SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff,

- v -

WILLIAM W MILNE, BOARD OF MANAGERS OF THE LION'S HEAD CONDOMINIUM, JOHN DOE NUMBER ONE THROUGH JOHN DOE NUMBER TEN,

Defendant.

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INDEX NO. 850241/2022

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion and cross-motions are determined as follows:

This is an action to foreclose on a mortgage encumbering residential real property located at 121 West 19th Street, Unit 6F, New York, New York 10011. The mortgage, dated March 28, 2008, was given by Defendant William Milne ("Milne") to non-party JPMorgan Chase Bank ("JPMorgan"). The mortgage secures a loan with an original principal amount of $1,000,000.00 which is evidenced by a note of the same date as the mortgage. Plaintiff Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee For Pretium Mortgage Acquisition Trust ("Wilmington") commenced this action on November 17, 2022, based upon its claim Defendant defaulted in repayment of the indebtedness. Plaintiff seeks interest retroactive to February 1, 2013, presumably the default date. Defendant Milne answered and pled eleven affirmative defenses including expiration of the statute of limitations.

Prior to the institution of this action, Plaintiff and an assignor commenced two prior actions to foreclose on this mortgage. The first action (*JPMorgan v Milne, et al*, NY Cty Index No 850114/2013) was commenced by JPMorgan against Milne on May 1, 2013. In its complaint, it was pled Milne defaulted in repayment on January 1, 2013 and that Plaintiff elected to declare the entire principal balance due and owing. A conference pursuant to CPLR §3408 were conducted and the matter was released from the Mortgage Foreclosure Conference Part by order of the Court dated December 7, 2015 (2013-NYSCEF Doc No 27).

By an *ex parte* order dated June 3, 2016, Justice Joan M. Kenny directed that the Clerk of the Court . . . mark the matter off the Court's calendar" based upon JPMorgan's failure to file a motion for an order of reference by the date set in the release order. In accordance with the express directive in that order, Plaintiff moved (2013-Mot Seq No 1) to "vacat[e] the . . . Dismissal", for a default judgment

against Milne pursuant to CPLR §3215 and an order of reference. Milne opposed the motion and cross-moved to dismiss pursuant to CPLR §3215[c] and based upon failure serve statutory pre-foreclosure notices pursuant to RPAPL §1304. By handwritten order, dated June 12, 2018[1], Justice Judith N. McMahon rendered a decision on the motions which is, in its entirety, as follows:

> [Plaintiff]'s motion to vacate is hereby denied.
> ORDERED that [Defendant]'s cross motion to dismiss is granted.
> ORDERED that the County Clerk shall enter judgment dismissing the action.

Plaintiff, Wilmington commenced another action (*Wilmington v Milne, et al*, NY Cty Index No 850098/2019) on April 29, 2019. In the complaint, Plaintiff pled Milne defaulted in repayment on August 1, 2013 and expressly accelerated the note. Milne answered and pled numerous affirmative defenses but did not raise expiration of the statute of limitations. By order of this Court dated August 3, 2021, Plaintiff's motion for summary judgment was denied based upon *inter alia* its failure to demonstrate *prima facie* service of notices in compliance with RPAPL §1304 and the terms of the mortgage. By order dated July 7, 2022[2], Plaintiff's second motion for summary judgment was denied and Milne's motion and dismissed the action based upon the Appellate Division, Second Department's decision in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept 2021] and its interpretation of RPAPL §1304. Notwithstanding the Court of Appeals' reversal of the Second Department's decision (*see Bank of America, NA v Kessler*, 39 NY3d 317 [2023]), Plaintiff sought no renewal of this Court's dismissal nor was a notice of appeal filed.

Now, Plaintiff moves for summary judgment against Defendant Milne, to strike his answer and affirmative defenses, for a default judgment against the non-appearing parties, for an order of reference and to amend the caption. Mortgagor Defendant Milne opposes the motion and cross-moves pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint as time barred, relying on the amendments made to the applicable statutes under the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]). Plaintiff opposes the cross-motion.

The initial inquiry must be whether the enactments in FAPA are applicable to this action. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in Freedom Mtge. Corp. v Engel" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA's legislative "response" which, by its reasoning, "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision

[1] This order was served with notice of entry on June 22, 2018.
[2] This order was served with notice of entry on July 8, 2018.

four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

With respect to retroactive applicability of FAPA to previously commenced and pending actions, the Appellate Division, First Department held, while these motions were *sub judice*, that the statutory amendments therein are to be retroactively applied (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37 [1st Dept. 2023]). The First Department reasoned that application of FAPA's amendments to pending litigation furthers the "the Legislature's goal, expressed in the language of FAPA and its legislative history" (*id.*). Based on the foregoing, the amendments instituted in FAPA will be applied in determining Milne's motion pursuant to CPLR §3211[a][5].

As relevant here, the applicable statute of limitations, CPLR §213[4], was amended to provide that "[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." (CPLR §214[4][a]). CPLR §203 was also amended to add subdivision [h] which provides that:

> Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

Also added was CPLR §205-a which supplanted the so-called "savings provision" under CPLR §205 in actions related to real property. Much like CPLR §205, the "statute is not technically a 'toll,' as it does not stop the underlying statute of limitations from running, but is instead a six-month 'extension' of the time for commencing the new action when its qualifying circumstances are present" (*Sokoloff v Schor*, 176 AD3d 120, 126-127 [2d Dept 2019]). However, application of CPLR §205-a is significantly more limited than its predecessor.

On a motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). The commencement of the 2013 and 2019 actions were unequivocal acts of acceleration of the debt. Among other things, the complaints expressly stated that Plaintiff was electing to declare the entire principal balance to be due and owing. Based upon the foregoing, Defendant established that the statute of limitations in this matter accrued in 2013 and that more than six-years transpired before this action was commenced.

Accordingly, the burden shifted to Plaintiff to demonstrate that a toll, stay or extension is applicable or that an issue of fact exists (*see eg Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). In opposition, Plaintiff posits that this action was timely commenced based upon the savings provision of

CPLR §205-a. This section limits its use to the "original plaintiff" in the prior dismissed action or "a successor in interest or an assignee of the original plaintiff" provided it pleads and proves that it is acting on behalf of the original plaintiff. (CPLR §205-a[a][1]). Further, the extension cannot be invoked if the prior action was terminated by:

> "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits"
>
> (CPLR §205-a[a]).

It is also necessary that any newly commenced action "would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period." Lastly, use of this savings provision is permitted only once (CPLR §205-a[a][2]).

Here, Plaintiff's reliance on this section fails in multiple respects. Initially, the dismissal of the 2019 action was for failure to take proceedings to enter a default pursuant to CPLR §3215[c], not RPAPL §1304 as Plaintiff alleges. Although Justice McMahon's decision is bereft of any reasoning, the first branch of Milne's cross-motion in that action was based upon CPLR §3215[c] and it is undisputed that Milne never answered in the 2019 action. Moreover, as Miline was in default, he was precluded from raising the issue of RPAPL §1304 as a basis for dismissal (*see Deutsche Bank Natl. Truat Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). Resort to the savings provision is also not available to Wilmington as JPMorgan was the original plaintiff and the complaint contains no allegation that Wilmington is acting on behalf of JPMorgan. Finally, since Plaintiff expressly claims that its 2019 action was timely based upon the application of the then applicable CPLR §205, a second six-month extension is precluded.

Accordingly, it is

ORDERED that Plaintiff's motion is denied and Defendant William Milne's cross-motion is granted that Plaintiff's complaint is dismissed.

4/2/2024
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE