

**NYC REO, LLC v Federal Natl. Mtge. Assn.**

2024 NY Slip Op 31352(U)

April 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 505512/2021

Judge: Richard J. Montelione

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At an IAS Term, Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the ~~5<sup>th</sup> day of March, 2024.~~

**APR 09 2024**

P R E S E N T:

HON. RICHARD J. MONTELIONE,  
Justice.

-----X  
NYC REO, LLC,

Plaintiff,

- against -

FEDERAL NATIONAL MORTGAGE ASSOCIATION  
and BAY 7, INC.,

Defendants.  
-----X

ORDER

Index No. 505512/21

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

56-62      65, 67-98

Opposition Affidavits (Affirmations) Annexed \_\_\_\_\_

68-98      101, 104-105

Reply Affidavits (Affirmations) \_\_\_\_\_

101, 104-105    107-108

Upon the foregoing papers in this action to quiet title to the real property at 318 Halsey Street in Brooklyn (Block 1846, Lot 40) (Property), pursuant to Article 15 of the New York Real Property Actions and Proceedings Law (RPAPL), plaintiff NYC REO, LLC (NYC REO or Plaintiff) moves (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3212, granting it summary judgment on its First and Second Causes of Action against defendant Federal National Mortgage Association (Fannie Mae) and

dismissing or otherwise striking Fannie Mae's answer and affirmative defenses (NYSCEF Doc No. 56).

Non-party Nationstar Mortgage LLC (Nationstar) d/b/a Mr. Cooper, Successor Defendant and Assignee of Fannie Mae, cross-moves (in mot. seq. four) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the First and Second Causes of Action in the complaint (NYSCEF Doc No. 65).

### **Background**

On March 8, 2021, NYC REO commenced this action against Fannie Mae and Bay 7, Inc.<sup>1</sup> by filing a summons and a verified complaint alleging that “[t]his action is brought pursuant to Article 15 of the [RPAPL] to compel a determination of claims” to the Property (NYSCEF Doc No. 1 at ¶ 1). The complaint alleges that NYC REO “acquired title to the Brooklyn Property by way of deed from the prior owner, Nicole Roman” and is the fee owner of the Property (*id.* at ¶ 2). The complaint alleges that “[e]ach of the Defendants is named because they claim, or it appears from the public records, that the[y] might claim an interest in the Brooklyn Property, adverse to that of [NYC REO]” (*id.* at ¶ 3).

The First Cause of Action seeks to quiet title regarding the October 3, 2005 mortgage encumbering the Property in the principal amount of \$464,000.00. “Pursuant to NY RPAPL 1501 Plaintiff seeks a declaratory judgment securing cancelation and discharge

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<sup>1</sup> By the court's January 31, 2022 decision and order (NYSCEF Doc No. 55), NYC REO was granted a default judgment as against Bay 7, Inc. on its Third (and final) Cause of Action for an order invalidating the February 12, 2014 deed by which Nicole Roman transferred the Property to Bay 7, Inc.

of [the] Mortgage recorded against the Brooklyn Property based upon the expiration of the statute of limitations set forth in CPLR 213 (4)” (*id.* at ¶ 11). The complaint alleges that on March 6, 2008, Indymac Bank (Indymac), Fannie Mae’s predecessor, commenced a prior foreclosure action, thereby accelerating the entire debt (2008 Foreclosure Action)<sup>2</sup> (*id.* at ¶ 12). Although the 2008 Foreclosure Action was dismissed by the court in November 2010 for failure to prosecute, allegedly that dismissal did not de-accelerate the loan (*id.* at ¶¶ 13-14). The complaint alleges that “[m]ore than 6 years have passed since the Fannie Mae mortgage was accelerated [on March 6, 2008], thus the statute of limitations expired on or about March 6, 2014” (*id.* at ¶ 19).

The Second Cause of Action seeks “a declaratory judgment and order discharging the [October 3, 2005] promissory note on the grounds that the statute of limitations has expired” based on Fannie Mae’s commencement of the 2008 Foreclosure Action and its failure to deaccelerate the debt (*id.* at ¶ 28).

Both the First and Second Causes of Action allege that Fannie Mae unsuccessfully moved to vacate the dismissal of the 2008 Foreclosure Action in January 2019, in which its counsel submitted an affirmation admitting that the October 2005 Fannie Mae mortgage was not deaccelerated (*id.* at ¶¶ 16 and 26).

On November 5, 2021, after an unsuccessful pre-answer dismissal motion, Fannie Mae answered the complaint and asserted affirmative defenses (NYSCEF Doc No. 54).

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<sup>2</sup> See *Indymac Bank, FSB v Nicole Roman*, Kings County index No. 7471/2008.

***NYC REO's Instant Summary Judgment Motion***

On October 25, 2022, NYC REO moved for summary judgment on its First and Second Causes of Action based on the affidavit of Siantan Bui (Bui), its “member.” Bui attests that NYC REO owns the Property and “acquired title to the . . . Property by way of deed from the prior owner, Nicole Roman” (NYSCEF Doc No. 61 at ¶¶ 4-5). Bui reiterates the allegations in the complaint regarding the 2005 mortgage, the 2008 Foreclosure Action, dismissal of the 2008 Foreclosure Action for failure to prosecute and the admitted lack of any de-acceleration of the debt (*id.* at ¶¶ 6-9). Bui asserts that “Fannie Mae failed to commence a foreclosure action within the applicable statute of limitations period” and “[t]he note and mortgage are therefore unenforceable as a result of the expiration of the statute of limitations period” (*id.* at ¶¶ 10-11).

***Nationstar's Opposition and Summary Judgment Cross Motion***

Nationstar opposes NYC REO's motion and cross-moves for summary judgment dismissing the First and Second Causes of Action. Nationstar argues that although the 2008 Foreclosure Action was dismissed by a November 24, 2010 decision and order (NYSCEF Doc No. 59), there was a June 24, 2019 decision and order denying Indymac's subsequent motion to vacate the November 2010 dismissal order (NYSCEF Doc No. 60) and an extension of Indymac's time to perfect its appeal from the June 2019 order to November 29, 2021 (*see* NYSCEF Doc No. 75 at 3). Nationstar argues that dismissal of the 2008 Foreclosure Action did not become final until Indymac's appeal from the 2019

order was ultimately dismissed by the Second Department on December 29, 2022, for failure to perfect the appeal.

Nationstar contends that “CPLR § 205 (a) permits the timely reassertion of a claim otherwise outside the applicable limitations period within the six (6) month period following the termination of a prior action *so long as the dismissal of the prior action does not fall under certain proscribed categories . . .*” (NYSCEF Doc No. 66 at 12 [emphasis added]). Under this reasoning, Nationstar asserts that its commencement of a second foreclosure action against the borrower in May 2022, prior to the dismissal of its appeal, was timely, and precludes the relief that NYC REO seeks in the First Cause of Action.

Nationstar only addresses the merits of the First Cause of Action regarding the mortgage because it asserts (in a footnote) that “[i]t is beyond dispute that Plaintiff is not an obligor under the Note . . . and thus has no basis to seek relief related to same as a stranger to the Loan transaction” (*id.* at 7, fn.1).

### ***NYC REO’s Opposition and Reply***

NYC REO opposes Nationstar’s summary judgment cross motion and submits a reply in further support of its summary judgment motion arguing that:

“(I) CPLR 205 (a) as amended by the [FAPA] is not available to a successor in interest or assignee of the original Plaintiff [in the 2008 Foreclosure Action], and consequently CPLR 205 (a) is not available to the Defendant in this action, who is admittedly an assignee or successor in interest of the original Plaintiff; (II) CPLR 205 (a) is not available where as is the case here, the prior case was dismissed for any form of neglect; (III) even prior to its recent amendment CPLR 205 (a) would be inapplicable as the 2008 Foreclosure Action was dismissed for

neglect to prosecute; and in any event, (IV) Defendant failed to commence a new action against Plaintiff and serve Plaintiff with same within six months of termination of the 2008 Foreclosure Action” (NYSCEF Doc No. 104 at ¶ 14).

### Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

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] [emphasis added]). Importantly, by its plain and unambiguous terms, the statute only applies to a *mortgage* encumbering property, and *not* to an action for breach of the underlying promissory note that was secured by the cancelled and discharged mortgage.

A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213 [4]). “The statute of limitations in a mortgage foreclosure action begins to run six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or *when the mortgage debt has been accelerated*” (*Zinker v Makler*, 298 AD2d 516, 517 [2002] [emphasis added]). “[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 Mortg., LLC v Weisblum*, 143 AD3d 866, 867 [2016] [internal quotations omitted]). “Acceleration occurs . . . by the commencement of a foreclosure action” and “[a] lender may revoke its election to accelerate the mortgage debt, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period” (*Pennymac Corp. v Holcomb*, 198 AD3d 978, 980 [2021]). A dismissal of a foreclosure action for failure to prosecute is not a dismissal on the merits, as a matter of law, and thus, does not de-accelerate the debt (*EMC Mortg. Corp. v Smith*, 18 AD3d 602, 603 [2005]).

Here, NYC REO demonstrated that the six-year statute of limitations began to run on March 6, 2008, when Indymac, Fannie Mae’s predecessor, accelerated the mortgage debt by commencing the 2008 Foreclosure Action against the borrower and former owner



of the Property, Nicole Roman. Other than the November 24, 2010 dismissal order of the 2008 Foreclosure Action, Nationstar has failed to identify any other affirmative act by which the 2008 acceleration of the mortgage debt could have been revoked. The record reflects that the 2008 Foreclosure Action was dismissed *without prejudice* based on Indymac's failure to proceed with its prosecution of the foreclosure action (*see* NYSCEF Doc Nos. 60 at 2 and 70 at 4). However, the record is devoid of any evidence that the March 2008 acceleration of the mortgage debt was ever revoked, and therefore, any action to foreclose the 2005 mortgage held by Nationstar has been time-barred since March 6, 2014.

The recently enacted Foreclosure Abuse Prevention Act (FAPA) "replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions upon instruments<sup>3</sup> described in CPLR 213 (4)"<sup>4</sup> (*Wells Fargo Bank, Nat'l Ass'n v Cafasso*, 223 AD3d 695, 696-697 [2024]). "Under CPLR 205-a (a), "[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced *and is terminated in any manner other than . . . a dismissal of the complaint for any form of neglect*, including, *but not limited to* those specified in . . . [CPLR 3215] . . . , the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences

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<sup>3</sup> There are no constitutional issues regarding retroactive application of CPLR 205-a because under either CPLR 205(a) and/or CPLR 205-a the six month period already expired.

<sup>4</sup> CPLR 213 (4) applies to actions on a mortgage, or a note secured thereby.

within six months following the termination, provided that the new 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” (*U.S. Bank Nat’l Ass’n v Onuoha*, 216 AD3d 1069, 1072 [2023] [emphasis added]).

Contrary to Nationstar’s assertion, the six-month savings provision does not apply here because the 2008 Foreclosure Action was dismissed on November 24, 2010 because Indymac inexplicably withdrew its motion for an order of reference when it was ordered to submit an affirmation confirming the factual accuracy of the allegations in the complaint. In dismissing the 2008 Foreclosure Action, the court explained:

“to allow this action to continue without seeking the ultimate purpose of a foreclosure action, to obtain a judgment of foreclosure and sale, *makes a mockery of and wastes judicial resources*. Continuing the instant action without moving for a judgment of foreclosure and sale is the judicial equivalent of a ‘timeout,’ and *granting a ‘timeout’ to plaintiff INDYMAC is a waste of judicial resources*. Therefore, the instant action is dismissed without prejudice” (*see* NYSCEF Doc No. 70 at 4 [emphasis added]).

While the 2008 Foreclosure Action was not dismissed under CPLR 3215 (c), it was dismissed for a “form of neglect” by Indymac because Indymac withdrew its motion for an order of reference on default and inexplicably failed to timely proceed with the 2008 Foreclosure Action as ordered and directed, resulting in a “waste of judicial resources.” The savings provision of CPLR 205 (a) or 205-a are, therefore, inapplicable under the particular circumstances presented here.

Nationstar's claim that it commenced a timely foreclosure action in 2022 because the court's November 2010 dismissal of the 2008 Foreclosure Action did not become final until the appeal was dismissed for failure to perfect in December 2021 is rejected. The record does not reflect that Indymac ever appealed from the November 2010 dismissal order of the 2008 Foreclosure Action. Instead, Indymac moved to vacate the November 2010 dismissal years after it was already a final order. The timing of Indymac's appeal from the 2019 order denying vacatur of the 2010 dismissal order is irrelevant to the statute of limitations issue presented here.

Consequently, NYC REO is entitled to an order, pursuant to RPAPL 1501 (4), granting it summary judgment on its First Cause of Action for a declaration and order that the 2005 mortgage is cancelled and discharged as an encumbrance against NYC REO's Property because the time within which to commence a foreclosure action expired in 2014.

However, the Second Cause of Action by which NYC REO seeks a declaratory judgment discharging the October 3, 2005 promissory note executed by Nicole Roman on the ground that the statute of limitations has expired is rejected. Nicole Roman is not a party to this action, and she is the borrower who executed the promissory note in favor of Indymac. There is no legal basis to cancel or discharge the promissory note based on Indymac's commencement of the 2008 Foreclosure Action, which merely sought to foreclose the mortgage encumbering the Property, which was given as security for the promissory note. NYC REO, which is not a party to the 2005 promissory note, lacks standing to seek any relief relating thereto. However, when a party "in an action for

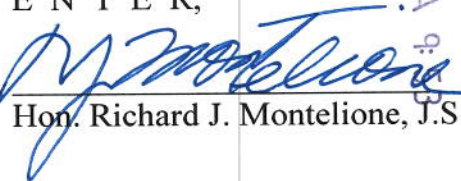
declaratory judgment is not entitled to the declaration sought, the remedy is not dismissal of the [cause of action], but a declaration of the rights of the parties, whatever those rights may be” (*La Lanterna v Fereri Enterprises, Inc.*, 37 AD3d 420, 422-423 [2007]). Accordingly, it is hereby

**ORDERED** that NYC REO’s summary judgment motion (mot. seq. three) is only granted with respect to the First Cause of Action; the summary judgment motion is otherwise denied; and it is further

**ORDERED, ADJUDGED AND DECLARED** that the October 3, 2005 mortgage executed by Nicole Roman is hereby discharged and cancelled, pursuant to RPAPL § 1501 (4). NYC REO must record a copy of this decision and order on the property records of the Property and the Kings County Clerk shall accept same for recording within 15 days of service of this decision and order with notice of entry thereof; and it is further

**ORDERED, ADJUDGED AND DECLARED** that the branch of Nationstar’s summary judgment cross motion (mot. seq. four) with respect to the Second Cause of Action is granted and the court declares that plaintiff has no privity of contract with respect to the October 3, 2005 promissory note and thus may not seek relief thereunder; the summary judgment cross motion is otherwise denied.

This constitutes the decision, order and judgment of the court.

E N T E R,  
  
Hon. Richard J. Montelione, J.S.C.

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