| **Nationstar Mtge. LLC v Levy** |
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| 2017 NY Slip Op 31676(U) |
| May 15, 2017 |
| Supreme Court, Kings County |
| Docket Number: 503090/2015 |
| Judge: Mark I. Partnow |
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At an IAS Term, Part FRP2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May, 2017.

PRESENT:

HON. MARK I. PARTNOW,
Justice.

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NATIONSTAR MORTGAGE LLC,

Plaintiff,

- against -

Index No. 503090/2015

DYLAN LEVY A/K/A DYLAN G. LEVY, ET. AL.,

Defendants.

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| The following e-filed papers read herein: | NYSCEF No.: |
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| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 14-19; 26-58; 61-63 |
| Opposing Affidavits (Affirmations) | 59; 64-67 |
| Reply Affidavits (Affirmations) | 70-72 |
| ____________Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendant Dylan Levy (Levy) moves for an order pursuant to CPLR 3211 (a)(5) seeking dismissal of the instant action. Plaintiff, Nationstar Mortgage (plaintiff) cross-moves pursuant to CPLR 3025(b) seeking to amend the complaint. Plaintiff further moves, by separate motion, pursuant to CPLR 306-b to validate late service upon defendant Thomas Thompson, III a/k/a Thomas J. Thompson, III (Thompson), nunc pro tunc.

Plaintiff commenced this action on March 17, 2015 to foreclose a mortgage encumbering the subject property at 337 90th Street in Brooklyn, New York. The mortgage was executed by Dylan Levy and Thomas J. Thompson, III on June 22, 2007 to secure a note in favor of American Brokers Conduit in the amount of $585,000.00. On July 21, 2008, Aurora commenced a prior action to foreclosure the mortgage (*Aurora v. Levy*, Kings County index No. 21217/2008). The prior action was discontinued by a "so-ordered" stipulation of discontinuance on March 27, 2012.

Levy's motion to dismiss pursuant to CPLR 3211(a)(5) is denied. Where a party moves to dismiss a complaint on the ground that it is barred by the statute of limitations, that party bears the initial burden of establishing the affirmative defense by prima facie proof that the time in which to sue has expired (*Assad v City of New York*, 238 AD2d 456 [2d Dept 1997]). If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (*see Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016]). "As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding ... the action" *(Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *see* CPLR 213[4] ). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes

due (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982; *Wells Fargo Bank, N.A v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2d Dept 1997]). 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 [2d Dept 2001]; *see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 982).

Levy has established, prima face, that the time in which to commence this action has expired (see *Wells Fargo Bank, N.A. v. Eitani,* 148 AD3d 193, 197 [2d Dept 2017]). It is clear, and not in dispute, that this action was commenced more than six years after the loan was accelerated by the commencement of the prior action on July 21, 2008 and, without any further action by plaintiff, the complaint would be barred by the statute of limitations. However, a lender may revoke its election to accelerate by an affirmative act occurring within the statute of limitations period provided that there is no change in the borrower's position in reliance thereon (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 606). In opposition to Levy's motion, plaintiff submits the affidavit of Damontrea Coleman, an "Assistant Secretary" of plaintiff. Coleman attests that on September 12, 2012, Levy was mailed a 30 day default notice letter stating that "if you do not pay the full amount of the default, we shall accelerate the entire sum of both principal and interest due and payable..."A copy of the letter is annexed to plaintiff's cross-motion. Plaintiff argues that the initial acceleration of the debt was revoked by "affirmative acts" of plaintiff which include the

voluntary discontinuance of the prior action along with service of the notice of intent to accelerate if the default is not cured by a date certain.

The parties have not raised any controlling case law delineating precisely what "affirmative acts" are necessary to revoke an acceleration. Courts have found that the mere acceptance of a partial payment of the accelerated debt is not an affirmative act revoking an acceleration (*UMLIC VP, LLC v Mellace, 19 AD3d 684* [2d Dept 2005]; *Lavin v Elmakiss*, 302 AD2d 638 [3d Dept 2003]), nor are dismissals of actions by the court (*Clayton Nat., Inc. v Guldi*, 307 AD2d 982 [2d Dept 2003]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]; *Fed. Natl. Mtge. Assn. v Mebane*, 208 AD2d 892 [2d Dept 1994]). In *Lavin*, the court stated that "the acceptance of such payments is not inconsistent with defendants' insistence that the entire debt immediately be paid. Hence, the mere acceptance of such payments does not, in our view, constitute proof of an affirmative act of revocation" (*Lavin v Elmakiss*, 302 AD2d at 639).

The court does not find that the mere discontinuance of a prior action alone constitutes an affirmative act revoking an acceleration as such act is "not inconsistent with [the lender's] insistence that the entire debt immediately be paid" (*Lavin v Elmakiss*, 302 AD2d at 639). In this matter, however, plaintiff alleges that following the discontinuance of the prior action it served a notice upon Levy of its intent to accelerate, which notice said that the default may be cured and the loan made current upon payment of arrears and late charges.

The court disagrees with Levy's contention that plaintiff did not demonstrate an unambiguous intent to revoke the acceleration. At the outset, Levy has not cited any controlling New York case law holding that the affirmative act revoking the acceleration must be "unequivocal" or "unambiguous." Nonetheless, the court finds that the service of the September 12, 2012 notice, in essence, provided Levy with a refreshed opportunity to bring the loan current and did not indicate that plaintiff was seeking payment of the entire indebtedness, coupled with plaintiff's discontinuance of the prior action, unequivocally demonstrates that plaintiff intended to revoke the prior acceleration. While the notice did not contain an express statement that plaintiff was thereby revoking its prior acceleration, insofar as the notice demanded only arrears and late charges, it is inconsistent with plaintiff's insistence that the *entire* debt be paid. Thus, plaintiff has established that this action was timely commenced requiring denial of Levy's motion to dismiss. In light of this determination, plaintiff's cross-motion (motion sequence 2) is denied as moot.

Lastly, plaintiff's motion to validate late service upon Thompson, nunc pro tunc, is granted. "A motion pursuant to CPLR 306-b to extend the time for service of a summons and complaint may be granted upon 'good cause shown or in the interest of justice" (*Moundrakis v. Dellis,* 96 AD3d 1026, 1026 [2d Dept 2012]; quoting CPLR 306-b). Here, the court grants plaintiff's motion for good cause shown and in the interest of justice. The plaintiff has established that it made a diligent effort in attempting to timely serve Thompson with the summons and complaint. Furthermore, plaintiff effectuated service upon Thompson roughly

fifteen days after the 120 day time period expired, a short delay. Thus, plaintiff's motion to validate late service upon Thompson, nunc pro tunc, is granted. Accordingly, it is hereby

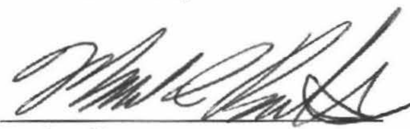
**ORDERED**, that defendant's motion to dismiss (motion sequence 1) pursuant to CPLR 3211(a)(5) is denied in its entirety; and it is further

**ORDERED**, that plaintiff's cross-motion to amend (motion sequence 2) pursuant to CPLR 3025(b) is denied as moot; and it is further

**ORDERED**, that plaintiff's motion to validate late service pursuant to CPLR 306-b is granted. A form order will follow.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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