SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART XVIII SUFFOLK COUNTY

PRESENT:
HON. STEPHEN M. BEHAR

BENEFICIAL HOMEOWNER SERVICE CORP.,

Plaintiff,

-against-

THERESA A. TOVAR A/K/A THRESA TOVAR; ET AL.,

Defendants.

INDEX NO.: 61092/2014

Motion Date: 05/09/14
Motion Sequence No.: 01 MOT D

PLAINTIFF'S ATTORNEY:
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DEFENDANTS::
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In this foreclosure action, Defendant, Tovar[1], moves for an Order, pursuant to CPLR 3211 (a) (5), dismissing Plaintiff's Complaint, with prejudice, on the ground that the Complaint is time barred pursuant to the six-year statute of limitations [*see CPLR § 213 (4)*], together with an award of attorneys' fees, costs, and disbursements, pursuant to RPL § 282, in the amount of $7640.00.

PROCEDURAL HISTORY

THE PRIOR "2007" FORECLOSURE ACTION

Based on Defendant's alleged default of February 16, 2007, Plaintiff accelerated the Consolidated Mortgage and Consolidated Note herein by commencing a foreclosure action (hereinafter the "2007 action"). Said action was filed on October 4, 2007, under Index No.: 31069/2007. (*See,*

[1] Reference made hereafter to Defendant is only to Defendant Tovar.

infra Ex. 1of Defendant's April 17, 2014 Affirmation in Support).

On February 4, 2008, the Court (*Molia, J., presiding*) granted Plaintiff's application for a default Judgment and for an Order of Reference (mot. seq. 001) (*See, infra* Ex. 2 of Defendant's April 17, 2014 Affirmation in Support). On September 22, 2008, the Court (*Molia, J., presiding*) granted Plaintiff's application for a Judgment of Foreclosure and Sale (mot. seq. 004) (*id.*).

On April 30, 2009, Defendant filed a Chapter 13 Bankruptcy petition (*See, infra* Ex. 4 of Defendant's August 20, 2014 Reply Memorandum at Law). On July 14, 2009, Defendant's Chapter 13 Bankruptcy case was dismissed and the automatic bankruptcy stay was terminated (*See, infra* Ex. 2 of Defendant's August 20, 2014 Reply Memorandum at Law).

On January 26, 2010, Defendant filed an Order to Show Cause (mot. seq. 005), pursuant to CPLR 5015 (4), seeking to dismiss Plaintiff's 2007 action based on the improper service of the complaint therein. Defendant's application was granted on May 6, 2010. (*See, infra* Ex. 1 of Defendant's August 20, 2014 Reply Memorandum at Law). Thereafter, on April 3, 2012, Plaintiff filed an unopposed motion to discontinue the 2007 action (mot. seq. 006), which was granted by the Court on April 20, 2012 (*See, infra* Ex. 4 of Defendant's August 20, 2014 Reply Memorandum at Law).[2]

PLAINTIFF'S INSTANT "2014" FORECLOSURE ACTION

Plaintiff filed the instant and second foreclosure action (the "2014 action") on February 21, 2014, under Index No.: 061092/2014. (*See, infra* Ex. 1 of Defendant's August 20, 2014 Reply Memorandum at Law). The instant action mirrors the 2007 action, in that it claims the same Plaintiff against the same Defendant, based on the same previously accelerated Consolidated Mortgage and Note.

Defendant argues that by filing the 2007 action, Plaintiff effectively accelerated the subject Consolidated Mortgage and Consolidated Note, rendering October 4, 2007 the "Acceleration Date" for the statute of limitation purposes. Using the October 4, 2007 acceleration date, Plaintiff could only satisfy the statute of limitation herein by re-filing the action (once dismissed) on or before October 3, 2013.

DECISION & ORDER

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired." *Lake v. NY Hosp. Med. Ctr. of Queens*, 119AD3d 843 [2d Dept 2014. If the defendant meets that burden, it is then incumbent upon plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period. *Reid v. Inc. Vil. of Floral Park*, 107 AD3d 777, 778

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[2] The Court notes that Plaintiff's motion to discontinue may be said to be superfluous based on this Court's dismissal of the action by the May 6, 2010 Order.

[2d Dept 2013].

It is well settled that an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action. *See*, CPLR § 213 (4); *Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982 [2d Dept 2012]. "[W]ith respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due'" *Wells Fargo Bank, N.A. v. Cohen*, 80 AD3d 753, 754 [2d Dept 2010]. "However, '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'." *Burke*, 94 AD3d at 982. "The filing of the summons and complaint and lis pendens in an action accelerate[s] the note and mortgage." *Clayton Nat'l, Inc. v. Guldi*, 307 AD2d 982, 982 [2d Dept 2003]. "Once the mortgage debt [is] accelerated, the borrowers' right and obligation to make monthly installments cease[s] and all sums bec[ome] immediately due and payable." *Fed. Nat'l Mtge. Ass'n v. Mebane*, 208 AD2d 892, 894 [2d Dept 1994].

Here, the Defendant has met her prima facie showing that Plaintiff's instant foreclosure action was commenced after the applicable statute of limitation period, demonstrating an entitlement to the dismissal of the instant action, with prejudice, pursuant to CPLR § 213 (4) and CPLR 3211 (a) (5). *Reid,* 107 AD3d at 778.

After reviewing Plaintiff's counsel unsuccessful attempt to rebut Defendant's prima facie showing, this Court finds that the instant action has been filed after the applicable statute of limitation period, and therefore, must be dismissed.

Plaintiff unsuccessfully argues that Defendant's Chapter 13 Bankruptcy filing tolled the applicable statute of limitations herein.

The tolling of a statute of limitation period pursuant to CPLR § 204 (a) only applies when a "stay" affects "the commencement of an action". As such, Plaintiff does not benefit of any tolling of the statute of limitation period under CPLR § 204 (a) because Defendant's Chapter 13 Bankruptcy filing did not stay Plaintiff's ability to commence an action. Indeed, Plaintiff had already commenced the action on October 4, 2007, whereas Defendant filed for Bankruptcy protection in April, 2009. *See, e.g., Saini v. Cinelli Enters.*, 289 AD2d 770, 772 [3rd Dept 2001], *lv denied* 98 NY2d 602 [2002] ("With regard to the claimed effect of defendant's bankruptcy filing on the Statute of Limitations, we find that it neither renewed nor tolled the six-year Statute of Limitations. The first action had been discontinued prior to the time that defendant filed its bankruptcy petition in December 1997 and the bankruptcy petition was dismissed in December 1998, long before this second foreclosure action was commenced and, thus, the bankruptcy proceeding never operated to toll a pending foreclosure action."). Accordingly, Plaintiff's counsel's argument that the Defendant's bankruptcy filing stayed and/or otherwise tolled the applicable statute of limitations herein is unsupported by the facts of this case.

Plaintiff next argues that the applicable statute of limitations was suspended by Governor Cuomo's Executive Order's No.'s 52 & 81 (Hanusek Aff. ¶ 6, Ex. B). This argument is also unavailing.

Plaintiff contends that Governor Cuomo's Executive Order's 52 and 81 (hereinafter "9 NYCRR § 8.52" and "9 NYCRR § 8.81", respectively) added "an additional 143 days to the statute of limitations expiration of October 4, 2013," (Hanusek Aff. ¶ 6).

This Court disagrees. 9 NYCRR § 8.52 temporarily suspended "[s]ection 201 of the [CPLR], *so far as it bars actions whose limitation period* concludes *during the period,*" between October 26, 2012 *See, infra* Ex. 5 of Defendant's August 20, 2014 Reply Memorandum at Law) (emphasis added), and December 25, 2012 (*See, infra* Ex. 5 of Defendant's August 20, 2014 Reply Memorandum at Law). Simply put, 9 NYCRR §§ 8.52 and/or 8.81 suspended any statute of limitations under section 201 of the CPLR if and/or when the statutory time period for an action to be commenced expired between October 26, 2012 and December 25, 2012. Here, indisputably, upon Plaintiff's counsel's own concession, the statute of limitations would not expire until October 4, 2013[3]. (Hanusek Aff. ¶ 6).

Since the applicable statute of limitations for the commencement of this action expired on or before October, 2013, 9 NYCRR §§ 8.52 and/or 8.81 did not suspend the statute of limitation period herein.

Plaintiff argues that the mandatory default notices sent by Plaintiff constitute a revocation of the previous acceleration (Hanusek Aff. ¶ 9, Ex. C). This contention also fails to persuade the Court.

The Second Department has again and again opined that without an affirmative and unambiguous act by a lender to revoke a prior acceleration, the acceleration remains undisturbed and the limitations statute still runs. *UMLIC VP, LLC v. Mellace,* 19 AD3d 684, 684 [2d Dept 2005]; *Guldi*, 307 AD2d at 982; *Lavin v. Elmakiss*, 302 AD2d 638, 639 [2d Dept 2003]. Strictly from a procedural standpoint, the Court notes that Plaintiff's opposition is supported only by the affirmation of Plaintiff's attorney, unsupported by any affidavit from an individual with personal knowledge. As such, Plaintiff has "presented insufficient evidence to [meet its burden which requires it to] raise a triable issue of fact as to whether the statute of limitations was tolled" (*Educ. Res. Inst., Inc. v. Piazza*, 17 AD3d 513, 515 [2d Dept 2005]), let alone establish whether Plaintiff has made an affirmative and unambiguous act to revoke a prior acceleration.

The Court further notes, without comment, that the 90 day default notices specifically state that ***"[u]nder New York State Law, we are required*** to send you this notice," and ***"[w]e are sending you this notice as required by New York State law***." (*See, infra* Ex. 4 of Defendant's August 20, 2014 Reply Memorandum at Law) (emphasis added). Failure to provide these mandatory notice would mandate dismissal of the action for failure to satisfy the statutory conditions precedent as set forth in RPAPL § 1304. In *Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 103 [2d Dept 2011], the Court held: "[P]roper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action. The plaintiff's failure to show strict compliance requires dismissal." Given the mandatory nature of the notices attached, the Court is

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[3] Despite Plaintiff's concession to the October 4, 2013 date, this Court finds that the Statute of limitation period expired on October 3, 2013. This difference, however, proves inconsequential for this particular analysis.

hard-pressed to find or imply an intent on the part of the Plaintiff to revoke any prior acceleration of the Consolidated Note and Mortgage herein; especially, when such assertion is not supported by an Affidavit of an individual with personal knowledge of the facts surrounding said alleged revocation.

Moreover, the Court of Appeals has held that once a mortgagee makes the election to file a foreclosure summons and complaint, thus accelerating the mortgage debt due and owed in full, said election is "final and irrevocable . . . and not subject to change at the option of the [mortgagee]," *Kilpatrick v. Germania Life Ins. Co.*, 183 NY 163, 168 [1905]. Notwithstanding, the Second Department has recently opined that "a lender *may* revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon." *Mebane*, 208 AD2d at 894 (citation omitted); but, in *Patella,* 279 AD2d at 604, the Court held: "Although a lender may revoke its election to accelerate the mortgage, the dismissal of the prior foreclosure action by the court did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year Statute of Limitations period subsequent to the initiation of the prior action." (*internal citations omitted*). In *Mebane*, 208 AD2d at 894, the Court held: "[T]he record is barren of any affirmative act of revocation occurring within the six-year Statute of Limitations period subsequent to the service of the complaint in the prior foreclosure action, wherein the holder of the mortgage notified the borrowers of its election to accelerate. The prior foreclosure action was never withdrawn by the lender, but rather, dismissed *sua sponte* by the court. It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate. Indeed, rather than seeking to revoke the prior election to accelerate, the plaintiff made a failed attempt in 1991 to revive the prior foreclosure action, and, in fact, in its complaint in the instant action commenced in 1992, the plaintiff continues to seek recovery of the entire mortgage debt pursuant to the acceleration clause." (*internal citations omitted*).

Upon the foregoing, the Court must hold that the mere act of serving mandatory default notices together with summons and complaint, without more, cannot and does not constitute a de facto revocation of a prior election to accelerate the mortgagor's obligation under the Note and Mortgage.

Plaintiff also argues that the previous acceleration of the Note and Mortgage obligation (via the filing of the 2007 action) was invalided by the Court's subsequent determination (prompting the dismissal of the 2007 action) that service of the Summons and Complaint was either improper or, worse yet, never effectuated. (Hanusek Aff. ¶ 10). This contention also fails in the eyes of the Court.

The Second Department has already held that: "[c]ontrary to the plaintiff's contention, the dismissal of the 1992 action for lack of personal jurisdiction did not constitute an affirmative act by the lender to revoke its election to accelerate." *Guldi,* 307 AD2d at 982; *accord Wydallis v. United States Fid. & Guar. Co.*, 63 NY2d 872, 873 [1984] ("[w]here a prior action is dismissed for want of personal jurisdiction, [CPLR § 205] cannot be applied to extend the period of limitations."). Accordingly, Plaintiff's latest contention, without more, must fail as a matter of law.

Plaintiff's final argument is that pursuant to GOL § 17-105 (1), Defendant's Bankruptcy filing caused the six (6) year statute of limitations to restart anew (Hanusek Aff. ¶ 11).

Contrary to Plaintiff's contention, the listing of a mortgage as a secured debt on a bankruptcy petition does not, in and of itself, constitute and affirmative act to re-acknowledge a debt under GOL § 17-105 (1). *Erlichman v. Ventura*, 271 AD2d 481, 482 [2d Dept 2000] ("[T]he listing of the debt on [defendant's] bankruptcy petition did not constitute written acknowledgment of the debt with the intent to pay so as to remove any Statute of Limitations bar to recovery.") (*internal citations omitted*); *see Saini,* 289 AD2d at 772 ("[T]he fact that defendant listed this mortgage on its schedule of secured claims on its disclosure statement to its bankruptcy petition did not constitute a promise to pay the mortgage so as to renew or extend the Statute of Limitations but, rather, signified defendant's intent not to pay it.") *(internal citations omitted*); *accord Petito v. Piffath,* 85 NY2d 1, 8-9 [1994], *cert denied* 516 US 864 [1995].

In light of the foregoing, this Court must conclude that Plaintiff's proffered excuses for having failed to file the instant action within six years of the first acceleration of the Note and Mortgage obligation herein (as revealed by the filing of the 2007 action) are untenable. Defendant's application herein to dismiss the instant action pursuant to CPLR 3211 (a) (5) and CPLR 213 (4) is therefore granted.

Defendant's request for an award of attorney's fees, however, is denied. Defendant has not established an entitlement to fees (*see RPL§ 282*) under the facts and circumstances of this case.

Accordingly, it is therefore

ORDERED, that Defendant instant motion is granted only to the extent that the within action is dismissed and the notice of pendency filed with the County Clerk under the within index number is vacated; and it is further

ORDERED, that Defendant's remaining requests, including her request for an award of counsel fees pursuant to RPL§ 282, are denied; and it is further

ORDERED, that Defendant, or her counsel, must serve a copy of this Decision and Order together with notice of its entry upon Plaintiff's counsel and upon the County Clerk's office within twenty (20) days of its receipt hereof.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 22, 2014
Central Islip, NY

Hon. Stephen M. Behar, A.J.S.C.