

<b>U.S. Bank Trust, N.A. v Stewart</b>
2019 NY Slip Op 31795(U)
June 17, 2019
Supreme Court, New York County
Docket Number: 850292/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARLENE P. BLUTH PART IAS MOTION 32

*Justice*

-----X

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

- v -

DORIS STEWART, COMMISSIONER OF JURORS, EMDIN & RUSSELL LLP, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ROBANI ENERGY INC, JOHN DOE

Defendant.

INDEX NO. 850292/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001 002

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78, 79, 85

were read on this motion to/for APPOINT - REFEREE

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) to dismiss by defendant Stewart is denied. The motion (MS002) for summary judgment by plaintiff is denied.

**Background**

Plaintiff seeks to foreclose on a mortgage secured by real property located at 417 West 141<sup>st</sup> Street in Manhattan. Stewart moves to dismiss on the ground that the instant case is time-barred. Stewart points out that there was a previous foreclosure case based on this mortgage commenced on December 9, 2010 (NYSCEF Doc. No. 37) that was dismissed on October 7,

2014 (NYSCEF Doc. No. 38). Stewart claims that because this case was commenced more than six years after the previous foreclosure case began, it is time barred.

In opposition, plaintiff claims that it sent a notice of de-acceleration to Stewart (NYSCEF Doc. No. 42). This notice stated that “To the extent that any previous acceleration may be applicable, we hereby revoke any prior and currently applicable acceleration of the loan, withdrawing any prior demand for immediate payment of all sums secured by the security instrument and re-institute the loan as an installment loan” (*id.*). Plaintiff also claims that the plaintiff that commenced the previous foreclosure case (JPMorgan Chase) lacked standing and, therefore, could not accelerate the loan—meaning that the statute of limitations never began to run.

In reply to the motion to dismiss, Stewart does not deny receiving the letter; instead, she claims that de-acceleration can only occur with the consent of both parties.

### Discussion

“In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [ ] raise an issue of fact as to whether the action was timely” (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

To be entitled to the remedy of summary judgment, the moving party “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Here, Stewart met her initial burden to demonstrate that this action was time barred. And plaintiff raised an issue of fact as to whether the acceleration of the mortgage was revoked by claiming that it sent the de-acceleration letter to Stewart (NYSCEF Doc. No. 42). “A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action” (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-70, 58 NYS3d 118 [2d Dept 2017]). Stewart’s claim that both sides need to consent to de-accelerate the loan is not supported in the cases she cites. As stated in *NMNT Realty*, a lender

can “revoke *its* election to accelerate” (*id.* [emphasis added]); there is no mention that a borrower needs to consent.

However, the Court declines to find that plaintiff is entitled to summary judgment because there is an issue of fact as to whether the acceleration of the loan was properly revoked. Although the de-acceleration letter mentions that the loan was reinstated as an installment loan, there is no mention of how much Stewart owes or when the payment is due. And plaintiff did not submit the monthly statements it presumably sent to Stewart after it allegedly revoked the prior acceleration. Simply put, attaching only a letter purporting to revoke an acceleration that mentions nothing about the amount due is not enough to establish, as a matter of law, that plaintiff engaged in an affirmative act to de-accelerate.

The Court also rejects plaintiff’s other argument that JPMorgan (its predecessor-in-interest) never had standing to accelerate. Plaintiff cannot take inconsistent positions when it’s convenient. Plaintiff’s predecessor-in-interest claimed that it had the note and purported to accelerate all amounts due in the complaint (*see* NYSCEF Doc. No. 37, ¶ 14 [previous foreclosure complaint]). And the Court’s decision dismissing the previous complaint found that plaintiff failed to prove that it had standing (NYSCEF Doc. No. 38); that is not an affirmative finding that plaintiff did not have standing. Moreover, if plaintiff truly believed that it lacked standing in the previous case, then it would not have sent a notice of de-acceleration letter to Stewart. There would be nothing to de-accelerate if its predecessor-in-interest lacked standing to accelerate in the previous foreclosure case. Obviously, the notice to revoke the acceleration was sent because plaintiff thought it had already accelerated the loan.

Summary

Although plaintiff attached a letter to de-accelerate the loan dated before the statute of limitations expired, plaintiff should have also submitted the monthly bills it sent to Stewart to corroborate that it actually treated the mortgage as an installment loan once again. Otherwise, lenders could simply send a letter like the one at issue here and never give the borrower a chance to make payments before commencing another foreclosure case. In other words, the Court requires more evidence to ensure that the letter is not a scheme to get around the statute of limitations—the affirmative act must include sending bills as if the loan was not accelerated. So while the letter is enough to raise an issue of fact against the motion to dismiss on statute of limitations grounds, it is not enough to get summary judgment for the plaintiff.

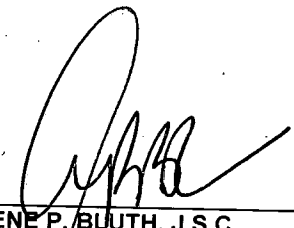
Accordingly, it is hereby

ORDERED that the motion (MS001) to dismiss by defendant Stewart is denied; and it is further

ORDERED that the motion (MS002) by plaintiff for summary judgment and to appoint a referee to compute is denied.

Discovery conference: 10/15/19 at 2:15 p.m.

6/17/19  
DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

APPLICATION:

CHECK IF APPROPRIATE:

- OTHER
- REFERENCE