

HSBC Bank USA v Kirschenbaum

Supreme Court of New York, Appellate Division, First Department

March 15, 2018, Decided ; March 15, 2018, Entered

5994, 850258/15, 400

Reporter

159 A.D.3d 506 *; 73 N.Y.S.3d 41 **; 2018 N.Y. App. Div. LEXIS 1636 ***; 2018 NY Slip Op 01644 ****; 2018 WL 1320306

[****1] HSBC Bank USA, Appellant, v Joshua Kirschenbaum, Respondent, et al., Defendants.

Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 29, 2016, which granted defendant Joshua Kirschenbaum's motion to dismiss the complaint in this mortgage foreclosure proceeding, unanimously affirmed, with costs.

Core Terms

statute of limitations, mortgage, notice, condition precedent, expiration, days, statutory prohibition, foreclosure action, complete control, tolling statute, commencement, foreclosure, limitations, de-accelerated, accelerated, discontinue, unanimously, authorizes, compliance, effectuate, proscribes, unavailing, borrower, concepts, duration, provides, untimely, relies, tolled, cases

Defendant borrower Kirschenbaum made a *prima facie* showing that this action [**42] was untimely. The mortgage was accelerated on August 3, 2009 when plaintiff commenced the first foreclosure action, the statute of limitations expired on August 3, 2015 (see [CPLR 213 \[4\]](#)), and plaintiff did not file this action until August 27, 2015.

Headnotes/Summary

Headnotes

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure

Limitation of Actions—Tolling—[RPAPL 1304](#) Required Notice as Condition Precedent to Foreclosure Action Did Not Toll Statute of Limitations

Counsel: [***1] Blank Rome LLP, New York (Timothy W. Salter of counsel), for appellant.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for respondent.

Judges: Concur—Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

Opinion

[**41] [*506] Order and judgment (one paper),

In opposition, plaintiff failed to raise a question of fact as to whether the statute of limitations had been tolled ([Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1085-1086, 30 NYS3d 288 \[2d Dept 2016\]](#)). We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law [§ 1304](#) tolled the statute of limitations for 90 days. [CPLR 204 \(a\)](#) authorizes tolling of a statute of limitations and provides that "[w]here the commencement of an action has been stayed by a court [***2] or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Proper service of the [RPAPL 1304](#) notice is a condition precedent to the commencement of a foreclosure action ([HSBC Bank USA v Rice, 155 AD3d 443, 443, 63 NYS3d 382 \[1st Dept \[*507\] 2017\]](#)). A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent ([Barchet v New York City Tr. Auth., 20 NY2d 1, 6, 228 NE2d 361, 281 NYS2d 289 \[1967\]](#)).

Here, plaintiff had complete control over when to serve the [RPAPL 1304](#) notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before the expiration of the statute of limitations. In addition, there is nothing in

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RPAPL 1302 or 1304 that proscribes the prosecution of the action.

Andersen v Long Is. R.R. (59 NY2d 657, 450 NE2d 213, 463 NYS2d 407 [1983]) and Burgess v Long Is. R.R. Auth. (79 NY2d 777, 587 NE2d 269, 579 NYS2d 631 [1991]), cases upon which plaintiff relies, do not involve RPAPL 1304.

Plaintiff's argument that the mortgage loan was decelerated when it moved to discontinue the first mortgage foreclosure proceeding is improperly raised for the first time on appeal (see Lutin v SAP V/A Atlas 845 WEA Assoc. NF LLC, 157 AD3d 466, 66 NYS3d 439, 2018 NY Slip Op 00103 [1st Dept 2018]). In any event, the argument is unavailing (see EMC Mtge. Corp. v Patella, 279 AD2d 604, 606, 720 NYS2d 161 [2d Dept 2001]; Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894, 618 NYS2d 88 [2d Dept 1994]). Concur—Acosta, P.J., Richter, Kapnick, Kahn [***3], Gesmer, JJ.

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