To be Argued by:
ADAM M. SWANSON
(Time Requested: 15 Minutes)

APL-2021-00151
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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Federal National Mortgage Association ("Fannie Mae") respectfully submits this reply brief in further support of its appeal from the decision & order of the Appellate Division, Second Department dated November 12, 2020.

By focusing on whether the HAMP Agreement and Borrowers' seven payments were effective to "decelerate" the Mortgage Loan—a term not even in the jurisprudence of this Court—Respondents conflate deceleration with renewal of the statute of limitations and, further misrepresent Fannie Mae's primary argument on appeal. The issue of whether a lender's optional election to accelerate has been revoked is separate and distinct from the issue of whether the statute of limitations is renewed by a borrower's part payment or written acknowledgment.

It is not necessary for a mortgage loan to be decelerated in order for renewal of the statute of limitations to occur. In fact, it is quite the opposite. Acceleration triggers the statute of limitations on the full debt and it, therefore, follows that to renew the statute of limitations the loan must be accelerated. Were the loan "decelerated" then the statute of limitations on the full debt would not need to be renewed.

Here, contrary to Respondents' flagrant misrepresentation, Fannie Mae is not arguing, "that the HAMP Agreement and the payments made in connection with it somehow served to decelerate the loan." (Resp. Br., p. 19.) Rather, Fannie Mae submits that the statute of limitations was renewed by both the HAMP Agreement and Borrowers' seven voluntary payments. And, per Respondents, "[i]t is undisputed that the Borrowers executed the HAMP Agreement and made seven (7) trial payments."[1] (Resp. Br., p. 19.) Tellingly, Respondents fail to address the legislative history of GOL 17-105 and 17-107, discussed at length in Fannie Mae's opening brief, which proves that the HAMP Agreement and Borrowers' payments renewed the statute of limitations as a matter of New York law.

The Second Department should be reversed.

ARGUMENT

I. APPELLANT WAS NOT REQUIRED TO SIGN THE HAMP AGREEMENT IN ORDER FOR IT TO BE EFFECTIVE TO RENEW THE STATUTE OF LIMITATIONS UNDER GOL 17-105

In order to be effective to renew or revive the state of limitation under GOL 17-105, the promise or waiver must be in a writing, "signed by the party to be

[1] *See Wells Fargo Bank N.A. v. Grover*, 165 A.D.3d 1541, 1543 (3d Dept. 2018) ("[P]artial payment and an implied promise to pay the remainder may be proven by extrinsic evidence, such as canceled checks or a borrower's admissions (internal citations omitted).").

charged." GOL 17-105(1). Those are the only two requirements.[2] Indeed, a promise to pay a preexisting debt owed by the promisor "[is] binding without mutual assent or consideration." Restatement (Second) of Contracts § 92, Comment(a) (1981). As such, and contrary to Respondents' meritless argument, it is of no moment that the copy of the HAMP Agreement contained in the Record only bears Borrowers' signatures. (*See* Resp. Br., p. 20.)

The Restatement (Second) of Contracts sets forth the following rules with respect to the effect of a promise to pay a general contractual indebtedness on the statute of limitations:

> (1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
>
> (2) The following facts operate as such a promise unless other facts indicate a different intention:
>
> (a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or

[2] Respondents' argument that the HAMP Agreement was not effective because it was not signed by the lender is disingenuous. Respondents did not raise this issue to any of the lower courts and, therefore there is no way for this Court to verify the facts stated in counsel's brief that lender never signed and delivered the HAMP Agreement to Borrowers. *See In re Hoge*, 96 A.D.3d 1398, 1399 (4th Dept. 2012); *Bank of New York Mellon v. Mitchell*, 186 A.D.3d 1470, 1472 (2d Dept. 2020).

(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or

(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

Restatement (Second) of Contracts § 82 (1981).

Under the rule stated in Subsection (1), where there is an express promise to pay an antecedent contractual indebtedness, facts which may be indicative of a different intention are irrelevant. The following illustrates the rule: "A owes B $100 and the claim is not yet barred by the statute of limitations. A promises B in a signed writing to pay the debt. The promise is binding, and the statute of limitations will not bar the claim for the statutory period after the making of the new promise." *Id.*

Unlike the foregoing rule, the debtor's intention to pay is relevant under the rule stated in Subsection (2). For example, the following illustrates the effect of an acknowledgment under Subsection 2(a) where there is an intention not to pay: "A owes B $500, and writes B, 'I admit that I owe you $500, but I am unable to pay it.' A's letter imposes no duty upon him." *Id.*

Under New York law, the effect of an acknowledgment or new promise to pay a contractual debt generally is governed by GOL 17-101. And, like the rules set forth in Section 82 of the Restatement (Second) of Contracts, intention is only relevant to an acknowledgment of a debt. "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 (internal citations omitted) (emphasis added)." *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 521 (1976).

Moreover, with respect to mortgage debts, the promise or waiver is "subject to any conditions expressed in the writing." GOL 17-105(1). If a promise to pay a preexisting debt "is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the occurrence of the condition or upon the arrival of the specified time." Restatement (Second) of Contracts § 91 (1981). Thus, the actual promise must be conditional. The following illustrations are instructive:

> (1) A owes B a debt of $60, but B's claim is barred by the statute of limitations. A promises in a signed writing to pay B in satisfaction of the claim $5 monthly for a year. The promise is binding but B's only right is to the payment of $5 at the end of each month.

(2) A owes B a debt of $500, and writes to B, "I will pay you $400 in full satisfaction if you will so accept it." B does not reply. A's promise is not binding, whether made before or after the debt of $500 was barred by the statute of limitations, because B has not complied with the condition requiring acceptance.

Id. §§ 91 & 82.

Here, the HAMP Agreement contained an express promise to pay the Mortgage debt because the payments made under the Plan were actually applied to the existing debt—which was what Borrowers agreed to. Unlike the above illustrations, that promise was unconditional. What was conditional in the HAMP Agreement was any obligation on the mortgagee to modify the payment terms of the mortgage. These are separate and distinct terms of the HAMP Agreement.

II. BORROWERS' PAYMENTS WERE NOT ACCOMPANIED BY A WRITTEN DISCLAIMER

At the outset, the HAMP Agreement required only the first three of the seven payments made by Borrowers. And the Record before this Court is devoid of any evidence to support Respondents' assertion that Borrowers were instructed by "the Appellants" to make the four additional payments "until a decision was reached." (Resp. Br., p. 22.) Respondents' contention that Borrowers were not provided with an explanation as to why the Mortgage Loan would not be modified is also unsupported. (*See Id*.)

Respondents' additional contention that Borrowers "made trial payments in the hopes of obtaining a permanent loan modification during the foreclosure settlement conference phase of the 2008 Foreclosure Action" is belied by the Record. (Resp. Br., p. 21.) The Appearance Detail for the 2008 Foreclosure Action proves that not one settlement conference was held. (R. 259.) And there is no evidence to suggest that the 2008 Foreclosure Action would have been eligible for settlement conferencing, since the version of CPLR 3408 in effect at that time only applied to high-cost, subprime and nontraditional home loans. *See* L.2008, c. 472, § 3.

Most notable, however is Respondents attempt to turn the shields of CPLR 3408 and HAMP into swords. (*See* Resp. Br., pp. 22, 28, & 29.) As this Court recently recognized in *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, FN 4, *reargument denied*, 37 N.Y.3d 926 (2021), "the legislature has imposed exacting standards for bringing a foreclosure claim." CPLR 3408 is no different. The primary purpose of the settlement conference process is to provide homeowners with loss mitigation options. The amount of time an action remains in the conferencing part can be substantial. For example, at the end of 2019, there were 38,753 settlement conferences held and 25,283 adjournments in the foreclosure

settlement parts.[3] It is well settled law that a foreclosing plaintiff is not required to modify its mortgage loan prior to or after a default in payment. *See Behar v. Wells Fargo Bank, N.A.*, 187 A.D.3d 1116, 1116 (2d Dept. 2020). Despite this fact, in 2019 32% of homeowners who participated in settlement conferences obtained a modification of their home loans to an affordable level.[4]

Putting all of this aside, Respondents' argument that Borrowers' payments were insufficient to renew the statute of limitations because they were conditioned on obtaining a permanent loan modification is without basis in law. And the notion that Borrowers made these payments under duress to please the court referees in the foreclosure settlement conferencing part is down-right offensive.

As this Court recognized in *Lew Morris Demolition Co*., 40 N.Y.2d at 520, unlike the effect of a written acknowledgment or promise on contractual debts generally, the effect of payments of principal or interest has not been codified by statute and is governed solely by case law. Specifically, with respect to part payment, the common law rule is as follows:

> 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

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[3] *See* Lawrence K. Marks, *2019 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases Pursuant to Chapter 507 of the Laws of 2009*, at 2 [2019], available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf.

[4] *See Id*.

> 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.

Id. at. 521 (internal citations omitted).

Unlike general contractual debts, the effect of part payment on a mortgage debt is codified and governed by statute, to wit, GOL 17-107. Pursuant to that section, a part payment is ineffective to renew or revive the statute of limitations only if it "is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage." GOL 17-107(1).

Here, Borrowers' seven payments were not accompanied by a written disclaimer of intention to affect the time limited for foreclosure of the Mortgage; not in the HAMP Agreement and not by some separate communication or notation. The Second Department, therefore erred when it applied the common law rule applicable to general contractual debts to determine whether Borrowers' payments renewed the statute of limitations.

III. THE EVIDENCE THAT THE 2008 FORECLOSURE ACTION WAS VOLUNTARILY DISCONTINUED REQUIRED DENIAL OF RESPONDENTS' MOTION

Contrary to Respondents' argument (*see* Resp. Br., p. 16), Fannie Mae did argue before the Supreme Court, that "[w]hen Chase Home Finance LLC moved

for discontinuance, it undertook an affirmative act to, inter alia, nullify its prior decision to exercise the acceleration option within the mortgage by withdrawing the complaint, and in doing so, any purported acceleration declared within the complaint was rescinded and revoked." (R. 96.) This Court may, therefore reach this issue.

Moreover, and as contended in Fannie Mae's opening brief, Respondents failed to meet their *prima facie* burden by including evidencing of the voluntary discontinuance of the 2008 Foreclosure Action with their motion papers.[5] *See Pryce v. Nationstar Mortg., LLC*, 142 N.Y.S.3d 827, 828 (2d Dept. 2021); *Wells Fargo Bank, Nat'l Ass'n v. Islam*, 193 A.D.3d 1016, 1016 (2d Dept. 2021); *U.S. Bank Nat'l Ass'n v. Francis*, 197 A.D.3d 525, 527-528 (2d Dept. 2021). As such, Respondents argument that the Mortgage Loan does not provide the lender with the unilateral right to revoke an election to accelerate cannot be considered. (*See* Resp. Br., pp. 36-44.)

[5] For this same reason, the burden never shifted to Fannie Mae to raise a triable issue of fact. But even if it had, Fannie Mae's submission of the order discontinuing the 2008 Foreclosure Action would have been sufficient, standing alone, to raise a triable issue of fact since Fannie Mae was not required to conclusively establish, as a matter of law, that the action is timely. *See NMNT Realty Corp. v. Knoxville 2012 Tr.*, 151 A.D.3d 1068, 1070 (2d Dept. 2017). Thus, and contrary to Respondents' incorrect contention, Fannie Mae did not need to prove that Borrowers were served with the motion to discontinue the 2008 Foreclosure Action. And that argument was not raised before the courts below.

Regardless, and contrary to Respondents' erroneous and unsupported contention, Fannie Mae's predecessor in interest maintained the right to unilaterally revoke the election effected by the commencement of the 2008 Foreclosure Action.

The provision of the subject mortgage providing the noteholder with the option to accelerate upon default is an "alternative contract," not an "option contract." This distinction is crucial since an election made under an alternative contract is revocable as of right, whereas an election under an option contract is not.

Section 87 of the Restatement (Second) of Contracts defines an option contract in terms of a binding offer and explains how the offer can become binding (by traditional consideration, by statute or by the offeree's reliance). *See* Restatement (Second) of Contracts § 87. Section 25 explains the purpose and effect of an option contract: "The principal legal consequence of an option contract is that stated in this Section: it limits the promisor's power to revoke an offer. The termination of the offeree's power of acceptance is subject to the requirements for discharge of a contractual duty. *See Id*. § 37. A revocation by the offeror is not itself effective, and the offer is properly referred to as an irrevocable offer." *Id*. § 25, Comment *d*.

Corbin on Contracts provides the following illustration and explanation of an option contract:

> Buyer (B), who sees a possibility of gain through the use or resale of certain property, may not at the moment have the money to pay for it, or B may not be sufficiently sure of such gain that B is willing to invest (to risk) the necessary amount. Therefore, B thinks: "I will get an option on that property for 30 days, if the owner (O) will make me a reasonable price. I will buy an 'option,' although I am not yet ready to buy the land." B negotiates with O: "At what price will you sell?" O replies: "$10,000." To this B replies: "I cannot pay that price now; but I would like a 30-day option at that price." O then says: "I will give you that option for $100 cash." Thereupon, B pays O $100; and O delivers this signed instrument: "In consideration of $100 received, I hereby give to B an option for 30 days to purchase Blackacre for $10,000." Thus, a valid contract has been made; and, in common parlance, B has an "option." There is as yet no "sale," although a possible one is in contemplation. O is still the "owner" of Blackacre, but with a very important limitation on O's privilege of selling it. To compensate for that limitation, O has $100 in hand. B has invested (risked) $100 for an "option" but has not risked $10,000 in a land purchase speculation. O has made an offer to B that is irrevocable for 30 days. Their contract so made is commonly and properly described as an "Option Contract."
>
> …
>
> In [this] simple illustration…B purchased the "option" with cash; the transaction was an exchange of the "option" and $100. This contract was preliminary to and separate from another exchange that was in contemplation—an exchange of land for $10,000. The primary element, that differentiates it from all other contracts, is that the Option Holder (optionee) has the legal power to consummate a second contract for the contemplated exchange or equivalents and at the same time the legal privilege of not exercising it. The Option Giver

> (optionor), on the other hand, has the correlative liability to become bound to execute that exchange, and at the same time a disability to avoid it. Their relationship can also be expressed, without any confusion of terms, thus: the option giver, by reason of the irrevocable promise, is bound by a conditional duty to perform the contemplated exchange (to convey the property) according to the stated terms; the option holder has a conditional right to that performance. The condition of the one's duty and of the other's right is a voluntary act of the option holder—the exercise of the power of acceptance.

3 Corbin on Contracts § 11.1.

An alternative contract is one in which a party promises to render some one of two or more alternative promises, either one of which is mutually agreed upon as the bargained-for equivalent given in exchange for the return performance by the other party. Corbin on Contracts states the following with respect to alternative contracts:

> Alternative contracts are contracts with an option, sometimes the promisor having the option of rendering either one of two alternative performances, and sometimes the option between the two being in the promisee. In the one case, the promisor has the power to discharge the duty in either one of two ways; in the other the promisee has the power to determine which of two performances it shall be the promisor's duty to render. The promisor may have the power to determine which one of two performances it shall be the duty to render; but the promisor is bound to perform one of them and is not legally privileged not to perform both. There is a contract; but it is not an "option contract," because the promisor's "option" is not between performing and not performing.

Id.

As relevant here, upon default, the noteholder has the option between alternative performances, i.e. borrower can continue paying the loan via monthly installments or immediately pay the entire amount due; but the borrower is under an inescapable duty to perform one of them and is not legally privileged to not pay the amount due. Stated otherwise, an election to accelerate does not create a power of acceptance in the borrower, as the borrower always remains obligated to pay the amount due under the loan. Moreover, in exchange for the loan (i.e. consideration) given by the lender, the borrowers promised: (1) to pay back the loan via monthly installments over the course of the contract term and (2) to pay the entire debt immediately after a default upon the noteholder's election. Thus, there is no new consideration given in exchange for the option to accelerate since it is part of the parties' original bargained-for exchange.

Because an election to accelerate does not give the borrower the option between performing and not performing borrower's obligation under the contract (to pay the amount owed) and because the option to accelerate was part of the parties' original bargained-for exchange, the noteholder maintains the right to unilaterally revoke its election even in the absence of an express contract provision so providing.

Accordingly, unless the parties' contract expressly provides otherwise, a noteholder is free to unilaterally revoke its acceleration election unless and until: (1) borrower performs and pays the accelerated debt or (2) circumstances arise leading to an equitable estoppel claim, i.e. a material change in the *borrower's* position in detrimental reliance on the election, as this Court explained in *Engel*, 37 N.Y.3d at 28, when it re-affirmed its decision in *Kilpatrick v. Germania Life Ins. Co.*, 183 N.Y. 163 (1905).

Notably, in its decision, this Court expressly recognized that a noteholder who elects to accelerate under an optional acceleration clause maintains the right to revoke the election, stating that "whether to exercise the contractual right to accelerate, and de-accelerate, remaine[s] within the discretion of [the noteholder]." *Engel*, 37 N.Y.3d at 34.

This Court also dispensed with the Second Department's notion reflected in *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 39 (2d Dept. 2019), *leave to appeal denied*, 34 N.Y.3d 910, 141 N.E.3d 956 (2020) and argued by Respondents (*see* Resp. Br., p. 42), that section 19 of the Fannie Mae/Freddie Mac form mortgage gives the borrower the contractual option to de-accelerate the loan,

explaining that the borrower's right under section 19 is a "right to cure." *Engel*, 37 N.Y.3d at 23.

Moreover, "[t]he decision of whether to exercise an option to accelerate a mortgage debt in response to a qualifying breach constitutes the election of a remedy." *Christiana Tr. v. Barua*, 184 A.D.3d 140, 159 (2d Dept. 2020) (Miller, J., *concurring in part and dissenting in part*), *leave to appeal denied*, 35 N.Y.3d 916 (2020), *and abrogated by Engel*, 37 N.Y.3d at 1. Acceleration may be effected via commencement of a foreclosure action. *Engel*, 37 N.Y.3d at 22.

"The bringing of a suit for one remedy rather than another is a manifestation of choice of that remedy." 12 Corbin on Contracts § 66.5. However, "[e]ven if the bringing of an action for one remedy is a manifestation of choice of that remedy, it does not preclude the plaintiff from shifting to another remedy as long as the defendant has not materially changed his position." Restatement [Second] of Contracts § 378, Comment *a*. "Nor must the shift be made within any particular time." *Id.*

Accordingly, even after a mortgagee has elected its remedy to accelerate and foreclose via the commencement of a foreclosure action, the mortgagee still retains the right to revoke its acceleration election and seek an alternative remedy for the

borrower's breach by voluntarily discontinuing the action. And, unless and until substantial prejudice to the borrower is shown, the mortgagee is under no restraint in changing its mind i.e. "shifting positions" via a voluntarily discontinuance, which is what occurred here.

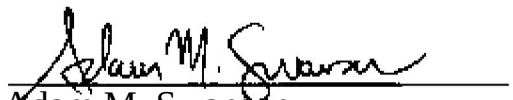
CONCLUSION

For all the foregoing reasons and for the reasons expressed in Appellant's opening brief, the Second Department's November 12, 2020, decision and order should be reversed.

Dated: New York, New York
March 17, 2022

Respectfully Submitted,

McCARTER & ENGLISH, LLP



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NEW YORK STATE COURT OF APPEALS
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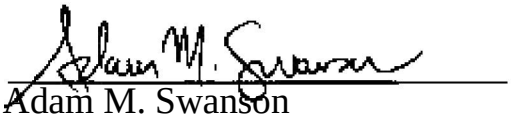
Dated: New York, New York
March 17, 2022

Respectfully Submitted,

McCARTER & ENGLISH, LLP



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