

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 22nd day of June 2016

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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SHARONA YADEGAR,

Plaintiff,

- against -

**DECISION AND
ORDER ON MOTION**

Index No: 8923/2015
Motion Sequence: 003

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

Defendant.

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The following papers were read on this Motion:
Defendant Deutsche Bank's Notice of Motion and Supporting Documents
Plaintiff's Affirmation in Opposition
Defendant's Reply Affirmation

Defendant Deutsche Bank National Trust Company as Trustee For Harborview Mortgage Loan Trust Mortgage Pass-Through Certificates Series 2005-9 (hereinafter referred to as "Defendant Deutsche Bank") has moved by notice of motion for an order pursuant to CPLR §2221(e) granting them leave to renew this Court's Order dated May 16, 2016 which memorialized this Court's Decision and Order on Motion dated April 12, 2016, and upon renewal for an order denying Plaintiff's previously granted application for summary judgment pursuant to CPLR §3212. Plaintiff has submitted opposition papers, Defendant Deutsche Bank has replied and the motion was deemed submitted June 14, 2016.

As a threshold issue, Defendant Deutsche Bank's moving papers are fatally defective inasmuch as they fail to annex the original moving papers upon which that motion was decided. It has been held that, "Because a Supreme Court Justice does not retain the papers following the disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions, Supreme Court

properly required [movants] to submit to it all papers that were to be considered on the instant motion (*see*, CPLR 2214 [c])". *Sheehy v. Pataki*, 236 A.D.2d 92 (3d. Dept. 1997). Accordingly, "courts have withheld reargument based upon a movant's failure to submit a complete set of papers relevant to the underlying motion." *All Am. Moving & Storage, Inc. v. Andrews*, 31 Misc. 3d 1214(A), (Bronx Sup. Ct. 2011). However, in the interest of judicial economy the Court will consider the motion despite this defect.

Additionally, Defendant Deutsche Bank has argued that Plaintiff's opposition papers were served late and should not be considered. Defendant Deutsche Bank alleges that the opposition papers were served a mere three days late, and Defendant Deutsche Bank still submitted a timely reply affirmation. Further, Defendant Deutsche Bank has failed to allege any prejudice created by the late service and, accordingly, the Court will consider the opposition papers. *See, Mallards Dairy, LLC v. E & M Engineers & Surveyors, P.C.*, 71 A.D.3d 1415, (4th. Dept. 2010).

CPLR §2221(e) reads:

"A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion".

Plaintiff previously moved for summary judgment and for an order discharging the mortgage in question. The underlying facts were set forth in this Court's Decision and Order on Motion dated April 12, 2016 (hereinafter referred to as the "Prior Decision").

Plaintiff's prior motion was predicated on her assertion that, by virtue of their commencement of a foreclosure action by Summons and Complaint filed December 1, 2007, the underlying mortgage was thereby accelerated by Defendant Deutsche Bank and the six year statute of limitations has now expired. Defendant Deutsche Bank was unable to meet their burden of demonstrating "an unconditional and unqualified acknowledgment of a debt" by Plaintiff in order for the statute of limitations to have been effectively extended by Defendant Deutsche Bank. *Hakim v. Peckel*, 280 A.D.2d 645 (2d. Dept. 2001).

Defendant Deutsche Bank now seeks renewal of the prior motion based upon a letter dated March 11, 2014 from Defendant Deutsche Bank to Plaintiff which purportedly effectuated the de-acceleration of the mortgage and, according to Defendant Deutsche Bank, effectively renewed the statute of limitations. In support of this motion, Defendant Deutsche Bank, by counsel, states:

"On or about January 22, 2016, the undersigned firm received copies of the Loan Files and due to the size of files, the Loan Files were uploaded in various compressed folders, *i.e.* ZIP folder ("ZIP Folder") onto an online document management system accessible to both SLS and the undersigned firm. Each Zip Folder was downloaded and each ZIP folder contains hundreds of pages of documents . . . After the issuance of the Decision and Order, SLS located in the Chase Documents a copy of a letter, dated March 11, 2014 (the "Revocation Letter"), from Chase addressed to Plaintiff at the Property Address wherein Chase "de-accelerates the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the Loan as an installment loan . . . Upon investigation, it appears the Revocation Letter was previously provided to counsel on or about January 22, 2016. However, in the thousands of pages in the Loan Files, counsel (who had not handled prior Foreclosure Actions) inadvertently overlooked this letter in the review of the thousands of pages of Loan Files because, in part, the errantly mislabeling of the Revocation Letter as a "Default Letter" . . . It should be noted that the failure to present the Revocation Letter in Defendant's opposition to Plaintiff's Motion and in support of its Cross-Motion was neither intentional or willful nor a pattern of dilatory behavior". (Affirmation ¶19-25).

Plaintiff argues in opposition that Defendant Deutsche Bank has failed to offer sufficient "reasonable justification" for their failure to include the letter in question as part of their original moving papers. Plaintiff also notes that the letter in question is dated March 11, 2004, more than six years after the acceleration of the mortgage and, accordingly, even if the Court were to accept the letter as newly discovered evidence despite it having admittedly been in Defendant Deutsche Bank's possession at the time of the prior motion, the letter is of no moment inasmuch it was purportedly sent well after the expiration of the statute of limitations.

“A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation’ (*Elder v Elder*, 21 AD3d 1055, 1055 [2005]; *Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727 [2009]). A motion for leave to renew must be based upon new facts, not offered on the original application, ‘that would change the prior determination’ (CPLR 2221 [e] [2]; see *Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884 [2009]). The new or additional facts must have either not been known to the party seeking renewal (see *Matter of Shapiro v State of New York*, 259 AD2d 753 [1999]) or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion (see *Cole-Hatchard v Grand Union*, 270 AD2d 447 [2000]). However, in either instance, a ‘reasonable justification’ for the failure to present such facts on the original motion must be presented (CPLR 2221 [e] [3]; see *Matter of Korman v Bellmore Pub. Schools*, 62 AD3d at 884). What constitutes a ‘reasonable justification’ is within the Supreme Court’s discretion (*Heaven v McGowan*, 40 AD3d 583 [2007]) . . . Where, as here, the ‘new evidence’ consists of documents which the plaintiff knew existed, and were in fact in his own possession at the time the initial motion was made, no reasonable justification exists for the plaintiff’s failure to exercise due diligence by submitting the documents in the first instance”. *Rowe v NYCPD*, 85 A.D.3d 1001 (2d. Dept. 2011).

Although Plaintiff argues that the debt was effectively accelerated December 1, 2007, they failed to provide proof of same. The only evidence of the acceleration of the debt is the March 14, 2008 summons and complaint, thus that is the date the Court must treat as the relevant start of the running of the statute of limitations.

Notably absent from Defendant Deutsche Bank’s papers is any form of proof of service of the letter in question, rendering it a nullity. Defendant Deutsche Bank has failed to include a copy of the signed certified mail receipt though the letter purports to have been sent via certified mail, or in the alternative, fails to include an affidavit from a person with appropriate knowledge attesting to the transmission of the letter. See, *Wells Fargo Bank, N.A. v. IPA Asset Management III, LLC*, 111 A.D.3d 820 (2d. Dept. 2013). Plaintiff denies ever having received the letter and Defendant Deutsche Bank has failed to demonstrate otherwise.

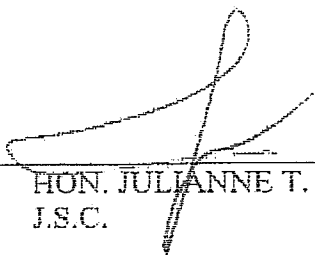
Accordingly, it is hereby:

ORDERED, that Defendant Deutsche Bank's motion for leave to renew is hereby denied in its entirety.

Defendant Deutsche Bank shall serve a copy of this order upon Plaintiff within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER



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