-64) The revocation did not prejudice Engel; he continued to collect rent from tenants and kept the money for himself instead of paying his loan obligation. (A. 164)

Even if the voluntary stipulation of discontinuance did not revoke its election to accelerate, Freedom Mortgage argued, then the default notice that it mailed to Engel in May 2013 did. The default notice stated that failure to correct the default "shall result in acceleration"—*i.e.*, the loan was *not* accelerated, and Engel could correct his default by making the monthly payments then due, as opposed to immediate payment in full. (A. 164) The default notice also stated that Engel had missed monthly payments from 2008 to 2013, again showing that the loan was *not* accelerated. If the loan were accelerated (it was not) the full amount of the debt would have been due and accruing interest throughout that period instead. (A. 164)

Because Freedom Mortgage revoked its election to accelerate within the six-year period after it commenced the first foreclosure action, the statute of limitations did not begin to run until Freedom Mortgage mailed its notice of election to accelerate in August 2013. Freedom Mortgage's second foreclosure action, commenced within two years after the 2013 notice of election, was timely. (A. 164)

In his response to Freedom Mortgage's motion, Engel admitted that he had actual knowledge of the 2008 complaint because his tenant had received it and sent it to him. (A. 218 [¶¶ 5-6]) Engel stated, "I was therefore fully aware of the fact that plaintiff had accelerated the mortgage since that was stated in the complaint." (A. 218 [¶ 7]) Engel stated that his attorney had advised him that service on his tenant was not "proper service." (A. 218 [¶ 4]) He thus admitted that he had declined to appear in an action of which he had actual knowledge, then moved to vacate the judgment only after Freedom Mortgage had secured it and a foreclosure sale was scheduled. Despite Engel's vexatious tactics, as noted, the parties sought to resolve their dispute "amicably" after Engel finally appeared. (A. 42, 212 [¶ 11])

Engel argued that Freedom Mortgage had not revoked its election to accelerate because the parties' stipulation did not expressly "reference" revocation. (A. 214 [¶¶ 26-27]) If Freedom Mortgage had truly intended to revoke the acceleration, Engel argued, it could have done so "in a simple letter stating that it was revoking the acceleration." (A. 213 [¶ 18]) Thus, Engel admitted that the acceleration was revocable; whether Freedom Mortgage had done so was the issue presented.

C. 2015: The Trial Court Denies Engel's Motion to Dismiss and Grants Freedom Mortgage's Motion for Summary Judgment

The trial court denied Engel's motion, granted Freedom Mortgage's motion, and appointed a referee to compute amounts due under the note. (A. 15-16) With respect to Engel's argument that the statute of limitations barred Freedom Mortgage's foreclosure action, the trial court reasoned that while Freedom Mortgage had accelerated the loan by commencing the first foreclosure action in 2008, the parties' January 2013 stipulation to discontinue the 2008 action was an affirmative act that revoked the acceleration. (A. 14) Having determined that the stipulation of discontinuance revoked the election to accelerate, the trial court did not analyze Freedom Mortgage's May 16, 2013 default notice.

D. 2018: The Appellate Division Grants Summary Judgment to Engel on Statute of Limitations Grounds

The Appellate Division reversed the trial court in a decision and order issued on July 11, 2018. The Appellate Division noted that the statute of limitations began to run on the entire debt on July 16, 2008, "when the plaintiff accelerated the mortgage debt by commencing the prior foreclosure action." (A. 227) And it noted that a lender "may revoke its election to accelerate the mortgage … by an affirmative act of revocation occurring during the six-year statute of limitations period …." (A. 227). But it held that:

> [Freedom Mortgage] failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period. Contrary to the Supreme Court's determination, the plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (*see Federal Natl. Mtge. Assn. v. Mebane*, 208 AD2d 892, 894; *cf. NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070).

(A. 227-28)

The decision and order did not discuss or analyze Freedom Mortgage's May 16, 2013 default notice, which had given notice to Engel that he had failed to make monthly payments and advised him that Freedom Mortgage would accept the monthly installment payments then due within the next 30 days. Nor did it explain why it was treating Engel's motion to dismiss as a motion for summary judgment.

Freedom Mortgage moved the Appellate Division for leave to reargue or, in the alternative, for leave to appeal. The Appellate Division denied the motion (A. 223), after which this Court granted leave to appeal. (A. 221)

ARGUMENT

I. Freedom Mortgage's Foreclosure Action Was Timely

A written agreement in which the borrower agrees to repay the lender a sum of money is called a "note." UCC § 3-104(2)(d). The lender secures payment on the note by obtaining a security interest in the borrower's real property through another written agreement called a "mortgage." UCC § 9-102(a)(55). Together, the note and mortgage allow the lender to make and the borrower to repay the mortgage loan.

A plaintiff must bring a claim based on breach of a note obligation within six years after the claim accrues. CPLR 203(a), 213(4). Under general principles of contract law, a claim for breach of contract accrues at the time of the breach. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). When a borrower breaches an obligation to make monthly payments, for example, a new claim accrues each time the borrower fails to make the payment. *See Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 126 n.3 (2019); *Phoenix Acquisition Corp. v. Campcore, Inc.*, 81 N.Y.2d 138, 141-42 (1993). When a lender has a discretionary option to demand immediate payment in full, the claim accrues at the time of the demand. *See* 1 Bergman on New York Mortgage Foreclosures § 5.11[3][a] (citing cases). And when a lender demands immediate payment in full by filing a summons and complaint, the filing of the complaint and claim accrual happen at the same time.

Here, Freedom Mortgage demanded immediate payment in full by filing a summons and complaint to commence a foreclosure action. (A. 32 [¶¶ 5, 9]; A. 37 [¶ 10]) As explained in greater detail below, the parties' written agreements allowed Freedom Mortgage to revoke its demand. *See infra* I.A., at 20-22. Freedom Mortgage revoked its demand in January

2013 when it discontinued the action in which it had made its demand for immediate payment in full. *See infra* I.B., at 22-26. And other evidence in the record confirms that Freedom Mortgage revoked the demand when it discontinued the action. *See infra* I.C., at 26-30.

A. The Note and Mortgage Allowed Freedom Mortgage to Revoke Its Demand for Immediate Payment in Full

This Court's decisions recognize that a lender's option to accelerate is discretionary. *See Adler v. Berkowitz*, 254 N.Y. 433, 437 (1930); *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 5-6 (1930). Consistent with basic contract principles, it has also recognized that a lender may waive a borrower's default and decline to enforce an acceleration clause. *See Odell v. Hoyt*, 73 N.Y. 343, 345 (1878) (after default by the mortgagor, the "mortgagees could, of course, defer the enforcement of the mortgage, or make any arrangement for giving time to the mortgagors which the parties might agree upon"); *see also* John A. Gebauer et al., 14A Carmody-Wait 2d New York Practice § 92:55 (Aug. 2019 update) ("The holder of a mortgage is under no duty to exercise an option to accelerate maturity but may waive the default." (footnotes omitted)).

The law does not establish any limit on the means by which a lender may revoke its election to accelerate a loan, and the lender may do so unless and until the revocation would be inequitable. If the borrower changes his or her position in reliance on the lender's notice of election to accelerate, then the doctrine of equitable estoppel may bar the lender from revoking the election. *See Kilpatrick v. Germania Life Ins. Co.*, 183 N.Y. 163, 168 (1905). Absent an estoppel, however, whether and when the lender may revoke a discretionary election to accelerate is generally a matter of contract. *Cf. Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 475-76 (1932) (parties did "not provide what the holder of the mortgage must do to evidence its election to declare the whole amount due" but "[s]uch a provision could have been embodied in the contract if the parties had so desired").

Here, the parties' contract granted Freedom Mortgage discretion to decline to demand immediate payment in full and to exercise that right later if Engel was in default. The note provides that even if the note holder does not require the borrower to pay immediately in full, the holder "will still have the right to do so" if the borrower is "in default at a later time." (A. 57 [¶ 6(D)) Thus, even after demanding payment in full,

if the note holder revoked its demand such that it did not require full payment, it would still have the right to accelerate again in the event of default. Likewise, even if the note holder declined to enforce its right to accelerate under the mortgage, it would "still have all of those rights and may exercise and enforce them in the future." (A. 74 [¶ 12(b)])

In sum, nothing in the parties' contract remotely suggests that the note holder's election to demand immediate full payment is irrevocable. Rather, the contract shows that the holder could decline or discontinue enforcement of its discretionary acceleration right without losing the option to enforce that right in the future. That is what happened here.

B. Freedom Mortgage Revoked Its Demand for Immediate Payment in Full by Discontinuing the 2008 Foreclosure Action

Freedom Mortgage's discontinuance of the foreclosure action was an affirmative act that nullified the very act that constituted the election to accelerate the loan: the filing of the foreclosure action. *See Loeb v. Willis*, 100 N.Y. 231, 235 (1885). When a foreclosure action is discontinued, "what has been done therein is also annulled, so that the action is as if it never had been." *Id.* And if the initial foreclosure action that brought about the acceleration never existed because the

discontinuance annulled it, then the demand stated in the complaint "therein" is likewise annulled (*id.*), as if the note holder had never demanded immediate payment in full, a claim had never accrued based on that demand, and the statute of limitations had never begun to run.

Under *Loeb* and subsequent cases, the law is clear that nothing in the first foreclosure action could estop or preclude Freedom Mortgage from bringing a second foreclosure action. *See id.*; *Brown v. Cleveland Tr. Co.*, 233 N.Y. 399, 406 (1922). The order discontinuing the action "rendered the pleadings ineffective," *Mahon v. Remington*, 256 A.D. 889, 889 (4th Dep't 1939), and thereby "nullified" the "election to accelerate," *U.S. Bank Nat'l Ass'n as Tr. for RASC-2005KS5 v. Wongsonadi*, 55 Misc. 3d 1207(A), 2017 WL 1333442, at *2 (Sup. Ct. Queens County Apr. 5, 2017); *see also U.S. Bank Nat'l Ass'n v. Creative Encounters, LLC*, 63 Misc. 3d 1224(A), 2019 WL 2093911, at *3 (Sup. Ct. Rensselaer County Apr. 12, 2019) (citing cases). Because the discontinuance fully negated the only action by which Freedom Mortgage had demanded immediate full payment, no reasonable person could conclude that it was still demanding immediate full payment after the discontinuance was entered and the action was dismissed. For all these reasons, the filing of the

voluntary stipulation to discontinue was an affirmative act that revoked the acceleration.

The parties' contract likewise provides that a voluntary discontinuance revokes an election to accelerate. For example, the mortgage states that even if the note holder "does not exercise *or enforce* any right of Lender under this [mortgage] … Lender will still have all of those rights and may exercise *and enforce* them in the future." (A. 74 [¶ 12(b) (emphasis added)]) A voluntary discontinuance is an act that ceases enforcement of the note holder's claim on the full amount of the debt because it nullifies and annuls the prior action, *Loeb*, 100 N.Y. at 235, and thereby returns the holder to its pre-enforcement position, *i.e.*, possessing all rights, including the right to accelerate and foreclose "in the future." (A. 74 [¶ 12(b)])

The contract also provides that Engel may discontinue enforcement of the mortgage by meeting certain conditions. Paragraph 19 of the mortgage provides that if he timely met payment conditions, he would have "the right to have enforcement of this Security Instrument stopped." (A. 76 [¶ 19]) If Engel stopped enforcement of the mortgage by making

payments, it would remain in "full effect as if Immediate Payment in Full had never been required." (A. 76 [¶ 19])

In this case, Engel and Freedom Mortgage discontinued enforcement of the mortgage in the first foreclosure action by joint stipulation. Freedom Mortgage's agreement to discontinue the first foreclosure action gave Engel the opportunity to halt foreclosure without making immediate payments, *i.e.*, the joint stipulation required *far less* of Engel than complying with paragraph 19 would have required.

To conclude that the parties intended by their stipulation to put Freedom Mortgage in a worse position than it would have occupied if Engel had discontinued enforcement by paying all past monthly amounts due under paragraph 19 would be irrational. But that is Engel's position. His argument is that he and Freedom Mortgage discontinued enforcement of the first foreclosure action but, nevertheless, Freedom Mortgage still required "Immediate Payment in Full," such that the statute of limitations was running and Freedom Mortgage could not accelerate again. Engel has not and cannot explain how such a result would be consistent with the parties' contract, their voluntary stipulation to resolve their dispute amicably, or common sense.

This Court, by contrast, has recognized that a lender may elect to waive a default by discontinuing a foreclosure action. *See Buffalo Loan, Trust & Safe-Deposit Co. v. Medina Gas & Electric Light Co.*, 162 N.Y. 67, 78 (1900) ("it is possible that the discontinuance of the action might be regarded as a waiver of the default"). In *Buffalo Loan*, the Court did not determine whether the foreclosing plaintiff had even made a demand for immediate payment in full; even so, discontinuing the action could waive the default. *See id.* But in this case, Freedom Mortgage made its demand in the complaint itself, leaving no reasonable doubt as to whether discontinuing the action would revoke the demand.

C. The May 2013 Default Notice Confirms That Freedom Mortgage Had Revoked Its Demand

Even if the voluntary stipulation to discontinue left an open issue of fact as to whether Freedom Mortgage had revoked the acceleration (and it did not), this Court should hold that Freedom Mortgage is entitled to judgment based on the events that took place after the discontinuance. The record confirms that Freedom Mortgage nullified and ceased enforcing its prior demand for immediate payment and expressly stated that it was willing to accept monthly installments. Engel did not pay the

monthly installments, however, and so Freedom Mortgage timely filed the foreclosure action at issue here.

In May 2013, about four months after revoking its election to demand immediate payment in full by discontinuing the first foreclosure action, Freedom Mortgage sent a default notice to Engel that warned him that he was in breach of his loan by failing to make "monthly payments." (A. 207) The May 2013 default notice proves that Freedom Mortgage had already revoked the acceleration and reinstated Engel's contractual obligation to make monthly payments or, at the very least, it revoked any extant demand for immediate full payment and instead required only payment of the unpaid monthly installments, including accrued interest. (A. 207) The May 16, 2013 default notice:

- Notified Engel that he had failed to make "monthly payments."
- Notified Engel that if "another monthly payment becomes due … [he] will need to add that payment amount due … in order to reinstate the loan."
- Notified Engel that failure to cure the default "shall" result in acceleration.
- Required Engel to pay $117,613.03, *not* the full amount of the loan.

(A. 207)

There is no possible reading of the May 2013 default notice that permits the conclusion that the entire amount of the loan was immediately due because a lender does not warn the borrower that failure to cure a default "shall result in acceleration" if the loan is already accelerated. (A. 207) Rather, the only possible interpretation of the May 2013 notice is that the loan was *not* accelerated and that Engel could cure the default and reinstate the loan by making past monthly installment payments.

Because the May 2013 default notice confirms that the stipulation to discontinue revoked the acceleration, this is not a case in which *other* evidence in the record casts doubt on the significance of the discontinuance. In *Vargas v. Deutsche Bank National Trust Co.*, for example, the foreclosing entity discontinued a prior foreclosure action, but it also sent "letters attempting to collect … the accelerated mortgage debt and informing [the borrower] that any payments made in contribution to the entire debt 'will not be deemed a waiver of the acceleration of [his] loan ….'" 168 A.D.3d 630, 630 (1st Dep't 2019). Under *those* facts, the court concluded that the foreclosing entity had not revoked the prior acceleration. *See id.*

Nor is this a case in which the *only* evidence in the record consists of the voluntary discontinuance. The Appellate Division has held in several cases that a voluntary discontinuance, standing alone, raises a triable question of fact as to whether the foreclosing plaintiff revoked its prior election to accelerate. *See Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 509 (1st Dep't 2019); *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1070 (2d Dep't 2017); *see also U.S. Bank Nat'l Ass'n v. Charles*, 173 A.D.3d 564, 565 (1st Dep't 2019). The First Department stated in *Charles*, for example, that "de-acceleration" is an issue of fact when the discontinuance does not provide that "the mortgage was de-accelerated" or that "plaintiff would now be accepting installment payments." 173 A.D.3d at 565.

This Court should hold that a voluntary discontinuance of a foreclosure action revokes a demand for immediate payment in full made in the foreclosure complaint, unless further evidence affirmatively establishes (as in *Vargas*) that the foreclosing plaintiff was still requiring immediate full payment. Even if this Court concluded that a triable issue of fact exists unless the plaintiff has affirmatively stated that it would accept installment payments, however, no triable issue of fact would exist

in this case because the May 2013 default notice stated that Freedom Mortgage would accept past and future monthly installments to cure the default. (A. 207) In all events, the Second Department erred in concluding that, as a matter of law, Freedom Mortgage did not revoke its election to accelerate. (A. 227-28)

Although Freedom Mortgage stated that it would accept monthly payments from Engel, the latter did not cure his default. In August 2013, Freedom Mortgage mailed a letter to Engel stating that it had "elected to accelerate [his] loan and declare the full amount due and payable at once." (A. 135) Less than two years later, in February 2015, Freedom Mortgage filed the second foreclosure action against Engel. (A. 22 [¶¶ 13-14]) This second foreclosure action was timely because Freedom Mortgage commenced it within two years after the August 2013 letter demanding immediate payment in full. *See* CPLR 203(a), 213(4).[1]

[1] As noted, Freedom Mortgage made its 2008 demand for immediate full payment in the complaint itself (A. 32 [¶¶ 5, 9]; A. 37 [¶ 10]), so that the demand and filing of the complaint took place at the same time. The second foreclosure action was different in this respect—it was not the instrument that made the demand.

II. This Court's Ruling That a Voluntary Discontinuance Revokes an Election to Accelerate Will Promote Settlement and Serve the Public Interest

If a borrower fails to make the required monthly payments under a mortgage loan agreement, the lender may commence a foreclosure action to recover the full amount due on the loan. But even after commencing the foreclosure action, the financial institution holding the note and mortgage may refrain from forcing a sale of the home if it concludes that it can enter into a mutually beneficial settlement agreement with the borrower. Indeed, in the wake of the financial crisis of 2008, the Legislature *required* trial courts to convene a *mandatory* settlement conference in cases in which the borrower was a resident of the home subject to foreclosure. 2008 N.Y. Laws, Ch. 472, § 3; *see* CPLR 3408.

Under New York law, the parties to a settlement conference must discuss in good faith whether the lender can modify payment schedules or amounts. *See* CPLR 3408(a), (f). If the parties reach a settlement, the lender must file a notice of discontinuance. CPLR 3408(g). Of course, both parties must agree to settle; one side cannot force a settlement agreement. Thus, each party to the settlement understands (1) that the

foreclosure action will not go forward and (2) in return, the borrower will resume making scheduled periodic payments on the loan.

New York law thus establishes that settlement of a mortgage foreclosure action serves the public interest. *See* CPLR 3408. The borrower gets another opportunity to keep the home and to make payments notwithstanding the prior breach of the loan agreement. The financial institution may save additional litigation expense. And the courts are spared further litigation. In view of these benefits, parties often settle mortgage foreclosure actions.

But these settlements can work only if the lender does not give up its right to foreclose in the event that the borrower defaults again. Indeed, the contract in this case makes clear that the lender retains the option to accelerate and foreclose if the borrower defaults again. (A. 57 [¶ 6(D)]) Numerous financial institutions have entered into settlement agreements with borrowers in reliance on contractual language and the parties' mutual understanding that if the settlement falls through and the borrower doesn't hold up his or her end of the bargain, the lender reserves the right to foreclose. To encourage and promote such

settlements, this Court should hold that Freedom Mortgage revoked the acceleration of the loan by discontinuing the first foreclosure action.

CONCLUSION

This Court should reverse the Appellate Division's order and reinstate the trial court's judgment in favor of Freedom Mortgage.

Dated: August 22, 2019 Respectfully submitted,

REED SMITH LLP

By: _____

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Word Count Certification

I, Brian Sutherland, hereby certify pursuant to Rule 500.13(c)(1) that the total word count for all printed text in the body of the brief is 6,506 words.

/s/ Brian A. Sutherland

63 Misc.3d 1224(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Rensselaer County.

U.S. BANK NATIONAL ASSOCIATION, not in Its Individual Capacity but Solely AS TRUSTEE FOR the RMAC TRUST, SERIES 2016-CTT, Plaintiff,
v.
CREATIVE ENCOUNTERS, LLC, Paula Jo Tufano and The People of the State of New York, Defendants.

256173
|
Decided April 12, 2019

Attorneys and Law Firms

Gross Polowy, LLC, (Douglas C. Weinert, Esq., of Counsel) 1775 Wehrle Drive, Suite 100, Williamsville, New York, 14221, Attorneys for Plaintiff.

The Law Offices of Christian P. Morris, Esq., P.O. Box 1, Schuylerville, New York, 12871, Attorneys for Defendants Creative Encounters, LLC and Paula Jo Tufano.

Opinion

Michael H. Melkonian, J.

***1** In this mortgage foreclosure action, plaintiff U.S. Bank National Association, not in its Individual Capacity but solely as Trustee for the RMAC Trust, Series 2016-CTT ("plaintiff") moves to confirm the Referee's Report made in accordance with RPAPL § 1321 and for a judgment of foreclosure and sale. Defendants Creative Encounters, LLC and Paula Jo Tufano (collectively referred to herein as "defendants") oppose and move for summary judgment to dismiss the complaint.

The underlying facts are that, on or about June 25, 2008, defendant Paula Jo Tufano ("Paula Jo") executed a Consolidation, Extension and Modification Agreement ("CEMA") and note in the amount of $ 182,000.00, consolidating a note of that date in the amount of $ 32,256.08, with a note executed and delivered by Paula Jo and Jody Tufano to the original lender, Homestead Funding Corporation d/b/a First Niagara Mortgage, in the principal sum of $ 155,000.00, which was secured by a mortgage on the subject property, located at 24 Eva Road, East Greenbush, New York (the "property"). The CEMA was recorded on August 12, 2008 in the Rensselaer County Clerk's office. By a series of assignments ending with an assignment dated July 7, 2016, plaintiff came into possession of the secured, consolidated note. That assignment was recorded in the Rensselaer County Clerk's Office on August 11, 2016.

Less than sixteen months after executing the note on June 25, 2008, Paula Jo defaulted under the terms of the note and mortgage by failing to make the installment payment due October 1, 2009, or at any time thereafter.

On August 9, 2010, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, plaintiff's predecessor-in-interest, commenced a foreclosure action against Paula Jo to foreclosure on the mortgage, by filing a summons, complaint and notice of pendency with the Rensselaer County Clerk's Office (the "first action") (Index No.234021-10). Plaintiff's predecessor-in-interest asserted in that action that Paula Jo defaulted on the note and mortgage by failing to make the monthly installment payments which became due and payable as of October 1, 2009, and for each and every month thereafter. The principal balance due as of the filing of that complaint was $ 179,379.35, plus interest from September 1, 2009.

Counsel for plaintiff's predecessor-in-interest, Steven J. Baum, P.C., moved to voluntarily discontinue the action, which was granted by this Court (Ceresia, J.) by Order dated September 12, 2013.

On October 1, 2014, Nationstar Mortgage, LLC, who had come into possession of the consolidated note by assignment dated January 16, 2013, commenced a second foreclosure action against Paula Jo to foreclosure on the mortgage, by filing a summons, complaint and notice of pendency with the Rensselaer County Clerk's Office (the "second action") (Index # 248053-14). Counsel for plaintiff's predecessor-in-interest, Fein, Such & Crane, LLP, moved to voluntarily discontinue the second action without prejudice, which was granted by this Court (McGrath, J.) by Order dated March 2, 2016.

***2** Plaintiff commenced the instant action to foreclose by filing a summons and complaint and notice of pendency on April 28, 2017. In its complaint, the plaintiff alleges, *inter alia*, that on May 1, 2011, Paula Jo defaulted in making payments due under the terms of the consolidated note and mortgage. [1] Defendants joined issue by filing an answer with counterclaims on June 15, 2017.

The Court first considers defendants' argument in their motion for summary judgment the action should be dismissed because it is barred by the statute of limitations since the Court's determination thereof may render the plaintiff's motion academic.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see*, *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065; *Zuckerman v. City of New York*, 49 NY2d 557; *Alvarez v. Prospect Hospital*, 68 NY2d 320).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see*, *Winegard v. New York University Medical Center*, 64 NY2d 851). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, *Zuckerman v. City of New York*, 49 NY2d 5557).

In their motion, defendants state that the applicable statute of limitations for a mortgage foreclosure action is six (6) years and that even though a mortgage is payable in installments once a mortgage debt is accelerated the entire amount comes due and the statute of limitations begins to run on the entire debt (CPLR § 213[4]; *EMC Mortgage Corporation v. Patella*, 279 AD2d 604, 605). Defendants argue that the first action accelerated the mortgage in the instant action and that the statute of limitations began to run at that time.

In opposition, however, plaintiff submits that both the first and second actions were voluntarily discontinued by plaintiff's predecessors-in-interest and those actions revoked the election to accelerate made at the time of the commencement of those actions. Plaintiff states that a voluntary discontinuance, as was done in 2010 in the first foreclosure action and in 2014 in the second action, is an affirmative act that is sufficient to revoke acceleration, citing *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068.

The six year statute of limitations in a mortgage foreclosure action begins to run from the due date of each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage (CPLR § 213[4]; *Loicano v. Goldberg*, 240 AD2d 476, 477; *Saini v. Cinelli Enterprises*, 289 AD2d 770, 771; *Kashipour v. Wilmington Sav. Fun Socy, FSB*, 144 AD3d 985, 986; *EMC Mtge. Corp v. Patella*, 279 AD2d 604, 605). A lender can revoke its election to accelerate a mortgage by an affirmative act of revocation which is made within the statute of limitations period (*Federal Natl. Mtge. Assn. v. Mebane*, 208 AD2d 892, 894; *Kashipour v. Wilmington Sav. Fund. Socy, FSB*, 144 AD3d at 987; *EMC Mtge. Corp v. Patella*, 279 AD2d at 606).

***3** In the instant case, the debt was accelerated when the first action was commenced in 2010. Plaintiff's predecessor-in-interest then voluntarily discontinued said action, which action was discontinued pursuant to the Order of Hon. George Ceresia dated September 12, 2013. The Court finds that plaintiff's predecessor-in-interest's distinct intention to voluntarily discontinue the first (and the second) action was an affirmative act of revocation of the election to accelerate and, as such, the statute of limitations has not run (*see*, *Wells Fargo Bank, N.A. as Trustee Carrington Mortg. Loan Tr. v. Rodriguez*, 62 Misc 3d 1211(A) (NY Sup. Ct. 2019); *U.S. Bank N.A. v. Wongsonadi*, 55 Misc 3d 1207 [A] [Sup Ct Queens Co 2017]; *U.S. Bank Nat. Ass'n v. Deochand*, 2017 NY Slip Op 30472[U] [Sup. Ct., Queens Cnty. 2017]; *Assyag v. Wells Fargo Bank, N.A.*, 2016 WL 6138269 [Sup.Ct., Queens Cnty. 2016]; *4 Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.*, 2016 WL 2839341 [Sup.Ct., New York Cnty. 2016]). To be sure, "when an action is discontinued, it is as if had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Newman v. Newaman*, 245 AD2d 353, 354). Moreover, plaintiff's subsequent actions of sending several default notices to Paula Jo between 2012 and 2017 are consistent with the Court's finding that there was a clear intention to revoke acceleration with both the 2010 and 2014 voluntary discontinuances. These letters are attached

to plaintiff's opposition to defendants' motion for summary judgment as Exhibit "L."

Therefore, defendants' motion for summary dismissal due to expiration of the statute of limitations is denied.

Turning next to plaintiff's motion for summary judgment, it is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage, and default in payment after due demand (*see*, CPLR § 3212; *United Cos. Lending Corp. v. Hingos*, 283 AD2d 764; *North Bright Capital, LLC v. 705 Flatbush Realty, LLC*, 66 AD3d 977). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion, plaintiff submits, *inter alia,* the affidavit of Michael Bennett, Assistant Secretary of Rushmore Loan Management Services, LLC, Appointed Attorney in-fact-for plaintiff ("Rushmore"). Mr. Bennett states that based upon a personal review of Rushmore's business records, which include the records from plaintiff:

> "[t]he Mortgage has been assigned by an Assignment of Mortgage, dated July 3, 2008 from Homestead Funding Corp. to Countrywide Bank FSB, and recorded August 12, 2008 ... in the Office of the Rensselaer County Clerk. The Mortgage has been subsequently assigned by a Gap Assignment of Mortgage, dated July 12, 2010 from Mortgage Electronic Registration Systems, Inc., as nominee for Homestead Funding Corp. dba First Niagara Mortgage to Homestead Funding Corp., and recorded August 12, 2010 ... Office of the Rensselaer County Clerk. The Mortgage has been subsequently assigned by a Gap Assignment of Mortgage, dated August 2, 2010 from Bank of America, N.A. successor by merger to Countrywide Bank, N.A. formerly known as Countrywide Bank, FSB to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Bank, FSB, and recorded ... in the Office of the Rensselaer County Clerk. The Mortgage has been subsequently assigned by an Assignment of Mortgage, dated July 12, 2010 from Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Bank, FSB to BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P., and recorded August 12, 2010 ... in the Office of the Rensselaer County Clerk. The Mortgage has been subsequently assigned by an Assignment of Mortgage, dated January 16, 2013 from Bank of America, N.A. to Nationstar Mortgage LLC, and recorded February 22, 2013 ... in the Office of the Rensselaer County Clerk. The Mortgage has been subsequently assigned by an Assignment of Mortgage, dated July 7, 2016 from Nationstar Mortgage LLC to U.S. Bank National Association, not in its individual capacity but solely as Trustee for the RMAC Trust, Series 2016-CTT, and recorded August 11, 2016 ... in the Office of the Rensselaer County Clerk."

***4** Mr. Bennett further states that plaintiff had possession of the note on April 28, 2016 and was in possession of the note prior to April 28, 2017. Mr. Bennett affirms that defendants are in default under the terms and conditions of the note and mortgage because the May 1, 2011 payment and subsequent payments were not made. Mr. Bennett further affirms that a default notice was sent to Paula Jo on January 5, 2017. Additionally, 90 day pre-foreclosure notices were sent by first-class mail and certified mail to Paula Jo on November 2, 2016.

Based upon plaintiff's submission of the notes, mortgages, the CEMA and Mr. Bennett's affidavit evidencing defendants' failure to make the contractually required loan payments, plaintiff has established its prima facie case of entitlement to summary judgment.

In opposition, defendants submit, among other things, an affirmation from counsel, Christian P. Morris. Mr. Morris contends that a question of fact exists with respect to the plaintiff's standing as certain assignments in the chain of possession of the mortgage were defective and that there is no evidence that plaintiff was in physical possession of the note when the action was commenced. Mr. Morris also contends that Mr. Bennett's affidavit is inadmissible and insufficient to establish plaintiff's prima facie case and that the statute of limitations has run.

Mr. Bennett properly laid the foundation for the affidavit to qualify the records relied upon as business records. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (*People v. Brown*, 13

NY3d 332, 341). The factual allegations set forth in Mr. Bennett's affidavit, including a personal review of the records, sufficiently established the admissibility of his statements under the business records exception to the hearsay rule (*see*, *Deutsche Bank Natl. Trust Co. v. Monica*, 131 AD3d 737; *Portfolio Recovery Assoc., LLC v. Lall*, 127 AD3d 576; *Merrill Lynch Bus. Fin. Servs. Inc. v. Trataros Constr., Inc.*, 30 AD3d 336).

Mr. Bennett affirms that plaintiff had possession of the subject notes prior to and at the time of commencement. A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (*see*, *Aurora Loan Services, LLC v. Taylor*, 114 AD3d 627; *Deutsche Bank Natl. Trust Co. v. Whalen*, 107 AD3d 931; *Bank of NY v. Silverberg*, 86 AD3d 274). "A plaintiff may demonstrate that it is the holder or assignee of the underlying note 'by showing either a written assignment of the underlying note or the physical delivery of the note.' " *Aurora Loan Servs., LLC v. Mercius*, 138 AD3d 650, 651, quoting *U.S. Bank N.A. v. Guy*, 125 AD3d 846. Although Mr. Morris argues that Mr. Bennett's affidavit is insufficient because he merely "looked at a computer maintained by a company he works for," there is no requirement that plaintiff establish how it came into possession of the endorsed in blank note to be able to enforce it (*see*, *PennyMac Corp. v. Chavez*, 144 AD3d 1006). Moreover, as plaintiff has demonstrated its standing by demonstrating that it was the holder of, and in possession of, the relevant note at the time the instant action was commenced (April 28, 2017), any challenge to the assignments is insufficient to demonstrate that plaintiff lacks standing.

***5** The Court finds that the defendants' conclusory allegations fail to demonstrate the existence of questions of fact on the issue of standing on the part of the plaintiff. Here, plaintiff has dispatched with its burden of proof by submitting a note bearing the endorsement in blank, the duly recorded assignments evidencing a chain of custody of the note and evidencing possession prior to commencement, all corroborated by Mr. Bennett's affidavit which properly constitutes an admissible business record pursuant to CPLR § 4518. Accordingly, plaintiff's standing has been demonstrated. The remaining affirmative defenses have been reviewed and deemed to be without merit.

Notwithstanding the general denials in the answer, absent from the opposition papers are any allegations by the defendants denying their continuous default in payment. Thus, even when viewed in the light most favorable to defendants, the opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of plaintiff's claims for a judgment of foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR § 3211[e]; *see*, *Emigrant Mtge. Co., Inc. v. Beckerman*, 105 AD3d 895).

Inasmuch as defendant has failed to present any question of fact which would require a hearing or to establish any reason why the Court should invoke its equity powers and intercede in this foreclosure action, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted; and it is further ORDERED that the defendants' Answer is stricken and is deemed to be a Notice of Appearance entitling his attorney to notice of all future proceedings herein.

The Court has considered the other arguments raised by the defendants and finds them to be without merit.

The Court simultaneously signs the proposed Judgment submitted by plaintiff, as modified.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.

All Citations

Slip Copy, 63 Misc.3d 1224(A), 2019 WL 2093911 (Table), 2018 N.Y. Slip Op. 51992(U)

Footnotes

1 At some point Paula Jo transferred the property to defendant Creative Encounters, LLC, which is the current owner of the property.

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63 Misc.3d 1224(A), 2019 WL 2093911, 2018 N.Y. Slip Op. 51992(U)

End of Document

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55 Misc.3d 1207(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, Queens County, New York.

U.S. BANK NATIONAL ASSOCIATION
as trustee for RASC–2005KS5, Plaintiff,
v.
Ricky WONGSONADI, USA Realty & Management Group, Inc., Mortgage Electronic Registration Systems, Inc., as nominee for Fremont Investment & Loan, "JOHN DOE No.1" to "JOHN DOE # 10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint, Defendants.
Ricky Wongsonadi, Third–Party Plaintiff,
v.
Ansar Mussaleen and USA Realty & Management Group Inc., Third–Party Defendants.

No. 703762/2015.
|
April 5, 2017.

Opinion

ROBERT J. McDONALD, J.

***1** The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 3212 granting plaintiff summary judgment, striking defendants Ricky Wongsonadi and USA Realty & Management Group, Inc.'s answers, amending the caption, appointing a referee, and awarding plaintiff costs of this motion; on this cross-motion by defendant/third-party plaintiff RICKY WONGSONADI (Wongsonadi) for an Order pursuant to CPLR 3211(5) dismissing the action on the grounds that it is barred by the statute of limitations; and on this cross-motion by defendant/third-party defendant USA REALTY & MANAGEMENT GROUP, INC. (USA Realty) for an Order dismissing the complaint as plaintiff is barred by the statute of limitations, lacks standing to bring this action, and failed to comply with a condition precedent:

Papers/	Numbered
Notice of Motion–Affirmation–Exhibits–Memo. of Law EF	37–55
Wongsonadi's Notice of Cross–Motion EF	57–62
USA Realty's Notice of Cross–Motion EF	79–86
Plaintiff's Reply & Opposition to Cross–Motion EF	87
Wongsonadi's Reply EF	88–89

This foreclosure action pertains to property located at 111–15A f/k/a 111–17 157th Street, Jamaica, New York 11433.

Based on the record before the Court, on February 7, 2005, Wongsonadi obtained a loan from Fremont Investment & Loan in the principal amount of $262,880, secured by a mortgage on the subject premises. Plaintiff asserts that it is the holder of the note and mortgage, and Wongsonadi defaulted pursuant to the terms of the note and mortgage by failing to make the monthly mortgage payments beginning on February 1, 2009 and continuing thereafter.

Based on the default, plaintiff commenced a prior foreclosure action by filing a summons and complaint and notice of pendency on August 10, 2009. The action was voluntarily discontinued and the lis pendens was cancelled on March 8, 2011.

Plaintiff then commenced this foreclosure action by filing a summons and complaint and notice of pendency on April 17, 2015. Defendant USA Realty joined issue by filing an answer with counterclaims on May 28, 2015. Defendant Wongsonadi joined issue by filing an answer with counterclaims on June 29, 2015. All other defendants are in default. This matter was released from the residential foreclosure settlement conference part on October 28, 2015 as Wongsonadi did not

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reside at the subject property. Wongsonadi then commenced a third-party action against Ansar Mussaleen and USA Realty on March 4, 2016.

Plaintiff now moves for an Order of Reference. Defendants Wongsonadi and USA Realty each oppose the motion and cross-move to dismiss the action on the grounds that the statute of limitations has run. The cross-motions to dismiss the action will be addressed herein first.

On a motion pursuant to CPLR 3211(a)(5)to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (*Kitty Jie Yuan v. 2368 W. 12th St ., LLC,* 119 AD3d 674 [2d Dept.2014]). Once a mortgage debt is accelerated, the borrower's right and obligation to make monthly installments ceases, all sums become immediately due and payable, and the six-year statute of limitations begins to run on the entire mortgage debt (see CPLR 213[4]; *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604 [2d Dept.2001]; *Federal Natl. Mtge. Assn. v. Mebane,* 208 A.D.2d 892 [2d Dept.1994]). A lender may revoke its election to accelerate the mortgage through an affirmative act of revocation occurring during the six-year statute of limitations (see *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604 [2d Dept.2001]).

***2** Here, the debt was accelerated upon commencement of the first action on August 10, 2009. Defendants contend, therefore, that the statute of limitations expired on or about August 10, 2015, and the voluntary discontinuance was not an affirmative act by the lender to revoke its election to accelerate (see *Federal Natl. Mtge. Assn. v.. Mebane,* 208 A.D.2d 892 [2d Dept.1994]). Thus, defendants assert that this action is time-barred. Plaintiff contends that this action is timely because the voluntary discontinuance of the prior action acted as a deceleration of the debt.

Although a court dismissal of a prior action for failure to prosecute, failure to appear at a conference or lack of personal jurisdiction or the acceptance of additional payments after acceleration do not constitute an act of revocation, (see e.g. *Clayton Natl., Inc. v. Guldi,* 307 A.D.2d 982 [2d Dept.2003]; *Federal Nat. Mortg. Ass'n v. Mebane,* 208 A.D.2d 892 [2d Dept.1994]), here plaintiff voluntarily discontinued the prior action before the six year statute of limitations expired. “When an action is discontinued, it is as if had never been; everything done in the action is annulled and all prior orders in the case are nullified” (*Newman v. Newaman,* 245 A.D.2d 353, 354 [2d Dept.1997]). Thus, the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action. Accordingly, this Court finds that discontinuing the prior foreclosure action was an affirmative act of revocation (see *U.S. Bank Nat. Ass'n v. Deochand,* 2017 N.Y. Slip Op 30472[U][Sup. Ct., Queens Cnty.2017]; *Assyag v. Wells Fargo Bank, N.A.,* 2016 WL 6138269 [Sup.Ct., Queens Cnty.2016]; *4 Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.,* 2016 WL 2839341 [Sup.Ct., New York Cnty.2016]). Thus, the statute of limitations has not run, and plaintiff's action is timely.

Turning to plaintiff's motion for summary judgment, it is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage, and default in payment after due demand (see *American Airlines Federal Credit Union v. Mohamed,* 117 AD3d [2d Dept.2014]; *TD Bank, N.A. v. 126 Spruce Street, LLC,* 117 AD3d 716 [2d Dept.2014]; *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 AD3d [2d Dept.2012]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion, plaintiff submits the affidavit of Sony Prudent, a Senior Loan Analyst for Ocwen Loan Servicing, LLC (Ocwen), the loan servicer for plaintiff. Sony Prudent states that based upon a personal review of Ocwen's business records, which include the records from plaintiff and plaintiff's prior loan servicer GMAC Mortgage, LLC, the note and mortgage were assigned to plaintiff by physical transfer to plaintiff on May 1, 2005. Since that time, plaintiff has been in possession of both the original note and mortgage. Sony Prudent affirms that defendant is in default under the terms and conditions of the note and mortgage because the February 1, 2009 payment and subsequent payments were not made. Sony Prudent further affirms that a default notice was sent to Wongsonadi on April 15, 2015. Additionally, 90 day pre-foreclosure notices were sent by first-class mail and certified mail to defendant on September 29, 2014.

***3** Based upon plaintiff's submission of the note, mortgage, and Sony Prudent's affidavit evidencing defendant Wongsonadi's failure to make the contractually required loan payments, plaintiff has established its prima facie case of entitlement to summary judgment.

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In opposition, defendant USA Realty contends that summary judgment is not warranted as plaintiff lacks standing and failed to comply with a condition precedent. USA Realty also contends that Sony Prudent's is inadmissible and insufficient to establish plaintiff's prima facie case.

Sony Prudent properly laid the foundation for the affidavit to qualify the records relied upon as business records. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (*People v. Brown,* 13 NY3d 332, 341 [2009]). The factual allegations set forth in Sony Prudent's affidavit, including a personal review of the records, sufficiently established the admissibility of her statements under the business records exception to the hearsay rule (see *Deutsche Bank Natl. Trust Co. v. Monica,* 131 AD3d 737 [3d Dept.2015]; *Portfolio Recovery Assoc., LLC v. Lall,* 127 AD3d 576 [1st Dept.2015]; *Merrill Lynch Bus. Fin. Servs. Inc. v. Trataros Constr., Inc.,* 30 AD3d 336 [1st Dept.2006]).

Sony Prudent affirms that plaintiff had physical possession of the subject note prior to and at the time of commencement. A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see *Aurora Loan Services, LLC v. Taylor,* 114 AD3d 627 [2d Dept.2014]; *Deutsche Bank Natl. Trust Co. v. Whalen,* 107 AD3d 931 [2d Dept.2013]; *Bank of N.Y. v. Silverberg,* 86 AD3d 274 [2d Dept.2011]). "A plaintiff may demonstrate that it is the holder or assignee of the underlying note 'by showing either a written assignment of the underlying note or the physical delivery of the note' " (*Aurora Loan Servs., LLC v. Mercius,* 138 AD3d 650, 651 [2d Dept.2016] quoting *U.S. Bank N.A. v. Guy,* 125 AD3d 846 [2d Dept.2015]). Although USA Realty contends that Sony Prudent's affidavit is insufficient in that it does not provide any factual details concerning the physical delivery of the note to plaintiff, there is no requirement that plaintiff establish how it came into possession of the endorsed in blank note to be able to enforce it (see *PennyMac Corp. v. Chavez,* 144 AD3d 1006 [2d Dept.2016]; *JPMorgan Chase Bank, N.A. v. Weinberger,* 143 AD3d [2d Dept.2016]). Moreover, as plaintiff has demonstrated its standing by demonstrating that it was the holder of, and in possession of, the note at the time this action was commenced, any challenge to the assignments is insufficient to demonstrate that plaintiff lacks standing.

***4** USA Realty also argues that plaintiff failed to satisfy a condition precedent by failing to provide a default notice as required by the terms of the subject mortgage. As defendant Wongsonadi has not denied receipt of the notice, USA Realty's argument is mere speculation and insufficient to defeat a motion for summary judgment. In any event, Sony Prudent affirms that a notice of default was sent to Wongsonadi on April 15, 2009. Sony Prudent's affidavit is sufficient to demonstrate compliance with the terms of the note and mortgage (see *Indymac Bank, F.S.B. v. Kamen,* 68 AD3d 931 [2d Dept.2009]).

Lastly, defendant Wongsonadi argues that the motion for summary judgment is premature as discovery is pending in the third-party action. Specifically, Wongsonadi contends that if the foreclosure action proceeds, it would prejudice his rights with respect to his suit to have the subject property transferred back to him.

Wongsonadi does not contest the existence of the note, mortgage, and default thereunder. Rather, he contends that this motion for summary judgment is premature, however, Wongsonadi fails to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; *Medina v. Rodriguez,* 92 AD3d 850 [2d Dept.2012]; *Hanover Ins. Co. v. Prakin,* 81 AD3d 778 [2d Dept.2011]; *Essex Ins. Co. v. Michael Cunningham Carpentry,* 74 AD3d 733 [2d Dept.2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.,* 67 AD3d 978 [2d Dept.2009]; *Gross v. Marc,* 2 AD3d 681 [2d Dept.2003]). Additionally, any dispute as to the amount owed by Wongsonadi to plaintiff may be resolved after a referee is appointed and the existence of such a dispute does not preclude the issuance of summary judgment (see *Crest/Good Mfg. Co., Inc. v. Baumann,* 160 A.D.2d 831 [2d Dept.1990]).

The remainder of defendants' opposition is insufficient to raise a question of fact. As defendants have failed to raise a material issue of fact in opposition, plaintiff is entitled to the relief sought (see *Baron Assoc., LLC v. Garcia Group Enters., Inc.,* 96 AD3d 793 [2d Dept.2012]; *Wells Fargo Bank Minn., Natl. Assn. v. Perez,* 41 AD3d 590 [2d Dept.2007], lv dismissed 10 NY3d 791 [2008]).

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Accordingly, for the reasons stated above, plaintiff's motion for summary judgment is granted. Plaintiff's branches of its application for a default judgment against the remaining defaulting defendants and for the appointment of a referee to compute the amounts due under the subject mortgage are also granted. The submissions further reflect that plaintiff is entitled to amend the caption.

Defendant RICKY WONGSONADI's cross-motion and defendant USA REALTY & MANAGEMENT GROUP, INC.'s cross-motion are both denied.

Settle Order.

All Citations

55 Misc.3d 1207(A), 55 N.Y.S.3d 695 (Table), 2017 WL 1333442, 2017 N.Y. Slip Op. 50452(U)

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