To Be Argued By:
BRIAN PANTALEO
Time Requested: 15 Minutes

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

Court of Appeals

STATE OF NEW YORK

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—

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

Defendants.

(*Caption continued on inside cover*)

BRIEF FOR PLAINTIFF-APPELLANT

BRIAN PANTALEO
GREENBERG TRAURIG, LLP
Metlife Building, 200 Park Avenue
New York, New York 10166
Telephone: (212) 801-9200
Facsimile: (212) 801-6400

Attorneys for Plaintiff-Appellant

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

Plaintiff-Appellant,

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

Defendants.

CORPORATE DISCLOSURE STATEMENT

Appellant Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-1, Asset-Backed Certificates, Series 2007-1 ("Wells Fargo") is an investor trust whose trustee is Wells Fargo Bank, N.A. Wells Fargo Bank, N.A. is a wholly-owned subsidiary of Wells Fargo & Company, Wells Fargo & Company has no parent corporation, and no publicly held corporation owns 10% or more of Wells Fargo & Company's stock.

STATUS OF RELATED LITIGATION

Under New York Court of Appeals Rule 500.13(a), Wells Fargo states that it is unaware of any litigation related to this appeal other than the prior foreclosure cases identified in the Statement of Case section. Wells Fargo obtained a foreclosure Summary Judgment and order of reference in the 2017 action (Index No. 850294/2017). Wells Fargo withdrew its Motion for an Order Confirming Referee Report and Judgment of Foreclosure and Sale after the First Department's May 28, 2020 Order.

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QUESTIONS PRESENTED

Question #1: A foreclosure lawsuit cannot accelerate a mortgage loan when the plaintiff lacks authority to bring the foreclosure lawsuit. Appellant Wells Fargo's foreclosure complaints in two earlier actions – in 2009 and 2011 – failed to establish its authority to foreclose when they referenced the wrong operative loan documents. Did the complaints in these two earlier foreclosure actions accelerate Respondent Donna Ferrato's mortgage loan and commence the statute of limitations?

Answer: No. As Ferrato argued *twice* to the Supreme Court, "the documents…are incorrect and of no force and effect."

Question #2: To accelerate a loan, a lender must act clearly and unequivocally. Ferrato first executed a loan document with a $900,000 principal balance, and an adjustable 8.3758% interest rate. A year later, Ferrato executed a second loan document changing the terms, with a $960,526.60 principal balance, and a five-year 5% fixed rate. Is a complaint foreclosing upon the first loan document clear notice accelerating the amounts due under the second loan document?

Answer: No. Purporting to accelerate the wrong loan document is not a clear and unequivocal act.

Question #3: In granting a motion to discontinue, can a trial court simultaneously order that a lender did not revoke its acceleration?

Answer: No. Revocation is a lender's contractual right – which it may do with a clear an unequivocal act.

PRELIMINARY STATEMENT

Statutes of limitations prevent plaintiffs from "slumbering on their rights," reduce surprises to defendants, and promote stability to litigants' affairs. For twelve years, and five lawsuits, Respondent Donna Ferrato knew the mortgagee was actively foreclosing upon the defaulted mortgage loan on her multimillion-dollar Tribeca loft. But through a series of defense tactics, Ferrato litigated these foreclosures long enough to manufacture a statute of limitations defense.

For example, in 2008, Ferrato defaulted on her mortgage loan. Appellant Wells Fargo, her mortgagee, filed a foreclosure action to protect its secured interest. Ferrato, a sophisticated borrower with experienced counsel, settled the action by agreeing to a loan modification. After making the minimum payments to be eligible, she immediately defaulted again.

Wells Fargo brought another foreclosure action. It filed actions in 2009, and 2011. Ferrato did not dispute, in either action, that she defaulted on her loan obligation. But she argued that neither foreclosure was valid, because Wells Fargo's complaint did not *reference* the modified loan. Specifically, she claimed that Wells

Fargo "was suing under the wrong instrument." And "the documents upon which plaintiff's Complaint [were] based are incorrect and of no force and effect." The Supreme Court agreed with this analysis, dismissing both cases – holding that Wells Fargo's complaints must identify the modified loan documents to be valid.

Accordingly, Wells Fargo filed another foreclosure in 2015, and sought a default judgment. But Ferrato filed a motion to dismiss, challenging service. In support, she had her cousin sign an affidavit claiming that the process servicer failed to effectuate service. Rejecting this delay tactic, the Supreme Court denied the motion. Ferrato appealed, and that appeal lasted two years. In May 2017, the First Department reversed the Supreme Court, and remanded the case for a traverse hearing.

With this nearly two-year delay now creating statute of limitations implications, Wells Fargo attempted to revoke acceleration. It filed a Motion to Discontinue Action without Prejudice and to Revoke. The Supreme Court discontinued the action, but it held the "acceleration of the subject loan is NOT revoked." Wells Fargo appealed this order.

Later in 2017, it also filed a new foreclosure action. Ferrato again moved to dismiss, arguing the case was time-barred because the 2009, and 2011, actions accelerated the loan. But the Supreme Court – using Ferrato's own earlier claims that these complaints were nullities – held that a foreclosure action filed under the

wrong loan documents cannot invoke the acceleration clause in the correct documents. Ferrato appealed. The First Department consolidated this appeal from the 2017 case with Wells Fargo's appeal in the 2015 case. And, on May 28, 2020, the First Department held that Wells Fargo's prior foreclosure complaints accelerated the loan, but Wells Fargo could not revoke acceleration in 2017.

In sum, Wells Fargo is a mortgagee that consistently and avidly pursued its right to foreclose upon its secured interest. Ferrato, through an array of foreclosure defense tactics – and by taking inconsistent positions in the Supreme Court – prolonged foreclosure litigation until she could raise a statute of limitations defense. If the 2009 and 2011 actions accelerated the correct loan, then Wells Fargo should have been able to proceed in those cases. If not, then the Court should reinstate the 2017 foreclosure case. Further, Wells Fargo expressed clear intent to revoke acceleration in 2017, and it was at least entitled to a factual record (i.e., summary judgment or documentary evidence) to establish such intent. By affirming the order in the 2015 case and reversing the order from the 2017 matter, the First Department deprived Wells Fargo from any avenue to preserve its secured interest. And thus, this Court should reverse its May 2020 order.

JURISDICTION

This Court has jurisdiction under CPLR 5602(a)(1)(i), because the First Department granted Wells Fargo's motion for leave to appeal. R 526.

STATEMENT OF CASE

On January 25, 2007, Ferrato executed an Adjustable Rate Note in her lender's favor. R 251-256.[1] The principal balance on this note was $900,000. *Id.* It provided that Ferrato would make monthly payments to her lender, initially, at 8.3758% interest. *Id.* But the note tied this rate to the LIBOR index, and Ferrato's mortgage would adjust accordingly. *Id.* Under these terms, Ferrato agreed to an initial monthly payment of $6,840.65, excluding escrow. *Id.* Accordingly, this Adjustable Rate Note required Ferrato to make monthly payments for the 30-year life of the loan. *Id.* Also, on January 25, 2017, Ferrato's lender secured the loan with a mortgage lien on the luxury apartment located at 25 Leonard Street, Unit #3, New York, New York. *Id*.

Ferrato defaulted under her Adjustable Rate Note and mortgage. R 35-81. And in May 2008, her lender at the time, Wells Fargo, filed a foreclosure action (index 106436/2008) based upon these operative documents. *Id.* To resolve this action, the parties renegotiated the loan's terms – entering into a new and distinct contract governing the loan. R 279-82.

Accordingly, on October 1, 2008, Wells Fargo's agent loan servicer and Ferrato entered into a modification agreement. *Id.* This modification agreement set $960,526.60 as the new principal balance. *Id.* at 279. It fixed the interest rate at 5%

[1] "R" refers to the Consolidated Record on Appeal.

over the next five years. *Id.* Initially, the new monthly payment was $4,002.19 plus escrow. *Id.* Then, over the next 25-years, the contract required Ferrato's monthly payments to be amortized in an amount necessary to pay off the amount remaining on the $960,526.60 principal balance. *Id.* at 280. For the modification to be effective, it also required her to make her first payment by November 14, 2008. *Id*.

Less-than four months after making this initial payment, Ferrato defaulted – failing to make her February 2009 payment under the new loan terms. R 30; ¶ 6. As a result, Wells Fargo filed a foreclosure action (index 113146/2009) on September 16, 2009. R 353.

Ferrato moved to dismiss this 2009 foreclosure action. R 347. She argued that Wells Fargo's foreclosure complaint was deficient, because it was based upon the Adjustable Rate Note – and Wells Fargo had failed to foreclose upon, or even acknowledge, the modified loan. R 350-2. On January 27, 2010, the Supreme Court granted Ferrato's motion on default. R 459. Wells Fargo's attorney filed a Notice of Entry for this dismissal order on May 3, 2010. R 461. [2]

On September 28, 2011, Wells Fargo filed what was a third foreclosure action (index 819272/2011). R 149-204. In response, Ferrato filed a motion to dismiss.

[2] The January 2010 order undeniably dismissed the action. R 459. Counsel for Wells Fargo made a subsequent application to discontinue the matter and cancel lis pendens, which the court granted in June 2010, most likely because Wells Fargo was then obligated to remove the lis pendens from the public record. *See* R 304-5.

SR 137. Again, she argued that Wells Fargo did not have authority to bring the action based upon the non-modified loan. R 483-88. Specifically, her attorney's affirmation claimed that Wells Fargo "was suing under the wrong instrument." R 505-6, ¶ 3. It further claimed that the documents referenced in the foreclosure complaint had been "amended and superseded by a later agreement containing substantially different terms." R 506, ¶ 4. And significantly, Ferrato's attorney argued that "the documents upon which plaintiff's Complaint is based are incorrect and *of no force and effect*."[3] (emphasis added) *Id.*[4]

The Supreme Court agreed with Ferrato that a foreclosure complaint, based on the wrong loan documents, had no legal force or effect. R 511-13. It held that without acknowledging the operative contract, Wells Fargo's complaint must be dismissed. *Id.* Accordingly, Wells Fargo was not "free to litigate on whatever mortgage interest they wish, irrespective of the subsequent loan modification agreement." R 512.

On February 11, 2015, Wells Fargo filed another foreclosure action. R 241-8. This time the complaint identified the modified loan. R 246, ¶ 4. The clerk assigned

[3] David C. Wrobel, Esq., has represented Ferrato in every preceding foreclosure action, and is an attorney of record for this appeal.

[4] This was a motion to dismiss in lieu of an answer. SR 137. It was not an opposition to a summary judgment motion. Nowhere in her moving papers – in either action – did Ferrato argue that Wells Fargo could not "establish a prima facie case for foreclosure" as Ferrato claimed in her brief to First Department. *See* SR 137-60.

this case index number 850034/2015 in the Supreme Court of New York for New York County. R 245.

When Wells Fargo received the index number, it attempted to serve Ferrato. R 324. Accordingly, on March 11, 2015, process server, Michael Whyte, appeared at Ferrato's residence with the summons and complaint. *Id.* Ferrato does not dispute that Mr. Whyte entered the building's lobby and took the elevator to the third floor – which opened directly into her unit. *Id.* It is also undisputed that he then came face-to-face with Fenella O'Malley Ferrato – a person of suitable age standing in Ferrato's apartment. R 324 & 325-6. Therefore, Mr. Whyte affirmed that he attempted to deliver the summons and complaint to this person who identified herself as "Tiffany Jones." R 324.

Ferrato failed to answer this complaint. But, on May 11, 2015, she moved to dismiss the 2015 foreclosure action – arguing that Wells Fargo did not properly serve her. *See* R 325-326. To support this motion, Ferrato filed an affidavit from O'Malley Ferrato. In this affidavit, O'Malley Ferrato acknowledged that she had seen Mr. Whyte when the elevator doors opened into Ferrato's unit. R 326. But – upon confronting a person of suitable age standing in Ferrato's dwelling – the process server chose not to deliver the papers he was carrying. *Id.* Rather, he waited for the elevator door to close – without attempting to serve her. *Id.*

The Supreme Court denied this motion to dismiss on July 8, 2015. R 205. On September 9, 2015, Ferrato filed a motion to reargue, and a notice of appeal. *See* R 31. On November 18, 2015, the court denied Ferrato's motion to reargue. *Id.* But the appeal would continue for almost two years. *See* R 205.

On June 14, 2017, the Supreme Court, Appellate Division, First Department, reversed the trial court. R 297. Accordingly, the Appellate Division remanded the matter for a traverse hearing on whether Wells Fargo properly served Ferrato in 2015. R 301. When Wells Fargo received the Appellate Division's remitter, it was six-weeks before September 28, 2017 – six years to the date when the 2011 action was filed. R 149. Because the hearing had yet to be scheduled – and it would take more than 90-days to notice a new foreclosure action under RPAPL 1304 – Ferrato could potentially extinguish Wells Fargo's mortgage lien if she prevailed at the hearing, and if her anticipated CPLR 213(4) defense was successful. *See* CPLR 213 & RPAPL 1304.

To alleviate any doubt regarding notice and personal jurisdiction, Wells Fargo, sought to discontinue the 2015 foreclosure action, and revoke acceleration. R 21-8. But Ferrato's counsel refused to stipulate. R 29-31. As a result, Wells Fargo filed a Motion to Discontinue Action without Prejudice and to Revoke Acceleration of the Loan on August 9, 2017. R 21. Ferrato opposed this motion –

arguing that the court should discontinue the action and allow the limitations period to expire. R 29-31.

By ordered entered on March 6, 2018, the Supreme Court discontinued the action, but held "the acceleration of the subject loan is NOT revoked." R 9. Again, the Supreme Court entered this order on a motion to discontinue. No documentary or summary judgment evidence was before the court when it refused to allow Wells Fargo to revoke acceleration. *Id.* So Wells Fargo appealed this order. R 2-6.

On December 13, 2017, Wells Fargo filed another action, seeking to foreclose upon the "Modified Subject Note" with a principal $960,526.60 (Index No. 850294/2017). R 199-228, ¶¶ 1, 14 & 18. Ferrato filed a motion to dismiss and seeking sanctions against Wells Fargo, and its attorneys. R 208-9. Ferrato argued that the 2017 complaint was time barred under the statute of limitations, because the loan had been accelerated in the 2008, and 2011, foreclosure actions. R 214.

On August 7, 2018, the Supreme Court entered an order denying Ferrato's motion to dismiss in its entirety. R 17-20. Specifically, it examined the orders and pleadings from the 2009, and the 2011, foreclosure actions. R 19. Accordingly, it found that – twice – Ferrato argued that Wells Fargo "had attempted to accelerate and foreclose on a loan that was no longer in effect, as it had been superseded by the October 2008 modification." *Id.* And twice, the Supreme Court granted motions to dismiss based upon Ferrato's argument. *Id.* Because Ferrato failed to offer a

mechanism for acceleration – other than foreclosure actions which were based upon a different loan – the correct limitation period began "when Plaintiff commenced the fourth [2015] action, which accelerated and attempted to foreclose on the October 2008 modified loan." *Id.* at 20.

Ferrato appealed this August 2018 Order. In August 2019, the First Department consolidated this appeal with Wells Fargo's appeal in the 2015 foreclosure action – index number 850034/2015. R 523. On May 28, 2020 the First Department affirmed the order in the 2015 action. *Id.* It further reversed the Supreme Court in the 2017 action. R 525 . In doing so, it held: "The fact that prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt." *Id.*

On August 27, 2020, after a motion for leave to appeal, the First Department certified its opinion for review by the Court of Appeals under CPLR 5713. R 526. Specifically, it asked this Court to review:

> "Was the order of [The First Department in May 2020], which affirmed the Order of the Supreme Court, entered March 6, 2018, and reversed the order of the Supreme Court made, entered August 7, 2018, properly made?"

Id. As a result, Wells Fargo now requests that this Court to reverse the First Department's May 28, 2020 Order. *Id.*

ARGUMENT

I. THE FORECLOSURE COMPLAINTS IN THE 2009, AND 2011, ACTIONS WERE BASED ON THE WRONG INSTRUMENT, AND THEREFORE DID NOT ACCELERATE THE LOAN.

The foreclosure complaints in 2009 and 2011 were based upon the wrong instruments as they did not mention the loan modification, and therefore Wells Fargo did not accelerate Ferrato's mortgage loan or trigger the running of the statute of limitations. New York has a six-year statute of limitations for foreclosure actions. CPLR 213(4). The limitations period starts from the date that the mortgagee accelerates the loan. *CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 43 A.D.3d 45, 54 (1st Dep't 2007). To accelerate the loan, the lender must act clearly and unequivocally to seek all amounts due under the operative loan document. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932). New York courts have held the filing of a lis pendens and a foreclosure complaint constitutes such an act. *Id.*; *Clayton National, Inc. v. Guldi*, 307 A.D.2d 982 (2d Dep't 2003); *Norwest Bank Minnesota, N.A. v. Sabloff*, 297 A.D.2d 722 (2d Dep't 2002).

But when a plaintiff lacks authority to commence a foreclosure action, its purported acceleration is a nullity, and thus the statute of limitations does not begin to run. *Deutsche Bank Natl. Trust Co. v Board of Mgrs. of the E. 86th St. Condominium*, 162 A.D.3d 547 (1st Dep't 2018) *citing EMC Mtge. Corp. v. Suarez*, 49 A.D.3d 592, 593 (2d Dep't 2008); *see also Wells Fargo Bank, N.A. v. Burke*, 94

A.D.3d 980, 983 (2d Dep't 2012) ("service of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt since the Predecessor did not have the authority to accelerate the debt or to sue to foreclose at that time.").

Here, Wells Fargo based its complaints in the 2009, and 2011, action on the wrong instrument. So it did not establish authority to accelerate the loan under the modification agreement. Further, acceleration under a different loan document, was not a clear and unequivocal act showing that Wells Fargo intended to declare the full principal balance due and owing under the *modified* loan. As a result, the Court should reverse First Department's May 28, 2020 Order.

A. AS FERRATO ARGUED TWICE THAT, WITHOUT THE CORRECT INSTRUMENT IDENTIFIED IN THE COMPLAINT, WELLS FARGO DID NOT HAVE AUTHORITY TO ACCELERATE THE MODIFIED LOAN.

Wells Fargo did not have authority to accelerate the modified loan based upon the pleadings in the 2009, and 2011, foreclosure actions. In 2008, the Second Department determined that a foreclosure plaintiff, cannot accelerate a mortgage loan without standing or authority to do so. *See Suarez*, 49 A.D.3d at 593; *see also Board of Mgrs. of the E. 86th St. Condominium*, 162 A.D.3d at 547 (adopting the same rule in the First Department). But the Second Department's 2012 decision in *Burke* sets forth a detailed analysis as to why a complaint from a plaintiff without standing cannot accelerate a loan. *Burke*, 94 A.D.3d at 983.

Accordingly, *Burke* evaluated a mortgage's acceleration clause as an option contract. *Id.* at 982-3. It held:

> Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation… As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage[.]

Id. And thus, "[c]ommencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised[.]" *Id.* at 983. But serving a defective foreclosure complaint is ineffective to exercise this option, because the plaintiff does "not have the authority to accelerate the debt or to sue to foreclose at that time[.]" *Id.*

Here, Ferrato argued to the Supreme Court that Wells Fargo's foreclosure complaints from 2009, and 2011, were nullities. Specifically, she claimed that "the documents upon which plaintiff's Complaint is based are incorrect and of no force and effect." R 505-6. And the Supreme Court agreed that, without the correct loan documents referenced in the complaint, Wells Fargo did not have the authority to foreclose upon the loan. R 506, ¶ 4. So, like the subject complaints in *Burke*, *Board of Mgrs. of the E. 86th St. Condominium*, *and Suarez*, Wells Fargo could not exercise an option to accelerate with a pleading that failed to establish its authority to do so. As a result, the Supreme Court's analysis in the August 2018 order was correct. And

the First Department erred in not affirming it. So this Court should reverse First Department's May 28, 2020 Order.

B. A COMPLAINT THAT ATTEMPTS TO FORECLOSE ON A DIFFERENT LOAN DOCUMENT IS NOT CLEAR AND UNEQUIVOCAL NOTICE THAT WELLS FARGO WAS ACCELERATING THE MODIFIED LOAN.

Filing a complaint purporting to foreclose upon an agreement "containing substantially different terms" was not a clear and unequivocal act that accelerated the modified loan. As noted above, to accelerate a loan, a lender must engage in a clear and unequivocal act indicating that all amounts are due under the operative loan document. *Albertina Realty Co.*, 258 N.Y. at 476 (1932).

Here, the 2009, and 2011, complaints were unclear. They demanded the full amount due under, what Ferrato twice argued was, a different loan. On one hand, the original Adjustable Rate Note's principal balance was $900,000. R 251. It had an adjustable rate, which was 8.3758% when Ferrato executed it. *Id.* Ferrato's initial monthly payment was $6,840.65, excluding escrow. *Id.*

But, as Ferrato correctly noted, the 2008 modification contained "substantially different terms." R 506. Had Ferrato only paid $4,002.19 in interest and principal per month, she would have defaulted under the Adjustable Rate Note's terms – but not under the modified loan. R 251 & 279. Further, these loans had different principal balances. *Id.* Wells Fargo could not clearly demand the full $960,526.60 principal balance when its complaints sought to foreclose on a different loan with a

$900,000 principal. By failing to reference the modified loan, Wells Fargo was unclear as to the total amount it claimed was due in 2009, and 2011.

Simply put, for a demand to be clear and unequivocal, it must necessarily *reference* the operative loan document.[5] Wells Fargo's 2009, and 2011, complaints did not. So, as the Supreme Court correctly determined in its August 2018 order, they did not accelerate the loan. And thus, the Court should reverse the First Department's May 28, 2020 Order.

C. STATEMENTS IN A 2017 ATTORNEY AFFIRMATION ARE IRRELEVANT TO WHETHER THE LOAN WAS PROPERLY ACCELERATED IN 2009 AND 2011.

In her brief to the First Department, Ferrato argued that statements in a 2017 attorney affidavit "admitted" that the loan was accelerated in 2009, or 2011. R 352-3. But a statement in 2017, is irrelevant to whether Wells Fargo properly accelerated the loan nearly a decade earlier. Without identifying the correct loan document, Wells Fargo did not have authority, and could not clearly act, to accelerate Ferrato's loan. Based upon this argument, Ferrato sought dismissal twice – in the 2009, and

[5] Because RPAPL does not require that the note be attached to the complaint in a foreclosure action, New York law likewise does not require the modification agreement to be *attached to* complaint. Rather, the 2009 and 2011 complaints were deficient because they did not *reference* the correct document. These pleadings are distinguishable from the complaint in the 2017 matter, which identifies the "Modified Subject Note," and the modified $960,526.60 principal balance. R 199-228.

2011, actions. And the Supreme Court's August 2018 order adopted Ferrato's argument.

A future attempt to revoke acceleration is irrelevant when the Supreme Court later determines that the loan was never properly accelerated in the first place. *See J & JT Holding Corp. v. Deutsche Bank National Trust Company*, 173 A.D.3d 704, 704-16 (2d Dep't 2019) (finding a conclusion from the mortgagee's other arguments, including revocation, "need not be reached" when the court first determined that the mortgagee did not have standing to accelerate the loan); *see also Milone v. US Bank National Association*, 164 A.D.3d 145, 155 ("just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well."). Rather, the Court treats a defective foreclosure complaint as a nullity. *See Suarez*, 49 A.D.3d at 593. And a revocation analysis is irrelevant to a nullified acceleration. *See J & JT Holding Corp.*, 173 A.D.3d at 704-16.

In this sense, acceleration is legal determination for the court to make. Not something that Wells Fargo can "admit" to years after the purported event. So the 2017 alleged "admission," which Ferrato's First Department brief attempted to attribute to Wells Fargo's attorney, is inconsequential to the Court's acceleration analysis. *See* R 541. As a result, the Court should reverse the First Department's May 2020 Order.

II. WELLS FARGO CLEARLY AND UNEQUIVOCALLY REVOKED ACCELERATION, OR WAS AT LEAST ENTITLED TO PRESENT A FACTUAL RECORD SUPPORTING REVOCATION TO THE SUPREME COURT.

The First Department's May 2020 Order deprived Wells Fargo of its contractual right to revoke acceleration. Once a lender accelerates a mortgage, the entire amount is due, and the statute of limitations begins to run. *Golden v. Ramapo Imp. Corp*., 78 A.D.2d 648, 650, 432 N.Y.S.2d 238, 241 (2d Dep't 1980); *EMC Mortgage Corp. v. Patella*, 279 A.D.2d 604, 720 N.Y.S.2d 161 (2d Dep't. 2001). But a lender can revoke acceleration. *Id.* Revocation requires the lender to engage in an "affirmative act," giving notice to the borrower that it is revoking acceleration, within the six-year limitations period. *Id*.; *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (3d Dep't 2003); *Fed. Nat. Mortgage Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 89 (2d Dep't 1994).

Whether withdrawing, or discontinuing, a prior foreclosure action constitutes clear revocation is an issue that is currently before this Court in three related cases.[6] But New York law – unquestionably – recognizes a lender's right to revoke acceleration. *Id*.; *Milone v. US Bank National Association*, 164 A.D.3d at 152. In *Milone*, the Second Department held, "A lender may revoke its election to accelerate

[6]Wells Fargo agrees with and adopts the argument in *Freedom Mortgage Corporation v. Engel*, APL-2019-00114, *Ditech Financial v. Naidu*, APL 2020-00023, and *Deutsche Bank National Trust Company, Appellant v. Vargas* APL-2020-00026 that a discontinuance revokes acceleration.

a mortgage… but courts must be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations[.]" *Id.*

The Second Department did not cite to any authority as two why it adopted a pretextual standard. Generally, the law utilizes pretext as a device to protect against racism or other discrimination. *See e.g., People v. Payne*, 88 N.Y.2d 172, 181 (2003) (analyzing pretext when a prosecutor allegedly strikes a juror based on race); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004) (examining pretext to determine whether an employer is discriminating against an employee); *People v. Reid*, 24 N.Y.3d 615, 621 (2014) (evaluating pretext to determine whether a police officer was racially profiling). But revocation is a different type of action. It is not an act done with discrimination or prejudice. Rather, when a lender revokes acceleration, it exercises a well-settled contractual right. *See Patella*, 279 A.D.2d at 720. In many cases, if it fails to exercise this right, it loses its secured interest under the statute of limitations. In contrast to criminal or employment cases where the Court applies a pretextual analysis, the intent to protect a secured mortgage is not immoral or unlawful. Rather, it is based upon contract law.

Here, Wells Fargo's intent to revoke was clear. It filed a "Motion to Discontinue Action without Prejudice and to Revoke Acceleration." R 21. And because revocation is a right implicit in the mortgage, it should not matter whether

it also wanted to protect itself from Ferrato extinguishing its otherwise valid mortgage lien under the statute of limitations.

But even if the Court applies the Second Department's pretextual analysis, Wells Fargo is entitled to a factual record. When the Supreme Court granted Wells Fargo's motion to discontinue, neither party submitted summary judgment or documentary evidence. As a result, the Supreme Court erred in finding pretext – a fact intensive inquiry – without addressing the evidence via summary judgment motion.

Moreover, Wells Fargo's revocation right was continuing. By holding that Wells Fargo's Motion to Discontinue Action without Prejudice and to Revoke Acceleration could "NOT" revoke acceleration, the Supreme Court effectively precluded it from de-accelerating the loan on a later date – with a subsequent act.

In sum, Wells Fargo's intent to revoke was clear. And even if this Court were to adopt the Second Department's pretextual standard, the Supreme Court could not have found pretext simultaneously in a motion to discontinue – without a factual record. As a result, the First Department erred when it affirmed the Supreme Court's March 2018 order finding that acceleration was "NOT revoked."

III. FERRATO SHOULD NOT BE ABLE TO EMPLOY DELAY AND LITIGATION TACTICS TO IMPLICATE THE STATUTE OF LIMITATIONS.

Wells Fargo did not "slumber" on its rights, and Ferrato was not surprised that it was seeking to foreclose on a loan worth more than a million dollars. Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Blanco v. American Tel. & Tel. Co.,* 90 N.Y.2d 757, 773, (1997) quoting *Telegraphers v Railway Express Agency*, 321 US 342, 348-349 (1944). Other policy considerations include promoting repose by giving security and stability to human affairs, "judicial economy, discouraging courts from reaching dubious results, recognition of self-reformation by defendants, and the perceived unfairness to defendants of having to defend claims long past[.]" *Id.* (citations omitted).

Here, met with countless foreclosure defense tactics, Wells Fargo has spent more than a decade trying to enforce its lien. A foreclosure in 2017 on her multimillion-dollar Tribeca apartment was not surprising to Ferrato. Rather, she played the game well: Default. Convince her lender to modify the loan. Default, again, after three payments. Have a relative confront the process servicer and give him a different name to avoid service. And, most importantly, delay – raising every

imaginable defense that Wells Fargo did not have authority to foreclose – so that the limitations period could expire.

Ferrato's only surprise came when the Supreme Court agreed with one of her earlier legal positions – a foreclosure complaint filed under the wrong loan documents is a nullity. As she twice argued to the Supreme Court, the documents upon which her lender based the 2009, and 2011, foreclosure actions lacked legal force and effect. But she appealed, and the First Department reversed – also holding that Wells Fargo could not revoke acceleration in 2017.

As a result, the First Department's May 2020 order deprived Wells Fargo – a mortgagee still acting diligently to foreclose – with an avenue to protect its secured interest. Simply put, a borrower should not be able to employ delay and defense litigation tactics to create a statute of limitations issue. And thus, the Court should reverse the First Department's May 2020 order.

CONCLUSION

This Court should reverse the First Department's May 28, 2020, Decision and Order.

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GREENBERG TRAURIG, LLP

By: Brian Pantaleo

Patrick G. Broderick
Brian Pantaleo
Attorneys for Plaintiff
MetLife Building, 200 Park Avenue
New York, New York 10166
(212) 801-9200
Broderickp@gtlaw.com
Pantaleob@gtlaw.com

COURT OF APPEALS

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to CPLR 500.13(c). that the foregoing brief was prepared on a computer using Microsoft Word.

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Brian Pantaleo

Brian Pantaleo
Attorneys for Plaintiff
MetLife Building, 200 Park Avenue
New York, New York 10166
(212) 801-9200
Pantaleob@gtlaw.com

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