MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR SASCO 2007-WF2,

Plaintiff,

-against-

HEMICHANDRA DEOCHAND AKA HEMCHANDRA DEOCHAND, et al.,

Defendants.

BY: **LANE, J.**

DATED: March 1, 2017

INDEX NO.: 702859/16

MOTION DATE: November 21, 2016

MOTION CAL. NO.: 151

MOTION SEQUENCE NO.: 1

Plaintiff's motion for an order: directing the entry of summary judgment in favor of the plaintiff and against the defendant, Hemichandra Deochand aka Hemchandra Deochand for the relief demanded in the Complaint pursuant to CPLR 3212; striking the Answer and dismissing the affirmative defenses of defendant, Hemichandra Deochand aka Hemchandra Deochand; substituting "Tiffany Frazier" as party defendant in place of "John Doe" and amending the caption to reflect such substitution; for permission to treat the answer as a limited notice of appearance entitling the defendant, Hemichandra Deochand aka Hemchandra Deochand through her attorney, Naomi Zeltser, Esq. to receive, without prior notice, a copy of the notice of sale, notice of discontinuance, and notice of surplus money proceedings, if any; appointing a referee to determine the amount due to the plaintiff and to determine whether the mortgaged premises can be sold in

parcels; and deeming all non-appearing and non-answering defendants in default, is granted.

The cross motion by defendant, Hemichandra Deochand for summary judgment dismissing the plaintiff's Complaint on the grounds that: the action is barred by the statute of limitations pursuant to CPLR 213(4), the plaintiff failed to prove that it served the notice required by RPAPL 1304 on defendant in the manner required by RPAPL 1304, plaintiff lacked standing, and for costs, is denied.

Plaintiff established, via inter alia, the affidavit of Natalie J. Bryant, Vice President Loan Documentation of Wells Fargo Bank, N.A., a prima facie entitlement to foreclose on a mortgage by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendant's default in payment (*see, Campaign v. Barbra*, 23 AD3d 327 [2d Dept 2005]; *First Trust National Association v. Pinter*, 264 AD2d 464 [2d Dept 1999]). The only Answering defendant is Hemichandra Deochand. The cross motion papers of defendant, Hemichandra Deochand fail to raise any triable issues of fact. The defendant contends in her opposition papers that the plaintiff lacked standing to bring this action. Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see, U.S. Bank N.A. v. Sharif*, 89 AD3d 723 [2d Dept 2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or

assignee of the subject mortgage and the holder or assignee of the underlying note (*Bank of N.Y. v. Silverberg*, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v. Barnett*, 88 AD3d 636 [2d Dept 2011]). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*U.S. Bank, N.A. v. Collymore*, 68 AD3d 752 [2d Dept 2009]). In support of the motion, plaintiff submitted, inter alia, a copy of the Note indorsed in blank. The plaintiff established that it had standing to commence the action as it established that it had physical possession of the note prior to commencing the action (*Citimortgage, Inc. v. Stosel*, 89 AD3d 887 [2d Dept 2011].

Moreover, plaintiff presented sufficient evidence to warrant the requested relief pursuant to RPAPL 1321 and CPLR 3215.

Additionally, the affidavit of James Green, Vice President Loan Documentation of Wells Fargo Bank, NA establishes a prima facie case that the requisite 90-day Notice was sent to defendant, Hemichandra Deochand. Ms. Deochand's raises no triable issue of fact (*see, Chemical Bank v. Darnley*, 300 AD2d 613; [2d Dept 2002]; Manhattan Savings Bank v. Kohen, 231 AD2d 499 [2d Dept 1996]; *Sando Realty Corp. v. Aris*, 209 AD2d 682 [2d

Dept 1994]).

Furthermore, moving defendant's contention that the action is barred by the statute of limitations is unavailing.

An action to foreclose a mortgage is governed by a six-year statute of limitations, pursuant to CPLR 213 (4). When a mortgage is payable in installments, each unpaid installment generates a separate cause of action, and the statute begins to run on the date such installment became due (*see Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980 [2012]; *Wells Fargo Bank, N.A. v. Cohen*, 80 AD3d 753 [2011]). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v. Patella*, 279 AD2d 604, 605 [2001]; *see, Nationstar Mortg., LLC v. Weisblum*, 143 AD3d 866 [2016]). To be effective, a debt must be accelerated by some affirmative action "evidencing the holder's election to take advantage of the accelerating provision" (*Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982-983).

While a lender may revoke its election to accelerate the mortgage debt, such rescission can only be accomplished through "an affirmative act by the lender revoking its election to accelerate," which is made within the statute of limitations period (*EMC Mtge. Corp. v, Patella*, 279 AD2d 604, 606; *see*, *Kashipour v. Wilmington Savings Fund Society, FSB*, 144 AD3d 985 [2016]). It has been established that the withdrawal of a prior

foreclosure action is an affirmative act of revocation (*4 Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.*, 2016 WL 2839341 [Sup Ct, NY County 2016]). In the instant case, the debt was accelerated when the first action was commenced in November, 2009. Plaintiff then voluntarily discontinued said action, which action was discontinued pursuant to the order of Hon. Augustus C. Agate dated September 10, 2014. Such voluntary discontinuance served as a revocation of plaintiff's election to accelerate, and as such, the statute of limitations has not run. Defendant's default occurred on May 1, 2010 and the action was timely filed on March 10, 2016.

Furthermore, plaintiff demonstrated that the amendment of the caption is warranted and that defendants would not be prejudiced (*see, Alaska Seaboard Partners, LP v. Low*, 294 AD2d 318 [2d Dept 2002]).

Accordingly, plaintiff's motion is granted and the cross motion is denied.

The court will designate a referee in the order to be entered hereon.

Settle order and submit to the Motion Support Office, Room 140.

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HOWARD G. LANE, J.S.C.