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To be Argued by:
WILLIAM E. BRUECKNER, ESQ.
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New York Supreme Court

Appellate Division—Fourth Department

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

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

Docket No.: CA 19-01672

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT:

As explained in the parties' initial briefs, this appeal arises from the parties' cross-motions for summary judgment with respect to the enforceability of a WrapAround Note and Mortgage executed by Respondent Batavia Townhouses, Ltd. (the "Partnership") in favor of Appellant Council of Churches Housing Development Fund, Inc. (the "Churches").[1]

Measured under standards accepted by this State's jurisprudence for more than 50 years, the Partnership's obligations under the WrapAround Note and Mortgage should be found to be enforceable, even though the Churches chose not to insist on payments before February 2019, because those Partnership obligations were annually reaffirmed in writings delivered to its creditor, the Churches, and because the Partnership, in good faith, ultimately made partial payments on that obligation.

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[1] The Churches cannot explain Respondents' petty contention that the Churches do "not have any church or clergy members." *Respondents' Brief at 3 n.1*. In this regard, the facts are undisputed, and Respondents are simply wrong. Appellant is a not-for-profit corporation formed by a group of Batavia area churches: its board members are all volunteers from those congregations. (R. 68, ¶5).

The Partnership's two limited partners (the "Limited Partners") contend that the writings and payments were insufficient to reaffirm the debt, and the obligations should not be enforceable.

ARGUMENT:

I.

THIS COURT'S REVIEW IS DE NOVO AND PLENARY.

Throughout their brief, Respondents repeatedly support their arguments by reference to the decision of Supreme Court Justice Timothy Walker. This Court should give no weight to these arguments, or even to Justice Walker's decision, as that decision relates to an issue of law.

This Court reviews Judge Walker's decision *de novo*, and has plenary jurisdiction, as it is "vested with the same power and discretion as Special Term." *Brady v. Ottaway Newspapers, Inc.*, 63 N.Y.2d 1031, 1032 (1984). *See,* CPLR 5501; *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278 (1st Dep't. 2004) (*de novo* standard applies to determinations made as a matter of law); *Gregoris Motors, Inc., v. Nissan Motor Corp. in USA*, 80 A.D.2d 631, at 632 (2d Dep't. 1981) (in reviewing motion for summary judgment, question of law may be appropriately decided by appellate court), *aff'd.*, 54 N.Y.2d 634 (1981). In

its review, this Court has comprehensive authority to reconsider the issues determined by Judge Walker, and is even empowered to reach issues that he did not. *HGCD Retail Services, LLC, v. 44-45 Broadway Realty Co.*, 37 A.D.3d 43, 51 (1st Dep't. 2006) (with regard to questions of law, Appellate Division properly may search the record and grant summary judgment even when issues were not argued below); *accord, Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 110 (1984) (Appellate Division has authority to grant summary judgment even in absence of decision on the issue by special term).

II.

RESPONDENTS' DEBT REAFFIRMATION ARGUMENTS ASK THIS COURT TO IMPLICITLY OVERRULE 50 YEARS OF JURISPRUDENCE.

After the enactment of General Obligations Law §17-105 in 1963, the courts in New York have regularly and often analyzed a mortgage debtor's reaffirmation of a mortgage obligation under the four-part test for an acknowledgement. See, *Appellant's Initial Brief*, at 18 (describing the four-part test: a writing; acknowledging the debt in no way inconsistent with an intent to pay; signed on the debtor's behalf, and delivered to the creditor). Those writings are to be construed in light of

"ordinary business understanding" and "rules of common sense." *See* *Appellant's Initial Brief*, at 14 – 15.

In the 56 years since Section 17-105 was adopted, the case reporters are replete with cases applying the four-part test to mortgage obligations. *See, e.g.,* *Comerica Bank, N.A. v. Benedict*, 39 A.D.3d 456 (2d Dep't. 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, 483 - 84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt); *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); *Karpa Realty Group, LLC, v. Deutsche Bank National Trust Company*, 164 A.D.3d 886 (2d Dep't. 2018) (court applies GOL §17-101 in mortgagor's action to declare mortgage unenforceable as untimely); *Maidman Family Parking, L.P., v. Wallace Industries, Inc.*, 145 A.D.3d 1165, 1166 (3d Dep't. 2016) (in an action on note and mortgage, court extends limitation period based on "a writing … signed, recogniz[ing] an

existing debt and contain[ing] nothing inconsistent with an intention on the debtor's part to pay it"); _US Bank NA v. Martin_, 144 A.D.3d 891 (2d Dept. 2016) (same); _Yadegar v. Deutsche Bank National Trust Company_, 164 A.D.3d 945 (2d Dep't. 2018) (same); _Sharova v. Wells Fargo Bank_, 62 Misc.3d 925, 937 (Sup. Court Kings County, 2019) (same); _Lynford v. Williams_, 34 A.D.3d 761 (2d Dep't. 2006); _Sichol v. Crocker_, 177 A.D.2d 842 (3d Dept. 1991) (analyzing acknowledgement of mortgage obligation, but finding that inferred promise to pay was not "unconditional").

Respondents urge this Court to disregard that half-century body of law, suggesting that all those cases are a result of only "a cursory look" and that "their analyses were flawed." _Respondents' Brief_, at 17. This, of course, merely evades the jurisprudence because they cannot overcome it.

For all the reasons explained in the Churches' initial brief, the Partnership reaffirmed the liability memorialized in the WrapAround Note and Mortgage by its annual inclusion of that liability in its audited financial statements, and in its tax returns, well beyond March 3, 2012.[2]

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[2] The cases establish that reaffirmation can either extend or reanimate the statute of limitation, because each acknowledgement "start(s) the statute of limitations running anew". _Scheuer v. Scheuer_, 308 N.Y. 447, 450 – 51 (1955); _Lynford v. Williams_, 34 A.D.3d 761, 762 (2d Dep't. 2006) (acknowledgment tolls

Those audited financial statements and tax returns satisfy the well-established and widely-accepted four-part test for a reaffirmation, particularly when they are interpreted in in light of "ordinary business understanding" and "rules of common sense." See *Appellant's Initial Brief*, at 14 – 15.

Respondents distort Section 17-105's legislative history by focusing on the Legislative Commission's recitation of the most obvious instance where a waiver of the statute of limitation can occur: where an express agreement says so. 1961 Legislative Document Number 65(F) (hereafter the "Legislative Document"), reprinted in *McKinney's 1961 Session Laws of New York* 1873, 1876. But in doing so, Respondents ignore that the Legislative Commission did not stop there. It cited an "express agreement" as a non-exclusive example of a transaction where the intent to waive the limitation period is "sufficiently evidenced." *Id*. However, the Legislative Commission did not rule out the possibility that other transactions "sufficiently evidence" an intent to waive the limitation

statute of limitation). Because the Partnership reaffirmed its obligations under the WrapAround Note and Mortgage in its annual financial statements and tax returns, it extended the statute of limitation each year, and the limitation period never expired.

period, and went on to recognize that the intent can be "implied" and "inferred." *Id*.

New York's jurisprudence 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. 526, 528 - 29 (1865); *George Tsunis Real Estate, Inc., v. Benedict,* 116 A.D.3d 1002 (2d Dep't. 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").

Respondents contend that, in this case, the relevant financial documents were not suitably "signed" on behalf of the Partnership. They rely on Shelley v. Dixon Equities, a case patently distinguishable from this dispute. *Shelley v. Dixon Equities*, 300 A.D.2d 566 (2d Dep't. 2002). In Shelley, the document containing the purported acknowledgment was a reconstruction of the debtor's financial records prepared by and signed

by an accountant representing the creditor, not the debtor. *Id.*, 567. Here, the auditors who prepared and signed the Partnership's financial statement each year were acting on behalf of the Partnership, as the debtor, not on behalf of the Churches, as creditor. See, e.g. *R. 100* (auditors' reports and financial statements required under Section 14.2 of the Partnership Agreement); *R. 131, 145, 159, 173, 187, 201* (auditors' reports addressed to auditors' client, the Partnership.)

Further, there can be no question that the Partnership's Executive Director signed the Partnership's tax returns, and this Court should not disregard those returns in its search of the record. *See*, *HGCD Retail Services,* 37 A.D.3d at 54 (this Court may search the record and award summary judgment).

The Limited Partners' feigned confusion regarding the import of the tax returns' reference to "all non-recourse loans," (*Respondents' Brief at 24 - 25*), should give this Court no pause. In this case, as the Limited Partners well know, the Partnership is obligated with respect to only one non-recourse loan: the loan owed by the Partnership to the Churches. The tax returns' reference had no meaning other than to that obligation, and the loan balance shown on the tax return each year corresponded

exactly to the balance reflected on the same year's audited financial report (which explicitly referred to the WrapAround Note and Mortgage).

The Limited Partners' overwrought fretting - that the statute of limitations will be eliminated in the partnership setting if the Court accepts these tax returns as reaffirmations of the Partnership's debt to the Churches – is another red herring. *Id., at 25.* It is precisely because these returns set out the non-recourse loan as a liability that the Court should extend the statute of limitations in this case, without concern. The Partnership's inclusion of the obligation on its tax returns after March 3, 2012, and even after March 3, 2018,[3] is a clear indication that it still regarded the WrapAround Note and Mortgage as an obligation it intended to repay, and NOT to assert the statute of limitation as a ground to refuse repayment. Any partnership sharing the Limited Partners' worries about the statute of limitation can avoid such an extension by simply reflecting its intent on the appropriate return, excluding any liability for a debt it considers expired, and thereby declining to reaffirm the debt in its return.[4]

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[3] See note 2, supra.

[4] Doubtlessly, in 2018 and again this year, the Limited Partners accepted the characterization of the ongoing obligation, the losses that it generated, and the

The extent to which Respondents ignore that which they cannot defeat speaks volumes. When the parties' conduct is measured under the appropriate standard, which applies ordinary business understanding and rules of common sense (see *Appellant's Initial Brief*, at 14 – 15), Judge Walker's Decision must be reversed, and this Court should determine that the WrapAround Note and Mortgage is valid and enforceable.

III.

THE CHURCHES' PARTIAL PAYMENTS WERE NEITHER NEGLIGENT NOR IN BAD FAITH

In contending that the Churches violated its fiduciary duty to the Limited Partners in electing to resume partial payments under the WrapAround Note and Mortgage, Respondents fail to take into consideration their own conduct and allegations at the time, and ignore relevant and determinative circumstances.

The controlling section of the parties' Partnership Agreement is Section 8.3. That section shields the Churches, as general partners, from liability for breach of fiduciary duty where its conduct is taken "in good

tax benefits derived from it, on their own tax returns. Their acceptance of the tax benefits reinforces the Partnership's ongoing obligation to repay the WrapAround Note and Mortgage.

faith," and "such course of conduct did not constitute negligence of the General Partners." *(R. 93, Section 8.3).*

The Limited Partners argue that the Churches were negligent in reinstating partial payments on the WrapAround Note and Mortgage in February 2019, "in the midst of litigation over whether it should be removed as a general partner … ." *Respondents' Brief, at 25.* They charge that a general partner has "no right to make a payment where (it has) knowledge of such facts as would put a prudent man on inquiry." *Id., at 28 (citation omitted).* And the Limited Partners reach so far as to accuse the Churches of bad faith, observing that "a partner who engages in self-dealing has the burden to prove the fairness of his actions." *Id.*, citing *Marmac Inv. Co., Inc., v. Wolpe*, 759 A.2d 620, 625 n.4 (D.C. 2000).

The Limited Partners' accusations contend that it is impossible for the Churches to demonstrate their reasonableness or fairness under these circumstances. However, the Limited Partners' fail to disclose to this Court all of the circumstances surrounding the Churches' decision to begin making partial payments.

In early 2019, when the partial payments were undertaken, the Churches and the Limited Partners were, indeed, embroiled in litigation

over whether the Churches should be removed as a general partner. In that federal court litigation – contrary to its argument on this appeal - the Limited Partners alleged that the Churches breached their fiduciary duty to the Partnership by not paying down the mortgage obligation and "effectively siphoned the equity interest of the limited partners." (*See R. 234 - 35, ¶¶15 – 17; R. 325 – 27, ¶¶ 8 – 10).*

Respondents' effort to have it both ways should not be tolerated by this Court. They cannot allege in a federal lawsuit that the Churches breached fiduciary duty by failing to pay the WrapAround Note and Mortgage, and then contend in this lawsuit that that very same conduct is negligent, bad faith, and manifestly unfair.

This Court should uphold the partial repayments as a basis for reaffirmation of the WrapAround Note and Mortgage.

CONCLUSION:

Nearly sixty years of jurisprudence in this State teaches that the reaffirmation of a mortgage obligation should be measured against a four-part test that looks for, and accepts, an inferred promise to repay the obligation. The inferred promises are to be interpreted by "ordinary business understanding" and "rules of common sense," and they are

recognized by the legislative history of General Obligations Law §17-105, as long as they are "sufficiently evidenced." Here, the inferred promise to repay the WrapAround Note and Mortgage is sufficiently evidenced in writings delivered annually to the Churches by the Partnership. Respondents' arguments - that only express promises to repay are adequate to reaffirm a mortgage obligation – fly in the face of this jurisprudence and legislative history, and should be rejected.

The parties' Partnership Agreement protects the Churches, as the Partnership's general partner, from liability for breach of fiduciary duty arising from conduct that is free of negligence and bad faith. At the time the Partnership undertook partial repayments of the WrapAround Note and Mortgage, the Limited Partners had brought a claim in federal court seeking the removal of the Churches as the Partnership's general partner, and based that claim on accusations that the Churches breached its fiduciary duty by failing to make payments on the WrapAround Note and Mortgage. It is manifest that the Limited Partners' contrary contention here – that the repayments are negligent and in bad faith – must not prevail.

This Court should reverse the Decision and Order below, and instead grant summary judgment to Appellants, finding the WrapAround Note and Mortgage to be valid and enforceable obligations of the Partnership.

DATED: 2 December 2019

Respectfully submitted,
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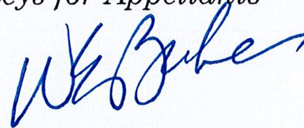

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