

**U.S. Bank Trust, N.A. v Flaumenbaum**

2023 NY Slip Op 34633(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 514623/19

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 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 21<sup>st</sup> day of August, 2023.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X  
U.S. BANK TRUST, N.A., AS TRUSTEE  
FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

Index No. 514623/19

MICHELLE FLAUMENBAUM and CITIBANK, N.A.,

ms#4

Defendants.  
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	104-108
Opposing Affidavits (Affirmations) _____	109-120
Affidavits/ Affirmations in Reply _____	122-125
Other Papers: <u>Affidavits/Affirmations in Support</u> _____	

Upon the foregoing papers, Michelle Flaumenbaum (defendant) moves in motion [mot.] sequence [seq.] number [no.] four for an order, pursuant to CPLR 2221 (e), to renew defendant's prior cross-motions to dismiss (mot. seq. nos. two and three) and her opposition to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust's (plaintiff) prior motion for summary judgment (mot. seq. no. 1).<sup>1</sup>

**BACKGROUND**

<sup>1</sup> Although defendant's notice of motion states that she is moving pursuant to CPLR 2221 (d), it is abundantly clear from the arguments, a ffirmation, and a ffidavit submitted in support that the defendant is moving pursuant to CPLR 2221 (e).

Plaintiff commenced the instant action to foreclose a mortgage encumbering the property located at 2507 East 63<sup>rd</sup> Street in Brooklyn, New York, by electronically filing a summons and complaint on July 3, 2019. The note and mortgage were executed on January 10, 2006, by the defendant to secure a \$412,000 loan from Approved Funding Corporation (*see* NYSCEF Doc No. 1). The note was assigned several times thereafter. According to the complaint, defendant defaulted under the terms of the note and mortgage.<sup>2</sup> Along with the complaint, plaintiff filed a copy of the endorsed note, the mortgage, copies of the assignments, a certificate of merit, and a notice of pendency. On August 11, 2019, defendant filed an attorney verified answer asserting fourteen affirmative defenses along with one counterclaim. Among other defenses, the defendant asserted that plaintiff lacked standing to maintain the instant action, that defendant failed to comply with conditions precedent, and that the action was barred by the applicable statute of limitations. Defendant's only counterclaim seeks recovery for attorneys' fees incurred in prior foreclosure actions based upon the subject mortgage in the event she prevails in the instant action.

On June 4, 2009, BAC Home Loans Servicing, LP (BAC) commenced a foreclosure action against the defendant under Index No. 13824/2009 (2009 Action). In its complaint, BAC elected to accelerate the mortgage balance and declared the same to be immediately due and payable (*see* NYSCEF Doc No. 31 at ¶ 12). BAC moved to discontinue the 2009 Action and by order dated July 19, 2012, the Honorable Loren

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<sup>2</sup> Although the complaint and annexed exhibits do not specify defendant's date of default, the subsequent submissions indicate that defendant defaulted on the payment that was due and payable on January 1, 2009, as well as subsequent installments (*see* NYSCEF Doc No. 31).

Baily-Schiffman granted BAC's motion and discontinued the action without prejudice (*see* NYSCEF Doc No. 33). On July 12, 2013, Nationstar Mortgage LLC (Nationstar) commenced a foreclosure action against the defendant under Index No. 503935/2013 (2013 Action). By order dated August 20, 2015, the Honorable Loren Baily-Schiffman granted defendant's motion to dismiss finding that plaintiff did not have possession of the note at the time of commencement of the 2013 Action (*see* NYSCEF Doc No. 35). On January 28, 2016, Nationstar commenced another foreclosure action against the defendant under Index No. 501132/2016 (2016 Action). By order dated February 6, 2019, the late Honorable Noach Dear dismissed the 2016 Action for plaintiff's failure to comply with RPAPL 1306 (*see* NYSCEF Doc No. 37). Plaintiff subsequently commenced the instant action, as previously noted, on July 3, 2019.

On December 18, 2019, plaintiff moved, in mot. seq. no. one, for summary judgment and related relief. On February 20, 2020, defendant cross-moved in mot. seq. no. two to dismiss the instant action as time barred by the statute of limitations. On May 4, 2021, defendant moved in mot. seq. no. three for leave to conduct discovery pursuant to CPLR 3212 (f).<sup>3</sup> By order dated February 15, 2022, the court granted plaintiff's motion for summary judgment and denied both of defendant's cross motions. In the decision, as is relevant here, the court held that "[c]ontrary to defendant's contentions, the subject loan was properly deaccelerated in the 2009 action under index number 13824/2009 by a voluntary discontinuance by order dated July 19, 2012" (*see* NYSCEF

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<sup>3</sup> Although Defendant labeled it as a revised cross motion on the basis that there was an intervening change in the law since defendant filed her initial cross motion to dismiss, the purported revised cross-motion also sought leave to conduct discovery. The Court treated defendant's mot. seq. nos. two and three as two distinct motions in its February 15, 2022, order.

Doc No. 98). In reaching its conclusion, the court cited *Freedom Mortgage Corp. v Engel* (37 NY3d 1 [2021]). It further held that “[s]ince Justice Baily-Schiffman determined that Nationstar did not have standing to commence the [2013] action, then Nationstar also lacked the authority to validly exercise the option to accelerate the debt. In any event, the summons and complaint filed in the instant action was filed within six years of the purported acceleration in the 2013 action” (*id.*). Ultimately, the court concluded that the instant action was not time barred by the 2009, 2013, and 2016 actions (*id.*). Additionally, defendant’s mot. seq. no. three was denied as “[d]efendant failed to demonstrate that reasonable attempts to discover facts which would give rise to a triable issue have been made or that further discovery might lead to relevant evidence” (*id.*). Defendant’s instant motion for leave to renew ensued.

### DISCUSSION

CPLR 2221 states, in relevant part as follows:

“(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.”

“A motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law” (*Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]). Absent circumstances set forth in CPLR 5015, a motion for leave to renew based upon a change in the law that would change the prior determination must be made prior

to the entry of a final judgment or before the time to appeal has expired (*Opalinski v City of New York*, 205 AD3d 917, 919 [2d Dept 2022]). Here, defendant filed its instant motion to renew less than three months after the enactment of the Foreclosure Abuse Prevention Act (FAPA) and before the entry of a final judgment. Thus, given the change in law and defendant's filing of a timely motion, the court grants leave to renew the February 15, 2022 order granting plaintiff's motion for summary judgment and denying defendant's cross motions to dismiss (*U.S. Bank Trust, N.A. v Miele*, 2023 NY Slip Op 23186, \*3 [Sup Ct, Westchester County 2023]).

In opposition to defendant's motion, plaintiff asserts that FAPA should not be construed to apply retroactively and that if FAPA is applied retroactively, it would violate plaintiff's constitutional rights. The court finds that contrary to plaintiff's contentions, FAPA may be applied retroactively and does not violate plaintiff's constitutional rights. First, FAPA provides that the law "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (FAPA § 10). It is clear that FAPA is intended to be applied retroactively from the plain language of the law, the legislative intent, and its application by the Appellate Division, Second Department (*Miele*, 2023 NY Slip Op 23186 at \*5; see *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]).

The court further finds that FAPA does not violate plaintiff's constitutional rights. FAPA, as is relevant to the instant action, restores, rather than alters the law as it existed at the time plaintiff's predecessor voluntarily discontinued the 2009 Action. As

defendant correctly argues, FAPA restores the law within the Second Department that existed prior to the *Freedom Mortgage Corp.* decision in that a lender's unilateral discontinuance of a prior foreclosure action is, by itself, insufficient to revoke acceleration and reset the statute of limitations (*U.S. Bank, N.A. v Williams*, 2023 NY Slip Op 23208, \*4 [Sup Ct, Putnam County 2023]).

Upon renewal, the court finds that defendant's cross motion to dismiss (mot. seq. no. two) must be granted and the instant action is hereby dismissed as time barred by the applicable limitations period (*Deutsche Bank Natl. Trust Co. v Wong*, 2023 NY Slip Op 03908, \*2 [2d Dept 2023]). "An action to foreclosure a mortgage is governed by a six-year statute of limitations" (*Deutsche Bank Natl. Co. v Natal*, 217 AD3d 835, 836 [2d Dept 2023]). "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" (*U.S. Bank N.A. v Doura*, 204 AD3d 721, 723 [2d Dept 2022], quoting *Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]). "Acceleration may occur, inter alia, by the commencement of a foreclosure action wherein the plaintiff elects in the complaint to call due the entire debt secured by the mortgage" (*id.*). Initially, the burden is on the defendant to establish, prima facie, that the time in which to commence the action has expired (*Natal*, 217 AD3d at 836). If the defendant satisfies his/her burden, the plaintiff must then raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether plaintiff commenced the instant action within the limitations period (*id.*).

Here, in support of her cross motion to dismiss, defendant established that the six-year statute of limitations began to run on the entire debt in June 2009, when plaintiff's

predecessor commenced the 2009 Action and elected to call due the entire amount of the loan. The defendant further noted that the instant action was commenced in July 2019, roughly 10 years after the limitations period began to run. In opposition, plaintiff contends that the loan was not accelerated by the commencement of the 2009 Action. Plaintiff further argues that even if the 2009 Action accelerated the loan, the discontinuance and the copies of the mortgage statements sent to the defendant, revoked the purported acceleration (*see* NYSCEF Doc No. 76). Additionally, plaintiff asserts that even if the 2009 Action accelerated the loan and was not de-accelerated, the instant action is nonetheless timely because the statute of limitations was tolled for six months following the dismissal of the 2013 Action in February of 2019.

On December 30, 2022, FAPA went into effect. The amendment to CPLR 3217 (e) by FAPA specifically overruled the Court of Appeals' holding in *Freedom Mortgage Corp v Engel*, (37 AD3d 1), finding that a voluntary discontinuance, in and of itself, revoked the acceleration of a mortgage debt (*U.S. Bank, N.A. v Simon*, 216 AD3d 1041, 1043 [2d Dept 2023]; see also *GMAT Legal Title Trust 2014-1*, 213 AD3d at 915). Additionally, under FAPA, a "plaintiff is estopped from asserting that the debt was not validly accelerated by the commencement of the [prior] action based on its lack of standing..." (*Wong*, 2023 NY Slip Op 03908 at \*2). FAPA also amended CPLR 213(4). As amended by FAPA, it provides as follows:

(a) [i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an express judicial determination, made

upon a timely interposed defense, that the instrument was not validly accelerated.

FAPA also amended CPLR 3217 to add a new subdivision which provides:

(e) Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute

Additionally, FAPA amended CPLR 203 by adding subdivision (h) which provides:

(h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

Since the 2009 Action was voluntarily discontinued, and therefore not dismissed on an expressed judicial determination that the instrument was not validly accelerated, the loan was not de-accelerated by the mere filing of a discontinuance and plaintiff cannot unilaterally toll or extend the limitations period (*Wong*, 2023 NY Slip Op 03908 at \*2). Additionally, the discontinuance of the 2009 Action together with the annexed mortgage loan statements did not constitute an affirmative act of revocation sufficient to de-accelerate the mortgage debt even if plaintiff's predecessor was permitted to do so unilaterally (*Gardner v Wells Fargo Bank N.A.*, 2023 NY Slip Op 04304, \*1 [2d Dept 2023]). Furthermore, contrary to plaintiff's contention, plaintiff is not entitled to the benefit of the savings provision of CPLR 205 (a) or CPLR 205-a since the 2009 Action was voluntarily discontinued (*U.S Bank, N.A. v Santos*, 2023 NY Slip Op 03942, \*1 [2d

Dept 2023])). Plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether plaintiff commenced the instant action within the limitations period and thus the instant action must be dismissed as untimely.

**CONCLUSION**

All arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein. Accordingly, it is hereby

**ORDERED** that defendant’s motion (mot. seq. no. four) for leave to renew is granted in its entirety; and it is further

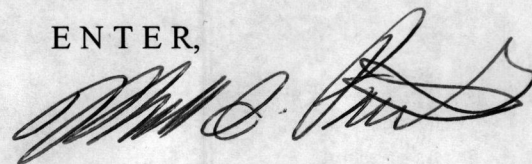
**ORDERED** that upon renewal, defendant’s cross motion (mot. seq. no. two) seeking dismissal of the instant action as barred by the statute of limitations is granted in its entirety, and the instant action is dismissed; and it is further

**ORDERED** that in light of the decision herein, plaintiff’s motion (mot. seq. no. one) for summary judgment and related relief is denied in its entirety; and it is further

**ORDERED** that defendant’s cross-motion (mot. seq. three) is denied as moot in light of the dismissal herein.

This constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.

**HON. MARK I PARTNOW  
SUPREME COURT JUSTICE**

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