THEODORE ROOSEVELT AMERICAN INN OF COURT

FEBRUARY 28, 2024 5:30 PM

NASSAU COUNTY BAR ASSOCIATION

CO-CHAIRS:

Neil A. Miller, Esq.

Evelyn Kalenscher, Esq.

Program: Who Wants A Free House? Ramifications of the Foreclosure Abuse Prevention Act; Eviction of Occupants After Foreclosure

CLE: 2.0 credits Professional Practice

Presenters:

Neil A. Miller, Esq. - Miller, Rosado & Algios, LLP

Evelyn Kalenscher, Esq.

William P. Bodkin, Esq. – Chief Court Attorney, Nassau County Supreme Court

Zara G. Friedman, Esq. – Deputy Chief Appellate Court Attorney, Appellate Term, Second Department

Roberta D. Scoll, Esq. – Nassau Suffolk Law Services Committee

Law Student: Jack D. Prochner, 3rd Year St. Johns Law School Student

Dinner will begin at 5:30pm and the program begins at 6:00pm

Neil A. Miller, Esq.

NEIL A. MILLER, ESQ. is a 1981 graduate from University of Chicago Law School, and is currently a partner in the firm of Miller, Rosado & Algios, LLP, in Garden City. He was admitted to the practice of law in 1982, and has been in private practice since then, primarily in the area of commercial litigation, both at the trial and appellate levels, since that time. His firm has represented homeowners and their assignees in mortgage foreclosure litigation, and has been appointed by several different title insurance companies over the years to represent homeowners and lenders facing title claims, including those relating to mortgage foreclosures. He has chaired panels for Inns of Court on the following topics: Defending the Homeowner in the Aftermath of the Foreclosure Crisis; Sales of Real Property, Mergers and Related Party Transactions Entered into by Religious Corporations; Identity Theft in Real Property Transactions; and Dealing with *Pro Se* Litigants. He has been selected in various years as a New York Metro Area Super Lawyer in Commercial Litigation. He received his undergraduate degree from Franklin & Marshall College.

Evelyn Kalenscher, Esq.

Evelyn Kalenscher is a participant in the New York State Attorney Emeritus Program for retired attorneys who work pro-bono. Since 2009, Ms. Kalenscher has worked two days a week through the Nassau/Suffolk Law Services Volunteer Lawyers Project in the Landlord/Tenant Part of the Nassau County District Court, representing indigent clients who are at risk of being evicted from their homes. Prior to retiring, Ms. Kalenscher was a founding member and partner in the law firm of Genoa, Kalenscher & Noto, P.C., where she practiced Matrimonial and Real Estate Law.

Ms. Kalenscher has been recognized by numerous organizations for her pro-bono work. In 2012, she was honored as the Nassau County Bar Association's Pro Bono Attorney of the Year. In 2014, she received the New York State Bar Association's President's Pro Bono Service Award and the Pro Bono Award from the Legal Services Corporation. In 2018 she was named an Outstanding Woman in the Law by the Maurice A. Deane School of Law at Hofstra University for her pro-bono work, and she was presented with the Distinguished Volunteer Service Award by the Office for Justice Initiatives of the New York Unified Court System. Most recently, in October 2023, she was honored by the NYS Unified Court System Office for Justice Initiatives, the New York County Lawyers Association and the New York State Bar Association for outstanding contributions to pro bono and access to justice.

In addition to being a long time member of the Theodore Roosevelt American Inn of Court, she is a past president and a member of the board. Ms. Kalenscher also sits on the boards of the Nassau Lawyers Association and the Nassau CountyWomen's Bar

Foundation where she is secretary and she is a member of the New York State Bar Association on the Real Property Committee. She is currently the president of the Board of Managers of her condominium community.

Ms. Kalenscher received a Bachelor of Business Administration Degree from Hofstra University and her JD degree from Hofstra University School of Law in 1989. She is admitted to practice in the State of New York, the District Court for the Eastern District of New York and the Supreme Court of the United States.

William P. Bodkin, Esq.

Bill Bodkin serves as the Chief Court Attorney and special referee at the Nassau County Supreme Court. In his spare time, he is the Village Justice for the Incorporated Village of Manorhaven when he is not lamenting the current state of the New York Mets. A close to 20 year veteran of the Court system, Bill has been privileged to be an Principal Appellate Court Attorney for the Appellate Division, First Department and a law clerk to two of Nassau's most respected judges, the Hon. Norman St. George and the Hon. Steven M. Jaeger.

A cum laude graduate of Brooklyn Law School, Bill has been a CLE lecturer for the Nassau County Court's Commission on Equal Justice

Zara G. Friedman, Esq.

Zara Friedman is the Deputy Chief Court Attorney for the Appellate Terms of the Supreme Court for the Second, Eleventh and Thirteenth Judicial Districts and the Ninth and Tenth Judicial Districts. Before joining the Law Department for the Appellate Terms, she was in private practice. She received her B.S. from Cornell University and her J.D. from The University of Maryland School of Law (now The University of Maryland Francis King Carey School of Law). She has done CLE and CJE updates on landlord/tenant law for The Judicial Institute and the Housing Court Judges Association Fall Conference.

Roberta D. Scoll, Esq.

Roberta D. Scoll, Esq. joined Nassau Suffolk Law Services Committee, Inc. as a staff Attorney and has served as coordinator of the Landlord/Tenant Attorney of the Day sector of the Volunteer Lawyers Project (VLP) for the past 15 years. The project represents low income clients about to be evicted from their housing. VLP enlists the aid of volunteer attorneys to represent the clients, as well as student interns, Pro Bono

Scholars, recent graduates of law school and newly admitted attorneys under the auspices of the Volunteer Lawyers Attorney of the Day project. In the Fall of 2023, the program was phased out as NSLS increased their in-house representation. Following the phase out, Ms. Scoll was a principal in initiating the Community Legal Help Project in Nassau County. This outreach program goes into Libraries as well as the Resource Center in the lower level of District Court in order to reach folks locally and advise them concerning their legal issues.

Since graduation from law school, Ms. Scoll has practiced matrimonial, personal injury, trademark and copyright law. For many years she had commuted to Washington, DC as a legal consultant to the film industry's trade association..

She received her Juris Doctorate in 1996, from City University of New York School of Law, with a keen focus and interest in public service and public interest law. In 1997 Ms. Scoll was admitted to practice in New York State, the United States District Court for the Southern and Eastern Districts of New York, and in 2002 she was admitted to the United States Supreme Court, the United States Court of Federal Claims, United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for the Armed Forces

From 2019 to 2022, Ms. Scoll was Chairperson of the Nassau County Bar Association's District Court Committee, and a member of the New York State Bar Association, American Bar Association, and the Theodore Roosevelt Inn of Court. In her current position at the Law Services, Ms. Scoll continues to work with volunteer attorneys counseling people on their rights and options on various Civil litigation topics. In November 2022, she was a recipient of the Leadership in Law Award from Long Island Business News.

Jack D. Prochner

Jack Prochner is a third-year student at St. John's University School of Law. He previously worked as a summer associate at one firm specializing in commercial construction disputes and another in securities litigation. In 2021, Jack graduated from the University of Miami with a B.A. in Accounting and a minor in Finance. Jack has previously assisted the Inn in preparing both the *How to Navigate the New Gun Laws* program held on December 7th, 2022 and the *Negotiating a Record Contract* program held on May 23rd, 2023.

PROGRAM:

1. Introduction of Panel and Overview of Entire Program - Evelyn Kalenscher, Esq. - 5 minutes

2. General Statute of Limitations principles of Mortgage Foreclosure Actions, how law evolved, Freedom Mortgage v. Engel case, overview of FAPA; introduction of game show - Neil A. Miller, Esq. - 15 minutes.

3. Game Show Question 1 - illustration of FAPA Section 6 and the new CPLR 205-a concerning terminations of prior foreclosure actions for failure to take proceedings for a default judgment within one year of the default - 10 minutes.

4. Game Show Question 2 - illustration of FAPA Section 8 and the new CPLR 3217(e) concerning voluntary discontinuances - 10 minutes.

5. Game Show Question 3 - illustration of FAPA Section 4 and the new CPLR 203(h) concerning unilateral revocations of acceleration by lenders - 10 minutes.

6. Game Show Question 4 - illustration of FAPA Section 7 and the addition of subsections 3 and 4 to CPLR 213(4), concerning the ability of the plaintiff in a second foreclosure action to challenge the standing of the plaintiff in a prior foreclosure action to have accelerated the mortgage debt - 10 minutes

7. Game Show Question 5 - illustration of FAPA Section 2 and the addition of subsection 3 to RPAPL 1301, concerning the ability of a lender to commence a new foreclosure action while one was pending - 10 minutes

8. Questions & Answer Session re FAPA - 10 minutes

9. Landlord/Tenant considerations after sale of residential house after foreclosure - Evelyn Kalenscher, Esq. - 1 minute

10. Game Show Question 6 - eviction of former owner - 9 minutes

11. Game Show Question 7 - eviction of tenant of former owner - 10 minutes

I. STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE ACTIONS: TRADITIONAL VIEW

A. Statute of Limitations is 6 years - CPLR 213(4); Everhome Mortgage Co. v. Aber, 39 N.Y.3d 949, 950, 178 N.Y.S.3d 8, 9 (2022).

B. When It Commences

1. Until the debt is accelerated, the mortgagee only has the right to sue on missed installment payments, and the 6 year statute of limitations runs from the date of each installment (Phoenix Acquisition Corp. v. Campcore, Inc., 81 N.Y.2d 138, 142, 596 N.Y.S.2d 752, 753 [1983]; Wells Fargo Bank, N.A. v. Burke, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540, 542 [2nd Dept. 2012]).

2. Once the complaint is accelerated, the borrower's right and obligation to make monthly installment payments ceases, and the 6 year statute of limitations runs on the entire debt (EMC Mortgage Corp. v. Patella, 279 A.D.2d 604, 605, 720 N.Y.S.2d 161, 162 [2nd Dept. 2001]; Federal National Mortgage Corp. Association v. Mebane, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 90 [2nd Dept. 1994]).

3. The acceleration must be clear and unequivocal (Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 476 [1932]; Nationstar Mortgage, LLC v. Weisblum, 143 N.Y.S.3d 866, 867, 39 N.Y.S.3d 491, 493 [2nd Dept. 2016]). The typical default letter states only that the mortgagee "may" choose to accelerate the loan if the default is not cured, and this is not deemed an acceleration because the note holder has the option, but is not obligated, to accelerate the loan if the default is not cured (see Adler v. Berkowitz, 254 N.Y.433, 436, *reh. den.*, 255 N.Y. 583 [1930]).

4. An unequivocal acceleration of the mortgage debt can occur by an appropriate allegation in the mortgage foreclosure complaint itself (Albertina Realty Co., *supra*; 1081 Stanley Ave., LLC v. Bank of New York Mellon Trust Co., N.A., 179 A.D.3d 984, 986, 118 N.Y.S.3d 643, 645 [2nd Dept. 2020]; Wells Fargo Bank, N.A. v. Burke, *supra*, 94 A.D.3d at 983, 943 N.Y.S.2d at 542-43 [2nd Dept. 2012]).

C. Revocation of Acceleration

1. Can be done unilaterally by mortgagee, but must occur must occur before the 6 year statute of limitations expires (US Bank National Association v. Livoti, 209 A.D.3d 1054, 1056, 176 N.Y.S.3d 713, 715-16 [2nd Dept. 2022]; Pennymac Corp. v. Smith, 199 A.D.3d 820, 822, 157 N.Y.S.3d 513, 515 [2nd Dept. 2021]).

2. The effect of a revocation of a prior acceleration of mortgage debt is to return the parties to their pre-acceleration rights and obligations, such that the noteholder might again accelerate the maturity of the then-outstanding debt and start a new foreclosure claim on that

outstanding debt (Freedom Mortgage Corp. v. Engel, 37 N.Y.3d 1, 28, 146 N.Y.S.3d 542, 553 [2021]).

3. A mere voluntary discontinuance of an action without an express mention of revocation of the acceleration seemingly would nevertheless be a revocation of an acceleration that occurred in the complaint, because such a discontinuance annulls everything done in the action (Brown v. Cleveland Trust Co., 233 N.Y.399, 406 [1922]; Loeb v. Willis, 100 N.Y. 231, 235 [1885]; Newman v. Newman, 245 A.D.2d 353, 354, 665 N.Y.S.2d 423, 424 [2nd Dept. 1997]).

II. Developments in the Aftermath of the 2007-08 Financial Crisis

A. Explosion in the volume of foreclosure litigation, leading to unprecedented burdens on the Court system. There were abuses by plaintiffs in mortgage foreclosure actions and their counsel to cut corners, leading to enactment of various administrative requirements.

B. Long delays in processing even uncontested foreclosures due to difficulties in obtaining necessary paperwork, sometimes arising from constant assignments of mortgage notes and mortgages, changes in loan servicers and attorneys.

C. One consequence of the delays: Increased dismissal of uncontested foreclosure cases pursuant to CPLR 3215[c] for failure to "take proceedings" for a default judgment within one year of the default without demonstrating "sufficient cause" for the delay (*i.e.*, a reasonable excuse).

1. The Second Department became much more strict in interpreting the "reasonable excuse" requirement (see Giglio v. NTIMP, Inc., 86 A.D.3d 301, 926 N.Y.S.2d 546 [2nd Dept. 2011]; Wells Fargo Bank v. Cafasso, 158 A.D.3d 848, 72 N.Y.S.3d 526 [2nd Dept. 2018]; Private Capital Group v. Hosseinipour, 170 A.D.3d 909, 95 N.Y.S.3d 585 [2nd Dept. 2019]).

2. These dismissals often took place more than 6 years after the acceleration of the mortgage debt in the complaint. If so, CPLR 205(a) applied to allow a new action to be commenced within 6 months of the dismissal, as long as the defendant was also served in those 6 months as well. The new action could be commenced by an assignee of the original plaintiff. Wells Fargo v. Eitani, 148 A.D.3d 193, 47 N.Y.S.3d 80 [2nd Dept.], *app dsmsd*, 29 N.Y.3d 1023, 55 N.Y.S.3d 157 (2017).

3. It is questionable whether Eitani was correctly decided in light of the "neglect to prosecute" exception contained in CPLR 205(a), but Eitani was nevertheless followed by almost every appellate court to consider the question (see HSBC Bank v. Janvier, 187 AD3d 999, 133 NYS3d 596 [2nd 2020]; Estrella v. East Tremont Medical Center, 193 AD3d 567, 142 NYS3d 802 [1st Dept. 2022]; U.S. Bank Trust, N.A. v. Moomey-Stevens, 168 A.D.3d 1169, 91 N.Y.S.3d 788 [3rd Dept. 2019]).

D. The First and Second Departments determined that a voluntary discontinuance with no mention of revocation of the acceleration of mortgage does not in fact revoke an acceleration made in a foreclosure complaint (Wells Fargo Bank, N.A. v. Liburd, 176 A.D.3d 464, 107 N.Y.S.3d 858 [1st Dept. 2019]; Christiana Trust v. Barua, 184 A.D.3d 140, 125 N.Y.S.3d 420 [2nd Dept. 2020]; Ditech Financial LLC v. Naidu, 175 A.D.3d 1387, 109 N.Y.S.3d 196 [2nd Dept. 2019]).

III. The Seminal Case of Freedom Mortgage Corp. v Engel, 37 N.Y.3d 1, 146 N.Y.S.3d 542 [2021]. Decided issues of what constitutes an acceleration of the mortgage debt and what constitutes a revocation of an acceleration.

A. Acceleration must be accomplished by an unequivocal overt act, but that a default letter stating that the mortgagee "will" accelerate if the default is not cured was insufficient to constitute an acceleration.

B. A voluntary discontinuance does revoke an acceleration of a mortgage that was made in a mortgage complaint, even without an express mention of revocation. No inquiry needed into what the actual intent of the plaintiff was in discontinuing.

IV. The Foreclosure Abuse Prevention Act ("FAPA").

A. Legislative Intent. One of the express purposes of the legislation is to correct "court decisions which, contrary to the intent of the legislature, have given mortgage lenders and loan servicers opportunities to . . . manipulate statutes of limitation to their advantage." (New York State Senate Bill S5473A Sponsor Memorandum). "Some of these tactics have been sanctioned by the judiciary has resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers." (New York State Senate Bill S5473D Sponsor Memorandum).

B. Section 2 - amends Real Property Actions & Proceedings Law 1301(3). Now, a second mortgage foreclosure action cannot be commenced while an earlier one is pending, without leave of Court. The second action is deemed to have discontinued the first action.

1. Attempting to redress mortgagee abuses. For instance where there is some defect the plaintiff cannot remedy in the first action, and the second action is more than 6 years later, but the plaintiff moves to consolidate the two actions under the earlier index number to make the second action appear timely.

2. One decision has held that this "did not introduce a new concept to the RPAPL, but rather, expanded upon the existing statute", so that a defendant in default in answering the complaint cannot assert this defense (Wells Fargo Bank, N.A. v. Brown, 2024 N.Y. Misc. LEXIS 412, 2024 Slip Op 30296 [Sup. Ct., Nass. Co. 1/23/24]).

C. Section 4 - adds a new CPLR 203(h) that once a mortgage foreclosure cause of action accrues, no party can unilaterally waive, postpone, cancel, toll, revive or reset the accrual of the cause of action or otherwise purport to effect a unilateral extension of the limitations period.

D. Section 6 - adds new CPLR 205-a, specifically applicable only to foreclosure actions:

1. The 6 month savings period of CPLR 205(a) is no longer available where the first action is terminated for, among other things, a voluntary discontinuance, any form of neglect (specifically including dismissals pursuant to CPLR 3126[3], CPLR 3215, CPLR 3216 and CPLR 3404, failure to comply with any scheduling order default for nonappearance for a conference or calendar call or failure to timely submit any order or judgment).

2. The original plaintiff can bring a new action if still within the limitations period, but must do so within 6 months following termination and must complete service upon the original defendant within the same 6 months.

E. Section 7 - amends CPLR 213(4) so that if statute of limitations is raised as a defense based on a claim that the mortgage note was accelerated prior or in a prior foreclosure action, the plaintiff in the new action is estopped from claiming that the prior acceleration was invalid unless the dismissal of the prior action was based on an express judicial determination that there was no valid acceleration. This addressed situations where the plaintiff in the second mortgage foreclosure action would claim that the plaintiff in the first mortgage foreclosure action had no standing to commence the first action and thus the acceleration of the debt in the complaint in the first action was invalid.

F. Section 8 - adds a new CPLR 3217(e) that the voluntary discontinuance of a mortgage foreclosure action, whether on motion, order, stipulation or notice, does not extend, revive or reset the limitations period.

G. Section 10 - FAPA "shall take effect immediately" and shall apply to all mortgage foreclosure actions "in which ;a final judgment of foreclosure and sale has not been enforced". While that might seem to mean conducting a foreclosure sale, at least one Court has held it to mean the scheduling of a foreclosure sale (U.S. Bank v. Leonardo, 79 Misc.3d 1075, 192 N.Y.S.3d 472 (Sup. Ct., Nass. Co. 2023).

V. Can FAPA Be Constitutionally Applied to Pending Cases?

A. Where no constitutional issue has been raised, FAPA has been applied retroactively to pending cases (US Bank Trust, N.A. v. Reizes, 2023 N.Y. App. Div. LEXIS 6607, 2023 NY Slip Op 06553 [2nd Dept. 12/20/23]; ARCPE 1, LLC v. DeBrosse, 217 A.D.3d 999, 193 N.Y.S.3d 51 [2nd Dept. 2023]; MTGLQ Investors, L.P. v. Singh, 216 A.D.3d 1087, 190

N.Y.S.3d 415 [2nd Dept. 2023]; U.S. Bank National Association v. Onuoha, 216 A.D.3d 1069, 190 N.Y.S.3d 108 [2nd Dept. 2023]).

B. No appellate cases in New York have addressed the constitutionality of retroactively apply FAPA. Supreme Court cases are divided over constitutional issues, sometimes even among judges of the same County.

C. Retroactive application of CPLR 205-a where prior action dismissed pursuant to CPLR 3215[c]

1. Some cases finding it constitutional:

Deutsche Bank National Trust Co. v. Dagrin, 79 Misc.3d 393, 190 N.Y.S.3d 582 (Sup. Ct. Queens Co. 2023)

Wilmington Savings Fund Society, FSB v. East Fork Capital Equities, LLC, 2023 N.Y. Misc. LEXIS 13636, 2023 NY Slip Op 33847 (Sup. Ct., N.Y. Co. 10/24/23)

Deutsche Bank National Trust Co. v. Contact Holdings Corp., 2023 N.Y. Misc. LEXIS 4131, 2023 NY Slip Op 32827 (Sup. Ct., Kings Co. 7/24/23)

2. Some cases finding it unconstitutional

U.S. Bank Trust N.A. v. Kenig, 2023 N.Y. Misc. LEXIS 8958, 2023 NY Slip Op 33563 (Sup. Ct., Rock. Co. 10/16/23)

Wilmington Trust, N.A. v. Gawlowski, 2023 N.Y. Misc. LEXIS 7389, 2023 NY Slip Op 23305 (Sup. Ct. Suff. Co. 10/6/23)

US Bank National Association v. Johns, 2023 N.Y. LEXIS 3965, 2023 NY Slip Op 32683 (Sup. Ct., Queens Co. 7/28/23)

HSBC Bank USA, N.A. v. Besharat, 80 Misc.3d 269, 195 N.Y.S.3d 380 (Sup. Ct. Putnam Co. 2023)

D. Retroactive application of new voluntary discontinuance provision of CPLR 3217(e):

1. Some cases finding it constitutional:

Pennymac Corp. v. Erneste, 2023 N.Y. Misc. LEXIS 23345, 2023 NY Slip Op 23345 (Sup. Ct. Queens Co. 12/6/23)

Nationstar Mortgage, LLC v. Naar, 2023 N.Y. Misc. LEXIS 4456, 2023 NY Slip Op 50909 (Sup. Ct. West. Co. 8/29/23)

Bayview Loan Servicing LLC v. Dalai, 80 Misc.3d 1100, 196 N.Y.S.3d 640 (Sup. Ct., Bronx Co. 2023)

Wells Fargo Bank NA v. Haq, 2023 NYLJ 1431 (Sup. Ct., Rich. Co. 6/14/23)
HSBC Bank USA, N.A. v. IPA Asset Managment, LLC, 79 Misc.3d 821, 190 N.Y.S.3d 622 (Sup. Ct., Suff. Co. 2023)

2. Some cases finding it unconstitutional

U.S. Bank Trust N.A. v. Kenig, 2023 N.Y. Misc. LEXIS 8958, 2023 NY Slip Op 33563 (Sup. Ct., Rock. Co. 10/16/23)

Deutsche Bank National Trust Co. v. Warren, 2023 N.Y. Misc. LEXIS 7773, 2023 NY Slip Op 33504 (Sup. Ct. Queens Co. 10/10/23)

E. Retroactive application of CPLR 203(h) to letter purporting to revoke acceleration

1. Some cases finding it constitutional

Federal National Mortgage Assocation v. Kerendian, 2023 N.Y. Misc. LEXIS 23314, 2023 NY Slip Op 34490 (Sup. Ct. Nassau Co. 10/13/23)

Pennymac Corp. v. Erneste, 2023 N.Y. Misc. LEXIS 23345, 2023 NY Slip Op 23345 (Sup. Ct. Queens Co. 12/6/23)

195-197 Hewes LLC v. Citimortgage, Inc., , 2023 N.Y. Misc. LEXIS 14352, 2023 NY Slip Op 3393 (Sup. Ct., Kings Co. 11/2/23)

Nationstar Mortgage, LLC v. Naar, 2023 N.Y. Misc. LEXIS 4456, 2023 NY Slip Op 50909 (Sup. Ct. West. Co. 8/29/23)

Tomala v. Caliber Home Loans, Inc., 2023 N.Y. Misc. LEXIS 8959, 2023 NY Slip Op 33564 (Sup. Ct. Rock. Co. 10/11/23)

Bayview Loan Servicing LLC v. Dalai, 80 Misc.3d 1100, 196 N.Y.S.3d 640 (Sup. Ct., Bronx Co. 2023)

U.S. Bank Trust, N.A. v. Miele, 80 Misc.3d 839, 197 N.Y.S.3d 656 (Sup. Ct., Westch. Co. 2023)

2. Case finding it unconstitutional

HSBC Bank USA, N.A. v. IPA Asset Management, LLC, 79 Misc.3d 821, 190 N.Y.S.3d 622 (Sup. Ct. Suff. Co. 2023)

VI. Landlord/tenant Law Considerations after Sale of Residential House in Foreclosure.

A. Evicting Former Owner

1. Must be served with 10 day Notice to Quit, which must be accompanied by proof of authority to sign notice on behalf of petitioner (Siegel v. Kentucky Fried Chicken of Long Island, 67 N.Y.2d 792, 501 N.Y.S.2d 317 [1986]; HSBC Bank v. Jeffers, 30 Misc.3d 1209(A), 958 N.Y.S.2d 646 [Dist. Ct., Nass. Co. 2011]).

2. Must "exhibit" the deed to the new owner or certified copy thereof, which can be a copy certified by an attorney pursuant to CPLR 2105 (RPAPL 713[5]; Plotch v. Dellis, 60 Misc.3d 1, 75 N.Y.S.3d 779 (Sup. Ct., App. Term, 2nd Dept. 2018). Plotch abrogated prior rule that deed had to be served "in-hand", and now utilize affix and mail service No longer needs to be personal service (Citibank, N.A. v. Colucci, 60 Misc.3d 135[A], 110 N.Y.S.3d 202 [Sup. Ct., App. Term, 2nd Dept. 2018]).RPAPL 733

B. Evicting Tenant of Former Owner

1. Tenant is a defined term under RPAPL 1305 (1)(c)

2. Before use of fictitious name good faith effort must be made to discover name of actual occupants. (CPLR 1024; Capital Resources v. John Doe, 154 Misc.2d 864, 586 N.Y.S.2d 706 (Civ. Ct., Kings Co. 1992).

3. Notice Requirements to tenants — RPAPL 1305(2). Unlike eviction of an owner, a bona fide tenant of residential property is entitled to continue to reside at the premises for the greater of: (1) 90 days from date the Notice to Quit is served; (2) the remainder of the lease term up to a maximum of 3 years, if the lease was entered into in good faith, for tenants who did not occupy the premises at the commencement of the foreclosure action. The statute also provides:

a. If the new owner intends to occupy the unit as his or her primary residence, tenant only is entitled to occupy for 90 days regardless.

b. For the lease to qualify under RPAPL 1305(2), tenant may

not be the prior owner of the property, the lease must require payment of rent that is not substantially less than fair market rent (unless subject to federal or state statutory system or federal or state statutory scheme.)

c. The lease continues under the same terms and conditions as were in effect at the time of entry of judgment of foreclosure and sale, or if no such judgment, that were in effect at the time of the transfer of ownership of the property.

4. Tenants also have rights under the Federal Protecting Tenants at Foreclosure Act. Cascade Funding RMI Alternative Holdings LLC v. Giannetto, 71 Misc.3d 1201 [A]. 177 N.Y.S.3d 471 (Just. Ct. West. Co. Nov.10, 2022).

5. Must "exhibit" the deed in same manner as to the former owner.

6. To evict, pursuant to RPAPL 713 (5) a separate proceeding must be initiated for each unit. (First Central Bank v. Ygllesia, 37 Misc. 3d 130, 2012 N.Y. Misc, LEXIS 4911 (Sup. Ct. App Term, 2nd Dept. 2012).

Freedom Mtge. Corp. v Engel

Court of Appeals of New York

February 18, 2021, Decided

No. 1, No. 2, No. 3, No. 4

Reporter
37 N.Y.3d 1 *; 169 N.E.3d 912 **; 146 N.Y.S.3d 542 ***; 2021 N.Y. LEXIS 103 ****; 2021 NY Slip Op 01090

[1] ***Freedom Mortgage*** Corporation, Appellant, v Herschel ***Engel***, Respondent, et al., Defendants. No. 2; Ditech Financial, LLC, & c., Appellant, v Santhana Kumar Nataraja Naidu, Respondent, et al., Defendants.Juan Vargas, Respondent, v Deutsche Bank National Trust Company, Appellant. Wells Fargo Bank, N.A., & c., Appellant, [2] v Donna Ferrato, Respondent, The Simon & Mills Building Condominium Board, et al., Defendants. Wells Fargo Bank, N.A., & c., Appellant, v Donna Ferrato, Respondent, Capital One Bank (USA) N.A., et al., Defendants.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Subsequent History: Motion granted by *Ditech Fin., LLC v. Santhana Kumar Nataraja Naidu, 2021 N.Y. LEXIS 936 (N.Y., May 27, 2021)*

Rehearing denied by, Motion granted by *Freedom Mtge. Corp. v. Herschel Engel, 2021 N.Y. LEXIS 965 (N.Y., May 27, 2021)*

Prior History: *Freedom Mtge. Corp. v. Engel, 163 A.D.3d 631, 81 N.Y.S.3d 156, 2018 N.Y. App. Div. LEXIS 5138, 2018 WL 3371696 (July 11, 2018)*
Wells Fargo Bank, N.A. v. Ferrato, 183 A.D.3d 529, 122 N.Y.S.3d 884, 2020 N.Y. App. Div. LEXIS 3184 (May 28, 2020)
Ditech Fin., LLC v. Naidu, 175 A.D.3d 1387, 109 N.Y.S.3d 196, 2019 N.Y. App. Div. LEXIS 6657, 2019 WL 4458571 (Sept. 18, 2019)
Vargas v. Deutsche Bank Natl. Trust Co., 168 A.D.3d 630, 93 N.Y.S.3d 32, 2019 N.Y. App. Div. LEXIS 686, 2019 WL 385313 (Jan. 31, 2019)

Core Terms

acceleration, noteholder, borrower, mortgage, revoke, foreclosure action, default, election, revocation, parties, statute of limitations, commencement, foreclosure, voluntary discontinuance, cure, motion to dismiss, discontinue, unequivocal, withdrawal, modified, notice, de-acceleration, installment, effectuated, expired, cases, contractual right, affirmative act, real property, contractual

Case Summary

Overview
HOLDINGS: [1]-The appellate division erred in granting a condominium unit owner's motion to dismiss a bank's fifth foreclosure action as untimely under *CPLR 213(4)* because the filings of prior complaints did not accelerate the modified loan underlying the foreclosure action since the bank failed to attach the modified agreements, or otherwise acknowledge them; [2]-Because an election to accelerate had been revoked, and a mortgagee's action was commenced within six years of any subsequent acceleration, the appellate division erred in granting a borrower's motion to dismiss on statute of limitations grounds; [3]-Where the maturity of the debt had been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revoked the election to accelerate, absent the noteholder's contemporaneous statement to the contrary.

Outcome
Orders of appellate division reversed, with costs, supreme court orders reinstated, motion to dismiss complaint granted, cross motion for summary judgment denied, motion to dismiss denied, and motion to revoke acceleration of mortgage loan granted.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN1[] **Foreclosures, Judicial Foreclosures**

Where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary.

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] **Statute of Limitations, Time Limitations**

Under *CPLR 213(4)*, a mortgage foreclosure claim is governed by a six-year statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Statute of Limitations, Time Limitations**

The court of appeals has repeatedly recognized the important objectives of certainty and predictability served by the statutes of limitations and endorsed by the principles of contract law, particularly where the bargain struck between the parties involves real property.

Governments > Legislation > Statute of Limitations > Time Limitations

HN4[] **Statute of Limitations, Time Limitations**

Statutes of limitations advance society's interest in giving repose to human affairs. The rules governing contract interpretation, the principle that agreements should be enforced pursuant to their clear terms, similarly promotes stability and predictability according to the expectations of the parties. There is a need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial relationships.

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

HN5[] **Mortgages & Other Security Instruments, Definitions & Interpretation**

Whether a foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts: the note and the mortgage. The noteholder's ability to foreclose on the property securing the debt depends on the language in these documents.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN6[] **Discharge & Payment, Time for Payments**

Noteholders can, and often do, anticipate and tolerate defaults relating to timely payment, permitting the borrower to correct such deficiencies without a significant disturbance in the contractual relationship. Precipitous acceleration of the debt serves neither party as it works a fundamental alteration of the status quo.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Discharge & Payment, Time for Payments**

A noteholder's election to accelerate the entire debt has multiple, significant effects. Under the typical contract, acceleration permits the noteholder to commence an action seeking the remedy of full foreclosure , an equitable tool permitting the noteholder to take possession of the real property securing the debt. Accordingly, a cause of action to recover the entire balance of the debt accrues at the time the loan is accelerated, triggering the six-year statute of limitations to commence a foreclosure action. *CPLR 203(a), 213(4)*. Acceleration is therefore a significant event for statute of limitations purposes.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] **Types of Contracts, Installment Contracts**

Prior to acceleration, upon a default on the obligation to timely make an installment payment, a cause of action accrues to recover that installment payment, triggering the six-year statute of limitations for an action to recover that payment, but a default alone does not trigger the statute of limitations relating to a foreclosure action.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN9[] **Discharge & Payment, Time for Payments**

Any election to accelerate must be made in accordance with the terms of the note and mortgage and that the parties are free to include provisions detailing what the noteholder must do to accelerate the debt. To be valid, an election to accelerate must be made by an unequivocal overt act that discloses the noteholder's choice, such as the filing of a verified complaint seeking foreclosure and containing a sworn statement that the noteholder is demanding repayment of the entire outstanding debt. The fact of election should not be confused with the notice or manifestation of such election.

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] **Statute of Limitations, Time Limitations**

While the act evincing the noteholder's election must be sufficient to constitute notice to all third parties of such a choice, a borrower's lack of actual notice does not as a matter of law destroy the effect of the election.Put another way, the point at which a borrower has actual notice of an election to accelerate is not the operative event for purposes of determining when the statute of limitations begins to run. The determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN11[] **Discharge & Payment, Time for Payments**

There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." Acceleration in this context is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time through the vehicle of monthly installment payments, although the contracts may provide the borrower the right to cure. Such a significant alteration of the borrower's obligations under the contract, replacing the right to make recurring payments of perhaps a few thousand dollars a month or less with a demand for immediate payment of a lump sum of hundreds of thousands of dollars, should not be presumed or inferred. Noteholders must unequivocally and overtly exercise an election to accelerate.

Real Property Law > Financing > Foreclosures

HN12[] **Financing, Foreclosures**

The legislature has imposed exacting standards for bringing a foreclosure claim, prescribing the precise method of providing pre-suit notice to the borrower, *RPAPL 1304*, and detailing what must be included in a foreclosure complaint, *CPLR 3012-b*, and an action may be dismissed for failure to adhere to those requirements.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN13[] **Discharge & Payment, Time for Payments**

The acceleration of a mortgage debt may occur by means other than the commencement of a foreclosure action, such as through an unequivocal acceleration notice transmitted to the borrower.

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures

HN14[] **Statute of Limitations, Time Limitations**

Under *RPAPL 1501*, a person with an interest in the property may commence an action to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be

free therefrom where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage has expired. *RPAPL 1501(4)*.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN15[] **Discharge & Payment, Time for Payments**

Acceleration should not be deemed to occur absent an overt, unequivocal act. Noteholders should be free to accurately inform borrowers of their default, the steps required for a cure and the practical consequences if the borrower fails to act, without running the risk of being deemed to have taken the drastic step of accelerating the loan. Even in the event of a continuing default, default notices provide an opportunity for pre-acceleration negotiation, giving both parties the breathing room to discuss loan modification or otherwise devise a plan to help the borrower achieve payment currency, without diminishing the noteholder's time to commence an action to foreclose on the real property, which should be a last resort.

Business & Corporate Compliance > ... > Consideration > Enforcement of Promises > Forbearance

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN16[] **Enforcement of Promises, Forbearance**

Absent a provision in the operative agreements setting forth precisely what a noteholder must do to revoke an election to accelerate, revocation can be accomplished by an affirmative act of the noteholder within six years of the election to accelerate. For example, an express statement in a forbearance agreement that the noteholder is revoking its prior acceleration and reinstating the borrower's right to pay in monthly installments has been deemed an affirmative act of de-acceleration.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN17[] **Discharge & Payment, Time for Payments**

A noteholder's motion to discontinue a prior foreclosure action raises a triable issue of fact as to whether the prior acceleration had been revoked. However, a noteholder's motion or stipulation to withdraw a foreclosure action, "in itself," is not an affirmative act of revocation of the acceleration effectuated via the complaint Both approaches require courts to scrutinize the course of the parties' post-discontinuance conduct and correspondence, to the extent raised, to determine whether a noteholder meant to revoke the acceleration when it discontinued the action.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN18[] **Discharge & Payment, Time for Payments**

Where the contract requires a pre-acceleration default notice with an opportunity to cure, a post-discontinuance letter sent by the noteholder that references the then-outstanding total debt and seeks immediate repayment of the loan is not necessarily evidence that the prior voluntary discontinuance did not revoke acceleration, it is just as likely an indication that it did and the noteholder is again electing to accelerate due to the borrower's failure to cure a default. The impetus behind the requirements that an action be unequivocal and overt in order to constitute a valid acceleration and sufficiently affirmative to effectuate a revocation is that these events significantly impact the nature of the parties' respective performance obligations.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN19[] **Discharge & Payment, Time for Payments**

When a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action, i.e., the withdrawal of the complaint, constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the unequivocal overt act of filing a foreclosure complaint, destroys the effect of the election.

Business & Corporate Compliance > ... > Negotiable

Instruments > Discharge & Payment > Time for Payments

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN20[] **Discharge & Payment, Time for Payments**

A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, 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.

Governments > Legislation > Statute of Limitations > Time Limitations

HN21[] **Statute of Limitations, Time Limitations**

Court of appeals precedent favors consistent, straightforward application of the statute of limitations which serves the objectives of finality, certainty and predictability, to the benefit of both borrowers and noteholders. New York's strong public policy favors finality, predictability, fairness and repose served by statutes of limitations. The effect of a voluntary discontinuance should not turn on courts' after-the-fact analysis of the significance of subsequent conduct and correspondence between the parties, occurring months, if not years, after the action is withdrawn.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN22[] **Discharge & Payment, Time for Payments**

The impact of the noteholder's voluntary discontinuance of the action should be evident at the moment it occurs. A clear rule that a voluntary discontinuance evinces revocation of acceleration, absent a noteholder's contemporaneous statement to the contrary), makes it possible for attorneys to counsel their clients accordingly, allowing borrowers to take advantage of the opportunity afforded by the de-acceleration, reinstatement of the right to pay arrears and make installment payments, eliminating the obligation to immediately pay the entire outstanding principal amount in order to avoid losing their homes. A return to the installment plan also makes it more likely that borrowers can benefit from the various public and private programs that exist to help borrowers work out of a default. Given the advantages of a clear default rule reinstating the pre-accelerated terms of the loan, the onus is on noteholders to inform the borrower at the time of the discontinuance if acceleration has not been revoked and it will not accept installment payments.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN23[] **Discharge & Payment, Time for Payments**

A clear rule on the effect of a voluntary discontinuance provides potential noteholders the opportunity to assess, based on clear, objective indicia and without the aid of an appellate court, the nature and status of the instrument they look to buy, e.g., whether the note is accelerated, and value it accordingly.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN24[] **Foreclosures, Judicial Foreclosures**

A noteholder's motivation for exercising a contractual right is generally irrelevant, but a noteholder has little incentive to repeatedly accelerate and then revoke its election because foreclosure is simply a vehicle to collect a debt and postponement of the claim delays recovery.

Counsel: **[****1]** Brian A. Sutherland, for appellant.

Anthony R. Filosa, for respondent.

Legal Services NYC, et al., American Legal and Financial Network, New York State Foreclosure Defense Bar, New York Mortgage Bankers Association, USFN-America's Mortgage Banking Attorneys, United Jewish Organizations of Williamsburg, Inc., amici curiae.

Christina A. Livorsi, for appellant.

Holly C. Meyer, for respondent.

New York State Foreclosure Defense Bar, United Jewish Organizations of Williamsburg, Inc., Adam Plotch, amici curiae.

Patrick Broderick, for appellant.

Justin F. Pane, for respondent.

Francis M. Caesar, New York State Foreclosure Defense Bar, United Jewish Organizations of Williamsburg, Inc., Adam Plotch, amici curiae.

Brian S. Pantaleo, for appellant.

M. Katherine Sherman, for respondent.

Francis M. Caesar, New York State Foreclosure Defense Bar, amici curiae.

Judges: Opinion by Chief Judge DiFiore. Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Rivera in a concurring opinion and Judge Wilson in a separate concurring opinion.

Opinion by: DiFIORE

Opinion

[917]** **[***547]** **[*19]** DiFIORE, Chief Judge:

These appeals—each turning on the timeliness of a mortgage foreclosure claim—

involve the intersection of two areas of law where the need for clarity **[****2]** and consistency are at their zenith: contracts affecting real property ownership and the application of the statute of limitations. In *Vargas v Deutsche Bank Natl. Trust Co.* and *Wells Fargo Bank, N.A. v Ferrato*, the primary issue is when the maturity of the debt was accelerated, commencing the six-year statute of limitations period. Applying the long-standing rule derived from *Albertina Realty Co. v Rosbro Realty Corp. (258 NY 472, 180 N.E. 176 [1932])* that a noteholder must effect an "unequivocal overt act" to accomplish such a substantial change in the parties' contractual relationship, we reject the argument in *Vargas* that the default letter in question accelerated the debt, and similarly conclude in *Wells Fargo* that two complaints in prior discontinued foreclosure actions that each failed to reference the pertinent modified loan likewise were not sufficient to constitute a valid acceleration. The remaining cases turn on whether the noteholder's voluntary discontinuance of a prior foreclosure action revoked acceleration of the debt, reinstating the borrower's contractual right to repay the loan over time in installments. *HN1*[↑] Adopting a clear rule that will be easily understood by the parties and can be consistently applied by the courts, we hold that where **[****3]** the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary. These conclusions compel a reversal of the Appellate Division order in each case.

HN2[↑] The parties do not dispute that under *CPLR 213 (4)*, a mortgage foreclosure claim is governed by a six-year statute of limitations (*see Lubonty v U.S. Bank N. A., 34 NY3d 250, 261, 116 N.Y.S.3d 642, 139 N.E.3d 1222 **[*20]** [2019]*)—in each case, the timeliness dispute turns on whether or when the noteholders exercised certain rights under the relevant contracts, impacting when each claim accrued and whether the limitations period expired, barring the noteholders' foreclosure claims. Because these cases involve the operation of the statute of limitations, we begin with some general principles. *HN3*[↑] We have repeatedly recognized the important objectives of certainty and predictability served by our statutes of limitations and endorsed by our principles of contract law, particularly where the bargain struck between the parties involves real property (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc., 25 NY3d 581, 593, 15 N.Y.S.3d 716, 36 N.E.3d 623 [2015]*). *HN4*[↑] Statutes of limitations advance our society's interest in **[****4]** "giving repose to human affairs" (*John J. Kassner & Co. v City of New York, 46 NY2d 544, 550, 389 N.E.2d 99, 415 N.Y.S.2d 785 [1979]* [citations omitted]). Our rules governing contract interpretation—the principle that agreements should be enforced pursuant to their clear terms—similarly promotes stability and predictability according to the expectations of the parties (*see 159 MP Corp. v Redbridge Bedford, LLC, 33 NY3d 353, 358, 104 N.Y.S.3d 1, 128 N.E.3d 128 [2019]*). This Court has emphasized **[***548]** **[**918]** the need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial relationships (*see ACE Sec. Corp., 25 NY3d at 593-594*, citing *Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 403, 615 N.E.2d 985, 599 N.Y.S.2d 501 [1993]*; *Ajdler v Province of Mendoza, 33 NY3d 120, 130, 99 N.Y.S.3d 749, 123 N.E.3d 233 n 6 [2019]*).

HN5[↑] Whether a foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts: the note and the mortgage. The noteholder's ability to foreclose on the property securing the debt depends on the language in these documents (*see Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc., 30 NY3d 572, 581, 69 N.Y.S.3d 520, 92 N.E.3d 743 [2017]*; *W.W.W. Assocs. v Giancontieri, 77 N.Y.2d 157, 162-163, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]*). In the residential mortgage industry, the use of standardized instruments is common, as reflected here where the relevant terms of the operative agreements are

alike, [1] facilitating a general discussion of the operation of the statute of limitations with respect **[*21]** to claims arising from agreements of this nature. In each case before us, the note and mortgage **[****5]** create a relationship typical in the residential mortgage foreclosure context: in exchange for the opportunity to purchase a home, the borrower promised to repay a loan in favor of the noteholder, secured by a lien on that real property, over a 30-year extended term through a series of monthly installment payments. As prescribed in the agreements, the borrower's failure to timely make monthly installment payments constituted a default.

For over a century, residential mortgage contracts have typically provided noteholders the right to accelerate the maturity date of the loan upon the borrower's default, thereby demanding immediate repayment of the entire outstanding debt (*see e.g., Odell v Hoyt, 73 NY 343, 345 [1878]*). In these cases, the mortgages provide that the noteholder "*may*" require immediate payment of the outstanding debt—*i.e.*, accelerate the maturity of the loan—upon the borrower's default [2] . It is plain from this language that whether to exercise this contractual right is a matter within the noteholder's discretion—the noteholder is not obliged to accelerate the loan upon a default (*Adler v Berkowitz, 254 NY 433, 436, 173 N.E. 574 [1930]*). The extended contractual relationship explains why residential mortgage agreements are generally structured in this **[****6]** way. Noteholders can—and often do—anticipate and tolerate defaults relating to timely payment, permitting the borrower to correct such deficiencies without a significant disturbance in the contractual relationship. *HN6*[↑] Precipitous acceleration of the debt serves neither party as it works a fundamental alteration of the status quo.

Indeed, a noteholder's election to accelerate the entire debt has multiple, significant effects. *HN7*[↑] Particularly relevant to these appeals, under the typical contract, acceleration permits the noteholder to **[***549]** **[**919]** commence an action seeking the remedy of full foreclosure (*see Odell, 73 NY at 345*)—an equitable tool permitting the noteholder to take possession of the real property securing the debt (*Copp v Sands Point Mar., 17 NY2d 291, 293, 217 N.E.2d 654, 270 N.Y.S.2d 599 [1966]*). Accordingly, a cause of action to recover the entire balance of the debt accrues at the time the loan is accelerated, triggering the six-year statute of limitations to commence a foreclosure action (*see CPLR 203[a], 213[4]; Phoenix Acquisition **[*22]** Corp. v Campcore, Inc., 81 NY2d 138, 143, 612 N.E.2d 1219, 596 N.Y.S.2d 752 [1993]; Lubonty, 34 NY3d at 261; see also CDR Creances S.A. v Euro-American Lodging Corp., 43 A.D.3d 45, 51, 837 N.Y.S.2d 33 [1st Dept 2007]; EMC Mtge. Corp. v Patella, 279 AD2d 604, 605, 720 N.Y.S.2d 161 [2d Dept 2001]; Lavin v Elmakiss, 302 AD2d 638, 639, 754 N.Y.S.2d 741 [3d Dept 2003]; Business Loan Ctr., Inc. v Wagner, 31 AD3d 1122, 1123, 818 N.Y.S.2d 406 [4th Dept 2006]*) [3] . Acceleration is therefore a significant event for statute of limitations purposes and, in two of these appeals, the timeliness dispute turns on whether certain acts—in *Wells Fargo*, the filing of complaints in prior foreclosure actions and, in *Vargas*, the issuance of a **[****7]** default letter—effectuated an acceleration of the indebtedness, starting the clock on the noteholders' claims.

I.

We have had few occasions to address how a lender may effectuate an acceleration of the maturity of a debt secured on real property. *HN9*[↑] However, in *Albertina Realty Co.*, we made clear that any election to accelerate must be made in accordance with the terms of the note and mortgage and that the parties are free to include provisions detailing what the noteholder must do to accelerate the debt (*258 NY at 475-476*). We further held that, to be valid, an election to accelerate must be made by an "unequivocal overt act" that discloses the noteholder's choice, such as the filing of a verified complaint seeking foreclosure and containing a sworn statement that the noteholder is demanding repayment of the entire outstanding debt (*id. at 476*). Although the Court did not otherwise decide "just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause," it did clarify that "[t]he fact of election should not be confused with the notice or manifestation of such election" (*id.*). *HN10*[↑] While the act evincing the noteholder's

---

[1] The agreements at issue in three of the cases before us are uniform instruments issued by Fannie Mae for use in New York (mortgage [Form 3033]; note [Form 3233; 3518]). The note and mortgage executed in *Wells Fargo* do not appear to be Fannie Mae or Freddie Mac standardized instruments.

[2] In addition, the Fannie Mae Form 3033 mortgage provides that the option to accelerate may be exercised only upon satisfaction of certain conditions, including notice and an opportunity for the borrower to correct the default.

[3] *HN8*[↑] Prior to acceleration, upon a default on the obligation to timely make an installment payment, a cause of action accrues to recover that installment payment, triggering the six-year statute of limitations for an action to recover that payment (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770, 967 N.E.2d 1187, 944 N.Y.S.2d 742 [2012]; e.g., Loiacono v Goldberg, 240 AD2d 476, 477, 658 N.Y.S.2d 138 [2d Dept 1997]; **Pagano v Smith, 201 AD2d 632, 633-634, 608 N.Y.S.2d 268 [2d Dept 1994])*** but a default alone does not trigger the statute of limitations relating to a foreclosure action (*see Phoenix Acquisition Corp., 81 NY2d at 143*).

election must be sufficient to "constitute[] [****8] notice to all third parties of such [a] choice," a borrower's lack of actual notice "d[oes] not as a matter of law destroy" the effect of the election (*id.*). Put another way, the point at which a borrower has actual notice of an election to accelerate is not the operative [*23] event for purposes of determining when the statute of limitations begins to run. Indeed, in *Albertina*, we held that the debt was accelerated when the verified complaint and *lis pendens* were filed, even though the papers had not yet been served [3] on the borrower [***550] [**920] (*id.*). The determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked.

There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." *HN11*[↑] Acceleration in this context is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time through the vehicle of monthly installment payments (although the contracts may provide the borrower the right to cure) (*see Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894, 618 N.Y.S.2d 88 [2d Dept 1994]*). Such a significant alteration of the borrower's obligations under the contract—replacing the right to make recurring payments [****9] of perhaps a few thousand dollars a month or less with a demand for immediate payment of a lump sum of hundreds of thousands of dollars—should not be presumed or inferred; noteholders must unequivocally and overtly exercise an election to accelerate. With these principles in mind, we turn to the two appeals before us in which the parties dispute whether, and when, a valid acceleration of the debt occurred, triggering the six-year limitations period to commence a foreclosure claim.

Wells Fargo

The central issue in *Wells Fargo* is whether the commencement of either of two prior, dismissed foreclosure actions constituted a valid acceleration, impacting the timeliness of this foreclosure action (the fifth involving this property), [4] which was commenced in December 2017. Over ten years ago, borrower [*24] Donna Ferrato allegedly defaulted on a $900,000 loan secured by a mortgage on her Manhattan condominium unit. Upon Wells Fargo's initiation of this foreclosure action, Ferrato moved to dismiss, arguing that the debt was accelerated in September 2009 by the commencement of the second foreclosure action and the limitations period therefore expired six years later, in September 2015. Supreme Court [****10] denied Ferrato's motion, concluding that neither the second nor the third foreclosure actions—commenced in 2009 and 2011, respectively—validly accelerated the debt because, as Ferrato had successfully argued in Supreme Court in those actions, the complaints reflected an attempt to foreclose upon the original note and mortgage even though the terms of that note had been modified (increasing the debt and changing the interest rate) in 2008. On Ferrato's appeal, the Appellate Division (among other things) reversed and granted her motion to dismiss, reasoning that the September 2009 complaint effected a valid acceleration of the modified loan despite the failure to reference the correct loan documents [5] . The Appellate Division granted Wells Fargo leave to [***551] [**921] appeal to this Court and, because we agree with Wells Fargo that the modified loan debt which it now seeks to enforce could not have been accelerated by the complaints filed in the second (or, for that matter, third) foreclosure action which failed to reference the modified note, we reverse the portion of the Appellate Division order granting Ferrato's motion to dismiss the complaint in the fifth foreclosure action and deny that motion. [****11]

It is undisputed that the parties modified the original loan in 2008 after Ferrato's initial default, changing the terms by altering the interest rate and increasing the principal amount of the loan by more than $60,000. Nevertheless, in the second foreclosure action on which Ferrato relies, Wells Fargo attached only the original note and mortgage (stating a principal amount of $900,000) to the complaint and failed to acknowledge that the parties entered into a modification agreement altering the amount and terms of the loans (the only oblique evidence of a modification was in an attached schedule stating a principal dollar amount consistent with the modified [*25] debt). Although Ferrato successfully moved to dismiss both prior actions on the basis that these

[4] As these cases reflect, for many reasons, including the extraordinary length of the contractual relationship—frequently spanning decades—multiple foreclosure actions involving the same borrower are not unusual. This type of contractual relationship is not static. Not only might a borrower's circumstances and payment practices vary over the course of three decades (a default may lead to a foreclosure action that is ultimately resolved through payment of arrears), but the party entitled to enforce the note is similarly variable because notes secured by residential mortgages are typically negotiable instruments, meant to be transferred and assigned. *HN12*[↑] Moreover, the legislature has imposed exacting standards for bringing a foreclosure claim—*e.g.*, prescribing the precise method of providing pre-suit notice to the borrower (*see RPAPL 1304*) and detailing what must be included in a foreclosure complaint (*see e.g.*, *CPLR 3012-b*)—and an action may be dismissed for failure to adhere to those requirements.

[5] The bank's appeal from another portion of the Appellate Division order relating to the fourth action between the parties is addressed in section II.

deficiencies precluded **[4]** Wells Fargo from foreclosing on her property, she now asserts that the filing of those complaints validly accelerated the debt. It is well-settled that the filing of a verified foreclosure complaint may evince an election to accelerate (*see Albertina, 258 NY at 476*), but here the filings did not accelerate the modified loan (underlying the current foreclosure action) because the bank failed to attach the modified agreements **[****12]** or otherwise acknowledge those documents, which had materially distinct terms. Under these circumstances—where the deficiencies in the complaints were not merely technical or *de minimis* and rendered it unclear what debt was being accelerated—the commencement of these actions did not validly accelerate the modified loan (*Albertina Realty Co., 258 NY2d at 476*) [6] . Because Ferrato did not identify any other acceleration event occurring more than six years prior to the commencement of the fifth foreclosure action, the Appellate Division erred in granting her motion to dismiss that action as untimely.

Vargas

/i>

In *Vargas*, an action under *RPAPL 1501 (4)* to discharge a mortgage on real property commenced by borrower Juan Vargas against noteholder Deutsche Bank, [7] the parties dispute whether a default letter issued by the bank's predecessor-in-interest validly accelerated the debt. *HN13*[↑] New York courts have observed, consistent with *Albertina*, that the acceleration of a mortgage debt may occur by means other than the commencement of a foreclosure action, such as through an unequivocal acceleration notice transmitted to the borrower (*see Mejias v Wells Fargo N.A., [***552] [**922] 186 AD3d 472, 474, 129 N.Y.S.3d 523 [2d Dept 2020]*; *Lavin, 302 AD2d at 638-639*). However, the Appellate Division departments disagree on the language necessary to render a letter **[*26]** sufficiently **[****13]** unequivocal to constitute a valid election to accelerate. In *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc. (148 AD3d 529, 48 N.Y.S.3d 597 [1st Dept 2017])*, the First Department concluded that a letter stating that the noteholder "will" accelerate upon the borrower's failure to cure the default constituted clear and unequivocal notice of an acceleration that became effective upon the expiration of the cure period. But the Second Department has rejected that view *(see e.g., Milone v US Bank N.A., 164 AD3d 145, 83 N.Y.S.3d 524 [2d Dept 2018]*; *21st Mtge. Corp. v Adames, 153 AD3d 474, 60 N.Y.S.3d 198 [2d Dept 2017])*, reasoning that comparable language did not accelerate the debt and was "merely an expression of future intent that fell short of an actual acceleration," which could "be changed in the interim" (*Milone, 164 AD3d at 152*). This disagreement is at the heart of the parties' dispute in *Vargas*.

Vargas commenced this quiet title action against Deutsche Bank in July 2016, seeking to cancel a $308,000 mortgage on residential property in the Bronx, contending the statute of limitations for any claim to foreclose on the mortgage had expired. Deutsche Bank moved to dismiss and, in opposition, Vargas argued that an August 2008 default letter sent by the bank's predecessor-in-interest [8] had accelerated the debt and that the limitations period had expired before commencement of the quiet title action. Supreme Court initially rejected that **[****14]** contention, reasoning that the default letter was insufficient in itself to constitute an election to accelerate. However, on renewal, the court reversed course, denied Deutsche Bank's motion to dismiss and granted summary judgment to Vargas, declaring the mortgage unenforceable and the property free from any encumbrances. The Appellate Division affirmed, deeming the letter a valid acceleration pursuant to *Royal Blue Realty*, and we granted Deutsche Bank leave to appeal *(34 N.Y.3d 910, 119 N.Y.S.3d 77, 141 N.E.3d 961 [2020])*.

It is undisputed that the August 2008 default letter was sent to Vargas—the only question is whether it effectuated a clear and unequivocal acceleration of the debt, an issue of law. The default letter informed Vargas that his loan was in "serious default" because he had not made his "required payments," but that he could cure the **[*27]** default by paying approximately $8,000 "on or before 32 days from the date of [the] letter." It further advised that, should he fail to cure his default, the noteholder "will accelerate [his] mortgage with the full amount remaining accelerated and becoming due and

---

[6] Notably, in the third foreclosure action, not only was the complaint plagued by the same defects as the second action, but Wells Fargo also asserted in response to the motion to dismiss that it was proceeding on the original, unmodified loan. The court dismissed the action, reasoning that Wells Fargo had commenced the action on the wrong debt.

[7] *HN14*[↑] Under *section 1501 of the Real Property Actions and Proceedings Law* (RPAPL), a person with an interest in the property may commence an action "to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom" "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired" (*RPAPL 1501[4]*).

[8] No argument is made here that the predecessor-in-interest lacked the authority to accelerate the maturity of the debt and we therefore do not address that question.

payable in full, and foreclosure proceedings will be initiated at that time." The letter warned: "[f]ailure to cure your default [****15] may result in the foreclosure and sale of your property."

We reject Vargas's contention that the August 2008 letter accelerated the debt and we therefore reverse the Appellate Division order, deny plaintiff's motion for summary judgment and grant Deutsche Bank's motion to dismiss. First and foremost, the letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written. Nor was this letter a pledge that [***553] [**923] acceleration would immediately or automatically occur upon expiration of the 32-day cure period. Indeed, an automatic acceleration upon expiration of the cure period could be considered inconsistent with the terms of the parties' contract, which gave the noteholder an optional, discretionary right to accelerate upon a default and satisfaction of certain conditions enumerated in the agreement. Although the letter states that the debt "will [be] accelerate[d]" if Vargas failed to cure the default within the cure period, it subsequently makes clear that the failure to cure "may" result in the foreclosure of the property, indicating that it was far from certain [****16] that either the acceleration or foreclosure action would follow, let alone ensue immediately at the close of the 32-day period.

This case demonstrates why *HN15*[↑] acceleration should not be deemed to occur absent an overt, unequivocal act. Noteholders should be free to accurately inform borrowers of their default, the steps required for a cure and the practical consequences if the borrower fails to act, without running the risk of being deemed to have taken the drastic step of accelerating the loan. Even in the event of a continuing default, default notices provide an opportunity for pre-acceleration negotiation—giving both parties the breathing room to discuss loan modification or otherwise devise a plan to help the borrower achieve payment currency, without diminishing the noteholder's time to commence an action to foreclose on the real property, which should be a last resort.

[*28] In *Freedom Mortgage* and *Ditech*, the issue is not whether or when the

debt was accelerated but whether a valid election to accelerate, effectuated by the commencement of a prior foreclosure action, was revoked upon the noteholder's voluntary discontinuance of that action. More than a century ago, in *Kilpatrick v Germania Life Ins. Co. (83 NY 163, 168 [1905])*, this Court addressed [****17] whether a noteholder who had exercised its discretionary option to accelerate the maturity of a debt pursuant to the terms of a mortgage could revoke that acceleration. We held that the noteholder's acceleration "became final and irrevocable" only *after* the borrower changed his position in reliance on that election by executing a new mortgage, applying an equitable estoppel analysis (*id.*).

Practically, the noteholder's act of revocation (also referred to as a de-acceleration) returns the parties to their pre-acceleration rights and obligations—reinstating the borrowers' right to repay any arrears and resume satisfaction of the loan over time via installments, *i.e.*, removing the obligation to immediately repay the total outstanding balance due on the loan, and provides borrowers a renewed opportunity to remain in their homes, despite a prior default. Thus, following a de-acceleration, a payment default could give rise to an action on the note to collect missed installments (an action with a six-year statute of limitations that runs on each installment from the date it was due). Or the noteholder might again accelerate the maturity of the then-outstanding debt, at which point a new foreclosure [****18] claim on that outstanding debt would accrue with a six-year limitations period. Determining whether, and when, a noteholder revoked an election to accelerate can be critical to determining whether a foreclosure action commenced more than six years after acceleration is time-barred. In opposition to motions to dismiss, *Freedom Mortgage* and *Ditech* asserted that their foreclosure actions were timely because they had revoked prior elections to accelerate by voluntarily [***554] [**924] withdrawing those actions. In response, the borrowers did not dispute the noteholders' right to revoke but contended a voluntary discontinuance does not revoke an acceleration.

HN16[↑] Although this Court has never addressed what constitutes a revocation in this context, the Appellate Division departments have consistently held that, absent a provision in the operative agreements setting forth precisely what a noteholder must do to revoke an election to accelerate, revocation can be accomplished [*29] by an "affirmative act" of the noteholder within six years of the election to accelerate (*NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d 1068, 1069, 58 N.Y.S.3d 118 [2nd Dept 2017]*; *Lavin, 302 AD2d at 639*; *Federal Natl. Mtge. Assn. v Rosenberg, 180 AD3d 401, 402, 119 N.Y.S.3d 441 [1st Dept 2020]*). For example, an express statement in a forbearance agreement that the noteholder is revoking its [5] prior acceleration and reinstating the borrower's [****19] right to pay in monthly installments has been deemed an "affirmative act" of de-acceleration (*see U.S. Bank Trust, N.A. v Rudick, 172 AD3d 1430, 1430-1431, 102 N.Y.S.3d 66 [1st Dept 2019]*). However, no clear rule has emerged with respect to the issue raised here—whether a noteholder's voluntary motion or stipulation to discontinue a mortgage foreclosure action, which does not expressly mention de-acceleration or a

willingness to accept installment payments, constitutes a sufficiently "affirmative act." Prior to 2017, without guidance from the Appellate Division, multiple trial courts had concluded that a noteholder's voluntary withdrawal of its foreclosure action was an affirmative act of revocation as a matter of law (*see e.g., 4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust Co., 2016 NY Misc LEXIS 4901, *2-5, 2016 WL 2839341, *1-4, [Sup Ct, NY County, May 10, 2016]; see also U.S. Bank Trust, N.A. v Adhami, 2019 U.S. Dist. LEXIS 19599, 2019 WL 486086, *5-6* and n 7, *2019 US Dist LEXIS 19599,*12-13* and n 7 [ED NY, Feb. 6, 2019, No. 18-CV-530 (PKC) (AKT)] [collecting cases]).

In 2017, the Second Department first addressed this issue in *NMNT Realty (151 AD3d 1068, 58 N.Y.S.3d 118)*, denying a borrower's summary judgment motion to quiet title on the rationale that the noteholder's motion to discontinue a prior foreclosure action raised a "triable issue of fact" as to whether the prior acceleration had been revoked [9] . The First Department has, at times, articulated the same rule (*see Capital One, N.A. [*30] v Saglimbeni, 170 AD3d 508, 509, 96 N.Y.S.3d 48 [1st Dept 2019]; U.S. Bank N.A. v Charles, 173 AD3d 564, 565, 105 N.Y.S.3d 388 [1st Dept 2019])*. However, more recently, as reflected in the Second Department's **[****20]** decisions in *Freedom Mortgage* and *Ditech* (among other cases), a different rule has emerged—that a noteholder's motion or stipulation to withdraw a foreclosure **[***555]** **[**925]** action, "in itself," is *not* an affirmative act of revocation of the acceleration effectuated via the complaint (*see Freedom Mtge. Corp., 163 AD3d 631, 633, 81 N.Y.S.3d 156 [2d Dept 2018]; Ditech, 175 AD3d 1387, 1389, 109 N.Y.S.3d 196 [2d Dept 2018]; Wells Fargo Bank, N.A. v Liburd, 176 AD3d 464, 464-465, 107 N.Y.S.3d 858 [1st Dept 2019])*. ***HN17***[↑] Both approaches require courts to scrutinize the course of the parties' post-discontinuance conduct and correspondence, to the extent raised, to determine whether a noteholder meant to revoke the acceleration when it discontinued the action (*see e.g., Vargas, 168 AD3d 630, 630, 93 N.Y.S.3d 32 [1st Dept 2019]*). For example, in *Christiana Trust v Barua (184 AD3d 140, 149, 125 N.Y.S.3d 420 [2d Dept 2020])*—after determining that the voluntary discontinuance was of no effect under the more recent approach described above—the court faulted the bank for failing to come forward with evidence that, after the discontinuance, it demanded resumption of monthly payments, invoiced the borrower for such payments, or otherwise demonstrated "it was truly seeking to de-accelerate the debt". Thus, the court suggested that the revocation inquiry turns on an exploration into the bank's intent, accomplished through an exhaustive examination of post-discontinuance acts.

This approach is both analytically unsound **[****21]** as a matter of contract law and unworkable from a practical standpoint. As is true with respect to the invocation of other contractual rights, either the noteholder's act constituted a valid revocation or it did not; what occurred thereafter may shed some light on the parties' perception of the event but it cannot retroactively alter the character or efficacy of the prior act. ***HN18***[↑] Indeed, where the contract requires a pre-acceleration default notice with an opportunity to cure, a post-discontinuance letter sent by the noteholder that references the then-outstanding total debt and seeks immediate repayment of the loan is not necessarily evidence that the prior voluntary discontinuance did not revoke acceleration—it is just as likely an indication that it did and the noteholder is again electing to accelerate due to the borrower's failure to cure a default. The impetus behind the requirements that an action be unequivocal and overt in order **[*31]** to constitute a valid acceleration and sufficiently affirmative to effectuate a revocation is that these events significantly impact the nature of the parties' respective performance obligations. A rule that requires post-hoc evaluation of events occurring **[****22]** after the voluntary **[6]** discontinuance—correspondence between the parties, payment practices and the like—in order to determine whether a revocation previously occurred leaves the parties without concrete contemporaneous guidance as to their current contractual obligations, resulting in confusion that is likely to lead (perhaps inadvertently) to a breach, either because the borrower does not know that the obligation to make installment payments has resumed or the noteholder is unaware that it must accept a timely installment if tendered.

Indeed, if the effect of a voluntary discontinuance of a mortgage foreclosure action depended solely on the significance of noteholders' actions taking place months (if not years) later, parties might not have clarity with respect to their post-discontinuance contractual obligations until the issue was adjudicated in a subsequent foreclosure action

[9] In these four cases, the relevant facts—*e.g.*, whether or not a voluntary discontinuance occurred or whether a default letter was sent—are not disputed and thus, whether acceleration was or was not revoked does not present a question of fact in the context of these appeals. Instead, the parties dispute the legal significance of events they acknowledge occurred—whether the voluntary discontinuance constituted a revocation of an acceleration that was accomplished by commencement of a prior action—a question that we determine as a matter of law. To be sure, there may be cases in which the question of whether an acceleration was validly revoked involves an "issue of fact," such as where the operative facts surrounding a purported acceleration or revocation are disputed, and the court may be unable to decide whether the statute of limitations had run as a matter of law. But that is not the situation in these appeals. Likewise, different notes and mortgage instruments may incorporate their own rules for acceleration or revocation thereof.

(which is what occurred here); in both *Freedom Mortgage* and *Ditech*, the Appellate Division disagreed with Supreme Court's determinations that the prior accelerations had been revoked by the voluntary discontinuance. Not only is this approach harmful to the parties but it is incompatible with the policy underlying **[****23]** **[***556]** **[**926]** the statute of limitations because—under the post-hoc, case-by-case approach adopted by the Appellate Division—the timeliness of a foreclosure action "cannot be ascertained with any degree of certainty," an outcome which this Court has repeatedly disfavored (*ACE Sec. Corp., 25 NY3d at 593-594*). Further, the Appellate Division's recent approach suggests that a noteholder can retroactively control the effect of a voluntary discontinuance through correspondence it sends to the borrower after the case is withdrawn (which injects an opportunity for gamesmanship). We decline to adopt such a rule.

HN19[↑] Rather, we are persuaded that, when a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—*i.e.*, the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" of filing a foreclosure complaint, "destroy[s] the effect" of the election (*see Albertina, 258 NY at 476*). We disagree with the Appellate Division's **[*32]** characterization of such a stipulation as "silent" with respect to revocation (*Freedom Mtge. Corp., 163 AD3d at 633*). *HN20*[↑] A voluntary discontinuance **[****24]** withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude 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.

HN21[↑] This approach comports with our precedent favoring consistent, straightforward application of the statute of limitations which serves the objectives of "finality, certainty and predictability," to the benefit of both borrowers and noteholders (*ACE Sec. Corp., 25 NY3d at 593*; *see also Matter of Regina Metro. Co., LLC v New York State Division of Hous. & Community Renewal, 35 NY3d 332, 372, 130 N.Y.S.3d 759, 154 N.E.3d 972 [2020]* [noting New York's "strong public policy favoring finality, predictability, fairness and repose served by statutes of limitations"]; *Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts., 32 NY3d 139, 151, 88 N.Y.S.3d 96, 112 N.E.3d 1219 [2018]*). The effect of a voluntary discontinuance should not turn on courts' after-the-fact analysis of the significance of subsequent conduct and correspondence between the parties, occurring months, if not years, after the action is withdrawn. **[****25]** Such an approach leads to inconsistent and unpredictable results and, critically, renders it impossible for parties to know whether, or when, a valid revocation has occurred, inviting costly and time-consuming litigation to determine timeliness.

The impact of the noteholder's voluntary discontinuance of the action should be evident at the moment it occurs. *HN22*[↑] A clear rule that a voluntary discontinuance evinces revocation of acceleration (absent a noteholder's contemporaneous statement to the contrary) makes it possible for attorneys to counsel their clients accordingly, allowing borrowers to take advantage of the opportunity afforded by the de-acceleration—reinstatement of the right to pay arrears and make installment payments, eliminating the obligation to immediately pay the entire outstanding principal **[***557]** **[**927]** amount in order to avoid losing their **[*33]** homes [10]. A return to the installment plan also makes it more likely that **[7]** borrowers can benefit from the various public and private programs that exist to help borrowers work out of a default. Given the advantages of a clear default rule reinstating the pre-accelerated terms of the loan, the onus is on noteholders to inform the borrower at the time **[****26]** of the discontinuance if acceleration has not been revoked and it will not accept installment payments.

Freedom Mortgage & Ditech

/i>

The appeals in *Freedom Mortgage* and *Ditech* are easily resolved by application of this rule. In both cases, the borrowers' motions to dismiss on statute of limitations grounds were predicated on the argument that an acceleration effectuated by a prior foreclosure action had never been revoked and the six-year limitations period expired prior to commencement of the instant action. In both cases, Supreme

[10] Moreover, this clarity also benefits those seeking to purchase notes secured by residential mortgages—negotiable instruments that are intended to be bought and sold, often changing hands repeatedly during their duration. *HN23*[↑] Unlike the current Second Department approach, a clear rule on the effect of a voluntary discontinuance provides potential noteholders the opportunity to assess, based on clear, objective indicia and without the aid of an appellate court, the nature and status of the instrument they look to buy (*e.g.*, whether the note is accelerated) and value it accordingly.

Court essentially applied the rule we adopt today—the acceleration was revoked by a voluntary discontinuance of the prior action—but the Appellate Division reversed in each case, dismissing the actions as time-barred. In *Freedom Mortgage*, the Appellate Division reasoned that the acceleration was not revoked because the stipulation was "silent" as to revocation. Applying the rule articulated above, ***Freedom Mortgage*** validly revoked the prior acceleration, evinced by the commencement of the July 2008 foreclosure action, when it voluntarily withdrew that action in January 2013 [11] . ***Engel***, the borrower, does not identify any contemporaneous statement by ***Freedom*** **[****27]** ***Mortgage*** (in the stipulation **[*34]** or otherwise) that it was not de-accelerating the debt or would not accept monthly installment payments. There is no need to analyze the parties' subsequent conduct and correspondence to determine the effect of the 2013 stipulation. Further, that the discontinuance was effectuated by a stipulation between the parties does not mean that the borrower and the noteholder were required to expressly agree on the effect of the discontinuance—whether to exercise the contractual right to accelerate, and de-accelerate, remained within the discretion of Freedom Mortgage. Because **[***558]** **[**928]** the July 2008 election had been revoked and the present action was commenced within six years of any subsequent acceleration, the Appellate Division erred in granting Engel's motion to dismiss on statute of limitations grounds. Accordingly, we reverse the Appellate Division order and remit the case for consideration of issues raised but not determined on the appeal to that Court.

A reversal is also warranted in *Ditech*, where the Appellate Division reasoned that the voluntary withdrawal of the prior action "did not, in itself **[****28]** constitute an affirmative act" of revocation [12] . The February 2014 stipulation **[8]** discontinuing the prior foreclosure action **[*35]** revoked the acceleration effectuated by the commencement of that action, and the record contains no contemporaneous statement by Ditech to the contrary. That Ditech sent Naidu, the borrower, a payoff letter in March 2015—more than a year later—communicating the amount in default does not alter that result. Naidu has not alleged that any other unrevoked acceleration occurred more than six years before the January 2016 commencement of this action that would render it untimely. We therefore reverse the Appellate Division order and remit the case for consideration of issues raised but not determined on the appeal to that Court.

Wells Fargo

Finally, we return to Wells Fargo to address an additional issue relating to de-acceleration that arose in a prior foreclosure action, the fourth action. Although Wells Fargo properly referenced the modified loan in that complaint, Ferrato moved to dismiss that action, alleging a lack of proper

---

[11] In ***Freedom Mortgage***, after sending ***Engel***, the borrower, an August 2013 letter notifying him of its election to accelerate the debt secured by a mortgage on his property, the bank commenced the instant foreclosure action in February 2015. Engel answered and moved to dismiss the complaint as time-barred, asserting that the debt was accelerated in July 2008 upon the filing of a prior foreclosure action and, as such, the six-year limitations period expired several months before the instant action was commenced. Freedom opposed Engel's motion to dismiss and cross-moved for summary judgment, arguing as relevant here that its voluntary discontinuance of the prior claim revoked that acceleration and the statute of limitations for this action was not triggered until its August 2013 acceleration letter. Supreme Court granted Freedom's cross motion for summary judgment, struck Engel's statute of limitations affirmative defense and implicitly denied his motion. On Engel's appeal, the Appellate Division reversed and determined the action was time-barred, reasoning that the acceleration was not revoked when the prior action was discontinued because the stipulation was "silent" as to revocation. We granted Freedom Mortgage leave to appeal ***(33 N.Y.3d 1039, 103 N.Y.S.3d 12, 126 N.E.3d 1052 [2019])***.

[12] Ditech commenced this foreclosure action against Naidu in January 2016 by filing a verified complaint stating that it was accelerating the mortgage and declaring the entire outstanding loan immediately due and payable, including recovery of unpaid installment payments. Naidu answered, raising the statute of limitations as an affirmative defense, and subsequently moved to dismiss the action as time-barred, arguing that a prior foreclosure action commenced in 2009 had accelerated the debt and was not revoked when that action was voluntarily discontinued by the noteholder. Ditech opposed the motion to dismiss and cross-moved for summary judgment on the complaint as against Naidu. In two orders, Supreme Court denied Naidu's motion to dismiss, concluding that the stipulation discontinuing the prior action without prejudice was an "affirmative act of revocation" and thus, the statute of limitations had not run, and granted Ditech's motion for summary judgment, determining that it had established its prima facie entitlement to judgment of foreclosure and Naidu failed to raise a question of fact in response. On Naidu's appeal, the Appellate Division reversed the orders insofar as appealed from, granted Naidu's motion to dismiss the complaint insofar as asserted against him as time-barred, and denied as academic plaintiff's cross-motion for summary judgment insofar as asserted against Naidu. The Court held that Ditech failed to demonstrate that the acceleration of the debt, effectuated by the filing of the July 2009 foreclosure action, was revoked within six years, reasoning that the February 2014 discontinuance of the action "did not, in itself" constitute an affirmative act of de-acceleration. Thus, the Court concluded, the action before it—commenced in January 2016—was untimely. We granted the bank leave to appeal ***(34 N.Y.3d 910, 119 N.Y.S.3d 77, 141 N.E.3d 961 [2020])***.

service. Supreme Court denied the motion but, on **[****29]** Ferrato's appeal, the Appellate Division determined a question of fact was raised and remitted for a traverse hearing. Wells Fargo then moved both to voluntarily discontinue that action and to revoke acceleration of the loan. Supreme Court granted the motion to discontinue but stated, without explanation, that "the acceleration of the subject loan is NOT revoked." On the bank's appeal of that portion of the order, the Appellate Division affirmed, indicating that Wells Fargo could not de-accelerate because it "admitted that its primary reason for revoking acceleration of the mortgage debt **[***559]** **[**929]** was to avoid the statute of limitations bar." [13]

The lower courts erred in denying Wells Fargo's motion to revoke and we therefore reverse that portion of the Appellate Division order as well. As stated above, while a noteholder **[*36]** may be equitably estopped from revoking its election to accelerate (*see Kilpatrick, 83 NY at 168*), defendant Ferrato did not allege that she materially changed her position in detrimental reliance on the loan acceleration, and the courts conducted no equitable estoppel analysis. We reject the theory, argued by Ferrato and reflected in several decisions (*see e.g., Wells Fargo Bank, N.A. v Portu, 179 AD3d 1204, 1207, 116 N.Y.S.3d 761 [3d Dept 2020]*; *Christiana Trust, 184 AD3d at 146*; *Milone, 164 AD3d at 154*; *Deutsche Bank Natl. Trust Co. Ams. v Bernal, 56 Misc 3d 915, 924, 59 N.Y.S.3d 267 [Sup Ct, Westchester County 2017]*), that a lender should be barred **[****30]** from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. ***HN24***[↑] A noteholder's motivation for exercising a contractual right is generally irrelevant (*see generally Metropolitan Life Ins. Co. v Noble Lowndes Intl., 84 NY2d 430, 435, 643 N.E.2d 504, 618 N.Y.S.2d 882 [1994]*)—but it bears noting that a noteholder has little incentive to repeatedly accelerate and then revoke its election because foreclosure is simply a vehicle to collect a debt and postponement of the claim delays recovery.

Accordingly, in *Freedom Mortgage* and *Ditech*, the orders of the Appellate Division should be reversed, with costs, and the cases remitted to the Appellate Division for consideration of issues raised but not determined on the appeals to that Court; in *Vargas*, the order of the Appellate Division should be reversed, with costs, defendant's motion to dismiss the complaint granted and plaintiff's cross motion for summary judgment denied; and in *Wells Fargo*, the order of the Appellate Division should be reversed, with costs, defendant Ferrato's motion to dismiss denied, plaintiff's motion to revoke acceleration of the mortgage loan granted and the certified question not answered as unnecessary.

Concur by: WILSON

Concur

WILSON, J. (concurring):

I fully concur in the majority opinion but write to make one caveat clear. We have not decided whether the **[****31]** notes and mortgages at issue here permit a lender to revoke an acceleration. [14] In three of the four cases before us, the issue was not in dispute: the borrowers did not contend that the noteholders lack the contractual right to revoke an acceleration. Ms. Ferrato stated that it is "well-established that a lender may revoke its election to accelerate the mortgage." Similarly, Mr. Naidu noted that the "[l]ender maintains the **[*37]** discretionary right to later revoke the acceleration." Neither party in *Vargas* mentioned the issue. In contrast, Mr. Engel argued at length that the note and mortgage grant the noteholder the contractual right to accelerate the loan but lack any contractual authorization to revoke that election (absent consent of the borrower). However, Mr. Engel raised that issue for the first time on appeal. Thus, it was not properly preserved for **[***560]** **[**930]** our review (*see, e.g., Feigelson v Allstate Ins. Co., 31 NY2d 913, 916, 292 N.E.2d 787, 340 N.Y.S.2d 646 [1972]*; Arthur Karger, Powers of the New York Court of Appeals § 17:1 [Sept. 2020 Update]).

Dissent by: RIVERA, J. (in part)

Dissent

RIVERA, J. (dissenting in part):

For the reasons discussed by the majority, I agree that there was no effective acceleration in *Vargas v Deutsche Bank National Trust Co.* and *Wells Fargo Bank, N.A. v Ferrato*. I am also **[****32]** in agreement that it was error for the lower courts to deny *Wells Fargo*'s motion to revoke. Accordingly, I concur in the majority's resolution of *Vargas* and *Wells Fargo*.

The question of whether the noteholders effectively revoked acceleration in ***Freedom Mortgage*** *Corp. v* ***Engel*** and *Ditech Financial LLC v Naidu*—an issue of material significance in

[13] As indicated above, the Appellate Division addressed both the fourth and fifth foreclosure actions in one order and subsequently granted Wells Fargo's motion for leave to appeal to this Court.

[14] Three of those are the standard Fannie Mae forms for notes and mortgages (majority op. at 3 n.1).

both appeals—is another matter.

As Judge Wilson notes, only the borrower in *Freedom Mortgage* has challenged the revocation on the ground that the noteholder does not have a contractual right to unilaterally revoke an acceleration (concurring op at 2). I agree with my colleague that because the borrower raises this challenge for the first time on appeal, it is unpreserved for our review (*see Bingham v New York City Tr. Auth., 99 NY2d 355, 359, 786 N.E.2d 28, 756 N.Y.S.2d 129 [2003]*).

Depending on whether and when we resolve that question, the rule adopted by the majority in these appeals may stand without further consideration, or be affirmed, modified, or discarded in the future. Nevertheless, if we are going to impose a "deceleration" rule based on the noteholder's voluntary withdrawal of a foreclosure action (majority op at 2), I would require that the noteholder provide express notice to the borrower regarding the effect of that withdrawal. **[****33]** I see no reason why an acceleration requires an unequivocal overt act—one that leaves no doubt as to the noteholder's intent—but revocation may be assumed by implication, requiring only that the noteholder affirmatively disavow an intention to revoke (*id.*). As the Second Department has recognized, there are many reasons for a noteholder to voluntarily withdraw an action (*see* **[*38]** *Christiana Trust v Barua, 184 AD3d 140, 147, 125 N.Y.S.3d 420 [2d Dept 2020], lv denied 35 N.Y.3d 916, 132 N.Y.S.3d 413, 157 N.E.3d 136 [2020]*). Application of the rule requiring notice is simple and not at all burdensome. The noteholder need only inform the borrower in the stipulation or a letter that withdrawal constitutes a revocation of the acceleration. Such notice ensures transparency in a high-stakes relationship.

Because appellants provided no evidence of notice, I would affirm the Appellate Division in *Freedom Mortgage* and *Ditech*.

For No. 1:

Order reversed, with costs, and case remitted to the Appellate Division, Second Department, for consideration of issues raised but not determined on the appeal to that Court. Opinion by Chief Judge DiFiore. Judges Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Wilson in a concurring opinion. Judge Rivera dissents and votes to affirm in an opinion.

For No. 2:

Order reversed, with costs, and case remitted to the Appellate Division, Second Department, for consideration of issues raised but not determined on the appeal to that Court. Opinion by Chief Judge DiFiore. Judges Stein, **[****34]** Fahey, Garcia, Wilson and Feinman concur, Judge Wilson in a concurring opinion. Judge Rivera dissents and votes to affirm in an opinion.

[931]** *For No. 3*:

[*561]** Order reversed, with costs, defendant's motion to dismiss the complaint granted and plaintiff's cross motion for summary judgment denied. Opinion by Chief Judge DiFiore. Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Rivera in a concurring opinion and Judge Wilson in a separate concurring opinion.

For No. 4:

Order reversed, with costs, defendant Ferrato's motion to dismiss denied, plaintiff's motion to revoke acceleration of the mortgage loan granted and certified question not answered as unnecessary. Opinion by Chief Judge DiFiore. **[9]** Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur, Judge Rivera in a concurring opinion and Judge Wilson in a separate concurring opinion.

Decided February 18, 2021

End of Document

foreclosure abuse prevention act, 2022 N.Y. AB 7737

Chaptered, December 30, 2022

Reporter
2022 N.Y. ALS 821; 2022 N.Y. Laws 821; 2022 N.Y. Ch. 821; 2022 N.Y. AB 7737

NEW YORK ADVANCE LEGISLATIVE SERVICE > NEW YORK 245TH ANNUAL LEGISLATIVE SESSION > CHAPTER 821 > ASSEMBLY BILL 7737

Notice

Added: Text highlighted in green
Deleted: ~~Red text with a strikethrough~~

Synopsis

AN ACT to amend the real property actions and proceedings law, the general obligations law and the civil practice law and rules, in relation to the rights of parties involved in actions commenced upon real property related instruments

Became a law December 30, 2022, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

Text

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title.

This act shall be known and may be cited as the "foreclosure abuse prevention act".

Section 2. Subdivision 3 of section *1301* of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended and a new subdivision 4 is added to read as follows:

3. 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.

4. If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations.

NEIL MILLER

Section 3. Subdivisions 4 and 5 of section *17-105* of the general obligations law are amended to read as follows:

4. ~~Except as provided in subdivision five, no~~An acknowledgment, waiver~~or promise has any effect to~~, promise, or agreement, express or implied in fact or in law, shall not, in form or effect, postpone, cancel, reset, toll, revive or otherwise extend the time limited for commencement of an action to foreclose ~~or~~a mortgage for any greater time or in any other manner than that provided in this section, ~~nor~~ unless it is made as provided in this section.

5. This section does not change the requirements~~,~~ or the effect with respect to the accrual of a cause of action nor the time limited for commencement of an action~~, of~~based upon either:

a. a payment or part payment of the principal or interest secured by the mortgage, or

b. a stipulation made in an action or proceeding.

Section 4. Section *203* of the civil practice law and rules is amended by adding a new subdivision (h) to read as follows:

(h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

Section 5. Subdivision (c) of section *205* of the civil practice law and rules, as amended by chapter 216 of the laws of 1992, is amended to read as follows:

(c) Application. This section also applies to a proceeding brought under the workers' compensation law but shall not apply to any proceeding governed by section two hundred five-a of this article.

Section 6. The civil practice law and rules is amended by adding a new section *205-a* to read as follows:

§ 205-a. Termination of certain actions related to real property.

(a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to, those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period. For purposes of this subdivision:

1. a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff; and

2. in no event shall the original plaintiff receive more than one six-month extension.

(b) Where the defendant has served an answer and the action upon an instrument described under subdivision four of section two hundred thirteen of this article is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the original plaintiff, or a successor in interest or assignee of the original plaintiff, the assertion of any cause of action or defense by the defendant in the new action shall be timely if such cause of action or defense was timely asserted in the prior action.

Section 7. Subdivision 4 of section *213* of the civil practice law and rules is amended by adding two new paragraphs (a) and (b) to read as follows:

(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.

(b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, 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.

Section 8. Rule *3217* of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

(e) Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, 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.

Section 9. Severability clause.

If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 10.

This act shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced.

History

Approved by the Governor December 30, 2022

Effective date: December 30, 2022

Sponsor

Weinstein

End of Document

SPONSOR MEMO (Select Portion)

BILL NUMBER: S5473D Revised 5/4/2022

PURPOSE AND INTENT OF BILL:

The Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present remedial legislation is to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof.

Accordingly, this bill amends certain statutes and rules to clarify the existing law and overturn those decisions that have strayed from legislative prescription and intent. These amendments and clarifications will ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions. The remedial aim of the bill is to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs to the prejudice of homeowners throughout New York. That some of these tactics have been sanctioned by the judiciary has resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers.

U.S. Bank Trust, N.A. v. Leonardo

Supreme Court of New York, Nassau County

June 12, 2023, Decided

Index No. 14266/2013

Reporter
79 Misc. 3d 1075 *; 192 N.Y.S.3d 472 **; 2023 N.Y. Misc. LEXIS 2871 ***; 2023 NY Slip Op 23181 ****

[**1]** U.S. Bank Trust, N.A., AS TRUSTEE FOR LB-CABANA SERIES IV TRUST, Plaintiff, against Joseph P. *Leonardo* et al., Defendant.

Core Terms

retroactive, foreclosure, rights, statute of limitations, foreclosure judgment, show cause, motions, renewal, vested

Case Summary

Overview
HOLDINGS: [1]-Defendant could not seek renewal under CPLR § 2221(e) because the retroactive application of the Foreclosure Abuse and Prevention Act in this case, when the plaintiff had scheduled a sale to enforce the judgment, contradicted legislative intent and went against public policy. Once a sale was scheduled, the judgment was deemed enforced.

Outcome
Defendant's motion for leave to renew denied in its entirety.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN1 **Foreclosures, Judicial Foreclosures**

As a general matter, enforcement of a foreclosure judgment occurs upon the conducting of the sale. CPLR § 5240. However, it is well-settled that property rights that are vested by the action of the court are placed beyond the reach of legislative power to affect. After adjudication the fruits of the judgment become rights of property Vested property rights under a final judgment or determination in the nature of a judgment cannot be affected by subsequent legislation.

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN2 **Injunctions, Temporary Restraining Orders**

In circumstances where a motion is pending seeking the vacatur of a judgment of foreclosure and sale, or any other relief that would impact the validity of the judgment, but no temporary restraining order is issued, a plaintiff is left with a quagmire.

Governments > Legislation > Effect & Operation > Retrospective Operation

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN3 **Effect & Operation, Retrospective Operation**

A defendant, through the mere filing of a motion when a sale is already scheduled, regardless of its merits, is empowered to thwart plaintiff's efforts to enforce their judgment and, if the Foreclosure Abuse and Prevention Act (*FAPA*) is to be retroactively applied at this very particular stage of the

proceedings, deny a plaintiff the fruits of their judgment which by virtue of the adjudication are vested property rights. Those vested property rights are beyond the reach of subsequent legislative alteration, and thus an interpretation of *FAPA* that results in an impairment of already vested rights cannot be inferred to be the legislative intent of the statute.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Effect & Operation > Prospective Operation

HN4[] **Legislation, Interpretation**

In determining whether a statute should be given retroactive effect, the court has recognized two axioms of statutory interpretation. Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN5[] **Procedural Due Process, Scope of Protection**

Retroactivity is generally disfavored in the law. However, courts defer to the legislature where the applicable legislation contains express language pertaining to retroactivity unless it reaches so far into the past or so unfairly as to constitute a deprivation of property without due process.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent and some other construction should be placed upon the statute, if possible, without violation of its language.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN7[] **Constitutional Questions, Necessity of Determination**

It is axiomatic that a constitutional question must be bypassed if the constitutional issue can be avoided by deciding the matter in some other fashion.

Headnotes/Summary

Headnotes

Mortgages — Foreclosure — Foreclosure Abuse Prevention Act — Retroactive Application to Judgment of Foreclosure — Judgment Enforced When Sale Scheduled

In a mortgage foreclosure action, the Foreclosure Abuse Prevention Act (L 2022, ch 821 [*FAPA*]) was not applied retroactively to the judgment of foreclosure and sale, because sale of the property had been scheduled and the judgment was therefore deemed enforced. *FAPA* applies "to all actions commenced on an instrument described under [*CPLR 213 (4)*] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10). As a general matter, enforcement of a foreclosure judgment occurs upon the conducting of the sale. However, it is well-settled that property rights that are vested by the action of a court are placed beyond the reach of legislative power to affect. After adjudication, the fruits of a judgment become rights of property and vested property rights under a final judgment or determination in the nature of a judgment cannot be affected by subsequent legislation. Here, plaintiff bank had attempted to schedule a sale of the foreclosed property for nearly a decade but was thwarted by defendant mortgagor's vexatious motion practice and delay tactics. Plaintiff's vested property rights were beyond the reach of subsequent legislative alteration, and thus an interpretation of *FAPA* that resulted in an impairment of already vested rights could not be inferred to be the legislative intent of the statute. Because *FAPA* was explicitly intended to level the playing field and ensure that plaintiffs do not have access to the perpetual ability to reset their own statute of limitations, it could not be reasonably construed to instead provide a savvy and/or litigious defendant the infinite opportunity to prevent a plaintiff from

enforcing their judgment and reaching the case's conclusion. Plaintiff's judgment therefore was deemed enforced once it scheduled a sale and it was entitled to proceed.

Counsel: **[***1]** Plaintiff's Attorneys: Zachary Gold, Esq., Friedman Vartolo, LLP, New York, NY.

Defendant's Counsel: Justin Pane, Esq., Justin F. Pane, P.C., Bohemia, NY.

Judges: HON. DAVID P. SULLIVAN, J.S.C.

Opinion by: DAVID P. SULLIVAN

Opinion

[*1076] **[**473]** David P. Sullivan, J.

The following papers were read on this motion:

Order to Show Cause and Supporting Documents 1

Affirmation in Opposition and Supporting Documents 2

Correspondence from Defendant's Counsel dated March 24, 20233

Correspondence from Plaintiff's Counsel dated March 24, 2023 4

Defendant Joseph P. ***Leonardo*** (hereinafter "Defendant") has moved by order to show cause seeking leave to renew, pursuant to *CPLR §2221(e)*, with respect to the Judgment of Foreclosure entered November 30, 2015 (hereinafter the "2015 Order") and, upon renewal, for an order dismissing the underlying action based on the expiration of the applicable statute of limitations pursuant to *CPLR §1001*, *1003*, and *RPAPL 1311(1)* based upon the enactment of the Foreclosure Abuse Prevention Act. Plaintiff opposed and the motion was deemed submitted on February 28, 2023.

This action was commenced on November 26, 2013, to foreclose with respect to a note and mortgage executed by Joseph ***Leonardo*** and Audrey ***Leonardo*** on June 10, 2008 in the amount of $504,000.00 for **[***2]** real property known as 2848 Riverside Dr, Wantagh, New York 11793 (hereinafter the "Property") based on Defendants' default on the loan as of February 22, 2010 and continuing thereafter without exception, as conceded in Defendant's moving papers.

On or about August 5, 2010, plaintiff's predecessor-in-interest commenced a foreclosure action in this court (hereinafter the "2010 Action") under Index No. 014885/2010. Defendant appeared and participated in the 2010 Action by, *inter alia*, serving an answer.

The 2010 Action was voluntarily discontinued by Order Discontinuing Action and Cancelling Notice of Pendency entered December 21, 2015 which granted plaintiff's predecessor's unopposed motion for voluntary discontinuance.

On or about November 23, 2013, while the 2010 Action remained active, new counsel for plaintiff's same predecessor-in-interest **[*1077]** commenced the instant foreclosure action in this court.

Defendant filed a motion to dismiss which was denied for defective service. Plaintiff moved for summary judgment, and Defendant cross-moved to dismiss. On February 23, 2015, this court granted Plaintiff summary judgment and denied Defendant's cross motion.

Defendant filed a third motion to dismiss, **[***3]** which was denied by the Court on February 20, 2015. Defendant moved to reargue that decision, which motion was denied on August 3, 2016.

Plaintiff moved for judgment of foreclosure and sale and Defendant cross-moved to dismiss for the fifth time. Judgment of Foreclosure and Sale was entered on November 24, 2015 (hereinafter the "2015 JFS") and Defendant's cross-motion was denied.

On November 24, 2015, Defendant moved to dismiss for the sixth time, which motion was denied by Order dated March 10, 2016. Defendant's wife Audrey ("Audrey"), also named as a defendant herein, then filed two motions to dismiss which were later withdrawn.

Audrey moved in March of 2016 to vacate the 2015 JFS by order to show cause, and Defendant moved to reargue the 2015 **[**474]** JFS. Both motions were jointly denied by Order dated **[****2]** September 22, 2016.

Defendant moved again for dismissal in August of 2016 and Plaintiff cross-moved for sanctions. Defendant and Audrey then further moved for, *inter alia*, reargument with respect to the September 22, 2016 Order, and for vacatur of the 2015 JFS. By Order dated April 11, 2017 (hereinafter the "2017 Order"), this court (Adams, J.) granted two motions by Plaintiff for sanctions **[***4]** (Motion Sequences 15 and 19) to the extent that "any future motions by defendants shall be by submission of an Order to Show Cause submitted on thirty-six (36) hours written notice to counsel for plaintiff of the time of submission", and denied Defendant's then-pending motions (Motion Sequences 16, 17, 18, 19, 20).

The 2017 Order was appealed, and the Appellate Division Second Department denied all pending appeals, including

reargument thereof (*Wells Fargo Bank, N.A. v. **Leonardo**, 167 AD3d 816, 90 N.Y.S.3d 199 [2d Dept 2018]*). Defendant then filed a motion to appeal to the Court of Appeals which was denied by the Court of Appeals on January 14, 2020, and reargument was thereafter **[*1078]** denied as well (*Wells Fargo Bank, N.A. v. **Leonardo**, 34 NY3d 908, 115 N.Y.S.3d 785, 139 N.E.3d 409 [2020]*; *Wells Fargo Bank, N.A. v. **Leonardo**, 35 NY3d 984, 125 N.Y.S.3d 73, 148 N.E.3d 537 [2020]*).

Defendant now moves, by Motion Sequence 27, some eight years post-judgment, for an order vacating the 2015 JFS and dismissing the action arguing that the instant case is barred by the statute of limitations in light of the enactment of the Foreclosure Abuse and Prevention Act (hereinafter "***FAPA***") on December 30, 2022 and its retroactive application.

Plaintiff argues that ***FAPA*** does not apply retroactively in this matter, and that, if it does, they have, in any event, "enforced" the 2015 JFS through their attempts to schedule sales. Plaintiff further contends that the retroactive **[***5]** application would render ***FAPA*** unconstitutional.

FAPA amended six laws (*CPLR § 203*, *CPLR § 205*, *CPLR § 213*, *CPLR § 3217*, *RPAPL § 1301* and *GOL § 17-105* and added *CPLR § 205-a*). According to the Bill Jacket, the stated purpose and intent of ***FAPA***, *inter alia*, is to "ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions" and "to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs" (Sponsor Memo, Bill Jacket, L. 2022, ch 821). ***FAPA*** recognized that "the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage". (*Id.*).

Defendant now argues that he is entitled to renewal pursuant to *CPLR §2221(e)* based upon a change in the law.

Plaintiff argues that ***FAPA*** cannot be applied retroactively in the instant matter, however this claim is belied by the express language of the statute. (See, *Deutsche Bank National Trust Company as Trustee for Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE5 v. Dagrin, 2023 NY Slip Op. 23103 [Sup Ct, Queens County 2023]*).

FAPA (§10) **[***6]** states that "This act shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced".

HN1[↑] **[*1079] [**475]** As a general matter, enforcement of a foreclosure judgment occurs upon the conducting of the sale. (*CPLR §5240; See, Guardian Loan Co., Inc. v. Early, 47 NY2d 515, 392 N.E.2d 1240, 419 N.Y.S.2d 56 [1979]*). However, it is well-settled that property rights that are vested by the action of the court are placed beyond the reach of legislative power to affect (*Gilman v Tucker, 128 N.Y. 190, 28 N.E. 1040, 21 N.Y. Civ. Proc. R. 170, 13 L.R.A. 304 [1891]*). "After adjudication the fruits of the judgment become rights of property" (*Id.*). "[V]ested property rights under a final judgment or determination in the nature of a judgment cannot be affected by subsequent legislation" (*People ex rel. H.D.H. Realty Corp. v Murphy, 194 A.D. 530, 186 N.Y.S. 38 [1st Dept 1920]*, citing *Gilman v. Tucker, supra*).

In the instant matter, Plaintiff has been attempting to schedule a sale for nearly a decade and has been thwarted over and over again by Defendant's vexatious motion practice and delay tactics. This Court (Adams, J.) imposed limitation on further motion practice in the 2017 Order.

HN2[↑] In circumstances where a motion is pending seeking the vacatur of a judgment of foreclosure and sale, or any other relief that would impact **[***7]** the validity of the judgment, but no temporary restraining order is issued, a plaintiff is left with a quagmire. Plaintiff may conduct the sale at their peril, thus risking that the sale is ultimately cancelled, or that the subsequent transfer of the property while decision is pending potentially divests them of their investment at the eleventh hour and could leave them owing restitution. The choice does not always lie with the plaintiff, as is the case here, where multiple sales have been cancelled as a result of temporary restraining orders issued in connection with repeated orders to show cause ultimately determined to be meritless. *HN3*[↑] Thus, a defendant, through the mere filing of a motion when a sale is already scheduled, regardless of its merits, is empowered to thwart plaintiff's efforts to enforce their judgment and, if ***FAPA*** is to be retroactively applied at this very particular stage of the proceedings, deny a plaintiff the fruits of their judgment which by virtue of the adjudication are vested property rights. Those vested property rights are beyond the reach of subsequent legislative alteration, and thus an interpretation of ***FAPA*** that results in an impairment of already vested **[***8]** rights cannot be inferred to be the legislative intent of the statute. (see, *Newrez LLC v. Kalina, 185 N.Y.S.3d 651, 78 Misc 3d 1217[A], 2023 NY Slip Op 50249[U] [Sup Ct, Albany County 2023]*; *MTGLQ Investors, L.P. v. Gross, 2023 NY Slip Op. 23082 [Sup Ct, Westchester County 2023]*; *Gilman v. Tucker, supra.*)

[*1080] As cited in ***FAPA***'s Sponsor Memo as it pertained to the effective date of the legislation, and thus its retroactivity,

the Court of Appeals articulated the standard for statutory retroactivity analysis in *Matter of Gleason (Michael Vee, Ltd.) (96 N.Y.2d 117, 749 N.E.2d 724, 726 N.Y.S.2d 45 [2001])* stating that:

> *HN4*[↑] In determining whether a statute should be given retroactive effect, we have recognized two axioms of statutory interpretation. Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis **[****3]** include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself **[**476]** reaffirms a legislative judgment about what the law in question should be. (internal citations omitted)

HN5[↑] "Retroactivity is generally disfavored **[***9]** in the law" (*Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 [1998]*). However, courts defer to the legislature where the applicable legislation contains express language pertaining to retroactivity "unless it reaches so far into the past or so unfairly as to constitute a deprivation of property without due process" (*Varrington Corp. v. City of New York Dep't of Fin., 85 NY2d 28, 32, 647 N.E.2d 746, 623 N.Y.S.2d 534 [1995]*; *Deutsche Bank v. Dagrin, supra*).

HN6[↑] "An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent and some other construction should be placed upon the statute, if possible, without violation of its language" (McKinney's Cons Laws of NY, Statutes §143).

In articulating the justification for ***FAPA***, the Sponsor notes that:

> Thus, while the Legislature fully agrees with the judiciary that "clear" and "bright line" rules should govern actions involving real property related instruments (see *Bank of Am., N.A. v Kessler, 202 AD3d 10, 14, 160 N.Y.S.3d 277 (2d Dept 2021)*; citing *Engel, 37 NY3d at 19, 20, 24*), the rules pronounced in Engel contravene the legislative purpose and express language of numerous **[*1081]** statutes and undermine ***the important public policy of giving repose to human affairs***.
>
> Accordingly, this remedial legislation seeks to level the playing field for all parties engaged in litigation involving mortgage related real property instruments and ***ensure the statute of limitations not only applies [***10] equally to all, but is impervious to unilateral manipulation***. (Sponsor Memo, Bill Jacket, L. 2022, ch 821 [emphasis added])

In the instant matter the application of ***FAPA*** retroactively at the specific moment in the timeline of the action where a plaintiff has undertaken affirmative steps toward the enforcement of the judgment by scheduling the sale would effectively take the proverbial sword from the hands of a plaintiff and rather than shielding the defendant, hand them the sword. This flies in the face of the legislature's stated intent to thwart unilateral manipulation of statutory limitations and would be directly contrary to the public policy of giving repose to human affairs by denying plaintiff, rather than defendant, repose.

In this case, Plaintiff's near-decade long efforts to sell the subject property have been forestalled due to a series of ultimately denied motions such that the 2015 JFS has not been "enforced". A statute explicitly intended to level the playing field and ensure that plaintiffs do not have access to the perpetual ability to reset their own statute of limitations cannot be reasonably construed as to have been intended to instead provide a savvy and/or litigious **[***11]** defendant the infinite opportunity to prevent a plaintiff from enforcing their judgment and reaching the case's conclusion. Beyond a retroactive deprivation of vested rights, such a construction would reward dilatory tactics and lead to patently unreasonable results.

Therefore, to the extent that Defendant seeks renewal based upon the retroactive application of ***FAPA*** where Plaintiff has already scheduled a sale, despite the fact that the sale was not actually conducted, the court finds that such would not be a reasonable interpretation of ***FAPA***. For the purposes of the retroactive applicability **[**477]** of ***FAPA***, once a sale has been scheduled the judgment is deemed enforced, and therefore Defendant is not entitled to renewal.

HN7[↑] It is axiomatic that a constitutional question must be bypassed if the constitutional issue can be avoided by deciding **[*1082]** the matter in some other fashion. *(People of the State of New York v. Felix, 58 NY2d 156, 446 N.E.2d 757, 460 N.Y.S.2d 1 (1983)*, citing to McKinney's Cons Laws of NY, Statutes §150; *Nestor I LLC v. Moriarty-Gentile, 78 Misc 3d 1233[A], 2023 NY Slip Op 50408[U] [Sup Ct, Suffolk County 2023]*). Inasmuch as the instant matter is resolved on other grounds, this court need not reach the issue of constitutionality.

Accordingly, it is hereby:

US Bank Trust, N.A. v. Reizes

Supreme Court of New York, Appellate Division, Second Department

December 20, 2023,Decided

2020-00819 (Index No. 523467/17)

Reporter
2023 N.Y. App. Div. LEXIS 6607 *; 2023 NY Slip Op 06553 **; 222 A.D.3d 907; 2023 WL 8792628

[**1] US Bank Trust, N.A., etc., respondent-appellant, v Mendel ***Reizes***, appellant-respondent, et al., defendants.

Prior History: In an action to foreclose a mortgage, the defendant Mendel ***Reizes*** appeals, and the plaintiff cross-appeals, from an order of the Supreme Court, Kings County (Noach Dear, J.), dated October 31, 2019. The order, insofar as appealed from, in effect, denied that branch of the motion of the defendant Mendel ***Reizes*** which was pursuant to *CPLR 3211(a)(5)* to dismiss the complaint insofar as asserted against him as barred by the statute of limitations and granted the plaintiff's cross-motion pursuant to *CPLR 2201* to stay the action. The order, insofar as cross-appealed from, in effect, denied that branch of the motion of the defendant Mendel ***Reizes*** which was pursuant to *CPLR 3211(a)(5)* [*1] to dismiss the complaint insofar as asserted against him as barred by the statute of limitations.

Core Terms

mortgage, statute of limitations, accelerated, commence, validly, mortgage debt, installment, commencement of the action, federal court action, defense motion, cross-appeal, cross-motion, foreclose, judicial determination, instant action, prior action, prima facie, inter alia, interposed, asserting, quotation, estopped, expired, marks

Case Summary

Overview

HOLDINGS: [1]-In an action to foreclose a mortgage, the action was untimely under *CPLR 3211(a)(5)* because defendant demonstrated that the statute of limitations began to run on June 1, 2010, when the mortgage company accelerated the mortgage debt and commenced the 2010 action; since the action was not commenced until December 6, 2017, more than six years later, defendant established, prima facie, that the instant action was untimely.

Outcome
Cross-appeal dismissed; order reversed.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > Time Limitations

HN1[] **Burdens of Proof, Allocation**

On a motion to dismiss a complaint pursuant to *CPLR 3211(a)(5)* on the ground that the statute of limitations has expired, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period.

Business & Corporate Compliance > Contracts > Types

of Contracts > Installment Contracts
Contracts Law > Types of Contracts > Installment Contracts

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property
Law > Financing > Foreclosures > Defenses

HN2[⬇] **Types of Contracts, Installment Contracts**

An action to foreclose a mortgage is subject to a six-year statute of limitations *CPLR 213(4)*. With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt.

Headnotes/Summary

Headnotes

Limitation of Actions — Six-Year Statute of Limitations — Mortgage Foreclosure — Acceleration of Debt by Commencement of Prior Foreclosure Action — Validity — Unilateral De-Acceleration Letter Allegedly Sent to Defendant Failed to Revive or Reset Statute of Limitations

Counsel: Mesnashe & Associates, LLP, Montebello, NY (Chezki Menashe of counsel), for appellant-respondent.

Stern & Eisenberg, P.C., Depew, NY (Arsenio Rodriguez of counsel), for respondent-appellant.

Judges: FRANCESCA E. CONNOLLY, J.P., CHERYL E. CHAMBERS, LINDA CHRISTOPHER, BARRY E. WARHIT, JJ. CONNOLLY, J.P., CHAMBERS, CHRISTOPHER and WARHIT, JJ., concur.

Opinion

DECISION & ORDER

ORDERED that the cross-appeal is dismissed; and it is further,

ORDERED that the order is reversed insofar **[*2]** as appealed from, on the law, that branch of the motion of the defendant Mendel ***Reizes*** which was pursuant to *CPLR 3211(a)(5)* to dismiss the complaint insofar as asserted against him as barred by the statute of limitations is granted, and the plaintiff's cross-motion pursuant to *CPLR 2201* to stay the action is denied; and it is further,

ORDERED that one bill of costs is awarded to the defendant Mendel ***Reizes***.

The cross-appeal by the plaintiff from the order must be dismissed, as the plaintiff is not aggrieved thereby (*see CPLR 5511*). The issues raised on the cross-appeal have been considered as alternative grounds for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y., 60 NY2d 539, 458 N.E.2d 1241, 470 N.Y.S.2d 564*; *Matter of Boyajian v Village of Ardsley, Zoning Bd. of Appeals, 210 AD3d 1079, 1080, 179 N.Y.S.3d 701*).

On June 22, 2005, Mendel ***Reizes*** (hereinafter the defendant) and Yehoshua Yusewitz executed a note in the sum of $450,000 in favor of HSBC Mortgage Corporation (USA) (hereinafter HSBC Mortgage). The note was secured by a mortgage on certain residential property located in Brooklyn. On June 1, 2010, HSBC Mortgage commenced an action (hereinafter the 2010 action) against the defendant and Yusewitz, among others, to foreclose the mortgage. The 2010 action was purportedly dismissed in August 2014. Subsequently, the mortgage was allegedly assigned to the plaintiff.

On December 6, 2017, the **[*3]** plaintiff commenced this action against the defendant and Yusewitz, among others, to foreclose the mortgage. Thereafter, the defendant moved, inter alia, pursuant to *CPLR 3211(a)(5)* to dismiss the complaint insofar as asserted against him as barred by the statute of limitations. The plaintiff cross-moved pursuant to *CPLR 2201* to stay the action in light of two federal court actions brought by the defendant (hereinafter the federal court actions), in which the defendant alleged, among other things, that the plaintiff's former attorneys in the instant matter and an alleged loan servicer for the loan violated the *Fair Debt Collection Practices Act (15 USC 1692 et seq.)* by knowingly attempting to collect on a time-barred debt. Although the plaintiff was not a party to either of the federal court actions, the plaintiff contended that a stay in this action was necessary in order to avoid the potential of conflicting decisions.

In an order dated October 31, 2019, the Supreme Court, inter alia, in effect, denied that branch of the defendant's motion which was pursuant to *CPLR 3211(a)(5)* to dismiss the complaint insofar as asserted against him as barred by the statute of limitations and granted the plaintiff's cross-motion pursuant to *CPLR 2201* to stay the action. The defendant appeals.

HN1[↑] "On a **[*4]** motion to dismiss a complaint pursuant to *CPLR 3211(a)(5)* on the ground that the statute of limitations has expired, the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (*Bayview Loan Servicing, LLC v Paniagua, 207 AD3d 691, 691-692, 172 N.Y.S.3d 451* [internal quotation marks omitted]; *see U.S. Bank N.A. v Vitolo, 182 AD3d 627, 627-628, 120 N.Y.S.3d 791*). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Bayview Loan Servicing, LLC v Paniagua, 207 AD3d at 692* [internal quotation marks omitted]; *see U.S. Bank N.A. v Vitolo, 182 AD3d at 628*).

HN2[↑] An action to foreclose a mortgage is subject to a six-year statute of limitations (*see CPLR 213[4]*). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due (*see Nationstar Mtge., LLC v Weisblum, 143 AD3d 866, 867, 39 N.Y.S.3d 491*). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the [s]tatute of [l]imitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella, 279 AD2d 604, 605, 720 N.Y.S.2d 161*).

Here, the defendant demonstrated that the statute of limitations began to run on June 1, 2010, when HSBC Mortgage accelerated **[*5]** the mortgage debt and commenced the 2010 action. Since the plaintiff did not commence the instant action until December 6, 2017, more than six years later, the defendant established, prima facie, that the instant action was untimely (*see Wilmington Sav. Fund Socy., FSB v Avenue Basin Mgt., Inc., 211 AD3d 1085, 1086, 181 N.Y.S.3d 318*; *U.S. Bank N.A. v Nail, 203 AD3d 1095, 1097, 165 N.Y.S.3d 124*).

In opposition, the plaintiff failed to raise a question of fact. Contrary to the plaintiff's contention, pursuant to *CPLR 203*, as amended by the Foreclosure Abuse Prevention Act (L 2022, ch 821 [eff Dec 30, 2022]; hereinafter FAPA), the unilateral de-acceleration letter allegedly sent to the defendant failed to revive or reset the statute of limitations (*see* 203[h]; *Anglestone Real Estate Venture Partners Corp. v Bank of New York Mellon*, __ AD3d __, ***2023*** NY Slip Op 06109 [2d Dept]; *E. Fork Funding LLC v U.S. Bank, N.A., 2023 US Dist LEXIS 56719, 2023 WL 2660645 [EDNY 2023]*).

Further, the plaintiff's contentions that the mortgage debt was not validly accelerated because HSBC Mortgage did not have standing to commence the 2010 action and failed to comply with *RPAPL 1304* before commencing that action are without merit. Pursuant to *CPLR 213(4)*, as amended by FAPA, "[i]n 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, **[*6]** 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*" (*id. § 213[4][a]* [emphasis added]; *see GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d 915, 916-917, 184 N.Y.S.3d 805*). Here, there is no indication in the record that the **[**2]** 2010 action was dismissed "based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated" (*CPLR 213[4][a]*). Therefore, the plaintiff is estopped from asserting that the mortgage debt was not validly accelerated by the commencement of the 2010 action (*see id.*; *GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d at 916-917*).

Accordingly, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to *CPLR 3211(a)(5)* to dismiss the complaint insofar as asserted against him as barred by the statute of limitations.

Further, the Supreme Court should have denied the plaintiff's cross-motion pursuant to *CPLR 2201* to stay the action (*see Davis v Commack Hotel, LLC, 211 AD3d 679, 680, 177 N.Y.S.3d 907*).

CONNOLLY, J.P., CHAMBERS, CHRISTOPHER and WARHIT, JJ., concur.

End of Document

NY CLS RPAPL § 1301

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1393)

§ 1301. Separate action for mortgage debt

1. Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

2. The complaint shall state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected.

3. 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.

4. If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations.

History

Add, L 1962, ch 312, eff Sept 1, 1963; *L 2022, ch 821, § 2*, effective December 30, 2022.

Annotations

Notes

Derivation Notes

Deriving from CPA §§ 1077, 1078; RCP 255.

Advisory Committee Notes:

This section combines CPA §§ 1077 and 1078 with RCP 255.

Wells Fargo Bank, N.A. v. Brown

Supreme Court of New York, Nassau County

January 23, 2024, Decided

Index No. 016936/2007

Reporter
2024 N.Y. Misc. LEXIS 412 *; 2024 NY Slip Op 30296(U) **

[**1] WELLS FARGO BANK, NA AS TRUSTEE FOR THE MLMI TRUST SERIES 2005-FMI, Plaintiff, -against- PATRICK BROWN, et. al., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

default, foreclosure, reference order, leave to renew, cross-motion, argues, renew, default judgment, subject property, instant action, former action, prior action, prior motion, prior order, inlaw, discontinuance, Mortgage, changes, papers, vacate

Judges: [*1] HON. DAVID P. SULLIVAN, J.S.C.

Opinion by: DAVID P. SULLIVAN

Opinion

FORECLOSURE PART

Upon the foregoing papers, Defendant Patrick Brown's motion, pursuant to *CPLR § 2221(e)*, for leave to renew Plaintiff's motion, dated November 28, 2018, and Defendant's cross-motion, dated January 29, 2019 to dismiss the complaint, and, upon renewal, for an Order of this Court (1) vacating the order and judgment of this Court dated June 9, 2022 confirming the referee's report and granting ajudgment of foreclosure and sale; (2) denying Plaintiff's motion for an order of reference; (3) and granting Defendant's cross-motion for an Order to dismiss is determined as set forth hereinafter.

Background and Facts

On or about April 8, 2005, Defendant executed and delivered to non-party FREMONT INVESTMENT AND LOAN a note in the amount of $332,800.00 which was secured by a mortgage on certain real property located at 1145 Irving Street, Valley Stream. New York (the "subject property"). On or about May 1, 2007, Defendant defaulted on his obligations to pay as required under the Note and Mortgage, leading Plaintiff to commence this action to foreclosure on the subject property on or about September 21, 2007. Defendant was served on or about [**2] September [*2] 26, 2007 and apparently has not formally appeared in this action with an answer. Based on Defendant's default, Plaintiff moved and was granted an order of reference on November 20, 2008.

From the Court's record, it appears following the granting of the order of reference, no further action was taken. On or about May 9, 2014, the matter was transferred to Plaintiff's current counsel of record, Gross Polowy, LLC. On or about May 18, 2018, Plaintiff moved to vacate the previously granted order of reference and sought a new order granting it a default judgment and order of reference. This motion, however, was withdrawn on June 12, 2018.

On or about December 4, 2018, Plaintiff moved again for a default judgment and order of reference. Defendant cross-moved to dismiss the complaint. In an Order entered September 9, 2019, this Court (Adams, J.)(the "September 9 Order")(NYSECF Doc. No. 30) granted Plaintiff's motion for a default judgment and an order of reference. On or about June 9, 2022, Plaintiff filed a motion for a judgment of foreclosure and sale, which was granted on October 26, 2022 (Sullivan, J.) over Defendant's opposition. Defendant appealed from that Order on or about December 19, [*3] 2022.

The Instant Motion

Defendant now seeks leave to renew the September 9 Order. In so doing, Defendant argues that during the pendency of this action, Plaintiff actually filed a second action with the same caption in 2012 under ***Nassau*** County Index No. 0103064/2012 (the "2012 action"). Defendant argued, in his initial cross-motion papers, that this action, filed first in time,

should be dismissed as effectively abandoned, or, being subject to a "de facto discontinuance" once Plaintiff filed the 2012 action.

Defendant now seeks to renew the prior motion based on the changes in law occasioned by the Foreclosure Abuse Prevention Act of 2023 ("***FAPA***"). Defendant argues that ***FAPA***, **[**3]** when passed, essentially codified the argument contained in its motion to dismiss when in amended New York State's Real Property Actions and Proceedings Law ("RPAPL") to provide that: "[n]o other action shall be commenced...without leave of the court in which the former action was brought" and that, in the event another action is brought without leave from the Court, "the former action shall be deemed discontinued" (*RPAPL 1301 [3]*). Defendant argues that this change in law warrants this Court granting it leave to renew the prior motion, and upon renewal, dismissal of the complaint.

In opposition, Plaintiff argues that (1) Defendant remains **[*4]** in default in this action, and accordingly, must demonstrate a reasonable excuse for its default and a meritorious defense to the instant action; and (2) that ***FAPA***, by its plain terms, does not apply to the instant action. Regarding the latter. Plaintiff contends that ***FAPA*** applies to any foreclosure action pending at the time of its enactment provided that the final judgment and sale had been entered but not yet enforced. Plaintiff asserts that because the Judgment of Foreclosure and Sale has been entered in this action and the sale scheduled, though repeatedly delayed, the action is in enforcement and therefore ***FAPA*** does not apply.

This Court, in the September 9 Order, did not address Defendant's argument, merely noting that Defendant, despite having filed the cross-motion, remained in default. Although still in default, Defendant now seeks leave to renew the prior order. However, the Court agrees with Plaintiff that the existence of a prior action pending is an affirmative defense that Defendant was required to raise in his answer had he not defaulted in this action. The changes to *RPAPL § 1301(3)* concerning the existence of a prior action pending did not introduce a new concept to the RPAPL, but **[*5]** rather, expanded upon the existing statute, the failure to comply with which Defendant could have asserted in his answer. Regardless of the merits of Defendant's argument, the fact remains, as the Court noted in the September 9 Order, that Defendant is in default.

[4]** Accordingly, it is **ORDERED** that Defendant Patrick Brown's motion for leave to renew this Court's prior order granting the judgment of foreclosure and sale is **DENIED**.

This shall constitute the Decision and Order of the Court.

Date: January 23, ***2024***

Mineola, New York

ENTER

/s/ David P. Sullivan

HON. DAVID P. SULLIVAN, J. S. C.

End of Document

NY CLS CPLR § 203

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 2 Limitations of Time (§§ 201 — 218)

§ 203. Method of computing periods of limitation generally.

(a) Accrual of cause of action and interposition of claim. The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed.

(b) Claim in complaint where action commenced by service. In an action which is commenced by service, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when:

1. the summons is served upon the defendant; or

2. first publication of the summons against the defendant is made pursuant to an order, and publication is subsequently completed; or

3. an order for a provisional remedy other than attachment is granted, if, within thirty days thereafter, the summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, or, where the defendant dies within thirty days after the order is granted and before the summons is served upon the defendant or publication is completed, if the summons is served upon the defendant's executor or administrator within sixty days after letters are issued; for this purpose seizure of a chattel in an action to recover a chattel is a provisional remedy; or

4. an order of attachment is granted, if the summons is served in accordance with the provisions of section 6213; or

5. the summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county within the city of New York in which the defendant resides, is employed or is doing business, or if none of the foregoing is known to the plaintiff after reasonable inquiry, then of the county in which the defendant is known to have last resided, been employed or been engaged in business, or in which the cause of action arose; or if the defendant is a corporation, of a county in which it may be served or in which the cause of action arose; provided that:

(i) the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision; or

(ii) first publication of the summons against the defendant is made pursuant to an order within sixty days after the period of limitation would have expired but for this provision and publication is subsequently completed; or

(iii) the summons is served upon the defendant's executor or administrator within sixty days after letters are issued, where the defendant dies within sixty days after the period of limitation would have expired but for this provision and before the summons is served upon the defendant or publication is completed.

6. in an action to be commenced in a court not of record, the summons is delivered for service upon the defendant to any officer authorized to serve it in a county, city or town in which the defendant resides, is employed or is doing business, or if none of the foregoing be known to the plaintiff after reasonable inquiry, then in a county, city or town in which defendant is known to have last resided, been employed or been engaged in business, or, where the defendant is a corporation, in a county, city or town in which it may be served, if the summons is served upon

the defendant within sixty days after the period of limitation would have expired but for this provision; or, where the defendant dies within sixty days after the period of limitation would have expired but for this provision and before the summons is served upon the defendant, if the summons is served upon his executor or administrator within sixty days after letters are issued.

(c) Claim in complaint where action commenced by filing. In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.

(d) Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

(e) Effect upon defense or counterclaim of termination of action because of death or by dismissal or voluntary discontinuance. Where a defendant has served an answer containing a defense or counterclaim and the action is terminated because of the plaintiff's death or by dismissal or voluntary discontinuance, the time which elapsed between the commencement and termination of the action is not a part of the time within which an action must be commenced to recover upon the claim in the defense or counterclaim or the time within which the defense or counterclaim may be interposed in another action brought by the plaintiff or his successor in interest.

(f) Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(g)

1. Time computed from actual or imputed discovery of facts. Except as provided in article two of the uniform commercial code or in *section two hundred fourteen-a* of this chapter, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

2. Notwithstanding paragraph one of this subdivision, in an action or claim for medical, dental or podiatric malpractice, where the action or claim is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, for the purposes of sections fifty-e and fifty-i of the general municipal law, *section ten of the court of claims act*, and the provisions of any other law pertaining to the commencement of an action or special proceeding, or to the serving of a notice of claim as a condition precedent to commencement of an action or special proceeding within a specified time period, the time in which to commence an action or special proceeding or to serve a notice of claim shall not begin to run until the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.

(h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

History

Fannie Mae ("Fannie Mae") v. Kerendian

Supreme Court of New York, Nassau County

October 13, 2023, Decided

Index No. 607224/2018

Reporter
2023 N.Y. Misc. LEXIS 23314 *; 2023 NY Slip Op 34490(U)

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), Plaintiff(s), -against- HALEH KERENDIAN, ET. AL., Defendant(s).

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

mortgage, renew, statute of limitations, retroactively, accelerate, retroactive application, de-accelerate, reargue, foreclosure, rights, foreclosure action, inter alia, unilaterally, documents, quotation, lender, vested, marks, summary judgment motion, contends, election, impair, revoke, summary judgment, reference order, mortgage debt, retroactive effect, contractual right, motion for leave, defense motion

Judges: [*1] Present: HON. DAVID P. SULLIVAN, Supreme Court Justice.

Opinion by: DAVID P. SULLIVAN

Opinion

Upon the foregoing papers, the motion of Defendant Haleh Kerendian (hereinafter "Defendant") pursuant to *CPLR 2221(f)* for leave to renew and reargue her opposition to Plaintiff's motion, inter alia, for summary judgment on the complaint and for an order of reference is determined as hereinafter set forth.

Factual and Procedural Background

On November 25, 2003, Defendant executed a note in the amount of $322,000 in favor of Washington Mutual Bank, FA, which was secured by a mortgage on real property located at 7 Spring Lane, Kings Point, New York ("the subject property"). Thereafter, the mortgage was assigned to JPMorgan Chase Bank, National Association ("Chase"). On June 23, 2009, Chase commenced an action to foreclose the mortgage (hereinafter the "2009 action"). By order dated September 13, 2012, the 2009 action was dismissed as abandoned pursuant to *CPLR 3215(c)*. On March 27, 2015, Chase sent a letter to Defendant de-accelerating the loan, withdrawing its prior demand for immediate payment of all sums secured by the mortgage, and reinstituting the loan as an installment loan.

Inn July 2016, the mortgage was assigned, and the note was transferred, [*2] to Plaintiff. On May 30, 2018, Plaintiff commenced this action, contending that Defendant failed to make the payment that was due on June 1, 2012, and all subsequent payments. Defendant interposed an answer and asserted various affirmative defenses, including expiration of the statute of limitations and failure to comply with *RPAPL 1304*. On January 17, 2019, Plaintiff moved, inter alia, for summary judgment on the complaint and for an order of reference. In a decision and order entered April 4, 2019 (Adams, J.), Plaintiff's motion was denied, with leave to renew upon proper papers including some evidence that Chase was truly seeking to de-accelerate the mortgage debt in issuing the March 27, 2015 letter.

On September 22, 2022, Plaintiff again moved, inter alia, for summary judgment on the complaint and for an order of reference (hereinafter the "summary judgment motion"). Defendant opposed the summary judgment motion, contending, inter alia, that Plaintiff failed to show that it had complied with *RPAPL 1304*, and the statute of limitations had expired. In a decision and order entered December 16, 2022 (Sullivan, J.), the summary judgment motion was granted, and in an order entered December 14, 2022, inter [*3] alia, a referee was appointed to compute the amount due Plaintiff ("order of reference").

Defendant's motion to renew and reargue

Defendant now moves pursuant to *CPLR 2221(f)* to renew

and reargue her opposition to the summary judgment motion, contending that reargument should be granted because: (1) the Court overlooked or misapprehended the law and the facts by determining that Plaintiff did not have to comply with RPAPL 1304; and (2) res judicata or collateral estoppel dictate that Plaintiff's motion be denied, and that renewal is appropriate based upon: (1) the enactment of the ***Foreclosure Abuse Prevention Act*** ("FAPA") (L 2022, ch 821); (2) the Court of Appeals decision in Bank of America v Kessler (39 NY3d 317, 186 N.Y.S.3d 85, 206 N.E.3d 1228 [2023]); and (3) her submission of "2005 residential owner occupied financing forms." Plaintiff opposes the motion arguing that Defendant did not raise collateral estoppel or res judicata as an affirmative defense in her answer, and is improperly raising them for the first time on reargument; Defendant failed to establish that the Court overlooked or misapprehended the relevant facts or misapplied controlling law in holding that Plaintiff was not required to comply with RPAPL 1304; Defendant failed to offer a reasonable justification for not presenting **[*4]** the newly submitted documents in opposition to the summary judgment motion, and in any event, the documents would not change the Court's determination; and PAPA cannot be retroactively applied to this action, as to do so would violate due process, the Contracts Clause, and the Bill of Attainder Clause, and constitute an unconstitutional taking.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). "While the determination to grant leave to reargue lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (Jaspar Holdings, LLC v Gotham Trading Partners # 1, LLC, 186 AD3d 582, 584, 130 N.Y.S.3d 19 [2d Dept. 2020] [citation and internal quotation marks omitted]; see Degraw Constr. Group, Inc. v McGowan Builders, Inc., 178 AD3d 772, 773, 111 N.Y.S.3d 898 [2d Dept 2019]). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked (see Matter of Hoffmann v Debello-Teheny, 27 AD3d 743, 815 N.Y.S.2d 627 [2d Dept 2006]). Absent such a showing, the court must deny the motion (see Barrett v Jeannot, 18 A.D.3d 679, 679, 795 N.Y.S.2d 727 [2d Dept 2005]).

A motion for leave to renew "shall be based upon **[*5]** new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e][2]; see McLaughlin v Snowlift, Inc., 214 AD3d 720, 721, 185 N.Y.S.3d 212 [2d Dept 2023]). "A motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law" (Opalinski v City of New York, 205 AD3d 917, 919, 168 N.Y.S.3d 116 [2d Dept 2022]; see Dinallo v DAL Elec., 60 AD3d 620, 621, 874 N.Y.S.2d 246 [2d Dept 2009]).

Here, Defendant has failed to demonstrate that the Court misapprehended the relevant facts or misapplied a controlling principle of law in determining that notice was not required pursuant to RPAPL 1304. In addition, Defendant's argument that res judicata and collateral estoppel require a denial of Plaintiff's motion was not previously advanced in her opposition to the summary judgment motion. Such a new argument cannot serve as the basis of a motion to reargue (see Degraw Constr. Group, Inc. v McGowan Builders, Inc., 178 AD3d at 773; Frisenda v X Large Enterprises Inc., 280 AD2d 514, 515, 720 N.Y.S.2d 187 [2d Dept 2001]). As such, that branch of Defendant's motion which was for leave to reargue is denied.

Defendant has also not established her entitlement to renewal with respect to the issue of RPAPL 1304. Contrary to Defendant's contention, the Court of Appeals' decision in Bank of America v Kessler (39 NY3d 317, 186 N.Y.S.3d 85, 206 N.E.3d 1228 [2023]) did not change the applicable law holding that a notice pursuant to RPAPL 1304 is not required to be sent where the loan is for an investment property and the borrower **[*6]** resides elsewhere, since such a loan does not qualify as a "home loan" under the statute. As such, renewal is not warranted based on *Kessler* (see e.g. Opalinski v City of Kew York, 164 A.D.3d 1354, 1355, 84 N.Y.S.3d 499 [2d Dept 2018]).

Nor do the documents submitted by Defendant justify renewal. In counsel's affirmation in support of the motion to renew and reargue, he claims to be annexing "2005 residential owner occupied financing forms." Defendant also submits her affidavit in which she alleges that she refinanced the loan in 2003 with Washington Mutual Bank, and due to an extensive flood a "couple of years ago" from Hurricane Ida, she discarded many of the boxes where she stored her documents. According to Defendant, "[r]ecently, I discovered a box containing of the [sic] closing documents in my storage room. I immediately provided the closing documents to my attorney which are now respectfully submitted to the Court." The documents annexed to the motion are an unsigned owner occupancy agreement dated November 25, 2003, between Washington Mutual Bank, FA and Defendant, and a deed from the prior owner of the subject property to Defendant. "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in

making [*7] their first factual presentation" (*Cioffi v S.M. Foods, Inc., 142 AD3d 526, 530, 36 N.Y.S.3d 664 [2d Dept 2016]* [internal quotation marks omitted]). As such, "the Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (*id. at 530*). Reasonable justification does not exist where 'the new evidence consists of documents which the [moving party] knew existed, and were in fact in his [or her] own possession at the time the initial motion was made" (*Rowe v NYCPD, 85 AD3d 1001, 1003, 926 N.Y.S.2d 121 [2d Dept 2011]* [internal quotation marks omitted]). Here, Defendant fails to offer a reasonable justification for her failure to present the new facts in opposition to the summary judgment motion (*see Yadegar v Deutsche Bank Natl. Tr. Co., 164 AD3d 945, 948, 83 N.Y.S.3d 173 [2d Dept 2018]*). In any event, the new evidence would not have changed the prior determination.

However, Defendant also contends she is entitled to renewal based upon the enactment of FAPA, which she argues is immediately applicable to this action and renders it time-barred.

"Pursuant to *CPLR 213(4)*, an action to foreclose a mortgage is subject to a six-year statute of limitations. Even if the mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and payable, and the statute of limitations begins to run on the entire debt. [*8] 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 Trust 2014-1 v Kator, 213 AD3d 915, 916, 184 N.Y.S.3d 805 [2d Dept 2023]* [internal citations omitted]).

On December 30, 2022, *FAPA* went into effect (L 2022, ch 821). FAPA amended six laws (*CPLR 203*, *CPLR 205*, *CPLR 213*, *CPLR 3217*, *RPAPL 1301*, and *General Obligations Law § 17-105*) and added *CPLR 205-a*. *CPLR 203* was amended by adding *paragraph (h)*, which provides that "[o]nee a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article [residential and commercial foreclosure actions] has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute." As such, by virtue of Chase commencing the 2009 action on June 23, 2009, and accelerating the mortgage debt, the statute of limitations expired on June 23, 2015. Pursuant to *CPLR. 203(h)*, Chase was unable to unilaterally toll or extend the statute of limitations period by sending the notice of de-acceleration on March 27, 2015. This action. commenced on [*9] May 30, 2018, more than six years after the cause of action accrued on June 23, 2009, is time-barred.

Plaintiff acknowledges that if FAPA applies, this action is time-barred, but argues that FAPA cannot be retroactively applied to this action given that the controlling law in this State since at least 1905 has been that a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage by an affirmative act occurring during the six-year statute of limitations period, provided that there is no change in the borrower's position in reliance thereon. According to Plaintiff, this longstanding decisional law providing a noteholder with a contractual right to unilaterally revoke an election to accelerate became part of the mortgage loan. Moreover, Plaintiff contends that there is a presumption against the retroactive application of FAPA, and the language in the effective date provision of FAPA is insufficient to indicate that the Legislature intended retroactive application in a manner that vitiates contract and property rights.

In general, "a court is to apply the law in effect at the time it renders its decision" (*Landgraf v USI Film Products, 511 U.S. 244, 264, 114 S. Ct. 1483, 128 L. Ed. 2d 229 [1994]* [internal quotation marks omitted]; [*10] *see Matter of Mia S., 212 AD3d 17, 20, 179 N.Y.S.3d 732 [2d Dept 2022]*). "In determining whether statutory amendments should be given retroactive effect, there are two axioms of statutory interpretation. 'Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose'" (*Nelson v HSBC Bank USA, 87 AD3d 995, 997, 929 N.Y.S.2d 259 [2d Dept 2011]*, quoting *Matter of Gleason [Michael Vee, Ltd.], 96 N.Y.2d 117, 122, 749 N.E.2d 724, 726 N.Y.S.2d 45 [2001]* [citation omitted]). "A remedial statute is one which is designed to correct imperfections in prior law, by generally giving relief to the aggrieved party" (*Matter of Mia S., 212 AD3d at 22* [internal quotation marks omitted]; *see Nelson v HSBC Bank USA, 87 AD3d at 998*). "Classifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity" (*Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 584, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]*). "Nonetheless, this principle of statutory construction serves as a 'navigational tool[ ],' or a guide in the search for legislative intent, at least 'where better guides are not available'" (*Matter of Mia S., 212 AD3d at 22*, quoting *Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d at 584*). "Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended

judicial interpretation; and whether the **[*11]** enactment itself reaffirms a legislative judgment about what the law in question should be" (*Matter of Gleason [Michael Vee, Ltd.], 96 NY2d at 122*; *see Matter of Mia S., 212 AD3d at 22*).

"A statute has retroactive effect if 'it would impair rights a party possessed when he [or she] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal, 35 NY3d 332, 365, 130 N.Y.S.3d 759, 154 N.E.3d 972 [2020]*, quoting *Landgraf v USI Film Products, 511 U.S. at 278-280*). "[A] statute that affects only 'the propriety of prospective relief' or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal, 35 NY3d at 365*, quoting *Landgraf v USI Film Products, 511 U.S. at 273*).

Contrary to Plaintiff's contentions, the Legislature clearly intended for *FAPA* to apply retroactively, since pursuant to its terms, FAPA "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821 § 10). As such, Plaintiff's argument that *FAPA* cannot be applied retroactively in the instant matter is belied by the express language of the statute (**[*12]** *see U.S. Bank Trust, N.A. v Leonardo, 79 Misc 3d 1075, 1078, 192 N.Y.S.3d 472 [Sup Ct, Nassau County 2023]*; *U.S. Bank Trust, N.A. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186 [Sup Ct, Westchester County June 21, 2023]*).

Moreover, in enacting FAPA, the Legislature articulated the purpose as follows:

> "The Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present remedial legislation is to clarify the meaning of existing statutes, codify correct judicial applications thereof and rectify erroneous judicial interpretations thereof.
>
> Accordingly, this bill amends certain statutes and rules to clarify the existing law and overturn those decisions that have strayed from legislative prescription and intent. These amendments and clarifications will ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions. The remedial aim of the bill is to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs to the prejudice of homeowners **[*13]** throughout New York. That some of these tactics have been sanctioned by the judiciary has resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers" (New York State Senate Bill S5473D Sponsor Memo).

Thus, *FAPA* is clearly intended to apply to all pending actions, such as this one, in which a judgment of foreclosure and sale has not been enforced (*cf. U.S. Bank Tr., N.A. as Tr. for LB-Cabana Series IV Tr. v Leonardo, 79 Misc 3d at 1081* [once a foreclosure sale has been scheduled, the judgment, is deemed enforced]), and has been applied retroactively by the Second Department in cases pending before it (*see e.g., ARCPE 1, LLC v DeBrosse, 217 AD3d 999, 1001, 193 N.Y.S.3d 51 [2d Dept 2023]*; *MTGLQ Inv'rs, L.P. v Singh, 216 AD3d 1087, 1088, 190 N.Y.S.3d 415 [2d Dept 2023]*; *GMAT Legal Tit. Tr. 2014-1 v Kator, 213 AD3d at 917*).

Plaintiff contends that applying FAPA retroactively violates several provisions of the United States Constitution. "Acts of the Legislature are entitled to a strong presumption of ***constitutionality***" (*Matter of County of Chemung v Shah, 28 NY3d 244, 251, 44 N.Y.S.3d 326, 66 N.E.3d 1044 [2016]*), and Plaintiff bears "the ultimate burden of overcoming that presumption by demonstrating the [act's] ***constitutional*** invalidity beyond a reasonable doubt" (*American Economy Ins. Co. v State, 30 NY3d 136, 149, 65 N.Y.S.3d 94, 87 N.E.3d 126 [2017]*).

Plaintiff first argues that the retroactive application of FAPA is not justified by a rational legislative purpose and therefore it violates due process. According to Plaintiff, when the **[*14]** mortgage loan was entered into in 2003, the clear and longstanding law of this State was that a lender may revoke an optional election to accelerate a mortgage debt. Thus, Plaintiff argues, by implication, the right to de-accelerate is a contractual right belonging to the lender and its successors and assigns, and the retroactive application of *CPLR 203(h)* to this action deprives it of substantive vested rights and property by rendering its foreclosure action, which was previously determined to be timely commenced, untimely. Plaintiff contends that the Legislature failed to consider the harsh and destabilizing effects on lenders' settled expectations with respect to their contractual rights to de-accelerate, and did not have a rational justification for this result.

"To comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by 'a legitimate legislative purpose furthered by rational means'" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal, 35 NY3d at 375*, quoting *American Economy Ins. Co. v State, 30 NY3d at 157-158*). "[I]n order to comport with due process, there must be a persuasive reason for the potentially harsh impacts of retroactivity" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal, 35 NY3d at 375* [internal quotation marks omitted]), and retroactive legislation has to "'meet a burden not faced by [purely **[*15]** prospective] legislation,' which is satisfied when 'the retroactive legislation of the legislation *itself* is justified by a rational legislative purpose'" (*id.* [emphasis added], quoting *Pension Ben. Guar. Corp. v R.A. Gray & Co., 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601 [1984]*).

As set forth above, the Legislature's intent in enacting *FAPA* was "to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof" (New York State Senate Bill S5473D Sponsor Mem.), and the retroactive application is supported by a legitimate legislative purpose—"to prevent lenders and loan servicers from manipulating the statute of limitations and abusing the judicial foreclosure process, and ensure equal application of state laws to all litigants currently in foreclosure actions and related actions" (*U.S. Bank Tr., N.A. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *9*; *see Article 13, LLC v Ponce de Leon Fed. Bank, 2023 U.S. Dist. LEXIS 140580, 2023 WL 5179626, at *5 [EDNY Aug. 11, 2023]*). Retroactively applying the statute is necessary to achieve the statute's remedial objective (*see Article 13, LLC v Ponce de Leon Fed. Bank, 2023 U.S. Dist. LEXIS 140580, 2023 WL 5179626, at *5*; *U.S. Bank Tr., N.A. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *9*).

There is no merit to Plaintiff's contention that *FAPA* affected the statute of limitations within which to commence a foreclosure action, and that therefore, actions upon time-barred claims should be allowed for a reasonable time after its effective date (*see Brothers v Florence, 95 NY2d 290, 301, 739 N.E.2d 733, 716 N.Y.S.2d 367 [2000]*), given that FAPA did not shorten the six-year statute **[*16]** of limitations within which to commence a foreclosure action (*cf. Merz v Seaman, 265 AD2d 385, 388, 697 N.Y.S.2d 290 [2d Dept 1999]* [retroactive application of amendment to *CPLR 214(6)* was impermissible to actions which had been timely commenced under *CPLR 213(2)*, where amendment shortened statute of limitations from six years to three years]).

Nor was Plaintiff deprived of a vested right. "A vested right, . . . , is an immediate, fixed right to present or future enjoyment" (*Gleason v Gleason, 26 NY2d 28, 40, 256 N.E.2d 513, 308 N.Y.S.2d 347 [1970]*). The "Legislature is not free to impair vested or property rights. The vested rights doctrine recognizes that a judgment, after it becomes final, may not be affected by subsequent legislation" (*Matter of Hodes v Axelrod, 70 NY2d 364, 370, 515 N.E.2d 612, 520 N.Y.S.2d 933 [1987]* [citation and internal quotation marks omitted]). Given that a final judgment has not been entered herein, Plaintiff does not have any vested property rights in this action, and thus, its due process rights will not be violated by the retroactive violation of *FAPA*(*see Article 13, LLC v Ponce de Leon Fed. Bank, 2023 U.S. Dist. LEXIS 140580, 2023 WL 5179626, at *5*; *U.S. Bank Tr., N.A. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *9*; *HSBC Bank USA. N.A. v IPA Asset Mgt., LLC, 79 Misc 3d 821, 825, 190 N.Y.S.3d 622 [Sup Ct, Suffolk County 2023]*).

Nor has Plaintiff shown that FAPA violates the Contracts Clause of the United States Constitution, which prohibits states from enacting "[l]aw[s] impairing the Obligation of Contracts" (*US Const, art I § 10[1]*); *see Matter of Raynor v Landmark Chrysler, 18 NY3d 48, 58, 959 N.E.2d 1011, 936 N.Y.S.2d 63 [2011]*). "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship" *American Economy Ins. Co. v State, 30 NY3d at 150* [internal **[*17]** quotation marks omitted]).

FAPA retroactive application does not impair Plaintiff's ability to contract, and does not, contrary to Plaintiff's contention, impair the relationship between Plaintiff and Defendant by "extinguishing Plaintiff's contractual right to unilaterally de-accelerate." Neither the note nor the mortgage contains a provision setting forth what the noteholder must do to revoke an election to accelerate the debt. Nor was Plaintiff's unilateral right to de-accelerate a contractual right that was made part of the mortgage loan based on the longstanding law of this State, given that prior to FAPA, a noteholder's right to unilaterally revoke an election to accelerate was not unfettered, but "was subject to the constraints of judicial decisions and legislative determinations" (*U.S. Bank Tr. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *7*). As Plaintiff acknowledges, "[a] note holder could be equitably estopped from revoking its election to accelerate the debt if the borrower had changed their position in reliance on the loan acceleration (*see Kilpatrick v Germania Life Ins Co, 183 N.Y. 163, 75 N.E. 1124 [1905]*)" (*U.S. Bank Tr. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *7*). In addition, "[a] mortgagee's

voluntary discontinuance of a mortgage foreclosure action in which the note holder had accelerated the full debt was, prior to *Freedom Mtge Corp v Engel, 37 NY3d 1, 146 N.Y.S.3d 542, 169 N.E.3d 912 (2021)*, which holding was nullified **[*18]** by the FAPA, held to be insufficient to de-accelerate the debt and toll the statute of limitations (*see Christiana Trust v Barua, 184 AD3d 140, 125 N.Y.S.3d 420 [2d Dept 2020]*). Second Department precedent held that to revoke the acceleration of the full debt required 'an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action' (*U.S. Bank Trust, N.A. v Miele, 186 AD3d 526, 527, 129 N.Y.S.3d 422 [2d Dept 2020)*, establishment of standing to de-accelerate the debt (*see Milone v US Bank Nat'l Ass'n, 164 AD3d 145, 83 N.Y.S.3d 524 [2d Dept 2018]*)[,] and establishment that de-acceleration of the debt was not 'a mere pretext to avoid the onerous effect of the statute of limitations' (*Christiana Trust v Barua, 184 AD3d at 146*)" (*U.S. Bank Tr. v Miele, 80 Misc. 3d 839, 197 N.Y.S.3d 656, 2023 NY Slip Op 23186, 2023 WL 4112924, at *7*). Accordingly, the retroactive application of *FAPA* does not violate the Contracts Clause of the United States Constitution.

Nor does it violate the Takings Clause of the Fifth Amendment to the United States Constitution, as made applicable to the States through the *Fourteenth Amendment*. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation" (*US Const 5th Amend)*. The New York Constitution provides that "[p]rivate property shah not be taken for public use without just compensation" (*NY Const, art 1, §7[a]*). "The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified" (*American Economy Ins. Co. v Stale, 30 N Y3d at 155*). As discussed **[*19]** above, prior to the enactment of FAPA, Plaintiff's right to unilaterally de-accelerate a mortgage debt was not unfettered, and retroactive application of does not impair Plaintiff's vested property rights. A judgment had not been entered in this action on the effective date of *FAPA*, and the issue of whether this action was time-barred due to commencement of the 2009 action has been contested throughout this litigation. As such, the retroactive application of *FAPA* does not violate the Takings Clause .

Finally, Plaintiff argues that retroactive application of FAPA violates the Bill of Attainder Clause of the United States Constitution (*US Const art I, § 10*). "Such a bill has been defined as a legislative act which applies either to named or easily identifiable individuals in such a way as to inflict punishment or impose penalties upon them without a judicial trial" (*Lanza v Wagner, 11 NY2d 317, 324, 183 N.E.2d 670, 229 N.Y.S.2d 380 [1962]*). Here, although one of the purposes of *FAPA* is "to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs" (New York State Senate Bill S5473D Sponsor Memo), there is no evidence that the statute was enacted for the specific purpose of punishing Plaintiff or any other specific lender **[*20]** (*see id. at 324; Concourse Rehabilitation & Nursing Ctr., Inc. v Novello, 80 A.D.3d 507, 510, 915 N.Y.S.2d 252 [1st Dept 2011]*). Rather, the purpose, rather than to punish lenders, is to ensure that "the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions" (*id.*), in order to ensure that noteholders purporting to sue on mortgage debt are bound by the same statutes of limitations that bind all other litigants.

Defendant has established that current law requires denial of the summary judgment motion and Plaintiff has failed to overcome the ***constitutionality*** of the application of FAPA to this action. Defendant's application for the Court to search the record and award her summary judgment dismissing the complaint is denied.

Accordingly, it is,

ORDERED that the branch of Defendant's motion which was for leave to reargue is **DENIED**; and it is further,

ORDERED that the branch of Defendant's motion which was for leave to renew is GRANTED to the extent that leave is granted to renew that branch of the motion seeking to deny Plaintiff's motion, inter alia, for summary judgment, based on the statute of limitations, and leave to renew is otherwise **DENIED**; and it is further,

ORDERED that upon renewal, Plaintiff's motion, inter alia, for summary **[*21]** judgment and an order of reference is DENIED; and it is further,

ORDERED that the decision and order entered December 16, 2022, and the order of reference entered December 14, 2022, are vacated; and it is further,

ORDERED that all requests for relief not addressed herein are **DENIED**.

This shall constitute the Decision and Order of the Court.

Date: 10/13/23

Mineola, New York

ENTER

/s/ David P. Sullivan

HON. DAVID P. SULLIVAN, J. S. C.

End of Document

NY CLS CPLR § 205

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 2 Limitations of Time (§§ 201 — 218)

§ 205. Termination of action.

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

(b) Defense or counterclaim. Where the defendant has served an answer and the action is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the plaintiff or his successor in interest, the assertion of any cause of action or defense by the defendant in the new action shall be timely if it was timely asserted in the prior action.

(c) Application. This section also applies to a proceeding brought under the workers' compensation law but shall not apply to any proceeding governed by section two hundred five-a of this article.

History

Add, L 1962, ch 308, § 1; amd, L 1963, ch 541, § 1; L 1965, ch 233, § 1; L 1978, ch 51, § 1, eff April 11, 1978; *L 1992, ch 216 § 2*, eff July 1, 1992; *L 2008, ch 156, § 1*, eff July 7, 2008; *L 2022, ch 821, § 5*, effective December 30, 2022.

Annotations

Notes

Editor's Notes

Laws 1992, ch 216, § 27, eff July 1, 1992, provides as follows:

§ 27. This act shall take effect on July 1, 1992 and shall apply to actions commenced on or after such date, except that:

(a) Until January 1, 1993, an action shall be deemed to be validly commenced and a claim contained in a complaint shall be deemed to be interposed against the defendant or co-defendant united in interest if such action is commenced as provided in this act or if such action is commenced in accordance with the law including *section 306-a of the civil practice law and rules* as added by chapter 166 of the laws of 1991 in effect immediately prior to the enactment of this act; and.

NY CLS CPLR § 205-a

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 2 Limitations of Time (§§ 201 — 218)

§ 205-a. Termination of certain actions related to real property

(a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period. For purposes of this subdivision:

1. a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff; and

2. in no event shall the original plaintiff receive more than one six-month extension.

(b) Where the defendant has served an answer and the action upon an instrument described under subdivision four of section two hundred thirteen of this article is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the original plaintiff, or a successor in interest or assignee of the original plaintiff, the assertion of any cause of action or defense by the defendant in the new action shall be timely if such cause of action or defense was timely asserted in the prior action.

History

L 2022, ch 821, § 6, effective December 30, 2022.

Annotations

Notes

Editor's Notes

Laws 2022, ch 821, § 1, eff December 30, 2022, provides:

§ 1. This act shall be known and may be cited as the "foreclosure abuse prevention act".

Laws 2022, ch 821, § 10, eff December 30, 2022, provides:

Wilmington Sav. Fund Socy., FSB v. East Fork Capital Equities, LLC

Supreme Court of New York, New York County

October 24, 2023, Decided

Index No. 850236/2021

Reporter
2023 N.Y. Misc. LEXIS 13636 *; 2023 NY Slip Op 33847(U) **

[**1] WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST, Plaintiff, - v - EAST FORK CAPITAL EQUITIES, LLC, BOARD OF MANAGERS OF STRIVERS GARDENS CONDOMINIUM CITY OF NEW YORK, A MUNICIPAL CORPORATION ACTING BY AND THROUGH ITS DEPARTMENT OF PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 THROUGH JOHN DOE #12, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: *Wilmington Sav. Fund Socy., FSB v. East Fork Capital Equities, LLC, 2022 N.Y. Misc. LEXIS 10841 (N.Y. Sup. Ct., July 15, 2022)*

Core Terms

retroactive application, retroactivity, statute of limitations, foreclosure, mortgage, foreclosure action, Appeals, savings, rights, retroactive effect, summary judgment, original plaintiff, prior action, accelerated, decisions, commence, vested, cases

Judges: [*1] PRESENT: HON. FRANCIS A. KAHN, III, A.J.S.C.

Opinion by: FRANCIS A. KAHN, III

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143 were read on this motion to/for JUDGMENT-SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property located at 300 West 135th Street, New York, New York. The mortgage, dated June 2, 2005, was given by non-party Martin Peters ("Peters") to non-party BNY Mortgage Company ("BNY"). The mortgage secures a loan with an original principal amount of $352,000.00 which is evidenced by a note of the same date as the mortgage. Plaintiff pleads that Peters defaulted in repayment of the loan on or about December 1, 2008. Non-party JP Morgan Chase Bank, NA ("JP Morgan"), the alleged noteholder at the time, commenced an action to foreclose the mortgage on May 5, 2009, by filing a summons [*2] and complaint. In that complaint, Plaintiff pled that it "elected to declare the entire principal balance due and owing and notified the Mortgagor of this election". While that action was pending, Defendant East Fork Capital Equities, LLC ("East Fork") became and remains the owner of the property. East Fork took title to the premises via a referee's deed dated January 20, 2016. The referee was appointed in a judgment and foreclosure and sale, dated November 5, 2015, issued in an action brought by Board of Managers of Strivers Gardens Condominium, a Defendant in this action, to foreclose on a lien for common charges (NY Cty Index No 153717/2013).

[**2] By order dated June 12, 2019, Justice Arlene Bluth dismissed the 2009 action pursuant to Uniform Rules for Trial Courts §202.48 [22 NYCRR]. Plaintiffs appeal of that order was denied by the Appellate Division, First Department in an order dated May 4, 2021 (*JP Morgan Chase Bank, N.A. v*

Peters, 194 AD3d 415, 143 N.Y.S.3d 216 [1st Dept 2021]). That Court reasoned that "[a]fter multiple opportunities to follow the court's directives, and after being fined, plaintiff was unable to properly settle an order on notice" (*id.*).

Plaintiff commenced this action on October 12, 2021, again seeking foreclosure on the 2007 mortgage. Prior to answering, Defendant East Fork moved to, *inter* **[*3]** *alia*, dismiss pursuant to *CPLR §3211 [a] [2], [7]* and *[8]*. That motion was denied by order of this Court dated July 15, 2022, and issue was joined by Defendant East Fork, which raised numerous affirmative defenses in their answer, including expiration of the statute of limitations.

Now, Plaintiff moves for summary judgment against Defendant East Fork, to strike its answer and affirmative defenses, for an order of reference and to amend the caption. East Fork opposes the motion and requests reverse summary judgment dismissing the complaint based upon expiration of the statute of limitations and the amendments made to the applicable statutes under the ***Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821*** [eff Dec. 30, 2022]). Plaintiff opposes the request for reverse summary judgment positing, *inter alia*, that FAPA has neither retroactive effect nor application as well as that retroactive application of FAPA would violate the *Due Process clauses of the Fifth* and *Fourteenth Amendments to the United States Constitution* and the *Takings Clause* thereof.

At the outset, Plaintiffs claim that the Defendant lacks standing to rely on provisions of FAPA is and its reliance on COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381) ("CEEFPA") as analogous authority is without merit. The express terms of CEEFPA provided it only applied when the "owner or mortgagor of such property is a natural person". FAPA contains no such limiting language. **[*4]** Indeed, the legislative history reveals that FAPA was intended to apply to "all actions". Further, FAPA's purpose was not only to protect residential homeowners, but to relieve "burdens on the courts".

The following inquiry must be whether the enactments in FAPA are retroactively applicable to this action.

FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in Freedom Mtge. Corp. v Engel" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The **[*5]** decision in *Freedom Mtge. Corp. v Engel, 37 NY3d 1, 146 N.Y.S.3d 542, 169 N.E.3d 912 (2021)* is specifically targeted by FAPA's legislative "response" which "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision **[**3]** four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see L 2022., ch 821* [eff Dec. 30, 2022]).

FAPA's enactments relevant here include, *CPLR §213 [4]*, the applicable statute of limitations, which was amended to provide that "[i]n 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, **[*6]** that the instrument was not validly accelerated." (*CPLR §214[4][a]*). Further, FAPA added *CPLR §205-a* which provides, in pertinent part, that where a foreclosure action:

> is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, *a dismissal of the complaint for any form of neglect*, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, *or by failure to timely submit any order or judgment, or upon a final judgment upon the merits*, the original plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by

> law at the time of the commencement of the prior action and that **[*7]** service upon the original defendant is completed within such six-month period.
>
> *CPLR §205-a[a]*[emphases added].

That section also provides that "a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff.

With respect to the application of newly enacted civil legislation to conduct that has already occurred, a tension exists between the ordinarily recognized presumption against retroactive application of a statute and the basic principle that a court should apply the law in existence when rendering its decision (*see eg Landgraf v Usi Film Prods., 511 U.S. 244, 272, 114 S. Ct. 1483, 128 L. Ed. 2d 229 [1994]; see also Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d 332, 365, 130 N.Y.S.3d 759, 154 N.E.3d 972 [2020]*). The concerns that arise when reviewing these two construction canons include, but are not limited to, giving proper effect to remedial legislation, disturbing a party's reliance on previously existing legal principles and recognition of fundamental fairness. But not all newly enacted statutes have retroactive effect despite affecting past actions. But not all newly enacted statutes have retroactive effect despite apparent facial applicability to existing actions. The Court of Appeals has adopted a "framework" established by **[*8]** the United States Supreme Court for analyzing this issue which is as follows:

> A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights. On the other hand, a **[**4]** statute that affects only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct.
>
> (*Regina, supra at 366* [internal citations and quotations omitted]).

Plainly, the portions of FAPA that are applicable here have retroactive *effect* upon this and many other existing foreclosure actions. The applicability of the so-called "savings provision" under *CPLR §205* was substantially altered if not virtually eliminated in foreclosure actions. A response by the Legislature to the Court of Appeals' decision in *Engel*, as well as multiple decisions of the Appellate Division interpreting *CPLR §205*, was not unexpected but the scope of the new procedures enacted in FAPA are significant (*see* Bruce J. Bergman, ***Foreclosure Abuse Prevention Act**: Time and Settlement*, NYLJ, August 29, 2023, at 5, col 2). The question therefore becomes whether retroactive **[*9]** *application* is justified.

For a statute to be afforded retroactive application, there must be a clear expression of the legislative purpose demonstrating that the legislature contemplated the potential unfairness of retroactive application and assessed that the benefits of application to existing cases and past conduct is an acceptable price to pay (*Regina, supra at 366, 370*). The inquiry to be resolved is "whether the legislature has expressed a sufficiently clear intent to apply the . . . amendments retroactively to these pending appeals. There is certainly no requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation" (*id.*).

Based on the express terms of the statute, the overall remedial construction of the legislation and the multiple unambiguous statements of legislative intent in FAPA's history as recounted supra, FAPA was plainly intended to apply retroactively. In the NY State Senate version of the bill, citation is made to *Gleason v Michael Vee, Ltd., 96 NY2d 117, 749 N.E.2d 724, 726 N.Y.S.2d 45 [2001]*. In that case, the Court of Appeals held that retroactive application of an amendment to *CPLR §7502[a]*, which was intended to overrule a precedent[1] established by the Court of Appeals to cases dismissed in the interval **[*10]** between disputed decision and the legislative response, was intended despite the Legislature's silence on retroactivity. The Court of Appeals reasoned that retroactive application was intended by the immediate effectiveness of the statute and its purpose "to clarify what the law was always meant to do and say". Both those intents were undoubtedly expressed by the Legislature in support of FAPA.

Additionally, the Appellate Divisions for the First and Second Departments have tacitly acknowledged this conclusion by applying FAPA to various existing cases (*see U.S. Bank N.A. v Santos, 218 AD3d 827, 193 N.Y.S.3d 271 [2d Dept 2023]; Deutsche Bank Natl. Trust Co. v Wong, 218 AD3d 742, 193 N.Y.S.3d 243 [2d Dept 2023]; U.S. Bank N.A. v Simon, 216 AD3d 1041, 191 N.Y.S.3d 61 [2d Dept 2023]; Bank of N.Y. Mellon v Stewart, 216 AD3d 720, 190 N.Y.S.3d 80 [2d Dept 2023]; U.S. Bank N.A. v Fox, 216 AD3d 445, 188 N.Y.S.3d 52 [1st Dept 2023]; GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d 915, 184 N.Y.S.3d 805 [2d Dept 2023]*). The Appellate Division, First Department's decision in *U.S. Bank N.A. v Fox*,

---

[1] *Solkav Solartechnik, G.m.b.H. v. Besicorp Group Inc., 91 NY2d 482, 695 N.E.2d 707, 672 N.Y.S.2d 838 [1998]*.

supra is particularly telling. In *Fox*, this Court, dismissed Plaintiffs complaint as untimely reasoning that the savings provision under CPLR §205 did not apply since a prior 2010 action for foreclosure was dismissed by Justice Mary V. Rosado for failure to prosecute at trial (*see U.S. Bank N.A. v. Fox, ___ Misc3d ___, 2022 N.Y. Misc. LEXIS 824, 2022 NY Slip Op 30555[U] [Sup Ct NY Cty 2022]*[Kahn III, J.]). On appeal, but after the enactment of FAPA, the First Department initially reversed this Court's decision. **[**5]** and reinstated Plaintiff's complaint (*see U.S. Bank N.A. v Fox, 212 AD3d 422, 424, 181 N.Y.S.3d 231 [1st Dept 2023]*). The First Department reasoned, **[*11]** under then applicable precedent, that CPLR §205 was applicable since Justice Rosado failed to set forth a "general pattern of delay" by the lender in her decision (*id.*)[2] . Soon thereafter, the First Department permitted the parties "to brief the effect of FAPA on [that] case". Upon such further briefing, the First Department "recalled and vacated" its earlier decision and "unanimously affirmed" this Court's decision reasoning that FAPA "applie[d] to [that] foreclosure action" and that "plaintiff [was] statutorily barred from commencing [that] action" (*see U.S. Bank N.A. v Fox, 216 AD3d at 446-447*). Were FAPA not intended to have retroactive application, the First Department certainly would not have reversed itself so expediently.

Plaintiff also posits that retroactive application of FAPA is violative of its due process rights under the US Constitution as well as the *Takings Clause* thereunder. As a rule, "[l]egislative enactments enjoy a strong presumption of ***constitutionality*** . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it **[*12]** unconstitutional" (*LaValle v. Hayden, 98 NY2d 155, 161, 773 N.E.2d 490, 746 N.Y.S.2d 125 [2002]* [citations omitted]). The United States Supreme Court recognized almost 30 years ago that the ***constitutional*** impediments to retroactive application of civil legislation are "modest" and that without a violation of an explicit ***constitutional*** proclamation "the potential unfairness of retroactive civil legislation is not [in and of itself] a sufficient reason for a court to fail to give a statute its intended scope" (*Landgraf, supra at 267 and 272*; *see also Regina, supra at 365* [Noting the Court of Appeals adoption of the *Landgraf* analytical framework in *American Economy Ins. Co. v State of New York, 30 NY3d 136, 65 N.Y.S.3d 94, 87 N.E.3d 126 [2017]]*).

While entitled to the presumption of ***constitutionality***, retroactive legislation must meet a burden not faced by entirely prospective legislation, specifically that the questioned statute is supported by "'a legitimate legislative purpose furthered by rational means'" (*American Economy Ins. Co. v State of New York, 30 NY3d 136, 157-158, 65 N.Y.S.3d 94, 87 N.E.3d 126 [2017]*, *citing General Motors Corp. v Romein, 503 U.S. 181, 191, 112 S. Ct. 1105, 117 L. Ed. 2d 328 [1992]*). Explained differently, ***constitutional*** muster is passed when "the retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corporation v R. A. Gray & Co., 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601 [1984]*). When applying this standard, the Court of Appeals has "suggested that, in order to comport with due process, there must be a 'persuasive reason' for the 'potentially harsh' impacts of retroactivity" (**[*13]** *Regina, supra at 375*). The question presented is one of degree requiring consideration of: [1] the length of the retroactivity period as affecting a party's repose, [2] the forewarning of legislative change relevant to reliance on existing law and [3] the public purpose for the statute (*see Replan Dev., Inc. v Department of Housing Preservation & Dev., 70 NY2d 451, 456, 517 N.E.2d 200, 522 N.Y.S.2d 485 [1987]*; *see also Regina, supra at 376*).

In this case, any claim of reliance by Plaintiff on the pronouncements in certain New York appellate decisions that approved application of the "savings provision" under CPLR §205 in circumstances such as those here is unavailing, despite the lengthy period of retroactivity posed by making FAPA applicable to all unenforced foreclosure actions -ie. those where are sale has not occurred. The claim that the amendments to the "savings provision" contained in FAPA shortened the statute of limitations is factually incorrect. The limitations period provided for under CPLR §213 [4] was, and remains after FAPA, at six-years. As such, any reliance on cases which hold that it is **[**6]** impermissible to retroactively apply a statute of limitations which renders a timely commenced action, time barred[3] is misplaced. CPLR §205 is not a statute of limitations but rather a "grace period so as to extend, *if applicable*, the time within which an action can be **[*14]** commenced" (*United States Fidelity & Guaranty Co. v. E. W. Smith Co., 46 NY2d 498, 505, 387 N.E.2d 604, 414 N.Y.S.2d 672 [1979]*[emphasis added]; *see also Sokoloff v. Schor, 176 AD3d 120, 126-127, 109 N.Y.S.3d 58 [2d Dept 2019]*). The legislative history of FAPA, particularly from the NY State Senate, makes plain that

[2] This finding was despite the First Department's own affirmance of Justice Rosado's dismissal for "failure of plaintiff to litigate its case at trial as scheduled for December 16, 2019" (*Onewest Bank, FSB v Fox, 191 AD3d 481, 138 N.Y.S.3d 307 [1st Dept 2021]*).

[3] *see eg Ruffolo v Garbarini & Scher, P.C., 239 AD2d 8, 12, 668 N.Y.S.2d 169 [1st Dept 1998]*.

limiting the applicability of the "savings provision" to the original plaintiff in the prior action, or one acting on behalf of same, was intended clarify certain judicial misinterpretations of the existing statute[4] as well as to codify the Court of Appeals' decision in *Reliance Ins. Co. v Polyvision Corp., 9 NY3d 52, 876 N.E.2d 898, 845 N.Y.S.2d 212 [2007]*, which the Legislature states contains the correct interpretation of its intent with respect to *CPLR §205*. Indeed, in discussing the holding in *Reliance*, the Court of Appeals recently observed that limiting invocation of *CPLR §205 [a]* to only the original plaintiff in an earlier terminated action was a principle founded in "precedent" in existence for "over a century" (*see ACE Sec. Corp. v DB Structured Prods., Inc., 38 NY3d 643, 652, 176 N.Y.S.3d 590, 197 N.E.3d 978 [2022]*).

The political resolve which gave rise to FAPA is far from new. The Legislature's statutory forays into the area of foreclosure law, particularly residential foreclosures, has been ubiquitous over the last fifteen years. In that period, and before, multiple perceived ills in the home lending and foreclosure arenas have been addressed with the institution of various procedural and substantive requirements that did not exist at common-law **[*15]** [5] as well as the amendment of existing laws. Further, these novel statutes have been routinely amended when application of these edicts were found ineffective or insufficiently expansive. Legislative enactments have also been accompanied by the adoption of various codes, rules and regulations by both executive agencies and the judiciary. Ongoing uncertainty in foreclosure law has been injected by the judiciary as well. In addition to the titanic shift *Engel* caused, the Appellate Division, Second Department's decision in *Bank of America, N.A. v Kessler, 202 AD3d 10, 160 N.Y.S.3d 277 [2nd Dept. 2021]*, and its subsequent reversal by the Court of Appeals[6] also generated a flurry of litigation machinations. The upshot of all this is that forewarning to the lending industry of the likelihood of change in any portion of this area of law has not been just heralded these many years, but virtually foregone.

The public purpose of FAPA is well documented in the statute's history and the intention of the legislature that it be applied to all existing cases is express. FAPA's purpose is broadly stated as to protect homeowners from "abuses of the judicial foreclosure process" through "an onslaught of successive foreclosure actions that would otherwise be barred by the statute of limitations". **[*16]** To accomplish this aim, the legislature clearly stated its intention to undo judicial pronouncements which permitted lenders to "manipulate the statutes of limitation to their advantage through clarification and restoration of "long standing law". The desire to protect property owners from foreclosure abuses is rationally based on well documented wide-spread misconduct by certain mortgage lenders (*see eg* Jackie Calmes and Sewell Chan, *President Presses Bid To Rein In Loan Abuse*, NY Times, Jan. 20, 2010 §B at 1, col 0) as well as entities in the mortgage foreclosure business (*see eg* Barry Meier, *A Foreclosure Mess Draws In the Filing Lawyers, Too*, NY Times, Oct. 16, 2010 §B at 1, col 1). The Legislature's **[**7]** repeated references to toppling judicial decisions which it views misinterpreted its intent and to codify opinions in accord therewith, evidence that retroactivity was central to the enactment of FAPA (*see Regina at 366*). Based on the foregoing analysis, the Court determines that, under the circumstances presented, retroactive application of FAPA does not violate Plaintiffs ***constitutional*** due process rights.

Based on the foregoing analysis, the Court determines that under the circumstances presented, retroactive application of FAPA does not violate Plaintiffs ***constitutional*** due process rights. As such, the Plaintiffs claim that the Court must impose a "grace period" before applying FAPA fails.

Plaintiff also asserts **[*17]** that retroactive enforcement of FAPA would violate the *Takings Clause of the Fifth* and *Fourteenth Amendments to the US Constitution*. This right proscribes "the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation'" (*Landgraf, supra at 266*). "The threshold step in any *Takings Clause* analysis is to determine whether a vested property interest has been identified" (*American Economy Ins. Co. v State of New York, supra at 155*). No person has a vested interest or ***constitutional*** right in any rule of law entitling them to have the precept remain unaltered (*see I. L. F. Y. Co. v. Temporary State Housing Rent Com., 10 NY2d 263, 270, 176 N.E.2d 822, 219 N.Y.S.2d 249 [1961]*; *J. B. Preston Co. v. Funkhouser, 261 NY 140, 144, 184 N.E. 737 [1933]*). Similarly, "[p]arties obtain no vested rights in the orders or judgments of courts while they are subject to review" (*Boardwalk & Seashore Corp. v. Murdock, 286 NY 494, 498, 36 N.E.2d 678 [1941]*). Resultantly, Plaintiff in this case had no vested right in either the "savings statute" or any

---

[4] *see eg Wells Fargo Bank, N.A. v Eitani, 148 AD3d 193, 47 N.Y.S.3d 80 [2d Dept 2017]*.

[5] Since 2000, the following are some of the New York statutes that have been enacted in response to perceived ills, inequities and abuses in the mortgage and foreclosure businesses" CPLR §§3021-b and *3408*; *RPAPL §§1302*, *1302-a*, *1303*, *1304*, *1305*, *1306*, *1307*, *1308*, *1393*; *RPL §§265-a*, *265-b*, *280-b*, *280-d*; *22 NYCRR §202.12-a*. The federal legislative and regulatory enactments are too legion to recount in this footnote.

[6] *Bank of America, NA v Kessler, 39 NY3d 317, 186 N.Y.S.3d 85, 206 N.E.3d 1228 [2023]*.

finding of this Court since no unappealable final judgment has been issued (*see U.S. Bank Trust, N.A. v. Miele, ___ Misc3d ___, 2023 N.Y. Misc. LEXIS 2988, 2023 NY Slip Op 23186 [Sup Ct West. Cty. 2023]*).

As one of the branches of relief sought by Plaintiff was summary judgment, the Court is authorized to search the record and grant accelerated judgment to the non-moving party with respect to a cause of action or issue **[*18]** that it a subject of the motion (*see Dunham v. Hilco Constr. Co., 89 NY2d 425, 676 N.E.2d 1178, 654 N.Y.S.2d 335 [1996]*). Here, the application of FAPA to the present action was raised by Defendant, which requested reverse summary judgment, and briefed extensively in reply by Plaintiff. Therefore, the Court finds it is appropriate to search the record and upon same it finds FAPA is applicable herein, and that this action is barred by the statute of limitations. The prior action was commenced in 2009 and the limitations period expired before the action was dismissed. Plaintiff may not avail itself of the "savings provision" under *CPLR §205-a* since Plaintiff herein was not a party in the 2009 action and that action was dismissed based upon "neglect" of the Plaintiff therein (*CPLR §205-a[a]*).

Accordingly, it is

ORDERED that Plaintiff's motion is denied and that upon searching the record, summary judgment is granted to Defendant and this action is dismissed as time barred.

10/24/2023

DATE

/s/ Francis A. Kahn

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

End of Document

U.S. Bank Trust N.A. v. Kenig

Supreme Court of New York, Rockland County

October 16, 2023, Decided

Index No.: 033411/2022

Reporter
2023 N.Y. Misc. LEXIS 8958 *; 2023 NY Slip Op 33563(U) **

[**1] U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF THE TRUMAN 2021 SC9 TITLE TRUST, Plaintiff, - against — BENJAMIN KENIG, PEARL KENIG, THE CHASE MANHATTAN BANK, "JOHN DOE #1" through "JOHN DOE #12" the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being tenants, occupants, persons or corporations, if any, having or claiming an interest in the or lien upon the premises, described in the Complaint, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

Mortgage, further order, retroactive, default, notice, foreclosure action, mortgaged premises, new action, assigned, compute, summary judgment motion, summary judgment, foreclosure, appointed, six-month, servicer

Judges: [*1] THOMAS P. ZUGIBE, Justice of the Supreme Court.

Opinion by: THOMAS P. ZUGIBE

Opinion

DECISION & ORDER

ZUGIBE, J.

The papers filed electronically as NYSCEF Document numbers 37-57, 59-70, 73-81, 83 and 84 were read on this Notice of Motion by Plaintiff (Motion Seq. 001) for an Order (i) pursuant to *CPLR 3212* granting Plaintiff summary judgment and pursuant to *CPLR 3215* granting a default judgment against non-answering Defendants; (ii) striking the affirmative defenses and counterclaim asserted in the Answer of Defendants BENJAMIN KENIG and PEARL KENIG; (iii) appointing a referee to compute the amount due to Plaintiff; and (iv) amending the caption of this action and Notice of Cross-Motion by Defendant (Motion Seq. 002) for an Order (i) granting Defendant summary judgment and granting judgment on Defendants' Counterclaim Cancelling and Discharging the subject Mortgage.

Upon the foregoing papers, and all prior papers and proceedings in this action, these motions are hereby determined as follows:

In this residential foreclosure action concerning real property located at 4 Underwood Road, Monsey, New York 10952 ("Mortgaged Premises"), it is alleged that the Property was encumbered by a Mortgage ("Mortgage") dated June 8, 1998, in the [*2] face amount of $161,000.00. A Promissory Note dated June 8, 1998 ("Note") identifying Flagstar Bank, FSB as named Payee, [**2] and payable in successive monthly installments on the first day of each month commencing August 1, 1998, was duly executed by the Defendants. A lost note affidavit dated February 22, 2013, together with a copy of the Note was duly filed as NYSCEF Doc. 2. The Mortgage was assigned to Nationsbanc Mortgage Corporation on February 21, 2001, and following a series of successive transfers, the Mortgage was ultimately transferred to Plaintiff on April 27, 2022. Plaintiff submits in support of its application copies of the Note and lost note affidavit, Mortgage, assignments of Mortgage, and recordation instruments for the foregoing, as well as default notices.

Respondent cross-moves for summary judgment alleging that this action is time barred. The relevant procedural history pertinent to this issue is as follows.

On July 21, 2014, the Mortgagee at that time, Ocwen Loan Servicing, LLC, commenced a foreclosure action against the Mortgaged Premises which, by its terms, accelerated the entire unpaid principal balance then due and owing under the Mortgage. On a motion to reargue [*3] the denial of Plaintiff's motion for summary judgment, the Court (Loehr,

J.), by Decision and Order dated August 30, 2017, granted Defendants' motion for summary judgment based upon the failure to serve a notice of default and the Complaint was dismissed.

The Mortgage was, thereafter, assigned to New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") which commenced a second foreclosure action against the Mortgaged Premises on November 20, 2018, under Rockland County Supreme Court Index No. 036885/2018. By Decision and Order of the undersigned dated February 7, 2022, Defendants' cross motion for summary judgment was granted and the Complaint was dismissed based upon the Appellate Division Second Department's holding in *Bank of America, N.A. v. Kessler, 202 A.D.3d 10, 160 N.Y.S.3d 277 (2d Dept. 2021)* finding that material included within the same envelope as the 90-day notice that was not "expressly delineated in these provisions" was a violation of *RPAPL § 1304*. Although Kessler was subsequently reversed by the Court of Appeals (*see, Bank of America v. Kessler, 39 NY3d 317, 186 N.Y.S.3d 85, 206 N.E.3d 1228 (2023)*, no motion for reargument or notice of appeal was filed with respect to the February 7, 2022 Decision and Order.

Instead, following the termination of the action in February of 2022, on April 27, 2022, the Mortgage was assigned **[*4]** to Plaintiff, U.S. BANK TRUST NATIONAL ASSOCIATION, and a new action for foreclosure was commenced by the filing of a Complaint on August 1, 2022. Defendants, in reliance on *CPLR § 205(a)*, not *CPLR § 205-a*, allege that although this matter was admittedly (1) commenced within six months of the termination of the prior action, and (2) the **[**3]** prior action was timely commenced, the instant action is time barred because the Plaintiff is not the Plaintiff from the dismissed 2018 action. While *CPLR § 205-a of the **Foreclosure Abuse Prevention Act ("FAPA")***, enacted December 20, 2022, is the controlling statutory authority for new actions, it is the retroactive effect of this legislation, if any, that is central to the resolution of the issues herein. If not retroactive, *CPLR 205(a)*, relied upon by Defendants herein, would apply as the applicable authority in this case.

CPLR § 205(a) states "the plaintiff **...** may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months... after the termination...". Defendant contends that the Plaintiff herein is an assignee *only* and not the "Plaintiff" from the dismissed action, and that therefore, the safe-harbor provision set forth in *CPLR § 205(a)* is not available to the Plaintiff here. This precise issue, however, **[*5]** was settled by the Second Department in *Wells Fargo Bank, N.A. v. Eitani, 148 AD3d 193, 47 N.Y.S.3d 80 (2d Dept. 2017)*. In *Eitani*, the Court held that "a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of *CPLR 205(a)* where, as here, it is the successor in interest as the current holder of the note". If the matter, *sub judice*, is governed by *CPLR § 205(a)*, the Complaint herein was timely filed insofar as it was filed 26 days before the statute of limitations would have expired on August 27, 2022.

Although the newly enacted *CPLR § 205-a*, like *CPLR § 205(a)*, similarly provides a six-month safety net for a plaintiff to recommence a dismissed action that was originally timely, *CPLR § 205-a* modifies the term "plaintiff" by the addition of the adjective "original" and expressly proscribes the initiation of a new action by "a successor in interest or an assignee of the original plaintiff... unless pleading and proving that such assignee is acting on behalf of the original plaintiff" [*CPLR § 205-a (1)*].

As noted hereinabove, following the dismissal of the complaint on February 27, 2022, the Mortgage was assigned on April 27, 2022 to Plaintiff, U.S. BANK TRUST NATIONAL ASSOCIATION, and a new action for foreclosure was commenced by the filing of a Complaint on August 1, 2022. **[*6]** Eight months after the assignment, and nearly four months after the expiration of the six-month tolling date, FAPA was enacted prohibiting the application of the tolling provision if the rights of the Plaintiff in the dismissed action were assigned and such assignee was not expressly "acting on behalf of the original plaintiff". No such relationship is **[**4]** plead or proven by Plaintiff. Dispositive of the central issue herein, therefore, is whether FAPA is retroactive for all cases pending at the time of its enactment.

New York State Senate Bill S5473D Sponsor Memorandum cogently articulated the rationale for the FAPA amendments, explaining that "[t]he Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage." A growing body of state and federal court decisions have concluded that the application of the statute retroactively is necessary to achieve the legislation's remedial **[*7]** objective, (See *Article 13, LLC v. Ponce de Leon Fed. Bank, 2023 U.S. Dist. LEXIS 140580, 2023 WL 5179626 (2023)*; *Deutsche Bank Natl. Trust Co. v. Dagrin, 79 Misc. 3d 393, 399, 190 N.Y.S.3d 582 [Sup. Ct., Queens Cty., 2023, Catapano-Fox, J.]*), while other courts have recently taken a contrary approach.

In *HSBC Bank USA, N.A. v. Besharat, 80 Misc.3d 269, 195 N.Y.S.3d 380 (Supreme Court, Putnam County, 2023)* in

reliance on the provisions of CPLR § 205(a) in effect at the time service of process was initiated, Plaintiff "***effected***" service of process within the specified six-month extension period on June 17, 2021, but service of process was not "***completed***" within that six-month period until July 1, 2021, a date after the close of the six-month window dictated by CPLR § 205-a, a statute enacted over eighteen months *after* service was effected consonant with the existing statute. Following an exhaustive analysis of the ***constitutional*** effect of retroactivity, the Court in Besharat, in determining that § 205-a was not retroactive in this case, explained as follows:

> The Court's holding is a narrow one, confined by the factual circumstances presented in this case. If and to the extent that the Legislature intended CPLR § 205-a to apply retroactively to deprive a mortgagee of the benefit of the pre-existing CPLR "savings provision" on account of its having failed to "complete" service of process on the mortgagor in accordance with **the after-enacted requirements of Section 205-a, such retroactive application of the statute would deprive the mortgagee of a vested right to enforce [*8] its claim on the note and mortgage against the mortgagor in violation of its federal and state *constitutional* right to due process of law.**

Besharat, 80 Misc.3d at 284-85 (emphasis added).

It is beyond cavil that in the case at bar, the retroactive application of the statute would, likewise, "deprive the mortgagee of a vested right ... in violation of its federal and state [**5] ***constitutional*** right to due process of law". When Plaintiff assigned the Mortgage and commenced the new action on August 1, 2022, the action was timely and otherwise consonant with existing law. A finding of retroactivity would result in the imposition of a harsh and inequitable outcome. As noted, the legislative intent of FAPA was to prevent lending institutions from engaging in conduct designed "to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage." Here, there are no assertions of abuse by Plaintiff. Indeed, the second action was dismissed based upon *Kessler* prior to its reversal, and the alleged infirmities in the current action were entirely lawful and appropriate according to the law existing at the time the conduct was undertaken. It is inconceivable that such a draconian outcome could [*9] have been within the legislative intent when enacting the consumer-oriented provisions of FAPA. This court, therefore, finds that the current action was timely commenced pursuant to CPLR § 205(a), the controlling statute in effect at the time.

Plaintiff further argues that the 2014 foreclosure action did not cause an acceleration of the mortgage since the action was dismissed upon a finding that a notice of default, a condition precedent to the commencement of this action, was not served. Based upon the Court's determination hereinabove that this action was timely commenced, this argument is deemed moot and, therefore, need not be addressed on this motion.

Addressing the merits of Plaintiff's motion for summary judgment, the evidence demonstrates that borrowers first defaulted in payment as of May 1, 2013, and for each successive month thereafter. Plaintiff also proves service on all Defendants and the additional mailing that CPLR 3215(g) requires to proceed on a default judgment with respect to the non-answering Defendants.

A foreclosure plaintiff carries its burden to prove entitlement to judgment by producing the mortgage, the unpaid note and competent evidence of borrowers' default on the loan (*see e.g.* Bank of New York Mellon v Gordon, 171 A.D.3d 197, 203, 97 N.Y.S.3d 286 (2d Dept. 2019) [*10]; U.S. Bank N.A. v. Denaro, 98 A.D.3d 964, 950 N.Y.S.2d 581 (2d Dept 2012)). In the present action, as noted hereinabove, Plaintiff attaches the lost note affidavit dated February 22, 2013, together with a copy of the original Note (NYSCEF Doc. 2) to the Complaint as "Exhibit A". Plaintiff's affiant also attests to the borrower's default through the affidavit of Joshua Nelms ("Nelms Affidavit"), (NYSCEF Doc. 53), an Assistant Secretary of Rushmore Loan Management Services, attorney-in-fact and loan servicer for the named Plaintiff. Plaintiff attaches and authenticates primary evidence of the [**6] default in the form of loan payment records with adequate proof of incorporation of prior servicer records under Gordon, supra and produces proof of a valid assignment through the production of the Mortgage and Assignments. Also submitted in support of this application is the Nelms Affidavit attesting that the original lost note affidavit was physically delivered to Plaintiff, custodian or its Servicer on or before November 13, 2019, and that the Note has continuously remained in its possession since delivery including at the time the action was commenced.

Defendants oppose summary judgment on the basis of statute of limitations only. As defendants oppose this relief only on this ground, all other affirmative defenses are waived as a matter of law (*see e.g.*, New York Comm'l Bank v J Realty F. Rockaway Ltd., 108 A.D.3d 756, 757, 969 N.Y.S.2d 796 (2d Dept. 2013); Starkman v City of Long Beach, 106 A.D.3d 1076, 1078, 965 N.Y.S.2d 609 (2d Dept 2013)).

Finally, Plaintiff moves pursuant to CPLR 3025(b) for an order amending the caption by substituting Noemi King in place and stead of John Doe #12. This application is based upon the affidavit of service (NYSCEF Doc. 48) establishing

that Noemi King resides at the Mortgaged Premises. This application is granted.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED, that Defendants' motion for summary judgment on the Counterclaim seeking a cancellation and discharge of the Mortgage is denied; and it **[*11]** is further

ORDERED, that Plaintiff is awarded default judgment against all non-answering defendants, and it is further

ORDERED, that Plaintiff's motion pursuant to *CPLR 3025(b)* for an order amending the caption is granted, and it is further

ORDERED, that, within five days hereof, plaintiff shall serve via NYSCEF and U.S. Mail on the borrower defendants, and file via NYSCEF an affidavit of such service, an instrument consistent with *RPAPL 1321(1)* specifying the name and telephone number of Plaintiff's current loan servicer; and it is further

ORDERED, that Alden H. Wolfe, Esq., with an address of 20 Squadron Blvd., Suite 330, New City, New York 10956-5245, telephone number: (845) 634-6760 is hereby appointed Referee to ascertain and compute the amount due to plaintiff for principal and interest on the note and mortgage sued upon and set forth in the complaint for payments made by plaintiff for **[**7]** taxes, assessments, water charges, insurance premiums and any other expenses that plaintiff has paid or may pay in connection with the protection of its security hereunder against the mortgaged premises, including, but not limited to, watchman or caretaker fees, water and sewer rents, insurance premiums, and any other advances **[*12]** to protect the lien of the subject mortgage during the pendency of this action and to examine whether the mortgaged premises can be sold in one parcel, and it is further

ORDERED, that by accepting this appointment, the said Referee certifies that he or she is in compliance with Part 36 of the Rules of the Chief Judge, including, but not limited to, *22 NYCRR sections 36.2(c)* and *36.2(d)*, and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify this Court; and it is further

ORDERED, that pursuant to *CPLR 8003(a)*, the fee of $350.00 shall be paid to the Referee for the computation of the amount due and upon the filing of his or her report, plus an additional fee of $750.00 upon sale of the property; provided, however, that if a scheduled sale is cancelled by any party to this action within 24 hours of such scheduled sale, the Referee will be entitled to a cancellation fee of $250.00. 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 herself or paying **[*13]** funds to herself without compliance with Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that within thirty (30) days of the date of entry of this Order, Plaintiff shall serve upon the Referee all documents necessary for the Referee to ascertain and compute the amounts due plaintiff; and it is further

ORDERED, that the Referee shall ascertain and compute the amounts due Plaintiff within sixty (60) days of entry of this Order, unless extension is granted by the Court for good cause shown; and it is further

ORDERED, that Plaintiff shall make application for Judgment of Foreclosure and Sale within ninety (90) days of the date of entry of this Order of Reference, unless extension is granted by the Court for good cause shown; and it is further

[8]** *ORDERED*, that the Referee shall complete and submit to the County Clerk, with a copy to the chambers of the undersigned a "FORECLOSURE ACTION SURPLUS MONIES FORM" within thirty (30) days of the sale; and it is further

ORDERED, that, within 10 days of the date of entry hereof, Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties, each owner of the equity of redemption, any tenants named in the **[*14]** action, the Referee appointed herein, and any other party entitled to notice, and by such date file by NYSCEF a suitable affirmation of such service.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York

October 16, 2023

/s/ Thomas P. Zugibe

THOMAS P. ZUGIBE

Justice of the Supreme Court

End of Document

NY CLS CPLR R 3217

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 32 Accelerated Judgment (§§ 3201 — 3222)

R 3217. Voluntary discontinuance.

(a) Without an order. Any party asserting a claim may discontinue it without an order

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; or

2. by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action; or

3. by filing with the clerk of the court before the case has been submitted to the court or jury a certificate or notice of discontinuance stating that any parcel of land which is the subject matter of the action is to be excluded pursuant to title three of article eleven of the real property tax law.

(b) By Order of Court. Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

(c) Effect of Discontinuance. Unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice, except that a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by any method an action based on or including the same cause of action in a court of any state or the United States.

(d) All notices, stipulations, or certificates pursuant to this rule shall be filed with the county clerk by the defendant.

(e) Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, 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.

History

Add, L 1962, ch 308; amd, L 1962, ch 318, § 19, eff Sept 1, 1963; L 1981, ch 115, § 27; L 1989, ch 736, § 1, eff July 24, 1989; *L 1999, ch 278, § 1*, eff July 20, 1999; *L 2003, ch 62, § 29* (Part J), eff July 14, 2003; *L 2011, ch 473, § 4*, eff Jan 1, 2012; *L 2022, ch 821, § 8*, effective December 30, 2022.

Annotations

Notes

Pennymac Corp. v. Erneste

Supreme Court of New York, Queens County

December 6, 2023, Decided

Index No. 707508/2017

Reporter
2023 N.Y. Misc. LEXIS 23345 *; 2023 NY Slip Op 23411 **; 2023 WL 9059848

[**1] Pennymac Corp., Plaintiff(s), against Glenda Erneste, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, ANTONIA ADEDEJI, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AEGIS FUNDING CORPORATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, MARY ERNESTE the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the Subject Property described in the Complaint, Defendant(s).

Prior History: *Pennymac Corp. v. Erneste, 2018 N.Y. Misc. LEXIS 29977 (N.Y. Sup. Ct., Feb. 20, 2018)*

Core Terms

statute of limitations, mortgage, accelerated, voluntary discontinuance, unilaterally, toll, prior action, cancel, reset, cross-motion, retroactive, foreclosure, interpose, six-year, commencement of the action, summary judgment, cause of action, discontinued, contractual, foreclose, default, argues, lender

Counsel: [*1] Attorneys for Plaintiff: Vallely Law, PLLC, Natalia Thomas, Syosset, NY.

Attorneys for Defendant Glenda Erneste: Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP, Matthew J. Routh Esq., Kew Gardens, New York.

Judges: MARGUERITE A. GRAYS, J.S.C.

Opinion by: MARGUERITE A. GRAYS

Opinion

Marguerite A. Grays, J.

By Notice of Motion, filed January 12, 2023, defendant Glenda Erneste (defendant) moves for an Order: (1) granting summary judgment in her favor pursuant to *CPLR §3212*, or alternatively, (2) dismissing the Complaint with prejudice as time-barred, pursuant to *CPLR §3211 (a) (5)* and *CPLR §213 (4)*, or alternatively, (3) pursuant to *CPLR §3211(a) (7)* and *CPLR §3211 (a) (1)*, dismissing the Complaint for failure to state a cause of action, and (4) canceling the lis pendens for the subject premises. By Notice of Cross-Motion, filed on March 22, 2023, plaintiff, Pennymac Corp, (plaintiff) cross-moves for an Order: (1) denying the defendant's motion in its entirety; (2) granting the plaintiff summary judgment for the relief demanded in the Complaint pursuant to *CPLR §3212*; (3) striking the defendant's Answer and dismissing her Counterclaims; (4) deeming all non-appearing and non-answering defendants in default pursuant to *CPLR §3215 (a)*; (5) amending the caption to substitute Revolve Capital Group LLC for Pennymac Corp; [*2] (6) appointing a referee to compute sums due and report; and (7) awarding cost of this motion to the plaintiff.

Relevant Background and Procedural History

On or about November 12, 2009, the plaintiff's predecessor in interest, Residential Funding Company, LLC, commenced an action against the instant defendant, declaring the entire unpaid balance of the loan immediately due and payable (*see Residential Funding Company, LLC v Glenda Erneste*, et al., index no. 30326/2009 [Sup Ct Queens Co]). On August 1, 2013, that plaintiff voluntarily discontinued that action with the filing of an Affidavit of Discontinuance. By letter dated June 2, 2014, the instant plaintiff advised the defendant that

the subject loan that was previously accelerated was "de-accelerated" and that the loan was re-instituted as an installment loan.

The instant action commenced with the filing of a Summons, Complaint, and Notice of Pendency to foreclose the real residential property located at 219-10 Edgewood Avenue, Springfield Gardens, New York 11413. On or about March 1, 2018, plaintiff moved for a second time for a default judgment, an Order of Reference, and to amend the caption and Complaint, which was granted by Decision **[*3]** and Order dated May 18, 2018. On January 22, 2020, the defendant appeared and moved to vacate the default and dismiss the Complaint for lack of personal jurisdiction. On February 22, 2022, the defendant's motion was granted to the extent of vacating the default, and the matter was set for a traverse hearing. On December 28, 2022, the defendant filed an Answer to the Complaint with Counterclaims with an extension of the plaintiff's time to complete service. The Answer includes the defense that this action is barred by the expiration of the statute of limitations. A Reply to the Counterclaims was filed on January 12, 2023. The instant motion and cross-motion followed.

Discussion

In support of her motion and in opposition to the cross-motion, the defendant argues that she is entitled to summary judgment as a matter of law because this action is time-barred by the six-year statute of limitation under *CPLR §213*, given the acceleration of the subject mortgage in 2009. The defendant relies on the passage of the *Foreclosure Abuse Prevention Act (FAPA)* on December 30, 2022, to assert that the plaintiff cannot unilaterally revoke acceleration through prior discontinuance. The defendant maintains that the **[*4]** plaintiff had until November 13, 2015, to commence another foreclosure action against her and failed to do so timely.

Alternatively, the defendant argues that this action should be dismissed for failure to state a cause of action given the statute of limitation violation. Plaintiff commenced this action on June 1, 2017. The defendant affirms that the previously filed case unambiguously and irrefutably accelerated the mortgage, and consequently, the Complaint fails to state a cause of action. The defendant also argues that the plaintiff concedes application of FAPA in its opposition and that the law requires dismissal on statute of limitations grounds.

In support of its cross-motion and in opposition to defendants' motion, the plaintiff argues that the instant action was timely commenced because FAPA's retroactive application is unconstitutional. The plaintiff also asserts that it relied on the existing case law at that time and sent a de-acceleration letter on June 2, 2014, to the defendant within the six-year tolling of the statute of limitations. The plaintiff posits that it has a contractual right to de-accelerate the subject mortgage. The plaintiff contends that it has made a prima **[*5]** facie showing for entitlement to a judgment by producing the Mortgage, Note, and evidence of the default. It is also asserted that the defendant's general denial is insufficient to rebut and defeat its motion for summary judgment. The plaintiff posits that each of the defenses raised in the answer lack merit and that it has unequivocally demonstrated its standing to maintain this action. The plaintiff also maintains that it established, through documentary evidence, compliance with all the requisite steps for entitlement to summary judgment. Similarly, the plaintiff argues that the defendant's Counterclaims lack merit, are boilerplate, and are time-barred.

In New York, "once a mortgage debt is accelerated, the entire amount is due, and the Statute of Limitations begins to run on the entire debt" (*Ditmid Holdings, LLC v JPMorgan Chase Bank, N.A., 180 AD3d 1002, 120 N.Y.S.3d 393 [2020]* citation omitted). In December 2022, FAPA was passed to specifically overturn *Freedom Mtge. Corp. v Engel, 37 NY3d 1, 146 N.Y.S.3d 542, 169 N.E.3d 912 [2021]*, which held that "the statute of limitations did not bar actions to foreclose certain mortgages because the accelerations of those mortgages that occurred by virtue of the filing of prior foreclosure actions were revoked by the voluntary discontinuances of the prior actions" (*Bank of NY Mellon v Stewart, 216 AD3d 720, 723, 190 N.Y.S.3d 80 [2023]*). On December 30, 2022, *FAPA* took immediate **[*6]** effect, applying to all actions concerning instruments described in *CPLR §213 (4)* in which a final Judgment of Foreclosure and Sale had not been enforced (2022 McKinney's Sess Law News of NY, ch 821, sec. 10). As stated therein, the purpose and intent of the FAPA is "to clarify the existing law and overturn those decisions that have strayed from legislative prescription and intent." Specifically, the Bill provides that its aim is:

> That some of these tactics have been sanctioned by the judiciary has resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers."

(New York State Senate Bill S5473D Sponsor Memorandum). The act seeks to clarify and codify existing law and is remedial in nature (*id.*). Under FAPA, "even if the mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and payable, and the statute of limitations begins to run on the entire debt" (*Bank of NY Mellon v Stewart, at 722*). The law amended several statues, including *RPAPL §1301 (4)*, *GOL 17-105 (4)*, *CPLR §203 (h)*, *CPLR §205-a*, *CPLR §213 (4)*, and *CPLR §3217 (e)* (*see* ***Bayview Loan Servicing, LLC v Dalal, 80 Misc. 3d***

*1100, 196 N.Y.S.3d 640, 2023 NY Slip Op 23277, at *2 [Sup Ct Bronx County]*).

Under *CPLR §3211 (a) (5)*, a cause of action may not be maintained where the applicable Statute of Limitations **[*7]** has expired. Pursuant to *CPLR §213 (4)*, where a prior action was commenced, a plaintiff is estopped from asserting that a debt was not validly accelerated where the Statute of Limitation has expired, 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. Under *CPLR §3217 (e)*, "[i]n any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, 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."

Additionally, pursuant to *CPLR §203 (h)*, once a cause of action to foreclose a mortgage of real property has accrued, "no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute." Under *RPAPL §1301 (4)*, "[i]f **[*8]** an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations."

Application

As has been held, the plain language in FAPA provides that "a voluntary discontinuance does not reset the applicable six-year statute of limitations" (*Article 13, LLC v Ponce de Leon Fed. Bank, 2023 US Dist LEXIS 140580*, citing *Deutsche Bank Natl. Trust Co. v Dagrin, 79 Misc 3d 393, 190 N.Y.S.3d 582 [2023]*). Relying on *FAPA*, this Department has held that neither a lender's voluntary discontinuance of a prior case nor a claim of lender's lack of standing in that prior action could bar application of the statute of limitations, which required dismissal of the proceeding (*Bank of NY Mellon v Stewart, 216 AD3d 720, 190 N.Y.S.3d 80*). In this Department, where a prior action was voluntarily discontinued, a lender is estopped from asserting that a debt was not validly accelerated where there was no expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated by the commencement of the prior action based on the plaintiff's lack of standing (*Bank of NY Mellon v Stewart, at 723*, citing *CPLR § 213(4)*). The voluntary discontinuance of a prior action does not act "in form or effect, [to] **[*9]** waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim" (*id., at 723*). Similarly, under *GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d 915, 184 N.Y.S.3d 805 [2023]*), the rule in this Department is that the unilateral voluntary discontinuance of a prior action alone does not serve to reset the statute of limitations as required by FAPA.

In this case, the plaintiff relies on its voluntary discontinuance of the 2009 action to reset the statute of limitations. However, the controlling law is that the lender cannot unilaterally retract acceleration of the mortgage with the filing of a voluntary discontinuance (*see Bank of NY Mellon v Stewart, 216 AD3d 720, GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d 915, Sycp, LLC v. Evans, 217 AD3d 707, 191 N.Y.S.3d 433 [2023], MTGLQ Invs., L.P. v Singh, 216 AD3d 1087, 190 N.Y.S.3d 415 [2023]*). The plaintiff's predecessor in interest elected to call all sums due in the prior 2009 action, and the loan was accelerated. The defendant also established that this action commenced more than six years from the time the statute of limitations began to accrue and that there is no basis in law to toll the statute of limitations. The plaintiff has failed to show that the statute of limitations was tolled with the filing of its unilateral voluntary discontinuance with application of FAPA, as conceded. The voluntary discontinuance did not "in form or effect, waive, postpone, cancel, toll, extend, **[*10]** revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" (*ARCPE 1, LLC v DeBrosse, 217 AD3d 999, at 1001-1002, 193 N.Y.S.3d 51 [2023]* citing *CPLR §3217 (e), CPRL §203 (h), GMAT Legal Title Trust 2014-1 v Kator, 213 AD3d at 917*). Consequently, the defendant is entitled to dismissal pursuant to *CPRL §213 (4)*. The defendant's motion to dismiss on *CPLR §3211* and *§3212* grounds is granted, and the lis pendens attached to the subject premises is cancelled.

Retroactivity

New York Courts have held that the *FAPA* is retroactive, and the Second Department has consistently applied the law retroactively (*see Nationstar Mtge., LLC v Naar, 80 Misc. 3d 1203[A], 194 N.Y.S.3d 922, 2023 NY Slip Op 50909[U], *5 [2023]*, citing *Bank of NY Mellon v Stewart, 216 AD3d 720, ARCPE 1, LLC v DeBrosse, 217 AD3d 999; HSBC Bank USA, N.A., as Trustee on behalf of Ace Securities Corp. Home Equity Loan Trust v IPA Asset Mgmt., LLC, 79 Misc 3d 821, 825-26, 190 N.Y.S.3d 622 [2023]*, *see also*, *FV-1, Inc. v Palaguachi, 2023 NY Slip Op 32684(U) [Sup Ct Queens County]*, specifically holding that FAPA is retroactive). The

Deutsche Bank Natl. Trust Co. v. Warren

Supreme Court of New York, Queens County

October 10, 2023, Decided

Index No. 705801/19

Reporter
2023 N.Y. Misc. LEXIS 7773 *; 2023 NY Slip Op 33504(U) **

[**1] DEUTSCHE BANK NATIONAL TRUST COMPANY, ON BEHALF OF FINANCIAL ASSET SECURITIES CORPORATION, SOUNDVIEW HOME LOAN TRUST 2007-WMC1 ASSET-BACKED CERTIFICATES, SERIES 2007-WMC1, Plaintiff, -against- LENNOX WARREN; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP.; COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK SOCIAL SERVICES DISTRICT; ANSON STREET, LLC A/A/O WMC MORTGAGE; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; AKEEM VINCENT; BERNADETTE JONES; HUDSON VINCENT, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

renewal, summary judgment, discontinuance, prior motion, retroactive application, statute of limitations, motion for leave, cross motion, counterclaims, foreclosure, memorandum, moves, reasonable justification, prior determination, limitations period, failure to submit, attorney's fees, final judgment, instant action, leave to renew, time barred, two hundred, new facts, non-appearing, retroactively, promulgated, subdivision, Mortgage, forgoing, default

Judges: [*1] HON. ROBERT I. CALORAS, J.S.C.

Opinion by: ROBERT I. CALORAS

Opinion

MEMORANDUM

On April 2, 2019, Plaintiff commenced this action by filing a Summons and Verified Complaint, wherein it alleged that on October 27, 2006 Defendant Lennox Warren (Defendant) executed a Note in the amount of $388,000.00, in favor of non-party WMC Mortgage Corp. This Note was secured by a mortgage on certain real property known as 111-24 197th Street, Saint Albans, New York 11412.

In a memorandum decision dated April 27, 2020 this Court denied Plaintiff's motion for summary judgment, a default judgment against all non-appearing Defendants, an order to strike and dismiss the affirmative defenses and counterclaims in the appearing Defendant's Answer, and to appoint a referee, and granted Defendant's cross motion to dismiss the Complaint as time barred, summary judgment on his *RPAPL 1501(4)* counterclaim, and for attorney's fees, costs and disbursements pursuant to *RPL 282(1)*. In the April 2020 decision, this Court determined that "[a]fter Plaintiff discontinued the 2008 action, it did not revoke its election to accelerate the loan by an affirmative act of revocation during the six-year statute of limitations period after the initiation of the 2008 action. [*2] Consequently, the Plaintiff commenced the instant action after the statute of limitations expired".

In a memorandum decision dated September 20, 2020 this Court granted Plaintiff's motion for leave to renew its prior motion for summary judgment. Upon renewal this Court determined that Plaintiff established its prima facie entitlement to summary judgment through the submission of the Stipulation of Discontinuance it filed on May 14, 2014 discontinuing the [**2] 2008 action, and that Defendant failed to raise any triable issues of fact with respect to his claim that the instant action is time barred. Subsequently on November 30, 2020 this Court issued an order of reference.

In the instant motion Plaintiff moves for a Judgment of Foreclosure and Sale (JFS). Defendant also cross moves in essence for leave to renew his opposition to Plaintiff's prior motion for leave to renew based upon a change in the law set forth in the newly enacted provisions of the ***Foreclosure Abuse Prevention Act (FAPA)***, and upon renewal moves for the following: summary judgment dismissing the Complaint

with prejudice as barred by the statute of limitations; and summary judgment on his counterclaims to quiet title pursuant [*3] to *RPAPL 1501(4)* and for reasonable attorneys' fees pursuant to *RPL 282*. Plaintiff opposes and argues, among other things, that FAPA cannot be applied retroactively.

Initially the Court will determine Defendant's cross motion. A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination' (*CPLR § 2221[e][2]*; *25 Bay Terrace Assoc, L.P. v Public Serv. Mut. Ins. Co., 194 AD3d 668, 148 N.Y.S.3d 484 [2d Dept. 2021]*). "'While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance'" (id.). "'When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal'" (id.). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (id.).

FAPA amended six laws (*CPLR § 203*, *CPLR § 205*, *CPLR § 213*, *CPLR § 3217*, *RPAPL § 1301* and *GOL § 17-105* and added *CPLR § 205-a*). "The most significant of the forgoing modifications is the newly promulgated *CPLR § 205-a*, which provides that lenders may only take advantage [*4] of the 'saving statute' if the matter was terminated in any manner other than: voluntarily discontinue the action, failure to obtain personal jurisdiction over the defendant, dismissal for any form of neglect including for violation of court rules or individual part rules, failure to comply with scheduling orders, by default due to nonappearance for conference or at calendar call, failure to submit an order or judgment, or upon a final judgment upon the merits (US Bank v Johns, NYLJ August 14, 2023 at p. 17, col. 3 [Sup. Ct. Queens County, Kerrigan, J.]). " If a foreclosure action is dismissed for any of the forgoing reasons, *CPLR 205-a* cannot be used to revive it and extend the limitations period" (id.).

> *CPLR § 3217(e)* provides:
> Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, 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.
> Section 10 of FAPA provides:
>
> This act shall take [*5] effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced.

[**3] The issue regarding whether §10 should be applied retroactively has not yet been heard by the Court of Appeals or any of the Appellate Divisions. However, several Supreme Courts across the State have heard this issue and determined the answer to be no (US Bank v Johns, supra; *U.S. Bank Trust, N.A., as Trustee For LB-Cabana Series IV Trust v Leonardo, 79 Misc. 3d 1075, 192 N.Y.S.3d 472, 2023 WL 3987683 [Sup. Ct. Nassau Co. 2023]* (Sullivan, J.), *Newrez LLC v Kalina, 78 Misc.3d 1217[A], 185 N.Y.S.3d 651, 2023 NY Slip Op 50249[U] [Sup. Ct. Albany Co. 2023]* [*citing* Justice Cardozo in *Jacobus v Colgate, 217 NY 235, 111 N.E. 837 [1916]*) (Lynch, J.); *MTGLQ Investors, L.P. v Gross, 79 Misc.3d 353, 190 N.Y.S.3d 244 [Sup. Ct. Westchester Co. 2023[[Greenwald, J.]*; *Wells Fargo Bank, N.A. v Orozco, ___ Misc3d ___, 2023 NY Slip Op. 32396[U] [Sup. Ct. Queens Co. 2023]* [Weiss, J.]). This Court agrees and finds that permitting retroactive application of FAPA would destroy rights already accrued by the Plaintiff (US Bank v Johns, supra; see *HSBC Bank United State NA, 2023 NYLJ LEXIS 1254*). "Thus, while clarification of an existing law or promulgation of a new law may, at times, warrant renewal, it does not here" (US Bank v Johns, supra). "Retroactive application in this instance would deprive the mortgagee of their right to enforce their claim against the mortgagor in violation of its federal and state ***constitutional*** rights to due process of law" (id.). [*6] Since this Court has determined that the amendment of *CPLR § 3217 (e)* is not entitled to retroactive application to the facts herein, it is unnecessary to address the remaining ***constitutional*** challenges raised by the Defendant. Accordingly, the cross motion filed by Defendant is denied and Plaintiff's motion is granted.

Submit order.

/s/ Robert I. Caloras

ROBERT I. CALORAS, J.S.C.

End of Document

NY CLS CPLR § 213, Part 1 of 2

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 2 Limitations of Time (§§ 201 — 218)

§ 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud.

The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law;

2. an action upon a contractual obligation or liability, express or implied, except as provided in *section two hundred thirteen-a* or two hundred fourteen-i of this article or article 2 of the uniform commercial code or article 36-B of the general business law;

3. an action upon a sealed instrument;

4. an 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.

(b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, 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.

5. an action by the state based upon the spoliation or other misappropriation of public property; the time within which the action must be commenced shall be computed from discovery by the state of the facts relied upon;

6. an action based upon mistake;

7. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith.

8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

9. an action by the attorney general pursuant to article twenty-three-A of the general business law or subdivision twelve of *section sixty-three of the executive law*.

Siegel v. Kentucky Fried Chicken, Inc.

Court of Appeals of New York

February 5, 1986, Argued ; March 18, 1986, Decided

No Number in Original

Reporter
67 N.Y.2d 792 *; 492 N.E.2d 390 **; 501 N.Y.S.2d 317 ***; 1986 N.Y. LEXIS 17516 ****

Aaron L. Siegel, Appellant, v. Kentucky Fried Chicken of Long Island, Inc., Respondent

Prior History: [****1] Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered May 6, 1985, which (1) reversed, on the law, an order of the Appellate Term of the Supreme Court in the Second Judicial Department, entered March 1, 1983, (a) reversing an order of the Nassau County District Court, First District (John D. Capilli, J.), which dismissed a proceeding to recover possession of real property, and (b) reinstating the proceeding, and (2) reinstated the order of District Court.

In this summary proceeding to recover possession of property leased to respondent tenant which was operating a fast food franchise on the premises, respondent maintained that a purported notice of termination of the lease sent to respondent by an attorney was ineffective and invalid.

The Appellate Division concluded that various provisions of the lease required the service of such notice by the "Landlord", and that a notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the [****2] landlord in the giving of such notice, is legally insufficient to terminate the tenancy.

Siegel v Kentucky Fried Chicken, 108 AD2d 218, affirmed.

Disposition: Order affirmed, with costs, in a memorandum.

Core Terms

Landlord, lease, provisions, printed, notice, tenant, notice of default, landlord's agent, termination, serving

Headnotes/Summary

Headnotes

Landlord and Tenant -- Lease -- Notice of Termination of Tenancy -- By Whom Given

In a summary proceeding to recover possession of real property leased by respondent tenant, an order of the Appellate Division, which reinstated an order dismissing the proceeding, should be affirmed. The lease's default provision refers to the "Landlord" serving notice of cancellation and its printed provisions define "Landlord" to mean "only the owner, or mortgagee in possession for the time being". Under such a lease, notices of default and of termination signed not by the owner or the attorney named in the lease, but by another attorney with whom the tenant had never previously dealt, were insufficient and the tenant was entitled to ignore them as not in compliance with the lease provisions concerning notice.

Counsel: *Bruce D. Mencher* for appellant.

Eugene I. Farber and *Steven T. Lowe* for respondent.

Judges: Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Hancock, [****3] Jr., concur; Judge Titone taking no part.

Opinion

[*793] [391] [***318] OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

The lease contains four printed provisions referring to the "Landlord or Landlord's agent," but in its default provision refers only to "the Landlord serving a written five (5) days'

notice upon Tenant" to be followed by "Landlord [serving] a written three (3) days' notice of cancellation". Its printed provisions defined the term "Landlord" to mean "only the owner, or mortgagee in possession, for the time being". It also contained a rider consisting of 44 typewritten paragraphs, three of which referred to a named attorney as escrowee, but none of which specified that notice of default or of termination **[*794]** which, as noted, was to be given by the landlord, could be given by the landlord's agent or by an attorney, or otherwise modified the printed definition of the term "Landlord."

Under such a lease notices of default and of termination signed not by the owner or the attorney named in the lease, but by another attorney with whom the tenant had never previously dealt, were insufficient **[****4]** and the tenant was entitled to ignore them as not in compliance with the lease provisions concerning notice *(cf. Mann Theatres Corp. v Mid-Island Shopping Plaza Co., 94 AD2d 466, 474; see, Reeder v Sayre, 70 NY 180, 188)*.

End of Document

HSBC Bank USA, N.A. v Jeffers

District Court of New York, First District, Nassau County

January 11, 2011, Decided

LT-006560-10

Reporter
30 Misc. 3d 1209(A) *; 958 N.Y.S.2d 646 **; 2011 N.Y. Misc. LEXIS 29 ***; 2011 NY Slip Op 50019(U) ****

[****1] *HSBC* Bank USA, N.A., Petitioner(s) against David H. *Jeffers*, IRIS THOMAS, JASPER THOMAS, MATTHEW THOMAS, LAJETTA THOMAS, Respondent(s)

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

Notice, Loans, execute, deeds, security instrument, summary proceeding, jurisdictionally, documents, no indication, Attorney-in-Fact, designation, terminate, landlord, mortgage, trusts

Headnotes/Summary

Headnotes

[**646] [*1209A] Landlord and Tenant--Lease--Notice of Termination of Tenancy--Proof of Agent's Signing Authority.

Counsel: [***1] For Petitioner: Steven J. Baum, P.C., New York.

For Thomas, David H. *Jeffers*, Respondents: Williarm D. Friedman, Esq., Hempstead, New York.

Judges: Hon. Scott Fairgrieve, DISTRICT COURT JUDGE.

Opinion by: Scott Fairgrieve

Opinion

Scott Fairgrieve, J.

Petitioner *HSBC* Bank USA, National Association, commenced this holdover summary proceeding against respondents to recover possession of 687 Front Street, Hempstead, New York. Petitioner HSBC Bank USA, National Association became the owner pursuant to a Referee's Deed, dated June 8, 2010, after bringing a foreclosure action in the Nassau County Supreme Court.

A 90 Day Notice to Vacate, dated June 25, 2010, was served upon respondents. This Notice was executed on behalf of petitioner by Kathryn Cross of Wells Fargo. Attached to the 90 Notice was a Limited Power of Attorney dated June 25, 2009, which reads in pertinent part as follows:

HSBC Bank USA, National Association, hereby constitutes and appoints Wells Fargo Bank, N.A., (the "Servicer"), as its lawful agent and attorney-in-fact, in its name, place and stead to execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate for the tasks described in items (1) [***2] through (4) below; provided however, that the documents described below may only be executed and delivered by such Attorney-in-Fact if such documents are required or permitted under the terms of the related servicing agreements and no power is granted hereunder to take any action that would be adverse to the interests of HSBC Bank USA, National Association or any action which is not required or permitted under the servicing or trust agreement. This Power of Attorney is being issued in connection with the Servicer's responsibilities to service certain mortgage loans (the "Loans") [****2] held by HSBC Bank USA, National Association as Trustee of various trusts. These Loans are comprised of mortgages, deeds of trust, deeds to secure debt and other forms of security instruments (collectively the "Security Instruments") and the promissory notes (the "Notes") they secure.

* * *

2. As HSBC Bank USA, National Association as Trustee of

the trusts act and deed, to transact business of any kind regarding the Loans, to obtain any interest in the Loans and/or the property and buildings which are the subject of the Security Instruments (the "Property"), to contract for, purchase, receive, take possession **[***3]** of and obtain evidence of title in and to the Property, and/or to secure payment of the Notes or performance of any related obligation or agreement.

Thereafter a Ten (10) Day Notice to Quit with the same Limited Power of Attorney was served upon respondents. The said Notice was executed as follows, but the court is unsure of the title designation used by the signer Joyce Reynolds, which is indiscernible:

HSBC BANK USA, NATIONAL ASSOCIATION

Joyce Reynolds

By: Joyce Reynolds

Title: ???

Respondent Jasper Thomas moves to dismiss the summary proceeding because the 10 Day Notice violates *Siegel v. Kentucky Fried Chicken of Long Island, 108 AD2d 218, 488 NYS2d 744 (2nd Dept 1985), aff'd 67 NY2d 792, 492 N.E.2d 390, 501 N.Y.S.2d 317*, which states as follows:

A notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the landlord in giving of such notice, is legally insufficient to terminate the tenancy. (*Id.*)

Respondent also contends that the said Limited Power of Attorney attached to the 10 Day Notice to Quit does not grant authority to Wells Fargo to execute the **[***4]** 10 Day Notice on behalf of petitioner.

This court rejects the foregoing argument because paragraph 2 of the Limited Power of Attorney allows Wells Fargo to execute a 10 Day Notice if properly done. However, in the case at bar, the court holds that the 10 Day Notice is jurisdictionally defective because it was executed by a Joyce Reynolds with no indication by whom she is employed and provides no clear designation of her employment status. There is absolutely no indication that Joyce Reynolds has any signing authority. The court notes that the 90 Day Notice was signed by Kathryn Cross of Wells Fargo. **[****3]**

This court held in *Deutsche Bank Natl. Trust Co. v. Resnik, 24 Misc 3d 1238[A] 899 NYS2d 58, 2009 NY Slip Op 51793[U]*, that a 10 Day Notice to Quit was subject to the *Kentucky Fried* rule. Since the 10 Day Notice to Quit was executed by Joyce Reynolds without any indication of her authority to sign, the 10 Day Notice is jurisdictionally defective and this proceeding is dismissed.

Conclusion

The Limited Power of Attorney gives Wells Fargo the authority to execute the required notices to evict. However, in the case at bar, the 10 Day Notice is jurisdictionally defective. This summary proceeding **[***5]** is dismissed with leave to renew upon proper papers.

So Ordered:

/s/ Hon. Scott Fairgrieve

DISTRICT COURT JUDGE

Dated: January 11, 2011

End of Document

NY CLS RPAPL § 713

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 7 Summary Proceeding to Recover Possession of Real Property (§§ 701 — 768)

§ 713. Grounds where no landlord-tenant relationship exists

A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds:

1. The property has been sold by virtue of an execution against him or a person under whom he claims and a title under the sale has been perfected.

2. He occupies or holds the property under an agreement with the owner to occupy and cultivate it upon shares or for a share of the crops and the time fixed in the agreement for his occupancy has expired.

3. He or the person to whom he has succeeded has intruded into or squatted upon the property without the permission of the person entitled to possession and the occupancy has continued without permission or permission has been revoked and notice of the revocation given to the person to be removed.

4. The property has been sold for unpaid taxes and a tax deed has been executed and delivered to the purchaser and he or any subsequent grantee, distributee or devisee claiming title through such purchaser has complied with all provisions of law precedent to the right to possession and the time of redemption by the former owner or occupant has expired.

5. Subject to the rights and obligations set forth in section thirteen hundred five of this chapter, the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him.

6. He is the tenant of a life tenant of the property, holding over and continuing in possession of the property after the termination of the estate of such life tenant without the permission of the person entitled to possession of the property upon termination of the life estate.

7. He is a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or (c) the licensor is no longer entitled to possession of the property; provided, however, that a mortgagee or vendee in possession shall not be deemed to be a licensee within the meaning of this subdivision.

8. The owner of real property, being in possession of all or a part thereof, and having voluntarily conveyed title to the same to a purchaser for value, remains in possession without permission of the purchaser.

9. A vendee under a contract of sale, the performance of which is to be completed within ninety days after its execution, being in possession of all or a part thereof, and having defaulted in the performance of the terms of the contract of sale, remains in possession without permission of the vendor.

10. The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer; no notice to quit shall be required in order to maintain a proceeding under this subdivision.

11. The person in possession entered into possession as an incident to employment by petitioner, and the time agreed upon for such possession has expired or, if no such time was agreed upon, the employment has been terminated; no notice to quit shall be required in order to maintain the proceeding under this subdivision.

NY CLS CPLR § 2105

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 21 Papers (§§ 2101 — 2106)

§ 2105. Certification by attorney.

Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk.

History

Add, L 1962, ch 308, § 1; amd, L 1962, ch 318, § 6; L 1964, ch 349, § 1; L 1970, ch 307, § 1, eff Sept 1, 1970.

Annotations

Notes

Prior Law

Earlier statutes: CPA §§ 170, 170–a; CCP § 3301; Code Proc § 312.

Advisory Committee Notes

(See also Advisory Committee notes preceding § 2101, under subheading "Certification.") This section is based upon CPA §§ 170 and 170-a.

Section 170, deriving from § 3301 of the Throop Code, allows a written stipulation by the attorneys for all interested parties to take the place of a certificate. Section 170-a, added to the CPA in 1944 upon recommendation of the Judicial Council (NY Laws 1944, c 91; see 10 NY Jud Council Rep 357-65 (1944), provides a simpler procedure to take the place of a certificate; it requires only an affidavit of the attorney furnishing the copy, thus dispensing with the need for consent by the opposing attorney. Under the CPA provisions, however, the affidavit procedure of § 170-a may be used only if the opposing attorney refuses or fails to stipulate under § 170. No reason is perceived for requiring resort first to the stipulation procedure, and only the simpler affidavit method of § 170-a has been retained in this section. In place of an affidavit, a statement by the attorney is provided.

The draft of CPA § 170-a, as proposed by the Judicial Council, was specifically limited to papers on appeal. See 10 NY Jud Council Rep 359 (1944). As enacted, however, its text in terms covers any "paper of which a certified copy is required by law," although the section heading still contains the reference to papers on appeal. The CPLR provision follows the language of the text of the CPA section and is applicable to all papers, in accordance with the general rule of construction that the text of a statute governs over an inconsistent caption or heading. See 2 Sutherland, Statutory Construction § 4903 (3d ed 1943); *Cf. People v O'Neil, 280 App Div 145, 146, 112 NYS2d 756, 757 (3d Debt 1952)*; 1 McKinney, Consolidated Laws of New York, Statutes §§ 123, 130 (1942).

Plotch v Dellis

Supreme Court of New York, Appellate Term, Second Department

April 13, 2018, Decided

2016-992 Q C NO.

Reporter
60 Misc. 3d 1 *; 75 N.Y.S.3d 779 **; 2018 N.Y. Misc. LEXIS 1375 ***; 2018 NY Slip Op 28116 ****

[****1] Adam ***Plotch***, Appellant, v John ***Dellis*** et al., Respondents, et al., Undertenants.

Prior History: Appeal from an order of the Civil Court of the City of New York, Queens County (John S. Lansden, J.), dated March 8, 2016. The order granted a motion by occupants to dismiss so much of the petition as was asserted against them and denied as moot petitioner's cross motion for summary judgment, in a summary proceeding brought pursuant to *RPAPL 713 (5)*.

Core Terms

deed, exhibition, certified copy, notice to quit, certificate

Case Summary

Overview

HOLDINGS: [1]-The civil court erred in granting the occupants' motion to dismiss and in denying, as moot, a foreclosure-sale purchaser's cross-motion for summary judgment in his summary proceeding brought pursuant to *RPAPL 713(5)* because the two attempts at service of process satisfied the reasonable application standard of *RPAPL 735* for purposes of obtaining a final judgment of possession, a copy of the referee's deed was not only shown to one of the occupants, but placed in her hand, and while the photocopies of the referee's deed that were served on occupants did not bear an original seal, as required *CPLR 4540(b)*, the signature of the purchaser's attorney on the original certification comported with the requirements of *CPLR 2105*.

Outcome
Order reversed, motion denied, and cross-motion granted.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures

Real Property Law > Deeds > Types of Deeds > Sheriff's Deeds

HN1[] **Financing, Foreclosures**

The legislature amended *RPAPL 713(5)* in 1976 to permit, in addition to exhibition of an original deed, exhibition of a certified copy of the deed. Service by means other than personal delivery of a certified copy of the deed, i.e., service of a certified copy of the deed which is left at the premises for the respondent to retain and examine, satisfies the exhibition requirement.

Evidence > Authentication

HN2[] **Evidence, Authentication**

CPLR 4540(a) permits copies of official records to be used for authentication purposes.

Evidence > Authentication

HN3[] **Evidence, Authentication**

In an authentication context, *CPLR 2105* requires that an attorney "subscribe" a certificate.

Headnotes/Summary

Headnotes

Landlord and Tenant — Summary Proceedings —

Property Sold in Foreclosure — Exhibition of Deed

1. In a post-foreclosure summary proceeding, the requirement of *RPAPL 713 (5)* that the deed delivered pursuant to such sale, or a copy of such deed, be exhibited to respondent was satisfied where, as part of the conspicuous place service, a certified copy of the deed was left at the premises for respondent to retain and examine. Service by means other than personal delivery of a certified copy of the deed, i.e., service of a certified copy of the deed which is left at the premises for the respondent to retain and examine, satisfies the exhibition requirement.

Landlord and Tenant — Summary Proceedings — Certification of Referee's Deed

2. In a post-foreclosure summary proceeding (*RPAPL 713 [5]*), the photocopy of the referee's deed served on the occupants of the premises that did not bear an original seal was nevertheless properly certified pursuant to *CPLR 2105* where petitioner's counsel signed the original certification of the deed that was attached to the petition filed with the court, which bore the certifying official's original signature and raised seal in compliance with *CPLR 4540 (b)*. *CPLR 2105* provides an alternative method of certification, by an attorney: "Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk." Here, petitioner's attorney signed the original certification, a photocopy was then made of that document, and that photocopy was served on the occupants, which comported with the requirements of *CPLR 2105*.

Counsel: **[***1]** *Adam **Plotch***, appellant pro se.

The Law Firm of Edward Vitale, P.C. (*Edward Vitale* of counsel) for Nikki Moundrakis and another, respondents.

*John **Dellis***, respondent pro se.

Judges: PRESENT: : MICHAEL L. PESCE, P.J., MICHELLE WESTON, DAVID ELLIOT, JJ. PESCE, P.J., WESTON and ELLIOT, JJ., concur.

Opinion

[*3] **[**779]** Memorandum.

Ordered that the order is reversed, without costs, the motion by occupants Nikki Moundrakis and Maria Moundrakis to dismiss so much of the petition as was asserted against them is denied and the cross motion by petitioner for summary judgment is granted.

[780]** In this postforeclosure summary proceeding (*RPAPL 713 [5]*), the record shows that, on July 7, 2015, petitioner effected personal service of a 10-day notice to quit on occupant Maria Moundrakis at the premises, **[***2]** a condominium purchased by petitioner at a foreclosure sale in 2013, and, by serving additional copies of the papers upon her, effected substituted service on occupants Nikki Moundrakis and John Dellis. A copy of the referee's deed was annexed to the notice to quit. Thereafter, the notice of petition and petition were served on all three occupants by conspicuous-place service after two attempts at personal service, one in the evening and one in the afternoon of the following day, had proved unsuccessful.

Maria Moundrakis and Nikki Moundrakis (occupants) moved to dismiss so much of the petition as was asserted against them, on various grounds, including that service of process was defective; that substituted service cannot fulfill the requirement of *RPAPL 713 (5)* to exhibit a certified referee's deed; that the deed was not exhibited to occupants; and that the copy of the deed served upon occupants was not properly certified. Petitioner cross-moved for summary judgment. By order dated March 8, 2016, the Civil Court dismissed the petition on the ground that petitioner had failed to demonstrate that the deed had been exhibited to occupant Maria Moundrakis, as there was no statement about exhibition, **[***3]** and denied petitioner's cross motion as moot.

At the outset, we note that the two attempts at service of process, one on August 25, 2015, at 6:43 p.m. and one on August 26, 2015, at 1:55 p.m., satisfied the reasonable application standard of *RPAPL 735* for purposes of obtaining a final judgment of possession, as at least one of the attempts was made when the process server could reasonably expect someone to be at home (*see Brooklyn Hgts. Realty Co. v Gliwa, 92 AD2d 602, 459 NYS2d 793 [1983]*), even if they might not have otherwise been sufficient for purposes of obtaining a money judgment (*see Borg v Feeley, 56 Misc 3d 128[A], 2017 NY Slip Op 50834[U] [App Term, 1st [*4] Dept 2017]*; *Avgush v Berrahu, 17 Misc 3d 85, 847 NYS2d 343 [App Term, 2d Dept, 9th & 10th Jud Dists 2007]*).

RPAPL 713 provides in pertinent part:

> "A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon

> the respondent in the manner prescribed in *section 735*, upon the following grounds: . . .
>
> "5. . . . [T]he property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him."

[1] We note that as to Maria Moundrakis, a copy of the deed was not only shown to her but placed in her hand, thus, contrary to the determination of the Civil Court, satisfying the exhibition requirement **[***4]** of *RPAPL 713 (5)*.

In *Home Loan Servs., Inc. v Moskowitz (31 Misc 3d 37, 920 NYS2d 569 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2011])*, this court held that attaching a certified copy of the referee's deed to the notice to quit did not satisfy the requirement of *RPAPL 713 (5)* that the deed be exhibited to the respondent, where the notice to quit was served by conspicuous-place service. Petitioner here, in effect, asks this court to reconsider this ruling, arguing, among other things, that the exhibition requirement dates from the time that the statute required exhibition of the original deed and that, under the language subsequently added to the statute permitting **[**781]** exhibition of a certified copy of the deed, service of such a certified copy by means other than personal delivery should suffice.

Upon reconsideration, this court agrees with petitioner's contention. Civil Practice Act § 1411 (6) required the exhibition to the respondent of an original referee's deed, and this requirement was carried over when the Civil Practice Act provision was replaced in 1962 by *RPAPL 713 (5)*. However, in 1976 (L 1976, ch 642), because of the difficulties attendant in exhibiting an original deed, and in response to the decision in *Rome v White (82 Misc 2d 356, 369 NYS2d 609 [Civ Ct, NY County 1975])* disallowing exhibition of a photostatic copy of the deed (*see* Sponsor's Mem, Bill Jacket, L 1976, **[***5]** ch 642), ***HN1***[↑] the legislature amended *RPAPL 713 (5)* to permit, in addition to exhibition of an original deed, exhibition of a certified copy of the deed. We are persuaded that service by means other than personal delivery of a certified copy of the deed, i.e., service of a certified copy of the deed **[*5]** which is left at the premises for the respondent to retain and examine, satisfies the exhibition requirement.

Occupants additionally contend that the referee's deed that was exhibited to them was not properly certified. ***HN2***[↑] *CPLR 4540 (a)* permits copies of official records to be used for authentication purposes. *CPLR 4540 (b)* states, in relevant part: "Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, . . . the officer having legal **[****2]** custody of the original, or his deputy or clerk, with his official seal affixed." It is undisputed that, while the photocopy of the referee's deed that was attached to the petition that was filed with the court bears the certifying official's original signature with his official raised seal in compliance with *CPLR 4540 (b)*, the copies served on occupants together with the notice to quit are photocopies of the referee's deed **[***6]** and do not bear an original seal. Thus, these copies do not satisfy the requirements of *CPLR 4540 (b)*.

[2] *CPLR 2105* provides for an alternative method of certification, by an attorney, stating:

> "Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk."

HN3[↑] This section of the CPLR requires that the attorney "subscribe" the certificate. It is undisputed that petitioner's attorney signed the original certification,* that a photocopy was then made of that document, and that the photocopy was served on occupants. We find that this procedure comports with the requirements of *CPLR 2105*, for the reasons set out in *Federal Natl. Mtge. Assn. v Wagshcal* (NYLJ, Jan. 31, 2001 at 33, col 4 [Civ Ct, NY County 2001]; *but see Security Pac. Natl. Trust Co. v Cuevas, 176 Misc 2d 846, 675 NYS2d 500 [1998])*.

Accordingly, the order is reversed, the motion by occupants Nikki Moundrakis and Maria Moundrakis to dismiss so much of the petition as was asserted against them is denied and the cross motion by **[**782]** petitioner for summary judgment is granted.

Pesce, P.J., Weston and **[***7]** Elliot, JJ., concur.

End of Document

*The original certification is attached to the petition filed with the Civil Court. Thus, the copy of the deed attached to the petition is certified by compliance with both *CPLR 4540 (b)* and *CPLR 2105*.

Citibank, N.A. v Colucci

Supreme Court of New York, Appellate Term, Second Department

June 29, 2018, Decided

2017-1480 RI C

Reporter
2018 N.Y. Misc. LEXIS 2712 *; 2018 NY Slip Op 51064(U) **; 60 Misc. 3d 135(A); 110 N.Y.S.3d 202

[**1] *Citibank*, N.A., Appellant, against Valerie *Colucci*, et al., Occupants, and Thomas Colucci, Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

deed, summary proceeding, exhibition, premises

Headnotes/Summary

Headnotes

Landlord and Tenant—Summary Proceedings—Property Sold in Foreclosure—Exhibition of Deed.

Counsel: [*1] Knuckles, Komosinski & Manfro, LLP (Stuart L. Kossar of counsel), for appellant.

Staten Island Legal Services (Jeanette Cepeda and Logan Schiff of counsel), for respondent.

Judges: PRESENT: THOMAS P. ALIOTTA, J.P., MICHAEL L. PESCE, MICHELLE WESTON, JJ.

Opinion

Appeal from an order of the Civil Court of the City of New York, Richmond County (Marina C. Mundy, J.), entered May 23, 2017. The order granted a motion by occupant Thomas Colucci to dismiss so much of the petition as is against him in a summary proceeding brought pursuant to *RPAPL 713 (5)*.

ORDERED that the order is reversed, without costs, and the motion by occupant Thomas Colucci to dismiss so much of the petition as is against him is denied.

Petitioner purchased the premises at a sale held pursuant to a judgment of foreclosure that had been entered in an action in the Supreme Court, Richmond County. All of the occupants were subsequently served, by conspicuous-place service, with 10-day notices to vacate and attorney-certified copies of the referee's deed. After petitioner commenced this summary proceeding pursuant to *RPAPL 713 (5)*, Thomas Colucci (occupant) moved to dismiss so much of the petition as is against him on the ground that affixing the deed to the door of the [*2] premises did not satisfy the exhibition requirement of *RPAPL 713 (5)*, citing this court's decision in *Home Loan Servs., Inc. v Moskowitz (31 Misc 3d 37, 920 N.Y.S.2d 569* [App Term, 2d Dept, 2d, 11th & 13th Jud Dits 2011]). The Civil Court granted occupant's motion.

This court has recently held that service of a certified copy of a deed by means other than personal delivery satisfies the exhibition requirement of *RPAPL 713 (5)* and no longer adheres to the decision in *Home Loan Servs., Inc. v Moskowitz* (*see Plotch v Dellis, 60 Misc 3d 1, 75 N.Y.S.3d 779, 2018 NY Slip Op 28116* [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]). Accordingly, the order is reversed and occupant's motion is denied.

ALIOTTA, J.P., PESCE and WESTON, JJ., concur.

End of Document

NY CLS RPAPL § 1305

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1393)

§ 1305. Notice to tenants

1. Definitions. For the purposes of this section, the following definitions shall apply:

(a) "Residential real property" shall mean real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes.

(b) "Successor in interest" shall mean any person or entity who or which acquires title in a residential real property as a result of a judgment of foreclosure and sale, or other disposition during the pendency of the foreclosure proceeding, or at any time thereafter but prior to the expiration of the time period as provided for in subdivision two of this section.

(c) "Tenant" shall mean any person who appears as a lessee on a lease of one or more dwelling units of a residential real property that is subordinate to the mortgage on such residential real property; or who at such time is a party to an oral or implied rental agreement with the mortgagor and obligated to pay rent to the mortgagor or such mortgagor's representative, for the use or occupancy of one or more dwelling units of a residential real property.

2. Notwithstanding any other provision of law, a tenant of a unit not subject to rent control or rent stabilization shall have the right to remain in occupancy of the unit of the subject residential real property where he or she resides on the date of service of the notice required by subdivision three of this section for the greater of: (a) a period of ninety days from the date of the service of such notice; or (b) for the remainder of the lease term if the tenant occupied the premises at the commencement of the foreclosure action or received a notice pursuant to section thirteen hundred three of this article; or (c) for the remainder of the lease term, provided that the lease agreement was entered into in good faith pursuant to this section and federal law, up to a maximum of three years, for tenants who did not occupy the premises at the commencement of the foreclosure action and therefore did not receive the original notice of service required pursuant to section thirteen hundred three of this article; provided that if a successor in interest who acquires title to such residential real property intends to occupy a single unit as his or her primary residence and the unit is not subject to a federal or state statutory system of subsidy or other federal or state statutory scheme, the successor may limit for one unit only, the tenant's right of occupancy to ninety days. For a lease to qualify under this subdivision, the tenant under such lease may not be the owner of the residential real property, and such lease must require the payment of rent for such unit that is not substantially less than the fair market rent for the unit, unless the unit is subject to federal or state statutory system of subsidy or other federal or state statutory scheme. A tenant under paragraph (a), (b), or (c) of this subdivision shall continue such tenancy subject to any limitations in this subdivision under the same terms and conditions as were in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions that were in effect at the time of the transfer of ownership of such property. For purposes of this section, "fair market rent" shall mean rent for a unit of residential real property of similar size, location and condition.

3. Notwithstanding any other provision of law, and consistent with subdivision two of this section, a successor in interest of residential real property shall provide written notice to all tenants in the same manner as required by subdivision four of section thirteen hundred three of this article: (a) that they are entitled to remain in occupancy of such property for the remainder of the lease term, or a period of ninety days from the date of mailing of such notice, whichever is greater, on the same terms and conditions as were in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions as were in effect at the time of

transfer of ownership of such property; and (b) of the name and address of the new owner. Any person or entity who or which becomes a successor in interest after the issuance of the ninety-day notice provided for in this subdivision, shall notify all tenants of its name and address and shall assume such interest subject to the right of the tenant to maintain possession as provided in this subdivision.

4. Acceptance of rental payments by any successor in interest on terms provided in subdivision three of this section shall not affect the right of the successor in interest to evict such tenant, as provided by law, upon the expiration of the time period as provided in subdivision two of this section or earlier if the tenant does not pay rent pursuant to any lease or oral or implied rental agreement in effect at the time of issuance of the judgment of foreclosure, or if no such judgment was issued, upon the terms and conditions as were in effect at the time of transfer of ownership of such property.

5. The rights conferred upon a tenant by subdivision two of this section shall be in addition to any other rights of such tenant, under law, including those rights conferred upon: (a) any tenant not named in the foreclosure action; or (b) any tenant whose tenancy is subsidized by the federal government, this state or any political subdivision of this state; or (c) any tenant whose tenancy is subject to rent control, rent stabilization, or federal statutory schemes.

History

Add, *L 2009, ch 507, § 4*, eff Jan 14, 2010; *L 2020, ch 354, § 1*, effective January 1, 2021; *L 2021, ch 83, § 1*, effective January 1, 2021.

Annotations

Notes

Editor's Notes

***Laws 2009, ch 507, § 25*, sub b,** eff Jan 14, 2010, provides as follows:

§ 25. This act shall take effect immediately; provided, however, that:

b. Sections four, seven and eight of this act shall take effect on the thirtieth day after this act shall have become a law and shall apply to actions where a judgment of foreclosure and sale is issued on or after such date;

Laws 2020, ch 354, § 2, eff January 1, 2021, provides:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, and shall apply to actions commenced on or after such date.

Laws 2021, ch 83, § 2, eff January 1, 2021, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2020 amending the real property actions and proceedings law relating to the definition of "tenant" for purposes of mortgage foreclosures, as proposed in legislative bills numbers S. 5357 and A. 6370, take effect.

Amendment Notes

The 2020 amendment by ch 354, § 1, deleted "at the time the notice required by subdivision four of section thirteen hundred three of this article" preceding "appears" in 1(c).

NY CLS CPLR § 1024

Current through 2024 released Chapters 1-23

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 10 Parties Generally (§§ 1001 — 1026)

§ 1024. Unknown parties

A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

Annotations

Notes

Advisory Committee Notes:

The chief occasion for proceeding against unknown parties is in connection with unknown heirs of deceased owners of land, and service on them is typically by publication. This section is suggested by § 215 of the CPA and New Jersey rule 4:30-4. Cf. NY Civ Prac Act §§ 232-a(6), 1036, 1055, 1064–69, 1073. To take care of possible counterclaim situations "party" is used instead of "defendant" in the title and the body of the statute. The provision of § 215 for a fictitious name is eliminated. There is no general provision in the Federal rules for unknown parties. Cf. *Fed R Civ P 25(c)*. Several of the states which have followed the Federal rules likewise have no general provision for unknown parties.

Derivation Notes:

Earlier statutes: CPA § 215; CCP § 451.

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

A.In General

2.Generally

Capital Resources Corp. v. John Doe

Civil Court of the City of New York, Kings County

June 3, 1992, Decided

Index No. L&T 108021/91

Reporter
154 Misc. 2d 864 *; 586 N.Y.S.2d 706 **; 1992 N.Y. Misc. LEXIS 334 ***

Capital Resources Corp., Petitioner, v. John *Doe* et al., Respondents.

Notice: [***1] EDITED FOR PUBLICATION

Subsequent History: Later proceeding at *Capital Res. Corp. v. Doe, 1992 N.Y. Misc. LEXIS 723 (N.Y. Civ. Ct., June 17, 1992)*

Disposition: Accordingly, the petition is dismissed.

Core Terms

notice, tenant, amend, apartment, default

Case Summary

Procedural Posture

Petitioner buyer filed a holdover proceeding against unidentified parties pursuant to *N.Y. C.P.L.R. 1024*, seeking to recover possession of an apartment building. He then filed a motion to substitute respondent tenant for the unidentified party and to amend the caption of the petition and notice to reflect the substitution.

Overview

The buyer bought an apartment building at a foreclosure sale and brought a holdover proceeding against its former owners as tenants of the first floor apartment. The buyer originally obtained a judgment of possession by default against the former owners, however, the tenant herein got the default vacated on the ground that he was the tenant lawfully in possession and that he was never served with the petition or notice. The buyer then brought this holdover action against unidentified parties who were in possession of the first floor apartment pursuant to *N.Y. C.P.L.R. 1024*. The buyer then sought to substitute the tenant for the unidentified parties and to amend the petition and notice to reflect the substitution. The court found that *N.Y. C.P.L.R. 1024* was only to have been used after a genuine effort to learn the true identity of a party was unsuccessful. Because this suit was filed less than one month after the tenant had the default judgment set aside, it was clear that the buyer knew the tenant's identity when he filed the suit. Moreover, the buyer failed to attach an affidavit alleging unsuccessful due diligence to discovery the tenant's identification.

Outcome
The court denied the motion for substitution and dismissed the petition.

LexisNexis® Headnotes

Civil Procedure > Parties > Joinder of Parties > General Overview

HN1[] **Parties, Joinder of Parties**

N.Y. C.P.L.R. 1024 authorizes the initiation of a proceeding against an unknown party under specified circumstances. The section reads in pertinent part: a party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. It is implicit in *§ 1024* that the unusual authority it sanctions should not be availed of in the absence of a genuine effort to learn the true name of the party. It must be demonstrated that the persons named as unknown actually are unknown. To make that showing, counsel should present an affidavit stating that a diligent inquiry has been made to determine the names of such parties.

Civil Procedure > ... > Pleadings > Amendment of

Pleadings > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

HN2[] **Pleadings, Amendment of Pleadings**

Because a summary proceeding is entirely statutory in origin, there must be strict compliance with the statute to give the court jurisdiction. The recent trend has been to more liberally permit correction by amendment. However, this permissive approach is not without limits and if the defect in the petition affects the very essence of the proceeding or if the petition is fundamentally flawed in material respects it cannot serve as a predicate for eviction.

Headnotes/Summary

Headnotes

Parties - Unknown Parties - Landlord's Misuse of Statutory Authority to Institute Action against Unknown Party

Petitioner landlord, having improperly utilized *CPLR 1024* to institute a summary holdover proceeding by suing the tenant as an unknown party when it had actual notice of the tenant's name from a previous proceeding between the parties, may not now amend the petition and notice of petition to substitute the tenant's name for "John Doe", even in the absence of a showing of prejudice to respondent. *CPLR 1024* should not be utilized in the absence of a genuine effort to learn the true name of the party, demonstrated by an affidavit from counsel stating that a diligent inquiry has been made to determine the name of such party. Under the circumstances of this case, petitioner's misuse of the statutory authority for resort to *CPLR 1024* borders on sanctionable misconduct. To sanction a practice which vitiates the requirements of *CPLR 1024* by focusing solely on the question of prejudice would greatly increase the number of default judgments and would invite the very abuse the statutory requirements were designed to prevent.

Counsel: *Howard Gallin* and *Horing & Welikson,* Forest Hills *(Scott Gross* of counsel), for petitioner. *Peter J. Pruzan,* New York City, for respondents.

Judges: REICHBACH

Opinion by: Gustin L. Reichbach, J.

Opinion

[*864] [707]** Petitioner initiated the instant holdover proceeding against John and Jane Doe, seeking to recover possession of apartment 1 at 840 East 34th Street, Brooklyn. Petitioner now moves to substitute Michael Gore for "John Doe" as a party **[*865]** respondent and to amend the caption of the petition and notice of petition to reflect the substitution. Respondent opposes this motion and seeks dismissal of the proceeding.

This case raises the issue of when a petitioner may initiate a "John Doe" proceeding pursuant to *CPLR 1024*, and what remedy is available if that statutory authority is misused.

HN1[] *CPLR 1024* authorizes the initiation of a proceeding against an unknown party under specified circumstances. The section reads in pertinent part: "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed **[***2]** against such person as an unknown party by designating so much of his name and identity as is known."

As the Advisory Committee on Practice and Procedure noted, the chief occasion for utilizing this section "is in connection with unknown heirs of deceased owners of land" (1957 Report of NY Advisory Comm on Prac and Pro, vol 1, at 53). It is implicit in *section 1024* that the unusual authority it sanctions should not be availed of in the absence of a genuine effort to learn the true name of the party. (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1024:1, at 234; *Chavez v Nevell Mgt. Co., 69 Misc 2d 718* [Civ Ct, NY County 1972]; 2 Weinstein-Korn-Miller, *NY Civ Prac P 1024.04*.) It must be demonstrated that the persons named as unknown actually are unknown. To make that showing, counsel should present an affidavit stating that a diligent inquiry has been made to determine the names of such parties. *(Chavez v Nevell Mgt. Co., supra;* 2 Weinstein-Korn- Miller, *NY Civ Prac P 1024.04*.)

A review of the background of this case demonstrates why petitioner was not entitled to utilize the procedures provided for by *CPLR 1024*.

Petitioner obtained **[***3]** title to the premises on December 13, 1990 after a foreclosure sale. Petitioner, represented by Horing & Welikson, of counsel to Howard Gallin, brought a holdover proceeding, and named the former owners of the building as the tenants of the first-floor apartment. *(Capital Resources Corp. v Bandoo,* index No. 051928/91.) Petitioner originally obtained a judgment of possession by default against the former owners. The respondent herein, Michael Gore, brought an order to show cause in that action in which

he alleged, *inter alia,* that he was the tenant lawfully in possession and that he was never served with the notice of **[*866]** petition and petition or even a notice of termination. Michael Gore further alleged that he did not receive any notice of the proceeding until he received a copy of the judgment addressed to "John Doe No. 1, Apt. 1" at the premises. The default was vacated by an order dated September 18, 1991.

Less than one month later, on October 10, 1991, petitioner served a new notice to quit, this time addressed to "John Doe 1, Jane Doe 1, and all other persons occupying the 1st floor apartment". Two months later, in November 1991, petitioner, again represented **[***4]** by Horing & Welikson, of counsel to Howard Gallin, commenced this proceeding, but in place of the former **[**708]** owners, the respondents were named as "John Doe" and "Jane Doe." Mr. Gore was not named anywhere in the notice to quit, the notice of petition or the petition.

No affidavit is attached to the petition alleging that petitioner made diligent inquiries to determine the name of the tenant on the first floor, nor was there even an allegation that petitioner did not know the tenant's name. Indeed, in support of this motion to amend, petitioner acknowledges that it knew Mr. Gore lived in the building and was the subject of this proceeding. Its sole justification for having brought this proceeding against "John Doe" was because of some uncertainty as to which apartment Mr. Gore resided in. This claim was advanced notwithstanding that Mr. Gore had in the prior proceeding identified himself as the tenant in apartment 1. This is a two-family house. Petitioner also had before the court a proceeding seeking possession of the other apartment in the building, which was also brought as a "John Doe" proceeding.

It is clear, indeed undisputed, that petitioner knew Mr. Gore's name **[***5]** and identity prior to the initiation of this proceeding. It therefore follows that petitioner misused the statutory authority for resort to *CPLR 1024*. The issue is whether petitioner may now amend its petition or whether the petition should be dismissed.

Petitioner argues that it has the right to liberally amend the notice of petition and petition, nunc pro tunc, citing *Jackson v New York City Hous. Auth. (88 Misc 2d 121* [App Term, 1st Dept 1976]), and relying on *Teachers Coll. v Wolterding (77 Misc 2d 81* [App Term, 1st Dept 1974]). Petitioner argues that since respondent does not contest receiving process, the petition can be freely amended.

HN2[↑] Because a summary proceeding is entirely statutory in **[*867]** origin, there must be strict compliance with the statute to give the court jurisdiction. *(Perrotta v Western Regional Off-Track Betting Corp., 98 AD2d 1* [4th Dept 1983]; *Little v Gallatin Props.,* NYLJ, May 13, 1992, at 26, col 4 [Kings County]; *see also, Matter of Blackgold Realty Corp. v Milne, 69 NY2d 719* [1987]; *Giannini v Stuart, 6 AD2d 418* [1st Dept 1958]; *141 St. Assocs. v Smith,* NYLJ, June 20, 1991, at 25, col 3 [App **[***6]** Term, 1st Dept].) For many years, the courts strictly construed compliance with pleading requirements. *(Dulberg v Ebenhart, 68 AD2d 323* [1st Dept 1979]; *Caiado v Bischoff, 140 Misc 2d 1014* [1988].) The recent trend has been to more liberally permit correction by amendment. *(Jackson v New York City Hous. Auth., 88 Misc 2d 121* [App Term, 1st Dept 1976], *supra.)* However, this permissive approach is not without limits and if the defect in the petition affects the " 'very essence of the proceeding' " *(Papacostopulos v Morrelli, 122 Misc 2d 938, 939* [Civ Ct, Kings County 1984]; *Thomas v Greenidege,* NYLJ, Jan. 21, 1992, at 35, col 2 [Kings County]), or if the petition is "fundamentally flawed in material respects" it cannot serve as a predicate for eviction *(141 St. Assocs. v Smith, supra,* at 25, col 4).

In this instance, the rules regarding when a petition may be amended must be read together with the requirements of *CPLR 1024* to determine whether this petition may be amended or whether it is fatally flawed.

Petitioner argues that the court's focus should be exclusively on the issue of whether or not respondent will suffer any prejudice if **[***7]** leave to amend is granted and that noncompliance with the requirement of *CPLR 1024* is not relevant to this determination.

Petitioner relies on *Teachers Coll. v Wolterding (77 Misc 2d 81* [App Term, 1st Dept 1974], *supra)* and argues that it provides authority permitting it to freely amend its petition. However, there are crucial factual differences between *Teachers Coll.* and this case. In *Teachers Coll.* the prime tenant was named in the caption while the subtenant was named as an unknown party. However, the subtenant was designated by name in the body of the petition as the occupant of the premises **[**709]** whose possessory interest was sought to be terminated. The subtenant's name was only missing from the caption. The court said such an omission could be amended. Here, the tenant is sued as an unknown party, Mr. Gore's name is completely absent from the body as well as the caption of the petition and the petitioner acknowledged that it **[*868]** knew Mr. Gore was the tenant prior to bringing this proceeding.

This is petitioner's second proceeding concerning these premises and petitioner and petitioner's attorney had *actual notice* of respondent's **[***8]** name from the earlier

proceeding. If the court were to ignore this blatant misuse of *CPLR 1024* and focus not on the issue of statutory compliance but solely on the question of prejudice, the result would be to sanction the use of "John Doe" proceedings at well. It is not hard to imagine the mischief that such a ruling would engender. If actual prejudice was the only standard petitioners would be free to ignore the statutory prerequisites and simply name "John Doe" instead of the actual tenant. If the "John Doe" respondent failed to appear, a default would be granted. If the respondent did appear, petitioner would be free to simply amend.

This court takes notice that more than one third of all judgments of possession are granted on default. *(See,* Comm on Legal Assistance of Assn of Bar of City of NY [Hous Ct Pro Bono Project] Part II [June 1988].) To sanction a practice which vitiates the requirements of *CPLR 1024* would greatly increase the number of default judgments, and would invite the very abuse the statutory requirements were designed to prevent.

Under the factual circumstances in this case, this court finds petitioner's conduct has skirted the very edges of **[***9]** sanctionable misconduct. (Rules of Chief Administrator of Courts [*22 NYCRR] § 130-1.1*; *see, e.g., East Harlem Pilot Block Bldg. HDFC v Serrano,* NYLJ, Apr. 28, 1992, at 23, col 3 [NY County].) *

[*10]** Accordingly, the petition is dismissed.

End of Document

---

* If respondent had defaulted and had been evicted based on this proceeding, petitioner's attorney might well have been held personally liable to respondent for damages. *(Chavez v Nevell Mgt. Co., 69 Misc 2d 718* [NY County 1972], *supra.) Chavez* was an action by a tenant against her former landlord and the landlord's attorney to recover damages sustained as a result of tenant's eviction. A summary nonpayment proceeding was instituted against a "John Doe," and a default judgment was granted. The landlord's attorney's secretary was notified of the tenant's actual name postjudgment, but prior to the execution of the warrant. The court held that the attorney misused the authority of *CPLR 1024* because the attorney was obligated not to permit the eviction to proceed in the name of "John Doe" once the true name of the tenant was reported to his secretary.

Cascade Funding RMI Alternative Holdings LLC v. Giannetto

Justice Court of New York, Town of Bedford, Westchester County

November 10, 2022, Decided

Docket No. 22030636

Reporter
2022 N.Y. Misc. LEXIS 6740 *; 2022 NY Slip Op 51132(U) **; 77 Misc. 3d 1204(A); 177 N.Y.S.3d 471; 2022 WL 17074912

[**1] *Cascade* Funding RMI Alternative Holdings LLC, Petitioner, against Elizabeth *Giannetto* AS TRUSTEE OF THE ELIZABETH GIANETTO LIVING TRUST DATED MARCH 14, 2003; JASON KANNRY, "JOHN DOE" and "JANE DOE," Respondent(s).

Notice: PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Prior History: *Cascade Funding Rmi Alternative Holdings Llc v. Giannetto, 2022 NYLJ LEXIS 2256 (Nov. 10, 2022)*

Core Terms

Notice, tenant, Premises, notice to vacate, lease, rent, Vacate, occupancy, necessary party, entitled to protection, diligent, tenancy, foreclosure, Holdover, parties, vacate the premises, fair market, mortgagor, residing

Headnotes/Summary

Headnotes

Parties — Unknown Parties — Failure to Allege Diligent Inquiry. — Landlord and Tenant — Summary Proceedings — Notice Requirements for Tenant in Possession When Title Transferred after Foreclosure.

Counsel: [*1] Counsel for Petitioner: Kimberly Mulligan, Esq. of Robertson, Anschutz, Schneid, Crane & Partners, PLLC.

Counsel for Respondents: James G. Dibbini, Esq. of James G. Dibbini & Associates, P.C.

Judges: Hon. Jodi J. Kimmel, Town Justice.

Opinion by: Jodi J. Kimmel

Opinion

Jodi J. Kimmel, J.

Margaret Bober and Eva Rem, admittedly appearing in this proceeding as Respondents on behalf of Jane Doe 1 and Jane Doe 2, have moved to dismiss the Petition prior to answering same.

BACKGROUND

On May 9, 2004, Elizabeth Giannetto, landlord, and Margaret Bober, tenant, entered into a month-to-month lease for the premises located at 4 Old Cross River Road, Katonah, NY ("the Premises"). Ms. Bober has been residing at the Premises since May 2004. Eva Rem is Ms. Bober's mother and claims to be living at the Premises but gives no indication of when she moved in. A Judgment of Foreclosure and Sale was entered on August 22, 2019. A foreclosure sale was conducted on November 20, 2019. Petitioner was the successful bidder at the sale, and a Referee's Deed was executed on December 17, 2019.

Petitioner claims in their Affirmation in Opposition that a Notice to Quit/Vacate was served on December 16, 2021. They attach an affidavit of service that shows [*2] this December date. However, Petitioner does not attach a copy of the notice that was allegedly served on December 16, 2021. Petitioner filed a Notice of Petition and Petition — Holdover with this Court on March 24, 2022 ("the Holdover Petition"). Attached to that Petition is a copy of a Notice to Vacate dated November 18, 2021. The Notice to Vacate is addressed to the same parties listed in the caption of this proceeding.

The first page of the Notice to Vacate is titled "Ten (10) Day Notice to Vacate". The Notice provides that the recipient(s) of the Notice either produce evidence that they are entitled to the protections of *Real Property Actions and Proceedings Law ("RPAPL") § 1305* or they are required to vacate the Premises within 10 days of service of the notice, that date being

handwritten into the notice as February 12, 2022 (said date comporting with service that would have been completed on February 2, 2022).

The second page of the Notice to Vacate has two sections. The first section is titled "Notice of Foreclosure & Tenant's Rights Under *New York RPAPL § 1305*". This section informs the recipient of the Notice, *inter alia*, that *RPAPL § 1305* grants certain rights to occupants who are tenants, including "the giving of 90-day Notice to Vacate or the right to remain until **[*3]** your lease expires . . .." Again, demand is made that the recipient of the notice "provide evidence to show that the occupant is entitled to the protection of *New York RPAPL § 1305*."

The second section on the second page is titled "Alternative Ninety (90) Day Notice". Here, the recipient of the Notice is purportedly given "the Ninety (90) Day Notice to Vacate as required by New York law (for tenants)." The Notice continues, "Pursuant to *New York RPAPL § 1305*, all tenants must vacate the property by May 3, 2022", the date, again, being filled in by hand with the date comporting with service that would have been completed on February 2, 2022. In point of fact, an affidavit of service indicating that service was completed on February 2, 2022, is annexed to the Notice to Vacate.

In view of the foregoing, the Court is constrained to disregard Petitioner's allegation that an undisclosed Notice to Vacate was served on December 16, 2021, in favor of the Notice that was served on February 2, 2022, said Notice being attached to the Petition filed with the Court.

As noted above, neither Ms. Bober nor Ms. Rem is specifically named in the Notice to Vacate. Similarly, they are not specifically named in the Holdover Petition.

Ms. Bober appeared **[*4]** in court on the initial return date and requested an adjournment to retain counsel. Counsel has appeared in this proceeding on behalf of Ms. Bober and Ms. Rem and moved this Court to dismiss the Holdover Petition contending that the Notice to Vacate is defective because it contains alternative periods within which to vacate; the Petition was served prematurely; and Petitioner failed to join necessary parties to this proceeding.

Both Respondents submitted affidavits with their motion. As noted above, in her affidavit, Margaret Bober states that she entered into a written month-to-month lease for the Premises with Elizabeth Giannetto. She attaches a copy of the lease. The monthly rent payable by the tenant to the landlord was established at $1,500. Ms. Bober also asserts that she has lived at the Premises since she signed her lease; her driver's license lists the Premises as her address; and she receives mail there. Eva Rem states in her affidavit that she is Ms. Bober's mother; she resides at the Premises with Ms. Bober (although she does not state when she moved in); and that "[a]t one point in time as part of a tenancy agreement with the prior owner, Elizabeth Giannetto, [she] paid **[*5]** in excess of $50,000 for property taxes and use and occupancy at the subject property" (no date of **[**2]** payment or proof of payment was given).

As will be addressed herein, while the Respondents are presently represented by the same attorney and they have put forward the same arguments, it is clear to the Court that the rights and claims of Ms. Bober and Ms. Rem are incongruous.

Procedural Irregularities

As a prefatory matter, the Court is constrained to address the deficiency of the movants' application. *Civil Practice Law and Rule ("CPLR") § 2214(a)* spells out the requirements for creating a Notice of Motion — the time and place of the hearing; relief sought; *etc.* must be included in this notice. A "motion" can be dismissed if proper notice of the motion is not given. *Glass Capital Ventures v Abdul-Malik, 2019 N.Y. Misc. LEXIS 11293 (Sup Ct, Queens County 2019)*.

Furthermore, the Holdover Petition was not annexed to the Respondents' papers rendering the motion procedurally deficient pursuant to *CPLR § 2214(c)*. It is axiomatic that this Court is unable to determine whether the Petitioner's Petition is legally sufficient so as to withstand dismissal without a copy of the actual pleading before it. *See generally, Alizio v Perpignano, 225 AD2d 723, 640 N.Y.S.2d 191 (2d Dept 1996); Thompson v Iannucci, 50 Misc 3d 1226[A], 36 N.Y.S.3d 50, 2015 NY Slip Op 51984[U] [Sup Ct, Ulster County 2015]*.

The foregoing having been stated, this **[*6]** Court will not dismiss the motion because of a procedural defect as the delay would ultimately prejudice the Petitioner.[1]

Conclusions of Law

The Validity of the Notice to Vacate

In their motion to dismiss, the Respondents contend that a combined 10-day and 90-day notice to vacate "is not legally recognized", however there is a plethora of case law that speaks to the contrary. *See e.g., Wilmington Trust, N.A. v Holmes, 68 Misc 3d 1220[A], 130 N.Y.S.3d 630,, 2020 NY Slip Op 51033[U] [Civ Ct, Queens County 2020]*. It is not unreasonable for a buyer at foreclosure to cast a wide net in a

[1] Any future motions filed without the required Notice of Motion will be rejected by this Court.

Notice to Vacate so as to cover all possible types of occupants since they will not likely have precise knowledge of who is residing in the house and their legal relationship, if any, to the Premises. The Court finds that the combined 10-day/90-day Notice to Vacate is not defective because it makes provision for alternate dates by which the occupant(s) must vacate the Premises.

Respondents also take issue with the fact that the Notice to Vacate purportedly required them to prove they were tenants by supplying evidence of their status to the Petitioner, without which, they would be required to vacate the Premises within ten (10) days of receipt of the Notice to Vacate. Respondents, citing *Bank of Am., N.A. v Owens, 28 Misc 3d 328, 903 N.Y.S.2d 667, 2010 NY Slip Op 20164 (City Ct, Rochester County 2010)*, argue that the *Protecting Tenants at Foreclosure* **[*7]** Act ("PTFA") provides protections for tenants and the Petitioner cannot impose additional obligations that are not provided in the statute. This Court concurs. In accordance with the PTFA there is no obligation for the Respondents to respond to a questionnaire and prove tenant status.

That said, the question remains: Are the Respondents "tenants" pursuant to *RPAPL § 1305* and/or the PTFA?

Status as "Tenant" and Timeliness of Petition

The protections of *both* *RPAPL § 1305* and the PTFA are available to protect tenants of foreclosed properties in New York. *See e.g.* **[**3]** *956 Rogers Ave NDB LLC v Blair, 67 Misc 3d 403, 120 N.Y.S.3d 748, 2020 NY Slip Op 20047 (Civ Ct, Kings County 2020)*.

Under the PTFA, a person is a "*bona fide* tenant" if: (1) neither the mortgagor nor his family member is the tenant; and (2) the tenancy was the result of an arm's length transaction; and (3) the monthly rent (unless it is subsidized rent) is not substantially less than the property's fair market value. *PTFA § 702(b)*. The PTFA provides that all "*bona fide* tenants" residing in foreclosed residential real property are entitled to at least 90 days' advance notice of their obligation to vacate the premises before they can be evicted. (*See PTFA § 702 [a]*).

The definition of "tenant" contained in *RPAPL § 1305* is as follows:

"Tenant" shall mean any person who appears as a lessee on a lease of one or **[*8]** more dwelling units of a residential real property that is subordinate to the mortgage on such residential real property; or who at such time is a party to an oral or implied rental agreement with the mortgagor and obligated to pay rent to the mortgagor or such mortgagor's representative, for the use or occupancy of one or more dwelling units of a residential real property.

RPAPL § 1305(1)(c).

As Ms. Bober has established that she is a lessee pursuant to a lease entered into with the prior mortgagor, she meets the definition of tenant pursuant to *RPAPL § 1305(1)(c)*. Whereas Ms. Bober has a month-to-month lease, pursuant to *RPAPL § 1305(2)*, she shall have the right to remain in occupancy of the Premises for a period of 90 days from the date of the service a notice to vacate.

Having established that she is a tenant and afforded 90 days after service of the predicate notice within which to vacate, the Petition with respect to Ms. Bober must be dismissed, without prejudice, as same was filed on March 24, 2022 — prior to the expiration of the 90-day period which ended on May 3, 2022.

Contrary to Petitioner's argument, whereas Ms. Bober is a tenant entitled to the protections of *RPAPL § 1305*, it matters not whether here tenancy was the result of an arm's **[*9]** length transaction as that requirement solely pertains to the PTFA which provides the same 90-day advance notice. Similarly, while Petitioner did not present credible evidence of the fair market rent of the Premises (an alleged printout from a website [Zillow] purporting to assign value to the Premises is not evidence and does not establish the fair market rent), again, the amount of the rent is a factor pertaining to the application of the PTFA. The only relevance fair market rent has to *RPAPL § 1305* is where a tenant seeks to extend her occupancy for the remainder of the lease term. In that case, for a lease to qualify under *RPAPL § 1305*, such lease must require the payment of rent "not substantially less than the fair market rent for the unit". In this case, the lease is a month-to-month lease and Respondent cannot extend her occupancy for longer than 90 days after service of the notice to vacate. Accordingly, the fair market rent is inapplicable.

Finally, on this point, Petitioner contends:

[P]ursuant to *RPAPL § 1305 (2)*, a tenant is afforded the protections of remaining in the premises the greater of 90 days or the remainder of the lease term, *provided* that such tenancy **[**4]** continues under the same terms and conditions as **[*10]** were in effect at the time of the entry of the judgment of foreclosure and sale or transfer of title. [Emphasis in the original].

Petitioner concludes that Respondents' "failure to continue submitting rental payments is a breach under the Rental Agreement and therefore Respondents would not be entitled to the protections provided under *RPAPL § 1305*."

Petitioner's conclusion has no merit. *RPAPL § 1305 (2)* provides, *inter alia*, that "a tenant . . . shall continue such tenancy . . . under the same terms and conditions as were in effect at the time of the entry of the judgment of foreclosure and sale . . .." Ignoring the fact that Petitioner has failed to present any credible evidence with the respect to the issue of what rent, if any, has been paid, the statute does not necessarily condition a tenant's right to remain in occupancy upon payment of rent. The statute simply provides that the parties are to continue to operate under the terms of the original lease during the tenant's period of continued occupancy. Whether or not Ms. Bober has defaulted in connection with her obligations under the lease is not at issue here.

With respect to Ms. Rem, based upon a review of the Record the Court finds that she is not a tenant, **[*11]** and she is not entitled to the protections of *RPAPL § 1305* or the PTFA. The written lease between the owner/landlord, Elizabeth Giannetto, and the tenant, Ms. Bober, expressly limits occupancy of the Premises to Ms. Bober and her minor children. Ms. Rem's vague reference to "a tenancy agreement" she had with Ms. Giannetto is unavailing. Ms. Rem failed to inform with respect to the terms of the purported tenancy agreement; she failed to allege that she paid rent; and while claiming that she paid "in excess of $50,000 for property taxes and use and occupancy", she failed to provide any details or proof with respect to the payment. Ms. Rem has not credibly alleged that she came into possession of the Premises as a result of an arm's length transaction. Indeed, Ms. Rem has even failed to state when she came to reside at the Premises. In view of the foregoing, Ms. Rem is not a tenant, and she is not entitled to the protections of *RPAPL § 1305* or the PTFA.

Notwithstanding that Ms. Rem is not entitled to the protections of *RPAPL § 1305* or the PTFA, the instant proceeding may not be maintained solely against Ms. Rem for the reasons set forth below.

Necessary Joinder and Identification of Parties

Respondents claim that the Petition **[*12]** must be dismissed because they were not specifically named in the Petition and, it follows, joined as necessary parties. Pursuant to *CPLR § 1024*, "[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known." A party can only resort to *CPLR § 1024*, however, if the party has exercised due diligence in trying to ascertain the names of the occupants of the subject premises. "A diligent effort to learn the party's name is a condition precedent to the use of *CPLR § 1024*, which should therefore be turned to only as a last resort." *George Tut & Company v Jane Doe, 20 Misc 3d 815, 862 N.Y.S.2d 428, 2008 NY Slip Op 28264 (Civ Ct, Kings County 2008)*; Siegel, NY Prac. § 188 at 304 (3d ed). "If a petitioner knows a party's name, or fails to demonstrate that diligent efforts were **[**5]** made to learn a party's name, then use of a fictitious name is not authorized by *CPLR 1024* and the petition is rendered fatally defective as to that party." *Pinnacle Bronx East v Bowery Residents Comm., Inc., 2006 NY Misc. LEXIS 4025, 235 NYLJ 60 (Civ Ct, Bronx County 2006), citing Triborough Bridge and Tunnel Auth. v Wimpfheimer, 165 Misc 2d 584, 633 N.Y.S.2d 695 (App Term, 1st Dept 1995); First Fed. Sav. & Loan Ass'n v Souto, 158 Misc 2d 219, 601 N.Y.S.2d 43 (Civ Ct, NY County 1993)*.

In this case, it does not appear as though the Petitioner made any effort to establish who lives at the Premises. Petitioner named two individuals who apparently do not live at the Premises and failed to name the two people who do live there. To show that they have performed a **[*13]** diligent inquiry, counsel would be required to submit an affidavit stating that a diligent inquiry has been made to determine the names of such parties. *Netherland Props, LLC v Karalesis, 63 Misc 3d 1235[A], 115 N.Y.S.3d 835, 2019 NY Slip Op 50896[U] [Civ Ct, Bronx County 2019]; see also, Chavez v Nevell Mgmt Co, 69 Misc 2d 718, 330 N.Y.S.2d 890 (Civil Ct, NY County 1972)*; 2 Weinstein-Korn-Miller, *NY Civ Prac*, para 1024.04. Here, the Petitioner has failed to allege that they made any inquiry.

Cognizant that the Petition is subject to dismissal as to Ms. Bober because it was filed before Ms. Bober was required to vacate the Premises, the Petition would also be subject to dismissal based upon Petitioner's reliance on *CPLR § 1024* without establishing that they undertook a diligent effort to learn her name before giving her a fictious name in the Petition.

The conclusion with respect to Ms. Rem is different, however, because she is not a "necessary party" in the proceeding. The definition of "necessary party" found in *CPLR § 1001(a)* is: "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action . . .." It appears the only connection that Ms. Rem has to the Premises is that she was invited to live there by her daughter, the tenant, Ms. Bober. It follows, any rights Ms. Rem has to occupy the Premises flow directly from her daughter and would **[*14]** terminate upon her daughter's eviction. As the mother of the tenant, Ms. Rem is not a "necessary party" and does not need to be named in the proceeding nor served with process and the 10-day notice provision of *RPAPL § 713* is inapposite. *170 West 85th Street Tenants Ass'n. v Cruz, 173*

AD2d 338, 339-340, 569 N.Y.S.2d 705 (1st Dept 1991).

The fact that Ms. Rem is not a "necessary party", however, does not mean is she is not a "proper party" and, in point of fact, "[t]he Appellate Division has stated that the constitutional right to due process requires that 'for [a warrant of eviction] to be effective against a subtenant, licensee or occupant, he be made a party to the proceeding, either by naming him in and serving him with the petition and notice of petition or by joining him as a party during the pendency of the proceeding'". *Parkash 2125 LLC v Galan, 61 Misc 3d 502, 84 N.Y.S.3d 724, 2018 NY Slip Op 28273 (Civ Ct, Bronx County 2018) citing 170 West 85th Street Tenants Ass'n., 173 AD2d at 339-340*.

Nevertheless, while it has been held that assigning a fictious name to an occupant is legally sufficient to give her notice of the proceeding (*170 West 85th Street Tenants Ass'n, id.*), and while there is no question that Ms. Rem has, in fact, received notice of the proceeding (she has appeared in the proceeding by counsel), Petitioner cannot maintain the holdover proceeding against an occupant alone where, as here, the Premises is also occupied by a tenant. *170 West 85th Street Tenants Ass'n., 173 AD2d at 339* **[*15]** ; *Triborough Bridge and Tunnel Auth v Wimpfheimer, 165 Misc 2d 584, 633 N.Y.S.2d 695*.

Finally on this point, where, as here, a necessary party (Ms. Bober) is required to be served with a predicate notice, the same rules with respect to the naming of necessary parties in the caption of the petition apply to the predicate notice. Where the Notice to Vacate contained the same improper caption as the Petition, Petitioner having failed to exercise due diligence in trying to ascertain the names of the occupants of the Premises before attempting to resort to *CPLR § 1024*, the Notice to Vacate, just like the Petition, is fatally flawed and not subject to amendment. *First Fed. Sav. & Loan Ass'n, 158 Misc 2d at 221 citing Chinatown Apts. v Chu Cho Lam, 51 NY2d 786, 412 N.E.2d 1312, 433 N.Y.S.2d 86 (1980)*.

CONCLUSION

It is the conclusion of this Court that the Petition must be dismissed, without prejudice. The Court finds that Margaret Bober is a tenant and entitled to a new and corrected 90-day notice. Petitioner may be advised to sue every occupant that it wishes to evict.

Upon consideration of the history of these proceedings, the Court directs that service of the Notice to Vacate upon Respondents' counsel, by hand or overnight delivery with a copy to the Respondent(s) via first-class mail, will be sufficient service of the Notice to Vacate.

SO ORDERED.

Dated: November 10, 2022

Hon. Jodi J. Kimmel

Town Justice

End of Document

First Cent. Sav. Bank v Yglesia

Supreme Court of New York, Appellate Term, Second Department

October 11, 2012, Decided

2010-2618 S C.

Reporter
37 Misc. 3d 130(A) *; 2012 N.Y. Misc. LEXIS 4911 **; 2012 NY Slip Op 51969(U) ***; 2012 WL 5053024

[***1] *First Central* Savings Bank, Respondent, against Jose *Yglesia*, Appellant, -and- MAGDELENA YGLESIA, JOSE NICHOLAS YNOA NUNEZ and "JANE DOE", Occupants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

final judgment, summary proceeding, non jury trial

Headnotes/Summary

Headnotes

[*130A] Landlord and Tenant--Summary Proceedings--Separate Proceedings to Recover Possession of Separate Units.

Judges: [**1] PRESENT: IANNACCI, J.P., MOLIA and La CAVA, JJ. Iannacci, J.P., Molia and La Cava, JJ., concur.

Opinion

Appeal from a final judgment of the District Court of Suffolk County, Fifth District (Dennis M. Cohen, J.), entered September 22, 2010. The final judgment, insofar as appealed from, after a nonjury trial, awarded possession to petitioner as against occupant Jose Yglesia in a summary proceeding brought pursuant to *RPAPL 713 (5)*.

ORDERED that the final judgment, insofar as appealed from, is reversed, without costs, and final judgment is directed to be entered dismissing so much of the petition as is against occupant Jose Yglesia.

In this summary proceeding by a purchaser in foreclosure (*RPAPL 713 [5]*), Jose Yglesia (occupant) appeals from so much of a final judgment as awarded possession to petitioner as against him. The uncontroverted evidence at the nonjury trial established that the subject house was the residence of three families living independently of each other, with each unit having its own entrance, kitchen and bathroom, and with each unit being separately possessed. In these circumstances, petitioner was required to maintain a separate summary proceeding to recover possession of each [**2] of the separate units and could not maintain a single proceeding to recover the entire house (*see City of New York v Mortel, 161 Misc 2d 681, 616 N.Y.S.2d 683* [App Term, 2d & 11th Jud Dists 1994]; *see also Sherhan v Numyal Food, Inc., 3 Misc 3d 129[A], 2004 NY Slip Op 50374[U], 787 N.Y.S.2d 681* [App Term, 2d & 11th Jud Dists 2004]). Accordingly, the final judgment, insofar as appealed from, is reversed and final judgment is directed to be entered dismissing so much of the petition as is against occupant.

Iannacci, J.P., Molia and La Cava, JJ., concur. [***2]

Decision Date: October 11, 2012

End of Document