

21st Mtge. Corp. v Ahmed

2025 NY Slip Op 32375(U)

July 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 501061/2015

Judge: Carolyn Mazzu Genovesi

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At an IAS 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 202

JUL 01 2025

Present: Hon. Carolyn Mazzu Genovesi

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21ST MORTGAGE CORPORATION AS SERVICER
FOR KNOXVILLE 2012 TRUST,

Plaintiff,

DECISION AND ORDER.

-against-

Index No.: 501061/2015

Mot. Seq. 7 & 8

IFTIKHAR AHMED, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, AMERICAN EXPRESS CENTURION BANK, ARROW FINANCIAL SERVICES LLC, ATTORNEY GENERAL OF THE STATE OF NEW YORK, BEIERSDORF, INC., COLORADO CAPITAL INVESTMENTS, CRIMINAL COURT OF THE CITY OF NEW YORK, GREAT PLAINS CAPITAL CORP AS SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A. SUCCESSOR IN INTEREST TO FLEET NATIONAL BANK, NEW CENTURY FINANCIAL SERVICES, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, GE MONEY BANK, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, WORKERS COMPENSATION BOARD OF THE STATE OF NEW YORK, DAVID KHAN, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, OPTION ONE MORTGAGE CORP, JOHN DOES AND JANE DOES,

Defendants,

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF Numbered
Motion (MS # 7), Affirmation is Support, Exhibits, Memorandum of Law in Support	<u>242-253</u>
Motion (MS # 8), Affirmation, Affirmation in Support, Exhibits	<u>254-259</u>
Affidavit in Opposition (MS # 8), Exhibits,	<u>261-266</u>
Plaintiff's Reply Affirmation	<u>267</u>
Defendant's Reply Affirmation	<u>268</u>

Upon the foregoing papers, plaintiff 21st Mortgage Corporation as Servicer for Knoxville 2012 Trust, makes a renewed motion for summary judgment seeking an order (1) granting summary judgment (2) striking defendant David Khan's Answer and Affirmative Defenses; (3) granting default judgment against the remaining defendants; (4) amending the caption as requested; (5) appointing a referee to compute the amounts due; (6) granting judgment against defendant David Khan in the amount of \$68,402.71 as of December 13, 2019 based upon Plaintiff's claim for unjust enrichment; and (7) for such other relief as this Court deems just and proper (MS #8).

Defendant David Khan moves for summary judgment dismissing this foreclosure action as barred by the statute of limitations, or in the alternative granting leave to renew the Decision and Order of Justice Larry D. Martin dated November 17, 2022 (MS #7).

Relevant Procedure and Facts

In November of 2007, Whitman Mortgagee, a New York Corporation, the predecessor in interest to plaintiff, 21st Mortgage Corporation (Knoxville 2012 Trust), commenced a first foreclosure action (2007 Action) on the subject property of this action by filing a Summons and Verified Complaint (Index No. 44186/2007). Defendant Khan was given leave to intervene because he purchased the property from defendant Ahmed. Plaintiff and defendant Khan filed a Stipulation of Discontinuance in the 2007 Action, dated November 5, 2014, which was "So-Ordered" by Justice Gloria Dabiri on June 18, 2015.

On January 20, 2015, in between the date of the stipulation to discontinue the 2007 Action and when the stipulation was "So-Ordered," plaintiff commenced this second action (2015 Action) by filing a Summons and Complaint. Defendant Khan was the only property owner who timely answered in the 2015 Action. Defendant filed an answer in March 2015 asserting, among other

affirmative defenses, that the 2015 Action could not be maintained by reason of the pendency of the 2007 Action because the mortgage is payable in installments, and an acceleration of the entire amount due began the running of the statute of limitations on the entire debt once the plaintiff commenced the 2007 Action.

Plaintiff moved, inter alia, for summary judgment and defendant cross-moved, inter alia, pursuant to CPLR 3211(a)(4) and RPAPL 1301(3) to dismiss the complaint for failure to seek leave of court to file the 2015 Action. By Order dated July 26, 2016, entered on August 4, 2016, Justice Noach Dear (J. Dear) denied the motion and cross-motion. J. Dear denied plaintiff's summary judgment motion because defendant raised issues of fact with regard to the timeliness of the action and additionally there was a question of fact as to the ability of the bank's affiant to testify as to when her employer became the servicer of the loan. Further, defendant's motion to dismiss pursuant to CPLR 3211(a)(4) and RPAPL 1301(3) was also denied by J. Dear. J. Dear found that where there is a substantial identity of the parties, the two actions are similar, the relief sought is substantially the same in both actions, and the court has broad discretion in determining whether the second action is valid when the plaintiff did not seek leave of court and another action is pending¹. Additionally, the Supreme Court granted plaintiff leave to commence this 2015 Action, nunc pro tunc, to the filing date. Defendant appealed the denial of his cross-motion pursuant to CPLR 3211(a)(4) and RPAPL 1301(3) to dismiss the complaint.

During the period of time when the appeal was pending, plaintiff made a motion to renew its summary judgment motion. By Decision and Order issued on October 16, 2017, J. Dear denied the plaintiff's motion to renew. Plaintiff argued that this 2015 Action was timely filed since the 2007 Action was pending at the filing of this matter. Therefore, the issue of fact as to whether this

¹The court cited *Scottsdale Ins. Co. v. Indemnity Ins. Corp.* RRG, 110 A.D.3d 783, 784 (2d Dep't 2013).

2015 Action was timely should not be determined at a trial. The court found that the 2007 Action was discontinued after the statute of limitations had run and that the overlapping pendency of the actions did not render the 2015 Action timely.

On June 19, 2019, the Appellate Division, Second Department (173 A.D.3d 951 [2d Dept 2019]) affirmed J. Dear's July 26, 2016, decision, and found that (the now former) RPAPL 1301(3)² did not prohibit plaintiff from commencing this 2015 Action. The appellate court found 1301(3)'s³ purpose was to shield the mortgagor from the expense of two independent actions at the same time. Moreover, the Second Department found that since the 2007 Action had not been discontinued at the time the 2015 Action was filed, plaintiff should have sought leave of court in the 2007 Action. However, under the circumstances of the facts of this case, where the stipulation to discontinue was signed (but not entered as an order) prior to the filing of the 2015 Action, the court found that the defendant was not prejudiced by plaintiff's failure to comply with RPAPL 1301(3), because the stipulation to discontinue the 2007 Action had already been signed prior to the filing of the 2015 Action. Additionally, regarding defendant's dismissal motion pursuant to the RPAPL 1301(3) grounds, the court found that "there [was] another action pending between the same parties for the same cause of action" but the purpose of the statute was to shield the mortgagor from the expense and annoyance of two independent actions on the same debt. Further, defendant's appeal of the denial of their CPLR 3211(a)(4) grounds that there was another action pending, was also denied by the court because under the circumstances of the case the Supreme Court did not improvidently exercise its discretion in denying defendant's cross-motion to dismiss on the grounds of failure to seek leave.

² On December 30, 2022, the Foreclosure Abuse Prevention Act ("FAPA") was enacted, and retroactively amended RPAPL 1301(3). *See infra*.

³ The appellate court interpreted this section before the added language of the FAPA amendments.

Thereafter, J. Dear scheduled a status conference on July 8, 2019, because of the significant period of inaction on the matter. By Order dated July 19, 2019, and entered on September 13, 2019, J. Dear ordered plaintiff to file a motion, a note of issue or provide the court with proof that there was ongoing loss mitigation within 90 days. On November 22, 2019, plaintiff filed a note of issue in Supreme Court.

Subsequently, in May of 2021 plaintiff again moved for renewal of its motion for summary judgment and defendant cross-moved for renewal urging dismissal. Plaintiff argued that the Court of Appeals in *Freedom Mortgage v. Engel*, 37, N.Y.3d 1 (2021) provided a change in law that would have led to a contrary result by both the lower court and the Appellate Division related to its original summary judgment motion.

By order on November 17, 2022, Justice Larry D. Martin denied both the plaintiff's motion to renew and defendant's motion to renew. The court found that while the Court of Appeals in *Engel* clarified that a discontinuance is a deacceleration of the mortgage, absent an express representation that it is not discontinued, it did not change the fact that deacceleration is only relevant if it occurs prior to the expiration of the statute of limitations. The court found that because the 2007 Action was commenced on December 3, 2007, and the discontinuance was dated November 5, 2014, the prior discontinuance was therefore untimely, and *Engel* would not have affected the prior outcome.

J. Martin also denied the defendant's cross-motion for renewal. Defendant had argued that the action should be dismissed because it was filed beyond the statute of limitations (which is the same basis for the motion to renew that is now before the court). J. Martin found that the defendant's motion to dismiss was predicated on the co-pendency of the actions, which was already determined by the Appellate Division in their denial of defendant's motion to dismiss.

Moreover, defendant asserted that *Engel* was a change in law that eliminated any issue of fact as to the timeliness of the 2015 Action. However, because J. Martin found the discontinuance did not constitute a valid deacceleration and J. Martin determined the law was still the same post- *Engel*, in the Order dated November 17, 2022, there was no change in how the law would affect the original decision (or the Appellate decisions affirmation) of that original determination.

Importantly for these issues before the court now, the court when it denied the motion to renew in the November 17, 2022 Order, also discussed that defendant did not originally seek dismissal based on the issue of the untimeliness related to the statute of limitations. That order determined that even though both parties requested that the court convert their motions to motions for summary judgment which would have allowed the court to address the issue of the statute of limitations in the filing of the 2015 Action⁴, the court declined to do so because all of those arguments could have been raised prior to the expiration of the time to move and good cause was not shown to consider the new issue pursuant to CPLR 3212(a).

Thereafter, according to the parties at oral argument on these motions, in November of 2024 a judge assigned for a pre-trial conference required both parties to file memoranda of law regarding how the FAPA statutory changes made in December of 2022, might impact the trial since the parties' last motions to renew were decided by J. Martin before that change in law.

This court's review of the internal court case markings and appearances show that in the UCMS system that the parties appeared in the non-jury trial part on March 6, 2023, and thereafter the next court markings show that these motions were filed and heard on January 15, 2025, in this court's part. Additionally, the court's e-file system NYSCEF provides that both parties' pre-trial

⁴ Plaintiff has asserted that under RPAPL 205(a), the tolling provision, that the 2015 Action was timely.

motions were filed on December 30, 2024. Thereafter, there is no application by either party for leave to seek permission to file new summary judgment motions.

Analysis and Law

Plaintiff's current motion for summary judgment is a new motion not based on its original summary judgment motion which was denied. Plaintiff moves for summary judgment arguing that they have a prima facie case because they produced the mortgage, unpaid note and evidence of default. Further, because the defendant has raised the issue of standing plaintiff asserts that they have proven that it was in possession of the note and that it contains an indorsement in blank payable to plaintiff and has provided the written assignments prior to their possession. Additionally, the bank provided an affidavit establishing that the note contains an allonge that is firmly affixed to the note. Nevertheless, plaintiff's motion papers do not address the issue that a new summary judgment motion with new documentation would be untimely and do not address why it should be heard for good cause. Moreover, the court cannot consider this motion as a motion to renew, as no change of law is present. Further, there was no order from a court granting permission to file a new summary judgment motion based on good cause after being denied their previous motion for summary judgment.

CPLR 3212(a) allows courts to set a date after which no summary judgment motions can be made but requires the court to allow the parties at least thirty days from the filing of the note of issue to make such motion. If no date is set by the court, CPLR 3212(a) allows a summary judgment motion to be made "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

Here the court finds that plaintiff's motion for summary judgment is untimely, because good cause was not provided nor does this motion seek leave to file a new summary judgment

motion. Further, plaintiff's motion cannot be treated as a motion to renew as the substance of the plaintiff's papers and argument are not related to the summary judgment denied on July 26, 2016 (CPLR 3213[a]; *Brill v. City of New York*, 2 N.Y.3d 648 [2004]).

Defendant now moves for summary judgment for the first time seeking dismissal of the complaint for failure to file within the statute of limitations because the 2015 Action was untimely and/or for leave to renew J. Martin's 2022 decision.

Addressing defendant's first motion for summary judgment, asserting that the 2015 Action was commenced outside the statute of limitations, for the same reasons found *supra* regarding plaintiff's new motion for summary judgment, here there is no prior motion seeking leave to file a late summary judgment motion based on good cause, nor does the current motion seek leave based on good cause. Therefore, this court finds defendant's summary judgment motion related to the statute of limitations claim is not timely and the court cannot consider it. (CPLR 3213[a]; *Brill v. City of New York*, 2 N.Y.3d 648 [2004]).

The court next considers defendant's motion to renew the original cross-motion, which was a motion to dismiss pursuant to CPLR 3211(a)(4). That motion was based on the assertion that plaintiff failed to meet the condition precedent of obtaining leave of court prior to filing 2015 Action pursuant to CPLR 3211(a)(4) and RPAPL 1301(3). However, under CPLR 3211(e), any defense based on a ground set forth in paragraph (a) subparagraph (1), (3), (4), (5) or (6) is waivable if not raised in the original motion. Subparagraph (5) of CPLR 3211(a) includes a defense based on the statute of limitations and therefore plaintiff argues that the statute of limitations defense of defendant was waived since it was not raised and cannot be considered in a motion to renew.

The court finds that it cannot consider defendant's motion to renew under CPLR 3211(a) based on the grounds that plaintiff filed the second action outside the statute of limitations, as defendant did not raise it as a defense in its first motion to dismiss.

Next the court considers whether a motion to renew should be considered if the changes of law under the Foreclosure Abuse Prevention Act ("FAPA") law would affect the original determinations made with regard to the statute of limitations defense in J. Dear's July 26, 2016 denial of both plaintiff's summary judgment motion and defendant's motion to dismiss.

The statute of limitations for a mortgage foreclosure action is six years. *U.S. Bank Trust, N.A. v. Aorta*, 167 A.D.3d 807 (2d Dep't 2018); CPLR 213(4). Under the changes made in the FAPA legislation, CPLR 213(4) provides that:

4. [A]n action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;

(a) In 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 expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

The law regarding acceleration of the time to start the statute of limitations is that: "When a mortgage is payable in installments, which is the typical practice, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt." *Wells Fargo Bank, N.A. v. Ruddy*, 206 A.D.3d 862, 863 (2d Dep't 2022) quoting *Deutsche Bank Trust Co. Am. v. Marous*, 186 A.D.3d 669, 670 (2d Dep't 2020). "Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the plaintiff elects in the complaint to call due the entire amount secured by the mortgage." *GMAT Legal Title Trust 2014—1 v. Kator*, 213 A.D.3d 915, 916 (2d Dep't 2023).

The court finds that the language under the retroactive law changes of FAPA would not change the procedural determinations related to the filing of a CPLR 3211 motion asserting a statute of limitations defense. Further, the court finds that the language changes related to when acceleration of the mortgage occurs would not change the determinations made upon the last motion to renew that was denied on November 22, 2022. That decision made it clear that the filing of the second action was outside the statute of limitations but could not be considered because it was not timely raised. Importantly here, defendant argues that FAPA does not affect their issue related to the expiration of the statute of limitations because they assert that even if FAPA legislation is not considered and the *Engel* case was not overruled by the new statute, there is no affirmative act of revocation of the acceleration of the mortgage occurring during the six-year period of the statute of limitations which expired before the 2015 Action and therefore the action is time barred without considering FAPA's retroactive application of the deacceleration of the mortgage. This makes it clear that the court cannot consider the motion to renew as the changes in law do not impact the prior determinations made or the facts as they were when the CPLR 3211 motion was originally made in 2016.

The court next looks to determine whether a motion to renew under CPLR 3211(a)(4) for failure to seek leave of court pursuant to RPAPL 1301(3) can be reconsidered because there was a change in law to that statute and defendant's previous motion to renew was denied, right before the FAPA law changes were made.

Defendant asserts that under RPAPL 1301(3), plaintiff failed to seek leave of court pursuant to that statute and because seeking leave is a condition precedent to the commencement of the 2015 Action leave should not be considered. The court recognizes this is the same argument made in his prior CPLR 3211 motions. Except here, defendant in his motion papers does not make

an argument related to the new language of RPAPL 1301(3) or why that language should allow the court to consider a motion to renew in that the changes to the law would affect the prior outcome. Therefore, the court does the analysis of the changes to RPAPL 1301(3).

Consequently, the court looks to the language of the statute to determine if the change in law affects the prior determinations in this matter, particularly whether the filing of the second, 2015 Action, could be sustained without seeking leave of court under the changes in law.

RPAPL 1301(3) in its entirety states;

While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought. The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action. For purposes of this subdivision, in the event such other action is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action, unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein, or seeks dismissal thereof based upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules. This subdivision shall not be treated as a stay or statutory prohibition for purposes of calculating the time within which an action shall be commenced and the claim interposed pursuant to sections two hundred four and two hundred thirteen of the civil practice law and rules. (emphasis added).

The court looks to the language of the two conditions after the subordinating conjunction in the sentence, under RPAPL 1301(3) which states;

"For purposes of this subdivision, in the event such other action is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action, unless prior to the entry of a final judgment in such other action,

- a defendant raises the failure to comply with this condition precedent therein,*
- or seeks dismissal thereof based upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules.⁵*

⁵ CPLR 3211(a)(4): (a) Motion to dismiss a cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that (4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.

Here, in the first portion of the sentence after the subordinating conjunction, the word “unless” makes clear that the 2007 Action would have been deemed dismissed unless either of the two following conditions are met. Defendant raised both conditions in their original CPLR 3211 motion. Defendant raises the failure of the plaintiff to comply with the condition precedent to seek leave of court for the “other action” (2015 Action) and seeks dismissal pursuant to CPLR 3211(a)(4). Therefore, the FAPA amendments would not change the outcome under that portion of the statute.

The court next considers the additional language, under the FAPA amendment to the fourth and last sentence under RPAPL 1301(3) which states that “*This subdivision shall not be treated as a stay or statutory prohibition for purposes of calculating the time within which an action shall be commenced and the claim interposed pursuant to sections two hundred four and two hundred thirteen of the civil practice law and rules.*” This language applies to a challenge to the statute of limitations. This amended section makes it clear that a plaintiff in a foreclosure action does not receive the benefit of tolling of the statute of limitations during the time in which the plaintiff seeks leave of court to file a second action. The court finds that the portion of the statute amended by FAPA would not affect the outcome of defendant’s motion, because defendant failed to raise the defense of the statute of limitations in his original CPLR 3211 motion. Moreover, the change of law would not affect the outcome of the prior CPLR 3211 motion, as defendant made clear, in his own motion papers and at oral argument, that even if FAPA was not considered the statute of limitations had expired when the second action was commenced. Therefore, this court finds that the argument related to the statute of limitations cannot be considered in a motion to renew, as there is no applicable no change in law or change of fact. Accordingly, for the foregoing reason, it is

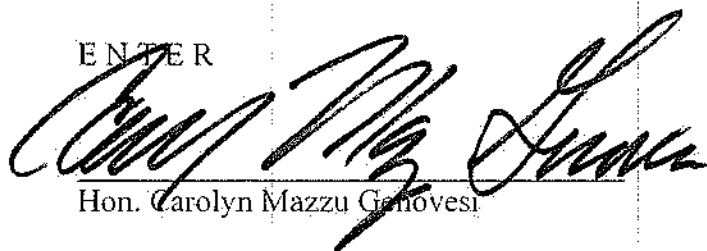
ORDERED that defendant's motion (MS # 7) for summary judgment or in the alternative granting a motion to renew is DENIED; and it is further

ORDERED that the branch of plaintiff's motion (MS # 8) for summary judgment, to strike defendants answer and affirmative defenses is DENIED; and it is further

ORDERED that the branch of plaintiff's motions (MS # 8) for default judgment against the non-appearing defendants is GRANTED.

All other relief requested is denied.

ENTER



Hon. Carolyn Mazza Genovesi