At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of November 2018.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.: 502866/15

x

MS 5 & 6

FEDERAL NATIONAL,

Plaintiff,

DECISION AND ORDER

-against-

MAXI JEANTY et al,

Defendant,

x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion(MS 5)	1
Opp/Cross (MS 6)	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

"The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). A prior action was filed on 8/27/08, accelerating the debt. The instant action was filed on 3/12/15, more than six years later.

A discontinuance alone is not a de-acceleration (*Freedom Mortgage Corporation v. Engel*, 2018 N.Y. Slip Op. 05140 [2d Dept 2018][" the plaintiff's execution of the January 23, 2013,

stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant"]) and Plaintiff offers no evidence that the loan was restored to installment status.

The HAMP Trial Period Plan is insufficient to serve as an acknowledgment of the debt pursuant to GO 17-101. "To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Yadegar v. Deutsche Bank*, 164 AD3d 945, 947 [2d Dept 2018 [internal quotation marks omitted]). While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it – rather, the signors thereof agreed to make three trial payments. If they did so – and if the lender decided that they qualified – a permanent modification would be offered. Put differently, the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to[1]. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute of limitations was not restarted (see, U.S. Bank, National Association v. Kess, 159 AD3d 767, 768 [2d Dept 2018]; *Sichol v. Crocker*, 177 A.D.2d 842, 843 [3d Dept 1991]).

Plaintiff's argument that there is no acceleration until judgment has been explicitly rejected by the Appellate Division (see, *Milone v US Bank Natl. Assn.*, 2018 NY Slip Op 05760 [2d Dept 2018]["A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due"]).

The bankruptcy toll was of insufficient duration to render the instant action timely.

Motion denied. Cross-motion granted. Case dismissed.

ENTER:

Hon. Noach Dear, J.S.C.

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[1] The trial plan was, in essence, a forebearance agreement. While payments were made, the plaintiff would suspend the foreclosure action with no guaranty that it would offer a permanent agreement.