Court of Appeals No. APL 2020-00023

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

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.

REPLY 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
awjmarks@daypitney.com

Dated: July 9, 2020

Queens County Clerk's Index No.: 700387/2016
Appellate Division, Docket Nos.: 2016-11072 & 2016-11073

APPELLATE INNOVATIONS
(914) 948-2240

14323

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. THIS COURT SHOULD FIND THAT THE VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION AUTOMATICALLY NULLIFIES THE ACCELERATION OF THE MORTGAGE DEBT AND/OR SERVES AS AN AFFIRMATIVE ACT REVOKING THE ACCELERATION 3

A. Where A Mortgage Debt is Accelerated By The Commencement of a Foreclosure Action, the Discontinuance of the Foreclosure Action Automatically Nullifies the Acceleration. 3

B. The Voluntary Discontinuance of a Foreclosure Action Is An Affirmative Act That Serves to Revoke the Acceleration of Mortgage Debt. 9

II. PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF DETERMINING THAT THE VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION SERVES TO NULLIFY AND/OR REVOKE THE ACCELERATION OF MORTGAGE DEBT 12

A. A Lender's Contractual Right to Choose a Remedy for Breach of a Mortgage Contract is Protected by Automatic Revocation of the Acceleration of a Mortgage Loan. 12

B. Automatic Revocation Does Not Circumvent the Purpose of the Statute of Limitations. 14

CONCLUSION 16

WORD COUNT CERTIFICATION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Albertina Realty Co. v. Rosbro Realty Corp.,
258 N.Y. 472 (1932) 4, 5, 6

Bank of N.Y. Mellon v. Yacoob,
182 A.D.3d 566 (2d Dep't 2020)...9

Beneficial Homeowner Serv. Corp. v. Tovar,
150 A.D.3d 657 (2d Dep't 2017)...5

Capital One, N.A. v. Saglimbeni,
170 A.D.3d 508 (1st Dep't 2019) 4

Charter One Bank, FSB v. Leone,
45 A.D.3d 958 (3d Dep't 2007)...6

Christiana Tr. v. Barua,
No. 2017-12206,
2020 WL 2892827 (2d Dep't 2020) 9, 10, 11, 12, 14

Deutsche Bank Nat'l Tr. Co. v. Adrian,
157 A.D.3d 934 (2d Dep't 2018)...4

Ditech Fin., LLC v. Corbett,
166 A.D.3d 1568 (4th Dep't 2018)...4

Fed. Nat. Mortg. Ass'n v. Mebane,
208 A.D.2d 892 (2d Dep't 1994)...9, 10

Freedom Mortg. Corp. v. Engel,
163 A.D.3d 631 (2d Dep't 2018)...9, 10, 11

Golden v. Ramapo Imp. Corp.,
78 A.D.2d 648 (2d Dep't 1980)...13

HSBC Bank USA, N.A. v. Gold,
171 A.D.3d 1029 (2d Dep't 2019)...8

HSBC Bank, USA, NA v. Margineanu,
86 N.Y.S.3d 694 (Sup. Ct. Suffolk Cty. 2018), *abrogated by Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d 34 (2d Dep't 2019)....................................5, 6

Lavin v. Elmakiss,
302 A.D.2d 638 (3d Dep't 2003)..4

Loeb v. Willis,
100 N.Y. 231 (1885)..3

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Barney Assocs.,
130 F.R.D. 291 (S.D.N.Y. 1990)..15

NMNT Realty Corp. v. Knoxville 2012 Trust,
151 A.D.3d 1068 (2d Dep't 2017)..9, 10, 11

Puzzuoli v. JP Morgan Chase Bank, N.A.,
55 Misc.3d 417 (N.Y. Sup. Ct. Dutchess Cty. 2016) 4, 5, 6

U.S. Bank Nat'l Ass'n v. Creative Encounters LLC,
183 A.D.3d 1086 (3d Dep't 2020)..9

Rules

CPLR 213..16

PRELIMINARY STATEMENT

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"), submits this brief in reply to Respondent's brief and in further support of its appeal of the Second Department's Appeal Order[2] dismissing Appellant's foreclosure action against Respondent as time-barred. Appellant's opening brief demonstrated that the Second Department's decision ignored longstanding precedent from this Court in dismissing this action on statute of limitations grounds. As discussed, it would have been impossible for Appellant's predecessor-in-interest to have reasonably foreseen that the voluntary discontinuance of the 2009 Foreclosure Action, without prejudice, and with the consent of Respondent, would bar a subsequent action.

Significantly, Respondent recognizes that the Second Department failed to follow this Court's precedent and that the case law in effect at the time supports Appellant's position that the voluntary discontinuance of the 2009 Foreclosure

---

[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.

[2] Unless otherwise noted, capitalized terms used herein have the same meaning ascribed to them in Appellant's opening brief.

Action automatically nullified everything within that action, or constituted an affirmative act of revocation of the prior acceleration of Respondent's mortgage debt. Nonetheless, Respondent argues that the voluntary discontinuance of the 2009 Foreclosure Action did not nullify the acceleration caused by the filing of that action because other acts taken by Appellant's predecessor-in-interest before filing related to the action evinced an independent election to accelerate.

Respondent's unsupported and proposed expanded definition of the term "commencement of an action" in the mortgage foreclosure context is contrary to well-established case law and jurisprudence in New York, would unreasonably complicate the determination of whether mortgage debt has been accelerated, and strips lenders of their contractual and equitable rights to determine which remedies to seek for a borrower's breach of a mortgage agreement. Accordingly, for the reasons detailed further below, Appellant respectfully requests that this Court reverse the Appeal Order and find that the voluntary and consented to discontinuance of the 2009 Foreclosure Action automatically nullified and/or revoked the prior acceleration of Respondent's loan.[3]

---

[3] Acceleration of the mortgage debt, as discussed herein, refers only to an acceleration arising from the commencement of a foreclosure action and does not refer to an acceleration of the debt by other means, such as by notices to borrowers, unless otherwise specified.

ARGUMENT

I. THIS COURT SHOULD FIND THAT THE VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION AUTOMATICALLY NULLIFIES THE ACCELERATION OF THE MORTGAGE DEBT AND/OR SERVES AS AN AFFIRMATIVE ACT REVOKING THE ACCELERATION

As discussed at length in Appellant's opening brief, when a foreclosure action is voluntarily discontinued, the result is the deacceleration of the mortgage debt that was accelerated by the commencement of an action. The discontinuance automatically nullifies the acceleration of the mortgage debt and/or serves as an affirmative act that revokes the acceleration of the debt. Despite Respondent's arguments otherwise, this Court should reverse the Second Department's Appeal Order on either of those two grounds.

A. Where A Mortgage Debt is Accelerated By The Commencement of a Foreclosure Action, the Discontinuance of the Foreclosure Action Automatically Nullifies the Acceleration.

Both Appellant and Respondent agree that "the discontinuance of an action will render the pleadings filed with the [c]ourt annulled, as if they were never filed." (Respondent's Br. at 23). This conclusion has previously been reached by this Court and is undoubtedly the law of the State of New York. *Loeb v. Willis*, 100 N.Y. 231, 235 (1885). Respondent attempts to circumvent the implications of this longstanding principle of law by distorting – and at times categorically ignoring – other longstanding case law. By so doing, Respondent argues that,

where it is undisputed that the commencement of the lawsuit is the trigger for the acceleration of the mortgage debt, any events connected with the action, i.e. verifying the complaint, that precede the actual date of filing still serve to accelerate the mortgage debt.

There is no question that the commencement of a foreclosure action is one of the ways a mortgage debt is accelerated. *Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 508-09 (1st Dep't 2019); *Deutsche Bank Nat'l Tr. Co. v. Adrian,* 157 A.D.3d 934, 935 (2d Dep't 2018); *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). Notwithstanding this well-established principle in New York law, Respondent argues that the debt can be accelerated prior to commencement of an action by acts taken by lender in furtherance of the action, such as by verifying the foreclosure complaint. (Respondent's Br. at 27-30). Respondent's argument relies entirely on *Puzzuoli v. JP Morgan Chase Bank, N.A.*, 55 Misc.3d 417 (N.Y. Sup. Ct. Dutchess Cty. 2016). In *Puzzuoli*, the court found the mortgage debt was accelerated no later than July 24, 2009, the date the complaint had been verified, despite it not being filed until "several days later." *Id.* at 427-28. The court's reasoning was based on this Court's ruling in *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472 (1932), but extrapolated far beyond this Court's ruling in that case.

In *Albertina*, the seminal case on the acceleration of mortgage debt through the commencement of a foreclosure action, this Court held:

> It is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause. We are satisfied, however, that the unequivocal overt act of the plaintiff in *filing the summons and verified complaint and lis pendens constituted a valid election*. It disclosed the choice of the plaintiff and constituted notice to all third parties of such choice. To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election. The complaint recited that the plaintiff had elected. The mere fact that before the summons could be served, the defendant made a tender, did not as a matter of law destroy the effect of the sworn statement that plaintiff had elected.

258 N.Y. at 476 (emphasis added). The importance of the *Albertina* decision was this Court's emphasis on the fact that *filing* a foreclosure action is the overt act that serves as the election to accelerate the mortgage debt. *Id.*

By contrast, *Puzzuoli* included within the election to accelerate the mortgage debt not only the filing of the foreclosure action, but earlier actions leading up to the action's commencement. 55 Misc.3d at 427-28. Despite this effort to expand the evidence of acceleration beyond the filing of a complaint, importantly, of the many cases which cite *Albertina*, very few have adopted *Puzzuoli*'s expansion of the holding in *Albertina*. *Compare HSBC Bank, USA, NA v. Margineanu*, 61 Misc. 3d 973, 977-78 (Sup. Ct. Suffolk Cty. 2018), *abrogated by Bank of N.Y.Mellon v. Dieudonne*, 171 A.D.3d 34 (2d Dep't 2019), *with Beneficial Homeowner Serv.*

Corp. v. Tovar, 150 A.D.3d 657, 658 (2d Dep't 2017) *and Charter One Bank, FSB v. Leone*, 45 A.D.3d 958, 958 (3d Dep't 2007).[4] This Court should similarly reject such an effort.

Respondent's argument ignores the practical implications of expanding the definition of acceleration of a mortgage debt through the commencement of a foreclosure action to include acts taken by the lender in *preparation* for the filing of the foreclosure action. For instance, consider a lender that asks its attorney to prepare a foreclosure complaint, signs the complaint, and then ultimately decides not to proceed with filing the complaint. If more than six years pass without the borrower curing his default before the lender finally elects to file a foreclosure action, Respondent's approach to acceleration of the debt would result in the action being time-barred. Will it even be possible for a lender to defeat a claim or defense that an action is time-barred without a court first requiring the parties to engage in discovery so a borrower can inquire whether there was an unfiled complaint or any other actions taken by the lender in *preparation* for the filing of the foreclosure action which evinced an intent to accelerate? If a mortgage is transferred to a successor-in-interest which has no way of knowing about the

[4] In one such case, the court recognized *Puzzuoli*'s expansion of *Albertina* while still determining that "'the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action' and the discontinuance of the prior foreclosure action was therefore 'an affirmative act of revocation.'" *Margineanu*, 61 Misc. 3d at 977-981 (quoting *U.S. Bank Nat. Ass'n v. Wongsonadi*, 55 N.Y.S.3d 695 (Sup. Ct. Queens Cty. 2017).

earlier unfiled complaint or other actions taken by a predecessor-in-interest, what is its obligation – and its counsel's obligation – to investigate such matters in order to avoid running into a statute of limitations issue?

It makes little sense to view the verification of the complaint as a wholly separate and independent act from the filing of the foreclosure action for purposes of the nullity doctrine. Indeed, the various steps taken to prepare and file a complaint are all in furtherance of commencement of a foreclosure action. Therefore, when it comes to filing a foreclosure action, which is later voluntarily discontinued, any act related thereto should also be deemed nullified. To find otherwise would lead to absurd results that upend the practice of mortgage law and the ability of lenders to be flexible in choosing remedies for breaches of mortgage contracts by borrowers.

Respondent acknowledges that New York courts use the commencement of an action to calculate the statute of limitations period for accelerating a debt, but Respondent attempts to explain away this contradiction with his acceleration argument by stating this is done merely as "the next best starting point for determining when acceleration occurred for the purposes of calculating the Statute of Limitations." (Respondent's Br. at 30). This is nonsensical. It would be just as simple to pinpoint when a statute of limitations period begins from the date a complaint is verified -- if that were actually the date the debt was accelerated.

Instead, the longstanding practice of calculating a statutory limitations period from the date a foreclosure action is commenced -- when commencement is the trigger for acceleration -- serves as further proof that it is the commencement of a foreclosure action which serves to accelerate the mortgage debt. *HSBC Bank USA, N.A. v. Gold*, 171 A.D.3d 1029, 1030 (2d Dep't 2019) ("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*" (quoting *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631, 632 (2d Dep't 2018))) (emphasis added).

Even here, the Second Department determined that the mortgage debt was accelerated by the initiation of the 2009 Foreclosure Action without any discussion of a pre-filing acceleration date: "the appellant[-borrower] established that the six-year statute of limitations began to run on the entire debt on July 28, 2009, when BAC accelerated the mortgage debt by commencing a foreclosure action and declaring therein that BAC 'elect[ed] to call due the entire amount secured by the mortgage.'" (R. 367).

This Court should affirm its earlier holdings that, where mortgage debt is accelerated by the commencement of a foreclosure action, it is the date of filing of the action, not the date of any act taken in preparation for said filing, such as the date of verification of the complaint, that controls for statute of limitations

purposes. This Court should also determine that the discontinuance of a foreclosure action serves to automatically nullify everything within the action, including the acceleration of the mortgage debt.

B. The Voluntary Discontinuance of a Foreclosure Action Is An Affirmative Act That Serves to Revoke the Acceleration of Mortgage Debt.

Separate and apart from the impact of a nullified complaint on the acceleration of a mortgage debt, this Court should rule that the voluntary discontinuance of a foreclosure action serves as an affirmative act that revokes the acceleration of the debt. As discussed in detail in Appellant's opening brief, New York law traditionally recognized that principle until a recent case, *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631 (2d Dep't 2018), abruptly found otherwise without distinguishing -- or even addressing -- the earlier case law.[5]

Appellant is not alone in its objection to *Engel*'s break from earlier case law. In a well-reasoned opinion dissenting in part and concurring in part with the Second Department's recent holding in *Barua*, 2020 WL 2892827, at *7, 14-17,

---

[5] Since mid-April, when Appellant's opening brief was filed, a few more opinions have weighed in on the matter which continue to follow the *Engel* line of cases without reconciling the decisions with the earlier holdings to the contrary in *Fed. Nat. Mortg. Ass'n v. Mebane*, 208 A.D.2d 892 (2d Dep't 1994), and *NMNT Realty Corp. v. Knoxville 2012 Tr.*, 151 A.D.3d 1068 (2d Dep't 2017). *E.g.*, *Bank of N.Y. Mellon v. Yacoob*, 182 A.D.3d 566, 567-68 (2d Dep't 2020); *U.S. Bank Nat'l Ass'n v. Creative Encounters LLC*, 183 A.D.3d 1086, 1087-88 (3d Dep't 2020); *Christiana Tr. v. Barua*, No. 2017-12206, 2020 WL 2892827, at *3-4 (N.Y. Sup. Ct. App. Div. 2d Dep't 2020).

the Honorable Justice Miller recognized and thoroughly articulated the problems with the *Engel* line of cases, explaining:

> My colleagues in the majority, relying on recent pronouncements from this Court, conclude that the evidence that Chase formally and affirmatively withdrew its only demand for the full payment of the debt was insufficient to raise a question of fact as to whether Chase revoked its election to accelerate. **The cases relied upon [by] my colleagues appear to be the product of judicial drift, as they fail to articulate any applicable legal theory, much less legal authority, to support their deviation from this Court's prior precedent.**

2020 WL 2892827, at *14 (Miller, J. concurring in part and dissenting in part) (emphasis added). Justice Miller proceeded to explore the *Mebane* and *Knoxville* line of cases discussed by Appellant in its opening brief, which established that a voluntary discontinuance of a foreclosure action creates, at a minimum, a triable issue of fact as to whether the mortgage debt has been revoked. *Id.* at *15-16 (citing *Mebane*, 208 A.D.2d at 894 and *Knoxville*, 151 A.D.3d at 1068).

Justice Miller also explained how the Second Department in *Engel* "departed from its prior precedent, without acknowledgment or explanation." *Id.* at *16. In so doing, Justice Miller properly noted that "[t]he new evidentiary burden imposed in [*Engel*] finds no support in the prior case law and its imposition is based on a misconstruction of the respective burdens imposed on a motion pursuant to CPLR

3211(a)(5)." *Id.* at *16 (internal citation omitted). As a result of *Engel*'s departure from prior case law on the issue,

> there has been a proliferation of cases holding that a stipulation or a motion for a voluntary discontinuance must explicitly state that an acceleration has been revoked in order to raise a triable issue of fact in this context. But neither these cases, nor *Freedom [Mortgage] Corp[oration] v. Engel*, has ever cited to any positive authority to support the imposition of this new burden. Nor do any of those cases acknowledge or explain their deviation from this [c]ourt's prior determination in *NMNT Realty Corp. v. Knoxville 2012 Trust*, 58 N.Y.S.3d 118[] or from the numerous other conflicting determinations that have been reached by other courts in this State.

Id. at *16.

Justice Miller's compelling opinion lays out the problematic nature of the *Engel* line of cases' disregard for earlier New York case law on the revocation of accelerated mortgage debt and creation of a new evidentiary burden without any support for the same. This Court should resolve this "judicial drift" from established precedent by ruling that the voluntary discontinuance of a foreclosure action serves in and of itself as an affirmative act sufficient to revoke the prior acceleration of the mortgage debt. After all, "[w]hen legal precedent is available, it should be applied in accordance with the doctrine of stare decisis," which "among other things, 'reassures the public that [the court's] decisions arise from a

continuum of legal principle rather than the personal caprice of the members of [a] [c]ourt.'" *Id.*, at *7 (quoting *People v. Peque*, 22 N.Y.3d 168, 194 (2013)).

II. PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF DETERMINING THAT THE VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION SERVES TO NULLIFY AND/OR REVOKE THE ACCELERATION OF MORTGAGE DEBT

In addition to well-established legal precedent, Appellant's opening brief identified noteworthy public policy considerations which favor a finding that the voluntary discontinuance of a foreclosure action which caused the acceleration of a mortgage debt automatically nullifies such acceleration and/or serves as an affirmative act revoking the acceleration of the debt. Respondent's public policy considerations do not support a finding to the contrary.

A. A Lender's Contractual Right to Choose a Remedy for Breach of a Mortgage Contract is Protected by Automatic Revocation of the Acceleration of a Mortgage Loan.

Respondent contends that automatic revocation of accelerated mortgage debt by the voluntary discontinuance of a foreclosure action deprives lenders of their contractual right to accelerate and deaccelerate when they choose. (Respondent's Br. at 43-45). This argument is a red herring. In every instance, any voluntary discontinuance of a foreclosure action necessarily needs the lender's consent. The lender's decision to voluntarily discontinue a foreclosure action is the lender exercising its right to deaccelerate the loan. So long as doing so does not prejudice the borrower, a lender may revoke the acceleration of a loan and then reaccelerate

the loan at a later time if it chooses to pursue foreclosure as its preferred remedy for a borrower's breach of the contract. *Golden v. Ramapo Imp. Corp.*, 78 A.D.2d 648, 650 (2d Dep't 1980) ("[O]nly if a mortgagor can show substantial prejudice will a court in the exercise of its equity jurisdiction restrain the mortgagee from revoking its election to accelerate.").

Respondent's argument that the lender's "ability and right to discontinue an action is not unlimited[]" is also unpersuasive. (Respondent's Br. at 45-47). Appellant acknowledges that seeking leave to voluntarily discontinue a mortgage foreclosure action is not an automatic or guaranteed course of action; a court may reject a lender's attempt to voluntarily discontinue an action. However, it is this process of judicial oversight that serves as a safeguard to protect borrowers who would be prejudiced by the discontinuance of an action and corresponding automatic revocation of a mortgage debt acceleration. *See Golden*, 78 A.D.2d at 650.

The right to elect whether or not to accelerate and maintain that acceleration is a bargained-for part of a mortgage contract between a lender and a borrower, not a statutory or common law right. Lenders should have the right to revoke that acceleration so long as doing so does not prejudice the borrower. Courts should not intervene in the contractual right to elect the appropriate remedy for a breach of contract or to change the remedy over time.

B. Automatic Revocation Does Not Circumvent the Purpose of the Statute of Limitations.

Respondent also argues that automatic revocation circumvents statutes of limitations and undermines their purpose. This argument is without merit. Borrowers are not entitled to a permanent acceleration of a mortgage loan just so they can benefit from the running of a statute of limitations. A lender's right to elect different remedies to address a breach of the contract by the borrower, including through the acceleration or deacceleration of the loan has no bearing on the principles behind statutes of limitations so long as it does not prejudice the borrower. In fact, Justice Miller's partial concurrence and dissent in *Barua* addressed this argument in depth:

> 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. There is absolutely no authority, in either law or equity, to support the imposition of additional, non[-]contractual restraints on a party's right to choose the remedy it will seek as redress for its adversary's breach.
>
> To the contrary, [the Second Department] has already recognized the circumstances under which equity may intervene: "*only if a mortgagor can show substantial prejudice* will a court in the exercise of its equity jurisdiction restrain the [holder] from revoking its election to accelerate." Accordingly, in order to invoke

> the court’s “equitable powers” of estoppel, a borrower must affirmatively “demonstrate . . . prejudice resulting from plaintiff's revocation of [its] election to accelerate.” Prejudice, in this context, generally “involves impairment of the [borrower’s] ability to defend on the merits, rather than merely foregoing such a procedural or technical advantage” as a statute of limitations defense.

2020 WL 2892827, at *17 (Miller, J. concurring in part and dissenting in part) (internal citations omitted).

Importantly, a borrower is not prejudiced by the mere loss of a procedural advantage like a statute of limitations defense. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Barney Assocs.*, 130 F.R.D. 291, 294 (S.D.N.Y. 1990). It would undermine a lender’s contractual rights for the courts to reject the idea of automatic revocation of an accelerated mortgage debt merely because borrowers would prefer to maintain a procedural advantage.

Although Respondent argues Appellant and its predecessors-in-interest were negligent in waiting to commence this action, Appellant has shown that the acceleration had been nullified or revoked when the 2009 Foreclosure Action was discontinued; therefore, the statute of limitations has run only on those monthly installments due more than six years prior to commencement of this action. (Respondent’s Br. at 50-52). Respondent also takes issue with how long Appellant’s predecessors-in-interest took to prosecute the 2009 Foreclosure Action, but that action was discontinued and the method of its prosecution is not

relevant here. In fact, Respondent clearly benefitted from any delay as he was able to live in his home without paying his mortgage debt.

New York law does not require claimants to file immediately after a cause of action accrues so long as the claimant files before the applicable statute of limitations expires. CPLR 213(4). That is precisely what Appellant's predecessor-in-interest did here.

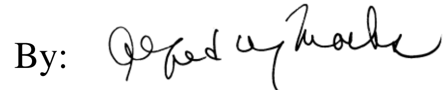
CONCLUSION

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 nullified the acceleration of Respondent's mortgage debt and/or revoked Appellant's predecessor-in-interest's election to exercise its option to accelerate the loan because the commencement of that action was the triggering event for acceleration.

Dated: New York, New York
July 9, 2020

Respectfully submitted,

DAY PITNEY LLP

By: 

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

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

WORD COUNT CERTIFICATION

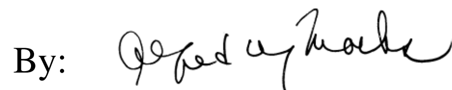
Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 4,188 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
Line spacing: Double

Dated: New York, New York
July 9, 2020

Respectfully submitted,

DAY PITNEY LLP

By: 
____

Alfred W.J. Marks, Esq.
605 Third Avenue, 31st Floor
New York, NY 10158-1803
(212) 297-5800
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

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 9th day of June, 2020 deponent served the within:

Reply 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
9th day of June, 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.

14323