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## HSBC Bank USA v Kirschenbaum

Supreme Court of New York, Appellate Division, First Department

March 15, 2018, Decided; March 15, 2018, Entered

5994, 850258/15, 400

### Reporter

159 A.D.3d 506 \*; 73 N.Y.S.3d 41 \*\*; 2018 N.Y. App. Div. LEXIS 1636 \*\*\*; 2018 NY Slip Op 01644 \*\*\*\*; 2018 WL 1320306

[\*\*\*\*1] HSBC Bank USA, etc., Plaintiff-Appellant, v Joshua Kirschenbaum, Defendant-Respondent, Board of Managers of the Central Park West Condominium, et al., Defendants.

**Notice:** THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

### Core Terms

statute of limitations, mortgage, notice, condition precedent, expiration, days, statutory prohibition, foreclosure action, complete control, tolling statute, commencement, foreclosure, limitations

**Counsel:** [\*\*\*1] Blank Rome LLP, New York (Timothy W. Salter of counsel), for appellant.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for respondent.

**Judges:** Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

### Opinion

[\*\*41] [\*506] Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 29, 2016, which granted defendant Joshua Kirschenbaum's motion to dismiss the complaint in this mortgage foreclosure proceeding, unanimously affirmed, with costs.

Defendant borrower Kirschenbaum made a prima facie showing that this action [\*\*42] was untimely. The

mortgage was accelerated on August 3, 2009 when plaintiff commenced the first foreclosure action, the statute of limitations expired on August 3, 2015 (see [CPLR 213\[4\]](#)), and plaintiff did not file this action until August 27, 2015.

In opposition, plaintiff failed to raise a question of fact as to whether the statute of limitations had been tolled ([Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1085-1086, 30 N.Y.S.3d 288 \[2d Dept 2016\]](#)). We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law (RPAPL) [§ 1304](#) tolled the statute of limitations for 90 days.

[CPLR 204\(a\)](#) authorizes tolling of a statute of limitations and provides that "[w]here the commencement of an action has been stayed by a court [\*\*\*2] or by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Proper service of the [RPAPL 1304](#) notice is a condition precedent to the commencement of a foreclosure action ([HSBC Bank USA v Rice, 155 AD3d 443, 443, 63 N.Y.S.3d 382 \[1st Dept \[\\*507\] 2017\]](#)). A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent ([Barchet v New York City Tr. Auth., 20 NY2d 1, 6, 228 N.E.2d 361, 281 N.Y.S.2d 289 \[1967\]](#)).

Here, plaintiff had complete control over when to serve the [RPAPL 1304](#) notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before the expiration of the statute of limitations. In addition, there is nothing in [RPAPL 1302](#) or [1304](#) that proscribes the prosecution of the action.

[Andersen v Long Is. R.R. \(59 NY2d 657, 450 N.E.2d 213, 463 N.Y.S.2d 407 \[1983\]\)](#) and [Burgess v Long Is.](#)

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[R.R. Auth. \(79 NY2d 777, 587 N.E.2d 269, 579 N.Y.S.2d 631 \[1991\]\)](#), cases upon which plaintiff relies, do not involve [RPAPL 1304](#).

Plaintiff's argument that the mortgage loan was de-accelerated when it moved to discontinue the first mortgage foreclosure proceeding is improperly raised for the first time on appeal (see *Lutin v SAP V/A Atlas 845 WEA Assoc. NF LLC*, 157 A.D.3d 466, 66 N.Y.S.3d 439, 2018 NY Slip Op 00103 [1st Dept 2018]). In any event, the argument is unavailing (see [EMC Mtge. Corp. v Patella](#), 279 AD2d 604, 606, 720 N.Y.S.2d 161 [2d Dept 2001]; [Federal Natl. Mtge. Assn. v Mebane](#), 208 AD2d 892, 894, 618 N.Y.S.2d 88 [2d Dept 1994]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME [\*\*\*3] COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2018