To be Argued by:
MARGARET J. CASCINO
(Time Requested: 30 Minutes)

APL-2021-00130
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Appellate Division–Second Department Docket No. 2017-07729

Court of Appeals

of the

State of New York

EVERHOME MORTGAGE COMPANY, AS NOMINEE FOR BANK ONE, N.A.,

Plaintiff-Appellant,

– against –

NUCHEM ABER and EQUITY RECOVERY CORPORATION,

Defendants-Respondents,

– and –

ATLANTIS ASSET RECOVERY LLC; MIDLAND FUNDING LLC DBA IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; CONGREGATION CHERNOBIL, INC.; CONTINENTAL CAPITAL GROUP, LLC; FAIRMONT FUNDING, LTD.; KAHAL MINCHAS CHINUCH OF TARTIKOV; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "JOHN DOES" and "JANE DOES," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF RELATED LITIGATION

Pursuant to 22 NYCRR 500.13(a), Appellant states that as of the date of the completion of this brief, there is no related litigation pending before any court.

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PRELIMINARY STATEMENT

The underlying mortgage contains a condition precedent that the lender *must* comply with prior to the lender being entitled to elect the remedy of acceleration. In the prior foreclosure action, defendant-respondent Nuchem Aber ("Aber") directly disputed the lender's compliance with the contractual demand requirements in his Verified Answer. *R.* 294-300. The prior foreclosure action was not adjudicated on the merits, but instead was dismissed due to the lender's failure to appear at a status conference. *R.* 86.

Defendant-respondent Equity Recovery Corporation ("Equity"; "Equity" and "Aber" are collectively referred to herein as "Respondents") failed to establish below that the mortgage loan was accelerated through the filing of the prior foreclosure complaint. The proof submitted by Equity – an unverified complaint – was insufficient as a matter of law to grant Equity summary judgment as Equity failed to establish a sworn statement by the lender regarding its intention to accelerate the loan. *R.*73-85. This Court's decisions in *Albertina* and *Engel* are controlling and support the reversal of the Appellate Division's decision in this case. The arguments raised by Respondents in their brief are unpersuasive.

Even if this Court determines that Equity had met its initial burden, as Respondents argue, the documentation submitted by Appellant (Aber's Verified Answer and the recorded Assignment of Mortgage) was sufficient to establish the

lender's non-compliance with the contractual demand requirement in connection with the prior foreclosure or, at a minimum, to raise an issue of material fact requiring the denial of Respondents' summary judgment motion. *R.* 71-72, 294-300.

The record before this Court establishes that Equity failed to resolve the issues of fact raised by Appellant's submissions in opposition to Equity's motion for summary judgment. *R.*301-316. Equity did *not* address Appellant's arguments relating to the Verified Answer or the Assignment of Mortgage below. Although Equity attached an affidavit of Aber in response to Appellant's opposition to Equity's motion, the affidavit neither addressed the prior foreclosure action nor eviscerated the statements contained within Aber's prior Verified Answer. *R.*301-307. Therefore, the arguments raised by Respondents for the first time on this appeal – that neither the Verified Answer nor the Assignment of Mortgage raised an issue of fact – should not be considered.

The Appellate Division's statement that a lender's "compliance with paragraph 22(b) [of the mortgage] is enforceable and waivable only by the borrower" is irrelevant where, as here, the borrower actually raised and disputed the lender's compliance with the contractual requirements in the prior foreclosure action. *R.* 294-300. The veracity and admissibility of Aber's Verified Answer from the prior foreclosure action was never challenged by Respondents. *R.*301-307. Therefore, Respondents' current argument that Aber was required to oppose the lender's cross-

motion for summary judgment on the grounds that the lender failed to comply with the contractual precedent in connection with the prior foreclosure is nonsensical and contradictory to the position that Aber takes in this action – that the action is time-barred.

Aber's sworn statement from the prior action is not only admissible, but also constitutes evidence of the fact that the contractual default notice was not properly served prior to the commencement of the prior foreclosure action. While the prior foreclosure action was not disposed of on the merits, the issue of the lender's compliance, or non-compliance, with the contractual requirements of the mortgage in the prior action goes directly to the issue of whether the prior foreclosure action actually triggered the statute of limitations making the current action untimely.

Based upon the established precedent and the record before this Court, the underlying order must be reversed and summary judgment denied.

LEGAL ARGUMENT

I. RESPONDENTS' NEW AND UNPRESERVED ARGUMENTS CANNOT BE CONSIDERED

Many of the arguments asserted by Respondents are raised for the first time on this appeal and should not be considered. Where an argument raised was not preserved below, the argument should not be considered by this Court.

For an argument to be properly preserved for review by this Court, "the specific argument must have been raised in the lower court so that the court could conduct that analysis in the first instance...." *U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 84, 89 (2019). This Court lacks discretion to reach unpreserved arguments. *Id*; *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009) (the legal system "is best accomplished when [we] determine[ ] legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court") *quoting* ***People v. Hawkins,*** 11 N.Y.3d 484, 493 (2008).

As Respondents do not establish that their arguments could not have been "avoided by factual showings or legal countersteps had [they] been raised below", the arguments are improperly raised on this appeal. *Telaro v. Telaro,* 25 N.Y.2d 433, 439 (1969).

II. THE TERMS OF THE UNDERLYING MORTGAGE ARE CONTROLLING

This Court is bound by the terms of the contractual agreements between the parties. *159 MP Corp. v Redbridge Bedford, LLC*, 33 N.Y.3d 353, 359-361 (2019). It is undisputed that the mortgage at issue contains a mandatory condition precedent that requires strict compliance for the lender to have the right to accelerate the mortgage debt. *R.* 63-64. Paragraph 22 expressly states that "*only if*" lender meets "*all of the*" conditions set forth within the paragraph, including that the lender sends to the mortgagor a notice of default providing the mortgagor with at least 30 days to cure, then the lender can elect to demand payment in full. *Id*. (emphasis added).

Contrary to Respondents' contentions, the contractual requirements of Paragraph 22 are mandatory, not optional. This Court has recognized that the contracts utilizing the terms "if," "unless," and "until" constitutes "unmistakable language" of conditions that must be met. *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995); *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009).

These principles were reiterated by this Court in *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1 (2021) whereby this Court stated:

> Whether a foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts: the note and the mortgage. The noteholder's

> ability to foreclose on the property securing the debt depends on the language in these documents.

Id.

Relying upon this Court's prior decision in *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 475-476 (1932), this Court further instructed in reviewing statute of limitations claims that "[t]he determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked." *Engel, supra.,* 37 N.Y.3d at 3.

Applying the foregoing principles to this case, the Appellate Division's affirmance of the summary judgment award in Equity's favor must be reversed as the Appellate Division improperly focused on the court's dismissal of the prior foreclosure. *R.* 386-388 (the acceleration of the mortgage debt "was neither invalidated by the court nor revoked by the plaintiff"). As set forth in *Albertina* and *Engel*, the Appellate Division should have focused its analysis on whether the lender properly accelerated the mortgage debt through the filing of the prior foreclosure complaint.

Under this analysis, the Appellate Division's decision must be reversed as the Verified Answer and the recorded Assignment of Mortgage – documents not disputed by Respondents below – establish the prior lender's non-compliance with the contractual demand requirements or, at a minimum, raise an issue of fact sufficient to deny summary judgment. *R.* 71-72, 294-300.

III. EQUITY'S SUBMISSION OF THE UNVERIFIED COMPLAINT WAS INSUFFICIENT TO ESTABLISH A *PRIMA FACIE* ENTITLEMENT TO SUMMARY JUDGMENT

As detailed in Appellant's opening brief, this Court's decisions in *Engel* and *Albertina* support a determination that Equity's sole submission of an *unverified* complaint was insufficient to establish that the current foreclosure action is time-barred.

Respondents argue against a verification requirement and reference the cases cited within *Albertina,* including *Hothorn v. Louis*, 52 A.D. 218 (2d Dep't 1900), *aff'd* 170 N.Y. 576, as purported support. However, the cases cited by Respondents are distinguishable from the facts herein in that the mortgage agreements underlying those cases did not contain a mandatory notice requirement as the mortgage loan does in this case. Therefore, those cases do not support an affirmance of the summary judgment order.

In *Hothorn*, the Appellate Division reversed the trial court's post-trial dismissal of the action finding that "[i]t is undoubtedly true that where in order to entitle the plaintiff to bring an action for foreclosure it appears upon the face of the complaint that it is necessary that such election should be made, it has been held that the bringing of the suit is to be deemed an election." *Id.* at 222.

The Appellate Division further noted that even though the mortgagee had no obligation under the mortgage agreement to notify the mortgagor of its intention to

exercise its option to accelerate the debt, the mortgagee had provided at least three notices of its intention to accelerate the mortgage loan to the mortgagor. *Id.* There is no evidence of the lender's compliance with the mandatory contractual requirement in this case. Therefore, *Hothorn* is not applicable.

The additional cases cited by Respondents, *North Hampton Nat. Bank v. Kidder*, 106 N.Y. 221, 228 (1887) and *New York Sec. & r. Co. v. Saratoga Gas & Electric Co.*, 34 N.Y.S. 890, 900 (3d Dep't 1885) *aff'd* 157 N.Y. 689 (1898) are also distinguishable in that the courts found that the filing of an action constituted a "sufficient declaration of its intention to exercise such option" where the underlying mortgage documents stated that the mortgagee held an *unconditional option* to accelerate the debt upon a default. Since the mortgage underlying this action contains a mandatory contractual requirement, the decisions in the cases cited by Respondents are not dispositive.

Respondents further contend that this Court's decisions in *Albertina* and *Engel* simply require an "overt" and "unequivocal act" sufficient to trigger the statute of limitations, but not a "sworn statement." Appellant disagrees. Appellant does not dispute that the filing of a complaint constitutes an "overt" and "unequivocal act". Appellant simply contends that the filing of an *unverified* complaint, unaccompanied by a sworn statement by the lender invoking its right to accelerate, is insufficient to trigger the statute of limitations.

As set forth in Appellant's opening brief, the insufficiency of an unverified complaint to establish a meritorious cause or to support a motion for default judgment is well recognized in New York. *Appellant Brf* p. 21. In *Engel*, this Court recognized the severity of acceleration, *i.e.*, the termination of the borrower's right to repay the debt over time, and stated that "noteholders must unequivocally and overtly exercise an election to accelerate." *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1, 2 (2021). Based upon this Court's precedent, it is not logical (and is contradictory) that an unverified complaint could be deemed sufficient to terminate a borrower's installment contract yet would be insufficient to obtain a default judgment against the same borrower.

Neither Respondents' reference to *Logue v. Young*, 94 A.D.2d 827 (3d Dep't 1983) nor 22 NYCRR §130-1.1 are persuasive. The Appellate Division in *Logue* determined that the unverified complaint was sufficient to defeat the defendant's motion to dismiss for failure to state a cause of action where the lender's counsel served a demand notice. Whether a contractual demand was properly sent prior to the commencement of the prior foreclosure action is directly disputed in this case. Respondents' final assertion that an unverified complaint signed by an attorney pursuant to 22 NYCRR §130-1.1 should be sufficient to constitute an "unequivocal" and "overt" act to accelerate a loan is not compelling and must fail on the same

grounds that an unverified complaint is insufficient to establish a claim or enter a default judgment. *Appellant Brf* p. 21.

IV. RESPONDENTS' "WAIVABLE AND ENFORCEABLE" ARGUMENT IS UNWORKABLE BASED UPON THE RECORD

Compliance with the contractual provisions of Paragraph 22 of the mortgage is mandatory in order for a lender to be entitled to elect the remedy of acceleration. Without strict compliance with the condition precedent set forth in the mortgage, the lender is *not* entitled to elect to accelerate the loan. *See, U.S. Bank v. Hazan*, 176 A.D. 3d 637 (1st Dep't 2019) ("a mortgage cannot be validly accelerated without proper notice required by the mortgage."); *HSBC Mortg. Corp. v. Gerber*, 100 A.D.3d 966 (2d Dep't 2012) (foreclosure action dismissed for failure to comply with conditions precedent); *Serapilio v. Staszak*, 255 A.D.2d 824, 824 (3d Dep't 1998) ("not only has the Statute of Limitations not run on a potential foreclosure action, it has not yet begun to run" determining action not time-barred where a lender fails to comply with the mandatory contractual requirements set forth in the mortgage).

Respondents, improperly, for the first time on this appeal, now attempt to argue that the provisions of Paragraph 22 are "waivable and enforceable" only by the mortgagor. Respondents contend that Aber was required to oppose Appellant's cross-motion for summary judgment in this action on the grounds that the *prior* foreclosure proceeding did not accelerate the mortgage debt.

This assertion is nonsensical in light of the joint answer filed by Respondents in this foreclosure action in which Respondents assert that the current action is time-barred. *R.*23-32. Arguing that Aber is now required to take a contradictory position in connection with the lender's cross-motion for summary judgment is unworkable, especially in light of Aber's unrebutted sworn statement (the Verified Answer) disputing the veracity of the lender's compliance with the contractual demand in the prior foreclosure action. *R.* 294-300. Respondents did not dispute the admissibility of the Verified Answer below and do not address Appellant's arguments that the Verified Answer constitutes judicial admissions and evidence of facts on this appeal.

Respondents' attempted reliance upon *Satterly v. Plaisted,* 52 A.D.2d 1074, *aff'd* 42 N.Y.2d 933 (4 Dept. 1976) – a case cited by the Appellate Division – is misplaced. *Satterly* involved a review of a real estate contract whereby the purchaser sought to compel specific performance. The Appellate Division reviewed a provision in the contract relating to the purchaser's right to compel specific performance and determined that the particular clause was inserted for the sole benefit of the purchaser based upon equitable principles. In determining that the clause did not make the contract voidable by the sellers, the Appellate Division found that the clause was waivable and only enforceable by the purchaser who in fact sought specific performance. *Id.* at 1074.

Moreover, this argument is inapposite to the guidance provided in *Engel*. As this Court stated in *Engel*, for an acceleration to be valid, the mortgage must be accelerated in accordance with the terms and requirements of the mortgage. *Engel, supra.,* 37 N.Y.3d at 3.

V. THE VERIFIED ANSWER FILED IN THE PRIOR FORECLOSURE ACTION IS ADMISSIBLE AND UNCONTROVERTED EVIDENCE

The admissibility and sufficiency of the Verified Answer was unchallenged by Respondents throughout the prior proceedings and, therefore, any arguments now attempting to challenge the Verified Answer are waived. *U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 84, 89 (2019); *Matter of Smith v. Smith*, 104 A.D.3d 860 (2d Dep't 2013); *O'Donnell v O'Donnell*, 80 A.D.3d 586, 587 (2d Dep't 2011); *Matter of Thomas v Murphy*, 2 A.D.3d 1404 (4 Dep't 2003); *Passaro v. Henry*, 251 A.D.2d 390 (2d Dep't 1998).

Aber's Verified Answer directly disputed the lender's compliance with the contractual demand in the prior foreclosure action. *R.* 298 ¶¶29-31 . It is well-established that an action commenced without compliance with the mandatory notice cannot trigger the statute of limitations. *See, Fed. Nat'l Mortg. Ass'n v. 4721 Ditmars Blvd, LLC*, 196 A.D.3d 465 (2d Dep't 2021) (dismissing statute of limitations defense finding current action was not time-barred as loan was not accelerated through prior foreclosure action where lender lacked standing to commence prior

action); *Deutsche Bank Nat'l Tr. Co. v. Limtcher*, 193 A.D.3d 686 (2d Dep't 2021) (finding action timely as prior action was a nullity due to lender's lack of standing therefore there was no prior acceleration of the debt); *Deutsche Bank Tr. Co. Americas v. Marous*, 186 A.D.3d 669, 671 (2d Dep't 2020); *HSBC Bank USA v. Rinaldi*, 177 A.D.3d 583, 585 (2d Dep't 2019) (prior foreclosure action did not accelerate debt). *See also, Fed. Nat'l Mortg. Ass'n v. Tudor*, 185 A.D.3d 905 (2d Dep't 2020) (action commenced against dead person was a nullity); *U.S. Bank Nat'l Ass'n v. Stewart*, 187 A.D.3d 1330 (3d Dep't 2020) (foreclosure action against a deceased mortgagor did not accelerate mortgage loan); *Mejias v. Wells Fargo N.A.* 186 A.D.3d 472 (2d Dep't 2020); *Deutsche Bank Nat'l Trust Co. v. Board of Mgrs. of the E. 86th St. Condominium*, 162 A.D.3d 547 (1 Dep't 2018) (purported acceleration of mortgage by plaintiff lacking standing was a nullity and did not trigger statute of limitations).

Although Equity submitted an affidavit of Aber in further support of its motion for summary judgment, the affidavit did not challenge the veracity of the prior answer or address the lender's prior compliance, or non-compliance, with contractual demands in the prior foreclosure action. *R.* 298 ¶¶29-31. As the Dissenting Justices in the Appellate Division properly note, "[p]arties who make sworn written statements are to be held to a strict accountability for the truth and

accuracy of their contents." *R.* 391 citing *Matter of Portnow*, 253 A.D. 395, 398 (2d Dep't 1938).

As the Verified Answer, unchallenged by Respondents, was the sole sworn statement presented before the court with respect to the issue of the lender's compliance with the contractual demands in connection with the prior foreclosure action[1], Appellant is entitled to every favorable inference that can be drawn therefrom. *De Lourdes Torres v.* Jones, 26 N.Y.3d 742, 763 (2016) (on a motion for summary judgment "the facts must be viewed in the light most favorable to the plaintiff, and every available inference must be drawn in the plaintiff's favor."); *Faison v. Lewis*, 25 N.Y.3d 220, 224 (2015); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

VI. EQUITY FAILED TO RESOLVE ALL MATERIAL ISSUES OF FACT

On a summary judgment motion, the movant's burden is to eliminate each and every issue of material fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012). All facts must be reviewed by the court in the light most favorable to the non-moving party. *Id*. Denial of a motion for summary judgment is required

[1]Although reference is made in Respondents' brief that Appellant is in possession of the prior servicing records from Fairmont, the prior lender, the record does not provide support for such claim as no such representation was made in connection with the underlying motions. R. 122-126.

whenever there "is any doubt as to the existence of [an] issue [of material fact]." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

Even if this Court determines that Equity met its initial burden, which Appellant disputes, the documentation submitted by Appellant (Aber's Verified Answer and the recorded Assignment of Mortgage) was sufficient to establish the lender's non-compliance with the contractual demand requirement in connection with the prior foreclosure or, at a minimum, to raise an issue of material fact requiring the denial of Respondents' summary judgment motion.

The record before this Court establishes that Equity failed to resolve the issues of fact raised by Appellant's submissions in opposition to Equity's motion for summary judgment. *R.* 71-72, 114-119, 294-300, 317-334. As stated above, Equity did *not* address Appellant's arguments relating to the Verified Answer or the Assignment of Mortgage below. Although Equity attached an affidavit of Aber in response to Appellant's opposition to Equity's motion, the affidavit neither addressed the prior foreclosure action nor eviscerated the statements contained within Aber's prior Verified Answer. *R.* 308.

Respondents' attempt to belatedly address the sufficiency of the Verified Answer and the Assignment of Mortgage, for the first time in connection with this appeal, is improper and their arguments were waived.

To the extent this Court considers such arguments, they should be rejected. Contrary to Respondents' assertion, Appellant was not required to *establish* that the lender failed to comply with Paragraph 22 in connection with the prior foreclosure action. Instead, Appellant was simply required to *raise* a question of fact as to the issue, which it did. *See, e.g.*, *U.S. Bank N.A. v. Trulli*, 179 A.D.3d 740, 742 (2d Dep't 2020) (lender had no obligation to establish standing in opposition to CPLR 3211(a)(3) motion to dismiss, but instead just needed to raise issue of fact); *Wells Fargo Bank N.A. v. Kehres*, 199 A.D.3d 869 (2d Dep't 2021); *Wilmington Sav. Fund Socy, FSB v. 117 Pulaski, LLC*, 197 A.D.3d 686 (2d Dep't 2021) (on CPLR 3211(a)(5) motion, "the burden shifts to the plaintiff to *raise a question of fact* as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period.") (emphasis added).

The Verified Answer and the Assignment of Mortgage each raised an issue as to the lender's compliance with the mandatory condition precedent in the prior foreclosure action. *R.* 71-72, 294-300. The Verified Answer directly disputed the lender's compliance with Paragraph 22 in connection with the prior foreclosure action. As Paragraph 22 of the mortgage requires contractual demand to include at least a 30-day period for the mortgagor to cure the default, the Assignment of Mortgage established that the lender in the prior foreclosure action (EverHome) was

assigned the note and mortgage seventeen days prior to the commencement of the prior foreclosure action. *R.* 63-64, 71-72. Therefore, any notice sent by EverHome pursuant to Paragraph 22 could not have strictly complied with the contractual provisions of the mortgage, which is a pre-requisite to accelerating the mortgage debt. *Id.*

Without strict compliance with the contractual requirements of the mortgage, the statute of limitations was not triggered by the filing of the prior foreclosure complaint and this current action would then be timely. As Respondent failed to resolve the issues raised by Appellant's submissions, the order should be reversed and summary judgment denied.

VII. THE ISSUES RAISED BY APPELLANT ON THIS APPEAL ARE PROPERLY BEFORE THIS COURT

The record establishes that Appellant contested the sufficiency of the documentation below and argued that the proof submitted by Equity was insufficient to establish that the statute of limitations was triggered upon the filing of prior foreclosure complaint. *R.* 115-119. Contrary to Respondents' contention, Appellant specifically asserted below that the complaint was unverified and insufficient to establish Equity's claim. *See R.* 117, ¶99 ("A review of the complaint in the prior foreclosure action shows that the complaint was not verified."); *R.* 117 ¶99.

Although Respondents had an opportunity to address the issue and clarify the record below, Respondents failed to do so. *R.* 301-308.

This Court's jurisdiction is not as constrained as argued by Respondents. This Court has jurisdiction over questions raised in the trial court even if the questions were not raised in the Appellate Division. *Telaro v. Telaro*, 25 N.Y.2d 433, 438 (1969) *quoting Cohen and Karger, Powers of the New York Court of Appeals*, n.1 at p. 624. , 255 N.E.2d 158 (1969). In *Telaro*, this Court stated "[i]t should be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate." *Id.* at

Further, "[a] question of law which could not have been obviated by an evidentiary showing at the court below may be raised for the first time on appeal." *People v. Rodriquez y Paz*, 58 N.Y.2d 327, 336-337 (1983). As stated in *Telaro*, "if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court." *Telaro, supra*, 25 N.Y.2d 439 (internal citations omitted).

CONCLUSION

Based upon the record below and the reasons set forth herein, this Court should reverse the Appellate Division's order and deny Equity's Motion in its entirety.

McGLINCHEY STAFFORD

Dated: New York, New York
January 5, 2022

By: Margaret J. Cascino

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NEW YORK COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
COUNTY OF NEW	)	ss.:	**BY OVERNIGHT FEDERAL**
YORK	)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On: January 6, 2022

deponent served the within: **Reply Brief for Plaintiff-Appellant**

upon:

(See Attached Service List)

the address(es) designated by said attorney(s) for that purpose by depositing **3** true cop(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on the 6th day of January 2022.

Mariana Braylovskiy

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