

<b>Kelly v U.S. Bank Trust N.A.</b>
2022 NY Slip Op 30984(U)
March 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 514879/2019
Judge: Devin P. Cohen
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Supreme Court of the State of New York  
County of Kings

Index Number 514879/2019  
Seqs. 002, 003

Part 91

**DECISION/ORDER**

\_\_\_\_\_  
CATHERINE KELLY,

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

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed. . . .	<u>      </u>
Answering Affidavits . . . . .	<u>2, 3</u>
Replying Affidavits . . . . .	<u>3</u>
Exhibits . . . . .	<u>      </u>
Other . . . . .	<u>      </u>

U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF AMERICAN HOMEOWNER PRESERVATION TRUST SERIES 2014A, 201 STREET ESTATES INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, THE STATE OF NEW YORK, AND "JOHN DOE #1" THROUGH "JOHN DOES #10", THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFFS INTENDED AS PERSONS OR ENTITIES HAVING SOME CLAIM OR INTEREST IN THE PREMISES DESCRIBED IN THE COMPLAINT,

Defendants.

Upon the foregoing papers, defendant U.S. Bank Trust National Association as Trustee of American Homeowner Preservation Trust Series 2014A’s (“U.S. Bank”) motion for summary judgment (Seq. 002), and plaintiff’s cross-motion for a stay (Seq. 003) are decided as follows:

**Factual Background and Procedural History**

Plaintiff Catherine Kelly commenced this action, pursuant to RPAPL § 1501(4), to cancel a certain mortgage held by defendant U.S. Bank. This mortgage was originally issued to Catherine Kelly, Fannie Kelly, and Mabel Kelly by Associates Consumer Discount Company, Inc. The mortgage was ultimately transferred to defendant U.S. Bank. In its motion papers, U.S. Bank provides copies of the mortgage documents and assignments.

When Catherine Kelly and others allegedly defaulted on the mortgage, the mortgagee at

that time commenced a foreclosure action. By order, dated October 23, 2015, the court (Boddie, J.) subsequently granted the mortgagee an order of reference upon Ms. Kelly's default. Ms. Kelly moved to vacate the order of reference, but the court (Sweeney, J.) denied the motion by order dated July 8, 2016. However, by order, dated February 23, 2017, the court (Knipel, J.) thereafter conditionally dismissed the action for failure to move for default within a year. On June 28, 2017, the court dismissed the foreclosure action.

As a result of the dismissal of the foreclosure action, plaintiff commenced this action to cancel the mortgage on the basis that any attempt to commence a new foreclosure action would be barred by the statute of limitations. By order dated February 20, 2020, the court (Knipel, J.) in the underlying foreclosure action vacated its earlier dismissal order and restored the action. Plaintiff has appealed this order, and the appeal is pending.

### Analysis

U.S. Bank moves for summary judgment to dismiss plaintiff's claim to cancel the mortgage. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

RPAPL § 1501(4) provides that a person having 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" (*BH 263, LLC v Bayview Loan Servicing, LLC*, 175 AD3d 1375, 1376 [2d Dept 2019]). An action on a bond or note secured by a mortgage must be commenced within six years of the

default (CPLR 213[4]).

U.S. Bank correctly argues that, because the mortgage action has been restored, U.S. Bank is not barred by the statute of limitations to commence such an action. Consequently, there would be no legal basis for Ms. Kelly's present action to cancel the mortgage. Ms. Kelly does not contest this directly. Instead, she contends that there is a pending disputed issue of fact about whether the foreclosure action should have remained dismissed or restored, and that the matter is unresolved because it is being reviewed on appeal. Justice Knipel's order is the law of the case and a pending appeal does not per se give rise to a present question of fact.

Ms. Kelly seeks a stay of this case while her appeal is pending. This court has broad discretion to grant or deny a request for a stay (*Chaplin v Natl. Grid*, 171 AD3d 691, 692 [2d Dept 2019]). Here, the court (Boddie, J.) determined that Ms. Kelly defaulted in the foreclosure action and issued an order of reference. The court (Sweeney, J.) later declined to vacate the default. The court (Knipel, J.) subsequently dismissed the action on the basis that the mortgagee had not moved for default, and then vacated that dismissal and restored the action.

At oral argument, Ms. Kelly argued that the mortgagee may have violated Rule 8 of this court's Foreclosure Part Rules, which requires a party to move for judgment of foreclosure and sale within one year of obtaining an order of reference. The rule further mandates dismissal of the action if the party does not comply. It does not appear from the text of the court's February 23, 2017 order that the action was dismissed pursuant to this rule.

U.S. Bank argues in its reply that, even if the action is dismissed, U.S. Bank can reinstate that action pursuant to CPLR 205(a), and so the foreclosure action would remain unbarred by the statute of limitations. CPLR 205(a) permits a party to recommence an action within six months, where the action was dismissed other than by "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". A dismissal pursuant to CPLR 3215(c), for failure to move for default within a year, does not amount to a neglect to prosecute for purposes of CPLR 205(a) where the court does not include any findings of specific conduct showing a pattern of delay (*HSBC Bank USA, N.A. v Janvier*, 187 AD3d 999, 1001 [2d Dept 2020]).

**Conclusion**

For the foregoing reasons, defendant U.S. Bank has established that its foreclosure action is not time-barred, and so its motion for summary judgment (Seq. 002) is granted. Under the circumstances, I do not see a sufficient basis to stay this action, and so plaintiff's motion for a stay (Seq. 003) is denied.

This constitutes the decision and order of the court.

\_\_\_\_\_  
March 15, 2022  
DATE

  
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DEVIN P. COHEN  
Justice of the Supreme Court

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