

## NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 27

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WILMINGTON SAVINGS FUND SOCIETY, FSB  
DOING BUSINESS AS CHRISTIANA TRUST, NOT  
IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS  
TRUSTEE FOR BCAT 2015-13BTT,

Index No. 36246/2020E

Hon. NAITA A. SEMAJ  
Justice of the Supreme Court

Plaintiff(s),

-against-

MANUEL A. MARTINEZ, et al.

Defendant(s).

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The following papers were read on motion (Seq. No. 2) for **SUMMARY JUDGMENT**  
submitted on **July 12, 2023**

Notice of Motion, Affirmations and Exhibits	NYSCEF Doc. # 61-83
Notice of Cross-Motion, Opposition, Exhibits	NYSCEF Doc. # 86-92
Affirmation in Opposition to Cross-Motion	NYSCEF Doc. # 93-94
Defendant's Reply Affirmation, Exhibits	NYSCEF Doc. # 97-103

Upon the foregoing papers, the plaintiff Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, Not In its Individual Capacity, but Solely as Trustee for BCAT 2015-13BTT ("Plaintiff") moves for an order (1) granting it summary judgment on the complaint and dismissing the defenses and counterclaims asserted in the answer of the defendant Manual Martinez ("Defendant"), (2) appointing a referee to compute the amount due and examine whether the subject property may be sold in parcels; (3) deeming all non-appearing parties in default; and (4) amending the caption.

Defendant opposes the motion and cross-moves for an order (1) granting summary judgment on Defendant's counterclaim pursuant to RPAPL 1501(4), declaring the mortgage and note on the subject property to be discharged, directing the Clerk of this Court to cancel the mortgage; (2) dismissing the complaint with prejudice, (3) pursuant to RPL § 282, directing Plaintiff pay Defendant's attorney's fees and costs; (4) related relief. Plaintiff opposes the cross-motion.

### Background

This is a residential foreclosure action. On or about June 10, 2003, Defendant executed and delivered a note in favor of Wells Fargo Home Mortgage, Inc. ("WFM") promising to pay the sum of \$322,700.00 (the "Note"). On that same date, as security for payment of the Note, Defendant executed and delivered a mortgage (the "Mortgage") in favor of WFM, encumbering the premises known as 2576 Poplar Street, Bronx, New York 10461 (the "Property"). In or around

July 2015, the Mortgage was assigned to Plaintiff. Plaintiff alleges that Defendant defaulted under the terms of the mortgage by failing to make the installment payment due on May 1, 2009, and all subsequent installments.

Plaintiff's predecessor Wells Fargo Bank, N.A., Successor by Merger to Wells Fargo Home Mortgage Inc. (hereinafter, "Wells Fargo"), commenced a prior foreclosure action on this Note and Mortgage by filing a summons and complaint in Bronx Supreme Court (Index Number 381643/2009) on or about July 31, 2009 (the "Prior Action"). By decision and order entered January 6, 2016, this Court (Thompson, J.S.C.) *inter alia*, denied Defendant's motion to vacate a default judgment and dismiss the action. Defendant appealed. In a decision and order dated March 12, 2020, the Appellate Division, First Department, reversed the motion court's order, vacated the judgment, and dismissed the complaint (*Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470 [1st Dept 2020]). The Court held that the complaint should have been dismissed as abandoned pursuant to CPLR 3215 (c), since Plaintiff "waited almost three years to seek a default judgment" without sufficient explanation (*id.* at 249).

Plaintiff commenced the instant action by filing a summons and complaint on November 11, 2020. Defendant filed an answer with counterclaims on or about December 16, 2020. Plaintiff replied to the counterclaims on or about January 5, 2021. These motions followed.

#### Applicable Law and Analysis

The Court first addresses Defendant's cross-motion. "An action to foreclose on a mortgage is subject to a six-year statute of limitations" (*Fed. Natl. Mtge. Assn. v Rosenberg*, 180 AD3d 401, 402 [1st Dept 2020], citing CPLR 213 [4]). "Once a mortgage debt is accelerated, and the entire amount is due and owing, the statute of limitations begins to run on the entire debt" (*id.*). In this case, the six-year statute of limitations began to run on July 31, 2009, when Plaintiff commenced the Prior Action and elected to call due to entire amount secured by the Mortgage (*US Bank NA v Outlaw*, 217 AD3d 721, 722 [2d Dept. 2023]). The Prior Action was dismissed by Appellate Division order dated March 12, 2020, on the grounds that Plaintiff abandoned the action pursuant to CPLR 3215 (c) by failing to take a default judgment against Defendant within one year of his default. Plaintiff commenced this action on November 11, 2020, more than six years after the underlying debt was accelerated. Consequently, Defendant has established, *prima facie*, that this action is time-barred (*Outlaw*, 217 AD3d at 723).

Plaintiff argues that it is entitled to the six-month "saving provision" of CPLR 205 (a). Plaintiff argues that the Prior Action was not dismissed for neglect to prosecute, even if it was, the Court failed to set forth the specific conduct constituting the neglect. Plaintiff also contends that the newly created CPLR 205-a (a) is inapplicable, because it does not apply retroactively. Plaintiff further alleges that retroactive application of the statute would violate the United States and New York State Constitutions.

CPLR 205 (a) provides:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of

the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

On December 30, 2022, the Legislature enacted the Foreclosure Abuse Prevention Act [L 2022, ch 821] (“FAPA”). Among other things, FAPA created a new section, CPLR 205-a, which replaced CPLR 205 (a) in foreclosure matters. CPLR 205-a (a) provides:

If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period.

CPLR 205-a subdivision (a) (1) provides: “a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff.”

Contrary to Plaintiff’s contentions, FAPA applies retroactively (*Bayview Loan Servicing, LLC v Dalal*, —AD3d— 2024 NY Slip Op 05767 [1st Dept Nov. 19, 2024]; *Wilmington Tr., N.A. v Farkas*, —AD3d— 2024 NY Slip Op 05841 [1st Dept Nov. 21, 2024]). Because the Prior Action was dismissed pursuant to CPLR 3215(c), Plaintiff is not entitled to the savings provision of CPLR 205-a (a) (*U.S. Bank Tr., N.A. v Giangrande*, 229 AD3d 834, 836 [2d Dept 2024]). In addition, this action is statutorily barred by CPLR 205-a (a) (1). Plaintiff is not the same as the plaintiff in the Prior Action. Moreover, Plaintiff has not pleaded or proven that it is acting on behalf of the original plaintiff, Wells Fargo. Rather, Plaintiff is asserting its own rights that it acquired from Wells Fargo

during the pendency of the Prior Action. Plaintiff, accordingly, cannot avail itself of the six-month savings provision of CPLR 205-a (*B and H Florida Notes LLC v Ashkenazi*, 221 AD3d 480, 482 [1st Dept 2023], citing *U.S. Bank N.A. v Fox*, 216 AD3d 445 [1st Dept 2023]).

In opposition to the cross-motion, Plaintiff contends that retroactive application of CPLR 205-a violates the Due Process Clause and the Bill of Attainder Clause of the U.S. Constitution.

“To comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by ‘a legitimate legislative purpose furthered by rational means’” (*Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 35 NY3d 332, 375 [2020], quoting *American Economy Ins. Co.*, 30 NY3d at 157-158). Stated another way, “there must be a ‘persuasive reason’ for the ‘potentially harsh’ impacts of retroactivity” (*id.* quoting *Holly S. Clarendon Trust v. State Tax Commn.*, 43 NY3d 933, 935 [1978]). In this case, the Legislature articulated the legitimate legislative purpose of FAPA: to address ongoing problem of abuses within the judicial foreclosure process, exacerbated by court decisions that acted contrary to the Legislative intent, which gave mortgage lenders the opportunity to “avoid strict compliance with remedial statutes and to manipulate statutes of limitation to their advantage” (New York State Senate Bill S5473D Sponsor Memorandum). FAPA is “remedial legislation” whose purpose “it to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof” (*id.*).

CPLR 205-a was specifically enacted to address the “extraordinary abuse and judicial misinterpretation of the ‘savings provision’ of CPLR 205 (a) in the context of mortgage foreclosure actions” (*id.*). The new statute only meant to clarify that dismissal of a prior action due to any form of neglect includes, *inter alia*, dismissal pursuant to CPLR 3215 (c) (*id.*). The statute intended to correct prior judicial determinations that erroneously held that a prior court’s recitation of specific conduct establishing a general pattern of delay was “a condition precedent to the bar against an extension of the statute of limitations for a neglect based dismissal” (*id.*). The above justifications for FAPA’s retroactive application “constitute a ‘rational legislative purpose’ that allow FAPA to ‘meet the test of due process’” (*Farkas*, 2024 NY Slip Op 05841; *Dalal*, 2024 NY Slip Op 05767). Furthermore, the Court finds that retroactive application of CPLR 205-a does not affect Plaintiff’s contractual or property rights. Plaintiff had no vested right to file a second foreclosure action after the statute of limitations on this debt expired, when the Prior Action was dismissed for neglect to prosecute (*see, e.g., Ditech Financial LLC v Naidu*, 82 Misc.3d 452, 464 [Sup Ct Queens Cty 2023] [holding that only a law in the nature of a contract, thus implicating the contract clause, may create vested rights which are not divested by its repeal]).

Furthermore, FAPA is not an unconstitutional bill of attainder. “Such a bill has been defined as a legislative act which applies either to named or easily identifiable individuals in such a way as to inflict punishment or impose penalties upon them without a judicial trial” (*Lanza v Wagner*, 11 NY2d 317, 324 [1962], *cert denied*, 371 US 901 [1962]). Here, Plaintiff failed to establish that FAPA was “enacted for the specific purpose of punishing [P]laintiff...” (*Concourse Rehabilitation & Nursing Ctr., Inc. v Novello*, 80 AD3d 507, 510 [1st Dept 2011]).



This Court thus finds that the retroactive application of FAPA/CPLR 205-a is constitutional. Consequently, Defendant has established its entitlement to dismissal of Plaintiff's complaint because this action is time-barred.

That branch of Defendant's motion seeking summary judgment on his counterclaim to discharge the Mortgage is also granted. Under RPAPL § 1501 (4), "a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced" (*1081 Stanley Ave., LLC v Bank of New York Mellon Tr. Co., N.A.*, 179 AD3d 984, 986 [2d Dept 2020]). Since Defendant established that this action to foreclose on the mortgage is time-barred, Defendant demonstrated his entitlement to summary judgment on its counterclaim (*Fox*, 216 AD3d at 446; *21st Mtge Corp. v Nweke*, 165 AD3d 616, 618 [2d Dept 2018]). Defendant's motion to amend the caption to *inter alia* reflect the proper plaintiff is also granted.

Finally, because Defendant is the prevailing party in this action, he is entitled to recover reasonable attorney's fees and/or expenses pursuant to RPL § 282 (*Deutsche Bank Natl Trust Co. v Gordon*, 179 AD3d 770, 774 [2d Dept 2020]). Defendant's counsel has submitted an affirmation, retainer agreement, and invoices demonstrating attorneys' fees in the total amount of \$7,915.00 plus costs of \$45.00, totaling \$7,960.00. After review of these submissions, this Court awards Defendant \$ 7,960.00 in attorney's fees and costs pursuant to RPL § 282.

### Conclusion

In light of the foregoing, Plaintiff's motion is denied, and Defendant's cross-motion for summary judgment, dismissing the complaint as time-barred, discharging the Mortgage, awarding attorneys' fees and costs pursuant to RPL §282, and related relief, is granted. Defendant's proposed order is signed.

Dated: 12/9/24

Hon. 

NAITA A. SEMAJ, J.S.C.

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| 1. CHECK ONE.....            | <input checked="" type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input type="checkbox"/> CASE STILL ACTIVE   |
| 2. MOTION IS.....            | <input type="checkbox"/> GRANTED                                  | <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input checked="" type="checkbox"/> SETTLE ORDER                  | <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> SCHEDULE APPEARANC                                  |
|                              | <input type="checkbox"/> FIDUCIARY APPOINTMENT                    | <input type="checkbox"/> REFEREE APPOINTMENT   |