Appellate Division Docket No. CA 19-01672
Genesee County Clerk's Index No. E67594

Court of Appeals

of the

State of New York

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, and BATAVIA INVESTORS, LTD.,

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Dated: November 3, 2020

COURT OF APPEALS STATE OF NEW YORK

BATAVIA TOWNHOUSES, LTD.,
ARLINGTON HOUSING CORPORATION, and
BATAVIA INVESTORS, LTD.,

Plaintiffs/Respondents,

Genesee County
County Clerk Index No.:
E67594

-vs.-

COUNCIL OF CHURCHES HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Defendant/Appellant.

NOTICE OF MOTION
FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

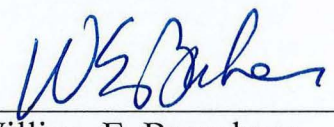
PLEASE TAKE NOTICE that, upon the annexed Affidavit of William E. Brueckner, made pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, sworn to on the 3rd day of November, 2020, Defendant COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC., will move this Court, at the Court of Appeals Hall, Albany, New York, on November 23, 2020, for an order granting leave to appeal to this Court from the Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the Motion.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the Motion.

There is no oral argument of motions, and no personal appearances are permitted.

DATED: 3 November 2020
Rochester, New York

McCONVILLE, CONSIDINE, COOMAN & MORIN, P.C.
Attorneys for Movant



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COURT OF APPEALS STATE OF NEW YORK

BATAVIA TOWNHOUSES, LTD.,
ARLINGTON HOUSING CORPORATION, and
BATAVIA INVESTORS, LTD.,

Plaintiffs/Respondents,

Genesee County
County Clerk Index No.:
E67594

-vs.-

COUNCIL OF CHURCHES HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Defendant/Appellant.

AFFIDAVIT IN SUPPORT OF
MOTION FOR PERMISSION TO APPEAL

WILLIAM E. BRUECKNER, being first duly sworn, deposes and says:

1. I am an attorney admitted to practice before the Courts of the State of New, and I am a partner with McConville, Considine, Cooman & Morin, P.C., counsel for Defendant/Appellant Council of Churches Housing Development Fund Company, Inc. (the ***"Churches"***). As such, I have personal knowledge of all the matters recounted in this Affidavit, which I submit in support of Defendant/Appellant's Motion for Permission to Appeal this case to the New York Court of Appeals.

PARTIES, TIMELINESS OF MOTION, AND PROCEEDINGS BELOW:

Parties and Corporate Disclosure

2. Defendant/Appellant Churches is the sole General Partner of Plaintiff/Respondent Batavia Townhouses, Ltd. (the ***"Partnership"***). The Partnership owns and operates a low and moderate income housing project in Batavia, New York. Plaintiffs/Respondents Arlington Housing Corporation and Batavia Investors, Ltd. are the only limited partners of the Partnership (the ***"Limited Partners"***). Churches has no parents, subsidiaries or affiliates.

Timeliness of Motion

3. Churches requests permission to appeal to this Court from an Order of the Appellate Division, Fourth Department dated October 2, 2020. On October 6, 2020, counsel for the Partnership and Limited Partners served me with the Order, together with Notice of Entry, by notice generated through the New York State Courts Electronic Filing System. This Motion is timely because it is filed and served within 30 days of service of the Opinion and Order and Notice of Entry. [A copy of the Opinion and Order is attached to this Affidavit as Exhibit A.]

Claim Asserted and Procedural History in the Courts Below

4. Churches is the creditor/mortgagee, and the Partnership is the obligor/ mortgagor, under a certain WrapAround Note and Mortgage executed in 1979 for a debt of $5.5 million, with interest accruing at 6% annually.

5. The Partnership and Limited Partners commenced this derivative declaratory judgment action against Churches on May 28, 2019 in Supreme Court, Genesee County, seeking a declaration that the WrapAround Note and Mortgage is unenforceable.

6. Plaintiffs claimed that the WrapAround Note and Mortgage could not be enforced because the Partnership, as the obligor/mortgagor on the WrapAround Note and Mortgage, had not made any payments to Churches with respect to the debt from 2012 until February 2019. Plaintiffs alleged that the applicable statute of limitations expired in the interim, and as a result, the Churches as creditor could no longer enforce the WrapAround Note and Mortgage, which by 2019 represented a debt of over $9 Million.

7. Churches timely answered the complaint, asserting that the debt embodied in the Wraparound Note and Mortgage had been unequivocally and expressly acknowledged every year in the Partnership's annual financial statements, income tax returns, and independent auditor's report.

8. With issue joined, both parties moved for summary judgment. In a Decision and Order dated August 16, 2019, and entered August 21, 2019, the Supreme Court awarded summary judgment to Plaintiffs – the Partnership and the Limited Partners - holding that the Wraparound Note and Mortgage was

unenforceable because the statute of limitations had expired. [A copy of Supreme Court's Decision and Order is annexed to this Affidavit as Exhibit B.]

9. The Churches filed a Notice of Appeal August 28, 2019, and perfected the appeal. The Fourth Department's Opinion and Order modified Supreme Court's Order by remitting the matter for entry of declaratory judgment, but otherwise affirmed that Order without costs.

THIS COURT'S JURISDICTION:

10. The Fourth Department's Opinion and Order is a final determination as provided by Civil Practice Law and Rules 5611. This Court has jurisdiction of this Motion and of the proposed appeal under Civil Practice Law and Rules 5602(a)(1)(i).

11. Defendant did NOT move for leave to appeal to this Court at the Appellate Division, but instead filed this Motion for Leave to Appeal directly with this Court.

QUESTION PRESENTED FOR REVIEW:

12. The Question presented on this appeal is as follows:

> Annually from 2012 through 2019 (and earlier) the Partnership transmitted to the Churches - as its creditor - written audited financial statements and an auditors' report signed by its independent auditors that reflected the WrapAround Note and Mortgage, and interest accrued thereon, as a liability of the Partnership. The Partnership also annually transmitted signed copies of its tax returns to the Churches, in which it listed the amount of the debt due on the WrapAround Note and Mortgage as a "non-recourse debt."

The Partnership - as obligor and mortgagor on the WrapAround Note and Mortgage - did not make any payments with respect to the debt from March 2012 until February 2019, and the Churches, as creditor and mortgagee, took no action to enforce it.

Are the financial statements, auditors' reports, and tax returns sufficient, under Article 17 of the New York General Obligations Law, to acknowledge and reaffirm the debt memorialized by the WrapAround Note and Mortgage, making it an enforceable obligation of the Partnership?

Relying solely on General Obligations Law § 17-105, the Appellate Division ruled that the financial statements, auditors' reports and tax returns did not reaffirm the debt, and that the debt was therefore unenforceable.

13. The Court of Appeals should grant this Motion for Leave to Appeal because the Appellate Division's Opinion and Order muddles the interplay between Section 17-101 of the General Obligation Law and Section 17-105 of the General Obligations Law, and conflicts with a long-established body of jurisprudence. This is an issue of statewide importance that affects fundamental reliance interests in commercial and real property transactions.

14. The Appellate Division's Decision and Order holds that General Obligations Law §17-105 provides the exclusive mechanism for the reaffirmation of debt secured by a mortgage, and that such a reaffirmation requires an *express written promise* to pay the debt, but that a *written acknowledgement* of that obligation would not reaffirm the debt. The Memorandum of Law submitted with in support of this Motion explains that decades of this State's case law deems such a written acknowledgment to be an implied promise to repay the debt: New York's courts

have long analyzed the reaffirmation of mortgage debts under both General Obligations Law §17-101 and General Obligations Law §17-105.

15. The Appellate Division's Opinion and Order is contrary to a long line of case law analyzing the interplay between General Obligation Law §§17-101 and Section 17-105, including a controlling decision of this Court. *See, e.g.,* Petito v. Piffath, 85 N.Y.2d 1, 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both 17-101 and 17-105). In their examination of the reaffirmation of mortgage obligations, those prior decisions are not limited to an evaluation of written "promises," they also evaluate writings characterized as "acknowledgements." *See also,* Comerica Bank, N.A. v. Benedict, 39 A.D.3d 456 (2d Dept. 2007) (in mortgage foreclosure case analyzing GOL §17-105, court examined whether writing qualified as an "acknowledgment" of the debt so as to extend the Statute of Limitations); Hakim v. Peckel Family Ltd. Partnership 280 A.D.2d 645 (2d Dept. 2001) (reaffirmation of mortgage obligation reviewed for unconditional and unqualified reaffirmation of the debt under GOL 17-101 and 17-105); McQueen v. Bank of New York, 57 Misc.3d 481, at 483 - 84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt).

16. Confronted with a property owner's request to invalidate a mortgage debt due to the alleged expiration of the Statute of Limitation, many New York courts have analyzed the timeliness issue under General Obligations Law §17-101, and not § 17-105 as the Appellate Division did in this case. *Karpa Realty Group, LLC, v. Deutsche Bank National Trust Company,* 164 A.D.3d 886 (2d Dept. 2018) (court applies GOL §17-101 in mortgagor's action to declare mortgage unenforceable as untimely); *US Bank NA v. Martin,* 144 A.D.3d 891 (2d Dept. 2016) (same); *Yadegar v. Duetsche Bank National Trust Company,* 164 A.D.3d 945 (2d Dept. 2018) (same); *Sharova v. Wells Fargo Bank,* 62 Misc.3d 925, at 937 (Sup. Court Kings County, 2019) (same).

17. Though the State's trial courts and the Appellate Divisions have considered the interplay between General Obligations Law § 17-101 and 17-105 with some regularity, the Churches' research suggests that the Court of Appeals has considered the issue on only two occasions. See, *Roth v. Michelson*, 55 N.Y.2d 278 (1982) (reviewing the effect of partial payment as reaffirmation of mortgage debt); see also, *Petito v. Piffath,* 85 N.Y.2d 1, at 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both GOL §§ 17-101 and 17-105).

18. In this case, the Appellate Division's Opinion and Order recognized that Petito "analyzed the sufficiency of evidence under both 17-101 and 17-105 in a

mortgage debt case." However, the Appellate Division concluded that, in Petito, this Court "had no occasion to pass on the threshold issue" of the applicability of Section 17-101, and "decided only that, if that section also applied," the writing under consideration in Petito did not constitute a sufficient acknowledgement of the debt. *Opinion and Order, at 5 - 6.*

19. The Memorandum of Law submitted in support of this Motion demonstrates – and will Churches will argue in full briefing before this Court if leave is granted - that the Appellate Division misapplied the relevant sections of the General Obligations Law. Moreover, the Appellate Division incorrectly concluded that the Partnership's annual acknowledgement of the mortgage debt (and the interest accruing each year on that debt) - in its financial statements, auditors' reports and tax returns - was insufficient to preserve the enforceability of the obligation.

20. An authoritative and clear pronouncement of the law is required to promote clarity in this important area of real estate and commercial jurisprudence. The Court of Appeals should grant leave to appeal in this case to provide that needed guidance and to reverse the erroneous application of the General Obligations Law by the Appellate Division, which extinguished more than $9 Million in debt owed to Churches by the Partnership.

WHEREFORE, Defendant/Appellant Council of Churches Housing Development Fund Company, Inc. requests that this Court grant an Order, pursuant to Civil Practice Law and Rules 5602(a)(1)(i), permitting Defendant/Appellant to appeal this case to the Court of Appeals.

WILLIAM E. BRUECKNER

Sworn to before me this
3rd day of November 2020.

Notary Public

MARY F. OGNIBENE
Notary Public, State of New York
Qualified in Monroe County
Commission Expires January 17, 2021

EXHIBIT A

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
FOURTH DEPARTMENT

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, AND BATAVIA INVESTORS, LTD.,

Plaintiffs - Respondents,

V.

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC. ,

Defendant-Appellant.

NOTICE OF ENTRY

Appellate Division
Docket No. CA 19-01672

Genesee County
Index No. E67594

PLEASE TAKE NOTICE, that the Order signed by Mark W. Bennett, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, a true copy of which is attached hereto as **Exhibit A**, was duly entered in the Clerk's office on the 2nd day of October, 2020.

Dated: Rochester, New York
October 6, 2020

HARTER SECREST & EMERY LLP

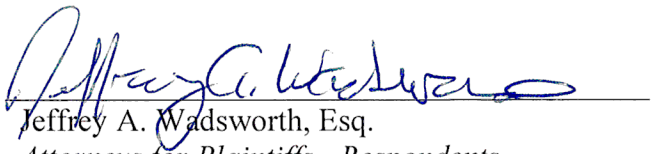
By: 

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

314

CA 19-01672

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION AND BATAVIA INVESTORS, LTD., PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC., DEFENDANT-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (WILLIAM E. BRUECKNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLAND & KNIGHT LLP, WASHINGTON, D.C. (STEVEN D. GORDON, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Timothy J. Walker, A.J.), entered August 19, 2019. The order, inter alia, denied the motion of defendant for summary judgment and granted the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Supreme Court, Genesee County, for further proceedings in accordance with the following opinion and as modified the order is affirmed without costs.

Opinion by PERADOTTO, J.:

In this action seeking, inter alia, a declaration that a mortgage is unenforceable on the ground that the limitations period for enforcement thereof had expired, we must determine, among other things, the applicable provision of the General Obligations Law under which the otherwise expired statute of limitations might be revived. We conclude that General Obligations Law § 17-105 (1), and not § 17-101, applies in this case.

I.

The undisputed facts establish that plaintiff Batavia Townhouses, Ltd. (Partnership)—which at all relevant times was comprised of defendant, as general partner, and plaintiffs Arlington Housing Corporation and Batavia Investors, Ltd. (collectively, Limited Partner plaintiffs), as limited partners—was formed to acquire and operate an apartment complex that had been owned and managed by defendant.

Partnership purchased the apartment complex and executed a wraparound note and mortgage (collectively, mortgage) in favor of defendant that was subordinate to a separate, previously issued loan on which defendant remained the obligor. Income generated by the apartment complex was used by Partnership to pay down the debt under the mortgage and, in turn, those funds were used by defendant to pay down the debt on the loan. Both the loan and the mortgage matured at the beginning of March 2012, and the loan was paid off on schedule, thereby leaving the mortgage as the sole encumbrance on the apartment complex property. After the maturity date, however, payments on the mortgage ceased, and defendant never instituted an action to foreclose on it.

More than six years after the maturity date, the Limited Partner plaintiffs accused defendant of violating its duties as the general partner by keeping rents at the apartment complex artificially low and preventing Partnership from paying off the mortgage, thereby siphoning the equity interest of the Limited Partner plaintiffs to defendant's own account. The Limited Partner plaintiffs sought to remove defendant as general partner pursuant to the partnership agreement, and litigation then began in federal court concerning the attempted removal. A few months later, defendant's Board of Directors adopted a resolution stating that defendant, as holder of the mortgage, demanded that Partnership resume "monthly debt service payments of interest" on the mortgage. The resolution stated that the purpose for demanding resumption of those payments was because defendant "ha[d] an immediate need for cash resources in order to defend itself and assert its interests in the litigation with the [Limited Partner plaintiffs]." Thereafter, defendant, as general partner of Partnership, made such payments to itself, as holder of the mortgage, which eventually totaled $330,000.

The Limited Partner plaintiffs commenced this derivative action (*see* Partnership Law § 121-1002) seeking, inter alia, a judgment declaring pursuant to RPAPL 1501 (4) that the mortgage is unenforceable on the ground that the limitations period for enforcement thereof had expired. Defendant appeals from an order that, among other things, denied its motion for summary judgment seeking a declaration that the mortgage is valid and enforceable and granted plaintiffs' cross motion for summary judgment seeking, inter alia, to cancel and discharge the mortgage.

II.

Defendant contends that, under either General Obligations Law § 17-101 or § 17-105 (1), its submissions—i.e., Partnership's financial statements that were sent to defendant and the Limited Partner plaintiffs during the relevant period and Partnership's tax returns—establish that the limitations period on a foreclosure action was revived and therefore that the mortgage remains enforceable. We agree with plaintiffs, however, that: (A) only General Obligations Law § 17-105 (1) applies, and (B) the documents submitted by defendant are not sufficient under that subdivision to revive the statute of

limitations.

Initially, RPAPL 1501 (4) provides in pertinent part that,

> "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance."

Thus, a party with an interest in real property that is subject to a mortgage may commence an action seeking to cancel and discharge the mortgage based on the expiration of the six-year statute of limitations applicable to mortgage foreclosure actions (*see* CPLR 213 [4]; *LePore v Shaheen*, 32 AD3d 1330, 1330-1331 [4th Dept 2006]). With an exception not relevant to this case, "it is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt" (*CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st Dept 2007]).

Here, it is undisputed that plaintiffs established in support of their cross motion that the six-year limitations period began to run at the beginning of March 2012 and expired at the beginning of March 2018. It is further undisputed that no payments on the mortgage were made by Partnership, the property owner, during that period. Plaintiffs thus met their initial burden of "establishing that more than six years had elapsed since [Partnership] defaulted on the mortgage . . . thereby establish[ing] that a mortgage foreclosure action commenced by defendant would be time-barred" (*LePore*, 32 AD3d at 1331; *see Defelice v Frew*, 166 AD3d 725, 726 [2d Dept 2018]). The burden therefore shifted to defendant to raise a triable issue of fact whether the statute of limitations was tolled or revived (*see JBR Constr. Corp. v Staples*, 71 AD3d 952, 953 [2d Dept 2010]; *LePore*, 32 AD3d at 1331; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A.

There are two statutory provisions that potentially apply in this case to revive the otherwise expired statute of limitations. General Obligations Law § 17-101 provides, in relevant part:

> "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for

> the recovery of real property."

Further, General Obligations Law § 17-105 (1) provides, in relevant part:

> "A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise."

We agree with plaintiffs for the reasons that follow that General Obligations Law § 17-105 (1), and not § 17-101, applies in this case.

First, the plain language of subdivision (1) of section 17-105 is specifically applicable to waivers of the limitations period for commencement of an action to foreclose a mortgage and promises to pay mortgage debt. As plaintiffs correctly contend, and contrary to defendant's assertion, that subdivision, by its terms, applies to the type of action brought here under RPAPL 1501 (4), which requires the party bringing such an action to establish that the limitations period for the commencement of a mortgage foreclosure action has expired (*see generally Albin v Dallacqua*, 254 AD2d 444, 444 [2d Dept 1998]).

Second, legislative history supports the conclusion that subdivision (1) of section 17-105 governs here. The Law Revision Commission recognized that the rationale for permitting a mere "acknowledgment" to revive a general or contractual debt—i.e., that such acknowledgment implied a new promise to pay the debt supported by moral consideration of the previous obligation—is inapplicable to the acknowledgment of a mortgage lien on real property because a mortgage is not a promise but rather an executed transaction creating an interest in real property (*see* 1961 Rep of NY Law Rev Commn, reprinted in 1961 McKinney's Session Laws of NY, at 1873-1874). The Commission thus proposed a separate provision—eventually codified as General Obligations Law § 17-105—that would clarify whether a transaction should be given the effect of either tolling the limitations period applicable to a mortgage foreclosure or reviving that limitations period after it had run (*see id.* at 1875-1876). The determination whether a transaction should be given those effects was to be controlled by two factors: (1) whether the transaction manifested an intention to waive the limitations period or not plead it, and (2) whether the transaction expressing such intent was sufficiently evidenced (*see id.*). With respect to the first factor, the Commission

listed several ways in which the requisite intention might manifest itself, including an express waiver of the limitations period and a promise not to plead it (*see id.*). Critically, an intention to waive the limitations period would also "reasonably . . . be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage" (*id.*; *accord* § 17-105 [1]). In sum, subdivision (1) of section 17-105 was enacted specifically to address the waiver of the statute of limitations applicable to mortgage debt and, in doing so, provided that an express promise to pay such debt made after the accrual of the right to foreclose would be sufficient to revive the otherwise expired statute of limitations.

Third, a leading treatise on mortgage foreclosure law in New York likewise reinforces the conclusion that subdivision (1) of section 17-105, and not section 17-101, applies. The treatise states, in relevant part, that "the statutes must be read carefully as a cursory look at General Obligations Law section[] 17-101 . . . might lead one to the erroneous conclusion that [it is] applicable to mortgage foreclosures; in fact, it is the provisions of [General Obligations Law §] 17-105 that are controlling" (1 Bergman on New York Mortgage Foreclosures § 5.11 [7] [2020]).

Fourth, principles of statutory construction support the same conclusion. Even assuming, arguendo, that the inapplicability of section 17-101 to "an action for the recovery of real property" does not remove from its scope actions under RPAPL article 15, we conclude that those principles still dictate that subdivision (1) of section 17-105 applies here. It is well established that, "whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable" (*Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 NY3d 1, 9 [2016]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 238). Section 17-101 is a general provision applicable to all types of contractual debts, whereas subdivision (1) of section 17-105 is a specific provision applicable to mortgage debts and, therefore, that subdivision is the applicable provision here. Defendant nonetheless asserts that the statutory structure supports the conclusion that a mere acknowledgment—as opposed to a promise—is effective to fulfill subdivision (1) of section 17-105. We reject that assertion. While an acknowledgment of mortgage debt is certainly inherent in a promise to pay that debt, it does not follow that mere acknowledgment is sufficient to fulfill the requirements of subdivision (1) of section 17-105 because that subdivision requires something more in the form of an express promise to pay (*see Petito v Piffath*, 85 NY2d 1, 8-9 [1994], *rearg denied* 85 NY2d 858 [1995], *cert denied* 516 US 864 [1995]; *see generally* 1 Bergman on New York Mortgage Foreclosures § 5.11 [6] [a]).

Fifth, case law to which we are bound does not compel a different conclusion. Defendant correctly notes that the Court of Appeals has analyzed the sufficiency of evidence under *both* section 17-101 and subdivision (1) of section 17-105 in a mortgage debt case (*see Petito*, 85 NY2d at 4-9). However, upon our review of the underlying appellate

decision in *Petito* (199 AD2d 252, 253 [2d Dept 1993], *revd* 85 NY2d 1 [1994]), which applied subdivision (1) of section 17-105 only, as well as the parties' briefs at the Court of Appeals, which did not squarely raise the threshold issue concerning the applicability of section 17-101 in mortgage debt cases (*see* brief for defendant-appellant, available at 1994 WL 16044901; brief for plaintiff-respondent, available at 1994 WL 16044902; reply brief for defendant-appellant, available at 1994 WL 16044903), we conclude that the Court of Appeals in *Petito* had no occasion to pass on that threshold issue (*see generally Naso v Lafata*, 4 NY2d 585, 591 [1958], *rearg denied* 5 NY2d 861 [1958]). Rather, in our view, the more accurate reading of *Petito* is that the Court of Appeals *assumed* the applicability of section 17-101 and decided only that, if that section also applied, the subject stipulation in that case did not constitute a sufficient acknowledgment thereunder (85 NY2d at 8).

B.

In light of our determination with respect to the applicable statutory provision, whether the documents submitted by defendant were sufficient to revive the statute of limitations depends on whether those documents constitute "a promise to pay the mortgage debt . . . made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged" (General Obligations Law § 17-105 [1]).

As Supreme Court properly concluded, the financial statements submitted by defendant do not meet the requirements of subdivision (1) of section 17-105 because those documents merely list the mortgage as a liability and do not constitute an express promise to pay the mortgage debt (*see Petito*, 85 NY2d at 8-9; *Filigree Films, Inc., Pension Plan v CBC Realty Corp.*, 229 AD2d 862, 863 [3d Dept 1996]; *cf. National Loan Invs., L.P. v Piscitello*, 21 AD3d 537, 538 [2d Dept 2005]; *Albin*, 254 AD2d at 445).

We agree with defendant that the court erred in failing to consider the tax returns it submitted. "Although defendant 'could not rely in support of [its] motion on evidence submitted for the first time in [its] reply papers[,]' . . . the [tax returns] were submitted by defendant in opposition to plaintiff[s'] cross motion, and were not merely reply papers in support of its own motion" (*Pittsford Plaza Co. LP v TLC W. LLC*, 45 AD3d 1272, 1274 [4th Dept 2007]). Nonetheless, even when properly considered, the tax returns merely reflect that Partnership had unspecified nonrecourse loans on its balance sheets and do not constitute an express promise to pay the mortgage debt (*see Petito*, 85 NY2d at 8-9).

Based on the foregoing, we conclude that defendant failed to raise a triable issue of fact whether the statute of limitations was revived pursuant to the applicable General Obligations Law § 17-105 (1) (*see generally LePore*, 32 AD3d at 1331).

III.

Defendant further contends that the court erred in concluding that the recommencement of mortgage payments did not revive the limitations period under General Obligations Law § 17-107. Although a partial payment can be effective in reviving the statute of limitations period (*see id.*), the court concluded that the payments were void ab initio because defendant's actions to recommence payment on the mortgage in the midst of litigation over whether defendant should be removed as general partner constituted a breach of fiduciary duty. We see no basis to disturb the court's determination.

The partnership agreement specified that the agreement would be governed by the law of the District of Columbia. The governing law permits partnerships to modify the duties among the partners by identifying "specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable" (DC Code Ann § 29-701.07 [b] [5] [A]). Here, the partnership agreement provided that the general partner would not be liable to Partnership or the Limited Partner plaintiffs for any loss arising from the action of the general partner if the general partner, in good faith, determined that such action was in the best interests of Partnership and such action did not constitute negligence. With respect to good faith, as the court properly noted, "partners owe each other the duty of 'the utmost good faith in all that pertains to their relationship' " especially "in the case of managing general partners in a limited partnership, on whose good faith the other partners depend entirely" (*Washington Med. Ctr., Inc. v Holle*, 573 A2d 1269, 1285 and n 26 [DC Ct App 1990]).

Contrary to defendant's contention, we agree with the Limited Partner plaintiffs that defendant's conduct in compelling Partnership to recommence payments on the mortgage after the statute of limitations expired and thus became unenforceable was to the detriment of Partnership. The record establishes that, in the midst of litigation with the Limited Partner plaintiffs regarding whether it should be removed as general partner, defendant diverted $330,000 from Partnership to pay a time-barred mortgage for the purpose, as stated by defendant's Board of Directors, of generating funds for defendant to defend its own position in that litigation. In doing so, defendant either negligently failed to ascertain the enforceability of the mortgage debt against Partnership, or it acted with a lack of good faith to Partnership by making payments that it knew to be unenforceable. " 'Good faith [does] not permit any one partner to advantage [itself] singly and alone, at the expense of the [partnership]' " (*Marmac Inv. Co. Inc. v Wolpe*, 759 A2d 620, 626 [DC Ct App 2000]).

IV.

Finally, although the court reached the correct result with respect to the motion and cross motion, it should have issued a

judgment declaring the rights of the parties in compliance with RPAPL article 15 because this is an action seeking a declaratory judgment pursuant to that statute (*see* RPAPL 1501 [4]; 1521). Accordingly, the order should be modified by remitting the matter to Supreme Court to grant an appropriate judgment (*see Corrado v Petrone*, 139 AD2d 483, 485 [2d Dept 1988]; *see generally JBR Constr. Corp.*, 71 AD3d at 953; *LePore*, 32 AD3d at 1331).

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT COUNTY OF GENESEE

BATAVIA TOWNHOUSES, LTD, ARLINGTON HOUSING CORPORATION, AND BATAVIA INVESTORS, LTD.,

Plaintiffs,

v.

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant.

NOTICE OF ENTRY

INDEX NO. E67594

Hon. Timothy J. Walker, J.S.C.

PLEASE TAKE NOTICE that the attached Decision and Order of the Honorable Timothy J. Walker, J.S.C., signed on August 16, 2019, was entered and filed with the Genesee County Clerk on August 19, 2019.

August 21, 2019

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF GENESEE

BATAVIA TOWNHOUSES, LTD.,
ARLINGTON HOUSING CORPORATION, and
BATAVIA INVESTORS, LTD.,

Plaintiffs

v.

COUNCIL OF CHURCHES HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Defendant.

COMMERCIAL DIVISION
DECISION AND ORDER
Index No. E67594

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **HARTER SECREST & EMERY, LLP**
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And
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Stephen D. Gordon, Esq., Of Counsel (*pro hac vice*)
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WALKER, J.

The limited partners of Plaintiff, Batavia Townhouses, Ltd. (the "Partnership"), commenced this derivative action to establish that a note and its associated mortgage ("WrapAround Note and Mortgage") signed by the Partnership and held by the general partner of the Partnership, Defendant, Council of Churches Housing Development Fund Company, Inc. ("Council"), is unenforceable because the statute of limitations has expired. Plaintiffs seek to

cancel and discharge the WrapAround Note and Mortgage, together with associated declaratory and injunctive relief. The parties have filed competing applications for summary judgment pursuant to CPLR 3212, asserting there are no genuine issues of material fact to be resolved. For the following reasons, Defendant's application is denied, and Plaintiffs' cross-application is granted.

BACKGROUND

In 1971, Council borrowed more than $4.7 million from a private lender to develop Birchwood Village Apartments in Batavia, New York ("Birchwood Village"). The loan was insured by the U.S. Department of Housing and Urban Development ("HUD"). Council owned and managed Birchwood Village until 1979, but ultimately defaulted on the loan. At that point, the lender filed a claim under its FHA loan insurance policy and HUD paid off the lender, thereby acquiring the note and associated mortgage. Thereafter, Council continued to default on loan payments and HUD was about to foreclose (Affidavit of Lawrence F. Penn, sworn to July 16, 2019 ["Penn Aff."], ¶¶ 6-7).

At this juncture, Plaintiff, Batavia Investors, Ltd. ("Investors"), in conjunction with Council, proposed to HUD that the ownership of Birchwood Village be changed to bring in private investors. HUD approved this proposal, but required that a new owner replace Council as the entity managing Birchwood Village (*Id.*, at ¶ 9). Accordingly, the Partnership was established to acquire and operate Birchwood Village. The Partnership purchased Birchwood Village from Council in 1979 for $5,500,000, and executed the WrapAround Note and Mortgage in that amount in favor of Council (*Id.*, at Ex. B). The WrapAround Note and Mortgage were subordinate to, and "wrapped around," the separate HUD loan. Council remained the obligor on

the HUD loan which, after modification, amounted to $5,588,357.75 as of June 1, 1985 (*Id.*, at ¶¶ 10-12)

The Partnership Agreement provided that the Partnership would operate Birchwood Village "in such manner as will conform to all rules and regulations of [HUD], and insofar as is consistent therewith, will maximize the Federal, state and local income tax benefits available to the Partnership" (*Id.*, at Ex. A, § 2.4). It further provided that the limited partners would receive almost all of the tax benefits and a primary share of any Partnership profits and/or residual equity (*Id.*, at Ex. A, §§ 4.1, 4.2, 5.1, and 13.2).

Originally, the Partnership had two general partners, Council and David C. Green, and one limited partner, Investors. In 1982, Plaintiff, Arlington Housing Corporation ("Arlington") replaced Mr. Green as a general partner. In 2004, Arlington converted to a limited partner, leaving Council as the sole general partner (*Id.*, at ¶ 13).

Both the HUD mortgage loan and the WrapAround Note and Mortgage matured on March 1, 2012. Until that time, income generated by Birchwood Village was used by the Partnership to pay debt service on the WrapAround Note and Mortgage and, in turn, those funds were used by Council to pay monthly debt service on the HUD mortgage loan in the amount of $25,288.40. The HUD mortgage loan was paid off on schedule in February 2012, leaving the WrapAround Note and Mortgage as the sole encumbrance on Birchwood Village (*Id.*, at ¶¶ 14-15).

After March 1, 2012, Council stopped using the income generated by Birchwood Village to make any debt service payments on the WrapAround Note and Mortgage.

In August 2018, Arlington and Investors accused Council of violating its duties as the general partner by keeping the rents at Birchwood Village artificially low and preventing the Partnership from paying off the WrapAround Note and Mortgage, thereby siphoning the equity interest of Arlington and Investors to its own account. On November 19, 2018, Arlington and Investors moved to remove Council as general partner of the Partnership by sending a 30-day notice of removal to Council that would take effect on December 19, 2018. On December 17, 2018, Council filed suit in federal court - *Council of Churches Housing Development Fund Company, Inc. v. Arlington Housing Corporation* (No. 6:18-cv-06920 [W.D.N.Y.]), seeking to block its removal. Arlington and Investors then filed a counterclaim to enforce the removal of Council (*Id.*, at ¶¶ 31-33).

Although the WrapAround Note and Mortgage matured on March 1, 2012, Council has never commenced an action to foreclose on it (*Id.*, at ¶ 16). No payments on the WrapAround Note and Mortgage were made by the Partnership from March 1, 2012, when it matured, until March 6, 2019 (*Id.*, at ¶ 21). Council made no demand for payment from the Partnership at any time until February 7, 2019, when Council's Board of Directors adopted a resolution that Council, as holder, demand that the Partnership "resume monthly debt service payments of interest on the Note & Mortgage in the amount of $27,500.00 per month in accordance with paragraph 3 of the Note & Mortgage, commencing August 2018" (*Id.*, at ¶¶ 18-20 and Ex. C). Council, as general partner of the Partnership, has made such payments to Council as holder starting on March 6, 2019. To date, $330,000 has been paid by the Partnership to Council pursuant to this resolution (*Id.*, at ¶ 22). These payments have been made without the consent of the limited partners.

Pursuant to Sections 14.1 and 14.2 of the Partnership Agreement, the general partner is required each year to prepare a written financial statement for the Partnership and distribute it to the limited partners. Accordingly, annual written financial statements were prepared under the oversight of a certified public accounting firm and were provided to the limited partners and to the general partner(s), together with an auditor's report certifying that the financial statements fairly presented the financial position of the Partnership. These financial statements list the WrapAround Note and Mortgage as a liability of the Partnership.

Important here, the financial statements are not signed. The auditor's reports are signed by the accounting firm.[1]

DISCUSSION

A. The Statute of Limitations

An action to foreclose a mortgage is subject to a six-year statute of limitations[2] (CPLR 213[4]; *see also, 53 PL Realty, LLC v. U.S. Bank Nat. Ass'n.*, 153 AD3d 894, 895 [2d Dept. 2017]). "It is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt ..." (*CDR Creances S.A. v. Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st Dept. 2007]). Here, the six-year limitations period began to run on March 2, 2012, and expired on March 2, 2018.

Under New York law, a debt barred by the statute of limitations is legally unenforceable (*Mintz v. Greenberg*, 5 AD2d 774 [2d Dept. 1958]); *Spas v. Wharton*, 106 Misc2d 180, 184 (Sup

[1] The Partnership's financial statements for 2012-2018 are Exhibits D-I to the affidavit of Joseph Flynn submitted in support of Defendant's motion for summary judgment.

[2] The enforceability of the WrapAround Note and Mortgage is governed by New York law, because it was executed in New York and involves real property located in New York.

Ct, Albany Cty 1980]). A mortgage barred by the statute of limitations can be cancelled and discharged (RPAPL §1501[4]). Plaintiffs have made "a *prima facie* showing of [their] entitlement to judgment as a matter of law by establishing that the subject mortgage is unenforceable since ... the six-year limitations period for the commencement of an action to foreclose the mortgage expired, causing the commencement of a new foreclosure action to be time-barred" (*Deutsche Bank National Trust Co. v. Lee*, 60 Misc3d 171, 175 (Sup Ct, Westchester Cty 2018]); *see also Defelice v. Frew*, 166 AD3d 725, 725-26 [2d Dept. 2018]).

B. Tolling and Revival

The applicable statute of limitations has expired. Thus, the burden shifted to Council to show that the limitations period has either been tolled or revived (*JBR Const. Corp. v. Staples*, 71 AD3d 952, 953 [2d Dept. 2010]); *Persaud v. U.S. Bank National*, 62 Misc3d 193, 195 (Sup Ct, Queens Cty 2018]). Council contends that the WrapAround Note and Mortgage remains enforceable because, during the period since March 1, 2012, the Partnership continued to include the debt in its annual financial statements and made partial payments of the debt. These facts are insufficient to toll or revive the statute of limitations.

1. The Annual Financial Statements

a. GOL § 17-105

Because the WrapAround Note and Mortgage is a mortgage of real property, the issue whether it has been tolled or revived is **not** governed by GOL §17-101, as Council asserts. Section 17-101, by its explicit terms, is inapplicable to actions for the recovery of real property:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the

> operation of the provisions of limitations of time for commencing actions **other than an action for the recovery of real property.** This section does not alter the effect of a payment of principal or interest (emphasis added).

(*See, Goldrick v. Goldrick*, 99 Misc2d 749, 755 (Sup Ct, Suffolk Cty 1979] [recognizing that GOL §17-101 does not apply to mortgage debts]).

Instead, GOL §17-105 applies, which provides that,

> [a] waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property ... or a **promise to pay the mortgage debt**, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, **by the express terms of a writing signed by the party to be charged is effective,** subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise" (emphasis added).

(*See also*, Bergman, *New York Mortgage Foreclosures* § 5.11[7] ["[A] cursory look at General Obligations Law sections 17-101 and 17-103 might lead one to the erroneous conclusion that they are applicable to mortgage foreclosure; in fact, it is the provisions of GOL section 17-105 that are controlling"]).

The terms of §17-105 are narrower than §17-101 because they provide that only a "promise to pay the mortgage debt" (as opposed to "an acknowledgment or promise") can revive the debt. This distinction is significant. "At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the statute of limitations running anew" (*Scheur v. Scheur*, 308 NY 447, 450-51 [1955]). Although an acknowledgment of a debt is not a promise to repay it, the acknowledgment provides a basis from which the common law would imply such a

promise. "A review of the cases, on the question of what is necessary to revive a debt barred by the statute of limitations, will clearly show that a bare or mere acknowledgment of the existence of the debt is sufficient, as the law will imply or infer from its existence a promise to pay it ..." (*Henry v. Root*, 33 NY 526, 530 [1865]). "A mere acknowledgment of an indebtedness, is but evidence from which a promise to pay may be inferred" (*Bloodgood v. Bruen*, 8 NY 362, 368 [1853]). "If the admission is unequivocal and unconditional, 'the law will imply a promise to pay from a bare acknowledgment'" (31 *Williston on Contracts* § 79:77 [4th ed]).

Against this background, the legislature provided in GOL §17-101 that a written "acknowledgment or promise" is sufficient to revive most contracts and debts, but adopted a different standard with respect to reviving debts involving real property. For the latter category, it provided that only "a promise to pay the mortgage debt ... made ... by the express terms of a writing signed by the party to be charged is effective" (GOL §17-105). A court is "bound, of course, in interpreting a statute, to construe it in view of other statutes relating to the same subject-matter, in accordance with the sense of its terms and the intention of the framers of the law" (*Town of Putnam Valley v. Slutzky*, 283 NY 334, 343 [1940]). "A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (Statutes §74; *see also*, *Kucher v. DaimlerChrysler Corp.*, 9 Misc3d 45, 50 [Sup Ct, App Term 2005]). Thus, the omission of an "acknowledgment" as a means of tolling or reviving a mortgage debt must be construed as a deliberate policy choice by the legislature; only a written promise to pay the debt will suffice.

b. The Financial Statements Do Not Satisfy GOL §17-105

In the instant matter, there is no writing by the Partnership during the six-year period from March 2, 2012 until March 2, 2018, that promises to pay the WrapAround Note and Mortgage, as required by GOL §17-105. The annual financial statements merely list the WrapAround Note and Mortgage as a liability; this does not constitute a promise to pay the debt. Therefore, the limitations period was not tolled by the financial statements and it expired on March 2, 2018.

c. The Financial Statements Do Not Constitute an Acknowledgment of the Debt

Furthermore, the financial statements are insufficient, for several reasons, to constitute even an "acknowledgment" of the debt. First, they do not qualify as an acknowledgment because they were not signed by the Partnership (*See, Shelley v. Dixon Equities*, 300 AD2d 566, 567 [2d Dept 2002] [financial records prepared by accountant, and not certified or signed by a principal of the debtor, were not an acknowledgment]); *20 Plaza Housing Corp. v. 20 Plaza East Realty*, 37 Misc3d 601 [NY Cty 2012] [inclusion of debt on annual reports not sufficient to revive claim because not signed by defendant]).

Second, "any purported acknowledgment must import 'a clear intention to pay'" (*Gizzi v. Gizzi*, 57 Misc3d 1217(A), 2017 WL 5244810, at *2 [Monroe Cty 2017]). Thus, "[t]he mere fact that the debt was carried on the defendants' books and tax returns would not, in and of itself, constitute the required acknowledgment" (*Skiadas v. Terovolas*, 271 AD2d 521 [2d Dept. 2000]); *accord Estate of Vengroski v. Garden Inn,* 114 AD2d 927, 928 [2d Dept. 1985] [the mere fact that the debt was carried on defendant's books and tax returns would not in and of itself constitute the required acknowledgment; critical determination is whether the acknowledgment

imports an intention to pay]; *Curtiss-Wright Corp. v. Intercontinent Corp.*, 277 AD 13, 18 [1st Dept 1950] [Van Voorhis, J., concurring] ["Merely carrying an account payable to plaintiff on defendant's books, would not constitute an acknowledgment or promise"]. "In general, [New York] courts have concluded that financial statements and tax returns *alone* are insufficient to restart the statute of limitations" (*Moore v. Candlewood Holdings, Inc.*, 714 FSupp2d 406, 410 [EDNY 2010] (emphasis in the original).

Council's contention that "courts have universally accepted that a debtor's financial statements ... will serve as an acknowledgment that revives a debt under the statute" (Def's. Memo., at 12) is misplaced. Council relies on *Chase Manhattan Bank v. Polimeni* (258 AD2d 361 [1st Dept 1999]), which held that the defendant's personal financial statement, which carried his debts to plaintiff, constituted an acknowledgment where the defendant authorized his secretary to sign a transmittal letter covering the financial statement and to send those documents to plaintiff. It was the debtor's formal transmission of the financial statement to the creditor, not the statement by itself, that constituted the acknowledgment.

Council also relies on *In re Meyrowitz' Estate* (114 NYS2d 541 [NY Cty Surr Ct 1952]), which held that the inclusion of debts owed by the deceased president to a corporation in the corporate balance sheets constituted an acknowledgment by the president where he was also the controlling stockholder and the other directors were corporate employees under his supervision and control. After reviewing these unusual facts, the court reasoned that, "[i]n the manner in which this corporation conducted its affairs, there was no occasion for the debtor to acknowledge the continued existence of the debt and to reiterate his promises to pay, except in the annual balance sheets" (*Id.* at 547). The facts here present the opposite situation.

The final case, *Clarkson Co. Ltd. v. Shaheen* (533 FSupp 905, 932 [SDNY 1982]), asserts without further analysis that "[the defendant's] acknowledgment of its 'longstanding' obligation to SNR in its 1980 annual report ... and the fact that the debt was carried on [the defendant's] books from at least 1978 through 1980 ... is a clear recognition of the continuing validity of the obligation." This cryptic language has since been construed as holding that "an acknowledgment of a debt to a third party will be effective to revive the limitation period if it appears that the debtor's intention was to communicate the acknowledgment to the creditor" (*In re Brill*, 318 BR 49, 59 [Bankr SDNY 2004]. In any event, to the extent this federal decision concludes that merely carrying a debt on a debtor's books constitutes an acknowledgment, this Court does not follow it, because it is at odds with prior and subsequent New York appellate decisions.

Additionally, the financial statements were not communicated to the debt-holder, much less with an intent to influence the debt-holder's conduct (*See, Lynford v. Williams*, 34 AD3d 761, 763 [2d Dept. 2006]). Here, the financial statements were prepared as required by the Partnership Agreement for distribution to the limited partners. Council, **as the general partner,** arranged for their preparation and received a copy of the statements. This is not the equivalent of a "communication" to Council **as the debt-holder,** nor were they intended to influence Council's conduct as the debt-holder. Council could have protected its interest as debt-holder, either by foreclosing on the WrapAround Note and Mortgage, or by causing the Partnership to explicitly reaffirm the debt. Council owed a fiduciary duty to the limited partners, and it was incumbent on Council to have the Partnership reaffirm the debt openly and formally, with full disclosure (*See, Tucker Anthony Realty Corp. v. Schlesinger*, 888 F2d 969, 973-74 [2d Cir 1989] [general partner who engages in self-interested transaction must establish its fairness by taking steps such as arm's

length negotiations, competitive bidding, or limited partner review and approval]). Having failed to do so, Council cannot now claim that the Partnership implicitly acknowledged the debt to it, as debt-holder, simply by continuing to list the WrapAround Note and Mortgage on internal financial statements.

2. The Payments in 2019 Did Not Revive the Limitations Period

The WrapAround Note and Mortgage became unenforceable on March 3, 2018, because Council did not commence a foreclosure proceeding during the limitations period. Council's actions to re-commence payments a year later -- in the midst of litigation over whether it should be removed as general partner -- constitutes a breach of its fiduciary duty as general partner of the Partnership (*See, Szelega v. O'Hara*, 159 AD2d 890, 891 [3d Dept 1990] [officer and majority shareholder of small corporation breached her fiduciary duty to the corporation by causing it to repay time-barred debts to her]).[3] As such, the 2019 payments are invalid and must be set aside, and the funds restored to the Partnership (*See, May v. Flowers*, 106 AD2d 873, 874-75 [4th Dept 1984] [where a general partner breaches its fiduciary duty to limited partners, the transaction is invalid and should be set aside]); *Marston v. Gould*, 69 NY 220, 225 [1877] ["Courts of equity hold each partner responsible to the other for all losses sustained by the misconduct [breach of trust] or a misapplication of the partnership funds"]); *In re Grotzinger*, 81 AD2d 268, 281 [1st Dept. 1981] ["limited partners are *cestui que trusts* and 'no injury ... [they] may sustain by a

[3] The Partnership Agreement is governed by D.C. law but this does not alter the analysis. Under D.C. law, "partners owe each other the duty of 'the utmost good faith in all that pertains to their relationship,'" especially "in the case of managing general partners in a limited partnership, on whose good faith the other partners depend entirely" (*Washington Med. Cntr., Inc. v. Holle*, 573 A2d 1269, 1285 & n. 26 [DC 1990]) (citation omitted). "Good faith will not permit any one partner to advantage himself singly and alone, at the expense of the firm" (*Marmac Inv. Co., Inc. v. Wolpe*, 759 A2d 620, 626 [DC 2000]). Further, D.C. law has long held that a lender should not be permitted "to benefit from any breach of trust by one of its own officers or agents in respect of the borrower" (*Sheridan v. Perpetual Bldg. Ass'n*, 299 F2d 463, 465 [DC Cir 1962] [*en banc*].

fraudulent breach of trust, can, upon the general principles of equity, be suffered to pass without remedy'").[4]

The WrapAround Note and Mortgage matured on March 1, 2012. During the next six years, no payment was made on the Note, no demand for payment was made by Council, and Council did not commence a foreclosure action. The Partnership took no action during this period that would toll or extend the limitations period. Accordingly, the statute of limitations expired and the WrapAround Note and Mortgage became unenforceable on March 3, 2018.

In light of the foregoing, it is hereby

ORDERED, that Council's motion for summary judgment is denied; and it is further

ORDERED, that Plaintiffs' cross-motion to cancel and discharge the WrapAround Note and Mortgage, and for an order requiring Council to restore to the Partnership all mortgage loan payments that it has collected pursuant to the February 7, 2019 resolution, is granted; and it is further

ORDERED, that Council's actions, subsequent to the expiration of the statute of limitations on March 3, 2018, to re-commence payments on the WrapAround Note and Mortgage (starting in February 2019) are invalid and are hereby set aside.

[4] "[T]he law that governs remedies is the law of the forum" (*Meacham v. Jamestown, F. & C.R. Co.*, 211 NY 346, 352 [1914] [Cardozo, J., concurring]).

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: August 16, 2019
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice

Appellate Division Docket No. CA 19-01672
Genesee County Clerk's Index No. E67594

Court of Appeals

of the

State of New York

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, and BATAVIA INVESTORS, LTD.,

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

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Dated: November 3, 2020

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This Memorandum of Law is submitted in support of the Motion of Defedant/Appellant Council of Churches Housing Development Fund Company, Inc. (the ***"Churches"***) for Permission to Appeal this case to the New York Court of Appeals, pursuant to CPLR 5602(a) and 22 NYCRR §500.22.

PRELIMINARY STATEMENT:

In June, 1970, a group of Batavia-area churches formed the Churches as a not-for-profit corporation incorporated under the New York Private Housing Finance Law and the Membership Corporations Law of New York. The mission of the Churches is to develop and operate, on a non-profit basis, a housing project for persons of low income where no adequate housing exists for such persons. A board of directors, all of whom serve in an uncompensated voluntary capacity, manages the Churches. (*R. 68,* ¶*5.*)

The Churches pursue their mission through involvement in the Birchwood Village Apartments ("*Birchwood Village*" or the "*Apartments*"), a 224-unit apartment complex located at 77-79 River Street in the City of Batavia, New York. Since its inception in 1971, Birchwood Village has operated as affordable housing for families of low and moderate income in the Batavia area. It has provided - and continues to provide - a vital resource to meet a critical need in the community. *(R. 68* ¶*6.)*

Plaintiff Batavia Townhouses, Ltd. (the "*Partnership*"), is the limited partnership through which the Churches currently pursues that mission: the Partnership owns and operates Birchwood Village. The Churches is the sole managing general partner of the Partnership. Plaintiffs Arlington Housing Corporation ("*Arlington*") and Batavia Investors, Ltd. ("*Investors*") are both limited partners in the Partnership. (Collectively, Arlington and Investors are sometimes referred to hereafter as the "*Limited Partners*.") There are no other partners in the Partnership. *(R. 69, ¶7.)*

Beginning in March 1971, the Churches originally developed, owned and operated Birchwood Village independent of the Partnership, through a loan that was insured by the United States Department of Housing and Urban Development ("*HUD*"). That loan was evidenced by a promissory note with a maturity date of March 1, 2012 (the "*Original Note*"), which was insured by HUD, and was secured by a mortgage (the "*HUD Mortgage*"). In exchange for HUD's agreement to insure the Original Note, the Churches agreed to operate Birchwood Village in compliance with certain HUD regulatory agreements that ensure the project would provide ongoing benefits to low- or moderate-income families. *(R. 69, ¶8.)*

In the early years of its existence, Birchwood Village was poorly managed and poorly maintained. The complex experienced financial difficulties through 1977, and at that time, the Board and management of the Churches recognized a

need to take action to improve physical and financial conditions at the Apartments. *(R. 69, ¶9.)*

After considering a number of available options, the Churches elected to take advantage of the benefits to be obtained by structuring the project as a limited partnership tax shelter. Through that structure, an infusion of capital would be brought to the project by a group of investors who would recognize the tax advantages of the tax shelter (through the limited partnership status of their investment fund), and another general partner – with expertise in construction and facility rehabilitation - would be introduced to the project. *(R. 70 ¶10.)*

On or about December 1, 1979, by operation of an agreement titled "Amended and Restated Certificate and Agreement of Limited Partnership of Batavia Townhouses, Ltd." (the "*Partnership Agreement*"), the Churches became one of two general partners of the Partnership,[1] and was designated as the Partnership's managing general partner. *(R. 70 ¶11; R. 86.)*

The Churches became the Partnership's managing general partner in exchange for the Churches' conveyance of Birchwood Village into the Partnership. At the time of the conveyance, the Apartments were still encumbered by the HUD Mortgage. *(R. 70 ¶12.)*

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[1] At that time, the Partnership's second general partner was an individual named David C. Green. His contribution to the project was his construction/rehabilitation expertise.

The Churches conveyed Birchwood Village to the Partnership in exchange for the Partnership's execution of the WrapAround Note and Mortgage dated September 1, 1979. The Wraparound Note and Mortgage memorialized the Partnership's debt to the Churches in the amount of $5.5 Million, together with interest at the annual rate of six percent (6%). Because the Churches' prior HUD Mortgage remained partially unpaid at the time of the conveyance, the Wraparound Note and Mortgage was subordinate to the HUD Mortgage. (R. 70, ¶13).

At that time, Investors was the Partnership's sole limited partner. Investors - itself a limited partnership, comprised of individuals seeking opportunities to realize federal tax benefits - contributed a total of $400,000 into the Partnership: this infusion of capital afforded the opportunity to rehabilitate the Apartments' physical and financial condition. The Apartments' status as a HUD regulated property afforded opportunities to realize significant tax advantages with respect to the Limited Partners' federal income tax liabilities.

In May 1981, the Partnership's second general partner withdrew, and was replaced by Plaintiff Arlington. Arlington's president is Lawrence F. Penn. Mr. Penn is also the president of Investors' general partner.[2] *(R. 71 ¶15.)* After

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2 During the two years of Mr. Green's status as co-general partner, the Partnership completed the contemplated improvements to the physical condition of the Apartments, and he fulfilled his role in the project. At the time, Mr. Penn was involved in numerous HUD properties across the nation, and he was viewed – at that time - as a person who could assist the Churches to optimize the operation of Birchwood Village.

Arlington joined the Partnership, the Churches remained the managing general partner, and Investors remained a limited partner. *(R. 72, ¶17 - 18.)*

Section 2.4 of the Partnership Agreement sets forth the following Purpose of Business for the Partnership:

> The sole purpose and business of the Partnership shall be to acquire real property, together with the improvements thereon, as described in the Project Documents, and to own, hold, manage, maintain, and operate thereon the Project together with such other activities related directly or indirectly to the foregoing as may be necessary, advisable, or convenient to the promotion or conduct of the business of the Partnership, including without limitation the incurring of indebtedness and the granting of liens and security interests in the real and personal property of the Partnership to secure the payment of such indebtedness; all in such manner as will conform to all rules and regulations of Agency, and insofar as is consistent therewith, will maximize the Federal, state and local income tax benefits available to the Partnership. The specifications of such business shall be deemed a limitation upon the powers of the General Partner. (emphasis added)

(R. 88).

To ensure that the operating losses that supported the tax savings would flow primarily to the investors, the Partnership Agreement allocated 99% of the Partnership's property, profits and losses to the limited partners. *(R. 71 ¶16 and n.2).*

At some time in or after 2001, the Churches received a copy of a memorandum dated April 3, 2001, advising all HUD Multifamily Field Offices that HUD had entered into a settlement agreement with "Lawrence Penn and all his affiliates,"

pursuant to which Penn and all his associated entities were to divest all interests in any HUD properties. The memo further explained that the settlement agreement was intended to resolve all outstanding criminal, civil and administrative matters involving HUD, the United States Department of Justice, Penn, and Penn's entities. *(R. 72, ¶19.)*

The divestitures were required by a Consent Judgment relating to multiple criminal and civil claims – including an indictment against Penn, personally – presented in U.S. v. Lawrence F. Penn, identified as Case No. CR-00-0084-SC in the United States District Court for the Northern District of California. *(R. 110 – 126).*

As a consequence, and given that Birchwood Village was a HUD property, Arlington was not permitted to continue in its capacity as a general partner of the Partnership. Arlington was permitted, however, to participate as a limited partner. By an amendment to the Partnership Agreement dated March 10, 2004, Arlington's status in the Partnership changed from general partner to limited partner. *(R. 73, ¶21.)*

In summary, as of and since 2004, the Partnership has been comprised of the Churches, as its sole managing general partner, and two limited partners, Plaintiffs Arlington and Investors. The Churches elected to operate the Apartments in the structure of the Partnership at a time early in the history of the Churches' effort to

fulfill their mission, when the Churches recognized a need for capital and expertise in the operation of the Apartments: the Churches contributed the $5.5 Million facility into the Partnership (subject to the WrapAround Note and Mortgage that ensured the Apartments would be returned to the Churches when the tax shelter had run its course); and, in comparison, the limited partners contributed a one-time infusion of $400,000; and the involvement of a man who was forced to remove himself from the project's management to resolve a criminal investigation by the project's regulating agency. *(R. 73, ¶22).*

In 2012, the Partnership paid the final installment due on the Original Note, and discharged the HUD Mortgage. The Wraparound Note and Mortgage became the only encumbrance on the Apartments, entitled to first priority. *(R. 73, ¶23).*

The Limited Partners' declaratory action represents their effort to invalidate the WrapAround Note and Mortgage, and to secure the Partnership's ownership of Birchwood Village free and clear. *(R. 73, ¶23).*

Every year since at least April 2000, the Partnership has distributed to its partners (both general and limited), written annual financial statements that have been prepared under the oversight of the Partnership's independent certified public accountants, EFPR Group, CPAs, PLLC. *(R. 74, ¶¶25 – 27).*

Those financial statements include balance sheets that reflect the WrapAround Note and Mortgage as a liability of the Partnership, state the then-present amount of

the liability (including both principal and accrued interest), and report the Partnership's obligation to repay the amount due. Every one of the financial statements specifically refers to the obligation as a "Note and mortgage payable." The financial statements were distributed to the Churches annually, under a signed auditors' report, most recently in April 2019. *(R. 74 - 75 ¶¶28 – 31; R. 129 – 212).*

The Partnership also prepared, filed, and shared with the Churches its annual tax returns. *(R. 233 – 234 ¶¶13 – 14; R. 270 – 296)*. Every one of those returns acknowledged the mortgage obligation in writing *(R. 274; R. 288 [acknowledging outstanding "non-recourse loan" in exact balance of mortgage at beginning of year and year-end])* and was signed by the Executive Director who oversees the daily operation of the apartment complex that is the subject of this litigation. *(R. 271; R. 272; R. 281; R. 285; R. 296 [signature of Partnership's Executive Director, Barbara Greenbaum])*.

DISCLOSURE STATEMENT:

Defendant/Appellant Churches is the sole General Partner of Plaintiff/Respondent Batavia Townhouses, Ltd. (the ***"Partnership"***). The Partnership owns and operates a low and moderate income housing project in Batavia, New York. Plaintiffs/Respondents Arlington Housing Corporation and Batavia Investors, Ltd. are the only limited partners of the Partnership (the ***"Limited Partners"***). Churches has no parents, subsidiaries or affiliates.

PROCEDURAL HISTORY and TIMELINESS OF MOTION:

The Partnership and Limited Partners commenced this derivative declaratory judgment action against Churches on May 28, 2019 in Supreme Court, Genesee County, seeking a declaration that the WrapAround Note and Mortgage is unenforceable. They seek a declaration that the WrapAround Note and Mortgage is unenforceable because the Partnership did not make any payment in connection with the WrapAround Note and Mortgage from 2012 until February 2019. *(R. 68, ¶3; R. 52 – 56)*. The Limited Partners contend that, during that interim, the limitation period for enforcement of the agreement has expired.

The Churches acknowledged service of the Summons and Complaint on May 29, 2019. The Churches timely filed an Answer on June 18, 2019, *(R. 57 – 64)*, and this Motion for Summary Judgment was filed the same day. *(R. 65 - 66)*. The Limited Partners cross-moved for summary judgment on July 17, 2019. *(R. 216)*.

On August 16, 2019, Supreme Court issued its Decision and Order awarding summary judgment to the Limited Partners. *(R. 3 – 16)*. That Order was entered August 21, 2019 *(R. 17)*.

The Churches filed a Notice of Appeal August 28, 2019, *(R. 1)*, and perfected the appeal. The Fourth Department's Opinion and Order modified Supreme Court's Order by remitting the matter for entry of declaratory judgment, but otherwise affirmed that Order without costs. *Brueckner Affidavit*, ¶9.

The Opinion and Order of the Appellate Division, Fourth Department is dated October 2, 2020. *Id.*, ¶3. It was served on the Churches on October 6, 2020, together with Notice of Entry, by notice generated through the New York State Courts Electronic Filing System. *Id.* This Motion is timely because it is filed and served within 30 days of service of the Opinion and Order and Notice of Entry.

THIS COURT'S JURISDICTION:

The Fourth Department's Opinion and Order is a final determination as provided by Civil Practice Law and Rules 5611. Defendant did NOT move for leave to appeal to this Court at the Appellate Division, but instead filed this Motion for Leave to Appeal directly with this Court. This Court has jurisdiction of this Motion and of the proposed appeal under Civil Practice Law and Rules 5602(a)(1)(i) and 22 N.Y.C.R.R. §500.22.

QUESTION PRESENTED FOR REVIEW:

The Question presented on this appeal is as follows:

Annually from 2012 through 2019 (and earlier) the Partnership transmitted to the Churches - as its creditor - written audited financial statements and an auditors' report signed by its independent auditors that reflected the WrapAround Note and Mortgage, and interest accrued thereon, as a liability of the Partnership. The Partnership also annually transmitted copies of its tax returns to the Churches, in

which it listed the amount of the debt due on the WrapAround Note and Mortgage as a "non-recourse debt."

The Partnership - as obligor and mortgagor on the WrapAround Note and Mortgage - did not make any payments with respect to the debt from March 2012 until February 2019, and the Churches, as creditor and mortgagee, took no action to enforce it.

Are the financial statements, auditors' reports, and tax returns sufficient, under Article 17 of the New York General Obligations Law, to acknowledge and reaffirm the debt memorialized by the WrapAround Note and Mortgage, making it an enforceable obligation of the Partnership?

Relying solely on General Obligations Law § 17-105, the Appellate Division ruled that the financial statements, auditors' reports and tax returns did not reaffirm the debt, and that the debt was therefore unenforceable.

THE QUESTIONS PRESENTED BY THIS APPEAL MERIT THIS COURT'S REVIEW:

The Court of Appeals should grant this Motion for Permission to Appeal because it presents a question or statewide importance of commercial and real estate law, and diverges from decades of jurisprudence, including controlling precedent from this Court, that has shaped the behavior of creditors and investors in this State. *See, 22 N.Y.C.R.R. §500.22(b)(4).*

The Appellate Division's Opinion and Order muddles the interplay between Section 17-101 of the General Obligation Law and Section 17-105 of the General Obligation Law, holds that General Obligations Law §17-105 provides the exclusive mechanism for the reaffirmation of debt secured by a mortgage, and that such a reaffirmation requires an *express written promise* to pay the debt, but that a *written acknowledgement* of that obligation would not reaffirm the debt. Decades of this State's decisional law deems such a written acknowledgment to be an implied promise to repay the debt, and analyzes the reaffirmation of mortgage debts under both General Obligations Law §17-101 and General Obligations Law §17-105.

The Appellate Division's Opinion and Order is contrary to a long line of case law analyzing the interplay between General Obligation Law §§17-101 and Section 17-105, including a controlling decision of this Court. *See, e.g.,* Petito v. Piffath, 85 N.Y.2d 1, 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both 17-101 and 17-105). In their examination of the reaffirmation of mortgage obligations, those prior decisions are not limited to an evaluation of written "promises," they also evaluate writings characterized as "acknowledgements." *See,* Comerica Bank, N.A. v. Benedict, 39 A.D.3d 456 (2d Dept. 2007) (in mortgage foreclosure case analyzing GOL §17-105, court examined whether writing qualified as an "acknowledgment" of the debt so as to extend the Statute of Limitations); Hakim v. Peckel Family Ltd.

Partnership 280 A.D.2d 645 (2d Dept. 2001) (reaffirmation of mortgage obligation reviewed for unconditional and unqualified reaffirmation of the debt under GOL §§ 17-101 and 17-105); *McQueen v. Bank of New York*, 57 Misc.3d 481, at 483 - 84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt).

Confronted with a property owner's request to invalidate a mortgage debt due to the alleged expiration of the Statute of Limitation, many New York courts have analyzed the timeliness issue under General Obligations Law §17-101, and not § 17-105 as the Appellate Division did in this case. *Karpa Realty Group, LLC, v. Deutsche Bank National Trust Company*, 164 A.D.3d 886 (2d Dept. 2018) (court applies GOL §17-101 in mortgagor's action to declare mortgage unenforceable as untimely); *US Bank NA v. Martin*, 144 A.D.3d 891 (2d Dept. 2016) (same); *Yadegar v. Duetsche Bank National Trust Company*, 164 A.D.3d 945 (2d Dept. 2018) (same); *Sharova v. Wells Fargo Bank*, 62 Misc.3d 925, at 937 (Sup. Court Kings County, 2019) (same).

Though the State's trial courts and the Appellate Divisions have considered the interplay between General Obligations Law § 17-101 and 17-105 with some regularity, the Churches' research suggests that the Court of Appeals has considered the issue on only two occasions. See, *Roth v. Michelson*, 55 N.Y.2d 278 (1982) (reviewing the effect of partial payment as reaffirmation of mortgage debt); see also,

Petito v. Piffath, 85 N.Y.2d 1, at 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both 17-101 and 17-105).

In this case, the Appellate Division's Opinion and Order recognized that Petito "analyzed the sufficiency of evidence under both 17-101 and 17-105 in a mortgage debt case." However, the Appellate Division concluded that, in Petito, the Court "had no occasion to pass on the threshold issue" of the applicability of Section 17-101, and "decided only that, if that section also applied," the writing under analysis therein did not constitute a sufficient acknowledgement of the debt. *Opinion and Order,* at 5 - 6.

The Opinion and Order Misconstrues GOL §17-105.

The Fourth Department's Opinion and Order is mistaken because it misapprehends the command of Section 17-105. The statute does not require a "writing" that includes an "express promise," as the Opinion and Order concludes: rather, the statute requires the "express terms of a writing" to include a "promise." See, *General Obligations Law* §17-105(1) (McKinney's 2020). The distinction – driven by the plain terms of the statutory provision - is absolutely critical to the proper determination of the issue, and decades of this State's judicial precedent teach that an acknowledgement in the "express terms of a writing" can lead to an implied

"promise", so long as the acknowledgment is unconditional and includes nothing inconsistent with the obligor's intention to pay.

Section 17-105(1) of the General Obligations Law provides as follows:

> A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property ... or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise.

General Obligations Law § 17-105(1) (McKinney's 2020) (emphasis added).

For decades, New York courts have recognized that the "express terms" of a writing can amount to an implied promise to pay a debt where those terms constitute an acknowledgment of a debt, by recognizing an existing debt and stating nothing inconsistent with an unconditional intention on behalf of the debtor to pay it. *Lew Morris Demolition Co. v. Board of Education,* 40 N.Y.2d 516, at 521 (1976); *Knoll v. Datek Securities Corp.*, 2 A.D.3d 594, at 595 (2d Dept. 2003). The writing must also be communicated to the promisee, such that the promisee can be presumed to have relied upon the reaffirmation. *See, e.g., Essex Real Estate Corp. v. Piluso,* 68 A.D. 2d 923 (2d Dept. 1979) (acknowledgement must be shown to have influenced the creditor); *In re Brill,* 318 B.R. 49, at 59 – 60 (Bankr. S.D.N.Y. 2004) (collecting cases interpreting New York state law).

Importantly, even after the enactment of General Obligations Law §17-105, the prevailing judicial precedent holds that an acknowledgement does not need to be an express promise. Instead, the writing need only contain *nothing inconsistent* with an unconditional intention to pay. *Knoll v. Datek Securities Corp*, 2 A.D.3d 594, at 595 (2d Dept. 2003). The governing precedent makes clear that an appropriate acknowledgement serves as a "promise" because the law infers a "promise" to repay when there is nothing inconsistent with such an intent. *Henry v. Root,* 33 N.Y. 447 (1955); *George Tsunis Real Estate, Inc., v. Benedict,* 116 A.D.3d 1002 (2d Dept 2014) (purported acknowledgment is sufficient to restart the running of a period of limitations when it demonstrated defendant's intent to pay); *see also Calltrol Corp. v. DialConnection, LLC,* 51 Misc.3d 1221(A), 2016 WL 2860753 (Sup. Court Westchester County 2016) ("The critical question is whether the acknowledgment imports an intention to pay"); *Celia v. Shah,* 94 Misc 2d. 932, at 935 (Dist. Ct. Nassau County, 1978) (absence of anything inconsistent with intent to pay infers promise to pay); *Connecticut Trust & Safe Deposit Co. v. Wead,* 172 N.Y. 497 (1902) (under Section 395 of the Code of Civil Procedure, reviewing document to determine whether it is "an acknowledgment of a subsisting debt that a promise to pay may fairly be implied from that acknowledgment ...").

Case law has long recognized that an appropriate acknowledgement also "sufficiently evidences" the intent to repay because the law infers a "promise" to

repay when there is nothing inconsistent with such an intent. *Henry v. Root,* 33 N.Y. 447 (1955); *George Tsunis Real Estate, Inc., v. Benedict,* 116 A.D.3d 1002 (2d Dept 2014) (purported acknowledgment is sufficient to restart the running of a period of limitations when it demonstrated defendant's intent to pay); *see also Calltrol Corp. v. DialConnection, LLC,* 51 Misc.3d 1221(A), 2016 WL 2860753 (Sup. Court Westchester County 2016) ("The critical question is whether the acknowledgment imports an intention to pay").

Contrary to the Fourth Department's holding, Section 17-105's plain language does not alter this interplay. The plain language of the statute requires a "promise" that can be determined from the "express terms" of a writing: there is nothing in the statute that requires the promise, itself, to be written expressly.

The other subparagraphs of Section 17-105 support the conclusion that an obligor can express an intent to pay a debt through an "acknowledgment," in contrast to a "promise." General Obligation Law §17-105(4) reads:

> Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose or *[sic]* mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

General Obligations Law §17-105(4) (McKinney's 2020) (emphasis added). If an acknowledgement were legally insufficient to extend the foreclosure limitations period, there would be no reason for subsection (4) to express the limitations on its

effectiveness. *A fortiori*, an acknowledgement must have some effectiveness to extend timeliness under Section 17-105.

This conclusion is confirmed by the cases interpreting Section 17-105. Those cases are not limited to an evaluation of written "promises," they also evaluate writings characterized as "acknowledgements." *See, Comerica Bank, N.A. v. Benedict*, 39 A.D.3d 456 (2d Dept. 2007) (in mortgage foreclosure case analyzing GOL §17-105, court examined whether writing qualified as an "acknowledgment" of the debt so as to extend the Statute of Limitations); *McQueen v. Bank of New York*, 57 Misc.3d 481, at 483 - 84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt).

The leading secondary authority agrees. Professor Bergman observes that the provisions of Section 17-105 "are controlling" in mortgage foreclosure actions, but even the punctilious Professor Bergman recognizes that makes little difference, due to the reality that the case law he recites with respect to acknowledgements "is and remains" "vital" after the enactment of Section 17-105. *BERGMAN ON NEW YORK MORTGAGE FORECLOSURES*, §5.11[7] (Bender 2019). Indeed, earlier in his study of the relevant jurisprudence, Professor Bergman states that Section 17-105 is merely a codification of "the authority under which an effective written acknowledgement

of a mortgage obligation serves as a revival of the statute of limitations time period." *BERGMAN*, supra., at §5.11[6][a] (emphasis added).

An authoritative and clear pronouncement of the law is required to promote clarity in this important area of real estate and commercial jurisprudence. The Court of Appeals should grant permission to appeal in this case to provide that needed guidance and to reverse the erroneous application of the General Obligations Law by the Appellate Division, which extinguished more than $9 Million in debt owed to Churches by the Partnership.

CONCLUSION:

A creditor's ability to rely on a written reaffirmation of mortgage debt presents important state-wide issues of commercial and real estate law. This Memorandum explains that, for decades, the Courts of this state have considered evidence of reaffirmation under two different provisions of the General Obligations Law: Sections 17-101 and 17-105. Naturally, mortgage creditors have shaped their behavior in conformity with those decades of analysis.

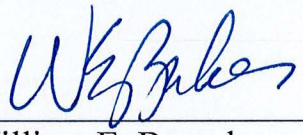
The Opinion and Order of the Appellate Division, Fourth Department in this case diverges from those decades of jurisprudence, and mistakenly holds that Section 17-105 provides the exclusive mechanism by which a mortgage debt can be reaffirmed. Because the Opinion and Order is inconsistent with those decades of jurisprudence, and with authoritative precedent from this Court, the Court of

Appeals should grant permission to appeal in this case to correct that mistake and clarify the law.

Defendant/Appellant Council of Churches Housing Development Fund Company, Inc. requests that this Court grant an Order, pursuant to Civil Practice Law and Rules 5602(a)(1)(i), permitting Defendant/Appellant to appeal this case to the Court of Appeals.

DATED: November 3, 2020
Rochester, New York.

McCONVILLE, CONSIDINE, COOMAN & MORIN, P.C.
Counsel for Movant



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