MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK **PART 36**
COUNTY OF QUEENS **HON. ROBERT I. CALORAS**

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DEUTSCHE BANK NATIONAL TRUST COMPANY, ON BEHALF OF FINANCIAL ASSET SECURITIES CORPORATION, SOUNDVIEW HOME LOAN TRUST FOR 2007-WMC1 ASSET- BACKED CERTIFICATES, SERIES 2007-WMC1,

Plaintiff,

-against-

LENNOX WARREN; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP.; COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK SOCIAL SERVICES DISTRICT; ANSON STREET, LLC A/A/O WMC MORTGAGE; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "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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Index No. 705801/2019
Motion Date: 1/30/20
Motion Cal. No. 9
Seq. No 1

Dated: April 27, 2020

On April 2, 2019, the Plaintiff commenced this action to foreclose a Mortgage on certain real property known as 111-24 197th Street, Saint Albans, New York 11412, that secured a Note executed by the Defendant, Lennox Warren (hereinafter "Defendant"), on October 26, 2006, to repay a loan in the amount of $388,000.00.

Plaintiff now moves for summary judgment and a default judgment against all other non-appearing defendants, strike and dismiss the affirmative defenses and counterclaim in the Defendant's Answer, and for an order appointing a Referee to compute the total sums due and owing to the Plaintiff. Plaintiff has submitted the following: an affidavit from Teresa H. Hubner; Note; Mortgage; Assignments of Mortgage; Loan History; Notices of Default; Comment Log; RPAPL 1304 Notices; Comment Log; USPS tracking information; RPAPL 1306 Proof of Filing; Summons and Complaint; Notice of Pendency; Certificate of Merit Pursuant to CPLR 3012-B; Affidavits of Service for all Defendants; Defendant's Answer; Plaintiff's Reply to Counterclaims; and Department of Manpower searches for Defendants.

Based upon these documents, the Plaintiff argues that it has established its prima facie entitlement to summary judgment, and Defendant's Answer fails to raise any issues of fact.

Defendant opposes, and in his cross-motion seeks, among other things, an order granting summary judgment in his favor pursuant to CPLR 3212, dismissing the Complaint with prejudice as barred by the statute of limitations. Defendant has submitted, among other things, the following: Defendant's affidavit; Summons and Complaint filed in the prior foreclosure action under Index Number 10481/08; Stipulation of Discontinuance in the prior action; and a memorandum of law. Based on these, Defendant claims that the Plaintiff brought a foreclosure action bearing Index Number 10481/18 on April 24, 2008, wherein the Plaintiff elected to accelerate the mortgage loan by bringing a foreclosure action in 2008, and call due the full amount owing under the subject promissory note (hereinafter the "2008 action"). In paragraph five of the Complaint in the 2008 action, the Plaintiff elected to accelerate the mortgage loan based upon the defendant's failure to make the mortgage payment due on January 1, 2008. Plaintiff voluntarily discontinued the 2008 action and cancelled the Notice of Pendency on or about May 14, 2014, by filing a Stipulation of Discontinuance and an attorney affirmation. Only the Plaintiff's counsel signed the Stipulation of Discontinuance since Defendant had not appeared in the 2008 action. In Plaintiff's Counsel's affirmation, annexed to the Stipulation of Discontinuance, the following is stated:

> That the above entitled action filed in the Office of the Clerk of the County of Queens on April 24, 2008 may be discontinued without prejudice and without further costs in favor of any party and that an order to that effect may be entered herein by any arty hereto without notice.

In his affidavit, Defendant stated that he did not sign or receive a copy of the Stipulation of Discontinuance and never received a letter from the Plaintiff informing him of its intention to revoke the acceleration of the mortgage debt, or to begin accepting installment payments. Plaintiff commenced the instant foreclosure action on April 2, 2019, almost five full years after having discontinued the 2008 Action. In its Complaint, Plaintiff alleges that the Defendant defaulted on a mortgage loan payment due on June 1, 2013. However, the Defendant stated that he has not made any payments on this mortgage since the Plaintiff accelerated the loan in 2008. In his Verified Answer, the Defendant asserted numerous affirmative defenses, including that the 2008 action was time-barred because the Plaintiff accelerated the debt in that action, and a counterclaim pursuant to RPAPL§1501(4).

Based upon the foregoing, Defendant argues that Plaintiff's motion should be denied, and that he is entitled to summary judgment and dismissal of the Complaint because this action is time barred. Defendant argues that the Plaintiff's election to accelerate the mortgage debt by commencing the 2008 action triggered the six-year statute of limitations, which expired on April 24, 2014, prior to the commencement of the instant action.

Defendant further argues that the Plaintiff's Stipulation of Discontinuance, discontinuing the 2008 action, was not a revocation of the acceleration of the mortgage debt, and was silent as to both the revocation of the acceleration of the mortgage debt and on accepting monthly installment payments from him. Consequently, Defendant argues that the Stipulation of Discontinuance and the Plaintiff's attorney's affirmation annexed thereto do not constitute an intent to revocate the acceleration of the loan. As such, Defendant argues that the instant action should be dismissed.

In opposition, Plaintiff argues that the 2008 action did not accelerate the debt, because Plaintiff had not sent an acceleration notice to the Defendant prior to the commencement of the 2008 action pursuant to the terms of the mortgage. Plaintiff argues that the loan was not accelerated, because it failed to serve a pre-foreclosure acceleration notice pursuant to the terms of the mortgage, which is a condition precedent to accelerating the loan. When the Plaintiff failed to provide a notice of acceleration pursuant to the mortgage, it discontinued the 2008 action. Consequently, because it never served a valid notice of acceleration prior to commencing the 2008 action, the Plaintiff argues that the statute of limitations never began to run on the full debt.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

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 (Bank of N.Y. Mellon v Craig, 169 AD3d 627, 628 [2d Dept. 2019]). Where a mortgage is payable in installments, the note and mortgage may contain an acceleration provision that gives the lender "the option to demand due the entire balance of principal and interest upon the occurrence of certain events delineated in the mortgage" (1 Bergman on New York Mortgage Foreclosures § 4.02; see Wells Fargo Bank, N.A. v Burke, 94 AD3d 980, 982-983 [2d Dept. 2012]). Where the terms of the note and mortgage provide that "the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" (Wells Fargo Bank, N.A. v Burke, supra at 982-983; see, Bank of N.Y. Mellon v Dieudonne, 171 AD3d 34, 37 [2d Dept. 2019; Esther M. Mertz Trust v Fox Meadow Partners, 288 AD2d 338, 340 [2d Dept. 2001]; see

also, 1 Bergman on New York Mortgage Foreclosures §§ 4.05, 5.11[2]; cf. Phoenix Acquisition Corp. v Campcore, Inc., 81 NY2d 138, 142-144 [1993]). The acceleration of a mortgage debt may occur when the holder of the note "commences an action to foreclose upon [the] note and mortgage and seeks, in the complaint, payment of the full balance due" (Milone v US Bank N.A., 164 AD3d 145, 152 [2d Dept. 2018]; lv dismissed 34 NY3d 1009[2019]). Once the holder of the note and mortgage has exercised its contractual option to accelerate the mortgage debt in accordance with the terms of the note and mortgage, "the entire amount is due and the Statute of Limitations begins to run on the entire debt" (21st Mtge. Corp. v Balliraj, 177 AD3d 687, 688-689 [2d Dept. 2019]). The limitations period begins to run on the entire debt when the mortgagee elects to accelerate the mortgage (see U.S. Bank, N.A. v Martin, 144 AD3d 891, 891-892 [2d Dept. 2016]). Although a lender may revoke its election to accelerate the loan, 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 (see Bank of N.Y. Mellon v Craig, supra; Milone v US Bank N.A., supra; Freedom Mtge. Corp. v Engel, 163 AD3d 631, 632 [2d Dept. 2018], lv dismissed 33 NY3d 1039 [2019]); Deutsche Bank Natl. Trust Co. v Adrian, 157 AD3d 934, 935 [2d Dept. 2018]).

Here, the Court finds that Defendant has established his prima facie entitlement to summary judgment. Defendant demonstrated, as a matter of law, that Plaintiff elected to accelerate the mortgage debt in 2008 by commencing the prior action under Index Number 10481/08 against the Defendant, wherein the Plaintiff sought payment of the full balance due (21st Mtge. Corp. v Balliraj, supra). Consequently, the Defendant established that the acceleration of the mortgage debt occurred more than six years prior to the commencement of the instant action. As such, the Defendant sustained his initial burden of demonstrating, prima facie, that the instant action was untimely. The Court also finds that the Plaintiff's claims that the 2008 action did not accelerate the mortgage debt, because it discontinued that action due to its failure to serve the Defendant with an acceleration notice pursuant to the terms of the mortgage, is without merit. In the Complaint for the 2008 action, the Plaintiff elected to accelerate the mortgage loan based upon the defendant's failure to make the mortgage payment due on January 1, 2008. After the Plaintiff discontinued the 2008 action, it did not revoke its election to accelerate the loan by an affirmative act of revocation during the six-year statute of limitations period after the initiation of the 2008 action. Consequently, the Plaintiff commenced the instant action after the statute of limitations expired. Accordingly, the plaintiff's motion is denied, and the branch of the Defendant's cross-motion seeking summary judgement and dismissing the Complaint with prejudice are granted.

In the next branch of the cross-motion, the Defendant seeks an order granting him summary judgment pursuant to CPLR 3212 and RPAPL 1501(4) on his counterclaim to quiet title, and directing that the subject mortgage be canceled and discharged of record. Defendant claims that he is entitled to summary judgment on his counterclaim, because the

instant action is time barred, he is the owner of the property, has lived at the property since he purchased it in October 2006, and is currently in possession of the property. Plaintiff opposes.

RPAPL 1501(4) provides that "[w]here the period allowed by the applicable statute of limitation for the commenced of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom". This provision further states that "[i]n any action brought under this section, it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not been paid". The party seeking to discharge a mortgage need only demonstrate that more than six years have elapsed since the mortgagee accelerated the debt, and that the mortgagee is not in possession of the subject property(21st Mortgage Corp. v Nweke, 165 AD3d 616 [2d Dept. 2018]; 53 PL Realty, LLC v U S. Bank Nat'l Ass'n, 153 AD3d 894, 896, 61 [2d Dept. 2017]; Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d 985 [2d Dept. 2016]). A mortgagor is entitled to judgment as a matter of law under RPAP 1501(4) upon demonstrating that enforcement of the subject note is time-barred (Mortgage Corp. v Nweke, supra). Where the mortgagor makes this showing, and the mortgagee fails to raise a triable issue of fact as to the expiration of the statute of limitations period, the mortgagor is entitled to cancelation and discharge of the subject mortgage (Kashipour v Wilmington Sav. Fund Socy., FSB, supra at 987; JBR Constr. Corp. v Staples, 71 AD3d 952, 953 [2d Dept. 2010]); Rack v Rushefsky, 5 AD3d 753, 753-754 [2d Dept. 2004]).

Here, the Court finds that Defendant has demonstrated his prima facie entitlement to summary judgment on his counterclaim. As set forth above, enforcement of the subject Note is time barred. Furthermore, in his affidavit, the Defendant established that he purchased the property in 2006, has lived at the property since then, and is currently in possession of the property. The Court also finds that the Plaintiff has failed to raise any triable issues of fact. Accordingly, the branch of the cross-motion seeking summary judgment on the Defendant's counterclaim is granted.

The remaining branch of the cross-motion seeking summary judgment on his counterclaim for reasonable attorneys' fees, costs, and disbursements pursuant to RPL 282(1) is granted. Where, as here, the defendant/mortagagor is the prevailing party in a foreclosure action, she is entitled to an award of attorneys' fees and expenses for the successful defense of the action pursuant to RPL 282(1) (21st Mtge. Corp. v Nweke, supra). The Court finds that the Plaintiff's claims that the Defendant will not be able to successfully defend himself in this action and that he has failed to demonstrate that the Plaintiff breached any term of the mortgage transaction, is without merit. Accordingly, a hearing shall be held at a later date, to be scheduled by the Court, to determine the amount of reasonable attorneys' fees, costs, and

disbursements the Defendant is entitled to pursuant to RPL 282(1). Based upon the foregoing, the Plaintiff's motion is denied, and the Defendant's cross-motion is granted.

Submit order.

ROBERT I. CALORAS, J.S.C.

FILED

5/13/2020
12:29 PM

COUNTY CLERK
QUEENS COUNTY