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| <b>Equity Recovery Corp. v Kahal Minchas Chinuch of Tartikov</b> |
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| 2014 NY Slip Op 32617(U) |
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| September 22, 2014 |
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| Sup Ct, Kings County |
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| Docket Number: 501513/14 |
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| Judge: Debra Silber |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9****EQUITY RECOVERY CORP. and 1174 MAZEL  
LLC,****Plaintiffs,****-against-****KAHAL MINCHAS CHINUCH OF TARTIKOV,****Defendant.****DECISION/ORDER/  
JUDGMENT****Index No. 501513/14****Submitted: 7/10/14  
Motion Sequence #1 & 2****HON. DEBRA SILBER, A.J.S.C.:**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion to dismiss defendant's counterclaim and for summary judgment and defendant's cross-motion to consolidate.

| <b>Papers</b>                                                 | <b>Numbered</b> |
|---------------------------------------------------------------|-----------------|
| Notice of Motion, Affirmation and Exhibits Annexed.....       | <u>1-7</u>      |
| Notice of Cross-Motion, Affirmation and Exhibits Annexed..... | <u>8-14</u>     |
| Affirmation in Opposition and Reply and Exhibits Annexed..... | <u>15-17</u>    |
| Reply.....                                                    | <u>18-20</u>    |

Upon the foregoing cited papers, the decision/order on these motions is as follows:

Plaintiffs move, pursuant to CPLR § 3211(a)(7), to dismiss the defendant's counterclaim, and for summary judgment. Defendant cross-moves pursuant to CPLR § 602, to consolidate this action with a pending foreclosure action.

This is a declaratory judgment action brought pursuant to RPAPL § 1501(4) for cancellation and discharge of a mortgage held by defendant and recorded against two properties, one property owned by plaintiff Equity Recovery Corp. and one property owned by plaintiff 1174 Mazel LLC, and to declare such property to be free therefrom, on the grounds that the six year statute of limitations for commencement of an action to

foreclose said mortgage has expired. CPLR § 213(4). When the statute of limitations has expired for commencement of an action to foreclose a mortgage, any person having an estate or interest in the real property may maintain an action under RPAPL § 1501(4) to secure the cancellation and discharge of record of the encumbrance, and to adjudge the property to be free from such encumbrance.

Defendant has counterclaimed for payment of the mortgage, wherein they claim that if plaintiffs are determined to be the assignees of the original debtor's obligations, then they owe defendant the money.

Plaintiffs produce the deeds for the two properties. They also produce the mortgage granted to defendant, dated April 14, 2005, secured by both of the properties, 1172 41<sup>st</sup> Street, Block 5592, Lot 35, conveyed to plaintiff Equity and 1174 41<sup>st</sup> Street, Block 5592, Lot 37, conveyed to plaintiff Mazel. Plaintiffs obtained title in 2009, subject to the mortgages thereon, from the New York City Sheriff in a sale to satisfy a judgment against the former owner, Nuchem Aber.

The affirmation of Nuchem Aber states that he executed and delivered to defendant a note and mortgage secured by the two properties on April 14, 2005. He is the only mortgagor thereon. He was the sole owner of the properties at that time, which was prior to the sheriff's sale. The original principal indebtedness was \$800,000. It was payable in monthly installments of \$9,333.33 payable on the first day of each month until October 1, 2006, when the entire unpaid balance became due, together with accrued interest on the unpaid balance computed as of April 5, 2005, at 14% per annum.

Plaintiffs contend that the the six year statute of limitations ran on October 1, 2012, as the mortgagee has not commenced a foreclosure action.

In response, defendant has cross-moved to join this action with one entitled *Everhome Mortgage Co. v Aber*, Index # 10540/2009. The *Everhome* matter is a foreclosure action on one of the two properties herein, 1172 41<sup>st</sup> Street. Kahal Minchas Tartikov, the defendant in the instant action, is also a named defendant in the *Everhome* action, in its capacity as a junior mortgagee.

The *Everhome* mortgage foreclosure action was dismissed, and the dismissal order was entered on April 15, 2014, after this motion was filed but before it was argued. Thus the defendant's motion which seeks to consolidate should have been withdrawn at oral argument, and is denied as academic. It is noted that there is a different *Everhome* action, against the other property, 1174 41<sup>st</sup> Street, Ind. 2415/09 which is still pending. Defendant's attorney filed a notice of appearance in that action in 2009. The defendant's cross-motion makes no reference to that action.

Plaintiffs have made out a prima facie case for the relief requested in their motion. RPAPL § 1501(4) has been satisfied, and defendant fails to overcome the motion and raise a triable issue of fact. Therefore, the motion is granted in its entirety. Plaintiffs' motion for summary judgment declaring that the subject mortgage should be extinguished on the grounds that the statutory limitations period applicable to the foreclosure of the mortgage has expired and was not abated or tolled is granted. *JBR Constr. Corp. v Staples*, 71 AD3d 952 (2d Dept 2010). As the defendant's counterclaim is also barred by the statute of limitations in that it is a claim arising from the same time-barred mortgage and note, the counterclaim is dismissed.

Therefore, it is hereby

**ORDERED** that the subject mortgage, entered in to by Nuchem Aber as mortgagor and Kahal Minchas Chinuch of Tartikov as mortgagee, dated April 14, 2005,

and recorded April 22, 2005 in the office of the Register of Kings County, CRFN 2005000235041, against Block 5592 Lots 35 and 37, is hereby declared to be invalid, cancelled and discharged, pursuant to RPAPL 1501(4), and the Office of the Register of Kings County is directed to cancel and discharge said mortgage of record.

The foregoing constitutes the Decision, Order and Judgment of this Court.

Dated: Brooklyn, New York  
September 22, 2014

**ENTER:**

  
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**Hon. Debra Silber, A.J.S.C.**

**Hon. Debra Silber**  
**Justice Supreme Court**

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