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

APL-2021-00130
Kings County Clerk's Index No. 507839/15
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.

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), TIAA, FSB f/k/a EverBank, successor by merger to EverHome Mortgage Company, is 100% owned by TIAA FSB Holdings, Inc., which is 100% owned by TIAA, a New York Stock life insurance company.

STATUS OF RELATED LITIGATION

Pursuant to Court of Appeals Rule 500.13(a), Appellant states that it is unaware of any litigation related to this appeal.

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PRELIMINARY STATEMENT

This appeal arises out of an order entered by the trial court, which dismissed the foreclosure complaint as untimely and granting summary judgment in favor of the non-borrower defendant discharging the underlying mortgage. The trial court found that the defendant established that the current foreclosure action was barred by the statute of limitations as the mortgage loan was accelerated through the commencement of a prior foreclosure action in 2009. As the instant action was not commenced within six years of the prior action, the current action was deemed time-barred.[12]

The Appellate Division, Second Department, with two Justices dissenting, agreed with the trial court and found that no issue of fact was raised by plaintiff sufficient to defeat defendant's entitlement to dismissal of the complaint. R. 383-392.[3] The Appellate Division erred in its determination as the prior foreclosure complaint was unverified and, therefore, the defendant failed to establish that the filing of the complaint triggered the statute of limitations. Further, the underlying mortgage contains a contractual condition precedent, *i.e.*, the requirement that a

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[1] The Order also denied Appellant's cross-motion for summary judgment, which is not being appealed herein.

[2] The 2009 foreclosure action was never adjudicated on the merits. Instead, the action was dismissed by the trial court due to the plaintiff's failure to appear at a scheduled conference.

[3] "R." refers to the "Record" (the "Record") prepared and served by Appellant.

delinquency notice be mailed to the borrower, which is required to be satisfied before the lender could accelerate the loan. R. 63-64 (¶22).

The foreclosure complaint filed in 2009 included an allegation that the borrower failed to comply with the terms of the note and mortgage by failing to make the required monthly mortgage payments and, as a result, the lender was electing to demand payment of the loan in full. R. 77 (Paragraph "Eighth"). The foreclosure complaint was not verified by either the lender or its counsel. R. 75-85. In response to the complaint, the borrower filed a verified answer denying the lender's allegations. R. 294-300. The borrower also asserted an affirmative defense denying that the lender provided the delinquency notice required under the mortgage and denying that the lender was entitled to accelerate the loan. R. 298-299.

Despite acknowledging that the borrower filed a verified answer in the 2009 action, the Appellate Division incorrectly determined that the defendant had established its *prima facie* entitlement to judgment finding that the mortgage loan was accelerated through the filing of the foreclosure complaint in the prior action. R. 383-392. The only proof submitted in support of defendant's Motion was a copy of the unverified foreclosure complaint. Defendant's failure to produce any documentary evidence establishing that the lender unequivocally elected to accelerate the loan should have resulted in the denial of the Motion.

The Appellate Division's decision also improperly affords a presumption of the validity of the election of acceleration in the first foreclosure action simply based upon the fact that a complaint was filed. However, such presumption is inappropriate where, as here, the foreclosure complaint was unverified and the borrower directly disputed the lender's compliance with the contractual condition precedent set forth in the mortgage. As such, the record before the court was sufficient to establish that the lender failed to serve the contractual demand in accordance with the mortgage. Therefore, defendant's motion to dismiss the complaint should have been denied as defendant did not establish that the commencement of the 2009 action triggered the statute of limitations.

Even if this Court determines that the defendant met its initial burden for dismissal, the order must be reversed as the terms of the mortgage, the timing of the loan assignment, and the borrower's verified answer establish that the statute of limitations was not triggered by the 2009 action or, at a minimum raise an issue of fact sufficient to require the denial of the motion. R. 48-70, 71-72, 294-300. Paragraph 22 of the mortgage expressly requires that the lender send a notice to the borrower advising the borrower of the specific rights afforded to the borrower *prior* to the lender having the right to demand payment in full on the loan. R. 63-64. Paragraph 22(b)(3) further provides that the borrower is entitled to a thirty (30) day period in which the borrower could cure the default. R. 64. Compliance with

Paragraph 22 is mandatory if the lender wants to avail itself of the right to accelerate the loan.

In this case, the note and mortgage were transferred to the lender by a written assignment dated April 13, 2009 – just seventeen (17) days before the commencement of the 2009 foreclosure action. R. 71-72. The dissenting Justices in the Appellate Division correctly noted that the lender could not establish compliance with the 30-day cure period required under Paragraph 22 of the mortgage prior to the commencement of the 2009 action. R. 390-392. Therefore, the assignment established that the statute of limitations could not have been triggered by the filing of the complaint due to the lender's non-compliance with the contractual demand requirement of the complaint.

The borrower's verified answer was further evidence of the lender's non-compliance with the requirements set forth in Paragraph 22 of the mortgage. R. 294-300. The majority in the Appellate Division incorrectly determined that the borrower's answer did not raise an issue of fact as the court stated that the prior acceleration was not revoked or judicially invalidated by the Supreme Court. R. 386-388. Such analysis again assumes that there was an acceleration of the loan, which was disputed by the borrower. Since the demand letter is a contractual precedent to the lender's right to demand payment in full on the mortgage loan (*i.e.*, the right to accelerate the loan), a foreclosure action commenced without the

mailing of the demand letter is a legal nullity. Therefore, the statute of limitations did not trigger and the second action was timely.

The admissibility of the borrower's verified answer was never challenged by defendant. In fact, defendant never responded to the lender's arguments relating to the issues surrounding the 2009 action, the lender's compliance with the contractual demand requirements of the mortgage, or the timing issue created by the assignment in either the trial court or the appellate proceedings. R. 10-15, 301-307.

The record before this Court establishes the existence of an issue of fact sufficient to preclude dismissal. As such, this Court should reverse the Order and deny defendant's motion in its entirety.

QUESTIONS PRESENTED

1. Whether the filing of an unverified complaint in the 2009 foreclosure action was sufficient to trigger the statute of limitations?

2. Whether the filing of the unverified complaint was sufficient to trigger the statute of limitations where the lender failed to comply with the mandatory contractual requirements set forth in the mortgage, which are a condition precedent to acceleration?

3. Whether the borrower's unrebutted verified answer filed in the 2009 action was sufficient to establish the lender's non-compliance with the contractual condition precedent set forth in the mortgage?

4. Whether the assignment transferring the note and mortgage to the foreclosing lender, seventeen days prior to the commencement of the 2009 foreclosure action, was sufficient to establish, or raise an issue of fact of, the lender's non-compliance with the terms of the mortgage?

JURISDICTION

This Court has jurisdiction pursuant to CPLR § 5601 as the action originated in the Supreme Court of the State of New York, Kings County, and the Appellate Division, Second Department, with two Justices dissenting, affirmed the order granting dismissal of the amended complaint as time-barred and granting summary judgment on the counterclaim to cancel and discharge the mortgage. R. 383-392. The issues presented herein were preserved in the prior proceedings. R. 34, 113-119, 324-327, 379.

STATEMENT OF THE CASE

On April 1, 2003, borrower Nuchem Aber ("Aber") executed a note in the amount of $368,000 from Fairmont Funding, Ltd. ("Fairmont") in which Aber agreed to repay the sum in monthly payments with interest (the "Note"). R. 127-130. As security for the repayment of the Note, Aber executed a mortgage on the same date to Fairmont secured by the real property located at 1172 41st Street, Brooklyn, New York (the "Property"), which was recorded in the Office of the City Register of the City of New York on June 18, 2003 as CRFN 2003000176894 (the "Mortgage"). R. 48-70, 127-130. The Note and Mortgage both utilized the Uniform Instruments promulgated by Fannie Mae, which are commonly used in residential loan transactions in New York. *Id.*

The Note and Mortgage set forth the terms and conditions of Aber's repayment of the mortgage loan, as well as the lender's rights and remedies in the event of a default. *Id.* The most widely utilized remedy for a borrower's default under a note and mortgage is the commencement of a foreclosure action, which is governed by Paragraph 22 of the Mortgage titled "*Lender's Rights If Borrower Fails to Keep Promises and Agreements*". R. 63-64.

Paragraph 22 details the specific action that a lender must take before the lender is entitled to demand the full repayment of the mortgage loan. This paragraph is critical to the determination of this case. Paragraph 22 states:

> Except as provided in Section 18 of this Security Instrument, *if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument.* Lender may do this without making any further demand for payment. This requirement is called "Immediate Payment in Full."
>
> If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale, Lender or another Person may acquire the Property. This is known as "Foreclosure and Sale." In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured.
>
> Lender may require immediate Payment in Full under this Section 22 *only if all of the following conditions are met*:

(a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;

(b) *Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states*:

(1) The promise or agreement that I failed to keep or the default that has occurred;

(2) The action that I must take to correct that default;

(3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;

(4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;

(5) That if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and

(6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have; and

(c) I do not correct the default stated in the notice from Lender by the date stated in that notice.

Id. (emphasis added).

Aber subsequently defaulted on his mortgage payments by failing to make the monthly payment due May 1, 2008 and each payment thereafter. R. 99, 124 (¶10), 132-149. The Note and Mortgage were transferred to EverHome ("Everhome") by written assignment dated April 13, 2009 (the "Assignment"). R.

71-72. Seventeen (17) days after the Assignment, Everhome commenced a foreclosure action against Aber and others by filing a summons, complaint, and notice of pendency of action (the "2009 Complaint") captioned *Everhome Mortgage Co., as Nominee for Bank One, N.A. v. Nuchem Aber, et al.* on April 30, 2009 in the Supreme Court of the State of New York, County of Kings under Index Number 10540/2009 (the "2009 Action"). R. 73-85. The 2009 Complaint was not verified by Everhome or its counsel. *Id.*

As set forth in Paragraph Sixth of the 2009 Complaint, Everhome alleged "[t]hat the Plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note." R. 77. Schedule D of the 2009 Complaint stated "[t]he Plaintiff became the owner and holder of the instant note and mortgage by virtue of a transfer of same for valuable consideration. Said transfer was memorialized by an Assignment of Mortgage dated April 13, 2009." R. 85.

Aber's default was set forth in Paragraph Eighth of the 2009 Complaint, which stated that Aber "failed and neglected to comply with the conditions of said mortgage, bond or note by omitting and failing to pay the monthly payments [set forth in Schedule C], and accordingly, the *plaintiff has duly elected and does hereby elect to call due the entire amount presently secured by the mortgage*

described in paragraph "Fifth" hereof." R. 77 (emphasis added). Schedule C of the 2009 Complaint detailed that Aber failed to make the May 1, 2008 payment. R. 84.

On June 4, 2009, Aber, through counsel, filed a Verified Answer with Counterclaims (the "Verified Answer") to the First Foreclosure Complaint. R. 294-300. The Verified Answer included a verification personally executed by Aber. R. 300. In the Verified Answer, Aber specifically denied the allegations set forth in Paragraph Eighth of the 2009 Complaint. R. 295.

Aber further set forth various affirmative defenses to the foreclosure action. As his Seventh Affirmative Defense, Aber asserted that Everhome failed to comply with Paragraph 22 of the Mortgage stating:

> 29. The mortgage which is the subject of this action, provided that in the event of a default, the Plaintiff was required to give the Defendant a specific written notice with an opportunity to cure any default.
>
> 30. Plaintiff failed to give Defendant NUCHEM ABER the notice of default as required by the mortgage.
>
> 31. The Plaintiff has failed to comply with a condition precedent of the mortgage [and] the acceleration by Plaintiff was in violation of the terms of the mortgage.
>
> 32. By reason of the foregoing, the complaint must be dismissed.

R. 298-299. The 2009 Action was not adjudicated on the merits. Instead, the 2009 Action was administratively dismissed by Order dated October 3, 2013 due to Everhome's failure to appear at a status conference. R. 86.

While the 2009 Action was pending, the Property was transferred to Equity by way of a Sheriff's Deed dated December 30, 2009 as an execution of a judgment against Aber. The Deed was recorded in the Office of the City Register of the City of New York on January 20, 2010 as CRFN 2010000019938. R. 40-47.

As Aber remained in default, Everhome commenced a second foreclosure action against Aber, Equity, and others by filing of a summons, complaint, and notice of pendency in the Kings County Clerk's Office on June 24, 2015 under Index Number 507839/2015 (the "2015 Action"). Everhome filed an amended summons, amended complaint, amended notice of pendency, and amended certificate of merit on June 25, 2015 (hereafter, the "Complaint"). R. 151-258.

Aber and Equity (collectively, "Defendants") filed an answer, through counsel, which was promptly amended, on July 30, 2015 (the "Answer"). R. 23-32. The Answer asserted fourteen affirmative defenses, including lack of standing, failure to send the contractual and statutory notices required under the Note and Mortgage, and the statute of limitations. *Id.* The Answer also asserted a counterclaim by Equity, pursuant to RPAPL Article 15, to cancel and discharge the Mortgage based upon the expiration of the statute of limitations (the "Counterclaim"). R. 28-31. In the Counterclaim, Equity alleged that no mortgage payments had been tendered since April 1, 2008 and, therefore, New York's six-year statute of limitations ran out prior to the commencement of the 2015 Action.

Id. Equity did not mention the 2009 Action in its Counterclaim or allege that the 2015 Action was time-barred due to the filing of the 2009 Action. *Id.* Everhome filed a reply to the counterclaim on August 19, 2015 (the "Reply"). R. 33-39. After settlement conferences, the case was released to proceed. R. 293.

On August 2, 2016, Equity filed a motion to dismiss the Complaint, pursuant to CPLR § 3211(a)(5), and for summary judgment on the Counterclaim, pursuant to CPLR § 3212 and RPAPL § 1501(4) (the "Motion"). R. 8-86. The Motion was supported solely by an attorney affirmation and exhibits. R. 10-15, 16-86. The Motion asserted that "[Everhome] clearly and unequivocally elected to accelerate the entire amount that was due on the loan and secured by the mortgage by commencing the [2009 Action] on April 30, 2009, and the six year statute of limitation began to run on that date." R. 13 (¶19). In support of its Motion, Equity attached a copy of the 2009 unverified complaint as purported documentary evidence of acceleration. Equity failed to appraise the court of the fact that Aber filed a Verified Answer contesting the validity of the 2009 Action, including that Everhome failed to comply with the contractual requirements set forth in Paragraph 22 of the Mortgage. R. 10-15.

On October 24, 2016, Everhome cross-moved for summary judgment against Defendants on the Complaint (the "Cross-Motion"). R. 87-300. In the Cross-Motion, Everhome disputed that the unverified 2009 Complaint accelerated

the mortgage loan. R. 115, 117-119. Everhome further attached a copy of Aber's Verified Answer as evidence that the lender failed to properly accelerate the mortgage loan as Everhome failed to comply with Paragraph 22 of the Mortgage prior to the commencement of the 2009 Action. R. 294-300. Everhome also referenced the Assignment, which expressly stated that the transfer of the Note and Mortgage was completed on April 13, 2009 – just seventeen (17) days prior to the commencement of the 2009 Action. Therefore, the record established that Everhome failed to provide Aber with the 30-day cure period as required under Paragraph 22 of the Mortgage.

In connection with its reply brief, Equity did not dispute the admissibility of Aber's Verified Answer or Everhome's non-compliance with Paragraph 22. R. 301-307. In fact, Equity did not respond to any of Everhome's arguments pertaining to whether the 2009 Complaint properly accelerated the mortgage loan where there was a question of fact surrounding Everhome's compliance with the mandatory notice requirements set forth in Paragraph 22 of the Mortgage. *Id.*

On June 6, 2017, the Supreme Court (Noach Dear, J.) issued an Order granting Equity's Motion and denying Everhome's Cross-Motion, finding that Equity established *prima facie* that the mortgage loan was accelerated on April 30, 2009 through the commencement of the 2009 Action and that Equity "[had] no

obligation to prove the viability of the prior action" (the "Order"). R. 6-7. The Order was entered on June 15, 2017 and Everhome appealed. R. 3-4.

The Appellate Division, Second Department, with two Justices dissenting, affirmed the Order determining that Equity met its initial burden of establishing its *prima facie* right to dismissal on statute of limitations grounds finding that the unverified 2009 Complaint constituted a valid acceleration of the loan and that the instant action was filed more than six years later. R. 383-388. The Appellate Division rejected Everhome's arguments regarding Everhome's failure to comply with Paragraph 22 and considered such arguments as a request for "judicial invalidation of its own election to accelerate the mortgage debt in order to avoid the effect of the statute of limitations." *Id.* The Decision undermines the terms of the contractual agreement between the parties in which the parties agreed that the lender could only demand payment in full (*i.e.*, acceleration) where the lender complies with the notice requirements set forth in Paragraph 22 of the Mortgage. R. 63-64. Since the record established that the lender failed to comply with the contractual terms of the Mortgage, the Appellate Division erred.

The Appellate Division further incorrectly determined that Everhome's submission, including the Verified Answer and the Assignment, failed to establish the lender's non-compliance with the contractual condition precedent to the commencement of the foreclosure action or, at a minimum, raise an issue of fact

precluding dismissal of the current complaint. The majority focused on Everhome's failure to submit documentation as to whether its predecessor, Fairmont, had sent a 30-day notice to Aber. The dissenting Justices disagreed with the majority noting that the timing of the Assignment, less than 30-days prior to the commencement of the 2009 Action, raised an issue of fact. R. 388-392.

The minority also reasoned that Aber's Verified Answer was sufficient to contest the core issue in the case – whether any prior acceleration is rendered null and void due to the lender's failure to send the contractual demand required under the Mortgage. *Id.* Based upon the dissent, Everhome filed the instant appeal. R. 379-380.

ARGUMENT

The Appellate Division erred in two primary regards: First, in finding that Equity met its initial burden to establish that the 2015 Action was untimely commenced as Equity produced no documentary evidence in support of its Motion, except for a copy of the unverified 2009 Complaint. The Appellate Division erred in determining that the loan was accelerated through the filing of the unverified complaint thereby triggering the statute of limitations. As the current action was not commenced until June 24, 2015, more than six years after the commencement of the initial action, the Appellate Division incorrectly determined that Equity established that this action was untimely. R. 383-388.

The Appellate Division erred as the record is barren of any evidence of an "unequivocal overt act" or a "sworn statement" of the lender establishing the lender's election to accelerate the mortgage loan. As detailed below, the filing of the unverified complaint is insufficient to trigger the statute of limitations. Further, the Appellate Division's analysis undermines the terms of the contractual agreements between the parties, especially here, where compliance with those requirements was expressly disputed by the borrower in the prior foreclosure action. As Paragraph 22 of the Mortgage expressly states that the remedy of acceleration is unavailable unless the lender sends notice to the borrower setting forth specific information, and as the lender's compliance with that provision was unequivocally disputed by the borrower in the 2009 Action, the commencement of the second foreclosure action is insufficient to find that Equity *prima facie* established that the second action is time-barred.

Second, the Appellate Division erred in determining that Everhome failed to raise an issue of fact in opposition to Equity's Motion. Both the Verified Answer and the Assignment establish the lender's failure to comply with the contractual condition precedent set forth in the Mortgage. Therefore, the commencement of the prior foreclosure action did not trigger the statute of limitations. As correctly noted by the dissenting Justices, both Aber's Verified Answer and the Assignment into Everhome, at a minimum, raised an issue of fact as to whether the mortgage

loan was properly accelerated in the first place. In connection with opposing the Motion, Everhome was entitled to ever favorable inference that could be drawn from the record before the court. A review of the Assignment shows that the Note and Mortgage were transferred to Everhome just seventeen (17) days prior to the commencement of the 2009 Action, which would have made Everhome's compliance with the 30-day notice period required under Paragraph 22 of the Mortgage impossible.

Further, Aber's Verified Answer directly denied that Everhome complied with the notice provisions of the Mortgage in the 2009 Action entitled Everhome to accelerate the loan. As the admissibility of Aber's Verified Answer was not challenged by Equity, the Verified Answer, in and of itself, was sufficient to preclude dismissal. Therefore, Equity's Motion should have been denied.

POINT I

THE 2009 ACTION DID NOT TRIGGER THE STATUTE OF LIMITATIONS

In New York, the statute of limitations applicable to mortgage foreclosure actions is six years. CPLR 213(4); *Lubonty v. U.S. Bank, N.A.,* 34 N.Y.3d 250, 261 (2019). Separate causes of action accrue for each mortgage payment that is not paid, and a new statute of limitations period begins to run on the date of each missed payment. *Wells Fargo Bank, N.A. v Burke,* 155 A.D.3d 668, 669 (2d Dep't 2017); *Nationstar Mtge., LLC v. Weisblum*, 143 A.D.3d 866, 867 (2d Dep't 2016);

Pagano v. Smith, 201 A.D.2d 632, 633 (2d Dep't 1994). "Once a mortgage debt is accelerated, 'the borrowers' right and obligation to make monthly installments cease[] and all sums become immediately due and payable', and the six-year Statute of Limitations begins to run on the entire mortgage debt." *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dep't 2001) *citing Federal Natl. Mtge. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994); *Lubonty*, 34 N.Y.3d at 261.

In support of its Motion, Equity submitted an attorney affirmation accompanied by a copy of the 2009 Complaint and copies of the pleadings filed in the instant action. R. 8-86. Equity's submissions were insufficient to establish that the mortgage loan was accelerated thereby triggering the statute of limitations. *Wells Fargo Bank, N.A. v Burke,* 155 A.D.3d 668, 669 (2d Dep't 2017); *Rakusin v Miano*, 84 A.D.3d 1051, 1052 (2d Dep't 2011); *see Stewart v GDC Tower at Greystone*, 138 A.D.3d 729, 730 (2d Dep't 2016); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (2d Dep't 1980) (attorney affirmation without personal knowledge of the facts is without evidentiary value); *Bank of N.Y. Mellon v. Aiello*, 164 A.D.3d 632 (2d Dep't 2018). Therefore, the Motion should have been denied.

A. Equity did not Establish an Unequivocal Overt Act by the Lender to Accelerate the Loan.

To trigger the statute of limitations, an election to accelerate the mortgage loan must be made by an "unequivocal overt act" in accordance with the provisions

of the mortgage. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472 (1932). In *Albertina*, this Court examined whether a filed, but unserved verified complaint was sufficient to constitute an acceleration of the mortgage loan to sustain the lender's rejection of the borrower's payment after the complaint was filed. In affirming the lender's election, this Court found "that the unequivocal overt act of the plaintiff in filing the summons and *verified* complaint and *lis pendens* constituted a valid election." *Id.* at 476 (emphasis added).

In *Freedom Mtge. Corp. v. Engel*, 2021 N.Y. Slip. Op. 01090, *2 (2021), this Court affirmed the principles set forth in *Albertina* stating, "[t]here are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." Acceleration in this context is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time ... Such a significant alteration of the borrower's obligations under the contract [] should not be presumed or inferred; noteholders must unequivocally and overtly exercise an election to accelerate." In applying this principle to the facts presented before this Court in *Wells Fargo v. Ferrato*, this Court found that the statute of limitations was not triggered by the filing of two prior verified complaints where the prior complaints failed to address the modified loan. *Id.* at *3-4. Since the borrower failed to identify any other acceleration event, this Court reversed the order dismissing the action.

Here, the Appellate Division erred in affirming the dismissal as there is no evidence of a "sworn statement" or other "unequivocal overt act" by Everhome that would have triggered the statute of limitations as the only evidence introduced by Equity in support of its Motion was the unverified 2009 Complaint. R. 73-85. The insufficiency of an unverified complaint to establish a meritorious cause of action has long been recognized by the courts in New York. *See Bowdren v. Peters*, 208 A.D.2d 1020 (3d Dep't 1994) (unverified complaint was insufficient to establish amounts requested on default judgment); *Ostberg v. Warren Webster & Co.*, 27 A.D.2d 983 (4 Dep't 1967) (unverified complaint could not establish meritorious cause of action to avoid dismissal under CPLR §3216); *Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965 (2d Dep't 1988) ("unverified complaint is not a valid substitute for a sworn affidavit"); *Fawn Second Ave. LLC v. First Am. Title Ins. Co.*, 192 A.D.3d 478 (1 Dep't 2021) (unverified complaint and attorney affirmation were insufficient to defeat motion to dismiss under CPLR 3012(b)); *HSBC Bank USA, N.A. v. Cooper*, 157 A.D.3d 775 (2d Dep't 2018) (unverified complaint insufficient to establish default judgment under CPLR §3215(f)); *HSBC Bank USA, N.A. v. Simms*, 163 A.D.3d 930 (2d Dep't 2018); *compare with NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1070 (2d Dep't 2017) (filing of verified complaint constituted a valid election to accelerate the mortgage loan); *Beneficial Homeowner Serv. Corp. v. Tovar*, 150 A.D.3d 657, 658 (2d Dep't

2017) (the failure to serve the summons and complaint "did not as a matter of law destroy the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt.").

Since Equity only submitted the unverified 2009 Complaint as purported evidence of the lender's acceleration of the mortgage loan, Equity did not establish that the statute of limitations was triggered by the filing of the 2009 Action.

B. Equity Failed to Establish that the Lender Complied with the Contractual Notice Requirements Set forth in Paragraph 22 of the Mortgage Prior to the Commencement of the 2009 Action.

In this case, the Appellate Division further erred in determining that the statute of limitations was triggered upon the filing of the 2009 Complaint as there is no evidence that the lender complied with the notice requirements set forth in Paragraph 22 of the Mortgage. R. 63-64. In support of its motion, Equity simply provided a copy of the unverified complaint filed in the action, which, as set forth above, is insufficient to establish that the lender was entitled to accelerate the loan. R. 73-85.

"[A]ny election to accelerate must be made in accordance with the terms of the note and mortgage and that the parties are free to include provisions detailing what the noteholder must do to accelerate the debt." *Freedom Mtge. Corp. v. Engel*, 2021 N.Y. Slip. Op. 01090, *2 (2021) citing *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. at 475-476. When examining whether a lender's actions

triggered the statute of limitations, this Court stated that "[t]he determinative question is [] whether the contractual election was effectively invoked." *Engel,* 2021 N.Y. Slip Op. 01090 at 3; *see also Jacobus v Colgate*, 217 N.Y. 235, 245 (1916) ("[a] cause of action does not accrue until its enforcement becomes possible"); *Roldan v Allstate Ins. Co.*, 149 A.D.2d 20, 26 (2d Dep't 1989) (Enforcement becomes possible "as soon as a claimant is able to state the elements of that cause of action, and hence, to assert a valid right to some sort of legal relief."); *Swift v New York Med. Coll.*, 25 A.D.3d 686, 687 (2d Dep't 2006) (a "cause of action accrues when the plaintiff possesses a legal right to demand payment").

Paragraph 22 of the underlying Mortgage expressly states that "Lender may require Immediate Payment in Full ... *only if all [specified] conditions are met*", including that "Lender sends ... a notice" that complies with the section. R. 63 (emphasis added). Providing the notice of default, pursuant to Paragraph 22(b), is a condition precedent to the lender's right to acceleration. *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) ("A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises")

A lender's failure to comply with the condition precedent precludes the lender's ability to accelerate the mortgage loan. *See HSBC Mtge. Corp. (USA) v Gerber*, 100 A.D.3d 966, 966-967 (2d Dep't 2012) (summary judgment denied due to failure to establish compliance with the default notice); *Wells Fargo Bank, N.A. v Burke*, 94 A.D.3d 980, 982-984 (2d Dep't 2012) (dismissal based upon statute of limitations grounds denied where complaint was deemed ineffective to accelerate mortgage debt where action was commenced by nonparty who had not been assigned the note or mortgage at the time the complaint was served); *GE Capital Mtge. Servs. v Mittelman*, 238 A.D.2d 471, 471 (2d Dep't 1997) (summary judgment denied where the plaintiff failed to establish that it complied with the notice requirements of the mortgage).

The Appellate Division's reference to *Satterly v. Plaisted*, 52 A.D.2d 1074, *aff'd* 42 N.Y.2d 933 (4 Dept. 1976) for the proposition that Paragraph 22 of the Mortgage is only enforceable (and waivable) by the borrower is misplaced. R. 386. *Satterly* involved a sales contract to purchase land and not a note and mortgage setting forth the contractual rights of parties enforcing its lien through a foreclosure action. The contract in *Satterly* contained a clause that the lot being purchased contained 150 feet lake frontage whereas a survey revealed that the actual frontage was less than 150 feet. Since the purchaser sought specific performance of the contract, the Appellate Division found that the provision in the contract relating to

the size of the frontage was for the sole benefit of the purchaser who had the right to waive it.

That holding does not apply to the facts in this case as Paragraph 22 states in no uncertain terms that the lender is only entitled to elect to accelerate the loan where all of the conditions set forth in the paragraph are met. R. 63-64. As the Mortgage details the actions that must be taken by the lender in order for the lender to be entitled to accelerate the loan, those terms must be followed. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 475 (1932).

Equity's submission of the unverified 2009 Complaint is insufficient to establish the lender's compliance with the pre-acceleration requirements of the Mortgage. Therefore, Equity failed to establish that the 2009 Action triggered the statute of limitations.

POINT II

THE DOCUMENTARY EVIDENCE BEFORE THE COURT ESTABLISHES THE LENDER'S NON-COMPLIANCE WITH PARAGRAPH 22 OF THE MORTGAGE

Even if this Court determines that the statute of limitations was triggered by the filing of the unverified 2009 Complaint, the Order must be reversed as the documentary evidence in the record establishes that the lender's election to accelerate the loan was a nullity due to its failure to comply with Paragraph 22(b) of the Mortgage.

A. Aber's Verified Answer Establishes That the Lender Failed to Comply with Paragraph 22 of the Mortgage.

It is undisputed that Aber filed a Verified Answer to the 2009 Complaint. R 294-300. The admissibility of the Verified Answer was unchallenged by Equity in both the trial court and the appellate proceedings. Although the 2009 Action was not adjudicated on the merits, Aber's Verified Answer filed in that action is sufficient to establish that Everhome failed to comply with the contractual requirements of the Mortgage as the Verified Answer is unrebutted.

In the Verified Answer filed in the 2009 Action, Aber affirmatively denied Paragraph Eighth of the 2009 Complaint, which alleged Everhome's compliance with the terms of the Mortgage and Everhome's election to declare the full amount due. *Id.*. Aber also, in his Seventh Affirmative Defense, directly disputed Everhome's compliance with the notice requirements set forth in Paragraph 22 of the Mortgage asserting that Everhome failed to provide Aber the notice required under Paragraph 22(b). R. 298-299. Aber further alleged that Everhome's failure to comply with the terms of the Mortgage rendered Everhome's attempt to accelerate the loan ineffective. *Id.* (¶¶ 29-32).

CPLR § 3018 draws a distinction between denials and affirmative defenses. CPLR § 3018. "Denials generally relate to allegations setting forth the essential elements that must be proved in order to sustain the particular cause of action." A mere denial of an element of a cause of action is sufficient to place the element in

issue and be required to be established by the plaintiff. *GMAC Mtge., LLC v. Coombs*, 191 A.D.3d 37 (2d Dep't 2020) (a defendant must plead "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the fact of a prior pleading"). Here, Aber's Verified Answer directly refuted Everhome's compliance with the contractual requirements set forth in the Mortgage prior to its filing of the 2009 Complaint.

Since a verified pleading may be utilized as an affidavit whenever required, CPLR §105(u), the introduction of the Verified Answer in opposition to Equity's Motion established Everhome's non-compliance with Paragraph 22 of the Mortgage. *Sanchez v. National R.R. Passenger Corp.*, 21 N.Y.3d 890, 891-892 (2013). Equity did not challenge the introduction of the Verified Answer and did not dispute that the Verified Answer established the lender's non-compliance with the required condition precedent to the acceleration of the loan. Therefore, the statute of limitations did not trigger upon the filing of the unverified 2009 Complaint as the lender failed to comply with the contractual terms of the Mortgage and, therefore, was not entitled to accelerate the loan.

The statements contained in Aber's Verified Answer constitute judicial admissions and evidence of the fact (or at least raises an issue of fact) that the default notice was not properly served upon Aber prior to the filing of the 2009 Complaint. *GMS Batching, Inc. v. TADCO Const. Corp.*, 120 A.D.3d 549, 551 (2d

Dep't 2014) ("Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made."); *Ocampo v. Pagan*, 68 A.D.3d 1077 (2d Dep't 2009) (holding that statements made in a verified pleading "constitute informal judicial admissions", are "generally admissible pursuant to an exception to the hearsay rule", and are "evidence of the fact or facts admitted.") (internal citations omitted); *Wenger v. DMR Realty Mgt., Inc.*, 90 A.D.3d 647, 648-649 (2d Dep't 2011) ("While [judicial admissions] are not conclusive, they are evidence of the fact or facts admitted.").

Based upon the Verified Answer filed in the 2009 Action, the Appellate Division erred in affirming the Order as Aber's Verified Answer established the lender's non-compliance with the mandatory contractual requirements of the Mortgage. Everhome's failure to comply with the pre-foreclosure demand nullifies any attempt to accelerate the Mortgage through the filing of the 2009 Action. *See DLJ Mtge. Capital, Inc. v. Pittman*, 150 A.D.3d 818, 819 (2d Dep't 2017) (no acceleration occurred through the commencement of a foreclosure action where the lender lacked standing); *Q&O Estates Corp. v. U.S. Bank Trust Nat'l Assoc.*, 175 A.D.3d 1337 (2d Dep't 2019); *U.S. Bank, N.A. v. Gordon*, 158 A.D.3d 832 (2d Dep't 2018).

B. The Written Assignment of the Note and Mortgage Occurred Seventeen Days Prior to the Commencement of the Action; therefore, the Lender Could Not have Complied with the Mortgage's 30-day Notice Requirement.

As set forth above, the Mortgage requires the service of a notice of default upon the borrower, providing at least 30-days to cure the default, prior to the lender exercising its right to accelerate the loan. R. 63-64; s*ee HSBC Mortg. Corp. (USA) v. Gerber*, 100 A.D.3d 966, 966 (2d Dep't 2012) ("The plaintiff failed to show that it complied with a condition precedent contained in the mortgage agreement, which required that it give the defendant notice of default prior to demanding payment of the loan in full").

The plain language of Paragraph 22 of the Mortgage provides that the lender can only require immediate payment in full if all of the conditions set forth in the Paragraph are met. R. 63-64; *Wells Fargo Bank, N.A. v Burke*, 94 A.D.3d 980, 983 (2d Dep't 2012) *citing Serapilio v. Staszak*, 255 A.D.2d 824 (3d Dep't 1988) (holding that the statute of limitations does not begin to run until certain conditions precedent are completed); *Loiacono v. Goldberg*, 240 A.D.2d 476 (2d Dep't 1997).

Here, the unverified 2009 Complaint asserted that Everhome complied with the terms of the Note and Mortgage and that Everhome duly elected to demand payment of the loan in full. R. 73-85. In this case, the Note and Mortgage were transferred to Everhome via written Assignment just seventeen (17) days prior to the filing of the 2009 Complaint. R. 72. As the dissenting Justices correctly noted,

Everhome could not have complied with the required 30-day notice period after it obtained ownership of the Note and Mortgage as there was insufficient time to mail the required notice prior to the filing of the 2009 Complaint. R. 63-64.

Therefore, the Assignment was sufficient to establish the lender's non-compliance with the contractual requirements of the loan or, in the alternative, sufficient to raise an issue of fact to defeat Equity's Motion. *Lessoff v 26 Ct. St. Assoc., LLC,* 58 A.D.3d 610, 611 (2d Dep't 2009); *see Lake v New York Hosp. Med. Ctr. of Queens,* 119 A.D.3d 843, 844 (2d Dep't 2014).

CONCLUSION

Based upon the record below, Equity failed to establish that the filing of the unverified complaint in the 2009 action triggered the statute of limitations making the current action untimely. As a result, this Court should reverse the Appellate Division's order and deny Equity's Motion in its entirety.

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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.

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