Court of Appeals No. APL 2020-00023

To be Argued by:
CHRISTINA A. LIVORSI
(Time Requested: 15 Minutes)

Court of Appeals
of the
State of New York

DITECH FINANCIAL LLC f/k/a Green Tree Servicing LLC,

Plaintiff-Appellant,

– against –

SANTHANA KUMAR NATARAJA NAIDU,

Defendant-Respondent,

– and –

CITIMORTGAGE, INC. and "JOHN DOE# 1" through "JOHN DOE# 12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

DAY PITNEY LLP
Attorneys for Plaintiff-Appellant
605 Third Avenue, 31st Floor
New York, New York 10158
(212) 297 5800
clivorsi@daypitney.com

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Appellate Division, Docket Nos.: 2016-11072 & 2016-11073

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Plaintiff-Appellant Wilmington Savings Fund Society, FSB, DBA Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust ("Wilmington Savings") as successor-in-interest in this action to Ditech Financial LLC[1] ("Appellant") states that:

Wilmington Savings is a subsidiary of WSFS Financial Corporation. Wilmington Savings is the principal subsidiary of WSFS Financial Corporation.

Other subsidiaries or divisions of WSFS Financial Corporation are as follows: Beneficial Equipment Finance Corporation, Cash Connect®, Christiana Trust Group, Cypress Capital Management, LLC, NewLane Finance, WSFS Institutional Services, WSFS Wealth Investments, WSFS Capital Management, LLC d/b/a West Capital Management, WSFS Mortgage and Arrow Land Transfer, and WSFS Wealth Management, LLC d/b/a Powdermill Financial Solutions, LLC.

[1] On July 29, 2016, Ditech Financial LLC f/k/a Green Tree Servicing LLC ("Ditech") assigned the subject mortgage to Wilmington Savings. Wilmington Savings is Ditech's successor-in-interest in this action and entitled to prosecute it pursuant to New York Civil Practice Law and Rules ("CPLR") 1018.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Appellant states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

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PRELIMINARY STATEMENT

It has been a long standing principle of New York law that, when a court action is discontinued, everything within the action is nullified. *Loeb v. Willis*, 100 N.Y. 231 (1885). This is because "[b]y the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been." *Id*. at 235. The application of this legal principle in the foreclosure context should mean that the timely voluntary discontinuance of a foreclosure action automatically nullifies the acceleration of a mortgage debt where the commencement of the action was the triggering event for acceleration.[2] However, courts within the state have issued inconsistent decisions often failing to acknowledge this principle, instead focusing on whether the voluntary discontinuance, without prejudice, was an affirmative act of revocation of the acceleration of the debt or at a minimum created a triable issue of fact. Most recently, two of the appellate divisions have held that the voluntary discontinuance of a foreclosure action does not revoke the acceleration of the mortgage debt. The inconsistent rulings from the courts have created uncertainty for lenders, which have relied on the longstanding case law to the contrary and are now

[2] Acceleration of the mortgage debt, as discussed hereinafter, refers only to acceleration arising from the commencement of a foreclosure action and does not refer to acceleration of the debt by other means, such as notices to borrowers.

potentially facing enormous write-offs of loans because the courts are finding the statute of limitations periods have expired.

In the case at issue, the Second Department held in its Decision & Order dated September 18, 2019 (the "Appeal Order"), that the voluntary discontinuance of a prior foreclosure action by one of Appellant's predecessors-in-interest did not revoke the acceleration of Defendant-Respondent Santhana Kumar Nataraja Naidu's ("Respondent") mortgage loan. As a result, the Second Department reversed the trial court's denial of Respondent's motion to dismiss on statute of limitations grounds and dismissed this action as untimely.

The prior foreclosure action had been timely discontinued voluntarily, without prejudice, and at a time when the existing case law indicated that the voluntary discontinuance would either nullify everything within the action, making any prior acceleration non-existent in the first instance, or would constitute an affirmative act of revocation of the prior acceleration. The Second Department, continuing with its recent line of cases, ignored precedent from this Court and dismissed the case on statute of limitations grounds that the lender could not have possibly been able to foresee at the time the prior action was discontinued.

For the reasons detailed further below, Appellant respectfully requests that the Court reverse the Appeal Order and find that the voluntary discontinuance of the prior foreclosure action here, which was without prejudice and with the consent of

Respondent, either automatically nullified and/or revoked the prior lender's election to exercise its option to accelerate Respondent's loan.

QUESTION PRESENTED

Whether the voluntary discontinuance in 2014 of a 2009 foreclosure action, which was stipulated to by both Respondent and Appellant's predecessor, automatically nullified the acceleration of Respondent's mortgage debt and/or is sufficient in and of itself to have revoked Appellant's predecessor's election to exercise its option to accelerate a loan where the commencement of the 2009 foreclosure action was the triggering event for acceleration.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Appellant's appeal of the Appeal Order under CPLR 5602(a)(1)(i) as (a) the Appeal Order finally determined the action, (b) the Appeal Order is not appealable as of right under CPLR 5601, and (c) this Court granted Appellant's motion for leave to appeal to the Court of Appeals from the Appeal Order in an order dated February 18, 2020. (R. 364-368). The issues have been preserved for the Court's review in the appeal before the Second Department. (Pl's App. Br. at 1, 3-5; R. 366-367).

Therefore, this Court has proper jurisdiction to hear this appeal.

STATEMENT OF THE CASE

This is a foreclosure action (the "Foreclosure Action") involving a residential mortgage loan secured by real property located at 137-29 Laburnum Avenue, Flushing, NY 11355 (the "Property"). (R. 210-219). On March 20, 2006, Respondent executed a Consolidation, Extension and Modification Agreement in favor of Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender ("America's Wholesale"), encumbering the Property (the "CEMA"). (R. 152-173). On April 12, 2006, the CEMA was recorded with the Office of the City Register of the City of New York (the "City Register") under CRFN 2006000203847. (R. 152). The CEMA consolidated two prior liens on the Property (one made on April 1, 2003 in the principal amount of $292,000.00 and another made on March 20, 2006 in the principal amount of $14,148.68) into a single lien against the Property in the amount of $296,000.00. (R. 114-173).

The consolidated mortgage was assigned from America's Wholesale to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP ("Countrywide") on July 22, 2009, and the assignment was recorded on September 4, 2009 in the City Register at CRFN 2009000286549. (R. 174-177). The consolidated mortgage was further assigned from Countrywide to Everbank on July 15, 2013, and the assignment was recorded on October 28, 2013 in the City Register at CRFN 2013008443916. (R. 178-181). The consolidated mortgage was next

assigned from Everbank to Green Tree Servicing LLC ("Green Tree") on May 8, 2015 and the assignment was recorded on September 21, 2015 in the Office of the City Register at CRFN 2015000335707. (R. 182-185). On July 29, 2016, the consolidated mortgage was assigned by Ditech to Wilmington Savings, during the pendency of this foreclosure action, and was recorded in the City Register at CRFN 2017000202030.[3]

Respondent defaulted on the loan by failing to make his monthly payment due on February 1, 2009 along with all subsequent monthly payments (the "Default"). (R. 96, 186-198, 212).

1. <u>The 2009 Foreclosure Action</u>

On or about July 28, 2009, Countrywide commenced a foreclosure action against Respondent and other defendants in the Supreme Court, Queens County under Index No. 20090/2009, seeking to foreclose on the subject consolidated mortgage (the "2009 Foreclosure Action") due to Respondent's Default. (R. 26-43).

In February 2014, Everbank (as assignee to Countrywide) and Respondent stipulated to a discontinuance of the 2009 Foreclosure Action without prejudice. (R. 51-52).

[3] Appellate courts "may, in general, take judicial notice of matters of public record." *Olga L.M.A. v. Ronald A.B.M.*, 135 A.D.3d 741, 742 (2d Dep't 2016) (quoting *In re Winona Pi.*, 86 A.D.3d 542, 543 (2d Dep't 2011)); *accord People ex rel. Nichols v. Bd. of Canvassers of Onondaga Cty.*, 129 N.Y. 395, 420 (1891) ("The court can take judicial notice of the facts appearing in the public records of the state.")

2. <u>The Current Foreclosure Action</u>

On January 13, 2016, Ditech filed a Verified Complaint for an Action to Foreclose a Mortgage (the "Complaint") in the Supreme Court, Queens County, under Index No. 700387/2016. (R. 199-297). Respondent filed a Verified Answer (the "Answer") on February 8, 2016. (R. 312-316).

On July 6, 2016, Respondent filed a motion to dismiss the Complaint pursuant to CPLR 3211(a)(5) on the grounds that the Complaint was time-barred pursuant to the six-year statute of limitations. (R. 15-84). Respondent argued that the debt had been accelerated by the filing of the 2009 Foreclosure Action on July 28, 2009 and, accordingly, the statute of limitations to enforce the loan had expired as of July 28, 2015. (R. 19-21). On July 21, 2016, Ditech opposed Respondent's dismissal motion and cross-moved for, *inter alia*, an order of reference. (R. 85-329).

By orders dated September 9, 2016, the Supreme Court, Queens County (Hon. Robert J. McDonald, J.S.C.) (the "Trial Court"), granted Ditech's[4] cross-motion for, *inter alia*, an order of reference (the "Order of Reference") and denied Respondent's motion to dismiss. (R. 4-8). In the accompanying short form order (the "Short Form Order"), the Trial Court found "the stipulation discontinuing the prior action without prejudice acted as a deceleration of the debt." (The "Order of Reference" and the

[4] By the time of the Trial Court Orders, the mortgage was already assigned from Ditech to Appellant, which continued to prosecute the action.

"Short Form Order" are hereinafter collectively referred to as the "Trial Court Orders".) (R. 4-8).

Respondent filed a notice of appeal (the "Notice of Appeal") on October 20, 2016 seeking to overturn the Trial Court Orders. (R. 2-3). The appeals to the Second Department followed.

3. <u>Appellate History</u>

On or about May 30, 2017, Respondent perfected the appeals (the "Appeals") from the Trial Court Orders. The Appeals were docketed by the Second Department as Docket Nos. 2016-11072 and 2016-11073. On or about December 15, 2017, Appellant served its Answering Brief in the Appeals. Counsel for Appellant and Respondent appeared for oral argument before the Second Department on April 29, 2019.

On September 18, 2019, the Second Department issued the Appeal Order reversing the Trial Court Orders, granting Respondent's motion to dismiss the Complaint as time-barred pursuant to CPLR 3211(a)(5) insofar as asserted against him, and denying Ditech's cross-motion for, *inter alia*, an order of reference as moot. (R. 365-367). On October 2, 2019, counsel for Respondent served a copy of the Appeal Order, with Notice of Entry, on counsel for Appellant via NYSCEF. (R. 364-367).

On October 28, 2019, Appellant filed a motion for leave to appeal to this

Court, which Respondent did not oppose. This Court granted leave to appeal in an order dated February 18, 2020. (R. 368).

ARGUMENT

I. THE COURT SHOULD HOLD THAT A VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION WITHOUT PREJUDICE AUTOMATICALLY NULLIFIES AND/OR REVOKES ACCELERATION OF THE MORTGAGE DEBT .

It is well-settled that a mortgage debt has a statute of limitations period of six years. CPLR 213(4). Under New York law, "once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt." *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dep't 2001). Commencement of a foreclosure action typically serves to accelerate a mortgage debt. *Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 508-09 (1st Dep't 2019); *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (3d Dep't 2003); *Ditech Fin., LLC v. Corbett*, 166 A.D.3d 1568, 1568 (4th Dep't 2018); *Sharova v. Wells Fargo Bank*, 62 Misc. 3d 925, 931 (Sup. Ct. Kings Cty. 2019) (citing *MSMJ Realty, LLC v. DLJ Mortg. Capital, Inc.*, 157 A.D.3d 885, 887 (2d Dep't 2018)).

Despite the Second Department's reasoning in the Appeal Order, as well as in some other recent cases, the majority of New York courts have held that the voluntary discontinuance of a foreclosure action revokes the acceleration of the mortgage debt in either of two ways: (1) by nullifying everything within the action, including the acceleration, and/or (2) by serving to voluntarily revoke the

acceleration. Keeping in line with the majority of courts and its own precedent, this Court should find that a voluntary discontinuance without prejudice served within the 6 year limitations period automatically nullifies and/or is sufficient to revoke any prior acceleration.

A. The Voluntary Discontinuance Of A Foreclosure Action Nullifies A Prior Acceleration of the Mortgage Debt.

Long-standing Court of Appeals' precedent holds that the voluntary discontinuance of a mortgage foreclosure action nullifies the acceleration of the mortgage loan.

In *Loeb v. Willis*, this Court reasoned:

> The foreclosure action was discontinued and all the proceedings therein thus annulled. There was no longer any record or adjudication in that action which bound any one. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been.

100 N.Y. at 235. The Second Department has relied upon this case law similarly finding that "[w]hen an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified." *Newman v. Newman*, 245 A.D.2d 353, 354 (2d Dep't 1997).[5] New York trial courts have

[5] Neither *Loeb* nor *Newman* are outliers; the Appellate Division departments have applied the nullity doctrine in actions across varied substantive law areas. *E.g.*, *Brown v. Cleveland Trust Co.*, 233 N.Y. 399, 406 (1st Dep't 1922) (contract); *Weldotron Corp. v. Arbee Scales, Inc.*, 161 A.D.2d 708, 709 (2d Dep't 1990) (fraud);

similarly applied this law and extended the Second Department's holding in *Newman* to voluntary discontinuances in the residential foreclosure context. *E.g.*, *U.S. Bank Nat'l Ass'n v. Creative Encounters, LLC*, No. 256173/2018, 2019 WL 2093911, at *3 (N.Y. Sup. Ct. Rensselaer Cty. Apr. 12, 2019) (lender's "distinct intention to voluntarily discontinue" prior foreclosure actions nullified everything in the action and "was an affirmative act of revocation" of the acceleration of the mortgage debt); *Wilmington Sav. Fund Soc'y, FSB v. DeCanio*, No. 600554/2015, 2017 WL 1713111, at *3-4 (N.Y. Sup. Ct. Suffolk Cty. May 3, 2017) (acceleration of debt nullified by voluntary discontinuance of prior foreclosure action); *U.S. Bank Nat'l Ass'n v. Wongsonadi*, No. 703762/2015, 2017 WL 1333442, at *3 (N.Y. Sup. Ct. Queens Cty. 2017) ("[T]he election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action.").

In its recent decisions, including the Appeal Order, the Second Department failed to acknowledge this precedent or even discuss its binding impact on the deceleration of the debt. *E.g.*, *Bank of N.Y. Mellon v. Ahmed*, No. 602169/2015, 2020 WL 1161247, at *2 (2d Dep't Mar. 11, 2020); *U.S. Bank Nat'l Ass'n v. Leone*, 175 A.D.3d 1452, 1454 (2d Dep't 2019); *Bank of N.Y. Mellon v. Craig*, 169 A.D.3d 627, 629 (2d Dep't 2019); *U.S. Bank Trust, N.A. v. Aorta*, 167 A.D.3d 807, 809 (2d

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In re HSBC Bank USA, NA, 72 A.D.3d 1515, 1516 (4th Dep't 2010) (estate law); *Mahon v. Remington*, 256 A.D 889, 889 (4th Dep't 1939) (mortgage and bond action).

Dep't 2018); *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631, 632-33 (2d Dep't 2018), *leave to appeal granted in part*, 33 N.Y.3d 1039 (2019).

In light of this Court's holding in *Loeb v. Willis*, the Second Department should have found that the voluntary discontinuance automatically revoked the acceleration of Respondent's loan because everything in the case, including the acceleration, became a nullity. Accordingly, this Court should hold that voluntarily discontinuing an action within the six year limitations period automatically nullifies and, therefore revokes, the acceleration of the mortgage debt.

B. The Voluntary Discontinuance of a Foreclosure Action Served Within the 6 Year Limitations Period Revokes the Acceleration of the Debt.

Even if the nullity case law is not found to be controlling, this Court should determine as a matter of law that the voluntary discontinuance of a foreclosure action, which was consented to by Respondent, is an affirmative act sufficient to revoke the acceleration of a mortgage debt. As previously discussed, the commencement of a foreclosure action typically serves to accelerate a mortgage debt. *E.g., Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 508-09 (1st Dep't 2019). The converse of a foreclosure action's commencement is its discontinuance. Therefore, when a lender chooses to voluntarily discontinue the action, it should

follow that the acceleration is also voluntarily revoked.[6] However, the law in New York on this issue now reflects inconsistencies which have prejudiced lenders relying on the case law in effect at the time they voluntarily discontinued earlier foreclosure actions.

Prior to recent Second Department rulings, including the Appeal Order, several New York trial courts held that a voluntary discontinuance served in and of itself to deaccelerate a mortgage debt, where the accelerating event was the commencement of the foreclosure. *E.g., U.S. Bank Nat'l Ass'n v. Deochand*, No. 702859/2016, 2017 WL 1031942, at *4-5 (N.Y. Sup. Ct. Queens Cty. Mar. 1, 2017); *4 Cosgrove 950 Corp. v. Deutsche Bank Nat'l Tr. Co.*, No. 152225/2015, 2016 WL 2839341, at *2-3 (N.Y. Sup. Ct. N.Y. Cty. May 11, 2016) ("Withdrawing the prior foreclosure action is an affirmative act of revocation.").

This line of cases was consistent with an early ruling by this Court from 1905, *Kilpatrick v. Germania Life Insurance Co.,* 183 N.Y. 163, 168 (1905), which appeared to recognize the lender's voluntary discontinuance as an effective

[6] Under the standard Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") mortgages, accelerating a mortgage debt is a discretionary option available to lenders when a borrower is in default. It is well-settled that, where a lender exercises this option, it is entitled to revoke the acceleration. *E.g., Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994) ("[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon.").

revocation of acceleration, although the Court ruled in favor of the borrower finding that the borrower would have been prejudiced if acceleration was revoked. It was also consistent with an early 1990s Second Department decision, *Federal National Mortgage Ass'n v. Mebane*, as well as two decisions issued by the First Department. In *Federal National Mortgage Ass'n v. Mebane*, the Second Department considered a trial court's *sua sponte* dismissal of a prior foreclosure action, concluding "[i]t cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate." 208 A.D.2d 892, 894 (2d Dep't 1994) (emphasis added). Implicit in this holding was the implication that a discontinuance by a lender would serve to decelerate the debt.

The First Department has also recognized that a voluntary discontinuance can serve to revoke an acceleration of the debt. *E.g.*, *U.S. Bank N.A. v. Charles*, 173 A.D.3d 564, 565 (1st Dep't 2019) (finding triable issue of fact as to whether "discontinuance of the prior foreclosure action de-accelerated the mortgage" where the discontinuance does not "provide[] that the mortgage was de-accelerated or that" lender would accept installment payments); *Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 509 (1st Dep't 2019) (finding whether the action was time-barred was a triable issue of fact where lender voluntarily discontinued a prior foreclosure action due to a "defective default notification"). In *Vargas v. Deutsche Bank National Trust Co.*, the First Department appeared to find no triable issue of fact only because the

lender explicitly stated after the voluntary discontinuance that payments made "will not be deemed a waiver of the acceleration of [the] loan," which contradicted what would otherwise be an affirmative act revoking the acceleration. 168 A.D.3d 630, 630 (1st Dep't 2019) (citing *NMNT Realty Corp. v. Knoxville 2012 Tr.*, 151 A.D.3d 1068 (2d Dep't 2017)).[7] The *Charles*, *Saglimbeni*, and *Vargas* decisions suggest that, absent some limiting language or inconsistent act on the part of the lender, a voluntary discontinuance, at a minimum, creates an issue of fact.

Federal courts have adopted the reasoning of these holdings noting "ten of the thirteen New York trial courts that have considered this issue have found that '[w]ithdrawing the prior foreclosure action is an affirmative act of revocation' that tolls the statute of limitations." *U.S. Bank Tr., N.A. v. Adhami*, No. 18-cv-530, 2019 WL 486086, at *5 (E.D.N.Y. Feb. 6, 2019) (alteration in original) (footnote omitted) (quoting *4 Cosgrove 950*, 2016 WL 2839341, at *4) (finding triable issue of fact as to whether action was time-barred); *see also OneWest Bank, N.A. v. Simon*, No. 14-cv-6622, 2019 WL 1320275, at *9-10 (E.D.N.Y. Mar. 22, 2019) (discussing division in case law and rejecting as matter of law borrowers' argument that action was time-barred); *Zucker v. HSBC Bank, USA*, No. 17-cv-2192, 2018 WL 2048880, at *7

[7] The Third and Fourth Departments have not yet ruled on this issue. Nonetheless, one recent trial court decision in the Third Department has held that a voluntary discontinuance was sufficient to revoke the acceleration. *U.S. Bank Nat'l Ass'n v. Creative Encounters, LLC*, No. 256173/2018, 2019 WL 2093911, at *3 (N.Y. Sup. Ct. Rensselaer Cty. Apr. 12, 2019).

(E.D.N.Y. May 2, 2018) (recognizing New York courts have found voluntary discontinuances of foreclosure actions constituted affirmative acts of revocation of accelerated mortgage debt), *adhered to upon reconsideration*, 2018 WL 4845739 (E.D.N.Y. Oct. 4, 2018); *In re Taylor*, 584 B.R. 590, 595 (Bankr. E.D.N.Y. 2018) (same).

The Second Department in *NMNT Realty Corp. v. Knoxville 2012 Trust* similarly found that the lender had "raised a triable issue of fact as to whether [lender's predecessor-in-interest's] motion 'constituted an affirmative act by the lender to revoke its election to accelerate.'" 151 A.D.3d 1068, 1070 (2d Dep't 2017) (citations omitted) (quoting *Mebane*, 208 A.D.2d at 894). There, the lender submitted evidence that its predecessor-in-interest mortgagee had "moved for, and . . . was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted." *Id.*

However, in 2018, the Second Department began departing from these lines of cases (and its own interpretation in *Mebane* and *Knoxville*), and reversed the trial court's finding of an affirmative act of revocation in *Freedom Mortgage Corp. v. Engel*, 163 A.D.3d 631, 632-33 (2d Dep't 2018). The Second Department has continued to take this position in later cases as well. *E.g., Ahmed*, 2020 WL 1161247, at *2; *Leone*, 175 A.D.3d at 1454; *Craig*, 169 A.D.3d at 629; *Aorta*, 167

A.D.3d at 809. Similarly, near the end of 2019, the First Department also shifted its stance on the issue, deciding that "a mere discontinuance of a prior foreclosure action, without more, is insufficient to constitute an affirmative act to revoke a lender's election to accelerate." *Wells Fargo Bank, N.A. v. Liburd*, 176 A.D.3d 464, 464 (1st Dep't 2019).

These departures are in marked contrast with the other decisions within the First and Second Departments, and other New York trial and federal courts. The Second Department's *Engel* line of cases does not simply differ from its own prior case law or the early First Department cases and Federal court case law; it fails to provide any meaningful explanation or justification for the abrupt change in law. While occasionally citing to *Mebane* or *Knoxville* as a comparison, no meaningful distinction is made. *E.g.*, *Craig*, 169 A.D.3d at 629.

Given the First and Second Departments' recent divergence from their own rulings and those of other New York trial and federal courts, this Court should resolve the issue in order to give borrowers and lenders certainty regarding whether voluntary discontinuances are sufficient to overcome statute of limitations claims. Ultimately, this certainty will reduce the burden on the courts and parties in litigating this issue. Given this Court's prior case law as well as the broader public policy and equity considerations, this Court should overturn the Second Department's ruling in the Appeal Order and the *Engel* line of cases.

C. It Would Be Inequitable to Adopt the Second Department's Recent Approach to Voluntary Discontinuances When Lenders Have Relied on Longstanding Nullity and Revocation Case Law .

For years, lenders, relying upon established jurisprudence, have been able to voluntarily discontinue residential foreclosure actions with the knowledge that doing so would not preclude them from later exercising their rights to foreclose. In the aftermath of the 2008-09 financial crisis, lenders like Appellant's predecessor-in-interest took advantage of this flexibility, voluntarily discontinuing without prejudice actions they did not want to pursue at that time. Where lenders and borrowers have been unable to reach an agreement and borrowers have continued to not pay their owed monthly payments, lenders have exercised their long established right to file a new action.

Because lenders have relied on the above nullity and revocation case law in determining how to proceed with borrowers who have stopped paying their mortgages, the Second Department's recent *Engel* line of cases has prejudiced their interests. Indeed, it has effectively rewarded borrowers who have stopped paying their mortgage debt – often for many years while lenders continue to pay expensive carrying costs – by allowing them to receive a free house in exchange for defaulting on a loan the borrower chose to obtain, benefited from obtaining, and agreed to pay back. The potential financial ramifications to lenders, which can no longer enforce their security interest in the mortgaged properties and will need to potentially write

whole loans off of their books, are significant. Indeed, if lenders are put in this position there will be an inevitable chilling effect on lending in the first instance, as well as working with borrowers to modify their loans. Moreover, the equities weigh against awarding houses and properties to delinquent borrowers where lenders have not failed to exercise their rights to foreclose but have instead relied on the case law in effect at the time of the defaults and foreclosure actions.

II. THE VOLUNTARY DISCONTINUANCE OF THE 2009 FORECLOSURE ACTION NULLIFIED AND/OR REVOKED THE ACCELERATION OF THE DEBT .

In the present case, the Second Department's reversal of the Trial Court Orders was erroneous. As discussed in full above, the Second Department's interpretation of voluntary discontinuances of foreclosure actions stands in contrast to its own precedent and other rulings of New York courts, including this Court, as well as broader principles of well-established New York case law. Here, the voluntary discontinuance of the 2009 Foreclosure Action in 2014 served to nullify the acceleration of the mortgage loan and/or constituted an affirmative act sufficient to revoke the acceleration of the debt.[8]

The following facts are not in dispute:

[8] Unlike the First Department case, *Vargas*, 168 A.D.3d at 630, there was no evidence in the record that contradicted the deceleration of the debt.

- Respondent defaulted on the subject loan when he failed to make his monthly payment due on February 1, 2009. (R. 96, 186-198, 212).
- Appellant's predecessors-in-interest, Countrywide, filed a foreclosure action on or about July 28, 2009, which accelerated the debt. (R. 26-43).
- In February 2014, Everbank (Countrywide's assignee and holder of the loan at the time) and Respondent stipulated to discontinue the 2009 Foreclosure Action. (R. 51-52).

Importantly, this stipulation of discontinuance was a *mutual decision signed by both parties*, not a *sua sponte* action by the court or a sanction against the lender for some sort of procedural deficiency. It was also clearly without prejudice. Although Respondent argues this action is outside the statute of limitations period, which he asserts ran on July 28, 2015, the parties' voluntary discontinuance of the 2009 Foreclosure Action in 2014 served to nullify and/or affirmatively revoke the acceleration of the debt altogether. Given his consent to the discontinuance of the 2009 Foreclosure Action, Respondent should be estopped from claiming that the Foreclosure Action is time-barred, and the Court should find that the statute of limitations has not expired.

Further, and significantly, Respondent cannot argue that he has been prejudiced in any way by the discontinuance of the 2009 Foreclosure Action or

subsequent filing of the current action in 2016 as he has been able to live in the Property for free since February 2009 while Appellant has paid considerable carrying costs on the Property. The prejudice to Appellant goes beyond just carrying costs, as the Second Department's ruling awards a free home to the Respondent, while Appellant loses the bargained-for security interest in the Property.

In light of these facts as well as the discussion in Sections I(A) and I(B), above, this Court should hold, as a matter of law, that a timely-served voluntary discontinuance of a prior foreclosure action nullifies and/or revokes the acceleration of the debt[9] and should reverse the Appeal Order and reinstate the Trial Court Orders (a) denying Respondent's motion to dismiss the complaint as time-barred and (b) granting Appellant's cross-motion for, *inter alia*, an order of reference.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that the Court reverse the Appeal Order and hold that the voluntary discontinuance of the 2009 Foreclosure Action either nullified the acceleration of Respondent's mortgage debt and/or revoked Appellant's predecessor's election to exercise its option to accelerate the loan because the commencement of that action was the triggering event for acceleration. Ruling in such a manner will bring consistency to the courts statewide

[9] At a minimum, the Court should find that there is a triable issue of fact, unless a borrower can put forth evidence that is inconsistent with a revocation of the acceleration the debt.

on this frequent issue in mortgage foreclosure actions, and will put lenders and borrowers on notice regarding these issues, ultimately minimizing the burden on the courts. Similarly, such a ruling will take into account equitable considerations such that a borrower who has defaulted on his/her loan should not be awarded a free home.

Dated: New York, New York
April 15, 2020

Respectfully submitted,

DAY PITNEY LLP

By: _____

Christina A. Livorsi, Esq.
Alfred W.J. Marks, Esq.
605 Third Avenue, 31st Floor
New York, NY 10158-1803
(212) 297-5800
clivorsi@daypitney.com
awjmarks@daypitney.com

Counsel for Plaintiff-Appellant Ditech Financial LLC f/k/a Green Tree Servicing LLC's successor-in-interest in this action, Wilmington Savings Fund Society, FSB, DBA Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust

WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 4,766 words. This brief was prepared on a computer using Microsoft Office Word 2010. A proportional typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
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Dated: New York, New York
April 15, 2020

Respectfully submitted,

DAY PITNEY LLP

By: Christina Livorsi

Christina A. Livorsi, Esq.
Alfred W.J. Marks, Esq.
605 Third Avenue, 31st Floor
New York, NY 10158-1803
(212) 297-5800
clivorsi@daypitney.com
awjmarks@daypitney.com

Counsel for Plaintiff-Appellant Ditech Financial LLC f/k/a Green Tree Servicing LLC's successor-in-interest in this action, Wilmington Savings Fund Society, FSB, DBA Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust

STATEMENT PURSUANT TO CPLR 5531

Court of Appeals
of the
State of New York

DITECH FINANCIAL LLC f/k/a Green Tree Servicing LLC,

Plaintiff-Appellant,

– against –

SANTHANA KUMAR NATARAJA NAIDU,

Defendant-Respondent,

– and –

CITIMORTGAGE, INC. and "JOHN DOE# 1" through "JOHN DOE# 12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

1. The index number of the case in the court below is 700387/2016. The Docket Numbers in the Appellate Division, Second Dept. are 2016-11072 and 2016-11073.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Queens County.

4. The action was commenced on or about July 27, 2009, by the filing of a Summons and Complaint. Defendant Santhana Kumar Nataraja Naidu joined the issue by the filing of a Verified Answer on or about January 29, 2016.

5. The nature and object of the action is Plaintiff seeks to foreclose a Consolidation, Extension Modification Agreement pertaining to property located at 137-29 Laburnum Avenue, Flushing, New York 11355.

6. The appeals are taken from the Decisions and Orders of the Honorable Robert J. McDonald, dated September 9, 2016. Further taken to the New York State Court of Appeals from the Appellate Division Decision and Order dated September 18, 2019.

7. This appeal is on the full reproduced record.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Brian R. Landy, Jr., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 38 Davis Avenue, Rye, New York 10580.

That on the 16th day of April, 2020 deponent served the within:

Brief for Plaintiff-Appellant

upon designated counsel for the parties indicated herein at the addresses provided below by depositing 3 true copies thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

LAW OFFICES OF MAGGIO & MEYER
Attorneys for Defendant-Respondent
3100 Veterans Memorial Highway
Bohemia, New York 11716
(631) 750-6886
emaggio@gmail.com

Sworn to before me this
16th day of April, 2020

Eric R. Larke
Notary Public, State of New York
No. 01LA5067236
Qualified in Westchester County
Commission Expires March 5, 2023

Brian R. Landy, Jr.

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