

Wilmington Trust, N.A. v Pacific St. Servs. Inc.

2024 NY Slip Op 32202(U)

May 13, 2024

Supreme Court, Kings County

Docket Number: Index No. 516344/19

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of May, 2024.

PRESENT:

HON. DEREKIM B. NECKLES,
Justice.

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WILMINGTON TRUST, NATIONAL ASSOCIATION,
NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY
AS TRUSTEE OF MFRA TRUST 2014-2,

Plaintiff,

-against-

MOT. SET 3
Index No. 516344/19

PACIFIC STREET SERVICES INC.; BOSCO CREDIT II TRUST
SERIES 2010-1; NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW
YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
NISSIM HEN; 55 CHESTER LLC; DESMOND DAVILA; JUNIOR
MORRISON; KEVIN TENROY; NANIE MERILUS; SHADAE
DAVILA; SIDNEY SULLIVAN; TENNECIA LOVELOCK;
THOMAS TENROY,

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	_____	115, 137-138
Opposing Affidavits (Affirmations)	_____	151

Upon the foregoing papers, plaintiff Wilmington Trust, National Association, not in its individual capacity, but solely as Trustee of MFRA Trust 2014-2, moves for a judgment of foreclosure and sale. Defendant 55 Chester LLC cross-moves for an order, pursuant to CPLR 2221 (e), granting defendant leave to renew a prior order, dated July 1,

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2022, which granted plaintiff's motion for summary judgment and, upon renewal, deny plaintiff's application in its entirety and grant summary judgment in favor of defendant.

Plaintiff commenced this action to foreclose a mortgage encumbering the subject property at 55 Chester Street in Brooklyn. The mortgage was executed on June 28, 2007 by nonparty Andy McAlpin to secure a \$640,000 note in favor of Bank of America, N.A. (BOA). A prior foreclosure action was commenced by BOA on August 29, 2013, but the action was dismissed by order dated May 1, 2019 (Hon. Noach Dear, J.) for failure to comply with Kings County Supreme Court Uniform Civil Term Rules, part F, rule 8 (Rule 8).¹

The instant action was commenced on July 25, 2019. On September 30, 2019, defendant filed an answer interposing several affirmative defenses, including statute of limitations, and two counterclaims. On May 4, 2020, plaintiff moved for summary judgment. By order dated June 21, 2022, Justice Mark I. Partnow granted plaintiff's motion, finding, in part, that the instant action was not time-barred as it was commenced prior to the expiration of the six-month savings provision of CPLR 205 (a). By order dated July 1, 2022, a referee was appointed to compute the amount due under the mortgage and note. In his report, dated December 15, 2022, the referee found the sum of \$284,007.44 due and owing as of October 28, 2022, inclusive of interest. Plaintiff now moves to confirm the referee's report and for the issuance of a judgment of foreclosure and sale. Defendant seeks renewal of plaintiff's prior summary judgment motion, arguing

¹ "Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference" (*Retained Realty, Inc. v Koenig*, 166 AD3d 691, 691 [2d Dept 2018]).

that the recently enacted Foreclosure Abuse Prevention Act (FAPA) prevents plaintiff in this matter from taking advantage of the savings provision of CPLR 205 (a). Defendant additionally seeks dismissal of this action as time barred.

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]; *see Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]). FAPA presents a change in the law which is sufficient to support defendant’s application pursuant to CPLR 2221 [e] [2] (*see Ditech Fin. LLC v Naidu*, 82 Misc 3d 452, 455 [Sup Ct, Queens County 2023]; *Bayview Loan Servicing, LLC v Dalal*, 80 Misc 3d 1100, 1103 [Sup Ct, Bronx County 2023]).

FAPA took effect “immediately” on December 30, 2022 and applied “to all actions commenced on an instrument described under [CPLR 213 (4)]² in which a final judgment of foreclosure and sale has not been enforced” (L 2022, ch 821, § 10). FAPA replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions, such as this, commenced upon instruments described in CPLR 213 (4) (*see* CPLR 205 [c]). CPLR 205-a (a) provides, in pertinent part:

“If an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than . . . for violation of any court rules or individual part rules . . . the original plaintiff . . . may commence a new action upon the same transaction or

² CPLR 213 (4) describes such instruments as “a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein.”

occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period.”

Because this action was dismissed for violation of a court rule, CPLR 205-a by its terms cannot be used to revive the prior BOA action and extend the limitations period.³ Plaintiff’s argument that CPLR 205-a has no retroactive effect runs counter to Section 10 of FAPA which states that “[t]his act shall take effect immediately and shall apply to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced,” in addition to several decisions from the Appellate Division, Second Department which applied CPLR 205-a retroactively (*see Deutsche Bank Natl. Trust Co. v Heitner*, --- AD3d ---, 2024 NY Slip Op 02170 [2d Dept 2024]; *Pryce v U.S. Bank N.A.*, --- AD3d ---, 2024 Slip Op 01828 [2d Dept 2024]; *U.S. Bank N.A. v Armand*, 220 AD3d 963 [2d Dept 2023]).

Plaintiff’s contention that retroactive application of CPLR 205-a would violate Due Process is also unavailing. Initially, there is no allegation or proof in the record that plaintiff has given notice to the Attorney General as required by CPLR 1012 (b) in order for a court to entertain a constitutional challenge (CPLR 1012 [b] [3]; *see Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]). Regardless, “legislative direction concerning the scope of a statute carries a presumption of constitutionality, and

³ It also appears that CPLR 205-a is unavailable as plaintiff is not the “original plaintiff” in the prior BOA action.

the party challenging that direction bears the burden of showing the absence of a rational basis justifying retroactive application of the statute” (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 375 [2020]). The challenging party must demonstrate “the [statute’s] constitutional invalidity beyond a reasonable doubt” (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 149 [2017]).

Regarding FAPA, the Legislature explicitly described the legitimate purpose of the law as follows:

“The Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present remedial legislation is to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof.

“Accordingly, this bill amends certain statutes and rules to clarify the existing law and overturn those decisions that have strayed from legislative prescription and intent. These amendments and clarifications will ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions. The remedial aim of the bill is to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs to the prejudice of homeowners throughout New York. . . .” (New York State Senate Bill S5473D Sponsor Memorandum).

As noted by one lower court, the savings provision of CPLR 205-a

“is not a statute of limitations, but a ‘grace period,’ which applies *if applicable* (see *United States Fidelity &*

Guaranty Co v. E.W. Smith Co., 46 NY2d 498 [1979] [emphasis added]). The relevant portion of FAPA does not operate to shorten the statute of limitations, it merely addresses its expiration and any potential tolling . . . The Legislature sought to clarify the meaning of existing statutes and achieved this goal by ‘codify[ing] [the] correct judicial applications thereof, and rectify[ing] erroneous interpretations thereof’ (see 2021 NY S.B. 5473D)” (*Bank of N.Y. Mellon Trust Co., N.A. v Huerta*, 82 Misc 3d 1235[A], 2024 NY Slip Op 50474[U], *4 [Sup Ct., Queens County 2024]).

Thus, the retroactivity of CPLR 205-a is “clearly integral to the fundamental aim of the legislation and was supported by a persuasive reason. Indeed, the Legislature sought fit to promulgate the legislation to combat the abuse of the judicial process by lenders to the detriment of borrowers. The potentially harsh impact is outweighed by the statutory goal and qualifies as a rational basis” (*id.*).

The retroactive application of CPLR 205-a does not affect statute of limitations for bringing a foreclosure action, nor shorten the grace period delineated by CPLR 205 (a) to fewer than six months. In this matter, retroactive application of CPLR 205-a would not make an otherwise timely recommencement of this action untimely by changing the limitations period of the savings provision. Rather, the new statute simply clarifies the Legislature’s intent regarding what constitutes an act of neglect so as to make the savings provision inapplicable in foreclosure actions.

Based on the foregoing, the court finds that plaintiff has failed to meet its burden in establishing that the retroactive application of CPLR 205-a in this matter violates Due Process.

“An action to foreclose a mortgage is governed by a six-year statute of limitations” (*Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 [2d Dept 2018]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*id.* [internal quotation marks omitted]; see *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]). Defendant demonstrated in its opposition to plaintiff’s prior summary judgment motion that the debt was accelerated on November 25, 2012, pursuant to the deadline imposed by a Notice of Intent to Accelerate, and that plaintiff did not commence the instant action until July 25, 2019, following the expiration of the six-year statute of limitations.⁴ As the savings provision of CPLR 205-a is unavailable, the instant action is untimely.

Accordingly, defendant’s cross motion to renew is granted, and upon renewal, plaintiff’s prior motion for summary judgment is denied, and this action is dismissed. In light of this disposition, plaintiff’s motion for a judgment of foreclosure and sale is denied.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



A. J. S. C.
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⁴ Plaintiff does not argue that the debt was accelerated on a later date.