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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WELLS FARGO BANK, N.A.,

Plaintiff,

- v -

YOO MI MIN aka YOOMI MIN, JI YOU MIN aka YI JOUN MIN, PNC BANK, N.A. SUCCESSOR BY MERGER TO NATIONAL CITY BANK, THE BOARD OF MANAGERS OF 1600 BROADWAY ON THE SQUARE CONDOMINIUM, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOE

Defendant.

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INDEX NO. 850295/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 67, 68, 69, 70, 71, 72, 77

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by plaintiff is denied and the cross-motion by defendant to dismiss is granted.

Background

Plaintiff seeks to foreclose on an apartment owned by defendant Yoo Mi Min located at 1600 Broadway in Manhattan. In 2007, Min got a loan from Bank of America for $1.36 million secured by the apartment. Min admits that she has not made any mortgage payments since 2009. In January 2010, plaintiff's predecessor commenced a foreclosure action (the "2010 Action") against Min (*see* NYSCEF Doc. No. 29). The complaint states that "Plaintiff elects to call due the entire amount secured by the mortgage" (*id.* ¶ 5).

The 2010 Action was dismissed in March 2014 due to "plaintiff's failure to comply with Judge Moulton's Order directing plaintiff to file an ex-parte application to appoint a referee and for summary judgment not later than 2/18/14" (NYSCEF Doc. No. 30). Plaintiff unsuccessfully tried to restore the 2010 Action via motion in 2015. The Court held that "Over a year has passed and now, plaintiff seeks to restore this case without so much as a reason, let alone a reasonable excuse for the failure to comply with a Court directive and the failure to restore this matter in a timely manner" (NYSCEF Doc. No. 31).

Plaintiff tried again in 2016, albeit unsuccessfully, to restore the 2010 Action. The Court concluded that:

> "This is a foreclosure matter that has been pending since 2010 Plaintiff has been afforded numerous opportunities to continue the prosecution of this action and has repeatedly failed to do so despite various Court orders. This matter was not dismissed, contrary to plaintiff's position, but rather marked off WITHOUT PREJUDICE due to plaintiff's repeated failure to present this Court with reasonable excuse(s) for its untimely applications and failure to set forth a presentation that it has a meritorious action to prosecute. Plaintiff now shifts the blame and argues that it failed to timely make applications because the Judges did not mail copies of its prior decisions to it. This is not an e-file case and it is plaintiff's responsibility to check its case docket. Waiting years to check on a matter and/or expecting the Courts to continually monitor plaintiff's own case and notify plaintiff of prior court directives, is not a reasonable excuse for the years of delay plaintiff has taken to prosecute this action which has been pending since 2010. Once again, plaintiff failed to set forth an entitlement for the relief it seeks to vacate its default, particularly in light of its lack of statement respecting the merits of this actions some six years after its commencement" (NYSCEF Doc. No. 32).

Plaintiff then commenced this action in December 2017 seeking identical relief as the 2010 Action. Min cross-moves to dismiss on the ground that this action is time barred. She claims that plaintiff's predecessor accelerated the mortgage when it commenced the 2010 Action and that this case, brought in 2017, is time barred.

In opposition, plaintiff claims that the 2010 Action did not accelerate the loan. Plaintiff argues that it does not have right to require the payment of the entire loan by filing a foreclosure

action based on paragraph 19(c) of the mortgage. It insists that only a judgment triggers the acceleration of the full mortgage debt.

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.*).

The Second Department, when considering the same Paragraph 19 at issue here, has held that "Contrary to the plaintiff's contention, the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt. That provision effectively gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met. The plaintiff argues that because its right to accelerate the entire outstanding debt was subject to the defendant's right, under certain circumstances, to de-accelerate that portion of the debt, the plaintiff's right to accelerate the debt was subject to a condition precedent

and the statute of limitations did not begin to run until the defendant's right to de-accelerate was extinguished in accordance with the terms of the mortgage" (*Bank of N.Y. Mellon v Dieudonne*, 171 AD3d 34, 39, 96 NYS3d 354 [2d Dept 2019]).

"To the contrary, the language of paragraph 19 indicates that the plaintiff's right to accelerate the entire debt may be exercised before the defendant's rights under the reinstatement provision in paragraph 19 are exercised or extinguished. Accordingly, contrary to the plaintiff's contention, the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision in paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage" (*id.* at 40).

Therefore, this Court finds that plaintiff accelerated the mortgage when it filed the 2010 Action and this case is time-barred because it was commenced more than six years after the loan was accelerated. This result makes sense; paragraph 19 is the *borrower's* right to make a payment to stop the foreclosure action. Plaintiff's position that a judgment is required to accelerate the mortgage would effectively eliminate the statute of limitations period for mortgage foreclosure actions. A judgment is, of course, the end of the action—the only remaining step is to sell the property at an auction. Under plaintiff's view, a lender could start and discontinue an indefinite number of foreclosure cases as long as these cases were discontinued without prejudice and prior to a judgment of foreclosure and sale.

The Court also observes that plaintiff's predecessor purported to accelerate this loan in paragraph five of the 2010 Action's complaint. The Court questions how plaintiff (or its predecessor) could bring an action declaring the entire loan due and then claim nine years later that the Court should ignore this clear intention from plaintiff.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied and the cross-motion by defendant Yoo Mi Min to dismiss is granted, this action is dismissed, and the County Clerk is directed to cancel the Notice of Pendency dated December 11, 2017 filed in connection with this case and the Clerk is directed to enter judgment accordingly.

7/31/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE