SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 31M

Justice

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THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2005-60T1 MOTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-60T1,

Plaintiff,

- v -

ADAM P10TCH, LLC,BOARD OF MANAGERS OF THE OCTAVIA CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK COUNTY CLERK, NEW YORK PRESBYTERIAN HOSPITAL, PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER TO WACHOVIA BANK, NATIONAL ASSOCIATION, WORKER COMPENSATION BOARD OF NEW YORK STATE,

Defendants.

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INDEX NO. 850163/2014

MOTION DATE 11/09/2021, 01/20/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 40, 182, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 360, 361, 363

were read on this motion to/for RENEWAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 40, 182, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 363

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Motion sequence numbers 006 and 007 are consolidated for disposition and resolved as follows:

This foreclosure action arises as the result of Daniel Miller's default on a September 26, 2005, mortgage agreement that he signed in connection with his purchase of apartment 6A at 216

East 47th Street in Manhattan. Plaintiff is the assignee of the mortgage. Miller died on March 1, 2009. Around the time of Miller's death, the mortgage payments ceased, and in 2009 plaintiff commenced a foreclosure action, *Bank of New York Mellon v Miller* (Index No. 109741/2009 [the first case]). Plaintiff did not litigate the first case due to its "inability to verify compliance with pre-acceleration notice requirements" (NYSCEF Doc. No. 312, *6). Plaintiff moved to discontinue the first case by way of notice of motion filed May 22, 2014, and on July 8, 2014, the court granted the motion and discontinued the action without prejudice (*id.* at **2-4).

On April 9, 2014, shortly before it moved to discontinue the first case, plaintiff commenced this action, the second foreclosure action, to accelerate the mortgage as of Miller's death, with interest accruing from February 1, 2009 (NYSCEF Doc. No. 313). The complaint asserts that "[t]here is now due and owing on the note and mortgage the following amounts: Principal balance: $732,059.23 Interest Rate: 6.125% Date interest accrues from: February 1, 2009" (*id.*, ¶ 7). The complaint seeks a judgment that calculates the total amount due to plaintiff, a sale of the property by auction, payment to plaintiff from the sale proceeds, and a deficiency judgment for any amount still due after such payment. Finally, it states that "[n]o action was brought to recover any part of the mortgage debt or if any such action is pending final judgment for Plaintiff was not rendered and it is the intent of the Plaintiff to discontinue it" (*id.*, ¶ 13).

The Board of Managers of Octavia Condominium (BOM) held a junior mortgage on apartment 6A. When BOM commenced a foreclosure action (*Bd. of Mgrs. of the Octavia Condominium v Miller*, Index No. 105972/2011 [*BOM*]) on May 24, 2011, BOM and plaintiff stipulated that plaintiff's lien was superior to that of BOM "and that any sale would be subject to the First Mortgage" (NYSCEF Doc. No. 40, **179-180). On August 13, 2012, BOM transferred the property to defendant Adam P10tch LLC (defendant) in a foreclosure sale. Defendant, the

sole bidder, paid $71,711, which was to be paid to plaintiff after deducting the expenses of the sale. The judgment of foreclosure stated that the premises was sold "subject to the lien of the mortgage held by MERS, as nominee for Countrywide Home Loans Inc. dated September 26, 2005 and recorded October 19, 2005 . . . as assigned to [plaintiff] by assignment of mortgage dated April 1, 2009 and recorded May 20, 2010" (*BOM*, Sup Ct, NY County, March 23, 2012, Scarpulla, index No. 105972/2011, *3). Further, from the proceeds of the sale, the Referee was to pay plaintiff any amount due under the mortgage. Defendant, who was aware of these terms, offered plaintiff $550,000 in cash as a full settlement of the lien. Plaintiff rejected the offer.

In December 2014, plaintiff moved to foreclose the mortgage (NYSCEF Doc. No. 35). Defendant cross-moved for dismissal of the action (NYSCEF Doc. No. 45). In its decision, the court found that the affidavit of Therese Pfullmann, the assistant vice president of Residential Credit Solutions, Inc., plaintiff's servicer, attesting that plaintiff held the note and the mortgage before the commencement of this action, along with the affirmation of counsel and copies of the pertinent documents, was sufficient to establish plaintiff's standing. As relevant here, the court rejected defendant's argument that plaintiff did not show that physical delivery of the note preceded the commencement of the action, concluding that "[t]here is no real question that plaintiff has established [timely] possession of the note" (*id.*, *8). The court also rejected as unpersuasive defendant's contention that, even if plaintiff possessed the note before it commenced this action and when it made the motion, plaintiff did not prove it possessed the note on the day it began this lawsuit.

In addition, the decision rejected defendant's position that dismissal was proper under RPAPL § 1301 (3) because of the 3-month overlap between the 2009 action and the one at hand. The court noted that the governing statute, CPLR 3211 (a) (4), allows for the exercise of

discretion (*id.*, * 9, citing *Whitney v Whitney*, 57 NY2d 731, 732 [1982]). The court found that there was no prejudice to defendant or benefit to plaintiff as a result of the brief overlap. The court directed the parties to settle the order.

On January 12, 2017, the court issued the settled order, which also appointed Michael P. Tempesta as Referee to compute the amount due to plaintiff. Defendant appealed the order. The First Department unanimously denied defendant's appeal (*Bank of N.Y. Mellon v Adam P10tch LLC*, 162 AD3d 502 [1st Dept 2018] [*P10tch*]).[1] The First Department explicitly affirmed this court's conclusion that "although a foreclosure action commenced in 2009 was pending at the time this action was commenced, under the circumstances, RPAPL 1301 (3) did not require that this action be dismissed" because the 2009 action "had effectively been abandoned, and was formally discontinued shortly after this action was commenced" (*P10tch*, 162 AD3d at 502-503). The First Department further held that the judgment in *BOM*, the condominium's action, did not extinguish plaintiff's mortgage or its right to pursue its claims in the current action (*id.* at 503).

The referee issued his report on October 29, 2018, and found that $1,297,965.70 was due to plaintiff, and that this amount included interest up to September 1, 2018. Plaintiff moved to confirm the report, and defendant cross-moved for relief related to the accumulation of interest (NYSCEF Doc. Nos. 165, 205 [motion sequence number 004]). Defendant also moved to reargue the court's interim order to the extent that the order sought the submission and consideration of certain documents (NYSCEF Doc. No. 262 [motion sequence number 005]). After the court received a transcript of the referee's hearing and other supplemental materials pursuant to its interim order, the court confirmed the referee's order in large part, finding that

[1] Pursuant to the settled order, the caption was amended to eliminate R. Tara Miller and John Doe as defendants.

$1,234,730.57 was due to plaintiff, including interest through October 29, 2020 (NYSCEF Doc. No. 325).[2]

On December 22, 2020, defendant appealed the October 29 order to the First Department (NYSCEF Doc. No. 304). By letter dated January 11, 2021, defendant withdrew the appeal without prejudice (NYSCEF Doc. No. 305). Defendant filed a new appeal on April 9, 2021 (NYSCEF Doc. No. 306). On April 21, 2022 and without discussion, the First Department granted plaintiff's motion to dismiss the appeal as untimely (*Bank of N.Y. Mellon v Adam P10tch LLC*, NYLJ, Apr. 21, 2022 [1st Dept 2022]; NYSCEF Doc. No. 363).

Prior to the dismissal of defendant's April 9 appeal, defendant initiated these two motions. In motion sequence number 006, which was filed on September 27, 2021, defendant Adam P10tch, LLC (movant) moves to renew this court's October 29, 2020 decision, which resolved motion sequence numbers 004 and 005 (NYSCEF Doc. No. 325). Movant bases its challenge on the February 18, 2021 Court of Appeals decision in *Freedom Mtge. Corp. v Engel* (37 NY3d 1 [2021] [*Engel*]). In motion sequence number 007, which was filed on December 6, 2021, movant seeks to vacate the same order it challenges in motion sequence number 006 on the ground that plaintiff committed a fraud on the court; and to renew the court's October 29, 2020 decision, its October 16, 2015 decision (NYSCEF Doc. No. 340), and the referee's report, based on the March 27, 2019 Second Department decision, *Bank of N.Y. Mellon v Gordon* (171 AD3d 197 [2d Dept 2019] [*Gordon*]).

Initially, the court considers the impact of the First Department's ruling that defendant's appeal of the court's October 29, 2020 decision was untimely. Plaintiff argues that, based on that

[2] With respect to motion sequence number 005, the court decided that the materials defendant had challenged were appropriate for consideration.

dismissal, the court's earlier order is final. Accordingly, this court must deny motion sequence number 006 and the portion of motion sequence number 007 that seeks renewal as untimely.

The court agrees that the portion of defendant's motions seeking renewal are untimely. Under *Matter of 160 E. 84th St. v New York State Div. of Hous. & Community Renewal* (203 AD3d 501, 501 [1st Dept 2022] [*160 E. 84th*]), "a motion for leave to renew based upon an alleged change in the law must be made prior to the entry of a final judgment, or before the time to appeal has fully expired." The Second Department explained in *Glicksman v Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.* (278 AD2d 364, 366 [2d Dept 2000]) that when a "judgment had been entered and no appeal was pending," courts traditionally denied a motion for leave to reargue based on a change in the law. CPLR 2221 was amended, among other reasons, to distinguish motions to reargue and those to renew. As the statute was silent as to the time limit for motions to renew, the *Glicksman* Court found that the prior case law still applied (*Glicksman*, 278 AD2d at 366 ["there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments" and their impact on motions based on changes in the law]). As indicated, the First Department has followed this precedent (*see 160 E. 84th*, 203 AD3d 501).

Here, the First Department's ruling that defendant's appeal of this court's October 29, 2020 decision was untimely (NYSCEF Doc. No. 363) underscore this court's determination that defendant's applications to renew are untimely. Defendant contends that because the First Department had not ruled on its April 2021 appeal when it filed the motions at hand, the above principle is inapplicable. Both of the motions currently before the court were filed months after the untimely appeal. Thus, motion sequence number 006 and the portions of motion sequence

number 007 that seeks renewal of the court's October 29, 2020 order and its October 16, 2015 order must be denied.

Further, the court notes that *Gordon*, upon which defendant relies in motion sequence number 007, was decided in 2019, around 19 months before the October 29, 2020 decision was rendered. Although the motion papers had been submitted, defendant had ample opportunity to submit a letter to the court that informed the court of the new caselaw. Indeed, while the current motions were pending, defendant sent a February 21, 2022 letter requesting that the court consider the Second Department's decision in *Sy Wald, LLC v Wells Fargo Bank, N.A.* (202 AD3d 857 [2d Dept 2022]; *see* NYSCEF Doc. No. 360 [February 21, 2022 letter]). In addition, defendant could have presented this argument in connection with motion sequence number 006, which sought renewal and was filed long after the decision in *Gordon* (*cf. DiCienzo v Niagara Falls Urban Renewal Agency*, 63 AD3d 1663, 1664 [4th Dept 2009] [finding that new facts could have been presented in initial motion]).

Even if the court were to grant renewal, it would deny motion sequence number 006. In the motion, defendant relies on the statement in *Engel* that "where acceleration [of a mortgage and note] occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, *absent an express, contemporaneous statement to the contrary by the noteholder*" (*Freedom Mtge. Corp.*, 37 NY3d at 32 [emphasis supplied]). Although *Engel* was decided in the context of a statute of limitations argument, defendant contends that it applies here to show that plaintiff decelerated the mortgage when it discontinued the first action. Defendant contends that because the second action already had been filed at the time of deceleration, plaintiff could not reaccelerate the mortgage and note.

Defendant is incorrect. "[T]he subsequent commencement of the [second] action accelerated the loan anew" (*Wilmington Sav. Fund Socy., FSB v Rashed*, 195 AD3d 774, 776 [2d Dept 2021] [*Rashed*]). The court rejects defendant's argument that because the second action predates the discontinuance this principle does not apply. As stated, both this court and the First Department rejected defendant's position that the current action should be dismissed based on its overlap with the first action. Here, the effective abandonment of the first action makes the intent to accelerate the loan in the current action viable (*see P10tch*, 162 AD3d at 502). Additionally, as noted, plaintiff's current complaint expressly states that if any prior foreclosure action was pending, "final judgment for Plaintiff was not rendered and it is the intent of the Plaintiff to discontinue it" (NYSCEF Doc. No. 313, ¶ 13). Given the fact that a few months separated the filing of the current action and the discontinuance of the first action, this is sufficient to constitute a timely statement of plaintiff's continuing intent to accelerate the loan. *Sy Wald* (202 AD3d 857), upon which defendant relies, is distinguishable, as in that case the second action was commenced several years after the discontinuance of the first.

The court also would deny the request to renew in motion sequence number 007. As *Gordon* notes, when a defendant challenges standing in a mortgage-related action, a plaintiff must show "that it is either the holder or assignee of the underlying note at the time the action has commenced" (*Gordon*, 171 AD3d at 203 [internal quotation marks and citation omitted]). During the course of this litigation, defendant has challenged plaintiff's standing a number of times – for example, by alleging that plaintiff cannot demonstrate that it is the assignee and by alleging that, even if it is the holder by an assignment that predates the action, it cannot establish that it possessed the document on the date that it commenced the lawsuit. Defendant cannot relitigate these arguments, which have been rejected by both this court and the First Department.

Defendant argues that *Gordon* represents a change in or clarification of the standard of proof required for standing, because plaintiff now must submit an affidavit by its attorneys' employee asserting that the documents upon which plaintiff relies were maintained by the attorneys and they demonstrated possession (*see id.*). Regardless of whether the law has changed, this argument fails. Along with its earlier summary judgment motion, plaintiff submitted a certificate of merit by Sarah K. Hyman, plaintiff's law firm's employee. Ms. Hyman stated that she reviewed the pertinent documents, and she attached copies of the note, mortgage, assignment, and required notices. Thus, plaintiff has satisfied the standard set forth in *Gordon*. Further, in the case at hand, plaintiff's submission of "an affidavit by an assistant vice president for servicing of plaintiff's servicer, which set forth the factual details of the physical delivery of the note and was accompanied by a copy of the note itself," supplemented plaintiff's submission of the note itself (*P10tch*, 162 AD3d at 502). *P10tch* has been followed even after *Gordon* (*see, e.g., Citimortgage, Inc. v Moran*, 188 AD3d 407, 408 [1st Dept 2020]).

Defendant also relies on cases that do not change the law. *JPMorgan Chase Bank, N.A. v Caliguri* (36 NY3d 953, 954 [2020] [*Caliguri*], *cert denied* 142 S Ct 110 [2021]) simply notes "[t]here is no 'checklist' of required proof to establish standing" as long as the plaintiff provides a sufficient evidentiary basis. *HSBC Bank USA, N.A. v Greene* (190 AD3d 417, 417-418 [1st Dept 2021] [*Greene*]) relies on prior cases dating back as early as 2011.[3] The statement in *Bear Stern Asset-Backed Sec. I Trust 2006-IMI v Ceesay* that there must be evidentiary support – either an affidavit by a party with knowledge of the mailing procedures or proof of mailing – that the 90-day notice was mailed also neither clarifies nor alters the law (180 AD3d 504, 504 [1st

[3] The decision also references *Merritt v Bartholick* (47 NY 44 [1867]).

Dept 2020] [*Bear Stern*] [citing *CitiMorgage, Inc. v Moran*, 167 AD3d 461 (1st Dept 2018) (citing *American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013])]).

Defendant's argument that the court should consider the motions because discovery has not been completed lacks merit. An argument under CPLR 3212 (f) must "make the requisite showing that discovery may lead to evidence justifying opposition" (*Mironov v Memorial Hosp. for Cancer & Allied Diseases*, 192 AD3d 514, 514 [1st Dept 2021]). Defendant's only concrete argument here is that if there had been discovery, defendant may have unearthed the alleged evidence of fraud earlier in the litigation.[4] However, the alleged fraud was that the first complaint did not include the unmarked signature page of the assignment and the current complaint included the additional page. This information always has been available to defendant, a party in both cases.

Finally, the court considers defendant's position that reargument is appropriate due to plaintiff's alleged fraud. Although defendant is correct that there is no time limit within which to make this application, "the motion must be made within a reasonable time" (*Empire State Conglomerates v Mahbur* 105 AD3d 898, 899 [2d Dept 2013] [under CPLR § 5015 [a][3]).[5] Here, there is no reason for defendant's delay of over seven years in making this allegation. Defendant's sole justification is that Paula A. Miller, P.C. (Miller) was counsel of record when the original summary judgment motion was made and she overlooked the purported fraud. Ms. Miller provides an affirmation in which she states that she did not review the paper file for the 2009 action when she moved for summary judgment (*see* NYSCEF Doc. No. 349). However,

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[4] Defendant also uses the alleged fraud to justify reopening the issue after it already has been litigated.

[5] The exceptions set forth in this statute are those applied in considering reargument when the motion otherwise would be untimely (*see Pigno v Bunim*, 74 AD2d 567, 568 [2d Dept 1980]).

Miller and current counsel are not the only two firms that have represented defendant. Miller replaced Rosenberg & Estis, P.C. as counsel in January 2015 (NYSCEF Doc. No. 42), and after Miller, Clair & Gjersten, Esqs. represented defendant (NYSCEF Doc. No. 244). Defendant's counsel cannot point to the purported negligence of each prior attorney as justification for the delay in making this motion. Further, current counsel does not explain why it did not move to reargue based on the alleged fraud between January 27, 2020, when current counsel came onto the case, and December 3, 2021, when it made this motion. Defendant also does not explain why fraud was not alleged in motion sequence number 006. Thus, defendant has not shown that it made this motion within a reasonable time.

In addition, as plaintiff argues, defendant has not raised a credible argument regarding fraud. Specifically, there is no indication that the endorsement in blank that plaintiff filed along with the complaint in the current action is not genuine. Moreover, the Pfullmann affidavit supports plaintiff's position that the note and its endorsement are genuine, as does the certificate of merit and the annexed documents.

The court has considered all of the parties' arguments, even if it does not address them here. For the reasons above, it is

ORDERED that motion sequence numbers 006 and 007 are denied.

This constitutes the Decision and Order of the court.

6/17/2022
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

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