SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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THE BANK OF NEW YORK MELLON, f/k/a
The Bank of New York as Trustee for First Horizon
Alternative Mortgage Securities Trust 2005-FA11,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 2017-51838

11 BAYBERRY STREET, LLC; THE BOARD OF DIRECTORS OF FOUR CORNERS HOMEOWNERS ASSOCIATION; STATE OF NEW YORK; and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon this application:

	PAPERS NUMBERED
NOTICE OF MOTION	**1**
AFFIRMATION	**2**
EXHIBITS	**3-5**
AFFIRMATION IN OPPOSITION	**6**
EXHIBITS	**7-9**
REPLY AFFIRMATION	**10**
EXHIBITS	**11-14**

This is a residential mortgage foreclosure action involving real property located at 11 Bayberry Street in the Town of East Fishkill (the "Premises"). Defendant 11 Bayberry Street, LLC (the "Company") currently owns the Premises.

Neither Plaintiff nor the Company were parties to the mortgage that is the subject of this foreclosure action. Specifically, the original mortgagee was First Horizon Loan Corporation. The original mortgagors were Man Yi Cindy Ng and Chin Feng Peter Shih.

The mortgage is dated November 22, 2005, and was recorded in the Dutchess County Clerk's Office on December 12, 2005, as Document No. 01-2005-24150. By deed dated October 9, 2006, Man Yi Cindy Ng and Chin Feng Peter Shih conveyed their interest in the Premises to the Company. That deed was recorded in the Dutchess County Clerk's Office on January 9, 2007, as Document No. 02-2007-247.

On June 3, 2009, First Horizon commenced a foreclosure action in Dutchess County Supreme Court (the "2009 Action"). The fifth paragraph of the Verified Complaint that was filed in the 2009 Action contains an acceleration clause, stating that First Horizon "elects to call due the entire amount secured by the mortgage." The sixth paragraph of the Verified Complaint identifies the accelerated amount of the mortgage as $527,248.00, plus applicable interest, escrow advances, and late charges.

By Assignment dated February 2, 2012, First Horizon assigned the mortgage to Plaintiff. The Assignment was recorded in the Dutchess County Clerk's Office on February 29, 2012, as Document No. 01-2012-657A.

By Decision and Order dated August 12, 2013, this Court dismissed the 2009 Action for failure to timely prosecute the action. No appeal was taken from that Decision and Order.

Plaintiff commenced this foreclosure action on July 25, 2017 (the "2017 Action"). The 2017 Action names the Company as a party defendant. The 2017 Action does not include Man Yi Cindy Ng and Chin Feng Peter Shih as additional party defendants.

The Company now moves to dismiss the 2017 action on the grounds that it is barred by the six-year statute of limitations. The Company also moves to dismiss on the grounds that the Complaint fails to include necessary parties (Man Yi Cindy Ng and Chin Feng Peter Shih), and on the grounds that Plaintiff lacks standing to foreclose the mortgage.

For the reason stated herein, the Company's motion to dismiss the 2017 Action based upon the statute of limitations is granted. The Company's motion to dismiss on the alternative grounds of lack of standing and failure to add a necessary party is denied.

DISCUSSION

"An action to foreclose a mortgage has a six-year statute of limitations." [Karpa Realty Group, LLC v. Deutsche Bank National Trust Co., 164 AD3d 886, 887 (2d Dept. 2018). *See also* MSMJ Realty, LLC, v. DLJ Mortgage Capital, Inc., 157 AD3d 885, 886 (2d Dept. 2018); NMNT Realty Corp. v. Knoxville 2012 Trust, 151 AD3d 1068, 1069 (2d Dept. 2017)]. "The law is well settled that, 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 Mortgage Corp., v. Patella, 279 AD2d 604, 605 (2d Dept. 2001). *See also* Goldman Sachs Mortgage Co., v. Mares, 135 AD3d 1121, 1122 (2d Dept. 2016); Lavin v. Elmakiss, 302 AD2d 638, 639 (3d Dept. 2003)].

When a Verified Complaint contains an acceleration clause, the "unequivocal overt act" of filing that document in the courthouse constitutes a valid election of the right to accelerate. [Albertina Realty Co., v. Rosbro Realty Corp., 258 NY 472, 47 (1932). *See also* Fannie Mae v. 133 Management, LLC, 126 AD3d 670 (2d Dept. 2015) ("the plaintiff's commencement of the action and filing of a notice of pendency constituted a valid election to accelerate the maturity of

the debt"); Charter One Bank, FSB, v. Leone, 45 AD3d 958 (3d Dept. 2007) ("plaintiff's act of commencing the action and the filing of a lis pendens constitutes a valid election to accelerate the maturity of the unpaid principal balance and accrued interest"); Clayton National, Inc., v. Guldi, 307 AD2d 982 (2d Dept. 2003) ("The filing of the summons and complaint and lis pendens in an action commenced in 1992 accelerated the note and mortgage")]. After that mortgage debt has been accelerated, a lender may only revoke that acceleration "through an affirmative act occurring within the limitations period." [Lavin v. Elmakiss, 302 AD2d 638, 639 (3d Dept. 2003)]; EMC Mortgage Corp., v. Patella, *supra* at 606].

It is undisputed that the fifth paragraph of the Verified Complaint in the 2009 Action contained a mortgage acceleration clause. It is also undisputed that neither First Horizon nor Plaintiff have ever revoked that acceleration through any affirmative act. Finally, it is undisputed that more than six years elapsed between the date that the complaint in the 2009 Action was verified (June 2, 2009) and the date that the 2017 Action was commenced (July 25, 2017).

Nonetheless, Plaintiff argues that the statute of limitations never began to run against the entire amount due because the mortgage contains a clause that provides the borrower with a limited opportunity to reverse the mortgage acceleration and avoid foreclosure. Because this opportunity to avoid foreclosure remains available until a judgment of foreclosure is entered, Plaintiff argues that the borrower contracted away its ability to accelerate the mortgage prior to the entry of judgment.

Essentially, Plaintiff argues that the mortgage acceleration clause contained in the Verified Complaint was merely anticipatory, and that it was without any force and effect unless and until a judgment of foreclosure was actually rendered. Because no judgment of foreclosure was entered prior to dismissal of the 2009 Action, Plaintiff argues that the mortgage acceleration

clause contained in the Verified Complaint was ineffective, and that the statute of limitations never began to run against the entire amount due.

The same argument was recently advanced by a lender, and ultimately rejected by the court, in Persaud v. U.S. Bank National, 2018 NY Slip Op. 28328 (Sup. Ct. Queens County, October 19, 2018) (Modica, J.). The Court finds the reasoning in Persaud to be persuasive, and consistent with both controlling precedent in the Second Department and recent decisions issued by several other trial court. [*see e.g.* Beneficial Homeowner Service Corp., v. Tovar, 150 AD3d 657 (2d Dept. 2017); Ward v. Walkley, 143 AD2d 415 (2d Dept. 1988); 839 Cliffside Avenue, LLC v. Deutsche Bank National Trust Company, 2018 WL 4259867, Case No. 15-CV-4516 (EDNY 2018); Cortes-Goolcharran v. Rosicki, Rosicki & Associates, 2018 WL 3748154, Case No. 17-CV-3976 (EDNY 2018). *Compare* Nationstar Mortgage v. MacPherson, 56 Misc.3d 339 (Sup. Ct. Suffolk County 2017)].

There are a number of striking similarities between the facts in Persaud, and the facts of this case. In both cases, paragraph 19 of the mortgage provided the borrower with a limited post-acceleration opportunity to avoid foreclosure prior to restore the mortgage. In both cases, this limited opportunity to reverse the mortgage foreclosure expired upon entry of a judgment of foreclosure. In both cases, a foreclosure action was commenced in 2009. In both cases, the Verified Complaint in the 2009 foreclosure action elected to accelerate the mortgage. In both cases, the 2009 mortgage foreclosure action was dismissed. In both cases, the lender filed another foreclosure action in 2017. And in both cases, the lender never revoked the mortgage acceleration contained in the Verified Complaint that had been filed more than eight years earlier.[1]

[1] After the 2009 action was dismissed in Persaud, the lender filed another foreclosure action in 2011. The 2011 action was also dismissed prior to the lender's commencement of the 2011 foreclosure action.

As in this case, the lender in Persaud argued that the mortgage was never accelerated for statute of limitations purposes because the mortgage afforded the borrower a limited opportunity to stop the acceleration and to avoid foreclosure. In his well-reasoned decision, Judge Modica rejected this argument because it incorrectly placed the emphasis on the lender's ability to prevail in a mortgage foreclosure action, rather than on the lender's election to accelerate the mortgage at the commencement of that action. Judge Modica found that the lender's argument would also defeat the legislative purpose of RPAPL §1501(4), which authorizes a borrower to seek a declaratory judgment canceling a mortgage after the expiration of the six-year statute of limitations, since under the lender's interpretation that limitations period would not begin to run until the lender had already obtained a judgment of foreclosure. Judge Modica also rejected the lender's argument because it confused the lender's act of electing to accelerate the mortgage with the borrower's limited contractual right to obtain relief from that acceleration, stating:

> There is a significant degree of difference between the ability of a lender to prevail in a mortgage foreclosure action brought to accelerate a mortgage debt as opposed to the right of such lender to elect to accelerate the debt by filing such a lawsuit. In this case, [the lender] affirmatively elected to accelerate the entire debt by filing the foreclosure action. Certainly, paragraph 19 of the Consolidated Mortgage was not an obstacle to [the lender's] right to file a lawsuit to accelerate the debt owed to it...
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> The subject language simply provides borrowers with the opportunity to avoid foreclosure. It cannot be reasonably interpreted as empowering a lender with the ability of avoiding the protection afforded to borrowers by RPAPL §1501(4). As noted, the mortgage note, in no way, limited [the lender's] ability to elect to accelerate the instant debt. The provision simply prevented [the lender] from succeeding on its election. Paragraph 19 imposed heavy hurdles on [the borrower] before she could prevent [the lender] from foreclosing on her property. Given this important distinction, the Court finds that there is no reason to give Paragraph 19 the strained interpretation proposed by [the lender]...
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> In closing, the Court notes that the election to accelerate the debt is what triggers the running of the statute of limitation. That election should not be confused with the rights of the borrower under Paragraph 19 to stop the foreclosure or with the ultimate ability of the lender to foreclose successfully on the property. Here, by filing two lawsuits, [the lender] affirmatively elected to accelerate the mortgage.

The Second Department recently observed that "determining precisely when a mortgage is accelerated" is a "key aspect" of any statute of limitations dispute involving a mortgage. [Milone v. US Bank, N.A., 164 AD3d 145, 151-52 (2d Dept. 2018)]. The Second Department also confirmed that there continue to be three ways to accelerate a mortgage: (1) by transmitting a clear and unequivocal acceleration notice to the borrower, (2) by self-executing contractual provision, such as a balloon payment; and (3) by commencing a foreclosure action that demands payment of the full balance due. [id. at 152].

The Verified Complaint that was filed in the 2009 Action accelerated the mortgage, and demanded payment of the full principal amount due. There is no merit to Plaintiff's argument that the acceleration clause in the 2009 Verified Complaint was ineffectual because no judgment of foreclosure was ever issued in that case.

The lender always retains the unilateral right to revoke a mortgage acceleration (provided that the revocation reflects a good faith desire to reinstate the loan, rather than a pretext to avoid the imminent expiration of the limitations period). [Id. at 153]. While the borrower does not possess a similar right under the common law, the lender is free to provide the borrower with a contractual de-acceleration right under specified conditions. Here, the contractual provision granting the borrower opportunity to de-accelerate the mortgage required compliance with a number of conditions. It also required the borrower to satisfy these conditions prior to entry of a judgment of foreclosure.

Stated differently, the mortgage does not render the lender's acceleration of the mortgage ineffectual until a judgment of foreclosure has been entered. If this were true, the lender would be forced to commence two foreclosure actions before it could foreclose on the entire amount due. [*see* Cortes-Goolcharran v. Rosicki, Rosicki & Associates, 2018 WL 3748154, Case No. 17-CV-3976 (EDNY 2018) ("Under the defendant's reading, a lender would have to sue for

individual missed payments, obtain a judgment for that amount, accelerate the loan, and sue again for the remaining amount"].

The absurdity of this result is self-evident. Rather than rendering a lender's acceleration ineffectual, the clear purpose of paragraph 19 of the mortgage is to set a deadline for de-acceleration brought about by the borrower's unilateral satisfaction of the specified conditions. Once a judgment of foreclosure has been entered, that deadline expires, and the borrower's limited opportunity to de-accelerate the mortgage is forfeited. [id. ("The plain language of the mortgage, however, simply gives [the borrower] the right to stop foreclosure and keep the mortgage in effect 'as if' there had been no acceleration. In other words, it gives [the borrower] the right to undo acceleration, not the right to prevent it.").

Therefore, the six-year statute of limitations began to run no later than June 3, 2009. [Milone v. US Bank, N.A., 164 AD3d 145, 152-53 (2d Dept. 2018) ("An acceleration of the full amount of the debt occurred in this instance upon the filing of the summons and complaint in the foreclosure action. We therefore measure the applicable six-year statute of limitations from the date the foreclosure action was commenced"). *See also* Deutsche Bank National Trust Co., v. Adrian, 157 AD3d 934, 935 (2d Dept. 2018) ("The filing of the summons and complaint seeking the entire unpaid balance of principal in the prior foreclosure proceeding constituted a valid election by [the lender] to accelerate the maturity of the debt"); Ward v. Walkley, 143 AD2d 415, 417 (2d Dept. 1988) ("a suit to foreclose a mortgage is notice of the most unequivocal character that the mortgagee wishes to avail himself of his option for acceleration")]. As a result, the six-year statute of limitations expired on June 3, 2015, more than two years prior to the commencement of the 2017Action [Kashipour v. Wilmington Savings Fund Society, FSB, 144 AD3d 985 (2d Dept. 2016); UMLIC VP, LLC, v. Mellace, 19 AD3d 684 (2d Dept. 2005); EMC Mortgage Corp., v. Patella, 279 AD2d 604 (2d Dept. 2001)].

The Company's motion to dismiss the 2017 Action on the alternate grounds that Plaintiff lacks standing to foreclose the mortgage is denied. The complaint and exhibits adequately allege that Plaintiff has standing to foreclose the mortgage. [Aurora Loan Services., LLC v Taylor, 25 NY3d 355 (2015); Wells Fargo Bank, NA, v. Inigo, 164 AD3d 545 (2d Dept. 2018); HSBC Bank USA, NA, v. Ozcan, 154 AD3d 822 (2d Dept. 2017)].

Likewise, the Company's motion to dismiss the 2017 Action on the grounds that Man Yi Cindy Ng and Chin Feng Peter Shih are necessary parties to this action is denied. They do not own the Premises, and Plaintiff does not seek a deficiency judgment. Therefore, they are not necessary parties. [HSBC Bank USA, v. Ungar Family Realty Corp., 111 AD3d 673 (2d Dept. 2013); DLJ Mortgage Capital, Inc., v. 44 Brushy Neck, Ltd., 51 AD3d 857 (2d Dept. 2008)]. In any event, "the absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale." [Central Mortgage Co. v. Davis, 149 AD3d 898, 900 (2d Dept. 2017), *quoting* Marine Midland Bank v. Freedom Road Realty Assoc., 203 AD2d 538, 539 (2d Dept. 1994)]. Therefore, even if Man Yi Cindy Ng and Chin Feng Peter Shih were necessary parties to this action, the failure to add them would not present a valid basis for dismissal of the action. [id].

Finally, there is no merit to Plaintiff's argument that the Company waived the statute of limitations defense by failing to timely interpose it as a defense. The Company asserted this defense in its initial pre-answer motion, prior to defending this action on the merits. This motion was filed with the Court 11 days before Plaintiff mailed the pre-default written notice that is required by CPLR 3215(g)(3). To the extent that these motion papers were arguably filed 8 days after the earliest possible deadline to file a responsive pleading, the Company has provided a reasonable excuse for that minimal delay, has established that it possesses a meritorious defense to this action, and has demonstrated that Plaintiff has not suffered any prejudice. [Ramirez v.

Islandia Executive Plaza, LLC, 92 AD3d 747, 748 (2d Dept. 2012); New Seven Colors Corp. v. White Bubble Laundromat, Inc., 89 AD3d 701, 702 (2d Dept. 2011); HSBC Bank USA National Association v. Nuteh 72 Realty Corp., 70 AD3d 998 (2d Dept. 2010)]. Based on the foregoing, it is hereby

ORDERED, that the motion to dismiss the Complaint is granted; and it is further

ORDERED, that the mortgage is cancelled due to the expiration of the six-year statute of limitations; and it is further.

ORDERED, that pursuant to RPAPL §1521(1), the Dutchess County Clerk shall cancel the mortgage encumbering the Premises that is dated November 22, 2005, and recorded in the Dutchess County Clerk's Office on December 12, 2005, as Document No. 01-2005-24150.

ORDERED, that all other motions are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
December 17, 2018

HON. PETER M. FORMAN, AJSC