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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.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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RULE 500.1(f): CORPORATE DISCLOSURE

Plaintiff/Respondent Batavia Townhouses, Ltd. ("the Partnership") is a District of Columbia limited partnership that owns and operates a housing project in Batavia, New York. Plaintiffs/Respondents Arlington Housing Corporation and Batavia Investors, Ltd. ("the Limited Partners") are the only limited partners of the Partnership. Batavia Investors, Ltd. is a limited partnership organized and existing under the laws of the District of Columbia. It has no parents, subsidiaries or affiliates. Arlington Housing Corporation is a corporation organized and existing under the laws of Texas, whose stock is owned entirely by PL Acquisition Inc. It has no parents, subsidiaries or affiliates.

RULE 500.13(a): STATUS OF RELATED LITIGATION

There is a pending action between Defendant/Appellant Council of Churches Housing Development Fund Company ("Council") and the Limited Partners in the United States District Court for the Western District of New York as to whether Council should be removed as the general partner of the Partnership. Council of Churches Housing Development Fund Company, Inc. v. Arlington Housing Corporation and Batavia Investors, Ltd., Case No. 6:18-cv-06920 (W.D.N.Y.). By a stipulated order dated August 27, 2019, that action is stayed pending the outcome of this appeal.

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QUESTION PRESENTED

Whether the six-year limitations period on a mortgage debt was tolled by the unsigned financial statements or the federal tax returns of the debtor?

The Appellate Division held that this issue is governed by GOL § 17-105, which requires a written promise signed by the debtor to toll or revive a mortgage debt, rather than by GOL § 17-101, which provides that either a written acknowledgement of the debt, or a promise to pay it, can revive other forms of debt. The court held that the mortgage debt was not tolled because neither the debtor's financial statements nor its federal tax returns constitutes an express promise to pay the debt.

STATEMENT OF FACTS

This case involves the enforceability of a mortgage debt as to which appellant Council of Churches Housing Development Fund Company, Inc. ("Council")[1] was both the creditor-mortgagee and the general partner of the debtor-mortgagor, appellee Batavia Townhouses, Ltd. (the "Partnership"). After the mortgage debt matured, Council caused the Partnership to stop making payments on it and Council allowed the six-year limitations period for enforcing the debt to expire. Later, Council caused the Partnership to resume making payments on the expired mortgage debt to further its own interest, not the Partnership's interest. The limited partners brought this derivative action to have the debt and its associated mortgage ("WrapAround Note and Mortgage") declared unenforceable and $330,000 in improper mortgage payments returned to the Partnership. The Supreme Court granted summary judgment to the limited partners and the Fourth Department affirmed.

A. Factual Background

1. The formation of the Partnership and the execution of the mortgage.

The relevant undisputed facts, as summarized by the trial court, are as follows. In 1971, Council borrowed more than $4.7 million from a private lender to construct

[1] Appellant styles itself as the "Churches" in its brief although it does not have any church or clergy members. The trial court referred to it as the "Council" in its decision and the Appellate Division referred to it simply as the "defendant."

Birchwood Village Apartments in Batavia, New York. This 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. HUD paid off the lender and acquired the note and associated mortgage. Council continued to default on loan payments and HUD was about to foreclose. (R. 4).

At this juncture, plaintiff Batavia Investors, Ltd. ("Investors") entered the picture and, together with Council, proposed to HUD that the ownership of the property be changed to bring in private investors. HUD approved this proposal, but required that a new owner replace Council as the manager of Birchwood Village. 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 a WrapAround Note and Mortgage in that amount. (*Id.*).

The WrapAround Note and Mortgage was subordinate to, and "wrapped around," the separate HUD loan. Council remained the obligor on the HUD loan which amounted to $5,588,357.75 as of June 1, 1985. (R. 4-5). Thus, the Partnership owned Birchwood Village but owed $5.5 million to Council to pay for the property, while Council in turn owed HUD a slightly greater amount on the original loan.[2]

[2] Council describes its sale of the property to the Partnership - to avoid default - by saying that it "contributed the $5.5 Million facility into the Partnership" whereas "the limited partners contributed a one-time infusion of $400,000." (Br. at 6-7). In reality, Council never invested any funds in the project, which was originally financed entirely with the HUD-insured loan, and then was remodeled with the infusion of funds provided by the limited partners.

The Partnership is a for-profit limited partnership. The Partnership Agreement provided that the Partnership would operate the property "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." It further provided that the limited partners would receive almost all of the tax benefits <u>and</u> a primary share of any Partnership profits and/or residual equity. (R. 5).

Council incorrectly asserts that "the WrapAround Note and Mortgage ... ensured the Apartments would be returned to [it] when the tax shelter had run its course." (Br. 7). Birchwood Village would revert to Council only if the WrapAround Note and Mortgage was not paid off and the outstanding balance owed at the time of foreclosure exceeded the appreciated market value of the property. If, instead, the market value of Birchwood Village exceeded the balance owed on the Note, the property would be sold to the highest bidder, the Note would be paid off, and the profit on the sale would be distributed primarily to the limited partners.

2. The maturation of the mortgage and the running of the limitations period.

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.[3] (R. 5). Thus, with respect to the WrapAround Note and Mortgage, Council now controlled the debtor-mortgagor as well as being the creditor-mortgagee. (Council remained the obligor on the HUD loan).

Both the HUD 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 (controlled by Council) to pay debt service on the WrapAround Note and Mortgage and, in turn, those funds were used by Council to pay debt service on the HUD loan in the monthly amount of $25,288.40. The HUD loan was paid off on schedule in February 2012, leaving the WrapAround Note and Mortgage as the sole encumbrance on Birchwood Village.[4] (R. 5).

After March 1, 2012, Council caused the Partnership to stop using the rent income from Birchwood Village to make any debt service payments on the WrapAround Note and Mortgage. (R. 5).

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[3] The reason why Arlington converted to a limited partner in 2004 is irrelevant to the issues in this case and so was not discussed by either the trial court or the Appellate Division. Yet Council dwells on the unproven claims whose settlement led to Arlington's change in partnership status. (Br. 6-7). It is, of course, improper to impugn a party's character by referring to irrelevant matters. *See Kaminski v. Modern Italian Bakery of West Babylon*, 270 A.D.2d 232, 232-33 (2d Dept. 2000).

[4] After the HUD mortgage note was repaid, HUD rules and regulations, including rent limits, ceased to apply to Birchwood Village.

In August 2018, the two limited partners, Arlington and Investors, accused Council of violating its duties as the general partner because it had kept the rents at Birchwood Village artificially low and had not paid down the WrapAround Note and Mortgage, thereby siphoning the equity interest of the limited partners, Arlington and Investors, to Council's own account.[5] On November 19, 2018, Arlington and Investors acted to remove Council as general partner of the Partnership pursuant to the Partnership Agreement by sending Council a 30-day notice of removal that would take effect on December 19, 2018. On December 17, 2018, Council filed suit in federal court seeking to block its removal. *Council of Churches Housing Development Fund Company, Inc. v. Arlington Housing Corporation*, No. 6:18-cv-06920 (W.D.N.Y.). Arlington and Investors filed a counterclaim to enforce the removal of Council as general partner. (R. 6).

Council never instituted an action to foreclose on the WrapAround Note and Mortgage after it matured on March 1, 2012. The Partnership made no payments on the WrapAround Note and Mortgage from March 1, 2012, when it matured, until

[5] Raising the rents at Birchwood Village and paying down the WrapAround Note and Mortgage would have increased the Partnership's equity in the property (i.e., the value of the property minus the balance owed on the mortgage note), which would be distributed primarily to the limited partners upon a sale of the property or dissolution of the Partnership. By restricting the rents and allowing the size of the mortgage debt to increase each year, Council decreased the Partnership's equity in the property and increased Council's ability to regain ownership of the property through foreclosure because any other purchaser would have to bid more than the ever-increasing amount of the mortgage debt.

seven years later, beginning in March 2019, after litigation between the parties commenced. (R. 6).

3. Council's improper payments on the expired mortgage.

Council, as the creditor, made no demand for payment from the Partnership at any time from March 1, 2012 until February 7, 2019. On that date, Council's Board of Directors adopted a resolution stating that Council, as holder of the note, demanded 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."[6] The resolution stated that the purpose for demanding resumption of the mortgage payments was because Council "has an immediate need for cash resources in order to defend itself and assert its interests in the litigation with the [limited partners]." *Id.*

Council, acting in its capacity as general partner, then caused the Partnership to make a series of "mortgage payments" to Council. These payments -- which started on March 6, 2019, and ultimately totaled $330,000 -- were made without the consent of the limited partners. (R. 6).

4. The documents alleged to revive the mortgage.

When the limited partners instituted this action to cancel and discharge the WrapAround Note and Mortgage, and restore the wrongful mortgage payments to

[6] This portion of the resolution appears at R. 214.

the Partnership, Council asserted that two different sets of documents had revived the mortgage debt after it matured in March 2012: (1) the Partnership's annual financial statements, and (2) its federal tax returns.

Pursuant to Sections 14.1 and 14.2 of the Partnership Agreement,[7] 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 general and limited partners, together with an auditor's report certifying that the financial statement fairly presented the financial position of the Partnership. These financial statements list the WrapAround Note and Mortgage as a liability of the Partnership. The financial statements are not signed by any person or entity. The auditor's reports are signed by the accounting firm. (R. 7).[8]

The Partnership also filed federal tax returns using IRS Form 1065, which were signed by a representative of the Partnership.[9] Schedule L of this IRS form covers "Balance Sheets per Books," and line 18 of this schedule covers "All

[7] These provisions appear at R. 99-101.

[8] The Partnership's financial statements and auditor's reports appear in the record as follows: 2012-2013 at R. 129-42; 2013-2014 at R. 143-56; 2014-2015 at R. 157-70; 2015-2016 at R. 171-84; 2016-2017 at R. 185-98; and 2017-2018 at R. 199-212.

[9] The Partnership's 2016 tax return appears at R. 270-83; the 2017 tax return is at R. 284-95.

nonrecourse loans." The Partnership's tax returns for 2016 and 2017 reflect two entries (figures) on Line 18 – one for "Beginning of tax year" and one for "End of tax year," which reflect the amount of the WrapAround Note and Mortgage. (R. 274, 288).

The limited partners disputed that either of these sets of documents revived the expired mortgage, which became the central issue in this case, along with whether Council had breached its duties as the general partner by making payments on the expired mortgage with Partnership funds.

B. The Supreme Court's Decision

An action to foreclose a mortgage is subject to a six-year statute of limitations. CPLR 213[4]. Thus, the limitations period on the WrapAround Note and Mortgage expired in March 2018, unless it was tolled or revived. (R. 7-8). The Supreme Court ruled that this issue was governed by GOL § 17-105, which requires a written promise signed by the debtor to toll or revive a mortgage debt, rather than by GOL § 17-101, which provides that other debts can be revived by either a written acknowledgement of the debt or a written promise to pay it. (R. 8-10). The court concluded that the Partnership's annual financial statements do not satisfy § 17-105 for two reasons: (1) they were not signed by the Partnership, and (2) they did not promise to pay the debt; rather, they merely listed it as a liability. (R. 11).

The court added that the financial statements do not constitute an "acknowledgement" of the debt which would satisfy § 17-101 either. First, they were not signed by the Partnership. Second, they did not demonstrate a clear intention to pay the debt. Third, they were not communicated to the debt-holder with an intent to influence the debt-holder's conduct. Instead, Council, as the general partner of the debtor, prepared them for internal distribution to the limited partners (to whom the debt is not owed) pursuant to Sections 14.1 and 14.2 of the Partnership Agreement. (R. 11-14).

Finally, the court found that Council's 2019 actions to re-commence mortgage payments a year after the limitations period expired -- in the midst of litigation over whether it should be removed as general partner -- constituted a breach of its fiduciary duty as general partner of the Partnership. It ruled that the 2019 payments were invalid and must be set aside, and the funds restored to the Partnership. (R. 14).

C. The Appellate Division's Decision

The Fourth Department affirmed the decision of the Supreme Court. It listed four separate reasons why GOL § 17-105(1), and not § 17-101, governs this case. First, the plain language of section 17-105 is specifically applicable to mortgage debts. (R. 363). Second, the legislative history confirms that section 17-105 was enacted to address the waiver of the statute of limitations applicable to mortgage debt, as opposed to other forms of debt. (R. 363-64). Third, a leading treatise

reinforces this conclusion, stating 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." (R. 364) (quoting *Bergman on New York Mortgage Foreclosures* § 5.11 [7] [2020])). Fourth, principles of statutory construction dictate that § 17-105, as the more specific provision, applies instead of § 17-101, which is a general provision applicable to all types of contractual debt.

The Fourth Department considered whether it was obliged to reach a different conclusion by this Court's decision in *Petito v. Piffath*, 85 N.Y.2d 1 (1994), which had analyzed a mortgage debt under both § 17-101 and § 17-105. It noted that the parties' briefs in *Petito* had not squarely raised the threshold issue of whether § 17-101 applies to mortgage debt, and so this Court did not have occasion to pass on that issue. The Fourth Department concluded that *Petito* had assumed the applicability of § 17-101 and had decided only that the evidence in that case was insufficient to satisfy the requirements of either § 17-101 or § 17-105. (R. 364-65).

The Fourth Department then examined whether either the Partnership's financial statements or tax returns were sufficient to revive the statute of limitations under § 17-105. It agreed with the Supreme Court that the financial statements are insufficient because they merely list the mortgage as a liability and do not constitute

an express promise to pay the mortgage debt. (R. 365). Likewise, the Fourth Department concluded that the tax returns merely reflect that the Partnership had unspecified nonrecourse loans on its balance sheets and do not constitute an express promise to pay the mortgage debt. (*Id.*).

Lastly, the Fourth Department upheld the Supreme Court's conclusion that Council breached its fiduciary duty to the limited partners by recommencing payments on the unenforceable mortgage in 2019, which rendered those payments void ab initio and precluded them from reviving the limitations period under GOL § 17-107. (R. 366). Council does not challenge this breach of duty ruling before this Court.[10]

ARGUMENT

A. The Tolling Or Revival Of The Limitations Period Is Governed By GOL § 17-105, Which Requires A Written Promise To Pay The Debt.

On this appeal, Council contends that both the Supreme Court and the Appellate Division "misapprehended the interplay between General Obligations Law § 17-101 and General Obligations Law §17-105." (Br. 14). To the contrary, both courts understood the interplay perfectly and correctly concluded that this case is governed by § 17-105, not by § 17-101.

[10] Therefore, it is astonishing that Council argues to this Court that the Partnership has reaffirmed the WrapAround Note and Mortgage "as recently as July 2019." (Br. at 11). July 2019 is when the last of the invalid recommenced payments was made. Pursuant to the Supreme Court's decision, all of the invalid payments were refunded by Council to the Partnership.

1. The statutes, themselves, provide that mortgage debts are governed by § 17-105.

Whether GOL § 17-101 or GOL §17-105 governs the revival of the WrapAround Note and Mortgage is resolved by the statutes, themselves. The terms of these two provisions make it clear that §17-105 governs this case.

GOL § 17-101 is entitled "Acknowledgment or new promise must be in writing." It provides that:

> 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.

This broad provision covers almost all contracts and provides that either a written acknowledgment of the contract or a written promise to perform it can revive the statute of limitations. However, it excludes actions for the recovery of real property.

GOL § 17-105 is entitled "Promises and waivers affecting the time limited for action to foreclose a mortgage." Subsection (1) 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 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 <u>a promise to pay the mortgage debt</u>, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, <u>by the express terms of a writing signed by the party to be charged is effective</u>, 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).

This provision is far narrower than § 17-101; it applies only to mortgages and it provides that only a written waiver of the statute of limitations or an express, written "promise to pay the mortgage debt" can toll or revive the mortgage.

Because a mortgage debt is at issue here, the revival of the WrapAround Note and Mortgage is governed by § 17-105, not by § 17-101. Whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable. *See* McKinney's Cons. Laws of NY, Book 1, Statutes § 238. Therefore, an express, written promise was required in order to revive the debt.

2. The legislative history confirms that § 17-105 governs all mortgage debts.

The conclusion that § 17-105 governs this case is confirmed by reviewing its legislative history. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility*, 36 N.Y.3d 32, 36 (2020) (citation omitted). "[I]t is appropriate to examine the legislative history even though the language of [the statute] is clear." *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000).

The legislative history of § 17-105 is best understood by starting with its common law and statutory roots. "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 N.Y. 447, 450-51 (1955)). "Since 1848, however, that rule has been qualified by statute in this state to the extent of requiring the acknowledgment or new promise to be in a writing, signed by the party to be charged." *Id.*[11] The current embodiment of this rule is GOL § 17-101. *See Lew Morris Demolition Co., Inc. v. Board of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976) (§ 17-101 "restates the rule that a written acknowledgment or promise will toll the Statute of Limitations").

Although an acknowledgement of a debt is not a promise to repay it, the acknowledgement provides a basis from which the law implies such a promise. *See Henry v. Root*, 33 N.Y. 526, 530 (1865); *Bloodgood v. Bruen*, 8 N.Y. 362, 368 (1853). Under § 17-101 and its predecessors, "[t]he writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing

[11] New York Laws of 1848, ch. 379, § 90. In 1876, the statute was reframed and embodied in section 395 of the Code of Civil Procedure. 2 Laws 1876, ch. 448, § 395. This section became section 59 of the Civil Practice Act, then was codified as section 33-d of the Personal Property Law, and is now GOL § 17-101.

inconsistent with an intention on the part of the debtor to pay it." *Lew Morris*, 40 N.Y.2d at 521 (collecting cases).

However, in 1961 the legislature carved out a different rule for mortgage debts by enacting a new provision that originally was codified as RPL § 251-a. L.1961, c. 582. This provision was subsequently re-codified as § 17-105 of the General Obligations Law, while the older, general rule became GOL § 17-101.[12]

The 1961 report of the Legislative Revision Commission on "Transactions Affecting the Time Limited for An Action to Foreclose a Mortgage of Real Property" explains the rationale for the new provision. The Commission recognized that currently "[i]n New York ... a barred mortgage may ... be revived by an 'acknowledgement.'" 1961 Leg. Doc. No. 65(F), reprinted in *McKinney's 1961 Session Laws of New York* at 1873. However, while a part payment of a mortgage debt was ordinarily treated as an acknowledgement, "what other transactions constitute acknowledgements for this purpose is unclear in New York." *Id.* "There is also uncertainty as to the requirements of an effective acknowledgement and confusion as to the legal theory on which the various transactions that operate as acknowledgements affect the statute of limitation." *Id.*

[12] L.1963, c. 576, § 1. GOL § 1-203(35) provides that § 17-105 applies to waivers, promises, agreements, recitals and acknowledgments made on or after September 1, 1961, which was the date RPL § 251-a had taken effect.

The Commission explained that the basis for allowing an acknowledgement to revive a debt is that "the acknowledgement implies a new promise to pay the debt, supported by the moral obligation of the previous consideration." *Id.* But "[t]his rationale is clearly inapplicable to an acknowledgement of a mortgage lien: a mortgage is not a promise but an executed transaction; the mortgage lien is an interest in land requiring for its creation a written instrument which is a conveyance within the real property recording statutes." *Id.* at 1873-74.

Further, the Commission found a lack of clarity in the existing case law as to what constituted a sufficient "acknowledgement," and cautioned that "it is doubtful whether a satisfactory clarification of this area of the law can be accomplished by decisional development without a prolonged period of uncertainty or without repeated litigation." *Id.* at 1875. The Commission feared that "the mere absence of a settled rule [for reviving a barred mortgage or tolling the statute of limitations] may have adverse effect on titles in some cases and seems likely in any case to create difficulties in real estate transactions." *Id.* To avoid this outcome, "[t]he Commission believes that legislation is needed to provide a coherent set of rules which will give effect, within limits clearly defined, to transactions intended to toll the statute of limitation … without requiring litigation of difficult questions of fact or impairing the security of titles and of real property financing." *Id.*

In formulating this new legislation, "two factors should be controlling: first, whether the transaction manifested an intention to waive the statute or not to plead it, and second whether the transaction expressing such intent is sufficiently evidenced." *Id.* at 1876. The Commission concluded that an express waiver of the statutory bar would meet the first requirement. In addition, "[a]n intention to waive the bar of the statute or the time that has expired is also reasonably to be inferred from <u>an express promise to pay the mortgage debt</u>, made after the accrual of a right of action to foreclose the mortgage." *Id.* (emphasis added).

This history demonstrates that the legislature, in enacting what is now GOL § 17-105, deliberately abandoned the previous rule that a mortgage debt could be tolled or revived by an "acknowledgement." Instead, it instituted a bright line rule requiring an express promise to pay the mortgage debt.

3. Council's arguments that § 17-105 does not govern this case are all flawed.

In a vain effort to avoid the impact of § 17-105, Council makes a series of arguments about why it does not apply here. None of these arguments withstands scrutiny.

First, Council completely misstates the legislative history by contending that (1) "the Legislative Revision Commission made clear that the intent was not to eliminate the possibility that an intention to pay a mortgage debt could be inferred by something other than an express promise," and (2) "the intent of Section 17-105

was to permit a writing to acknowledge a mortgage debt so long as the intent to pay could be fairly inferred, and the writing contained nothing that expressly disclaimed the intent to pay." (Br. 20). The exact opposite is true. The Commission specified that nothing less than an express, written promise to pay a mortgage debt would suffice to toll or revive that debt. The new provision proposed by the Commission, which is now § 17-105, was designed to eliminate litigation and uncertainty over whether a mortgage debt remains enforceable based on an "inference" from something less than an express, written promise to pay the debt.

Council selectively cites Professor Bergman's treatise in support of its argument that GOL § 17-105 did not make any significant change to the law regarding the tolling or revival of mortgage debts. (Br. at 21-22). However, it ignores his statements that: (1) "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 17-105 that are controlling." *Bergman on New York Mortgage Foreclosures* § 5.11 [7] [2021]; and (2) under section 17-105, "[i]nsufficient as a writing … is an acknowledgment of the debt which does not also contain an unconditional promise to pay the debt." *Id.* § 5.11[6][a] (emphasis added). Professor Bergman adds that, "[v]ital though most of the recited case law is and remains, reference to statutes on the point is essential. Moreover, the statutes must be read carefully …." *Id.* § 5.11[7].

Next Council argues that §17-105 only applies to an action to recover real property. It reasons that "the express written promise requirement in Section §17-105 was intended to address 'serious impairment of titles to land[']" and so is limited to "cases that affect the ownership of land." (Br. 22). According to Council, where a dispute involves "only a bilateral question regarding the validity of debt, between a debtor and creditor already familiar with the transaction, ... Section 17-105 continues to contemplate the effectiveness of a 'acknowledgement.'" (Br. 23). Thus, it claims, §17-105 does not apply to this action pursuant to RPAPL § 1501(4) to invalidate the WrapAround Note and Mortgage and secure its cancellation and discharge as an encumbrance.

Council's argument is flawed from beginning to end. As discussed above, the Legislative Revision Commission was concerned that "the mere absence of a settled rule [for reviving a barred mortgage or tolling the statute of limitations] may have adverse effect on titles <u>in some cases</u> and seems likely <u>in any case</u> to create difficulties in real estate transactions." 1961 Leg. Doc. No. 65(F), reprinted in *McKinney's 1961 Session Laws of New York* at 1875 (emphasis added). Thus, in order to forestall difficulties in real estate transactions, the rule needed to apply "in any case." Accordingly, § 17-105 is not limited to actions to recover real property. Instead, by its terms, § 17-105 governs the tolling or revival of the limitations period for any mortgage, regardless of the nature of the action. As the Fourth Department

correctly held, it applies to actions under RPAPL § 1501(4) where the dispositive issue is whether the limitations period on a mortgage has expired.[13]

Council contends that § 17-101 governs this case because it applies to all cases "other than an action for the recovery of real property," and this action does not seek to recover real property. However, the exclusion of actions for the recovery of real property dates back to when this provision was section 59 of the Civil Practice Act, long before the enactment of what is now § 17-105. The legislature further reduced the scope of this general provision (§ 17-101) by enacting the newer provision (§ 17-105). Thus the scope of § 17-101 is limited by § 17-105. *See Francois v. Dolan*, 95 N.Y.2d 33, 39 (2000) ("what is special or particular in the later of two statutes supersedes as an exception whatever in the earlier statute is unlimited or general," quoting *East End Trust Co. v. Otten*, 255 N.Y. 283, 286 (1931)). Furthermore, as the Fourth Department ruled, even assuming arguendo that both § 17-101 and § 17-105 might apply to an action under RPAPL § 1501(4), established principles of statutory construction dictate that § 17-105 governs because it is the more specific provision. (R. 364). "[W]henever there is a general and a specific provision in the same statute, the general applies only where the particular enactment

[13] Indeed, even under Council's view that § 17-105 should be limited to "cases that affect the ownership of land" (Br. 22), this would include an action under RPAPL § 1501(4). Whether a mortgage is valid and enforceable typically affects the ownership of the mortgaged property, directly or indirectly. That is certainly the situation in this case.

is inapplicable." *Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 N.Y.3d 1, 9 (2016).

Finally, Council invokes this Court's decision in *Petito v. Piffath* which analyzed the enforceability of a mortgage debt under both § 17-101 and § 17-105, and decisions of lower courts that have analyzed mortgage debts under § 17-101 instead of § 17-105. But, as the Fourth Department explained, *Petito* did not have occasion to decide the threshold issue of whether § 17-101 applies to mortgage debt since it had not been raised by the parties' briefs. Nor was this threshold addressed and decided in any of the other cases cited by Council. Those courts (or the litigants who framed the issue for them) may have taken "a cursory look" at § 17-101 and been led "to the erroneous conclusion that [it is] applicable to mortgage foreclosure." *Bergman on New York Mortgage Foreclosures* § 5.11[7].[14]

The Fourth Department is the first appellate court to explicitly address whether § 17-105 or § 17-101 governs mortgage debts and, after a thorough examination of the issue, it correctly concluded that § 17-105 governs them. Notably, the First Department promptly followed the Fourth Department's decision. *See U.S. Bank, N.A. v. Caruana*, 188 A.D.3d 511 (1st Dept. 2020).

[14] Further, in most or all of these cases, it made no difference to the outcome whether the analysis was performed under the more demanding standard of § 17-105 or the less demanding standard of § 17-101. *Petito* is one such case.

For these reasons, all of Council's arguments fail. The conclusion is inescapable that § 17-105 governs the tolling or revival of all mortgage debts, including the debt in this case.

B. The Partnership's Financial Statements And Tax Returns Do Not Toll The Limitations Period.

1. The financial statements and tax returns to not promise to pay the mortgage debt.

The Fourth Department ruled that neither the Partnership's annual financial statements nor its federal tax returns satisfy the requirements of GOL § 17-105 because neither constitutes an express promise to pay the mortgage debt: the financial statements merely list the mortgage as a liability, and the tax returns merely reflect that the Partnership had unspecified nonrecourse loans on its balance sheets. (R. 365). Council does not challenge this ruling.

2. The financial statements and tax returns do not constitute an acknowledgement of the mortgage debt.

Council instead argues that the financial statements and tax returns suffice to constitute an acknowledgement of the mortgage debt. But, under § 17-105, an acknowledgement is not enough to revive the debt. Furthermore, the Partnership's financial statements and tax returns fail to acknowledge the mortgage debt in a manner sufficient to satisfy § 17-101 even were it applicable here. Contrary to Council's contention, courts have not found that a debtor acknowledges, and thereby revives, a debt simply by carrying the debt on its books or its tax returns. *See Skiadas*

v. Terovolas, 271 A.D.2d 521 (2d Dept. 2000) ("The mere fact that the debt was carried on the defendants' books and tax returns would not, in and of itself, constitute the required acknowledgment."); *Estate of Vengroski v. Garden Inn*, 114 A.D.2d 927, 928 (2d Dept. 1985) (same); *Artisan Stainless Specialties, Inc. v. Broadway Equities*, 294 A.D.2d 385, 386 (2d Dept. 2002) (tax return did not acknowledge debt); *Curtiss-Wright Corp. v. Intercontinent Corp.*, 277 A.D. 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, courts have concluded that financial statements and tax returns alone are insufficient to restart the statute of limitations." *Moore v. Candlewood Holdings, Inc.*, 714 F.Supp.2d 406, 410 (E.D.N.Y. 2010) (emphasis in the original).[15]

Council cites three decisions in support of its argument that the Partnership's financial statements suffice to acknowledge the mortgage debt, but the Supreme Court distinguished two of them and correctly declined to follow the third. The first decision, *Chase Manhattan Bank v. Polimeni*, 258 A.D.2d 361 (1st Dept. 1999), held that the defendant's personal financial statement, which listed his debts to plaintiff,

[15] Council's argument that, by filling out Schedule L of its federal tax return, a partnership thereby tolls or revives the limitations period on all the debts referenced therein would effectively eliminate the statute of limitations on partnership debts in New York.

constituted an acknowledgement where the defendant authorized his secretary to sign a transmittal letter covering the financial statement and to send those documents to plaintiff. The Supreme Court explained that "[i]t was the debtor's formal transmission of the financial statement to the creditor, not the statement by itself, that constituted the acknowledgement." (R. 12). Here, in contrast, the financial statements were prepared by the Partnership for internal use -- the Partnership Agreement requires the general partner to prepare an annual statement and distribute it to the limited partners. Council, as the general partner, received a copy. But the statements were never transmitted to Council, as the creditor, for the purpose of acknowledging the mortgage debt.[16]

The second decision, *In re Meyrowitz' Estate*, 114 N.Y.S.2d 541 (N.Y. Cty. Surr. Ct. 1952), held that the inclusion in the corporate balance sheets of debts owed to the corporation by its president and controlling stockholder constituted an acknowledgement by the president. The balance sheets at issue were those of the creditor rather than those of the debtor. The Supreme Court noted that these were "unusual facts" and the rationale for the decision was that, "'[i]n the manner in which

[16] The Supreme Court explained that "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." (R. 13). But "Council owes 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." (*Id.*, citing *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 973-74 (2d Cir. 1989)). "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." (R. 14).

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 [of the creditor].'" (R. 12, quoting 114 N.Y.S.2d at 547). In contrast, the court found that "[t]he facts here present the opposite situation," (R. 12), i.e., there was no need for Council to rely on the financial statements of the Partnership to acknowledge the continued existence of the debt because it could have obtained a formal extension of the debt from the Partnership whenever it wanted.

The final decision is *Clarkson Co. Ltd. v. Shaheen*, 533 F.Supp. 905, 932 (S.D.N.Y. 1982). The Supreme Court ruled that, "to the extent this federal decision concludes that merely carrying a debt on a debtor's books constitutes an acknowledgement, this Court does not follow it, because it is at odds with prior and subsequent New York appellate decisions." (R. 13).

Thus, even were § 17-101 applicable here, the Partnership's financial statements and tax returns fail to constitute an acknowledgement of the WrapAround Note and Mortgage sufficient to toll or revive that debt.

In addition, the Partnership's financial statements are not "signed by the party to be charged," as required by § 17-101. Indeed, the statements are not signed by anyone. Painting with a broad brush, Council argues that the statements were "signed by the accountants who were directed by the Partnership to prepare them."

(Br. 25). But the accountants signed only the Independent Auditors' Reports, not the financial statements, themselves. This does not suffice. Nor would it suffice even if they had signed the financial statements because the outside accountants are not "the party to be charged." *See Shelley v. Dixon Equities*, 300 A.D.2d 566, 567 (2d Dept. 2002) (financial records prepared by accountant, and not certified or signed by a principal of the debtor, were not an acknowledgement of a debt); *20 Plaza Housing Corp. v. 20 Plaza East Realty*, 37 Misc.3d 601, 950 N.Y.S.2d 871, 874 (N.Y. Cty. 2012) (annual reports prepared by accountant and not signed by defendant were not an acknowledgement of a debt).

C. Council's Appeal To Sympathy Is Unavailing.

Council's arguments were correctly rejected by both the Supreme Court and the Appellate Division. Council's repeated assertion that this Court should apply "ordinary business understanding" and "rules of common sense" to adjudicate this case (Br. 11, 13, 24, 28) is an implicit admission that a straightforward application of the law to the facts does not produce the result it seeks. Hoping to elicit the Court's sympathy, Council laments that a ruling against it would "produc[e] an unexpected windfall to the Limited Partners and an undeserved benefit no party ever anticipated they might obtain." (Br. 11). However, this is the result whenever a time-barred mortgage is cancelled and discharged pursuant to RPAPL § 1501(4).

Council's appeal to sympathy is misguided and unavailing. A statute of

limitations "serve[s] the ... objectives of finality, certainty and predictability" and "expresses a societal interest or public policy of giving repose to human affairs." *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 130 n. 6 (2019) (citations omitted). It reflects a legislative "determination that the interests of an occasional claimant [a]re subordinate to society's interest in repose." *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 218 (1963).

The legislature, in CPLR 201, has forbidden courts from extending limitations periods and so they are "not subject to a discretionary judicial extension." *Lubonty v. U.S. Bank N. A.*, 34 N.Y.3d 250, 261 n. 8 (2019) (emphasis in original). Further, this Court has repeatedly recognized the importance of certainty and predictability in cases involving real property and "has emphasized the need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial relationships." *Freedom Mortgage Corp. v. Engel*, --- N.Y.3d ----, 2021 WL 623869, at *1 (Feb. 18, 2021). Council's "windfall" argument flies in the face of these governing principles.

CONCLUSION

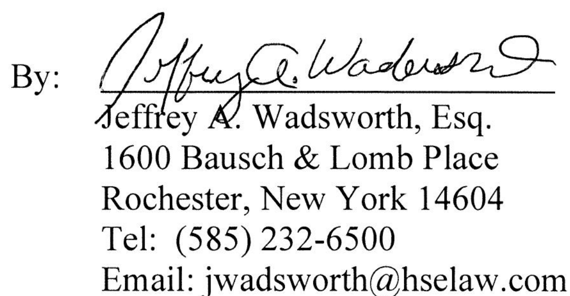
Because this case involves a mortgage debt, the tolling of the statute of limitations is governed by GOL § 17-105. Because neither the Partnership's financial statements nor its tax returns constitute an express promise to pay the debt, the limitations period was not tolled and the mortgage debt became unenforceable

in 2018. Accordingly, the WrapAround Note and Mortgage was properly cancelled and discharged pursuant to RPAPL § 1501(4). The Fourth Department's decision is sound. It should be affirmed.

Dated: June 2, 2021
Rochester, New York

Respectfully submitted,

HARTER SECREST & EMERY LLP

By: 

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