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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. RALPH P. FRANCO, Justice

TRIAL/IAS, PART 12

SALOMON BROTHERS REALTY CORP.,

Plaintiff(s),

-against-

CAROL ANN BRANKER

Defendant(s).

NASSAU COUNTY
INDEX No.:2582/01
MOTION SEQ. 2&3

The following papers read on this motion:
Notice of Motion/ Order to Show Cause.....
Answering Affidavits.....
Replying Affidavits.....

Motion (seq. no.2) by the attorney for plaintiff for an order striking the answer and affirmative defenses and granting summary judgment is denied. Cross motion (seq. no.3) by attorney for defendant for an order dismissing the complaint pursuant to CPLR 3211(a) (5) is granted.

An action to foreclose a mortgage can be brought on each mortgage installment within six years of the time it matured. The maturity date of the mortgage involved herein is May 1, 2013. Pursuant to the note and mortgage there are separate installment payments becoming due and owing every month and under usual circumstances, the statute of limitations would not begin to run until that time. When a mortgage is payable in installments, once a mortgage is accelerated, the entire amount becomes due and the statue of limitations begins to run on the entire debt. ***Federal Natl Mtge, Assn. v. Mebane,*** 208 A.D.2d

892, ***Rols Capital Co. v. Beeten,*** 264 A.D. 724,48, ***Loiacono v. Goldberg,*** 240 A.D. 2d. 476. The filing of the summons, complaint and lis pendens constitute a valid election to declare the principal of the mortgage due. ***Lapidus v. Kollel Avreichim Torah Veyirah*** 114 Misc. 2d 451. A mortgagee's election to accelerate the mortgage debt may be accomplished by service of a complaint clearly setting forth its election to accelerate. ***Logue v. Young*** 94 A.D. 2d 827.

On **October 31, 1989**, the former owner of the mortgage, RCR Services, Inc., d/b/a Mortgage Default Services Company ("RCR Services"), filed a summons, complaint and lis pendens with the Supreme Court of Nassau County under Index No.20957/89 and subsequently served the defendant, (hereinafter referred to as the "1989 action"). RCR Services elected to accelerate the entire mortgage debt. The mortgage debt was accelerated on October 31, 1989 and the statute of limitations on any other action to foreclose the same mortgage began to run on that day. (see, ***Rols Capital Co. V. Beeten*** 240 A.D. 2d 476. Attorney for the defendant contends that the instant action, which seeks to foreclose on the same mortgage debt, and was commenced on **February 15, 2001**, more than six years after the mortgage was previously accelerated, is timed barred and should be dismissed pursuant to CPLR 3211 (a)(5).

The plaintiff acknowledges that RCR Services brought the "1989 action". Salomon contends that the acceleration of the mortgage debt within the six-year statute of limitations period was de-accelerated. To show that the October 31, 1989 acceleration was de-accelerated, the plaintiff alleges several forbearance agreements were entered into with the defendant and these forbearance

agreements de-accelerated the mortgage debt. The plaintiff attaches certain correspondences as Exhibit D to its motion papers in an attempt to prove this allegation. However, when these correspondence are analyzed, all of these correspondences and the resulting forbearance agreements took place between November 7, 1984 and May 1, 1985, over 4 years before the 1989 action was commenced and the mortgage accelerated. These correspondences could not have de-accelerated the plaintiff's 1989 acceleration.

The plaintiff also alleges that as a result of a letter the defendant wrote to HUD on December 9, 1989, "RCR Services immediately ceased all prosecution of the prior foreclosure" and "the prosecution of the prior foreclosure action ceased before there was any judicial intervention or even an index number assigned to the RCR Services "foreclosure action". The plaintiff has failed to provide the court with any evidence that the mortgage was de-accelerated at that time. On the contrary, there is documentary evidence that RCR Services, in fact, continued the prosecution of the foreclosure action. Attached as Exhibit 2 to defendant's moving papers is an order of reference in the "1989 action" which was granted by the court on July 27, 1990. As a result, the plaintiff continued with the "1989 action" and at a minimum, purchased an index number, served the defendants, filed an affirmation of regularity and had an Order of Reference signed by the court. Although plaintiff contends that RCR Services cancelled the acceleration and ceased the prior foreclosure action immediately after receiving the defendant's letter of December 9,1989, RCR Services never cancelled the acceleration and continued prosecuting the

foreclosure action for several months thereafter.

The plaintiff further contends that the de-acceleration is evidenced by various correspondences made by HUD during 1999 and 2000 and attaches these correspondences to their motion as plaintiff's Exhibit K. These correspondences constitute plaintiff's first affirmative act that may indicate plaintiff's election to de-accelerate their 1989 acceleration. However, if these documents do indicate plaintiff's election to de-accelerate the loan, the plaintiff made this election after the six-year statue of limitations had already expired. In ***EMC Mortgage Corp. v. Patella*** 279 A.D. 2d 604, a case similar to the case at bar, the Second Department ruled the foreclosure action was time barred where the record was barren of any affirmative act on the part of the mortgagee revoking its election to accelerate during the six-year statute of limitations period subsequent to the initiation of a prior foreclosure action.

Plaintiff alleges that defendant's post-1989 correspondence reveals that the defendant reaffirmed the mortgage debt by admitting that she was delinquent in her monthly mortgage payments.

As a matter of fact and law, none of these letters dated subsequent to the 1989 acceleration contain an admission that is sufficient to either revive the statute of limitations or to toll it for a long enough period to make plaintiff's instant action timely. In order to toll the statute of limitations, a writing acknowledging the debt should contain language that recognizes the existing obligation while at the same time containing nothing inconsistent with the conclusion that the debtor intends to repay the debt. ***Wooley v. Hoffman*** ,99

N.Y.S. 2d 293 (Sup. Ct. 1950). A writing containing these requisites starts the statute of limitations running anew from that point. While Carol Branker's letter dated December 9, 1989, attached to plaintiff's motion as Exhibit G, may be sufficient to toll the statute of limitations from October 31,1989 until December 9,1989 the instant foreclosure action was still brought more than six years after December 9,1989 and therefore is still time barred.

The letter dated October 29,2000, which is attached as part of plaintiff's papers as Exhibit N, meets some of the requirements to toll the statute of limitations, was not written by the defendant, Carol Branker, but by her son, Hayden Branker and cannot be attributed to her. Even assuming, arguendo, that Hayden Branker's letter can be somehow attributable to his mother, in order for a writing to toll the statute, it must contain language which recognizes the existing obligation while at the same time contain nothing inconsistent with the conclusion that the mortgor intends to repay the debt. ***Wooley v. Hoffman***, 99 N. Y. S. 2d 293(Sup. Ct. 1950). Throughout Hayden Braker's letter of October 29, 2000, he uses the personal pronoun " I ", referring to himself and stating that he, Hayden Branker, and by implication, not his mother, would be willing to pay the debt. As such, this writing is clearly inconsistent with the conclusion that the defendant, Carol Branker, herself intended to repay the debt and is therefore insufficient to revive the statute of limitations.

In order to be sufficient to revive the statute of limitations, a writing must contain both an acknowledgment of the debt and an unconditional promise to pay the debt; however, where a condition precedent, such as the preparation and

execution of a modification agreement, accompanies an acknowledgment of the debt, it renders any implied promise conditional and is therefore ineffectual to revive the statute of limitations. ***Sichol v. Crocker***, 177 A.D. 2d 842. Hayden Branker's acknowledgment of the debt within his letter of October 29, 2000 contained two important precedents. First, in order for him to repay the debt, he would have to assume full responsibility of the debt. Second, a new agreement would have to be drawn up which he would sign acknowledging his obligation to pay $750.00 per month, an amount different from that contained in the note and mortgage. The letter contains conditions precedent and is insufficient to revive the statute of limitations.

Attorney for plaintiff has not submitted sufficient evidence to demonstrate that the debt was subsequently de-accelerated or toiled during the six-year period or revived at any time.

The allegation that defendant made an interest payment of $7.75 in February 1992, so as to toll the statute of limitations, is erroneous.

The court does not agree with Salomon's argument, that the statute of limitations defense is inapplicable in the instant case as Salomon is the assignee/agent of HUD, an agency of the federal government and, as such, is not bound by the state statute of limitations.

Making its argument, Salomon cites ***RCR Services V. Herbil Holding Co.,*** 229 A.D.2d 379. The court in ***Herbil Holding*** supra ruled that although the plaintiff/mortgagee was not the federal government, it submitted evidence sufficient to determine that, as a matter of law, it is prosecuting the claim as

assignee/agent of HUD and because the ultimate benefits from the foreclosure will flow to HUD the plaintiff is entitled to HUD's immunity from the state statute of limitations. In the within action Salomon, while it may be an assignee of HUD, failed to submit evidence that it was prosecuting the claim as the assignee/agent of HUD or that the benefits from the foreclosure will flow to HUD.

In this action, the assignment shows that the mortgage was assigned to Salomon Brothers Realty Corp., without recourse (assignee). As a result, since the mortgage was assigned to Salomon without recourse, Salomon cannot look to HUD if they are unable to foreclose. Therefore, none of the benefits from the foreclosure or for that matter the detriment as a result of its failure to foreclose, will flow to HUD. Salomon Brothers is not prosecuting the claim as HUD's agent and cannot get the benefit from HUD's immunity.

This decision is the Order and Judgment of the Court and terminates all proceedings under Index No. 2582/01.

Attorney for defendant shall submit an Order in appropriate form to vacate any Notices of Pendency that may be filed against the property as a result of the 1989 action.

Dated: December 12, 2002

Hon. Ralph P. Franco

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ENTERED
DEC 17 2002
NASSAU COUNTY
COUNTY CLERK'S OFFICE