APL-2020-00138
New York County Clerk's Index Nos. 850034/15, 850294/17

Court of Appeals
of the
State of New York

WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-5, ASSET-BACKED CERTIFICATES, SERIES 2007-5,

Plaintiff-Appellant,

—against—

DONNA FERRATO,

Defendant-Respondent,

—and—

THE SIMON & MILLS BUILDING CONDOMINIUM BOARD; CAPITAL ONE BANK, (USA) N.A.; SUSAN GILMER; MATTHEW GRINNELL; MIDLAND FUNDING, LLC, and JOHN DOE AND JANE DOE #1 through #7,

Defendants.

(Caption continued on inside cover)

BRIEF FOR AMICUS CURIAE FRANCIS M. CAESAR, ESQ. IN SUPPORT OF DEFENDANT-RESPONDENT

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WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-5, ASSET-BACKED CERTIFICATES, SERTES 2007-5,

Plaintiff-Appellant,

—against—

DONNA FERRATO,

Defendant-Respondent,

—and—

CAPITAL ONE BANK (USA) N.A., MATTHEW GRINNELL, SUSAN GILMER, MIDLAND FUNDING LLC, BOARD OF MANAGERS OF THE SIMON & MILLS BUILDING CONDOMINIUM BOARD, AND "JOHN DOE #1" through "JOHN DOE #12",

Defendants.

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus Curiae Francis M. Caesar, Esq. ("Amicus Curiae") is a concerned citizen and an attorney admitted to practice law in the State of New York. Amicus Curiae has written and published opinion articles in the *New York Law Journal* that have discussed problematic legal issues that have arisen in recent quiet title and foreclosure cases in this State. Amicus Curiae was granted leave to file an *amicus curiae* brief in the pending appeal before this Court captioned *Juan Vargas v. Deutsche Bank National Trust Company as Trustee etc., APL-2020-00026.* Amicus Curiae is also a self-represented litigant in matters pending in the Second Department.

STATEMENT PURSUANT TO 22 NYCRR §500.23(a)(4)

No party or party's counsel in this case has contributed to the content of this amicus curiae brief or participated in the preparation in any manner; no party or party's counsel in this case has contributed money that was intended to fund the preparation or submission of this brief; and no person or entity, other than Amicus Curiae, contributed money that was intended to fund preparation or submission of this brief.

QUESTION PRESENTED

Based on the arguments presented in the brief of plaintiff-appellant Wells Fargo National Association as Trustee etc. ("Appellant-Trustee Wells Fargo"), Amicus Curiae argues the following question is presented on this appeal:

Question: Did the verified 2009 foreclosure summons and complaint (R 82-148 [1]) serve as proof that Appellant-Trustee Wells Fargo duly elected to accelerate Respondent Donna Ferrato's mortgage loan and commence the accrual of the limitations period set forth in CPLR §213(4)?

Answer: Yes. Not only is the 2009 foreclosure summons and complaint (R 82-148) proof of Appellant-Trustee Wells Fargo's election of remedy, the verified 2008 summons and complaint (R 35-81) is earlier proof of Appellant-Trustee Wells Fargo's election.

PRELIMINARY STATEMENT

This is a contract dispute that requires interpretation of the loan documents underlying this appeal, especially the acceleration covenant in the mortgage (Section 21, R 54-69). Yet none of the orders or decisions from the trial and appellate courts refer to the express terms of said loan documents to resolve this dispute. This is a common mistake in residential foreclosure and quiet title actions

1. "R" refers to the Record on Appeal, filed October 13, 2020, by Appellant-Trustee Wells Fargo.

heard in this State: the failure to read and interpret the unambiguous loan terms in residential mortgage disputes. This Court must correct this error.

A. THE ORDER ON APPEAL.

In an order entered May 28, 2020 (R 523-525), the First Department: (i) unanimously affirmed the order of the Supreme Court, New York County (Judith N. McMahon, J.), entered March 6, 2018 (R 7-9), which, to the extent appealed from, denied Appellant-Trustee Wells Fargo's motion to revoke acceleration of a mortgage loan made to Respondent Donna Ferrato; and (ii) unanimously reversed the order of the same court and Justice, entered August 7, 2018 (R 14-20), which denied Respondent Ferrato's motion to dismiss Appellant-Trustee Wells Fargo's foreclosure action on the basis of CPLR §3211(a)(4) and CPLR §3211(a)(5).

In an order entered August 27, 2020 (R 528-529), upon motion by Appellant-Trustee Wells Fargo for leave to appeal to the Court of Appeals from the order of the First Department entered May 28, 2020 (R 523-525), the First Department granted the motion and, pursuant to CPLR §5713, certified the following question of law: "Was the order of this Court, which affirmed the order of the Supreme Court, entered March 6, 2018 and reversed the order of the Supreme Court, entered August 7, 2018, properly made?"

B. THE ORDER ON APPEAL WAS PROPERLY MADE.

Amicus Curiae argues the First Department's order entered May 28, 2020 (R 523-525) was properly made.

On this appeal, Appellant-Trustee Wells Fargo seeks to avoid the consequences of the State's statute of limitations by revoking the Appellant-Trustee Wells Fargo's acceleration of the underlying mortgage loan. Appellant-Trustee Wells Fargo contends, contrary to the record, that it has the contractual right to revoke the acceleration; alternatively, Appellant-Trustee Wells Fargo argues that the discontinuance of a foreclosure action is a revocation of the acceleration pleaded in the complaint.

However, there is no contractual provision in the mortgage (R 54-69), note (R 251-256) or any other loan document in the record, that grants Appellant-Trustee Wells Fargo the right to revoke its election of acceleration. In fact, Appellant-Trustee Wells Fargo contractually waived its entitlement to revoke its acceleration. (Section 11, Mortgage, R 54-69.)

Furthermore, any contention by Appellant-Trustee Wells Fargo that the discontinuance of a foreclosure action could be deemed a revocation of an election of the remedy is contradicted by New York Court of Appeals precedents. (See e.g., *Matter of Garver*, 176 N.Y. 386, 394, 68 N.E. 667 (1903).) The doctrine of election of remedies, as defined in Court of Appeals precedents, is a waiver doctrine (see

e.g., *Morris v. Rexford*, 18 N.Y. 552, 557, 1859 WL 8240 (1859)); once the Appellant-Trustee Wells Fargo duly made its election of acceleration, it cannot unilaterally undo its election – absent an express contractual provision.

C. THE ARGUMENT PRESENTED HEREIN.

Amicus Curiae argues herein that this case involves an interplay between well-settled contract construction principles and the common law doctrine of election of remedies (a waiver doctrine in New York). The lower courts in this action failed to reference or apply either — notwithstanding a plethora of Court of Appeals precedents that mandate such application.

POINT I:

THE LOWER COURTS FAILED TO APPLY WELL-SETTLED CONTRACT CONSTRUCTION PRINCIPLES OR THE DOCTRINE OF ELECTION OF REMEDIES TO RESOLVE THE ISSUES IN THIS CASE

What a contract says matters, even in residential mortgage disputes.

In commercial and residential mortgages, acceleration is a contractual means to convert a term loan into a demand loan. Instead of the debt being payable in installments over time, the lender has the right, on a certain contractually identified trigger, to make the debt payable immediately. By way of example, the trigger could be the lender's election upon the debtor's default (see e.g., Real Property Law §254(2)); the lender's insecurity (see e.g., NY-UCC §1-309); or the

lender sending to the debtor a specialized "notice of acceleration" (see e.g., the Fannie Mae New York form mortgage, §§20, 22).

This Court has recognized that acceleration clauses are quite common in commercial transactions and are generally enforced according to their terms. (See e.g., *Fifty States Mgt. Corp. v Pioneer Auto Parks,* 46 N.Y.2d 573, 577, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979); see also *Conditioner Leasing Corp. v Sternmor Realty Corp.,* 17 N.Y.2d 1, 4, 213 N.E.2d 884, 266 N.Y.S.2d 801 (1966).) There is no cause to avoid this principle in residential mortgage transactions.

Furthermore, it is axiomatic in this State that "[w]here the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole," *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244, 21 N.E.3d 1000, 997 N.Y.S.2d 339 (2014). Indeed, "[c]onstruction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms," *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44, 865 N.E.2d 1210 (2007); see also *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 (1995). Again, there is no cause to avoid this principle in residential mortgage disputes.

In deciding this residential mortgage case, however, the lower courts failed to make any reference to the express terms of the loan documents in the record. This was error because the unambiguous terms of the loan documents in the record conclusively resolve the dispute underlying this appeal.

A. THE MORTGAGEE'S CONTRACTUAL RIGHT TO ACCELERATE, WITHOUT NOTICE, UPON THE DEBTOR'S DEFAULT.

The note (R 251-256) underlying this appeal is dated January 25, 2007 and provides for monthly installment payments with a maturity date of February 1, 2037. (Para. 3(A), R 251). The note (R 251-256) defines a default as follows:

> "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default. If I am in default, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all interest that I owe on that amount, together with any other charges that I owe under this Note or the Security Agreement, except as otherwise required by applicable law."

Note, Para. 7(B), R 252.

Section 11 of the note (R 251-256) specifically refers to the mortgage to set forth the mortgagee's remedies in the event of the mortgagor's default:

> "In addition to the protection given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the 'Security Instrument'), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make

> immediate payment in full of all amounts I owe under this this Note."

Note, Para. 11, R 253.

Section 21 of the mortgage (R 54-69), which is captioned "Lender's Rights if Borrower Fails to Keep Promises and Agreements," reads as follows:

> "Except as provided in Paragraph 17, above, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Leader may do this without making any further demand for payment. This requirement is called 'immediate payment in full.'
>
> "If any installment under the Note or note, secured hereby is not paid when due, or if Borrower is in default under any other mortgage or other Instrument secured by the Property, all sums secured by this Security Instrument and accrued interest thereon *shall at once become due and payable at the option of the Lender without prior notice,* except as otherwise required by applicable law, and regardless of any prior forbearance. In such event, Lender, at its option, and subject to applicable law, may then or thereafter invoke the power of sale and/or any other remedies or take any other actions permitted by applicable law.
>
> "If Lender requires immediate payment in full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale Lender or another person may acquire the Property. This is known as "foreclosure and sale." In any lawsuit for foreclosure and sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured." *[**Emphasis added.**]*

Mortgage, Section 21, R 62.

1. The Misquoted Acceleration Covenant in the Note is a Nullity.

Paragraph 11 of the note (R 251-256) misquotes the acceleration covenant from the mortgage (R 54-69) actually signed by Respondent Ferrato as mortgagor. The misquoted acceleration covenant in Paragraph 11 of the note (R 251-256) conditions acceleration on a thirty (30) day notice. However, since this is not the acceleration covenant in the mortgage (R 54-69) actually signed by Respondent Ferrato, this Paragraph 11 must be deemed a nullity.

2. The Self-Captioned "Loan Modification Agreement" Does Not Modify the Note or Mortgage.

The record contains a self-captioned Loan Modification Agreement (R-279-282), dated October 1, 2008, between Respondent Ferrato and an entity called American Home Mortgage Servicing, Inc. "as servicer." Although said Loan Modification Agreement (R 279-282) contains a representation that American Home Mortgage Servicing, Inc. "has the authority to enter into this Agreement on behalf of the Note Holder" (Para. 5(d), R 279-282), there is neither a written acknowledgement of said agreement by Appellant-Trustee Wells Fargo nor a power of attorney in the record to prove said authority. "The declarations of an alleged agent may not be shown for the purpose of proving the fact of agency," *Lexow &*

Jenkins v. Hertz Commercial Leasing Corp., 122 A.D.2d 25, 26, 504 N.Y.S.2d 192 (2nd Dept. 1986). Indeed, the mortgage (R 54-69) specifically provides:

> "This Security Instrument may be modified or extended *only by* an agreement in writing *signed by the Borrower and Lender or lawful successors in interest.*" *[**Emphasis added.**]*

Mortgage, Section 26, R 62.

At best, the Loan Modification Agreement (R 279-282) is a forbearance agreement, enforceable against the identified loan servicer. It is not an effective amendment of the loan documents. Nevertheless, estoppel principles may apply; Respondent Ferrato did sign the Loan Modification Agreement and Appellant-Trustee Wells Fargo subsequently ratified the Loan Modification Agreement by commencing the 2009 foreclosure action (R 82-148). [2]

Nevertheless, nothing in the self-captioned Loan Modification Agreement (R 279-282) purports to modify the acceleration provision in the mortgage (Section 21, R 54-69).

B. THE ACCELERATION PROVISION IN THE MORTGAGE IS SIMILAR TO RPL §254(2).

The acceleration covenant at Section 21 of the mortgage (R 54-69) is substantially similar to RPL §254(2) — the statutory acceleration covenant analyzed

2. In the seminal United States Supreme Court case *Robb v. Vos*, 155 US 13, 43, 15 S.Ct. 4, 14, 39 L.Ed. 52 (1894), the Court held that "one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

by this Court in *Albertina v. Rosbro*, 258 N.Y. 472, 477, 180 N.E. 176 (1932). Both RPL §254(2) and Section 21 of the mortgage (R 54-69) provide that the mortgagee, in the event of the mortgagor's default, has the optional remedy to accelerate the maturity date of the loan to make the whole sum of the mortgage debt due and payable immediately. Furthermore, both RPL §254(2) and Section 21 of the mortgage (R 54-69) do not require the mortgagee to give notice to the mortgagor, or to make a demand, in order to exercise the option of acceleration. Therefore, as provided in *Albertina*, the law will only require proof of some "overt act" by the mortgagee to demonstrate that said mortgagee made its election of remedy. (*Albertina*, 258 N.Y. at 476.) Upon said election, the cause of action for full foreclosure, and the applicable statute of limitation (CPLR §213(4)), accrues in accordance with CPLR §203(a). [3]

C. REQUIREMENT FOR AN OVERT ACT OF ELECTION.

The conclusion in *Albertina* that the law requires an "overt act" of election must not be conflated with the requirement that procedurally correct

3. The acceleration clause in the mortgage underlying this appeal (R 54-69) is starkly different than the acceleration clause in the Fannie Mae New York form mortgage – the mortgage underlying each of the currently pending appeals before this Court captioned: *Freedom Mortgage v. Engel,* APL-2019-00114; *Ditech Financial LLC v. Naidu,* APL-2020-00023; and *Vargas v. Deutsche Bank National Trust Company etc.,* APL-2020-00026. The Fannie Mae New York form mortgage triggers accrual of a cause of action for full foreclosure on a demand for an "Immediate Payment in Full." The right to make the demand vests after a minimum thirty (30) day cure period expires, which cure period runs from the date a contractual "notice of acceleration" is sent or delivered to the mortgagor. Hence CPLR §206(a) is the operative accrual statute for said Fannie Mae New York form mortgage.

commencement papers must be filed. First, the Court in *Albertina* made quite clear that the filing of commencement papers was not the exclusive proof of an election. (See *Albertina* 258 N.Y. at 476 ("It is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause").)

Second, the requirement for an "overt act" is a requirement of the doctrine of elections of remedies. As this Court explained:

> An election of remedies presupposes a right to elect (*Henry v. Herrington*, 193 N. Y. 218, 222). It 'is simply what its name imports; a choice, *shown by an overt act,* between two inconsistent rights, either of which may be asserted at the will of the chooser alone' (*Bierce v. Hutchins*, 205 U. S. 340, 346). *[**Emphasis added.**]*

Schenck v. State Line Telephone Co., 238 N.Y. 308, 311, 144 N.E. 592 (1924).

The purpose at law for requiring an "overt act" of election is best explained in a 1939 law review note:

> "Election is something more than the mere mental act of the mortgagee. There must be some manifestation of an intention to exercise the option, and this must be clear and unequivocal. According to some courts, election, when it is not by way of suit, must be followed by an affirmative act in the direction of enforcement. However, the bringing of an action is universally considered a sufficient manifestation of an intention to elect, and this is true even though the action has not been technically commenced by the service of summons." [**Footnotes omitted.**]

Editors, "*Acceleration Clauses in Notes and Mortgages,*" 88 U. Pa. L. Rev. 94, 96 (1939).

Hence, the requirement for an "overt act" acknowledges that, in the spectrum of proof that may be presented to the court, proof of a "mental act" is not enough; "bringing an action" is sufficient; and what lies in between is a triable issue of fact.

D. THE 2008 VERIFIED COMPLAINT IS THE PROOF OF THE "OVERT ACT" OF ELECTION IN THE RECORD.

A review of the record underlying this appeal reveals that the 2008 verified complaint (R 39-75) is the earliest proof of an "overt act" of election by Appellant-Trustee Wells Fargo. In said verified complaint, Appellant-Trustee Wells Fargo pleads at paragraph "ninth":

> "That, plaintiff elects herein to call due the entire amount secured by the mortgagee(s) as more than thirty (30) days have elapsed since the date of default."

2008 Verified Complaint, R-41.

The fact that there were procedural deficiencies with the 2008 verified summons and complaint (R 35-81) is a nonissue in the determination of whether the commencement of said action was sufficient evidence of Appellant-Trustee Wells Fargo's election of acceleration. This Court has made very clear that, when evaluating the commencement of a suit as proof of an overt act of election, it is irrelevant whether the suit was effective or discontinued. For example, in *Conrow v. Little*, this Court held:

> "It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any step to enforce the contract was a conclusive election not to rescind it on account of anything known at the time. After that the option no longer existed, and it is of no consequence whether or not the plaintiffs made their choice effective."

Conrow v. Little, 115 N.Y. 387, 394, 22 N.E. 346 (1889).

Furthermore, in *Terry v. Munger*, this Court held:

> "Any decisive act of the plaintiffs, with knowledge of all the facts, would determine their election in such a case as this. (*Sanger v. Wood*, 3 Johns. Ch. 416, 421.)
>
> "The proof that an action of that nature had been in fact commenced would have been just as conclusive upon the plaintiffs upon the question of election (proof of knowledge of all the facts at that time being given) as would the judgment have been. It was not necessary that a judgment should follow upon the action thus commenced."

Terry v. Munger, 121 N. Y. 161, 167, 24 N.E. 272 (1890).

There is no equivocation in New York Court of Appeals precedents that the act of commencing an action -- not its outcome -- is sufficient proof of an election. As this Court held in *Matter of Garver*:

> "It is, therefore, the settled law of this court that an election of remedies is determined by the commencement of an action, and not by the result of it***."

Matter of Garver, 176 N.Y. at 394.

E. THE DOCTRINE OF ELECTION OF REMEDIES IS A WAIVER DOCTRINE.

Once the election of remedy is made, absent an express contractual right, the election cannot be unilaterally undone to pursue the abandoned alternative remedies. This is the essence of the doctrine of remedies as adopted in this State: once an election has been made, the right to pursue the alternative remedies is waived:

> "These proceedings on the part of the plaintiff amounted plainly to an election of remedies; and if the right of election existed, the effect was to confine him to the remedy which he then preferred and adopted.*** The remedies are not concurrent, and the choice between them once being made, *the right to follow the other is forever gone.**** In peculiar circumstances a party may take either one of these courses, but having rightfully made his choice, *the right to follow the other is extinct and gone*." *[**Emphasis added.**]*

Morris v. Rexford, 18 N.Y. 552, 556-557.

The doctrine of election of remedies has been recognized by this Court as harsh. But, as a waiver doctrine, it is not inherently unfair so long as the party waiving its right does so with both knowledge of its existence and an intention to relinquish it. As this Court explained in *Matter of City of Rochester*:

> "Waiver is usually a matter of intention as indicated by the language or conduct, and knowledge, actual or constructive, of the existence of the right or condition alleged to have been waived is an essential prerequisite to its relinquishment."

Matter of City of Rochester, 208 N.Y. 188, 197, 101 N.E. 875 (1913); see also *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 968, 520 N.E.2d 512 (1988).

As discussed below, it can be inferred that Appellant-Trustee Wells-Fargo had knowledge of its relinquishment by reference to the express terms of the mortgage. (See e.g., Sections 11, 18, R 54-69.)

F. THE MORTGAGEE DID NOT NEGOTIATE THE RIGHT TO REVOKE ACCELERATION AND EXPRESSLY WAIVED THE RIGHT OF REVOCATION.

The original mortgagee of the note (R 251-256) and mortgage (R 54-69) could have negotiated the right for the mortgagee or its successors to revoke an acceleration. But it did not. The time to secure said right was at the bargaining table. (See *Eujoy Realty Corp. v. Van Wagner Communications, LLC*, 22 N.Y.3d 413, 424, 981 N.Y.S.2d 326, 4 N.E.3d 336 (2013) ("Courts will give effect to the contract's language and the parties must live with the consequences of their agreement. If they are dissatisfied, the time to say so is at the bargaining table [**quotation marks and alterations omitted**]"). Appellant-Trustee Wells Fargo cannot expect the Court to reform the mortgage to create said right – especially considering the restraint on the Court's powers imposed by CPLR §201. It is axiomatic under New York law that where the contract terms are unambiguous, the court may not revise the contract. (See e.g., *Graf v. Hope Building Corp.*, 254 N.Y. 1, 4, 171 N.E. 884 (1930) ("The

contract is definite and no reason appears for its reformation by the courts***. We are not at liberty to revise while professing to construe.")

Furthermore, not only did the original mortgagee not negotiate the right to revoke an acceleration, the original mortgagee expressly waived the entitlement of revocation. Section 11 of the mortgage (R 54-69), which is captioned "Continuation of Borrower's Obligations and of Lender's Rights," provides:

> "Even if Lender does not exercise or enforce any right of Lender under this Security Instrument or under the law, Lender will still have all of those rights and may exercise and enforce them in the future."

Section 11, Mortgage (R 60).

Simply, with the 2008 verified summons and complaint (R 35-81), once the Appellant-Trustee Wells Fargo exercised its right to require an immediate payment in full, Appellant-Trustee Wells Fargo continued to have such right even upon a separate election not to enforce said right – e.g., by discontinuing said action.

Ironically, the loan documents give Respondent Ferrato the conditional right to undo the effects of an acceleration – i.e., to revert the mortgage loan into a term loan "as if immediate payment in full had never been required." Section 18 of the mortgage (R 54-69), which is captioned "Borrower's Right to Have Lender's Enforcement of this Security Instrument Discontinued," specifically provides:

> "Even if Lender has required immediate payment in full, I may have the right to have enforcement of this Security Instrument discontinued. I will have this right at any time

> before sale of the Property under any power of sale granted by this Security Instrument or at any time before a judgment has been entered enforcing this Security Instrument***. If I fulfill all of the conditions in this Section 18, then the Note and this Security Instrument will remain in full effect as if immediate payment in full had never been required."

Section 18, Mortgage, R 61.

G. SUMMARY.

The terms of the loan documents underlying this appeal are clear and unambiguous. The original mortgagee did not negotiate the right to revoke its election; indeed, it explicitly waived that right. Furthermore, the application of the doctrine of election remedies proves Appellant-Trustee Wells Fargo did not have the right to revoke its election of acceleration, regardless of its express waiver and failure to negotiate such right.

CONCLUSION

The order on appeal (R 523-525) was properly made. It is "settled law of this court that an election of remedies is determined by the commencement of an action, and not by the result of it," *Matter of Garver*, 176 N.Y. at 394. The 2008 verified summons and complaint (R 35-81) is proof of Appellant-Trustee Wells Fargo's election to accelerate. Neither the discontinuance of said action, nor the self-captioned Loan Modification Agreement (R 279-282), had any effect thereon.

The loan documents in the record do not provide Appellant-Trustee Wells Fargo with the right to revoke its election. Indeed, in Section 11 of the mortgage (R 54-69), Appellant-Trustee Wells Fargo reserved all rights to enforce its rights "in the future;" that is an express waiver of the right to revoke an election. Furthermore, the doctrine of election of remedies proves an election of remedy cannot be undone unilaterally absent a contractual right.

What the contract says matters. This Court must remind the courts of this State that said courts must read and interpret the unambiguous terms of the loan documents to resolve residential foreclosure and quiet title disputes.

Dated: Chappaqua, New York
October 22, 2020

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE (22 NYCRR §500.13(c))

The undersigned, Francis M. Caesar, Esq., hereby certifies that the foregoing amicus curiae brief was prepared on a word-processing system. A proportionally spaced typeface was used, as follows:

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Line Spacing:	Double

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Dated: Chappaqua, New York
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