

**U.S. Bank N.A. v Catalfamo**

2019 NY Slip Op 32586(U)

August 8, 2019

Supreme Court, Warren County

Docket Number: 64757

Judge: Paulette M. Kershko

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK COUNTY OF WARREN  
SUPREME COURT

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U.S. BANK NATIONAL ASSOCIATION, NOT  
IN ITS INDIVIDUAL CAPACITY BUT SOLELY  
AS TRUSTEE FOR THE RMAC TRUST, SERIES  
2016-CTT,

Plaintiff,

-against-

ELIZABETH CATALFAMO, STEVEN C.  
CATALFAMO, ASSET ACCEPTANCE LLC,

JOHN DOE (Those unknown tenants, occupants,  
persons or corporations or their heirs, distributees,  
executors, administrators, trustees, guardians,  
assignees, creditors or successors claiming an  
interest in the mortgaged premises),

Defendants.

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**DECISION/ORDER**

Ind. #: 64757

RJI #: 56-1-2018-0163

**Appearances:**

Sarah A. Michalek, Esq. (Plaintiff)  
Gross Polowy, LLC  
1775 Wehrle Drive, Suite 100  
Williamsville, NY 14221

Christopher S. Nenninger, Esq. (Defendant, Steven C. Catalfamo)  
Matte & Nenninger, PC  
444 Glen Street  
Glens Falls, NY 12801-2943

ORDER



Pamela J. Vogel, Warren Co Clerk

**2017-64757**

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Receipt # 2019501669

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FILED & ENTERED

Motion Papers:

1 - Motion to Dismiss and Quiet Title<sup>1</sup> filed by defendant, Steven C. Catalfamo (hereafter

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<sup>1</sup>Although labeled a Motion to Dismiss, the motion is brought pursuant to Civil Procedure Laws and Rules (“CPLR”) 3211(a) (5) and seeks Summary Judgment pursuant to CPLR 3212.

“defendant”), dated April 19, 2018, with affidavit of defendant and affidavit of Christopher S. Nenninger, Esq., with exhibits A through L; Affirmation in Opposition of plaintiff, U.S. Bank National Association, Not In Its Individual Capacity But Solely As Trustee For The RMAC Trust, Series 2016-CTT (hereafter “plaintiff”) by Laura M. Strauss, Esq., dated May 10, 2018, along with annexed exhibits A through F; and Reply Affidavit of Christopher S. Nenninger, Esq., dated May 24, 2018, along with annexed exhibits A and B; Defendant Reply Affidavit of Steven C. Catalfamo, dated May 22, 2019, along with annexed exhibits A through R.

2 - Plaintiff’s Motion for Summary Judgment and an Order of Reference (and other ancillary relief), dated December 31, 2018, with affirmation of Sarah A. Michalek, Esq., dated December 31, 2018, along with annexed exhibits A through Q, and Memorandum of Law dated December 31, 2018; Affirmation of Christopher S. Nenninger, Esq., dated January 17, 2019, along with annexed exhibits A and B; and plaintiff’s reply affidavit of Douglas C. Weinert, Esq., dated January 23, 2019, along with annexed exhibits A and B.

Kershko, J.,

On December 11, 2017, the plaintiff commenced this action (hereinafter the “second action”) to foreclose a residential mortgage against defendants Steven C. Catalfamo and Elizabeth Catalfamo, concerning property located at 142 Pickle Hill Road, in the Town of Queensbury, Warren County, New York (the “subject premises”)<sup>2</sup>. The plaintiff alleges that the defendants are in default for failing to make the mortgage payment due on December 10, 2011, or any mortgage payments thereafter.<sup>3</sup> On that same date, the plaintiff filed a Notice of Pendency

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<sup>2</sup>Defendant Elizabeth Catalfamo has not answered or filed any responsive papers.

<sup>3</sup>The plaintiff alleges in the complaint that the defendants owe the sum of \$699,904.07 on the Note and Mortgage with a deferred balance of \$29,658.85.

in the Warren County Clerk' Office in Liber 81 at Page 276. On January 30, 2018, defendant interposed an answer, asserting affirmative defenses<sup>4</sup> and counterclaimed against the plaintiff seeking to cancel/discharge the Mortgage and to quiet title to the subject premises, pursuant to RPAPL 1501. On March 2, 2018, plaintiff filed a Reply, alleging affirmative defenses, to defendant Catalfamo's Counterclaim. On April 19, 2018, defendant filed a motion to dismiss the action because the applicable six year statute of limitations, as set forth in CPLR 213 (4), has expired and moves for summary judgment canceling/discharging the mortgage and quieting title to the subject premises. On January 7, 2019, plaintiff filed a motion seeking a summary judgment dismissal of defendant's affirmative defenses and counter-claim that are set forth in the defendant's answer, permission to treat defendant's answer as a limited notice of appearance<sup>5</sup>, the appointment of a Referee to determine the amount due and to amend the caption to remove the defendants Elizabeth Catalfamo and John Doe, as parties to the action.

The defendant bears the initial burden of establishing, prima facie, that the time in which to sue (the statute of limitations) has expired. See Wells Fargo Bank, N.A. v. Burke, 155 AD3d 668, 669 (2d Dept 2017). Once this showing has been made, the burden shifts to the plaintiff to present evidentiary facts, in admissible form, establishing that the action was timely commenced or to raise an issue of fact. See Lessoft v. 26 Ct. St. Assoc., 58 AD3d 610 (2d Dept 2009) and See U.S. Bank N.A. v. Martin, 144 AD3d 891, 892 (2d Dept 2016). CPLR 213 (4) provides that the statute of limitations for "...an action upon a ... mortgage of real property, or any interest therein" must be commenced within six years. The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, unless the debt has been accelerated. See Wells Fargo Bank, N.A. v. Burke, 94 AD3d 980 (2d Dept 2012). A creditor can effectively accelerate the loan indebtedness of a borrower by sending notice to the borrower that the debt has been accelerated or by commencing an action for foreclose upon a

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<sup>4</sup> The defendant alleged the doctrine of laches, waiver and/or estoppel, statute of limitations and lack of required pre-foreclosure notices, under RPAPL.

<sup>5</sup> For the purposes of receipt of the judgment of foreclosure and sale, copy of the notice of sale, notice of discontinuance and notice of any surplus monies,

note and mortgage seeking payment of the entire debt. See See Charter One Bank, FSB v. Leone, 45 AD3d 958 (3d Dept 2007) and Milone v. US Bank, NA, 164 AD3d 145, 152 (2d Dept 2018). When a bank accelerates the debt, by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage, unless the acceleration is revoked or decelerated, through an affirmative act, occurring within the statute of limitations period. Id at 152 and See also Lavin v. Elmakiss, 302 AD2d 638 (3d Dept 2003).

When a bank decelerates or revokes the accelerated debt, the deceleration of the debt must satisfy a five prong test in order to effectively toll and/or re-set the statute of limitations clock, to wit: 1) the deceleration must be evidenced by an affirmative act; (2) the affirmative act must be clear and unequivocal; 3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked; 4) the affirmative act must occur before the expiration of the six year statute of limitations period; and 5) the borrower must not have changed his or her position in reliance upon the acceleration.. See Citimortgage, Inc. v. Ramirez, 59 Misc3d 1212(A)\*2, 2018 WL 1749899, NY Slip Op 50525(U) (NY Sup Court 2018). See also Deutsche Bank National Trust Company America's as Trustee for Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH6 v. Bernal, et al., 53 Misc3d 915 (Sup Ct Westchester Co 2017) (where the Court found that the banks' deceleration letter failed to notify the defendant that he had the right to make current monthly payments when his right and obligation to do so had ceased upon acceleration of the debt or that the plaintiff bank would accept such payments) and Milone, Supra at 154 (where the Court found that if a deceleration letter contains an express demand for monthly payments on the note or is accompanied by copies of monthly invoices for installment payment or other forms of evidence showing that the bank was truly seeking to decelerate the loan, within the applicable statute of limitations period, it was not pretextual to defeat the defendants' right to cancel the note and discharge the mortgage pursuant to RPAPL 1501). While there is also some case law to support that a voluntary discontinuance of a mortgage foreclosure action, could, in some instances, be evidence of a deceleration of the debt by a creditor, the law is well settled that a plaintiff cannot voluntarily discontinue a mortgage

foreclosure action that has been already been dismissed by a Court, pursuant to CPLR 3404, as abandoned, nor is a court's dismissal of a mortgage foreclosure action evidence of a deceleration of debt. See Citimortgage, Inc., Supra at 3\*.

As and for the defendant Catalfamo's motion to dismiss and the plaintiff's motion for summary judgment, the Court makes the following findings of fact and conclusions of law:

1. On March 5, 2007, defendants, Steven C. Catalfamo and Elizabeth Catalfamo, executed a Promissory Note (hereinafter the "Note") in favor of Household Finance Realty Corporation of New York (hereafter "Household") in the amount of \$732,878.74.

2. On March 5, 2007, defendant Steven C. Catalfamo executed a mortgage (hereinafter the "Mortgage"), that was recorded in the Warren County Clerk's Office on March 12, 2007, in Liber 3213 at Page 119, securing the Note and placing a lien against the subject premises<sup>6</sup>. Paragraph 9 of the Mortgage provides, in part, **"...[t]hat the whole of said principal sum and interest shall become due at the option of the Lender, after default in the payment of any installment of principal or of interest for fifteen days..."**

3. On June 15, 2009, Household, through its counsel, sent a letter to the defendants (hereinafter the "Acceleration Letter"), notifying them that they were in default as of October 10, 2008<sup>7</sup> and that **"...the mortgagee has elected to and herewith elects to declare the entire principal balance of the loan due and payable at once. Accordingly, demand is hereby made for the amount due calculated as follows:**

**Total Principal Due as of the date of this invoice \$718,934.84...."**

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<sup>6</sup>On June 7, 2007, the same mortgage was recorded in the Warren County Clerk's Office in Liber 3286 at Page 86, to include an Adjustable Rate Rider.

<sup>7</sup>The defendant admits, in his motion papers in the second action, that he has not made a mortgage payment since April of 2008.

4. On June 16, 2009, Household filed a Notice of Pendency, Summons and Complaint thereby commencing a mortgage foreclosure action against the defendants (hereinafter the “first foreclosure action”) demanding payment of the defendants in Paragraph TENTH of the Complaint of the

**“ENTIRE PRINCIPAL BALANCE: \$718,934.84**

**INTEREST THEREON FROM: September 10, 2008**

**AT THE RATE AS SET FORTH IN THE INSTRUMENT SECURED BY THE MORTGAGE” and in the WHEREFORE clause contained therein, Household**

**“...demands judgment against the defendants as follows:...f. That Plaintiff may be paid the amount adjudged to be due on the Note and the Mortgage with interest at the time of such payment, together with any monies advanced and paid pursuant to any term or provision of the Note and Mortgage so as to protect the lien of the Mortgage, and together with taxes, insurance premiums and all other charges and liens paid thereon with interest upon said amount from the date of the respective payments and advances, together with all amounts due by virtue of statutory costs, allowances and attorney’s fees, together with any reasonable attorney’s fees over and above the amounts covered by the statutory attorney’s fees, together with the expenses of the sale insofar as the amount of such monies properly applicable thereto will pay the same...”**

5. Defendant Catalfamo filed an answer to the Complaint in the first foreclosure action.

6. On December 3, 2009, the Honorable David B. Krogmann, retired Justice of the Supreme Court, signed an Order in the first foreclosure action granting Household’s Motion for Summary Judgment against defendant Catalfamo, Default Judgment against defendants Elizabeth Catalfamo and John Doe 1-10 and an Order of Reference.

7. Thereafter, Household filed for a Judgment of Foreclosure in the first foreclosure action and Sale and the motion was reserved upon until the matter was returned from the mandatory Residential Foreclosure Settlement Conference part.

8. On August 2, 2011, Judge Krogmann issued a Letter Order in the first foreclosure action directing Household to file an attorney affirmation for creditors and Affidavit of Service that is required in residential mortgage foreclosure actions, pursuant to Administrative Order 431/11<sup>8</sup>.

9. On May 29, 2013, Judge Krogmann issued a Letter Order in the first foreclosure action denying Household's request for a Judgment of Foreclosure and Sale based upon Household's failure to file the required affirmation.

10. On February 24, 2014, Household assigned the Note/Mortgage to U.S. Bank Trust, NA, as Trustee for LSF8 Master Participation Trust (hereafter "US Bank").

11. On June 24, 2014, US Bank submitted the Affidavit of Theodore Schroeder Jr., Default Service Officer for Caliber Home Loans, Inc., (hereinafter "Caliber"), attorney in fact for U.S. Bank, to the Referee in the first foreclosure action, of the amount due alleging that the defendants were in default since at least October 10, 2008.

12. On August 13, 2014, Judge Krogmann issued a Letter Order in the first foreclosure action dismissing it, as abandoned, pursuant to CPLR 3404 (hereinafter the "Abandonment Dismissal Order) which is not evidence of a deceleration of the debt on the Note and Mortgage.

13. On the 27<sup>th</sup> day of August, September, October, November, December of 2014 and January, February, March, April, May, June, July, August, September, October, November and December of 2015, Caliber, on behalf of US Bank, issued identical "Informational Statements", addressed to the defendants. The Informational Statements refer to a "Contractual Due Date" of 10/08/08, with a demand for payment of principal and interest in the amount of \$5,969.83 for the respective month as set forth in the "Explanation of Amount" section thereof.

14. On November 14, 2014, Judge Krogmann issued a Decision and Order in the first foreclosure action denying US Bank's motion to vacate and restore the action.

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<sup>8</sup>This was a precursor to the Certificate of Merit that is now required in such actions pursuant to CPLR 3012-B.

15. Neither Household nor US Bank could voluntarily discontinue the first foreclosure action, on June 10, 2015<sup>9</sup>, thereby decelerating the debt on the Note and Mortgage and/or tolling the statute of limitations, given the Court's determination in its' Abandonment Dismissal Order, issued almost ten months prior thereto, that the first foreclosure action was dismissed.

16. On June 3, 2015, Caliber, on behalf of US Bank, sent letters to the defendants at the address of the subject premises and to an address in Jacksonville, Florida, via certified mail, return receipt requested (hereinafter the "Deceleration Letter"). The Deceleration Letter read, in relevant part, as follows:

**"...Under the terms of your Loan, which includes the Note and Mortgage, your obligations were previously accelerated and brought to maturity. All sums secured by the Security Instrument were declared immediately due and payable. Caliber is writing to advise you that as of the date of this letter, the maturity of the Loan is hereby de-accelerated, immediate payment of all sums owed is hereby withdrawn, and the Loan is re-instituted as an installment loan.**

**PLEASE BE ADVISED THAT TO THE EXTENT 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.."**

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<sup>9</sup>The plaintiff did not provide the Court with a certified copy of any such Order of Voluntary Discontinuance of the first foreclosure action.

17. On June 13, 2015, defendant Steven Catalfamo signed the return receipt for the Deceleration Letter, at the subject premises.

18. On May 2, 2016, US Bank assigned the Note and Mortgage to the plaintiff.

19. On October 12, 2016, Rushmore Loan Management Services, LLC. (hereinafter "Rushmore"), on behalf of the plaintiff, sent a letter to the defendants advising them that it will be servicing the Note and Mortgage and attached thereto another letter, with the same date, referred to as a "statement of your debt" which set forth a "Payment Due Date" of 10/10/08.

20. On November 18, 2016, Rushmore, on behalf of the plaintiff, issued a Mortgage Statement to the defendants, with a payment coupon on the bottom portion thereof, demanding payment of \$515,445.04, indicating a default date of 10/10/08.

21. On April 20, 2017, Rushmore, on behalf of the plaintiff, issued a Mortgage Statement to the defendants, with a payment coupon on the bottom portion thereof, demanding payment of \$623,393.37, indicating a default date of 10/10/08.

22. On February 27, 2017, Rushmore, on behalf of the plaintiff, issued an Informational Letter advising the defendants that the total amount due was \$652,580.30, indicating a default date of 10/10/08.

23. On May 9, 2017, Rushmore, on behalf of the plaintiff, mailed 90 day demand letters to the defendants, pursuant to RPAPL 1304, alleging that the defendants were in default 1,977 days and that \$388,722.52 was due and owing. Electronic proof of same was filed by the plaintiff, with the New York State Superintendent of Financial Services, pursuant to RPAPL 1306.

24. The defendants have met their prima facie burden of proof that the six year statute of limitations began to run on June 15, 2009, on the principal only, due and owing on the Note and Mortgage, pursuant to the Acceleration Letter of the same date, wherein Household only demanded payment of the principal sum of **\$718,934.84** and that it had expired on June 15, 2015, prior to the commencement of the second action.

25. The defendants have also met their prima facie burden of proof that the six year statute of limitations also began to run, on all other sums due and owing under the Note and Mortgage, including interest, on June 16, 2009, the date of the filing of the Notice of Pendency, the Summons and the Complaint in the first foreclosure action and that it expired on June 16, 2015.

26. The plaintiff has met its burden proof that the Deceleration Letter to defendant Catalfamo, dated June 3, 2015, met the first and fourth prongs of the deceleration test such that the Deceleration Letter was mailed to defendant Catalfamo prior to the expiration of the respective statutes of limitations period as set forth herein, regarding all indebtedness of defendant Catalfamo, due and owing under the Note and Mortgage.

27. The plaintiff has failed to meet its burden of proof that the Deceleration Letter to defendant Catalfamo has met the second or third prongs of the deceleration test such that the affirmative act was not clear and unequivocal that the debt was being decelerated or revoked, despite defendant Catalfamo receiving actual notice of the Deceleration Letter, because the Deceleration letter was devoid of any demand for monthly mortgage payments from him, did not include copies of monthly invoices for installment payments, did not provide any provisions advising him that they would accept monthly payments of principal and interest nor did the plaintiff offer any proof of, or any other forms of evidence, that would demonstrate that it was truly seeking to decelerate the loan, prior to June 15<sup>th</sup> and 16<sup>th</sup> of 2015.

28. The plaintiff has also failed to meet its' burden of proof on the fifth prong of the deceleration test, demonstrating that defendant Catalfamo did not change his position in reliance upon the acceleration of the debt due under the Note and Mortgage, as it is plausible that he could have acquired the ability to pay the arrears and maintain current mortgage payments, and he could have perceived that the plaintiff would not have accepted monthly payments due to the acceleration thereof. Plaintiff's motion papers are silent on this issue.

29. The Deceleration Letter was pretextual to avoid the onerous effect of the approaching expiration of the respective statutes of limitations, just days later and was intended to defeat the defendant's rights under Article 15 of the RPAPL. This Court cannot permit the plaintiff to benefit from its failure, or that of its predecessors, to diligently pursue the first foreclosure action or to, properly and honestly, decelerate the debt alleged therein, for the purposes of reinstating the loan such that defendant Catalfamo would once again be making payments thereon.

30. The defendant's motion to dismiss the action is granted, pursuant to CPLR 3211(a) (5), as the statute of limitations had expired on the principal on June 15, 2015 and on the interest and other charges on June 16, 2015, approximately two years and six months prior the commencement of the second action on December 11, 2017, making it untimely.

31. The second action is hereby dismissed, with prejudice, and the Warren County Clerk is hereby directed to cancel the Notice of Pendency in connection herewith.

32. The plaintiff's summary judgment motion for an Order of Reference, to appoint a referee to compute the amount due, to treat the defendant's answer as a limited notice of appearance and to amend the caption to remove the defendants Elizabeth Catalfamo and Joe Doe from the caption is hereby denied, in its entirety, based upon the expiration of the statute of limitations as set forth herein.

CPLR 3212 requires the moving party to establish its' defense or cause of action sufficiently to warrant a court's directing judgment, as a matter of law, demonstrating prima facie evidence that there are no triable issues of fact, thereby shifting the burden to the other party to produce evidentiary proof, in an admissible form, establishing the existence of material issues of fact requiring trial. See Zuckerman v. City of New York, 49 NY2d 557 (1980) and Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1988), citing RPAPL 1501(4) which states that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage, or to enforce a vendor's lien, has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons...to secure the cancellation and discharge of record of such encumbrance, See also Kashipour v. Wilmington Sav. Fund Socy., FSB, 144 AD3d 985 (2d Dept 2016).

As and for the defendant Catalfamo's summary judgment motion on RPAPL 1501(4), the Court makes the following findings and conclusions of law:

1. The Court adopts findings 1 through 32 as set forth herein.
2. The defendant's motion for summary judgment to cancel/discharge the mortgage lien on the subject premises and to quiet title thereto is granted as the plaintiff has failed to raise any triable issues of fact and the respective statutes of limitations have expired.
3. The plaintiff is hereby barred from all claim of any lien, encumbrance or interest in the subject premises and that the estate, title and interest of the defendant in the subject premises is hereby adjudged free from the lien of such Mortgage, and from any claim, lien and encumbrance arising from said Mortgage or the ownership thereof.
4. The plaintiff and every person claiming under it, by title accruing after the filing of the judgment roll, or of the notice of pendency of the action, as prescribed by law, be and they are hereby forever barred from asserting such claim, the invalidity of which is established in this second foreclosure action, to an estate or interest in the subject premises, of any kind or nature whatsoever.
5. Upon entry of the within Decision and Order and upon the payment of any lawful fees, the Warren County Clerk shall cancel and discharge of record the Mortgage and mark upon the liber and indices wherein the same is recorded, the cancellation of said Mortgage with a notation referring to this Decision and Order and the date of entry thereof.

This shall constitute the decision and order of this court.

Dated: August 8, 2019



Hon. Paulette M. Kershko,  
Acting Justice of the Supreme Court

