

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of January, 2016.

P R E S E N T:

HON. DAVID B. VAUGHAN,

Justice.

-----X
IRENE NAGROTSKY,

Plaintiff,

- against -

Index No. 506293/15

VICTORIA J. KOCH, a/k/a VICTORIA KOCH HEIL WEIL,

Defendants.

-----X
VICTORIA J. KOCH,

Third-Party Plaintiff,

- against -

IRENE NAGROTSKY, GUSTAVO GONZALEZ, CHRISTIANA LAZO, WELLS FARGO, N.A., TRANSIT ADJUDICATION BUREAU OF THE CITY OF NEW YORK, PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, WYCKOFF HEIGHTS MEDICAL CENTER and JOHN DOE numbers 1 through 10, intended to indicate other persons who may have an interest in the premises that is the subject of this action,

Third-Party Defendants.

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavit (Affirmation) _____
Reply Affidavit (Affirmation) _____

1-2

3-4

5

Upon the foregoing papers, plaintiff and third-party defendant, Irene Nagrotsky (Nagrotsky), moves for an order: (1) dismissing the counterclaim and the third-party complaint asserted by defendant and third-party plaintiff, Victoria J. Koch a/k/a Victoria Koch Heil Weil (Koch), pursuant to CPLR 3211 (a) (3), (a) (5), (a) (7) and CPLR 3012-b (a); (2) awarding Nagrotsky costs and attorneys' fees "as the Certificate of Merit of Pamela Gallagher, Esq., attached to the Third-Party Summons, Verified Answer with Counterclaim and Third-Party Complaint willfully fails to provide documents required by the statute";¹ and (3) awarding Nagrotsky "reasonable attorney's fees and expenses for the defense of this defective mortgage foreclosure cause of action asserted by [Koch]," pursuant to RPL § 282.

Background

Nagrotsky's 1982 Purchase Of The Property

Nagrotsky, on July 21, 1982, purchased the residential property at 408 9th Street in Brooklyn, identified as Block 1012, Lot 22 (Property), pursuant to a bargain and sale deed from "James J. Dunne a/k/a James Joseph Dunne as Distributee of Florence J. Dunne, who died in testate a resident of Kings County 11/11/61 . . ."² The July 1982 Deed reflects that it was recorded with the Department of Finance in the New York City Register's Office on August 5, 1982 in Reel 1331, Page 657 (Klass Affirmation, Exhibit C).

The 1982 Mortgage

Nagrotsky financed her 1982 purchase of the Property with \$20,000.00 that she obtained from her mother-in-law (and defendant Koch's mother), Tiby Kaplan (Kaplan). The

¹ See Nagrotsky's August 6, 2015 Notice of Motion at page 2.

² A copy of the 1982 Deed is annexed as part of Exhibit C to the August 6, 2015 affirmation of Richard A. Klass, Esq., submitted in support of Nagrotsky's motion (Klass Affirmation).

parties memorialized the transfer by a July 21, 1982 mortgage purporting to encumber the Property between Nagrotsky as “mortgagor” and Kaplan as “mortgagee” (1982 Mortgage).

Although the parties did not execute a promissory note evidencing the loan, the 1982 Mortgage provides that it secures “a certain bond, note or obligation . . .” and contains the following *incomplete* terms for repayment of the money:

“**WITNESSETH**, that to secure the payment of an indebtedness in the sum of TWENTY THOUSAND no/cents (\$20,000.00) dollars, lawful money of the United States, to be paid with interest thereon to be computed from the date hereof, at the rate of fifteen (15%) per centum per annum, and to be paid on the ____ day of _____ 19_____, next ensuing and _____ according to a certain bond, note or obligation bearing even date herewith . . .” (Klass Affirmation, Exhibit D).

Notably, Paragraphs 4 of the 1982 Mortgage provides:

“4. That the whole of said principal sum and interest shall become due at the option of the mortgagee: *after default in the payment of any installment of principal or of interest* for fifteen days; or after default in the payment of any tax, water, rate, sewer rent or assessment for thirty days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any off-sets or defenses exist against the mortgage debt, as hereinafter provided. . . .” (*id.* at emphasis added).

The 1982 Mortgage states that “[t]his mortgage may not be changed or terminated orally”

Oddly, the 1982 Mortgage was not recorded with the Department of Finance in the New York City Register’s Office *for over thirty years*, until Koch eventually recorded it on October 5, 2013 (more than *thirteen years after* Kaplan’s 1999 death) under City Register File Number (CRFN) 2013000413576 (*id.*).

The 1998 Mortgage Assignment

By “Assignment of Mortgage” dated October 15, 1998, Kaplan assigned her right, title and

interest in the 1982 Mortgage to Koch under her married name, Victoria J. Heilweil (1998 Mortgage Assignment).

Like the 1982 Mortgage, the 1998 Mortgage Assignment was not recorded with the City Register's Office *for over fifteen years*, until Koch eventually recorded it on January 28, 2014 (more than *fourteen years after* Kaplan's 1999 death) under CRFN 2014000033713 (*id.* at Exhibit E).

Nagrotsky Conveyed The Property

Nagrotsky, on January 30, 2014, as the "surviving spouse of Donald G. Koch, deceased on 9/18/13 . . ." conveyed the Property to Gustavo Gonzalez (Gonzalez) and Christiana Lazo (Lazo) by a bargain and sale deed (*see* Klass Affirmation, Exhibit C). The January 2014 deed was recorded in the City Register's Office on April 8, 2014 at CRFN 2014000119493 (*id.*).

The Instant Action

Nagrotsky, on May 20, 2015, commenced this action against Koch, her sister-in-law, pursuant to RPAPL § 1501,³ *et. seq.*, seeking to cancel and discharge the 1982 Mortgage.

Nagrotsky's verified complaint alleges that she "became the owner in fee simple of the [Property] . . . from transfer by the prior owner, by deed recorded with the City Register of Kings County on July 21, 1982 . . ." (Klass Affirmation, Exhibit A [Complaint at ¶ 3]). Nagrotsky alleges, "upon information and belief," that "at the time [she] purchased the

³ RPAPL § 1501 (4) provides, in relevant part:

"[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage, or to enforce a vendor's lien, has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons, known or unknown, including one under disability as hereinafter specified, to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom . . ."

Property, the sum of \$20,000.00 was *offered* by Tiby Kaplan, [her] mother-in-law and mother of the Defendant” and “at the time the money was *provided* to [her], Tiby Kaplan had not made a final determination as to whether the money was to be considered a gift or a loan” (*id.* at ¶¶ 5 and 6 [emphasis added]).

Nagrotsky alleges that “the [1982] Mortgage contains no terms of repayment” and “[u]pon information and belief, at no time was a note ever executed by Plaintiff in favor of Tiby Kaplan” (*id.* at ¶¶ 7 and 8). Tiby Kaplan died on January 26, 1999 and allegedly “made no demand upon Plaintiff during her lifetime for payment of the above-mentioned money” (*id.* at ¶ 9). Nagrotsky also alleges that her husband and Koch’s brother, Donald G. Koch, died in August 2013, and “[a]t no time between the deaths of Tiby Kaplan and Donald G. Koch did Defendant or anyone else make a demand for repayment under the [1982] Mortgage” (*id.* at ¶ 10).

Nagrotsky asserted two causes of action against Koch, seeking: (1) cancellation and discharge of the 1982 Mortgage, pursuant to RPAPL § 1501 (4), and a judgment determining that her interest in the Property is “free therefrom . . .” on the grounds that “Defendant’s time to collect pursuant to the terms of the [1982] Mortgage has expired”; “Defendant has made no claim upon Plaintiff for payment of the Mortgage,” and thus, “the [1982] Mortgage should be cancelled and the cloud on this title to the Property be cleared” (*id.* at ¶¶ 14-19), and (2) a judgment declaring that the 1982 Mortgage is “a nullity” because “no note was ever executed by the Plaintiff” (*id.* at ¶¶ 21-23).

Koch’s Answer, Counterclaim And Third-Party Complaint

Koch, on or about July 2, 2015, responded to Nagrotsky’s complaint by serving a verified answer, denying the material allegations therein and asserting ten affirmative defenses, including laches, unclean hands, estoppel, waiver and the Statute of Frauds.

Koch also asserted a counterclaim and commenced a third-party action against Nagrotsky, Gonzalez, Lazo and Wells Fargo, N.A. (Wells Fargo) by filing a “Third-Party

Summons” and a “Verified Answer with Counterclaim and Third-Party Complaint” seeking to foreclose on the Property pursuant to the 1982 Mortgage, which Nagrotsky allegedly “failed to satisfy upon the sale of the Property . . . on or about January 30, 2014” to Gonzalez and Lazo “for a purchase price of approximately \$1.9 million . . .” (Klass Affirmation, Exhibit B [Answer and Third-Party Complaint at ¶¶ 34 and 59]).

Koch alleges that her mother, “Tiby Kaplan gave a loan of \$20,000.00 to Nagrotsky, secured by a Mortgage on the Property[,]” which Nagrotsky executed “as security for the loan . . .” (*id.* at ¶ 53) and that she is “the current owner and holder of the [1982] Mortgage” (*id.* at ¶ 36; *see also* ¶ 56), since “Kaplan assigned all of her right, title and interest in the [1982] Mortgage to her . . . in writing . . .” (*id.* at ¶ 55). Koch further alleges that “[b]y letter dated June 28, 2014, [she] made a demand to counsel for Third-Party Defendants Gustavo Gonzalez and Christiana Lazo to pay the [1982] Mortgage princip[al] and accrued interest” (*id.* at ¶ 61) and that [a]t no time has the indebtedness secured by the [1982] Mortgage been paid and the [1982] Mortgage remains of record unsatisfied” (*id.* at ¶ 60; *see also* ¶ 62).

Koch alleges that she “has complied with all notification requirements under RPAPL § 1303 and 1320 . . .” (*id.* at ¶ 51); she “is neither a ‘mortgage banker’ not an ‘exempt organization’ as defined in Banking Law § 590, and therefore . . . the prior notice requirements of the RPAPL § 1304 do not apply to this action” (*id.* at ¶ 52).

Koch alleges that she sued Wells Fargo because it is “the mortgagee of the mortgage(s) on the Property given . . . by Third-Party Defendants Gustavo Gonzalez and Christiana Lazo[,]” which was “recorded after the [1982] Mortgage was recorded and [is] subordinate thereto” (*id.* at ¶¶ 41 and 42); and that Wells Fargo “knew of the existence of the [1982] Mortgage . . .” when it granted Gonzalez and Lazo a mortgage (*id.* at ¶ 43).

Koch asserted a counterclaim against Nagrotsky alleging that “the principal sum of the [1982] Mortgage, with all arrearage of interest thereon [at the rate of 15% per annum] is due and payable to Koch, as the Mortgagee Toby Kaplan’s assign, upon demand[,]” pursuant to the terms of the 1982 Mortgage and RPAPL § 254 (2) (*id.* at ¶ 65). More specifically, Koch alleges that Nagrotsky owes her \$118,750.00 as of July 1, 2015, “representing \$20,000.00 in principal and \$98,750 in interest” (*id.* at ¶ 69). Koch seeks “a money judgment against Nagrotsky for the sum of \$118,750.00 plus interest from July 7, 2015, together with the costs and expenses of this action, including Koch’s attorneys’ fees, costs and disbursements” (*id.* at page 12).

Koch also asserted a cause of action seeking to foreclose on the Property, alleging that: Gonzalez and Lazo purchased the Property “subject to the [1982] Mortgage” (*id.* at ¶ 77); their “claimed interest(s) in the Property are subordinate to the interest of the holder of the [1982] Mortgage” (*id.* at ¶ 80); and that “[t]he [1982] Mortgage provides that in the event of a default in payment, the holder of the [1982] Mortgage is empowered to sell the mortgaged Property” (*id.* at ¶ 81).

Koch’s attorney, Pamela Gallagher, Esq., executed a “Certificate of Merit,” pursuant to CPLR 3012-b, affirming that she “consulted about the facts of this case with . . . Koch” and certified that “there is a reasonable basis for the commencement of this action, and that [Koch] is the creditor entitled to enforce rights . . .” (Klass Affirmation, Exhibit B [Certificate of Merit at ¶¶ 4 and 5]).

Nagrotsky’s Dismissal Motion

Nagrotsky, on or about August 6, 2015, moved to dismiss Koch’s counterclaim and third-party complaint seeking to enforce the 1982 Mortgage and foreclose on the Property.

Nagrotsky contends that dismissal is warranted, pursuant to CPLR 3211 (a) (3), because Koch lacks standing and the capacity to foreclose, as a matter of law, since Koch is “purportedly the holder of ONLY the mortgage [and] she does not allege to be the owner of any purported note” (Klass Affirmation at ¶ 14). Nagrotsky contends that:

“[s]ince there is no note accompanying the mortgage and assignment of mortgage, these instruments are legal nullities as they fail to be supported by any underlying note. Therefore, [Koch] does not have the legal capacity to sue under the underlying mortgage” (*id.* at ¶ 15 [underline in original]).

Nagrotsky further argues that, “[a]ssuming *arguendo* that there was even a note” Koch’s counterclaim and third-party complaint are subject to dismissal, pursuant to CPLR 3211 (a) (5), because they are time-barred by the six-year statute of limitations applicable to mortgage foreclosure actions (*id.* at ¶ 20). Nagrotsky notes that the 1982 Mortgage “does not contain terms of repayment” and analogizes that “New York State law provides that a *note* with no express time for payment is deemed payable on demand and the statute of limitations starts to run upon delivery” (*id.* [emphasis added]). Nagrotsky argues that Koch’s claims are time-barred because “33 years have elapsed since the execution of the mortgage” (*id.* at ¶ 21).

Nagrotsky also contends that Koch’s claims should be dismissed and she is entitled to an award of attorneys’ fees, pursuant to CPLR 3012-b (a) and (e), because Koch and her attorney failed to comply with CPLR 3012-b, which requires that the note or a “Lost Note Affidavit” be included with the pleadings and/or the Certificate of Merit (*id.* at ¶¶ 22-27).

Koch’s Opposition

Koch, in opposition, contends that “Nagrotsky and her husband frequently reassured both Victoria Koch and her mother that the mortgage would be satisfied when the [Property] was sold” and that “Nagrotsky sold the mortgaged [Property] for \$1.9 million but failed to

satisfy the \$20,000 mortgage now held by her sister-in-law . . .”⁴ Koch contends that the 1982 Mortgage “explicitly contains a covenant to pay the debt, and Nagrotsky repeatedly acknowledged the debt she owed . . .” (Koch Opposition Memorandum at 1).

Koch explains that “[n]o note was executed at the time because the [1982] Mortgage contains an explicit covenant by Nagrotsky to pay the debt,”⁵ and contends that the covenant in Paragraph 1 of the 1982 Mortgage (“[t]hat the mortgagor will pay the indebtedness as hereinbefore provided”) is enforceable because “New York law will uphold a covenant to pay the debt set forth in a mortgage even in the absence of a note or bond . . .” (Koch Opposition Memorandum at 3).

Koch further contends that her third-party action to foreclose under the 1982 Mortgage is timely because “a mortgage with no repayment terms is payable upon demand” and “the statute of limitations did not begin to run until [her] demand to pay the mortgage in August 2013” (*id.* at 5). Koch relies on CPLR 206 (a), which provides that “where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when *the right to make the demand is complete*” (emphasis added). Koch contends that the six-year statute of limitations began to run when she requested that Nagrotsky satisfy the 1982 Mortgage by letter dated September 24, 2013 (Koch Opposition Affidavit at ¶ 15 and Exhibit A).

Notably, Koch explains that she belatedly recorded the 1982 Mortgage in October 2013, after “Nagrotsky indicated she would not honor the debt” (*id.* at ¶ 16).

⁴ See Koch’s August 25, 2015 memorandum of law in opposition to Nagrotsky’s dismissal motion (Koch Opposition Memorandum) at 1.

⁵ See Koch’s August 20, 2015 affidavit in opposition to Nagrotsky’s dismissal motion (Koch Opposition Affidavit) at ¶ 5.

Nagrotsky's Reply

Nagrotsky, in reply, submits her attorney's affirmation contending that the statute of limitations expired on July 21, 1988, because: (1) "[i]t is undisputed by . . . Koch that a promissory note was never executed . . .";⁶ (2) "[a]pproximately 33 years ago, . . . Nagrotsky executed a mortgage in favor of Tiby Kaplan" which "was not recorded by Koch until October 5, 2013 – **31 years after its execution** (Klass Reply Affirmation at ¶¶ 4-5 [emphasis in original]); (3) "[t]he mortgage does not set forth repayment terms" (*id.* at ¶ 7); and (4) if the 1982 Mortgage is a "demand instrument," Koch's foreclosure action is time-barred because "a cause of action against a maker of a demand instrument accrues on **the date of the demand instrument**" (*id.* at ¶¶ 8-9 [emphasis in original]).

Nagrotsky relies on the Court of Appeals' holding in *Martin v Stoddard*, (127 NY 61 [1891]), in addition to recent holdings by various appellate courts regarding the accrual of the six-year statute of limitations when promissory notes are due on demand (*see* Klass Reply Affirmation at ¶¶ 9-11). Nagrotsky argues that "the statute of limitations began to run on July 21, 1982, the date this mortgage was executed" and that "[t]he holder of the mortgage was required to take any action with respect to this mortgager, on or before July 21, 1988" (*id.* at ¶ 12). Nagrotsky also notes that Koch's Opposition Affidavit "admits that demand for payment was only made in September, 2013[.]" decades after the six-year statute of limitations expired (*id.* at ¶ 13; *see also* Koch Opposition Affidavit at ¶ 15).

Nagrotsky reiterates that Koch "was never assigned the underlying debt or obligation under this mortgage, and as such, lacks standing to assert a claim to enforce the mortgage" (Klass Reply Affirmation at ¶ 21).

⁶ *See* the October 7, 2015 reply affirmation of Richard A. Klass, Esq., in further support of Nagrotsky's dismissal motion (Klass Reply Affirmation) at ¶ 4.

Discussion

Koch's Counterclaim And Third-Party Complaint For Foreclosure Under The 1982 Mortgage Is Barred By The Six-Year Statute Of Limitations

CPLR 213 (4) provides that “an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein” must be commenced within six years. When the terms of a mortgage provide for its repayment in installments, “separate causes of action for each installment accrue[s], and the Statute of Limitations began to run, on the date each installment became due” (*Pagano v Smith*, 201 AD2d 632, 633 [1994]). However, “[o]nce 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 AD2d 476, 477 [1997]). In short, the six-year statute of limitations within which a mortgagee can foreclose upon a mortgage accrues *from the date on which payment is due*.

Here, however, the 1982 Mortgage has no provision stating when payment was due, since those provisions of the 1982 Mortgage were left blank (Klass Affirmation, Exhibit D). Under such circumstances, New York courts have held that the loan is presumed to be payable upon demand and the statute of limitations accrues from the date of the mortgage.

In *Martin v Stoddard*, (127 NY 61 [1891]), a case relied on by Nagrotsky, the Court of Appeals specifically held that:

“The mortgage has been omitted from the record before us and, *as the time when payment was to be made does not appear*, it will be presumed that it was made payable on demand. And the thing promised being the payment of money, the Statute of Limitations began to run from the date of the instrument, at which time the demand could have been made

. . . .

“This presumption might be repelled by proof (1) of payment of some part, or (2) by written acknowledgment of such right of action within that period” (127 NY at 63 and 65 [emphasis added]).

In *Corrado v Petrone*, (139 AD2d 483 [1988]), a factually analogous case, the plaintiff commenced an action, pursuant to RPAPL Article 15, to cancel and discharge a 1970 mortgage lien for \$11,000.00 on his real property. Like here, the defendants asserted a counterclaim (also styled as a third-party complaint) to foreclose under the 1970 mortgage, the terms of which mention four 1967 promissory notes that were not included in the record. Plaintiff moved for summary judgment cancelling and discharging the 1970 mortgage, pursuant to RPAPL Article 15, and the defendants/third-party plaintiffs cross-moved for summary judgment dismissing plaintiff’s complaint. The Appellate Division, Second Department, affirmed the trial court’s order granting the plaintiff summary judgment and dismissing the defendants/third-party plaintiffs’ counterclaim for foreclosure, holding that:

“[t]he appellants conceded that they have not received any payments of principal or interest on the debt secured by the mortgage since the execution of the mortgage on September 9, 1970. Therefore, whether the mortgage was given to secure a loan made in 1967 or a later loan made in 1970, it is clear that an action to foreclose the mortgage lien is now time-barred (139 AD2d at 484-485).

The Second Department cited to CPLR 213 (4) and the Court of Appeals’ holding in *Martin v Stoddard*. The court rejected appellants’ contention that the parties orally agreed on a payment due date because the 1970 mortgage (like the 1982 Mortgage at issue here) provided that “[t]his mortgage may not be changed or terminated orally[,]” and thus, the appellate court held that “appellants’ claim is barred from consideration by the parol evidence rule” (139 AD2d at 485).

Here, as in *Corrado*, Koch’s counterclaim for foreclosure based on the 1982 Mortgage – which was also styled and asserted as a third-party complaint – is subject to dismissal, pursuant to CPLR 3211 (a) (5), because the applicable six-year statute of limitations expired.

There is no dispute that the 1982 Mortgage contains no date for the repayment of the debt, and therefore, it was payable on demand within six years after the statute of limitations began to accrue. Absent any written payment terms, the statute of limitations began to accrue when the 1982 Mortgage was originally executed by Kaplan and Nagrotsky on July 21, 1982. Thus, the six-year statute of limitations within which Kaplan could have asserted a cause of action against Nagrotsky for foreclosure under the 1982 Mortgage accrued on July 21, 1982 and expired on July 21, 1988, *more than ten years before* the 1998 Mortgage Assignment from Kaplan to Koch.


Koch's contentions that the 1982 Mortgage "was always described by Nagrotsky, my brother, and my mother as a 30-year mortgage, payable at the end of the term, in 2012, or upon the sale of [the] house . . ." and that Nagrotsky and Koch's brother "repeatedly reassured my mother that the debt would be paid at the end of the 30-year term . . ." are unavailing (Koch Opposition Affidavit at ¶¶ 6 and 8). In *Corrado*, the Second Department refused to consider similar oral representations regarding the due date of the loan because such oral statements are barred by the parol evidence rule. Like the mortgage in *Corrado*, the 1982 Mortgage at issue here explicitly provides that "[t]his mortgage may not be changed or terminated orally" (Klass Affirmation, Exhibit D). Consequently, Koch's counterclaim for foreclosure is subject to dismissal because it is time-barred. Accordingly, it is

ORDERED that the branch of Nagrotsky's motion seeking an order dismissing Koch's First Counterclaim and Third-Party Complaint, pursuant to CPLR 3211 (a) (5), on the ground that it is time-barred by the six-year statute of limitations is granted; and it is further

branch of Nagrotsky's motion seeking an order, pursuant to CPLR 3012-b (e) and RPL § 282, awarding her costs and attorneys' fees is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,


J. S. C.
HON. DAVID B. VAUGHAN