To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSMC MORTGAGE BACKED PASS-THROUGH CERTIFICATES SERIES 2006-5,

Plaintiff,

DECISION AND ORDER
Index No.: 034183/16

-against-

LEAH SZOFFER, MORDECHAI SZOFFER, NATIONAL CITY BANK and JOHN DOE,

Defendants.

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LOEHR, J.

The following papers numbered 1-4 were read on Defendants' motion pursuant to CPLR 3211 to dismiss the Complaint as untimely under the statute of limitations and Plaintiff's motion for summary judgment for an Order of Reference.[1]

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1
Notice of Cross Motion - Affirmation - Affidavit - Exhibits	2

[1] As Defendants answered – and in fact counterclaimed to quiet title with respect to Plaintiff's mortgage and for attorney's fees – Defendants could not move to dismiss the Complaint, nor for the relief sought in their counterclaims, pursuant to CPLR 3211. However, inasmuch as Plaintiff moved for summary judgment – and apparently treated Defendants' motion as a motion for summary judgment, the Court can and will reach the merits on all issues (CPLR 3212[b]).

Plaintiff's Memorandum of Law	3
Defendants' Reply Affirmations	4

Upon the foregoing papers, it appears that on January 7, 2006 the Defendants borrowed $400,000 from American Brokers Conduit ("ABC"), evidenced by a Note and secured by a Mortgage on the property located at 7 Wilsher Drive, Monsey, New York. The Mortgage was a uniform Fannie Mae/Freddie Mac New York instrument. Paragraph 22 of the Mortgage gives Plaintiff the right to accelerate the loan upon a default. Paragraph 19 of the Mortgage gives the Defendants the right have a foreclosure discontinued up to the entry of Judgment by paying in full the amount due prior to acceleration together with the Plaintiff's fees and expenses. Other than by such payment by Defendants, the Mortgage does not give the Plaintiff the right to unilaterally de-accelerate the loan once accelerated. In May 2006, the loan was assigned to Plaintiff. The Defendants defaulted on August 1, 2008. Plaintiff, as authorized by the Mortgage and in order to protect its collateral, has advanced $90,259.52 for taxes between July 1, 2011 and August 14, 2017. Plaintiff commenced the first foreclosure on January 29, 2009 (the "First Foreclosure"), accelerating the loan no later than that date. The First Foreclosure was discontinued by a Stipulation dated June 18, 2009. Why is not set forth except that simultaneously Plaintiff's counsel submitted an Affirmation that "the Plaintiff elected to pursue other contract remedies, rather than foreclosure of the mortgage loan at this time."

On January 19, 2011, Plaintiff commenced its second foreclosure (the "Second Foreclosure"). The Second Foreclosure was discontinued by Stipulation dated August 4, 2011. Why is not set forth except that Defendants' counsel who executed the Stipulation affirms that it was due to the Defendants not having been properly served.

On December 23, 2011, Plaintiff commenced its third foreclosure (the "Third Foreclosure"). On January 23, 2013, the parties filed a Stipulation of Discontinuance. Why is not set forth except that Plaintiff's counsel simultaneously submitted an Affirmation to the effect "that Plaintiff has voluntarily elected to discontinue the subject foreclosure at this time."

On October 5, 2016, Plaintiff commenced the instant foreclosure. In the Complaint, Plaintiff alleges that Defendants failed to pay the December 1, 2010 and subsequent installments. While, at first blush, one might suppose that such later default date resulted from payments having been made in the interim after one or more of the foreclosures had been discontinued and

presumably pursuant to some agreement, that was apparently not the case. As averred by Plaintiff's servicer, the Defendants never made a payment after August 1, 2008, and the 2010 default date was inserted in the Complaint as Plaintiff recognized that unpaid installments prior to December 1, 2010 were beyond the statute of limitations.

Defendant answered, raised the statute of limitations and counterclaimed for a declaration that the Mortgage is unenforceable and to vacate its lien and the lis pendens pursuant to RPAPL 1501, and for attorneys fees pursuant to Real Property Law § 282. Both sides move for summary judgment.

Having submitted the Note and Mortgage and evidence of the Defendants' default and the service of condition precedent notices on the Defendants, Plaintiff has established its prima facie entitlement to summary judgment for an Order of Reference. However, the statute of limitations is six years from a default in the payment of any installment or the full amount of the debt once accelerated (CPLR 213[4]; *Wells Fargo Bank, N.A. v Burke,* 94 AD3d 980, 982 [2d Dept 2012]). Here, the debt was accelerated no later than January 29, 2009. Accordingly, the statute of limitations expired prior to the commencement of this action on October 5, 2016, unless, as Plaintiff asserts, the loan was de-accelerated. While there is appellate authority for the proposition that a lender may revoke its election to accelerate the mortgage (*US Bank National Association v Barnett,* 151 AD3d 791, 793 [2d Dept 2017]), at a minimum, such requires an affirmative act of revocation by the lender (*NMNT Realty Corp. v Knoxville 2012 Trust,* 151 AD3d 1068, 1069 [2d Dept 2017]; *Kashipour v Wilmington Savings Fund Society,* 144 AD3d 985, 986 [2d Dept 2016]). Plaintiff argues that inasmuch as the prior foreclosures were discontinued by Stipulation that, in and of itself, is sufficient. Clearly, if the parties entered into a settlement wherein the loan was reinstated or a trial modification was tried and payments made and accepted, the loan would have been de-accelerated through the express or implied agreement of the parties. Here, however, the only evidence – other than the discontinuance of the prior actions – is that there was no agreement, the Plaintiff never stated or offered to reinstate the loan and no payments were made or accepted. Under such circumstances, the loan was never reinstated and the accelerated loan is unenforceable due to the statute of limitations (*id.; US Bank National Association v Barnett,* 151 AD3d 791 [2d Dept 2017]).

Moreover, any other result would allow the lender to restart the statute of limitations unilaterally and without notice to the borrower, and would therefore essentially write the statute

of limitations out of the CPLR. And where is the authority? The mortgage allows the lender to accelerate unilaterally on default. It does not allow the lender to de-accelerate unilaterally: it is only upon agreement, explicit or implicit, such as by written agreement, written acknowledgment of the debt or by payment made and accepted (*see* General Obligations Law § 17-101; *see, e.g., Peoples Trust Co. Of Malone, N.Y. v O'Neil,* 273 NY 312, 315 [1937]; *Bergenfield v Midas Collections, Inc.,* 38 AD2d 939 [2d Dept 1972]; *cf EMC Mortgage Corp. v Patella* (279 AD2d 604 [2d Dept 2001]; *Federal National Mortgage Association v Mebane,* 208 AD2d 892, 894 [2d Dept 1994]; *Golden Ramapo Improvement Corp.,* 78 AD2d 648 [2d Dept 1980]; *Bank of New York, v Slavin,* 54 Misc3d 311, 314-15 [Sup Ct, Rensselear Co 2016]).[2]

Plaintiff also argues that inasmuch as the Defendants had the right to cure their default, even after acceleration, the statute of limitations never started to run. Plaintiff cites no authority for this proposition. Moreover, every borrower has the unilateral right to cure their default and re-instate an even accelerated mortgage under Chapter 13 of the United States Bankruptcy Code. If, as Plaintiff argues, the mere right to cure, even if not performed, stayed the commencement of the statute of limitations, it would never start with respect to any loan and lenders would be able to delay foreclosure forever.

As no such agreement has been submitted, nor evidence of monthly payments made by Defendants and accepted by Plaintiff, nor an acknowledgment of the debt, the cross motion dismissing the Complaint based on the statute of limitations is granted as is the counterclaim for a declaration that the Mortgage is unenforceable, vacating its lien and the lis pendens, and Plaintiff's motion for summary judgment is denied. (RPAPL 1501; CPLR 3212[b]). Defendants are therefore entitled to attorneys fees pursuant to Real Property Law 282. Counsel shall submit a fee application setting forth the hours expended and his usual hourly rate. The balance of the counterclaims are dismissed as failing to state a claim.

Plaintiff also seeks, in the alternative, to recover the approximately $90,000 in taxes it paid on the Defendants' behalf within the past six years. While the payment of such taxes certainly enriched the Defendants at Plaintiff's expense such that in equity and good conscience the Defendants should not be able to retain it, as Plaintiff voluntarily made such payments to

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[2] While there is dictum in some of these cases that a lender might unilaterally de-accelerate a loan, such is only when it would not prejudice the other party – a proposition clearly inapplicable here.

protect its lien without any fraud by Defendants or any mistake by Plaintiff, the voluntary payment doctrine bars Plaintiff's recovery of such payments (*Wells Fargo Bank, N.A. v Burke*, ___ AD3d___, 2017 WL 4930564 [2d Dept]).

This constitutes the decision and order of the Court.

Dated: New City, New York
December 4, 2017

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