

**U.S. Bank Trust, N.A. v East Fork Capital Equities,  
LLC**

2018 NY Slip Op 33328(U)

December 18, 2018

Supreme Court, New York County

Docket Number: 850227/2017

Judge: Judith N. McMahon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JUDITH REEVES MCMAHON PART**

*Justice*

-----X

**INDEX NO. 850227/2017**

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST,

**MOTION DATE 11/20/2018,  
11/20/2018**

Plaintiff,

**MOTION SEQ. NO. 002 003**

- v -

EAST FORK CAPITAL EQUITIES, LLC, KIM NGO, THE BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, JOHN DOE AND JANE DOE SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF PREMISES BEING FORECLOSED HEREIN,

**DECISION AND ORDER**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 101, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 120, 133

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is

Defendant's, East Fork Capital Equities, LLC, ("EAST FORK"), motion for Summary Judgment dismissing the action is granted. Plaintiff's, U.S. Bank Trust N.A., ("US BANK"), motion seeking Summary Judgment is denied.

This is an action whereby US BANK seeks to foreclose upon a mortgage encumbering a residence located at 20 West Street, Unit 22A, New York, NY 10022.

On or about May 26, 2006, Kim Ngo ("NGO") executed an adjustable rate note and mortgage in favor of Washington Mutual Bank, FA ("WAMU").

NGO defaulted on the note in March 2010.

A Letter titled, "Acceleration Warning (Notice of Intent to Foreclose)" was sent to NGO on or about May 11, 2010. The letter gave NGO thirty-two days to cure the default or "Chase will accelerate the maturity of the loan." JP Morgan Chase Bank, National Association ("JPMORGAN CHASE"), sent the letter as attorney in fact for WAMU's receiver.

NGO did not cure the default.

On or about November 22, 2010, JPMORGAN CHASE commenced a foreclosure action as successor-in-interest to WAMU.

Concurrent with JPMORGAN CHASE's foreclosure, the Board of Managers of the Downtown Club (the "CONDO BOARD") had also commenced a foreclosure action on the subject property.

On May 21, 2014, JPMORGAN CHASE assigned the subject note to Plaintiff US BANK.

Two years later, on or about April 11, 2016, US BANK filed a motion for Summary Judgment. At the time the motion was filed, it had been six years since NGO's default and the subsequent letter to accelerate the note.

On or about April 13, 2016, pursuant to a judgment in the CONDO BOARD's foreclosure action, Defendant EAST FORK was the successful bidder at the Sheriff's auction for the subject property.

On or about August 18, 2016, EAST FORK opposed US BANK's motion for Summary Judgment and cross-moved to Dismiss.

On January 9, 2017, the Honorable Arlene Bluth denied US BANK's motion for Summary Judgment and granted EAST FORK's motion to Dismiss.

On October 6, 2017, US BANK commenced this foreclosure action.

Now, US BANK moves for Summary Judgment and EAST FORK moves to Dismiss pursuant to the Statute of Limitations.

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).

“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. Acceleration occurs, inter alia, by the commencement of a foreclosure action.” *Deutsche Bank Nat'l Tr. Co. v. Adrian*, 157 A.D.3d 934, 69 N.Y.S.3d 706 (N.Y.A.D. 2<sup>nd</sup> Dept., 2018).

At the very latest, the subject mortgage loan was accelerated on or about November 22, 2010, when the original mortgage foreclosure action was commenced. It is not necessary to consider whether the mortgage loan was accelerated earlier by the Acceleration Warning letter.

Although US BANK may have attempted to de-accelerate the mortgage loan by stipulation prior to the original foreclosure action being dismissed, the proposed stipulation was never executed.

“A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action.” *Deutsche Bank Nat'l Tr. Co. v. Adrian, Supra*.

No proof was submitted demonstrating an affirmative act of revocation of the acceleration.

The present foreclosure action was commenced October 6, 2017, more than six years after the acceleration of the loan. The present action must be dismissed as it was commenced more than six years after the acceleration of the loan.

ORDERED that Plaintiff US BANK's motion seeking Summary Judgment and related relief is denied; and it is further

ORDERED Defendant EAST FORK's motion for Summary Judgment dismissing the action is granted and the complaint is dismissed in its entirety; and it is further

ORDERED the subject mortgage loan on which US BANK commenced this foreclosure action is discharged as null and void; and it is further

ORDERED the subject mortgage loan on which US BANK commenced this foreclosure action shall be expunged from the public record; and it is further

ORDERED US BANK's notice of pendency is cancelled; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

12/18/18

DATE

JUDITH REEVES MCMAHON, J.S.C.  
Hon. Judith N. McMahon  
J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: