STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATE SERIES 2005-EFC2,

Plaintiff,

-against-

DAWN M. LYNCH; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; EQUIFIRST CORPORATION,

Defendants.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
Index No. 2015-250786

Appearances: RAS Boriskin, LLC
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DECISION/ORDER

Zwack, J.:

In this residential mortgage foreclosure action, the plaintiff U.S. Bank National Association ("USBNA") moves for summary judgment and an order appointing a referee to compute. The defendant Dawn M. Lynch ("Lynch") opposes, and cross moves for summary judgment, which is opposed by USBNA.

As background, by Decision and Order dated November11, 2019 the Court vacated the Judgment of Foreclosure dated January 17, 2019 and granted Lynch leave to file a late answer in the foreclosure action commenced on August 5, 2015 ("2015 Action). USBNA commenced a prior foreclosure action against Lynch on June 16, 2008 ("2008 Action"). Lynch interposed an answer in the 2008 Action, and on August 25, 2011the Court (Ceresia, G.)released the matter from the Residential Mortgage Foreclosure Settlement Part (CPLR 3408), and permitted USBNA to proceed forward with the 2008 Action. A review of the records of the County Clerk shows no further proceedings filed by USBNA in the 2008 Action after August 25, 2011, with the exception of a consent to substitute attorneys that was filed on December 8, 2014.

For the reasons that follow the Court denies USBNA's motion for summary judgment and grants Lynch's cross motion for summary judgment in its entirety.

Turning first to USBNA's motion for summary judgment, in a mortgage foreclosure action, "where a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagor's default, the mortgagee demonstrates its entitlement to a judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagor to assert and demonstrate, by competent and admissible evidence, any defense that could properly raise a question of fact as to his or her default" (*United Cos. Lending Corp. v Hingos,* 283 AD2d 764, 765 (3d Dept 2011]).

Albeit USBNA's application is supported by the requisite proof that it is the owner of Lynch's note and mortgage and that she is in default under the terms of the note and mortgage, Lynch has asserted in opposition the affirmative defense based on statute of limitations. On this issue she bears the initial burden of "establishing prima facie" that the time to sue on her note and mortgage has expired (CPLR 213[4]), including "when the plaintiff's cause of action accrued" (*Haynes v Williams,* 162AD3d 1377, 1378 [3d Dept 2018], quotations and citations omitted). Particularly, Lynch asserts that

USBNA accelerated her mortgage debt with the commencement of the 2008 Action — thereby triggering the six year statute of limitations — and that it was not revoked or de-accelerated during the six year period following 2008.

Thus, whether USBNA is now entitled to summary judgment in the 2015 Action turns on the question of whether the commencement of the 2008 Action validly accelerated Lynch's mortgage debt, and, if so, was it revoked or de-accelerated within six years of acceleration.

The commencement of a foreclosure action (which clearly identifies the debt being accelerated) accelerates the mortgage debt, which triggers the six year statute of limitations, and once accelerated it may only be revoked (or de-accelerated) by an unequivocal act occurring within the six year period (*Freedom Mortgage Corp. v Engel,* 37 NY3d 1 [2021]; *U.S. Bank National Association v Creative Encounters, LLC,* 194 AD3d 1135, 1136 [3d Dept 2021]. As held in *Freedom Mortgage* (at 33-34), a de-acceleration requires, within six years of the acceleration, an "affirmative act" of the note-holder, including: an express agreement to revoke the acceleration, or a voluntary motion or stipulation to discontinue the foreclosure action.

Turning to Lynch's asserted defense — that USBNA is now time barred to foreclose her mortgage debt — she points to USBNA commencement of

the 2008 Action, that it then accelerated her debt with the commencement of the 2008 Action, and argues that the 2015 Action was commenced more than six years after the 2008 acceleration. In support, she points to USBNA's 2008 Complaint, which at paragraph "Seventh" clearly states that it "hereby elects to call the entire amount secured by" her mortgage.

Turning to USBNA's Complaint in the 2015 Action, USBNA states that Lynch defaulted on August 16, 2008, and by reason "such defaults" accelerates her mortgage debt with the commencement of the 2015 Action. The Complaint also states that "the plaintiff alleges that no other proceedings have been had for the recovery of the mortgage indebtedness or if such action is pending, a final judgment was not rendered and such action is intended to be discontinued." Here, the Court understands that USBNA, by stating that it intended to discontinue the 2008 Action, effectively revoked its 2008 acceleration of Lynch's debt.

On this record, Lynch has clearly established, prima facie, that the 2015 Action is untimely. The filing off the summons and complaint in the 2008 Action — seeking to foreclose the same mortgage debt — "constituted a valid election by the plaintiff to accelerate the maturity of the debt (*Deutsche Bank Natl. Trust Co. v Adrian,* 157ad3d 934, 935 [2d Dept 2018],

citations omitted) — and thereafter USBNA failed to de-accelerate the debt within six years and not until the commencement of the 2015 Action.

Now, in opposition to Lynch's cross-motion for summary judgment and dismissal of USBNA's 2015 Complaint, it offers a March 20, 2020 affirmation by its attorney, who argues that "the prior foreclosure action (2008 Action) were (sic) for an entirely different default as the Defendant continued to make payments on the loan which cured the original default date prior to Defendant re-defaulting on the loan...(and once) the default is cured, under the terms of the Mortgage, the loan is de-accelerated...(then asserts that her) default upon which the instant action is based, was her failure to make the July 16, 2008 payment and subsequent payments"...(and then argues that the statute of limitations did not commence) until the loan was accelerated by Plaintiff when it commenced this action on August 5, 2015."

Notably lacking in USBNA's opposition is any supporting proof that, prior to the commencement of the 2015 Action, it timely revoked the 2008 acceleration of the debt, or that Lynch signed a writing or acknowledgment "to perform the previously defaulted contract" (General Obligations Law §17-101; *Knoll v Datek Sec. Corp.,* 2 AD3d 594, 595 [2d Dept 2003]; *Sichol v Crocker,* 177 AD2d 842, 842-843 [3d Dept 1991]) — either being required

to restart the statute of limitations after the commencement of the 2008 Action. Nor has USBNA offered proof that the 2008 Action was voluntarily discontinued before the running of the statute of limitations.

What is clear, once the Court released the 2008 Action from the CPLR 3408 settlement part in 2011, USBNA failed to take any further proceedings in the 2008 Action, and instead attempted to restart the expired statute of limitations with the filing of the 2015 Action. What is also clear is that USBNA intended to discontinue the 2008 Action with the commencement of the 2015 Action[1] (*Deutsche Bank Natl. Trust Co. v Gambino,* 153 AD3d 1232, 1233-1234 [2d Dept 2017]), and that Lynch's debt was not de-accelerated until the commencement of the 2015 Action. Since the 2015 Action was commenced more than six years after Lynch's debt was accelerated in the 2008 Action, the 2015 Action is time barred, and USBNA's Complaint must be dismissed.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment and order of reference is denied in its entirety; and it is further

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[1]Paragraph 14 of Complaint.

ORDERED, that the defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED, that the plaintiff's Complaint is this action is dismissed; and it is further

ORDERED, that plaintiff's Notice of Pendency is this matter is cancelled, and the Rensselaer County Clerk is directed to reflect the cancellation of the Notice of Pendency in the Clerk's records.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: February 23, 2022
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated February 19, 2020; Affirmation of Tracy Starasoler, Esq., dated February 19, 2020, together with Exhibits "A" through "S";
2. Notice of Cross-Motion dated March 12, 2020; Affidavit of Dawn M. Lynch, sworn to March 12, 2020, together with Exhibit "A"; Affirmation of Stephen J. Waite, Esq., dated March 12, 2020; Memorandum of Law;
3. Reply Affirmation of Khardeen Shillingford, Esq., dated March 20, 2020;
4. Reply Affidavit of Stephen J. Waite, Esq., sworn to April 9, 2020; Reply Affidavit of Dawn M. Lynch, sworn to April 9, 2020, together with Exhibits "A" through "D".