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SHORT FORM ORDER

INDEX NO. 1814-2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 003: 8-4-2017; 004: 10-5-2017
Adjourned Date: 3-19-2018
Motion Sequence.: 003: MG; 004: MD

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE1 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE1,

Plaintiff,

-against-

JOSEPH RUGGIERO, JR. MICHAEL ROEMER, PETRO, INC. UM CAPITAL, LLC, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, VILLAGE OF LINDENHURST, PEOPLE OF THE STATE OF NEW YORK, DIRECT DRAINAGE INC., ANTHONY PAPARELLA DBA AP LANDSCAPING, JOHN & BENEDETTO DIMAIO, BROOKWOOD CORAM II LLC,

"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 premises described in the complaint,

Defendants.

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Upon consideration of the notice of motion for an order directing summary judgment in favor of the plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE1 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE1 ["the plaintiff" or "Deutsche Bank"], appointing a referee to compute, and related relief, the supporting affirmation, affidavit, and exhibits (motion sequence 003), the notice of cross-motion for summary judgment in favor of the defendant Joseph Ruggiero, Jr. ["the defendant"], the supporting affirmation, and exhibits, and the plaintiff's memorandum of law in opposition to the defendant's cross-motion and in further support of the plaintiff's summary judgment motion, it is

ORDERED that the plaintiff's motion for summary judgment, striking the defendant's answer and remaining affirmative defenses, and appointing a referee to compute the amount due the plaintiff is granted; and it is further

ORDERED that the defendant's cross-motion for summary judgment dismissing the complaint is denied in its entirety; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order upon the attorney for the defendant and all parties entitled to notice by first-class mail.

By order dated March 15, 2017 ["the prior order"], so much of the plaintiff's motion seeking an order striking the affirmative defenses of lack of standing to commence the action asserted on behalf of the defendant Joseph Ruggiero, Jr. ["the defendant"], was granted; that branch of the plaintiff's motion for an order awarding summary judgment in its favor and against the answering defendant, striking his answer and dismissing the remaining affirmative defenses and counterclaims set forth therein, awarding plaintiff default judgment against the remaining non-answering, non-appearing defendants, appointing a referee to compute amounts due under the subject mortgage, and amending the caption was denied, without prejudice and with leave to renew within 120 days. The plaintiff now renews its motion for summary judgment (motion sequence 003). The defendant opposes the plaintiff's motion and cross moves for summary judgment dismissing the complaint (motion sequence 004), as barred by the six year statute of limitations applicable to actions to foreclose a mortgage. The parties' familiarity with the underlying facts is assumed and will not be repeated here except as necessary to inform this decision.

The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the note, and the affidavit of its servicer's employee attesting to the defendant's default under the terms of the note and mortgage for the payment due on April 1, 2007, and the payments due thereafter (*see* ***Deutsche Bank Nat'l Tr. Co. v. Iarrobino***, 159 AD3d 670, 69 NYS3d 503 [2d Dept 2018]; ***Citigroup v. Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]). In opposition, the defendant failed to raise an issue of fact. The plaintiff also tendered sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL §1304 (*see* ***Citimortgage, Inc. v. Banks***, 155 AD3d 936, 937, 64 NYS3d 121, 123 [2d Dept 2017]; ***Flagstar Bank, FSB v. Mendoza***, 139 AD3d 898, 900, 32 NYS3d 278, 280 [2d Dept 2016]; ***Zarabi v. Movahedian***, 136 AD3d 895, 895, 26 NYS3d 153 [2d Dept 2016]). In response, the answering defendant failed to raise a triable issue of fact.

Regarding so much of the plaintiff's motion for an order striking the fifteenth affirmative defense of the statute of limitations, the plaintiff asserts that at the earliest, the subject mortgage was accelerated when a prior action based on the same default on the note and mortgage was commenced against the defendant. The first action entitled *Deutsche Bank Trust Company Americas Formerly Known as Banker's Trust Company, as Trustee and Custodian For IXIS 2006-HE1 against Joseph Ruggiero, Jr. et al.*, Index 24016-2007 ["the prior action"], was commenced on August 3, 2007. The instant action, commenced by Deutsche Bank National Trust Company, as Trustee for IXIS Real Estate Capital Trust 2006-HE1 Mortgage Pass Through Certificates, Series 2006-HE1 ["Deutsche Bank"], was commenced on January 27, 2014.

The plaintiff asserts that the statute of limitations was tolled during the pendency of four voluntary petitions for bankruptcy filed by the defendant between August 7, 2007, and July 29, 2009, amounting to a cumulative toll of the statute of limitations of 194 days during the pendency of the prior action (*see* 11 U.S.C. §362[a]; *see also* ***PSP-NC, LLC v. Raudkivi***, 138 AD3d 709, 711, 29 NYS3d 51, 53 [2d Dept 2016]). Since the instant action was commenced within six years and 177 days of the commencement of the prior action, presumably the date of acceleration of the loan, the plaintiff contends

that this action is timely and that the fifteenth affirmative defense in the answer should be stricken and summary judgment granted in plaintiff's favor.

In opposition to the plaintiff's motion and in support of the defendant's cross-motion for summary judgment, the defendant does not contest that the plaintiff has established prima facie entitlement to a judgment of foreclosure as well as strict compliance with RPAPL §1304. The defendant's sole argument is that the action is barred by the applicable period of limitations for mortgage foreclosure actions. According to defense counsel, although each of the four bankruptcy petitions was dismissed by a notice of automatic dismissal of a specific date, pursuant to §521 (i) (l) of the Bankruptcy Code, each bankruptcy case was dismissed effective on the 46th day after the date of the filing of each of the four petitions. Therefore, according to the defendant, the period of the toll was 180 days rather than 194 days as calculated by the plaintiff. Notably, under either calculation, assuming the acceleration of the mortgage occurred when the prior action was commenced on August 3, 2007, the instant action is timely in that it was commenced within six years and 177 days measured from the commencement of the prior action.

Alternatively, the defendant argues that the mortgage was accelerated for statute of limitations purposes when Saxon Mortgage Services, Inc., a prior loan servicer servicing the defendant's loan, sent the defendant a notice of default by certified mail dated March 21, 2007 ["the notice letter"], well beyond the period of limitations, even assuming a toll of 194 days. In relevant part, the notice letter states as follows:

> "This letter is further notice to you that Saxon intends to enforce the provisions of the Note and Security instrument. You must pay the amount in Default within 30 days of the date of this letter. If this date is a Saturday, Sunday or legal holiday you will have until the next business day to cure the default. If you do not pay the full amount of the default by the Cure Date, Saxon will accelerate the entire sum of principal and accrued but unpaid interest on your loan and deem it immediately due and payable. You will receive no other advanced notice of the acceleration. Saxon will also seek any and all remedies that it may have under the Note and Security Instrument, such as the foreclosure sale of the property described in the Property Address."

The defendant asserts that the notice letter accelerated the mortgage; since the letter was sent more than six years and 180 days before the instant action was commenced, the action is barred. The defendant contends that the allegation in the complaint in the prior action (at ¶ 9), that "pursuant to the terms of said instrument [s] notice of default has been duly given to the defendants if required, and the period to cure, if any, has elapsed and by reason thereof, Plaintiff *has elected* and hereby elects to declare immediately due and payable the entire unpaid balance of principal" confirms that the notice letter, rather than the commencement of the prior action, accelerated the mortgage for statute of limitations purposes [*emphasis supplied*].

A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213[4]; ***NMNT Realty Corp. v. Knoxville 2012 Trust***, 151 AD3d 1068, 1069, 58 NYS3d 118 [2d Dept 2017]). "[E]ven 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" (***Nationstar Mtge., LLC v.***

Weisblum, 143 AD3d 866, 867, 39 NYS3d 491 [2d Dept 2016] [internal quotation marks omitted]; *see* ***Wells Fargo Bank, N.A. v. Burke***, 94 AD3d 980, 982, 943 NYS2d 540 [2d Dept 2012]; ***EMC Mtge. Corp. v. Patella***, 279 AD2d 604, 605, 720 NYS2d 161 [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, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" (***U.S. Bank Nat'l Ass'n v. Gordon***, 158 AD3d 832, 72 NYS3d 156 [2d Dept 2018], *citing* ***Wells Fargo Bank, N.A. v. Burke***, 94 AD3d at 982–983, 943 NYS2d 540).

Acceleration may occur, inter alia, by the commencement of a foreclosure action (see ***Deutsche Bank Nat'l Tr. Co. v. Adrian***, 157 AD3d 934, 935, 69 NYS3d 706, 707 [2d Dept 2018]; ***Fannie Mae v. 133 Mgt., LLC***, 126 AD3d 670, 670, 2 NYS3d 361 [2d Dept 2015]; ***Clayton Natl. v. Guldi***, 307 AD2d 982, 982, 763 NYS2d 493 [2d Dept 2003]; ***U.S. Bank Nat'l Ass'n v. Gordon***, *supra*). Calculating from the commencement date of the prior action, the plaintiff demonstrated, prima facie, that this action was timely, taking into account the tolls during the four automatic bankruptcy stays, and that the defendant's fifteenth affirmative defense of the statute of limitations is no bar to this action.

In opposition to the plaintiff's motion and in support of his cross motion, the defendant asserts that the March 2007 notice letter ("the notice letter"), constituted a demand to accelerate the debt making the instant action untimely. For that to be the case, the notice letter must have expressed that intent "in a clear and unequivocal manner" (***Wells Fargo Bank, N.A. v. Burke***, 94 AD3d at 983, 943 NYS2d 540, 542; ***Bank of Am. v. Luma***, 157 AD3d 1106, 1107, 69 NYS3d 170, 171 [3d Dept 2018]; ***Goldman Sachs Mtge. Co. v. Mares***, 135 AD3d 1121, 1122, 23 NYS3d 444 [3d Dept 2016]). Here, the notice letter sent to the defendant before the commencement of the prior 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 (***DLJ Mortg. Capital, Inc. v. Hirsh,***—AD3d—, 2018 WL 2225246 [2d Dept, *decided* May 16, 2018]; ***21st Mortg. Corp. v. Adames***, 153 AD3d 474, 475, 60 NYS3d 198, 200 [2d Dept 2017], *citing* ***Goldman Sachs Mtge. Co. v. Mares***, 135 AD3d at 1122–1123). Thus, the Court rejects the defendant's assertion that the mortgage was accelerated any earlier than the commencement of the prior action on August 3, 2007.

Although, as has been stated, acceleration may occur by the commencement of a foreclosure action (*see* ***Deutsche Bank Nat'l Tr. Co. v. Adrian***, 157 AD3d 934, 935, 69 NYS3d 706, 707 [2d Dept 2018]), service of a complaint may be ineffective to constitute a valid exercise of the option to accelerate the debt, if the plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time (***U.S. Bank Nat'l Ass'n v. Gordon***, 158 AD3d 832, 72 NYS3d 156 [2d Dept 2018]; ***Wells Fargo Bank, N.A. v. Burke***, 94 AD3d at 983, 943 NYS2d 540, 543).

On his cross motion, the defendant did not demonstrate as a matter of law that the prior plaintiff, Deutsche Bank Trust Company Americas Formerly Known as Banker's Trust Company, as Trustee and Custodian For IXIS 2006-HE1 ["Deutsche Americas"], had standing to commence the prior action and ergo, the authority to accelerate the loan. The defendant submitted as evidence of the prior plaintiff's standing to commence the prior action an assignment of mortgage from Mortgage Electronic Registration Systems Inc. ["MERS"], acting solely as nominee for the original lender, that purported to assign the mortgage "together with the bond or note or obligation described in [the subject] mortgage" dated November 23, 2007. The written assignment post-dated the commencement of the prior action but purported to have been effective as of March 1, 2005, prior to the commencement of the prior action.

For several reasons, the assignment of mortgage from the original lender to Deutsche Americas was ineffective to establish Deutsche Americas's standing to commence the prior action and hence, its authority to accelerate the mortgage when it commenced the prior action on August 3, 2007.

First, on its cross motion, the defendant failed to demonstrate that MERS as nominee of the original lender had the authority to assign the note and mortgage or that prior to the written assignment MERS took delivery of the note. Although the mortgage instrument identified MERS as the nominee, and purported to grant MERS the authority to foreclose on the subject property, the mere presence of such language in the mortgage instrument itself cannot overcome the requirement that the foreclosing party be the holder of the underlying note at the time the action is commenced" (***Homecomings Fin., LLC v. Guldi***, 108 AD3d 506, 508, 969 NYS2d 470, 473 [2d Dept 2013], *citing* ***Bank of N.Y. v. Silverberg***, 86 AD3d at 282–283, 926 NYS2d 532 [2d Dept 2011]; *compare* ***Citibank, N.A. v. Herman***, 125 AD3d 587, 589, 3 NYS3d 379, 381 [2d Dept 2015]).

Even assuming MERS had the authority to assign the note and mortgage to Deutsche Americas, the assignment did not become effective to confer standing until after both the notice letter was sent (March 2007), and the prior action was commenced (August 2007). Although the assignment of mortgage to Deutsche Americas purports to be retroactive to March 1, 2005, it is well established that a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment (***Wells Fargo Bank, N.A. v. Marchione***, 69 AD3d 204, 210, 887 NYS2d 615 [2d Dept 2009]; ***Countrywide Home Loans, Inc. v. Gress***, 68 AD3d 709, 710, 888 NYS2d 914, 915 [2d Dept 2009]; *see also* ***Wells Fargo Bank, N.A. v. Jones***, 139 AD3d 520, 523, 32 NYS3d 95, 99 [1st Dept 2016]; ***LaSalle Bank Natl. Assn.***, 59 AD3d 912, 875 NYS2d 595 [3d Dept 2009][same]).

Finally, even assuming that Deutsche Americas had standing to commence the prior action, the instant action was still commenced within the applicable period of limitation for foreclosure actions taking into account the periods due to the automatic bankruptcy stays (*see* 11 U.S.C. § 362[a]).

For all the reasons set forth above, the Court grants the relief sought in the plaintiff's notice of motion in its entirety and denies the defendant's cross motion for summary judgment based upon the expiration of the statute of limitations. The plaintiff is granted summary judgment, an order striking the defendant's answer and all the remaining affirmative defenses, and appointing a referee to compute.

The proposed Order submitted by plaintiff, as modified by the Court, has been signed simultaneously with this Order.

Dated: May 29, 2018

C. Randall Hinrichs

HON. C. RANDALL HINRICHS, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION