SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ATHENE ANNUITY AND LIFE COMPANY,

Plaintiff,

- v -

WILLIE SUGGS, JOSEPH L. TAIT, UNITED STATES OF AMERICA (SOUTHERN DISTRICT) O/B/O INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE AND JANE DOE

Defendant.

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INDEX NO. 850236/2024

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for AMEND CAPTION/PLEADINGS.

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

In this action to foreclose on a mortgage encumbering residential real property, Defendant Willie Suggs ("Suggus"), borrower and mortgagor, moves pursuant to CPLR §§213[4] and 3025[b] to amend his answer to add an affirmative defense of expiration of the statute of limitations. Plaintiff opposes the motion.

Leave to amend a pleading under CPLR §3025[b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party "must overcome a heavy presumption of validity in favor of [allowing amendment]" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Defendant posits that the statute of limitations accrued on March 2, 2017, when a prior action to foreclose the present mortgage was commenced and that its discontinuance by order of this Court dated September 8, 2020 did not de-accelerate the indebtedness. Defendant relies on the enactment of the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]) in support of the motion. However, Defendant failed to consider that the discontinuance was based upon his execution of a loan modification agreement dated October 22, 2019, and that the loan was reinstated after he successfully fulfilled the trial period thereunder.

Pursuant to General Obligations Law §17-107, Suggs' execution and compliance with the terms of that agreement de-accelerated the loan. The statute in question, titled "Effect of part payment on time limited for foreclosure of a mortgage", provides as follows:

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

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

The newly created CPLR §203[h] and amendments to GOL 17-105[4] contained in FAPA did not nullify the application of GOL §17-107[1]. These statutes provide as follows:

> 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.
>
> (CPLR §203[h]);
>
> An acknowledgment, waiver, 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 a mortgage for any greater time or in any other manner than that provided in this section, unless it is made as provided in this section.
>
> (GOL §17-105[4]).

Excluded from the scope of CPLR §203[h] are provisions "expressly prescribed by statute". GOL §17-107 is such a statute and the amendment and legislative history makes that deduction clear. At the outset, retention of GOL §17-105[5][a] despite the amendment of GOL §17-105[4] was intended. Subsection [a] of GOL §17-105[5] provides that "[t]his 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 based upon either: a. a payment or part payment of the principal or interest secured by the mortgage".

With respect to the purpose of these amendments, "[t]he Legislature has specified the methods by which the statute of limitations in a mortgage foreclosure action could be waived or extended in Article 17 of the General Obligations Law (*see* Gen. Oblig. Law 17-105 (express written agreement to extend, waive or not plead as a defense the statute of limitations); *17-107* (*unqualified payment on account of mortgage indebtedness effective to revive statute of limitations*) [emphasis added]" (NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions). In addition, under the summary of CPLR §203[h] contained in the New York State Senate Sponsor's Memorandum, it states in footnote 2 as follows:

> "The language 'unless expressly prescribed by statute,' is not intended to be a 'loophole' in the subdivision and should not be viewed or treated as such. Rather, the language represents the legislature's recognition of certain unique situations *where the law, in effect, may technically provide a party with the unilateral ability to toll or extend the time prescribed by law to commence an action and to interpose a claim* (*see* Gen. Oblig. Law 17-105, *17-107*; *see also* 11 USC 362 [automatic bankruptcy stay tolls statutes of limitation as per the unilateral act by the debtor of filing the petition] [emphasis added]".
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> (NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions, fn 2).

That same legislative history also acknowledges that CPLR §203[h] is not intended to affect a *mortgagor's* contractual right to de-accelerate the indebtedness, which in this case is contained in paragraph 19 of the mortgage at issue. On that score, the New York State Senate Sponsor's Memorandum, regarding the same provision states in footnote 3 as follows:

> "We note, the primary purpose of CPLR 203 (h) is to clarify that upon accrual of a cause of action, the *aggrieved party* -- meaning the party with the right to commence an action and interpose a claim -- may not unilaterally extend *its own time* to assert *its own claim*. Thus, the subdivision has no adverse impact on a *borrower's* contractual or statutory right to 'reinstate' a mortgage loan (i.e., pay the total amount of his or her arrears and thereby bring the mortgage loan back to a regular monthly installment contract), which effectively 'de-accelerates' a/k/a 'de-accrues' *a lender's* cause of action to sue upon the prior, but subsequently cured, mortgage loan default(s) (*see e.g.*, Fannie Mae/Freddie Mac Form 3033 mortgage ¶ 19; *cf.* Gen. Oblig. Law 17-105, 17-107). Accordingly, 'de-accrual' under the General Obligations Law (*e.g.*, §§ 17-105, 17-107 [the exercise of a borrower's contractual right to reinstate a mortgage loan or *a borrower's execution of a properly drafted loan modification agreement*]), constitutes permissive means 'expressly prescribed by statute' (CPLR 203[h])".
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> (NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions, fn 3 [additional emphasis added]).

Here, the loan modification executed by Defendant Suggs provides that upon satisfaction of the trial period, which occurred, the loan was reinstated as monthly installment loan. Paragraph 3 of the agreement included the modified term of the loan, the number of monthly installments and the amounts thereof. Thus, by accepting the loan modification, Suggs effected a de-accrual of the loan under GOL §17-107 which renders this action timely and the proposed affirmative defense clearly devoid of merit.

Accordingly, it is

ORDERED that the motion is denied in its entirety.

11/22/2024
DATE

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

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