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SHORT FORM ORDER

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INDEX NO.: 007017/2010
SUBMIT DATE: 11/28/2012
MTN. SEQ.#: 002; 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 002 - 10/3/2012
003 - 10/31/2012
MOTION NO.: 002: MD 003: MD

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BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP,

Plaintiff

-against-

DAVID HASSETT, JACQUELINE HASSETT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants of occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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By: Edward Rugino, Esq.
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Plainview, NY 11803

WESTERMAN BALL EDERER MILLER & SHARFSTEIN, LLP
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Attys. for Defendants
David Hassett and Jacqueline Hassett
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Upon the following papers numbered 1 to 44 read on this application for an award of attorneys' fees pursuant to Real Property Law §282, and on the cross motion for costs and attorneys' fees in making a frivolous motion; Notice of Motion/Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-18; Answering Affidavits and supporting papers_____; Replying Affidavits and supporting papers 19-44; Other ____; it is

ORDERED that the application by the defendants, David Hassett and Jacqueline Hasset ["the defendants"], for an order pursuant to Real Property Law § 282 awarding the defendants their attorneys' fees and expenses incurred in the total amount of $10,526.27 (as amended upon the submission of their reply papers in the amount of $18,038.34) (motion sequence 002), and the cross motion by the plaintiff BAC Home Loans Servicing, LP f/k/a/ Countrywide Home Loans Servicing LP ["the plaintiff"], for an order awarding the plaintiff the costs of the motion and reasonable attorneys' fees in the amount of $607.50 (motion sequence 003), are decided together; and it is further

ORDERED that the defendants' motion for attorneys' fees is denied; and it is further

ORDERED that the plaintiff's motion for the costs of the motion and reasonable attorneys' fees is denied.

On February 24, 2010, the plaintiff commenced a foreclosure action against the defendants, residential homeowners, alleging that the defendants defaulted on a loan in the amount of $527,573.00. As collateral security for the indebtedness, the defendants do not dispute that they executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominees for the lender, ["MERS"], a mortgage dated February 11, 2009. The plaintiff alleges in the complaint that the defendants defaulted on the note by failing to pay the installment which became due and payable as of August 1, 2009.

On April 11, 2012, the defendants moved for an order granting summary judgment and dismissing the complaint pursuant to CPLR 3212, asserting that the plaintiff lacked standing to maintain the action. This court issued an order dismissing the complaint pursuant to CPLR 3211 (a) (3), without prejudice, and directing the County Clerk to cancel and discharge the notice of pendency filed on February 24, 2010 against the property, and to enter upon the margin of the record of same a notice of cancellation referring to that Order, and in all other respects the plaintiff's motion was denied.

Importantly, the defendants' dismissal motion urged that the action should be dismissed *with prejudice*, and on the merits. The court declined the defendants' invitation and dismissed the action *without prejudice*, due to the plaintiff's failure in opposing the defendants' motion to demonstrate by proof in admissible form, i.e., an affidavit from a person with knowledge, that the plaintiff had standing to commence a foreclosure action, in other words, that it was both the holder or assignee of the mortgage and the holder or assignee of the underlying note prior to the commencement of the action. *See* ***GRP Loan, LLC v. Taylor***, 95 A.D.3d 1172, 1173 (2d Dept. 2012).

The defendants now move for an order awarding attorneys' fees pursuant to Real Property Law § 282. For the following reason, the defendant's motion is denied.

Real Property Law § 282 entitled, "**Mortgagor's right to recover attorneys' fees in actions or proceedings arising out of foreclosures of residential property**" provides, in pertinent part:

> 1. Whenever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage, or that amounts paid by the mortgagee therefor shall be paid by the mortgagor as additional payment, there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor as the result of the failure of the mortgagee to perform any covenant or agreement on its part to be performed under the mortgage or *in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract*, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the mortgagee or by way of counterclaim in any action or proceeding commenced by the mortgagee against the mortgagor. Any waiver of this section shall be void as against public policy.

Both parties acknowledge that the legislature provided that as to the statute's applicability,

> "§ 3. This act shall take effect on the sixtieth day [Dec. 19, 2010] after it shall have become a law, shall apply to residential real property mortgages in existence on or after such date and shall apply to actions and proceedings commenced on or after such date."

The extensive argument in the moving and cross moving papers, which includes a full discussion of the legislative history of the statute's enactment, focuses entirely on an issue of apparent first impression- whether the statute applies where, as here, the foreclosure action was commenced prior to the enactment of RPL § 282. The defendants argue that the statute was clearly intended to apply to both residential real property mortgages in existence on or after [December 19, 2010], and to actions and proceedings commenced on or after such date. Hence, the defendants urge, since the subject mortgage was in existence on the effective date of the statute, RPL § 282 clearly applies notwithstanding that the action was commenced prior to the enactment of the statute.

Under the circumstances here, the court determines that the statute does not warrant an award of attorneys' fees in the defendants' favor irrespective of whether the legislature intended the statute to apply retroactively to actions or proceedings commenced prior to the statute's effective date. The defendants can not be said to have achieved success as a prevailing party in the context of the ultimate outcome of the foreclosure action warranting an award of attorneys' fees.

There is a dearth of authority as to what defines a prevailing party for purposes of an award of attorneys' fees under RPL § 282. However, as the defendants repeatedly point out in their reply papers, RPL § 282 is modeled upon Real Property Law § 234, "a reciprocal attorneys' fee provision which authorizes prevailing tenants to collect attorneys' fees when a lease authorizes fees to be recovered by a prevailing landlord." Several appellate cases interpreting RPL § 234 and the prevailing parties' entitlement to an award of fees informs and resolves the issue of apparent first impression here.

In ***Elkins v. Cinera Realty***, the Second Department held that a landlord or tenant is entitled to attorney fees only when it can be said that the landlord or tenant is the "prevailing party" in a "controversy" which reaches an "ultimate outcome" (***Elkins v. Cinera Realty***, 61 A.D.2d 828, 402 N.Y.S.2d 432 [2d Dept. 1978]; *see also* ***Centennial Restorations Co. v. Wyatt***, 248 A.D.2d 193, 669 N.Y.S.2d 585 [1st Dept. 1998]).

In ***Elkins***, *supra*, the landlord had commenced a total of three summary proceedings against its tenant. The first two were dismissed without prejudice: the first, because the landlord failed to appear; and the second, because the petition had not been properly verified. The court denied the tenant's application for attorneys' fees because the third summary proceeding had already been commenced on the same theory. The Second Department held that since the controversy had not yet been finally determined, the tenant's application for attorneys' fees was premature. The Court reasoned that if the landlord is ultimately successful in recovering the rent due under the lease, it would be unjust to allow the plaintiff-tenant to recover his reasonable attorney's fees based on the outcome of each separate stage of what is clearly one controversy.

A controversy reaches an "ultimate outcome" when a court disposes of an action on the merits, or when it becomes clear that an action, although not disposed of on the merits, cannot or will not be commenced

again on the same grounds. A tenant may be entitled to attorneys' fees, for example, when a landlord discontinues a proceeding for a second time and the applicable law does not permit the landlord to recommence a third proceeding (***Centennial Restorations Co. v. Wyatt***, *supra*, 248 A.D.2d 193, 669 N.Y.S.2d 585 [1st Dept. 1998]), or when a court dismisses a petition on a procedural ground and the landlord decides, for one reason or another, not to commence another proceeding against the tenant (***Park South Associates v. Essebag***, 126 Misc.2d 994, 995, 487 N.Y.S.2d 252 [App. Term 1st Dept. 1984]; ***N.V. Madison Inc. v. Saurwein***, 103 Misc.2d 996, 998–999, 431 N.Y.S.2d 251 [App. Term 1st Dept. 1980]).

A controversy does not reach an "ultimate outcome" sufficient to entitle a litigant to the award of attorneys' fees, however, when an action is dismissed on procedural grounds or is otherwise discontinued and there is some indication that the action may be recommenced at a later time (***see, Roxborough Apartment Corp v. Becker***, 177 Misc.2d 408, 676 N.Y.S.2d 821 [1998]).

The statute of limitations to foreclose on the subject loan and mortgage has not expired. The plaintiff alleges that the defendants defaulted on the note by failing to pay the installment which became due and payable as of August 1, 2009. 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 (see CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due (*see* ***Wells Fargo Bank, N.A. v. Cohen***, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569; ***Loiacono v. Goldberg***, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138; ***Pagano v. Smith***, 201 A.D.2d 632, 633, 608 N.Y.S.2d 268).

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" (***EMC Mtge. Corp. v. Patella***, 279 A.D.2d 604, 605, 720 N.Y.S.2d 161; *see* ***Lavin v. Elmakiss***, 302 A.D.2d 638, 639, 754 N.Y.S.2d 741; ***Zinker v. Makler***, 298 A.D.2d 516, 517, 748 N.Y.S.2d 780).

At the very earliest, the action accrued on August 1, 2009, the date when the loan payment became due and the defendants defaulted. Since the action was dismissed without prejudice, and the period of limitation to commence another action has not expired, the ultimate outcome and the identity of the prevailing party are yet to be determined. *See* ***Board of Managers of 55 Walker Street Condominium v. Walker Street, LLC***, 6 A.D.3d 279 (2d Dept. 2004) (to qualify as 'prevailing party for purposes of award of attorneys' fees claimant must have been prevailing party on the central claims advanced and receive substantial relief in consequence thereof).

In the exercise of this Court's discretion, an award of attorneys' fees to the defendants pursuant to RPL § 282 is not warranted at this time. *See* ***Skyline Terrace Cooperative, Inc. v. Butler***, 32 Misc.3d 138(A), 936 N.Y.S.2d 61 (App. Term 2011).

Finally, since it is clear that at least at this juncture the plaintiff is not a prevailing party, the court expressly declines to resolve the issue of apparent first impression whether Real Property Law § 282 is retroactive to actions commenced before its effective date, or the more fundamental issue, whether the particular clause in the subject mortgage addressing attorneys' fees would entitle the mortgagors to an award

of attorneys' fees under Real Property Law § 282 as a prevailing party. *Cf.* ***Casamento v. Juaregui,*** 88 A.D.3d 345, 929 N.Y.S.2d 286 (2d Dept. 2011). That latter issue was likewise not addressed in the parties' papers.

The cross motion by the plaintiff for an order awarding the plaintiff the costs of the motion and reasonable attorneys' fees in the amount of $607.50 is denied as the plaintiff has failed to show that the defendants' motion based on an issue of first impression constitutes frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (1), i.e., conduct that "is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."

DATED: 28 Jan. 2013

HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION