SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR DEUTSCHE ALT-A SECURITIES, INC. MORTGAGE LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-2,

Plaintiff,

Index No.: 850258/15

Motion Seq. No: 001

-against-

DECISION & ORDER

JOSHUA KIRSCHENBAUM; BOARD OF MANAGERS OF THE 400 CENTRAL PARK WEST CONDOMINIUM; SETH WINSLOW; A. ABADIAM, BVBA; ANDRE Y. ABADJIAN; UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE,

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this foreclosure proceeding, defendant Joshua Kirschenbaum ("Kirschenbaum") moves to dismiss the complaint pursuant to CPLR § 3211(a)(5) on grounds that this action is barred by the statute of limitations. Plaintiff HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc. Mortgage Loan Trust Mortgage Pass-Through Certificates Series 2005-2 ("plaintiff") opposes the motion.

Background

This action is for foreclosure of a mortgage, held by plaintiff, for the premises known as 400 Central Park West, Apartment 6J, New York, New York 10025 (the "Property").

On October 26, 2004, Kirschenbaum duly executed and delivered to plaintiff's predecessor-in-interest ("First Financial Equities") a note whereby Kirschenbaum agreed to pay the sum of $465,000.00 with interest thereon (the "Note") (Notice of Motion, Exhibit "F" [Note] at 8). To secure the payment, Kirschenbaum executed a mortgage dated that date, with Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First Financial (the "Mortgage") covering the Property (Affirmation in Opposition, Exhibit "B").[1] According to plaintiff, Kirschenbaum defaulted under the Note and Mortgage by failing to pay the installment due on August 1, 2008, and each installment thereafter.[2]

On or about August 3, 2009, plaintiff filed a Summons and Verified Complaint against the defendants herein and other parties [Supreme Court Index No.: 110987/2009] (Notice of

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[1]The Mortgage was recorded in the Office of the City Register of the City of New York on June 17, 2005 (Affirmation in Opposition, Exhibit "B").

[2]Kirschenbaum does not dispute his default.

Motion, Exhibit "C")(the "2009 Foreclosure Action").[3] According to plaintiff, there were several mandatory settlement conferences between 2010 and 2012.

On or about August 13, 2013, plaintiff filed a Motion to Discontinue the 2009 Foreclosure Action, which was granted by Court Order, dated September 20, 2013, thereby disposing of said action (Notice of Motion, Exhibit "E"). According to plaintiff, on April 26, 2014, a notice "in compliance with Real Property and Proceedings Law" ("RPAPL") was sent to Kirschenbaum (Memorandum of Law in Opposition at 2).[4]

Plaintiff asserts that in 2013 and 2014, and up until the commencement of the subject foreclosure action, there were delays caused by, among other things, change in the servicer, and contacts between the servicer and Kirschenbaum in 2014 regarding a loan modification (Memorandum of Law in Opposition at 2).[5]

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[3]The Verified Complaint accelerated the Note declaring the "entire amount due." (Notice of Motion, Exhibit "D" ["Verified Complaint" at ¶ 8]).

[4]Although not identified by plaintiff as such, the reference to a "notice sent to [Kirschenbaum] on April 26, 2014" must be a reference to the RPAPL 1304 Notice. Elsewhere in its Memorandum of Law plaintiff states that "as of April 26, 2015, the 90 day notices previously sent expired as they are only valid for a 12 month period" (Memorandum of Law in Opposition at 3).

[5]Plaintiff claims that on April 8, 2015, Kirschenbaum was sent a 45-day "Know your Options" letter that is required by the Consumer Protection Bureau, and that on May 5, 2015, Ocwen Loan Servicing, LLC (the subsequent servicer) received a written debt dispute letter from Kirschenbaum, which prevented plaintiff from commencing the action. In addition, plaintiff claims that there was a delay until April 2015 obtaining 'last

As of April 26, 2015, the 90-day notices previously sent expired, and a new 90-day notice was sent to Kirschenbaum on May 26, 2015. Plaintiff contends that based on the May 26, 2015 90-day notice, a new foreclosure action could not been commenced until the expiration of the statutory ninety day period from the date the notice was sent to Kirschenbaum, *to wit*, August 27, 2015.

Plaintiff, as holder of the promissory note and assignee of the mortgage, then filed a second Summons and Complaint against the defendants herein on August 27, 2015 (the "2015 Foreclosure Action") to recover the unpaid balance of the loan of $445,685.91, together with interest thereon from July 2008 plus accumulated late charges and sums advanced by plaintiff (Notice of Motion, Exhibit "F" [Complaint at ¶ 11]). On October 15, 2015, Kirschenbaum filed the instant motion seeking dismissal of the subject 2015 Foreclosure Action pursuant to CPLR § 3211(a)(5).

Discussion

Motion to Dismiss

"'On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of

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payment date' information for a "14 day letter" required to be sent to Kirschenbaum pursuant to the "National Mortgage Settlement" (Memorandum of Law in Opposition at 3).

establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff'" (*Benn v Benn*, 82 AD3d 548,548 [1st Dept 2011][internal quotation and citation omitted]).

Statute of Limitations

The statute of limitations applicable to an action to foreclose upon a mortgage is six years (CPLR 213[4]; *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]). [O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*Nationstar Mortgage, LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]; *see Lavin v Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003]).

Proper acceleration therefore begins upon the filing and service of a summons and complaint (*City Sts. Realty Corp. v Jan Jay Constr. Enters. Corp.*, 88 AD2d 558, 559 [1st Dept 1982]). If accelerated in that manner, the complaint must specifically state the plaintiff's election to accelerate (*Logue v Young*, 94 AD2d 827, 827 [3d Dept 1983]).[6]

[6]Plaintiff concedes that the Complaint contained language accelerating the subject loan. The Complaint provides that "defendants failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on August 1, 2008 and each subsequent payment thereafter" and "by reason of such defaults

Pursuant to CPLR § 204(a), however, "where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced."

RPAPL Section 1304

RPAPL Section 1304 provides in pertinent part that with regard to home loans "at least ninety days before a lender, an assignee or mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower" which notice includes the language specified therein ([RPAPL 1304 (1)](the "90-Day Notice")).

The parties' contentions

In support of his motion to dismiss on statute of limitations grounds, Kirschenbaum argues that the statute of limitations began to run on February 9, 2009 based on a default letter, dated January 5, 2009, sent by plaintiff's predecessor to Kirschenbaum (the "Default Letter"). The Default Letter provided that if the default is not cured on or before February 9, 2009, the full amount of the remaining mortgage payments will be accelerated, meaning that the six

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[p]laintiff hereby declares the balance of the principal indebtedness immediately due and payable" (Notice of Motion, Exhibit "F" [Complaint at ¶¶ 9-10]; Affirmation in Opposition at ¶ 26).

year statute of limitations would have expired on February 9, 2015 (Notice of Motion, Affirmation in Support at ¶ 2(a)). Alternatively, Kirschenbaum maintains that the statute of limitations expired no later than August 3, 2015, six years after plaintiff filed its first summons and complaint accelerating the subject loan in the 2009 Foreclosure Action on August 3, 2009. Given that this action was commenced on August 27, 2014, it would be time barred (Notice of Motion [Affirmation in Support at ¶ 3]).

Plaintiff appears to concede that the subject loan was accelerated on August 3, 2009 by the filing of the Verified Complaint in the 2009 Foreclosure Action, such that the statute of limitations expired on August 3, 2015, if no tolling provision applies. Plaintiff argues, however, a 90-Day Notice constitutes a statutory prohibition under CPLR 204(a), meaning that the 90-Day Notice, dated May 26, 2015 tolled the instant action for a period of ninety days. Assuming the action was stayed for ninety days, plaintiff could not commence the instant foreclosure action until August 24, 2015. As a result, the commencement of the instant action on August 27, 2015 would be timely.[7] In addition, plaintiff argues that the statute of limitations should also be tolled

[7]If the 90-Day Notice stayed the action for ninety days, the six year statute of limitations would not expire until November 1, 2015 (Affirmation in Opposition at ¶ 33).

for (i) an additional ninety day period for the April 26, 2014 90-Day Notice; and (ii) the period of time between August 8, 2009 until September 20, 2013 when the 2009 Foreclosure Action was pending pursuant to RPAPL 1301.[8] Finally, plaintiff argues that this Court should equitably toll the statute of limitations on grounds that dismissing this action would confer an "unwarranted windfall" on Kirschenbaum.

In reply, Kirschenbaum maintains that (i) RPAPL 1304 does not apply in the first place because the subject Property is not owner occupied; and (ii) even if plaintiff was required to send a 90-Day Notice under RPAPL 1304, the 90-Day Notice requirement is a statutory condition precedent, and as such, the tolling provision of CPLR 204(a) does not apply (Affirmation in Reply at ¶¶ 15-20; Limited Memorandum of Law in Further Support at 1-6).

Determination

It is clear that the Complaint seeks to accelerate the subject loan based upon Kirschenbaum's failure to make payment that became due on August 1, 2008, and each subsequent month thereafter pursuant to the terms of the Note and Mortgage (Notice of Motion, Exhibit "F" [Complaint at ¶ 9-10]).

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[8]RPAPL 1301(3) provides that "[w]hile an action [to recover any part of a mortgage debt] is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought."

Kirschenbaum's argument that the subject loan was accelerated on February 9, 2009 based on the Default Letter is unavailing. The Default Letter which provides that if the loan is not cured on or before February 9, 2009, the loan will be accelerated, does not constitute an acceleration for purposes of the statute of limitations (*see First Fed. Sav. Bank v Midura*, 264 AD2d 407 [2d Dept 1999]; Tr. Oral Argument, December 14, 2015 at 2-4).

Significantly, plaintiff does not contend and there is no evidence in the record demonstrating that plaintiff or its predecessor-in-interest de-accelerated the subject loan subsequent to discontinuance of the 2009 Foreclosure Action on September 20, 2013. Accordingly, the six-year statute of limitations period accrued on August 3, 2009 when plaintiff filed the 2009 Foreclosure Action accelerating the subject loan. As such, the six year statute of limitations period applicable to foreclosure actions expired on August 3, 2015 prior to the commencement of the subject foreclosure action on August 27, 2015. Kirschenbaum has thus met his *prima facie* burden establishing that the time in which to sue has expired (*Benn v Benn*, 82 AD3d at 548). "Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable,

or the plaintiff actually commenced the action within the applicable limitations period" (*Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086 [2d Dept 2016][internal quotations and citation omitted]).

As a result, the only way that the subject action would not be barred by the statute of limitations, is if a tolling provision applies. First, plaintiff argues that CPLR 1304, the 90-Day Notice provision, tolls the statute of limitations for ninety days as it constitutes a statutory prohibition under CPLR 204(a).

It is well established that "proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of [a] foreclosure action" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103 [2d Dept 2011]; *see Deutsche Bank Nat'l Trust Co. v Quinn*, 120 AD3d 609, 610 [2d Dept 2014]. When a statutory requirement is a condition precedent to the commencement of an action, it does not constitute a statutory prohibition or statute of limitations under CPLR 204(a)(*see generally Barchet v New York City Tr. Auth.*, 20 NY2d 1, 6 [1967]; *Singer v Lilly & Co.*, 153 AD2d 210, 214 [1st Dept 1990]; *Matter of Velez v Motor Veh. Acc. Indem. Corp.*, 56 AD2d 764, 765 [1st Dept 1977]). A statutory condition precedent is not a statutory prohibition given that "plaintiff has complete control over the acts

necessary to effectuate compliance with [a] statutory mandate. All the plaintiff needs do is make out the proper paper and serve it" (*Barchet v New York City Tr. Auth.*, 20 NY2d at 6). However, when the commencement of an action is stayed by a statutory prohibition, the duration of the stay is excluded by the statute of limitations (*see Wilder v City of New York*, 193 AD2d 420, 421 [1st Dept 1993]).

This Court has found no appellate case determining specifically whether filing of a 90-Day Notice tolls the statute of limitations applicable to foreclosure actions. However, case law is clear that service of a 90-Day Notice pursuant to RPAPL 1304 constitutes a condition precedent, rather than a statutory prohibition. By its terms, a condition precedent is not subject to the tolling provision of CPLR 204(3).[9]

In other contexts, condition precedents to commencement of actions have been determined not to constitute tolls (*see*

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[9] Plaintiff cites to one lower court case which, although acknowledging that RPAPL 1304 is a statutory condition precedent, held that CPLR 204 served to extend the statute of limitations for ninety days after the plaintiff filed a 90-Day Notice (*Emigrant Bank v Greene*, 2015 NY Slip Op. 31712 (U) [Queens Supreme Court 2015]). The holding that a condition precedent tolls a statute of limitations pursuant to CPLR 204 is contrary to appellate authority as discussed herein.

e.g. Singer v Lilly & Co., 153 AD2d at 210, 216, 220 [1ST Dept 1990] [commencement of personal injury suit under toxic tort revival statute a condition precedent not subject to tolling]; *Kahn v Trans World Airlines*, 82 AD2d 696, 696 [2d Dept 1981] [two year statute of limitations is a condition precedent to suit and therefore not subject to the infancy tolling provisions of the CPLR]).

Courts have distinguished conditions precedent to suit with statutory prohibitions where the right to commence an action is not solely under plaintiff's control, such as when a motion is pending to file a late notice of claim (*see Ambrus v City of New York*, 87 AD3d 341 [2d Dept 2011]; *Barchet v New York City Tr. Auth.*, 20 NY2d at 6). In such cases, "the toll has been held to run from the date an application for leave to serve a late notice of claim is made to the date upon which an order granting that relief goes into effect" (*Ambrus v City of New York*, 87 AD3d at 342).

In the instant matter, just like with other condition precedents, plaintiff was afforded complete control over when it could satisfy CPLR 1304 and file the 90-Day Notice. Plaintiff chose to file the first 90-Day Notice on April 26, 2014, which expired after twelve months, and then to file the

second 90-Day Notice on April 26, 2015.[10]

Plaintiff's additional arguments are without merit. For the same reasons enunciated above, the April 26, 2014 90-Day Notice likewise fails to toll the statute of limitations. In addition, plaintiff's contention that RPAPL Section 1301 tolls the statute of limitations for the period of time the 2009 Foreclosure Action was pending is unavailing. The 2009 Foreclosure Action was not a pending action as it was dismissed prior to the commencement of this action.

Finally, although foreclosure actions are equitable in nature (*Norwest Bank Minn. NA v E.M.V. Realty Corp.*, 94 AD3d 835, 836 [2d Dept 2012]), plaintiff has cited no grounds for permitting equitable tolling under the circumstances of this action. "Plaintiff has not shown that it was actively misled by defendant, or that it in some extraordinary way had been prevented from complying with the limitations period" (*Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 38 AD3d 325, 325 [1st Dept 2007] [internal quotations and citation omitted]).

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[10]There is no evidence in the record to support Kirschenbaum's alternative argument that the Property was not owner occupied thus rendering the 90-Day Notice provision inapplicable (*see* Tr. Oral Argument, dated December 14, 2015 at 8-10).

Conclusion

Accordingly, it is hereby

ORDERED AND ADJUDGED, that Kirschenbaum's motion to dismiss the instant proceeding is granted, and the action is dismissed in its entirety; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: November 23, 2016

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.

FILED
NOV 29 2016
COUNTY CLERK'S OFFICE
NEW YORK

CLERK

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D. [signature]

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Judgment