

PUBLISHED

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

U.S. Bank National Association as Trustee
for Merrill Lynch Mortgage Investors Trust,
Mortgage Loan Asset-Backed Certificates,
Series 2006-MLN1,

Plaintiff,

-against-

Jayne Parisi, Randi Viola n/k/a Randi Richman,
Lisa Viola, Accredited Surety and Casualty
Company, Meenan Oil Co., Inc., Jacoby and
Jacoby, Esqs., Columbia Federal Savings Bank,
Bank of America, National Association, successor
by merger to LaSalle Bank Midwest National
Association, Nationstar Mortgage LLC, and
"John Doe #1" through "John Doe #12", the last
twelve names being fictitious, said parties intended
being tenants or occupants, if any, having or
claiming an interest in, or lien upon the premises
described in the complaint,

Defendants.

Motion Sequence No.: 001; MG; CD
Motion Date: 6/17/15
Submitted: 7/29/15

Index No.: 66885/2014

Attorney for Plaintiff:

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Attorney for Defendants Lisa Viola
and Randi Viola n/k/a Randi Richman:

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Clerk of the Court

Upon the following papers **electronically filed** and numbered 1 to 58 read upon this motion
for dismissal of the complaint; it is

ORDERED that this motion by defendants, Randi Viola, now known as Randi Richman,
and Lisa Viola, for an order pursuant to CPLR 3211(a)(1) and (a)(5) dismissing the complaint of
plaintiff, U.S. Bank National Association, as trustee for Merrill Lynch Mortgage Investors Trust,
Mortgage Loan Asset-Backed Certificates, Series 2006-MLN1, is granted to the extent that the
complaint is hereby dismissed, and in all other respects the motion is denied.

On March 22, 2007, an action in foreclosure was commenced by LaSalle Bank, N.A., as trustee for the MLMI Trust Series 2006-MLN1, against borrowers Jayne Parisi and Randi Viola upon their alleged default on October 1, 2006 in making payments on a note given to Opus Home Equity Services, Inc., dated May 24, 2006 in the principal sum of \$250,000. The note is secured by a mortgage on premises known as 28 Titmus Drive, Mastic, NY 11950, and it is alleged in the complaint that "Plaintiff elects to call due the entire amount secured by the mortgage." By order of the Court dated January 31, 2013 (Spinner, J.), the action was discontinued without prejudice.

By the filing of a summons and complaint with notice of pendency on August 26, 2014, plaintiff U.S. Bank National Association, as trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-MLN1, commenced this foreclosure action against Parisi and Randi Viola, now known as Randi Richman, and others. It is alleged in the complaint that the defendant borrowers "failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on September 1, 2008 and each subsequent payment thereafter." On October 20, 2014, defendant borrowers filed and served an answer to the complaint. By notice of rejection dated October 21, 2014, however, the answer was rejected by plaintiff as untimely. Thereafter, by stipulation dated May 12, 2015 and filed on May 13, 2015, counsel for plaintiff and counsel for the defendant borrowers agreed that the defendants' time to serve "a response to Plaintiff's Complaint" was extended to June 5, 2015. By notice of motion dated June 1, 2015, defendants brought this motion pursuant to CPLR 3211(a)(1) and (a)(5) for an order dismissing the complaint as time barred under CPLR 213(4). Defendants also seek recovery of attorneys' fees. Plaintiff has opposed the motion.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92). In addition, to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is time-barred, a defendant must make a *prima facie* showing when the cause of action accrued and that the time in which to sue has expired (*see Gould v Decolator*, 121 AD3d 845, 994 NYS2d 368 [2d Dept 2014]).

As a general matter, 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 (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982, 943 NYS2d 540 [2d Dept 2012]). Generally, with respect to a mortgage payable in installments, separate causes of action 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* at 94 AD3d 982). Thus, it is argued by plaintiff that the action is timely based on the allegation in the complaint that the date of default is September 1, 2008. 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" (*Wells Fargo Bank, N.A. v Burke*, *supra* at 94 AD3d 982, quoting *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605, 720 NYS2d 161 [2001]). Here, the act of commencing the

initial action and filing the lis pendens in 2007 constituted an election to accelerate the maturity of the unpaid principal balance and accrued interest (*see Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). Thus, movants have demonstrated that the six-year statute of limitations began to run on March 22, 2007, when the underlying mortgage debt was accelerated. As this action was not commenced until August 26, 2014, more than seven years from the date that the statute of limitations began to run, movants have shown that the action is untimely. It is the determination of this Court, however, that an award of attorneys' fees under Real Property Law § 282 is not warranted under the circumstances of this case (*see DKR Mortg. Asset Trust 1 v Rivera*, ___ AD3d ___, 14 NYS3d 414 [2d Dept 2015]).

In the posture of defendants' CPLR 3211 motion to dismiss, it is the task of the Court to determine whether plaintiff's pleading states a cause of action, liberally construing the complaint and accepting as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (*see 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 773 NE2d 496, 746 NYS2d 131 [2002]). Plaintiff argues that September 1, 2008, the default date set forth in the complaint now before this Court, is the date that the cause of action accrued. It is undisputed, however, that the option to accelerate all sums due under the mortgage debt was exercised by the filing of the complaint in the 2007 action. Accordingly, the six-year statute of limitations expired on March 22, 2013. Furthermore, the record before this Court does not show that plaintiff undertook any affirmative act to revoke its election to accelerate the mortgage loan, and plaintiff makes no claim that it revoked its election to accelerate (*see Federal Nat's Mortg. Ass'n v Mebane*, 208 AD2d 892, 618 NYS2d 88 [2d Dept 1994]).

Plaintiff has failed to submit proof in evidentiary form to support its claim that the defendants reaffirmed their debt by making payments on their mortgage. The computerized printout of the "Nationstar Mortgage LLC Detail Transaction History" is not accompanied by an affidavit by a person having knowledge of the facts. Accordingly, since it is not evidentiary material in admissible form, it is without probative value (*see Currie v Wilhouski*, 93 AD3d 816, 941 NYS2d 218 [2d Dept 2012]). Moreover, a review of the transaction history reveals that it does not support plaintiff's contention that payments were made by the defendant borrowers after the acceleration of the mortgage loan.

Plaintiff's argument that defendants waived their statute of limitations defense is belied by the undisputed facts before this Court. The answer to the complaint that was filed on behalf of the defendants on October 20, 2014 was rejected by plaintiff by a written notice which was filed with the Court. Thereafter on May 13, 2015, the parties filed with the Court a written stipulation setting forth the following agreement:

1. Defendants' time to serve a response to Plaintiff's Complaint is hereby extended to June 5, 2015;
2. Defendants hereby admit proper service and receipt of Plaintiff's Complaint; and
3. Defendants hereby waive and/all counterclaim against Plaintiff,

except for attorneys' fees, pursuant to RPL §282.

A stipulation that has been reduced to a properly subscribed writing will be construed as a contract (see *McCoy v Feinman*, 99 NY2d 295, 785 NE2d 714, 755 NYS2d 693 [2002]). Contrary to the plaintiff's contention, the defendants did not waive their statute of limitations defense, as CPLR 3211(a) permits a defendant to raise the defense by a pre-answer motion to dismiss. This Court has considered the plaintiff's remaining contentions and finds them to be without merit. Accordingly, this Court is constrained to dismiss the complaint.

Dated:

October 14, 2015



HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION