SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

U.S. BANK NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A. AS SUCCESSOR TO LASALLE BANK, N.A. AS TRUSTEE FOR THE MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-5,

Plaintiff(s),

- against -

SUSANNE M. COX, JPMORGAN CHASE BANK, N.A. FKA JPMORGAN CHASE BANK, CITIMORTGAGE, INC.,

Defendant(s).

DECISION & ORDER
Index No.: 67082/2016
Motion Date: 11/3/17

Plaintiff moves for an order, granting summary judgment in its favor, dismissing the defenses asserted in the answer, granting permission to treat the answer as a limited notice of appearance, appointing a referee to compute, amending the caption, deeming all non-appearing defendants in default and fixing and determining the default, extinguishing and foreclosing the interests of certain defendants in the mortgaged premises. Defendant Susanne M. Cox (defendant) cross moves for an order, dismissing the action due to the expiration of the statute of limitations or granting summary judgment in her favor.

The following papers were read:

Notice of Motion (#003), Affirmation, Exhibits (18), and Memo of Law	1-21
Notice of Motion (#003a), Aff'n, Exs (18), Proposed Order, and Memo of Law	22-43
Notice of Cross-Motion (#004), Affirmation, Affidavit, and Exhibits (8)	44-54
Affirmation in Opp'n and Reply	55
Affirmation in Reply	56

By way of background, on November 15, 2016, plaintiff commenced this action to foreclose a mortgage (Mortgage) on real property known as 424 Washington Avenue, Pleasantville, New York. The complaint alleges that defendant defaulted on her payment obligations as of May 1, 2011. Plaintiff now moves for, among other things, summary judgment and defendant cross moves to dismiss or for summary judgment.

In establishing its *prima facie* entitlement to judgment as a matter of law, plaintiff has produced the mortgage, the unpaid note, evidence of default, and has demonstrated that the affirmative defenses are without merit (*see Mendel Group, Inc. v Prince*, 114 AD3d 732, 733 [2d Dept 2014]). In particular, plaintiff addresses, at some length, defendant's affirmative defense based on the statute of limitations. Initially, plaintiff notes that it had commenced a prior foreclosure action in 2009 under index number 28888/2009 (Prior Action), which was discontinued in or about 2012. However, plaintiff contends that the subject mortgage did not permit acceleration of the debt prior to judgment and, as no judgment was entered in the Prior Action, the mortgage debt was not accelerated. Plaintiff also contends that, even if the Court finds that there was an effective acceleration of the mortgage debt, plaintiff provided defendant with a de-acceleration letter on October 12, 2015, which was prior to the expiration of the statute of limitations. Based hereon, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In response, defendant contends that plaintiff accelerated the mortgage debt with the commencement of the Prior Action and with it the applicable six-year statute of limitations began to run. Additionally, defendant contends that plaintiff's purported de-acceleration letter was ineffective as it was sent by plaintiff's counsel, not plaintiff, and because plaintiff's purported counsel failed to include any authority to act on behalf of plaintiff. Furthermore, defendant contends that plaintiff has failed to demonstrate compliance with the notice requirements of RPAPL § 1304. Specifically, defendant notes that the purported notice states that defendant has been in default for 2330 days or since July 1, 2009. However, defendant notes, plaintiff's affidavit of merit fixes the default date as May 1, 2011. As such, defendant contends, the purported notice is invalid. In addition, defendant contends that plaintiff has failed to proffer sufficient proof of the mailing of such notice. Based hereon, defendant contends that plaintiff's motion should be denied and the action dismissed.

Defendant has failed to establish the existence of a material issue of fact or otherwise present a basis to deny plaintiff's motion. It is well settled that once a mortgage debt is accelerated, the entire amount becomes due and the statute of limitations begins to run (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). However, under New York law, a mortgage lender may revoke its election to accelerate all sums due under an optional acceleration clause, provided that there is no change in the borrower's position in reliance thereon (*see Fed. Nat. Mortg. Ass'n v Mebane*, 208 AD2d 892, 894 [2d Dept

1994]). A mortgage lender accomplishes the revocation by means of an affirmative act within the statute of limitations (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 606 [2d Dept 2001]).

In the Prior Action, the complaint alleges that defendant defaulted on her payment obligations as of July 1, 2009 and, "[a]ccordingly, Plaintiff elects to call due the entire amount secured by the mortgage." As such, the applicable statute of limitations began to run when this was provided with to defendant (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]). However, plaintiff has produced competent evidence that it revoked this acceleration by serving a de-acceleration letter on defendant on or about October 12, 2015, which was within the applicable six-year statute of limitations. In addition, defendant has failed to show that she suffered any undue prejudice as a result of this revocation. As such, the instant action is not time-barred.

Regarding plaintiff's compliance with RPAPL § 1304, defendant's arguments are also unavailing. RPAPL § 1304 (1) requires that notice be provided to the borrower, which shall include, among other things, the statement that as to how long the subject loan has been in default. As noted above, the Prior Action fixed the default date at July 1, 2009. Thus, when plaintiff served defendant prior to the commencement of this action with the 90-day notice, which again fixed the default date at July 1, 2009, there could not be any confusion. That the complaint in this action fixes the default date at May 1, 2011 does not invalidate the effectiveness of the 90-day notice. Additionally, plaintiff has provided competent evidence that it served defendant with the 90-day notice and defendant has produced no evidence to undermine this showing.

Based upon the foregoing, plaintiff's motion for summary judgment is granted and defendant's cross-motion to dismiss is denied. There being no opposition to the remaining relief sought by plaintiff and there being nothing facially improper about this relief, the Court grants the remainder of plaintiff's motion. The Court will sign plaintiff's proposed order, as modified, contemporaneously herewith.

Dated: January 24, 2018
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court