At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of October 2017.

P R E S E N T:

HON. NOACH DEAR,

J.S.C.

Index No.: ,

BNY MELLON,

Plaintiff,

DECISION AND ORDER

-against-

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Moving Papers and Affidavits Annexed	1
Opposition/Cross	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants move for dismissal arguing that Plaintiff's claims are barred by the statute of limitations and for summary judgment on their counterclaim to discharge the note and mortgage. Plaintiff opposes and cross-moves for summary judgment in its favor.

"The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). A prior action was filed on 1/22/08, accelerating the debt. The instant action was filed on 8/22/16, more than

six years later.

Plaintiff argues that, per the mortgage, acceleration does not take place until judgment. The Court disagrees. The filing of a foreclosure action is inherently an acceleration of the debt (see, *Beneficial Homeowner Service Corp. v. Tovar*, 150 A.D.3d 657 [2d Dept 2017]; *Ward v. Walkley*, 143 A.D.2d 415, 417 [2d Dept.1988], quoting 55 Am. Jr. 2d, Mortgages § 387 ["a suit to foreclose a mortgage is notice of the most unequivocal character that the mortgagee wishes to avail himself of his option for acceleration"]). Additionally the 2008 complaint states (in paragraph NINTH), "Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal ..."

Plaintiff further argues that the discontinuance of the prior action acted as a de-acceleration. Such determination is properly made on a case-by-case basis (see, *NAINT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]) – seemingly by examining whether the conduct of the plaintiff therein would lead a fact-finder to conclude that the loan was restored to being an installment contract. Herein, in seeking to discontinue the 2008 action, the plaintiff's counsel wrote that "Plaintiff avers that it is in the interest of all parties and in the interests of judicial economy to discontinue this action without prejudice...." providing minimal information as to the plaintiff therein's motivations and intentions (but certainly not implying that the underlying claims had been resolved or that the plaintiff no longer intended to seek payment in full). Further, no evidence has been offered that the loan was treated as an installment contract thereafter – neither a letter to Defendants stating that payments would now be accepted nor monthly statements reflecting a de-acceleration have been proffered. Finally, in filing the instant suit, a default date preceding the 2008 action has again been utilized.

Motion granted. Case dismissed. Judgment for Defendants on their counterclaim. Settle Order on Notice. Cross-motion denied.

ENTER:

Hon. Noach Dear, J.S.C.

2017 OCT 13 AM 9:29