

CitiMortgage, Inc. v Peterson

2025 NY Slip Op 34880(U)

December 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 503536/2020

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 11th day of December, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,

Justice.

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CITIMORTGAGE, INC.,

Plaintiff,

- against -

Index No. 503536/2020

PATRICK PETERSON, 44 CROWN CT LLC, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY DEPARTMENT OF FINANCE PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and JOHN DOE and Mary DOE, (Said Names being fictitious, it being the intention of Plaintiff to Designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the Premises being foreclosed herein,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

31-47
49-58
60-65

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 26 Frank Court in Brooklyn (Block 8900, 144) (Property), defendants Patrick Peterson (Peterson) and 44 Crown Ct LLC (44 Crown Ct) (collectively, Defendants) move (in motion sequence [mot. seq.] one) for an order granting them

summary judgment dismissing the complaint and granting their counterclaim for an award of attorneys' fees, pursuant to CPLR 3212 and RPL § 282 (NYSCEF Doc No. 31).

Background

On February 13, 2020, CitiMortgage, Inc. (CitiMortgage or Plaintiff) commenced this foreclosure action by filing a summons, a complaint verified by counsel and a notice of pendency against the Property. The complaint alleges that “heretofore, the defendant(s), Patrick Peterson, for the purpose of securing to plaintiff or its assignor, its successors and assigns, the sum of \$147,468.74, duly made a certain bond, note, loan agreement, extension agreement, consolidation agreement, or recasting agreement, as the case may be[,] which was secured by a mortgage encumbering his residential Property (Complaint at ¶¶ 4-5). The complaint alleges Peterson “failed and neglected to comply with the terms and provisions of said mortgage, bond/note/loan agreement, and said instrument(s) secured by said mortgage by omitting and failing to pay items of principal and interest or taxes, assessments, water rates, insurance premiums, escrow and/or other charges, all as more fully appears in **Schedule C** and accordingly the plaintiff hereby elects to call due the entire amount secured by the mortgage . . .” (*id.* at ¶ 7). Schedule C indicates that: (1) the origination date of the \$134,650.00 loan was January 27, 2001; (2) the loan was modified in 2004 to increase the principal loan amount to \$147,468.74; and (3) the alleged payment default date is August 1, 2013 (*id.* at 14).

Notably, annexed to the complaint are: (1) a redacted copy of the January 27, 2001, promissory note in favor of the original lender, Consumer Home Mortgage, Inc.

(Consumer), which contains an endorsement from Consumer to the order of ABN Amro Mortgage Group, Inc. (ABN) and a blank endorsement from ABN (*id.* at 15-16); (2) an August 21, 2007, Certificate of Merger between ABN and CitiMortgage (*id.* at 27-30); and (3) a September 9, 2004, Loan Modification Agreement, pursuant to which the principal balance of the subject mortgage loan was increased to \$147,468.74 as of August 1, 2004 (*id.* at 32-37).

On March 9, 2020, Peterson and 44 Crown Ct¹ answered the complaint, denied the material allegations therein and asserted affirmative defenses, including the expiration of the statute of limitations (NYSCEF Doc No. 25 at ¶ 36). Defendants also asserted a counterclaim for an award of attorneys' fees, pursuant to RPL § 282 (*id.* at ¶¶ 90-93).

Defendants' Instant Summary Judgment Motion

On December 21, 2020, Defendants Peterson and 44 Crown Ct collectively moved for summary judgment dismissing the complaint based on the expiration of the six-year statute of limitations and granting their counterclaim for an award of attorneys' fees (NYSCEF Doc No. 31). Defense counsel submits an affirmation asserting that on or about July 10, 2008, CitiMortgage commenced a prior action against Defendant Peterson to foreclose the subject mortgage under Kings County Index No. 20166/2008 (2008 Foreclosure Action) (NYSCEF Doc No. 32 at ¶ 10). Defense counsel submits a copy of CitiMortgage's complaint in the 2008 Foreclosure Action, which specifically alleges that

¹ By a March 26, 2018, deed, Defendant 44 Crown Ct became the title owner of the Property (NYSCEF Doc No. 33).

“plaintiff has elected to exercise its option to demand immediate payment in full of the amounts outstanding under the Note and Mortgage and has notified the Defendants of its decision to demand immediate payment in full” (NYSCEF Doc No. 38 at ¶ 17). Defense counsel asserts that CitiMortgage voluntarily discontinued the 2008 Foreclosure Action on or about December 26, 2013 (NYSCEF Doc No. 32 at ¶ 11 and NYSCEF Doc No. 39).

Defense counsel asserts that on or about June 9, 2014, CitiMortgage commenced a second foreclosure action against Peterson under Kings County index No. 8635/2014 (2014 Foreclosure Action), which the court (Dear. J.) dismissed by a July 19, 2016, decision and order based on CitiMortgage’s failure to prosecute the action, pursuant to CPLR 3215 (c) (NYSCEF Doc No. 32 at ¶¶ 13-14 and NYSCEF Doc Nos. 41 and 42).

Defense counsel asserts that this foreclosure action, commenced by CitiMortgage on February 13, 2020, is barred by the six-year statute of limitations because “the Mortgage was fully accelerated by the commencement of [the 2008 Foreclosure Action]” on July 10, 2008, and “the applicable statute of limitation would have expired, at the latest, on July 10, 2014[,]” *more than five years before* CitiMortgage commenced this foreclosure action (NYSCEF Doc No. 32 at ¶¶ 26-29). Defense counsel notes that the Second Department has repeatedly held that the mere discontinuance of a prior foreclosure action is insufficient to evidence an affirmative act to revoke plaintiff’s election to accelerate the mortgage debt (*id.* at ¶¶ 32-38).

Defense counsel also asserts that Defendants are entitled to summary judgment on their counterclaim for an award of attorneys’ fees, pursuant to RPL § 282, because “the

subject mortgage contains covenants providing for Plaintiff's recovery of attorneys' fees and/or expenses incurred as a result of any alleged default of Defendants . . ." and Defendants have demonstrated that they have a successful defense (*id.* at ¶¶ 45-47).

Defendants also submit affidavits from Peterson and Eran Matalon, the managing member of Defendant 44 Crown Ct, both of which attest that defense counsel advised them that "due to the relevant statute of limitations, any foreclosure actions in connection with the mortgage are explicitly time-barred" (NYSCEF Doc Nos. 46 at ¶ 9 and 47 at ¶ 5).

CitiMortgage's Opposition

CitiMortgage, in opposition, submits an attorney affirmation arguing that "contrary to Defendants' position, the Court of Appeals has held that a voluntary discontinuance of a foreclosure action prior to the expiration of the statute of limitations does, in fact, constitute an affirmative act revoking the acceleration of a mortgage debt" (NYSCEF Doc No. 49 at ¶ 32). CitiMortgage relies on the Court of Appeals' decision in *Freedom Mortgage Corp. v Engel*, (37 NY3d 1 [2021]), which held that the noteholder's voluntary discontinuance of a foreclosure action, prior to the expiration of the statute of limitations, constitutes an affirmative act of revocation and is therefore a valid de-acceleration (NYSCEF Doc No. 49 at ¶¶ 33-36 and 43).

While counsel asserts that "Plaintiff does not dispute that the terms of the mortgage being foreclosed herein (*see Exhibit 'A'*) contain a covenant which provides for Plaintiff's recovery of attorneys' fees and/or expenses as a result of a foreclosure action[,] Plaintiff

claims that Defendants are not entitled to attorneys' fees, pursuant to RPL § 282, because Defendants have not successfully defended this action (*id.* at ¶¶ 40-42).

Defendants' Reply

Defendants, in reply, submit an attorney affirmation asserting that prior to the 2008 Foreclosure Action, CitiMortgage commenced a foreclosure action on December 12, 2007, against Defendant Peterson under Kings County index No. 45461/07 (2007 Foreclosure Action), by which the mortgage debt was accelerated (NYSCEF Doc No. 60 at ¶ 4 [i]). Defendants submit a copy of CitiMortgage's complaint in the 2007 Foreclosure Action, which alleges that "plaintiff has elected to exercise its option to demand immediate payment in full of the amounts outstanding under the Note and Mortgage . . ." (NYSCEF Doc No. 61 at ¶ 17). Defense counsel argues that the statute of limitations actually expired on December 12, 2013, based on the acceleration of the 2007 Foreclosure Action, long before this action was commenced on February 13, 2020 (NYSCEF Doc No. 60 at ¶ 5).

Defense counsel argues that CitiMortgage's reliance on the Second Department's holding *Engel* is misplaced because *Engel* only dealt with the impact of a voluntary discontinuance of a prior foreclosure action "which is not the case here" (*id.* at ¶ 11). Defense counsel asserts that "the commencement of the Second [2008] Action operated as an "effective abandonment" and "de facto discontinuance" of the First [2007] Action" citing to Second Department authority (*id.* at ¶ 12). Defense counsel also asserts that "in light of *Engel*, the discontinuance of the Second [2008] Action had no connection with an intent to deaccelerate" (*id.* at ¶ 54). Defense counsel asserts that "Defendants' reliance on

the First [2007] Action is properly before this Court, as Defendants are not raising a new argument and the *Engel* holding was issued after their motion was made” (*id.* at ¶ 18).

Notably, CitiMortgage did not seek leave to submit a sur-reply in response to Defendants’ reply regarding its commencement of the 2007 Foreclosure Action.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

(1)

A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213 [4]). “The statute of limitations in a mortgage foreclosure action begins to run six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage debt has been accelerated” (*Zinker v Makler*, 298 AD2d 516, 517 [2d Dept 2002]). “[O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016] [internal quotations omitted]). “Acceleration occurs . . . by the commencement of a foreclosure action” and “[a] lender may revoke its election to accelerate the mortgage debt, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period” (*Pennymac Corp. v Holcomb*, 198 AD3d 978, 980 [2d Dept 2021]).

Here, there is no dispute that CitiMortgage’s commencement of the 2007 Foreclosure Action against Peterson on December 12, 2007, accelerated the mortgage debt, since CitiMortgage’s complaint in the 2007 Foreclosure Action expressly elected to call due the entire amount secured by the mortgage. The Second Department has held that a mortgagee’s commencement of a subsequent action to foreclose the same mortgage as a prior foreclosure action is an abandonment of the prior action and constitutes a “de facto discontinuance” (*U.S. Bank Tr., N.A. v Humphrey*, 173 AD3d 811, 812 [2d Dept 2019]; *MLB Sub I, LLC v Grimes*, 170 AD3d 992, 994 [2d Dept 2019]; *see also Wilmington Sav. Fund Soc’y, FSB as Tr. of Bosco Credit II Tr. Series 2010-1 v Sinclair*, ___ Misc.3d ___, 236 NYS3d 544, 553 [Sup Ct Kings County 2025]).

CitiMortgage's reliance on the Court of Appeals' decision in *Engel* to argue that an acceleration is revoked when a foreclosure action is discontinued is misplaced. In *Engel*, the Court of Appeals held, in relevant part, that:

“where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder” (*Engel*, 37 NY3d at 32).

However, the New York State Legislature subsequently enacted the Foreclosure Abuse Prevention Act (FAPA) in December 2022, which reversed the foregoing holding in *Engel*.

As the Second Department noted:

“FAPA had the effect of nullifying this particular holding in *Engel*. FAPA amended CPLR 3217, governing the voluntary discontinuance of an action, by adding a new paragraph (e), which provides that “[i]n any action on an instrument described under [CPLR 213 (4)], *the voluntary discontinuance of such action*, whether on motion, order, stipulation or by notice, *shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period* to commence an action and to interpose a claim, unless expressly prescribed by statute” (*GMAT Legal Title Tr. 2014-1 v Kator*, 213 AD3d 915, 917 [2d Dept 2023]; *see also HSBC Bank USA, Nat'l Ass'n v Islam*, 221 AD3d 672, 674 [2d Dept 2023] [emphasis added]).

Applying FAPA in this foreclosure action, CitiMortgage's de facto discontinuance of the 2007 Foreclosure Action did not de-accelerate the mortgage debt, or revive, or reset the statute of limitations and CitiMortgage has failed to demonstrate that it otherwise de-accelerated the mortgage debt (*Anglestone Real Est. Venture Partners Corp. v Bank of New*

York Mellon, 221 AD3d 943, 946 [2d Dept 2023] [holding that under FAPA, discontinuances of prior foreclosure actions did not revive or reset statute of limitations]). The six-year statute of limitations began to run on December 12, 2007, when CitiMortgage accelerated the mortgage debt by commencing the 2007 Foreclosure Action. The six-year statute of limitations thus expired on December 12, 2013, *more than six years before* CitiMortgage commenced this foreclosure action on February 13, 2020, and consequently, dismissal of the complaint is warranted based on the expiration of the statute of limitations.

(2)

RPL § 282 (1) provides, in relevant part, that:

“[w]henever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys’ fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage . . . there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys’ fees and/or expenses incurred by the mortgagor . . . in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract . . .”

Importantly, CitiMortgage does not dispute that the subject mortgage contains a covenant which provides for Plaintiff’s recovery of attorneys’ fees (NYSCEF Doc No. 49 at ¶ 41; *see also* NYSCEF Doc No. 50 at 8 [mortgage at § 18] [“[i]n any lawsuit for foreclosure and sale, Lender will have the right to add all reasonable attorneys’ fees to the amount owed Lender . . .”]). Because Defendants Peterson and 44 Crown Ct successfully

defended this foreclosure action based on the expiration of the statute of limitations, they are entitled to an award of reasonable attorneys' fees. Accordingly, it is hereby

ORDERED that Defendants' summary judgment motion (mot. seq. one) is granted, the complaint is dismissed with prejudice as time-barred, the notice of pendency filed against the Property is canceled and Defendants counterclaim for an award of attorneys' fees, pursuant to RPL § 282, is granted; and it is further

ORDERED that Defendants shall submit evidentiary proof of the reasonable attorneys' fees that they incurred in defending this foreclosure action within 30 days after service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,



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