839 Cliffside Ave, LLC v. Deutsche Bank Nat'l Trust Co.

United States District Court for the Eastern District of New York

August 25, 2017, Decided; August 25, 2017, Filed

15-CV-4516 (SIL)

Reporter

2017 U.S. Dist. LEXIS 221906 *

839 CLIFFSIDE AVE, LLC, Plaintiff, -against- DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF3, Defendant.

Prior History: 839 Cliffside Ave. LLC v. Deutsche Bank Nat'l Trust Co., 2016 U.S. Dist. LEXIS 131411 (E.D.N.Y., Sept. 23, 2016)

Counsel: **[*1]** For 839 Cliffside Ave LLC, Plaintiff: Abraham David, David Berg, LEAD ATTORNEYS, Shane David Wax, Berg & David PLLC, Brooklyn, NY.

For Deutsche Bank National Trust Company, As Trustree for First Franklin Mortgage Loan Trust 2006-FF3, Mortgage Pass-Through Certificates, Series 2006-FF3, Defendant: Ashley Newman, Brian S. McGrath, LEAD ATTORNEYS, McGlinchey Stafford, New York, NY.

For Bank of America, N.A., Objector: Cindy Schmitt Minniti, Reed Smith, New York, NY.

For Deutsche Bank National Trust Company, As Trustree for First Franklin Mortgage Loan Trust 2006-FF3, Mortgage Pass-Through Certificates, Series 2006-FF3, Deutsche Bank National Trust Company, As Trustree for First Franklin Mortgage Loan Trust 2006-FF3, Mortgage Pass-Through Certificates, Series 2006-FF3, Counter Claimants: Ashley Newman, Brian S. McGrath, LEAD ATTORNEYS, McGlinchey Stafford, New York, NY.

For 839 Cliffside Ave LLC, 839 Cliffside Ave LLC, Counter Defendants: Abraham David, David Berg, LEAD ATTORNEYS, Shane David Wax, Berg & David PLLC, Brooklyn, NY.

Judges: STEVEN I. LOCKE, United States Magistrate Judge.

Opinion by: STEVEN I. LOCKE

Opinion

ORDER

LOCKE, Magistrate Judge:

Presently before the Court on diversity grounds, in this residential mortgage **[*2]** litigation, is Plaintiff 839 Cliffside Ave, LLC's ("Plaintiff" or "839 Cliffside") Motion to Dismiss ("Motion to Dismiss") filed pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(e) ("Rule 12(b)(6)" and "Rule 12(e)," respectively). *See* Plaintiff's Motion to Dismiss ("Pl. Mot. to Dismiss"), Docket Entry ("DE") [39].[1] In its Motion to Dismiss, Plaintiff seeks primarily to dismiss for failure to state a claim the first counterclaim for foreclosure in Defendant Deutsche Bank National Trust Company's ("Defendant" or "Deutsche Bank") Amended Counterclaim ("ACC") along with other alternative relief. *See* Pl. Mot. to Dismiss. Defendant opposes. *See* Defendant's Memorandum in Opposition ("Def. Opp."), DE [41]. For the reasons set forth in detail below, the Court grants Plaintiff's motion and dismisses Defendant's first counterclaim.

I. Relevant Background

On or about November 9, 2005, Elmar Polatov ("Polatov") executed and delivered a note (the "Note") in the amount of $750,000.00 memorializing a loan made to him by First Franklin Bank ("Subject Loan"). *See* ACC ¶ 4, DE [35], Exhibit ("Ex.") A, DE [35-1].[2] The Note was issued in connection with a mortgage (the "Mortgage") by Polatov on a piece of real property located at 839 Cliffside Avenue, North Woodmere, **[*3]** New York 11581 ("Subject Property"). *See id.* ¶ 5, Ex. B, DE [35-2]. The Mortgage was assigned multiple times and eventually recorded as transferred to Deutsche Bank. *See id.* ¶ 6, Ex. C - E, DE [35-3, 4, 5].

Prior to that assignment, Polatov defaulted on the Note and Mortgage by failing to make all required monthly payments on and after October 1, 2007. *See* ACC ¶ 9. On July 1, 2008,

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[1] This action has been assigned to this Court for all purposes pursuant to 28 U.S.C. § 636(c). *See* DE [22].

[2] The Court takes the following facts from the ACC unless otherwise indicated and for the purposes of deciding this motion to dismiss presumes them to be true.

Deutsche Bank commenced a state court foreclosure action titled *Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF3, Mortgage Pass-Through Certificates, Series 2006-FF3 v. Elmar Polatov, et al.*, Index No. 12067/2008 ("2008 State Foreclosure Action"). *See* Declaration of Shane Wax, Esq. ("Wax Dec."), DE [39-1], Exs. A, B. With respect to this state court action, Defendant attempted to serve Polatov on July 16, 2008, leaving copies of the summons and complaint with an individual at the Subject Property, and also mailing copies of those documents to that same address by first class mail in accordance with the terms of the Mortgage. *See id.* Exs. G, H, I. Polatov failed to appear and defend himself as mortgagor of the Subject Property and defaulted. *See* Def. Opp. Ex. **[*4]** 1, 4., DE [41-2, 5]. Subsequently, a judgment of foreclosure and sale was entered on May 24, 2010. *See id.* On January 5, 2011, the default was vacated, and the action was dismissed without prejudice pursuant to N.Y. Civil Practice Law Rule ("CPLR") 3211(a)(8) for improper service. *See id.* Ex. 4., DE [41-5]. It appears from the record that no appeal of that decision was ever taken and that Defendants never attempted to reserve Polatov after the dismissal. On March 31, 2015, 839 Cliffside purchased Subject Property from Polatov, and recorded the transfer of the deed with the Nassau County Clerk's Office on April 2, 2015. *See* Complaint ¶ 4; ACC ¶ 8.

II. Relevant Procedural History

Plaintiff commenced the present action by filing the Complaint on August 3, 2015, in which it asserted a single cause of action, the discharge of Defendant's mortgage encumbrance on Subject Property. *See* Complaint, DE [1]. On November 2, 2015, Defendant filed an Answer counterclaiming unjust enrichment and equitable mortgage and filed a third-party complaint against Polatov. *See* Answer, DE [18]. Plaintiff's January 12, 2016 motion to strike, which Defendant opposed, was granted in part and denied in part, striking **[*5]** the third-party Complaint, dismissing a counterclaim for equitable mortgage and striking Defendant's tenth affirmative defense for equitable mortgage. *See* Motion to Strike, DE [25]; September 26, 2016 Order, DE [28].

Subsequently, Defendant sought leave by letter motion to amend its Answer and Counterclaim, which Plaintiff opposed. *See* Defendant's Motion to Amend, DE [30]; Plaintiff's Opposition, DE [31]. The Court granted Defendant's motion and directed Defendant to serve the Amended Answer and the ACC on or before November 4, 2016. *See* October 27, 2016 Order, DE [33].

Defendant subsequently filed its Amended Answer and Counterclaims, which pleads two causes of action, foreclosure on the Mortgage and unjust enrichment. *See* Amended Answer and ACC, DE [35]. In response, Plaintiff filed the instant motion to dismiss predicated on the foreclosure counterclaim's futility due to the expiration of the statute of limitations time period applicable to any attempt to collect on the Mortgage and Note. *See* Pl. Mot. to Dismiss.

III. LEGAL STANDARD

When a motion to dismiss is premised on statute of limitations grounds, as presently before the Court, such a motion "is generally [] treated as a motion **[*6]** to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6)." *Estate of Leventhal v. Wells Fargo Bank, N.A.*, 14 CIV. 8751, 2015 U.S. Dist. LEXIS 129402, 2015 WL 5660945, at *6 (S.D.N.Y. Sept. 25, 2015) (citing *Nghiem v. U.S. Dep't of Veterans Affairs*, 451 F. Supp. 2d 599, 602 (S.D.N.Y. 2006) *aff'd*, 323 F. App'x 16 (2d Cir. 2009)) (other citations and internal quotation marks omitted). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a claim must be grounded in "factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)). Essentially the cause of action must "state a claim to relief that is plausible on its face." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1973). "A claim has facial plausibility when the [party] pleads factual content that allows the court to draw the reasonable inference that [its adversary] is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). In applying this standard, the Court accepts as true all well-pled factual allegations, but does not credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Id.*

Under Rule 12(b)(6), the Court may supplement the allegations in the cause of action with facts from documents referenced in or relied upon in the cause of action when deciding a motion to dismiss. *Horton v. Wells Fargo Bank N.A.*, 16-CV-1737, 2016 U.S. Dist. LEXIS 158791, 2016 WL 6781250, at *2 (S.D.N.Y. Nov. 16, 2016), *aff'd*, 703 Fed. Appx. 23, 2017 WL 3264019 (2d Cir., 2017) (citing *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) ("In considering a motion to dismiss for **[*7]** failure to state a claim pursuant to Rule 12(b)(6), a

district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint."); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("[W]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint[,] the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.") (internal citations omitted)). Specifically relevant as to the present matter, "[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998))

As the burden rests with the party putting forth the affirmative defense that the statute of limitations has expired, "a pre-answer motion to dismiss on this ground may be granted only if it is clear on the face of the complaint that the statute of limitations has run." *Fargas v. Cincinnati Mach., LLC*, 986 F. Supp. 2d 420, 427 (S.D.N.Y. 2013) (citing *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)); *see Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n. 12 (2d Cir. 2014) ("Although the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided on a Rule 12(b)(6) motion **[*8]** if the defense appears on the face of the complaint."); *Gonzalez v. J.P. Morgan Chase Bank, N.A.*, 228 F. Supp. 3d 277, 291 (S.D.N.Y. 2017) ("Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss.") (quoting *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989)).

IV. Discussion

A. Defendant's Foreclosure Counterclaim is Time-Barred

Applying the standards detailed above, the Court grants Plaintiff's Motion to Dismiss as Defendant's first counterclaim of foreclosure is clearly time-barred by the applicable statute of limitations. Under New York State law, a foreclosure action is subject to a six-year statute of

limitations. *See* CPLR 213(4).[3] Under New York law, "With respect to a mortgage payable in installments, separate causes of action accrue[] for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due.... However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt." *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540, 542 (2d Dep't 2012) (internal citations and quotations marks omitted). The filing of the summons and complaint seeking foreclosure premised upon acceleration is sufficient to accelerate **[*9]** the debt and commence the statute of limitations time period as to the entire mortgage. *Bank of Am., Nat. Ass'n v. Commack Properties, LLC*, CIV.A. 09-5296, 2010 U.S. Dist. LEXIS 136305, 2010 WL 5139219, at *5 (E.D.N.Y. Dec. 10, 2010) (citing *Clayton Nat'l Inc. v. Guldi*, 307 A.D.2d 982, 763 N.Y.S.2d 493 (2d Dep't 2003)); *see Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 472, 180 N.E. 176, 176 (1932) (holding that election to accelerate a debt is established by the "unequivocal overt act of . . . filing the summons and verified complaint"). Though a lender by a clear deliberate action may choose to revoke its election to accelerate a mortgage, the dismissal of a prior foreclosure action does not alone "constitute an affirmative act ... revoking its election to accelerate." *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 605-06, 720 N.Y.S.2d 161, 163 (2d Dep't 2001). Without some definitive subsequent revocation, there is no tolling and the six-year statute of limitations time period continues to run. *See Guldi*, 307 A.D.2d at 982, 763 N.Y.S.2d 493-94 (holding that dismissal of the 1992 action for lack of personal jurisdiction did not constitute an affirmative act by the lender as would revoke its election to accelerate) (citing *Fed. Nat. Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 90 (2d Dep't 1994)).

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[3] As this court is sitting in diversity, the choice of law rules of the forum state, New York, control. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-497, 61 S. Ct. 1020, 1021-22, 85 L. Ed. 1477 (1941); *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 822 F.3d 620, 641 (2d Cir. 2016). "When confronted with a choice of law question, New York courts generally look to the law of the jurisdiction that has 'the greatest interest in the litigation,' as determined by the 'facts or contacts which ... relate to the particular law in conflict.'" *Watts v. Jackson Hewitt Tax Serv. Inc.*, 579 F. Supp. 2d 334, 345 (E.D.N.Y. 2008) (quoting *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 382, 248 N.E.2d 576, 300 N.Y.S.2d 817, 825 (1969)). When, as here, the parties utilize New York law in the memoranda and the dispute is over a foreclosure on a mortgage and note connected to a piece of real property in New York owned by a New York resident, New York has the greatest interest in the litigation. *See Onewest Bank, N.A. v. Perez*, 14CV3465, 2015 U.S. Dist. LEXIS 189632, 2015 WL 12659924, at *5 (E.D.N.Y. July 18, 2015). Accordingly, the Court applies New York law.

After Polatov's default, Defendant sought foreclosure on the Note and Mortgage by filing a complaint and commencing the 2008 State Foreclosure Action on July 1, 2008. *See* Wax Decl. ¶¶3-6, 10, Ex. 1-B; Amended Answer ¶¶ 9-10. Defendant then attempted to give notice of that action by both personally delivering a copy of the verified complaint and mailing it by **[*10]** first class mail to Polatov at the Subject Property. *See id.* ¶¶ 8, 14, 15, Ex. 1-G, J; Counterclaim ¶ 10; Def. Mem. Ex. 3 ¶ 11. The prior foreclosure action was dismissed on December 20, 2010, and Defendant did not attempt to recommence a foreclosure action until it filed the ACC on November 4, 2016. *See* Amended Answer ¶ 12; *compare* Counterclaim *with* ACC ¶¶ 16-17. Deutsche Bank does not assert in the ACC or its opposition that at any point after the filing of the original foreclosure action it took any action to revoke its election. *See* ACC; Def. Opp. Accordingly, the Court finds that the statute of limitations expired on July 1, 2014, and the present attempt in the ACC to revive that foreclosure on the Mortgage and Note is time-barred.

Defendant argues that the question as to improper service on Polatov in the prior foreclosure action, which was the grounds for its dismissal, invalidates the election to accelerate at issue in the present motion. Def. Opp. at 13-14. However, though improper service of a foreclosure action's summons and complaint may prevent enforcement of an actual foreclosure and sale and provide grounds to vacate such a judgment, it does not affect the validity of **[*11]** the election to accelerate that results from the filing of the action itself and the running of the statute of limitations time period. *See Albertina Realty*, 258 N.Y. at 476, 180 N.E. at 177 ("The fact of election should not be confused with the notice or manifestation of such election."); *Guldi*, 307 A.D.2d at 982, 763 N.Y.S.2d at 493-94 (holding that summons and complaint commenced the statute of limitations despite prior action being dismissed due to lack of personal jurisdiction); *Puzzuoli v. JPMorgan Chase Bank, N.A.*, 55 Misc. 3d 417, 426, 49 N.Y.S.3d 228, 236 (N.Y. Sup. Ct. 2016) (holding that a mortgage is accelerated when the lender elects to exercise its right of acceleration, not when the borrower receives notice of that election, commencing statute of limitations period when the oath was administered two days prior to the complaint's actual filing) (citing *Albertina* at 476, 180 N.E. at 177 (stating that a tender of payment does not "destroy the effect of the sworn statement that plaintiff ha[s] elected"); *Gold v. Vanden Brul*, 28 Misc. 2d 644, 644, 211 N.Y.S.2d 757, 758 (Monroe Sup. 1961) (the "sworn act" of verifying the foreclosure complaint "constituted an election to accelerate"). The Second Circuit has recognized that, under New York State law, actual notice to the mortgage owner of a bank's intent to accelerate the debt in default is but one example of an "unequivocal overt act" of

election, while "initiating a foreclosure suit" remained a separate, equally valid "manifestat[ion **[*12]** of] election." *United States v. Alessi*, 599 F.2d 513, 515 n.4 (2d Cir. 1979).

To argue against this precedent, Defendant cites to *Wells Fargo Bank, N.A. v. Burke*, and *21st Mtge. Corp. v. Osorio*, 51 Misc. 3d 1219(A), 41 N.Y.S.3d 453, 2016 WL 2613975 (Queens Sup. Ct. 2016) (unpublished and uncorrected). In *Burke*, physical service of the complaint was accomplished, but it was held to be nevertheless ineffective. *Burke*, 94 A.D.3d at 983-84, 943 N.Y.S.2d at 543. There, the chief deficiency in the filing of the original foreclosure action was that the mortgagee bank filed it before ever properly being assigned the mortgage and note at issue. *See id.* That defective action was subsequently consolidated with another foreclosure action after the mortgagee had properly taken possession of the note and mortgage, but that second action failed to name the mortgagor at issue as a defendant. *See id.* Collectively, this prevented the bank from validly taking the "unequivocal overt act" necessary to trigger acceleration and thus the statute of limitations, as the drafting and filing of the complaint there would have, at most, amounted to a future promise to elect rather than the act of election itself. *See id.* Accordingly, *Burke* is inapposite.

Similarly, *Osorio* does not save the ACC. There, the state trial court actually found an acceleration took place predicated on the filing of a complaint despite improper service. *See **[*13]** Osorio*, 51 Misc. 3d 1219(A), 41 N.Y.S.3d 453. The court reasoned that the filing of a foreclosure action plus an awareness of the action, as evidenced in the defendant moving to vacate the default judgment, together satisfied what, if any, notice requirements *Burke* imposed so as to allow the statute of limitations to commence. *See id.* ("It is evident that [defendant mortgage holder] was aware of the[] action [] when she sought to vacate the judgment and the sale against her, and thus was on notice that [the bank] availed itself of the option to accelerate."). Here, Defendant attached to its papers Polatov's Affidavit, whereby his attorney moved on or about July 27, 2010 to vacate the state court's foreclosure and sale order of the Subject Property. *See* Def. Opp. Ex. 3. Even were the Court to start running the six-year period from this later date, it would still have expired months before the filing of the ACC and the renewal of foreclosure action, rendering the question raised by the holding in *Osorio* moot.

In anticipation of the Court rejecting the applicability of these cases, Defendant argues that the ACC's foreclosure counterclaim should be deemed to relate back to the original counterclaims of unjust enrichment and equitable **[*14]** mortgage under Federal Rule of Civil Procedure

15(c)(1)(B) ("Rule 15"). *See* Def. Opp. at 19-21. Defendant is correct that otherwise untimely claims may be permitted under the relation back doctrine. However, Rule 15 allows for an amendment to a pleading to relate back to the date of the original pleading only when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading." *Charlot v. Ecolab, Inc.*, 97 F. Supp. 3d 40, 69 (E.D.N.Y. 2015). "Where the amendment would involve a new cause of action [ ], the district court may deny leave unless 'the original complaint gave the defendant fair notice of the newly alleged claims.'" *O'Hara v. Weeks Marine*, Inc., 294 F.3d 55, 68 (2d Cir. 2002) (quoting *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998) (citing *Tran v. Tran*, 67 F. App'x 40, 42 (2d Cir. 2003) (noting that notice is the "central question"); *Higgins v. NYP Holdings, Inc.*, 836 F. Supp. 2d 182, 192 (S.D.N.Y.2011) ("'[T]he pertinent inquiry'" is whether the defendant received fair notice.") (quoting *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 815 (2d Cir.2000))). In the present matter, the question is the relation back of newly added claims, rather than the elaboration of prior claims. *Compare* Counterclaim *with* ACC ¶¶ 16-17. Thus, "'the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test.... [C]ourts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading.'" *Charlot*, 97 F. Supp. 3d at 71 (quoting **[*15]** Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1497 (3d ed. 2014)).

The ACC markedly alters rather than elaborates on the allegations contained in the counterclaims filed with the Answer. Deutsche Bank originally alleged claims of unjust enrichment and equitable mortgage for the sum of the carrying costs that it expended regarding Subject Property since Polatov's default. *See* Counterclaim ¶¶ 14-25. Defendant did not originally raise any claim to the balance or interest due on the Mortgage against 839 Cliffside or Polatov. *See id.* However, it did note that Polatov, had denied executing the Note and Mortgage in the prior state court proceeding and to the prior loan servicer, an allegation that was subsequently dropped. *Compare* Counterclaim ¶ 9 *with* ACC. The ACC by contrast seeks to foreclose on the Subject Property on the contractual terms of the original mortgage. *See* ACC ¶¶ 16-17. In the ACC, Defendant also adds allegations concerning its and its predecessor-in-interest's compliance with the notice requirements of the Mortgage regarding Polatov's default and their desire to foreclose. *See* ACC ¶ 10. Perhaps most significantly, Deutsche Bank now asserts for the first time a claim to the principal **[*16]** and interest due under the Mortgage and Note, approximately $750,000. *See* ACC ¶¶ 11, 16-17.

Nevertheless, Defendant relies on *US Bank N.A. v. Gestetner*, 103 A.D.3d 962, 960 N.Y.S.2d 227 (3d Dep't 2013) to argue that the new foreclosure cause of action contained in the ACC relates back to the original counterclaims as a matter of law. In *Gestetner*, the mortgagee sought to amend its original timely pleadings of foreclosure with new causes of action for fraud, equitable mortgage, and unjust enrichment. *Id.* The Appellate Division granted leave to amend with respect to the latter two. *Id.* The *Gestetner* court reasoned that as an equitable mortgage required proof of "the existence of a clear intent between the parties that certain property be held, given or transferred as security for an obligation," such proof already was pled directly from the transactions and events alleged in plaintiff's original foreclosure claim. *Id.* Concerning the unjust enrichment cause of action, the Appellate Division allowed the amendment because of that mortgagee's allegation that the mortgagor would be unjustly enriched if permitted to retain "the benefits of its unpaid mortgage loan" was similarly based upon the same transactions described in the original foreclosure complaint. *See* **[*17]** *id.* With no citation, Deutsche Bank asserts that "[l]ogically, the inverse [— an original timely complaint for unjust enrichment can be amended to include an otherwise time-barred foreclosure action —] should also be true." *See* Def. Opp. at 20. The Court disagrees.

Unlike in *Gestetner*, here, the relation back doctrine does not allow Deutsche Bank to circumvent the statute of limitations because its prior counterclaims seeking to recover only carrying costs on equitable grounds did not provide any notice to Plaintiff that Defendant would also seek to recover the underlying principal and interest by enforcing against 839 Cliffside the contractual obligations contained in the Note and Mortgage. The Appellate Division in *Gestetner* itself noted immediately before denying the same mortgagee leave to amend the complaint to add a new claim for fraud regarding the same transaction, "The *sine qua non* of the relation back doctrine is notice, and the requisite notice must be contained in the original pleading." *Id.* (quoting *Lawyers' Fund for Client Protection of the State of N.Y. v. JP Morgan Chase Bank, N.A.*, 80 A.D.3d 1129, 1130, 915 N.Y.S.2d 741, 742 (3d Dep't 2011) (internal quotation marks and citations omitted)). Here, nothing in the original counterclaim gave notice that Defendant would allege the same conduct that previously only **[*18]** constituted an inequity would also now be characterized to be a violation of a contractual obligation. Moreover, as the bases for recovery in the original and amended causes of action are not obviously or closely related, the filing date of the ACC is controlling. Accordingly, Deutsche Bank's reliance on *Gestetner* is unavailing.

Additionally, the Court notes that adopting Defendant's position runs counter to the basic rationale and purpose of New York's statute of limitations. Such time limitations on suits are "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556, 94 S. Ct. 756, 767, 38 L. Ed. 2d 713 (1974) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944)). Regardless of the propriety of the service or the basis for the dismissal in the 2008 State Foreclosure Action, Deutsche Bank was aware of the filing of its own complaint in that action and the resulting acceleration of the Mortgage. After the dismissal of that action, Defendant should have either affirmatively rescinded its acceleration so as to toll the limitations period or pursued its claim more expeditiously during the intervening six years if it wanted to recover. **[*19]** Having failed to do so, the Court finds that the statute of limitations has expired and that the Mortgage is extinguished. Accordingly, 839 Cliffside's motion to dismiss the first counterclaim of foreclosure is granted.

B. Defendant had Standing to Bring the 2008 State Foreclosure Action

Defendant also challenges dismissal of its first cause of action on the grounds that there is a "question of fact" as to whether it had standing when it commenced the 2008 State Foreclosure Action that Plaintiff argues accelerated the Mortgage. *See* Def. Opp. at 17. Under New York law, in order for a party to have standing to commence a mortgage foreclosure action it must be either the holder or assignee of the underlying mortgage and note. *See JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 644, 37 N.Y.S.3d 286, 288 (2d Dep't 2016). Deutsche Bank has already admitted in the Amended Answer and ACC to the attendant facts regarding its standing in the prior action and is bound by those admissions.

"'Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission.'" *Haywood v. Bureau of Immigration & Customs Enf't*, 372 F. App'x 122, 124 (2d Cir. 2010) (quoting *In re Velasquez*, 19 I. & N. Dec. 377, 382 (BIA 1986)). Facts admitted in an answer are such a distinct and formal admission **[*20]** as would bind a party "throughout the litigation." *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 578 (2d Cir. 2006) (citing *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (finding that district

court erred by disregarding a fact admission and relying on contrary evidence)). Moreover, under Federal Rule of Civil Procedure 8 ("Rule 8"), "a denial must fairly respond to the substance of the allegation." Fed. R. Civ. Pro. 8(b)(2). "A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest." Fed. R. Civ. Pro. 8(b)(4). If an allegation is not properly denied when a responsive pleading is so required, the responding party is deemed to have admitted it. Fed. R. Civ. Pro. 8(b)(6).

Paragraph 8 of the Complaint reads, "On February 1, 2008, FFFC assigned the mortgage to Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage via assignment recorded May 20, 2008 in Liber 32990, Pages 547-550." Compl. ¶ 8. In its Amended Answer, regarding the assignment at issue, Defendant equivocates rather than actually denying the allegation, stating, "Defendant denies the allegations set forth in Paragraph 8 of the Complaint in the manner in which they are stated, and states that the assignment of mortgage referenced by Plaintiff in this Paragraph speaks for itself." *See* Answer ¶ 8. Further, in the attachments to the ACC, Deutsche Bank submitted **[*21]** the assignment at issue dated February 1, 2008, by which it acquired the Note and Mortgage, and that document, of which the Court takes notice as being incorporated into the pleadings, fully corroborates 839 Cliffside's allegation in the Complaint regarding Deutsche Bank's standing. *See* ACC Ex. D. Additionally, in the ACC, Defendant affirmatively alleges that it was the lawful rightful owner of the Mortgage and the Note as of February 1, 2008. *See* ACC ¶ 6b ("From FFFC to Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF3, Mortgage Pass-Through Certificates, Series 2006-FF3 by Assignment of Mortgage dated February 1, 2008 and recorded in the Nassau County Clerk's Office on May 20, 2008, Liber Book M 32990, Pages 547-550."). Thus, there is no "question of fact" regarding Defendant's standing in the 2008 State Foreclosure Action as could invalidate the acceleration of the Mortgage. Accordingly, as Deutsche Bank's foreclosure cause of action is clearly time-barred, the Court grants Plaintiff's motion to dismiss.

C. Plaintiff's Other Requested Relief

The additional relief sought by Plaintiff under Federal Rules of Civil Procedure 12(e) and 12(f) that sought a more definitive statement **[*22]** and/or the striking of certain terms in the first counterclaim was in the alternative to dismissal, and, thus, is moot. Additionally, 839 Cliffside concedes that its motion to dismiss Defendant's second counterclaim for unjust enrichment is

likewise moot were the Court to grant its motion with respect to the foreclosure claim. Accordingly, the Court need not engage in any further analysis with respect to these requests for relief.

V. Conclusion

Based on the foregoing, Plaintiff's motion to dismiss the first counterclaim contained in the ACC is hereby granted, and Defendant's cause of action seeking foreclosure on the Mortgage and sale of Subject Property is dismissed with prejudice as time-barred under the applicable statute of limitations.

Dated: Central Islip, New York

August 25, 2017

SO ORDERED.

/s/ Steven I. Locke

STEVEN I. LOCKE

United States Magistrate Judge

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