Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BANC OF AMERICA FUNDING 2007-6 TRUST,

Plaintiff,

-against-

OSCAR PIKA, MORTGAGEIT, INC., SLOMINS INC., ET AL,

Defendants.

Index No.: 714233/17

Motion Date: 8/1/18

Motion Seq. Nos.: 2 & 3

The following papers numbered E74 through E115 were read on a motion by plaintiff for, among other things, leave to amend the complaint and notice of pendency, pursuant to CPLR 3025, and a motion by defendant, Oscar Pika, seeking, among other things, summary judgment, pursuant to CPLR 3212, discharging the mortgage and extinguishing the promissory note herein.

	Papers Numbered
Notices of Motion - Affirmations - Exhibits	E74-E100
Answering Affirmations - Exhibits	E101-E108
Reply Affirmations - Exhibits.....	E109-E115

Upon the foregoing papers it is ordered that these motions, by plaintiff, and by defendant, Pika, are determined as follows:

In this action to foreclose a mortgage on property known as 93-05 215th Place, Queens Village, New York, Pika executed a note in the amount of $390,000.00 on such property on February 23, 2007, along with a mortgage, as security for said note. Plaintiff alleges that the borrower defaulted in payment of the mortgage by failing to make the monthly payments due on January 1, 2012 and thereafter.

Plaintiff commenced a foreclosure proceeding against this property in May 2011, under Index No. 12553/2011, the notice of pendency of which was canceled by court order on May 24, 2011, and said action was discontinued by plaintiff on December 4, 2014. A second action to

foreclose was commenced on December 5, 2014, under Index No. 709303/2014. Said second action was dismissed by court order on March 29, 2017, for the failure of plaintiff to timely seek an order of reference. Plaintiff commenced its current action on October 13, 2017.

Plaintiff moves (Seq.# 2) for leave to amend the complaint to join additional parties as defendants; to amend the notice of pendency; and to extend its time to serve the amended pleadings. Defendant, Pika, moves (Seq. 3) for summary judgment dismissing the complaint, "discharging the mortgage ... (and) extinguishing the underlying promissory note ... on the ground that this action is time-barred." Each party opposes the other's motion.

The court will necessarily determine defendant, Pika's motion first, as the granting of said motion will render plaintiff's motion moot. Moving defendant contends that plaintiff's action is time-barred, alleging that plaintiff elected to accelerate the entire mortgage debt by its commencement of the foreclosure action on May 24, 2011, and did not commence the instant action until October 13, 2017, a date beyond the requisite statute of limitations. In opposition, plaintiff claims it properly revoked its election to accelerate the mortgage debt, thereby terminating the running of the statute of limitations.

Actions to foreclose a mortgage are governed by a six-year statute of limiktations (CPLR 213 [4]; *see Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017]). The filing of a summons and complaint constitutes a valid act of acceleration, and commences the running of the statute of limitations on the entire debt from that date (*see 21st Mtge. Corp. v Nweke*, 2018 NY Slip Op. 06509 [2d Dept 2018]). A lender may revoke its election to accelerate the mortgage by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the foreclosure action (*see Milone v U.S. Bank N.A.*, 164 AD3d 145 [2d Dept 2018]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]).

In the case at bar, plaintiff demonstrated that it sent what it characterizes as a "de-acceleration letter" to Pika on May 17, 2017, in compliance with the requirements for the revocation of its intention to accelerate herein. The parties do not contest the fact that, if said letter was properly served on Pika, and if the language in said letter was sufficient to comply with the "affirmative act of revocation" requirement, the letter was sent within the six-year statutory period, and was timely made.

Pika argues, without citing any supportive case law, that the subject letter is not one of "de-acceleration" because "it failed to notify the defendant that he had the right to resume making the monthly payments, and that the note holder would accept the payments." In *Milone v U.S. Bank N.A.*, 164 AD3d 145, the Second Department asserted "that de-acceleration notices must be clear and unambiguous to be valid and enforceable" (at 153), and not be "sent as a mere pretext to avoid the statute of limitations" (at 154). Contrary to Pika's contention, the language of the subject May 17, 2017 letter, which states, in relevant part, that the bank "hereby de-accelerates the Loan, withdraws its prior demand for immediate payment of all sums ... and reinstates the Loan as an installment loan," sufficiently complies with the dictate of *Milone* that there be a demand for

continuation of monthly payments. Further, the is no substantial prejudice to Pika, who defaulted on his mortgage payments in 2011, has apparently failed to make any such payments to date, and may well be continuing to rent the premises. Additionally, Pika has failed to credibly assert either that that he has "relied on the ... acceleration to his detriment," or that the cited case of *EMC Mtge. Corp. v Patella*, 279 AD2d 604 (2d Dept 2001), supports the contention that such "reliance" is a consideration in this matter.

Defendant also argues that the de-acceleration letter was not properly served on Pika, as it was sent to the subject property address, and not to the "updated" address from 2010. Such contention is without merit. Pika has failed to submit an affidavit on his own behalf, attesting to any "new" address, and the submitted "evidence" of his having changed his mailing address with regard to the subject mortgage, failed to contain any address for Pika other than the subject property address, to which the "Confirmation of mailing address change" was sent. Further, the mortgage permits service on Pika at the mortgaged property address.

As defendant, Pika, has failed to demonstrate that the letter to him was untimely sent, or was improperly mailed, or that the language used did not comply with the requirements for a de-acceleration letter, his motion seeking a discharge of the mortgage, and the extinguishing of the underlying promissory note, is denied.

A fundamental purpose of joinder practice is "to implement a requisite of due process the opportunity to be heard before one's rights or interests are adversely affected" (*Martin v Ronan*, 47 NY2d 486, 490 [1979]). "Necessary" parties include "[p]ersons who ... might be inequitably affected by a judgment in the action" (CPLR 1001 [a]; *see Guccione v Estate of Guccione*, 84 AD3d 867 [2d Dept 2011]; *Sorbello v Birchez Assoc., LLC*, 61 AD3d 1225 [2d Dept 2009]; *Migliore v Manzo*, 28 AD3d 620 [2d Dept 2006]). Plaintiff's motion seeking leave to amend the caption, complaint, and notice of pendency, to add and/or substitute additional parties-defendant is properly brought pursuant to CPLR 3025 (b), 1002, and 2001. As a general rule, leave to amend a pleading should be freely granted, unless it (1) would unfairly prejudice or suprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" (*Freder v Costello Indus., Inc.*, 162 AD3d 984, 985 [2d Dept 2018], quoting *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]; *see Coleman v Worster*, 140 AD3d 1002 [2d Dept 2016]; *Bleakley Platt & Schmidt, LLP v Barbera*, 136 AD3d 725 [2d Dept 2016]).

The opposition of Pika fails to demonstrate that plaintiff's proposed amendment is prejudicial, a surprise, insufficient, or devoid of merit. Instead, such opposition, in attempting to evidence the reasons why only Oscar Pika, Jr. and Gerda Menig should not be defendants in this action, is unconvincing. Pika contends, incorrectly, that "the law of the case doctrine" bars plaintiff's right to commence this action against such proposed defendants, due to the decision in the 2011 action dismissing the complaint as against Pika, Jr. and Menig, who were sued as "John Does" in that action. "The [law of the case] doctrine applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision, and to the same questions presented in the same case" (*Matter of Chung Li*, 2018 NY Slip Op. 07120, *1 [2d Dept 2018], quoting *RPG*

Consulting, Inc. v Zormati, 82 AD3d 739, 740 [2d Dept 2011]). In the 2011 action, the court denied plaintiff's motion to substitute Pika, Jr and Menig for "John Does." Said decision, as conceded by Pika in his opposition papers, granted plaintiff leave to commence another action against said proposed defendants, which is what plaintiff is requesting in the instant motion. Consequently, "the law of the case doctrine" is inapplicable herein, and the branch of plaintiff's motion with regard to proposed defendants, Pika, Jr. and Menig, is granted.

CPLR 1024 states, in relevant part, that when the identification of the "John Doe" party becomes known, "all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." Such statute requires that all proceedings must be in the defendant's true name from the time when same is ascertained (*see Herbert v Gabel Equip. Corp.*, 123 AD2d 741 [1986] (after ascertaining the true identity of defendants, plaintiff served them with a copy of the original summons and complaint, along with an amended summons and complaint bearing the actual names of the defendants); accord *Porter v Kingsbrook OB/GYN Associates, P.C.*, 209 AD2d 497 [1994]; *US Bank. N.A. v Losner*, 145 AD3d 935 [2016]). In the case at bar, a branch of plaintiff's motion seeks the substitution of "Bdia Nloda," "Amba Pika," "John Doe #1," and "African Hair Braiding Business" in place and stead of "John Doe, etc."

Movant has demonstrated that the amendment is warranted in that there exists a common question of law or fact (*see CPLR 1002 [a]*) and that the proposed amendment is not "palpably insufficient or patently devoid of merit" (*Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]; *see Jablonski v Jakaitis*, 85 AD3d 969 [2d Dept 2011]; *Truebright Co., Ltd. v Lester*, 84 AD3d 1065 [2d Dept 2011]). Further, plaintiff has ascertained the names of the occupants of the subject property expeditiously, and with minimal prejudice to defendants. Defendant, Pika, has failed to raise an issue of fact to rebut plaintiff's prima facie entitlement to the relief requested, and this branch of plaintiff's motion is granted.

Plaintiff will file a copy of the amended notice of pendency, summons, and complaint, in the form as included as an exhibit herein, with the clerk of this court within thirty (30) days of entry of this order, and serve such amended pleadings upon all parties hereto, along with a notice of entry. Defendants' answers, and amended answers, shall be served in compliance with the applicable sections of the CPLR.

Accordingly, defendant, Pika's motion is denied. Plaintiff's motion is granted in its entirety.

A copy of this Order is being mailed to the attorneys for the parties

Dated: November 27 2018

J.S.C.

FILED

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COUNTY CLERK
QUEENS COUNTY