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

Decided and Entered: March 11, 2021 530034

GMAT LEGAL TITLE TRUST 2014-1, US BANK NATIONAL ASSOCIATION, as Trustee,
Appellant,
v MEMORANDUM AND ORDER

ERIN WOOD,
Respondent,
et al.,
Defendant.

Calendar Date: January 12, 2021

Before: Garry, P.J., Egan Jr., Lynch, Aarons and Pritzker, JJ.

Kosterich & Skeete, LLC, Tuckahoe (Denise Singh Skeete of counsel), for appellant.

McDonough & Artz PC, Binghamton (Philip J. Artz of counsel), for respondent.

Pritzker, J.

Appeal from an order of the Supreme Court (Northrup Jr., J), entered January 10, 2019 in Delaware County, which granted defendant Erin Wood's motion for dismissal of the complaint against her.

In 2007, defendant Erin Wood (hereinafter defendant) executed a promissory note to borrow $196,910 from Security American Mortgage Company, Inc., that was secured by a mortgage

executed in favor of Mortgage Electronic Registration Systems, Inc., on certain real property located in the Town of Hudson, Delaware County. Following a series of assignments, plaintiff became the current holder of the note. In May 2008, defendant was sent a notice of default stating that the mortgage payments would be accelerated if the default was not cured on or before June 10, 2008. At that time, defendant owed $5,344 in mortgage arrears. In February 2009, a mortgage foreclosure action was commenced and, in December 2013, plaintiff's predecessor moved to, among other things, discontinue the 2009 action, which motion Supreme Court (Lambert, J.) granted.

In October 2014, plaintiff commenced a second foreclosure action against defendant. In August 2015, plaintiff was granted a default judgment and order of reference and, in June 2016, Supreme Court also granted plaintiff's motion for a judgment of foreclosure and sale. However, after considering a cross motion filed by defendant seeking to vacate the default order pursuant to CPLR 5015 (a) (1), in a July 2016 amended order, Supreme Court granted defendant's motion, vacated the judgment of foreclosure and sale as well as the default judgment and ordered defendant to serve an answer. Defendant thereafter filed an answer and asserted, among other affirmative defenses, that plaintiff's foreclosure action was barred by the statute of limitations.

Plaintiff then moved to reargue and, although Supreme Court, in a February 2017 decision, effectively granted reargument and somewhat altered its reasoning, it adhered to its prior decision. Plaintiff then filed a motion denominated "notice of motion for summary/default judgment, renewal and reargument of prior decision, and confirmation of order of reference," which, in an order entered in March 2018, Supreme Court (Northrup Jr., J.) denied. Plaintiff appealed and this Court affirmed (173 AD3d 1533 [2019]). Defendant then moved for dismissal of the complaint as time-barred, which Supreme Court granted in an order entered January 2019. Plaintiff appeals.

Initially, we do not discern any procedural bar to our review of plaintiff's claim that the action was timely. Not

only were plaintiff's arguments preserved, but, as this Court's prior decision did not address the merits of the statute of limitations defense (173 AD3d 1533), the law of the case doctrine does not preclude our review (see Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health, 91 AD3d 1224, 1226 [2012], lv denied 20 NY3d 861 [2013]). Nor do we find that CPLR 5501 (a) is a bar to this Court's review, as the statute of limitations defense was decided in the order on appeal; thus, the issue is before this Court without having to bring up for review the February 2017 nonfinal order. Furthermore, as it dismissed plaintiff's complaint, the order on appeal is a final order and is appealable as of right (see CPLR 5701 [a] [1]; compare 173 AD3d at 1535).

We turn now to the merits of plaintiff's claim that the foreclosure action was not barred by the statute of limitations. "The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage" (Beneficial Homeowner Serv. Corp. v Heirs at Large of Ramona E. Thwaits, 185 AD3d 1126, 1128 [2020] [internal quotation marks and citations omitted], lv denied 35 NY3d 918 [2020]; see CPLR 213 [4]). Where acceleration occurs by demand, that fact must be communicated to the mortgagor in a clear and unequivocal manner (see Freedom Mtge. Corp. v Engel, ___ NY3d ___, ___, 2021 NY Slip Op 01090, *4 [2021]). Notably, "'[t]he fact of election [to accelerate] should not be confused with the notice or manifestation of such election'" (id. at *3, quoting Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472, 476 [1932]).

Here, the issue is whether the May 2008 default letter was an acceleration event that triggered the statute of limitations. We hold that is was not. Thus, the second action, commenced in October 2014, was timely. To that end, the May 2008 letter provided that, if the default was not cured "on or before June 10, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable

in full, and foreclosure proceedings will be initiated at that time." Since this letter was "'merely an expression of future intent that fell short of an actual acceleration,' which could 'be changed in the interim'" (Freedom Mtge. Corp. v Engel, 2021 NY Slip Op at *4, quoting Milone v US Bank N.A., 164 AD3d 145, 152 [2018], lv dismissed 34 NY3d 1009 [2019]), it did not accelerate the debt (see Freedom Mtge. Corp. v Engel, 2021 NY Slip Op 01090 at *5). "[T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written" (id. at *4). Further, the May 2008 letter specifically discussed other non-acceleration options for defendant, including a repayment plan or loan modification, which plaintiff, as the holder of the note, should be able to do "without running the risk of being deemed to have taken the drastic step of accelerating the loan" (id.). Thus, the statute of limitations was not triggered until the debt was accelerated by the commencement of the first action in February 2009 (see id. at *2), rendering the commencement of the second action, in October 2014, timely as it was within the six-year statute of limitations (see CPLR 213 [4]). Accordingly, Supreme Court erred in granting defendant's motion dismissing the complaint.

Garry, P.J., Egan Jr., Lynch and Aarons, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and motion denied.

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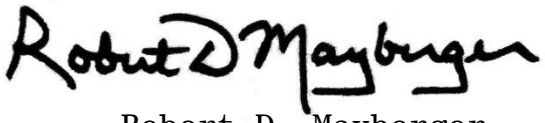

Robert D. Mayberger
Clerk of the Court