Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN** IA PART 36
Justice

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BANK OF AMERICA, N.A., ETC.,

Plaintiff(s),

-against-

SOLOMON FACHLAEV, ET AL,

Defendant(s).

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Index No.: 707497/15
Motion Date *CMP*:10/19/15
(Rcv'd Pt. 36 10/28/15)
Motion Cal. No CMP: 23
Motion Seq. No.: 1

Settlement Conference Date 2/17/16 #11

The following numbered papers read on this motion by defendant Solomon Fachlaev pursuant to CPLR 3211(a)(1), (3), (4), (5) and (7) and Standards and Administrative Policies (22 NYCRR) §§ 130.1.1 and 130.1.2 dismissing this action with prejudice and for costs and sanctions.

PAPERS	NUMBERED
Notice of Motion - Affidavits - Exhibits	1 - 5
Answering Affidavits - Exhibits	6 - 11
Supplemental Affirmation	12
Further Reply Papers	13 - 15
Order - Stipulation	16 - 17

The prior decision dated March 9, 2016 is hereby recalled and the following is substituted in its stead.

In the interest of judicial economy, as well as the case being ripe for settlement, this matter was set down for a settlement conference by order dated November 17, 2015 for December 9, 2015 which was ultimately adjourned to February 17, 2016. However, despite the Court's best efforts, no settlement was reached.

Now, upon the foregoing cited papers and after conference, it is ordered that defendant's motion is determined as follows:

Defendant Solomon Fachlaev executed a mortgage to plaintiff on November 14, 2006 against the real property known as 147-24 68th Road, Flushing, New York to secure a note evidencing a loan in the amount of $648,750. On June 16, 2009, plaintiff commenced a foreclosure action entitled *Bank of America, N.A. v Fachlaev*, (Sup Ct, Queens County, Index No. 15859/09) based upon the alleged default in payment by Fachlaev of the monthly mortgage installment due on January 1, 2009 and monthly thereafter.

In an order dated April 8, 2010, an order of reference was granted. Fachlaev then moved to vacate the order of reference and to dismiss the complaint based upon lack of personal jurisdiction. By order dated April 30, 2012 the Court ordered a traverse hearing on the issue of proper service of process. In an order dated March 11, 2014, after a traverse hearing was conducted, the court held that the plaintiff failed to prove proper service of the complaint and directed plaintiff to re-serve the defendant borrower within 120 days or the

complaint would be dismissed. The defendant borrower then moved to cancel the notice of pendency. In an order dated October 6, 2014, the court granted the motion, dismissed the action and directed the cancellation of the notice of pendency.

The plaintiff then commenced this action on July 16, 2015, seeking to foreclose the mortgage which was the subject of the prior action based upon the same alleged default in payment. The defendant has moved to dismiss the complaint based upon *res judicata* and the statute of limitations. Pursuant to an order of this Court the parties were directed to appear for a settlement conference. At the conference the Court allowed the parties to file further papers on this motion. Despite the Court Rules requiring the submission of working papers with e-file papers, this Court will in this instance consider the papers that were e-filed by the parties without the submission of working copies to the Court.

The defendant Fachlaev first moves pursuant CPLR 3211(a)(5) to dismiss on the grounds of *res judicata*. The prior action was dismissed based upon lack of personal jurisdiction. Thus, the prior adjudication was not on the merits and cannot be relied upon by the defendant for *res judicata* purposes (*Kokoletsos v Semon*, 176 AD2d 786 [2d Dept 1991]). Therefore, the branch of the motion to dismiss based on *res judicata* is denied.

The defendant Fachlaev next moves to dismiss based upon the expiration of the statute of limitations. An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213[4]). The defendant Fachlaev argues that the statute of limitations of the entire debt ran from the date of the first default of January 1, 2009 and that the statute of limitations for the entire mortgage action expired as of January 1, 2015. This argument is without merit. With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). The default date was only the start of the statute of limitations as to the installment payment that became due on that date. However, once a mortgage debt is accelerated the entire amount is due and the statute of limitations begins to run on the entire debt (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt. Thus, the statute of limitations for the entire debt did not begin to run until the plaintiff elected to accelerate under the acceleration clause of the mortgage.

It is undisputed that the plaintiff elected to accelerate the loan in the complaint of the first action, which was filed on June 16, 2009. This action was not commenced until July 16, 2015, which is more than six-years after the acceleration in the complaint and, thus, without any further action by the lender this complaint would be barred by the statute of limitations. A lender, however, may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in borrower's position in reliance thereon. This must be done by an affirmative act occurring within the statute of limitations period (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606). Here, the plaintiff lender has submitted evidence that it sent a de-acceleration letter to the borrower on April 21, 2015. This letter is sufficient on a motion to dismiss to constitute proof raising an issue of fact as to an affirmative act of revocation.

Thus, if April 21, 2015 was within the applicable statute of limitations the defendant is not entitled to dismissal as a matter of law even though this action was brought more than six-years after the plaintiff accelerated the loan in the complaint of the first action.

The plaintiff argues that the loan was not accelerated until the commencement of the original action. The defendant, on the other hand, argues that the loan was in fact accelerated at an earlier date. The defendant argues that the plaintiff sent default letters to him on February 15, 2009 and March 4, 2009 which accelerated the loan as of the cure date contained within the letter.[1] Each of the letters sent by the plaintiff contained a warning that stated if the debt of the defendant was not paid within 32 days that the lender will accelerate the debt and commence foreclosure proceedings without further notice to the debtor. These letters were insufficient to actually accelerate the debt as it does not provide clear and unequivocal notice to the defendants that the entire debt was being accelerated. A letter discussing a possible future event does not constitute an exercise of the optional acceleration clause (*see Goldman Sachs Mtge. Co. v Mares*, 135 AD3d 1121 [3d Dept 2016]); *Pidwell v Duval*, 28 AD3d 829 [3d Dept 2006]; *Chase Mtge. Co. v Fowler*, 280 AD2d 892 [4th Dept 2001]). The defendant's reliance on *First Fed. Sav. Bank v Midura*, (264 AD2d 407 [2d Dept 1999]) is misplaced. The Court in *Midura* did not hold, as the defendant argues, that a default letter on its own accelerated the debt. Rather, the Court found that the letter states that the loan would be accelerated if the debt was not paid by a certain date and that the lender, after payment was not made by the date stated in the letter, then accelerated the loan. Here, the defendant Fachlaev has not shown that the plaintiff took any affirmative action to actually accelerate the loan prior to the commencement of this action. The defendant has failed to show as a matter of law that the debt was accelerated at a date prior to the commencement of this action. Therefore, the defendant has failed to establish as a matter of law that this action to foreclose is barred by the statute of limitations. Though, the denial of the motion to dismiss based on the statute of limitations is without prejudice to the defendant raising the statute of limitations as an affirmative defense.

Finally, in the event the plaintiff is successful in this action, however, it will be limited to those unpaid installments which accrued within the six-year statute of limitations periods prior to the commencement of the action (*see Wells Fargo Bank N.A. v Cohen*, 80 AD3d at 754). The plaintiff might be able to collect further if it can establish that it properly sent a RPAPL 1304 notice and that the sending of that notice tolled the statute of limitations for 90 days.

Accordingly, the motion by defendant Fachlaev to dismiss the complaint and for sanctions and costs is denied.

FILED

APR 19 2016

COUNTY CLERK
QUEENS COUNTY

Date: April 5, 2016

DICCIA T. PINEDA-KIRWAN, J.S.C.

[1] The Court notes that the letters appear to reference two different loan numbers and it is unclear which loan is the subject of this action.