Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

LUIS AQUINO and FRANCISCA AQUINO, x

Plaintiffs,

-against-

VENTURES TRUST 2013-I-H-R BY MCM CAPITAL PARTNERS,

Defendants.
x

Index Number 700398/ 2016

Motion Date December 13, 2017

Motion Seq. No. 1

The following papers read on this motion by plaintiffs Luis Aquino and Francisca Aquino pursuant to CPLR 3212 for summary judgment against defendant, to strike the answer of defendant, and to dismiss the counterclaim asserted against them; and this cross motion by defendant for summary judgment and dismissing the complaint pursuant to CPLR 3212.

| | Papers Numbered |
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| Notice of Motion - Affidavits - Exhibits | EF Doc. #22-#43 |
| Notice of Cross Motion - Affidavits - Exhibits | EF Doc. #44-#55 |
| Answering Affidavits - Exhibits | EF Doc. #56-#58 |
| Reply Affidavits | EF Doc. #60 |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In 2006, plaintiffs Luis Aquino and Francisca Aquino executed a mortgage in favor of Ameriquest Mortgage Co. (Ameriquest) (the Ameriquest mortgage) that encumbered the real property known as 153-38 78th Street, Howard Beach, New York (the subject property)

owned by Luis Aquino pursuant to a deed dated January 31, 2002. The Ameriquest mortgage secured a 30-year note executed by plaintiffs, pursuant to which they promised to repay the underlying loan in the principal sum of $574,000.00, plus interest (the Ameriquest note).

On October 19, 2009, CitiMortgage, Inc. (CitiMortgage) commenced an action against Luis Aquino and Francisca Aquino, among others, entitled *CitiMortgage, Inc. v Aquino*, (Supreme Court, Queens County Index No. 28017/2009) (the 2009 foreclosure action) to foreclose the Ameriquest mortgage. The complaint alleged that CitiMortgage was the owner and holder of both the note and mortgage, or had been delegated the authority to bring a foreclosure action by the owner and holder of the note, and that the Aquinos had defaulted by failing to make the monthly mortgage payment beginning on July 1, 2009.

On the basis of a stipulation dated April 2, 2015 and filed on April 4, 2015, entered into by CitiMortgage and the Aquinos, the 2009 foreclosure action was discontinued without prejudice to CitiMortgage and the affirmative defenses and counterclaims[1] of the Aquinos were discontinued without prejudice. A separate stipulation provided for the cancellation and discharge of the notice of pendency. CitiMortgage and the Aquinos also entered into an agreement dated April 2, 2012, whereby CitiMortgage agreed to pay the Aquinos' legal fees in the amount of $6,000.00. Such agreement provided that the payment of $6,000.00 in legals fees was not "in any way an admission of liability or the truth of [the Aquinos'] counterclaims."[2]

On January 13, 2016, plaintiffs Luis Aquino and Francisca Aquino commenced this action against defendant pursuant to RPAPL 1501(4) to cancel and discharge of record the Ameriquest mortgage encumbering the subject property. The complaint alleges that plaintiff Luis Aquino acquired and holds title to the property by virtue of a deed dated January 31, 2002, and defendant claims a mortgage interest in the property which is adverse to such interest. It also alleges that enforcement of the Ameriquest mortgage is barred by the applicable six-year statute of limitations (*see* CPLR 213[4]), which allegedly began to run when CitiMortgage accelerated the debt by commencing the 2009 foreclosure action.

Defendant served an answer, asserting various affirmative defenses, including based upon its claims that the voluntary discontinuance of the 2009 foreclosure action constituted revocation of the prior election to accelerate the mortgage debt and an acknowledgment by

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[1] No copy of the answer or counterclaims interposed by the Aquinos in the 2009 foreclosure action has been submitted herein.

[2] *see* n 1.

plaintiffs of their debt and intention to repay it, and plaintiffs' submission of a loan modification application constituted a revival of the statute of limitations. Defendant also interposed counterclaims for unjust enrichment based upon advances made by defendant and its predecessor in relation to the subject property, since the commencement of the 2009 foreclosure action, and an award of attorneys' fees pursuant to paragraph 9 of the Ameriquest mortgage. Plaintiffs served a reply.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

Under RPAPL 1501 (4), "any person having an estate or interest in the real property subject" to a mortgage may maintain an action to cancel and discharge such mortgage where "the period allowed by the applicable statute of limitation[s] for the commencement of an action to foreclose a mortgage ... has expired." "To maintain a cognizable cause of action under RPAPL article 15, a plaintiff must describe in his or her complaint the nature of the plaintiff's interest in the real property and the source of this interest (*see* RPAPL 1515[1])" (*Guccione v Estate of Guccione*, 84 AD3d 867, 869 [2d Dept 2011]).

Plaintiffs do not allege in their complaint that plaintiff Francisca Aquino has an estate or interest in the subject property. Rather, they allege that plaintiff Francisca Aquino is named as a party plaintiff herein "solely because she is a signatory to the [m]ortgage" (Plaintiffs' Exhibit "H," Complaint, ¶6). Consistent with this allegation, plaintiffs, in their prayer for relief in the complaint, seek a declaration that plaintiff Luis Aquino is vested with absolute title in fee simple in the subject property, free and clear of the Ameriquest mortgage (*see* RPAPL 1501[4]). To the extent plaintiffs now claim in their joint affidavit, in support of their motion, that *they* own the subject property, the January 31, 2002 deed names plaintiff Luis Aquino as the sole grantee and conveys no estate and ownership interest in the property to plaintiff Francisca Aquino. Plaintiffs submit no correction deed, subsequent deed, or other proof, indicating that plaintiff Francisca Aquino has any estate or ownership interest in the property. Thus, plaintiff Francisca Aquino has failed to establish, prima facie, that she has an estate or interest in the subject property within the meaning of RPAPL 1501(4) (*see Guccione v Estate of Guccione*, 84 AD3d 867; *Lennard v Chinkpoo Realty Holding Corp.*,

76 AD3d 1052 [2d Dept 2010]; *Soscia v Soscia*, 35 AD3d 841 [2d Dept 2006]; *see also Terrapin Industries, LLC v Bank of New York*, 137 AD3d 569 [1st Dept 2016]). That branch of the motion by plaintiff Francisca Aquino for summary judgment on the complaint and to strike the answer is denied.

With respect to the branch of the cross motion by defendant for summary judgment dismissing the complaint insofar as asserted against it by plaintiff Francisca Aquino, the January 31, 2002 deed grants no estate or interest in the property to plaintiff Francisca Aquino, and she alleges in the complaint that she has no estate or interest in the subject property. To the extent plaintiff Francisca Aquino now claims, in the joint affidavit, to co-own the property with Luis Aquino, she has failed to present any evidence to show such ownership (*see Guccione v Estate of Guccione*, 84 AD3d 867, 870). Nor does she move to amend the complaint to allege the nature and source of her claimed interest in the subject property (CPLR 3025, RPAPL 1515[1]). That branch of the cross motion by defendant for summary judgment dismissing the complaint insofar as asserted against it by plaintiff Francisca Aquino is granted.

With respect to the branch of the motion by plaintiff Luis Aquino for summary judgment on the complaint and to strike the answer, "[a] plaintiff in an action under RPAPL 1501(4) to clear a mortgage must prove that the statute of limitations on an action to foreclose the mortgage 'has expired' " (*Stewart Title Ins. Co. v Bank of New York Mellon*, 154 AD3d 656, 661 [2d Dept 2017]). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). In the case of a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]).[3] Once the debt has been accelerated by a demand or commencement of an action, however, the entire sum becomes due and the statute of limitations begins to run on the entire debt (*see U.S. Bank National Association v Gordon*, 158 AD3d 832 [2d Dept 2018]; *21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2d Dept 2017]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, the borrower must be provided with notice of the holder's decision to exercise the option to

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[3] In such case, recovery is limited to only those unpaid installments which accrued within the six-year period immediately preceding its commencement of the action (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592 [2d Dept 2008]; *see generally Lavin v Elmakiss*, 302 AD2d 638 [3d 2003]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]).

accelerate the maturity of a loan (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605-606), and such notice must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439 [2d Dept 2006]). "Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised (*see EMC Mtge. Corp. v Smith*, 18 AD3d at 603; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2d Dept 2003]; *Arbisser v Gelbelman*, 286 AD2d [693], 694 [2d Dept 2001])" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983). However, a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that the revocation is evidenced by an affirmative act occurring during the six-year statute of limitations period subsequent to the initiation of the 2009 foreclosure action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]).

Plaintiff Luis Aquino asserts that the applicable six-year statute of limitations expired by the time the instant action was commenced. He contends that the mortgage debt was accelerated on October 19, 2009, when the 2009 foreclosure action was commenced, and there is no longer any pending foreclosure action. In support of his motion, plaintiff Luis Aquino submits a copy of the complaint in the 2009 foreclosure action in which CitiMortgage elected to call due the entire amount secured by the mortgage and the stipulation of discontinuance of that action. He also submits plaintiffs' joint affidavit in which plaintiffs state they reside in the subject property, and admit they defaulted in payment under the Ameriquest mortgage. In that affidavit, plaintiffs also state they never were notified of "the bank's intention to revoke its acceleration of the debt," or consented to any such revocation. Plaintiffs further state that after the initial default, they never made any subsequent monthly payment, executed or received a loan modification agreement, or acknowledged the debt or an intention to repay it.

These submissions show that the mortgage debt was accelerated on or about October 19, 2009, the date on which the 2009 foreclosure action was instituted, more than six years before the commencement of this action, and there is no pending foreclosure action. Thus, plaintiff Luis Aquino has established, prima facie, that the applicable six-year statute of limitations expired by the time of the commencement of the instant action, and he is entitled to judgment as a matter of law on the complaint against defendant (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1070 [2d Dept 2017]; *Kashipour v Wilmington Sav. Fund Socy.*, FSB, 144 AD3d 985, 987 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2d Dept 2003]; *see also U.S. Bank, National Association v Kess*, 159 AD3d 767 [2d Dept 2018]). As plaintiff Luis

Aquino has met his burden, the burden shifts to defendant to raise a question of fact as to this showing or a bona fide defense.

In opposition and in support of its cross motion, defendant asserts that the Ameriquest mortgage remains enforceable. Defendant claims that CitiMortgage is its predecessor in interest, but lacked standing at the time of the commencement of the 2009 foreclosure action to accelerate the debt or to sue for foreclosure, because the note and mortgage had not yet been assigned to CitiMortgage, by physical delivery or pursuant to a written assignment of mortgage. Defendant argues the commencement of the 2009 foreclosure action was ineffective to constitute a valid exercise of the option to accelerate the debt and hence, enforcement of the Ameriquest mortgage is not barred by the applicable six-year statute of limitations (*see* CPLR 213[4]).

Defendant failed to raise a defense in its answer based upon its claim that CitiMortgage lacked standing to accelerate the debt, or to sue to bring the 2009 foreclosure action. Plaintiff maintains that defendant's failure to raise such a defense in its answer or in a timely motion to dismiss, constitutes a waiver (*see* CPLR 3211[e]). While the better practice would have been for defendant to plead the issue of CitiMortgage's alleged lack of authority to accelerate the debt, or to sue to bring the 2009 foreclosure action as an affirmative defense in its answer, defendant's failure to do so does not constitute a waiver (*see Ronder & Ronder, P.C. v Nationwide Abstract Corp.*, 99 AD2d 608 [3d Dept 1984]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3018:13, 3018:14, pp 309-313; CPLR 3212:10, p 18). Furthermore, since the 2009 foreclosure action was not brought by Ameriquest, the originator of the mortgage loan, plaintiff Luis Aquino may not claim surprise as to defendant's assertion herein that CitiMortgage lacked standing to bring the earlier action.

In opposition to plaintiff Luis Aquino's motion and in support of its cross motion, defendant submits a copy of a written assignment of mortgage dated November 4, 2009 and recorded on December 9, 2009, the Ameriquest note and an affidavit of Michelle Roark, a vice president of document control of CitiMortgage. As defendant correctly contends, these submissions raise a triable issue of fact as to whether CitiMortgage had standing to bring the 2009 foreclosure action.

The assignment of mortgage executed by Ameriquest on November 4, 2009 and recorded on December 9, 2009, purports to assign the Ameriquest mortgage and together with the note to CitiMortgage. The note bears, among other things, an endorsement by Ameriquest. In her affidavit, Roark states that CitiMortgage is the predecessor-in-interest to plaintiff and that she reviewed the business records regularly made and maintained by CitiMortgage in the course of its regularly conducted business activities as servicer of

residential loans, including the records relating to the Ameriquest note and mortgage. Roark also states that based upon her review of such records, the note and mortgage were assigned to CitiMortgage, by physical delivery of the note from HSBC Bank USA, National Association, as Trustee for the registered holders of the Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, Series 2006-AF2 (HSBC) to CitiMortgage on November 4, 2009 at CitiMortgage's office located in Missouri. Roark further states the note was endorsed by Ameriquest to HSBC.

The note, however, has confusing notations relative to the endorsements thereon. There are special endorsements and a blank endorsement. All are undated. With respect to the special endorsements, a "*" appears before the name "CitiMortgage, Inc." apparently to indicate the insertion of the name "HSBC Bank USA, National Association, as Trustee for the registered holders of the Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, Series 2006-AF2." It is unclear whether such insertion was before or after the name "CitiMortgage, Inc." first appeared on the note. It is also unclear as to when the blank endorsement by CitiMortgage first appeared on the note. Roark does not address the issue of the special endorsements and blank endorsement to CitiMortgage in her affidavit. As a consequence, defendant's own submissions raise a triable issue of fact as to whether CitiMortgage lacked standing to bring the 2009 foreclosure action.

Defendant also argues that even assuming CitiMortgage had standing to bring the 2009 foreclosure action, the commencement of that action did not trigger the running of the statute of limitations. According to defendant, the Ameriquest mortgage grants the right to the borrower to have enforcement of the mortgage stopped at any time before the judgment of foreclosure and sale is entered. Defendant asserts that because no judgment was entered in the 2009 foreclosure action, the acceleration of the mortgage debt did not occur.

Plaintiff contends that defendant has waived such defense, having not raised it in its answer or by a timely motion to dismiss. Defendant, however, asserted a defense based upon documentary evidence. Such defense encompasses its claim that the commencement of the 2009 foreclosure action did not trigger the running of the statute of limitations in the absence of entry of judgment in the 2009 foreclosure action. With respect to the merits of the defense, paragraph 22 of the Ameriquest mortgage does not mandate automatic acceleration of the mortgage debt upon the borrower's default in an installment payment, but rather grants the lender the option of electing to accelerate the entire debt upon the borrower's default, if certain conditions are met. Paragraph 22 also grants the borrower the right to stop enforcement of the mortgage at any time prior to entry of judgment, even if the lender has required immediate payment in full, upon the borrower meeting certain conditions, i.e. payment of arrears, and other amounts due under the mortgage, and reasonable fees, including attorneys' fees. Paragraph 22 also provides that if all such conditions are fulfilled,

then the mortgage "will remain in full effect as if Immediate Payment in Full had never been required" (Defendant's Exhibit "5," Ameriquest Mortgage ¶ 22). Thus, under the terms of the Ameriquest mortgage, reinstatement is allowed *following* the exercise of the option to accelerate the mortgage debt, upon the borrower's making good on the default. Contrary to the argument of defendant, that such reinstatement is permitted under the Ameriquest mortgage, does not mean that acceleration remains inchoate until entry of judgment. It is notable that defendant makes no claim plaintiffs cured the default in payment at any point following commencement of the 2009 foreclosure action.

Defendant alternatively asserts that even assuming CitiMortgage had standing to bring the 2009 foreclosure action, the statute of limitations was reset by virtue of plaintiffs' submission, on or about November 15, 2016, of a signed written application for loss mitigation to it. The application contains an express acknowledgment by plaintiffs of their indebtedness but does not constitute an express promise to pay the mortgage debt per se. To the extent it contains an acknowledgment of an "inten[tion]" to pay the mortgage debt, it is accompanied by a condition precedent, to wit, the modification of the loan. Defendant has failed to demonstrate that the condition was met. Moreover, the application was signed on November 15, 2016, which is not within the applicable period of limitations, and therefore the acknowledgments therein are ineffectual to revive the statute of limitations (*see Aleci v Virgie E. Tinsley's Enterprises, Inc.*, 102 AD2d 808 [2d Dept 1984]; *see also Hakim v Peckel Family Ltd. Partnership*, 280 AD2d 645 [2d Dept 2001]; *Sichol v Crocker*, 177 AD2d 842 [3d Dept 1991]).

Defendant also asserts that even assuming CitiMortgage had standing to bring the 2009 foreclosure action, the discontinuance of the 2009 foreclosure action by stipulation constituted a revocation of the election by CitiMortgage to accelerate the mortgage debt prior to the expiration of the statute of limitations. That CitiMortgage entered into the stipulation of discontinuance with the Aquinos raises a triable issue of fact as to whether CitiMortgage acted affirmatively to revoke its election to accelerate (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1070). Nevertheless, because the stipulation and the related documents do not address the issue of revocation, they, without more, are insufficient to establish that CitiMortgage's entry into the stipulation of discontinuance constituted an affirmative act of revocation. Plaintiffs' averment that they never consented to any revocation of acceleration, likewise does not disprove that the discontinuance was an affirmative act of revocation on the part of CitiMortgage (*see id.*).

Inasmuch as there are triable issues of fact as to whether CitiMortgage had standing to bring the 2009 foreclosure action and whether its entry into the stipulation of discontinuance constituted an affirmative act to revoke its election to accelerate, that branch of the motion by plaintiff Luis Aquino for summary judgment on the complaint and to strike

the answer is denied. The branch of the cross motion by defendant for summary judgment dismissing the complaint insofar asserted against it by plaintiff Luis Aquino is denied.

With respect to that branch of the motion by plaintiffs for, in effect, summary judgment dismissing the counterclaim for unjust enrichment, plaintiffs has failed to make a prima facie showing that no advances for, among other things, property taxes and insurance, were made by defendant or its predecessor in interest within the six-year period prior to the commencement of this action (*see* CPLR 213; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894-895 [2d Dept 1994]). With respect to that branch of the motion by plaintiffs for, in effect, summary judgment dismissing the counterclaim for attorneys' fees, the Ameriquest mortgage requires the borrower to pay, to the lender, reasonable attorneys fees' with interest, spent by the lender "to protect its interest in the Property and/or rights under this Security Instrument" (Plaintiffs' Exhibit "C," Ameriquest Mortgage, paragraph 9). Because questions of fact exist as to whether the Ameriquest mortgage remains enforceable, plaintiff Luis Aquino has failed to demonstrate that the counterclaim for attorneys' fees is not viable. However, insofar as defendant has failed to show that plaintiff Francisca Aquino has an ownership interest in the property, defendant has failed to state a valid cause of action against her for attorneys' fees predicated upon the Ameriquest mortgage. That branch of the motion by plaintiffs for, in effect, summary judgment dismissing the counterclaim for attorneys' fees is granted only with respect to such counterclaim asserted against plaintiff Francisca Aquino.

Dated: MAY 16 2018

Hon. Leslie J. Purificacion, J.S.C.

FILED
MAY 24 2018
COUNTY CLERK
QUEENS COUNTY