SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------X

MATTHEW MAZZELLA and MELVIN CARO,

Plaintiffs,

- against -

CAPITAL ONE, N.A., MORTGAGE ELECTRONIC RECORDING SYSTEMS, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant.

----------X

DECISION & ORDER

Index No. 161010/15
Mot. Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THE MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION (001) AND AFFIDAVIT ATTACHED	1 (Exhs 1-13)
MEMORANDUM OF LAW IN SUPPORT	2
NOTICE OF CROSS MOTION AND AFFIDAVIT ATTACHED	3 (Exhs 1-15)
MEMORANDUM OF LAW IN SUPPORT AND IN OPPOSITION	4
AFFIRMATION IN SUPPORT AND IN OPPOSITION	5
MEMORANDUM IN OPPOSITION AND IN FURTHER SUPPORT	6
REPLY TO OPPOSITION	7 (Exhs 1-2)

In this action seeking, in essence, a judgment declaring that the premises they own are no longer encumbered by a mortgage, plaintiffs Matthew Mazzella ("Mazzella") and Melvin Caro

("Caro") (collectively "plaintiffs") move, pursuant to CPLR 3212 and CPLR 3025, for summary judgment, for leave to amend their amended complaint, and to amend the caption.

Defendants Capital One, N.A. ("Capital One") and Mortgage Electronic Registration Systems, Inc. ("MERS") cross-move, pursuant to CPLR 3212, for summary judgment in their favor, and, pursuant to CPLR 3025, for an order permitting Capital One to add a counterclaim and a third-party complaint seeking to foreclose on plaintiffs' mortgage. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, **the motion is decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND

The amended complaint alleges as follows: plaintiffs own the real property located at 207 Cabrini Boulevard, New York, New York 10033 ("the Property") (amended complaint, ¶ 2). Chevy Chase Bank, FSB ("Chevy Chase Bank"), the lender in connection with the mortgage described below ("the Mortgage"), was merged into Capital One on July 30, 2009 (*id.*, ¶ 3). MERS is the mortgagee of record in the Mortgage (*id.*, ¶ 4).[1]

Plaintiffs claim that they own and possess the Property in fee simple (*id.*, ¶ 7). They assert that, contrary to defendants' claim, defendants have no interest in the Property (*id.*, ¶ 8). The claim is based on the Mortgage to the Property that plaintiffs executed to MERS on November 13, 2006. On December 4, 2006, the Mortgage was recorded in the office of the City Register for the City of New York (*id.*, ¶ 9).

[1]As discussed below, plaintiffs assert that Mortgage Electronic Recording Systems, Inc. was erroneously named in this action.

Plaintiffs claim that, by letter dated June 4, 2008, Capital One (by its predecessor in interest, Chevy Chase Bank), sent them a notice of default representing that all indebtedness secured by the Mortgage became due and payable on July 3, 2008. The entire indebtedness was not paid, and there has been no payment upon the Mortgage or indebtedness, whether by way of principal or interest, during the past six years (*id.*, ¶ 10). The running of the statute of limitations for the commencement of an action to foreclose the Mortgage or to bring any action on the bond[2] for principal or for any interest thereon has not been tolled or abated, and the bond and Mortgage have become barred by the statute of limitations. Any estate or interest that defendants ever had or claim to have had in the Property, or in any part thereof, and any liens or encumbrances thereon that may have existed or be claimed to have existed in favor of defendants, are null and void as against the estate and interest of plaintiffs in and to the Property. Plaintiffs thus maintain that they now hold the Property in fee simple, absolutely free and clear from any claim, lien, or encumbrance arising from the mortgage or the ownership thereof (*id.*, ¶ 12).

Plaintiffs seek judgment (1) barring defendants' claims to an estate or interest in the Property; (2) determining that plaintiffs are the lawful owners and vested with an absolute and unencumbered title in fee to the Property, free and clear of the bond and Mortgage; (3) directing the Clerk of the County of New York and the City Register for the City of New York to cancel and discharge of record the Mortgage; and (4) granting plaintiffs recovery of their costs, disbursements, and allowances against defendants.

[2] Plaintiffs refer to the debt as a bond, whereas defendants characterize it as a note.

In their answer, defendants state that plaintiffs allege that, by letter dated June 4, 2008, they were declared in default for failing to meet a construction deadline, and the loan was accelerated as of July 3, 2008. In 2008, however, Capital One, or its predecessor in interest, elected to (1) waive the alleged default; (2) extend the construction deadline; and (3) revoke or withdraw the acceleration of the loan. Plaintiffs acknowledged the foregoing in an "Extension Agreement," dated June 12, 2008 and "Construction/Permanent Loan Modification and Extension Agreement," dated October 29, 2008. The treatment of the note and Mortgage as nonaccelerated in 2008 is further confirmed by (1) monthly payments made by plaintiffs and accepted by Capital One or its predecessor through and including April 2009, and (2) by subsequent notices of default that Capital One issued, wherein it demanded only past due installment payments, and neither claimed the note and Mortgage were accelerated. The note and Mortgage have not been accelerated since. Therefore, urge defendants, plaintiffs' assertion that the statute of limitations to collect on the debt has expired, based on the acceleration of the note and Mortgage in 2008, is incorrect.

As a second affirmative defense, defendants assert that, among other communications, plaintiffs sent a letter to Capital One on March 2013 (a) requesting payoff numbers, and (b) acknowledging the loan and debt, and the existence of the Mortgage lien covering the Property. The foregoing constituted an acknowledgement of the debt, which, thereby, extended the statute of limitations.

In the instant motion, plaintiffs assert that their indebtedness was accelerated in July 2009 (rather than in 2008, as alleged in the amended complaint), and that all amounts were due in August 2009. No payment was made upon the Mortgage or indebtedness during the six years

prior to the commencement of this action and to date. Thus, they argue, any action to collect on the debt is time-barred.

As stated above, plaintiffs, in the amended complaint, allege that the Mortgage was accelerated in 2008. In addition to requesting summary judgment, plaintiffs seek to amend the complaint to reflect that, after receiving discovery from defendants, the relevant notice of default and acceleration is a letter produced by defendants dated July 19, 2009, which declared that plaintiffs' failure to cure the default by August 19, 2009 "shall result in the acceleration (immediately becoming due and payable in full) of the entire sum secured by the loan security instrument and the immediate institution of foreclosure proceedings by either strict foreclosure or by sale of the property by public auction."

In support of their motion, plaintiffs submitted an affidavit by Mazzella stating as follows: In November of 2006, plaintiffs were to receive the proceeds of a construction loan secured by the Mortgage. Capital One (through its predecessor, Chevy Chase Bank) wired the proceeds that were to be disbursed at the closing to the trust account of Bellettieri, Fonte & Laudonio, P.C. ("BF&L"), Capital One's attorneys for the deal. Of those proceeds, $200,000 were made payable by check to a third party with whom they were negotiating the terms of a mutual relationship unrelated to the Mortgage and loan. At the closing on November 13, 2006, plaintiffs received from BF&L a check payable to the third-party, but they held onto the check because of ongoing negotiations (Mazzella aff, ¶ 4). A few weeks later, on or about December 8, 2006, news releases reported that a partner at BF&L (Anthony Bellettieri) was accused of stealing more than $22 million from his clients (*id.*, ¶ 5). Thereafter, they were advised by phone

by BF&L's bank, JPMorgan Chase Bank, that the check payable to the third-party drawn from BF&L's trust account would not be honored, and that the account was closed (*id.*, ¶ 6).

In February 2007, Bellettieri pleaded guilty to bank and mail fraud in federal court (*id.*, ¶ 7). Plaintiffs demanded that Capital One replace the bad check from its attorneys, BF&L, with a new good check representing the $200,000 in proceeds that Capital One owed to them pursuant to the terms of the loan but Capital One refused to do so (*id.*, ¶ 8). Plaintiffs continuously demanded that Capital One credit them the $200,000 taken by their attorney and, after a final payment by plaintiffs in April of 2009, they stopped making payments on the loan, and it is undisputed that they have not made a payment since (*id.*, ¶ 9).

In a letter dated July 19, 2009, Capital One sent plaintiffs a notice of default, and all indebtedness secured by the Mortgage became due and payable on August 18, 2009. This acceleration was never rescinded or revoked, the entire indebtedness was not paid, and there has been no payment upon the Mortgage or indebtedness, whether by way of principal or interest, during the six years prior to the commencement of this action and to date (*id.*, ¶ 10).

Defendants did not submit an affidavit controverting these assertions.

Plaintiffs also seek to amend the caption to reflect the true name of one of the defendants, to strike Mortgage Electronic Recording Systems, Inc. from the caption as a defendant, because it is a misnomer for the proper corporate defendant, Mortgage Electronic Registration Systems, Inc. Defendants argue that the notice of default relied upon by plaintiffs did not accelerate the loan. They also argue that this Court should find that plaintiffs acknowledged the debt, in a March 2013 letter and 2013 emails, pursuant to General Obligations Law § 17-101. As an alternative, they assert that issues of fact exist regarding whether additional discovery is needed to

investigate the issue of the possible acknowledgment of the debt. They further contend that plaintiffs' request for summary judgment on the proposed complaint is procedurally improper. Additionally, defendants seek leave to assert a counterclaim and third party complaint against plaintiffs seeking foreclosure.

DISCUSSION

"[T]he statute of limitations period applicable to an action on a bond or note, the payment of which is secured by mortgage upon real property is six years" (CPLR 213 [4]; *CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st Dept 2007]). Regarding "a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]). Nevertheless, "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" (*id.* [internal quotation marks and citation omitted]).

"[T]he six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt" (*CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d at 51 [internal quotation marks and citation omitted]). "Where the holder of the note elects to accelerate the mortgage debt, notice to the borrower must be 'clear and unequivocal'"

(*Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dep 2016], quoting *Sarva v Chakravorty*, 34 AD3d 438, 439 [2d Dept 2006]).

Here, the notice to plaintiffs was "clear and unequivocal," and, therefore, the statute of limitations period began to run in August 2009. By letter to plaintiffs dated July 19, 2009, the "Collection Department Mortgage Loan Servicing Division" of Chevy Chase Bank stated that the loan was "in default because one or more monthly payments are past due." It further stated that:

> "We must receive payment in CERTIFIED FUNDS, in the amount of $17,734.95 on or before August 18, 2009 (which date is not less than 30 calendar days from the date of this notice), the payment of which sum will cure the default. Only the TOTAL AMOUNT DUE to reinstate the loan will be accepted. If payment is not received by August 18, 2009, additional costs, including attorneys' fees may be incurred for which you will be responsible. *Your failure to cure said default on or before said date shall result in the acceleration (immediately becoming due and payable in full) of the entire sum secured by the loan security instrument* and the immediate institution of foreclosure proceedings by either strict foreclosure or by sale of the property by public auction" (emphasis added).

Ex. 6 to Mazzella Aff.

Chevy Chase Bank's use of the phrase "shall result in the acceleration" indicates even greater certainty than the phrase "will accelerate," as was at issue in the recent decision in *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings* (2017 WL 1013457, 2017 NY App Div LEXIS 1933 [1st Dept, March 16, 2017, Index No. 850119/15]). In *Deutsche Bank Natl. Trust Co.*, the Court held that the use of the word "will" established that the bank accelerated the maturity date of the loan. The Court stated:

> "The letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it 'will' accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days, all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgages pursuant to the letters"

(2017 WL 1013457 at *1, 2017 NY App Div LEXIS 1933 at *1). "Shall" indicates a determination, promise, or inevitability (American Heritage Dictionary, Second College Edition, 1991 at 1125).

Defendants' reliance upon decisions such as *Goldman Sachs Mtge. Co. v Mares* (135 AD3d 1121 [3d Dept 2016]) is unavailing. In that case, the notice stated that "[f]ailure to pay the total amount past due, plus all other installments and other amounts becoming due hereafter . . . on or before the [30th] day after the date of this letter *may* result in acceleration of the sums secured by the mortgage," and the Court itself emphasized the word "may" (*id.* at 1122).

Also unavailing is defendants' reliance on *Pidwell v Duvall* (28 AD3d 829 [3d Dept 2006]). There, the notice stated that "if Duvall failed to make certain payments in the future, it *would* 'result in the entire balance of said Note and Mortgage being called all due and payable'" (emphasis added) (*id.* at 831). The Court characterized it as a "possible future event [that] did not constitute an exercise of the first mortgages optional acceleration clause."

Here, the notice also informed plaintiffs that "No further notice will be given prior to the initiation of legal action or foreclosure." Ex. 6 to Mazzella Aff. Thus, the failure to cure would result in the automatic acceleration of the debt; no further action would be taken by defendants. The only act that would stop the acceleration from taking effect would be an act by plaintiffs, which had not occurred.

Defendants also cite to letters sent to plaintiffs after the July 2009 notice which, they contend, only sought past amounts due. They argue that, if the loan had accelerated in July 2009, they would not have pursued only the sums required to cure the default. However, the fact that

defendants may have done this has no bearing on the fact that they unequivocally accelerated the debt.

As a second ground, defendants assert that plaintiffs acknowledged the debt, thereby extending the statute of limitations pursuant to General Obligations Law § 17-101 ("Acknowledgment or new promise must be in writing"), which provides:

> "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest."

"In order to constitute an acknowledgment of a debt under GOL § 17–101, a writing 'must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it'" (*Compañía de Inversiones de Engergía S.A. v AEI*, 80 AD3d 533, 533 [1st Dept 2011], quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

> "At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the Statute of Limitations running anew, but since 1848 that rule has been qualified by statute in this State to the extent of requiring the acknowledgment or new promise to be in a writing, signed by the party to be charged. The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it."

(*Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 520-521 [internal citation omitted], citing, among other decisions, *Connecticut Trust & Safe Deposit Co. v Wead*, 172 NY 497, 500 [1902] ["It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain

nothing inconsistent with an intention on the part of the debtor to pay it" [internal quotation marks and citations omitted]).

Defendants contend that Mazzella sent a letter to Capital One in March 2013, signed by him, (a) requesting payoff numbers from Capital One, and (b) acknowledging the loan and debt with Capital One and the existence of the Mortgage lien covering the Property. Defendants argue that the letter, combined with other email communications, did not include any statements inconsistent with plaintiffs' intention to pay the debt to Capital One.

However, this Court finds that an issue of fact exists regarding whether the communications satisfy General Obligations Law § 17-101.

The communications here, relied upon by defendants, include the March 13, 2013 letter from Mazzella to Capital One stating:

> "This letter serves as my written authorization to permit Jean L. Chou, P.C., as my attorney, to discuss the short sale prospect of the above property liened by the mortgage attached to Capital One Loan Number 0556042786. Please call me at (000) 000-0000 with any questions or concerns. Thank you."

Ex. 10 to Mazzella Aff.

That plaintiffs conceded recognition of the mortgage is insufficient. "[A]n acknowledgment is effective only if it imports an intention to pay or at least contains nothing inconsistent with an intention to pay" (*Curtiss-Wright Corp. v Intercontinent Corp.*, 277 App Div 13, 16 [1st Dept 1950]; *see also Estate of Vengroski v Garden Inn*, 114 AD2d 927, 928 [2d Dept 1985] ["The critical determination is whether the acknowledgment imports an intention to pay"]).

The other communications relied upon by defendants include the following: an email dated April 12, 2013, from Jean L. Chou, Esq. (as attorney for plaintiffs) to Cynthia Malone, Esq. (of the foreclosure department of the law firm representing Capital One), stating:

> "Cynthia, I represent the above borrower whose mortgage is owned by Capital One. I was retained to discuss repayment plans re: this file. My client was unfortunately a victim of the bank attorney Bellettieri's embezzlement scheme when the mortgage was first procured through Chevy Chase in 2006. When are you available to speak? Please let me know. Thank you, Jean."
>
> An email dated April 19, 2013, from Ms. Chou to Ms. Malone, stating:
>
> "Thanks, Cynthia. Please advise asap as my clients are in the midsts [sic] of negotiating several payment plans with creditors and we will need to know Capital's stance asap."
>
> An email dated June 18, 2013 from Mazzella to Ms. Malone, stating:
>
> "Hi Cynthia - we need a payoff statement ASAP reflecting the monies absconded by Capital Ones [sic] attorney as well as any interest accrued removed" (Exhibit 9).
>
> An email dated June 27, 2013 from Mazzella to Ms. Malone, stating:
>
> "Good morning Cynthia and the payoff team - your response with the adjusted payoff figure is imperative. Please advise ASAP. Thank you, Matthew Mazzella Team Lead, Client Implementations."
>
> Ex. 9 to Cross Mot.

As mentioned above, in his uncontroverted affidavit, Mazzella states that, as part of the transaction at issue, one of Capital One's attorneys (Bellettieri, who later pleaded guilty to mail and bank fraud) caused plaintiffs to suffer a $200,000 loss. Plaintiffs demanded that Capital One replace the bad check from BF&L with a new good check representing the $200,000 in proceeds that, he claims, Capital One owed them pursuant to the terms of the loan. Capital One refused to do so. Plaintiffs continuously demanded that Capital One credit them the $200,000 allegedly

taken by their attorney, but, after a final payment by them in April of 2009, they stopped making payments on the loan, and it is undisputed that they have not made a payment since.

As revealed by the plain language of the communications, quoted above, and relied upon by defendants, plaintiffs continued to dispute the amount due as a result of the $200,000 allegedly taken by their attorney. "My client was unfortunately a victim of the bank attorney Bellettieri's embezzlement scheme when the mortgage was first procured through Chevy Chase in 2006;" "we need a payoff statement ASAP reflecting the monies absconded by Capital One's attorney as well as any interest accrued removed;" "your response with the adjusted payoff figure is imperative." Ex. 9 to Cross Mot.

The communications present an issue of fact as to whether the communications satisfy the requirements of an acknowledgment pursuant to General Obligations Law § 17-101 (*see e.g. Zarintash v Kopple*, 234 AD2d 105, 106 [1st Dept 1996] ["plaintiff submitted letters dated prior to the expiration of the limitations period which bear defendant's signature and acknowledge her intent to repay the subject debts" and "raise issues of fact as to the applicability of the [s]tatute of [l]imitations"]; *Good Luck Prod. Co., Ltd. v Crystal Seafood Corp.*, 60 F Supp 3d 365, 372 [ED NY 2014] ["Ultimately, whether the email imports an intention to pay is a fact-specific inquiry that the Court cannot decide at this stage of the litigation"]; *Faulkner Arista Records LLC*, 602 F Supp 2d 470, 481 [SD NY 2009 [court found a question of fact as to whether the plaintiffs satisfied the condition set forth in the letters, and, thus, whether the defendant's writings constituted written acknowledgments of its debt sufficient to toll the statute of limitations under General Obligations Law § 17–101]).

A jury could find that the communications fail to satisfy the requirement that they contain "nothing inconsistent with an intention to pay." In stating, "we need a payoff statement ASAP reflecting the monies absconded by Capital One's attorney as well as any interest accrued removed," a fact-finder could determine that plaintiffs had not "unequivocally express[ed] an intent to pay" (*cf. Education Resources Inst., Inc. v Hawkins*, 88 AD3d 484, 485 [1st Dept 2011]). The intent to pay was not "unconditional" (*Faulkner v Arista Records*, 602 F Supp 2d at 479). In *Atlantic Natl. Trust LLC v Silver* (9 AD3d 321, 322 [1st Dept 2004]), the Court noted that the "letter explicitly refers to the loan, its June 1, 1993 maturity date and plaintiff's entitlement to immediate payment of the entire principal balance and accrued interest." Such is not the case here.

In support of their assertion that "any dispute as to the amount owed does not prevent the 2013 emails from being recognized as an acknowledgment," defendants cite *Chapman Waterproofing Co. v Reliance Ins. Co.* (2008 WL 5375235, 2008 NY Misc LEXIS 8055 [Sup Ct, New York County Dec. 1, 2008, Index No. 401260/08]) wherein the court held: "Contrary to Chapman's contention, the fact that the letter questions the amount of the debt and does not make reference to a sum certain does not render Chapman's acknowledgment conditional" (2008 WL 5375235, 2008 NY Misc LEXIS 8055, *14). In so holding, the court cited three decisions, all of which are distinguishable from the instant matter.

In *City of New York v North Riv. Hous. Dev. Fund Corp.* (12 AD3d 294 [1st Dept 2004]), the Court held that "defendant's May 1997 letter to plaintiff, stating that '[t]his income . . . would be applied . . . to our $82,000 mortgage arrears with the City,' constituted acknowledgment within the meaning of General Obligations Law § 17-101 that restarted the

statute of limitations. That payment was promised on receipt of a no action letter does not make the acknowledgment conditional, inconsistent with an intention to pay, or otherwise render section 17-101 inapplicable" (*id.* at 296 [internal citation omitted]). In *City of New York v North Riv. Hous. Dev. Fund Corp.*, the debtor expressly referred to the amount of the mortgage owed, stating that anticipated income "would be applied . . . to our $82,000 mortgage arrears with the City" (*id.*).

In *Banco do Brasil v State of Antigua & Barbuda* (268 AD2d 75 [1st Dept 2000]), the Court stated that defendants' letter to plaintiffs constituted an "acknowledgment or promise" within the meaning of General Obligations Law § 17-101, thereby reviving plaintiffs' otherwise time-barred claims. In its entirety, the letter referred to the parties' loan agreement, and confirmed "four balances," including "the original loan amount, accrued interest, past-due interest, and, adding up the first three balances, the total amount" (*id.* at 77). The Court stated that, even if the "recital of a repayment obligation that is current and increasing with time is something less than a new promise to pay a past-due debt, it clearly conveys and is consistent with an intention to pay, which is all that need be shown in order to satisfy section 17-101" (*id.* at 79).

In *Atlantic Natl. Trust LLC v Silver* (9 AD3d 321, 322 [1st Dept 2004]), the Court "held that the letter dated December 30, 1993, authored by the servicing agent for the loan and signed by defendant borrower, constituted an acknowledgment of defendant's debt, within the meaning of General Obligations Law § 17-101, which restarted the statute of limitations. The letter explicitly refers to the loan, its June 1, 1993 maturity date and plaintiff's entitlement to

immediate payment of the entire principal balance and accrued interest." The Court determined that, even though the letter also set forth a new schedule for repayment of the debt, that did not make the defendant's acknowledgment conditional, because "[i]n its entirety, the letter clearly conveys and is consistent with an intention to pay an existing debt" (*id.*).

A fact finder could determine that, even if the communications expressed an intent to pay, it was conditioned upon defendants' crediting plaintiffs with the $200,000 absconded by the attorney. "While an express promise to pay conditioned upon the debtor's future ability has been held sufficient to start the statute of limitations running anew, the burden is on the creditor to show that the condition has been performed" (*Flynn v Flynn*, 175 AD2d 51, 52 [1st Dept 1991], *appeal denied* 78 NY2d 863 [1991]).

Defendants also argue that, if plaintiffs' income tax returns do not reflect the alleged cancellation of the debt, then plaintiffs either acknowledge that the debt is still in existence, or they committed tax fraud. However, tax fraud is not at issue in this action. As for acknowledgment of the debt, "the mere fact that the debt was carried on defendant's books and tax returns would not, in and of itself constitute the required acknowledgment. The critical determination is whether the acknowledgment imports an intention to pay" (*Estate of Vengroski v Garden Inn*, 114 AD2d 927, 928 [2d Dept 1985]). *In Lynford v Williams* (34 AD3d 761 [2d Dept 2006]), the Court explained why:

> "Assuming arguendo that the references to the debt in the financial aid application and the alleged statement of net worth otherwise satisfied the elements of a valid acknowledgment, it is undisputed that these documents were neither communicated to the plaintiff or to anyone on his behalf, nor intended to influence the plaintiff's conduct in any manner. Indeed, the plaintiff did not learn of the subject documents until after he commenced this action, and it is clear that he did not delay commencement of the action based on their contents. Accordingly, absent such

> communication to the plaintiff, these documents do not suffice to take this action out of the operation of the statute of limitations"

(*id.* at 762 [internal citations omitted]). Therefore, in *Chase Manhattan Bank v Polimeni* (258 AD2d 361 [1st Dept 1999], *lv dismissed* 93 NY2d 952 [1999]), the Court held that the "defendant's personal financial statement, which carried his debts to plaintiff at issue herein, constituted an 'acknowledgment or promise' within the meaning of General Obligations Law § 17-101, and was sufficient to revive plaintiff's time-barred claims on those debts" (258 AD2d at 361). But that was because the "defendant authorized his secretary to sign the transmittal letter covering the financial statement *and to send those documents to plaintiff*" (*id.* [emphasis added]). Defendants here do not assert that plaintiffs sent any such financial statements to them.

As for amending the complaint, plaintiffs assert that the allegations in the complaint relied on an earlier acceleration. They also contend that such a pre-note of issue amendment would not prejudice defendants, since there is no surprise and the notice of default was in defendants' possession and was provided to Plaintiffs by defendants during discovery.

The request to permit amendment of the complaint is granted. Defendants have not shown an "indication" that they have been "hindered" in the preparation of their case, or that they have been prevented from taking some measure in support of their position (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 24 (1981), *rearg denied* 55 NY2d 801 [1981]). This is especially true here, where plaintiffs are not seeking to add a cause of action or expand upon the relief sought.

The request to amend the caption to remove defendant Mortgage Electronic Recording Systems, Inc. is unopposed and granted.

Capital One requests leave to add a counterclaim and third-party complaint for foreclosure against plaintiffs and proposed third-party defendants City of New York Department of Finance and John Doe and Mary Doe. Capital One avers that the counterclaim involves the same parties and property, and largely the same witnesses and documentary evidence, as plaintiffs' claim against defendants. Both sets of claims concern the parties' interest in the Property. It contends that it could file a separate foreclosure action, but it would be more efficient to resolve these competing claims together.

It also claims that granting leave to amend will cause no undue prejudice to plaintiffs, especially because plaintiffs also seek leave to amend their pleading. Discovery is ongoing in this action. The request is unopposed and granted.[3]

Finally, as to discovery, as discussed above, defendants have not established an entitlement to copies of plaintiffs' tax returns. Any other discovery issues are to be addressed at conference.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Matthew Mazzella and Melvin Caro for summary judgment and for leave to amend the complaint and caption is granted to the extent of granting leave to amend the complaint and caption, and is otherwise denied; and it is further,

[3]Defendants submit a proposed amended answer containing a counterclaim and third-party complaint (annexed to cross motion as Ex. 15). However, since defendants are being ordered herein to respond to the proposed second amended complaint, this Court will not order that the amended answer be in the same form as Ex. 15.

ORDERED that the caption shall hereinafter read as follows:

----------X
MATTHEW MAZZELLA and MELVIN CARO,

Index No. 161010/15

Plaintiffs,

- against -

CAPITAL ONE, N.A. and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant.
----------X

and it is further,

ORDERED that the proposed second amended complaint attached to plaintiffs' motion papers as Exhibit 9 shall be deemed served upon defendants upon service of a copy of this Decision and Order with notice of entry; and it is further,

ORDERED that defendants' time to serve an answer to the second amended complaint, with a proposed counterclaim and third party complaint, is extended until 20 days after the service upon them of a copy of this Decision and Order with notice of entry; and it is further,

ORDERED that the cross motion by defendants Capital One, N.A. and Mortgage Electronic Registration Systems, Inc. is granted to the extent of permitting Capital One, N.A,. leave to add a counterclaim and third-party complaint for foreclosure against plaintiffs and proposed third-party defendants City of New York Department of Finance and John Doe and Mary Doe, and is otherwise denied; and it is further,

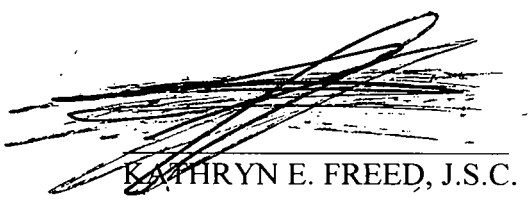
ORDERED that the plaintiffs' reply to the counterclaim shall be served not later than 20 days following defendants' service of their answer; and it is further,

ORDERED that counsel for the parties are directed to appear at a preliminary conference scheduled for June 27, 2017, at 2:30 p.m., in Part 2, Courtroom 280, at 80 Centre Street New York, New York; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: April 10, 2017

ENTER:



KATHRYN E. FREED, J.S.C.