SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32

Justice

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U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF THE CABANA SERIES IV TRUST,

Plaintiff,

- v -

21647 LLC,BOARD OF MANAGERS OF CHRISTODORA HOUSE CONDOMINIUM, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY NATIONAL BANK, JOHN DOE AND JANE DOE,

Defendant.

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INDEX NO. 850174/2021

MOTION DATE

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 91, 92, 93, 102, 103, 104, 105, 108, 109, 110

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 111, 112, 113, 114, 115, 116

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions and cross-motion are determined as follows:

This is an action to foreclosure on a mortgage encumbering residential real property located at 143 Avenue B, Unit 6B, New York, New York. The mortgage at issue was given by non-parties Anna Davolio Meldal and Melissa Eaton ("Borrowers") to secure a loan of $640,800.00 that was documented by a note dated August 21, 2007. Defendant Borrowers apparently first defaulted on this loan on June 1, 2010. The purported holder of the note and mortgage at that time commenced an action to foreclose against the Borrowers by filing a summons and complaint on February 21, 2013 (*see* NY Cty Index No 850025/2013). During the pendency of the 2013 action, Defendant 21647, LLC ("21647") acquired title to the property by a referee's deed after a foreclosure sale conducted pursuant to a judgment in an action to foreclose on a common charge lien on the property (NY Cty Index No 153490/2016). The deed was expressly subject to the mortgage at issue herein.

By order and judgment dated June 12, 2019, Justice Arlene Bluth granted Plaintiff's motion in the 2013 action for a judgment of foreclosure and sale. Concomitantly, Justice Bluth denied 21647's cross-motion to vacate the order of reference and dismiss the complaint. By decision dated January 14, 2021, the Appellate Division, First Department reversed Justice Bluth, vacated the judgment and dismissed the 2013 action (*MTGLQ Invs., L.P. v Shay*, 190 AD3d 527 [1st Dept 2021]). The Appellate Division held that dismissal of the action against Mortgagor Eaton pursuant to CPLR §3215[c] was necessary as plaintiff therein failed to timely take proceedings to enter a default. Resultantly, the Court found dismissal against Eaton required "discontinuation of the action against Meldal as well" and cited RPAPL §1311[1]["Necessary defendants"]. The Court also held that dismissal of the action against Meldal was required based upon a lack of personal jurisdiction.

Plaintiff herein commenced this action with the filing of a summons and complaint on July 2, 2021. A deed, dated March 16, 2021, transferring the entire premises from 21647 to non-party Batia Plotch was recorded with the NYC Department of Finance, Office of the City Register on July 12, 2021. The deed was executed by Adam Plotch as a Member of 21647.

Now, Defendant 21647 moves pre-answer to dismiss pursuant to CPLR §3211[a][1], [2], [3], [5] and [8] as well as an order cancelling the notice of pendency filed against the mortgaged property (Mot Seq No 1). Plaintiff cross-moves to discontinue the action against Defendant 21647, a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Non-party Adam Plotch moves (Mot Seq No 2) *pro se* for an order imposing sanctions on Plaintiff pursuant to 22 NYCRR §130-1.1 and, if necessary, to intervene. Plaintiff opposes this motion. Non-party Batia Plotch moves (Mot Seq No 3) to intervene and to dismiss pursuant to CPLR §3211[a][1], [2], [5] and [10]. Plaintiff opposes the motion. Motion Sequence Numbers 1 and the cross-motion, 2 and 3 are consolidated herein for disposition.

Defendant 21647's motion is denied in its entirety as it was made some four months after it transferred its interest in the premises to non-party Batia Plotch (*see Valiotis v Bekas*, 191 AD3d 1037 [2d Dept 2021]). Any mention of that transaction is conveniently absent from 21647's moving and opposition papers. There is also no claim that Batia Plotch was continuing to defend the action in the name of 21647 when the motion was made (*see* CPLR §1018). Indeed, 21647's motion is supported by an affidavit from Adam Plotch, as managing member of 21647.

The branch of non-party Batia Plotch's motion to intervene is granted. "[I]ntervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties" (*Halstead v Dolphy*, 70 AD3d 639, 640 [2d Dept 2010]). Here, the motion was made approximately 10 months after Batia Plotch took title and neither an order of reference nor a judgment of foreclosure and sale has been issued (*see Bank of Am. v Nocella*, 194 AD3d 900, 902 [2d Dept 2021]; *US Bank N.A. v Carrington*, 179 AD3d 743, 744 [2d Dept 2020]). That Batia Plotch recorded her deed "after the action was commenced and the notice of pendency was filed does not definitively bar intervention" (*Consumer Solutions, LLC v Charles*, 187 AD3d 1134, 1135 [2d Dept 2020]).

As to the branch of Batia Plotch's motion to dismiss Plaintiff's action as barred by the statute of limitations, the Movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). An action to foreclose on a mortgage is governed by a six-year statute of limitations (CPLR §214[6]; *Citimortgage, Inc. v Dalal*, 187 AD3d 567 [2d Dept 2020]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). "The law is well settled that, 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]). The commencement of an action to foreclose on a mortgage can constitute an unequivocal act of accelerating the mortgage note (*see Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

The commencement of the 2013 action evidenced an unequivocal intent to accelerate the note (*see eg HSBC Bank United States, N.A. v Hochstrasser,* 193 AD3d 915 [2d Dept 2021]). Among other things, the complaint expressly stated that "plaintiff hereby elects to call due the entire amount presently secured by the Note and Mortgage". Since it is unchallenged that more than six years transpired before that action was dismissed or this action commenced, Batia Plotch demonstrated *prima facie* this action is time barred (*see U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]).

In opposition, Plaintiff claims the acceleration of a mortgage debt did not occur since HSBC Bank USA, NA ("HSBC Bank"), the plaintiff that commenced the 2013 action, lacked standing to bring that action. Plaintiff is correct that an acceleration "is only valid if the party making the acceleration had standing at that time to do so" (*Milone v US Bank N.A.*, 164 AD3d 145, 153 [2d Dept 2018]). Unlike other instances where the standing of a Plaintiff in a previously commenced foreclosure action was either raised or adjudicated (*see Bank of N.Y. Mellon Trust Co., N.A. v Lagasse,* 188 AD3d 775 [2d Dept 2020]; *see also Fed. Nat'l Mtge. Ass'n v 4721 Ditmars Blvd,* 196 AD3d 465 [2d Dept 2021]), the standing of HSBC Bank was never questioned in the 2013 action. Therefore, by denying its predecessor had standing to commence the action, Plaintiff was required to demonstrate HSBC Bank lacked standing when the 2013 action was commenced (*see HSBC Bank USA, N.A. v Spitz,* ____AD3d____, 2022 NY Slip Op 00170 [2d Dept 2022]; *Wilmington Sav. Fund Socy., FSB v Matamoro,* 200 AD3d 79 [2d Dept 2021]).

In opposition, Plaintiff argues that the unendorsed note annexed to the 2013 complaint demonstrates HSBC Bank was not the holder at the time the action was commenced. Movant also implies that the allonge annexed to the note that was appended to the amended complaint cannot remedy this defect. This argument overlooks that annexing a note indorsed in blank to a complaint only evidences a foreclosure plaintiff's standing, not establishes it. Standing to foreclose on a note and mortgage exists in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the

action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). The first category is not an issue here. With respect to the second and third, Plaintiff failed to establish an issue of fact as to HSBC Bank's lack of standing.

In the 2013 action, HSBC Bank USA proffered and relied upon a copy of the note as well as an undated indorsement in blank on an allonge executed by the original lender, HSBC Mortgage Corporation (USA). Counsel for MTGLQ Investors, LP, HSBC Bank's successor, acknowledged in an affirmation submitted in support of the motion for an order of reference in that action that "[t]he subject note was transferred via endorsement in blank" and referred to a copy of the same note and allonge that was annexed to the original complaint. This evidence has not been rebutted by Plaintiff herein. As a result, Plaintiff failed to negate that HSBC Bank had standing in the 2013 action as the holder of the note endorsed in blank via physical receipt (*see eg Bank of N.Y. Mellon v Knowles*, 151 AD3d 596 [1st Dept 2017]). Additionally, Plaintiff failed to demonstrate the note was not assigned to HSBC Bank before the action was commenced.

Plaintiff also asserts that this action was timely commenced based upon the savings provision of CPLR §205[a]. That section permits a plaintiff to commence a new action based upon the same transaction within six months of the conclusion of the prior action where it "is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action or a final judgment on the merits" (CPLR §205[a]). "The statute is not technically a 'toll,' as it does not stop the underlying statute of limitations from running, but is instead a six-month 'extension' of the time for commencing the new action when its qualifying circumstances are present" (*Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]).

In determining the applicability of CPLR §205[a], the Court is to be mindful that "[t]he statute's 'broad and liberal purpose is not to be frittered away by any narrow construction'" (*Malay v City of Syracuse*, 25 NY3d 323, 327 [2015], *citing Gaines v New York*, 215 NY 533, 539 [1915]). Nevertheless, the statute operates only "in certain cases in which at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and the defendant has been given timely notice of the claim being asserted by or on behalf of the injured party" (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 177 [1979]).

Movant's argument that CPLR §205[a] is inapplicable since the dismissal of the 2013 action was by "a final judgment on the merits" is nonsensical. A "dismissal does not constitute a 'final judgment upon the merits' precluding application of CPLR 205 (subd [a]) to a subsequently commenced action unless it actually represents a definitive adjudication of the factual or legal merits of the underlying claim" (*Carrick v Central General Hospital*, 51 NY2d 242, 252 [1980]). Nothing in the Appellate Division's decision was addressed to the substantive claim of foreclosure in the 2013 action. Dismissal was based on CPLR 3215[c], RPAPL 1311[1] and lack of personal jurisdiction.

Movant's assertion that the entire proceeding was dismissed for want of prosecution is also inapposite. CPLR §205[a] provides that dismissal for neglect to prosecute is excluded where it is "made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise", provided the Court "set[s] forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (*see also Sokoloff v Schor*, 176 AD3d 120, 133 [2d Dept 2019]; *Marrero v Nails*, 114 AD3d 101 [2d Dept 2013]; *Berman v Szpilzinger*, 200 AD2d 367 [1st Dept 1994]). A dismissal for failure to take proceedings to enter a default under CPLR §3215[c] generally does not fall within the "neglect to prosecute" exception of CPLR §205[a] (*see eg Deutsche Bank Nat'l Trust Co. v Gouin,* 194 AD3d 479 [1st Dept 2021]; *U.S. Bank Trust, N.A. v Moomey-Stevens*, 168 AD3d 1169 [3d Dept 2019]). In this case, the Appellate Division's dismissal was expressly made pursuant to CPLR §3215[c], was applied to Mortgagor Eaton only and did not specify, or even allude to, a pattern of delay in prosecuting the 2013 action. Indeed, Movant argued in its motion to dismiss in the 2013 action that the action must be dismissed "without regard to the merits" (NY Cty Index No 850025/2013, NYSCEF Doc No 104, p 27). As such, the dismissal of the complaint against the Mortgagors does not fall within the neglect to prosecute exception.

As to Mortgagor Meldal, the Appellate Division held that "[d]ismissal of the action as against Eaton requires discontinuation of the action as against Meldal as well" and cited RPAPL §1311[1] (*MTGLQ Invs., L.P. v Shay*, supra at 529). Immediately thereafter the Court stated: "Even were this not the case, dismissal of the action as against Meldal is appropriate for the independent reason that she was never properly served and personal jurisdiction was thus never obtained over her" (*id.*). Plaintiff's assertion that this second basis for dismissal was dictum is not persuasive. The introductory phrase "[e]ven were this not the case" is some indication that what follows is dicta (*see eg Daley v Related Cos.*, 210 AD2d 76, 77 [1st Dept 1994]["IAS court's comment to the effect that if the motion were to be treated as one for reargument then reargument should be granted was clearly dictum"]). But this language was immediately followed by the pronouncement that "dismissal of the action as against Meldal *is* appropriate for the independent reason" of lack of personal jurisdiction. The use of the word "is", as opposed to, for example, "would be" confirms it was a second holding not dicta. Further, that the Appellate Division saw fit to follow that statement with a substantial analysis of the defects in personal jurisdiction over Mortgagor Meldal confirms this conclusion. Hence, since the dismissal was based upon lack of personal jurisdiction over Meldal, CPLR §205[a] is inapplicable to that Defendant (*Rinaldi v Rochford*, 77 AD3d 720 [2d Dept 2010]).

As a result, the issue becomes whether CPLR §205[a] authorizes recommencement of an action where dismissal against only one of two original Mortgagors was based on lack of personal jurisdiction. Where an action is dismissed for failure to obtain personal jurisdiction over one of several defendants, courts have precluded application of CPLR §205[a] as to only the Defendant not served (*see Dunlop v Saint Leo the Great R.C. Church*, 133 AD3d 1288, 1289 [4th Dept 2015]; *Scialo v Gass,* 205 AD2d 522 [2d Dept 1994]). However, unlike those cases, Eaton and Meldal were both indispensable parties (*see Home Fed. Sav. Bank v Versace*, 272 AD2d 576 [2d Dept 2000]) and the action could not properly be continued without both joined (*see LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept 2018]). Permitting Plaintiff to avail itself of the savings provision of CPLR §205[a] where it had not secured personal jurisdiction over all indispensable parties would be inapposite and precludes application of the extension thereunder.

The motion by non-party Adam Plotch is denied as entirely without merit. Sanctions may only be sought by parties to an action or their attorneys (Rules of the Chief Administrator §130-1.1[a][22 NYCRR]). Adam Plotch's request to intervene solely for that purpose is absurd bordering on frivolous.

Accordingly, it is

ORDERED that the motion by Defendant 21647 LLC (MS#1) is denied in its entirety, and it is

ORDERED that Plaintiff's cross-motion (MS#1) is denied in its entirety, and it is

ORDERED that non-party Adam Plotch's motion (MS#2) is denied in its entirety, and it is

ORDERED that Defendant Batia Plotch's motion (MS#3) is granted to the extent that Plaintiff's complaint is dismissed pursuant to CPLR §3211[a][5] and §214[6], and it is

ORDERED that the notice of pendency filed in the New York County Clerk's Office filed against the real property located at 601-603 East 9th Street, Unit 6B, New York, New York 10021 (Block 392, Lot 1023) is discharged, and the Clerk shall note same in its records.

2/28/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE