

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D12486
Y/cb

_____AD3d_____

Argued - September 22, 2006

ROBERT W. SCHMIDT, J.P.
THOMAS A. ADAMS
MARK C. DILLON
JOSEPH COVELLO, JJ.

2006-01769

DECISION & ORDER

Ramesh Sarva, et al., respondents, v Amitava
Chakravorty, et al., appellants.

(Index No. 1577/98)

Edward Weissman, New York, N.Y. (Jan Marcantonio of counsel), for appellants.

Bernard Ouziel, Great Neck, N.Y., for respondents.

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]).

November 8, 2006

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The defendants' remaining contention is improperly raised for the first time on appeal (*see Sandoval v Juodzevich*, 293 AD2d 595), 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 made by the defendants (*see Orellano v Samples Tire Equip. & Supply Corp.*, 110 AD2d 757; *see generally Education Resources Institute v Piazza*, 17 AD3d 513; *Costantini v Bimco Indus.*, 125 AD2d 531; *Bernstein v Kaplan*, 67 AD2d 897).

SCHMIDT, J.P., ADAMS, DILLON and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court