| **US Bank Trust Co., N.A. v East Fork Capital Equities LLC** |
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| 2026 NY Slip Op 31570(U) |
| April 10, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 850307/2024 |
| Judge: Francis A. Kahn III |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. FRANCIS A. KAHN, III** **PART** **32**

*Justice*

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US BANK TRUST COMPANY, NATIONAL ASSOCIATION AS TRUSTEE FOR CMSI REMIC SERIES 2008-02-REMIC PASS-THROUGH CERTIFICATES SERIES 2008-02,

Plaintiff,

- v -

EAST FORK CAPITAL EQUITIES LLC,BOARD OF MANAGERS OF 105TH STREET CHANI CONDOMINIUM, BOARD OF MANAGERS OF EAST 105TH STREET CHANI CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, CLERK OF THE COUNTY OF NEW YORK, JOHN DOE #1 THROUGH JOHN DOE #10, THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE PERSON 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

Defendant.

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**INDEX NO.** 850307/2024

**MOTION DATE** _____

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 81, 82, 83, 84, 99

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions are determined as follows:

This is an action to foreclose on a mortgage encumbering a parcel of residential real property located at 309 East 105th Street, Unit 1N, New York, New York. The mortgage, dated February 7, 2008, was given by Defendants Paul Mihalitsianos a/k/a Paul Peter Mihalitsianos ("Mihalitsianos") and Corrinne Borges a/k/a Corrine Borges ("Borges") to non-party Resource One, Inc. ("Resource"). The mortgage secures an indebtedness with an original principal amount of $443,000.00 which is memorialized by a note executed by only Mihalitsianos.

Prior to the institution of this action, Plaintiff and its assignors apparently commenced two erstwhile actions to foreclose on this mortgage. The first action was commenced by non-party Citimortgage, Inc. ("Citimortgage") against Mihalitsianos and Borges with the filing of a summons and complaint on July 18, 2014 (*see Citimortgage v Mihalitsianos, et al*, NY Cty Index No.: 850248/2014). On March 9, 2017, Plaintiff, Mihalitsianos and Borges executed a loan modification agreement which was recorded with the Office of the New York City Register on April 12, 2017. In paragraphs E and F of that agreement, Mihalitsianos and Borges acknowledged the principal balance under the note and reaffirmed their promise to repay the indebtedness. By order of Justice Carol Edmead, dated June 7, 2017, the action was discontinued in accordance with the parties' stipulation dated June 2, 2017.

Plaintiff submitted documents which it claims evidence the history of this loan transaction whereby Mihalitsianos and Borges made four installment payments under the modification agreement in March 21, May 15, June 30 and July 17, 2017. Thereafter, Defendant East Fork Capital Equities LLC ("East Fork") acquired the property at public auction conducted on November 14, 2018, pursuant to a judgment issued in an action to foreclose on a lien for common charges (*see Board v Mihalitsianos, et al*, NY Cty Index No.: 160387/2013). East Fork took title via a Referee's deed, dated and recorded on December 14, 2018.

On July 5, 2019, Plaintiff commenced a second action to foreclose the within mortgage and pled that the Mortgagors defaulted in repayment of the indebtedness (*see Citimortgage v Mihalitsianos, et al*, NY Cty Index No.: 850147/2019). Plaintiff's motion for summary judgment against the appearing party, a default judgment against the non-appearing parties and an order of reference was granted by order dated April 18, 2023. In that order, the branch of Plaintiff's motion to add East Fork as a party Defendant was granted. A judgment of foreclosure and sale was entered on July 17, 2023. By order of this Court, dated April 23, 2023, East Fork's default was vacated based on a lack of personal jurisdiction. Further, Plaintiff's complaint was dismissed as fatally flawed as it omitted East Fork, the record owner at the time and an indispensable party, from the initial pleading.

Plaintiff commenced this action on August 15, 2024 via summons and complaint wherein it pled that Mihalitsianos and Borges defaulted in repayment and named East Fork as a Defendant. Mihalitsianos and Borges defaulted in appearing. East Fork answered and pled thirty-nine affirmative defenses, including lack of standing and expiration of the statute of limitations. Now, Plaintiff moves (Mot Seq No 1) for summary judgment against East Fork, to strike all the affirmative defenses, for a default judgment against the non-appearing parties, for appointment of a referee to compute and to amend the caption. East Fork opposes the motion and, by separate notice of motion (Mot Seq No 2), seeks summary judgment dismissing Plaintiff's complaint. Plaintiff opposes East Fork's motion.

In support of the branch of its motion for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Meeting these requirements swings "the burden to defendant to raise a triable issue of fact regarding [their] affirmative defenses to foreclosure" (*Berstein v Dubrovsky*, 169 AD3 410 [1st Dept 2019]).

Similarly, East Fork was obligated to provide evidence in support of the branch of its motion to dismiss which showed, *prima facie*, that the time to foreclose expired before this action was commenced (*see* CPLR §§213[4] and 3211[a][5]; *Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet this burden, a "[d]efendant must establish, *inter alia*, when [a] [p]laintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). Should this threshold be reached, the burden shifts to a Plaintiff to demonstrate that a toll, stay or extension is applicable or that an issue of fact exists (*see eg U.S. Bank N.A. v Nail,* 203 AD3d 1095 [2d Dept 2022]; *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

Beginning with East Fork's motion, the limitations period for foreclosure actions is six-years and where, as here, an installment loan is concerned, that period accrues when the indebtedness is accelerated by an "unequivocal overt act" such as commencing an action to foreclose or giving actual notice of an election to accelerate the loan (*see* CPLR §213[4]; *Van Dyke v U.S. Bank, Natl. Assn.*, ___NY3d___, 2025 NY Slip Op 06537 [2025]). The commencement of the 2014 action by Citimortgage was an unequivocal act of acceleration of the debt secured by the mortgage herein (*see eg Wilmington Trust NA v Farkas,* 232 AD3d 524 [1st Dept 2024]). Among other things, the complaint expressly stated that Citimortgage elected to declare the entire principal balance to be due and owing. Since there is no proof that the 2014 action was dismissed based upon an interposed defense of lack of standing (CPLR §213[4][a]) and this action was commenced more than six years later, East Fork demonstrated *prima facie* that this action is untimely (*see Deutsche Bank Natl. Trust Co. v Roberts*, ___AD3d___, 2026 NY Slip Op 01124 [1st Dept 2026]). Accordingly, the burden shifted to Plaintiff to demonstrate the existence of a toll, stay, extension or issue of fact.

Plaintiff posits that the Mortgagors reinstated the installment loan with the execution of the modification agreement and that event effected a de-accrual of the statute of limitations in accordance with GOL §17-105. It also claims that the installment payments made by Mihalitsianos and Borges after the reinstatement extended the statute of limitations via operation of GOL §17-107.

The above statutes, along with several others, were amended via enactment of the Foreclosure Abuse Prevention Act[1] ("FAPA") (*see eg* CPLR §203[h]; CPLR §214[4][a]; CPLR §3217; GOL §§17-105 and 17-107). Simply stated, FAPA proscribed unilateral lender "de-acceleration" and "de-accrual" of the statute of limitations once an instrument secured by a mortgage is accelerated. Commencement of a foreclosure action which calls the entire indebtedness due, the most common occurrence in this milieu, causes the statute of limitations to accrue, and a lender is estopped from unilaterally de-accelerating or de-accruing the limitations period. Further, waiver or postponement of the statute of limitations may only be accomplished as "prescribed by statute" (CPLR §3217[e]; *Van Dyke v U.S. Bank, Natl. Assn.*, supra). General Obligations Law §17-105[1], in pertinent part, that:

> a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise.

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[1] (L 2022, ch 821 [eff Dec. 30, 2022]). The retroactivity and constitutionality of these provisions was recently validated by the Court of Appeals (*Article 13 LLC v Ponce De Leon Fed. Bank*, ___NY3d___, 2025 NY Slip Op 06536 [2025]; *see also Van Dyke v U.S. Bank, Natl. Assn.*, supra).

Despite being an inherently personal transaction, a waiver or promise having the effect of reviving or tolling the statute of limitations can, under general principles of equity, be effective against not only the parties to the waiver, but also those who acquire the interest of the promisor. To avoid "[s]erious impairment of titles to land and hinderance or real property financing", the Legislature eschewed the option of having such a waiver "run with the land" and adopted limitations in application of GOL §17-105[3][a] (*see* 1961 Report of N. Y. Law Rev. Comm., pp. 114-115; N. Y. Legis. Doc., 1961, No. 65 [F])[2]. As such, GOL §17-105[3][a] states a waiver is applicable:

> against (1) the person who made it, to the extent of any interest held by him at the date thereof and (2) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the waiver or promise.

Initially, the loan modification agreement and the loan account ledger proffered by Plaintiff were in admissible form. Plaintiff submitted the affidavit of Alex D. Crossman ("Crossman"), a VP Document Execution of Cenlar, FSB ("Cenlar"), the servicer of the subject loan[3], submitted with its motion for summary judgment. Crossman laid a proper foundation for the admission Cenlars' records into evidence under CPLR §4518 by sufficiently showing that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Crossman established that those records were received from the makers and incorporated into the records Selene kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Crossman were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Substantively, Citimortgage, Mihalitsianos and Borges indisputably assented to modify the loan and reinstate same as a 21-year installment loan. The modification agreement contains, under section 3[E] and [F], an acknowledgement of the principal balance of the loan as well as a promise to repay the indebtedness via 252 monthly installments beginning on April 1, 2017 (*see Wells Fargo Bank, N.A. v. Robinson-John,* 220 AD3d 974, 978 [2d Dept 2023]; *14 Film Corp v Mid-Island Mtge Corp*, 218 AD3d 525, 543 [2d Dept 2023]). Further, no language in the agreement was inconsistent with an intention on the part of the alleged debtor to pay the debt (*cf. Lew Morris Demolition Co. v Board of Education*, 40 NY2d 516, 521 [1976]).

Contrary to East Fork's argument, the modification agreement is effective against it via GOL §17-105[3][a] despite not taking title from Mihalitsianos and Borges. East Fork's literal interpretation of the phrase in GOL §17-105[3][a][2] "acquiring *from him*" as meaning that privity of title with a mortgagor must exist is not supported by the legislative history. The Law Review Commission's

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[2] The Law Review Commission's recommendation to the Legislature concerned adoption of Real Property Law §§251-a and 251-b, which were near identically worded predecessor statutes to GOL §§17-105 and 17-107.

[3] Cenlar's authority to act on Plaintiff's behalf was established with submission of a power of attorney dated January 28, 2016, as well as the servicing agreement, dated January 27, 2017, referenced therein (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

recommendation to the Legislature references applicability of a wavier to those who "subsequently acquire the interest *of* the person who made it" (*see* 1961 Report of NY Law Rev. Comm., p. 114; NY Legis. Doc 1961, No. 65[F]), not *from* the person who made it (*see Wells Fargo Bank, N.A. v Robinson-John*, supra [GOL §17-105[3][a][2] applicable to a defendant which acquired its title as the successful bidder at a sale authorized by a judgment foreclosing a lien for common charges]). East Fork's reliance on *Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054 [2d Dept 2020] is misplaced as that case is factually distinguishable and ostensibly is no longer a viable precedent. First, the mortgagor in *Dorsin* only executed a three-payment trial period plan with the intention of negotiating a modification if consummated. Second, the court in *Dorsin* premised its ruling primarily on GOL §17-101 which the Court of Appeals subsequently held does not govern whether the statute of limitations is tolled or revived in a foreclosure action (*Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc.*, 38 NY3d 467, 470 [2022]).

Based on the above, the only remaining question is whether East Fork had "actual notice" of the existence of the modification agreement prior to its acquisition of the property. "Subsequent purchasers may be charged with three kinds of notice: actual, constructive, and inquiry. Actual notice to subsequent purchasers is provided by the proper recording of an instrument whose existence is found upon searching the chain of title" (2 Warren's Weed New York Real Property § 15.03 [2026]; *see also Witter v Taggart*, 78 NY2d 234, 238 [1991]["The recording act . . . was enacted . . . to establish a public record which will furnish potential purchasers with actual or at least constructive notice of previous conveyances and encumbrances"]; *Andy Associates, Inc. v. Bankers Trust Co.*, 49 NY2d 13, 20 [1979]["[A] purchaser of an interest in land . . . has no cause for complaint . . . when its interest is upset as a result of a prior claim against the land the existence of which was apparent on the face of the public record at the time it purchased"]).

East Fork's argument that application of GOL §17-105[3][2] is dependent on its subjective awareness of the modification agreement is misplaced. The legislative history provides that the purpose of requiring actual notice in this context was so that "subsequent purchasers for value should be relieved of any presumed notice or duty to inquire based either on knowledge or notice of the *mortgage*" (*see* 1961 Report of NY Law Rev. Comm., p. 114; NY Legis. Doc 1961, No. 65[F][emphasis added]). This comports with the Legislature's intention to do away with the doctrine that the statute of limitations is affected by simply acquiring a property that is subject to a mortgage. The Law Review Commission acknowledged as much when it observed as follows:

> A rule under which a written agreement reviving a barred mortgage or extending the time limited for action to foreclose a mortgage was made to run with the land so as to bind subsequent purchasers would require that the agreement be *brought within the recording system so that it would be discoverable by ordinary search.*
>
> (*id.* [emphasis added]).

The Appellate Division, First Department appears to share this interpretation (*see Yuzary v WCP Wireless Lease Subsidiary LLC,* 94 AD3d 679 [1st Dept 2012]). In *Yuzary*, the Court observed that a letter extending the mortgage term, if genuine, would not be effective against the bona fide encumbrancer in that case because "it was never recorded" (*id.* at 80). Similarly, in *Bergenfeld v Midas Collections, Inc.*, 38 AD2d 939 [2d Dept 1972], the Appellate Division differentiated GOL §17-105

from GOL §17-107 as being "between the effect of an *unrecorded* mortgage extension agreement and the effect of part payments on account of a mortgage indebtedness" (*id.* at 940 [emphasis added]).

Adopting East Fork's interpretation of the notice provision would not only countenance, but reward, willful blindness of readily available public information directly in its line of title. The Court of Appeals' decision in *Roth v Mitchelson*, 55 NY2d 278 [1982] is not to the contrary. That case holds that listing the mortgage debt only in a bankruptcy schedule does not constitute sufficient notice under GOL §17-107. Unlike the present matter, the creditor in *Roth* failed to prove the existence of any waiver under GOL §17-105, much less a record one. Hence, East Fork had actual notice of the existence of the agreement (*see Maicus v Maicus,* 156 AD3d 1019, 1121 [3d Dept 2017]*; Butler v Mathisson,* 114 AD3d 894 [2d Dept 2014]).

East Fork's position that the modification agreement only affected a recommencement of the statute of limitations is inapposite. FAPA's amendments just clarify that a lender/mortgagor may not "unilaterally extend its own time to assert its own claim" (NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions, fn 3). The Legislature expounded on its reasoning in enacting CPLR §203[h] as follows:

> Thus, the subdivision has no adverse impact on a borrower's contractual or statutory right to 'reinstate' a mortgage loan (i.e., pay the total amount of his or her arrears and thereby bring the mortgage loan back to a regular monthly installment contract), which effectively 'de-accelerates' a/k/a 'de-accrues' a lender's cause of action to sue upon the prior, but subsequently cured, mortgage loan default(s) (*see e.g.*, Fannie Mae/Freddie Mac Form 3033 mortgage ¶ 19; cf. Gen. Oblig. Law 17-105, 17-107). Accordingly, 'de-accrual' under the General Obligations Law (e.g., §§ 17-105, 17-107 [the exercise of a borrower's contractual right to reinstate a mortgage loan or a borrower's execution of a properly drafted loan modification agreement]), constitutes permissive means 'expressly prescribed by statute' (CPLR 203[h])".

Here, Plaintiff proffered admissible proof that the mortgage affords to the Borrower, in paragraph 19, the right to have the lender's enforcement of the instrument discontinued and a copy of a modification clearly reinstating the mortgage as a 21-year installment loan without a trial period. This proof established the indebtedness, originally accelerated on July 18, 2014, was contractually de-accelerated by Mihalitsianos and Borges on March 9, 2017, and was not accelerated again until July 5, 2019, when the second action was commenced. Thus, as the bar date in this case was July 5, 2025, this action was timely when it was commenced on August 15, 2024.

Even were the Court to accept East Fork's claim that the modification agreement only reset the statute of limitations to the date of the modification agreement, Plaintiff showed that 556 days of tolls[4] existed after that date which extended the expiration of the statute of limitations from March 9, 2023, to September 15, 2024, a month after commencement of this action. Were GOL §17-105 not applicable,

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[4] A 228-day toll, between March 20, 2020, and November 3, 2020, exists based on executive orders issued during the COVID-19 pandemic (*see UMB Bank v Janvier*, 242 AD3d 796 [2d Dept 2025]). Two bankruptcy tolls exist based on petitions filed by Mihalitsianos as follows: 122-days between March 12, 2018, and July 12, 2018 as well as 206 days between August 27, 2018 and March 21, 2019 (*see* NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions, fn 2 [Legislature acknowledged "automatic bankruptcy stay tolls statutes of limitation as per the unilateral act by the debtor of filing the petition" citing 11 USC 362").

Plaintiff nonetheless established the timeliness of the within action via application of the partial payment principle under GOL §17-107. Excepted from FAPA's estoppel provision of CPLR §203[h] are extensions of the limitations period that are "expressly prescribed by statute" and GOL §17-107 is such a statute (*see* GOL §17-105[5][a]).

GOL §17-107, titled "Effect of part payment on time limited for foreclosure of a mortgage", provides as follows:

> A payment on account of a mortgage indebtedness, or instalment thereof or interest thereon, which is effective to revive an action to recover such indebtedness, instalment or interest or to extend the time limited for such action, is also effective, between persons described in subdivision two of this section, to make the time limited for commencement of an action to foreclose the mortgage run from the date of payment, unless the payment is accompanied by written disclaimer of intention to effect the time limited for foreclosure of the mortgage.
>
> (GOL §17-107[1]).

The above edict has its origin in a venerable common-law principle that provides "[w]hen part payment of an obligation, which would otherwise be unenforceable under the statute of limitations, is made . . . the statute will run afresh beginning with the date of that payment, provided it may be inferred from the payment that an intention arose therefrom to honor the entire obligation to which it relates" (1 Bergman on New York Mortgage Foreclosures §5.11[6][b] [2023]). When applicable, the statute of limitations begins to run anew from "the date of the last such payment" (*Federal Natl. Mtge. Assn. v Jeanty*, 39 NY3d 951, 952 [2022]). "The full force of this rule is not diminished or superseded by statutory overlay" (*Roth v Michelson*, 55 NY2d 278, 281 [1982]). Therefore, under either the statute or at common-law, "[i]n order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was 'accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" (*U.S. Bank N.A. v Martin*, 144 AD3d 891, 892-893 [2d Dept 2016], *citing Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

In this case, after the execution of the modification on March 9, 2017, the loan history reveals that Mortgagors made four [4] installment payments the last of which was "effective" July 15, 2017 (NYSCEF Doc No 24, pg 12). "Those four payments established circumstances amounting to 'an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" (*Federal Natl. Mtge. Assn. v Jeanty*, 39 NY3d 951, 952 [2022], *citing Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, supra at 521; *see also Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc.*, 189 AD3d 20, 29 [4th Dept 2020]). Further, where, as here, the partial payments are "made before expiration of the time limited for the commencement of the action . . . [it] is also effective against *any subsequent purchaser of the interest of the person who made the payment*" (GOL §17-107[2][emphasis added]; *see also Gurecki v Gurecki*, 189 AD3d 1729, 1732 [2d Dept 2020]). Accordingly, the statute of limitations was revived by Mihalitsianos and Borges, the accrual date became July 15, 2017, and the expiration date was extended to July 15, 2023, the date of the last payment (*see Chiu v 1-9 Bond St. Realty, Inc.*, 79 AD3d 416 [1st Dept 2010]). Although this date is still 397 days before this action was commenced, the tolls referenced supra sufficiently account for that time.

Regarding reformation of the mortgage, East Fork is correct that such a cause of action based on an alleged mistake, including a scrivener's error, is governed by the six-year statute of limitations which accrues date the mistake was made, not when it was discovered (*see Citibank, N.A. v Horan*, 230 AD3d 1216, 1218-1219 [2d Dept 2024]; *Bank of N.Y. Mellon v MS Global Group, LLC*, 222 AD3d 821, 825 [2d Dept 2023]). In this case, the mortgage was executed on February 7, 2008, and this cause of action was not asserted until 2024, some 16 years later, making it untimely. Any reliance on the relation-back theory under CPLR §203[f] is unavailing since the reformation cause of action was time barred when the first action to foreclose was commenced on July 18, 2014 (*see Deutsche Bank Natl. Trust Co. v McAvoy*, 188 AD3d 808, 810 [2d Dept 2020]). Thus, Plaintiff's reformation cause of action is time barred.

Parenthetically, the Court notes that an error in the metes and bounds description or block and lot numbers in a mortgage does not bar a claim for foreclosure. The Court of Appeals has noted that "[t]he language in which assessors can put land descriptions, and the actual range and possibility of accurate actual description are quite as infinite as the locations and lines of different land" (*Goff v Shultis*, 26 NY2d 240, 244 [1970]). The issue to be attended is whether the "the land can be identified with reasonable certainty notwithstanding [any] errors" and "parol evidence may be introduced to identify the property intended and its exact boundaries" (*Brookhaven v Dinos*, 76 AD2d 555, 561 [2d Dept 1980], *affd* 54 NY2d 911). In this case, the note and mortgage clearly identified the property subject to the encumbrance.

Accordingly, Defendant East Fork's motion (MS #2) for summary judgment dismissing the complaint as barred by the statute of limitations is denied, but the cause of action for reformation of the mortgage is dismissed.

Turning to Plaintiff's motion for summary judgment on its cause of action to foreclose the mortgage, it established *prima facie* its entitlement to summary judgment by submitting proof, via an affidavit from an employee of its servicer, along with the supporting documentation, demonstrated the mortgage, the unpaid note and Defendant's default in repayment (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] written assignment of the note to the plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). In this case, it is undisputed that Plaintiff was not the original lender.

Concerning holder status, "[t]he attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). Here, Plaintiff annexed a copy of the note to the complaint which contains, on its face, a specific endorsement by Resource, the original lender, to Citimortgage and an endorsement in blank. This was sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597).

Plaintiff's standing was also shown via two written assignments of the mortgage. While often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]), a mortgage assignment that includes transfer of the note, or similar language (eg. loan, indebtedness, the money due and owing, etc.), which can be sufficient to transmit the note (*see eg Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor,* supra). Presently, two assignments submitted show that mortgage was assigned from Resource to and then to Plaintiff. Both documents contained appropriate language transferring the "note" and the "monies due". Therefore, the burden shifted to Defendant to raise an issue of fact on one the affirmative defenses (*see Bernstein v Bubrovsky*, 169 AD3d 410 [1st Dept 2019]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of its cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. Indeed, as the validity of the loan documents were not contradicted by any of the appearing defendants, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). The assertion the motion must be denied because no discovery has been conducted is unavailing as Defendants offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would support a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). All the affirmative defenses not addressed by East Fork in the opposition were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]). The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion (MS #1) for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that Defendant East Fork's motion (MS #2) for summary judgment is granted only to the extent that Plaintiff's cause of action for reformation of the mortgage is dismissed; and it is further

ORDERED that the affirmative defenses pled by all the appearing Defendants are stricken; and it is further

ORDERED that **Roberta Ashkin, Esq., 400 East 70th Street New York New York 10021, (646) 779-8520** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that the mortgage and any necessary loan documents related to such Mortgage be, and the same hereby are, reformed by substituting therein the intended Legal Description of the mortgaged premises, which is the correct description, in place of the mortgage premises description which is erroneous (a copy of the Intended Mortgaged premises is attached); and it is further

ORDERED, that the caption of this action be amended by striking therefrom the remaining Defendants sued herein as "John Doe #1" to "John Doe #10," all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
US Bank Trust Company, National Association as Trustee for CMSI REMIC Series 2008-02-REMIC Pass-Through Certificates Series 2008-02,

Plaintiff,

-against-

East Fork Capital Equities LLC, Board of Managers of 105th Street Chani Condominium, Board of Managers of East 105th Street Chani Condominium, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Clerk of the County of New York,

Defendants.

----------X

and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 6, 2026, at 11:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/10/2026
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | X | FIDUCIARY APPOINTMENT | | REFERENCE |