To be Argued by:
HOLLY C. MEYER
(Time Requested: 15 Minutes)

Court of Appeals No. APL 2020-00023
Queens County Clerk's Index No.: 700387/2016
Appellate Division, Second Department Docket Nos.: 2016-11072 & 2016-11073

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 DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

Defendant-Respondent Santhana Kumar Nataraja Naidu (hereinafter "Borrower") submits this Answering Brief in the appeal by Plaintiff-Appellant Ditech Financial LLC f/k/a Green Tree Servicing LLC (hereinafter "Appellant"). It is the position of the Borrower that the decision of the Appellate Division, Second Department, which reversed the trial Court Order and denied Summary Judgment to the Appellant was proper. In addition, the Appellate Court's decision in granting Summary Judgment to Borrower and dismissing the matter as time barred was soundly grounded in long standing case law and should be affirmed by this Court.

Although there remains a question as to whether an acceleration clause gives a lender the contractual right to unilaterally revoke an acceleration, that issue is not a part of this Appeal. The limited question before this Court, presuming a Lender has the right to revoke an acceleration, is whether a voluntary discontinuance by the Lender Plaintiff is an automatic revocation of acceleration. Appellant takes the position that the voluntary discontinuance of a foreclosure action should be deemed an automatic revocation of the Mortgage debt which, in turn, would reset the statute of limitations pertaining to Appellant's claim. Appellant submits that existing case law supports its position under two separate theories, both of which

appear to be based on the literal meaning of language found in many Decision. Specifically, courts have held time and again that the acceleration of a mortgage debt occurs with the filing of the complaint and the Statute of Limitations begins. Interpreting this language literally would indicate the acceleration of the mortgage debt only occurs at the moment the complaint is filed.

Appellant's literal interpretation is the basis of its first theory grounded on established law that when an action is discontinued, everything within the action is annulled as if it never occurred. Appellant's theory proclaims that the election to accelerate and call due the entire unpaid principal balance is alleged in the pleadings of the complaint. When the action is discontinued, everything within the action is nullified, including the complaint and all allegations contained therein, including the acceleration. The flaw in this theory is failure to recognize the event, the act of choosing to accelerate, took place prior to the complaint being drafted, executed and/or filed. The Appellant fails to acknowledge that the event of choosing to accelerate the Mortgage debt by Appellant's predecessor in interest (BAC), came first. That choice was the reason BAC retained the Law Office Steven J. Baum to commence a foreclosure action seeking judgment for the entire unpaid principal balance ; requesting the Law Office of Steven J. Baum to prepare the Summons and Complaint; authorize Megan Szeliga, Esq, as an attorney with the Law Office of Steven J. Baum, to verify the truthfulness of the pleadings in the

complaint, which include the assertion that the debt had been accelerated and; file the complaint document to commence a foreclosure action. All the actions of BAC came second, after the Mortgage debt was accelerated. The mere filing of the complaint and commencement of the foreclosure action was secondary and had no relation to the primary occurrence, the election of BAC to accelerate the mortgage debt. The fact the complaint document itself was null and void by the discontinuance of the action does not diminish or undo any events or facts stated therein.

In the alternative, Appellant seeks this Court's revival of its claim by finding that the voluntary discontinuance should be deemed a sufficient overt act on the part of the Appellant's predecessor in interest to serve as a revocation of the acceleration. This theory stems from established case law which finds that the act of commencing a foreclosure action is sufficient to serve as an overt act manifesting the intent of a Lender to accelerate the maturity of a mortgage debt. If the acceleration is evidenced by the commencement of a foreclosure action, then logically the discontinuance of that same foreclosure action must be interpreted as a deceleration of the mortgage debt. With deceleration, the six-year statute of limitations will stop and be reset. Appellant's logic is flawed because it negates the fact that there is only one reason to commence a foreclosure action, to enforce a right and claim arising out of the acceleration of the debt. The act of

commencement is intended to facilitate the election to accelerate and is, therefore the overt act of effectuating acceleration. However, there are several reasons to discontinue a foreclosure action which are unrelated to the intent to decelerate. If the act of discontinuance is not done to facilitate the intent to revoke the acceleration, then it cannot serve as the overt act to effectuate deceleration.

It is noted that Appellant's literal meaning foundation for its theories ignores another obscure point. Appellant's theory appears to be based on a misinterpretation of the language of the Courts and rests on the notion that the commencement of the foreclosure action initiates the acceleration of the mortgage debt, thereby triggering the running of the statute of limitations. A more reasonable interpretation is that a lender's choice to accelerate is discretionary and may occur at any point in time. Without a specific and clarifying statement from a Lender, such as a notice of acceleration, determining the precise moment the election to accelerate occurred is all but impossible. A court is without means of determining exactly when the choice to elect was made, thereby triggering the statute of limitations. Rational minds would agree using the moment in time when the choice to accelerate was noticed, and evidenced, is the next best thing. Less plausible is the belief that a court would find that election to accelerate by a lender only occurs the moment the complaint was filed. Literal interpretations of words, without

context, leads to impractical and illogical theories such as the one Appellant now rests its arguments upon.

Appellant further argues that it would be inequitable to Lenders if the Second Department's position were adopted because Lenders have relied on prior established case law and the Second Department's recent holdings are in direct contradiction with those prior decisions. Appellant submits that affirming the Second Department's findings will unfairly prejudice Lenders who have relied on prior decisions. In reality, the Second Department's recent decisions clarify, and are in harmony with, well established case law. First, the necessity of verifying a complaint before it may be filed is to ensure the accuracy and truthfulness of all claims in the pleadings. This would logically indicate that the events and facts set forth in the complaint occurred not because of the complaint but prior to its preparation and filing. Second, all case law cited herein and by the Appellant uniformly hold that acceleration and deceleration of a Mortgage debt are effectuated by notice or an overt act which manifest the clear and unequivocal intent of the lender to accelerate, and at times decelerate, the mortgage debt.

More significant is the statute of Limitations which affording the Appellant six full years to enforce its claim. Six years, five of which the Appellant's predecessor BAC squandered by abandoning the 2009 foreclosure action without even filing a Request for Judicial Intervention.

The matter before this Court is not a matter of whether a borrower will be "rewarded" with a free house. The matter is one where the Appellant seeks to avoid the consequences of its own inaction by altering the very fabric of long-standing contract, common and statutory law. The adoption of Appellant's position of deeming all voluntary discontinuances of foreclosure actions as automatic revocation of acceleration will redeem for the Appellant a claim which it itself was instrumental in losing. However, in doing so, the new standard will not only change the contractual rights of all lenders, but will circumvent the core purpose of the statute of limitations, all because the Appellant failed to act in a manner necessary to preserve its own rights, claim and cause of action.

For these reasons, the Order of the Appellate Division should be affirmed insofar as it denied summary judgement to Ditech and dismissed the action as barred by the statute of limitations.

QUESTIONS PRESENTED

1. Whether a discontinuance of an action serves to void and nullify a claim which accrued prior to the Commencement of the Action.

2. Whether the voluntary discontinuance of a foreclosure action without reason or reference to a Lender's intent to revoke acceleration of the Mortgage debt serve as an overt act effectuating a deceleration of the Mortgage Debt.

3. Whether converting a Lender's discretionary contractual right of decelerating a Mortgage Debt to a mandatory deceleration by automatic nullification is inequitable and against public policy

STATEMENT OF FACTS

A. The Notes and Mortgages

On April 1, 2003 Borrowed executed a Note in favor of America's Wholesale Lender. ("AWL") in the amount of $292.000. (R. 114-115). As security for said Note, Borrower on the same day executed a Mortgage, naming Mortgage Electronic Registration Systems (MERS) as Nominee for AWL as the Mortgagee. The Mortgage encumbered Property located at 137-29 Laburnum Avenue Flushing, NY 11355 (the "Property"). On March 20, 2006 Borrower executed a second Note in favor of AWL in the amount of $14,148.68. (R.116-117). On that same date, Borrower executed a Consolidation, Extension and Modification Agreement (CEMA) as well as a Consolidation Note,(R. 118-119), in favor of AWL, and Consolidation Mortgage naming MERS as nominee for AWL. According to submitted documents the Consolidation Note and Mortgage were subsequently assigned from AWL to BAC Home Loans Servicing, LLP f/k/a Countrywide Home Loans Servicing LP (BAC) on July 22, 2009 (R. 176-177). The Consolidation Mortgage was further assigned from BAC to Everbank on July

15, 2013 (A. 180-181) then from Everbank to Green Tree Servicing LLC ("Green Tree") on May 8, 2015. (R. 182-185).

Under the terms of the Notes referenced above (Notes), Borrower would be required to make monthly payments to the Lender which were due on the first of each month. Failure on the part of the Borrower to make each month's payment when due would place the Borrower in default. (R. 115; 117; 119 at ¶ 6(b)). Paragraph 6(c) entitled the Lender to require Borrower to pay immediately in full the entire unpaid principal balance of the debt if the default was not cured after notice was given of said default. (R. 115; 117; 119).

Paragraph 22 of the Mortgages referenced above outline the terms which encompass the rights of the Lender to demand all amounts due under the Notes, thereby accelerating the maturity of the debt, should the borrower fail to cure the default after 30 days written Notice had been given by the lender. (R. 134-135; 149-150; 171-172).

B. **The 2009 Foreclosure Action**

While the Notes were held by BAC, BAC commenced a foreclosure action by filing a Summons and Complaint on July 28, 2009 with the Supreme Court, Queens County under Index No. 20090/2009. The pleadings alleged that Borrower had failed to comply with the terms of the Consolidated Note and Mortgage by failing to make required payments when due, the first date of missed payment

being February 1, 2009. (R. 29). Paragraph 6 of the complaint alleged that as a result of Borrower's default, BAC exercised its right to accelerate the maturity of the debt, called due "the entire amount secured by the mortgage" and asserted it was owed the entire unpaid principal balance and accrued interest as of January 1, 2009. (R. 29). The Complaint was executed and verified by Megan B. Szeliga, Esq. on July 27, 2009, on behalf of the Law Office of Steven J. Baum, BAC's Attorneys. (R.31). The Summons and Complaint were filed the following date, on July 28, 2009, thereby commencing the 2009 foreclosure action.

After Borrower filed his timely answer (R. 44-49) the matter languished for almost five years. Once BAC initiated the action to enforce its claimed right it neglected to move the action forward beyond the filing of the complaint. No RJI was filed, no settlement conferences were scheduled, and no motions were made. When the Notes and Mortgages were assigned and transferred from BAC to Everbank, Everbank's counsel presented Borrower with a Stipulation of Discontinuance. The stipulation stated that "all claims by Plaintiff are dismissed without prejudice and the affirmative defenses and counterclaims asserted against Plaintiff were dismissed without prejudice. (R. 52 at ¶ I). No explanation was offered as to why the action was being discontinued. More significantly, the Stipulation, which was prepared by Everbank's Counsel, was silent as to any revocation of the accelerated debt or the reinstatement of the installment terms of

repayment. The Stipulation, as written, contained no language which would give the Borrower notice that he may resume making installment payments and could cure any default by tendering payment of the arrears. The stipulation, executed by both parties in February 2014, was filed with the Trial Court and the 2009 action was discontinued.

C. The 2016 Foreclosure Action

On January 13, 2016, Ditech, as assignee and alleged holder of the Notes, filed a Verified Complaint with the Supreme Court, Queens County under Index No. 700387/2016 seeking to foreclose on the same Consolidation Note and Mortgage that was the subject of the 2009 action. Borrower filed a Verified Answer on February 8, 2016.

Borrower filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(5) on July 6, 2016. Said application was grounded on the fact that Ditech's cause of action was time-barred pursuant to the six-year statute of limitations. (R. 15-84). Appellant filed opposition to Borrower's application on July 21, 2016 and cross moved for Summary Judgment and appointment of a Referee. (R. 85-329). In its opposition, Appellant argued the Borrower's execution of the stipulation was, in some way, a reaffirmation of the mortgage debt which reset the statute of limitation. (R. 107 at ¶ 67).

On September 9, 2016 Honorable Robert J. McDonald, J.S.C. executed a decision and order granting Summary Judgment to Ditech and denied Borrower's application for dismissal. (R.5-14). Although the Stipulation of Discontinuance never addressed Plaintiff's revocation of acceleration, the Trial Court infused an intent on the part of the Plaintiff that the discontinuance of the 2009 action was Plaintiff's overt act intended to serve as a revocation of the acceleration and therefore the Stipulation of Discontinuance "acted as a deceleration of the debt." (R.11).

Borrower filed a notice of Appeal on October 20, 2016 seeking the Appellate Court to reverse the Trial Court's decision and overturn the Summary Judgment order (R. 2-3).

D. Appellate History

The Borrower perfected his appeal on May 30, 2017 under docket Nos. 2016-11072 and 2016-11703. Appellant served its answering brief on or about December 15, 2017. Oral Arguments were held before the Second Department on April 20, 2019.

On September 18, 2019 the Second Department reversed the order of the Trial Court. The Court denied Ditech's cross-motion for summary judgment and granted Borrower's motion for dismissal finding that the action was barred by the six-year statute of limitations. (R. 365-367). The Appellate Court reasoned that the debt was

accelerated by BAC. However, the situation did not, "in itself constitute an affirmative act to evoke its election to accelerate, since, the inter alia, the stipulation, which discontinued the prior foreclosure action, was silent on the issue of the revocation of the election to acceleration, and did not otherwise indicate that the Plaintiff would accept installment payments form the appellant." (R.367).

ARGUMENT

POINT I

A VOLUTARY DISCONTINUANCE OF A FORECLOSURE ACTION, IN AND OF ITSELF, IS NEITHER A NULLIFICATION OF AN ELECTION TO ACCELERATE NOR AN AFFIRMATIVE ACT EFFECTUATING A REVOCATION OF ACCELERATION OF A MORTGAGE DEBT

It is undisputed that the maturity of the debt was accelerated in 2009 by BAC, Appellant's predecessor in interest. What is disputed is whether the voluntary discontinuance, in and of itself, was an automatic revocation of the acceleration of the Mortgage Debt. Appellant's argument in favor of automatic revocation by voluntary discontinuance appears to stem from a skewed interpretation of the language found in courts' decisions which state that a mortgage debt is accelerated by the *commencement of the foreclosure action* and the statute of limitations begins to run. Appellant offers two legal theories grounded on an "if, then" concept. First, a discontinuance of an action voids all that occurred within the action. A complaint commences the action, and the

acceleration is set forth within the complaint. Therefore, *if* the acceleration occurred by the commencement of the action, *then* the acceleration is voided when the action is discontinued and the statute of limitations never began to run. Appellant's second theory suggests that *if* it is determined the filing of the complaint is the overt act which accelerates the debt *then*, conversely, the discontinuance of the action is the overt act necessary to revoke the acceleration.

These theories may appear sound when interpreting the language of Courts' decisions without context. However, when considering the overall concepts and logical applications of these holdings, Appellant's argument and theories become illogical and against well-established case law.

A. Nullification of the Action, and the Complaint document, did not nullify the election to accelerate because the act of election occurred prior to the preparation, execution and filing of the Complaint

Appellant's first theory rests on two notions. The first theory is grounded on the well-established case law which holds that where an action is discontinued, then all that occurred within the action is nullified, as if it never occurred. Simply put, Appellant submits that the action is commenced with the filing of the complaint. If the action is annulled as well as the complaint, then the acceleration plead within the complaint is nullified as well. Without acceleration, the statute of limitations never began to run. The flaw in Appellant's argument is that the choice to accelerate was made prior to the filing of the action. Therefore, neither the nullification of the

complaint nor discontinuance of the action had any relevance or consequence on the acceleration itself.

i. Discontinuance of a Foreclosure action renders everything within the action a nullity.

The first part of Appellant's argument rests on this Court's decision in Loeb v. Willis. 1881 N.Y. LEXIS 484, (N.Y. 1885). In Loeb, the Plaintiff obtained a judgment of foreclosure and sale in a foreclosure action which subsequently was voluntarily discontinued. Id. The Plaintiff then brought a second action in foreclosure and attempted to use the Judgment from the first action. This Court held that the judgement had been annulled by the discontinuance of the first action, stating that "If a suit be discontinued at any stage, or the judgment rendered therein be set aside, or vacated, or reversed, then the adjudication therein concludes no one and it is not an estoppel or bar in any sense." Id. In Brown v. Cleveland Trust Co., 233 N.Y. 399, (N.Y. 1922), this Court, relying on Loeb, held that "The action having been discontinued, there was no adjudication in that action which bound anyone." Yonkers Fur Dressing Co. v. Royal Ins. Co further confirmed that a stipulation of settlement and discontinuance of a case deems the matter as if it had never begun. 247 N.Y. 435, (N.Y. 1928).

More recently, and heavily relied upon, is a decision by the Second Appellate Department in Newman v. Newman, 245 A.D.2d 353 (N.Y. App. Div.

2nd Dept. 1997). Newman was a divorce action wherein the defendant served counterclaims without an answer. Plaintiff filed a discontinuance of the action which the Court deemed had nullified the Defendant's counterclaims. The Court held that when the action was 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. id *citing* Brown v. Cleveland Trust Co., 233 N.Y. 399, (N.Y. 1922); Weldotron Corp. v. Arbee Scales, Inc., 161 A.D.2d 708, (N.Y. App. Div. 2nd Dept. 1990); Miehle Printing Press & Mfg. Co. v. Amtorg Trading Corp., 278 A.D. 682, (N.Y. App. Div. 1st Dept. 1951).

Logically, where an action is nullified, the court no longer holds jurisdiction. Kaufman v Kaufman, 2019 N.Y. Misc. LEXIS 4528, (Sup. Ct. New York Cty 2019), and the pleading of the case are annulled as well. *see* Anostario v. Anostario, 255 A.D.2d 777, 680 N.Y.S.2d 279, (N.Y. App. Div. 3rd Dept. 1998); Mahon v. Remington, 256 A.D. 889, (N.Y. App. Div. 1st Dept. 1939) *citing* Loeb v. Willis, 1881 N.Y. LEXIS 484, (N.Y. 1885. To this end, all are in agreement that the discontinuance of an action will render the pleadings filed with the Court annulled, as if they were never filed. However, to adopt the position of the Appellant it must be also be determined that the discontinuance of the action not only nullifies the complaint but dissolves it all together, as if it were never drafted or executed. More significantly, that all the facts and events affirmed within the

complaint also cease to exist along with the Complaint. Contrary to Appellant's theory, only the documents and court's actions are annulled by the discontinuance. The nullification does not turn back the hands of time and undo events or alter the facts which were commemorated in the pleadings of the complaint. The stated events and facts, including the acceleration, occurred prior the preparation of the complaint and continue to exist after the dissolution of the complaint.

ii. The election to accelerate is an event that did not occur within the action.

Appellant's argument stands, or falls, on the determination of whether the statement of facts set forth in the complaint became true at the time the Complaint was filed. If yes, then acceleration, which was declared within the pleadings of the Complaint, occurred and became true at the time the complaint was filed. Therefore, logically, the annulment of the action, and all pleadings associated with the annulment, would likewise annul the professed election to accelerate. However, the events, and facts regarding those events including the Lender's choice to accelerate, occurred prior to the filing of the complaint. Therefore, nullifying the complaint document does not bear any consequence on the existence of the facts stated therein.

a. A Foreclosure action is commenced as a result of an acceleration, not to originate an acceleration

In Wallace v. McConnell, 38 U.S. 136 (U.S. 1839), Justice Thomas wrote that where there is an agreement between parties and a promisor fails to perform, then immediately upon such failure the breach occurred, the wrong was done, and the cause of action then and there arose." (*see also* Haimes v. Schonwit, 268 A.D. 652, 52 N.Y.S.2d 272, 1945 N.Y. App. Div. LEXIS 5284[2nd dept. 1945]; "a cause of action accrues when a payment falls due.). The basic concept and structure of our legal system is that where there is a wrong done, and a cause of action arises, the injured party may seek judicial intervention and issuance of an order directing compensation be paid to the injured party by the party which committed the wrong. The cause of action encompasses the facts that give the injured party the right to seek judicial redress or relief against a borrower and the legal theory forming the basis of a lawsuit.

A right to accelerate exists by the terms of the Note and Mortgage and are discretionary to the Lender. Milone v. US Bank N.A., 164 A.D.3d 145 (N.Y. App. Div. 2nd Dept. 2018). Where a Borrower defaults on the obligation of installment payments, Lender may accelerate the mortgage debt, conceiving a cause of action for full amount of the debt. There are several ways a mortgage debt may be accelerated. One way is in the form of an acceleration notice sent to the

borrower. To be effective, the acceleration notice to the borrower must be clear and unequivocal. Id. A second form of acceleration, which is self-executing, is the obligation of certain borrowers to make a balloon payment under the terms of the note at the end of the pay-back period. Id. A third form of acceleration exists when a Lender commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the "full balance due" Id. This third form is where Appellant is resting its argument. Appellant takes the position that the acceleration only comes to fruition *because* the complaint was filed and the action commenced. One could argue that such position is supported by the literal interpretation of various courts' decisions. In Federal Natl. Mtge. Assn. v Schmitt, the Court stated "OneWest Bank accelerated the mortgage by commencing the prior foreclosure action." 172 A.D.3d 1324, (N.Y. App. Div. 2nd Dept. 2019). In Deutsche Bank Natl. Trust Co. v Adrian, the Court said the "Acceleration occurs, inter alia, by the commencement of a foreclosure action." 157 A.D.3d 934, (N.Y. App. Div. 2nd Dept. 2018); *see also* Your New Home, LLC v JP Morgan Chase Bank, N.A., 62 Misc. 3d 1046, (Sup Ct. Westchester Cty. 2019); Lavin v. Elmakiss, 302 A.D.2d 638, (App. Div. 3rd Dept. 2003). Other Courts phrase their decisions by stating the commencement of the action constitutes a valid election to accelerate the maturity of the debt. *see* Charter One Bank, FSB v. Leone, 45 A.D.3d 958, (N.Y. App. Div. 3rd Dept. 2007); Beneficial Homeowner Serv. Corp. v Tovar, 150 AD3d 657, 658

(N.Y. App. Div. 2nd Dept. 2017); Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, (N.Y. 1932); Federal Nat'l Mortgage Ass'n v. Mebane, 208 A.D.2d 892, (N.Y. App. Div. 2nd Dept. 2015); EMC Mtge. Corp. v. Smith, 18 A.D.3d 602, (N.Y. App. Div. 2nd Dept. 2005); Clayton Natl. v Guldi, 307 AD2d 982, [N.Y. App. Div. 2nd Dept. 2003]; Arbisser v Gelbelman, 286 AD2d 693, 694, [N.Y App. Div. 2nd Dept. 2001]).

When taken literally, the language of the courts would affirm that the acceleration occurred "by" or "when" the action was commenced. To put another way, the acceleration occurred because the action was commenced. However, the act of election to accelerate does not occur because the action was commenced but rather was the reason the action was commenced. The terms of the Notes and Mortgages bestowed upon the Appellant, and its predecessor in interest, the option, the election, to accelerate the Mortgage Debt. (R.118 at ¶ 6(c); 134-135 at ¶22). To elect is to choose and that election should not be confused with the notice or manifestation of such election." Puzzuoli v JPMorgan Chase Bank, N.A., 55 Misc. 3d 417, (Sup. Ct. Dutchess Cty 1957) *citing* (Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 476, (N.Y. 1932); Beneficial Homeowner Serv. Corp. v Tovar, 150 A.D.3d 657, (N.Y. App. Div. 2nd Dept. 2017); *see also* City Sts. Realty Corp. v Jan Jay Constr. Enters. Corp., 88 AD2d 558, 4 [N.Y. App. Div. 1st Dept. 1982] [a borrower's unsuccessful attempt to tender payment prior to service

of the mortgage foreclosure complaint did not impair that election]; Hirsch v. Badler, 3 AD2d 921, [N.Y. App. Div. 2nd Dept. 1957] [a letter exercising the right to accelerate a mortgage was an affirmative act constituting a valid election of that right, despite the fact that the borrowers refused delivery of that letter].) Puzzuoli v JPMorgan Chase Bank, N.A., 55 Misc. 3d 417, (Sup. Ct. Dutchess Cty. 2016).

b. Verification of the Complaint affirmed the act of election occurred prior to the filing of the complaint and was not an event which occurred within the action.

Where a Lender has accelerated the unpaid debt, it may bring a cause of action to recover the full balance of the Mortgage loan. Commencement of the action begins with the filing of a complaint. The compliant must state with particularity the allegations of the aggrieved party and the causes of action arising from such alleged action or inaction. (CPLR 3014). The Pleadings must also include a demand for the relief to which the pleader deems himself entitled. CPLR 3017. CPLR 3020 required a verification, "a statement under oath that the pleading is true to the knowledge of the deponent." The pleadings are then filed with the Court which, filed with the Summons, commences the action. Logically speaking, the pleadings, which include statements of allegations and entitled relief, are prepared and sworn to prior to the filing of the document with the Court. This would mean the allegations within the complaint are sworn to be true prior, and without relation, to the filing of the Complaint document.

When applying this logical sequence, the Appellant's theory must fail. In paragraph five of the complaint filed in the 2009 action, BAC alleged that the debt was accelerated (R. 29). Paragraph six alleged that there was "now due and owing" the principal balance of $285,554.29. (R. 29). The relief sought by BAC was a decree for the amount due to Plaintiff including the Principal Balance. (R. 30). This document was executed by Steven J. Baum, PC. as attorney for BAC, and was verified on July 27, 2009 by Megan B Szeliga, Esq., Attorney for Plaintiff. (R. 35). Ms. Szeliga, as attorney, swore and deposed that she "read the foregoing Summons and Complaint and knows the contents thereof; that the same is true to her knowledge..". (R. 35). The complaint was filed with the Clerk of the Court, Queens County, on July 28, 2009. (R. 37). Based on the requirements of the CPLR and the verification of Megan Szeliga, as of July 27, 2009 the complaint affirmed that Plaintiff had already accelerated the debt and had a cause of action against Borrower for an amount which included the unpaid principal balance because it was accelerated. The complaint, which commenced the foreclosure action, was filed with the Court on July 28, 2009, a day after the complaint was executed. Accordingly, pursuant to the sworn verification of BAC's counsel, the acceleration of the Mortgage debt took place before, and independent of, the filing of the complaint or commencement of the action. Therefore, the nullification of the Complaint document itself, including its filing, does not diminish or eliminate the

facts set forth therein. If Appellant's position is adopted the result would be that facts in the complaint were inaccurate when sworn to, meaning Megan Szeliga gave false testimony in her verification. Setting such precedent would further create a legal conundrum because a complaint attesting to the acceleration of a mortgage debt could not be verified as true and accurate until it was filed. However, only a verified complaint can be filed to commence an action.

iii. The commencement of a foreclosure action is the next best starting point for determining when acceleration occurred for the purpose of calculating the Statute of Limitations but does not cause acceleration

Appellant's position that acceleration occurs at the time the action is commenced is a flawed interpretation of why Courts have used the commencement of the action as a starting point for calculating the Statute of Limitations. The Notes and Mortgages at issue are contracts that include terms which set forth the rights and obligations of all parties to the contract. The Notes are an acknowledgement of the Borrower that he received money and he is obligating himself to repay Lender the money borrowed. The agreement states that repayment shall not be all the money at one time but rather repayment shall be by installment payments tendered over the course of thirty years with the last payment due on April 1, 2036 (R. 118 at ¶3(b)). The Note agreements further states that each installment was due on the first of each month (R. 118 at ¶3(b)) and each payment

for the amount of $1,798.53. (R. 118 at ¶3(b). After thirty years, the contract will have matured and the obligation of the Borrower will be complete. Each month, Lender was entitled to, and owed, $1,798.53 from the Borrower. If the Borrower failed to make one or more of the monthly payments when due, the Lender was entitled to an amount equal to the missed installment payments. A cause of action accrued for each missed payment and the statute of limitations began to run immediately for each installment owed. *see* Phoenix Acquisition Corp. v. Campcore, Inc., 81 N.Y.2d 138, (N.Y. 1993); Vigilant Ins. Co. of Am. v. Hous. Auth., 87 N.Y.2d 36, (Callaghan) 1285 (N.Y. 1995); Haimes v. Schonwit, 268 A.D. 652, (N.Y. App. Div. 2nd Dept. 1945); Comm'rs of the State Ins. Fund v. Trio Asbestos Removal Corp., 9 A.D.3d 343, (N.Y. App. Div. 2nd Dept. 2004).

The principles that the running of the statute of limitations against each installment is triggered from the time it becomes due, that is, from the time when an action might be brought to recover it, makes is easier to determine when the statute of limitations begins to run. Where the agreement calls for installments to be due the first of each month, the statute of limitations for each missed installment payment begins to run on the second day of the month.

The Notes at issue include terms which give the Lender the right to accelerate the maturity of the loan and advance all future payments, placing the obligation on the borrower to pay the entire loan back immediately. (R. 119 at

¶6(c)). The Mortgages, the security instrument of the Notes, further detail the rights and obligations of the parties to the Notes, including how a lender may accelerate the Mortgage debt. (R.134-135 at ¶22). Accordingly, the Lender may elect, chose, to terminate repayment by installments and call the remaining balance due and owing immediately. The acceleration of the loan debt is optional and exercised at the discretion of the Lender. It is this discretion that distinguishes an option to accelerate from a provision in the mortgage for automatic acceleration upon default in an installment (*see* Adler v. Berkowitz, 254 N.Y. 433, (N.Y. 1930). Once the Lender choses to accelerate the Mortgage debt, the entire amount is due, and the Statute of Limitations begins to run on the entire debt. (EMC Mtge. Corp. v Patella, 279 AD2d 604, [N.Y. App. Div. 2d Dept 2001]; *see also* Goldman Sachs Mtge. Co. v Mares, 135 AD3d 1121, [N.Y. App. Div. 2d Dept 2016]; Lavin v Elmakiss, 302 AD2d 638, 639, [N.Y. App. Div. 3d Dept 2003]). The problem is, unlike the installment payments which had a specified due date, the acceleration does not have a definitive date due.

As stated, the option to accelerate is a discretionary choice which can be made by Lender at any time. One minute the loan is an installment agreement and the lender is owed each monthly installment and can bring a cause of action to recover those payments which are passed due. The next moment, the entire unpaid principal is due immediately, entitling the Lender to bring action to collect the

entire unpaid principal balance, as well as all interest, fees and costs. So, if in the real world the choice to accelerate can occur at any time, and in the legal world once the lender choses to accelerate the mortgage debt, the entire amount is due and the Statute of Limitations begins to run on the entire debt, how do you figure out when the statute of limitations began to run. How can the statute of limitations be calculated? As stated above, under legal theory there are a few methods which acceleration may occur. However, in the real world each method only evidences a prior act of election to accelerate. They had to because, if it had not, none of the aforementioned would have occurred. The reason for each of the above ways, the act of sending notice, creating the agreement or commencing the action, all occurred because of one reason, the lender accelerated the mortgage debt. The problem is that the exact moment when the election to accelerate occurred is undeterminable because the ability to step into the mind of the person who chose to accelerate is all but impossible. The next best moment for determining the time when the statute of limitations began to run is by using the moment the preconceived acceleration was evidenced such as by written notice (*see* Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc., 148 A.D.3d 529, (N.Y. App. Div. 1st Dept. 2017) or commencement of a foreclosure action. One could even argue that the date the complaint is verified is the more accurate date for

calculating because that is the date which verifies, evidences, that acceleration has been elected.

Sound reasoning supports the theory that courts use the date of commencement as the acceleration date for the purposes of definitiveness. This reasons also makes Appellant's argument, filing of the complaint initiates acceleration, unsound. The commencement of a foreclosure action is merely the next best trigger point for determining when acceleration occurred for the purpose of calculating the Statute of Limitations.

B. Voluntary Discontinuation of an Action, in and of itself, is insufficient to serve as the requisite overt act revoking acceleration of the Mortgage Debt

Appellant's alternate "if, then" theory proposes that a voluntary discontinuance of a foreclosure action is the requisite overt act necessary to effectuate the revocation of an acceleration of the mortgage debt. The basis of this theory rests on the notion that *if* the commencement of a foreclosure action is a sufficient overt act effectuating the acceleration *then* "the converse is true" and the discontinuance is a sufficient overt act to serve as an effective deceleration. The Appellant's theory is flaw for one basic reason, the act of commencing a foreclosure action is based on a decision to accelerate the debt. The core reason for bringing the action, that being to obtain a judgment for the entire unpaid principal balance, is premised on the prior acceleration. However, the opposite cannot be said as there are numerous reasons a lender will choose to discontinue an action.

i. An overt act is an act which is specifically conducted to further an intention

The decisions emerging recite a "converse" theory but a little different than Appellant seeks to utilize. Court decisions on both side of the argument, whether a voluntary discontinuance alone is a revocation of acceleration, seem to all agree on one thing, acceleration of a Mortgage Debt requires an overt act evidencing the intent to accelerate. Further, conversely, revocation of the acceleration must be evidence by an overt act as well. *see* Lavin v. Elmakiss, 302 A.D.2d 638, 754 N.Y.S.2d 741, (N.Y. App. Div. 3rd Dept. 2003); Wells Fargo Bank, N.A. v Rodriguez, 2019 N.Y. Misc. LEXIS 298, (N.Y. Sup. Ct. Queens Cty. 2019); 4 Cosgrove 950 Corp. v. Deutsche Bank Nat'l Trust Co., 2016 N.Y. Misc. LEXIS 4901 (NY County 2016).

An overt act is an act that manifests an intention, the intent guides the act. *see* Toys "R" Us v. Silva, 89 N.Y.2d 411, (N.Y. 1996); (*see also* Abacus Fed. Sav. Bank v Lim, 75 A.D.3d 472, [N.Y. App. Div. 1st Dept. 2010]:"Overt act is an act which is conducting in furtherance of an intention.); People v. Silverman, 252 A.D. 149, [N.Y. App. Div. 2nd Dept. 1937] "…committed an overt act for the purpose of reaching the objective"; People v. Ortiz, 100 A.D.2d 6, [N.Y. App. Div. 4th Dept. 1984]: the act provides the corroboration of the intention.). Put another way, the intent to do something comes first. The action follows second as a product

of the intent and is done because of, and to manifest or confirm, the preconceived intent. With this in mind finding the commencement of an action serves as the overt act effectuating an acceleration makes sense. (*see* HSBC Bank USA v. Sandoval, 2017 N.Y. Misc. LEXIS 4526, (Sup. Ct. Rockland Cty. 2017): "The acceleration begins at the filing of a summons and complaint and notice of pendency, as long as the summons and complaint clearly demonstrate the plaintiff's intent to accelerate the mortgage."). The sole reason a plaintiff would file a foreclosure action seeking relief, which includes the full unpaid principal balance, is to facilitate the election to accelerate the loan. Further, the language of the complaint must clearly and unambiguously state the choice of election as the election of acceleration is what entitled a plaintiff to demand full payment. Therefore, logically, the commencement of the action makes clear the intent to accelerate and the act of commencing the action is in furtherance of the intent to accelerate thereby serving as the overt act effectuating acceleration.

To use the converse theory, if the pleadings in the complaint clearly set forth the intention which is furthered by the act of commencing of an action then the converse must be true as well. The Lender must make clear that the act of discontinuing the action is in furtherance of the intent to revoke the acceleration.

Unlike the commencement of the action, the which is done solely based on the intent to accelerate, the discontinuance may occur for several reasons. A lender

may discontinue a foreclosure action due to issues verifying compliance with certain notice requirements, (Federal Natl. Mtge. Assn. v Schmitt, 172 A.D.3d 1324 [N.Y. Appl Div. 2nd Dept. 2019]), to issues establishing its standing, (Wells Fargo Bank, N.A. v Burke 94 AD3d 980, 943 NYS2d 540 [N.Y. App. Div. 2nd Dept. 2012]), or procedural issue, (NMNT Realty Corp. v Knoxville 2012 Trust, 151 A.D.3d 1068, [N.Y. App. Div. 2nd Dept . 2017]). The point is, there are a several reasons that a Lender Plaintiff would choose to discontinue a foreclosure action, reasons that may have no purpose in furthering an intent to revoke the acceleration of the Mortgage Debt. this is why requiring the overt act for deceleration must be clear an unambiguous, to remove any doubt as to the underlying reason of the Lender in discontinuing the action. *see* Wells Fargo Bank, N.A. v Machell, 2017 N.Y. Misc. LEXIS 1581, (Sup. Ct. Ulster Cty. 2017); Lavin v. Elmakiss, 302 A.D.2d 638, (App. Div. 3rd Dept. 2003); EMC Mortg. Corp. v. Patella, 279 A.D.2d 604, (N.Y. App. Div. 2nd Dept. 2001). Otherwise the purpose and intention for discontinuing the action is left ambiguous. Where there is ambiguity in the purpose for the discontinuance, the act of discontinuing the action cannot serve as the overt act effectuating the revocation. (*see* Bank of N.Y. Mellon v Craig, 169 AD3d 627, [N.Y. App. Div. 2d Dept 2019]); Freedom Mtge. Corp. v Engel, 163 A.D.3d 631, [N.Y. App. Div. 2nd Dept. 2018]). This is not to say that discontinuance is never the overt act of revocation, only that the intent, if not

specified in the discontinuance, is an issue of fact left unanswered. *see* NMNT Realty Corp. v. Knoxville, 151 AD3d 1068 (N.Y. App. Div. 2nd Dept. 2017).

ii. Implied interpretations have been replaced by Recent Court Rulings which clarify Courts' positions that a voluntary discontinuance does not serve as an overt act effectuating revocation of acceleration

To support its argument, Appellant looks to lower court decisions that have echoed its position that voluntary discontinuance served as a deceleration of the debt. U.S. Bank N.A. v Deochand, 2017 N.Y. Misc. LEXIS 863, (Sup. Ct. Queens Cty. 2017); 4 Cosgrove 950 Corp. v. Deutsche Bank Nat'l Trust Co., 2016 N.Y. Misc. LEXIS 4901 (Sup. Ct. New York Cty. 2016). Appellant also cited this Court's decision in Kilpatrick v. Germania Life Ins. Co., 183 N.Y. 163, (N.Y. 1905), and attempts to interject interpretations that do not exist. In Kilpatrick, this Court specified the narrow question addressed which was whether the payment of the One-thousand-dollar bonus was voluntary or extracted. This Court found that Lender had accelerated the debt and commenced the action, therefore it was no longer entitled to the bonus. The decision held that the lender could not revoke the acceleration because the borrower had changed its position. Id. The decision of this Court did not infer nor insinuate anything which could "appear to recognize" a voluntary discontinuance was an effective revocation of acceleration as Appellant attempts to insinuate.

Appellant refers to the federal court's decision in U.S. Bank Trust, N.A. v. Adhami, 2019 U.S. Dist. LEXIS 19599, (E.D.N.Y. Feb 6, 2019) where the Court noted 10 of the 13 trial courts have considered the issue. However, the court did not state that all 10 courts ruled that the discontinuance is an automatic revocation. To clarify, the Court in US Bank did not find automatic revocation but instead found that the Defendant lender raised a rebuttable presumption that the voluntary discontinuance was a revocation of acceleration. If Borrower could show evidence contrary to that presumption, the revocation does not stand. Id. This decision is a far cry from the proclamation that the discontinuance is an overt act or an automatic revocation. The Federal Court's decision does support the concept that discontinuance may be an act disassociated with intent to revoke acceleration and the purpose and intention should be stated clearly and unambiguously.

Appellant turns to the Second Department for implicit support in Federal National Mortgage Ass'n v. Mebane. 208 A.D.2d 892, (N.Y. App. Div. 2nd Dept. 1994). The Court in Mebane stated that, "It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate." Appellant states this statement evidences the Second Department's intended meaning which was to recognize a voluntary discontinuance would constitute an affirmative act of revocation. However, recent cases decide by the Second Department clarify its position that a discontinuance of an action, in and of

itself, does not serve as an overt act for revocation of acceleration. *see* Freedom Mortgage Corp v Engle, 163 AD3d 631 (N.Y. App. Div. 2nd Dept. 2018); Bank of N.Y. Mellon v Craig, 169 A.D.3d 627, (N.Y. App. Div. 2nd Dept. 2019); Bank of N.Y. Mellon v Yacoob, 2020 N.Y. App. Div. LEXIS 2566, (N.Y. App. Div. 2nd Dept. April 29, 2020); Deutsche Bank Natl. Trust Co. v Gordon, 117 N.Y.S.3d 688, (N.Y. App. Div. Jan. 2020).

Contrary to Appellant's implication, the Second Department's recent line of cases do not deviate from its previous decisions. As stated above, the Mebane decision made not insinuation that a voluntary discontinuance constitutes an overt act of the Lender. The Mebane court only held that the dismiss by the Court is definitely not an overt act of the Lender in revocation of the acceleration. 208 A.D.2d 892, (N.Y. App. Div. 2nd Dept. 2015). The Knoxville decision affirmed that the overt act must be clear and unambiguous to serve as an overt act for revocation. 151 A.D.3d 1068, (N.Y. App. Div. 2nd Dept. 2017). These decisions support the Second Departments well-established position, that discontinuance of an action, in and of itself, is insufficient to be deemed a revocation of acceleration.

The First Department recently followed the logic of the Second Department, finding the overt act for acceleration and revocation must be clear and unambiguous and discontinuance of an action, which is silent regarding intent to revoke the acceleration, is insufficient to effectuate the revocation. *see* Wells Fargo

Bank, N.A. v Liburd, 176 A.D.3d 464, (N.Y. App. Div. 1st Dept. 2019); Vargas v Deutsche Bank Natl. Trust Co., 168 A.D.3d 630, (N.Y. App. Div. 1st Dept. 2019). Wells Fargo Bank, N.A. v Ferrato, 2020 N.Y. App. Div. LEXIS 3184, 2020 NY Slip Op 03067 (N.Y. App. Div. 1st Dept. May 28, 2020). It is worth noting that in Ferrato the Plaintiff, Wells Fargo, admitted that the purpose for discontinuing the foreclosure action was to revoke the acceleration, however the revocation was its secondary purpose. The primary purpose, as admitted, was to avoid the running of the statute of limitations. Id.

Appellant mentioned the Third Department and noted it had not ruled on the issue. Appellant, instead, cited a decision of a Trial Court in the Third Department which held that a voluntary discontinuance was sufficient to revoke acceleration. U.S. Bank Natl. Assn. v Creative Encounters LLC, 2019 N.Y. Misc. LEXIS 2295 (Sup Ct. Rensselaer Cty. 2019). The Appellate Court recently overturned the Trial Court's decision in U.S. Bank Natl. Assn. v Creative Encounters LLC, 2020 NY Slip Op 02844 (N.Y. App. Div. 3rd Dept. May 2020). The court in Creative Encounters cited another recent Third Department case, Specialized Loan Servicing Inc. v Nimec, 2020 NY Slip Op 02688 (N.Y. App. Div. 3rd Dept. May 2020). The Court in both cases held that the voluntary discontinuance, without more, did not serve as the necessary overt act effectuating a revocation of the acceleration.

The Courts in all corners of the State are evaluating this issue based on logic and legal standard. A lender has the right to choose to accelerate the maturity of a mortgage debt where a Borrower is in default. That election is discretionary and once made, the lender is entitled to reject any payment that is not for the full amount of the outstanding mortgage debt. The choice to accelerate must be evidenced in some manner, either by notice or an overt act of the lender which is clear and unambiguous. The commencement of a foreclosure action by filing a complaint which pleads the lender's election to accelerate and demand for judgment for the unpaid principal is a clear showing of the lender's intended acceleration. As such, it serves as an overt act effectuating acceleration. Since the lender's choice to accelerate must be clear, so must its intent to revoke. If a Lender wishes to discontinue an action because it wishes to revoke that acceleration, or additionally revoke the acceleration, then such intention and choice must also be clear and unequivocal. Given that there are several reasons to discontinue an action which may have no relation or relevance to an intent to revoke acceleration, a discontinuance in and of itself is insufficient as an overt act revoking acceleration.

POINT II

CONSTITUTING A VOLUTARY DISCONTINUANCE OFA FORECLOSURE ACTION AS AN AUTOMATIC REVOCATION OF ACCELERATION IS INEQUITABLE, AGAINST PUBLIC POLICY AND CONTRADICTS WELL-ESTABLISHED LAW

A. Automatic deceleration deprives Lenders of their contractual right to accelerate and decelerate at their option

The acceleration clause of a Mortgage is a contract which the parties to the mortgage had a right to enter into, Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, (N.Y. 1932) and unless the contract is found to be oppressive or unconscionable, courts should not interfere with or alter the contractual rights of either party. Graf v Hope Building Corp, 254 NY 1 (1930). The plain language of the acceleration clause makes clear that the right to accelerate is a discretionary right rather than a mandatory right. Milone v. US Bank N.A., 164 A.D.3d 145, (N.Y. App. Div. 2nd Dept. 2018). Where a lender chooses to exercise its contractual right to accelerate a mortgage debt the Lender is not required to accept any payment less than the full repayment amount as demanded. *see* Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, (N.Y. 1932); Albany Sav. Bank FSB v. Seventy-Nine Columbia St., 197 A.D.2d 816, (N.Y. App. Div. 3rd Dept. 1993); Home Sav. of Am. v. Isaacson, 240 A.D.2d 633, (N.Y. App. Div. 2nd Dept. 1997). Once a loan has been accelerated, a Lender cannot be compelled to reinstate the installment payments of the loan and accept only the arrears due (*see* Nat'l Bank of N. Am. v. Cohen, 89 A.D.2d 725, (N.Y. App. Div. 3rd Dept. 1982).). It has also been held that since the right to accelerate is a discretionary right rather than a mandatory one, a Lender maintains the discretionary right to later revoke the acceleration. Wells Fargo Bank, N.A. v Burke, 94 A.D.3d 980, (N.Y. App. Div. 2nd

Dept. 2012); see (*see* Federal Nat'l Mortgage Ass'n v. Mebane, 208 A.D.2d 892, 618 N.Y.S.2d 88, (N.Y. App. Div. 2nd Dept. 1994); Golden v. Ramapo Improv. Corp., 78 A.D.2d 648, (N.Y. App. Div. 2nd Dept. 1980).

The right to accelerate, and the right to revoke that acceleration, are held only by the Lender pursuant to the Note and Mortgage contracts and, unless the terms of the contract are oppressive or unconscionable, a court should not interfere nor, more importantly, deprive a party of its contractual right. However, adoption of Appellant's position will do just that. It will convert the discretionary choice to a mandatory event and divest all lenders from their option to choose. For example, a lender accelerates a mortgage debt and commences a foreclosure action to recovery the full amount. During the pendency of the matter, circumstances arise which make success in the pending matter impossible. Lender is now in a quandary. If the lender discontinues the action with intent to refile, he will lose his right to full payment and the Borrower can use that window between discontinuance and refiling to pay the arrears, forcing the lender to accept the arrears and reinstate the original installment agreement. If lender does not discontinue the action, the circumstances will cause him to lose the case.

It is submitted that adoption of Appellant's automatic revocation theory will contradict public policy and established case law that a court shall not interfere with a contract of able minded parties. The contractual rights of a lender regarding

acceleration of a mortgage debt lie with the lender alone. The current legal theory that a lender may revoke that acceleration is also based on his contractual rights which are optional only to the lender to exercise. Appellant's proposal seeks to have this Court interfere with the innate contractual rights of all lenders in that their rights to revocation will no longer be discretionary. They may be faced with circumstances requiring discontinue of the foreclosure action. That discontinuance will then mandate and compel the Lender to accept installment payments against their will. For this reason, established law and public policy against court interference with contracting parties far outweigh the need to revive the cause of action against the Borrower which Appellant was solely responsible for losing.

B. Leave to Discontinue Action is not given carte blanche

Appellant is partially correct in its affirmation that Lenders were able to voluntarily discontinue foreclosure action with the knowledge they may later exercise their rights in a new action. However, that ability and right to discontinue an action is not unlimited. A plaintiff may discontinue its action voluntarily upon stipulation by the parties or by order of the court (*see* CPLR 3217 [b]). It is well-established that a motion for leave to discontinue an action without prejudice should be granted unless there are reasons which would justify its denial (*see* Wells Fargo Bank, N.A. v Fisch, 103 AD3d 622, [N.Y. App. Div. 2nd Dept. 2013]: the general rule is that plaintiff should be permitted to discontinue the action without

prejudice, unless defendant would be prejudiced thereby];). The determination of whether to grant or deny such motion "rests within the sound discretion of the court," GMAC Mtge., LLC v Bisceglie, 109 A.D.3d 874, (N.Y. App. Div. 2nd Dept. 2013) *quoting* Expedite Video Conferencing Servs., Inc. v Botello, 67 A.D.3d 961, (N.Y App. Div. 2nd Dept. 2009). (*see* Matter of Sheena B. [Rory F.]., 83 AD3d 1056, [N.Y. App. Div. 2nd Dept. 2011][ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted; particular prejudice or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible]; Kane v Kane, 163 AD2d 568, [N.Y. App. Div. 2nd Dept. 1990] [neither CPLR 104 nor CPLR 3217 (b) supports the grant of a discontinuance by the court if unfair prejudice results to the adversary]; St. James Plaza v Notey, 166 AD2d 439, [N.Y. App. Div. 2nd Dept. 1990][if the party opposing the motion can demonstrate prejudice if the discontinuance is granted, discontinuance must be denied).

In GMAC Mtge., LLC v Bisceglie, the Court upheld the lower Court's denial to discontinue the action noting that it appeared the plaintiff sought to discontinue the action to avoid the adverse consequences of its improper use of a limited signing officer to obtain summary judgment in its favor. 109 A.D.3d 874, (N.Y. App. Div. 2nd Dept. 2013). In Kaplan v. Village of Ossining, the court denied discontinuance because the plaintiff was attempting to circumvent the effect of a

preceding conditional order of preclusion. 35 A.D.3d 816, (N.Y. App. Div. 2nd Dept. 2006). Additionally, this Court held that "Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible." Tucker v. Tucker, 55 N.Y.2d 378, (N.Y. 1983); (see Citimortgage, Inc. v Sultan, 47 Misc. 3d 626, [Sup. Ct. Kings Cty. 2014]: "Courts should look at 'the prejudice that may accrue to others in, or even outside of, the litigation'". The above makes clear that a Lender who believes it may discontinue a foreclosure action at will is not relying on established law, but rather a misinterpretation of the law.

C. Automatic revocation by Discontinuance of an Action would circumvent the purpose of the Statute of Limitations

Considering the well-established law set forth above, it is demonstrated that a Lender does not possess the unfettered right to discontinue a foreclosure action. A Lender must justify its request with a reason that is sound. Further, the purpose and consequence of the discontinuance must not prejudice the defendant. It is submitted that if a Lender were to reason that the discontinuance is for the purpose of acceleration revocation alone in order to avoid the approaching expiration of the statute of limitations period, as admitted in Wells Fargo Bank, N.A. v Ferrato, 2020 N.Y. App. Div. LEXIS 3184, (N.Y. App. Div. 1st Dept. 2020), that application would be denied as prejudicial and contradictory to the intent of the statute of limitations. The primary purpose of a Statute of Limitations

is to compel the exercise of a right of action within a reasonable time so that the defendant will have a fair opportunity to prepare an adequate defense free of the attendant prejudices occasioned by inordinate delay. Cucuzza v. Vaccaro, 109 A.D.2d 101, (N.Y. App. Div. 2nd Dept. 1985); Bellini v. Gersalle Realty Corp., 120 A.D.2d 345, (N.Y. App. Div. 1st Dept. 1986); (*see* Commissioner of Welfare v. Jones, 73 Misc. 2d 1014, [Sup. Ct. Queens Cty. 1973] purpose of a statute of Limitations is to protect against state claims).

The adoption of Appellant's theory would facilitate the dissolution of the statute's purpose. A lender would be able to commence an action, then discontinue it on the eve of the expiration, reaccelerate, commence a new action and begin the cycle again for a period six years beyond the original maturity date of the loan. Courts will be addressing foreclosure matters with alleged default dates stemming back decades. Revival of Appellant's, or any lender's cause of action, in this manner is against public policy in favor a timely resolution and is prejudicial to all who will face litigation of stale matters.

D. Stipulation of Discontinuance executed by Borrower was not a consent to revocation of the acceleration because the stipulation was silent regarding revocation

Appellant's argument before the lower Court did not contend that the acceleration was revoked for the reasons addressed above. Appellant argued that the Borrower's execution of the stipulation was "reaffirmation of the debt". (R.¶67

at 107). Reaffirmation on the part of the borrower would be an act on the part of the borrower in acknowledgement of the debt, not an overt act on the part of the Appellant evidencing its revocation of the acceleration. Appellant now argues that the consent to discontinue the action was Borrower's consent to lender's choice of acceleration revocation. This argument had no basis. The stipulation executed by the Borrower was an agreement to discontinue the action. As an agreement, which is binding on all parties, all the terms which shall bind the parties must be set forth in the agreement. *see* Cooley v. CNYE Realty Corp., 16 A.D.3d 871, (N.Y. App. Div. 3rd Dept. 2005); PGA Mech. Contrs., Inc. v GPNZ Realty Co., LLC, 37 Misc. 3d 1210(A), (Sup. Ct. Kings Cty. 2012). In Petito v. Piffath, this Court held that a stipulation settling a mortgage foreclosure action which is silent as to an express acknowledgment of the mortgagor's indebtedness cannot be construed as a written acknowledgment of the underlying debt sufficient to revive an otherwise time-barred claim based upon the mortgage." 85 N.Y.2d 1, (N.Y. 1994). Since the Stimulation of Discontinuance executed by the Borrower made no reference or acknowledgement of the mortgage debt (R. 51-52), the stipulation was not a reaffirmation of the debt nor a consent to revocation but merely an agreement to discontinue the action.

E. The Loss of claim affirmed by the Second Department's decision is a consequence of Appellant's negligent inaction

Appellant submits that the Second Department's ruling "awards a free home" to the Borrower while the Appellant loses. Appellant offers this Court theories of why the limited action of its predecessor in interest, that being the commencement then discontinuance of the 2009 foreclosure action, should be viewed as sufficient to revive its claim. The undisputed facts Appellant omits are:

- BAC commenced a foreclosure action against the Borrower in July, 2009;
- No Request for Judicial Intervention was filed by BAC
- No motions were filed by BAC
- The 2009 action languished without movement for almost five years
- Counsel for BAC's assignee, Everbank, drafted the Stipulation of Discontinuance,
- The Stipulation of Discontinuance was executed and filed with the Court in February 2014
- The Statute of Limitations, from the commencement of the 2009 action, did not expire until July 28, 2015, seventeen months after the discontinuance was filed.

- The Assignment to GreenTree, Appellant by merger, is dated May 8, 2015, almost three months before the expiration of the statute of Limitations. (R. 184)
- The second action was not commenced until January 2016, five months after the expiration of the statute of limitations.

The facts set forth above exemplify the negligent inaction of Appellant and its predecessors in interest. Appellant wishes to bear victim in this situation focusing on the default of the borrower as the reason for Appellant's economic loss. In reality the facts of the matter make clear that it was the inaction of the Appellant that resulted in the Appellant's loss of its claim. Appellant asserts that the Borrower will be "rewarded a free home" due to the prejudicial ruling of the Second Department. That the Appellant relied upon, and followed, the established law and is now being dispossessed of its right and claim due to an unexpected and "out of left field" decision of the Court. To the contrary. This matter, including the rights and claim of the Appellant, were held and lost by the Appellant. The statute of limitations is six years. That was six years the Appellant had to enforce its right under the law. Appellant's predecessor in interest commenced a foreclosure action in 2009 and then abandoned that action for almost five years, not even filing an RJI. Everbank, Appellant's predecessor in interest and BAC's successor in interest, drafted the Stipulation to discontinue the action. As a contractual agreement,

Everbank could have included a clause which clearly stated the acceleration was revoked and the Borrower could cure his default by tendering the payments then in arrears. After the discontinuance, Everbank had another year and a half to bring a new action. Instead, Everbank transferred interest in the Appellant via GreeTree. The Appellant, after interjection into this matter by assignment, could have sent notice to the borrower advising the Borrower that it was revoking the acceleration and Borrower could return to installment payments and pay up his arrears. The Appellant could have commenced a second action prior to July 28, 2015, the expiration date of the statute of limitations. Had Appellant, or any of its predecessors, adhered to the established statute of limitations, judicial procedure and contract law, Appellant would not now have a need to beg this Court's resurrection of its claim by establishing, as a matter of law, the silent stipulation of discontinuance was a revocation of Appellant's acceleration.

CONCLUSION

For the foregoing reasons, Borrower respectfully requests that this court uphold the Order of the Second Department and reject Appellant's theories. As set forth above, the facts in a complaint preexist the complaint itself and do not dissipate upon the discontinuance of an action. Further, a revocation must be clear and unambiguous and evidenced by notice or an overt act which is specifically carried out because of the revocation. In addition, the concept of automatic

revocation will have a chilling effect on a lender's discretionary contractual right, as well as the purpose of the statute of Limitations. The matter before this court is the creation of Appellant's own inaction. This Court should not now save Appellant's claim at the expense and determinant of law and public policy.

Dated: Bohemia, New York
June 1, 2020

Respectfully Submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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