

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-00783

PRESENT: WHALEN, P.J., BANNISTER, SMITH, NOWAK, AND DELCONTE, JJ.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC.,
ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-R5,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

PETER F. TESTA, DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

GREENBERG TRAURIG, LLP, GARDEN CITY (STEVEN LAZAR OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

DONALD H. MICHALAK, FREDONIA, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Chautauqua County (Ronald D. Ploetz, A.J.), entered March 28, 2024. The order denied the motion of plaintiff for summary judgment, and granted the cross-motion of defendant Peter F. Testa insofar as it sought summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Supreme Court, Chautauqua County, for further proceedings in accordance with this memorandum and as modified the order is affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff appeals and defendant Peter F. Testa (defendant) cross-appeals from an order that denied plaintiff's motion seeking, inter alia, summary judgment against defendant on its complaint, granted defendant's cross-motion to the extent that it sought summary judgment dismissing the complaint with prejudice as barred by the statute of limitations pursuant to CPLR 213 (4), and dismissed the complaint with prejudice.

Contrary to plaintiff's contention on its appeal, defendant met his initial burden of establishing that the action is untimely (*see U.S. Bank Trust N.A. v Holmes*, 233 AD3d 1480, 1480 [4th Dept 2024]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018] [*Adrian*]). "The statute of limitations in an action to foreclose on a mortgage 'begins to run once the debt has been accelerated by a demand' " (*Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]; *see Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). " 'Acceleration occurs, inter alia, by the commencement of a foreclosure action' " (*Federal Natl. Mtge.*

Assn., 188 AD3d at 74; see *U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]), and " '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' " (*Federal Natl. Mtge. Assn.*, 188 AD3d at 74 [emphasis omitted]; see *Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]). Here, in support of the cross-motion, defendant submitted plaintiff's complaint in a prior foreclosure action with respect to the same mortgage, which was filed on April 11, 2007, and declared "that the whole of the principal sum secured hereby become immediately due and payable." Thus, defendant established that the mortgage debt was accelerated on that date and that the six-year statute of limitations applicable to mortgage foreclosure actions (see CPLR 213 [4]) had expired by the time plaintiff commenced the instant action on November 16, 2018 (see *Federal Natl. Mtge. Assn.*, 188 AD3d at 74; *Adrian*, 157 AD3d at 935).

In opposition, plaintiff did not "raise a question of fact whether the statute of limitations was tolled or otherwise inapplicable or whether . . . plaintiff actually commenced the action within the applicable period" (*U.S. Bank Trust N.A.*, 233 AD3d at 1480). Plaintiff's purported voluntary discontinuance of the prior foreclosure action in 2012, which occurred after the action had been dismissed sua sponte for failure to prosecute, did not reset the statute of limitations. Plaintiff relies on the rule with respect to voluntary discontinuance set out in *Freedom Mtge. Corp. v Engel* (37 NY3d 1, 32 [2021]), but we note that the Legislature abrogated that rule by enacting the Foreclosure Abuse Prevention Act (FAPA), which provides, in relevant part, 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" (CPLR 3217 [e]; see L 2022, ch 821, § 8; *Bank of N.Y. Mellon v Stewart*, 216 AD3d 720, 723 [2d Dept 2023]).

Contrary to plaintiff's further contention, we conclude that, "[a]lthough the Legislature did not explicitly state that FAPA should apply retroactively, it clearly indicated that it should" (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 44 [1st Dept 2023]; see *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1067-1068 [2d Dept 2024] [*Dagrín*]; see generally *Jacobus v Colgate*, 217 NY 235, 240 [1916] [citation omitted]). The plain language of the legislation requires FAPA to be retroactively applied, with section 10 providing that FAPA applies "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; see *Dagrín*, 233 AD3d at 1068). Additionally, "FAPA is remedial in nature . . . , and the 'take-effect-immediately' language and the statements in the legislative memoranda in support of FAPA evince a sense of urgency" (*Genovese*, 223 AD3d at 45). It is an "axiom of statutory interpretation, and an exception to the presumption against

retroactive application, that 'remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose' " (*Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 22 [2d Dept 2022], lv dismissed 39 NY3d 1118 [2023]).

We also conclude that the retroactive application of FAPA to this action does not infringe upon plaintiff's rights to substantive and procedural due process and does not violate the Contract Clause or Takings Clause of the United States Constitution (see US Const, art I, § 10 [1]; Amend V). Pursuant to its own terms, FAPA took effect immediately upon its passage 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), and was enacted to overrule existing law that had "allow[ed] noteholders to abuse the foreclosure process by manipulating and extending the statute of limitations to the detriment of homeowners," contrary to legislative intent (*U.S. Bank N.A. v Lynch*, 233 AD3d 113, 117 [3d Dept 2024], appeal dismissed 43 NY3d 985 [2025]; see *Deutsche Bank Natl. Trust Co. v Goldwasser*, 237 AD3d 1291, 1293 [3d Dept 2025] [*Goldwasser*]). Retroactive legislation will satisfy due process if " 'the retroactive application of the legislation is . . . justified by a rational legislative purpose' " (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 158 [2017], cert denied 584 US 1013 [2018], quoting *Pension Benefit Guaranty Corporation v R.A. Gray & Co.*, 467 US 717, 730 [1984]) and here, inasmuch as the remedial legislation is "rationally related to the legitimate legislative purpose of providing a mechanism for parties to resolve their disputes with finality," we conclude "that retroactive application of FAPA to foreclosure actions where a final judgment has not been enforced does not violate plaintiff's due process rights" (*Goldwasser*, 237 AD3d at 1293-1294; see *Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 531-532 [1st Dept 2024]; *Dagrín*, 233 AD3d at 1069).

The Contract Clause prohibits states from enacting laws "impairing the Obligation of Contracts" (US Const, art I, § 10 [1]; see *American Economy Ins. Co.*, 30 NY3d at 149; *Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 58 [2011]). Here, plaintiff "has identified no contractual provision that entitled it to [unilaterally] revoke a prior acceleration of the mortgage loan debt" and reset the statute of limitations by the mere voluntary discontinuance of an action, and, thus, has failed to establish any violation of the Contract Clause (*FV-1, Inc. v Palaguachi*, 234 AD3d 818, 822 [2d Dept 2025]; see *Goldwasser*, 237 AD3d at 1294; *Dagrín*, 233 AD3d at 1069-1071). Similarly, inasmuch as plaintiff did not have the right to unilaterally revoke a prior acceleration of the mortgage loan debt and reset the statute of limitations by the mere voluntary discontinuance of an action, FAPA did not impair a vested right in violation of the Takings Clause (see *Dagrín*, 233 AD3d at 1071; *US Bank N.A. v Williams*, 80 Misc 3d 258, 266-267 [Sup Ct, Putnam County 2023]).

Finally, we agree with defendant on his cross-appeal that, inasmuch as Supreme Court properly granted defendant's cross-motion and dismissed the complaint with prejudice, it should have issued a

judgment on defendant's counterclaim pursuant to RPAPL article 15, cancelling and discharging the mortgage in the real property records (see RPAPL 1501 [4]; *Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co.*, 189 AD3d 20, 29 [4th Dept 2020], *affd* 38 NY3d 467 [2022]; see also *Deutsche Bank Natl. Trust Co. v Sylvestre*, 238 AD3d 980, 982 [2d Dept 2025]). We therefore modify the order and remit the matter to Supreme Court to grant an appropriate judgment (see *Batavia Townhouses, Ltd.*, 189 AD3d at 29-30).

We have reviewed plaintiff's remaining contentions and conclude that none warrants reversal or further modification of the order.