

**U.S. Bank Trust, N.A. v Dromerhauser**

2018 NY Slip Op 33663(U)

April 11, 2018

Supreme Court, Suffolk County

Docket Number: 600435/2017

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 600435/2017  
CAL No. \_\_\_\_\_

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 1-31-17  
SUBMIT DATE 3-8-18  
Mot. Seq. # 01 - MD

-----X  
U.S. BANK TRUST, N.A., as Trustee for LSF9  
MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

ROBERT DROMERHAUSER A/K/A ROBERT  
C. DROMERHAUSER, MARY K.  
DROMERHAUSER, NORA M. MAHER, ET  
AL.,

Defendants.  
-----X

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**PETER D. TAMSEN, P.C.**  
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Upon the following papers numbered 1 - 38 read on this motion to ~~dismiss~~; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 21 - 30; Replying Affidavits and supporting papers 31 - 38; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

The defendants, Robert Dromerhauser and Mary K. Dromerhauser, seek an order pursuant to CPLR 3211(a)(1) and (5) dismissing the plaintiff's complaint against them as time barred. Plaintiff opposes the motion in all respects.

Plaintiff commenced this foreclosure action by e-filing a summons and complaint on or about January 10, 2017. The affidavit of service indicates that defendants Robert Dromerhauser and Mary K. Dromerhauser were served on January 12, 2017 by service upon Robert Dromerhauser. The defendants do not deny service of process.

CPLR § 213(4) states that "The following actions must be commenced within six years: an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein."

The Court in *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2nd Dept 2016], held that

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"As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding . . . the action" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982, 943 N.Y.S.2d 540; see CPLR 213[4]). 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 Burke*, 94 AD3d at 982; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754, 915 N.Y.S.2d 569; *Loiacono v Goldberg*, 240 AD2d 476, 477, 658 N.Y.S.2d 138). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605, 720 N.Y.S.2d 161; see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982). Where the holder of the note elects to accelerate the mortgage debt, notice to the borrower must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439, 826 N.Y.S.2d 74; see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982).

Once a mortgage debt is accelerated, "the borrowers' right and obligation to make monthly installments ceased and all sums [become] immediately due and payable," and the six-year Statute of Limitations begins to run on the entire mortgage debt. (*EMC Mortg. Corp. v Patella*, 279 AD2d 604, 605 [2nd Dept 2001]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892)

In *Ross v Jamaica Hosp. Med. Ctr.*, 122 AD3d 607, 607-608 [2nd Dept 2014], the Court held that

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Baptiste v Harding-Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2011]; see *Zaborowski v Local 74, Serv. Empl. Intl. Union, AFL-CIO*, 91 AD3d 768, 936 NYS2d 575 [2012]).

In *Home Sav. of Am. v Isaacson*, 240 AD2d 633, 633-634 [2nd Dept 1997], the Court held

"The law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (*New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399, 401). Once a default has been declared and a loan's maturity has been accelerated, a mortgagee is not required to accept a tender of less than full repayment as demanded (see, *Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472; *Albany Sav. Bank v*

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*Seventy-Nine Columbia St.*, 197 AD2d 816). Once a loan has been accelerated, a mortgagor has no right to compel redemption of the loan by tendering only the arrears due (*National Bank v Cohen*, 89 AD2d 725).

“A valid tender of an amount sufficient to expunge a default prior to the exercise of an option to accelerate cannot be refused and constitutes a total defense to the foreclosure claim (see, *Jeferne, Inc. v Capanegro*, 89 AD2d 577; *Sherwood v Greene*, 41 AD2d 881, 882)”. (*Call v La Brie*, 116 AD2d 1034, 1035 [4th Dept 1986].)

In *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994], the Court held that

although a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon (see, *Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 650), the record is barren of any affirmative act of revocation occurring within the six-year Statute of Limitations period subsequent to the service of the complaint in the prior foreclosure action, wherein the holder of the mortgage notified the borrowers of its election to accelerate (see, *Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476). The prior foreclosure action was never withdrawn by the lender, but rather, dismissed sua sponte by the court. It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate (*cf.*, *Kilpatrick v Germania Life Ins. Co.*, 183 NY 163). Indeed, rather than seeking to revoke the prior election to accelerate, the plaintiff made a failed attempt in 1991 to revive the prior foreclosure action, and, in fact, in its complaint in the instant action commenced in 1992, the plaintiff continues to seek recovery of the entire debt pursuant to the acceleration clause. Once the mortgage debt was accelerated, the borrowers' right and obligation to make monthly installments ceased and all sums became immediately due and payable (see, *Centerbank v D'Assaro*, 158 Misc 2d 92, 95).

The defendants indicate that a prior action was commenced on September 16, 2008 by Citibank under Index number 34746/2008 alleging a default date of May 1, 2008. The defendants state that the plaintiff filed an ex parte motion to discontinue which was granted by order dated November 27, 2012, (Asher, J.). The defendants argue that the prior action accelerated the mortgage wherein paragraph 5 of that complaint stated “Plaintiff elects to call due the entire amount secured by the mortgage” and therefore this action is barred. In opposition the plaintiff argues that the terms of the mortgage contract do not allow for acceleration before the entry of a Judgment of Foreclosure and Sale because up until that time the defendants can still make all past due monthly payment and bring the mortgage up to date without the requirement of paying all sums due immediately. The prior action never culminated in a Judgment of Foreclosure so therefore acceleration was never completed. In addition, the plaintiff indicates that the motion to discontinue was done upon the consent of the defendants as shown by the Consent to Cancel Lis Pendens and to Discontinue Action without Prejudice signed by the defendants' attorney on April 10, 2012. Finally, the plaintiff claims that since the alleged acceleration was done

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solely within the first complaint, the discontinuance of that action was the affirmative deceleration of the mortgage. The mortgage servicer, Caliber Home Loans, Inc., sent defendant Robert C. Dromerhauser a form 1099-C, Cancellation of Debt, in 2016 for \$73,202.91 thereby cancelling the payments due between May 1, 2008 and January 1, 2011, which would have been beyond the statute of limitations for the pending action. The defendants accepted that cancellation and attached the paperwork evincing the cancellation and corresponding amendment to the amount due to their moving papers at exhibit M.

A review of the pertinent terms of paragraph 19 of the mortgage contract indicate that the borrowers have the right under the terms of the contract to discontinuance of a foreclosure proceeding if the borrowers tender all past due payments without the need for payment in full even if it was demanded in the complaint. Based upon the terms of the contract the plaintiff did not accelerate the mortgage on September 16, 2008 and even if they had attempted to accelerate the mortgage the affirmative action of discontinuing the first foreclosure action upon the defendants' consent would have decelerated the mortgage. To this day the defendants have the right to tender all past due payments to bring the mortgage current and then demand the foreclosure action be discontinued. Therefore the motion to dismiss is denied; and it is

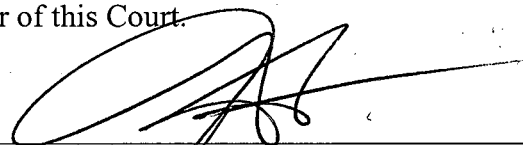
**ORDERED** that a copy of this order shall be served by the plaintiff on the defendants' attorney by regular mail on or before May 10, 2018; and it is further

**ORDERED** that the defendants shall serve their answer within twenty (20) days from service of a copy of this order; and it is further.

**ORDERED** that the action is stayed, pending the filing of an application to the Surrogate of Suffolk County. The parties agree that defendant Nora M. Maher, passed away prior to the commencement of this action on August 12, 2015.

The foregoing constitutes the decision and Order of this Court.

Dated: April 11, 2018

  
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HON. JOSEPH A. SANTORELLI  
J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION