

June 25, 2020

VIA FEDERAL EXPRESS

New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *U.S. Bank, N.A. v. Creative Encounters, LLC*
APL-2020-00088
Appellate Division, Third Department Dkt. No. 529451
Rensselaer County Index No. 256173

To the Honorable Court:

This law firm represents plaintiff-appellant U.S. Bank, N.A. in the above-referenced appeal. We submit this Jurisdictional Response pursuant to Rule 500.10(a) and in response to this Court's June 18, 2020 Jurisdictional Inquiry.

A. Preliminary Statement.

This Court has subject matter jurisdiction over this appeal pursuant to CPLR 5601(a); the appellate division order on appeal finally determined the action and two justices dissented on an issue of law. Accepting this appeal also would be in the public interest.

This appeal concerns the applicability of the statute of limitations to a mortgage foreclosure action on an installment loan with a maturity date of July 1, 2038. The Supreme Court (Rensselaer County) properly granted judgment of foreclosure and sale because U.S. Bank satisfied all requirements for judgment, including showing this action was timely commenced. The Supreme Court correctly found this action timely because any prior acceleration of the at-issue loan was revoked before commencement of this action.

The Appellate Division, Third Department, over a two-justice dissent, held the action time-barred because, as a matter of law, the loan was not de-accelerated before commencement of this action. The Appellate Division order finally determines this action as it dismisses the complaint in its entirety. No further claims remain pending before the Supreme Court.

This Court should accept jurisdiction and reverse the Appellate Division order. The action was timely commenced because any prior acceleration was revoked when the previous foreclosure actions were discontinued, and the lender indicated it would accept less than the full accelerated amount. The statute of limitations also tolled during the pendency of the prior actions; and limitations expiration is contrary to the terms of the mortgage loan.

This Court has the opportunity to correct the misapplication of these principles of law by the lower courts which has resulted in the improper dismissal and cancellation of duly executed mortgages statewide.

B. Statement of Facts.

Paula Jo Tufano executed a \$182,000 promissory note in June 2008. (R38.) The note is secured by a mortgage encumbering Ms. Tufano's property in Rensselaer County, New York. (R61.) Ms. Tufano conveyed the property to Creative Encounters, LLC in June 2013. (R346.)

BAC Home Loans Servicing, LP commenced an action to foreclose the mortgage in August 2010. (R465.) That action was voluntarily discontinued in September 2013. (R475.) Before discontinuance Ms. Tufano's lender notified her it would accept less than the full accelerated amount. (R675.)

A second action to foreclose the mortgage was filed in October 2014. (R478.) That action was voluntarily discontinued in March 2016. (R492.) Ms. Tufano's lender again notified her before discontinuance it would accept less than the full accelerated amount. (R618.)

After the second action was discontinued Ms. Tufano was provided further notice that less than the full accelerated amount was due and her failure to cure might result in future acceleration and loss of her home. (R87; R595; R601.) Ms. Tufano did not cure her default.

U.S. Bank commenced this action to foreclose the mortgage in April 2017. (R494.) Ms. Tufano and Creative Encounters, LLC served an answer with counterclaims for fraud and slander of title. (R350.) U.S. Bank served a reply to the counterclaims. (R574.)

U.S. Bank moved for summary judgment and an order of reference on April 12, 2018. (R31, ¶ 13.) The Supreme Court (Hon. Michael Melkonian) entered an order on April 23, 2018, granting summary judgment and an order of reference in U.S. Bank's favor and dismissed the counterclaims. (R156.)

The referee returned a report of amount due in May 2018. (R161.) By notice of motion dated July 6, 2018, U.S. Bank moved to confirm the referee report and for a judgment of foreclosure and sale. (R20.) Ms. Tufano and Creative Encounters, LLC opposed entry of judgment of foreclosure and sale and cross-moved to vacate the April 2018 summary judgment order. (R210.) The Supreme Court (Hon. Michael Melkonian) entered an order on November 15, 2018, vacating the April 2018 summary judgment order and denying the motion for judgment of foreclosure and sale without prejudice. (R588.)

By notice of motion dated December 12, 2018, Ms. Tufano and Creative Encounters, LLC moved for summary judgment dismissing the complaint in its entirety as barred by the statute of limitations. (R369.) U.S. Bank opposed dismissal on the grounds any acceleration caused by the two prior actions was revoked. (R518.) The Supreme Court (Hon. Michael Melkonian) entered an order on April 24, 2019, denying Ms. Tufano and Creative Encounters, LLC's motion for summary judgment dismissing the complaint finding the action timely. (R8.) The same order granted U.S. Bank's July 2018 motion for judgment of foreclosure and sale and struck Ms. Tufano and Creative Encounters, LLC's answer containing the counterclaims. (*Id.*)

Ms. Tufano and Creative Encounters, LLC took an appeal as of right to the Appellate Division, Third Department. (R6.) The appellants' brief asked for the complaint be dismissed, or in the alternative, the case be remanded for further proceedings. The appellants' brief did not seek reinstatement of the counterclaims.

The Appellate Division issued a memorandum and order on May 14, 2020. Justices Lynch, Clark, and Reynolds Fitzgerald held the mortgage foreclosure action barred by the statute of limitations and ordered the motion for judgment of foreclosure and sale denied, and the cross-motion for summary judgment dismissing the complaint granted. Because Ms. Tufano and Creative Encounters, LLC abandoned their counterclaims in the appellate briefing, the Appellate Division did not address or reinstate them. Justices Pritzker and Devine dissented finding as a matter of law the foreclosure action was timely and that judgment should be affirmed.

C. This Court Has Subject Matter Jurisdiction under CPLR 5601(a).

An appeal to this Court may be taken as of right in an action originating in the supreme court "from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal." CPLR 5601(a). This case falls squarely within that jurisdiction.

(1) The Order of the Appellate Division Finally Determines the Action.

"The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing." *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995). "Nonetheless, a fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters." *Id.* The only causes of action asserted in this action were U.S. Bank's complaint for mortgage foreclosure, and Ms. Tufano and Creative Encounters, LLC's fraud and slander of title counterclaims. (R350; R494.)

The foreclosure complaint was finally resolved by the Appellate Division's May 14, 2020 memorandum and order as it grants Ms. Tufano and Creative Encounters, LLC's motion for summary judgment and dismisses the complaint. (Op. at 9.)

The counterclaims were finally resolved in the April 24, 2019 order granting final judgment in favor U.S. Bank. (R8.) Ms. Tufano and Creative Encounters, LLC's appellate brief did not seek reinstatement of the counterclaims, abandoning any argument as to their dismissal. *See, e.g., Micklas v. Town of Halfmoon Planning Board*, 170 A.D.3d 1483, 1485 (3d Dep't 2019) ("Petitioners could have advanced any issues regarding that order on their appeal from the final judgment, but failed to brief those issues and have therefore abandoned them."). The Appellate Division's May 14, 2020 memorandum and order does not reverse the April 24, 2019 order to the extent it dismissed the counterclaims and did not remand for consideration of those claims.

(2) There is a Dissent by Two Justices on an Issue of Law.

Justices Pritzker and Devine dissented from the majority opinion denying U.S. Bank's motion for judgment and foreclosure and sale and granting the motion to dismiss the complaint as time-barred. The issue was one of law as to whether a prior acceleration of the loan was revoked rendering this action timely commenced.

Justice Pritzker wrote he and Justice Devine "respectfully dissent because we find the debt was, *as a matter of law*, de-accelerated within the applicable statute of limitations and the action is not time-barred." (Op. at 6) (emphasis added). This was based on the discontinuance of the prior actions along with the various notices seeking less than the full amount due, which the dissent found as a matter of law "served to renew the installment payments at the option of Tufano and, therefore, constituted affirmative acts revoking the prior acceleration of the debt well within the six-year statute of limitations." (Op. at 7.) This two-justice dissent on the law was in U.S. Bank's favor, the party taking this appeal.

(3) This Court Should Accept Review to Clarify Statute of Limitations Law.

The erroneous holding reached by the majority of the Appellate Division is a symptom of a common misconception of law held by the lower courts of this State. This Court explained 135 years ago when a "foreclosure action [is] discontinued . . . all the proceedings therein [are] annulled." *Loeb v. Willis*, 100 N.Y. 231, 235 (1885). "By the discontinuance of an action . . . what has been done therein is also annulled, so that the action is as if it never had been." *Id.*; see also *Brown v. Cleveland Trust Co.*, 233 N.Y. 399, 406 (1922) ("By the discontinuance of an action . . . what has been done therein is [] annulled, so that the action is as if it had never been."). Any acceleration declared by the two prior foreclosure actions was annulled when those actions were voluntarily discontinued. The Appellate Division strayed from this Court-established precedent. If filing the complaint accelerated the loan, withdrawal of the complaint has the opposite effect.

This Court should additionally accept review to examine the impact of the Court's recent decision in *Lubonty v. U.S. Bank, N.A.*, 34 N.Y.3d 250 (2019)—which was decided after U.S. Bank filed its brief in the Appellate Division. In *Lubonty* this Court held the statute of limitations is tolled under CPLR 204(a), even while a first mortgage foreclosure action is pending, so long as a statutory prohibition from commencing a second action is imposed. *Id.* at 261.

While *Lubonty* concerned a bankruptcy stay under 11 U.S.C. § 362, the logic and reasoning of the decision is equally applicable to the statutory prohibition imposed by RPAPL § 1301(3). The plain language of RPAPL § 1301(3) provides: "While the action is pending or after final judgment for the plaintiff therein *no other action shall be commenced* or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." RPAPL § 1301(3) (emphasis added).

The statute of limitations to commence this action was tolled from August 2010 through September 2013, and from October 2014 through March 2016, while the two prior actions were pending. Judge Stein implicitly recognized in her *Lubonty* dissent that RPAPL § 1301(3) was a bar worthy of CPLR 204(a) application when she noted "under RPAPL 1301(3), U.S. Bank could not have commenced a third

foreclosure action while the second foreclosure action was pending 'without leave of the court.'" *Lubonty*, 34 N.Y.3d at 265 n.10 (Stein J., dissenting). That is the situation presented in this appeal.

The ultimate flaw in the Appellate Division's reasoning, the same error being committed in other cases through the State, is failure to adhere to the plain language of the parties' contract. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) (citations and internal quotation marks omitted). "[A] court may not rewrite clear and unambiguous contracts." *Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 303 (1999).

Under the terms of Ms. Tufano's note and mortgage, the statute of limitations has not expired on all possible future accelerations. The note and mortgage require Ms. Tufano to make monthly payments until the maturity date of July 1, 2038, at which time she is obligated to pay the loan in full. (R38; R61.) Even assuming some prior acceleration, all sums not paid will again come due. If Ms. Tufano fails to pay all amounts still due in 2038, she will be in default, authorizing a future acceleration and foreclosure. Acceleration is not self-executing. Cases holding the statute of limitations accrues on each installment are contrary to the terms of Mr. Tufano's note and mortgage, which states acceleration is at the lender's option, and not waived through forbearance or delay.

Holding the statute of limitations expired when not all future default and accelerations have occurred effects an impermissible rewrite of the mortgage agreement. Ms. Tufano and U.S. Bank contracted for a thirty-year relationship. That relationship should be honored.

* * *

Having demonstrated the order on appeal falls within this Court's jurisdiction under CPLR 5601(a) as an order finally determining the action from which two-justices dissented on the law, U.S. Bank respectfully requests this Court accept jurisdiction and set a briefing schedule in the normal course with oral argument.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric M. Levine", with a long horizontal flourish extending to the right.

Eric M. Levine