To be Argued by:
ANTHONY R. FILOSA
(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.

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CORPORATE DISCLOSURE STATEMENT

In compliance with 22 NYCRR 500.1(f), Respondent Equity Recovery Corporation states that is has no parents, affiliates or subsidiaries.

STATUS OF RELATED LITIGATION

Pursuant to 22 NYCRR 500.13(a), Respondents state they are unaware of any litigation related to this appeal.

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QUESTIONS PRESENTED

1. Whether a lender can rely on the argument that an "unverified" foreclosure complaint is insufficient to accelerate a mortgage debt when the lender failed to raise the argument before the Supreme Court?

No.

2. Does an "unverified" foreclosure complaint nullify a lender's unequivocal and overt election therein to accelerate a mortgage debt and demand immediate payment in full?

No.

3. Can a lender rely on its own alleged breach of a mortgage's "default notice" condition precedent to avoid the bar of the statute of limitations when the condition was inserted solely for the borrower's benefit and thus is enforceable only by the borrower?

No.

4. Can a lender rely on its own alleged breach of a mortgage's "default notice" condition precedent to avoid the bar of the state of limitations when the lender caused the failure of the condition?

No.

5. Should the proponent of a statute of limitations defense and/or claim in a mortgage-related action bear the *prima facie* burden of demonstrating a lender's prior compliance with that mortgage's "default notice" provision?

No.

6. Can a lender meet its burden to establish the inapplicability of the statute of limitations by asserting non-compliance with a mortgage's "default notice" provision, when the lender, despite being in exclusive possession of all relevant mailing records, fails to proffer those records, and provides no excuse for its failure?

No.

7. Can a lender meet its burden to establish the inapplicability of the statute of limitations by asserting non-compliance with a mortgage's "default notice" provision based on the borrower's bare denial of receipt of the notice in its answer in a prior action?

No.

8. Can the assignee of a mortgage note meet its burden to establish the inapplicability of the statute of limitations by asserting its own non-compliance with the mortgage's "default notice" provision, where the assignee was not the owner or holder of the note when the notice was required to be served?

No.

PRELIMINARY STATEMENT

Under this Court's mortgage acceleration jurisprudence, all that is required for a lender to exercise an optional clause to accelerate a mortgage debt is an "unequivocal overt act" of the lender demanding immediate payment of the full principal and interest debt. When acceleration occurs, the statute of limitations begins to run. Here, there was an unequivocal overt act – an express statement in a complaint in a prior action that the lender had accelerated the debt – more than six years before this action was commenced. Thus, the Appellate Division correctly dismissed this foreclosure action as barred by the statute of limitations and granted summary judgment to Respondent Equity Recovery Corp. ("Equity") on its counterclaim under RPAPL §1501(4) to discharge the mortgage on statute of limitations grounds.

Appellant seeks to avoid this conclusion on several grounds, of which the principal one is not preserved for this Court's review. All of Appellant's arguments lack merit.

First, Appellant contends (falsely, as the record below reflects) that the Complaint in the earlier action ('the 2009 Action") was not verified and, was thus ineffective to accelerate the debt. This argument was not raised before the Supreme Court and, thus, is not preserved for this Court's review.

Even if it had been preserved, this argument would warrant scant attention from this Court. Appellant alleged without qualification in the complaint in the 2009 Action that it elected to demand immediate payment of the full principal and interest debt. That was an "unequivocal overt act" evidencing the lender's election to accelerate the mortgage, whether the complaint was verified or not. There is no basis in law or logic for disregarding allegations made in pleadings filed by attorneys who are bound to act with ethics and integrity, simply because the allegations are not made under oath.

Second, a lender may not seek judicial invalidation in a later action of its acceleration of a debt by the commencement of a prior action in order to avoid the bar of the statute of limitations. Any failure by the lender to serve a default notice does not affect the running of the statute of limitations.

The Appellate Division's conclusion comports with both well-settled law and clear public policy. The requirement in the mortgage that the lender send the borrower a thirty-day written notice of default is a contractual condition precedent existing solely for the benefit of the borrower, and enforceable and waivable only by the borrower. Moreover, a party may not take advantage of its own failure to comply with a condition precedent. Public policy and precedent support the notion that, if the issue is relevant, the lender, who has superior and often exclusive access to the facts, should prove its own failure to serve the notice when

confronted with a statute of limitations defense. The contrary rule would encourage lenders to manufacture an issue of fact by choosing not to come forward with the evidence.

Third, as the Appellate Division correctly held, Respondents met their *prima facie* burden by demonstrating that Appellant unequivocally and overtly demanded immediate payment of the full debt more than six years before this action was commenced. The burden then shifted to *Appellant* to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable. The Appellate Division properly determined that Appellant failed to meet its burden. Appellant offered no credible reason why it could not (or chose not to) tender admissible evidence as whether a 30-day notice was served upon the borrower. Appellant says that it would have been "impossible" for *Appellant* to have served the notice, since its predecessor, Fairmont Funding Corp. ("Fairmont"), allegedly assigned the mortgage to Appellant fewer than thirty (30) days before the commencement of the 2009 Action. But Appellant admits that it is in possession of all relevant records, and does not explain why it offered no evidence as to whether its predecessor served the notice or not.

For this same reason, Appellant's reliance upon the verified answer of Respondent Nuchem Aber ("Aber") in the 2009 Action, in which he alleged that *Appellant* failed to give him a Paragraph 22(b) notice, fails to create a triable

question of fact. In any event, a bald denial of receipt is insufficient to establish, *prima facie*, that the paragraph 22(b) notice was not mailed or delivered, or to create a factual dispute on that issue.

The Order of the Second Department should be affirmed.

COUNTER-STATEMENT OF FACTS

A. The Note and Mortgage

On or about April 1, 2003, Aber executed a promissory note (the "Note") to Fairmont R127-130. The Note was secured by a mortgage to Fairmont (the "Mortgage") against real property located at 1172 41st Street, Brooklyn, New York 11218 (the "Property"). (R 48-70). Paragraph 22(b) of the Mortgage requires the lender to send the borrower a notice of payment default, with a 30-day opportunity to cure the default, before accelerating the debt. R63-64 at ¶22.

An Assignment of Mortgage dated April 13, 2009 between Fairmont as assignor and Plaintiff-Appellant Everhome Mortgage Company, as Nominee for Bank One, N.A. (the "Appellant"), as assignee, was recorded on May 14, 2009. R71-72.

B. Appellant's Acceleration of The Debt With The Commencement Of The 2009 Action

On April 30, 2009, Appellant commenced the 2009 Action against Aber in the Supreme Court of Kings County, seeking to foreclose the Mortgage. R73-85.

Appellant asserted in its complaint that it "has duly elected and does hereby elect to call due the entire amount presently secured by the mortgage". R77 at ¶8.

Appellant now claims, in its brief in this Court, that "[t]he 2009 Complaint was not verified by Everhome or its counsel." Brief for Plaintiff-Appellant ("Appellant's Br.") at 10. However, the complaint in the 2009 Action *was verified* by Appellant's then-counsel — as evident from the case file for the 2009 Action on record with the Kings County Clerk's Office.[1]

Appellant moved for summary judgment in the 2009 Action. Aber did not oppose this motion. In support of this application, Appellant submitted three (3) notices of default allegedly sent to Aber. One such notice of default was sent by Appellant on June 16, 2008, and the other two (2) notices of default were sent by Appellant's counsel on November 12, 2008. The notices explicitly represented that they were being sent on behalf of Appellant, described as the "holder and/or servicing agent of the holder of [the] [N]ote and [M]ortgage."[2] Appellant's motion was denied on grounds unrelated to the service of a notice of default.

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[1] *See* Minutes of Kings County Clerk's Office of Index No. 10540/2009, searchable at https://iapps.courts.state.ny.us/webccos/kingscc/indexSearch, at page 48 of 49 of the April 30, 2009 entry, last accessed on November 16, 2021. The Court of Appeals can take judicial notice of the record of the 2009 Action. *See Long v State of New York*, 7 NY3d 269, 275 [2006] (court can take judicial notice of court records indicating when an action was terminated); *Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004] ("[T]his Court may take judicial notice of undisputed court records and files.").

[2] *See* Minutes of Kings County Clerk's Office of Index No. 10540/2009, searchable at https://iapps.courts.state.ny.us/webccos/kingscc/indexSearch, at page 133-136 of 145 of the August 20, 2012 entry, last accessed on November 16, 2021. Once again, although Appellant's

Subsequently, on October 3, 2013, the 2009 Action was dismissed due to Appellant's failure to appear at a status conference. R86. Prior to the dismissal of the 2009 Action, title to the Property was transferred to Equity via a Sheriff's Deed. R40-47.

C. Appellant's Commencement of The Current Action More Than Six Years After The Acceleration of The Debt

On June 24, 2015, Appellant commenced this second foreclosure action (the "2015 Action") against Respondents with the filing of a Summons and Complaint. R99 at ¶11. In their Answer, Respondents asserted a statute of limitations affirmative defense and interposed a counterclaim under RPAPL §1501(4) to cancel and discharge the Mortgage due to the expiration of the statute of limitations (the "Counterclaim"). R28 at ¶36, R28-31 at ¶¶37-51.

D. Supreme Court's Determination That This Action Is Time-Barred

Equity moved to dismiss Appellant's complaint, pursuant to CPLR §3211(a)(5), due to the expiration of the statute of limitations, and for summary judgment on its Counterclaim (the "Motion"). R8-86. Equity demonstrated that the Mortgage was time-barred because the 2015 Action was commenced over six (6)

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failed application for summary judgment in the 2009 Action is not part of the Record on Appeal, this Court may take judicial notice of the motion and the papers and exhibits submitted in support of it, as well as, the August 16, 2012 Order from Justice Kurtz. *See supra* n.1.

years after the Mortgage was accelerated by Appellant's commencement of the 2009 Action. R13-15, R73-85.

Appellant cross-moved for summary judgment against Respondents. R87-300. In its cross-motion, Appellant never asserted — as it now does in its brief (*see* Appellant's Br. at 17, 19-22) — that its complaint in the 2009 Action was unverified or that commencement of a foreclosure action via an unverified complaint is insufficient to accelerate a debt. *See* R97-121.

Rather, Appellant argued that Respondents failed to establish that Appellant complied with Paragraph 22(b) of the Mortgage before commencement of the 2009 Action and, thus, failed to establish that filing the 2009 Action constituted a valid acceleration of the debt. *See* R117-119. In support of this contention, Appellant proffered Aber's verified answer in the 2009 Action, which asserted an affirmative defense claiming that Appellant failed to "give" him a proper notice of default. R298 ¶29-31. Appellant further asserted that because the April 13, 2009 Assignment of Mortgage (R71-72) was executed only seventeen (17) days prior to commencement of the 2009 Action, "it would have been impossible for [Appellant] to have complied with" Paragraph 22 of the Mortgage in connection with "any notice of default that *may have been* issued by [Appellant]." R118-119 at ¶¶104-109 (emphasis added). Appellant offered no evidence as to whether a 30-day notice had been served by its predecessor, Fairmont.

In response Equity contended that it was *not* required to demonstrate compliance with Paragraph 22(b) of the Mortgage as part of its *prima facie* burden to establish the expiration of the statute of limitations. Rather, under established New York law, the undisputed commencement of the 2009 Action with a complaint demanding immediate payment in full was sufficient to both accelerate the Mortgage and meet Equity's *prima facie* burden. *See* R304-305 ¶¶16-20, R73-85. Equity also noted that in the 2009 Action, there was no judicial determination by the Supreme Court that Appellant failed to comply with Paragraph 22 of the Mortgage. *See* R305 ¶19, R86.

The Supreme Court granted Equity's motion and denied Appellant's cross-motion (the "Order"). R5-7. The Supreme Court held that because it was "undisputed that a prior action was filed on 4/30/09 and that the instant action was filed on 6/24/15, slightly more than six years later[,]" Equity "met its initial burden of demonstrating, prima facie, that this action was untimely….". R6-7. The Supreme Court further determined that "[t]he burden of creating an issue of fact as to the plaintiff-in-the-prior action's…ability to send notices is upon [Appellant] and [Equity] has no obligation to prove the viability of the prior action." R7. As a result, Appellant "failed to demonstrate the existence of an issue of fact" and the Supreme Court both dismissed the 2015 Action and discharged the Mortgage. R7. Appellant appealed the Order. R3-4.

E. The Appellate Division's Affirmance of The Supreme Court's Determination That The 2015 Action Was Time-Barred

By Decision and Order dated June 9, 2021, the Appellate Division, Second Department, with two Justices concurring in part and dissenting in part, affirmed the Order. R383-388. The majority held that Equity met its *prima facie* burden on summary judgment by demonstrating that Appellant demanded immediate payment in full in the 2009 complaint and that the 2015 Action was commenced over six years later. R384. Thus, it was *Appellant's* burden to raise an issue of fact as to the running of the statute of limitations based on alleged noncompliance with the paragraph 22(b) notice provision of the Mortgage. R385. The majority also found that Appellant failed to meet its burden. Specifically, the majority held that compliance with the paragraph 22(b) notice provision is enforceable and waivable only by the borrower because the provision was inserted into the Mortgage for his sole benefit. R386. Thus, the Court could not condone Appellant's attempt to belatedly take advantage of its own potential breach. R386. The majority also recognized that the election to accelerate the Mortgage when it commenced the 2009 Action was never invalidated by the Supreme Court in that action, nor by any act of revocation by the Plaintiff. R386.

The Second Department majority determined that Appellant failed to raise a question of fact. Appellant, despite being in possession of *all* relevant

business records for the Mortgage loan and, thus, in the "best position to know to know whether it or Fairmont mailed or delivered to Aber the notice of default," failed to proffer any of the alleged mailing records or explain why such records were not submitted. R387. Aber's answer in the 2009 Action constituted, at best, a "bald denial of receipt" of the required notice which, under established New York law, is "insufficient to establish, prima facie, that such notice was not mailed or delivered, or to raise a question of fact as to mailing or delivery." R387.

Appellant appealed to this Court. R379-380.

ARGUMENT

POINT I

A FORECLOSURE COMPLAINT WHICH UNEQUIVOCALLY AND OVERTLY DEMANDS IMMEDIATE PAYMENT IN FULL NEED NOT BE VERIFIED TO ACCELERATE THE DEBT

A. Appellant Failed To Preserve Its "Lack Of Verification" Argument For Review By This Court

Appellant's argument that a foreclosure complaint must be verified to accelerate the debt cannot be considered by this Court, since Appellant failed to preserve the argument for review. "To preserve an argument for a review by this Court, a party must 'raise *the specific argument in the Supreme Court* and ask the court to conduct that analysis' in the first instance". *US Bank, NA v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 89 [2019] *quoting Matter of New York City Asbestos*

Litig., 27 NY3d 1172, 1176 [2016] (emphasis added). Appellant did not raise this argument before the Supreme Court. (R 97-121; R 317-334). This Court has faithfully applied the preservation doctrine in declining to consider arguments not raised before the trial court and, hence, not preserved for review by this Court. *See Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 28 [2021]; *Jin Ming Chen v Ins. Co. of the State of Pennsylvania*, 36 NY3d 133, 139, n2 [2020].

Faithful application of the preservation doctrine here is a matter of fairness. By failing to raise this argument before the Supreme Court, Appellant deprived this Court of the benefit of the Supreme Court's analysis and deprived the Respondents the opportunity to make factual showings or take legal counter steps before the Supreme Court. *See Bingham v New York City TR Auth.,* 99 NY2d 355, 359 [2003]. Here, the factual counter step Respondents could have taken is simple and dispositive: they could have shown that the Complaint in the 2009 Action was in fact verified. *See*, Minutes of Kings County Clerk's Office of Index No. 10540/2009, https://iapps.courts.state.ny.us/webccos/kingscc/indexSearch. at page 48 of 49 of the April 30, 2009 entry, last accessed on November 18, 2021; *see also supra* p. 7.

B. The Absence Of A Verification Does Not Render A Demand For Immediate Payment In Full Either Equivocal Or Covert

Apart from the preservation problem, Appellant's argument fails on the law. To accelerate a debt under an optional acceleration clause, this Court's jurisprudence has required only an "unequivocal overt act" that discloses the creditor's choice to demand immediate payment in full of the debt (*Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932] ("*Albertina*") — a principle recently reaffirmed by this Court's decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 22-23 [2021] ("*Engel*"). *Albertina* and *Engel* simply require a lender's "unequivocal overt act" to exercise an optional acceleration clause. *Albertina*, 258 NY at 476; *Engel*, 37 NY3d at 22-23. The absence of a verification in a complaint which demands immediate payment in full does not render a demand either "equivocal" or "covert". The law merely requires that an election to accelerate be fashioned in clear and unequivocal terms. See *id.* Nothing in *Albertina* or *Engel* states that a sworn verification is *essential* to accelerate a mortgage debt.

Rather, the authorities cited by this Court in *Albertina* for the proposition that a foreclosure complaint which demands immediate payment in full of the debt constitutes an acceleration all held that the *mere bringing of the suit* for immediate payment in full is to be deemed an election — a sworn verification is not required. *See, e.g., Hothorn v Louis*, 52 AD 218, 222 [2d Dept 1900], *affd* 170 NY

576 [1902] ("[T]he bringing of the suit is to be deemed an election [to accelerate the debt]"); *North Hampton Nat. Bank v Kidder*, 106 NY 221, 228 [1887] ("The action to foreclose the mortgage, based upon both these defaults, was such an election [to accelerate the debt]); *New York Sec. & Tr. Co. v Saratoga Gas & Electric Light Co.,* 34 NYS 890, 900 [3d Dept 1885], *affd* 157 NY 689 [1898] ("[T]he bringing of the suit itself was a sufficient declaration of its intention to exercise such option"). When the Appellate Division was squarely confronted with this issue, it rejected the contention that an *unverified* complaint which demanded immediate payment in full did not accelerate the debt under *Albertina*. *See Logue v Young*, 94 AD2d 827, 827 [3d Dept 1983].

The rules of the New York courts provide that the *signing* of a complaint by an attorney – whether the complaint is verified or not – constitutes a certification that the contentions contained in that paper are not "frivolous". 22 NYCRR §130-1.1a(b). 22 NYCRR §130-1.1 defines "frivolous conduct" as including the assertion of "material factual statements that are false". 22 NYCRR §130-1.1. Appellant was the plaintiff in the 2009 Action. R73. Thus, its attorneys certified that the allegation that it "had elected and does hereby elect" to accelerate the debt was not false. R77 at Eighth. That is more than enough to make the assertion "unequivocal" and "overt."

The rule for which Appellant argues would allow a lender to nullify a prior acceleration because a prior complaint *which it brought* and which its attorneys certified was not verified. Such a rule would undermine the integrity of pleadings and of the attorneys who file them.

C. Neither The Loan Documents Nor The CPLR Require A Verified Complaint To Accelerate The Debt

The loan documents do not require a verification or other sworn statement to accelerate the debt. R63-64 at ¶22. The parties could have inserted such a requirement in the loan documents if they intended one. *See Albertina*, 258 NY at 75-76. The Court cannot insert a verification requirement in the loan documents under the guise of interpreting the writing. See *2138747 Ontario, Inc. v Samsung C & T Corp*., 31 NY3d 372, 381 [2018].

The CPLR does not require a mortgage foreclosure complaint to be verified. *See* CPLR 3020. The absence of verification, even assuming one was required, does not invalidate a complaint, where the defendant does not timely object to the absence of a verification. *See Matter of Lentlie v Egan*, 94 AD2d 839, 840 [3d Dept 1983], *affd* 61 NY2d 874 [1984]. Here, Aber did not object that the 2009 Complaint was not verified.

This Court's imposition of a "verification" requirement would contravene *Engel*. Under *Engel*, a stipulation of discontinuance, which is not

verified and not executed by the lender, can de-accelerate a debt. *See Engel*, 37 NY3d at 28. Based on this logic, there is no reason a lender's attorney (acting on the lender's behalf), should not be able to *accelerate* the same mortgage debt by executing and filing a complaint. To hold otherwise would create a distinction that has no basis in the law.

The practical implications of a court imposing a "verification" requirement are unworkable. If the Court finds that an unverified complaint which demands immediate payment in full does not accelerate the debt, it would invalidate judgments entered upon unverified foreclosure complaints. Under such a rule, the absence of a verification would mean that the full debt was not due when the action was commenced—resulting in scores of motions to vacate these judgments based upon an intervening change in the law. *See* CPLR 2221(e)(2).

POINT II

THE PARAGRAPH 22 NOTICE OF DEFAULT IS A CONDITION PRECEDENT INSERTED SOLELY FOR THE BENEFIT OF THE BORROWER AND, THUS, IS ENFORCEABLE ONLY BY THE BORROWER

A. Any Defect in Preservation Requires Affirmance of the Appellate Division's Order

As a threshold matter, to the extent the argument made in this Point II was not raised before the Supreme Court (and thus not preserved for this Court's review), that would require affirmance of the Appellate Division's order, because

the argument was part of the basis for the Appellate Division's ruling. Where the Appellate Division affirms an order of the Supreme Court on unpreserved grounds, its ruling is deemed an exercise of its "interest of justice" jurisdiction. *Hecker v State*, 20 NY3d 1087, 1087 [2013]. In such a case, the Court of Appeals "ha[s] no power to review either the Appellate Division's exercise of its discretion to reach that issue, or the issue itself". *US Bank v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 89 [2019], *quoting Hecker*, 20 NY3d at 1087; *see Elezaj v Carlin Constr. Co.*, 89 NY2d 992, 994-995 [1997] (affirming order of Appellate Division determined on issue not preserved for review by Court of Appeals); *Brown v City of New York*, 60 NY2d 893, 894 [1983] (holding unpreserved issue reviewed by Appellate Division was an exercise of discretion which is beyond power of Court of Appeals to review); *Feinberg v Saks & Co.*, 56 NY2d 206, 210 [1982] (same).

Here, the arguably unpreserved argument adopted by the Appellate Division is sufficient on its own to sustain the Appellate Division's order. If that argument is unreviewable, the correctness of the Appellate Division's alternative holding (discussed in Point III below) is academic, and an affirmance is required. *See Hecker*, 20 NY3d at 1087. But in any event, as shown below, the Appellate Division's was correct in holding that Appellant cannot seek the judicial invalidation of its own election to accelerate the mortgage debt in order to avoid the effect of the statute of limitations.

B. Written Notice And An Opportunity To Cure An Alleged Payment Default Is A Condition Precedent Inserted Solely For The Benefit Of The Borrower

Service upon the borrower of a written notice of default is a condition precedent solely for the benefit of the borrower: it gives the borrower additional time to make installment payments before the lender may accelerate the debt and commence a foreclosure action. *See generally Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 69 [2006] (contractual written notice and opportunity to cure payment defaults under lease and guaranty were for benefit of the tenant and guarantor, respectively); *US Bank, NA v Sabloff*, 192 AD3d 724, 724 [2d Dept 2021] (service of notice of default upon borrower is to borrower's benefit "since each successive notice effectively extends the borrower's ability to cure the purported default"). These were the purposes of the paragraph 22 notice here. R127; R63-64 at ¶22.

Where a condition precedent is inserted in a contract solely for the benefit of one party, the right to enforce or otherwise take advantage of that condition precedent rests solely with that party. *See Born v Schrenkeinsen*, 110 NY55, 59 [1888] ("[W]hen a written instrument provides that it shall become void in case of default by one party to perform some covenant therein contained, it becomes void *only upon the claim and at the option of the party for whose benefit the covenant was inserted and who is injured by the default*") (emphasis added); *see also* W.W.W.

Assoc., Inc. v Giancontieri, 77 NY2d 157, 162 [1990] ("A party for whose sole benefit a condition is included in a contract may waive the condition").

For instance, in *Satterly v Plaisted*, 52 AD2d 1074 [4th Dept 1976], a contract of sale was subject to there being not less than 150 feet lake frontage. *See id*. at 1074. When the purchaser commenced an action for specific performance, the seller attempted to void the contract by arguing that the frontage was less than 150 feet. *See id*. at 2074. The Appellate Division disagreed, reasoning that the condition that the lake frontage not be less than 150 feet was inserted in the contract solely for the benefit of the purchaser and, thus, only the purchaser had the right to enforce (or waive) that condition. *See id*. at 1074. This Court affirmed the judgment in favor of the purchaser for the reasons stated in the memorandum at the Appellate Division. *See Satterly v Plaisted*, 42 NY2d 933 [1977]. The same rule has been applied by this Court to a diverse array of contracts beyond those for the sale of real property. *See, e.g. Born,* 110 NY at 59-60 [1888] (condition precedent to royalty agreement inserted solely for benefit of one party enforceable or waivable only upon the claim of that party); *Carroll v Charter Oak Ins. Co.*, 10 Abb Pr NS 166, 170 [1868] (condition in insurance policy inserted solely for benefit of insurer was enforceable or waivable by insurer); *Litchfield v Irvin*, 51 NY 51, 58-59 [1872] (applying rule to contract for sale of bonds).

Thus, only Aber may take advantage of any failure by the lender to serve a paragraph 22(b) notice. Aber has not sought in this action to vitiate the acceleration of the mortgage debt on the basis that Appellant failed to provide him a paragraph 22 notice before commencing the 2009 Action. Nor did Aber oppose Appellant's motion for summary judgment in this action by alleging any failure by Appellant to furnish him with the paragraph 22 notice before commencing the 2009 Action. Rather, he maintained before the Supreme Court that this action was barred by the statute of limitations because it was commenced more than six years after the filing of the Complaint in the 2009 Action. R28 at ¶36. Hence, he has waived any reliance on any alleged failure to furnish him with the paragraph 22 notice before commencing the 2009 Action. *See Capital One, NA v Saglimbeni*, 170 AD3d 508, 509 [1st Dept 2019]; CPLR 3015(a) (failure of contractual condition precedent is an affirmative defense to be asserted by defendant); CPLR 3018; *see also Wilmington Trust v Sukhu*, 155 AD3d 591, 592 [1st Dept 2017] (holding borrower waived defense based on plaintiff's alleged failure to provide 30 days' written notice of default where borrower failed to timely raise it in response to plaintiff's motion for summary judgment); *Signature Bank v Epstein*, 95 AD3d 1199, 1200-1021 [2d Dept 2012] (borrower waived right to assert lack of compliance with a condition precedent where borrower failed to raise it in response to the plaintiff's motion for summary judgment); *US Bank, NA v Flynn*, 27 Misc3d 802, 807 [Sup. Ct. Suffolk County

2010] (affirmative defenses "effectively abandoned" by mortgagor's failure to assert them in opposition to the plaintiff's summary judgment motion)[3].

C. Appellant May Not Benefit From The Alleged Failure Of A Condition Precedent Which It Caused

The mortgage requires the "Lender" to send the paragraph 22 notice. (R. 64). Thus, assuming no such notice was sent to Aber, the failure of that condition was caused by Appellant (or its predecessor Fairmont, in whose shoes Appellant stands). *See Muller v Kling*, 209 NY 239, 243 [1913]. The Appellate Division correctly determined that if Appellant or its predecessor failed to serve Aber with the paragraph 22 notice, Appellant could not benefit from its own breach by avoiding the statute of limitations. R386, *citing Gerschel v Christensen*, 128 AD3d 455, 456 [1st Dept 2015]; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378-79 [1986] ("'To allow a recovery of this money would be to sustain an action by a party on his own breach

[3] A defense must be raised by asserting it *in the action which is currently pending before the court*. *See* CPLR 3018(b). For this reason, Aber's assertion of the affirmative defense in his answer *in the 2009 Action* that the plaintiff did not give the required notice of default *before commencing the 2009 Action* does not prevent his waiver of this defense *in the present action*. In any event, Aber's answer in the 2009 Action was insufficient to create a triable question of fact in this action for the additional reasons stated in Point IV below. Nor did Aber gain any benefit from his assertion of the defense in the 2009 Action. That action was dismissed due to Appellant's failure to appear at a court conference. (R86). *See Saglimbeni*, 170 AD3d at 509.

of his own contract, which the law does not allow….'"), *quoting Lawrence v Miller*, 86 NY 131, 140 [1881].

This Court has long followed the rule that a party cannot take advantage of a failure of a condition precedent caused by his own conduct. *See e.g. Young v Hunter*, 6 NY 203, 207 [1852] ("[A] party cannot insist upon a condition precedent, when its non-performance has been caused by himself"); *Amies v Wesnofske*, 255 NY 156, 162-163 [1931] ("If a promisor himself is the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of the failure"); *Arc Elec. Const. Co. v George A. Fuller Co.*, 24 NY2d 99, 104 [1969] ("[A party] cannot rely on a condition precedent where the non-performance of the condition was caused or consented to it by itself"); *A.H.A. General Const., Inc. v New York City Housing Authority*, 92 NY2d 20, 31 [1998] (party to contract cannot insist upon condition precedent to contract, when its non-performance has been caused by himself)*; Pesa v Yoma Development Group, Inc.*, 18 NY3d 527, 534 [2012] ("The defendant cannot rely on a condition precedent . . . where the non-performance of the condition was caused or consented to it by itself"). There is no reason to depart from this rule here.

If Appellant or its predecessor failed to serve the paragraph 22(b) notice, Appellant was (or should have been) aware of that fact *before* it commenced the 2009 Action. Yet, Appellant maintained throughout the 2009 Action that the loan

was accelerated. R77 at ¶Eighth. Acceleration affects a radical change in the relative rights of the lender and the borrower. Once a loan is accelerated, a lender no longer must accept a borrower's monthly installment payments and the lender may instead maintain an action to recover the full mortgage debt. *See Engel*, 37 NY3d at 23. Appellant may not be permitted to enjoy the fruits of acceleration, and then disavow that acceleration due to its own breach when it suits Appellant's purposes.

POINT III

THE SECOND DEPARTMENT CORRECTLY HELD THAT APPELLANT BORE THE BURDEN OF DEMONSTRATING NON-COMPLIANCE WITH PARAGRAPH 22(b) OF THE MORTGAGE

Assuming the failure to serve a paragraph 22(b) notice affects the running of the statute of limitations, the burden to demonstrate non-compliance with paragraph 22 of the mortgage to raise a question of fact concerning the statute of limitations rests with the lender, both under well-settled law and as a matter of public policy. Appellant failed as a matter of law to meet that burden here. This furnishes an independent reason for affirming the Appellate Division's order.

Under New York law, the statute of limitations for an action to foreclose upon a mortgage is six (6) years. *See* CPLR §213[4]; *Lubonty v U.S. Bank, N.A.*, 34 NY3d 250, 261 [2019]. Once a mortgage debt is accelerated, the entire amount becomes due and the applicable six (6) year statute of limitations period

begins to run on the entire mortgage debt. *See Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 21 [2021].

All five Appellate Division Justices here agreed that "Equity sustained its initial burden of demonstrating, prima facie, that this action is time-barred" by demonstrating that "the statute of limitations began to run on the entire debt on April 30, 2009, *when the plaintiff commenced the first action to foreclose the mortgage and elected in the complaint to call due the entire amount secured by the mortgage*." R384 (emphasis added); R389. As a result, the burden shifted to Appellant to raise a question of fact as to the expiration of the statute of limitations (*i.e.*, via any alleged non-compliance with paragraph 22 of the Mortgage) — a burden that, as the Appellate Division majority properly concluded, Appellant failed to meet. *See id.* This conclusion is wholly consistent with well-established law in all of the Appellate Division Departments (*see infra*).

A. The Lender Bears the Burden of Establishing that Acceleration Did Not Occur Due to Alleged Non-Compliance with a Mortgage's Default Notice Provision

Appellant offers absolutely no support for the proposition that the proponent of a statute of limitations-based defense or claim in the mortgage foreclosure context must establish compliance with the relevant mortgage's "default notice" provision as part of its *prima facie* burden. *See id.* The reason for this is simple: no court has ever so held.

To the contrary, *all* of the Appellate Division Departments that have analyzed the issue have held that the defendant need only establish the lender's election to accelerate via the filing of a foreclosure complaint which demands immediate payment of the full debt. After that initial showing is made, it is incumbent on the lender to lay bare its defenses and raise an issue of fact as to the expiration of the statute of limitations — whether that be by the borrower's affirmation of the mortgage debt, the lender's revocation of acceleration, a lender's lack of standing in the preceding foreclosure action, or any alleged failure to comply with the mortgage's "default notice" provision. *See, e.g.*, *Wilmington Sav Fund Soc'y v 117 Pulaski*, 197 AD3d 686, 687 [2d Dept 2021]; *MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019]; *U.S. Bank N.A. v Jalas*, 195 AD3d 1122, 1123 [3d Dept 2021]; *U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039-41 [4th Dept 2020]; *see also Milone v U.S. Bank, N.A.,* 164 AD3d 145, 152 [2d Dept 2018] (the proponent of a statute of limitations defense or RPAPL 1501(4) claim can meet its prima facie burden by demonstrating either: (a) that the relevant mortgage matured more than six (6) years prior to the interposition of the claim and/or defense; or (2) that a clear and unequivocal "acceleration notice" was transmitted to the borrower).

The two Appellate Division cases that examined this precise "default notice" issue in this context held that it is the *lender's* burden to establish any alleged

non-compliance with paragraph 22(b). *See Cohn v Nationstar Mtg. LLC*, 187 AD3d 499, 500 [1st Dept 2020] (the mortgagee "proffered no evidence…to support its contention that its predecessor may not have served a 30-day notice of acceleration prior to commencing the 2009 action.") (citations omitted); *Sharf v Wells Fargo Bank, N.A.*, 186 AD3d 1747, 1748-49 [2d Dept 2019] ("Here, the Sharfs established, prima facie, that Wells Fargo elected to accelerate the mortgage debt when it commenced the foreclosure action and sought payment of the full balance due…Contrary to the Supreme Court's determination, there is no evidence in the record that Wells Fargo failed to satisfy the notice of default condition in the consolidated mortgage prior to the commencement of the foreclosure action.") (citations omitted).

Nor has this Court held differently. While Appellant relies on *Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021] and *Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472 [1932] (*see* Appellant's Br. at 22-23), neither of these cases supports the proposition that Equity's *prima facie* burden in this matter extended beyond a demonstration that the filing of the 2009 Action triggered the running of the statute of limitations. To the contrary, both *Engel* and *Albertina* reinforce the premise that for statute of limitations purposes, *prima facie* proof of acceleration is established by the mere filing of a complaint which demands immediate payment of the full debt, with the burden shifting to the lender to raise a

question of fact in opposition. *See Engel*, 37 NY3d at 22-23 (*citing Albertina*, 258 NY at 475-76).

B. Public Policy Clearly Favors Imposing any Burden Concerning Paragraph 22 Non-Compliance Upon Appellant

Public policy confirms the wisdom of placing the burden of producing sufficient evidence to create a question of fact about section 22 non-compliance on the lender seeking to defeat a statute of limitations defense.

The statute of limitations promotes "fairness to the defendant" and "protect[s] parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth." *See Flanagan v Mt. Eden General Hosp.*, 24 NY2d 427, 429-30 [1969]; *Duffy v Horton Memorial Hosp.*, 66 NY2d 473, 476 [1985] ("A defendant…'ought not be called on to resist a claim where the evidence has been lost, memories have faded, and witnesses have disappeared.' "); *see also Railroad Telegraphers v Railway Express Agency, Inc.*, 321 US 342, 348 [1944] (statutes of limitation are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

"In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact *which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant*." *Concrete Pipe & Products of California, Inc. v Constr. Labors Pension Tr. for S. California*, 508 US 602, 626 [1993] (emphasis added). "The ordinary rule, based on considerations of fairness, *does not place the burden upon a litigant and of establishing facts peculiarly within the knowledge of his adversary*". *United States v New York, N.H. & H.R. Co.*, 355 US 253, 256 [1957] (emphasis added). Where "the facts are within [a party's] peculiar knowledge…he [or she] should, therefore, prove them." *Collins v Bennett*, 46 NY 490, 494 [1871]. Under this familiar, long-established principle, the burden of proof on the notice issue is the Appellant's, as the Appellate Division correctly held.

Here, the relevant knowledge and documents regarding compliance with paragraph 22 are admittedly in the Appellant's possession. R122-123 at ¶¶2-4, R386-387. As the Second Department majority recognized, Appellant explicitly represented that it is in possession of all the relevant business and/or mailing records concerning this Mortgage (including the records of its predecessor-in-interest Fairmont). R122-123 at 2-4, R386-387. In this case, as in virtually all foreclosure cases where a time-bar is asserted, the relevant "default notice" should have been sent many years ago. It would be unfair and unrealistic to expect the homeowner,

often relying on his or her unaided memory, to prove that notice was sent, when documentary proof of that fact should be in the lender's possession *See Flanagan*, 24 NY2d at 429-30; *Duffy*, 66 NY2d at 476.

The Court's allocation of the burden of proof here will have consequences not just for mortgagees and homeowners, but for third parties. Junior lenders, subordinate lienholders and subsequent judgment creditors all are necessary parties to foreclosure actions. *See* RPAPL 1311(1). These defendants are "strangers" to the mortgage contract, and have no way of knowing whether a paragraph 22 notice of default has been served, but have the same right as any other party to assert a statute of limitations defense, or a claim to discharge a mortgage as time-barred under RPAPL 1501(4). *See Roth v Michelson*, 55 NY2d 278, 280 [1982]; RPAPL 1501(4). It would be absurd to place on these defendants the burden of proving the date in the distant past when a default notice was served. The duty of disproving service should be on the lender. If, as Appellant suggests, failing to serve a paragraph 22 notice can affect the running of the statute of limitations (*but see* Point II above) then the plaintiff (as the party required to serve the notice or, at the very least, the successor to that party) can simply offer evidence already in its possession to show that the notice was not served. Lenders routinely rely upon the records of their predecessors, their agents, and even the agents of their predecessors, to establish facts as critical as the payment default — the very *sine qua non* of a

foreclosure action. *See Bank of New York Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019], *citing People v Cratsley*, 86 NY2d 81, 90-91 [1995].

Placing the *prima facie* burden as to the notice issue upon Equity here, as the Appellant asks, would raise another the public policy consideration: where does the defendant's *prima facie* burden end? For instance, in order for a default notice to be sent in the first place, there must have been a prior default. Must the defendant prove that also? And because a default only occurs if there is a valid contractual obligation to pay, would the statute of limitations proponent also need to prove that there was a validly executed Note and Mortgage? In other words, must a homeowner first prove a valid foreclosure claim in order to establish a statute of limitations defense? The much more logical conclusion is for the Court to confirm the approach applied by the Departments of the Appellate Division: any burden concerning paragraph 22 non-compliance lies with lenders seeking to overcome the statute of limitations. *See Cohn*, 187 AD3d at 500; *Sharf*, 186 AD3d at 1748-49 [2d Dept 2019].

Yet another policy consideration supports the Appellate Division's holding: the contrary rule would encourage banks to withhold documents, conveniently omit relevant facts, or intentionally keep inadequate records. This is exactly what happened here. In the Supreme Court, Appellant sought to refute the statute of limitations defense while putting forth none of its own or its predecessor's

records. It proffered only Aber's answer in the 2009 Action and an argumentative affirmation by its own attorney. By contrast, in its failed summary judgment motion in the 2009 Action, Appellant submitted three (3) default notices mailed to Aber in 2008. *See supra* p.7.

The law favors "consistent, straightforward application of the statute of limitations which serves the objectives of 'finality, certainly and predictability,' to the benefit of both borrowers and noteholders." *Engel*, 37 NY3d at 20, 32; *see also Adjler v Province of Mendoza*, 33 NY3d 120, 130 n.6 [2019]. It is far more predictable and reliable for the rule concerning the relevant burdens to be as it currently is in the Appellate Division Departments — *i.e.*, that a defendant's prima facie burden is met by establishing that an unequivocal, overt demand for immediate payment in full was made more than six (6) years earlier, with the burden then shifting to the lender to raise a question of fact whether the action was timely commenced.

POINT IV

APPELLANT FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT CONCERNING SERVICE OF THE PARAGRAPH 22 NOTICE OF DEFAULT

An acceleration of the full debt occurred on April 30, 2009 when the 2009 Action was commenced. Since this action was commenced over six years later,

Respondents sustained their prima facie burden of proving this foreclosure action is barred by the statute of limitations. *See Federal National Mortgage Association v Sajdak*, 192 AD3d 764, 765 [2d Dept 2021]; CPLR 213(4); *1081 Stanley Ave., LLC v Bank of NY Mellon Trust Co., NA*, 179 AD3d 984, 986 [2d Dept 2020]; RPAPL §1501(4). Appellant failed to sustain its burden to raise a question of fact.

A. Aber's Mere Denial Of Receipt Of The Paragraph 22 Notice In His Answer in the 2009 Action Is Insufficient To Create A Question Of Fact

Appellant's reliance upon Aber's Answer in the 2009 Action to raise a question of fact concerning the service of the paragraph 22 notice is misplaced. There, Aber alleged that *Appellant* "failed to give" Aber written notice of default as required by the Mortgage. R298 at ¶30. This allegation did not create a question of fact for two reasons.

First, mere denial of receipt of a mailing, standing alone, cannot create an issue of fact regarding mailing. *See CIT Bank NA v Schiffman*, 36 NY3d 550, 557 [2021] ("The denial of a receipt…standing alone, is insufficient"); *Matter of Banos v Rhea*, 25 NY3d 266, 280 [2015] ("[P]etitioner's bare denial of receipt is insufficient" to raise a question of fact); *Nassau Ins. Co. v Murray*, 46 NY2d 828, 829-830 [1978] (holding denial of receipt of notice, standing alone, is insufficient).

Second, under the Mortgage, notices given by first class mail are deemed given when *mailed,* not when actually received by the borrower. R61 at

¶15. Thus, whether Aber actually received a paragraph 22 notice via first class mail is irrelevant. Aber lacks personal knowledge of whether a paragraph 22 notice was *mailed* to him via first class mail; nor can he testify to Appellant's mailing practices. Thus, his affidavit can prove nothing about mailing. *See Schiffman*, 26 NY3d at 556; *Nassau Ins. Co.*, 46 NY2d at 829; *see also Citibank, NA v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019] (holding proof of the requisite mailing can be established with proof of the actual mailings or via proof of a standard office mailing procedure, sworn to by someone with personal knowledge of the procedure). Any assertion by Aber that the section 22 notice requirement was not complied with would be "mere conclusion . . . or unsubstantiated allegation", which cannot create a question of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Of course, it is Appellant that has the evidence as to whether a notice was mailed or not. It has chosen not to provide it.

B. The Alleged Assignment Of The Note To Appellant Less Than Thirty Days Before The Commencement Of The 2009 Action Does Not Create An Issue of Material Fact

Appellant argues that *it* could not have served a paragraph 22 notice because it was assigned the mortgage fewer than 30 days before the commencement of the 2009 Action. This argument also fails to create a question of fact, because it ignores the obvious: Appellant's predecessor, Fairmont, could and should have sent

the notice. Appellant, which is in possession of Fairmont's records, has chosen not to disclose whether Fairmont did so.

Summary judgment may only be avoided where there is a "material" question of fact. *See Zuckerman*, 49 NY2d at 562. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted". *Anderson v Liberty Lobby, Inc.*, 477 US 242, 248 [1986]. An issue is not "material" where the presence or absence of evidence of the issue is not outcome determinative. *See Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004] ("But factual disputes are not enough; they must relate to material issues… [a factual dispute] is irrelevant when, as a matter of law, in neither event would a claim…the established"); *Rizk v Cohen*, 73 NY2d 98, 105 [1989] (Factual dispute was not "material" since there were "no *legally dispositive facts* in dispute") (emphasis added). Whether *Appellant* took an assignment less than 30 days before the commencement of the 2009 Action was not "material" to whether a paragraph 22 notice of default was served. The material issue, if any, is what Fairmont, the then owner of the Note, did.

The Mortgage provides that the "Lender" shall provide the paragraph 22 notice of default. R61 at ¶15; R64. A mortgage note is a negotiable instrument. *See Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361 [2015]. Thus, the

transfer of physical possession of the note alone (where the instrument is payable to bearer), or of the note with any necessary endorsement or allonge (where the instrument is payable to order) transfers the note itself, making the transferee the "owner" or "holder" of the note. *See* UCC-3-301; UCC-3-202; *see also US Bank NA v Nelson*, 36 NY3d 998, 1007 [2020] (Wilson, J. concurring). It is undisputed that Fairmont was the owner and holder of the note when a section 22 notice should have been sent. Whether Fairmont sent the notice is the only possibly material issue – an issue as to which Appellant has proved nothing. Appellant has not met its burden proof.

CONCLUSION

Appellant's demand for immediate payment in full in the 2009 Complaint accelerated the debt and triggered the six-year statute of limitations. Appellant cannot, in a subsequent action, seek judicial invalidation of its own election, by pointing to its own alleged failure to comply with a contractual condition precedent, and thus benefit from its own wrong. Respondents sustained their prima facie burden by demonstrating that this action was commenced over six years after the commencement of the 2009 Action. In opposition, Appellant failed to raise a question of fact.

The Order of the Appellate Division should be affirmed.

Dated: November 26, 2021

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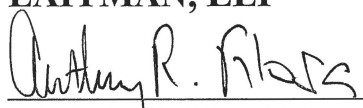
By: 

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NEW YORK STATE COURT OF APPEALS
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