At an IAS Term, Part FRP1 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 25th day of November 2025

P R E S E N T:
HON. CENCERIA P. EDWARDS, CPA,
Justice.

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FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,

Plaintiff(s),

-against-

MENACHEM SHAGALOW, FAYE SHAGALOW, BAAR EQUITIES, INC., et al.,

Defendant(s).

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ORDER

Motion Calendar: 5/24/2022
Motion Cal. #(s): 9

Index #: 511210/2014
Mot. Seq. #(s): 5

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion, Affidavits/Affirmations, and Exhibits	140-147
Opposing Affidavits/Affirmations and Exhibits	148-164
Reply Affidavits/Affirmations and Exhibits	165,166

This is an action to foreclose on a mortgage encumbering the residential property known as 385 Crown Street Brooklyn, NY 11225 (the "subject premises"). Contending that discovery is not complete, defendants Menachem Shagalow and Faye Shagalow, and Baar Equities, Inc., (collectively, "Defendants"), now move, in motion sequence ("mot. seq.") #5, for an Order striking the Note of Issue ("NOI") filed on April 30, 2021, and removing this action from the trial calendar.

PROCEDURAL HISTORY

Plaintiff commenced this action on November 26, 2014. It is alleged in the amended complaint that on or about November 15, 2002, defendant Menachem Shagalow entered into a Consolidation, Extension and Modification Agreement ("CEMA"), pursuant to which he borrowed $285,750, secured by the subject mortgage that he and defendant Faye Shagalow executed, he

failed to make the monthly installment payment due on July 1, 2008, and all subsequent payments, and the principal amount due and owing is $197,193.20 (*see* NYSCEF Doc. #5, ¶¶ 2-6)..

Defendants answered and asserted multiple defenses including, inter alia, the statute of limitations and the failure to send a proper a notice of default, which is a condition precedent under the CEMA. With respect to the statute of limitations defense, Defendants note that on December 15, 2008, Plaintiff's predecessor-in-interest, Citimortgage, Inc. ("Citimortgage") commenced an action against, inter alia, defendants Menachem Shagalow and Faye Shagalow (together, "the Shagalow defendants") to foreclose on the subject mortgage based on the same underlying default ("the 2008 action"). The complaint in that action, dated December 8, 2008, provides, in paragraph "13," that due to the Shagalow defendants' failure to cure the default, "Plaintiff **has elected and hereby elects** to declare immediately due and payable the entire unpaid balance of principal" (NYSCEF Doc. #166, p. 7 [emphasis added]). Defendants contend that this means Citmortgage previously accelerated the mortgage and reiterated that in the complaint, as it is well known that lenders often send borrowers acceleration letters before commencing a foreclosure action.

On April 21, 2016, Plaintiff moved, in mot. seq. #1, for summary judgment and an order of reference (*see* NYSCEF Doc. #s 25-48), against which Defendants cross-moved, in mot. seq. #2, for summary judgment dismissing the complaint (*see* NYSCEF Doc. #s 49-58). In opposition to Plaintiff's motion, Defendants argued, inter alia, that Citimortgage's assertion in the 2008 action that it had already accelerated the mortgage raises a triable issue of fact because if that occurred more than 12 days before the December 8, 2008 date of that complaint, *i.e.*, November 26, 2008, the entire mortgage debt would be time-barred. Defendants, thus, contended that Plaintiff's motion for summary judgment was premature because evidence of the date of the initial acceleration is in the exclusive possession of Plaintiff, or its predecessor and Plaintiff made the motion before this case was released from the Settlement Conference Part and the exchange of discovery. (*See* NYSCEF Doc. #, pp 6-9.) By decision dated March 6, 2017, the Court (Noach Dear, J.) denied Plaintiff's motion and Defendants' cross-motion, finding that both sides did not satisfy their respective prima facie burdens as proponents of summary judgment (*see* NYSCEF Doc. #71).

On May 25, 2017, Plaintiff moved again, in mot. seq. #3, for summary judgment and an order of reference (*see* NYSCEF Doc. #s 74-98). Defendants opposed and cross-moved, in mot.

seq. #4, for, inter alia, an order granting them discovery bearing on whether Plaintiff's predecessor-in-interest accelerated the entire mortgage debt prior to November 26, 2008 (*see* NYSCEF Doc. #s 101-107). As in the prior motion practice, Defendants argued that Plaintiff's motion was premature because a preliminary conference had not been held and no discovery had occurred, and they noted that Plaintiff's motion included an affidavit from its subservicer, Seterus, Inc., attesting that Seterus has the loan records from Plaintiff's predecessor, Citimortgage (*see* NYSCEF Doc. #102, pp. 11-12, citing NYSCEF Doc. #79 [Exhibit "B" to mot. seq. #3]). By order dated October 16, 2017, the Court (Dear, J.) granted Defendants' cross-motion to the extent of holding that any monthly mortgage installment payments due more than 6 years before the commencement of the instant action are time-barred, denied Plaintiff's motion with prejudice, and directed the parties to "complete discovery and proceed to trial" (*see* NYSCEF Doc. #119). The Court did not expressly address the portion of the cross-motion seeking an order requiring Plaintiff to provide discovery regarding the prior acceleration of the mortgage debt.

Discovery Process

Plaintiff's counsel claimed to have never received Defendants' third Notice for Discovery and Inspection served on or about November 8, 2018, and so defense counsel emailed a courtesy copy of the demand on November 29, 2018 (*see* NYSCEF Doc. #141, ¶¶ 7-8 [Def. Attorney Affirmation in Support of mot. seq. #5], citing Exhibits "C" and "D"). This demand contains 13 requests for documents including, inter alia, specific written communications to the Shagalow defendants, *i.e.*, the mortgagors, which were purportedly referenced in Plaintiff's response to Defendants' second discovery demand:

- a Delinquency Notice dated July 17, 2008;
- a "45 Day Letter" dated August 12, 2008;
- a "Broken Promise Letter" dated September 30, 2008; and
- an "E-mail sent to Customer via Vendor" dated October 17, 2008 (*see* NYSCEF Doc. #144, p. 7 [Exhibit "C" to mot. seq. #5]).

Plaintiff's response to the third demand is dated November 29, 2018, the same day on which the courtesy copy was emailed to Plaintiff's counsel, and Plaintiff proffered the same objection, verbatim, for each of the 13 document requests: "Plaintiff objects to this demand as it is vague, overbroad, unduly burdensome and overreaches the proper objective of seeking the

production of documents which are relevant to the subject matter involved in this action" (*see* NYSCEF Doc. #147, pp. 5-7). By letter dated December 28, 2018, Defendants rejected Plaintiff's response, stating that the objections are "disingenuous at best" because Plaintiff had previously produced documents indicating that the documents had been sent to Defendants (*see id.*, p.2).

Defendants represent that during the deposition of Plaintiff's representative on February 20, 2019, they requested certain "specific documents" which, according to a customer log Plaintiff provided earlier in discovery, were previously sent to the Shagalow defendants by Plaintiff's predecessor-in-interest, Citimortgage (*see* NYSCEF Doc. #141, ¶¶ 8-9 [Def. Attorney Affirmation in Support of mot. seq. #5], citing Exhibits "D" and "E"). Defendants further represent that they continued to follow up, but these documents have never been provided (*see id.*).[1] The customer log lists 11 documents, seven of which contain dates spanning July 2008 through October 2008. This includes the first three of the four listed above from Defendants' third discovery demand, as well as documents titled "Proof of Payment" and "Conventional Workout Cover Ltr," each dated October 8, 2008. (*See* NYSCEF Doc. #146 [Exhibit "E" to mot. seq. #5].)

In or about February of 2020, Defendants served a subpoena *duces tecum* upon Citimortgage seeking, inter alia, all notices and letters sent to the Shagalow defendants, including all notices of default and delinquency notices, showing that Citimortgage elected to accelerate the subject mortgage debt prior to its commencement of the 2008 foreclosure action (*see* NYSCEF Doc. #160). Due to logistical difficulties caused by the COVID-19 pandemic, Citimortgage's responses spanned most of the year, but sometime after October 20, 2020, its counsel advised that it could not produce the documents sought, particularly, the September 30, 2008 Broken Promise Letter and the October 8, 2008 Conventional Workout Cover Ltr, because its computer systems do not maintain copies of consumer letters (*see* NYSCEF Doc. #162, pp. 2-6).

Notes of Issue

On November 7, 2017, less than a month after the Court denied Plaintiff's second summary judgment motion with prejudice and ordered the parties to complete discovery, Plaintiff filed its

[1] Defendants did not submit a copy of the February 20, 2019 deposition transcript containing their demand for the documents, or proof of their follow-up attempts. However, in its opposition to the instant motion, Plaintiff does not dispute Defendants' representation of these facts.

first note of issue ("NOI"), but the parties agreed to vacate it the next day and filed a stipulation to that effect on November 10, 2017 (*see* NYSCEF Doc. #s 121-122). Plaintiff filed the second NOI on August 8, 2018, but filed a letter and notice withdrawing it nine days later (*see* NYSCEF Doc. #s 126-128). Plaintiff filed a third NOI on June 28, 2019 (*see* NYSCEF Doc. #132), but this was vacated pursuant to another stipulation filed on October 22, 2020, which provided that "Plaintiff must file a new Note of Issue by May 1, 2021" and "this Stipulation is binding on Plaintiff and Defendants even if not 'So Ordered' by the Court" (*see* NYSCEF Doc. #134). Abiding by this deadline, Plaintiff filed the fourth NOI on April 30, 2021, which is the subject of the instant motion.

The Certificates of Readiness included with each of the first three NOIs filed in November 2017, August 2018, and June 2019, respectively, represented that discovery proceedings known to be necessary had been completed, there were no outstanding requests for discovery, and that the case was ready for trial (*see* NYSCEF Doc. #132 at p. 2; Doc. #142 at pp.3, 9, and 17 [Exhibit "A" to mot. seq. #5]). According to Defendants, these statements were inaccurate and hence, upon advising Plaintiff of same, the parties agreed to vacate or withdraw these NOIs (*see* NYSCEF Doc. #141, ¶3 [Def. Attorney Affirmation in Support of mot. seq. #5]). Plaintiff does not dispute this characterization but further represents that the third NOI was vacated because Defendants' counsel stated during an in-court appearance on October 21, 2020 that they were still receiving responses to their subpoena from Citimortgage (*see* NYSCEF Doc. #148, ¶¶ 16 and 20 [Pltf. Attorney Affirmation in Opposition to mot. seq. #5]).

ANALYSIS

Defendants argue that the fourth NOI should be stricken because Plaintiff has never produced the letters and notices issued by its predecessor to the borrowers in the fall of 2008, which have been repeatedly demanded and which they deem central to their statute of limitations defense (hereinafter, "the fall 2008 documents"). In opposition, Plaintiff argues that there are no outstanding demands for discovery and Defendants are merely dissatisfied with the responses provided by Plaintiff and its predecessor. The governing standard is as follows:

> "'A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a material fact within the meaning of 22 NYCRR 202.21 (e), and where that statement is incorrect, the note of issue should be vacated.' However, 'to vacate a note of issue, discovery requests must be legitimate and pending, and

> not resolved or contrived.' Further, 'where the Supreme Court has directed the completion of discovery by a certain date or where the party seeking vacatur has failed to timely comply with court orders and discovery demands, denial of a motion to vacate is proper'" (*Reid v Green*, 236 AD3d 945, 946 [2d Dept 2025] [internal citations and alterations omitted], quoting, inter alia, *Jablonsky v Nerlich*, 189 AD3d 1561, 1563 [2d Dept 2020] and *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1004 [2d Dept 2019]).

This case has a somewhat unusual procedural history, in that it does not appear that a Preliminary Conference and resultant order managing discovery was ever held. Instead, the record shows that Plaintiff twice moved for summary judgment before either of these customary initial steps occurred. It thus appears that Defendants first sought judicial relief for the specific discovery at issue here, namely, the fall 2008 documents which may evince Citimortgage's prior acceleration of the underlying mortgage debt, when they cross-moved against Plaintiff's second summary judgment motion and requested an Order compelling Plaintiff to produce such discovery. However, while the Court's October 2017 Decision and Order granted Defendants partial relief and directed the parties to complete discovery, it did not specifically address their request that Plaintiff provide this specific evidence.

The record shows that in the years following their unsuccessful attempt to persuade the Court to order Plaintiff to provide the fall 2008 documents, Defendants continued to request this evidence through multiple written discovery demands, oral demands made on the record during the deposition of Plaintiff's witness, and by subpoenaing Plaintiff's predecessor, Citimortgage, which originally created the documents. Although it would have been the better practice to have sought court intervention again, it cannot be said that Defendants' alternative strategy to attempt to procure the fall 2008 documents from the source was unreasonable, as Citimortgage appeared to have made good faith efforts during 2020 to locate the documents and can hardly be faulted for no longer maintaining records created 12 years prior for a loan it had not owned since 2014.

This Court cannot accept Plaintiff's contention that it duly responded to Defendants' third discovery demand and, thus, complied with its disclosure obligations. To the contrary, Plaintiff's wholesale boilerplate objection to every document request in the demand as "unduly burdensome" and irrelevant rendered its response essentially nonresponsive. To date, Plaintiff has not explained how it could be unduly burdensome to identify documents which it has already acknowledged exist, by virtue of the previously provided customer log. Moreover, the relevance of the fall 2008

documents to Defendants' statute of limitations defense is self-evident. It is also noted that Plaintiff's response is dated the very same day that it received Defendants' courtesy copy of the demand, which strongly suggests that Plaintiff did not make any meaningful effort to search for the documents before it objected to producing them.

Defendants note in their reply papers that Plaintiff has never actually stated that it does not have or cannot produce the fall 2008 documents (*see* NYSCEF Doc. #165, ¶10), but had Plaintiff done so, then "Defendants would have its [*sic*] remedies with respect to those documents" (*id.*, ¶18). Relatedly, as discussed above, Defendants previously noted that Plaintiff's 2017 summary judgment motion includes an affidavit from a representative of its servicer, Seterus, Inc., who averred that Seterus incorporated into its own records the prior records from Citimortgage. The Court, thus, finds that there is a nonspeculative basis in this record upon which to conclude that it is possible that the fall 2008 documents still exist in some form within records possessed by Plaintiff and/or its agents. At a minimum, Plaintiff must make a good faith effort to search for and produce the documents before claiming to have fulfilled its disclosure obligations.

CONCLUSION

Although the Certificate of Readiness accompanying the NOI filed on April 30, 2021 does incorrectly state that all pretrial discovery has been completed, given the age of this case and that the matter has been on the trial calendar for a long time, the Court declines to vacate the NOI. Since Defendants seek a limited amount of evidence which is discrete and readily identifiable, there is no need to reopen the discovery process. Under these circumstances, the Court finds it more prudent to direct the completion of discovery to the extent indicated below (*see Umana v Tower E. Condominium*, 208 AD3d 710, 711 [2d Dept 2022]; *Encarnacion v Monier*, 81 AD3d 875, 875-876 [2d Dept 2011]).

Accordingly, the above referenced motion by Defendants (mot. seq. #5), is **GRANTED solely to the extent** that it is

ORDERED, that within thirty (30) days of the entry of this Order, Plaintiff shall provide Defendants with the documents generated by its predecessor, Citimortgage, Inc., and purportedly

sent to the mortgagors during the six-month period preceding the commencement of the 2008 foreclosure action, as discussed in detail in the body of this Decision and Order; and it is further

ORDERED, that if Plaintiff cannot provide the documents as directed above, Plaintiff shall submit an affidavit or affirmation from a person with personal knowledge of the relevant facts, explaining why Plaintiff cannot comply with the directive, including a detailed description of the steps taken to both preserve and procure the documents from the time that Defendants first demanded the documents' production up to the present date.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: November 25, 2025

Hon. Cenceria P. Edwards, JSC, CPA