

**Avenue Basin Mgt., Inc. v Wilmington Savs. Fund
Socy., FSB**

2025 NY Slip Op 30325(U)

January 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 516625/2019

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 21st day of January, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X Index No.: 516625/2019
AVENUE BASIN MANAGEMENT, INC.,

Plaintiff,

DECISION AND ORDER

- against -

(Mot. Seq. No. 4)

WILMINGTON SAVINGS FUND SOCIETY, FSB.,

Defendant.

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<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Affirmation in Support/ Exhibit.....	95 – 97
Affirmation in Opposition/Exhibits.....	98 – 111
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Plaintiff Avenue Basin Management Inc. (“Plaintiff”) moves for an order: (1) staying Defendant Wilmington Savings Fund Society, FSB.’s (“Defendant”) motion pending in the foreclosure action under Index No. 520221/2019 (the “2019 Foreclosure Action”); (2) pursuant to CPLR 2221 (e), allowing Plaintiff leave to renew this Court’s decision and order, dated May 27, 2021 and entered on June 1, 2021; and upon renewal, restoring this action to the court’s active calendar; and (3) pursuant to CPLR 602, consolidating the instant quiet title action with the Foreclosure Action (Mot. Seq. No. 4).

This action involves real property located at 6512 Avenue T in Brooklyn, New York (the “Property”). On or about June 22, 2006, the Property was purchased by Daniel Friedberg (“Friedberg”), who entered into a mortgage agreement with GFI Mortgage Bankers, Inc. for the principal amount of \$300,000. The mortgage was later assigned to JPMorgan Chase Bank National Association (“JPMorgan”). JPMorgan commenced a foreclosure action against Friedberg on or

about August 12, 2013, and elected to accelerate the entire unpaid balance of the principal. In 2014 the mortgage was assigned to Federal National Mortgage Association and then in 2016 to Defendant Wilmington Savings Fund Society, FSB. By order dated June 24, 2019, the foreclosure action was dismissed without prejudice since it was commenced after Friedberg's death.¹ Thereafter, Friedberg's estate sold the Property to Plaintiff for \$25,000 via an executor deed dated July 26, 2019. Now, Plaintiff seeks to quiet title.

Defendant filed a motion to dismiss (Mot. Seq. No. 1) on the grounds that the complaint failed to state a cause of action based upon documentary evidence. Since the foreclosure proceeding was declared a nullity based on Friedberg's passing, Defendant maintained that the loan was not accelerated by that foreclosure action, the statute of limitations never began to run, and Plaintiff had no standing to extinguish Defendant's mortgage lien. In opposition, Plaintiff argued that the six-year statute of limitations began to run when JPMorgan accelerated the loan when it initiated the foreclosure proceeding in 2013. By order dated February 17, 2020, the Court granted Defendant's motion, finding that Plaintiff was not entitled to the cancellation and discharge of Defendant's mortgage lien based upon the running of the statute of limitations.

Plaintiff then filed a motion seeking, in part, to reargue the Court's decision (Mot. Seq. No. 2) on the basis that the Court overlooked that there was a 2011 foreclosure action, which was voluntarily discontinued. According to Plaintiff, the existence of the 2011 foreclosure action and dismissal of the 2013 action demonstrate that the time for Defendant to foreclose the mortgage had expired. Defendant, in opposition, claimed that Plaintiff was trying to present a new argument, making Plaintiff's motion procedurally improper. Defendant further explained that the 2011 foreclosure action was dismissed via stipulation of the parties since they reached a loan modification agreement. In an order dated May 27, 2021, the Court granted leave to reargue and upon reargument, adhered to its decision since the argument about the 2011 foreclosure action was being raised for the first time. Even if this argument was considered, the Court held that the prior decision still stands based on *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021], a Court of Appeals decision finding that a voluntary withdrawal of the foreclosure action revokes the election to accelerate.

¹ In the 2019 Foreclosure Action decision, the Court dismissed the action without prejudice since the statute of limitations had not yet expired.

The Court will first address Plaintiff's motion to renew. Plaintiff argues that the Foreclosure Abuse Prevention Act ("FAPA"), which became effective December 30, 2022, renders the *Freedom Mtge. Corp.* decision obsolete and legally inapplicable and resolves the action in favor of Plaintiff due to amendments to CPLR 205-a and 213 (4). First, since Defendant is not the original foreclosing party from the 2013 foreclosure action and the 2019 foreclosure action is not against the same borrower, Plaintiff argues that Defendant is not entitled to the savings statute (CPLR 205-a). Second, Plaintiff argues that the 2013 foreclosure action accelerated the subject mortgage, and the 2019 foreclosure action was commenced after the expiration of the statute of limitations. Third, Plaintiff contends that FAPA applies retroactively.

In opposition, Defendant maintains that the loan was not accelerated by the 2013 foreclosure action because it was commenced against a deceased individual. Since the 2013 foreclosure action was dismissed without prejudice, Defendant argues that the 2019 foreclosure action was timely commenced after an administrator had been appointed. Even if the 2013 action was not dismissed without prejudice, Defendant argues that FAPA cannot apply retroactively to render a loan time-barred. In addition, Defendant claims that a retroactive application of FAPA is unconstitutional. In its reply, Plaintiff asserted that FAPA is retroactive and constitutional.

After oral argument, the Court instructed the parties to submit additional briefs on the issue of the retroactive effect of FAPA. Plaintiff's supplemental affirmation cited to a 2013 Second Department case, an Eastern District case, and sister court cases, based on the proposition that FAPA is retroactive and constitutional. In its supplemental opposition, Defendant argues that the Second Department case cited by Plaintiff does not mention the word constitutional or retroactive. Instead, Defendant cited to two Second Department cases wherein the issue of the constitutionality of FAPA's retroactive application was referred to the lower court.

In light of a new ruling from the Second Department, the Court's initial order dated February 17, 2020, is now reversed. Similar to the facts here, the successor mortgagor in *Trento 67, LLC v Onewest Bank, N.A.* (230 AD3d 1 [2d Dept 2024]) commenced a foreclosure action, and elected to accelerate the mortgage debt, after the borrower-defendant had passed and the action was dismissed on that ground. The Second Department "note[d] that the death of a defendant prior to commencement of a foreclosure action, although rendering such action a legal nullity from its inception, does not revoke or invalidate, or otherwise destroy, [the lender's] express invocation of the contractual election to accelerate the debt" (*Trento 67, LLC*, 230 AD3d at 4 [internal citations

and quotation marks omitted]). Accordingly, the Second Department held that “the statute of limitations began to run on April 4, 2014, when the mortgage debt was accelerated” (*id.* [internal citation omitted]).

Even though this action was a legal nullity since it was commenced after the borrower’s passing, the Second Department has determined that this does not revoke or invalidate the mortgagor’s invocation of its election to accelerate. Applying the *Trento 67, LLC*’s holding to this action, the Court finds that the applicable six-year statute of limitations began to run on August 12, 2013, and would expire on August 12, 2019. Since JPMorgan commenced its foreclosure action on or about September 13, 2019, approximately one month after the expiration of the statute of limitations, the Court finds that it is untimely.

Therefore, it is hereby


ORDERED, that Plaintiff’s motion (Mot. Seq. No. 4) seeking to renew is granted and upon renewal, the Court’s decision dated May 27, 2021, is vacated; the Court’s decision dated February 17, 2020, is also vacated and Defendant’s motion to dismiss (Mot. Seq. No. 1) is denied; and the matter is restored to the active calendar; and it is further

ORDERED, that the portion of Plaintiff’s motion seeking to stay Defendant’s motion for summary judgment in the 2019 Foreclosure Action is rendered moot by this decision; and it is further

ORDERED, that the portion of Plaintiff’s motion seeking to consolidate this matter with the 2019 Foreclosure Action (Index No. 520221/2019) is denied as moot.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice