| **Critchlow v HSBC Bank USA N.A.** |
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| 2020 NY Slip Op 34374(U) |
| December 9, 2020 |
| Supreme Court, Kings County |
| Docket Number: 522001/2017 |
| Judge: Lara J. Genovesi |
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 9th day of December 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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EDITH CRITCHLOW, Index No.: 522001/2017

Plaintiff, DECISION & ORDER

-against-

HSBC BANK USA N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-3,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | NYSCEF Doc. No.: |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 8-17 |
| Opposing Affidavits (Affirmations) | 20-23 |
| Reply Affidavits (Affirmations) | 25 |

***Introduction***

Defendant, HSBC Bank, USA N.A., as trustee for the registered noteholders of Renaissance Home Equity Loan Trust 2006-3, moves by notice of motion, sequence

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number one, pursuant to CPLR § 3211(a)(3), (7) & (10) to dismiss plaintiff's complaint. Plaintiff, Edith Critchlow, opposes this application.

***Background & Procedural History***

Plaintiff commenced the instant action pursuant to RPAPL Article 15 to quiet title of the premises located at 2171 Strauss Street, Brooklyn, New York, 11212 and to cancel/discharge the mortgage between Je'reivien L. Kayo and HSBC Bank. On July 27, 2006, Je'reivien L. Kayo obtained a loan in the amount of $558,000.00 from Fremont Investment & Loan. A mortgage was executed in the amount of $558,000.00 for the premises by MERS as nominee for Delta Funding Corp. On December 13, 2007, the mortgage was assigned to HSBC. Thereafter, HSBC commenced a foreclosure action against Kayo, Critchlow, among others (index number 45642/2007).

HSBC moved for summary judgment in the 2007 foreclosure action. In the court's decision and order dated May 25, 2011, the Hon. Martin Solomon held that

> The motion for a judgment of foreclosure must be denied. The assignment of the mortgage to plaintiff purportedly executed and acknowledged in the state of Florida is not accompanied by a certificate of conformity. The assignment is not in recordable form and may not be used as evidence. (See RPL 299-a(c); See also CPLR 2309(c)). Without the assignment, plaintiff is unable to establish a prima facie case.

(NYSCEF Doc. # 13).

Thereafter, on November 7, 2011, HSBC voluntarily discontinued the action and cancelled the lis pendens (*see* NYSCEF Doc. # 14).

On January 21, 2014, Kayo executed a deed conveying the property to plaintiff Edith Critchlow for $5,800.00 consideration. The instant action was commenced on November 13, 2017, seeking to quiet title and cancel the mortgage between Kayo and HSBC. Kayo is not a named defendant in this action. An action to foreclose the property was commenced by HSBC on June 29, 2018 (index number 513463/2018).

***Defendant's Contentions***

Defendant contends that plaintiff is precluded from commencing the instant action as the mortgage was not accelerated in 2007, and thus the statute of limitations has not expired. Defendant maintains that commencement of 2007 action is not clear and convincing evidence of acceleration. Judge Solomon's denial of summary judgment in the 2007 action establishes HSBC's lack of standing. Where there is no standing, there can be no authority to accelerate the mortgage. Defendant further avers that even if the debt was accelerated, HSBC's voluntary discontinuance was an affirmative act of deceleration. Defendant further contends that the complaint should be dismissed for plaintiff's failure to sue Kayo and that plaintiff lacks the capacity to bring the instant action as she is not a party to the mortgage.

***Plaintiff's Contentions***

As an initial matter, plaintiff contends that defendant's motion is procedurally improper pursuant to rule 202.8(c) of the Uniform Rules of Court, because defendant set forth arguments in affirmation rather than a memorandum of law or brief. Plaintiff further contends that Kayo is not a necessary party to this action and even if he is the

correct remedy would be to direct plaintiff to join him. Plaintiff avers that the statute of limitations has expired and thus plaintiff has capacity to bring the instant lawsuit.

Additionally, although plaintiff did not cross-move, she "respectfully suggests that, in the event that, upon a search of the record, summary judgment is not granted to her, this action be stayed pending the determination of the bar claim action, pursuant to CPLR 2201, or set for a joint trial, given the commonality of issues, i.e., the enforceability of the mortgage" (NYSCEF Doc. # 20, Affirmation in Opposition at ¶ 5; *see also* NYSCEF Doc. # 21, Memorandum of Law at p 4 of 9).

***Discussion***

Defendant moves pursuant to CPLR § 3211 to dismiss plaintiff's complaint. CPLR § 3211 provides, *inter alia*,

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> 3. the party asserting the cause of action has not legal capacity to sue; or
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> 7. the pleading fails to state a cause of action; or
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> 10. the court should not proceed in the absence of a person who should be a party.

***CPLR § 3211(a)(3) – Plaintiff lacks capacity to sue***

Defendant moves to dismiss because plaintiff lacks capacity as she is not a party to the mortgage and therefore cannot raise any defenses exclusive to the borrower, such as the statute of limitations defense. "[O]nce the applicable statute of limitations for the commencement of an action to foreclose a mortgage has expired, RPAPL 1501(4)

expressly permits 'any person having an estate or interest in the real property subject to such encumbrance' to maintain an action to secure the cancellation and discharge of record of such encumbrance (*Prand Corp. v. Gardiner*, 176 A.D.3d 1127, 111 N.Y.S.3d 393 [2 Dept., 2019], quoting RPAPL § 1501[4]; *see also Vitolo v. U.S. Bank Nat'l Ass'n*, 182 A.D.3d 630, 120 N.Y.S.3d 833 [2 Dept., 2020]). Here, defendant failed to establish how plaintiff, as the deeded owner of the property, has no capacity to maintain an action to discharge and cancel the mortgage between HSBC and Kayo pursuant to RPAPL § 1501(4). Accordingly, this branch of defendant's motion is denied.

***CPLR § 3211(a)(10) – Failure to include necessary parties***

Defendant moves to dismiss plaintiff's complaint based on plaintiff's failure to include Kayo as a defendant in this action. As stated above, plaintiff has capacity to maintain this action, as she is a deeded owner and has an interest in the real property. Defendant has failed to establish how Kayo is a necessary party. However, even assuming that Kayo is a necessary party, where a necessary party is subject to the jurisdiction of the court, the court should order the party summoned rather than dismissing the complaint for failure to join that party (*see Mulford Bay, LLC v. Rocco*, 186 A.D.3d 1520, 131 N.Y.S.3d 84 [2 Dept., 2020], citing *Windy Ridge Farm v. Assessor of Town of Shandaken,* 11 N.Y.3d 725, 864 N.Y.S.2d 794 [2008]; *see also* CPLR 1001[b]). Accordingly, this branch of defendant's motion is denied.

***CPLR § 3211(a)(7) - Failure to state a cause of action***

Defendant moves to dismiss the complaint for failure to state a cause of action. "When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard

is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bennett v. State Farm Fire & Cas. Co.*, 161 A.D.3d 926, 78 N.Y.S.3d 169 [2 Dept., 2018], quoting *Sokol v Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2 Dept., 2010]). "[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, 78 N.Y.S.3d 129 [2 Dept., 2018], citing *Leon v Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]; *see also Mirro v. City of New York,* 159 A.D.3d 964, 74 N.Y.S.3d 356 [2 Dept., 2018]).

However, defendant herein correctly argues that where evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted to one for summary judgment, the court must consider whether plaintiff has a cause of action and not merely whether plaintiff has stated one. The complaint should not be dismissed unless defendant can conclusively establish that the facts alleged by plaintiff are false (*see Bonavita v. Gov't Employees Ins. Co.,* 185 A.D.3d 892, 127 N.Y.S.3d 577 [2 Dept., 2020], quoting *Graphic Arts Mut. Ins. Co. v. Pine Bush Cent. Sch. Dist.,* 159 A.D.3d 769, 73 N.Y.S.3d 73 N.Y.S.3d 241 [2 Dept., 2018]).[1] Here, defendant failed to establish that plaintiff does not have a cause of action.

[1] "Where 'evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate'".

Defendant first contends that HSBC, as plaintiff in the prior foreclosure action, did not have standing to foreclose and therefore, the commencement of the 2007 action is insufficient to accelerate the mortgage and begin the statute of limitations.

> Pursuant to RPAPL 1501(4), a person having an estate or interest in real property subject to a mortgage may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired (*see* RPAPL 1501[4]; *Ditmid Holdings, LLC v. JPMorgan Chase Bank, N.A.,* 180 A.D.3d 1002, 1003, 120 N.Y.S.3d 393; *Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 151, 83 N.Y.S.3d 524). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). " 'The law is well settled that, 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' " (*Ditmid Holdings, LLC v. JPMorgan Chase Bank, N.A.,* 180 A.D.3d at 1003, 120 N.Y.S.3d 393, quoting *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161).

(*Daldan, Inc. v. Deutsche Bank Nat'l Tr. Co.*, -- A.D.3d --, 2020 N.Y. Slip Op. 06749 [2 Dept., 2020]).

> "An acceleration of a mortgage debt may occur in different ways. One way is in the form of an acceleration notice transmitted to the borrower by the creditor or the creditor's servicer" (*Milone v. U.S. Bank N.A.,* 164 A.D.3d 145, 152, 83 N.Y.S.3d 524). "[Another] form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" (*id.* at 152). "[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so"

(*Mejias v. Wells Fargo N.A.*, 186 A.D.3d 472, 129 N.Y.S.3d 523 [2 Dept., 2020]).

"[T]he commencement of a foreclosure action by a plaintiff lacking standing does not serve to accelerate the debt" (*Onewest Bank FSB v. PSP-NC, LLC*, 181 A.D.3d 692, 121 N.Y.S.3d 288 [2 Dept., 2020], citing *Herzl Dev. Grp., LLC v. Fed. Nat'l Mortg. Ass'n*, 175 A.D.3d 665, 108 N.Y.S.3d 197 [2 Dept., 2019]).

Here, the 2007 foreclosure action was not dismissed for lack of standing. Rather, it was discontinued after summary judgment was denied. Contrary to defendant's contention, Justice Solomon did not make an affirmative ruling that HSBC lacked standing to bring the foreclosure action. Justice Solomon ruled that the assignment provided is insufficient to establish HSBC's standing as it was missing a certificate of conformity. It is undisputed that HSBC was assigned the mortgage on July 27, 2006 (*see* NYSCEF Doc. # 11). Rather, the court merely held that HSBC failed to provide proof sufficient to make the prima facie showing required for summary judgment. HSBC's failure to establish their standing is not a ruling that standing doesn't exist. As the action was voluntarily discontinued thereafter, no affirmative ruling on HSBC's standing was made.[2] Accordingly, defendant failed to establish that the mortgage was never accelerated by the commencement of the foreclosure action.

Defendant further contends that even if the mortgage was validly accelerated in the prior action, the voluntary withdrawal of the prior foreclosure action constitutes a valid deceleration of the mortgage debt. The Appellate Division, Second Department, "has repeatedly held that a lender's mere act of discontinuing an action, without more,

[2] This Court notes that plaintiff commenced a second action to foreclose, currently pending in FRP-1.

does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt" (*Christiana Tr. v. Barua*, 184 A.D.3d 140, 125 N.Y.S.3d 420 [2 Dept., 2020], *lv. denied,* 35 N.Y.3d 916, 157 N.E.3d 136 [2020], citing *Milone v. US Bank Nat'l Ass'n*, 164 A.D.3d 145, 83 N.Y.S.3d 524 [2 Dept., 2018], *lv. dismissed,* 34 N.Y.3d 1009, 138 N.E.3d 1088 [2019]).

> The reason for requiring that a valid de-acceleration requires more than a bare discontinuance of a foreclosure action is that the full balance of a mortgage debt cannot be sought without an acceleration, whereas the voluntary discontinuance of a foreclosure action may be occasioned for any number of different reasons, including those that have nothing to do with an intent to revoke the acceleration. A bare discontinuance does not disclose its underlying reasons nor say anything about the discontinuing party's intent to de-accelerate the full debt.
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> . . .
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> [T]he acceleration of a debt in a residential mortgage foreclosure action survives a simple discontinuance of the action, because the right to exercise an acceleration independently arises from the provisions of the note between the parties, and not from the existence of the potential judicial remedies of the court. In other words, the mere discontinuance of an action is not tantamount to a withdrawal of the acceleration itself, but merely withdraws the prayer that the court assist the lender in collecting the accelerated amount.

(*Christiana Tr. v. Barua*, 184 A.D.3d 140, *supra*).

In the instant case, the 2007 foreclosure action was voluntarily discontinued after summary judgment was denied by Justice Solomon. Contrary to defendant's contention, the discontinuance alone does not decelerate the mortgage and toll the statute of limitations. The discontinuance filed in the 2007 foreclosure action is silent as to

deceleration of the mortgage (*see* NYSCEF Doc. # 14). Here, unlike the facts in *Milone,* there is no evidence that a de-acceleration letter was sent that clearly and unambiguously demanded resumption of monthly payments (164 A.D.3d 145, *supra*).

Accordingly, that portion of defendant's motion to dismiss for failure to state a cause of action is denied.

***Conclusion***

Defendant's motion to dismiss is denied, in its entirety. Plaintiff's request, in opposition, for this Court to search the record and grant plaintiff summary judgment or in the alternative, to stay the instant action or for a joint trial with the 2018 foreclosure action is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

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