NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR5,

Plaintiff,

- against-

MARY MATHEW, ELIZABETH MATHEW, MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., AS NOMINEE FOR GREENPOINT MORTGAGE FUNDING, INC., ITS SUCCESSORS AND ASSIGNS, CITIBANK, N.A., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the Subject Property described in the Complaint,

Defendants.

Index No. 710495/17

Motion Date December 1, 2017

Motion Cal. No. 157

Motion Seq. No. 1

The following papers read on this motion by defendants, Elizabeth Mathew and Mary Mathew, pursuant to CPLR 3211(a)(5), to dismiss the complaint insofar as asserted against them as time barred.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF Doc. #15-#33
Affirmation in Opposition - Exhibits.....	EF Doc. #34-#41
Reply Affirmation.....	EF Doc. #43-#45

Upon the foregoing papers, it is ordered that the motion is determined as follows:

In July 2006, Elizabeth Mathew and Mary Mathew executed and delivered a note payable GreenPoint Mortgage Funding, Inc. (GreenPoint) in the original principal amount of $548,000.00. As security for the note, the Mathews executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for GreenPoint, which allowed negative amortization up to the maximum principal amount of $602,800.00 (i.e., 125% of the original note balance), encumbering the real property known as 214-14 148th Drive, Rosedale, New York (the subject mortgage). The mortgage was assigned by MERS, as nominee for GreenPoint, to GMAC Mortgage, LLC (GMAC), by assignment of mortgage dated February 23, 2009. Elizabeth Mathews and Mary Mathew thereafter entered into a loan modification agreement dated April 1, 2009, with GMAC, which, among other things, changed the principal balance of the loan to $637,095.41. In the loan modification agreement, the Mathews acknowledged that GMAC was the holder and owner of the note and subject mortgage.

Elizabeth Mathews and Mary Mathew defaulted in paying the monthly mortgage installment due on March 1, 2010. On October 12, 2010, non-party GMAC commenced a mortgage foreclosure action, entitled *GMAC Mortgage, LLC v Mathew* (Sup Ct, Queens County, Index No. 25725/2010) (the 2010 foreclosure action). In the complaint in the 2010 foreclosure action, GMAC alleged it was the owner and holder of the note and subject mortgage and elected to call due the entire amount secured by the mortgage. By consent dated April 26, 2011, and filed on May 2, 2011, the 2010 foreclosure action was discontinued.

On December 16, 2011, GMAC commenced another mortgage foreclosure action, entitled *GMAC Mortgage, LLC v Mathew* (Sup Ct, Queens County, Index No. 28257/2011) (the 2011 foreclosure action), based upon the same alleged default by Elizabeth Mathew and Mary Mathew under the subject mortgage as was alleged in the 2010 foreclosure action. By order dated October 14, 2015. and entered on November 2, 2015, the Hon. Martin J. Schulman, J.S.C. *sua sponte* dismissed that action, without prejudice, due to GMAC's failure to comply with the terms of a prior order dated August 5, 2015.[1]

On July 31, 2017, plaintiff commenced this foreclosure action, alleging it is the owner or the holder of the note and subject mortgage, or has been delegated the authority to bring this action by the owner or holder of the note and subject mortgage. In the complaint, plaintiff alleges that it directly, or through an agent, maintains physical or constructive possession of the note secured by the subject mortgage, and the subject mortgage was transferred to it via an assignment of mortgage. Plaintiff also alleges that defendants, Mathew, defaulted in paying the monthly mortgage installment due on March 1, 2010, and that as a consequence, it declares the balance of the principal indebtedness to be immediately due and owing. A copy of the note

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[1] No copy of the August 5, 2015 order has been submitted to this court.

endorsed in blank by GreenPoint is annexed to the complaint.

In lieu of answering, defendants, Elizabeth Mathew and Mary Mathew, move, pursuant to CPLR 3211(a)(5), to dismiss the complaint insofar as asserted against them on the ground the action is time-barred.

"On a motion to dismiss a cause of action, pursuant to CPLR 3211(a)(5), on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired" (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 [2d Dept 2017]). Upon such showing, the burden shifts to the plaintiff to set forth evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (*id.* at 670; *see U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2d Dept 2016]).

An action to foreclose a mortgage is subject to a six-year statute of limitations (*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 Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011]). Once the debt has been accelerated by a demand or commencement of an action, however, the entire sum becomes due and the statute of limitations begins to run on the entire debt (*see U.S. Bank National Association v Gordon*, 158 AD3d 832 [2d Dept 2018]; *21st Mtge. Corp. v Adames*, 153 AD3d 474, 475 [2d Dept 2017]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *EMC Mtge. Corp. v Patella*, 279 AD2d at 605-606), and such notice must be "clear and unequivocal" (*Sarva v Chakravorty*, 34 AD3d 438, 439 [2d Dept 2006]). "Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised (*see EMC Mtge. Corp. v Smith*, 18 AD3d at 603; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2d Dept 2003]; *Arbisser v Gelbelman*, 286 AD2d [693], 694)" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983). However, "a lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon" (*Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]).

Defendants, Mathew, in their joint affidavit, admit that they defaulted in paying the "debt service" payment due on March 1, 2010, and received a letter dated April 2, 2010, from GMAC, notifying them of their default and demanding payment of the outstanding arrears, late charges and other amounts within 30 days of the date of the letter. They also admit that they failed to pay the outstanding arrears by May 2, 2010. They contend that as per the April 2, 2010 letter,

the subject mortgage loan was accelerated as of May 3, 2010, i.e. the cure date as set forth in the letter, and therefore, the instant action, having been brought more than six-years later, is untimely commenced. In support of the motion, defendants, Elizabeth Mathew and Mary Mathew, submit, along with their joint affidavit, copies of the complaints in the 2010 and 2011 foreclosure actions, the April 2, 2010 letter, the April 26, 2011 consent, and the October 14, 2015 order of Justice Schulman, among other things.

In opposition to the motion, plaintiff contends that the April 2, 2010 letter does not constitute an election to accelerate the mortgage debt. Plaintiff asserts the letter indicates that acceleration would occur contemporaneous with the initiation of foreclosure proceedings, and is not a clear and unequivocal notice that the debt is accelerated by demand. Plaintiff argues that the letter did not trigger the running of the statute of limitations. Plaintiff alternatively argues that even assuming the mortgage debt was accelerated by virtue of the April 2, 2010 letter, or the commencement of the 2010 foreclosure action, the voluntary discontinuance of the 2010 foreclosure action constituted an affirmative act of revocation of such acceleration.

At the outset, the court notes that plaintiff makes no claim that triable issues of fact exist as to whether GMAC had authority to issue the April 2, 2010 letter, or commence the 2010 foreclosure action and accelerate the mortgage debt (*cf. Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]). Nor does plaintiff claim that the 2010 foreclosure action remains pending (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985 [2d Dept 2016]). (Indeed, plaintiff's counsel states in her affirmation in opposition dated October 26, 2017, that "it is undisputed that the 2010 Foreclosure Action was voluntarily discontinued").

The subject loan documents offer the lender the option to accelerate the mortgage loan if the borrower defaults.[2] The April 2, 2010 letter to defendants, Elizabeth Mathew and Mary Mathew, notified them the mortgage loan was in default and specifically advised that the letter constituted "a demand for payment" of all past due amounts. The letter provided that defendants, Elizabeth Mathew and Mary Mathew, "may cure the default by paying the total amount due ... within 30 days from the date of this letter" and unless full payment of all past due amounts were received, "we will accelerate the maturity of the loan, declare the obligation due and payable without further demand, and begin foreclosure proceedings."

Although the letter demands payment for all past due amounts, it falls short of providing "clear and unequivocal" notice to defendants, Mathew, that the entire mortgage debt would be

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[2] The loan modification agreement does not impair the mortgagee's rights under the mortgage, and the mortgage gives the mortgagee the option to exercise the acceleration clause (*see* Exhibit "4" of defendants Mathew [Mortgage § 22 at 14]). Likewise, the note indicates that "the Note Holder may require [the borrower] to pay immediately the full amount of Principal that has not been paid" (*see* Exhibit "4" of defendants Mathew [Note § 7(c) at 3]).

automatically accelerated upon failure to cure the default within 30 days (*see 21st Mortg. Corp. v Adames*, 153 AD3d 474 [2d Dept 2017]*; Goldman Sachs Mtge. Co. v Mares*, 135 AD3d 1121, 1122 [3d Dept 2016]). Rather, the letter's language allows that sometime in the future, after the expiration of 30 days without a cure and without further demand, GMAC will declare the obligation due and payable at once, i.e. will accelerate the mortgage debt, and proceed with foreclosure proceedings (*see 21st Mortg. Corp. v Adames*, 153 AD3d 474; *Goldman Sachs Mtge. Co. v Mares*, 135 AD3d at 1122-1123; *cf. Deutsche Bank Nat. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017]). Thus, contrary to the assertion by defendants, Mathew, the statute of limitations did not begin to run on the entire mortgage debt simply upon the failure by defendants, Mathew, to cure their default within 30 days of the April 2, 2010 letter.

Nevertheless, defendants, Mathew, have shown that GMAC elected to accelerate the mortgage debt in the body of the complaint filed in the 2010 foreclosure action and that such action was voluntarily discontinued in April 2011. Defendants, Mathew, have demonstrated, *prima facie*, that plaintiff did not commence this action until more than six years thereafter, and consequently, they have sustained their initial burden of showing that the action is untimely (*see U.S. Bank, N. A. v Kess*, ___ AD3d ___, 2018 WL 1179153, 2018 NY App Div LEXIS 1424 [2d Dept 2018]; *U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2d Dept 2016]). The burden shifts to plaintiff to present admissible evidence establishing that the action was timely or to raise a question of fact as to whether the action was timely (*see U.S. Bank N.A. v Martin*, 144 AD3d 891, 892; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Contrary to plaintiff's assertion, the voluntary discontinuance of the 2010 foreclosure action by GMAC, without more, did not itself constitute an affirmative act of revocation of such acceleration (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 606; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]; *see also HSBC Bank USA v Kirschenbaum*, ___ AD3d ___, 2018 WL 1320306, 2018 NY App Div LEXIS 1636 [2d Dept 2018]). The statute of limitations silently continues to run its course following a voluntary discontinuance absent some affirmative act of revocation of the acceleration accompanying the discontinuance (*see U.S. Bank, N. A. v Kess*, ___ AD3d ___, 2018 WL 1179153, 2018 NY App Div LEXIS 1424 [2d Dept 2018]). The April 26, 2011 consent makes no mention of a revocation or deceleration. Plaintiff has offered no evidence of any such affirmative act of revocation occurring the six-year limitations period subsequent to the initiation of the 2010 foreclosure action (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987; *Clayton Natl. v Guldi*, 307 AD2d 982; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 606 [2d Dept 2001]; *see also Lavin v Elmakiss*, 302 AD2d 638 [3d Dept 2003]). The sua sponte dismissal of the 2011 foreclosure action likewise is not an affirmative act sufficient to revoke the previously manifested acceleration (*see MSMJ Realty, LLC v DLJ Mortgage Capital, Inc.*, 157 AD3d 885 [2d Dept 2018]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892; *see also EMC Mortg. Corp. v Patella*, 279 AD2d 604).

As a consequence, the instant foreclosure action is time-barred. The motion by defendants, Elizabeth Mathew and Mary Mathew, pursuant to CPLR 3211(a)(5), to dismiss the com

Dated: April 13, 2018

DARRELL L. GAVRIN, J.S.C.