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<b>Wilmington Sav. Fund Socy., FSB v Fernandez</b>
2018 NY Slip Op 28385
Decided on November 19, 2018
Supreme Court, Onondaga County
Karalunas, J.
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Decided on November 19, 2018

Supreme Court, Onondaga County

**Wilmington Savings Fund Society, FSB d/b/a Christiana Trust, Not  
Individually but as Trustee for Hilldale Trust**

**against**

**Julian M. Fernandez a/k/a Julian Martin Fernandez et al.**

2017-5908

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Deborah H. Karalunas, J.

This constitutes the court's decision regarding plaintiff's motion for leave to reargue  
[\[FN1\]](#) this court's Letter Decision and Order dated June 20, 2018 and defendant's cross motion

to quiet title. Pursuant to CPLR Section 2221(d)(2), a motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Re-argument does not provide a party the opportunity to advance arguments not previously tendered. [Garland v. RLI Ins. Co.](#), 79 AD3d 1576, 1577 (4th Dep't 2010). However, it is within the court's discretion to grant leave to reargue when the court may have "overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its decision." *Delcrete Corp. v. Kling*, 67 AD2d 1099, 1099-1100 (4th Dep't 1979).

By Letter Decision and Order dated June 20, 2018 this court denied defendant's motion to dismiss the complaint as untimely based upon a default letter but granted the motion based upon defendant's discharge in bankruptcy. Having failed to previously brief the bankruptcy issue, plaintiff now moves to reargue claiming the court mistakenly held that a bankruptcy filing automatically accelerated the entire debt thereby triggering the running of the statute of limitations. Gold Aff. ¶ 3.

Plaintiff mischaracterizes this court's ruling; the court held defendant's March 15, 2010 [\*2] Chapter 7 discharge in bankruptcy and April 1, 2010 bankruptcy case closure triggered the running of the statute of limitations, and rendered the instant action untimely. Upon further review, however, the court is persuaded that a discharge in bankruptcy extinguishes only a debtor's *in personam* liability for any deficiency on a debt but leaves intact the creditor's right to a claim against the debtor *in rem*. *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991). A Chapter 7 discharge extinguishes an individual's personal obligation under a promissory note but does not eradicate plaintiff's security interest in the property. *Citimortgage, Inc. v. Chouen*, 2014 NY Slip Op 333251(U) \*\*4 (Sup. Ct. Suffolk County 2014). A creditor's right to foreclose on the mortgaged property survives or passes through the bankruptcy. *Johnson*, 501 U.S. at 82-83.

An action based upon the foreclosure of a mortgage has a six-year statute of limitations. CPLR § 213(4). "The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum become due and the statute of limitations begins to run on the entire mortgage." [Bank of Am., Natl. Assn. v. Luma](#), 157 AD3d 1106, 1106 (3d Dep't 2018). "Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take

advantage of the accelerating provision, and until such action has been taken the provision has no operation." [\*Wells Fargo Bank, N.A. v. Burke\*, 94 AD3d 980](#), 982-983 (2d Dep't 2012); *Mcintosh v. Fed. Nat'l Morg. Ass'n*, 2016 WL 4083434 at \* 4 (S.D.NY July 25, 2016). Commencement of an action is one method of acceleration. *Milone v. U.S. Bank Natl. Assn.*, 164 AD3d 145 (2d Dep't 2018). "As with other contractual [optional acceleration clauses], the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the note and mortgage." *Wells Fargo Bank, N.A.*, 94 AD3d at 983.

Here, plaintiff's mortgage has an optional acceleration clause which states in pertinent part that:

If I am in default under this security instrument, this is what Lender may do, in addition to any other rights or remedies provided by law:

**Accelerate Payment.** Lender shall have the right at its option without notice to [defendant] to require that I pay immediately the entire amount then remaining unpaid under the credit agreement and under this security instrument, including any prepayment penalty which I would be required to pay.

As decided previously, there was no default letter which accelerated the subject debt prior to plaintiff commencing the instant foreclosure action on November 1, 2017. Therefore, the six-year statute of limitations only began to run in this *in rem* foreclosure action upon commencement of this action. Consequently, this action is timely.

While the unique facts of this matter appear to be a case of first impression in New York, other jurisdictions have encountered a similar factual scenario and have held that a discharge in bankruptcy does not accelerate the debt, and the statute of limitations on an *in rem* foreclosure action begins to run when the holder of the secured interest in the mortgaged property demands payment or commences an action to foreclose. *Can Fin., LLC v. Krazmien*, 2018 WL 3654832 at \* 2 (Fla. Dist. Ct. App. 2018)("borrower's bankruptcy discharge did not affect Bank's ability to initiate an *in rem* foreclosure action"); *Kabler v. HSBC Bank USA, Nat. Ass'n*, 2018 WL 1384551 (Kan. Dist. Ct. 2017)(Chapter 7 discharge does not accelerate debt; the terms of the [\*3] acceleration clause in the note and mortgage govern).

As the court in *Kabler* stated:

even after the debtor's personal obligations have been extinguished by a bankruptcy discharge, the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor's property because a bankruptcy

discharge extinguishes only one mode of enforcing a claim - namely, an action against the debtor in personam - while leaving intact another - namely, an action against the debtor *in rem*. The creditor still holds a right to payment because a discharge does not constitute payment or satisfaction of the debt.

Based on the foregoing, the court grants plaintiff leave to reargue and upon re-argument reverses its prior decision. Defendant's motion to dismiss based on his discharge in bankruptcy is DENIED. Likewise, defendant's cross-motion to quiet title also is DENIED.

Defendant is required to serve his ANSWER to plaintiff's complaint within TWENTY (20) days from the date of service on him of this Letter Decision and Order with notice of entry.

Deborah H. Karalunas, J.S.C.

### Footnotes

**Footnote 1:** While the notice of motion asserts that plaintiff is seeking leave to renew and reargue, the attorney's affirmation is limited to re-argument.

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