At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 23rd day of April 2018

PRESENT:
HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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ELYSE M. SANSONE,

Plaintiff,

DECISION AND ORDER ON MOTION
Index No: 611543/2017
Motion Seq: 001

- against -

NORTH SHORE INVESTORS REALTY GROUP, LLC and NASSAU COUNTY CLERK,

Defendants.

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The following papers were read on the instant motions:
Plaintiff's Notice of Motion and Supporting Documents
Defendant's Affirmation in Opposition and Supporting Documents
Plaintiff's Reply Affirmation

Plaintiff has moved by notice of motion for an order pursuant to CPLR §3212 granting summary judgment and, in accordance therewith, an order cancelling and discharging the subject mortgage. Defendant has opposed the motion, Plaintiff replied and the motion was deemed submitted on April 13, 2018.

CPLR §3212(b) states, in relevant part, that a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party".

"The standards regarding summary judgment motions are familiar and fundamental. The party moving for summary judgment 'bears the initial burden of making a prima

facie showing of its entitlement to judgment as a matter of law' *(Holtz v Niagara Mohawk Power Corp.*, 147 A.D.2d 857, 858). Once such a showing has been established, the 'burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact' (*Mahar v Mahar*, 111 A.D.2d 501, 502; *see also, Ferber v Sterndent Corp.*, 51 N.Y.2d 782; *Cusano v General Elec. Corp.*, 111 A.D.2d 557). General conclusory statements, expressions of hope, and repetition of the allegations in the pleadings do not constitute evidentiary proof substantiating the party's claim and, therefore, are insufficient to defeat a summary judgment motion". *Fresh Meadows Country Club v. Lake Success*, 158 A.D.2d 581 (2d. Dept. 1990).

The underlying action is a foreclosure proceeding related to a mortgage executed by Richard Sansone on or about August 3, 2007 in favor of Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as nominee for Resmae Mortgage Corporation (hereinafter "Resmae"). Richard Sansone died August 11, 2009 leaving his wife, Plaintiff herein, as property owner as his sole heir at law. After a default in payment, the subject mortgage (hereinafter the "Mortgage") was accelerated by the service of a Notice of Intent to Foreclose dated August 19, 2008 sent by Resmae to Richard Sansone. It is undisputed that no payments have been made on the account for more than six years prior to the commencement of the underlying action.

The Mortgage was assigned to Wells Fargo Bank, NA as Trustee for Resmae Mortgage Loan Trust Mortgage Pass-through Certificates, Series 2007-1 (hereinafter "Wells Fargo") by assignment recorded on August 21, 2009 and Wells Fargo commenced a foreclosure proceeding filed under Index #11942/2009 (hereinafter the "2009 Action"). The 2009 Action was withdrawn by stipulation of discontinuance dated February 3, 2012. The Mortgage was assigned to DLI Mortgage Capital, Inc. (hereinafter "DLI") by assignment recorded on September 7, 2010. The Mortgage was then assigned to Konduar Capital Corporation (hereinafter "Konduar") by assignment recorded on March 20, 2012. Konduar commenced a foreclosure action filed under Index #3649/2012 (hereinafter the "2012 Action") which was discontinued pursuant to a motion filed by Konduar. The Mortgage was then assigned to Defendant herein by assignment dated January 14, 2014. Plaintiff commenced the instant action on October 27, 2017 seeking the cancellation of the Mortgage.

CPLR §213 reads, in relevant part:

"The following actions must be commenced within six years: . . .

> 4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;".

Plaintiff argues that, inasmuch as the debt was accelerated and the Mortgage called due pursuant to the Notice of Intent to Foreclose dated August 19, 2008, and no affirmative act of revocation or deceleration was ever undertaken by any of the Mortgage holders, the statute of limitations for the enforcement of the Mortgage has expired and, accordingly, the Mortgage should be cancelled and discharged.

Defendant argues in opposition that the statute of limitations has not expired based upon the discontinuance of both the 2009 Action and the 2012 Action. Defendant quotes the following language from the Queens County Supreme Court matter of *U.S. Bank Nat'l. Ass'n. v. Wongsonadi*,

> "Although a court dismissal of a prior action for failure to prosecute, failure to appear at a conference or lack of personal jurisdiction or the acceptance of additional payments after acceleration do not constitute an act of revocation, (see e.g. Clayton Natl., Inc. v. Guldi, 307 A.D.2d 982 [2d Dept.2003]; Federal Nat. Mortg. Ass'n v. Mebane, 208 A.D.2d 892 [2d Dept.1994]), here plaintiff voluntarily discontinued the prior action before the six year statute of limitations expired. "When an action is discontinued, it is as if had never been; everything done in the action is annulled and all prior orders in the case are nullified" (Newman v. Newaman, 245 A.D.2d 353, 354 [2d Dept.1997]). Thus, the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action. Accordingly, this Court finds that discontinuing the prior foreclosure action was an affirmative act of revocation (see U.S. Bank Nat. Ass'n v. Deochand, 2017 N.Y. Slip Op 30472[U][Sup. Ct., Queens Cnty.2017]; Assyag v. Wells Fargo Bank, N.A., 2016 WL 6138269 [Sup.Ct., Queens Cnty.2016]; 4 Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co., 2016 WL 2839341 [Sup.Ct., New York Cnty.2016]). Thus, the statute of limitations has not run, and plaintiff's action is timely". 55 Misc.3d 1207(A) (Sup. Ct. Queens Cty. 2017).

Defendant also cites a series of other cases which all stand for the same proposition.

The flaw in Defendant's argument is that the instant matter is easily distinguishable from all of the cases cited by Defendant in that, in Defendant's cited cases the election to accelerate the debt was contained in the complaint. In the instant matter, acceleration was not effectuated by the filing of the complaint, but by the mailing of a Notice of Intent to

Foreclose. Therefore, the discontinuance of the 2009 Action and the 2012 Action have no bearing the acceleration of the underlying debt. A separate affirmative revocation would have had to have been effectuated to revoke the Notice of Intent to Foreclose.

Defendant further argues that, pursuant to a May 18, 2015 Order from The Honorable Thomas A. Adams denying a summary judgment motion on the 2012 Action, standing had not been established for the plaintiff therein to have commenced the action. Defendant argues that, therefore, the plaintiff therein could not have accelerated the debt as it potentially lacked standing. That argument is of no moment as that plaintiff was not the entity that accelerated the debt. Resmae accelerated the debt through the Notice of Intent to Foreclose dated August 19, 2008. In order to make the standing argument as they attempted to, Defendant would have to have argued that Resmae did not have standing at the time they elected to accelerate the debt, which they did not argue, nor can same be claimed as they were the initial mortgage holder and the Mortgage had not yet been assigned to any other entity at the time of the acceleration.

Moreover, Defendant makes no arguments whatsoever disputing the validity of the Notice of Intent to Foreclose. They do not dispute its existence, or that same was sent to the mortgagor by the initial mortgagor, or that the Notice of Intent to Foreclose served to accelerate the debt. Accordingly, same is deemed admitted.

Accordingly, it is hereby:

ORDERED, that the Plaintiff's motion is hereby granted in its entirety and the subject mortgage shall be cancelled and discharged of record. Plaintiff shall submit a proposed order on notice.

Plaintiff shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Dated: April 23 2018

HON. JULIANNE T. CAPETOLA
J.S.C.