NEW YORK SUPREME COURT - QUEENS COUNTY

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

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE HOLDERS, OF THE J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-WMC4 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-WMC4,

Plaintiff,

- against -

SEVA KOWLESSAR, KAMAR ANDERSON, UTICA BUILDERS LLC, PEOPLE OF THE STATE OF NEW YORK, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP., U.S. BANK NATIONAL ASSOCIATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, PS FUNDING, INC., CW FUNDING, LLC, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE (Those unknown tenants, occupants, persons or corporations or their heirs, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises.)

Defendants.

Index No. 713057/17

Motion Date July 17, 2018

Motion Cal. No. 21

Motion Seq. No. 1

The following papers numbered EF34 to EF104 read on this motion by defendants, PS Funding Inc. ("PS Funding") and Utica Builders LLC ("Utica"), for summary judgment dismissing the action on the ground that it is time-barred under the applicable six-year statute of limitations. Alternatively, PS Funding seeks to have the action dismissed as against it as it no longer has an interest in the property and thus is not a necessary party to the action.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF34 - EF58
Affirmation in Opposition - Exhibits.....	EF61 - EF101
Reply Affirmation.....	EF102 - EF104

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

Plaintiff commenced this action to foreclose a $442,000.00 mortgage encumbering the property known as 127-23 Hawtree Creek Road, South Ozone Park, New York. PS Funding and Utica move for summary judgment on the ground that this foreclosure action is time-barred. Alternatively, PS Funding seeks to have the action against it dismissed as it no longer has an interest in the property, and thus is not a necessary party to the action. Plaintiff opposes the motion.

Facts

On September 22, 2006, Shereida Jakie ("Jakie"), Keesoldath Kowlessar a/k/a Krishna S. Kowlessar ("Kowlessar"), and Seva Kowlessar ("Seva") executed a $442,400.00 mortgage encumbering the property in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for WMC Mortgage Corp. ("WMC"). By assignment of mortgage dated December 5, 2007, the subject mortgage was assigned to US Bank, N.A.

On October 10, 2007, Jakie, Kowlessar and Seva conveyed the property to Frances Twomey, LLC ("Twomey"), for $360,000. On that same date, Twomey transferred the property to John Harrison, LLC ("Harrison"). On November 10, 2008, Harrison sold the property to Kamar Anderson ("Anderson") for $655,000. On November 10, 2008, Anderson executed a $589,500 mortgage encumbering the Property in favor of MERS as nominee for US Bank, N.A.

On March 8, 2010, US Bank commenced a foreclosure action in this Court in connection with the Subject Mortgage, captioned *US Bank, NA v Shereida Jakie, et al.*, under Index No. 5793/2010 (the "Prior Foreclosure Action"). On October 26, 2016, US Bank moved for an order discontinuing the Prior Foreclosure Action. The motion was granted, without opposition, and in an order dated December 7, 2016, the Court discontinued the Prior Foreclosure Action.

Utica acquired the Property via a referee's deed from Edward A. Schachter dated May 22, 2017. On May 22, 2017, Utica executed a $288,000 mortgage encumbering the Property in favor of CW Funding, LLC ("CW"), which was recorded in the City Register's Office on June 13, 2017, and was subsequently assigned to PS Funding by Assignment of Mortgage dated June 2, 2017 (the "PS Funding Mortgage"). Utica sold the Property to Hubahib for $525,000 by deed dated November 21, 2017. Hubahib financed her purchase of the Property, in part, with a

mortgage loan from Federal Savings Bank ("FSB"). On November 21, 2017, Hubahib executed a $420,000 mortgage in favor of MERS as nominee for FSB. On November 27, 2017, PS Funding issued a Satisfaction of Mortgage, consenting to the discharge of the PS Funding Mortgage as a lien upon the Property.

On September 20, 2017, plaintiff commenced this action to foreclose upon the Subject Mortgage. By the instant motion, defendants seek summary judgment dismissing the complaint insofar as asserted against them, on the ground that the action is time-barred. In support of the motion, defendants submitted the complaint in the prior foreclosure action. Plaintiff opposes the motion arguing that there was no acceleration because there was no final judgment of foreclosure issued in the prior case.

Discussion

In the first instance, the branch of the motion by PS Funding which is to dismiss the complaint insofar as asserted against it, is granted. On November 27, 2017, PF Funding issued a Satisfaction of Mortgage consenting to the discharge of the PS Funding Mortgage as a lien upon the property. Where the debt underlying the mortgage has been satisfied, a foreclosure action must be dismissed (*see FGB Realty Advisors, Inc. v Parisi*, 265 AD2d 297 [2d Dept 1999] ("A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation").

The branch of the motion which is to dismiss as to Utica is also granted. An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). "The law is well-settled that, even 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" (*Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Acceleration occurs by the commencement of a foreclosure action (*Deutsche Bank Natl. Tr. Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069–1070 [2d Dept 2017]).

In the case at bar, defendants established, *prima facie*, that the within action is untimely. Defendants submitted proof that the mortgage debt was accelerated by the filing of a prior action to foreclose the Subject Mortgage under Index No. 5793/2010 on March 8, 2010 which resulted in an acceleration of the entire amount due and commenced the running of the statute of limitations (*see Deutsche Bank Natl. Tr. Co. v Adrian*, 157 AD3d at 935; *U.S. Bank Nat. Ass'n v Barnett*, 151 AD3d 791, 792-93 [2d Dept 2017]). Thus, the six-year statute of limitations for an action to foreclose the mortgage had expired by the time the instant action was commenced on September 20, 2017. Moreover, while a lender may revoke its election to accelerate the mortgage (*see Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]), the

record in this case is barren of any affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the prior action (*see Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d at 987; *Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *see also Lavin v Elmakiss*, 302 AD2d 638 [2003]).

In opposition, plaintiff argues that the 2010 Action did not constitute an acceleration because there was no final judgment of foreclosure issued in that case. The claim that only an entry of judgment triggers an acceleration is without merit. The filing of the summons and complaint constitutes a valid act of acceleration and the statute of limitations begins to run on the entire debt from that date (*see EMC Mtge. Corp. v Smith*, 18 AD3d 602 [2d Dept 2005]). Once again, a lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the foreclosure action.

Plaintiff also asserts that the filing of the 2010 Action was not an acceleration because the plaintiff in that case, U.S. Bank, N.A., lacked standing to commence the earlier action because the subject mortgage was actually held by U.S. Bank, N.A., as Trustee, on behalf of the holders of the J.P. Morgan Mortgage Acquisition Trust 2006-WMC4 Asset Backed Pass-Through Certificates, Series 2006-WMC4 (the "Trust"). Plaintiff cites a series of cases which do not stand for the proposition which plaintiff asserts, to wit, that a bank that is actually the Trustee of a Trust cannot commence a foreclosure of a mortgage that forms part of the Trust. Indeed, EPTL §11-1.1[b][8] specifically authorizes a fiduciary, with respect to any mortgage held by an estate or trust to, inter alia, "foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note. . ."

Plaintiff's contention that defendants' motion should be denied as premature pursuant to CPLR 3212 (f) is without merit. CPLR 3212 (f) provides, in relevant part, that a court may deny a motion for summary judgment "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212 [f]; *see Jones v American Commerce Ins. Co.*, 92 AD3d 844 [2d Dept 2012]; *James v Aircraft Serv. Intl. Group*, 84 AD3d 1026, 1027 [2d Dept 2011]). " 'This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion' " (*James v Aircraft Serv. Intl. Group*, 84 AD3d at 1027, *quoting Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [2d Dept 1988]). A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (see CPLR 3212 [f]; *Boorstein v 1261 48th St. Condominium*, 96 AD3d 703 [2d Dept 2012]; *Dietrich v Grandsire*, 83 AD3d 994 [2d Dept 2011]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib., Inc*., 34 AD3d 759, 760 [2d Dept 2006]).

Here, plaintiff did not satisfy its burden of demonstrating that defendants' motion for summary judgment is premature (see *Williams v Spencer-Hall*, 113 AD3d 759, 760 [2d Dept 2014]). In support of its conclusory and unspecific assertion that it needs more discovery, the sole item of disclosure that plaintiff points to is Utica and Hubahib's status as a bona fide purchaser. This issue however, relates to plaintiff's affirmative defense to a counterclaim. It is not pertinent to the instant motion. If the action is time-barred, plaintiff's defense to a counterclaim becomes moot. Furthermore, even assuming *arguendo*, that plaintiff is correct regarding their status as good faith purchasers, this does not alter the result that the action is time-barred. Plaintiff failed to demonstrate that additional discovery is needed to establish that their claims are not time-barred (see *Bass v Union Carbide Corp*., 22 AD3d 618, 620 [2d Dept 2005]; *Neryaev v Solon*, 6 AD3d 510 [2d Dept 2004]). In short, plaintiff did not satisfy its burden of demonstrating that defendants' motion for summary judgment is premature (*see Williams v Spencer-Hall*, 113 AD3d at 760).

The branch of the motion by Utica which is to cancel the notice of pendency is denied with leave to renew when the time to appeal from a final judgment has expired (*see* CPLR 6514).

Accordingly, the motion for summary judgment pursuant to CPLR 3212, is granted.

Dated: November 26, 2018

DARRELL L. GAVRIN, J.S.C.