State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 7, 2021 530321

MTGLQ INVESTORS, L.P.,
Appellant,
v
OPINION AND ORDER
ROBERT J. WENTWORTH et al.,
Respondents,
et al.,
Defendants.

Calendar Date: November 20, 2020

Before: Egan Jr., J.P., Clark, Aarons, Reynolds Fitzgerald and Colangelo, JJ.

Knuckles, Komosinski & Manfro, LLP, Elmsford (Michel Lee of counsel), for appellant.

Kriss, Kriss & Brignola, LLP, Albany (Charles T. Kriss of counsel), for respondents.

Clark, J.

Appeals (1) from an order of the Supreme Court (Mackey, J.), entered August 29, 2019 in Albany County, which, among other things, granted a cross motion by defendants Robert J. Wentworth and Brandie M. Wentworth for summary judgment dismissing the complaint against them, and (2) from the judgment entered thereon.

In 2007, defendants Brandie M. Wentworth and Robert J. Wentworth (hereinafter collectively referred to as defendants)

executed a promissory note in the amount of $192,000, which was secured by a mortgage on certain real property in the Town of Bethlehem, Albany County. In June 2011, several months after first defaulting on the mortgage, Robert Wentworth filed for chapter 13 bankruptcy, thereby giving rise to an automatic stay (see 11 USC 362).[1] Plaintiff's predecessor in interest filed a proof of claim in the bankruptcy proceeding and thereafter sought relief from the automatic stay. In December 2011, the bankruptcy court issued an order lifting the stay and expressly permitting the commencement of an action to foreclose on the mortgage. Plaintiff's predecessor in interest commenced a mortgage foreclosure action in 2014; however, that action was dismissed in 2016 for failure to prosecute. Meanwhile, in September 2014, Robert Wentworth conveyed his interest in the mortgaged property to Brandie Wentworth.

In May 2018, plaintiff commenced this action seeking to foreclose on the mortgage. Following joinder of issue, plaintiff moved for summary judgment. Defendants, in turn, cross-moved for summary judgment dismissing the complaint, alleging that the action was barred by the statute of limitations and seeking to have the mortgage discharged pursuant to RPAPL 1501.[2] In an August 2019 order, Supreme Court found that the action was time-barred and consequently denied plaintiff's motion and granted defendants' cross motion. The court thereafter entered a judgment canceling and discharging the mortgage. Plaintiff appeals from both the order and the judgment.

Plaintiff challenges Supreme Court's determination that the six-year statute of limitations has expired and that the action is therefore time-barred (see CPLR 213 [4]). In a

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[1] Brandie Wentworth separately filed for chapter 7 bankruptcy and later received a discharge.

[2] Although the cross motion papers indicate that the cross motion was made solely by Brandie Wentworth, Supreme Court attributed the cross motion to defendants. Inasmuch as plaintiff does not challenge this attribution on appeal, we will also treat the cross motion as having been made by defendants.

mortgage foreclosure action, the statute of limitations begins to run from the date on which each unpaid installment is due, unless the debt has been accelerated (see MTGLQ Invs., LLP v Lunder, 183 AD3d 967, 968 [2020]; Deutsche Bank Natl. Trust Co. v DeGiorgio, 171 AD3d 1267, 1268 [2019]). If the debt is accelerated, generally by demand or by the commencement of a mortgage foreclosure action, "the entire sum becomes due and the statute of limitations begins to run on the entire mortgage" (Lavin v Elmakiss, 302 AD2d 638, 639 [2003], lv dismissed 100 NY2d 577 [2003], lv denied 2 NY3d 703 [2004]; accord Bank of Am., N.A. v Luma, 157 AD3d 1106, 1106-1107 [2018]).

We agree with Supreme Court that the mortgage was accelerated on December 8, 2011, the date on which the bankruptcy court issued the order lifting the automatic bankruptcy stay as to plaintiff's predecessor in interest and its assignees and/or successors in interest (see Matter of LHD Realty Corp., 726 F 2d 327, 331 [7th Cir 1984]; In re PCH Assoc., 122 BR 181, 198-199 [SD NY 1990]). By filing a proof of claim in the bankruptcy proceeding and shortly thereafter seeking affirmative relief from the automatic bankruptcy stay, plaintiff's predecessor in interest communicated a clear and unequivocal intent to accelerate the entire mortgage debt (see generally MTGLQ Invs., LLP v Lunder, 183 AD3d at 968). Inasmuch as plaintiff did not produce any evidence to conclude that the mortgage was deaccelerated after December 2011 and given that this action was commenced in May 2018, outside of the six-year statute of limitations (see CPLR 213 [4]), Supreme Court properly concluded that this action is time-barred (see generally MTGLQ Invs., LLP v Lunder, 183 AD3d at 968).

Finally, Supreme Court did not err in discharging and canceling the mortgage. RPAPL 1501 (4) states, as relevant here, that, where the statute of limitations period for the commencement of a mortgage foreclosure action has expired, "any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom" (emphasis added). Contrary to

the Second Department, we do not read RPAPL 1501 (4) as stating that the cancellation and discharge of a mortgage can only be obtained by commencing an action or interposing a counterclaim for such relief (compare e.g. Bank of N.Y. Mellon v 11 Bayberry St., LLC, 186 AD3d 1596, 1596 [2020]; Deutsche Bank Natl. Trust Co. v Gambino, 153 AD3d 1232, 1234-1235 [2017]). The language of RPAPL 1501 (4) is permissive, merely allowing for the maintenance of an action to discharge and cancel the mortgage; it does not foreclose Supreme Court from granting such relief in a mortgage foreclosure action when warranted.

Here, defendants did not interpose a counterclaim seeking to discharge and cancel the mortgage. However, defendants requested, in their answer, dismissal of the complaint and such "other and further relief as [Supreme Court] deem[ed] just and equitable" and thereafter specifically requested in their cross motion that the mortgage be discharged and canceled. Thus, plaintiff had notice and an ample opportunity to oppose the cancellation and discharge of the mortgage. Under these circumstances and in the interest of judicial economy, Supreme Court – a court of equity – did not err in granting defendants' request for discharge and cancellation of the mortgage. Plaintiff's remaining arguments are either unpreserved or rendered academic by our determination.

Egan Jr., J.P., Aarons, Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the order and the judgment are affirmed, with costs.

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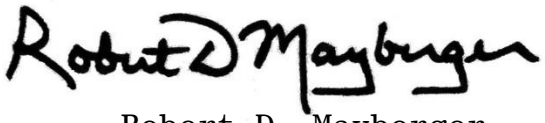

Robert D. Mayberger
Clerk of the Court