

U.S. Bank N.A. v Caruana

2019 NY Slip Op 32888(U)

September 27, 2019

Supreme Court, New York County

Docket Number: 850103/2017

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 15

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR J.P. MORGAN MORTGAGE TRUST 2006-A6,

Index. No. 850103/2017
Motion Seq. No. 001

Plaintiff,

Decision and Order

-against-

QUENTIN P. CARUANA a/k/a QUENTIN PHILLIP
CARUANA a/k/a QUENTIN CARUANA,
LINA CARUANA, J.P. MORGAN CHASE BANK N.A.,
BOARD OF MANAGERS OF THE PARK AVENUE
PLACE CONDOMINIUM; "JOHN DOE AND JANE DOE,"
said names being fictitious, it being the intention of
Plaintiff to designate any and all occupants of premises
being foreclosed herein,

Defendants.

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Melissa Crane, J.S.C.,

In this action, plaintiff U.S. Bank National Association, as trustee for J.P. Morgan Mortgage Trust 2006-A6 (Plaintiff), commenced a residential mortgage foreclosure against defendants Quentin P. Caruana and Lina Caruana (Defendants), husband and wife, seeking a judgment of foreclosure and sale of an apartment unit in a condominium building located on East 55th Street, New York City (Property). By this motion (sequence number 001), Plaintiff seeks an order, pursuant to CPLR 3212, granting it summary judgment, striking all of Defendants' affirmative defenses in their answer and appointing a referee to compute the amount of the debt Defendants owe to Plaintiff. Besides opposing Plaintiff's motion, Defendants' cross motion for summary judgment seeks dismissal of this action as time barred pursuant to CPLR 213 (4), as well as dismissal of the complaint for failure to comply with the notice requirement of RPAPL § 1304.

BACKGROUND FACTS AND PROCEDURAL HISTORY¹

As borrowers, Defendants executed a note, dated August 10, 2006 (Note), pursuant to which they promised to pay JP Morgan Chase Bank (Bank), the lender, the principal sum of \$738,000. Complaint, ¶ 10. On the same day, Defendants also executed a mortgage in favor of the Bank (Mortgage) to secure their obligations. *Id.*, ¶ 11. Under the Note, Defendants promised to make monthly payments of principal and interest, commencing on October 1, 2006 and continuing through September 1, 2036, when the entire principal and interest would be due and payable. *Id.*, ¶ 12. The Mortgage provides that, in case of default under the Note, the holder of the Mortgage could declare the entire debt immediately due and payable. *Id.*, ¶ 14. Plaintiff is the current owner and holder of the Note and Mortgage through assignment. *Id.*, ¶ 15. On September 27, 2006, the Bank executed an allonge endorsing the Note to Chase Home Finance LLC (Chase Home). Chase Home subsequently merged into the Bank in May 2011. *Id.*, ¶¶ 16-21. Plaintiff “acquired physical possession of the original, indorsed Note before this action was commenced.” *Id.*, ¶ 18.

When Defendants defaulted on the Note and Mortgage, Chase Home commenced a foreclosure action against them in this court, on November 17, 2009, under index number 116173/2009 (2009 Foreclosure Action). Plf. Brief at 5. By order dated August 12, 2016, this

¹ The court draws the facts from the parties' submissions, including, among other things: the complaint (Complaint; NYSCEF Doc. No. 01); Defendants' answer (Answer; NYSCEF Doc. No. 13); Plaintiff's brief in support of motion (Plf. Brief, NYSCEF Doc. No. 37); Defendants' affirmation in opposition to motion and in support of cross motion (Def. Opp., NYSCEF Doc. No. 43); and Plaintiff's brief in further support of motion and in opposition to Defendants' cross motion (Plf. Reply, NYSCEF Doc. No. 52). In addition, the court has drawn upon the affidavits and affirmations filed in connection with the foregoing, as well as their exhibits.

court (Justice Hagler) dismissed the 2009 Foreclosure Action, on the basis that the Bank failed to appear at a scheduled conference and failed to diligently prosecute the action. *Id.*; *see also* Docket of 2009 Foreclosure Action (not a e-filed case) (order with respect to motion sequence number 002). Thereafter, by order dated March 20, 2017, Justice Hagler denied the Bank's motion for an order to vacate the dismissal and to restore the action to the court's calendar. *See* Docket of 2009 Foreclosure Action (order with respect to motion sequence number 003).

In the interim, and after defaulting on the Note and Mortgage, Defendant Quentin Caruana (Quentin), on May 4, 2011, filed a petition for relief under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the Central District of California. Complaint, ¶ 22. In Schedule D of his bankruptcy petition, Quentin acknowledged the debt under the Note and Mortgage as a secured claim. *Id.*, ¶ 23. Quentin also executed a document entitled "Chapter 7 Debtor's Individual Statement of Intention" (Statement of Intention) wherein he declared that he intended to "retain" and "keep current" the debt. *Id.*, ¶ 24. Quentin obtained a bankruptcy discharge on September 9, 2011. Plf. Brief at 4. An order of the bankruptcy court dated September 27, 2011 closed his bankruptcy case. Def. Opp., ¶ 21. After the bankruptcy discharge, he submitted a loss mitigation application, dated September 15, 2011, to Plaintiff's prior loan servicer (September 2011 Application). *Id.* at 5. Thereafter, in the letter dated October 12, 2012 (October 2012 Letter), he referenced the loan account number for the debt and "authorized a realtor to communicate" with Plaintiff's prior servicer regarding a short sale. *Id.* Afterwards, he sent another letter to Plaintiff's prior servicer on January 3, 2013 (January 2013 Letter), wherein he "referenced the loan account and authorized Diamond Law Group to represent him regarding a short payoff of the Loan." *Id.* He sent to Plaintiff's prior servicer

another loss mitigation application on March 13, 2013 (March 2013 Application). *Id.*

According to Plaintiff, Defendants defaulted in making the mortgage payment due on January 1, 2012 and the monthly payments thereafter. Plf. Brief at 5. "There is now due and owing to Plaintiff the principal sum of at least \$687,479.64, plus interest thereon, and other recoverable amounts." *Id.* Mortgage default letters, dated March 31, 2017, were "mailed to Defendants at the Property and to their last known address." *Id.* On May 3, 2017, Plaintiff commenced this mortgage foreclosure action. NYSCEF Doc. No. 01. In their Answer, Defendants asserted 12 affirmative defenses, including, among others, the defense of statute of limitations, and the defense that Plaintiff failed to comply with the notice requirement of RPAPL § 1304. NYSCEF Doc. No. 13. On November 29, 2018, the court heard oral argument on Plaintiff's motion and Defendants' cross motion for summary judgment. The transcript for that hearing (Transcript) was received by the court on May 13, 2019. NYSCEF Doc. No. 53.

APPLICABLE LEGAL STANDARDS

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.*:

"As we have stated frequently, the proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

68 NY2d 320, 324 (1986) (internal citations omitted); *Gammons v City of New York*, 24 NY3d 562, 569 (2014) (movant must tender sufficient evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment).

Courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Moreover, the courts have held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion. *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 (1978). On the other hand, "[w]here different conclusions can reasonably be drawn the evidence, the motion should be denied." *Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (1992); accord *Jaffe v Davis*, 214 AD2d 330 (1st Dept 1995) (conflicting inferences required denial of summary judgment motion).

ANALYSIS

As discussed, besides opposing Plaintiff's motion for summary judgment, Defendants also cross move to dismiss the complaint on two principal grounds: Plaintiff's failure to comply with RPAPL § 1304; and the statute of limitations pursuant to CPLR 213 (4).

I. Notice Requirements of RPAPL § 1304

Section 1304 sets forth the notice requirements for an action to foreclose upon a

mortgage secured by a "home loan." The statute defines, in relevant part, a "home loan" as a mortgage on real estate with a one to four family dwelling or a condominium unit that is "used or occupied, or intended to be used or occupied . . . as the home or residence . . . and which is or will be occupied by the borrower as the *borrower's principal dwelling*." RPAPL § 1304 (5) (a) (i) - (iv) (emphasis added).

In support of Defendants' cross motion, Quentin submitted an affidavit (NYSCEF Doc. No. 44) in which he stated, in relevant part, that he is a resident of the State of California, and that he "could not afford to keep the apartment" after it went into foreclosure, but that he "had always intended to use the New York apartment as my home." Quentin affidavit, ¶ 8. In the affirmation of counsel in support of the cross motion, counsel argues that "Defendant claims in his affidavit that he intended to occupy the condominium unit as a principal dwelling," and that "Plaintiff did not provide notice to Defendant pursuant to RPAPL § 1304," even though the loan on the subject condominium unit "qualifies as a home loan." Def. Opp., ¶¶ 57-60.

Plaintiff contends that the "Second Home Rider" to the Mortgage Defendants signed states that "Borrower shall occupy, and shall only use, the Property as Borrower's second home." Plf. Reply at 10; referencing exhibit 3 (NYSCEF Doc. No. 25). Thus, Plaintiff asserts that the subject loan is not a "home loan," as defined in RPAPL § 1304 (5), because the Second Home Rider "establish[es] that the Property was not, nor was it intended to be, Defendants' primary residence." Plf. Reply at 10; citing *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1271 (3d Dept 2017) (plaintiff was not required to comply with RPAPL §1304 because the loan was not a home loan, "given that the second home rider attached to the mortgage and defendant's own submissions established that the mortgaged property was not his primary residence").

Defendants do not dispute the existence of the Second Home Rider. Indeed, their counsel conceded, at oral argument, that the condominium unit is a second residence, and section 1304 notices are required only with respect to the principal or primary dwelling. Transcript at 3-4. Thus, Defendants' argument that Plaintiff failed to comply with the notice requirement of RPAPL § 1304 is without merit, because that statute is inapplicable to the facts in this action.

II. Statute of Limitations Defense

Defendants contend that this action is untimely because it is barred by the six-year statute of limitations in CPLR 213 (4). The parties do not dispute the applicability of section 213 (4) to this action.

Generally speaking, courts have held that the time limit begins to run from the due date for each unpaid installment under the note. *Plaia v Safonte*, 45 AD3d 747 (2d Dept 2007). However, when the debt is accelerated, the entire amount is due and the statute begins to run on the entire debt. *EMC Mtge. Corp. v Patella*, 279 AD2d 604 (2d Dept 2001). An affirmative act of acceleration may be in the form of a demand upon the borrower to pay the debt in full or the commencement of a foreclosure action. *Lavin v Elmakiss*, 302 AD2d 638 (3d Dept 2003). Thus, Defendants argue that the 2009 Foreclosure Action commenced on November 17, 2009 triggered the statute. According to defendants, then, unless the limitations period became tolled, such as during the bankruptcy proceeding of the borrower, the "last possible date [by] which Plaintiff had to recommence another action [on the debt] is six years (November 18, 2015) plus that period in which Mr. Caruana was in bankruptcy." Def. Opp., ¶ 30. Defendants further argue that, because "Mr. Caruana's bankruptcy lasted from May 4, 2011 to September 11 [sic], 2011, a period of 127 days, the latest date that Plaintiff could have served a timely complaint [in this

action] is March 23, 2016, [but] the date of commencement of the instant action is May 3, 2017.”

Id., ¶ 32.

While Defendants' arguments are generally correct, they require a more detailed explanation and some minor corrections. As a starting point, CPLR 204 (a) provides for the tolling of the limitations period: when an action is stayed by a court or statutory prohibition, “the duration of the stay is not a part of the time within which the action must be commenced.” Thus, courts have tolled mortgage foreclosure actions during the borrower's bankruptcy proceeding. *See e.g. Mercury Capital Corp. v Shepherds Beach, Inc.*, 281 AD2d 604 (2d Dept 2001).

A. The Bankruptcy Tolling

Here, Quentin commenced his Chapter 7 bankruptcy case on May 4, 2011, received a bankruptcy discharge on September 9, 2011, and his Chapter 7 case closed on September 27, 2011. Notably, the bankruptcy discharge only extinguishes his personal liability on the Note, but the right of Plaintiff, as a secured creditor, to foreclose on the Property survives and passes through bankruptcy and remains enforceable under state law. *Johnson v Home State Bank*, 501 US 78, 83 (1991). Indeed, section 524 (j) of the Bankruptcy Code recognizes this “ride through option” for mortgage liens on real property and permits debtors who continue to pay their mortgages post discharge. *In re Sosa*, 443 BR 263, 268 (Bankr. D RI 2011); *accord In re Gill*, 529 BR 31, 38 (Bankr WD NY 2015). Also, in a Chapter 7 case, section 362 (c) (2) (C) of the Bankruptcy Code states that the automatic stay under section 362 (a) remains in effect until a bankruptcy discharge is either granted or denied. However, pursuant to section 554 (c), any property scheduled in a debtor's bankruptcy filings under section 521 (1) that is “not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for

purposes of section 350," a statutory provision that states that after an estate is fully administered, the court discharges the trustee and closes the case. In Mr. Caruana's Chapter 7 case, the bankruptcy trustee did not administer the apartment unit (i.e. the Property) and was abandoned to Mr. Caruana at the closing of his bankruptcy case. This means that the earliest date Plaintiff could have resumed prosecution of the 2009 Foreclosure Action was September 27, 2011. This also means that the six-year limitations period under CPLR 213 (4) was tolled or extended by 146 days due to the bankruptcy case, and the latest date by which Plaintiff must have commenced the instant action was April 12, 2016, not March 23, 2016, as Defendants maintain. Nevertheless, because plaintiff did not commence this action until May 3, 2017, it is time barred under CPLR 213 (4).²

Notwithstanding the foregoing, Plaintiff contends that the "Statement of Intention" filed by Quentin under section 521 (1) of the Bankruptcy Code, in conjunction with his Chapter 7 bankruptcy petition, restarted the running of the statute of limitations. Plf. Reply at 3-6. In particular, Plaintiff contends that because, in the Statement of Intention, "Quentin specifically referred to the Chase Home Mortgage and the Property, and expressly wrote that his intention with regard to the Loan was to 'retain and keep current' [the Mortgage debt]," the Statement of Intention "was an acknowledgment of the Mortgage debt under GOL § 17-101," and renewed the limitations period. *Id.*, citing *In re Failla*, 838 F3d 1170, 1173 (11th Cir 2016) (*Failla*), and *Knoll v Datek Sec. Corp.*, 2 AD3d 594 (2d Dept 2003) (*Knoll*).

² Plaintiff is not entitled to the six-month extension under CPLR 205, that governs the time in which a new action after termination of an action, because the court dismissed the 2009 Foreclosure Action for neglect to prosecute. Even assuming the six-month extension applies (extending the time to October 12, 2016), this action is still time barred.

Plaintiff's contention is unpersuasive. In a Statement of Intention, a debtor must indicate whether he intends to "surrender" or "retain" property by checking off the appropriate box, and if he intends to retain property, he must then indicate whether he intends to "redeem the property," "reaffirm the debt," or "other" with an explanation. Here, Quentin checked off the "retain" box, and then explained in the "other" box that he would "retain, keep current." Significantly, he did not check off the box for "reaffirm the debt." Had he done so, his creditor (i.e. the Bank or Plaintiff) and the bankruptcy court would have had to undertake the highly detailed procedures in section 524 of the Bankruptcy Code. This section sets forth specific methods to reaffirm the debt that would otherwise be dischargeable under section 727 of the Bankruptcy Code, by means of a court-approved reaffirmation agreement between the debtor and the creditor. Quentin did not enter into any reaffirmation agreement with the Bank or Plaintiff. Instead, the debt under the Note was eventually discharged by order of the bankruptcy court. To equate the simple act of indicating "retain, keep current" in the Statement of Intention with the elaborate provisions and procedures to "reaffirm the debt," as Plaintiff urges, is without merit.

Plaintiff's reliance on *Failla* is also misplaced. In that case, the issue was whether a debtor who agreed to surrender his house in bankruptcy to discharge a mortgage debt could oppose a subsequent foreclosure action by the secured lender in state court. 838 F3d at 1173. The debtor indicated his intention to surrender the house in his Statement of Intent filed pursuant to section 521 (a) (2) of the Bankruptcy Code. *Id.* The bankruptcy trustee abandoned the house to the debtor because it had a negative value (i.e. the debt was greater than the fair market value), and he continued to live in the house while contesting the foreclosure. *Id.* The court held that "[e]ven if the trustee abandons the property, the debtors' duty to surrender the property to the

creditor remains," because reading "surrender" to refer only to the surrender of the home to the trustee makes "section 521 (a) (2) superfluous to section 521(a) (4)," which requires a debtor to "surrender to as to this trustee all property of the estate." *Id.* at 1175 (internal quotation marks and citation omitted). The court held that because the debtor filed his Statement of Intention to surrender the house, he could not contest the state foreclosure action. *Id.* at 1178. In this action, the issue is not "surrender" of the Property, but whether indicating "retain, keep current" in the Statement of Intention is substantively and legally equivalent to reaffirming the mortgage debt. As explained above, the answer is in the negative. Indeed, any attempt to treat "retain, keep current" as the equivalence of "reaffirm the debt" is unavailing, because it would render the Statement of Intent filed under section 521 (a) "superfluous" with the specific debt reaffirmation under section 524 (c) of the Bankruptcy Code. Plaintiff's reliance on *Knoll* is also misplaced, because that case has nothing to do with a bankruptcy discharge or reaffirmation of an otherwise dischargeable debt. Instead, the issue in *Knoll* was "whether the commission analysis documents constitute written acknowledgments of a debt sufficient to take the action outside the statute of limitations." 2 AD3d at 595. Because the facts and legal issue in *Knoll* are distinguishable from those in this case, it is inapplicable.

Plaintiff further argues, erroneously, that because Quentin "acknowledged the Mortgage debt" in his Statement of Intention, and because his bankruptcy "acted to stay the running of the limitations period to enforce the Mortgage until [he] obtained a discharge on September 9, 2011 . . . the statute of limitations to enforce the Mortgage did not begin to run until September 9, 2011." Plf. Reply at 6, citing *PSP-NC, LLC v Raudkivi*, 138 AD3d 709 (2d Dept 2016). In the cited case, the borrower defaulted on the payment of his debt. After the lender started a

foreclosure action in October 2001, he commenced a Chapter 13 bankruptcy case in October 2002, and pursuant to a Chapter 13 repayment plan filed in April 2003, he reinstated the debt, promised to pay the lender the debt arrears and all post-petition payments outside the plan. *Id.* at 710. After the bankruptcy court approved the repayment plan, he made payments until July 2005 and then stopped. *Id.* After he was granted a bankruptcy discharge in October 2006, the lender assigned the mortgage and note in July 2011 to the plaintiff, who commenced the action to foreclose in July 2012. *Id.* The borrower contended that the plaintiff's foreclosure action was barred by the six-year statute of limitations, because the statute began to run in October 2011 when the lender started a prior foreclosure action. *Id.* The court disagreed, holding that the Chapter 13 payment plan in which he promised to repay the debt "renewed the limitations period," and the automatic stay that was in effect "tolled the renewed limitations period" until he was granted a bankruptcy discharge in October 2006. *Id.* at 711. Here, Quentin's bankruptcy was filed under Chapter 7 (a straight liquidation), not Chapter 13 (bankruptcy relief provided to individuals with regular income where they can propose a debt repayment plan to make installment payments to creditors). Because a Chapter 13 repayment plan is a borrower's acknowledgment of his debt and his promise to repay such debt (in whole or in part), and the plan is subject to the approval of the bankruptcy court, a confirmed repayment plan renews the running of the statute of limitations. Because this action involves only a straight liquidation under Chapter 7, *PSP-NC, LLC v Raudkivi* is inapplicable.

B. Post Bankruptcy Loss Mitigation Applications And Letters

Plaintiff argues that the loss mitigation applications Quentin sent via his September 2011 Application, March 2013 Application and related letters (NYSCEF Doc. Nos. 29 and 32)

acknowledged the Mortgage debt in writing and thereby renewed the running of the statute of limitations under GOL § 17-101. Plf. Brief at 15-19; Plf. Reply at 7-8. Plaintiff takes the position that because these documents identified the loan by its number, indicated the loan balance, and stated that Defendants “can afford to pay in full” and “are anxious to get this settled,” they qualified as an acknowledgment of debt under GOL § 17-101, that provides

An acknowledgment or promise contained in a writing signed by the party to be charged is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the [CPLR].

See GOL § 17-101. Plaintiff cites, inter alia, *Metwaly v International Bus. Machines*, 97 AD3d 514 (1st Dept 2012) and *Chase Manhattan Bank v Polimeni*, 258 AD2d 361 (1st Dept 1999), to support its arguments that in order to satisfy the statute: (1) the borrower's writing need only recognize an existing debt and contain nothing inconsistent with an intention to pay the debt. A promise to pay is not required.

Notably, none of the cases involved an acknowledgment of debt within the context of applications or hardship letters seeking loan modification under CPLR 3408 (mandatory settlement conference in residential foreclosure actions) and the federal rules governing the Home Affordable Modification Program (HAMP). Def. Opp. at 7-10. In *Costa v Deutsche Bank Natl. Trust Co.*, 247 F Supp 3d 329 (SD NY 2017) the federal district court held that the mandatory settlement conference and the HAMP application process did not toll or stay the statute of limitations under CPLR 204 (a). *Id.* at 344- 348. Importantly, the court rejected the bank's argument that the loan modification applications renewed the statute of limitations period pursuant to GOL § 17-101. *Id.* at 348-353. Specifically, the court held that the loan modification applications and the hardship letters of Vito Costa, the borrower, did not revive the

bank's statute of limitations period to foreclose the mortgage because "[n]one of these writings unconditionally acknowledged Vito's intent to pay the Loan; most liberally construed, they implied a conditional offer of settlement that [the lender] never accepted." The court concluded that a foreclosure settlement agreement did not constitute an acknowledgment of debt sufficient to renew the running of the statute under GOL § 17-120 because it "contain[ed] neither an express acknowledgment of [the borrower's] indebtedness nor an express promise to pay the mortgage debt per se." Instead, it "contained only a promise to pay [the plaintiff] a specific sum in exchange for [the plaintiff's] agreement to forego prosecution of its foreclosure action." *Id.*, quoting *Petito v Piffath*, 85 NY2d 1, 8 (1994). See also, *Hakim v Peckel Family Ltd. Partnership*, 280 AD2d 645 (2d Dept 2001) (settlement offer letter did not renew running of the statute because it was conditioned on the lender's acceptance of a disputed reduction in mortgage amount, and the lender never accepted the condition); *Sichol v Crocker*, 177 AD2d 842 (3d Dept 1991) (draft foreclosure settlement letter did not renew running of the statute even though the letter arguably acknowledged the debt; there was no unconditional promise to pay, thus rendering any promise conditional, and the condition was never fulfilled).

Other courts have followed, the holding in *Costa*, that relied, in turn, upon the Court of Appeals decision in *Petito v Piffath*. See e.g., *Wells Fargo Bank, N.A. v Grover*, 165 AD3d 1541 (3d Dept 2018) (while the HAMP agreement represented mortgagor's implied promise to pay the debt in consideration of modification of the mortgage, mortgagor's partial payments against the debt renewed the statute of limitations for mortgagee to bring foreclosure action); *U.S. Bank, N.A. v Martin*, 144 AD3d 891, 892-893 (2d Dept 2016) (to establish the statute of limitations renewed by partial payment, lender must show that the payment was "accompanied by

circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder,” but because the payment was made as a condition to receiving an extension of a bankruptcy stay, this payment did not constitute an unqualified acknowledgment of the debtor or manifest a promise to pay the remainder) (internal quotation marks and citations omitted).

Here, the September 2011 Application and the March 2013 Application (including the related hardship letters) do not amount to defendants’ “absolute and unqualified acknowledgment” to pay the Mortgage debt. At most, these applications and letters reflect, as part of the requirement to enter into a foreclosure settlement or HAMP agreement, the borrower’s admission of the existence of the debt and an implied promise to pay this debt in consideration for the proposed loan modification. Here, Plaintiff does not allege that it accepted the modification applications or any partial payment of the debt. As discussed above, a lender’s acceptance of the loan modification application and partial debt payments are among the requisite elements sufficient to renew the running of the statute under GOL § 17-101. Plaintiff has failed to show the required elements and, thus, its argument that the applications and letters at issue renewed the running of the statute is without merit.

C. Debt Acceleration By Commencement Of Mortgage Foreclosure

Alternatively, Plaintiff argues that because the Mortgage contains a provision that permits the Defendants to re-instate the loan prior to the entry of a judgment of foreclosure, the Mortgage was not accelerated and the statute of limitations did not start to run against the entire debt. Plf. Brief at 13-15; Plf. Reply at 8-9; citing, among other cases, *Nationstar Mtge., LLC v MacPherson*, 56 Misc 3d 339 (Sup Ct, Suffolk County 2017) (*MacPherson*).

Specifically, the Mortgage provides, in paragraph 19 that: "Even if Lender has required Immediate Payment in Full, I may have the right to have enforcement of this Security Agreement stopped. I will have this right at any time before the earliest of . . . (c) a judgment has been entered enforcing this Security Instrument" Mortgage, ¶ 19 (c). In *MacPherson*, the Suffolk County trial court held that, where the terms of a mortgage give the borrower the right to reinstate the loan by payment of the arrears, the commencement of a foreclosure action does not accelerate the mortgage debt. Only the entry of a judgment of foreclosure can accelerate the mortgage debt. 56 Misc 3d at 350-351. The trial court reasoned that, because the lender contractually "bargained away its right to demand payment in full" upon a payment default or the commencement of a foreclosure action, the language in the mortgage "afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law 258 . . ." *Id.*

Plaintiff's reliance on *MacPherson* is misplaced. Since its issuance by the Suffolk County trial court in April 2017, "the Second Department has not echoed or approved that holding." *Your New Home, LLC v JP Morgan Chase Bank, N.A.*, 62 Misc 3d 1046, 1052 (Sup Ct, Westchester County 2019), citing, *inter alia*, *21st Mtge. Corp. v Osorio*, 167 AD3d 823 (2d Dept 2018) (acceleration of a mortgage occurs by the commencement of a foreclosure action); *U.S. Bank Trust, N.A. v Aorta*, 167 AD 3d 807 (2d Dept 2018) (same). The court in *Your New Home* also noted that "[t]he only type of situation in which the Second Department has held that filing a foreclosure complaint does *not* accelerate the mortgage debt is where the lender did not at that time have the authority to accelerate the debt . . . such as where it was not yet the holder of the note." 62 misc 3d at 1052 (citations omitted; emphasis in original). The court further

observed that “a number of trial-level courts have considered and rejected the holding in [*MacPherson*].” *Id.* (citations omitted).

Indeed, in a recent decision issued on March 13, 2019, the Second Department expressly abrogated the holding in *MacPherson*: “to the extent that decisional law interpreting the same contractual language [in paragraph 19 of the mortgage] holds otherwise, it should not be followed.” *Bank of New York Mellon v Dieudonne*, 171 AD3d 34, 40 (2d Dept 2019) (*Dieudonne*). In *Bank of New York Mellon*, the Court noted that the mortgage at issue “is a uniform instrument issued by Fannie Mae and Freddie Mac for use in New York,” and due to the “prevalence of the language used in this uniform instrument, and in light of the divergent decisions reached in the trial-level decisions . . . we deem it appropriate to clarify the legal principles that are relevant to this issue and to set forth the appropriate construction of the language used in these uniform instruments.” *Id.* at 35-36. Specifically, the Court explained that because paragraph 22 of the subject mortgage³ “unequivocally set forth the conditions that had to be satisfied” before the lender was contractually entitled to exercise its option to accelerate the entire debt, “the reinstatement provision in paragraph 19 of the mortgage was not a condition to the [lender’s] acceleration of the mortgage,” and that the extinguishment of the borrower’s right to de-accelerate the mortgage by allowing the borrower to pay the arrearage and reinstating the loan under paragraph 19 was not a condition precedent to the lender’s acceleration. *Id.* at 39-40.

³ Paragraph 22 provides, in relevant part, that if all the conditions stated in this paragraph are met, “Lender may require that I [i.e. the borrower] pay immediately the entire amount then remaining unpaid under the Note and this Security Agreement . . . If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold.”

Therefore, the Second Department affirmed the trial court's decision, holding that the lender's mortgage foreclosure action was time-barred by the six-year statute of limitations. *Id.* In this action, the Mortgage is nearly identical to the one in *Dieudonne*. Accordingly, the holding in *Dieudonne* is fully applicable here.

CONCLUSION

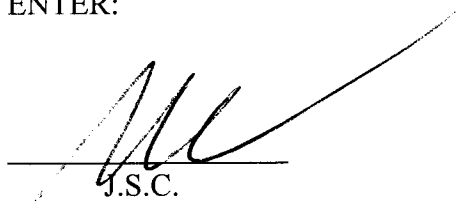
Based upon all of the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment (motion sequence number 001) is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted, and the Clerk of the Court is hereby directed to enter judgment dismissing the complaint accordingly.

DATED: 9-27, 2019

ENTER:



HON. MELISSA A. CRANE
J.S.C.