PROGRAM MATERIALS
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Time Waits for No One! The Statute of Limitations in NY Foreclosure

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Time Waits for No One! The Statute of Limitations in NY Foreclosure

Morgan R. McCord | May 17, 2021 at 2:00 p.m. EDT
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The statute of limitations in foreclosure

- Under CPLR 213(4), a mortgage foreclosure claim is governed by a six-year statute of limitations*. *See Lubonty v. U.S. Bank N. A.*, 34 N.Y.3d 250, 261 (2019)

* New York state and federal courts have held that a claim to foreclose a Federal Housing Authority loan is not subject to any state-imposed statute of limitations. *See e.g.*, *Windward Bora, LLC v. Wilmington Savings Fund Society, FSB*, Civ. No. 1:18-CV-402 (DJS), 2019 WL 4736236, at *6 (N.D.N.Y. Sept. 27, 2019)**; *Fleet Nat. Bank v. D'Orsi*, 26 A.D.3d 898, 899-900 (N.Y. App. Div. 4th Dep't 2006); *Long Island Realty Grp. VII v. U.S. Dep't of Hous. & Urban Dev.*, 2005 WL 2179687, at *4 (E.D.N.Y. Sept. 9, 2005).

** Kenneth J. Flickinger's litigation update discussing *Windward Bora, LLC v. Wilmington* is included in the presentation materials.

When does the clock start running?

- With 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*, *e.g.*, *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753, 754 (N.Y. App. Div. 2d Dep't 2011).
- Thus, an action to foreclose a mortgage may be brought to recover unpaid installments which became due within the six-year period preceding the commencement of the action
- Installments that became due more that six-years before commencement are time-barred

Examples

- *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753 (N.Y. App. Div. 2d Dep't 2011) – Appellate Division, Second Department held that even though the last mortgage payment was made in June 2000, and the foreclosure was not commenced until June 2008, the entire action was not time-barred. Instead, the foreclosing plaintiff's recovery was limited to the unpaid installments which accrued within the six-year period preceding the commencement of foreclosure action (the installments which became due on or after July 1, 2002).

Examples continued

- *Wilmington Sav. Fund Socy. FSB v. Deliberto*, 184 A.D.3d 1081, 1083 (N.Y. App. Div. 4th Dep't 2020) – Appellate Division, Fourth Department held that since the plaintiff commenced this foreclosure action on September 15, 2017, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, were not barred by the statute of limitations. However, recovery for installments due before that date were barred by the statute of limitations.

Examples continued

- *Ditech Fin., LLC v. Reiss*, 175 A.D.3d 618 (N.Y. App. Div. 2d Dep't 2019) – Appellate Division, Second Department held that since the defendant made his last mortgage payment in January 2009, and this action was not commenced until October 6, 2016, unpaid installments from January 2009 through October 5, 2010 were time-barred

What about acceleration?

- "Even if a mortgage is payable in installments, the terms of the mortgage may contain an acceleration clause that gives the lender the option to demand due the entire balance of principal and interest upon the occurrence of certain events delineated in the mortgage." *Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d 34, 37 (N.Y. App. Div. 2d Dep't 2019)
- "A lender's right to accelerate a mortgage debt does not arise from the common law or a statute, but from the terms of the parties' agreement. Accordingly, the specific terms of each note and mortgage dictate the circumstances under which a holder may demand due the entire balance of principal and interest." *Christiana Trust v. Barua*, 184 A.D.3d 140, 158 (N.Y. App. Div. 2d Dep't 2020) (cf. Real Property Law § 254[2]).
- Generally speaking, the holder's option to accelerate the mortgage debt becomes operable when the borrower commits what amounts to a material breach of the parties' agreement, as defined in the agreement itself.

What impact does acceleration have on the statute of limitations?

- "Once a mortgage debt is accelerated, the borrowers' right and obligation to make monthly installments ceases and all sums become immediately due and payable" *Federal Natl. Mtge. Assn. v. Mebane*, 208 A.D.2d 892, 894 (N.Y. App. Div. 2d Dep't 1994);
- As a result, upon acceleration, the limitations period begins to run on the entire debt. *See e.g., Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980 (N.Y. App. Div. 2d Dep't 2012).

What is needed to accelerate the mortgage debt?

- Standing:
  - As a general matter, in order to constitute a valid election to accelerate, the entity making the election must have the contractual authority, or standing, to make the election, and that authority must be exercised in accordance with the terms of the note and mortgage. *See e.g., Milone v. U.S. Bank N.A.*,164 A.D.3d 145 (N.Y. App. Div. 2d Dep't 2018).
  - No standing, no acceleration. *See e.g.*, *U.S. Bank, N.A. v. Auguste*, 173 A.D.3d 930, 932 (N.Y. App. Div. 2d Dep't 2019)* ("Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration.")

* Morgan R. McCord represented U.S. Bank, N.A.

What is needed to accelerate the mortgage debt?

- Affirmative act:
  - "Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision." *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d at 982-983.
  - The act must be overt and unequivocal. *See Freedom Mtge. Corp. v. Engel*, 2021 WL 623869, at *1 (2021).*

* Kenneth J. Flickinger's litigation update discussing *Freedom Mtge. Corp. v. Engel* is included in the presentation materials.

What is needed to accelerate the mortgage debt?

- Notice:
  - In order for a holder's election to be enforceable against the borrower, the borrower must generally be provided "with notice of the lender's decision to exercise an option to accelerate the maturity of a loan." *Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d at 38.
  - However, actual notice to the borrower is not necessary. *See Freedom Mortgage Corp. v. Engel*, 2021 WL 623869, at *3 ("a borrower's lack of actual notice does not as a matter of law destroy the effect of the election [to accelerate]")
  - To be enforceable, notice of the holder's election must be "clear and unequivocal." *Sarva v. Chakravorty*, 34 A.D.3d 438, 439 (N.Y. App. Div. 2d Dep't 2006).

What affirmative acts accelerate the mortgage debt?

- Commencement of a foreclosure action:
  - "The unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constituted a valid election [to accelerate the mortgage debt]." *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932).
  - If the holder elects to foreclose the mortgage, it must choose whether to foreclose the entire mortgage debt or proceed with a "partial foreclosure." *Golden v. Ramapo Improvement Corp.*, 78 A.D.2d 648, 649 (N.Y. App. Div. 2d Dep't 1980).
  - Partial foreclosure "permits a lender to recover unpaid installments that have become due, without accelerating the remaining portion of the debt." *Aurora Loan Servs., LLC v. Tobing*, 172 A.D.3d 975, 977 (N.Y. App. Div. 2d Dep't 2019).

What affirmative acts accelerate the mortgage debt?

- Default Notice/Letter:
  - "Acceleration of a mortgage debt may occur by means other than the commencement of a foreclosure action, such as through an unequivocal acceleration notice transmitted to the borrower." *Freedom Mtge. Corp. v Engel*, 2021 WL 623869, at *4.
  - To be unequivocal, such notices/letters must either:
    - seek immediate payment of the entire outstanding loan balance indicating that the debt was accelerated at the time the letter was written; or
    - pledge that acceleration would immediately or automatically occur upon expiration of a stated cure period
  - Notices stating that a lender "will" or "may" accelerate are insufficient to accelerate the mortgage debt. *See e.g.*, *Milone v. U.S. Bank N.A.*,164 A.D.3d at 152 (holding that such language was "merely an expression of future intent that fell short of an actual acceleration," which could "be changed in the interim").

What affirmative acts accelerate the mortgage debt?

- Seeking relief from the automatic stay in bankrutpcy:
  - *MTGLQ Invs., L.P. v. Wentworth*, 192 A.D.3d 186, 189 (N.Y. App. Div. 3d Dep't 2021) ("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. 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")

Examples of acceleration

- *U.S. Bank Trust, N.A. v. Miele*, 186 A.D.3d 526, 528 (N.Y. App. Div. 2d Dep't 2020) – Appellate Division, Second Department held that defendants demonstrated that the six-year statute of limitations began to run on July 7, 2009, when the plaintiff accelerated the mortgage debt by commencing a prior foreclosure action. Since the instant action was filed more than six years later, on January 28, 2016, the defendants sustained their initial burden of demonstrating, prima facie, that the action was untimely.

Examples continued

- *Federal Natl. Mtge. Assn. v. Tortora*, 188 A.D.3d 70, 74 (N.Y. App. Div. 4th Dep't 2020) – Appellate Division, Fourth Department held that defendant met his initial burden of establishing that the statute of limitations expired by submitting evidence establishing that the full amount of the mortgage debt was accelerated in April 2009, when plaintiff's predecessor in interest commenced the first foreclosure action. Because the current foreclosure was not filed until 2018, more than six years after the debt was accelerated, the defendant established that the statute of limitations had expired, requiring dismissal of that action.

Can acceleration be revoked?

- Yes, like acceleration, the contracts between the parties control. *Freedom Mtge. Corp. v Engel*, 2021 WL 623869, at *5-6.
- Absent a provision in the operative agreements setting forth what a noteholder must do to revoke an election to accelerate, revocation can be accomplished by an "affirmative act" of the noteholder within six years of the election to accelerate. *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 A.D.3d 1068 (N.Y. App. Div. 2d Dep't 2017)

What impact does revocation have on the statute of limitations?

- If an acceleration is validly revoked, the default principles of accrual apply and the statute of limitations continues to run "only upon the maturity of [each] discrete [payment] obligation." *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995).
- Installment payments that were due more than six years prior to the commencement of an action will still be time-barred. *See e.g.*, *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d at 982.

What is needed to revoke acceleration?

- Standing:
  - As is the case with acceleration, an entity must have the contractual authority or standing to validly revoke an election to accelerate, and that authority must be exercised in accordance with the terms of the note and mortgage. *See e.g.*, *Milone v. U.S. Bank N.A.*, 164 A.D.3d at 155.

What is needed to revoke acceleration?

- Affirmative act within the statute of limitations:
  - As with acceleration, revocation must be made by an affirmative act that is clear and unambiguous. *See e.g.*, *Federal Nat'l Mortgage Ass'n v. Mebane*, 208 A.D.2d at 894; *Christiana Trust v. Barua*, 184 A.D.3d at 140.
  - The act must be taken before the statute of limitations has expired on the accelerated mortgage debt. *See e.g., Bank of N.Y. v. Hutchinson*, 190 A.D.3d 804, 806 (N.Y. App. Div. 2d Dep't 2021)*; *Christiana Trust v. Barua*, 184 A.D.3d at 140.

    * Morgan R. McCord's litigation update discussing *Bank of N.Y. v. Hutchinson* is included in the presentation materials. A variation of this update was published in the New York Law Journal on March 12, 2021.

What affirmative acts revoke acceleration?

- Voluntary discontinuance:
  - As will be discussed later in this presentation, the Court of Appeals held earlier this year in its landmark *Freedom Mortgage v. Engel* decision that the voluntary discontinuance of a foreclosure action is an affirmative act sufficient to revoke acceleration of the mortgage debt. *See Freedom Mtge. Corp. v Engel*, 2021 WL 623869, at *7.

What affirmative acts revoke acceleration?

- Loan modification:
  - A loan modification agreement, which clearly and unambiguously demanded a resumption of monthly installment payments was deemed to be a sufficient affirmative act of revocation. *See Bank of N.Y. v. Hutchinson*, 90 A.D.3d at 806.

What affirmative acts revoke acceleration?

- Forbearance:
  - An express statement in a forbearance agreement that the noteholder is revoking its prior acceleration and reinstating the borrower's right to pay in monthly installments has been deemed an affirmative act of revocation. *See U.S. Bank Trust, N.A. v. Rudick*, 172 A.D.3d 1430 (N.Y. App. Div. 2d Dep't 2019).

What affirmative acts revoke acceleration?

- De-acceleration letters/notices:
  - A de-acceleration letter/notice containing a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations has been held to be a de-acceleration in fact. *See e.g.*, *Milone v. U.S. Bank N.A.*, 164 A.D.3d at 154.

Examples of revocation:

- *Bank of N.Y. v. Hutchinson*, 90 A.D.3d 804 (N.Y. App. Div. 2d Dep't 2021) – Appellate Division, Second Department held that although the defendant met her initial burden of demonstrating, prima facie, that the instant action was time-barred due to the filing of a prior foreclosure, the plaintiff's submission of a loan modification agreement was sufficient to raise a triable issue of fact as to whether the plaintiff had revoked its election to accelerate thereby warranting denial of summary judgment to the defendant.

Examples continued

- *U.S. Bank N.A. v. Kropp-Somoza*, 2021 WL 608732, *2 (N.Y. App. Div. 2d Dep't Feb. 17, 2021) – Appellate Division, Second Department held that although the defendant established, prima facie, that the instant action was untimely based on the filing of a prior foreclosure action, the plaintiff demonstrated that it revoked its election to accelerate the mortgage by a de-acceleration letter that contained "a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations."

Equitable Estoppel May Bar Revocation

- A noteholder may be equitably estopped from revoking its election to accelerate when the borrower has been substantially prejudiced and/or materially changed his/her position in detrimental reliance on the election. *See e.g.*, *Kilpatrick v. Germania Life Ins. Co.,* 183 NY 163, 168 (1905) (holding, in applying an equitable estoppel analysis, that the noteholder's acceleration became final and irrevocable only after the borrower changed his position in reliance on that election by executing a new mortgage); *Milone v. U.S. Bank N.A.*, 164 A.D.3d at 156 ("Only if a borrower can demonstrate substantial prejudice may a court, in the exercise of its equity jurisdiction, restrain the lender from revoking its election to accelerate")

What about Tolling?

- Statute of limitations are tolled by the automatic stay in bankruptcy. *See e.g.*, *Lubonty v. U.S. Bank N.A.,*159 A.D.3d at 963–964.
- Statute of limitations on note suit tolled during pendency of foreclosure action. *See CitiMortgage, Inc. v. Ramirez*, 192 A.D.3d 70 (N.Y. App. Div. 3d Dep't 2020)*
- Governor Cuomo's Covid-19 Executive Orders tolling/suspending statute of limitations (particularly EO 202.8, 202.67 and 202.72 ending tolling/suspension Nov. 3, 2020) (tolling amounts to 228 days)
  - EOs have not yet been addressed in foreclosure actions
  - One court held the EOs tolled the statute of limitations rather than suspended them. *See Foy v. State*, No. 135085, 2021 WL 866035, at *2 (N.Y. Ct. Cl. Feb. 16, 2021) ("it is clear that a toll, and not a suspension, was intended")
  - Another court applied both a suspension and tolling analysis. *See Morse v. LoveLive TV US, Inc.,* 69 Misc. 3d 1224(A) (N.Y. Sup. Ct. 2020) ("Various interpretations of the COVID orders regarding the tolling deadlines are possible … Under either interpretation [suspension or tolling] of the COVID orders, plaintiff filed both the amended complaint and the supplemental summons in accordance with the timeline ordered by this court")

* Kenneth J. Flickinger's litigation update discussing *CitiMortgage v. Ramirez* is included in the presentation materials.

What about Renewal?

- Partial Payments/Acknowledgment:
  - "A debtor's partial payment toward a mortgage debt may renew the statute of limitations in a foreclosure action if the creditor shows that there was a payment by the debtor or the debtor's agent of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remaining balance." *Wells Fargo Bank N.A. v. Grover*, 165 A.D.3d 1541, 1542 (N.Y. App. Div. 3d Dep't 2018)

Freedom Mortgage Corp. v. Engel, 2021 WL 623869 (Feb. 18, 2021)

- On February 18, 2021, the Court of Appeals reversed four (4) decisions from the Appellate Divisions, which greatly affect the prosecution of mortgage foreclosure actions in New York with respect to the statute of limitations

Foreclosure SOL Leading up to *Engel*

- Before 2018, general consensus that discontinuance revoked acceleration.
- In 2018, the Appellate Division, Second Department issued its decision in *Freedom Mortg. Corp. v. Engel*, reversed that trend, and held that voluntary discontinuance, without more, was insufficient to revoke acceleration.
- This was a huge shift with major repercussions.

First Department in *Vargas v. Deutsche Bank*

- Before the Court of Appeals decision in *Engel* there was a split between the First and Second Departments of the Appellate Division.
- In Vargas, the First Department held that a loan could be accelerated by notice stating that the debt "will", "may" or "shall" be accelerated if the debt is not cured.
- The Second Department held that such language was insufficient to accelerate the debt, as the language was not unequivocal, but a statement of future intent.

Unequivocal Revocation…but

- …did you really mean it?
- The Second Department issued decisions in 2018 and 2020 holding that a notice to the borrower expressly revoking acceleration MAY NOT be sufficient if it was only a pretext to avoid the application of the statute of limitations
- Forced courts to analyze the subjective intent of the lender/servicer/counsel to determine whether post-revocation actions indicated that it was pretextual

Court of Appeals to the rescue. *Freedom Mortg. Corp. v. Engel*

- Court of Appeals decision reversed those Appellate Division cases. The major takeaways are:
  - A notice expressing intent to accelerate the debt in the future is not an act of acceleration, and will not commence the running of the statute of limitations. If such a notice, typically referred to as a "default notice" or "thirty-day notice", merely states that the lender "shall", "may" or "will" accelerate the debt if the default is not cured, the notice is equivocal as to acceleration, and will not be considered an overt act of acceleration for statute of limitations purposes.
  - Where the only act of acceleration is the commencement of a foreclosure action, voluntary discontinuance of the foreclosure action, without more, constitutes an act of revocation of the acceleration for statute of limitations purposes.
  - A mortgagee's motive in revoking acceleration is irrelevant. A lender should not be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt.

Certainty Going Forward

- The implication of these decisions for the mortgage servicing industry cannot be understated. The Court of Appeals has laid out rules that are clear and easy to apply, creating much needed certainty going forward. There is no longer a need to prove the subjective intent behind a revocation of acceleration. The act of revocation, whether by voluntary discontinuance of a foreclosure action, or by notice, is sufficient, and may not be assailed as insincere.

What About Looking Backwards?

- Hundreds of mortgages have been wiped out over the last few years based on the Appellate Division case law that was reversed in these cases. Can a lender that lost its mortgage on similar issues get a do-over?
- A motion for leave to renew may provide a remedy. CPLR 2221(e) allows a party to seek to correct an adverse determination on the grounds that "there has been a change in the law that would change the prior determination."

Motion to Renew (cont'd)

- The action must still be "sub judice" to permit such a motion. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case. *See* Siegel, N.Y. Prac. §254 (6th ed.).
- If final judgment has not been entered, an action will be deemed pending, allowing for a timely motion to renew on the basis of a change in law. *See State of New York Mortg. Agency v. Braun*, 182 A.D.3d 63 (N.Y. App. Div. 2d Dep't 2020) ("an action is deemed pending until there is a final judgment. Here, while there was an order granting the defendant's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered.").

Too Good to be True?

- A concurrence, and separate dissent, in the Engel case left open the question whether the notes and mortgages permit a lender the contractual right to revoke an acceleration, as the arguments were not raised in the three (3) of the four (4) appeals decided, and the argument was raised for the first time on appeal in the other, and, therefore, was unpreserved for appellate review. Might this victory be short lived?

Contractual Right to Revoke?

- Court of Appeals teased this as a potential argument in the concurrence and dissent in *Engel*.
- The argument has potential to completely undo the holding in *Engel*.
- A contract cannot be modified or altered without the consent of all the parties thereto. *Becker v. Faber*, 280 N.Y. 146 (1939).
- Where there is an absence of mutual assent to a proposed modification, the original terms of the contract remain in effect. *Beacon Terminal Corp. v. Chemprene, Inc.*, 75 A.D.2d 350 (N.Y. App. Div. 2d Dep't 1980).

Contractual Right to Revoke (cont'd)

- Second Department is on record holding that, "[S]ince the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than mandatory, [lender] maintained the right to later revoke the acceleration." *Milone v. U.S. Bank*, 164 A.D.3d at 531-532.

Proposed Legislation SB 5473 (Introduced March 8, 2021)

- The “Foreclosure Process Abuse Prevention Act”
- The bill was introduced in the New York State Senate March 8, 2021, and is currently in the judiciary committee.
- If this becomes law, foreclosure practice in New York will be fundamentally changed.
- Statute of limitations, the savings statute, successive motions for summary judgment, defendant’s right to recover legal fees, will all be changed to favor defaulting borrowers.

Proposed Legislation (cont'd)

- The proposed legislation would undo *Engel*.
- "Once a cause of action has accrued, no party may unilaterally waive, postpone, cancel, or reset the accrual thereof, or otherwise effectuate a unilateral extension of the limitations period prescribed by law to interpose the claim."

Proposed Legislation (cont'd)

- CPLR 205(a), the saving statute.
- Allows a new action to be commenced within six months of dismissal of a previous action seeking the same relief, as long as the dismissal was not (1) for lack of personal jurisdiction, (2) on the merits, or (3) for neglect to prosecute.
- The proposed legislation would add as exceptions to the saving statute, dismissal for any form of neglect, including failure to seek a default judgment within one year, and other procedural dismissals
- And would limit use of the saving statute to one-time only.

Questions?

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About Us

ECKERT SEAMANS

Morgan R. McCord

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Morgan McCord focuses his practice on banking, financial services, consumer and commercial collections, and bankruptcy litigation. He represents banks, loan servicers, and other financial institutions through all phases of litigation involving diverse claims. These claims typically involve lender liability, title issues, contested foreclosures, stolen and forged negotiable instruments, fraudulent or unauthorized account transactions, electronic transactions, identity theft, cashier's checks, and other retail and wholesale banking transactions. Morgan also represents financial services institutions in defending matters arising under the full range of laws and statutes regulating the consumer finance industry, such as the Truth-in-Lending Act (TILA), Real Estate Settlement Procedures Act (RESPA), Fair Debt Collection Practices Act (FDCPA), and Fair Credit Reporting Act (FCRA).

REPRESENTATIVE MATTERS

- In a landmark decision, reported on the front page of the *New York Law Journal*, secured an affirmance from the U.S. Court of Appeals for the Second Circuit of a decision by the U.S. District Court for Southern District of New York dismissing all claims against a prominent national bank arising under 42 U.S.C. 1983 and New York's Exempt Income Protection Act.
- In a decision by the U.S. District Court for the District of New Jersey, featured in the New Jersey Law Journal, obtained dismissal of all claims against a prominent national bank stemming from a counterfeit check fraud scheme ensnaring a law firm.
- Obtained dismissal of all claims against a prominent national bank arising under the Expedited Funds Availability Act and Article 4 of the Uniform Commercial Code.

PROFESSIONAL AFFILIATIONS

- New York State Bar Association, Committee on Creditor's Rights and Banking Litigation
- American Bar Association

COMMUNITY INVOLVEMENT

- Borough of Cresskill, New Jersey – Zoning Board of Adjustment
- Stonegate at Cresskill Condominium Association – President

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PRACTICE AREAS:

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STATE ADMISSIONS:

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U.S. District Court for the Southern District of New York
U.S. District Court for the District of New Jersey
U.S. Bankruptcy Court for the Eastern District of New York
U.S. Bankruptcy Court for the Southern District of New York

EDUCATION:

J.D., cum laude, Hofstra University School of Law, 2009; Senior Editor, *Hofstra University School of Law Journal of International Business and Law*

B.A., magna cum laude, Muhlenberg College, 2006; The National Scholars Honor Society; Kyle M. Larsson Memorial Scholarship Award in Business and Economics

AWARDS AND RECOGNITION

- Recognized as one of "America's Most Honored Lawyers for 2020 – Top 10%" by The American Registry
- Selected for inclusion in *New York Metro Super Lawyers* as a "Rising Star"
- Selected for inclusion in US Business-News Magazine's 2018 Business Elite Awards as "Bankruptcy Lawyer of the Year – North East USA"
- Selected for inclusion in the "Legal Elite Of 2017" as the "Financial Litigator of the Year 2017 – Greater New York" from *North America News*
- Selected for inclusion in the "Legal Elite of 2016" for Financial Services Litigation (Westchester, NY) by *Corporate America Magazine*.

NEWS AND INSIGHTS

PUBLICATIONS

- "High Court Answers Open Questions Concerning RPAPL 1304 and 1306," Eckert Seamans' Financial Services Litigation Update, April 14, 2021.
- "Second Department Clarifies Law Concerning a Lender's Revocation of Acceleration in Foreclosure and Confirms the Sanctity of Settlement," New York Law Journal, March 12, 2021.
- "Appellate Division, Second Department Clarifies Law Concerning a Lender's Revocation of Acceleration in Foreclosure and Confirms the Sanctity of Settlement," Eckert Seamans' Financial Services Litigation Update, February 10, 2021.
- "Appellate Division Interprets RPAPL 1302-a for the First Time in a Decision with Important Implications for Mortgage Servicers," Eckert Seamans' Financial Services Litigation Update, December 3, 2020.
- "Second Department Interprets RPAPL 1302-a for the First Time in a Decision with Important Implications for Mortgage Servicers," New York Law Journal, December 2020.
- "New York High Court Shields Banks from Certain Direct Actions by Debtors," Banking Law Industry Alert, January 2014.

SPEAKING ENGAGEMENTS

- "Don't Bank on It! Counterfeit Check Fraud 101," CLE webinar presentation for Lawline, November 2018.
- "Compass – What do Regulators Really Want?" presented to employees of an international software provider to banks, commodities and security traders, December 2017.
- "Counterfeit Check Scams 101," Journal of International Business, Hofstra University School of Law, May 2014.

About Us

ECKERT SEAMANS

Kenneth J. Flickinger

MEMBER

Kenneth Flickinger practices in the area of commercial litigation with a concentration in representing nationally prominent financial institutions and mortgage servicers. The matters at issue in these cases include commercial and residential foreclosure actions, debt collection matters, loan servicing, lender liability, mortgage fraud, business torts, title issues, predatory lending, credit discrimination, state and federal unfair and deceptive trade practices (UDAP) statutes, and other alleged violations of law arising from his clients' lending, servicing, and collections activity. Kenneth also represents financial services institutions in defending matters arising under the full range of laws and statutes regulating the consumer finance industry, such as the Truth-in-Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA), and the Equal Credit Opportunity Act (ECOA). Kenneth counsels mortgage servicers and asset management companies on compliance issues including Consumer Financial Protection Bureau regulations, Fair Debt Collection Practices Act, and New York foreclosure and consumer protection statutes, and has worked closely with general counsels and in-house counsel regarding all aspects of litigation strategy.

PROFESSIONAL AFFILIATIONS

- New York City Bar Association, Member of the Mortgage Foreclosure Task Force

NEWS AND INSIGHTS

PUBLICATIONS

- "Discontinued and Revoked: Court of Appeals Changes Landscape of Foreclosure Statute of Limitations Jurisprudence in Reversing Quartet of Appellate Division Cases," Eckert Seamans' Financial Services Litigation Update, February 19, 2021.
- "Citimortgage v. Ramirez: Appellate Division, Third Department, Holds Statute of Limitations on Note Suit is Tolled During Pendency of Foreclosure Action." Eckert Seamans' Financial Services Litigation Update, February 5, 2021.
- "Chief Administrative Judge of the New York Courts Issues Guidance Relating to Recently Enacted Emergency Eviction and Foreclosure Prevention Act." Eckert Seamans' Financial Services Litigation Update, January 4, 2021.

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U.S. Bankruptcy Court for the Western District of New York
U.S. Bankruptcy Court for the District of New Jersey
U.S. Court of Appeals for the Second Circuit

EDUCATION:

J.D., St. John's University School of Law, 2004
B.A., State University of New York at Albany, 2001

- "New York Passes COVID-19 Emergency Eviction and Foreclosure Prevention Act: Effect on Prosecuting Foreclosures in New York," Eckert Seamans' Legal Update, December 29, 2020.
- "Second Circuit Court of Appeals Holds that Assignee of Federal Agency is Immune from Application of New York Statute of Limitations on Mortgage Foreclosure," Eckert Seamans' Financial Services Litigation Update, December 17, 2020.

SPEAKING ENGAGEMENTS

- "COVID-19: NY & Mass. Foreclosure Law and Mass. Obsolete Mortgage Law," co-presenter, CLE webinar for a firm client corporate legal department, June 2020.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 2. Limitations of Time (Refs & Annos)

McKinney's CPLR § 213

§ 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud

Effective: August 26, 2019
Currentness

The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law;

2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law;

3. an action upon a sealed instrument;

4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;

5. an action by the state based upon the spoliation or other misappropriation of public property; the time within which the action must be commenced shall be computed from discovery by the state of the facts relied upon;

6. an action based upon mistake;

7. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith.

8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

9. an action by the attorney general pursuant to article twenty-three-A of the general business law or subdivision twelve of section sixty-three of the executive law.

Credits

(L.1962, c. 308. Amended L.1963, c. 532, § 5; L.1965, c. 248, §§ 3 to 5; L.1966, c. 138, § 3; L.1975, c. 43, §§ 1, 2; L.1983, c. 403, § 34; L.1988, c. 709, § 2; L.2004, c. 403, § 1, eff. Aug. 17, 2004; L.2019, c. 184, § 1, eff. Aug. 26, 2019.)

McKinney's CPLR § 213, NY CPLR § 213

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

New York Official Reports

34 N.Y.3d 250, 139 N.E.3d 1222, 116 N.Y.S.3d 642, 2019 N.Y. Slip Op. 08520

**1 Gregg Lubonty, Appellant,

v

U.S. Bank National Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A, et al., Respondent.

Court of Appeals of New York
85
Argued October 17, 2019

Decided November 25, 2019

CITE TITLE AS: Lubonty v U.S. Bank N.A.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 28, 2018. The Appellate Division affirmed an order of the Supreme Court, Suffolk County (Joseph Farneti, J.; op 2015 NY Slip Op 31632[U] [2015]), which had (1) granted defendant's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint; and (2) dismissed the complaint in its entirety.

Lubonty v U.S. Bank N.A., 159 AD3d 962, affirmed.

HEADNOTES

Limitation of Actions
Tolling
Action Stayed by Statutory Prohibition—Automatic Bankruptcy Stay

(1) The automatic stay pursuant to 11 USC § 362 (a) prohibiting the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition constitutes a "statutory prohibition" under CPLR 204 (a), which tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition." The bankruptcy stay provision expressly prohibits the "commencement or continuation" of any covered action (11 USC § 362 [a] [1])—it is a blanket ban on filing or continuing lawsuits against the debtor. While an aggrieved party may seek relief from the automatic stay by application to the bankruptcy court, the need to seek judicial relief from the automatic stay means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the bankruptcy court will favorably exercise its discretion.

Limitation of Actions
Tolling
Commencement of Action Stayed by Statutory Prohibition—Subsequent Actions Asserting Same Claim

(2) The term "commencement" within the meaning of CPLR 204 (a) for purposes of tolling the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" includes the commencement of subsequent actions asserting the same claim. Accordingly, in plaintiff's action to discharge his mortgage commenced after he twice filed for bankruptcy and then obtained an automatic stay and dismissal of the foreclosure actions pending against him, the 1,651 days during which defendant was prevented from commencing a foreclosure action due to the automatic bankruptcy stays were not part of the time within which a foreclosure action had to be commenced. Neither the Court of Appeals nor the legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action. Likewise, a toll operates to compensate a claimant *251 for the shortening of the statutory period in which it must commence—or recommence—an action, irrespective of whether the stay has actually deprived the claimant of any opportunity to do so. Thus, in determining whether the statute of limitations on a foreclosure action had expired when a RPAPL 1501 (4) action is filed, the duration of any bankruptcy stay must be excluded, regardless of whether an earlier action on the same claim had been initiated or was pending when the stay was imposed.

Limitation of Actions
Tolling
Action Stayed by Statutory Prohibition—Prior Action Asserting Same Claim Pending When Stay Imposed

(3) CPLR 204 (a)'s toll of the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" is available to a party who, at the time the stay was imposed, had a pending action asserting the same claim. Accordingly, defendant bank's foreclosure claims were not time-barred, where the statute of limitations was tolled for the period during which defendant was statutorily prohibited from commencing any action concerning plaintiff's property by virtue of the stays automatically imposed when plaintiff filed for bankruptcy while the foreclosure actions of defendant and its predecessor remained pending. Plaintiff's use of the automatic stay, and his control over the timing of its application and revocation, had the effect of halting the pending litigation and staying the commencement of subsequent foreclosure actions for more than four years. In both foreclosure actions, plaintiff filed for bankruptcy and obtained an automatic stay at critical stages of the litigation. In both cases, plaintiff acted to lift the stay and shortly thereafter obtained dismissal of the relevant foreclosure action. Defendant was clearly prevented from asserting its rights as a direct result of plaintiff's actions. The limitations period began to run upon the acceleration of plaintiff's mortgage by defendant's predecessor. The property was subject to bankruptcy stays for at least 1,651 days, during which defendant was statutorily prohibited from commencing any action concerning the property. Adding the duration of the stay to the six-year statute of limitations period, defendant's claims were not time-barred when Supreme Court granted defendant's motion to dismiss plaintiff's action to discharge the mortgage.

RESEARCH REFERENCES

Am Jur 2d Bankruptcy §§ 1707, 1782; Am Jur 2d Limitation of Actions § 186.

Carmody-Wait 2d Limitation of Actions § 13:368.

McKinney's, CPLR 204 (a).

NY Jur 2d Limitations and Laches §§ 290, 293.

Siegel, NY Prac § 51.

11 USCA § 362 (a).

ANNOTATION REFERENCE

See ALR Index under Bankruptcy and Insolvency; Limitation of Actions; Stay of Proceedings.

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***252** Query: bankruptcy /3 stay & toll! /s limitation /s prohibition

POINTS OF COUNSEL

Lester & Associates, P.C., Garden City (*Peter K. Kamran* of counsel), for appellant.

Reversal is warranted as the Supreme Court and the Appellate Division have misinterpreted or disregarded the clear statutory language of CPLR 204 (a). (*Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471; *People v Lopez*, 34 Misc 3d 476; *MLG Capital Assets v Judith Eidelkind Trust*, 275 AD2d 357; *Zuckerman v 234-6 W. 22 St. Corp.*, 267 AD2d 130; *Mercury Capital Corp. v Shepherds Beach*, 184 Misc 2d 266.)

Hinshaw & Culbertson LLP, New York City (*Schuyler B. Kraus, Joseph Silver* and *Han Sheng Beh* of counsel), for respondent.

I. CPLR 204 (a) clearly tolls the statute of limitations irrespective of when a matter was commenced. (*Wilkinson v First Natl. Fire Ins. Co. of Worcester, Mass.*, 72 NY 499; *MLG Capital Assets v Judith Eidelkind Trust*, 275 AD2d 357; *PSP-NC, LLC v Raudkivi*, 138 AD3d 709; *Ackerman v Price Waterhouse*, 84 NY2d 535; *McCarthy v Volkswagen of Am.*, 55 NY2d 543; *Matter of Feinberg*, 18 NY2d 499.) II. Appellant's interpretation of CPLR 204 (a) does not comport with the legislative intent because it would lead to unjust and absurd results. (*Williams v Williams*, 23 NY2d 592; *Zappone v Home Ins. Co.*, 55 NY2d 131; *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*, 14 AD3d 553, 7 NY3d 451; *Matter of Hyde*, 15 NY3d 179; *Matter of Breen v Board of Trustees of the N.Y. Fire Dept. Pension Fund*, 299 NY 8; *Wade v Byung Yang Kim*, 250 AD2d 323; *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757; *Crown, Cork & Seal Co. v Parker*, 462 US 345; *Matter of Long v Adirondack Park Agency*, 76 NY2d 416.)

OPINION OF THE COURT

Garcia, J.

New York law tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" (CPLR 204 [a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (*see* 11 USC § 362 [a]). We must determine whether the bankruptcy stay qualifies as a "statutory prohibition" ***253** under CPLR 204 (a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. For the reasons set forth below, we answer yes to both questions, and affirm the order of the Appellate Division.

I.

The relevant procedural history spans two foreclosure actions, two bankruptcy petitions, and the instant action ****2** to cancel and discharge the mortgage. In 2005, plaintiff Gregg Lubonty took out a $2.5 million mortgage on a property in Southampton, New York. Less than two years later, he defaulted on his mortgage payments. On June 11, 2007, defendant U.S. Bank National Association's predecessor in interest, American Home Mortgage Acceptance, Inc. (AHMA), accelerated plaintiff's mortgage and commenced a foreclosure action. For purposes of this appeal, we assume that at this point the six-year statute of limitations on the foreclosure claim was triggered (*see* CPLR 213 [4]). Just two weeks later, before his answer in the first foreclosure action was due, plaintiff filed a bankruptcy petition in federal court invoking the automatic stay and barring continuation of the first foreclosure action. On November 24, 2009, approximately 882 days after initially filing, plaintiff voluntarily dismissed the first bankruptcy action and the stay was lifted. On January 14, 2010, AHMA filed for default judgment in the first foreclosure action. On September 27, 2010, the trial court dismissed the action as abandoned.[1]

Subsequently, AHMA assigned plaintiff's mortgage to defendant and in June 2011 defendant commenced a foreclosure action. On September 30, 2011, plaintiff moved to dismiss the second foreclosure action for improper service. Before the return date on that motion, however, plaintiff once again filed for bankruptcy, and an automatic bankruptcy stay was again imposed, prohibiting continuation of the second foreclosure action for 769 days.

***254** On November 26, 2013, the bankruptcy court ordered the property and three other properties, with a combined market value of approximately $7.375 million, released to plaintiff from the bankruptcy estate in return for two payments totaling $25,000. On April 8, 2014, the bankruptcy trustee notified the court in the second foreclosure action that the stay was no longer in effect. The stay of the second foreclosure action was lifted.[2] Plaintiff's motion to dismiss for improper service was still pending and defendant filed its opposition on June 2, 2014, the day after plaintiff made the final payment releasing the property from his bankruptcy estate. Plaintiff replied on June 12, 2014. On October 21, 2014, the court dismissed the second foreclosure action for improper service of process.[3]

Two weeks later, plaintiff filed the instant action under Real Property Actions and Proceedings Law § 1501 (4) to discharge the mortgage, asserting that the statute of limitations on defendant's foreclosure claim had expired.[4] Defendant moved to dismiss the action arguing that the statute of limitations on its foreclosure claim had not, in fact, expired because it was tolled while the bankruptcy stay was in effect.

Supreme Court dismissed, agreeing with defendant that "[u]nder [the provisions of CPLR 204 (a) and 11 USC § 362 (a) (1)], the applicable statute of limitations is tolled for the period of time during which a stay or prohibition is ****3** in effect" (2015 NY Slip Op 31632[U], *4 [Sup Ct, Suffolk County 2015]). The Appellate Division unanimously affirmed, concluding that "plaintiff's contention that CPLR 204 (a) does not apply here because the earlier foreclosure actions had already been commenced when the petitions in bankruptcy were filed is without merit" (*Lubonty*, 159 AD3d at 964). Applying CPLR 204 (a), the ***255** Appellate Division determined that the statute of limitations for defendant's foreclosure claim was extended until December 2017 (*id.*). This Court granted plaintiff leave to appeal (32 NY3d 903 [2018]).[5]

II.

(1) Whether the automatic bankruptcy stay constitutes a "statutory prohibition" under CPLR 204 (a) is an issue of first impression for this Court. The issue need not detain us long. The bankruptcy stay provision expressly prohibits the "commencement or continuation" of any covered action (11 USC § 362 [a] [1])—it is a blanket ban on filing or continuing lawsuits against the debtor (*see infra* at 258). It is true that an aggrieved party may seek relief from the automatic stay by application to the bankruptcy court (*see* 11 USC § 362 [d]). But the need to seek judicial relief from the automatic stay

means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the bankruptcy court will favorably exercise its discretion (*see id.* § 362 [d] [1]). It is therefore clear that section 362 (a) is a "statutory prohibition" within the plain meaning of CPLR 204 (a).

III.

The issue then becomes whether the toll provided in CPLR 204 (a) is available to a claimant who, when the bankruptcy stay was imposed, had already commenced an action against the debtor—later dismissed—on the claim now reasserted. In interpreting this statute, our goal is to give force to the intent of the legislature and we therefore begin with the plain text—"the clearest indicator of legislative intent" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). In a manner consistent with the text, we may look to the purpose of the enactment and the objectives of the legislature (*see Matter of Albano v Kirby*, 36 NY2d 526, 530-531 [1975]). We must also "interpret a statute so as to avoid an unreasonable or absurd application of the law" (*People v Garson*, 6 NY3d 604, 614 [2006] [internal quotation marks omitted], citing *People v Santi*, 3 NY3d 234, 244 [2004]). Applying those principles here, plaintiff's cramped reading of CPLR 204 (a), one that produces inequitable and potentially absurd results, must be rejected.

***256 A.**

CPLR 204 (a) provides, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The result here depends on our reading of the term "commencement."

Plaintiff argues that it is impossible for defendant to have been prohibited from "commencing" an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not "stayed" under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, "commencement" of that second action was not stayed, once again making the toll inapplicable (*see* dissenting op at 263). As a result, the six-year statute of limitations would have expired on June 11, 2013—a time when the bankruptcy stay was in effect prohibiting any action against plaintiff. Plaintiff's brand of literalism quickly loses sight of the forest for the trees, producing an outcome antagonistic to the purpose and design of the tolling provision (*see New York Trust Co. v Commissioner of Internal Revenue*, 68 F2d 19, 20 [2d Cir 1933, Hand, J.]). That interpretation must be rejected.

Neither this Court nor the legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent actions ****4** asserting the same claim (*cf. Carrick v Central Gen. Hosp.*, 51 NY2d 242, 246 [1980] ["plaintiff *commenced* a second action by serving defendants with a summons and complaint" (emphasis added)]; CPLR 205 [a] [permitting a plaintiff, in certain circumstances, to "commence a new action" after termination of a prior action]). Likewise, a toll operates to compensate a claimant for the shortening of the statutory period in which it must commence—or recommence—an action, irrespective of whether the stay has actually deprived the claimant of *any* opportunity to do so (*see Matter of Hickman [Motor Veh. Acc. Indem. Corp.]*, 75 NY2d 975, 977 [1990] [holding that the limitations period ***257** was extended even though the stay ended 10 months before the original limitations period would have expired]).

(2) Here, in ruling on plaintiff's claim that the mortgage should be discharged, the court must look to whether the "applicable statute of limitation for the commencement of an action to foreclose" had expired (RPAPL 1501 [4]). Because the two bankruptcy stays prevented defendant from commencing a foreclosure action for at least 1,651 days, that time is not part of the time within which such an action must be commenced. Put another way, in determining whether the statute of limitations on a foreclosure action had expired when plaintiff filed this RPAPL action, the duration of any bankruptcy stay must be excluded, regardless of whether an earlier action on the same claim had been initiated or was pending when the stay was imposed.[6]

This interpretation of "commencement" promotes the purpose of CPLR 204 (a) and, unlike plaintiff's proposed rule, is reconcilable with both the bankruptcy stay's effect, and the policies underlying the enforcement of limitations periods.

B.

The New York tolling statute is an old one, reaching back into the days of equity (3 Rep of Commissioners Appointed

to Revise Statute Laws of this State, ch 4, § 39 at 16 [1828] ["Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force, shall not be deemed any portion of the time in this Chapter limited, for the commencement of such suit"]), modified first to reflect the merger of law and equity with the enactment of the Field Code in 1848 (Nathan Howard, Code of Procedure of the State of New York, Unabridged 440 [1867] ["When the commencement of an action shall be stayed by injunction, the time of the continuance of the injunction shall not be part of the time limited for the commencement of the action"]), and later to include statutes having ***258** the same effect (*id.* [noting that the statute was amended to include the "statutory prohibition" language in 1849]). Having remained practically unchanged for almost two centuries, this rule has strong roots in the equitable principle that plaintiffs should not be penalized for failing to assert their rights when a court or statute prevents them from doing so (*cf. Matter of Feinberg*, 18 NY2d 499, 507 [1966] ["The purpose of a Statute of Limitations is to penalize claimants for sleeping on their rights"]).

We have concluded that the bankruptcy stay is a "statutory prohibition" within the ambit of this equitable tolling provision, and we must therefore look to the effect of the bankruptcy stay on the course of the litigation. The federal statutory restraint is indeed broad in application. "Nothing is more basic to bankruptcy law than the automatic stay and nothing is more important to fair case administration than enforcing stay violations" (*In re Lehman Bros. Holdings, Inc.*, 433 BR 101, 112 [Bankr SD NY 2010]). The effects of that stay are wide-ranging and limit virtually all judicial action against the debtor and any codebtors: "The automatic stay is designed to provide blanket relief from creditor action" (*In re Newberry*, 604 BR 37, 40 [Bankr ED Mich 2019]), and any exceptions from the stay are narrowly written and "strictly construed" (*In re Montgomery*, 525 BR 682, 693 [Bankr WD Tenn 2015]). Courts have also held that the bankruptcy stay not only prevents an action from being continued, but also from being discontinued and recommenced (*see U.S. Bank N.A. v Joseph*, 159 AD3d 968, 970-971 [2d Dept 2018]). Moreover, ****5** the effective date of any stay is controlled by the debtor: the stay is automatic and "springs into being immediately upon the filing of a bankruptcy petition" and "operates without the necessity for judicial intervention" (*In re Soares*, 107 F3d 969, 975 [1st Cir 1997] [internal quotation marks and citation omitted]). In short, the stay brings any potential and ongoing litigation to a standstill at a debtor's behest.

(3) Plaintiff's use of the automatic stay, and his control over the timing of its application and revocation, had the effect of halting the pending litigation and staying the commencement of subsequent foreclosure actions for more than four years. In both foreclosure actions, plaintiff filed for bankruptcy and obtained an automatic stay at critical stages of the litigation: in the first case, pre-answer, and in the second before defendant could respond to the motion to dismiss for lack of personal ***259** jurisdiction. In both cases, plaintiff acted to lift the stay—either by dismissing the bankruptcy case or "purchasing" the property from the bankruptcy estate—and shortly thereafter obtained dismissal of the relevant foreclosure action. Defendant was clearly prevented from asserting its rights as a direct result of the actions of the plaintiff.

In addition to the inequity and gamesmanship it would encourage, application of a "pending action" rule urged by plaintiff would raise a host of practical issues. For example, given the federal rules regarding stays of an action against codebtors, if one debtor declares bankruptcy, a plaintiff cannot proceed independently against a codebtor even if the codebtor has not filed for bankruptcy (*see Deutsche Bank Natl. Trust Co. v DeGiorgio*, 171 AD3d 1267, 1268 n 2 [3d Dept 2019], citing 11 USC § 1301 [a]). Application of a "pending action" rule could produce absurd results in such a situation: if a codebtor is not named in the original suit, or the action against the codebtor is dismissed for some reason prior to the application of the bankruptcy stay, the "pending action" rule would make suit untimely against the bankrupt debtor but not against the codebtor. Application of the rule adopted here would make both subject to the toll as both were subject to the stay.

In another scenario, under the "pending action" rule, an unasserted claim the creditor "slept on," arising out of the same transaction or series of transactions as the claim interposed, would get the benefit of the toll, while the claim that was previously asserted would not. Yet another absurd result. The rule adopted here would apply the toll equally to claims arising from the same transaction.

It is not surprising therefore that courts in the Second and Third Departments, as well as a federal court applying New York law, under circumstances where a prior action was pending when the bankruptcy stay began, have each

interpreted CPLR 204 (a) as excluding the time the stay was in effect from the statute of limitations (*see DeGiorgio*, 171 AD3d at 1268; *Joseph*, 159 AD3d at 968; *In re Strawbridge*, 2012 WL 701031, *9-10, 2012 US Dist LEXIS 29751, *25-27 [SD NY, Mar. 6, 2012, No. 11 Civ. 6759(PAE)]).[7] No court has adopted plaintiff's interpretation.

***260 C.**

The dissent adopts as a refrain plaintiff's argument that the "statutory scheme" of the CPLR requires a different result. Specifically, plaintiff contends that CPLR 205 (a) demonstrates the legislature's intent for the toll to apply only in cases where no action on the claim was commenced before the bankruptcy stay became effective. CPLR 205 (a) provides a six-month grace period to "*commence* a new action upon the same transaction or occurrence or series of transactions or occurrences" where the previous action has been dismissed for any "other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" (CPLR 205 [a] [emphasis added]). Plaintiff asserts that the legislature's enactment of this savings provision shows that it contemplated specific circumstances where plaintiffs should be allowed to extend the statute of limitations for their claims, and that a failure to obtain personal jurisdiction over the defendant was not one of them. This argument begs the question of whether CPLR 204 (a) applies to toll the statute of limitations under these circumstances. Because it does, the legislature's contemplation of which grounds for dismissal earn the protections of the grace period is irrelevant—the statute of ****6** limitations has not expired, and the grace period in this case is unnecessary. There may well be other provisions within the CPLR that could provide relief to other litigants in other circumstances. CPLR 204 (a), however, provides defendant with relief in this case.

Plaintiff also argues that the bankruptcy statute itself provides the primary mechanism by which a defendant may refile a claim—namely, the 30-day grace period provided in 11 USC § 108 (c). This argument is also unavailing: if another statute tolls the action longer than 30 days section 108 (c) applies the longer toll, rather than the 30-day grace period (*see Pettibone Corp. v Easley*, 935 F2d 120, 121 [7th Cir 1991] ["Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business"]; *see also HSBC Bank USA, N.A. v Crum*, 907 F3d 199, 206 [5th Cir 2018]; Siegel & Connors, NY Prac § 51 [6th ed 2018]).

***261 IV.**

Applying the above rule to the instant action, defendant's claims were not time-barred when Supreme Court granted defendant's motion to dismiss.[8] The statute of limitations for a foreclosure claim is six years (CPLR 213 [4]). Here, the limitations period began to run on June 11, 2007, upon AHMA's acceleration of plaintiff's mortgage. The property was subject to bankruptcy stays for at least 1,651 days, during which defendant was statutorily prohibited from commencing any action concerning the property. Adding the duration of the stay to the six-year statute of limitations period, defendant had until on or about December 18, 2017, to commence the foreclosure action. Dismissal of plaintiff's action to discharge the mortgage was thus proper. Accordingly, the order of the Appellate Division should be affirmed, with costs.

Stein, J. (dissenting). The express language of CPLR 204 (a) is unambiguous: "[w]here the *commencement* of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be *commenced*" (emphasis added). Consequently, where a stay is instituted *after* an action is commenced—that is, where "the commencement of [the] action [is not] stayed"—section 204 (a) is inapplicable. In my view, the majority reads the word "commencement" out of section 204 (a), thereby impermissibly extending the statute of limitations by judicial fiat. Therefore, I respectfully dissent.

A brief restatement of the complicated procedural posture of this case—which includes two foreclosure actions, two bankruptcy proceedings, and the present action to cancel and discharge the mortgage—is necessary. In 2005, plaintiff executed a note with nonparty American Home Mortgage Acceptance, Inc. (AHMA), secured with a mortgage on residential real property (the subject property). In 2007, AHMA commenced the first foreclosure action, alleging that plaintiff had defaulted on the mortgage and requesting payment in full. Approximately ***262** two weeks later, plaintiff commenced a bankruptcy proceeding, automatically staying continuation of the first foreclosure action (*see* 11 USC § 362). This stay was lifted in November 2009, after plaintiff's bankruptcy petition was dismissed. The first foreclosure action was subsequently dismissed as abandoned in September 2010.[1]

In June 2011, after being assigned the mortgage, defendant U.S. Bank National Association (U.S. Bank) commenced a second foreclosure action, based upon the same default alleged in the first foreclosure action. Plaintiff moved to dismiss the complaint based upon improper service and, shortly thereafter, commenced a second bankruptcy proceeding, which stayed the second foreclosure action before U.S. Bank had an opportunity to respond to plaintiff's motion to dismiss. The subject property was thereafter released from the bankruptcy estate, and the stay was lifted. In October 2014, Supreme Court granted plaintiff's motion to dismiss the second foreclosure action, concluding, on the evidence presented, that U.S. Bank had failed to properly serve plaintiff under CPLR 308 (2).

Plaintiff subsequently commenced this action against U.S. Bank pursuant to RPAPL 1501 (4), seeking to cancel and discharge the mortgage on the subject property because the six-year statute of limitations applicable to commencement of a foreclosure action had expired (*see* CPLR 213 [4]). U.S. Bank moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), asserting, as relevant here, that the two bankruptcy stays tolled the statute of limitations pursuant to CPLR 204 (a) such that it was still possible to timely commence a third foreclosure action. Plaintiff opposed the motion to dismiss, arguing that CPLR 204 (a) was inapplicable because each bankruptcy stay became effective *after* each mortgage foreclosure action was *commenced*, and each stay was terminated before each foreclosure action was dismissed; therefore, plaintiff contended that, pursuant to the express language of CPLR 204 (a), the statute of limitations was not tolled insofar as "the commencement of an action" was never stayed. Plaintiff advances the same arguments on this appeal. ****7**

Because this case presents a question of statutory interpretation regarding CPLR 204 (a), we must "attempt to effectuate ***263** the intent of the [l]egislature, and where the statutory language is clear and unambiguous," we must interpret the statute "so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976] [citations omitted]; *see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). It is also well established that " 'resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction . . . courts have no right to add or take away from that meaning' " (*Majewski*, 91 NY2d at 583, quoting *Tompkins v Hunter*, 149 NY 117, 122-123 [1896]).

CPLR 204 (a) is entitled, in pertinent part, "[s]tay of *commencement* of action" and, as previously noted, provides that, "[w]here the *commencement* of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be *commenced*" (emphasis added). Although the majority correctly states that the outcome of this case is dependent upon our reading of the term "commencement," the majority neglects the critical point that "commencement" is defined in CPLR 304. In that regard, the legislature has provided that "[a]n action is commenced by *filing* a summons and complaint or summons with notice in accordance with [CPLR 2102]" (CPLR 304 [a] [emphasis added]). In light of that definition, CPLR 204 (a) could not be clearer: a toll of the statute of limitations is available only where a would-be plaintiff is precluded from duly filing the applicable papers —thereby commencing an action—as the result of a stay or statutory prohibition.

Here, it is undisputed that the first foreclosure action was commenced under CPLR 304 (a) before any bankruptcy stay took effect, and the second foreclosure action was commenced in the time period between the first and second bankruptcy stays, i.e., when no stay was in effect. Accordingly, because the bankruptcy stays did not prevent the commencement of a foreclosure action regarding the subject property, the toll codified in CPLR 204 (a) does not apply.

Nevertheless, the majority holds that "the duration of any bankruptcy stay must be excluded, regardless of whether an earlier action on the same claim ha [s] been initiated or was pending when the stay was imposed" (majority op at 257). Stated differently, according to the majority, whenever a stay is interposed, the statute of limitations is extended for the length ***264** of that stay, even if the action was already commenced and is subsequently terminated. However, if the legislature intended to enact such a rule, it easily could have made CPLR 204 (a) applicable whenever a stay prevents a party from "commencing or *continuing* a civil action"—the phrase used in the 1978 Bankruptcy Code (11 USC § 108 [c] [emphasis added]; *see* § 362 [a] [1]). Instead, the legislature chose to enact a statute that links application of the toll to "commencement," a term defined by the CPLR. Therefore, the rule adopted by the majority today disregards two fundamental principles of law. First, it renders the phrase "the commencement of" superfluous, in contravention

of our rules of statutory interpretation (*see Majewski*, 91 NY2d at 587; *Jensen v General Elec. Co.*, 82 NY2d 77, 86 [1993]). Second, the majority's rule extends the statute of limitations without regard to the plain language of the tolling provision, thereby ignoring the legislature's express direction that "[n]o court shall extend the time limited by law for the commencement of an action" (*see* CPLR 201).

The majority reaches its result by relying on amorphous notions of equity, positing that application of the express statutory language would produce absurd results and encourage gamesmanship. To be sure, "courts should construe [statutes] to avoid objectionable, unreasonable[,] or absurd consequences" (*Long v State of New York*, 7 NY3d 269, 273 [2006]; *see New York State Bankers Assn. v Albright*, 38 NY2d 430, 437 [1975]). However, the majority struggles to identify any such consequences that result from applying the unambiguous text of CPLR 204. First, the majority states that an absurd result would occur where an action is commenced against one codebtor before imposition of a bankruptcy stay and against a second codebtor after the same stay is lifted. The majority asserts that, in this scenario, the literal effect of the plain language of CPLR 204 (a) is that the causes of action against each codebtor would become untimely at different times (*see* majority op at 259). Of course, it might be the case that the relation-back doctrine would apply in this scenario, avoiding the consequence the majority presumes (*see* CPLR 203 [c]; *Buran v Coupal*, 87 NY2d 173, 178 [1995]). In any event, even if the majority were correct, it is wholly unclear why we should rewrite CPLR 204 (a) to avoid such an outcome. That the application of the statute of limitations may vary between different parties or claims is a reality of complex civil litigation. ****8**

The majority further posits, more generally, that enforcing the statute as written would reward parties that delay commencement ***265** of an action, because a party that commences an action closer in time to the expiration of the statute of limitations is more likely to benefit from a CPLR 204 (a) toll if a stay goes into effect, whereas a party that commences an action before any stays are imposed, will receive no toll. The majority overlooks that a party who commences an action within the statute of limitations has not engaged in dilatory conduct. In other words, enforcing the statute as written does not encourage delay beyond the limitations period that the legislature has deemed appropriate. Thus, the majority's attempt to grasp for scenarios under which the express language of the statute could create a questionable outcome is unpersuasive.

Furthermore, the statutory scheme belies the majority's conclusion that CPLR 204 (a), as written, creates undesirable results. To ascertain whether the express language of CPLR 204 (a) creates absurd results, we must examine how that toll operates within the larger statutory scheme of the CPLR as a whole (*see e.g. Matter of Mestecky v City of New York*, 30 NY3d 239, 243 [2017]; *Matter of Wallach v Town of Dryden*, 23 NY3d 728, 744 [2014]). Generally, under the CPLR, the limitations period runs from the date a claim accrues until it is interposed by filing—that is, until the action is commenced (*see* CPLR 203 [a], [c]). In other words, once an action is commenced, it either is or is not time-barred by the applicable statute of limitations.[2] However, U.S. Bank seeks to invoke a toll despite its timely interposition —i.e., commencement—of the second foreclosure action because that action was dismissed after the expiration of the applicable limitations period as a result of U.S. Bank's failure to properly serve the summons and complaint on plaintiff. Conveniently, the CPLR contains a provision addressing this precise predicament—namely, where an action is timely commenced, but subsequently terminated after the statute of limitations period expires. Specifically, CPLR 205 (a) provides, in relevant part:

> ***266** "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination."

Therefore, without assistance from the judiciary, the legislature has provided a remedy for the situation faced by U.S. Bank where an action is terminated after the limitations period has expired. Read in the context of the broader statutory scheme—specifically, CPLR 203 and 205 (a)—it was perfectly reasonable that the legislature chose to limit the application of CPLR 204 (a) to situations arising *before* commencement.[3] ****9**

Here, of course, the second foreclosure action was dismissed for U.S. Bank's failure to effectuate proper service, a personal jurisdiction defect expressly excluded from the benefit of CPLR 205 (a) (*see* CPLR 205 [a]; *Keane v Kamin*, 94 NY2d 263, 265 [1999]; *Dobkin v Chapman*, 21 NY2d 490, 500-501 [1968]). That a party in U.S. Bank's position is without a remedy under CPLR 205 (a) is the legislature's intended consequence of CPLR article 2; to that end, the

legislature amended CPLR 205 (a) in 1992 to add the personal jurisdiction exception (*see* L 1992, ch 216).[4] If U.S. Bank's action had been dismissed outside the statute of limitations for any reason other than the four exceptions ***267** to CPLR 205 (a), it would have had six months to recommence the action. In other words, that U.S. Bank was unable to timely commence a third foreclosure action did not result from an absurd reading of CPLR 204 (a). Rather, it was the legislature's intended result.

The majority disregards the legislative scheme of the CPLR in one additional respect that is noteworthy. CPLR 306-b requires that service be completed within 120 days of the commencement of an action, but provides that "[i]f service is not made upon a defendant within [that] time" the court may, "upon good cause shown or in the interest of justice, extend the time for service." Rather than move to extend its time to complete proper service under this provision, U.S. Bank unsuccessfully chose to litigate the propriety of its original service.[5] Additionally, U.S. Bank could have moved for relief from the stay in the bankruptcy proceeding in order to effectuate proper service (*see* 11 USC § 362 [d] [4]; [f]).[6] Given U.S. Bank's failure to even attempt to utilize these existing statutory remedies, I disagree with the majority's conclusion that interpreting the statute as written and as advanced by plaintiff would be inherently unreasonable. We should not lose sight, as the majority has, of the relevant statutory scheme when interpreting the express language of the statute.

Finally, although the majority proclaims that lower courts have unanimously read CPLR 204 (a) to disregard the term "commencement," it is notable that, of the three cases cited in support of this proposition, one relies upon the Appellate Division order being reviewed on this appeal (*see Deutsche Bank Natl. Trust Co. v DeGiorgio*, 171 AD3d 1267, 1268 [3d Dept 2019]) and none include any meaningful analysis of the statutory language or scheme, or of the legislative intent underlying CPLR 204 (a).

***268** In sum, the express language of CPLR 204 (a) evinces the legislature's unmistakable intent to provide a statute of limitations toll only "[w]here the commencement of an action has been stayed." I would hold that "commencement" should be read as defined in the CPLR, itself. Contrary to the majority's view, there is nothing inherently absurd about applying the words chosen by the legislature under the facts of this case, in light of U.S. Bank's failure to avail itself of other statutory devices that likely would have prevented a dismissal of the second foreclosure action based upon improper service. Nor, considering the broader statutory scheme, can it be said that the ****10** plain language of CPLR 204 (a) encourages gamesmanship or creates absurd results. Therefore, I would reverse the order of the Appellate Division.

Chief Judge DiFiore and Judges Wilson and Feinman concur; Judge Stein dissents in an opinion in which Judges Rivera and Fahey concur.

Order affirmed, with costs.

Footnotes

1 In dismissing, the trial court in the first foreclosure action reasoned that "Plaintiff did not seek a default judgment as against Defendant mortgagor . . . until January 14, 2010, approximately thirty months after the action was commenced." No mention is made of the first bankruptcy action; the court only notes that AHMA "has failed to offer any explanation for the extensive delay." Excluding the time the action was stayed by the first bankruptcy action, less than a month had elapsed from the time plaintiff's answer was due to when defendant filed for default judgment (*see* CPLR 3215 [c]).

2 Although the exact date on which the stay was lifted is uncertain (Nov. 26, 2013, Apr. 8, 2014, or June 1, 2014), the choice among the dates does not change the result, and therefore for purposes of this opinion the earliest date will be used to calculate the limitations period (*accord Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 964 [2d Dept 2018]).

3 In dismissing the action, the trial court noted the "apparently inconsistent positions taken by [plaintiff] in the Bankruptcy proceeding, claiming that the property was of inconsequential value due to the pending foreclosure action and the position taken in the instant case." In fact, this representation by plaintiff to the trustee was used to justify the bankruptcy estate's sale to plaintiff of four properties valued at $7.375 million for a total price of $25,000.

4 RPAPL 1501 (4) provides that where the statute of limitations for commencement of a foreclosure action on a mortgage has expired, a person with an interest in real property subject to the mortgage may maintain an action "to secure the cancellation and discharge of record of such encumbrance."

5 The parties notified this Court that defendant filed a third foreclosure action concerning the subject property on December 14, 2017.

6 Commentators similarly use broad terms to describe the effects of the tolling provision (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:6 at 10 [2010 ed] ["If a federal statute, such as the (bankruptcy stay), bars an action against the debtor, the statute of limitations period is tolled during the period of the stay"]; Weinstein-Korn-Miller, NY Civ Prac ¶ 204.00 [2d ed 2004] ["In general, the period of the stay or statutory prohibition is added to the period of limitation"]).

7 The Third Department, in adopting the rule we apply here, found the Second Department's reasoning in this case persuasive (*see DeGiorgio*, 171 AD3d at 1268, citing *Lubonty*, 159 AD3d at 963-964).

8 The accusation that the Court, in interpreting and applying the CPLR 204 (a) tolling provision, is somehow "ignoring" or "disregarding" the law is unwarranted (dissenting op at 263-264; *see* CPLR 201 [an action must be commenced within the time specified in CPLR article 2 and "(n)o court shall extend the time limited by law for the commencement of an action"]). "[A]lthough [the statute of limitations] is subject to a variety of statutory tolls and extensions . . . [it] is not subject to a *discretionary* judicial extension" (Siegel & Connors, NY Prac § 33 at 51 [6th ed 2018] [emphasis added]).

1 Whether AHMA could have avoided dismissal by arguing that the bankruptcy stay prevented it from prosecuting the action, and whether the first foreclosure action was properly dismissed as abandoned, are not questions before the Court on this appeal.

2 The majority suggests that "[n]either this Court nor the legislature has restricted the term 'commencement' to the first time a party files a complaint asserting a cause of action" (majority op at 256). But the CPLR directs that the limitation periods be calculated from accrual until commencement (CPLR 203 [c]) and, once a party commences an action, there generally would be no occasion to recommence the same action while the first action is pending. Indeed, if a party were to recommence the same action, the court could dismiss that action (*see* CPLR 3211 [a] [4]). Moreover, under RPAPL 1301 (3), U.S. Bank could not have commenced a third foreclosure action while the second foreclosure action was pending "without leave of the court."

3 I agree with the majority that, if CPLR 204 (a) applied, then U.S. Bank would have had no need to resort to CPLR 205 (a) because it would have had more than six months remaining on the statute of limitations to recommence a third foreclosure action after termination of the second foreclosure action. However, this misses the point of looking to CPLR 205 (a) in this case. As noted, before proclaiming that the unambiguous language of a statute creates absurd results, it is prudent to see how that statute fits within the broader legislative scheme. The majority reads CPLR 204 (a) in a vacuum, despite its obvious relation to other provisions of CPLR articles 2 and 3.

4 Before 1992, the personal jurisdiction exception to CPLR 205 (a) existed in case law only (*see Markoff v South Nassau Community Hosp.*, 61 NY2d 283, 286 [1984]). In *Markoff*, this Court held that CPLR 205 (a)—which applies, by its plain terms, only where an action is "timely *commenced*,"—was not triggered in the absence of proper service because, under the then-existing statutory regime, an action was commenced by service, not filing (emphasis added). Notably, the *Markoff* Court recognized that "commence[ment]" could not be read out of CPLR 205 (a)—a statute related to limitation periods. When the legislature revised the CPLR to adopt commencement by filing, it expressly codified the *Markoff* rule in CPLR 205 (a), even though the Court's rationale no longer applied under the new statutory scheme. This history reinforces that the inapplicability of CPLR 205 (a) to the facts of this case was intentional.

5 Here, only 132 days had passed between the commencement of the second foreclosure action and the institution of the bankruptcy stay. When the bankruptcy stay was lifted, U.S. Bank likely had a strong argument that the court should afford it additional time to correct its defective service considering that stay.

6 Alternatively, U.S. Bank could have moved to reopen the bankruptcy proceeding (*see* 11 USC § 350 [b]) or attempted to take advantage of the 30-day window provided by 11 USC § 108 (c) (2) for recommencing an action where the applicable limitations period has expired.

End of Document

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Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

WINDWARD BORA, LLC, Plaintiff,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB, Not in its Individual Capacity AS Certificate TRUSTEE FOR NNPL TRUST SERIES 2012-1 its Successors and Assigns doing business as Christina Trust, Defendant.

Civ. No. 1:18-CV-402 (DJS)
|
Signed 09/27/2019

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DECISION AND ORDER

DANIEL J. STEWART, United States Magistrate Judge

I. RELEVANT BACKGROUND

***1** Plaintiff has brought this action pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") Article 15 seeking to compel the determination of Defendant's claims with respect to a mortgage, and to discharge the mortgage pursuant to RPAPL § 1501(4). *See* Dkt. No. 1, Compl. The Court has jurisdiction over the action based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. *Id.* at pp. 2-3.

On April 28, 2005, Wayne Carter and Gwendolan Carter ("Borrowers") borrowed $155,769.00 from Syracuse Securities, Inc. in a note, and executed a mortgage of the premises (the "Mortgage") as collateral, which was recorded on June 20, 2005.[1] Dkt. No. 16-10, Dolan Aff., ¶¶ 5-6; Dkt. No. 16-2, Skeete Decl., Exs. C & D.[2] Syracuse Securities, Inc., then assigned the Mortgage to Washington Mutual Bank, FA on April 28, 2005; the assignment of mortgage was recorded on June 20, 2005. Dolan Aff. at ¶ 7; Skeete Decl., Ex D. Washington Mutual Bank, FA assigned the Mortgage to Wells Fargo Bank, N.A. on January 10, 2007, which was recorded on January 29, 2007. Dolan Aff. at ¶ 8; Skeete Decl., Ex. D. On January 19, 2010 the Mortgage was modified by Wells Fargo Bank, N.A. by way of a Housing and Urban Development (HUD) loan modification agreement, which was recorded on July 26, 2010. Dolan Aff. at ¶ 9; Skeete Decl., Ex. E. Wells Fargo Bank, N.A. then assigned the Mortgage to the Secretary of HUD on November 28, 2014, which was recorded on July 16, 2015. Dolan Aff. at ¶ 10; Skeete Decl., E. The Secretary of HUD assigned the Mortgage to V Mortgage Acquisitions, LLC on July 13, 2015, which was recorded on July 16, 2015. Dolan Aff. at ¶ 11; Skeete Decl., Ex. E. V Mortgage Acquisitions, LLC assigned the Mortgage to Kondaur Capital Corporation, as Separate Trustee of Matawin Ventures Trust 2014-3 ("Kondaur") on July 15, 2015, which was recorded on July 16, 2016. Dolan Aff. at ¶ 12; Skeete Decl., Ex. E. Kondaur assigned the Mortgage to NNPL Trust Series 2012-1 on September 8, 2015, which was recorded on September 18, 2015. Dolan Aff. at ¶ 13; Skeete Decl., Ex. E. NNPL Trust Series 2012-1 assigned the Mortgage to Defendant on June 26, 2017, which was recorded on August 8, 2017. Dolan Aff. at ¶ 12; Skeete Decl., Ex. E. Defendant assigned the Mortgage to Waterfall on March 29, 2018, which was recorded on May 13, 2018. Dolan Aff. at ¶ 15; Skeete Decl., Ex. E.

***2** The Borrowers have failed to make payments on the loan since July 1, 2010. Dolan Aff. at ¶ 16. Defendant's predecessor-in-interest commenced a foreclosure action in the New York State Supreme Court, Saratoga County on October 19, 2010; that action was dismissed on July 12, 2016, before Defendant's predecessor-in-interest had obtained a judgment of foreclosure and sale. Skeete Decl., Exs. A & G.

Plaintiff commenced this action on April 2, 2018. Plaintiff has now moved for summary judgment, arguing that the Mortgage must be extinguished because the statute of limitations has run on Defendant's time to foreclose. *See* Dkt. No. 15-1, *generally.* Defendant opposes Plaintiff's Motion and cross-moves for summary judgment dismissing Plaintiff's Complaint, arguing that the statute of limitations does not apply to it because the loan is an FHA loan, and because

Defendant is an assignee of a federal agency. *See* Dkt. No. 16, *generally.* Defendant further contends that the 2010 action did not accelerate the Mortgage debt, and that the statute of limitations therefore did not begin to run in 2010. *Id.* Plaintiff opposed Defendant's cross-motion, Dkt. No. 19, and Defendant has submitted a reply in further support of its Motion, Dkt. No. 23.

II. RELEVANT LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the burden to demonstrate through "pleadings, depositions, answers to interrogatories, and admissions on file, together with [ ] affidavits, if any," that there is no genuine issue of material fact. *F.D.I.C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. Fed. R. Civ. P. 56(c); *see also Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) ("Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case."); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). To that end, sworn statements are "more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion" and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983) and *Colon v. Coughlin*, 58 F.3d at 872).

When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 742 (2d Cir. 1998). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. ANALYSIS

A. Whether the Mortgage was Accelerated

***3** Plaintiff contends that the Mortgage was accelerated when Defendant commenced the foreclosure action in 2010, and that the acceleration was never revoked via an affirmative and unambiguous act by Defendant or its predecessors. Dkt. No. 15-1 at pp. 5-6; Dkt. No. 19 at pp. 10-13.

The loan provides that it is governed by federal law and the law of the jurisdiction in which the Property is located, New York State. Dkt. No. 15-6, Mortgage, ¶ 14. As contract interpretation is a matter of state law, the question of whether the Mortgage was accelerated is a question of New York state law. *See Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 618 (2d Cir. 2001).

> As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action. With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due. 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.

Wells Fargo Bank, N.A. v. Burke, 94 A.D.3d 980, 982 (2d Dep't 2012) (internal citations and quotation marks omitted). The acceleration of a mortgage debt is important because it begins the running of the six year statute of limitations.

Defendant contends that commencement of the 2010 action did not accelerate the debt. Dkt. No. 16 at pp. 11-16. Defendant points to two documents to support this argument. First, the loan documents provide that "Borrower has a right to be reinstated if Lender has required immediate payment in full ... even after foreclosure proceedings are instituted," subject to certain requirements and exceptions.

Mortgage at ¶ 10. Similarly, HUD regulations provide that "[i]f the owner cures a default ... prior to completion of foreclosure proceedings, the lender must reinstate the loan." Dkt. No. 16-8, HUD Regulations, § 9-6. Defendant argues that because the Borrowers had the right to reinstate the loan up until the time the foreclosure proceeding was complete, the Mortgage still essentially remained an installment contract until a judgment was entered, and the Mortgage was therefore never actually accelerated. Dkt. No. 16 at pp. 11-16 (citing *Nationstar Mortg., LLC v. MacPherson*, 56 Misc.3d 339 (Sup. Ct., Suffolk Cty. Apr. 3, 2017)). In response, Plaintiff contends that filing a foreclosure action constituted an affirmative action to accelerate a mortgage debt, and the language in the loan documents does not alter this fact. Dkt. No. 19 at pp. 10-13.

The New York Appellate Division, Second Department recently decided the issue of whether a reinstatement provision in a mortgage, which gives the borrower the option to de-accelerate the maturity of the debt, prevents the debt from being validly asserted. *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 35 (2d Dep't Mar. 13, 2019). In that case, the plaintiff contended that the statute of limitations did not begin to run until the borrower's rights under the reinstatement provision in the mortgage were extinguished. *Id.* The court determined that the reinstatement provision was not a condition precedent to the acceleration of the mortgage, and that the statute of limitations started to run when the plaintiff exercised its option to accelerate. *Id.* at 35-37.

***4** As the Second Department described, "[w]here, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff possesses a legal right to demand payment." *Id.* at 36-37 (internal quotation marks omitted) (citation omitted). There the court explained the general rule that

> even if a mortgage is payable in installments, the terms of the mortgage may contain an acceleration clause that gives the lender the option to demand due the entire balance of principal and interest upon the occurrence of certain events delineated in the mortgage. Where the terms of the mortgage provide that the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation. Once a mortgage has been validly accelerated in accordance with the terms of the mortgage, the entire amount is due and the Statute of Limitations begins to run on the entire debt.

Id. at 37 (internal quotation marks and citations omitted).

"A borrower generally must be provided with notice of the lender's decision to exercise an option to accelerate the maturity of a loan, and such notice must be 'clear and unequivocal'. 'Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised.' " *Id.* at 38 (internal citations omitted).

The Second Department in *Dieudonne* held that the reinstatement provision did not prevent the lender from validly accelerating the mortgage debt. *Id.* at 39. As here, the plaintiff in that case argued that

> because its right to accelerate the entire outstanding debt was subject to the defendant's right, under certain circumstances, to de-accelerate that portion of the debt, the plaintiff's right to accelerate the debt was subject to a condition precedent and the statute of limitations did not begin to run until the defendant's right to de-accelerate was extinguished in accordance with the terms of the mortgage.

Id. The court there noted that "a cause of action for payment of a sum of money allegedly owed pursuant to a contract accrues when the plaintiff possesses a legal right to demand payment," and that, as with the Mortgage at issue in this case, a section of the mortgage explicitly provided conditions that had to be satisfied before the plaintiff was contractually entitled to exercise its option to accelerate the entire outstanding debt. *Id.*; *see* Mortgage at ¶ 9. It described that, as with the Mortgage at issue in this case, the reinstatement provision was not listed as a condition required to accelerate the mortgage, and there was no language in the reinstatement paragraph indicating that it served as a condition precedent to the right to accelerate. *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d at 39-40; *see* Mortgage at ¶¶ 9-10. As with the Mortgage at issue here,

> to the contrary, the language of [the reinstatement paragraph] indicates that the plaintiff's right to accelerate the entire debt may be exercised *before* the defendant's rights under the reinstatement provision [ ] are exercised or extinguished. Accordingly, contrary to the plaintiff's contention, the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision in paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage."

***5** *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d at 40. The Second Department explicitly noted that, "[t]o the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed," and cited specifically to *Nationstar Mortg., LLC v. MacPherson*, 56 Misc.3d 339 (Sup. Ct., Suffolk Cty. Apr. 3, 2017), the primary case on which Defendant relies in support of its argument that the Mortgage was not accelerated.

Here, as in *Dieudonne*, Plaintiff demonstrated that the Mortgage provides that the lender may require immediate payment in full of all sums secured by the Mortgage if the borrower failed to satisfy certain conditions under the Mortgage. Mortgage at ¶ 9; *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d at 38. In the 2010 action, Defendant's predecessor-in-interest explicitly called due the entire amount secured by the Mortgage. Dkt. Nos. 19-1 & 19-2 (affidavit from officer of Wells Fargo Bank, N.A. stating that it "elected to call due the entire unpaid principal balance" based on the default); Dkt. No. 15-15 (Summons and Complaint from 2010 action, "elect[ing] to call due the entire amount secured by the mortgage"). Defendant's predecessor-in-interest thus validly exercised its option to accelerate the balance due by filing the summons and complaint in the 2010 foreclosure action. *See* Dkt. Nos. 15-15 & 19-2.

Similarly, Defendant argues that the terms of the Note and Mortgage provide that the mortgagee may not accelerate when not permitted by HUD regulations; HUD Regulations provide that if the mortgagor cures a default prior to completion of foreclosure proceedings, the mortgagee must reinstate the loan. Dkt. No. 16 at p. 11; *see* Mortgage at ¶ 9; Dkt. No. 15-5, Note, ¶ 6. However, as discussed above, Defendant does not contend that Plaintiff actually satisfied the reinstatement provision, and the extinguishment of that right was not a condition precedent to acceleration. As such, the requirement that the mortgagee reinstate the loan if the mortgagor cures a default prior to foreclosure proceedings provides no basis for finding the Mortgage was not accelerated in this case. Defendant does not point to any other HUD regulation that would have prevented the loan from being accelerated. As such, this argument also fails. The commencement of the 2010 action did accelerate the loan.

B. Whether the Loan is Subject to the Statute of Limitations

Defendant contends that it is not subject to the statute of limitations because the loan is a Federal Housing Authority ("FHA") loan, and because Defendant is an assignee of HUD. Dkt. No. 16 at pp. 9-11. Defendant asserts that the statute of limitations does not apply to federal agencies or their assignees. In opposition, Plaintiff argues initially that Defendant has not demonstrated that the Mortgage is FHA-insured. Dkt. No. 19 at pp. 2-6. Plaintiff points out that the Dolan Affidavit submitted by Defendant only states that the Note, Mortgage, and Loan Modification Agreement contain an FHA case number, and that a notation on the Loan Modification Agreement indicates that it is a HUD Modification Agreement; it does not provide any further documentation or affirmative statements regarding the loan's FHA status. *Id.* at pp. 3-4. Plaintiff states that there is no indication that the loan is necessarily still in the FHA program, if it ever was at all, as loans can be removed from the FHA program. *Id.* at pp. 4-6. In addition, Plaintiff argues that HUD held the loan for less than eight months, and that Defendant should not be entitled to the protection of being excepted from the statute of limitations that was intended to benefit the federal government. *Id.* at pp. 6-10. Plaintiff also describes the role HUD has recently played in owning loans, and that it does not collect or enforce debts from the loans, and may not benefit at all from a foreclosure action. *Id.* at pp. 7-10.

***6** In the summary judgment context, the Court must address the evidence in the record before it. At oral argument Plaintiff's counsel stated that she would expect there to be other documents, not produced here, establishing that the loan had been an FHA loan and suggested that the absence of such records in the record meant that Defendant had failed to carry its burden on the question of the FHA status of the loan. The record, however, establishes that the mortgage in question bears an FHA Case Number and that mortgage was filed in the office of the Saratoga County Clerk. Dkt. No. 16-6. Plaintiff's speculation about what may have subsequently happened to the loan does not, absent evidentiary proof to the contrary, rebut the proof provided by Defendant.[3]

"[U]nless Congress specifically provides otherwise, the federal government is not subject to any statute of limitations in enforcing its rights." *Capozzi v. U.S.*, 1992 WL 409963, at *2 (D. Conn. Jan. 29, 1992) (citing *United States v. Podell*, 572 F.2d 31, 35 n.7 (2d Cir. 1978)). "There is no federal statute of limitations applicable to mortgage foreclosure actions brought by the United States or its federal agencies. That rule applies equally to an assignee of a federal agency, including

a commercial lender, and includes the benefit of immunity from a state limitations period." *Fleet Nat. Bank v. D'Orsi*, 26 A.D.3d 898, 899-900 (4th Dep't 2006) (internal citations omitted); *see also Long Island Realty Grp. VII v. U.S. Dep't of Hous. & Urban Dev.*, 2005 WL 2179687, at *4 (E.D.N.Y. Sept. 9, 2005).

The record in this case establishes that HUD was assigned the Mortgage in 2014. Dkt. No. 15-10. The Mortgage has since been assigned multiple times and is now held by Defendant. *See generally* Dkt. No. 16-1. Plaintiff argues that Defendant should not be exempt because the federal government does not stand to benefit from Defendant acting as its assignee. This argument is largely conclusory, however. Plaintiff cites to no legal authority contrary to that cited above, indicating that an assignee of a federal agency does not receive the benefit of being immune from the limitations period. Plaintiff points to a letter from HUD, which it describes as providing that HUD does not seek to collect on defaulted loans, and is barred by Congress from doing so. *See* Dkt. No. 19 at pp. 8-9. The documents cited, however, do not expressly make the point asserted by Plaintiff. While Plaintiff is correct that it is not clear that the federal government will directly benefit from Defendant acting as its assignee, there are indirect benefits to HUD that are "inherent in these mortgage obligations that are not burdened by time limitations. This allows them to be bundled and traded as investment vehicles and permits such federally insured loans to be offered to the public at reduced interest or expense." *In re McFarland*, 7 Misc. 3d 1003(A) (Sur. Ct. Nassau Cty. 2005). At oral argument Plaintiff also asserted that HUD may have held the Mortgage, but not the Note, and as a result could never have foreclosed on the Mortgage. Here, too, however, Plaintiff offers a mere possibility unsupported by evidentiary proof. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts.").

This case is distinguishable from those in which courts have found the exception does not apply. In *Gulnick*, the court found the plaintiff did not demonstrate it was entitled to the exception. In that case, the plaintiff alleged the loan was insured by HUD, but failed to show that HUD had ever held the mortgage. *Bank of Am., N.A. v. Gulnick*, 170 A.D.3d 1365, 1367 (3d Dep't 2019); *see also Fleet Nat. Bank v. D'Orsi*, 26 A.D.3d at 900 (plaintiff failed to establish a federal agency ever held the mortgage or had the right to foreclose on the mortgage). Here, the parties do not dispute that HUD did hold the Mortgage.

***7** In addition, there is a "strong presumption against time-barring the government's attempts to enforce its rights," and "unless Congress specifically provides otherwise, the federal government is not subject to any statute of limitations in enforcing its rights." *Capozzi v. U.S.*, 1992 WL 409963, at *2 (citing *United States v. Podell*, 572 F.2d at 35 n.7). As the evidence in the record indicates that HUD did hold the Mortgage, without a compelling reason the exception would not apply, this presumption favors finding the exception applies here, and the Court so finds.

IV. CONCLUSION

For the reasons stated herein, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment (Dkt. No. 15) is **DENIED**; and it is further

ORDERED, that Defendant's Motion for Summary Judgment (Dkt. No. 16) is **GRANTED**; and it is further

ORDERED, that the letter request seeking mediation (Dkt. No. 24) is **DENIED as moot**; and it is further

ORDERED, that the Complaint (Dkt. No. 1) is **DISMISSED**; and it is further

ORDERED, that judgment be entered in favor of Defendant; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order upon the parties to this action.

All Citations

Slip Copy, 2019 WL 4736236

Footnotes

1 Plaintiff failed to file a Statement of Undisputed Material Facts pursuant to Local Rule 7.1(a)(3), or to respond to Defendant's Statement of Undisputed Material Facts. The Court therefore deems the facts set forth in Defendant's

Statement of Material Facts admitted, and accepts Defendant's assertion of facts to the extent they are supported by the record. *See* *Campbell v. Consol. Rail Corp.*, 2008 WL 3414029, at *3 (N.D.N.Y. Aug. 8, 2008).

2 Defendant attaches the loan documents to an attorney affirmation rather than to the declaration of an individual with knowledge of the business records. Plaintiff's submission of evidence is similar, although Plaintiff includes a "request for judicial notice." The parties attach the same central documents to their motions, and neither party raises any objection or concern regarding the documents submitted. The Court will take judicial notice of these undisputed documents that are publicly recorded documents. *See, e.g.*, *Im v. Bayview Loan Serv. LLC*, 2018 WL 840088, at *3 n.5 (S.D.N.Y. Feb. 12, 2018); *Alexander v. Nationstar Mortg.*, LLC, 2017 WL 6568057, at *1 (S.D.N.Y. Dec. 22, 2017); *Estate of Leventhal ex rel. Bernstein v. Wells Fargo Bank*, N.A., 2015 WL 5660945, at *4 (S.D.N.Y. Sept. 25, 2015); *Gordon v. First Franklin Fin. Corp.*, 2016 WL 792412, at *1 n.2 (E.D.N.Y. Feb. 29, 2016).

3 Plaintiff, for example, has submitted information demonstrating that, if the loan ever was in the FHA program, it is possible that it may have been removed, either by FHA removing the loan, or upon request by the mortgagor, but offers no evidence to suggest that this process was ever undertaken.

End of Document

26 A.D.3d 898, 811 N.Y.S.2d
502, 2006 N.Y. Slip Op. 00933

**1 Fleet National Bank, as Successor in Interest to Fleet Bank of New York, N.A., Respondent

v

Carol A. D'Orsi, Also Known as Carol Hummel, et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division,
Fourth Department, New York
05-01225, 1640
February 3, 2006

CITE TITLE AS: Fleet Natl. Bank v D'Orsi

HEADNOTE

Mortgages
Foreclosure

Corporation obtained loan from plaintiff through United States Small Business Administration (SBA), which guaranteed 90% of loan, and defendants executed personal guaranty and mortgage, using their residence as collateral; corporation defaulted on loan, SBA honored its guaranty, and plaintiff commenced foreclosure action on mortgage—although there is no federal statute of limitations applicable to mortgage foreclosure actions brought by United States or its federal agencies, plaintiff failed to establish that it was entitled to judgment as matter of law; SBA was not party to action, and record did not establish that SBA ever held mortgage or had right to foreclose on mortgage, regardless of whether it paid on its guaranty. *899

Appeal from an order of the Supreme Court, Monroe County (Patricia D. Marks, A.J.), dated April 1, 2004. The order, among other things, granted plaintiff's motion for summary judgment against defendants Carol A. D'Orsi, also known as Carol Hummel, and Robert W. Hummel.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously modified on the law by denying those parts of the motion seeking summary judgment and appointment of a referee and by vacating the last ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Defendant Robert W. Hummel was the vice-president/secretary of VHS Floor Fashions, Inc. (VHS), which obtained a loan from plaintiff through the United States Small Business Administration (SBA). VHS executed the note, and Robert Hummel and Carol A. D'Orsi, also known as Carol Hummel (collectively, defendants), executed a personal guaranty and mortgage, using their residence as collateral. In addition, the SBA guaranteed 90% of the loan. VHS thereafter defaulted on the loan, and the SBA honored its guaranty. On or about January 15, 2003, plaintiff commenced this foreclosure action on the mortgage. In July 2003, plaintiff and the SBA assigned "any and all right and interest" in the mortgage and note to LPP Mortgage Ltd., formerly known as Loan Participant Partners, Ltd. (LPP Mortgage). Plaintiff subsequently moved, inter alia, to amend the caption "to reflect the name of the Plaintiff as [LPP Mortgage]" and for summary judgment on the complaint. Defendants cross-moved for summary judgment dismissing the complaint against them as time-barred. Supreme Court, inter alia, granted those parts of plaintiff's motion to amend the caption and for summary judgment, concluding that there was no applicable statute of limitations because federal law applies to this action. We agree with defendants that plaintiff is not entitled to summary judgment.

There is no federal statute of limitations applicable to mortgage foreclosure actions **2 brought by the United States or its federal agencies (*see Cracco v Cox*, 66 AD2d 447, 450-452 [1979]; *see also Westnau Land Corp. v United States Small Bus. Admin.*, 785 F Supp 41, 43 [1992], *affd* 1 F3d 112 [1993]; *United States v 93 Ct. Corp.*, 350 F2d 386 [1965], *cert denied* 382 US 984 [1966]). That rule applies equally to an assignee of a federal agency, including a commercial lender, and includes the benefit of immunity from a state limitations period (*see UMLIC VP LLC v Matthias*, 364 F3d 125, 131-133 [2004]; *United States v Thornburg*, 82 F3d 886, 890-891 [1996]; *900 *Long Is. Realty Group VII v United States Dept. of Hous. & Urban Dev.*, 2005 WL 2179687, 2005 US Dist LEXIS 32390 [ED NY 2005]). Plaintiff has

failed to establish, however, that it is entitled to judgment as a matter of law under those precedents (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, the SBA is not a party to the action, and the record does not establish that the SBA ever held the mortgage or had a right to foreclose on the mortgage, regardless of whether it paid on its guaranty. Certain documents in the record refer to a "Guaranty Agreement" or "Participation Agreement" between plaintiff and the SBA, but no such agreement is included in the record on appeal. Although the SBA is labeled an "Assignor" in the documents transferring its right and interest in the mortgage and note to LPP Mortgage, the record on appeal also does not contain the Loan Sale Agreement in which that term purportedly is defined. Because plaintiff has failed to provide the requisite documentation establishing that the SBA had the right to foreclose on the mortgage unfettered by a statute of limitations and, thus, that such right was assigned to LPP Mortgage, plaintiff has failed to establish its entitlement to judgment as a matter of law (*see generally id*.). We therefore modify the order accordingly. Present—Hurlbutt, J.P., Scudder, Gorski and Smith, JJ.

2005 WL 2179687
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

LONG ISLAND REALTY GROUP VII, Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, Island Properties & Equity, Llc and New Life Properties, Meadows Office Supply Co., Inc., Pension Plan & Trust, and Kim Branch, Defendants.

No. 03–CV–6105 (DRH).
|
Sept. 9, 2005.

Attorneys and Law Firms

Michael Premisler, Carle Place, New York, for the Plaintiff.

United States Attorney, Eastern District of New York, Central Islip, New York, for the Defendant United States Department of Housing & Urban Development Roslynn R. Mauskopf.

MEMORANDUM OF DECISION AND ORDER

HURLEY, J.

***1** Presently before the Court are the motions by: (1) defendant United States Department of Housing & Urban Development ("HUD") for summary judgment dismissing the Complaint and for summary judgment on its counterclaim; and (2) plaintiff Long Island Realty Group VII ("Plaintiff") for summary judgment against HUD. For the reasons stated below, HUD's motion for summary judgment is granted with respect to the Complaint and denied without prejudice with regard to its counterclaim. Plaintiff's motion for summary judgment is denied.

BACKGROUND

The facts are undisputed unless otherwise noted. Plaintiff is the owner of a parcel of real property located at 94 Little Plains Road, Huntington, New York (the "premises"). On August 26, 1980, the premises, which were then owned by Ann Tinsley, became encumbered by a mortgage in favor of the Prudential Mortgage Company ("Prudential") in the amount of $40,200.00. On August 26, 1980, Prudential assigned the mortgage on the premises to the New York Guardian Mortgage Corporation ("NYGMC"). On December 28, 1982, NYGMC assigned the mortgage on the premises to HUD.

In or about 1983, Plaintiff purchased the premises at foreclosure, subject to HUD's mortgage. The last payment made by Plaintiff on the mortgage was in or about December 1989, causing the mortgage to fall into arrears. In January 1991, HUD assigned the mortgage on the premises to R.F. Norman d/b/a Mortgage Default Service Company ("R.F.Norman") "TOGETHER with all rights and interest in the same." (Decl. of Robert Paikoff, dated January 27, 2005, Ex. 2.) R.F. Norman had previously been awarded a contract from HUD, effective October 1, 1988, to perform mortgage foreclosures on behalf of HUD. Under the terms of the contract, R.F. Norman would be paid $175.00, plus incidental costs, for each successfully completed foreclosure. Once a mortgage was foreclosed, R.F. Norman was required to convey the property back to HUD. HUD maintains that viewing its assignment in conjunction with its contract with R.F. Norman, its assignment to R.F. Norman was for collection purposes only.

R.F. Norman took no action to foreclose on the mortgage and on September 18, 1995, he returned the mortgage to HUD. On August 21, 2001, R.F. Norman reassigned the mortgage back to HUD.

According to Plaintiff, on November 10, 2003, an auction sale was conducted and the premises was purportedly sold to defendants Island Properties and Equities, LLC and New Life Properties. (Pl.'s Local 56.1 Statement ¶ 15.) HUD contends that it cancelled the sale in January 2004 and "subsequently returned the deposit posted by these defendants." (HUD's Reply Mem. at 1 (citing Decl. of Joann Frey, dated Mar. 2, 2005).)

On November 19, 2003, Plaintiff commenced this action in the Supreme Court of Suffolk County, seeking to discharge the mortgage held by HUD on the premises. In addition to HUD, Plaintiff named defendants Island Properties and

Equities, LLC and New Life Properties, "as the successful bidder at the mortgage foreclosure sale." (Compl.¶ 4(B).) Plaintiff also named defendant Meadows Office Supply Co., Inc., "the holder of a subordinate mortgage," and defendant Kim Branch, "the tenant and current occupant" of the premises. (*Id.* ¶ 4(C)-(D).)

***2** On December 3, 2003, HUD removed the action to this Court. None of the other defendants has answered or otherwise responded to the Complaint. In its answer, HUD asserts a counterclaim for money damages seeking the unpaid principal and interest on the mortgage, as well as reimbursement for unpaid real property taxes and mortgage foreclosure costs. According to HUD, as of January 2005, it has paid real property taxes on the premises in the amount of $81,319.48. (HUD's Local Rule 56.1 Statement ¶ 17.) In addition, the amount due to bring the mortgage on the premises current as of January 1, 2005 is $229,115.34.

DISCUSSION

1. Plaintiff's Claim to Discharge HUD's Mortgage on the Premises is Dismissed

A. The Federal Government is not Subject to a Statute of Limitations When Bringing a Foreclosure Action

It is well settled that the United States is not subject to any statute of limitations unless Congress has explicitly expressed one. *See Westnau Land Corp. v. U.S. Small Business Admin.,* 1 F.3d 112, 115 (2d Cir.1993); *Capozzi v. United States,* 980 F.2d 872, 875 (2d Cir.1992). Pursuant to 28 U.S.C. § 2415(a), the United States is barred from maintaining an action for money damages "unless the complaint is filed within six years after the right of action accrues." However, 28 U.S.C. § 2415(c) specifically states that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."

In *Westnau,* the Second Circuit held that section 2415(a) does not apply to mortgage foreclosure actions brought by the United States. 1 F.3d at 116. The court rejected the plaintiff's argument that a mortgage foreclosure is essentially the collection of money damages and, therefore, section 2415(a) should apply. *Id.* at 114–15. Instead, the court found that "[t]he key language of § 2415(a), 'an action for money damages,' is not normally considered to comprehend an equitable action of foreclosure." *Id.* at 115. Thus, foreclosure actions by the federal government are not subject to the limitations bar of section 2415(a). *Id.* at 116. Accordingly, even if the United States is barred from suing on a note, it may still bring a foreclosure action on the mortgage securing the note at any time. *See UMLIC VP LLC v. Matthias,* 364 F.3d 125, 134 (3d Cir.2004) ("[T]here is no federally provided statute of limitations period for mortgage foreclosure actions."); *United States v. Begin,* 160 F.3d 1319, 1321 (11th Cir.1998) (same).[1]

The Second Circuit in *Westnau* also held that mortgage foreclosure actions by the United States are not governed by *state* statute of limitations. *Id.* at 117. The Court adopted the lower court's reasoning that in the absence of a limitations period governing foreclosure actions by the federal government, there "is no vacuum to fill because the ancient rule that the United States is not subject to a limitations period clearly addresses the issue presented." *Id.* (citations and internal quotation marks omitted). Thus, the federal government is never time barred from bringing a foreclosure action because of a statute of limitations. *Id.*

B. An Assignee of the United States is not Subject to a Statute of Limitations When Bringing a Foreclosure Action

***3** In the instant action, the mortgage on the premises originated in 1980 and was assigned to HUD on December 28, 1982. On January 16, 1991, HUD assigned the mortgage to R.F. Norman. On August 21, 2001, R.F. Norman assigned the mortgage back to HUD.

It is well established, and the parties do not dispute, that a mortgage assigned to the federal government *after* the state limitations period has expired against the assignor is time barred on the ground that the claim "was worthless at the time it was assigned." *Westnau Land Corp. v. United States Small Business Admin.,* 785 F.Supp. 41, 44 n. 2 (E.D.N.Y.1992), *aff'd,* 1 F.3d 112 (2d Cir.1993); *see also FDIC v. Former Officers and Dirs. of Metropolitan Bank,* 884 F.2d 1304, 1309 n. 4 (9th Cir.1989) ("If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency."), *superceded by statute on other grounds as stated in SMS Fin., Ltd., Co. v. ABCO Homes, Inc.,* 167 F.3d 235 (5th Cir.1993). The parties agree that when HUD acquired the mortgage on the premises in 1982, the state limitations period had not lapsed and, thus, HUD acquired viable rights. The parties dispute, however, whether New York's six year statute of limitations for commencing foreclosure proceedings (pursuant to N.Y. C.P.L.R. § 213(4)) applied and expired during the almost ten

year period R.F. Norman held the rights to the mortgage. Thus, the discreet issue for the Court to decide is whether the indefinite right to foreclose continued to apply after HUD assigned the mortgage to R.F. Norman or whether that right is reserved strictly to the government.

In support of its argument that the indefinite limitations period continued to apply while R.F. Norman held the rights to the mortgage, HUD relies primarily on the holding by the Ninth Circuit in *U.S. v. Thornburg,* 82 F.3d 886 (9th Cir.1996). *Thornburg* involved the applicability of section 2415(a)'s six year limitation period to the private assignee of the federal government. In *Thornburg,* a corporation executed and delivered a promissory note to a private bank. *Id.* at 888. The note was guaranteed by the United States Small Business Administration (the "SBA"). *Id.* Upon the borrower's default, the SBA paid the bank the amount due and then assigned its interest in the note, guarantee, and mortgage to the SBA. *Id.* The SBA then assigned the note back to the bank for collection purposes. *Id.* The bank again failed to collect and then reassigned the note to the SBA. *Id.*

The borrowers argued that the state statute of limitations ran out on the note while it was in the hands of the bank and that therefore, the action by the SBA was time barred because a transfer back to the United States cannot revive a time-barred claim. The Ninth Circuit rejected this argument and held that during the period of time the bank held the rights to the note, the federal six-year statute of limitations applied. *Id.* at 892. After discussing several cases that reached the same result, the court ultimately rested its decision on the principle that an assignee of the United States stands in the shoes of the United States.[2] *Id.* at 890–92. Any change to this common law rule, the court found, must come from Congress. *Id.* at 891.

***4** The court further noted that because the assignment to the bank was conditional in that it was for collection purposes only, this situation presented an even more compelling case for the application of the common law rule on assignments. *Id.* Because "[t]he United States did not divest itself of its right to bring an action to collect the unpaid balance of the loan in appointing the [b]ank to act as its surrogate in negotiating with the debtors," the federal limitations period should apply. *Id.* The court rejected the borrowers' argument that the assignment was not conditional because it did not contain any language indicating that it was for the purpose of collection only. *Id.* at 892. Instead, the court found that "[t]he absence of any limiting language in the [assignment] does not affect the nature of the assignment. 'An assignment absolute in form can be shown to be for collection only." ' *Id.* (quoting *Arthur Pew Constr. Co. v. Lipscomb,* 965 F.2d 1559, 1575 (11th Cir.1992)). In this regard, the court noted that the conditional nature of the assignment was further reflected in that fact that the assignment "did not authorize the [b]ank to pocket any money it was able to recover." *Id.* Rather, when the bank failed to collect on the debt, it returned the note to the SBA. *Id.*

HUD argues that applying *Thornburg* to the instant case, R.F. Norman, as an assignee of HUD, stepped into the shoes of HUD and assumed all of the HUD's rights, including that of not being bound by any limitations period with respect to bringing a foreclosure action. HUD also submits that *Thornburg* is particularly applicable because as in that case, HUD's assignment of the mortgage on the premises to R.F. Norman was for collection purposes only.

Plaintiff counters that *Thornburg* is distinguishable because its holding was limited to section 2415(a), which provides a six year limitations period on claims for money damages, as opposed to the instant case, where federal law provides no statute of limitations governing foreclosure actions. In that regard, Plaintiff argues that "[t]he distinction between an action to enforce the debt on one hand, and an action to foreclose the mortgage securing the debt on the other, is a key one in [*Thornburg*]." (Pl.'s Mem. at 9.)

Plaintiff also argues that *Thornburg* is inapposite because in that case, the bank only held the note and guaranty for fifteen months after they were reassigned from the SBA. Thus, when the SBA reacquired them, the statutory period to enforce the debt applicable to the bank, as an assignor, had not expired. Rather, the limitations period expired after that assignment, while SBA held the rights. In this case, R.F. Norman held the rights to the mortgage for almost ten years before assigning them to HUD.

The Court finds Plaintiff's distinctions unpersuasive and holds that R.F. Norman, as assignee of HUD, stood in the shoes of HUD and was thus subject to the federal rule that there is no statute of limitations in foreclosure actions. With respect to Plaintiff's latter argument regarding the length of time R.F. Norman held the rights to the mortgage, the holding of *Thornburg* is that the *federal* limitations period applies to a private party assignee of the federal government. Plaintiff's argument that the limitations period expired during the period of time R.F. Norman held the rights to the mortgage

presumes the applicability of the state statute of limitations, an assumption the *Thornburg* court expressly rejected.

***5** Furthermore, although *Thornburg* dealt with section 2415(a), there is no reason why the rationale behind the court's holding should not apply equally to foreclosure actions for which there is no federally provided statute of limitations. In fact, at least one other court has agreed. In *UMLIC VP LLC v. Matthias,* 364 F.3d 125 (3d Cir.2004), a case not raised by the parties, the Third Circuit "join[ed] every other appellate court to consider the issue"[3] and held that pursuant to the common law rule that an assignee stands in the shoes of the assignor, the federal statute of limitations applies in a foreclosure action brought by an assignee of the United States. *Id.* at 131 (citing *UMLIC–Nine Corp. v. Lipan Springs Dev. Corp.,* 168 F.3d 1173 (10th Cir.1999); *Thornburg,* 82 F.3d at 886; *FDIC v. Bledsoe,* 989 F.2d 805 (5th Cir.1993); *Tivoli Ventures, Inc. v. Bumann,* 870 P.2d 1244 (Colo.1994)). Finding that there is no federal limitations period on foreclosure actions, the court held that there was no statute of limitations governing the private party-assignee's right to foreclose. *Id.* at 135.

Accordingly, the Court adopts the reasoning in *Thornburg* and *UMLIC* and holds that R.F. Norman, as assignee of HUD, was subject to the federal rule that there is no statute of limitations in foreclosure actions and, therefore, HUD's time to foreclose on the premises is not time barred. Thus, Plaintiff's Complaint, which seeks to discharge HUD's mortgage on the premises as null and void, is dismissed as to HUD.

II. Plaintiff's Application to Invalidate the November 2003 Foreclosure Sale is Denied as Moot

In Plaintiff's opposition papers, Plaintiff moves to invalidate HUD's purported November 2003 foreclosure sale of the premises to defendants Island Properties & Equities LLC and New Life Properties because HUD failed to file the statutorily required notice under 12 U.S.C. § 3751. In response, HUD submits the declaration of Joann Frey, Attorney–Advisor with the New York Office of HUD, who states that in January 2004, "HUD canceled the non-judicial foreclosure sale of the premises to co-defendants Island Properties and Equities, LLC and New Life Properties." (Decl. of Joann Frey, dated Mar. 2, 2005, at ¶ 5.) She further states that "[b]y letter dated January 26, 2004, HUD authorized its foreclosure agent ... to return the deposit posted by these co-defendants at the Commissioner's sale on November 7, 2003." (*Id.* ¶ 6.) Accordingly, because HUD cancelled the November 2003 foreclosure sale, Plaintiff's application is denied as moot.

III. HUD's Motion for Summary Judgment on its Counterclaim is Denied Without Prejudice

In its answer to the Complaint, filed on April 9, 2004, HUD counterclaims for money damages seeking reimbursement for Plaintiff's unpaid principal and interest under the mortgage, as well as for real property taxes and foreclosure costs. The last payment made by Plaintiff under the mortgage was in December 1989.

***6** As discussed above, pursuant to 28 U.S.C. § 2415(a), the United States is barred from maintaining an action for money damages "unless the complaint is filed within six years after the right of action accrues." Upon first glance, it would appear that HUD's counterclaim is time barred as it was brought well beyond six years from the date Plaintiff ceased making payments under its mortgage. HUD asserts, however, that pursuant to New York law, a separate cause of action accrues on indebtedness secured by a mortgage as each installment becomes due. (HUD's Reply at 4 (citing *United States v. Quaintance,* 665 N.Y.S.2d 191 (4th Dep't 1997).) Thus, HUD submits that it is entitled to damages for Plaintiff's failure to remit mortgage payments dating to April 1998, i.e., six years back from the time HUD interposed its counterclaim.

HUD offers no authority, however, as to why New York law would govern the accrual of a claim under section 2415(a). Moreover, HUD omits an important exception to the New York rule: if pursuant to the terms of the agreement, the creditor accelerates the entire debt upon default, the statute of limitations with respect to all installments begins to run at that time. *See, e.g., Comind Participacoes, S.A. v. Terry,* No. 91 CIV. 3803, 1995 WL 234792, at *1 (S.D.N.Y. Apr. 20, 1995) (applying New York law). Here, there is no information in the record as to whether Plaintiff's mortgage contained an acceleration clause and if so, whether HUD elected to accelerate upon Plaintiff's default. Plaintiff similarly does not address this issue.

Accordingly, HUD's motion for summary judgment on its counterclaim is denied without prejudice. HUD is hereby directed to serve a memorandum of law on or before October 7, 2005, specifically addressing whether federal or state law applies in determining when a cause of action accrues under 28 U.S.C. § 2415(a). If the installment approach applies, HUD shall submit the appropriate documentary evidence in support

of its claim. Plaintiff shall serve a memorandum in opposition on or before November 4, 2005; HUD shall serve a reply memorandum, and file all papers with the Court, on or before November 18, 2005.

CONCLUSION

For the foregoing reasons, HUD's motion for summary judgment is granted to the extent the Complaint is dismissed as against HUD. HUD's motion for summary judgment on its counterclaim is denied without prejudice pending further briefing by the parties in accordance with this decision. Plaintiff's motion for summary judgment is denied.

Plaintiff is directed to inform the Court by October 7, 2005 as to whether it intends to proceed against the remaining defendants, none of whom have appeared in this action.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2179687

Footnotes

1 "An action for money damages based on breach of a promissory note is an *in personam* action by which the creditor seeks to recover money from the debtor. A foreclosure action, on the other hand, is not a suit against a debtor. Instead, it is an action *in rem,* a proceeding against the property for the legal determination of the existence of the mortgage lien, the ascertainment of its extent, and the subjection to a sale of the estate pledged for its satisfaction." *Begin,* 160 F.3d at 1321 (internal quotation marks and citations omitted).

2 The court noted that it was only able to find one case that had reached a contrary result. *Thornburg,* 82 F.3d at 891 (citing *Wamco, III v. First Piedmont Mortgage Corp.,* 856 F.Supp. 1076 (E.D.Va.1994) (holding that the rights conferred by 12 U.S.C. § 1821(d)(14)(A), which governs actions brought by the Resolution Trust Corporation as a conservator or receiver, are personal to the assignor and are inapplicable to assignees of the Resolution Trust Corporation)).

3 Although the cases referred to by the Third Circuit all involved assignments from the federal government to private parties, none of them involved the right to foreclose.

New York Official Reports

80 A.D.3d 753, 915 N.Y.S.2d 569, 2011 N.Y. Slip Op. 00506

**1 Wells Fargo Bank, N.A., Appellant

v

Chana Cohen, Heir to the Estate of Edith Powell, Deceased, et al., Respondents, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
January 25, 2011

CITE TITLE AS: Wells Fargo Bank, N.A. v Cohen

HEADNOTES

Limitation of Actions
When Cause of Action Accrues
Installment Payments

In mortgage foreclosure action where default in payment occurred eight years before action was commenced, action was not time-barred even though more than six years had elapsed since last mortgage payment was made and mortgage balance was accelerated; mortgage and note did not provide that entire debt represented by mortgage was to be automatically accelerated upon borrower's default in installment payment, nor did plaintiff ever exercise its option under note to accelerate debt; separate causes of action accrued for each installment, so plaintiff's recovery was merely limited to those unpaid installments that accrued within six-year period of limitations preceding its commencement of action.

Mortgages
Foreclosure
Summary Judgment

Steven J. Baum, P.C., Amherst, N.Y. (Jacob W. Osher of counsel), for appellant.

Martin Kurlander, Brooklyn, N.Y., for respondent Chana Cohen.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Schack, J.), dated June 19, 2009, which denied its motion for summary judgment on the complaint and granted the cross motion of the defendant Chana Cohen, in effect, to dismiss the complaint insofar as asserted against her on the ground that the action is barred by the statute of limitations. *754

Ordered that the order is modified, on the law, by (1) deleting the provision thereof granting that branch of the cross motion of the defendant Chana Cohen which was, in effect, to dismiss the complaint insofar as asserted against her on the ground that the action is barred by the statute of limitations to the extent that the complaint relates to unpaid mortgage installments which accrued on or after July 1, 2002, and substituting therefor a provision denying that branch of the cross motion, and (2) deleting the provision thereof denying that branch of the plaintiff's motion which was for summary judgment with respect to those causes of action which relate to unpaid mortgage installments which accrued on or after July 1, 2002, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

In this mortgage foreclosure action, the default in payment occurred in June 2000 but the action was not commenced until June 2008. The Supreme Court dismissed the complaint, concluding the action was time-barred because "[m]ore than six years elapsed since the last mortgage payment was made and the mortgage balance was accelerated." However, the mortgage and note do not provide that the entire debt represented by the mortgage was to be automatically accelerated upon the borrower's default in an installment payment, nor did the plaintiff ever exercise its option under the note to accelerate the debt. Therefore, the statute of limitations for the commencement of a foreclosure action did not expire six years after the June 2000 default (*see* CPLR 213 [4]).

"[W]ith respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due' " (*Loiacono v Goldberg*, 240 AD2d 476, 477 [1997], quoting *Pagano v Smith*, 201 AD2d 632, 633 [1994]; *see Lavin v Elmakiss*, 302 AD2d 638, 639 [2003]; *Zinker v Makler*, 298 AD2d 516 [2002]). Accordingly, even though the last payment on the subject

mortgage was June 2000, and this action was not commenced until June 2008, the entire action is not time-barred. Instead, as the plaintiff conceded before the Supreme Court, in the event that it prevailed in this action, its recovery would be limited ****2** to only those unpaid installments which accrued within the six-year period of limitations preceding its June 2008 commencement of this foreclosure action, that is, the unpaid installments which accrued on or after July 1, 2002 (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2008]; *see generally Lavin v Elmakiss*, 302 AD2d 638 [2003]; *Loiacono v Goldberg*, 240 AD2d 476 [1997]). ***755**

The plaintiff is also entitled to summary judgment with respect to so much of its complaint which is not time-barred. A plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021 [2010]; *Campaign v Barba*, 23 AD3d 327 [2005]; *DiNardo v Patcam Serv. Sta.*, 228 AD2d 543 [1996]). Once the plaintiff has made such a showing, it is then incumbent upon the defendant to assert any defenses which could properly raise a triable issue of fact regarding the default (*see Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021 [2010]; *Metropolitan Distrib. Servs. v DiLascio*, 176 AD2d 312 [1991]).

Here the plaintiff produced the mortgage, the unpaid note, and evidence of default. In opposition thereto, the respondent Chana Cohen only argued that the action was barred by the statute of limitations, which, as explained above, is only a valid defense with respect to so much of the plaintiff's causes of action which accrued prior to July 1, 2002. To the extent that Cohen has raised other issues which she contends are sufficient to defeat summary judgment in favor of the plaintiff, these issues are improperly raised for the first time on appeal (*see Bingham v New York City Tr. Auth.*, 99 NY2d 355 [2003]; *Fletcher v Westbury Toyota, Inc.*, 67 AD3d 730 [2009]).

Accordingly, the plaintiff's motion for summary judgment should have been granted to the extent set forth above. Skelos, J.P., Balkin, Leventhal and Sgroi, JJ., concur.

New York Official Reports

184 A.D.3d 1081, 126 N.Y.S.3d 273, 2020 N.Y. Slip Op. 03297

**1 Wilmington Savings Fund Society FSB, Doing Business as Christiana Trust, as Trustee for Hilldale Trust, Appellant,

v

Dennis G. Deliberto, Also Known as Dennis Deliberto, et al., Respondents, et al., Defendants.

Supreme Court, Appellate Division, Fourth Department, New York
19-01350, 60
June 12, 2020

CITE TITLE AS: Wilmington Sav. Fund Socy. FSB v Deliberto

HEADNOTES

Parties
Death of Party
Action against Decedent was Nullity

Mortgages
Foreclosure
Limitations Period

Mortgages
Acceleration Clause
Debt Did Not Accelerate Automatically upon Death of Decedent

Friedman Vartolo LLP, New York City (Zachary Gold of counsel), for plaintiff-appellant.
Law Office of T. Padric Moore, PLLC, Clifton Park (T. Padric Moore of counsel) and Bosman & Associates PLLC, Albany, for defendants-respondents.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 24, 2019. The order, among other things, granted the cross motion of defendant Dennis G. Deliberto, also known as Dennis Deliberto, defendant Keith Deliberto, and the estate of Michael G. Deliberto for summary judgment dismissing the complaint against them.

It is hereby ordered that said appeal insofar as it concerns defendant Agnes J. Deliberto, also known as Agnes Deliberto, defendant Michael G. Deliberto, and the estate of Michael G. Deliberto is unanimously dismissed, the complaint against defendant Agnes J. Deliberto, also known as Agnes Deliberto, *1082 and defendant Michael G. Deliberto is dismissed, and the parts of the order concerning those defendants and the estate of Michael G. Deliberto are vacated, and the order is otherwise modified on the law by denying the cross motion in part and reinstating the complaint against defendants Dennis G. Deliberto, also known as Dennis Deliberto, and Keith Deliberto to the extent that it seeks recovery of amounts due within six years prior to the commencement of the action, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: On August 10, 2007, defendant Michael G. Deliberto (decedent) executed a note in favor of a lender for a $30,000 line of credit, to be paid in monthly installments with the final payment on August 10, 2032. Defendant Dennis G. Deliberto, also known as Dennis Deliberto, and defendant Keith Deliberto (collectively, defendants) and decedent secured payment of the note with a mortgage encumbering certain real property in which each had a one-third interest as a tenant-in-common. Defendant Agnes J. Deliberto, also known as Agnes Deliberto (Agnes), had a life estate in the property. Agnes died on June 8, 2008, and decedent died on October 14, 2009.

In 2016, the mortgage was assigned to plaintiff. Plaintiff sent a default letter to decedent on May 26, 2017, stating that $3,244.78 was owed to cure the default. When decedent did not respond, plaintiff commenced this foreclosure action on September 15, 2017, accelerating the entire debt. Plaintiff thereafter filed a motion to amend the complaint to add, among others, the unknown heirs-at-law of decedent's estate as defendants in the action, and the appointment of a guardian ad litem on their behalf. Defendants and the estate of decedent cross-moved for summary judgment dismissing the complaint against them on the grounds of the statute of limitations, laches, and estoppel. Supreme Court granted the cross motion and consequently denied plaintiff's motion, and plaintiff appeals.

At the outset we note that, "[s]ince [a] party may not commence a legal action or proceeding against a dead person . . . , the action [against decedent and Agnes] was a nullity from its inception" (*Schaffer v Jaskowiak*, 140 AD3d 1748, 1748-1749 [4th Dept 2016], *lv denied* 28 NY3d 906 [2016] [internal quotation marks omitted]). Thus, we must dismiss the appeal insofar as it concerns decedent and Agnes because "the order appealed from, insofar as it purports to affect [decedent and Agnes], [is] a nullity and this Court has no jurisdiction to hear and ***1083** determine that purported appeal" (*Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]; *see Schaffer*, 140 AD3d at 1749). Furthermore, inasmuch as the estate of decedent was not substituted as a defendant, the court " 'lacked jurisdiction to rule on the [cross] motion' " insofar as the cross motion purports to affect the estate of decedent (*Matter of Leopold*, 32 AD3d 1227, 1228 [4th Dept 2006]; *see generally Wood v Dolloff*, 52 AD3d 1190, 1190 [4th Dept 2008]), and this Court consequently lacks jurisdiction to review the order on appeal insofar as it concerns the estate of decedent (*see Wood*, 52 AD3d at 1190).

With respect to the merits, we agree with plaintiff that the court erred in analyzing the cross motion as if plaintiff had moved for summary judgment based on decedent's default on the note, thereby placing the prima facie burden on plaintiff rather than on the proponents of the cross motion for summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and that the court erred in sua sponte raising issues such as the validity of the mortgage and whether the mortgage secured the note (*see Daimler Chrysler Ins. Co. v Keller*, 164 AD3d 1209, 1210 [2d Dept 2018]; *see also Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1693 [4th Dept 2009]).

We further agree with plaintiff that defendants failed to meet their prima facie burden on their cross motion of establishing that the entire foreclosure action is barred by the statute of limitations. An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]). Here, the note provided that decedent agreed to repay the loan in monthly installments from September 2007 to August 2032. "[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the [s]tatute of [l]imitations [begins] to run, on the date each installment [becomes] due" (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011] [internal quotation marks omitted]; *see United States of Am. v Quaintance*, 244 AD2d 915, 915-916 [4th Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). Plaintiff commenced this foreclosure action on September 15, 2017. Therefore, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, is not barred by the statute of limitations. To the extent that plaintiff seeks recovery for installments due before that date, recovery is barred by the statute of limitations (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]; *Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2d Dept 2001], *lv dismissed* 97 NY2d 714 [2002], *lv dismissed* 99 NY2d 532 [2002]).

***1084** We also conclude that defendants did not establish that the debt was accelerated at any time prior to the commencement of this foreclosure action. When plaintiff filed its complaint on September 15, 2017, it elected at that time to accelerate the entire debt (*see generally Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Consequently, at that time, the entire debt became due —less any amounts for installments that became due outside of the six-year limitations period, i.e., before September 15, 2011 (*see EMC Mtge. Corp.* 49 AD3d at 593; *Esther M. Mertz Trust*, 288 AD2d at 340). We therefore modify the order by denying the cross motion in part and reinstating the complaint against defendants to the extent that it seeks recovery of amounts due within six years prior to the commencement of the action.

Contrary to the contention of defendants, because any amount that became due after September 15, 2011, is within the limitations period, laches is not an available defense with respect to those amounts (*see Janian v Barnes*, 294 AD2d 787, 789 [3d Dept 2002]; *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses*, 191 AD2d 151, 152 [1st Dept 1993]; *Schmidt's Wholesale v Miller & Lehman Constr.*, 173 AD2d 1004, 1005 [3d Dept 1991]).

We reject defendants' contention that the debt accelerated automatically upon decedent's death. The mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983-984 [2d Dept 2012]; *Esther M. Mertz Trust*, 288 AD2d at 340). We likewise reject defendants' contention that they are entitled to summary judgment dismissing the complaint based on

equitable estoppel. A valid defense of equitable estoppel must be based on "evidence that [defendants] 'prejudicially changed their position in reliance upon' an assurance by plaintiff" (*PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013], *lv dismissed* 23 NY3d 940 [2014]). Defendants failed to submit in support of their cross motion any evidence that plaintiff made such an assurance, or that defendants relied upon any such assurance.

Defendants contend that "[p]laintiff offers no documentary evidence of loan statements and the record is void of any payments tendered by the obligor." We note, however, that defendants ***1085** cannot meet their burden on their cross motion by pointing out gaps in plaintiff's proof (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911 [2d Dept 2013], *lv dismissed* 21 NY3d 1068 [2013]; *see generally Nick's Garage, Inc. v Geico Indem. Co.*, 165 AD3d 1621, 1622 [4th Dept 2018]).

In light of our determination, we remit the matter to Supreme Court to determine the merits of plaintiff's motion. Present—Centra, J.P., Peradotto, Lindley, NeMoyer and Bannister, JJ.

New York Official Reports

175 A.D.3d 618, 107 N.Y.S.3d 108, 2019 N.Y. Slip Op. 06208

**1 Ditech Financial, LLC, Formerly Known as Green Tree Servicing LLC, Appellant,

v

Yechezkel Reiss, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2017-11380, 517592/16
August 21, 2019

CITE TITLE AS: Ditech Fin., LLC v Reiss

HEADNOTE

Mortgages
Foreclosure
Partially Time-Barred Action

Reed Smith LLP, New York, NY (Kessen B. Zinner of counsel), for appellant.
Heller, Horowitz & Feit, P.C., New York, NY (Eli Feit and Stuart A. Blander of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), dated September 5, 2017. The order, insofar as appealed from, in effect, granted that branch of the motion of the defendant Yechezkel Reiss which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred.

Ordered that the order is modified, on the law, by deleting the provision thereof, in effect, granting that branch of the motion of the defendant Yechezkel Reiss which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred to the extent that the complaint relates to unpaid mortgage installments which accrued on or after October 6, 2010, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In August 2006, the defendant Yechezkel Reiss (hereinafter the defendant) executed a consolidated note in the sum of $400,000 in favor of Fairmont Funding, Ltd. (hereinafter Fairmont Funding), which was secured by a mortgage on residential property in Brooklyn. On October 6, 2016, the plaintiff, alleging that it is the current holder of the note, and that the defendant defaulted on his monthly payments in February 2009, commenced this mortgage foreclosure action against, among others, the defendant. The defendant moved, among other things, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred. The Supreme Court, in effect, granted that branch of the motion. The plaintiff appeals.

*619 The Supreme Court should not have, in effect, granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred in its entirety. An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]). The limitations period begins to run on the entire debt when the mortgagee or its predecessor elects to accelerate the mortgage (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982-983 [2012]; *Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2001]). When the mortgagee elects to accelerate the mortgage debt, notice to the borrower must be "clear and unequivocal" (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983). "[O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]; *see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]).

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 [2017]; *see U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834-835 [2018]). " 'If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period' " (*U.S. Bank*

N.A. v Gordon, 158 AD3d at 835, quoting *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]).

Here, contrary to the defendant's contention, he did not establish that the complaint should be dismissed on statute of limitations grounds through the notices sent to the defendant in February 2009 and May 2009, as those notices did not accelerate the mortgage. The notices indicated that acceleration was a possible future event, but did not constitute an exercise of the mortgage's acceleration clause (*see DLJ Mtge. Capital, Inc. v Hirsh*, 161 AD3d 944, 945 [2018]; *21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2017]). Rather, the mortgage was only accelerated in October 2016, when the plaintiff served the foreclosure complaint on the defendant seeking immediate payment of the balance of the principal indebtedness. Thus, the Supreme Court should not have granted dismissal of the ***620** complaint in its entirety as time-barred. Specifically, the defendant failed to show that the causes of action in the complaint, insofar as they relate to unpaid mortgage installments which accrued within the six-year period immediately preceding the plaintiff's October 2016 commencement of this foreclosure action, to wit, the unpaid installments which accrued on or after October 6, 2010, were time-barred (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2008]).

However, where, as here, the mortgage was payable in installments, there are "separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due" (*Pagano v Smith*, 201 AD2d 632, 633 [1994]; *see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d at 754). Therefore, since the plaintiff alleged that the defendant made his last payment on the mortgage in January 2009 and this action was not commenced until October 6, 2016, the defendant established that any unpaid installments of the mortgage which accrued before the six-year period prior to the plaintiff's commencement of this mortgage foreclosure action, to wit, unpaid installments from January 2009 through October 5, 2010, are time-barred (*see Khoury v Alger*, 174 AD2d 918, 919 [1991]; *see also Wells Fargo Bank, N.A. v Cohen*, 80 AD3d at 754). In opposition, the plaintiff failed to raise a question of fact.

The defendant's remaining contention is without merit. Leventhal, J.P., Miller, Duffy and Brathwaite Nelson, JJ., concur.

New York Official Reports

171 A.D.3d 34, 96 N.Y.S.3d 354, 2019 N.Y. Slip Op. 01732

**1 Bank of New York Mellon, Formerly Known as The Bank of New York, as Trustee (CWALT 2004-24CB), Appellant,

v

Alice J. Dieudonne, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2017-08956, 518577/16
March 13, 2019

CITE TITLE AS: Bank of N.Y. Mellon v Dieudonne

SUMMARY

Appeal from an order of the Supreme Court, Kings County (Noach Dear, J.), dated June 27, 2017, in an action to foreclose on a mortgage. The order granted defendant Alice J. Dieudonne's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against her as time-barred.

Bank of N.Y. Mellon v Dieudonne, 2017 NY Slip Op 32982(U), affirmed.

HEADNOTE

Mortgages
Foreclosure
Reinstatement Provision Not Condition Precedent to Acceleration

Where plaintiff bank accelerated defendant's mortgage in a prior foreclosure action, plaintiff's second foreclosure action was properly dismissed as barred by the statute of limitations as defendant's contractual right to de-accelerate the maturity of the debt pursuant to the mortgage's reinstatement provision was not a condition precedent to the acceleration of the mortgage and did not prevent plaintiff from validly exercising its option to accelerate. Defendant demonstrated that the mortgage provided plaintiff with the right to require defendant to pay the entire amount then remaining unpaid under the note and mortgage if plaintiff first satisfied certain conditions set forth in the mortgage. Defendant's evidentiary submissions established that plaintiff complied with those conditions and then validly exercised its option to accelerate the entire remaining balance due under the note by filing the summons and complaint in the first foreclosure action. As the second action was commenced more than six years later, defendant established, prima facie, that the time in which to commence the action had expired (CPLR 213 [4]). The mortgage's reinstatement provision gave defendant the contractual option to de-accelerate the mortgage when certain conditions precedent were met. The mortgage's acceleration provision unequivocally set forth the conditions that had to be satisfied before plaintiff was contractually entitled to exercise its option to accelerate the entire outstanding debt. The reinstatement provision was not referenced in, or included among, those conditions listed in the acceleration provision. Nor did the reinstatement provision include any language indicating that it served as a condition precedent to plaintiff's right to accelerate the outstanding debt. To the contrary, the reinstatement provision indicated that plaintiff's right to accelerate the entire debt could be exercised before defendant's rights under the reinstatement provision were exercised or extinguished.

RESEARCH REFERENCES

Am Jur 2d Limitation of Actions §§ 145, 325; Am Jur 2d Mortgages §§ 426–429, 441, 617.

*35 Carmody-Wait 2d Limitation of Actions §§ 13:167, 13:268; Carmody-Wait 2d Foreclosure of Mortgages on Real Estate §§ 92:54, 92:168.

McKinney's, CPLR 213 (4).

Mortgage Liens in New York (2017-2018 ed), ch18, Statute of Limitations; ch 19, The Action to Foreclose the Mortgage.

NY Jur 2d Limitations and Laches § 95; NY Jur 2d Mortgages and Deeds of Trust §§ 468, 469, 609.

ANNOTATION REFERENCE

See ALR Index under Acceleration of Obligations; Foreclosure; Limitation of Actions; Mortgages.

APPEARANCES OF COUNSEL

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bayshore (*Keith L. Abramson* of counsel), for appellant.
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OPINION OF THE COURT

Miller, J.

This appeal presents an issue of first impression for this Court. The plaintiff in this mortgage foreclosure action contends that it lacked the authority to exercise its contractual option to accelerate the maturity of the entire balance of the loan it seeks to recover. The plaintiff argues that it was prevented from validly accelerating the debt by virtue of a reinstatement provision in the subject mortgage which gives the borrower the option, under certain circumstances, to effectively de-accelerate the maturity of the debt. The plaintiff further argues that the statute of limitations did not begin to run until the borrower's rights under the reinstatement provision in the subject mortgage were extinguished.

The mortgage at issue is a uniform instrument issued by Fannie Mae and Freddie Mac for use in New York. Given the prevalence of the language used in this uniform instrument, and in light of the divergent conclusions reached in the trial- ***36** level decisions interpreting that language, we deem it appropriate to clarify the legal principles that are relevant to this issue and to set forth the appropriate construction of the language used in these uniform instruments. Ultimately, we conclude that the reinstatement provision contained in the subject mortgage was not a condition precedent to the acceleration of the mortgage and did not prevent the plaintiff from validly exercising its option to accelerate. Accordingly, the statute of limitations started to run when the plaintiff exercised its option to accelerate.

In October 2016, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Alice J. Dieudonne (hereinafter the defendant). The defendant moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against her as time-barred. The defendant argued that the entire debt was accelerated in June 2010, when a prior action was commenced to foreclose the same mortgage. The Supreme Court granted the defendant's motion, and the plaintiff appeals.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima ****2** facie, that the time in which to commence an action has expired" (*Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 [2007]; *see Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d 843, 845 [2010]; *6D Farm Corp. v Carr*, 63 AD3d 903, 905-906 [2009]). "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed" (CPLR 203 [a]). Accordingly, "[t]o meet [his or her] burden, a defendant must establish when the causes of action accrued" (*Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 766 [2010]; *see Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2006]).

Generally, "[a] cause of action does not accrue until its enforcement becomes possible" (*Jacobus v Colgate*, 217 NY 235, 245 [1916]), which occurs "as soon as a claimant is able to state the elements of that cause of action, and hence, to assert a valid right to some sort of legal relief" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 26 [1989]; *see New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [2000]). "Where, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff ***37** possesses a legal right to demand payment" (*Swift v New York Med. Coll.*, 25 AD3d at 687 [internal quotation marks omitted]; *see Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d at 845; *Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2009]).

"As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding . . . the action" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]; *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" (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d

866, 867 [2016]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [1997]).

However, even if a mortgage is payable in installments, the terms of the mortgage may contain an acceleration clause that gives the lender "the option to demand due the entire balance of principal and interest upon the occurrence of certain events delineated in the mortgage" (1 Bergman on New York Mortgage Foreclosures § 4.02 [2018]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983). Where the terms of the mortgage provide that

> "the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983; *see Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2001]; *Ward v Walkley*, 143 AD2d 415, 417 [1988]; *see also* 1 Bergman on New York Mortgage Foreclosures §§ 4.05, 5.11 [2] [2018]; *cf. Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 142-144 [1993]).

Once a mortgage has been validly accelerated in accordance with the terms of the mortgage, "the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]; *see Nationstar* ***38** *Mtge., LLC v Weisblum*, 143 AD3d at 867; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *Loiacono v Goldberg*, 240 AD2d at 477).

A borrower generally must be provided with notice of the lender's decision to exercise an option to accelerate the maturity of a loan (*see EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2005]; *Arbisser v Gelbelman*, 286 AD2d 693, 694 [2001]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605-606), and such notice must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439 [2006]; *see Arbisser v Gelbelman*, 286 AD2d at 694; *Colonie Block & Supply Co. v Overmyer Co.*, 35 AD2d 897, 897 [1970]). "Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *see EMC Mtge. Corp. v Smith*, 18 AD3d at 603; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2003]; *Arbisser v Gelbelman*, 286 AD2d at 694).

Here, in support of her motion, the defendant demonstrated that the subject mortgage provided the plaintiff with the right to require the defendant to immediately pay "the entire amount then remaining unpaid under the Note and [mortgage]" if the plaintiff first satisfied certain conditions set forth in the mortgage. The defendant's evidentiary submissions established that the plaintiff complied with those conditions (*cf. Serapilio v Staszak*, 255 AD2d 824, 824 [1998]), and then validly exercised its option to accelerate the entire remaining balance due under the note by filing the summons and complaint in the first foreclosure action in June 2010 (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Milone v US Bank N.A.*, 164 AD3d 145, 152-153 [2018]; ****3** *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2018]; *Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657, 658 [2017]). Accordingly, since this action was not commenced until October 2016, the defendant established, prima facie, that the time in which to commence this action has expired (*see* CPLR 213 [4]).

Where, as here, a defendant satisfies the initial burden of proof on a motion pursuant to CPLR 3211 (a) (5), "the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]; *see Stewart v GDC Tower at Greystone*, 138 AD3d 729, 730 [2016]). Here, in opposition to ***39** the defendant's prima facie showing, the plaintiff failed to raise a question of fact.

Contrary to the plaintiff's contention, the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt. That provision effectively gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met. The plaintiff argues that because its right to accelerate the entire outstanding debt was subject to the defendant's right, under certain circumstances, to de-accelerate that portion of the debt, the plaintiff's right to accelerate the debt was subject to a condition precedent and the statute of limitations did not begin to run until the defendant's right to de-accelerate was extinguished in accordance with the terms of the mortgage (*see Nationstar Mtge., LLC v MacPherson*, 56 Misc 3d 339 [Sup Ct, Suffolk County 2017]; *see generally* 1 Bergman on New York Mortgage Foreclosures § 1.07 [2018]).

As we have already observed, a cause of action for payment of a sum of money allegedly owed pursuant to a contract accrues when the plaintiff "possesses a legal right to demand payment" (*Matter of Prote Contr. Co. v Board of Educ. of City of N. Y.*, 198 AD2d 418, 420 [1993]; *see City of New York v State of New York*, 40 NY2d 659, 668 [1976]; *Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d at 845). "[A]s a general rule, when the right to final payment is subject to a condition, the obligation to pay arises and the cause of action accrues, only when the condition has been fulfilled" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]; *see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012]; *City of New York v State of New York*, 40 NY2d at 668). The Court of Appeals has recognized that the use of terms such as "if," "unless," and "until" constitutes "unmistakable language of condition" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]; *see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d at 771-772; *MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]).

Here, paragraph 22 of the subject mortgage unequivocally set forth the conditions that had to be satisfied before the plaintiff was contractually entitled to exercise its option to accelerate the entire outstanding debt. The language of the mortgage makes clear that the plaintiff is entitled to exercise its option to accelerate "if all of th[ose] conditions . . . are ***40** met." The reinstatement provision in paragraph 19 of the mortgage was not referenced in, or included among, those conditions listed in paragraph 22. Nor does the reinstatement provision in paragraph 19 of the mortgage include any language indicating that it serves as a condition precedent to the plaintiff's right to accelerate the outstanding debt. To the contrary, the language of paragraph 19 indicates that the plaintiff's right to accelerate the entire debt may be exercised *before* the defendant's rights under the reinstatement provision in paragraph 19 are exercised or extinguished. Accordingly, contrary to the plaintiff's contention, the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision in paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage (*see generally Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d at 771-772). To the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed (*see U.S. Bank N.A. v Nail*, 2018 NY Slip Op 32897 [U] [Sup Ct, Westchester County 2018]; *Wells Fargo Bank, N.A. v Fetonti*, 2018 NY Slip Op 30193[U] [Sup Ct, Westchester County 2018]; *HSBC Bank, USA, NA v Margineanu*, 61 Misc 3d 973 [Sup Ct, Suffolk County 2018]; *U.S. Bank Trust, N.A. v Monsalve*, 2017 NY Slip Op 32764[U] [Sup Ct, Queens County 2017]; *Nationstar Mtge., LLC v MacPherson*, 56 Misc 3d 339 [Sup Ct, Suffolk County 2017]).

Accordingly, we agree with the Supreme Court's determination granting the defendant's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against her as time-barred. ****4**

Therefore, the order is affirmed.

Dillon, J.P., Austin and Duffy, JJ., concur.

Ordered that the order is affirmed, with costs.

184 A.D.3d 140, 125 N.Y.S.3d 420, 2020 N.Y. Slip Op. 03095

**1 Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as Trustee for Normandy Mortgage Loan Trust, Series 2013-18, Respondent,
v
Himon Barua, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2017-12206, 611910/15
June 3, 2020

CITE TITLE AS: Christiana Trust v Barua

SUMMARY

Appeal from an order of the Supreme Court, Suffolk County (Peter H. Mayer, J.), dated September 7, 2017, in an action to foreclose a mortgage. The order, insofar as appealed from, denied defendant Himon Barua's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred and to cancel a lis pendens filed against the subject property.

Christiana Trust v Barua, 2017 NY Slip Op 33196(U), reversed.

HEADNOTES

Mortgages
Acceleration Clause
Revocation—Bare Discontinuance of Foreclosure Action Does Not De-Accelerate Loan Balance

(1) A lender's mere act of discontinuing a mortgage foreclosure action, without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt. A bare discontinuance does not disclose its underlying reasons nor say anything about the discontinuing party's intent to de-accelerate the full debt. There are sound legal and public policy reasons in requiring that a lender or servicer, upon de-accelerating a loan balance, demonstrate its good-faith and bona fide intentions in rescinding its demand for the full loan balance and in seeking a resumption of monthly installment payments. Once a mortgage debt is accelerated, the borrower's right and obligation to make monthly installments ceases and all sums and penalties become immediately due and payable. A borrower so circumstanced may typically, necessarily, and detrimentally rely upon the acceleration for not tendering further monthly payments on the note, knowing that monthly installments will no longer be accepted. While the borrower might have defaulted in the first instance as a result of a financial inability to pay monthly installments, it is entirely possible in some cases that a borrower may acquire, after the loan balance is accelerated, the ability to pay arrears and maintain current payments, though lacking the ability to pay off the entire accelerated debt. A de-acceleration of the full debt revives the borrower's right to make the monthly payments that became due between the time the loan was accelerated and the time the acceleration was revoked, together with the right to make future monthly installment payments. Since the borrower may continue to assume that its lender or servicer will not accept post-acceleration monthly payments, the lender, in order to effectively rescind the acceleration, should be required to notify the borrower that the right to make monthly payments is restored and that the lender will accept the tender of such payments.

*141 Mortgages
Foreclosure
Six-Year Statute of Limitations—Second Action Time Barred on Accelerated Debt Where Bare Discontinuance Did Not De-Accelerate Loan Balance

(2) In a mortgage foreclosure action, where the lender accelerated the full mortgage payment then discontinued the action, a second action, commenced six years and four days later by plaintiff assignee of the mortgage, was untimely as the lender's mere act of discontinuing the action, without more, did not constitute, in and of itself, an affirmative act revoking the earlier acceleration of the debt. Acceleration of full mortgage debt has the effect of commencing the

six-year statute of limitations set forth in CPLR 213 (4). Lenders may revoke the acceleration of full mortgage loan balances, so long as the revocation is accomplished by an affirmative act occurring within six years of the earlier acceleration. Just as acceleration notices must be clear and unambiguous, the de-acceleration of note balances must also be clear and unambiguous to convey the fact that the previous demand for full payment of the note has been affirmatively revoked. Plaintiff failed to demonstrate any language in the motion to discontinue, or in the order rendered thereon, that clearly and unambiguously repudiated the statement in the lender's verified complaint that it had elected to accelerate the full amount of the outstanding loan debt. Plaintiff also failed to establish that it ever demanded a resumption of monthly mortgage installment payments, invoiced the defendant for such payments, or offered any other evidence demonstrating that it was truly seeking to de-accelerate the debt in addition to its discontinuance of the action. Defendant met his initial burden of demonstrating that the second action was time-barred by four days. In opposition, plaintiff failed to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it actually commenced the second action within the applicable limitations period, as there was no evidence in the record that the lender or the plaintiff ever communicated a de-acceleration of the demand for payment of the full debt.

Mortgages
Foreclosure
Six-Year Statute of Limitations—RPAPL 1304 Does Not Toll Statute of Limitations

(3) In a mortgage foreclosure action, where the lender accelerated the full mortgage payment then discontinued the action, a second action, commenced six years and four days later by plaintiff assignee of the mortgage, was untimely pursuant to CPLR 204 (a) because the 90-day period required for mailing a statutory notice of default under RPAPL 1304 did not operate as toll of the statute of limitations. CPLR 204 (a) authorizes the tolling of a statute of limitations where the commencement of an action is stayed by a court order or by a statutory prohibition. There is a difference between a "statutory prohibition," which tolls the statute of limitations, and a "condition precedent" to suit, which does not generate a toll. RPAPL 1304 is not a statutory prohibition within the scope of CPLR 204 (a), but is instead a condition precedent to the commencement of mortgage foreclosure actions, and does not trigger a toll of the applicable statute of limitations under CPLR 204 (a). Plaintiff did not even detail how or in what manner its compliance with RPAPL 1304 caused its commencement of the second action to occur four days beyond the expiration of the six-year statute of limitations.

RESEARCH REFERENCES

Am Jur 2d Limitation of Actions §§ 112, 116, 145, 325; Am Jur 2d Mortgages §§ 576, 577, 615, 617.

***142** Carmody-Wait 2d Limitation of Actions §§ 13:167, 13:268; Carmody-Wait 2d Foreclosure of Mortgages on Real Estate §§ 92:36, 92:51, 92:54, 92:55, 92:165.

McKinney's, CPLR 204, 213 (4); RPAPL 1304.

Mortgage Liens in New York (2017-2018 ed) ch 19, The Action to Foreclose the Mortgage.

NY Jur 2d Limitations and Laches §§ 95, 142, 164, 290; NY Jur 2d Mortgages and Deeds of Trust §§ 466, 468, 469, 503, 506, 550.

Siegel, NY Prac § 35.

ANNOTATION REFERENCE

See ALR Index under Acceleration of Obligations; Foreclosure; Limitation of Actions; Mortgages.

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Query: mortgage /3 foreclos! & discontinuance /s de-accelerat!

APPEARANCES OF COUNSEL

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Knuckles, Komosinski & Manfro, LLP, Elmsford (*Jordan J. Manfro* of counsel), for respondent.

OPINION OF THE COURT

Dillon, J.

This is an appeal that involves the commencement of a mortgage foreclosure action that accelerated the full balance

of the debt, the discontinuance of that action, the later commencement of a second action on the same note, and the statute of limitations. For reasons set forth below, we hold that the second action was time-barred, as it was commenced beyond the applicable six-year statute of limitations of CPLR 213 (4). We also address whether the mere discontinuance of an action, in and of itself, nullifies any debt acceleration demanded in a foreclosure plaintiff's complaint, absent other communication to the borrower that de-acceleration is also intended by the discontinuance.

I. Relevant Facts

On July 25, 2006, the defendant Himon Barua (hereinafter the defendant) executed a note in the sum of $312,000 in favor of JPMorgan Chase Bank, N.A. (hereinafter Chase). The note ***143** was secured by a residential mortgage executed by both the defendant and the defendant Emon Barua encumbering certain real property located in Brentwood (hereinafter the subject property). The defendant allegedly defaulted in his monthly payment obligations on the note beginning on April 1, 2009.

On November 6, 2009, Chase commenced a mortgage foreclosure action against the defendant and others by the filing of a summons and complaint in the Supreme Court (hereinafter the first action). Chase alleged in paragraph 9 of the complaint that the named defendants defaulted on their payment obligations under the note and mortgage by failing to make the payment that had become due on April 1, 2009. In paragraph 11 of the complaint, it was alleged that Chase "elected and does hereby elect to declare the entire principal balance [of the note] to be due and owing." Later, according to an eCourts printout contained in the record, Chase moved to discontinue the first action, and the motion was granted in an order dated October 15, 2013.

In a summons with notice and complaint filed on November 10, 2015, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as trustee for Normandy Mortgage Loan Trust, Series 2013-18 (hereinafter the plaintiff), commenced an action against the defendant and others to foreclose the mortgage on the subject property (hereinafter the second action). The plaintiff alleged that it was the holder of the note and the assignee of the mortgage, and that the defendant was in default of his payment obligations. Paragraph III (E) of the complaint alleged that the plaintiff "elected to and hereby accelerate[s] the mortgage and declare[s] the entire mortgage indebtedness immediately due and payable."

On March 10, 2016, the defendant moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him on the ground that the second action was time-barred and to cancel a lis pendens that had been filed against the subject property. The defendant argued that since the first action was commenced on November 6, 2009, and accelerated the full amount due on the note at that time, the second action, commenced on November 10, 2015, was commenced beyond the six-year statute of limitations of CPLR 213 (4) and was therefore untimely. In opposition, the plaintiff argued, inter alia, that the discontinuance of the first action without prejudice, which occurred within six years of that action's acceleration of the full balance due on the note, operated as a de- ***144** acceleration of the debt. The plaintiff further argued that the discontinuance of the first action "leaves the situation as if the action had never been filed" (internal quotation marks omitted), in effect erasing the acceleration of the debt which occurred when the first action was commenced on November 6, 2009. The plaintiff concluded that the commencement of the second action on November 10, 2015, constituted a new acceleration rendering the second action timely.

In the order appealed from, dated September 7, 2017, the Supreme Court, inter alia, denied the defendant's motion (2017 NY Slip Op 33196[U] [2017]). The court agreed with the plaintiff that when the first action was discontinued, everything that had occurred within that action, including Chase's acceleration of the loan debt, was annulled. The court concluded that since the first action had been voluntarily discontinued by Chase, that affirmative act revoked the 2009 acceleration of the debt, and the debt acceleration of the second action in 2015 was therefore timely.

For the reasons we discuss below, we reverse the order insofar as appealed from.

II. The Effect of De-Acceleration upon the Statute of Limitations

The parties do not dispute that the controlling statute of limitations for breach of contract actions is six years (*see* CPLR 213 [4]; *Milone v US Bank N.A.*, 164 AD3d 145, 151 [2018]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 197 [2017]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]), and that the first action had the stated effect of accelerating the balance of the debt owed on the defendant's note, which triggered the limitations period (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 986; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605

[2001]). The plaintiff and the defendant differ about whether the 2009 debt acceleration was thereafter extinguished by the affirmative discontinuance of the first action on October 15, 2013.

Two years ago, this Court addressed similar issues in *Milone v US Bank N.A.* (164 AD3d 145 [2018]). In *Milone*, a lender commenced an action to foreclose a mortgage upon residential property on January 13, 2009, as a result of the borrower's default in making monthly installment payments on the note. The acceleration of the full mortgage debt in that action had the effect of commencing the six-year statute of limitations set ***145** forth in CPLR 213 (4). In an order of the Supreme Court dated February 29, 2012, the action was dismissed after more than three years had run against the statute of limitations. On October 21, 2014, approximately three months before the statute of limitations was to expire, the lender's servicer transmitted a letter to the borrower advising that the note, which had previously been accelerated, was de-accelerated, that any prior demand for full payment on the note was withdrawn, and that the debt was reinstituted as an installment loan (*see Milone v US Bank N.A.*, 164 AD3d at 149).

On March 10, 2015, after the six-year statute of limitations had expired as measured from the initial debt acceleration, the borrower in *Milone* commenced an action pursuant to RPAPL 1501 to cancel and discharge the mortgage and note, arguing that no new foreclosure action had been commenced on the note within six years from its acceleration. The lender moved to dismiss the complaint in the RPAPL 1501 action on the ground that since a de-acceleration of the loan balance had occurred within six years of the acceleration, there was no violation of the statute of limitations and a new six-year limitations period would only begin to run if the full balance of the same note were to be accelerated at some time in the future (*see Milone v US Bank N.A.*, 164 AD3d at 149-150). The borrower cross-moved for summary judgment on the complaint. The Supreme Court granted the lender's motion to dismiss the complaint with prejudice and denied the borrower's cross motion for summary judgment on the complaint. On appeal, this Court modified the order, concluding that the Supreme Court should have denied the lender's motion to dismiss the complaint because there was a question of fact as to the lender's standing to de-accelerate the loan debt.

This Court used the occasion in *Milone* to sort out the law and procedures governing the acceleration and de-acceleration of notes. We recognized well-established precedent that lenders may revoke the acceleration of full mortgage loan balances, so long as the revocation is accomplished by an affirmative act occurring within six years of the earlier acceleration (*see id.* at 154, citing *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2018], *MSMJ Realty, LLC v DLJ Mtge. Capital, Inc.*, 157 AD3d 885, 887 [2018], *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2017], *U.S. Bank N.A. v Barnett*, 151 AD3d 791, 793 [2017], *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 987, ***146** *UMLIC VP, LLC v Mellace*, 19 AD3d 684 [2005], *Clayton Natl. v Guldi*, 307 AD2d 982 [2003], and *EMC Mtge. Corp. v Patella*, 279 AD2d at 606; *see also HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2019]; *Freedom Mtge. Corp. v Engel*, 163 AD3d 631, 632 [2018], *lv granted in part* 33 NY3d 1039 [2019]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d at 935). We then held for the first time that just as acceleration notices must be clear and unambiguous (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2012]; *Sarva v Chakravorty*, 34 AD3d 438, 439 [2006]; *see also J & JT Holding Corp. v Deutsche Bank Natl. Trust Co.*, 173 AD3d 704 [2019]), the de-acceleration of note balances must also be clear and unambiguous to convey the fact that the previous demand for full payment of the note has been affirmatively revoked (*see Milone v US Bank N.A.*, 164 AD3d at 153). We further held in *Milone*, for the first time, that just as standing is a prerequisite to a valid acceleration, a party must also have standing to effect a de-acceleration of the debt (*see id.* at 155). Moreover, recognizing that the foreclosure of mortgages encumbering residential properties involves elements of equity, we held in *Milone* that the declaration of a de-acceleration cannot be utilized as a mere pretext to avoid the onerous effect of the statute of limitations.

> "[A] de-acceleration letter is not pretextual if . . . it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration" (*id.* at 154, citing *Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d 915, 923-924 [Sup Ct, Westchester County 2017, Scheinkman, J.]).

(1) The *Milone* case involved a de-acceleration letter from a servicer that clearly and unambiguously demanded a resumption of monthly installment payments on the note.

Here, by contrast, we are faced not with a letter of de-acceleration, but a discontinuance of the first action, which had sought full payment of the accelerated debt. Beyond *Milone*, this Court has repeatedly held that a lender's mere act of discontinuing an action, ***147** without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt (*see Bank of N.Y. Mellon v Yacoob*, 182 AD3d 566 [2d Dept 2020]; *HSBC Bank, N.A. v Vaswani*, 174 AD3d 514, 515 [2019]; *Federal Natl. Mtge. Assn. v Schmitt*, 172 AD3d 1324, 1326 [2019]; *Aquino v Ventures Trust 2013-I-H-R by MCM Capital Partners*, 172 AD3d 663 [2019]; *Bank of N.Y. Mellon v Craig*, 169 AD3d 627, 629 [2019]; *U.S. Bank Trust, N.A. v Aorta*, 167 AD3d 807, 809 [2018]; *Freedom Mtge. Corp. v Engel*, 163 AD3d at 633; *Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657, 658 [2017]).* Various reported trial level decisions and orders holding to the contrary should no longer be followed.

The reason for requiring that a valid de-acceleration requires more than a bare discontinuance of a foreclosure action is that the full balance of a mortgage debt cannot be sought without an acceleration, whereas the voluntary discontinuance of a foreclosure action may be occasioned for any number of different reasons, including those that have nothing to do with an intent to revoke the acceleration. A bare discontinuance does not disclose its underlying reasons nor say anything about the discontinuing party's intent to de-accelerate the full debt.

There are sound legal and public policy reasons in requiring that a lender or servicer, upon de-accelerating a loan balance, demonstrate its good faith and bona fide intentions in rescinding its demand for the full loan balance and in seeking a resumption of monthly installment payments. Once a mortgage debt is accelerated, the borrower's right and obligation to make monthly installments ceases and all sums and penalties become immediately due and payable (*see Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [1994]). A borrower so circumstanced may typically, necessarily, and detrimentally rely upon the acceleration for not tendering further monthly payments on the note, knowing that monthly installments will no longer be accepted (*see Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d at 923). While the borrower might have defaulted in the first instance as a result of a financial inability to pay monthly installments, it is entirely possible in some cases that ***148** a borrower may acquire, after the loan balance is accelerated, the ability to pay arrears and maintain current payments, though lacking the ability to pay off the entire accelerated debt (*see id.*). A de-acceleration of the full debt revives the borrower's right to make the monthly payments that became due between the time the loan was accelerated and the time the acceleration was revoked, together with the right to make future monthly installment payments. Since the borrower may continue to assume that its lender or servicer will not accept post-acceleration monthly payments, the lender, in order to effectively rescind the acceleration, should be required to notify the borrower that the right to make monthly payments is restored and that the lender will accept the tender of such payments (*see id.*). Indeed, for residential mortgage loans subject to the federal Real Estate Settlement Procedures Act (hereinafter RESPA), the rules promulgated by the Consumer Financial Protection Bureau pursuant to RESPA require the issuance of statements for each periodic billing period (*see* 12 USC § 2617; 12 CFR 1026.41 [a] [2]; [b], [d]).

Here, the plaintiff did not submit to the Supreme Court, and hence could not include in the appellate record (*see* CPLR 5526; *Matter of Dondi*, 63 NY2d 331, 339 [1984]; *Yauchler v Serth*, 114 AD3d 1069 [2014]; *Singer v Board of Educ. of City of N.Y.*, 97 AD2d 507 [1983]; *Renelique v American Tr. Ins. Co.*, 47 Misc 3d 134[A], 2015 NY Slip Op 50482[U], *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]), a copy of the earlier motion papers that sought to discontinue the first action. The plaintiff also did not provide to the court, and could not include in the appellate record, the order dated October 15, 2013, that granted the motion to discontinue the first action, as it instead relied at all times upon a mere eCourts printout of the motion history of the first action. As a result, the plaintiff failed to demonstrate any language in the motion to discontinue, or in the order rendered thereon, that clearly and unambiguously repudiated the statement in Chase's verified complaint that Chase had elected to accelerate the full amount of the outstanding loan debt (*see Bank of N.Y. Mellon v Yacoob*, 182 AD3d 566 [2020]; *HSBC Bank, N.A. v Vaswani*, 174 AD3d at 515; *Federal Natl. Mtge. Assn. v Schmitt*, 172 AD3d at 1326; *Aquino v Ventures Trust 2013-I-H-R by MCM Capital Partners*, 172 AD3d at 663; *Bank of N.Y. Mellon v Craig*, 169 AD3d at 629; *U.S. Bank Trust, N.A. v Aorta*, 167 AD3d at 809; *Freedom Mtge. Corp. v Engel*, 163 AD3d at 633; ***149** *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d at 935-936; *cf. Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d at 658). The plaintiff also failed to establish that it ever demanded a resumption of monthly mortgage installment payments, invoiced the defendant for such payments, or offered any other evidence demonstrating that it was truly seeking to de-accelerate the debt in addition to its discontinuance of the action (*see Milone v US Bank N.A.*,

164 AD3d at 155). Other evidence of a valid de-acceleration may include, but is not limited to, the voluntary vacatur of a lender's filed lis pendens (*see* CPLR 6514 [d]), and a forbearance agreement evincing a clear intent to revoke a prior acceleration and reinstate the homeowner's right to repay the underlying debt in monthly installments (*see U.S. Bank Trust, N.A. v Rudick*, 172 AD3d 1430, 1431 [2019]), but the record is devoid of evidence of those activities as well.

Our developed law that the discontinuance of residential mortgage foreclosure actions is not tantamount to an automatic de-acceleration of the full loan debt is further buttressed by the fact that these actions are not only creatures of contract law. Mortgage foreclosure actions are not purely contractual, but are a unique hybrid of contract (the note) and equity (foreclosure on the premises and eviction of the homeowner). " 'A foreclosure action is equitable in nature and triggers the equitable powers of the court' " (*Onewest Bank, FSB v Kaur*, 172 AD3d 1392, 1393-1394 [2019], quoting *Rajic v Faust*, 165 AD3d 716, 717 [2018]). We are therefore not persuaded by our dissenting colleague that courts cannot examine the subjective intent of the discontinuing party in these instances. If residential mortgage foreclosure actions are flavored with a twist of equity, as they are, then the decisional authority that has developed in *Milone* and its progeny, and in *Bernal*, has a valid equitable basis, without representing any judicial drift on the part of our Court.

Moreover, the acceleration of a debt in a residential mortgage foreclosure action survives a simple discontinuance of the action, because the right to exercise an acceleration independently arises from the provisions of the note between the parties, and not from the existence of the potential judicial remedies of the court. In other words, the mere discontinuance of an action is not tantamount to a withdrawal of the acceleration itself, but merely withdraws the prayer that the court assist the lender in collecting the accelerated amount. The right to collect the full debt, once accelerated, exists under paragraph ***150** 7 (c) of the parties' note independent of the lawsuit unless, as we have previously held, a de-acceleration is clearly and unambiguously communicated to the borrower as such. To the extent our dissenting colleague suggests that the discontinuance of an action withdraws all requests for relief, including any demand for recovering the accelerated debt, citing *Loeb v Willis* (100 NY 231 [1885]) and *Mahon v Remington* (256 App Div 889 [1939]), those cases are inapplicable, as an acceleration springs from the parties' note, and not from the collateral right to commence an action upon it.

Indeed, as noted by the Court of Appeals, "[t]he fact of election [to accelerate a mortgage debt] should not be confused with the notice or manifestation of such election" (*Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]). An acceleration may be communicated in different forms—by a letter to the borrower clearly and unambiguously advising that because of a default in payment the full loan balance was being called due (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983; *Sarva v Chakravorty*, 34 AD3d at 439), by a self-executing balloon payment due at the end of the payback period (*see Trustco Bank N.Y. v 37 Clark St.*, 157 Misc 2d 843, 844 [Sup Ct, Saratoga County 1993]), or, as relevant here, by commencing an action where the complaint seeks to recover the full amount of the loan balance (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY at 476; *Wells Fargo Bank, N.A. v Lefkowitz*, 171 AD3d 843, 844 [2019]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *City Sts. Realty Corp. v Jan Jay Constr. Enters. Corp.*, 88 AD2d 558, 559 [1982]). Those activities are unilaterally initiated by the lender or servicer as a matter of right or, as in the case of a final balloon payment, by prior contractual agreement of the parties. A bare discontinuance of litigation does not nullify the fact that a contractual right to accelerate has been unilaterally exercised pursuant to the terms of a note. An acceleration of loan debt by the transmittal of a letter or by the commencement of an action in a court of law has legal implications, such as the financial penalties authorized under the note, the potential negative effect upon the borrower's credit rating, and reliance by the borrower that monthly payments will no longer be expected or accepted and thereby prevent any pay-down of the balance owed. To occur, none of these or other consequences of an acceleration require any permission, ruling, stipulation, decision, or order of a court, as they are independent of the litigation.

(2) ***151** Here, since Chase accelerated the loan balance by commencing the first action on November 6, 2009, and the second action was not commenced until November 10, 2015, the defendant met his initial burden of demonstrating, prima facie, that the second action is time-barred by operation of CPLR 213 (4) and 3211 (a) (5) by four days (*see HSBC Bank USA, N.A. v Gold*, 171 AD3d at 1030; *Bank of N.Y. Mellon v Dieudonne*, 171 AD3d 34, 36 [2019]; *U.S. Bank N.A. v Joseph*, 159 AD3d 968, 969 [2018]; *U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834 [2018]; *Campone v Panos*, 142 AD3d 1126, 1127 [2016]; *Stewart v GDC Tower at Greystone*, 138 AD3d 729, 730 [2016]). In opposition, where the burden of

going forward shifted, the plaintiff failed to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it actually commenced the second action within the applicable limitations period (*see HSBC Bank USA, N.A. v Gold*, 171 AD3d at 1030; *U.S. Bank N.A. v Joseph*, 159 AD3d at 969; *U.S. Bank N.A. v Gordon*, 158 AD3d at 834; *Stewart v GDC Tower at Greystone*, 138 AD3d at 730; *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]), as there is no evidence in the record that Chase or the plaintiff ever communicated a de-acceleration of the demand for payment of the full debt. Therefore, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint in the second action insofar as asserted against him as time-barred.

III. The Interplay of CPLR 204 (a) and RPAPL 1304

The plaintiff argues that the second action is timely pursuant to CPLR 204 (a) because the 90-day period required for mailing a statutory notice of default under RPAPL 1304 operates as a toll of the statute of limitations for that same period of time. Although the plaintiff's argument is raised for the first time on appeal, we are able to reach it since it is an issue of law which appears on the face of the record and could not have been avoided had it been raised before the Supreme Court (*see Countrywide Bank, FSB v Singh*, 173 AD3d 673, 675 [2019]).

(3) The notice period of RPAPL 1304 does not operate to toll the statute of limitations. CPLR 204 (a) authorizes the tolling of a statute of limitations where the commencement of an action is stayed by a court order or by a statutory prohibition (*see Torsoe Bros. Constr. Corp. v McKenzie*, 271 AD2d 682, 682-683 [2000]). There is a difference between a "statutory prohibition," ***152** on the one hand, which tolls the statute of limitations, and a "condition precedent" to suit, on the other, which does not generate a toll (*see Barchet v New York City Tr. Auth.*, 20 NY2d 1, 6 [1967]; *HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 506-507 [2018]). RPAPL 1304 is not a statutory prohibition within the scope of CPLR 204 (a), but is instead a condition precedent to the commencement of mortgage foreclosure actions (*see Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2019]; *Marchai Props., L.P. v Fu*, 171 AD3d 722, 724-725 [2019]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 1050 [2017]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2011]). As such, RPAPL 1304 does not trigger a toll of the applicable statute of limitations under CPLR 204 (a) (*see HSBC Bank USA v Kirschenbaum*, 159 AD3d at 507; *cf. Singh v New York City Health & Hosps. Corp. [Bellevue Hosp. Ctr. & Queens Hosp. Ctr.]*, 107 AD3d 780, 782 [2013]; *Pilgrim v New York City Tr. Auth.*, 235 AD2d 527, 527-528 [1997]; *Costa v Deutsche Bank Natl. Trust Co. for GSR Mtge. Loan Trust 2006-OA1*, 247 F Supp 3d 329, 344-348 [SD NY 2017]). CPLR 201 cautions that "[n]o court shall extend the time limited by law for the commencement of an action." Here, were it relevant, the plaintiff does not even detail how or in what manner its compliance with RPAPL 1304 caused its commencement of the second action to occur four days beyond the expiration of the six-year statute of limitations (*see HSBC Bank USA v Kirschenbaum*, 159 AD3d at 506-507; *cf. Capital One, N.A. v Saglimbeni*, 170 AD3d 508, 509 [2019]).

IV. Miscellaneous

In light of our determination to grant that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against him, we also grant that branch of the defendant's motion which was to cancel the lis pendens that had been filed against the subject property (*see Gallagher Removal Serv. v Duchnowski*, 179 AD2d 622 [1992]).

The parties' remaining contentions are without merit or have been rendered academic by other aspects of this opinion and order.

In light of the foregoing, the order is reversed insofar as appealed from, on the law, and the defendant's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred and to cancel the lis pendens filed against the subject property is granted.

***153** Miller, J., concurs in part and dissents in part, and votes to modify the order, on the law, by deleting the provision thereof denying that branch of the motion of the defendant Himon Barua which was pursuant to CPLR 3211 (a) (5) to dismiss so much of the complaint as sought to recover damages for any unpaid installments that were due prior to November 10, 2009, insofar as asserted against him, and substituting therefor a provision granting that branch of the motion, and, as so modified, to affirm the order insofar as appealed from, with the following opinion: It is rare, given the centuries of jurisprudence upon which we may draw, for a court to encounter a truly novel legal issue. This is especially true when legal issues arise from a well-developed practice area such as contract law. When legal precedent is available, it should be applied in accordance with the doctrine of stare

decisis. That doctrine, among other things, "reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of [a] Court" (*People v Peque*, 22 NY3d 168, 194 [2013]; *see Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 23 [2016]).

In this case, we are urged to announce and extend an entirely new set of legal rules to govern the issues that have arisen in this relatively straightforward mortgage foreclosure action. The issues implicated by this case are not new, however, and the legal precedents that have developed to address these situations should not be so lightly cast aside with vague references to "equity" or through the invocation of one-sided hypotheticals that have no bearing on the facts of this case.

Instead of restoring clarity and predictability, the decision to ignore precedent will foster additional confusion in this important area of the law. And while the public policy views underlying the decision to create these new rules are no doubt laudable, they are realized here without any legislative basis, and at the expense of the parties' contract. Accordingly, and for the reasons that follow, I must respectfully dissent in part.

1. Factual and Procedural Background

With summons and notice dated August 5, 2015, and filed November 10, 2015, the plaintiff, Christiana Trust, commenced this action to foreclose a mortgage. The complaint alleged that the defendant Himon Barua (hereinafter the borrower) executed a note in the sum of $312,000 in favor of the defendant JPMorgan Chase Bank, N.A. (hereinafter Chase). The complaint alleged that the borrower defaulted under the terms ***154** of the note by failing to make required monthly payments beginning with the payment due on April 1, 2009, and "each subsequent month thereafter." The complaint alleged that in light of the borrower's default, the plaintiff was electing to accelerate the mortgage debt and declare the entire indebtedness immediately due and payable. The plaintiff sought a judicial sale of the property to satisfy the amounts due under the terms of the note and, if necessary, a deficiency judgment against the borrower.

There is no indication in the record that the borrower has ever interposed an answer in response to the complaint. In any event, with notice dated March 10, 2016, the borrower moved, inter alia, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him on the ground that the action is barred by the statute of limitations. In support of his motion, the borrower submitted, inter alia, a complaint in a prior foreclosure action that had been commenced by Chase in 2009 (hereinafter the 2009 action), and an eCourts printout indicating that the prior action had been discontinued by Chase sometime in 2013. The borrower argued that Chase had unequivocally elected to accelerate the mortgage debt by commencing the 2009 action, and that the present action was time-barred by virtue of the fact that it had been commenced more than six years later.

The plaintiff opposed the borrower's motion. The plaintiff argued that the motion was not properly before the court because the borrower had defaulted in this action and had failed to set forth a reasonable excuse for his default. In any event, the plaintiff contended that the voluntary discontinuance in the 2009 action constituted a revocation of Chase's election to accelerate the mortgage debt and foreclose the mortgage.

In an order dated September 7, 2017, the Supreme Court, among other things, denied the borrower's motion, inter alia, to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211 (a) (5). The court noted that, generally, the holder of a note is entitled to revoke its election to accelerate a mortgage debt so long as it does so within six years of the acceleration, i.e., before the six-year statute of limitations period has run. The court determined that, in this case, Chase had revoked its election to accelerate the mortgage debt and foreclose the mortgage by voluntarily discontinuing the 2009 action, which had been effected in an order dated October 15, ***155** 2013. In light of the evidence that Chase had revoked its election to accelerate the mortgage debt less than six years prior to the commencement of the instant action, the court concluded that the instant action was timely commenced.

The borrower appeals from the Supreme Court's order. On appeal, the borrower contends that the court erred in denying his motion, inter alia, to dismiss the complaint insofar as asserted against him as time-barred. The borrower contends that Chase's voluntary discontinuance of the 2009 action did not constitute an affirmative act revoking Chase's election to accelerate the mortgage debt and foreclose the mortgage. In response, the plaintiff contends that, in accordance with this Court's case law, the court properly denied the borrower's motion since the evidence that Chase voluntary discontinued the 2009 action raised a question of fact as to whether Chase revoked its election to accelerate the mortgage debt and foreclose the mortgage.

2. Legal Analysis

The statute of limitations is an affirmative defense (*see* CPLR 3018 [b]). At a trial, "[t]he defendant interposing the Statute of Limitations as an affirmative defense has the burden of proving its applicability" (*Connell v Hayden*, 83 AD2d 30, 39 [1981]). "However, a plaintiff relying upon an exception thereto has the burden of proving that [it] comes within the exception" (*id.* at 39).

"[T]he Statute of Limitations is generally viewed as a personal defense" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]). "[A]s a general rule a party who has not raised the Statute of Limitations as a defense in the answer or by a motion to dismiss is held to have waived it" (*id.* at 552; *see* CPLR 3211 [e]; *see also* 1 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 201.11 [2020]).

The CPLR authorizes "[a] party [to] move for judgment dismissing one or more causes of action asserted against [them] on the ground that . . . the cause of action may not be maintained because of . . . [a] statute of limitations" (CPLR 3211 [a] [5]). "In resolving a motion to dismiss pursuant to CPLR 3211 (a) (5), the court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference" (*U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834 [2018]; *see Faison v Lewis*, 25 NY3d 220, 224 [2015]; *Ford v Phillips*, 121 AD3d 1232, 1234 [2014]; ***156** *6D Farm Corp. v Carr*, 63 AD3d 903, 905 [2009]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 [2016]; *see Campone v Panos*, 142 AD3d 1126, 1127 [2016]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]; *see U.S. Bank N.A. v Gordon*, 158 AD3d at 834-835; *Stewart v GDC Tower at Greystone*, 138 AD3d at 730).

As relevant here, "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein" "must be commenced within six years" (CPLR 213 [4]). "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed" (CPLR 203 [a]; *see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012]). Accordingly, to meet its initial burden on a motion pursuant to CPLR 3211 (a) (5), a defendant must establish, as a matter of law, "when the causes of action accrued" (*Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 766 [2010]; *see Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2006]).

Generally, "[a] cause of action does not accrue until its enforcement becomes possible" (*Jacobus v Colgate*, 217 NY 235, 245 [1916]). This occurs "as soon as a claimant is able to state the elements of that cause of action, and hence, to assert a valid right to some sort of legal relief" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 26 [1989]; *see Bank of N.Y. Mellon v Dieudonne*, 171 AD3d 34, 36 [2019]; *New York City Tr. Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [2000]).

Since nominal damages are always available to enforce the promises given in a contract (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]; *cf. Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 300 [1936]), all of the elements necessary to ***157** maintain a cause of action alleging breach of contract are present at the time the contract is breached (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Accordingly, "[i]n New York, a breach of contract cause of action accrues at the time of the breach" (*id.* at 402; *see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d at 770).

Where, as here, the alleged breach is a default in the making of a monthly installment payment, a separate breach occurs for each installment that is not paid, and the statute of limitations begins to run on each cause of action "on the date each installment becomes due" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]; *see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [1997]; *Pagano v Smith*, 201 AD2d 632, 633 [1994]). "[T]he cause of action accrues when the plaintiff possesses a legal right to demand payment" (*Swift v New York Med. Coll.*, 25 AD3d at 687 [internal quotation marks omitted]; *see Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d 843, 845 [2010]; *Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2009]).

Accordingly, an action may generally be brought on each unpaid installment within six years of the time it matured or became due (*see* 1 Bergman on New York Mortgage Foreclosures § 5.11 [2] [2020]). Conversely, and without more, "recovery is barred for installments due more than six years before the mortgage foreclosure action was commenced" (*id.*).

In this case it is clear, based on the factual allegations in the complaint alone, that the statute of limitations bars recovery of a portion of the damages sought in this action. As previously indicated, this action was commenced with the filing of the summons with notice on November 10, 2015 (*see* CPLR 304 [a]; *see also* 2102). The complaint specifically seeks to recover damages for unpaid installments that were due beginning on April 1, 2009—more than six years before this action was interposed. The borrower's submissions established, prima facie, that recovery is time-barred for any unpaid installments that were due prior to November 10, 2009—to wit, from the installment due on April 1, 2009, up to and including the installment due on November 1, 2009 (*see* CPLR 203 [a]; 213 [4]; *see also* General Construction Law § 20).

In response to the borrower's motion, the plaintiff failed to raise a question of fact as to whether the action was timely with respect to any unpaid installments that were due before ***158** November 10, 2009. The plaintiff did not address the fact that, on its face, the complaint seeks to recover payments that were due more than six years before this action was commenced. Accordingly, the Supreme Court should have granted the borrower's motion to the extent of dismissing so much of the complaint as sought to recover damages for any unpaid installments that were due prior to November 10, 2009, insofar as asserted against him (*see e.g. Elia v Perla*, 150 AD3d 962, 965 [2017]; *Central Gen. Hosp. v Bramex Ltd.*, 174 AD2d 556, 556 [1991]).

The borrower contends that the plaintiff is also barred from recovering damages for any unpaid installments that were due *less* than six years prior to the commencement of this action, as well as barred from recovering damages for installments that have not yet come due under the terms of the parties' agreements. Notably, in this regard, the borrower agreed in the note to make monthly installment payments until August 1, 2036.

The borrower contends that, upon his default, Chase validly exercised its option to accelerate the maturity of the entire unpaid portion of the mortgage debt. Since this acceleration occurred more than six years prior to the commencement of this action, the borrower contends that the statute of limitations has run on the entire unpaid portion of the mortgage debt, and that the Supreme Court should have granted dismissal of the entire complaint as time-barred.

"[E]ven if a mortgage is payable in installments, the terms of the mortgage may contain an acceleration clause that gives the lender 'the option to demand due the entire balance of principal and interest upon the occurrence of certain events delineated in the mortgage' " (*Bank of N.Y. Mellon v Dieudonne*, 171 AD3d at 37, quoting 1 Bergman on New York Mortgage Foreclosures § 4.02; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983). "Once [a] mortgage debt [is] accelerated, the borrowers' right and obligation to make monthly installments cease[s] and all sums [become] immediately due and payable" (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [1994]; *see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]).

A lender's right to accelerate a mortgage debt does not arise from the common law or a statute, but from the terms of the parties' agreement. Accordingly, the specific terms of each note and mortgage dictate the circumstances under which a holder may demand due the entire balance of principal and interest ***159** (*cf.* Real Property Law § 254 [2]). Generally speaking, the holder's option to accelerate the mortgage debt becomes operable when the borrower commits what amounts to a material breach of the parties' agreement, as defined in the agreement itself (*cf. Awards.com v Kinko's, Inc.*, 42 AD3d 178, 187 [2007], *affd* 14 NY3d 791 [2010]).

Thus, it has been recognized that "an acceleration clause . . . is merely a device . . . intended to secure the [borrower's] obligation to perform a material element of the bargain" (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 578 [1979]). An option to accelerate is properly viewed as a remedy "for the benefit of the mortgagee, in whose control it should repose" (1 Bergman on New York Mortgage Foreclosures § 4.03). It need hardly be said that the holder of a note and mortgage is not required to seek or obtain the borrower's consent to an acceleration, as the decision of whether to exercise an option to accelerate a mortgage debt is reserved solely to the discretion of the holder, as one of the remedies available to compensate it for a material breach committed by the borrower (*see Cohn v Spitzer*, 145 App Div

104, 107 [1911], *affd* 207 NY 738 [1913]; *cf. U.S. Bank Trust, N.A. v Rudick*, 172 AD3d 1430, 1431 [2019]).

The decision of whether to exercise an option to accelerate a mortgage debt in response to a qualifying breach constitutes the election of a remedy. Until the holder affirmatively elects to take advantage of the option to accelerate the mortgage debt, "[it] has no operation" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *see Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2001]; *Ward v Walkley*, 143 AD2d 415, 417 [1988]; *see also* 1 Bergman on New York Mortgage Foreclosures §§ 4.05, 5.11 [2]; *cf. Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 142-144 [1993]). Accordingly, until it is affirmatively exercised, a holder's "right to accelerate the debt [does] not affect the Statute of Limitations," which, under such circumstances, continues to run "only upon the maturity of [each] discrete [payment] obligation" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]).

As a general matter, in order to constitute a valid election to accelerate, the entity making the election must have the contractual authority, or "standing," to make the election, and that authority must be exercised in accordance with the terms of the note and mortgage (*Milone v US Bank N.A.*, 164 AD3d 145, 155 [2018]; *see* ***160** *U.S. Bank N.A. v Gordon*, 158 AD3d at 836; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983; *see also Avail Holding LLC v Ramos*, 2019 WL 6498170, 2019 US Dist LEXIS 208524 [ED NY, Dec. 3, 2019, 19-cv-117 (BMC)]). Accordingly, where the parties' agreements "provide what the holder of the mortgage must do to evidence its election to declare the whole amount due," those terms must be followed (*Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 475 [1932]).

"Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982-983). In order for a holder's election to be enforceable against the borrower, the borrower must generally be provided "with notice of the lender's decision to exercise an option to accelerate the maturity of a loan" (*Bank of N.Y. Mellon v Dieudonne*, 171 AD3d at 38; *see EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2005]). To be enforceable, notice of the holder's election must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439 [2006]; *see Arbisser v Gelbelman*, 286 AD2d 693, 694 [2001]; *Colonie Block & Supply Co. v Overmyer Co.*, 35 AD2d 897, 897 [1970]).

In commencing an action to enforce the terms of a note, the holder must set forth the remedy it seeks for the alleged breach. Where the plaintiff is the holder of both the note and mortgage, it must first elect whether to proceed "at law in a suit on the debt as evidenced by the note [or] in equity to foreclose the mortgage" (*Copp v Sands Point Mar.*, 17 NY2d 291, 293 [1966]; *see generally Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 181 [1990]).

If the holder elects to foreclose the mortgage, it must choose whether to foreclose the entire mortgage debt or proceed with a "partial foreclosure" (*Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 649 [1980]; *see* 2 Bergman on New York Mortgage Foreclosures § 17.01; *accord* RPAPL 1351 [2]). Partial foreclosure "permits a lender to recover unpaid installments that have become due, without accelerating the remaining portion of the debt" (*Aurora Loan Servs., LLC v Tobing*, 172 AD3d 975, 977 [2019]; *see Golden v Ramapo Improvement Corp.*, 78 AD2d at 650-651; *see also* 2 Bergman on New York Mortgage Foreclosures § 17.03).

If the holder of a note and mortgage elects to foreclose a portion of the mortgage debt that has not yet come due, it must ***161** necessarily exercise its option to accelerate the maturity of that portion of the debt. Under such circumstances, proper service of a pleading setting forth an election to foreclose the entire mortgage debt will ordinarily be sufficient "to put the borrower on notice that the option to accelerate the debt has been exercised" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY at 476; *EMC Mtge. Corp. v Smith*, 18 AD3d at 603; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2003]; *Arbisser v Gelbelman*, 286 AD2d at 694). Indeed, "[t]he commencement of an action on one of two or more theories has traditionally been considered the decisive act that constitutes [an] election" (5 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 3002.01).

However, "[e]ven if the bringing of an action for one remedy is a manifestation of choice of that remedy, it does not preclude the plaintiff from shifting to another remedy as long as the defendant has not materially changed his [or her] position" (Restatement [Second] of Contracts § 378, Comment *a*; *see* 12 Corbin on Contracts § 66.6 [2020]). Put another way, "a binding election occurs only where an estoppel is created" (12 Corbin on Contracts § 66.7 n 3, citing

Twentieth Century-Fox Film Corp. v National Publs., Inc., 294 F Supp 10, 12 [SD NY 1968]).

Accordingly, even after the holder of a note and mortgage has elected to accelerate the entire mortgage debt, the holder retains the right to "revoke its election to accelerate . . . provided that there is no change in the borrower's position in reliance thereon" (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d at 894; *see Golden v Ramapo Improvement Corp.*, 78 AD2d at 650; *see also* 1 Bergman on New York Mortgage Foreclosures § 4.03 [1]). The decision of whether to revoke an acceleration and seek an alternative remedy for the borrower's breach "is discretionary with the [holder]" (*Golden v Ramapo Improvement Corp.*, 78 AD2d at 650), and unless and until prejudice to the borrower is shown, the holder of a note and mortgage is "under no restraint in changing [its] mind" (*id.*). However, in order to be effective against the borrower, notice of the revocation must be "clear and unambiguous" (*Milone v US Bank N.A.*, 164 AD3d at 153).

Since a valid acceleration gives the holder the immediate right to the accelerated portion of the mortgage debt, the statute of limitations begins to run on that portion of the debt from the date of the acceleration (*see* ***162** *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605; *Loiacono v Goldberg*, 240 AD2d at 477). Accordingly, without more, an action to foreclose an accelerated portion of a mortgage debt is untimely if it is commenced more than six years after that mortgage debt was validly accelerated (*see* CPLR 213 [4]).

The holder "may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation" within six years after the election to accelerate was validly made (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069 [2017]; *see EMC Mtge. Corp. v Patella*, 279 AD2d at 606). As is the case with an acceleration, an entity must have the contractual authority or "standing" to validly revoke an election to accelerate, and that authority must be exercised in accordance with the terms of the note and mortgage (*Milone v US Bank N.A.*, 164 AD3d at 155). If an acceleration is validly revoked, the default principles of accrual apply and the statute of limitations continues to run "only upon the maturity of [each] discrete [payment] obligation" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d at 44), such that installment payments that were due more than six years prior to the commencement of an action will still be time-barred (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982).

Here, in support of his motion to dismiss pursuant to CPLR 3211 (a) (5), the borrower submitted, inter alia, the complaint from the 2009 action. As the borrower correctly contends, in its complaint in the 2009 action, Chase sought to recover the entire outstanding principal sum of the mortgage debt and unequivocally elected to accelerate that debt. Without more, the submission of the complaint in the 2009 action alone would have been sufficient to establish, prima facie, that the present action is time-barred, as it had been commenced more than six years after an acceleration of the entire mortgage debt had occurred (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY at 476; *Bank of N.Y. Mellon v Dieudonne*, 171 AD3d at 38; *Milone v US Bank N.A.*, 164 AD3d at 152-153).

However, the borrower's submissions also included evidence indicating that Chase discontinued the 2009 action sometime in 2013. As the Supreme Court in this case properly concluded, the voluntary discontinuance of the 2009 action by Chase constituted formal and unequivocal notice that it was withdrawing its complaint and all of the requests for relief contained therein (*see Mahon v Remington*, 256 App Div 889, 889 [1939]; ***163** *see also Loeb v Willis*, 100 NY 231, 235 [1885]). Under these circumstances, Chase "destroy[ed] the effect" of the election that it had made in the complaint in the 2009 action by affirmatively discontinuing that action and formally withdrawing its only request for that relief (*Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY at 476; *cf. Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657, 658 [2017]).

Inasmuch as the complaint in the 2009 action constituted the only evidence in the record showing that Chase had ever demanded the immediate payment of the entire mortgage debt, evidence showing that it had been affirmatively withdrawn by Chase in connection with a voluntary discontinuance raised a question of fact as to whether Chase revoked its election to accelerate (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070; *see also U.S. Bank N.A. v Charles*, 173 AD3d 564, 565 [2019]; *Capital One, N.A. v Saglimbeni*, 170 AD3d 508, 509 [2019]). Since the only demand for payment of the full debt that is contained in the record was formally and voluntarily withdrawn by Chase, I cannot agree with my colleagues' conclusion that there is no evidence in the record that Chase ever affirmatively revoked its demand for payment of the full debt (*see* majority op at 148-149).

Under the circumstances, since the borrower submitted this evidence of the voluntary discontinuance in support of his motion, he failed to sustain his initial burden of eliminating all questions of fact as to whether the entire action is time-barred (*see U.S. Bank N.A. v Gordon*, 158 AD3d at 834-835). Under such circumstances, the Supreme Court should have denied the borrower's motion to the extent that it pertained to the portions of the complaint that sought to recover damages for any unpaid installments that were due on or after November 10, 2009.

My colleagues in the majority, relying on recent pronouncements from this Court, conclude that the evidence that Chase formally and affirmatively withdrew its only demand for the full payment of the debt was insufficient to raise a question of fact as to whether Chase revoked its election to accelerate. The cases relied upon my colleagues appear to be the product of judicial drift, as they fail to articulate any applicable legal theory, much less legal authority, to support their deviation from this Court's prior precedent. In order to provide perspective on this issue, it is necessary to review this Court's prior case law in this area.

***164** In *Golden v Ramapo Improvement Corp.* (78 AD2d at 648), the plaintiff commenced an action to foreclose a mortgage and "elected to accelerate the remainder due under the mortgage." The plaintiff subsequently "moved for a severance and for partial summary judgment on so much of her claim as sought foreclosure and sale for all payments due as of October 20, 1976, when defendant had been formally notified of its default pursuant to the terms of the mortgage" (*id*.). In rejecting the defendant's position that the plaintiff either did not or could not revoke her election to accelerate, this Court stated that the "[p]laintiff's purpose in moving for severance and partial summary judgment and in submitting a judgment containing the provision for continuing the mortgage was clearly to limit her recovery to those sums already past due under the payment schedules of the mortgage note" (*id.* at 650).

In *Federal Natl. Mtge. Assn. v Mebane* (208 AD2d at 894), the plaintiff "commenced a foreclosure action . . . and exercised its option to accelerate all sums due under the mortgage by making demand in the complaint." That action was later dismissed due to the plaintiff's failure to prosecute (*see id*.). More than six years after the mortgage debt had been accelerated, the plaintiff commenced a second action to recover on the same debt (*see id*.). This Court rejected the plaintiff's contention that the court's dismissal of the first action constituted evidence that it had revoked its election to accelerate the mortgage debt, concluding that "[i]t cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate" (*id*.).

This Court adhered to this principle in a number of subsequent determinations (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987 [2016] ["the dismissal of the prior foreclosure action by the court did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the prior action"]; *Clayton Natl. v Guldi*, 307 AD2d at 982 ["the dismissal of the 1992 action for lack of personal jurisdiction did not constitute an affirmative act by the lender to revoke its election to accelerate"]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606 ["the dismissal of the prior foreclosure action by the court did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year Statute of Limitations period"]).

***165** This Court first addressed the issue presented on this appeal in *NMNT Realty Corp. v Knoxville 2012 Trust* (151 AD3d 1068 [2017]). In that case, the plaintiff commenced the action pursuant to RPAPL 1501 (4) to cancel and discharge of record a mortgage on the ground that any action to foreclose was barred by the statute of limitations (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1069). In moving for summary judgment, the plaintiff submitted a complaint from a prior action that had been commenced by the predecessor in interest of the holder of the note and mortgage to recover the entire mortgage debt (*see id.* at 1070). This Court concluded that the submission of the complaint established the plaintiff's prima facie entitlement to summary judgment since it established that an action to foreclose the mortgage was time-barred (*see id*.).

However, this Court determined that, in opposition to the plaintiff's showing, the holder of the note and mortgage raised a triable issue of fact as to whether its predecessor in interest had revoked its election to accelerate the mortgage debt (*see id*.). In reaching this conclusion, this Court cited to evidence that the holder's predecessor in interest had "moved for, and . . . was granted, an order that discontinued the foreclosure action" (*id*.). This Court distinguished cases where the prior foreclosure action was never withdrawn by the lender, but rather, dismissed by the court, since, in those cases, there was

no affirmative act by the lender to show that it had revoked its election to accelerate (*see id*.). This Court also rejected evidence from the original mortgagors that the " 'Order of Discontinuance was the result of procedural deficiencies in the proceedings,' " finding that such allegations "do not disprove an affirmative act of revocation" (*id*.).

This Court's determination in *NMNT Realty Corp. v Knoxville 2012 Trust* (151 AD3d 1068 [2017]) has been cited and followed by the Appellate Division, First Department, in at least two subsequent cases (*see U.S. Bank N.A. v Charles*, 173 AD3d at 565 [concluding that "(t)here is an issue of fact in this particular case regarding whether plaintiff's discontinuance of the prior foreclosure action de-accelerated the mortgage," despite the fact that "neither the motion seeking discontinuance (n)or the order entered granting that relief provided that the mortgage was de-accelerated or that plaintiff would now be accepting installment payments from the defendant"]; *Capital One, N.A. v Saglimbeni*, 170 AD3d at 509 [concluding that "an ***166** issue of fact exists regarding whether the action is time-barred, which is dependent on whether plaintiff's assignor's voluntary discontinuance of the prior action due to a 'defective default notification' de-accelerated the mortgage debt"]; *see also U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust v Adhami*, 2019 WL 486086, *6, 2019 US Dist LEXIS 19599, *13 [ED NY, Feb. 6, 2019, 18-CV-530 (PKC) (AKT)] [concluding that action should not be dismissed as time-barred since "Plaintiff has sufficiently alleged, at this stage, that the prior voluntary discontinuance tolled the statute of limitations"]; *Zucker v HSBC Bank, USA*, 2018 WL 2048880, *7, 2018 US Dist LEXIS 74478, *17 [ED NY, May 2, 2018, 17-CV-2192 (DRH) (SIL)] [noting generally that "Appellate Courts in New York have held that when a mortgagee moves for and is granted an order of discontinuance, it raises a question of fact as to (whether) there was an affirmative act to revoke its election to accelerate"]).

Moreover, as recently as last year, "ten of the thirteen New York trial courts that have considered this issue have found that [w]ithdrawing the prior foreclosure action is an affirmative act of revocation that tolls the statute of limitations" (*U.S. Bank Trust, N.A. v Adhami*, 2019 WL 486086, *5, 2019 US Dist LEXIS 19599, *12-13 [footnote and internal quotation marks omitted]; *see e.g. Wilmington Sav. Fund Socy. v DeCanio*, 55 Misc 3d 1215[A], 2017 NY Slip Op 50585[U] [Sup Ct, Suffolk County 2017]; *4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust Co.*, 2016 NY Slip Op 32854[U], *3 [Sup Ct, NY County 2016]).

In *Freedom Mtge. Corp. v Engel* (163 AD3d 631 [2018], *lv granted in part* 33 NY3d 1039 [2019]), however, this Court departed from its prior precedent, without acknowledgment or explanation. In that case, the defendant established that the action was time-barred by showing that "the six-year statute of limitations began to run on the entire debt . . . when the plaintiff accelerated the mortgage debt by commencing [a] prior foreclosure action" (*id.* at 632-633). In opposition, the plaintiff submitted evidence that it had voluntarily entered into a stipulation discontinuing the prior foreclosure action (*see id.* at 633). This Court, for the first time, held that evidence of a voluntary discontinuance was only sufficient to raise a triable issue of fact if the stipulation or discontinuance explicitly stated that it was being executed in order to revoke the election to accelerate, or otherwise specifically provided that the holder of the ***167** note and mortgage would resume accepting monthly installment payments until the next default (*see id*.).

The new evidentiary burden imposed in *Freedom Mtge. Corp. v Engel* (163 AD3d 631 [2018]) finds no support in the prior case law, and its imposition is based on a misconstruction of the respective burdens imposed on a motion pursuant to CPLR 3211 (a) (5). Indeed, as previously noted, in opposition to a prima facie showing under CPLR 3211 (a) (5), a plaintiff is not required to conclusively establish, as a matter of law, that the action is timely. Rather, it need only rebut the defendant's prima facie showing with evidence that raises a question of fact (*see Pennymac Corp. v McGlade*, 176 AD3d 963, 965-966 [2019]). As this Court has previously recognized, in this very context, " '[s]ometimes . . . whether maturity has arrived through acceleration can be a question of fact' " (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983, quoting 1 Bergman on New York Mortgage Foreclosures § 5.11 [3]; *cf. LPP Mtge. Ltd. v Gold*, 44 AD3d 718, 719 [2007]).

Inasmuch as there is no basis to require the plaintiff to establish, as a matter of law, that this action is timely, there is no basis to require the production of evidence that would conclusively establish that the plaintiff formally agreed to continue to accept prospective monthly payments (*cf. Connell v Hayden*, 83 AD2d at 39). Such a showing would satisfy, as a matter of law, the plaintiff's ultimate burden of proof on this issue, as it would unequivocally constitute " 'an affirmative act of revocation' " (*Milone v US Bank N.A.*, 164 AD3d at 154, quoting *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1069).

In the wake of *Freedom Mtge. Corp. v Engel* (163 AD3d 631 [2018]), there has been a proliferation of cases holding that a stipulation or a motion for a voluntary discontinuance must explicitly state that an acceleration has been revoked in order to raise a triable issue of fact in this context. But neither these cases, nor *Freedom Mtge. Corp. v Engel*, has ever cited to any positive authority to support the imposition of this new burden. Nor do any of those cases acknowledge or explain their deviation from this Court's prior determination in *NMNT Realty Corp. v Knoxville 2012 Trust* (151 AD3d 1068 [2017]) or from the numerous other conflicting determinations that have been reached by other courts in this state (*see U.S. Bank N.A. v Charles*, 173 AD3d at 565; *Capital One, N.A. v Saglimbeni*, 170 AD3d at 509; *see also* ***168** *Wilmington Sav. Fund Socy. v DeCanio*, 55 Misc 3d 1215[A], 2017 NY Slip Op 50585[U]; *4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust Co.*, 2016 NY Slip Op 32854[U], *3; *U.S. Bank Trust, N.A. v Adhami*, 2019 WL 486086, 2019 US Dist LEXIS 19599). As this case illustrates, it is vital to advise the bench and bar if case law has been overruled, or it will continue to be relied upon, generating additional appeals. Given this confusion, it is hardly surprising that it has been recently observed that "New York State appellate courts have provided limited guidance on the mortgage acceleration question at issue here" (*U.S. Bank Trust, N.A. v Adhami*, 2019 WL 486086, *5, 2019 US Dist LEXIS 19599, *11).

Although never fully explained, the heightened evidentiary burden imposed by this Court in *Freedom Mtge. Corp. v Engel* (163 AD3d 631 [2018]) apparently reflects the idea that the subjective motivation behind any decision to revoke an acceleration is relevant because a revocation will not be effective if it was "a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note" (*Milone v US Bank N.A.*, 164 AD3d at 154; *see Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d 915, 924 [Sup Ct, Westchester County 2017]).

This notion, that an otherwise valid revocation may be rendered invalid based on the subjective motivations of the lender, finds no support in the case law and is at odds with well-established principles of contract law. The Court of Appeals has expressly considered the limitations on the right of a lender to revoke its election to accelerate a mortgage debt, and has applied the well-established equitable principles of estoppel to this situation (*see Kilpatrick v Germania Life Ins. Co.*, 183 NY 163, 168 [1905]). There is absolutely no authority, in either law or equity, to support the imposition of additional, noncontractual restraints on a party's right to choose the remedy it will seek as redress for its adversary's breach.

To the contrary, this Court has already recognized the circumstances under which equity may intervene: "*only if a mortgagor can show substantial prejudice* will a court in the exercise of its equity jurisdiction restrain the [holder] from revoking its election to accelerate" (*Golden v Ramapo Improvement Corp.*, 78 AD2d at 650 [emphasis added]; *see Kilpatrick v Germania Life Ins. Co.*, 183 NY at 168; *Ost v Mindlin*, 170 App Div 558, 559 [1915], *affd* 224 NY 668 [1918]). Accordingly, in order to invoke the court's "equitable powers" of estoppel, a ***169** borrower must affirmatively "demonstrate . . . prejudice resulting from plaintiff's revocation of [its] election to accelerate" (*Golden v Ramapo Improvement Corp.*, 78 AD2d at 650; *see Kilpatrick v Germania Life Ins. Co.*, 183 NY at 168; *see generally First Union Natl. Bank v Tecklenburg*, 2 AD3d 575, 576-577 [2003]; *Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d at 923). Prejudice, in this context, generally "involves impairment of the [borrower's] ability to defend on the merits, rather than merely foregoing such a procedural or technical advantage" as a statute of limitations defense (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Barney Assoc.*, 130 FRD 291, 294 [SD NY 1990]; *see Kilpatrick v Germania Life Ins. Co.*, 183 NY at 168; *see also Beauge v New York City Tr. Auth.*, 282 AD2d 416, 416 [2001]; *Busler v Corbett*, 259 AD2d 13, 16 [1999]). Of course, there has been no such showing or allegation of prejudice in this case.

Inasmuch as existing principles of equity serve to protect a borrower from the misuse of a contractual right (*see First Union Natl. Bank v Tecklenburg*, 2 AD3d at 576-577), there is no reason to introduce an entirely novel "intent" element to this well-established area of the law. An acceleration is either revoked, in fact, or it is not. Evidence of the amount demanded by the holder during the relevant period is dispositive on this point. There is no reason to add a mens rea component or inject an additional layer of analysis to explore the holder's metaphysical motivations in choosing their contractual remedy. Regardless of intent, an acceleration has not been revoked, "in fact," if the holder of the note and mortgage continues to demand the immediate payment of the entire mortgage debt or refuses to accept prospective monthly installment payments in accordance with the terms of the original agreements (*Milone v US Bank N.A.*, 164 AD3d at 154; *see Lavin v Elmakiss*, 302 AD2d 638, 639 [2003]).

Here, the borrower has not alleged that Chase or any subsequent holder continued to demand the immediate payment of the entire mortgage debt after it discontinued the 2009 action, or that it otherwise refused to accept any tendered monthly installment payments. Nor is there any evidence in the record indicating that Chase engaged in any such conduct.

Rather, the evidence in the record shows that Chase formally and affirmatively withdrew its only demand for the immediate payment of the entire mortgage debt. This evidence is relevant because it has a tendency to make it more likely that Chase ***170** had revoked its election to accelerate to pursue a different remedy than the one it sought in the withdrawn complaint (*see generally* Guide to NY Evid rule 4.01, Relevant Evidence, https://www.nycourts.gov/judges/evidence/4-RELEVANCE/4.01_RELEVANT%20EVIDENCE.pdf; 1 McCormick on Evidence § 185 [8th ed 2020]). Accordingly, the order should be modified by deleting the provision thereof denying that branch of the borrower's motion which was pursuant to CPLR 3211 (a) (5) to dismiss so much of the complaint as sought to recover damages for any unpaid installments that were due prior to November 10, 2009, insofar as asserted against him, and substituting therefor a provision granting that branch of the borrower's motion, and, as so modified, the order should be affirmed.

Scheinkman, P.J., and Leventhal, J., concur with Dillon, J.; Miller, J., concurs in part and dissents in part, and votes to modify the order, in a separate opinion.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendant Himon Barua pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred and to cancel a lis pendens filed against the subject property is granted.

Footnotes

* The number of reported appellate cases holding that the mere discontinuance of an action does not singularly qualify as a clear and unambiguous repudiation of a prior debt acceleration is now quite numerous—so numerous, in fact, that *NMNT Realty Corp. v Knoxville 2012 Trust* (151 AD3d 1068 [2017]), which may be construed as holding to the contrary on this one discrete legal point, appears to be an outlier.

McKinney's Real Property Law § 254

§ 254. Construction of clauses and covenants in mortgages and bonds or notes

Effective: September 4, 2008
Currentness

In mortgages of real property, and in bonds and notes secured thereby or in assignments of mortgages and bonds and mortgages and notes, or in agreements to extend or to modify the terms of mortgages and bonds and mortgages and notes, the following or similar clauses and covenants must be construed as follows:

1. Clauses of mortgage. The words "This mortgage, made the ..... (A) ..... day of ..... (B) ....., nineteen hundred and ..... (C) ....., between ..... (D) ....., the mortgagor, and ..... (E) ....., residing at ..... (F) ....., the mortgagee, Witnesseth, that to secure the payment of an indebtedness in the sum of ..... (G) ..... dollars, lawful money of the United States, to be paid on the ..... (H) ..... day of ..... (I) ....., nineteen hundred and ..... (J) ....., with interest thereon to be computed from ..... (K) ..... at the rate of ..... (L) ..... per centum per annum, and to be paid ..... (M) ....., according to a certain bond, note or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee (description)," must be construed as equivalent in meaning to the words "This indenture, made the ..... (A^1) ..... day of ..... (B^1) ....., in the year nineteen hundred and ..... (C^1) ..... between ..... (D^1) ....., party of the first part, and ..... (E^1) ....., of ..... (F^1) ....., party of the second part.

"Whereas, the said ..... (D^1) ..... is justly indebted to the said party of the second part in the sum of ..... (G^1) ..... dollars, lawful money of the United States, secured to be paid by his certain bond, note or obligation, bearing even date herewith, conditioned for the payment of the said sum of ..... (G^1) ..... dollars, on the ..... (H^1) ..... day of ..... (I^1) ..... nineteen hundred and ..... (J^1) ..... and the interest thereon, to be computed from ..... (K^1) ....., at the rate of ..... (L^1) ..... per centum per annum, and to be paid ..... (M^1) .....

"It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of any installment of principal, interest, taxes or assessments, as hereinafter provided.

"Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond, note or obligation, with interest thereon, and also for and in consideration of one dollar, paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns for ever (description), together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises, together with all fixtures and articles of personal property attached to, or used in connection with, the premises. To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever. Provided, always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond, note or obligation, and the interest thereon,

at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine and be void."

(Explanation: Whatever words are inserted in the blank spaces above marked (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L), and (M) respectively, shall be construed as being inserted in the corresponding blank spaces above marked (A1), (B1), (C1), (D1), (E1), (F1), (G1), (H1), (I1), (J1), (K1), (L1), and (M1) respectively.)

2. Covenant that whole sum shall become due. A covenant "that the whole of the said principal sum and interest shall become due at the option of the mortgagee: after default in the payment of any installment of principal or of interest for ..... days; or after default in the payment of any tax, water rate or assessment for ..... days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided," must be construed as meaning that should any default be made in the payment of any installment of principal or of any part thereof, or in the payment of the said interest, or any part thereof, on any day whereon the same is made payable, or should any tax, water rate or assessment, and/or any installment of any assessment which has been divided into annual installments pursuant to provision of law in such cases made and provided which now is or may be hereafter imposed upon the premises hereinafter described, become due or payable, and should the said installment of principal or interest remain unpaid and in arrear for the space of ..... days, or such tax, water rate or assessment or annual installment remain unpaid and in arrear for ..... days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment and/or annual installment is unpaid, and demand for the payment thereof, or should any default be made after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinafter provided, or upon failure to furnish such statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided, after the expiration of ..... days in case the request is made personally, or after the expiration of ..... days after the mailing of such request in case the request is made by mail, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding.

3. Covenant to pay indebtedness. In default of payment, mortgagee to have power to sell. A covenant "that the mortgagor will pay the indebtedness, as hereinbefore provided," must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, doth covenant and agree to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon as provided by said mortgage. And if default shall be made in the payment of the principal sum or the interest that may grow due thereon, or of any part thereof, or in case of any other default, that then and from thenceforth it shall be lawful for the mortgagee, his executors, administrators or successors to enter into and upon all and singular the premises granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said mortgagor, his heirs, executors, administrators, successors or assigns therein, at public auction, according to the act in such case made and provided, and as the attorney of the mortgagor for that purpose duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance for the same in fee simple (or otherwise; as the case may be) and out of the money arising from such sale, to retain the principal and interest which shall then be due, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase-money, if any there shall be, unto the mortgagor, his heirs, executors, administrators, successors or assigns, which sale so to be made shall forever be a perpetual bar both in law and equity against the mortgagor, his heirs, successors and assigns, and against all other persons claiming or to claim the premises, or any part thereof by, from or under him, them or any of them.

4. Mortgagor to keep buildings insured. (a) A covenant "that the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee; that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies," shall be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by fire, to an amount to be approved by the mortgagee not exceeding in the aggregate one hundred per centum of their full insurable value and in a company or companies to be approved by the mortgagee, and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, which policy or policies shall have endorsed thereon the standard New York mortgagee clause in the name of the mortgagee, so and in such manner and form that he and they shall at all time and times, until the full payment of said moneys, have and hold the said policy or policies as a collateral and further security for the payment of said moneys, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns, may make such insurance from year to year, in an amount in the aggregate not exceeding one hundred per centum of the full insurable value of said buildings erected on the mortgaged premises for the purposes aforesaid, and pay the premium or premiums therefor, and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns, such premium or premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage, and shall be collectible thereupon and thereby in like manner as the principal moneys, and that should the mortgagee by reason of such insurance against loss by fire receive any sum or sums of money for damage by fire, and should the mortgagee retain such insurance money instead of paying it over to the mortgagor, the mortgagee's right to retain the same and his duty to apply it in payment of or on account of the sum secured by the mortgage and in satisfaction or reduction of the lien thereof shall be limited and qualified as hereafter in this paragraph provided. Said insurance money so received by the mortgagee shall be held by him as trust funds until paid over or applied as hereinafter provided. If the mortgagor shall notify the mortgagee in writing within thirty days after the fire that the mortgaged premises have been damaged thereby, and shall thereafter make good the damage by means of such repairs, restoration or rebuilding as may be necessary to restore the buildings to their condition prior to the damage, then upon presentation to the mortgagee within three years after the fire of proof that the damage has been fully made good (and if he so demands in writing within thirty days after such presentation of proof, then upon presentation to the mortgagee within thirty days after such demand of proof also of the actual cost of such repairs, restoration and rebuilding and of the reasonable value of any part of the work so performed by the mortgagor) the mortgagee, unless he rejects the proof submitted to him as insufficient, shall pay over to the mortgagor so much of said insurance money theretofore received by the mortgagee as does not exceed the lesser of (1) the reasonable cost of such repairs, restoration and rebuilding or (2) the total amount actually paid therefor by the mortgagor, together with the reasonable value of any part of the work done by him. Such proof shall be deemed sufficient unless, within sixty days after presentation of all such proof to the mortgagee as aforesaid, he shall notify the mortgagor in writing that the proof is rejected. Any excess of said insurance money over the amount so payable to the mortgagor shall be applied in reduction of the principal of the mortgage. Provided, however, that if and so long as there exists any default by the mortgagor in the performance of any of the terms or provisions of the mortgage on his part to be performed the mortgagee shall not be obligated to pay over any of said insurance money received by him. If the mortgagor shall fail to comply with any of the foregoing provisions within the time or times hereinabove limited, or shall fail within sixty days after rejection of the proof so submitted to commence an action against the mortgagee to recover so much of said insurance money as is payable to the mortgagor as hereinabove provided, or if the entire principal of the mortgage shall have become payable by reason of default or maturity, the mortgagee shall apply said insurance money in satisfaction or reduction of the principal of the mortgage; and any excess of said insurance money over the amount required to satisfy the mortgage shall be paid to the mortgagor. Unless the court, in any such action, shall determine that the mortgagee's rejection of the proof submitted by the mortgagor prior to the commencement of the action was unreasonable, the mortgagee may offset the reasonable amount, as determined by the court, of his expense incident to the litigation, and may reimburse himself out of the insurance money for the amount so determined. The term "mortgage," as hereinabove used, shall be deemed to include agreements extending or otherwise in any way modifying the terms or provisions of an existing mortgage. The term "mortgagor," as hereinabove used, shall mean the owner for the time being of the mortgaged fee or the junior mortgagee actually in possession of the mortgaged property, or the tenant for the time being in possession of the property under a lease which has been mortgaged. The term "mortgagee," as hereinabove used, shall be deemed to include the successors in interest of the mortgagee. In the event that there be more than one mortgage covering

the same premises, such covenant must be construed as hereinbefore prescribed in this paragraph, except that the mortgagor, his heirs, successors and assigns, notwithstanding such foregoing provisions, may not be required to provide such insurance, as to all the mortgagees combined, in the preferential order of their priority, for a total amount of more than one hundred per cent of the insurable value of the buildings on the premises, and a second or subordinate mortgagee shall be entitled to exercise the rights of a mortgagee with respect to the procurement of such insurance and the holding of the policy or policies thereof as hereinbefore prescribed in this paragraph only when and to the extent that the mortgagor, his heirs, successors or assigns, as the case may be, does or do not furnish satisfactory proof of such maximum insurance for the benefit of such second or subordinate mortgagee and one or more other mortgagees in the preferential order of their priority in a company or companies duly authorized to do business in this state.

The limitations and qualifications hereinabove imposed on the mortgagee's right to retain proceeds of a fire insurance policy shall apply only to mortgages or extensions or other modifications thereof made after the effective date of this act.

(b) A covenant "that the mortgagor will keep the buildings on the premises insured against loss by flood if the premises are located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of nineteen hundred sixty-eight;[1] that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies," shall be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by flood provided the premises are located in an area identified by the Secretary of Housing and Urban Development of the United States as an area having special flood hazards and in which flood insurance is available under the National Flood Insurance Act of nineteen hundred sixty-eight, to an amount at least equal to the outstanding principal balance of the money secured by the mortgage or the maximum limit of coverage available with respect to the buildings under said Act, whichever is less, and in a company or companies to be approved by the mortgagee and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, which policy or policies shall have endorsed thereon the standard New York mortgagee clause in the name of the mortgagee, so and in such manner and form that he and they shall at all time and times, until the full payment of said money, have and hold the said policy or policies as a collateral and further security for the payment of said money, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns may make such insurance from year to year, in the amount as aforesaid, and pay the premium or premiums therefor, and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns, such premium or premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage, and shall be collectible thereupon and thereby in like manner as the principal moneys, and that should the mortgagee by reason of such insurance receive any sum or sums of money for damage by flood, the provisions for retention, holding application and payment of said insurance money shall be as set forth in paragraph (a) above with respect to loss by fire. The term "mortgage," as hereinabove used, shall be deemed to include agreements extending or otherwise in any way modifying the terms or provisions of an existing mortgage. The term "mortgagor," as hereinabove used, shall mean the owner for the time being of the mortgaged fee or the junior mortgagee actually in possession of the mortgaged property, or the tenant for the time being in possession of the property under a lease which has been mortgaged. The term "mortgagee," as hereinabove used, shall be deemed to include the successors in interest of the mortgagee. In the event that there be more than one mortgage covering the same premises, such covenant must be construed as hereinbefore prescribed in this paragraph except that the mortgagor, his heirs, successors and assigns, notwithstanding such foregoing provisions, may not be required to provide such insurance, as to all the mortgagees combined, in the preferential order of their priority, for a total amount greater than the outstanding principal balance of the money secured by the mortgage or the maximum limit of coverage available with respect to the premises, whichever is less, and a second or subordinate mortgagee shall be entitled to exercise the rights of a mortgagee with respect to the procurement of such insurance and the holding of the policy or policies thereof as hereinbefore prescribed in this paragraph only when and to the extent that the mortgagor, his heirs, successors or assigns, as the case may be, does or do not furnish

satisfactory proof of such maximum insurance for the benefit of such second or subordinate mortgagee and one or more other mortgagees in the preferential order of their priority in a company or companies duly authorized to do business in this state.

The limitations and qualifications hereinabove imposed on the mortgagee's right to retain proceeds of a flood insurance policy shall apply only to mortgages or extensions or other modifications thereof made after the effective date of this act.

4-a. Mortgagor to maintain premises and all improvements thereon in good condition or repair. (a) A covenant contained in a mortgage on real property improved by a residence for four families or more that the mortgagor will maintain the premises and all improvements thereon in "good condition or repair" shall be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the premises and the building or buildings erected thereon in good condition and repair and free from violations of applicable municipal or state laws, codes or regulations concerning the state of such condition and/or repair. Upon a finding and certification by any such government or its agency of a violation of any such law, code or regulation involving a serious danger to the health and safety of the occupants of such mortgaged premises and upon the service of one copy thereof on the owner of record, or upon the appointment of an administrator pursuant to article seven-A of the real property actions and proceedings law, such mortgagee may declare the entire balance of the principal sum secured by such mortgage, together with all accrued interest, immediately due and payable upon the following conditions: the mortgagee shall allow the mortgagor a reasonable opportunity to correct the violation or, in the case of an administrator appointed pursuant to article seven-A of the real property actions and proceedings law, to have such administrator removed; the mortgagee may commence foreclosure proceedings upon failure of the mortgagor to make such corrections within the time period mandated by local law, rule or code enforcement agency, provided, however, no such action shall be commenced within thirty days of the expiration of the period, if any, specified by local law, rule or code enforcement regulation, or, in the case of an administrator appointed pursuant to article seven-A of the real property actions and proceedings law, the mortgagee may commence foreclosure proceedings no earlier than sixty days after the appointment of such administrator.

(b) Should any such mortgagee commence a foreclosure proceeding based upon such violation and not complete the same because such violation had been cured, the mortgagee shall be entitled to recover all reasonable attorney's fees and disbursements incurred in the bringing of such proceeding.

(c) Notwithstanding the provisions of this section, the mortgagee and the mortgagor shall retain all existing interest and rights.

5. Mortgagor to warrant title. A covenant "that the mortgagor warrants the title to the premises," must be construed as meaning that the mortgagor warrants that he has good title to said premises and has a right to mortgage the same and that the mortgagor shall and will make, execute, acknowledge and deliver in due form of law, all such further or other deeds or assurances as may at any time hereafter be reasonably desired or required for the more fully and effectually conveying the premises by the mortgage described, and thereby granted or intended so to be, unto the said mortgagee, his executors, administrators, successors or assigns, for the purpose aforesaid, and unto all and every person or persons, corporation or corporations, deriving any estate, right, title or interest therein, under the said indenture of mortgage, or the power of sale therein contained, and the said granted premises against the said mortgagor, and all persons claiming through him will warrant and defend.

6. Mortgagor to pay all taxes, assessments or water rates. A covenant "that the mortgagor will pay all taxes, assessments or water rates and in default thereof, the mortgagee may pay the same" must be construed as meaning that until the amount hereby secured is paid, the mortgagor will pay all taxes, assessments and water rates which may be assessed or become liens on said premises, and in default thereof the holder of this mortgage may pay the same, and the mortgagor will repay the same with interest, and the same shall be liens on said premises and secured by the mortgage.

7. Statement of amount due. A covenant "that the mortgagor within ..... days upon request in person or within ..... days upon request by mail will furnish a written statement duly acknowledged of the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt" must be construed as meaning that the mortgagor, and any subsequent owner of the premises described herein upon request, made either personally or by mail, shall certify, by a writing duly acknowledged, to the mortgagee or to any proposed assignee of this mortgage, the amount of principal and interest then owing on this mortgage and whether any offsets or defenses exist against the mortgage debt within ..... days in case the request is made personally, or within ..... days after the mailing of such request in case the request is made by mail.

8. Notice and demand. A covenant "that notice and demand or request may be made in writing and may be served in person or by mail" must be construed as meaning that every provision for notice and demand or request shall be deemed fulfilled by written notice and demand or request personally served on one or more of the persons who shall at the time hold the record title to the premises, or on their heirs or successors, or mailed by depositing it in any post-office station or letter-box, enclosed in a post-paid envelope addressed to such person or persons, or their heirs or successors, at his, their or its address to the mortgagee last known.

9. Power of attorney to assignee. The word "assign" or other words of assignment, when contained in an assignment of a mortgage and bond or mortgage and note, must be construed as having included in their meaning that the assignor does thereby make, constitute and appoint the assignee the true and lawful attorney, irrevocable, of the assignor, in the name of the assignor, or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond or mortgage and note, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made.

10. Mortgagee entitled to appointment of receiver. A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

Credits

(L.1909, c. 52. Amended L.1917, c. 682; L.1930, cc. 150, 166; L.1940, c. 377; L.1941, c. 636; L.1945, c. 886, § 3; L.1948, c. 744, § 12; L.1965, c. 830; L.1977, c. 262, § 1; L.1984, c. 409, § 1; L.2006, c. 94, § 1, eff. June 7, 2006; L.2008, c. 529, § 1, eff. Sept. 4, 2008.)

Footnotes

1 42 USCA § 4001 et seq.

McKinney's Real Property Law § 254, NY REAL PROP § 254

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

End of Document

208 A.D.2d 892, 618 N.Y.S.2d 88

Federal National Mortgage Association, Respondent,
v.
Henry Mebane et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
93-03234, 93-04609
(October 31, 1994)

CITE TITLE AS: Federal Natl. Mtge. Assn. v Mebane

HEADNOTE

LIMITATION OF ACTIONS
SIX-YEAR STATUTE OF LIMITATIONS
Mortgage Foreclosure

(1) On November 12, 1970, defendants borrowed money secured by mortgage on their home; defendants were obligated to make monthly payments of principal and interest until December 1, 2000, at which time unpaid principal and interest would become due and payable; mortgage was assigned to plaintiff, which commenced foreclosure action on May 22, 1974, alleging defendants had defaulted in payments commencing March 1, 1973, and exercised its option to accelerate all sums due under mortgage by making demand in complaint; mistrial was declared and action was marked off trial calendar on December 6, 1976, and was deemed dismissed one year thereafter; on January 3, 1979, plaintiff assigned mortgage to predecessors of current owner and holder of mortgage; instant foreclosure action was commenced on August 5, 1992 --- Although lender may revoke its election to accelerate all sums due under optional acceleration clause in mortgage provided that there is no change in borrower's position in reliance thereon, record is barren of affirmative act of revocation occurring within six-year Statute of Limitations period subsequent to service of complaint in prior foreclosure action, wherein holder of mortgage notified defendants of its election to accelerate; prior foreclosure action was never withdrawn by lender, but dismissed sua sponte by court; it cannot be said dismissal by court constituted affirmative act by lender to revoke its election to accelerate; rather than seeking to revoke prior election to accelerate, plaintiff made failed attempt in 1991 to revive prior foreclosure action, and in its complaint in instant action commenced in 1992, plaintiff continues to seek recovery of entire mortgage debt pursuant to acceleration clause; once mortgage debt was accelerated, defendants' right and obligation to make monthly installments ceased and all sums became immediately due and payable; therefore, six-year Statute of Limitations began to run at that time; consequently, this foreclosure action is time-barred --- Valid cause of action has been stated sounding in unjust enrichment to recover sums advanced for property taxes and insurance, within six-year period prior to commencement of this action.

In an action to foreclose a mortgage, the defendants appeal (1) as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Coppola, J.), entered January 22, 1993, as denied their motion to dismiss the complaint and granted that branch of the plaintiff's cross motion which was for leave to serve an amended complaint adding a cause of action sounding in unjust enrichment, and (2) from an order of the same court, entered March 22, 1993, which denied their motion for reargument.

Ordered that the appeal from the order entered March 22, 1993, is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order entered January 22, 1993, is modified, on the law, by (1) deleting the provision thereof which denied so much of the defendants' motion which was to dismiss the first and second causes of action sounding in foreclosure, and substituting therefor a provision granting the defendants' motion to dismiss the first and second causes of action, and (2) deleting the provision thereof which granted so much of the cross motion which was to amend the complaint to assert a cause of action sounding in unjust enrichment relating to all sums which were allegedly advanced by the plaintiff prior to August 5, 1986, and substituting therefor a provision granting the cross motion to the extent of permitting the plaintiff to serve an amended complaint asserting a cause of action

sounding in unjust enrichment relating to all sums advanced by the plaintiff on or after August 5, 1986, and otherwise denying that branch of the cross motion which was for leave to serve an amended complaint; as so modified, the order entered January 22, 1993, is affirmed insofar as appealed from, without costs or disbursements, and the plaintiff's time to serve an amended complaint in accordance herewith is extended until 30 days after service upon it of a copy of this decision and order, with notice of entry.

On or about November 12, 1970, the defendants (hereinafter the borrowers) borrowed $27,900 from Eastern Service Corp., secured by a mortgage on their home. Under the terms of the mortgage, the borrowers were obligated to make monthly payments of principal and interest in the amount of $342 until December 1, 2000, at which time the unpaid principal and interest shall become due and payable. On November 12, 1970, Eastern Mortgage Corp. assigned the mortgage to the Federal National Mortgage Association (hereinafter FNMA). ***894** On or about May 22, 1974, FNMA commenced a foreclosure action, alleging that the borrowers had defaulted in payments commencing March 1, 1973, and exercised its option to accelerate all sums due under the mortgage by making demand in the complaint. A mistrial was declared in that action. The action was marked off the trial calendar on December 6, 1976, and was deemed dismissed one year thereafter *(see,* CPLR 3404). On January 3, 1979, FNMA assigned the mortgage to the predecessors of Metmor Financial, Inc. (hereinafter Metmor), the current owner and holder of the mortgage. The instant foreclosure action was commenced by service of a summons and complaint on August 5, 1992.

Contrary to Metmor's contention, although a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon *(see, Golden v Ramapo Improvement Corp.,* 78 AD2d 648, 650), the record is barren of any affirmative act of revocation occurring within the six-year Statute of Limitations period subsequent to the service of the complaint in the prior foreclosure action, wherein the holder of the mortgage notified the borrowers of its election to accelerate *(see, Albertina Realty Co. v Rosbro Realty Corp.,* 258 NY 472, 476). The prior foreclosure action was never withdrawn by the lender, but rather, dismissed *sua sponte* by the court. It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate *(cf., Kilpatrick v Germania Life Ins. Co.,* 183 NY 163). Indeed, rather than seeking to revoke the prior election to accelerate, the plaintiff made a failed attempt in 1991 to revive the prior foreclosure action, and, in fact, in its complaint in the instant action commenced in 1992, the plaintiff continues to seek recovery of the entire mortgage debt pursuant to the acceleration clause. Once the mortgage debt was accelerated, the borrowers' right and obligation to make monthly installments ceased and all sums became immediately due and payable *(see, Centerbank v D'Assaro,* 158 Misc 2d 92, 95). Therefore, the six-year Statute of Limitations began to run at that time *(see,* CPLR 213 [4]; *see also, Thompson v Willson,* 183 Misc 949, 952, *affd* 269 App Div 829; *Duval v Skouras,* 181 Misc 651, 655, *affd* 267 App Div 811). Consequently, this foreclosure action is time-barred *(see,* CPLR 213 [4]).

However, contrary to the borrowers' contention, Metmor stated a valid cause of action sounding in unjust enrichment to recover sums advanced, *inter alia,* for property taxes and ***895** insurance, within the six-year period prior to the commencement of this action *(see,* CPLR 213; *McDermott v City of New York,* 50 NY2d 211, 217; *see also, McGrath v Hilding,* 41 NY2d 625, 629; *Community Natl. Bank & Trust Co. v State of New York,* 68 AD2d 999, 1000; *cf., Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.,* 70 NY2d 382, 388; *Isaacs v Incentive Sys.,* 52 AD2d 550).

There is no merit to the borrowers' remaining contentions.

Santucci, J. P., Joy, Krausman and Goldstein, JJ., concur.

94 A.D.3d 980, 943 N.Y.S.2d
540, 2012 N.Y. Slip Op. 02866

**1 Wells Fargo Bank, N.A., Successor by Merger to Wells Fargo Bank Minnesota, N.A., as Trustee for Delta Funding Home Equity Loan Trust 1991-1, Respondent

v

Windsor Burke et al.,
Appellants, et al., Defendants.

Supreme Court, Appellate Division,
Second Department, New York
2011-01630, 25077/09
April 17, 2012

CITE TITLE AS: Wells Fargo Bank, N.A. v Burke

HEADNOTES

Mortgages
Acceleration Clause
Authority to Accelerate Debt

Limitation of Actions
Six-Year Statute of Limitations
Mortgage Foreclosure

***981**

Jeffrey M. Kramer, Brooklyn, N.Y., for appellant Windsor Burke, and Harry L. Klein, Brooklyn, N.Y., for appellant 105 4th Units, LLC (one brief filed).

House & Allison, APC, New York, N.Y. (Sara L. Markert and Victor L. Matthews of counsel), and Peter T. Roach & Associates, Syosset, N.Y. (Scott A. Koltun of counsel), for respondent (one brief filed).

In an action to foreclose a mortgage, the defendant Windsor Burke appeals from so much of an order of the Supreme Court, Kings County (Silber, J.), dated December 16, 2010, as denied his motion pursuant to CPLR 5015 to vacate his default in appearing or answering and to dismiss the complaint insofar as asserted against him as barred by the statute of limitations, and the defendant 105 4th Units, LLC, appeals from so much of the same order as, upon reargument, adhered to its original determination in an order dated February 1, 2010, denying that branch of its motion which was pursuant to CPLR 3211 (a) (5) to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003, as barred by the statute of limitations.

Ordered that the order dated December 16, 2010, is affirmed insofar as appealed from, with costs.

In 1999, the defendant Windsor Burke borrowed $45,000 from nonparty Delta Funding Corporation (hereinafter Delta) which was secured by a 30-year mortgage on property owned by Burke located in Brooklyn. Burke defaulted on March 3, 2002, by failing to make the required monthly payment, and he conceded that he failed to make any of the monthly payments that came due after that date.

In June 2002, a foreclosure action (hereinafter the 2002 action) was commenced against Burke by the nonparty Wells Fargo Bank Minnesota, N.A. (hereinafter the Predecessor). However, the note and mortgage were not assigned to the Predecessor until August 23, 2002. Burke did not appear or interpose an answer in the 2002 action.

A junior lienholder, the nonparty Board of Managers 105 4th Avenue Condominium (hereinafter the Condominium Board), was named as a defendant in the 2002 action, but was never served with process. Another action was commenced by the Predecessor in 2003 (hereinafter the 2003 action), which named the Condominium Board as the defendant. Burke was not named as a **2 defendant in the 2003 action. The 2003 action was consolidated with the 2002 action on November 2005.

By deed dated June 29, 2006, Burke conveyed his interest in the property to the nonparty NB 105 4th Apts, LLC. That entity, in turn, conveyed the interest to the defendant 105 4th Units, LLC (hereinafter Units LLC), pursuant to a bargain and sale deed dated November 15, 2006.

Sometime in July 2008, counsel for Units LLC advised counsel for the Predecessor that since the Predecessor had not

been assigned the note and mortgage prior to commencing the 2002 action, it lacked standing. The Predecessor agreed to voluntarily ***982** discontinue the consolidated action, and an order dated April 14, 2009, discontinued the consolidated action.

In June 2009, the note and mortgage were assigned to the plaintiff. On October 5, 2009, the present foreclosure action was commenced by the plaintiff against, among others, Burke and Units LLC. Burke did not appear or interpose an answer. Units LLC made a pre-answer motion to dismiss the complaint insofar as asserted against it. It argued that the Predecessor had accelerated the loan in 2002 or 2003, and that the 2009 action was therefore barred by the six-year statute of limitations.

The Supreme Court denied that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003. However, the court found that payments which had become due prior to October 5, 2003, were time-barred.

Units LLC moved for leave to reargue. At this point, Burke separately moved to vacate his default and to dismiss the complaint insofar as asserted against him. The Supreme Court granted the motion for reargument, but, upon reargument, adhered to its prior determination denying that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003. The Supreme Court also denied Burke's motion to vacate his default and to dismiss the complaint insofar as asserted against him. Burke and Units LLC appeal.

As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action (*see* CPLR 213 [4]). With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [1997]; *Pagano v Smith*, 201 AD2d 632, 633 [1994]). 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" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]; *see Lavin v Elmakiss*, 302 AD2d 638, 639 [2003]; *Zinker v Makler*, 298 AD2d 516, 517 [2002]).

Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the ***983** holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation (*see Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2001]; *Ward v Walkley*, 143 AD2d 415, 417 [1988]; *see also* 1-5 Bergman on New York Mortgage Foreclosures § 5.11 [2] [2011]). "Sometimes . . . whether maturity has arrived through acceleration can be a question of fact" (1-5 Bergman on New York Mortgage Foreclosures § 5.11 [3] [2011]; *cf. LPP Mtge. Ltd. v Gold*, 44 AD3d 718, 719 [2007]).

As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage (*see Serapilio v Staszak*, 255 AD2d 824 [1998]; *Loiacono v Goldberg*, 240 AD2d at 477; *see generally Island Auto Seat Cover Co., Inc. v Minunni*, 69 AD3d 570, 571 [2010]). Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan (*see EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2005]; ****3** *EMC Mtge. Corp. v Patella*, 279 AD2d at 605-606; *Arbisser v Gelbelman*, 286 AD2d 693, 694 [2001]), and such notice must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439 [2006]; *see Arbisser v Gelbelman*, 286 AD2d at 694; *Colonie Block & Supply Co. v Overmyer Co.*, 35 AD2d 897, 897 [1970]). Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised (*see EMC Mtge. Corp. v Smith*, 18 AD3d at 603; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *Arbisser v Gelbelman*, 286 AD2d at 694).

Here, the Predecessor had not been assigned the note or the mortgage at the time the 2002 complaint was served upon Burke. Accordingly, service of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt since the Predecessor did not have the authority to accelerate the debt or to sue to foreclose at that time (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2008]). Furthermore, Units LLC failed to demonstrate that the commencement of the 2003 action was effective to constitute a valid exercise of the acceleration option since it failed to show that the Predecessor served Burke with

the complaint in the 2003 action prior to October 5, 2003 (*see Sarva v Chakravorty*, 34 AD3d at 439). Even if the consolidation of the 2002 and 2003 actions could be construed as a valid acceleration, it occurred in 2005, less than six years prior to the commencement of this action (*see* CPLR 213 [4]).

In sum, Units LLC failed to demonstrate that the option to ***984** accelerate the maturity of the loan was validly exercised in accordance with the terms of the note and mortgage, prior to October 5, 2003 (*see EMC Mtge. Corp. v Suarez*, 49 AD3d at 593; *Sarva v Chakravorty*, 34 AD3d at 439; *see also Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d at 339; *Loiacono v Goldberg*, 240 AD2d at 477; *Pagano v Smith*, 201 AD2d at 633; *Ward v Walkley*, 143 AD2d at 417). Accordingly, upon re-argument, the Supreme Court properly adhered to its prior determination denying that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003.

Contrary to Burke's contention, the Supreme Court properly denied his motion to vacate his default in appearing or answering and to dismiss the complaint insofar as asserted against him as barred by the statute of limitations (*see Centennial El. Indus., Inc. v Ninety-Five Madison Corp.*, 90 AD3d 689, 689-690 [2d Dept 2011]; *Brownfield v Ferris*, 49 AD3d 790, 791 [2008]). Skelos, J.P., Dickerson, Austin and Miller, JJ., concur.

New York Official Reports

KeyCite Red Flag - Severe Negative Treatment
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164 A.D.3d 145, 83 N.Y.S.3d 524, 2018 N.Y. Slip Op. 05760

**1 Diane Milone, Appellant,

v

US Bank National Association, Respondent.

Supreme Court, Appellate Division, Second Department, New York
100268/15, 2016-02068
August 15, 2018

CITE TITLE AS: Milone v US Bank N.A.

SUMMARY

Appeal from an order of the Supreme Court, Richmond County (Philip G. Minardo, J.), dated November 25, 2015, in an action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage and note. The order granted defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint with prejudice and denied plaintiff's cross motion for summary judgment on the complaint.

HEADNOTES

Limitation of Actions
When Cause of Action Accrues
Action to Cancel and Discharge Mortgage and Note—Six-Year Statute of Limitations—Acceleration of Mortgage Debt by Commencement of Foreclosure Action

(1) In an action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage and note assigned to defendant that plaintiff had executed to purchase residential real estate but subsequently defaulted upon, resulting in the commencement of a foreclosure action that was dismissed for defendant's failure to produce the original note, the six-year statute of limitations was measured from the date the foreclosure action was commenced. A person with an estate or interest in real property subject to an encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the six-year statute of limitations for commencing a foreclosure action (*see* CPLR 213 [4]) has expired (*see* RPAPL 1501 [4]). When a mortgage is payable in installments, as here, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt. A mortgage debt is accelerated when an acceleration notice is transmitted to the borrower by the creditor or the creditor's servicer, but to be effective the acceleration notice to the borrower must be clear and unequivocal. Here, the language in a letter sent to plaintiff by a nonparty before the foreclosure action was commenced —that her failure to cure her delinquency within 30 days "will result in the acceleration" of the note—did not fix the date of the acceleration for statute of limitations purposes. It was merely an expression of future intent that fell short of an actual acceleration and was not clear and unequivocal, as future intentions may always be changed in the interim. Nevertheless, when defendant commenced its foreclosure action against plaintiff, its complaint expressly "elect[ed] to call due the entire amount secured by the mortgage," an acceleration of the full amount of the debt occurred upon the filing of the summons and complaint in the foreclosure action, and the statute of limitations was therefore measured from the date the action was commenced. Since defendant's original foreclosure action was dismissed and it did not commence a new action within six years, plaintiff established, prima facie, that the six-year statute of limitations had expired and that she was entitled to summary judgment on the RPAPL 1501 (4) cause of action.

*146 Limitation of Actions
Six-Year Statute of Limitations
Action to Cancel and Discharge Mortgage and Note—De-Acceleration Notice within Six Years of Commencement of Mortgage Foreclosure Action—Clear, Unequivocal and Nonpretextual De-Acceleration Notice

(2) In an action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage and note, in which plaintiff established, prima facie, that the full amount of the debt had been accelerated—and the applicable six-year statute of limitations therefore began to run—when defendant commenced a foreclosure action that was ultimately dismissed and it did not commence a new foreclosure action before the statute of limitations expired, defendant raised a triable issue of fact

requiring the denial of plaintiff's cross motion for summary judgment because defendant de-accelerated the mortgage within six years of the commencement of its foreclosure action. A lender may revoke its election to accelerate a mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of a prior foreclosure action. A de-acceleration notice must be clear and unambiguous to be valid and enforceable, but courts must be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. Here, after defendant's foreclosure action was dismissed but before the statute of limitations expired, a nonparty representing itself to be defendant's loan servicer sent plaintiff a letter noting her continued default on the note, but also stating that the nonparty "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan"—a clear and unequivocal demand that plaintiff meet her prospective monthly payment obligations, which constituted a de-acceleration in fact and could not be viewed as pretextual in any way. Specifically, a de-acceleration letter is not pretextual if, as here, it contains an express demand for monthly payments on the note or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration.

Parties
Standing
De-Acceleration Notice—Residential Mortgage Lender

(3) In an action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage and note, in which plaintiff established, prima facie, that defendant's commencement of a foreclosure action that was ultimately dismissed had accelerated the full amount of the debt and had caused the applicable six-year statute of limitations to run, but defendant raised a triable issue of fact requiring the denial of plaintiff's cross motion for summary judgment because defendant had de-accelerated the mortgage before the statute of limitations expired, defendant's motion to dismiss the complaint was denied because it did not establish that it had standing to de-accelerate the earlier demand that plaintiff's mortgage debt be paid in its entirety. A lender may revoke its election to accelerate a mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of a prior foreclosure action. Moreover, standing, when raised, is a necessary element to a valid de-acceleration. Here, after defendant's foreclosure action was dismissed but before the statute ***147** of limitations expired, a nonparty representing itself to be defendant's loan servicer sent plaintiff a clear and unequivocal demand to meet her prospective monthly payment obligations—a letter noting her continued default on the note, but also stating that the nonparty "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan"—that constituted a de-acceleration in fact. That notice, however, did not establish that defendant had standing to de-accelerate the earlier demand that plaintiff's mortgage debt be paid in its entirety and no other evidence submitted in support of defendant's CPLR 3211 (a) (1) motion to dismiss the complaint demonstrated that it had standing. The standing issue was particularly germane on this record, where defendant had been directed to provide the original note in the prior foreclosure action, but failed to do so, and that action was thereafter dismissed.

Mortgages
Construction
Acceleration Clause—Discretionary Right to Accelerate Debt—De-Acceleration of Debt Permitted if Borrower Not Substantially Prejudiced

(4) In an action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage and note assigned to defendant that plaintiff had executed to purchase residential real estate but subsequently defaulted upon, resulting in the commencement of a foreclosure action that was dismissed for defendant's failure to produce the original note, de-acceleration was permitted by the note and a nonparty representing itself to be defendant's loan servicer sent plaintiff a clear and unequivocal de-acceleration notice before the applicable six-year statute of limitations expired. The note permitted defendant to accelerate the full amount of the principal and interest upon plaintiff's default, but contained no provision permitting

defendant to revoke any such acceleration. However, since the plain language setting forth defendant's contractual right to accelerate the entire debt was discretionary rather than mandatory, it maintained the right to later revoke the acceleration. Moreover, a court, in the exercise of its equity jurisdiction, may restrain a lender from revoking its election to accelerate only if a borrower can demonstrate substantial prejudice. Here, plaintiff was not substantially prejudiced by the course of the litigation and its attendant contractual provisions, procedures and substantive law: she executed a 30-year note in the sum of $1,235,000 subject to a mortgage securing the property and made monthly payments for approximately four years before defaulting on her obligation; since that time, plaintiff—without paying the mortgage or rent and without paying property taxes—had been residing at premises likely valued at more than $1 million; and, with each passing month that she remained in possession of the premises, the statute of limitations continued to expire as to missed payments due more than six years earlier on a rolling monthly basis.

RESEARCH REFERENCES

Am Jur 2d Limitation of Actions §§ 145, 325; Am Jur 2d Mortgages §§ 617, 624.

Carmody-Wait 2d Foreclosure of Mortgages on Real Estate §§ 92:48, 92:55; Carmody-Wait 2d Action to Compel Determination of Claims to Real Property §§ 101:15, 101:17.

***148** McKinney's, RPAPL 1501 (4).

Mortgage Liens in New York (2017-2018 ed) ch 19, The Action to Foreclose the Mortgage.

NY Jur 2d Limitations and Laches § 95; NY Jur 2d Mortgages and Deeds of Trust §§ 115, 500–506; NY Jur 2d Real Property —Possessory and Related Actions § 453.

ANNOTATION REFERENCE

See ALR Index under Foreclosure; Limitation of Actions; Mortgages.

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APPEARANCES OF COUNSEL

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Reed Smith LLP, New York City (*Diane A. Bettino* and *Siobhan A. Nolan* of counsel), for respondent.

OPINION OF THE COURT

Dillon, J.P.

The instant appeal provides us with an occasion to address the timeliness and required proofs for the valid de-acceleration of note obligations underlying residential mortgage foreclosure actions.

I. Facts

On September 20, 2004, the plaintiff purchased residential real estate in Staten Island. The transaction included the plaintiff's execution of a note in the sum of $1,235,000, which was secured by a mortgage upon the premises. The lender listed on the note was "Wall Street Mortgage Bankers Ltd. d/b/a Power Express" (hereinafter WSMB). The note provided for, inter alia, interest-only payments due and owing the first of each month for 120 months, with full maturity of the obligation on April 1, 2036. On December 28, 2007, Mortgage Electronic Registration Systems, Inc., as nominee of WSMB, assigned the mortgage to the defendant, US Bank National Association.

The plaintiff defaulted on her obligations under the note beginning with the payment due on October 1, 2008, and ***149** continuing each month thereafter. By letter dated November 16, 2008, an entity known as America's Servicing Co. (hereinafter ASC) advised the plaintiff that her account was in default, and that if a stated amount of delinquency and fees was not paid within 30 days, the circumstances "will result in the acceleration of your Mortgage Note . . . [and that o]nce acceleration has occurred, a foreclosure action, or any other remedy permitted under the terms of your Mortgage or Deed of Trust, may be initiated." The plaintiff did not pay the delinquency and fees, and on January 13, 2009, US Bank commenced a foreclosure action against her in the Supreme Court, Richmond County, by the filing of a summons and complaint with the Richmond County Clerk.

The standing of US Bank, which was not named on the note, must have been an issue between the parties in the foreclosure action, since the Supreme Court executed a preliminary conference order on September 20, 2011, directing US Bank to produce the original note by October 5, 2011. No original note was thereafter produced, and on February 29, 2012, the foreclosure action was dismissed.

Matters lay dormant until October 21, 2014. By letter of that date sent to the plaintiff, Wells Fargo Bank N.A., which represented itself as US Bank's loan servicer, noted the plaintiff's continued default on the note. It also stated that Wells Fargo "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan."

More than four months later, on March 10, 2015, the plaintiff commenced this action pursuant to RPAPL 1501 to cancel and discharge the mortgage and note. The plaintiff specifically alleged that more than six years had passed from ASC's letter of November 16, 2008, by which the note associated with the mortgage was accelerated; that US Bank's foreclosure action had been dismissed; and that no new foreclosure action had been timely commenced.

US Bank moved pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint in its entirety. US Bank argued, through an affidavit of Wells Fargo's vice-president of loan documentation and annexed documentary evidence, that payment of the note, which had previously been accelerated, was de-accelerated by Wells Fargo's letter to the plaintiff dated October 21, 2014. Counsel for US Bank reasoned that since the de-acceleration ***150** was communicated within six years of the earlier acceleration, no violation of the statute of limitations occurred, and a new six-year limitations period would begin to run if US Bank were to accelerate the note in the future.

The plaintiff cross-moved for summary judgment on the complaint. In support of her cross motion, and in opposition to US Bank's dismissal motion, the plaintiff argued that no right of de-acceleration was contained in the note or mortgage; that US Bank's decision to de-accelerate rather than to commence a new action within the original six years is a tacit admission that it does not possess the original note; that once an acceleration option is exercised, it cannot be revoked; that construing the note and mortgage as allowing a de-acceleration and extending the statute of limitations would violate public policy; and that the purported de-acceleration was per se prejudicial to the borrower.

In the order appealed from, the Supreme Court, without analysis, granted US Bank's motion to dismiss the complaint with prejudice, and denied the plaintiff's cross motion for summary judgment on the complaint.

For reasons set forth below, we modify the order appealed from. While we agree with the Supreme Court's determination to deny the plaintiff's cross motion for summary judgment on the complaint, we conclude that the court also should have denied US Bank's motion to dismiss the complaint.

II. Legal Analysis

US Bank's motion to dismiss and the plaintiff's cross motion for summary judgment are governed by different standards of proof. Therefore, if one party loses its motion, that result does not necessarily require that the other party prevails, since each motion must be measured by its own discrete standard of proof.

The required forms of proof are well established. A motion to dismiss pursuant to CPLR 3211 (a) (1) on the ground of documentary evidence may only be granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Hutton Group, Inc. v Cameo Owners Corp.*, 160 AD3d 676 [2018]; *Hershco v Gordon & Gordon*, 155 AD3d 1007, 1008 [2017]). On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must ***151** accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hershco v Gordon & Gordon*, 155 AD3d at 1008; *Cruciata v O'Donnell & McLaughlin, Esqs.*, 149 AD3d 1034, 1034-1035 [2017]). A motion for summary judgment, by contrast, may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden shifts to the party opposing the motion to produce evidentiary proof in an admissible form establishing the existence of material issues

of fact requiring trial (*see Zuckerman v City of New York*, 49 NY2d at 562).

A. The Statute of Limitations for Mortgage Debt Accelerations

(1) The cause of action in the complaint to cancel and discharge the mortgage and note is governed by RPAPL 1501 (4). The statute provides that a person with an estate or interest in real property subject to an encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired (*see* RPAPL 1501 [4]; *Lubonty v U.S. Bank N.A.*, 159 AD3d 962 [2018]; *53 PL Realty, LLC v US Bank N.A.*, 153 AD3d 894 [2017]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]). Actions to foreclose upon a mortgage are governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 197 [2017]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 986; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2012]). When a mortgage is payable in installments, which is the typical practice, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt (*see U.S. Bank N.A. v Joseph*, 159 AD3d 968 [2018]; *Stewart Tit. Ins. Co. v Bank of N.Y. Mellon*, 154 AD3d 656, 659 [2017]; *53 PL Realty, LLC v US Bank N.A.*, 153 AD3d at 895; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069 [2017]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]). Determining precisely when a mortgage is accelerated ***152** is therefore a key aspect in any action or proceeding commenced pursuant to RPAPL 1501 (4).

An acceleration of a mortgage debt may occur in different ways. One way is in the form of an acceleration notice transmitted to the borrower by the creditor or the creditor's servicer. To be effective, the acceleration notice to the borrower must be clear and unequivocal (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *Sarva v Chakravorty*, 34 AD3d 438, 439 [2006]). A second form of acceleration, which is self-executing, is the obligation of certain borrowers to make a balloon payment under the terms of the note at the end of the pay-back period (*see Trustco Bank N.Y. v 37 Clark St.*, 157 Misc 2d 843, 844 [Sup Ct, Saratoga County 1993]). A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *City Sts. Realty Corp. v Jan Jay Constr. Enters. Corp.*, 88 AD2d 558, 559 [1982]).

Here, we find that both parties have been under a mistaken impression that the letter sent to the plaintiff by ASC dated November 16, 2008, fixed the date of the acceleration for statute of limitations purposes. It did not. The language in the letter, that the plaintiff's failure to cure her delinquency within 30 days "will result in the acceleration" of the note, was merely an expression of future intent that fell short of an actual acceleration (*see Bank of Am., N.A. v Luma*, 157 AD3d 1106 [2018]; *21st Mtge. Corp. v Adames*, 153 AD3d 474 [2017]). The notice to the plaintiff was not clear and unequivocal, as future intentions may always be changed in the interim. In making this finding, we respectfully disagree with our colleagues in the Appellate Division, First Department, who addressed similar language and held otherwise in *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.* (148 AD3d 529 [2017]).

Nevertheless, when US Bank commenced its foreclosure action against the plaintiff on January 13, 2009, paragraph "Fifth" of its complaint expressly "elect[ed] to call due the entire amount secured by the mortgage." An acceleration of the full amount of the debt occurred in this instance upon the filing of the summons and complaint in the foreclosure action. We therefore measure the applicable six-year statute of limitations from the date the foreclosure action was commenced, January ***153** 13, 2009. Since US Bank's original foreclosure action was dismissed and it did not commence a new action before Tuesday, January 13, 2015, the plaintiff, in support of her cross motion, submitted evidence establishing, prima facie, that the six-year statute of limitations had expired and that she was entitled to summary judgment on the RPAPL 1501 (4) cause of action (*see Deutsche Bank Natl. Trust Co. v Gambino*, 153 AD3d 1232, 1234 [2017]).

Of course, we have held, and it is now well settled, that an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so (*see U.S. Bank N.A. v Gordon*, 158 AD3d 832 [2018]; *Stewart Tit. Ins. Co. v Bank of N.Y. Mellon*, 154 AD3d at 663; *DLJ Mtge. Capital, Inc. v Pittman*, 150 AD3d 818, 819 [2017]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at

983-984; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592 [2008]; *Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d 915, 919 [Sup Ct, Westchester County 2017]). Here, conceivably, US Bank could have attempted to defeat the plaintiff's action by arguing that it did not have standing to accelerate the full amount of the plaintiff's debt, which would explain its failure to produce the original note resulting in the dismissal of the foreclosure action on February 29, 2012. The absence of a valid acceleration would mean that the statute of limitations had never even begun to run on the full debt, and thereby defeat the plaintiff's RPAPL 1501 (4) cause of action in its entirety. However, any such argument would have the additional and perhaps unpalatable effect of rendering untimely any claim of US Bank for missed mortgage payments older than six years and counting.

B. De-Acceleration

(2) In support of its motion to dismiss and in opposition to the plaintiff's cross motion for summary judgment, US Bank relies upon Wells Fargo's de-acceleration letter to the plaintiff dated October 21, 2014. To the extent this Court has held that acceleration notices must be clear and unambiguous to be valid and enforceable (*see Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *Sarva v Chakravorty*, 34 AD3d at 439), we likewise hold here that de-acceleration notices must also be clear and unambiguous to be valid and enforceable. The de-acceleration language used in this instance meets that criteria.

***154** Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. Here, however, the de-acceleration letter containing a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations constitutes a de-acceleration in fact and cannot be viewed as pretextual in any way. Specifically, a de-acceleration letter is not pretextual if, as here, it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration (*cf. Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d at 923-924). In contrast, a "bare" and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.

Contrary to the plaintiff's arguments, "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1069-1070; *see Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2018]; *MSMJ Realty, LLC v DLJ Mtge. Capital, Inc.*, 157 AD3d 885, 887 [2018]; *U.S. Bank N.A. v Barnett*, 151 AD3d 791, 793 [2017]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 987; *UMLIC VP, LLC v Mellace*, 19 AD3d 684 [2005]; *Clayton Natl. v Guldi*, 307 AD2d at 982; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

Here, US Bank's de-acceleration occurred on October 21, 2014, within six years measured from the commencement of its foreclosure action on January 13, 2009. Accordingly, while the plaintiff, in support of her cross motion, established her prima facie entitlement to summary judgment on her RPAPL 1501 (4) cause of action, US Bank's timely de-acceleration notice raises a triable issue of fact requiring the denial of the plaintiff's cross motion.

***155** As previously noted, the burden of proof governing a motion pursuant to CPLR 3211 (a) is different from the burden of proof governing a motion pursuant to CPLR 3212. Therefore, US Bank's de-acceleration notice, which raises a triable issue of fact sufficient to defeat the plaintiff's cross motion for summary judgment, does not necessarily mandate dismissal of the complaint on the basis of that documentary evidence, because it fails to "utterly refute" the plaintiff's allegations as a matter of law.

(3) We hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well.

Here, the de-acceleration notice dated October 21, 2014, does not establish that US Bank had standing to de-accelerate the earlier demand that the plaintiff's mortgage debt be paid in its entirety, and no other evidence submitted in support of US Bank's CPLR 3211 (a) (1) motion to dismiss the complaint demonstrates that it had standing. This issue is particularly germane on this record, where US Bank had been

directed to provide the original note under the terms of the preliminary conference order dated September 20, 2011, and the foreclosure action was thereafter dismissed on February 29, 2012. Had US Bank provided documentary evidence in support of its CPLR 3211 (a) (1) motion establishing, inter alia, its standing to accelerate and de-accelerate the plaintiff's mortgage debt, it might have been entitled to dismissal of the complaint. Failing that, the motion to dismiss was not accompanied by documents utterly refuting the allegation in the plaintiff's complaint that US Bank's efforts to collect on the debt were time-barred.

C. The Lender's Right to De-Accelerate

(4) The plaintiff argues that while paragraph 6 of the note permits the lender to accelerate the full amount of the principal and interest upon the borrower's default, the note contains no provision permitting the lender to revoke any such acceleration, and that a de-acceleration is therefore not contractually permitted. We disagree. Since the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than mandatory, US Bank maintained the right to later revoke the acceleration (*see Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [1994]; *Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 650 [1980]).

***156 D. Substantial Prejudice**

Assuming, arguendo, that the lender could revoke an earlier election to accelerate the debt, the plaintiff maintains that this Court should not permit US Bank to do so since she will be substantially prejudiced as a result.

Only if a borrower can demonstrate substantial prejudice may a court, in the exercise of its equity jurisdiction, restrain the lender from revoking its election to accelerate (*see Kilpatrick v Germania Life Ins. Co.*, 183 NY 163, 169-170 [1905]; *Golden v Ramapo Improvement Corp.*, 78 AD2d at 650). Here, the plaintiff complains that the dismissal of US Bank's foreclosure action without a finding on the merits of its standing, coupled with a de-acceleration of the entire debt, causes her prejudice by leaving a lien on her home. She argues that she is further prejudiced by the effect of a de-acceleration that revives her obligation to make monthly payments on the underlying note to a party that arguably lacks provable standing.

The plaintiff is not substantially prejudiced as to warrant the exercise of equity jurisdiction in her favor. In September 2004, she executed a 30-year note in the sum of $1,235,000 subject to a mortgage securing the property, and made monthly payments for approximately four years before defaulting on her obligation in October 2008. Since that time, the plaintiff, without paying the mortgage or rent and without paying property taxes, has been residing at premises likely valued at more than $1 million. Moreover, with each passing month that the plaintiff remains in possession of the premises, the statute of limitations continues to expire as to missed payments due more than six years ago on a rolling monthly basis. Contrary to the plaintiff's contentions, she is not substantially prejudiced by the course of the litigation and its attendant contractual provisions, procedures, and substantive law.

E. Miscellaneous

Accepting the allegations in the plaintiff's complaint as true and affording the plaintiff all favorable inferences, as we must, we conclude that US Bank is not entitled to dismissal of the complaint under CPLR 3211 (a) (7) for failure to state a cause of action.

The parties' remaining contentions either are without merit or have been rendered academic.

***157** III. Conclusion

For the reasons set forth, we agree with the Supreme Court's determination to deny the plaintiff's cross motion for summary judgment on the complaint, and disagree with the court's determination to grant the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint. Accordingly, the order is modified, on the law, by deleting the provision thereof granting the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint with prejudice, and substituting therefor a provision denying the motion; as so modified, the order is affirmed.

Chambers, Sgroi and Connolly, JJ., concur.

Ordered that the order is modified, on the law, by deleting the provision thereof granting the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint with prejudice, and substituting therefor a provision denying the motion; as so modified, the order is affirmed, without costs or disbursements.

End of Document

New York Official Reports

173 A.D.3d 930, 103 N.Y.S.3d 481, 99 UCC Rep.Serv.2d 217, 2019 N.Y. Slip Op. 04747

**1 U.S. Bank National Association, as Trustee, on Behalf of the Holders of CSMC Mortgage-Backed Pass-Through Certificates, *931 Series 2007-1, Respondent,
v
Marie Auguste, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2017-02305, 2017-02306, 506979/14
June 12, 2019

CITE TITLE AS: U.S. Bank N.A. v Auguste

HEADNOTE

Mortgages
Foreclosure
Standing—Attempted Retroactive Assignment

C. Steve Okenwa, P.C., New York, NY, for appellant.
Eckert Seamans Cherin & Mellott, LLC, White Plains, NY (Morgan R. McCord of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Marie Auguste appeals from two orders of the Supreme Court, Kings County (Noach Dear, J.), both dated January 3, 2017. The first order granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant Marie Auguste and for an order of reference, and denied that defendant's cross motion to dismiss the complaint insofar as asserted against her. The second order also granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant Marie Auguste, and appointed a referee to ascertain and compute the amount due to the plaintiff.

Ordered that the orders are affirmed, with one bill of costs.

The defendant Marie Auguste borrowed the sum of $640,000 from nonparty First United Mortgage Banking Corp. (hereinafter First United) on September 14, 2006, secured by a mortgage on property in Brooklyn.

The plaintiff previously commenced an action to foreclose the mortgage on May 24, 2007. By order dated November 27, 2007, the Supreme Court directed dismissal of that action on the ground that the plaintiff failed to establish standing. The plaintiff had submitted a purported assignment of the mortgage, which was dated July 9, 2007, but stated that it was effective on November 22, 2006. The Court held that "such an attempt to retroactively assign the mortgage is insufficient to establish the plaintiff's ownership interest at the time the action was commenced."

The plaintiff commenced the instant action to foreclose the mortgage on July 29, 2014. The plaintiff attached the note to the complaint. The plaintiff further submitted an allonge to the note, signed by the president of First United, endorsing the note in blank.

The plaintiff moved for summary judgment on the complaint insofar as asserted against Auguste and for an order of reference. Auguste cross-moved to dismiss the complaint insofar as asserted against her as time-barred and based on lack of standing. By order dated January 3, 2017, the Supreme Court granted the plaintiff's motion for summary judgment and for an order of reference, and denied Auguste's cross motion to dismiss the complaint insofar as asserted against her. In another order, also dated January 3, 2017, the court also granted *932 the plaintiff's motion for summary judgment and appointed a referee to ascertain and compute the amount due to the plaintiff. Auguste appeals from both orders.

We agree with the Supreme Court's denial of that branch of Auguste's cross motion which was to dismiss the complaint insofar as asserted against her as time-barred. A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213 [4]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069 [2017]). "[E]ven 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" (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]). Acceleration occurs, inter alia, "when a creditor

commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" (*Milone v US Bank N.A.*, 164 AD3d 145, 152 [2018]; *see Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2003]). "[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so" (*Milone v US Bank N.A.*, 164 AD3d at 153).

Auguste contends that the commencement of the prior action in 2007 accelerated the debt, and that the commencement of the instant action, seven years later, was beyond the statute of limitations. Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2008]). Thus, we agree with the Supreme Court's determination that the commencement of the prior action in 2007 did not accelerate the debt, and that the instant action was timely.

We also agree with the Supreme Court's determination granting the plaintiff's motion for summary judgment on the complaint insofar as asserted against Auguste, and for an order of reference. "In moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the note, and evidence of the default in payment" (*Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861, 862 [2017]). Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, the ***933** plaintiff must prove its standing as part of its prima facie showing that it is entitled to summary judgment (*see US Bank N.A. v Cohen*, 156 AD3d 844, 845 [2017]). A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753-754 [2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*Dyer Trust 2012-1 v Global World Realty, Inc.*, 140 AD3d 827, 828 [2016]).

Here, contrary to Auguste's contention, the plaintiff established, prima facie, that it had standing to prosecute this action by demonstrating that it was in physical possession of the note and the blank-endorsed allonge, which were annexed to the complaint, at the time this action was commenced (*see Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d at 862-863; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2016]). Moreover, "[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it (*see* UCC 3-204 [2]). Moreover, it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date" (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d at 645).

In view of the foregoing, Auguste's remaining contention has been rendered academic. Mastro, J.P., Dillon, Maltese and Brathwaite Nelson, JJ., concur.

2021 WL 623869

Court of Appeals of New York.

FREEDOM MORTGAGE CORPORATION, Appellant,
v.
Herschel ENGEL, Respondent, et al., Defendants.
Ditech Financial, LLC, & c., Appellant,
v.
Santhana Kumar Nataraja Naidu, Respondent, et al., Defendants.
Juan Vargas, Respondent,
v.
Deutsche Bank National Trust Company, Appellant.
Wells Fargo Bank, N.A., & c., Appellant,
v.
Donna Ferrato, Respondent, The Simon & Mills Building Condominium Board, et al., Defendants.
Wells Fargo Bank, N.A., & c., Appellant,
v.
Donna Ferrato, Respondent, Capital One Bank (USA) N.A., et al., Defendants.

No. 1
|
No. 2
|
No. 3
|
No. 4
|
Decided February 18, 2021

Synopsis

Background: In first case, mortgagee brought action to foreclose mortgage loan. The Supreme Court, New York County, Judith N. McMahon, J., 2018 WL 3747251, denied mortgagor's motion to dismiss. Mortgagor appealed. The Supreme Court, Appellate Division, 183 A.D.3d 529, 122 N.Y.S.3d 884, reversed. Mortgagee appealed. In second case, mortgagor brought action to discharge mortgage on her real property. The Supreme Court, Bronx County, Julia I. Rodriguez, J., denied mortgagee's motion to dismiss. Mortgagee appealed. The Supreme Court, Appellate Division, 168 A.D.3d 630, 93 N.Y.S.3d 32, affirmed. Mortgagee appealed. In third case, mortgagee brought foreclosure action against mortgagor. The Supreme Court, Orange County, Sandra Sciortino, J., granted summary judgment in favor of mortgagee. Mortgagor appealed. The Supreme Court, Appellate Division, 163 A.D.3d 631, 81 N.Y.S.3d 156, reversed. Mortgagee appealed. In fourth case, mortgagee brought action to foreclose mortgage loan. The Supreme Court, Queens County, Robert J. McDonald, J., 2016 WL 6432721, granted summary judgment in favor of mortgagee. Mortgagor appealed. The Supreme Court, Appellate Division, 175 A.D.3d 1387, 109 N.Y.S.3d 196, reversed. Mortgagee appealed.

Holdings: The Court of Appeals, DiFiore, C.J., held that:

[1] mortgagee's commencement of two earlier, dismissed foreclosure actions did not effectuate valid acceleration of debt, as would trigger six-year statute of limitations for foreclosure claims;

[2] default letter sent to mortgagor did not validly accelerate debt, as would support mortgagor's claim to discharge mortgage on ground that statute of limitations for foreclosure claim had expired, abrogating *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597;

[3] as matter of first impression, mortgagees revoked their acceleration of mortgage debt when they voluntarily discontinued their earlier foreclosure actions, abrogating *Christiana Trust v. Barua*, 184 A.D.3d 140, 149, 125 N.Y.S.3d 420; and

[4] mortgagee was not equitably estopped from revoking its election to accelerate debt, even though its primary reason for

revoking acceleration was to avoid statute of limitations bar; abrogating *Christiana Trust v. Barua*, 184 A.D.3d 140, 149, 125 N.Y.S.3d 420; *Milone v. US Bank National Association*, 164 A.D.3d at 154, 83 N.Y.S.3d 524; *Deutsche Bank Natl. Trust Co. Ams. v. Bernal*, 56 Misc.3d 915, 924, 59 N.Y.S.3d 267.

Reversed.

Wilson, J., filed concurring opinion.

Rivera, J., filed opinion dissenting in part.

West Headnotes (20)

[1] **Limitation of Actions** Nature of statutory limitation

Statutes of limitations advance society's interest in giving repose to human affairs.

[2] **Contracts** Application to Contracts in General

Rules governing contract interpretation, particularly, the principle that agreements should be enforced pursuant to their clear terms, promotes stability and predictability according to the expectations of the parties.

[3] **Mortgages and Deeds of Trust** Time for proceedings; limitations and laches

Whether a mortgage foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts, namely, the note and the mortgage, and the noteholder's ability to foreclose on the property securing the debt depends on the language in these documents. N.Y. CPLR § 213(4).

[4] **Mortgages and Deeds of Trust** Acceleration

Acceleration of the debt permits the noteholder to commence an action seeking the remedy of full foreclosure, an equitable tool permitting the noteholder to take possession of the real property securing the debt.

[5] **Limitation of Actions** Title or right of parties to mortgage or deed as security

A cause of action to recover the entire balance of the debt accrues at the time the loan is accelerated, triggering the six-year statute of limitations to commence a foreclosure action. N.Y. CPLR §§ 203(a), 213(4).

2 Cases that cite this headnote

[6] **Limitation of Actions** Title or right of parties to mortgage or deed as security

Prior to acceleration, upon a default on the obligation to timely make an installment payment, a cause of action accrues to recover that installment payment, triggering the six-year statute of limitations for an action to recover that payment, but a default alone does not trigger the statute of limitations relating to a foreclosure action. N.Y. CPLR § 213(4).

[7] **Mortgages and Deeds of Trust** Acceleration

"Acceleration" of the debt is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time through the vehicle of monthly installment payments, although the contracts may provide the borrower the right to cure.

1 Cases that cite this headnote

[8] **Mortgages and Deeds of Trust** Election to accelerate

Noteholders must unequivocally and overtly exercise an election to accelerate the debt, since such a significant alteration of the borrower's obligations under the contract, replacing the right to make recurring payments of perhaps a few thousand dollars a month or less with a

demand for immediate payment of a lump sum of hundreds of thousands of dollars, should not be presumed or inferred.

[9] **Limitation of Actions** Title or right of parties to mortgage or deed as security

Mortgages and Deeds of Trust Validity

Mortgagee's commencement of two earlier, dismissed foreclosure actions did not effectuate valid acceleration of debt, as would trigger six-year statute of limitations for mortgagee's foreclosure claim in action against mortgagor, where, in earlier actions, mortgagee had attempted to foreclose on original note and mortgage even though terms of that note had been modified, mortgagee failed to attach modified agreements or otherwise acknowledge those documents, which had materially distinct terms from original note and mortgage, and, given deficiencies in those complaints, it was unclear what debt was being accelerated. N.Y. CPLR §§ 203(a), 213(4).

[10] **Mortgages and Deeds of Trust** Election to accelerate

The filing of a verified foreclosure complaint may evince an election to accelerate the debt.

1 Cases that cite this headnote

[11] **Limitation of Actions** Title or right of parties to mortgage or deed as security

Mortgages and Deeds of Trust Validity

Default letter sent by mortgagee's predecessor-in-interest to mortgagor did not validly accelerate debt, as would trigger six-year statute of limitations for foreclosure claims, and, thus, support mortgagor's claim to discharge mortgage on her real property on ground that statute of limitations for any claim to foreclose on her mortgage had expired, where default letter did not seek immediate payment of entire, outstanding loan, but, rather, it expressed future intent that mortgagee "will" accelerate debt if mortgagor failed to cure default within cure period set forth in letter, without pledging that acceleration would immediately or automatically occur upon expiration of cure period; abrogating *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597. N.Y. CPLR §§ 203(a), 213(4); N.Y. RPAPL § 1501(4).

3 Cases that cite this headnote

[12] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

A noteholder's act of revocation of its election to accelerate mortgage debt, also referred to as a de-acceleration, returns the parties to their pre-acceleration rights and obligations, reinstating the borrowers' right to repay any arrears and resume satisfaction of the loan over time via installments, that is, removing the obligation to immediately repay the total outstanding balance due on the loan, and provides borrowers a renewed opportunity to remain in their homes, despite a prior default.

1 Cases that cite this headnote

[13] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Effect of dismissal

When a noteholder effectuated an acceleration of mortgage debt via the commencement of a foreclosure action, a voluntary discontinuance of that action, that is, the withdrawal of the complaint, constitutes a revocation of that acceleration.

7 Cases that cite this headnote

[14] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Effect of dismissal

When a noteholder effectuated an acceleration of mortgage debt via the commencement of a foreclosure action and then voluntarily

discontinues that action, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the unequivocal overt act of filing a foreclosure complaint, destroys the effect of the election.

4 Cases that cite this headnote

[15] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Effect of dismissal

A voluntary discontinuance of a foreclosure action withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration of debt is being revoked.

[16] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Effect of dismissal

When acceleration of the debt occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder.

3 Cases that cite this headnote

[17] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Effect of dismissal

Mortgagees revoked their valid elections to accelerate mortgage debt, effectuated via filing of complaints in earlier foreclosure actions, when they voluntarily discontinued their earlier foreclosure actions against mortgagors during six-year limitations period for bringing foreclosure actions, even though mortgagees did not expressly mention de-acceleration or willingness to accept installment payments in their stipulations to voluntarily discontinue earlier actions, where mortgagees made no contemporaneous statement in their stipulations or otherwise that they were not de-accelerating debt or would not accept monthly installment payments; abrogating *Christiana Trust v. Barua*, 184 A.D.3d 140, 149, 125 N.Y.S.3d 420. N.Y. CPLR § 213(4).

[18] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Waiver, estoppel, and consent

Mortgagee was not equitably estopped from revoking its election to accelerate mortgage debt, effectuated via filing of complaint in earlier foreclosure action against mortgagor, although its primary reason for revoking acceleration was to avoid statute of limitations bar to filing future foreclosure action on accelerated debt, where mortgagor did not materially change her position in detrimental reliance on loan acceleration; abrogating *Christiana Trust v. Barua*, 184 A.D.3d 140, 149, 125 N.Y.S.3d 420; *Milone v. US Bank National Association*, 164 A.D.3d at 154, 83 N.Y.S.3d 524; *Deutsche Bank Natl. Trust Co. Ams. v. Bernal*, 56 Misc.3d 915, 924, 59 N.Y.S.3d 267. N.Y. CPLR § 213(4).

[19] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Waiver, estoppel, and consent

A noteholder may be equitably estopped from revoking its election to accelerate mortgage debt.

[20] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

Mortgages and Deeds of Trust Waiver, estoppel, and consent

A noteholder's motivation for exercising a contractual right is generally irrelevant in determining whether the noteholder is equitably estopped from revoking its election to accelerate mortgage debt.

Attorneys and Law Firms

Case No. 1: Brian A. Sutherland, for appellant.

Anthony R. Filosa, Garden City, for respondent.

Legal Services NYC, et al., American Legal and Financial Network, New York State Foreclosure Defense Bar, New York Mortgage Bankers Association, USFN - America's Mortgage Banking Attorneys, United Jewish Organizations of Williamsburg, Inc., amici curiae.

Case No. 2: Christina A. Livorsi, for appellant.

Holly C. Meyer, for respondent.

New York State Foreclosure Defense Bar, United Jewish Organizations of Williamsburg, Inc., Adam Plotch, amici curiae.

Case No. 3: Patrick G. Broderick, for appellant.

Justin F. Pane, for respondent.

Francis M. Caesar, New York State Foreclosure Defense Bar, United Jewish Organizations of Williamsburg, Inc., Adam Plotch, amici curiae.

Case No. 4: Brian S. Pantaleo, for appellant.

M. Katherine Sherman, for respondent.

Francis M. Caesar, New York State Foreclosure Defense Bar, amici curiae.

Opinion

DiFIORE, Chief Judge:

***1** These appeals—each turning on the timeliness of a mortgage foreclosure claim—involve the intersection of two areas of law where the need for clarity and consistency are at their zenith: contracts affecting real property ownership and the application of the statute of limitations. In *Vargas v. Deutsche Bank Natl. Trust Co.* and *Wells Fargo Bank, N.A. v. Ferrato,* the primary issue is when the maturity of the debt was accelerated, commencing the six-year statute of limitations period. Applying the long-standing rule derived from *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 176 (1932) that a noteholder must effect an "unequivocal overt act" to accomplish such a substantial change in the parties' contractual relationship, we reject the argument in *Vargas* that the default letter in question accelerated the debt, and similarly conclude in *Wells Fargo* that two complaints in prior discontinued foreclosure actions that each failed to reference the pertinent modified loan likewise were not sufficient to constitute a valid acceleration. The remaining cases turn on whether the noteholder's voluntary discontinuance of a prior foreclosure action revoked acceleration of the debt, reinstating the borrower's contractual right to repay the loan over time in installments. Adopting a clear rule that will be easily understood by the parties and can be consistently applied by the courts, we hold that where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary. These conclusions compel a reversal of the Appellate Division order in each case.

[1] **[2]** The parties do not dispute that under CPLR 213(4), a mortgage foreclosure claim is governed by a six-year statute of limitations (*see Lubonty v. U.S. Bank N. A.,* 34 N.Y.3d 250, 261, 116 N.Y.S.3d 642, 139 N.E.3d 1222 [2019])—in each case, the timeliness dispute turns on whether or when the noteholders exercised certain rights under the relevant contracts, impacting when each claim accrued and whether the limitations period expired, barring the noteholders' foreclosure claims. Because these cases involve the operation of the statute of limitations, we begin with some general principles. We have repeatedly recognized the important objectives of certainty and predictability served by our statutes of limitations and endorsed by our principles of contract law, particularly where the bargain struck between the parties involves real property (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006–SL2 v. DB Structured Prods., Inc.,* 25 N.Y.3d 581, 593, 15 N.Y.S.3d 716, 36 N.E.3d 623 [2015]). Statutes of limitations advance our society's interest in "giving repose to human affairs" (*John J. Kassner & Co. v. City of New York,* 46 N.Y.2d 544, 550, 415 N.Y.S.2d 785, 389

N.E.2d 99 [1979] [citations omitted]). Our rules governing contract interpretation—the principle that agreements should be enforced pursuant to their clear terms—similarly promotes stability and predictability according to the expectations of the parties (*see 159 MP Corp. v. Redbridge Bedford, LLC,* 33 N.Y.3d 353, 358, 104 N.Y.S.3d 1, 128 N.E.3d 128 [2019]). This Court has emphasized the need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial relationships (*see ACE Sec. Corp.,* 25 N.Y.3d at 593–594, 15 N.Y.S.3d 716, 36 N.E.3d 623, citing *Ely–Cruikshank Co. v. Bank of Montreal,* 81 N.Y.2d 399, 403, 599 N.Y.S.2d 501, 615 N.E.2d 985 [1993]; *Ajdler v. Province of Mendoza,* 33 N.Y.3d 120, 130 n. 6, 99 N.Y.S.3d 749, 123 N.E.3d 233 [2019]).

***2** **[3]** Whether a foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts: the note and the mortgage. The noteholder's ability to foreclose on the property securing the debt depends on the language in these documents (*see Nomura Home Equity Loan, Inc., Series 2006–FM2 v. Nomura Credit & Capital, Inc.,* 30 N.Y.3d 572, 581, 69 N.Y.S.3d 520, 92 N.E.3d 743 [2017]; *W.W.W. Assoc., Inc. v. Giancontieri,* 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]). In the residential mortgage industry, the use of standardized instruments is common, as reflected here where the relevant terms of the operative agreements are alike,[1] facilitating a general discussion of the operation of the statute of limitations with respect to claims arising from agreements of this nature. In each case before us, the note and mortgage create a relationship typical in the residential mortgage foreclosure context: in exchange for the opportunity to purchase a home, the borrower promised to repay a loan in favor of the noteholder, secured by a lien on that real property, over a 30–year extended term through a series of monthly installment payments. As prescribed in the agreements, the borrower's failure to timely make monthly installment payments constituted a default.

For over a century, residential mortgage contracts have typically provided noteholders the right to accelerate the maturity date of the loan upon the borrower's default, thereby demanding immediate repayment of the entire outstanding debt (*see e.g., Odell v. Hoyt,* 73 N.Y. 343, 345 [1878]). In these cases, the mortgages provide that the noteholder "*may* " require immediate payment of the outstanding debt—*i.e.,* accelerate the maturity of the loan—upon the borrower's default.[2] It is plain from this language that whether to exercise this contractual right is a matter within the noteholder's discretion—the noteholder is not obliged to accelerate the loan upon a default (*Adler v. Berkowitz,* 254 N.Y. 433, 436, 173 N.E. 574 [1930]). The extended contractual relationship explains why residential mortgage agreements are generally structured in this way. Noteholders can—and often do—anticipate and tolerate defaults relating to timely payment, permitting the borrower to correct such deficiencies without a significant disturbance in the contractual relationship. Precipitous acceleration of the debt serves neither party as it works a fundamental alteration of the status quo.

[4] **[5]** **[6]** Indeed, a noteholder's election to accelerate the entire debt has multiple, significant effects. Particularly relevant to these appeals, under the typical contract, acceleration permits the noteholder to commence an action seeking the remedy of full foreclosure (*see Odell,* 73 N.Y. at 345)—an equitable tool permitting the noteholder to take possession of the real property securing the debt (*Copp v. Sands Point Mar., Inc.,* 17 N.Y.2d 291, 293, 270 N.Y.S.2d 599, 217 N.E.2d 654 [1966]). Accordingly, a cause of action to recover the entire balance of the debt accrues at the time the loan is accelerated, triggering the six-year statute of limitations to commence a foreclosure action (*see* CPLR 203[a], 213[4]; *Phoenix Acquisition Corp. v. Campcore, Inc.,* 81 N.Y.2d 138, 143, 596 N.Y.S.2d 752, 612 N.E.2d 1219 [1993]; *Lubonty,* 34 N.Y.3d at 261, 116 N.Y.S.3d 642, 139 N.E.3d 1222; *see also CDR Créances S.A. v. Euro–American Lodging Corp.,* 43 A.D.3d 45, 51, 837 N.Y.S.2d 33 [1st Dept. 2007]; *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161 [2d Dept. 2001]; *Lavin v. Elmakiss,* 302 A.D.2d 638, 639, 754 N.Y.S.2d 741 [3d Dept. 2003]; *Business Loan Ctr., Inc. v. Wagner,* 31 A.D.3d 1122, 1123, 818 N.Y.S.2d 406 [4th Dept. 2006]).[3] Acceleration is therefore a significant event for statute of limitations purposes and, in two of these appeals, the timeliness dispute turns on whether certain acts —in *Wells Fargo,* the filing of complaints in prior foreclosure actions and, in *Vargas,* the issuance of a default letter—effectuated an acceleration of the indebtedness, starting the clock on the noteholders' claims.

I.

***3** We have had few occasions to address how a lender may effectuate an acceleration of the maturity of a debt secured on real property. However, in *Albertina Realty Co.,* we made clear that any election to accelerate must be made in accordance with the terms of the note and mortgage and that the parties are free to include provisions detailing what

the noteholder must do to accelerate the debt (258 N.Y. at 475–476, 180 N.E. 176). We further held that, to be valid, an election to accelerate must be made by an "unequivocal overt act" that discloses the noteholder's choice, such as the filing of a verified complaint seeking foreclosure and containing a sworn statement that the noteholder is demanding repayment of the entire outstanding debt (*id.* at 476, 180 N.E. 176). Although the Court did not otherwise decide "just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause," it did clarify that "[t]he fact of election should not be confused with the notice or manifestation of such election" (*id.*). While the act evincing the noteholder's election must be sufficient to "constitute[ ] notice to all third parties of such [a] choice," a borrower's lack of actual notice "d[oes] not as a matter of law destroy" the effect of the election (*id.*). Put another way, the point at which a borrower has actual notice of an election to accelerate is not the operative event for purposes of determining when the statute of limitations begins to run. Indeed, in *Albertina,* we held that the debt was accelerated when the verified complaint and *lis pendens* were filed, even though the papers had not yet been served on the borrower (*id.*). The determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked.

[7] **[8]** There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." Acceleration in this context is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time through the vehicle of monthly installment payments (although the contracts may provide the borrower the right to cure) (*see Federal Natl. Mtge. Assn. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88 [2d Dept. 1994]). Such a significant alteration of the borrower's obligations under the contract—replacing the right to make recurring payments of perhaps a few thousand dollars a month or less with a demand for immediate payment of a lump sum of hundreds of thousands of dollars—should not be presumed or inferred; noteholders must unequivocally and overtly exercise an election to accelerate. With these principles in mind, we turn to the two appeals before us in which the parties dispute whether, and when, a valid acceleration of the debt occurred, triggering the six-year limitations period to commence a foreclosure claim.

Wells Fargo

[9] The central issue in *Wells Fargo* is whether the commencement of either of two prior, dismissed foreclosure actions constituted a valid acceleration, impacting the timeliness of this foreclosure action (the fifth involving this property),[4] which was commenced in December 2017. Over ten years ago, borrower Donna Ferrato allegedly defaulted on a $900,000 loan secured by a mortgage on her Manhattan condominium unit. Upon Wells Fargo's initiation of this foreclosure action, Ferrato moved to dismiss, arguing that the debt was accelerated in September 2009 by the commencement of the second foreclosure action and the limitations period therefore expired six years later, in September 2015. Supreme Court denied Ferrato's motion, concluding that neither the second nor the third foreclosure actions—commenced in 2009 and 2011, respectively—validly accelerated the debt because, as Ferrato had successfully argued in Supreme Court in those actions, the complaints reflected an attempt to foreclose upon the original note and mortgage even though the terms of that note had been modified (increasing the debt and changing the interest rate) in 2008. On Ferrato's appeal, the Appellate Division (among other things) reversed and granted her motion to dismiss, reasoning that the September 2009 complaint effected a valid acceleration of the modified loan despite the failure to reference the correct loan documents.[5] The Appellate Division granted Wells Fargo leave to appeal to this Court and, because we agree with Wells Fargo that the modified loan debt which it now seeks to enforce could not have been accelerated by the complaints filed in the second (or, for that matter, third) foreclosure action which failed to reference the modified note, we reverse the portion of the Appellate Division order granting Ferrato's motion to dismiss the complaint in the fifth foreclosure action and deny that motion.

***4** **[10]** It is undisputed that the parties modified the original loan in 2008 after Ferrato's initial default, changing the terms by altering the interest rate and increasing the principal amount of the loan by more than $60,000. Nevertheless, in the second foreclosure action on which Ferrato relies, Wells Fargo attached only the original note and mortgage (stating a principal amount of $900,000) to the complaint and failed to acknowledge that the parties entered into a modification agreement altering the amount and terms of the loans (the only oblique evidence of a modification was in an attached schedule stating a principal dollar amount consistent with the modified debt). Although Ferrato successfully moved to dismiss both prior actions on the basis that these deficiencies precluded Wells Fargo from

foreclosing on her property, she now asserts that the filing of those complaints validly accelerated the debt. It is well-settled that the filing of a verified foreclosure complaint may evince an election to accelerate (*see Albertina,* 258 N.Y. at 476, 180 N.E. 176), but here the filings did not accelerate the modified loan (underlying the current foreclosure action) because the bank failed to attach the modified agreements or otherwise acknowledge those documents, which had materially distinct terms. Under these circumstances—where the deficiencies in the complaints were not merely technical or *de minimis* and rendered it unclear what debt was being accelerated—the commencement of these actions did not validly accelerate the modified loan (*Albertina Realty Co.,* 258 N.Y. at 476, 180 N.E. 176).[6] Because Ferrato did not identify any other acceleration event occurring more than six years prior to the commencement of the fifth foreclosure action, the Appellate Division erred in granting her motion to dismiss that action as untimely.

Vargas

In *Vargas,* an action under RPAPL 1501(4) to discharge a mortgage on real property commenced by borrower Juan Vargas against noteholder Deutsche Bank,[7] the parties dispute whether a default letter issued by the bank's predecessor-in-interest validly accelerated the debt. New York courts have observed, consistent with *Albertina,* that the acceleration of a mortgage debt may occur by means other than the commencement of a foreclosure action, such as through an unequivocal acceleration notice transmitted to the borrower (*see Mejias v. Wells Fargo N.A.,* 186 A.D.3d 472, 474, 129 N.Y.S.3d 523 [2d Dept. 2020]; *Lavin,* 302 A.D.2d at 638–639, 754 N.Y.S.2d 741). However, the Appellate Division departments disagree on the language necessary to render a letter sufficiently unequivocal to constitute a valid election to accelerate. In *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.,* 148 A.D.3d 529, 48 N.Y.S.3d 597 (1st Dept. 2017), the First Department concluded that a letter stating that the noteholder "will" accelerate upon the borrower's failure to cure the default constituted clear and unequivocal notice of an acceleration that became effective upon the expiration of the cure period. But the Second Department has rejected that view *(see e.g., Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 83 N.Y.S.3d 524 [2d Dept. 2018]; *21st Mtge. Corp. v. Adames,* 153 A.D.3d 474, 60 N.Y.S.3d 198 [2d Dept. 2017]), reasoning that comparable language did not accelerate the debt and was "merely an expression of future intent that fell short of an actual acceleration," which could "be changed in the interim" (*Milone,* 164 A.D.3d at 152, 83 N.Y.S.3d 524). This disagreement is at the heart of the parties' dispute in *Vargas.*

Vargas commenced this quiet title action against Deutsche Bank in July 2016, seeking to cancel a $308,000 mortgage on residential property in the Bronx, contending the statute of limitations for any claim to foreclose on the mortgage had expired. Deutsche Bank moved to dismiss and, in opposition, Vargas argued that an August 2008 default letter sent by the bank's predecessor-in-interest[8] had accelerated the debt and that the limitations period had expired before commencement of the quiet title action. Supreme Court initially rejected that contention, reasoning that the default letter was insufficient in itself to constitute an election to accelerate. However, on renewal, the court reversed course, denied Deutsche Bank's motion to dismiss and granted summary judgment to Vargas, declaring the mortgage unenforceable and the property free from any encumbrances. The Appellate Division affirmed, deeming the letter a valid acceleration pursuant to *Royal Blue Realty,* and we granted Deutsche Bank leave to appeal (34 N.Y.3d 910, 2020 WL 772997 [2020]).

***5** **[11]** It is undisputed that the August 2008 default letter was sent to Vargas—the only question is whether it effectuated a clear and unequivocal acceleration of the debt, an issue of law. The default letter informed Vargas that his loan was in "serious default" because he had not made his "required payments," but that he could cure the default by paying approximately $8,000 "on or before 32 days from the date of [the] letter." It further advised that, should he fail to cure his default, the noteholder "will accelerate [his] mortgage with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." The letter warned: "[f]ailure to cure your default may result in the foreclosure and sale of your property."

We reject Vargas's contention that the August 2008 letter accelerated the debt and we therefore reverse the Appellate Division order, deny plaintiff's motion for summary judgment and grant Deutsche Bank's motion to dismiss. First and foremost, the 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. Nor was this letter a pledge that acceleration would immediately or automatically occur upon expiration of the 32–day cure period. Indeed, an automatic acceleration upon expiration of the cure period could be

considered inconsistent with the terms of the parties' contract, which gave the noteholder an optional, discretionary right to accelerate upon a default and satisfaction of certain conditions enumerated in the agreement. Although the letter states that the debt "will [be] accelerate[d]" if Vargas failed to cure the default within the cure period, it subsequently makes clear that the failure to cure "may" result in the foreclosure of the property, indicating that it was far from certain that either the acceleration or foreclosure action would follow, let alone ensue immediately at the close of the 32–day period.

This case demonstrates why acceleration should not be deemed to occur absent an overt, unequivocal act. Noteholders should be free to accurately inform borrowers of their default, the steps required for a cure and the practical consequences if the borrower fails to act, without running the risk of being deemed to have taken the drastic step of accelerating the loan. Even in the event of a continuing default, default notices provide an opportunity for pre-acceleration negotiation—giving both parties the breathing room to discuss loan modification or otherwise devise a plan to help the borrower achieve payment currency, without diminishing the noteholder's time to commence an action to foreclose on the real property, which should be a last resort.

II.

In *Freedom Mortgage* and *Ditech,* the issue is not whether or when the debt was accelerated but whether a valid election to accelerate, effectuated by the commencement of a prior foreclosure action, was revoked upon the noteholder's voluntary discontinuance of that action. More than a century ago, in *Kilpatrick v. Germania Life Ins. Co.,* 183 N.Y. 163, 168, 75 N.E. 1124 (1905), this Court addressed whether a noteholder who had exercised its discretionary option to accelerate the maturity of a debt pursuant to the terms of a mortgage could revoke that acceleration. We held that the noteholder's acceleration "became final and irrevocable" only *after* the borrower changed his position in reliance on that election by executing a new mortgage, applying an equitable estoppel analysis (*id.*).

[12] Practically, the noteholder's act of revocation (also referred to as a de-acceleration) returns the parties to their pre-acceleration rights and obligations—reinstating the borrowers' right to repay any arrears and resume satisfaction of the loan over time via installments, *i.e.,* removing the obligation to immediately repay the total outstanding balance due on the loan, and provides borrowers a renewed opportunity to remain in their homes, despite a prior default. Thus, following a de-acceleration, a payment default could give rise to an action on the note to collect missed installments (an action with a six-year statute of limitations that runs on each installment from the date it was due). Or the noteholder might again accelerate the maturity of the then-outstanding debt, at which point a new foreclosure claim on that outstanding debt would accrue with a six-year limitations period. Determining whether, and when, a noteholder revoked an election to accelerate can be critical to determining whether a foreclosure action commenced more than six years after acceleration is time-barred. In opposition to motions to dismiss, *Freedom Mortgage* and *Ditech* asserted that their foreclosure actions were timely because they had revoked prior elections to accelerate by voluntarily withdrawing those actions. In response, the borrowers did not dispute the noteholders' right to revoke but contended a voluntary discontinuance does not revoke an acceleration.

***6** Although this Court has never addressed what constitutes a revocation in this context, the Appellate Division departments have consistently held that, absent a provision in the operative agreements setting forth precisely what a noteholder must do to revoke an election to accelerate, revocation can be accomplished by an "affirmative act" of the noteholder within six years of the election to accelerate (*NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 1069, 58 N.Y.S.3d 118 [2d Dept. 2017]; *Lavin,* 302 A.D.2d at 639, 754 N.Y.S.2d 741; *Federal Natl. Mtge. Assn. v. Rosenberg,* 180 A.D.3d 401, 402, 119 N.Y.S.3d 441 [1st Dept. 2020]). For example, an express statement in a forbearance agreement that the noteholder is revoking its prior acceleration and reinstating the borrower's right to pay in monthly installments has been deemed an "affirmative act" of de-acceleration (*see U.S. Bank Trust, N.A. v. Rudick,* 172 A.D.3d 1430, 1430–1431, 102 N.Y.S.3d 66 [1st Dept. 2019]). However, no clear rule has emerged with respect to the issue raised here—whether a noteholder's voluntary motion or stipulation to discontinue a mortgage foreclosure action, which does not expressly mention de-acceleration or a willingness to accept installment payments, constitutes a sufficiently "affirmative act." Prior to 2017, without guidance from the Appellate Division, multiple trial courts had concluded that a noteholder's voluntary withdrawal of its foreclosure action was an affirmative act of revocation as a matter of law (s*ee e.g., 4 Cosgrove 950 Corp. v. Deutsche Bank Natl. Trust Co.,* 2016 WL 2839341, *1–4, 2016 N.Y. Misc. LEXIS 44901, *2–5 [Sup. Ct., N.Y. County, May 10,

2016]; *see also U.S. Bank Trust, N.A. v. Adhami,* 2019 WL 486086, *5–6 and n. 7, 2019 U.S. Dist LEXIS 19599, *12–13 and n. 7 [E.D. N.Y., Feb. 6, 2019, No. 18–CV–530 (PKC) (AKT)] [collecting cases]).

In 2017, the Second Department first addressed this issue in *NMNT Realty,* 151 A.D.3d 1068, 58 N.Y.S.3d 118, denying a borrower's summary judgment motion to quiet title on the rationale that the noteholder's motion to discontinue a prior foreclosure action raised a "triable issue of fact" as to whether the prior acceleration had been revoked.[9] The First Department has, at times, articulated the same rule (*see Capital One, N.A. v. Saglimbeni,* 170 A.D.3d 508, 509, 96 N.Y.S.3d 48 [1st Dept. 2019]; *U.S. Bank N.A. v. Charles,* 173 A.D.3d 564, 565, 105 N.Y.S.3d 388 [1st Dept. 2019]). However, more recently, as reflected in the Second Department's decisions in *Freedom Mortgage* and *Ditech* (among other cases), a different rule has emerged—that a noteholder's motion or stipulation to withdraw a foreclosure action, "in itself," is *not* an affirmative act of revocation of the acceleration effectuated via the complaint (*see Freedom Mtge. Corp.,* 163 AD3 631, 633, 81 N.Y.S.3d 156 [2d Dept. 2018]; *Ditech,* 175 A.D.3d 1387, 1389, 109 N.Y.S.3d 196 [2d Dept. 2018]; *Wells Fargo Bank, N.A. v. Liburd,* 176 A.D.3d 464, 464–465, 107 N.Y.S.3d 858 [1st Dept. 2019]). Both approaches require courts to scrutinize the course of the parties' post-discontinuance conduct and correspondence, to the extent raised, to determine whether a noteholder meant to revoke the acceleration when it discontinued the action (*see e.g., Vargas,* 168 A.D.3d 630, 630, 93 N.Y.S.3d 32 [1st Dept. 2019]). For example, in *Christiana Trust v. Barua,* 184 A.D.3d 140, 149, 125 N.Y.S.3d 420 (2d Dept. 2020)—after determining that the voluntary discontinuance was of no effect under the more recent approach described above—the court faulted the bank for failing to come forward with evidence that, after the discontinuance, it demanded resumption of monthly payments, invoiced the borrower for such payments, or otherwise demonstrated "it was truly seeking to de-accelerate the debt". Thus, the court suggested that the revocation inquiry turns on an exploration into the bank's intent, accomplished through an exhaustive examination of post-discontinuance acts.

***7** This approach is both analytically unsound as a matter of contract law and unworkable from a practical standpoint. As is true with respect to the invocation of other contractual rights, either the noteholder's act constituted a valid revocation or it did not; what occurred thereafter may shed some light on the parties' perception of the event but it cannot retroactively alter the character or efficacy of the prior act. Indeed, where the contract requires a pre-acceleration default notice with an opportunity to cure, a post-discontinuance letter sent by the noteholder that references the then-outstanding total debt and seeks immediate repayment of the loan is not necessarily evidence that the prior voluntary discontinuance did not revoke acceleration—it is just as likely an indication that it did and the noteholder is again electing to accelerate due to the borrower's failure to cure a default. The impetus behind the requirements that an action be unequivocal and overt in order to constitute a valid acceleration and sufficiently affirmative to effectuate a revocation is that these events significantly impact the nature of the parties' respective performance obligations. A rule that requires post-hoc evaluation of events occurring after the voluntary discontinuance—correspondence between the parties, payment practices and the like—in order to determine whether a revocation previously occurred leaves the parties without concrete contemporaneous guidance as to their current contractual obligations, resulting in confusion that is likely to lead (perhaps inadvertently) to a breach, either because the borrower does not know that the obligation to make installment payments has resumed or the noteholder is unaware that it must accept a timely installment if tendered.

Indeed, if the effect of a voluntary discontinuance of a mortgage foreclosure action depended solely on the significance of noteholders' actions taking place months (if not years) later, parties might not have clarity with respect to their post-discontinuance contractual obligations until the issue was adjudicated in a subsequent foreclosure action (which is what occurred here); in both *Freedom Mortgage* and *Ditech,* the Appellate Division disagreed with Supreme Court's determinations that the prior accelerations had been revoked by the voluntary discontinuance. Not only is this approach harmful to the parties but it is incompatible with the policy underlying the statute of limitations because—under the post-hoc, case-by-case approach adopted by the Appellate Division—the timeliness of a foreclosure action "cannot be ascertained with any degree of certainty," an outcome which this Court has repeatedly disfavored (*ACE Sec. Corp.,* 25 N.Y.3d at 593–594, 15 N.Y.S.3d 716, 36 N.E.3d 623). Further, the Appellate Division's recent approach suggests that a noteholder can retroactively control the effect of a voluntary discontinuance through correspondence it sends to the borrower after the case is withdrawn (which injects an opportunity for gamesmanship). We decline to adopt such a rule.

[13] **[14]** **[15]** **[16]** Rather, we are persuaded that, where a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—*i.e.,* the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" of filing a foreclosure complaint, "destroy[s] the effect" of the election (*see Albertina,* 258 N.Y. at 476, 180 N.E. 176). We disagree with the Appellate Division's characterization of such a stipulation as "silent" with respect to revocation (*Freedom Mtge. Corp.,* 163 A.D.3d at 633, 81 N.Y.S.3d 156). A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder.

This approach comports with our precedent favoring consistent, straightforward application of the statute of limitations which serves the objectives of "finality, certainty and predictability," to the benefit of both borrowers and noteholders (*ACE Sec. Corp.,* 25 N.Y.3d at 593, 15 N.Y.S.3d 716, 36 N.E.3d 623; *see also Matter of Regina Metro. Co., LLC v. New York State Division of Hous. & Community Renewal,* 35 N.Y.3d 332, 372, 130 N.Y.S.3d 759, 154 N.E.3d 972 [2020] [noting New York's "strong public policy favoring finality, predictability, fairness and repose served by statutes of limitations"]; *Deutsche Bank Natl. Trust Co. v. Flagstar Capital Mkts. Corp.,* 32 N.Y.3d 139, 151, 88 N.Y.S.3d 96, 112 N.E.3d 1219 [2018]). The effect of a voluntary discontinuance should not turn on courts' after-the-fact analysis of the significance of subsequent conduct and correspondence between the parties, occurring months, if not years, after the action is withdrawn. Such an approach leads to inconsistent and unpredictable results and, critically, renders it impossible for parties to know whether, or when, a valid revocation has occurred, inviting costly and time-consuming litigation to determine timeliness.

***8** The impact of the noteholder's voluntary discontinuance of the action should be evident at the moment it occurs. A clear rule that a voluntary discontinuance evinces revocation of acceleration (absent a noteholder's contemporaneous statement to the contrary) makes it possible for attorneys to counsel their clients accordingly, allowing borrowers to take advantage of the opportunity afforded by the de-acceleration—reinstatement of the right to pay arrears and make installment payments, eliminating the obligation to immediately pay the entire outstanding principal amount in order to avoid losing their homes.[10] A return to the installment plan also makes it more likely that borrowers can benefit from the various public and private programs that exist to help borrowers work out of a default. Given the advantages of a clear default rule reinstating the pre-accelerated terms of the loan, the onus is on noteholders to inform the borrower at the time of the discontinuance if acceleration has not been revoked and it will not accept installment payments.

Freedom Mortgage & Ditech

[17] The appeals in *Freedom Mortgage* and *Ditech* are easily resolved by application of this rule. In both cases, the borrowers' motions to dismiss on statute of limitations grounds were predicated on the argument that an acceleration effectuated by a prior foreclosure action had never been revoked and the six-year limitations period expired prior to commencement of the instant action. In both cases, Supreme Court essentially applied the rule we adopt today—the acceleration was revoked by a voluntary discontinuance of the prior action—but the Appellate Division reversed in each case, dismissing the actions as time-barred. In *Freedom Mortgage,* the Appellate Division reasoned that the acceleration was not revoked because the stipulation was "silent" as to revocation. Applying the rule articulated above, Freedom Mortgage validly revoked the prior acceleration, evinced by the commencement of the July 2008 foreclosure action, when it voluntarily withdrew that action in January 2013.[11] Engel, the borrower, does not identify any contemporaneous statement by Freedom Mortgage (in the stipulation or otherwise) that it was not de-accelerating the debt or would not accept monthly installment payments. There is no need to analyze the parties' subsequent conduct and correspondence to determine the effect of the 2013 stipulation. Further, that the discontinuance was effectuated by a stipulation between the parties does not mean that the borrower and the noteholder were required to expressly agree on the effect of the discontinuance—whether to exercise the contractual right to accelerate, and de-accelerate, remained within the discretion of Freedom Mortgage. Because the July 2008 election had been revoked and the present action was

commenced within six years of any subsequent acceleration, the Appellate Division erred in granting Engel's motion to dismiss on statute of limitations grounds. Accordingly, Engel having directed no challenge to the noteholder's prima facie showing of his default, we reverse the Appellate Division order and reinstate the Supreme Court order granting relief to the bank.

***9** A reversal is also warranted in *Ditech,* where the Appellate Division reasoned that the voluntary withdrawal of the prior action "did not, in itself constitute an affirmative act" of revocation.[12] The February 2014 stipulation discontinuing the prior foreclosure action revoked the acceleration effectuated by the commencement of that action, and the record contains no contemporaneous statement by Ditech to the contrary. That Ditech sent Naidu, the borrower, a payoff letter in March 2015—more than a year later—communicating the amount in default does not alter that result. Naidu has not alleged that any other unrevoked acceleration occurred more than six years before the January 2016 commencement of this action that would render it untimely and raises no other arguments in defense of Ditech's summary judgment motion. We therefore reverse the Appellate Division order and reinstate the Supreme Court orders, which denied Naidu's motion to dismiss and granted Ditech summary judgment.

Wells Fargo

[18] Finally, we return to Wells Fargo to address an additional issue relating to de-acceleration that arose in a prior foreclosure action, the fourth action. Although Wells Fargo properly referenced the modified loan in that complaint, Ferrato moved to dismiss that action, alleging a lack of proper service. Supreme Court denied the motion but, on Ferrato's appeal, the Appellate Division determined a question of fact was raised and remitted for a traverse hearing. Wells Fargo then moved both to voluntarily discontinue that action and to revoke acceleration of the loan. Supreme Court granted the motion to discontinue but stated, without explanation, that "the acceleration of the subject loan is NOT revoked." On the bank's appeal of that portion of the order, the Appellate Division affirmed, indicating that Wells Fargo could not de-accelerate because it "admitted that its primary reason for revoking acceleration of the mortgage debt was to avoid the statute of limitations bar."[13]

***10** **[19]** **[20]** The lower courts erred in denying Wells Fargo's motion to revoke and we therefore reverse that portion of the Appellate Division order as well. As stated above, while a noteholder may be equitably estopped from revoking its election to accelerate (*see Kilpatrick,* 183 N.Y. at 168, 75 N.E. 1124), defendant Ferrato did not allege that she materially changed her position in detrimental reliance on the loan acceleration, and the courts conducted no equitable estoppel analysis. We reject the theory, argued by Ferrato and reflected in several decisions (*see e.g., Wells Fargo Bank, N.A. v. Portu,* 179 A.D.3d 1204, 1207, 116 N.Y.S.3d 761 [3d Dept. 2020]; *Christiana Trust,* 184 A.D.3d at 146, 125 N.Y.S.3d 420; *Milone,* 164 A.D.3d at 154, 83 N.Y.S.3d 524; *Deutsche Bank Natl. Trust Co. Ams. v. Bernal,* 56 Misc.3d 915, 924, 59 N.Y.S.3d 267 [Sup. Ct., Westchester County 2017]), that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant (*see generally Metropolitan Life Ins. Co. v. Noble Lowndes Intl., Inc.,* 84 N.Y.2d 430, 435, 618 N.Y.S.2d 882, 643 N.E.2d 504 [1994])—but it bears noting that a noteholder has little incentive to repeatedly accelerate and then revoke its election because foreclosure is simply a vehicle to collect a debt and postponement of the claim delays recovery.

Accordingly, in *Freedom Mortgage* and *Ditech,* the orders of the Appellate Division should be reversed, with costs, and the Supreme Court orders reinstated; in *Vargas,* the order of the Appellate Division should be reversed, with costs, defendant's motion to dismiss the complaint granted and plaintiff's cross motion for summary judgment denied; and in *Wells Fargo,* the order of the Appellate Division should be reversed, with costs, defendant Ferrato's motion to dismiss denied, plaintiff's motion to revoke acceleration of the mortgage loan granted and the certified question not answered as unnecessary.

WILSON, J. (concurring):

I fully concur in the majority opinion but write to make one caveat clear. We have not decided whether the notes and mortgages at issue here permit a lender to revoke an acceleration.[14] In three of the four cases before us, the issue was not in dispute: the borrowers did not contend that the noteholders lack the contractual right to revoke an acceleration. Ms. Ferrato stated that it is "well-established that a lender may revoke its election to accelerate the mortgage." Similarly, Mr. Naidu noted that the "[l]ender maintains the discretionary right to later revoke the acceleration." Neither

party in *Vargas* mentioned the issue. In contrast, Mr. Engel argued at length that the note and mortgage grant the noteholder the contractual right to accelerate the loan but lack any contractual authorization to revoke that election (absent consent of the borrower). However, Mr. Engel raised that issue for the first time on appeal. Thus, it was not properly preserved for our review (*see, e.g., Feigelson v. Allstate Ins. Co.,* 31 N.Y.2d 913, 916, 340 N.Y.S.2d 646, 292 N.E.2d 787 [1972]; Arthur Karger, Powers of the New York Court of Appeals § 17:1 [Sept.2020 Update]).

RIVERA, J. (dissenting in part):

For the reasons discussed by the majority, I agree that there was no effective acceleration in *Vargas v. Deutsche Bank National Trust Co.* and *Wells Fargo Bank, N.A. v. Ferrato.* I am also in agreement that it was error for the lower courts to deny *Wells Fargo* 's motion to revoke. Accordingly, I concur in the majority's resolution of *Vargas* and *Wells Fargo.*

The question of whether the noteholders effectively revoked acceleration in *Freedom Mortgage Corp. v. Engel* and *Ditech Financial LLC v. Naidu* —an issue of material significance in both appeals—is another matter.

As Judge Wilson notes, only the borrower in *Freedom Mortgage* has challenged the revocation on the ground that the noteholder does not have a contractual right to unilaterally revoke an acceleration (concurring op at 2). I agree with my colleague that because the borrower raises this challenge for the first time on appeal, it is unpreserved for our review (*see Bingham v. New York City Tr. Auth.,* 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 786 N.E.2d 28 [2003]).

***11** Depending on whether and when we resolve that question, the rule adopted by the majority in these appeals may stand without further consideration, or be affirmed, modified, or discarded in the future. Nevertheless, if we are going to impose a "deceleration" rule based on the noteholder's voluntary withdrawal of a foreclosure action (majority op at ——), I would require that the noteholder provide express notice to the borrower regarding the effect of that withdrawal. I see no reason why an acceleration requires an unequivocal overt act—one that leaves no doubt as to the noteholder's intent—but revocation may be assumed by implication, requiring only that the noteholder affirmatively disavow an intention to revoke (*id.*). As the Second Department has recognized, there are many reasons for a noteholder to voluntarily withdraw an action (*see Christiana Trust v. Barua,* 184 A.D.3d 140, 147, 125 N.Y.S.3d 420 [2d Dept. 2020], *lv denied* 35 N.Y.3d 916, 2020 WL 6142798 [2020]). Application of the rule requiring notice is simple and not at all burdensome. The noteholder need only inform the borrower in the stipulation or a letter that withdrawal constitutes a revocation of the acceleration. Such notice ensures transparency in a high-stakes relationship.

Because appellants provided no evidence of notice, I would affirm the Appellate Division in *Freedom Mortgage* and *Ditech.*

Judges Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Wilson in a concurring opinion. Judge Rivera dissents and votes to affirm in an opinion.

Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Rivera in a concurring opinion and Judge Wilson in a separate concurring opinion.

Order reversed, with costs, and order of Supreme Court, Orange County, reinstated.

Order reversed, with costs, and orders of Supreme Court, Queens County, reinstated.

Order reversed, with costs, defendant's motion to dismiss the complaint granted and plaintiff's cross motion for summary judgment denied.

Order reversed, with costs, defendant Ferrato's motion to dismiss denied, plaintiff's motion to revoke acceleration of the mortgage loan granted and certified question not answered as unnecessary.

All Citations

--- N.E.3d ----, 2021 WL 623869, 2021 N.Y. Slip Op. 01090

Footnotes

1 The agreements at issue in three of the cases before us are uniform instruments issued by Fannie Mae for use in New York (mortgage [Form 3033]; note [Form 3233; 3518]). The note and mortgage executed in *Wells Fargo* do not appear to be Fannie Mae or Freddie Mac standardized instruments.

2 In addition, the Fannie Mae Form 3033 mortgage provides that the option to accelerate may be exercised only upon satisfaction of certain conditions, including notice and an opportunity for the borrower to correct the default.

3 Prior to acceleration, upon a default on the obligation to timely make an installment payment, a cause of action accrues to recover that installment payment, triggering the six-year statute of limitations for an action to recover that payment (*see Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.,* 18 N.Y.3d 765, 770, 944 N.Y.S.2d 742, 967 N.E.2d 1187 [2012]; *e.g., Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 [2d Dept. 1997]; *Pagano v. Smith,* 201 A.D.2d 632, 633–634, 608 N.Y.S.2d 268 [2d Dept. 1994]) but a default alone does not trigger the statute of limitations relating to a foreclosure action (*see Phoenix Acquisition Corp.,* 81 N.Y.2d at 143, 596 N.Y.S.2d 752, 612 N.E.2d 1219).

4 As these cases reflect, for many reasons, including the extraordinary length of the contractual relationship—frequently spanning decades—multiple foreclosure actions involving the same borrower are not unusual. This type of contractual relationship is not static. Not only might a borrower's circumstances and payment practices vary over the course of three decades (a default may lead to a foreclosure action that is ultimately resolved through payment of arrears), but the party entitled to enforce the note is similarly variable because notes secured by residential mortgages are typically negotiable instruments, meant to be transferred and assigned. Moreover, the legislature has imposed exacting standards for bringing a foreclosure claim—*e.g.,* prescribing the precise method of providing pre-suit notice to the borrower (*see* RPAPL 1304) and detailing what must be included in a foreclosure complaint (*see e.g.,* CPLR 3012–b)—and an action may be dismissed for failure to adhere to those requirements.

5 The bank's appeal from another portion of the Appellate Division order relating to the fourth action between the parties is addressed in section II.

6 Notably, in the third foreclosure action, not only was the complaint plagued by the same defects as the second action, but Wells Fargo also asserted in response to the motion to dismiss that it was proceeding on the original, unmodified loan. The court dismissed the action, reasoning that Wells Fargo had commenced the action on the wrong debt.

7 Under section 1501 of the Real Property Actions and Proceedings Law (RPAPL), a person with an interest in the property may commence 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" "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired" (RPAPL 1501[4]).

8 No argument is made here that the predecessor-in-interest lacked the authority to accelerate the maturity of the debt and we therefore do not address that question.

9 In these four cases, the relevant facts—*e.g.,* whether or not a voluntary discontinuance occurred or whether a default letter was sent—are not disputed and thus, whether acceleration was or was not revoked does not present a question of fact in the context of these appeals. Instead, the parties dispute the legal significance of events they acknowledge occurred—whether the voluntary discontinuance constituted a revocation of an acceleration that was accomplished by commencement of a prior action—a question that we determine as a matter of law. To be sure, there may be cases in which the question of whether an acceleration was validly revoked involves an "issue of fact," such as where the operative facts surrounding a purported acceleration or revocation are disputed, and the court may be unable to decide whether the statute of limitations had run as a matter of law. But that is not the situation in these appeals. Likewise, different notes and mortgage instruments may incorporate their own rules for acceleration or revocation thereof.

10 Moreover, this clarity also benefits those seeking to purchase notes secured by residential mortgages—negotiable instruments that are intended to be bought and sold, often changing hands repeatedly during their duration. Unlike the current Second Department approach, a clear rule on the effect of a voluntary discontinuance provides potential noteholders the opportunity to assess, based on clear, objective indicia and without the aid of an appellate court, the nature and status of the instrument they look to buy (*e.g.,* whether the note is accelerated) and value it accordingly.

11 In *Freedom Mortgage,* after sending Engel, the borrower, an August 2013 letter notifying him of its election to accelerate the debt secured by a mortgage on his property, the bank commenced the instant foreclosure action in February 2015. Engel answered and moved to dismiss the complaint as time-barred, asserting that the debt was accelerated in July 2008 upon the filing of a prior foreclosure action and, as such, the six-year limitations period expired several months before the instant action was commenced. Freedom opposed Engel's motion to dismiss and cross-moved for summary judgment, arguing as relevant here that its voluntary discontinuance of the prior claim revoked that acceleration and the statute of limitations for this action was not triggered until its August 2013 acceleration letter. Supreme Court granted Freedom's cross motion for summary judgment, struck Engel's statute of limitations affirmative defense and implicitly denied his

motion. On Engel's appeal, the Appellate Division reversed and determined the action was time-barred, reasoning that the acceleration was not revoked when the prior action was discontinued because the stipulation was "silent" as to revocation. We granted Freedom Mortgage leave to appeal (33 N.Y.3d 1039, 103 N.Y.S.3d 12, 126 N.E.3d 1052 [2019]).

12 Ditech commenced this foreclosure action against Naidu in January 2016 by filing a verified complaint stating that it was accelerating the mortgage and declaring the entire outstanding loan immediately due and payable, including recovery of unpaid installment payments. Naidu answered, raising the statute of limitations as an affirmative defense, and subsequently moved to dismiss the action as time-barred, arguing that a prior foreclosure action commenced in 2009 had accelerated the debt and was not revoked when that action was voluntarily discontinued by the noteholder. Ditech opposed the motion to dismiss and cross-moved for summary judgment on the complaint as against Naidu. In two orders, Supreme Court denied Naidu's motion to dismiss, concluding that the stipulation discontinuing the prior action without prejudice was an "affirmative act of revocation" and thus, the statute of limitations had not run, and granted Ditech's motion for summary judgment, determining that it had established its prima facie entitlement to judgment of foreclosure and Naidu failed to raise a question of fact in response. On Naidu's appeal, the Appellate Division reversed the orders insofar as appealed from, granted Naidu's motion to dismiss the complaint insofar as asserted against him as time-barred, and denied as academic plaintiff's cross-motion for summary judgment insofar as asserted against Naidu. The Court held that Ditech failed to demonstrate that the acceleration of the debt, effectuated by the filing of the July 2009 foreclosure action, was revoked within six years, reasoning that the February 2014 discontinuance of the action "did not, in itself" constitute an affirmative act of de-acceleration. Thus, the Court concluded, the action before it—commenced in January 2016—was untimely. We granted the bank leave to appeal (34 N.Y.3d 910, 2020 WL 772997 [2020]).

13 As indicated above, the Appellate Division addressed both the fourth and fifth foreclosure actions in one order and subsequently granted Wells Fargo's motion for leave to appeal to this Court.

14 Three of those are the standard Fannie Mae forms for notes and mortgages (majority op. at —— n.1).

New York Official Reports

34 A.D.3d 438, 826 N.Y.S.2d 74, 2006 N.Y. Slip Op. 08103

**1 Ramesh Sarva et al., Respondents

v

Amitava Chakravorty et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
1577/98, 2006-01769
November 8, 2006

CITE TITLE AS: Sarva v Chakravorty

HEADNOTE

Mortgages
Acceleration Clause

Action to recover on mortgage note was timely commenced within six years after note matured, and judgment in favor of plaintiffs was affirmed—record failed to establish acceleration of mortgage debt by plaintiffs; while plaintiff claimed he sent letter to defendant in June 1988 expressing his desire "to get paid in full," no such letter was admitted into evidence, and defendant insisted that he never received communication *439 accelerating debt; moreover, defendants continued to make, and plaintiffs continued to accept, periodic installment payments on note for years after June 1988, thereby negating contention that debt had been accelerated.

In an action to recover on a mortgage note, the defendants appeal from a judgment of the Supreme Court, Queens County (Weiss, J.), entered January 11, 2006, which, after a nonjury trial, is in favor of the plaintiffs and against them in the principal sum of $196,950.

Ordered that the judgment is affirmed, with costs.

Contrary to the defendants' contention, the record fails to establish a clear and unequivocal acceleration of the mortgage debt by the plaintiffs in this case. While the plaintiff mortgagee Ramesh Sarva testified regarding his belief that he sent a letter to the defendant mortgagor Kamal Chakraverty in June 1988 expressing his desire "to get paid in full," no such letter was admitted into evidence at trial, and Chakraverty adamantly insisted that he never received the letter or any other communication accelerating the debt. Moreover, it is undisputed that the defendants continued to make, and the plaintiffs continued to accept, periodic installment payments on the note for years after June 1988, thereby negating the contention that the debt had been accelerated. Accordingly, this action to recover on the note was timely commenced within six years after the note matured, and the trial court properly denied the defendants' application to dismiss the action as time-barred (*see* CPLR 213 [4]).

The defendants' remaining contention is improperly raised for the first time on appeal (*see Sandoval v Juodzevich*, 293 AD2d 595 [2002]), and we decline to reach it since the plaintiffs did not have an opportunity to present opposing evidence with regard to the effect of the partial payments **2 made by the defendants (*see Orellano v Samples Tire Equip. & Supply Corp.*, 110 AD2d 757 [1985]; *see generally Education Resources Inst., Inc. v Piazza*, 17 AD3d 513 [2005]; *Costantini v Bimco Indus.*, 125 AD2d 531 [1986]; *Bernstein v Kaplan*, 67 AD2d 897 [1979]). Schmidt, J.P., Adams, Dillon and Covello, JJ., concur.

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New York Official Reports

258 N.Y. 472, 180 N.E. 176

ALBERTINA REALTY COMPANY, Respondent,
v.
ROSBRO REALTY CORPORATION, Appellant, Impleaded with Others.

Court of Appeals of New York.
Argued February 15, 1932.

Decided March 3, 1932.

CITE TITLE AS: Albertina Realty Co. v Rosbro Realty Corp.

***472 Real property**

Mortgage -- Foreclosure -- Acceleration -- Election -- Statutory construction of acceleration clause in form of mortgage set forth in Real Property Law, binding on parties that adopt it -- Action to foreclose mortgage on real property -- Default in payment of installment of principal -- Sufficiency of election by mortgagee that whole of principal should be due and payable -- Tender of amount of installment before service of summons insufficient to destroy sworn statement in complaint that plaintiff had elected

1. The effect of the acceleration clause set forth in the statutory form of mortgage as provided by Schedule M of section 258 of the Real Property Law (Cons. Laws, ch. 50), as construed by subdivision 2 of section 254 of the statute, as amended by chapter 682 of the Laws of 1917, is to make the default in the payment of the installment of principal on the due date a ground for accelerating the due date of the entire principal of the mortgage, at the election of the holder thereof, without regard to the days of grace allowed in case of default in the payment of interest. Parties to a mortgage in the statutory form executed after the enactment of the statute are bound by the statutory construction given that form.

2. In an action to foreclose a mortgage upon real property containing an acceleration clause in the form provided by the statute, a finding of fact that the plaintiff had elected that the whole of the principal should immediately become due and payable, is justified by evidence that three days after default in payment of an installment of the principal due, the plaintiff caused to be filed in the office of the clerk of the county wherein the mortgaged property was located, the summons, verified complaint and notice of *lis pendens* in the action. Such an unequivocal overt act constituted a valid election, and the fact that, before the summons could be served, the defendant made a tender of the amount of the installment, did not destroy the effect of the sworn statement in the complaint that the plaintiff had elected. A contention that as the action had not then been commenced by the service of the summons, there had been no election at the time of the tender, cannot be sustained.

Albertina Realty Co. v. Rosbro Realty Corp., 233 App. Div. 737, affirmed.

***473** APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1931, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property.

Joseph Kahn, D. Freiberger and *J. Freiberger* for appellant. As the summons and complaint were served subsequent to a tender made by defendant of the installment due and no other election to declare the entire principal due was made prior to the service of the summons, the action was premature and should have been dismissed. (*Trowbridge v. Malex Realty Corp.*, 111 Misc. Rep. 211; 198 App. Div. 656; *Cohen v. Beiber*, 123 App. Div. 528; *Haynes v. Onderdonk*, 2 Hun, 619; *Nosrep Corp. v. Clinton Securities Corp.*, 193 App. Div. 878; *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163.) If the statutory construction of the acceleration clause contained in subdivision 2 of section 254 of the Real Property Law is to be taken as an absolute legislative fiat in disregard of the intent of the parties using the language it is to be deemed unconstitutional as an impairment of the obligation of contracts or a denial of the freedom to enter into lawful contracts. (*Besas v. Slobodoff*, 129 Misc. Rep. 205; *Matter of Thurber*, 162 N. Y. 244; *Carpenter v. Newland*, 92 Misc. Rep. 596; *People v. Fox*, 144 App. Div. 611; *Newell v. People*, 7 N. Y. 9.)

Samuel W. Dorfman and *Jacob R. Schiff* for respondent. The record shows an election by plaintiff to declare the entire balance of principal due prior to the tender made by defendant. (*Hothorn v. Louis*, 52 App. Div. 218; 170 N. Y.

576; *Beach v. Shanley*, 35 App. Div. 566; *Cresco Realty Co. v. Clark*, 128 App. Div. 144; *Pizer v. Herzig*, 120 App. Div. 102.) The plain language of subdivision 2 of section 254 of the Real Property Law, construing the very clause contained in the mortgage ***474** being foreclosed, cannot be disregarded. (*Besas v. Slobodoff*, 129 Misc. Rep. 205; *Kelmenson v. Boulevard Construction Corp.*, 232 App. Div. 847; *Hothorn v. Louis*, 52 App. Div. 218.)

HUBBS, J.

Plaintiff is the holder of a real property mortgage upon which there became due one hundred sixty-six and 66/100 dollars ($166.66) of principal on July 15th, 1930, which was not paid. On July 18th the plaintiff caused to be filed in the office of the County Clerk a summons and verified complaint and a *lis pendens* in an action to foreclose the mortgage. The complaint alleged the default in payment of the installment of principal and stated that the plaintiff elected that the entire balance of principal remaining unpaid should immediately become due and payable. Three days later, on July 21st, the appellant, then owner of the premises in question, tendered to the plaintiff the amount of the installment of principal which became due on July 15th. The plaintiff declined to accept the tender upon the ground that it had elected to declare due the whole amount unpaid on the mortgage, had turned the matter over to its attorney and the summons and verified complaint and *lis pendens* had been filed in the County Clerk's office. The mortgage contains an acceleration clause which reads: 'That the whole of said principal sum shall become due after default in the payment of any installment of the principal or of interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days after notice and demand.'

At the trial two questions of importance were raised. *First*, at the time of the tender had the whole amount of the principal become due because the plaintiff had so elected, and *second*, did the mortgage give plaintiff the right to so elect, before the expiration of thirty days from the due date?

***475** It is conceded by appellant that if the action had been commenced by the service of the summons upon one or more defendants before the tender, the tender would have been too late, as the notice of plaintiff's election would have been sufficiently evidenced by the commencement of the action.

It is urged, however, that, as the action had not been commenced by the service of a summons (Civ. Pr. Act, § 218), there had been no election at the time of the tender and the only amount then due was the amount tendered which tender precluded the plaintiff from thereafter maintaining the action to recover the full amount unpaid. We think the construction urged by appellant is too narrow.

The acceleration clause does not constitute a forfeiture or a penalty. It is a fair and legal contract which the parties to the mortgage had a right to enter into. (*Noyes v. Anderson*, 124 N. Y. 175, 180; *Graf v. Hope Building Corp.*, 254 N. Y. 1.) There is no claim that the contract was made as a result of fraud or mistake.

It is true that on July 15th, and until the plaintiff exercised his right to have the whole amount become due, there remained due only the installment of one hundred sixty-six and 66/100 dollars ($166.66) of principal, and if the tender was made before the right of election was exercised, it could not be thereafter availed of by plaintiff. (*Cresco Realty Co. v. Clark*, 128 App. Div. 144.) (See, also, *Brown v. Kennedy*, 309 Mo. 335; 41 A. L. R. 729, 732 and note.) No demand was necessary to enable plaintiff to elect to exercise his right to insist that the whole amount was due. (*Hothorn v. Louis*, 52 App. Div. 218; affd., 170 N. Y. 576; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221; *New York Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 88 Hun, 569; affd., 157 N. Y. 689.)

The agreement does not provide what the holder of the mortgage must do to evidence its election to declare the whole amount due. Such a provision could have ***476** been embodied in the contract if the parties had so desired.

The trial court found as a fact that the plaintiff had elected that the whole of the principal should immediately become due and payable. Such finding was justified by the evidence. It is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause. We are satisfied, however, that the unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constituted a valid election. It disclosed the choice of the plaintiff and constituted notice to all third parties of such choice. To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election. The complaint recited that the plaintiff had elected. The mere fact that before the summons could be served, the defendant made a tender, did not as a matter of law destroy the effect of the sworn statement that plaintiff had elected. (*Hothorn v. Louis, supra; Pizer v. Herzig*, 120 App. Div. 102; 2 Jones on Mortgages [7th ed.], § 1182.)

The acceleration clause used in the mortgage is the statutory clause provided by Schedule M of section 258 of the Real Property Law (Cons. Laws, ch. 50). That section 'does not prevent or invalidate the use of other forms.'

The parties to the mortgage in question were not limited to the use of the form of acceleration clause contained in the

mortgage in question. They might have provided that the whole of the principal sum should become due after any default in the payment of *principal* or interest for thirty days, thereby providing that the days of grace should apply to a default in the payment of an installment of the *principal* as well as of the interest.

Having chosen the statutory form, they are bound by the statutory construction given that form, as the mortgage was executed after the enactment of the statute. ***477** Section 254, subdivision 2, as amended by Laws of 1917, chapter 682, provides that such acceleration clause 'must be construed as meaning that should any default be made in the payment of any installment of principal or any part thereof, or in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, or should any tax, water rate or assessment, which now is or may be hereafter imposed upon the premises hereinafter described, become due or payable, and should the said interest remain unpaid and in arrear for the space of _____ days, or such tax, water rate or assessment remain unpaid and in arrear for _____ days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding.'

The effect of such construction is to make the default in the payment of the installment of *principal* on the due date, a ground for accelerating the due date of the entire principal of the mortgage at the election of the holder thereof without regard to the days of grace allowed in case of default in the payment of interest. The distinction between the effect of a default in the payment of an installment of principal and a failure to pay interest on a due date is of vital importance. The distinction has been called to the attention of the profession in the cases where the question has been raised, but has never before been passed upon by this court. (*More Realty Corp. v.* ***478** *Mootchnick*, 232 App. Div. 705; *Kelmenson v. Boulevard Construction Corp.*, 232 App. Div. 847.)

We have considered the other questions raised by appellant and are satisfied with the disposition made of them in the Supreme Court.

The judgment should be affirmed with costs.

CARDOZO, Ch. J., POUND, CRANE, KELLOGG and O'BRIEN, JJ., concur; LEHMAN, J., not sitting.

Judgment affirmed.

New York Official Reports

78 A.D.2d 648, 432 N.Y.S.2d 238

Ruth Golden, Respondent,
v.
Ramapo Improvement Corp., Appellant, et al., Defendant

Supreme Court, Appellate Division, Second Department, New York
265 E, 266 E
October 14, 1980

CITE TITLE AS: Golden v Ramapo Improvement Corp.

HEADNOTES

PLEADING
SPLITTING CAUSE OF ACTION

(1) Mortgage foreclosure --- Both contentions by defendant that plaintiff split her cause of action, to its prejudice, and that allegedly defective description was improperly cured without formally amending complaint so that it could respond in amended answer are without merit --- Rule against splitting cause of action precludes plaintiff from recovering in later action any part of debt that could have been recovered in earlier action; however, debt must have been due at time of earlier action for this rule to operate --- Thus any direct attack on continuing validity of mortgage note depends on whether plaintiff's initial election to accelerate was properly revoked; general rule is that waiver of right to accelerate mortgage debt is discretionary with mortgagee; this discretion distinguishes option to accelerate from provision in mortgage for automatic acceleration upon default in installment --- By its admission of default, defendant does not contest plaintiff's right to accelerate; rather defendant's argument implies that plaintiff either did not or could not revoke her election to accelerate --- In either case defendant's position is not supported by undisputed facts.

MORTGAGES
FORECLOSURE

(2) Partial foreclosure --- Having determined that plaintiff did not split her cause of action to recover on debt, next question is whether partial foreclosure in case does not preclude second foreclosure on ground that plaintiff's remedy as against security was exhausted by foreclosure and sale --- Foreclosure and sale to recover only interest neither implicates rule against splitting causes of action (interest and principal being two causes of action in debt), nor policy against vexatious use of foreclosure.

MORTGAGES
DESCRIPTION OF MORTGAGED PROPERTY

(3) As to defendant's argument regarding description of mortgaged property in complaint, any minor ambiguity in original description, when measured solely by reference to one map filed for original development of premises, was resolved by additional use in other parts of description of later map, which clearly showed released parcels to be but small part of mortgaged premises ---Moreover, as dispute related solely to adequacy of description in terms of pleading requirements, defendant's argument must be rejected under liberal pleading policy of CPLR 3013, particularly in view of defendant's obvious familiarity with boundaries of premises and released parcels, as indicated by fact that it had earlier drafted legal description of parcels in securing their release from mortgage.

MORTGAGES
ACCELERATION CLAUSE

(4) Revocation of election to accelerate --- Plaintiff's purpose in moving for severance and partial summary judgment and in submitting judgment containing provision for continuing mortgage was clearly to limit her recovery to those sums already past due under payment schedules of mortgage note; that she was under no restraint in changing her mind is clear: only if mortgagor can show substantial prejudice will court in exercise of its equity jurisdiction restrain mortgagee from revoking its election to accelerate --- Having failed to suggest, let alone demonstrate, any prejudice resulting from plaintiff's revocation of her election to accelerate, defendant cannot

invoke court's equitable powers to restrict plaintiff's desired remedy.

In a mortgage foreclosure action, defendant Ramapo Improvement Corp. appeals from (1) an order of the Supreme Court, Rockland County (Burchell, J.), entered September 29, 1978, which, *inter alia*, granted plaintiff's motion for severance and partial summary judgment on past due interest and taxes and denied its cross motion for summary judgment, and (2) a judgment of the same court (Walsh, J.), entered May 25, 1979, which, *inter alia*, ordered partial foreclosure and sale of the real property in question subject to a continuing lien of the mortgage in the amount of the unpaid principal.

Appeal from the order dismissed (see *Matter of Aho*, 39 NY2d 241, 248). Judgment affirmed. Plaintiff is awarded one bill of $50 costs and disbursements to cover both appeals.

In May, 1972 plaintiff Ruth Golden accepted a purchase-money mortgage and mortgage note from defendant Ramapo Improvement Corporation (hereinafter defendant) in the amount of $240,000, representing the balance due for the sale of an approximately 40-acre parcel of land simultaneously conveyed by plaintiff to defendant. The mortgage specified that any payments made under its provisions for releasing parcels from the mortgage would be credited against amortization payments as they fell due under a schedule calling for installments of $10,600 every August 31, starting in 1974, with the balance due on August 31, 1979. The mortgage also granted plaintiff an option to accelerate the payment of the entire principal upon a default in payments of principal, interest or taxes. In her complaint plaintiff alleged (without denial by defendant) a default in payments of quarterly interest installments for 1976 and 1977, taxes for the periods 1975-1976 and 1976-1977, and principal installments for 1976 and 1977. She elected to accelerate the remainder due under the mortgage. The record shows, however, that payments for releases granted by plaintiff had amounted to $86,185 as of the date the first installment of principal fell due, and amounted to $95,125 by the end of January, 1976; the remainder was $144,875. In applying these release payments against the amounts due under the amortization schedule, it appears that defendant was not, in fact, in arrears at any time as to the principal. Possibly for this reason, by notice of motion dated April 27, 1978, plaintiff moved for a severance and for partial summary judgment on so much of her claim as sought foreclosure and sale for all payments due as of October 20, 1976, when defendant had been formally notified of its default pursuant to the terms of the mortgage. Initially stating that the debt then due included interest and taxes, "as well as the total principal of the mortgage which has become due by reason of the election by plaintiff to declare the entire principal due", her motion sought judgment without necessity for a reference to compute, and clarified her intentions by stating that she has "not sought judgment of foreclosure by reason of the admitted failure to make additional interest, principal and tax payments and reserves ***649** her rights with regard thereto". Defendant opposed the motion on the ground that the plaintiff was attempting to foreclose on only part of the mortgage and that this constituted an impermissible splitting of her cause of action. In addition, defendant cross-moved for summary judgment on the ground that the complaint's description of the property in question was defective. Specifically, the description had excepted property released from the mortgage, and one of the released parcels had merely been described by reference to a map entitled "Golden Estates Section I" filed in the county clerk's office. The difficulty lay in the fact that the "Section I" reference was contained only in the legend in one corner of the map of the plat, and there was no specific indication that it referred only to a subdivision drawn in the map's center rather than to both the subdivision and the surrounding area labeled "other lands of Ramapo Improvement Corp." Therefore, argued defendant, since the premises' description was drafted in terms of a companion map utilizing the identical boundaries, entitled "Golden Estates Section II", the whole of the mortgaged premises as described was coterminous with the released parcel (Section I) and therefore excepting Section I from the whole left no property on which to foreclose. In reply, plaintiff pointed out that the Section II map was a companion map which, both by sequence in the map book and by display of additional subdivisions, clearly showed that Section I was but an earlier subdivision of the entire premises and that it was labeled as such (i.e., "Section I") on the later map. Plaintiff offered an amendment to specify the released parcels by lot number. Special Term (Burchell, J.) granted plaintiff's motion and denied defendant's cross motion, finding the defendant's contention regarding the description's ambiguity to be without merit, and appointed a Referee "to ascertain and compute the amount due (and the amount hereafter to become due), with interest to the date of his report" and to determine if the premises could be more fairly sold in parcels rather than as a whole. The Referee recommended the sale of the mortgaged premises as one parcel. Plaintiff next moved to confirm the Referee's report and for judgment that, as drafted by plaintiff, included the amended description of the premises and a specification

that the sale be subject to the mortgage on which the unpaid balance was $144,875. Special Term (Walsh, J.) granted the motion and denied defendant's cross motion to vacate the Referee's report on the ground that the amendment of the description was an improper amendment of the complaint. On appeal defendant argues that plaintiff split her cause of action, to its prejudice, and that the allegedly defective description was improperly cured without formally amending the complaint so that it could respond in an amended answer. Both contentions are without merit. Defendant's first argument appears to be premised on injury arising from the sale of the property subject to the mortgage, which would terminate the defendant's equity of redemption and therefore defendant's control over the primary security for the mortgage note on which it yet remains liable -- the premises. Presumably defendant would have preferred a foreclosure of the entire debt rather than this partial foreclosure because in the former situation its maximum exposure on the note would be limited to what might have been a small deficiency judgment, if any, upon sale of the premises unencumbered by the mortgage. Alternatively, defendant's unspecific argument may be a more direct (though premature) attack on the validity of continuing liability based on the purportedly still extant mortgage for $144,875. The rule against splitting a cause of action precludes plaintiff from recovering in a later action any part of a debt that could have been recovered in an earlier action; however, the debt must have been due at the time of the earlier ***650** action for this rule to operate (see *O'Dougherty v Remington Paper Co.*, 81 NY 496, 498-500; *Holden v Sackett*, 12 Abb Prac 473, 475). Thus any direct attack on the continuing validity of the mortgage note depends on whether plaintiff's initial election to accelerate was properly revoked, as Special Term impliedly determined in granting a judgment of foreclosure and sale with the continuing lien. The general rule is that waiver of the right to accelerate the mortgage debt is discretionary with the mortgagee *(Adler v Berkowitz*, 254 NY 433, 437; *Odell v Hoyt*, 73 NY 343). It is this discretion that distinguishes an option to accelerate from a provision in the mortgage for automatic acceleration upon default in an installment (see *Batchelder v Council Grove Water Co.*, 27 Jones & Sp 262, affd 131 NY 42; *Leakey v Schwing*, 150 Misc 150). By its admission of default, defendant does not contest plaintiff's right to accelerate (see, e.g., *Domus Realty Corp. v 3440 Realty Co.*, 179 Misc 749, affd 266 App Div 725); rather, defendant's argument implies that plaintiff either did not or could not revoke her election to accelerate. In either case defendant's position is not supported by the undisputed facts. Plaintiff's purpose in moving for severance and partial summary judgment and in submitting a judgment containing the provision for continuing the mortgage was clearly to limit her recovery to those sums already past due under the payment schedules of the mortgage note. That she was under no restraint in changing her mind is likewise clear: only if a mortgagor can show substantial prejudice will a court in the exercise of its equity jurisdiction restrain the mortgagee from revoking its election to accelerate (see *Kilpatrick v Germania Life Ins. Co.*, 183 NY 163; *Ost v Mindlin*, 170 App Div 558, affd 224 NY 668; *Federal Land Bank of springfield, Mass. v Shoemaker*, 147 Misc 308; cf. *Cohn v Spitzer*, 145 App Div 104, affd 207 NY 738; *Prudence Co. v Sussman*, 143 Misc 686). Having failed to suggest, let alone demonstrate, any prejudice resulting from plaintiff's revocation of her election to accelerate, defendant cannot invoke the court's equitable powers to restrict plaintiff's desired remedy. Having determined that plaintiff did not split her cause of action to recover on the debt, the next question is whether the partial foreclosure in the instant case precludes a second foreclosure on the ground that plaintiff's remedy as against the security was exhausted by the foreclosure and sale. Partial foreclosure is not universally accepted (see 59 CJS Mortgages, § 521; 3 Powell, Law of Real Property, par 463), but it appears to have had a long history of acceptance in this jurisdiction. Foreclosure and sale to recover only interest neither implicates the rule against splitting causes of action (interest and principal being two causes of action in debt, see *Union Trust Co. of Rochester v Kaplan*, 249 App Div 280; *Gregory v Jacobs*, 56 NYS2d 574, affd 269 App Div 921), nor the policy against vexatious use of foreclosure (see *Womens Hosp. in State of N. Y. v Sixty-Seventh St. Realty Co.*, 265 NY 226, 235; 95 ALR 1031, 1043). Decisions in the last century allowed foreclosure limited to interest then due, although there is no direct indication that this was partial foreclosure, i.e., that the mortgage survived as security for the outstanding principal (see *Malcolm v Allen*, 49 NY 448,453-454; *Brinckerhoff v Thallhimer*, 2 Johns Ch 486; *Bank of Ogdensburgh v Arnold*, 5 Paige Ch 38; *Burt v Saxton*, 1 Hun 551, 554; *House v Eisenlord*, 30 Hun 90, affd 102 NY 713; *Asendorf v Meyer*, 8 Daly 278, 280; *Schieck v Donohue*, 92 App Div 330, 336; *Matter of City of New York [E. 29th St.]*, 247 App Div 648, 653, revd on other grounds, 273 NY 62). A judgment of foreclosure and sale with a continuing lien of the original mortgage has been held to be a mere procedural irregularity, though adversely affecting marketability of title *(Stuyvesant v Weil*, 41 App Div 551, affd 167 NY 421; see *Bank of Amer. v* ***651** *Tierney Sons*, 252 NY 584; *Pretzfeld v Lawrence*, 34 Misc 329). Unabashed acceptance of the notion that a mortgagee could have multiple foreclosures of his mortgage does not appear in

the lawbooks until after the Legislature amended section 1086 of the former Civil Practice Act (L 1927, ch 683, § 1) to add an explicit provision now contained in subdivision 2 of section 1351 of the Real Property Actions and Proceedings Law: "Where the mortgage debt is not all due, and ... it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the final judgment ... may, at the option of the mortgagee, direct that the whole property be sold to satisfy the debt then due with the costs of the action and expenses of the sale, subject to the continuing lien of the mortgage for the amount of the debt not then due and unpaid according to its terms." The first reported judicial reaction to the Legislature's *imprimatur* for this concept of mortgage severability was to castigate the legislative counsel who had drafted the provision and who later relied on it as private counsel; Special Term held that the change could only be made in the Real Property Law and not a procedural statute *(Bank of Amer. Nat. assn. v Dames*, 135 Misc 391). But its validity has been assumed in later decisions *(Womens Hosp. in State of N. Y. v Sixty-Seventh St. Realty Co*., 265 NY 226, 235, *supra; Prudence Co. v Sussman*, 143 Misc 686; *Haberkorn v Da Silva*, 210 NYS2d 391). Indeed, defendant concedes as much in its brief. Accordingly, defendant's argument that plaintiff proceeded improperly is without factual or legal merit. As to defendant's argument regarding the description of the mortgaged property in the complaint, it suffices for purposes of this appeal to note that any minor ambiguity in the original description, when measured solely by reference to the one map filed for the original development of the premises, was resolved by the additional use in other parts of the description of the later map, which clearly showed the released parcels to be but a small part of the mortgaged premises. Moreover, as this dispute related solely to the adequacy of the description in terms of pleading requirements, defendant's argument must be rejected under the liberal pleading policy of CPLR 3013, particularly in view of defendant's obvious familiarity with the boundaries of the premises and released parcels, as indicated by the fact that it had earlier drafted the legal description of the parcels in securing their release from the mortgage. Therefore, the judgment granting a partial foreclosure and sale should be affirmed.

Hopkins, J. P., Damiani, Titone and Mangano, JJ., concur.

New York Official Reports

172 A.D.3d 975, 101 N.Y.S.3d 438, 2019 N.Y. Slip Op. 03751

**1 Aurora Loan Services, LLC, Appellant,

v

Sylvia Tobing, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
103567/08, 2017-05945
May 15, 2019

CITE TITLE AS: Aurora Loan Servs., LLC v Tobing

HEADNOTES

Mortgages
Foreclosure
Satisfaction of Notice Requirement

Mortgages
Foreclosure
Failure to Demonstrate Proper Acceleration—Recovery Permitted for Unpaid Installments That Have Already Come Due

Sandelands Eyet LLP, New York, NY (Margaret S. Stefandl and Tiffany L. Maldonado of counsel), for appellant.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Richmond County (Philip J. Minardo, J.), dated March 13, 2014. The order, upon a decision of the same court (Peter G. Geis, Ct. Atty. Ref.), dated December 18, 2013, in effect, denied the plaintiff's motion for summary judgment on the complaint and for an order of reference, and searched the record and awarded summary judgment in favor of the defendant Sylvia Tobing dismissing the complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof searching the record and awarding summary judgment in favor of the defendant Sylvia Tobing dismissing the complaint; as so modified, the order is affirmed, without costs or disbursements.

In August 2008, the plaintiff commenced this action to foreclose a mortgage given by the defendant Sylvia Tobing (hereinafter the defendant), encumbering certain real property on Staten Island (hereinafter the mortgaged premises). The complaint, and the subsequently filed amended complaint, both alleged that the defendant defaulted under the terms of the note and mortgage by failing to make certain required monthly payments that were due on May 1, 2008, and thereafter. The complaint and the amended complaint both stated that, given the defendant's default, the plaintiff elected "to call due the entire amount secured by the mortgage."

The defendant interposed a verified answer in response to the plaintiff's allegations. As relevant here, the defendant asserted one affirmative defense which alleged that "[t]he plaintiff failed to satisfy a condition precedent prior to the commencement of this action."

The plaintiff subsequently moved for summary judgment on the complaint and for an order of reference. The defendant opposed ***976** the plaintiff's motion. The defendant argued that paragraph 22 of the subject mortgage required the plaintiff to provide her with written notice of her default at least 30 days before the plaintiff was permitted to accelerate the loan. The defendant argued that the plaintiff's motion for summary judgment should be denied because there was "a genuine issue of material fact as to whether the Plaintiff accelerated the Mortgage pursuant to the terms of the Mortgage." The defendant also argued, among other things, that she was entitled to summary judgment dismissing the complaint.

In an amended order dated October 18, 2013, the Supreme Court directed a Court Attorney Referee (hereinafter the Referee) to hear and determine "[w]hether the 30-day Notice [of default] was properly sent" in accordance with the terms of the subject mortgage. In a decision dated December 18, 2013, the Referee determined that the 30-day notice relied upon by the plaintiff had not been sent to the mortgaged premises as required by the terms of the mortgage. Accordingly, the Referee concluded that "the 30 day notice was not properly sent."

In the order appealed from, the Supreme Court, upon the determination of the Referee, in effect, denied the plaintiff's motion for summary judgment on the complaint and for an

order of reference, and searched the record and awarded summary judgment in favor of the defendant dismissing the complaint.

The plaintiff contends, inter alia, (1) that the Supreme Court improperly referred the matter to the Referee to hear and determine a contested factual issue, and (2) that the Supreme Court erred in searching the record and awarding the defendant summary judgment because the 30-day notice of default is a condition precedent to acceleration, not a condition precedent to commencing a foreclosure action. We modify.

"In a court which has jurisdiction over the subject matter of the litigation, the parties may agree, within broad limits, as to the mode of trial" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY 416, 419 [1955]; *accord* CPLR 4317 [a]). "Statutory procedures and, indeed, even the constitutionally protected right to a jury trial may be waived by the parties' acquiescence in the procedure adopted" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 419-420; *see Matter of Powley v Dorland Bldg. Co.*, 281 NY 423, 429 [1939]). "The appointment of a referee to hear and determine, made by a court fully vested with jurisdiction, relates only to the form of trial and, if upon consent, is unassailable" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 420 [citation omitted]).

Here, the plaintiff waived its right to object to the Supreme ***977** Court's authority to order a reference to determine whether the 30-day notice of default was properly sent in accordance with the terms of the subject mortgage by failing to object to the reference and by actively participating in the hearing before the Referee (*see S. Nicolia & Sons Realty Corp. v A.J.A. Concrete Ready Mix, Inc.*, 137 AD3d 994, 994 [2016]; *Winopa Intl., Ltd. v Woori Am. Bank*, 59 AD3d 203, 204 [2009]; *Cogen v Robin Klinger Children's Entertainment*, 17 AD3d 619, 620 [2005]; *587 Dev., Inc. v Pizzuto*, 8 AD3d 5, 5 [2004]). A party who does not object to a reference on the ground that the reference was not authorized "cannot put in his [or her] evidence and take [a] chance that he [or she] will win and, upon his [or her] failure, claim that the reference was illegal" (*Matter of Powley v Dorland Bldg. Co.*, 281 NY at 429; *see Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 420; *S. Nicolia & Sons Realty Corp. v A.J.A. Concrete Ready Mix, Inc.*, 137 AD3d at 994).

The plaintiff's remaining contention with respect to the determination of the Referee is without merit. Inasmuch as the complaint purports to accelerate the loan and seeks to recover the entire outstanding amount of the loan, the Referee's determination that the plaintiff had not complied with a condition precedent to acceleration required the denial of the plaintiff's motion for summary judgment on the complaint and for an order of reference (*see Wilmington Sav. Fund Socy. FSB v Yisroel*, 166 AD3d 1056, 1056-1057 [2018]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1027-1028 [2017]; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153 [2015]; *cf. Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 659 [1995]).

However, the plaintiff's failure to demonstrate that it properly accelerated the entire amount of the loan prior to the commencement of this action does not, as a matter of law, necessarily preclude the plaintiff from recovering on the unpaid installments which have already come due. "With respect to a mortgage payable in installments, separate causes of action accrue[ ] for each installment that is not paid" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]; *see Fulton Holding Group, LLC v Lindoff*, 165 AD3d 1053, 1055-1056 [2018]; *see also* 2 Bergman on New York Mortgage Foreclosures § 17.02). In New York, "partial foreclosure exists as a form of judicial foreclosure" (2 Bergman on New York Mortgage Foreclosures § 17.01; *accord* RPAPL 1351 [2]), and permits a lender to recover unpaid installments that have become due, without accelerating the remaining portion of the debt (*see Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 650-651 [1980]; *see* ***978** *also* 2 Bergman on New York Mortgage Foreclosures § 17.03). Accordingly, as the plaintiff correctly contends, compliance with the conditions of acceleration contained in paragraph 22 of the subject mortgage is not a condition precedent to commencing this foreclosure action to the extent that the plaintiff seeks to recover unpaid amounts that have already come due under the terms of the note and mortgage (*see Golden v Ramapo Improvement Corp.*, 78 AD2d at 650-651). Under these circumstances, the Supreme Court should not have searched the record and awarded summary judgment in favor of the defendant dismissing the complaint (*see* CPLR 3212 [b]; *see generally Goetz v Trinidad*, 168 AD3d 688 [2019]). Rivera, J.P., Balkin, Chambers and Miller, JJ., concur.

End of Document

New York Official Reports

192 A.D.3d 186, 140 N.Y.S.3d 292, 2021 N.Y. Slip Op. 00064

**1 MTGLQ Investors, L.P., Appellant,

v

Robert J. Wentworth et al., Respondents, et al., Defendants.

Supreme Court, Appellate Division, Third Department, New York
530321
January 7, 2021

CITE TITLE AS: MTGLQ Invs., L.P. v Wentworth

SUMMARY

Appeals from (1) an order of the Supreme Court, Albany County (L. Michael Mackey, J.), entered August 29, 2019, and (2) the judgment entered upon the order, in an action to foreclose on a mortgage. The order, among other things, granted a cross motion by defendants Robert J. Wentworth and Brandie M. Wentworth for summary judgment dismissing the complaint against them. The judgment canceled and discharged the mortgage.

MTGLQ Invs., L.P. v Wentworth, 2019 NY Slip Op 34087(U), affirmed.

HEADNOTES

Mortgages
Acceleration Clause
Acceleration by Proof of Claim in Bankruptcy Proceeding

(1) Plaintiff's action to foreclose a mortgage was time-barred where it was commenced more than six years after plaintiff's predecessor in interest accelerated defendant mortgagors' entire debt by filing a proof of claim in defendants' bankruptcy proceeding and shortly thereafter seeking affirmative relief from the automatic bankruptcy stay. By filing a proof of claim in the bankruptcy proceeding and 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, and there was no evidence to conclude that the mortgage was deaccelerated after that date. Accordingly, the mortgage was accelerated on the date on which the bankruptcy court issued an order lifting the automatic bankruptcy stay as to plaintiff's predecessor in interest and its assignees and/or successors in interest.

Mortgages
Cancellation
Time-Barred Mortgage Properly Cancelled and Discharged without Counterclaim

(2) In an action to foreclose on a mortgage, Supreme Court properly granted defendant mortgagors' request for discharge and cancellation of the mortgage where the statute of limitations period for the commencement of the foreclosure action had expired, notwithstanding that defendants did not interpose a counterclaim seeking to discharge and cancel the mortgage. RPAPL 1501 (4), which provides that "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," 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. Defendants requested, in their answer, dismissal of the complaint and such other and further relief as Supreme Court deemed just and equitable and thereafter specifically ***187** requested in their cross motion that the mortgage be discharged and canceled. Plaintiff mortgagee had notice and an ample opportunity to oppose the cancellation and discharge of the mortgage.

RESEARCH REFERENCES

Am Jur 2d Mortgages §§ 406, 546, 549, 550.

Carmody-Wait 2d Foreclosure of Mortgages on Real Estate §§ 92:49, 92:56, 92:168, 92:248.

McKinney's, RPAPL 1501 (4).

Mortgage Liens in New York (2017-2018 ed) ch 18, Statute of Limitations.

NY Jur 2d Mortgages and Deeds of Trust §§ 500, 508, 610, 652, 654.

ANNOTATION REFERENCE

See ALR Index under Foreclosure; Limitation of Actions; Mortgages.

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APPEARANCES OF COUNSEL

Knuckles, *Komosinski & Manfro*, *LLP*, Elmsford (*Michel Lee* of counsel), for appellant.
Kriss, *Kriss & Brignola*, *LLP*, Albany (*Charles T. Kriss* of counsel), for respondents.

OPINION OF THE COURT

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 ***188** 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 (2019 NY Slip Op 34087[U]). 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 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* ***189** 100 NY2d 577 [2003], *lv denied* 2 NY3d 703 [2004]; *accord Bank of Am., N.A. v Luma*, 157 AD3d 1106, 1106-1107 [2018]).

(1) 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 ****2** 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 F2d 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).

(2) 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 ***190** "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 ****3** costs.

Footnotes

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.

New York Official Reports

186 A.D.3d 526, 129 N.Y.S.3d 422, 2020 N.Y. Slip Op. 04422

**1 U.S. Bank Trust, N.A., Respondent,
v
Stephen D. Miele et al.,
Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2016-11124, 51023/16
August 5, 2020

CITE TITLE AS: U.S. Bank Trust, N.A. v Miele

HEADNOTE

Limitation of Actions
Six-Year Statute of Limitations
Mortgage Foreclosure

Carl E. Person, New York, NY (Giancarlo Malinconico of counsel), for appellants.
Day Pitney LLP, New York, NY (Rachel G. Packer and Alfred W. J. Marks of counsel), for respondent.

In an action to foreclose a mortgage, the defendants Stephen D. Miele and Catherine G. Miele appeal from an order of the Supreme Court, Westchester County (Orazio R. Bellantoni, J.), dated September 23, 2016. The order denied those defendants' motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against them on the ground that the action is barred by the statute of limitations.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the motion of the defendants Stephen D. Miele and Catherine G. Miele which was pursuant to CPLR 3211 (a) (5) to dismiss the causes of action relating to unpaid mortgage installments which accrued on or before January 27, 2010, insofar as asserted against them, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

*527 On July 7, 2009, JPMorgan Chase Bank, National Association (hereinafter Chase), commenced an action to foreclose a mortgage executed by the defendants Stephen D. Miele and Catherine G. Miele (hereinafter together the defendants) in favor of Washington Mutual Bank, FA, securing a note in the amount of $2.6 million. In an order dated September 12, 2014, the Supreme Court directed dismissal of that action, without prejudice, for failure to comply with an order directing Chase to timely move for summary judgment and an order of reference. Thereafter, on January 28, 2016, the plaintiff commenced this foreclosure action, alleging that the defendants had defaulted under the terms of the note and mortgage by failing to make the payment due on December 1, 2008.

The defendants moved, pre-answer, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against them on the ground that the action is barred by the statute of limitations. The plaintiff opposed the motion, submitting the affidavit of an employee of its loan servicer, Caliber Home Loans, Inc. (hereinafter Caliber). Annexed to the affidavit were letters addressed to each of the defendants, dated May 13 and May 14, 2015, respectively, a limited power of attorney authorizing Caliber to act on behalf of the plaintiff, and United States Postal Service receipts date-stamped May 14, 2015. The letters stated that "the maturity of the Loan is hereby de-accelerated, immediate payment of all sums owed is hereby withdrawn, and the Loan is re-instituted as an installment loan." The Supreme Court denied the defendants' motion, and the defendants appeal.

When, as here, a mortgage is payable in installments, "separate causes of action for each installment accrue[ ], and the Statute of Limitations [begins] to run, on the date each installment [becomes] due" unless the mortgage debt is accelerated (*Pagano v Smith*, 201 AD2d 632, 633 [1994]; *see Loiacono v Goldberg*, 240 AD2d 476 [1997]). " '[O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' " (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016], quoting *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]). A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

"In resolving a motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint on the ground that the action is barred ***528** by the statute of limitations, the court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference" (*Bank of N.Y. Mellon v Celestin*, 164 AD3d 733, 735 [2018]; *see JP Morgan Chase Bank, N.A. v Mbanefo*, 166 AD3d 742, 743 [2018]). "On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 [2017]; *see U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834-835 [2018]). " 'If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period' " (*U.S. Bank N.A. v Gordon*, 158 AD3d at 835, quoting *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]).

Here, in support of their motion, the defendants demonstrated that the six-year statute of limitations (*see* CPLR 213 [4]) began to run on July 7, 2009, when Chase accelerated the mortgage debt and commenced the prior foreclosure action (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Milone v US Bank N.A.*, 164 AD3d 145, 152 [2018]). Since the plaintiff did not commence the instant foreclosure action until more than six years later, on January 28, 2016, the defendants sustained their initial burden of demonstrating, prima facie, that the action was untimely (*see U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768 [2018]).

In opposition, the plaintiff tendered evidence that, in May 2015, it sent letters to each of the defendants that purported to de-accelerate the entire debt (*see Milone v US Bank N.A.*, 164 AD3d at 154). However, such evidence is sufficient only to raise a question of fact as to whether those causes of action that sought unpaid installments which accrued within the six-year period of limitations preceding the commencement of this action (*see* CPLR 213 [4]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *Khoury v Alger*, 174 AD2d 918, 919 [1991]) are barred by the statute of limitations due to this alleged de-acceleration by the plaintiff. Since the plaintiff failed to tender any evidence to rebut the defendants' showing that the statute of limitations bars the causes of action relating to unpaid mortgage installments which accrued on or before January 27, 2010, the Supreme Court should have granted that branch of the defendants' motion which was to dismiss those causes of action.

***529** The defendants' remaining contentions either are without merit or need not be reached in light of our determination. Dillon, J.P., Chambers, Miller and Duffy, JJ., concur.

New York Official Reports

188 A.D.3d 70, 131 N.Y.S.3d
763, 2020 N.Y. Slip Op. 05410

**1 Federal National Mortgage Association ("Fannie Mae"), a Corporation Organized and Existing under the Laws of the United States of America, Appellant,

v

Claude Tortora, Also Known as Claude Totora and Another, Respondent, et al., Defendants. (Action No. 1.)
Claude Tortora, Individually, and as Executor of the Estate of Jacqueline Squitieri, Deceased, Respondent,

v

Federal National Mortgage Association ("Fannie Mae"), a Corporation Organized and Existing under the Laws of the United States of America, Appellant. (Action No. 2.)
(Appeal No. 1.)

Supreme Court, Appellate Division,
Fourth Department, New York
1299/19, 18-02343
October 2, 2020

CITE TITLE AS: Federal Natl. Mtge. Assn. v Tortora

SUMMARY

Appeal from an amended order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered December 13, 2018. The amended order, among other things, granted summary judgment in action No. 1 to defendant Claude Tortora, also known as Claude Totora, also known as Claude T. Tortora, and determined that the subject mortgage was unenforceable.

HEADNOTE

Mortgages
Foreclosure
Reinstatement Provision Did Not Preclude Acceleration of Mortgage

Where plaintiff mortgagee's predecessor in interest accelerated a mortgage in a prior foreclosure action, plaintiff's subsequent foreclosure action, commenced more than six years after the acceleration of the mortgage, was properly dismissed as barred by the statute of limitations as the reinstatement provision in the mortgage did not in any way affect or impede acceleration of the full mortgage debt. The reinstatement provision, which gave defendant mortgagor the option, under some circumstances, to de-accelerate the full mortgage debt, was not mentioned anywhere in the text of the mortgage's acceleration provision, which governed when plaintiff could exercise its option to accelerate the full debt. The language of the reinstatement provision indicated that plaintiff's right to accelerate the entire debt could be exercised before defendant's rights under the reinstatement provision were exercised or extinguished, merely giving defendant the contractual option to de-accelerate the mortgage when certain conditions were met. This rationale did not violate public policy by disrupting the mortgage market, undermining the policy favoring uniform mortgages, or effectively conferring a windfall on defendant by awarding him a "free" residence as it had been over a decade since the first foreclosure action had been commenced and plaintiff and its predecessor were to blame for failing to timely secure foreclosure of the mortgage. There was nothing in the record to establish that plaintiff or its predecessor ever affirmatively elected to revoke the acceleration of the mortgage. Moreover, plaintiff was not entitled to recovery of interest *71 that accrued on the principal in the six years before the commencement of the prior foreclosure action or the amount of authorized advances paid by its loan servicer on behalf of the mortgagor because both were incident of the mortgage debt, could not exist without the debt, and were extinguished once the debt was extinguished.

RESEARCH REFERENCES

Am Jur 2d Mortgages §§ 426, 429, 617.

Carmody-Wait 2d Foreclosure of Mortgages on Real Estate §§ 92:49–92:54, 92:168.

Mortgage Liens in New York (2017-2018 ed) ch 19, The Action to Foreclose the Mortgage.

NY Jur 2d Mortgages and Deeds of Trust §§ 506, 560, 610.

ANNOTATION REFERENCE

See ALR Index under Foreclosure; Mortgages.

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Query: mortgage /3 foreclos! & accelerated /3 debt /p limitation & reinstatement

APPEARANCES OF COUNSEL

Hogan Lovells US LLP, New York City (*Chava Brandriss* of counsel), for plaintiff-appellant and defendant-appellant.
Webster & Dubs, P.C., Buffalo (*Daniel Webster* of counsel), for defendant-respondent and plaintiff-respondent.

OPINION OF THE COURT

Curran, J.

The main issue on appeal in these consolidated actions is whether in action No. 1 the applicable statute of limitations has expired, precluding Federal National Mortgage Association, the plaintiff in action No. 1 and the defendant in action No. 2 (Fannie Mae), from foreclosing a mortgage given by decedent Jacqueline Squitieri, mother of the plaintiff in action No. 2, who is also a defendant in action No. 1 (Tortora). In particular, this appeal presents a novel question for this Court: whether a reinstatement provision in the subject mortgage that gives the mortgagor the option, under some circumstances, to de-accelerate the full mortgage debt prevented the mortgagee from validly accelerating the full mortgage debt and thereby ***72** prevented accrual of the foreclosure action for statute of limitations purposes. We answer that question in the negative.

I

The subject property, a residence located in Amherst, New York, was purchased in 2007 by Squitieri by means of a loan secured by a 30-year mortgage. The mortgage is a uniform instrument issued by Fannie Mae, among others, for use in New York State and contains several provisions that are relevant on appeal. Section 22 (acceleration provision) permits the lender to require immediate payment of the loan in full upon the borrower's default, provided certain conditions are met. Section 19 (reinstatement provision) grants a borrower in default the right to effectively de-accelerate the maturity of the mortgage debt by paying in full the past due amount, thereby returning the loan to its pre-default status. Additionally, section 3 (a) requires the borrower to pay certain amounts necessary for taxes and insurance, and sections 4 and 9 require the borrower to pay certain liens on the property and to reimburse the lender for amounts spent to protect the lender's rights in the property should the borrower fail to comply with the mortgage (collectively, authorized advances). In this case, authorized advances were paid by the lender's loan servicers on behalf of the borrower.

Squitieri defaulted on the loan in October 2008. In April 2009, Fannie Mae's predecessor in interest commenced a foreclosure action (first foreclosure action), stating in the complaint that it "elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal" on the mortgage debt. In July 2012, Supreme Court dismissed the first foreclosure action, without prejudice, based on the predecessor in interest's failure to supply a reasonable explanation for its inactivity in prosecuting the action.

In April 2013, the predecessor in interest commenced another foreclosure action (second foreclosure action) against, among others, Squitieri and Tortora, the latter of whom was initially named as a John Doe occupant of the property, based again on the 2008 default. Following assignment of the mortgage to it in 2014, Fannie Mae was substituted as plaintiff in the second foreclosure action and obtained a default judgment against Tortora and Squitieri, among others. Fannie Mae subsequently moved for a judgment of foreclosure and sale. In March 2015, however, the court denied that motion and instead ***73** dismissed the complaint with prejudice based on Fannie Mae's repeated failure to appear in support of its motion.

In August 2016, Squitieri commenced action No. 2—an action to quiet title to the subject property—seeking, inter alia, a determination that the mortgage was void and should be cancelled. Squitieri asserted that the full amount of the

mortgage debt had been accelerated in 2009 and could no longer be enforced due to the expiration of the six-year statute of limitations. In its answer, Fannie Mae asserted, inter alia, a counterclaim to recover the amount of authorized advances paid by the loan servicer on behalf of Squitieri plus interest on those advances. Squitieri died in April 2017. She had previously transferred the subject property to Tortora by quitclaim deed dated May 2015, which was filed with the county clerk's office following her death.

In February 2018, Fannie Mae commenced action No. 1, a foreclosure action predicated on a default dating back to March 2012, seeking the principal amount of the mortgage debt, with interest. In his answer, Tortora alleged, as his only affirmative defense, that action No. 1 was barred by the statute of limitations because the debt had been accelerated in 2009 and more than six years had elapsed since then. Tortora thereafter moved for, inter alia, consolidation of the actions, substitution as plaintiff in action No. 2, summary judgment on the complaint in action No. 2, and summary judgment dismissing the complaint against him in action No. 1 as time-barred. Fannie Mae cross-moved, inter alia, to strike the statute of limitations defense in action No. 1 and for summary judgment dismissing the complaint in action No. 2 or, alternatively, summary judgment on its counterclaim in action No. 2.

Fannie Mae appeals from an amended order that, inter alia, denied the cross motion and granted that part of the motion seeking dismissal of the complaint in action No. 1 against Tortora as time-barred. We affirm.

II

A

The court did not err in granting that part of the motion seeking summary judgment dismissing the complaint against Tortora in action No. 1, insofar as Fannie Mae sought to recover the principal amount of the mortgage debt, as barred by the applicable six-year statute of limitations (*see* ***74** CPLR 213 [4]). The statute of limitations in an action to foreclose on a mortgage "begins to run once the debt has been accelerated by a demand" (*Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). "Acceleration occurs, inter alia, by the commencement of a foreclosure action" (*Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]; *see U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]; *Fannie Mae v 133 Mgt., LLC*, 126 AD3d 670, 670 [2d Dept 2015]). Moreover, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the [s]tatute of [l]imitations begins to run on the *entire debt*" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001] [emphasis added]; *see Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]).

Here, we conclude that Tortora met his initial burden on the motion of establishing, "prima facie[,] that the time in which to sue ha[d] expired" (*Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019] [internal quotation marks omitted]; *see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]). He did so by submitting evidence establishing that the full amount of the mortgage debt was accelerated in April 2009, when Fannie Mae's predecessor in interest commenced the first foreclosure action (*see U.S. Bank N.A.*, 163 AD3d at 1483-1484; *Wilmington Sav. Fund Socy., FSB*, 160 AD3d at 1410; *EMC Mtge. Corp.*, 279 AD2d at 605). Indeed, the predecessor in interest specifically stated in its complaint in that action that it "elected and hereby elects to declare immediately due and payable the *entire* unpaid balance of principal" on the mortgage debt (emphasis added). Because Fannie Mae did not commence action No. 1 until 2018, more than six years after the debt was accelerated, Tortora established that the statute of limitations had expired, requiring dismissal of that action (*see* CPLR 213 [4]; *Larkin*, 81 AD3d at 1355).

B

In opposition, Fannie Mae did not raise an issue of fact whether the full mortgage debt was accelerated in 2009 (*see North Shore Invs. Realty Group, LLC v Traina*, 170 AD3d 737, 738 [2d Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Fannie Mae's central contention is that the mortgage debt could not have been accelerated in 2009; rather, it could only be accelerated once there was a final judgment of foreclosure inasmuch as the reinstatement ***75** provision of the mortgage precludes earlier acceleration of the full debt by granting the borrower the right to restore the loan to its pre-default status until the time of final judgment.

As Fannie Mae notes, however, the Second Department recently rejected that argument in *Bank of N.Y. Mellon v Dieudonne* (171 AD3d 34, 39-40 [2d Dept 2019], *lv denied* 34 NY3d 910 [2020] [hereafter *Dieudonne*]), a case involving a mortgage identical to the one at issue here. Inasmuch as we agree with the Second Department's conclusion that the

presence of a reinstatement provision does not, by itself, automatically preclude a lender from accelerating the full mortgage debt (*see id.* at 36), we reject Fannie Mae's contention that we should decline to follow that case.

Importantly, we conclude that the mortgage's reinstatement provision does not in any way affect or impede acceleration of the full mortgage debt. The reinstatement provision is not mentioned anywhere in the text of the mortgage's acceleration provision, which governs when Fannie Mae could exercise its option to accelerate the full debt (*see id.* at 36, 39-40). Further, the language of the reinstatement provision "indicates that [Fannie Mae's] right to accelerate the entire debt may be exercised *before* the [borrower's] rights under the reinstatement provision . . . are exercised or extinguished" (*id.* at 40). Thus, in effect, the reinstatement provision merely "gives the borrower the contractual option to *de-accelerate* the mortgage when certain conditions are met" (*id.* at 39 [emphasis added])—which presupposes that an acceleration has already occurred.

Inasmuch as the reinstatement provision did not automatically prevent acceleration of the debt before entry of a final judgment, we by necessity also reject Fannie Mae's argument that acceleration of a debt secured by a mortgage containing a reinstatement provision could not occur until entry of a final judgment. Accepting Fannie Mae's argument would put the proverbial cart before the horse because, if followed to its logical end, the argument would permit a mortgagee to obtain judgment on a foreclosure claim before the claim even accrued—a proposition that cannot be true. In effect, there would be no statute of limitations for such claims. Consistent with our conclusion that the reinstatement provision does not affect acceleration of the full mortgage debt (*see id.* at 39-40), we reject Fannie Mae's contention that the delayed accrual of a foreclosure claim was a trade-off contemplated by the interplay of the mortgage's acceleration and reinstatement provisions.

***76** Fannie Mae also contends that following the Second Department's approach in *Dieudonne* would violate public policy by disrupting the mortgage market, undermining the policy favoring uniform mortgages, and effectively conferring a windfall on Tortora by awarding him a "free" residence. We reject Fannie Mae's contention. Specifically, we note that it has been over a decade since the first foreclosure action was commenced. The court dismissed that action due to the mortgagee's failure to timely prosecute its claim. The court similarly dismissed the second foreclosure action, that time with prejudice, because of Fannie Mae's *repeated failure* to appear in court in support of its own motion for a judgment of foreclosure and sale. Given that history, Fannie Mae has only itself and its predecessor in interest to blame for failing to timely secure foreclosure of the mortgage, thereby creating the risk that Tortora would receive a "free" residence. Thus, the relatively unique circumstances of this case support the conclusion that adopting the rationale of *Dieudonne* will not violate public policy in the hyperbolic manner argued by Fannie Mae.

It is true enough that the presence of a reinstatement provision in a mortgage mitigates the harsh and unforgiving old rule that did not permit borrowers to pay arrears once a lender had elected to accelerate a loan (*cf. Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 477 [1932]). That does not, however, vitiate the duty of a lender to timely commence and prosecute a foreclosure action once it accelerates the debt. To that end, we are mindful that the policies undergirding statutes of limitations aim both to protect parties like Tortora against stale claims and to encourage parties like Fannie Mae not to sleep on their rights (*see generally* Siegel, NY Prac § 33 at 43 [5th ed 2011]). Tortora's ability to obtain a "free" home was simply the risk the mortgagee took by not diligently pursuing its prior foreclosure actions; it is not a reason for us to conclude that the mortgage's reinstatement provision prevented acceleration of the full amount of the debt in 2009.

C

Having concluded that the full mortgage debt was effectively accelerated despite the presence of the reinstatement provision, we further conclude that there is nothing in the record establishing that Fannie Mae or its predecessor in interest ever affirmatively elected to revoke the 2009 acceleration of the mortgage in the six years following the commencement of ***77** the first foreclosure action (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935; *Lavin v Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003], *lv dismissed* 100 NY2d 577 [2003], *lv denied* 2 NY3d 703 [2004]).

Thus, we conclude that Fannie Mae did not raise an issue of fact with respect to the statute of limitations and that the court properly dismissed the complaint in action No. 1 against Tortora with respect to the principal amount of the mortgage debt (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935).

III

New York Official Reports

151 A.D.3d 1068, 58 N.Y.S.3d 118, 2017 N.Y. Slip Op. 05230

**1 NMNT Realty Corp., Appellant,
v
Knoxville 2012 Trust, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
13279/13, 2015-03210
June 28, 2017

CITE TITLE AS: NMNT Realty Corp. v Knoxville 2012 Trust

HEADNOTE

Mortgages
Discharge

Miller, Rosado & Algios, LLP, Mineola, NY (Neil A. Miller and Christopher Rosado of counsel), for appellant.
Helfand & Helfand, New York, NY (Andrew B. Helfand and Diane Bradshaw of counsel), for respondent.

In an action pursuant to RPAPL 1501 (4) to cancel and discharge of record a mortgage, the plaintiff appeals from so much of an order of the Supreme Court, Suffolk County (Pastoressa, J.), dated January 29, 2015, as denied its cross motion for summary judgment on the complaint insofar as asserted against the defendant Knoxville 2012 Trust.

Ordered that the order is affirmed insofar as appealed from, with costs.

In 2003, the plaintiff's predecessors-in-interest (hereinafter the mortgagors) executed a mortgage in favor of Washington Mutual Bank, FA (hereinafter WAMU), that encumbered a parcel of real property located in Smithtown, Suffolk County (hereinafter the property), owned by the mortgagors. The mortgage secured a note executed by one of the mortgagors, pursuant to which he promised to repay the underlying loan in the sum of $918,000. In 2004, WAMU assigned the note and mortgage to Homecomings Financial Network, Inc. (hereinafter Homecomings). *1069

The mortgagors defaulted by failing to make the monthly mortgage payment due on December 1, 2003, and any payments thereafter. On July 27, 2006, Homecomings commenced an action to foreclose the mortgage. Among other things, the complaint stated that Homecomings "has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal." A judgment of foreclosure and sale was obtained, but Homecomings subsequently moved to discontinue the action and vacate the judgment. By order dated September 22, 2011, the Supreme Court granted the motion. In February 2012, the plaintiff purchased the property from the mortgagors. The note and the mortgage were subsequently assigned to the defendant Knoxville 2012 Trust (hereinafter Knoxville).

In May 2013, the plaintiff commenced this action pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage on the ground that any action to foreclose was barred by the statute of limitations. Knoxville moved for summary judgment dismissing the complaint **2 insofar as asserted against it, and the plaintiff cross-moved for summary judgment on the complaint insofar as asserted against Knoxville. The Supreme Court denied the motion and the cross motion, and the plaintiff appeals.

RPAPL 1501 (4) provides that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired," any person with an estate or interest in the property 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" (RPAPL 1501 [4]; *see JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 [2010]). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]). " '[E]ven 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' " (*Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867, quoting *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982). A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring

during the six-year statute of limitations period subsequent to the initiation ***1070** of the prior foreclosure action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

Here, in support of its cross motion for summary judgment on the complaint insofar as asserted against Knoxville, the plaintiff submitted, inter alia, a copy of the verified complaint that commenced Homecomings' prior foreclosure action against the mortgagors, in which Homecomings specifically stated that it had "elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal." This established that the mortgage debt was accelerated on or about July 27, 2006, the date on which the earlier foreclosure action was commenced, and thus, that the applicable six-year statute of limitations had expired by the time the plaintiff commenced the instant action on May 16, 2013. Consequently, the plaintiff established, prima facie, its entitlement to judgment as a matter of law on the complaint insofar as asserted against Knoxville (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 987; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2005]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]).

In opposition to the plaintiff's showing, the defendant submitted proof that, on August 16, 2011, Homecomings moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted. The defendant thereby raised a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) as to whether Homecomings' motion "constituted an affirmative act by the lender to revoke its election to accelerate" (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [1994]). Contrary to the plaintiff's contention, this case is distinguishable from the cases in which, because "[t]he prior foreclosure action was never withdrawn by the lender, but rather, dismissed . . . by the court[,] [i]t cannot be said that [the] dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate" (*id.* at 894; *see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985 [2016]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606). The Supreme Court properly found that the mortgagors' conclusory statements that the "Order of Discontinuance was the result of procedural deficiencies in the proceedings," contained in the affidavits submitted by the plaintiff in support of its cross motion, do not disprove an affirmative act of revocation (*see Zuckerman v City of New York*, 49 NY2d at 562). ***1071**

The parties' remaining arguments have been rendered academic in light of our determination. Chambers, J.P., Miller, Hinds-Radix and LaSalle, JJ., concur.

Fannie Mae also contends on appeal that, even if the court properly granted the motion for summary judgment dismissing the complaint against Tortora in action No. 1 as time-barred to the extent it sought to recover the principal of the mortgage debt, the court erred in granting the motion to the extent that the complaint sought to recover interest that accrued on the principal in the six years preceding the commencement of action No. 1. Fannie Mae further contends that the court erred in denying its cross motion insofar as Fannie Mae sought summary judgment on its counterclaim in action No. 2 to recover the amount of authorized advances paid by its loan servicers on behalf of Squitieri. We disagree.

The court properly granted the motion with respect to the recovery of interest that accrued on the principal in the six years before the commencement of action No. 1 because the accrued interest, "being a mere incident [of the mortgage debt], cannot exist without the debt, and the debt being extinguished [,] the interest . . . necessarily [is also] extinguished" (*Ajdler v Province of Mendoza*, 33 NY3d 120, 126 [2019] [internal quotation marks omitted]; *see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). A similar rationale supports the denial of the cross motion with respect to the counterclaim seeking recovery of the amount of the authorized advances because the provisions purportedly entitling Fannie Mae to those amounts, as terms of the mortgage, were incident to the extinguished debt and therefore "stand[ ] or fall[ ] with" it (*Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923], *rearg denied* 236 NY 591 [1923]; *see generally Ajdler*, 33 NY3d at 126).

To the extent that Fannie Mae relies on a purported exception to the general rule that permits claims seeking recovery of incidents of residential mortgages (*see e.g.* ***78** *Chapin v Posner*, 299 NY 31, 42 [1949]; *Ernst v Schaack*, 271 App Div 1012, 1013 [2d Dept 1947], *affd* 297 NY 566 [1947]; *Johnson v Meyer*, 268 NY 701, 702 [1935]), we note that those cases do not "apply outside the narrow context of the mortgage moratorium legislation in which they were decided" (*Ajdler*, 33 NY3d at 128 n 4), i.e., Great Depression-era mortgage moratorium statutes that are no longer in effect (*see Kirschner v Cohn*, 270 App Div 126, 129 [2d Dept 1945]; *Union Trust Co. of Rochester v Kaplan*, 249 App Div 280, 281 [4th Dept 1936]).

Accordingly, the amended order should be affirmed. Based on the foregoing, Fannie Mae's remaining contention is academic.

Centra, J.P., Carni, Lindley and Winslow, JJ., concur.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs.

New York
Official Reports

87 N.Y.2d 36, 660 N.E.2d 1121, 637
N.Y.S.2d 342, 27 UCC Rep.Serv.2d 1285

Vigilant Insurance Company
of America et al., Respondents,
v.
Housing Authority of the City of
El Paso, Texas, et al., Appellants.

Court of Appeals of New York
229
Argued September 20, 1995;

Decided November 1, 1995

CITE TITLE AS: Vigilant Ins. Co. of Am.
v Housing Auth. of City of El Paso, Tex.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered July 21, 1994, which (1) reversed, on the law, an order of the Supreme Court (Beatrice Shainswit, J.), entered in New York County, granting a motion by defendants for summary judgment dismissing the complaint and directing that plaintiffs return certain bearer bonds and interest coupons for cancellation, (2) denied defendants' motion, (3) reinstated the complaint, and (4) remanded the matter for further proceedings. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Vigilant Ins. Co. v Housing Auth., 201 AD2d 58, modified.

HEADNOTES

Limitation of Actions
What Statute Governs
Declaratory Judgment Action Involving Right and Title to Bearer Bonds

(1) When the rights of parties sought to be stabilized in a declaratory judgment action are, or have been, open to resolution through a particular procedural route for which a specific limitation period is statutorily provided, then that period generally governs the time for commencement of the declaratory judgment action. Otherwise, the six-year catch-all Statute of Limitations of CPLR 213 (1) applies. Thus, the six-year Statute of Limitations (CPLR 213 [1]) applies to plaintiffs' claims seeking a judgment declaring that they are bona fide purchasers entitled to payment on certain bearer bonds issued by a public corporation, backed by the "full faith and credit of the United States", and not secured by a mortgage upon real property. Although issued by a public corporation, the bonds are not secured "only" by a pledge of full faith and credit of the "issuer" and, therefore, the 20-year Statute of Limitations to recover on a bond under CPLR 211 (a) is inapplicable. Moreover, because the bonds at issue are not secured by a mortgage upon real property, CPLR 213 (4) which relates specifically to actions on bonds and establishes a six-year limitations period is inapplicable. Accordingly, without any other specific limitation periods being statutorily applicable to plaintiffs' declaratory relief claims, the cow-catcher six-year period of CPLR 213 (1) obtains.

Bonds
Bearer Bonds
Bearer Bond as "Security" under UCC Article 8

(2) A bearer bond constitutes a "security" as defined in UCC 8-102 and, therefore, the accrual date of UCC 3-122 for actions involving time instruments ***37** is inapplicable to plaintiffs' cause of action seeking a declaration of their superior right and title with respect to certain bearer bonds and interest coupons because a security is specifically governed by UCC article 8 and expressly excluded from article 3.

Limitation of Actions
When Cause of Action Accrues
Declaratory Judgment Action Involving Right and Title to Bearer Bonds

(3) Plaintiffs' claims seeking a judgment declaring that they are bona fide purchasers entitled to payment on certain bearer bonds acquired before they obtained knowledge that the bonds were stolen accrue on the day after maturity

of the bonds. In determining the accrual of an action, a defendant's interest in defending a claim must be balanced with a plaintiff's interest in not being deprived of a claim before a reasonable chance to assert it arises. Declaratory judgment actions do not fit neatly into the balancing equation, since they are often commenced before there has been conduct which might give rise to a right to remedial or coercive relief. Here, since the right to sue on the bonds' principal debt does not accrue until the debt is due and payable, there is no reasonable basis to bar on Statute of Limitations grounds plaintiffs' opportunity to seek a declaration of those seriously disputed rights on the debt instrument prior to maturity of the bond.

Limitation of Actions
When Cause of Action Accrues
Claims of Conversion and Breach of Contract Involving Bearer Bonds

(4) In an action involving the superior right and title of plaintiffs with respect to certain bearer bonds and interest coupons, plaintiffs' cause of action asserted in 1990 alleging that "[d]efendants' confiscation of the coupons presented by plaintiffs and their refusal to redeem" the coupons and bonds effectively constituted a tortious conversion of the bonds and the coupons, is time barred by the three-year limitation period *(see,* CPLR 214 [3]) applicable to conversion causes of action. Since accrual runs from the date the conversion takes place and not from discovery or the exercise of diligence to discover, the conversion, as alleged, occurred in July 1983 when defendant placed "stops" on the bonds and allegedly first refused to honor the title and right of plaintiffs' assignor to negotiate the bonds or to redeem the interest coupons. Moreover, plaintiffs' cause of action for breach of contract similarly accrued in 1983 under like reasoning and is, accordingly, barred by the applicable six-year Statute of Limitations (CPLR 213 [2]).

Limitation of Actions
When Cause of Action Accrues
Past Due Interest on Bearer Bond Coupons

(5) Claims involving past due interest on coupons issued in conjunction with bearer bonds accrue on the date each installment becomes due.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Bonds, §§ 34, 37, 75-79; Commercial Code, § 74; Conversion, § 94; Limitation of Actions, §§ 92, 133.

Carmody-Wait 2d, Limitation of Actions §§ 13:129, 13:146, 13:226; Action on Official Bond or Undertaking § 134:25.

CPLR 211 (a); 213 (1), (2), (4); 214 (3); UCC 3-122, 8-102.

NY Jur 2d, Conversion, and Action for Recovery of Chattel, § 164; Limitations and Laches, §§ 77, 93, 113, 114, 139, 173; Negotiable Instruments and Other Commercial Paper, §§ 14, 21. ***38**

ANNOTATION REFERENCES

Limitation statute applicable to action on bonds of public body or on obligation to collect revenues for their payment. 38 ALR2d 930.

What is "security" under UCC art 8. 11 ALR4th 1036.

POINTS OF COUNSEL

Bondy & Schloss, New York City *(Joel S. Forman* and *Jacqueline I. Meyer* of counsel), for appellants.
I. The Statute of Limitations began to run in 1983 when the facts giving rise to plaintiffs' causes of action were made known to Drexel and when Drexel suffered its loss. *(Solnick v Whalen,* 49 NY2d 224; *Otten v Marasco,* 235 F Supp 794, 353 F2d 563; *Neinken v Brill,* 251 App Div 730; *Valdes v Atlantic Steamer Fire Co.,* 120 AD2d 661, 68 NY2d 609; *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Morawski v Board of Educ.,* 85 AD2d 850; *Rieser v Baltimore & Ohio R. R. Co.,* 123 F Supp 44, 228 F2d 563; *Phoenix Acquisition Corp. v Campcore, Inc.,* 81 NY2d 138; *Insurance Co. v United States,* 561 F Supp 106; *Cruden v Bank of N. Y.,* 957 F2d 961.)
II. Policy considerations espoused by this Court weigh heavily in favor of defendants. *(Jensen v General Elec. Co.,* 82 NY2d 77; *Snyder v Town Insulation,* 81 NY2d 429; *Ely-Cruikshank Co. v Bank of Montreal,* 81 NY2d 399; *Martin v Edwards Labs.,* 60 NY2d 417; *Flanagan v Mount Eden Gen. Hosp.,* 24 NY2d 427; *Kronos, Inc. v AVX Corp.,* 81 NY2d 90; *Schwartz v Heyden Newport Chem. Corp.,* 12 NY2d 212; *Schmidt v Merchants Desp. Transp. Co.,* 270 NY 287, 271 NY 531; *Simcuski v Saeli,* 44 NY2d 442.)

D'Amato & Lynch, New York City *(Ronald H. Alenstein, Donna Marie Hughes* and *Jeffrey Underweiser* of counsel), for respondents.

The bonding companies' main cause of action is for a declaratory judgment that they have the rights of bona fide purchasers with respect to the bearer bonds, and thus have the right to obtain payments of interest when due and principal at maturity. The only sensible limitation period and accrual rules to apply in the circumstances are those applicable to actions upon "time instruments". The Court below correctly did just that. *(Valdes v Atlantic Steamer Fire Co.,* 120 AD2d 661, 68 NY2d 609; *Solnick v Whalen,* 49 NY2d 224; *Gutekunst v Continental Ins. Co.,* 486 F2d 194; *Manufacturers* ***39** *& Traders Trust Co. v Sapowitch,* 296 NY 226; *Gruntal v United States Fid. & Guar. Co.,* 254 NY 468; *Morawski v Board of Educ.,* 85 AD2d 850; *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Matter of Board of Educ. [Wager Constr. Corp.],* 37 NY2d 283; *Long Is. R. R. Co. v Northville Indus. Corp.,* 41 NY2d 455; *Medaris v Lionel Corp.,* 25 AD2d 735.)

OPINION OF THE COURT

Bellacosa, J.

Plaintiffs, collectively referred to as "Vigilant," are subrogees of Drexel Burnham Lambert. They plead three discretely denominated causes of action that have some overlapping features. A predominant objective is the declaration of their superior right and title with respect to certain bearer bonds and interest coupons issued by defendant Housing Authority of the City of El Paso. The stolen bonds have had a checkered history culminating in two key legal issues on this appeal. First, we must determine the respective Statutes of Limitations applicable to plaintiffs' various causes of action and, second, the governing accrual events. The merits of the causes of action and the appropriate relief are not before us on this appeal.

Supreme Court dismissed the complaint, but the Appellate Division reinstated all the causes. The Appellate Division then certified the following question to this Court: "Was the order of this Court, which reversed the order of Supreme Court, properly made?" We modify the order of the Appellate Division and, thus, answer the certified question, in the main, in the negative.

Plaintiffs had jointly issued a brokers bond and policy to the Drexel firm, a former member of the New York Stock Exchange. The policy covered Drexel for any loss caused by alleged stolen securities. On or about July 21, 1983, Drexel's Switzerland office purchased 41 El Paso Housing Authority bearer bonds for $112,681 from Chessed Anstalt, a Liechtenstein corporation. The bonds, originally issued in 1967, bore a maturity date of July 1, 1997. Plaintiffs allege that Drexel purchased the bonds in good faith, for value, without notice of adverse claims and thus qualified as a bona fide purchaser for value (*see,* Uniform Commercial Code § 8-302). On July 27, 1983, Drexel sold the bearer bonds to Irving Trust Co. for $118,218. Plaintiffs assert that Irving also took possession of the bonds in good faith, for value and without notice of any adverse claims. Irving shortly discovered that a holder previous ***40** to Drexel had reported the bonds stolen. Under these circumstances, New York Stock Exchange rule 272 and Securities Exchange Commission rule 17f-1 (17 CFR 240.17f-1) required Drexel to reclaim and replace the bonds for its purchaser, Irving. Drexel complied by going to the open market and purchasing replacement bonds. Irving then assigned to Drexel all of its right, title and interest in the stolen bonds and coupons.

Drexel sought indemnification from plaintiffs for its losses. Plaintiffs paid the claim and Drexel, in turn, assigned to plaintiffs all of its right, title and interest in the bonds. Plaintiffs claim, therefore, also to be bona fide purchasers as assignees through the bona fide purchasers' chain of transfers.

Plaintiffs also note that the Federal Bureau of Investigation seized the bonds and their interest coupons from Drexel as evidence in 1983 as part of its investigation of the bond theft. The FBI first returned the bonds and coupons to plaintiffs in 1989. At that first opportunity, plaintiffs detached the interest coupons then due and payable and presented them to the El Paso Housing Authority via its transfer agent, Morgan Guaranty Trust Company. Morgan refused payment, confiscated the coupons and declined to remove "stops" placed against the bonds themselves, as requested by plaintiffs.

Plaintiffs sued in 1990, seeking relief under three separate causes of action: a declaration of their rights and title to the bonds and coupons; tortious conversion of the bonds and interest coupons by Morgan; and breach of the bond obligations.

At Supreme Court, defendants successfully resisted the suit on Statute of Limitations grounds. The court held that plaintiffs' rights were wholly derivative from Drexel and that all the claims thus accrued in 1983, when Drexel first learned of the theft.

The Appellate Division reversed on the law and reinstated plaintiffs' complaint, with two Justices dissenting (201 AD2d 58). It applied UCC 3-109, concluding that accrual of the declaratory judgment claim would occur on the first day after maturity of the bonds in 1997 *(see,* UCC 3-122). As to other claims, the Court held that "[a]ny of these interest [coupon] claims which accrued six years *prior* to the commencement of this action are presumably precluded by the period of limitations" (201 AD2d, at 61). By implication, the others were held viable and not stale. Defendants-appellants seek reinstatement of Supreme Court's dismissal of the entire complaint.

In *Solnick v Whalen* (49 NY2d 224), the Court stated that the CPLR prescribes no general period of limitation for a ***41** declaratory judgment action. Courts must look to the underlying claim and the "nature of the relief sought" to determine the applicable period of limitation *(id.,* at 229; *see also, Sears, Roebuck & Co. v Enco Assocs.,* 43 NY2d 389, 395). Stated another way, a court's inquiry focuses on the "substance of [the] action to identify the relationship out of which the claim arises and the relief sought" *(Solnick v Whalen, supra,* at 229; *New York City Health & Hosps. Corp. v McBarnette,* 84 NY2d 194, 201; *Save the Pine Bush v City of Albany,* 70 NY2d 193, 202; *Press v County of Monroe,* 50 NY2d 695, 701). When the rights of parties sought to be stabilized in a declaratory judgment action are, or have been, open to resolution through a particular procedural route for which a specific limitation period is statutorily provided, then that period generally governs the time for commencement of the declaratory judgment action *(Solnick v Whalen,* 49 NY2d 224, 229, *supra).* Otherwise, the six-year catch-all Statute of Limitations set forth in CPLR 213 (1) applies *(see, New York City Health & Hosps. Corp. v McBarnette, supra,* at 201; *Solnick v Whalen, supra,* at 230; *Sears, Roebuck & Co. v Enco Assocs., supra,* at 396; *Press v County of Monroe, supra,* at 701).

The gravamen of plaintiffs' declaratory judgment action is that they are bona fide purchasers entitled to payment on the bonds upon maturity and on the interest coupons when due. The declaratory prayer for relief includes that "plaintiffs right and title to the El Paso bonds and coupons is superior to all other parties [and] that defendants withdraw all stops and other impediments preventing plaintiffs from freely negotiating the aforesaid bearer bonds."

We note initially that CPLR 211 (a) grants a 20-year limitation period to recover on a bond. It provides:

"An action to recover principal or interest upon a written instrument evidencing an indebtedness of the state of New York or of any person, association or public or private corporation ... secured only by a pledge of the faith and credit of the issuer, regardless of whether a sinking fund is or may be established for its redemption, must be commenced within twenty years after the cause of action accrues."

Although defendant City of El Paso Housing Authority qualifies as a public corporation under CPLR 211 (a), plaintiffs cannot avail themselves of that lengthy stretch of repose. The bonds at issue on their face declare that they are backed by ***42** the "full faith and credit of the United States." Since the bonds are not secured "only" by a pledge of full faith and credit of the "issuer," the long relaxation allowed under CPLR 211 (a) is unavailing.

(1) Next, CPLR 213 (4) relates specifically to actions on bonds. Subdivision (4) provides that "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property" must be commenced within six years. Because the bonds at issue are not secured by a mortgage upon real property, that prerequisite discounts its applicability. Without any other specific limitation periods being statutorily applicable to plaintiffs' declaratory relief claims, the cow-catcher six-year period obtains *(see,* CPLR 213 [1]; *Solnick v Whalen,* 49 NY2d 224, 230, *supra).*

The dispositive fulcrum, thus, becomes the accrual date. The question is whether 1983, 1989 or 1997 controls. Defendants-appellants urge 1983, when Drexel first became aware that the bonds were stolen *(Cruden v Bank of N. Y.,* 957 F2d 961 [2d Cir 1992]; *Insurance Co. v United States,* 561 F Supp 106 [ED Pa 1983]; *Rieser v Baltimore & Ohio R. R. Co.,* 123 F Supp 44, *affd* 228 F2d 563 [2d Cir 1955]). That was Supreme Court's view and ruling, though the Appellate Division differed.

Plaintiffs seek to uphold the 1997 accrual date on the ground that the bearer bonds are time instruments governed by UCC 3-109 *(see also,* UCC 3-122). UCC 3-109 (1) provides that "[a]n instrument is payable at a definite time if by its terms it is payable (a) on or before a stated date or at a fixed period after a stated date." Subdivision (1) of UCC 3-122 provides that "[a] cause of action against a maker or an acceptor accrues (a) in the case of a *time instrument* on the

day after maturity" (emphasis added). UCC 1-201 (1) defines an "[a]ction" to include "recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined." The Appellate Division reversed and granted plaintiffs reinstatement of the declaratory judgment cause on that ground (201 AD2d 58, 60; *see, Valdes v Atlantic Steamer Fire Co.,* 120 AD2d 661, 662, *lv denied* 68 NY2d 609).

A major difficulty with this rationale, however, is that the general provisions of article 3 expressly exclude "investment securities" from its governance. Notably, Uniform Commercial Code § 3-103 states: "[t]his article does not apply to money, documents of title or *investment securities"* (emphasis added). Additionally, the Official Comment to article 3 provides: "It ***43** should be noted especially that this Article does not apply in any way to the handling of securities. Article 8 deals with that subject" (Uniform Commercial Code § 3-101, Official Comment, McKinney's Cons Laws of NY, Book 62 1/2, at 4).

(2) Turning then to article 8 of the Uniform Commercial Code, we see that it governs stocks, bonds and other evidences of indebtedness. A security is defined in article 8 as an instrument which (1) is issued in bearer or registered form; (2) is a security commonly dealt in a security exchange or market and; (3) is either one of a class of series or divisible into a class or series *(see,* UCC 8-102). Because bearer bonds satisfy all three elements of UCC 8-102, they are "securities" as defined in that section *(see, Silverman v Alcoa Plaza Assocs.,* 37 AD2d 166, 170-171; *Matthysse v Securities Processing Servs.,* 444 F Supp 1009; *Phoenix Ins. Co. v National Bank & Trust Co.,* 366 F Supp 340; *Andrews v Troy Bank & Trust Co.,* 529 So 2d 987, 990 [Ala]; *Morris v Kaiser,* 292 Ala 650, 299 So 2d 252; 7 Hawkland, Alderman & Schneider, Uniform Commercial Code Series art 8, § 8-102:4, at 30). Because a security is specifically governed by article 8 and expressly excluded from article 3, the accrual provision of UCC 3-122 (1) is not applicable to this case (Uniform Commercial Code § 8-102, Official Comment, McKinney's Cons Laws of NY, Book 62 1/2, at 129; *see generally,* Comment, *The Status of an Investment Security Holder Under Article 8,* 33 Fordham L Rev 466 [1965]). Thus, we must look elsewhere for the rationale that justifies our agreement with the result reached by the Appellate Division.

(3) As the Court has stated in other contexts, a cause of action does not accrue until an injury is sustained *(see, LaBello v Albany Med. Ctr. Hosp.,* 85 NY2d 701, 705; *Snyder v Town Insulation,* 81 NY2d 429, 432; *Kronos, Inc. v AVX Corp.,* 81 NY2d 90; *Jacobus v Colgate,* 217 NY 235, 241). An action accrues, then, when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court *(see, Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169, 175). We conclude that the general six-year CPLR limitations period, as applied in this case, will only begin to run on the day after maturity of the bonds, July 2, 1997.

The accrual of an action "depends on a nice balancing of policy considerations" *(Victorson v Bock Laundry Mach. Co.,* 37 NY2d 395, 403). A defendant's interest in defending a claim must be balanced with a plaintiff's interest in not being deprived of a claim before a reasonable chance to assert it arises *(Martin v Edwards Labs.,* 60 NY2d 417, 425). Declaratory ***44** judgment actions do not fit neatly into the balancing equation, since they are often commenced "before there has been conduct which might give rise to a right to remedial or coercive relief" *(Solnick v Whalen,* 49 NY2d 224, 230, *supra).*

In *Phoenix Acquisition Corp. v Campcore, Inc.* (81 NY2d 138), we added illumination that helps to support the correct rationale and result in the portion of the dispute we are here discussing. There, the creditor loaned money secured by a promissory note providing that the creditor had the option to accelerate the entire debt due at any time if the debtor failed to make payment of any sum of principal or interest. When Campcore defaulted, the creditor waited until maturity to demand full payment of the principal and interest. In rejecting Campcore's argument that the Statute of Limitations blocked the suit, we held that the creditor's right to accelerate the debt did not affect the Statute of Limitations, which ran only upon the maturity of the discrete obligation *(id.,* at 140).

That rationale parallels the present controversy with respect to plaintiffs' pursuit of declaratory relief. Since the right to sue on the bond's principal debt does not accrue until the debt is "due and payable" *(id.,* at 141), we perceive no reasonable basis to bar on Statute of Limitations grounds plaintiffs' opportunity to seek a declaration of those seriously disputed rights on the debt instrument prior to maturity of the bond, especially in the unusual evolution of this controversy.

Plaintiffs' other causes of action are classified as tortious conversion and breach of contract. We agree with Supreme Court on this aspect of the case that these two causes are barred by pertinent Statutes of Limitations.

(4) Plaintiffs' second cause of action alleges that "[d]efendants' confiscation of the coupons presented by plaintiffs and their refusal to redeem" the coupons and bonds effectively constituted a tortious conversion of the bonds and the coupons. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" *(Employers' Fire Ins. Co. v Cotten,* 245 NY 102, 105; *Industrial & Gen. Trust v Tod,* 170 NY 233, 245). For Statute of Limitations purposes, an action for conversion as well as an action for damages for the taking of a chattel are subject to a three-year limitation period *(see,* CPLR 214 [3]). Since accrual runs from the date the conversion takes place *(see, Sporn v MCA Records,* 58 NY2d 482, 488) and not from discovery or the exercise of diligence to discover *(see, Varga v Credit-Suisse,* 5 AD2d 289, *affd* 5 NY2d 865), we deem ***45** the conversion, as alleged, to have occurred in July 1983. That is the date when defendant Morgan placed "stops" on the bonds and allegedly first refused to honor the title and right of Drexel to negotiate the bonds or to redeem the interest coupons. Since the whole action was not commenced until 1990, the three-year limitation bars this conversion claim and any tort-related relief or damages, as such. The action denominated as a breach of contract similarly accrued in 1983 under like reasoning and is, accordingly, barred by the applicable six-year statute (CPLR 213 [2]).

(5) Last, as to plaintiffs' claim regarding past due coupon interest, we have held that when a contract provides for the payment of money in installments, such as interest installments, the Statute of Limitations runs on each installment from the date it becomes due *(Phoenix Acquisition Corp. v Campcore, Inc.,* 81 NY2d 138, 141, *supra; Matter of Philippe,* 31 Misc 2d 193, *affd* 19 AD2d 587, *affd* 14 NY2d 600; *see also,* 18 Williston, Contracts § 2026C, at 787 [3d ed 1961]). Thus, the Appellate Division correctly curtailed how far back plaintiffs' request for relief could reach in that regard.

Accordingly, the order of the Appellate Division should be modified in accordance with this opinion, with costs to plaintiffs-respondents, and, as so modified, affirmed and the case is remitted to Supreme Court for further proceedings. The certified question should be answered in the negative.

Chief Judge Kaye and Judges Simons, Titone, Smith, Levine and Ciparick concur.
Order modified in accordance with the opinion herein, with costs to plaintiffs-respondents, and, as so modified, affirmed. Certified question answered in the negative. ***46**

190 A.D.3d 804
Supreme Court, Appellate Division,
Second Department, New York.

BANK OF NEW YORK, etc., respondent,
v.
Antoinette HUTCHINSON,
appellant, et al., defendants.

2017–13111
|
(Index No. 501471/16)
|
Argued—November 5, 2020
|
January 20, 2021

Synopsis

Background: Mortgagee commenced mortgagor foreclosure action against mortgagor, who moved for summary judgment dismissing foreclosure complaint. The Supreme Court, Kings County, Harriet Thompson, J., denied mortgagor's motion. Mortgagor appealed.

[Holding:] The Supreme Court, Appellate Division, held that genuine issue of material fact as to whether mortgagee had timely revoked its election to accelerate mortgage precluded summary judgment.

Affirmed.

West Headnotes (5)

[1] **Mortgages and Deeds of Trust** Time for proceedings; limitations and laches

An action to foreclose a mortgage is subject to a six-year statute of limitations. N.Y. CPLR § 213(4).

[2] **Limitation of Actions** Installments in general

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. N.Y. CPLR § 213(4).

[3] **Limitation of Actions** Installments in general

Mortgages and Deeds of Trust Acceleration

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. N.Y. CPLR § 213(4).

[4] **Mortgages and Deeds of Trust** Abandonment of acceleration; deacceleration

A lender may revoke its election to accelerate a mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action. N.Y. CPLR § 213(4).

[5] **Judgment** Mortgages and secured transactions, cases involving

Genuine issue of material fact existed as to whether mortgagee had revoked its election to accelerate full balance of mortgage debt within six years of filing its prior foreclosure action against mortgagor, precluding summary judgment in its subsequent foreclosure action against mortgagor, commenced 10 years after prior action. N.Y. CPLR §§ 213(4), 3013, 6514(e).

Attorneys and Law Firms

***560** Leon I. Behar, P.C., New York, NY, for appellant.

Davidson Fink LLP, Rochester, N.Y. (Larry T. Powell of counsel), for respondent.

WILLIAM F. MASTRO, A.P.J., CHERYL E. CHAMBERS, ANGELA G. IANNACCI, PAUL WOOTEN, JJ.

DECISION & ORDER

In an action to foreclose a mortgage, the defendant Antoinette Hutchinson appeals from an order of the Supreme Court, Kings County (Harriet Thompson, J.), dated September 18, 2017. The order, insofar as appealed from, denied those branches of that defendant's motion which were for summary judgment dismissing so much of the complaint as relates to unpaid mortgage installments which accrued after February 2, 2010, insofar as asserted against her, for summary judgment on her first, second, and third counterclaims, for abuse of process, malicious prosecution, and an award of attorney's fees, respectively, and pursuant to 22 NYCRR 130.1–1 for sanctions.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff seeks to foreclose a mortgage given by the defendant Antoinette Hutchinson (hereinafter the defendant) encumbering real property located in Brooklyn. The plaintiff alleges that the defendant defaulted under the terms of the mortgage by failing to make the monthly payment due August 1, 2008, and all payments due thereafter.

The defendant moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against her on the ground that the action was barred by the six-year limitations period (*see* CPLR 213[4]). She submitted evidence that the mortgage debt was accelerated by virtue of a foreclosure action commenced by the plaintiff on February 15, 2006 (hereinafter the 2006 action), the 2006 action was voluntarily discontinued on April 2, 2007, and the instant action was commenced on February 2, 2016. In opposition, the plaintiff argued that it had revoked its election to accelerate the mortgage debt within the limitations period. The plaintiff submitted a loan modification agreement, dated November 6, 2006, and a consent to cancel lis pendens, filed March 29, 2007. The Supreme Court found that the defendant had satisfied her prima facie burden and, in opposition, the plaintiff raised a triable issue of fact. The court nevertheless determined that, to the extent the plaintiff sought to collect unpaid principal and interest payments due before February 2, 2010, it was barred by the six-year limitations period. The court also denied those branches of the defendant's motion which were for summary judgment on her first, second, and third counterclaims, for abuse of process, malicious prosecution, and attorney's fees, respectively, and pursuant to 22 NYCRR 130.1–1 for sanctions. The defendant appeals.

[1] **[2]** **[3]** **[4]** 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 ***561** date each installment becomes due (*see Nationstar Mtge., LLC v. Weisblum,* 143 A.D.3d 866, 867, 39 N.Y.S.3d 491; *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 982, 943 N.Y.S.2d 540; *Wells Fargo Bank, N.A. v. Cohen,* 80 A.D.3d 753, 754, 915 N.Y.S.2d 569; *Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138). 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" (*EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161; *see Kashipour v. Wilmington Sav. Fund Socy., FSB,* 144 A.D.3d 985, 986, 41 N.Y.S.3d 738; *Nationstar Mtge., LLC v. Weisblum,* 143 A.D.3d at 867, 39 N.Y.S.3d 491; *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d at 982, 943 N.Y.S.2d 540). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 1069–1070, 58 N.Y.S.3d 118; *see Freedom Mtge. Corp. v. Engel,* 163 A.D.3d 631, 632, 81 N.Y.S.3d 156, *lv granted* 33 N.Y.3d 1039, 103 N.Y.S.3d 12, 126 N.E.3d 1052).

Here, the defendant met her initial burden of demonstrating, prima facie, that the instant action was time-barred (*see* CPLR 213[4]; *Nationstar Mtge., LLC v. Dorsin,* 180 A.D.3d 1054, 1055, 119 N.Y.S.3d 435; *Bank of N.Y. Mellon v. Alli,* 175 A.D.3d 1472, 1473, 109 N.Y.S.3d 398; *NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d at 1070, 58 N.Y.S.3d 118). Accordingly, the burden shifted to the plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it actually commenced the second action within the applicable limitations period (*see Christiana Trust v. Barua,* 184 A.D.3d 140, 151, 125 N.Y.S.3d 420).

[5] We agree with the Supreme Court's determination that the plaintiff's submission of the loan modification agreement, which "clearly and unambiguously demanded a resumption of monthly installment payments on the note" (*Christiana Trust v. Barua,* 184 A.D.3d at 146, 125 N.Y.S.3d 420; *see Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 154, 83 N.Y.S.3d 524; *cf. Freedom Mtge. Corp. v. Engel,* 163 A.D.3d at 633, 81 N.Y.S.3d 156), and the consent to cancel lis pendens (*see* CPLR 6514[e]), was sufficient to raise a triable issue of fact as to whether the plaintiff had revoked its election to accelerate the full balance of the mortgage debt within six years from February 15, 2006 (*see Christiana Trust v. Barua,* 184 A.D.3d at 149, 125 N.Y.S.3d 420; *U.S. Bank Trust, N.A. v. Rudick,* 172 A.D.3d 1430, 102 N.Y.S.3d 66; *Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 83 N.Y.S.3d 524), thereby warranting denial of summary judgment to the defendant dismissing the complaint in its entirety.

Contrary to the defendant's contention, under the circumstances, the plaintiff was not required to submit proof of installment payments made under the loan modification agreement (*see generally Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741). The defendant's contention that the complaint failed to comply with CPLR 3013 is without merit (*see U.S. Bank N.A. v. Nelson,* 169 A.D.3d 110, 113, 93 N.Y.S.3d 138). The defendant's unsubstantiated and conclusory claim that she was prejudiced because she relied on the voluntary discontinuance of the 2006 action to enter into a contract to sell the property to a third party, is insufficient to invalidate the revocation (*cf. Federal Natl. Mtge. Assn. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88).

***562** The defendant's remaining contentions are either not properly before this Court or without merit.

Inasmuch as the defendant's counterclaims for abuse of process, malicious prosecution, and an award of attorney's fees, as well as her request for sanctions, were premised on her contention that the complaint was time-barred, the Supreme Court properly denied those branches of the motion which were for summary judgment on the first, second, and third counterclaims, and for sanctions.

MASTRO, A.P.J., CHAMBERS, IANNACCI and WOOTEN, JJ., concur.

All Citations

190 A.D.3d 804, 140 N.Y.S.3d 559, 2021 N.Y. Slip Op. 00284

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New York Official Reports

172 A.D.3d 1430, 102 N.Y.S.3d 66, 2019 N.Y. Slip Op. 04218

**1 U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust, Appellant,

v

Samuel Rudick, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2016-11116, 604853/15
May 29, 2019

CITE TITLE AS: U.S. Bank Trust, N.A. v Rudick

HEADNOTE

Mortgages
Foreclosure
Limitations Period Had Not Expired

Day Pitney LLP, New York, NY (Christina A. Parlapiano, Robert N. Pollock, and Gross Polowy, LLC, of counsel), for appellant.
Young Law Group, PLLC, Bohemia, NY (Ivan E. Young and Justin Pane of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated October 4, 2016. The order, insofar as appealed from, granted that branch of the motion of the defendant Samuel Rudick which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him as barred by the applicable statute of limitations.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Samuel Rudick which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him as barred by the applicable statute of limitations is denied.

The plaintiff is the current holder of a note in the amount of $2,470,033 dated September 29, 2006, executed in favor of JP Morgan Chase Bank, N.A. (hereinafter Chase), by the defendant Samuel Rudick (hereinafter the defendant). The note was consolidated with numerous prior notes through a consolidation, extension, and modification agreement and secured by a mortgage dated September 29, 2006, on property in Westhampton.

After the defendant allegedly defaulted on the mortgage, Chase commenced a foreclosure action on June 12, 2008 (hereinafter the prior action). While the prior action was still pending, Chase and the defendant entered into a forbearance agreement on October 9, 2009, whereby Chase agreed, inter alia, to refrain from exercising its right to seek payment in full of all sums owed under the loan documents, and the defendant agreed, among other things, to repay all past due amounts pursuant to a new monthly repayment schedule. The defendant thereafter allegedly ceased to make payments under the forbearance agreement and, ultimately, the prior action was voluntarily discontinued by Chase for reasons that do not appear in the record.

*1431 This action was commenced in May 2015 by the plaintiff, as Chase's successor in interest, and the defendant moved, inter alia, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him as barred by the six-year statute of limitations (*see* CPLR 213 [4]). The Supreme Court granted that branch of the defendant's motion, and the plaintiff appeals.

While the commencement of the prior action in June 2008 constituted an election by Chase to accelerate the mortgage, thereby triggering the running of the statute of limitations on the entire debt (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Milone v US Bank N.A.*, 164 AD3d 145, 152 [2018]; *Freedom Mtge. Corp. v Engel*, 163 AD3d 631, 632 [2018]), the subsequent forbearance agreement—a copy of which was submitted by the plaintiff in opposition to the defendant's motion—evinced a clear intent by Chase, with the defendant's knowledge and consent, to revoke its prior election and reinstate the defendant's right to repay the underlying debt in monthly installments, subject to the new terms and conditions set forth in the forbearance agreement (*see Milone v US Bank N.A.*, 164 AD3d at 154; *Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 650 [1980]). Thus, contrary to the defendant's contention, the earliest the six-year statute of limitations could have begun

to run on the entire debt is the date on which the defendant defaulted under the terms of the forbearance agreement—a date which could not have been more than six years before this action was commenced.

Accordingly, we disagree with the Supreme Court's determination granting that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against him as barred by the applicable statute of limitations.

In light of our determination, we need not reach the plaintiff's remaining contentions. Chambers, J.P., Maltese, LaSalle and Barros, JJ., concur.

191 A.D.3d 918
Supreme Court, Appellate Division,
Second Department, New York.

U.S. BANK NATIONAL ASSOCIATION, etc., respondent,
v.
Treena Ann KROPP–SOMOZA, etc., appellant, et al., defendants.

2018–09231
|
(Index No. 602571/16)
|
Submitted—December 1, 2020
|
February 17, 2021

Synopsis

Background: Mortgagee brought foreclosure action against mortgagor and others, which was subsequent action on prior discontinued foreclosure for same mortgage. The Supreme Court, Suffolk County, John H. Rouse, J., granted mortgagee's motion for summary judgment, to strike mortgagor's answer, and for an order of reference, denied mortgagor's cross motion to dismiss the complaint as time-barred, and subsequently entered an order and judgment of foreclosure and sale. Mortgagor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] loan servicer's letter to mortgagor tolled period within which mortgagee could bring foreclosure action, and

[2] affidavit of employee of loan servicer properly laid foundation for admission of business records created by prior loan servicer.

Affirmed.

West Headnotes (7)

[1] **Limitation of Actions**

To dismiss a cause of action on ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. N.Y. CPLR § 3211(a)(5).

[2] **Limitation of Actions**

If a defendant satisfies the prima facie burden that the time within which a plaintiff has to commence has action has expired, the burden shifts to the plaintiff to raise a question of fact as to whether statute of limitations was tolled or otherwise inapplicable, or whether plaintiff actually commenced action within applicable limitations period to survive a motion to dismiss an action as barred by the applicable statute of limitations. N.Y. CPLR § 3211(a)(5).

[3] **Mortgages and Deeds of Trust**

Actions to foreclose a mortgage are governed by a six-year statute of limitations. N.Y. CPLR § 213(4).

[4] **Mortgages and Deeds of Trust**

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. N.Y. CPLR § 213(4).

[5] **Mortgages and Deeds of Trust**

A lender may revoke its election to accelerate a mortgage for the purpose of tolling the six-year statute of limitations period, but it must do so by an affirmative act of revocation occurring during the limitations period subsequent to the

initiation of the prior foreclosure action. N.Y. CPLR § 213(4).

[6] Limitation of Actions

Loan servicer's letter to mortgagor, sent within six-year limitations period, tolled period within which mortgagee could bring subsequent foreclosure action, even though letter referenced mortgagor's continued default on note for sums that had already accrued under original payment schedule, where mortgagee's letter affirmatively revoked and de-accelerated its election to accelerate mortgage as part of prior foreclosure action against mortgagor by containing clear and unequivocal demand that mortgagor meet her prospective monthly payment obligations under mortgage. N.Y. CPLR § 213(4).

[7] Judgment

Affidavit of employee of mortgagee's loan servicer properly laid foundation for admission of business records created by prior loan servicer into evidence to support mortgagee's motion for summary judgment in foreclosure action, where employee set forth in affidavit, among other things, that records provided by prior servicer were incorporated into loan servicer's own records and routinely relied upon by servicer in its own business.

Attorneys and Law Firms

Fred M. Schwartz, Smithtown, NY, for appellant.

Aldridge Pite, LLP (Reed Smith LLP, New York, N.Y. [Michael V. Margarella and Diane A. Bettino], of counsel), for respondent.

MARK C. DILLON, J.P., SYLVIA O. HINDS–RADIX, ROBERT J. MILLER, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***1** In an action to foreclose a mortgage, the defendant Treena Ann Kropp–Somoza appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Suffolk County (John H. Rouse, J.), entered April 30, 2018. The order and judgment of foreclosure and sale, upon an order of the same court dated November 20, 2017, inter alia, granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Treena Ann Kropp–Somoza, to strike that defendant's answer, and for an order of reference and denying that defendant's cross motion pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred, among other things, granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property.

ORDERED that the order and judgment of foreclosure and sale is affirmed, with costs.

In August 2005, the defendant Treena Ann Kropp–Somoza (hereinafter the defendant) executed a note in the sum of $319,600 which was secured by a mortgage on residential property located in Suffolk County. The defendant allegedly defaulted in her monthly payment obligations on the note beginning in December 2008. In July 2009, the plaintiff commenced an action (hereinafter the 2009 action) against the defendant, among others, to foreclose the mortgage, alleging that the defendant had defaulted on her payment obligations. In February 2015, the plaintiff discontinued the 2009 action.

In April 2015, the plaintiff's loan servicer transmitted a letter to the defendant. The letter noted that the plaintiff had "[p]reviously ... accelerated the maturity of the Loan and declared all sums secured by the Security Instrument immediately due and payable." The letter went on to advise the defendant that the plaintiff "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the Loan as an installment loan."

In February 2016, the plaintiff commenced the instant action to foreclose the same mortgage. The defendant interposed an answer. Thereafter, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference. The defendant opposed the plaintiff's motion and cross-moved pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred.

In an order dated November 20, 2017, the Supreme Court, among other things, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference, and denied the defendant's cross motion to dismiss the complaint as time-barred. The court subsequently entered an order and judgment of foreclosure and sale, inter alia, granting the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale and directing the sale of the subject property. The defendant appeals from the order and judgment of foreclosure and sale. We affirm.

***2** **[1]** **[2]** "To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*U.S. Bank N.A. v. Gordon,* 158 A.D.3d 832, 834–835, 72 N.Y.S.3d 156 [internal quotation marks omitted]; *see U.S. Bank N.A. v. Greenberg,* 170 A.D.3d 1237, 97 N.Y.S.3d 133). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*U.S. Bank N.A. v. Gordon,* 158 A.D.3d at 835, 72 N.Y.S.3d 156 [internal quotation marks omitted]; *see Stewart v. GDC Tower at Greystone,* 138 A.D.3d 729, 729, 30 N.Y.S.3d 638).

[3] **[4]** **[5]** Actions to foreclose a mortgage are governed by a six-year statute of limitations (*see* CPLR 213[4]; *Wells Fargo Bank, N.A. v. Eitani,* 148 A.D.3d 193, 197, 47 N.Y.S.3d 80; *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 982, 943 N.Y.S.2d 540). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the [s]tatute of [l]imitations begins to run on the entire debt" (*Deutsche Bank Natl. Trust Co. v. Adrian,* 157 A.D.3d 934, 935, 69 N.Y.S.3d 706 [internal quotation marks omitted]; *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 1069–1070, 58 N.Y.S.3d 118).

[6] Here, the defendant established, prima facie, that the instant action was untimely. The filing of the summons and complaint in the 2009 action constituted a valid election by the plaintiff to accelerate the maturity of the entire mortgage debt (*see Deutsche Bank Natl. Trust Co. v. Adrian,* 157 A.D.3d at 935, 69 N.Y.S.3d 706; *Fannie Mae v. 133 Mgt., LLC,* 126 A.D.3d 670, 670, 2 N.Y.S.3d 361). This established that the mortgage debt was accelerated in July 2009, and that, without more, the applicable six-year statute of limitations had expired by the time the plaintiff commenced the instant action in February 2016 (*see Albertina Realty Co. v. Rosbro Realty Corp.,* 258 N.Y. 472, 476, 180 N.E. 176; *Clayton Natl. v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493).

In opposition, however, the plaintiff demonstrated that it revoked its election to accelerate the mortgage within six years of the acceleration. The April 2015 letter contained "a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations" (*Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 154, 83 N.Y.S.3d 524). Contrary to the defendant's contention, the references in the April 2015 letter to her "continued default on the note" for sums that had already accrued under the original payment schedule (*id.* at 149, 83 N.Y.S.3d 524) were not inconsistent with a de-acceleration and did not render the letter ineffective, as a matter of law, to provide notice of the plaintiff's decision to revoke its election to accelerate the mortgage (*see id.* at 154, 83 N.Y.S.3d 524; *see also Federal Natl. Mtge. Assn. v. Rosenberg,* 180 A.D.3d 401, 402, 119 N.Y.S.3d 441; *cf. Vargas v. Deutsche Bank Natl. Trust Co.,* 168 A.D.3d 630, 630, 93 N.Y.S.3d 32, *lv granted* 34 N.Y.3d 910, 2020 WL 772997; *but see U.S. Bank N.A. v. Creative Encounters LLC,* 183 A.D.3d 1086, 124 N.Y.S.3d 92; *Wells Fargo Bank, N.A. v. Portu,* 179 A.D.3d 1204, 1207, 116 N.Y.S.3d 761).

[7] The defendant's contention that the Supreme Court erred in granting that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against her is also without merit. Contrary to the defendant's contention, the affidavit from an employee of the plaintiff's loan servicer was sufficient to lay a foundation for the admission of certain business records which were created by the prior loan servicer (*see generally People v. Cratsley,* 86 N.Y.2d 81, 90–91, 629 N.Y.S.2d 992, 653 N.E.2d 1162; *State of New York v. 158th St. & Riverside Dr. Hous. Co., Inc.,* 100 A.D.3d 1293, 1296, 956 N.Y.S.2d 196). The employee set forth in her affidavit, among other things, that the records provided by the prior servicer "were incorporated into the [servicer's] own records and routinely relied upon by the [servicer] in its own business" (*Bank of N.Y. Mellon v. Gordon,* 171 A.D.3d 197, 209, 97 N.Y.S.3d 286; *see Bank of*

Am., N.A. v. Brannon, 156 A.D.3d 1, 8, 63 N.Y.S.3d 352; *cf. U.S. Bank, N.A. v. Onuogu,* 188 A.D.3d 756, 131 N.Y.S.3d 611; *Matter of Carothers v. GEICO Indem. Co.,* 79 A.D.3d 864, 864–865, 914 N.Y.S.2d 199).

***3** The defendant's remaining contentions are without merit.

Accordingly, we affirm the order and judgment of foreclosure and sale.

DILLON, J.P., HINDS–RADIX, MILLER and CHRISTOPHER, JJ., concur.

All Citations

--- N.Y.S.3d ----, 191 A.D.3d 918, 2021 WL 608732, 2021 N.Y. Slip Op. 01082

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New York
Official Reports

21 Bedell 163, 183 N.Y. 163, 75 N.E. 1124,
2 L.R.A.N.S. 574, 111 Am.St.Rep. 722

JAMES KILPATRICK, Appellant,

v.

THE GERMANIA LIFE INSURANCE COMPANY, Respondent.

Court of Appeals of New York.
Argued October 26, 1905.

Decided November 21, 1905.

CITE TITLE AS: Kilpatrick v Germania Life Ins. Co.

***163** INVOLUNTARY PAYMENT

Under a mortgage providing that upon default in an interest payment, the principal and interest should become due at the option of the mortgagee, and also giving the mortgagor the privilege, at any time after a date specified, of paying the principal before maturity upon the payment of a thousand dollars additional as a bonus, the institution of foreclosure proceedings upon a default in an interest payment made before the time had arrived when the mortgagor could exercise his privilege, constitutes an election, final and irrevocable, to treat the mortgage debt as due; when, therefore, the mortgagor, having made financial arrangements for that purpose, notified the mortgagee that he would pay the mortgage and interest and the latter stated that the foreclosure suit had been discontinued, insisted upon the payment of the ***164** bonus before it would satisfy the mortgage and threatened to sue for the interest, and, in order to procure the discharge of the mortgage, the mortgagor paid the bonus, such payment must be regarded as involuntary and may be recovered back in an appropriate action for that purpose.

Kilpatrick v. Germania Life Ins. Co., 95 App. Div. 287, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 17, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

This action is brought to recover the sum of one thousand dollars alleged to have been wrongfully exacted from the plaintiff by the defendant as a bonus on the payment of a mortgage, this sum being in excess of the principal and interest called for by the plaintiff's bond.

On August 28th, 1899, the plaintiff executed and delivered to the defendant his bond for $80,000, with a mortgage to secure the payment of the same, covering premises in the borough of Manhattan, in the city of New York, at six per centum per annum until the buildings on the mortgaged premises should be fully completed, and with interest thereafter at five per centum per annum, payable semi-annually on February and August first, with the privilege to the plaintiff of paying the principal sum secured by the bond and mortgage, with accrued interest thereon, at any time after August 28th, 1900, and prior to August 1st, 1901, upon the payment, in addition to the principal sum and interest, of the further sum of one thousand dollars.

The mortgage contained a covenant that upon default in the payment of interest, or any part thereof, on any day whereon the same was payable by the terms of the bond and mortgage, the principal sum, with all arrears of interest should, at the option of the defendant, become and be due and payable immediately.

The plaintiff made default in the payment of six months' interest, which became due and payable August 1st, 1900. ***165** The defendant thereupon commenced an action to foreclose the mortgage, claiming the whole amount of principal to be due by reason of the default in payment of interest. The summons and complaint were filed in the office of the clerk of the county of New York August 7th, 1900, and the defendant was served with the summons and complaint about August 10th, 1900. On August 22nd, 1900, an order was entered by the defendant, *ex parte,* discontinuing the action and canceling the *lis pendens,* without costs. The plaintiff became aware of this discontinuance two or three days before the 28th of August, 1900.

On August 28th, 1900, the plaintiff paid to the defendant the principal sum of $80,000 secured by the bond and mortgage, together with interest, and also one thousand dollars bonus. This action was brought to recover the one thousand dollars bonus so paid by the plaintiff to the defendant on the ground

that such payment was involuntary, and that the plaintiff was wholly under duress, and strenuously objected to the payment thereof, alleging that the same was wholly unwarranted both in law and equity. The plaintiff embodied in his complaint a second cause of action for money had and received by defendant to its use, and that no part thereof had been paid.

The action was tried at a jury term and the complaint dismissed at the close of the plaintiff's case. The judgment entered upon this decision was affirmed with a divided court, Presiding Justice VAN BRUNT and Justice HATCH dissenting.

E. R. Root and *Addison Allen* for appellant. The institution of the foreclosure suit by the defendant was such an exercise of its option by the mortgagee under its bond as effectually deprived the mortgagor of his privilege, and likewise relieved him from paying the consideration agreed on for such privilege. (*Conrow v. Little,* 115 N. Y. 387; *Terry v. Munger,* 121 N. Y. 161; *Genet v. D. & H. C. Co.,* 170 N. Y. 296.) The taking and retention of the $1,000 now sought to be recovered by the plaintiff were arbitrary, unjust and illegal, ***166** and such as the law cannot justify or permit. (*Tripler v. Mayor, etc.,* 125 N. Y. 617; *Scholey v. Mumford,* 60 N. Y. 501; *Bates v. N. Y. Ins. Co.,* 3 Johns. Cas. 239; *Buckley v. Mayor, etc.,* 30 App. Div. 463; 159 N. Y. 558; *Carew v. Rutherford,* 106 Mass. 1; *McPherson v. Cox,* 86 N. Y. 472; *Homer v. State of New York,* 42 App. Div. 431; *Maxwell v. Griswold,* 51 U. S. 256; *Adams v. I. Nat. Bank,* 116 N. Y. 611.)

J. Brewster Roe for respondent. The commencement of the foreclosure proceedings was in nowise an election. (*Conrow v. Little,* 115 N. Y. 387; *Terry v. Munger,* 121 N. Y. 161; *Genet v. D. & H. C. Co.,* 170 N. Y. 296.) Where a payment is entirely voluntary, it cannot be said that it was made under duress, and it is, therefore, immaterial whether or not the mortgage had become payable before August 1, 1901. (*Windbiel v. Carroll,* 16 Hun, 101; *Mowatt v. Wright,* 1 Wend. 355; *Clark v. Dutcher,* 6 Cow. 674; *Wyman v. Farnsworth,* 3 Barb. 369; *Flower v. Lance,* 59 N. Y. 603; *Matthews v. Brewing Co.,* 26 Misc. Rep. 48; *Vaughn v. Village of Portchester,* 135 N. Y. 460; *Kortright v. Cady,* 21 N. Y. 343; *Hess v. Cohen,* 20 Misc. Rep. 333; *Bliss v. Wallis,* 3 How. Pr. [N. S.] 325.)

BARTLETT, J.

A very narrow question is presented on this appeal. We have a mortgage given on the 28th of August, 1899, payable August 1st, 1901. The interest was payable semi-annually on February and August first. The privilege was accorded the plaintiff of paying the principal sum and interest at any time after August 28th, 1900, and prior to August 1st, 1901, upon the payment in addition to the principal sum and interest of the further sum of one thousand dollars. The mortgage contained the usual covenant that upon default in the payment of interest the principal sum, with all arrears of interest, should, at the option of the defendant, become due and payable immediately. The plaintiff defaulted in the payment of his interest due August 1st, 1900.

***167** The plaintiff, represented by his nephew, called upon the counsel for the defendant prior to the time he was served with the summons and complaint and sought to make some arrangement as to the payment of the interest, but was informed that counsel had been instructed to foreclose. A day or two later the plaintiff was served with the summons and complaint in the foreclosure action.

Some time later the plaintiff's nephew again called on counsel for the defendant to notify him that they would be ready to pay the amount of the bond and mortgage with interest within the next day or two, and informed him that they had arranged for a new loan of $95,000 on the same premises covered by the defendant's mortgage. The defendant's counsel then informed the plaintiff's nephew and representative that he was very sorry, but his client had withdrawn its foreclosure suit and proposed to sue for the interest only, and that they would not receive payment of the principal sum due under the bond and mortgage unless plaintiff paid the additional sum of one thousand dollars. This was some three or four days before the 28th of August, 1900, when the parties met and plaintiff paid the principal, interest and one thousand dollars bonus, protesting at the same time that the latter was an illegal exaction and was money not due the defendant.

The sole question presented is whether the payment of this bonus of one thousand dollars was, under the circumstances, voluntary or exacted when the plaintiff was under duress. It will be observed that at the time when the defendant saw fit to avail itself of the covenant contained in the mortgage providing that default in payment of interest should, at its option, make the principal sum and interest due and payable immediately, the time had not yet arrived when the plaintiff was permitted to exercise his option to pay the principal sum, interest and said bonus at any time after August 28th, 1900, and prior to August 1st, 1901.

At this time, on August 1st, 1900, it was for the defendant to decide whether it would elect to treat the mortgage debt as ***168** due; it so elected, and instituted an action of foreclosure. From the moment of this election the mortgage debt became due and the plaintiff was practically warned that he must take measures to protect himself. It is undisputed that before the discontinuance of the foreclosure action the

plaintiff had changed his position, had obligated himself to make a new loan on the mortgaged premises, and necessarily had contracted financial obligations in that connection.

After these negotiations for the new loan had proceeded to a point when the plaintiff was advised as to the time when he might expect the money thereon, he notified the defendant that on a day certain he would pay the mortgage and interest. Thereupon the defendant's counsel stated to the plaintiff that the foreclosure action had been discontinued and that an action would be begun to recover the interest only, and that the plaintiff would not be permitted to discharge the mortgage debt and interest unless he also paid the bonus.

The defendant having placed the plaintiff in this position, it had no power, by discontinuing the foreclosure action, to restore the status of the parties as existing on August 1st, 1900, when plaintiff made default in the payment of interest. The election made by defendant at that time to treat the mortgage debt as due became final and irrevocable after plaintiff's change of position and assumption of legal obligations, the direct result of that election. Thenceforward the right to exact the bonus, so called, of one thousand dollars departed from the defendant, because it had voluntarily waived it by bringing suit to foreclose the mortgage, and expressly alleging its election in the complaint. It could not again elect by withdrawing its previous election. It could not say, 'I waive my waiver.' The election once made was final and not subject to change at the option of the defendant. Notwithstanding this, the defendant insisted upon the payment of the bonus before it would satisfy the mortgage, and in addition threatened to sue for the interest. Having no right to the bonus, it still insisted on the payment thereof before it would do its legal duty. The plaintiff, in view of the way business is done ***169** in giving a new mortgage to pay off the old one, could not wait to make a tender and take legal action and he was not obliged to. He could submit to the exaction and pay the bonus, and sue to recover it back, because such a payment is not voluntary. In effect the defendant held plaintiff's property in its grasp through its lien thereon and would not surrender it until the unlawful exaction was complied with. The payment was made to free the property from the duress as much as if it had been a chattel and the defendant had it in his possession under a pledge, refusing to part with it unless the bonus was paid. Under these circumstances the compulsion was illegal, unjust and oppressive and the plaintiff having submitted under protest had the right to recover, according to the authorities. The refusal of the defendant to accept the mortgage debt and interest unless the bonus was paid, placed the plaintiff in a position where he was compelled to submit to the exaction in order to receive a satisfaction of the defendant's mortgage and secure the money on the new loan which would protect him in the emergency.

The distinction between a voluntary and involuntary payment is very clearly pointed out in many cases. In *Tripler v. Mayor, etc., of N. Y.* (125 N. Y. 617), Judge PECKHAM states (p. 625): 'The very word used to describe an involuntary payment, imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills.'

In *Scholey v. Mumford* (60 N. Y. 498), Judge RAPALLO remarks (p. 501): 'To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary.'

In *Bates v. New York Ins. Co.* (3 Johns. Cas. 238), Justice THOMPSON states (p. 239): 'The equitable extension of this kind of action' (money had and received) 'has of late been so liberal, that it will lie to recover money obtained from any one by extortion, imposition, oppression, ***170** or taking an undue advantage of his situation. In the present case, there was, at least, an undue advantage taken of the plaintiff's situation. * * * The money being inequitably demanded of him, he must be presumed to have paid it, relying on his legal remedy to recover it back.'

In *Buckley v. Mayor, etc., of N. Y.* (30 App. Div. 463), Justice BARRETT states (p. 465): 'There is no ironclad rule which confines an involuntary payment to cases of duress of person or restraint of goods. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle. (*Carew v. Rutherford,* 106 Mass. 1.)' This case was affirmed without opinion in 159 N. Y. 558.

In *Radich v. Hutchins* (95 U. S. 210), Mr. Justice FIELD states (p. 213): 'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, for which the latter has no other means of immediate relief than by making the payment.'

In *Adams v. Irving National Bank* (116 N. Y. 606), Judge BROWN, referring to the old common-law rule applicable to this subject, states (p. 610): 'This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain

goods wrongfully detained; excessive fees when taken under color of office; excessive charges collected for performance of a duty, etc. In all such cases there was a moral coercion which destroyed the contract.' (See, also, *Briggs v. Boyd,* 56 N. Y. 289; *Stenton v. Jerome,* 54 N. Y. 480; *Baldwin v. Liverpool & G. W. Steamship Co.,* 74 N. Y. 125.)

We are of opinion that the plaintiff was under duress when making the payment of the bonus of one thousand dollars ***171** and is entitled to recover judgment for that sum with interest.

The judgments and orders of the Appellate Division and the Trial Term should be reversed, and a new trial ordered, with costs to the appellant in all the courts to abide the event.

GRAY, J. (dissenting).

The plaintiff seeks to recover back from the defendant a sum of money, which, as he claims, was wrongfully exacted from him by the defendant upon his payment of the principal of a bond given to secure a loan of money to him. His right to it must depend upon whether the money was paid under compulsion; for if the payment was voluntary, with no duress of the person, or of goods, he is concluded. There was neither misrepresentation, nor mistake; for the payment was pursuant to an agreement and I am unable to perceive in the circumstances disclosed any ground for the recovery.

The plaintiff had borrowed $80,000 from the defendant and had given his bond, secured by a mortgage of real estate in New York, for the repayment. The loan was to be paid in two years. If default was made in the payment of interest, the principal sum became due immediately. Each instrument contained the following clause: 'That the said Jaines Kilpatrick shall have the privilege of paying said principal sum of $80,000, with accrued interest thereon, at any time after August 28, 1900, and prior to August 1, 1901, (the due date of the bond), upon payment to said company, in addition to said principal sum and interest, of the further sum of $1,000.' Presumably, the $1,000 represented an indemnity to the company for the shifting of so large a loan and the temporary loss of the investment. The plaintiff failed to pay his interest on August 1, 1900, and, within a few days, the defendant commenced a suit in foreclosure of the mortgage; but, a few days later and before any appearance, or answer, voluntarily discontinued it, without costs. After the commencement of the foreclosure action, the plaintiff claims to have arranged to obtain the loan of $95,000 upon the mortgaged ***172** property; but the time, or terms, of the arrangement do not appear, nor does it appear that the defendant knew anything of the arrangement at the time when it discontinued the foreclosure suit. What does appear is that a nephew of the plaintiff, after the foreclosure suit was begun, spoke to the defendant's attorney and requested a little more time than the twenty days to answer, as he thought that they would be able to obtain another loan. At a later interview, the defendant's attorney informed him that the foreclosure action had been discontinued and that his client would sue for the interest due, and would not take payment of the principal without the additional payment of the $1,000 stipulated for. Thereafter, on August 28, 1900, the plaintiff paid the amount of the principal of his bond, with the additional $1,000.

It seems to me clear that the payment was, in law, voluntarily made. The defendant abandoned its foreclosure suit and decided to allow the loan to remain. The plaintiff could, then, have paid the interest; but he preferred to pay off the existing loan and to borrow a larger sum upon the property. This he had the right to do; but he could only exercise it by complying with the stipulation of his bond, in paying the $1,000 for the privilege. If it should be considered that the defendant, by its commencement of the foreclosure action, had forfeited, or compromised, its rights, then the plaintiff should have made a tender of the moneys due upon his bond; in which event, upon the defendant's refusal to accept them, he could have appealed to the courts to compel the discharge of the mortgage. (See *Kortright v. Cady,* 21 N. Y. 343, 347.) The two courses were open to him, to continue the existing loan, or to pay it off, and he chose the latter; which was to his convenience and advantage, as enabling him to borrow a larger amount. If the bargain shall be said to have been a hard one, the agreement was willingly entered into and I do not think it should be avoided upon the vague theory of some coercion in fact. It cannot, as I think, well be held that there was any duress, which coerced the plaintiff to make payment. There was no obligation upon him, at the time, to ***173** pay the principal; though there was an advantage which he wished to seize upon, in his ability to borrow more upon his property. If the defendant had placed itself in a position, where it was bound to take the principal sum, it had withdrawn from that position and the plaintiff, as I have pointed out, made no tender in discharge of his indebtedness, upon which to predicate a right to have the satisfaction thereof decreed in equity. The utmost he can urge is that the defendant compelled him to abide by the strict terms of his agreement. That was not illegal and no circumstances are shown, which warrant the court in granting relief, whether upon the ground of fraud; or of duress of the person, or of goods; or to prevent injury to property rights.

For these reasons, as for those stated by Mr. Justice PATTERSON, in the Appellate Division, I advise the affirmance of the judgment.

HAIGHT, VANN and WERNER, JJ., concur with BARTLETT, J.; CULLEN, Ch. J., concurs with GRAY, J.; O'BRIEN, J., absent.

Judgment reversed, etc.

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New York Official Reports

192 A.D.3d 70, 136 N.Y.S.3d 572, 2020 N.Y. Slip Op. 07970

**1 CitiMortgage, Inc., Appellant,

v

Jose Ramirez, Respondent.

Supreme Court, Appellate Division, Third Department, New York
531159
December 24, 2020

CITE TITLE AS:
CitiMortgage, Inc. v Ramirez

SUMMARY

Appeal from an order of the Supreme Court, Schenectady County (Vincent W. Versaci, J.), entered January 15, 2020. The order granted defendant's motion to dismiss the complaint.

HEADNOTES

Estoppel
Collateral Estoppel
Question of Law—Tolling of Statute of Limitations—Relitigation Permitted

(1) Where plaintiff's action to foreclose on a mortgage was dismissed for failure to prosecute, and a second foreclosure action was dismissed as time-barred, collateral estoppel did not bar plaintiff's subsequent action seeking a money judgment for the unpaid balance of the note because the question of whether the statute of limitations was tolled during the pendency of the first foreclosure action constituted a purely legal question that could be relitigated. Collateral estoppel does not apply to bar relitigation of a pure question of law. Determinations as to statutes of limitations, including the applicable statute and whether any toll interrupted it from running, constitute questions of law, although a factual question may exist regarding the proper calculation under the circumstances. Here, plaintiff did not dispute Supreme Court's determinations that the statute of limitations was six years, that it began to run when the first foreclosure action was commenced, and that plaintiff's acceleration of the mortgage debt was never decelerated. But collateral estoppel did not bar relitigation of the question of whether the statute was tolled during the pendency of the first foreclosure action, a purely legal question.

Judgments
Res Judicata
Prior Dismissed Foreclosure Action—New Action for Money Judgment—New Action Permitted Due to Required Election of Remedies

(2) Where plaintiff's action to foreclose on a mortgage was dismissed for failure to prosecute, and a second foreclosure action was dismissed as time-barred, res judicata did not preclude plaintiff's subsequent action seeking a money judgment for the unpaid balance of the note because plaintiff could not have raised that cause of action in the prior foreclosure proceeding due to its required election of remedies. Res judicata bars not only those claims that were actually litigated previously, but also those which might have been raised in the former action. However, the holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of those alternate remedies. Due to this required election of remedies, plaintiff could not have raised a cause of action to recover on the note in the context of the second foreclosure proceeding. Accordingly, the outcome of that foreclosure proceeding did not have res judicata effect barring the action to recover on the note.

Limitation of Actions
Six-Year Statute of Limitations
Tolling—Statutory Prohibition on New Action during Pendency of Prior Mortgage Debt Action—Tolling Established

(3) Where plaintiff's action to foreclose on a mortgage was dismissed for failure to prosecute, plaintiff timely commenced a subsequent action seeking *71 a money judgment for the unpaid balance of the note because it established that the statute of limitations was tolled during the pendency of the foreclosure action until that action was dismissed for failure to prosecute. “Where the

commencement of an action has been stayed . . . by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced" (CPLR 204 [a]). Here, RPAPL 1301 (3), which provides that while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought," operated as a "statutory prohibition" under CPLR 204 (a). Given the toll, plaintiff's commencement of the money judgment action was timely.

RESEARCH REFERENCES

Am Jur 2d Judgments §§ 452, 453, 458, 466, 468, 478, 480; Am Jur 2d Limitation of Actions § 148; Am Jur 2d Mortgages § 546.

Carmody-Wait 2d Limitation of Actions §§ 13:167, 13:368; Carmody-Wait 2d Judgments §§ 63:468, 63:470, 63:496, 63:497.

Mortgage Liens in New York (2017-2018 ed) ch 19, The Action to Foreclose the Mortgage.

NY Jur 2d Judgments §§ 333–337, 343, 394, 395; NY Jur 2d Limitations and Laches § 263; NY Jur 2d Mortgages and Deeds of Trust §§ 609, 610, 676.

Siegel, NY Prac §§ 447, 457.

ANNOTATION REFERENCE

See ALR Index under Collateral Estoppel; Foreclosure; Limitation of Actions; Mortgages; Res Judicata.

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APPEARANCES OF COUNSEL

Akerman LLP, New York City (*Jordan M. Smith* of counsel), for appellant.
The Legal Project, Albany (*Debra J. Willsey* of counsel), for respondent.

OPINION OF THE COURT

Mulvey, J.

***72** Appeal from an order of the Supreme Court (Versaci, J.), entered January 15, 2020 in Schenectady County, which granted defendant's motion to dismiss the complaint.

In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. The note and mortgage were later assigned to plaintiff. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which Supreme Court (Drago, J.) dismissed on October 30, 2013, for failure to prosecute. In April 2015, Supreme Court (Buchannan, J.) denied plaintiff's motion to vacate the dismissal. In 2017, plaintiff commenced a second foreclosure action. Supreme Court (Versaci, J.) dismissed that action as time-barred, as the statute of limitations on the mortgage foreclosure claim began to run on May 5, 2010—the date the mortgage was accelerated—and expired in May 2016. The court also discharged the mortgage.

In May 2019, plaintiff commenced the present action, seeking a money judgment against defendant in the amount of the unpaid balance of the note. Defendant moved pre-answer to dismiss the complaint on the grounds that it was barred by, among other things, the doctrine of res judicata and the statute of limitations. Supreme Court, finding that plaintiff is collaterally estopped from relitigating the issue of whether the statute of limitations period was tolled, granted defendant's motion and dismissed the complaint (*see* CPLR 3211 [a] [5]). Plaintiff appeals.

(1) Collateral estoppel does not bar this action. A finding of collateral estoppel requires that "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [internal quotation marks and citations omitted]; *see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 199 [2008]). However, the doctrine of collateral estoppel "does not apply to bar relitigation of a pure question of law" (*Avon Dev. Enters. Corp. v Samnick*, 286 AD2d 581, 582 [2001]; *see American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]). Generally,

determinations as to statutes of limitations—including which statute applies and whether any toll interrupts the running of the applicable statute ***73** —constitute questions of law, although a factual question may exist regarding the proper calculation under the circumstances (*see Avon Dev. Enters. Corp. v Samnick*, 286 AD2d at 582; *cf. Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d at 200; *compare Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 316 [2006] [noting that, in situations involving discovery of a condition, the statute of limitations issue is a mixed question of law ****2** and fact]).

Here, plaintiff does not dispute Supreme Court's determinations that the statute of limitations is six years, that it began to run on May 5, 2010, with the commencement of the first foreclosure action and that plaintiff's acceleration of the mortgage debt and the debt was never decelerated. The question of whether the statute was tolled during the pendency of the first foreclosure action constitutes a purely legal question. Thus, collateral estoppel does not bar relitigation of that question (*see Avon Dev. Enters. Corp. v Samnick*, 286 AD2d at 582).

(2) The doctrine of res judicata also does not preclude this action.[*] Under that doctrine, "a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under the transactional analysis approach, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*id.* [internal quotation marks and citations omitted]; *see Maki v Bassett Healthcare*, 141 AD3d 979, 981 [2016], *appeal dismissed, lv dismissed and lv denied* 28 NY3d 1130 [2017]). "[R]es judicata bars not only those claims that were actually litigated previously, but also those which might have been raised in the former action" (*Bernstein v State of New York*, 129 AD3d 1358, 1359 [2015] [internal quotation marks and citations omitted]; *accord Piller v Princeton Realty Assoc. LLC*, 173 AD3d 1298, 1303 [2019]). However, "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies" (*Gizzi v Hall*, 309 AD2d 1140, 1141 [2003]; *see Kodsi v Scotto*, 170 AD3d 1357, 1358 [2019]; *Wells Fargo Bank, N.A. v Goans*, 136 AD3d 709, 709 [2016]). Due to this ***74** required election of remedies, plaintiff could not have raised a cause of action to recover on the note in the context of the second foreclosure proceeding. Accordingly, the outcome of that foreclosure proceeding does not have res judicata effect so as to bar the current action to recover on the note.

(3) Moving to the statute of limitations defense, defendant had the initial burden to establish that the statutory time had expired (*see Matter of Steinberg*, 183 AD3d 1067, 1070 [2020]). If that burden was met, the burden shifted to plaintiff to "raise a question of fact as to whether the statute of limitations has been tolled" (*id.* [internal quotation marks and citation omitted]). Whether the present action is viewed as an action on a note secured by a mortgage or as an action on a contractual obligation, the statute of limitations is six years (*see* CPLR 213 [2], [4]). That statute of limitations commenced on May 5, 2010, when the loan was accelerated by the first foreclosure action, and the loan was never ****3** decelerated (*see U.S. Bank N.A. v Creative Encounters LLC*, 183 AD3d 1086, 1086-1087 [2020], *appeal dismissed* 35 NY3d 1062 [2020]). Defendant met his burden of establishing that this 2019 action, commenced more than six years after the statute of limitations began to run, is time-barred absent a tolling provision (*see* CPLR 213).

With the burden shifted, plaintiff relies on the interplay of two statutes to establish a toll. CPLR 204 (a) provides that, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." "[T]his rule has strong roots in the equitable principle that plaintiffs should not be penalized for failing to assert their rights when a court or statute prevents them from doing so" (*Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 258 [2019]). "[A] toll operates to compensate a claimant for the shortening of the statutory period in which it must commence —or recommence—an action, irrespective of whether the stay has actually deprived the claimant of any opportunity to do so" (*id.* at 256 [emphasis omitted]). Courts have held that a statute that acts as a "blanket ban on filing or continuing lawsuits" constitutes a stay subject to the tolling provision of CPLR 204 (a) (*id.* at 255). For example, the Court of Appeals concluded that the automatic bankruptcy stay provided for in federal law (*see* 11 USC § 362 [a] [1]) constitutes a "statutory prohibition" under CPLR 204 (a) even though "an aggrieved party may seek relief from the automatic stay by application to the bankruptcy ***75** court," because "the need to seek judicial relief from the automatic stay means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the bankruptcy court will favorably exercise its

discretion" (*Lubonty v U.S. Bank N.A.*, 34 NY3d at 255, citing 11 USC § 362 [d] [1]).

The statute that plaintiff relies on, in conjunction with CPLR 204 (a), is RPAPL 1301 (3), which provides that, while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of RPAPL 1301 (3) is "to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt" (*Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995] [internal quotation marks, emphasis and citation omitted]; *see Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2011]). Similar to the ability to request relief from a stay under the bankruptcy statute, although under RPAPL 1301 (3) a creditor may seek leave of court to commence another action to recover a part of a mortgage debt, "the need to seek judicial relief from the . . . stay means the creditor is otherwise prohibited from proceeding, and there is no guarantee that **4 the . . . court will favorably exercise its discretion" (*Lubonty v U.S. Bank N.A.*, 34 NY3d at 255). Furthermore, the toll during a stay due to a "statutory prohibition" under CPLR 204 (a) has been held to apply to the provisions of RPAPL 1301 (*see Phalen-Sobolevsky v Mullin*, 26 AD3d 806, 807 [2006]; *Torsoe Bros. Constr. Corp. v McKenzie*, 271 AD2d 682, 682-683 [2000]). Hence, although defendant met his initial burden of demonstrating that the statute of limitations had expired, plaintiff established that the statute was tolled during the pendency of the first foreclosure action, from May 2010 to October 2013. Accordingly, plaintiff's commencement of this action in May 2019 was timely.

Garry, P.J., Lynch, Clark and Reynolds Fitzgerald, JJ., concur.

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

Footnotes

* The res judicata issue, as framed by the parties' arguments, is limited to whether Supreme Court's ruling on statute of limitations grounds—in its order disposing of the second foreclosure action—bars the current action.

2020 Sess. Law News of N.Y. Exec. Order 202.8 (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

Executive Order No. 202.8
CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY

March 20, 2020

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York;

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

WHEREAS, in order to facilitate the most timely and effective response to the COVID-19 emergency disaster, it is critical for New York State to be able to act quickly to gather, coordinate, and deploy goods, services, professionals, and volunteers of all kinds; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:

• In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020;

• Subdivision 1 of Section 503 of the Vehicle and Traffic Law, to the extent that it provides for a period of validity and expiration of a driver's license, in order to extend for the duration of this executive order the validity of driver's licenses that expire on or after March 1, 2020;

• Subdivision 1 of Section 491 of the Vehicle and Traffic Law, to the extent that it provides for a period of validity and expiration of a non-driver identification card, in order to extend for the duration of this executive order the validity of non-driver identification cards that expire on or after March 1, 2020;

• Sections 401, 410, 2222, 2251, 2261, and 2282(4) of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a registration certificate or number plate for a motor vehicle or trailer, a motorcycle, a snowmobile, a vessel, a limited use vehicle, and an all-terrain vehicle, respectively, in order to extend for the duration of this executive order the validity of such registration certificate or number plate that expires on or after March 1, 2020;

• Section 420-a of the vehicle and traffic law to the extent that it provides an expiration for temporary registration documents issued by auto dealers to extend the validity of such during the duration of this executive order.

• Subsection (a) of Section 602 and subsections (a) and (b) of Section 605 of the Business Corporation Law, to the extent they require meetings of shareholders to be noticed and held at a physical location.

NOW, THEREFORE, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through April 19, 2020:

• The provisions of Executive Order 202.6 are hereby modified to read as follows: Effective on March 22 at 8 p.m.: All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function. Any business violating the above order shall be subject to enforcement as if this were a violation of an order pursuant to section 12 of the Public Health Law.

• There shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days.

• Effective at 8 p.m. March 20, any appointment that is in-person at any state or county department of motor vehicles is cancelled, and until further notice, only on-line transactions will be permitted.

• The authority of the Commissioner of Taxation and Finance to abate late filing and payment penalties pursuant to section 1145 of the Tax Law is hereby expanded to also authorize abatement of interest, for a period of 60 days for a taxpayers who are required to file returns and remit sales and use taxes by March 20, 2020, for the sales tax quarterly period that ended February 29, 2020.

(L.S.) GIVEN under my hand and the Privy Seal of the State in the City of Albany this twentieth day of March in the year two thousand twenty.

BY THE GOVERNOR
/S/ Andrew M. Cuomo
/s/ Melissa DeRosa
Secretary to the Governor

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2020 Sess. Law News of N.Y. Exec. Order 202.67 (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

Executive Order No. 202.67
CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY

October 4, 2020

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby find that a disaster continues to exist for which affected state agencies and local governments are unable to respond adequately. Therefore, pursuant to the authority vested in me by the Constitution of the State of New York and Section 28 of Article 2-B of the Executive Law, I hereby continue the declaration of the State Disaster Emergency effective March 7, 2020, as set forth in Executive Order 202. This Executive order shall remain in effect until November 3, 2020.

IN ADDITION, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202 up to and including 202.21, and 202.27, 202.28, 202.29, 202.30, 202.38, 202.39, 202.40, 202.48, 202.49, 202.50, 202.55 and 202.55.1, as extended, and Executive Order 202.60 for another thirty days through November 3, 2020, except:

• Subdivision 1 of Section 491 of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a non-driver identification card, shall no longer be suspended or modified as of November 3, 2020;

• Sections 401, 410, 2222, 2251, 2251, and 2282(4) of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a registration certificate or number plate for a motor vehicle or trailer, a motorcycle, a snowmobile, a vessel, a limited use vehicle, and an all-terrain vehicle, shall no longer be suspended or modified as of November 3, 2020;

• Section 420-a of the Vehicle and Traffic law, to the extent that it provides an expiration for temporary registration documents issued by auto dealers shall no longer be suspended or modified as of November 3, 2020; and

• The suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by

any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be , and provided further:

• The suspension and modification of Section 30.30 of the criminal procedure law, as continued and modified in EO 202.60, is hereby no longer in effect, except for felony charges entered in the counties of New York, Kings, Queens, Bronx, and Richmond, where such suspension and modification continues to be effective through October 19, 2020; thereafter for these named counties the suspension is no longer effective on such date or upon the defendant's arraignment on an indictment, whichever is later, for indicted felony matters, otherwise for these named counties the suspension and modification of Section 30.30 of the criminal procedure law for all criminal actions proceeding on the basis of a felony complaint shall no longer be effective, irrespective, 90 days from the signing of this Executive order on January 2, 2021.

(L.S.) GIVEN under my hand and the Privy Seal of the State in the City of Albany this fourth day of October in the year two thousand twenty.

BY THE GOVERNOR
/S/ Andrew M. Cuomo
/s/ Melissa DeRosa
Secretary to the Governor

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2020 Sess. Law News of N.Y. Exec. Order 202.72 (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

Executive Order No. 202.72
CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY

November 3, 2020

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby find that a disaster continues to exist for which affected state agencies and local governments are unable to respond adequately. Therefore, pursuant to the authority vested in me by the Constitution of the State of New York and Section 28 of Article 2-B of the Executive Law, I hereby continue for thirty days the declaration of the State Disaster Emergency effective March 7, 2020, as set forth in Executive Order 202. This Executive order shall remain in effect through December 3, 2020.

IN ADDITION, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive, contained in Executive Orders 202 up to and including 202.21, and 202.27, 202.28, 202.29, 202.30, 202.31, 202.38, 202.39, 202.40, 202.41, 202.42, 202.43, 202.48, 202.49, 202.50, 202.51, 202.52, 202.55, 202.55.1, 202.56, 202.60, 202.61, 202.62, 202.63, as continued and contained in Executive Orders 202.67 and 202.68 for another thirty days through December 3, 2020, except:

• Subdivision (a) of Section 301 of the Vehicle and Traffic Law, to the extent that it requires annual safety inspections and at least biennial emissions inspections, shall no longer be suspended or modified, and provided no penalty shall attach to the failure to obtain such inspection until December 1, 2020;

• Subdivision 1 of Section 491 of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a non-driver identification card, shall no longer be suspended or modified;

• Sections 401, 410, 2222, 2251, 2251, and 2282(4) of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a registration certificate or number plate for a motor vehicle or trailer, a motorcycle, a snowmobile, a vessel, a limited use vehicle, and an all-terrain vehicle, shall no longer be suspended or modified, but provided that no penalty shall attach to the failure to extend such registration until December 1, 2020;

• Section 420-a of the Vehicle and Traffic law, to the extent that it provides an expiration for temporary registration documents issued by auto dealers shall no longer be suspended or modified;

• Pursuant to Executive Order 202.67, the suspension for civil cases in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby no longer in effect as of November 4, 2020, provided any criminal procedure law suspension remains in effect and provided that all suspensions of the Family Court Act remain in effect until November 18, 2020 and thereafter continue to remain in effect for those juvenile delinquency matters not involving a detained youth and for those child neglect proceedings not involving foster care.

• To the extent Executive Order 202.61 modified subdivision 1 of section 579 of the Public Health Law to require reporting of COVID-19 and influenza test results by additional clinical laboratories within 3 hours, such modification is continued and amended to permit such laboratories to report results to the Department within 24 hours, provided the Department may require more frequent reporting if deemed necessary;

IN ADDITION, I hereby temporarily suspend or modify the following from the date of this Executive Order through December 3, 2020:

• Sections 732 and 743 of the Real Property Actions and Proceedings Law are modified to the extent necessary to provide that the time to answer in any summary eviction proceeding for nonpayment of rent that is pending on the date of the issuance of this Executive Order will be sixty days.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directives through December 3, 2020:

• The directive contained in Executive Order 202.61, along with implementing guidance, requiring clinical laboratories and licensed professionals authorized by the Department of Health Physician Office Laboratory Evaluation Program to administer a test for COVID-19 or influenza to report results of COVID-19 and influenza tests to the Department within three hours, is hereby modified to permit clinical laboratories and those licensed professionals with reporting requirements to report results to the Department within 24 hours, provided the Department may require more frequent reporting if deemed necessary.

(L.S.) GIVEN under my hand and the Privy Seal of the State in the City of Albany this third day of November in the year two thousand twenty.

BY THE GOVERNOR
/S/ Andrew M. Cuomo
/s/ Melissa DeRosa
Secretary to the Governor

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2021 WL 866035
Court of Claims of New York.

Jahn FOY, Claimant,

v.

The STATE of New York,[1] Defendant.

135085
|
Decided on February 16, 2021

Attorneys and Law Firms

For Claimant: JAHN FOY, PRO SE

For Defendant: HON. LETITIA JAMES, ATTORNEY GENERAL, BY: Ellen S. Mendelson, Esq., Assistant Attorney General

Opinion

Richard E. Sise, A.P.J.

***1** Claimant brought this action seeking to be reinstated to his position as a New York State Court Officer and for a declaratory judgment that a stipulation he signed regarding the terms of his continued employment is void. He also requests money damages for his alleged wrongful termination. Defendant has moved to dismiss the claim on the grounds that the claim was not timely filed or served, that the court lacks jurisdiction to issue the declaratory judgment sought here or to order that claimant be reinstated to his position.

Claimant alleges that on February 7, 2019 he entered into a stipulation with the Office of Court Administration which provided that he could be fired immediately if he was late for work more than three times in any consecutive four-week period, or was late for work more than a total of thirty minutes in any consecutive four-week period, or if he reported to his assigned post late more than three times in any consecutive four-week period. According to claimant, he was called into a meeting on December 10, 2019. The purpose of the meeting is not made clear in the claim but involved some discussion of lateness issues regarding claimant. Claimant alleges that sometime prior to the meeting he had made an inquiry about an incident report in which he was named. He asserts that the report was falsified and that he was attempting to have the report corrected. He further contends that the December 10th meeting was provoked by his efforts regarding that incident report. As alleged in the claim, his termination on February 18, 2020 was done in bad faith and under false pretenses. The claim also makes a vague reference to a decision made by a Judge Silver and argues that the decision was made without adequate consideration of the circumstances surrounding claimant's termination.

As defendant correctly argues, the court does not have jurisdiction to make a declaratory judgment with respect to the stipulation regarding claimant's continued employment (*see* Court of Claims Act § 9 [9-a] [power to make a declaratory judgment limited to controversies involving the obligation of an insurer to indemnify or defend a defendant in this court]; *cf.* CPLR 3001 [power of Supreme Court to render a declaratory judgment]). Defendant also correctly argues that this court does not have the power to order such equitable relief as reinstatement (*Koerner v. State of New York*, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232 [1984]).

Whether the claim was timely filed and served depends on a number of considerations; the date of accrual, the time within which the claim must be filed and served, the dates of filing and service and any tolls or suspensions that may apply. The latest date for any event alleged in the claim is February 18, 2020, the date on which claimant was terminated, and, because the date when the claim arose must be alleged in the claim (Court of Claims Act § 11 [b]), this represents the latest possible date of accrual. Under Court of Claims Act § 10 the claim for wrongful termination, to the extent one exist here (*see Piro v. Bowen*, 76 A.D.2d 392, 397, 430 N.Y.S.2d 847 [2d Dept. 1980] [the general rule is that a discharged public employee cannot recover unpaid salary until they prove their right to the position from which they were discharge]), had to be filed and served within 90 days of accrual (*see Sager v. County of Sullivan*, 145 A.D.3d 1175, 41 N.Y.S.3d 443 [3d Dept. 2016] [treating claim for wrongful termination based on retaliatory action as a tort]). The claim, however, was not filed until July 21, 2020, and not served until November 17, 2020, which is nearly nine months after the February 18, 2020 date of accrual. Thus, the claim was not served within the period of time prescribed by section 10.

***2** Claimant argues, however, that he has been afforded additional time to file and serve his claim by Executive Order 202.8 issued on March 20, 2020 by Governor Cuomo in response to the COVID-19 public health emergency. The executive order, extended seven times and to the extent it applies here, ultimately expired on November 3, 2020,[2]

was issued pursuant to authority vested in the Governor by Executive Law § 29-a. The executive order provides in part that:

> "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

The executive order makes pointed reference to the Court of Claims Act and is clear in stating that any specific time limit for the commencement of any legal action is tolled. A toll suspends the running of the applicable period of limitation for a finite time period, in this instance, 30 days[3], and "[t]he period of the toll is excluded from the calculation of the time in which the [claimant] can commence an action." (*Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492, 505, n. 8, 133 N.Y.S.3d 224, 158 N.E.3d 93 [2020]). The amount of time covered by the original executive order and all extensions is 228 days. The number of days between when the claim accrued, February 18, 2020, and when claimant accomplished service on November 17, 2020, is 273 days. Subtracting the period of the toll, 228 days, from the period of time between accrual and service, 273 days, results in a difference of 45 days. Therefore, on November 17, 2020, 45 days remained before the expiration of time to serve and file the claim.

While defendant inexplicably failed to advise the court of Executive Order 202.8 and then, once raised by claimant, neglected to address it's impact here, a number of commentators have noted that the authority afforded the governor by Executive Law § 29-a (1) is to "temporarily suspend any statute" and that the statute does not specifically authorize a toll and that a suspension of a period of limitation is fundamentally different from a toll. Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension. Thus, if the executive orders discussed above worked a suspension rather than a toll, any time period affected by those orders expired on November 3, 2020. As such, the claim here, served on November 17, 2020, would be untimely.

Executive Order 202.8, as noted, provides for a toll, as do Executive Order 202.67 and Executive Order 202.72, the last two executive orders addressed to time limits for the commencement, filing or service of a legal action. Thus, it is clear that a toll, and not a suspension, was intended and the question becomes whether the statute authorizes a toll. The primary consideration in the construction of a statute is to ascertain and give effect to the intention of the legislature (McKinney's Cons Laws of NY, Book 1, Statutes § 92). The legislative intent is to be ascertained from the words and language used and the statutory language is generally construed according to its natural and most obvious sense without resorting to an artificial or forced construction. (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Focusing on the phrase "suspend any statute" in Executive Law § 29-a (1), the statue demonstrates a far reaching application. Considering that the legislature extended the authority for the governor to suspend to "any statute", that power should not be read in the narrow context of statutes involving time limitations where a 'suspension' represents a term of art. Moreover, a statute must be construed as a whole reading the various sections together to determine legislative intent (*Matter of Plastic Surgery Group, P.C. v. Comptroller of the State of NY*, 34 N.Y.3d 507, 516, 121 N.Y.S.3d 723, 144 N.E.3d 332 [2019]; *Loehr v. New York State Unified Court System*, 150 A.D.3d 716, 57 N.Y.S.3d 40 [2d Dept. 2017]). In that regard, consideration must be given to the language in Executive Law § 29-a (2) which provides that "[s]uspensions pursuant to subdivision one of this section shall be subject to the following standards and limits" and in paragraph "d" of subdivision two, which provides that the implementing executive order "... may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions". The language in subdivision two, paragraph "d" makes clear that something other than a straightforward suspension of a statute is authorized. The governor is also permitted to modify the terms and conditions of a statue. Here, Executive Order 202.8, and its successors, can reasonably be characterized as implementing a temporary alteration of the timely filing and service provisions in Court of Claims Act § 10, a modification. As such, the tolls were authorized and the claim is not untimely.

All Citations

--- N.Y.S.3d ----, 2021 WL 866035, 2021 N.Y. Slip Op. 21047

Footnotes

1 The caption of the action has been amended to reflect the only proper defendant.

2 The extensions of E.O. 202.8 are found in: E.O. 202.14, E.O. 202.28; E.O. 202.38; E.O. 202.48; E.O. 202.55; E.O. 202.60 and E.O. 202.67. E.O. 202.72 announced that the tolls were no longer in effect as of November 4, 2020.

3 Executive Law § 29-a limits the duration of directives authorized by its provisions to 30 days, but provides that the governor may extend the directive for additional periods not to exceed 30 days each.

New York Official Reports

Unreported Disposition
69 Misc.3d 1224(A), 135 N.Y.S.3d 629 (Table), 2020 WL 7380288 (N.Y.Sup.), 2020 N.Y. Slip Op. 51481(U)

***1** Elisabeth Morse, Plaintiff,

v.

LoveLive TV US, Inc.,
RICHARD COHEN, Defendant.

Supreme Court, New York County
650110/2017
Decided on December 15, 2020

CITE TITLE AS: Morse v LoveLive TV US, Inc.

ABSTRACT

Pleading
Amendment
Failure to Timely Re-File upon Amended Pleading—COVID-19 Toll

Corporations
Dissolution
Defendant's motion to dismiss plaintiff's Business Corporation Law § 1006 claim was denied

Morse v LoveLive TV US, Inc., 2020 NY Slip Op 51481(U). Pleading—Amendment—Failure to Timely Re-File upon Amended Pleading—COVID-19 Toll. Corporations—Dissolution—Defendant's motion to dismiss plaintiff's Business Corporation Law § 1006 claim was denied. (Sup Ct, NY County, Dec. 15, 2020, Reed, J.)

APPEARANCES OF COUNSEL

Plaintiff:
Elizabeth Avnet Morse, Esq.

Defendants:
Wallace Neel, Esq.
1 Blue Hill Plaza Lobby Level # 1509, Pearl River, NJ 10965
By: Wallace B. Neel, Esq.

OPINION OF THE COURT

Robert R. Reed, J.

In this breach of contract action, plaintiff Elisabeth Morse, acting pro se, alleges that defendant LoveLive TV US Inc. (LoveLive US), the wholly owned subsidiary of defendant LoveLive TV Limited (LoveLive UK), terminated her employment and failed to award her the severance package provided for in her employment agreement. Plaintiff further alleges that LoveLive US informally dissolved without accounting to creditors, including plaintiff, and that defendant Richard Cohen (Cohen), the chief executive officer and sole director of LoveLive US, remains personally liable to plaintiff for the failure to account to creditors, pursuant to New York Business Corporation Law ("BCL") § 1006, due to the informal dissolution of LoveLive US.

Motion sequence nos. 003 and 004 are consolidated for disposition. In motion sequence no. 003, plaintiff moves, pursuant to CPLR 3124, for an order compelling discovery or, in the alternative, pursuant to CPLR 3126, for an order striking defendants' answer for failure to provide discovery.

In motion sequence no. 004, defendants LoveLive US and Cohen move: (1) pursuant to CPLR 3211 (a) (8), for an order dismissing all claims against each of them for lack of personal jurisdiction; and (2) pursuant to CPLR 3211 (a) (7), dismissing all claims against each of them with prejudice, for failure to state a claim.

For the reasons set forth below, defendants' motion to dismiss is denied, and plaintiff's motion to compel discovery is granted.

FACTS

Plaintiff's Employment

Accepting the allegations of the amended complaint as true (*Leon v Martinez*, 84 NY2d 83, 88 [1994]), the following facts emerge: LoveLive US was an agency producing audio-visual content. On July 1, 2016, plaintiff and LoveLive US entered into an employment agreement (the Employment Agreement [NYSCEF Doc No. 88]) for plaintiff's employment as Senior

Vice President of Business Affairs and Strategic Development (amended complaint [NYSCEF Doc No. 85], ¶ 14). The Employment Agreement provided that, should plaintiff and defendants extend plaintiff's employment with LoveLive US through 2017, plaintiff would receive an increase in salary of $50,000 in January of 2017, and a bonus of 20% payable in the next calendar year (Employment Agreement at 1).

The Employment Agreement further states that:

> "If by the end of 2016, either you or the Company decide not to extend to 2017, and assuming targets are met, you will be granted a lump sum payment equivalent to 20% of annual 2016 salary (to be paid in early 2017)"

(*id*.). Plaintiff refers to this lump sum payment as the "Severance Amount."

Plaintiff alleges that, during negotiation of the Employment Agreement, she and LoveLive US agreed that "targets" meant satisfactory performance by plaintiff of her services for LoveLive US (amended complaint, ¶17). Plaintiff agreed to accept the Severance Amount provision of the Employment Agreement in lieu of a "market" salary (*id*., ¶ 19).

Plaintiff commenced employment with LoveLive US on July 18, 2016, and provided legal, business affairs, and strategic development services to LoveLive US (amended complaint, ¶¶ 20-21). Plaintiff alleges that she consistently received positive evaluations and feedback from her supervisor, LoveLive's Chief Operating Officer, Marisa Bangash, and that she met all the "prerequisite [sic] targets" for LoveLive US necessary for the payment of the Severance Amount ***2** (*id*., ¶¶ 22-23).

On November 15, 2016, Bangash informed plaintiff that, due to Lovelive US's financial difficulties, LoveLive US would not extend plaintiff's employment into 2017 (*id*., ¶ 24). Bangash further informed plaintiff that LoveLive US was "downsizing," and that plaintiff's position would not be replaced (*id*., ¶ 25). Plaintiff alleges that Bangash told her that she had met her targets, and would be entitled to the Severance Amount (*id*., ¶ 26). On November 23, 2016, Cohen stated in an email provided to Bangash that plaintiff was owed the Severance Amount, stating: "It seems perfectly obvious to me that the 20% bonus is due, as we have no intention of making performance an issue" (*id*., ¶ 27; *see* exhibit D [NYSCEF Doc No. 89]).

On December 2, 2016, LoveLive US ceased doing all business (*id*., ¶ 28). On December 3, 2016, LoveLive UK, LoveLive US's parent company, terminated the employment of all LoveLive US employees, including plaintiff (*id*., ¶ 29).

LoveLive US has not filed for bankruptcy, nor has it assigned its assets to a third-party fiduciary for the benefit of its creditors (*id*., ¶ 31). LoveLive US has not sent any formal communication to its creditors accounting for or regarding the disposition of LoveLive US assets (*id*., ¶ 32). According to plaintiff, LoveLive US has paid other former LoveLive employees amounts they were contractually owed upon termination (*id*., ¶ 33).

On December 27, 2016, plaintiff sent a letter to James Holland (Holland), LoveLive's Chief Financial Officer, and inquired whether LoveLive US had filed for bankruptcy (*id*., ¶ 34; *see* exhibit F [NYSCEF Doc No. 91]). In response, Holland informed plaintiff that LoveLive US "ceased to trade on 2nd December 2016 pursuant to a resolution of the directors," but had "decided against bankruptcy" (*id*., ¶ 34; *see* exhibit E [NYSCEF Doc No. 90]).

On February 10, 2017, defendants' attorneys sent a letter to plaintiff's attorney stating that defendants had no intention of paying plaintiff the Severance Amount, or any other compensation (*id*., ¶ 37; *see* exhibit H [NYSCEF Doc No. 93]).

Cohen is the sole registered and active director of Lovelive US (*id*., ¶ 39). Plaintiff alleges that all material business decisions of LoveLive US are subject to Cohen's approval (*id*., ¶ 40).

Plaintiff asserts that, under New York law, where it is impossible or futile to obtain a judgment against a defunct corporation that has defaulted on debts by "informal dissolution," creditors can maintain an action directly against the directors or shareholders, and that under BCL § 1006, directors incur derivative personal liability when they undertake to divest a corporation of all its property. Plaintiff alleges that defendants' counsel has confirmed on the record that LoveLive US has defaulted against creditors by informal dissolution, stating that LoveLive US "went bust," is a "now-defunct New York company," and an "out-of-business enterprise" (*id*., ¶ 44; *see* exhibit M, defendant's memorandum of law at 1, 6 [NYSEC Doc No. 97]; exhibit N, 8/8/17 transcript of oral argument in *TV Tech Managers, Inc.*

v Cohen, Index No. EF001342-2017 [Sup Ct, Orange County, Civil Term] [NYSCEF Doc No. 98]).

Plaintiff further alleges that, on December 8, 2016, after defaulting on creditors by informal dissolution, LoveLive US disbursed cash assets to select employees as payroll compensation (*id*., ¶ 45; *see* exhibit O [NYSCEF Doc No. 99]). On or about December 2016, Gemma Rowe Johnson (Johnson) was contracted by LoveLive UK to liquidate LoveLive US's material assets (*id*., ¶ 45). In Holland's January 4, 2017 email to plaintiff, Holland stated that "[LoveLive US has] made payments to staff in respect of accrued PTO and salary to December 2, 2016. We further understand that this has exhausted the company's cash on hand. The ***3** contractor is in the process of liquidating the remaining assets of the company " (*see id*., exhibit E [NYSCEF Doc No. 90; *see also* exhibit P, 1/18/17 Rowe email to Morse [NYSCEF Doc No. 100] ["I have been contracted to perform some administrative tasks related to the liquidation"]).

Plaintiff alleges that, in addition to cash, LoveLive US transferred and/or informally liquidated various non-cash assets by informal dissolution, including office equipment, computer equipment, and kitchen equipment (*id*., ¶ 49). On March 5, 2020, during oral argument, defense counsel confirmed that no formal notice of dissolution or accounting was ever provided to creditors of LoveLive US (*id*., ¶ 50; *see* 3/5/20 transcript of oral argument at 9 [NYSCEF Doc No 109]).

Procedural History

1. Defendants' First Motion to Dismiss

On March 16, 2017, plaintiff filed the initial complaint, seeking payment of the Severance Amount. Plaintiff sought to pierce the corporate veil and hold both Cohen and LoveLive UK liable for the contractual obligations of LoveLive US, its subsidiary, by alleging that LoveLive UK and Cohen were alter egos of LoveLive US.

On June 22, 2017, defendants filed a motion to dismiss the initial complaint as against them for failure to state a claim, on the ground that the contractual provision upon which plaintiff sues is conditional, and that plaintiff failed to satisfy the condition precedent -- i.e., that "targets" were "met" -- prior to suing. Cohen and LoveLive UK also sought dismissal as against them for lack of personal jurisdiction. In opposition to the motion (NYSCEF Doc No. 19), plaintiff clarified that her cause of action against Cohen "is dependent not on [a] veil piercing doctrine, but on the informal dissolution of LoveLive US" pursuant to BCL § 1006 (b) (plaintiff's opposition at 6).

By decision dated August 1, 2019 (NYSCEF Doc No. 36), this court granted defendants' motion to dismiss with respect to LoveLive UK, finding that plaintiff had failed to demonstrate the necessary elements for piercing the corporate veil as against it (8/1/19 decision at 6). With respect to plaintiff's BCL § 1006 claim, the court rejected defendants' argument that no assets of LoveLive US were transferred to shareholders or officers, and denied the motion to dismiss with respect to Cohen:

> "In the instant action, defendant corporation LoveLive US was informally dissolved by Cohen, the CEO and sole board member. It seems to this court, from what is alleged, that Cohen may have failed to provide for or to pay corporate liabilities for LoveLive US, and, thus, obtaining a judgment against LoveLive US by plaintiff may now be futile. As such, it would seem inefficient to require plaintiff to first obtain judgment against LoveLive US and then move the court to amend her complaint to include Cohen or, alternatively, to institute a new, plenary action against Cohen at some later time. Defendants' motion to dismiss all claims against individual defendant Robert Cohen is, therefore, denied"

(8/1/19 decision at 9).

2. Plaintiff's Discovery Demands and Motion to Compel

On August 22, 2019, the parties met with the court, which issued a preliminary conference order regarding the timing of discovery demands (NYSCEF Doc No. 75). On October 17, 2019, a status conference was held (*see* status conference order [NYSCEF Doc No. ***4** 77]), during which the timing and scope of discovery were discussed, with plaintiff noting that her ability to hold depositions would depend on defendant's complete and responsive production of discovery materials. The court ordered that EBTs be conducted before January 10, 2020.

On September 23, 2019, plaintiff served demands for discovery and inspection to defendants (NYSCEF Doc No. 76). On November 12, 2019, defendants submitted their response to plaintiff's discovery demands (NYSCEF Doc No. 78). Plaintiff asserts that defendants served incomplete responses and non-responsive objections to her demands.

Plaintiff contends that she unsuccessfully attempted to locate and subpoena certain third parties for deposition prior to January 10, 2020. On January 16, 2020, the parties met in person to attempt to resolve discovery disputes, but were unable to reach resolution on many disputed issues. Subsequent to meeting, the parties appeared before this court, at which time plaintiff unsuccessfully sought responses to outstanding demands. The court then directed plaintiff to file a motion to compel discovery (*see* status conference order [NYSCEF Doc No. 80]). On February 14, 2020, plaintiff filed the instant motion to compel discovery (NYSCEF Doc No. 66).

3. Defendant's Motion to Reargue the First Motion to Dismiss

On February 2, 2020, defendants filed a motion to reargue this court's August 1, 2019 decision with respect to defendants' first motion to dismiss (NYSCEF Doc No. 43). Defendants argued that this court should have dismissed the complaint as against Cohen, because it does not allege that Cohen received any corporate asset. Defendants further argued that this court should have dismissed the breach of contract cause of action because plaintiff failed to allege that the "targets were met," or what the "targets" were, as set forth in the Employment Agreement, that would trigger the need for the Severance Payment.

On March 5, 2020, this court heard oral argument regarding the motion to reargue. During that oral argument, with respect to BCL § 1006, this court recognized that "you have a fiduciary duty as a director [and] one of the things that you don't do as a director is sell off assets while knowing that you have creditors who are entitled to notice before you sell those assets. That's what the case law says" (3/5/20 transcript of oral argument at 10 [NYSCEF Doc No. 101]). This court further recognized if "someone at some point s[old] off any kind of physical assets, any other type of monetizable assets . . . . [and] if they did that without notice to their creditors . . . . [t]hat's where the director liability stems from" (*id*. at 14-15).

This court then granted defendants' motion to reargue on the record, and dismissed the complaint as against Cohen and LoveLive US without prejudice, with leave to file an amended complaint:

> "With respect to the claim against Richard Cohen, counsel for defendants has articulated that for there to be director liability in formation with the informal dissolution of the corporation, there has to have been some transfer of assets that was done without appropriate notice to creditors. The complaint does not allege that.
>
> To the extent that the complaint's language does not exclude that possibility, the Court believes that dismissing the complaint without prejudice will allow for a correction in addition of that answering if it is in fact the case.
>
> With respect to Lovelive TV U.S., any condition precedent with lack of specific language regarding condition precedent being satisfied, the Court believes, too, that if it is the case, that that those targets were met and plaintiff can in good faith make those allegations, then the deficiency of the complaint can be cured and thus dismissing it in its current form without prejudice addresses the problem of the complaint and allows for its -- ***5** allows for it to be fixed.
>
> Accordingly, it is hereby ordered that the motion for leave to reargue is granted and upon reargument, it is hereby ordered [that the] motion to dismiss the claim against Richard Cohen and Lovelive TV U.S., Inc. is granted without prejudice. It is further ordered that the plaintiff should within 30 days of today's date make all efforts to -- the Court is giving plaintiff leave to refile an amended complaint on this index number within 30 days of today's date. If that's not done within those 30 days, then the plaintiff will need to purchase a new index number"

(3/5/20 transcript of oral argument at 17-18).

4. The Amended Complaint

On April 3, 2020, plaintiff and defense counsel agreed that all notices should be served to each other via email until otherwise agreed (*see* emails dated April 3, 2020 [NYSCEF Doc No. 124]). On April 3, 2020, plaintiff informed defense counsel that she was unable to file the amended complaint due to the court's COVID restrictions, but would file as soon as the court allowed (*see id*.).

On May 19, 2020, plaintiff filed the amended complaint with the changes as directed by this court, and served notice to defense counsel via email with receipt of opening (*see* proof of receipt [NYSCEF No. 125]). The amended complaint contains two causes of action. The first cause of action is for breach of the Employment Agreement. The second cause of action is for director liability under BCL § 1006.

On June 18, 2020, plaintiff filed and served a supplemental summons corresponding to the amended complaint, as well as a letter to the Court explaining the delay between filings:

> "On May 19, 2020, as the plaintiff pro se, I filed an Amended Complaint in the above matter. At that time, I failed to file the Supplemental Summons; I blame my ignorance as a transactional attorney. I have now filed the Supplemental Summons backdated to May 19, 2020"

(6/18/20 letter from plaintiff to court [NYSCEF Doc No. 119]).

On June 22, 2020, defendants filed the instant motion to dismiss plaintiff's amended complaint (NYSCEF Doc No. 109).

DISCUSSION

MOTION TO DISMISS THE AMENDED COMPLAINT (MOTION SEQUENCE NO. 004)

Defendants' motion to dismiss the amended complaint is based on three grounds: (1) lack of personal jurisdiction based upon the alleged untimely filing of the amended complaint and supplemental summons; (2) lack of jurisdiction over Cohen as the amended Complaint does not allege that assets were transferred to Cohen during LoveLive's informal dissolution; and (3) plaintiff's failure to state a breach of contract claim.

Motion to Dismiss Based on Lack of Personal Jurisdiction

Defendants contend that plaintiff has failed to establish personal jurisdiction over either of them because plaintiff failed to file or serve a supplemental summons in this action within 30 days of March 5, 2020. On that date, the court dismissed this action, but ruled that if plaintiff wanted to re-file upon an amended pleading, she could utilize the instant Index Number. ***6** However, the Court noted that, "[i]f that's not done within those 30 days, then the Plaintiff will need to purchase a new index number" (3/5/20 transcript of oral argument at 17-18).

On March 22, 2020--17 days after the court's March 5 directive--Chief Administrative Judge Lawrence K. Marks issued an Administrative Order (AO/78/20) directing that "effective immediately . . . no papers shall be accepted for filing by a county clerk or a court in any matter of a type," with limited enumerated exceptions. On May 20, 2020, Chief Administrative Judge Marks issued a Memorandum ("Filing of New Cases") which ordered that "e-filing through the NYSCEF system . . . will be restored in several counties, including the five New York City counties," as of May 25.

Defendants contend that plaintiff waited 41 days to file the supplemental summons, which does not include the approximately 64 days during which COVID-19 caused the courts to ban non-essential e-filing. When plaintiff filed a supplemental summons via NYSCEF on June 18, 2020, she wrote the court a contemporaneous letter admitting the "fail[ure] to file the Supplemental Summons" and "blame[d]" the failure on "my ignorance" of the process. Defendants contend that this filing was 11 days too late, because, after the passage of 30 days, plaintiff no longer had leave of Court to issue a supplemental summons under this Index Number. According to defendants, the amended pleading is therefore a nullity under New York law, because no process has been served nor proved, and personal jurisdiction has not been established.

The court rejects this argument, as it fails to take into account the executive orders issued by Governor Andrew Cuomo. On March 5, 2020, this court encouraged plaintiff to refile an amended complaint within 30 days of its ruling. The resulting filing deadline would have been April 3, 2020. However, all filings in this court (except for those in "essential matters") were prohibited as of March 22, 2020 pursuant to Judge Marks' administrative order, as well as three Executive Orders issued by Governor Cuomo: No. 202.8, issued March 20, 2020; No. 202.14, issued May 7, 2020; and No. 202.38, issued June 6, 2020 (collectively, the COVID orders).

Governor Cuomo's Executive Order 202.8, entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," provides:

> "I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:
>
> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding*, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil

> practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, *or by any other* statute, local law, ordinance, *order*, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020"

(Executive Order 202.8 [emphasis added]).

Executive Order 202.14 extended the suspension through May 7, and Executive Order 202.48 extended the suspension through July 6, 2020. The specific language of Governor Cuomo's executive orders applies to the facts at hand, mandating the suspension and tolling of any specific time limit for "the commencement, filing, or service of any legal action, notice, ***7** motion, or other process or proceeding, as prescribed by" any "order," such as the court's March 5th order requiring plaintiff to re-file her amended pleading within 30 days.

This court finds that plaintiff's filing of the supplemental summons on June 18, 2020 falls easily within the tolling deadline for this court's request for the filing of an amended complaint. Various interpretations of the COVID orders regarding the tolling deadlines are possible. For deadlines that fell between March 20 and July 7, the new deadline might be calculated by either: (1) extending the length of the tolling period (109 days) because the COVID orders should be understood as permissive for any time that lapses during the COVID emergency (i.e., July 21, 2020); or (2) the new deadline should be the next business day after the tolling period expires, (i.e., July 8, 2020). Under either interpretation of the COVID orders, plaintiff filed both the amended complaint and the supplemental summons in accordance with the timeline ordered by this court (i.e., prior to July 8, 2020 or July 21, 2020).

Accordingly, defendants' motion to dismiss for lack of personal jurisdiction is denied.

Motion to Dismiss for Failure to State a Claim

It is firmly established that, on a motion to dismiss a complaint pursuant to CPLR 3211(a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Leon*, 84 NY2d at 87). The sole inquiry is whether a cognizable legal theory is contained in the pleading, not whether there is evidentiary support or whether the claimant can ultimately succeed on the merits (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008]). If the four corners of the complaint provide potentially meritorious claims, the motion to dismiss should be denied (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]). "'However imperfectly, informally, or even illogically the facts may be stated, a complaint, attacked for insufficiency, must be deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 138 [1st Dept 1978] [citation omitted]).

Construing the amended complaint in the generous manner to which it is entitled, this court concludes that the amended complaint contains sufficient allegations to withstand dismissal.

1. BCL§ 1006

In support of its motion to dismiss, defendants contend that the amended complaint fails to state a claim for relief against Cohen because "[n]othing in the Amended Complaint alleges that LoveLive US transferred anything to any Shareholder or Director (and certainly not to Cohen)" (defendants' memorandum of law at 2 [NYSCEF Doc No. 122]).

Once again, defendants mischaracterize the facts that must be pled to sufficiently allege a BCL § 1006 claim. This court has already twice directly addressed and rejected defendants' argument that a director must receive a transfer of assets for liability to accrue: first, when it granted jurisdiction over Cohen in its August 1, 2019 order, and then again during oral argument of defendants' motion to reargue on March 5, 2020, stating that:

> "The *Darcy* court was unequivocal in its determination that it is the neglect to afford creditors an opportunity for court review of their claims that constitutes a violation of the directors' duties. And it matters not that they may have supposed that they were not ***8** required to do any more, but then they did for the protection of creditors.
>
> It doesn't say anything about transferring assets to the directors. It says that when you dissolve the corporation without giving notice to the creditor. If

> you take your -- if you take your corporation and you know you owe creditors $100,000 and you dissolve your corporation and sell off $50,000 to someone else, you sell off bits and pieces of your corporation to some other entities and don't tell those creditors, then you as director have a responsibility for overseeing the corporation [and] have failed in your obligation as a director.
>
> Normally, as a director . . . you have a fiduciary duty as a director [and] one of the things that you don't do as a director is sell off assets while knowing that you have creditors who are entitled to notice before you sell those assets. That's what the case law says.
>
> * * *
>
> Nothing says [directors] have to receive [assets]. That's for shareholders. For directors, the failure is the failure to give proper notice. So there needs to be a transfer, yes. The director's failure is in failing to follow the steps necessary to give adequate notice to the creditors, so they can maintain their claims"

(transcript of 3/5/20 oral argument at 9-10, 13-14; *see Darcy v Brooklyn & NY Ferry Co.*, 196 NY 99, 103 [1909]; *see also Matter of* Hartley, 479 BR 635, 640-641 [SD NY 2012] [under New York law, where it is impossible or futile to obtain a judgment against a defunct corporation that has defaulted on debts by "informal dissolution," creditors can maintain an action directly against the directors or shareholders]; *Parent v Amity Autoworld, Ltd.*, 15 Misc 3d 633, 640 [Suffolk Dist Ct 2007] ["the cost of an informal dissolution is that directors cannot shield themselves against corporate creditor liability. Directors who undertake to divest a corporation of all its property without taking the proceedings for a voluntary dissolution do so at their peril"]).

In the amended complaint, plaintiff alleges that, on December 8, 2016, after defaulting on creditors by informal dissolution, LoveLive US disbursed cash assets to select employees as payroll compensation (amended complaint, ¶ 45). Plaintiff further alleges that Johnson was contracted by LoveLive UK to liquidate LoveLive US's material assets, and that, in addition to cash, LoveLive US transferred and/or informally liquidated various non-cash assets by informal dissolution, including office equipment, computer equipment, and kitchen equipment (*id.*, ¶¶ 46, 49). Finally, plaintiff alleges that, during the March 5, 2020 oral arguments, defense counsel confirmed that no formal notice of dissolution or accounting was ever provided to creditors of LoveLive US (*id.*, ¶ 50). This court finds that these allegations are sufficient to state a claim for liability against Cohen pursuant to BCL § 1006.

Although defendants also argue that the tort of deepening insolvency is not recognized by New York courts, this argument is irrelevant, as plaintiff has never argued that deepening insolvency applies to this case.

Accordingly, defendant's motion to dismiss plaintiff's BCL § 1006 claim is denied.

2. Breach of Contract

Defendants argue that plaintiff's cause of action for breach of contract must be dismissed as against LoveLive US because, although "the Amended Complaint does, at long last, allege that the contract obligation that Plaintiff invokes has a condition precedent in the meeting of 'targets,' the Amended Complaint still makes no effort to explain what those targets were, nor ***9** how they were met" (defendants' memorandum of law at 3-4). This court disagrees.

In its decision on the record on March 5, 2020, this court stated that "[w]ith respect to Lovelive TV U.S., any condition precedent with lack of specific language regarding precedent being satisfied, the Court believes, too, that [if] it is the case, that those targets were met and plaintiff can in good faith make those allegations, then the deficiency of the complaint can be cured" (3/5/20 transcript of oral argument at 17).

In the amended complaint, plaintiff specifically alleges that "targets" meant satisfactory performance by plaintiff of her services for LoveLive US, that plaintiff met all the "prerequisite [sic] targets" for LoveLive necessary for the payment of the Severance Amount, and that Cohen stated that such targets were met (*see* amended complaint, ¶¶ 17, 23, 26, 27). This court finds that these allegations are sufficient to state a cause of action for breach of contract against LoveLive US.

Thus, defendants' motion to dismiss plaintiff's breach of contract cause of action is denied.

MOTION TO COMPEL DISCOVERY (MOTION SEQUENCE NO. 003)

Plaintiff moves to compel complete responses to her outstanding discovery demands. Plaintiff asserts that, at the meeting on January 16, 2020, the parties agreed

that plaintiff would drop certain discovery demands to which defendants had previously provided incomplete and unresponsive answers, and that the parties were unable to come to resolution regarding the remainder of the discovery demands.

It is well established that the failure to provide good-faith responses to discovery demands "'impairs the efficient functioning of the courts and the adjudication of claims;" (*Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 201, 207 [2d Dept 2012], *quoting Gibbs v St. Barnabas Hosp.,* 16 NY3d 74, 81 [2010]). Under CPLR 3101(a), "full disclosure" is required for "all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that "material and necessary" is "to be interpreted liberally," and that the test of whether matter should be disclosed is "one of usefulness and reason" (*Allen v Crowell--Collier Publ. Co.,* 21 NY2d 403, 406 [1968]). The Court of Appeals specifically interpreted "material and necessary" to mean nothing more or less than "relevant" (*id.* at 407; *see e.g. Osowski v AMEC Constr. Mgt., Inc.,* 69 AD3d 99, 106 [1st Dept 2009] ["it was proper for the trial court to compel disclosure of [the settlement agreements] because these agreements were 'material and necessary' to the issues raised in the third-party action"]).

As set forth below, the disclosure sought by plaintiff is relevant, material, and necessary to her claims against defendants. Importantly, defendants have submitted no opposition to plaintiff's motion. Thus, an order compelling such disclosure is warranted (*see* CPLR 3124; *see also City of New York v Maul*, 118 AD3d 401, 402 [1st Dept 2014] [compelling disclosure of documents relevant to plaintiff's claims]).

First, defendants claim that plaintiff's demand for production of "board minutes" for one year prior to the date of commencement of this action is "irrelevant" and "overbroad" (*see* defendants' response to document requests, section b). However, LoveLive US's board minutes prior to its dissolution are certainly relevant to determine when and whether it lost all of its assets, and who made the decision to consider the company as insolvent and no longer functional.

Defendants also object to plaintiff's demand for a list of LoveLive US's directors for one year prior to the commencement of this action to the present (*see id*., section e). Because this ***10** court has ruled that Cohen may be liable in this action due to his role as a director of LoveLive US, establishing that Cohen was and is the only director of LoveLive US is directly relevant to this matter.

Defendants object to plaintiff's demand for internal emails, working notes, documents and communications relating regarding plaintiff's hiring by defendants, as well as any drafts of the Employment Agreement, as overbroad (*see id*., sections j, l, m and n). However, such emails and other documents are clearly relevant, and likely critical, to deciphering the meaning and intent of the Employment Agreement, given that the phrase "targets are met" is not defined in the Employment Agreement itself.

Defendants also object to plaintiff's demands for materials relating to the nature and quality of her performance as a LoveLive US employee, as well as materials regarding the termination of the Employment Agreement by LoveLive US, as "overbroad" (*see id*., sections p and q). These documents, however, are also directly relevant to the issue of whether plaintiff has met her performance "targets," as set forth in the Employment Agreement.

Defendant further object to the production of discovery materials relating to the dissolution of LoveLive US, stating that "no dissolution has occurred" (*see id*., section v). Defendants also failed to completely answer plaintiff's interrogatories regarding: the timeline of dissolution of LoveLive US, the finances of LoveLive US causing such dissolution, the process and parties involved in making the decision to dissolve LoveLive US, the involvement by Cohen in the process of LoveLive US's dissolution, and the disposition of LoveLive US's assets at time of dissolution (*see* defendants' response to interrogatories [NYSCEF Doc No. 79], sections p, q, r, s and t). As the Court has permitted jurisdiction over Cohen due to LoveLive US's informal dissolution, these documents, as well as full and complete answers to plaintiff's interrogatories, are certainly relevant and material.

Defendants object to the production of discovery materials relating to substantiation of their affirmative defenses for failure to state a cause of action, equitable principles of release, failure of consideration, laches, privity, waiver, unclean hands and/or estoppel, the statute of frauds, abandonment of rights, and impossibility to plaintiff's causes of action, as "overbroad" (*see* defendants' response to document requests, section x), as well as failing to answer plaintiff's interrogatories regarding the factual basis for such affirmative defenses (*see* defendants' response to

interrogatories, sections l, m, n and o). Again, production of documents relating to defendants' affirmative defenses, as well as responses detailing the factual basis for such affirmative defenses, are certainly relevant.

Because the record demonstrates that plaintiff's requests seek material and necessary information, the motion to compel is granted (*see O'Halloran v Metropolitan Transp. Auth.*, 169 AD3d 556, 557 [1st Dept 2019]; *Portillo v Carlson*, 167 AD3d 792, 793 [2d Dept 2018]).

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint (motion sequence no. 004) is denied; and it is further

ORDERED that plaintiff's motion to compel discovery (motion sequence no. 003) is granted, and defendants are directed to serve all documents in their possession that are responsive to plaintiff's outstanding demands for discovery, as well as to serve and full and complete response to plaintiff's interrogatories, within 20 days of service upon defendants of a copy of this decision with notice of entry. If no such documents exist, defendants are directed to ***11** so state in a sworn affidavit by an officer or someone with personal knowledge of the facts, within such 20-day time period.

DATE 12/15/2020

ROBERT R. REED, J.S.C.

New York Official Reports

165 A.D.3d 1541, 86 N.Y.S.3d 299, 2018 N.Y. Slip Op. 07219

**1 Wells Fargo Bank N.A., Successor by Merger to Wells Fargo Bank Minnesota N.A., Formerly Known as Norwest Bank Minnesota N.A., Renaissance Home Equity Loan Asset-Backed Certificates Series 2002-1, Respondent,

v

William P. Grover, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Third Department, New York
526095
October 25, 2018

CITE TITLE AS: Wells Fargo Bank N.A. v Grover

HEADNOTE

Limitation of Actions
Revival of Time-Barred Claims
Mortgage Foreclosure—Partial Payment against Mortgage Indebtedness and Implied Promise to Pay Remainder

The Crossmore Law Office, Ithaca (Edward Y. Crossmore of counsel), for appellant.
Hinshaw & Culbertson LLP, New York (Dana B. Briganti of counsel), for respondent.

Garry, P.J. Appeal from an order of the Supreme Court (Faughnan, J.), entered April 19, 2017 in Tompkins County, which, among other things, denied William P. Grover's motion for summary judgment dismissing the complaint against him.

In 2002, defendant William P. Grover (hereinafter defendant) borrowed a sum of money from plaintiff's predecessor in interest *1542 and executed a note secured by a mortgage on property in the City of Ithaca, Tompkins County. In February 2009, plaintiff commenced a foreclosure action arising from defendant's failure to pay the mortgage installment due in May 2008. In April 2013, plaintiff moved to voluntarily discontinue the 2009 action without prejudice, as it could not verify the validity of the execution or notarization of all the documents that had been filed. Plaintiff also sought to cancel the notice of pendency and to discharge the referee. Supreme Court (Mulvey, J.) granted the motion in its entirety.

In January 2016, plaintiff commenced this foreclosure action based upon defendant's continued failure to make payments. After joinder of issue, defendant moved for summary judgment dismissing the complaint against him, asserting that the action was time-barred. Plaintiff cross-moved for summary judgment and an order of reference. Supreme Court (Faughnan, J.) found that the action was timely because the voluntary discontinuance of the 2009 action had brought about a revocation of the acceleration of the debt that had resulted from the **2 commencement of that action and, thus, denied defendant's motion and granted plaintiff's cross motion. Defendant appeals.

We affirm, albeit on grounds different from those upon which Supreme Court based its decision. A debtor's partial payment toward a mortgage debt may renew the statute of limitations in a foreclosure action if the creditor "show[s] that there was a payment by the debtor or the debtor's agent of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remaining balance" (*Saini v Cinelli Enters.*, 289 AD2d 770, 771 [2001] [internal quotation marks, brackets, emphasis and citations omitted], *lv denied* 98 NY2d 602 [2002]; *see* General Obligations Law § 17-107 [1], [2] [b]; *Petito v Piffath*, 85 NY2d 1, 7 [1994]; *see generally Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]). We find that plaintiff demonstrated its entitlement to judgment as a matter of law on the ground that defendant made partial payments against the mortgage debt under circumstances sufficient to renew the statute of limitations and thus render this action timely.

Plaintiff submitted evidence that, while the 2009 action was pending, defendant entered into an agreement to make three reduced mortgage payments during a trial period under a federal mortgage debt relief program known as the Home Affordable Mortgage Program (hereinafter HAMP), and that he *1543 then made payments due in September and

October 2010, but failed to make the third payment. The purpose of HAMP, which was established in response to the 2008 mortgage foreclosure crisis pursuant to the Emergency Economic Stablization Act of 2008 (12 USC § 5201 *et seq.*), was to "provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable reduced levels, without discharging any of the underlying debt" (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 197-198 [2014] [internal quotation marks and citation omitted]). As part of the process of obtaining a HAMP mortgage modification, eligible borrowers agreed to make three reduced payments during a trial period; if these payments were made and all other requirements were satisfied, the process resulted in the permanent modification of the mortgage.[1] A borrower entering into a HAMP agreement was required, among other things, to acknowledge that he or she was unable to afford mortgage payments and was in default or in danger of default, that partial payments under the HAMP agreement did not cure the borrower's default, and that the provisions of the underlying note and mortgage "remain[ed] in full force and effect" (*Thomas v JPMorgan Chase & Co.*, 811 F Supp 2d 781, 787-788 [SD NY 2011]; *see US Bank N.A. v Sarmiento*, 121 AD3d at 197-199). Thus, a borrower who entered into a HAMP agreement necessarily admitted the existence of the underlying debt, acknowledged that more payments were due, and made an implied promise to pay them in consideration of the modification of the mortgage.

The contract documents that defendant executed when he entered into the HAMP agreement are not part of the record on this appeal.[2] However, partial payment and an implied promise to pay the remainder may be proven by extrinsic evidence, such as canceled checks or a borrower's admissions (*see Education Resources Inst., Inc. v Piazza*, 17 AD3d 513, 514 [2005]; *Costantini v Bimco Indus.*, 125 AD2d 531, 531 [1986]; *Bernstein v Kaplan*, 67 AD2d 897, 897 [1979]).

Here, plaintiff met its prima facie burden on its cross motion for summary judgment by submitting the note and mortgage and evidence of defendant's default (*see e.g. Bank of N.Y. Mellon v Slavin*, 156 AD3d 1073, 1075-1076 [2017]), as well as evidence ***1544** that the action was ****3** timely because of defendant's payments under the HAMP agreement. The burden thus shifted to defendant to submit admissible evidence demonstrating the existence of an issue of fact as to his defense of untimeliness (*see generally HSBC Bank USA, N.A. v Szoffer*, 149 AD3d 1400, 1400-1401 [2017]). He did not do so. Instead, he conceded the facts relative to the HAMP agreement and resulting payments. He further submitted related documents that included copies of his cashier's checks for these payments, one of which bore the identifying number of the mortgage loan. Moreover, he conceded that the payments were credited against the mortgage debt. Defendant's self-serving argument that he did not intend to make these payments against the mortgage debt, but instead against a purported separate indebtedness established by the HAMP agreement, is unsupported by any proof of such an indebtedness. It is further belied by the nature and purpose of HAMP agreements. As previously noted, these agreements do not establish any new indebtedness and serve the sole purpose of modifying existing mortgages.[3] Accordingly, plaintiff established as a matter of law that this action was timely commenced, as defendant's 2010 partial payments were made under circumstances that constituted an unqualified acknowledgment that more was due and from which a promise could be inferred to pay the balance (*see National Heritage Life Ins. Co. in Liquidation v Hill St. Assoc.*, 262 AD2d 378, 378 [1999]; *compare Saini v Cinelli Enters.*, 289 AD2d at 771-772; *see also Mundaca Inv. Corp. v Rivizzigno*, 247 AD2d 904, 906 [1998]). Further, defendant failed to meet his prima facie burden on his motion for summary judgment dismissing the complaint to establish that this action is untimely (*compare Bank of N.Y. Mellon v Slavin*, 156 AD3d at 1073-1074). Plaintiff's cross motion for summary judgment was properly granted, and defendant's motion for summary judgment was properly denied.

As for the second issue argued by the parties—whether plaintiff's voluntary discontinuance of the 2009 action revoked the acceleration of the mortgage, such that the action was timely commenced—no appellate court in New York had ruled upon that issue when Supreme Court found that the acceleration of defendant's mortgage debt had been revoked. We note that, thereafter, the Second Department ruled on the issue in a ***1545** matter involving somewhat similar facts (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1070 [2017]). However, in view of our determination that defendant's partial payments rendered the action timely, we need not address the revocation issue.

McCarthy, Lynch, Aarons and Rumsey, JJ., concur. Ordered that the order is affirmed, with costs.

FOOTNOTES

Footnotes

1 Because defendant did not make the third reduced payment, no HAMP modification of the underlying mortgage was obtained.

2 A separate forbearance agreement, executed by defendant in 2008, appears in the record but was no longer in effect at the pertinent time and is not relevant here.

3 For this reason, we are unpersuaded by defendant's argument that a notice of intent to terminate the HAMP agreement sent to him after he failed to make the third payment constitutes proof of a separate indebtedness simply because it lists the amount of the unpaid HAMP installment separately from the amount due under the original note.

New York Official Reports

163 A.D.3d 631, 81 N.Y.S.3d 156, 2018 N.Y. Slip Op. 05140

**1 Freedom Mortgage Corporation, Respondent,

v

Herschel Engel, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
1139/15, 2016-02581
July 11, 2018

CITE TITLE AS: Freedom Mtge. Corp. v Engel

HEADNOTE

Mortgages
Foreclosure
Acceleration—Time-Barred

Solomon Rosengarten, Brooklyn, NY, for appellant.
Cohn & Roth, Mineola, NY (Michael C. Nayar of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Herschel Engel appeals from an order of the Supreme Court, Orange County (Sandra B. Sciortino, J.), dated November 12, 2015. The order, insofar as appealed from, denied that defendant's motion for summary judgment dismissing the complaint insofar as asserted against him and granted those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike his answer and affirmative defenses, and to appoint a referee.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, the motion of the defendant Herschel Engel for summary judgment dismissing the complaint insofar as asserted against him is granted, and those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against the defendant Herschel Engel, to strike his answer and affirmative defenses, and to appoint a referee are denied.

In May 2005, Herschel Engel (hereinafter the defendant) borrowed the sum of $225,000 from Fairmont Funding, Ltd. (hereinafter Fairmont). The loan was memorialized by a note and secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Fairmont. On July 22, 2005, the defendant executed an extension and modification agreement and a consolidated note, which created a new loan with a total unpaid principal balance of $224,806. The defendant allegedly defaulted on the loan by failing to make the payment due on March 1, 2008.

In July 2008, the plaintiff commenced an action to foreclose the mortgage against the defendant, among others. In that action, the defendant moved to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction due to improper service of process upon him. In a stipulation dated *632 January 23, 2013, which was so-ordered by the Supreme Court, the parties agreed, inter alia, that: (1) the defendant was served with a copy of the summons and complaint; (2) the defendant would withdraw his motion; (3) the action would be discontinued without prejudice and the notice of pendency would be cancelled; and (4) they "desire to amicably resolve this dispute and the issues raised in the [defendant's motion] without further delay, expense or uncertainty."

More than two years later, on February 19, 2015, the plaintiff commenced this action to foreclose the mortgage. The defendant joined issue by serving an answer with various affirmative **2 defenses, including that the action was time-barred. Thereafter, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the action was time-barred. The plaintiff opposed the motion and cross-moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer and affirmative defenses, and to appoint a referee. The Supreme Court denied the defendant's motion and granted the plaintiff's cross motion. The defendant appeals.

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 [2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2012]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [1997]). 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" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]; *see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2016]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d at 867; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2017]; *see Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2018]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 606).

Here, the defendant established that the six-year statute of limitations began to run on the entire debt on July 16, 2008, ***633** when the plaintiff accelerated the mortgage debt by commencing the prior foreclosure action (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2005]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605). Since the plaintiff did not commence this action until February 19, 2015, the defendant sustained his prima facie burden on his motion (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070; *U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2016]).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period. Contrary to the Supreme Court's determination, the plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (*see Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [1994]; *cf. NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070).

The plaintiff's alternate contention that the loan had never been accelerated since the defendant had not been served with the summons and complaint in the prior action is belied by the terms of the January 23, 2013, stipulation, which provide that the defendant was, in fact, served with the summons and complaint.

Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint insofar as asserted against him, and denied those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer and affirmative defenses, and to appoint a referee.

In light of our determination, we need not consider the parties' remaining contentions. Chambers, J.P., Maltese, Duffy and Barros, JJ., concur.

New York Official Reports

168 A.D.3d 630, 93 N.Y.S.3d 32, 2019 N.Y. Slip Op. 00681

*1 Juan Vargas, Respondent,
v
Deutsche Bank National Trust Company, Appellant.

Supreme Court, Appellate Division, First Department, New York
302647/16, 8276
January 31, 2019

CITE TITLE AS: Vargas v Deutsche Bank Natl. Trust Co.

HEADNOTES

Limitation of Actions
Six-Year Statute of Limitations
Foreclosure

Mortgages
Acceleration Clause

Greenberg Traurig, LLP, New York (Brian Pantaleo of counsel), for appellant.
Steinberg & Associates, Kew Gardens (Herbert N. Steinberg of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 19, 2017, which, upon renewal, denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment declaring plaintiff's property free and clear of all liens and encumbrances by defendant, unanimously affirmed, with costs.

The motion court correctly determined that defendant was time-barred from commencing a foreclosure action against plaintiff's mortgaged property because more than six years had passed from the date that the debt on the mortgage was accelerated (CPLR 213 [4]). The 2008 letter from defendant's predecessor-in-interest informed plaintiff that his debt "will [be] accelerate[d]" and "foreclosure proceedings will be initiated" if he failed to cure his default within 32 days of the letter. The letter highlighted that time was of the essence and it is undisputed that plaintiff did not cure his default within the time period.

We have held that this language constitutes a clear and unequivocal intent to accelerate the loan balance and commence the statute of limitations on the entire mortgage debt (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017], *lv denied* 30 NY3d 960 [2017]).

Moreover, given defendant's continued efforts, including sending letters attempting to collect from plaintiff the accelerated mortgage debt and informing him that any payments made in contribution to the entire debt "will not be deemed a waiver of the acceleration of [his] loan," there is no basis for a finding that discontinuance of the prior foreclosure action constituted an affirmative act by defendant to revoke the acceleration (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]).

We have considered defendant's remaining arguments and find them unavailing. Concur—Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 22. Stay, Motions, Orders and Mandates (Refs & Annos)

McKinney's CPLR Rule 2221

Rule 2221. Motion affecting prior order

Effective: July 20, 1999
Currentness

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and

2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

(b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.

(c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge.

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Credits

(L.1962, c. 308. Amended L.1986, c. 355, § 5; L.1999, c. 281, § 1, eff. July 20, 1999.)

McKinney's CPLR Rule 2221, NY CPLR Rule 2221
Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

Siegel, N.Y. Prac. § 254 (6th ed.)

New York Practice | December 2020 Update

The Late David D. Siegel[a0]

Patrick M. Connors[a1]

Chapter 10. Motion Practice

§ 254. Motion to Reargue or Renew

Motion to Reargue Versus Motion to Renew

A motion to reargue is based on no new proof; it seeks to convince the court that it overlooked or misapprehended something on the first go around and ought to change its mind. The motion to renew (or rehear)[1] is based on new or additional proof not used the first time around or a change in the law. Both should be distinguished from the motion to resettle, which just corrects the order to reflect what is in the decision or in some other way affects only the form of the order.[2]

An extensive body of guiding caselaw evolved to govern the motions to reargue or renew. Most of it is codified in subdivision (d) of CPLR 2221, on the motion to reargue, and subdivision (e), on the motion to renew.[3] The codification occurred in 1999. While the intention was to make it a mere codification, i.e., to clarify without changing, a few changes may have been made, most likely inadvertently. These will be noted.

The first change concerns the proof needed on the motion to renew. Ideally, it should be shown that the proof being offered on the motion has been only recently discovered and that the movant is acting with reasonable dispatch in bringing it before the court. Nonetheless, while a renewal motion may be based on "new facts not offered on the prior motion,"[4] there is no express requirement in the statute that the facts be "newly discovered" as some of the decisions indicate. This is consistent with some pre-amendment caselaw indicating that the new proof need not necessarily be newly discovered.[5] CPLR 2221(e)(3) does, however, explicitly require a "reasonable justification for the failure to present such facts on the prior motion." In In re Defendini,[6] the Second Department framed a helpful interpretation of the statute, observing that "[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion."

Time to Make Motion to Reargue or Renew

Under the 1999 codification, CPLR 2221(d)(3) provides that the motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

That language is summary and somewhat arbitrary. Under the law that existed prior to the statute, when an appeal had been duly taken from the original order, and was pending, the motion to reargue could be made during the pendency of the appeal and any time up to the appeal's submission. The jurisdiction of the original court to entertain the reargument motion was not deemed terminated by the mere taking of the appeal. That was a good rule. It gave the lower court an opportunity to obviate the appeal by altering the decision to correct the determination that generated the appeal in the first place. The new rule, with

its arbitrary 30-day time limit on the motion to reargue, can be construed to divest the original court of that jurisdiction, which would in turn force through an appeal that might not be necessary.

There are thus good policy reasons for retaining the old rule. Some lower court cases nevertheless held that it was displaced by the adoption of CPLR 2221(d)(3) and that a motion to reargue is now strictly limited to 30 days from the time of the service of the objectionable order notwithstanding the pendency of an appeal from it. The First Department rejected that construction, however, and held in favor of the older rule in Leist v. Goldstein,[7] and the Second Department did likewise in Itzkowitz v. King Kullen Grocery Co., Inc.[8] Under these appellate decisions, the pendency of an appeal from the order continues to be a time period available for a motion to reargue, which is indeed the preferable construction.

A connected issue arises, obfuscated rather than helped by the amendment of CPLR 2221(d)(3). This is where the aggrieved person himself serves the order on the winner, the reverse of the usual procedure in which the winner serves it.[9] When the winner serves the order by mail, the loser clearly gets the additional five days allowed by CPLR 2103(b)(2), extending the 30 days in which to appeal[10] or move to reargue[11] to 35 days. But does the loser get the additional five days when it is he himself who serves the order and serves it by mail? Caselaw had said yes, and the yes apparently applied to both the appeal step of CPLR 5513 as well as the reargument step of CPLR 2221.

Here, another 1999 amendment needs integration. It added a subdivision (d) to CPLR 5513 explicitly allowing the loser to add the extra five days to the 30-day appeal period even when it is the loser who has served the order. But that's just for the taking of an appeal. No similar amendment was made for the motion to reargue, and the opportunity to just borrow the appeal steps for application to the reargument motion—which is what happened before the amendment—may be lost because of the independent codification of the reargument motion in CPLR 2221(d)(3). The warning to the loser who elects to serve the order herself, and to serve it by mail,[12] is that while she may be extending by five days her time to appeal, she may not be extending her time to move to reargue.

CPLR 2221(e) does not prescribe a specific time period for making a motion to renew. There are, however, several time limitations recognized in the caselaw that a party moving for renewal must consider. The case must still be "sub judice" to allow for a motion for renewal. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case.[13] While CPLR 2221(e)(3) requires a party seeking renewal based on new facts to provide a reasonable justification for failing to present the facts on the prior motion, it does not require a similar justification when moving for renewal based on a change in the law. Nonetheless, a party seeking renewal based on a change in the law that would change the earlier determination should act expeditiously.[14]

After a final judgment has been entered, a party can still resort to CPLR 5015(a)(2) and move for relief from the judgment based on "newly discovered evidence."[15]

Papers on a Motion to Reargue or Renew

In Biscone v. JetBlue Airways Corp.,[16] the Second Department concluded that the moving papers on a motion for reargument/renewal were insufficient because plaintiff failed to furnish a complete set of the papers relied upon in making the original motion as required by CPLR 2214(c). The decision is explored in greater detail above,[17] but we note it here because the problem seems to arise most frequently in motions for reargument or renewal under CPLR 2221, which does not clearly specify the papers that need to be submitted.[18] A party moving for reargument or renewal should be sure to include three things on the motion: (1) the motion for renewal and/or reargument; (2) the papers submitted on the underlying motion; and (3) the underlying order. The papers submitted on the underlying motion are particularly important on a motion for reargument because the movant will want to point to the things on the original motion that the court "overlooked or misapprehended."[19]

Using a Motion to Renew to Cure a Procedural Defect on a Motion

Recently, we have seen a number of occasions in which a party makes a procedural error on a motion, such as submitting an affirmation when an affidavit is required,[20] and attempts to cure the error on a motion to renew, which includes the proper papers. The Second Department took a somewhat rigid position on such renewal motions, denying them regardless of the lack of prejudice if the party failed to provide a reasonable justification for the defects in the documents originally submitted.[21] By contrast, the First Department appears to allow the trial court the discretion to grant motions to renew in the absence of prejudice even where the original failure was due to a party's procedural mistake.[22] The Third Department apparently agrees with the First Department on the matter.[23]

Even the Second Department took a more lenient approach on such motions in Defina v. Daniel,[24] where the court ruled that the lawyer's mistake of including an affirmation instead of a notarized affidavit constituted law office failure and provided "a reasonable justification for the plaintiff's failure to provide the affidavit to the court in opposing the original motion." Upon granting renewal, the Second Department considered the affidavit and concluded that it created a question of fact, necessitating a reversal of the order of summary judgment in defendant's favor.

The decision in *Defina*, and the generosity it bestowed on a moving party who failed to include the proper documents with its motion papers, should not be embraced by the practicing bar. The decisions in this realm are not always forgiving and are difficult to reconcile.[25] Furthermore, the Court of Appeals has not weighed in on the matter. Who would want to be before that Court, or any other, on a motion to renew arguing that the "reasonable justification for the failure to present [proper papers] on the prior motion"[26] was because of a lack of procedural knowledge?

Appealability of Orders on Motions to Reargue or Renew

Appealability of orders on reargument and renewal motions should be carefully noted. An order on a motion to renew is appealable whether it grants or denies the motion. An order on a motion to reargue is appealable only if it grants the motion. An order denying a motion to reargue is not appealable; it would amount to an extension of time in which to appeal the original order.

An order granting a motion to reargue is appealable even if, after the granting, the prior decision is adhered to.[27] It has also been held that an order granting reargument supersedes the original order.[28] Therefore, an appeal must be taken from the latter order granting reargument.[29]

Challenging issues—and pitfalls—arise when an order is in fact on appeal and a party makes a motion to the lower court to reargue or renew it during the appeal's pendency. If a new order somehow eventuates, and the party aggrieved by it appeals it, what effect has that on the original appeal? The subject has been troublesome enough to earn some special statutory attention. It's reviewed in the later chapter on appeals.[30]

There's an ongoing question about whether a non-appealing defendant may be allowed to exploit a co-defendant's appellate victory if the issues disposed of in the appealed case would also benefit the non-appealer. A motion to renew after the co-defendant's appellate victory was used to achieve that result—successfully—in Koscinski v. St. Joseph's Medical Center.[31]

Mislabeling of Motion

If a motion is based on new proof, but is erroneously termed a "reargument" motion, the mislabel will be ignored and the motion will be treated as one to renew.[32] And vice-versa.[33] This is of course important on the question of appealability.[34]

The motion to reargue and the motion to renew are listed in CPLR 2221(a) and must therefore be made to the judge who made the original order. That instruction, a product of the now largely superseded Master Calendar System, is self-evident under its replacement, the Individual Assignment System (IAS). It remains relevant in a number of situations even in the IAS era.[35]

Motions to reargue, reconsider, renew, etc., are not exempt from the fee-for-each-motion requirement that applies in the supreme and county courts.[36]

CUMULATIVE SUPPLEMENT

Motion to Reargue Versus Motion to Renew
In Affirming Denial of Motion to Renew, Second Department Rules that Prior Attorney's Claim of Law Office Failure Did Not Establish a "Reasonable Justification" for Failing to Submit Documentary Evidence with Original Motion

In the third paragraph to this section, we note that CPLR 2221(e)(3) explicitly requires that a motion for renewal based on new facts contain a "reasonable justification for the failure to present such facts on the prior motion." In HSBC Bank USA, NA v. Nemorin, 167 A.D.3d 855, 90 N.Y.S.3d 270 (2d Dep't 2018), supreme court denied defendant's CPLR 2221(e) motion for leave to renew her prior motion to vacate a judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against her based on lack of personal jurisdiction. *See* CPLR 5015(a)(4); § 430. The motion for renewal was based upon the submission of "new" documentary evidence regarding defendant's "residence to controvert the [plaintiff's] affidavit of service." To provide a justification for the failure to present the documentary evidence on the original motion, the defendant submitted an affidavit of her prior attorney who claimed that the failure to submit the evidence on the original motion was due to "law office failure because at the time of the prior motion, he was distracted, stressed, and depressed about an attorney disciplinary proceeding against him which thereafter resulted in his suspension from the practice of law." *Nemorin*, 167 A.D.3d at 856, 90 N.Y.S.3d at 271. This did not constitute a "reasonable justification" and, therefore, the Second Department affirmed the denial of the motion for renewal.

Time to Make Motion to Reargue or Renew
Motion for Leave to Renew Based on Change in Law After Action Has Gone to Final Judgment Ruled Untimely

As we note in the penultimate paragraph under this subheading, CPLR 2221(e) does not prescribe a specific time period for making a motion to renew. The action must, however, still be "sub judice" to permit such a motion. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case.

In Redeye v. Progressive Insurance Co., 158 A.D.3d 1208, 1209, 71 N.Y.S.3d 233, 234 (4th Dep't 2018), the court tracked the caselaw preceding the 1999 amendment adding CPLR 2221(e) and concluded that "there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments." In that the action was no longer pending when the plaintiff in *Redeye* made the motion for leave to renew based on a change in the law, the court ruled it was untimely. The court also affirmed the denial of plaintiff's CPLR 5015(a) motion to vacate the prior order granting defendant summary judgment, "reject[ing] plaintiff's contention that there [were] sufficient reasons to vacate the prior order in the interests of substantial justice." *Id.* at 1209, 71 N.Y.S.3d at 234–35.

As the Court of Appeals explained in Matter of Huie [Furman], 20 N.Y.2d 568, 572, 285 N.Y.S.2d 610, 612, 232 N.E.2d 642, 644 (1967), denying as untimely a motion for renewal based on a change in the law "might at times seem harsh, [but] there must be an end to lawsuits."

Motion to Reargue in E-Filed Action Ruled Untimely

In the paragraph accompanying notes 9-11 in this section, we discuss the 5-day add-on in CPLR 2103(b)(2), which can offer a party 35 days to make a motion for reargument. In Mazario v. Snitow Kanfer Holtzer & Millus LLP, 2018 WL 6739091 (Sup. Ct., New York County 2018), plaintiffs untimely moved for leave to reargue a decision and order dated May 24, 2018, which was served by defendants with notice of entry by e-filing it on May 29, 2018. Plaintiffs moved to reargue on July 3, 2018, within 35 days after service of the order with notice of entry. The 5-day add-on when service of interlocutory papers is made by regular mail did not apply in this e-filed action, however, because the service of the order with notice of entry occurred upon the filing of those papers, not their mailing. Therefore, the motion was 5 days late. *See* Nolte v. Bridgestone Assocs. LLC, 2018 WL 3729562 (Sup. Ct., New York County 2018) (motion for reargument in e-filed action deemed untimely by 5 days; fact "[t]hat plaintiff also elected to serve a copy of the [order with] notice of entry by regular mail did not extend defendant's deadline to file a motion for reargument."); § 202, above (discussing application of CPLR 2103(b)(2) in e-filed actions).

Statewide Practice Rules of the Appellate Division, Effective September 17, 2018, Address Timing of Motion for Reargument

CPLR 2221(d)(3) excludes from its scope "motions to reargue a decision made by the appellate division or the court of appeals." The statewide Practice Rules of the Appellate Division, housed in 22 N.Y.C.R.R. Part 1250, were adopted by the four judicial departments and became effective on September 17, 2018. *See* § 11. The new rules address, among other things, the timing for reargument motions. Pursuant to 22 N.Y.C.R.R. section 1250.16(d)(1), such motions must be made within 30 days of service of the appellate court's order, with notice of entry, which is the same time constraint for motions for leave to appeal. Previously, the 30-day period began to run from the date of the appellate court order in the First Department, and no time constraint for reargument motions existed in the Third Department.

[END OF SUPPLEMENT]

Footnotes

a0	Distinguished Professor of Law Emeritus, Albany Law School
a1	Albert and Angela Farone Distinguished Professor of Law in New York Civil Practice, Albany Law School
1	The motion to renew is sometimes called a motion to "rehear." No consequence appends to the distinction. "Renew" is the almost universally used term. See Commentary C2221:9 on McKinney's CPLR 2221.
2	See § 250.
3	The codification is discussed at length in SPR 86:1.
4	CPLR 2221(e)(2).
5	See, e.g., Webb & Knapp v. United Cigar-Whelan Stores Corp., 276 A.D. 583, 96 N.Y.S.2d 359 (1st Dep't 1950).
6	In re Defendini, 142 A.D.3d 500, 502, 35 N.Y.S.3d 495, 497 (2d Dep't 2016); see Commentary C2221:9 on McKinney's CPLR 2221.
7	Leist v. Goldstein, 305 A.D.2d 468, 760 N.Y.S.2d 191 (1st Dep't 2003); see Garcia v. Jesuits of Fordham, Inc., 6 A.D.3d 163, 774 N.Y.S.2d 503 (1st Dep't 2004).
8	Itzkowitz v. King Kullen Grocery Co., Inc., 22 A.D.3d 636, 804 N.Y.S.2d 350 (2d Dep't 2005).

9 See § 250.
10 CPLR 5513(a).
11 CPLR 2221(d)(3).
12 See SPR 86:2–3.
13 See Dinallo v. DAL Elec., 60 A.D.3d 620, 874 N.Y.S.2d 246 (2d Dep't 2009).
14 Bray v. Gluck, 235 A.D.2d 72, 663 N.Y.S.2d 725 (3d Dep't 1997); see Commentary C2221:9A on McKinney's CPLR 2221; see also Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School Dist., 278 A.D.2d 364, 717 N.Y.S.2d 373 (2d Dep't 2000) (where motion for renewal was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely).
15 Maddux v. Schur, 53 A.D.3d 738, 861 N.Y.S.2d 814 (3d Dep't 2008); see § 428.
16 Biscone v. JetBlue Airways Corp., 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dep't 2012) (SPR 253:3).
17 See § 246.
18 Compare CPLR 3212(b) (specifying which papers must be submitted on motion for summary judgment).
19 CPLR 2221(d)(2).
20 See § 205.
21 See, e.g., Austin v. McPherson, 111 A.D.3d 610, 974 N.Y.S.2d 281 (2d Dep't 2013); Singh v. Mohamed, 54 A.D.3d 933, 864 N.Y.S.2d 498 (2d Dep't 2008).
22 See, e.g., B.B.Y. Diamonds Corp. v. Five Star Designs, Inc., 6 A.D.3d 263, 775 N.Y.S.2d 34 (1st Dep't 2004); Kalir v. Ottinger, 2011 WL 6968334 (Sup. Ct., New York County 2011) (applying the First Department's rule, the court granted the motion for renewal, despite the fact that defendants submitted defective documents on two prior occasions); see also SPR 243:3.
23 Wilcox v. Winter, 282 A.D.2d 862, 722 N.Y.S.2d 836 (3d Dep't 2001).
24 Defina v. Daniel, 140 A.D.3d 825, 33 N.Y.S.3d 421 (2d Dep't 2016).
25 See Commentary C2221:9 on McKinney's CPLR 2221.
26 CPLR 2221(e)(3).
27 See CPLR 2221(f) (noting that if a motion to reargue or renew is granted, "the court may adhere to the determination on the original motion").
28 See Dennis v. Stout, 24 A.D.2d 461, 260 N.Y.S.2d 325 (2d Dep't 1965).
29 Bliss v. Jaffin, 176 A.D.2d 106, 573 N.Y.S.2d 687 (1st Dep't 1991).
30 See § 532.
31 Koscinski v. St. Joseph's Medical Center, 47 A.D.3d 685, 850 N.Y.S.2d 162 (2d Dep't 2008); see § 543.
32 Board of Ed. of Scotia-Glenville Central School Dist. v. Shapiro, 85 A.D.2d 763, 445 N.Y.S.2d 270 (3d Dep't 1981).
33 Weiss v. Deloitte & Touche, LLP, 63 A.D.3d 1045, 1047, 882 N.Y.S.2d 229, 232 (2d Dep't 2009).
34 See § 532.
35 See § 253.
36 See SPR 137:1.

End of Document

New York Official Reports

182 A.D.3d 63, 119 N.Y.S.3d 522, 2020 N.Y. Slip Op. 01107

**1 State of New York Mortgage Agency, Appellant,

v

Yakov Braun, Respondent, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
12921/09, 2016-12588, 2017-06885
February 13, 2020

CITE TITLE AS: State of New York Mtge. Agency v Braun

SUMMARY

Appeals from orders of the Supreme Court, Rockland County (Thomas E. Walsh II, J.), entered October 4, 2016, and March 16, 2017, in an action to foreclose a mortgage. The October 4, 2016 order denied plaintiff's motion pursuant to CPLR 306-b to extend the time to serve defendant Yakov Braun with the summons and complaint, and pursuant to CPLR 308 (5) to direct an alternative method for service of process. The March 16, 2017 order, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to renew the prior motion and, in effect, upon reargument, adhered to the original determination.

HEADNOTE

Process
Service of Process
Extension of Time—Interest of Justice

In an action to foreclose a mortgage, an extension of time to serve defendant mortgagor with the summons and complaint pursuant to CPLR 306-b was warranted in the interest of justice notwithstanding that plaintiff mortgagee requested the extension of time after a motion to dismiss based on lack of personal jurisdiction had been granted. CPLR 306-b provides that if service is not timely effected on a defendant, the court, on motion, must either dismiss the action without prejudice as to that defendant, or on good cause shown or in the interest of justice, extend the time for service. While plaintiff's lack of promptness in requesting the extension of time weighed against granting the extension, the extension was warranted in the interest of justice. The action was timely commenced, defendant had actual notice of the controversy, plaintiff demonstrated the existence of a potentially meritorious cause of action and there was no identifiable prejudice to defendant attributable to the delay in service. Moreover, the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing. There was no merit to the argument that the motion should have been denied because the action was no longer pending. An action is deemed pending until there is a final judgment. While there was an order granting defendant's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered and, thus, the action was still pending when plaintiff moved, among other things, to extend the time to serve defendant. Moreover, CPLR 306-b does not provide that a motion pursuant thereto to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss, or that a motion pursuant to CPLR 306-b to extend the time for service must be made in any particular time frame.

*64 RESEARCH REFERENCES

Am Jur 2d Mortgages § 583; Am Jur 2d Process §§ 545, 547.

Carmody-Wait 2d Commencement of Actions; Summons and Service of Process § 24:96; Carmody-Wait 2d Foreclosure of Mortgages on Real Estate § 92:89.

McKinney's, CPLR 306-b.

NY Jur 2d Mortgages and Deeds of Trust §§ 545, 547; NY Jur 2d Process and Papers §§ 10, 12.

Siegel, NY Prac § 63.

ANNOTATION REFERENCE

See ALR Index under Foreclosure; Process and Service of Process and Papers.

FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

APPEARANCES OF COUNSEL

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Jeremy Rosenberg, New York City, for respondent.

OPINION OF THE COURT

Leventhal, J.

On these appeals, we agree with the plaintiff that an extension of time to serve a certain defendant was warranted in the interest of justice. In reaching this conclusion, we reject the view that the motion pursuant to CPLR 306-b to extend the time for service, made in a pending action but after the Supreme Court issued an order granting a motion to dismiss based on lack of personal jurisdiction, should have been denied without consideration of its merits.

Factual and Procedural Background

In December 2009, the plaintiff[*] commenced this action to foreclose a residential mortgage against Yakov Braun (hereinafter ***65** the defendant) and others. Allegedly, service of the summons and complaint was made on the defendant pursuant to CPLR 308 (2) by serving his wife at the subject property on two occasions. Following the defendant's failure to appear in the action or answer the complaint, the Supreme Court issued an order of reference and an amended judgment of foreclosure and sale. The defendant petitioned for relief in the United States Bankruptcy Court, Southern District of New York, but his case was dismissed.

The day before a scheduled foreclosure sale of the subject property, the defendant moved, inter alia, to vacate the judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction. The Supreme Court, in an order dated December 17, 2013, inter alia, directed a hearing to determine the validity of service of process. The parties presented evidence at the hearing. However, the plaintiff was unable to present the testimony of the process server because he had died prior to the hearing. Thereafter, the court, in an order entered January 22, 2016, granted the defendant's motion to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction.

In or around April 2016, the plaintiff moved, among other things, pursuant to CPLR 306-b to extend the time to serve the defendant with the summons and complaint. In an order entered October 4, 2016, the Supreme Court denied the plaintiff's motion. Subsequently, in an order entered March 16, 2017, the court denied that branch of the plaintiff's motion which was for leave to renew the prior motion and, in effect, upon reargument, adhered to the original determination. The plaintiff appeals from the order entered October 4, 2016, and from the order entered March 16, 2017.

This Appeal

The parties dispute, inter alia, whether the Supreme Court correctly denied that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the defendant with the summons and complaint.

CPLR 306-b, entitled, "Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause," provides:

> ***66** "Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31-32 [2009]). " 'Good cause' and 'interest of justice' are two separate and independent statutory standards" (*Bumpus v New York City Tr. Auth.*, 66 AD3d at 31).

> "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (*id.* at 31-32 [citations omitted]).

If good cause for an extension is not established, courts must consider the broader interest of justice standard of CPLR 306-b (*see Bumpus v New York City Tr. Auth.*, 66 AD3d at 32). In considering the interest of justice standard,

> "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of ***67** time, and prejudice to defendant" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105-106).

Here, although we reject the plaintiff's contention that it established good cause for an extension (*see Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 743 [2018]), we agree with the plaintiff that an extension of time to serve the defendant with the summons and complaint was warranted in the interest of justice. The action was timely commenced in December 2009, based on the defendant's alleged default that year in paying his indebtedness that was secured by the mortgage. The statute of limitations, however, had expired by the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service (*see Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d at 744). The defendant had actual notice of the controversy. The Supreme Court, in its order dated December 17, 2013, wrote, among other things, that the defendant "is prepared to say anything and to conceal anything to stave off a foreclosure sale" and that "[i]t is clear that [the defendant] has been well-aware that a foreclosure action was pending. (The day before a previously-scheduled foreclosure sale, [the defendant] filed a Chapter 13 bankruptcy petition)." The plaintiff also demonstrated the existence of a potentially meritorious cause of action, and the lack of identifiable prejudice to the defendant attributable to the delay in service (*see Emigrant Bank v Estate of Robinson*, 144 AD3d 1084, 1085-1086 [2016]). Moreover, as the interest of justice standard permits consideration of "any other relevant factor" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105), we take into account that the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing. While the plaintiff's lack of promptness in requesting the extension of time weighs against granting the extension, on a careful analysis of the factual setting of the case and a balancing of the competing interests the parties present, we conclude that an extension of time to serve the defendant with process was warranted in the interest of justice. We note that a plaintiff who believes service was properly made has no incentive to move to extend the time to serve until after it has been found that service was, in fact, deficient.

In concluding that an extension of time to serve the defendant was warranted in the interest of justice, we find unpersuasive the defendant's argument that the plaintiff's motion was ***68** properly denied because it was made in an action that was no longer pending.

In *Cooke-Garrett v Hoque* (109 AD3d 457 [2013]), decided in 2013, this Court reversed an order that had denied, as untimely, the plaintiff's motion pursuant to CPLR 306-b to extend the time to serve the defendant, and remitted the matter to the Supreme Court for a determination on the merits. The Supreme Court had issued an order granting the defendant's motion to vacate his default in appearing and answering the complaint on the ground of lack of personal jurisdiction. However, no judgment dismissing the complaint on the ground of lack of personal jurisdiction was entered. The plaintiff subsequently moved to extend her time to serve the defendant. The Supreme Court denied the plaintiff's motion on the ground that its prior order "had dismissed the [instant] action" and, thus, there was no pending action in which to grant an extension of time for service of process (*Cooke-Garrett v Hoque*, 109 AD3d at 457). On appeal, however, this Court agreed with the plaintiff's contention that since no judgment had been entered dismissing the action, the action was pending when she moved to extend the time to serve. "An action is deemed pending until there is a final judgment (*see* CPLR 5011; *Paola Vista Clothing v V.R.P. Calzaturificio*, 148 AD2d 593, 595 [1989]; *Knapek v MV Southwest Cape*, 110 AD2d 928, 929 [1985]; *see generally* Siegel, NY Prac § 409 [5th ed])" (*Cooke-Garrett v Hoque*, 109 AD3d at 457; *see generally Towley v King Arthur Rings*, 40 NY2d 129, 132 [1976] ["A judgment is the law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding"]).

This Court recently cited to *Cooke-Garrett* in *US Bank N.A. v Saintus* (153 AD3d 1380 [2017]), decided in 2017. In *Saintus*, the plaintiff commenced a mortgage foreclosure action. Following a hearing to determine the validity of service of process, in an order entered July 10, 2015, the Supreme Court granted that branch of the motion of the defendant Jean Joseph Saintus which was pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction. The Supreme Court concluded that the plaintiff had failed to exercise due diligence in attempting to effectuate service pursuant to CPLR 308 (1) or (2) before resorting to affix and mail service pursuant to CPLR 308 (4). No judgment dismissing the complaint on the ground of lack of ***69** personal jurisdiction was entered. In an order entered October 28, 2015, the court, in effect, denied that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend its time to serve the summons and complaint upon Saintus. The plaintiff appealed from both orders. This Court, inter alia, reversed the order entered October 28, 2015, insofar as appealed from, granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend its time to serve Saintus, and vacated the order entered July 10, 2015. This Court held that the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend its time to serve the summons and complaint upon Saintus in the interest of justice (*see US Bank N.A. v Saintus*, 153 AD3d at 1381). This Court addressed factors relevant to the interest of justice standard for an extension under CPLR 306-b. Next, this Court determined that the Supreme Court did not lack jurisdiction to entertain this branch of the plaintiff's motion, stating that "[i]nasmuch as no judgment was entered dismissing the action, the action was pending when the plaintiff moved to extend the time to serve Saintus with process" (*US Bank N.A. v Saintus*, 153 AD3d at 1382, citing *Cooke-Garrett v Hoque*, 109 AD3d 457 [2013]).

As explained in *Cooke-Garrett*, an action is deemed pending until there is a final judgment. Here, while there was an order granting the defendant's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered. Therefore, the action was still pending when the plaintiff moved, inter alia, to extend the time to serve the defendant. As our recent precedent, *Cooke-Garrett* and *Saintus*, demonstrate, a court may consider the merits of a motion pursuant to CPLR 306-b to extend the time for service, even one made after the granting of a motion to dismiss, so long as the action remains pending. Where the court grants such a motion pursuant to CPLR 306-b to extend the time for service, it would likewise vacate an order granting the earlier motion to dismiss.

We respectfully disagree with our learned dissenting colleagues' conclusion that a motion pursuant to CPLR 306-b to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss. "[A] court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language ***70** itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [citations and internal quotation marks omitted]).

> " 'In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning' " (*id.* at 583, quoting *Tompkins v Hunter*, 149 NY 117, 122-123 [1896]).

Certainly, CPLR 306-b, as recited above, provides that if service is not timely effected on a defendant, the court, on motion, must either (1) dismiss the action without prejudice as to that defendant, or (2) on good cause shown or in the interest of justice, extend the time for service.

Notably, however, CPLR 306-b does not provide that a motion pursuant thereto to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss, or that a motion pursuant to CPLR 306-b to extend the time for service must be made in any particular time frame. The legislature could have imposed time limitations in CPLR 306-b had it wished to do so, as it has done so in other statutes (*see e.g.* CPLR 2221 [d] [3] ["A motion for leave to reargue: . . . shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals"]; 3212 [a] ["Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good

cause shown"]; 5015 [a] [1] ["(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the ***71** moving party has entered the judgment or order, within one year after such entry"]). Since the legislature did not impose time limitations in CPLR 306-b, this Court should not read a time limitation into the statute. If the legislature intended the result espoused by our dissenting colleagues, that a motion pursuant to CPLR 306-b to extend the time for service made in a pending action must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss, then it is up to the legislature to amend the statute accordingly.

In *Sottile v Islandia Home for Adults* (278 AD2d 482 [2000]), decided in 2000, this Court affirmed the Supreme Court's denial of that branch of the plaintiffs' motion which was pursuant to CPLR 306-b to extend the time to serve the respondents, on the ground that there was no longer an action pending in which relief could be granted. This Court stated that "[a] plain reading of the statute further supports the court's conclusion that the plaintiffs could not seek an extension after the action was dismissed. The statute gives a court the option of extending the time to serve *instead of* dismissing the action" (*Sottile v Islandia Home for Adults*, 278 AD2d at 484).

> "Such a reading is consistent with the Legislative Memorandum in Support of the 1997 amendment of CPLR 306-b, which contemplates that a motion would be made while an action is pending: 'under this proposal, there would be no express requirement that a motion to extend the time for service be made within the 120-day period. Indeed, a plaintiff would move to extend the time as a cross motion to a motion to dismiss for failure to timely serve' " (*Sottile v Islandia Home for Adults*, 278 AD2d at 484, quoting Senate Introducer's Mem in Support, 1997 McKinney's Session Laws of NY at 2457; *see* Mem of Off of Ct Admin, Bill Jacket, L 1997, ch 476 at 8, 1997 NY Legis Ann at 319).

Critically, in *Sottile*, a judgment had been entered dismissing the complaint before the plaintiffs moved pursuant to CPLR 306-b to extend the time for service. That a judgment dismissing the complaint had been entered prior to the plaintiffs' motion in *Sottile* is critical because, as explained above, an action is pending until a judgment has been entered.

The cases our dissenting colleagues cite to do not compel a contrary conclusion. Granted, this Court's case *Broser v Dworman* ***72** (78 AD3d 979 [2010]), decided in 2010, appears to support their position. In *Broser*, the plaintiff moved, inter alia, pursuant to CPLR 306-b to extend the time to serve the supplemental summons and amended complaint on Robert Herskowitz subsequent to the issuance of an order granting Herskowitz's motion to dismiss the amended complaint insofar as asserted against him on the basis that service was improper under CPLR 308. This Court, citing to *Sottile*, among other cases, held that the "Supreme Court properly denied [the plaintiff's] motion to extend the time to serve process, as, by then, there was no longer any action pending against Herskowitz in which such relief could be granted" (*Broser v Dworman*, 78 AD3d at 980). This Court added that the "plaintiff's remedy was to have sought the same relief by notice of cross motion at the time of Herskowitz's motion to dismiss" (*id.*). *Broser* involved an odd procedural history. In that case, the plaintiff sought an extension of time to serve a party that the plaintiff had been given permission to add as a defendant some six years after the plaintiff commenced the action. Besides, this Court's decision and order does not indicate whether a judgment had been entered in *Broser*; if no judgment had been entered, then the action was pending at the time of the plaintiff's motion. To the extent *Broser* holds that a motion pursuant to CPLR 306-b must be denied if it is made subsequent to the issuance of an order granting a motion to dismiss but prior to entry of judgment, *Broser* should no longer be followed.

In *Hambric v McHugh* (289 AD2d 290 [2001]), decided in 2001, the Supreme Court had issued an order granting the defendants' motion to dismiss the complaint, and denying the plaintiffs' cross motion pursuant to CPLR 306-b to extend the time for service. The plaintiffs did not appeal from that order, and instead commenced a second action against the defendants. The defendants then moved in the second action to dismiss the complaint as time-barred. In opposition, the plaintiffs argued that they should be permitted to commence the second action pursuant to CPLR 306-b. The Supreme Court denied the defendants' motion. On appeal, this Court reversed. This Court explained that under CPLR 306-b, as amended in 1997, a plaintiff still must serve a defendant within 120 days, but the action no longer was deemed dismissed if service was not made within that time period. Although the statute gave the court the flexibility to extend

the time to serve, "the amended version of CPLR 306-b no longer affords a plaintiff ***73** the opportunity to commence a second action concerning otherwise time-barred claims after the dismissal of the first action" (*Hambric v McHugh*, 289 AD2d at 291). Thus, in *Hambric*, the "plaintiffs' second action, which was commenced after the expiration of the Statute of Limitations, should have been dismissed as time-barred" (*id.* at 292). This Court cited *Sottile* in support of the proposition that "[s]ince the plaintiffs commenced their first action after the amended CPLR 306-b went into effect, the Supreme Court was authorized to extend the plaintiffs' time to effect proper service only as to that timely-filed first action, and only while that first action was still pending" (*Hambric v McHugh*, 289 AD2d at 291). That quotation implies that the first action was no longer pending in *Hambric*, where the court had issued an order granting the defendants' motion, inter alia, to dismiss the complaint but there was no mention, in this Court's decision and order, of a judgment having been entered. Our case is different because it does not involve a motion for an extension sought in a second action commenced after the expiration of the statute of limitations.

This Court likewise cited to *Hambric* and *Sottile* in *Matter of Rodamis v Cretan's Assn. Omonoia, Inc.* (22 AD3d 859 [2005]), decided in 2005. *Matter of Rodamis* is likewise distinguishable from our case. In *Matter of Rodamis*, the petitioners commenced a proceeding pursuant to CPLR article 78. That proceeding was dismissed due to, inter alia, defective service and failure to serve initiatory papers. The petitioners did not move pursuant to CPLR 306-b to extend the time to serve. Instead, after the applicable statute of limitations period expired, the petitioners commenced a new proceeding, and sought leave therein to extend the time to effect service. The Supreme Court, inter alia, granted that branch of the petition which was for the extension and denied that branch of the cross motion which was to dismiss the proceeding as time-barred. On appeal, this Court reversed insofar as appealed from, explaining that after the previous proceeding was dismissed, there no longer was a timely commenced, pending proceeding in which the petitioners could move to extend the time for service. This Court stated that it was too late to move for such relief in the proceeding "as it was commenced after expiration of the applicable statute of limitations period" (*Matter of Rodamis v Cretan's Assn. Omonoia, Inc.*, 22 AD3d at 860).

This Court, citing to *Hambric* and *Matter of Rodamis*, said something substantially similar in ***74** *Walker v Chaman* (31 AD3d 751 [2006]), decided in 2006. However, *Walker* is distinguishable since the (cross) motion at issue there was one for an extension of time to effect service in the prior action made in the subsequent, time-barred action (*see id.* at 751 ["The plaintiff's cross motion for an extension of time to effect service in a prior action was properly denied. After the prior action was dismissed, there was no longer a timely-commenced, pending action in which the plaintiff could seek such leave; it was too late to seek leave in this action as it was commenced after the expiration of the applicable statute of limitations period"]).

In *Donahue v Nassau County Healthcare Corp.* (15 AD3d 332 [2005]), decided in 2005, this Court cited to *Sottile* and *Hambric* regarding the denial of a motion pursuant to CPLR 306-b which was made in an action that was no longer pending. But, in context, it did so in recounting what the Supreme Court had done in an order in a previous action (*see Donahue v Nassau County Healthcare Corp.*, 15 AD3d at 333).

Other cases of this Court that our dissenting colleagues discuss are distinguishable as well. In *Lee v Colley Group McMontebello, LLC* (90 AD3d 1000 [2011]), decided in 2011, this Court stated that the plaintiff was required to serve upon the defendant a notice of cross motion pursuant to CPLR 306-b in order to obtain the affirmative relief of an extension of time to serve the summons with notice (*see Lee v Colley Group McMontebello, LLC*, 90 AD3d at 1000-1001). *Lee* cited to four cases in support of this proposition. With the exception of *Broser*, which is cited as a "see also," these cases, *DeLorenzo v Gabbino Pizza Corp.* (83 AD3d 992, 993 [2011]); *Rinaldi v Rochford* (77 AD3d 720, 720 [2010]); and *New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.* (39 AD3d 608, 609 [2007]), concern a party requesting an extension pursuant to CPLR 306-b rather than cross-moving for that relief (*see DeLorenzo v Gabbino Pizza Corp.*, 83 AD3d at 993 ["To the extent that the plaintiff attempted to informally seek leave to effect late service of the original summons and complaint upon the defendant pursuant to CPLR 306-b, that affirmative relief should have been sought in a notice of cross motion to the Supreme Court" (citation omitted)]; *Rinaldi v Rochford*, 77 AD3d at 720 ["To the extent that the plaintiff attempted to informally seek leave to effect late service of the original summons and complaint upon the defendants pursuant to CPLR 306-b, that affirmative relief should have been sought in a notice of cross motion to the Supreme Court and, in any event, ***75** was not available to the plaintiff under the circumstances" (citations omitted)]; *New York State Div. of Human Rights v Oceanside*

Cove II Apt. Corp., 39 AD3d at 609 ["The plaintiff, having conceded the impropriety of its service of the summons and complaint, was relegated to seeking an extension of the time to effect service under CPLR 306-b. Rather than making a motion for this relief, the plaintiff, in opposing the defendant's cross motion, inter alia, to dismiss for lack of in personam jurisdiction, merely asked for this extension and argued why it should be granted. This constituted a violation of CPLR 2215, as amended. Since the plaintiff merely requested this relief in its opposition papers, and did not make a motion on notice as defined in CPLR 2211, the plaintiff is not entitled to appeal as of right from the order denying its request to extend the time for service of the summons and complaint" (citations omitted)]). That circumstance, a party informally requesting an extension pursuant to CPLR 306-b rather than making a motion on notice for that relief, is not present in the case at bar.

Our colleagues cite to three Appellate Division, First Department cases: *Henneberry v Borstein* (91 AD3d 493 [2012]), decided in 2012; *Jimenez v City of New York* (13 AD3d 107 [2004]), decided in 2004; and *James v Nadal Corp.* (290 AD2d 248 [2002]), decided in 2002. These cases are persuasive but not binding authority for this Court (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 665 [1984]).

In any event, these First Department cases do not dictate a different conclusion in the case at bar. In *Henneberry*, the First Department explained that on a motion pursuant to CPLR 306-b to dismiss a complaint on the ground that service was not made on a defendant, "the express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action" (*Henneberry v Borstein*, 91 AD3d at 495). This explanation is consistent with the statute. However, as discussed above, the statute does not provide that a motion pursuant to CPLR 306-b to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss and prior to the entry of judgment, or that a motion pursuant to CPLR 306-b to extend the time for service must be made in any particular time frame.

In *James*, the First Department cited to *Sottile* for the proposition that "[a]s Supreme Court correctly recognized, an extension of time to serve defendant could only be granted if the ***76** first action, which was timely commenced, was pending since the second action was commenced after the expiration of the statute of limitations" (*James v Nadal Corp.*, 290 AD2d at 249). In *James*, the plaintiffs voluntarily stipulated to discontinue their initial action, commenced eight months earlier, after it appeared that service of the complaint was defective. Thereafter, the plaintiffs commenced a second action after the expiration of the statute of limitations and served the defendant again. The Supreme Court granted the defendant's motion to dismiss the second action as time-barred. However, upon reargument, the Supreme Court vacated the stipulation discontinuing the first action, consolidated the two actions, and concluded that the plaintiff had demonstrated good cause for the delay in serving the defendant. The First Department held that the Supreme Court erred in doing so. Although *James* suggests that there was no first action pending once it was discontinued by stipulation, the decision and order does not indicate whether a judgment had been entered, and the First Department's holding in that case was based on its conclusion that the Supreme Court should not have vacated the stipulation since there was an insufficient basis to vacate an otherwise valid stipulation.

In *Jimenez*, the First Department cited to *Sottile* in support of the proposition that "[m]oreover, once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (*Jimenez v City of New York*, 13 AD3d at 107). The decision and order in *Jimenez* does not indicate whether a judgment had been entered, and it gave this rationale about the plaintiff no longer being able to seek an extension once the action was dismissed only after explaining why an extension was not warranted (*see id.* ["Although extensions of time should be liberally granted on good cause shown or in the interest of justice, plaintiff made no showing of diligence, that the cause of action had merit, that there had been no undue delay in service, or that he had promptly requested the extension of time. Moreover, once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (citations omitted)]).

In short, the cases that our dissenting colleagues cite to fail to convince us that a motion pursuant to CPLR 306-b to extend the time for service made in a pending action must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss.

***77** Contrary to the dissent's assertion, we do not espouse a procedure in which a plaintiff may move for an extension pursuant to CPLR 306-b and "simply ignore" (dissenting op at 87) the issuance of an order granting a motion to dismiss. A plaintiff's delay in moving pursuant to CPLR 306-b to extend the time for service until after the issuance of

an order granting a motion to dismiss can be considered as a factor weighing against granting an extension in the interest of justice. Indeed, the Court of Appeals has specifically identified "the promptness of a plaintiff's request for the extension of time" as among the relevant factors in determining whether an extension should be granted in the interest of justice (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105-106).

However, a plaintiff's delay in moving pursuant to CPLR 306-b to extend the time for service until after the issuance of an order granting a motion to dismiss should not deprive the court of its discretion to extend the time to serve a defendant in a pending action. Although we acknowledge that the better practice would be for a plaintiff to affirmatively seek relief pursuant to CPLR 306-b prior to the issuance of an order granting a motion to dismiss, we believe that the failure to do so does not automatically preclude the court from granting the motion for an extension in an appropriate case. The promptness of a plaintiff's request for the extension of time being a factor supports our view: unlike a plaintiff who knows that service was not effectuated on a defendant and, thus, should promptly move for an extension to serve that defendant, why would a plaintiff who believes that it timely served the defendant move to extend the time for service prior to a court determining that service was, in fact, ineffective?

The dissent fears that our conclusion, that a court should address the merits of a motion pursuant to CPLR 306-b to extend the time for service made in a pending action, will create further procedural issues. The dissent posits, in part, "[t]he dates of entry of judgment, service of a motion to extend, and entry of any order resolving the plaintiff's motion to extend will become critical in determining the jurisdiction of the motion court or appellate court" (dissenting op at 86; *see id.* at 86 n 3 ["During the pendency of this appeal, nothing is stopping the defendant from entering judgment dismissing the complaint. So, if the clerk enters judgment during the pendency of this appeal, but before this Court's determination of the appeal, what happens then?"]). The dissent's procedural fears are ***78** overstated and unfounded. Courts are empowered to vacate orders or judgments on the grounds codified in CPLR 5015 (a) as well as for sufficient reason and in the interest of substantial justice (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Katz v Marra*, 74 AD3d 888 [2010]; *see also McMahon v City of New York*, 105 AD2d 101, 104 [1984] ["Both the trial court and this (C)ourt have inherent power, as well as statutory power under CPLR 5015, to set aside a judgment on appropriate grounds"]). In appropriate instances, an order, or even a judgment, may be vacated where it is inconsistent with the relief being granted.

Our colleagues would deny a plaintiff the opportunity to move to extend the time for service, even in a case like this, where it is undisputed that interest of justice would lie, because the motion is made even a week, or a day, or a minute after the issuance of an order granting a motion to dismiss. The better rule is to allow flexibility for a plaintiff to seek justice rather than rigidly slamming shut the courthouse door on a plaintiff's potentially meritorious action.

We reiterate that this action was timely commenced in December 2009, based on the defendant's alleged default that year in paying his indebtedness that was secured by the mortgage, but the statute of limitations had expired by the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service; that the defendant had actual notice of the controversy; that the plaintiff demonstrated the existence of a potentially meritorious cause of action, and the lack of identifiable prejudice to the defendant attributable to the delay in service; and that the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing. While the plaintiff's lack of promptness in requesting the extension of time weighs against granting the extension, on a careful analysis of the factual setting of the case and a balancing of the competing interests the parties present, we conclude that an extension of time to serve the defendant with process was warranted in the interest of justice.

The plaintiff's remaining contentions are without merit.

Barros, J. (dissenting, in part, and voting to affirm the orders entered October 4, 2016, and March 16, 2017). These appeals raise the issue of whether a plaintiff's motion pursuant to CPLR 306-b to extend the time to serve a defendant is ***79** timely made after the court has already issued an order granting that defendant's motion to dismiss the complaint for lack of personal jurisdiction. The plain language and legislative history of CPLR 306-b compel the conclusion that the plaintiff must affirmatively seek an extension of time to serve, at the latest, before the court's determination of the defendant's motion to dismiss.

I. Factual Background

On December 8, 2009, the plaintiff commenced this action to foreclose a mortgage given by the defendant Yakov Braun. Service of the summons and complaint was alleged to have been made pursuant to CPLR 308 (2) by serving the defendant's wife at the subject property on two occasions. The defendant did not appear in the action or answer the complaint. On July 11, 2013, the defendant moved to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction, which the plaintiff opposed. In an order dated December 17, 2013, the Supreme Court directed a hearing to determine the validity of service of process.

The hearing on the issue of service was held on June 11, 2015, and August 26, 2015. At the time of the hearing, the plaintiff was unable to produce the process server, as the process server was deceased. The process server's affidavits of service were admitted. Two witnesses testified for the defendant, the defendant's wife and his housekeeper, and they each denied service. Following the hearing, the parties submitted posthearing memoranda. In an order entered on January 22, 2016, the Supreme Court granted that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction (hereinafter the dismissal order).

Notably, despite the unavailability of its process server and the expiration of the statute of limitations, the plaintiff did not cross-move pursuant to CPLR 306-b to extend the time to serve the defendant prior to the Supreme Court's issuance of the dismissal order. Nor did the plaintiff seek leave to renew or reargue its opposition to the defendant's motion to dismiss, or seek to vacate or appeal from the dismissal order. Instead, by notice of motion dated April 6, 2016, which was more than two months after entry of the dismissal order, the plaintiff moved, inter alia, pursuant to CPLR 306-b to extend the time to serve the defendant. In an order entered October 4, 2016, the court ***80** denied the plaintiff's motion as untimely. In an order entered March 16, 2017, the court denied that branch of the plaintiff's motion which was for leave to renew the prior motion and, in effect, upon reargument, adhered to its prior determination. The plaintiff appeals from both orders.

II. The Meaning and Purpose of CPLR 306-b

Current CPLR 306-b provides, in pertinent part, that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

Citing to the Bill Jacket, the Court of Appeals in *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95, 104-106 [2001]) summarized the history and purpose of CPLR 306-b. In 1992, the original CPLR 306-b "transformed New York from a commencement-by-service to a commencement-by-filing jurisdiction" which made the act of filing the point at which an action commenced for statute of limitations purposes (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 100). Under former CPLR 306-b, if the plaintiff failed to file proof of service within 120 days of filing the complaint, the complaint was *automatically* dismissed (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 100). "The plaintiff was free to commence a new action and serve process within a second 120-day period from the date of the automatic dismissal, even if the Statue of Limitations had expired" (*id*.)

To ameliorate the harsh consequence of an automatic dismissal, and to relieve plaintiffs of the burden and cost of commencing a new action, the legislature in 1997 amended CPLR 306-b to eliminate the automatic dismissal, and provide that if service cannot be made within the 120-day period, then the court, upon motion, may either dismiss the action or extend the plaintiff's time to serve (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 100). As set forth in the Bill Jacket, the amendment of CPLR 306-b was intended to (1) eliminate uncertainty as to whether the court has authority to extend the time for service; (2) provide a single mechanism for seeking a time extension; (3) provide a standard for granting the extension; (4) leave to the court's discretion the duration of the extension; and (5) eliminate the burden on counsel to file proof of service and the burden on the clerk to process the filings of proof of service (*see* Mem of Off of Ct Admin No 97-67R, 1997 NY Legis Ann at 318-319).

***81** The Committee on Civil Practice Law and Rules of the Commercial and Federal Litigation Section noted that "[t]he stated purpose" of the current CPLR 306-b is to eliminate the "unwanted and unnecessary litigation" that occurred under prior CPLR 306-b, and to "simplify procedures without losing the benefits of the commencement by filing system" (NY State Bar Assoc Legis Report, Bill Jacket, L 1997, ch 476 at 10).

In addressing the timeliness of a CPLR 306-b motion to extend the time for service, the legislative memorandum explains as follows:

> "Also, under this proposal, there would be no express requirement that a motion to extend the time for service

be made within the 120-day period. *Indeed, a plaintiff would move to extend the time as a cross motion to a motion to dismiss for failure to timely serve*. However, the court would consider the plaintiff's diligence in seeking an extension of time in making its decision as to whether the motion should be granted" (Legis Mem in Support, 1997 McKinney's Session Laws of NY at 2457 [emphasis added]; *see also* Mem of Off of Ct Admin, 1997 NY Legis Ann at 319; *Sottile v Islandia Home for Adults*, 278 AD2d 482, 484 [2000]).

For more than a decade after CPLR 306-b was amended, appellate courts interpreted the statutory language to mean that the motion court has "the option of extending the time to serve *instead of* dismissing the action" (*Sottile v Islandia Home for Adults*, 278 AD2d at 484; *see Henneberry v Borstein*, 91 AD3d 493, 495 [2012]; *Broser v Dworman*, 78 AD3d 979, 980 [2010]). "[T]he express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action" (*Henneberry v Borstein*, 91 AD3d at 495). The Court of Appeals explained that CPLR 306-b "empowers a court *faced with* the dismissal of a viable claim" the option of granting the plaintiff an extension of time to serve the defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 106 [emphasis added]).

Relying on the above authorities, especially the Bill Jacket, courts have emphasized that, if the 120-day period for service has expired, and the defendant has moved to dismiss the complaint for lack of personal jurisdiction, the plaintiff seeking an extension of time to serve must cross-move for that affirmative relief (*see* ***82** *Lee v Colley Group McMontebello, LLC*, 90 AD3d 1000, 1000-1001 [2011] ["she was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the summons with notice upon the defendant pursuant to CPLR 306-b"]; *DeLorenzo v Gabbino Pizza Corp.*, 83 AD3d 992, 993 [2011] ["that affirmative relief should have been sought in a . . . cross motion"]; *Broser v Dworman*, 78 AD3d at 980 ["The plaintiff's remedy was to have sought the same relief by notice of cross motion at the time of (the defendant's) motion to dismiss"]; *Rinaldi v Rochford*, 77 AD3d 720, 720 [2010] [affirmative relief to extend the time for service "should have been sought in a notice of cross motion"]).

This is so because "once the action [is] dismissed, plaintiff could no longer seek an extension of time to effect service" (*Jimenez v City of New York*, 13 AD3d 107, 107 [2004]; *see James v Nadal Corp.*, 290 AD2d 248 [2002]; *see also Walker v Chaman*, 31 AD3d 751 [2006]; *Matter of Rodamis v Cretan's Assn. Omonoia, Inc.*, 22 AD3d 859, 860 [2005]; *Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332 [2005]; *Hambric v McHugh*, 289 AD2d 290, 291 [2001] [the court is "authorized to extend the plaintiffs' time to effect proper service . . . only while (the action is) still pending"]).

Here, to obtain an extension of time to serve the defendant, the plaintiff's remedy was to cross-move for that relief at the time of the defendant's motion to dismiss (*see Broser v Dworman*, 78 AD3d at 980; *Rinaldi v Rochford*, 77 AD3d at 720; *Sottile v Islandia Home for Adults*, 278 AD2d at 484). The plaintiff's motion, inter alia, to extend the time to serve the defendant, which was made more than two months after the entry of the order directing dismissal of the complaint, was untimely.

III. *Cooke-Garrett v Hoque* (109 AD3d 457 [2013]) and *US Bank N.A. v Saintus* (153 AD3d 1380 [2017]) were incorrectly decided and should no longer be followed.

In *Cooke-Garrett v Hoque* (109 AD3d 457 [2013]) and *US Bank N.A. v Saintus* (153 AD3d 1380 [2017]), this Court, in conclusory fashion, held that where a court has issued an order directing dismissal of an action for lack of personal jurisdiction, a plaintiff's motion pursuant to CPLR 306-b for an extension of time to serve the defendant is timely so long as the clerk has not yet entered judgment on the order dismissing the complaint. In *Cooke-Garrett* and *Saintus*, this Court did not provide any explanation for departing from our prior jurisprudence requiring that a plaintiff move for an extension before ***83** the court's determination of the defendant's motion to dismiss (*see Sottile v Islandia Home for Adults*, 278 AD2d at 484).

The holdings in *Cooke-Garrett* and *Saintus* are erroneous because, among other reasons: (1) they are contrary to the plain language and legislative purpose of CPLR 306-b; (2) they misapprehend the meaning and significance of orders directing dismissal and judgments; (3) they allow the plaintiff to attack an order directing dismissal of an action without complying with CPLR 2221 or appealing; and (4) they violate the principle of judicial economy.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v*

City of New York, 41 NY2d 205, 208 [1976]; *see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 582 [1998]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d at 583). "[T]o interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain" (McKinney's Cons Laws of NY, Book 1, Statutes § 76, Comment at 168 [1971 ed]; *see Bender v Jamaica Hosp.*, 40 NY2d 560 [1976]).

In requiring a court to entertain the merits of a plaintiff's motion for an extension pursuant to CPLR 306-b made after the court has already granted the defendant's motion to dismiss for lack of personal jurisdiction, this Court in *Cooke-Garret* and *Saintus*, and the majority herein, rewrite CPLR 306-b by replacing the word "or" with the word "and," such that the motion court can dismiss the action *and* later extend the plaintiff's time to serve. Instead of just two options (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 106; *Henneberry v Borstein*, 91 AD3d at 495), there is this *third* option.

Although CPLR 306-b does not contain the word "judgment" or "pending action," in *Cooke-Garrett* and *Saintus*, this Court determined that the timeliness of a CPLR 306-b motion to extend depends, in part, upon whether and when a clerk enters judgment on an order directing dismissal. Indeed, under the rationale of *Cooke-Garrett* and *Saintus*, had the clerk entered judgment sooner, the plaintiff's subsequent motion to extend

***84** the time to serve would have been denied as untimely.[1] The holdings in *Cooke-Garrett* and *Saintus* run contrary to the Court of Appeals' statement in *Leader v Maroney, Ponzini & Spencer* that CPLR 306-b "empowers *a court* faced with the dismissal of a viable claim" the option of granting the plaintiff an extension of time to serve the defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 106 [emphasis added]). A *court* is no longer faced with a dismissal if it has, as here, months before already directed dismissal of the complaint.

The *Cooke-Garrett* and *Saintus* rationale derives from a misapprehension of prior case law which contrasts the current CPLR 306-b with former CPLR 306-b. In using the phrase "pending action," the earlier cases were merely pointing out that under current CPLR 306-b, a plaintiff must seek an extension of time to serve the defendant in a pending action, as opposed to commencing a *new* action, which was how a plaintiff obtained an extension under former CPLR 306-b (*see e.g. Matter of Rodamis v Cretan's Assn. Omonoia, Inc.*, 22 AD3d 859 [2005]; *James v Nadal Corp.*, 290 AD2d 248 [2002]; *Sottile v Islandia Home for Adults*, 278 AD2d 482 [2000]). Those earlier cases were not, as the majority infers, intending to make an esoteric distinction between the legal effect of an order directing dismissal versus a judgment. Thus, parsing out the words "order" and "judgment" from opinions predating *Cooke-Garrett* to make a point about whether those actions were still pending has no bearing on whether a plaintiff's motion pursuant to CPLR 306-b to extend the time for service is timely. Before this Court's *Cooke-Garrett* opinion, no appellate court had ever held that a plaintiff may move to extend the time to serve after the court had already granted the defendant's motion to dismiss. Thus, *Broser v Dworman* (78 AD3d 979 [2010]), which expressly held that the plaintiff's motion for an extension was untimely since it was made after an order directing dismissal, is consistent with *Sottile v Islandia Home for Adults* (278 AD2d 482 [2000]), even though in *Sottile* there happened to be both an order directing dismissal and an entry of judgment.

***85** The *Cooke-Garrett* and *Saintus* cases misapprehend the nature and significance of orders and judgments. CPLR 5011 provides, in pertinent part, that "[a] judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final. A judgment shall refer to, and state the result of, the verdict or decision, or recite the default upon which it is based." Entry of judgment happens when the clerk of the court signs and files the judgment (*see* CPLR 5016). In some counties, the party who seeks the judgment requests the clerk to prepare and enter the judgment, whereas in other counties, the party prepares the judgment and requests the clerk to enter it (*see* New York State Unified Court System, CourtHelp, Going to Court, Judgments, http://www.nycourts.gov/courthelp/goingtocourt/judgments.shtml [last accessed Jan. 29, 2020]).

Entering judgment is a ministerial act, and the content of the judgment is determined by the terms of the court's decision, verdict, or default upon which the judgment is based (*see* Siegel & Connors, NY Prac § 409 at 791-792 [6th ed 2018]). A judgment is the note upon which *enforcement* of a decision, verdict, or default lies (*see id.*).

No less significant, however, is that the court's order, which the judgment merely reflects, establishes the rights of the

parties (*see id.*). It is the *court* that determines the rights of the parties, not the clerk (*see generally Cadichon v Facelle*, 18 NY3d 230, 234-235 [2011]). Until reversed or vacated, an order issued after a hearing on the issue of the validity of service of process directing dismissal of the complaint for lack of personal jurisdiction is as conclusively determinative on the issue of the court's personal jurisdiction over the defendant as any judgment issued by the court based upon that order (*see e.g. Engel v Aponte*, 51 AD2d 989, 990 [1976]; *Klein v Gruss & Son*, 18 AD2d 1085, 1086 [1963]; *Riley v Southern Transp. Co.*, 278 App Div 605, 605 [1951]; *see also generally* Black's Law Dictionary 1270 [10th ed 2014] [the word "order" "embraces final decrees as well as interlocutory directions (and) commands"]).

The notion that such an order is nondeterminative until such time as a judgment is entered upon it *by the clerk* defies the expectations of the parties in understanding the status of the litigation. Since the court has determined that it lacks personal jurisdiction over the defendant, the defendant cannot be expected to continue litigating other than through possible renewal or reargument (*see* CPLR 2221), or a plaintiff's appeal. ***86** Thus, as it pertains to determining the timeliness of a CPLR 306-b motion, the distinction between an order directing dismissal of a complaint for lack of jurisdiction, and a judgment of dismissal based upon the same order, is one without a difference.[2]

The holdings of *Cooke-Garrett*, *Saintus*, and the majority herein operate so that, under the guise of CPLR 306-b, the plaintiff may belatedly seek reconsideration or vacatur of the court's prior order directing dismissal of the complaint. Nothing in the statutory text or legislative history of CPLR 306-b suggests that it may be utilized to attack a prior order directing dismissal without meeting any of the requirements of CPLR 2221, or without appealing. Here, the majority, sua sponte, vacates a dismissal order that the plaintiff never sought to vacate, and which the plaintiff never appealed from.

The rule espoused by *Cooke-Garrett*, *Saintus*, and the majority herein will inevitably cause further difficult procedural issues since a plaintiff's motion to extend may be defeated simply by a defendant's visit to the clerk to effect entry of judgment on an order directing dismissal. The dates of entry of judgment, service of a motion to extend, and entry of any order resolving the plaintiff's motion to extend will become critical in determining the jurisdiction of the motion court or appellate court.[3] Indeed, there is no other context in which the *clerk's* date of entry of an order or judgment is used as either a deadline or a date for computing the timeliness of a subsequent ***87** motion or appeal (*see e.g.* CPLR 2221 [providing that a motion for leave to reargue shall be made within 30 days after *service* of a copy of the order determining the prior motion *and* written notice of its entry]; CPLR 5015 [providing that a motion to vacate a judgment or order on the ground of excusable default must be made within one year after *service* of a copy of the judgment or order *with* written notice of its entry]; CPLR 5513 [providing, inter alia, that the timeliness of an appeal is computed from the date of *service* of a copy of the judgment or ordered appealed from *and* written notice of its entry]).

The majority's assertion that these procedural problems are solved by CPLR 5015 or a court's inherent power to exercise control over its own judgments, is erroneous. In *Matter of McKenna v County of Nassau, Off. of County Attorney* (61 NY2d 739 [1984]), the Court of Appeals held that a court's resort to CPLR 5015 to reopen a judgment to "correct a perceived error of law that could have been raised on" an appeal is an abuse of discretion (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739 [1984]). "A court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect" (*id.* at 739 [alterations and internal quotation marks omitted]; *see JPMorgan Chase Bank, N.A. v Dev*, 176 AD3d 691, 692 [2019]). Here, the court ordered dismissal of the complaint after considering two rounds of briefing, and upon conducting a hearing on the issue of service in which the plaintiff fully participated. The plaintiff could have sought reargument or appealed from the dismissal order, but did neither. According to the procedure condoned by the majority, the plaintiff may simply ignore the order directing dismissal of the complaint, and move for an extension pursuant to CPLR 306-b. Upon granting the plaintiff's motion, the motion court or this Court could then vacate any judgment entered upon the order directing dismissal of the complaint using its "inherent power to exercise control over its judgments." This convoluted procedure is not supported by the text and legislative intent of CPLR 306-b or 5015.

Finally, interpreting the statute to allow a plaintiff to move for an extension after the court has issued an order granting the defendant's motion to dismiss violates the principle of judicial economy, and undermines CPLR 306-b's express statutory purposes to eliminate "unwanted and unnecessary litigation" ***88** and "simplify procedures" (NY State Bar

Assn Legis Report, Bill Jacket, L 1997, ch 476 at 10). Instead of a single round of motion practice dedicated to service of process issues, the court and the parties are now compelled to engage in a second round of motion practice on the often-difficult question of whether an extension of time to serve a defendant is warranted for good cause or in the interest of justice.[4] Given the situation, as here, where a plaintiff inexplicably delayed in moving to extend the time to serve until months after the court issued its order directing dismissal, any determination by the court granting the plaintiff's motion will likely give rise to a difficult appellate issue.

Much of this motion and likely appellate practice could be avoided by properly interpreting the statute to require a plaintiff to affirmatively seek an extension of time to serve a defendant in response to that defendant's motion to dismiss. In such a way, the court can consider, in a single round of motion practice, the two options set forth in CPLR 306-b.

The majority asks, "why would a plaintiff who believes that it timely served the defendant move to extend the time for service prior to a court determining that service was, in fact, ineffective?" (majority op at 77). The answer is simple: to avoid a dismissal *in the event that* the court determines that service was ineffective. For example, here, when the defendant moved to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction, caution would dictate that the plaintiff cross-move for an extension of time to serve the defendant since the plaintiff was on notice that its process server died, and the statute of limitations was about to expire.

Even so, the majority's question raises a valid concern, that is, whether the plaintiff should be permitted to seek an extension of time to serve a defendant once it is apprised of the court's determination that its prior service attempt was invalid. CPLR 306-b permits the plaintiff to seek an extension of time to serve a defendant in situations, inter alia, where, as here, the defendant contests the validity of the plaintiff's service attempt and seeks dismissal of the complaint. As stated at the outset of this dissent, a plaintiff's motion to extend the time to serve the defendant need only be made, at the latest, before the court orders the dismissal of the complaint, not necessarily ***89** before the court's determination on the issue of the validity of the plaintiff's service attempt. Although courts often determine that service was invalid within the same order granting dismissal of the complaint for lack of personal jurisdiction, the plaintiff here does not argue that, under the circumstances of this case, the Supreme Court deprived it the opportunity to move for an extension before ordering the dismissal of the complaint. Such an argument, in any event, would be more appropriately cited as a ground supporting a motion for leave to reargue (*see* CPLR 2221).

IV. Conclusion

In sum, moving for an extension of time to serve a defendant in response to a defendant's motion to dismiss is not only the better practice, it is the practice that the legislature envisioned when the statute was enacted (*see* Mem in Support, 1997 McKinney's Session Laws of NY at 2457 ["Indeed, a plaintiff would move to extend the time as a cross motion to a motion to dismiss for failure to timely serve"]; *Sottile v Islandia Home for Adults*, 278 AD2d at 484). Since the plaintiff first moved for an extension of time to serve the defendant more than two months after entry of the order granting the defendant's motion to dismiss, the Supreme Court properly denied the plaintiff's motion as untimely.

Balkin, J.P. and Connolly, J., concur with Leventhal, J.; Barros, J., dissents in a separate opinion in which Hinds-Radix, J., concurs.

Ordered that the order entered October 4, 2016, is modified, on the law and in the exercise of discretion, by deleting the provision thereof denying that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the defendant Yakov Braun with the summons and complaint, and substituting therefor a provision granting that branch of the plaintiff's motion and vacating the order entered January 22, 2016; as so modified, the order entered October 4, 2016, is affirmed, and the order entered March 16, 2017, is vacated; and it is further,

Ordered that the appeal from the order entered March 16, 2017, is dismissed as academic in light of our determination on the appeal from the order entered October 4, 2016; and it is further,

Ordered that the plaintiff's time to serve the summons and complaint upon the defendant Yakov Braun is extended until ***90** 120 days after the date of service upon the plaintiff of a copy of this opinion and order with notice of entry; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

Footnotes

* The plaintiff, the State of New York Mortgage Agency, provides financing and programs designed for first-time and low-income homebuyers, and is part of the State's affordable housing agency (*see* New York State Homes and Community Renewal [HCR], About HCR, https://hcr.ny.gov/hcr-overview [last accessed Jan. 29, 2020]).

1 The majority asserts that a rule which requires the plaintiff to cross-move to extend the time to serve in response to a motion to dismiss for lack of timely service "rigidly slam[s] shut the courthouse door on a plaintiff's potentially meritorious action" (majority op at 78). However, as explained herein, the rule that the majority espouses also slams the door shut on plaintiffs, except the door-slamming occurs on the arbitrary date when the clerk enters judgment on the order of dismissal.

2 The majority's reliance upon *Towley v King Arthur Rings* (40 NY2d 129 [1976]) is misplaced. That case holds that, in interpreting out-of-state law for purposes of applying it in a New York action, courts should rely upon out-of-state judgments, as opposed to out-of-state opinions. It does not address the legal effect of an *order* dismissing the complaint for lack of personal jurisdiction issued in the very action before the court.

3 If the clerk enters a judgment dismissing the complaint on the same date that the plaintiff serves its motion to extend the time to serve, is the plaintiff's motion still timely? If the clerk enters judgment *after* the plaintiff serves its motion, but *before* the motion court's determination of the plaintiff's motion, would the court's granting of the plaintiff's motion be null and void, or would it supersede and require vacatur of the judgment? If the clerk enters judgment dismissing the complaint *after* the court issues an order denying the plaintiff's motion to extend, but before the plaintiff files an appeal from that order, would the Appellate Division have jurisdiction to consider the appeal from the denial of the plaintiff's motion to extend? During the pendency of this appeal, nothing is stopping the defendant from entering judgment dismissing the complaint. So, if the clerk enters judgment during the pendency of this appeal, but before this Court's determination of the appeal, what happens then?

4 There may even be a third round of motion practice if the clerk enters judgment dismissing the complaint while the issue of an extension is being considered.

New York Official Reports

280 N.Y. 146, 19 N.E.2d 997, 121 A.L.R. 1010

WILLIAM U. BECKER, as Executor of MARTHA W. BECKER, Deceased, Appellant,
v.
JOHN W. N. FABER et al., Defendants, and CLARA K. INTEMANN et al., as Executors of JOHN A. KOLLE, Deceased, Respondents.

Court of Appeals of New York.
Argued January 11, 1939.

Decided February 28, 1939.

CITE TITLE AS: Becker v Faber

***146 Guaranty**

Principal and surety --- Mortgage --- Foreclosure --- Deficiency judgment --- Surety not released by remission in part of obligation of principal --- Action to foreclose mortgage with demand for deficiency judgment against executors of guarantor --- Complaint improperly dismissed on ground that mortgagee by agreeing to accept past due interest in installments and by agreeing to lower rate of interest had so altered mortgage agreement as to release surety

1. A surety is discharged by a change in the terms of its principal's contract, for the performance of which the surety has bound itself, even though the change might not be disadvantageous to it. Remission or waiver, however, of part of the performance which might be exacted by the assured from the principal does not release the principal from performance of the part of the original obligation which remains unchanged and in full force, and, if the principal fails in such performance, the surety may be held for the default, in accordance with its agreement. Neither principal nor surety is held in such case for a new or altered obligation but both are held to performance of an obligation assumed in the original agreement.

2. In this action to foreclose a mortgage on real property, where a deficiency judgment was asked against the executors of a deceased guarantor of payment of the principal of the bonds with interest, the complaint as against such executors was improperly dismissed on the ground that the mortgagee by agreeing that the mortgagor might pay past-due interest in monthly installments and in agreeing to a lower rate of interest and accepting payment of interest at a lower rate than provided for in the bond, so modified the terms of the mortgage agreement as to release the guarantor. The creditor's agreement to forego part of his rights did not discharge the surety from responsibility for failure of performance by the principal debtor of that part of the original obligation which still remained untouched and unaffected by the creditor's remission of the remainder of the obligation. The surety is held to no obligation which he did not assume and if the surety meets that obligation he will be subrogated to the creditor's cause of action against the principal debtor, in accordance with the terms of the original contract.

Becker v. Faber, 254 App. Div. 772, reversed.

***147** APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 27, 1938, unanimously affirming, so far as appealed from, a judgment entered upon a decision of the court at a Trial Term, in an action to foreclose a mortgage on real property, which denied recovery by plaintiff as against defendants-respondents of any deficiency after sale of the mortgaged premises, and directed a dismissal of the complaint on the merits as against the defendants-respondents.

Joseph H. Sand for appellant. Plaintiff's offer to grant a temporary reduction of the accruing interest rate, long after the mortgage was due and payable, conditioned upon payment of arrears in taxes, did not discharge the guarantor. (*Coe v. Cassidy*, 72 N. Y. 133; *Union Trust Co. v. Kaplan*, 249 App. Div. 280.) The guarantor was not discharged by reason of plaintiff's conditional agreement to accept interest at a lesser rate. (*Olmstead v. Latimer*, 158 N. Y. 313; *National Citizens Bank v. Toplitz*, 178 N. Y. 464; *American Bonding Co. v. Kelly*, 172 App. Div. 437; *Westchester Mortgage Co. v. McIntire, Inc.*, 174 App. Div. 525; *Ullmann Realty Co. v. Hollander*, 66 Misc. Rep. 348.)

William D. Sullivan for respondents. The guarantor or surety is bound by the strict letter or precise terms of the contract of the principal and is discharged when the agreement upon which the guaranty is based is modified without consent. (*Duecker v. Rapp*, 67 N. Y. 464; *Page v. Krekey*, 137 N. Y. 307; *Antisdel v. Williamson*, 165 N. Y. 372; *Katz v. Leblang*, 243 App. Div. 421; *Franklin Title & Mortgage Guar. Co. v. Shernov*, 250 App. Div. 267.)

LEHMAN, J.

The plaintiff has brought this action to foreclose a mortgage upon real property in Nassau county. Payment of the principal and interest of the bond, secured by the mortgage, was guaranteed in October, 1923, by John A. Kolle. Asking a deficiency judgment against the executors of the last will and testament of John A. ***148** Kolle, deceased, the plaintiff made them parties to the foreclosure action. The complaint against them has been dismissed on the ground that the mortgagor and mortgagee modified the terms of the mortgage agreement without the knowledge or consent of the guarantor, and by force of such modification the guarantor was released. The bond and mortgage were executed on or about June 1, 1923. The mortgagor bound himself to pay the sum of $10,000 on or before June 1, 1926, with interest thereon to be computed from the 1st day of June, 1923, at the rate of six per cent per annum and to be paid on the first day of December next ensuing the date thereof, and semi-annually thereafter. The bond was not paid at maturity. No agreement to extend the time of payment was made. Interest was paid, as stipulated in the bond, every six months until December, 1932. In January, 1933, the mortgagee agreed that the mortgagor would be permitted to meet the installment of interest which had become due on December 1, 1932, by monthly payments of $50 each and that similar monthly payments might be made upon subsequent installments after they became due semi-annually. In 1935 the mortgagee informed the mortgagor that when past due interest was paid up to June 1, 1934, she 'is willing to charge you and accept 4%, but only on condition that you clean up the back taxes, and that interest rate to be effective for only one year, namely June, 1935.' Though the mortgagor did not comply with the stipulated condition, the mortgagee accepted, for more than two years, monthly checks for interest at the rate of four per cent. It is said that through the leniency thus shown to the mortgagor, the mortgagee has released the surety.

A contractual obligation may not be altered without the consent of the person who has assumed the obligation. The obligation of a surety or guarantor of due performance of a contract cannot be extended, without the surety's consent, to cover performance of a different contract. Alteration of the contractual obligation of the principal releases the surety, for the principal is no longer bound to perform the ***149** obligation guaranteed by the surety and the surety cannot be held responsible for the failure of the principal to perform any other obligation. The rule is based upon fundamental principles of contract which have not been seriously challenged in any jurisdiction, though there is difference of opinion in regard to the proper application of the rule. In this State the rule has been applied stringently. This court has said that the 'defendant's [surety's] obligation is *strictissimi juris*, and he is discharged by any alteration of the contract, to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury.' (*Page v. Krekey*, 137 N. Y. 307, 314; *Paine v. Jones*, 76 N. Y. 274, 278; *Antisdel v. Williamson*, 165 N. Y. 372.) The rule when strictly applied at times produces results which do not accord with our sense of what is fair or desirable and which are, perhaps, not consistent with the realities of business experience. When so applied, the rule has been subjected to searching and severe criticism. We have been urged to confine its application to cases where alterations in the obligation of the surety may increase the burden of the surety. Where the court can say with reasonable certainty that a surety gains benefit through an alteration, we are told it is unsound to hold that the surety is discharged. Before we consider whether we should abandon old precedents, reconsider an old-established rule or even redefine the field of its proper application, we should first determine whether a result which is challenged as unfair and unreasonable may not be due to an undiscriminating extension of established principles or old precedents rather than to infirmity in the principles or precedents.

By 'alteration' in the obligation of the principal, the principal is discharged from performance of the obligation in its original form and, in effect, a new obligation is substituted for the old. In those cases where we have held that alteration of any kind in the obligation of the principal discharges the surety, there has been a change in the nature of the obligation which might be required of the principal; performance of the old obligation might be more onerous ***150** but relief from the burden of the old was accompanied by the creation of rights and duties different from those which arose out of the original agreement. We have in such cases refused to balance the advantage of relief from the old burden against possible disadvantage imposed by the new. We have held that the surety is discharged by any modification of the contract of the principal which requires of him performance in any respect different from the performance guaranteed by the surety. We have not held that an act of leniency towards the principal by the assured through remission of a part of an obligation or waiver of full performance constitutes an *alteration* of the obligation of the principal which will discharge the surety completely. Reduction in the rate of interest is a remission of part of the obligation. Remission or waiver of part of the performance which might be exacted by the assured from the principal does not release the principal from performance of

the part of the original obligation which remains unchanged and in full force; and if the principal fails in such performance the surety may be held for the default in accordance with the surety's agreement. Neither principal nor surety is held in such case for a new or altered obligation; both are held to performance of an obligation assumed in the original agreement.

Nothing said or decided by this court conflicts with the general rule that 'A surety is none the less discharged by a change in the terms of the principal's contract, for the performance of which the surety has bound himself, when the change might not be thought disadvantageous to him. But an agreement merely to remit part of the performance due from the principal without changing its character, as by lessening the amount of rent to be paid under a guaranteed lease, or by providing for a lower rate of interest on a debt than the contract provides for, or by waiving a portion of the performance of a contract, will not discharge the surety.' (4 Williston on The Law of Contracts [Rev. ed.], § 1240.) It follows that remission of a part of the interest even if such remission had been made by valid contract would not ***151** discharge the surety. (*Cambridge Sav. Bank v. Hyde*, 131 Mass. 77.)

The effect of the agreement to accept, in monthly installments, interest which under the terms of the bond was payable every six months, presents a similar question though in different form. It is said that such agreement followed by acceptance of monthly check extended the time for the payment of the principal sum. The doctrine that extension of time for payment of the principal debt even for a few days discharges the surety, has been established by a long line of decisions. (*National Park Bank v. Koehler*, 204 N. Y. 174; 4 Williston on The Law of Contracts, § 1222.) Leniency shown to a debtor in default, delay permitted by the creditor without change in the time when payment of the debt might be *demanded*, does not, however, constitute an extension of the time for payment. That requires a binding contract which precludes the creditor from enforcing payment according to the terms of the original contract and confers upon the debtor the *right* to withhold payment after the original debt has become due. In this case it is said that such a binding agreement arises from the receipt of checks for $50 intended as monthly payments of interest on the principal debt.

This court in *New York Life Ins. Co. v. Casey* (178 N. Y. 381) cited with approval the applicable rule as stated in Brandt on Suretyship (p. 352): 'The general rule is that the reception of interest *in advance* upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker *during the period for which the interest has been paid*, unless the right to sue is reserved by the agreement of the parties. The payment of interest *in advance* is not of itself a contract to delay, but is evidence of such contract, and while this evidence may be rebutted, yet in the absence of any rebutting evidence it becomes conclusive.' (Italics are new.) (Cf. *Kings County Trust Co. v. Giovinco*, 266 N. Y. 137.) In this case there has been no 'period for which the interest has been paid' in advance. In January, ***152** 1933, the mortgagee agreed to accept in monthly installments interest which had become due and payable earlier. The principal of the mortgage debt was long since due. The mortgagee might have demanded at any time, payment both of principal and past due interest. There was no contract, express or implied, which would have given the principal debtor the right to refuse payment of principal and past due interest and there never was an instant of time when some interest was not past due. Even a binding agreement to accept payment of past due interest in monthly installments -- and we do not intimate that here the mortgagee's agreement constituted more than a proffered favor without binding effect -- would not have discharged the surety. (*Coe v. Cassidy*, 72 N. Y. 133.)

In this case the surety claims that unqualified benefit bestowed upon the principal debtor and leniency and consideration shown to the principal debtor discharges the surety. That is not the law of this State. The surety guaranteed the performance of the obligation of the principal debtor. The creditor's agreement to forego part of his rights does not discharge the surety from responsibility for failure of performance by the principal debtor of that part of the original obligation which still remains and *which remains untouched and unaffected by the creditor's remission of the remainder of the obligation*. The surety is held to no obligation which he did not assume and if the surety meets that obligation he will be subrogated to the creditor's cause of action against the principal debtor, in accordance with the terms of the original contract.

The judgments should be reversed and judgment granted for the plaintiff, with costs in all courts.

CRANE, Ch. J., O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur.

Judgment accordingly.

19 N.E.2d 997, 121 A.L.R. 1010

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New York
Official Reports

75 A.D.2d 350, 429 N.Y.S.2d 715

Beacon Terminal Corporation, Appellant,

v.

Chemprene, Inc., Respondent

Supreme Court, Appellate Division,
Second Department, New York
June 30, 1980

CITE TITLE AS: Beacon Term. Corp. v Chemprene, Inc.

SUMMARY

Appeal from a judgment of the Supreme Court in favor of defendant, entered May 18, 1978 in Dutchess County upon a decision of the court at a Trial Term (Joseph Jiudice, J.), without a jury.

HEADNOTES

Landlord and Tenant
Lease

(1) The terms of a lease which required the owner of an industrial complex to sell steam to its tenant were given a proper construction by the trial court which found that the meaning of the ambiguous contract was fixed by the parties' conduct; a clause in the lease, which purported to alter the original agreement of the parties which had provided that the tenant would pay the actual cost of the fuel required to generate the steam provided for the tenant, seemed to alter the method of cost computation by linking the price to be charged to the tenant to the New York City prices quoted in the *Journal of Commerce*; however, for seven years following the execution of this lease, the owner's officers and employees continued the earlier practice of billing the tenant for steam in accordance with the actual cost of fuel oil, and only thereafter, without notifying the tenant of the change in the method of computation, began billing in accordance with the higher fuel oil prices quoted in the *Journal of Commerce*, which the tenant paid without protest; the trial court's determination that the parties intended that changes in the price of oil paid for by the owner be passed along to the tenant through calculations based upon the actual cost of the oil, the reference to *Journal of Commerce* quotations being merely a convenient device for ascertaining the highest price that plaintiff could charge, was a practical interpretation of the ambiguous language, fixing the meaning of the clause agreed to by the parties at the reinception of the landlord-tenant relationship.

Landlord and Tenant
Lease
Modification

(2) A clause in a lease referring to the method of computation of the cost of steam provided by the landlord to the tenant, which the trial court determined was fixed by the conduct of the parties during the first seven years after execution of the agreement to be the actual cost of the fuel oil used to generate the steam, was not modified by the parties to allow the landlord to bill the tenant at a higher rate by using a different formula to ascertain the price of steam since the requisite intent to effectuate a modification agreement has not been demonstrated; the landlord began computing the cost of steam by the new formula during a period of rapidly rising oil prices without altering the invoice format used for billing the tenant or notifying the tenant that the bills were being computed by a new formula and the tenant paid steam bills on demand without reviewing their accuracy, only becoming aware that the landlord had begun charging higher prices after the landlord commenced this action to recover for sums allegedly underbilled ***351** during the seven years after execution of the lease; therefore, although the requisite intent of the parties to effect a modification may be proved by their conduct, the proof establishes that intent to modify is lacking; furthermore, the tenant's purported agreement to pay a higher price for steam, without any corresponding alteration in the landlord's obligation, is not supported by either consideration or a signed writing as required by section 5-1103 of the General Obligations Law.

Landlord and Tenant
Lease
Waiver of Rights

(3) The trial court having determined that by an ambiguous clause in a lease the parties intended that the cost of steam

charged by the landlord to the tenant was to be keyed to the actual cost of fuel oil used by the landlord to generate steam, the tenant's overpayment without protest of the bills, which the landlord improperly computed by a formula not sanctioned in the lease, does not constitute a waiver of its rights to obtain compliance with the agreed upon formula for computing the price of steam, since a waiver must be an intentional abandonment or relinquishment of a known right and cannot be created by negligence or oversight; the tenant, uninformed of the new formula used by the landlord to compute the price of steam which raised the price of steam charged to the tenant, did not make an intentional decision to relinquish the right to pay for steam in accordance with the original and more advantageous method of computation; therefore, the tenant is entitled to recover overpayments for steam paid to the landlord after it began to compute the price of steam by a different formula.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

9 NY Jur, Contracts § 69; 33 NY Jur, Landlord and Tenant §§ 98-100

General Obligations Law §5-1103

49 Am Jur 2d, Landlord and Tenant §§ 166, 168

11 Am Jur Legal Forms 2d, Leases of Real Property §§ 161:1043, 161:1044, 161:1065

APPEARANCES OF COUNSEL

Warshaw Burstein Cohen Schlesinger & Kuh (Jay A. Kranis and *Marc E. Richards* of counsel), for appellant.
Van DeWater & Van DeWater (David D. Hagstrom of counsel), for respondent.

OPINION OF THE COURT

Lazer, J.

In 1964 Beacon Terminal Corporation, the owner of an industrial complex in Beacon, New York, entered into a new 10-year lease with its tenant, Chemprene, Inc., which had rented certain buildings in the complex since 1952. As had ***352** been provided in earlier leases, the new agreement required Beacon to sell steam to Chemprene for its manufacturing processes. Although the preceding lease had unequivocally linked the cost of the steam directly to the actual cost of the fuel oil needed to produce it, the 1964 lease contained a new provision which seemed to alter the method of cost computation. Section 8[e] of the lease pertinently stated:

"The steam rate ... is based upon a tank wagon price for No. 6 fuel oil delivered at Beacon, New York of $5.85 per 100 gallons. If for any calendar month the average price of such fuel oil, based upon New York City prices quoted in the Journal of Commerce, plus cost of delivery to Beacon, New York, increases or decreases, Tenant shall pay an additional amount for steam for such month equal to, or shall be credited with an amount equal to 1.3 times the average increase or average decrease in fuel oil price over or below $5.85 for such month times the number of gallons of fuel oil consumed by Landlord's plant during such month for such steam furnished to Tenant. The number of gallons consumed shall be determined by the following formula: Number of pounds of steam delivered to Tenant during month, per metersv105 = Number of gallons of fuel oil consumed".

Notwithstanding any change which may have been reflected in section 8[e], for the seven years which followed the execution of the 1964 lease, Beacon's officers and employees, including at least one who had been instrumental in negotiating the lease, continued the earlier practice of billing Chemprene for steam in accordance with the actual cost of fuel oil. As a consequence, Chemprene paid substantially less for steam than it would have done had the prices charged been keyed to *Journal of Commerce* quotations. Following a real or imagined insult in 1971, however, Beacon's president, Sherman Weiser, re-examined the lease and directed that Chemprene be billed for steam in accordance with fuel oil prices quoted in the *Journal of Commerce* for New York City. Although the change resulted in a significant increase in the cost of steam to Chemprene, it paid the higher bills as they became due without making any protest. ***353**

In 1972 Beacon instituted this action in which it sought to recover the sum of $214,153.15 which it alleged Chemprene had been undercharged for steam during the years 1964 to 1971. Contending that under the lease the price of steam was linked directly to the cost of fuel oil, Chemprene counterclaimed to recover its alleged overpayments from the time that Beacon changed its billing procedures in 1971. According to Chemprene, the alleged overcharges had been paid and were not protested because the change in the basis for the billing had gone unnoticed by the personnel concerned with reviewing invoices.

Beacon's effort to obtain summary judgment failed when Special Term denied a motion for such relief and when this court affirmed with the declaration that: "The language of the lease is ambiguous and defendant's affidavits raise factual issues concerning the intent of the parties in the execution of the lease." *(Beacon Term. Corp. v Chemprene, Inc*., 51 AD2d 566.)

Following a trial, judgment was rendered dismissing Beacon's complaint and awarding Chemprene the sum of $101,728.04 on its counterclaim. It is Beacon's appeal from that judgment that now confronts us.

(1)We are in accord with the finding of the trial court that for the period 1964 to 1971 the amounts the plaintiff billed for steam effectuated the parties' intent when they drafted section 8[e] of the lease. Under this construction, the parties intended changes in the price of oil paid for by the plaintiff to be passed along to the defendant through calculations based upon the actual delivered cost of oil to the plaintiff, the reference to *Journal of Commerce* quotations being merely a convenient device for ascertaining the highest price that plaintiff could charge. The trial court thus gave a practical interpretation to the language we had earlier deemed ambiguous (see, e.g., *Brooklyn Public Library v City of New York*, 250 NY 495; *Clark v Carolina & Yadkin Riv. Ry. Co*., 225 NY 589; *City of New York v New York City Ry. Co*., 193 NY 543; *Nicoll v Sands*, 131 NY 19; *Woolsey v Funke*, 121 NY 87; *Martin v Cope*, 28 NY 180; Restatement, Contracts 2d [Tent Drafts Nos. 1-7, 1973], § 228), fixed the meaning of the clause as of the date of signing of the lease in 1964, and, in essence, declared what the parties had agreed to at the 1964 reinception of the landlord-tenant relationship. We conclude that these determinations at nisi prius are warranted. ***354**

Since the trial court properly found that the meaning of the ambiguous contract was fixed by the parties' conduct, Beacon can defeat its tenant's counterclaim only if it can establish either that the parties modified the lease when the billings were increased in 1971 or that Chemprene waived its rights when it paid the higher bills. On this record, the increased billings which commenced in 1971 and their payment by Chemprene effected neither a modification of the lease nor a waiver of the right to pay for steam on the basis of the actual fuel costs. The modification of a contract results in the establishment of a new agreement between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact (see *Becker v Faber*, 280 NY 146; *Clark v Carolina & Yadkin Riv. Ry. Co., supra; Walker v Millard*, 29 NY 375; *Radist v Zidel*, 12 AD2d 648; *Lockwood v Embalmers Supply Co*., 233 App Div 189; *Hart v Garrett Co*., 93 App Div 145; 6 Corbin, Contracts, § 1293). Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms (see, e.g., *Becker v Faber, supra; Walker v Millard, supra; Ballard v Friedeberg*, 177 App Div 715). While it is true that modification may be proved circumstantially by the conduct of the parties (see, e.g., *Martin v Peyton*, 246 NY 213), the record here does not manifest the required mutual assent to a change in terms.

At the trial, plaintiff's president, Sherman Weiser, testified that in 1971, after his honesty was affronted by defendant's attempt to verify a rise in the price of oil with plaintiff's supplier, he altered the invoicing procedures for steam consumption. According to Weiser, when he examined the lease to ascertain whether defendant was permitted to obtain verification, he found that the price differential clause made reference to the *Journal of Commerce* price quotations. At that point, he decided that all future steam bills would be rendered on the basis of the prices quoted in that periodical. Apart from the fact that this claim of belated discovery seems to conflict with Mr. Weiser's letter of August 18, 1966 to the defendant making specific reference to section 8[e], the invoice format used for steam charges was not changed, nor was the defendant notified that the bills were being computed by a new formula. The difference in monthly billed prices between the former basis, which was the actual delivered price of oil, and ***355** the new basis--*Journal of Commerce* quotations-- occurred during a period of rapidly rising oil prices. As a result, the increase in steam charges was not sufficiently steep to alert the defendant that the method by which it was being billed had been altered.

Two of defendant's employees responsible for reviewing bills testified that the defendant paid steam bills on demand without reviewing their accuracy and that prior to December, 1973, with one exception, defendant never had been advised that billings for the years 1964 to mid-1971 were incorrect. The exception referred to involved freight charges for oil which plaintiff began to bill in February, 1972; it did not involve the price of oil itself. When plaintiff informed defendant by letter that in order to recoup freight charges that had been omitted it was considering recomputation of all bills rendered prior to February, 1972, defendant commenced examination of the monthly steam bills to ferret out the disputed freight charges. Only after plaintiff instituted this

action to recover for sums allegedly underbilled for steam supplied prior to 1971 did defendant become aware that plaintiff had begun charging the higher *Journal of Commerce* prices in mid-1971. At that point, the counterclaim for recovery of overcharges was asserted.

(2)It is apparent, then, that the existence of the requisite intent to effectuate a modification agreement has not been demonstrated (see *Smith v Kerr*, 108 NY 31; *Browning v Fox*, 183 App Div 778, affd 230 NY 535). Furthermore, it is obvious that the defendant's purported agreement to pay a higher price for steam, without any corresponding alteration in plaintiff's obligations, was not supported either by consideration or a signed writing (see General Obligations Law, § 5-1103; *Matter of Crea*, 27 NY2d 339; cf. Restatement, Contracts 2d [Tent Drafts Nos. 1-7, 1973], § 89D).

(3)Finally, it is abundantly clear that Chemprene's overpayments did not constitute a waiver of its rights to obtain compliance with the lease.

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed ... It is essentially a matter of intention. Negligence, oversight, or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved ... The evidence must have probative force sufficient to prove that there was in fact an intention to waive ***356** the right or benefit--a voluntary choice not to claim it." *(Alsens Amer. Portland Cement Works v Degnon Contr. Co*., 222 NY 34, 37; see, also, *Whipple v Prudential Ins. Co. of Amer*., 222 NY 39.)

Having decided that the parties intended by their lease that the cost of steam was to be keyed to the actual cost of fuel oil, we find no support for the conclusion that Chemprene made an intentional decision to relinquish the right to pay for steam in accordance with the advantageous method of computation from which it had benefitted for seven years.

Accordingly, there must be an affirmance.

Mollen, P. J., Hopkins and O'Connor, JJ., concur.
Judgment of the Supreme Court, Dutchess County, entered May 18, 1978, affirmed, with costs. ***357**

2021 New York Senate Bill No. 5473, New York Two Hundred Forty-Fourth Legislative Session

NEW YORK BILL TEXT

TITLE: Relates to the rights of parties involved in foreclosure actions.

VERSION: Introduced
March 08, 2021
Sanders, Jr., James

Image 1 within document in PDF format.

SUMMARY: Relates to the rights of parties involved in foreclosure actions.

TEXT:

STATE OF NEW YORK _____

5473

2021-2022 Regular Sessions

IN SENATE

March 8, 2021 _____

Introduced by Sen. SANDERS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, the general obligations law, the real property actions and proceedings law, and the real property law, in relation to the rights of parties involved in foreclosure actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "Foreclosure Process Abuse Prevention Act".

§ 2. Section 203 of the civil practice law and rules is amended by adding a new subdivision (h) to read as follows:

(h) Clarification. Once a cause of action has accrued, no party may unilaterally waive, postpone, cancel, or reset the accrual thereof, or otherwise effectuate a unilateral extension of the limitations period prescribed by law to interpose the claim, unless expressly permitted by law.

§ 3. Subdivision (a) of section 205 of the civil practice law and rules, as amended by chapter 156 of the laws of 2008, is amended to read as follows:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for ~~neglect to prosecute the action~~ **any form of neglect, including those specified in subdivision (c) of section thirty-two hundred fifteen, and rules thirty-two hundred sixteen and thirty-four hundred four of this chapter, or sections 202.27 or 202.48 of part two hundred of title twenty-two of the New York codes, rules, and regulations**, or a final judgment upon the merits, the **original** plaintiff,

or, if the **original** plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced **within the applicable limitations period prescribed by law** at the time of commencement of the prior action and that service upon **the** defendant is effected within such six-month period. Where a dismissal is one for **any form of** neglect ~~to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise~~ , the judge shall set forth on the record **either** the specific **law, rule or code forming the basis for dismissal or, in the alternative, the** conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

For the purposes of this subdivision:

1. an assignee of the plaintiff shall not be deemed the plaintiff, unless acting on behalf or asserting the rights of the original plaintiff;

2. an action is deemed "terminated" upon entry of the order or judgment of dismissal, regardless of whether an appeal is taken therefrom; and

3. in no event shall the plaintiff receive more than one six-month extension under this subdivision.

§ 4. Section 206 of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

(e) Based on standardized residential mortgage instruments. In an action to foreclose upon any uniform or model mortgage instrument securing real property or any interest therein, as adopted by the federal national mortgage association and federal home loan mortgage corporation or U.S. Department of Housing and Urban Development, the time within which the action must be commenced shall be computed from the time the right to demand immediate payment in full of all sums so secured thereby may be exercised.

§ 5. Section 306-b of the civil practice law and rules, as amended by chapter 473 of the laws of 2011, is amended to read as follows:

§ 306-b. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. **A motion to extend the time for service of a defendant under this section shall be denied as untimely if it is made after the entry of any order or judgment of dismissal.**

§ 6. Section 2001 of the civil practice law and rules, as amended by chapter 529 of the laws of 2007, is amended to read as follows:

§ 2001. Mistakes, omissions, defects and irregularities. **(a)** At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

(b) The court shall not disregard or permit a mistake, omission, defect or irregularity arising from the failure of a lender, an assignee or a mortgage loan servicer to strictly comply with section thirteen hundred one, thirteen hundred two, thirteen hundred three, thirteen hundred four or thirteen hundred six of the real property actions and proceedings law, where applicable.

§ 7. Rule 3212 of the civil practice law and rules is amended by adding a new subdivision (d) to read as follows:

(d) Successive motions; standard. Where the court issues an order denying all or any part of a motion for summary judgment, the court shall consider any successive motion for summary judgment made by the party having previously moved unsuccessfully for such relief as a motion affecting a prior order and the motion shall be made and reviewed in accordance with subdivisions (d), (e) or (f) of rule two thousand two hundred twenty-one or subdivision (a) of rule five thousand fifteen of this chapter.

§ 8. Subdivision (d) of rule 3217 of the civil practice law and rules, as added by section 29 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

(d) **Effect of discontinuance of actions based upon certain instruments. Unless effectuated in strict accordance with the applicable provisions of article seventeen of the general obligations law, the discontinuance of an action upon an instrument described under subdivision four of section two hundred thirteen of this chapter, by any means, shall not, in form or effect:**

1. act as a waiver, postponement, cancellation, resetting, or tolling of accrual of the cause of action;

2. extend the limitations period prescribed by law to interpose the claim; or

3. automatically revoke or nullify an election of remedies made in any complaint.

(e) All notices, stipulations, or certificates pursuant to this rule shall be filed with the county clerk by the defendant.

§ 9. Subdivision 3 and paragraph a of subdivision 4 of section 17-103 of the general obligations law are amended to read as follows:

3. ~~A promise to waive, to extend, or not to plead the statute of limitation has no effect to~~ **A waiver, promise or agreement, express or implied in fact or in law, shall not, in form or effect, postpone, cancel, reset, toll, revive or otherwise** extend the time limited by statute for commencement of an action or proceeding for any greater time or in any other manner than that provided in this section, ~~or~~ unless made as provided in this section.

a. does not change the requirements or the effect with respect to the ~~statute of limitation, of~~ **accrual of a cause of action, nor the time limited for commencement of an action based upon** an acknowledgment or promise to pay~~,~~ or a payment or part payment of principal or interest~~, or a stipulation made in an action or proceeding~~ ;

§ 10. Subdivisions 4 and 5 of section 17-105 of the general obligations law are amended to read as follows:

4. ~~Except as provided in subdivision five, no~~ **An** acknowledgment, waiver ~~or promise has any effect to~~ **, promise or agreement, express or implied in fact or in law, shall not, in form or effect, postpone, cancel, reset, toll, revive or otherwise**

extend the time limited for commencement of an action to foreclose ~~or~~ **a** mortgage for any greater time or in any other manner than that provided in this section, ~~nor~~ unless it is made as provided in this section.

5. This section does not change the requirements~~,~~ or the effect with respect to the **accrual of a cause of action, nor the** time limited for commencement of an action~~, of~~ **based upon either:**

a. a payment or part payment of the principal or interest secured by the mortgage, or b. a stipulation made in an action or proceeding.

§ 11. Subdivisions 1, 1-a and 2 of section 1304 of the real property actions and proceedings law, subdivision 1 as amended by section 6 of part Q of chapter 73 of the laws of 2016, subdivision 1-a as added by section 3 and subdivision 2 as amended by section 4 of part HH of chapter 58 of the laws of 2018, are amended to read as follows:

1. Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following:

"YOU MAY BE AT RISK OF FORECLOSURE. PLEASE READ THE FOLLOWING NOTICE

CAREFULLY" "As of ___, your home loan is ___ days and ___ dollars in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home.

Attached to this notice is a list of government approved housing counseling agencies in your area which provide free counseling. You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at ~~http://www.aghomehelp.com/~~ **https://ag.ny.gov/consumer-frauds/help-homeowners**. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg nys np counseling agencies.htm**; housing counselors from New York-based agencies listed on this website are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation**. Qualified free help is available; watch out for **non-attorney** companies or people who charge a fee for these services. **To learn more about and protect your legal rights, it is advisable that you consult or retain a New York state licensed attorney who is experienced in foreclosure defense. Contact your local bar association or a local state funded legal services agency to consult or retain an attorney. To check an attorney's license status, educational background and history of misconduct, you can visit the unified court system's attorney directory database at https://iapps.courts.state.ny.us/attorneyservices/search?0. Additional free information and resources can be found at the following websites: https://homeownerhelpny.org/ and https://www.lawhelpny.org/issues/housing.**

~~Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation.~~ If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence.)

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at ~~(show number)~~ **877-226-5697** or visit the Department's website at ~~(show web address)~~ **http://www.dfs.ny.gov**.

IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you.**"**

1-a. Notwithstanding any other provision of law, with regard to a reverse mortgage home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower or borrowers at the property address and any other addresses of record, including reverse mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type except for the heading which shall be in at least sixteen-point type which shall include the following:

"YOU COULD LOSE YOUR HOME TO FORECLOSURE. PLEASE READ THE FOLLOWING NOTICE CAREFULLY. Date Borrower's address Loan Number: Property Address: Dear Borrower(s): As of _____, we as your lender or servicer claim that your reverse mortgage loan is ___ days in default. Under New York State Law, we are required to send you this notice to inform you that you may be at risk of losing your home. We, the lender or servicer of your loan, are claiming that your reverse mortgage loan is in default because you have not complied with the following conditions of your loan: _____ You are not occupying your home as your principal residence _____ You did not submit the required annual certificate of occupancy _____ The named borrower on the reverse mortgage has died _____ You did not pay property taxes

Servicer name paid your property taxes for the following time periods:_____

_____ quarter/year _____ You did not maintain homeowner's insurance

Servicer name purchased homeowner's insurance for you on the following date(s) and for the following cost(s):

_____

_____ You did not pay water/sewer charges

Servicer name paid water/sewer charges for you on the following date(s) and for the following cost(s):

_____ _____ You did not make required repairs to your home If the claim is based on your failure to pay property or water and sewer charges or maintain homeowner's insurance, you can cure this default by making the payment of $_____ for the advancements we made towards these payments on your behalf. You have the right to dispute the claims listed above by contacting us, by calling _____ or sending a letter to _____. This may include proof of payments made for property taxes or water and sewer charges or a current declaration page from your insurance company, or any other proof to dispute the servicer's claim. If you are in default for failure to pay property charges (property taxes, homeowner's insurance and/or water/sewer charges) you may qualify for a grant, loan, or re-payment plan to cure the default balance owed. If you are in default due to the death of your spouse, you may be considered an eligible "Non-Borrowing Spouse" under a HUD program which allows you to remain in your home for the rest of your life. If you are over the age of 80 and have a long term illness, you may also qualify for the "At-Risk Extension," which allows you to remain in your home for one additional year and requires an annual re-certification. Attached to this notice is a list of government-approved housing counseling agencies and legal services in your area which provide free counseling. You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at ~~http://www.aghomehelp.com~~ **https://ag.ny.gov/**

consumer-frauds/helphomeowners. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg nys np counseling agencies.htm**; housing counselors from New York-based agencies listed on this website are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation**. You may also call your local Department of Aging for a referral or call 311 if you live in New York City. Qualified free help is available; watch out for **non-attorney** companies or people who charge a fee for these services. **To learn more about and protect your legal rights, it is advisable that you consult or retain a New York state licensed attorney who is experienced in foreclosure defense. Contact your local bar association or a local state funded legal services agency to consult or retain an attorney. To check an attorney's license status, educational background and history of misconduct, you can visit the unified court system's attorney directory database at https://iapps.courts.state.ny.us/attorneyservices/search?0. Additional free information and resources can be found at the following websites: https://homeownerhelpny.org/ and https://www.lawhelpny.org/issues/housing.**

You may also contact us directly at _____ and ask to discuss all possible options to allow you to cure your default and prevent the foreclosure of your home. While we cannot ensure that a resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have. If you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence). If you need further information, please call the New York State Department of Financial Services' toll-free helpline at 877-226-5697 or visit the Department's website at http://www.dfs.ny.gov. IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you."

A lender, assignee or mortgage loan servicer of a reverse mortgage home loan which provides notice to the borrower as required by this subdivision is not required to provide notice to such borrower with regard to such loan pursuant to subdivision one of this section. **For purposes of this section, the borrower shall also mean any non-borrower mortgagor and non-borrowing mortgagors shall be entitled to notice under this section in the same manner and direction as the borrower.**

2. The notices required by this section shall be sent by such lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage. The notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice. Notice is considered given as of the date it is mailed. The notices required by this section shall contain a current list of at least five housing counseling agencies **and at least one bar association** serving the county where the property is located from the most recent listing available from department of financial services. The list shall include the counseling agencies' **and county bar associations'** last known addresses and telephone numbers. The department of financial services shall make available on its websites a listing, by county, of such agencies **and bar associations**. The lender, assignee or mortgage loan servicer shall use such lists to meet the requirements of this section. **The department of financial services shall update the counseling agency and bar association listings on its websites on the first Friday of every month and shall save, archive and make available on its websites each monthly listing for a period of no less than ten years.**

§ 12. Section 282 of the real property law, as added by chapter 550 of the laws of 2010, is amended to read as follows:

§ 282. ~~Mortgagor's right~~ **Right** to recover attorneys' fees in actions or proceedings arising out of foreclosures of residential property. 1.

Whenever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of

the mortgagor **or borrower** to perform any covenant or agreement contained in such mortgage, or that amounts paid by the mortgagee therefor shall be paid by the mortgagor as additional payment, there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor **or borrower** the reasonable attorneys' fees and/or expenses incurred by the mortgagor **or borrower** as the result of the failure of the mortgagee to perform any covenant or agreement on its part to be performed under the mortgage or in the successful defense of any action or proceeding **pending or** commenced by the mortgagee against the mortgagor **or borrower** arising out of the contract, and an agreement that such fees and expenses may be recovered as provided by law in an action **or proceeding pending or** commenced against the mortgagee or by way of counterclaim in any action or proceeding **pending or** commenced by the mortgagee against the mortgagor **or borrower**. Any waiver of this section shall be void as against public policy.

2. For the purposes of this section, "residential real property" means real property improved by a oneto four-family residence, a condominium that is occupied by the mortgagor or **borrower or** a cooperative unit that is occupied by the mortgagor **or borrower**.

3. For the purposes of this section, "successful defense" of any action or proceeding pending or commenced by the mortgagee shall mean any form of dismissal of the action or proceeding, with or without prejudice, on the court's own initiative, after trial, or upon application or motion made by the mortgagor or borrower.

§ 13. Severability clause. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 14. This act shall take effect immediately; provided, however:

a. for causes of action pursuant to subdivision (e) of section 206 of the civil practice law and rules as added by section four of this act, having accrued prior to, and would be time barred immediately upon, the effective date of this act, suits thereupon shall be commenced within one year after this act shall have become a law; and b. for causes of action pursuant to subdivision (e) of section 206 of the civil practice law and rules as added by section four of this act, having accrued prior to the effective date of such section and for which less than one year remains upon the applicable limitations period for the commencement of an action or proceeding thereupon, such suits shall be commenced within one year after this act shall have become a law.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 2. Limitations of Time (Refs & Annos)

McKinney's CPLR § 205

§ 205. Termination of action

Effective: July 7, 2008
Currentness

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

(b) Defense or counterclaim. Where the defendant has served an answer and the action is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the plaintiff or his successor in interest, the assertion of any cause of action or defense by the defendant in the new action shall be timely if it was timely asserted in the prior action.

(c) Application. This section also applies to a proceeding brought under the workers' compensation law.

Credits
(L.1962, c. 308. Amended L.1963, c. 541, § 1; L.1965, c. 233; L.1978, c. 51, § 1; L.1992, c. 216, § 2; L.2008, c. 156, § 1, eff. July 7, 2008.)

McKinney's CPLR § 205, NY CPLR § 205
Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

ECKERT SEAMANS ATTORNEYS AT LAW

December 17 2020

Financial Services Litigation Update

Second Circuit Court of Appeals Holds that Assignee of Federal Agency is Immune from Application of New York Statute of Limitations on Mortgage Foreclosure

By Kenneth J. Flickinger

On December 10, 2020, the United States Court of Appeals for the Second Circuit held that an assignee of a mortgage, which was previously assigned to an agency of the federal government, acquires immunity from the application of the New York State statute of limitations on mortgage foreclosures.

In *Windward Bora, LLC v. Wilmington Savings Fund Society*, FSB, 2020 WL 7250869 (2d Cir., Dkt. No. 19-3626), the Second Circuit addressed the issue "whether the federal government's immunity to state limitations periods is inherited by an assignee of the federal government," for the first time.

In *Windward*, the plaintiff commenced an action in the federal District Court for the Northern District of New York, to quiet title and discharge a mortgage against residential real property, held by defendant Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not in its Individual Capacity as Certificate Trustee for NNPL Trust Series 2012-1 its Successors and Assigns ("Wilmington"). A prior assignee of the mortgage commenced a foreclosure action in 2010. The 2010 action was dismissed in 2016, and the foreclosing plaintiff's attempts to vacate the dismissal and reopen the case were denied. Between 2014 and 2017, the mortgage was assigned five (5) times. The first of those assignments was to the United States Department of Housing and Urban Development ("HUD"). After four (4) more assignments, the mortgage was ultimately assigned to the defendant, Wilmington.

In *Windward*, the Second Circuit held that "[i]t is well-established that 'the United States is not bound by a statute of limitations unless Congress has explicitly expressed one,'" and, thus "New York's six-year limitations period on foreclosure actions does not apply to actions brought by the United States or federal agencies." *Id*, at *2 citing *Westnau Land Corp. v. U.S. Small Bus. Admin*., 1 F.3d 112, 115 (2d Cir. 1993).

The Second Circuit held that federal immunity, applicable to the United States or federal agencies, can be transferred to a non-governmental entity by assignment, holding that "under traditional common law principles governing assignments, 'the assignee of the United States stands in the shoes of the United States and is entitled to rely on the limitations periods prescribed by federal law.'" *Id*. The Second Circuit reasoned that this result is warranted "because it improves the marketability of instruments held by the United States, thereby giving the United States greater flexibility in monetizing its claims." *Id*, citing *UMLIC VP LLC v. Matthias*, 364 F.3d 125, 133 (3d Cir. 2004).

The Plaintiff argued that the assignee should not be entitled to immunity from the statute of limitations because (1) it did not show that the ultimate benefits from a foreclosure of the mortgage would flow to HUD; (2) defendant failed to provide evidence that the *note* was ever assigned to HUD, notwithstanding the undisputed evidence that the *mortgage* was assigned to HUD; and (3) that the defendant failed to prove that the loan was insured by FHA. The Second Circuit rejected these arguments for various reasons. Relevant to the application of the holding of this case in the future, the Court rejected the plaintiff's third argument, i.e., that the defendant failed to prove that the loan was insured by FHA, holding that the defendant's inherited immunity is not conditioned on whether the loan was FHA-insured.

One question arising out of *Winward* is whether the case will be binding on New York Courts. While federal case law is persuasive in the absence of state authority to the contrary, it is not binding, except on issues involving a federal question. *Conergics Corp. v. Dearborn Mid-West Conveyor Co*., 144 A.D.3d 516, 43 N.Y.S.3d 6 (1st Dep't 2016). In *Windward*, the federal question is whether the United States, or an agency of the United States, is immune from state statutes of limitations. The issue addressed by the Second Circuit is whether an assignment of a mortgage from a federal agency to a non-governmental entity conveys with it the federal immunity enjoyed by the assignor. Assignment of a mortgage is governed, generally, by common law, not federal law. Is the Second Circuit's decision in *Windward*, then, a decision on a federal question? The Second Circuit in *Windward* appears to have addressed this, specifically calling the issue of assignee immunity a "federal question", and citing the Third Circuit Court of Appeals' decision in *UMLIC VP LLC* with approval. *Windward* at *3. The Third Circuit in *UMLIC VP LLC* held "federal law supplies the statute of limitations in cases where the plaintiff is successor in interest to the United States." *UMLIC VP LLC*, 364 F.3d at 127. This issue may be litigated in the New York Courts in the future.

The takeaway from *Winward* is that every lender facing a potential statute of limitations issue should check the chain of assignments to determine whether there may be an intervening assignment from a federal agency, making available the assignee immunity argument adopted by Second Circuit.

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This Legal Update is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact Kenneth J. Flickinger at 914.286.2817 or kflickinger@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

ECKERT SEAMANS ATTORNEYS AT LAW

February 5, 2020

Financial Services Litigation Update

Citimortgage v. Ramirez: Appellate Division, Third Department, Holds Statute of Limitations on Note Suit is Tolled During Pendency of Foreclosure Action

By Kenneth J. Flickinger

On December 24, 2020, the Appellate Division, Third Department, decided an appeal in the case *Citimortgage, Inc. v. Jose Ramirez*, 2020 WL 7647749. The Third Department effectively held that an action for a money judgment on a mortgage note is tolled during the pendency of an action to foreclose the mortgage incident thereto. Using the argument adopted by the Third Department in *Ramirez* may provide an avenue of recovery to a mortgagee that may no longer pursue foreclosure based on the expiration of the statute of limitations. A summary of the facts of the case is as follows:

In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which the Supreme Court dismissed on October 30, 2013 for failure to prosecute. In 2017, plaintiff commenced a second foreclosure action. The Supreme Court dismissed that action as time-barred, as the statute of limitations on the mortgage foreclosure claim began to run on May 5, 2010 – the date the mortgage was accelerated – and expired in May 2016. The court also discharged the mortgage.

In May 2019, plaintiff commenced an action seeking a money judgment against defendant in the amount of the unpaid balance of the note. Defendant moved pre-answer to dismiss the complaint on the grounds that it was barred by, among other things, the doctrine of res judicata and the statute of limitations. The lower court, finding that plaintiff was collaterally estopped from relitigating the issue of whether the statute of limitations period was tolled, granted defendant's motion and dismissed the complaint. The plaintiff appealed. The Appellate Division, Third Department, held as follows:

The question of whether the statute was tolled during the pendency of the first foreclosure action constitutes a purely legal question, and was not barred by the doctrine of collateral estoppel.

The Third Department also held that the doctrine of res judicata did not apply, based on the election of remedies embodied in Real Property Actions and Proceedings Law ("RPAPL") 1301(3). The Third Department cited *Gizzi v. Hall*, 309 A.D.2d 1140, 1141 (3d Dep't 2003), stating "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies." The Court held that, due to this required election of remedies, plaintiff could not have raised a cause of action to recover on the note in the context of the second foreclosure proceeding. Accordingly, the outcome of that foreclosure proceeding did not have res judicata effect so as to bar the subsequent action to recover on the note.

As to the statute of limitations, while the Court found that defendant met his burden of establishing, prima facie, that the six-year statute of limitations on the 2019 action on the note was expired, the Court found that plaintiff established that the statute of limitations was tolled during the pendency of the first foreclosure action.

Section 204(a) of the Civil Practice Law and Rules ("CPLR) provides that, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." RPAPL 1301(3), provides that, while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

The Appellate Division, Third Department, drew an analogy between RPAPL 1301(3) and the automatic stay upon the filing of a petition in federal bankruptcy court pursuant to section 362(a) of the Bankruptcy Code. The Third Department held "[s]imilar to the ability to request relief from a stay under the bankruptcy statute, although under RPAPL 1301(3) a creditor may seek leave of court to commence another action to recover a part of a mortgage debt, "the need to seek judicial relief from the ... stay means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the ... court will favorably exercise its discretion."

In *Ramirez*, the Third Department held that the cause of action for a money judgment on the note was tolled during the pendency of the foreclosure action, to wit, from the time of commencement of the 2010 action, until October 30, 2013, the date the first foreclosure action was dismissed.

This ruling may provide an alternative to a mortgagee that is otherwise restricted from foreclosure by the application of the statute of limitations. There will be other considerations, of course. For example, the homestead exemption pursuant to CPLR § 5206, may limit the total amount a plaintiff can recover from execution of a money judgment against the debtor's real property (the homestead exemption is currently $150,000.00 in the five boroughs of New York City, Nassau, Suffolk, Westchester, Putnam, and Rockland Counties). A debtor may also seek to discharge the debt in bankruptcy court (although section 707 of the Bankruptcy Code may prevent a debtor from doing so under certain circumstances that may constitute abuse). Nevertheless, the holding in *Ramirez* may breathe new life into a mortgage debt previously thought to be time-barred, allowing a mortgagee to live to fight another day.

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ECKERT SEAMANS ATTORNEYS AT LAW

February 10, 2020

Financial Services Litigation Update

Appellate Division, Second Department Clarifies Law Concerning a Lender's Revocation of Acceleration in Foreclosure and Confirms the Sanctity of Settlement

By Morgan R. McCord

On January 20, 2021, the Appellate Division, Second Department addressed the often-confounding question of what evidentiary showing a foreclosing lender must make to defeat a defendant's motion for dismissal on statute of limitations grounds. The court found, as many suspected, that a lender's submission of a loan modification agreement coupled with proof of its voluntary discontinuance of a foreclosure action and cancellation of the notice of pendency are sufficient to raise an issue of fact. The decision brings much needed clarity to the Second Department's statute of limitations jurisprudence and, perhaps more importantly, confirms the sanctity of settlement.

The facts in *Bank of N.Y. v. Hutchinson*, AD 2nd, 2017-13111, are straightforward. The defendant/mortgagor filed motion for summary judgment seeking, *inter alia*, dismissal of the complaint based on the expiration of the six-year statute of limitations period. In support of the motion, the defendant submitted evidence showing that the mortgage debt was accelerated by virtue of a prior foreclosure action commenced on February 15, 2006 (the "2006 action") and that the 2006 action was voluntarily discontinued on April 2, 2007. In opposition, the plaintiff argued that it had revoked its election to accelerate the mortgage debt within the limitations period. The plaintiff submitted a loan modification agreement dated November 6, 2006 and a consent to cancel lis pendens filed March 29, 2007. The Supreme Court denied the motion finding that although the defendant satisfied her *prima facie* burden to show that the action was time-barred, the plaintiff raised a triable issue of fact in opposition. The defendant appealed.

The Appellate Division began its analysis reciting the well-settled law that a mortgage foreclosure action is subject to a six-year statute of limitations under CPLR 213(4). The court noted that where a mortgage is 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. However, once a mortgage payable in installments is accelerated, the entire balance is due and the statute of limitations begins to run on the entire debt.

This is not the end of the story however. The Second Department has created a new body of law over the past few years concerning a lender's revocation of its election to accelerate the mortgage debt. Under this jurisprudence, a lender may revoke its election to accelerate the mortgage, but it must do so by an "affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the prior foreclosure action."

After setting forth these principles, the Appellate Division applied them to the facts of the case, concluding, in accord with the lower court, that the defendant met her initial burden of demonstrating *prima facie* that the case was time-barred. The court also agreed with the Supreme Court's determination that the plaintiff raised a triable issue of fact in opposition, finding that:

> the submission of the loan modification agreement, which clearly and unambiguously demanded a resumption of monthly installment payments on the note, and the consent to cancel lis pendens were sufficient to raise a triable issue of fact as to whether the

> plaintiff had revoked its election to accelerate the full balance of the mortgage debt within six years from February 15, 2006 ….

Consequently, the Appellate Division affirmed the lower court's decision denying the defendant's motion.

In reaching its decision, the Appellate Division rejected the defendant's argument that the plaintiff was required to demonstrate that payments were made under the loan modification agreement, holding, based on the facts of this case, that such a showing was not necessary. The court also rejected the defendant's claim of prejudice, holding that any such prejudice was not sufficient to defeat revocation.

The Appellate Division's decision is a welcome relief to the mortgage servicing industry. Lenders no longer need to fear that settlement of a foreclosure action by modification will be used against them years later, after the statute of limitations has expired, as a basis for dismissal. Notwithstanding the foregoing, we recommend that foreclosing lenders make clear when discontinuing actions that they are revoking acceleration of the mortgage debt.

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This Legal Update is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact Morgan R. McCord at 914.286.2630 or mmccord@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

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Financial Services Litigation Update

Discontinued and Revoked:
Court of Appeals Changes Landscape of Foreclosure Statute of Limitations Jurisprudence in Reversing Quartet of Appellate Division Cases

By Kenneth J. Flickinger

On February 18, 2021, the Court of Appeals reversed four (4) decisions from the Appellate Divisions, which greatly affect the prosecution of mortgage foreclosure actions in New York with respect to the statute of limitations[1]. The major takeaways from the decisions are as follows:

- A notice expressing intent to accelerate the debt in the future is not an act of acceleration, and will not commence the running of the statute of limitations. If such a notice, typically referred to as a "default notice" or "thirty-day notice", merely states that the lender "shall", "may" or "will" accelerate the debt if the default is not cured, the notice is equivocal as to acceleration, and will not be considered an overt act of acceleration for statute of limitations purposes.
- Where the only act of acceleration is the commencement of a foreclosure action, voluntary discontinuance of the foreclosure action, without more, constitutes an act of revocation of the acceleration for statute of limitations purposes.
- A mortgagee's motive in revoking acceleration is irrelevant. A lender should not be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt.

CERTAINTY GOING FORWARD

The implication of these decisions for the mortgage servicing industry cannot be understated. The Court of Appeals has laid out rules that are clear and easy to apply, creating much needed certainty going forward. There is no longer a need to prove the subjective intent behind a revocation of acceleration. The act of revocation, whether by voluntary discontinuance of a foreclosure action, or by notice, is sufficient, and may not be assailed as insincere.

WHAT ABOUT LOOKING BACKWARDS?

Hundreds of mortgages have been wiped out over the last few years based on the Appellate Division case law that was reversed in these cases. Can a lender that lost its mortgage on similar issues get a do-over? A motion for leave to renew may provide a remedy. CPLR 2221(e) allows a party to seek to correct an adverse determination on the grounds that "there has been a change in the law that would change the prior determination."

[1] The cases are *Freedom Mortg. Corp. v. Engel, et al., etc.*, 2021 WL 623869.

The action must still be "sub judice" to permit such a motion. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case. *See* Siegel, N.Y. Prac. §254 (6th ed.).

If final judgment has not been entered, an action will be deemed pending, allowing for a timely motion to renew on the basis of a change in law. *See State of New York Mortg. Agency v. Braun*, 182 A.D.3d 63 (2d Dep't 2020) ("an action is deemed pending until there is a final judgment. Here, while there was an order granting the defendant's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered.").

After a final judgment has been entered, a party may resort to CPLR § 5015. While a change in law is not one of the enumerated grounds for vacatur of a judgment, "[t]he Supreme Court has the inherent authority to vacate a judgment in the interest of justice." *Goldenberg v. Godenberg*, 123 A.D.3d 761 (2d Dep't 2014). A mortgagee that lost a foreclosure based on the expiration of the statute of limitations should move quickly to determine whether there are grounds for relief.

TOO GOOD TO BE TRUE?

However, a concurrence, and separate dissent, on these appeals left open the question whether the notes and mortgages permit a lender the contractual right to revoke an acceleration, as the arguments were not raised in the three (3) of the four (4) appeals decided, and the argument was raised for the first time on appeal in the other, and, therefore, was unpreserved for appellate review. Might this victory be short lived? We certainly expect to see this argument raised by the defense bar. How will the Appellate Divisions receive it? We will not know the answer to that question for years. But the Court of Appeals provided a hint in referencing *Kilpatrick v. Germania Life Ins. Co.*, 83 N.Y. 163, 168 (1905), in which the Court of Appeals held that the noteholder was estopped from revoking acceleration after the borrower changed his position in reliance on the noteholder's election to accelerate. This appears to be justification for a noteholder's right to revoke acceleration, so long as the borrower has not detrimentally relied on the election. We will see if the Appellate Divisions follow the Court of Appeals' lead. In the meantime, the mortgage finance and servicing industries can enjoy a rare victory.

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