

At a term of the Supreme Court of the State of New York, held in and for the County of Nassau, at 100 Supreme Court Drive Mineola, New York 11501, on the 12th day of April 2016.

PRESENT:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

.....X

SHARONA YADEGAR,
Plaintiff,

- against -

**DECISION AND
ORDER ON MOTION**

Index No: 607556/15
Motion Sequence: 001



DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR HARBORVIEW
MORTGAGE LOAN TRUST MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2005-9
and MAUREEN O'CONNELL as Nassau County Clerk,
Defendants.

..... X

The following papers were read on the instant motion:
Plaintiff's Notice of Motion and Supporting Documents
Defendant's Notice of Cross-Motion and Supporting Documents
Plaintiff's Reply Affirmation

Plaintiff moves by notice of motion for an order granting summary judgment pursuant to CPLR §3212. Defendant cross-moved for summary judgment and dismissal of the complaint. Plaintiff has submitted reply papers and the motion was deemed submitted on April 11, 2016.

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 relevant undisputed facts are as follows: Plaintiff executed acknowledged and delivered a mortgage to Defendant's predecessor in interest in the principal amount of \$1,500,000.00 on or about October 8, 2004. The mortgage was assigned to Defendant effective August 26, 2005. On March 14, 2008 Defendant commenced a foreclosure action against Plaintiff, accelerating the entirety of the mortgage debt as of December 1, 2007. On or about April 10, 2009, while the other action was pending, Defendant commenced another foreclosure proceeding against Plaintiff for the same debt based upon the same default. In or about November 2011 the 2008 foreclosure action was discontinued by Defendant by motion. On September 12, 2012, this Court dismissed the 2009 foreclosure action as abandoned. No motion to reargue or notice of appeal was filed as to that September 12, 2012 order. The underlying action herein was commenced November 19, 2015.

Plaintiff argues that, inasmuch as the debt was accelerated as of December 1, 2007 and more than six years, the applicable statute of limitations, has passed since that time, the mortgage should be cancelled and discharged as a legal nullity.

Defendant argues in opposition that, though the statute of limitations has admittedly expired based upon the acceleration of the debt, the statute of limitations was extended many times by what they deem to be Plaintiff's reaffirmation of the debt in the form of a letter in support of Plaintiff's application for short sale dated January 26, 2011 (hereinafter referred to as the "January 2011 letter"), a Residential Contract of Sale dated March 9, 2011 (hereinafter referred to as "March 2011 contract") along with a rider noting that the contract contemplated the approval of a short sale by Defendant, a Borrower's Assistance Form dated March 31, 2010 (hereinafter referred to as the

“BAF”), and a Client Third Party Authorization Form dated February 1, 2011 (hereinafter referred to as “TPA”).

It is well-settled, as noted by Plaintiff in the multitude of directly on-point cases cited in their papers, that in order for the statute of limitations to be extended, Defendant has the burden of demonstrating “an unconditional and unqualified acknowledgment of a debt” by Plaintiff. *Hakim v. Peckel*, 280 A.D.2d 645 (2d. Dept. 2001). All of the documents relied upon by Defendant herein were conditional promises all predicated upon reduction of the principal debt, modification of the mortgage terms, or acceptance of the application for a short sale which were admittedly denied by Defendant. The various letters and forms relied upon herein, as in *Randustrial Corporation v. Acme Distribution*, “may only be construed as stating an intention not to pay the debt unless plaintiff performed certain further acts . . . We recognize that an express promise to pay, conditioned upon the debtor's future ability, has been held sufficient to start the statute running anew (*Wakeman v. Sherman*, 9 N.Y. 85; *Francis v. Rycroft*, 148 App. Div. 65). In such cases, however, the burden is on the creditor to show that the condition has been performed (*Curtiss-Wright Corp. v. Intercontinent Corp.*, 277 App. Div. 13)”. 79 A.D.2d 862 (4th Dept. 1980). Clearly Defendant has not demonstrated that the conditions were met, to wit, the acceptance of the application for a short sale or modification of the mortgage terms.

Accordingly, it is hereby:

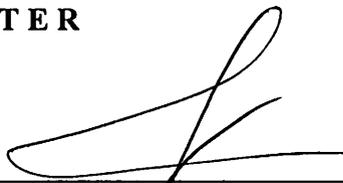
ORDERED, that Plaintiff's motion is hereby granted in its entirety and the mortgage shall be discharged.

Plaintiff shall submit a proposed Order on notice.

This constitutes the decision and order of the Court.

Dated: 4/12/16

ENTER



HON. JULIANNE T. CAPETOLO
J.S.C.

ENTERED

APR 15 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE