MEMORANDUM DECISION

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE _CASSANDRA A. JOHNSON_
Justice

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WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR LEHMAN MORTGAGE TRUST MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-9,

Plaintiff,

Index No. 713860/2019

Motion Date: October 11, 2023

- against -

Motion Seq. No. 1

KATHLEEN CUMBERBATCH A/K/A KATHLEEN A. CUMBERBATCH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR INDYMAC BANK, F.S.B., CITIBANK (SOUTH DAKOTA), N.A., NEW YORK CITY PARKING VIOLATIONS BUREAU, "JOHN DOE#1" through "JOHN DOE #12," 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,

Defendants.

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By notice of motion, filed on July 3, 2023, defendant Kathleen Cumberbatch (defendant) moves for an order: (i) granting her summary judgment pursuant to CPLR 3212 (a); (ii) dismissing the complaint with prejudice as time-barred; (iii) cancelling the notice of pendency; (iv) cancelling and discharging of record the subject mortgage, pursuant to RPAPL 1501 (4); and (v) awarding defendant statutory attorney's fees, pursuant to RPL 282.

By notice of cross-motion, filed on September 13, 2023, plaintiff moves for an order: (i) striking the answer and deeming it a standard notice of appearance and waiver and directing the entry of summary judgment in plaintiff's favor and against defendant for the relief demand in the complaint on the ground that there is no defense to the causes of action alleged therein; ii) appointing a Referee to compute and report; and (iii) amending the caption to strike the "John Doe #1" through "John Doe #12" defendants pursuant to CPLR 3025.

Relevant Background and Procedural History

On August 12, 2019, the instant action to foreclose the real residential property located at 131-27 230th Street in Springfield Gardens, New York 11413 (subject property) commenced with the filing of a summons, complaint, Notice of Pendency, and Certificate of Merit. The complaint alleges that the defendant executed a note and two mortgages, with a predecessor in interest, that were consolidated, extended, and modified to form a single lien on October 13, 2006, for $400,000, against the subject property. The complaint also alleges that the mortgage was transferred to the plaintiff by an Assignment of Mortgage. It is further alleged that the defendant defaulted on the loan by failing to pay an installment due on October 1, 2013, and that the default has not been cured. The complaint also seeks an order marking a prior mortgage recorded on February 15, 2000, for $132,000 as fully satisfied.

On December 13, 2019, defendant filed an answer to the complaint raising several defenses, including violation of the statute of limitations, and counterclaims to quiet title

discharging the mortgage and for cost and attorneys' fees. The defense alleges that on or about September 21, 2009, plaintiff's predecessor in interest commenced a prior foreclosure action under index number 25519/2009 (2009 action) against the instant defendant and subject property for the same loan. On November 21, 2017, the 2009 action was voluntarily discontinued, the judgment of foreclosure and sale was vacated, the Referee was discharged, and the Notice of Pendency canceled by Order of the court without opposition.

Discussion

Arguments

In support, defendant argues the instant action is barred by the six-year statute of limitation under CPLR 213 (4), given the acceleration of the debt in 2009. The defendant asserts that plaintiff's time to prosecute this action expired on September 22, 2015, years before this action commenced on August 12, 2019. The defendant relies on the passage of the Foreclosure Abuse Prevention Act (FAPA) on December 30, 2022, to assert that a plaintiff can no longer unilaterally extend or reset the statute of limitation. Defendant maintains that plaintiff's revocation letter did not serve to toll or restart the six-year statute of limitation with the voluntary discontinuance of the 2009 action ordered on November 17, 2017. Defendant proffers further that since the 2009 action commenced, she has not made any mortgage payments and that she did not receive any correspondence informing her that the subject loan was decelerated and that plaintiff would accept regular monthly mortgage payments from her. The defendant also contends she is entitled to summary

judgment on her counterclaims to cancel and discharge the mortgage and statutory attorney's fees because the action is time-barred.

In opposition and in support of its cross-motion, plaintiff argues that the instant action was timely commenced because the subject loan was decelerated prior to the expiration of the statute of limitations. Plaintiff contends that a "prior law firm" sent defendant a deceleration letter in September 2015 and that this letter was valid under controlling case law when it was sent. It is also argued that none of defendant's defenses create an issue of fact to deny a judgment and an Order of Reference in plaintiff's favor. Plaintiff argues further that retroactive application of FAPA would be unconstitutional and that the statute does not indicate that the amendments would retroactively apply to previously terminated lawsuits. Plaintiff avers further that it has provided a *prima facie* showing for entitlement to a judgment, that it has standing to maintain this action and its compliance with RPAPL 1304 and 1306.

In her reply, defendant counters that there is no admissible proof that the revocation letter proffered by plaintiff was mailed to her. Defendant also maintains that plaintiff is not entitled to summary judgment because it does not have standing and there is no admissible proof the 90-day notice was served as required.

Legal framework

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 [2d Dept 2020] citation omitted). On December 30,

2022, FAPA passed specifically to overturn *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [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 N.Y. Mellon v Stewart*, 216 AD3d 720, 723 [2d Dept 2023]). The act took immediate effect, applying to all actions concerning instruments described in CPLR 231 (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).

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 N.Y. Mellon v Stewart*, at 722). In addition, the Act 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*, 2023 NY Slip Op 23277, at 2 [Sup Ct Bronx County]).

Pursuant to CPLR 203 (h), once a cause of action to foreclosure 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." General Obligations Law 17-105 (4) provides that no acknowledgment or agreement can toll or otherwise extend the time limited to commence an action to foreclose a mortgage in any manner other than that

provided in this section. Under RPAPL 1301 (4), "[i]f 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."

Additionally, 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."

Application

To prevail on her motion, defendant must establish, *prima facie*, that the time to commence this action expired (*U.S. Bank N.A. v Corcuera*, 217 AD3d 896, 897 [2d Dept 2023], citing *Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668 [2d Dept 2017]). With such an initial showing, the burden then shifts to plaintiff to establish, with admissible evidence, that the action was timely commenced or that there are issues of fact concerning timeliness (*U.S. Bank N.A. v Corcuera*, at 897, citing *U.S. Bank N.A. v Martin*, 144 AD3d 891 [2d Dept 2016]). The defendant's evidence demonstrates that the statute of limitations began

running on September 22, 2009, the date the prior foreclosure action commenced and accelerated the mortgage. Consequently, defendant has established, *prima facie*, that this action commenced more than six years after the limitation time started to run (*U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2d Dept 2016]).

With this shift, to meet its burden, plaintiff proffers a letter dated September 14, 2015, on plaintiff's current counsel's letterhead. The letter provides that it is a notice of the lender's revocation of its prior acceleration. The letter is unsigned and does not identify the name of an individual to account for it. An affidavit from Nicole Marie Krongel (Krongel affidavit), the office manager of plaintiff's law firm, is provided, attesting that she is familiar with and has personal knowledge of the firm's record-keeping systems. The Krongel affidavit also provides that affiant has personal knowledge of these records, having examined them and that the deceleration letter was sent via USPS first class mail on September 14, 2015, to defendant at the subject property. Two screenshots of the firm's business record, both with the heading "Matter Form – Change", including the name "JCEIJoyce Celano" following the word "staff."

The screenshots do not provide a complete view of the record. The dates under the "ModifyDate" column of the "Matters – Notes" screenshot are cutoff. The court is left to presume that the information concerning the year cutoff is 2015. If the year were different, that would contradict the plaintiff's assertions. The screenshots are redacted, with entry dates blocked. Contrary to plaintiff's contention, the screenshots do not establish that a deceleration letter was mailed prior to the expiration of the limitation period. The

screenshots also indicate "12/21/2021" in the "Goto" column. The screenshots are incomplete and redacted; the entry dates and times are not sequential; and it is unclear when the document was mailed, September 14 or 15, 2015. Plaintiff's evidence is insufficient to foreclosure the issue of the timeliness of this action given that "[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (*Aurora Loan Servs., LLC v Czin*, 211 AD3d 1000, 1003 [2d Dept 2022]).

Further, prior to FAPA, a deceleration notice had to be "clear and unambiguous" to be enforceable (*see Bank of N.Y. Mellon v Yacoob*, 182 AD3d 566 [2d Dept 2020]). In September 2015, the prior proceeding that had accelerated the mortgage was pending. The September 2015 letter could not have revoked the acceleration, as the loan continued to be accelerated by the 2009 action (*see Nationstar Mtge., LLC v Naar*, 80 Misc3d 1203 (a) [Sup Ct Westchester County 2023], [lender's deacceleration letters invalid both because they were sent during the pendency of prior action and under FAPA]). Given the timing of the letter, the notice was ambiguous as it contradicted the then-pending 2009 action. The intent of the notice is also unclear and appears pretextual and ineffective since a new proceeding commenced in 2019 soon after the prior action was discontinued on November 17, 2017 (*see U.S. Bank, N.A. v Navarro*, 2022 NY Slip Op 32291(U) [Sup Ct Queens County 2022]). No payments were made to plaintiff, there was no assent to any such revocation, and plaintiff has not provided any evidence to the contrary.

Moreover, plaintiff fails to counter the defendant's assertion that there is no contractual agreement that would permit it to unilaterally decelerate the loan. The letter

appears to be a unilateral stipulation (*see Nationstar Mtge., LLC v Naar*, 80 Misc3d 1203(a)). Unilateral deceleration without a contractual or statutory basis provides no grounds upon which to toll or restart the statute of limitation (see CPLR 203 (h) and CPLR 3217 (e), as amended by FAPA; *see also, Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc.*, 38 NY3d 467 [2022] holding that Section 17-105 of the General Obligations Law is the only statute that governs whether the statute of limitations has tolled in a foreclosure action). The Court of Appeals held in *Batavia Townhouses, Ltd.*, 38 NY3d 46, that only an express promise by a borrower to pay the mortgage debt can toll or revive the statute of limitations for a mortgage foreclosure action. Unilateral deceleration in the face of FAPA, without a contractual or statutory basis, is not tenable (*id.*). Arguably, a contractual agreement providing for unilateral deceleration may also be unenforceable as parties are prohibited from extending or waiving the statute of limitations before it begins to run (see NY CLS CPLR 201).

Given the proceeding, the letter proffered by plaintiff fails to establish that the statute of limitations was tolled, and that the statute of limitation has not expired. Plaintiff fails to raise an issue of fact that would necessitate trial. Consequently, defendant is entitled to summary judgment as a matter of law. The defendant' motion to dismiss the complaint on CPLR 3212 (a) grounds as time-barred is granted, and the lis pendens attached to the subject premises is therefore cancelled.

Similarly, under RPAPL 1501 (4) "a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge of record that encumbrance

where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge of record the mortgage was commenced (*Scarso v Wilmington Sav. Fund Socy., FSB*, 200 AD3d 817, 818 [2d Dept 2021] citing *Ditmid Holdings, LLC v JPMorgan Chase Bank, N.A.*, 180 AD3d 1002 [2d dept 2020]; *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985 [2d Dept 2016]). Defendant's uncontested attestation that she solely possesses the subject property, and that neither plaintiff nor a predecessor in interest or servicers have ever been in possession serves to establish the requirements of RPAPL 1501 (4). Since plaintiff fails to show that the statute of limitation did not run on the entire debt when this action was commenced, defendant's motion for an order discharging the mortgage pursuant to RPAPL 1501 (4) is granted, and the subject mortgage is cancelled and discharged of record. The defendant's motion for statutory attorneys' fees is also granted.

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*, 2023 NY Slip Op 50909(U)14 [Sup Ct Westchester County 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 of Ace Securities Corp. Home Equity Loan Trust v IPA Asset Mgmt., LLC*, 79 Misc3d 821, 825-26 [Supt Ct Suffolk County 2023], *see also, FV-1, Inc.*

v Palaguachi, FV-1, Inc. v Palaguachi, 2023 NY Slip Op 32684(U) [Sup Ct Queens County], specifically holding that FAPA is retroactive). The language of the statute makes it clear that FAPA is intended to apply retroactively to prevent lenders and loan servicers from abusing and manipulating the statute of limitations to their advantage (*see Bayview Loan Servicing, LLC v Dalal*, 2023 NY Slip Op 23277). A judgment of foreclosure and sale has not been enforced in this case, and the action is pending. Therefore, FAPA applies and bars the tolling of the statute of limitation through plaintiff's unilateral deceleration of the loan (*see GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915).

Constitutionality

To establish a violation of the contract clause, there must be a substantial impairment of a contractual right (*Consumers Union of U.S., Inc. v State*, 5 NY3d 327 [2005]). "[W]here there is no existing contractual agreement regarding the terms changed by the legislation, there is no need to consider whether there was in fact an impairment and whether it was substantial" (*id*, at 359). There is no constitutional violation herein, as there is no showing plaintiff had a contractual right to unilaterally decelerate the subject loan. It is uncontested that the terms of the subject loan do not include plaintiff's right to unilaterally cancel acceleration. Consequently, plaintiff fails to show that there was a taking of a substantial right (*see id*, *see also, HSBC Bank USA, N.A. v IPA Asset Mgt., LLC*, 79 Misc3d 821, holding that FAPA did not take any vested rights of the plaintiff). In this case, there is no evidence that plaintiff's contractual rights were impaired.

The Act is remedial in nature and was passed to clarify and enforce existing law that mandates a six-year statute of limitation in foreclosure cases (*see Bayview Loan Servicing, LLC v Dalal*, 2023 NY Slip Op 23277, citing *Deutsche Bank Natl. Trust Co. v Dagrin*, 79 Misc3d 393, [Sup Ct Queens County 2023], *U.S. Bank Trust, N.A. v Miele*, 2023 NY Slip Op 23186 [Sup Ct Westchester County]). Specifically, the bill provides that its aim is:

> to thwart and eliminate abusive and unlawful litigation tactics that 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"

(New York State Senate Bill S5473D Sponsor Memorandum). The purpose and intent of FAPA is "to clarify the existing law and overturn those decisions that have strayed from legislative prescription and intent" (*Bayview Loan Servicing, LLC v Dalal, at 1106 citing* Senate Introducer's Mem in Support of 2021 NY Senate Bill S5473D [same-as bill to 2021 NY Assembly Bill A7737B, enacted as L 2022, ch 821]).

The FAPA serves to limit "the methods which a plaintiff in a foreclosure action can reset the accrual date" and extend the statute of limitations beyond the six-year period (*HSBC Bank USA, N.A.*, at 825). As has been held, under the instant circumstance, FAPA does not violate the federal or state constitution or any due process right (*id.*). Further, there is a strong presumption that the legislation is constitutional (*see White v. Cuomo*, 38 NY3d 209 [2022], *see also, FV-1, Inc. v Palaguachi*, 2023 NY Slip Op 32684(U), *HSBC Bank USA, N.A. v IPA Asset Mgt., LLC*, 79 Misc3d 821). The constitutionality of the statute is

not overcome by plaintiff's evidence or lack thereof. Consequently, the FAPA applies, and the statute of limitations was not tolled.

Moreover, as has been held, "FAPA did not shorten the six-year statute of limitations and, since it only applies when a final judgment had not yet been entered, the legislation did not affect a party's vested property rights" (*Bayview Loan Servicing, LLC v Dalal*, 2023 NY Slip Op 23277, *U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust v Miele*, 2023 NY Slip Op 23186, *HSBC Bank USA, N.A., as Trustee of Ace Securities Corp. Home Equity Loan Trust v IPA Asset Mgmt., LLC*, 79 Misc3d 821). Consequently, plaintiff's cross motion based on constitutional and due process grounds is denied in its entirety. The remainder of the plaintiff's cross-motion is also denied. The action is time-barred pursuant to CPRL 213 (4) and the defendant is entitled to dismissal.

Conclusion

The court has considered the parties' remaining contentions and finds them without merit. Accordingly, the defendant's motion to dismiss on CPLR 3212 (a) grounds is granted, the *lis pendens* attached to the subject premises is cancelled, the subject mortgage is cancelled and discharged of record, and defendant is awarded statutory attorneys' fees to the extent provided in the subject mortgage document. The plaintiff's cross-motion is denied in all respects. All relief not expressly granted herein is denied.

SETTLE ORDER.

FILED
7/10/2024
COUNTY CLERK
QUEENS COUNTY

Dated: JUL - 8 2024

HON. CASSANDRA A. JOHNSON