SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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BANK OF AMERICA, N.A.,

Plaintiff,

- v -

MARY SITGRAVES, BUREAU OF HIGHWAY OPERATIONS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES DESCRIBED IN THE COMPLAINT,

Defendant.

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INDEX NO. 850086/2017

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 175, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 205

were read on this motion to/for JUDGMENT - SUMMARY.

In this mortgage foreclosure action, plaintiff Bank of America moves pursuant to CPLR 3212 for summary judgment on the complaint and for dismissal of defendant Mary Sitgraves' affirmative defenses and counterclaims. In support of its motion, plaintiff submits the mortgage, the unpaid note and evidence of defendant's default in paying the note. Affidavit of Nichole Renee Williams sworn to on July 3, 2018, Exh. A. Accordingly, plaintiff has established, prima facie, its right to summary judgment. *East New York Sav. Bank v. 924 Columbus Associates*, L.P., 216 A.D.2d 118, 118 (1st Dep't 1995); *Village Bank v. Wild Oaks Holding, Inc.*, 196 A.D.2d 812, 812 (2d Dep't 1993) ("It is settled that in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. When a plaintiff does so, it is incumbent upon the defendant to assert any defenses which could properly raise a viable question of fact as to his default.")

In opposition, defendant Sitgraves argues that this action is time-barred. An action to foreclose upon a mortgage on real property is governed by a six-year statute of limitations. CPLR 213(4). When a mortgage is payable in installments, such as here, an acceleration of the entire amount due triggers the running of the statute of limitations on the entire debt. *Milone v. US Bank Nat'l Assoc.*, 164 A.D.3d 145, 151 (2d Dep't 2018). One common way that an acceleration occurs is when a creditor commences a foreclosure action upon a note and mortgage and seeks, in the complaint, payment of the full balance due. *Id.* at 152.

It is undisputed that in this case, plaintiff commenced a prior foreclosure action against defendant Sitgraves on August 30, 2010, thus triggering the six-year statute of limitations. Affirmation of Susan Pepitone dated March 27, 2019, Exh. A. This action lay dormant for three years until April 1, 2013, when plaintiff moved for summary judgment on its complaint. Pepitone Aff., Exh. D. After defendant Sitgraves answered the complaint, served crossclaims and opposed the summary judgment motion, plaintiff moved to withdraw its summary judgment motion and discontinue the action because it determined that it may have improperly served its default notice on defendant Sitgraves. Pepitone Aff., Exh. F, ¶ 7. By order dated July 3, 2013, the court permitted plaintiff to withdraw its motion and discontinue the action. Pepitone Aff., Exh. H. Plaintiff did not commence the present foreclosure until April 3, 2017, eight months after the statute of limitations expired.

Plaintiff argues that despite the commencement of the prior foreclosure action, this action is timely because it de-accelerated the debt by moving to discontinue the prior action. It is well-settled that "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." *Milone*, 164 A.D.3d at 154 (internal

quotations and citations omitted). Here, plaintiff's motion to discontinue the prior foreclosure action based on the defective default notification and the court's order granting the motion at most create an issue of fact regarding whether the action is time-barred given that both the motion and order are silent on the issue of the election to accelerate and did not otherwise indicate that plaintiff would accept installment payments from defendant Sitgraves. *Capital One v. Saglimbeni*, 170 A.D.3d 508, 509 (1st Dep't 2019) (holding that issue of fact exists regarding timeliness of action where plaintiff's assignor voluntarily discontinued prior action due to defective default notice); *Vargas v. Deutsche Bank Nat'l Trust*, 168 A.D.3d 630 (1st Dep't 2019); *Aquino v. Ventures Trust*, 2019 WL 1926115 at *2 (2d Dep't 2019).

Plaintiff also argues that it de-accelerated the debt by mailing a notice on July 13, 2016 to defendant Sitgraves rescinding the notice to accelerate the debt. NYSCEF Doc. 84. Although a lender may revoke its election to accelerate the mortgage by serving a de-acceleration notice, "[c]ourts must, of course, be mindful of the circumstances where a bank may issue a de-acceleration letter to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note . . . ." *Milone*, 164 A.D.3d at 154. Here, plaintiff's bare bones de-acceleration notice, which was not accompanied by any monthly invoices and which was served three years after the dismissal of the prior action and one month before the expiration of the statute of limitations, appears to be a mere pretext to avoid the statute of limitations. *See U.S. Bank Nat'l Assoc. v. Papanikolaw*, 62 Misc.3d 1207(A), at *7-8 (Sup. Ct. Rockland Cty. Jan. 2, 2019). Thus, plaintiff is not entitled to summary judgment as there is a material issue of fact regarding the timeliness of this action.

Plaintiff also moves pursuant to CPLR 3013 for an order striking defendant Sitgraves' affirmative defenses and counterclaims as conclusory and lacking the requisite factual specificity and because they lack merit under CPLR 3211(b). Upon a motion to dismiss a defense, defendant is entitled to the benefit of every favorable inference of its pleading, which is to be liberally construed and if there is any doubt as to the availability of a defense, it should not be dismissed. *Butler v. Catinella*, 58 A.D.3d 145, 148 (2d Dep't 2008). With respect to the first affirmative defense of failure to state a cause of action, it is well-established that pleading this defense is unnecessary, constitutes "harmless surplusage," and that a motion by the plaintiff to strike the same should be denied. *Id.* (citing *Riland v. Fredrick S. Todman*, 56 A.D.2d 350, 353 [1st Dep't 1977]). Defendant Sitgraves' second and third affirmative defenses and counterclaims are based on the statute of limitations and as discussed above, they are meritorious.

Defendant Sitgraves' fourth affirmative defense and counterclaim for fraud is based primarily on plaintiff's alleged misrepresentations in the prior foreclosure action that it was the owner of the note and mortgage. In support of its motion, plaintiff submits the note and mortgage, evidence of its standing in the current action, as well as a print-out showing that the note was delivered to plaintiff in May 2007. Affirmation of Nandini Chowdhury dated February 21, 2019, Exh. A. However, it fails to submit evidence that it held the note and mortgage at the time it commenced the first foreclosure in 2010, at which point defendant Sitgraves claims that the note and mortgage were held by Freddie Mac. Chowdhury Aff., Exh. G, ¶ 44. Accordingly, it is premature to dismiss defendant's fraud claim. However, defendant Sitgraves' fifth affirmative defense and counterclaim for civil conspiracy to commit fraud and sixth affirmative defense and counterclaim for aiding and abetting fraud lack merit and must be dismissed, particularly since they are asserted against one party. *See Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st

Dep't 2010) (outlining elements of civil conspiracy, which include an agreement between two or more persons).

Contrary to plaintiff's contentions, defendant Sitgraves' seventh affirmative defense and counterclaim for breach of the duty of good faith and fair dealing is based on particularized allegations, namely, plaintiff's failure to negotiate in good faith with defendant Sitgraves for a loan modification, and thus will not be dismissed. Likewise, plaintiff's motion to dismiss defendant Sitgraves' eighth affirmative defense and counterclaim for deceptive business practices under Gen. Bus. L. § 349 is premature.

Accordingly, it is

ORDERED that the motion is granted with respect to the fifth affirmative defense and counterclaim for civil conspiracy to commit fraud and sixth affirmative defense and counterclaim for aiding and abetting fraud, which are hereby dismissed, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a conference on 09/05, 2019 at 9:30 a.m. at which time defendant Sitgraves' motion to compel (#005) will be addressed; and it is further

ORDERED that plaintiff shall provide working copies of its opposition to the motion to compel directly to Part 47 at least one week prior to the conference.

7/2/19
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE