

**Bank of N.Y. Mellon Trust Co., N.A. v Einhorn**

2025 NY Slip Op 31175(U)

April 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 514071/15

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP 1 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 29<sup>th</sup> day of October, 2024.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION FKA THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-RS4,

Plaintiff,

- against -

Index No. 514071/15

JONATHAN EINHORN; MARINA DIST DEV CO. LLC T/A BORGATA; SHEUNG MO CHOI; MAIN STREET ACQUISITION CORP. A/P/O HSBC BANK NEVADA, N.A.; FORD MOTOR CREDIT Co.; NEW YORK CITY DEPARTMENT OF FINANCE; PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; CITIBANK (SOUTH DAKOTA), N.A. and "JOHN DOE #1" TO "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

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) \_\_\_\_\_

76, 78-87 90-95

Opposing Affidavits (Affirmations) \_\_\_\_\_

91-95 96-98

Reply Affidavits (Affirmations) \_\_\_\_\_

96-98

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 18 East 3<sup>rd</sup> Street in Brooklyn (Block 5271, Lot 13) (Property), plaintiff The Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank, N.A. as Trustee for Residential Asset Mortgage Products, Inc. Mortgage Asset-Backed Pass-Through Certificates, Series 2006-RS4 (BONY or Plaintiff) moves (in motion sequence [mot. seq.] two) for an order: (1) consolidating this 2015 foreclosure action with the prior foreclosure action bearing Kings County index No. 27465/09 (2009 Foreclosure Action),<sup>1</sup> and (2) amending the caption of the consolidated action (NYSCEF Doc No. 76).

Defendant Jonathan Einhorn (Einhorn or Defendant Borrower) cross-moves (in mot. seq. three) for an order dismissing this action as barred by the statute of limitations (NYSCEF Doc No. 90).<sup>2</sup>

### **Background**

On November 17, 2015, BONY commenced this foreclosure action by filing a summons with an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2). The complaint alleges that on April 26, 2006, Einhorn executed and delivered a promissory note in the principal amount of \$549,500.00 in favor of HSBC

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<sup>1</sup> Although BONY's notice of motion characterizes the 2009 Foreclosure Action as "pending in this Court[.]" the court's records reflect that the 2008 Foreclosure Action was marked "disposed."

<sup>2</sup> Although Einhorn's notice of cross-motion mistakenly references RPAPL 1501 (4), which applies to a proceeding to expunge a mortgage based on the statute of limitations, Einhorn obviously meant to move for summary judgment since issue has been joined for some time. Pursuant to CPLR 2001, Einhorn's cross-motion is deemed to be filed pursuant to CPLR 3212.

Mortgage Corporation (USA) (HSBC), which was secured by a mortgage on Einhorn's residential Property (NYSCEF Doc No. 1 at ¶¶ 2-4). The complaint alleges that Einhorn defaulted "by failing to pay principal and interest and/or taxes, insurance premiums, escrows and/or other charges commencing with the June 1, 2009 payment . . ." (*id.* at ¶ 8 [emphasis added]). The complaint alleges that "[m]ore than fifteen (15) days have elapsed since the first of said defaults occurred, and by reason thereof, Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal . . ." (*id.* at ¶ 9).

Notably, despite the existence of the prior 2009 Foreclosure Action, the complaint alleges that "[n]o other action or proceeding has been commenced or maintained *or is now pending at law or otherwise* for the foreclosure of said mortgage or for the recovery of said sum secured by said note and mortgage or any part thereof" (*id.* at ¶ 15 [emphasis added]).

On April 6, 2016, Einhorn answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that Plaintiff failed to comply with RPAPL 1304 as it failed to serve him with a 90-day pre-foreclosure notice and this action is barred by the statute of limitations (NYSCEF Doc No. 38 at ¶¶ 54 and 65).

On October 26, 2018, almost three years after commencement, BONY moved for an order of reference and summary judgment (NYSCEF Doc No. 40-57). Einhorn only opposed BONY's summary judgment motion on the grounds that BONY failed to satisfy conditions precedent to commencement of this action by failing to serve him with a default notice and a 90-day pre-foreclosure notice in accordance with RPAPL 1304 and that

BONY lacked standing (*see* NYSCEF Doc No. 59). Einhorn did not raise the statute of limitations in opposition to BONY's summary judgment motion (*id.*).

By a May 1, 2019 decision and order, the court (Dear, J.) denied BONY's summary judgment motion on the ground that it failed to demonstrate proper, timely mailing of the RPAPL 1304 notices and BONY submitted a fact affidavit "stating little more than [the notices] were sent, seemingly by another entity" (NYSCEF Doc No. 68 at 1). The court directed that the "[p]arties . . . complete discovery and proceed to trial (*id.* at 2). Notably, BONY did not appeal from or move for leave to reargue the court's denial of its summary judgment motion based on issues regarding the RPAPL 90-day pre-foreclosure notice.

***BONY's Instant Motion to Consolidate***

Instead of proceeding to trial as directed by the court, about three years later, on June 6, 2022, BONY moved for an order consolidating this foreclosure action with the 2009 Foreclosure Action (NYSCEF Doc No. 76). BONY's motion is supported by an affirmation from Plaintiff's counsel, who asserts that "[a]fter Defendant defaulted on his obligations under the Note and Mortgage, Plaintiff commenced an earlier action on October 29, 2009 to foreclose on the Mortgage by filing a Summons and Complaint under Index Number 27465/2009[.]" which contradicts the complaint (NYSCEF Doc No. 80 at ¶ 3).

Although Plaintiff's counsel explicitly acknowledges that the 2009 Foreclosure Action was "marked as *disposed* on January 3, 2012 . . ." and the BONY failed to proceed with its prosecution of the 2009 Foreclosure Action within 120 days of entry of the court's July 21, 2011 decision and order, as explicitly directed by the court, Plaintiffs' counsel

nevertheless asserts that the 2009 Foreclosure Action “remain[s] pending” (*id.* at ¶¶ 4 and 13 [emphasis added]). Although the court marked the 2009 Foreclosure Action “disposed” for failure to resume prosecution within 120 days, Plaintiff’s counsel affirms that “the Actions should now be consolidated” since “there is no final order of dismissal entered in [the 2009 Foreclosure] Action . . .” (*id.* at ¶¶ 13 and 18). Plaintiff’s counsel asserts that Einhorn waived an objection to consolidation, since he did not move to dismiss this foreclosure action based on the pendency of the 2009 Foreclosure Action (*id.* at ¶ 26).

### ***Einhorn’s Dismissal Cross-Motion***

On February 6, 2023, Einhorn opposed Plaintiffs’ motion to consolidate this action and the 2009 Foreclosure Action and cross-moved for dismissal based on the expiration of the statute of limitations (NYSCEF Doc No. 90). Defense counsel submits an affirmation asserting that BONY’s “motion to consolidate this action with a prior decade old[,] dismissed action . . .” should be denied and “[t]he Statute of Limitations expired six years after the [October 24, 2009] commencement of the [2009] action or on October 29, 2015[,]” prior to the commencement of this foreclosure action on November 17, 2015, pursuant to the Foreclosure Abuse Prevention Act (FAPA) (NYSCEF Doc No. 91 at ¶¶ 1 and 4-6). Defense counsel asserts that when the 2009 Foreclosure Action was “disposed” by the court after BONY “abandoned” that action in 2011, “the Plaintiff did nothing, whatsoever for over a decade to vacate the dismissal and on October 29, 2015, the Statute of Limitations to foreclose expired” (*id.* at ¶¶ 8 and 10). Defense counsel asserts that FAPA was enacted for circumstances, like here, “to prevent foreclosure plaintiffs from ignoring or

circumventing applicable statutes of limitation” (*id.* at ¶ 12). Defense counsel further asserts that:

“Section 7 of . . . F[APA] amended . . . CPLR 213 (4) by adding two new paragraphs to further clarify scenarios (such as here) where the foreclosing plaintiff commences a second foreclosure action while an initial action is still pending or where it was discontinued or dismissed.

“The amendment states in pertinent part: ‘a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.’ Here, after reviewing the docket of the 2009 Foreclosure Action and the Order dismissing same, nowhere does it mention that same was interposed on a defense/claim that the acceleration was invalid or that the Court found that the mortgage debt was invalidly accelerated. Thus, under the new CPLR . . . 213 (4), the statute of limitations continued to run from the date of accrual/acceleration [on] October 29, 2009 and expired on October 29, 2015[,] rendering this action untimely . . .” (*id.* at ¶¶ 19-20).

### ***BONY’s Opposition to the Cross-Motion***

BONY, in opposition to the cross-motion, submits an attorney affirmation arguing that Einhorn’s cross-motion to dismiss the complaint is untimely under CPLR 3211 (e) because it was filed after service of his answer (NYSCEF Doc No. 96 at ¶¶ 5-7). BONY’s counsel further argues that Einhorn “waived his ability to seek dismissal or summary judgment on statute of limitations grounds by not asserting such in his opposition . . . to Plaintiff’s prior motion for summary judgment . . .” because Einhorn purportedly “abandoned” the defense (*id.* at ¶ 8).

## Discussion

(1)

### *BONY's Motion to Consolidate This Action With The Previously Disposed 2009 Foreclosure Action*

CPLR 602 (a) provides that:

“[w]hen actions involving a common question of law or fact are *pending before a court*, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” (emphasis added).

“The trial court has broad discretion in determining whether to order consolidation” of two pending actions, pursuant to CPLR 602 (a), but consolidation should be rejected where it would cause “prejudice to a substantial right by a party opposing the motion” (*Hanover Ins. Grp. v Mezansky*, 105 AD3d 1000, 1000 [2d Dept 2013]). The Second Department has held that consolidation should serve “[t]he interests of justice and judicial economy” (*id.*).

Here, consolidation is not available because the 2009 Foreclosure Action was “disposed” of years ago when BONY failed to proceed with its prosecution of the 2009 Foreclosure Action within 120 days of entry of the court’s July 21, 2011 decision and order. Contrary to Plaintiff’s counsel’s assertion, the 2009 Foreclosure Action is not “pending,” and thus, cannot be consolidated with this 2015 foreclosure action, pursuant to the plain and unambiguous terms of CPLR 602 (a).

Even if the 2009 Foreclosure Action was not marked “disposed” by the court over 10 years ago, consolidation would not promote the interests of justice and judicial economy

under the circumstances presented here. The record reflects that BONY did not timely proceed with its prosecution of the 2009 Foreclosure Action, as directed by the court, resulting in the court's disposal of the 2009 Foreclosure Action as abandoned by BONY. After abandoning the 2009 Foreclosure Action in 2011, BONY commenced this foreclosure action in 2015 by filing a complaint specifically alleging that there is no prior or pending action to foreclose the Property. BONY unsuccessfully moved for summary judgment and an order of reference more than three years ago, and by a May 1, 2019 decision and order, the court directed BONY to complete discovery and proceed to trial. Instead of proceeding with the prosecution of this action, BONY waited another three years before seeking consolidation of this action with the disposed 2009 Foreclosure Action. Under these circumstances, consolidation would further delay a trial to Einhorn's prejudice (as interest continues to accrue on the loan) and would not promote the interests of justice and judicial economy. For these reasons, BONY's motion to consolidate this foreclosure action with the disposed 2009 Foreclosure Action is denied.

(2)

***Einhorn's Summary Judgment Cross-Motion***

The Second Department has held that a defendant's failure to raise an affirmative defense in opposition to a plaintiff's summary judgment motion results in the waiver of that particular affirmative defense (*New York Com. Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 757 [2d Dept 2013]).

Here, in opposition to BONY's prior motion for summary judgment and an order of reference, Einhorn failed to raise the expiration of the statute of limitations as a defense, and consequently, Einhorn waived that affirmative defense, as a matter of law. Consequently, Einhorn's motion seeking summary judgment based entirely on the expiration of the statute of limitations is denied. Accordingly, it is hereby

**ORDERED** that Plaintiff's motion to consolidate this action with the previously disposed 2009 Foreclosure Action (mot. seq. two) is denied; and it is further

**ORDERED** that Einhorn's summary judgment cross-motion (mot. seq. three) for dismissal based on the expiration of the statute of limitations is denied.

This constitutes the decision and order of the court.

E N T E R,

April 7, 2025



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