SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** **PART 55**

Justice

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WELLS FARGO BANK, N.A.,

Plaintiff,

- v -

DENISE A. BIDERMAN, JUDITH GRACE BIEDERMANN,

Defendants.

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INDEX NO. 152703/2020

MOTION DATE 05/27/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for REARGUMENT/RECONSIDERATION.

This action was commenced by filing of a summons and complaint on March 12, 2020 (NY St Cts Elec Filing [NYSCEF] Doc No. 1). Wells Fargo Bank, N.A. (plaintiff) sought a declaratory judgment affirming the validity and priority of the mortgage loan held by plaintiff and permitting plaintiff to record a power of attorney executed by Denise Biderman that endowed Judith Grace Biedermann (collectively defendants) with the authority to act as her attorney-in-fact during their joint purchase of 212 East 47th Street, Unit 25A, New York, New York (*id.*, generally). Issue was joined by defendants interposing an answer with counterclaims on June 15, 2020 (NYSCEF Doc No. 13). Plaintiff filed a reply to the counterclaims on June 25, 2020 (NYSCEF Doc No. 15).

The parties moved for summary judgment and following arguments of counsel at a virtual hearing held on June 2, 2021, this court found that enforcement of the mortgage was not valid, as the defaulted loan had been accelerated by commencement of a foreclosure action on April 3, 2013, the statute of limitations expired in 2019, and this action was not commenced until 2020, beyond the statute of limitations (NYSCEF Doc No. 76 (Transcript) at 12:15-13:2). The court also found that the power of

attorney issue was moot, denied plaintiff's motion for summary judgment and granted defendants' cross-motion for summary judgment, dismissing the complaint (*id.* at 13:3-21). The decision was memorialized in a written order dated April 26, 2022 (NYSCEF Doc No. 70). Defendants served plaintiff with notice of entry of the judgment on April 28, 2022 (NYSCEF Doc No. 71).

Plaintiff now moves, pursuant to CPLR 2221 (d), for leave to reargue the decision and order of this court and, upon reargument, an order restoring this action to the court's calendar and determining the merits of plaintiff's motion for summary judgment (NYSCEF Doc Nos. 79). Defendants opposed, arguing, among other things, that plaintiff's reargument motion was not timely made (NYSCEF Doc No. 80).

A motion for leave to reargue pursuant to CPLR 2221 (d) is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Frenchman v Lynch,* 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis,* 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche,* 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to afford the unsuccessful party with successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally presented" (*Matter of Setters v Al Props. & Devs. [USA] Corp.,* 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]). Here, as discussed further below, the court did not overlook or misapprehend the facts or law as they were presented to the court and, thus, reargument is denied.

CPLR 2221 (d) (3) provides that 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" (CPLR 2221 [d] [3]). Plaintiff submitted this reargument motion in a timely fashion on May 27, 2022, which

was within the thirty-day period after the court's April 26, 2022 order was entered on April 28, 2022 (NYSCEF Doc No. 76). Contrary to defendants' argument, plaintiff's motion to reargue is timely because the June 2021 decision was not appealable (*see* CPLR 5512[a], *Guzman v Americare, Inc.*, 202 AD3d 504, 504 [1st Dept 2022], *lv dismissed* 38 NY3d 1156 [2022] ["[n]o appeal lies from a decision, or from an appealed paper directing the settlement of an order"]]; *Sanchez de Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 931 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011] [holding that motion court's denial, during oral argument, of plaintiffs' motion for leave to amend, is not appealable, as no appeal lies from a ruling and the transcript was not "so ordered" by the court]).

Plaintiff argues that it should be granted leave to reargue because "the Court did not address and ignored that a new foreclosure action had already been timely commenced" (NYSCEF Doc No. 79 at ¶ 4). Plaintiff contends that the second foreclosure action was timely recommenced under the savings provision of CPLR 205 (a) (NYSCEF Doc No. 50 at 6; NYSCEF Doc No. 79 at ¶¶ 25-26; NYSCEF Doc No. 84 at ¶¶ 14-15, 18). Plaintiff argues that the dismissal of the first foreclosure action by the Appellate Division, First Department for failure to address required Real Property Actions and Proceedings Law (RPAPL) 1304 notices to defendants' specific unit in a 275-unit condominium building, (*Wells Fargo Bank, N.A. v Biedermann*, 178 AD3d 505, 505 [1st Dept 2019]), is not an exception under CPLR 205 (a)'s savings provision. (NYSCEF Doc No. 84 at ¶ 14; NYSCEF Doc No. 94 at ¶¶ 13-14 citing *Merino v Wells Fargo Bank, N.A.*, 195 AD3d 489, 489 [1st Dept 2021] [dismissal of prior "foreclosure action on RPAPL 1304 grounds triggered the six-month grace period provided by CPLR 205 (a)"]; *CitiMortgage, Inc. v Moran*, 188 AD3d 407, 408 [1st Dept 2020] [applying CPLR 205 (a) where plaintiff failed to comply with RPAPL 1304 in prior action].) Plaintiff contended that the statute of limitations on the second foreclosure action was further tolled by a series of executive orders issued by then-Governor

Andrew Cuomo in response to the COVID–19 pandemic (NYSCEF Doc No. 79 at ¶ 25; NYSCEF Doc No. 84 at ¶ 13).

Plaintiff fails to raise a triable issue of fact as to whether the statute of limitations in this action for declaratory relief was tolled or otherwise inapplicable. Plaintiff fails to explain the relevancy of its newly asserted argument that CPLR 205 (a) tolls the statute of limitations in this action for declaratory relief. CPLR 205 (a) permits a plaintiff to commence a new action based upon the same transaction within six months of the conclusion of the prior action where it "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 on the merits" (CPLR 205 [a]).[1] However, the time period within which to commence a second suit under CPLR 205 (a) "is not technically a 'toll,' as it does not stop the underlying statute of limitations from running, but is instead a six-month 'extension' of the time for commencing the new action when its qualifying circumstances are present" (*Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]). Plaintiff cites no authority rebutting this conclusion; plaintiff merely asserts that dismissal is inappropriate due to the pendency of the second foreclosure action (NYSCEF Doc No. 79 at ¶ 26; NYSCEF Doc No. 84 at ¶ 5).

Plaintiff's assertion, that the pendency of the second foreclosure lawsuit tolls the statute of limitations, is entirely unsupported. Plaintiff cites no authority for the proposition that the pendency of the second foreclosure action invalidated the acceleration of the mortgage debt, halting or resetting the statute of limitations (*Berdoe v Federal Natl. Mtge. Assn.*, 211 AD3d 519, 520 [1st Dept 2022] [court

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[1] The court notes that on December 30, 2022, the Legislature enacted the Foreclosure Abuse Prevention Act ("FAPA"), amending CPLR 205 (a) and replacing it with a new savings provision, CPLR 205-a. The parties were permitted to brief whether FAPA impacted the disposition of plaintiff's motion (NYSCEF Doc Nos. 87 and 94). After reviewing the parties' submissions, the court finds that FAPA is inapplicable (*Deutsche Bank Nat. Trust Co. v Contact Holdings Corp.*, 2023 NY Slip Op 32827 [U], at **11 [Sup Ct, Kings County 2023, index No. 507319/2022, Knipel, L.] ["CPLR 205-a does not affect the statute of limitations nor the time a cause of action for foreclosure accrues, but merely delineates the types of dismissals excepted from the savings provision"]).

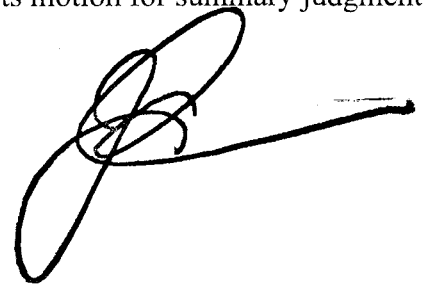
rejected proposition concerning the tolling of statute of limitations where defendant failed to cite any supporting authority]). Indeed, plaintiff never disputed the validity of the acceleration of the mortgage loan, instead arguing that (1) this was not an action to foreclose a mortgage; (2) plaintiff timely commenced its second foreclosure action due to executive orders relating to the COVID-19 pandemic tolling the statute of limitations for foreclosure proceedings; (3) RPAPL 15 does not have a statute of limitations; and (4) defendants deception relating to the recording of the power of attorney precludes them from arguing that plaintiff's claims are time-barred (NYSCEF Doc No. 50 at 5-10). In its opposition, plaintiff failed to provide evidence that it took any affirmative action of revocation during the limitations period, stopping the running of the statute of limitations on the mortgage debt (*Federal Natl. Mtge. Assn. v Rosenberg*, 180 AD3d 401, 402 [1st Dept 2020] [mortgagee provided evidence that it took affirmative action to de-accelerate the mortgage, which would have stopped the running of the six-year statute of limitations on the mortgage debt]).

Plaintiff wrongly asserts that the "issue here is not whether there was ever a de-acceleration of the mortgage debt at any point after the initial foreclosure was commenced" (NYSCEF Doc No. 94 at ¶ 10). Indeed, the crux of the matter is whether plaintiff de-accelerated or revoked its acceleration of the mortgage debt within six-years of April 3, 2013, and before the statute of limitations lapsed (*Federal Natl. Mtge. Assn. v Rosenberg*, 180 AD3d at 402 [statute of limitations on an accelerated debt ceases to run when the lender affirmatively revokes the election to accelerate the amounts due on the mortgage loan]). "Once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run" (*Citimortgage, Inc. v Dalal*, 187 AD3d 567, 568 [1st Dept 2020] [citations omitted]). The commencement of the 2013 foreclosure action was an unequivocal act of acceleration (*Berdoe*, 211 AD3d at 519-520 [six-year statute of limitations began to run once mortgage debt was accelerated by decision of mortgagee's servicer to commence prior foreclosure action]).

Additionally, the dismissal of the first foreclosure action does not constitute an affirmative act by plaintiff to revoke the election to accelerate sufficient to rest the statute of limitations (*Federal Natl. Mtge. Assn. v Woolstone*, 196 AD3d 548, 549 [2d Dept 2021] [citations omitted] [court's dismissal of prior foreclosure action did not constitute affirmative act by lender revoking its election to accelerate, and record is devoid of any affirmative act of revocation occurring during the six-year statute of limitations period after the initiation of the prior action]; *Deutsche Bank Trust Co. Ams. v Smith*, 170 AD3d 660, 660–661 [2d Dept 2019] [dismissal of prior foreclosure action does not revoke election to accelerate]). Therefore, the court adheres to its prior decision that the filing of the prior foreclosure action in 2013 accelerated the entire debt due under the mortgage, commencing the running of the statute of limitations and since plaintiff did not commence this action until 2020—more than seven years later—plaintiff's action here is untimely.

Accordingly, plaintiff has failed to demonstrate that the court misapprehended or overlooked any matter of fact or law regarding the statute of limitations that would warrant leave to reargue.

ORDERED that the motion of plaintiff for leave to reargue its motion for summary judgment is denied.



10/31/2023
DATE

James d'Auguste, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE