

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR HOME EQUITY
MORTGAGE LOAN ASSET-BACKED TRUST
SERIES INABS 2007-A, HOME EQUITY MORTGAGE
LOAN ASSET-BACKED CERTIFICATES
SERIES INABS 2007-A,

Plaintiff,

-against-

**DECISION AND ORDER
INDEX NO. 2018-50772
SEQ. NO. 1**

KIMBERLY M. STEUBER, DENIS J. STEUBER;
NY FINANCIAL SERVICES, LLC; DISCOVER BANK;
WORLDWIDE ASSET PURCHASING II, LLC;
MIDLAND FUNDING LLC DBA IN NEW YORK AS
MIDLAND FUNDING OF DELAWARE LLC; LVNV
FUNDING LLC; DUTCHESS COUNTY DEPARTMENT
OF COMMUNITY AND FAMILY SERVICES,

“JOHN DOE #1” through “JOHN DOE#12”, the last
twelve names being fictitious and unknown to plaintiff,
the persons or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming an
interest or lien upon the Subject Property, described in
the complaint,

Defendants.

ACKER, J.

Defendants KIMBERLY M. STEUBER and DENIS J. STEUBER (hereinafter
sometimes referred to jointly as “STEUBER”) move for an order, pursuant to CPLR 3212,
granting summary judgment seeking the following relief:

- Dismissing the action as time-barred;
- Vacating the Notice of Pendency; and
- Directing the County Clerk to cancel and discharge the mortgage pursuant to RPAPL §1501(4); and
- Setting the matter down for inquest on the issue of attorneys' fees pursuant to Real Property Law §282.

The following papers were considered:

PAPERS	NUMBERED
Notice of Motion/Affidavit of Kimberly M. Steuber/Affirmation of Michael Treybich, Esq./Exhibits A-N/Memorandum of Law	1-19
Affirmation in Opposition of Lijue T. Philip, Esq./Exhibits 1-3	19-23
Defendant's Reply Memorandum of Law	24

The instant foreclosure action involves the real property known as 4 Dara Lane, Wappingers Falls, New York. On January 12, 2007, Defendant KIMBERLY M. STEUBER entered into a mortgage re-finance loan agreement with IndyMac Bank, F.S.B. ("IndyMac"). The Note was in the amount of \$360,000 and was secured by a mortgage on the real property. It is not contested that the Defendant defaulted on the loan in October, 2008. As a result, the Noteholder, IndyMac, commenced a residential foreclosure action on April 3, 2009, under Index Number 2009-2381. On August 12, 2012, Defendant KIMBERLY M. STEUBER filed a Chapter 7 Bankruptcy petition. She was discharged on November 12, 2012. On September 13, 2012, counsel for IndyMac advised the Court that Ms. STEUBER had filed a bankruptcy petition and that counsel would proceed with the foreclosure when the bankruptcy stay was lifted. On October 29, 2015, in response to the Court calendaring the matter for a status conference on October 30, 2015, counsel for IndyMac advised that they would be filing a stipulation of discontinuance. Thereafter, in June, 2018, counsel for IndyMac filed a motion to discontinue and, by order dated August 9, 2018, the case was discontinued.

Meanwhile, the Note was apparently transferred to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY ("DEUTSCHE BANK"). On March 23, 2018, Plaintiff

DEUTSCHE BANK filed the instant Summons and Complaint under Index Number 2018/50772 commencing this foreclosure action. The parties attempted to resolve the matter in the foreclosure Settlement Part, but, when they were unable to do so, the case was assigned to this Court. Defendants filed the instant motion shortly thereafter.

Discussion

A moving party is entitled to summary judgment if it tenders evidence sufficient to eliminate all material issues of fact from the case. Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. Id.; Alvarez v. Prospect Hosp., 68 NY2d 320 [1986].

Defendants allege that the action should be dismissed as time-barred. The statute of limitations on a foreclosure action is six years pursuant to CPLR (4). The time begins “to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated.” See Plaia v. Safonte, 45 AD3d 747, 748 (2nd Dept. 2007) (*citations omitted*); Nationstar Mtge. LLC v. Weisblum, 143 AD3d 86 (2nd Dept. 2016). “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.” Wells Fargo Bank, N.A. v. Burke, 94 AD3d 980, 981 (2nd Dept. 2012) (*quotations omitted*). Acceleration of the loan must be exercised by clear and unequivocal notice to the mortgagor. Id. The commencement of foreclosure action provides sufficient notice to the borrower that the mortgagee has accelerated the debt. Beneficial Homeowner Serv. Corp. v. Tovar, 150 AD3d 657 (2nd Dept. 2017).

In this case, the STEUBER Defendants have met their burden for summary judgment. See RPAPL 1501(4); Stewart Tit. Co. v. Bank of N.Y. Mellon, 154 AD3d 656 (2nd Dept. 2017). They have established that the mortgage debt was accelerated by the commencement of the prior action in 2009 and that the six-year statute of limitations has expired. In opposition, DEUTSCHE BANK contends that the second action, which it commenced in 2018, was based on STEUBER’S default in failing to pay the July 2012 installment payment.

According to DEUTSCHE BANK, the 2009 IndyMac action did not accelerate the debt because language in the STEUBER mortgage states that the borrower may reinstate the loan at any time up to the date of a judgment of foreclosure and sale. DEUTSCHE BANK argues that as there was no judgment of foreclosure and sale in the IndyMac action, the debt was never accelerated. However, recent appellate case law provides that the act of commencing a foreclosure action accelerates the mortgage. Wells Fargo v. Burke, supra: 21st Mtge Corp. v. Osorio, 167 AD3d 823 (2nd Dept. 2018); U.S. Bank Trust, N.A. v. Aorta, 167 AD3d 807 (2nd Dept. 2018). Moreover, in 2019, the Appellate Division, Second Department specifically addressed the Plaintiff's argument as to the reinstatement language and rejected it. See Bank of N.Y. Mellon v. Dieudonne, 171 AD3d 34 (2nd Dept. 2019).¹ The Second Department concluded that the reinstatement provision was not a condition precedent to acceleration of the mortgage, and that the debt was accelerated by the commencement of a prior action. Id.

Thus, as the mortgage debt at issue was accelerated in 2009, the statute of limitations expired in 2015. DEUTSCHE BANK cannot, therefore, start another foreclosure action in 2018. The motion to dismiss must be granted and the mortgage must be discharged pursuant to RPAPL §1501(4). The Court further grants the motion insofar as it requests an inquest on counsel fees. See Real Property Law § 282; DKR Mtge. Asset Trust v. Rivera, 130 AD3d 777 (2nd Dept. 2015).

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of Defendants KIMBERLY M. STEUBER and DENIS J. STEUBER, for an order granting summary judgment against Plaintiff is granted; and it is further

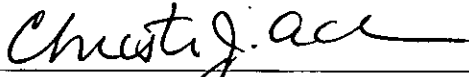
¹ The Court also held that a case relied on by Plaintiff, Nationstar Mtge., LLC v. MacPherson, 56 Misc. 3d 339, should not be followed.

ORDERED that Plaintiff shall settle judgment for a declaration canceling and discharging the mortgage and lis pendens of record and canceling the promissory note; and it is further

ORDERED that counsel shall appear on **July 19, 2019 at 9:30 a.m.** for a conference to schedule the inquest.

This shall constitute the Decision and Order of this Court.

Dated: June 19, 2019
Poughkeepsie, New York



CHRISTI J. ACKER
Justice of the Supreme Court

To: Michael Treybich, Esq.
Treybich Law, P.C.
Attorney for Defendants KIMBERLY M. STEUBER and DENIS J. STEUBER
Via NYSCEF

RAS BORISKIN, LLC
Attorneys for Plaintiff
Via NYSCEF