

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Judith N. McMahon J.S.C. Justice

PART

Index Number : 850294/2017
WELLS FARGO BANK, NATIONAL
vs
FERRATO, DONNA
Sequence Number : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s).
Answering Affidavits -- Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion decided in accordance with the attached order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/17/18

Hon. Judith N. McMahon J.S.C. (Signature)

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

At IAS Part \_\_\_\_\_ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on the 17 of July, 2018

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
WELLS FARGO BANK, NATIONAL,

Plaintiff,

-against-

DONNA FERRATO, THE SIMON & MILLS BUILDING  
CONDOMINIUM BOARD; CAPITAL ONE BANK,  
(USA) NA; SUSAN GILMER; MATTHEW GRINNEL;  
MIDLAND FUNDING, LLC,

Defendants.

Present:  
HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 850294/2017  
Motion Sequence No. 001

-----X

Defendant's motion to dismiss the action is denied.

This is an action whereby Plaintiff seeks to foreclose the mortgage held by Plaintiff on the real property located at 25 Leonard Street, Unit 3, New York, New York 10013.

Defendant moves to dismiss pursuant to CPLR 3211(a)(4), on the ground that there is already another action currently pending between the same parties for the same cause of action, and CPLR 3211(a)(5), on the ground that the cause of action was not brought within the statute of limitations period.

This action is the fifth foreclosure action brought by Plaintiff against Defendant on the subject premises.

On January 25, 2007, Defendant entered into a mortgage in the amount of \$900,000.00 for the subject property.

The January 25, 2007 mortgage was assigned to Plaintiff on or about May 12, 2008.

Plaintiff's first foreclosure action on the subject property was commenced in or around May 2008. That action was settled when the parties agreed to a loan modification in or about October 2008, which decelerated the loan and restored it to monthly installments.

The second foreclosure action was commenced on or about September 16, 2009. The commencement of the second action purported to accelerate the loan which would have the effect of restarting the statute of limitations running. Defendant asserts that the second action was discontinued on or about June 2010. However, a review of the Court's file reflects that a motion to dismiss, filed by Defendant on the grounds that Plaintiff commenced the second action alleging default on the original January 2007 loan without any reference to the October 2008 loan modification, was granted on default on January 28, 2010.

Plaintiff commenced a third foreclosure action on or about September 28, 2011. The third action was dismissed on the same basis as the second action, namely a motion to dismiss arguing that Plaintiff commenced the third action alleging default on the original January 2007 loan and not the October 2008 modification. In the Court's written decision, it states that Plaintiff argued it could maintain a cause of action on either the original mortgage or the modified agreement. The Court dismissed Plaintiff's argument and granted Defendant's motion on January 23, 2013.

Plaintiff commenced a fourth foreclosure action on or about February 11, 2015. Due to Plaintiff's failure to make a motion for the appointment of a referee within the deadline ordered by the Court, the fourth action was marked off the Court's calendar on or about September 14, 2016.

On or about May 18, 2017, the Appellate Division, First Department ordered that a Traverse Hearing would be necessary should Plaintiff ever move to restore the fourth action.

The fourth action was discontinued on February 27, 2018 by order of this Court, wherein this Court specifically denied Plaintiff's requested relief to revoke the acceleration of the subject loan.

On or about January 29, 2018, Plaintiff commenced a fifth foreclosure action, the instant action.

Defendant moves to dismiss this (the fifth) foreclosure action pursuant to CPLR 3211(a)(4) and 3211(a)(5)

As noted above, the fourth action has already been discontinued, so the relief requested pursuant to CPLR 3211 (a)(4) is no longer a valid basis for dismissal.

Defendant's grounds for dismissal pursuant to CPLR 3211 (a)(5) is that the statute of limitations has expired.

The relevant statute, CPLR 213, states that, "the following actions must be commenced within six years...4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein". *CPLR 213(4)*.

"It is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt." *CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 43 A.D.3d 45, 837 N.Y.S.2d 33, (N.Y.A.D. 1<sup>st</sup> Dept., 2007).

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

Defendant asserts that the subject loan was accelerated upon the commencement of the second foreclosure action which made the entire principal of the loan due. According to Defendant's argument, the statute of limitations would then have begun to run on or about September 16, 2009, and therefore expired on or about September 16, 2015.

However, as Defendant's arguments on the motions to dismiss granted in the second and third actions assert, Plaintiff attempted to foreclose in both the second and third action on the original January 2007 mortgage, not the October 2008 modification. In granting the successive motions to dismiss, the Court agreed with Defendant's argument(s) that in the second and third actions Plaintiff improperly attempted to accelerate the original January 2007 loan without reference to the October 2008 modified loan. The Court granted both of Defendant's motions to dismiss, on the basis that Plaintiff had attempted to accelerate and foreclose on a loan that was no longer in effect, as it had been superseded by the October 2008 modification.

In opposition to the motion to dismiss the third action, Plaintiff argued that it was inconsequential whether the foreclosure referenced the original January 2007 loan or the October 2008 modification. The January 23, 2013 dismissal order found that there was no basis for that argument.

Defendant offers no other mechanism for the acceleration of the subject loan other than the commencement of the foreclosure actions.

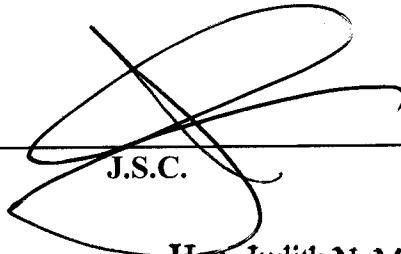
Therefore, the statute of limitations on the October 2008 modification, which is the controlling loan on the subject property began to run on or about February 11, 2015, when Plaintiff commenced the fourth action, which accelerated and attempted to foreclose on the October 2008 modified loan.

This means that the statute of limitations has not yet expired and will not expire until at least on or about February 11, 2021.

Accordingly, it is:

ORDERED, Defendant Donna Ferrato's motion to dismissing the action is denied.

**ENTER,**



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke, is written over a horizontal line. Below the signature, the text "J.S.C." is printed.

**J.S.C.**

**Hon. Judith N. McMahon  
J.S.C.**

**Dated: July 17, 2018**