At an IAS Term, Part 64 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 7th day of January, 2019.

PRESENT:

HON. KATHY J. KING,
Justice.

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LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR STEARNS ASSET BACKED SECURITIES I LLC, ASSET-BACKED CERTIFICATES, SERIES 2005-FR1
800 State Highway
121 Bypass
Lewisville, TX 75067,

Plaintiff,

- against -

DONNA DANIELS, JONI WHITE, DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT, ERIN SERVICES COMPANY LLC, HSBC BANK USA F/K/A MARINE MIDLAND BANK, KINGS SUPREME COURT, NEW CENTURY FINANCIAL SERVICES, NEW YORK CITY CRIMINAL COURT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NOVASTAR MORTGAGE, INC., PEOPLE OF THE STATE OF NEW YORK, ANTHONY JEFFCOAT, BURT HALL, CARLOS ROBERTS, COREY ROBERTS, LINDA ROBERTS, DUSTIN FRANKEL and NOELLE WILLIAMS,

Defendants.

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DECISION/ORDER

Index No. 13827/2008

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavit (Affirmations) Annexed	1-2 3-4
Opposing Affidavit (Affirmations)	5
Reply Affidavit (Affirmation)	6

Upon the foregoing papers, in the within foreclosure action, defendants, Dustin Frankell and Noell E. Williams ("defendants") move for summary judgment pursuant to CPLR 3212, seeking dismissal of plaintiff's complaint in its entirety, based on laches and estoppel. Plaintiff Lasalle Bank National Association ("plaintiff") oppose and cross move for summary judgment against the defendants and seek to, *inter alia*, strike the answer of the intervenors with prejudice; enter a judgment of foreclosure and sale pursuant to RPAPL 1351; confirm the report of the Court Appointed Referee; and amend the caption to substitute U.S. Bank, N.A., National Association as Trustee, as party plaintiff.

BACKGROUND AND PROCEDURAL HISTORY

On April 22, 2005, Donna Daniels ("Daniels"), the title holder of the property[1] located at 359 Jefferson Avenue, Brooklyn, New York ("the subject property"), gave Freemont Investment and Loan, a mortgage on the property as collateral for a loan of $560,000, which is the subject of the underlying foreclosure action. The mortgage was thereafter assigned to plaintiff, Lasalle Bank[2] on May 5, 2008. By deed dated August 31, 2006, Daniels conveyed the property to Joni White for a purchase price of $750,000. On August 31, 2006, White gave a mortgage on the property to NovaStar Mortgage ("NovaStar"). Thereafter, on August 14, 2007, NovaStar commenced a foreclosure action against White ("the White Foreclosure"), and a notice of pendency was filed in conjunction therewith.

After the commencement of the White Foreclosure, NovaStar's mortgage was assigned to Deutsche Bank, who was thereafter substituted as plaintiff in the action. A judgment of foreclosure and sale was entered in the White Foreclosure action in August 8, 2009, and on September 29,

[1] For purposes of this decision/order, the Court's discussion as regards chain of title begins in 2005, the year in which the property was encumbered by the mortgage at issue.

[2] Referred to in the Assignment of Mortgage as LaSalle Bank National Association, as Trustee for Certificate holders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Securities, Series 2005-FR-1

2009, the property was conveyed by referee's deed to Deutsche Bank for $531, 250.[3] A foreclosure sale was held on September 24, 2009 at which Deutsche Bank II was the successful bidder, and the property was conveyed to the Deutsche Bank II by referee's deed dated September 24, 2009. Thereafter, Deutsche Bank II conveyed the subject property to 69th Avenue, Inc. for $480,200 by bargain and sale deed dated March 12, 2013. The property was sold by 69th Avenue to the defendants on July 25, 2014 for $1,800,000, and in connection with this purchase, they took a mortgage on the property in the amount of $1,350,000 from Sterling National Bank.

Nine months after the commencement of the White Foreclosure, on or about May, 2008, plaintiff commenced the within foreclosure action against Daniels.[4] Plaintiff also filed a notice of pendency against the property. Since the defendants in the within action did not have interest in the property, beneficial or otherwise, they were not named as defendants or served with a notice of the 2008 action. Plaintiff moved for an Order of Reference which declared all non-appearing parties in default.[5] Thereafter, plaintiff's motion for a judgment of foreclosure and sale was withdrawn on October 6, 2009. Except for the re-filing of the notice of pendency, no further action was taken on the within foreclosure action. By order dated September 17, 2013, Judge Knipel dismissed the action for failure to prosecute and vacated the notice of pendency.

On January 14, 2015, plaintiff's order to show cause to vacate the order of dismissal and to "revive" the action was granted, and plaintiff re-filed the notice of pendency on March 3, 2015. No opposition was filed to the order to show cause. Defendants subsequently moved to intervene and by order dated November 30, 2015, the court permitted defendants to intervene in the underlying foreclosure action.

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[3] A subsequent conveyance was made from *Deutsche Bank* to *Deutsche Bank National Trust Company as Trustee for NovaStar Mortgage Funding Trust Series 2006-5 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2006-5* ("*Deutsche Bank II*") on March 12, 2013.

[4] The complaint names Donna Daniels, together with other named defendants having a beneficial interest or encumbrance on the subject property.

[5] Plaintiff indicated that the only defendant to appear in the action was Erin Services Company LLC.

Defendants filed and served a verified answer alleging nine affirmative defenses and two counterclaims against plaintiff, and now move for summary judgment dismissing the complaint based on their eighth affirmative defense to the extent that plaintiff's claims are barred by laches and/or estoppel. Plaintiff cross moves for, *inter alia*, an order for summary judgment dismissing defendants' verified answer and counterclaims, with prejudice, and entry of a judgment of foreclosure and sale.

DISCUSSION

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). " It is well settled that in order to prevail on a summary judgment motion, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact(see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Once the movant makes a *prima facie* showing, the burden shifts to the opposing party to produce evidentiary proof in admissible form to establish the existence of material issues of fact that require a trial (see *Alvarez*, 68 N.Y.2d at 324; see also *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Defendants contends that plaintiff should be estopped from assertion of rights to the subject property based on laches. In order for laches to apply to the failure of an owner of real property to assert his or her interest, "it must be shown that [the] plaintiff inexcusably failed to act when he [or she] knew, or should have known, that there was a problem with his [or her] title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel" (*Kraker v Roll*, 100 AD2d 424, 432-33 [2d Dept 1984] [citations omitted]). "Equitable

estoppel arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property and incurs expense in reliance on that belief. The property owner must inexcusably delay in asserting a claim to the property, knowing that the opposing party has changed his position to his irreversible detriment" (*Wilds v Heckstall*, 93 AD3d 661, 664 [2d Dept 2012] citing *Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010] [internal quotation marks and citation omitted]). Moreover, as the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense (see *Schulz v State*, 81 NY2d 336, 348 [1993]).

Based on the foregoing, the Court finds that defendants' have established as a matter of law that plaintiff should be estopped from assertion of rights on the subject property based on the doctrine of laches.

The moving papers demonstrate that plaintiff commenced the underlying foreclosure in 2008 and obtained an order of reference on or about February 26, 2009. While plaintiff moved for a judgment of foreclosure and sale within the requisite one year following issuance of the order of reference pursuant to Kings County General Foreclosure Rules (Part F, Paragraph 8), that motion was subsequently withdrawn in 2010. But for extension of the notice of pendency on March 30, 2011, plaintiff failed to prosecute this action for three years and the action was dismissed on September 17, 2013 because plaintiff "failed to proceed to entry of judgment within one year of default." In addition to dismissing the action, the notice of pendency was also vacated.

While this Court granted plaintiff's motion to vacate its dismissal and restore the foreclosure action on default, almost a year later on September 2, 2014, a review of this Court's order vacating the dismissal indicates that it was improvidently granted, since the statute of

limitations had expired on May 8, 2014.[6] Notwithstanding this fact, the Court finds that plaintiff's delay in moving to vacate its dismissal prior to the expiration of the statute of limitations, is woefully inexcusable under these circumstances.

Defendant Dustin Frankel's affidavit in support of the motion establishes that he and his wife purchased the subject property from 69th Avenue Inc., who, in turn, purchased the property from Deutsche Bank II who had successfully foreclosed on its mortgage on the property. The documents evidencing such foreclosure are annexed to the moving papers as supporting exhibits. Plaintiff relies on *Astoria Federal Sav. & Loan Ass'n v. June*, 190 AD2d 644 [2d Dept 1993] for the proposition that defendants are not relieved of their duty to investigate the public record when purchasing the property to determine the nature of the title they are receiving, even if a notice of pendency is not filed at the time of their purchase. The record shows, however, that when defendants conducted their due diligence of the property in late May 2014, there was no extant foreclosure proceeding and no notice of pendency on file against the property.

It is well settled that the filing of a notice of pendency puts the "world on notice of the plaintiff's potential rights in [an] action and thereby warn[s] all comers that if they then buy the realty or land on the strength of it or otherwise rely on the defendant's right, they do so subject to whatever the action may establish as the plaintiff's right" (Siegel, New York Practice § 334, at 509 [3d ed]; CPLR 6501; see also *In re Sakow*, 97 NY2d 436, 440 [2002]). Significantly, pursuant to CPLR 6516 (a), the filing of a lis pendens is mandatory in a mortgage foreclosure action, and a new lis pendens is allowed even after the lapse of an earlier one. In the instant case, however, plaintiff failed to avail itself of the statutory exception afforded to a mortgagor by failing to file a new lis pendens prior to the expiration of the statute of limitations.

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[6] Plaintiff, in its memorandum of law in support of its cross motion cites the "Motion Fact Sheet" as the basis for the Court's decision for vacating the dismissal and restoring the action. The Motion Fact Sheet relied on by plaintiff is an internal document containing research and preliminary notes prepared by court personnel, solely for the use by the court. It appears that this document was inadvertently scanned into the Court file. Since this document is not an official court record, any statements contained therein cannot be considered law of the case.

Accordingly, defendants have established *prima facie* entitlement to summary judgment as a matter of law since the record establishes that there was no reason to believe that plaintiff could or would attempt to foreclose on the subject mortgage. Accordingly, the Court finds that plaintiff's delay in diligently enforcing and protecting its mortgage lien substantially prejudices defendants, who purchased a $1.8 million homestead, subject to the interest of third party lender by whom a purchase money mortgage was obtained. The equities favor dismissal of plaintiff's complaint, since the record taken as whole, consistent with the representations contained in Frankel's Affidavit, establishes that defendants would not have closed on the property and risk losing their home (See Frankel Affidavit, Paragraph 13). The essence of the equitable defense of laches is prejudicial delay in the assertion of rights (see *Stein v Doukas*, 98 AD3d 1026, 1028 [2d Dept 2012]).

The Court also rejects plaintiff's contention that a property owner must commence an action pursuant to Real Property Actions and Proceedings Law ("RPAPL") 1501(4) to ensure that their title is free and clear of any cloud from a mortgage of record for which the statute of limitations has expired.

RPAPL 1501(1) states in pertinent part that, "where a person claims an estate or interest in real property...such person...as the case may be, *may* maintain an action against any other person, known or unknown, including one under disability as hereinafter specified, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make..." It is a well settled principle of statutory construction that words of discretion in a statute, such as the use of the word "may" contained in RPAPL 1501(1), are permissive in nature. As such, defendants' were not mandated to commence an action to discharge a mortgage to clear title, as part of their due diligence, and it was properly within defendants' prerogative to proceed with the present application before the Court.

The Court notes that even if the requested relief, at bar, was not granted, plaintiff did not establish *prima facie* entitlement to summary judgment since it did not establish standing. In order to have standing to commence a foreclosure action the plaintiff must demonstrate that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action (see *Deutsche Bank Nat. Trust Co. v Rivas*, 95 AD3d 1061, 1061-62 [2d Dept 2012]). The affidavit of Rebecca Adelman provided in support of the cross-motion is conclusory and provides no factual basis as to the physical delivery of the note (see *Flagstar Bank v Anderson*, 129 AD3d 665 [2d Dept 2015]; *Bank of New York Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]; *Deutsche Bank National Trust v. Haller*,100 AD3d 680 [2d Dept 2012]). Further, plaintiff has submitted no documentary evidence to establish when the assignment of the note or the physical delivery of the note occurred.

Further, the endorsement on the note in which plaintiff relies is a stamped, undated endorsement which cannot as a matter of law serve as evidence to establish that the note was transferred to plaintiff before the foreclosure action was commenced (see Deutsche Bank Natl. Trust Co. v Weiss, 133 AD3d 704, 706 [2d Dept 2015]). Notably, the original lender and mortgagee, Fremont, is not a party to the Pooling Service Agreement ("PSA") which pooled and securitized the note and mortgage in question. Plaintiff asserts that EMC Mortgage Corporation ("EMC") is now the trustee of records. However, plaintiff submits no documentation establishing if and when EMC came into possession of the note or has authorization to convey the note and mortgage. The unsworn PSA does not resolve this issue (see Deutsche Bank National Trust v. Haller,100 AD3d 680 [2d Dept 2012]). Accordingly, plaintiff has failed to establish that it was the holder or assignee of the note and mortgage at the time the action was commenced.

Based on the foregoing, it is hereby,

ORDERED, that the Court's order dated January 14, 2015 is hereby vacated, and it is further;

ORDERED, that the defendants' motion is granted, and plaintiff's complaint is dismissed in its entirety, and it is further;

ORDERED, that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the Court.

E N T E R,

HON. KATHY J. KING
J. S. C.

HON. KATHY J. KING
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