At an IAS Term, Part FRP-1, 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 12th day of April 2022.

PRESENT:

HON. CENCERIA P. EDWARDS,
A.J.S.C.

Index No.: 500037/17

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JILLIAN SOLOMON et al,

Plaintiff,

DECISION AND ORDER

-against-

HSBC BANK NA et al,

Defendant,

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Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion (MS 4)	1
Opposition/Cross (MS 6)[1]	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

On December 17, 2007, First United Mortgage Banking Corp. ("FUMBC") commenced an action against Plaintiff Solomon seeking to foreclose on a lien on 527 Cleveland Street. An order of reference was granted on default in 2009 and a motion for judgment of foreclosure and sale was filed later that year and subsequently withdrawn. The plaintiff filed a motion for discontinuance on September 6, 2012 and the discontinuance order was signed on November 15, 2012.

[1] MS 5 does not appear to exist.

A second foreclosure action, this time filed by Defendant HSBC Bank USA, NA, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates 2007-3 ("HSBC"), was commenced on November 14, 2012. Solomon, who had already transferred the property to Plaintiff Grand National, answered. In 2014, HSBC moved for summary judgment and Grand National cross-moved for dismissal for lack of personal jurisdiction over it. Following a traverse hearing, the 2012 action was dismissed by order dated May 29, 2015.

On August 24, 2015, Solomon and Grand National filed a quiet title action against HSBC seeking to extinguish its lien. Following protracted motion practice, the action was dismissed pursuant to CPLR 306-b(a) based upon the plaintiffs' failure to timely file proof of service.

The instant quiet title action was then commenced on January 3, 2017. Defendants HSBC and Wells Fargo Bank, NA as attorney-in-fact for HSBC Bank USA, NA, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates 2007-3 ("Wells Fargo") jointly answered. On April 3, 2017, Plaintiffs moved for summary judgment in their favor, arguing that the mortgage on their property is now unenforceable as the statute of limitations has run. Defendants opposed and cross-moved for summary judgment in their favor and the dismissal of the action, alleging that the loan was not accelerated until 2012 and thus that the statute of limitations had not run. By order dated November 9, 2017, the Honorable Lawrence Knipel granted Defendants' cross-motion and denied Plaintiffs' motion finding that, contrary to Plaintiff's contention, the loan was not accelerated in 2007. Most relevantly, he found that "[t]he affidavit of Krause [stet] establishes that at the time FUMBC declared a default and commenced the first foreclosure action it no longer possessed an interest in the note and mortgage and therefore lacked standing to commence the first foreclosure action and accelerate the loan." Plaintiffs moved for renewal and argument. That motion was summarily denied on February 14, 2018. However, upon Plaintiff's appeal, the Appellate Division, Second Department modified Judge Knipel's determination on July 15, 2020, holding that both motions for summary judgment should have been denied – Plaintiffs' for failing to demonstrate that the first foreclosure action constituted a valid election to accelerate the mortgage and Defendants' as the PSA was insufficient to demonstrate that the subject note had been assigned to a loan trust prior to the commencement of the 2007 action and Kruse's failure to provide the business

records allegedly showing that the note endorsed in blank by First United was physically delivered to Wells Fargo on or about December 28, 2006.

HSBC filed a third foreclosure action on August 9, 2018. Solomon and Grand National jointly answered raising, among other things, the alleged expiration of the statute of limitations. Upon the motion of Solomon and Grand National, the foreclosure action was "stayed pending determination of the appeal from Judge Knipel's 11/9/17 order."[2]

On September 22, 2020, Plaintiffs moved for summary judgment in the instant action, now producing a copy of the complaint from the 2007 action in response to the Appellate Division's grounds for denial of their previous motion. Plaintiffs further argue that the recorded assignment of the mortgage by FUMBC– dated during the pendency of the first action— demonstrates that it still had standing to file the initial foreclosure action[3]. In the alternative, Plaintiffs move to consolidate the instant action with the co-pending 2018 foreclosure action.

Defendants opposed and cross-moved for dismissal, arguing that it has now proffered additional evidence to demonstrate that FUMBC lacked standing to accelerate the loan in 2007 and that, as the 2007 action was discontinued, any possible acceleration was revoked.

Plaintiffs filed opposition to the cross-motion, also further arguing therein in support of the motion-in-chief. Therein, they argue that they have now met their prima facie burden of

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[2] That appeal having been resolved, the foreclosure action is no longer stayed.

[3] Defendant also, oddly, cites to *Cudjoe v Boriskin*, 157 AD3d 654 [2d Dept 2018] for the proposition that "standing to commence a foreclosure action is not a proper defense in an action to quiet title." *Cudjoe* was a quiet title action filed by a homeowner alleging that the defendants (the individuals who signed and notarized an assignment of mortgage and the attorney who signed he subsequent foreclosure complaint) had engaged in a wrongful foreclosure action based upon fraud. The Appellate Division noted that the plaintiff "in effect, challenges BAC's standing to commence the foreclosure action. That challenge is misplaced in this action, which seeks not to foreclose a mortgage, but to quiet title. Standing to commence the foreclosure action is not properly raised in this action to quiet title" (*Id.*, at 655). Put differently, a quiet title plaintiff cannot base her action upon the foreclosure plaintiff's alleged lack of standing as that is an issue that should have been raised on the context of the foreclosure action. A quiet title defendant can certainly argue that there was no prior acceleration as the party that allegedly did so lacked standing (see, for example, *Q & O Estates Corp. v US Bank Trust Nat'l Assoc.*, 175 AD3d 1337 [2d Dept 2019]; *J & JT Holding Corp. v Deutsche Bank Nat'l Trust Co.*, 173 AD3d 704 [2d Dept 2019]).
In reply, Plaintiffs also cite *JP Morgan Chase Bank, NA v Bank of Am.*, 164 AD3d 565 [2d Dept 2018] which quotes *Cudjoe*. However, in *JP Morgan*, the Appellate Division was addressing the trial court's refusal to substitute Fannie Mae as plaintiff in a quiet title action – and held that the trial court erroneously applied the standard used to establish standing in mortgage foreclosure actions as opposed to whether the movant had established that Fannie Mae "'claims an estate or interest' in the subject property as required by RPAPL 1501[1] (*Id*, at 568). *JP Morgan*, thus, also does not support Plaintiffs' argument.

showing that the statute of limitations for foreclosure has run. Plaintiffs also suggest that Defendants' motion is actually seeking renewal of the Appellate Division's order and should have been brought there[4]. Additionally, Plaintiff's argue that a trial court cannot apply *Engel* to cases where the Appellate Division addressed statute of limitations pre-*Engel*. Plaintiffs also suggest that the filing of the 2018 action served as a "contemporaneous statement" contrary to deacceleration and that *Engel* did not resolve the threshold question as to whether de-acceleration is possible at all.

Defendants replied, reiterating that they had demonstrated that FUMBC did not have standing to accelerate the loan in 2007 and, even if it did, the 2007 action was discontinued and constitutes a deacceleration pursuant to *Engel*. They further note that the appellate holding was that the parties failed to meet their respective burdens – rather than affirmative findings – and, thus, that they are permitted to remedy that before the trial court.

This Court agrees with Defendants. The instant motions are most properly characterized as successive motions for summary judgment. The parties do not seek to vacate any finding of the Appellate Division, rather to supplement the record before the trial court. As it appears that both parties want the motions to be considered and in the interest of judicial economy, the Court will do so.

The Appellate Division held that the Kruse Affidavit was insufficient to demonstrate that the note endorsed in blank by First United was physically delivered to Wells Fargo prior to the commencement of the 2007 action. Defendants now proffer the Penno Affidavit and appended exhibits. Therein, the affiant states that "Wells Fargo, as custodian for the Trust, had physical possession of the original Note, endorsed as required, on June 1, 2007" (Penno Aff, at ¶8). He then references an electronic record appended to his papers – which was not previously provided by Kruse. Upon review, it is clear to this Court that Wells Fargo was in possession of the original note on behalf of HSBC at the time FUMBC commenced the 2007 action and,

[4] By the same logic, Plaintiff's motion would also be for renewal – Plaintiff is now offering the proof that the Appellate Division found lacking in its prior proffer.

consequently, that action could not serve as an acceleration (*Wells Fargo Bank, NA v Burke*, 94 AD3d 980, 983 [2d Dept 2012])[5].

Additionally, "where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder" (*Freedom v Engel*, 37 NY3d 1, 32 [2021]). The 2007 action was discontinued without any explicit statement regarding acceleration. That Plaintiff restarted a new action thereafter is irrelevant (*Id.* [Court should not look at subsequent conduct and correspondence of the parties]). Though the discontinuance order was not signed until after the commencement of the second action, the motion to discontinue was filed earlier, revoking any prior acceleration.

Defendants' motion for summary judgment dismissing this action is granted in its entirety. Plaintiffs' motion for summary judgment or, in the alternative, to consolidate this action with the co-pending foreclosure is denied.

The foregoing is the decision and order of the Court.

ENTER:

Hon. Cenceria P. Edwards, A.J.S.C.

[5] The Court notes that this is consistent with the basis for the discontinuance as specified in the supporting affirmation, "a possible defect with the chain of title" (Feld Aff., at ¶4).