To Be Argued By:
Peter K. Kamran
Time Requested: 15 Minutes

APL-2018-00166

Suffolk County Clerk's Index No. 21853/14
Appellate Division, Second Department Docket No. 2015-10458

Court of Appeals

STATE OF NEW YORK

GREGG LUBONTY,

Plaintiff-Appellant,

against

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A, and AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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Date Completed: November 12, 2018

STATEMENT PURSUANT TO CPLR 5531

Court of Appeals

STATE OF NEW YORK

GREGG LUBONTY,

Plaintiff-Appellant,

against

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A, and AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A,

Defendants-Respondents.

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1. The index number in the case in the court below is 21853/2014.
2. The full names of the original parties are as above. There have been no changes.
3. The action was commenced in Supreme Court, Suffolk County.
4. The action was commenced on or about November 6, 2014, by filing and service of a summons and verified complaint seeking to quiet title to real property.
5. The nature and object of this action is as follows: vacate mortgage.
6. The appeal is from the Order of the Honorable Joseph Farneti, dated August 17, 2015, affirmed by the Decision and Order of the Appellate Division, Second Department, entered March 28, 2018.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.

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I. PRELIMINARY STATEMENT

The underlying action was commenced pursuant to New York Real Property Actions and Proceedings Law § 1501(4) seeking to expunge a mortgage lien against real property as unenforceable due to the expiration of the statute of limitations pursuant to CPLR 213(4). Through this appeal Appellant is seeking this Honorable Court's review of the Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 28, 2018 (the "Decision"). Record of Appeal [hereinafter "R"] 258-260. The Decision affirmed the Supreme Court's dismissal of Appellant's complaint against U.S. National Bank Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A, and American Home Mortgage Investment Trust 2005-4A (the "Respondent") upon a finding that the six-year statute of limitations for a mortgage foreclosure was tolled pursuant to CPLR 204(a) based on Appellant's two bankruptcy filings. Id.

However, CPLR 204(a) clearly provides that its tolling provisions are only applicable when a stay, such as the bankruptcy stay of 11 USC § 362(a), prevents the commencement of an action. CPLR 204(a). In Appellant's case, both of Appellant's bankruptcy filings occurred subsequent to the commencement of foreclosure actions, thus not invoking or implicating in any way the tolling provisions of CPLR 204(a) and serving only to stay the continuation of the already commenced foreclosure actions.

It is respectfully submitted that the Appellate Division erred in holding that the tolling provisions of CPLR 204(a) applied in Appellant's case as the automatic stays pursuant to 11 USC § 362(a) never stayed Respondent's commencement of an action as contemplated by CPLR 204(a).

II. QUESTION PRESENTED

This appeal presents a narrow question of law, to wit:

Whether Respondent was stayed from commencing a foreclosure action within the meaning of CPLR 204(a), thus tolling the running of the statute of limitations, when foreclosure actions had already been commenced by Respondent prior to Appellant's bankruptcy filings.

III. STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to CPLR 5602(a)(1)(i). The Appellate Division's Decision affirming the order granting Respondents' CPLR 3211(a)(7) motion to dismiss Appellant's complaint, dated August 17, 2015, constitutes a final determination under CPLR 5611, which finally disposed of Appellant's complaint seeking a judgment pursuant to RPAPL 1501(4) declaring Respondent's mortgage lien invalid and directing the Suffolk County Clerk to cancel and discharge the mortgage of record. Furthermore, this Honorable Court, by Order dated September 13, 2018, granted Appellant's motion seeking leave to appeal to the

Court of Appeals. R. 261-262.

IV. PRESERVATION OF ARGUMENTS

The question of law presented in this appeal was clearly preserved in the record. In effect, the arguments have been preserved when the Honorable Joseph Farneti issued an order (the "Order") granting Respondent's CPLR 3211(a)(7) motion to dismiss Appellant's complaint, dated August 17, 2015 (R. 5-9), when Appellant filed his Notice of Appeal (R. 2-15), when Appellant perfected his appeal before the Appellate Division and further, in Appellant's motion to this Honorable Court seeking leave to appeal.

V. STATEMENT OF THE CASE

On August 2, 2005, Appellant executed the Mortgage in favor of American Home Mortgage Acceptance, Inc. ("AHMA"). R. 41-67.

The Mortgage was subsequently assigned by MERS as Nominee to AHMA by assignment of Mortgage dated May 31, 2007 (the "First Assignment"), and recorded in the office of the Clerk of Suffolk County, New York on the 5th day of July, 2007, in Liber M00021563 of Mortgages, at page 418. R. 227-29.

Respondent alleges that the Mortgage was "pooled and securitized in the American Home Mortgage Investment Trust 2005-4A" (the "Trust") "in accordance with the securitization transaction that closed on or about October 7, 2005 and was

filed with the Securities and Exchange Commission." R. 76 at ¶5.

Respondent claims to provide evidence that the Mortgage was in fact pooled and securitized on October 7, 2005, but, instead, merely provides portions of a copy of the trust agreement which, while it shows AHMA as the servicer and Respondent as the trustee of the Trust, does not show or make reference to the Mortgage whatsoever. R. 81-88.

AHMA commenced the first foreclosure in the New York State Supreme Court, Suffolk County, on June 11, 2007, styled American Home Mortgage Acceptance, Inc. v. Gregg Lubonty, et al., under Index No. 17749/2007 (the "First Foreclosure"). See R. 26 at ¶8; see also R. 258. The First Foreclosure was based on an alleged default in payment of the installment payment due on February 1, 2007. Id. AHMA demanded payment in full of all amounts due under the note and Mortgage thereby accelerating the Mortgage debt. Id. The First Foreclosure was dismissed by an order issued by the Honorable Ralph F. Costello, dated September 27, 2010, for failure to adhere to the requirements of CPLR § 3215(c). R. 142-43.

On June 26, 2007 Appellant commenced his first bankruptcy case (the "First Bankruptcy") through the filing of a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Southern District of Florida, Case No. 07-14945-AJC. R. 89-136. The First Bankruptcy stayed the continuation (but not the

commencement) of the First Foreclosure until the First Bankruptcy was voluntarily dismissed on November 24, 2009. R. 137-141.

Thereafter, the Mortgage was assigned by AHMA to Respondent by assignment of Mortgage dated May 9, 2011, and recorded in the office of the Clerk of Suffolk County, New York on the 16th day of May, 2011 (the "Second Assignment"), in Liber M00022077 of Mortgages, at page 438. R. 230-32.

The second foreclosure was commenced on June 9, 2011, by Respondent and styled U.S. Bank National Association as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A v. Gregg Lubonty, et al., Index No. 11893/2011 (the "Second Foreclosure"). R. 199; R. 258.

On October 19, 2011, Appellant commenced his second bankruptcy case (the "Second Bankruptcy") through the filing of a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Eastern District of New York, Case No. 8-11-77413-ast. R. 144-193.

By order of the Bankruptcy Court dated July 2, 2013, the Second Bankruptcy was converted from a case under Chapter 11 to a case under Chapter 7 of the Bankruptcy Code.

The Second Bankruptcy stayed the continuation (but not the commencement) of the Second Foreclosure action until November 26, 2013, when the Chapter 7

bankruptcy trustee released the Property from the bankruptcy estate. See R. 194-98; see also R. 199-201.

On October 21, 2014, the Second Foreclosure action was dismissed due to a finding that Plaintiff was not properly served with process in the Second Foreclosure. R. 199-201.

Thereafter, on November 5, 2014, Appellant commenced the instant underlying action, pursuant to RPAPL 1501(4), seeking a judgment declaring the Mortgage to be unenforceable due to the expiration of the statute of limitations and directing the Suffolk County Clerk to cancel and discharge the Mortgage in its records. R. 22-68.

The Respondent moved to dismiss this action, arguing that the statute of limitations was tolled by the filing of Appellant's two bankruptcy petitions and that as such the statute of limitations had not expired. R. 73-213.

On August 17, 2015, the Lower Court issued an order (the "Order") granting Respondent's motion to dismiss, erroneously holding that the Appellant's two bankruptcies had tolled the statute of limitations for foreclosure of the Mortgage. R. 5-9.

On or about September 21, 2015, Respondent served Appellant with a notice of entry of the Order. See R. 4-9.

On September 23, 2015, Appellant served a notice of appeal of the Order on

Respondent. R. 2-15.

On April 22, 2016, Appellant perfected his appeal by filing a Brief and Record on Appeal. A copy of the Brief for the Appellant and Record on Appeal to the Appellate Division were previously submitted in conjunction with Appellant's motion (the "Motion") seeking leave to appeal to the Court of Appeals.

On or about September 22, 2016, Respondent submitted a brief in opposition. A copy of Respondent's opposition brief was previously submitted in conjunction with Appellant's Motion.

On or about November 3, 2016, Appellant submitted a reply brief in further support of the appeal. A copy of the reply brief was previously submitted in conjunction with Appellant's Motion.

The Appellate Division heard the parties' oral arguments on November 6, 2017. The Appellate Division's Decision affirming the Order of the Supreme Court, Suffolk County was entered March 28, 2018. R. 258-260.

The Decision with Notice of Entry was served upon Appellant on April 12, 2018. On May 11, 2018, Appellant served his Motion seeking leave to appeal to the Court of Appeals, on or about June 10, 2018, Respondent served its' opposition to Appellant's Motion, and by Order dated September 13, 2018, this Honorable Court granted Appellant's motion seeking leave to appeal. R. 261-262.

VI. ARGUMENT

POINT I REVERSAL IS WARRANTED AS THE SUPREME COURT AND THE APPELLATE DIVISION HAVE MISINTERPRETED OR DISREGARDED THE CLEAR STATUTORY LANGUAGE OF CPLR 204(a).

CPLR 204(a) is a clearly crafted and unambiguous statute which provides as follows:

> "Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

It is clear that pursuant to CPLR 204(a) a stay issued by a court or a statutory prohibition that prevents the "*commencement*" of an action works to toll the running time for the statute of limitations. However and materially, CPLR 204(a) is silent as to a stay issued by a court or statutory prohibition that prevents the *continuation* of an action.

In this case CPLR 204(a)'s clear meaning has at best been misinterpreted by the courts below and at worst the courts below have engaged in impermissible judicial legislating.

In Appellant's case, both of Appellant's bankruptcy filings occurred subsequent to the commencement of foreclosure actions, thus not invoking or implicating in any way the tolling provisions of CPLR 204(a). That is to say it was a theoretical

impossibility for Respondent to have been stayed from commencing a foreclosure action because the foreclosure actions had already been commenced prior to Appellant's bankruptcy filings.

"While 'it is emphatically the province and duty of the judicial department to say what the law is' (Marbury v. Madison, 1 Cranch 137 (1803)) 'courts should be extremely hesitant interpolating their notions of policy in the interstices of legislative provisions' (Finger Lakes Racing Association Inc. v. New York State Racing & Wagering Board, 45 N.Y. 2d 471, 479 (1978))." People v. Lopez, 34 Misc. 3d 476, 480 (Crim. Ct. Rich. County 2011).

Further, "[c]ourts are constitutionally bound to give effect to the expressed will of the Legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern." Finger Lakes, 45 N.Y. 2d at 479-480.

"If, as here, the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation. To permit a court to say that the law must mean something different than the common import of its language would make the judicial superior to the legislative branch of government and practically invest it with lawmaking power." Id. Moreover, "the remedy for a harsh law is not in strained interpretation by the judiciary, but rather its amendment or repeal

by the Legislature." Id.

In this case the Supreme Court in the Order and the Appellate Division in the Decision clearly disregarded or misinterpreted the plain and unambiguous language of CPLR 204(a). Respondent was never stayed from commencing foreclosure actions; rather Respondent was stayed from continuing already commenced foreclosure actions as a result of Appellant's bankruptcy filings. Thus, CPLR 204(a)'s tolling provisions were never invoked.

In the single sentence addressing Appellant's argument that the tolling provisions of CPLR 204(a) were not implicated since Appellant's bankruptcy filings did not stay Respondent from commencing foreclosure actions the Appellate Division stated "[t]he plaintiff's contention that CPLR 204(a) does not apply here because the earlier foreclosure actions had already been commenced when the petitions in bankruptcy were filed is without merit (see *MLG Capital Assets v Judith Eidelkind Trust*, 275 AD2d 357)." R. 260.

The Appellate Division's MLG Capital decision provides no factual background whatsoever and merely states "[t]he Supreme Court properly denied the appellants' motion and granted the plaintiff's cross motion for summary judgment (*see, Zuckerman v 234-6 W. 22 St. Corp.*, 267 AD2d 130; *Mercury Capital Corp. v Shepherds Beach,* 184 Misc 2d 266)." MLG Capital Assets, LLC v. Judith Eidelkind Tr., 275 A.D.2d

357 (2d Dep't. 2000). However, even a brief review of the Supreme Court's underlying decision which the Appellate Division affirmed in MLG Capital shows that the borrower, during its Chapter 7 bankruptcy proceeding and while the automatic stay was in place pursuant to 11 USC § 362(a), reaffirmed the debt to the mortgage holder by making a payment to the mortgage loan holder which was processed and credited. See generally MLG Capital Assets, LLC v. Judith Elkind Trust, Index No. 11702/1999, Decision and Order (Sup. Ct. Suffolk County 2000) (unpublished decision provided in Appellant's Addendum to this Brief). By reaffirming the mortgage loan debt the borrowers in MLG Capital started the statute of limitations running anew. However, the borrowers were still under the protection of the automatic stay when they reaffirmed the debt so the statute of limitations was immediately tolled pursuant to CPLR 204(a). To be clear, Appellant believes both the Supreme Court and the Appellate Division decided the MLG Capital case correctly, though neither of these decisions have any bearing whatsoever to the instant case as Appellant has not (and it is not claimed that Appellant ever) reaffirmed the debt in such a way as to re-start the running of the six-year statute of limitations to foreclose a mortgage pursuant to CPLR 213(4).

In the same vein as the Appellate Division's decision in MLG Capital, the Appellate Division (in this case, the Appellate Division, First Department) decision in

Zuckerman cited by the MLG Capital court provides little to no factual detail from which the circumstances relevant to this instant appeal can be gleaned, stating only that "[i]n particular, the action was not time-barred because the automatic stay of 11 USC § 362 tolled the limitations period for this foreclosure action (*see,* CPLR 204[a])." Zuckerman v. 234-6 W. 22 St. Corp., 267 A.D.2d 130 (1st Dep't. 1999). However, a review of the underlying Supreme Court decision again provides valuable insight into the applicability (or rather, inapplicability) of any decision involving the facts surrounding the Zuckerman decision.

As is clear from the Supreme Court decision in Zuckerman v. 234-6 W. 22 St. Corp., 167 Misc. 2d 198 (Sup. Ct. 1996) the note and mortgage became due and owing on June 1, 1988. Id. at 199. The owner of the property subject to the foreclosure "filed a petition under chapter 11 of the Bankruptcy Code" on October 27, 1992. Id. Because a stay was in place, the plaintiff could not commence a foreclosure action. Id. On December 2, 1992, the plaintiff therein (the "Zuckermans") "submitted an application to the Bankruptcy Court to dismiss the proceeding and, in the alternative, for relief from the automatic stay provided in 11 USC § 362 to permit them to prosecute their cross claims" in an action in which they sought "specific performance of an agreement under which the [defendant therein] contracted to sell them premises known as 234 West 22nd Street," which was one of the two buildings covered by the

mortgage held by the Zuckermans. Id. "By order dated March 30, 1993 (i) the application to dismiss was denied; (ii) specific performance was granted directing [the defendant therein] to transfer title to the aforesaid building to the Zuckermans; and (iii) the automatic stay was lifted with respect to the" Zuckermans' action. Id. Thereafter, "on October 21, 1994", almost two years to the day after the owner of the property had sought bankruptcy protection the Zuckermans "commenced" the foreclosure action (a separate action from their previous specific performance action) against the owner of the contested property – the remaining property not conveyed pursuant to the court's earlier granting of specific performance. Id.

In Zuckerman despite the fact that the foreclosure action was commenced six years, four months, and 21 days after the debt was accelerated, the foreclosure action was timely commenced because the provisions of CPLR 204(a) extended the Zuckermans' time to commence their foreclosure action. Id. However, this is because the Zuckermans had not previously commenced a foreclosure action prior to the defendant's commencement of its Chapter 11 bankruptcy case, the Zuckermans had only asserted a cross-claim for specific performance in a related action, no foreclosure cause of action had yet been asserted. Id.

Furthermore, MLG Capital cites to Mercury Capital Corp. v Shepherds Beach, 184 Misc. 2d 266 (Sup. Ct. 2000), but as with MLG Capital, the facts in Mercury

Capital are distinctly different that the facts herein. In Mercury Capital the mortgagee had not commenced a foreclosure action prior to the borrowers filing bankruptcy and invoking the automatic stay and this fact alone renders the Mercury Capital decision meaningless in the context of this instant appeal. As an aside and for reasons that do not impact this appeal, it should be noted that the Appellate Division itself overturned the decision in Mercury Capital finding that the statute of limitations had expired. Mercury Capital Corp. v. Shepherds Beach, Inc., 281 A.D.2d 604, (2d Dep't. 2001).

In Zuckerman and Mercury, it makes sense that the tolling provisions of CPLR 204(a) was found to be applicable and controlling because, in both of those actions, the filing of a petition in the bankruptcy court had prevented the mortgagees parties from commencing a foreclosure action.

In short, the Appellate Division's reliance on MLG Capital for the proposition that the tolling provisions of CPLR 204(a) apply in the instant action is entirely misplaced. Neither MLG Capital nor the cases it cites, Mercury Capital and Zuckerman, or their underlying Supreme Court decisions, address the fact pattern presented in this instant appeal. The fact pattern presented by MLG Capital is the closest; however the fact that the borrowers reaffirmed the mortgage debt during their bankruptcy renders the decision meaningless with respect to this instant appeal.

For the sake of clarity, Appellant does not disagree with the holdings in any of

these cases. If Respondents herein had not commenced foreclosure actions prior to Appellant's commencement of his bankruptcy cases Appellant agrees that the tolling provisions of CPLR 204(a) would be implicated. However, that is not the case.

To reiterate, Appellant's argument and the impact and interaction of 11 USC § 362(a) and CPLR 204(a) is as follows:

i. June 11, 2007: AHMA commenced the First Foreclosure action and accelerated the amount owed under the Mortgage.

ii. June 26, 2007: the continuation of the First Foreclosure is stayed as a result of Appellant's filing a bankruptcy petition and commencement of the First Bankruptcy.

iii. November 24, 2009: the First Bankruptcy is voluntarily dismissed by Appellant thus vacating the automatic stay with respect to the continuation of the First Foreclosure.

iv. September 27, 2010: the First Foreclosure is dismissed due to Respondent's failure to move for default judgment within one year of default.

v. June 9, 2011: the Second Foreclosure is commenced by U.S. Bank.

vi. October 19, 2011: the continuation of the Second Foreclosure is stayed as a result of Appellant's filing a bankruptcy petition and commencement of the Second Bankruptcy.

vii. November 26, 2013: the Property is released from the bankruptcy estate, thus vacating the automatic stay with respect to the continuation of the Second Foreclosure.

viii. October 21, 2014: the Second Foreclosure is dismissed by an Order of the court well after the June 11, 2013, expiration of the statute of limitations pursuant to CPLR 213(4).

The above timeline makes it clear that neither Respondent nor its predecessor (AHMA) were stayed from commencing foreclosure actions by the automatic stays triggered by Appellant's First and Second Bankruptcy cases, and thus, the tolling provisions contained in CPLR 204(a) were never implicated.

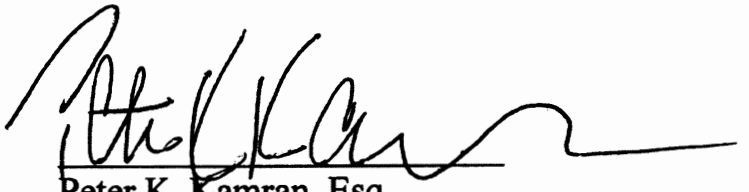
VII. CONCLUSION

As set forth above, because the commencement of the First Foreclosure and the commencement of the Second Foreclosure were not hindered in any way, whatsoever, by the filing of Appellant's First Bankruptcy or the Second Bankruptcy, it is impossible to apply the tolling provision of CPLR 204(a) to the circumstances in this case without defying law, time and logic. Therefore, it is respectfully submitted that

this Honorable Court should reverse the Order of the Supreme Court and the Decision of the Appellate Division.

WHEREFORE, for the reasons set forth above it is respectfully requested that this Honorable Court reverse the Order of the Supreme Court and the Decision of the Appellate Division.

Dated: November 12, 2018
Garden City, New York



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 3,496.

Dated: November 12, 2018

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ADDENDUM

INDEX NO. 11702/1999

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33, SUFFOLK COUNTY

PRESENT:
HON. GERARD P. EMILIO

MOTION DATE NOVEMBER 8, 1999
MOTION SEQ. NO. 001/ 002
MD. XXX

MLG CAPITAL ASSETS, LLC.

Plaintiff,

-against-

JUDITH EIDELKIND TRUST, d/b/a LONG ISLAND REALTY, JUDITH EIDELKIND, WALTER EIDELKIND, ET AL.,

Defendants.

PLTF'S/PET'S ATTY:
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225 Eileen Way
Syosset, New York 11791

DEFT'S/RESP'S ATTY:
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Upon the following papers numbered 1 to 10 read on this motion by defendants for an Order pursuant to CPLR 3212 and cross-motion by plaintiff for an Order pursuant to CPLR 3212

Notice of Motion/Order to Show Cause and supporting papers 1-3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers _____ Replying Affidavits and supporting papers _____ Memorandum of Law 7-8; 9-10; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that this motion by defendants for an Order, pursuant to CPLR 3212, directing the entry of summary judgment in favor of defendants and dismissing the Complaint on the ground that the plaintiff's claim is barred by the statute of limitations; and further, canceling the subject mortgage as an encumbrance of record upon the ground that enforcement of the same is barred; and further, awarding sanctions to defendants, is denied; and it is further

ORDERED, that the cross-motion by plaintiff, for an Order pursuant to CPLR 3212, dismissing the counterclaims, and directing the entry of summary judgment in favor of plaintiff and against the defendants for the relief demanded in the Complaint, appointing a referee to compute, and amending the caption of the action to strike therefrom the names "John Doe #1" through "John Doe #10", inclusive, is granted.

Submit Order.

This action was brought to foreclose a mortgage lien on real property located at 63 Old Brook Road, Dix Hills, New York, which mortgage and note were executed on November 20, 1989. After the moving defendants defaulted on said mortgage loan, a foreclosure action was commenced by the original mortgagee, Barclays Bank of New York, N.A., in August, 1991, under Index Number 91-19330. That action was pending when the moving defendants herein filed a petition for Chapter 7 bankruptcy protection on April 10, 1992.

During the pendency of the bankruptcy proceedings, the defendants made a payment on their mortgage loan on or about January 30, 1993, which was processed and credited by the Bank on February 9, 1993. On August 10, 1993 the Bankruptcy Court granted the mortgagee's motion for permission to continue prosecution of its' pending foreclosure action. On August 24, 1995 the defendants were discharged from their personal debt at the conclusion of the bankruptcy proceedings, but the mortgage remained of record as a lien against the premises.

In 1996, the 1991 foreclosure action was dismissed for failure to serve all necessary parties. A second foreclosure action, which had been commenced in 1994, was voluntarily discontinued in January, 1997, also for failure to serve all necessary parties.

The instant action was commenced on May 25, 1999 by the filing of a Summons and Complaint with the Suffolk County Clerk. The answer asserts a counterclaim, seeking to invalidate the existing mortgage based upon the affirmative defense that the claim is barred by the statute of limitations. The defendants maintain that CPLR 213(4) provides for a six year statute of limitations period for mortgage foreclosure actions and that same has run prior to the commencement of the instant action because the defendants' bankruptcy proceeding did

not toll said statute under 11 U.S.C. Sec. 362. The Court finds this argument unavailing.

The Statue of Limitations to commence a foreclosure action is six years CPLR Sec.211(4). The statute begins to run upon the borrower's default (Saliani v. Armhein, 533 NYS2d 375 (Suffolk County, 1988).) It is also well accepted principal that any partial payment acts as a reaffirmance of the debt and starts the statute running anew (Lew Morris Demolition Co. Inc. v. Board of Education, 40 NY2d 516, 387 NYS2d 409 (1976).) Defendants admit that the last payment made by plaintiff's predecessor occurred on January 30, 1993. Defendants not only acknowledge this, but also acknowledge, as a matter of law, the statute of limitation began to run anew as of January 30, 1993. Therefore, the only dispute over the statute of limitation issue is whether any part of the six years which commenced on January 30, 1993 was tolled. Defendants argue that there was no tolling of the time limit and therefore the six year statute expired in January 1999; approximately four months before the within action was commenced in May of 1999. Plaintiff contends there is a tolling under CPLR 204(a).

The defendants fail to acknowledge any effect of the Chapter 7 bankruptcy proceeding filed on April 10, 1992, and for which the plaintiff obtained relief from the automatic stay on August 10, 1993.

CPLR 204(a) is a clear and unequivocal tolling provision which provides: "Where the commencement of an action has been stayed by a Court or by a statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced." Under CPLR 204(a), the filing of a petition in bankruptcy results in a tolling "for the entire period of the stay specifically imposed by the Bankruptcy Code" (Zuckerman v. 234-6 W. 22 St. Corp., 167 Misc2d 198, 203; 645 NYS2d 967, 971.)

Therefore, the statute of limitations in this action would be tolled from January 30, 1993 (the date of the admitted last payment) to August 10, 1993 (when plaintiff obtained relief from the automatic stay), a period of six months and ten days. As this action was commenced on May 28, 1999, more than one month prior to the expiration of the statute of limitations period on August 10, 1999, and inasmuch as service on all parties was proper, the instant action was timely commenced.

Plaintiff argues against any automatic tolling of the statute of limitations citing Colorado case law which interprets 11 U.S.C. Sec. 108(c)(1). Neither the Colorado case law nor the reasoning therein is applicable to the case at bar. New York has a statute (CPLR 204) which expressly provides a tolling. Therefore, unlike the situation in the Colorado decision, when examining the case at bar, this Court need not examine whether 11 U.S.C. Sec. 108(c)(1), a federal statute, provides a tolling. This is entirely a state law issue and New York has a statute directly addressing and providing a toll.

The foregoing shall constitute the Order and decision of the Court.

Dated: January 31, 2000

/S/ HON. GERARD D'EMILIO

GERARD D'EMILIO, J.S.C.