Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HOME EQUITY MORTGAGE LOAN ASSET-BACKED TRUST SERIES INABS 2007-A,

Plaintiff(s),

- and -

PERLA NISSAN; OLYMPIC REALTY NEW YORK INCORPORATED, INC.; NEW YORK CITY REGISTER, QUEENS COUNTY; and "JOHN DOE #1" through "JOHN DOES #12," the last twelve names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, person or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendant(s).

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Index No.: 719387/19

Motion Date: 8/11/20

Motion Cal. No.: 13

Motion Seq. No: 01

The following papers numbered 1 - 9 read on this motion by defendants Nissan Perla (s/h/a Perla Nissan) and Olympic Realty New York Incorporated, Inc., to dismiss the complaint, cancel the notice of pendency, and impose sanctions, and on the cross-motion by plaintiff for leave to amend the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits-Service.....	5 - 8
Reply Affirmation.....	9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

In this action sounding in equity, and also purportedly brought pursuant to Article 15 of the RPAPL, plaintiff seeks to establish of record its mortgage in the original amount of $420,000.00 against real property located at 222 Beach 40th Street, County of Queens, City and State of New York, identified as Block 15848, Lots 48 and 50 on the Queens County tax map, owned by

defendants Nissan Perla (s/h/a Perla Nissan) and Olympic Realty New York Incorporated, Inc. (hereafter, collectively, "the moving defendants"). It is undisputed that Mr. Perla acquired the adjacent parcels of real property in 2002 and 2003, and provided the subject mortgage to nonparty MERS, as nominee for First Meridian Mortgage, LLC, on or about July 6, 2006, and it was recorded on or about April 2, 2008. According to plaintiff, the subject mortgage was subsequently assigned to multiple entities, including nonparty OneWest Bank, FSB ("OneWest"), who eventually assigned it to plaintiff on August 21, 2010, as recorded on December 1, 2010.

It is also undisputed that on or about September 15, 2009, before the subject mortgage was assigned to plaintiff, OneWest commenced a separate foreclosure action under Index No. 25172/2009 against Mr. Perla and other entities, including 222 Beach 40th Street, LLC ("Beach 40"), a company wholly owned by Mr. Perla which, at one point, also had an ownership interest in the subject properties.[1] The record is unclear as to everything that transpired over the following five years, but by notice of motion dated October 14, 2014, OneWest moved for a default judgment against Mr. Perla and Beach 40 in the 2009 foreclosure action. Mr. Perla alleges that he was never served with OneWest's summons and complaint, but he later learned of the default judgment motion, and so, by notice of cross-motion dated December 15, 2015, he and Beach 40 cross-moved to dismiss on the grounds of lack of personal jurisdiction and abandonment. By order dated February 16, 2018, Hon. Carmen R. Velasquez, JSC, after conducting a traverse hearing, granted the cross-motion and dismissed the complaint, finding that Mr. Perla and Beach 40 had not been served.

Plaintiff advises that the order dismissing the 2009 foreclosure action has been appealed, the appeal was perfected in April of 2019, and the parties are presently awaiting the scheduling of oral arguments and a final submission date before the Second Department. On November 15, 2019, some seven months after the perfecting of that appeal, plaintiff commenced the instant action.

Defendant now moves to dismiss the complaint based on documentary evidence (see CPLR 3211 [a][1]), expiration of the statute of limitations (see CPLR 3211 [a][5]), and for failure to state a cause of action (see CPLR 3211 [a][7]). As the Court of Appeals has explained,

"[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept

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[1]Mr. Perla remains the fee owner of Lot 50, but on July 29, 2013, he conveyed title to Lot 48 to defendant Olympic Realty New York Incorporated, Inc.

the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [quotations and citations omitted]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). In addition,

> "[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, dismissal should not eventuate" (*Doe v Ascend Charter Schs.*, 181 AD3d 648, 650 [2d Dept 2020]).

Moreover, allegations of a "vague, speculative, and conclusory nature" are insufficient to establish the existence of a cause of action (*see Kaplan v Conway & Conway*, 173 AD3d 452, 453 [1st Dept 2019]; *see also Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 278 [2016] ["Conclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss."]).

The moving defendants, relying upon the procedural history of the 2009 foreclosure action, argue that the instant action should be dismissed on the grounds of *res judicata* and expiration of the statute of limitations, since that prior action involved the enforceability of the mortgage lien which plaintiff seeks to establish of record in the case at bar. As to the former ground, "[t]he doctrine of res judicata precludes a party from litigating 'a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter'" (*Matter of Josey v Goord*, 9 NY3d 386, 389 [2007], *quoting Matter of Hunter*, 4 NY3d 260, 269 [2005]). However, "'[t]he dismissal of an action for non-service of a complaint under CPLR 3012(b) is obviously not on the merits, and if it were possible to commence a new action, it could not be met with the defense of res judicata'" (*Samuels v Rosenberg*, 178 AD2d 639, 640 [2d Dept 1991], *quoting* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3012:13, at 591). As plaintiff notes, Justice Velazquez dismissed the 2009 foreclosure action upon finding that OneWest had not acquired personal jurisdiction over Mr. Perla and Beach 40, by virtue of OneWest's process server's failure to properly effectuate service of process. Since such a dismissal precludes the application of *res judicata*, the court turns to the statute of

limitations ground asserted by the moving defendants.

The moving defendants argue that this action should be dismissed because the commencement of a foreclosure action is the only means through which plaintiff can enforce the mortgage against the subject premises, but the statute of limitations has expired on any such action. In its opposing papers, plaintiff does not actually contest this contention by the moving defendants; rather, plaintiff argues that the assertion of this defense is premature. It is well-settled that,

> "[o]n a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. Once this showing has been made, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise [a question of fact] as to whether the action was timely" (*Bank of NY Mellon v Craig*, 169 AD3d 627, 628 [2d Dept 2019] [internal quotation marks and citations omitted]).

"As a general matter, 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" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012], *citing* CPLR 213 [4]). In addition, "'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'" (*id*, *quoting EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept [2001]). "An acceleration of a mortgage debt occurs, inter alia, when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" (*Deutsche Bank Natl. Trust Co. v Ebanks*, ___AD3d___, 2020 NY Slip Op 08035, *1, *4 [2d Dept 2020]). A lender may revoke its acceleration of a mortgage debt only by an affirmative act occurring during the six-year statute of limitations period (*see EMC Mtge. Corp.*, 279 AD2d at 605-606), which is "clear and unambiguous," and not "pretextual" (*see Milone v US Bank N.A.*, 164 AD3d 145, 153-154 [2d Dept 2018], *lv dismissed* 34 NY3d 1009 [2019]).

It is uncontroverted on this record that plaintiff's predecessor, OneWest, commenced the prior foreclosure action on or about September 15, 2009, and in paragraphs "9" and "10" of the complaint in that action, OneWest elected to accelerate the entire outstanding principal balance of the mortgage on the subject premises. Moreover, there is no indication that OneWest or plaintiff ever revoked the acceleration. The court, thus, finds that the moving defendants have met their burden to establish that

the time within which to commence an action to enforce the mortgage has expired (*see e.g. Citimortgage, Inc. v Ford*, 186 AD3d 1609, 1610 [2d Dept 2020] ["The fact that the prior foreclosure action was dismissed for failure to effectuate personal service does not invalidate the plaintiff's election to exercise its right to accelerate the maturity of debt."]; *see also MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019] [holding that a defendant prima facie established that a foreclosure action commenced in July 2016 was untimely, where the plaintiff's predecessor accelerated the mortgage by commencing a prior foreclosure action in February 2007, which was dismissed without prejudice in August 2012]).

Plaintiff argues that the statute of limitations defense is premature because the February 16, 2018 order dismissing the 2009 foreclosure action was timely appealed, and so there is a possibility that the Second Department may reverse the dismissal. Hence, according to plaintiff, that action "has yet to be fully adjudicated." Contrary to plaintiff's contention, however, an order dismissing an action is a final determination of the parties' rights as relates to the action. Moreover, since plaintiff has not argued, and it does not appear, that the prior order was subject to an automatic stay under CPLR 5519, or that a stay was otherwise imposed, there is no basis in this record to question the enforceability of the dismissal order. In any event, plaintiff's argument is besides the point. To the extent that the instant action is not already superfluous, it would be rendered unnecessary by an appellate ruling that Mr. Perla and Beach 40 were validly served with the 2009 foreclosure summons and complaint, because plaintiff, as OneWest's successor-in-interest, will, presumably, then be able to continue the foreclosure action, subject to any other defenses.[2] Plaintiff has not argued that the statute of limitations has been tolled since the September 15, 2009 acceleration of the mortgage on the subject premises, nor has plaintiff proffered any other evidentiary facts tending to establish that it is inapplicable. The court, therefore, finds that the moving defendants have established their entitlement to judgment dismissing the complaint as to them.

In their reply papers, the moving defendants also request that the court affirmatively award them additional relief of cancelling and discharging plaintiff's mortgage lien against the subject premises pursuant to RPAPL 1505 (4). The statute permits a party to "maintain [such] an action" where the period within which to foreclose upon a mortgage encumbrancing real property has expired

[2]It is noted that Justice Velazquez did not reach Mr. Perla and Beach 40's alternative ground for dismissing the foreclosure complaint as abandoned pursuant to CPLR 3215 (c). Plaintiff has not indicated whether this issue was also briefed and argued to the Second Department.

(*see id*). By its terms, the statute requires the party seeking such relief to commence an action, or at the least, assert a cause of action. The moving defendants have not commenced an action against plaintiff to cancel and discharge the subject mortgage. Moreover, since this is a CPLR 3211 pre-answer motion to dismiss, the moving defendants have not yet served an answer wherein they have asserted a counterclaim (*see P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 199 [1st Dept 2009], [explaining that a counterclaim "is a cause of action asserted by a defendant against a plaintiff," which, "[b]y its very nature, . . . seeks affirmative relief"], *citing* CPLR 3019 [a]). The court is, thus, constrained to deny this request by the moving defendants, as procedurally improper.

Plaintiff cross-moves for leave to amend the complaint to include additional party defendants, who, it appears, may have unreleased liens on Lot 50, and against whom plaintiff also wishes to have the subject mortgage declared as superior. Leave to amend pleadings should be "freely given upon such terms as may be just" (CPLR 3025 [b]), and such a motion "should be granted where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party" (*DLJ Mtge. Capital, Inc. v David*, 147 AD3d 1024, 1025 [2d Dept 2017]). Plaintiff explained in its motion papers that it commenced this action "to secure a declaration of priority and validation for its duly recorded mortgage and encumbrance" on the subject premises owned by the moving defendants. However, as noted, plaintiff also has not disputed that its mortgage is enforceable only through a properly commenced foreclosure action. Since plaintiff has failed to controvert the moving defendants' showing that the subject mortgage is time-barred, and, thus, unenforceable, the proposed amendment to include additional parties against whom plaintiff may declare said mortgage valid is, *a fortiori*, patently devoid of merit.

For the foregoing reasons, the above-referenced motion and cross-motion are granted to the extent that it is

ORDERED that the complaint is dismissed as to defendants Nissan Perla (s/h/a Perla Nissan) and Olympic Realty New York Incorporated, Inc.; and it is further

ORDERED that the notice of pendency filed in this action against the real property located at 222 Beach 40th Street, County of Queens, City and State of New York, identified as Block 15848, Lots 48 and 50 on the Queens County tax map, shall be cancelled, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion is denied in its entirety.

The foregoing shall constitute the decision and order of this court.

Dated: February 2, 2021

JANICE A. TAYLOR, J.S.C.

FILED
2/2/2021
3:28 PM
COUNTY CLERK
QUEENS COUNTY

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