

|  |
|--|
| <b>Nationstar Mtge., LLC v Marivia IT Consultants, Inc.</b>  |
| 2023 NY Slip Op 33239(U)   |
| September 19, 2023   |
| Supreme Court, Suffolk County  |
| Docket Number: Index No. 614680/2019   |
| Judge: S. Betsy Heckman Torres   |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.   |

Short Form Order

SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

**HON. S. BETSY HECKMAN TORRES, J.S.C.**

-----X

NATIONSTAR MORTGAGE, LLC,

Plaintiff,

-against-

MARIVIA IT CONSULTANTS, INC., et al.,

Defendants.

-----X

INDEX NO.: 614680/2019

MOTION DATE: 5/2/2023

MOTION SEQ. #: 003 MD

**PLAINTIFF'S ATTORNEY:**

Gross Polowy LLC

1775 Wehrle Dr Ste 100

Williamsville, NY 14221

**DEFENDANT'S ATTORNEY:**

Justin F. Pane, P.C.

80 Orville Drive, Suite 100

Bohemia, NY 11716

Hinshaw & Culbertson LLP

800 Third Avenue, 13th Floor

New York, NY 10022

Upon the e-file document list numbered 97-142 read on Marivia's motion for summary judgment, plaintiff's opposition papers and Marivia's reply papers, and upon due consideration; it is

**ORDERED** that this motion (#003) by defendant Marivia IT Consultants, Inc, (hereinafter "Marivia") and non-party Lisa M. Leib seeking, inter alia, dismissal of the action or in the alternative, to leave to amend their answer to include a res judicata affirmative defense is denied; and it is further

**ORDERED** that the parties are directed to appear for an in-person conference to be held at the Courthouse, One Court Street, Riverhead, New York, 11901, Room A-301 on **Tuesday, November 14, 2023 at 10:00AM.**

Familiarity with this matter is presumed, having been fully set forth in the Court's prior order dated August 4, 2020 (Heckman, J.) and the determination of the Second Department by order dated May 3, 2023, *Nationstar v. Leib*, 216 A.D. 3d 651, 189 N.Y.S.3d 219.

Initially the court notes that the pending motion (#003) was originally filed as a cross-motion to plaintiff's motion (#002), however, plaintiff filed a letter (see, NYSCEF #124) withdrawing plaintiff's motion (#002) and the court will determine the motion (#003)

accordingly. Further, pursuant to the prior order dated August 4, 2020 (Heckman, J), Lisa Leib is no longer a party to this action, accordingly, to the extent she seeks any relief herein, such is denied.

Marivia's motion (#003) seeks, inter alia, to dismiss plaintiff's action arguing that it is time-barred.

Actions to foreclose a mortgage are governed by a six-year statute of limitations (see CPLR 213[4]). "When a mortgage is payable in installments, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt" (*Federal Natl. Mtge. Assn. v. 4721 Ditmars Blvd, LLC*, 196 A.D.3d 465, 466, 146 N.Y.S.3d 845). "A mortgage debt may be accelerated when a lender commences a mortgage foreclosure action against the borrower and seeks payment of the full balance due in the complaint" (*HSBC Bank USA v. Rinaldi*, 177 A.D.3d 583, 585, 111 N.Y.S.3d 115). However, the acceleration of a mortgaged debt by commencement of an action is only valid if the party making the acceleration had standing at that time to do so (see *Federal Natl. Mtge. Assn. v. 4721 Ditmars Blvd, LLC*, 196 A.D.3d at 466, 146 N.Y.S.3d 845; *HSBC Bank USA v. Rinaldi*, 177 A.D.3d at 585, 111 N.Y.S.3d 115).

Here, the 2012 foreclosure action was dismissed on the ground that the plaintiff lacked standing. Pursuant to a DECISION AFTER TRIAL (Quinlan, J.) dated February 16, 2019, the court, *upon motion of the defendant* in that action, "dismissed plaintiff's complaint as it had no standing to commence the action." Therefore, the purported acceleration through commencement of that action was a nullity and the statute of limitations did not begin to run at that time (see *IPA Asset Mgt., LLC v. Bank of N.Y. Mellon*, 202 A.D.3d 1068, 1070, 159 N.Y.S.3d 894; 187 *Federal Natl. Mtge. Assn. v. 4721 Ditmars Blvd, LLC*, 196 A.D.3d at 467, 146 N.Y.S.3d 845; *Deutsche Bank Trust Co. Ams. v. Marous*, 186 A.D.3d 669, 671, 130 N.Y.S.3d 101). Furthermore, the plaintiff was not estopped from asserting that the mortgage was not validly accelerated by commencement of the 2012 action, as that action "was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated" (CPLR 213[4][a]; cf. *GMAT Legal Title Trust 2014-1 v. Kator*, 213 A.D.3d 915, 917, 184 N.Y.S.3d 805).

Likewise, that branch of Marivia's motion which was pursuant to CPRL 3025(a) for leave to amend their answer to include a res judicata affirmative defense, such application is denied as the proposed amendment is devoid of merit.

"In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*U.S. Bank N.A. v. Singer*, 192 A.D.3d 1182, 1185, 145 N.Y.S.3d 537 [internal quotation marks omitted]; see CPLR 3025[b]; *Citimortgage, Inc. v. Rogers*, 203 A.D.3d at 1126, 163 N.Y.S.3d 452).

“Under the doctrine of res judicata, or claim preclusion, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding. Thus, a party seeking to assert res judicata must show the existence of a prior judgment on the merits between the same parties, or those in privity with them, involving the same subject matter” (*Capital One, N.A. v. Trubitsky*, 206 A.D.3d 608, 610, 170 N.Y.S.3d 142 [internal quotation marks omitted]).

Here, as previously determined, the 2012 action to foreclose was dismissed for lack of standing. Thus, the foreclosure action was dismissed without reaching the merits of the foreclosure claim. Since the defendants therefore failed to demonstrate that “a judgment on the merits exists between the same parties involving the same subject matter,” the present action is not barred by res judicata (*id.* at 611, 170 N.Y.S.3d 142 [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v. Pantel*, 179 A.D.3d 650, 650–651, 116 N.Y.S.3d 336).

Marivia’s remaining contentions lack merit and are denied.

Accordingly, Marivia’s motion (#003) is denied in its entirety and the parties are directed to appear for a conference.



DATED: September 19, 2023

J.S.C

HON. S. BETSY HECKMAN TORRES, J.S.C.