

<b>Bank of N.Y. Mellon Trust Co. v Kim</b>
2019 NY Slip Op 32229(U)
July 24, 2019
Supreme Court, New York County
Docket Number: 850331/2018
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*

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THE BANK OF NEW YORK MELLON TRUST COMPANY,  
NA, FKA THE BANK OF NEW YORK TRUST COMPANY,  
NA, AS TRUSTEE FOR THE CHASE MORTGAGE  
FINANCE TRUST MULTI-CLASS MORTGAGE PASS-  
THROUGH CERTIFICATES, SERIES 2006-S4,

Plaintiff,

- v -

BRIAN KIM aka BRIAN B. KIM aka BRIAM KIM, CITIBANK,  
N.A., BOARD OF MANAGERS OF THE CHRISTODORA  
HOUSE CONDOMINIUM, JDF REALTY, INC., JPMORGAN  
CHASE BANK, NA, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY DEPARTMENT OF  
FINANCE PARKING VIOLATIONS BUREAU, NEW YORK  
CITY TRANSIT ADJUDICATION BUREAU, NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE,  
UNITED STATES OF AMERICA O/B/O INTERNAL  
REVENUE SERVICE, JOHN DOE #1 THROUGH JOHN  
DOE #12

Defendants.

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INDEX NO. 850331/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 64, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISMISS

The motion to dismiss by defendant Brian Kim is denied.

**Background**

In this mortgage foreclosure action about a property in Manhattan, Kim moves to dismiss on the ground that this case is time barred. Kim admits that he stopped making his monthly payments in December 2010. On March 3, 2011, the servicer sent a letter, which warned that the

failure to pay off the loan arrears in 32 days would result in acceleration of the loan without further notice to Kim.

After Kim failed to pay the loan arrears, plaintiff commenced a foreclosure action in 2013. However, that case was dismissed in March 2016 (NYSCEF Doc. No. 67). Kim argues that because this case was commenced after the six-year statute of limitations expired in 2017, the Court should dismiss this case.

In opposition, plaintiff argues that it de-accelerated the loan via a letter dated May 3, 2016 (NYSCEF Doc. No. 75) and that the loan was not accelerated in the March 2011 warning letter.

In reply, Kim asserts that both the de-acceleration letter and the subsequent monthly statements were sent to the same incorrect address in Flushing (a separate address from the location of the mortgaged property).

The Court permitted the parties to submit additional papers concerning the validity of the Flushing address. Kim claimed that he was incarcerated for various crimes from April 20, 2012 until December 27, 2016 and that plaintiff knew he was in prison rather than living at the address in Flushing. However, plaintiff points out that Kim submitted a loan modification request in September 2012 that listed the Flushing address as his mailing address.

### **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]).

“[A]ctions are time-barred [where] they were commenced more than six years from the date that all of the debt on the mortgages was accelerated” (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530, 48 NYS3d 597 (Mem) [1st Dept 2017]).

“When the borrower did not cure his defaults . . . all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgages pursuant to the letter” (*id.*).

#### **Acceleration Letter**

Contrary to plaintiff’s contention, the initial acceleration letter sent on March 3, 2011 accelerated the loan when plaintiff did not pay within 32 days (NYSCEF Doc. No. 32). The letter states that the servicer “will accelerate” if the default was not cured (*id.*). Although not identical, it contains substantially the same language used in the acceleration letter in *Royal Blue* (*see Deutsche Bank Natl. Trust Co.*, 148 AD3d at 530). The First Department’s decision compels this Court to find that the acceleration letter here accelerated the loan in April 2011 (after the expiration of the 32-day period).

#### **De-Acceleration Letter**

“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]).

The Court finds that simply sending a letter purporting to de-accelerate the loan is not enough, standing alone, to revoke a prior acceleration. Without more, lenders could simply send

a letter like the one here and never give the borrower a chance to make payments before commencing another foreclosure case. The Court's concern is that sending only a letter might be part of a scheme to get around the statute of limitations by not informing the borrower how much he or she owes or providing an opportunity to pay the arrears before starting another foreclosure case.

However, plaintiff also submitted monthly statements it sent to Kim after it sent the letter purporting to revoke the acceleration (*see* NYSCEF Doc. No. 76). The first bill is dated May 13, 2016 (*id.*)—just ten days after the revocation letter was sent. And the bill demands payment of outstanding arrears rather than the entire amount of the loan. This shows that plaintiff took an affirmative step to revoke its acceleration.

### **The Flushing Address**

Having found that the loan was properly de-accelerated within the statute of limitations, the only remaining question is whether the notice of de-acceleration and monthly statements were sent to the right address. Kim claims that he was incarcerated when the revocation letter was sent and that plaintiff knew he was in prison.

Plaintiff attaches a computer entry that purports to show that Kim changed his mailing address to the subject Flushing location in February 2011 (NYSCEF Doc. No. 121). Plaintiff also attaches a "Request for Mortgage Assistance" information packet Kim sent to the servicer that lists his address in Flushing (NYSCEF Doc. No. 122). This document is dated September 27, 2012 (*id.*)—according to Kim, he was incarcerated in September 2012. Based on this record, the Court rejects Kim's argument that the Court should ignore the de-acceleration letter (and subsequent monthly bills) because the servicer mailed them to the wrong address.

Although Kim acknowledges in the mortgage assistance packet that “he became incarcerated” (*id.*), Kim did not affirmatively state that he was *currently incarcerated*. And, most importantly, Kim did not submit any evidence that he provided a different address to the servicer once he was incarcerated. In effect, Kim contends that the Flushing address he provided to the servicer is wrong because he was incarcerated even though he submitted a loan modification application with the Flushing address while incarcerated and never provided an updated address. That argument fails. Having never given his prison address as his current mailing address, Kim cannot impute that knowledge to the plaintiff.

To the extent that Kim claims that the dismissal of the 2013 case was based on plaintiff’s improper reliance on the Flushing address, that is not controlling here. As an initial matter, the 2016 decision dismissing the previous case does not specifically discuss the basis for its dismissal on personal jurisdiction grounds. And a closer inspection of the motion papers revealed that Kim argued that the case should be dismissed because plaintiff did not complete service within 120 days of starting the case pursuant to CPLR 306-b (*see* NYSCEF Doc. No. 40 for Index No. 850055/2013). Simply put, there is no finding that the Flushing address was the “wrong” address; rather it appears that the previous case was dismissed because plaintiff did not effectuate service within 120 days of commencing the action.

The Court also rejects Kim’s claims about the inadmissibility of the records submitted by plaintiff from the servicer. These documents are admissible because a proper foundation was established.

### Summary

The Court recognizes that Kim claimed that he was incarcerated in his motion to dismiss the 2013 action. But that does not nullify the de-acceleration letter because it does not establish

it was the wrong address to send mail. Kim admitted that his sister lived at the Flushing address during the 2013 litigation (*id.*). It could be that Kim was receiving mail at the Flushing address while in prison. But there is no evidence that Kim ever told plaintiff or plaintiff's servicer that mail should be sent to the correctional facility or some other address. Rather, the record shows that Kim used the address to ask for a loan modification while incarcerated. And the Court notes that plaintiff served Kim in this case (after his release) at the same Flushing address at issue in this motion.

The Court declines to disregard a revocation letter and absolve Kim of his financial obligations (a loan with a principal balance allegedly worth over \$1 million) at the motion to dismiss stage.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Brian Kim is denied and Kim is directed to answer pursuant to the CPLR.

Next Conference: October 29, 2019 at 2:15 p.m. Plaintiff is directed to make a motion to appoint a referee to compute within 45 days after Kim files his answer (or after the time to file his answer expires).

7/24/19  
DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE