

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 17-01674

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING
BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY
BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION
TRUST, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STEVEN E. GUSTAFSON, PAM L. GUSTAFSON,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, ELMSFORD (JORDAN J. MANFRO OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONO OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County
(Frank A. Sedita, III, J.), entered November 29, 2016. The order
granted the motion of defendants Steven E. Gustafson and Pam L.
Gustafson to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion is denied
and the complaint against defendants Steven E. Gustafson and Pam L.
Gustafson is reinstated.

Memorandum: Plaintiff commenced this mortgage foreclosure action
in April 2016, alleging that Steven E. Gustafson and Pam L. Gustafson
(defendants) defaulted in the payment of their mortgage in May 2009
and in each subsequent month thereafter. In moving to dismiss the
complaint against them, defendants contended that the action is barred
by the six-year statute of limitations (*see* CPLR 213 [4]; *see also*
CPLR 3211 [a] [5]), and Supreme Court granted the motion. We reverse.

We agree with plaintiff that defendants failed to meet their
initial burden of establishing that the action is time-barred. Where,
as here, a mortgage is payable in installments, separate causes of
action accrue for each unpaid installment, and the six-year statute of
limitations begins to run on the date that each installment becomes
due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept
2010]; *see also United States of Am. v Quaintance*, 244 AD2d 915, 915-
916 [4th Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). If, however,
the mortgage holder accelerates the entire debt by a demand, the six-

year statute of limitations begins to run on the entire debt (see *Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; see also *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]).

Here, defendants' own submissions in support of the motion establish that, although another entity purported to accelerate defendants' entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt (see *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]; see also *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982-983 [2d Dept 2012]). Although this mortgage foreclosure action therefore is not time-barred, we note that, "in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [and 90-day] period immediately preceding its commencement of this action" (*EMC Mtge. Corp.*, 49 AD3d at 593; see RPAPL 1304; CPLR 204 [a]).