MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST SERIES 2015-1,
Plaintiff,

- against -

SHAWNETT G. WELSH, PATRICIA A. EDGAR, MARSHLYN WALTERS,

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. 707439/2017

MOTION SEQ. NO. 3

BY: ESPOSITO, J.

DATED: June 17, 2019

Plaintiff seeks to foreclose on a mortgage given by the defendants Patricia A. Edgar, Shawnett G. Welsh, and Marshlyn Waters, as record owners, of the subject real property, known as 134-58 161st Street, Springfield Gardens, New York, to secure a note, evidencing a loan in the principal amount of $450,968. The plaintiff alleges that it is the holder of the mortgage and underlying obligation and that the defendants Edgar, Welsh and Waters defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on July 1, 2009 and as a consequence, it elected to accelerate the entire mortgage

debt.

On June 11, 2010, the plaintiff's predecessor in interest commenced an action to foreclose the subject mortgage entitled *BAC Home Loans Servicing LP v Welsh*, (Sup Ct, Queens County, Index No. 14943/2010). That action was dismissed in an order dated March 4, 2015. Plaintiff commenced this action by filing a copy of the summons and complaint with notice of pendency on or about May 31, 2017.

The plaintiff then moved for summary judgment, to amend the caption and for an order of reference. The defendants Patricia A. Edgar and Iona Lettman s/h/a John Doe, cross moved to dismiss the complaint. The court granted the motion to dismiss finding that the action was brought after the expiration of the statute of limitations. The plaintiff has now moved to reargue the court's decisions and upon reargument to deny the cross motion and to grant the motion for summary judgment, to amend the caption and an order of reference.

It is within the court's discretion to grant a motion for reargument when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order" (*Dunitz v J.L.M. Consulting Corp.*, 22 AD3d 455, 456 [2d Dept 2005]; *Marini v Lombardo*, 17 AD3d 545 [2d Dept 2005]; CPLR 2221). Here, the plaintiff has shown that the court overlooked that the plaintiff attached as an exhibit an affidavit of service for a deacceleration letter. In light of this, court will grant the motion to reargue.

The court turns first to the cross motion to dismiss the action. An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). However, once a mortgage debt is accelerated the entire amount is due and the statute of limitations begins to run on the entire debt (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt. The defendant has established that the loan was accelerated by commencement of the first foreclosure action on June 11, 2010. This action was not commenced until May 31, 2017, which is more than six-years after the acceleration in the complaint. The defendants have, thus, made a prima facie showing that this action was not commenced within the six-year statute of limitations, which began to run upon the filing of the complaint in the 2010 action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 605).

The burden shifts to plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is

otherwise inapplicable or whether it actually commenced the action within the applicable limitations period (*see Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014]; *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56 [2d Dept 2013]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]). The plaintiff argues that it revoked its acceleration by sending the defendants a letter which revoked the acceleration. A lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in borrower's position in reliance thereon. This must be done by an affirmative act occurring within the statute of limitations period (*EMC Mtge. Corp. v Patella*, 279 AD2d at 606). Here, the plaintiff has established that it revoked the acceleration within the six-year statute of limitations by sending a notice to the borrower dated June 10, 2016 that affirmatively revoked the acceleration and made the monthly payments due again.

The argument put forth by the defendant that the affidavit of service is not admissible because it was signed by an employee of the plaintiff's law firm is without merit. The affidavit, was not an affidavit of mailing based upon a review of business records, but an actual affidavit of service by the person who actually mailed the letter. The fact that the mailing was sent by plaintiff's counsel on behalf of the servicer, does not make the affidavit of servicer inadmissible (see e.g., *Flagstar Bank FSB v Mendoza*, 139 AD3d 898 [2d Dept 2016]). Therefore, the statute of

limitations does not bar this action.

Turning next to the motion for summary judgment, the plaintiff has made a prima facie showing of entitlement to judgment as a matter of law by submission of the mortgage, the note and proof of default. (*See GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002].)

In opposition, the defendant failed to raise an issue of fact. The defendant raised the affirmative defense that the plaintiff did not comply with a contractual condition precedence and RPAPL 1304. RPAPL 1304 provides that with regard to a home loan at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Aurora Loan Servs., LLC* 85 AD3d at 107). In support of its motion the plaintiff submitted an affidavit of mailing from its servicer. In her affidavit the affiant discussed the standard business practice regarding mailing the RPAPL 1304 notices and stated that the RPAPL 1304 notices were mailed to defendant by both certified and first-class mail.

Additionally, the plaintiff's submissions included documents submitted pursuant to CPLR 4518 under the business record exception to the hearsay rule including a transaction report indicating the mailing of the letter by certified and first class, USPS tracking results and copies of the letters copies of the 1304 notices sent to the defendant. The affidavit and documents were sufficient to establish compliance with RPAPL 1304. (*Citimortgage, Inc. v Wallach*, 163 AD3d 520 [2d Dept 2018]; *Nationstar Mtge., LLC v LaPorte*, 162 AD3d 784 [2d Dept 2018]; *Citimortgage, Inc. v Banks*, 155 AD3d 936 [2d Dept 2017]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]).) The argument that the notice was improper is without merit. The notices that were sent were in compliance with RPAPL 1304.

Accordingly, the motion is granted and upon reargument the motion for summary judgment is granted and the cross motion to dismiss is denied. The caption is amended as proposed and a referee to compute shall be named in the order to be entered hereon.

Settle Order

DATED: October 18th, 2019

FILED
OCT 22 2019
COUNTY CLERK
QUEENS COUNTY

JOSEPH J. ESPOSITO, J.S.C.