*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*)

## REPLY BRIEF FOR 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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## PRELIMINARY STATEMENT

Ferrato's response brief, amidst inconsistencies, makes two major concessions. First, Ferrato concedes that a foreclosure complaint cannot accelerate a mortgage loan when the plaintiff lacks authority to foreclose. So notice that the borrower is electing its option to accelerate is inadequate when the *wrong plaintiff* files a complaint. With this principal established, Ferrato then argues that this lack of notice is distinguishable when a plaintiff forecloses upon the *wrong loan instrument*. But she fails to provide the Court with any authority, or explanation, as to why.

With respect to her own loan, Ferrato now asserts that the standard summons language from RPAPL 1320 – indicating that she could lose her home – had the legal force and effect of providing her with notice that her lender accelerated the modified loan. Ferrato cites no authority as to how this language – universal in all residential foreclosure summonses – specifically triggers notice in a foreclosure upon the incorrect loan document. And she (successfully) argued the opposite to the Supreme Court in 2011 – i.e., the documents that the earlier complaints were based upon were "of no force and effect." So she did not have notice.

Ferrato's second concession is that Wells Fargo had a contractual right to revoke acceleration. In fact, she admits that it filed a motion in August 2017 clearly stating it intended to do so. But she asserts that Wells Fargo had the wrong intentions

– to reset the limitations period – for exercising this contractual right. Ferrato's response brief, however, does not address Wells Fargo's argument that a lender's motivations for decelerating a loan should not factor into revocation analysis at all. So, again, she asks this Court to uphold a rule, but she provides it with no analysis as to why.

Finally, despite Ferrato's claims to the contrary, Wells Fargo did not slumber on its rights. Rather, it avidly pursued them in five separate actions. And it was in the final stages in the 2017 foreclosure case when the First Department reversed the Supreme Court. This order, combined with Ferrato's inconsistent posture towards notice and the modified loan, effectively deprived Wells Fargo from an avenue to foreclose upon its secured interest. And thus, for the reasons set forth below, the Court should reverse this May 28, 2020 Order.

## ARGUMENT

### I. FERRATO CONCEDES THAT BURKE SHOULD APPLY, BUT FAILS TO ADEQUATELY DISTINGUISH IT.

Ferrato concedes that a foreclosure lawsuit cannot accelerate a mortgage loan when the plaintiff lacks authority to foreclose. Resp't Br. 11 citing *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 983 (2d Dep't 2012). In this regard, she acknowledges that the Second Department correctly decided *Burke*. Resp't Br. 11. And that this Court should adopt the above legal principle. Wells Fargo agrees.

*Burke* relied upon option contract jurisprudence. *Id.* at 982-3. It held that, in addition to an affirmative act, "the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan[.]" And that notice must be clear and unequivocal. *Id.* at 983. In other words, the initial plaintiff in *Burke* referenced the correct loan document, and the correct terms. *Id.* But it did not clearly and unequivocally notice acceleration, because it was the wrong plaintiff. *Id.*

Here, the 2009 and 2011 complaints referenced the wrong documents.[1] Ferrato fails to present a plausible argument as to how such complaints established the notice that *Burke* and its progeny require. *See id.* It is a meaningless distinction that *Burke* involves standing, and this matter does not. Rather, the inquiry hinges upon notice to exercise the option. *Id.* At a minimum, clear and unequivocal notice must entail a foreclosure upon the correct loan instrument. Ferrato twice argued the "documents upon which plaintiff's complaint are based are incorrect." R 506. And the Supreme Court agreed. R 512. Therefore, and for the reasons set forth below, the 2009 and 2011 complaints did not accelerate the loan.

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[1] Although Ferrato argued it should have, the Supreme Court did not dismiss the 2011 action because the modification agreement was not attached. R 512. Rather, and as noted below, the dismissal resulted from the fact that the modification was not relied upon in the pleading. *Id.* RPAPL sets forth detailed procedural requirements in residential foreclosures. It does not require that all loan documents be attached to the foreclosure complaint.

### A. THE SPECIAL SUMMONS REQUIREMENT IN RPAPL 1320 DOES NOT ACCELERATE A MORTGAGE LOAN.

Ferrato argues that a summons stating, "YOU ARE IN DANGER OF LOSING YOUR HOME," provided clear and unequivocal notice that Wells Fargo accelerated the modified loan. Resp't Br. 13. But this is the standard language that all residential foreclosure summonses require. *See* RPAPL 1320 ("Special summons requirements in private residential cases"). In fact, the statute required the summons in *Burke*, *Board of Mgrs. of the E. 86th St. Condominium*, and *Suarez* to contain identical language. Despite this same warning, the defective complaints in these cases did not accelerate their respective loans. *See* e.g., *Burke*, 94 A.D.3d at 983. The lenders did not have authority. *Id.* And their complaints, even with summonses that said the borrowers could lose their homes, did not provide those borrowers with clear and unequivocal notice. *Id.* So, Ferrato's argument concerning this summons language – which she raises for the first time in her Court of Appeals brief, and without citing authority – must fail.

Further, this argument is inconsistent with what she argued in the 2009 and 2011 actions. In defending her earlier foreclosure, Ferrato claimed her loan was "renegotiated." R 468. She asserted that the original mortgage was "superseded by a later agreement that contains substantially different terms." R 506. This position does not comport with her brief's argument that the "DANGER OF LOSING YOUR HOME" language alerted her that Wells Fargo was foreclosing upon the *modified*

loan. Resp't Br. 14-15. And if the summons language was sufficient notice, the Supreme Court should have permitted Wells Fargo to proceed with the foreclosure upon its secured asset. Ferrato cannot now benefit – a nearly million-dollar windfall – from her inconsistent positions.[2] As a result, this Court should reverse the First Department's May 28, 2020 Order.

### B. FERRATO CANNOT NOW, CONTRARY TO HER EARLIER POSITIONS, ARGUE THE MODIFICATION LANGUAGE WAS CLEAR AND UNEQUIVOCAL NOTICE.

Despite the modification agreement preserving some rights and liabilities from the original mortgage, acceleration still requires clear and unequivocal notice. As noted above, Ferrato claimed that the parties "renegotiated" the original mortgage. R 468. And that the original mortgage was "superseded by a later agreement that contains substantially different terms." R 506.

In 2011, the Supreme Court adopted this argument. It held that foreclosure upon the modification agreement was different than foreclosing upon the original mortgage – Wells Fargo cannot "litigate on whatever mortgage instrument they wish, irrespective of subsequent loan modification agreements." R 512. This "whatever mortgage instrument" language distinguishes between a foreclosure

[2] Ferrato's should be estopped from raising these inconsistent arguments, many of which she raises before this Court for the first time in five lawsuits. *See Bihn v. Connelly*, 162 AD3d 626 (2d Dep't 2018) ("a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed.").

complaint on the original mortgage, and a complaint foreclosing upon the modified loan. *Id.*[3] Indeed, if they were distinct foreclosures, notice of one could not be clear and unequivocal notice accelerating the other.

Notably, Ferrato's response brief argues the opposite of what she argued in 2009 and 2011. She now claims certain language in the modification – "All rights and remedies, stipulations contained in the Security Interest…shall also apply to default in making of modified payments under this Agreement" – means that "the original loan and mortgage always remained in extant." Resp't Br. 15. But even this language contemplates default and acceleration only after failure to make "modified payments." R 280; ¶ 4(a). The original payment was $6,840.65. R 251-256. The modified payment was $4,002.19. R 279.

In sum, the Supreme Court dismissed the earlier actions, because it distinguished foreclosure upon the original mortgage from foreclosure upon the modified loan. After obtaining these dismissals, Ferrato cannot argue a decade later that she knew all along Wells Fargo accelerated the modified loan when at the time

[3] Ferrato's claim that the Supreme Court held that "the 2008 Loan Modification agreement was necessary to establish a prima facie case for foreclosure" is wrong. Resp't Br. 12. Ferrato filed a motion to dismiss in lieu of an answer. R 347. Wells Fargo did not file a motion for summary judgment. It did not have to establish a prima facie case at the pleading stage. More precisely, the Supreme Court held that the elements of a foreclosure case had not been alleged in Wells Fargo's complaint, because the modification and mortgage were distinct instruments – i.e., Wells Fargo could not "litigate on whatever mortgage instrument they wish" – and Wells Fargo allegations arose from the mortgage only.

she claimed: "the documents upon which plaintiff's Complaint are based are incomplete and of no force and effect." R 506. Rather, the earlier complaints were nullities – without legal "force and effect" to clearly and unequivocally provide her notice. As a result, this Court should reverse the First Department's May 28, 2020 Order.

## II. FERRATO CONCEDES THAT WELLS FARGO HAD A RIGHT TO REVOKE ACCELERATION, AND THAT IT EXPRESSED A CLEAR INTENT TO REVOKE.

Ferrato does not contest that, as a lender, Wells Fargo had the right to revoke acceleration. She also acknowledges that Wells Fargo filed a motion, in August 2017, clearly expressing this intent. Resp't Br. 16. Despite these concessions, she argues that Wells Fargo did not revoke acceleration, because it did not have the correct underlying motivation to do so. *Id.*

In its initial brief, Wells Fargo argued that this Court should not adopt an onerous rule that prevents a lender from revoking acceleration to protect its otherwise valid property interest from a statute of limitations forfeiture. *See* App. Br. 19-20. Revocation is a contractual right, arising from an arms-length transaction. *Id.* Recently, in the Second Department, Justice Miller issued a dissent supporting Wells Fargo's position. *Christiana Trust v. Barua*, 184 A.D.3d 140, 168 (2d Dep't 2020). According, he explained that "pretext," and an option holder's motivation, should not factor into revocation analysis:

> This notion, that an otherwise valid revocation may be rendered invalid based on the subjective motivations of the lender, finds no support in the case law and is at odds with well-established principles of contract law. The Court of Appeals has expressly considered the limitations on the right of a lender to revoke its election to accelerate a mortgage debt, and has applied the well-established equitable principles of estoppel to this situation (see *Kilpatrick v. Germania Life Ins. Co.*, 183 NY 163, 168 [1905]). There is absolutely no authority, in either law or equity, to support the imposition of additional, noncontractual restraints on a party's right to choose the remedy it will seek as redress for its adversary's breach.

(Miller J., concurring in part and dissenting in part) *Id.*[4]

Ferrato fails to address this argument from Wells Fargo's brief, upon which Justice Miller expounds. She sets forth no basis, or policy justification, to support why a lender cannot revoke acceleration to avoid losing a secured asset – or even why a lender's motivations for revocation are important at all. As a result , this Court should adopt a rule – as with any other contractual right – that the lender's motivations for revoking acceleration are irrelevant. And thus, this Court should reverse the First Department's May 28, 2020 Order.

## III. WELLS FARGO DID NOT SLUMBER ON ITS RIGHTS.

Wells Fargo, as five lawsuits demonstrate, did not slumber on its rights. On May 27, 2020, Wells Fargo had obtained summary judgment in the 2017 foreclosure action. App. Br. i. This means that Ferrato failed to produce evidence to challenge

[4] As Justice Miller points out, this Court recognized the concept of revocation as early as 1905. *See Kilpatrick*, 183 NY at 168 (holding that the election to accelerate only becomes "final and irrevocable after plaintiff's change of position and assumption of legal obligations, the direct result of that election.").

Wells Fargo's authority to foreclose in 2017. *Id.* She was unable to dispute that she did not make payments under the modified terms, or that she received the proper default notices. *Id.* At that time, the parties were waiting for a referee's hearing to determine, how much she owed, the only remaining issue. *Id.* It was the First Department's Order, not Wells Fargo lacking diligence, that disrupted this status quo.

Every foreclosure defendant has a right to a defense. But that defense strategy should not include an attempt to delay foreclosure for long enough to implicate the statute of limitations, and to discharge an otherwise valid debt. The First Department's Order encourages those very tactics – immediately defaulting on a modification agreement, chicanery with the process server, delay through interlocutory appeals, opposing discontinuances, and taking unabashedly inconsistent positions before this Court. Moreover, when it dismissed the 2017 action, it left a diligent and aggrieved foreclosure plaintiff with no redress to recover a near million-dollar loan. Affirming the First Department results in an onerous sanction for Wells Fargo, and nearly a million-dollar windfall for Ferrato. Therefore, the Court should reverse the First Department's May 28, 2020 Order.

## CONCLUSION

This Court should reverse the First Department's May 28, 2020 Decision and Order, and restore Wells Fargo's avenue to foreclose upon its secured interest.

Dated: New York, New York
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## CERTIFICATE OF COMPLIANCE

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