To be Argued by:
DAVID C. WROBEL
(Time Requested: 30 Minutes)

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) NS; SUSAN GILMER; MATTHEW GRINNELL; MIDLAND FUNDING, LLC; and JOHN DOE AND JANE DOE #1 THROUGH #7,

Defendants.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR DEFENDANT-RESPONDENT

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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; and "JOHN DOE #1" THROUGH "JOHN DOE#12",

Defendants.

Status of Related Litigation

Pursuant to Court of Appeals Rules 500.13(a), Donna Ferrato states that she is unaware of any litigation related to this appeal.

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Preliminary Statement

This Brief is submitted on behalf of Defendant-Respondent Donna Ferrato ("Ferrato") in connection with the Consolidated Appeal of two Supreme Court decisions in consecutive foreclosure actions - - Action #1 (Index No. 850034/15, the "Fourth Foreclosure Action") and Action # 2 (Index No. 850294, the "Fifth Foreclosure Action") - - brought by Wells Fargo Bank, National Association as Trustee for Option One Mortgage Loan Trust 2007-5, Asset-Backed Certificates, Series 2007-5 (the "Bank") against Ferrato to foreclosure on the real property located at 25 Leonard Street Unit 3 (the "Premises"). In an Decision and Order, dated May 28, 2020, the Appellate Division, First Department, affirmed the Decision and Order of the Supreme Court in Action #1 and reversed the Decision and Order of the Supreme Court in Action #2, holding that the "fact that the prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt," and, thus, the foreclosure action commenced in December 2017 was time-barred. R523-525 [the "May 28, 2020 Order"].[1] In its Brief, dated October 12, 2020 (the "Bank's Brief"), the Bank asks this Court to reverse the First Department's May 28, 2020 Order, arguing that: (1) the two previously-dismissed foreclosure actions did not accelerate the mortgage debt because they "were based on the wrong instrument"; (2) the Bank "clearly and unequivocally revoked the

[1] Citations to the Consolidated Record on Appeal shall be in the form R_.

acceleration" or should have been permitted to submit evidence to the Supreme Court to that effect; and (3) Ferrato's "delay and litigation tactics", rather than the Bank's incompetence, caused the Bank to miss its filing deadline. Because none of the Bank's arguments have merit, this Court must affirm the May 28, 2020 Order.

As set forth in greater detail below, the First Department properly determined that the Bank's Fifth Foreclosure Action was time-barred even though the Bank's prior foreclosure actions were dismissed. Additionally, the First Department properly rejected the Bank's argument that its prior foreclosure actions were "nullities" because the Complaints in those actions failed to attach a copy of the loan modification agreement. The Bank's unceasing efforts to foreclose on the Premises and repeated warnings to Ferrato that she was "in danger of losing [her] home" constituted clear and unequivocal notice to Ferrato that the Bank was accelerating the mortgage debt. The Bank has presented no evidence, nor can it, that it revoked the acceleration of the mortgage debt prior to the expiration of the statute of limitations. Accordingly, the First Department's May 28, 2020 Order must be affirmed.

Questions Presented

Did the First Department properly determine that the Second and Third Foreclosure Actions accelerated the mortgage debt even though they failed to attach the loan modification agreement?

Answer: Yes.

Did the First Department properly determine that the Bank failed to clearly and unequivocally revoke its prior loan accelerations when it commenced a Fifth Foreclosure Action while simultaneously asking the court in the Fourth Foreclosure Action to revoke the acceleration?

Answer: Yes.

Procedural History

The Bank brought the first action to foreclose on the Premises in May 2008 (the "First Foreclosure Action") [R35-81]. After bringing the First Foreclosure Action, the Bank agreed to renegotiate the terms of the mortgage in order to allow Ferrato to remain in her home [R211; ¶5]. In October 2008, the Bank agreed to a Loan Modification Agreement, which modified the terms of the existing $900,000 mortgage [R211; ¶6].

Following Ferrato's default under the Note, Mortgage, and Loan Modification Agreement in or about March 2009, the Bank commenced a second foreclosure action against Ferrato in or about September 16, 2009 (Index No. 113146/2009) (the "Second Foreclosure Action") [R82-148]. Ferrato moved to dismiss the Second Foreclosure Action for failure to state a claim, arguing, *inter alia*, that the Bank failed to attach a copy of the 2008 Loan Modification Agreement to the Summons and Complaint. The Bank did not oppose Ferrato's motion but, instead, filed an application to discontinue the Second Foreclosure Action without Prejudice. The court (Braun, J.S.C.) granted the Bank's motion on or about June 2010 and discontinued the Second Foreclosure Action [R304-305].

Over a year later, in or about September 28, 2011, the Bank filed a third foreclosure action against Ferrato (Index No. 810272/2011) (the "Third Foreclosure Action") [R149-204]. Ferrato moved to dismiss the Third Foreclosure

Action, arguing, *inter alia*, that the Bank failed to state a claim for foreclosure because the Bank (once again!) failed to attach the 2008 Loan Modification Agreement to the Summons and Complaint [R212; ¶10]. The court (Kenney, J.S.C.) granted Ferrato's motion and dismissed the Third Foreclosure Action on or about January 25, 2013 [R212; ¶10]. In dismissing the Third Foreclosure Action, Justice Kenney determined that:

> [The Bank] gives no authority, statute or case, to support its self-serving statement that they are free to litigate on whatever mortgage instrument they wish, irrespective of subsequent loan modification agreements. As such, [the Bank] has failed to rebut defendant's prima facie entitlement to dismissal of the within foreclosure action commenced and relied upon incomplete mortgage documents and terms between the parties.

[R512].

Over a year and a half later, on or about February 11, 2015, the Bank filed the Fourth Foreclosure Action (also referred to herein as "Action #1") [R241-298]. Ferrato moved to dismiss the Fourth Foreclosure Action for, *inter alia*, failure to properly serve the Summons and Complaint. The court denied Ferrato's motion to dismiss on or about July 8, 2015 and remanded the matter to the Residential Foreclosure Part. Ferrato appealed the denial of her motion to dismiss [R212; ¶12]. Notwithstanding Ferrato's pending (and eventually successfully) appeal, the Fourth Foreclosure Action proceeded and the Bank was ordered to make a motion for appointment of a referee. Nonetheless, the Bank failed to make this motion

and, thus, the Fourth Foreclosure Action was marked off the court's calendar on September 14, 2016 [R212; ¶13].

On or about May 18, 2017, the Appellate Division, First Department, determined that there was a question of fact as to whether the Bank had properly served Ferrato in the Fourth Foreclosure Action and ordered that "in the event plaintiff moves to restore the matter to the calendar, the matter be referred for a traverse hearing." [R299-301]. Remarkably, the Bank never moved to restore the matter to the calendar. Rather, on August 9, 2017, the Bank moved to discontinue the Fourth Foreclosure Action and "to revoke acceleration of the loan" [R213; ¶16]. In its motion, the Bank admitted that the sole reason that it sought to voluntarily discontinue the Fourth Foreclosure Action and to revoke the loan acceleration was to avoid the time bar of the six-year statute of limitations [R23-28; ¶17].

While the Bank's motion was pending in the Fourth Foreclosure Action, the Bank filed the Fifth Foreclosure Action on or about January 29, 2018 [R216-239]. On February 21, 2018, Ferrato moved to dismiss the Fifth Foreclosure Action, pursuant to CPLR Rule 3211(a)(4), on the grounds that the Fourth Foreclosure action against her was still pending, albeit on appeal; and pursuant to CPLR 3211(a)(5), because the Fifth Foreclosure Action was commenced beyond the six-year statute of limitations [R208-209].

The Action # 1 Order

On or about March 15, 2018, the Lower Court granted the Bank's motion to voluntarily discontinue the Fourth Foreclosure action, but "DENIED" the Bank's motion "to the extent that the acceleration of the subject loan is NOT revoked" [R9]. The Action #1 Order was entered by the Clerk of the County of New York on March 6, 2018, and the Bank filed its Notice of Appeal on March 14, 2019 [R2-8]. The Bank appealed only the portion of the decision that denied its request to revoke the loan acceleration [R2-3].

The Action #2 Order

On July 17, 2018, the Lower Court issued its decision on Ferrato's motion to dismiss the Fifth Foreclosure Action. The Decision and Order was not based on any of the arguments raised in the Bank's opposition papers. Rather, the Lower Court, *sua sponte*, decided that the Second and Third Foreclosure Actions did not accelerate the mortgage debt and trigger the start of the statute of limitations because the Complaints in those actions did not attach a copy of the 2008 Loan Modification Agreement, they included only the original January 2007 loan documents [R17-20].

The Lower Court reasoned that, since Ferrato sought dismissal of both the Second and Third Foreclosure Actions based on the Bank's failure to attach the 2008 Loan Modification Agreement, and the courts granted those motions "on the

basis that [the Bank] had attempted to foreclose on a loan that was no longer in effect" [R19], then those actions did not accelerate the subject loan and start the running of the statute of limitations. Specifically, the Lower Court held:

> the statute of limitations on the October 2008 modification, which is the controlling loan on the subject property began to run on or about February 11, 2015 when [the Bank] commenced the fourth action, which accelerated and attempted to foreclose on the October 2008 modified loan. This means that the statute of limitations has not yet expired and will not expire until at least on or about February 11, 2021.

[R20].

Further, the Lower Court rejected Ferrato's argument regarding CPLR 3211(a)(4) because "the fourth action has already been discontinued" [R18]. The Action #2 Order did not address the fact that the Fourth Foreclosure Action was still pending on appeal.

On August 7, 2018, the Action #2 Order was entered by the Clerk of the County of New York, and Ferrato filed her Notice of Appeal on September 6, 2018 [R10].

The May 28, 2020 Decision and Order

On May 28, 2020, the Appellate Division, First Department, issued its Decision and Order in which it unanimously affirmed the Lower Court's Order in Action #1 that denied the Bank's motion to revoke the acceleration of the mortgage

debt while simultaneously permitting the Bank to voluntarily discontinue the action holding that:

> Wells Fargo admitted that its primary reason for revoking acceleration of the mortgage debt was to avoid the statute of limitations bar, and it proceeded to collect on the accelerated loan amount in a fifth foreclosure action filed shortly after it made its motion to revoke acceleration.

R524.

Additionally, the First Department held that the Fifth Foreclosure Action is time barred, "as Wells Fargo had accelerated the mortgage debt when it commenced its second foreclosure action" and because the "fact that the prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt." R525.

Thereafter, the Bank moved for leave to appeal the May 28, 2020 Order and, the First Department granted that motion on August 27, 2020. R529-529.

Argument

I. The Bank incorrectly asserts that it did not have the "authority" to foreclosure on the Premises in the Second and Third Foreclosure Actions

It its Brief, the Bank claims that it did not have the "authority" to foreclosure on the Premises in the Second and Third Actions because those actions were "based upon the wrong instruments." *See* Bank's Brief at pp. 12-14. Simply put, the Bank is wrong.

In support of its argument, the Bank cites several cases in which courts determined that, where a plaintiff lacked the authority to commence a foreclosure action, the statute of limitations did not start to run. However, all of the cases upon which the Bank relies involve plaintiffs that were not the legal holders of the notes at the time that they commenced the foreclosure actions. In *EMC Mortgage Corp. v Suarez*, 49 AD3d 592 [2d Dept 2008], the note was never assigned to the first entity that attempted to foreclosure on the property and, as such, the commencement of that action was a "nullity". *Id*. at 593. Similarly, in *Deutsche Bank Natl. Trust v. Board of Managers of the East 86th Street Condominium*, 162 AD3d 547 [1st Dept 2018], the court determined that the plaintiff in the first foreclosure action lacked standing to commence the 2008 action, which was, thus, a "nullity".

Finally, in quoting *Wells Fargo Bank, N.A. v Burke,* 94 AD3d 980 [2d Dept 2012], for the proposition that "…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'", the Bank neglects to advise this Court that the lack of "authority" was not based on the plaintiff's failure to reference the correct loan documents. The lack of authority found in *Burke* was based on the fact that "the Predecessor had not been assigned the note or mortgage at the time the 2002 complaint was served upon Burke." *Id*. at 983. Accordingly, the Bank's claim that it did not have the authority to foreclosure on the loan based on its failure to attach or reference the 2008 Loan Modification Agreement is, in no way, supported by the facts found in *Burke* or in in any of the other cases upon which it relies.

Neither the Second nor the Third Foreclosure Actions brought against Ferrato were dismissed because the court determined that the Bank did not have the authority to foreclosure on the mortgage debt. As to the Second Foreclosure Action, the Lower Court did not reach a decision on Ferrato's motion to dismiss. To the contrary, the Bank chose not to oppose Ferrato's motion to dismiss and, instead, made an application to discontinue the action, which the court (Braun, J.S.C.) granted [R304-305].

As to the Third Foreclosure Action, the Lower Court did reach a decision on Ferrato's motion to dismiss, but only to the extent that it determined that the Bank failed to rebut Ferrato's claim that the complaint did not state a *prima facie* claim for relief. Specifically, Justice Kenney's decision clearly states that the only reason that she granted Ferrato's motion was because the Bank failed to adequately refute Ferrato's argument that the 2008 Loan Modification Agreement was necessary to establish a *prima facie* case for foreclosure. *See HSBC Bank USA, N.A. v. Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept. 2015] (the borrower must produce the unpaid note, the mortgage, and evidence of a default). Moreover, the decision in the Third Foreclosure Action pointed out that the Bank was attempting to foreclose with "incomplete mortgage documents", not with mortgage documents that were the "wrong instrument" or "no longer in effect". No court determined that the Bank lacked the authority/standing to foreclosure on the Premises because that fact has never been in dispute. Accordingly, the Bank had the authority to commence both the Second and the Third Foreclosure Actions that triggered the start of the statute of limitations.

II. The Bank's commencement of both the Second and Third Foreclosure Actions constituted clear and unequivocal notice that the Bank was accelerating the mortgage debt

In its Brief, the Bank claims that the Second and Third Foreclosure Actions could not have triggered the start of the statute of limitations because they failed to

reference the "modified loan" and, thus, did not provide Ferrato with clear and unequivocal notice of the Bank's intent to seek "all amounts [] due under the operative loan document". Bank's Brief at pp. 15-16. For the reasons set forth below, the Bank's argument must be rejected.

Pursuant to CPLR § 213(4), a foreclosure proceeding has a six (6) year statute of limitations. It is well settled that the statute of limitations starts to run as soon as the mortgage debt is accelerated. *See EMC Mortg. Corp v. Patella*, 279 AD2d 604, 605 [2d Dept 2000]; *see also Arbisser v Gelbelman*, 286 AD2d 693 [2d Dept 2001), *lv. denied*, 97 N.Y.2d 612 (N.Y. 2002) (dismissing action to foreclose mortgage as time-barred because six-year limitations period began to run when mortgage debt was accelerated and the period expired before action was commenced).

Commencement of a foreclosure action is sufficient to accelerate the debt when the borrower is provided with "clear and unequivocal notice" that the entire amount of the mortgage debt is being demanded. *See Costa v. Deutsche Bank National Trust Co.,* 247 FSupp3d 329, 340 [SDNY 2017].

The Bank has attempted to foreclose on Ferrato's home five times now. On September 16, 2009, the Bank commenced the Second Foreclosure Action and notified Ferrato that the entire mortgage debt was due and that she was "IN DANGER OF LOSING [HER] HOME" [R82]. Using that date, the statute of

limitations expired six years later, on September 16, 2015. Again, on September 28, 2011, the Bank commenced the Third Foreclosure Action and notified Ferrato that the entire mortgage debt was due and that she was still "IN DANGER OF LOSING [HER] HOME" [R149]. Using that date, the statute of limitations expired on September 28, 2017.

To remove any doubt, when the Bank filed the Fourth Foreclosure Action on February 11, 2015 and then failed to prosecute that case to the point where it was marked off the court's calendar, the Bank admitted that, unless its prior loan accelerations were revoked, it would have a statute of limitations problem if and when it attempted to foreclose on Ferrato's home for a fifth time. The Bank, without citing to any provision of the CPLR, specifically asked the court in the Fourth Foreclosure Action to revoke the loan acceleration because it was fully aware that, without the revocation, any future foreclosure action would be time-barred. Thus, the Bank's judicial admission that the loan had, in fact, been accelerated is clear evidence that the statute of limitations had expired.[2]

Regardless, even if the Bank's failure to include the 2008 Loan Modification Agreement was fatal to its ability to state a cause of action for foreclosure, this

[2] In its Brief, the Bank argues that it cannot "admit" that it accelerated the mortgage debt. *See* Bank's Brief at pp. 16-17. However, the Bank certainly can (and does) admit that it intended to accelerate the mortgage debt and was, in fact, demanding that Ferrato pay back the entire amount owed or it would take her home away from her!

determination does not alter the fact that the Bank's commencement of the Second and the Third Foreclosure Actions, in and of themselves, triggered the start of the statute of limitations to run because the Bank made it clear that it intended to demand the entire mortgage debt be paid or it was going to foreclose on the Premises. The 2008 Loan Modification was just that -- a modification -- and the original loan and mortgage have always remained extant.

Specifically, the language in the Loan Modification states: "Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note or Security Instrument." [R280; ¶ 4(d)]. Further, the Loan Modification agreement expressly states: "[a]ll rights and remedies, stipulations, and conditions contained in the Security Instrument relating to default in the making of payments under the Note and Security Instrument shall also apply to default in the making of the modified payments under this Agreement." [*Id.*; ¶ 4(a)]. Accordingly, it cannot be disputed that the Bank's decision to commence the Second and Third Foreclosure Actions constituted accelerations of the mortgage debt – regardless of whether the Complaints in those actions attached or referenced the 2008 Loan Modification Agreement.

III. The Bank has not and cannot present any evidence that it clearly and unequivocally revoked the acceleration of the loan prior to the expiration of the statute of limitations

It is well established that "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action." *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]; *see also U.S. Bank National Ass. v. Charles,* 173 AD3d 564 [1st Dept June 20, 2019] ("Acceleration only takes place when the holder of the note and mortgage takes 'affirmative action…evidencing the holder's election' to do so" (internal citations omitted)). In its brief, the Bank seems to argue that its "Motion to Discontinue Action without Prejudice and to Revoke Acceleration" in Action #1/Fourth Foreclosure Action signaled its "clear" intent to revoke the acceleration. *See* Bank's Brief at pp. 18-20.

However, in its motion to discontinue and revoke the acceleration, the Bank admitted that the sole reason that it wanted to revoke the acceleration was to avoid a statute of limitations problem of its own making. Indeed, the Bank's attorney swore under oath that "the basis of this motion is to ensure proper service of the Summons and Complaint is effectuated on the Defendant Donna Ferrato and to revoke the acceleration of the loan prior to the expiration of Plaintiff's six (6) year state of limitations to foreclosure under CPLR § 231(5)". [R23] (Affirmation of

Shan P. Massand, sworn to on August 9, 2017 at ¶3). Although the Bank may have believed that the Lower Court had the discretion to do so, the Lower Court simply could not absolve the Bank of the consequences of its own dilatory behavior. Moreover, as the First Department pointed out, the Bank commenced the Fifth Foreclosure Action - - accelerating the loan - - shortly after it made a motion to revoke the acceleration in the Fourth Foreclosure Action. These simultaneous actions, at the very least, create an ambiguity and cannot reasonably be considered "clear and equivocal" notice of the Bank's intent. Ultimately, the Bank wanted to stop the statute of limitations from running for sole the purpose of allowing it to continue to foreclosure of Ferrato's home.

Other than the mere fact that the Bank made a motion to revoke the acceleration in its Fourth Foreclosure Action, the Bank can point to no evidence that it clearly and unequivocally revoked the acceleration. Recent case law demonstrates that mere voluntary discontinuance of an action is insufficient in itself to constitute an affirmative act of revocation. In *U.S. Bank Trust N.A. v. Aorta*, the court determined that a motion to discontinue "was insufficient, in itself, to evidence an affirmative act to revoke the election to accelerate the mortgage debt." 167 AD3d 807, 809 [2nd Dept 2018]; *see also HSBC Bank USA ETC. v. Kirschenbaum,* 159 AD3d 506 506 [1st Dept 2018] (holding that plaintiff's argument that the mortgage loan was de-accelerated when it moved to discontinue

the foreclosure action was "unavailing"); *Vargas v. Deutsche Bank National Trust,* 168 AD3d 630 [1st Dept Jan. 31, 2019] (holding that discontinuance of prior action did not constitute an affirmative act to revoke the acceleration of the loan). Similarly, in *Freedom Mortgage Corp. v. Engel*, the court decided that a stipulation between the parties that included an agreement to discontinue the action without prejudice and to "resolve this dispute amicably" "did not, in itself, constitute an affirmative act to revoke its election to accelerate since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." 163 AD3d 631, 633 [2nd Dept 2018].[3]

IV. The Bank's attempt to blame Ferrato for its own incompetence must be rejected by this Court

In its last-ditch effort to save itself from its own incompetence, the Bank argues that "Ferrato should not be able to employ delay and litigation tactics to implicate the statute of limitations." Bank's Brief at pp. 21-22. The procedural history of this matter makes it absolutely clear that the Bank did, in fact, "slumber" on its rights.

[3] Ferrato appreciates that this Court is hearing arguments in *Freedom Mortgage Corporation* and *Vargas*. However, even assuming that this Court reverses those decisions, those reversals will not affect the determination here, that the Fifth Foreclosure Action is time-barred. Although the Bank voluntarily discontinued the Second Foreclosure Action, it did so only after Ferrato made a motion to dismiss. Further, the Fifth Foreclosure Action is still time-barred if you count from the Bank's commencement of the Third Foreclosure Action, which was not voluntarily discontinued.

"Statutes of limitation not only save litigants from defending stale claims, but also express[] a societal interest or public policy of giving repose to human affairs'". *ACE Sec. Corp. v DB Structured Products, Inc.*, 25 NY3d 581, 593 [2015], quoting *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979], omitting internal quotation. Certainty is important – especially when it comes to whether a person may stay in his or her home. Ferrato has been living in limbo dealing with the Bank for over ten years now. Public policy favors enforcing the statutorily mandated statute of limitations.

Moreover, it has long been recognized in New York that a mortgagor can be relieved of its default under a mortgage on the grounds of "waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part." *Ferlazzo v. Riley,* 278 NY 289 [1938]. In the instant case, where the Bank fully intended to commence and maintain foreclosure proceedings against Ferrato, the Bank should not be able to benefit from its own inadequate or incorrect pleadings or from its own failure to pursue its own case. *See, generally, Triple Cities Construction Co. v. Maryland Casualty Co.,* 4 NY2d 443 [1958] ("An estoppel …. rests upon the word or deed of one party upon which another rightfully relies and, in so relying, changes [its] position to [its] injury. " *quoting Metropolitan Life Insurance Co. v. Childs Co.,* 230 NY 285 [1921]), *Nassau Trust Co. v. Montrose Concrete Prods. Corp*., 56 NY2d 175, 184 [1982] (Equitable

estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.")

There cannot be a clearer or more unambiguous way to accelerate a mortgage debt than to commence a foreclosure action. The fact that the action is dismissed and/or discontinued – due to the Bank's ineptitude and/or non-action, does not make the commencement less real. Ferrato could not have blithely ignored any of the foreclosure actions, or certainly her home would have been foreclosed upon. The fact the Ferrato actually defended herself against the foreclosure actions and succeeded with some of her defenses should not be held against her. The Bank is the only party to be blamed for its failure to foreclose on the Premises despite having numerous opportunities to do so.

Conclusion

For the reasons set forth herein, the Decision and Order of the Appellate Division, First Department dismissing the Fifth Foreclosure Action as time-barred must be affirmed.

Dated: November 13, 2020
New York, New York

Respectfully submitted,

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Certificate of Compliance

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