To commence the statutory time for 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 WESTCHESTER

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WELLS FARGO BANK, N.A.,

Plaintiff,

-against -

ELIZABETH A. FETONTI a/k/a ELIZABETH FETONTI, LENOX HILL HOSPITAL, MIDLAND FUNDING LLC and JOHN DOE,

Defendants.

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INDEX NO. 52654/2017

DECISION/ORDER

Submission Date: 11/1/17
Motion Seq. 1

ECKER, J.

The following papers numbered 1 through 19 were considered on the motion of ELIZABETH A. FETONTI a/k/a ELIZABETH FETONTI ("defendant"), made pursuant to CPLR 3211(a)(5) and CPLR § 213(4), for an order dismissing the complaint, as against WELLS FARGO BANK, N.A.("plaintiff"):

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-F	1 - 8
Affirmation in Opposition, Exhibits A-E [1]	9 - 14
Reply Affirmation, Exhibits A-D	15-19

Upon the foregoing papers, the court determines as follows:

In this residential mortgage foreclosure action, defendant alleges that the present foreclosure action is barred due to the running of the six year statute of limitations, as prescribed in CPLR § 213(4). A prior action for foreclosure of the subject mortgage was commenced between the same parties on January 1, 2011 under Index No. 02019/2011 ("the 2011 Action").

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[1] Plaintiff is required to use numbered exhibit tabs. Plaintiff has been so advised in the many cases brought before this court. Should plaintiff's firm continue to fail to comply with the court's directive, an appropriate sanction may be imposed.

Approximately two years later, on May 31, 2013, the 2011 Action was dismissed for failure to prosecute (CPLR 3216[a] and [c])(Scheinkman, J.)[Deft. Ex. C]. The second foreclosure action was thereafter commenced on February 28, 2017 ("the 2017 Action"). On this motion, defendant argues that the 2011 Action constituted an election by plaintiff to accelerate the outstanding indebtedness and that, consequently, plaintiff is now barred by the statute of limitations from foreclosing against the mortgaged property in the 2017 Action.

Here, the question of whether the 2011 Action constituted an acceleration of the debt, and whether the dismissal of that action bars this litigation, is not readily resolved without a very careful reading of the controlling authorities. These decisions make clear that in reaching this determination, the court must look to the contract of the parties, which here is the mortgage instrument [Deft. Ex. A]. Specifically, the court must analyze the provisions of Section 19 and Section 22 thereof, to determine whether the action of commencing the prior foreclosure action was an acceleration of the underlying debt under these clauses. Of import, the parties did not use the statutory form of an acceleration clause from Real Property Law § 258, but instead elected to incorporate another verison of the provision in their contract.

The foundational decision with regards to this issue is *Albertina Realty Co. v Rosbro Realty Corp.* (258 NY 472 [1932]). In that foreclosure action, the Court ruled that the use of the statutory form of a mortgage (RPL § 258, Schedule M), incorporated an election by the parties to agree that the commencement of a foreclosure action constituted an acceleration of the entire debt. The Court further concluded that the effort to make a partial payment of principal was insufficient to satisfy the payment of the entire debt as then accelerated. The Court noted that it was the language of the mortgage instrument, agreed upon by the parties, that led to this conclusion. As such, the belated attempt by the mortgagor to avoid the consequences of the filed foreclosure action failed and the foreclosure was permitted to proceed.

In *Long Island Sav. Bank of Centerreach v Denkensohn* (222 AD2d 659 [2d Dept 1995]), the Court reviewed the appellant's contention that the plaintiff was obligated to send a notice of acceleration of mortgage debt as a condition precedent to requiring immediate payment of the entire amount of debt then remaining under the note. The Court concluded, however, that the mortgage unambiguously provided that, upon the appellant's default in payment, the plaintiff was entitled to accelerate the entire remaining unpaid mortgage debt "without making any further demand for payment." Hence, furnishing notice of acceleration was not a condition precedent to demanding payment of the entire amount remaining under the note.

Thereafter, in *Arbisser v Gelbelman* (286 AD2d 693 [2d Dept 2001]) the Court held that the commencement of the original foreclosure action was "unquestionably notice of the intent to accelerate." Moreover, the Court pointed out, although the original foreclosure action was withdrawn, the withdrawal occurred only after a certificate of estoppel was executed. Of import, the estoppel certificate specifically provided that the mortgage payments were in default and the outstanding debt was immediately due and payable. Under the circumstances, the Court reasoned, once the mortgage debt was accelerated, all sums became immediately due and payable, and the statute of limitations began to run. Accordingly, the six-year statute of limitations had already expired when the second foreclosure action was commenced.

In *Wells Fargo Bank, N.A. v Cohen* (80 AD3d 753 [2d Dept 2011]), the Court was called upon to rule where default occurred in June 2000 and the foreclosure action was not commenced until June 2008, beyond the six year statute of limitations. The Court held that because the mortgage and note did not provide the entire debt was automatically accelerated upon the default of an installment payment and plaintiff declined to exercise its option under the note to accelerate the debt, the statute of limitations for a foreclosure action did not expire six years after the June 2000 default (see CPLR 213 [4]). The Court went on to state:

> "With respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the Statute of Limitations begins to run, on the date each installment becomes due. Accordingly, even though the last payment on the subject mortgage was June 2000, and this action was not commenced until June 2008, the entire action is not time-barred. Instead . . . in the event that [plaintiff] prevailed in this action, its recovery would be limited to only those unpaid installments which accrued within the six-year period of limitations preceding its June 2008 commencement of this foreclosure action, that is, the unpaid installments which accrued on or after July 1, 2002 (internal quotation marks and citations omitted)."

Hence, in the absence of language in the mortgage stating that the entire debt was automatically accelerated upon the borrower's default on an installment payment, or the exercise by plaintiff of the option to accelerate, there was no running of the statute of limitations as to payments due and owing for a period of six years prior to the commencement of the foreclosure action.

In *Wells Fargo, N.A. v Burke* (94 AD3d 980 [2d Dept 2012]), the prior foreclosure action was voluntarily discontinued due to lack of standing. The Court found that there was no acceleration because the prior action was a nullity. Of import for the discussion herein, the Court stated (Id. at pp 982, 983) that "[w]here the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the acceleration provision, and until such action has been taken the provision has no operation . . . As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage (internal citations omitted)."

In *Fannie Mae v 133 Management, LLC* (126 AD3d 670 [2d Dept 2015]), the Court held that the plaintiff established, prima facie, that, as set forth in the provisions of the mortgage, it was not required to give the defendants notice of their default or the plaintiff's intent to accelerate the debt. As such, commencement of the action and the filing of the notice of pendency constituted a valid election to accelerate the maturity of the debt.

In *Beneficial Homeowner Service Corp. v Tovar* (150 AD3d 657 [2d Dept 2017]), the Court reviewed a situation where a prior foreclosure action was dismissed for failure to effect service. Importantly, the plaintiff had elected to call due the entire amount secured by the mortgage in the original foreclosure litigation. The Court concluded that the dismissal of the prior foreclosure did not invalidate the plaintiff's election to exercise its right to accelerate the maturity

of the debt and granted defendant's motion to dismiss the complaint in the new foreclosure action as time-barred.

Citing *Albertina Realty Co. v Rosbro Realty Corp.*, *supra*, the Court stated that "[n]othing in the parties' agreement provides that the plaintiff's election is not valid until the defendant homeowner receives notice thereof. Consequently, the failure to properly serve the summons and complaint upon the defendant homeowner did not as a matter of law destroy the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt (internal citations omitted)." The plaintiff's reliance on *Wells Fargo Bank, N.A. v Burke, supra,* was misplaced because, in that case, the plaintiff in the prior foreclosure action had not been assigned the note or mortgage as of the date that the action was commenced and therefore was without authority to exercise the acceleration option in the agreement. In the present case, the Court emphasized, there was no dispute that the plaintiff was authorized to accelerate the debt when it filed the summons and complaint in 2007. Accordingly, the second foreclosure action was time-barred.

In *21 Mortg. Corp. v Adames* (153 AD3d 474 [2d Dept 2017]), the Court ruled that a letter sent to the mortgagors prior to the commencement of the dismissed prior foreclosure action "was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause"(internal citations omitted)(*see Bank of America v Luma,* 2018 N.Y. Slip Op. 00214 [3d Dept 2018]).

Applying the above holdings to the facts at issue here, the court finds that the commencement and dismissal of the 2011 Action, when viewed in the light of the parties' mortgage contract, did not constitute an acceleration of the debt. Here, paragraph 19 and paragraph 22 provide for the steps that the mortgagee may take when there is a default, and what steps, prior to judgment, that defendant may take to cure the default. Each of the parties is afforded the option to proceed as they may elect. However, no where in the mortgage instrument (or the mortgage note) is there a mandate that plaintiff must provide a clear, unequivocal election to accelerate the debt. Nor is there any evidence that plaintiff, on its own accord and outside the four walls of the contract, advised defendant in clear and unequivocal language at a time before the commencement of the prior action that the debt was being irrevocably accelerated (see *Sarva v Chakravorty*, 34 AD3d 438, 439 [2d Dept 2006]).

Importantly, the relevant provisions in this action are identical to the form reviewed by the Court in the recent case of *Nationstar Mortgage, LLC v MacPherson,* 56 Misc3d 339 [Sup. Ct. Suffolk Co. 2017]. In that decision, Justice Whelan conducted an exhaustive legal analysis of the questions surrounding the relevant form. Initially, he determined that "[h]ere the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law § 258 or under the holding in *Albertina.*" Consequently, under the express wording of the relevant provisions, the court concluded, plaintiff had no authority to reject the borrower's payment of arrears in order to reinstate the mortgage, until judgment was entered. Accordingly, under the

specific contract terms at issue, plaintiff did not have the right to require payment in full with the simple filing of a foreclosure action.

Given the operative language Justice Whelan found that the borrower could pay the unpaid installments and the payment of same would destroy the option to accelerate, which clearly states that immediate payment in full could only be declared upon the entry of a judgment. "Until the option to declare the entire debt due is effectively exercised, the borrower has the right to tender the payments then due and make good on his or her defaults. Here, it is a judgment that triggers the acceleration in full of the entire mortgage debt . . . and pursuant to the contract that these parties entered into, the mortgage remains, in essence, an installment contract until a judgment is entered." Hence, in the absence of clear and unequivocal language in the relevant provision requiring the sending of the acceleration notice, or the act of voluntarily sending such a notice by the lender, there was no acceleration of the debt. Consequently, there was no running of the six year statute of limitations, although plaintiff's recovery was limited to only those unpaid installments which accrued within the six-year period immediately preceding the commencement of this action (*Id.*; *Wells Fargo Bank, N.A. v Cohen*, *supra*).

In the present action, the relevant mortgage provisions are identical to the clauses reviewed in *Nationstar*, such that the rationale from that decision is applicable here. Accordingly, in reviewing the mortgage instrument here, as with other contracts, it is the language of the document that the parties select that controls. Here, there is no evidence that a clear and unequivocal notice of acceleration was sent. That fact, when considered together with the language of the mortgage instrument that outlines each party's option upon commencement of the foreclosure action, requires a finding that the dismissal of the prior action in 2013 did not bar the 2017 Action. To the extent that defendant argues that the *Nationstar* decision is not binding on this court, the argument is inconsequential as the analysis from the *Nationstar* holding is rational, convincing and appropriately applied to the circumstances presented here. Therefore, defendant's motion to dismiss is denied.

Under the guiding principles outlined above, however, plaintiff is precluded from seeking to collect on any part of the outstanding indebtedness that goes back farther than March 1, 2011, in that this action was filed on February 28, 2017 [NYSCEF Doc. No. 1], or six years prior to the commencement date.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant ELIZABETH A. FETONTI a/k/a ELIZABETH FETONTI, made pursuant to CPLR 3211(a)(5), for an order dismissing the complaint due to the running of the statute of limitations, as against defendant WELLS FARGO BANK, N.A. is denied; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 813, on March 5, 2018, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
January 25, 2018

ENTER

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Woods Oviatt Gilman LLP
Attorneys for Plaintiff
Via NYSCEF

Law Office of Peter Spino, Jr.
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