

**Bayview Loan Servicing, LLC v Victor Horsford  
Realty Corp.**

2015 NY Slip Op 30077(U)

January 20, 2015

Supreme Court, New York County

Docket Number: 650372/2014

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. Peter H. Moulton PART 57

*Justice*

BAYVIEW LOAN SERVICING, LLC A  
DELAWARE LIMITED LIABILITY COMPANY

INDEX NO. 650372/14

MOTION DATE 03

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

v.

VICTOR HORSFORD REALTY CORP.,  
ROCKY HORSFORD, NECHADIM CORP.,  
NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, NEW YORK  
CITY ENVIRONMENTAL CONTROL  
BOARD, STATE OF NEW YORK, CITY OF  
NEW YORK, "JOHN DOE" #1-10, "MARY  
DOE" #1-10, and "JANE DOE" #1-10, the  
names being fictitious, their true names  
being unknown to plaintiff, persons  
intended being persons in possession of  
portions of the premises described in the  
complaint in the action

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

This action was commenced by plaintiff to foreclose a 2005 mortgage made by Victor Horsford Realty Corp. to Silver Hill Financial LLC which secured a \$1,000,000 loan.<sup>1</sup> In 2006, Silver Hill Financial LLC allegedly assigned the mortgage to plaintiff who seeks \$992,077.81 in this action, plus interest from October 2013. In this motion, defendants Victor Horsford Realty Corp. and Rocky Horsford (collectively "Horsford") for an order, pursuant to RPAPL §1501(4), cancelling and discharging a mortgage made on April 18, 2008 by those defendants in favor of co-

<sup>1</sup>Plaintiff maintains that Victor Horsford also personally guaranteed the loan.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

defendant Nechadim Corp. secured by the property which is the subject of this mortgage foreclosure action (197 Lenox Avenue) and another property (480 East 186<sup>th</sup> Street) (the "Nechadim mortgage"), based on the expiration of the statute of limitations is denied at this time.<sup>2</sup>

Horsford correctly notes that the statute of limitations in a mortgage foreclosure is six years pursuant to CPLR §213 (4). Based on Nechadim's payoff document, indicating that no payments were ever made, Horsford asserts that a mortgage foreclosure action had to have been commenced by April 2014. Rocky Horsford submits an affidavit urging the court to cancel the mortgage as time-barred, citing to the payoff document which he asserts Nechadim belatedly provided.

In opposition to the motion, counsel for Nechadim submits an affirmation noting that the six year period begins to run the day after the debt matures, or is accelerated, citing *CDR Creances S.A. v Euro-America Lodging Corp.*, 43 AD3d 45 [1st Dept 2007]). Citing to the term of the mortgage attached to Horsford's papers (which ran through December 17, 2008), Nechadim's counsel asserts that his client has until December 16, 2014 to file a foreclosure action. Counsel (conspicuously) does not submit his client's affidavit, and makes such unsupported statements as "Nechadim did not accelerate the loan prior to maturity." Nechadim's counsel, however, observes that Horsford does not claim that the mortgage was accelerated. Thus, his argument is based upon Horsford's lack of proof. He further argues that Nechadim commenced a foreclosure action in 2009, and that Horsford's assertion that the action was dismissed, is unsupported.

In reply, counsel for Horsford asks this court to schedule an immediate hearing

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<sup>2</sup>The mortgage secures a loan to Victor Horsford Realty Corp., in the principal amount of \$135,000. Nechadim's payoff document reflects that the amount owed through August 17, 2014 is \$584,448.85 based on a default interest rate of 24 percent and reflect that no payments were ever received from Horsford. Horsford asserts that he made many payments, has proof of such payments made to Nechadim's account, and that the payoff numbers are wrong.



on the amount due to Nechadim, so that the amount owed can be paid and the Nechadim mortgage can be discharged. He asserts that the court can do so citing *Matter of First Natl. City Bank v City of N.Y. Fin. Admin.* (36 NY2d 87 [1975] [special proceeding should have been converted to an action because a court can “regard the problem as one of improper form only]).” In calculation of the amount due, counsel seeks sanctions based on Nechadim’s lack of good faith, which may result in the barring of interest, legal fees and expenses. Horsford’s counsel also states that Nechadim has failed to comply with a subpoena so-ordered by this court, but has made no motion for contempt.

In a supplemental affirmation in opposition (which was permitted by the court), counsel for Nechadim asserts that this court has no “jurisdiction” to discharge the Nechadim mortgage because a “plenary action” is required, and relief should not be granted by motion. Nechadim’s counsel further asserts that “the instant action involves a different mortgage” and the “mortgage held by Nechadim is not the subject of the instant action.”<sup>3</sup>

#### Discussion

Nechadim’s counsel seizes upon the form in which Horsford has brought this application. Nechadim is already a party defendant in this action. While it is true that the action involves the senior mortgage, and this application regards the second or junior mortgage, Horsford could have cross-claimed against co-defendant Nechadim. Under CPLR § 3019 (b) a cross-claim may be asserted by one defendant against another defendant for any cause of action at all, whether or not related to the plaintiff’s claim. However, *Matter of First Natl. City Bank* does not obviate the need for counsel to file the appropriate papers. That case involved CPLR §103 (c), which speaks to conversion of a special proceeding to an action, or vice-versa, in order to

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<sup>3</sup>The court denies Nechadim’s counsel’s request for a sur-reply and rejects the Rosengarten Sur-Reply Affirmation dated December 21, 2014.

avoid dismissal of a case brought in the incorrect form. CPLR §103 (c) does not obviate the need to follow other sections of the CPLR (and Horsford can easily remedy this defect in form). Accordingly, before the court can hold a hearing on the amount owed secured by the Nechadim mortgage, the proper pleadings/motion to amend must be filed.

Horsford correctly asserts that this court would have the power to toll interest, if appropriate (and asserted in Horsford's pleadings). Appellate courts have not hesitated to toll interest as a permissible remedy tailored to the circumstances of a particular case (*see e.g., Dayan v York*, 51 AD3d 964 [2d Dept 2008] [where plaintiff was substituted in place of a bank in a foreclosure action after purchasing the mortgage, it was inequitable and unconscionable for defendant to be charged accrued interest and penalties given plaintiff's delay in prosecuting the foreclosure action between 1995 and late 2001]; *Norwest Bank Minn., N.A. v E.M.V. Realty Corp.*, 94 AD3d 835 [2d Dept 2012] [tenant, who received an assignment of the mortgage and a judgment lien from a bank, could not recover interest on the unpaid principal balance of a mortgage in light of its deliberate acts in triggering the foreclosure action]; *Danielowich v PBL Dev.*, 292 AD2d 414 [2d Dept 2002] [tolling interest for the five months mortgagee that it took to move to confirm referee's report]; *Dollar Fed. Sav. & Loan Assn. v Herbert Kallen, Inc.*, 91 AD2d 601 [2d Dept 1982] [fixing the date of computation for amounts due at two years prior to date of referee's report, due to plaintiff's unconscionable delay]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976] ["If the mortgagee is responsible for the delay, it should forfeit the interest and other charges"]).

Lower courts have also tolled interest (*see e.g., US Bank N.A. v Gioia*, 42 Misc 3d 947 [Supreme Court, Queens County 2013] [interest tolled from the commencement of the foreclosure action until further order based on bank's unreasonable and unexcused delay]; *US Bank, N.A. v Rodriguez*, 41 Misc 3d 656

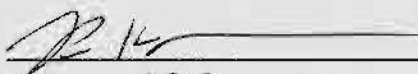


[Supreme Court, Bronx County 2013] [interest, late fees and attorney's fees tolled after the date of a HAMP denial until the borrower received a final detailed determination and after review of all HAMP options]); *US Bank, N.A. v Shinaba*, 40 Misc 3d 1239 (A) [Supreme Court, Bronx County 2013] [interest, late fees and attorney's fees tolled for over two years as a result of the bank's failure to negotiate in good faith, including long and unexcused delays]; *Deutsche Bank Trust Co. of Am. v Davis*, 32 Misc 3d 1210 (A) [Supreme Court, Kings County 2011] [sanctions due to delay attributable to the bank included cancellation of 50 percent of two years of interest, accruing from the date of the first HAMP conference]; *Wells Fargo Bank, N.A. v Ruggiero*, 39 Misc 3d 1233 [interest and attorney's fees cancelled for over three years from the date of the first conference until the date of the order in light of the bank's unexplained delays, unexplained charges, and misrepresentations]).

Had Horsford filed the appropriate pleadings, the motion would be denied as to the statute of limitations. No evidence has been proffered that the Nechadim mortgage was accelerated (which is the unstated basis for the contention that the statute of limitations expired). However, to the extent that Horsford has proof that the Nechadim mortgage was accelerated prior to maturity and that the statute of limitations expired, the motion can be renewed.

This Constitutes the Decision and Order of the Court.

Dated: January 20, 2015

  
 J.S.C.  
 PETER H. MOULTON

New York, New York

- 1. Check one: .....  Case Disposed  Non-Final Disposition
- 2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other
- 3. Check if Appropriate: .....:  Settle Order  Submit Order

Do Not Post  Fiduciary Appointment  Reference