At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 22nd day of January 2018

P R E S E N T:
HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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EMILIO CORREA and DIANE CORREA,

Plaintiffs,

- against -

U.S. BANK, National Association as Trustee for Residential Asset Securities Corporation, Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2005 EMX3,

Defendants,

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DECISION AND ORDER ON MOTION
Index No: 608596/2017
Motion Seq: 001, 002

The following papers were read on the instant motions:

Defendants' Notice of Motion and Supporting Documents and Memorandum of Law
Plaintiffs' Notice of Cross-Motion and Supporting Documents
Defendants' Affidavit in Opposition to Cross-Motion and Supporting Documents and Reply Memorandum of Law
Plaintiffs' Reply Affirmation
Plaintiffs' Supplemental Reply Affirmation

Defendants have moved by notice of motion for an order pursuant to CPLR §3212 granting them summary judgment and dismissal of the complaint. Plaintiffs have cross-moved for an order pursuant to CPLR §3212 granting them summary judgment. Plaintiffs opposed the cross-motion and replied on their own motion, Defendants replied and submitted a supplemental reply. Both motions were deemed submitted on January 19, 2018.

CPLR §3212(b) states, in relevant part, that a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party".

"The standards regarding summary judgment motions are familiar and fundamental. The party moving for summary judgment 'bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law' *(Holtz v Niagara Mohawk Power Corp.*, 147 A.D.2d 857, 858). Once such a showing has been established, the 'burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact' (*Mahar v Mahar*, 111 A.D.2d 501, 502; *see also*, *Ferber v Sterndent Corp.*, 51 N.Y.2d 782; *Cusano v General Elec. Corp.*, 111 A.D.2d 557). General conclusory statements, expressions of hope, and repetition of the allegations in the pleadings do not constitute evidentiary proof substantiating the party's claim and, therefore, are insufficient to defeat a summary judgment motion". *Fresh Meadows Country Club v. Lake Success*, 158 A.D.2d 581 (2d. Dept. 1990).

The underlying action is a quiet title action related to a mortgage executed by Plaintiffs on or about April 22, 2005. Defendants herein commenced a foreclosure action with respect to the subject mortgage on July 28, 2011 (hereinafter the "2011 Foreclosure Action"). That action was dismissed in 2015 for failure to prosecute pursuant to CPLR §3126. Plaintiffs commenced a quiet title action on November 5, 2015 (hereinafter the "2015 Quiet Title Action") which was dismissed on pre-answer motion to dismiss on April 29, 2016. Plaintiffs then commenced the instant action on August 22, 2017.

Defendants first argue that the instant action is barred by the doctrine of *res judicata* inasmuch as the 2015 Quiet Title Action was dismissed and the instant action requests the same relief. However, inasmuch as the mortgage in question was accelerated in July of 2011, and the 2015 Quiet Title Action preceded the expiration of the statute of limitations with respect to enforcement of the mortgage based on the acceleration, there are new facts and circumstances related to the instant action that renders this instant matter a different cause of action and not subject to dismissal, as a whole, based upon the doctrine of *res judicata*.

Defendants next contend that, while the underlying mortgage was, admittedly, accelerated by the 2011 Foreclosure Action, the mortgage was then affirmatively decelerated by letter dated April 7, 2017 and, therefore, the statute of limitations issue is moot.

The April 7, 2017 letter reads, in relevant part:

> "Previously your loan was accelerated and all sums secured by the Security Instrument were declared immediately due and payable. Wells Fargo Bank,

N.A., hereby de-accelerates the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and reinstates the Loan as an installment loan".

Plaintiffs first argue that the 2011 Foreclosure Action was dismissed with prejudice and that, therefore, they are barred from commencing a new foreclosure action which entitles Plaintiffs to proceed with the quiet title action. However, that was the same allegation made in their 2015 Quiet Title Action, which was dismissed by the Order of Justice George R. Peck dated April 28, 2016 and entered April 29, 2016 which explicitly held that "Here, dismissal of the 2011 foreclosure action was not, as plaintiffs erroneously allege, a dismissal with prejudice nullifying the note and mortgage which were the basis of that foreclosure action" and that "Defendant US Bank is not precluded from commencing a new action on the mortgage and note within the applicable six year statute of limitations". Accordingly, that argument is barred by the doctrine of *res judicata.*

Plaintiffs argue in their motions papers that, inasmuch as the mortgage in question contains a provision permitting acceleration of the loan, but contains no converse provision explicitly permitting deceleration, same is not permitted and the deceleration is without effect. While Defendants argue that this theory of liability is not contained in the complaint and Plaintiffs are, in effect, changing their theory of liability within the instant motion, in the interest of judicial economy the Court has considered this argument by Plaintiffs herein.

It has been well-settled that, just as a lender may exercise the option to accelerate a debt, so they may exercise the option to decelerate the debt. *Golden v. Ramapo Imp. Corp.*, 78 A.D.2d 648(2d. Dept.1980). Such revocation requires an affirmative act on the part of the lender which places the borrower on notice of same. *See, Clayton Natl. v. Guldi*, 307 A.D.2d 982, (2d. Dept. 2003), *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, (2d. Dept. 2001), *Federal Natl. Mtge. Assn. v. Mebane*, 208 A.D.2d 892 (2d. Dept. 1994), *Kashipour v. Wilmington Savings Fund Society, FSB*, 144 A.D.3d 985 (2d. Dept. 2016).

While the dismissal of the 2011 Foreclosure Action would not be sufficient to constitute an affirmative deceleration of the debt, the April 7, 2017 clearly constituted an unequivocal affirmative act on the part of Defendants herein to revoke their acceleration of the mortgage debt within the applicable statute of limitations period, thereby reinstating the mortgage and re-starting the clock. Therefore, the mortgage remains enforceable and the complaint must be dismissed for failure to state a cause of action.

Accordingly, it is hereby:

ORDERED, that the Defendants' motion is hereby granted in its entirety and the complaint filed under Index #608596/2017 is hereby dismissed; and it is further

ORDERED, that Plaintiffs' cross-motion is hereby denied in its entirety.

Defendants shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Dated:
January 22, 2018

HON. IULIANNE T. CAPETOLA
J.S.C.

ENTERED
JAN 25 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE