SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,

Plaintiff,

- v -

CASSANDRA FOX, JPMORGAN CHASE BANK, N.A., BOARD OF MANAGERS OF THE RUPPERT YORKVILLE TOWERS CONDOMINIUM, JOHN DOE NUMBER ONE JOHN DOE NUMBER TEN

Defendant.

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INDEX NO. 850160/2021

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 75

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclosure on a mortgage on residential real property located at 1619 3rd Avenue, Unit 17J, New York, New York. The mortgage at issue was given by Defendant Cassandra C. Fox ("Fox") to secure a loan of $417,000.00 that was documented by a note dated April 7, 2008. Defendant Fox apparently first defaulted on this loan on August 1, 2010. The purported holder of the mortgage at that time commenced an action to foreclose by filing a summons and complaint on December 29, 2010 (*see* NY Cty Index No 810136/2010). That action was actively litigated for some 7 years and included two summary judgment motions and several hearings. Plaintiff filed a note of issue in 2018 and by order dated August 14, 2019, Justice Deborah Kaplan referred the matter to Justice Mary V. Rosado for a trial to be completed before the end of 2019. Justice Rosado held a pre-trial conference on October 22, 2019 and the parties consented to a trial date of December 16, 2019.

On that date, counsel for both parties appeared and a colloquy on the record was held. Plaintiff's counsel appeared and informed the Court that they could commence, but not complete a trial that day as two of their three witnesses were unavailable. Plaintiff's counsel asserted to the Court that the witness unavailability was the result of "law office failure". Defendant's counsel orally requested the case be dismissed and Justice Rosado granted the motion on the record. As a reason for the dismissal, Justice Rosado noted it was because Plaintiff was "not moving forward". Plaintiff's request to commence the trial with the witness that was present and for a continuance to produce the other witnesses was denied.

Justice Rosado issued an order dated December 17, 2019 dismissing Plaintiff's complaint which stated, virtually in its entirety, as follows:

> This action is dismissed for failure of the Plaintiff One West Bank, FSB to litigate its case at trial as scheduled for December 16, 2019. Plaintiff was aware of the trial date after a pre-trial conference was held on October 22, 2019 pursuant to an Order dated August 14, 2019 (Kaplan, J.). Counsel from Plaintiff's firm appeared on that date and the trial date, December 16, 2019, was set upon consent of the parties. On the trial date, Plaintiff's counsel appeared, by a different attorney from the same firm, and requested an adjournment due to law office failure. Plaintiff's counsel claimed that the attorney who appeared from his office for the pre-trial conference failed to follow proper office protocol to ensure that all necessary witnesses would be available for trial. As such, Plaintiff's counsel only had one of three witnesses needed to prove its case. However, during the pre-trial Plaintiff's counsel advised the Court that she had only one witness for trial. On the date of trial, he claimed that he had two additional unavailable witnesses. This case has been languishing since 2010. Accordingly, the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

By decision dated February 9, 2021, the Appellate Division, First Department affirmed Justice Rosado's decision holding as follows:

> The court providently dismissed this foreclosure action for failure of plaintiff to litigate its case at trial as scheduled for December 16, 2019 (*see* 22 NYCRR 202.27 [b]; *see also Campos v New York City Health and Hosps. Corp.*, 307 AD2d 785, 763 N.Y.S.2d 292 [1st Dept 2003]). The court properly rejected plaintiff's unsubstantiated argument of law office failure as the reason it was unable to make out a prima facie case at trial unless granted an adjournment or continuance (*see also Mazzola v Village Hous. Assoc., LLC*, 164 AD3d 668, 669, 83 N.Y.S.3d 127 [2d Dept 2018]). Given plaintiff's failure to diligently prepare for trial, the court providently denied its request for an adjournment or continuance (*see generally Matter of Global Liberty Ins. Co. v Perez*, 168 AD3d 592, 593, 93 N.Y.S.3d 18 [1st Dept 2019]).
>
> (*Onewest Bank, FSB v Fox*, 191 AD3d 481 [1st Dept 2021].

Thereafter, Plaintiff's motion to vacate the dismissal of the 2010 action was denied by order of Justice Rosado dated March 31, 2021. Plaintiff again appealed, but Defendant Fox's motion to dismiss the appeal was granted by decision of the Appellate Division, First Department dated August 26, 2021. In the interim, Plaintiff commenced this action on June 9, 2021 with the filing of a summons and complaint. Defendant Fox served and filed an answer containing eight affirmative defenses, including expiration of the statute of limitations, and a counterclaim pursuant to Article 15 of the Real Property Actions and Proceedings Law.

Now, Defendant Fox moves to dismiss pursuant to CPLR §3211[a][5], for summary judgment on her counterclaim and to cancel the notice of pendency. Plaintiff opposed the motion.

On a motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund*

Socy., FSB v Alam, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). An action to foreclose on a mortgage is governed by a six-year statute of limitations (CPLR §214[6]; *Citimortgage, Inc. v Dalal*, 187 AD3d 567 [2d Dept 2020]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). "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" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). The commencement of an action to foreclose on a mortgage can constitute an unequivocal act of accelerating the mortgage note (*see Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

The commencement of the 2010 action was an unequivocal act of acceleration (*see eg HSBC Bank United States, N.A. v Hochstrasser*, 193 AD3d 915 [2d Dept 2021]). Among other things, the complaint expressly stated that "[p]ursuant to the terms of the note and mortgage, the plaintiff has elected and does hereby elect to declare the entire principal balance to be due and owing." Based upon the foregoing, Defendant Fox established that the statute of limitations in this matter accrued on December 29, 2010 and that more than six-years transpired before the action was dismissed.

In opposition, Plaintiff posits that the action was timely commenced based upon under the savings provision of CPLR §205[a]. That section permits a plaintiff to commence a new action based upon the same transaction within six months of the conclusion of the prior action where it "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 on the merits" (CPLR §205[a]). "The statute is not technically a 'toll,' as it does not stop the underlying statute of limitations from running, but is instead a six-month 'extension' of the time for commencing the new action when its qualifying circumstances are present" (*Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]).

Plaintiff's assertion that the exclusion from CPLR §205[a] of cases dismissed for neglect to prosecute is limited to only those instances when CPLR §3216 is applied is without merit (*see Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 520 [2005]). CPLR §205[a] expressly provides that dismissal for neglect to prosecute the action may be "made pursuant to rule thirty-two hundred sixteen of this chapter *or otherwise*" (emphasis added), provided the Court "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" (*see also Sokoloff v Schor*, supra at 133; *Marrero v Nails*, 114 AD3d 101 [2d Dept 2013]; *Berman v Szpilzinger*, 200 AD2d 367 [1st Dept 1994]). Similarly, Plaintiff's assertion that a dismissal pursuant to Uniform Rules for Trial Courts §202.27[b][22 NYCRR] cannot constitute neglect to prosecute is unsupported (*see Marrero v Nails*, supra at 110 ["Accordingly, the dismissal of an action pursuant to 22 NYCRR 202.27 (b) may, under appropriate circumstances, constitute a dismissal for neglect to prosecute"]).

The basis of dismissal of Plaintiff's 2010 foreclosure action, failure to proceed to trial on a final date, is definitively neglect to prosecute (*see Laffey v New York*, 72 AD2d 685 [1st Dept 1979], *aff'd* 52 NY2d 797 [Dismissal of action was for neglect to prosecute where Plaintiff announced "ready to go to trial, but . . . had no witnesses available and could not 'actually proceed to trial'"]; *see also Keel v*

Parke, Davis & Co., 72 AD2d 546 [2d Dept 1979]; *Wright v. L. C. Defelice & Son, Inc.*, 22 AD2d 962 [2d Dept 1964].

The prior action was dismissed by Justice Rosado on the appointed trial date because Plaintiff's counsel therein was not prepared to try the case to completion. The finality of the trial date and the reason therefore was made patently apparent to the parties at the pre-trial conference held two months earlier. Justice Rosado made clear both on the record and in her written decision the basis for her dismissal was "failure of the Plaintiff . . . to litigate its case at trial." Justice Rosado also stated that the case was "languishing since 2010". Further, Plaintiff's request that the dismissal be "without prejudice" was rebuffed by Justice Rosado (*cf.* Deutsche *Bank Natl. Trust Co. v Baquero*, 192 AD3d 660 [2d Dept 2021]). As explained by the Court of Appeals:

> Where a case is dismissed for [neglect to prosecute], it is not acceptable to permit plaintiffs to start all over again, after the statute of limitations has expired. To countenance that result would be to convert the dismissal itself into just one more opportunity to try again . . .

(*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, supra at 521).

Accordingly, CPLR §205[a] is inapplicable herein and the branch of Defendant Fox's motion for summary judgment dismissing Plaintiff's complaint as barred by the statute of limitations is granted.

As to the branch of Defendant Fox's motion for summary judgment on its counterclaim, "[p]ursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced" (*1081 Stanley Ave., LLC v Bank of N.Y. Mellon Trust Co., N.A.*, 179 AD3d 984, 986 [2d Dept 2020]). Accordingly, based on the foregoing determination of the Court, Defendant Fox established *prima facie* entitlement to judgment as a matter of law on her counterclaim. No issue of fact exists.

Accordingly, it is

ORDERED that Defendant Cassandra C. Fox's motion for summary judgment is granted and the Plaintiff's complaint is dismissed, and it is

ORDERED that Defendant Cassandra C. Fox's motion for summary judgment on her counterclaim is granted, and it is

ORDERED that the mortgage dated April 7, 2008 encumbering 1619 3rd Avenue, Unit 17J, New York, New York (CRFN No.: 2008000168013) is cancelled and discharged and the New York City Department of Finance, Office of the City Register is directed to amend its records to reflect this cancellation and discharge, and it is

ORDERED that the notice of pendency filed in the New York County Clerk's Office filed against the real property located at 1619 3rd Avenue, Unit 17J, New York, New York (Block 1536, Lot 1546) is discharged, and the Clerk shall note same in its records.

2/15/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

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