

<b>Wells Fargo Bank, N.A. v Crawford</b>
2020 NY Slip Op 31502(U)
May 19, 2020
Supreme Court, Kings County
Docket Number: 506634/2015
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 506634/2015  
Motion Date: 2-24-20  
Mot. Cal. No.:

-----X  
WELLS FARGO BANK, NATIONAL ASSOCIATION  
AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN  
TRUST 2005-4 ASSET-BACKED CERTIFICATES,  
SERIES 2005-4,

Plaintiff,

-against-

**DECISION/ORDER**

JAMES CRAWFORD; 979 L LLC; CRIMINAL COURT  
OF THE CITY OF NEW YORK; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE;  
NEW YORK CITY PARKING VIOLATIONS BUREAU;  
UNITED STATES OF AMERICA; THE PEOPLE OF  
THE STATE OF NEW YORK; THE CITY OF NEW YORK;  
and JOHN DOE AND JANE DOE #1 through #7, the last  
seven (7) names being fictitious and unknown to the Plaintiff,  
the persons or parties intended being the tenants, occupants,  
persons or parties, if any, having or claiming an interest in or  
lien upon the mortgaged premises described in the Complaint,

Defendants.

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The following papers numbered 1 to 3 were read on this motion:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to foreclose a mortgage, plaintiff, WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2005-4 ASSET-BACKED CERTIFICATES, SERIES 2005-4 (“Well Fargo”), moves for an order (1) striking the fourth and fifth affirmative defenses asserted in the Amended Answer of Defendant,

THE CITY OF NEW YORK, to the Amended Complaint; and (2) for such other and further relief as this Court may deem just and proper.

**Background:**

In this action to foreclose a mortgage, the sole borrower, Defendant, JAMES CRAWFORD (the "Borrower"), has not appeared in this action and has consented to the foreclosure. The City of New York ("the City") was granted leave to intervene in the action and seeks a finding that its purported liens, which are in excess of one million dollars, are superior to Plaintiff's. It is the City's contention that Plaintiff is barred from asserting its mortgage lien due to the expiration of the statute of limitations. Both Plaintiff and the City previously moved for summary judgment raising many of the arguments that are being made in connection with this motion and their motions were denied. Notwithstanding the denial of the summary judgment motions, Plaintiff was permitted leave to seek dismissal of the City's fourth and fifth affirmative defenses set forth in the City's Amended Answer to the Amended Complaint and now seeks such relief. The City's fourth affirmative defense alleges that Plaintiff commenced this action after the statute of limitations for actions to foreclose a mortgage had expired. The City's fifth affirmative defense alleges that the loan modification entered into with the Borrower in 2014 (the "2014 Loan Modification") is unenforceable. Plaintiff maintains that both defenses are devoid of merit as a matter of law.

**Discussion:**

An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due (*see Nationstar Mtge., LLC v. Weisblum*, 43 A.D.3d 866, 867, 39

N.Y.S.3d 491; *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540; *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569; *Loiacono v. Goldberg*, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138). However, “even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605, 720 N.Y.S.2d 161; see *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 A.D.3d 985, 986, 41 N.Y.S.3d 738; *Nationstar Mtge., LLC v. Weisblum*, 143 A.D.3d at 867, 39 N.Y.S.3d 491; *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d at 982, 943 N.Y.S.2d 540). “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 A.D.3d 1068, 1069–1070, 58 N.Y.S.3d 118; see *Deutsche Bank Natl. Trust Co. v. Adrian*, 157 A.D.3d 934, 935, 69 N.Y.S.3d 706; *EMC Mtge. Corp. v. Patella*, 279 A.D.2d at 606, 720 N.Y.S.2d 161).

Plaintiff contends that the City’s fourth affirmative defense, that the action is time barred, is a defense personal to the borrower, who has defaulted in the action, and cannot be asserted by the City. The Court disagrees. The City as a necessary party to the action has the requisite standing to assert this defense. (*Charney v. N. Jersey Trading Corp.*, 172 A.D.2d 390, 390, 568 N.Y.S.2d 769, 770).

Next, Plaintiff contends that the statute of limitations defense is devoid of merit as a matter of law. The City contends that the six-year time limit began to run on the entire debt on July 8, 2008, when Option One accelerated the entire mortgage debt by commencing the first foreclosure action and that since this action was commenced more than six years later, the action is time barred.

Plaintiff contends that the mortgage debt was never accelerated when Option One commenced the first foreclosure action because Option One was **not** the holder of the mortgage note at the time. Plaintiff contends that since Option One transferred possession of the mortgage note to Plaintiff's prior loan servicer, American Home Mortgage Servicing, Inc. ("AHMSI") as of April 30, 2008 (*see* Hood Affidavit ¶ 11), more than two months before the first foreclosure action was commenced, Option One lacked standing to commence the foreclosure action and the alleged acceleration of the mortgage debt was a nullity.

The City contends, however, that the transfer of the mortgage note to AHMSI was invalid because the allonge on which Option One endorsed the note was not "so firmly affixed thereto as to become a part thereof" (UCC 3-202[2]); *HSBC Bank USA, N.A. V. Roumiantseva*, 130 A.D.3d 983,985 15 N.Y.S.3d 117 [holding that an allonge attached to a note by a paperclip did not constitute a valid transfer of the note because the allonge was not so firmly affixed to the note as to become a part thereof]. In support of its position, the City relies on the affidavit of Dolores Ialacci, the person who endorsed the note on Option One's behalf and who shipped it off to AHMSI. She averred that it was Option One's general practice not to staple or otherwise affix allonges to the notes before shipping them off. The City maintains since the transfer of the mortgage note to AHMSI was invalid, Option One continued to be the holder of the note on July 8, 2008 when the first foreclosure action was commenced and had the requisite standing to commence the action. Thus, the City contends that the mortgage debt was accelerated when that action was commenced.

Plaintiff and the City raised essentially these same arguments on their prior motions for summary judgment, both of which were denied. The Court denied the motions finding that although the City submitted sufficient evidence to support a finding that the allonge was not so

firmly affixed to the mortgage note to become a part thereof, the City did not establish such as a matter of law. The same is true now. Accordingly, whether the commencement of the first foreclosure action accelerated the mortgage remains an issue of fact.

Next, Plaintiff maintains that even if the first foreclosure action accelerated the mortgage debt, the two subsequent loan modifications entered into with the Borrower, the second one having allegedly occurred in 2014, constituted separate affirmative acts revoking the acceleration of the mortgage debt and thereby tolled the applicable statute of limitations. The City's fifth affirmative defense is that the 2014 Loan Modification is unenforceable as a matter of law.

Plaintiff contends that the mortgage loan was initially modified by agreement, dated October 1, 2008, creating a new principal balance of \$703,247. Plaintiff contends that the Borrower made monthly payments of \$2,930.20 pursuant to the 2008 Loan Modification, beginning with the October 2008 payment, and continued to make payments at the modified loan amount through September 1, 2013. Plaintiff further contends that since these payments were accepted by the lender pursuant to the 2008 Loan Modification as full consideration for the Borrower's monthly payments, the statute of limitations was revived, and the mortgage debt was decelerated.

Plaintiff further contends that the Loan was modified a second time by agreement effective February 1, 2014, pursuant to which the Borrower made monthly payments of \$1,658.61 from January 28, 2014 to September 8, 2014. Plaintiff contends that these payments also revived the statute of limitations and Plaintiff's acceptance of them was sufficient to decelerate the mortgage debt. This action ensued after the Borrower defaulted under the terms of

the 2014 Loan Modification by failing to make the payment due October 1, 2014 and by failing to tender subsequent installments.

The Court rejects Plaintiff's contention that the two agreements constituted a deceleration of the mortgage debt. While a mortgage holder has the option to "decelerate" a loan once it has been accelerated, a deceleration notice must also be clear and unambiguous to be valid and enforceable (*Milone v. US Bank Natl Assn*, 164 A.D.3d 145, 153, 83 N.Y.S.3d 524, 530, *leave to appeal dismissed*, 34 N.Y.3d 1009, 138 N.E.3d 1088). Nothing contained in either modification agreement, even if properly before the Court, constituted a clear and unequivocal revocation of the acceleration. Further, the stipulation of discontinuance of the first foreclosure, by itself, did not constitute a clear and unequivocal revocation of the acceleration (*Aquino v. Ventures Tr. 2013-I-H-R by MCM Capital Partners*, 172 A.D.3d 663, 664, 100 N.Y.S.3d 386).

The only remaining issues are whether the modification agreements and the payments allegedly made by the Borrower following their alleged execution revived the statute of limitations. " 'General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' " (*Yadegar v. Deutsche Bank Natl. Trust Co.*, 164 A.D.3d 945, 947, 83 N.Y.S.3d 173, quoting *Lynford v. Williams*, 34 A.D.3d 761, 762, 826 N.Y.S.2d 335). "The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Lew Morris Demolition Co. v. Board of Educ. of City of N.Y.*, 40 N.Y.2d 516, 521, 387 N.Y.S.2d 409, 355 N.E.2d 369; *see Yadegar v. Deutsche Bank Natl. Trust Co.*, 164 A.D.3d at 947, 83 N.Y.S.3d 173). Before the Court can even address the issue of whether the modification agreements revived the statute of limitations, Plaintiff must first demonstrate that the agreements were signed by the Borrower (Mr. Crawford). Although both

agreements have a signature which purports to be Mr. Crawford's, no admissible proof was offered by the Plaintiff to establish that the signatures are his. The affidavit of Derrick Raleigh, who never observed Mr. Crawford sign the agreements and who expressed no familiarity with his signature, was insufficient proof to establish as a matter of law that Mr. Crawford executed the agreements.

“In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown 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’ ” (*U.S. Bank N.A. v. Martin*, 144 A.D.3d 891, 892–893, 41 N.Y.S.3d 550, quoting *Lew Morris Demolition Co. v. Board of Educ. of City of N.Y.*, 40 N.Y.2d at 521, 387 N.Y.S.2d 409, 355 N.E.2d 369; see General Obligations Law § 17–107; *Petite v. Piffath*, 85 N.Y.2d 1, 9, 623 N.Y.S.2d 520, 647 N.E.2d 732). No such showing was made here. The payment history did not show that the payments were made by Mr. Crawford and thus, did not prove that it was made by the debtor (see *U.S. Bank Nat. Assn v. Martin*, 144 A.D.3d 891, 893, citing *Education Resources Inst., Inc. v. Piazza*, 17 A.D.3d at 515, 794 N.Y.S.2d 65; *Saini v. Cinelli Enters., Inc.*, 289 A.D.2d 770, 771, 733 N.Y.S.2d 824; *Big Chief Lewis v. Stim*, 99 A.D.2d 501).

Accordingly, for all of the above reasons, it is hereby

**ORDRED** that Plaintiff's motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 19, 2020



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020