To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR INDYMAC IMJA MORTGAGE LOAN TRUST 2007-A2, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-A2,

Plaintiff,

– against –

WILLIAM WEININGER, ELLEN WEININGER, et al.,

Defendants.

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Index No. 53805/2017

Sequence No. 3 & 4

DECISION & ORDER

In an action to foreclose a mortgage (1) the defendants William Weininger and Ellen Weininger move to renew their prior motion for summary judgment dismissing the complaint on the grounds that it is barred by the statute of limitations (motion sequence #3); and (2) the plaintiff moves to confirm the referee's report and for judgment of foreclosure and sale (motion sequence #4).

Papers Considered

1. Notice of Motion/Affirmation of Christopher A. Gorman, Esq./Exhibits A-G;
2. Memorandum of Law in Opposition;
3. Reply Affirmation of Christopher A. Gorman, Esq./Exhibit 1/Reply Memorandum of Law;
4. Notice of Motion/Affirmations of Deana Cheli, Esq./Oath/Referee Report/Exhibits A-C;
5. Memorandum of Law in Opposition;
6. Memorandum of Law in Reply.

Factual and Procedural Background

In a decision and order dated August 15, 2019, this Court granted the plaintiff's motion for summary judgment against the appearing parties, a default judgment against the non-appearing parties, an order of reference, and to amend the caption. The Court denied the Weininger's cross motion for summary judgment dismissing the complaint as

time barred. The defendants argued that this is the third residential foreclosure action commenced upon the same note and mortgage and this action was barred by the statute of limitations. The defendants also argued that Ellen Weininger was a borrower pursuant to RPAPL 1304 even though she only signed the mortgage and not the note and, therefore, was entitled to a notice pursuant to 1304.

As to the statute of limitations, this Court held that although the filing of the first foreclosure action in October 2010 accelerated the mortgage debt and the statute of limitations began to run, the plaintiff affirmatively revoked its election to accelerate the mortgage within the six-year time period rendering the commencement of this action timely. The Court found that plaintiff submitted proof that it moved for and, on August 5, 2016, was granted an order that discontinued the 2010 foreclosure action and canceled the notice of pendency (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d at 1070) and also submitted proof of its willingness to enter into a loan modification and accept installment payments on the loan in 2014, which the Court found to be an affirmative act of revocation.

As to the 90-day notice, this Court distinguished the cases of *Aurora Loan Servs. v. Weisblum*, 85 AD3d 95 (2d Dept 2011) *overruled in part Citibank, N.A. v Contin-Scheurer*, 172 AD3d 17 (2d Dept 2019) and *Aurora Loan Servs., LLC v Komarovsky*, 151 AD3d 924, 927 (2d Dept 2017), and held that Ellen Weininger was not a borrower for the purposes of RPAPL 1304.

The defendants now move to renew their underlying cross motion for summary judgment dismissing the complaint. The plaintiff opposes the motion.

The plaintiff moves to confirm the referee's report and for a judgment of foreclosure and sale. The defendants oppose the motion.

Discussion

An action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action (*see* CPLR 213 [4]). With respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept 1997]). "[E]ven 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" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012] *quoting EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). A mortgage debt is accelerated when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due (*see Milone v US Bank N.A.*, 164 AD3d 145, 152 [2d Dept 2018]). A lender, however, "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, 1069-1070 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]).

The defendants argue that this action is barred by the six-year statute of limitations. Specifically, the defendants argue that the debt was accelerated by the filing of the 2010 foreclosure action and the acceleration was never affirmatively revoked by plaintiff.

In support of their motion to renew, the defendants argue that in three separate decisions issued in September 2019, subsequent to this Court's prior decision in August 2019, the Second Department confirmed that the discontinuance or dismissal of a prior foreclosure action does not constitute a de-acceleration of a mortgage debt. Those cases are: *Bank of NY Mellon v Alli*, 175 AD3d 1472 (2d Dept 2019); *Ditech Fin., LLC v Naidu*, 175 AD3d 1387 (2d Dept 2019) and *U.S. Bank N.A. v Leone*, 175 AD3d 1452 (2d Dept 2019).

In opposition, plaintiff argues that it affirmatively revoked the acceleration of the mortgage by moving to discontinue the 2010 foreclosure action and by offering the defendant a loan modification in 2014 in which it agreed to accept installment payments.

Plaintiff commenced the first foreclosure action with the filing of a summons and complaint on October 26, 2010 (Index No. 27232/2010). In an order entered August 5, 2016, the Supreme Court, Westchester County (Scheinkman, J.) granted the plaintiff's motion to discontinue the 2010 foreclosure action. Plaintiff commenced this action with the filing of a summons and complaint on March 24, 2017.

The Court finds that the defendants met their initial burden of demonstrating, prima facie, that the instant action was untimely commenced. Thus, the burden shifts to the plaintiff to demonstrate that this action is timely or raise an issue of fact as to whether the plaintiff revoked its election to accelerate the mortgage.

The evidence demonstrates that the plaintiff moved to discontinue the 2010 foreclosure action and such motion was granted. This Court, in determining that the plaintiff affirmatively revoked its election to accelerate the mortgage within the six-year time period rendering the commencement of this action timely, relied upon *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]). In *NMNT Realty Corp.*, the Second Department held that the defendant made a prima facie showing that the six year statute of limitations had expired since the loan was accelerated with the filing of a prior foreclosure action. However, the Court also found that, in opposition, the plaintiff submitted proof that it moved for and was granted a discontinuance of the prior foreclosure action which raised an issue of fact as to whether that motion constituted an affirmative act by the lender to revoke its election to accelerate.

In so ruling, the Second Department distinguished other cases where prior foreclosure actions were dismissed by the court. In those cases, the Court noted the prior

actions were not withdrawn by the lender and therefore, the dismissals by the court did not constitute an affirmative act by the lender to revoke its election to accelerate.

A motion for leave to renew shall be based on new facts not offered on the original motion or "shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]).

The defendants argue, in support of its motion to renew, that a discontinuance of the prior action, by itself, is insufficient to constitute an affirmative act of revocation (*see U.S. Trust, N.A. v Aorta*, 167 AD3d 807 [2d Dept 2018]; *HSBC Bank, N.A. v Vaswani*, 174 AD3d 514 [2d Dept 2019]). The Court agrees and as a result, the defendants' motion to renew is granted.

In *Ditech Fin., LLC v Naidu*, 175 AD3d at 1389, the Second Department held that the plaintiff failed to raise an issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year period. The Court held that contrary to the Supreme Court's determination, the plaintiff's execution of a stipulation discontinuing the prior foreclosure action within the time frame did not, *by itself*, constitute an affirmative act to revoke its election to accelerate since "the stipulation ... was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the [defendant]".

In *U.S. Bank N.A. v Leone*, 175 AD3d 1452 (2d Dept 2019), the Second Department held that contrary to the mortgagee's contention, its submission of an order discontinuing the prior action upon its own motion, in itself, was insufficient to establish, prima facie, that it revoked its election to accelerate the mortgage debt. While the order granted the plaintiff's motion to discontinue the prior action, nothing in the order itself served to destroy the effect of the plaintiff's prior election to accelerate the maturity of the debt.

The Court notes that *NMNT Realty Corp. v Knoxville 2012 Trust* (151 AD3d 1068) has not been overruled and in fact, has been cited recently by the Second Department. However, it is clear from recent Second Department cases that a lender's discontinuance of a prior action, by itself, is insufficient to demonstrate revocation of the election to accelerate.

Here, the plaintiff did move to discontinue the first foreclosure action. However, the order entered August 5, 2016 granting the motion (Scheinkman, J.) is silent on the issue of revocation of the election to accelerate. The plaintiff's motion to discontinue the 2010 action was not due to the plaintiff's lack of standing to commence that action (*see U.S. Bank N.A. v Auguste*, 173 AD3d 930, 932 [2d Dept 2019] [holding that where the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration]). The plaintiff's discontinuance of the 2010 action was due to its failure to verify compliance with certain notice requirements and did not constitute a

revocation of its decision to accelerate the mortgage (*see Federal Natl. Mtge. Assn. v Schmitt*, 172 AD3d 1324 [2d Dept 2019]).

Moreover, the Court finds that the 2014 loan modification letter sent to the defendant is insufficient to establish that the plaintiff revoked its election to accelerate the mortgage. "[D]e-acceleration notices must also be clear and unambiguous to be valid and enforceable" (*Milone v US Bank N.A.*, 164 AD3d 145, 153 [2d Dept 2018]). A de-acceleration letter is not pretextual if it contains an express demand for monthly payments on the note, or, "in the absence of an express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration" (*Milone v US Bank N.A.*, 164 AD3d at 154).

On April 15, 2014, plaintiff issued a proposed modification agreement to William Weininger. Pursuant to the proposal, in order to accept the modification on the loan, the defendants were required to complete certain steps before May 1, 2014, such as paying the full down payment of $5,126.34 then paying the new monthly installment payments of $5,126.34 commencing on June 1, 2014. The Court finds that this letter does not make an express demand for monthly payments and does not constitute an unconditional and unqualified acknowledgement of the debt sufficient to reset the statute of limitations (*see Nationstar Mtge., LLC v Dorsin*, __ AD3d __, 2020 NY App Div LEXIS 1407 [2d Dept February 26, 2020] [finding that the modification plan did not constitute an unconditional and unqualified acknowledgement of the debt sufficient to reset the statute of limitations where the borrowers made all the trial payments under a proposed modification plan but were not offered a permanent modification agreement]). In this case, the proposed modification agreement was never accepted by the defendants and no payments were made pursuant to the agreement and, therefore, the loan was never de-accelerated.

Thus, the plaintiff failed to demonstrate that this action is timely or raise an issue of fact that its election to accelerate the loan was revoked. As a result, this action is barred by the statute of limitations and the plaintiff's motion for judgment of foreclosure and sale is academic. In light of this determination, the Court need not reach the issue of whether the defendant Ellen Weininger is a borrower entitled to a notice pursuant to RPAPL 1304.

Accordingly, it is

ORDERED that the motion of the defendants William Weininger and Ellen Weininger to renew their prior cross motion for summary judgment dismissing the complaint is GRANTED (motion sequence #3); and it is further

ORDERED that upon renewal, the cross motion of the defendants William Weininger and Ellen Weininger for summary judgment dismissing the complaint is GRANTED and the complaint is dismissed.

Dated: White Plains, New York
March 10, 2020

HON. WILLIAM J. GIACOMO, J.S.C.