

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Handwritten signature/initials

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Regency Ventures LLC,

Index
Number: 10700/12

Plaintiff,

Motion
Date: 11/4/13

- against -

Elaine Lelekakis, Terry Voyiatgis as
Administrator of the Estate of James
Voyiatgis, New York City Department of
Taxation and Finance, New York City
Environmental Control Board, New York City
Transit Adjudication Bureau, New York
City Parking Violations Bureau
"John Doe #1" through "John Doe #10",
et.al.,

Motion
Cal. Number: 125

Defendants.

Motion Seq. No.: 2
-----X

2013 NOV 29 PM 12:53

QUEENS COUNTY CLERK
FILED

Motion by plaintiff in this mortgage foreclosure action for summary judgment and for an order of reference is granted. Cross-motion by defendant Lelekakis for summary judgment dismissing the complaint or, in the alternative, for an order compelling discovery is denied.

By deed dated February 1, 2002 and recorded March 6, 2002, Constatntine Voyiatgis, the executor of the estate of John K. Voyiatgis, transferred the subject property to Elaine Lelekakis, George Voyiatgis and James Voyatigis as tenants in common. By deed dated August 19, 2002 and recorded on November 26, 2002, James Vogiatgis deeded his interest in the property to Elaine Lelekakis and George Voyiatgis so that the property was, on that date, owned by Elaine Lelekakis and George Voyiatgis as tenants in common.

Elaine Lelekakis and George Voyiatgis thereupon, on said date, obtained a loan with Astoria Federal Savings and Loan Association for the sum of \$428,000 and signed a mortgage.

On December 22, 2004, Elaine Lelekakis and George Voyiatgis executed a deed transferring title to the subject property to Elaine Lelekakis, and Elaine Lelekakis obtained another loan from Emigrant Funding Corp, pursuant to which the mortgage between Astoria Federal and Elaine Lelekakis and George Voyiatgis was

assigned by Astoria Federal to Emigrant Funding Corp. and Lelekakis executed a mortgage with Emigrant for \$309,352.54 as well as a consolidation, extension and modification of mortgage consolidating the assigned Astoria Federal loan, the principal balance of which was \$390,647.46, for a new loan in the sum of \$700,000.

The consolidated mortgage contains a standard "due on sale" provision which prohibits the sale, encumbrance or transfer of the property or any part thereof and provides that a breach of that provision entitles the mortgagee to accelerate the entire principal balance of the loan. In this regard, paragraph 10 of the consolidated mortgage provides that "Mortgagor shall not without the prior written consent of the Mortgagee, sell, convey, alienate, mortgage, encumber, pledge or otherwise transfer the Mortgaged Property or any part thereof". Section 21 of the mortgage, entitled, "Events of Default", provides, "The Debt shall become immediately due and payable at the option of Mortgagee upon one or more of the following events (each being an 'Event of Default' and, collectively, 'Events of Default')... (d) if Mortgagor violates or does not comply with any of the provisions of Sections...10". Moreover, Section 22 of the mortgage, entitled, "Remedies of Mortgagee", provides that "Upon the occurrence of any Event of Default, the mortgagee will pay, from the date of the Event of Default and until the entire Debt is paid in full, whether prior to or subsequent to the entry of a judgment of foreclosure and sale and the satisfaction of any deficiency judgment, interest on the unpaid principal balance of the Note at the rate of twenty-four (24%) percent per annum".

Notwithstanding the foregoing provisions, Lelekakis, as the sole mortgagor and owner of the property, executed a deed the next day, on December 23, 2004, which was recorded on March 15, 2005, transferring the subject mortgaged property to herself and to George Voyiatgis as tenants in common.

ON June 22, 2010, Emigrant assigned the mortgage to Carver Federal Savings Bank.

Upon the death of George Voyiatgis, the administrator of his estate, John James Voyiatgis, transferred a 1/6th interest in the property to Terry Voyiatgis, as administrator of the estate of James Voyiatgis, by deed dated April 27, 2011.

By letter dated February 9, 2012 from Carver to Lelekakis, Carver apprised her that it had recently discovered that she had transferred a portion of her interest in the property by deed dated December 23, 2004 in violation of Section 10 of the mortgage, that such transfer constitutes an "Event of Default" as set forth in

Section 21 of the mortgage, and that Carver was electing to apply the escrow funds to the payment of the balance of the loan and was charging interest at 24% per annum on the remaining unpaid balance starting from February 1, 2012 until receipt of full payment of the debt, pursuant to Section 22 of the mortgage.

On March 14, 2012, Carver assigned the note and mortgage to plaintiff which commenced the present foreclosure action on May 21, 2012. Plaintiff alleges in the complaint that by reason of Lelekakis' default in transferring part of the title to the premises by deed dated December 23, 2004, plaintiff was electing to accelerate the entire outstanding principal sum of the loan pursuant to the due-on-transfer provisions of the mortgage.

Pursuant to the Garn-St. Gerrmain depository Institutions Act of 1982 (12 U.S.C. 1701j-3), which pre-empts any State law to the contrary, a "due-on-sale" provision in a mortgage is enforceable exclusively according to its terms in the contract. Paragraph 10 of the consolidated mortgage clearly enjoins the mortgagor from transferring any portion of the property, and Section 21 clearly provides that the debt shall immediately become due and payable at the option of the mortgagee.

Here, plaintiff's predecessor in interest, Carver, exercised its option to accelerate the loan by clear and unequivocal language in its letter to Lelekakis, and plaintiff, as assignee, commenced the present foreclosure action to recover the accelerated debt, indicating in its complaint, "That by reason of the default of the Defendat Elaine Lelekakis, and pursuant to the due on transfer or encumbrance provisions of the mortgages as consolidated, the Plaintiff has elected and does elect that the whole of the principal sum secured hereby become immediately due and payable." Therefore, not only had Lelekakis been given unequivocal notice by Carver of its election to accelerate the debt, but plaintiff likewise provided unequivocal notice of its intention to exercise the due-on-transfer provisions of the loan agreement in its complaint. Commencement of a foreclosure action constitutes sufficient notice that the mortgagee has exercised its option to accelerate the debt (see Wells Fargo Bank, N.A. v Burke, 94 AD 3d 980 [2nd dept 2012]; EMC Mortgage Corp. v Smith, 18 AD 3d 602 [2nd Dept 2005]).

Lelekakis has failed to raise any triable issue of fact in opposition. Lelekakis has failed to proffer any facts to support her contention that plaintiff is guilty of laches or otherwise has waived enforcement of the due-on-transfer provision of the mortgage. Moreover, her alternative argument that summary judgment should be denied because there is outstanding discovery is without

merit. The mere hope that the discovery process might yield evidence favorable to the opponent of summary judgment is insufficient to warrant denial of summary judgment (see Goldes v City of New York, 19 AD 3d 448 [2nd Dept 2005]).

Accordingly, the motion is granted and the cross-motion is denied.

Settle order.

Dated: November 20, 2013



KEVIN J. KERRIGAN, J.S.C.

QUEENS COUNTY CLERK
FILED

2013 NOV 29 PM 12:53