[Cite as *Bank of New York Mellon v. DePizzo,* 2015-Ohio-4026.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

THE BANK OF NEW YORK MELLON f.k.a. THE BANK OF NEW YORK SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE FIRST FRANKLIN MORTGAGE LOAN TRUST 2004-FF10,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-T-0122**
- vs -	:	
JOSEPH DePIZZO, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 2278.

Judgment: Reversed and remanded.

Richard A. Freshwater and *Jessica E. Salisbury-Copper,* Thompson Hine, LLP, 3900 Key Center, 127 Public Square, Cleveland, OH 44114 (For Plaintiff-Appellant).

Philip D. Zuzolo and *Patrick B. Duricy,* Zuzolo Law Office, LLC, 700 Youngstown-Warren Road, Niles, OH 44446 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, the Bank of New York Mellon as Trustee for the First Franklin Mortgage Loan Trust, appeals the November 20, 2014 Order of the Trumbull County Court of Common Pleas, granting the defendant-appellee, Joseph DePizzo's,

Motion to Dismiss New York Mellon's Complaint in Foreclosure.[1] The issues before this court are whether a loan is accelerated for the purposes of applying the statute of limitations when the complaint states the date which payment on the loan was not made but does not explicitly state that the loan was accelerated, and whether the filing of a prior complaint in foreclosure can establish the date a loan has been accelerated. For the following reasons, we reverse the judgment of the court below and remand for further proceedings consistent with this opinion.

{¶2} On November 19, 2013, New York Mellon filed a Complaint in Foreclosure in the Trumbull County Court of Common Pleas against Joseph DePizzo, the Trumbull County Treasurer, First Franklin, and Jane Doe, DePizzo's spouse.

{¶3} New York Mellon's Complaint alleged that it was entitled to enforce a promissory note "upon which there remains unpaid the sum of $83,101.11 plus interest at the rate of 10.375% per annum from September 1, 2006." It noted that it was the holder of the mortgage, upon which it was entitled to foreclose due to nonpayment. Attached to the Complaint were copies of the Note and Mortgage.

{¶4} On November 26, 2013, the Trumbull County Treasurer filed an Answer and Consent to Decree in Foreclosure.

{¶5} On September 5, 2014, New York Mellon filed a Motion for Default Judgment.

{¶6} Joseph and Norma DePizzo filed a Motion to Dismiss Complaint on October 15, 2014, arguing that the action was barred by the statute of limitations, since the promissory note had been accelerated more than six years prior to bringing the

1. Norma DePizzo was listed as a party to Joseph's pleadings in the trial court, but is not an appellee. Pursuant to the Preliminary Judicial Report, she passed away on September 8, 2006. Ownership rights in the subject property were transferred to Joseph through a Certificate of Transfer in the probate court.

action. This was based on the allegation in the Complaint that the sum was due "from September 1, 2006."

{¶7} On October 28, 2014, the DePizzos filed a Motion for Leave to File Answer Instanter, which was subsequently granted.

{¶8} New York Mellon filed a combined Brief in Opposition to the Motion to Dismiss, Motion to Strike, and Brief in Opposition to Motion for Leave on November 4, 2014. It argued that the due date for the payment is "not the controlling date for the purposes of the * * * statute of limitations" and September 1, 2006, was not the date of acceleration under the allegations of the Complaint. It argued that, in the absence of evidence showing a notice of intent to accelerate, the Note's maturity date was September 1, 2034, when the statute of limitations would begin to run.

{¶9} On November 18, 2014, the DePizzos filed a Supplement to the Motion to Dismiss, adding that New York Mellon had previously sought foreclosure upon the same Note in 2007, further supporting a conclusion that the Note was accelerated more than six years ago.

{¶10} The trial court issued an Order Granting Defendants' Motion to Dismiss the Complaint on November 20, 2014. It held that the statute of limitations upon the promissory note had expired before the Complaint was filed. It found that the Complaint indicated that the promissory note in the matter had been accelerated as of September 1, 2006.

{¶11} New York Mellon timely appeals and raises the following assignment of error:

{¶12} "The Trial Court erred by dismissing BONY as Trustee's complaint."

{¶13} Under Ohio's Civil Rules, a defendant may plead the "failure to state a claim upon which relief can be granted" by motion. Civ.R. 12(B)(6). "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. "In making this determination, all factual allegations contained in the complaint must be presumed true and the non-moving party is entitled to the benefit of all reasonable inferences." *HSBC Bank USA v. Teagarden*, 2013-Ohio-5816, 6 N.E.3d 678, ¶ 16 (11th Dist.).

{¶14} "Appellate review of a trial court's decision to dismiss a complaint pursuant to Civ.R. 12(B)(6) is de novo." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12.

{¶15} New York Mellon asserts that the allegations of the Complaint did not conclusively demonstrate when the balance due on the Note was accelerated, thus making it impossible for the court to grant a Civ.R. 12(B)(6) dismissal based on the statute of limitations.

{¶16} Pursuant to R.C. 1303.16(A): "Except as provided in division (E) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." R.C. 1303.16 codifies Uniform Commercial Code § 3-118 in Ohio. Since there is no question that the stated due date in the Note has not yet passed, the issue in this case is whether

the Complaint shows that the Note had been accelerated more than six years prior to the filing of the Complaint.

{¶17} Here, DePizzo argued, and the trial court found, that New York Mellon "admitted" it had accelerated the Note by stating that "there remains unpaid the sum of $83,101.11 plus interest at the rate of 10.375% per annum *from September 1, 2006*" in the Complaint.

{¶18} We initially note that "[d]efaulting on the monthly obligation is not the same as accelerating the due date of the entire balance unless the note provides for such an occurrence." *Bank of N.Y. Mellon Trust Co., N.A. v. Unger*, 8th Dist. Cuyahoga No. 101598, 2015-Ohio-769, ¶ 10. While there are limited cases in Ohio interpreting acceleration under R.C. 1303.16(A), courts in other states have noted, in applying UCC 3-118, that acceleration generally requires a separate act, aside from a mere failure to meet a due date, especially when there is language in the note that the lender *may* give notice of acceleration due to non-payment. *Thompson v. D.A.N. Joint Venture III, L.P.*, M.D. Ala. No.1:05-CV-938-TFM, 2007 U.S. Dist. LEXIS 10849, 9 (Feb. 13, 2007) (a debt "does not mature for the purpose of the statute of limitations" until the last installment is due and unpaid if the note contains an acceleration clause that may be, but is not, exercised by the creditor); *Florian v. Lenge*, 880 A.2d 985, 994 (Conn.App.2005) ("[w]hen acceleration of the total unpaid debt is optional on the part of the holder of a note, and the holder has given no indication to the debtor that the entire balance is presently due, the cause of action does not accrue until that balance is due pursuant to the particular note or the holder has notified the debtor of an earlier date") (citation omitted). *See also Boulder Capital Group, Inc. v. Lawson*, 2nd Dist. Clark No.

2014-CA-58, 2014-Ohio-5797, ¶ 16 (where a lender had the option to accelerate a debt, such a provision was not self-executing and "[a]cceleration did not and could not take place until the holder exercised the option") (citation omitted).

{¶19} While DePizzo essentially contends that New York Mellon conceded that the Note was accelerated, such is not the case. The Complaint makes no mention of acceleration. The Complaint merely alleges the statement quoted above, that there was a total amount of $83,101.11 due as of September 1, 2006. This can be interpreted as merely alleging the failure to make a payment as of that date, which led to the ultimate demand for the entire amount. This does not mean that New York Mellon actually called for the acceleration on that date, given the complete lack of such a statement in the Complaint. "A motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (1982).

{¶20} The Note provides the following statement to the borrower: "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means." The Note later provides: "If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration." As such, since there is a requirement that notice be given for acceleration to occur, evidence of such notice, or an admission in the Complaint of the

date of acceleration, would appear to be necessary to establish acceleration and, therefore, when the six year statute of limitations period began. *See Thompson* at 9.

{¶21} Reading the foregoing language in full, the September 1, 2006 date also appears to be tied to establishing the amount of interest owed. The amount of interest owed is stated immediately preceding the date of September 1, clarifying when interest commenced. The trial court and DePizzo's conclusion that the loan was accelerated on that date requires making an improper inference, in favor of DePizzo rather than New York Mellon, based upon the language of the Complaint, rather than relying on a clear statement regarding the date of acceleration. DePizzo provides no evidence establishing the acceleration date and has not pursued a summary judgment motion on this ground. Since the Complaint does not conclusively show that acceleration occurred, the statute of limitations defense cannot be applied. *Id.*

{¶22} DePizzo asserts that New York Mellon could not ask for the full balance of the loan and interest on that amount as of September 1, 2006, if the loan had not been accelerated as of that date. While this may be the case and New York Mellon may not ultimately prevail on its claim, it does not follow that it is evident from the face of the Complaint that the statute of limitations applies, as is required to grant a Civ.R. 12(B)(6) Motion to Dismiss. *See Unger*, 2015-Ohio-769, at ¶ 9 (even in summary judgment proceedings, the party who seeks dismissal of a complaint on statute of limitations grounds bears "the burden of demonstrating the accelerated due date of [his] mortgage loan").

{¶23} DePizzo also contends that, since New York Mellon filed a Complaint in Foreclosure regarding the same property in March of 2007, a fact of which the court

was permitted to take judicial notice, it is clear the note was accelerated at that time and the six year time limit since that lawsuit expired prior to the filing of the Complaint in this case.

{¶24} "[A] court may generally take judicial notice of at least some matters outside of the pleadings such as copies of other [courts'] decisions and judgment entries related to a case before it." *State ex rel. Kolkowski v. Bd. of Commrs. of Lake Cty.*, 11th Dist. Lake No. 2008-L-138, 2009-Ohio-2532, ¶ 31; *Perry v. McKay*, 11th Dist. Trumbull No. 2009-T-0023, 2009-Ohio-5767, ¶ 6 ("it is well established under Ohio law that a court has the ability to take judicial notice of any judgment issued by another court within this state" and the "fact that a particular ruling has been made").

{¶25} The docket of the Trumbull County Court of Common Pleas indicates that New York Mellon previously filed a foreclosure action against DePizzo, Case No. 2007 CV 00779. This alone, however, does not make it clear when the note was accelerated. The docket indicates that the 2007 matter was settled and dismissed. No documentation from those proceedings is present in the record before this court, and no further evidence reveals the events that occurred in the years following that case. Thus, we cannot say that the filing of the 2007 action constituted acceleration and started the running of the date of the statute of limitations. The parties may have agreed that the Note be reinstated and that any potential notice of acceleration no longer applied, although that settlement was not ultimately successful. *See Bank of Am., N.A. v. Gray*, 5th Dist. Fairfield No. 2012-CA-116, 2013-Ohio-712, ¶ 26 (where the bank accelerates a loan but intervening circumstances such as a payment provide a basis for the loan to be reinstated, a separate notice of acceleration is required for acceleration to occur in the

future). At this stage in the proceedings, it is not appropriate to assume that those foreclosure proceedings should serve as notice of acceleration for the purpose of this action.

{¶26} Finally, New York Mellon argues that, since a mortgage is separate from a promissory note, the six year statute of limitations in R.C. 1303.16(A) should not apply. We note that this argument was not raised below by New York Mellon. Regardless, given the foregoing, it is unnecessary to address this argument.

{¶27} The sole assignment of error is with merit.

{¶28} For the foregoing reasons, the Order of the Trumbull County Court of Common Pleas, dismissing New York Mellon's Complaint, is reversed and remanded for further proceedings consistent with this opinion. Costs to be taxed against the appellee.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶29} I respectfully dissent, finding the trial court properly dismissed the complaint in foreclosure pursuant to Civ.R. 12(B)(6). The majority contends it is unclear from the face of the complaint whether New York Mellon accelerated the note September 1, 2006, thus making the complaint untimely filed under R.C. 1303.16(A).

However, as the learned trial court observed, acceleration is a condition precedent to foreclosure. *Deutsche Bank Natl. Trust Co. v. Byrd*, 9th Dist. Summit No. 27280, 2014-Ohio-3704, ¶10. As that court further observed, the complaint in foreclosure asserted New York Mellon had fulfilled all conditions precedent, and the amount owed under the Note was $83,101.11 in principal, plus interest, dating from September 1, 2006. I agree with the trial court this necessarily shows the Note was accelerated on the date given.

{¶30} I would affirm the decision of the trial court.