SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 90 R
JUDICIAL HEARING OFFICER

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U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

- v -

ALEXANDER JANES, NEW YORK ENVIRONMENTAL CONTROL BOARD, JOHN DOE #1 THROUGH JOHN DOE #12, THE LAST TWELVE NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES,

Defendant.

INDEX NO. 850065/2017
MOTION DATE 10/2/2019
MOTION SEQ. NO. 003

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 72 were read on this motion to/for REFERENCE - HEAR & REPORT.

The question that was posed by Justice Judith Reeves McMahon on December 20, 2018 was:

> The issue of **the standing of Bank of America and/or the authority of BAC Home Loans Servicing, LP to have sent the September 16, 2010 Notice of Intent to Accelerate Letter** (Emphasis in Original Order)

was sent to Referee to hear and report.

A. BACKGROUND

The matter was originally referred to this court on March 26, 2019. It was adjourned by this Court after discussing the case with all parties including non-party Bank of America ("BOA"). During this initial meeting it became clear to

this Court that non-party BOA needed to search its records in order to determine whether BOA had the authority to send Alexander Scott Janes ("JANES"), the defendant in this case, the September 16. 2010 Notice of Intent to Accelerate.

The actual reason why this issue is so crucial to the case is because it implicates the Statue of Limitations. As Justice McMahon so aptly analyzed in her December 20, 2918 decision:

> This is an action whereby US BANK seeks to foreclose upon a mortgage encumbering a residence located at 240 Riverside Boulevard, Unit 11 N, New York, NY 10023.
>
> On or about November 7, 2005, JANES executed a note and mortgage in favor of America's Wholesale Lender.
>
> On or about August 2010, JANES defaulted on the note.
>
> A letter dated September 16, 2010, was sent to JANES from BAC Home Loans Servicing, LP as servicer "on behalf of the holder of the promissory note". The letter was titled, "Notice of Intent to Accelerate". The letter stated that, "[i]f the default is not cure on or before October 21, 2010, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time."
>
> The default was never cured.
>
> On or about November 11, 2011, the note was assigned to Bank of America. N.A. ("BOA").
>
> On or about January 20, 2012, BOA commenced a foreclosure action on the subject mortgage loan.
>
> On or about August 15, 2013, the note was assigned to Nationstar Mortgage LLC.

On or about April 22, 2014, the note was assigned to US BANK (NATIONAL ASSOCIATION), (the plaintiff in this case) ("US BANK").

On or about December 19, 2016, a motion was granted to discontinue the original foreclosure action commenced by BOA. The reason given (by the movant, US BANK) for the discontinuance was that "a condition precedent to the foreclosure was not met."

US BANK alleges that the condition precedent not met was that BOA did not have standing to send the September 16, 2010 Acceleration Letter because the letter was sent fourteen months before the loan was assigned to BOA.

US BANK commenced the present foreclosure action on or about February 24, 2017, two months after the motion to discontinue.

Presently, BOA has made a motion seeking Summary Judgment and JANES has cross-moved seeking to dismiss on the grounds that the Statue of Limitation has expired.

The relevant statute, CPLR 213, stated that,

> The following actions must be commenced within six years . . . 4. An action upon a bond or note, the payment of which is secure by a mortgage upon real property. Or upon a bond or note and mortgage so secured, or upon mortgage of real property, or any interest therein. *CPLR 213(4)*.

"It is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is the date after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire amount is due and the statute of limitations begins to run on the entire mortgage debt." *CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 43 A.D.3d 45 (1st Dept. 2007).

This Court rejects Plaintiff's argument, pursuant to *Nationstar* v. *McPherson*, [2017 NY Slip Op 27120 (Sup. Ct. Suff.)] that acceleration does not occur until judgment is entered. *Nationstar* v. *McPherson* is not controlling and is counter to the current caselaw and statute.

"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. Acceleration occurs, inter alia, by the commencement of a foreclosure action." *Deutsche Bank Nat'l Tr. Co. v. Adrian*, 157 A.D.3d 934 (2nd Dept., 2018).

"A lender may revoke its election to accelerate the mortgage but 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." *Id.*

No proof was submitted demonstrating an affirmative act of revocation.

The date of the acceleration of the mortgage loan is disputed between the parties.

JANES argues that the September 16, 2010 Letter accelerated the loan, in which case the Statute of Limitations expired on September 16, 2016.

US BANK argues that BOA did not have standing to send the September 16, 2010 Letter and therefore the mortgage loan was not accelerated until the commencement of the original foreclosure on or about January 20, 2012, in which case the Stature of Limitation expired January 20, 2018, which would be after the present foreclosure action was commenced.

BOA's standing to have sent the September 16, 2016 (stet) Letter must be determined.

Justice McMahon's Decision and Order dated December 12, 2018 at pp. 1-3.

B. EVIDENCE GARNERED AT THE HEARING

The hearing was conducted on April 30, 2019. The Court heard from three witnesses: Zachary Chromiak, Assistant Vice President of BOA; Rene Burden,

employed by a Mr. Cooper, a mortgage loan servicer on behalf of the plaintiff; and Alexander Scott Janes, the defendant in this case, who was called by the plaintiff.

Mr. Chromiak testified that he was first employed by Bank of America on September 19, 2011 and that since February 2012 he has served as Assistant Vice-President, Consumer Resolution Associate for Bank of America. (Tr. 20:3-5; 25:8-18). He stated that he has reviewed servicing agreements "on close to 100 different cases." (Tr. 41:18 – 42:8). Mr. Chromiak testified:

> Part of my duties are to review the business records of BOA. In that review, I determined that the investor history of this loan charted from Countrywide Home Loans Inc. to Goldman Sachs, and then Goldman Sachs deposited the loans it had purchased into trust where U.S. Bank was Trustee.
>
> I reached out to our investment asset management team and received specifically from mortgage loan schedules associated with that transaction and this loan, and I received what has been marked as Defendant's Exhibit A for identification.
>
> It was a list of loans that had been sold by Countrywide Home Loans Inc. for deposit and Janes' loan was one of these loans. The rest of these loans had been redacted. That's how I identified this loan as part of that transaction. (Tr. 23:5 – 20)

The following documents were placed into Evidence:

Exhibit A was introduced into Evidence over Plaintiff's objection. (Tr. 36:16-17). This was identified by the witness as "GSR 2006-1F, It's the Servicer CHL Bulk, 20060, 124, and it is an Excel Spreadsheet." (Tr. 36: 7-8). It indicates at US BANK v. JANES/BANA 00184 that a loan who ID

number ended in 1838 for 30 years, the Servicer is listed as Chas Country, the originator as Country, the Full Borrower's Last Name, First Name, Address, City, State, Zip as Janes, Alexander, 240 River, New York NU 10023. Other information is also included in that description.

Exhibit B "Servicing Agreement between Countrywide Home Loans Servicing LP (Servicer) and Goldman Sachs Mortgage Company; (Owner)";

Exhibit C "Assignment, Assumption and Recognition Agreement among GOLDMAN SACHS MORTGAGE COMPANY, as Assignor; GS MORTGAGE SECURITIES CORP. as Assignee and COUNTRYWIDE HOME LOANS, INC. as Seller; Dated as of January 1, 2006;

Exhibit D "Assignment, Assumption and Recognition Agreement among GS MORTGAGE SECURITIES CORP., as Assignor; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, as Assignee; COUNTRYWIDE HOME LOANS, INC., as Seller; and COUNTRYWIDE HOME LONS SERVICING LP, as Servicer and as acknowledge by WELLS FARGO BANK, N.A. as Master Servicer; Dated as of January 1, 2006; were placed into evidence again over the objections of the Plaintiff. (Tr. 42:9-14).

Mr. Chromiak explained, in response to a question on cross examination:

Q: Mr. Chromiak, can you tell me which of these exhibits B, C and D is the relevant one that describes the authority of Countrywide as Servicer?

A: Sure. Exhibit D is the Assignment, Assumption Recognition Agreement for the Overarching Trust in this particular matter. That's where Goldman Sachs assigned these loans to U.S. Bank N.A. as the Trustee. It lists. Countrywide Home Loans Inc, as Seller; Countrywide Home Servicing as the Servicer . . .

That Servicing Agreement is the agreement dated July 1, 2004, which is Exhibit B. Exhibit B is the Servicing Agreement which outlines, in no small part, Countrywide Home Servicing LPs duties as Servicer." (Tr. 43:6 – 44: 3).

On redirect, Mr. Chromiak testified that Countrywide Home Loan Servicing LP was renamed BAC Home Loan Servicing LP in 2009. (Tr. 52:17 – 20). Mr. Chromiak stated that the only thing that changed at that time was the name of the Servicing Agent not the way it functioned. "They (BAC) were still using the same systems and their servicing operations and personnel carried over." (Tr. 53:9-10). The witness also testified that he was not aware of any objections by Goldman Sacks to the renaming of Countrywide Home Loan Servicing into BAC Home Loan Servicing. (Tr. 53:16 – 19).

Indeed, Ms. Stephanie Wilson of Reed Smith LLP who represented non-party BOA, asked at the conclusion of Mr. Chromiak's testimony to clarify one aspect of the section, namely Exhibit D in evidence, Section 2. The Court, after

reviewing all of Exhibit D in evidence finds the first part of §2 to be the most relevant. It reads:

> From this date forward, the Servicer shall note the transfer of the Mortgage Loans to the Assignee in its books and records, shall recognize the Assignee (U.S. Bank National Association, as Trustee) as the owner of the Mortgage Loans and shall **service** the Mortgage Loans for the benefit of the Assignee pursuant to the Servicing Agreement, the terms of which are incorporated herein by reference. It is the intention of the Assignor, Servicer and Assignee that the Servicing Agreement be binding upon and inure to the benefit of the Servicer and the Assignee **and their permitted successors and assigns.** (Emphasis added.)

The court in response to the Third Party's attorney's request, read into the record the entire second paragraph of §2. Indeed, Plaintiff's attorney, Mr. Lancelot E. Colquitt, stated "Just in response to that, I note that the Plaintiff is not disputing the fact that the servicing rights are assignable." (Tr. 56:23-25). To which, Ms. Wilson on behalf of the non-party BOA, responded: "Our belief is the terms say, and of course, the Owner, which is U.S. Bank, can terminate at any point, **which it did not**." (Tr. 57:12-14) (Emphasis added.)

The Court also takes notice of Exhibit E in evidence. It is the summons and complaint in the BOA's foreclosure action filed on January 20, 2012 under Index No. 810016/2012. The caption clearly explains the relationship of BOA to BAC and Countrywide. The Caption reads:

> BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO BAC HOME LOAN SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING. LP,

Plaintiff

-against-

ALEXANDER SCOTT JANES et al.

The 2012 complaint reads in pertinent sections as follows:

> §3A. Thereafter, the Note and Mortgage were assigned to Plaintiff by an Assignment of Mortgage dated November 16, 2011 and recorded in the New York County Clerk's Office on December 27, 2011 in CRFN: 2011000447297;
>
> §3 B. The Plaintiff is the owner and/or holder of the subject Note and Mortgage *or* **has been delegated the authority to institute a mortgage foreclosure action by the owner and/or holder of the subject Mortgage and Note** . . . (Emphasis added).

In addition to this document, Bank of America produced its NOTICE OF INTENT TO ACCELERATE which was introduced into evidence as **Exhibit G**. The document is dated September 16, 2010 and is addressed to Alexander SC Janes, 240 RIVERSIDE BOULEVARD APT 11N NEW YORK, NY 10069-1030. (Capitalization in the original).

The Notice includes Account No: 96231**838**; Premises: 240 Riverside Blvd Unit 11n (stet), New York, NY 10023. (Emphasis added). The last four number of the Account Number are the same as the four numbers of the loan in Exhibit A. The third paragraph of the Notice reads as follows:

> If the default is not cured on or before October 21, 2010, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be

initiated at that time. As such, the failure to cure the default may result in the foreclosure and sales of your property. . . (Emphasis in the Original)

The final paragraph of the document reads as follows:

Finally, please be advised that you have the right to have BAC Home Loans Servicing, LP's enforcement of its Security Instrument discontinued and to have the Note and Security Instrument remain fully effective as if immediate payment in full had never been required if the following conditions are met: (1) BAC Home Loans Servicing, LP receives the full amount that then would be due under

BAC Home Loans Servicing, LP is a subsidiary of Bank of America, N.A.

This Court found Mr. Zachary Chromiak to be a credible, informative and disinterested witness.

Plaintiff called as its first witness a Rene Burden who stated that she was employed by Mr. Cooper whom she described as "They service mortgage loans, they originate loans, all based on investors and also Mr. Cooper, they have the right to move forward with foreclosure proceedings, accept payments, review files in its (sic) totality and also anything as it pertains to the Servicing Agreement with many different investors." (Tr. 59:11-15).

Also, on direct, Ms. Burden was asked by her attorney what was the relationship of "Nationstar" to Mr. Janes' loan. She answered, "We are the Servicer of that loan." She added that Nationstar began servicing that loan (Mr. Janes' loan) "[o]n or around, I believe, April of 2014." (Tr. 59:16 – 60:3). Ms. Burden continued by stating that she was aware of the Foreclosure action but

because "we could not determine whether a demand letter was made", "we invalidated the Demand Letter" and the existing foreclosure "We deemed it invalid. Mr. Cooper deemed it invalid" and the proceedings were discontinued." (Tr. 60:4–61:17).

This court found Ms. Burden's testimony to be vague, self-serving and mainly irrelevant to the proceedings at hand. She provided no concrete evidence to counter the documents in evidence and the credible testimony of Mr. Chromiak. What she talked about was the servicing of the Janes' loan AFTER April 2014. Ms. Burden did not add a scintilla of evidence as to whether BOA/BAC had the right to serve the Notice of Intent to Accelerate September 16, 2010 letter.

Plaintiff next called the defendant Alexander Scott Janes. The one point that Mr. Colquitt, U. S. Bank National Association's attorney, elicited from Mr. Janes was that at the time Mr. Janes answered the original 2012 Foreclosure Action, he claimed as his defense that he was never served with a Notice of Default and/or Intent to Accelerate.

Mr. Janes read into the record a statement made in Mr. Janes' answer to the 2012 BOA's foreclosure action: "The Plaintiff (BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOAN SERVICING, LP FKA COUNTRYWIDE HOME LOAN SERVICING, LP) failed to serve a Notice of Default and/or Intent to Accelerate as required by the Note and Mortgage and/or

the Notice of Default and/or Intent to Accelerate served by the Plaintiff as defective, untimely and/or did not contain the proper address of the Defendant." (Tr. 94:4 – 8).

When asked whether that assertion was true, to the best of Mr. Janes' knowledge, Mr. Janes replied, "At that time, yes." (Tr. 94: 12).

That concluded the hearing.

C. FINDING OF FACTS AND CONCLUSIONS OF LAW.

This Court finds that BOA was the successor by merger to BAC Home Loans Servicing, LP which was formerly known as Countrywide Home Loans Servicing, LP. As such BOA, as Servicer, had both the right and the duty to serve Alexander Scott Janes with September 16, 2010 Notice of Intent to Accelerate and, later, on January 12, 2012, the Foreclosure Action.

The fact that US BANK discontinued the BOA's 2012 Foreclosure Action on December 19, 2016 because it believed at "a condition precedent to the foreclosure was not met" was a serious error on US BANK'S part. This is true particularly since US Bank "is the Trustee for these deal documents. So, to say that this is the first time I am seeing (this) or I don't have it, is really disingenuous. BOA should not have (had) to spend all of this time to produce documents where

US BANK was a partner to the deal. . .” (Tr. 14:17–23 Proceedings prior to the Commencement of the Hearing.)

In response, US BANK’S attorney, Mr. Lancelot E. Colquitt, stated that the reason US BANK discontinued BOA’s foreclosure action “was based on the answer of Mr. Janes (that he [Mr. Janes] was not served with the September 16, 2010 Notice of Intent to Accelerate) and . . . when the Trustee and my client, the later Servicer reached out to the prior Servicer, he was saying we need to confirm that you had the authority to send this notice, we were informed we did not have authority. That is why we discontinued the prior action.” (Tr.16:6–11 Proceedings prior to the Commencement of the Hearing).

While it is true that Mr. Colquitt got Mr. Janes to admit that he asserted in his answer to 2012 Foreclosure Action, the defense of not having received the Notice of Intent to Accelerate and therefore, Mr. Janes argued in his answer, the 2012 Foreclosure Action was defective, (Plaintiff Exhibit 3 in Evidence) it should have been clear that this was likely a boiler plate defense, not one that sophisticated parties (such as US BANK) should have taken as a fact since the defense was asserted by the defendant in the Foreclosure Action.

In truth, US BANK did not produce one single document to support its assertion that it made inquiry about the Notice of Intent to Accelerate Letter or that it had been told by “someone” not known to this Court or, it appears, to the

Plaintiff, that the Notice of Intent to Accelerate was not served. Indeed, when Ms. Burden was asked on cross examination the name of the person to whom she spoke to at BOA and she answered, "I can't name the person directly." (Tr. 71:10).

This Court concludes that US BANK as Trustee should have had a copy of the Notice of Intent to Accelerate in its files or a document stating that such a notice was served. A decision on the part of US BANK, or its new Servicer or the new Servicer's attorney, to discontinue the BOA 2012 Foreclosure Action did not invalidate BOA's 2010 Notice of Intent to Accelerate. US BANK cannot now claim that JANES is judicially estopped[1] from asserting a Statute of Limitations defense because of his answer claiming that he was not served with the Notice of Intent in the 2012 BOA Foreclosure Action.

Whatever the reasons for its actions, US BANK through its attorneys moved to discontinue the 2012 BOA Foreclosure Action. It did so voluntarily, deliberately and consciously without anyone coercing it into so moving. And US BANK was successful. On December 19, 2016, a little over two months **after** the Statute of Limitations had expired, the Court granted US BANK's motion and dismissed the 2012 BOA Foreclosure action.

[1] JUDICIA ESTOPPEL is the doctrine that prohibits a party that has assumed a certain position in a prior legal proceeding and **that secured a judgment in its favor**, from assuming a contrary position in another action because the party's interest has changed. *City of New York v. College Point Sports Ass'n, Inc.* 61 A.D.3d 33 (2nd Dept. 2009) (Emphasis added).

This Court finds that BOA had the right and the duty to send the Notice of Intent to Accelerate on September 16, 2010 and that it did properly send it to Janes on that date.

This Court also finds that US BANK's argument that defendant Janes is judicially estopped from asserting a Statute of Limitation defense because of his earlier answer to the 2012 BOA Foreclosure action to be unavailing. The doctrine of Judicial Estoppel has as its cornerstone that the party asserting the defense must have prevailed in the action. Janes did not prevail in the 2012 Foreclosure Action. It was Judicially dismissed at US BANK's request.

Whatever efforts may have been made by US BANK to determine whether (1) the Notice of Intent to Accelerate was actually sent and/or (2) BOA had the right to send the document to the defendant Alexander Scott Janes on September 16, 2010, US BANK did not produce any such evidence for the Court to consider. In fact, it produced no evidence of any kind to support its contention that it made substantial efforts to determine whether a Notice of Intent to Accelerate was made in 2010 or whether BOA had the right to send such a notice. Apart from Janes' answer to the 2012 BOA Foreclosure Action, US Bank produced not a scintilla of evidence.

As such, this Court finds that the credible evidence in this case indicates that the Notice of Intent to Accelerate was made on September 16, 2010. In its complaint in the Foreclosure Action, BOA states:

> § 8. There is now due plaintiff the principal amount of $649,730.00 with interest thereon at the rate of 6.375 per cent per annum from July 1, 2010, along with all other amounts due pursuant to the terms of the note and mortgage, together with the costs and expenses of this action. . . .

Even if the Acceleration Date is delayed to the October 21, 2010 date as stated in the September 16, 2010 Notice of Intent to Accelerate[2], the Statute of Limitations began to run on the entire debt on that date. As Justice McMahon stated in her December 20, 2018 decision:

> "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." *Deutsche Bank Nat'l Tr. Co. v. Adrian, 157 A.D.3d 934* (2nd Dept., 2018).

This court finds that the Statue of Limitations began to run on October 21, 2010. As such, the Statute of Limitations to bring an action for foreclosure expired on October 20, 2016. BOA's 2012 Foreclosure Action was discontinued on December 19, 2016 which effectively terminated the action against Alexander Scott Janes. It irretrievably ended any opportunity on US BANK's part to collect on Janes' outstanding debt.

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[2] The language of the September 16, 2010 Notice of Intent to Accelerate states "If the default is not cured on or before October 21, 2010, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. . . . " (Emphasis in the original.)

D. RECOMMENDATIONS

This Court respectively recommends that the Court finds that (1) BANK OF AMERICA, N.A. AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP to have been legally bound to serve JANES with the September 16, 2010 Notice of Intent to Accelerate; (2) that BOA was legally bound to commence the Foreclosure Action for the benefit of US BANK against JANES on January 20, 2012; (3) that US BANK voluntarily discontinued BOA's 2012 Foreclosure Action against JANES on December 19, 2016; and (4) the voluntary discontinuance of the 2012 BOA Foreclosure Action was made two months and nine days AFTER the 6-year Statute of Limitations had run in this matter.

This constitutes the decision and recommendations of this Court.

Dated: New York, New York
November 7, 2019

EILEEN BRANSTEN, JHO