SHORT FORM ORDER
SUPREME COURT-STATE OF NEW YORK-COUNTY OF NASSAU
PRESENT: HON. THOMAS A. ADAMS,
Supreme Court Justice

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The Bank of New York Mellon , et al.,.

Plaintiff,

-against-

Jerry Laskin, et al.,

Defendants.

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FORECLOSURE PART
NASSAU COUNTY
INDEX NO:604747/18
Motion Seq. No .2
Date: Feb. 19, 2019

This motion by the plaintiff for an order pursuant to CPLR 2221 (d) and (e) granting it reargument and/or renewal of this court's order dated December 14, 2018, which granted the defendant Jerry Laskin's ("defendant") motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) is determined as provided herein.

Via this court's order dated December 14, 2018, this action was dismissed as untimely pursuant to the defendant's motion to dismiss pursuant to CPLR 3211 (a) (5) based upon a prior foreclosure action which had been commenced on August 3, 2011. That action was in fact discontinued "without prejudice" via a "Stipulation of Discontinuance of Action" and a "Stipulation Cancelling Notice of Pendency" which were signed on behalf of both parties on May 19, 2017. This court found that that Stipulation did not constitute a revocation of the 2011 acceleration of the note and mortgage and that this action which was commenced more than six years from the date that the prior action was commenced was untimely. Relying on and quoting *Freedom Mtge. Corp. v Engel* (163 AD3d 631, 633 [2d Dept 2018]), the court reasoned that "the Stipulation was silent on the issue of revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant."

The plaintiff seeks both reargument and/or renewal.

In seeking renewal, the plaintiff relies on correspondence which its records indicate were sent to the defendant by both regular and certified mail at two different addresses on April 11, 2017 shortly before the prior action was discontinued. Those letters unequivocally establish that the plaintiff revoked its acceleration of the mortgage. They provide, inter alia:

> "This letter is to notify you that Nationstar Mortgage LLC("Nationstar") hereby rescinds and abandons any acceleration or act of acceleration previously made pursuant to the terms of the note and mortgage. Any prior demand for immeditae payment of the entire loan balance is withdrawn and the loan is reinstated as a monthly installment loan. This means that your loan has reverted back to monthly payments. You are obligated to make each monthly payment under the terms of yur promissory note and mortgage contract. The loan is now deemed de-accelerated."

"Although a motion to renew is generally based upon the discovery of material facts which were unknown to the movant at the time of the original motion, it is well settled that '[t]he requirement * * * is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion' " (*Citibank, N.A. v Olson*, 204 AD2d 381, 381-82 [2d Dept 1994], quoting *Karlin v Bridges*, 172 AD2d 644 [2d Dept 1991]). However, where the "new" facts were known to the movant at the time of the original motion, the court's discretion is limited. In that case, the movant is required to offer a reasonable excuse for the failure to present the "new" facts on the prior motion in order to obtain renewal (*Surdo v Levittown Pub. School Dist.*, 41 AD3d 486, 486 [2d Dept 2007]). "[L]aw office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion, the movant must submit supporting facts to explain and justify the failure, and mere neglect is not accepted as a reasonable excuse (citations omitted)" (*Assevero v Rihan*, 144 AD3d 1061, 1063 [2d Dept 2016]). Here, in an effort to explain its failure to offer the legal correspondence which clearly revoked its acceleration of the note and mortgage in 2011, the plaintiff represents that "such documents are extrinsic to the pleadings and, thus, arguably not appropriate for consideration on a CPLR 3211 motion." When considered in conjunction with the unsettled law applicable to whether a Stipulation of Discontinuance signed by the defendant suffices to revoke the plaintiff's acceleration of the mortgage (see infra), the plaintiff has adequately explained its failure to offer the facts offered now on the

original motion (*Assevero v Rihan*, 144 AD3d at 1063; Defina v Daniel, 140 AD3d 825, 826 [2d Dept 2016]). The exhibits submitted here conclusively establish that the plaintiff revoked its acceleration of the defendant's note and mortgage before the prior action was discontinued and that the defendant knew it: A signed receipt for the correspondence has been submitted. Renewal is granted and upon renewal, the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) is denied.

In seeking reargument, the plaintiff faults this court for relying on *Freedom Mtge. Corp. v Engel* (163 AD3d 631, 633 [2d Dept 2018]), in which the Second Department held that:

> "the plaintiff failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period....[T]he plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (citations omitted)."

However, the court's holding was additionally based upon the fact that in that Stipulation "which was so-ordered by the Supreme Court, the parties agreed, inter alia, that: (1) the defendant was served with a copy of the summons and complaint; (2) the defendant would withdraw his motion; (3) the action would be discontinued without prejudice and the notice of pendency would be cancelled; and (4) *they 'desire to amicably resolve this dispute and the issues raised in the* [*defendant's motion*] *without further delay, expense or uncertainty'* " (*Freedom Mtge. Corp. v Engel* (163 AD3d at 633).

Plaintiff also faults this court for relying on *U.S. Bank Nat. Ass'n v Barnett,* (151 AD3d 791, 792 [2d Dept 2017]). In that case, the Supreme Court, after a hearing to determine the validity of service of process, vacated the judgment of foreclosure and sale entered in the first foreclosure action on the ground of lack of personal jurisdiction. Then, the plaintiff commenced that action to foreclose the mortgage which the court found to be untimely since the plaintiff itself had not revoked its acceleration of the note and mortgage.

In addition, the plaintiff faults this court for not following the court's holding in *NMNT Realty Corp. v Knoxville 2012 Tr.* (151 AD3d 1068, 1070 [2d Dept 2017]). That action was brought by the mortgagor to quiet title. He maintained that the Statute of Limitations to foreclose had expired based upon a previous acceleration of the note that occurred more than six years prior. The court found that "the defendant submitted proof that ... [its predecessor] moved for, and ... was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted" and that it "thereby raised a triable issue of fact as to whether [its predecessor's] motion 'constituted an affirmative act by the lender to revoke its election to accelerate' " (*NMNT Realty Corp. v Knoxville 2012 Tr.*, 151 AD3d at 1070, citing *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [Dept 1994]).

The plaintiff has demonstrated that none of the authorities relied on by the court clearly resolve the issue presented here, i.e., whether this action is time-barred, as a matter of law. In none of the cases did the court hold that a straightforward Stipulation of Discontinuance without prejudice signed by the defendant, standing alone, did not revoke an acceleration of a loan. Upon reconsideration, the court finds that the facts in *NMNT Realty Corp. v Knoxville 2012 Tr.* are most akin to the facts here. An issue of fact exists as to whether the plaintiff revoked its 2011 acceleration of the note and mortgage in 2017 and accordingly, whether this action is timely. Upon reargument, this court's order dated December 14, 2018 is vacated and the defendant's motion to dismiss this action pursuant to CPLR 32111 (a) (5) is denied.

The plaintiff additionally relies on *Nationstar Mortg., LLC v MacPherson* (56 Misc 3d 339, 350 [Sup Ct Suffolk County 2017]). In that case, the court found that the langusage of the mortgage which permitted the borrower to pay the outstanding balance owed up until the time of foreclosure prevented the note from being accelerated for Statute of Limitations purposes. The court held:

> "Here, the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law 258 or under the holding in Albertina, supra (see *Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472 [1932]). Under the express wording of the mortgage document, plaintiff has no right to

> reject the borrower's payment of arrears in order to reinstate the mortgage, until a judgment is entered. Pursuant to paragraph 19(c), set forth above, the lender cannot reject a payment that would reinstate the Mortgage and accelerate the maturity of the debt by requiring payment in full until after "... a judgment has been entered." Under the contract terms at issue, plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action. The borrower could pay the unpaid installments and the payment of same would destroy the option to accelerate, which clearly states that immediate payment in full could only be declared upon the entry of a judgment. Until the option to declare the entire debt due is effectively exercised, the borrower has the right to tender the payments then due and make good on his or her defaults. Here, it is a judgment that triggers the acceleration in full of the entire mortgage debt" (*Nationstar Mortg., LLC v MacPherson*, 56 Misc 3d at 351).

Case law regarding the MacPherson decision is inconsistent (*Your New Home, LLC v JP Morgan Chase Bank, N.A.*, 92 NYS3d 851 [Sup Ct 2019]; *Sharova v Wells Fargo Bank, N.A. as Tr. for Structured Adjustable Rate Mtge. Loan Tr.*, 92 NYS3d 546, 552 [Sup Ct Kings County 2019]; *U.S. Bank N.A. v Janes*, 2018 WL 6790248, [Sup C. New York County 2018]; *Persaud v U.S. Bank Natl.*, 62 Misc3d 193 [Sup Ct Queens County 2018]; but see*Wells Fargo Bank, N.A. as Tr. Carrington Mtge. Loan Tr. v Rodriguez*, 62 Misc 3d 1211(A) [Sup Ct Queens County 2019]; *Wells Fargo Bank, N.A. v Fetonti*, 2018 WL 823782 [Westchester County 2018]; *HSBC Bank, USA, NA v Margineanu*, 61 Misc 3d 973, 984 [Sup Ct Suffolk County 2018]). The Second Department has not yet directly addressed the scenario addressed in that case. However, "the Second Department has repeatedly and unwaveringly held ...that acceleration of a mortgage occurs by the commencement of a foreclosure action with the filing of a summons and complaint" (*Your New Home, LLC v JP Morgan Chase Bank, N.A.*, __ AD3d __, 2019 WL 255480 at *4, citing *21st Mortgage Corp. v Osorio*, 167 AD3d 823 [2nd Dept. 2018]; *U.S. Bank Trust, N.A. v Aorta*, 167 AD3d 807 [2nd Dept. 2018]). In view of the foregoing, the court rejects the plaintiff's argument that the mortgage language prevented the acceleration of the note and mortgage via the commencement of an action.

In conclusion, the plaintiff's motion for reargument and/or renewal is granted; both reargument and renewal are granted; and, upon reargument and renewal, this

court's December 14, 2018 order is vacated and the defendant's motion to dismiss the complaint pursuant to CCPLR 3211 (a) (5) is denied.

ENTER:

Date: MAR 2 0 2019

Thomas A. Adams
Supreme Court Justice

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE