

**HSBC Bank USA, N.A. v David**

2025 NY Slip Op 32263(U)

June 16, 2025

Supreme Court, Kings County

Docket Number: Index No. 518076/16

Judge: Carolyn Mazzu Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-5, 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 day of

JUN 16 2025

PRESENT:

Hon. Carolyn Mazza Genovesi,

Index No.: 518076/16

HSBC BANK USA, N.A.,

MS # 2 & 3

Plaintiff,

DECISION AND ORDER

-against-

DINA DAVID et. al.

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

| <b>Papers</b>      | <b>Numbered</b> |
|--------------------|-----------------|
| Motion (MS 2)      | <u>1</u>        |
| Opp/Cross (MS 3)   | <u>2</u>        |
| Reply/Opp to Cross | <u>3</u>        |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for an extension of time to file a note of issue and to compel Defendant to respond to its previously served discovery requests and appear for a deposition (MS # 2). Defendant –while not directly opposing the relief requested by Plaintiff – cross-moves for renewal of Plaintiff's (denied) motion for summary judgment and, thereupon, dismissal of the instant action as untimely (MS #3). Plaintiff opposes.

Plaintiff's presumptive predecessor in interest, HSBC Mortgage Corporation (USA) commenced a prior action to foreclose the subject mortgage on April 1, 2008 (Index No. 10716/2008). The 2008 action was discontinued by Justice Bruce M. Balter, by Order dated June 15, 2009, and entered on June 23, 2009. HSBC Mortgage Corporation (USA) commenced a second action to foreclose the subject mortgage on May 1, 2009 (Index No. 10806/2009). By Order dated September 15, 2011, and entered on August 9, 2012, Justice Martin M. Solomon dismissed the 2009 action and associated notice of pendency sua sponte, as HSBC Mortgage Corporation (USA) failed to move to appoint a referee. HSBC Mortgage Corporation (USA) moved to restore the 2009 action, on November 12, 2015. Justice Martin M. Solomon denied the motion to restore, by Order dated April 21, 2016 and entered April 22, 2016.

This action was commenced on October 13, 2016. By Order dated October 31, 2018 and entered on November 8, 2018, Justice Noach Dear denied plaintiff's prior motion for summary judgment and found that issues of fact remained "as to the timeliness of this action and Plaintiff's compliance with RPAPL 1304."

Defendant argues that this action is now time-barred, under the recently enacted CPLR 205-a. Under CPLR 2221(e), a motion for leave to renew "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." The Foreclosure Abuse Prevention Act of 2022 (FAPA) "amends CPLR 205 to provide that it no longer applies to mortgage foreclosure actions (CPLR 205[e]), and creates a new statute, CPLR 205-a." (*US Bank National Association v Fox*, 216 AD3d 445, 446 [1st Dept 2023]). In *Deutsche Bank National Trust Company v Zak*, 235 AD3d 839, 843 [2d Dept 2025], the Appellate Division, Second Department held that FAPA's addition of CPLR 205-a is retroactive. CPLR 205-a allows a

plaintiff to commence a new action within six months following the termination of an initial action, under certain specific circumstances. CPLR 205-a(1) includes a provision that CPLR 205[a] does not have, which provides “a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff.” The six-year statute of limitations began to run on May 1, 2009, when the second action was commenced accelerating the mortgage (*U.S. Bank Trust, NA v Aorta*, 167 AD3d 807 [2d Dept 2018]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2d Dept 2023]). If the CPLR 205-a toll applies, this action may be timely; if plaintiff cannot benefit from CPLR 205-a, this action is time-barred.

In the complaint, plaintiff states that the “mortgage was assigned from HSBC Mortgage Corporation (USA) to HSBC Bank USA, N.A., Plaintiff, by Assignment of Mortgage dated August 22, 2011 recorded on September 1, 2011...” However, plaintiff does not plead or prove that it is acting on behalf of HSBC Mortgage Corporation (USA), the plaintiff in the two prior actions. Plaintiff therefore cannot benefit from the toll provided by CPLR 205-a.

In opposition, plaintiff contends that the 2009 action was never “terminated” for the purpose of CPLR 205-a, because plaintiff was never served the dismissal order with notice of entry. For the purpose of CPLR 205-a, “‘termination’ of the prior action occurs when appeals as of right are exhausted” (*U.S. Bank National Association v Coleman*, 215 AD3d 780, 783 [2d Dept 2023]). The right to appeal expires 30 days after service of an order with notice of entry (*U.S. Bank National Association v. Corcuera*, 217 AD3d 896, 898 [2d Dept 2023]; CPLR 5513[a]). However, the extension of the termination date pending the exhaustion of an appeal “applies only where an appeal was available and was in fact taken” (*U.S. Bank National Association as Trustee for RMAC Trust, Series 2016-CTT v Farrell*, 200 AD3d 1707, 1708 [4th

Dept 2021] quoting Siegel & Connors, NY Prac § 52 [6th ed.2018]). Since no appeal from the dismissal Order was ever taken, the extension for the purpose of appeal does not apply, and the 2009 action was terminated on August 9, 2012, the date of the Order dismissing the action. Moreover, since CPLR 205-a(1) was not met, the statute of limitations expired on May 1, 2015, and this case must be dismissed as time-barred.

In light of the Court's determination that this matter is untimely, the Court will not address plaintiff's motion to extend the time to file a note of issue and to compel discovery. For the foregoing reasons, it is

ORDERED that plaintiff's motion (MS # 2) is DENIED; and it is further

ORDERED that the branch of defendant's cross-motion (MS # 3) to renew is GRANTED; and it is further

ORDERED that upon renewal, the Court finds there is no question of fact as to the timeliness of this action; and it is further

ORDERED that the branch of defendant's cross-motion (MS # 3) to dismiss the complaint as time-barred is GRANTED and the complaint is DISMISSED.

This constitutes the decision and order of the Court.

ENTER:



Carolyn Mazzu Genovesi

Hon. Carolyn Mazzu Genovesi