SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Wilmington Sav. Fund Socy., FSB v. Rosenbaum

2021 NY Slip Op 04924 (N.Y. Ct. App. 2021) · No. 2019-06636; 2019-14510 · Decided September 1, 2021

SUMMARY

The New York Appellate Division, Second Department, affirmed an order and judgment dismissing a mortgage foreclosure action as time-barred and canceling and discharging the mortgage. The court held that the six-year statute of limitations began to run on the entire mortgage debt when the predecessor lender accelerated the debt by commencing a prior foreclosure action in December 2009, and that the plaintiff failed to establish lack of standing in the prior action.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Reinaldo E. Rivera, J.P.; Robert J. Miller, J.; Betsy Barros, J.; Valerie Brathwaite Nelson, J.
JURISDICTION	New York
DECIDED	September 1, 2021
DOCKET	2019-06636; 2019-14510
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiff in a mortgage foreclosure action appealed from an order granting the defendants' cross motion for summary judgment dismissing the complaint as time-barred and granting their RPAPL 1501(4) counterclaim, and from the resulting order and judgment canceling and discharging the mortgage.
STANDARD OF REVIEW	Summary judgment is proper where the moving party establishes entitlement to judgment as a matter of law and the opposing party fails to raise a triable issue of fact; the appellate court reviewed the statute-of-limitations and RPAPL 1501(4) determinations de novo.
PRECEDENTIAL VALUE	published appellate opinion
PARTIES	Wilmington Savings Fund Society, FSB v. Jehuda Rosenbaum, Ahuva Rosenbaum

TOPICS

foreclosure | mortgages | statute of limitations | summary judgment | appellate procedure

PRACTICE AREAS

real estate law | mortgage foreclosure | civil procedure | appellate procedure

QUESTIONS PRESENTED

1. Whether the appeal from the earlier order had to be dismissed after entry of the subsequent order and judgment.
2. Whether the six-year statute of limitations for a mortgage foreclosure action began to run on the entire debt when the predecessor commenced the prior foreclosure action and accelerated the debt.
3. Whether the defendants were entitled to summary judgment dismissing the foreclosure complaint as untimely and to cancellation and discharge of the mortgage under RPAPL 1501(4).
4. Whether the plaintiff raised a triable issue by arguing that its predecessor lacked standing to commence the prior foreclosure action.

HOLDINGS

1. The appeal from the earlier order must be dismissed because the right to take a direct appeal from that order terminated upon entry of the order and judgment; the issues raised on that appeal remained reviewable on the appeal from the order and judgment.
2. Although separate causes of action accrue for unpaid installments of an installment mortgage, once the mortgage debt is accelerated, the statute of limitations begins to run on the entire debt.
3. The defendants were entitled to summary judgment because they established prima facie that the foreclosure action was commenced more than six years after acceleration, and the plaintiff failed to raise a triable issue of fact; the mortgage was properly canceled and discharged under RPAPL 1501(4).

KEY QUOTATIONS

> *"An action to foreclose a mortgage is subject to a six-year statute of limitations"* ([*1])

> *"However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt"* ([*1])

FACTUAL BACKGROUND

The mortgage was payable in installments, but the plaintiff's predecessor accelerated the entire mortgage debt by commencing a prior foreclosure action in December 2009. The plaintiff commenced the present foreclosure action in August 2017, approximately seven years and eight months after that acceleration. The defendants sought summary judgment dismissing the complaint as time-barred and canceling and discharging the mortgage of record.

PROCEDURAL HISTORY

The Supreme Court, Kings County, granted the defendants' cross motion for summary judgment and later entered an order and judgment canceling and discharging the mortgage. The Appellate Division dismissed the appeal from the earlier order because direct appellate review terminated upon entry of the order and judgment, reviewed the issues on the appeal from the order and judgment, and affirmed that judgment.

DISPOSITION

affirmed

CASES CITED

- Matter of Aho, 39 NY2d 241, 248
- Nationstar Mtge., LLC v. Weisblum, 143 AD3d 866, 867
- Wells Fargo Bank, N.A. v. Burke, 94 AD3d 980, 982
- Freedom Mtge. Corp. v. Engel, 37 NY3d 1, 21
- Kashipour v. Wilmington Sav. Fund Socy., FSB, 144 AD3d 985, 986
- Federal Natl. Mtge. Assn. v. Schmitt, 172 AD3d 1324, 1325
- Bank of N.Y. Mellon v. Craig, 169 AD3d 627, 629
- Deutsche Bank Natl. Trust Co. Ams. v. Bernal, 186 AD3d 1491

OPINION

PER CURIAM.

Wilmington Sav. Fund Socy., FSB v Rosenbaum (2021 NY Slip Op 04924) Wilmington Sav. Fund Socy., FSB v Rosenbaum 2021 NY Slip Op 04924 Decided on September 1, 2021 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on September 1, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department REINALDO E. RIVERA, J.P. ROBERT J. MILLER BETSY BARROS VALERIE BRATHWAITE NELSON, JJ. 2019-06636 2019-14510 (Index No. 515725/17) [*1]Wilmington Savings Fund Society, FSB, etc., appellant, vJehuda Rosenbaum, et al., respondents, et al., defendants.

Knuckles, Komosinski & Manfro, LLP, Fishkill, NY (Louis A. Levithan of counsel), for appellant. Israel Vider, Brooklyn, NY, for respondents. DECISION & ORDER In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Noach Dear, J.), dated March 19, 2019, and (2) an order and judgment (one paper) of the same court dated December 9, 2019.

The order, insofar as appealed from, granted those branches of the cross motion of the defendants Jehuda Rosenbaum and Ahuva Rosenbaum which were for summary judgment dismissing the complaint insofar as asserted against them and on their counterclaim pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage.

The order and judgment, inter alia, canceled and discharged of record the subject mortgage. ORDERED that the appeal from the order is dismissed; and it is further, ORDERED that the order and judgment is affirmed; and it is further, ORDERED that one bill of costs is awarded to the defendants Jehuda Rosenbaum and Ahuva Rosenbaum.

The appeal from the order must be dismissed, because the right of direct appeal therefrom terminated with the entry of the order and judgment in the action (see Matter of Aho, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment (see CPLR 5501[a][1]; Matter of Aho, 39 NY2d at 248).

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). With respect to 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; Wells Fargo Bank, N.A. v Burke, 94 AD3d 980, 982).

However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (see Freedom Mtge. Corp. v Engel, 37 NY3d 1, 21; Kashipour v Wilmington [*2]Sav. Fund Socy., FSB, 144 AD3d 985, 986).

Here, in support of those branches of their cross motion which were for summary judgment dismissing the complaint insofar as asserted against them as time-barred and on their counterclaim pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage, the defendants Jehuda Rosenbaum and Ahuva Rosenbaum (hereinafter together the defendants) established that the six-year statute of limitations period began to run on the entire debt in December 2009, when the plaintiff's predecessor in interest commenced a prior action to foreclose the mortgage (see Federal Natl.

Mtge. Assn. v Schmitt, 172 AD3d 1324, 1325; Bank of N.Y. Mellon v Craig, 169 AD3d 627, 629). Since the plaintiff did not commence this action until August 2017, approximately seven years and eight months after the debt was accelerated, the defendants demonstrated, prima facie, that this action is untimely (see Federal Natl. Mtge. Assn. v Schmitt, 172 AD3d at 1325; Bank of N.Y.

Mellon v Craig, 169 AD3d at 629). In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, it failed to demonstrate that its predecessor in interest lacked standing to commence the prior action, and that the statute of limitations therefore never began to run on the full debt (see Deutsche Bank Natl. Trust Co. Ams. v Bernal, 186 AD3d 1491).

Accordingly, the Supreme Court properly granted those branches of the defendants' cross motion which were for summary judgment dismissing the complaint insofar as asserted against them as barred by the statute of limitations and on their counterclaim pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage. RIVERA, J.P., MILLER, BARROS and BRATHWAITE NELSON, JJ., concur.

ENTER: Maria T. Fasulo Acting Clerk of the Court