SHORT FORM ORDER

INDEX NO. 611910/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-19-16
ADJ. DATE 5-10-16
Mot. Seq. # 001 - MD

CHRISTIANA TRUST, A Division of Wilmington Savings Fund Society, FSB, as Trustee for Normandy Mortgage Loan Trust, Series 2013-18,

Plaintiff(s),

- against -

Himon Barua, Emon Barua, et al.,

Defendant(s).

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants, dated March 10, 2016, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated April 12, 2016, and supporting papers; (3) Reply Affirmation by the defendant, dated May 9, 2016, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (001) by the defendant, Himon Barua, which seeks dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(5) is hereby denied; and it is further

ORDERED that counsel for the plaintiff ("Christiana Trust") shall promptly serve a copy of this Order upon counsel for all parties via First Class Mail, and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

On or about July 25, 2006, defendant Himon Barua purchased real property located at 295 Wurz Street, Brentwood, NY 11717, which was secured by a note and mortgage in the amount of $312,000 held by the original lender, JP Morgan Chase Bank ("Chase Bank"). After defendant defaulted on the loan, Chase accelerated the mortgage and note and commenced a foreclosure action on November 6, 2009 under

Index Number 44000-2009. Thereafter, Chase Bank filed a motion for voluntary discontinuance of the 2009 action, which was granted by Hon. Justice Denise Molia by Order, dated October 15, 2013. On or about December 30, 2013, Chase purportedly assigned the note and mortgage to plaintiff here, Christiana Trust, which commenced this second foreclosure action against Barua by the filing of a summons and complaint and lis pendens on November 10, 2015. In this motion, defendant Barua seeks dismissal of this second action pursuant to CPLR 3211(a)(5), on the grounds that the action is time barred under the six-year statute of limitations set forth in CPLR 213(4).

Pursuant to CPLR 3211(a)(5), a party may move for dismissal "on the ground that . . . the cause of action may not be maintained because of . . . [a] statute of limitations." An action to foreclose a mortgage bears a six-year statute of limitations (CPLR 213[4]; see *Kashipour v Wilmington Savings Fund Society, FSB*, 144 AD3d 985, 41 NYS3d 738 [2d Dept 2016]. Generally, a mortgage foreclose action may be brought to recover unpaid amounts due within the six-year period immediately preceding the action (see CPLR 213[4]; *Nationstar Mortgage, LLC v Weisblum*, 143 AD3d 866, 39 NYS3d 491 [2d Dept 2016]).

When a mortgage is payable in installments, separate causes of action accrue for each unpaid installment and the statute of limitations begins to run on the date each installment becomes due, unless the mortgage debt is accelerated (see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]; *Esther M. Mertz Trust v Fox Meadow Partners, Ltd.*, 288 AD2d 338, 734 NYS2d 77 [2d Dept 2001]; *Wells Fargo Bank, N.A v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 658 NYS2d 138 [2d Dept 1997]). However, where an installment payment mortgage is properly accelerated, the entire amount is due and the six year statute of limitations begins to run on the entire mortgage debt (see CPLR 213[4]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 2017 NY Slip Op 05230, 151 AD3d 1068, ___ NYS3d ___ [2d Dept 2017]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 720 NYS2d 161 [2d Dept 2001]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]).

A notice of acceleration served upon the borrower acceleration must be "clear and unequivocal" that the lender has elected to accelerate the entire mortgage debt (see *Sarva v Chakravorty*, 34 AD3d 438, 826 NYS2d 74 [2d Dept 2006]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]). The filing of a foreclosure summons and complaint and lis pendens serves as such notice (see *Clayton National, Inc. v Guldi*, 307 AD2d 982, 763 NYS2d 493 [2d Dept 2003]).

While a lender may revoke its election to accelerate the mortgage debt, such revocation can only be accomplished through an affirmative act by the lender, provided such revocation is made within the statute of limitations period, and provided there is no change in the borrower's position in reliance thereon (see *Kashipour v Wilmington Savings Fund Society, FSB*, 144 AD3d 985, 41 NYS3d 738 [2d Dept 2016]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 720 NYS2d 161 [2d Dept 2001]; *Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 432 NYS2d 238 [2d Dept 1980]). A foreclosure action is dismissible where the lender has made no affirmative act of revocation during the six-year statute of limitations period after the complaint was served in the prior foreclosure action in which the lender notified the borrower of its election to accelerate (see *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]; *Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 432 NYS2d 238 [2d Dept 1980]).

When an action is discontinued, everything done in the action is annulled, and it is as if the action had never been (see *Stone Mountain Holdings, LLC v Spitzes*, 119 AD3d 548, 990 NYS2d 39 [2d Dept 2014]; *Newman v Newman*, 245 AD2d 353, 665 NYS2d 423 [2d Dept 1997]; *Weldotron Corp. v Arbee Scales*, 161 AD2d 708, 555 NYS2d 844 [2d Dept 1990]). Therefore, an election to accelerate contained in a previously filed complaint is nullified when the plaintiff voluntarily discontinues that prior action (see *Wilmington Sav. Fund Society, FSB v DeCanio*, 55 Misc3d 1215(A), 57 NYS3d 677 [Sup Ct, Suffolk County 2017]; *U.S. Bank Nat. Ass'n v Wongsonadi*, 55 Misc3d 1207(A), 55 NYS3d 695 [Sup Ct, Queens County 2017]; *U.S. Bank Nat. Ass'n v Deochand*, 2017 NY Slip Op 30472[U] [Sup Ct, Queens County 2017]).

Here, the plaintiff's predecessor-in-interest, Chase Bank, moved for voluntarily discontinuance of the prior foreclosure action, which was granted by Order of Justice Molia, dated October 15, 2013. Such voluntary discontinuance constituted an affirmative act of revocation of the prior action. Therefore, when Christiana Trust's summons and complaint and notice of pendency were filed on November 10, 2015, the statute of limitations had not run and the action was timely commenced. Therefore, the defendant's motion to dismiss pursuant to CPLR 3211(a)(5) is denied.

This constitutes the Decision and Order of the Court.

Dated: September 7, 2017

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION