STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE,

Plaintiff,

-against-

DAWN LYNCH; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., AS NOMINEE FOR EQUIFIRST CORPORATION; "JOHN DOE" AND "JANE DOE", said names being fictitious, it being the intention of the Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendants.

DECISION AND ORDER
Index No. EF2008-225743

All Purpose Term
Hon. Laura M. Jordan, Supreme Court Justice

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Jordan, J.

I. INTRODUCTION

On June 16, 2008, Plaintiff U.S. Bank National Association as Trustee ("Plaintiff") commenced this mortgage foreclosure action (the "2008 Action" or "this action") against Defendant Dawn Lynch ("Defendant") to foreclose on residential property located in Rensselaer, New York (*see* NY St Cts Elec Filing ["NYSCEF"] Doc No. 5). The exact procedural history of

this case is disputed by the parties and will be examined in greater detail shortly, but, on October 24, 2012, an entry was created in the Unified Court System eCourts case tracking service ("WebCivil Supreme") stating that the 2008 Action had been "Marked Off" (*see* WebCivil Supreme, Index No. EF2008-225743). The 2008 Action is currently set as "Disposed" (*id.*).

Currently before the Court is Plaintiff's motion to vacate the "Marked Off" entry in WebCivil Supreme[1] and restore the 2008 Action to the Court's calendar (*see* NYSCEF Doc No. 33). For the reasons set forth below, Plaintiff's motion is granted.

II. BACKGROUND

As noted above, Plaintiff commenced this action on June 16, 2008, seeking to foreclose on a mortgage (*see* NYSCEF Doc No. 5). Plaintiff alleged that Defendant breached her obligations under the mortgage by failing to tender the payment that came due in March 2008 (*see* NYSCEF Doc No. 38 at 9). Defendant filed an answer on August 4, 2008 (*see* NYSCEF Doc No. 12). On August 31, 2010, Plaintiff moved for summary judgment (*see* NYSCEF Doc Nos. 15, 16). That motion was held in abeyance pending the parties' participation in a final foreclosure settlement conference on August 25, 2011 (*see* CPLR 3408).

The August 25 settlement conference was unsuccessful and, on August 26, 2011, Justice Ceresia granted Plaintiff's motion for summary judgment of foreclosure and order of reference.[2]

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[1] Plaintiff's motion frequently refers to the October 24, 2012 entry in WebCivil Supreme's appearance summary as stating "Pre-Marked Off" rather than "Marked Off" (*see, e.g.*, NYSCEF Doc No. 33 at 1). It appears that the WebCivil Supreme entry may have originally stated "Pre-Marked Off" (NYSCEF Doc No. 47 at 1) but was, at some later point, changed to just "Marked Off."

[2] Although Plaintiff argues that there is no evidence that its motion for summary judgment was considered or granted because no decision or directive to submit a proposed order was ever entered on the docket (*see* NYSCEF Doc No. 34 at 4, citing NYSCEF Doc No. 46 at 2), the Court is bound by Justice Zwack's determination on this issue, as discussed in the section on collateral estoppel, below.

This Court's legacy case management system indicates that there was a conference held on July 18, 2012, which none of the parties attended. The legacy system also contains the following notation: "AT 7/18/12 CONF COURT ALLOWS 60 DAYS FOR MOTION OR MATTER WILL BE CONSIDERED ABANDONED, SMD." According to the legacy case management system, this matter was then marked as disposed on October 24, 2012. Plaintiff's only activity in the 2008 Action between the grant of its motion for summary judgment and the present motion was filing a substitution of counsel on December 8, 2014 (*see* NYSCEF Doc No. 46 at 2).

Plaintiff, however, was not totally inactive. In August 2015, Plaintiff commenced a second action (the "2015 Action") against Defendant to foreclose on the same mortgage (*see* NYSCEF Doc No. 50). Defendant did not initially appear in the 2015 Action, and in February 2017, the Court granted Plaintiff a Judgment of Foreclosure and Sale (*see* NYSCEF Doc No. 23 in the 2015 Action, Index No. EF2015-250786, at 2). However, on September 11, 2019, Defendant successfully moved to vacate the Judgment of Foreclosure and Sale (*see* NYSCEF Doc No. 40 in the 2015 Action). Plaintiff then moved for summary judgment (*see* NYSCEF Doc No. 46 in the 2015 Action), and Defendant cross-moved for summary judgment (*see* NYSCEF Doc No. 50 in the 2015 Action). As relevant here, Defendant argued that the 2015 Action was time barred under the statute of limitations (*see* NYSCEF Doc No. 52 in the 2015 Action). On February 23, 2022, Justice Zwack granted Defendant's cross motion for summary judgment in its entirety, dismissed Plaintiff's complaint, and cancelled Plaintiff's notice of pendency (*see* NYSCEF Doc No. 57 in the 2015 Action).[3]

Now, Plaintiff has returned to the 2008 Action and has filed the present motion to vacate

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[3] Plaintiff has appealed the February 23, 2022 Decision and Order (*see* NYSCEF Doc No. 58 in the 2015 Action).

the "Marked Off" entry in WebCivil Supreme and restore this action to the Court's calendar (*see* NYSCEF Doc No. 33). Plaintiff argues that (1) CPLR 3404 is not applicable to this action; (2) the commencement of the 2015 Action does not preclude it from seeking to restore and prosecute this action; and (3) this motion is timely (*see* NYSCEF Doc No. 34 at ¶¶ 27-32). In opposition, Defendant argues that (1) CPLR 3404 is applicable to this case because "summary judgment is the procedural equivalent of trial" and therefore, this action should not be "considered a 'pre-note case' that would otherwise have rendered CPLR 3404 inapplicable"; (2) independent grounds for a finding of abandonment can be found under the Uniform Rules for the New York State Trial Courts ("22 NYCRR") §§ 202.48 and 202.27; (3) Plaintiff's commencement of the 2015 Action constituted a *de facto* discontinuance of the 2008 Action; (4) recent amendments to Sections 1301 (3) and (4) of the Real Property Actions and Proceedings Law ("RPAPL") prohibit Plaintiff's motion to restore; and (5) the doctrine of judicial estoppel should preclude Plaintiff's attempt to restore this action to the calendar (*see* NYSCEF Doc No. 64). In reply, Plaintiff argues that (1) the doctrines of collateral and judicial estoppel preclude Defendant from arguing that this action was discontinued or dismissed; (2) CPLR 3404, 22 NYCRR 202.48, and 22 NYCRR 202.27 are inapplicable here; (3) the amendments to RPAPL 1301 (3) and (4) are inapplicable to this action; and (4) the retroactive application of RPAPL 1301 (4) would violate Plaintiff's constitutional rights (*see* NYSCEF Doc No. 69). Finally, in a sur-reply, Defendant argues that (1) collateral estoppel should not apply to its argument that the 2015 Action discontinued the 2008 Action under RPAPL 1301 (3); and (2) the amendments to RPAPL 1301 (3) and (4) are both applicable to this action and constitutional as applied to Plaintiff (*see* NYSCEF Doc No. 71).

III. DISCUSSION

A. Collateral Estoppel, Judicial Estoppel, and the 2015 Action

In the 2015 Action, Justice Zwack decided several issues that directly concern the arguments currently being advanced by the parties. In particular, in the September 11, 2019 Decision and Order, Justice Zwack held that (1) Plaintiff "commenced the [2015] Action without terminating or discontinuing the [2008] Action" (NYSCEF Doc No. 40 in the 2015 Action, at 9); (2) there was "simply no merit to the … claim that the [2008] Action was marked off the Court's calendar and dismissed" (*id.*); (3) Plaintiff's motion for summary judgment and order of reference in the 2008 Action was granted in a decision dated August 26, 2011 (*see id.*); and (4) no dismissal pursuant to CPLR 3404 could have occurred in the 2008 Action because no note of issue had been filed (*see id.* at 10-11). Justice Zwack then concluded that, because Plaintiff had "obtained the Judgment [of Foreclosure and Sale dated January 17, 2017] through a misrepresentation of the status of the [2008] Action," and could not have maintained the 2015 Action "absent a discontinuance of the [2008] Action," Defendant was "entitled to a vacatur of the Judgment of Foreclosure and Sale" (*id.* at 12).

As noted above, Plaintiff argues that this Court is bound, by the doctrine of collateral estoppel, to these determinations (*see* NYSCEF Doc No. 69 at 7-9). "A finding of collateral estoppel requires that '(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits'" (*CitiMortgage, Inc. v Ramirez*, 192 AD3d 70, 72 [3d Dept 2020], quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]).

Defendant challenges only the first factor in the collateral estoppel analysis (*i.e.*, whether

the issues in both proceedings are identical), and only with respect to its arguments under RPAPL 1301 (3) (*see* NYSCEF Doc No. 71 at 3-5). Specifically, Defendant argues that although Justice "Zwack held that the 2008 Action had not been discontinued [at the time] the 2015 Action was commenced," he did not make any determination on what impact the commencement of the 2015 Action had on the legal status of the 2008 Action (*id.* at 4). The Court agrees. Whether the commencement of the 2015 Action discontinued the 2008 Action under RPAPL 1301 (3) was never addressed in the 2015 Action.[4] Therefore, the Court is free to make its own determination on this specific issue.

However, Justice Zwack's conclusion that this action was not terminated, discontinued, or dismissed prior to the commencement of the 2015 Action is an issue that is identical across both actions, was fully litigated by both parties in the 2015 Action, and necessary to his conclusion that Defendant was entitled to a vacatur of the January 17, 2017 Judgment of Foreclosure and Sale (*see* NYSCEF Doc No. 40 in the 2015 Action, at 12). Defendant does not challenge the applicability of collateral estoppel to this issue in her submissions. Because the Court is bound to Justice Zwack's conclusion on this issue, the Court cannot now consider Plaintiff's arguments that this action was, or could have been, properly dismissed under CPLR 3404, 22 NYCRR § 202.48, or 22 NYCRR § 202.27.[5]

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[4] Justice Zwack did address RPAPL 1301 (3) in his 2019 Decision and Order, but only with respect to the issue of whether the 2015 Action was properly commenced under the precondition requirements in Subsection 3, as they then existed (*see* NYSCEF Doc No. 40 in the 2015 Action, at 11; *see also* former RPAPL 1301 [3]).

[5] However, the Court concludes that no dismissal occurred in this action under these rules, either before or after the commencement of the 2015 Action. CPLR 3404 is only available where a note of issue has been filed (*see McCarthy v Jorgensen*, 290 AD2d 116, 118 [3d Dept 2002]). A note of issue was never filed in this action. The Court is unpersuaded by Defendant's argument that the grant of summary judgment advances the case to a "post-trial" stage where the application of CPLR 3404 would be appropriate (NYSCEF Doc No. 64 at 7; *see Lopez v*

Although technically unnecessary in light of the above holding, the Court would also arrive at the same conclusion through the application of judicial estoppel. The equitable doctrine of judicial estoppel provides that, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, it may not thereafter, simply because its interests have changed, assume a contrary position" (*Walker v. GlaxoSmithKline, LLC*, 201 AD3d 1272, 1275 [3d Dept 2022] [internal quotation marks, brackets, and citation omitted]). One of Defendant's primary arguments in support of her motion to vacate the January 17, 2017 Judgment of Foreclosure and Sale was that the 2008 Action was still pending at the time Plaintiff commenced the 2015 Action (*see* NYSCEF Doc No. 38 in the 2015 Action, at 4-8). Using this argument, Defendant successfully obtained vacatur of the Judgment of Foreclosure and Sale in Justice Zwack's 2019 Decision and Order (*see* NYSCEF Doc No. 57 in the 2015 Action). To the extent that Defendant seeks to use judicial estoppel against Plaintiff (*see* NYSCEF Doc No. 64 at 12-15) that argument is unavailing in as much as Plaintiff did not prevail in the 2015 Action.

In sum, the Court holds that—although it is free to consider and rule on Defendant's argument that the 2015 Action discontinued the 2008 Action under RPAPL 1301 (3)—it is

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Imperial Delivery Serv., Inc., 282 AD2d 190, 199 [2d Dept 2001] [holding that CPLR 3404 "should be reserved strictly" for cases on "the trial calendar"]). Section 202.48 of the Uniform Rules states that "[p]roposed orders or judgments . . . must be submitted for signature . . . within 60 days after the signing and filing of the decision directing that the order be settled or submitted" (22 NYCRR § 202.48 [a]). There is no order in the record reflecting a dismissal under this rule, and the proper remedy would have been of the dismissal of the motion, not dismissal of the entire action (*see* 22 NYCRR § 202.48 [b]). Section 202.27 of the Uniform Rules allows a court to "make such order as appears just" where no party appears for a conference (22 NYCRR § 202.27 [c]). Although it appears that none of the parties attended the July 18, 2012 conference, the Court is still required to "enter an order" setting forth the consequences of that default (*id.* § 202.27). The Rensselaer County Clerk's file for this case does not contain any orders filed on the date of the conference or the date this case was marked as disposed. There were two orders filed several days after the case was marked as disposed, but neither of those orders appear to relate to a dismissal under Section 202.27.

bound, under the doctrine of collateral estoppel, by Justice Zwack's determinations that (1) Plaintiff did not terminate or discontinue this action prior to commencing the 2015 Action; (2) this action was never marked off the Court's calendar or dismissed; (3) Plaintiff's motion for summary judgment and order of reference in this action was granted in a decision dated August 26, 2011; and (4) no dismissal pursuant to CPLR 3404 could have occurred in in this action.

B. "De Facto" Discontinuance

Defendant next argues that Plaintiff's commencement of the 2015 Action, in conjunction with the statement in that complaint that all other pending actions were intended to be discontinued, "constituted a de facto discontinuance" of the 2008 Action which "waived ... [P]laintiff's right to challenge the administrative dismissal of the [2008] [A]ction" (NYSCEF Doc No. 64 at 10). The authority relied on by Defendant, however, is not persuasive. In particular, Defendant relies exclusively on the dissent in *Bank of Am., N.A. v Ali* (202 AD3d 726, 734 [2d Dept 2022, Hinds–Radix, J., dissenting]), wherein Judge Hinds-Radix argued that "the commencement of [a] second action constituted a de facto discontinuance of the first action" in that case, which "waived the plaintiff's right to challenge the administrative dismissal of the first action" (*id.* [citations omitted]). The majority in *Ali*, however, expressly addressed and rejected this argument:

> We reject the defendant's contention that the plaintiff effectively abandoned the instant action by commencing the 2015 action. . . . [RPAPL 1301(3)] contemplates a stay or dismissal of the later commenced action if leave is not obtained, not a dismissal of the first action . . . . This Court held, in *Humphrey* and *Conlin*, and the Appellate Division, First Department, held, in *Chait*, that although the first actions were not formally discontinued, the effective abandonment of those actions was a "de facto discontinuance" which militated against dismissal of the second action pursuant to RPAPL 1301(3) . . . . We see no reason to import the concept of effective abandonment from RPAPL 1301(3) to the situation here, where the plaintiff seeks to restore the first action to the active calendar after the second action has been dismissed . . . .

(*Ali*, 202 AD3d at 728-730). This Court is bound by that determination.

C. The Foreclosure Abuse Prevention Act and RPAPL 1301

In December 2022, the Legislature enacted the Foreclosure Abuse Prevention Act ("FAPA") to amend the General Obligations Law, the CPLR, and the RPAPL "in relation to the rights of parties involved in actions commenced upon real property related instruments" (L 2022, ch 821). Defendant argues that the FAPA's amendments to RPAPL 1301 prohibit Plaintiff's motion because (1) under RPAPL 1301 (3), the commencement of the 2015 Action resulted in the discontinuance of the 2008 Action (*see* NYSCEF Doc No. 71 at 6-7); and (2) under RPAPL 1301 (4), Justice Zwack's determination that the 2015 Action was time barred under the applicable statute of limitations also bars the restoration of the 2008 Action under the statute of limitations (*see* NYSCEF Doc No. 64 at 11-12). In opposition, Plaintiff argues that FAPA's amendments to RPAPL 1301 (3) and (4) are inapplicable to this action and would, if found to be applicable, violate its due process rights (*see* NYSCEF Doc No. 69 at 13-23). Plaintiff is correct.

Initially, RPAPL 1301 (3) provides that if a second action to recover any part of a mortgage debt is commenced without leave of the court, the first action shall be deemed discontinued upon the commencement of the second action *unless*, "prior to the entry of a final judgment in [the second] action, a defendant raises the failure to comply with this condition precedent therein" (RPAPL 1301 [3]). In the 2015 Action, Defendant clearly raised Plaintiff's failure to comply with RPAPL 1301 (3) (*see* NYSCEF Doc No. 38 in the 2015 Action, at 6-8; NYSCEF Doc No. 40 in the 2015 Action, at 11). Thus, RPAPL 1301 (3)'s discontinuance provision is inapplicable here.

RPAPL 1301 (4) provides that, if an action to foreclose a mortgage "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." Although it appears that a plain reading of Subsection 4 would require the Court to find that the 2008 Action—which was timely at the time it was commenced—is now time-barred by the statute of limitations,[6] the Court holds that FAPA's changes to RPAPL 1301 are inapplicable to this case. FAPA's retroactivity provision provides that it "shall take effect immediately and shall apply 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 [emphasis added]). Final judgment was entered in the 2015 Action on February 23, 2022, over ten months before FAPA was signed into law (*see* L 2022, ch 821, eff. Dec. 30, 2022). Thus, the Court holds that 2015 Action is outside the reach of Section 10 of FAPA, and the determination that the 2015 Action was time barred under the statute of limitations does not trigger the provisions of RPAPL 1301 (4).

However, even assuming that the 2015 Action did fall within the reach of Section 10 of FAPA, the application of RPAPL 1301 (4) to this action, which was timely when it was commenced, would "impair [Plaintiff's] vested rights and violate due process" (*Merz v Seaman*, 265 AD2d 385, 388-89 [2d Dept 1999]; *see also Ruffolo v Garbarini & Scher, P.C.*, 239 AD2d 8, 12 [1st Dept 1998] [holding that the application of an amendment to CPLR 214 (6) "to render [an] action, timely when commenced, time barred by virtue of retroactive application of the amendment is impermissible" because it would "impair vested rights" and " violate due process"]; *Martin v Canale*, 252 AD2d 932, 933-34 [3d Dept 1998] ["We agree with the First

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[6] "'[A] statute must be read and given effect as it is written by the [l]egislature, not as the court may think it should or would have been written if the [l]egislature had envisaged all the problems and complications which might arise'" (*Estate of Youngjohn v Berry Plastics Corp.*, 36 NY3d 595, 607 [2021], quoting *Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 NY2d 539, 548-549 [1983]).

Department's determination in *Ruffolo* . . . that the 'application of the amendment to CPLR 214(6) so as to render this action, timely when commenced, time barred by virtue of retroactive application of the amendment is impermissible'"] [quotation omitted]).

IV. CONCLUSION

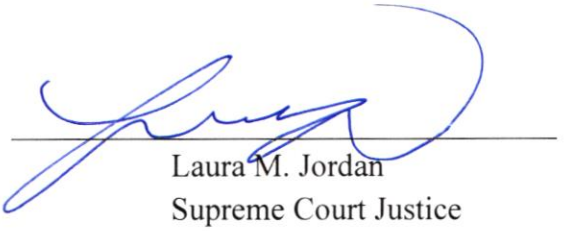
Accordingly, after carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, it is hereby

ORDERED that Plaintiff's motion to restore this action to the Court's active calendar for further proceedings (NYSCEF Doc No. 33) is **GRANTED**; and it is further

ORDERED that the parties are directed to appear for an in-person Court conference before Justice Laura M. Jordan on **July 13, 2023 at 11:00 AM** at the Rensselaer County Courthouse, 80 Second Street, Troy, New York 12180.

This shall constitute the decision and order of the Court. The Court has uploaded this original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the County Clerk's Office. Counsel for Plaintiff is not relieved from the applicable provisions of CPLR § 2220 and § 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed documents upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

May 22, 2023
Troy, New York



Laura M. Jordan
Supreme Court Justice

Papers Considered:

1. Docket Number 33 – Notice of Motion
2. Docket Number 34 – Affirmation in Support of Motion
3. Docket Numbers 35-58 – Exhibits A through X to Motion
4. Docket Number 61 – Affidavit of Defendant
5. Docket Number 62 – Affirmation in Opposition to Motion
6. Docket Number 63 – Exhibit to Affirmation in Opposition
7. Docket Number 64 – Memorandum of Law in Opposition
8. Docket Number 69 – Memorandum of Law in Reply
9. Docket Number 71/72 – Defendant's Sur-Reply