

<b>U.S. Bank N.A. v Francis</b>
2018 NY Slip Op 34063(U)
June 28, 2018
Supreme Court, Queens County
Docket Number: 710551/2017
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR STRUCTURED ASSET  
SECURITIES CORPORATION, MORTGAGE  
PASS-THROUGH CERTIFICATES, SERIES  
2006-BC6,

Index No.: 710551/2017

Plaintiff,

Motion

Date: May 2, 2018

-against-

Motion Cal. No.: 40

Motion Sequence No.: 2

PAULINE FRANCIS, ET AL.,

Defendants.

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The following efile papers numbered 20-44 submitted and considered on this motion by defendant Pauline Francis seeking an Order pursuant to CPLR 3211 (a)(5) to dismiss this foreclosure action as time barred under CPLR§213(4) and attorney’s fees under Real Property Law §282.

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits..... EF 20-32  
Affirmation in Opposition-Affidavits-Exhibits..... EF 33-41  
Reply Affirmation-Affidavits-Exhibits..... EF 42-44

The defendant’s motion is granted and this action is dismissed.

This is an action to foreclose a mortgage against real property know as and located at 1128 Bay Park Pl., Far Rockaway, New York 11691, Block 15722 Lot 60, given by defendant Pauline Francis (hereinafter “Francis”) to secure a Balloon Note dated October 6, 2006 in the amount of \$332,000.00 made payable to BNC Mortgage Inc. (hereinafter “BNC”).

Francis makes this pre-answer application pursuant to the amended CPLR 3408 statute which extends the defendant’s deadline to answer the complaint 30 days from the date of the initial

mandatory settlement conference, to file an answer to the foreclosure complaint.

Francis alleged that another plaintiff, Deutsche Bank National Trust Company, etc., (hereinafter "Deutsche") initiated a former foreclosure action on January 13, 2010 under Index number 966/2010 by the filing of a summons and complaint and a notice of pendency. On November 13, 2014, by Order of Honorable David Elliot, the prior foreclosure action and all counterclaims were discontinued upon motion of the plaintiff Deutsche.

On August 1, 2017, the current plaintiff, U.S. Bank National Association, as Trustee for Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-BC6 (hereinafter "U.S. Bank Trust") filed the instant foreclosure action against Francis with the filing of a summons and complaint and notice of pendency. Francis now moves for an Order pursuant to CPLR 3211 (a)(5) to dismiss this foreclosure action as time barred under CPLR§213(4). Francis maintained that the statute of limitations on this foreclosure action is time barred as it is commenced more than seven years from the first action which was commenced on January 13, 2010. The prior action was discontinued and no new action was commenced within six months of the discontinuance on November 13, 2014 under CPLR §205. Pursuant to CPLR §205(a), a new action can be commenced by plaintiff under the following circumstances: [i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance...and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period." The loan was accelerated in January 2010, and that the time to commence the action expired on January 13, 2016. Francis alleged that she has been prejudiced by the delay.

In opposition, U.S. Bank Trust argued that it sent 90 day notices to Francis on or about May 20, 2013, April 13, 2015, July 5, 2016, and notice of de-acceleration sent on or about October 7, 2016. U.S. Bank alleged that its voluntary discontinuance of the action constituted a voluntary act by plaintiff to revoke its election to accelerate, and revocation of the acceleration means that the statute of limitations is no longer deemed to have begun running. Thus, assuming *arguendo* that the statute of limitations began to run on January 19, 2010, the mailing of the October 7, 2016 acceleration revocation notice was still timely as a result of the tolling provided to plaintiffs who are required to sent 90-day default notices pursuant to RPAPL §1304. U.S. Bank claimed that based upon the 90-day default notices sent on May 20, 2013, April 13, 2015 and July 5, 2016, it was entitled to a tolling of 270 days, which extended the statute of limitations run date to October 15, 2016, a Saturday, which means the statute of limitations had it begun to run on January 9, 2010 would have expired on October 17, 2017.

### Legal Analysis

The Court shall address the merits of this motion under CPLR 3211 (a)(1) and (5). On a motion to dismiss, the issue is “whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83 [1994]). “The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]). “To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607 [2d Dept 2017]). “To qualify as documentary evidence, the evidence ‘must be unambiguous and of undisputed authenticity’ ” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]) “Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable, qualify as documentary evidence in proper cases...” (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). Pursuant to CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action on the ground that the cause of action cannot be maintained because the statute of limitations has expired, and the movant must make a prima case that the time in which to commence the action has now elapsed (*see generally U.S. Bank Natl. Assn. v Gordon*, 155 AD3d 832 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017]). “In resolving a motion to dismiss pursuant to CPLR 3211(a)(5), the court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference...[i]f the defendant satisfied this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period” (*see U.S. Bank Natl. Assn. v Gordon*, 155 AD3d 832 [2d Dept 2018]).

The statute of limitations in a mortgage foreclosure action begins to run six years from the due date of each unpaid installment or the time the mortgagee is entitled to demand full payment or when the mortgage debt has been accelerated (*see CPLR § 213 [4]; Kashipour v Wilmington Savings Fund Society, FSB*, 144 AD3d 985 [2d Dept 2016]; *Wells Fargo Bank v Burke*, 94 AD3d 980 [2d Dept 2012]). Acceleration occurs by written notice to the borrower such as a default letter (*First Fed. Sav. Bank v Midura*, 264 AD2d 407 [2d Dept 1999]). Acceleration can also occur by the commencement of a foreclosure action by the filing of a summons and complaint (*see Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934 [2d Dept 2018]; *Beneficial Homeowner Serv. Corp. v Tovar*, 150 AD3d 657 [2d Dept 2017]; *Wells Fargo Bank v Burke*, 94 AD3d 980 [2d Dept 2012]; *Fannie Mae v 133 Mgt., LLC.*, 126 AD3d 670 [2d Dept 2005]). Once the mortgage debt is accelerated the borrower’s right to make monthly installments stops and all sums become due and the six year statute of limitations under CPLR § 213 (4) begins to run on the mortgage debt (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]; *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892 [2d Dept 1994]). A lender may revoke its election to accelerate the mortgage debt through an affirmative act revoking its election to accelerate, such as the withdrawal of a prior foreclosure action (*see Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934 [2d Dept 2018]).

Here the Court finds that based upon defendant's papers she has sustained her initial burden of demonstrating, prima facie, that this action was untimely (*see U.S. Bank Natl. Assn. v Kess*, 159 AD3d 767 [2d Dept 2018]; *U.S. Bank Natl. Assn. v Barnett*, 151 AD3d 791 [2d Dept 2017]. In opposition, U.S. Bank failed to raise a question of fact. It failed to submit an affidavit of someone with personal knowledge to demonstrate the mailing of the notices and the de-acceleration correspondence dated October 7, 2017 or proof that the de-acceleration notice was mailed to demonstrate that the statute of limitations was tolled (*see CPLR 4518; MSMJ Realty, LLC v DLJ Mtge. Cap., Inc.*, 157 AD3d 885 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Gambino*, 153 AD3d 1232 [2d Dept 2017]; *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892 [2d Dept 1994]). Plaintiff failed to commence the instant action until more than six years after January 13, 2010. Plaintiff's predecessor had the authority and exercised the option to accelerate the maturity of the loan and accelerated the debt as of January 13, 2010 in the prior action (*compare DLJ Mtge. Cap. Inc.*, -AD3d-, 2018 NY Slip Op 03505 [2d Dept 2018]; *21<sup>st</sup> Mtge. Corp. v Adames*, 153 AD3d 474 [2d Dept 2017]; *Wells Fargo v Burke*, 94 AD3d 980 [2d Dept 2012]).

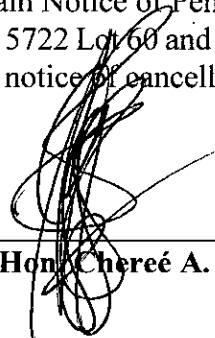
Therefore it is

**ORDERED**, the motion of defendant Pauline Francis to dismiss this action pursuant to CPLR 3211 (a) (5) as time barred under CPLR § 213 (4) is granted; and it is further

**ORDERED**, that the branch of the motion for an Order pursuant to Real Property Law §282 for attorneys fees is granted and defendant is awarded attorneys fees and Court costs; and it is further

**ORDERED**, that the County Clerk of the County of Queens is directed, upon payment of the proper fees, if any to cancel and discharge a certain Notice of Pendency filed in this action on August 1, 2017 against the property known as Block 15722 Lot 60 and said Clerk is hereby directed to enter upon the margin of the record of the same, a notice of cancellation referring to this Order.

Dated: June 28, 2018

  
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Hon. Chereé A. Buggs, JSC

FILED  
JUL 5 2018  
COUNTY CLERK  
QUEENS COUNTY