

At Part 37 of the Supreme Court held
in and for the County of Queens at the
Courthouse located at 88-11 Sutphin
Boulevard, Jamaica, New York, 11435
on the 7th day of January, 2016

Present: Hon. Salvatore J. Modica
Acting Justice of the Supreme Court

X

MOHAMMAD SOROUGH,

Index No. 706506/2015

Plaintiff

MORTGAGED PREMISES
249-23 88th Road
Bellerose, New York 11426

-against-

ORDER GRANTING RELIEF
UNDER RPAPL § 1501(4)

CITIMORTGAGE, INC. ET AL,

BLOCK 8668 -LOT 0173

Sequence No. 1

Defendant(s).

X

The plaintiff, Mohammad Soroush, commenced this action, pursuant to RPAPL § 1501(4), to cancel an encumbrance with respect to the property located at 249-23 88th Road, Bellerose, NY 11426 (Block 8668-Lot 0173), Queens County, New York. Essentially, the plaintiff seeks an order granting summary judgment under CPLR 3212, and for an order discharging the mortgage, which is currently recorded with the Queens County Clerk, and extinguishing the underlying promissory note that was executed in connection with that property. Inasmuch as issue has been joined in this case, the plaintiff's motion is timely within the meaning of *Brill v City of New York*, 2 NY3d 648 (2004). The defendant, Citimortgage, opposes the instant application. The plaintiff's motion is granted in all respects.

UPON the plaintiff's moving papers, with exhibits attached, the papers filed by the defendant, Citimortgage, in opposition, such papers showing what proceedings have heretofore been had herein, the Summons and Complaint that has been filed in this case; the Summons and Complaint that was filed in a foreclosure action under Index Number 6544/2009 by defendant, Citimortgage, against the plaintiff, Mohammad Soroush; the decision and order of a Justice of this Court, dated December 21, 2011, and filed on December 28, 2011, dismissing that foreclosure action; the decision and order of that same Justice, dated November 26, 2014, and filed on December 15, 2014, denying the

motion by defendant, Citimortgage, for a default judgment against the plaintiff, Mohammad Soroush; and due proof that the defendant, Citimortgage, has been duly served with process, and all the papers on file in this action and due deliberation having been had thereon, the motion by Mohammad Soroush is granted in all respects.

According to the plaintiff, the defendant, Citimortgage, commenced a foreclosure action under Index Number 6544/2009, against Mohammad Soroush on March 17, 2009, with respect to the property located at 249-23 88th Road, Bellerose, New York, 11426 (Block 8668—Lot 0173). According to the records of the Queens County Clerk, on March 19, 2009, Soroush was allegedly served with the Summons and Complaint pursuant to CPLR 308(2); and copies of the required documents were allegedly mailed to him on March 23, 2009. Affidavits of both service and mailing were subsequently filed with the Queens County Clerk on March 24, 2009. Soroush neither filed an answer nor made an appearance in that foreclosure action and, as a result, Citimortgage filed a motion for a default judgement against him. In a decision, dated December 20, 2011, and filed on December 28, 2011, a Justice of the Supreme, finding that personal jurisdiction had never been acquired over Soroush, denied the motion and dismissed the action against him. To the knowledge of this Court, that decision has neither been appealed nor vacated by Citimortgage. Almost three years later, Citimortgage inexplicably filed another motion for a default judgment against Soroush. That application was denied by the Court which originally dismissed the foreclosure action, in a decision and order, dated November 26, 2014, and filed on December 15, 2014.

Almost four months later, on March 15, 2015, Citimortgage sent Soroush a letter revoking its acceleration of the loan. That letter, which Soroush has annexed to its moving papers, and which is dated March 13, 2015, reads that “[t]he maturity of the Loan was previously accelerated by filing a lawsuit to foreclosure the mortgage...[and that] [t]he maturity of the loan is hereby de-accelerated, immediate payment of all sums owed is hereby withdrawn, and the Loan is, re-instituted as an installment loan.” See Exhibit A of moving papers by counsel, dated July 29, 2015. In a letter by counsel for Soroush, dated April 10, 2015, Soroush rejected Citimortgage’s “offer to ‘de-accelerate’ and ‘reinstitute’ the loan...” It was Soroush’s position that there were no provisions in either the Note or the Mortgage for “de-acceleration of an accelerated balance...” and that “[t]he language used in the Note and Mortgage is clear and unambiguous and does not provide for a unilateral ‘de-acceleration.’” See Exhibit B of moving papers by counsel, dated July 29, 2015. According to Soroush, once Citimortgage made the decision to accelerate the payments due on the underlying note on March 18, 2009, “absent a subsequent, mutually signed written agreement between Citimortgage and...Mohammad Soroush there can be no de-acceleration.” See Exhibit B of moving papers by counsel, dated July 29, 2015. In short, Soroush argues, “[o]nce Citimortgage elected to accelerate pursuant to the Note and Mortgage, there was no longer an installment debt, and there was never any agreement between the parties to modify the situation.” *Id.*

On June 22, 2015, Soroush filed the instant action and seeks an order, under RPAPL § 1501, canceling the lien on the subject property. That is, the plaintiff,

Mohammad Soroush, seeks an order discharging the mortgage, which is currently recorded with the Queens County Clerk, and extinguishing the underlying promissory note that was executed in connection with that property. The motion by Mohammad Soroush, is granted in all respects.

RPAPL § 1501 (4) provides that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired," any person with an estate or interest in the property may maintain an action "to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom." RPAPL § 1501 (4). In this case, Soroush, the property owner, has made a *prima facie* showing of his entitlement to judgment as a matter of law by establishing that the underlying foreclosure action commenced by the defendant mortgagee in 2009 was dismissed by another Judge of this Court on the ground that personal jurisdiction was never acquired over him "and that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (see CPLR 213 (4). *JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 (2nd Dept. 2010); *see also Pulver v Dougherty*, 58 AD3d 978 (3rd Dept. 2009); *see also Plaia v Safonte*, 45 AD3d 747 (2nd Dept. 2007); *Le Pore v Shaheen*, 32 AD3d 1330 (4th Dept. 2006); *Zinker v Makler*, 298 AD2d 516 (2nd Dept. 2002); *compare Caliguri v JPMorgan Chase Bank, N.A.*, 121 AD3d 1030 (2nd Dept. 2014); *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 n 3. (2008).¹ Because a successive foreclosure action is permitted following a dismissal for lack of personal jurisdiction, such a dismissal is obviously not on the merits. *See eg Mobile Air Transp., Inc. v Summit Handling Sys., Inc.*, 2015 NY Slip Op 07955 (2nd Dept 2015); *see also Matter of Schulz v State of New York*, 81 NY2d 336, 347 (1993); *Carrick v Central Gen. Hosp.*, 51 NY2d 242,

¹ Specifically, in this case, Citimortgage moved for a default judgment against the defendant, Mohammad Soroush, in 2011. The Court that presided over Citimortgage's application for a default judgment against the defendant, Mohammad Soroush, instead, dismissed the underlying foreclosure action under Index Number 6544/2009, holding that "CPLR 306(a) requires the affidavit of service of a summons show that service was made in an authorized manner. The affirmative burden of alleging compliance with the mailing is placed upon the plaintiff...[and that] [t]he affidavit of service must show the details of the mailing of process and 'mere mailing is not an authorized manner.'" *See* Decision and Order Braithwaite Nelson, J., dated December 21, 2011, and filed on December 28, 2011. That Court concluded that the affidavit of service under Index Number 6544/2009 did not establish that Citimortgage complied with the requirements of mailing contained in CPLR 308(2) inasmuch as it failed to provide "the required details of the purported mailing." *Id.* For instance, the affidavit fails to establish that "the summons was mailed to the defendant at his last known residence or at his actual places of business" *Id.* As the Court further noted, "the affidavit is entirely devoid of any business or location to which the summons was purportedly mailed." *Id.* For these reasons, that Court dismissed the foreclosure action filed by Citimortgage against Mohammad Soroush. Rather than move to reargue the decision of that Judge or to take an appeal of her ruling to the Appellate Division, Second Department, Citimortgage, simply filed a second default motion against Soroush, which was denied in a decision and order, dated November 26, 2014, and filed December 15, 2014.

251-252 (1980). That, however, does not end the inquiry, for RPAPL 1501(4) is satisfied when it is clear that the statute of limitations bars a foreclosure action against a mortgagor. Thus, if a prior foreclosure action is dismissed for failure to acquire jurisdiction over a mortgagor, a subsequent foreclosure action will be permitted only if it is brought within the applicable statute of limitations. See *U.S. Bank N.A. v Dellarmo*, 128 AD3d 680, 680-81 (2nd Dept. 2015). In this case, the statute of limitations prevents Citimortgage from instituting a new foreclosure action against Soroush. See CPLR 213 (4). For these reasons, the facts of this case are controlled by the plain language of RPAPL 1501(4), which make it abundantly clear that a mortgagee is entitled to have a mortgage cancelled as an encumbrance on real property if "the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired..." RPAPL § 1501 (4). In this case, the Soroush has met his *prima facie* burden of his entitlement to relief under RPAPL § 1501 (4). In opposing the instant motion, "the defendant has failed to raise a triable issue of fact as to whether the statute of limitations was tolled or revived." *JBR Constr. Corp. v Staples*, *supra* 71 AD3d at 953; see also *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Rack v Rushefsky*, 5 AD3d 753 (2nd Dept. 2004). Accordingly, the plaintiff's motion is granted.

The Court makes one final observation. Generally, an action to foreclose a mortgage may be brought to recover any unpaid sums that are due within the six-year period that immediately precedes the commencement of the action. See *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 (2nd Dept. 2012); see also CPLR 213 (4). In that respect, the Court recognizes that as to mortgages payable in installments, separate causes of action will accrue "for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due." *Wells Fargo Bank, N.A. v Burke*, *supra* 94 AD3d at 982; see *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 (2nd Dept. 2011); see also *Loiacono v Goldberg*, 240 AD2d 476, 477 (2nd Dept. 1997); see also *Pagano v Smith*, 201 AD2d 632, 633 (2nd Dept. 1994). Nevertheless, it is well-established 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." See *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 (2nd Dept. 2001); see also *Wells Fargo Bank, N.A. v Burke*, *supra* 94 AD3d at 982; see also *Lavin v Elmakiss*, 302 AD2d 638, 639(3rd Dept. 2003); *Zinker v Makler*, 298 AD2d 516, 517 (3rd Dept. 2003).

In this case, the complaint filed with the Queens County Clerk under Index Number 6544/2012, establishes that the defendant failed to make payments on the underlying promissory note of \$533,850.00 on December 8, 2008 and thereafter, and that Citimortgage clearly and unequivocally "elect[ed] to call due the entire amount secured by the mortgage," which, at the time of the filing of the complaint, contained a principal balance of \$529,719.81. See Paragraphs 1 thru 6 of Citimortgage's Complaint that was filed with the Queens County Clerk on December 28, 2011. Notwithstanding the argument by Citimortgage, the papers of both sides, as well as the records on file with the Queens County Clerk, make it patently clear that Citimortgage provided Mohammed Soroush, the borrower in this case, with notice of its decision to "exercise the option to accelerate the maturity of a loan...and such notice [was both] 'clear and unequivocal'"

Wells Fargo Bank, N.A. v Burke, supra 94 AD3d at 982; see also *Sarva v Chakravorty*, 34 AD3d 438, 439 (2nd Dept. 2006); see also *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 (2nd Dept. 2005); See *EMC Mtge. Corp. v Patella*, supra 279 AD2d at 605-606; see also *Arbisser v Gelbelman*, 286 AD2d 693, 694 (2nd Dept. 2001). Having clearly and unequivocally elected to accelerate the entire amount that was due on the loan that was secured by the mortgage, both by a letter to Mohammad Soroush and in the foreclosure action it filed against him under Index Number 5644/2009, Citimortgage may not insulate itself from the provisions of RPAPL § 1501 by simply sending Soroush a letter indicating it no longer wished to exercise the acceleration option contained in the promissory note and mortgage. See *Wells Fargo Bank, N.A. v Burke*, supra 94 AD3d at 982. That letter made it abundantly clear that "[t]he maturity of the loan was previously accelerated by filing a lawsuit to foreclose the mortgage." See Exhibit E of moving papers by counsel, dated July 29, 2015. Accordingly, this Court must grant the motion by the plaintiff, Mohammed Souroush, for summary judgment and issue an order declaring that, the subject mortgage is invalid, and directing the County Clerk of Queens County to cancel it. *Id.*; see also RPAPL § 1501(4).

Accordingly, for reasons stated in this decision, the plaintiff's motion is granted in all respects.

It is therefore:

ORDERED that the instant motion by the plaintiff, Mohammad Soroush, for summary judgment is granted; and it is further

ORDERED that the subject mortgage held by defendants, Citimortgage, Inc., is declared invalid pursuant to RPAPL § 1521(4); and it is further

ORDERED that the County Clerk of Queens County is directed to cancel the mortgage held by defendant, CitiMortgage, Inc.

Accordingly, the plaintiff's motion is granted in all respects.

This constitutes the decision and order of this Court.

SETTLE ORDER ON NOTICE

Dated: January 7, 2016


Salvatore J. Modica

FILED
JAN 11 2016
COUNTY CLERK
QUEENS COUNTY