At an IAS Term, Part FRP-2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of March, 2024.

P R E S E N T:

HON. DEREFIM B. NECKLES,

Justice.

----------X

DLJ MORTGAGE CAPITAL, INC.,

Plaintiff,

-against-

MOT. SEQ. 4
Index No. 506702/13

BERTHA PITTMAN, a/k/a BERTHA MAE PITTMAN, VISTA HOLDING, INC., D&M FINANCIAL CORP., NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION STATE OF NEW YORK, and "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	160
Opposing Affidavits (Affirmations)	174
Affidavits/ Affirmations in Reply	179
Other Papers: Affirmation in Support	162

Upon the foregoing papers, defendant Vista Holding, Inc. (Vista) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint on statute of limitations grounds.

Plaintiff commenced this action to foreclose a mortgage encumbering the property at 1637 St. Marks Avenue in Brooklyn. The mortgage was executed on October 24, 2001 by defendant Bertha Pittman a/k/a Bertha Mae Pittman (Pittman) to secure a $350,000 note in favor of defendant D&M Financial Corp. (D&M). By deed dated September 27, 2002, Pittman conveyed the subject property to Vista. On November 11, 2003, the mortgage and note were assigned from D&M to Fairbanks Capital Corp. (Fairbanks). By assignment instrument dated December 29, 2011, the mortgage and note were purportedly assigned from Fairbanks to US Bank National Association, as Trustee (US Bank). The December 29, 2011 assignment to US Bank was executed by Wells Fargo Bank, N.A. (Wells Fargo) "AS ATTORNEY-IN-FACT FOR" Fairbanks. By assignment instrument dated December 6, 2012, the mortgage and note were purportedly assigned from US Bank to plaintiff.

On May 15, 2002, a prior foreclosure action on the subject mortgage was commenced by D&M's alleged assignee, "Olympus Servicing, L.P. f/k/a Calmco Servicing, L.P. on behalf of Owner" (Olympus Action). The plaintiff in the Olympus Action alleged in its amended complaint that Pittman defaulted under the terms of the mortgage and note by failing to make the payment due on December 24, 2001 or any month thereafter. The Olympus Action was voluntarily discontinued on April 26, 2004.

On February 14, 2003, prior to the date of its assignment, Fairbanks commenced an action to foreclose the subject mortgage, alleging that Pittman defaulted by failing to make the monthly payment due August 24, 2002. A judgment of foreclosure and sale was entered in the Fairbanks Action on June 7, 2005. By order dated February 4, 2010,

the judgment of foreclosure was vacated and the complaint in the Fairbanks Action was dismissed for lack of standing.

The instant action was commenced on October 30, 2013. On December 30, 2013, Vista moved to dismiss the complaint under CPLR 3211 on standing and statute of limitations grounds. Vista's motion to dismiss was denied by order dated September 8, 2014 (Hon. Debra Silber, J.). With respect to the statute of limitations ground. Justice Silber found that the commencement of the Fairbanks Action did not constitute a valid acceleration of the mortgage since Fairbanks was not the holder of the note and thus had no authority to accelerate. Justice Silber also determined that Vista failed to establish plaintiff's lack of standing. On May 10, 2017, the Appellate Division, Second Department affirmed the September 8, 2014 order (*DLJ Mtge. Capital, Inc. v Pittman*, 150 AD3d 818 [2d Dept 2017]). The Appellate Division stated:

> "The Supreme Court properly determined that the action was not time-barred. Contrary to the appellant's contention, an affidavit made in support of a motion for an order of reference in the [Fairbanks Action], which the plaintiff in that action lacked standing to commence, did not, under the circumstances of this case, constitute an affirmative action evidencing the exercise of the option to accelerate the maturity of the loan" (*DLJ Mtge. Capital, Inc.*, 150 AD3d at 819).

A subsequent motion by plaintiff for summary judgment was denied by order dated April 4, 2023, wherein Justice Partnow found an issue of fact remained as to whether plaintiff had proper standing. On May 9, 2023, Vista brought the instant motion for summary judgment dismissing the complaint on statue of limitations grounds, based

this time on the commencement and discontinuance of the Olympus Action in the early 2000s.

RPAPL 1504 (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 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." An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]). "[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" (*Bank of N.Y. Mellon v Mor*, 201 AD3d 691, 694 [2d Dept 2022]; *see U.S. Bank N.A. v Connor*, 204 AD3d 861, 862-863 [2d Dept 2022]). Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the holder of the note elects in the complaint to call due the entire amount secured by the mortgage (*see GMAT Legal Title Trust 2014–1 v Kator*, 213 AD3d 915, 916 [2d Dept 2023]; *Ditech Fin., LLC v Connors*, 206 AD3d 694, 697 [2d Dept 2022). 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 Abadin v HSBC Bank USA, N.A.*, 219 AD3d 426, 428 [2d Dept 2023].

Under previous caselaw in the Second Department, the voluntary discontinuance of a foreclosure action, without more, was deemed insufficient to establish that a bank had revoked the acceleration of the debt (*see Christiana Trust v Barua*, 184 AD3d 140,

146-147 [2d Dept 2020]; *HSBC Bank, N.A. v Vaswani*, 174 AD3d 514, 515 [2d Dept 2019]; *U.S. Bank Trust, N.A. v Aorta*, 167 AD3d 807, 809 [2d Dept 2018]). Such caselaw was abrogated by the Court of Appeals' decision in *Freedom Mtge. Corp. v Engel* (37 NY3d 1 [2021]), which held 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" (*Freedom Mtge. Corp.*, 37 NY3d at 32).

The Court of Appeals' decision resulted in the enactment of the Foreclosure Abuse Prevention Act (L 2022, ch 821, § 4 [eff Dec. 30, 2022]) (FAPA) which amended certain statutes including "CPLR 3217, governing the voluntary discontinuance of an action, by adding a new paragraph (e), which provides that '[i]n any action on an instrument described under [CPLR 213(4)], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute'" (*Bank of N.Y. Mellon v Stewart*, 216 AD3d 720, 723 [2d Dept 2023]). FAPA also amended, inter alia, CPLR 213 (4) by adding two new paragraphs (a) and (b) to read as follows:

> (a) In any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial

> determination, made upon a timely interposed defense, that the instrument was not validly accelerated.
>
> (b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

FAPA took effect "immediately" on December 30, 2022 and applied "to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10).

Here, Vista established prima facie that the instant action is time-barred by showing that more than six years has elapsed since the time the debt was accelerated by the commencement of the 2002 Olympus Action and the time the instant action was commenced (*see U.S. Bank N.A. v Onuoha*, 216 AD3d 1069, 1072 [2d Dept 2023]; *Select Portfolio Servicing, Inc. v Sampson*, 216 AD3d 693, 694 [2d Dept 2023]). In opposition, plaintiff fails to raise an issue of fact.

Contrary to plaintiff's contention, Vista's motion is not barred by the "law of the case," doctrine since Justice Silber and the Appellate Division only considered whether the commencement of the Fairbanks Action in 2003 acted as a proper acceleration of the mortgage. On the instant motion, the issue before the court concerns the acceleration of the mortgage by commencement of the Olympus Action.

Further, the court does not find that the statute of limitations defense was waived or abandoned because it was not raised in opposition to plaintiff's prior motion for summary judgment. While a statute of limitations defense is waived unless it is raised in an answer or in a timely pre-answer motion to dismiss (*see* CPLR 3211 [a] [5]; [e]; *21st Mtge. Corp. v Palazzotto*, 164 AD3d 1293, 1294 [2d Dept 2018]; *MidFirst Bank v Ajala*, 146 AD3d 875 [2d Dept 2017]; *South Point, Inc. v Rana*, 139 AD3d 935, 935-936 [2d Dept 2016]), the defense was expressly raised by Vista in its answer to plaintiff's complaint. The Appellate Division cases cited by plaintiff in support of its contention that the defense was waived or abandoned when it was not raised in opposition to plaintiff's prior summary judgment motion are distinguishable. *New York Commercial Bank v J. Realty F Rockaway, Ltd.* (108 AD3d 756 [2d Dept 2013]) involved a motion for summary judgment in lieu of complaint, by which the opposing papers function essentially as an answer would in a plenary action (*see generally*, CPLR 3213). Thus, failure to raise waivable affirmative defenses in papers opposing a CPLR 3213 motion may render them waived as if not raised in an answer. In *Starkman v City of Long Beach* (106 AD3d 1076 [2d Dept 2013]), the plaintiff's summary judgment motion sought dismissal of certain affirmative defenses. The Appellate Division, in reversing the Supreme Court, stated that the "first, second, and fourth affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses. In any event, those affirmative defenses were either waived (*see* CPLR 3211 [e]) or are without merit" (*Starkman*, 106 AD3d at 1078). In distinction from the instant matter, the fate of the affirmative defenses in *Starkman* was determined as part

of the disposition of the plaintiff's summary judgment motion. The April 4, 2023 order of Justice Partnow did not dismiss, strike or even address Vista's statute of limitations defense, and denied the motion solely based on plaintiff's failure to establish standing. Because plaintiff failed to establish, prima facie, its entitlement to judgment as a matter of law on the issue of standing, it was not necessary for the court to consider the sufficiency of Vista's opposition papers and make a determination on its other affirmative defenses (*see Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017]). Justice Partnow's order has not been appealed, nor has it otherwise been challenged by motion for reargument. Vista's statute of limitations defense therefore remains extant for purposes of the instant motion. The lower court cases cited by plaintiff in support of its argument that the statute of limitations defense has been waived or abandoned are likewise distinguishable and/or nonbinding.

Plaintiff's argument that FAPA is not retroactive runs counter to several decisions from the Appellate Division, Second Department which gave FAPA retroactive effect (*see Johnson v Cascade Funding Mtge. Trust 2017-1*, 220 AD3d 929, 931-932 [2d Dept 2023]; *ARCPE 1, LLC v DeBrosse*, 217 AD3d 999, 1001-1002 [2d Dept 2023]; *Deutsche Bank Natl. Trust Co. v Natal*, 217 AD3d 835, 836 [2d Dept 2023]; *U.S. Bank N.A. v Outlaw*, 217 AD3d 721, 723 [2d Dept 2023]; *Sycp, LLC v Evans*, 217 AD3d 707, 709 [2d Dept 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]), as well as Section 10 of FAPA which states that "[t]his act shall take effect immediately and shall apply to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced."

While lower courts are divided on the constitutionality of the retroactive application of FAPA (*compare U.S. Bank Trust, N.A. v Miele*, 80 Misc 3d 839 [Sup Ct, Westchester County 2023]; *HSBC Bank USA, N.A. v IPA Asset Mgt., LLC*, 79 Misc 3d 821 [Sup Ct, Suffolk County 2023] [holding that the retroactive application of FAPA does not violate the mortgage lender's constitutional rights] *with U.S. Bank Trust, N.A. v Joerger*, 2024 NY Slip Op 24075 [Sup Ct, Suffolk County 2024]; *HSBC Bank USA, N.A. v Besharat*, 80 Misc 3d 269 [Sup Ct, Putnam County 2023] [holding retroactive application of FAPA unconstitutional]), this court may not consider the constitutional issue as plaintiff has not provided proof of notice to the Attorney General as required by CPLR 1012 (b) (CPLR 1012 [b] [3]).

Finally, while the amended complaint in the Olympus Action recites a different, earlier default date than that recited in the instant action, such discrepancy alone does not constitute competent proof of any payment by the borrower or reinstatement of the subject mortgage (*see Morgan v New York Telephone*, 220 AD2d 728, 729 [2d Dept1995] ["Mere conclusory assertions, devoid of evidentiary facts, are insufficient (to defeat summary judgment), as is reliance upon surmise, conjecture, or speculation"]).

As a result, Vista's motion for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

DATED: 3/21/24

A. J. S. C.

HON. DEREFIM B. NECKLES
A.J.S.C.

9

[* 9]