

**U.S. Bank N.A. v Duncan-Roberts**

2022 NY Slip Op 30130(U)

January 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 508834/2018

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18<sup>th</sup> day of January, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR JP ALT TRUST 2006-S2,

Plaintiff,

-against-

GILLIAN DUNCAN-ROBERTS; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; COMMISSIONER OF LABOR STATE OF NEW YORK; WORKERS' COMPENSATION BOARD OF NEW YORK STATE, "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint.,

Defendants.

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**DECISION / ORDER**

Index No. 508834/2018  
Mot. Seq. # 1 & # 2

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	41-42, 76-77
Opposing Affidavits (Affirmations) _____	77, 114, 118
Affidavits/ Affirmations in Reply _____	121
Other Papers: <u>Affirmations in Support</u> _____	62, 89, 99, 104, 108

Upon the foregoing papers, in Motion Sequence #1, defendant Gillian Duncan-Roberts moves for an order: (a) pursuant to CPLR 3212, granting her summary judgment

in a separate action she brought to cancel and discharge the subject mortgage; (b) pursuant to CPLR 3212, granting summary judgment to defendant on her counterclaim, in the instant foreclosure action, for attorneys' fees pursuant to Real Property Law [RPL] § 282; (c) dismissing the instant action; (d) cancelling, discharging, and declaring unenforceable, the subject mortgage; (e) declaring that defendant holds absolute legal title to the subject premises free and clear of any interest of plaintiff U.S. Bank National Association as Trustee for JP ALT Trust 2006-S2, and all persons or entities claiming under and/or acting in concert with plaintiff; (f) declaring that plaintiff, and all persons or entities claiming under and/or acting in concert with plaintiff, are forever barred and precluded from asserting any claims to an interest in the subject premises; (g) granting temporary, preliminary, and permanent injunctive relief enjoining plaintiff, and all persons or entities claiming under and/or acting in concert with plaintiff, from interfering in any way with defendant's title, possession, use and/or enjoyment of the subject premises; (h) directing the Kings County Clerk's Office, upon payment of any required fees, to cancel and discharge the subject mortgage, recorded in the Office of the City Register on January 20, 2006; and (i) directing the Kings County Clerk's Office, upon payment of any required fees, to cancel, discharge, and remove the Notice(s) of Pendency filed in the Kings County Clerk's Office on April 24, 2008 and extended on March 28, 2011, and March 5, 2014, as against the subject premises in connection with this action.

In Motion Sequence #2, plaintiff cross-moves for and order: (a) granting plaintiff summary judgment, and striking and dismissing, with prejudice, defendant's verified amended answer with counterclaim; (b) issuing an Order of Reference appointing a referee

to compute; (c) amending the caption to substitute Stephanie Lawrence for defendant John Doe #1 and Nancy Woodson for defendant John Doe #2 and dismissing the action as against defendants John Doe #3 through John Doe #12; and (d) entering a default judgment against the non-answering defendants: New York City Environmental Control Board, Commissioner of Labor State of New York, Workers' Compensation Board of New York State, Stephanie Lawrence, and Nancy Woodson.

Plaintiff commenced this action to foreclose a mortgage encumbering the subject premises at 4411 Clarendon Road in Brooklyn, New York (Block 4944 Lot 19). It is a two-family house. The mortgage was executed by defendant on December 29, 2005 to secure a \$408,000 note in favor of SunTrust Mortgage, Inc. (SunTrust). On April 24, 2008, SunTrust commenced an action to foreclose the mortgage (*SunTrust Mortgage, Inc. v Duncan-Roberts, et al.*, Kings County index No. 12704/08) (SunTrust Action). According to a corporate assignment of mortgage dated September 24, 2014, the mortgage was purportedly assigned from SunTrust to plaintiff, although it is not clear when plaintiff became the holder of the underlying note.<sup>1</sup> By order dated October 11, 2016 (Lawrence Knipel, J.), the SunTrust Action was dismissed without prejudice due to SunTrust's and/or plaintiff's failure to appear at a status conference. Neither SunTrust nor plaintiff appealed the dismissal order or otherwise moved to reargue or vacate the order. Nor was the SunTrust Action recommenced within the six-month saving period of CPLR §205 (a).

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<sup>1</sup> A copy of the note, endorsed in blank by SunTrust, was filed by plaintiff along with the summons and complaint in the instant 2018 action. In Doc 77, ¶12, counsel states that "SunTrust Mortgage serviced the Borrower's loan on behalf of the Trust prior to and at the commencement of the 2018 Foreclosure Action against the Borrower until on or about January 2, 2019."

On March 20, 2018, 10 years after the SunTrust action was commenced, defendant commenced an action seeking, among other relief, the cancellation and discharge of the subject mortgage pursuant to Real Property Actions and Proceedings Law [RPAPL] § 1501 (4) (*Duncan-Roberts v U.S. Bank National Association, as Trustee for JP ALT 2006-S2, et al.*, Kings County index No. 505621/18)(Quiet Title Action). Thereafter, on April 30, 2018, plaintiff, as assignee of SunTrust, commenced the instant action for foreclosure. On May 23, 2018, defendant filed an answer to this action, setting forth twenty-four affirmative defenses, including statute of limitations, and counterclaims seeking the cancellation and discharge of the subject mortgage pursuant to RPAPL §1501 (4) and attorneys' fees under RPL §282. On June 20, 2018, defendant filed an amended answer, which included only the counterclaim seeking attorneys' fees, not the counterclaim under RPAPL §1501 (4). Defendant did not bring any motions to dismiss the action based on any of her affirmative defenses until now.

In the Quiet Title Action, plaintiff moved for dismissal pursuant to CPLR §3211 (a) (4) on the grounds that another action (the instant foreclosure action) was pending between the parties for the same relief.<sup>2</sup> On October 2, 2018, Justice Karen B. Rothenberg issued a decision and order deciding that the Quiet Title Action was to be joined for trial with the instant foreclosure action rather than dismissed. To date, the Quiet Title Action has not been consolidated with or joined with this action for trial but remains assigned to IAS Part 83. As the Quiet Title Action is not presently before this court, those parts of defendant's motion seeking summary judgment on her complaint in the Quiet Title Action, including

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<sup>2</sup> At the time plaintiff brought the dismissal motion in the Quiet Title Action, defendant's answer in the instant foreclosure action still included the RPAPL 1501 (4) counterclaim. The answer in this action was amended to remove the RPAPL §1501 (4) counterclaim prior to Justice Rothenberg's decision.

all of her claims for declaratory and injunctive relief (items “d” through “h” of defendant’s motion), are denied without prejudice to those issues being raised and resolved in the Quiet Title Action, now before Justice Ingrid Joseph (Part 83).

Turning to the branch of defendant’s motion for dismissal of the complaint, “[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” (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 [2d Dept 2017]; see *Bill Kolb, Jr., Subaru, Inc. v LJ Rabinowitz, CPA*, 117 AD3d 978, 979 [2d Dept 2014]). 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” (*Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]; see *Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844 [2d Dept 2014]).

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*, 143 AD3d 866, 867 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]). 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 AD2d 604, 605 [2d Dept 2001]; see

*Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]; *Nationstar Mtge., LLC*, 143 AD3d at 867; *Wells Fargo Bank, N.A.*, 94 AD3d at 982). “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 AD3d 1068, 1069-1070 [2d Dept 2017]; *see Milone v US Bank N.A.*, 164 AD3d 145, 154 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]). While the voluntary discontinuance of a foreclosure action by the plaintiff qualifies as such an affirmative act of revocation (*see Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021]), a court’s *sua sponte* dismissal of a foreclosure action (as occurred here) does not serve as such an affirmative act by plaintiff (*see Deutsche Bank Natl. Trust Co. v Rivera*, \_\_ AD3d \_\_, 2021 NY Slip Op 07306 [2d Dept 2021]; *Deutsche Bank v Gambino*, 153 AD3d 1232, 1234 [2d Dept 2017]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]).

In support of her motion to dismiss the complaint as time-barred, to cancel the notice of pendency, and for summary judgment on her counterclaim for counsel fees, defendant has established, *prima facie*, that the statute of limitations began to run on the entire debt on April 24, 2008, when SunTrust commenced the SunTrust Action and elected in the complaint to call due (accelerate) the entire amount secured by the mortgage (*see Bank of N.Y. Mellon v Craig*, 169 AD3d 627, 629 [2d Dept 2019]). Since plaintiff did not commence this action until April 30, 2018, more than six years later, defendant has sustained her initial burden of demonstrating, *prima facie*, that this action is time-barred

(see *U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2d Dept 2016]).

In opposition to defendant's motion, plaintiff sets forth two arguments. First, plaintiff contends that the commencement of the SunTrust Action was ineffective to accelerate the mortgage debt, and thus trigger the running of the limitations period, since SunTrust failed to comply with the condition precedent of serving a notice of default as required by paragraph 22 (b) of the subject mortgage. Second, plaintiff maintains that even if the mortgage debt was accelerated by the commencement of the SunTrust Action, the limitations period began anew pursuant to General Obligations Law [GOL] § 17-105 (1) and 17-107 upon defendant's acknowledgment of the mortgage debt in a 2014 hardship letter, and in her 2014 and 2015 Chapter 7 Bankruptcy filings.

In *Everhome Mortgage Company v Aber* (195 AD3d 682 [2d Dept 2021]), the Appellate Division, Second Department rejected the identical argument set forth by plaintiff here regarding the effect of a mortgagee's failure to comply with a contractual condition precedent to foreclosure (e.g., service of a notice of default) on the validity of an acceleration by commencement of a foreclosure action. The Appellate Division stated:

“The requirement in paragraph 22 (b) of the mortgage that the lender first send the borrower a written notice of default, with at least 30 days' notice of acceleration, is a contractual condition precedent inserted in the contract solely for the benefit of the borrower, as it gives the borrower additional time to make installment payments before the lender may accelerate the mortgage debt. As such, compliance with paragraph 22 (b) is enforceable and waivable only by the borrower. Thus, the plaintiff's belated attempt to take advantage of its own potential breach of paragraph 22 (b) to the prejudice of Equity, whose rights under RPAPL 1501 (4) to discharge and cancellation of the mortgage have vested, must not be condoned.

“Although Aber had asserted noncompliance with paragraph 22 (b) as an affirmative defense in the first action, the Supreme Court ultimately did not invalidate the plaintiff’s election to accelerate the mortgage debt on that basis, since it directed dismissal of the complaint based upon the plaintiff’s failure to appear at a court conference. Thus, given that the 2009 acceleration of the mortgage debt was neither invalidated by the court nor revoked by the plaintiff, the Supreme Court properly determined that this action is time-barred” (*Everhome Mtge. Co.*, 195 AD3d at 686 [internal citations omitted]).

Thus, where the prior action was not dismissed on the grounds that the mortgagee failed to comply with a condition precedent, such grounds cannot be used as a basis to nullify the prior acceleration and salvage an otherwise untimely subsequent foreclosure action. The SunTrust Action was not dismissed on the grounds that SunTrust failed to serve a notice of default, and there was otherwise no judicial determination regarding this issue made in the SunTrust Action. Further, at no time during the pendency of the SunTrust Action did plaintiff or defendant claim that the notice of default was not duly served. In the instant action, plaintiff offers no affidavit from SunTrust and/or its servicer or any other proof to support a claim that the notice of default was not duly served by SunTrust in 2008. As a result, the court finds that plaintiff has failed to demonstrate that the subject mortgage loan was not duly accelerated upon the commencement of the SunTrust Action in 2008.

Plaintiff also argues that the limitations period began anew under GOL 17-105 (1) and 17-107 since defendant acknowledged the mortgage debt in a hardship letter, dated April 24, 2014, wherein defendant requested approval for a short sale, and that she also acknowledged the debt in voluntary petitions for Chapter 7 Bankruptcy filed in 2014 and 2015 [Doc 111].

GOL 17-105 (1) provides:

1. A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.

This provision, applicable to mortgage foreclosures in particular, and therefore controlling in this case, does not have any provision for “renewing” the debt. While GOL 17–101, which governs contractual debts generally, allows the limitations period to restart upon a debtor’s acknowledgment of his/her debt, this section does not (*see Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc.*, 189 AD3d 20, 25-27 [4th Dept 2020]; *U.S. Bank N.A. v Caruana*, 188 AD3d 511 [1st Dept 2020]). GOL 17–105 (1) requires a promise to pay the debt. There is nothing in the defendant’s hardship letter requesting a short sale which evinces a promise by defendant to pay the mortgage debt (*see Yadegar v Deutsche Bank Natl. Trust Co.*, 164 AD3d 945 [2d Dept 2018]; *Karpa Realty Group, LLC v Deutsche Bank Natl. Trust Co.*, 164 AD3d 886 [2d Dept 2018]). Rather, defendant was seeking a reduction in the amount necessary to satisfy the mortgage in order to effectuate a sale of the property (*see Yadegar*, 164 AD3d at 947 [borrower’s letter accompanying her request for authorization of a short sale of her property, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the

borrower's own funds)). Further, plaintiff cannot rely on the Bankruptcy petitions filed by defendant in 2014 and 2015. While defendant listed SunTrust in the petitions as a creditor holding a secured claim, the petitions themselves contain no express promise by defendant to pay the mortgage debt (*see U.S. Bank N.A.*, 188 AD3d at 511; *cf. PSP-NC, LLC v Raudkivi*, 138 AD3d 709 [2d Dept 2016] [statute of limitations renewed when defendant acknowledged the mortgage debt *and promised to repay it* in a Chapter 13 Bankruptcy plan]).

General Obligations Law §17-107, also cited by plaintiff, is inapplicable, as it involves the effect of payments by the borrower on the statute of limitations. Here, plaintiff does not argue that defendant made any payments after the mortgage was accelerated in 2008. In fact, plaintiff states [Doc 77 ¶25] “Borrower failed to make the payment that was due January 1, 2008 under the terms of the Mortgage and has failed to make subsequent payments to bring the loan current.”

Further, the court notes that pursuant to CPLR 204(a), the Bankruptcy Code's automatic stay of 11 U.S.C.S. 362(c) tolls the limitations period for foreclosure actions (*Lubonty v. U.S. Bank N.A.*, 159 AD3d 962, 962 [2d Dept 2018]). Here, SunTrust (as “attorney in fact for U.S. Bank National Association as Trustee for JP ALT 2006-S2”) moved to lift the stay in the defendant's second Chapter 7 Bankruptcy proceeding, (USDC SDNY Case 15-36639-cgm) which motion was granted by order dated March 14, 2016. Therefore, while there was a toll of the statute of limitations from the first Chapter 7 filing (USDC SDNY 14-36787-cgm) on August 29, 2014 to the dismissal order on May 5, 2015, and from the second Chapter 7 filing on September 3, 2015 to the

date of the order lifting the stay so the prior foreclosure action could proceed, issued on March 14, 2016, a total of approximately 16 months, the six-year statute of limitations had still run by the date this action was commenced, April 30, 2018, as the acceleration took place on April 24, 2008.

Accordingly, that part of defendant's motion to dismiss the complaint on statute of limitations grounds is granted. The complaint is hereby dismissed, and the Kings County Clerk is directed to cancel the notice of pendency filed (on 4/30/18 and extended on 4/21/21) in conjunction with this action upon payment of the applicable fees. In light of this disposition, plaintiff's cross motion is rendered moot.

As defendant is the prevailing party in this action, that part of defendant's motion for summary judgment on her counterclaim for attorney's fees under RPL §282 is granted, and this matter shall be set down for a hearing to determine the amount of attorney's fees and expenses to be awarded to defendant (*see Deutsche Bank Natl. Trust Co. v Gordon*, 179 AD3d 770, 773-774 [2d Dept 2020]). A separate referee referral order is issued simultaneously herewith.

The forgoing constitutes the decision and order of the court.

**ENTER,**



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**Hon. Debra Silber, J.S.C.**