At an IAS Term, Part FRP1 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 30th day of June, 2022.

P R E S E N T:
HON. CENCERIA P. EDWARDS, C.P.A.,
Justice.

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DEKALB ASSETS 2015 LLC,

Plaintiff(s),

-against-

NICOLE ROMAN A/K/A NICOLE M. ROMAN; BAY 7, INC., et al.,

Defendant(s).

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ORDER

Calendar #(s): 8 and 9

Index #: 509253/2016

Mot. Seq. #(s): 5 and 6

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/Petition/Cross-Motion and Affidavits (Affirmations) and Exhibits	127-150, 154-174
Opposing Affidavits (Affirmations) and Exhibits	174-177
Reply Affidavits (Affirmations) and Exhibits	178-181, 183

This is an action to foreclose on a mortgage encumbering the residential real property known as 318 Halsey Street, in Brooklyn, New York 11216. On December 15, 2004, defendant-borrower Nicole Roman (s/h/a "Nicole Roman a/k/a/ Nicole M. Roman") purchased the subject premises using $566,116.00 loaned to her by non-party First Estate Funding Corp. ("First Estate"), which assigned the mortgage to nonparty CitiMortgage, Inc. ("CitiMortgage") that day. This mortgage (hereafter, "the 2004 mortgage") was publicly recorded on January 11, 2005, and was assigned twice during the pendency of this action, eventually ending up with the present plaintiff, Dekalb Assets 2015 LLC ("Dekalb Assets").

The record shows that on October 23, 2005, Ms. Roman executed another note with First Estate in the amount of $464,000.00, also secured by a mortgage against the subject premises,

which was publicly recorded on May 23, 2006. This mortgage (hereafter, "the 2005 mortgage") was eventually assigned to defendant Federal National Mortgage Association ("FNMA") in July of 2015, and this was publicly recorded on August 5, 2015. During the interim, by deed dated February 12, 2014, and publicly recorded on February 18, 2014, Ms. Roman conveyed the subject premises to defendant Bay 7, Inc. (*see* NYSCEF doc. no. 139).

By summons and complaint filed June 2, 2016, CitiMortgage, Plaintiff's predecessor-in-interest, commenced the instant action against, *inter alia*, defendant-borrower Nicole Roman, Bay 7, Inc., and One West Bank FSB (a predecessor-in-interest to FNMA), to foreclose on the 2004 mortgage, alleging that Ms. Roman failed to make any monthly installment payments after November 1, 2007. Apparently, Ms. Roman, appearing *pro se*, was the only defendant to answer the complaint, which expressly requests a deficiency judgment against her (*see* Complaint, ¶¶ F and G [NYSCEF doc. no. 1]).[1] Interestingly, the complaint discloses that a prior action to foreclose on the 2004 mortgage had been "discontinued," although it provided no details, not even the index number (*see id.*, ¶27). In addition, as Plaintiff notes in its counsel's affirmation in opposition to the motion and in support of the cross-motion (*see* NYSCEF doc. no. 155, ¶36, FN1), Ms. Roman asserted the statute of limitations as a defense in her answer (*see* NYSCEF doc. no. 20, ¶5), and again in her affidavit in opposition to CitiMortgage's motion for summary judgment and an order of reference (motion seq. #2), specifying that the prior action was commenced by CitiMortgage, itself, in 2008, although she also did not provide an index number (*see* NYSCEF doc. no. 52, ¶¶ 6-9). Nonetheless, on or about November 2, 2018, the Court (Lawrence Knipel, J.) issued an order of reference ("ORef"), apparently without a decision, granting summary judgment against Ms. Roman and default judgment against the other defendants (*see* NYSCEF doc. no. 55). Thereafter, on or about August 16, 2019, the Court (Ingrid Joseph, J.) granted CitiMortgage's motion for a judgment of foreclosure and sale ("JFS") and amended the caption to substitute Dekalb Assets as the plaintiff (*see* NYSCEF doc. no. 87).

By order to show cause signed on October 23, 2019, FNMA, which was still a nonparty at that time, moved in motion seq. #4, *inter alia*, for leave to intervene as a defendant in this action, stay the scheduled foreclosure sale, vacate the ORef and JFS, or, alternatively, modify the

[1] NYSCEF doc. no. 1, entitled "Summons and Complaint," is a 51-page document containing, *inter alia*, several schedules and other exhibits. The actual complaint, found at pages 5-15 of the document, contains 27 numbered paragraphs of factual allegations, and nine lettered paragraphs (A through F) comprising the prayer for relief.

ORef and JFS to reflect that they are unenforceable against FNMA and that any sale of the subject premises should be subject to FNMA's purportedly first position mortgage (*see* NYSCEF doc. nos. 91 and 111). FNMA contended that its mortgage has priority because when its predecessor, First Estate, executed the note with defendant-borrower Roman in October of 2005, the funds were used to pay off the 2004 mortgage, as First Estate represented that it was still the holder of that debt (*see* NYSCEF doc. no. 93, ¶¶ 25-30). By decision and order dated March 19, 2020, and entered June 11, 2020, the Court (Ingrid Joseph, J.) granted the motion to the extent of granting FNMA leave to intervene, amending the caption to add FNMA as a defendant, and directing FNMA to serve and file an answer to the complaint (*see* NYSCEF doc. no. 119). Justice Joseph found that the documentary evidence submitted on the motion sufficiently established that FNMA's lien may be superior to Plaintiff's (*see id.*, p. 2). On June 30, 2020, FNMA e-filed an answer asserting several defenses, including, *inter alia*, fraud, accord and satisfaction, and the statute of limitations (*see* NYSCEF doc. no. 121, ¶¶ 39, 47-49, and 51-57).

FNMA now moves, in effect, for summary judgment dismissing the complaint on the ground that it is time-barred.[2] Plaintiff opposes and cross-moves, *inter alia*, to vacate the March 19, 2020 order pursuant to CPLR §5015(a)(3) based upon FNMA's purported fraud, misrepresentation, or other misconduct, and to strike FNMA's answer, pursuant to CPLR §§ 3124 and 3126, due to FNMA's purported failure to properly respond to Plaintiff's disclosure demands. For the reasons explained below, the Court grants FNMA's motion (motion seq. #5) and denies Plaintiff's cross-motion (motion seq. #6) as moot.

At the outset, the Court reject's Plaintiff's contention that FNMA's motion should be summarily denied as an untimely motion to dismiss. It is noted that FNMA denominated its motion as one to dismiss pursuant to CPLR 3211(a)(5). Plaintiff is correct that once FNMA served its answer, issue was joined and therefore it could not seek dismissal of the complaint solely under this statutory provision since such a motion, commonly called a "pre-answer motion to dismiss" may only be made before service of the responsive pleading is required (*see* CPLR

[2] The instant moving papers identify Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar") as the movant, by virtue of a November 1, 2019 corporate assignment of the 2005 mortgage from FNMA (via Nationstar as its Attorney-in-Fact) to Nationstar as assignee (*see* NYSCEF doc. no. 144). However, the motion also includes a November 15, 2019 corrective corporate assignment of the mortgage from FNMA's immediate predecessor, Ocwen Loan Servicing LLC (also via Nationstar as its Attorney-in-Fact) to FNMA (*see* NYSCEF doc. no. 145), thereby seeming to undo Nationstar's status as assignee. Due to this confusion, this decision refers to FNMA as the movant, as it is the assignee that successfully moved to intervene as a party-defendant and then answered the complaint.

3211[e]). However, CPLR 3211(c) provides that on a motion made under subdivision (a) or (b), the parties may submit evidence that could properly be submitted on a motion for summary judgment, after which a court may, upon adequate notice, convert the motion to one for summary judgment. There is no question that the parties included with their respective moving papers evidence which could properly be submitted on a motion for summary judgment. Moreover, Plaintiff's sole objection to the conversion on the basis of purportedly outstanding discovery is meritless, as it has not articulated how the specific items of discovery sought in its cross-motion bear on the statute of limitations issue upon which FNMA's motion to dismiss is based. Therefore, the Court will treat FNMA's motion as one for summary judgment "because the parties made it unequivocally clear that they were laying bare their proof and deliberately charting a summary judgment course" (*Myers v BMR Bldg. Inspections, Inc.*, 29 AD3d 546, 546 [2d Dept 2006] [internal quotation marks and alterations omitted]).

Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (*see id.*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

CPLR 3212 (c) recognizes that a party may move for summary judgment on, *inter alia*, any of the grounds for dismissal enumerated in CPLR 3211 (a) or (b).

> "On 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*, 189 AD3d 1535, 1536-1537 [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]).

In support of summary judgment, FNMA submits, *inter alia*, a copy of the complaint filed by Plaintiff's predecessor, CitiMortgage, showing that the prior foreclosure action, concerning the same 2004 mortgage, was commenced on or about April 10, 2008 under index number 12712/2008 (*see* NYSCEF doc. no. 137). Since that complaint contained a demand for payment of the full principal balance due (*see id.*, ¶¶ 9-10), FNMA has established, *prima facie*, that the 2004 mortgage was accelerated when the prior action was commenced. Moreover, notwithstanding that the recent enactment of the Foreclosure Abuse Prevention Act ("FAPA") has clarified that lenders cannot unilaterally reset the statute of limitations by, *inter alia*, discontinuing a foreclosure action (*see* CPLR §§ 203[h] and 3217[e]), this is not at issue here. Although Ms. Roman and FNMA have, each, previously indicated that the 2008 foreclosure action was discontinued (*see* NYSCEF doc. no. 52, ¶6; NYSCEF doc. no. 128, ¶12), the record clearly shows that by order dated October 17, 2013, and entered January 29, 2014, a copy of which FNMA submitted with its motion, the Court (Knipel, J.) dismissed that case as abandoned pursuant to CPLR §3215(c) (*see* NYSCEF doc. no.138). It is well-settled that the dismissal of a prior foreclosure action does not constitute an affirmative act by the lender to revoke an acceleration (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987 [2d Dept 2016]; *EMC Mtge. Corp.*, 279 AD2d at 605-606; *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]). Hence, assuming *arguendo* that, post-FAPA, there are still some

scenarios in which a lender may validly revoke an acceleration and return a loan to installment payment status, there is no indication that revocation was ever attempted here. Since the statute of limitations for actions to foreclose on a mortgage is six years and the prior foreclosure action was commenced in or around April of 2008, FNMA has established, *prima facie*, that the instant foreclosure action, commenced by the same entity on June 2, 2016, is untimely.

In the face of FNMA's *prima facie* showing, the burden shifts to Plaintiff "to raise a triable issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Kitty Jie Yuan v 2368 W. 12th St., LLC*, 119 AD3d 674, 674 [2d Dept 2014]). Plaintiff argues that the complaint in the 2008 foreclosure action was not verified, and the filing of an unverified complaint cannot validly accelerate a mortgage debt.[3] However, Plaintiff cites to no binding authority for this proposition, and the lone case it does cite is from a lower court, which was later abrogated on appeal, albeit on different grounds. Plaintiff attempts to bolster its argument by extrapolating from various cases which refer to the filing of a "summons and verified complaint" in articulating the general rule that commencing a foreclosure action in which the entire principal amount is called due serves to accelerate a mortgage debt that was previously payable in installments. This Court is not persuaded. The dicta upon which Plaintiff relies does not necessarily compel the conclusion that a complaint must be verified for its filing to constitute an affirmative act of acceleration. To the contrary, other appellate cases articulate the rule without mentioning whether the complaint was verified (*see e.g., HSBC Bank United States, N.A. v Hochstrasser*, 193 AD3d 915, 917 [2d Dept 2021] ["The filing of the summons and complaint in the 2009 action constituted a valid election by the plaintiff to accelerate the maturity of the entire mortgage debt."]; *Clayton Natl., Inc. v Guldi*, 307 AD2d 982, 982 [2d Dept 2003] [referring to the "filing of the summons and complaint and lis pendens" as the operative act of acceleration]).

The Court is similarly unpersuaded by Plaintiff's reliance, by analogy, on the principle that an unverified complaint cannot support a default judgment. On such applications, the proponent is statutorily required to submit proof of the facts constituting the claim (*see* CPLR 3215[f]; *CitiMortgage, Inc. v Weaver*, 197 AD3d 1087, 1088 [2d Dept 2021]). Accordingly, said

[3] The record is unclear on whether the complaint from the 2008 action really was unverified. The document refers to itself, on the first page next to the caption, as a "verified complaint" (*see* NYSCEF doc. no. 137). However, the last page in this e-filed document, included as Exhibit "I" to FNMA's moving papers-in-chief, is the signature page, signed by CitiMortgage's counsel, and there is no separate verification page or even a traditional "blue back" sheet. It is unknown if the document is complete, or if additional pages, including the verification, were just not uploaded as part of this exhibit.

facts must be alleged by one with personal knowledge, either in the form of an affidavit or verified complaint (*see Deutsche Bank Natl. Trust Co. v Hossain*, 196 AD3d 631, 633 [2d Dept 2021]). In contrast, a lender's election to accelerate a mortgage need only be shown by an affirmative act that is clear and unequivocal, and this includes the commencing of a foreclosure action by filing a summons and complaint, wherein the lender expressly elects to call due the entire amount secured by the mortgage *(see Milone v US Bank N.A.*, 164 AD3d 145, 152 [2d Dept 2018]; *EMC Mtge. Corp.*, 279 AD2d at 605-606). It is the clarity and unequivocal nature of the affirmative act that is significant for acceleration purposes. Plaintiff has, thus, failed to persuasively articulate why the evidentiary requirements of CPLR 3215(f) should be imported into what is otherwise a simple and straightforward analysis as to the timing of a lender's act to accelerate a mortgage. In any event, Plaintiff's argument is now foreclosed by FAPA, which provides, *inter alia*, that a lender can no longer argue that a loan was not validly accelerated in a prior action unless there was a prior adjudication to that effect in said action (*see* CPLR § 213[4][a] and [b]). As Plaintiff has failed to raise a triable issue of fact, FNMA has demonstrated its entitlement to dismissal of the complaint as against it as time-barred.

Plaintiff also argues that FNMA cannot assert a statute of limitations defense because the borrower-defendant, Ms. Roman, raised it in opposition to CitiMortgage's motion for summary judgment, and since Justice Knipel granted that motion, the law of the case is that the defense has been rejected on the merits. However, "preclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" (*People v Evans*, 94 NY2d 499, 502 [2000]). On that motion by Plaintiff's predecessor, FNMA had no such opportunity, as it was not a party at that time. In addition, unlike the other preclusion doctrines described as "rigid rules of limitation," such as collateral estoppel and res judicata, "law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, and is not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion, but does not restrict its authority" (*id.* at 503 [internal quotation marks and citations omitted]). The record on this motion practice presents more information about the prior foreclosure action than was presented on the prior motion. In light of this, combined with Plaintiff's failures to provide any indication as to the reasoning behind Justice Knipel's rejection of Ms. Roman's statute of limitations defense, or to

make a sufficient showing on the instant motion as to the applicability of the defense, this Court declines to apply the law of the case doctrine in so rigid a manner.

Plaintiff also argues that FNMA cannot raise the statute of limitations defense because it is personal to Ms. Roman. However, Plaintiff improperly raised this specific argument for the first time in its reply to FNMA's opposition to the cross-motion (*see* NYSCEF doc. no. 183, 24¶), rather than in the cross-motion itself, which served as Plaintiff's opposition to FNMA's original motion. In any event, the caselaw upon which Plaintiff relies for this principle arose in factually inapposite contexts. In *Bhmpw Funding v. Lloyd-Lewis* (194 AD3d 780, 783-784 [2d Dept 2021]) the Court held that a subsequent owner of real property could not raise a defense as to the time-barred installment payments for which only the borrower's estate was liable. And in *In re EATON* (282 AD 32, 34-35 [3d Dept 1953]), the Court held that an estate executor had the right, under the common law rule, to satisfy the debts owed by two legatees to the testator by retaining their respective distributives share of the estate, and this bound a particular legatee's assignee because his position "[wa]s in no way superior to that of his assignor." The Court also explained that the defense was tolled as to that legatee because he had been absent from the State since the testator's death. Plaintiff seizes upon the Court's statement that the statute of limitations was "a personal defense which does not accrue to [the assignee]" (*see id.* at 35), but this was in reference to the other legatee against whom the defense had not been tolled because he had remained present in the State. Accordingly, the common thread from these cases is that a defendant cannot invoke a statute of limitations defense that belongs to another party. Here, however, FNMA pleaded the defense in its own answer. Moreover, on the facts of this case, Plaintiff's contention that only Ms. Roman may invoke the statute of limitations presents as illogical since a judgment of foreclosure and sale will cut off all other potential interests in the subject premises, including FNMA's mortgage lien. Plaintiff has cited to no authority holding that a defendant whose own interests are at stake in an action may not contest the timeliness of the claim which threatens said interest.

The above analysis renders the branches of Plaintiff's cross-motion seeking to compel disclosure or strike FNMA's answer moot. Plaintiff also seeks to vacate the March 19, 2020 order permitting FNMA to intervene in this action, on the ground of fraud or misrepresentation, pursuant to CPLR §5015(a)(3). The gravamen of Plaintiff's argument is that it believes the documentary evidence submitted on FNMA's prior order to show cause (motion seq. #4) does

not show that CitiMortgage (the holder of the 2004 mortgage at that time) was paid from the proceeds of the 2005 mortgage transaction, and so the latter does not have priority. Plaintiff also contends that FNMA falsely represented that its own predecessor's action to foreclose on the 2005 mortgage was still pending when it had been dismissed in 2010, thereby calling into question the mortgage's enforceability and, by extension, the grounds for FNMA's intervention. However, Plaintiff's arguments more properly bear on the substantive merit of any potential causes of action that FNMA might bring to vindicate its perceived interests in the subject premises. Hence, even if Plaintiff is correct that FNMA's claim of lien priority lacks merit, that does not mean that it lacked a good faith basis to move to intervene. To the contrary, the record suggests that FNMA has at least a potentially legitimate interest in the outcome of this action, since the 2005 mortgage is a "lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff" (RPAPL §1311[3]). FNMA is, thus, a necessary defendant to this foreclosure action (*see id.*), and, arguably, has a colorable claim to intervene as of right (*see* CPLR § 1012[a][3]) and in the Court's discretion (*see* CPLR § 1013).

It is noted that the complaint named FNMA's predecessor, One West Bank FSB, as a defendant, identifying it in Schedule C as a party with an interest in the premises as a subordinate lienor (*see* NYSCEF doc. no. 1, p. 30). The record also shows that One West Bank FSB assigned away its interest in the 2005 mortgage by assignment recorded June 12, 2015 (*see* NYSCEF doc. no. 140), and FNMA acquired its interest by assignment recorded August 5, 2015 (*see* NYSCEF doc. no. 141), each of which occurred the year before CitiMortgage commenced this action. It is also noted that Plaintiff has proffered no explanation for its predecessor's failure to name FNMA as a defendant in the first place. Accordingly, the complaint, itself, implicitly acknowledges that the holder of the 2005 mortgage was always meant to be a party to this action. Since that entity is FNMA, and it was Plaintiff's predecessor's omission which precipitated FNMA's need to move to intervene, there is no basis to vacate Justice Joseph's order granting such relief, even if, as Plaintiff contends, FNMA misrepresented the facts to bolster its claim of lien priority.[4] Moreover, based on the unique procedural history just described, this Court would

[4] It is unclear why Plaintiff seeks to vacate the order permitting FNMA to intervene. "The absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale" (*Cent. Mtge. Co. v Davis*, 149 AD3d 898, 900 [2d Dept 2017]). As FNMA's status as assignee of record for the 2005 mortgage predates this action, the failure to name it as a necessary party (*see* RPAPL 1311[3]), absent intervention or joinder, would render any judgment obtained by Plaintiff ineffective as against FNMA.

not find vacatur of the order to be the appropriate remedy, particularly since the validity and priority of all liens on the property, including the 2005 mortgage, would have to be determined by a referee even if Plaintiff had been successful in prosecuting this foreclosure action as against FNMA. This conclusion renders it unnecessary to wrestle with FNMA's argument that this Court cannot do anything to substantively affect the March 19, 2020 order because Plaintiff has already perfected its appeal of same.

Accordingly, the above-referenced motion and cross-motion in sequence #5 and #6, respectively, are decided to the extent that it is:

ORDERED that the motion by defendant FNMA for, in effect, summary judgment dismissing the complaint (seq. #5), is **GRANTED to the extent** of dismissing the complaint as against that defendant; and it is further

ORDERED that the cross-motion by Plaintiff to, *inter alia*, vacate the March 19, 2020 order and strike defendant FNMA's answer for failure to provide discovery (seq. #6), is **DENIED** in its entirety; and it is further

ORDERED that Plaintiff shall serve a copy of this order, with notice of entry, upon defendant Nicole Roman and all other parties or persons entitled to notice, within 20 days of the date of entry, and shall file proof of same.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: may 31, 2023

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