MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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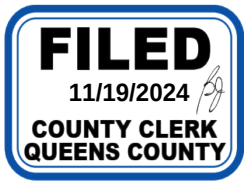
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

Index No.: 701645/24
Mot. Date: 9/10/24
Mot. Seq. 2

CHRISTIAN GONZALEZ, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE, said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,



Defendants. **Dated: November 18, 2024**

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The motion by plaintiff for, *inter alia*, an order of reference, is denied; and, the cross-motion by defendant Christian Gonzalez for an order, *inter alia*, granting summary judgment in his favor on his counterclaims, pursuant to CPLR 3212, canceling and discharging a certain mortgage, pursuant to RPAPL §1501(4), and awarding him attorneys' fees, pursuant to RPL § 282, is granted.

By way of background information, on February 14, 2001, defendant Christian Gonzalez (hereinafter defendant) executed a Note, in the sum of $189,450.00, in favor of Ameritrust Mortgage Bankers, Inc. (Ameritrust Mortgage). The Note was secured by a Mortgage, encumbering real property located at 88-05 77th Street a/k/a 8805 77th Street, Woodhaven, New York 11421 (the subject property). Said Mortgage was recorded, on March 30, 2001, in the Office of the City Register of the City of New York, under Reel: 5831 Page 495. That same day, the Mortgage was reassigned to the plaintiff, then operating as Chase Manhattan Mortgage Corporation.

On February 8, 2006, the plaintiff, then operating as Chase Home Finance, LLC, commenced a prior action, originally assigned Index No. 3041/2006 and then 705615/2020, after conversion to efiling, seeking to foreclose on the Mortgage by calling the entire amount due after the defendant's alleged default on the September 1, 2005 mortgage payment (the 2006 Action).

On February 17, 2023, the 2006 Action was discontinued, pursuant to a two-attorney Stipulation of Discontinuance.

On January 23, 2024, the plaintiff commenced this instant foreclosure action via the filing of a Summons and Complaint, based upon the same September 1, 2005 default as in the 2006 Action.

Defendant filed his Verified Answer with Counterclaims, on March 15, 2024, asserting fourteen affirmative defenses, and two counterclaims to cancel and discharge the Mortgage as time-barred, pursuant to RPAPL § 1501(4), and for an award of attorneys' fees incurred for this action and the 2006 Action, pursuant to RPL § 282 (NYSCEF Doc. No. 16).

Plaintiff now brings the instant motion for an order, *inter alia*, awarding it summary judgment and an order of reference. Defendant cross-moves for an order awarding him summary judgment on his counterclaims.

The Court will first address defendant's cross-motion.

In sum and substance, the defendant argues that he is entitled to summary judgment on his counterclaims, pursuant to CPLR 3212, due to the statute of limitations to enforce the Mortgage having expired following the acceleration of the loan via the commencement of the 2006 Action.

"The proponent of a summary judgment motion must make a *prima facie* showing of the entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Solis v Aguilar*, 206 AD3d 685, 686 [2d Dept 2022], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Regarding the defendant's first counterclaim, "[p]ursuant to RPAPL 1501(4), a person having an estate or interest in real property subject to a mortgage may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure

action has expired" (*U.S. Bank NA v Schaer*, 223 AD3d 928, 929 [2d Dept 2024] [internal citations omitted]).

Pursuant to CPLR 213(4), an action to foreclose a mortgage is governed by a six-year statute of limitations. "[E]ven 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" (*U.S. Bank NA v Schaer*, 223 AD3d at 929), quoting *BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2d Dept 2021]). "Acceleration occurs, *inter alia*, by the commencement of a foreclosure action wherein the holder of the note elects in the complaint to call due the entire amount secured by the mortgage" (*U.S. Bank NA v Schaer*, 223 AD3d at 929).

In support of his motion, the defendant established, *prima facie*, that: the Mortgage debt was accelerated, upon the commencement of the 2006 Action, where the plaintiff elected to call due the entire amount owed; the discontinuance of the 2006 Action did not reset or toll the statute of limitations, where it was discontinued by stipulation and occurred outside the six-year statute of limitations period (*see* CPLR 213[4], as amended by the Foreclosure Abuse Prevention Act [L 2022, ch 821]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept 2023]; *Bayview Loan Servicing, LLC v Paniagua*, 207 AD3d 691 [2d Dept 2022]); and, this instant action was commenced, on January 23, 2024, more than six years after the mortgage debt was accelerated with the 2006 Action.

The burden then shifted to the plaintiff to raise a triable issue of fact.

In opposition to the defendant's cross-motion, the plaintiff argues, as relevant here, that it is immune from New York's statute of limitations on mortgage foreclosure actions, due to the Note and Mortgage being a "Federal Housing Administration (FHA) loan."

"There is no federal statute of limitations applicable to mortgage foreclosure actions brought by the United States or its federal agencies" (*Nationstar Mtge., LLC v Scheinberg*, 216 AD3d 652, 654 [2d Dept 2023] [internal citations omitted]). "That rule applies equally to an assignee of a federal agency, including a commercial lender, and includes the benefit of immunity from a state limitations period" (*Id*.) (internal citations omitted).

In support of its assertion that it is immune from New York's statute of limitations, the plaintiff submits: the Note and Mortgage, which bear an FHA case number; and, to establish the FHA or the United States Department of Housing and Urban Development

(HUD)'s interest in the Loan, the insurance policy on the Mortgage, dated February 14, 2001, and issued by the American Land Title Association, which provides that the "Name of Insured" for the loan insurance policy is "Ameritrust Mortgage Bankers, Inc. and or the Secretary of Housing and Urban Development of Washington, D.C., its successors and assigns, as their interest may appear" (NYSCEF Doc. No. 61).

Plaintiff's contentions are unavailing. Despite the plaintiff's assertions, the fact that an underlying Note bears an FHA Case Number is not the determining factor on whether the assignee of the loan is afforded immunity from New York's statute of limitations in foreclosure actions (*see e.g. Bank of Am. N.A. v Reid*, 2024 NY Slip Op 04942 [2d Dept 2024]); *Reverse Mtge. Solutions, Inc. v Gipson*, 230 AD3d 813 [2d Dept 2024]).

Instead, the "relevant distinction...is that between a loan that was merely *insured* by a federal agency and a loan that was *held* by a federal agency, such that the federal agency had a right to foreclose the mortgage" (*Id.* at *6)(emphasis in original).

The Court record reflects that the Note and Mortgage were initially executed in favor of Ameritrust Mortgage, and then immediately assigned to the plaintiff, in its prior and current iterations, who has held the Note and Mortgage ever since. At no point in time did FHA or HUD ever hold the Note and Mortgage.

Other than the Note and Mortgage bearing an FHA case number, the plaintiff sets forth no additional arguments, nor presents any additional evidence, that "it is an assignee of HUD or that HUD had the right to foreclose on the mortgage," (*Reverse Mtge. Solutions, Inc v Miglucci*, 2024 NY Slip Op 05171 at *5 [3rd Dept 2024]).

Furthermore, the insurance policy submitted only establishes that the mortgage "was merely insured by a federal agency" (*Bank of Am. N.A. v Reid*, 2024 NY Slip Op 04942 at *6 [2d Dept 2024]).

Additionally, the plaintiff's contention that the "ultimate benefit of the foreclosure action and sale will flow to the FHA/HUD" is unsupported and wholly without merit.

As the plaintiff has failed to establish that it is an assignee of FHA or HUD, and that either of those federal agencies had the right to foreclose on the mortgage at any point in time, the plaintiff is not entitled to immunity from New York's statute of limitations on foreclosures. Thus, the plaintiff has failed to raise a triable issue of fact. As such, the branch of defendant's cross-motion awarding him summary judgment on his first counterclaim

cancelling and discharging the Mortgage against the subject property, dated February 14, 2001 and recorded on March 30, 2001, in the Office of the City Register of the City of New York under Reel: 5831 Page 495, is granted.

Given the above, the Court need not address the additional grounds raised by the defendant for, either the denial of plaintiff's motion for summary judgement and an order of reference, or the dismissal of the instant action, at this time.

Regarding the defendant's second counterclaim seeking attorneys' fees incurred for this action and the 2006 Action, pursuant to RPL § 282, such is granted, as to this action *only*.

"Real Property Law §282(1) provides that under certain circumstances, a mortgagor can recover from the mortgagee 'the reasonable attorneys' fees and/or expenses incurred by the mortgagor...in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract,' and 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" (*Heitner v Capital One, N.A.*, 226 AD3d 976, 979 [2d Dept 2024]), citing RPL §282[1]).

As the defendant is the prevailing party in this action where he additionally set forth a counterclaim seeking an award of attorneys' fees, pursuant to RPL § 282(1), defendant is entitled to such, as to this instant action only. Regarding the attorneys' fees incurred for the 2006 Action, such is denied, due to, *inter alia*, said action being discontinued, pursuant to the two-attorney stipulation and not being decided on the merits (*see e.g. DKR Mtge. Asset Trust 1 v Rivera*, 130 AD3d 774 [2d Dept 2015]).

As for the amount awarded for reasonable attorneys' fees, in the instant matter, the defendant shall file an affirmation of legal services, in addition to a proposed order as set forth below, for the Court to base its award.

Additionally, as the defendant has established that the instant action is time-barred, pursuant to CPLR 213(4), the instant action is dismissed, and the plaintiff's motion for summary judgment and an order of reference is denied, as moot.

In sum, the defendant's cross motion is granted and he is awarded summary judgment in his favor as to both his counterclaims in that, the Mortgage against the subject property,

dated February 14, 2001, and recorded on March 30, 2001, in the Office of the City Register of the City of New York under Reel: 5831 Page 495, is cancelled and discharged as time-barred, pursuant to RPAPL §1501(4), and he shall be awarded attorneys' fees in this instant action, only, pursuant to RPL § 282. The instant action is hereby dismissed as time-barred. Plaintiff's motion for, *inter alia*, summary judgment and an order of reference is denied, as moot.

The defendant shall submit a proposed order and affirmation of legal fees, in accordance with the findings set forth above.

Submit Proposed Order. Proposed Order must be filed to NYSCEF.

FILED
11/19/2024
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.