

<b>White v Citibank, N.A.</b>
2018 NY Slip Op 31813(U)
July 24, 2018
Supreme Court, Suffolk County
Docket Number: 02169/2015
Judge: C. Randall Hinrichs
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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: 8/17/2017; 004: 10-5-2017  
 Adjourned Date: 11-30-2017  
 Motion Sequence: 003: MD; 004: MD

-----X  
 MICHAEL WHITE,

Plaintiff,

-against-

CITIBANK, N.A., AS INDENTURE TRUSTEE  
 FOR CERTIFICATE HOLDERS OF BEAR  
 STEARNS SECOND LIEN TRUST 2007-1,  
 MORTGAGE BACKED NOTES, SERIES  
 2007-1 AND THE WHEATLEY HARBOR LLC,

Defendants.  
 -----X

THE SARAGA LAW FIRM  
 Attorneys for Plaintiff  
 23 Green Street  
 Suite 105  
 Huntington, NY 11743

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 Attorneys for Defendant Wheatley Harbor  
 250 North Sea Road  
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The Court, in its deliberations has considered the following: (1) Notice of Motion by defendant The Wheatley Harbor LLC, dated July 19, 2017, and supporting papers (Motion Sequence 003); (2) Notice of Cross-Motion by the plaintiff, dated September 28, 2017, and supporting papers (Motion Sequence 004); (3) Affidavit in Support of Defendant's Motion for Summary Judgment, dated November 22, 2017; (4) Reply Affirmation in Further Support of Plaintiff's Cross-Motion for Summary Judgment, dated November 27, 2017. It is

**ORDERED**, that defendant The Wheatley Harbor, LLC's motion for summary judgment in its favor on its counterclaim against the plaintiff to recover on the promissory note (#003) is denied; and it is further

**ORDERED**, that plaintiff's cross-motion for summary judgment in its favor dismissing the defendant's counterclaim (#004), is denied; and it is further

**ORDERED**, that the parties are directed to appear at a conference before the Court on **August 22, 2018, at 9:30 a.m.** at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York, to discuss readiness for trial.

The instant action was commenced by plaintiff Michael White on February 10, 2015 pursuant to RPAPL 1501(4) and CPLR 3001, seeking a declaratory judgment to discharge encumbrances of title to property known as 244 Little Noyac Path, Water Mill, New York ("Noyac property"). The Complaint alleges that on or about August 12, 2004, the plaintiff executed a note and first mortgage on the Noyac property in favor of Webster Bank, N.A.. The note and mortgage were subsequently assigned to Deutsche Bank National Trust Co., as trustee for WaMu Mortgage Pass-Through Certificates Series 2006-AR3



("Deutsche Bank"). On or about November 13, 2006, the plaintiff executed another note and mortgage upon the Noyac property in the principal amount of \$500,000.00. According to the complaint, Citibank is the current owner and holder of this second mortgage. Prior to July 2, 2007, the plaintiff executed a third note and mortgage upon the Noyac property in the original consolidated principal amount of \$1,200,000.00. Defendant The Wheatley Harbor, LLC ("Wheatley") is the owner and holder of this third note and mortgage. At the time this action was commenced, a foreclosure action brought by the first mortgagee, Deutsche Bank, against defendants Michael White, Mortgage Electronic Registration Systems, Inc., as nominee for GreenPoint Mortgage Funding, Inc., The Wheatley Harbor, LLC, American Express Travel Related Services, Inc., and Noreen Conway, was pending under index number 20329-09.

In the instant action, plaintiff Michael White claims that he ceased making payments on the second mortgage (held by Citibank) on November 1, 2008. He seeks to have the loan and indebtedness evidenced and secured by the second mortgage declared a nullity, and to have the second mortgage discharged of record. With respect to the third mortgage (held by Wheatley), the plaintiff states that the loan and indebtedness evidenced and secured by the third mortgage matured, and became payable in full by its express terms, on April 10, 2008. The plaintiff alleges that because more than six years have elapsed since the maturity date, during which Wheatley failed to commence any legal proceedings against the plaintiff, Wheatley no longer has the legal right to seek collection of the indebtedness or foreclose upon the lien of the third mortgage. The plaintiff seeks to have the loan and indebtedness evidenced and secured by the third mortgage declared a nullity, and to have the third mortgage discharged of record pursuant to RPAPL 1501(4).

On or about March 9, 2015, defendant Wheatley Harbor answered the complaint and asserted a counterclaim for foreclosure of the third mortgage on the subject property. Wheatley Harbor's answer indicates that it was the owner and holder of three promissory notes executed by Hampton Coastal Holdings, LLC. The first note dated January 30, 2007 was in the principal sum of \$425,000.00; the second note dated March 27, 2007 was in the principal sum of \$135,000.00; and the third note dated April 10, 2010 was in the principal sum of \$650,000.00. The notes were secured by three subordinate mortgages on the Noyac property executed by the plaintiff in favor of Wheatley. The plaintiff also executed instruments entitled "Continuing Absolute Unconditional Guaranty of Payment" of all indebtedness of Hampton Coastal Holdings, LLC, in favor of the defendant, on the same dates that the notes were executed. On April 10, 2007, a Consolidated Mortgage Note in the principal sum of \$1,200,000.00 was executed by Hampton Coastal Holdings, LLC in favor of Wheatley Harbor. This Consolidated Note consolidated the obligations evidenced in the prior three notes. A Consolidation and Extension Agreement dated April 10, 2007 and executed by the plaintiff in favor of Wheatley Harbor, consolidated the three subordinate mortgages on the Noyac property into a single mortgage securing the principal sum of \$1,200,000.00. On the same date, the plaintiff executed a "Continuing Absolute Unconditional Guaranty of Payment" of all indebtedness of Hampton Coastal Holdings, LLC in favor of Wheatley.

The Consolidated Note provides, in pertinent part, that Hampton Coastal Holdings LLC would pay interest on the principal sum at the rate of 4% per annum in excess of the highest Prime Rate announced by Chase Bank from time to time on the 30<sup>th</sup> day of April, 2007, and on the last day of each succeeding month until April 10, 2008 (the "Maturity Date"). The note states: "Notwithstanding the foregoing, if the unpaid principal balance is not paid when due (whether at stated maturity, by acceleration or otherwise) it shall bear interest until fully paid from such due date at the rate of twenty-



four (24%) percent per annum.” The note further states: “This Note is secured by three mortgages affecting real property located in the State of New York, which mortgages were consolidated into a single mortgage, and by a mortgage affecting real property located in the State of North Carolina.” The Consolidated Note is signed by Michael White as “Member” on behalf of Hampton Coastal Holdings, LLC. The Consolidation and Extension Agreement provides that payments are to be made in accordance with the provisions of the Consolidated Note. The agreement states that the unpaid principal together with accrued and unpaid interest shall be due and payable on April 10, 2008, the maturity date. Paragraph 10 of the agreement is entitled “Priority of Liquidation of Collateral” and states:

“Lender has agreed to liquidate real property collateral given as security for the obligation secured by the Consolidated Note prior to liquidating the real property described in this instrument. This provision shall not be construed to prohibit commencement of a foreclosure action relating to the real property described herein prior to sale of the North Carolina real property collateral. However, no such sale of the real property described herein may be made until the North Carolina real property has been sold and a deficiency in the sum of remitted to the lender exists.”

The Consolidated Mortgage was signed by Michael White.

Wheatley Harbor alleges that by oral agreement between Stanley Weisz, the sole equity member of Wheatley Harbor, and Michael White, individually and as a member of Hampton Coastal Holdings, LLC, the maturity date was extended on a month to month basis provided that the monthly installments of interest due under the Consolidated Note were made on a timely basis. Wheatley alleges that on January 29, 2008, the principal sum evidenced by the Consolidated Mortgage (\$1,200,000.00) was reduced by a payment to Wheatley of \$130,000.00 to the sum of \$1,070,000.00. According to Wheatley, all monthly interest payments due on the Consolidated Note, as extended, were paid through January 31, 2009. On May 28, 2009, the plaintiff or Hampton Coastal Holdings, LLC made a payment to Wheatley in the sum of \$6,000.00, which was applied to interest on the principal sum on the Consolidated Note. On July 16, 2009, plaintiff or Hampton Coastal Holdings LLC made a payment to Wheatley in the sum of \$6,000.00, which was also applied to interest on the principal sum. On or about July 1, 2010, plaintiff or Hampton Coastal Holdings LLC made a payment to Wheatley in the sum of \$85,000.00, which was applied to interest at the default rate on the principal sum. On or about March 13, 2013, Hampton Coastal Holdings LLC made a payment to Wheatley, by credit upon the liquidation of the North Carolina collateral, in the sum of \$244,448.08, which was applied to interest at the default rate on the principal sum.

According to Wheatley Harbor’s verified answer, due to the plaintiff’s alleged failure to make regular monthly installments of interest on or after July 16, 2009, and its failure to voluntarily make any payments in reduction of principal on or after July 1, 2010, Wheatley elected to accelerate payment of the entire principal balance, together with all other applicable charges, on January 10, 2011. Wheatley did not seek affirmative relief to recover the debt owed to it by Hampton Coastal Holdings LLC and guaranteed by the plaintiff because the commitment letter issued by Wheatley to the plaintiff in connection with the loans required exhaustion of Wheatley’s remedies against the collateral furnished by Hampton Coastal Holdings LLC and situated in North Carolina, and also because the holder of the first mortgage, Deutsche Bank, had commenced a foreclosure action. The computation provided by Wheatley shows that the last payment made was February 6, 2009. No payments prior to this date are reflected on the computation. The computation reflects the interest added after February 6, 2009, and credits the



payments made on May 28, 2009 (\$6,000.00), July 16, 2009 (\$6,000.00) and July 1, 2010 (\$85,000.00). The computation also reduced the amount owed by \$244,448.08, the sum allegedly received upon liquidation of the North Carolina property in 2013. According to the defendant's computation, the total amount due as of July 14, 2017 is \$2,883,136.92.

On January 16, 2015, the Court granted a Judgment of Foreclosure in the foreclosure action commenced by Deutsche Bank, the holder of the first mortgage, under index number 20329-09.<sup>1</sup> Subsequently, Wheatley Harbor moved to amend its Answer to eliminate the cause of action for foreclosure and to replace it with a cause of action seeking a money judgment due to plaintiff's alleged default in payment of the Consolidated Note. By order dated February 27, 2017, Wheatley was granted permission to file an Amended Answer. The Amended Answer states that the plaintiff failed to make regular monthly installments of interest on or after July 16, 2009, and failed to make any payments in the reduction of principal on or after March 13, 2013. It further represents that no other action or proceeding has been brought for the recovery of said sum evidenced and secured by the Consolidated Note, except for a foreclosure in the state of North Carolina. The Amended Answer was Verified by Stanley Weisz, the sole member of The Wheatley Harbor, LLC.

In reply to Wheatley's counterclaim to recover on the promissory note, the plaintiff asserted as an affirmative defense that the counterclaim is barred by the statute of limitations because the agreements matured by their own terms on April 10, 2008 and were not extended or modified in writing by the parties. As the defendant failed to commence an action to recover the debt by April 10, 2014, plaintiff asserted that the applicable statute of limitations had run.

Defendant Wheatley Harbor now moves for summary judgment in its favor on its counterclaim to recover on the note. The defendant argues that the plaintiff's partial payments, including the voluntary payment by the plaintiff or Hampton Coastal Holdings LLC in the sum of \$85,000.00 on or about July 1, 2010, caused the applicable six-year statute of limitations period to run anew, and that the defendant's initial answer, interposed on March 9, 2015, was well within the extended period of the statute of limitations. The defendant seeks judgment against the plaintiff on its counterclaim in the sum of \$2,883,136.92, together with interest on the principal sum of \$1,070,000.00, from and after July 14, 2017. In support of its motion, the defendant provides a copy of the Consolidation and Extension Agreement, the Continuing Absolute Unconditional Guaranty of Payment, as well as its computation of the amount allegedly due. The defendant also provides an Affidavit of Stanley Weisz, the sole equity member of The Wheatley Harbor, LLC, affirming that the factual statements set forth in the motion are accurate.

The plaintiff then cross-moved for summary judgment in his favor dismissing the defendant's counterclaim. In his motion, the plaintiff states that in April of 2007, he obtained a loan from Wheatley Harbor in the total amount of \$1,200,000.00. To secure this loan, the defendant agreed to liquidate real property owned by the plaintiff in North Carolina, and required that plaintiff give a mortgage on the Noyac property. According to the plaintiff, his understanding of this agreement was that at the time he executed the loan documents, he was essentially transferring ownership of the North Carolina property to the defendant. The loan secured by the mortgage on the subject property expired by its own terms on

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<sup>1</sup> The foreclosure action named The Wheatley Harbor, LLC as a defendant, and Wheatley Harbor, through its counsel, served a Notice of Appearance and Wavier in Foreclosure.



April 10, 2008. The plaintiff asserts that the statute of limitations began to run at that time, expiring six years later on April 11, 2014. The plaintiff challenges the defendant's motion, claiming that Wheatley failed to submit evidence in admissible form or the testimony of an individual with personal knowledge in support of its motion. The plaintiff also asserts that the copies of the Consolidation Agreement and Guaranty annexed to the defendant's moving papers were incomplete, and points out that the defendant failed to attach a copy of the Consolidated Note to its moving papers. The plaintiff affirms that, to the best of his recollection, the defendant did not send him periodic statements regarding the outstanding balance on this loan at any time. While the plaintiff asserts that he has no records related to the two payments of \$6,000.00 in 2009, which the defendant asserts re-started the Statute of Limitations, he believes they may have related to the North Carolina property. The plaintiff further denies making the payment of \$85,000.00. He believes that payment was made by the third-party purchaser of the North Carolina property directly to the defendant. According to the plaintiff, the payments made after the maturity date were not made towards the mortgage on the Noyac property, nor were they intended to achieve any purpose other than discharging the North Carolina lien. It was the plaintiff's understanding that after the loan matured, the defendant was seeking the full amount due and owing, and was charging interest at a rate of 24% per year. He believed that any additional payments after the maturity date were accepted by the defendant for the purpose of discharging the North Carolina lien and that they did not affect the mortgage on the Noyac property. The plaintiff states that he did not receive any notices or documentation from the defendant regarding these payments, nor was he contacted by the defendant to discuss them. He knew that the lien was discharged from the North Carolina property, so it was his belief that they payments were applied for that purpose. Finally, the plaintiff denies any recollection of reaching an oral agreement with Mr. Weisz to extend the maturity date of the agreement.

In opposition to the plaintiff's cross-motion and in further support of its motion for summary judgment, the defendant submitted a more substantive affidavit of Stanley Weisz, which attaches a copy of the Consolidated Note as well as copies of checks allegedly tendered by or on behalf of the plaintiff to Wheatley in connection with the loan between April 2007 and February 2009. A review of the checks reveals that they contain varied language in the "Memo" lines, including: "Mortgage April 2007," "Payment," "Mortgage Interest," "Loan interest January 2008," "Hampton Coastal." Some of the checks are signed by the plaintiff on checks containing his name and address in the header, while others appear to have different signatures and are on checks with headers stating "Hampton Structural Builders, Ltd." (with the same P.O. box address as on plaintiff's checks), and "Georgica Pond Builders, LLC" (with a different P.O. box address). The defendant also attaches a check allegedly tendered on behalf of the plaintiff to Wheatley on or about July 14, 2009, after the maturity date, in the amount of \$6,000.00. This check contains the header "Georgica Pond Builders, LLC" and appears to be signed by an "NM Conway." The Memo states "Hampton Coastal." The defendant indicates that another check dated May 28, 2009, also in the sum of \$6,000.00, was misplaced but was paid by the bank on which it was drawn. The defendant also attaches a check dated June 29, 2010 in the amount of \$85,000.00 made payable to Wheatley Harbor. The header of the check states "Kipke & Rose P.A. Trust Account," and the signator is unclear. In what appears to be a memo underneath the check it states: "Buyer/Borrower: Trulove" "Seller: Hampton Coastal Holdings, LLC," "Property: 2164 Fay Circle/Supply NC 28462." The defendant claims that this payment was voluntarily made on behalf of Hampton Coastal as consideration for the release of one of the subdivided parcels situated in North Carolina and owned by Hampton, from the blanket mortgage held by Wheatley. The defendant argues that these payments, made subsequent to April 10, 2008, conclusively establish the intent of plaintiff and his solely owned entity, Hampton Coastal, to pay the balance of the sums secured by the mortgages encumbering both the North Carolina property



owned by Hampton Coastal and the New York property owned by the plaintiff. Accordingly, defendant argues that these payments extended the statute of limitations to recover on the note to July 14, 2015 at the earliest. In reply, the plaintiff objects to the defendant proffering evidence for the first time in reply, and argues that, in any event, the defendant failed to meet its burden of establishing the context of the payments made by the plaintiff.

Preliminarily, the Court notes that the instant action was brought while the foreclosure action by the first mortgagee, Deutsche Bank, was still pending. That action has since been resolved with a judgment of foreclosure and sale, and the Court's records reflect that the subject property has been sold, with no surplus. The lien on the property held by Wheatley, as the third mortgagee, was cut off by the foreclosure of the senior mortgage, to which Wheatley was made a party, and there was no surplus money available to satisfy the indebtedness. Thus, Wheatley's only alternative is to seek recovery at law of the unpaid balance due on the mortgage debt, as it is doing through its counterclaim in this action (*see, Kirschner v Cohn*, 270 AD 126, 58 NYS2d 561 [2d Dept 1945]; *Wachtel v Tantleff*, 255 AD 867, 7 NYS2d 618 [2d Dept 1938]).

The plaintiff's complaint seeks a judgment declaring the loan and indebtedness evidenced and secured by the second and third mortgages to be nullities, and an order discharging those mortgages, pursuant to RPAPL 1501(4). "RPAPL 1501(4) authorizes a person having an estate or interest in real property subject to a mortgage to maintain an action against another to secure the cancellation and discharge of record of such encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided, however, that the mortgagee or its successor is not in possession of the affected real property at the time of the commencement of the action" (*see Kashipour v Wilmington Savings Fund Society, FSB*, 144 AD3d 985 [2d Dept 2016]). As the plaintiff admits in his papers, however, the plaintiff's interest in the subject property, and therefore his causes of action under RPAPL 1501(4), were extinguished by the foreclosure sale of the subject property (*see, Guccione v Estate of Guccione*, 84 AD3d 867, 923 NYS2d 591 [2d Dept 2011] [plaintiff failed to establish, prima facie, that she had an interest in the underlying real property within the meaning of RPAPL 1501(4)]). Accordingly, the plaintiff's causes of action under RPAPL 1501(4) are hereby dismissed.

The Court next turns to the defendant's motion for summary judgment on its counterclaim to recover on the promissory note. In support of its summary judgment motion, a movant must provide evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). The Court finds the defendant's evidentiary showing insufficient to meet its burden. In particular, defendant Wheatley Harbor has failed to establish, prima facie, that its counterclaim is not barred by the statute of limitations. The six-year statute of limitations on a mortgagee's action to recover on a mortgage note accrues on the date the note matures, in this case on April 10, 2008 (*see CPLR 213[4]; Sarva v Chakravorty*, 34 AD3d 438, 826 NYS2d 74 [2d Dept 2006]). In order to demonstrate that the statute of limitations has been renewed by a partial payment, "it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Education Resources Inst., Inc. v Piazza*, 17 AD3d 514, 794 NYS2d 65 [2d Dept 2005], quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976], 387 NYS2d 409 [1976]; *Stern v Stern Metals, Inc.*, 22 AD3d 567, 802 NYS2d 243 [2d Dept 2005]). The



circumstances of a partial payment may be proven by extrinsic evidence, including the books and records of the debtor, copies of cancelled checks and accompanying memoranda, or admissions by the debtor (*Education Resources Inst., Inc. v Piazza*, 17 AD3d 514, 794 NYS2d 65 [2d Dept 2005]; *Bernstein v Kaplan*, 67 AD3d 897, 413 NYS2d 186 [2d Dept 1979]).

Here, in support of its motion, the defendant failed to provide any monthly statements containing the ongoing loan balance, payment slips or copies of checks to support its claims that payments towards the loan were made by the plaintiff after the maturity date, nor did the defendant provide sufficient evidence to establish the circumstances surrounding such alleged payments. The computation provided by the defendant lacks any details regarding the payments and is incomplete in that it does not include any payment history before February 6, 2009. The defendant's allegation that an oral agreement was made to extend the maturity date is conclusory, and in any event, may be barred by the terms of the agreement and the parol evidence rule (*see*, General Obligations Law §15-301[1]; *Central Fed. Sav. v Berk*, 215 AD2d 520, 626 NYS2d 556 [2d Dept 1995]). It also appears that the defendant inadvertently failed to attach a copy of the Consolidated Note to its moving papers. While the defendant provides a copy of the Consolidated Note as well as copies of checks on reply, it is well settled that "a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court" (*Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 68 NYS3d 115 [2d Dept 2017]). Even if the Court were to consider the copies of checks submitted in reply, however, they merely create more questions. The checks appear to be written and signed by different entities and individuals and the defendant fails to provide a clear explanation of their relationship to each other, if any. Moreover, there are no detailed check memos or payments slips from which one can clearly discern to what end each payment was made (*see e.g., Roth v Michelson*, 55 NY2d 278, 449 NYS2d 159 [1982]; *U.S. Bank Nat. Ass'n v Martin*, 144 AD3d 891, 41 NYS3d 550 [2d Dept 2016]). The defendant failed to submit records or ledgers of payment history kept contemporaneously throughout the term of the loan to establish how the payments were received and credited. This lack of clarity is confounded by the confusion regarding the nature of the parties' deal in relation to the unspecified North Carolina property. The Consolidated Note contains language indicating that it is secured by mortgages on the Noyac property as well as a mortgage on the North Carolina property, but no copy of the North Carolina mortgage is provided, and the Consolidation and Extension Agreement consolidates three mortgages on the Noyac property to reach its \$1,200,000.00 total. The Consolidation and Extension Agreement does indicate, however, that Wheatley will liquidate the North Carolina property collateral prior to liquidating the real property that is the subject of this action. Accordingly, without sufficient evidence regarding the circumstances surrounding the post-maturity payments, including by whom they were made and for what purpose, the Court is unable to determine whether those payments constitute an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder, thereby extending the statute of limitations. The defendant's motion is denied.

The plaintiff's motion seeking dismissal of the defendant's counterclaim is also denied. While the plaintiff's papers give rise to more questions surrounding the payments, they fail to establish, prima facie, that the statute of limitations has run on the defendant's claim to recover on the promissory note. The plaintiff claims that he believed that in executing this deal, he essentially transferred ownership of the North Carolina property to the defendant, yet he fails to provide a deed evidencing any such transfer. While the plaintiff believes that the payments made after the maturity date were in relation to the North Carolina property and not the loan, he provides absolutely no evidence or records in support of this



contention. A movant seeking summary judgment has the burden of establishing its prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its case, not merely pointing to gaps in his opponent's proof (*see Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 585 NYS2d 894 [1992]; *Jarzabek v Tucci*, 155 AD2d 908, 548 NYS2d 956 [1989]). Consequently, the Court finds the plaintiff's evidence inadequate to negate the possibility that the payments made after the maturity date were in fact voluntary payments made by the plaintiff on the Consolidated Note that extended the statute of limitations. Accordingly, the plaintiff's motion is denied.

In conclusion, the plaintiff's causes of action brought under RPAPL 1501(4) to discharge the second and third mortgages on the subject property are dismissed, as the plaintiff no longer has an interest in the subject property. To the extent that the plaintiff may also seek via his complaint a declaratory judgment that defendants Citibank and Wheatley Harbor "no longer [have] the legal right to seek collection of the indebtedness" on the underlying notes, those limited causes of action remain. Due to issues of proof and the existence of numerous questions of fact, defendant Wheatley's motion for summary judgment in its favor on its counterclaim to recover on the note is denied, as is the plaintiff's cross-motion seeking summary judgment in its favor dismissing the defendant's counterclaim. The parties are directed to appear at a conference before the Court on **August 22, 2018, at 9:30 a.m.** at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York, to discuss readiness for trial on these remaining issues.

DATED: July 24, 2018

  
 C. RANDALL HINRICHS  
 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION