Kings County Clerk's Index No. 502866/15
Appellate Division–Second Department Docket No. 2019-00544

Court of Appeals

of the

State of New York

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), a corporation organized and existing under the laws of the United States of America,

Plaintiff-Appellant,

– against –

MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty,

Defendants-Respondents,

– and –

CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

MOTION FOR LEAVE TO APPEAL

McCARTER & ENGLISH, LLP
Attorneys for Plaintiff-Appellant
Worldwide Plaza
825 Eighth Avenue, 31st Floor
New York, New York 10019
Tel.: (212) 609-6800
Fax: (212) 609-6921
aswanson@mccarter.com

Of Counsel:
ADAM M. SWANSON

DISCLOSURE STATEMENT
PURSUANT TO COURT OF APPEALS RULE 500.1(f)

Pursuant to Court of Appeals Rules 500.1(f) and 500.22(b)(5), Plaintiff-Appellant, Federal National Mortgage Association ("Fannie Mae"), states that it has the following parents, affiliates, or subsidiaries: None

STATE OF NEW YORK
COURT OF APPEALS

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Defendants.

Sup. Ct. Kings County
Index No. 502866/2015

App. Div. Second Department Docket No. 2019-00544

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed memorandum of law, dated May 21, 2021, and the exhibits thereto, and upon all papers and prior proceedings in this action, the accompanying record on appeal and briefs submitted to the Appellate Division, Second Department, and any other papers submitted herewith, Plaintiff-Appellant, Federal National Mortgage Association ("Fannie Mae"), will move this Court, at the Court of Appeals, 20 Eagle Street, Albany,

New York, on the 7th day of June, 2021, or as soon thereafter as counsel may be heard for an order granting Fannie Mae leave to appeal, pursuant to CPLR 5602(a)(1)(i), from: (i) a decision and order of the Appellate Division, Second Department, entered on November 12, 2020 and served with Notice of Entry on November 20, 2020, which affirmed a decision and order of the Supreme Court, Kings County that granted summary judgment to defendant and ordered Fannie Mae's complaint dismissed, and (ii) an Order of the Appellate Division, Second Department entered on February 19, 2021 and served with Notice of Entry on April 21, 2021, which denied Fannie Mae's motion for reargument or for leave to appeal to the Court of Appeals.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served and filed with the Court of Appeals on or before the return date of the motion.

Dated: May 21, 2021
New York, New York

Respectfully submitted,

MCCARTER & ENGLISH, LLP

Adam M. Swanson

Adam M. Swanson, Esq.
825 Eighth Ave., 31st Floor
New York, New York 10019
(212) 609-6800

Counsel for Plaintiff-Appellant Federal National Mortgage Association

TO:

Clerk
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207-1004

Brian McCaffrey, Esq.
Brian McCaffrey Attorney at Law, P.C.
88-18 Sutphin Boulevard
Jamaica, New York 11435
Counsel for Defendants-Respondents
Maxi Jeanty a/k/a Maxi Jeanty, Jr.
Sherley Jeanty a/k/a Shereley
Adrien Jeanty

STATE OF NEW YORK
COURT OF APPEALS

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Defendants.

Sup. Ct. Kings County
Index No. 502866/2015

App. Div. Second Department Docket No. 2019-00544

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Dated: May 21, 2021
New York, New York

Adam M. Swanson, Esq.
McCARTER & ENGLISH LLP
825 Eighth Ave., 31st Floor
New York, New York 10019
(212) 609-6800

Counsel for Plaintiff-Appellant Federal National Mortgage Association

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PRELIMINARY STATEMENT

The Home Affordable Modification Program ("HAMP") was integral to the recovery from the financial crisis of 2008. HAMP sought to curb avoidable foreclosures by compelling mortgage servicers and owners to modify defaulted mortgage loans under certain circumstances. Through HAMP, thousands of New York residential mortgage borrowers cured their mortgage defaults and had their monthly mortgage payments permanently reduced to an affordable level through modification, allowing them to keep their homes. Before a permanent HAMP modification was granted, qualifying borrowers made a series of trial payments under a Home Affordable Modification Trial Period Plan ("HAMP Agreement"). Not all borrowers given a temporary HAMP Agreement were also given a permanent modification under HAMP.

The HAMP Agreement is a form document. Under the HAMP Agreement, if a permanent HAMP modification was not ultimately offered to borrower, the parties agreed, "any payment I make under the Plan shall be applied to the amounts I owe under the Loan Documents and shall not be refunded to me." When this occurred, as it did in this case, the mortgage holder would apply the funds it received under the HAMP Agreement to pay the mortgage loan in accordance with its unmodified terms and then proceed with enforcing the unmodified mortgage.

The question presented by this case is what impact seven of those trial plan payments made by the borrowers, Maxi Jeanty and Ingrid Adrien ("Borrowers" or "Respondents") under their HAMP Agreement have on the foreclosure statute of limitations. Since the Borrowers' mortgage was not permanently modified under HAMP, their seven payments were fully applied against their unmodified mortgage and in accordance with the terms they agreed to under the HAMP Agreement.

The Supreme Court incorrectly determined these payments were of no consequence and did not renew the statute of limitations. The Second Department affirmed and incorrectly applied this Court's precedent in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976). The decision reveals a direct conflict between the Second and Third Departments on this exact issue. Here, the Second Department rested on its decision in *Nationstar Mtge., LLC v. Dorsin*, 180 A.D.3d 1054 (2nd Dept. Feb. 26, 2020) ("*Dorsin*"), concerning payments under the very same form agreement. The Second Department found these payments to be conditional and, therefore insufficient to renew the statute of limitations under Section 17-101 of the General Obligations Law, or the part payment doctrine under the common law and Section 17-107 of the General Obligations Law.

In contrast, on October 2018, the Third Department held in *Wells Fargo Bank v. Grover*, 165 A.D.3d 1541, 1543 (3rd Dept. Oct. 25, 2018) ("*Grover*") that

these HAMP agreement trial payments do renew the statute of limitations under both Section 17-101 of the General Obligations Law and the part payment doctrine of the common law and Section 17-107 of the General Obligations Law. The *Grover* court found "a borrower who entered into a HAMP agreement necessarily admitted the existence of the underlying debt, acknowledged that more payments were due, and made an implied promise to pay them in consideration of the modification of the mortgage."

Unable to distinguish *Grover* on the facts or law, the Second Department simply observed in *Dorsin*, "[a]lthough the Appellate Division, Third Department, held to the contrary in *Wells Fargo Bank N.A. v. Grover* (165 AD3d 1541 [2018]), we disagree and decline to follow that holding." Both *Grover* and *Dorsin* relied on the *Lew Morris* case and Sections 17-101 and 17-107 of the General Obligations Law. There could not be a more direct conflict of authorities between intermediate appellate courts and as of this Motion, Fannie Mae cannot locate any reported decision from the First or Fourth Departments on this issue.

The question presented here is also of great public and statewide importance for three primary reasons. (i) The issues concern the application of the statute of limitations to covenants regarding residential mortgage contracts, an intersection of the law where this Court recently observed, "the need for clarity and consistency are at their zenith." (ii) The HAMP Agreement ruled upon in *Grover*, and ruled

upon differently in *Dorsin* and here, is a standard form agreement that was used over 150,000[1] times throughout the State of New York and, therefore many pending cases and outstanding mortgage loans may be directly impacted. (iii) Trial payments similar to the ones required under the HAMP program are now part of new programs being designed to address an anticipated increase in foreclosures resulting from the COVID-19 crisis. Consequently, this issue is not limited to HAMP and is likely to recur in the future.

QUESTION PRESENTED

Whether payments made by a mortgage loan borrower to their lender and applied against the unpaid balance of the mortgage loan pursuant to an agreement whereby the borrower covenants to comply with all "requirements of the Loan Documents" and acknowledges that "all terms and provisions of the Loan Documents remain in full force and effect" renew the statute of limitations to foreclose the mortgage under New York law.

TIMELINESS OF THIS MOTION

Fannie Mae's motion is timely under CPLR §5513(b). This is an appeal arising from a decision and order of the Supreme Court entered December 5, 2018, notice of entry of which was served upon Fannie Mae on December 5, 2018, by e-

[1] Reported statistics by the U.S. Treasury Department include northern New Jersey as part of the New York City metropolitan statistical area and, therefore an exact number cannot be ascertained.

filing. (*See* Exhibit C.) Fannie Mae timely served and filed a notice of appeal from the Supreme Court's decision and order on January 4, 2019, by e-filing. (R. 3.)[2] Fannie Mae was served with notice of entry of the Second Department's decision and order affirming the Supreme Court on November 20, 2020. (*See* Exhibit B.) Fannie Mae timely filed a motion for leave to appeal in the Second Department on December 20, 2020, which the Second Department denied on February 19, 2021. (*See* Exhibit A.) Defendants-Respondents served notice of entry of the February 19, 2021 decision and order on motion of the Second Department on April 21, 2021, by U.S. mail. (*See* Exhibit A.) Service of this Motion on May 21, 2021 is, therefore timely. *See* CPLR § 5513(a); *see Matter of Reynolds v. Dustman*, 1 N.Y.3d 559, 560 (2003).

STATEMENT OF THE CASE

A. The Note and Mortgage and First Foreclosure Lawsuit

On June 20, 2007, Borrowers Maxi Jeanty and Ingrid Adrien borrowed the principal amount of $384,000.00 to purchase property at 42 Paerdegat 10th Street, Brooklyn ("Property"). To evidence their debt, Borrowers executed a promissory note ("Note") and to secure their debt, Borrowers mortgaged the Property ("Mortgage"). The Mortgage was recorded July 16, 2007 in the Office of the City

[2] (R. _.) denotes the Record on Appeal submitted to the Appellate Division, Second Department, a copy of which accompanies this Motion.

register of the City of New York as City Register File No. 2007000362095. (R. 195.)

The Note and Mortgage went into default and in 2008 Fannie Mae's predecessor commenced an action to foreclose the Mortgage ("First Foreclosure"). (R. 237.) Shortly after the First Foreclosure was commenced, Borrowers entered into the HAMP Agreement, which is discussed in more detail below. The HAMP Agreement was not successful and did not lead to a permanent modification of the Mortgage or resolve the First Foreclosure. (R. 164.) Borrower, Ingrid Adrien filed for bankruptcy on June 17, 2010 and was granted a discharge on October 4, 2010. (R. 82.) Thereafter, the First Foreclosure was discontinued by Order dated February 13, 2015 and the instant foreclosure, a second foreclosure action was commenced.

B. <u>The HAMP Agreement</u>

As mentioned above, Borrowers entered into the HAMP Agreement, which became effective on May 1, 2009. The HAMP Agreement explained that:

> If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement ("Modification Agreement"), as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.

The purpose of the HAMP Agreement was to provide Borrowers more affordable monthly mortgage payments due to their financial hardship. To that end, Borrowers represented, *inter alia*, that:

> A. I am unable to afford my mortgage payments for the reasons indicated in my Hardship Affidavit and as a result, (i) I am either in default or believe I will be in default under the Loan Documents in the near future, and (ii) I do not have sufficient income or access to sufficient liquid assets to make the monthly mortgage payments now or in the near future.

(R. 164.) To be considered for a permanent modification, the HAMP Agreement required Borrowers to make at least three consecutive monthly payments of $2,553.00 on May 1, 2009, June 1, 2009 and July 1, 2009. (R. 165.) Addressing the application of these payments, Borrowers agreed as follows in Paragraph 2:

> D. The Lender will hold the payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full. I understand the Lender will not pay me interest on the amounts held in the account. If there is any remaining money after such payment is applied, such remaining funds will be held by the Lender and not posted to my account until they total an amount that is enough to pay the next oldest delinquent monthly payment in full;
>
> E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents;
>
> F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period

> payments required under Section 2 of this Plan; (iii) the Lender determines that any of my representations in Section 1 were not true and correct as of the date I signed this Plan or are no longer true and correct at any time during the Trial Period; or (iv) I do not provide all information and documentation required by Lender, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

(R. 165.) Under Paragraph 4 of the HAMP Agreement, the Borrowers made additional promises and re-affirmed their Mortgage debt, consistent with their goal to modify the Mortgage terms. Borrowers promised:

> B. To comply, except to the extent that they are modified by this Plan, with all covenants, agreements, and requirements of the Loan Documents, including my agreement to make all payments of taxes, insurance premiums, assessments, Escrow Items, impounds, and all other payments, the amount of which may change periodically over the term of my loan.
>
> * * *
>
> D. That all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents.

(R. 166.) Nothing in the HAMP Agreement disavowed the Mortgage or stated that Borrowers maintained or reserved any right to challenge the validity or enforceability of the Note or Mortgage. On the contrary, under the HAMP Agreement, Borrowers acknowledged their debt and affirmed that "all terms and provisions of the Loan Document remain in full force and effect."

Under these terms, Borrowers made seven payments of $2,553.00 on account of their Mortgage debt, on April 30, 2009; May 30, 2009; July 2, 2009; August 1, 2009; September 19, 2009; October 27, 2009; and March 8, 2010. (R. 167-180.) For reasons that do not appear in the record and were not integral to the litigation, the trial plan under the HAMP Agreement did not materialize into a permanent modification for Borrowers. Thus, Fannie Mae commenced the instant foreclosure action under the original Note and Mortgage terms. (R. 11.)

C. This Foreclosure Action, Appeal and Preservation of Arguments for Review

Fannie Mae commenced this action on March 12, 2015 to foreclose the Mortgage. (R. 11.) Recognizing the seven trial payments made under the HAMP Agreement, which had been applied against the Mortgage, the Complaint in the instant action alleges the Mortgage is in default for failure to make the payment due November 1, 2008. (R. 20.) By contrast, when the First Foreclosure was commenced the alleged date of default was March 1, 2008, several months earlier. (R. 238.) Borrowers filed an Answer with Affirmative Defenses in the instant action on December 19, 2017 alleging, *inter alia*, the statute of limitations as an affirmative defense. (R. 73-77.)

Fannie Mae moved for summary judgment in April 2018 and Borrowers cross-moved for summary judgment dismissing the action as barred by the statute of limitations. (R. 78 and 207.) In opposition to the cross-motion, Fannie Mae

argued that, *inter alia*, enforcement of the Mortgage was not barred by the statute of limitations because Borrowers had executed the HAMP Agreement under which they made seven trial payments that were applied against the Mortgage loan balance as they had agreed. (R. 280-285.) Fannie Mae argued that the statute of limitations was renewed under Section 17-101 of the General Obligations Law or by part payment of the debt under the common law and Section 17-107 of the General Obligations Law. (R. 97-101.)

To prove these payments, in the Record before the Supreme Court Fannie Mae introduced as part of its summary judgment moving papers: (a) the HAMP Agreement (R. 164); (b) an escrow ledger and payment history for the Mortgage loan (R. 167); and (c) the Affidavit of Riki Lachia, sworn to April 4, 2018 (R. 203). Borrowers never disputed making these payments and never repudiated their covenants under the HAMP Agreement. The Supreme Court (Dear, J.S.C.) denied Fannie Mae's motion for summary judgment and granted Borrowers summary judgment to dismiss the Complaint, determining that the instant action was barred by the statute of limitations. (R. 6.)

Supreme Court rejected Fannie Mae's argument that the trial payments under the HAMP Agreement renewed the statute of limitations observing:

> While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it – rather, the signors thereof agreed to make three trial payments. If they did so – and if the lender decided that they qualified – a permanent modification would be

> offered. Put differently, the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to[1]. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute of limitations was not restarted.
>
> [1]The trial plan was, in essence, a forbearance agreement. While payments were made, the plaintiff would suspend the foreclosure action with no guaranty that it would offer a permanent modification.

(R. 7.) On appeal to the Second Department, Fannie Mae charged that the Supreme Court committed error by not recognizing that the HAMP Agreement and the seven payments thereunder renewed the statute of limitations. (*See* Exhibit B.) Fannie Mae argued that renewal occurred under either Section 17-101 of the General Obligations Law or under the part payment doctrine at common law and under Section 17-107 of the General Obligations Law. (*See* Br. for Appellant-Plaintiff (10/2/2019), at pp. 10-15 and *see* Reply Br. for Plaintiff-Appellant (2/10/2020), at pp. 6-11.) The Second Department affirmed the Supreme Court, in reliance upon its *Dorsin* decision and this Court's precedent in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976). The Second Department determined:

> Contrary to the plaintiff's contention, Maxi's execution of the HAMP plan, and the trial payments made pursuant thereto, did not constitute an "unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1054, 1056-1057 [internal quotation marks omitted]). Rather, because "[a]ny intention to repay the debt was conditioned on the parties reaching a permanent modification

> agreement . . . it cannot be said that the writing contained 'nothing inconsistent with an intention on the part of the debtor to pay' the debt" (*id*. at 1056, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521; see *U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769). Similarly, the trial payments made by Maxi pursuant to the HAMP plan "were made for the purpose of reaching an agreement to modify the terms of the parties' contract, and any promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1057 [citation omitted]).

(*See* Exhibit B.) *See also Federal Nat'l Mtg. Assoc. v. Jeanty*, 188 A.D.3d 827, 829-30 (Nov. 12, 2020). Fannie Mae moved for reconsideration or for leave to appeal to this Court, again based upon the split of authorities between *Grover* and *Dorsin* and a misapplication of *Lew Morris*. The Second Department denied the motion for reconsideration or for leave to appeal to the Court of Appeals. (Exhibit A.) Fannie Mae now moves for leave to appeal from this Court.

JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to CPLR §5602(a) because it originated in the Supreme Court, Kings County, and this appeal is from an order of the Appellate Division, Second Department that finally determined the proceeding and that is not appealable as of right. The Appellate Division's order affirmed the Supreme Court's order, which denied Fannie Mae's motion for summary judgment and granted "defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them as time-barred".

The Supreme Court's decision and order dismissing the complaint, affirmed by the Appellate Division's decision and order resolved all claims in this case because Fannie Mae's complaint stated just one claim to foreclose the Mortgage. (R. 11.) Respondents were the only defendants that appeared in the Supreme Court and defended against Fannie Mae's claim. (R. 84-85.) The Supreme Court heard no claims, conducted no proceedings, and entered no order or judgment with respect to any of the other non-appearing defendants. As a result of the Supreme Court's decision and order that Fannie Mae's complaint is barred by the statute of limitations, which was affirmed by the Second Department, Fannie Mae has no enforceable interest in the Property and no other claim that it could pursue in this case. Accordingly, there is nothing left for the Supreme Court to do in this case, and the Appellate Division's order of affirmance disposed of all issues within the meaning of CPLR §5611.

ARGUMENT AND REASONS TO GRANT LEAVE TO APPEAL

A motion seeking leave to appeal should be granted when it demonstrates that "the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4). This case satisfies each requirement. The Court should grant Fannie Mae's Motion for three reasons primary: (i) This case concerns the

mortgage foreclosure statute of limitations and the need for clarity surrounding the mortgage foreclosure statute of limitations is at its "zenith", which this Court recently recognized in *Freedom Mtg. Corp. v. Engel*, No. 1, 2021 N.Y. Slip. Op. 01090, 2021 WL 623869 (2021); (ii) There is a direct and immediate conflict not only with this Court's decision in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976), but between the Second and Third Departments specifically concerning whether payments under a HAMP Agreement—which is a form agreement utilized nearly 150,000 times in New York—renew the mortgage foreclosure statute of limitations; and (iii) There is certain to be an increase in foreclosure cases arising from the COVID-19 pandemic under which similar "trial payments" will be made by borrowers going forward and, therefore this conflict ought to be resolved now.

The lower courts need clarity on this issue and the rules concerning the renewal of the mortgage foreclosure statute of limitations on account of an acknowledgement of the mortgage debt and its part payment by the borrower. The rules should not be differently applied in Brooklyn vs. Albany. Fannie Mae respectfully requests leave to appeal.

I. RENEWAL OF THE MORTGAGE FORECLOSURE STATUTE OF LIMITATIONS BY PARTIAL PAYMENTS MADE UNDER A HAMP AGREEMENT IS A MATTER OF GREAT PUBLIC AND STATEWIDE IMPORTANCE

To abate the financial crisis of 2008, the U.S. Department of the Treasury and U.S. Department of Housing and Urban Development established the Making Home Affordable Program (MHA). (https://home.treasury.gov/data/troubled-assets-relief-program/housing/mha). The cornerstone of MHA was the Home Affordable Modification Program (HAMP). (*Id*.) To obtain a permanent HAMP mortgage loan modification, participants had to first agree to make trial payments, like the ones under the HAMP Agreement at issue here. The HAMP Agreement is a form agreement of the program. Over 150,000 HAMP Agreements were entered into in New York. (https://home.treasury.gov/sites/default/files/initiatives/financial-stability/reports/Documents/MSA%20Data%20May%202014.pdf).[3]

[3] The cited data is reported as of May 2014 because the HAMP Program expired, although it could be renewed. The cited data is the "HAMP Activity by Metropolitan Statistical Area" report and the "Trial Modifications Started" column for New York State, which aggregates to 160,357 and includes: (1) Albany-Schenectady-Troy (2,629); (2) Binghamton (375); (3) Buffalo-Niagara Falls (2,217); (4) Elmira (147); (5) Glens Falls (489); (6) Ithaca (76); (7) Kingston (1,314); (8) New York-Northern New Jersey-Long Island (142,484); (9) Poughkeepsie-Newburgh-Middletown (6,663); (10) Rochester (2,325); (11) Syracuse (1,144); and (12) Utica-Rome (494). Since the New York City metropolitan area statistic includes northern New Jersey, a specific number limited to New York State only cannot be ascertained.

Consequently, this form HAMP Agreement and the meaning of its terms has been and will continue to be the subject of litigation in New York for years to come.

A. The Effect of HAMP "Trial Payments" Upon the Mortgage Foreclosure Statute of Limitations Concerns an Intersection of Law that this Court has Already Determined that Clarity and Consistency are Needed

"The purpose of HAMP, which was established in response to the 2008 mortgage foreclosure crisis pursuant to the Emergency Economic Stabilization Act of 2008 (12 USC § 5201 et seq.), was to 'provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable reduced levels, without discharging any of the underlying debt'". *Wells Fargo Bank N.A. v. Grover*, 165 A.D.3d 1541, 1543 (3rd Dept. 2018). Thus, under all these HAMP agreements, as was the case with the HAMP Agreement here, Borrowers acknowledged that "all terms and provisions of the Loan Documents remain in full force and effect" and that "nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents". (R. 164-166.) Everything about the HAMP centered around an acknowledgement of the mortgage debt, an implicit and explicit promise to repay it and a good faith effort by the lender to modify certain terms of the debt to make it affordable for borrowers so they might avoid foreclosure.

The parties expressly acknowledged that despite entering into the HAMP Agreement, a permanent modification under HAMP may not occur. (R. 164); *see Nationstar Mortg., LLC v. Dorsin*, 180 A.D.3d 1054, 1056 (2nd Dept. 2020). And the parties agreed that lender would hold each payment made under the HAMP Agreement until there were sufficient funds to apply a monthly mortgage payment under the unmodified mortgage loan and "any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me". (R. 165.) Thus, in the HAMP Agreement, after acknowledging the debt and promising to honor the Mortgage loan, Borrowers then tendered payments against the debt which they expressly agreed would be applied as monthly mortgage payments against their existing debt and not refunded.

The issue at hand is the meaning of these covenants and the effect of these payments being made under these circumstances upon the mortgage foreclosure statute of limitations. The court below found that the payments were "conditioned on the parties reaching a permanent modification agreement" and any promise by Borrowers was similarly "conditioned upon the parties reaching a mutually satisfactory modification agreement." *Federal Nat'l Mtg. v. Jeanty*, 188 A.D.3d 827, 829 (2020). The Second Department did not even address the fact that the payments were actually kept and actually applied against the debt owed to Fannie Mae in accordance with the HAMP Agreement.

The construction and meaning of covenants concerning consumer debt, and specifically consumer mortgage loans and their application to the foreclosure statute of limitations is hotly contested in the courts below. This past February in *Freedom Mtg. Corp. v. Engel*, this Court observed:

> These appeals--each turning on the timeliness of a mortgage foreclosure claim-- involve the intersection of two areas of law where the need for clarity and consistency are at their zenith: contracts affecting real property ownership and the application of the statute of limitations

No. 1, 2021 WL 623869 (N.Y. Feb. 18, 2021). The issues here similarly need clarity. The task at hand is to apply the meaning of the covenants in the HAMP Agreement and the performance thereunder to the well-settled law of the renewal of the mortgage foreclosure statute of limitations under Section 17-101 of the General Obligations Law, or under the part payment doctrine of the common law and Section 17-107 of the General Obligations Law. Two intermediate appellate courts have already reached exact opposite conclusions with respect to this task, pitting *Grover* against *Dorsin* and, therefore there cannot be certainty or clarity until this issue is resolved by this Court.

Since over 150,000 of these form HAMP Agreements have been executed throughout New York State, this issue is sure to be presented to the First and/or Fourth Departments, if it has not already. There will be little distinction among

cases because the same form agreement, the HAMP Agreement is at issue. For this reason, Fannie Mae respectfully requests that the Court grant it leave to appeal.

B. The Effect of Trial Payments on Defaulted Mortgage Debt will Raise Future Issues in New York because Trial Payments are Now Commonly Used for Loss Mitigation as Recognized in Federal Regulation X

The mortgage foreclosure statute of limitations will remain a problematic issue in New York, especially because during the COVID-19 pandemic New York lenders and mortgagees have been prohibited from commencing foreclosure actions for the last fourteen months. Foreclosure actions still cannot be commenced in New York until August 31, 2021, at the earliest.[4] Trial loan modification plans and trial payments will similarly continue to impact New York law as borrowers work to cure mortgage defaults arising from the pandemic in the future. The remedial actions taken in response to the COVID-19 pandemic make it all the more likely that the foreclosure statutes of limitations will continue to collide with trial modification agreements, plans and payments like the HAMP Agreement here.

Under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("COVID-19 Act"), the Legislature declared:

[4] Additionally, under proposed federal regulations that amend Regulation X, the commencement of a residential foreclosure action may not likely be permitted until sometime after December 31, 2021. *See Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X*, 86 FR 18840-01.

> COVID–19 presents a historic threat to public health. Hundreds of thousands of residents are facing eviction or foreclosure due to necessary disease control measures that closed businesses and schools, and triggered mass-unemployment across the state. The pandemic has further interrupted court operations, the availability of counsel, the ability for parties to pay for counsel, and the ability to safely commute and enter a courtroom, settlement conference and the like.
>
> Stabilizing the housing situation for tenants, landlords, and homeowners is to the mutual benefit of all New Yorkers and will help the state address the pandemic, protect public health, and set the stage for recovery. It is, therefore, the intent of this legislation to avoid as many evictions and foreclosures as possible for people experiencing a financial hardship during the COVID–19 pandemic or who cannot move due to an increased risk of severe illness or death from COVID–19.
>
> As such, it is necessary to temporarily allow people impacted by COVID–19 to remain in their homes. A limited, temporary stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID–19 emergency pandemic.

NY LEGIS 381 (2020), 2020 Sess. Law News of N.Y. Ch. 381 (S. 9114) (McKINNEY'S). Prior to the COVID Act, Governor Andrew Cuomo prohibited the commencement of foreclosure actions (and almost all civil actions) by Executive Order, beginning in March 2020 and continuing through November 2020. *See* Executive Order No. 202.67 (https://www.governor.ny.gov/news/no-20267-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency). These severe and unprecedented restrictions on the enforcement of mortgage contracts portend a wave of foreclosure litigation after the moratoria are

lifted and with it, the resurgence of loss mitigation programs, such as HAMP, requiring trial modification agreements, plans and payments.

For example, the Federal Consumer Financial Protection Bureau ("CFPB") has already proposed an amendment to Regulation X, 12 CFR Part 1024, which governs mortgage servicing that incorporates trial loan modification agreements like the HAMP Agreement here. *See Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X*, 86 FR 18840-01. Specifically, this new proposed rule expressly requires borrowers to perform under a "trial loan modification plan" similar to the HAMP Agreement. When the CFPB published this proposed new rule and solicited comment in the Federal Register, it explained:

> **Trial Loan Modifications**
>
> As discussed above, to be eligible for the proposed exception to the anti-evasion requirement under § 1024.41(c)(2)(vi), proposed § 1024.41(c)(2)(vi)(A)(4) would require that either the borrower's acceptance of a loan modification offer must end any preexisting delinquency on the mortgage loan, or a loan modification offered must be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan …
>
> The Bureau understands that certain loan modification options, such as the flex modifications offered by the GSEs, require that a borrower complete a trial loan modification plan before the loan modification is finalized and a borrower's delinquency ends ….
>
> The Bureau seeks to ensure that borrowers are not harmed by a loan modification offer that requires the completion of a trial loan modification plan before ending any preexisting delinquency on the

> mortgage loan account. Specifically, the Bureau wants to ensure that, if those borrowers failed to perform under a trial loan modification plan, they would still have sufficient opportunity to complete an application and be reviewed for all loss mitigation options before foreclosure can be initiated. To achieve this goal, the Bureau is proposing to require the resumption of reasonable diligence efforts if a borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if a borrower requests further assistance.

Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 FR 18840-01.

Consequently, the issues presented in this case do not just arise from the 2008 mortgage crisis and will, therefore dissipate with time. On the contrary, trial loan modification agreements, plans and payments in mortgage defaults are here to stay and are already part of the regulatory fabric of Regulation X. By resolving the *Grover* vs. *Dorsin* conflict and by clarifying the rule laid down in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976), this Court will not only settle a dispute affecting the 150,000 or so HAMP Agreements already in existence, it will settle a dispute that could impact scores of trial loan modification agreements, plans and payments to be executed in the future.

II. THERE IS CONFLICTING AUTHORITY IN THE SECOND AND THIRD DEPARTMENTS ABOUT THE APPLICATION OF THIS COURT'S PRECEDENT AND WHETHER "TRIAL PAYMENTS" MADE AGAINST A MORTGAGE DEBT UNDER A HAMP AGREEMENT RENEW THE STATUTE OF LIMITATIONS AND THAT CONFLICT CAN ONLY BE RESOLVED IN THIS COURT

The conflict between the Second Department and the Third Department on this issue of the impact of the HAMP Agreement and trial payments upon the mortgage foreclosure statute of limitations is stark. Ruling upon the same HAMP plan with the same HAMP agreement and where the same "trial payments" were made by a borrower, the Third Department in *Grover* found the statute of limitations was renewed because:

> [A] borrower who entered into a HAMP agreement necessarily admitted the existence of the underlying debt, acknowledged that more payments were due, and made an implied promise to pay them in consideration of the modification of the mortgage.

Grover, 165 A.D.3d 1541, 1543. In contrast, the Second Department determined in *Dorsin* that the statute of limitations was not renewed because:

> the Plan did not constitute an "unconditional and unqualified acknowledgment of [the] debt" sufficient to reset the statute of limitations. While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur.

Dorsin, 180 A.D.3d 1054, 1056 (internal citations omitted).

Both the *Grover* and *Dorsin* cases, and the decision below in this case, relied upon this Court's precedent in *Lew Morris Demolition Co. v. Bd. of Ed. of City of*

New York, 40 N.Y.2d 516, 520 (1976). *Lew Morris* was incorrectly applied by the Second Department in this case and in *Dorsin*.

In *Lew Morris*, the parties had a dispute concerning plaintiff's performance under a construction contract that also included a separate protracted litigation arising from the death of another at the construction site. After the wrongful death claim was resolved, the contractor, Lew Morris Demolition Co. filed a notice of claim against the municipal defendant and the parties entered into a stipulation under which Lew Morris made a $13,650 payment. This Court observed that the parties' stipulation provided:

> [S]aid amount is paid "not as a final payment or payment of any character under said contract, but as a partial settlement, pursuant to the above resolution of the Board of Education, of and on account of the aforesaid claim and without prejudice to the rights of either party with respect to the balance of the above numbered claim."

Lew Morris Demolition Co., 40 N.Y.2d at 519.

This Court determined that under the terms of the payment and stipulation in *Lew Morris*, the statute of limitations was not renewed. The starting point was the long-standing law under both Section 17-101 of the General Obligations Law and the common law part payment doctrine. The *Lew Morris* Court explained:

> Section 17-101 of the General Obligations Law provides: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of

> real property. This section does not alter the effect of a payment of principal or interest." This section restates the rule that a written acknowledgment or promise will toll the Statute of Limitations and copies former section 33-d of the Personal Property Law, no attempt being made to codify the effect of payments of principal or interest, a matter traditionally resolved by case law. At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the Statute of Limitations running anew, but since 1848 that rule has been qualified by statute in this State to the extent of requiring the acknowledgment or new promise to be in a writing, signed by the party to be charged . The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it .
>
> In order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder .

Lew Morris Demolition Co., 40 N.Y.2d 516, 520–21 (1976) (internal citations omitted). Turning to the facts of its case, the *Lew Morris* Court explained that the parties' stipulation expressly provided that the payment was not made "under said contract" and it also expressly reserved the parties' disputed rights to the contract in their claim because it was executed "without prejudice". 40 N.Y.2d at 521. Thus, the Court found the Lew Morris claim was time-barred and not renewed under Section 17-101 or the part payment doctrine.

But the facts of this case are exactly opposite of *Lew Morris*. Here, under the HAMP Agreement Borrowers agreed, without qualification:

> B. To comply, except to the extent that they are modified by this Plan, with all covenants, agreements, and requirements of the Loan Documents, including my agreement to make all payments of taxes, insurance premiums, assessments, Escrow Items, impounds, and all other payments, the amount of which may change periodically over the term of my loan.
>
> * * *
>
> D. That all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents.

(R. 166.) No right to dispute the Mortgage debt was preserved by Borrowers under the HAMP Agreement and the agreement was not signed "without prejudice". (R. 164-166.)

Similarly, under Section 17-107 of the General Obligations Law, a "payment on account of a mortgage indebtedness, or instalment thereof or interest thereon" revives, renews and extends the statute of limitations to the date of the payment. N.Y. Gen. Oblig. Law § 17-107. The statute is affirmative and self-executing by its terms and renews the statute of limitations "unless the payment is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the

mortgage." *Id*. There was such a written disclaimer in *Lew Morris*[5] but there is no such disclaimer by the Borrowers here under the HAMP Agreement. (R. 164.)

Thus, upon a proper application of the *Lew Morris* decision and the controlling law of the renewal of the statute of limitations under Section 17-101 of the General Obligations Law or by the part payment doctrine under the common law and codified in Section 17-107 in the General Obligations Law, Fannie Mae's Mortgage should not have been ruled time-barred.

[5] Section 17-107 of the General Obligations Law was not at issue in *Lew Morris* because that case did not concern a mortgage debt. However, the disclaimer set forth in *Lew Morris* demonstrates the type of covenant necessary to preserve a statute of limitations defense.

CONCLUSION

For the reasons set forth above, Fannie Mae respectfully requests the Court grant this motion for leave to appeal to the this Court.

Dated: May 21, 2021
New York, New York

Respectfully Submitted,

McCARTER & ENGLISH, LLP

Adam M. Swanson

Adam M. Swanson
825 Eighth Ave., 31st Floor
New York, New York 10019
(212) 609-6800

Counsel for Plaintiff-Appellant Federal National Mortgage Association

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), a corporation organized and existing under the Laws of the United States of America

Plaintiff-Appellant,

-Against-

MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty

Defendants-Respondents

CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK PARKING VIOLATIONS BUREAU; CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

Index No. 502866/2015

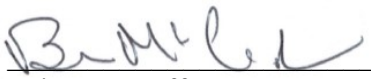
NOTICE OF ENTRY OF APPELLATE ORDER

Appellate Division Docket No. 2019-00544

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision & Order entered in this action on the 19th day of February 2021, in the office of the Appellate Division Second Department Clerk of the Court.

Dated: April 21, 2021

Yours,



Brian McCaffrey, Esq.
Brian McCaffrey Attorney at Law, P.C.
88-18 Sutphin Blvd.
Jamaica, New York 11435
Tel.: 718 480-8280
Fax : 718 480-8279

To:
Shapiro, DiCaro & Barak, LLC
175 Mile Crossing Boulevard
Rochester, NY 14624
Attorneys for Plaintiff Appellant

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M275651
MB/

MARK C. DILLON, J.P.
SYLVIA O. HINDS-RADIX
ANGELA G. IANNACCI
LINDA CHRISTOPHER, JJ.

2019-00544 DECISION & ORDER ON MOTION

Federal National Mortgage Association, etc., appellant,
v Maxi Jeanty, etc., et al., respondents,
et al., defendants.

(Index No. 502866/2015)

Appeal from an order of the Supreme Court, Kings County, dated November 27, 2018, which was determined by decision and order of this Court dated November 12, 2020. Motion by the appellant for leave to reargue the appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

DILLON, J.P., HINDS-RADIX, IANNACCI and CHRISTOPHER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

ATTORNEY AFFIRMATION OF SERVICE

APPELLATE DIVISION DOCKET NO. 2019-00544

TRIAL COURT INDEX NO. 502866/2015

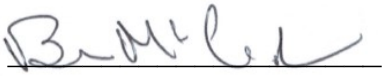
I, Brian McCaffrey, affirm to be true under the penalties of perjury, that I am an attorney duly admitted to practice law in the Courts of the State of New York, and that I am not a party to this action, and that on **April 21, 2021**, I served a true and complete copy of the annexed **NOTICE OF ENTRY OF APPELLATE ORDER with all exhibits** on the party noticed herein below, address designated by said attorney for that purpose in the following manner:

By mailing same in a sealed envelope, with postage paid thereon, in an official depository of the United States Postal Service within the State of New York, addressed to the last known addressee(s) as follows:

TO:

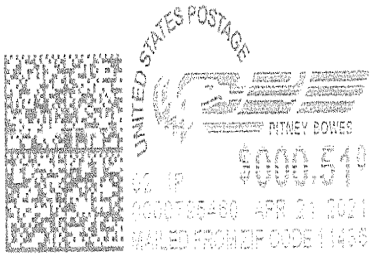
Shapiro, DiCaro & Barak, LLC
Attorneys for Plaintiff-Appellant
175 Mile Crossing Boulevard
Rochester, NY 14624

Dated: April 21, 2021



Brian McCaffrey, Esq.

Brian McCaffrey Attorney at Law, PC
88-18 Sutphin Blvd., 1st Floor
Jamaica, NY 11435



Shapiro, DiCaro & Barak, LLC
175 Mile Crossing Boulevard
Rochester, NY 14624

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), a corporation organized and existing under the Laws of the United States of America

Plaintiff-Appellant,

-Against-

MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty

Defendants-Respondents

CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK PARKING VIOLATIONS BUREAU; CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

Index No. 502866/2015

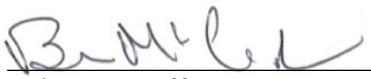
NOTICE OF ENTRY OF APPELLATE ORDER

Appellate Division Docket No. 2019-00544

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision & Order entered in this action on the 12th day of November 2020, in the office of the Appellate Division Second Department Clerk of the Court.

Dated: November 20, 2020

Yours,



Brian McCaffrey, Esq.
Brian McCaffrey Attorney at Law, P.C.
88-18 Sutphin Blvd.
Jamaica, New York 11435
Tel.: 718 480-8280
Fax : 718 480-8279

To:
Shapiro, DiCaro & Barak, LLC
175 Mile Crossing Boulevard
Rochester, NY 14624
Attorneys for Plaintiff Appellant

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D64630
T/htr

_____AD3d_____ Submitted - June 8, 2020

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
JEFFREY A. COHEN
SYLVIA O. HINDS-RADIX, JJ.

2019-00544 DECISION & ORDER

Federal National Mortgage Association, etc., appellant,
v Maxi Jeanty, etc., et al., respondents,
et al., defendants.

(Index No. 502866/15)

Shapiro, DiCaro & Barak, LLC, Rochester, NY (Austin T. Shufelt of counsel), for appellant.

Brian McCaffrey, Jamaica, NY, for respondents.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), dated November 27, 2018. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Maxi Jeanty and Sherley Jeanty and for an order of reference, and granted those defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them as time-barred.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In June 2007, the defendant Maxi Jeanty (hereinafter Maxi) borrowed the sum of $384,000 from JPMorgan Chase Bank, N.A., which was secured by a mortgage encumbering residential property located in Brooklyn. On August 27, 2008, the plaintiff's predecessor in interest, Chase Home Finance, LLC (hereinafter Chase), commenced an action to foreclose the mortgage against Maxi, among others (hereinafter the 2008 action). Thereafter, Maxi executed a Home Affordable Modification Trial Period plan (hereinafter the HAMP plan), pursuant to which he represented, among other things, that he was unable to afford his mortgage payments, and agreed to make three trial payments, at a reduced rate, with the first payment being due on or before May 1,

2009. The HAMP plan provided that if Maxi was in compliance, and his representations continued to be true, Chase would offer a permanent modification agreement. It is undisputed that Maxi made seven payments, each in the amount of $2,553, over the period between April 2009 and March 2010, but was never offered a permanent modification agreement. In December 2014, Chase moved, inter alia, for a voluntary discontinuance of the 2008 action. By order dated February 13, 2015, the Supreme Court granted Chase's motion, and, among other things, discontinued the 2008 action without prejudice.

In March 2015, the plaintiff, the alleged holder of the subject note and mortgage, commenced this action against Maxi and the defendant Sherley Jeanty, a co-owner of the subject property (hereinafter together the defendants), to foreclose the same mortgage. The plaintiff subsequently moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, and the defendants cross-moved for summary judgment dismissing the complaint insofar as asserted against them. The Supreme Court denied the plaintiff's motion and granted the defendants' cross motion. The plaintiff appeals.

"Generally, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action" (*Bank of N.Y. Mellon v Ahmed*, 181 AD3d 634, 635; *see* CPLR 213[4]). "However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*Deutsche Bank Natl. Trust Co. v Gordon*, 179 AD3d 770, 772 [internal quotation marks omitted]; *see Freedom Mtge. Corp. v Engel*, 163 AD3d 631, 632, *lv granted in part* 33 NY3d 1039).

Here, in support of their cross motion, the defendants submitted the complaint in the 2008 action, in which Chase had expressly elected "to call due the entire amount secured by the mortgage," thus demonstrating that the mortgage was accelerated in 2008. Since the plaintiff did not commence this action until March 2015, more than six years later, the defendants sustained their initial burden of demonstrating, prima facie, that this action is time-barred (*see Deutsche Bank Natl. Trust Co. v Gordon*, 179 AD3d at 773; *Bank of N.Y. Mellon v Alli*, 175 AD3d 1472, 1473; *Freedom Mtge. Corp. v Engel*, 163 AD3d at 631).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was revived pursuant to General Obligations Law § 17-101, or whether the six-month saving provision of CPLR 205(a) was applicable.

"General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt" (*Yadegar v Deutsche Bank Natl. Trust Co.*, 164 AD3d 945, 947 [internal quotation marks omitted]). "To constitute a valid acknowledgment, a 'writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it'" (*id*. at 947, quoting *Sichol v Crocker*, 177 AD2d 842, 843; *see Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521). "In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a

promise may be inferred to pay the remainder" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054, 1056 [internal quotation marks omitted]; *see* General Obligations Law § 17-107; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521).

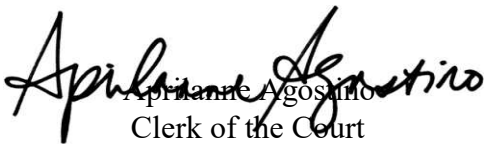
Contrary to the plaintiff's contention, Maxi's execution of the HAMP plan, and the trial payments made pursuant thereto, did not constitute an "unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1054, 1056-1057 [internal quotation marks omitted]). Rather, because "[a]ny intention to repay the debt was conditioned on the parties reaching a permanent modification agreement . . . it cannot be said that the writing contained 'nothing inconsistent with an intention on the part of the debtor to pay' the debt" (*id*. at 1056, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521; *see U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769). Similarly, the trial payments made by Maxi pursuant to the HAMP plan "were made for the purpose of reaching an agreement to modify the terms of the parties' contract, and any promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1057 [citation omitted]).

The plaintiff's alternative contention that it was entitled to the benefit of the six-month saving provision of CPLR 205(a) is without merit. "CPLR 205(a) extends the time to commence an action after the termination of an earlier related action, where both actions involve the same transaction or occurrence or series of transactions or occurrences" (*Sokoloff v Schor*, 176 AD3d 120, 126). The statute provides for a six-month grace period "where the previous action has been dismissed for any 'other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits'" (*Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 260, quoting CPLR 205[a]). Here, since the 2008 action was terminated by voluntary discontinuance, the instant action cannot benefit from the six-month grace period afforded by CPLR 205(a) (*see Ventures Trust 2013-I-H-R v Chitbahal*, 167 AD3d 682, 683-684; *EB Brands Holdings, Inc. v McGladrey, LLP*, 154 AD3d 646, 647-648; *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768, 768-769; *cf. Censor v Mead Reinsurance Corp.*, 176 AD2d 600, 601).

Accordingly, we agree with the Supreme Court's determination denying those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, and granting the defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them as time-barred.

DILLON, J.P., LEVENTHAL, COHEN and HINDS-RADIX, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

ATTORNEY AFFIRMATION OF SERVICE

SUPREME COURT INDEX NO. 502866/2015

APPELLATE DIVISION DOCKET NO. 2019-00544

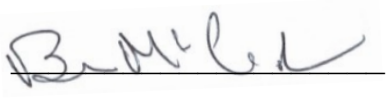
I, Brian McCaffrey, affirm to be true under the penalties of perjury, that I am an attorney duly admitted to practice law in the Courts of the State of New York, and that I am not a party to this action, and that on **November 20, 2020**, I served a true and complete copy of the annexed **NOTICE OF ENTRY OF APPELLATE ORDER with all exhibits** on the party noticed herein below, address designated by said attorney for that purpose in the following manner:

By mailing same in a sealed envelope, with postage paid thereon, in an official depository of the United States Postal Service within the State of New York, addressed to the last known addressee(s) as follows:

TO:

Shapiro, DiCaro & Barak, LLC
Attorneys for Plaintiff-Appellant
175 Mile Crossing Boulevard
Rochester, NY 14624

Dated: November 20, 2020



Brian McCaffrey, Esq.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America,

Plaintiff,

-against-

Maxi Jeanty a/k/a Maxi Jeanty, Jr.; Sherley Jeanty a/k/a Sherley Adrien Jeanty; City of New York Environmental Control Board; City of New York Parking Violations Bureau; City of New York Transit Adjudication Bureau, "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

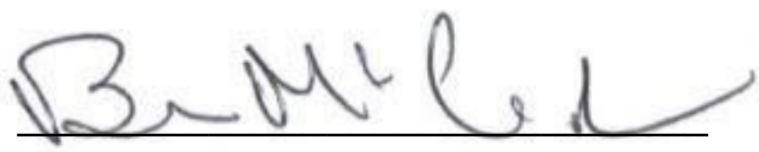
----------X

Index No. 502866/2015

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order that was entered in this action in the office of the Kings County Clerk on December 4, 2018.

Dated: December 5, 2018
Jamaica, N.Y.



Brian McCaffrey Attorney at Law, P.C. 88-18, Sutphin Blvd., 1s[t] Floor Jamaica, NY 11435
Telephone: 718-480-8280 Facsimile: 718-480-8279
info@mynylawfirm.com

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of November 2018.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.: 502866/15

---------- x

MS 5&6

FEDERAL NATIONAL,

Plaintiff,

DECISION AND ORDER

-against-

MAXI JEANTY et al,

Defendant,

---------- x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion(MS 5)	1
Opp/Cross (MS 6)	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

"The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). A prior action was filed on 8/27/08, accelerating the debt. The instant action was filed on 3/12/15, more than six years later.

A discontinuance alone is not a de-acceleration (*Freedom Mortgage Corporation v. Engel*, 2018 N.Y. Slip Op. 05140 [2d Dept 2018][" the plaintiff's execution of the January 23, 2013,

stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant"]) and Plaintiff offers no evidence that the loan was restored to installment status.

The HAMP Trial Period Plan is insufficient to serve as an acknowledgment of the debt pursuant to GO 17-101. "To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Yadegar v. Deutsche Bank*, 164 AD3d 945, 947 [2d Dept 2018 [internal quotation marks omitted]). While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it – rather, the signors thereof agreed to make three trial payments. If they did so – and if the lender decided that they qualified – a permanent modification would be offered. Put differently, the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to[1]. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute of limitations was not restarted (see, U.S. Bank, National Association v. Kess, 159 AD3d 767, 768 [2d Dept 2018]; *Sichol v. Crocker*, 177 A.D.2d 842, 843 [3d Dept 1991]).

Plaintiff's argument that there is no acceleration until judgment has been explicitly rejected by the Appellate Division (see, *Milone v US Bank Natl. Assn.*, 2018 NY Slip Op 05760 [2d Dept 2018]["A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due"]).

The bankruptcy toll was of insufficient duration to render the instant action timely.

Motion denied. Cross-motion granted. Case dismissed.

ENTER:

Hon. Noach Dear, J.S.C.

KINGS COUNTY CLERK FILED 2018 DEC -3 AM 9:16

[1] The trial plan was, in essence, a forebearance agreement. While payments were made, the plaintiff would suspend the foreclosure action with no guaranty that it would offer a permanent agreement.

ATTORNEY AFFIRMATION OF SERVICE

State of New York:

County of Queens:

INDEX NO. 502866/2015

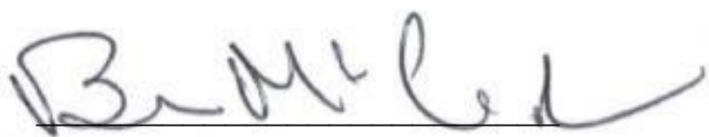
I, Brian McCaffrey, affirm to be true under the penalties of perjury, that I am an attorney duly admitted to practice law in the Courts of the State of New York, and that I am not a party to this action, and that on **December 5, 2018** I served the annexed **NOTICE OF ENTRY with Decision and Order** on the party noticed herein below, address designated by said attorney for that purpose in the following manner:

Shapiro, Dicaro & Barak, LLC
175 Mile Crossing Blvd.
Rochester, NY 14624

VIA E-FILING ON NYSCEF AS PER ATTORNEY APPEARANCES AND CONSENT TO E-FILING

THIS IS AN E-FILE CASE. PURSUANT TO RULE 202.5-b(a)(2)(i). SERVICE OF THIS NOTICE IS COMPLETE UPON THE ABOVE-NAMED COUNSEL FOR PLAINTIFF UPON E-FILING.

Dated: December 5, 2018
Jamaica, N.Y.



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America,

Plaintiff,

-against-

Maxi Jeanty a/k/a Maxi Jeanty, Jr.; Sherley Jeanty a/k/a Sherley Adrien Jeanty; City of New York Environmental Control Board; City of New York Parking Violations Bureau; City of New York Transit Adjudication Bureau, "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

Index No. 502866/2015
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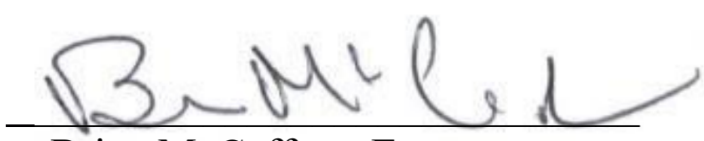

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