

**U.S. Bank N.A. v Marty**

2019 NY Slip Op 35069(U)

May 24, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 604463-2018

Judge: C. Randall Hinrichs

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SHORT FORM ORDER

INDEX NO. 604463-2018

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 49 SUFFOLK COUNTY**

PRESENT: HON. C. RANDALL HINRICHS  
Justice of the Supreme Court

Motion Date: 5-3-2018  
Motion Sequence.: 001:MG

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR STRUCTURED ASSET  
INVESTMENT LOAN TRUST MORTGAGE  
PASS-THROUGH CERTIFICATES, SERIES  
2006-BNC1,

LEOPOLD & ASSOCIATES, PLLC  
By Richard O'Brien, Esq.  
Attorneys for Plaintiff  
80 Business Park Drive  
Suite 110  
Armonk, New York 10504

Plaintiff,

-against-

NELSON MARTY; EQUITABLE ASCENT  
FINANCIAL LLC; CLERK OF SUFFOLK  
COUNTY TRAFFIC & PARKING  
VIOLATIONS AGENCY; CCU LLC; "JOHN  
DOE#1" through "JOHN DOE #12, the last  
twelve names being fictitious, parties intended  
being possible tenants or occupants of premises,  
and corporations, other entities or persons who  
claim, or may claim, a lien against the premises,  
described in the complaint,

YOUNG LAW GROUP, PLLC  
By Ivan E. Young, Esq.  
80 Orville Drive, Suite 100  
Bohemia, New York 11716

Defendants.

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Upon consideration of the (1) Notice of Motion, affidavit, affirmation, and memorandum of law on behalf of defendant Nelson Marty ["the defendant"], all dated April 11, 2018, and supporting exhibits; (2) Affirmation in Opposition by attorney for plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-BNC1 ["the plaintiff"], dated April 26, 2018, and supporting exhibits; and (3) the defendant's Reply Memorandum of Law dated May 2, 2018, it is

**ORDERED** that the defendant's motion for an order dismissing the complaint as time-barred is granted; and it is further

**ORDERED** that the Notice of Pendency filed with the clerk of the court against property known as 67 Beach Lane, Coram, Suffolk County, parcel identification number Section: 452.00 Block: 03.00 Lot: 043.000, is cancelled, and it is further

**ORDERED** that, if applicable, within thirty (30) days of the entry date of this Order, notice pursuant to CPLR §8019(c) with a copy of the order shall be served upon the County Clerk by the defendant, along with payment of any required fees; and it is further

**ORDERED** that defense counsel shall serve a copy of this order upon the attorneys for the plaintiff pursuant to CPLR 2103(b) (1), (2), (3), or (6) and by first class mail upon any other party entitled to notice within thirty days of entry of the order.

A prior residential foreclosure action entitled *U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-BNC1, Plaintiff, against Nelson Marty, Defendant*, Index Number 2904-2010, was commenced on January 22, 2010 [hereafter “the 2010 action”]. The complaint in the 2010 action declared the plaintiff’s election to accelerate the subject mortgage. The 2010 action was dismissed as abandoned pursuant to CPLR 3215(c) by Order of this Court dated September 6, 2017, and entered on September 15, 2017 [“the dismissal order”]. The plaintiff did not move to renew or reargue the order dismissing the 2010 action, nor did it take an appeal from the dismissal order. By a separate order in the 2010 action dated December 13, 2017, the branch of the plaintiff’s motion to discontinue the action was denied as moot, the action already having been dismissed, and that branch of the plaintiff’s motion to cancel any lis pendens filed against the subject property was granted.

The present foreclosure action involving the same plaintiff and mortgagors was commenced on March 6, 2018, more than eight years after the subject mortgage was accelerated by commencement of the 2010 action. The affidavit of service e-filed by the plaintiff attests that the defendant was served by the affix and mail method of service at his dwelling place pursuant to CPLR 308(4). The affidavits of service (NYSCEF Dkt. Nos. 11, 14), aver that the affixing and the mailing service components required by CPLR 308 (4), respectively, took place on March 14, 2018, within the six months of entry of the order dismissing the action on September 15, 2017. The affidavits of service were e-filed on the same date. The defendant moves by notice of motion dated April 11, 2018, to dismiss the complaint as time-barred pursuant to CPLR 3211 (a)(5).

“To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired” (*U.S. Bank N.A. v. Gordon*, 158 AD3d 832, 834–835, 72 NYS3d 156 [2d Dept 2019] [internal quotation marks omitted]; see *Campone v. Panos*, 142 AD3d 1126, 1127, 38 NYS3d 226 [2d Dept 2016]; *Stewart v. GDC Tower at Greystone*, 138 AD3d 729, 30 NYS3d 638 [2d Dept 2016]). “If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period” (*U.S. Bank N.A. v. Gordon*, 158 AD3d at 835, 72 NYS3d 156 [internal quotation marks omitted]; *Bank of New York Mellon v. Craig*, 169 AD3d 627, 628, 93 NYS3d 425, 427 [2d Dept 2019]).



Actions to foreclose upon a mortgage are governed by a six-year statute of limitations (*see* CPLR 213[4]; *Milone v. U.S. Bank N.A.*, 164 AD3d 145, 83 NYS3d 524 [2d Dept 2018]). 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 (*see Nationstar Mtge., LLC v. Weisblum*, 143 AD3d 866, 867, 39 NYS3d 491 [2d Dept 2016]; *Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982, 943 NYS2d 540 [2d Dept 2012]; *Wells Fargo Bank, N.A. v. Cohen*, 80 AD3d 753, 754, 915 NYS2d 569 [2d Dept 2011]; *Loiacono v. Goldberg*, 240 AD2d 476, 477, 658 NYS2d 138 [2d Dept 1997]). Once a mortgage debt is accelerated, however, the statute of limitations begins to run on the entire debt (*see Amrusi v. Nwaukoni*, 155 AD3d 814, 65 NYS3d 62 [2d Dept 2017]; *Stewart Tit. Ins. Co. v. Bank of N.Y. Mellon*, 154 AD3d 656, 659, 61 NYS3d 634 [2d Dept 2017]).

Here, the parties do not dispute that the six-year statute of limitations began to run on January 22, 2010, when the plaintiff accelerated the mortgage debt by commencing the 2010 action (*see Milone v. US Bank Nat'l Ass'n*, 164 AD3d 145, 152, 83 NYS3d 524, 529 [2d Dept 2018]; *Amrusi v. Nwaukoni*, 155 AD3d at 817). Neither party has offered evidence to contradict the presumption that the plaintiff here and in the 2010 action had both standing and the authority to accelerate the mortgage in 2010 (*see U.S. Bank N.A. v. Gordon*, 158 AD3d 832, 72 NYS3d 156 [2d Dept 2018]).<sup>1</sup> Moreover, since the plaintiff did not commence this action until March 6, 2018, more than six years after the acceleration, the defendant sustained his initial burden of demonstrating, *prima facie*, that this action is untimely (*see U.S. Bank N.A. v. Martin*, 144 AD3d 891, 891–892, 41 NYS3d 550 [2d Dept 2016]).

In opposition to the defendant's *prima facie* showing, the plaintiff maintains that pursuant to CPLR 205(a), the instant action was timely because it was commenced within six months of the dismissal of the 2010 action. The plaintiff calculates the six month period as running from December 13, 2017, the date of the order cancelling the *lis pendens* in the 2010 action, rather than September 15, 2017, the date of entry of the dismissal order.

The savings provision of CPLR 205(a) provides:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely

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<sup>1</sup> Although the plaintiff's affirmation in opposition (at ¶6), makes a single reference to an affidavit evidencing that the plaintiff in the 2010 action lacked standing, and thus, authority to accelerate the mortgage, in opposition, plaintiff has attached no such affidavit or any documentary proof disputing the plaintiff's standing to commence the 2010 action (*see 21st Mortg. Corp. v. Adames*, 153 AD3d 474, 60 NYS3d 198 [2d Dept 2017])[commencement of prior action was ineffective to constitute valid exercise of option to accelerate debt since the plaintiff in prior action did not have authority to accelerate debt or sue to foreclose at that time].



commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

For purposes of CPLR 205(a), the commencement of the six-month period begins when the first action is finally terminated, generally when all appeals as of right have been exhausted (*see Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 519, 806 NYS2d 453, 840 NE2d 565 [2005]; *Lehman Bros. v. Hughes Hubbard & Reed*, 92 NY2d 1014, 1016, 684 NYS2d 478, 707 NE2d 433 [1998]; *Bank of New York Mellon v. Slavin*, 156 AD3d 1073, 1074, 67 NYS3d 328, 331 [3d Dept 2017]). Here there was no appeal from the dismissal order. If there was no appeal, the 2010 action is considered terminated for purposes of CPLR 205(a), upon the entry of the order dismissing the action on September 15, 2017 (*Ross v. Jamaica Hosp. Med. Ctr.*, 122 AD3d 607, 608, 996 NYS2d 118, 119 [2d Dept 2014]). Contrary to the plaintiff's argument, the order cancelling the lis pendens dated December 13, 2017, did not extend the date of the termination of the action for purposes of CPLR 204(a) as the cancellation was a mere ministerial act (*see CPLR 6514 [e]*; *see also Burns v. Pace Univ.*, 25 AD3d 334, 335, 809 NYS2d 3, 5 [1<sup>st</sup> Dept 2006]). Rather, the order dismissing the complaint terminated the action and its entry on September 15, 2017, started the clock on the six month savings provision of CPLR 205(a). Thus, assuming CPLR 205(a) is otherwise available, commencement of the action and service on the defendant on March 14, 2018, would otherwise be timely (*see Silber v. Stein*, 287 AD2d 494, 495, 731 NYS2d 227, 229 [2d Dept 2001], *citing Pyne v. 20 E. 35 Owners Corp.*, 267 AD2d 168, 700 NYS2d 450 [1<sup>st</sup> Dept 1999]; *see also Quinones v. Neighborhood Youth & Family Servs., Inc.*, 71 AD3d 1106, 1106, 896 NYS2d 908 [2d Dept 2010]).

As to the requirements of CPLR 205 (a), there is no dispute that this action is based on the same occurrence as the 2010 action, namely, the default on the payment obligations under the note and mortgage. There is also no dispute that the 2010 action was timely commenced, the very act of commencing the 2010 action having triggered the period of limitations. However, the parties disagree as to whether the dismissal of the complaint in the 2010 action as abandoned pursuant to CPLR 3215 (c) amounted to a "neglect to prosecute", one of CPLR 205(a)'s exceptions, thereby depriving the plaintiff of the benefit conferred by CPLR 205(a).

The dismissal order stated that from the time the defendant was served in the action until four years later when new counsel was substituted for the plaintiff, the 2010 action lay dormant. Once incoming plaintiff's counsel was substituted on or about May 7, 2014, a further period of fourteen months elapsed before the plaintiff moved for leave to enter a default judgment and an order of reference. This Court dismissed the action, finding that the plaintiff made no showing to justify the five and a half year delay in moving for a default judgment. Plaintiff's neglect was not "a one-time failure" (*compare Bank of New York Mellon v. Slavin*, 156 AD3d 1073, 1074, 67 NYS3d 328, 331 [3d Dept 2017]), but amounted to a general pattern of delay in prosecuting the 2010 action for a period in excess of five years. In this Court's view and under these particular facts, CPLR 205(a) is not available to the plaintiff to extend the period of limitations for this action.

The facts and holding in *Wells Fargo Bank, N.A. v. Eitani* are distinguishable (*Wells Fargo Bank, N.A. v. Eitani*, 148 AD3d 193, 198, 47 NYS3d 80, 84 [2d Dept], *appeal dismissed*, 29 NY3d 1023, 77 NE3d 892 [2017]). In *Eitani*, the plaintiff had obtained an order of reference based on Eitani's default in answering the complaint (*Eitani*, 148 AD3d at 196). Further, the prior action in *Eitani* was dismissed "without costs or prejudice", the order simply stating that the plaintiff failed to proceed to entry of judgment within one year of default." *Id.* at 198. The dismissal order in *Eitani* did not include any findings of specific conduct demonstrating a "general pattern of delay in proceeding with the litigation." *Id.* Rather, the case was one of a number of cases dismissed on a routine clearing of the docket. *Id.* at 196.

In contrast, the dismissal order here described a five-and-a-half year period where the plaintiff did nothing to prosecute the action. Even after a change in counsel four years after commencement, new counsel delayed more than one year before filing an R.J.I. and moving for a default judgment. This pattern of delay was chronicled in the dismissal order in the prior action, distinguishing these facts from the facts in *Eitani*.

Since the Court considers the five-and-one-half year delay as a neglect to prosecute, it follows that the plaintiff was not entitled to the six month extension of CPLR 205(a). The defendant's motion to dismiss the complaint based on the expiration of the statute of limitations is granted.

DATED: May 24, 2019

  
C. RANDALL HINRICHS, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION