

Bank of N.Y. Mellon v MS Global Group LLC

2022 NY Slip Op 32244(U)

June 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 502152/12

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of May, 2022.

John

[Signature]

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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THE BANK OF NEW YORK MELLON F/K/A THE BANK NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006-OC3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OC3,

Plaintiff,

- against -

Index No. 502152/12

MS GLOBAL GROUP LLC; FARKHADJAN USMANOV; UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE; BOARD OF MANAGERS OF OCEANA CONDOMINIUM NO. EIGHT; LEAF FUNDING INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., ACTING SOLELY AS NOMINEE FOR FIRST NATIONAL BANK OF ARIZONA; NEW YORK CITY PARKING VIOLATIONS BUREAU; YOLANDA S. (REFUSED LAST NAME),

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

170-172 179-182

Opposing Affidavits (Affirmations) _____

189, 191-202

Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose a residential mortgage on the property at 105 Oceana Drive, Unit 1D in Brooklyn (Block 8720, Lot 2322) (Property),

defendant MS Global Group LLC (MS Global) moves (in motion sequence [mot. seq.] five) for an order, pursuant to CPLR 2221 (d), granting it “reargument of Motion Sequence No. 003 and upon reargument, granting MS Global’s motion for the relief requested in its Notice of Motion dated July 5, 2019 . . .” (see NYSCEF Doc Nos. 91 and 170).

Plaintiff The Bank of New York Mellon (BONY Mellon) f/k/a The Bank of New York (BONY), as trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OC3, Mortgage Pass-Through Certificates, Series 2006-OC3 cross-moves (in mot. seq. six) for an order, pursuant to CPLR 3025 (b), for leave to file a third amended complaint.

Background

The Prior Foreclosure Actions

1. The 2006 Foreclosure Action

On July 21, 2006, BONY commenced an action to foreclose a \$650,000.00 mortgage encumbering the Property in Kings County Supreme Court captioned *Bank of New York as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-OC3 Mortgage Pass Through Certificates, Series 2006-OC3 v Usmanov, et al.*, Kings County index No. 21765/06 (2006 Foreclosure Action). The complaint in the 2006 Foreclosure Action alleged that on or about January 5, 2006, defendant Farkhadjan Usmanov (Usmanov or borrower) executed a \$650,000.00 note in favor of First National Bank of Arizona (FNBA), which was secured by a mortgage on the Property, and that

Usmanov did not comply therewith by failing to make the monthly payment due on April 1, 2006 (*see* NYSCEF Doc No. 105).

By a December 19, 2009 stipulation executed only by BONY's counsel and the referee, previously appointed by a November 20, 2006 order, BONY voluntarily discontinued the 2006 Foreclosure Action without prejudice (NYSCEF Doc No. 106).

2. The March 2012 Foreclosure Action

On or about March 1, 2012, *more than two years after* BONY discontinued the 2006 Foreclosure Action, BONY Mellon commenced a second action to foreclose the same mortgage on the Property captioned *The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OC3, Mortgage Pass-Through Certificates, Series 2006-OC3 v Usmanov, et al.*, Kings County index No. 5145/12 (March 2012 Foreclosure Action) (*see* NYSCEF Doc No. 107).

By a September 22, 2015 stipulation filed on October 8, 2015, which was executed *only by* BONY Mellon's counsel, the March 2012 Foreclosure Action was discontinued (*see* NYSCEF Doc No. 108).

The Instant Foreclosure Action

Meanwhile, on July 30, 2012, while the March 2012 Foreclosure Action was pending, BONY Mellon commenced this action to foreclose the same mortgage by filing a summons, a complaint verified by counsel and a notice of pendency against the Property.¹

¹ An additional notice of pendency was filed against the Property on July 14, 2015, which expired on July 14, 2018. Notably, a third notice of pendency was not filed until November 13, 2018. BONY filed an amended notice of pendency on May 4, 2019.

Despite the pendency of the March 2012 Foreclosure Action, the complaint incorrectly alleged that “there are no pending proceedings at law or otherwise to collect or enforce said note and mortgage” (NYSCEF Doc No. 93, complaint at ¶ 16).

MS Global’s Purchase of the Property

By a July 18, 2018 deed (executed *four days after* the July 14, 2015 notice of pendency expired), MS Global purchased the Property (*see* NYSCEF Doc No. 96).

The May 9, 2019 Order

On February 5, 2019, BONY moved to add MS Global as a defendant and to amend the complaint and the caption, which the court (Dear, J.) granted by a May 9, 2019 order (*see* NYSCEF Doc Nos. 60 and 74). Regarding MS Global, the May 9, 2019 order provided that: (1) “upon service of the Supplemental Summons and Amended Complaint upon MS GLOBAL . . . defendant shall thereupon have the time prescribed by the CPLR to serve and answer or otherwise move so as to challenge the summons and complaint or any other order entered in this action[,]” and (2) “the foreclosure sale to be had pursuant to a judgment of foreclosure and sale entered herein shall sever and extinguish any rights, title and interest of MS GLOBAL . . . which is subordinate to Plaintiff’s mortgage” (NYSCEF Doc No. 74 at 3).

The Second Amended Complaint

On May 24, 2019, BONY filed a supplemental summons and a second amended complaint, which contains substantially the same allegations as the original complaint but annexes copies of the note and mortgage (NYSCEF Doc No. 76, second amended

complaint). Notably, the second amended complaint alleges that “[t]here has been *three prior action[s]* to collect or enforce the aforementioned default under the Note or Mortgage under Index No. 21765/2006, Index No. 5145-2012, and 10720/2013” (*id.* at ¶ 29 [emphasis added]).

MS Global’s Underlying Dismissal Motion (Mot. Seq. Three)

On July 5, 2019, MS Global filed a pre-answer motion to dismiss the second amended complaint in lieu of an answer and to vacate the court’s May 9, 2019 order adding it as a defendant to this action.

MS Global argued that this foreclosure action is barred by the six-year statute of limitations, which began to run as early as June 21, 2006, the date on which plaintiff had the right to accelerate under the mortgage based on Usmanov’s alleged April 1, 2006 payment default, but no later than July 30, 2012, the date of commencement. MS Global argued that plaintiff previously accelerated all amounts due under the mortgage and never deaccelerated. MS Global argued that the discontinuance of the March 2012 Foreclosure Action should be deemed to be with prejudice, pursuant to CPLR 3217 (c), and that this action cannot be maintained under the doctrine of res judicata. Finally, MS Global argued that by discontinuing the March 2012 Foreclosure Action in 2015, while this action was pending, plaintiff impermissibly maintained two actions to foreclose the same mortgage without leave of the court in violation of RPAPL 1301 (3).

MS Global sought to vacate the May 9, 2019 order on the ground that it was not given notice of plaintiff’s motion to add it as a party defendant, and thus, the court lacked

jurisdiction. MS Global also argued that the court lacked jurisdiction because it was not served with the supplemental summons and amended complaint in the form directed by the court. MS Global asserted that the May 9, 2019 order exceeded the scope of the relief plaintiff sought in the motion and impermissibly held that it is bound by all prior proceedings in this action.

BONY Mellon, in opposition, argued that this action is not time-barred because MS Global has not met its burden of demonstrating that the mortgage was accelerated, which is the event that triggers the accrual of the six-year statute of limitations.

BONY Mellon contended that MS Global failed to establish that the 2006 Foreclosure Action represented a valid acceleration of the debt since the assignment of the mortgage from MERS to BONY was not executed until after the 2006 Action was commenced on July 21, 2006. BONY Mellon relied on language in an August 18, 2008 order issued in the 2006 Foreclosure Action wherein the court (Partnow, J.) noted that “Assignment of mtg to P was signed after action commenced” and argued that the court thereby determined that BONY lacked standing at the time of commencement. BONY Mellon further argued that the voluntary discontinuance of the 2006 Foreclosure Action creates a triable issue of fact as to whether the prior acceleration had been rescinded. BONY Mellon also argued that the discontinuance of the March 2012 Foreclosure Action was not an adjudication on the merits.

MS Global, in reply, argued that there was no adjudication on the merits in the 2006 Foreclosure Action that BONY lacked standing to foreclose.

The Court's December 2, 2019 Decision and Order

By a December 2, 2019 decision and order entered on December 6, 2019, the court (Dear, J.) denied MS Global's pre-answer motion to dismiss this foreclosure action as time-barred on the ground that there is an issue of fact as to whether or not BONY had standing to accelerate the debt by commencing the 2006 Foreclosure Action:

"[a] prior action was filed on 7/21/06, accelerating the debt. (The record reflects no acceleration prior to the '06 complaint.) The instant action was filed on 7/30/12, slightly more than six years later. As such, Defendant met its initial burden of showing that the instant action is untimely. The burden then shifted to Plaintiff to demonstrate that the prior action was not an acceleration or any other basis for the instant action to be timely (*U.S. Bank Nat. Ass'n v Martin*, 144 A.D.3d 891 [2d Dept 2016])

"Plaintiff offers a variety of largely unavailing arguments. The burden is on Plaintiff to show that the plaintiff in the '06 action failed to comply with pre-acceleration requirements (rather than on MS [Global] to demonstrate that the plaintiff complied) (*see Martin*) – and it has not . . . A discontinuance alone is insufficient to demonstrate de-acceleration (*Freedom Mortgage Corporation v Engel*, 163 A.D.3d 631, 633 [2d Dept 2018] [*'the plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant'*]). And subsequently sending required pre-suit notices for new actions does not constitute evidence of intent to de-accelerate.

"Plaintiff is correct, however, that *Judge Partnow raised a question as to the plaintiff's standing in the 2006 action. While he did not adjudicate the issue to conclusion, this creates an issue of fact whether the '06 action was an acceleration.* (The burden will be on Plaintiff to demonstrate the lack of standing [*see, Martin*] and the Court looks forward to seeing what

evidence Plaintiff will be able to locate.)” (*see* NYSCEF Doc No. 163 [emphasis added]).

The court also held that “[w]hile the second discontinuance of the 2012 Foreclosure Action] was by notice, it does not appear to have been for the purpose of harassment and thus was not with prejudice.” (*id.*). In addition, the court noted that plaintiff’s claims against MS Global, which did not exist until MS Global owned the Property in 2018, likely relate back to plaintiff’s assertion of its claims against Usmanov in 2012:

“The Court also notes that Plaintiff asserted its claims against Usmanov in 2012 (which . . . might or might not have been timely). The claim against MS [Global] did not exist until 2018. Having sued the correct person in 2012, the claim would likely relate back against his successor-in-interest (especially if it took with knowledge of the litigation). Even if Plaintiff were not able to add or substitute MS [Global], it could have completed this action in its absence and, if successful, the purchaser at auction could have started a re-foreclosure (or a strict foreclosure)” (*id.* at 3).

Regarding MS Global’s argument that the May 9, 2019 order should be vacated because the court exceeded the scope of the relief plaintiff sought in the motion and impermissibly held that MS Global is bound by all prior proceedings, the court held that:

“Not fully addressed by the parties is the fact that the expiration of the [July 14, 2015] notice of pendency eliminates ‘constructive notice’ of this action – *but actual knowledge thereof would also have led MS to take subject to this litigation. MS has not offered any evidence* – and the circumstances (deed right after expiration of NOP, title report almost certainly having been run while NOP was in force, etc.) suggest that there likely was knowledge of this action” (*id.* [emphasis added]).

The court also rejected MS Global's argument that vacatur of the May 9, 2019 order was warranted on the ground that MS Global was not given notice of plaintiff's motion to add it as a party. The court held that "[a]s Plaintiff was seeking leave to sue a non-party (rather than seeking relief against the party – it could have started a separate action without leave of Court), the lack of notice of that motion to MS is not fatal" (*id.*).

Finally, the court ruled that the supplemental summons and amended complaint served upon MS Global were "substantially identical to those appended to [BONY Mellon's] moving papers and, thus, Plaintiff complied with the prior order" and "Plaintiff did not actively prosecute multiple actions" and explicitly noted that "the co-pending [2012 Foreclosure action] was never prosecuted at all" (*id.*).

MS Global's Instant Motion to Reargue

On January 17, 2020, MS Global filed the instant motion for leave to reargue its dismissal motion. MS Global submits an attorney affirmation asserting that this is the *third* residential foreclosure action commenced to enforce the same note and mortgage and describes both the 2006 Foreclosure Action and the March 2012 Foreclosure Action. Defense counsel describes Judge Dear's December 2, 2019 decision and order and references its accompanying memorandum of law for "those matter of law or fact which MS Global respectfully submits the Court overlooked or misapprehended in determining Motion Sequence No. 3" (*see* NYSCEF Doc No. 171 at 6).

MS Global contends that the court "erred" by excusing BONY Mellon's failure to furnish MS Global, a non-party, with notice of its underlying motion to amend the

complaint to add it as a defendant because “[t]he failure to serve notice of a motion renders the Court without jurisdiction to grant the relief sought” (NYSCEF Doc No. 173 at 4).

MS Global also argues, without citing any controlling legal authority, that the “Court misapprehended the law and/or facts in holding that whether MS Global had actual knowledge of this litigation was a question of fact . . .” because “even purchasers with actual knowledge of a litigation are not bound thereby if they acquire their interest after the expiration of a notice of pendency” (NYSCEF Doc No. 173 at 1 and 20-21).

MS Global contends, at length, that the court “erred” by failing to vacate the May 9, 2019 order joining it as a defendant because the court lacked jurisdiction to do so. MS Global argues that the court erred by “reasoning that ‘[h]aving sued the correct person [Usmanov] in 2012, the claim would likely relate back against his successor-in-interest [MS Global]’” (*id.* at 11-18). MS Global asserts that “it was error for the Court to raise this argument *sua sponte*.” MS Global thus argues that “the Court correctly determined that MS Global met its initial burden of showing that the action is untimely” but “since Plaintiff failed to demonstrate the applicability of the relation-back doctrine, it was error for the Court to deny MS Global’s motion to dismiss this action on those grounds” (*id.* at 12). MS Global now argues, without submitting any evidentiary support, that it is not united in interest with Usmanov because: (1) they have different defenses; (2) they do not stand and fall together; and (3) BONY Mellon was not mistaken about MS Global’s identity.

Finally, MS Global argues that “the Court committed an error of law in finding a question of fact . . .” regarding acceleration of the 2006 Foreclosure Action based on Judge Partnow’s observation that there were standing issues in the 2006 Foreclosure Action. First, MS Global argues that Usmanov, the borrower, failed to assert standing as an affirmative defense in the 2006 Foreclosure action, and thus, the defense is waived and “[w]here the affirmative defense of standing has been waived ‘it [is] inappropriate for the court to raise that affirmative defense *sua sponte*.’” MS Global further argues that “since there was no final determination on the merits regarding the plaintiff’s standing to commence the 2006 Foreclosure Action, this Court was not bound under the doctrine of collateral estoppel to conclude that a question of fact existed as to standing.” Finally, MS Global contends that “Plaintiff failed to offer evidence in admissible form raising a question of fact regarding Plaintiff’s lack of standing to commence the 2006 Action” because it merely raised Judge Partnow’s finding that there were standing issues in the 2006 Foreclosure Action.

BONY Mellon’s Opposition and Cross Motion

BONY Mellon, in opposition, submits a memorandum of law arguing that the court properly granted its motion to add MS Global as a party defendant, pursuant to CPLR 1003, and asserts that nothing in CPLR 1003 requires notice to the proposed new defendant. BONY Mellon notes that all parties were served with notice of its motion, and not the party sought to be added, which is consistent with the requirements of CPLR 2103 (e), which explicitly provides that only parties who have appeared need be served with papers.

Regarding the relation-back doctrine, BONY Mellon argues that the court “did not overlook or misapprehend any law or fact in reaching” the conclusion that the claim against MS Global did not exist until 2018 (when MS Global took title to the Property) and that “[h]aving sued the correct person in 2012, the claim would likely related back against his successor-in-interest (especially if it took with knowledge of the litigation).” BONY Mellon asserts that it “could not have named MS Global prior to it taking its interest in the property” and “MS Global wants this Court to hold the limitations period expired before the claim accrued.”

BONY Mellon also cross-moved for an order, pursuant to CPLR 3025, for leave to amend the complaint. BONY Mellon submits a proposed third amended complaint, argues that leave to amend should be freely given and that MS Global cannot claim prejudice or surprise by the amendment because there has been no discovery. BONY Mellon explains that the proposed amendment merely seeks to add a new claim to foreclose the mortgage based on the borrower’s violation of the “due on sale” clause. BONY Mellon argues that even if the statute of limitations to foreclose the mortgage based on the borrower’s payment default is expired, the same statute of limitations does not apply to a claim based on a violation of the “due on sale” clause.

MS Global’s Opposition to the Cross Motion

MS Global, in opposition to the cross motion, argues that the proposed amendment is palpably insufficient and devoid of merit. It argues that since the mortgage loan has already been accelerated, BONY Mellon cannot reaccelerate the loan on the basis of

another alleged default. MS Global contends that enforcement of a “due on transfer” clause must be exercised before the entire debt has become due and prior to the mortgage being accelerated in 2006 or subsequently in 2012. MS Global further argues that BONY Mellon’s cross motion to amend should be denied due to plaintiff’s inexcusable delay.

BONY Mellon’s Reply

BONY Mellon, in reply, contends that MS Global has not met its burden of demonstrating that the proposed amendment is palpably insufficient or patently devoid of merit. BONY Mellon contends that since the court has not yet determined that the loan was validly accelerated, it can assert all of the various ways that the loan was allegedly accelerated. BONY Mellon also argues that mere lateness is not a barrier to an amendment, especially in the absence of any prejudice.

Discussion

(1)

“A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). “While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Ahmed v Pannone*, 116 AD3d 802, 805 [2014];

see also Salcedo v Demon Trucking, Inc., 146 AD3d 839, 840 [2017]; *Haque v Daddazio*, 84 AD3d 940, 942 [2011]; *Mazinov v Rella*, 79 AD3d 979, 980 [2010]).

Here, MS Global has failed to demonstrate how the court (Dear, J.) overlooked or misapprehended either matters of fact or law when it issued the December 2, 2019 decision and order denying MS Global's pre-answer motion to dismiss the complaint as time-barred and to vacate the May 9, 2019 order adding it as a defendant to this action after it was deeded the Property in 2018.

While MS Global contends that the court erred in holding that it was not entitled to notice of BONY Mellon's motion for leave to add it as a defendant, MS Global reiterates the very same arguments it previously made before Judge Dear in its underlying motion. The court correctly held that "[a]s Plaintiff was seeking leave to sue a non-party . . . the lack of notice of that motion to MS [Global] is not fatal." Nothing in CPLR 1003 or CPLR 3025 requires that a nonparty sought to be added to the action be provided with notice before the pleading is amended and the party is joined in the action (*see* Seigel's New York Practice § 138 ["notice need not be given to the person sought to be added . . ."]).

Similarly unavailing is MS Global's assertion that "[r]eargument is warranted because this Court misapprehended the law and/or facts in holding that whether MS Global had actual knowledge of this litigation was a question of fact which precluded dismissal of the action on statute of limitations grounds." Justice Dear correctly noted that, at the very least, there is a question of fact regarding MS Global's knowledge of this litigation when it took title to the Property on July 18, 2018, *a mere four days after* the notice of pendency

expired on July 14, 2018. “[A] purchaser of real property is bound by the consequences of a lawsuit of which he has actual knowledge” (*Da Silva v Musso*, 76 NY2d 436, 439 [1990]; *see also DeMaio v Capozello*, 124 AD3d 823, 824 [2015]).

Finally, MS Global has failed to establish that the court erred in finding a question of fact regarding the acceleration of the debt in 2006 based on Judge Partnow’s observation that there were issues of fact regarding plaintiff’s standing in the 2006 Foreclosure Action. Essentially, MS Global claims, without any authority, that the court erred because it could not find issues of fact that were not specifically raised in BONY Mellon’s opposition papers. Once again, MS Global merely restates the very same arguments that it made in support of its underlying dismissal motion without advancing any new arguments or demonstrating how the court was incorrect. Consequently, while leave to reargue is granted, MS Global has failed to identify any grounds to grant its underlying motion to dismiss the complaint and vacate the May 9, 2019 order, and thus, this court adheres to Judge Dear’s December 2, 2019 decision and order.

(2)

A party may amend its pleading by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of the parties (*see* CPLR 3025 [b]; *Cullen v Torsiello*, 156 AD3d 680, 681 [2017]). “Leave shall be freely given upon such terms as may be just” (CPLR 3025 [b]; *see also Cullen*, 156 AD3d at 681). As a general rule, “a court hearing a motion for leave to amend will not examine the merits of the proposed amendment” (*Ricca v Valenti*, 24 AD3d 647, 648 [2005]). A

court has broad discretion to grant a motion to amend the pleadings . . . when there is no actual prejudice or surprise to the opposing party (*see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v City of New York*, 43 NY2d 400, 405 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Cullen*, 156 AD3d at 681). Finally, a motion to amend must be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions made to the pleading (CPLR 3025 [b]; *Drice v Queens County District Attorney*, 136 AD3d 665 [2016]; *Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844, 845-846 [2014]).

Here, BONY Mellon has properly submitted a proposed third amended summons and complaint with a redlined version reflecting the additional factual allegations. The proposed third amended complaint contains the following new allegations:

“the terms of the mortgage provide: (1) that the whole of said principal sum and interest shall become due at the option of the Mortgagee after default in payment of any installment of principal or of interest; (2) that upon any default the Mortgagor will pay to the Mortgagee any sums paid for taxes, charges, assessments, and insurance premiums upon said mortgaged premises; (3) that in case of sale under foreclosure, the premises may be sold in one parcel” (NYSCEF Doc No. 181, proposed third amended complaint at ¶ 19).

The third proposed amended complaint further alleges that:

“Usmanov, his successors, assigns and/or transferees, have failed to comply with the terms and conditions of said mortgage by transferring and selling all or part of the property with the consent Plaintiff. To wit the loan is in default because the property referenced above was sold or transferred to: (i) West Fork Capital Equities, LLC by referee’s deed dated April 6, 2016; and (ii) MS Global Group LLC by indenture dated

July 18, 2018, without prior written permission of Plaintiff”
(*id.* at ¶ 21).

Pursuant to the federal Garn-St. Germain Depository Institutions Act, a “due-on-sale clause” “means a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender’s security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender’s prior written consent” (12 USC § 1701j-3 [a] [1]; *see also Dupuis v Yorkville Federal Sav. and Loan Ass’n*, 589 F Supp 820, 822 [SD NY 1984]). “Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c), enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan” (12 USC § 1701j-3 [b] [1]). With limited exceptions, “due-on-sale practices of Federal savings associations and other lenders shall be governed exclusively by the OCC’s regulations, in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise” (12 CFR § 191.5 [a]).

Here, the proposed amendment states a cause of action under the mortgage loan’s due-on sale clause. Contrary to MS Global’s contention, since there are questions of fact regarding BONY Mellon’s standing, whether acceleration was proper and whether the statute of limitations has expired, this cause of action is not a clear “reacceleration.” Additionally, alternative theories of acceleration can be alleged in separate causes of action in a pleading. Further, the court does not examine the legal sufficiency or merits of this cause of action as pleaded, because MS Global has failed to establish that the amended

pleading's insufficiency or lack of merit is clear and free from doubt (*see Lucido v Mancuso*, 49 AD3d 220, 2299 [2008] ["[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt"]; *see also Carter v Nouveau Industries, Inc.*, 187 AD3d 702, 704 [2020]). Absent a showing of prejudice or surprise by MS Global, leave to amend is granted. Accordingly, it is hereby

ORDERED that MS Global's motion for leave to reargue (mot. seq. five) is granted and, upon reargument, the court adheres to Judge Dear's December 2, 2019 decision and order; and it is further

ORDERED that BONY Mellon's cross motion (mot. seq. six) for leave to file a third amended complaint is granted and BONY Mellon shall serve its third amended complaint (in the same form annexed to its cross motion) upon all parties within 30 days of service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R

J. S. C.



HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE