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

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

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF APPELLANTS MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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PRELIMINARY STATEMENT

As stated by the Appellant, 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.

Unfortunately, under HAMP, through no fault of their own, many homeowners like the Defendants here, were offered Trial Payment Plans (“TPP”) but never received permanent modifications. Courts have held that the TPP agreement is not an enforceable contract. "Several courts have already held that the

TPP does not constitute a binding contract for permanent modification" (*Costigan*, 2011 U.S. Dist. LEXIS 84860, 2011 WL 3370397, *7; see also *JPMorgan Chase Bank v Ilardo*, 36 Misc3d 359, 940 N.Y.S.2d 829, [Sup. Ct, Suffolk County 2012 [applying New York contract law]). The TPP agreement "is explicitly not an enforceable offer for [a] loan modification" (*Morales v Chase Home Fin.*, 2011 U.S. Dist. LEXIS 49698, 2011 WL 1670045, *5 [ND Cal, Apr. 11, 2011, No. C 10-02068 JSW]).

Under contract law principles, when "some further act of the purported offeror is necessary, the purported offeree has no power to create contractual relations, and there is as yet no operative offer." 1 Joseph M. Perillo, Corbin on Contracts § 1.11, at 31 (rev. ed. 1993) (hereinafter "Corbin on Contracts (rev. ed.)"), citing *Bank of Benton v. Cogdill*, 118 Ill. App. 3d 280, 454 N.E.2d 1120, 1125-26, 73 Ill. Dec. 871 (Ill. App. 1983). Thus, "a person can prevent his submission from being treated as an offer by [using] suitable language conditioning the formation of a contract on some further step, such as approval by corporate headquarters." *Architectural Metal Systems, Inc. v. Consolidated Systems, Inc.*, 58 F.3d 1227, 1230 (7th Cir. 1995) (Illinois law). *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 561

In *Wigod*, Wells Fargo argued that the TPP made a permanent modification expressly contingent on the bank taking some later action. It is well established

that the Appellant and other lenders and servicers have made the same exact arguments in defense of a slew of TPP lawsuits brought by borrowers, who like the Respondents in this case, made all of their Trial Plan Payments, but were ultimately denied a permanent loan modification.

The most on point case law on this subject is a federal circuit decision, *Pennington v. HSBC Bank*, 2012 WL 4513333 (5th Cir. Oct. 3, 2012), which lends circuit-level support for three important propositions that leads to dismissal of most HAMP TPP claims, because TPP's are not binding.

First, *Pennington* held borrowers who were current when they applied for HAMP and alleged they would not have defaulted but for a botched TPP process are not entitled to any relief because the TPP presupposes either actual or imminent default on the loan. This is an important development because, for the most part, courts appeared to have been more sympathetic to borrowers who were current with their loan before they attempted to modify their loan through HAMP as opposed to borrowers already in default who, for whatever reason, the program failed to help.

Second, the *Pennington* court refused to enforce the TPP against the servicer where there is no evidence the servicer had ever signed the TPP. Borrowers had sometimes been able to circumvent statute of frauds defenses by alleging they made the TPP payments and thus partially performed. Depending on state law,

partial performance can replace the signature requirement for purposes of the statute of frauds. However, the Fifth Circuit has now rejected that reasoning because borrowers "already owed regular payments. Although the fact that they paid under the TPP indicates that they hoped to be bound, the question is whether the bank expressed a similar intent despite the fact that conditions in the TPP remained unfulfilled. The bank deposited the payments, but the [borrowers] owed more than that. Even if the bank intended to refuse to accept the TPP, it would still take the money in partial satisfaction of the amount owed while interest accrued." Under this reasoning, borrowers must therefore need to have received a signed TPP from their servicer in order to advance any potential claims.

Third, the *Pennington* court questioned what damages the borrower could potentially prove even if he had a legal right to relief. In other HAMP TPP cases, borrowers typically alleged they suffered accrued interest, late penalties, negative credit reporting, and other default-associated fees during and/or after the TPP. That these claims ever survived dismissal should have raised eyebrows since all of these things happen to borrowers who receive a TPP and are immediately approved for a permanent HAMP modification, i.e., the HAMP guidelines quite clearly specify that interest will continue to accrue, and negative credit reports will be given, even if a previously current borrower qualifies for a permanent HAMP modification. If a permanent modification does result, the charges get capitalized into the modified

loan balance, and the borrower has to repay them. These fees and charges would therefore not be "damages" - the HAMP program was deliberately designed in this way by the Treasury. Stated differently, all of these "damages" occur even when everything about HAMP proceeds correctly (except late fees, which are typically waived once the permanent modification is entered into).

Here, Appellant seeks to take advantage of unsuspecting borrowers by having them make TPP payments that according to them decelerate the loan while not being obligated to offer a permanent loan modification. Appellant obviously seeks to have it both ways. They want to be able to lure unsuspecting borrowers, like the Respondents herein, into making payments that the Appellant argues, “decelerates the loan”, while being able to arbitrarily refuse to grant a permanent modification to borrowers who made the trial payments.

A decision in favor of the Appellant’s arguments would be inequitable and would set the intent of the Statute of Limitations on its ear.

QUESTION PRESENTED

Whether payments made by a mortgage loan borrower in foreclosure, to their lender/servicer, pursuant to a conditional trial modification under a Trial Payment Plan (“TPP”) where the lender/servicer did not permanently modify the borrower’s mortgage loan after all trial payments were made, allows a lender/servicer to sidestep the Statute of Limitations by claiming that the TPP

payments decelerated the mortgage loan. And in so doing, eviscerate the intent of the Statute of Limitations and allow the lender/servicer to profit from its own intransigence.

THE HAMP AGREEMENT

As stated by the Appellant on page 6 of their memorandum of law, the HAMP Agreement in this case contained the following pertinent provisions:

> 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**; [emphasis added]
> 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

Here, it is crystal clear, the Appellant who provided the "HAMP Agreement", ensured that the plain language of the agreement was conditional. One of those conditions, flies in the face of the Appellant's arguments to this Court. Namely, the HAMP Agreement in this case specifically addressed the acceleration of the mortgage by stating:

> "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"

This language in the HAMP Agreement is there because lenders and servicers such as the Appellant want to ensure that Borrower's such as the Respondents cannot go before foreclosure courts and raise deceleration as a defense to the foreclosure action in a motion to dismiss.

Here, the Appellant's argument that the Trial Payments decelerated the loan fly in the face of the specific language that they themselves placed in the HAMP Agreement, seems to be duplicitous at best and disingenuous at worst. In any event, Appellant cannot reasonably use the language of the HAMP Agreement to purposefully prevent a deceleration argument by Borrower/Defendants in

foreclosure and then make the deceleration argument themselves when it suits them.

APPELLANT'S EXHIBITS

Attached to Appellant's instant motion as Exhibit A is a copy of the decision and order of unanimous affirmance made by this Court and entered on November 12, 2020, together with its notice of entry served on November 20, 2020.

The appeal involved was taken from a decision and order of the Supreme Court, County of Kings, dated November 27, 2018 and entered December 3, 2018. A copy of the decision and order sought to be reviewed is annexed to Appellant's instant motion as Exhibit C.

The decision and order of the Supreme Court, County of Kings, dated November 27, 2018 and entered December 3, 2018, which the Appellate Division Second Department unanimously affirmed, granted the cross-motion by Defendants-Respondents, Maxi Jeanty a/k/a Maxi Jeanty, Jr. and Sherley Jeanty a/k/a Sherley Adrien Jeanty (hereinafter "Respondents"), to dismiss this action as time barred, and denied Appellant's motion for summary judgment on its mortgage foreclosure claim accordingly.

ARGUMENTS AGAINST APPELLANT'S REQUEST FOR LEAVE TO APPEAL THE SECOND DEPARTMENTS RULING

POINT I & POINT II

I. The Trial Payment Plan Was Not an Acknowledgement of the Debt Under General Obligations Law § 17-101

II. The Partial Payments Do Not Meet The Standards Under General Obligations Law § 17-107

1. In its decision and order of affirmance, the Appellate Division relied on, *inter alia*, its prior decision in *Yadegar v Deutsche Bank Natl. Trust Co.*, 164 AD3d 945, 947 to affirm the lower court's ruling that "The HAMP Trial Period Plan is insufficient to serve as an acknowledgment of the debt…" General Obligations Law § 17-101

2. The Appellate Division also relied on its prior holding in *Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054, 1056 that "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" which cited General Obligations Law § 17-107 and this Court's ruling in *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521).

3. Appellant seems to ignore the fact that this Court has already ruled on the issue presented here and instead attempts to create a purported "split" between the Second Department and the Third Department surrounding the application of

General Obligations Law § 17-107. The actual "split" here, is between the Third Department and the Court of Appeals.

4. Appellant has now abandoned all of its prior arguments and centers its argument here on General Obligations Law § 17-107 and the payments made on the conditional HAMP trial modification, that Appellant itself refused to finalize.

5. As the Appellate Division stated in its decision and order of affirmance,

> "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." [emphasis added]

6. This decision not to offer a permanent modification was made solely by the Appellant who now seeks to use the conditional trial agreement payments and their own intransigence in failing to offer a final unconditional modification, to impose and benefit from, the "part payments" provisions of General Obligations Law to toll the Statute of Limitations.

7. If this Court were to reverse the lower court and the Appellate Division decisions, it would reward Appellant who was intransigent in finalizing the loan modification. Indeed, if Appellant succeeds on its argument, then every lender in a foreclosure action could simply circumvent the Statute of Limitations by engaging in a meaningless conditional trial plan as an insurance policy by collecting a few

payments, refusing to permanently modify the loan, prosecuting their foreclosure action and in the event that their action is somehow dismissed, being able to recommence a new action having circumvented the Statute of Limitations. Such an outcome would clearly be inapposite to the legislative intent of the Statute of Limitations under CPLR § 213(4).

8. Indeed, any decision reached that upholds Appellant's argument would turn the Statute of Limitations upside down and create a loophole that would reward intransigent lenders who offer meaningless conditional trial plans with absolutely no intention of finalizing them.

9. In order to prevail in their argument, Appellant must persuade this Court that General Obligations Law §§ 17-101, 17-105, 17-107 are in conflict with each other, As the lower court and the Appellate Division correctly decided, they are not, rather these provisions of General Obligations Law work together as intended by the legislature and codified in case law.

8. Appellant seeks to sidestep the Appellate Divisdion's reliance on well establish and well settled case law as it pertains to real property actions and mortgages, whether they be foreclosure actions or quiet title actions pursuant to Article 15 of the Real Property Law such as *Yadegar v Deutsche Bank Natl. Trust Co*., 164 AD3d 945, 947; *Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054, 1056; *U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769

9. New York's precedential case law is clear, a conditional trial modification or settlement agreement or payments made in connection with these agreements "contains neither an express acknowledgment of his indebtedness nor an express promise to pay the mortgage debt per se" see *U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769

10. Appellant's attempt to weave a gossamer's thread around their reliance on General Obligations Law § 17-107 as a way to avoid the very character of the trial modification which is conditioned upon a promise to pay only if there is a permanent modification.

11. Appellant seeks to have this Court follow a case decided by the Appellate Division, Third Department in *Wells Fargo Bank, N.A. v Grover* (165 AD3d 1541, 86 N.Y.S.3d 299). However, as clearly explained by the Second Department, that decision in in direct contravention of this Court's rulings as stated by the Second Department in *Nationstar Mtge., LLC v Dorsin*, 180 A.D.3d 1054, 1057, where the Second Department stated:

> "Similarly, contrary to the plaintiff's further contention and the Supreme Court's conclusion, the trial payments made pursuant to the Plan did not constitute an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise could be inferred to pay the remainder. Rather, the payments were made for the purpose of reaching an agreement to modify the terms of the parties' contract (cf. *Petito v Piffath*, 85 NY2d at 9; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521-522), 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 (see *U.S. Bank N.A. v Martin*, 144 AD3d at 893). Just as an express conditional promise or acknowledgment does not serve to reset the statute of limitations, an implied conditional promise also does not have that effect. Although the Appellate Division, Third Department, held to the contrary in *Wells Fargo Bank, N.A. v Grover* (165 AD3d 1541, 86 N.Y.S.3d 299), we disagree and decline to follow that holding. [emphasis added] *Nationstar Mtge., LLC v Dorsin*, 180 A.D.3d 1054, 1057

12. Appellant's request to have this case reviewed by this Court, because of a "split" between the Second and the Third Department is a mischaracterization. As stated herein, the purported "split" is between the Third Department and the Court of Appeals. Appellant's Motion for Leave to Appeal to the Court of Appeals should be rejected because the Court of Appeals has already ruled on this very issue. The Third Department's departure from the precedent established by Court of Appeals is not a basis to have the Court of Appeals review the instant case which is in line with precedent established by the Court of Appeals.

13. In its decision in the instant case, the Second Department cited, *Petito v Piffath*, (85 NY2d 1, 647 N.E.2d 732, 623 N.Y.S.2d 520 [1994], rearg denied, 85 NY2d 858, 648 NE2d 796, 624 NYS2d 376, cert. denied, 516 US 864, 116 S. Ct. 177, 133 L. Ed. 2d 116 [1995]), a precedent-setting case, where this Court held that a settlement agreement in a foreclosure action cannot constitute the borrower's acknowledgment of the debt sufficient to renew the running of the Statute of

Limitations for enforcement of the debt itself. In so holding, this Court relied on the express language of GOL § 17-101, which provides that "[a]n 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 [CPLR]." The Court noted that the settlement agreement contained "neither an express acknowledgment of [the borrower's] indebtedness nor an express promise to pay the mortgage debt per se. Rather, the agreement contained only a promise to pay [plaintiff] a specific sum in exchange for [plaintiff's] agreement to forego prosecution of its foreclosure action . . ." (*Petito v Piffath,* 85 NY2d at 7).

14. Notably, in *Petito*, the Plaintiff / Appellant attempted to reargue, but their application was denied. *Petito*, remains the codified law in New York, it has been cited in a plethora of cases and received nothing but positive treatment. Indeed, *Petito*, has been cited and followed by the Appellate Divisions in the First Department in *U.S. Bank N.A. v Caruana*, 2020 N.Y. App. Div. LEXIS 6755, the Second Department in *U.S. Bank, N.A. v Kess*, 159 A.D.3d 767, 769, the Third Department in *Saini v. Cinelli Enters.*, 289 A.D.2d 770, just to cite a few.

15. New York's Southern District Court has followed the ruling in *Petito* as well. In *Faulkner v. Arista Records LLC,* 602 F. Supp. 2d 470, 479, the court held that "An acknowledgment of an existing debt and the intent to pay the same must,

however, be unconditional. *In re Brill*, 318 B.R. at 54. If any condition must be satisfied prior to payment being made, the creditor must show that the condition has been satisfied before application of the toll embodied in § 17-101."

16. In the case at bar, there is no representation by the Appellant that the HAMP trial modification was not conditional, indeed, for reason's never disclosed in these proceedings, Appellant's on their own, chose not to finalize the HAMP modification, presumably because the "conditions" under which the HAMP trial modification was offered were not met. Regardless of the reason, for Appellant's to now argue that their extraction of payments from a borrower by offering a conditional trial modification that Appellant itself refused to finalize would fly in the face of equity and the law.

17. Finally, Appellant's ignore the fact that this Court has already ruled on this very issue and hope against hope, that they can miraculously persuade this Court to reverse what it has already decided in favor of the Third Departments departure from this Court's ruling in *Petito*. This is a misapprehension of the way that precedent works, a proverbial grasping at straws approach to the law.

18. As the Second Department found in *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984), "While we should accept the decisions of sister departments as persuasive (see, e.g., *Sheridan v Tucker*, 145 App Div 145, 147; 1 Carmody-Wait 2d, NY Prac, § 2:62; cf. *Matter of Ruth H.*, 26 Cal App 3d 77,

86), we are free to reach a contrary result (see, e.g., *Matter of Johnson*, 93 AD2d 1, 16, revd on other grounds 59 NY2d 461; *State v Hayes*, 333 So 2d 51, 53 [Fla App]; *Glasco Elec. Co. v Department of Revenue*, 87 Ill App 3d 1070, affd 86 I11 2d 346). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (*Giblin v Nassau County Med. Center*, 61 NY2d 67, 76). We find the Third Department decisions little more than a "conclusory assertion of result", in conflict with settled principles, and decline to follow them (*People v Hobson*, 39 NY2d 479, 490). *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 665

19. Here, Appellant relies on a decision by the Appellate Division, Third Department in *Wells Fargo Bank, N.A. v Grover* (165 AD3d 1541, 86 N.Y.S.3d 299), where a borrower who entered into a HAMP trial agreement failed to make the third (3rd) and final trial payment. In *Grover,* the Third Department holding failed to follow the precedent set by the Court of Appeals in *Petito*. As such, *Grover,* is in conflict with settled principles of law.

20. As the Second Department so aptly stated in *Mountain View*, the "Third Department decision… [is]… in conflict with settled principles…" as such, this Court is free, indeed obligated, to observe the doctrine of s*tare decisis* in following the Court of Appeals in *Petito*.

21. Further, this case is inapposite to the fact pattern in *Grover*. Here, it is undisputed that Defendant Jeanty, made seven (7) trial payments while waiting on a

final modification which the Appellant itself refused to offer. In *Grover*, the Defendant Borrower failed to make the third and final trial payment.

22. Pursuant to the doctrine of *stare decisis*, this Court should refuse to reverse its well established precedent setting principle as laid out in *Petito*, because as this Court has explained the principle of *stare decisis*, "the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*People v Peque*, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013] [internal quotation marks and citation omitted], cert denied sub nom. *Thomas v New York*, 574 US, 135 S Ct 90, 190 L Ed 2d 75 [2014]). *People v Garvin*, 30 N.Y.3d 174, 185

23. Here, Appellant's arguments seek to overturn precedent already established by this Court simply because the Third Department seems to have turned a blind eye to the doctrine of *stare decisis*, and has ignored this Court's precedent.

24. This Court is not bound by decisions made by the Third Department, especially when those decisions are inapposite to precedent set by this Court.

25. In light of the foregoing Appellants motion should be denied in its entirety.

WHEREFORE, I respectfully pray that the Court will deny Appellants motion in its entirety, and that the Court direct such other and further relief as may seem just and proper.

Dated: June 16, 2021

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STATE OF NEW YORK
COURT OF APPEALS

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.

A.D. Docket No. 2019-00544

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

ATTORNEY AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

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 **June 16, 2021**, I served a true and complete copy of the annexed **MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS 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:

Adam M. Swanson, Esq.
MCCARTER & ENGLISH, LLP
825 Eighth Ave., 31st Floor
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Counsel for Plaintiff-Appellant Federal
National Mortgage Association

DATED: June 16, 2021

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Architectural Metal Sys. v. Consolidated Sys.

United States Court of Appeals for the Seventh Circuit

April 19, 1995, Argued ; July 5, 1995, Decided

No. 94-3898

Reporter
58 F.3d 1227 *; 1995 U.S. App. LEXIS 16422 **; 26 U.C.C. Rep. Serv. 2d (Callaghan) 1047

ARCHITECTURAL METAL SYSTEMS, INCORPORATED, Plaintiff-Appellant, v. CONSOLIDATED SYSTEMS, INCORPORATED, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 1054. George M. Marovich, Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

bid, quotations, terms, discrepancies, vague, purchase order, new bid, recipient, revised, promissory estoppel, summary judgment, headquarters, binding, offers

Case Summary

Procedural Posture
Plaintiff offeree sought review of the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which granted summary judgment in favor of defendant offeror in a diversity action for breach of contract. Plaintiff alleged defendant was obligated to honor an accepted bid that defendant claimed was made in error, on both conventional breach of contract and promissory estoppel theories.

Overview
Plaintiff offeree solicited bids for a subcontract. Plaintiff accepted defendant offeror's bid, which had a proviso that an order had to be approved by its headquarters. The parties negotiated an agreement. Defendant then raised its price by 73 percent, claiming that it had made a mistake in calculating the price. Plaintiff filed an action for breach of contract on traditional and promissory estoppel theories under the Uniform Commercial Code (U.C.C.). The district court granted summary judgment in favor of defendant on the basis that defendant's bids were not offers because they lacked detail, were not approved by the headquarters, and they were not accepted, or that the contract was barred by the statute of frauds. On appeal, the court reversed the grant of summary judgment in favor of defendant, holding that whether plaintiff should have known the bid was mistaken was a triable issue of fact. The court found that the parties thought they had resolved the potentially deal-breaking disagreements, that discrepancies between the bid and acceptance did not prevent the formation of the contract under the U.C.C., and that the contract was not barred by the statute of frauds.

Outcome
The court reversed and remanded the summary judgment dismissing plaintiff offeree's suit against defendant offeror, holding that there was a substantial issue of fact for trial, whether the discrepancy between two bids should have been enough to put the offeree on notice of mistake.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > Contract Formation > Offers > General Overview

HN1 **Consideration, Promissory Estoppel**

The test for an offer is whether it induces a reasonable belief in the recipient that he can, by accepting, bind the sender.

Business & Corporate Compliance > ... > Readjustments > Formation > Additional & Different Terms

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

HN2 **Formation, Additional & Different Terms**

Under the Uniform Commercial Code, the fact that the acceptance contains different terms from the offer does not convert the acceptance into an offer or otherwise make it ineffective as an acceptance. *U.C.C. § 2-207*.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

HN3 **Sales (Article 2), Form, Formation & Readjustment**

A person can prevent his submission from being treated as an offer by suitable language conditioning the formation of a contract on some further step, *U.C.C. § 2-207(2)(a)*.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > Statute of Frauds > General Overview

HN4 **Consideration, Promissory Estoppel**

The statute of frauds is applicable to a promise claimed to be enforceable by virtue of the doctrine of promissory estoppel.

Counsel: For ARCHITECTURAL METAL SYSTEMS, INCORPORATED, an Illinois corporation, Plaintiff - Appellant: Jacqueline A. Criswell, James K. Borcia, TRESSLER, SODERSTROM, MALONEY & PRIESS, Chicago, IL.

For CONSOLIDATED SYSTEMS, INCORPORATED, a South Carolina corporation, Defendant - Appellee: Michael G. Bruton, Paul L. Price, PRETZEL & STOUFFER, Chicago, IL.

Judges: Before POSNER, Chief Judge, FLAUM, Circuit Judge, and SHABAZ, District Judge. *

Opinion by: POSNER

Opinion

[*1228] POSNER, *Chief Judge*. The district judge granted summary judgment for the defendant in a suit for breach of contract (a diversity suit, governed by Illinois law), and we must decide whether he did so prematurely. The facts, construed, in light of the procedural setting, as favorably to the plaintiff as the record permits, are (slightly simplified) as follows:

On January 20, 1992, Mellon Stuart, the general contractor on a project to rehabilitate a train station, solicited bids for a subcontract to provide the metal decking required by the project. AMS, the plaintiff in this suit, was interested in the subcontract. AMS is a middleman, not a fabricator, so it asked for price quotations from fabricators, including CSI, the defendant. CSI's Memphis office submitted a price quotation which stated however that any actual order must be approved by CSI's headquarters **[**2]** in South Carolina. Armed with CSI's price quotation (which CSI sent to Mellon Stuart as well as to AMS), AMS on February 12 submitted a $ 1.9 million bid to Mellon Stuart. Mellon Stuart accepted AMS's bid two days later, on February 14. But shortly afterward, Mellon Stuart altered its specifications (as it had reserved the right to do) with regard to the painting of the metal decking, and invited AMS to submit a revised bid. AMS sent the altered specs to CSI and to another fabricator, Bowman, for revised price quotations. Both Bowman and, on March 24, CSI submitted revised price quotations to AMS. CSI's new price was $ 769,033, less than half of Bowman's price. AMS submitted a revised bid to Mellon Stuart on April 6 after informing CSI that it would be submitting CSI's price quotation to Mellon Stuart and that it wanted to be sure that the quotation was correct (and it was so assured), and after extracting CSI's agreement to post a performance bond if CSI got the order. CSI's price quotation did not contain the clause in the previous one requiring approval by headquarters.

Mellon Stuart thought AMS's new price too high. Negotiations ensued, and AMS **[*1229]** lowered the price slightly, to $ **[**3]** 1,884,195. On April 14 Mellon Stuart formally accepted AMS's new bid. AMS informed CSI of this, and there was some further discussion of specifications, leading CSI to submit a new bid to AMS on April 24 but with prices identical to those in the March 24 bid for items included in both bids. The clause requiring approval by headquarters was again omitted. The parties then discussed escalation terms and, according to notes taken by AMS's negotiator, reached agreement on them. On April 28, CSI's salesman in Memphis (Allen), with whom AMS had been dealing, faxed AMS that "we look forward to working with you on the transit project." On the same day, AMS prepared and mailed a purchase order to CSI, but at the same time it told Allen that the order was a mere formality; they had a deal.

CSI, however, responded to AMS's purchase order on May 1 with a revised bid in which it raised its price by 73 percent, claiming that it had made a mistake in calculating the price in its previous bids. AMS rejected the bid, insisting that CSI honor the deal previously struck. When CSI refused, AMS turned to another supplier--to whom it had to pay $ 260,967 more than the price in CSI's bid of April 24. This **[**4]** suit, to recover that addition, followed. AMS argues both conventional breach of contract and promissory estoppel. The parties agree that the issues are governed by the Uniform Commercial Code as interpreted by the courts of Illinois.

Regarding the contract claim as distinct from the claim of promissory estoppel, the district court held that CSI's price quotations were not offers and anyway were not accepted. They were not offers first because they lacked detail and second because they were conditioned on approval by CSI's headquarters. The record does not support either conclusion. ***HN1***[↑] The test for an offer is whether it induces a reasonable belief in the recipient that he can, by accepting, bind the sender. *McCarty v. Verson Allsteel Press Co., 89 Ill. App. 3d 498, 411 N.E.2d 936, 943, 44 Ill. Dec. 570 (Ill. App. 1980)*; *Restatement (Second) of Contracts § 24* (1981). A lack of essential detail would negate such a belief, since the sender could not reasonably be expected to empower the recipient to bind him to a contract of unknown terms. "I would like to buy your hamster" is not intended to empower the recipient of that solicitation to reply: "My price is $ 1 million. We have a contract." Granted, the degree to which the **[**5]** reasonable recipient will think a vague offer intended to empower him to create by acceptance a legally enforceable

* Hon. John C. Shabaz of the Western District of Wisconsin.

contract depends on the courts' attitudes toward vague offers. The more willing the courts are to interpolate missing terms, the more difficult it is for the recipient of a vague offer to interpret the intentions behind the offer. In Michigan during the heyday of the Toussaint decision (*Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 885 (Mich. 1980))* from which the Supreme Court of Michigan has recently backed off, *Rowe v. Montgomery Ward & Co., 437 Mich. 627, 473 N.W.2d 268, 273-75 (Mich. 1991)*, no promise was too vague to support an enforceable contract (at least of employment), so no inference that a vague offer was not really an offer could be drawn from its vagueness. Illinois has never gone that far; contracts in Illinois really can fail for indefiniteness, see, e.g., *Academy Chicago Publishers v. Cheever, 144 Ill. 2d 24, 578 N.E.2d 981, 161 Ill. Dec. 335 (Ill. 1991)*, and, since this is so, the recipient of a hopelessly vague offer should know that it was not intended to be an offer that could be made legally enforceable by being accepted.

CSI's April 24 price quotation was not hopelessly vague. It specified **[**6]** the items to be sold, the quantity and price of each item, and the delivery terms. These are the essential terms of a contract for the sale of goods. As long as the remaining terms, covering warranty, excuses, remedies, and so forth can be pieced out from trade usage, an unexplored issue in this case, the contract will not fail for indefiniteness, *Wait v. First Midwest Bank/Danville, 142 Ill. App. 3d 703, 491 N.E.2d 795, 801, 96 Ill. Dec. 516 (Ill. App. 1986)*, or--what amounts to the same thing--the "offer" be deemed the mere solicitation of an offer, as in *McCarty v. Verson Allsteel Press Co., supra, 411 N.E.2d at 943*. The parties had ironed out their differences over escalation terms and the bond, and having **[*1230]** done so thought they had a deal--a contract. That is, they thought they had resolved the only potential deal-busting disagreements. At any rate there was enough evidence of this to preclude summary judgment for the defendant.

The Uniform Commercial Code, its draftsmen mindful of the haste and sloppiness, and disregard for lawyerly niceties, that characterize commercial dealing, tolerates a good deal of incompleteness and even contradiction in offer and acceptance. This is clearest in its rejection of the common law's **[**7]** "mirror image" rule. ***HN2***[↑] Under the UCC, the fact that the acceptance contains different terms from the offer does not convert the acceptance into an offer or otherwise make it ineffective as an acceptance. *UCC § 2-207*; *Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994)*. The parties have a contract despite the discrepancies. The course of dealing here is typical of the commercial practices that under the UCC result in the formation of enforceable contracts.

HN3[↑] A person can prevent his submission from being treated as an offer by suitable language conditioning the formation of a contract on some further step, *UCC § 2-207(2)(a)*; *La Salle National Bank v. Vega, 167 Ill. App. 3d 154, 520 N.E.2d 1129, 1133, 117 Ill. Dec. 778 (Ill. App. 1988)*; *Northrop Corp. v. Litronic Industries, supra, 29 F.3d at 1179*, such as approval by corporate headquarters. The district judge thought that the inclusion of such a clause in previous price quotations by CLS put AMS on notice that such approval would be required even for price quotations not containing the clause. That is a *non sequitur*. For all AMS knew, the clause had been left out because the Memphis office had obtained the requisite approval from the home office in South Carolina. **[**8]** What is more, in an affidavit submitted by AMS to which the district judge unaccountably failed to refer, a former officer of CLS stated that home-office approval was not in fact required. We suppose it could be argued that even if the clause was not intended seriously, unless AMS knew this it would not think the price quotation an offer and therefore would not intend to accept it and so create a binding contract. Whether this tortuous reasoning has any basis in law is irrelevant, however, because AMS treated the price quotations as offers and because the last two quotations, those of March 24 and April 24, omitted the clause. CSI argues that the omission was inadvertent and known by AMS to be such, but these obviously are issues for trial rather than for summary judgment.

Equally premature is the judge's conclusion that if the price quotations were offers, AMS did not accept them because its acceptance, which the judge deemed to be the purchase order of April 28, contained discrepant terms. We have already pointed out that a discrepancy between offer and acceptance does not prevent the formation of a contract. CSI's brief contains an imposing list of discrepancies, which it describes **[**9]** as "radical," but admits that there is not a shred of evidence that they were potential deal-busters. An example of one of these "radical" discrepancies is that CSI's March 24 and April 24 price quotations specify "G-90" steel while the purchase order specifies "G-60" steel. We have no idea what this difference signifies. For all we know it is (to persons knowledgeable in the trade) an obvious typographical error, inverting "9" and thus turning it into "6." The Uniform Commercial Code, moreover, does not make even "radical" differences between offer and acceptance a ground for concluding that there is no contract. If there is an offer and an acceptance, then, however, discrepant (within reason) their terms are, there is a contract, and the question is merely *what* the terms are. *Northrop Corp. v. Litronic Industries, supra, 29 F.3d at 1175, 1179*. (The possibilities are the terms in the offer, the terms in the acceptance, or "default" terms interpolated

by the court.) Nor is it even clear that the purchase order here, with its discrepant terms, *was* the acceptance. The acceptance may have been oral.

Which brings us to the question whether the contract, if there was one, was made unenforceable **[**10]** by the statute of frauds. We think not. Between the price quotations and the purchase order (whether or not it was the formal acceptance of CSI's offer), there was enough indication of the terms of the parties' contract to satisfy the UCC's not **[*1231]** very demanding statute of frauds. *UCC § 2-201*; *Monetti, S.P.A. v. Anchor Hocking Corp., 931 F.2d 1178, 1182-83 (7th Cir. 1991)*.

Since the case must go back to the district court for a trial, we should consider whether AMS's alternative theory of liability, that based on promissory estoppel, is also viable. The theory is simply that AMS, in deciding what price to bid for the contract with Mellon Stuart, reasonably relied, to its detriment, on CSI's expressed willingness to sell metal decking at the low price in the March 24 and April 24 price quotations. We adhere to the view tentatively adopted in *Goldstick v. ICM Realty, 788 F.2d 456, 464-66 (7th Cir. 1986)*, and since confirmed (as a prediction of Illinois law) by two decisions of the Illinois Appellate Court, *First National Bank v. McBride, 267 Ill. App. 3d 367, 642 N.E.2d 138, 142, 204 Ill. Dec. 676 (Ill. App. 1994)*; *Dickens v. Quincy College Corp., 245 Ill. App. 3d 1055, 615 N.E.2d 381, 386, 185 Ill. Dec. 822 (Ill. App. 1993)*, that ***HN4***[] the statute of frauds is applicable **[**11]** to a promise claimed to be enforceable by virtue of the doctrine of promissory estoppel. That is not a problem here; the alleged promise is the price quotations, which are written, not oral.

The judge, while intimating that the statute of frauds might bar AMS's claim of promissory estoppel, rejected the claim on different grounds. The first was that AMS had not relied on CSI's price quotations, since it had entered into a binding contract with Mellon Stuart on February 14, before it had received final bids from CSI. This ignores the fact that Mellon Stuart reopened the bidding after altering its specifications, which required AMS to submit a new bid. AMS submitted its new bid on April 6, after and in reliance on CSI's price quotations of March 24 (which essentially were repeated on April 24), and became bound on April 14, when Mellon Stuart accepted the new bid. So far as we can determine from the record, AMS was under no contractual obligation to Mellon Stuart to submit a revised bid, let alone at a particular price. Had it known how much CSI would charge, it might have submitted a higher bid, or no bid; either way, it would not have been in breach of the contract previously made **[**12]** with Mellon Stuart on the basis of AMS's February bid. The contract based on that bid, the contract that took effect on February 14 when Mellon Stuart accepted AMS's bid of two days earlier, became defunct when Mellon Stuart altered the specs and invited a new bid.

Second, the judge thought that AMS's reliance on CSI's price quotations could not be reasonable, given the disparity between CSI's price and Bowman's. The judge ruled that AMS should have known, or at least suspected, that CSI's price had been computed erroneously. At the argument of the appeal, CSI's lawyer rather recklessly argued that whenever one bid is at least 50 percent lower than the next lowest, acceptance of the low bid does not create a binding contract; the buyer is on notice of the existence of a mistake. There is no such rule of law. *Community Consolidated School District No. 169 v. Meneley Construction Co., 86 Ill. App. 3d 1101, 409 N.E.2d 66, 68, 42 Ill. Dec. 571 (Ill. App. 1980)*; *Chicago City Bank & Trust Co. v. Wilson, 86 Ill. App. 3d 452, 407 N.E.2d 964, 968, 41 Ill. Dec. 466 (Ill. App. 1980)*. It would lead to absurdities. If a person hailed a cab, asked what the price would be to his destination, was told $ 10, said it was too high, hailed another cab, was quoted by that cabbie **[**13]** a price of $ 5, and agreed, the second cabbie would be able to demand a higher price, on the ground that the passenger should have known by reason of the discrepancy in prices that the $ 5 price had been computed erroneously.

There are circumstances in which a mistake can be inferred from the price in the offer. See, e.g., *Vincent DiVito, Inc. v. Vollmar Clay Products Co., 179 Ill. App. 3d 325, 534 N.E.2d 575, 577, 128 Ill. Dec. 393 (Ill. App. 1989)*; *S.N. Nielsen Co. v. National Heat & Power Co., 32 Ill. App. 3d 941, 337 N.E.2d 387, 389-90 (Ill. App. 1975)*; 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 9.4 (1990). Suppose that CSI's bid had been, not $ 769,033, but $ 7,690.33. AMS could not cry "Gotcha!" It would know that a mistake had been made. Perhaps it should have drawn that inference here. But that would depend on the circumstances. Bowman's bid could have been mistaken on the high side. There is no evidence **[*1232]** of that but there is evidence that there were special reasons why Bowman's price was much higher than CSI's that had nothing to do with mistake by anyone. The judge's comment on that evidence was, "We are not persuaded that these factors justify reasonable reliance." This is not the language of summary judgment. The weighing of **[**14]** evidence is the task for trial. The function of summary judgment is to determine whether there are contestable issues. Whether a 56 percent discrepancy between two bids to supply metal decking for the rehabilitation of a train station should make a bulb light up in the brain of the person to whom the bids have been submitted remains profoundly uncertain on this record. We note that CSI does not as one of its defenses to the

breach of contract claim seek reformation of the contract on the ground of mistake. We express no view on whether that course remains open to it in the further proceedings that must be conducted in the district court.

REVERSED AND REMANDED.

Neutral
As of: June 15, 2021 10:31 PM Z

Bank of Benton v. Cogdill

Appellate Court of Illinois, Fifth District

September 26, 1983, Filed

No. 82-694

Reporter
118 Ill. App. 3d 280 *; 454 N.E.2d 1120 **; 1983 Ill. App. LEXIS 2332 ***; 73 Ill. Dec. 871 ****

BANK OF BENTON, Plaintiff-Appellant, v. DANNY M. COGDILL et al., Defendants-Appellees

Prior History: [*1]** Appeal from the Circuit Court of Williamson County; the Hon. Snyder Howell, Judge, presiding.

Disposition: Reversed and remanded.

Core Terms

deed, deficiency judgment, foreclosure, satisfaction of the debt, attorney's fees, mortgage, mortgaged property, real estate, conversation, defendants', paperwork, appraisal, telephone, tendered, offeree

Case Summary

Procedural Posture
Plaintiff bank sought review of a judgment from the Circuit Court of Williamson County (Illinois) that denied the bank a deficiency judgment against defendant mortgagors after the trial court granted the bank a partial summary judgment and ordered the mortgagors' property sold, which was not sold for an amount sufficient to pay the debt owed to the bank that was secured to the property.

Overview
The bank asserted that the trial court's judgment, which the trial court based upon an alleged agreement between the bank and the mortgagors, was contrary to the law and the evidence and that the bank was entitled to a deficiency judgment and attorney fees. The mortgagors claimed that they had proven an agreement that the bank would take a deed, which would have paid their debt to the bank. The court determined from the evidence that the bank, through one of its officers, had only suggested the acceptance of a deed as an alternative to a foreclosure, but the mortgagors were subsequently informed that the bank could not accept a deed as payment of the debt. The court held that the mortgagors had not received an offer from the bank, which they accepted, and consequently, as a matter of law, there was no such contract with the bank. The court further held that the bank was entitled to a deficiency judgment and attorney fees under the mortgage agreement and the trial court lacked the equitable authority to deny the bank that recovery.

Outcome
The court reversed the trial court's judgment and remanded to the trial court for further proceedings, including a judgment for reasonable attorney fees incurred in the foreclosure proceedings in an amount to be determined by the trial court.

LexisNexis® Headnotes

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Contract Interpretation > General Overview

HN1 **Jury Trials, Province of Court & Jury**

Where there is no dispute as to facts essential to a purported contract, the question of its existence is solely a matter of law for a determination by a reviewing court.

Civil Procedure > Trials > Bench Trials

Contracts Law > Contract Formation > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN2 **Trials, Bench Trials**

When a trial court makes no finding with regard to a contract that is alleged by a party and gives no reason for its decision, an appellate court must consider the facts asserted by the party alleging the contract in light of basic principles of contract law to determine the existence of the purported contract.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

Contracts Law > Contract Formation > Offers > General Overview

Contracts Law > Contract Formation > General Overview

HN3 **Contract Formation, Acceptance**

An offer sufficient to form the basis of a contract is an act that creates a power of acceptance in the offeree. After an offer is made a voluntary expression of assent by the offeree is all that is necessary to create a contract. An offer must be an expression of will or intention. It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him. Invitations to deal or acts of mere preliminary negotiation are excluded. So long as it is reasonably apparent that some further act of the offeror is necessary, the offeree has no power to create contractual relations by an act of his own, and there is as yet no operative offer.

Contracts Law > Contract Formation > Offers > General Overview

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN4 **Contract Formation, Offers**

A statement that is in the nature of preliminary negotiations regarding steps that will be taken by an initiating party that contains two possible alternative solutions to a controversy does not constitute an offer that can be accepted by an opposing party with no further action by the initiating party.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

Real Property Law > Property Valuations

Contracts Law > Contract Formation > General Overview

HN5[] **Contract Formation, Acceptance**

In order to create an enforceable contract the acceptance by an offeree must be unequivocal.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Real Property Law > Financing > Foreclosures > Deficiency Judgments

Real Property Law > Financing > Foreclosures > General Overview

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview

HN6[] **Preliminary Considerations, Equity**

In the absence of a contract waiving its right to a deficiency judgment, a mortgagee is entitled to a judgment for the deficiency remaining after a foreclosure and sale of the mortgaged property. The right to secure such a deficiency judgment in any foreclosure proceeding is clear, provided the mortgagee receives only one full satisfaction. Where a proper showing is made as to the pleadings and the evidence, the entry of such a decree is mandatory and a trial court lacks the discretion to deny the mortgagee relief on equitable grounds.

Counsel: Richard O. Hart, of Hart & Hart, P.C., of Benton, for appellant.

J.C. Mitchell, of Mitchell & Armstrong, Ltd., of Marion, for appellees.

Judges: JUSTICE JONES delivered the opinion of the court. KASSERMAN and KARNS, JJ., concur.

Opinion by: JONES

Opinion

[*281] [1121] [****872]** The plaintiff, Bank of Benton, Benton, Illinois, appeals from the trial court's judgment denying it a deficiency judgment and attorney fees following foreclosure of a mortgage and sale of the property subject to the mortgage. The bank asserts on appeal that this judgment **[*282]** was contrary to the law and the evidence and that the bank was entitled to a deficiency judgment and attorney fees where the amount realized from the judicial sale of the mortgaged property was less than the amount of the defendants' indebtedness. The defendants-mortgagors contend, however, that the court's judgment can be sustained on the basis of their affirmative defense in the foreclosure action that the bank had waived its right to a deficiency judgment by agreeing to take a deed to the mortgaged **[***2]** property in lieu of foreclosure. We find as a matter of law that no such agreement existed, and we accordingly reverse the judgment of the trial court.

[1122] [****873]** On July 31, 1980, the plaintiff bank filed a two-count complaint for foreclosure of a first and second mortgage on real estate owned by the defendants, Danny and Carla Cogdill. In their answer to this complaint the defendants asserted that the plaintiff was not entitled to a deficiency judgment against them because, in March and April of 1980, the defendants had "tendered and offered to convey" their interest in the real estate to the plaintiff and were refused. At that time, the defendants stated, the real estate was of a fair market value sufficient to pay the amount of indebtedness due the plaintiff under its notes and mortgages. The defendants further alleged that the plaintiff was not entitled to attorney fees in the foreclosure action because this action was unnecessary and was due to the plaintiff's failure to accept the real estate in satisfaction of the debt.

Upon stipulation of the parties the court entered a partial summary judgment of foreclosure in favor of the plaintiff, reserving for later **[***3]** hearing the issues of the plaintiff's entitlement to a deficiency judgment and attorney fees. The total amount of indebtedness was stated as $ 81,673.05, plus attorney fees if found to be includable at a later hearing. The court conducted a sale of the real estate, and the property was sold to the plaintiff as high bidder for $ 63,000. The court then filed a report of sale and distribution in which it found a deficiency in the amount of $ 19,416.83.

Following the sale the plaintiff filed a motion for summary judgment on the remaining issues, asking the court to determine that it was entitled to a judgment for the deficiency plus attorney fees. The court made a record sheet entry order denying the motion, in which it stated:

> "Consideration has been given to the arguments and facts as thus far presented. There is a shortage of case law and statute law as to the issues involved. The plaintiff contends that it is entitled to a deficiency judgment by reason of the judicial sale of the property for a lesser amount than was sufficient to liquidate **[*283]** the debt plus costs and attorney's fees. The defendants contend that the plaintiff is not entitled to said benefits by **[***4]** reason of the fact that, at least three (3) months before suit to foreclose was filed, the defendants tendered and offered to convey their interests in the realty to plaintiff who refused the tender and offer. Further, the defendants claim and assert that at the time of the tender, the fair market value of the property exceeded the total of the amounts due by way of principal and interest.
>
> The plaintiff's position finds support in the pleadings and affidavits and other matters in the file. There seems no law [*sic*] supporting defendants' position. This case is concerned with both legal and equitable principles. The rights of the plaintiff must be considered in light of equity and good conscience. If the defendants were able to prove their position, it would shock one's conscience to permit the plaintiff to stiffen its position and procrastinate in the settlement and disposition of the business transaction between plaintiff and defendants, and thereby cause a deficiency of $ 19,416.83, and expect the defendants to make plaintiff whole. The defendants contend, in substance, that they tried to make the plaintiff '*whole*' yet plaintiff refused. The judgment of this court **[***5]** leaves the plaintiff to suffer whatever ills result from a situation that plaintiff could have avoided. The defendants yet must establish their position by proof. Motion for Summary Judgment denied."

A hearing was held on July 28, 1982, on the issues of the plaintiff's right to a deficiency judgment and attorney fees. At that hearing, defendant Danny Cogdill testified that he became unemployed in December 1979 and was unable to make his mortgage payments. In April 1980 he received a number of telephone calls from David Bauer, vice-president of the Bank of Benton, regarding when he would be able to make some payment on the overdue balance. Sometime shortly after April 25, 1980, defendant Cogdill received a letter from Bauer, which stated:

> **[**1123]** **[****874]** "If we do not have some assurance of payment on the loan, it may be necessary for us to start foreclosure action or have you deed the property to the Bank of Benton in satisfaction of the debt."

Mr. Cogdill testified further:

> "A. On April 29, I contacted Mr. Bauer by telephone and informed him that we would accept the Bank's offer to deed the property over to the Bank of Benton in satisfaction of the debt **[***6]** **[*284]** against me.
> Q. When you refer to the Bank's offer, are you referring to what's set forth or part of what's set forth in Defendants' Exhibit 2, the letter of April 25th?
> A. Yes.
> Q. What, if anything, did Mr. Bauer say to you at that time?
> A. He said something to the effect that he would start the paper work pertaining to the conveyance of the deed in satisfaction of the debt and that he would be in touch with me shortly.
> Q. What is the next thing that you did or heard?
>
> A. The next thing I heard was I received a telephone conversation [*sic*] from Mr. Bauer approximately one week later stating that other Bank of Benton officials had declined his previous offer to accept the conveyance of the deed in satisfaction of the debt against it.
> Q. What did he say to you about whether or not they were going to go ahead and go through with it?
> A. He just said that he could not go through with it at that point.

Q. What, if anything, did you tell him?
A. I told him that's all that I knew to do because I was still unemployed and I had no money to make the payment and that they would just have to do whatever they saw fit.

Q. What, after that time, took place regarding the **[***7]** matter of the delinqency?
A. I received another telephone call, and I think a letter confirmed this, and they wanted to know if I had any other assets that I could pledge in addition to the property itself for satisfaction of the debt.
Q. What, if anything, did you advise them?
A. I advised them that the only thing I had of any value was an interest in a land trust pertaining to a new office building in Benton, Illinois, and that I would be willing to sign over this land trust interest which we figured had a value of $ 6,000.00 to $ 8,000.00 net value in it.
* * *
Q. What happened after that, if anything?
A. He said he would take it back to the Board and see what they had to say abut that.
* * *

A. The next conversation was that the Bank of Benton, **[*285]** through Mr. Bauer -- that they had decided they were not interested in acquiring any more property and that they rejected the offer.
Q. They rejected the original proposal?
A. The original proposal plus the conveyance of the land trust interest.
Q. Now, is that when foreclosure followed?
A. Yes."

David Bauer, called by the defendants as an adverse witness, testified that he recalled having conversations with Mr. **[***8]** Cogdill in April 1980 regarding the matter of his delinquencies. When questioned about a specific conversation occurring between April 25, 1980, and May 9, 1980, he stated that, while he could recall nothing else about the conversation, "the substance of the conversation was that we wanted to be paid."

Later, on direct examination by the plaintiff, Mr. Bauer testified that "at some point" after the letter of April 25, 1980, was sent, Danny Cogdill came into the bank to discuss the situation with him. The testimony continued:

[1124]** **[****875]** "Q. Did you ever tell him [Danny Cogdill] that the Bank would accept the property in satisfaction of the debt?
A. No, I did not.
Q. Did you ever tell him that in writing?
A. No, I did not.
Q. Did you ever tell him that orally?
A. No, I did not.
Q. Did Mr. Cogdill ever offer to make a deed to you in satisfaction of the debt?
A. Yes, he did.
Q. Do you recall when he made that offer?
A. It was at some time prior to April 25.
Q. Do you know approximately how long prior --
A. Within a week prior to April 25.
Q. In that conversation did he offer to deed the property to the Bank of Benton?

A. Yes, we discussed this possibility **[***9]** of him deeding the property to the Bank.
* * *
Q. Did you ever tell Mr. Cogdill that you would accept the property in satisfaction of the debt?
A. No.
* * *

[*286] Q. What did you tell Mr. Cogdill about taking the property in satisfaction of the debt, if anything?

A. Mr. Cogdill and I discussed taking the property in satisfaction of the debt. I said that this might be possible. Certain procedures we would have to go through [*sic*].
Q. What were those procedures?
A. Number one would be a new appraisal.
Q. What else?
A. Number two would be, if we found everything to be all right would be title work to be certain that there were no other liens against the property other than the two liens to the Bank of Benton.
Q. What would be the purpose of the appraisal?
A. To determine if the value of the property was sufficient to pay off the two loans.
Q. And did you have that appraisal made?
A. We did.
Q. And after that appraisal was made did the Bank make a decision about what to do in this problem area?
A. We made a decision not to accept tender of the property in satisfaction of the debt.
* * *
Q. Was that decision communicated to Mr. Cogdill?

A. Yes, it was. **[***10]**
Q. How was it communicated to him?
A. I discussed it with him over the telephone.
* * *
Q. That would have been after the letter of April 25, I take it?
A. Yes."

During the course of the hearing, the court allowed the defendants to amend their answer to allege that the plaintiff was not entitled to a deficiency judgment "because on April 25, 1980, plaintiff offered to take a deed from defendants in lieu of foreclosure. Defendants accepted said offer and notified plaintiff, who stated that the paper work would then be commenced. Thereafter, plaintiff refused to perform said agreement and continues to do so to the date of this agreement [*sic*]." The defendants repeated their assertion "that at the time they offered to deed said real estate to plaintiff, the fair cash market value was sufficient to pay the amount of principal and interest [then due]." The plaintiff filed a reply in which it denied the existence of the alleged agreement and further raised the issue of **[*287]** the statute of frauds (Ill. Rev. Stat. 1981, ch. 59, par. 2) with reference to any such agreement.

The trial court ruled in favor of the defendants and, on October 21, 1982, made the following **[***11]** record sheet entry:

"This court after hearing the evidence and arguments of counsel * * * finds **[**1125]** **[****876]** that the facts and the principles of law and equity are compelling to the extent that a deficiency judgment against the defendants is denied."

A written judgment was subsequently filed denying the plaintiff a deficiency judgment and attorney fees.

On appeal from this judgment the plaintiff contends that there was no basis in law or fact for the court's ruling that the plaintiff was not entitled to a deficiency judgment. The plaintiff asserts initially that the court was without authority to disallow the deficiency judgment on general equity principles. (See *Metz v. Dionne (1928), 250 Ill. App. 369*; *cf.* *Eiger v. Hunt (1935), 282 Ill. App. 399* (court reversed trial court's denial of deficiency judgment based on "the equities of the case").) In addition, the plaintiff notes, there was no showing in the instant case that it had waived its right to a deficiency judgment by means of the statutory procedure for such waiver (Ill. Rev. Stat. 1981, ch. 77, par. 18(c), now ch. 110, par. 12 -- 126).

The defendants take no issue with these assertions by the **[***12]** plaintiff but contend, rather, that the trial court's ruling can be sustained on the basis of the alleged agreement by the bank to take a deed to the mortgaged property in lieu of foreclosure. They assert that although there was no statutory waiver of the deficiency by the bank, the bank effectively waived its right to a deficiency judgment by invoking the common law means of acquiring a mortgagor's interest in real estate by way of deed. (See 27 Ill. L. & Prac. *Mortgages* sec. 241 (1956).) The defendants contend, therefore, that since the court could have found from the evidence that such a contract existed, the court's judgment denying a deficiency judgment and attorney fees should be affirmed.

As evidence of the alleged contract, the defendants cite the letter sent to the defendants on April 25, 1980, in which the bank's vice-president, David Bauer, stated: "If we do not have some assurance of payment on the loan, it may be necessary for us to start foreclosure action or have you deed the property to the Bank of Benton in satisfaction of the debt." The defendants contend that this statement constituted an offer by the plaintiff which they accepted by tendering a deed to the **[***13]** bank. Alternatively, the defendants contend that even if this statement could not be construed as an offer to take a deed to **[*288]** the mortgaged property in lieu of foreclosure, the bank subsequently agreed to accept the deed tendered by defendant Cogdill when Mr. Bauer told Cogdill he would start the paper work concerning such a transaction.

The plaintiff does not dispute the facts relied upon by the defendants but contends that, even assuming such facts, the evidence at trial failed to establish the existence of a contract. ***HN1***[] Where there is no dispute as to facts essential to a purported contract, the question of its existence is solely a matter of law for determination by the court. (12 Ill. L. & Prac. *Contracts* sec. 46 (1955); *Anderson v. City of Northlake (N.D. Ill. 1980), 500 F. Supp. 863*; see 3 Corbin on Contracts sec. 595 (1960).) ***HN2***[] The trial court here made no finding with regard to the contract alleged by the defendants and, indeed, gave no reason for its decision denying the plaintiff a deficiency judgment. This court, then, must consider the facts asserted by the defendants in light of basic principles of contract law to determine the existence of the purported **[***14]** contract.

HN3[] An offer sufficient to form the basis of a contract has been defined as an act that creates a power of acceptance in the offeree. (1 Corbin on Contracts sec. 11 (1963).) Professor Corbin states that, after an offer is made, "a voluntary expression of assent by the offeree is all that is necessary to create what we call contract." (1 Corbin on Contracts sec. 11, at 24 (1963).) He continues:

> "[An offer] must be an expression of will or intention. It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him. * * * It is on this ground that we must eclude invitations to deal or acts of mere preliminary negotiation * * *. * * * *So long as it is reasonably apparent that some further act of* ***[**1126]*** ***[****877]*** *the offeror is necessary*, the offeree has no power to create contractual relations by an act of his own, and there is as yet no operative offer." (Emphasis added.) 1 Corbin on Contracts sec. 11, at 25 (1963).

While, in the instant case, the defendants contend that the bank offered to accept a deed in lieu of foreclosure by its statement of August 25, 1980, we believe this ***HN4***[] statement was in the **[***15]** nature of preliminary negotiations regarding steps that would have to be taken if the defendants continued to default on their loan payments. The statement contained two possible alternative solutions to the parties' problem and thus did not constitute an offer that could be accepted by the defendants with no further action by the plaintiff bank. Rather, the bank's statement left open the possibility that it would elect to pursue statutory foreclosure proceedings, as it in fact did. We therefore find **[*289]** no merit in the defendants' argument that the bank's statement constituted an offer which they accepted by tendering their deed to the mortgaged property.

The defendants' further contention that a contract was formed when they themselves offered and the bank accepted a deed to the mortgaged property is likewise without merit. While there is no question that the defendants offered to deed their property to the bank in lieu of foreclosure, it does not follow that the plaintiff accepted this offer when vice-president Bauer agreed to "start the paper work" involved in such a transaction. ***HN5***[] In order to create an enforceable contract, the acceptance by the offeree must be unequivocal. **[***16]** (*Lee Shell Co. v. Model Food Center, Inc. (1969), 111 Ill. App. 2d 235, 250 N.E.2d 666*.) The equivocal nature of Bauer's statement here is made evident by his testimony that the paper work referred to included getting an appraisal of the property in question and having title work done to see that there were no other liens against the property. The record contains nothing to indicate that Bauer meant anything more by his statement or that the defendants were justified in concluding that the bank had indeed accepted their offer. Since the record fails to disclose a meeting of the minds essential to the formation of a contract, we find no basis for the defendants' contention that the plaintiff's right to a deficiency judgment in the instant case was barred by its contract to take a deed in lieu of foreclosure.

HN6[] In the absence of such a contract waiving its right to a deficiency judgment, the plaintiff in the instant case was entitled to a judgment for the deficiency remaining after the foreclosure and sale of the mortgaged property. The right to secure such a deficiency judgment in any foreclosure proceeding is clear, provided the mortgagee receives only one full satisfaction. **[***17]** (*Emerson v. La Salle National Bank (1976), 40 Ill. App. 3d 794, 352 N.E.2d 45*; *In re Estate of Folksdorf (1940), 304 Ill. App. 463, 26 N.E.2d 660*.) Where, as here, a proper showing had been made as to the pleadings and the evidence, the entry of such a decree was mandatory (*Clifford v. Levin (1935), 282 Ill. App. 263*), and the court lacked discretion to deny the plaintiff relief on equitable grounds. (But *cf.* *Collins v. Baim (1939), 299 Ill. App. 405, 20 N.E.2d 298* (court had jurisdiction

to determine any fact occurring after decree of foreclosure which would render deficiency decree inequitable).) The plaintiff was further entitled by the terms of its mortgages and notes to a judgment for reasonable attorney fees incurred in the foreclosure proceedings (27 Ill. L. & Prac. *Mortgages* sec. 514 (1956)), the amount to be determined by the trial court upon remand for that purpose.

[*290] For the reasons stated we reverse the judgment of the circuit court of Williamson County and remand this cause for further proceedings.

Reversed and remanded.

Costigan v. CitiMortgage, Inc.

United States District Court for the Southern District of New York

August 1, 2011, Decided; August 2, 2011, Filed

10 Civ. 8776 (SAS)

Reporter
2011 U.S. Dist. LEXIS 84860 *; 2011 WL 3370397

BRIAN ***COSTIGAN***, individually and on behalf of a class of all others similarly situated, Plaintiff, - against - CITIMORTGAGE, INC., Defendant.

Core Terms

modification, Documents, mortgage, borrower, permanent, fair dealing, good faith, alleges, lender, foreclosure, consumers, damages, default, negligent misrepresentation, motion to dismiss, modification agreement, promissory estoppel, claim for breach, original loan, obligations, collecting, processing, deceptive, covenant, terms, foreclosure proceeding, mortgage payment, homeowners, repleading, breached

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Judges: Shira A. Scheindlin, United States District Judge.

Opinion by: Shira A. Scheindlin

Opinion

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Brian ***Costigan*** brings this putative class action against CitiMortgage, Inc., ("Citi"), seeking declaratory relief, injunctive relief, damages, and attorneys' fees, alleging (1) breach of contract; **[*2]** (2) promissory estoppel; (3) breach of the covenant of good faith and fair dealing; (4) fraud; (5) constructive fraud; (6) negligence; (7) violation of the New York Deceptive Practices Act; (8) violation of the New Jersey Consumer Fraud Act; and (9) violation of the Fair Debt Collection Practices Act. Defendant

now moves to dismiss all claims pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. [1] For the reasons discussed herein, defendant's motion is granted.

II. BACKGROUND[2]

A. Home Affordable Mortgage Program

In response to the financial crisis, Congress in 2008 enacted the Emergency Economic Stabilization Act of 2008, which in turn authorized the Secretary of the Treasury to establish the Troubled Asset Relief Program ("TARP"). [3] TARP directed the Secretary of the Treasury to "implement a plan that seeks to maximize assistance for homeowners" **[*3]** and allowed the Secretary to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures." [4] Under this authority, the Department of the Treasury announced the "Making Home Affordable Program" in February 2009, which included the "Home Affordable Mortgage Program" ("HAMP"). HAMP was aimed at helping homeowners who were in or were at immediate risk of being in default on their home loans by reducing monthly payments to sustainable levels.

Under HAMP, Citi entered into a Service Participation Agreement ("SPA") with Fannie Mae in July 2009, acting as an agent of the U.S. Department of the Treasury. [5] The SPA states that it "shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors in interest." [6] In entering into the SPA, Citi agreed to "perform the loan modification and other foreclosure prevention services" [7] for "all mortgage loans it services, whether it services such mortgage loans for its own account or for the account of another party." [8]

B. Loan Modification

To obtain a home loan modification under HAMP, the borrower applying for modification initially provides the lender with required documentation. The lender reduces the monthly mortgage payment to thirty-one percent of the homeowner's gross monthly income. The homeowner participates in a three-month Trial Period Plan ("TPP"), based on the new mortgage payment. In executing the TPP agreement, which is labeled "Step One of a Two-Step Documentation Process," the borrower represents that

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[1] *See* Memorandum of Law in Support of Citimortgage Inc.'s Motion to Dismiss Amended Complaint ("Def. Mem.").

[2] All alleged facts are drawn from the relevant portions of the complaint, and are taken to be true for the purposes of this motion to dismiss. *See Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1943, 173 L. Ed. 2d 868 (2009)*.

[3] ***Pub. L. No. 110-343, 122 Stat. 3765*** (codified as amended at *12 U.S.C. §§ 5201-5261*).

[4] *12 U.S.C. § 5219(a)(1)*.

[5] *See* Commitment to Purchase Financial **[*4]** Instrument and Service Participation Agreement for the Home Affordable Mortgage Program under the Emergency Economic Stabilization Act of 2009 ("SPA"), Ex. D to Notice of Motion at 11. Although the SPA, the Trial Period Plan, and plaintiff's original mortgage documents were not attached to the Complaint, the Court may consider these documents because the Complaint "relies heavily on [their] terms and effects," rendering these documents "integral" to the Complaint. *Chambers v Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)*.

[6] SPA § 10.F.

[7] *Id.* § 1.A.

[8] *Id.* § 2.A.

> I am unable to afford my mortgage payments for the reasons indicated in my Hardship Affidavit [9] and as a result (i) I am either **[*5]** in default or believe that I will be in default under the Loan Documents in the near future, and (ii) I do not have the sufficient income or access to sufficient liquid assets to make the monthly mortgage payments now or in the near future. [10]

If the borrower does not provide all the required documentation required by the lender, or if the lender does not provide the borrower with an executed copy of a modification agreement, "the Loan Documents will not be modified . . . and the lender will have all of the rights and remedies provided in the Loan Documents," including instituting foreclosure proceedings. [11] The lender "will not be obligated or bound to make any modification of the Loan Documents if the lender determines that [the borrower does] not qualify." [12] Payments made under the TPP do "not constitute a cure of [the borrower's] default under the Loan Documents unless such payments are sufficient to completely cure [the borrower's] entire default." [13] Borrower agreed that "all terms and provisions of the Loan Documents remain in full force and effect; nothing in [the TPP] shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained **[*6]** in the Loan Documents." [14] Following successful completion of the TPP, including final approval by the lender, the lender will permanently modify eligible mortgages.

C. *Costigan*

In October 2005, ***Costigan*** received a loan from ABN Amro Mortgage Group, Inc., secured by a mortgage on his home, which is located at 453 Boesel Avenue, Manville, New Jersey. [15] In April 2009, ***Costigan*** contacted Citi, the servicer of the loan, seeking to obtain a loan modification. At that time, ***Costigan*** was suffering economic difficulties, but had never missed a mortgage payment. [16]

Costigan entered into a TPP with Citi effective November 1, 2009. [17] Under the TPP, ***Costigan*** was to make three monthly payments of $1,409.75 each, due on November 1, 2009, December 2, 2009, and January 1, 2010. [18] ***Costigan*** made all three payments on time. [19] ***Costigan*** also regularly **[*7]** contacted Citi, who assured him that "everything was progressing smoothly and that Mr. ***Costigan*** would obtain a permanent modification at the end of the trial period." [20]

When ***Costigan*** contacted Citi in January 2010, after submitting his third payment under the TPP, Citi told ***Costigan*** that his modification was still being reviewed and that he should make another trial payment. [21] Upon contacting Citi again in February

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[9] The Hardship Affidavit is used to verify the borrower's financial hardship in connection with an application for a loan modification.

[10] Home Affordable Modification Trial Period Plan ("TPP"), Ex. C to Notice of Motion, § 1.A.

[11] *Id.* § 2.F.

[12] *Id.* § 2.G.

[13] *Id.* § 2.E.

[14] *Id.* § 4.D.

[15] *See* Mortgage, Ex. A to Notice of Motion, at 1-2.

[16] *See* Amended Complaint ("FAC") ¶ 172.

[17] *See* TPP.

[18] *See* FAC ¶ 175.

[19] *See id.* ¶ 177.

[20] *See id.*

2010, ***Costigan*** was told that his HAMP modification application had been rejected in December 2009. [22] Citi also informed ***Costigan*** that "there was a large amount of unapplied funds in his account equaling [the TPP payments]." [23]

Citi subsequently informed ***Costigan*** that he should apply for Citi's internal loan modification program, and that ***Costigan*** should resume making full payments in accordance with the terms of the original loan documents. By March 2010, ***Costigan*** resumed making full payments. [24] ***Costigan*** also applied for Citi's internal loan modification program. Although ***Costigan*** contacted Citi regularly to inquire about the status of the application, Citi did not respond to **[*8]** his request for information. [25]

Ultimately, ***Costigan*** was unable to afford his full monthly payments and filed for Chapter 7 bankruptcy. On August 4, 2010, after discharge of the bankruptcy, Citi filed a foreclosure complaint against ***Costigan***. [26]

III. LEGAL STANDARD

A. *Rule 12(b)(6)* Motion to Dismiss

In deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the court evaluates the sufficiency of the complaint under the "two-pronged approach" promulgated by the Supreme Court in *Ashcroft v. Iqbal*. [27] *First*, a court "'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" [28] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to withstand a motion to dismiss. [29] *Second*, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." [30] To survive a *Rule 12(b)(6)* motion to dismiss, the allegations in the complaint must meet a standard of "plausibility." [31] A claim **[*9]** is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [32] Plausibility "is not akin to a probability requirement;" rather, plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." [33]

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[21] *See id.* ¶ 178.

[22] *See id.* ¶ 180.

[23] *Id.* ¶ 181.

[24] *See id.* ¶ 182.

[25] *See id.* ¶ 183.

[26] *See id.* ¶ 184.

[27] *129 S.Ct. at 1950*.

[28] *Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010)* (quoting *Iqbal, 129 S. Ct. at 1950*). *Accord Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010)*.

[29] *Iqbal, 129 S.Ct. at 1949* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

[30] *Id. at 1950*. *Accord Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010)*.

[31] *Twombly, 550 U.S. at 564*.

[32] *Iqbal, 129 S. Ct. at 1949* (quotation marks omitted).

[33] *Id.* (quotation marks omitted).

B. *Federal Rule of Civil Procedure 9(b)*

Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." To satisfy the particularity requirement, "the complaint must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain **[*10]** why the statements were fraudulent." [34] "While traditionally associated with claims of securities fraud, *Rule 9(b)* has been applied to claims of consumer fraud as well as claims relating to consumer protection statutes." [35]

Although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," [36] this rule should not be "mistaken for license to base claims of fraud on speculation and conclusory allegations." [37]

> [P]laintiff's must plead facts that give rise to a strong inference of intent. The requisite "strong inference" of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. [38]

C. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure **[*11]** provides that other than amendments as a matter of course, "a party may amend its pleading only with the opposing party's written consent or with the court's leave." [39] Although "[t]he Court should freely give leave when justice so requires," [40] it is "within the sound discretion of the district court to grant or deny leave to amend." [41] "When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint." [42] However, "it is well established that leave to amend a complaint need not be granted when amendment would be futile." [43]

IV. APPLICABLE LAW[44]

A. Breach of Contract

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[34] *Lerner v. Fleet Bank N.A., 459 F.3d 273, 290 (2d Cir. 2006)* (quotation marks omitted).

[35] *Meserole v. Sony Corp. of America, No. 08 Civ. 8987, 2009 U.S. Dist. LEXIS 42772, 2009 WL 1403933, at *3 (S.D.N.Y. May 19, 2009)*.

[36] *Fed. R. Civ. P. 9(b)*.

[37] *Shields v. Citytrust Bancorp., 25 F.3d 1124, 1128 (2d Cir. 1994)*.

[38] *Lerner, 459 F.3d at 290-91* (quotation marks and citations omitted).

[39] *Slayton v. American Express Co., 460 F.3d 215, 226 n.10 (2d Cir. 2006)* (quotation marks omitted).

[40] ***Fed. R. Civ. P. 15(a)(2)***.

[41] *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)*.

[42] *Hayden v. County of Nassau, 180 F.3d 42, 53 (2d Cir. 1999)*.

[43] *Ellis v. Chao, 336 F.3d 114, 127 (2d Cir. 2003)*.

[44] With the exception of plaintiff's claim under the New York Deceptive Practices Act, New Jersey law applies to all of the claims at issue in this motion.

To survive a motion to dismiss a breach of contract claim, the complaint must allege "(1) a contract between the parties; (2) a breach **[*12]** of that contract; (3) damages flowing therefrom, and (4) that the party stating the claim performed its own contractual obligation." [45] "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." [46]

B. Promissory Estoppel

A claim for "[p]romissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." [47]

C. Breach of Covenant of Good Faith and Fair Dealing

"Every party to a contract . . . is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." [48] New Jersey has adopted the Uniform Commercial Code definition of "good faith," defining it as "honesty in fact and the observance **[*13]** of reasonable commercial standards of fair dealing in the trade." [49] The covenant of good faith and fair dealing therefore '"requires that neither party do anything which will interfere with or destroy each party's reasonable expectations under the contract."' [50]

D. Fraud

"To establish common-law fraud, a plaintiff must prove: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." [51] "Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent **[*14]** duty imposed by law." [52]

"[S]tatements will not form the basis of a fraud claim when they are mere 'puffery' or are opinions as to future events." [53] Although an opinion can constitute a misrepresentation, there is "a marked difference between what constitutes justifiable reliance upon statements of the maker's opinion and what constitutes justifiable reliance upon other representations." [54]

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[45] *Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)* (citing *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 210 F. Supp. 2d 552, 561 (D.N.J. 2002))*.

[46] ***Restatement (Second) of Contracts § 313(2) cmt. a*** (1981).

[47] *Toll Bros. v. Brotherhood of Chosen Freeholders of Burlington, 194 N.J. 223, 253, 944 A.2d 1 (2008)*.

[48] *Elliott & Frantz, Inc. v. Ingersoll-Rand Co., 457 F.3d 312, 328 (3d Cir. 2007)* (quoting *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224, 864 A.2d 387 (2005))*.

[49] *N.J. Stat. Ann. § 12A:2-103(1)(b)* (West 2004). *See also U.C.C. § 2-103(1)(c)* (2005).

[50] *Lekki Capital Corp. v. Automatic Data Processing, Inc., No. 01 Civ. 7421, 2002 U.S. Dist. LEXIS 8538, 2002 WL 987147, at *4 (S.D.N.Y. May 14, 2002)* (quoting *Atlantic City Racing Assoc. v. Sonic Fin. Corp., 90 F. Supp. 2d 497, 510 (D.N.J. 2000)*.

[51] *Banco Popular North Am. v. Gandi, 184 N.J. 161, 172-73, 876 A.2d 253 (2005)* (quotation marks omitted).

[52] *Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316, 788 A.2d 268, 280 (2002)*.

[53] *Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994)* (applying New York law).

[54] *Restatement (Second) of Torts § 525 cmt. d*.

E. Negligent Misrepresentation

"To establish a claim of negligent misrepresentation, a plaintiff must prove that an incorrect statement was negligently made and justifiably relied upon to recover damages for economic loss or injury sustained as a consequence of that reliance." [55] "[N]egligence might be inferred from the falsity of the representation." [56] "Because negligent misrepresentation does not require scienter as an element, it is easier to prove than fraud." [57]

F. Negligent Processing of Loan Modifications and Foreclosures

A common law cause of action for negligence has four elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." [58]

G. Violation of the New York Deceptive Practices Act

The New York Deceptive Practices Act (the "DPA") [59] makes "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing or any service in this state" unlawful. [60] The DPA allows "any person who has been injured by reason of any violation of [the DPA]" to bring an action for damages. Under the statute, "[t]he court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated [the DPA]." [61] The court may also "award reasonable **[*16]** attorney's fees to a prevailing plaintiff." [62]

To state a cause of action under the DPA a plaintiff must allege that "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." [63] A violation of the DPA does not require proof of the elements of common-law fraud and thus "an action under *[section] 349* is not subject to the pleading-with-particularity requirements of *Rule 9(b)*." [64]

H. Violation of the New Jersey Consumer Fraud Act

The New Jersey Consumer Fraud Act (the "CFA") outlaws

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[55] *In re Schering Plough Corp. Intron/Temodar Consumer Class Action, No. 06-cv-5774, 2009 U.S. Dist. LEXIS 58900, 2009 WL 2043604, at *32 (D.N.J. July 10, 2009)* **[*15]** (citing *H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334, 461 A.2d 138 (1983)*).

[56] *Rosenblum, 93 N.J. at 334*.

[57] *Kaufman v. i-Stat Corp., 165 N.J. 94, 110, 754 A.2d 1188 (2000)*.

[58] *Polzo v. County of Essex, 196 N.J. 569, 584, 960 A.2d 375 (2008)*.

[59] *N.Y. Gen. Bus. Law § 349* (McKinney 2004).

[60] *Id. § 349(a)*.

[61] *Id. § 349(h)*.

[62] *Id.*

[63] *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)* (citation omitted).

[64] *Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005)*.

> The act, use or employment . . . of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate . . . . [65]

"To state a **[*17]** claim under the [CFA], a plaintiff must allege (1) a violation of the Act, (2) that he or she suffered an ascertainable loss as a result of the unlawful conduct, and (3) a causal relationship between the unlawful practice and the loss sustained by plaintiff." [66] New Jersey courts have repeatedly held that a "mortgage loan [is] covered by the CFA's definitions of merchandise and advertisement . . . and that [a] claim that the lender had engaged in an unconscionable commercial practice in violation of *N.J.S.A. 56:8-2* was for a jury to decide." [67] "Claims under the CFA are required to meet the particularity requirement of [*Rule] 9(b)*." [68]

I. Violation of the Fair Debt Collection Practices Act

Congress passed the Fair Debt **[*18]** Collection Practices Act (the "FDCPA") [69] to "eliminate abusive debt collection practices by debt collectors . . . ." [70] The FDCPA prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt . . . ," [71] and of any "unfair or unconscionable means to collect or attempt to collect any debt." [72] A debt collector, under the definition of the statute, is a person who collects or attempts to collect "debts owed or due or asserted to be owed or due another." [73] The FDCPA, however, provides a number of exceptions to this definition. One such exception is "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity. . . (iii) concerns a debt which was not in default at the time it was obtained by such person." [74] "Thus, under *[section] 1692a(6)(F)(iii)*, the classification of debt collector depends upon the status of a debt, rather than the type of collection activities used." [75]

V. [*19] DISCUSSION

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[65] *N.J. Stat. Ann. §§ 56:8-1 to -109* (West 2004).

[66] *Meadowlands Invs., LLC v. CIBC World Mkts Corp., No. 04 Civ. 7328, 2005 U.S. Dist. LEXIS 21102, 2005 WL 2347856, at *6 (S.D.N.Y. Sept. 22, 2005)*.

[67] *Gonzalez v. Wilshire Credit Corp., 411 N.J. Super. 582, 988 A.2d 567, 573 (N.J. Super. Ct. App. Div. 2010)* (citing *Associates Home Equity Servs. v. Troup, 343 N.J. Super. 254, 778 A.2d 529 (N.J. Super. Ct. App. Div. 2001))*.

[68] *Daloisio v. Liberty Mut. Fire Ins. Co., 754 F. Supp. 2d 707, 709 (D.N.J. 2010)*. *Accord Meadowlands, 2005 U.S. Dist. LEXIS 21102, 2005 WL 2347856, at *3*.

[69] *15 U.S.C. §§ 1692-1692p (2009)*.

[70] *Id. § 1692(e)*.

[71] *Id. § 1692e(10)*.

[72] *Id. § 1692f*.

[73] *Id. § 1692a(6)*.

[74] *Id. § 1692a(6)(F)*. *See also Kesselman v. The Rawlings Co., LLC, 668 F. Supp. 2d 604, 611-12 (S.D.N.Y. 2009)*.

[75] *Alibrandi v. Financial Outsourcing Servs., 333 F.3d 82, 86 (3d Cir. 2003)*.

A. Breach of Contract

1. Mortgage Agreement

Costigan alleges that Citi breached the terms of the residential mortgage agreement by "foreclosing on loans that were not in default." [76] This claim has no merit. The mortgage agreement states that if ***Costigan*** were to default, Citi could, after giving notice, "foreclose [the Mortgage] by judicial proceeding." [77] ***Costigan*** does not allege that Citi failed to give notice before instituting foreclosure proceedings. ***Costigan*** admits that he could not pay his full mortgage payments after his application for modification had been denied, and that he declared bankruptcy. ***Costigan*** therefore breached the mortgage agreement, and Citi, by initiating foreclosure proceedings, merely exercised its rights under the mortgage agreement. ***Costigan***'s claim for breach of the original mortgage agreement is therefore dismissed.

2. Service Provider Agreement

Costigan cannot enforce the provisions of the SPA between Citi and Fannie Mae. Several district courts have held that borrowers have no third-party right to enforce the SPA. [78] Contrary to ***Costigan***'s assertion that "the SPA and the incorporated Program Documentation **[*20]** constitute a contract for which [p]laintiff's and the Class are intended beneficiaries," [79] the SPA specifically states that it "shall inure to the benefit of and be binding upon the parties to the Agreement," [80] Citi and Fannie Mae. Allowing ***Costigan*** to enforce the SPA would contradict the express terms of the agreement and would "open the door to potentially 3-4 million homeowners filing individual claims." [81] ***Costigan***'s claim for breach of the SPA is therefore dismissed.

3. Trial Period Plan

Costigan argues that the TPP agreement constitutes a valid contract for the permanent modification of his home loan, and that Citi breached this contract by not offering him a permanent loan modification. As discussed by this Court in *Thomas v. JPMorgan Chase*, ***Costigan***'s claim "is contradicted by the express terms of the TPP **[*21]** agreement, which states that any permanent modification is subject to the subsequent approval of Chase, and the receipt of a signed modification agreement." [82]

Although the TPP states that Citi "will provide [the borrower] with a Home Affordable Modification Agreement" [83] if the borrower is in compliance with the TPP, it also unequivocally states that the TPP does not constitute a permanent modification of the original loan; by signing the TPP, ***Costigan*** attested that he

> understand[s] that this Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) [he] meets all of the conditions required for modification, (ii) [he] receive[s] a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. [84]

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[76] Compl. ¶ 239.

[77] Mortgage, Ex. A to Compl. ¶ 22.

[78] *Edwards v. Aurora Loan Servs., LLC, No. 09 Civ. 2100, 791 F. Supp. 2d 144, 2011 U.S. Dist. LEXIS 62462, 2011 WL 2340939, at *4-*6 (D.D.C. June 14, 2011)*. *Accord Grill v. BAC Home Loans Servicing, No. 10-CV-03057, 2011 U.S. Dist. LEXIS 3771, 2011 WL 127891, at *5-*7 (E.D. Cal. Jan. 14, 2011)* (collecting cases).

[79] FAC ¶ 241.

[80] SPA § 10.F.

[81] *Marks v. Bank of Am., N.A., No. 10-cv-08039, 2010 U.S. Dist. LEXIS 61489, 2010 WL 2572988, at *4 (D. Ariz. June 22, 2010)*.

[82] *Thoma v. JPMorgan Chase, No. 10 Civ. 8993, 2011 U.S. Dist. LEXIS 83504, 2011 WL , at *26 (S.D.N.Y. July 29, 2011)*.

[83] TPP, preamble.

The TPP ponders that "[i]f prior to the Modification Effective Date . . . the Lender does not provide [the borrower] with a fully executed copy of . . . the Modification Agreement . . . the Loan documents will not be modified . . . ." [85] By signing the TPP, ***Costigan*** "agree[d] that [Citi] will not be obligated **[*22]** or bound to make any modification of the Loan Documents if [Citi] determines that [***Costigan*** does] not qualify." [86] The Complaint fails to plead that ***Costigan*** met "all of the conditions required for modification" and Citi clearly never received a "fully executed copy of the Modification Agreement."

Several courts have already held that the TPP does not constitute a binding contract for permanent modification. [87] The cases ***Costigan*** cites in opposition are not only limited to one district, but are easily distinguishable. In *Bosque v. Wells Fargo*, plaintiffs' theory was "that the TPP is a contract governing the three-month trial period, and that compliance with its obligations entitles plaintiffs to either (1) a new contract with a permanent loan modification or (2) a decision on whether plaintiffs are entitled to the permanent modification by the modification effective date stated in the TPP." [88] The *Bosque* court held that "modified mortgage payments standing alone would likely not constitute cognizable consideration under the TPP." [89] However, the *Bosque* court held that because plaintiffs "were required to provide documentation of their current **[*23]** income, make legal representations about their personal circumstances, and agree to undergo credit counseling if requested to do so" they had suffered a "new legal detriment," and that plaintiffs therefore had sufficiently alleged consideration. [90] ***Costigan*** does not allege that any such matters constituted consideration.

Under the TPP agreement Citi would "suspend any scheduled foreclosure sale" while ***Costigan*** was making TPP payments. [91] But ***Costigan*** does not allege that Citi foreclosed on his home while the TPP was in effect, nor that Citi did so before it notified him that his application for permanent modification had been denied. Thus Citi fulfilled all of its obligations under the TPP. Accordingly, ***Costigan***'s claim for breach of the TPP agreement is dismissed.

B. Promissory Estoppel

In the alternative, ***Costigan*** **[*24]** seeks to recover damages based on promissory estoppel, alleging that he "forewent other remedies" such as bankruptcy or selling his home, because Citi "by way of the TPP agreement, made a representation to [***Costigan***] and Class Members . . . that if they returned the TPP agreements executed and with supporting documentation, and made their TPP payments, they would receive a permanent HAMP modification." [92] As discussed earlier, the TPP agreement

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[84] *Id.* § 2.G.

[85] *Id.* § 2.F.

[86] *Id.*

[87] *See, e.g.*, *Lund v. CitiMortgage, Inc., No. 10-CV-1167, 2011 U.S. Dist. LEXIS 52890, 2011 WL 1873690, at *2 (D. Utah May 17, 2011)*; *Grill, 2011 U.S. Dist. LEXIS 3771, 2011 WL 127891, at *4*; *Brown v. Bank of New York Mellon, No. 10-CV-550, 2011 U.S. Dist. LEXIS 6006, 2011 WL 206124, at *3 (W.D. Mich. Jan. 21, 2011)*; *Vida v. OneWest Bank, No. 10-987, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, at *15 (D. Or. Dec. 13, 2010)*.

[88] *762 F. Supp. 2d 342, 352 (D. Mass. 2011)*.

[89] *Id.*

[90] *Id.*

[91] TPP § 2.B.

[92] FAC ¶ 218.

unequivocally states that it does not constitute a permanent modification of ***Costigan***'s loan. [93] Accordingly, ***Costigan***'s promissory estoppel claim is dismissed.

C. Breach of Covenant of Good Faith and Fair Dealing

Costigan claims that Citi, by entering into the SPA and receiving **[*25]** funds under TARP from the Department of the Treasury, "covenanted, on behalf of itself and its subsidiaries to administer its contractual obligations with principles of good faith and fair dealing." [94] ***Costigan*** further claims that Citi therefore has an "implied duty to insure that its loan modification and foreclosure procedures were not fraudulent or unconscionable with respect to borrowers." [95] ***Costigan*** claims that these covenants were breached by defendants in several ways. [96]

As discussed above, ***Costigan*** was neither a party to the SPA nor an intended third-party beneficiary of that agreement. As such, he cannot enforce any covenant of that agreement, explicit or implied. The only agreement to which ***Costigan*** was a party is the original loan and mortgage. But ***Costigan***'s allegations of breach of the covenant of good faith and fair dealing concerns Citi's obligations under the SPA, *not under the original loan documents.*

The only alleged breach of the covenant of good faith and fair dealing that concerns the *original* loan documents are that Citi failed to take reasonable measures to collect the proper sums from ***Costigan*** and initiated foreclosure **[*26]** proceedings without cause. But the sums Citi collected or attempted to collect from ***Costigan*** were either due under his original mortgage or lower sums paid in accordance with the TPP agreements. Further, as discussed earlier, ***Costigan*** breached the express terms of the original loan documents by failing to pay his mortgage, and defendants therefore had reason to initiate foreclosure proceedings. Accordingly, ***Costigan***'s claim for breach of the covenant of good faith and fair dealing is dismissed.

D. Fraud and Negligent Misrepresentation

Costigan asserts a claim for fraud and for negligent misrepresentation, alleging that defendant knowingly, recklessly, or negligently "misrepresented and/or failed to disclose material facts relating to Citi's loan modification and foreclosure processes," [97] and that he as a result "suffered damages and economic loss in an amount to be proven at trial." [98] Specifically, ***Costigan*** alleges that Citi misrepresented that

> (1) Citi had properly processed modification documents; (2) Citi would make prompt decisions on modifications, although the bank kept many consumers waiting months longer than promised; (3) Citi would not foreclose upon consumers' homes while **[*27]** modification requests were pending or while homeowners were making trial modification payments; (4) Citi had approved a loan modification, when it had not; and/or that (5) Citi would convert consumers to permanent

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[93] None of the cases relied on by ***Costigan*** discusses the relevant language quoted from the TPP in part V.A.3, *supra. See*, e.g., *Jackson v. Ocwen Loan Servicing, LLC, No. 10-cv-00711, 2011 U.S. Dist. LEXIS 12816, 2011 WL 587587, at *3 (E.D. Cal. Feb. 9, 2011)*; *Bosque, 762 F. Supp. 2d at 351-53*; *Durmic v. J.P. Morgan Chase Bank, NA, No. 10-CV-10380, 2010 U.S. Dist. LEXIS 124603, 2010 WL 4825632, at *5 (D. Mass. Nov. 24, 2010)*; *Hanson v. Wells Fargo Home Mortg., No. 10CV00318, 2010 U.S. Dist. LEXIS 85629, 2010 WL 3310615, at *2-3 (E.D. Ark. Aug. 18, 2010)*.

[94] FAC ¶ 226.

[95] *Id.* ¶ 225.

[96] *See id.* ¶ 229

[97] *Id.* ¶¶ 234, 244.

[98] *Id.* ¶¶ 241.

> modifications if and when they made the payments required by trial modification agreements, although many consumers who successfully completed their trial periods have not received permanent modifications. [99]

Costigan's allegations fail to satisfy the strict pleading requirement of *Rule 9(b) of the Federal Rules of Civil Procedure*. [100] The Amended Complaint alleges only that Citi represented to ***Costigan*** that "everything was processing smoothly and that Mr. ***Costigan*** would obtain a permanent modification at the end of the period." [101] ***Costigan*** therefore fails to "identify the speaker, [] state where and when the statements were made, [or] explain why the statements were fraudulent." [102] Accordingly, ***Costigan***'s fraud and negligent misrepresentation claims are dismissed.

E. Negligent Processing of Loan Modifications and Foreclosures

Costigan claims that Citi owes its borrowers "a duty of reasonable care in the processing and determination of the loan modification applications and the processing of their foreclosures" [103] and that Citi breached this duty by "failing to properly evaluate [p]laintiff and Class Members' loan modification applications and foreclosures." [104] *First*, as discussed above, the SPA and the other terms of HAMP do not impose a duty on Citi with respect to borrowers. *Second*, it is well-established that "a bank does not owe a duty of care to a borrower, even if the borrower is a consumer." [105] ***Costigan***'s negligence claim is therefore dismissed.

F. Violation of the New York Deceptive Practices Act

Costigan's claims that Citi violated *section 349 of New York's General Business Law* must be dismissed because the Complaint fails to allege that any consumer-oriented **[*29]** conduct took place in New York. *Section 349(a)* outlaws "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing or any service *in this state*." [106] ***Costigan*** is a resident of New Jersey, and his loan and mortgage were obtained through branches located in New Jersey. ***Costigan*** in fact does not allege that Citi committed any acts that caused injury to him in New York.

To the extent that ***Costigan*** alleges that he was injured in New Jersey by allegedly deceptive practices devised or originating in New York, his claim under *section 349* also fails. "The phrase 'deceptive acts or practices' under the statute is not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer." [107] The statute "was not intended to police the out-of-state transactions of New York companies." [108] Instead, the legislative history of the statute

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[99] *Id.* ¶ 234.

[100] *Rule 9(b)* applies to both fraud claims and negligent misrepresentation. *See In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 2009 U.S. Dist. LEXIS 58900, 2009 WL 2043604, at *32 (D.N.J. July 10, 2009)* **[*28]** .

[101] FAC ¶ 177.

[102] *Lerner, 459 F.3d at 290*.

[103] *Id.* ¶ 249.

[104] *Id.* ¶ 250.

[105] *Shinn v. Champion Mortgage Co., No. 09-cv-00013, 2010 U.S. Dist. LEXIS 9944, 2010 WL 500410, at *4 (D.N.J. Feb. 5, 2010)* (citing *United Jersey Bank v. Kensey, 306 N.J.Super. 540, 553, 704 A.2d 38 (N.J. Super. Ct. App. Div. 1997)*).

[106] *N.Y. Gen. Bus. Law § 349(a)* (emphasis added).

[107] *Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 325, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002)* (dismissing Florida plaintiff from an action against New York insurer where policy was purchased and paid for in Florida). *Accord Wiener v. Unumprovident Corp., 202 F. Supp. 2d 116, 120 (S.D.N.Y. 2002)* (dismissing claim because "[w]hile it appears that plaintiff's application for the insurance policies was submitted in New York, she is a New Jersey resident and received her benefits in New Jersey").

makes clear that it was intended to protect consumers in the state of New York. [109] To expand this protection to consumers in other states would subject New York businesses to almost unlimited liability. Not only is this a burden on **[*30]** the courts, but would undermine other states' initiatives to protect their consumers in a way they think most appropriate. ***Costigan***'s claim for violation of the DPA is therefore dismissed.

G. Violation of the New Jersey Consumer Fraud Act

Plaintiff alleges that "the acts and practices of Defendant" as set forth elsewhere in the Amended Complaint, violate the CFA. [110] As discussed earlier, ***Costigan***'s allegations regarding Citi's purportedly fraudulent or deceptive conduct fails to satisfy the strict pleading requirement of *Rules 9(b) of the Federal Rules of Civil Procedure*. [111] ***Costigan*** simply fails **[*31]** to "plead the who, what, when, where, and how: the first paragraph of any newspaper story." [112] Accordingly, ***Costigan***'s claim under the CFA is dismissed.

H. Violation of the Federal Debt Collection Practices Act

Costigan alleges that Citi violated the FDCPA by engaging "in a pattern and practice of filing false, deceptive, misleading, and perjured affidavits in connection with foreclosure proceedings." [113] But the FDCPA does not extend to the facts of this case. A "debt collector" under means anyone who collects "debts owed . . . another" and excludes collecting a debt to the extent the collection "concerns a debt which *was not in default* at the time it was obtained by such person." [114] The Amended Complaint does not allege that ***Costigan***'s loan was in default at the time Citi "obtained" that loan. [115] As a result, Citi is excluded from the definition of "debt **[*33]** collector" under the statute. ***Costigan***'s claim under the FDCPA is therefore dismissed.

I. Leave to Replead

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[108] *Goshen, 98 N.Y.2d at 325*.

[109] *See id.* (discussing legislative history and underlying public policy rationale of *section 349*).

[110] FAC ¶¶ 258-259. Defendant seeks to dismiss this claim on the ground that "where, as here 'the factual allegations of the cause of action are . . . scattered throughout the complaint . . .' dismissal for failure to satisfy *Rule 8(a)(2)* is proper." Def. Mem. at 22 (quoting *San Diego Home Solutions v. Recontrust Co., No. 08 cv 1970, 2008 U.S. Dist. LEXIS 99684, 2008 WL 5209972, at *2 (S.D. Cal. Dec. 10, 2008)*). "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." ***Fed. R. Civ. P. 10(c)***. This rule is not made void by the *Twombly-Iqbal* "plausibility" requirement, nor by *Rule 9(b)*'s particularity requirement. A complaint does not need to restate the same facts outlined in the section for common-law fraud for each subsequent claim, and the court will not dismiss ***Costigan***'s claim simply because he incorporates by reference facts stated elsewhere in the Amended Complaint. The particularity requirement of *Rule 9(b)* has three purposes: (1) to put the defendant on notice of the details of the claims **[*32]** against him, (2) to protect a defendant's reputation and goodwill from unfounded allegations, and (3) to prevent strike suits. *See Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004)*. The Amended Complaint states facts with sufficient particularity to accomplish these goals.

[111] *See Daloisio, 754 F. Supp. 2d at 709* (holding that "[c]laims under the CFA are required to meet the particularity requirement of [*Rule] 9(b)*").

[112] *In re Advanta Corp. Sec. Litig., 180 F.3d 525, 534 (3d Cir. 1999)*

[113] FAC ¶ 305.

[114] *15 U.S.C. § 1692a(6)(F)* (emphasis added).

[115] *Id. § 1692a(6)(F)(iii)*.

Leave to replead is generally granted unless it would be futile to permit plaintiff to amend. Here, ***Costigan*** may, with regard to his fraud, negligent misrepresentation, and CFA claims, be able to allege additional facts that would satisfy the particularity requirement of *Rule 9(b)*. Likewise, ***Costigan*** could allege additional facts that would allow him to state a claim for breach of the original loan agreements.

However, repleading the other claims would be futile. ***Costigan*** has no standing to enforce the SPA, rendering futile any attempt to replead their claims for breach of the SPA or for breach of the covenant of good faith and fair dealing. Given that the TPPs did not grant ***Costigan*** a permanent modification, repleading his claim for breach of the TPP and for promissory estoppel likewise would be futile. New Jersey law holds that Citi does not owe a duty of care to borrowers beyond the terms of their contract, defeating any negligence claim. And because ***Costigan*** is a New Jersey resident who conducted all **[*34]** of his transactions with Citi in New Jersey repleading the DPA claim would also be futile. Additionally, Citi is explicitly excluded from the statutory language of the FDCPA. Accordingly, these claims are dismissed with prejudice. ***Costigan*** may within thirty (30) days of the date of this Order file a second amended complaint with respect to his claims for (i) breach of the original mortgage agreements, (ii) fraud, (iii) negligent misrepresentation, and (iv) violation of the CFA. If ***Costigan*** fails to do so, all claims dismissed herein will be dismissed with prejudice.

VI. CONCLUSION

For the foregoing reasons, Citi's motion to dismiss is granted without prejudice as to ***Costigan***'s claims for (i) breach of contract of the original mortgage agreements, (ii) fraud, (iii) negligent misrepresentation, and (iv) violation of the CFA. Citi's motion to dismiss is granted with prejudice as to ***Costigan***'s claims for (i) breach of the SPA and the TPP agreements, (ii) promissory estoppel, (iii) breach of the covenant of good faith and fair dealing, (iv) negligence, (v) violation of the DPA, and (vi) violation of the FDCPA. The Clerk of the Court is directed to close this motion [docket #25], and, if ***Costigan*** **[*35]** does not file an amended complaint within thirty (30) days, to close this case.

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

August 1, 2011

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As of: June 15, 2021 10:33 PM Z

Faulkner v. Arista Records LLC

United States District Court for the Southern District of New York

March 5, 2009, Decided; March 5, 2009, Filed

07 Civ. 2318 (DAB)

Reporter
602 F. Supp. 2d 470 *; 2009 U.S. Dist. LEXIS 17872 **

ERIC FAULKNER, DUNCAN FAURE, ALAN LONGMUIR, DEREK LONGMUIR, LESLIE MCKEOWN, AND STUART WOOD, Plaintiffs, -against- ARISTA RECORDS LLC, Defendant.

Prior History: *Mitchell v. Faulkner, 2009 U.S. Dist. LEXIS 17374 (S.D.N.Y., Mar. 5, 2009)*

Core Terms

royalties, Plaintiffs', Records, parties, payee, fiduciary relationship, fiduciary duty, breach of contract claim, letters, accrued, email, motion to dismiss, acknowledgment, limitations, written acknowledgment, constructive trust, claim for breach, willing to pay, accounting, breach of fiduciary duty, contractual obligation, record company, confidence, settlement, terms, toll, condition precedent, six years, allegations, obligations

Case Summary

Procedural Posture
Alleging that defendant, a recording company, failed to pay or properly account for royalties owed under the parties' agreement, plaintiffs, members of a musical group, asserted claims for breach of contract, breach of fiduciary duty, constructive trust, and accounting. Before the court was defendant's *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

Overview

Defendant did not deny that it failed to pay plaintiffs the royalties they were due under the parties' contract. Instead, defendant argued that it did not know to whom and where to direct the payments. The court held that plaintiffs' claim that defendant breached its contractual obligations was timely under *N.Y. C.P.L.R. § 203(a)* because defendant's obligation to account for and pay royalties was a continuing obligation. Plaintiffs provided sufficient evidence to support the conclusion that their breach of contract claim was not limited to the six-year period before the lawsuit was filed because letters in which defendant appeared to acknowledge its obligation to pay royalties might have tolled the statute of limitations pursuant to *N.Y. Gen. Oblig. Law § 17-101* if plaintiffs satisfied a condition precedent requiring them to provide correct payee information. Plaintiffs made a prima facie showing that the condition precedent was satisfied because defendant at one point possessed payee information that allowed it to send royalty statements to plaintiffs and plaintiffs submitted payee information to defendant within six years of defendant's earliest alleged written acknowledgment.

Outcome
The court denied defendant's motion to dismiss plaintiffs' breach of contract claim. The court granted defendant's motion to dismiss plaintiffs' claims for breach of fiduciary duty, constructive trust, and accounting.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

For a complaint to survive dismissal under *Fed. R. Civ. P. 12(b)(6)*, a plaintiff must plead enough facts to state a claim to relief that is plausible on its face. In other words, a plaintiff must satisfy a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In deciding a motion to dismiss, the court must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally. However, general, conclusory allegations need not be credited when they are belied by more specific allegations of the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

In ruling on a *Fed. R. Civ. P. 12(b)(6)* motion, a court may consider the complaint as well as any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference. It is also well established that a district court may rely on matters of public record in deciding a motion to dismiss under *Rule 12(b)(6)*, including case law and statutes.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Affirmative Defenses, Statute of Limitations**

In New York, the statute of limitations on a claim for breach of contract is six years. *N.Y. C.P.L.R. § 203(a)*. A cause of action for breach of contract ordinarily accrues and the limitations period begins to run upon breach. If a contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN4[] **Affirmative Defenses, Statute of Limitations**

Under *N.Y. Gen. Oblig. Law § 17-101*, a written acknowledgement of a contractual obligation made subsequent to the execution of the contract may effectively toll the statute of limitations for a breach of contract claim.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN5 **Affirmative Defenses, Statute of Limitations**

See *N.Y. Gen. Oblig. Law § 17-101*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN6 **Contract Conditions & Provisions, Conditions Precedent**

To toll effectively or restart the running of the statute of limitations under *N.Y. Gen. Oblig. Law § 17-101*, an acknowledgment or promise must be in writing, be signed by the debtor party, recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it. An effective acknowledgment may take a variety of forms. In determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay. A written acknowledgment need not specify the precise amount owed to effectively toll the statute of limitations. An acknowledgment of an existing debt and the intent to pay the same must, however, be unconditional. If any condition must be satisfied prior to payment being made, the creditor must show that the condition has been satisfied before application of the toll embodied in *§ 17-101*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Tolling

HN7 **Contract Conditions & Provisions, Conditions Precedent**

A condition precedent, if contained in an acknowledgment, must be fulfilled in order to satisfy the requirements of *N.Y. Gen. Oblig. Law § 17-101*. It is a creditor's burden to show that it has satisfied a condition set by a debtor.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN8 **Contract Interpretation, Fiduciary Responsibilities**

A claim for breach of fiduciary duty under New York law requires the existence of a fiduciary duty and a breach of that duty. A fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another. While it is not entirely clear when fiduciary duties arise out of a contractual relationship, it is well-settled law that, a conventional business relationship does not create a fiduciary relationship in the absence of additional factors. Generally, an arm's length business transaction, even those where one party has superior bargaining power, is not enough to give rise to a fiduciary relationship.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN9 **Motions to Dismiss, Failure to State Claim**

The existence of a fiduciary relationship is often a fact-intensive inquiry appropriate for a jury, however, conclusory allegations that a contractually-bound record company and recording artist shared a long and enduring relationship of trust and confidence are insufficient to plead a fiduciary relationship and survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN10 **Contract Interpretation, Fiduciary Responsibilities**

Without special circumstances, no fiduciary relationship exists between a music publisher and composer as a matter of law. The fact that a defendant record company is contractually responsible for collecting royalties and passing them on to a plaintiff music artist does not, in itself, create a fiduciary relationship between parties.

Estate, Gift & Trust Law > Trusts > Constructive Trusts

HN11 **Trusts, Constructive Trusts**

Under New York law, a party seeking a constructive trust must establish four elements: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment.

Civil Procedure > Remedies > Equitable Accountings > Grounds for Accountings

HN12 **Equitable Accountings, Grounds for Accountings**

Proof of a fiduciary relationship is a mandatory element of an accounting claim under New York law.

Counsel: [1]** For Eric Faulkner, Duncan Faure, Alan Longmuir, Derek Longmuir, Leslie McKeown, Stuart Wood, Plaintiffs: Tamara F. Carmichael, LEAD ATTORNEY, Christelette Angelika Hoey, Gillian Rattray, Holland & Knight LLP, New York, NY; Joshua Krumholz, Holland & Knight, L.L.P., Boston, MA.

For Arista Records LLC, Defendant: Robert A. Jacobs, LEAD ATTORNEY, Manatt, Phelps & Phillips, LLP(TimesSq), New York, NY.

For Gordon Clark, Pat McGlynn, Movants: William L. Buus, Buus, Kim, Kou & Tran, L.L.P., Newport Beach, CA; Wolfgang Heimerl, Heimerl Law Firm, Bernardsville, NJ.

For Ian Mitchell, Intervenor: William L. Buus, Buus, Kim, Kou & Tran, L.L.P., Newport Beach, CA; Wolfgang Heimerl, Heimerl Law Firm, Bernardsville, NJ.

Judges: Deborah A. Batts, United States District Judge.

Opinion by: Deborah A. Batts

Opinion

[*473] *MEMORANDUM & ORDER*

DEBORAH A. BATTS, United States District Judge.

Plaintiffs Eric Faulkner, Duncan Faure, Alan Longmuir, Derek Longmuir, Leslie McKeown, and Stuart Wood, former members of the 1970s hit rock group, the Bay City Rollers (the "Rollers"), bring claims for breach of contract, breach of fiduciary duty, constructive trust, and accounting against Defendant Arista Records LLC ("Arista"), their record label. Plaintiffs **[**2]** allege that Defendant breached its 1981 contract with Plaintiffs by refusing to account for the royalties Plaintiffs were due under that agreement, and by withholding payment of those royalties to Plaintiffs for over twenty-five years. Plaintiffs further allege that Parties' long relationship was fiduciary in nature, and that Arista breached its fiduciary duty to Plaintiffs by, among other things, failing to pay or properly account for these royalties. Plaintiffs seek the imposition of a constructive trust in favor of Plaintiffs to prevent Arista's unjust enrichment, and an accounting that will enable Plaintiffs to determine the total amount of money they are owed. Plaintiffs further seek compensatory and punitive damages, interest, costs and attorneys' fees as well as all right, title and interest in all their master recordings, and in all copyrights in works created by the Rollers and held by Arista or any related entity.

Defendant Arista moves to dismiss Plaintiffs' claims pursuant to *Fed R. Civ. P. Rule 12(b)(6)*. Defendant does not deny that it has failed to pay Plaintiffs the royalties they are due under the Parties' 1981 contract. Defendant argues instead that Plaintiffs' breach **[**3]** of contract claim - filed decades after Defendant's initial failure to pay or account for the royalties due - is time-barred. Defendant argues that Plaintiffs' remaining claims fail as a matter of law because there was no fiduciary relationship between the Parties, as required by each of those claims, because the claims are duplicative of Plaintiffs' breach of contract claim, and because the claims are likewise time-barred.

For the reasons set forth below, Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

The following facts alleged in the First Amended Complaint in 07 Civ. 2318, filed on July 13, 2007, are assumed to be true for purposes of this Memorandum and Order.

Plaintiffs Eric Faulkner, Duncan Faure, Alan Longmuir, Derek Longmuir, Leslie McKeown and Stuart Wood were members of the 1970's musical group known as the "Bay City Rollers." (*Am. Compl*. PP 14 & 17-18) Originating in the United Kingdom and achieving a number of Top Ten hits on the UK charts, the group's success "spread to the rest of the world" by the mid-70s. (*Id*. PP 23-28) Between 1974 and their break-up in 1981, the Rollers released eight original **[**4]** albums, as well as numerous compilations and re-releases derived from their catalogue of original recordings. (*Id*. P 32) After the band's break-up, compilations and greatest hits collections continued to be released in the United States and abroad. (*Id*. P 29) Third-party estimates of the group's total worldwide album sales range between 70 million to over 100 million. (*Id*. P 33)

On or about September 15, 1971, present and former members of the Rollers entered into an agreement (the "1971 Agreement") with Bell Records, a division of Columbia Pictures Industries, Inc. [1] (*Id*. **[*474]** P 37) Three years later, in 1974, Bell Records and other Columbia labels merged to create a new entity, Arista Records, Inc., which succeeded to the rights and obligations of Bell Records under the 1971 Agreement with the Rollers. (*Id*. P 38) Defendant Arista Records LLC ("Arista") later succeeded to the rights and obligations of Arista Records, Inc. (*Id*.) Pursuant to the terms of the 1971 Agreement, all master recordings made under the agreement and all related derivatives and performances became "entirely and forever the

[1] The signatories of the 1971 Agreement were the Rollers' original members: Gordon Fraser Clark, Derek Longmuir, Alan Longmuir, Neil Henderson, Archie Marr, and Eric Manclark. (*Am. Compl*. P 37) On or about May 21, 1974, Eric Faulkner, Stuart Wood and Leslie McKeown replaced Archie Marr, Neil Henderson, and Gordon Fraser Clark as signatories of that Agreement.

property of" the recording company (Bell Records in 1971, succeeded by Defendant Arista), in **[**5]** exchange for which the Rollers received various royalty amounts for records sold. (*Id*. PP 39-41)

Beginning in 1975, a corporation known as ALK Enterprises ("ALK") began to operate the affairs of the Rollers in the United States, (*id*. PP 44 & 47) and on or about July 1, 1975, ALK entered into a new agreement with Arista (the "1975 Agreement") on behalf of the Rollers. (*Id*. P 49) Pursuant to the 1975 Agreement, ALK as the Rollers' "Producer" was to receive various royalties on the Rollers' behalf in exchange for "all records and reproductions made" by the Rollers "together with the performances embodied therein." (*Id*. PP 49-55)

On March 5, 1981, upon the group's break-up, Plaintiffs entered into two settlement agreements - the first with ALK (the "1981 ALK Agreement"), and the second with Arista (the "1981 Arista Agreement"). Pursuant **[**6]** to the 1981 ALK Agreement, under which the Rollers regained their royalty rights from ALK, ALK assigned to Plaintiffs all of its "right, title and interest in and to" the 1975 Agreement, and "any and all payments or other benefits due at any time after" February 28, 1979. (*Id*. P 60) In addition, ALK assigned to Plaintiffs "all right, title and interest" in any claims that ALK had against Arista in connection with any of the agreements between them, including the 1975 Agreement. (*Id*. P 61)

The 1981 Arista Agreement, the contract at issue in this action, provided in pertinent part that:

> ". . . [Arista] shall pay royalties to [the Bay City Rollers] earned from and after February 28, 1979 in respect of master recordings [the Rollers] recorded under the Agreement, but only to the extent such payments would otherwise have been payable to ALK. . . . All such monies shall be remitted to 'THE BAY CITY ROLLERS' at the following address: c/o Arrow, Edelstein & Gross, P.C., 1370 Avenue of the Americas, New York, New York 10019, Attention: Gerald F. Edelstein, Esq. and shall be accompanied by statements with respect to such payments."

(1981 Arista Agreement, at Jacobs Decl., May 18, 2007, Ex. 8 at **[**7]** 2) Under the Agreement, Arista was to render royalty statements to Plaintiffs twice a year. (*Am. Compl*. P 69) In exchange for the designated royalty payments and statements, Plaintiffs released Arista from payments and other obligations due to the Rollers prior to February 28, 1979, except that Plaintiffs retained the right to assert claims based upon audits that had been prepared pertaining to that time period. (*Id*. P 67)

The 1981 Arista Agreement further provided that: "This agreement is the entire agreement between the parties and shall **[*475]** not be modified, except by an instrument in writing, signed by each of the parties duly authorized to execute such modification." (1981 Arista Agreement, at Jacobs Decl., May 18, 2007, Ex. 8 at 6)

Despite the terms of the 1981 Arista Agreement, and repeated requests made by Plaintiffs to Defendant over the years, "for reasons never explained," Arista "stopped providing royalty statements after entering into the 1981 Agreement." (*Am. Compl*. PP 70-74) According to Plaintiffs, Arista sent its "first purported royalty statement" in 1993, additional statements in 1996 and 1997, and began to provide regular royalty statements only in 2004; however, Plaintiffs **[**8]** "duly objected to" all of these statements as "materially incomplete and wholly inadequate." (*Id*. PP 75-77) Plaintiffs further allege that "[o]ther than one payment of $ 254,392.56 paid on or about September 2, 1997, Arista has not paid any royalties" to Plaintiffs in over 25 years. (*Id*. P 98)

Plaintiffs allege that included in the funds that Arista has withheld from Plaintiffs are payments Arista has received from third-party licensees of the Rollers' music. (*Id*. at P 105) Plaintiffs also allege that Arista has wrongfully claimed that the 1981 Agreement between Parties obligated Plaintiffs to pay third parties for fees and costs associated with the recording and sale of their recordings. (*Id*. P 108) While such payments were dependent upon sales generated from Plaintiffs' recordings, all information about actual sales and amounts owed by Plaintiffs to third parties allegedly was and is within the complete control of Defendant, preventing Plaintiffs from knowing and fulfilling any contractual obligations they may have, and leaving Plaintiffs potentially liable to third parties for claims of payment. (*Id*. PP 109-112)

At no time has Defendant ever claimed that it did not owe royalties to **[**9]** Plaintiffs under the 1981 Arista Agreement, but rather, has in the years since making the Agreement repeatedly reaffirmed in writing its obligation to pay Plaintiffs under that Agreement. (*Id*. P 78) Defendant explains its failure to pay the royalties due by alleging that it did not know to whom and where to direct the payments. (*Id*. PP 80 & 99; *see also* Letter from Glenn Delgado to Mark St. John, Nov. 1, 2001, at Jacobs Decl., Ex. 1; Letter from Glenn Delgado to Mark St. John, Jan. 9, 2002, at Jacobs Decl., Ex. 2) Defendant does not dispute that the 1981 Arista Agreement clearly set forth payee information. (*See* 1981 Arista Agreement, at Jacobs Decl., May 18, 2007,

Ex. 8 at 2) Defendant claims instead that about a year after the Agreement was made, the payee designated in the Agreement - Arrow, Edelstein & Gross, P.C. - changed its name and address, and the same year, three members of the band sent Defendant a letter directing Defendant to send royalty payments and statements to a third party. (*See* Letter from Glenn Delgado to Mark St. John, Nov. 1, 2001, at Jacobs Decl., July 11, 2007, Ex. 1 at 1) According to Defendant,

> "As: (i) there was a dispute among the members of the Rollers **[**10]** regarding where statements and payments should be rendered[;] (ii) the address on file for rendering statements and payments was incorrect; (iii) the 1981 Agreement provides that the 'agreement shall not be modified, except by an instrument in writing, signed by each of the parties duly authorized to execute such modification'; and (iv) Arista did not receive a change of address/payee letter, signed by all of the parties, in accordance with the terms of the 1981 Agreement, Arista placed royalties on hold to avoid a payment to an incorrect party."

[*476] (*Id*. at 1-2) Through a number of letters, the commencement of an interpleader action against the original signatories to the 1981 Arista Agreement, and the negotiation of a mutually-agreed upon settlement agreement which Defendant claims was never executed by Plaintiffs, Defendant insists that it "has always attempted, in good faith, to resolve the issues" surrounding outstanding royalties owed by Arista to the Rollers, and has been "willing to pay the Rollers all accrued royalties . . . provided Arista receives a correct change of address/payee letter signed by all of the parties" according the terms of the 1981 Agreement. (*Id*. at 2-3)

In addition **[**11]** to a number of letters exchanged between Parties prior to 2001, (*Am. Compl*. PP 81-88) representatives of Arista produced three written communications (two letters dated November 1, 2001 and January 2, 2002, and an email dated April 6, 2004) within six years of the March 20, 2007 filing of this action that reiterated their debt to Plaintiffs. First, on November 1, 2001, Arista's Director of Business and Legal Affairs, Glenn Delgado, wrote to Mark St. John, the Rollers' representative, summarizing the payee dispute to date. He concluded, in pertinent part, that:

> ". . . Arista remains committed to resolving all of the outstanding issues with the Rollers, in a fair and amicable way. To that end, Arista would be willing to pay the Rollers all accrued royalties and the amount Arista conceded to in connection with the audit, provided Arista receives a correct change of address/payee letter signed by all of the parties in accordance with the terms of [the] 1981 Agreement. . . . Please understand that this letter is intended to facilitate settlement discussions and is not intended to be a full statement of all the facts and circumstances concerning this matter or a waiver of any of Arista's **[**12]** rights or remedies, all of which are hereby expressly reserved."

(Letter from Glenn Delgado to Mark St. John, Nov. 1, 2001, at Jacobs Decl., July 11, 2007, Ex. 1 at 2-3)

On January 9, 2002, Mr. Delgado again wrote to Mr. St. John on behalf of Arista, essentially restating the position that Defendant had set forth in its previous letter of November 1, 2001, including, in pertinent part, that "Arista would be more than willing to pay any accrued royalties to the correct payees, provided we receive correct payee information . . ." (Letter from Glenn Delgado to Mark St. John, Jan. 9, 2002, at Jacobs Decl., July 11, 2007, Ex. 2)

Plaintiffs allege that on April 6, 2004, Arista for the third time confirmed in writing its intention to pay earned royalties to Plaintiffs when Steve Gawley of Arista sent an email (the "Gawley email") to Clive Rich and Jane Preston - but not to Plaintiffs or to Plaintiffs' representatives - regarding a documentary to be aired by the British Broadcasting Company about Arista's failure to pay royalties to the Rollers. (*Am. Compl*. PP 91-92) Plaintiffs assert that Jane Preston had contacted Arista for comment upon the anticipated documentary, and that the Gawley email **[**13]** was intended to respond to that inquiry. (*Id*. at P 92) Among other things, Plaintiffs allege that Mr. Gawley stated in that email that,

> "Through our correspondence to Mark St. John, which we have provided to you, Arista has always maintained and made clear that we would pay any earned royalties to the appropriate parties. . . . Arista rendered a full and complete accounting, inclusive of international earnings, when Arista placed the sums owed into escrow."

(*Id*. P 93) Plaintiffs further allege that Arista threatened to hold Preston's organization legally culpable if it took a contrary **[*477]** position in its documentary to the one asserted by Defendant in the Gawley email. (*Id*. P 94)

While Defendant has many times insisted that the requested payee information was never supplied, and as such, Defendant could not make any royalty payments to Plaintiffs, Plaintiffs assert their "belie[f] that Arista has had the requested payee information for a significant period of time." (Letter from Joshua C. Krumholz to Robert A. Jacobs, Krumholz Decl., Ex. 2)

Nevertheless, in an effort "to avoid any doubt," Plaintiffs provided Defendant with a "notice of 'change of address/payee letter' as requested," signed **[**14]** by all named Plaintiffs to this action, in a correspondence dated August 16, 2007. (Krumholz Decl., Exs. 2-3)

Plaintiffs filed this action on March 20, 2007. Defendant first moved to dismiss Plaintiffs' complaint on May 21, 2007. Plaintiffs subsequently filed their First Amended Complaint with the Court on July 13, 2007. Defendant filed the instant Motion to Dismiss Plaintiffs' First Amended Complaint on August 6, 2007; Plaintiff responded on August 20, 2007. The Motion was fully briefed as of September 17, 2007.

II. DISCUSSION

A. Legal Standard

HN1[↑] For a complaint to survive dismissal under *Rule 12(b) (6)*, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. In other words, a plaintiff must satisfy "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation **[**15]** of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1964-65* (internal quotation marks omitted). In deciding a motion to dismiss, the court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007)* (citation omitted). However, "general, conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint." *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany, No. 05 Civ. 10669, 2007 U.S. Dist. LEXIS 71906, 2007 WL 2822214, at *7 (S.D.N.Y. Sept. 27, 2007)*.

HN2[↑] In ruling on a 12(b)(6) motion, a court may consider the complaint as well as "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." *Zdenek Marek v. Old Navy (Apparel) Inc., 348 F.Supp.2d 275, 279 (S.D.N.Y. 2004)* (citing *Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001)* (internal quotations omitted)). It is also "well established that a district court may rely on matters of public record in deciding a motion **[**16]** to dismiss under *Rule 12(b)(6)*, including case law and statutes." *Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1988)*; *see also Dayton Monetary Associates v. Donaldson, Lufkin, & Jenrette Securities, 1992 U.S. Dist. LEXIS 12283, 1992 WL 204374, at *3 (S.D.N.Y. 1992)* (public court filings considered on 12(b)(6) motion to dismiss).

B. *Breach of Contract*

Plaintiffs allege that Defendant Arista has breached its contractual obligations to **[*478]** Plaintiffs to account for and make royalty payments due to Plaintiffs pursuant to the terms of the 1981 Arista Agreement and provisions of the 1975 Agreement incorporated therein. [2] Defendant does not contest that it has not fully accounted for or made the royalty payments required by its contract with Plaintiffs. Defendant instead moves to dismiss Plaintiffs' breach of contract claim as time-barred by the relevant statute of limitations.

There is no dispute between Parties that Plaintiffs' breach of contract claim is governed by New York law, as stated in the 1981 Agreement. (1981 Agreement, at Jacobs Decl., **[**17]** May 18, 2007, Ex. 8 at 6) ***HN3***[↑] In New York, the statute of limitations on a claim for breach of contract is six years. *N.Y. C.P.L.R. § 203(a)*; *Guilbert v. Gardner, 480 F.3d 140, 149 (2d Cir. 2007)*. A cause of action for breach of contract ordinarily accrues and the limitations period begins to run upon breach. *Guilbert, 480 F.3d at 149*. If a contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew. *Id. at 150*.

Because Plaintiffs allege that Defendant never paid them "two years of royalties that became due immediately upon execution of the Arista Agreement," (Pls.' Opp. at 6) triggering a breach when the contract was executed in March 1981, Plaintiffs' breach

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[2] Hereinafter, this Memorandum and Order will refer to the 1981 Arista Agreement and incorporated provisions of the 1975 Agreement simply as "the 1981 Agreement."

of contract claim with respect to the 1981 Agreement with Arista ordinarily would have become time-barred under New York law in March 1987. However, Defendant's obligation to account for and pay Plaintiffs their royalties had no set end date; it was a continuing obligation according to the 1981 Agreement, "from and after February 28, 1979." (1981 Arista Agreement, at Jacobs Decl., May 18, 2007, Ex. 8 at 2) As such, Plaintiffs' claim that Defendant has breached **[**18]** its contractual obligations within six years of the commencement of this action is timely.

Under the continuing obligation theory alone, Plaintiffs' breach of contract claim would be limited to the six-year period before the lawsuit was filed. *See, e.g.*, *Beller v. William Penn Life Ins. Co., 8 A.D.3d 310, 314, 778 N.Y.S.2d 82 (2d Dept. 2004)*. However, ***HN4***[↑] under *N.Y. General Obligations Law § 17-101*, a written acknowledgement of a contractual obligation made subsequent to the execution of the contract may effectively toll the statute of limitations for a breach of contract claim.***HN5***[↑] *Section 17-101* provides that:

> "An acknowledgement 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. . ."

N.Y. Gen. Oblig. Law § 17-101. ***HN6***[↑] To toll effectively or restart the running of the statute of limitations under *§ 17-101*, an acknowledgment or promise must be in writing, be signed by the debtor party, "recognize an existing debt and contain nothing inconsistent with an intention on the part of **[**19]** the debtor to pay it." *GP Hemisphere Associates, LLC, v. The Republic of Nicaragua, 2000 U.S. Dist. LEXIS 14165, 2000 WL 1457025, at *3 (S.D.N.Y. Sept. 28, 2000)* (internal quotations omitted); *Lew Morris Demolition v. Board of Education, 40 N.Y.2d 516, 521, 387 N.Y.S.2d 409, 355 N.E.2d 369 (1976)*. An effective acknowledgment may take a variety of forms. *Id*. "In determining the effectiveness of an acknowledgment, the **[*479]** critical determination is whether the acknowledgment imports an intention to pay." *In re Brill, 318 B.R. 49, 54 (Bankr.S.D.N.Y. 2004)* (internal quotations and citation omitted); *see also Banco Do Brasil S.A. v. State of Antigua and Barbuda, 268 A.D.2d 75, 707 N.Y.S.2d 151 (1st Dep't 2000)* ("an intention to pay . . . is all that need be shown in order to satisfy *section 17-101*"). A written acknowledgment need not specify the precise amount owed to effectively toll the statute of limitations. *United Rubber, Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. Great Am. Indus., Inc., 479 F.Supp. 216, 230 (S.D.N.Y. 1979)*. An acknowledgment of an existing debt and the intent to pay the same must, however, be unconditional. *In re Brill, 318 B.R. at 54*. If any condition must be satisfied prior to payment being **[**20]** made, the creditor must show that the condition has been satisfied before application of the toll embodied in *§ 17-101*. *Id*.

Plaintiffs claim that Defendant has on at least three occasions over the past six years rendered an express, written acknowledgment and intention to pay its debt to Plaintiffs. First, on November 1, 2001, Arista's Director of Business and Legal Affairs, Glenn Delgado, wrote to Mark St. John, the Rollers' representative, that:

> "Arista remains committed to resolving all of the outstanding issues with the Rollers in a fair and amicable way. To that end, Arista would be willing to pay the Rollers all accrued royalties and the amount Arista conceded to in connection with the audit, provided Arista receives a correct change of address/payee letter signed by all of the Parties in accordance with the terms of [the] 1981 Agreement."

(Letter from Glenn Delgado to Mark St. John, Nov. 1, 2001, at Jacobs Decl., July 11, 2007, Ex. 1 at 2-3). Second, on January 9, 2002, Mr. Delgado again wrote to Mr. St. John, reiterating that "Arista would be more than willing to pay any accrued royalties to the correct payees, provided we receive correct payee information . . ." (Letter from **[**21]** Glenn Delgado to Mark St. John, Jan. 9, 2002, at Jacobs Decl., July 11, 2007, Ex. 2). Third, on April 6, 2004, Steve Gawley of Arista sent an email ("Gawley email") to Clive Rich and Jane Preston in response to inquiries regarding a documentary to be aired about Arista's failure to pay the Rollers their royalties. (*Am. Compl*. PP 91-92) Plaintiffs allege that Mr. Gawley stated in that email that:

> "Through our correspondence to Mark St. John, which we have provided to you, Arista has always maintained and made clear that we would pay any earned royalties to the appropriate parties."

(*Id*. P 93)

Defendant disputes that either letter sent by Glenn Delgado to Mark St. John constitutes a written acknowledgment sufficient to toll the statute of limitations under *N.Y. General Obligations Law § 17-101*. Defendant argues that the letters were "conditional settlement offer[s]" to pay to Plaintiffs an "unspecified amount" of accrued royalties and, as such, do not make out the clear and unconditional intention to pay a specific debt that is required by the statute. (Def.'s Reply Memo, July 11, 2007, at 8) Defendant

argues that the Gawley email does nothing more than refer to those prior conditional **[**22]** settlement offers, does not acknowledge that Arista actually *has* any earned royalties to pay, and was neither directed to Plaintiffs, nor intended to influence them. (Def.'s Memo of Law, August 6, 2007, at 4-5) Defendant further contends that Plaintiffs are unable to demonstrate that they satisfied the condition precedent to any intention to pay that Defendant may have **[*480]** expressed - specifically, providing the necessary and requested payee information. (Def.'s Reply Memo, July 11, 2007, at 8)

Defendant's assertions are unpersuasive, particularly at this stage of the litigation. Each Delgado letter is quite clearly in writing and signed by Defendant's Director of Business and Legal Affairs, Mr. Delgado. Each of the letters plainly recognizes Arista's debt to Plaintiffs, specifically referencing the 1981 Agreement between the Parties and conceding the continuing validity of the contractual obligation. (*See* Jacobs Decl., July 11, 2007, Ex. 1 at 3 & Ex. 2 at 1) On their face, the statements made by Defendant in the letters - that "Arista remains committed to resolving all of the outstanding issues with the Rollers . . . . To that end, Arista would be willing to pay the Rollers all accrued **[**23]** royalties and the amount Arista conceded to in connection with the audit. . ." and "Arista would be more than willing to pay any accrued royalties to the correct payees" - twice import a clear intention to pay Plaintiffs. (*Id*.) Certainly, the letters "contain nothing inconsistent with an intention" on the part of Arista to pay the debt owed. *GP Hemisphere Associates, LLC, 2000 U.S. Dist. LEXIS 14165, 2000 WL 1457025, at *3*.

Defendant insists that the Delgado letters are inconsistent with Defendant's contractual obligation because the letters include that Defendant reserves its rights. (*Id*. at 3) Defendant's notice that it reserves its rights, however, does nothing to disturb its written acknowledgment that it is willing to pay "all accrued royalties" to Plaintiffs in accordance with the 1981 Agreement. Defendant's reliance on *Lew Morris Demolition Co., Inc. v. Board of Education of the City of New York, 40 N.Y.2d 516, 355 N.E.2d 369, 387 N.Y.S.2d 409 (1976)* on this point is unconvincing. In that case, the defendant expressly repudiated its obligations under a contract in the course of making its settlement offer. The defendant had specifically advised the plaintiff that the settlement it was offering was in no way to be understood **[**24]** as a "final payment or payment of any character under said contract. . ." *Id. at 519*. The Delgado letters contain no such language. Neither letter offers to settle the dispute between Parties for any sum other than that which is properly due under the Parties' contract. Rather, a plain reading of the Delgado letters demonstrates a forthright acknowledgment of Defendant's contractual obligations.

Defendant's strongest argument for dismissal of Plaintiffs' breach of contract claim is that the written acknowledgments made by Defendant were not unconditional; they conditioned Defendant's intention to pay upon the receipt of correct payee information from Plaintiff. Indeed, the letters specifically condition Defendant's willingness to pay with the clauses, "provided Arista receives a correct address/payee letter signed by all of the parties," and "provided we receive correct payee information …" (Jacobs Decl., July 11, 2007, Ex. 1 at 3 and Ex. 2 at 1) Defendant maintains that it never received the required payee information, and as such, Plaintiffs failed to satisfy the condition precedent set by Defendant's written acknowledgments. Plaintiffs do not contest that ***HN7***[↑] a condition precedent, if **[**25]** contained in an acknowledgment, must be fulfilled in order to satisfy the requirements of *§ 17-101*, or that it is Plaintiffs' burden, as creditor, to show that they have satisfied the condition set by Defendant. (Pls.' Opp., August 2, 2007, at 13) Indeed, the relevant case law is well-settled on these points. *See, e.g., In re Brill, 318 B.R. at 54*.

[*481] Plaintiffs submit instead that they "long ago gave Arista the necessary payee information," (Pls.' Opp., August 2, 2007, at 13) referencing a letter from Plaintiffs' representative, Mark St. John (the "St. John letter") dated January 29, 2002. This letter refers to prior "discussion and correspondence" between the Parties that allegedly established the proper payee information. (*Am. Compl*. P 96; Jacobs Decl., August 7, 2001, Ex. 1 at 1) The St. John letter further states that the proper payee information "has been fully set out and addressed in the past . . . to previous Arista legal executives." (Jacobs Decl., August 7, 2001, Ex. 1 at 1) The Court notes that Defendant's uncontested remission of royalty statements to Plaintiffs in 1993, 1996, 1997, and regularly beginning in 2004, (*Am. Compl*. PP 75-77) suggests that Defendant at one point **[**26]** possessed payee information that it found satisfactory enough to send Plaintiffs statements of the royalty amounts they were owed.

To "avoid any doubt" as to whether Plaintiffs had provided Arista with the requested payee information, Plaintiffs forwarded a "notice of 'change of address/payee letter' as requested" to Arista on August 16, 2007, signed by the six original signatories of the 1981 Agreement, the Plaintiffs in this action. (Krumholz Decl., Tabs 2 & 3) The Court notes that that letter was submitted to Defendant by Plaintiffs within six years of the earliest alleged written acknowledgment of Defendant's existing debt to Plaintiffs and its intention to pay - the November 1, 2001 Delgado letter.

At this stage in the proceedings, drawing all reasonable inferences in Plaintiffs' favor, there is at least a question of fact as to whether the condition set forth in the Delgado letters was satisfied by Plaintiffs, and thus, whether the writings from Defendant to Plaintiffs constitute written acknowledgments of Defendant's debt sufficient to toll the statute of limitations for Plaintiffs' breach of contract claim under *N.Y. Gen. Oblig. Law § 17-101*. Unlike the cases upon which Defendant **[**27]** relies, *see Randustrial v. Acme Distribution Center, 79 A.D.2d 862, 434 N.Y.S.2d 511, 512 (N.Y.A.D. 1980)* (plaintiff failed even to allege that it had performed the condition precedent); *In re Brill, 318 B.R. at 55-56* (creditor "[did] not allege or prove that [d]ebtor became able to pay at any time," when the condition precedent was debtor's ability to pay), Plaintiffs here have made a *prima facie* showing that the condition precedent has been satisfied. Whether the statute of limitations has been tolled, and thus, whether Plaintiffs' breach of contract claim remains ripe, will rely ultimately on this fact-intensive inquiry, *see Clarkson Co. v. Shaheen, 533 F. Supp. 905, 932 (S.D.N.Y. 1982)*, which is inappropriate for resolution at this juncture. Defendant's motion to dismiss Plaintiffs' breach of contract claim on statute of limitations grounds is therefore DENIED.

C. *Breach of Fiduciary Duty*

Plaintiffs allege in their second cause of action that Defendant owed a fiduciary duty to Plaintiffs given the "long and enduring relationship between Arista and [the Rollers]," and that Defendant breached this duty when it failed for over twenty-five years to account for and pay Plaintiffs **[**28]** the royalties it owed them. (*Am. Compl*. PP 129-133) Defendant argues that Plaintiffs' claim for breach of fiduciary duty must be dismissed because the Parties' relationship is not a fiduciary one, and as such, Defendant breached no fiduciary duty to Plaintiffs. (Def.'s Memo of Law at 10) Defendant further contends that Plaintiffs' breach of fiduciary duty claim duplicates their breach of contract claim, and is time-barred. (*Id*.)

[*482] ***HN8***[↑] A claim for breach of fiduciary duty under New York law requires the existence of a fiduciary duty and a breach of that duty. *Muller-Paisner v. TIAA, 289 Fed.Appx. 461, 465 (2d Cir. 2008)* "A fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another." *Cooper v. Sony Records Int'l, 2001 U.S. Dist. LEXIS 16436, 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2001)*; *Reuben H. Donnelley Corp. v. Mark I Marketing Corp., 893 F.Supp. 285, 289 (S.D.N.Y. 1995)*. While "it is not entirely clear when fiduciary duties arise out of a contractual relationship," it is well-settled law that, "a conventional business relationship **[**29]** does not create a fiduciary relationship in the absence of additional factors." *Reuben H. Donnelley Corp., 893 F.Supp. at 289*. "Generally, an arm's length business transaction, even those where one party has superior bargaining power, is not enough to give rise to a fiduciary relationship." *Sony Music Entertainment, Inc. v. Robison, et al, 2002 U.S. Dist. LEXIS 3100, 2002 WL 272406, at *3 (S.D.N.Y. Feb. 26, 2002)*, quoting *Savage Records Group, N.V. v. Jones*, No. 600814/95 at 6-7 (N.Y.Sup.Ct. July 17, 1997), *aff'd*, *247 A.D.2d 274, 667 N.Y.S.2d 906 (N.Y.App.Div.1998)*.

HN9[↑] The existence of a fiduciary relationship is often a "fact-intensive" inquiry appropriate for a jury, *see CBS Inc. v. Ahern, 108 F.R.D. 14, 26 & n 21 (S.D.N.Y. 1985)*, however, conclusory allegations that a contractually-bound record company and recording artist shared a "long and enduring relationship . . . of trust and confidence" (*Am. Compl*. P 131) are insufficient to plead a fiduciary relationship and survive a motion to dismiss. *See Sony Music Entertainment, 2002 U.S. Dist. LEXIS 3100, 2002 WL 272406, at *3* (artists' "assertions that they placed 'trust and confidence' in [record company] over the six years of their relationship . . . are not sufficient to create fiduciary duties in the absence **[**30]** of a special relationship"); *Cooper, 2001 U.S. Dist. LEXIS 16436, 2001 WL 1223492, at *5* ("Plaintiffs' conclusory allegations that a fiduciary duty was owed by [Defendant record company] cannot survive a motion to dismiss."); *Mellencamp v. Riva Music Ltd., 698 F.Supp. 1154, 1160 (S.D.N.Y. 1988)* ("since plaintiff's [breach of fiduciary duty claims] are predicated solely upon the professional relationship between the parties and do not plead any specific conduct or circumstances upon which trust elements are implicated, they are dismissed.").

Courts in this District have "repeatedly rejected the existence of a fiduciary relationship between recording artists and their record label," *Sony Music Entertainment, Inc., 2002 U.S. Dist. LEXIS 3100, 2002 WL 272406 at *3*. ***HN10***[↑] Without "special circumstances," courts have routinely held that "no fiduciary relationship exists between a music publisher and composer as a matter of law." *Cooper, 2001 U.S. Dist. LEXIS 16436, 2001 WL 1223492 at *5*; *Carter v. Goodman Group Music Pub., 848 F.Supp. 438, 444 (S.D.N.Y. 1994)*. The fact that a defendant record company is contractually responsible for collecting royalties and passing them on to a plaintiff music artist does not, in itself, create a fiduciary relationship between parties. *Sony Music Entertainment Inc., 2002 U.S. Dist. LEXIS 3100, 2002 WL 272406 at *3*; **[**31]** *Rodgers v. Roulette Records, Inc., 677 F.Supp. 731, 739 (S.D.N.Y. 1988)*.

To insulate their claim for breach of fiduciary duty against the overwhelming tide of legal authority in this District against it, Plaintiffs cite to *Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dept. 1988)*. In *Apple Records*, plaintiffs, the individual members of the Beatles, alleged breach of fiduciary duty and other claims against their record companies, Capitol Records, **[*483]** Inc. and EMI Records, pursuant to licensing and manufacturing and distributing agreements between the parties. *Apple Records, 137 A.D.2d at 52-53*. The Supreme Court of New York, Appellate Division, in reviewing the lower court's decision granting in part and denying in part defendants' motion to dismiss Plaintiffs' claims, and denying, in pertinent part, defendants' motion to dismiss plaintiffs' claim of breach of fiduciary duty, noted that,

> "In upholding the sixth cause of action for breach of fiduciary duties, the motion court acknowledged that while the contract did not establish a formal fiduciary relationship, the pleadings were sufficient to raise an issue as to the existence of an informal one . . ."

Id. at 57. **[**32]** The appellate court went on to review the facts in the pleadings that had led the lower court to such a conclusion, noting that "[a] fiduciary relationship, whether formal or informal, 'is one founded upon trust or confidence . . [and] might be found to exist, in appropriate circumstances, between close friends, or even *where confidence is based upon prior business dealings*," *id*. (citations omitted) (emphasis added), explaining that:

> "The business dealings between Capitol Records and the Beatles date back to 1962, when the still unacclaimed Beatles entrusted their musical talents to defendant Capitol Records. It is alleged that this relationship proved so profitable to defendant that at one point the Beatles constituted 25 to 30 percent of its business. Even after the Beatles attained their remarkable degree of popularity and success, they continued to rely on Capitol Records for the manufacture and sale of their recordings."

Id. The court concluded, in pertinent part, that "it can be said that from such a long enduring relationship [between parties] was borne a special relationship of trust and confidence" sufficient to convert it from a conventional, arm's length business relationship **[**33]** to a fiduciary one. *Id*.

Given the unprecedented facts of that case, *Apple Records* stands as the exception to the general rule that a fiduciary relationship does not exist between recording artists and their record companies under New York law, and thus is of little precedential value to these or other plaintiffs. *See Sony Music Entertainment Inc., 2002 U.S. Dist. LEXIS 3100, 2002 WL 272406, at *3* (finding *Apple Records* "distinguishable . . . . in the absence of a special relationship"); *Cooper v. Sony Records Int'l, 2001 U.S. Dist. LEXIS 16436, 2001 WL 1223492, *5, n 10 (S.D.N.Y. Oct 15, 2001)* (finding that "[u]nlike *Apple Records*, here there is no assertion of a special relationship beyond that which normally exists between contracting parties in an arms-length transaction."). While this Court is aware of certain factual similarities [3] that do exist **[*484]** between Plaintiffs' case and the Beatles' in *Apple Records*, the Court finds notably absent those facts that led the New York Supreme Court and Appellate Court to conclude that a "special relationship of trust and confidence" had developed between the Beatles and their record companies such that a fiduciary relationship was created. In contrast to the business dealings between the Beatles, Capitol **[**34]** Records, and EMI, there are no facts here to suggest that the dealings between the Rollers and Arista were anything other or more than garden-variety arm's length transactions. This Court notes, in fact, that Plaintiffs were represented by a intermediary, pass-through corporate entity, ALK, in their second agreement with Defendant in 1975, to best "protect [their] interests." (*Am. Compl*. P 46) These differences prevent the Court from sustaining Plaintiffs' claim for breach of fiduciary duty against Defendant's motion to dismiss under *Apple Records*.

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[3] Plaintiffs entered into their first agreement with Arista's predecessor, Bell Records, when they were relative unknowns. (*Am. Compl*. P 16) Within a few years of first signing with Defendant in 1971, the Rollers "released a string of highly successful singles," and by 1975, the year they signed their second contract with Arista, the Rollers' success in the UK had "spread to the rest of the world." (*Id*. PP 18 & 23) Plaintiffs allege that their contract with Arista was so profitable to the company that "Arista has generated millions of dollars from the Rollers through the sale of albums, compact discs . . . licenses, digital transmissions, **[**35]** ringtones, and other rights and licenses." (*Id*. P 35) Indeed, Plaintiffs continued to rely on Arista for the licensing of their records through and well after the rise and fall of their popularity; Plaintiffs brought this action over thirty years after signing their original agreement with Defendant's predecessor and twenty-six years after the band's break-up. (*Id*. PP 29) All this time, Plaintiffs allege, Arista has "never made the payments required under [the 1981 Agreement at issue in this action] or any other agreement" between the Parties, but "[has] been holding all the funds owed" for over twenty-five years. (*Id*. PP 68 & 80)

Because the Court finds that no fiduciary relationship existed between Parties, it need not address Defendant's additional arguments against Plaintiffs' claim for breach of fiduciary duty. Defendant's motion to dismiss Plaintiffs' claim for breach of fiduciary duty is GRANTED.

C. *Constructive Trust*

Defendant further moves to dismiss Plaintiffs' action to impose a constructive trust in favor of the Rollers to prevent unjust enrichment by Arista. ***HN11***[↑] Under New York law, a party seeking a constructive trust must establish four elements: (1) a confidential or fiduciary **[**36]** relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment. *See, e.g.*, *Cooper, 2001 U.S. Dist. LEXIS 16436, 2001 WL 1223492 at *5*. As the Court has already found that no fiduciary relationship exists between these Parties, Plaintiffs' claim for a constructive trust fails as a matter of law. Defendant's motion to dismiss Plaintiffs' constructive trust claim is GRANTED.

D. *Accounting*

Plaintiffs' fourth claim for an accounting of Arista's financial affairs as they pertain to the agreements between Parties likewise fails given the absence of a fiduciary relationship in this case. ***HN12***[↑] Proof of a fiduciary relationship is a mandatory element of an accounting claim under New York law. *See, e.g.*, *Rodgers, 677 F.Supp. at 738-739*. Defendant's motion to dismiss Plaintiffs' accounting claim is therefore GRANTED.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is DENIED as to Plaintiffs' breach of contract claim and GRANTED as to Plaintiffs' claims of breach of fiduciary duty, constructive trust, and accounting. Defendant shall answer the first and sole remaining claim of Plaintiffs' First Amended Complaint within thirty (30) days of the date **[**37]** of this Memorandum and Order.

SO ORDERED.

Dated: New York, New York

March 5, 2009

/s/ Deborah A. Batts

Deborah A. Batts

United States District Judge

End of Document

Giblin v. Nassau County Medical Center

Court of Appeals of New York

January 17, 1984, Decided

No Number in Original

Reporter
61 N.Y.2d 67 *; 459 N.E.2d 856 **; 471 N.Y.S.2d 563 ***; 1984 N.Y. LEXIS 3994 ****

Martin J. Giblin, Appellant, v. Nassau County Medical Center et al., Respondents; Glen Davis, Appellant, v. New York City Transit Authority, Respondent

Prior History: [**1]** Appeal, in the first above-entitled action, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 13, 1983, which (1) reversed, on the law, an order of the Supreme Court at Special Term (M. Hallsted Christ, J.), entered in Nassau County, denying a motion by defendants to dismiss the complaint, and (2) granted defendants' motion.

Appeal, in the second above-entitled action, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered August 1, 1983, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Thomas R. Jones, J.), entered in Kings County, denying a motion by defendant to dismiss the complaint and granting a cross motion by plaintiff to strike defendant's second affirmative defense, (2) granted defendant's motion, (3) denied plaintiff's cross motion, and (4) dismissed the complaint.

The issue common to both appeals was whether the Statute of Limitations for municipal tort liability is tolled when the plaintiff applies for permission to file a late notice of claim. In each case, the Supreme Court held the statute was tolled, and denied a motion to dismiss, **[****2]** relying on the Court of Appeals decision in *Barchet v New York City Tr. Auth. (20 NY2d 1)*. On November 16, 1980, plaintiff Martin Giblin was treated at the Nassau Medical Center for an injury to his left wrist and forearm. On August 13, 1981, he applied for permission to file a late notice of claim against the county and the Medical Center, alleging that the county had treated his injury as a sprain, but in June of 1981 he discovered that he had in fact suffered a fracture. On September 15, 1981 the motion was granted, and a few days later the notice of claim was filed. The summons and complaint, however, were not served until March 4, 1982. The defendants moved to dismiss on the ground the action had not been commenced within one year and 90 days as required by *section 50-i of the General Municipal Law*. The Appellate Division reversed the Supreme Court's denial of the motion and dismissed the complaint, recognizing that *CPLR 204* (subd [a]) tolls the running of the Statute of Limitations whenever there is a stay or statutory prohibition to suit, but concluding that *Barchet* was inapplicable due to a 1976 amendment to subdivision 5 of *section 50-e of the General Municipal **[****3]** Law* which permits the plaintiff to make the application to file a late notice after the commencement of the action. On May 17, 1980, plaintiff Glen Davis allegedly was injured when he fell between two moving subway cars. On December 29, 1980, he applied for leave to file a late notice of claim upon the New York City Transit Authority. On March 25, 1981, the motion was granted and plaintiff's proposed notice of claim was deemed served. The summons and complaint were served on October 1, 1981. The defendant moved to dismiss claiming that the plaintiff had not commenced the action within one year and 120 days as required by the applicable statute (*Public Authorities Law, § 1212*). The defendant contended that the Statute of Limitations had expired approximately two weeks prior to commencement of the action. Plaintiff cross-moved to strike the affirmative defense, claiming that the statute was tolled from December 29, 1980 to March 25, 1981, while the application to file a late notice of claim was pending. The Supreme Court denied the motion to dismiss, relying on *Barchet*, and the Appellate Division reversed, finding its prior decision in Giblin to be dispositive.

The Court **[****4]** of Appeals reversed the orders of the Appellate Division and reinstated the orders of the Supreme Court, holding, in an opinion by Judge Wachtler, that the Statute of Limitations for municipal tort liability is tolled from the time the plaintiff applies for permission to file a late notice of claim until the order granting that relief goes into effect, pursuant to *Barchet* and *CPLR 204* (subd [a]), and that the 1976 amendment to *section 50-e of the General Municipal Law* simply eliminated the obstacle which prevented a plaintiff from applying for leave to file a late notice of claim once he had

commenced the action, but did not dispense with the requirement that the complaint allege that the notice has been served and that more than 30 days have elapsed since the service.

Giblin v Nassau County Med. Center, 95 AD2d 795.

Davis v New York City Tr. Auth., 96 AD2d 819.

Disposition: In *Giblin v Nassau County Med. Center*: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (*22 NYCRR 500.4*), order reversed, with costs, and the order of Supreme Court, Nassau County, reinstated.

In *Davis v New York City Tr. Auth.*: On review of submissions pursuant **[****5]** to section 500.4 of the Rules of the Court of Appeals (*22 NYCRR 500.4*), order reversed, with costs, and the order of Supreme Court, Kings County, reinstated.

Core Terms

commencement of the action, late notice, tolled, notice of claim, notice, statute of limitations, application for leave, subdivision, elapsed

Case Summary

Procedural Posture

Plaintiffs, the injured parties in separate personal injury suits, sought review of orders from the Appellate Division of the Supreme Court (New York), which reversed on the law orders that denied defendant, medical center's and municipal transit center's, motions to dismiss due to the statutes of limitations provided in *N.Y. C.P.L.R. 204(a)*.

Overview

Plaintiffs were injured in separate incidents and in each instance the trial court entered orders that denied the defendants' motions to dismiss, noting that *N.Y. C.P.L.R. 204(a)* tolled the running of the statute of limitations whenever there was a stay or statutory prohibition to suit. On review the court found that pursuant to *N.Y. Gen. Mun. Law § 50-i(1)*, no suit could have been maintained against a county for personal injury unless a notice of claim was made and served upon the county in compliance with *N.Y. Gen. Mun. Law § 50-e*, shall have appeared as an allegation in the pleadings that at least 30 days had elapsed since service of the notice and that payment or adjustment was neglected or refused. The appellate division wrongly reasoned that an amendment to *§ 50-e* deleted the statutory prohibition to commencing the action, however the court held that the statutory prohibition was not deleted by the amendment. The court held that because the prohibition was not altered, *N.Y. C.P.L.R. 204(a)* served to toll the statute of limitations while a motion to file a late notice of claim was pending.

Outcome

The court reversed the orders of the appellate division and reinstated the supreme court's orders that denied the defendants' motions to dismiss.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Stay

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN1[] **Judgments, Relief From Judgments**

N.Y. C.P.L.R. 204(a) states that where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Local Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > State & Territorial Governments > Claims By & Against

HN2[] **Pleadings, Complaints**

N.Y. Gen. Mun. Law § 50-i(1) provides that no action or special proceeding shall be prosecuted or maintained against a county for personal injury unless, (a) a notice of claim shall have been made and served upon the county in compliance with *§ 50-e* of that chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN3[] **Pleadings, Complaints**

Because the statutory prohibition to commencing the action is not altered by amendment, *N.Y. C.P.L.R. 204 (a)* serves to toll the running of the statute of limitations while a motion to file a late notice of claim is pending.

Headnotes/Summary

Headnotes

Limitation of Actions -- Notice of Claim -- Toll of Statute of Limitations Pending Application to File Late Notice

The Statute of Limitations for municipal tort liability is tolled from the time the plaintiff applies for permission to file a late notice of claim until the order granting that relief goes into effect (see *Barchet v New York City Tr. Auth., 20 NY2d 1*; *CPLR 204*, *subd [a]*), and the 1976 amendment to subdivision 5 of *section 50-e of the General Municipal Law*, which deleted the requirement that the application to file a late notice "shall be made prior to the commencement of an action" and added the provision that "An application for leave to serve a late notice shall not be denied on the ground that it was made after

commencement of an action against the public corporation", neither authorizes the practice of serving complaints before notice of claim nor eliminates the problems encountered by a plaintiff who has filed a premature complaint so as to dispense with the need for the *Barchet* rule; the **[****6]** amendment simply eliminates the obstacle which prevented a plaintiff from applying for leave to file a late notice of claim once he had commenced the action, and does not dispense with the requirement that the complaint allege that the notice has been served and that more than 30 days have elapsed since the service (see *General Municipal Law, § 50-i, subd 1; Public Authorities Law, § 1212*).

Counsel: *Leonard M. McEvoy* for appellant in the first above-entitled action.

Edward G. McCabe, County Attorney (*Kathryn Driscoll Hopkins* of counsel), for respondents in the first above-entitled action.

Melvin Block for appellant in the second above-entitled action.

Kenneth H. Schiffrin and *Richard K. Bernard* for respondent in the second above-entitled action.

Judges: Wachtler, J. Chief Judge Cooke and Judges Jasen, Jones, Meyer and Kaye concur; Judge Simons taking no part.

Opinion by: WACHTLER

Opinion

[*69] [856] [***563] OPINION OF THE COURT**

The common question on these two appeals is whether the Statute of Limitations for municipal tort liability is tolled when the plaintiff applies for permission to file a late notice of claim. In each case Special Term **[****7]** held the statute was tolled, and denied a motion to dismiss, relying on our decision in *Barchet v New York City Tr. Auth. (20 NY2d 1)*. **[*70]** However, in each instance the Appellate Division, Second Department, reversed and dismissed the complaint holding that the *Barchet* decision was no longer applicable in light of a 1976 amendment to *section 50-e of the General Municipal Law*.

[*564]** The Giblin Case

On November 16, 1980 the plaintiff, Martin Giblin, was treated at the Nassau Medical **[**857]** Center for an injury to his left wrist and forearm. On August 13, 1981 he applied for permission to file a late notice of claim against the county and the Medical Center. In support of the motion he alleged that the county had treated his injury as a sprain, but in June of 1981 he discovered that he had in fact suffered a fracture. On September 15, 1981 the motion was granted, and a few days later the notice of claim was filed. The summons and complaint, however, were not served until March 4, 1982.

The defendants moved to dismiss on the ground the action had not been commenced within one year and 90 days as required by *section 50-i of the General Municipal Law*. **[****8]** The Supreme Court, Nassau County, denied the motion stating: "The statute of limitations is tolled during the pendency of an application for leave to file a late notice of claim (*Barchet v New York City Tr. Auth., 20 NY2d 1*; *Colantuono v Valley School District, 90 Misc 2d 918*)."

The Appellate Division, Second Department, unanimously reversed and dismissed the complaint. The court recognized that *CPLR 204* (subd [a]) tolls the running of the Statute of Limitations whenever there is a stay or statutory prohibition to suit, and that in the *Barchet* decision this statute was held to apply when an application to file a late notice of claim is pending. The court also noted that the *Barchet* decision was based on a statutory scheme which precluded or stayed a party from commencing an action until the notice of claim had been filed, but concluded that this decision "no longer applies" because a 1976 amendment to subdivision 5 of *section 50-e of the General Municipal Law* permits the plaintiff to make the application to

file a late notice after the commencement of the action (L 1976, ch 745, § 2). In support of this result, the **[*71]** court cited *Corey v County of* **[****9]** *Rensselaer (88 AD2d 1104*, mot for lv to app den *57 NY2d 602*).

Plaintiff has appealed as of right on the basis of the reversal.

The Davis Case

On May 17, 1980 plaintiff, Glen Davis, allegedly was seriously injured when he fell between two moving subway cars. On December 29, 1980 he applied for leave to file a late notice of claim upon the New York City Transit Authority. On March 25, 1981 the motion was granted, and plaintiff's proposed notice of claim was deemed served. Plaintiff, however, did not commence the action by serving the summons and complaint until October 1, 1981.

The defendant moved to dismiss claiming that the plaintiff had not commenced the action within one year and 120 days as required by the applicable statute (*Public Authorities Law, § 1212*; see, also, *Serravillo v New York City Tr. Auth., 51 AD2d 1027*, affd on mem below *42 NY2d 918*). The defendant, therefore, contended that the Statute of Limitations had expired on September 14, 1981, approximately two weeks prior to commencement of the action. Plaintiff cross-moved to strike the affirmative defense, claiming that the Statute of Limitations was tolled from December 29, 1980 to March 25, 1981, **[****10]** while the application to file a late notice of claim was pending.

The Supreme Court, Kings County, denied the motion to dismiss, and granted the cross motion relying on *Barchet*.

The Appellate Division, Second Department, reversed, finding its prior decision in Giblin to be dispositive. Justice O'Connor concurred on constraint of Giblin but urged that the history of the 1976 amendment showed no legislative intent to abolish the *Barchet* rule. He also argued that the amendment did not alter the basic requirement that a notice of claim is a condition precedent to suit; that a party is still **[***565]** stayed or precluded from commencing an action until the notice is filed, and that the Statute of Limitations should therefore **[**858]** continue to be tolled (pursuant to *CPLR 204*, *subd [a]*) while an application to file a late notice of claim is pending.

[*72] This plaintiff has also appealed as of right on the basis of the reversal.

Analysis

In the *Barchet* case the plaintiff had failed to give the 90-day notice of claim required by the statute, but applied for permission to file a late notice before the expiration of the Statute of Limitations. The motion **[****11]** was granted, after the statutory period had run. At that point the notice of claim and complaint were served on the defendant. In opposition to the defendant's motion to dismiss, the plaintiff claimed she was barred by statute from commencing the action until the court granted permission to file a late notice of claim and the running of the statute should therefore be tolled pursuant to *CPLR 204* (subd [a]). ***HN1***[⬆] That statute states: "Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

We held that the Statute of Limitations was tolled from the time the plaintiff commenced the proceeding to obtain leave to file a late notice of claim until the order granting that relief went into effect. We noted (at p 6) that once the application was made, her right to commence the action "was no longer solely within her control but was dependent upon obtaining leave of the court. She was, in effect, prohibited from commencing the action until that consent was obtained. Indeed, the statute provides that the application for leave of the court 'shall be made prior **[****12]** to the commencement of an action' [*General Municipal Law, § 50-e*, former subd 5]. This requirement is quite similar to that which requires the plaintiff to allege that 30 days have elapsed since the notice of claim was served [*Public Authorities Law, § 1212*]. In neither case do the statutes specifically proscribe the prosecution of the action but in both cases they prescribe procedures which have the same effect."

The 1976 amendment, relied on by the Appellate Division, only changed one of those statutes in one respect. The Legislature revised subdivision 5 of *section 50-e of the General Municipal Law* by deleting the requirement that **[*73]** the application to file a late notice "shall be made prior to the commencement of an action", and added the following sentence at the end of the

subdivision: "An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation".

No alteration was made in the other statute cited in the *Barchet* decision, *section 1212 of the Public Authorities Law*, which still requires that the complaint allege that more than 30 days have elapsed since service **[****13]** of the notice of claim. (This statute is applicable in the Davis case which, like the *Barchet* case, involves a suit against the New York City Transit Authority.) Neither did the Legislature amend the comparable provision found in ***HN2***[⬆] subdivision 1 of *section 50-i of the General Municipal Law* which in suits against a county, as in the Giblin case, provides that "[no] action or special proceeding shall be prosecuted or maintained against a * * * county * * * for personal injury * * * unless, (a) a notice of claim shall have been made and served upon the * * * county * * * in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused".

The 1976 amendment illustrates that the Legislature was aware of the fact that complaints were sometimes served before the notice of claim, and that the lawmakers were inclined to grant some relief to the plaintiff under those circumstances. However, **[***566]** on its face the amendment does not, as the Appellate Division concluded, expressly **[****14]** authorize the practice or completely **[**859]** eliminate the problems encountered by a plaintiff who has filed a premature complaint, so as to also dispense with the need for the *Barchet* rule.

By its terms, the 1976 amendment simply eliminates the obstacle which prevented a plaintiff from applying for leave to file a late notice of claim once he had commenced the action. It does not go further and dispense with the requirement that the complaint allege that the notice has been served and that more than 30 days have elapsed since **[*74]** the service. Thus, under the current statutes, service of the notice and allegation or proof to this effect are still conditions precedent to suit. Although, as noted in *Barchet*, these requirements do not "specifically proscribe the prosecution of the action * * * they prescribe procedures which have the same effect" (*20 NY2d, at p 6*). In short, the 1976 amendment removed the statutory obstacle to the granting of a motion to serve a late notice of claim, but did not remove the statutory impediments to suit which still prevent a plaintiff from properly commencing the action until permission to file a late notice of claim is granted by **[****15]** the court. ***HN3***[⬆] Because the statutory prohibition to commencing the action was not altered by the 1976 amendment, the rationale of the *Barchet* decision still applies and *CPLR 204* (subd [a]) should serve to toll the running of the Statute of Limitations while a motion to file a late notice of claim is pending.

Because the statute is clear on its face it is probably unnecessary to consider the legislative history of the amendment (compare *Matter of Barton v Lavine, 38 NY2d 785*, with *New York State Bankers Assn. v Albright, 38 NY2d 430, 436-437)*. It is interesting to note, however, that this history supports the conclusion that the amendment was not intended to abolish the *Barchet* rule, but was simply designed to have the limited effect indicated above.

The amendment was proposed in the Twenty-First Annual Report of the Judicial Conference. In its report, the Judicial Conference noted that the harshness of the law then current was relieved to some extent by the provisions which authorized a court to permit a late filing of the notice of claim (Twenty-First Ann Report of NY Judicial Conference, 1976, p 286). Citing the *Barchet* case, the report (at p 303)also observed **[****16]** that "the statute of limitations is tolled under the provisions of *CPLR 204(a)* during the pendency of a proceeding to obtain leave to file a late notice". The report, however, criticized the additional requirement that the plaintiff make the application prior to the commencement of the action to enforce the claim. The relevant portion of the report, authored by Professor Paul S. Graziano, states (at p 401): "It can lead to unfair results. Assume that timely service of a notice of claim under *section 50-e* is a condition precedent to the commencement **[*75]** of an action to enforce the claim and that plaintiff has commenced an action but served an untimely or no notice. Dismissal of that action upon motion of the defendant seems to afford a sufficient remedy for the noncompliance. If, however, plaintiff realizes his mistake, why should he not be permitted immediately to apply for leave to serve a late notice if a basis for so doing is available? Compelling him to discontinue the pending action, with the attending delay, can exacerbate an already precarious situation".

The report concludes (at p 403) that the purpose of proposed amendment "is to give a claimant the opportunity **[****17]** immediately to correct his nonperformance of the condition precedent if he possibly can. Nonperformance may result in dismissal of the pending action, but its pendency will not be a ground for denying an application for leave to serve a late notice".

There is, therefore, no basis for the conclusion reached in the case relied upon by the Appellate Division (*Corey v County of* ***[***567]*** *Rensselaer, 88 AD2d 1104, 1105*, *supra*) that "The requirement of *section 50-i* (subd 1, par [b]) of the General Municipal Law that the complaint must **[**860]** allege that 30 days have elapsed since service of the notice of claim * * * is modified by subdivision 5 of *section 50-e of the General Municipal Law* (as amd by L 1976, ch 745, § 2) which provides that 'An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action'". In the *Corey* decision the Appellate Division also observed that "plaintiff could have timely commenced the action by service of a summons with notice either before or at the time she applied for leave to serve a late notice of claim". The court recognized that the plaintiff could not also allege **[****18]** compliance with the prior notice statute but suggested that she could surmount this obstacle by later including the statement in her complaint.

These options, of course, are only available in the sense that a party may always commence an action despite a statutory bar. The *Barchet* decision, however, assumes that the plaintiff will respect, or at least not intentionally disregard, the statutory prohibition in which case he is entitled to the benefit of the tolling provisions of *CPLR 204* **[*76]** (subd [a]). This was not noted in the *Corey* memorandum, which in fact made no reference to the *Barchet* decision. *

Accordingly, in each case the order of the Appellate Division should be reversed and the order of the Supreme **[****19]** Court reinstated.

In *Giblin v Nassau County Med. Center*: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (*22 NYCRR 500.4*), order reversed, with costs, and the order of Supreme Court, Nassau County, reinstated.

In *Davis v New York City Tr. Auth.*: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (*22 NYCRR 500.4*), order reversed, with costs, and the order of Supreme Court, Kings County, reinstated.

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* Although we denied leave to appeal in ***Corey v County of Rensselaer (57 NY2d 602***), that is "not equivalent to an affirmance and has no precedential value" (***Panico v Young, 46 NY2d 847***; *Matter of Marchant v Mead-Morrison Mfg. Co., 252 NY 284, 297-298* [Cardozo, Ch. J.]).

Glasco Electric Co. v. Department of Revenue

Appellate Court of Illinois, Fourth District

August 29, 1980, Filed

No. 16102

Reporter
87 Ill. App. 3d 1070 *; 409 N.E.2d 511 **; 1980 Ill. App. LEXIS 3529 ***; 42 Ill. Dec. 896 ****

GLASCO ELECTRIC COMPANY, Plaintiff-Appellant, v. THE DEPARTMENT OF REVENUE, Defendant-Appellee

Prior History: [*1]** APPEAL from the Circuit Court of Sangamon County; the Hon. RICHARD J. CADAGIN, Judge, presiding.

Disposition: Reversed and remanded.

Core Terms

circuit court, administrative review, compliance, final assessment, notice, waived

Case Summary

Procedural Posture
Plaintiff taxpayer filed an action in the Circuit Court of Sangamon County (Illinois) to review a defendant Illinois Department of Revenue's final assessment for 1974 through 1976 use taxes. The trial court granted the Department's motion to dismiss the action on the basis that the taxpayer failed to file a bond within 20 days of filing the action. The trial court denied the taxpayer's motion for reconsideration. The taxpayer appealed.

Overview
The taxpayer filed its action for administrative review on September 13, 1978, and filed its bond on November 29, 1978. The Department filed its motion to dismiss on November 1, 1979. The taxpayer filed an affidavit showing that the Attorney General had waived the timely filing of the bond. The Department did not file a counter affidavit. The trial court held that the filing of the bond within 20 days was jurisdictional. The court held that the taxpayer's affidavit was sufficient to show that the Department waived the 20-day filing period for the bond. The court held that the 20-day filing period was not jurisdictional and that the trial court improperly dismissed the action.

Outcome
The court reversed the trial court and remanded to the trial court for further proceedings.

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1[] **Separation of Powers, Jurisdiction**

Ill. Const. art. VI, § 9 grants circuit courts original jurisdiction "of all justiciable matters" with minor exceptions where that jurisdiction is exclusively in the supreme court, but it also specifically states that Circuit Courts shall have such power to review administrative action as provided by law. Accordingly, absent legislation, administrative review is not a matter of right under section 9. Nor does that section prevent the legislature from conditioning the circuit court's jurisdiction to entertain a particular type of administrative review upon the filing of a bond to secure payment of sums of money administratively determined to be owed.

Civil Procedure > Remedies > Bonds > Execution of Bonds

Administrative Law > Judicial Review > Reviewability > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > ... > Service of Process > Service of Summons > General Overview

Civil Procedure > ... > Service of Process > Service of Summons > Issuance of Summons

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] **Bonds, Execution of Bonds**

Ill. Rev. Stat. ch. 120, para. 439.12 (1979) provides in part that any suit under the Administrative Review Act to review a final assessment or a revised final assessment issued by the Department of Revenue under this Act shall be dismissed on motion of the Department or by the court on its own motion, unless the person filing such suit files, with the court, within 20 days after the filing of the complaint and the issuance of the summons in the suit, a bond with good and sufficient surety or sureties. When dismissing the complaint, the court shall enter judgment against the taxpayer and in favor of the Department in the amount of the final assessment or revised final assessment, together with any interest which may have accrued since the Department issued the final assessment and for costs. If the court finds in a particular case that the plaintiff cannot procure a bond required herein, the court may relieve the plaintiff of the obligation of filing such bond, but shall enter an order, in lieu of such bond, subjecting the plaintiff's real and personal property to a lien in favor of the Department.

Administrative Law > Judicial Review > Reviewability > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN3[] **Judicial Review, Reviewability**

At the time the circuit court dismisses the taxpayer's complaint for administrative review, it shall also enter a money judgment in favor of the Department of Revenue and against the taxpayer. Ordinarily, a court lacking subject matter jurisdiction of a case has power only to dismiss the case.

Counsel: Brown, Hay & Stephens, of Springfield (Edward J. Cunningham and Mark H. Ferguson, of counsel), for appellant.

William J. Scott, Attorney General, of Chicago (Joseph D. Keenan, III, Assistant Attorney General, of counsel), for appellee.

Judges: Mr. JUSTICE GREEN delivered the opinion of the court. TRAPP and WEBBER, JJ., concur.

Opinion by: GREEN

Opinion

[*1070] **[**512]** **[****897]** We are concerned here with the provisions of section 12 of the Retailers' **[*1071]** Occupation Tax Act (Ill. Rev. Stat. 1977, ch. 120, par. 451), which requires a petitioner seeking review of final assessments or reassessments for certain types of State taxes to either (1) file a sufficient bond in the circuit court within 20 days of the filing of the administrative review, or (2) obtain an order from the circuit court in which the petition for review is filed, placing a lien upon the petitioner's property to secure payment of the taxes in issue. Section 12 of the Use Tax Act (Ill. Rev. Stat. 1979, ch. 120, par. 439.12) incorporates this provision, and the question presented **[***2]** is whether compliance with the foregoing is necessary for the circuit court to retain jurisdiction or whether compliance can be waived. We hold that compliance is not jurisdictional and can be waived and was here waived.

On August 8, 1978, after various administrative proceedings, defendant, Department of Revenue, issued a final notice of deficiency assessing the use tax liability of plaintiff, Glasco Electric Company, to total $ 22,332.22 for the tax years 1974 through 1976. Plaintiff then filed a complaint for administrative review in the circuit court of Sangamon County on September 13, 1978. On November 29, 1978, well beyond the 20-day limit of section 12, plaintiff, for the first time, filed a proper bond in that court, and the bond was approved. The case lay dormant until November 1, 1979, when defendant filed a motion to dismiss, claiming the plaintiff's failure to timely file bond had deprived the court of jurisdiction. Plaintiff countered by filing an affidavit indicating agreements by members of the Attorney General's staff which would constitute a waiver by them of the timely filing requirement if that can be waived. Defendant filed no counteraffidavit. On that same **[***3]** date, the motion was heard and the court entered an order determining the 20-day requirement to be jurisdictional: (1) dismissing the complaint; and (2) entering judgment in favor of defendant and against plaintiff for the amount of the reassessment plus interest and costs. After plaintiff's motion to reconsider was denied, plaintiff appealed to this court.

[513]** **[****898]** Neither the supreme court nor this court has ever passed upon the question of whether the 20-day requirement of section 12 is jurisdictional. However, in *Randy's House of Steele, Inc. v. Allphin (1979), 76 Ill. App. 3d 788, 395 N.E.2d 197*, the appellate court for the second district was faced with the issue and, *sua sponte*, dismissed a section 12 appeal because bond had not been timely filed. The precedent of that case was binding upon the circuit court but not upon us. (*People v. Spahr (1978), 56 Ill. App. 3d 434, 371 N.E.2d 1261*.) Thus, the circuit court properly dismissed the case, but we are free to review that order without being similarly bound.

Article VI, section 9, of the Illinois Constitution of 1970 ***HN1***[↑] grants circuit courts original jurisdiction "of all justiciable matters" with **[***4]** minor exceptions where that jurisdiction is exclusively in the supreme court, but **[*1072]** it also specifically states that "Circuit Courts shall have such power to review administrative action *as provided by law*." (Emphasis added.) Accordingly, absent legislation, administrative review is not a matter of right under section 9. (*Board of Education v. Gates (1974), 22 Ill. App. 3d 16, 316 N.E.2d 525*.) Nor does that section prevent the legislature from conditioning the circuit court's jurisdiction to entertain a particular type of administrative review upon the filing of a bond to secure payment of sums of money administratively determined to be owed.

Pertinent parts of section 12 provide:

> ***HN2***[↑] "Any suit under the 'Administrative Review Act' to review a final assessment or a revised final assessment issued by the Department under this Act shall be *dismissed on motion of the Department or by the court on its own motion*, unless the person filing such suit files, with the court, within 20 days after the filing of the complaint and the issuance of the summons in the suit, a bond with good and sufficient surety or sureties * * *. *When dismissing the complaint, the court* **[***5]** *shall enter judgment against the taxpayer and in favor of the Department in the amount of the final*

*assessment or revised final assessment, together with any interest which may have accrued since the Department issued the final assessment * * * and for costs, * * *.*

If the court finds in a particular case that the plaintiff cannot procure * * * [a] bond required herein, the court may relieve the plaintiff of the obligation of filing such bond, but shall enter an order, in lieu of such bond, subjecting the plaintiff's real and personal property * * * to a lien in favor of the Department." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 120, par. 451.

Although the bond requirement of section 12 has been in force since 1953 the question of the timely filing of such a bond has been before the courts of review of the States in only four cases. (*Randy's House of Steele, Inc.;* *Streator Brick Systems, Inc. v. Department of Revenue (1978), 58 Ill. App. 3d 8, 373 N.E.**2d** 1040*; *Diamond Jim's, Inc. v. Department of Revenue (1978), 66 Ill. App. 3d 613, 384 N.E.**2d** 428*; *Bee Jay's Truck Stop, Inc. v. Department of Revenue (1977), 52 Ill. App. 3d 90, 367 N.E.**2d** 173*, *cert. denied* **[***6]** (1978), *435 U.S. 970, 56 L. Ed. **2d** 61, 98 S. Ct. 1610*.) Only in *Randy's House of Steele, Inc.*, was the reviewing court required to pass on the question of whether compliance was jurisdictional. The issue was raised for the first time on appeal, and the appellate court held that the circuit court had lacked jurisdiction of the administrative review because of the taxpayer's failure to timely comply. The appellate court determined that the legislature had intended for the requirement to be jurisdictional because (1) it had stated in mandatory language that upon noncompliance, the court "shall" dismiss the suit, and (2) it had directed the **[*1073]** court to do so "on its own motion." In *Streator Brick Systems, Inc.*, no question of collateral attack or waiver was involved, but the appellate court affirmed a trial court's dismissal for noncompliance, saying that the dismissal was justified on either the theory that the circuit court lacked jurisdiction or merely because **[**514]** **[****899]** the taxpayer had failed to comply with the statute. In the other two cases failure of timely compliance with the bond requirement was held to be valid ground for dismissal, but the **[***7]** question of jurisdiction was not discussed. Defendant relies upon the reasoning of the court in *Randy's House of Steele, Inc.*

We recognize that by analogy to common law procedural principles, the legislative direction to the court to act *sua sponte* creates some inference that the bond or lien requirement was to be jurisdictional, but we deem that analogy to common law procedural principles more strongly suggests that compliance with those requirements was not intended to be jurisdictional.

Section 12 provides that ***HN3***[↑] at the time the circuit court dismisses the taxpayer's complaint for administrative review it shall also enter a money judgment in favor of the Department of Revenue and against the taxpayer. Ordinarily, a court lacking subject matter jurisdiction of a case has power only to dismiss the case. (*People ex rel. Carlstrom v. Shurtleff (1933), 355 Ill. 210, 189 N.E. 291*.) Under defendant's interpretation of section 12, the taxpayer's filing a petition for administrative review and then failing to comply with the bond or lien requirement would leave the court without jurisdiction to proceed with administrative review but with power to enter a money judgment concerning **[***8]** the matter upon which the review was sought. We recognize that *article VI, section 9, of the Illinois Constitution of 1970* empowers the legislature to enact such a law but such a procedure would be most unusual.

The mandatory language of section 12 is similar to that in section 8 -- 103 of the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1979, ch. 85, par. 8 -- 103), which provides that a tort action against a governmental entity or officer "shall be dismissed" if statutory notice of the injury is not given with one year. In *Helle v. Brush (1973), 53 Ill. **2d** 405, 292 N.E.**2d** 372*, compliance with the notice requirement was held not to be a condition precedent to the cause of action but similar to a provision of a statute of limitations that could be waived by a party. No contention was even made that the notice requirement was jurisdictional in the sense that a judgment obtained absent notice would render such a judgment subject to collateral attack. We recognize the difference between the plenary jurisdiction of circuit courts in "justiciable" matters and their limited jurisdiction in administrative review, but we consider the trend to construe **[***9]** the word "shall" as not being absolutely mandatory to be significant.

Section 12 does not expressly state that the 20-day requirement is **[*1074]** applicable to the alternate method of compliance by obtaining a lien order, but the section has been so interpreted. (*Diamond Jim's, Inc.*; *Bee Jay's Truck Stop.*) The failure of the legislature to be more precise on this point would give at least slight indication that it did not consider a question so important as that of jurisdiction to be involved.

Finally, we note that with the enactment of the Civil Practice Act of 1933 (Ill. Rev. Stat. 1933, ch. 110, par. 125 *et seq.*), filing of bond was no longer a jurisdictional requirement for the vast majority of civil appeals and such continued to be the case under

subsequent legislation and Supreme Court Rules. We consider this studied legislative and judicial policy to be significant in determining the intent of the uncertain legislative provision before us.

As the sufficiency of plaintiff's affidavit to show grounds for waiver is not disputed, we reverse the order of the circuit court dismissing the case and remand the case to it to proceed with administrative review.

Reversed **[***10]** and remanded.

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In re Brill

United States Bankruptcy Court for the Southern District of New York, Poughkeepsie Division

December 16, 2004, Decided

Chapter 7, Case No.: 02-37138 (cgm)

Reporter
318 B.R. 49 *; 2004 Bankr. LEXIS 2152 **

IN RE: RALPH D. BRILL, Debtor.

Disposition: Creditor's claim was disallowed as barred by applicable statute of limitation.

Core Terms

statute of limitations, repay, acknowledgment, conditions, funds, communicated, limitations period, parties, revive, acknowledgement of debt, repayment, correspondence, unenforceable, matrimonial, borrow

Case Summary

Procedural Posture

Movant, the trustee in bankruptcy sought an order reducing, expunging and/or modifying the claims of a pro se creditor, who was the brother of the debtor, based upon a promissory note the debtor had made to the creditor. The six year statute of limitations under *N.Y. C.P.L.R. 213* had expired, and the only issue in dispute was whether *N.Y. Gen. Oblig. Law § 17-101* extended the limitation period as to the instant debt.

Overview

The debtor filed a voluntary Chapter 7 petition, and listed the creditor on his petition as holding an unsecured claim. The trustee argued that creditor's claim was barred, under *11 U.S.C.S. §§ 502* and *558*, on statute of limitation grounds, as the note had been due in full in 1992 and no action to collect on the loan was ever taken within the six-year limitation period. No payment on the loan had been made since 1996, and thus, the statute of limitation expired at the latest on January 26, 2002. The creditor asserted that correspondence between he and the debtor, and a net worth statement prepared by Debtor for a 1999 matrimonial action, sufficed to satisfy the standard for reviving the statute of limitations under *N.Y. Gen. Oblig. Law § 17-101*. The court viewed the evidence, and concluded that the debtor never intended to repay the debt owed to creditor, and none of the documents served to revive the limitations period. None of the debtor's correspondence constituted an unconditional acknowledgement of the debt evidencing intent to pay.

Outcome

The trustee's motion was granted, and the creditor's claim was disallowed.

LexisNexis® Headnotes

Bankruptcy Law > ... > Bankruptcy > Estate Property > Defenses

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Estate Property, Defenses**

The listing of a debt on a bankruptcy petition does not constitute written acknowledgment of the debt with the intent to pay so as to remove the statute of limitations as a bar to recovery.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Defenses

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Estate Property, Defenses**

To revive a statute of limitations, partial payment must be made under circumstances from which a promise to honor the obligation may be inferred to make the time limited for bringing an action start anew from the time of such payment.

Bankruptcy Law > Claims > General Overview

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Bankruptcy Law > ... > Bankruptcy > Case Administration > Notice

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

Bankruptcy Law > ... > Bankruptcy > Estate Property > Defenses

Governments > Legislation > Statute of Limitations > General Overview

HN3[] **Bankruptcy Law, Claims**

A challenged claim will not be allowed by the bankruptcy court if the claim is barred by the applicable statute of limitations. Pursuant to *11 U.S.C.S. § 502*, a claim, proof of which has been filed, is deemed allowed unless objected to and, after notice and a hearing, the court disallows the claim in whole or in part. *11 U.S.C.S. § 502(b)(1)* requires a claim to be disallowed if such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Defenses

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Governments > Legislation > Statute of Limitations > Waivers

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Estate Property, Defenses**

See *11 U.S.C.S. § 558*.

Bankruptcy Law > ... > Bankruptcy > Claims > Allowance of Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Bankruptcy Law > ... > Bankruptcy > Claims > Reconsideration of Claim Allowance

Bankruptcy Law > ... > Bankruptcy > Estate Property > Defenses

Governments > Legislation > Statute of Limitations > General Overview

HN5[] **Claims, Allowance of Claims**

The United States District Court for the Southern District of New York recognizes the authority of the Bankruptcy Court to apply a statute of limitation or other dispositive defense in the disallowance of claims. If a claim would be unenforceable against the debtor outside of bankruptcy because the statute of limitation had run, the claim will not be allowed in bankruptcy.

Contracts Law > ... > Discharge & Payment > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN6[] **Defenses, Statute of Limitations**

N.Y. C.P.L.R. 213 provides that an action to collect sums due under a note must be commenced within six years. The statute of limitation applicable to an action on a note accrues on the date final payment became due on the subject debt.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Statute of Limitations, Extensions & Revivals**

See *N.Y. Gen. Oblig. Law § 17-101*.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Payment

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

Governments > Legislation > Statute of Limitations > General Overview

HN8[] **Tolling of Statute of Limitations, Payment**

In order to revive a statute of limitations under *N.Y. Gen. Oblig. Law § 17-101*, a writing 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 determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay. Additionally, the acknowledgment of the existing debt and the intent to pay same must be unconditional. If any condition must be satisfied prior to payment being made, the creditor must show that the condition has been satisfied before application of the toll contained in *§ 17-101*.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN9 **Statute of Limitations, Extensions & Revivals**

While an express promise to pay is conditioned on the happening on some future ability or debt, the burden is on a creditor to show fulfillment of such condition, and absent such showing, application of *N.Y. Gen. Oblig. Law §17-101* is inappropriate.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN10 **Pro Se Litigants, Pleading Standards**

Pro se litigants are afforded considerable leniency in meeting formal pleading requirements. Nonetheless, pro se litigants are not relieved of their duty to plead and prove their entitlement to the relief they seek.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > General Overview

HN11 **Statute of Limitations, Pleadings & Proof**

Statutes of limitation are designed, in part, to protect potential defendants from the burden of litigating stale claims by putting defendants on notice of claims against them within specified periods, so they can prepare their defenses adequately while the evidence is still fresh. They are designed to prevent fraudulent and stale claims from being asserted, to the surprise of the parties or their representatives, when the evidence has been lost, or the facts have become obscure from the lapse of time or the defective memory, death, or removal of witnesses.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN12 **Statute of Limitations, Revival**

An acknowledgment of a debt to a third party will be effective to revive the limitation period if it appears that the debtor's intention was to communicate the acknowledgment to the creditor.

Counsel: **[**1]** Attorney for Chapter 7 Trustee Paul Banner: Joann Sternheimmer, Esq., Deily, Mooney & Glastetter, LLP, Albany, New York.

Peter Brill, creditor pro se, Boston, MA.

Judges: CECELIA G. MORRIS, UNITED STATES BANKRUPTCY JUDGE.

Opinion by: CECELIA G. MORRIS

Opinion

[*51] MEMORANDUM DECISION

CECELIA G. MORRIS, UNITED STATES BANKRUPTCY JUDGE:

On October 19, 2004, the Court heard oral argument on the Trustee's Motion for an Order Reducing, Expunging and/or Modifying Claims and Creditor Peter Brill's Opposition thereto. On November 12, 2004 and November 22, 2004, respectively, counsel for the Trustee and the creditor *pro se* filed responsive briefs. For the reasons set forth below, the Court finds Creditor Peter Brill's Proof of Claim unenforceable against the estate because it is time barred pursuant *New York Civil Practice Law and Rules Section 213*, and thus disallows the claim pursuant to *11 U.S.C. §§ 502(b)(1)* and *558*.

JURISDICTION

The Court has jurisdiction over this contested matter under *28 U.S.C. Sections 1334(a)* and *157(a)* and the standing order of reference to bankruptcy judges dated July 10, 1984 signed by acting Chief Judge Robert **[**2]** J. Ward. This is a core proceeding under *28 U.S.C. Section 157(b)(2)(B)*. The following opinion constitutes the Court's findings of fact and conclusions of law under Bankruptcy *Rules 9014* and *7052*.

BACKGROUND FACTS

On April 10, 1991 Debtor executed a Promissory Note (the "Note") in favor of his brother, Peter Brill (the "Creditor") in the principal amount of $ 100,000 bearing interest at a rate often percent (10%) per year. The Note provided that all payments due pursuant to its terms were to be made on or before April 9, 1992. Except for two interest payments of $ 10,000 each made on January 10, 1993 and January 26, 1996, Debtor has made no payments toward the Note. It is undisputed that the Creditor Peter Brill, Debtor's brother, never took legal action to collect on the Note prior to Debtor's bankruptcy filing.

On September 9, 2002 Debtor filed a voluntary petition pursuant to Chapter 7 of title 11 of the United States Code. Debtor listed the Creditor on his petition as holding an unsecured claim in the sum of $ 192,000. On November 15, 2002, the Creditor filed a Proof of Claim, Claim No. 3, asserting an unsecured claim in the original principal **[**3]** amount of $ 100,000, plus interest of $ 131,731.15, for a total claim of $ 231,731.15. Although both brothers state that a copy of the Note was attached to the filed Proof of Claim, no such Note is found on this Court's electronic docket. A hard copy of the Note was submitted to the Court by the attorney for the Trustee. On July 26, 2004 the Trustee filed a Motion Seeking an Order Reducing, Expunging and/or Modifying Claims, (the "Motion"), ECF Docket No. 126, seeking, *inter alia*, to expunge the Creditor's claim as not being supported by sufficient documentary evidence. Debtor objected to the Motion on the grounds that the Trustee was in

possession of the signed promissory note, that the debt had been listed in the Debtor's bankruptcy petition, [1] **[**5]** that Creditor **[*52]** had testified as to the existence of the debt in Debtor's matrimonial trial and that the debt had been adjudicated Debtor's responsibility in the matrimonial proceeding. Meanwhile, the Trustee was communicating with the Creditor in an attempt to obtain supporting documentation to substantiate Creditor's claim, and the Creditor complied by forwarding the Note as well as various correspondence between the parties that reference **[**4]** the debt. On August 25, 2004, the Trustee requested an adjournment of the hearing on the Motion until October 5, 2004, stating in correspondence to the Court, ECF Docket No. 137, that documentation provided by the Creditor had supplied the Trustee with additional grounds to object to Creditor's claim. The Motion was also adjourned to allow the Creditor to obtain counsel to defend his claim, if the Creditor determined that was necessary. The Trustee submitted a Supplemental Affidavit In Further Support of the Motion for an Order Reducing, Expunging and/or Modifying Claims. The Court subsequently adjourned the October 5, 2004 hearing until October 19, 2004. On that date, the Creditor appeared in Court and submitted opposition to the Trustee's Motion, ECF Docket No. 143. After hearing oral argument and taking testimony, the Court took the matter under advisement. Subsequent to oral argument, both the Trustee and Creditor were permitted to file responsive briefs, ECF Docket Nos. 145 and 146, respectively. [2]

SUMMARY OF THE ARGUMENTS

In the Trustee's Supplemental Affidavit and Memorandum of Law in Further Support of the Motion, the Trustee argues that Creditor's claim is barred on statute of limitation grounds, as the Note was due in full on April 9, 1992, and no action to collect on the loan was ever taken within the six-year limitation period. Additionally, no payment on the loan had been made since January 26, 1996, and thus, the statute of limitation expired at the latest on January 26, 2002, [3] **[**7]** approximately nine months before Debtor's bankruptcy **[**6]** filing. As the Creditor's claim would have been unenforceable against the debtor under applicable New York State Law, i.e. *New York Civil Practice Law and Rules ("C.P.L.R.") § 213*, the Trustee advances that the claim should be disallowed pursuant to *11 U.S.C. § 502(b)(1)*. Although the statute of limitation could have been extended **[*53]** by partial payment of the obligation or a written and signed acknowledgement of the debt containing nothing inconsistent with an intention to repay, *see N.Y. General Obligations Law ("G.O.L.") § 17-101*, the Trustee states that the correspondence between the Creditor and Debtor fails to meet the standard for reviving the applicable statute of limitation. The Creditor counters the Trustee's arguments by supplying the Court with correspondence between the parties, as well as the Net Worth Statement prepared by Debtor in 1999 in connection with his matrimonial action, all of which the Creditor contends

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[1] ***HN1***[↑] The listing of a debt on a bankruptcy petition does not constitute written acknowledgment of the debt with the intent to pay so as to remove the Statute of Limitations as a bar to recovery. *See Erlichman v. Ventura, 271 A.D.2d 481, 706 N.Y.S.2d 907 (2d Dep't 2000)*.

[2] The Debtor has submitted to the Court a letter, dated November 22, 2004, with regard to the Trustee's Second Supplemental Memorandum. The letter at issue primarily discusses the matrimonial court's distribution of marital property, which was recently upheld by the First Department in an opinion authored by Judge George Marlow. The Debtor has expressed his intention to appeal the Appellate Division's affirmance of the property award; in any event, the outcome of that appeal will have no bearing on the disposition of this contested matter.

[3] The Court assumes without deciding that partial payment made on January 26, 1996 extended the statute of limitation. ***HN2***[↑] In order to revive a statute of limitations, partial payment must be made "under circumstances from which a promise to honor the obligation may be inferred . . . [to] . . . make the time limited for bringing an action start anew from the time of such payment . . ." *See Roth v. Michelson, 55 N.Y.2d 278, 281, 434 N.E.2d 228, 449 N.Y.S.2d 159 (1982)*. The creditor has by no means definitively proven that the part payment made in 1996 revived the limitation period because he has not shown that the payment was made under circumstances from which a promise to honor the entire obligation may be inferred. The Trustee has proceeded, however, as if the January 26,1996 payment revived the statute of limitation and thus the Court does not pass upon that issue herein.

satisfy the standard for reviving the statute of limitation pursuant to applicable New York law. Both parties filed response briefs that contradict their opponent's arguments but did not advance any new positions. [4]

DISCUSSION

HN3[] A challenged claim will not be allowed by the bankruptcy court if the claim is barred by the applicable statute of limitations. Pursuant to *11 U.S.C. § 502*, a **[**8]** claim, proof of which has been filed, is deemed allowed unless objected to and, after notice and a hearing, the court disallows the claim in whole or in part. *Section 502(b)(1)* requires a claim to be disallowed if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Further support for disallowing a time barred claim is found in *11 U.S.C. § 558* which provides that HN4[] "the estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation . . . A waiver of any such defense by the debtor after the commencement of the case does not bind the estate." HN5[] The Southern District of New York recognizes the authority of the Bankruptcy Court to apply a statute of limitation or other dispositive defense in the disallowance of claims. *See U.S. Lines, Inc. v. U.S. Lines Reorganization Trust (In re U.S. Lines, Inc.), 262 B.R. 223, 234 (S.D.N.Y. 2001)*; *see also G.W. White & Son v. Tripp, 1995 U.S. Dist. LEXIS 1887, 1995 WL 65058 at *2 (N.D.N.Y. 1995)* (if a claim would be unenforceable **[**9]** against the debtor outside of bankruptcy because the statute of limitation had run, the claim will not be allowed in bankruptcy); *cf In re Cutler-Owens Int'l Ltd., 55 B.R. 291, 292-3 (Bankr. S.D.N.Y. 1985)*.

HN6[] New York C.P.L.R. *§ 213* provides that an action to collect sums due under a note must be commenced within six years. The statute of limitation applicable to an action on a note accrues on the date final payment became due on the subject debt. *See Young v. Woodcrest Club, 188 Misc. 2d 706, 729 N.Y.S.2d 855, 857 (N.Y. Sup. Ct. 2001)* (the right of action does not accrue upon a contract until payment thereunder is due by its terms); *Anthony Marino Constr. Corp. v. F. & J. Sales Corp., 76 A.D.2d 767, 429 N.Y.S.2d 417 (N.Y. App. [*54] Div. 1980)* (Limitations period to recover on note began to run on the repayment date of the loan). The parties agree that pursuant to the terms of the Note, payment in full was due on April 9, 1992. The Creditor does not dispute that the six-year statute of limitations found in C.P.L.R. *§ 213* applies to his claim, and that absent any revival or extension of the pertinent limitation period, his claim would be time barred and unenforceable **[**10]** against the bankruptcy estate.

The only issue in dispute is whether *G.O.L. Section 17-101* extended the six year limitation period in the instant case. *G.O.L. Section 17-101* states in pertinent part that HN7[] "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 . . ." HN8[] In order to revive the statute of limitations, "the writing . . . 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.**" *See Lew Morris Demolition Co. v. Bd. Of Educ. of City of New York, 40 N.Y.2d 516, 521, 355 N.E.2d 369, 387 N.Y.S.2d 409 (1976)*(emphasis added); *GP Hemisphere Assocs., LLC v. Republic of Nicar., 2000 U.S. Dist. LEXIS 14165 , 2000 WL 1457025 (S.D.N.Y. Sept. 28, 2000)*; *Banco do Brasil v. State of Antigua, 268 A.D.2d 75, 707 N.Y.S.2d 151 (N.Y. App. Div. 2000)*. "In determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports **[**11]** an intention to pay." *Knoll v. Datek Secs. Corp., 2 A.D.3d 594, 769 N.Y.S.2d 581 (N.Y. App. Div. 2003)*. Additionally, the acknowledgment of the existing debt and the intent to pay same must be unconditional. If any condition must be satisfied prior to payment being made, such as the future ability to pay or the sale of an asset, the Creditor must show that the condition has been satisfied before application of the toll contained in *G.O.L. § 17-101*. *See Snyder v. Madera Broadcasting, Inc., 872 F.Supp. 1191, 1198 (E.D.N.Y. 1995)*; *see also Flynn v. Flynn, 175 A.D.2d 51, 572 N.Y.S.2d 307, 309 (N.Y. App. Div. 1991)*; *Mesiano v. Mazzeo, 12 Misc. 2d 858,*

[4] The creditor refers to settlement discussions with the Trustee in his Response to the Trustee's Second Supplemental Memorandum of Law to the Trustee's Motion. The creditor states that settlement negotiations are an "obvious admission that there is merit to the Claim." *Federal Rule of Evidence 408*, Compromise and Offers to Compromise, states that "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, **is not admissible to prove liability for or invalidity of the claim or its amount.** Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Therefore, the Court has disregarded the creditor's reference to settlement negotiations in rendering this opinion.

172 N.Y.S.2d 913 (N.Y. Sup. Ct. 1958) (If borrowers acknowledgment and promise to pay is one to repay when he is able to do so, the lender must plead and prove such ability); *Eppler v. Van Vleck, 16 N.Y.S.2d 809, 810 (N.Y. App. Div. 1939)* ("None of the letters sent by the defendant to the plaintiff was unconditional. Those sent within six years after the debt became due acknowledged the debt, but promised payment only when able . . . the plaintiff had the burden of establishing ability to pay on the **[**12]** part of the defendant). The parties agree that this is the legal standard to be satisfied; however, the Trustee and the Creditor draw different conclusions based on the Debtor's letters to his brother with regard to the subject loan. For the reasons set forth below, the Court holds that each correspondence that contains an acknowledgment of the debt either contains a condition that has not been satisfied or a statement inconsistent with an intention to repay such that the toll contained in *G.O.L. § 17-101* does not apply.

The Letters

The Creditor provided the Trustee and the Court with several communications [5] which he advances acknowledge the **[*55]** claim such that the limitation period was tolled. In considering each letter, the Court first ascertains whether the debt has been acknowledged, and then determines whether any inconsistencies or conditions are placed on payment. Of course, the existence of any such inconsistencies or conditions would mean that the letter would not meet the standard for extending the six-year limitation period.

[13] Letter dated September 24, 1996:**

Acknowledgment of Debt:	"I will still no matter what happens give your money back." "Our financial
Statements Inconsistent with Intention to Pay or Conditions on Payment:	condition continues to deteriorate as the IRS is taking away all of Gail's new income and I remain treading in hot water . . . it is not clear what will be left, if anything . . . As for me, I am broke. I have assets but no cash . . . I am at the edge. If a buy out happens [of water purification technology] the cash to me will hopefully be enough to pay you off and others . . . If the Culligan Deal doesn't happen I will be in trouble . . . So let's confront the next 24 months realistically concerning your $ 100,000 . . . I will not have enough money to make any 96 Interest Payments or Principal Reduction payments. The earliest will be June 97 counting on Culligan, Gail, or Colorado Land Sales . . . What I need now is another $ 100,000. Our credit is so bad that the banks won't loan to us for a few years . . . Cash or

[5] The creditor submitted the first page of one letter, dated November 17, 1998, which acknowledges the debt and references allocation of responsibility for the debt to either Debtor or his estranged wife in the matrimonial proceeding. As this correspondence does not meet the signature requirement of *G.O.L. Section 17-101*, and additional information may have been contained on subsequent pages that have not been provided to the Court, the Court does not consider this letter in connection with this decision.

	your signature to borrow $ 100,000 was what I would explore . . ."

[14]** The Debtor's statement, "I will still no matter what happens give your money back," was made in connection with a request for additional funds. The Debtor continuously references his dire financial straits and conditions payment to the Creditor on the success of his various business ventures and a future ability to pay. At no point does Debtor propose a payment plan, or make any concrete unconditional proposal to repay the money owed to the Creditor. Instead, he states that he will be unable to pay anything unless the "Culligan deal" is consummated, the Colorado Land Sales are successful, or "Gail" [Debtor's former spouse] is able to somehow repay the loan. The Creditor has not shown any of these conditions have been satisfied, i.e. that the Culligan deal occurred. *See* *Flynn v. Flynn, 175 A.D.2d 51, 572 N.Y.S.2d 307 (1st Dep't 1991)*; *Snyder v. Madera Broadcasting, Inc., 872 F.Supp. 1191, 1198 (E.D.N.Y. 1995)* ***HN9***[↑] (while an express promise to pay is conditioned on the happening on some future ability or debt, the burden is on the Creditor to show fulfillment of such condition, and absent such showing, application of *section 17-101* is inappropriate). The Creditor does **[**15]** not allege or prove that Debtor became able to **[*56]** pay at any time, or that any of the Debtor's undertakings were profitable. [6] This letter therefore fails to meet the standard set forth in *G.O.L. § 17-101*.

Letter dated April 16, 1998:

Acknowledgment of Debt:	"In that troubled year you were good [7] enough to loan us $ 125,000 . . . I am taking responsibility for your loan . . . I figured we owe you $ 150,000."
Statements Inconsistent with Intention to Pay or Conditions on Payment:	"We have gotten ourselves into a financial straightjacket. Some of these problems our own doing, but the big reasons why you . . . haven't been paid has to do with market conditions and events beyond our control like my $ 87,000 hospital bill . . . all together we owe over $ 4,000,000 . . . So as the saying goes you can't take money out of a stone -- and that's where we are. If we had it or could get more of it you are the first in line for some more payments . . . I have stated this before -- if I knew that you would need those funds I wouldn't have approached you and if we knew how

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[6] ***HN10***[↑] Pro se litigants are afforded considerable leniency in meeting formal pleading requirements. Nonetheless, pro se litigants are not relieved of their duty to plead and prove their entitlement to the relief they seek. *See* *DeBuono v. Fanelli (In re Fanelli), 263 B.R. 50,62 (Bankr. N.D.N.Y. 2001)* (Gerling, J.) (While obligated to hold pro se litigant to a more relaxed procedural standard, the Court would not ferret out arguments on his behalf and seek to substantiate them when no attempt is made to so by the litigant); *In re Wright, 223 B.R. 886, 893 (Bankr. E.D. Pa. 1998)* (pro se litigants are held to the same standard as represented litigants when it comes to proving their positions).

[7] Note that Debtor states that he paid back a separate $ 25,000 loan, plus interest, in his 4/16/1998 letter. The $ 25,000 loan is not at issue in the bankruptcy as it has been satisfied.

> our world was going to unfold I wouldn't have made that fateful request of you in 1991. . . . We have no funds to pay you at this time . . . However, if the stock market was making me richer by the week and I didn't need the money right away I'd probably cast this loan as a safe treasury bond that might take a while to redeem or mature but will prove to be a satisfactory investment in the long run . . . Another idea is for you to put some money into the River's Edge Colorado Project to get it going and give yourself a new project to work on. This will get you a return on your new money and there is enough profit to return what I owe you as well. The same would be true about the Deer Hollow Project in Cold Spring . . . I'm not sure where the $ 8,275.49 comes from but I am glad to pay it if it is due."

[16]** Again, Debtor emphasizes his financial difficulties, states that the Creditor "can't **[*57]** take money from a stone" and asserts that he has no funds to repay the Creditor. Debtor also requests more funds from the Creditor and states that repayment will be forthcoming if the Creditor lends the Debtor additional money. His vague references to repayment at an unknown and unascertainable date in the future strike the Court as an attempt to induce the Creditor to invest in yet another of Debtor's business ventures, rather than an expression of an intention to repay the sums due. The Debtor's statements that he is currently unable to make payments and does not know when he will be able to make any payments is inconsistent with an intention to repay the loan and thus, the April 16, 1998 letter does not extend the applicable statute of limitation.

Letter dated June 8, 1998:

Acknowledgment of the Debt:	"I am deeply frustrated that I have not repaid you what you were so kind to provide to us by now . . . we are very sorry to have taken your well intentioned funds. To have dragged this out so long was not our plan or purpose."
Statements Inconsistent with Intention to Pay or Conditions on Payment	"In my heart and on paper you were to have gotten all your money back at the time the Log Home was sold in Telluride . . . Unfortunately it took much longer to sell because the

economy was in recession. When we finally did sell it was sold for $ 1,000,000 on 100 acres -- which was all of our holdings. We were planning to get $ 200,000 for the additional 35 acres . . . I never recovered. I didn't plan it that way or misinform you of our inability to pay! . . . These properties have high mortgages on them. I have to sell them at prices sufficiently above the mortgages to make it worth while . . . there are tax liens and bank obligations which would be taken off first by the title companies before anything is left over to pay you. . . . I'm not sure what you mean by passing ownership to you [in response to Creditor's suggestion made in May, 1998 that Debtor pass ownership of a property to him to satisfy the debt]. Everything that has a lien on it has to be satisfied before passing title . . . if I can get rid [of a partner] on the Cold Spring land it might be possible to carve out something for you there of approximate value. If I had the ability to get any of our holdings free and clear that would mean I'd have the money to pay you which I don't have and isn't possible at this time . . . if you could invest about $ 100,000 through your own corporation into the Colorado Project you would have a new project . . . Another way is for me to borrow the money from a bank or your margin account with your signature guarantee so no monies have to leave your account . . . If I can get a couple Lots developed in Colorado this Project would begin to Sell and I believe very strongly that your funds would be

returned to you plus an additional kicker."

[17] [*58]** Again, the Debtor declines to make payment, and even refuses to pass title of a property to the Creditor to satisfy the underlying loan. Debtor states in his letter that all mortgages must be satisfied to transfer such title and that payment to the Creditor was not possible at the time; instead, Debtor again attempts to induce the Creditor to lend him more money. Repayment to the Creditor is always conditioned upon some future fortuitous event dependent upon additional sums being lent by the Creditor. At no point does the Debtor offer unconditional payment at a specific point in time.

Interestingly enough, the Creditor himself apparently did not believe that the Debtor's many promises were consistent with an intention to repay him. In an email to the Creditor dated August 13, 2001 Debtor mentions the "big loan" and asks for a loan of additional sums. Once again, Debtor refers to the debt as a bond that the Creditor cannot access until it is mature. The Creditor replies by ridiculing the Debtor's characterization of the loan as a bond, which he refers to as a "Brill Bond." The Creditor refused to lend additional money to Debtor because he did not believe that Debtor would repay any **[**18]** funds, stating that there was "no guarantee [of payment] and poor history." The Creditor points out that Debtor has never even offered a payment plan on the loan, despite Creditor's numerous requests that he do so. The Creditor goes on to underscore that Debtor's only offers of repayment have been conditioned on participation in Debtor's' investments,' which the Creditor placed in single quotation marks, indicating to the Court that he does not himself believe that Debtor's offers provide a realistic opportunity for return or evidence an intention to repay the money owing. The email at issue was sent pre-petition and reflects the Creditor's understandable frustration as well as his obvious belief that Debtor had no intention whatsoever of repaying the funds owed. The Creditor further indicates, in an email entitled "Cornered," and dated August 12, 2001 [8] that "A Bank or another Creditor would have foreclosed by now. Should I have sent you weekly bills & (sic) made daily threatening demand calls? It seems you have a weak sense of obligation and **no intention of repaying me, but prefer to expend whatever spare change you might have at the moment on personal/family gratification/obligation** **[**19]** rather than make any payments (however slight) on the loan . . ."

Like the Creditor, the Court now reaches the inescapable conclusion that Debtor never intended to repay the debt owed to Creditor, the letters forwarded to the Creditor which acknowledge the loan were in fact thinly veiled attempts to borrow additional funds and contained conditions upon repayment that were never fulfilled as well as statements inconsistent with an intention to repay. Furthermore, it is also clear that the Creditor refrained from pursuing legal remedies based upon a sense of familial obligation. [9] While understandable, this forbearance is not a legally sufficient reason to prejudice Debtor's other creditors, who have acted to preserve their **[*59]** legal rights. Whereas Creditor declined to collect from his brother, he has no similar scruple against seeking payment from the bankruptcy estate, thereby reducing the dividend to other creditors who have been diligent in pursuing their **[**20]** claims. These creditors, who went to the expense of reducing their claims to judgment or instituting legal proceedings, should not now be prejudiced by payment of a time barred claim.

> *HN11*[↑] "Statutes of limitation are designed, in part, to protect potential defendants from the burden of litigating stale claims by putting defendants on notice of claims against them within specified periods, so they can prepare their defenses adequately while the evidence is still fresh. They are designed to prevent fraudulent and stale claims from being asserted, to the surprise of the parties or their representatives, when the evidence has been lost, or the facts have become obscure from the lapse of time or the defective memory, death, or removal of witnesses." *See* *51 Am. Jur. 2d Limitation of Actions § 15* (2004).

It is true that application of a statute of limitation can have rigid and **[**21]** sometimes harsh results. The need for finality necessitates this rigidity. Legislatures have set deadlines upon the ability to seek recourse from the courts to prevent defendants from being held liable in perpetuity for past actions when memories have faded, evidence has been lost or has degraded, and witnesses are no longer available to testify. The claim being asserted in this case is stale. The defendant is no longer the Debtor personally, but his bankruptcy estate. The estate now has the burden of challenging the legitimacy of debt that is more than a decade old. Other creditors in this action might be surprised to learn that Debtor owes his brother close to a quarter of a million

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[8] The date is handwritten in the email header.

[9] No such filial sensibility prevented the Creditor from charging his brother a handsome interest rate of 10% per annum.

dollars, as there is no suggestion that the promissory note was ever recorded in any public record, or any legal action ever instituted against Debtor.

The Net Worth Statement

The Creditor's argument that that statute of limitation was revived by Debtor's inclusion of his debt on Debtor's February 16, 1999 Net Worth Statement (the "Net Worth Statement") need not occupy the Court for very long. Case law states that ***HN12***[ ] an acknowledgment of a debt to a third party will be effective to revive **[**22]** the limitation period if it appears that the debtor's intention was to communicate the acknowledgment to the creditor. *See, e.g.* *Clarkson Co. v. Shaheen, 533 F. Supp. 905, 932 (S.D.N.Y. 1984)*(carrying debt on books for two years and acknowledging debt in annual report revived statute of limitation pursuant to *G.O.L. Section 17-101*); *Vengroski v. Garden Inn, 114 A.D.2d 927, 495 N.Y.S.2d 200 (N.Y. App. Div. 1985)* (the mere fact that the debt was carried on defendant's books and tax returns would not in and of itself constitute the required acknowledgment; critical determination is whether the acknowledgment imports an intention to pay). The Creditor argues that the Debtor forwarded the Net Worth Statement to him via letter dated June 14, 1999, thereby communicating an intention to repay the debt. The only on-point case cited by Creditor in his first reply brief, *Flynn v. Flynn, 175 A.D.2d 51, 572 N.Y.S.2d 307, 309 (N.Y. App. Div. 1991)*, states that a Net Worth Statement is not a written acknowledgment addressed to defendant-creditor and therefore is insufficient to start a statute of limitation running again. Additionally, although the Creditor states that the Net **[**23]** Worth Statement was provided to him under cover of a letter dated June 14, 1999, the letter itself makes no mention of enclosing the Net Worth Statement, or what conclusion Creditor should draw from such an enclosure. Although the Creditor argued before **[*60]** this Court that it was the Debtor's habit to enclose documents with his communications without making any mention of the enclosures, this testimony is belied by the fact that the June 14, 1999 letter *does* mention an enclosure -- a promotion on Architectural Tours of Europe. Thus the Court is not convinced that the Net Worth Statement was forwarded to the Creditor with that letter. Additionally, in order to satisfy the Court that the third party acknowledgment standard had been satisfied, the Debtor in this circumstance would have had to make mention of the Net Worth Statement in the body of the letter, with an indication as to why the Net Worth Statement was enclosed -- i.e. that Creditor would be paid through the matrimonial proceeding. "When the debtor acknowledges the existence of the debt to a stranger, the acknowledgment will be effective *if it appears that it was the intention of the debtor* that the acknowledgment should **[**24]** be communicated to and should influence the creditor. Where, however, there is no intention on the part of the debtor that his statement be communicated to the creditor, the acknowledgment is not sufficient to stop the running of the statute." *In re Sonnenthal, 39 Misc. 2d 901, 242 N.Y.S.2d 135 (N.Y. Surrogate Ct. 1963)*(emphasis added). Where, as here, the parties are brothers, with an incentive to assist one another as against other creditors of the estate, the Court requires more than mere testimony of the claimant and the Debtor as to the transmittal of the Net Worth Statement and the intent behind same -- instead, contemporaneous evidence of the communication and its intent would be essential.

There are other difficulties with the Net Worth Statement's alleged acknowledgment of the debt -- it provides 1990 as the year the debt was incurred, when in fact the subject Note was signed in 1991. The Net Worth Statement also lumps together the two separate loans made pursuant to two separate instruments -- the $ 100,000 and $ 25,000 -- as if borrowed pursuant to the same instrument, under the section entitled "Notes **[plural]** Payable." Ostensibly, these should have been listed **[**25]** as separate obligations, and indeed, the $ 25,000 note should not have been mentioned at all, as the smaller loan was purportedly repaid almost immediately, *see* Letter to Peter Brill, dated April 16, 1998 ("A minor point, but simultaneously with this loan was a loan for $ 25,000 and you did receive that principal plus interest back. . . .") These minor discrepancies would not be so troubling if the Net Worth Statement did not contain a legend above Debtor's notarized signature which states "The foregoing statements . . . have been carefully read by the undersigned who states that they are true and correct." As Debtor affirmed that he had carefully read the Net Worth Statement for inaccuracies, the Court must assume that the 1990 date was accurate and that Debtor may be referring to a different debt owed to the Creditor altogether. In any case, the debt is not identified with sufficient precision in the Net Worth Statement to absolutely constitute an acknowledgment of the claim at issue herein, as there are discrepancies as to date and amount.

The Court is not persuaded on the current record that this Net Worth Statement was communicated to the Creditor as Debtor's intention to **[**26]** repay him; rather, it is just as likely the debt was included for consideration by the state court in the equitable distribution analysis. There is no indication in the June 1999 letter that Debtor intended to repay the Creditor after the matrimonial proceeding was complete, if a property award was made on that basis. Indeed, why should he? There was never a threat of any legal **[*61]** action; Debtor was confident of Creditor's forbearance based upon past experience.

CONCLUSION

The Creditor's claim is disallowed as barred by the applicable statute of limitation. The Trustee is directed to submit an order consistent with this opinion.

Dated: Poughkeepsie, New York

December 16, 2004

CECELIA G. MORRIS

U. S. B. J.

In re Estate of Johnson

Supreme Court of New York, Appellate Division, Second Department

March 21, 1983

No Number in Original

Reporter
93 A.D.2d 1 *; 460 N.Y.S.2d 932 **; 1983 N.Y. App. Div. LEXIS 17086 ***

In the Matter of the Estate of Edwin I. Johnson, Deceased. Robert Abrams, as Attorney-General of the State of New York, Appellant; Jonathan G. Blattmachr, Respondent

Prior History: [*1]** Appeal from an intermediate decree of the Westchester County Surrogate's Court (Evans V. Brewster, S.), entered September 10, 1981, which, in a proceeding to construe the will of decedent so as to permit gender-neutral scholarship awards, (1) denied said relief, and (2) decreed that Croton-Harmon Union Free School District be replaced as trustee of the scholarship fund by a private trustee.

Matter of Johnson, 108 Misc 2d 1066.

Disposition: Intermediate decree of the Surrogate's Court, Westchester County, dated September 10, 1981, reversed, on the law, without costs or disbursements, and the Attorney-General's petition for a construction of article sixth of the will of Edwin Irving Johnson so as to delete the word "men" and to insert in place thereof the word "persons" is granted.

Core Terms

school district, the will, state action, deserving, discriminatory, substitution, bright, graduates, provisions, bequest, young man, trusts, public agency, high school, appointment, recipients, wishes, needy, funds, decree, gender, charitable trust, gender-restricted, male, involvement, female, select, substitute trustee, testamentary trust, purposes

Case Summary

Procedural Posture
A decedent's will created a gender-restricted scholarship fund to be administered by a school district. The school district refused award the scholarships and the Westchester County Surrogate's Court (New York) refused to delete the sex restriction or ordered that the school district be replaced by a private trustee who was willing to administer the fund. Appellant attorney general sought review of the decision.

Overview
The attorney general contended that the Surrogate's decree was both inconsistent with a proper application of the doctrine of cy pres and violative of the constitutional guarantee of equal protection of the law. The court found that by naming the school district as the trustee to receive, invest, administer, and dispense the scholarship funds, the bequest required substantial state involvement, thereby triggering the guarantees of the Fourteenth Amendment. The Surrogate was correct in determining that it was appropriate to reform the trust because the decedent would have preferred the removal of the gender restriction to the failure of the trust. However, the court held that it would not give effect to a testamentary disposition designed to carry out some immoral or illegal purpose. The court held that presented with an invidiously discriminatory charitable trust which could not be constitutionally performed, the Surrogate was precluded by the Fourteenth Amendment from actively intervening to reform the trust in a way that had the "immediate objective" and "ultimate effect" of enforcing its discriminatory provision.

Outcome

The court held that the Surrogate's intermediate decree should be reversed and that the attorney general's petition to construe the will so as to the delete the gender restriction should be granted.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Tax Law > ... > Deductions > Charitable Deductions > General Overview

Estate, Gift & Trust Law > Gifts > Personal Gifts > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

HN1[] **Trusts, Charitable Trusts**

Charity ministers to the mind as well as to the body and, accordingly, it is established law that a gift for the promotion of education or learning is a gift for charitable uses.

Estate, Gift & Trust Law > Trusts > General Overview

Tax Law > ... > Deductions > Charitable Deductions > General Overview

HN2[] **Estate, Gift & Trust Law, Trusts**

A charitable trust may be restrictive, provided only that the class of beneficiaries is sufficiently large so that the public is interested in the enforcement of the trust.

Constitutional Law > Equal Protection > Gender & Sex

HN3[] **Equal Protection, Gender & Sex**

An agency of the state cannot constitutionally administer a scholarship program which discriminates on the basis of sex.

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Tax Law > ... > Deductions > Charitable Deductions > General Overview

HN4[] **Trusts, Charitable Trusts**

A charitable trust which is impossible to perform need not fail if the evidence demonstrates that the settlor had a general charitable intent. Where such an intent is shown, the court may reform the trust to permit it to be performed in a way that is as consistent as possible with the settlor's original intent.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Tax Law > ... > Deductions > Charitable Deductions > General Overview

HN5[] **Protection of Rights, Public Versus Private Discrimination**

One may dispose of his property to selective beneficiaries such as a favored religious institution, a fraternal organization, or a group which performs good work for limited segments of society. And the right, of course, is not necessarily limited to the disposition of property to groups or causes which society views as worthy. The right to dispose of property may be exercised as well in a manner that indulges one's own personal bigotry and irrational prejudices. Private discrimination, no matter how egregious, distasteful, or morally reprehensible, is not constitutionally proscribed.

Estate, Gift & Trust Law > Wills > Interpretation > General Overview

HN6[] **Wills, Interpretation**

A court will not give effect to a testamentary disposition designed to carry out some immoral or illegal purpose. Similarly, the right to dispose of property in an invidiously discriminatory fashion may not be exercised in a way that enlists the substantial participation of the state or its agents in the accomplishment of the discriminatory purpose.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Substantive Due Process > Scope

HN7[] **Equal Protection, Nature & Scope of Protection**

The constitutional guarantee of equal protection of the law comes forcefully into play whenever state action fosters or encourages invidious discrimination. Nevertheless, in the absence of obvious government involvement in discrimination, it is often difficult to determine whether the state's connection with the challenged conduct is sufficiently substantial to amount to state action within the contemplation of the Fourteenth Amendment.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Constitutional Law > Equal Protection > General Overview

HN8[] **Protection of Rights, Public Versus Private Discrimination**

State action will be found where the court, by sifting facts and weighing circumstances determines that the conduct allegedly causing the deprivation of a federal right is fairly attributable to the state. And, where the impetus for the discrimination is private, the state must have significantly involved itself with invidious discriminations in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN9[] **Types of Contracts, Covenants**

For the purposes of the Fourteenth Amendment, state action may be found in the conduct of the state's judicial authorities. Thus, under the principle that the Constitution is violated when the state enforces privately originated discrimination, the Supreme Court has found unconstitutional state action where the state's judiciary is called upon to enforce a private and invidiously discriminatory covenant. The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Governments > Courts > Authority to Adjudicate

HN10[] **Protection of Rights, Public Versus Private Discrimination**

Resort may not be had to the judiciary to actively intervene for the purpose of enforcing, promoting, or supporting private invidious discrimination.

Headnotes/Summary

Headnotes

Constitutional Law -- Equal Protection of Laws -- Reformation of Discriminatory Private Trust

The *equal protection clause of the Fourteenth Amendment to the United States Constitution* was violated where, in a proceeding to construe the provisions of a will establishing a scholarship fund for the benefit of needy and deserving male high school graduates within a local school district and naming the **[***2]** school district as trustee, the Surrogate directed that a private trustee be substituted in place of the named trustee, which, as an agency of the State, is constitutionally prohibited from administering the invidiously discriminatory provisions of the trust; the decree was itself an unconstitutional exercise of State judicial power, since it directed reformation in order to give effect to the discriminatory objective of a trust which was constitutionally infirm as originally established. The proper course is to delete the gender restriction, since it was at least as important to the testator that the school district carry out the task of selecting the scholarship recipients as it was to exclude women as objects of his bounty.

Counsel: *Robert Abrams, Attorney-General* (*Shirley Adelson Siegel, Deborah Bachrach* and *Lawrence S. Kahn* of counsel), appellant *pro se*.

Jonathan G. Blattmachr (*Milbank, Tweed, Hadley & McCloy* [*Linden Havemeyer Wise*] of counsel), guardian ad litem for unknown males who are prospective scholarship recipients under the will of Edwin Irving Johnson, respondent *pro se*.

Wirth H. Koenig, c/o Greenbaum, Wolff & Ernst, guardian ad **[***3]** litem for unknown distributees under the will of Edwin Irving Johnson.

Abigail A. Jones, Lenore W. Tucker, Phyllis N. Segal and *Anne E. Simon*, for New York State National Organization for Women and Advocates for Children, *amici curiae*.

Judges: Mollen, P. J. Weinstein and Brown, JJ., concur with Mollen, P. J.; Niehoff, J., dissents and votes to affirm the intermediate decree, with an opinion, in which Boyers, J., concurs.

Opinion by: MOLLEN

Opinion

[*2] OPINION OF THE COURT

[934]** The issue presented on this appeal is whether the equal protection clause of the Fourteenth Amendment is violated when a Surrogate reforms the provisions of a will so as to give effect to a testamentary bequest which discriminates on the basis of sex.

In 1978 Edwin Irving Johnson died. His will created a gender-restricted scholarship fund to be administered by the Croton-Harmon Union Free School District for the benefit of its needy and deserving male high school graduates. The school district declined to award the scholarships **[*3]** on a gender-restricted basis, proposing instead to make the selections without regard to sex. In a proceeding to construe the will so as to permit **[***4]** gender-neutral scholarship awards, the Surrogate refused to delete the sex restriction. Instead, he decreed that the school district be replaced by a private trustee who was willing and able to administer the fund and award the scholarships as directed in the will (*108 Misc 2d 1066*). The appellant and *amici curiae* now contend that the Surrogate's decree, which clears the way for scholarships to be awarded on a discriminatory basis, is both inconsistent with a proper application of the doctrine of cy pres and violative of the constitutional guarantee of equal protection of the law.

[935]** We turn first to a brief review of the pertinent facts.

On June 30, 1961, Mr. Johnson executed a will which bequeathed his residuary estate to Columbia University in trust. The income of the trust was to be paid first to his sister-in-law and, upon her death, to the trustees of Columbia University. The trustees were to apply the income to scholarships for young men from the Croton-Harmon Union Free School District who were attending Columbia. A further provision of the will directed that, if continuation of the Columbia scholarship fund became impractical, the corpus of the trust would **[***5]** be divided equally between the university and the school district for scholarship purposes. A subsequent will, dated December 4, 1974, contained identical provisions regarding the creation of a scholarship fund at Columbia University.

At one point, the university expressed dissatisfaction with that portion of the bequest limiting the class of beneficiaries to those of its students who had graduated from the high school of the Croton-Harmon school district. When the university asked that the restriction be modified, Mr. Johnson's attorney replied that his client's interest in the school district was greater than his interest in Columbia.

The will here in issue, Mr. Johnson's last, was executed on December 15, 1975. The bequest to Columbia University was deleted and replaced with a provision bequeathing the residuary estate to the Croton-Harmon school district with a direction that the district apply the funds for scholarships **[*4]** to needy college-bound graduates without regard to the university to be attended. Again, however, the will contained a gender restriction, providing that the scholarships were to be granted to "deserving young men". The specific provision was **[***6]** as follows: "sixth: I give, devise and bequeath my entire residuary estate to Croton-Harmon Union Free School District, the principal of which shall be invested and held for the purposes hereof, and the net income of which shall be used and applied, each year to the extent available, for scholarships or grants for bright and deserving young men who have graduated from the High School of such School District, and whose parents are financially unable to send them to college, and who shall be selected by the Board of Education of such School District with the assistance of the Principal of such High School."

Mr. Johnson died on January 10, 1978, and his will was admitted to probate four months later. Pursuant to article sixth, his executrix made distributions to the Croton-Harmon Union Free School District of $ 195,000, representing the entire residuary

estate. In April, 1979, the district's board of education announced that the Edwin Irving Johnson scholarships were to be awarded and that applications would be accepted from graduating male students on or before May 1, 1979.

Although only male applicants were solicited, at least one female student applied for a scholarship, and threatened **[***7]** to seek Federal injunctive relief if she were denied consideration on account of her sex. In addition, the National Organization for Women Legal Defense and Education Fund contacted the Civil Rights Office of the Department of Health, Education and Welfare (HEW), and alleged that, in proposing to award gender-restricted scholarships, the school district was acting in violation of title IX of the Education Amendments of 1972 (*US Code, tit 20, § 1681, subd [a] et seq.*). As a result of this communication, HEW commenced an investigation to determine whether the school district was engaged in discrimination on the basis of sex.

Thereafter, the school district decided to defer awarding the scholarships and entered into a stipulation with the **[*5]** executrix of the will and with the Attorney-General of the State of New York by which they agreed "to the deletion of the word 'men' in Article Sixth of the Will and the insertion of the word 'persons' in its place". On June 11, 1979, the Attorney-General commenced this proceeding to have the Surrogate construe article sixth of the Johnson will as **[**936]** agreed in the stipulation. The purpose of such a construction, the Attorney-General **[***8]** asserted, was "to permit the educational bequest set forth [therein] to be administered in accordance with the testator's general charitable intent without violation of the United States Constitution, the Constitution of the State of New York, Federal Law and the public policy as reflected in [those] provisions prohibiting discrimination based on sex." [1]

The Surrogate first appointed a guardian ad litem to represent Mr. Johnson's unknown distributees. The guardian submitted a report in which he offered no opposition to the proposed construction. His position was that, as there probably were no surviving distributees who might qualify to take in intestacy, "the decedent would prefer that scholarships be provided to girls as well as boys, if the alternative * * * would be to have his residuary estate pass as intestate property" and thereby escheat **[***9]** to the State. After receiving this report, the Surrogate appointed a second guardian ad litem -- this one to represent prospective male scholarship recipients under the will as written. The second guardian submitted a report in which he opposed the stipulated construction. He maintained that "the appropriate remedy is for the Court to apply the cy pres doctrine to appoint a new administrator for the scholarship fund which is not an instrumentality of the State."

The Surrogate, finding (*108 Misc 2d 1066, 1070*, *supra*) the establishment of a gender-restricted scholarship fund "neither illegal nor against public policy", directed that the school district, which had refused to administer the discriminatory trust, be replaced by a private trustee who would comply with the provisions of the will. Although the selection of scholarship recipients was to be the independent responsibility of the private trustee, the Surrogate **[*6]** directed (p 1073) that the trustee "may consider any recommendations that may be made to it by the Board of Education of the Croton-Harmon Union Free School District or principal of the high school".

It is from the intermediate decree, entered upon the **[***10]** Surrogate's decision, that the Attorney-General now appeals. The decree should be reversed.

The bequest here in issue, which sought to provide higher education for those who could not otherwise afford it, created a charitable trust. It has long been recognized that ***HN1***[↑] "[charity] ministers to the mind as well as to the body" and, accordingly, "[it] is established law in this state that a gift for the promotion of education or learning is a gift for charitable uses" (*Butterworth v Keeler, 219 NY 446, 449, 450* [Cardozo, J.]; see, also, *EPTL 8-1.1*, *subd [a]*; 4 Scott, Trusts [3d ed], *§ 370*). Moreover, the trust here does not lose its charitable character because its beneficiaries are limited to males (see 4 Scott, Trusts [3d ed], § 370.6; *Restatement, Trusts 2d, § 370*, Comment [*j*]). ***HN2***[↑] A charitable trust may be restrictive, provided only that the class of beneficiaries is sufficiently large so that the public is interested in the enforcement of the trust (4 Scott, Trusts [3d ed], § 369.5).

Although charitable in nature, however, the trust Mr. Johnson created was clearly vulnerable to an equal protection challenge. By naming the Croton-Harmon Union Free School **[***11]** District, a public agency, as trustee to receive, invest, administer

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[1] Upon receiving the school district's assurance that no scholarships would be awarded pending the Surrogate's determination, HEW terminated its investigation.

and dispense scholarship funds and to select scholarship recipients, the bequest required substantial State involvement, thereby triggering the guarantees of the Fourteenth Amendment (see, e.g., *Pennsylvania v Board of Trusts, 353 U.S. 230*; *Wachovia Bank & Trust Co. v Buchanan, 346 F Supp 665*, affd *487 F2d 1214*; *Matter of Crichfield Trust, 177 NJ Super 258, 261*; cf. *Shapiro v Columbia Union Nat. Bank & Trust Co., 576 SW2d 310* **[**937]** [Mo]). [2] Those guarantees would plainly be violated by the award of scholarships pursuant to the bequest's sex-based discriminatory restriction because such restriction had no substantial relation to the goal of promoting higher education **[*7]** (see *Kirchberg v Feenstra, 450 U.S. 455*; *Califano v Westcott, 443 U.S. 76*; *Craig v Boren, 429 U.S. 190*; *Stanton v Stanton, 421 U.S. 7*; *Reed v Reed, 404 U.S. 71*; *People v Whidden, 51 NY2d 457*). As the Supreme Court itself has observed, "[coeducation] is a fact, not a rarity" (*Stanton v Stanton, supra, p 15*). Thus, as written, Mr. Johnson's bequest was fatally flawed, for ***HN3***[↑] an agency of the State **[***12]** cannot constitutionally administer a scholarship program which discriminates on the basis of sex (see *Matter of Crichfield Trust, supra*).

When the Attorney-General petitioned for the construction of the will, therefore, the Surrogate was presented, not merely with an unremarkable situation in which a trustee is unwilling or unable to perform, but with a testamentary trust which by its terms was constitutionally infirm. The Surrogate undertook to remove the infirmity, and the questions presented here concern whether he should have undertaken that task and, if so, whether the course he chose was appropriate and proper.

HN4[↑] A charitable trust which is impossible to perform need not fail if the evidence demonstrates that the settlor had a general charitable intent. Where such an intent is shown, the court may reform the trust to permit it to be performed in a way that is as consistent as possible **[***13]** with the settlor's original intent (see, e.g., *Sherman v Richmond Hose Co. No. 2*, *230 NY 462, 473*; *EPTL 8-1.1*, *subd [c]*). In our view, the evidence before the Surrogate amply demonstrated that Mr. Johnson had a general charitable intent.

From 1961 onward he made substantial provision in his wills for educational scholarships, first for graduates of the Croton-Harmon school district's high school attending Columbia University, then for the district's graduates regardless of which college they planned to attend. Significantly, in his 1961 and 1974 wills, Mr. Johnson directed that, if the trust became impractical to administer, the corpus was to be divided equally between Columbia and the school district to permit them to continue awarding scholarships as they saw fit. His last will contained no reverter or gift-over clause. Thus, Mr. Johnson has never made provision for the scholarship funds to be applied to any noncharitable purpose in the event the trust as written **[*8]** proved impossible to perform. The absence of such an alternative disposition is generally taken as substantial evidence of a general charitable intent (see *Matter of Syracuse Univ*. [*Hendricks* **[***14]**], *1 Misc 2d 904, 912-913*, affd *3 AD2d 890*, affd *4 NY2d 744*; *Matter of Lawless, 194 Misc 844, 855*, affd *277 App Div 1045*; Bogert, Trusts and Trustees [2d ed, rev], § 437; 4 Scott, Trusts [3d ed], § 399.2; see, also, *Matter of Fletcher, 280 NY 86, 91)*. Additionally, whereas the trust here was impossible to perform because of the combination of the identity of the trustee and the restriction placed on the class of beneficiaries, there is no evidence to suggest that either factor was an essential or indispensable element of Mr. Johnson's desire to create a scholarship fund. There is no indication, therefore, that a modification of either factor would do violence to Mr. Johnson's fundamental intent (cf. *Evans v Abney, 396 U.S. 435*; *Matter of Syracuse Univ*. [*Heffron*], *3 NY2d 665*). Indeed, the guardian for **[**938]** unknown distributees asserted that his examination of the will and its predecessors led him to conclude that Mr. Johnson would have preferred the removal of the gender restriction to the failure of the trust.

Accordingly, we conclude that the Surrogate was correct in determining that it was appropriate to reform the trust. We turn, then, to the **[***15]** question of whether the reformation he made was proper.

The Surrogate was presented with two options for removing the obstacle to the performance of the trust. The Attorney-General, supported by the executrix and the school district and unopposed by the guardian for unknown distributees, asked that the gender restriction on the class of beneficiaries be deleted. The guardian for prospective male scholarship recipients asked, in effect, that the school district be replaced as trustee by a person or entity not connected with the State (see *SCPA 1502*). The Surrogate chose the latter course finding, as do the distinguished dissenters in this court, that Mr. Johnson's primary and unambiguously expressed intent was to provide scholarships only for "bright and deserving young men", and that that purpose was more important to him than having the district serve as trustee. Concededly, this position may be viewed as consistent with the general rule that the identity **[*9]** of the beneficiary is presumed to be more important to the settlor than the identity

[2] Indeed, in his report to the Surrogate, the guardian for prospective male scholarship recipients conceded as much.

of the trustee (see Bogert, Trusts and Trustees [2d ed, rev], § 328). Nevertheless, our review of the record persuades us that **[***16]** it was at least as important to Mr. Johnson that the school district act as trustee as that the scholarships be awarded on a discriminatory basis. Moreover, we conclude that, whatever Mr. Johnson's primary intent, the Surrogate's decree cannot stand because it offends the equal protection clause of the Fourteenth Amendment.

In supporting the Surrogate's determination upholding the gender restriction, the dissenters place heavy reliance upon the right of every individual to dispose of his property as he sees fit. It is indeed fundamental that ***HN5***[⬆] one may dispose of his property to selective beneficiaries such as a favored religious institution, a fraternal organization, or a group which performs good work for limited segments of society. And the right, of course, is not necessarily limited to the disposition of property to groups or causes which society views as worthy. The right to dispose of property may be exercised as well in a manner that indulges one's own personal bigotry and irrational prejudices. Private discrimination, no matter how egregious, distasteful, or morally reprehensible, is not constitutionally proscribed (see, e.g., *Adickes v Kress & Co., 398 U.S. 144, 169*; **[***17]** *Shelley v Kraemer, 334 U.S. 1, 13)*.

Nevertheless, it is both the genius and the strength of our system that rights, no matter how important, are rarely, if ever, absolute (see *Schermerhorn v Rosenberg, 73 AD2d 276, 283)*. So it is with the right to freely dispose of one's property. It has long been settled, for example, that ***HN6***[⬆] our courts will not give effect to a testamentary disposition designed to carry out some immoral or illegal purpose (see, e.g., *Matter of Hughes, 225 App Div 29, 30-31*, affd *251 NY 529*; 4 Scott, Trusts [3d ed*], § 377*; *Restatement, Trusts 2d, § 377*). Similarly, and as relevant here, the right to dispose of property in an invidiously discriminatory fashion may not be exercised in a way that enlists the substantial participation of the State or its agents in the accomplishment of the discriminatory purpose (see, e.g., *Jackson v Statler Foundation, 496 F2d 623, 633-634*, cert den *420 U.S. **[*10]** 927*; see, also, *Evans v Newton, 382 U.S. 296, 298)*. "Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore **[***18]** something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in * * * discrimination." (*Adickes v **[**939]** Kress & Co., 398 U.S. 144, 190-191*, *supra* [Brennan, J., concurring in part and dissenting in part].)

Thus, ***HN7***[⬆] the constitutional guarantee of equal protection of the law comes forcefully into play whenever State action fosters or encourages invidious discrimination (see, e.g., *Moose Lodge No. 107 v Irvis, 407 U.S. 163, 173, 176-177)*. Nevertheless, in the absence of obvious government involvement in discrimination, it is often difficult to determine whether the State's connection with the challenged conduct is sufficiently substantial to amount to State action within the contemplation of the Fourteenth Amendment (see *Moose Lodge No. 107 v Irvis, supra, p 172*).

The Supreme Court has never accomplished the virtually impossible task of formulating a comprehensive definition of State action (see *Reitman v Mulkey, 387 U.S. 369, 378*; *Kotch v Pilot Comrs., 330 U.S. 552, 556)*. Instead, the court, on an essentially *ad hoc* basis, has looked to different factors, depending largely upon the **[***19]** context in which the constitutional claim arises. In some instances, the court has focused simply on whether there is a close nexus between the actions of the State and the challenged conduct (see, e.g., *Jackson v Metropolitan Edison Co., 419 U.S. 345*). In other cases the court has relied on indications of a symbiotic relationship between the State and the individual charged with invidious discrimination (see, e.g., *Burton v Wilmington Parking Auth., 365 U.S. 715*). On occasion, the court has pointed to joint activity by the actor and State agents (see, e.g., *Flagg Bros. v Brooks, 436 U.S. 149*). Still elsewhere, the court has found State action where private discriminatory activity is undertaken under compulsion of some State enforced custom (see, e.g., *Adickes v Kress & Co., supra*). And, in another context, the court has found State action where a private entity performs a public function which is traditionally the exclusive prerogative of **[*11]** the State (see, e.g., *Marsh v Alabama, 326 U.S. 501*). On the other hand, the fact that a private entity receives some public funds or enjoys a tax exemption is not generally regarded as sufficient to trigger the guarantees **[***20]** of the equal protection clause (see, e.g., *Rendell-Baker v Kohn, 457 U.S. 830*; see, also, *Dorsey v Stuyvesant Town Corp., 299 NY 512*). Nor does State action necessarily exist solely because a private entity is subject to State regulation (see, e.g., *Blum v Yaretsky, 457 U.S. 991*; *Jackson v Metropolitan Edison Co., supra*).

The rule emerging from the long course of constitutional litigation is that ***HN8***[⬆] State action will be found where the court, "by sifting facts and weighing circumstances" (*Burton v Wilmington Parking Auth., 365 U.S. 715, 722*, *supra*), determines that "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the state" (*Lugar v Edmondson Oil Co., 457 U.S. 922, , 102 S Ct 2744, 2754)*. And, "where the impetus for the discrimination is private, the State must have

'significantly involved itself with invidious discriminations' * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition" (*Moose Lodge No. 107 v Irvis, 407 U.S. 163, 173*, *supra*; see, also, *Sharrock v Dell Buick-Cadillac, 45 NY2d 152, 158)*.

Beyond this, however, there are well-settled **[***21]** principles which obtain in equal protection cases and which are particularly helpful to our analysis of the issues at bar. The very earliest cases in the area recognized that, ***HN9***[↑] for the purposes of the Fourteenth Amendment, State action may be found in the conduct of the State's judicial authorities (see, e.g., *Virginia v Rives, 100 U.S. 313, 318*; *Ex parte Virginia, **[**940]** 100 U.S. 339, 347*; *Civil Rights Cases, 109 U.S. 3, 11*; *Twining v New Jersey, 211 U.S. 78, 91*; *Brinkerhoff-Faris Co. v Hill, 281 U.S. 673, 680)*. Thus, under the principle that the Constitution is violated when the State "enforces privately originated discrimination" (*Moose Lodge No. 107 v Irvis, 407 U.S. 163, 172*, *supra*; see, also, *Griffin v Maryland, 378 U.S. 130, 136)*, the Supreme Court has found unconstitutional State action where the State's judiciary is called upon to enforce a private and invidiously discriminatory covenant (*Shelley v Kraemer, 334 U.S. 1*, *supra*) or to **[*12]** award damages for its breach (*Barrows v Jackson, 346 U.S. 249*). As the court has observed, "[the] Constitution confers upon no individual the right to demand action by the State which **[***22]** results in the denial of equal protection of the laws to other individuals" (*Shelley v Kraemer, supra, p 22*).

It is these principles which must govern the disposition of the case at hand.

As previously indicated, we do not view the circumstances here as akin to those in which a named trustee, through death, illness or disinclination, becomes unable to perform his responsibilities. The Croton-Harmon school district, as an agency of the State, was unable to carry out its duties under the bequest because it was constitutionally prohibited from doing so. Accordingly, there was more here than the simple performance by a Surrogate of the relatively neutral function of substituting one trustee for another (see *SCPA 1502*).

The Surrogate was asked, not only by the Attorney-General of the State, but impliedly by the named trustee and by Mr. Johnson's executrix, to delete the gender restriction in order to preserve the trust. Acting essentially *sua sponte*, however, the Surrogate, in an effort to adhere to what he believed to be Mr. Johnson's primary intent, decided instead to remove the district as trustee and to direct that a private trustee be substituted to administer the scholarship **[***23]** fund on the discriminatory basis set forth in the will. Significantly, under the Surrogate's decision, the private trustee, without being bound by the strictures of the Fourteenth Amendment, would remain free to receive what might well prove to be decisive recommendations from the school district. The decree, therefore, accomplished indirectly what could not be accomplished directly, viz., the selection of scholarship recipients by the school district on a gender-restricted basis. Acting in the capacity of a State judicial officer, the Surrogate issued a decree which enforced privately originated discrimination by removing the constitutional obstacle that prevented it. This, in our view, was inconsistent with the purposes and principles of the Fourteenth Amendment (see, e.g., *Matter of Crichfield Trust, 177 NJ Super 258, 262*, *supra*).

[*13] Instructive on this point is the celebrated litigation surrounding the will of Stephen Girard, a wealthy resident of Philadelphia who died in 1831. The will left in trust a considerable sum to the City of Philadelphia, and to its Mayor and aldermen to be used, *inter alia*, for the purpose of establishing an educational institution **[***24]** for the training and maintenance of "poor white male orphans". The trust was administered by various city agencies until 1869 when, by State law, a local board of trusts was established to oversee and administer the institution. In 1954, two otherwise qualified black children applied for admission to the institution and were refused under constraint of the bequest's racial restriction. Their subsequent court challenge reached the Supreme Court which held that, since the board of trusts was a State agency, its refusal to admit the children because of their race was unconstitutional discrimination by the State. The court remanded the cause for further proceedings (see *Pennsylvania v Board of Trusts, 353 U.S. 230*, *supra*).

[941]** On remand, the Pennsylvania Supreme Court simply remitted the matter to the Orphans' Court of Philadelphia which promptly replaced the board of trusts with a private trustee to administer the institution on the racially restricted basis prescribed in the will. On the appeal that followed, the Pennsylvania Supreme Court upheld the substitution of trustees (*Matter of Girard Coll. Trusteeship, 391 Pa 434*, cert den *sub nom.* *Pennsylvania v **[***25]** Board of Trusts, 357 U.S. 570*). The court saw the issue largely as concerning "the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced" (*391 Pa, at p 441*). The court distinguished *Shelley v Kraemer (334 U.S. 1*, *supra*) and *Barrows v Jackson (346 U.S. 249*, *supra*) on the ground that the black applicants to the Girard institution had not been deprived of any constitutionally guaranteed right since they had no right in the first instance to

be beneficiaries under the will. [3] Finally, **[*14]** the court concluded that the substitution of trustees was entirely appropriate as it would be in any case in which the named trustee could no longer serve.

[*26]** Following the rejection of their challenge in the Pennsylvania Supreme Court, the black children instituted a Federal class action. The District Court sustained their constitutional claim largely on the basis of the "momentum" created by the long-standing direct connection between the Girard institution and the State (*Commonwealth of Pennsylvania v Brown, 270 F Supp 782*). The court held that (p 790) "the transfer of immediate supervisory control to private trustees by the Orphans' Court failed to effectively disassociate the State from the discriminatory policies and purposes which the State operation of the school had come to embody."

On appeal, the Third Circuit Court of Appeals unanimously affirmed (*Commonwealth of Pennsylvania v Brown, 392 F2d 120*, cert den *391 U.S. 921*). While agreeing with the District Court's finding regarding "momentum", the Court of Appeals went further in condemning the substitution of trustees. The court found *Shelley v Kraemer* (*supra*) to be applicable, and held that (p 125) State involvement was "the obvious net consequence of the displacement of the City Board by the Commonwealth's agent and the filling of the Girard Trusteeships with **[***27]** persons selected by the Commonwealth and committed to upholding the letter of the will." The court continued (p 125):

"Those radical changes pushed the College right back into its old and ugly unconstitutional position * * *

"We do not consider the move of the state court in disposing of the City Trustees and installing its own appointees to be a non obvious involvement of the State * * * The action in this instance and its motivation are to put it mildly, conspicuous. And what happened to Girard does '* * * significantly encourage and involve the State in private discriminations.'"

Moreover, of the five Circuit Judges who heard the case, two concurred separately in the result, each specifically expressing the view that affirmance would be warranted **[*15]** solely because the Orphans' Court's *sua sponte* substitution of trustees was itself unconstitutional State action (Kalodner, J., concurring, pp 125-127; Van Dusen, J., concurring, pp 127-128; see, also, *Wachovia Bank & Trust Co. v Buchanan, 346 F Supp 665, 667-668*, affd *487 F2d 1214*, *supra*).

In the case at bar, we reach a similar conclusion. In doing so, however, we take care to note that we are not holding that **[***28]** **[**942]** the largely ministerial and neutral judicial acts of merely admitting to probate a will containing a discriminatory bequest, or of substituting one private trustee for another to administer a discriminatory testamentary trust, constitute State action for the purposes of the Fourteenth Amendment (see *Gordon v Gordon, 332 Mass 197*, cert den *349 U.S. 947*; *United States Bank of Portland v Snodgrass, 202 Ore 530*; *Matter of Potter, 275 A2d 574, 580* [Del]). Nor do we hold that the act of a court in upholding the discriminatory provisions of a purely private trust against an outside challenge involves the State in unconstitutional discrimination (see, e.g., *Lockwood v Killian, 172 Conn 496*).

We hold only that, presented with an invidiously discriminatory charitable trust which could not be constitutionally performed, the Surrogate was precluded by the Fourteenth Amendment from actively intervening to reform the trust in a way that had the "immediate objective" and "ultimate effect" of enforcing its discriminatory provision (*Reitman v Mulkey, 387 U.S. 369, 373*, *supra*; see *Shelley v Kraemer, 334 U.S. 1*, *supra; Barrows v Jackson, 346 U.S. 249*, **[***29]** *supra; Commonwealth of Pennsylvania v Brown, 392 F2d 120*, cert den *391 U.S. 921*, *supra; Matter of Crichfield Trust, 177 NJ Super 258*, *supra*). While the boundaries of unconstitutional State action may be imprecise, we are convinced that the Surrogate's decree in this case fell well within their embrace.

We are, of course, aware of the holding of the Appellate Division, Third Department, in *Matter of Wilson (87 AD2d 98)*, which involved a gender-restricted scholarship fund administered by a private trustee. According to the will which established the trust, the trustee was to select recipients on the basis of high school performance "as may **[*16]** be certified to" by the superintendent of schools (p 99). When the school district refused to certify information to the trustee, the Appellate Division ordered that the bequest be reformed to provide that students seeking scholarships apply directly to the trustee.

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[3] We note that the dissenters in this court advance an identical argument, observing that "'bright and deserving young women' * * * had no constitutional or statutory right to share in Mr. Johnson's estate" and that they had "no constitutional or statutory right to have compelled [him] to include them in his will."

Clearly, the reform ordered in *Wilson* (*supra*) had substantially less impact than the one made by the Surrogate at bar. In any event, to the extent that our holding today may be inconsistent with *Wilson*, we attribute it to a respectful disagreement **[***30]** with our sister court. We find ourselves persuaded, and indeed we are bound to hold as we do, by the constitutional principle that ***HN10***[↑] resort may not be had to our judiciary to actively intervene for the purpose of enforcing, promoting or supporting private invidious discrimination (see *Shelley v Kraemer, supra; Barrows v Jackson, supra; Matter of Hoffman, 53 AD2d 55*; *Sweet Briar Inst. v Button, 280 F Supp 312*).

Having concluded, then, that the decree here in issue was an unconstitutional exercise of State judicial power, we hold that the appropriate course is to delete the gender restriction. Significantly, the evidence suggests that such a reformation would be fully consistent with an important, if not the primary, intent of the testator.

In his bequest, Mr. Johnson did not specify qualifications, such as grade average, college entrance examination scores, or class standing, for scholarship recipients (cf. *Matter of Wilson, supra*). Instead, he required only that they be "bright and deserving". The task of determining whether an applicant merited that description fell entirely upon the school district to which, as the record reveals, Mr. Johnson was so strongly devoted. **[***31]** It was plainly his intent to further the success of the district by enabling it to provide scholarship assistance to those graduates it felt to be needy, bright and deserving. It seems clear, therefore, that, contrary to the suggestion in the dissent, Mr. Johnson did not view the function of the school district as merely that of **[**943]** a conduit responsible only "to invest and dole out money for college scholarships". Rather, the school district's role under Mr. Johnson's plan was central to the bequest, for it was the district, as it was the university under the earlier wills, that he judged to be in the best **[*17]** position to select deserving recipients for his scholarships. Indeed, without input from the school district, the selection process would be substantially impaired (see *Howard Sav. Inst. of Newark v Peep, 34 NJ 494, 505-509)*. It was undoubtedly this consideration that led the Surrogate to hold specifically that the private trustee could receive and consider recommendations from the district.

Moreover, there is no indication in the record that Mr. Johnson was of a misogynic bent. It is true that his scholarship bequests were written to benefit young men. **[***32]** Nevertheless, in his 1961 and 1974 wills, he provided that, if the Columbia scholarship fund became impractical to maintain, the corpus would be divided between the university and the district for scholarship purposes. *Significantly, he attached no gender restriction to those alternate scholarship awards.* Based upon these facts, we conclude that, contrary to the views expressed by the Surrogate and by the dissenters, it was at least equally important to Mr. Johnson that the school district carry out the significant and sensitive task of selecting scholarship recipients as that needy, bright and deserving young women be excluded as objects of his bounty.

Finally, we think it appropriate to address some of the observations and arguments advanced by the distinguished dissenters. Contrary to the fears expressed in the dissent, our holding today poses no threat to an individual's general right to dispose of his property as he sees fit and to have his testamentary wishes respected by the courts. We have no quarrel with the dissenters' strong advocacy of a person's right to confer the benefits of his property to groups of his own choosing, and to exclude anyone from his bounty, **[***33]** be they men or women, blacks or whites, Jew or Gentile. And our holding does not limit that right except where State action is involved, for we deem it a matter of fundamental constitutional law that, when one makes a discriminatory disposition of his property, he must do so in a way that does not require the active assistance or substantial involvement of the State in the accomplishment of his purpose.

In this regard, we are somewhat at a loss to understand two arguments advanced by the dissenters addressed to the **[*18]** issues at bar. They contend that "the mere naming of a public agency as the trustee of a testamentary trust by a settlor does not constitute State action since the public agency has done nothing". They later suggest that "it would be proper to have [the school] serve as trustee of [a sex restricted] trust under appropriate circumstances". In our view, the first argument is entirely irrelevant; the second is simply wrong.

When Mr. Johnson named the school district as trustee, he presumably intended that it act as such. The trust as created was unconstitutional, not because the name of the Croton-Harmon school district appeared in the will, but because **[***34]** the Fourteenth Amendment would not permit the district to perform the function called for in the bequest. Thus, when we say that the bequest was constitutionally infirm, we obviously mean, not that Mr. Johnson was somehow prohibited from writing the will as he did, but that his direction could not be honored consistent with the Fourteenth Amendment.

Moreover, we think that the dissenters' suggestion that the school district could in fact act as trustee under certain circumstances is entirely devoid of merit. In the *Girard* case, for example, the Supreme Court had little difficulty in condemning as unconstitutional the board of trust's serving as trustee, and in fact did so in three sentences: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college **[**944]** because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment" (*Pennsylvania v Board of Trusts, 353 U.S. 230, 231*, *supra*).

Indeed, even in *Matter of Wilson (87 AD2d 98*, *supra*), upon which the dissent relies, **[***35]** the Appellate Division, Third Department, noted that (p 101) any direction by the court that the school district supply the private trustee with information necessary for the award of gender-restricted scholarships "would raise serious questions as to the constitutional and statutory legality of such an order". We think it settled, therefore, that the school district could not constitutionally serve as trustee under the bequest **[*19]** here in issue, and it appears that no party to this proceeding has seriously contended otherwise. Thus, the dissenters' repeated observation that the Surrogate was compelled to act because of the district's "unwillingness or inability" to serve as trustee is somewhat mistaken. Whether the district was willing or unwilling to act is irrelevant. It was unable to act because it was constitutionally proscribed from doing so.

Additionally, in the case of a discriminatory trust like the one at bar, the dissenters claim to see no difference between the substitution of one private trustee for another and the substitution of a private trustee for a public one. We think that the distinction is clear. In the first case, the trust as created can be performed **[***36]** without constitutional objection since purely private discrimination is not proscribed. The court's act of substituting trustees is merely ministerial and constitutionally neutral. In the latter case, the Fourteenth Amendment prohibits the performance of the trust as created, and the court's act breathes life into a discriminatory provision which, because of State involvement, was invalid at its inception.

The belated and relatively recent societal and legal acknowledgment that women are entitled to equal protection of the law has led all members of this court to agree that the Fourteenth Amendment would be violated by the expenditure of public funds for gender-restricted educational scholarships. For the reasons previously stated, we think it settled beyond peradventure that the same constitutional strictures apply where, although the funds are private, they are bequeathed to a public agency which is made exclusively responsible both for distributing the funds and selecting the recipients. The dissenters' sweeping policy statements notwithstanding, the question presented is a very narrow one, viz., whether the Surrogate, faced with a trust which could not be constitutionally **[***37]** performed, altered the bequest in a way that was constitutionally permissible. We hold that he did not, for the living document which is our Constitution, and our own sense of fundamental fairness, simply will not permit active court intervention to further and promote discrimination.

[*20] For all of these reasons, therefore, we hold that the Surrogate's intermediate decree should be reversed and that the Attorney-General's petition to construe the will so as to delete the gender restriction should be granted.

Dissent by: NIEHOFF

Dissent

Niehoff, J. (dissenting).

For centuries Americans have properly believed that they have the legally protected right, with some few exceptions not applicable here, to will their property to whomever they wish. Today our court holds that notwithstanding the fact that Mr. Johnson, the testator here, had such right, and that it was perfectly legal for him to have chosen the beneficiaries he did, he lost or forfeited that right, and that the court has the power and right to rewrite the will in a way which will enable others not designated as objects of his bounty to share in his estate.

[945]** Why is that result called for in his case? Simply because **[***38]** instead of having chosen a private trustee to act for him he selected a school district, a public agency, as trustee, as a consequence of which the Surrogate was called upon either (1) to change the dispositional provisions of the will or (2) to appoint a private trustee as a substitute for the school district and the Surrogate chose to substitute a private trustee for the school district.

The Surrogate was faced with making one of the foregoing choices inasmuch as the school district indicated to the Surrogate that it was unwilling or unable to serve unless the Surrogate changed the dispositional provisions of the trust in a manner agreeable to the trustee. The Surrogate, recognizing his duty to see to it that the testator's clearly expressed wishes were carried out, refused to alter the provisions of Mr. Johnson's trust and, instead, appointed a substitute trustee to implement the testator's wishes (*108 Misc 2d 1066*). Our distinguished brethren of the majority say that (1) the naming of a school district as trustee, which because of its public nature could not constitutionally carry out the terms of the trust, "tainted" the provisions of the charitable trust and (2) the Surrogate **[***39]** was guilty of unconstitutional "State action" when he removed the "taint" by substituting a private trustee for the school district trustee thereby enabling the trust to be carried out in accordance with Mr. Johnson's wishes.

[*21] We, the dissenters, have an entirely different perception of the issue presented by this case and the manner in which it should be resolved.

I. THE ISSUE

Initially, we find ourselves unable to agree with the opening paragraph of the majority opinion in which the issue in this case is stated as follows: " The issue presented on this appeal is whether the equal protection clause of the Fourteenth Amendment is violated when a Surrogate reforms the provisions of a will so as to give effect to a testimentary bequest which discriminates on the basis of sex."

The Surrogate did not deem it appropriate to reform and did not in fact reform, i.e., amend or improve, the provisions of the testator's will, as the majority asserts. It was the Attorney-General, speaking for himself, and impliedly for the trustee named by the testator, who sought to persuade the Surrogate to amend or improve the dispositional provisions of the will and who let it be known to the **[***40]** Surrogate that the trustee would not serve as such unless the Surrogate adopted the change advanced by the Attorney-General and trustee. The Surrogate, whose function it was to make certain that the testator's lawful wishes were honored, not altered or frustrated, had no real choice but to refuse to amend the will, and to grant the trustee's request to be replaced.

In truth and in fact it is our court which has undertaken to amend the dispositional provisions of the will by disregarding the testator's expressed instructions which were lawful in their nature and by naming other persons as being eligible to share in the testator's estate.

As we see it, the issue in this case should be expressed in the following manner: When a testator sets up a gender-restricted trust and names a public agency as trustee to administer it, and that trustee makes known its unwillingness or inability to serve unless the testator's wishes as to his beneficiaries are altered, does the Surrogate violate the Fourteenth Amendment when he appoints a substitute trustee to carry out the testator's wishes?

[*22] We start our discussion with the premise that no constitutional or statutory provision exists **[***41]** which prohibited Mr. Johnson from setting up a trust to provide "scholarships or grants for bright and deserving young *men* who have graduated from the High School of [the Croton-Harmon Union Free] School District, and whose parents are financially unable to send them to college" (emphasis supplied). Indeed, the law clearly authorized Mr. Johnson to select his beneficiaries, which we perceive as meaning **[**946]** that if for reasons which appealed to him he wanted to limit them to "bright and deserving young men" who are graduates of the high school of the Croton-Harmon Union Free School District and whose parents are financially unable to send them to college he had the absolute and unfettered right to do so. The majority does not claim otherwise.

We also think it needs no citation of authorities to establish that while the law recognizes that "bright and deserving young women" have a right equal to that of "bright and deserving young men" to receive college educations, they have no constitutional or statutory right to have compelled Mr. Johnson to include them in his will. Beyond question, if taxpayers' money was being distributed in this case, such money could not be **[***42]** expended for education in a way which would prefer men over women. But, we are not dealing with State funds. Our concern is with the disposition of the private funds of Mr. Johnson who had both the right and the power under our law to choose those whom he would benefit even though other deserving persons might have been excluded. We are satisfied that he clearly and unequivocally chose to bestow his bounty upon needy, bright and deserving young men.

We further believe it is elementary that inasmuch as Mr. Johnson exercised his rights lawfully when he set up the trust for "bright and deserving young men", Mr. Johnson was entitled, after his demise, to expect the courts not to frustrate his lawful intention by rewriting his will so as to produce a result other than the one he intended, however desirable or admirable it might be to do so.

In so stating, we are not espousing sex discrimination or seeking to advance the cause of sex discrimination. Right thinking persons abhor and condemn such discrimination. **[*23]** Indeed, equal access to educational opportunity is of paramount importance to our society. What we are saying in our dissent is simply that the fact that the law **[***43]** favors equal opportunity for the sexes does not permit us to disregard Mr. Johnson's wishes as expressed in his will and to impose upon Mr. Johnson, posthumously, the requirement that he conform to that policy of the law by our undertaking to change the provisions of his will. We do not think our brethren of the majority think otherwise. But, they feel they must reach the conclusion they do because of the concept of "State action".

Now, there can be no quarrel with the justness of the State action principle which is designed to prevent the State from involving itself in a significant way in activities which are proscribed to the State. The State is to be condemned if it does so and there can be no doubt that the State action rule is a truly salutary rule of law. But, the State action concept is like a hall of mirrors. One can easily become confused and lost in it. It is essential never to lose sight of the fact that it is a rule of reason and common sense conceived to protect us all against unlawful activity by the State or its agents, *not against action by individuals which for them is lawful*. We do not believe that we have the right to extend that principle heedlessly **[***44]** to situations never intended by the framers of our Constitution to be covered by the language of the Fourteenth Amendment. Unless a particular extension can fairly be supported by sound legal reasoning or be founded upon applicable precedent it ought not to be made.

Neither sound legal reasoning nor applicable precedent support the proposition that the mere appointment of a substitute trustee by a Surrogate, regardless of whether the original trustee named was a public agency, constitutes State action which violates the Constitution.

While our colleagues of the majority, who have undertaken to "improve" or "reform" Mr. Johnson's will, undoubtedly consider their decision as being a blow struck against unconstitutional discrimination and one which will advance the cause of equality of the sexes, we view it as an unprecedented assault upon the freedom every individual, **[*24]** *man or woman*, in this State has to dispose of *his or her* private property as *he or she* sees fit.

[947]** Although the ruling in the case at bar is directed at a trust for needy, bright and deserving young men graduates of the high school of the Croton-Harmon Union Free School District (CHUF), **[***45]** the ruling cannot be said to be restricted to the peculiar facts of this case. The holding lays down a principle of law applicable to all charitable trusts where a public agency is named as trustee. We find the broad implications of the decision to be very disturbing.

Let us suppose that Mr. Johnson was a graduate of a private male college for which he had a great fondness and he wished to encourage others to attend that college. Had he set up a trust naming the school district as trustee and providing that deserving graduates of CHUF high school who attended that college were to be the beneficiaries, which of necessity would be limited to men, would we not have to emasculate the provisions of that will to achieve nondiscrimination? And, what if Mr. Johnson had instructed the school district that his beneficiaries were to be chosen only from graduates of a certain religious faith, or ethnic background. Following the majority's reasoning, the will would have to be "reformed" to include persons of all faiths and ethnic origins else the equal protection clause of the Constitution would be violated.

But, the "fall out" does not end there. It also affects the rights of men and women **[***46]** to set up trusts for women.

Doubtless there are men and women in this State, some of whom have been active in the ongoing and unfinished struggle for equal rights for women, who have an understandable empathy for women and who, because of such sensitivity, wish to give women special help by setting up trusts in which they provide funds for their education. Are we to classify such trusts as "invidiously discriminatory" because they bestow benefits on women only as Mr. Johnson's trust has been labeled by the majority because it assists men only? To be sure, we cannot have two different rules, one for trusts for men and another for trusts for women, and we do not think the majority has suggested otherwise.

[*25] Are persons who are rightfully desirous of aiding women to be reproached for setting up trusts whose benefits are restricted to women, as Mr. Johnson seems to have been condemned here for setting up a trust limiting his beneficiaries to needy, bright, and deserving young men? We think that such charitably minded persons ought not to be censured. Likewise, Mr. Johnson ought not to be castigated for the form his benevolence has taken.

Should a person in this State select **[***47]** a school district or other public agency as trustee to administer a trust for "deserving young women" and the trustee declines to administer such trust because it is not gender neutral, our vote would be to uphold the dispositional provisions of such a will and to permit the Surrogate to substitute a private trustee as was done in this case. However, it would seem to follow, as night follows day, that under the holding of the majority, that testator or testatrix will lose or forfeit the right he or she had to choose women as his or her beneficiaries. He or she will have to share his or her property with "deserving young men" as well, contrary to his or her wishes.

Not only are we gravely troubled by what we perceive as an attack by the majority upon freedom of disposition of private property, but we are very much at odds with the reasoning which appears to undergird that attack. It is said that the dispositional provisions of the trust must be altered because of unconstitutional State action. We ask the question: "Where is that State action to be found?" Our answer is there is no unconstitutional State action to be found in this case.

Mr. Johnson did not violate the equal protection **[***48]** clause of the Fourteenth Amendment by limiting his beneficiaries to deserving young men or by naming a public agency as trustee. The Fourteenth Amendment states, in relevant part, that "[no] State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the **[**948]** laws". By its very language that amendment is directed to the action of the States only, not to that of individuals. Accordingly, Mr. Johnson's acts of limiting his beneficiaries to men, as he had the legal right to do, or of naming a school district as trustee, even though **[*26]** that trustee was unwilling or unable to act, did not amount to unconstitutional State action. Nor can it properly be said that Mr. Johnson's acts in the foregoing respects "tainted" i.e., corrupted or stigmatized, the will in some way. There was nothing unconstitutional or unlawful in Mr. Johnson's having limited his beneficiaries to men, and the majority does not claim otherwise. Therefore, the restrictive nature of his bequest cannot be said to have "tainted" the will. Likewise, the naming of the school district as trustee did not "taint" the will. At the very most, Mr. **[***49]** Johnson unwittingly chose a trustee who was unable to act for him. But that does not mean that he violated the Constitution.

The school district did not violate the equal protection clause of the Fourteenth Amendment either. The school district was simply named as trustee. Had the Surrogate ordered the school district to carry out Mr. Johnson's wishes and the school district had done so, one might be able to argue that, as a State agency actively involved in carrying out the terms of the trust, the trustee was engaged in State action in violation of the Constitution. But, the Surrogate did no such thing. And, the school district has declined to act in furthering Mr. Johnson's wishes. Hence, its *refusal to act* cannot be classified as unconstitutional State action.

That leaves only the Surrogate's act of appointing a substitute trustee which, likewise, did not amount to unconstitutional State action.

The majority concedes that there would be no unconstitutional State action if the Surrogate had merely "[substituted] one private trustee for another to administer * * * [this] discriminatory testamentary trust". That concession, which simply states a principle of established **[***50]** law, constitutes the Achilles heel of the majority opinion. If the Surrogate can substitute one private trustee for another to administer a discriminatory testamentary trust without being guilty of unconstitutional State action, why can he not substitute a private trustee for a public agency trustee without being guilty of unconstitutional State action? In both situations the action of the Surrogate, the State official charged with the unconstitutional State action by **[*27]** the majority, is precisely the same. In both situations the Surrogate, by appointing a substitute trustee, will, to the exact same degree, be assisting the testator to carry out his discriminatory objective. What is more, the appointment of a substitute trustee by the Surrogate has no effect whatever on those ineligible for scholarship assistance. It deprives them of nothing. At the time of Mr. Johnson's death no female CHUF high school graduate nor any male high school graduate who was not needy, bright and deserving had any right or claim to Mr. Johnson's estate. The appointment of a substitute trustee by the Surrogate did not change that fact. Those ineligible simply remained ineligible. In short, **[***51]** their ineligibility does not turn on who or what entity serves as trustee. Yet the majority classifies the situation involving the substitution of one private trustee for another as permissible and brands the situation involving the substitution of a private trustee for a public agency trustee as constitutionally objectionable. We are unable to perceive a distinction in the two situations.

The majority appears to suggest that there is a distinction because Mr. Johnson's charitable trust "could not constitutionally be performed". Stated somewhat differently, the majority takes the position that the school district could not administer the terms without violating the Constitution. Assuming, *arguendo*, that the trustee was disqualified from acting because of the Constitution, it does not follow that by relieving the school district from doing that which the majority consider would have been unconstitutional action on its part, the Surrogate has violated the Constitution.

[949]** Mr. Johnson did no more than make an unwitting mistake or error when he named the school district as his trustee. Must we hold that, as a result, he has forfeited his right to have his property **[***52]** distributed as he directed and that the court can step in and remake the dispositional provisions as it deems appropriate? Why can't the court merely cure the defect by means of judicial surgery eliminating that which the majority claims is contrary to the Constitution and saving that which is not, thereby allowing Mr. Johnson to dispose of his property in his own way? Must we take it upon ourselves to punish Mr. Johnson as **[*28]** being something of a malefactor because he sought to do what he wanted with his property and was not aware of the complex legal concept known as "State action", a concept whose application is a source of considerable mystery even to legal scholars. In this connection we note that on this very appeal, the court has divided 3 to 2 on the applicability of the doctrine.

If Mr. Johnson had, in the first instance, named a private trustee who refused to serve unless the dispositional provisions of the trust were broadened to include needy, deserving bright young women, and the Surrogate were to have replaced that trustee with a substitute, the majority of this court apparently would not hesitate to affirm the Surrogate's decree. It would not declare Mr. **[***53]** Johnson's right to dispose of his property as he saw fit forfeited and undertake to rewrite the dispositional provisions of the trust. But, for some reason, which we do not believe is supported by logic or law, it believes that it is necessary to declare a forfeiture because Mr. Johnson erred in naming a public school district as trustee. And, there can be no escape from the fact that what the majority is doing is declaring a forfeiture, something which the law abhors and seeks to avoid wherever reasonably possible.

The testator, not the court, is entitled to make a disposition of all his property, and all that the court is permitted to do, as far as legal rules permit, is to effectuate the disposition which the testator has directed. The function of the court is not to draw a new will for the testator but to bring about the result intended by the testator. "It is not the province of the court to speculate on why certain language is used, nor may the court vary or void the terms of a valid will by the exercise of judicial hindsight in order to improve upon the decedent's scheme of testamentary disposition. The courts will not undertake to make a better will * * * for the testator" **[***54]** (64 NY Jur, Wills, § 558).

The object of the court is "not to seek flaws in the instrument and declare it invalid, but rather to sustain it if legally possible * * * Legality, rather than illegality, must be presumed as part of the testator's purpose, and an inference that one is moved by an improper or unlawful **[*29]** motive should never be drawn when a legitimate purpose is just as apparent" (64 NY Jur, Wills, § 563).

So, in this case, we should presume that Mr. Johnson's motive in setting up a charitable trust limited to needy, bright, deserving young male graduates from CHUF high school was proper, not evil. The trust constituted a lawful disposition of Mr. Johnson's property, as the majority concedes. At the very most, and this we do not concede, the naming of CHUF as trustee was an invalid act. But, the invalid can be separated from the valid by merely substituting trustees as the Surrogate did. Can it be doubted that such course, which upholds and carries out the testator's intention, is preferable to declaring a forfeiture and assuming the power to rewrite the will, changing the beneficiaries in the process?

As we see it, the eminent Surrogate of Westchester County **[***55]** was faced with a choice -- substitute a private trustee for the public agency trustee, as he would have done if the original trustee was a private trustee who was unwilling or unable to serve, or change the dispositional provisions of the will. The situation was not so complicated or insoluble that he needed a *deus ex machina* to disentangle it. Cognizant of his obligation to make certain that Mr. Johnson's wishes as to the disposition of his **[**950]** property were carried out, he did nothing more grievous to accomplish that goal than perform the purely ministerial and neutral act of substituting a willing trustee for an unwilling one or one unable to serve. In so doing, he did not violate the Constitution of the United States.

We would affirm the Surrogate's decree.

II. THERE IS NO LEGAL JUSTIFICATION FOR REWRITING MR. JOHNSON'S BEQUEST

There can be no doubt that we are confronted with a situation in which the charitable intentions of the testator cannot be fulfilled exactly as provided in his will. This does not result from the fact that there are no bright and deserving young men available who can qualify under the terms of Mr. Johnson's will. Rather, this situation **[***56]** has come about solely because the designated trustee is unwilling or unable to serve in that capacity. It does not follow **[*30]** that because of the unwillingness or inability of CHUF to serve as trustee the bequest must be altered in accordance with the doctrine of cy pres, or reformed, as the majority refers to it. Nor can we agree that an examination of Mr. Johnson's will discloses that it was at least as important to Mr. Johnson that the school district act as trustee as that the scholarships be awarded only to deserving young men.

There is an age old principle now codified in *SCPA 1502* to the effect that a testamentary trust will not fail for want of a trustee. That section, which authorizes a court to appoint a successor trustee wherever there is no trustee able to act (*SCPA 1502*, *subd 1*), was relied upon by the Surrogate in his decision. Thus, the Surrogate said (p 1072): "Selection by the court of a trustee in place of the board of education to administer the scholarship fund is necessary in order to execute the trust and is specifically provided by law (*SCPA 1502*)."

The refusal of a named trustee to serve does not involve cy pres considerations (see *EPTL 8-1.1*, subds **[***57]** [a], [c]). Stated somewhat differently, cy pres comes into play when there is an "indefiniteness or uncertainty of the persons designated as beneficiaries" or "circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition" (*EPTL 8-1.1*, *subds [a]*, *[c]*). In the case at bar, the unwillingness or inability of the school district to serve as trustee does not bring about any indefiniteness or uncertainty as to the persons designated as beneficiaries and is not such a change in circumstances as to render impracticable or impossible a literal compliance with the terms of the disposition made by Mr. Johnson, except in the very narrow sense, which is not at all controlling, that CHUF will no longer be selecting the recipients of the awards. Manifestly, the want of a trustee is simply not the type of change in circumstances envisaged by *EPTL 8-1.1* as to call for a rewriting of Mr. Johnson's will, particularly since it is abundantly clear therefrom who it was that Mr. Johnson wished to benefit with his **[***58]** money. Hence, it is unnecessary **[*31]** to invoke the cy pres doctrine (*EPTL 8-1.1*, *subds [a]*, *[c]*) on the facts before us.

We consider it beyond question that Mr. Johnson knew whom he wanted to benefit with his funds and expressed his wishes plainly. As the Surrogate wrote in his opinion (p 1068): "The expressed purpose of testator to provide scholarships for 'bright and deserving young men' is set forth in the will clearly and without ambiguity. No alternative or gift over is provided and no construction is required to ascertain testator's intent or dominant purpose."

Ordinarily, the intent of a testator is to be gleaned from within the four corners of the will. The court must search, not merely for the testator's probable intention, but for the intention which the will itself, either expressly or by implication, declares, and all rules of interpretation are subordinated to the requirement that the actual purpose of the testator be sought as far as is consonant with principles of law and public policy (*Matter of Fabbri, 2 NY2d 236, 239-240)*. Rules of **[**951]** construction are to be applied for the purpose of determining the testator's intent where the intent is **[***59]** not clearly expressed by the testamentary words, and such rules are to be disregarded when the language is clear and definite (61 NY Jur, Trusts, § 122). Thus, rules of construction are merely subsidiary aids which are not to be employed unless needed and if the "intention of a willmaker is to be found in the words used in the will and these are clear and definite there is no power to change them" (*Matter of Bisconti, 306 NY 442, 445)*.

In the present case, Mr. Johnson decreed that the income from the trust which he set up was to be used, each year, to provide "scholarships or grants for bright and deserving young *men* who have graduated from the High School of such School District [Croton-Harmon Union Free School District], and whose parents are financially unable to send them to college" (emphasis supplied). The language selected by the testator is clear and unambiguous. He intended to provide scholarships for bright and deserving young *men* who are graduates of the high school of CHUF and there is not the slightest suggestion in those words that he intended to include any other than men in his bequest. The words employed by Mr. Johnson are so clear **[*32]** **[***60]** and certain that there is no reason to hold that he meant something other than what he so plainly wrote. Had he intended to include women in the bequest he could have accomplished that purpose by writing "bright and deserving young men and women", or "bright and deserving young graduates", or "bright and deserving young persons". Instead, he said "bright

and deserving young men" and the court should not feel free to ignore the language used by Mr. Johnson in the interest of being more benevolent than Mr. Johnson.

As we read the will CHUF was simply named as trustee in order to invest and dole out the money for college scholarships. CHUF was not intended to be the recipient of any portion of Mr. Johnson's estate and was not to benefit therefrom in any way. The money was to go to the young men for their college educations. Hence, it cannot be fairly said that Mr. Johnson intended to benefit CHUF, which was to receive no part of his funds, and that the needy, bright, and deserving young male graduates who were to receive the annual scholarships or grants were of only secondary importance or of only equal importance with the school district.

Of course, in all fairness it must be **[***61]** said that the majority does not claim that Mr. Johnson intended to benefit CHUF. But it does assert that the record establishes that it was at least as important to Mr. Johnson that the school district act as trustee as that the scholarships be awarded only to deserving young men. Here, again, we cannot concur.

Our conclusion that the school district, as trustee, was of only secondary importance to Mr. Johnson is supported by the weight of established authority. As stated earlier, the charitable trust before us states in no uncertain terms that its purpose is to provide scholarships for needy, bright and deserving male graduates of CHUF high school. Scott on Trusts tells us that: "Where a testator devises or bequeaths property to * * * be applied to a particular charitable purpose, it is to be inferred that the application of the property to the designated purpose is the testator's primary intention, and that the choice of the organization to make the application is secondary. In such a case the fact that the corporation named is unwilling or unable to accept the gift **[*33]** and to apply the property to the designated purpose does not cause the disposition to fail" (4 Scott, **[***62]** Trusts [3d ed], § 397.3, pp 3044-3045). Likewise it is noted in Bogert on Trusts that: "The court regards the expression of a charitable trust intent and the indication of a class of beneficiaries as the important factors in creation. The personality of the trustee is not vital. There are many possible trustees available. The court can easily supply a trustee. The **[**952]** important matter is that the benefits of the property in question should be applied toward the described social purpose" (Bogert, Trusts and Trustees [2d ed, rev], § 328, pp 609-610).

Thus, it is well established that the expression of a charitable trust intent and the indication of a class of beneficiaries are the important factors in creation. The identity of the trustee is incidental. Lest there be any claim that Mr. Johnson's prior wills evidence his long-standing devotion to CHUF we would point out that the only constant in the three wills referred to by the majority was Mr. Johnson's unmistakably clear intent to provide scholarship assistance for needy young male graduates from CHUF's high school and that if anything can be gleaned from a comparison of the three wills it is that Mr. Johnson **[***63]** had little concern for the particular trustee who held his residuary estate as long as the income therefrom was used to help bright, deserving young men from CHUF to attend college.

It is true that after specifying the class of beneficiaries who were to be entitled to receive Mr. Johnson's bounty the will provides that the beneficiaries "shall be selected by the Board of Education of such School District with the assistance of the Principal of such High School". But the fact that Mr. Johnson was looking to CHUF to select potential recipients does not mean that Mr. Johnson, if faced with a choice of having to broaden the class of beneficiaries in order to retain the services of CHUF in selecting from the class, or of keeping the class and having a different trustee make the selection, would have opted for the former. The string of wills mentioned above establish by clear and convincing evidence that Mr. Johnson had a fixed purpose in mind -- to award scholarships to deserving, **[*34]** needy young men graduates from his home school district -- and that the choice of trustee was merely incidental thereto. There is no reason why the private trustee named by the Surrogate cannot **[***64]** obtain all the material necessary to ascertain the relative merit and worthiness of applicants.

The Surrogate, recognizing the school district's reluctance to administer the trust, provided for the substitution of a private trustee who would select scholarship recipients and limited CHUF's role to making recommendations to the trustee. The Surrogate appreciated that by taking that action he could discharge his duty and responsibility of seeing to it that Mr. Johnson's intention be carried out as nearly as possible. However, there remains for us to consider the question of whether, for some constitutional reason, it was impermissible for the Surrogate to have taken the course he did.

III. THERE IS NO LEGAL BASIS FOR HOLDING THAT THE SURROGATE'S ACT OF APPOINTING A SUBSTITUTE TRUSTEE AMOUNTED TO STATE ACTION WHICH VIOLATED THE *EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION*

We start our discussion of the State action question with the same premises as we started this opinion, namely, that not one student of CHUF, male or female, had any rights with respect to Mr. Johnson's personal fortune prior to his death and that upon his death, needy, bright and deserving young male graduates **[***65]** of the district high school became eligible for scholarship assistance to the exclusion of females (and for that matter males from affluent families). Throughout its opinion the majority appears to concede that such distinction is a lawful one absent State involvement.

We also reiterate the indisputable principle that "bright and deserving young women" graduates of the high school of CHUF had no constitutional or statutory right to share in Mr. Johnson's estate.

Since Mr. Johnson had the absolute right to set up a male restricted trust, did he not also have the corollary right to expect the courts of this State to *permit* his wishes, **[*35]** which were plainly lawful, to be carried out? We believe the obvious answer to that question is "yes". It seems to us to be entirely illogical to conclude that Mr. Johnson **[**953]** had the right to dispose of his property as he saw fit but that such right was a mere abstract or theoretical one which could not legally be carried out because of Surrogate's Court involvement of the limited type with which we are here concerned.

Notwithstanding the fact that the majority recognizes Mr. Johnson's right to choose, and in choosing limit **[***66]** his beneficiaries, the decision rendered by the majority results in a holding to the effect that because of the provisions of the Federal Constitution as to equal protection of the laws Mr. Johnson's will cannot be carried out and that persons other than those chosen by him are entitled to participate in his estate. That conclusion is reached by means of an application of the "State action" doctrine to the act of the Surrogate in appointing a substitute trustee.

The heart of the majority's opinion on this issue is to be found on pages 15 and 16 thereof. In the first and lengthier paragraph the court tells us what it does not hold, and it then concludes with one short paragraph in which the holding of the opinion is stated. We believe it essential to analyze those paragraphs seriatim.

First, the court states: "[We] take care to note that we are not holding that the largely ministerial and neutral judicial acts of merely admitting to probate a will containing a discriminatory bequest, or of substituting one private trustee for another to administer a discriminatory testamentary trust, constitute State action for the purposes of the Fourteenth Amendment (see *Gordon v Gordon **[***67]** , 332 Mass 197*, cert den *349 U.S. 947*; *United States Bank of Portland v Snodgrass, 202 Ore 530*; *Matter of Potter, 275 A2d 574, 580* [Del]). Nor do we hold that the act of a court in upholding the discriminatory provisions of a purely private trust against an outside challenge involves the State in unconstitutional discrimination (see, e.g., *Lockwood v Killian, 172 Conn 496*)."

Thus, the majority holds, and we agree, that a Surrogate may (1) admit to probate a will containing a discriminatory trust; (2) act in substituting one private trustee for another **[*36]** private trustee of a discriminatory testamentary trust; and (3) uphold a discriminatory trust against an outside challenge *even though such judicial activity will result in the enforcement of the discriminatory provisions of the testamentary trust*. The reasoning behind the above holdings is relatively uncomplicated and exceedingly sound, to wit, private discrimination is not unlawful and does not violate the Constitution and the Surrogate's neutral judicial acts of admitting a will to probate, substituting one private trustee for another, or upholding a will from outside attack cannot constitute State action **[***68]** which would violate the Constitution. Despite that holding the majority goes on to say: "We hold only that, presented with an invidiously discriminatory charitable trust which could not be constitutionally performed, the Surrogate was precluded by the Fourteenth Amendment from actively intervening to reform the trust in a way that had the 'immediate objective' and 'ultimate effect' of enforcing its discriminatory provision (*Reitman v Mulkey, 387 U.S. 369, 373*, *supra*; see *Shelley v Kraemer, 334 U.S. 1*, *supra; Barrows v Jackson, 346 U.S. 249*, *supra; Commonwealth of Pennsylvania v Brown, 392 F2d 120*, cert den *391 U.S. 921*, *supra; Matter of Crichfield Trust, 177 NJ Super 258*, *supra*). While the boundaries of unconstitutional State action may be imprecise, we are convinced that the Surrogate's decree in this case fell well within their embrace."

As the majority candidly concedes, Mr. Johnson had the absolute right to set up a male restricted trust but it concludes that "as written, Mr. Johnson's bequest was fatally flawed, for an agency of the State cannot constitutionally administer a scholarship **[**954]** program which discriminates on the basis of sex". **[***69]** Assuming, *arguendo*, the accuracy of the conclusion that "an agency of the State cannot constitutionally administer a scholarship program which discriminates on the basis of sex", it most certainly does not follow that anything (1) Mr. Johnson did, (2) the school district did, or (3) the Surrogate did, amounts

to unconstitutional State action, or that the will was fatally flawed, requiring that the dispositional provisions be rewritten by the court.

[*37] As noted at the beginning of this opinion, by its very language the Fourteenth Amendment is directed to the action of States only, not that of individuals, and the United States Supreme Court has firmly established the principle that the equal protection clause of the Fourteenth Amendment is a restriction on the State governments and operates exclusively upon them and their agents (see *Truax v Corrigan, 257 U.S. 312*). It is equally well settled that the equal protection clause was designed as a safeguard against acts of the State, and not against the conduct of private individuals or persons (see *Dorsey v Stuyvesant Town Corp., 299 NY 512*). Clearly then, nothing Mr. Johnson did comes within the ambit of the equal **[***70]** protection clause. This is so whether we are talking about the creation of the subject trust, the naming of the limited class of beneficiaries, or the naming of the trustee to administer the trust. Without a doubt, the mere naming of a public agency as the trustee of a testamentary trust by a settlor does not constitute State action since the public agency has done nothing, i.e., it has never acted. Rather, it is only when the public agency becomes actively engaged in the administration of the trust, that is, when there is "State action" in the situation, that the equal protection clause comes into play and must be considered to determine if it is unconstitutional State action.

This point was emphasized by Justice Douglas in the case of *Evans v Newton (382 U.S. 296, 300)* wherein he wrote: "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State *in the supervision, control, or management* of that facility, we assume *arguendo* that no constitutional difficulty would be encountered" (emphasis added).

Having started with the premise that Mr. Johnson's will was "fatally flawed" because he named a public agency as trustee **[***71]** the majority goes on to say that by substituting a private trustee for the school district, i.e., by removing the flaw, the Surrogate's decree falls within the ambit of unconstitutional State action. The majority so holds in spite of its unequivocal statement, quoted above, to the effect that the Surrogate's substitution of one private trustee for another private trustee is not State action. That is, **[*38]** while the majority acknowledges that the Surrogate's substitution of one private trustee for another private trustee would not constitute unconstitutional State action, it holds that the substitution of a private trustee for a public trustee, even one who has not acted, does constitute unconstitutional State action. As we said earlier, we see no distinction in kind in the two situations and fail to see how a Surrogate's substitution of a private trustee for a public trustee who has not even acted under the will suddenly ripens into unconstitutional State action for Fourteenth Amendment purposes. In both situations the Surrogate will be aware of the discriminatory nature of the trust and in both instances the Surrogate, by appointing a substitute trustee, will, in a sense, **[***72]** be assisting the testator to carry out his discriminatory objective. What is more, the degree of involvement in enforcement by the Surrogate is identical. Why should there be any difference in Fourteenth Amendment result if the trustee replaced is either a public agency or a private person? The end result of the Surrogate's action is the same in both cases. The trust is carried out as written even though it is discriminatory.

Not only do we not perceive the logic in the distinction drawn by the majority but we fail to see that the cases relied upon by **[**955]** the majority support its argument that such a distinction is a legally sound one.

The case of *Reitman v Mulkey (387 U.S. 369, supra)*, cited by the majority, involved the interpretation of an amendment to the California Constitution (art I, § 26). There the State of California had taken affirmative action by legislation designed to encourage private discrimination in housing. In reality, the State was seeking to establish discrimination in housing as its public policy. As both the Supreme Court of California and the United States Supreme Court held, the purpose of the legislation was to make the State a partner **[***73]** in discrimination. The holding in that case is hardly relevant to the matter before us. Here, there is no question that it was perfectly legal for Mr. Johnson to limit his beneficiaries as he did and the question before us is solely whether the substitution of a private trustee for a public agency trustee violates the Constitution when the substitution of a private trustee for a private trustee does **[*39]** not? The latter situation does not make the State a partner in discrimination. Why should the former?

Shelley v Kraemer (334 U.S. 1, supra) involved the direct enforcement of racially discriminatory restrictive covenants by Missouri and Michigan State courts. The United States Supreme Court found State action holding that (pp 13-14, 19), "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements" and that "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." In that case, action by the courts would have

deprived the petitioners of the right to live where they **[***74]** chose, rights which they had secured under contracts. We have no such situation here.

As pointed out above, at the time of Mr. Johnson's death, no female CHUF high school graduate who was not needy, bright and deserving had any right or claim to Mr. Johnson's estate. This is so irrespective of who or what entity was named by Mr. Johnson to act as trustee. It is equally true with respect to who or what entity ultimately serves as trustee of the residuary trust. Inasmuch as the appointment of a substitute trustee by the Surrogate did not change that fact and had no effect whatsoever on those ineligible for scholarship assistance it can hardly be said that the Surrogate's act constitutes significant State involvement.

In other words, the appointment of a successor trustee did not result in depriving those previously ineligible for scholarship grants of any material thing whatsoever, and had no effect upon the existing gender discriminatory trust.

Barrows v Jackson (346 U.S. 249, supra) is similar to *Shelley v Kraemer* (*supra*). It held simply that the enforcement of a covenant forbidding use and occupancy of real estate by noncaucasians, by an action at law in a State **[***75]** court to recover damages from a cocovenantor for a breach of the covenant, is barred by the *Fourteenth Amendment of the Federal Constitution*. That case is by no means authority for the proposition that in relieving a public agency **[*40]** from acting as trustee and appointing a private one in its place, there is a violation of the Fourteenth Amendment.

The *Girard College* case (*Commonwealth of Pennsylvania v Brown, 392 F2d 120*, cert den *391 U.S. 921, supra*), is also readily distinguishable from the case at bar. That case concerned itself with a situation of aggravated State involvement for a period in excess of 100 years in a racially discriminatory trust. There for more than 100 years the State had been an active partner in the discrimination. City officials had administered the trust as trustees for that period of time and the Legislature examined and audited the Girard College accounts annually. Clearly, the facts of that case bear no resemblance to those at bar. That case cannot properly be cited as one which warrants **[**956]** the result which the majority has reached here.

Like *Commonwealth of Pennsylvania v Brown* (*supra*), the case of *Matter* **[***76]** *of Crichfield Trust (177 NJ Super 258, supra*), decided in 1980, almost 50 years after the establishment of the trust, involved an ongoing existing testamentary trust which had been administered by a public trustee for that period of approximately 50 years. The trust in question was created in 1932 by Frieda M. Crichfield, a woman, and provided for an annual stipend of $ 400 to "worthy boys of Summit High School". Not surprisingly, the Chancery Division of the New Jersey Superior Court found the "Board's action in administering the trust is state action" (*177 NJ Super 258, 261)*. The court proceeded to apply the cy pres doctrine and modified the trust in accordance with the trustee's request by eliminating the sex-based classification and allowing the trustee to increase the award to an amount equal to $ 1,300, the annual current trust income. In so doing, the court said the following (p 261): "At the time the trust was created in 1932 few female graduates of Summit High School sought higher education and the settlor may not have foreseen the change in the number of women pursuing higher education and the growth in public and legal awareness of sex discrimination." Thus, the **[***77]** court considered the will a proper subject "for adaptation to circumstances which the settlor may not have foreseen", and reconstrued it (*177 NJ Super 258, 260)*.

[*41] Mr. Johnson's will is quite different. There is no room to say that he may have intended to include all worthy young people in his benevolence. At the time he wrote his will in 1975, it had become equally common for young women to attend college as it was for young men to do so and yet Mr. Johnson persisted in specifying "men" in his will. Furthermore, the protracted involvement of the school board in administering the trust for almost 50 years distinguishes *Matter of Crichfield Trust* (*supra*) from the instant matter and renders the case inapposite herein.

Thus, we are of the view that the majority has cited no authority which truly supports its conclusion that the Surrogate's appointment of a private trustee to replace the school district, in and of itself, amounted to State action, and that the majority's conclusion has expanded the concept of State action far beyond any application to date. Contrary to the majority, we are of the opinion, for reasons already given, that the facts and circumstances **[***78]** of the case before us lead to the inescapable conclusion that the mere appointment by the Surrogate of a substitute trustee for CHUF cannot reasonably result in a finding of State action herein.

The appointment of a successor trustee did not result in depriving those previously ineligible for scholarship grants of any material thing whatsoever and had no effect upon the existing gender discriminatory trust. In short, the conduct allegedly causing the deprivation of a Federal right is not fairly attributable to the State.

Recently, in the case of *Lugar v Edmondson Oil Co. (457 U.S. 922, , 102 S Ct 2744, 2754)*, the United States Supreme Court discussed the question of fair attribution and held in relevant part:

"As a matter of substantive constitutional law the state action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments,' *Flagg Brothers, supra*, 436 U.S., at 156, 98 S.Ct., at 1733. As the Court said in *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974)*:

"'In 1883, this Court, in the *Civil Rights Cases, 109 U.S. **[***79]** 3 [3 S.Ct. 18, 27 L.Ed. 835]*, affirmed the essential dichotomy **[*42]** set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory **[**957]** or wrongful," against which the Fourteenth Amendment offers no shield.'

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

"Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state."

Because this is a private discrimination case, we see no useful purpose to be served in distinguishing the other cases cited by the majority which for the most part deal with public or quasi-public discrimination **[***80]** issues. It is sufficient to say that the existing authority which most closely parallels the case at bar supports our position. Those cases include *Matter of Wilson (87 AD2d 98)*, a case similar to the one before us, wherein the Appellate Division, Third Department, upheld a gender-restricted trust but eliminated the role of a public school district in awarding annual scholarships to "young men" although the district had already participated in the administration of the trust for 11 years. In order to effectuate the trust for young male graduates of the Canastota High School the court simply removed the school district from its role in certifying the information necessary to enable the trustee to make the awards to the graduates. The court refused to accept the suggestion that the trust's gender-restricted terms be altered. Thus, the court said (*87 AD2d 98, 102*, *supra*): "Appellants next contend that regardless of the testator's intent, the gender restriction should be removed because it is adverse to the State's public policy of promoting equal opportunity in education. However, although a **[*43]** gender-neutral educational trust is preferable on public policy grounds **[***81]** to one which imposes a gender restriction, there is another competing public policy consideration, namely, preserving the right of the testator to dispose of his property as he wishes (see *Matter of Hughes, 225 App Div 29*, affd *251 NY 529*). This rule becomes even more compelling when applied to the area of private charitable trusts, for one of the very reasons for the rule is to encourage bequests for charitable purposes. A provision for the furtherance of education and learning is, without question, a charitable purpose (*Butterworth v Keeler, 219 NY 446*). Therefore, while a gender-neutral provision would be preferable, we decline to adopt a rule the effect of which would be to permit a court to exercise its cy pres powers according to its perception of current public policy, rather than in accordance with the unambiguous intent of the testator. Thus, although the terms of the trust restrict, in part, the beneficiaries thereof to a particular class, its validity is not impaired as long as the general and dominant purpose of the trust is charitable or educational in nature (*Matter of Rupprecht, 271 App Div 376*, affd *297 NY 462*; *Matter of Johnson, 108 Misc 2d 1066*)." **[***82]**

In *Matter of Cram (Mont , 606 P2d 145*) the Supreme Court of Montana was faced with a testamentary trust which excluded female members of the 4-H Club of Montana and female members of Future Farmers of America (FFA) from becoming eligible recipients under the trust while allowing male members of such organizations to become eligible. The trustee petitioned for instructions. A female FFA member, the State Human Rights Commission, and the Superintendent of Public Instruction appeared and requested reformation of the trust so as to eliminate the discriminatory provisions and make the trust gender neutral (not unlike the case at bar). The Eighth District Court, Cascade County, modified the trust **[**958]** be removing the FFA and 4-H Club State leaders from the mechanics of the trust. The Supreme Court of Montana affirmed, holding that by eliminating the public organizations from the mechanics of the trust, State action had also been removed. The court concluded its opinion with these words (p , p 150): "We hold that the modified Cram trust **[*44]** is enforceable in its present form. A private person has the right to dispose of his money or property as he **[***83]** wishes and in so doing may

lawfully discriminate in regard to the beneficiaries of his largess without offending the equal protection clause as long as the State and its instrumentalities are not involved, and unless the trust is unlawful, private trusts are to be encouraged."

The case of *Shapiro v Columbia Union Nat. Bank & Trust Co. (576 SW2d 310* [Mo]), is another similar case. There, one Victor Wilson established a private charitable trust to assist deserving resident "boys" in obtaining university educations. A female law student brought an action alleging that she was denied an opportunity to apply for and be considered for financial aid from the trust established by Wilson. The University of Missouri at Kansas City, a public institution, accepted and processed the applications of prospective recipients for financial aid from the Wilson trust. Agents of the university nominated qualified male students and forwarded those names to a private trustee who approved the names of the male students and then awarded the scholarship funds. The private trustee had the ultimate and final power to determine which qualified boys would finally be awarded scholarship funds. The Missouri **[***84]** Supreme Court determined that the participation by the agents of the State university was not of such a significant extent in any of its manifestations or so entwined with private conduct that State action resulted. The court held that neither the equal protection clause nor Civil Rights Act was violated and affirmed the dismissal of the female law student's petition.

The United States Supreme Court has said that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey, 387 U.S. 369, 380 (1967)*, in order for the discriminatory action to fall within the ambit of the constitutional prohibition" (*Moose Lodge No. 107 v Irvis, 407 U.S. 163, 173)*.

The Surrogate's substitution of a trustee, be it a private trustee for a private trustee or a private trustee for a public agency trustee, cannot be said to significantly involve the State in carrying out the restrictive provisions of Mr. **[*45]** Johnson's trust. The State will not be controlling or managing the distribution of Mr. Johnson's funds and no act of discrimination has been or is being committed by the Surrogate.

As **[***85]** noted by the Supreme Court in *Lugar v Edmondson Oil Co. (457 U.S. 922, , 102 S Ct 2744, 2754*, *supra*) the State action principle requires that the courts "respect the limits of their own power as directed against state governments and private interests." We think the view adopted by the majority fails to heed the warning contained in that language.

Up to this point we have assumed, for purposes of argument, that the school district could not constitutionally administer the trust as written, and we have sought to show that such fact does not convert the Surrogate's act of substituting trustees into unconstitutional State action and does not call for a different result than when he substitutes a private trustee for a private trustee. However, it is not at all clear that a school district cannot constitutionally administer a private scholarship program which discriminates on the basis of sex.

As stated by the majority the proposed settlement of this matter was due in large part to the Department of Health, Education and Welfare's investigation to determine if CHUF was acting in violation of title IX of the Education Amendments of 1972 (Pub L 92-318; 86 Stat 373; *US Code, **[***86]** tit 20, § 1681 et seq.*). Title IX proscribes **[**959]** gender discrimination in education programs or activities receiving Federal financial assistance. *Section 1681 of title 20 of the United States Code* provides that but for nine exceptions which are inapplicable herein: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance". (*US Code, tit 20, § 1681, subd [a]*.)

Section 1682 of title 20 of the United States Code authorizes agencies awarding Federal financial assistance to education programs or activities to effectuate the provisions of the foregoing section by promulgating appropriate **[*46]** regulations (*University of Richmond v Bell, 543 F Supp 321, 324)*.

In 1975 the Department of Health, Education and Welfare invoked its section 902 (*US Code, tit 20, § 1682*) authority to issue regulations governing the operation of Federally funded education programs, which regulations extended "for example, to policies involving admissions, textbooks, and athletics" (*North Haven Bd. of Educ. **[***87]** v Bell, 456 U.S. 512, 516)*.

The regulations concerning financial assistance are found in *34 CFR 106.37*. Under regulation *34 CFR 106.37(a)*, except as to financial aid established by certain legal instruments and athletic scholarships, a recipient (which is defined in *34 CFR 106.2 [h]* as, *inter alia*, "any State or political subdivision thereof * * * to whom * * * assistance is extended directly or through

another recipient") may not discriminate in any manner on the basis of sex to provide different amounts or types of financial assistance. As can be seen from the above, an exception to that general proposition exists with respect to financial aid established by certain legal documents. The exception which covers situations such as the one at bar involving the administration of scholarships created by will is found in *34 CFR 106.37(b)* and reads as follows: "(b) *Financial aid established by certain legal instruments*. (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign **[***88]** government which requires that awards be made to members of a particular sex specified therein: *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex."

Hence, title IX and the regulations promulgated thereunder do not totally bar public schools from participating in gender-restricted scholarships. Rather, the regulations require schools to award an equal amount of financial assistance to male and female students in the aggregate. Stated differently, the regulations *specifically permit* CHUF to award the scholarship established by Mr. Johnson's **[*47]** will if female students in that district receive the same amount of financial assistance from other sources such as a trust restricted to women.

The Federal regulations cited above demonstrate an awareness by the Federal authorities that it is not uncommon for Americans to set up scholarship-type trusts limited to one sex with public school districts as trustees and a further awareness of the fact that such trusts are quite legal.

Contrary to the implication that CHUF could never act as trustee of **[***89]** a sex-restricted trust, there is reason to hold that it would be proper to have CHUF serve as trustee of such a trust under appropriate circumstances. So, for example, if at the time of Mr. Johnson's death there was available a separate scholarship fund for the benefit of deserving, bright young women, whether the scholarship was created by Mr. Johnson, or any third person with CHUF as its administrator, the school district's administration of Mr. Johnson's trust would be perfectly proper and not contestable.

[960]** Presumably, the Federal regulations were written with the Fourteenth Amendment in mind and, unless we are ready to hold that they are unconstitutional, it would follow that school districts are not, *ipso facto*, prohibited from administering sex-restricted trusts.

The record before us is barren of any evidence concerning the existence or nonexistence of scholarship assistance available to CHUF graduates. And that is for good reason, since such evidence would be relevant solely on the issue of whether CHUF was justified in its refusal to undertake the administration of Mr. Johnson's trust, an issue which was not before the Surrogate and is not before us.

Of **[***90]** course, it may be argued that CHUF's expressed fear of losing Federal funds if it were to undertake the administration of Mr. Johnson's will is proof enough that there were no similar funds available to needy, deserving, bright young women. But, even if that be deemed an established fact, which would mean that the school district could not legally *administer* the Johnson trust, the most that means is that CHUF was justified in refusing to act. It does not **[*48]** follow that the Surrogate violated the equal protection clause of the Constitution when he relieved the school district and allowed a private trustee to carry out the lawful provisions of the will.

In one of the final paragraphs of its opinion the majority maintains that there is a clear distinction between substituting a private trustee for a private trustee and substituting a private trustee for a public one. It is said that "[in] the latter case, the Fourteenth Amendment prohibits the performance of the trust as created, and the court's act breathes life into a discriminatory provision which, because of State involvement, was invalid at its inception." We think that the two situations cannot be so distinguished. **[***91]** The so-called discrimination, or gender-restricted provision, relates to the persons who will be the beneficiaries. That provision is the same whether the original trustee named be private or public. Such dispositional provision was not invalid at its inception -- it was lawful. At the worst, and we do not concede it to be so, the naming of the public agency was "invalid at its inception" because the trustee could not act. But, when the Surrogate allows such trustee to refuse to act and replaces it, he breathes no more life into the gender-restricted provision than he does when he replaces a private trustee. The lawful, dispositional provision, although gender restricted, is carried out in both instances to the very same degree and the Surrogate's role is precisely the same.

We end as we began. This case does not involve a violation of the *Fourteenth Amendment to the Constitution of the United States*. Mr. Johnson, the now deceased individual in this drama whose charitable intentions have come under fire and whose property is the subject of this dispute, did not violate the Constitution when he set up a trust for needy, deserving young men as he had the legal right to do, **[***92]** or by simply naming the school district to serve as trustee. The school district, which declined to act as such unless the Surrogate rewrote the provisions of Mr. Johnson's will, did not violate the Constitution when it declined to act. Lastly, the Surrogate who did nothing more than perform the judicially neutral or ministerial act of substituting a willing trustee for an unwilling one, or one who **[*49]** was disqualified from serving, did not deny or deprive young women in the subject school district of equal protection of the laws or in any other way violate the Constitution.

We agree with the majority that the Constitution is a living document. But, it is not to be interpreted in such a way that the fundamental right one has to dispose of his or her property as he or she sees fit is to be snuffed out and the terms of the will rewritten as to the beneficiaries simply because the decedent, without any malice or improper motive, selects a public agency as trustee.

The day may come when the State will have the unfettered power to dictate how an individual may dispose of the property he or she has acquired in his or her lifetime **[**961]** or to write a "better" will for a **[***93]** resident than he or she may write for himself or herself, but such day has not yet arrived.

Therefore, we the dissenters, have no choice but to vote to affirm the intermediate decree of the Surrogate.

End of Document

In re Ruth H.

Court of Appeal of California, Second Appellate District, Division Four

June 15, 1972

Crim. No. 20051

Reporter
26 Cal. App. 3d 77 *; 102 Cal. Rptr. 534 **; 1972 Cal. App. LEXIS 920 ***

In re RUTH H., a Person Coming Under the Juvenile Court Law. KENNETH E. KIRKPATRICK, as Chief Probation Officer, etc., Plaintiff and Respondent, v. RUTH H., Defendant and Appellant

Subsequent History: [*1]** On June 23, 1972, the opinion was modified to read as printed above. Respondent's petition for a hearing by the Supreme Court was denied August 9, 1972.

Prior History: Superior Court of Los Angeles County, Juvenile No. 410407, Abraham Gorenfeld, Referee.

Disposition: The order is reversed.

Core Terms

pills, juvenile, girls', vice-principal, informant, arrest, witnesses, questioning, envelope, appears, proceedings, probation officer, contested, contends

Case Summary

Procedural Posture
Appellant minor sought review of a judgment from the Superior Court of Los Angeles County (California), which adjudged her to be a ward of the court and placed her under the supervision of respondent probation officer in the home of her grandparents.

Overview

Respondent probation officer filed a petition that charged appellant minor with possessing a restricted dangerous drug (sodium secorbarbital) in violation of *Cal. Health & Safety Code § 11910*. The juvenile court adjudged appellant to be a ward of the court. Appellant challenged the juvenile court's order, contending that the drug capsules admitted into evidence against her should have been excluded, because she was arrested without probable cause. On appeal, the court found that based on the school security guard's observations of appellant's suspicious behavior and the subsequent unsteadiness of another student, there was probable cause to arrest and search appellant. Appellant also contended that she was denied due process because there was no district attorney present at her hearing, causing the juvenile court referee to act as both prosecutor and judge. Reversing the juvenile court's order, the court held that because there was a dispute over the admissibility and legal effect of evidence, a more formal hearing was required. Thus, the dual obligations placed on the referee violated appellant's right to procedural due process.

Outcome
The court reversed the juvenile court's order adjudging appellant to be a ward of the court because appellant was denied procedural due process at her contested juvenile court proceeding.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Personal Knowledge

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

HN1[] **Probable Cause, Personal Knowledge**

Reasonable or probable cause exists when the facts and circumstances within the knowledge of the officer at the moment of the arrest are sufficient to warrant a prudent man in believing that the defendant has committed an offense.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > General Overview

HN2[] **Sales (Article 2), Form, Formation & Readjustment**

It is an accepted rule that information given by an untested and therefore unreliable informant is insufficient, alone, to establish probable cause. However, if the information is corroborated in essential respects by other facts, sources or circumstances, it may nevertheless be sufficient. Such corroboration need not itself amount to reasonable cause to arrest; its only purpose is to provide the element of reliability missing when the police have had no prior experience with the informant. Accordingly, it is enough if it gives the officers reasonable grounds to believe the informant is telling the truth.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

Family Law > Delinquency & Dependency > Wards of Court

HN3[] **Juvenile Offenders, Juvenile Proceedings**

See *Cal. Welf. and Inst. Code § 503*.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

HN4[] **Juvenile Offenders, Juvenile Proceedings**

See *Cal. Welf. & Inst. Code § 680*.

Constitutional Law > Bill of Rights > General Overview

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

HN5[] **Constitutional Law, Bill of Rights**

Juveniles are entitled to the fundamental protection of the Bill of Rights in proceedings that may result in confinement or other sanctions, whether the state labels these proceedings criminal or civil.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

Family Law > Delinquency & Dependency > Delinquency Proceedings

HN6[] **Fundamental Rights, Procedural Due Process**

Due process of law is a requisite to the constitutional validity of juvenile court proceedings in which alleged misconduct may result in a determination of delinquency and commitment to a state institution.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant was charged in a proceeding in juvenile court under *Welf. & Inst. Code, § 602*, with the possession of sodium secobarbital pills, a restricted dangerous drug (*Health & Saf. Code, § 11910*). The hearing was conducted by a juvenile court referee, who called and questioned witnesses and ruled on objections and motions made by defendant's attorney. A school security agent, authorized to make arrests, testified that he arrested defendant and seized the pills from her pocket after he had observed her on two occasions that same morning receiving money from two other students in exchange for something concealed in her hand, and that he later received a report that one of such students was thereafter observed to be unable to maintain her balance in the classroom. The court entered an order adjudging defendant to be a ward of the court, and she was placed under the supervision of the probation officer. (Superior Court of Los Angeles County, Juvenile No. 410407, Abraham Gorenfeld, Referee.)

The Court of Appeal rejected defendant's contention that there was no probable cause for her arrest and that the pills should therefore have been excluded from evidence, but the judgment was reversed on the ground that the conduct of the referee both in presenting the case filed by the probation officer and in judging contested matters of fact and law violated defendant's constitutional right to procedural due process. The court expressed the opinion that its decision was required in order to avoid conflict with two decisions of another division of the court in its district. (Opinion by Dunn, J., with Files, P. J., and Jefferson, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

CA(1)[] **(1)**

Arrest § 12(20)—Reasonable or Probable Cause—Review.

--A finding that probable cause for an arrest existed may be obviated on appeal only by a showing that there was no substantial evidence in support of such determination.

CA(2)[] **(2)**

Arrest § 12(13)—Without Warrant—Facts and Circumstances Establishing Reasonable or Probable Cause.

--A security agent at a high school who was authorized to make arrests under *Pen. Code, §§ 830.4, subd. (a)(13)*, *836*, Ed. Code, § 15832 et seq., and *Welf. & Inst. Code, § 625*, had probable cause to arrest defendant, a student, for possession of a

restricted dangerous drug (*Health & Saf. Code, § 11910*), and the seizure of such drugs from defendant pursuant to the arrest was proper, where on two occasions that day he saw defendant receive money from other students in exchange for something concealed in defendant's hand; where he received a report that one of the students was subsequently unable to maintain her balance in a classroom; and where that student informed the security agent that she had obtained the drug from defendant.

CA(3a)[] **(3a)** *CA(3b)*[] **(3b)**

Arrest § 12(10)— Without Warrant — Reasonable or Probable Cause — Information Obtained From Informers Generally.

--A high school student's reliability as an informant concerning information given to the school security agent that she had bought drugs from defendant, was corroborated by the agent's own prior observation of a suspicious transaction between the informant and defendant, and by a verified report to the agent that after such transaction the informant was unable to maintain her balance in a classroom.

CA(4)[] **(4)**

Arrest § 12(10)—Without Warrant—Reasonable or Probable Cause—Information Obtained From Informers.

--While it is an accepted rule that information given by an untested and therefore unreliable informant is insufficient by itself to establish probable cause, if the information is corroborated in essential respects by other facts, sources, or circumstances so as to give the officer reasonable grounds to believe the informant is telling the truth, it may nevertheless be sufficient.

CA(5)[] **(5)**

Delinquent Children § 12(16)(a)—Correction and Care—Determination and Disposition of Appeal—Denial of Continuance.

--In a juvenile court proceeding relating to a charge of possession of a dangerous restricted drug (*Health & Saf. Code, § 11910*), no abuse of discretion was shown by the court's denial of defendant's motion for a continuance and for an order to compel the state to produce a witness, where such witness' testimony related only to the issue of probable cause for arrest, and not to the issue of defendant's guilt, and where it was not established that defendant or her attorney were in fact unaware of the witness' identity and expected testimony.

CA(6)[] **(6)**

Delinquent Children § 12(9)(d)—Correction and Care—Findings—Sufficiency of Evidence to Sustain.

--In a juvenile court proceeding relating to a charge of possession of a dangerous restricted drug (*Health & Saf. Code, § 11910*), the evidence was sufficient to show that the pills tested by the police chemist were the same ones found in defendant's pocket at the time of her arrest by a school security agent, where the agent testified that the pills were placed in an envelope by a vice-principal in his presence and marked with the date, time, and defendant's name, and that he turned the envelope over to a deputy sheriff who arrived soon thereafter, and where it appeared that the deputy sheriff, after opening the envelope, estimated that it contained 20 to 25 pills, a figure very close to the actual count of 28 pills previously made by the security agent.

CA(7a)[] **(7a)** *CA(7b)*[] **(7b)**

Delinquent Children § 3—Constitutionality of Juvenile Court Law—Dual Functions of Referee—Procedural Due Process.

--A proceeding in juvenile court under *Welf. & Inst. Code, § 602*, charging defendant with possession of a restricted dangerous drug (*Health & Saf. Code, § 11910*), in which defendant was adjudged a ward of the court, was a contested proceeding

requiring a formal adversary atmosphere under *Welf. & Inst. Code, § 680*, where, although defendant neither testified nor produced witnesses, the admissibility and legal effect of certain evidence was disputed, and the defendant's constitutional right to procedural due process was violated by the referee's assumption of the dual obligations of presenting the case and judging contested matters of fact and law.

CA(8)[] **(8)**

Delinquent Children § 3—Constitutionality of Juvenile Court Law—Fundamental Rights of Minor.

--A contested proceeding in juvenile court under *Welf. & Inst. Code, § 602*, that may result in a minor's confinement or other sanctions, whether or not the proceeding is labeled "criminal" or "civil," requires a formal adversary proceeding (*Welf. & Inst. Code, § 680*) in which the fundamental protection of the bill of rights is extended to the minor, and due process of law is a requisite to the validity of such proceedings.

Counsel: Richard S. Buckley, Public Defender, John J. Gibbons, Laurance S. Smith and Elinor B. Levinson, Deputy Public Defenders, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Herbert L. Ashby and Edward A. Hinz, Jr., Chief Assistant Attorneys General, William E. James, Assistant Attorney General, Norman H. Sokolow and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Dunn, J., with Files, P. J., and Jefferson, J., concurring.

Opinion by: DUNN

Opinion

[*80] [535]** Ruth H., a minor, appeals from an order (*Welf. & Inst. Code, § 800*) entered January 13, 1971, in a juvenile proceeding in the superior court held under *Welfare and Institutions Code section 602*, wherein appellant was adjudged to be a ward of the court and ordered placed under supervision of the probation officer in the home of her grandparents.

On August 12, 1971, the court entered an order **[***2]** reading, in part: "Case dismissed." The Attorney General asks us to dismiss the present appeal as being moot by virtue of the order of dismissal. We treat the so-called "dismissal" as more properly being an order of "termination" under *Welfare and Institutions Code section 778* and the motion to dismiss the appeal is, in any event, denied. (*In re Richard D. (1972) 23 Cal.App.3d 592 [100 Cal.Rptr. 351]*.)

The petition filed by the probation officer (*Welf. & Inst. Code, § 650*) charged appellant with possessing a restricted dangerous drug (sodium secobarbital) on December 2, 1970, in violation of *Health and Safety Code section 11910*. Appellant contends the drug capsules admitted into evidence against her should have been excluded, first contending she was arrested without probable cause. We disagree.

[*81] *CA(1)*[] **(1)** The court found probable cause existed. On appeal "the only way such determination may be obviated is by a showing that there was no substantial evidence in support of it." (*People v. Morales (1968) 259 Cal.App.2d 290, 295 [66 Cal.Rptr. 234]*.) Charles E. Jones testified that he was resident security agent at Washington High School. About 9:20 a.m. the morning **[***3]** of December 2, 1970, he saw appellant there in the car area where she received money from Deborah, another student, and handed Deborah something in her closed hand. He soon thereafter learned that Deborah could not "maintain her balance in the classroom" and he was asked to escort her to the nurse's office. In the nurse's office, at approximately 10 a.m. that morning, Deborah stated to him that "she had obtained a red" from appellant. Later on that morning, near the office of the girls' vice-principal, he saw another exchange of money and an object passed in the same manner between appellant and a girl named Sandra.

Appellant was asked to and did accompany Jones to the office of the girls' vice-principal. Jones stated to appellant and to the vice-principal what he had seen and what Deborah had told him. He advised appellant of her rights. Appellant denied that she had any pills at that time. When Jones asked if he could look in her pockets she got "very excited." Jones then placed her under arrest, handcuffed her, searched her pockets and found 28 "reds," or sodium secobarbital. Appellant stated she was "holding these pills for a girl by the name of Linda Smith."

A telephone **[***4]** call by the vice-principal brought two deputy sheriffs to the school. They were told appellant was walking down the street. One deputy followed and arrested her, the other entering the school and going to the office of the girls' vice-principal. When appellant was returned by the first deputy, the second deputy placed her under arrest for possession of dangerous drugs.

[536]** CA(2)[↑] **(2)** Under *Penal Code sections 830.4, subdivision (a)(13)*, and *836*, Education Code section 15832 et seq. and *Welfare and Institutions Code section 625*, Jones was a peace officer authorized to make an arrest if he had "reasonable cause to believe that the person to be arrested has committed a felony." Jones had observed two transactions, the first involving Deborah, in which money was exchanged for "something" small enough to be concealed by appellant's hand. Between these two transactions Deborah was noted to be unable to maintain her balance. As stated in *People v. Hogan (1969) 71 Cal.2d 888, 890 [80 Cal.Rptr. 28, 457 P.2d 868]*: HN1[↑] "Reasonable or probable cause exists when the facts and circumstances within the knowledge of the officer at the moment of the arrest are sufficient to warrant a prudent **[***5]** man in believing that the defendant has committed an **[*82]** offense." The facts just recited seem sufficient to justify the trial court's conclusion that reasonable cause was shown. Appellant relies on *Cunha v. Superior Court (1970) 2 Cal.3d 352 [85 Cal.Rptr. 160, 466 P.2d 704]*, but the facts are different here since we have not only suspicious action but, additionally, the subsequent unsteadiness of Deborah. Added to this is the statement Deborah made to Jones.

CA(3a)[↑] **(3a)** Appellant contends that Deborah was an untested informant, not shown to be reliable, and that her statement should be disregarded for that reason, citing *People v. Scoma (1969) 71 Cal.2d 332, 338-339 [78 Cal.Rptr. 491, 455 P.2d 419]*. In *Scoma*, the informant possessed narcotics and that fact, alone, was held insufficient to lend credence to his statement that he obtained the narcotics from a named person. CA(4)[↑] **(4)** HN2[↑] It is an accepted rule that information given by an untested and therefore unreliable informant is insufficient, alone, to establish probable cause. However, if the information is corroborated in essential respects by other facts, sources or circumstances, it may nevertheless be sufficient. **[***6]** "Such corroboration need not itself amount to reasonable cause to arrest; its only purpose is to provide the element of 'reliability' missing when the police have had no prior experience with the informant. Accordingly, it is enough if it gives the officers reasonable grounds to believe the informant is telling the truth . . . ." (*People v. Lara (1967) 67 Cal.2d 365, 374-375 [62 Cal.Rptr. 586, 432 P.2d 202]*.) CA(3b)[↑] **(3b)** Deborah's reliability as an informant was corroborated by Jones' observation of her transaction with appellant and her inability to maintain her balance soon thereafter, giving the officer reasonable grounds to believe Deborah was telling the truth.

CA(5)[↑] **(5)** Jones testified during the hearing that he did not inform the police about Deborah's statement to him. Appellant's counsel stated to the court that Deborah was not mentioned in the police report and claimed "there is no way that the defense could find" her. On this basis counsel then moved "that the Court order the People to bring in Deborah and ask for a reasonable continuance for the People to comply with this order." The motion was denied. Appellant contends such ruling was erroneous, claiming Jones' testimony regarding **[***7]** Deborah's statement was a "surprise" to her. We disagree.

First, appellant relies chiefly upon *Eleazer v. Superior Court (1970) 1 Cal.3d 847 [83 Cal.Rptr. 586, 464 P.2d 42]*. By its own language (p. 851), however, its rule of disclosure relates to an informer who "is a material witness on the issue of guilt." Here, Deborah's further identification, if needed at all, related only to proof of probable cause and not to guilt or innocence. Once probable cause to arrest and search appellant was established, **[*83]** her guilt rested upon other evidence, namely, the evidence that she possessed sodium secobarbital.

Second, the record does not establish that appellant and her attorney were unaware of the evidence. The court justifiably could believe Jones' testimony that: "I explained to the girl's Vice Principal *and to Ruthie Elaine* [H.] that I had observed **[**537]** her on two occasions and the one girl who stated to us she was under the Nurse's care at that time, that she had obtained a red from Elaine." (Italics added.) In the light of this evidence, which appellant ignores, no indisputable "surprise" was shown. Believing Jones' testimony, the court could conclude **[***8]** that appellant learned the identity of the informant and of her expected testimony long before the hearing, namely, on the very day of her arrest. Since appellant's motion was addressed to

the court's discretion, an abuse of that discretion must be shown. (*People v. Buckowski (1951) 37 Cal.2d 629, 631 [233 P.2d 912]*; *People v. Johnson (1970) 5 Cal.App.3d 851, 859 [85 Cal.Rptr. 485]*; *People v. Coleman (1968) 263 Cal.App.2d 697, 706 [69 Cal.Rptr. 910]*.) None here appears; the motion for a continuance was properly denied.

CA(6)[] **(6)** Appellant contends the evidence is insufficient to show that the pills tested by the police chemist were the pills found in her pocket; in other words, that the chain of identity is incomplete. We disagree. On Jones' testimony the 28 pills he took from her pocket were, in his presence, placed in an envelope by the girls' vice-principal who marked the envelope with the date, time and with appellant's name. "And you turned the pills over to Deputy Gibel? The Witness: Yes, sir." Deputy Sheriff Gibel testified that he and his partner went to the school in response to a call, arriving at 11:10 a.m. He saw the girls' vice-principal in her **[***9]** office; the evidence was in an envelope on her desk. He opened it and saw approximately 20-25 capsules. After his partner apprehended appellant and returned to school with her, Gibel then marked and tagged this evidence. The girls' vice-principal did not testify.

Appellant's sale to Deborah occurred at approximately 9:20 a.m. Deborah was brought to the nurse's office and made her statement there at 10 or 10:05 a.m. Appellant's second sale, to Sandra, occurred sometime thereafter, the approximate time not being shown. Following this, appellant was brought to the office where the girls' vice-principal "had quite a conversation with her," stating she would have to call for the sheriff, which she did. The pills were placed in an envelope. An inference that the deputy sheriffs arrived soon thereafter is justified; accordingly, the time which elapsed between the vice-principal's placing of the pills in the envelope and marking it and the appearance of deputy Gibel was but a short time. No evidence disclosed that the pills were tampered with or that opportunity existed for an interloper to do so.

[*84] Appellant bases her contention solely on Gibel's testimony that Jones was **[***10]** not in the office when Gibel picked up the envelope. She totally ignores Jones' testimony that he turned the pills over to Gibel. Even if Jones' testimony is ignored, however, Gibel further testified that Jones entered the office shortly after Gibel had opened the envelope. Presumably, Jones recognized the pills as being the same he had found. If they were not, it is reasonable to expect he would have said so. Indeed, corroboration of identity appears in the fact Jones counted 28 pills whereas Gibel estimated there were 20-25, a tally so close as to indicate the same pills were involved. *People v. Blackshear (1968) 261 Cal.App.2d 65 [67 Cal.Rptr. 662]*, a decision of this division relied upon by appellant, is clearly distinguishable.

Last, appellant points to the fact no deputy district attorney was present at the hearing. Appellant argues that such situation required the juvenile court referee to act as both prosecutor and judge, and resulted in a cumulation of errors which the participation of a deputy district attorney would have prevented. We disagree with the contention as stated, first observing there is no showing of errors, cumulative or otherwise. Next to **[***11]** be noted is the fact that participation of a prosecutor, while it may be authorized, is not required. (*Welf. & Inst. Code, § 681*.) Third, the record does not indicate that the juvenile hearing **[**538]** referee was other than impartial in the questioning of witnesses. He did not take sides nor did he act as a "prosecutor." No evidence was presented by appellant, for which reason the referee was not called upon to cross-examine any witnesses or to object to questions asked of them on direct examination by appellant's lawyer.

CA(7a)[] **(7a)** It is true that counsel for appellant did object to evidence brought out by the referee and also made various motions; this required the referee to rule upon the objections and the motions. We thus are faced with a problem broader than that voiced by appellant, namely, is the due process clause shown to be violated in a hearing such as this, where a referee is called upon both to call and question witnesses and then to rule upon objections and motions made by the minor's attorney? It is observed that no objection was made to the referee's acting in a dual capacity or was a request made that he refrain from questioning the witnesses. Had such an objection **[***12]** been made, the referee could have called upon the probation officer present who quite properly could have been asked to question the witnesses. (*In re Steven C. (1970) 9 Cal.App.3d 255, 263-266 [88 Cal.Rptr. 97]*.)

CA(8)[] **(8)** Proceedings in a juvenile court are said to be not criminal in nature. HN3[] *Welfare and Institutions Code section 503* states: "An order adjudging a **[*85]** minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." Informality in such proceedings, in contrast to a formal trial or hearing, is desired to the end that no one may be cowed or confused by full legal panoply. Nevertheless, when a person within the juvenile court's jurisdiction (*Welf. & Inst. Code, §§ 600*, *602*) does not acquiesce in the allegations of the petition but disputes them, the statute contemplates more formality. Thus, *section 680 of the Welfare and Institutions Code* reads in part: HN4[] "*Except* where there is a contested issue of fact or law, the proceeding

shall be conducted in an informal nonadversary atmosphere . . . ." (Italics added. And see: *In re Bacon (1966) 240* ***[***13]*** *Cal.App.2d 34, 45 [49 Cal.Rptr. 322]*.) Here there was a "contest" for, although the minor neither testified nor called witnesses, the admissibility and legal effect of the evidence produced was disputed.

Where a proceeding is held under *Welfare and Institutions Code section 602*, the case of *Richard M. v. Superior Court (1971) 4 Cal.3d 370 [93 Cal.Rptr. 752, 482 P.2d 664]* points to a significant aspect (p. 375): ***HN5***[↑] "Juveniles are entitled to the fundamental protection of the Bill of Rights in proceedings that may result in confinement or other sanctions, whether the state labels these proceedings 'criminal' or 'civil.' (*In re Winship (1970) 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068]*; *In re Gault (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428]*.)" And as said in *In re M.G.S. (1968) 267 Cal.App.2d 329, 335-336 [72 Cal.Rptr. 808]*: ***HN6***[↑] "Due process of law is a requisite to the constitutional validity of juvenile court proceedings in which alleged misconduct may result in a determination of delinquency and commitment to a state institution . . . ." (Also see: *In re Steven C., supra. 9 Cal.App.3d at pp. 260-262*.) Thus, under statute and Constitution, a minor **[***14]** brought into juvenile court for a contested proceeding under *section 602 of the Welfare and Institutions Code*, possesses certain rights to be protected although they are not, perhaps, the same where jurisdictional facts are undisputed.

CA(7b)[↑] **(7b)** As will be noted in our ensuing discussion, two cases in point recently have been decided in this district by another division. These are *Lois R. v. Superior Court (1971) 19 Cal.App.3d 895 [97 Cal.Rptr. 158]* and *Gloria M. v. Superior Court (1971) 21 Cal.App.3d 525 [98 Cal.Rptr. 604]*, each involving a hearing held pursuant to *Welfare and Institutions Code section 600, subdivision (a)*. Each case held it improper for a juvenile court referee to both call and question witnesses and then to rule on the outcome of the hearing. Where, as in our case, no partiality **[**539]** is shown and no evidence of unfairness or injustice appears (*Cal. Const., art. VI, § 13*), we are not necessarily in agreement with our sister division.

[*86] In *Lois R. v. Superior Court, supra*, a writ proceeding, similar although not identical problems were dealt with arising from a *section 600* proceeding. The court there stated (p. 903): "Where **[***15]** the petition is contested, the parents are entitled to a fair hearing with an impartial arbiter, both in fact and in reality, and that means the provision of a referee who does not assume the functions of advocate." (Also see: *Gloria M. v. Superior Court, supra.*) The two cases mentioned recognize that a referee, like a trial judge, properly may question witnesses. We point out, however, that although an advocate may ask questions it does not necessarily follow that anyone who asks questions is an advocate. That syllogism is sophistic.

The court's conclusions in each of the two cases seemingly are based upon the fact that in each case the referee, from the outset, questioned the witnesses. If that analysis is correct, then the conclusionary distinction is artificial, being easily avoided by having the probation officer, whose presence may be required under statute (*Welf. & Inst. Code, § 581*), call the witness to the stand and undertake minimal preliminary questioning.

Nevertheless, we feel obligated to avoid conflict with another division of this district. Its two decisions stand unobliterated; we have no power of review over them. In the circumstances of our case, the **[***16]** referee not only presented the case filed by the probation officer but was required also to judge contested matters of fact and law. (*Estate of Buchman (1954) 123 Cal.App.2d 546, 560 [267 P.2d 73]*.) The dual obligations thus placed on the referee violated, according to our sister division, appellant's constitutional right to procedural due process. Thus, persons appearing before the referee should have no basis to suspect him of partiality; appearances are important. As we have observed, no actual bias or partiality was exhibited by the referee.

In re Murchison (1955) 349 U.S. 133 [99 L.Ed. 942, 75 S.Ct. 623], is a case relied upon in *Lois R., supra.* A comment on that case in 69 Harvard Law Review 162, 163, *The Supreme Court, 1954 Term*, is pertinent: "The Court's concern for the separation of prosecutory from adjudicative power reflects the traditional emphasis on both the fact and appearance of judicial impartiality, particularly in criminal proceedings."

[*87] The order is reversed.

End of Document

JP Morgan Chase Bank, N.A. v Ilardo

Supreme Court of New York, Suffolk County

March 5, 2012, Decided

22781/2011

Reporter
36 Misc. 3d 359 *; 940 N.Y.S.2d 829 **; 2012 N.Y. Misc. LEXIS 911 ***; 2012 NY Slip Op 22053 ****; 2012 WL 695032

[**1]** JP Morgan Chase Bank, National Association, Plaintiff, v Matthew Ilardo, Also Known as Matthew J. Illardo, et al., Defendants.

Core Terms

modification, borrowers, servicers, permanent, mortgage, modify, Documents, foreclosure action, terms, foreclosure, modification agreement, mortgage loan, eligibility, default, loans, trial period, defendants', Directive, demanded, estoppel, parties, courts, federal court, entitlement, guidelines, promise, bad faith, decisions, Lender, breach of contract claim

Case Summary

Overview
Defendant borrowers filed a motion for summary judgment in plaintiff lender's foreclosure action, and to direct it to modify its mortgage pursuant to a plan under the terms of a trial plan program loan modification (TPP) and the federal Home Affordable Modification Program (HAMP). The court found, inter alia, that the borrowers were not eligible, or had a private right of action, for modification under HAMP. In addition, the lender had no duty under the terms of the TPP to modify the loan. Consequently, the borrowers were not entitled to the relief sought.

Outcome
Motion denied, and summary judgment awarded to lender.

LexisNexis® Headnotes

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN1[] **Contracts Law, Contract Modifications**

The aim of the Home Affordable Modification Program (HAMP) is 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. Under HAMP, loan servicers are provided with incentive payments for issuing

permanent loan modifications and it requires that all mortgage loans owned or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation that meet certain requirements be evaluated by the loan servicers for loan modifications.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN2[] **Contracts Law, Contract Modifications**

Although participation in the Home Affordable Modification Program (HAMP) is required for government-sponsored entities (GSEs), such as the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, HAMP participation is voluntary for non-GSEs. Non-GSE servicers who elect to participate are required to enter into a servicer participation agreement with the federal government. These agreements provide that they are governed by and must be construed under federal law.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN3[] **Contracts Law, Contract Modifications**

The Home Affordable Modification Program (HAMP) servicer participation agreements also contain provisions recognizing that many loans are securitized and held by a disparate pool of investors under the terms of pooling and servicing agreements (PSAs), many of which, prohibit modification so as to protect the subordinate security holders. Since many loan servicers are bound by such pre-existing PSAs with the investors, the HAMP guidelines do not require servicers to consider loans for HAMP modification where prohibited by the rules of the applicable PSA and/or other investor servicing agreements. If the loan is not investor-owned or if the investor consents to modification, the loan is evaluated for HAMP eligibility.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN4[] **Contracts Law, Contract Modifications**

A loan servicer is required to apply a sequence of steps, the "Standard Modification Waterfall," to evaluate a hypothetical loan modification that would lower a borrower's payment to no greater than 31 % of the borrower's gross monthly income. The Standard Modification Waterfall includes the steps of reducing the interest rate in increments of 0.125% down to the floor interest rate of 2%, extending the term of the loan, and forgiving principal. If the net present value (NPV) result for the modification scenario is greater than the NPV result for no modification, the result is deemed positive' and the servicer should offer the modification. If the NPV result for no modification is greater than NPV result for the modification scenario, the modification result is deemed negative' and the servicer has the option of performing the modification in its discretion.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN5[] **Contracts Law, Contract Modifications**

Loan servicers are required to fully verify a borrower's financial information before offering a trial plan program loan modification.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN6[] **Procedural Due Process, Scope of Protection**

There is no entitlement to a loan modification under the Home Affordable Modification Program.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN7[] **Procedural Due Process, Scope of Protection**

There is no cognizable property interest in loan modifications.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN8[] **Contracts Law, Contract Modifications**

The Home Affordable Modification Program only requires participating servicers to consider eligible loans for modification, but does not require servicers to modify eligible loans.

Contracts Law > Contract Modifications > General Overview

Governments > Legislation > Statutory Remedies & Rights

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN9[] **Contracts Law, Contract Modifications**

nothing in the Home Affordable Modification Program expressly or impliedly provides borrowers with a private right of action for a loan modification.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN10 **Contracts Law, Contract Modifications**

Qualified borrowers may not reasonably rely upon a servicer participation agreement (SPA) between servicers and the Federal National Mortgage Association as manifesting an intention to confer a right upon him or her because the SPA does not require the servicer to modify eligible loans.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN11 **Contracts Law, Contract Modifications**

Since there is no duty on the part of Home Affordable Modification Program servicers to modify mortgages, neither the engagement in the processing of loan modification applications nor the issuance of a trial plan program loan modification gives rise to a right on the part of borrowers to a permanent loan modifications if they successfully complete the trial plan payments.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN12 **Breach of Contract Actions, Elements of Contract Claims**

Under New York law, the elements of a cause of action to recover damages for breach of contract are: the existence of a contract, the claimant's performance under the contract, the defendant's breach of that contract, and resulting damages.

Contracts Law > Contract Interpretation > General Overview

HN13 **Contracts Law, Contract Interpretation**

A contract should be read as a whole and interpreted as to give effect to its general purpose.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN14 **Breach of Contract Actions, Elements of Contract Claims**

Performance on the part of a claimant is but one element of a breach of contract claim.

Civil Procedure > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN15 **Civil Procedure**

Under principles of New York jurisprudence, a waiver is a voluntary relinquishment of a known right that should not be lightly presumed.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN16 **Consideration, Promissory Estoppel**

The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN17 **Consideration, Promissory Estoppel**

In a promissory estoppel context, the requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN18 **Consideration, Promissory Estoppel**

The conduct relied upon to establish promissory estoppel must not be otherwise compatible with the agreement between the parties as written.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN19 **Estoppel, Equitable Estoppel**

Although a mortgage lender may be estopped from asserting rights under a mortgage to prevent a fraud or injustice upon the person against whom enforcement is sought, the reliance upon the lender's words or promises must be justifiable and such words must mislead the borrower to a detriment.

Civil Procedure > ... > Service of Process > Proof of Service > General Overview

HN20 **Service of Process, Proof of Service**

22 NYCRR 202.12-a(b) does not require that a plaintiff file a request for judicial intervention upon the filing of proof of service upon a defendant, who is likely one of several proper party defendants to be joined in the action.

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

HN21 **Service of Process, Time Limitations**

Since a plaintiff has as long as 120 days to effect service, and even longer if it be extended by the court, *22 NYCRR 202.12*-a(b) does not mandate the immediate filing of a request for judicial intervention.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Comply

HN22 **Involuntary Dismissals, Failure to Comply**

Dismissal of any claim due to a default in the observance of procedural statutes is considered a drastic remedy available only upon a clear a showing of wilful and contumacious conduct. *CPLR 3126*.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN23 **Involuntary Dismissals, Failure to Prosecute**

CPLR 3216 is a extremely forgiving statute that never requires, but merely authorizes, a supreme court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed.

Contracts Law > Contract Modifications > General Overview

HN24 **Contracts Law, Contract Modifications**

A judicially imposed directive compelling a plaintiff to specifically perform a modification agreement, to which it had not assented and was not required to so assent by law, constitutes an unreasonable resort to equitable principles to override long standing principles of contract of law.

Real Property Law > Financing > Foreclosures > Equitable Foreclosures

HN25 **Foreclosures, Equitable Foreclosures**

A foreclosure action is a proceeding in a court of equity that is regulated by statute.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN26 **In Rem & Personal Jurisdiction, In Rem Actions**

While equity acts only in personam, an action for foreclosure is in the nature of a proceeding in rem to appropriate the land.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN27 **Affirmative Defenses, Fraud & Misrepresentation**

A mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation.

Contracts Law > Contract Interpretation > General Overview

HN28[] **Contracts Law, Contract Interpretation**

The stability of contract obligations must not be undermined by judicial sympathy.

Contracts Law > Defenses > Unconscionability > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN29[] **Defenses, Unconscionability**

In the absence of some act by a mortgagee that a court of equity would be justified in considering unconscionable, he is entitled to the benefit of the covenant.

Contracts Law > Contract Interpretation > General Overview

HN30[] **Contracts Law, Contract Interpretation**

Courts are not at liberty to revise while professing to construe a contract.

Contracts Law > Contract Modifications > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Contracts Law > Defenses > Unconscionability > General Overview

HN31[] **Contracts Law, Contract Modifications**

A determination not to modify a mortgage loan by a foreclosing bank that is under no legal obligation to modify such a loan is not unconscionable conduct and does not constitute bad faith. Even if it did, resort to the equitable powers of a court as a means to judicially impose a loan modification would be inappropriate.

Headnotes/Summary

Headnotes

Mortgages — Foreclosure — Loan Modification under Federal Home Affordable Modification Program

1. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan (TPP) offered by plaintiff under the Federal Home Affordable Modification Program (HAMP) was denied. There is no duty on the part of HAMP servicers to modify mortgages, and neither the engagement process in the processing of loan modification applications nor the issuance of a TPP gives rise to a right on the part of borrowers to permanent loan modifications if they successfully complete the trial plan payments. Here, while defendants received written confirmation of a TPP from plaintiff and they timely fulfilled their obligations to pay reduced monthly installments during the

three-month trial period pursuant thereto, plaintiff subsequently advised defendants that it was unable to offer a HAMP modification.

Mortgages — Foreclosure — Breach of Contract Claim Premised on Federal Home Affordable Modification Trial Period Plan

2. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan (TPP) offered by plaintiff under the Federal Home Affordable Modification Program (HAMP) based on plaintiff's alleged breach of the terms of the TPP was denied. Defendants made no claim that plaintiff breached an enforceable obligation imposed by any unconditional term of the TPP inasmuch as their net present value result was properly calculated as negative at 26% of their gross monthly housing income, well below the 31% threshold imposed upon qualification. Moreover, plaintiff's alleged breach was contradicted by the express terms of the TPP agreement, which states that any permanent modification is subject to the subsequent approval of plaintiff and the receipt of a signed modification agreement, since plaintiff notified defendants that it was unable to offer a HAMP loan modification. Furthermore, since there is no federal entitlement to a permanent loan modification, plaintiff did not breach the TPP by failing to offer a permanent modification of the loan even though defendants fulfilled their installment payment obligations thereunder.

Mortgages — Foreclosure — Waiver

3. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan (TPP) offered by plaintiff under the Federal Home Affordable Modification Program based on plaintiff's alleged waiver of its right to foreclose was denied. In the TPP, plaintiff expressly reserved its right to all remedies afforded under original loan documents, including its right to foreclose in the event of a default. The record was devoid of any evidence of a waiver of any right to foreclose on the part of the plaintiff.

Mortgages — Foreclosure — Promissory Estoppel

4. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan (TPP) offered by plaintiff under the Federal Home Affordable Modification Program (HAMP) based upon promissory estoppel was denied. The requirement that there be a clear and unambiguous promise could not be met by references to a course of conduct between the parties. In addition, the conduct relied upon to establish estoppel must not be otherwise compatible with the agreement between the parties as written. Because the TPP agreement here unequivocally stated that it did not constitute a permanent modification of defendants' loan, the other portions wherein it states that if defendants returned executed TPP agreements with supporting documentation and made their TPP payments, they would receive a permanent HAMP modification were insufficient to establish a claim of promissory estoppel.

Mortgages — Foreclosure — Equitable Estoppel

5. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan (TPP) offered by plaintiff under the Federal Home Affordable Modification Program based upon promissory estoppel was denied. Although a mortgage lender may be estopped from asserting rights under a mortgage to prevent a fraud or injustice upon the person against whom enforcement is sought, the reliance upon the lender's words or promises must be justifiable and such words must mislead the borrower to a detriment. Here, no justifiable reliance on the terms of the TPP had been shown to exist. To the extent that defendants' unsubstantiated and nonspecific allegations of misleading and unconscionable conduct and bad faith over the course of the unsuccessful modification might be construed as sounding in tort, they were legally insufficient.

Mortgages — Foreclosure — Failure to File Request for Judicial Intervention

6. In a mortgage foreclosure action, the motion of defendants mortgagees for summary judgment dismissing the action and directing plaintiff loan servicer to permanently modify its mortgage in accordance with the terms of a Home Affordable Modification Trial Period Plan offered by plaintiff under the Federal Home Affordable Modification Program based upon plaintiff's failure to file a request for judicial intervention (RJI) upon the filing of the proofs of service as required by Uniform Rules for Trial Courts *(22 NYCRR) § 202.12-a (b)* was denied. The rule does not require that the plaintiff file the RJI upon the filing of proof of service upon the borrower, who is likely one of several proper party defendants to be joined in the action. Additionally, there is no time requirement imposed upon the filing of proof of service effected by personal delivery. Since a plaintiff has as long as 120 days to effect service, and even longer if it be extended by the court, the rule does not mandate the immediate filing of the RJI. In any event, dismissal of any claim due to a default in the observance of procedural statutes is considered a drastic remedy available only upon a clear showing of wilful and contumacious conduct, which defendants have failed to make.

Counsel: **[***1]** *Enza Cammarasana*, Northport, for defendants. *Fein, Such & Crane, LLP*, Chestnut Ridge, for plaintiff.

Judges: THOMAS F. WHELAN, J.S.C.

Opinion by: THOMAS F. WHELAN

Opinion

[*361] **[**831]** Thomas F. Whelan, J.

It is ordered that this motion (No. 001) by the Ilardo defendants for summary judgment dismissing this mortgage foreclosure action and directing the plaintiff to modify its mortgage in accordance with the terms of a trial period modification plan offered by the plaintiff under the Federal Home Affordable Modification Program (HAMP) and an order "waiving" all interest accrued on the loan from implementation of the HAMP offer to the resolution of this action and "expunging any alleged deficiencies in payment" is denied.

This mortgage foreclosure action arises out of a mortgage given by the Ilardo defendants on August 23, 2004 to secure a $320,000 mortgage loan in connection with the purchase of residential real property situated in Centerport, New York. The complaint was filed on July 13, 2011, in response to which the Ilardo defendants filed an answer with counterclaims. **[**832]** That answer was amended by the defendants' service of an amended **[*362]** answer with counterclaims dated September 16, 2011, **[***2]** in response to which the plaintiff replied in October of 2011.

On December 7, 2011, the answering defendants served the instant motion in which they seek a judicially imposed loan modification and other relief. The defendants claim an entitlement to such relief under the terms of a trial plan program loan modification (hereinafter TPP) to which the parties agreed in September of 2009. The Ilardos further claim an entitlement to such relief by reason of the deceptive and bad faith conduct on the part of the plaintiff and its representatives in corresponding with the Ilardos in connection with their unsuccessful attempts to secure a permanent modification of the subject loan and the plaintiff's bad faith and prejudicial conduct in prosecuting this action other than in accordance with court rules and notions of fairness and justice. The Ilardos urge this court to apply principles of contract law and/or invoke this court's equity powers and issue an order that (1) compels the plaintiff to provide the defendants with a permanent loan modification as of October 1, 2009 providing for a reduced monthly payment in the amount set forth in the trial program implemented by the parties during **[***3]** the last three months of 2009; (2) eradicates all interest and deficits in payment that accrued under the original loan documents; and (3) dismisses this foreclosure action.

Underlying these demands for relief are the following factual allegations, all of which are advanced in the affidavit of defendant, Dina Ilardo, that is attached to the moving papers. In August of 2004, the Ilardo defendants purchased their home with the aid of the $320,000 mortgage that is the subject of this action and they regularly paid the monthly installment due for principal, interest, taxes, insurance and escrow from the loan's inception until May of 2009. At that time, the Ilardos were experiencing difficulties in meeting their financial responsibilities and began a 27-month pursuit of a modification of their

mortgage loan. The Ilardos missed their first mortgage payment on August 1, 2009, allegedly at the direction of the plaintiff's agents. **[****2]**

In the month preceding the August 1, 2009 default, Dina Ilardo was purportedly told by agents of Chase Bank, the loan servicer, to "stop paying" the mortgage (*see* ¶ 12 of the Ilardo affidavit). Such advice was allegedly issued when Ms. Ilardo called Chase in July **[***4]** of 2009 to follow up on a buyer's assistance form completed by her in May of 2009 in connection with her initial efforts to secure a mortgage loan modification. Ms. Ilardo **[*363]** claims that she was told that a loan default was a necessary element of eligibility for a loan modification.

On or about September 1, 2009, the Ilardos received correspondence from Chase advising them that they were past due on the August installment. Ms. Ilardo "immediately" called Chase and "was assured not to worry because we were now in a temporary modification program," the "specific amounts of which were confirmed in that conversation" (*see* ¶ 14 of the Ilardo affidavit). On September 10, 2009, the Ilardos received written confirmation of a Home Affordable Modification Trial Period Plan (TPP) from Chase in which a three-month, trial term period was scheduled to begin on October 1, 2009. The plan provided for a reduction of the Ilardos' monthly installment payments from $2,432 to $1,953. The Ilardos believed that if they paid the three trial payments beginning on October 1, 2009 and ending on December 1, 2009, Chase would provide them with a Home Affordable **[**833]** Modification Agreement (*see* ¶ 16 of the Ilardo **[***5]** affidavit).

The Ilardos allege that they timely made the trial payments and that they continued to pay the reduced monthly installment following the expiration of the trial term for "months" even though Chase advised them that they were in arrears. In response, Dina Ilardo called Chase three times in January of 2010 and was allegedly told "not to worry" since they were in "a loan modification" (*see* ¶¶ 18-19 of the Ilardo affidavit). On February 11, 2010, Ms. Ilardo was advised by "Cindy" at Chase that "our application was still in review but that Chase may have to place us in a different program" (*see* ¶ 20 of the Ilardo affidavit). According to Ms. Ilardo, she continued to converse with Chase representatives through July of 2010 and continued to send to them financial documentation in connection with obtaining a loan modification under programs other than the HAMP program which provided the three-month TPP beginning in October of 2009.

On January 12, 2011, Chase returned the Ilardos' monthly payment (*see* ¶ 25 of the Ilardo affidavit). The Ilardos continued to receive notices from Chase advising of loan deficiencies (*see* ¶ 28 of the Ilardo affidavit). Ms. Ilardo nevertheless claims **[***6]** that she was only notified by letter dated June 1, 2011 that Chase was unable to offer a HAMP loan modification or a modification under any Chase modification programs (*see* ¶ 31 of the Ilardo affidavit). The Ilardos made no further payments to Chase following receipt of that letter (*see* ¶ 27 of the Ilardo affidavit). **[*364]** Undaunted by these circumstances, Ms. Ilardo continued to pursue loan modification possibilities with Chase until August 23, 2011 (*see* ¶¶ 33-34 of the Ilardo affidavit).

The plaintiff challenges the accuracy and completeness of Ms. Ilardo's narrative of the conversations she purportedly had with Chase. Such challenges are premised on the self-serving and unsubstantiated nature of Ms. Ilardo's factual allegations regarding her dialogue with Chase **[****3]** representatives. The plaintiff also points to a glaring omission on the part of Ms. Ilardo and her counsel in failing to mention or include a copy of Chase's April 27, 2010 rejection letter. Therein, Chase advised the Ilardos that it was unable to offer a HAMP modification because the Ilardos' housing expense was less than 31% of the gross monthly income and that they did not qualify for a modification under any programs offered **[***7]** by Chase, including the Making Homes Affordable program to which the defendants were first referred in February of 2010. The April 27, 2010 rejection letter references the trial plan documentation and advises that delinquencies in the loan must be addressed to avoid the "negative impact a possible foreclosure may have on your credit rating, the risk of a deficiency judgment being filed against you and the possible adverse tax effects of a foreclosure on your Property." The plaintiff further challenges Ms. Ilardo's claim that bank representatives advised her that she had to be in default under the terms of her loan to qualify for a loan modification since the TPP documentation itself clearly provides otherwise. The plaintiff also contests the merits of the defendants' claims for dismissal of this action, reinstatement of the trial modification as of the date of its inception on October 1, 2009 and a waiver of all interest and an expungement of all loan deficiencies under HAMP or the common-law theories advanced by the defendants.

Without denying the existence of the plaintiff's April 27, 2010 rejection letter or the accuracy of the assertion set forth therein that the Ilardos' housing **[***8]** expense **[**834]** was 26% of their gross monthly housing income and thus less than the 31% required for a positive net present value (NPV) result, the defendants claim that their right to a permanent loan modification upon the same terms as the trial modification rests upon the language of the TPP itself. In support of this claim, the Ilardos rely upon the following language set forth on page two of the TPP:

> "If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be **[*365]** true in all material respects, then the Lender will provide me with a Loan 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 Ilardos thus contend that under HAMP and principles of contract law and the law governing waiver and estoppel, the court should mandate that the plaintiff permanently modify the loan by reinstating the terms of the TPP.

In opposition to these arguments, the plaintiff contends that it was not required to permanently modify the mortgage loan if it determined during the trial period that the borrower did not meet the requirements under HAMP for a modification. In support of these **[***9]** contentions, the plaintiff cites the following language from the Trial Period Plan:

> "I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until: (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan."

As an alternate ground for the granting of this motion, the defendants assert that the **[****4]** plaintiff engaged in outrageous and deceptive conduct and has acted in such bad faith that the defendants are entitled to a judicially mandated loan modification. As legal authority for this position, counsel assiduously relies on a decision issued in a mortgage foreclosure proceeding in this court in the case of ***Wells Fargo Bank, N.A. v Meyers*** *(30 Misc 3d 697, 913 NYS2d 500 [Sup Ct, Suffolk County 2010, Sweeney, J.])*. Therein, the *Meyers* defendants were offered a TPP under HAMP and performed by paying the reduced **[***10]** monthly installments for the three-month trial period. Immediately following the start of that trial period, the bank instituted the foreclosure action. The case was assigned to the specialized mortgage foreclosure conference part and referred to Acting Justice Sweeney after the plaintiff steadfastly declined to offer the defendants a permanent modification of their mortgage loan over the course of four settlement conferences in the conference part. When the plaintiff again refused to modify the loan at conferences before Acting Justice Sweeney, a hearing on the issue of the plaintiff's **[*366]** "bad faith" was scheduled. Following that hearing, the court issued the order reported above in which the plaintiff was directed to specifically perform "the original modification agreement proposed by the plaintiff and accepted by the defendants" (*id. at 701*). The court went on to dismiss the foreclosure action. In granting such relief, which was issued sua sponte, as the defendants had not interposed an answer or any other paper demanding affirmative relief, the court resorted to its equitable powers to bring about the result imposed.

The facts as alleged by Ms. Ilardo in this action are remarkably similar to those **[***11]** set forth in the *Meyers* decision except that the plaintiff here did not commence this foreclosure action prior to the issuance **[**835]** of a determination as to the ineligibility of the borrowers for a HAMP modification. This court nevertheless declines to adopt the reasoning of the *Meyers* court or to otherwise concur in its result. Nor is this court persuaded that the remedies demanded are otherwise available to the defendants under HAMP, state contract law or principles of waiver and/or estoppel. For these reasons and those outlined below, the court finds that the defendants are not entitled to the relief demanded on this motion.

The HAMP Program

The Home Affordable Modification Program or HAMP is a federal program that arose out of the Emergency Economic Stabilization Act of 2008 and the Helping Families Save Their Homes Act (Helping Families Act) of May of 2009. The HAMP program is administered by the Federal National Mortgage Association (Fannie Mae) as the agent of the Department of the Treasury. ***HN1***[↑] The program's aim is 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 **[***12]** levels, without discharging any of the underlying debt. Under HAMP, loan servicers are provided with incentive payments for issuing permanent loan modifications and it requires that all mortgage loans owned or guaranteed by Fannie Mae or the Federal Home Loan Mortgage Corporation (Freddie Mac and, together with Fannie Mae, the government-sponsored entities or GSEs) that meet certain requirements be *evaluated* by the loan servicers for loan modifications.

HN2[↑] Although participation in HAMP is required for government-sponsored entities (GSEs) **[****5]** such as Fannie Mae and Freddie Mac, HAMP participation is voluntary for non-GSEs. Non-GSE servicers who elect to participate (participating

servicers) are **[*367]** required to enter into a Servicer Participation Agreement (SPA) with the federal government. These agreements provide that they are governed by and must be construed under federal law (*see* Marshall and DeStefano III, *Lenders Prevail in Lawsuits by Borrowers Seeking to Enforce Federal Loan Modification Programs*, Pratt's J Bankr L, Sept. 2010, available on Westlaw at JBKRL 2010.09-5 at 4). The plaintiff here is a participant in HAMP. ***HN3***[↑] The HAMP SPAs also contain provisions recognizing that many loans are securitized and held by a disparate pool of investors under the terms of pooling and servicing agreements (PSAs), many of which prohibit modification **[***13]** so as to protect the subordinate security holders. Since many loan servicers are bound by such preexisting PSAs with the investors, the HAMP Guidelines do not require servicers to consider loans for HAMP modification where prohibited by the rules of the applicable PSA and/or other investor servicing agreements. If the loan is not investor-owned or if the investor consents to modification, the loan is evaluated for HAMP eligibility (*see* *Edwards v Aurora Loan Services, LLC, 791 F Supp 2d 144 [D DC 2011]*).

The guidelines and supplemental directives issued by Fannie Mae set forth HAMP activities servicers must perform and all modification eligibility guidelines. The guidelines set forth basic eligibility criteria and require the servicer to perform a net present value analysis, comparing the NPV of a modified loan to the NPV of an unmodified loan. ***HN4***[↑] The servicer is required to apply a sequence of steps, the "Standard Modification Waterfall," to evaluate a hypothetical loan modification that would lower the borrower's payment to no greater than 31% of the borrower's gross monthly income. The standard modification waterfall includes the steps of reducing the interest rate **[***14]** in increments of .125% down to the floor interest rate of 2%, extending the term of the loan, and forgiving principal. If the NPV result for the modification **[**836]** scenario is greater than the NPV result for no modification, the result is deemed "positive" and the servicer should offer the modification. If the NPV result for no modification is greater than the NPV result for the modification scenario, the modification result is deemed "negative" and the servicer has the option of performing the modification in its discretion (*see* *id. at 149*).

Prior to June 1, 2010, servicers were permitted to rely upon borrowers' unverified verbal representations when determining whether the borrower qualified for a TPP (*see* US Dept of the Treasury, Supplemental Directive 09-01, at 6-7). Borrowers who **[*368]** entered into TPPs on that basis were then required to submit income verification documentation, which servicers were required to analyze to determine whether the borrower qualified for a permanent modification (*id.*). Although this TPP-first, verification-later procedure allowed servicers to expedite the TPP process and quickly provide relief to struggling homeowners, it resulted in some borrowers who were offered **[***15]** TPPs being found ineligible for permanent modifications. To remedy this issue, the Treasury on January 28, 2010 issued a supplemental directive which, effective June 1, 2010, ***HN5***[↑] requires servicers to fully verify a borrower's financial information before offering a TPP (*see* US Dept of the Treasury, Supplemental Directive 10-01). The defendants in this case applied for a loan modification under the old guidelines.

[**6]** HAMP Litigation in the Federal Courts

Borrowers rejected for loan modifications began to file federal lawsuits in which they claimed a constitutionally protected property right to permanent modifications under HAMP and its guidelines and other federal statutes and regulations. In a 2009 case entitled ***Williams v Geithner*** *(2009 US Dist LEXIS 104096, 2009 WL 3757380 [D Minn 2009])*, a federal district court addressed the issue in great detail and found that ***HN6***[↑] there is no entitlement to a loan modification under HAMP. The plaintiffs' claims that the servicers' failure to notify them of adverse HAMP decisions violated their due process rights were rejected on the ground that ***HN7***[↑] there is no cognizable property interest in loan modifications (*see* *2009 WL 3757380 at *7, 2009 US Dist LEXIS 104096 at *21-22*). The court's findings were premised on, among other **[***16]** things, the absence of mandatory language in the statutory and program framework and its inclusion of discretion vested in plan participants. In this regard the court noted as follows:

> "Loan servicers seek to maximize their investments, and in doing so, make profitability determinations between modification or foreclosure, based in part on predictions about an individual borrower's likelihood of default. If the Secretary prescribed the exact criteria all servicers must use to determine whether a loan has a positive NPV (and therefore should be modified if the other criteria are satisfied) then servicers may choose to forego participating in the HAMP program so that they are not forced to modify loans that do not make financial sense. While Congress required the Secretary to implement a **[*369]** plan to assist distressed homeowners, that plan not only made servicer participation voluntary, but also afforded to program participants discretion on several variables that impact the NPV determination" (*2009 WL 3757380 at *7, 2009 US Dist LEXIS 104096 at *21-22*).

The court in *Williams* went on to hold that "loan **[***17]** modifications are not an entitlement, but are linked to decisions that result in profits to taxpayers. Congress did not intend to mandate loan modifications" (*2009 WL 3757380 at *6, 2009 US Dist LEXIS 104096 at *18*).

In a plethora of federal cases decided after *Williams*, federal courts have held that ***HN8***[⬆] HAMP only requires participating **[**837]** servicers to consider eligible loans for modification but does not require servicers to modify eligible loans (*see Lucia v Wells Fargo Bank, N.A., 798 F Supp 2d 1059 [ND Cal 2011]*; ***Marks v Bank of Am., N.A.**, 2010 US Dist LEXIS 61489, 2010 WL 2572988 [D Ariz 2010]*; *Escobedo v Countywide Home Loans, Inc., 2009 US Dist LEXIS 117017, 2009 WL 4981618 [SD Cal 2009]*). In ***Hart v Countrywide Home Loans, Inc.**, (735 F Supp 2d 741, 747-748 [2010])*, a District Court in the Eastern District of Michigan stated the rule as follows:

> "The language of the HERA [Housing and Economic Recovery Act of 2009] requires the Secretary of the Treasury 'to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program.' *12 U.S.C. § 5219*. While the Secretary must *encourage* mortgage servicers to modify loans, the statute does not *require* Defendant or other mortgage servicers to modify loans. *See* **[***18]** *Escobedo v. Countrywide Home Loans, Inc., No. 09cv1557 BTM(BLM), 2009 US Dist LEXIS 117017, 2009 WL 4981618, at *3 (S.D.Cal. Dec. 15, 2009)* ('The [SPA] Agreement does not state that Countrywide must modify all mortgages that meet the eligibility **[****7]** requirements.'); *Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 US Dist LEXIS 104096, 2009 WL 3757380, at *6 (D Minn Nov. 9, 2009)* (concluding that loans may be modified where appropriate and with discretion). Therefore, even if Plaintiff were eligible for modification, there would be no duty imposed on Defendant for which Plaintiff could seek relief."

Borrowers' claims of a private right of action under HAMP and their breach of contract claims as third-party beneficiaries **[*370]** of SPAs between servicers and Fannie Mae have been repeatedly rejected by federal courts (*see Ramos v Wells Fargo Home Mtge., 2012 US Dist LEXIS 9770, 2012 WL 261308 [D Md 2012]*; ***Keosseian v Bank of Am.**, 2012 US Dist LEXIS 16811, 2012 WL 458470 [D NJ 2012]*; ***Steffens v American Home Mtge. Servicing, Inc.**, 2011 US Dist LEXIS 26586, 2011 WL 901812 [D SC 2011]*; ***Bourdelais v J.P. Morgan Chase**, 2011 US Dist LEXIS 35507, 2011 WL 1306311 [ED Va 2011]*; ***Grill v BAC Home Loans Servicing LP**, 2011 US Dist LEXIS 3771, 2011 WL 127891 [ED Cal 2011]*; ***Zoher v Chase Home Fin.**, 2010 US Dist LEXIS 109936, 2010 WL 4064798 [SD Fla 2010]*; ***Robinson v Wells Fargo Bank, N.A.**, 2010 US Dist LEXIS 60648, 2010 WL 2534192 [D Ariz 2010]*; ***Escobedo v Countywide Home Loans, Inc., supra***). **[***19]** In October of 2011, a circuit court of appeals finally weighed in on the issue and likewise held that ***HN9***[⬆] nothing in HAMP expressly or impliedly provides borrowers with a private right of action for a loan modification (*see **Nelson v Bank of Am., N.A.**, 446 Fed Appx 158, 2011 WL 5138591 [11th Cir 2011]*).

In an effort to avoid these results, borrowers who successfully participated in trial modifications under HAMP increasingly began to assert common-law contract claims based on their TPP agreements. However, many federal courts have rejected these claims as being nothing more than HAMP claims dressed in the verbiage of common-law breach of contract claims (*see **Hemenway v Wells Fargo, N.A.**, 2012 US Dist LEXIS 18839, 2012 WL 512398 [D Or 2012]*; ***Keosseian v Bank of Am.**, supra*; ***Parks v BAC Home Loan Servicing, LP**, 825 F Supp 2d 713, 2011 US Dist LEXIS 125920, 2011 WL 5239240 [ED Va 2011]*; ***Wittkowski v PNC Mtge.**, 2011 US Dist LEXIS 133464, 2011 WL 5838517 [D Minn 2011]*; ***Herold v U.S. Bank, N.A.**, 2011 US Dist LEXIS 103501, 2011 WL 4072029, [D Ariz 2011]*; ***Senter v JPMorgan Chase Bank, N.A.**, 810 F Supp 2d 1339 [SD Fla 2011]*; ***Bourdelais v J.P. Morgan Chase**, supra*; ***Wigod v Wells Fargo Bank, N.A.**, 2011 US Dist LEXIS 7314, *13-14, 2011 WL 250501, *5 [ND Ill 2011]*; ***Cox v Mortgage Elec. Registration Sys., Inc.**, 794 F Supp 2d 1060 [D Minn 2011]*; **[***20]** ***Vida v OneWest Bank, F.S.B.**, 2010 US Dist LEXIS 132000, *9-11, 2010 WL 5148473, *4 [D Or 2010]*).

Other federal courts held that state common-law claims of a contractual entitlement **[**838]** to a permanent loan modification may be viable (*see **Gaudin v Saxon Mtge. Servs., Inc.**, 820 F Supp 2d 1051, 2011 US Dist LEXIS 132957, 2011 WL 5825144 [ND Cal 2011]*; ***Allen v CitiMortgage, Inc.**, 2011 US Dist LEXIS 86077, 2011 WL 3425665 [D Md, Aug. 4, 2011]*; ***Hinton v Wells Fargo Bank, N.A.**, 2011 US Dist LEXIS 92560, **[*371]** 2011 WL 3652321 [ED Va 2011]*; ***Stovall v SunTrust Mtge., Inc.**, 2011 US Dist LEXIS 106137, 2011 WL 4402680 [D Md 2011]*; ***Bosque v Wells Fargo Bank, N.A.**, 762 F Supp 2d 342, 2011 WL 304725 [D Mass 2011]*; ***Durmic v J.P. Morgan Chase Bank, NA**, 2010 US Dist LEXIS 124603, 2010 WL 4825632 [D Mass 2010]*), and that such claims are not preempted under HAMP or other federal statutes (*see **Olivares v PNC Bank, N.A.**, 2011 US Dist LEXIS 118338, 2011 WL 4860167 [D Minn 2011]*; ***Darcy v CitiFinancial, Inc.**, 2011 US Dist LEXIS*

95238, 2011 WL 3758805 [WD Mich 2011]; ***Fletcher v OneWest Bank, FSB***, *798 F Supp 2d 925, 2011 WL 2648606 [ND Ill 2011]*; ***Wright v Chase Home Fin., LLC***, *2011 US Dist LEXIS 104307, 2011 WL 4101513 [D Ariz 2011]*; ***Allen v CitiMortgage, Inc.***, *supra*). However, most courts have rejected claims that either a HAMP application or a TPP constitutes a binding contract for permanent modification under controlling **[****8]** state law principles (*see* ***McInnis v BAC Home Loan Servicing, LP***, *2012 US Dist LEXIS 13653, 2012 WL 383590 [ED Va 2012]*; **[***21]** ***Pennington v HSBC Bank USA, Natl. Assn.***, *2011 US Dist LEXIS 147411, 2011 WL 6739609 [WD Tex 2011]*; ***Lonberg v Freddie Mac***, *776 F Supp 2d 1202 [D Or 2011]*; ***Lund v CitiMortgage, Inc.***, *2011 US Dist LEXIS 52890, 2011 WL 1873690 [D Utah 2011]*; ***Parks v BAC Home Loan Servicing, LP***, *825 F Supp 2d 713, 2011 US Dist LEXIS 125920, 2011 WL 5239240 [2011]* [modification application not a contract]; ***Steffens v American Home Mtge. Servicing, Inc.***, *supra* [modification application not a contract]; ***Reyna v Wells Fargo Bank, N.A.***, *2011 US Dist LEXIS 74456, 2011 WL 2690087 [D Nev 2011]*; ***Rackley v JPMorgan Chase Bank, Natl. Assn.***, *2011 US Dist LEXIS 79323, 2011 WL 2971357 [WD Tex 2011]*; ***Stovall v SunTrust Mtge., Inc.***, *supra*; ***Senter v JPMorgan Chase Bank, N.A.***, *supra*; ***Grill v BAC Home Loans Servicing LP***, *supra*; ***Herold v U.S. Bank, N.A.***, *supra*; ***Bourdelais v J.P. Morgan Chase***, *supra*; ***Marks v Bank of Am.***, *N.A., supra*; *cf.* ***Gaudin v Saxon Mtge. Servs., Inc.***, *supra*; ***Bolone v Wells Fargo Home Mtge., Inc.***, *2011 US Dist LEXIS 94714, 2011 WL 3706600 [ED Mich 2011]*; ***Darcy v CitiFinancial, Inc.***, *supra*; ***Bosque v Wells Fargo Bank, N.A.***, *supra*; ***Durmic v J.P. Morgan Chase Bank, NA***, *supra*).

Rejection of state breach of contract claims premised upon a TPP rests upon various failings. Some courts hold that since there is no duty to modify a loan and no **[***22]** unqualified promise to do so under the terms of the TPP, there is no enforceable contract (*see e.g.* ***McInnis v BAC Home Loan Servicing, LP***, *supra*; ***Pennington v HSBC Bank USA, Natl. Assn.***, *supra* [there **[*372]** being no obligation to modify the loan, the TPP offer was merely to consider the plaintiff's application for a loan modification, not a definite pledge or promise to modify the plaintiff's mortgage]; *see also* ***Senter v JPMorgan Chase Bank, N.A.***, *supra* [adding as grounds a failure of consideration as well as the unenforceable nature of the TPP as a mere agreement to agree in the future]).

In ***Thomas v JPMorgan Chase & Co.*** *(811 F Supp 2d 781, 2011 WL 3273477 [2011])*, a New York federal district court in the Southern District, applying New Jersey law, addressed the merits of the plaintiffs' state claims sounding in a breach of the TPP on the part of the bank. However, the court found that the TPP did not constitute a binding contract for permanent modification due to the borrowers' failure to satisfy all conditions for a permanent loan set forth in the TPP and that consideration for any such modification was lacking. In addition, the court found that no breach of any affirmative obligation on **[***23]** the part of the bank under the TPP had occurred (*see id. at 796*). Within a month of the issuance **[**839]** of the decision in *Thomas*, the Southern District of New York also found that a TPP does not constitute a binding contract for permanent modification due to a failure of consideration and that no breach of any affirmative obligation on the part of the bank under the TPP had occurred (*see* ***Costigan v CitiMortgage, Inc.***, *2011 US Dist LEXIS 84860, 2011 WL 3370397 [2011]*). Upon application of both federal and New Jersey law, the court rejected Costigan's claims of breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, negligent processing of loan modifications and foreclosures and violations of state consumer protection practices.

Following *Costigan*, two decisions issued out of the Federal District Court of New Jersey likewise addressed the merits of the borrowers' state law claims based on purported breaches of the TPP and related tort claims and rejected those claims as unmeritorious (*see* ***Stolba v Wells Fargo & Co.***, *2011 US Dist LEXIS 87355, 2011 WL 3444078 [2011]*; ***Keosseian v Bank of Am.***, *supra*). However, in a more recent **[****9]** case, **[***24]** a district court in the Eastern District of New York denied an accelerated dismissal of the borrowers' New York state law claims sounding in breach of contract predicated upon a TPP and other state law claims, although the TPP at issue therein was not before the court (*see* ***Picini v Chase Home Fin. LLC***, *854 F Supp 2d 266, 2012 US Dist LEXIS 22502, 2012 WL 580255 [Feb. 16, 2012]*).

[*373] HAMP Litigation in New York

In contrast to the federal courts, HAMP litigation in New York courts has yielded fewer than 20 reported decisions, only two of which emanate from appellate courts. In ***Aames Funding Corp. v Houston*** *(85 AD3d 1070, 926 NYS2d 639 [2011])*, the Second Department granted the borrower's application to stay a scheduled foreclosure sale since the plaintiff bank was precluded from referring any loan to foreclosure and from conducting a foreclosure sale under a HAMP Supplemental Directive 10-02 issued on March 24, 2010 with respect to any borrowers whose ineligibility for a modification had not been determined. In ***Bank of Am., N.A. v Tornheim*** *(82 AD3d 1141, 919 NYS2d 372 [2011])*, the Second Department declined to

dismiss a recently commenced foreclosure action since the defendants' demands therefor were **[***25]** predicated upon an unfounded claim that the Helping Families Act created a moratorium on foreclosure actions. While the Helping Families Act of May 20, 2009 led to a variety of new federal measures designed to reduce foreclosures, preserve home ownership and fight the contraction of the real estate market, the court expressly found that the act did not create a moratorium on mortgage foreclosure actions and that the provision relied upon by the defendants is "merely precatory and does not create an enforceable private right" (*see id.*). The remaining reported decisions referencing HAMP are trial court decisions, none of which appear to have an import on the issues raised herein other than the decision the *Meyers* case, upon which the Ilardo defendants rely.

Analysis

[1] This court finds that the Ilardos' claims of an entitlement to a permanent modification of their mortgage loan under the terms of their TPP and by reason of their due and timely fulfillment of their obligations to pay, during the three-month trial period, reduced monthly installments are without merit under federal law. As indicated above, various federal courts have held that ***HN10***[↑] qualified borrowers may **[***26]** not reasonably rely upon an SPA between servicers and Fannie Mae as manifesting an **[**840]** intention to confer a right upon them because the SPA does not require the servicer to modify eligible loans (*see e.g.* ***Williams v Geithner***, *supra*; ***Escobedo v Countrywide Home Loans, Inc.***, *supra*). ***HN11***[↑] Since there is no duty on the part of the HAMP servicers to modify mortgages (*see* ***Nelson v Bank of Am., N.A.***, *supra*; *Lucia v Wells Fargo Bank, N.A., supra*; ***Hart v Countrywide Home Loans, Inc.***, *supra*), neither the engagement in the processing of **[*374]** loan modification applications nor the issuance of a TPP gives rise to a right on the part of borrowers to permanent loan modifications if they successfully complete the trial plan payments (*see* ***Steffens v American Home Mtge. Servicing, Inc.***, *supra*; ***Ramos v Wells Fargo Home Mtge., supra***; *Keosseian v Bank of Am., supra*; *Bourdelais v J.P. Morgan Chase, supra*; *Senter v JPMorgan Chase Bank, N.A., supra* **[****10]** ; *Grill v BAC Home Loans Servicing LP, supra*; *Zoher v Chase Home Fin., supra*; *Robinson v Wells Fargo Bank, N.A., supra*; ***Escobedo v Countywide Home Loans, Inc.***, *supra*).

Nor did the Ilardos establish an entitlement to summary judgment on their counterclaims **[***27]** for a judicially imposed permanent modification of their mortgage loan and the eradication of accrued interest and loan deficiencies under state law theories. ***HN12***[↑] Under New York law, the elements of a cause of action to recover damages for breach of contract are: the existence of a contract, the claimant's performance under the contract, the defendant's breach of that contract, and resulting damages (*see* ***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, *83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]*; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, *69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]*). ***HN13***[↑] A contract should be read as a whole and interpreted as to give effect to its general purpose (*see* ***Beal Sav. Bank v Sommer***, *8 NY3d 318, 324-325, 834 NYS2d 44, 865 NE2d 1210 [2007]*).

[2] The Ilardos' claims that the TPP was a binding contract and the plaintiff breached it by failing to offer a permanent modification after the Ilardos successfully performed are rejected as unmeritorious. Assuming, without so finding, that such claims are sufficiently distinct from claims that the plaintiff breached HAMP directives or guidelines, there has been no offer of proof that the plaintiff breached any binding obligation imposed upon **[***28]** it under the terms of the TPP, as the issuance of permanent modification was conditioned upon a number of events. The TPP between the parties here contains terms identical to those in the *Costigan* case, with respect to which the *Costigan* court stated as follows:

> "Although the TPP states that Citi 'will provide [the borrower] with a Home Affordable Modification Agreement' [(TPP Preamble)] if the borrower is in compliance with the TPP, it also unequivocally states that the TPP does not constitute a permanent modification of the original loan; by signing the TPP, Costigan attested that he
>
> " 'understand[s] that this Plan is not a modification **[*375]** of the Loan Documents and that the Loan Documents will not be modified unless and until (i)[he] meets all of the conditions required for modification, (ii)[he] receive[s] a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed.' [(*Id.* § 2.G.)]
>
> "The TPP ponders that '[i]f prior to the Modification Effective Date . . . the Lender does not provide [the borrower] with a fully executed copy of . . . the Modification Agreement . . . the Loan documents will not be modified . . . .' [(*Id.* § 2.F.)] **[**841]** By signing the TPP, Costigan 'agree[d] **[***29]** that [Citi] will not be obligated or bound to make any modification of the Loan Documents if [Citi] determines that [Costigan does] not qualify.' [(*Id.*)] The Complaint fails to plead that Costigan met 'all of the conditions required for modification' and Citi clearly never received a 'fully executed copy of the Modification Agreement' " (*2011 WL 3370397 at *6, 2011 US Dist LEXIS 84860 at *21-22*).

This court finds this reasoning persuasive and thus finds that the Ilardos' breach of the TPP claim "is contradicted by the express terms of the TPP agreement, which states that any permanent modification is subject to the subsequent approval of Chase, and the receipt of a signed modification agreement" (*Costigan v CitiMortgage, Inc., 2011 WL 3370397 at *6, 2011 US Dist LEXIS 84860 at *20-21*, quoting *Thomas v JPMorgan Chase & Co., 811 F Supp 2d 781, 796, 2011 WL , at p.26 [2011]*). Here, it is not disputed that the **[****11]** Ilardos' NPV result was properly calculated as "negative" at 26%, well below the 31% threshold imposed upon qualification. Since the Ilardos make no claim that the plaintiff breached an enforceable obligation imposed by any unconditional term of the TPP, such as the suspension of a scheduled foreclosure sale, their breach of contract claims, to the extent premised upon the terms of **[***30]** the TPP, are without merit (*see Thomas v JPMorgan Chase & Co., supra*; *Stolba v Wells Fargo & Co., supra*; *Keosseian v Bank of Am., supra*). Moreover, since there is no federal entitlement to a permanent loan modification, the plaintiff did not breach the TPP by failing to offer a permanent modification of the loan, even though the Ilardos fulfilled their installment payment obligations thereunder. As indicated above, *HN14*[↑] performance on the part of the claimant is but one element of a breach of contract claim. The court thus finds that the Ilardos are not entitled to the affirmative relief demanded under the common law of contracts.

[*376] **[3]** Also without merit are the Ilardos' claims of waiver. *HN15*[↑] Under principles of New York jurisprudence, a waiver is a voluntary relinquishment of a known right that should not be lightly presumed (*see Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 520 NE2d 512, 525 NYS2d 793 [1988]*; *Fish King Enters. v Countrywide Ins. Co., 88 AD3d 639, 930 NYS2d 256 [2d Dept 2011]*). In the TPP, the plaintiff expressly reserved its right to all remedies afforded under original loan documents, including its right to foreclose in the event of a default. The record here is devoid of any evidence **[***31]** of a waiver of any right to foreclose on the part of the plaintiff (*see Federal Home Loan Mtge. Corp. v Drofan Realty Corp., 1996 US Dist LEXIS 345, 1996 WL 15680 [SD NY 1996]*; *Federal Home Loan Mtge. Corp. v 141st St. & Broadway Realty Co., 1994 US Dist LEXIS 103, 1994 WL 9686 [SD NY 1994]*).

[4] Equally lacking in merit are the defendants' claims for relief under principles of promissory estoppel. *HN16*[↑] "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (***Agress v Clarkstown Cent. School Dist.**, 69 AD3d 769, 771, 895 NYS2d 432 [2d Dept 2010]*). *HN17*[↑] The requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties (*see Southern Fed. Sav. & Loan Assn. of Georgia v 21-26 E. 105th St. Assoc., 145 BR 375, 383 [SD NY 1991], affd 978 F2d 706 [2d Cir 1992]*). In addition, *HN18*[↑] the conduct relied upon to establish estoppel must *not* be otherwise compatible with the agreement between the parties as written (*see Rose v [**842] Spa Realty Assoc., 42 NY2d 338, 366 NE2d 1279, 397 NYS2d 922 [1977]*; *Southern Fed. Sav. & Loan Assn. of Georgia v 21-26 E. 105th St. Assoc., supra* **[***32]**). Because the TPP agreement unequivocally states that it does not constitute a permanent modification of the Ilardos' loan, the other portions wherein it states that if the borrowers returned executed TPP agreements with supporting documentation and made their TPP payments, they would receive a permanent HAMP modification are insufficient to establish a claim of promissory estoppel (*see Costigan v CitiMortgage, Inc., supra*; *Thomas v JPMorgan Chase & Co., supra*; *cf. Picini v Chase Home Fin. LLC, supra*).

[5] Likewise unavailing are the asserted claims of equitable estoppel. *HN19*[↑] Although a mortgage lender may be estopped from asserting rights under a mortgage to prevent a fraud or injustice upon the person against whom enforcement is sought, the reliance **[*377]** upon the lender's words or promises **[****12]** must be justifiable and such words must mislead the borrower to a detriment (*see Red Tulip, LLC v Neiva, 44 AD3d 204, 842 NYS2d 1 [1st Dept 2007]*; *Carver Fed. Sav. & Loan Assn. of N.Y. v Glanzer, 186 AD2d 706, 588 NYS2d 905 [2d Dept 1992]*). Here, no justifiable reliance on the terms of the TPP has been shown to exist **[***33]** (*see Costigan v CitiMortgage, Inc., supra*; *Thomas v JPMorgan Chase & Co., supra*; *cf. Picini v Chase Home Fin. LLC, supra*). To the extent that the Ilardos' unsubstantiated and nonspecific allegations of misleading and unconscionable conduct and bad faith over the course of the unsuccessful modification may be construed as sounding in tort, they are legally insufficient (*see Baer v Complete Off. Supply Warehouse Corp., 89 AD3d 877, 934 NYS2d 179 [2d Dept 2011]*; *Ford v Waxman, 50 AD2d 585, 375 NYS2d 145 [2d Dept 1975]*; *see also Federal Home Loan Mtge. Corp. v Drofan Realty Corp., supra*; *Federal Home Loan Mtge. Corp. v 141st St. & Broadway Realty Co., supra*; *see also Thomas v JPMorgan Chase & Co., supra*; *Hemenway v Wells Fargo, N.A., supra*).

[6] The court rejects the defendants' claim that their motion should be granted in light of the failure of the plaintiff to file a request for judicial intervention (RJI) upon the filing of the proofs of service as required by Uniform Rules for Trial Courts *(22 NYCRR) § 202.12-a (b)*. *HN20*[↑] The rule does not require that the plaintiff file the RJI upon the filing of proof of service

upon the borrower, who is likely one of several proper party defendants to be joined in the action. Additionally, there **[***34]** is no time requirement imposed upon the filing of proof of service effected by personal delivery (*see* CPLR 308 [1]). ***HN21***[↑] Since a plaintiff has as long as 120 days to effect service, and even longer if it be extended by the court, the rule does not mandate the immediate filing of the RJI. In any event, ***HN22***[↑] dismissal of any claim due to a default in the observance of procedural statutes is considered a drastic remedy available only upon a clear showing of wilful and contumacious conduct (*see* CPLR 3126; ***Orgel v Stewart Tit. Ins. Co.***, *91 AD3d 922, 938 NYS2d 131 [2d Dept 2012]*; *see also* CPLR 3216; ***Atterberry v Serlin & Serlin***, *85 AD3d 949, 949, 925 NYS2d 860 [2d Dept 2011]* [***HN23***[↑] CPLR 3216 is an "extremely forgiving" statute which "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed"]). Here, the Ilardos failed to demonstrate a violation of *22 NYCRR 202.12-a (b)* or that any such violation warrants the dismissal of this action and/or the granting of the other relief demanded.

[*378] **[**843]** Finally, the court declines the Ilardos' invitation to adopt the reasoning of the court in ***Wells Fargo Bank, N.A. v Meyers*** *(30 Misc 3d 697, 913 NYS2d 500 [2010]*, **[***35]** *supra*). While the court appreciates Acting Justice Sweeney's apparent frustration with the plaintiff's steadfast unwillingness to issue a permanent modification, ***HN24***[↑] a judicially imposed directive compelling the plaintiff to specifically perform a modification agreement, to which it had not assented and was not required to so assent by law, constitutes an unreasonable resort to equitable principles to override long-standing principles of contract law. Although many courts have found instances of bad faith negotiations on the part of banks in this recent flood of mortgage foreclosure actions, a resort to the court's equity powers in an effort to bring about a judicially desired result has had harsh results, including the cancellation of mortgages, the dismissal of various foreclosure actions with prejudice, the imposition of monetary sanctions well beyond the limits prescribed for frivolous conduct under *22 NYCRR part 130* and a judicially compelled loan modification. While appellate courts sort out the appropriateness of such action, this court remains guided by a more tempered approach reflective of fundamental **[****13]** pronouncements of law and equity issued by our Court of Appeals such as **[***36]** those set forth in ***Jo Ann Homes at Bellmore v Dworetz*** *(25 NY2d 112, 250 NE2d 214, 302 NYS2d 799 [1969]*). Writing for a unanimous panel, Judge Burke wrote:

> "Concededly, ***HN25***[↑] a foreclosure action is a 'proceeding in a court of equity which is regulated by statute.' (*Dudley v. Congregation of St. Francis, 138 N. Y. 451, 457, 34 NE 281, 282]*; see, also, *Amherst Factors v. Kochenburger, 4 NY2d 203, 173 NYS2d 570, 149 NE2d 863*) Nevertheless, *it is well settled that such a proceeding is unlike other equity actions in several ways*. Thus, ***HN26***[↑] while equity acts only in personam, an action for foreclosure 'is in the nature of a proceeding *in rem* to appropriate the land'. (*Reichert v. Stilwell, 172 N. Y. 83, 89, 64 NE 790, 792*.) Just as this court sustained the legality of a mortgage where the note was illegal (*Amherst Factors v. Kochenburger, supra*.;), we now conclude that ***HN27***[↑] a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation. The trial court, which was the court of equitable jurisdiction in this instance, chose not to sustain the defense of fraud in the foreclosure proceeding and neither common sense nor precedent warrants a contrary determination" (*id. at 122* [emphasis **[***37]** added]).

[*379] More recently, the Second Department reminded us that ***HN28***[↑] the " 'stability of contract obligations must not be undermined by judicial sympathy' " (***Emigrant Mtge. Co., Inc. v Fisher***, *90 AD3d 823, 824, 935 NYS2d 313 [2011]*, quoting ***First Natl. Stores v Yellowstone Shopping Ctr.***, *21 NY2d 630, 638, 237 NE2d 868, 290 NYS2d 721 [1968]*, quoting ***Graf v Hope Bldg. Corp.***, *254 NY 1, 4-5, 171 NE 884 [1930]*).[1] In *Graf*, Judge O'Brien found as follows:

> "Plaintiffs may be ungenerous, but generosity is a voluntary attribute and cannot be enforced even by a chancellor. Forbearance is a quality which under the circumstances of this case is likewise free from coercion. Here there is no penalty, no forfeiture (*Ferris v. Ferris, 28 Barb. 29, 16 How Pr 102*; *Noyes v. Anderson, 124 N. Y. 175, 180, **[**844]** 26 NE 316, 317, 21 Am St Rep 657*), nothing except a covenant fair on its face to which both parties willingly consented. It is neither oppressive nor unconscionable. (*Valentine v. Van Wagner, 37 Barb. 60, 23 How Pr 400*.) ***HN29***[↑] In the absence of some act by the mortgagee which a court of equity would be justified in considering unconscionable, he is entitled to the benefit of the covenant. The contract is definite and no reason appears for its reformation by **[***38]** the courts. (*Abrams v. Thompson, 251 N. Y. 79, 86, 167 N E 178*.) ***HN30***[↑] We are not at liberty to revise while professing to

[1] The Second Department in *Fisher* reversed the order of the trial court which reduced the mortgagors' monthly payments due, among other things, to the trial court's apparent sympathy for the distressed financial circumstances of the borrowers who were suffering from one or more medical conditions.

construe. (*Sun P. & P. Assn. v. Remington P. & P. Co., 235 N. Y. 338, 346, 139 N E 470*.) Defendant's mishap, caused by a succession of its errors and negligent omissions, is not of the nature requiring relief from its default. Rejection of plaintiffs' legal right could rest only on compassion for defendant's negligence. Such a tender emotion must be exerted, if at all, by the parties rather than by the court. Our guide must be the precedents prevailing since courts of equity were established in this State. Stability of contract obligations must not be undermined by judicial sympathy. To allow this judgment to stand would constitute an interference by this court between **[****14]** parties whose contract is clear" (*Graf, 254 NY at 4-5*).[2]

Guided as it is by the foregoing precedents, this court finds that ***HN31***[] a determination not to modify a mortgage loan by a **[*380]** foreclosing bank that is under no legal obligation to modify such a loan is not unconscionable conduct and does not constitute bad faith. Even if it did, resort to the equitable powers of this court as a means to judicially impose a loan modification would, in the opinion of this court, be inappropriate. The court thus declines to invoke its equity powers in aid of the granting of the defendants' demands for a judicially imposed permanent loan modification **[***40]** and the other relief demanded by them.

In view of the foregoing, the defendants' motion for summary judgment on their counterclaims is denied and reverse summary judgment dismissing the defendants' counterclaims, pursuant to *CPLR 3212 (b)*, is awarded to the plaintiff.

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[2] Because the result in *Graf* is predicated upon a rejection **[***39]** of a resort to equity in aid of a borrower, it has its detractors (*see* ***Di Matteo v North Tonawanda Auto Wash**, 101 AD2d 692, 476 NYS2d 40 [4th Dept 1984]*). It is nevertheless applied regularly in cases wherein there has been a default in the payment of principal and interest (*see* ***Red Tulip, LLC v Neiva**, 44 AD3d 204, 842 NYS2d 1 [2007]*; ***Hudson City Sav. Inst. v Burton, 88 AD2d 728, 451 NYS2d 855 [3d Dept 1982]***; *Federal Home Loan Mtge. Corp. v Drofan Realty Corp., supra*; *Federal Home Loan Mtge. Corp. v 141st St. & Broadway Realty Co., supra*; *see also* 1 Mortgages and Mortgage Foreclosure in New York § 28:17).

Matter of Morris v New York City Dept. of Health & Mental Hygiene

Supreme Court of New York, New York County

September 29, 2013, Decided

100845/13

Reporter
41 Misc. 3d 1209(A) *; 980 N.Y.S.2d 276 **; 2013 N.Y. Misc. LEXIS 4476 ***; 2013 NY Slip Op 51635(U) ****; 2013 WL 5566613

[**1]** In the Matter of the Application of Barbara Morris, Petitioner, against New York City Department of Health and Mental Hygiene, Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Later proceeding at *Matter of Morris v. New York City Dept. of Health & Mental Hygiene, 2015 N.Y. App. Div. LEXIS 477 (N.Y. App. Div. 1st Dep't, Jan. 15, 2015)*

Decision reached on appeal by *Matter of Rossi v. New York City Dept. of Parks & Recreation, 2017 N.Y. App. Div. LEXIS 2689 (N.Y. App. Div. 1st Dep't, Apr. 11, 2017)*

Prior History: *Matter of Morris v. New York City Dept. of Health & Mental Hygiene, 2013 N.Y. Misc. LEXIS 4448 (N.Y. Sup. Ct., Sept. 25, 2013)*

Core Terms

vending, food, mobile, veterans, vendors, waiting list, Decisions, disabled, citywide, restricted area, protections, regulated, licenses, restrictions, specialized, limits, merits

Headnotes/Summary

Headnotes

[*1209A] [276]** Licenses--Food Vendors--Disabled War Veteran's Exception Extended to Widows.

Judges: [*1]** JOAN B. LOBIS, J.S.C.

Opinion by: JOAN B. LOBIS

Opinion

Joan B. Lobis, J.

Barbara Morris, acting pro se, brings this petition under *Article 78 of the New York Civil Practice Law and Rules.* She challenges the denial of her application for a restricted area mobile food vending permit and seeks priority for a citywide mobile food vending permit based on transference rights as the widow of a disabled veteran. Respondent New York City

Department of Health and Mental Hygiene (DOH) opposes the petition. For the reasons set forth below, the petition is granted in part and denied in part.

Petitioner Barbara Morris is the widow of John K. Morris, a veteran with service-related disabilities. Ms. Morris avows that Mr. Morris served in the Navy. At the time of his death in 2009, he was 45th on the disabled veterans' waiting list to receive a mobile food vending permit.

Since 2009, Ms. Morris has had a mobile food vendor license issued by the DOH and sells hot dogs, pretzels, and beverages from pushcarts of disabled veterans who already have mobile food vending permits. She has also applied for a citywide mobile food vending permit. On March 22, 2013, Ms. Morris applied for her own restricted area mobile food vending permit.

That **[***2]** same month this Court issued a series of decisions, including *Rossi v. New York City Department of Parks and Recreation, Index No. 103794/2012, 2013 NY Misc. LEXIS 1092 (NY County Sup. Ct., Mar. 20, 2013)*[1] (collectively the "March 2013 Decisions"). In the **[****2]** March 2013 Decisions, food-vending veterans with service-related disabilities challenged notices of violation that they had received in operating hot dog pushcarts. The violations generally cited the New York City Department of Parks and Recreation regulation, Section 1-03(c)(1) of Title 56 of the Rules of the City of New York, which prohibits a person from failing "to comply with the lawful direction or command" of an officer. The legal authority upon which the directive to move was based was *New York General Business Law Section 35-a*. That state statute, among other things, limits the amount of space that a specialized vending licensee can take up at a given location and limits the number of specialized vending licensees in particular areas. Under *Section 35-a*, the New York City Department of Consumer Affairs (DCA) issues specialized vending licenses that restrict by location, size of vending area, and number of vendors per area, **[***3]** among others, veterans with service-related disabilities who are general vendors. This Court, construing the face of the statute, found that *Section 35-a* distinguishes general vendors, who are regulated by the DCA, from certain other types of vendors, including food vendors, who are regulated by the DOH. It held that *Section 35-a*, which was enacted as a narrow exception restricting certain veteran protections provided under *New York General Business Law Sections 32* and *35*, did not extend to food vendors.[2]

In response to the March 2013 Decisions, holding that the veterans' restrictions **[***4]** enacted under *General Business Law Section 35-a* did not extend to food vendors, the DOH issued a letter dated April 1, 2013, signed by its General Counsel, Thomas Merrill, addressed to "To Whom It May Concern" (the "Merrill Interpretation"). General Counsel Merrill interpreted this Court's decision as requiring that since the veterans' restrictions under *Section 35-a* did not extend to food vendors, the general protections for veterans under *General Business Law Sections 32* and *35* did not apply to them either.[3] General Counsel Merrill threatened "appropriate enforcements [sic] proceedings" against these disabled veteran food vendors for any failure to comply with all local laws regulating food vending regardless of any previous exemptions.

On April 15, 2013, the DOH denied Ms. Morris's application for a restricted area mobile food vending permit. Steven Linden, Director of Licensing for the DOH, wrote to Ms. Morris that "due to ongoing litigation, you may submit an application for a restricted area' mobile food vending permit only if you have a contract from the Department of Parks and Recreation authorizing you **[***5]** to vend on Parks property." **[****3]**

As a result of the April 15 denial of her application, Ms. Morris brought this Article 78 petition in June, challenging that determination as arbitrary and capricious. As relief she seeks an order compelling the DOH to issue her a restricted area mobile food vending permit without requiring that she contract with the Parks Department to be eligible for that permit. Additionally

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[1] Related proceedings appear at *Belkebir v. New York City Department of Parks and Recreation, Index No. 103796/2012, 2013 NY Misc. LEXIS 1097 (NY County Sup. Ct., Mar. 20, 2013)*; *Diaz v. New York City Department of Parks and Recreation, Index No. 103795/2012, 2013 NY Misc. LEXIS 1098 (NY County Sup. Ct., Mar. 20, 2013)*; and *Rossi v. New York City Department of Parks and Recreation, Index No. 103792/2012, 2013 NY Misc. LEXIS 1117 (NY County Sup. Ct., Mar. 20, 2013)*.

[2] No motion to reargue or renew was submitted following the March 2013 Decisions. The Respondent in those proceedings has filed notices of appeal.

[3] The DOH was not a party to the proceedings in the March 2013 Decisions.

she claims that she is entitled to priority on the waiting list for a citywide full-term mobile food vending permit because the DOH impermissibly refused to transfer her husband's position on the waiting list to her.

Later, on June 27, 2013, in separate proceedings, this Court denied cross-motions by the DOH to dismiss petitions by similarly-situated food vendors seeking a declaration that the Merrill Interpretation was *ultra vires*, and that the state legislature's protections for veterans continued to apply to these disabled veteran food vendors notwithstanding this Court's March 2013 Decisions. *Rossi v. NY City Dep't of Health and Mental Hygiene*, Index No. 100562/2013; *Rivera v. NY City Dep't of Health* ***[***6]*** *and Mental Hygiene*, Index No. 100563/2013; *Belkebir v. NY City Dep't of Health and Mental Hygiene*, Index No. 100564/2013; *Rossi v. NY City Dep't of Health and Mental Hygiene*, Index. No. 100565/2013 (collectively the "Merrill Interpretation Decisions"). On August 26, 2013, following the DOH's answer in those actions, this Court in final dispositions declared that the Merrill Interpretation was *ultra vires*, and that the protections continued to apply.

In its Answer to the petition now before this Court, the DOH opposed Ms. Morris's petition on three grounds. Notwithstanding this Court's disposition denying the motion to dismiss in the Merrill Interpretation Decisions at the time that the DOH submitted its Answer, the DOH claims that Ms. Morris has failed to establish her right to the relief sought. While conceding that this Court has rejected its legal position regarding the applicability of *General Business Law Section 35-a*, the DOH reasserts its position. In its second affirmative defense, citing doctrines of collateral estoppel and res judicata, the DOH claims that Petitioner's claim for priority on the city-wide mobile vending waiting list is barred by the disposition of Petitioner's 2012 petition arising out of a prior application that was dismissed as untimely. **[***7]** Lastly, in a third affirmative defense, the DOH claims that any priority on any waiting list held by Ms. Morris's deceased husband is not transferable to Ms. Morris as a matter of law.

In reply, Ms. Morris argues that her 2013 application should not have been denied even though the respondent in this Court's March 2013 Decisions has appealed those determinations.[4] Ms. Morris contends that this Court's prohibition against enforcing restrictions that apply to general vendors under *General Business Law Section 35-a* on food vendors as well is not stayed. She further argues that the 2012 petition was not adjudicated on the merits and accordingly cannot bar any consideration of the merits of her claim for priority on the citywide **[****4]** mobile food vending waiting list raised in the petition presently before this Court. Lastly, Petitioner argues that she is entitled to priority on the waiting list through her spousal relationship to her deceased husband.

In an Article 78 proceeding, the judiciary reviews an administrative action to determine whether that action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. *E.g.*, *Pell v. Bd. of Educ., 34 NY2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974)*; *Roberts v. Gavin, 96 AD3d 669, 671, 948 N.Y.S.2d 36 (1st Dep't 2012)*. Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. *E.g.*, *Dunne v. Kelly, 95 AD3d 563, 564, 944 N.Y.S.2d 89 (1st Dep't 2012)*; *see also Lynch v. City of NY, 108 A.D.3d 94, 965 N.Y.S.2d 441, 445 (1st Dep't 2013)* (statute must be read and given effect as written by legislature). Agencies may not "create whatever rule they deem necessary" that conflicts with the statutes that they interpret. *NY Statewide Coalition of Hispanic Chambers of Commerce v. NY City Dep't of Health and Mental Hygiene, 110 A.D.3d 1, 970 N.Y.S.2d 200, 2013 WL 3880139 (1st Dep't 1013)*; *see also County of Westchester v. Bd. of Trustees, 9 NY3d 833, 835-36, 872 N.E.2d 858, 840 N.Y.S.2d 746 (2007)* (administrative agency's regulations must not conflict with **[***9]** state statute or that statute's underlying purposes); *Edenwald Contracting Co. v. City of NY, 86 Misc 2d 711, 720, 384 N.Y.S.2d 338 (NY County Sup. Ct. 1974)* (agency cannot step beyond powers conferred upon it by statute); *aff'd, 47 AD2d 610, 366 N.Y.S.2d 363 (1st Dep't 1975)*.

This Court finds that Petitioner has established her right to compel the DOH to consider her application for a restricted area mobile food vending permit without any "contract from the Department of Parks and Recreation authorizing you to vend on Parks property." As this Court determined in the March 2013 Decisions, the restrictions in *General Business Law Section 35-a*, which created a narrow exception to the general protections for veterans under *General Business Law Sections 32* and *35*, do not extend to food vendors. Since 1896, *Subsection 1 of Section 32* of the New York State General Business Law, in pertinent

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[4] While the pro se petitioners in the March 2013 Decisions captioned their papers naming the Department of Parks and Recreation as respondent, the body which issued the final determination for review was the Environmental Control Board, within the **[***8]** Office of Administrative Trials and Hearings, see ***New York City Charter Section 1049-a***, and that body defended the action.

part, has expressly extended the protections of disabled war veterans to their widows: "Every honorably discharged member of the armed forces . . . and the surviving spouse of any such veteran . . . shall have the right to hawk, peddle, vend and sell goods, wares or merchandise or solicit trade." Those protections extend further to exempt **[***10]** veterans who are disabled as a result of service-related injuries from restrictions on "hawking or peddling, without the use of any but a hand driven vehicle, in any street, avenue alley, lane or park of a municipal corporation . . . ." *Gen. Bus. Law § 35*.

This record shows that Ms. Morris has a food vending license but needs a permit to operate her own cart. *NYC Admin. Code § 17-306(d)*. It is uncontroverted that Ms. Morris may obtain a restricted area mobile food vending permit without a waiting list. As the DOH explained to Ms. Morris, those "permits are *exempt* from the statutory limits which apply to street vending . . . . They do, however, authorize vending on . . . property under the jurisdiction of the New York City Department of Parks and Recreation."

The DOH's claim that this Court's rulings in the March 2013 Decisions have been **[****5]** statutorily stayed based on the Environmental Control Board's appeal as respondent in those cases does not impact this determination. *See, e.g.*, *All Am. Crane Serv. Inc. v. Omran, 58 AD3d 467, 467, 871 N.Y.S.2d 106 (1st Dep't 2009)*; *Pokoik v. Dep't of Health Servs., 220 AD2d 13, 15-16, 641 N.Y.S.2d 881 (2d Dep't 1996)* (governmental party's appeal does not "restore the case to the status **[***11]** which existed before it was issued . . . an order does not become undecided and the declaratory provisions are not undeclared" when that party serves notice of appeal). In its own Answer in this action, the DOH has attached its answer in a prior petition filed by Ms. Morris. As recently as last year when it filed that answer, the DOH acknowledged in those papers that the Department of Consumer Affairs only regulates "non-food goods and services." Those powers to regulate, it admitted, include issuing "specialized vending licenses." *General Business Law Section 35-a*, it further admitted, "sets forth the provisions for specialized vending licenses." *See also 6 RCNY § 2-315* (DCA regulation setting forth application procedures for honorably discharged veterans eligible for specialized vending licenses under *Section 35-a*). These prior admissions by the DOH and regulatory scheme reinforce this Court's ruling that any automatic stay does not affect this Court's determinations prohibiting impermissibly extending *General Business Law Section 35-a* to restrict food vendors.[5]

This Court next addresses the DOH's contention that Ms. Morris is collaterally estopped or barred by the doctrine of res judicata from litigating her claim for priority on the citywide mobile food vending waiting list. Dismissals for untimeliness are not dismissals on the merits. *See, e.g., Omansky v. Lapidus & Smith, LLP, 273 AD2d 110, 111, 709 N.Y.S.2d 88 (1st Dep't 2000)* (complaint should not have been dismissed on grounds of collateral estoppel and res judicata since prior dismissal was not on merits). In denying Ms. Morris's earlier petition, Justice Mendez specifically dismissed the proceeding **[***13]** "as untimely and barred by the statute of limitations." In raising this claim, the DOH simply misstates the relevant procedural history: "Justice Manual [sic] J. Mendez of the New York Supreme Court denied the petition and dismissed the proceeding on the merits as barred by the statute of limitations."

Lastly this Court considers Ms. Morris's request for priority on the citywide mobile food vending waiting list. In this case, the record shows that a prior request for preference on the waiting list was already dismissed as untimely by Justice Mendez. There is nothing in the record before this Court to show that Ms. Morris has made any additional request for priority on the citywide mobile vending waiting list. At this time, therefore, there is no final **[****6]** administrative action before this Court to review. *See CPLR § 7801(1)*. Accordingly, it is

ADJUDGED that the petition is granted in part to the extent that the DOH's denial of Ms. Morris's application for a restricted area mobile food vending permit for lack of a contract to vend on Parks property is vacated and remanded for further consideration without that condition, and it is further

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[5] This Court notes that the parties include settlement correspondence offering Ms. Morris a disabled veteran's mobile food **[***12]** unit vending permit. *See 24 RCNY § 6-13*. Ms. Morris rejected that offer based on the regulation's specific incorporation by reference to *General Business Law Section 35-a*, which in multiple decisions now this Court has held does not apply to food vending. As this Court noted in Ms. Rossi's determination in the March 2013 Decisions, the DOH may continue to regulate food vendors but *Section 35-a* references must be read as severed from any such regulations. *Rossi v. NY City Dep't of Health and Mental Hygiene*, Index No. 100562/2013, slip op. at 7; *see, e.g.*, ***Ricketts v. City of NY, 281 AD2d 245, 245, 722 N.Y.S.2d 25 (1st Dep't 2001)***.

ADJUDGED that the petition is denied to the extent **[***14]** that Ms. Morris seeks priority on any waiting list for a citywide full-term mobile food vending permit.

Dated: September 29, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

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Morales v. Chase Home Fin. LLC

United States District Court for the Northern District of California

April 11, 2011, Decided; April 11, 2011, Filed

No. C 10-02068 JSW

Reporter
2011 U.S. Dist. LEXIS 49698 *; 2011 WL 1670045

HERMINIA MORALES, et al., Plaintiffs, v. CHASE HOME FINANCE LLC, et al., Defendants.

Subsequent History: Appeal withdrawn by *Morales v. Chase Home Fin. LLC, 2012 U.S. App. LEXIS 25487 (9th Cir. Cal., Dec. 13, 2012)*

Core Terms

modification, trial period, permanent, documentation, borrowers, servicer, eligible, promise, alleges, modify, modification agreement, motion to dismiss, Mortgage, Lender, breach of contract claim, Rosenthal Act, unfair, loans, fair dealing, good faith, amend, terms, claim for relief, communications, Supplemental, collection, guidelines, Directive, covenant, promissory estoppel

Counsel: **[*1]** For Herminia Morales, individually and on behalf of all others similarly situated, Michelle Suranofsky, individually and on behalf of all others similarly situated, Plaintiffs: Whitney Huston, LEAD ATTORNEY, James C. Sturdevant, The Sturdevant Law Firm, San Francisco, CA; Cynthia Lynn Singerman, Elizabeth Scott Letcher, Maeve Elise Brown, Noah Zinner, Housing and Economic Rights Advocates, Oakland, CA.

For Chase Home Finance LLC, a Delaware limited liability company, Chase Home Finance, Inc., a Delaware corporation, JPMorgan Chase Bank, N.A., a national banking association, Defendants: Wendy M. Garbers, LEAD ATTORNEY, Rita Lin, Morrison & Foerster LLP, San Francisco, CA; Michael John Agoglia, Morrison & Foerster, San Francisco, CA.

For JPMorgan Chase & Co., a Delaware corporation, Defendant: Wendy M. Garbers, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING MOTION TO DISMISS

Now before the Court is the motion filed by Defendants Chase Home Finance LLC and JPMorgan Chase Bank, N.A. (collectively, "Chase") to dismiss the complaint filed by Plaintiffs Herminia Morales and Michelle Suranofsky ("Plaintiffs"). **[*2]** The Court grants the pending motions for leave to file notice of supplemental authority. (Doc nos. 49, 63, 64, 65, 66, 67, 71, 74, 75.) Having reviewed the pleadings and papers submitted on the motion and having considered the relevant legal authority and arguments of counsel, the Court hereby GRANTS Chase's motion to dismiss.

BACKGROUND

Plaintiffs filed this putative class action on May 14, 2010, on behalf of all California homeowners whose loans have been serviced by Defendants and who have complied with their obligations under a written Home Affordable Modification Program ("HAMP") Trial Period Plan ("TPP") Contract, but who have not received a permanent HAMP modification. (Compl. ¶ 94.)

A. The Home Affordable Modification Program

Pursuant to the Emergency Economic Stabilization Act of 2008, the United States Department of Treasury implemented HAMP as a program designed to provide affordable mortgage loan modifications and other alternatives to foreclosure for eligible borrowers. (Compl. ¶ 3.) Chase began processing loans under HAMP on April 6, 2009, and on July 31, 2009, entered into a Servicer Participation Agreement ("SPA") with the federal government. (Compl. ¶ 32.) Chase entered **[*3]** into an Amended and Restated SPA on March 24, 2010. (*Id.* ¶ 32 and Ex. 1.) The SPA requires incorporates supplemental documentation and guidelines issued by the Department of Treasury, Fannie Mae or Freddie Mac, collectively known as the "Program Guidelines." (*Id.* ¶ 33 and Ex. 1, § 1.B.)

Fannie Mae issued the first Supplemental Directive ("SD 09-01") in April 2009 which set forth HAMP eligibility guidelines. (*Id.* ¶ 33 and n.10.) *See* SD 09-01, available at *www.hmpadmin.com*. The guidelines set forth basic eligibility criteria and requires the servicer to perform a net present value ("NPV") analysis, comparing the NPV of a modified loan to the NPV of an unmodified loan. (Compl. ¶ 35; SD 09-01 at 4-5.) The servicer is required to apply a sequence of steps, the "Standard Modification Waterfall," to evaluate a hypothetical loan modification that would lower the borrower's payment to no greater than 31% of the borrower's gross monthly income. (Compl. ¶ 35; SD 09-01 at 8-10.) The Standard Modification Waterfall includes the steps of reducing the interest rate in increments of .125% down to the floor interest rate of 2%, extending the term of the loan, and forgiving principal. (SD 09-01 at 9-10.) **[*4]** "If the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed 'positive' and the servicer MUST offer the modification." (SD 09-01 at 4; Compl. ¶ 36.) "If the NPV result for no modification is greater than NPV result for the modification scenario, the modification result is deemed 'negative' and the servicer has the option of performing the modification in its discretion." (SD 09-01 at 4.)

Under HAMP, "[s]ervicers must use a two-step process for HAMP modifications. Step one involves providing a Trial Period Plan outlining the terms of the trial period, and step two involves providing the borrower with an Agreement that outlines the terms of the final modification." (SD 09-01 at 14.) Under the TPP the homeowner makes mortgage payments based on adjusted loan terms during a three-month trial period. (Compl. ¶ 37; SD 09-01 at 17-18.) Plaintiffs allege that Chase offers TPPs to eligible homeowners through a TPP Contract which promises a permanent HAMP modification for those homeowners who make the required payments under the plan and fulfill the documentation requirements. (Compl. ¶ 38.)

B. Plaintiff Morales

Plaintiff Morales refinanced **[*5]** her home in February 2007 for a $607,750 mortgage from Washington Mutual, now Chase. (Compl. ¶ 49.) Morales first applied to Chase for a loan modification in March 2009 and was denied in May 2009 for missing documentation. (*Id.* ¶ 51.) On June 16, 2009, Morales again applied for a loan modification and was denied because her expenses were too high. (*Id.* ¶ 52.) Morales submitted an updated form with updated income documentation and was approved by Chase for a trial modification under HAMP on July 24, 2009. (*Id.* ¶¶ 53-54.) Chase sent and Morales executed a standard form contract entitled "Home Affordable Modification Trial Period Plan (Step One of Two-Step Documentation Process)" (the "TPP Contract"), which states in part:

> 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.

(Compl. ¶ 55 and Ex. 2.) The TPP Contract provided that Morales make three trial period **[*6]** payments of $1,960.44. (*Id.* ¶ 57.) Morales timely executed the TPP contract and made payments for August 1, September 1 and October 1, 2009. (*Id.* ¶¶ 58-59.)

From October 3, 2009, Chase sent Morales about ten letters requesting documentation to evaluate her modification request and stating that her modification was "at risk" and asking Morales to continue making trial period payments. (*Id.* ¶¶ 60-66.) Morales made payments in November 2009, December 2009, January 2010, February 2010, March 2010 and April 2010, which Chase accepted. (*Id.* ¶ 67.)

Chase never offered Morales a HAMP final modification, nor did Chase send her a written denial. (*Id.* ¶ 68.) By letter dated March 11, 2010, Chase offered Morales a non-HAMP modification for an interest-only loan for ten years, with principal and interest payments amortized over a term longer than the life of the loan and a balloon payment of $399,766.63 at the end of the loan term. (*Id.* ¶ 69.) Morales alleges that she could not afford the initial payment under the proposed modification. (*Id.* ¶ 70.) She further alleges that Chase reported to credit reporting agencies that her mortgage payments from July 2009 to January 2010 were "180 days past due" **[*7]** without reporting that she was paying under a modified payment plan. (*Id.* ¶ 72.)

C. Plaintiff Suranofsky

Plaintiff Suranofsky refinanced her mortgage loan in 2006 for a $190,000 loan at 8.25% interest. (*Id.* ¶ 74.) She applied for a HAMP modification in July 2009, and Chase offered her a Trial Period Plan under HAMP to begin August 1, 2009. (*Id.* ¶¶ 76-77.) Suranofsky received the standard TPP Contract from Chase entitled "Home Affordable Modification Trial Period Plan (Step One of Two-Step Documentation Process)" which states in part:

> 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.

(Compl. ¶ 79 and Ex. 3 ¶ 1.) The TPP Contract further provides, "If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Lender will send me a Modification Agreement." (*Id.* Ex. 3 ¶ 3.)

The TPP Contract **[*8]** provided for three trial period payments of $613.00 due on August 1, September 1, and October 1, 2009. (*Id.* ¶ 80.) Suranofsky returned the executed TPP Contract with requested documentation and payment for $613.00 on August 15, 2009. (*Id.* ¶ 81.) She timely made her payments for September and October 2009. (*Id.* ¶ 82.) In October 2009, Chase sent Suranofsky letters requesting additional documentation to evaluate her modification request. (*Id.* ¶ 83.) Suranofsky sent the requested documentation. (*Id.* ¶ 84.) On October 20, 2009, a Chase representative called her to inform that she had been approved for final modification and that her packet would be sent within 30-60 days. (*Id.* ¶ 85.) The Chase representative told her that she should continue making payments under her Trial Period Plan and sent her additional TPP coupons for November 2009, December 2009 and January 2010. (*Id.*) After being erroneously informed that her house had been subject to a foreclosure sale, Suranofsky sought assistance from Project Sentinel, who contacted Chase in January 2010. (*Id.* ¶ 86.) Chase informed Suranofsky's representative that she had been denied a permanent modification in November 2009 for insufficient **[*9]** income. (*Id.* ¶¶ 86-87.)

Suranofsky reapplied for loan modification and was instructed to continue making TPP payments. (*Id.* ¶¶ 88-89.) Chase accepted her payments for November 2009, December 2009, and January through March 2010. (*Id.* ¶ 88.) On March 13, 2010, Chase informed Suranofsky's representative that she was being denied a permanent modification due to insufficient income. (*Id.* ¶ 90.) Suranofsky has not received a written denial from Chase. (*Id.*) Chase has reported to credit reporting agencies that Suranofsky is making mortgage payments under a modified plan, but that her payments are 180 days past due for November 2009 through at least February 2010. (*Id.* ¶ 93.)

D. Claims for Relief

Plaintiffs allege the following claims for relief: (1) breach of the Trial Period Plan Contract; (2) breach of covenant of good faith and fair dealing; (3) breach of the Servicer Participation Agreement contract; (4) promissory estoppel; (5) violation of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), *Cal. Civ. Code § 1788 et seq.*; (6) and violation of the Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*

Chase filed the instant motion to dismiss the complaint **[*10]** on July 23, 2010. The Court held a hearing on the motion to dismiss on September 17, 2010, and the matter was submitted.

LEGAL STANDARD

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. However, even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw **[*11]** the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly, 550 U.S. at 556-57*) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*.

ANALYSIS

A. Contract Claims Under the TPP Contract

1. Breach of Contract Claim

In order to state a claim for breach of contract, Plaintiffs must allege "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." *First Commercial Mortg. Co. v. Reece, 89 Cal. App. 4th 731, 745, 108 Cal. Rptr. 2d 23 (2001)*.

Chase **[*12]** contends that this claim must be dismissed because Plaintiffs have not alleged a cognizable form of consideration to support the existence of a valid contract. Plaintiffs concede that they had a pre-existing duty to make mortgage payments, but argues that the TPP payments are sufficient consideration because the performance due under the TPP Contract "'differs in any way' from the pre-existing legal duty." (Pls' Opposition to Defs' Mot. to Dismiss ("Opp.") at 7 (quoting *House v. Lala, 214 Cal.App.2d 238, 243, 29 Cal. Rptr. 450 (1963)*.) Plaintiffs further contend that they offered other kinds of consideration in addition to the mortgage payments already due: (1) the TPP Contracts require Plaintiffs to make escrow payments to Chase for property taxes and insurance as a condition of eligibility for modification; (2) borrowers suffer derogatory credit reporting during the Trial Period; and (3) Plaintiffs must complete burdensome documentation requirements. (Opp. at 7.) Plaintiffs' allegations, accepted as true, support the existence of the contract to participate in the TPP for the three month trial period, but not a contract for permanent modification after the trial period expires.

Under California law, **[*13]** the intention of the parties as expressed in the contract is the source of contractual rights and duties. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage, 69 Cal. 2d 33, 38, 69 Cal. Rptr. 561, 442 P.2d 641 (1968)* ("*PG&E*"). In *Grill v. BAC Home Loans Servicing LP, 2011 U.S. Dist. LEXIS 3771, 2011 WL 127891 *4 (E.D. Cal. Jan. 14, 2011)*, the Court reviewed the language of the TPP Contract similar to the ones at issue here and determined that TPP Contract

contradicted the plaintiff's claim that a binding contract for loan modification existed. The TPP Contracts here contain the same language that the *Grill* court found insufficient to support a contract for permanent loan modification:

> I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (I) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.

(Compl. Ex. C ¶ 2G.) The *Grill* court determined that this contractual **[*14]** language "makes clear that providing the requested documents was simply a part of the application process, which plaintiff was willing to complete in the hope that BAC would modify his loan. Under the language of [the TPP Contract], a binding modification would not result unless and until BAC determined that plaintiff complied with the requirements. If BAC so determined, then it would send plaintiff a modification agreement, including a new monthly payment amount, which both plaintiff and defendant would execute." *2011 U.S. Dist. LEXIS 3771, 2011 WL 127891 *4*. Because Grill had failed to allege either that the lender determined that he had met the requirements or that the lender sent Grill a loan modification that was executed, the court dismissed the breach of contract claim with leave to amend. *Id. See Vida v. OneWest Bank, F.S.B., 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473 *6 (D. Or. Dec. 13, 2010)* ("The Trial Period Plan is explicitly not an enforceable offer for loan modification."). *See also Lonberg v. Freddie Mac, 776 F. Supp. 2d 1202, 2011 U.S. Dist. LEXIS 23137, 2011 WL 838943 (D. Or. March 4, 2011)*; *Wigod v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 7314, 2011 WL 250501 (N.D. Ill. Jan. 25, 2011)*.

The Court has reviewed the decisions of other district courts that have held that the TPP Contract supports **[*15]** a breach of contract claim by borrowers who entered the TPP Contract. Those decisions do not discuss the specific contract provision considered here and in *Grill*. *See Durmic v. J.P. Morgan Chase Bank, N.A., 2010 U.S. Dist. LEXIS 124603, 2010 WL 4825632 (D. Mass. Nov. 24, 2010)*; *Jackson v. Ocwen, 2011 U.S. Dist. LEXIS 12816, 2011 WL 587587 (E.D. Cal. Feb. 9, 2011)*. In *Bosque v. Wells Fargo Bank, N.A., 762 F.Supp.2d 342, 2011 U.S. Dist. LEXIS 8509, 2011 WL 304725 (D. Mass. 2011)*, the court reviewed other specific provisions of the TPP Contract but did not hold that terms of the TPP Contract created a contract for permanent modification. There, the court denied the lender's motion to dismiss the plaintiffs' breach of contract claim and noted that the plaintiffs did not argue "that the TPP is a contract for a permanent loan modification." *2011 U.S. Dist. LEXIS 8509, [WL] at *6*. The court determined that although the plaintiffs had previously argued that they were entitled to a permanent modification as long as they complied with their obligations under the TPP, the plaintiffs more recently relied on another contract theory that "they are merely entitled to a decision by Wells Fargo as to whether they will receive a permanent modification by the modification effective date specified in section 2 of the TPP." **[*16]** *2011 U.S. Dist. LEXIS 8509, [WL] at *4*. The *Bosque* plaintiffs alleged that Wells Fargo "failed to notify plaintiffs of *any* decision with regard to their loan modification status." *2011 U.S. Dist. LEXIS 8509, [WL] at *3*. The *Bosque* court denied the motion to dismiss the contract claim on the ground that "the TPP contains all essential and material terms necessary to govern the trial period repayments and the parties' related obligations," including "a decision on whether plaintiffs are entitled to the permanent modification." *2011 U.S. Dist. LEXIS 8509, [WL] at *6-7*.

Although Chase did not provide a written denial letter, Plaintiffs do not allege that Chase breached the contract by failing to notify them of any decision regarding modification, distinguishing them from the *Bosque* plaintiffs. (*See* Compl. ¶¶ 68-69, 87.) Rather, Plaintiffs specifically allege that "[t]he TPP Contract promises a permanent HAMP modification for those homeowners who make the required payments under the plan and fulfill the documentation requirements" and that "Chase breached the TPP Contract . . . by failing to offer Plaintiffs and members of the Plaintiff Class permanent HAMP modifications at the close of their Trial Periods." (Compl. ¶¶ 38, 106.) Plaintiffs fail to allege, however, that they **[*17]** have met all the conditions set forth in the TPP Contract for loan modification, including receipt of a "fully executed copy of a Modification Agreement," and therefore fail to allege the existence of a binding contract regarding a permanent loan modification. The breach of contract claim is therefore DISMISSED.

Plaintiffs seek leave to amend the complaint to allege that Plaintiffs meet the initial eligibility requirements for HAMP and are informed and believe that they qualify for permanent HAMP modification. (Opp. at 5.) The legal question whether Plaintiffs had a contract for permanent modification does not turn on whether or not Plaintiffs actually qualify for permanent HAMP modification. As the court determined in *Williams v. Geithner, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757380 *6 (D. Minn. Nov. 9, 2009)*, Congress did not intend for HAMP to mandate loan modifications. The *Williams* court determined that the

"regulations promulgated by Treasury for administering the HAMP clearly demonstrate that the Secretary allowed the exercise of some discretion, including calculation of the NPV, to the servicers." *Id.* HAMP only requires participating servicers to consider eligible loans for modification, but does not require **[*18]** servicers to modify eligible loans. *See Hoffman v. Bank of America, N.A., 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773 *4 (N.D. Cal. June 30, 2010)*; *Marks v. Bank of America, 2010 U.S. Dist. LEXIS 61489, 2010 WL 2572988 *3 (D. Ariz. June 22, 2010)*.

The complaint alleges that Chase did not offer or denied Plaintiffs a HAMP loan modification and that Chase has not provided a written denial. (Compl. ¶¶ 68-69, 87.) Plaintiff Suranofsky has alleged that a Chase representative informed her that she had been approved for final modification, but was subsequently denied a permanent modification. (*Id.* ¶¶ 85, 87.) Even if she or Plaintiff Morales were able to allege that Chase determined that they qualified for modification under the Net Present Value analysis, neither will be able to allege that she received a fully executed copy of a Modification Agreement. Thus, amendment of the breach of contract claim would be futile and no leave to amend will be granted.

2. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiffs allege that Chase violates the covenant of good faith and fair dealing in its TPP contracts by "[f]ailing to permanently modify loans and/or provide alternatives to foreclosure and using unfair means to keep Plaintiffs and the Plaintiff **[*19]** Class in temporary modification contracts." (Compl. ¶ 113c.)

"Every contract 'imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'" *Fortaleza v. PNC Financial Services Group, Inc., 642 F.Supp.2d 1012, 1021 (N.D.Cal. 2009)* (quoting *McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 798, 71 Cal. Rptr. 3d 885 (2008)*. "To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights to benefit from the contract." *Id. at 1021-22* (citations omitted).

Because Plaintiffs have not sufficiently alleged the existence of a contract for permanent loan modification, Chase's motion to dismiss the claim for breach of the implied covenant of good faith and fair dealing is GRANTED.

3. Promissory Estoppel

Plaintiffs contend that they detrimentally relied upon Chase's promise of a permanent modification if they completed three months of trial period payments and completed documentation requirements. (Compl. ¶¶ 34-38, 71, 92, 129-30.) Promissory estoppel will bind a promisor "'when he should reasonably expect a substantial change of position, **[*20]** either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.'" *Mehta v. Wells Fargo Bank, N.A., 737 F.Supp.2d 1185, 1198 (S.D. Cal. 2010)* (quoting *Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal.3d 665, 672 n.1, 111 Cal. Rptr. 693, 517 P.2d 1157 (1974)*. The elements of a promissory estoppel claim are "(1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance." *Boon Rawd Trading Intern. Co., Ltd. v. Paleewong Trading Co., Inc., 688 F.Supp.2d 940, 953 (N.D. Cal. 2010)* (citation omitted). "The purpose of this doctrine is to make a promise that lacks consideration (in the usual sense of something bargained for and given in exchange) binding under certain circumstances." *Id.*

As discussed above, the TPP Contract does not require Chase to modify an applicant's loan. Plaintiffs argue that they entered into the TPP in reliance on the promise of permanent modification, "reasonably believing they had been pre-screened and were eligible." (Opp. at 12.) HAMP did not, however, require that servicers **[*21]** verify eligibility prior to accepting borrowers into the TPP until the program was amended by directive in January 2010: "A significant program change is a requirement for full verification of borrower eligibility prior to offering a trial period plan." Supplemental Directive SD 10-01 at 1, available at *www.hmpadmin.com*. SD 10-01 clarified that under the prior Supplemental Directive 09-01, HAMP "gave servicers the option of placing a borrower into a trial period plan based on verbal financial information obtained from the borrower, subject to later verification during the trial period." *Id. See* SD 09-01 at 17 ("Servicers are not required to verify financial information prior to the effective date of the trial period.") The SD 10-01 directive amended HAMP such that "[e]ffective for all HAMP trial period plans with effective dates on or after June 1, 2010, a servicer may only offer a borrower a trial period plan based on verified

income documentation in accordance with this Supplemental Directive." *Id.* The TPP Contract also provides that the borrowers will provide documents to permit verification of income. (Compl. Ex. 2 at 1.) Thus, at the time Plaintiffs were offered Trial Period modifications **[*22]** in August 2009, there was no promise that Plaintiffs would be found eligible for permanent loan modification on which Plaintiffs could reasonably rely.

Plaintiffs further argue that "HAMP rules set out a specific and detailed method for determining the terms of a Home Affordable Modification Agreement" and that the TPP promises "to give a loan modification determined by a formula well known by both parties." (Opp. at 8, 10.) However, courts have determined that lenders are not required under HAMP to modify eligible loans. *See* *Marks, 2010 U.S. Dist. LEXIS 61489, 2010 WL 2572988 at *3*. "Even Fannie Mae, which has rights under the [Servicer Participation] Agreement, cannot force a participating servicer to make a particular loan modification." *Id.* "A qualified borrower would not be reasonable in relying on the Agreement as manifesting an intention to confer a right on him or her because the Agreement does not require that [the participating servicer] modify eligible loans." *Escobedo v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 117017, 2009 WL 4981618 *3 (S.D. Cal. Dec. 15, 2009)*.

In *Escobedo*, the court determined that the SPA set forth Home Affordable Modification Program Guidelines which provided that "[p]articipating servicers are required **[*23]** to *consider* all eligible loans under the program guidelines unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements." *Id.* (emphasis added in original). The *Escobedo* court determined that the SPA Agreement under HAMP "does not state that [the servicer] must modify all mortgages that meet the eligibility requirements." *Id. See also* *Hoffman, 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773 at *4* (citing *Escobedo*); *Benito v. Indymac Mortgage Serv., 2010 U.S. Dist. LEXIS 51259, 2010 WL 2130648 *7 (D. Nev. May 21, 2010)* (determining that HAMP does not confer on borrowers the right to enforce the HAMP contract and that "even Fannie Mae, which has rights under the contract, cannot force [the servicer] to make any particular loan modification").

Having determined that Chase did not make promises about permanent loan modification, the Court concludes that Plaintiffs fail to allege a claim for promissory estoppel. *See* *Grill, 2011 U.S. Dist. LEXIS 3771, 2011 WL 127891 *8*. Chase's motion to dismiss the fourth claim for relief in the complaint is therefore GRANTED.

B. Breach of Contract Claim Under the SPA

Plaintiffs assert a breach of contract claim under the Servicer Participation Agreement ("SPA") between Chase and Fannie Mae. (Compl. ¶¶ 118-127.) **[*24]** As many district courts in the Ninth Circuit have determined, individual borrowers do not have standing to sue under the SPA because they are not intended third party beneficiaries of the SPA. In *Hoffman*, the court determined that borrower was "an incidental and not an intended beneficiary to the HAMP servicer's agreement." *2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773 *4 (N.D. Cal. June 30, 2010)* (citing *Klamath v. Patterson, 204 F.3d 1206 (9th Cir. 1999)* and distinguishing *County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237 (9th Cir. 2009))*. *Hoffman* recognized the weight of authority concluding that a borrower does not have enforceable rights under the HAMP Servicer Participation Agreement, and the Court adopts the *Hoffman* court's reasoning to determine that Plaintiffs do not have standing to sue under the SPA. *2010 U.S. Dist. LEXIS 70455, [WL] at *3-4*. *See also* *Orcilla v. Bank of America, N.A., 2010 U.S. Dist. LEXIS 133353, 2010 WL 5211507 (N.D. Cal. Dec. 16, 2010)* (disagreeing with *Marques v. Wells Fargo Home Mortg., 2010 U.S. Dist. LEXIS 81879, 2010 WL 3212131 (S.D. Cal. Aug. 12, 2010))*. Chase's motion to dismiss the third claim for relief of the complaint for breach of the SPA contract is therefore GRANTED.

C. State Law Claims

1. Rosenthal Act

Plaintiffs allege that Chase has violated the Rosenthal **[*25]** Act by falsely promising that borrowers who complete their Trial Period modifications will get permanent modifications in order to collect mortgage debt and servicing fees. (Opp. at 19; Compl. ¶ 137.) Plaintiffs contend that Chase has made misrepresentations "in connection with the collection of any debt," or using "unfair or unconscionable means to collect or attempt to collect any debt" pursuant to *Section 1788.17 of the California Civil*

Code, which incorporates by reference certain provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692(e) and (f). (Opp. at 19.)

Chase does not dispute Plaintiffs' allegation that Chase is a debt collector within the meaning of the Rosenthal Act, but contends that Plaintiffs fail to allege a "demand" for payment of delinquent debt. (Reply at 19-20 (citing Walcker v. SN Commercial, LLC, 286 Fed. Appx 455, 457 (9th Cir. 2008).) In *Walcker*, the Ninth Circuit determined that the loan servicer's letters to plaintiffs were informational and not "demands for payment" in violation of the requirements for communications "in the collection of a claim" under Washington state law. 286 Fed. Appx. at 457 (citing Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384, 388-89 (7th Cir. 1998)). **[*26]** Unlike the informational letters in Walcker, Plaintiffs allege that the communications from Chase demanded three Trial Period payments and indicate that the borrower is required to pay the debt. These allegations are sufficient to demonstrate a demand for payment in support of a Rosenthal Act claim.

To evaluate claims under the Rosenthal Act, the Court must consider whether the alleged communications from the debt collector would likely mislead the "least sophisticated debtor." *Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 934 (9th Cir. 2007)* (citing Swanson v. S. Oregon Credit Serv., Inc., 869 F.2d 1222, 1229 (9th Cir.1989).) Plaintiffs contend that Chase misled borrowers into believing that Chase screens borrowers for eligibility and determines that borrowers qualify for HAMP before placing them into Trial Periods so that they would be entitled to permanent modification if they successfully complete the Trial Period. (Opp. at 20; Compl. ¶¶ 32-43, 53-55, 75-79.)

The "least sophisticated debtor" standard is an objective one. Swanson, 869 F.2d at 1227. Under that standard, the Court determines that the alleged communications do not make false, deceptive or misleading statements that **[*27]** Chase promised a permanent loan modification if the borrower successfully makes three Trial Period payments. The TPP Contract itself states that the TPP "is not a modification of the Loan Documents" and that "the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan." (Compl. Ex. 2 ¶ 2.G.) The title of the TPP Contract itself indicates that the TPP is the first step of a "Two-Step Documentation Process." (Compl. Ex. 2.) Plaintiffs have not demonstrated that the TPP Contract or other modification-related communications were false, deceptive or misleading. *See Wade v. Regional Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996)* (collection agency did not violate Section 1692e where notice correctly told plaintiff that she had an unpaid debt, and properly informed her that failure to pay might adversely affect her credit reputation). Nor do Plaintiffs' allegations demonstrate that Chase's documents or communications were unfair or unconscionable. *Id.* (out-of-state collection agency's unlicensed collection activity did not violate Section 1692f).

Therefore, Chase's motion to dismiss the fifth claim **[*28]** for relief for violation of the Rosenthal Act is GRANTED.

2. UCL Claim

Plaintiffs allege that Chase used unfair, deceptive and unlawful means to induce Plaintiffs to enter Trial Period modifications, to prolong the trial period payments and deny Plaintiffs permanent modification in violation of the UCL. (Compl. ¶¶ 142-44.) Under Section 17200, unfair competition is defined as "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." *See* Cal. Bus. & Prof. Code § 17200.

The complaint alleges that Chase's unfair business practices include "[f]ailing to perform loan servicing functions consistent with its responsibilities to Plaintiffs and the Plaintiff Class and its responsibilities under HAMP." (Compl. ¶ 143a.) Plaintiffs do not dispute that HAMP does not create a private right of action. *See* Marks, 2010 U.S. Dist. LEXIS 61489, 2010 WL 2572988 at *5-6. Plaintiffs therefore may not assert a UCL claim based on alleged violations of HAMP because the UCL cannot create a private right of action where none exists under the federal statute. Aleem v. Bank of America, 2010 U.S. Dist. LEXIS 11944, 2010 WL 532330 (C.D. Cal. Feb. 9, 2010) (citing Summit Tech., Inc. v. High-Line Med. Instruments Co., Inc., 922 F.Supp. 299, 316 (C.D. Cal. 1996)).

The **[*29]** complaint also alleges that Chase engages in unlawful business practices by violating state laws prohibiting breach of contract, breach of the covenant of good faith and fair dealing, and violations of the Rosenthal Act. (Compl. ¶ 142.) The complaint further alleges that Chase engages in fraudulent conduct by making misrespresentations and omissions of fact about permanent loan modifications which induced Plaintiffs to enter TPP Contracts. (Compl. ¶ 144.) Because the Court determines

that the TPP Contract makes no promise of permanent modification and dismisses those claims on which the UCL claim is predicated, the Court GRANTS Chase's motion to dismiss the sixth claim for relief for violation of *Section 17200*.

CONCLUSION

For the foregoing reasons, the Court GRANTS Chase's motion to dismiss the complaint without leave to amend. The clerk shall close the file.

IT IS SO ORDERED.

Dated: April 11, 2011

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

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Questioned
As of: June 15, 2021 10:45 PM Z

Mountain View Coach Lines, Inc. v. Storms

Supreme Court of New York, Appellate Division, Second Department

June 18, 1984

No Number in Original

Reporter
102 A.D.2d 663 *; 476 N.Y.S.2d 918 **; 1984 N.Y. App. Div. LEXIS 18836 ***

Mountain View Coach Lines, Inc., Appellant, v. Betty Storms, Respondent

Prior History: [*1]** Appeal from so much of a judgment of the Supreme Court (Vincent Gurahian, J.), entered July 12, 1983 in Dutchess County, as dismissed plaintiff's claim for loss of use.

Disposition: Judgment of the Supreme Court, Dutchess County, entered July 12, 1983, reversed insofar as appealed from, on the law, with costs, and matter remitted to the Supreme Court, Dutchess County, for entry of an appropriate judgment in the principal sum of $ 3,200.

Core Terms

loss of use, Damages, cases, hired, motor vehicle, Appeals, boat, decisions, utilized, repairs, spare, damages for loss, trial court, two thirds, persuasive, remit

Case Summary

Procedural Posture
Plaintiff bus owner appealed from a judgment of the Supreme Court, Dutchess County (New York), which dismissed the bus owner's claim for loss of use.

Overview
A vehicle owned by defendant vehicle owner collided with a bus owned by the bus owner. Instead of hiring a substitute bus, the bus owner utilized a bus it maintained in reserve. The parties stipulated the vehicle owner's negligence, the cost of repairs, the damages sustained for loss of use, and that the facts supporting a claim for loss of use were the same as in cases where the appellate division in another department held that loss of use damages in such circumstances were not recoverable. The supreme court dismissed the claim for damages for loss of use. On appeal, the bus owner prevailed. The court held that the supreme court was generally bound by appellate division precedent from other departments, but the court was not. The court held that damages for loss of use were not interdicted where a replacement maintained in reserve was used instead of hiring a substitute. The court said that there was no logical or practical reason why a distinction should be drawn between cases in which a substitute vehicle is actually hired and those in a spare is utilized, because if a spare is not maintained and used, a substitute would have to be hired.

Outcome
The court reversed the judgment of the supreme court insofar as it dismissed the bus owner's claim for loss of use. The court remitted the matter to the supreme court for entry of an appropriate judgment awarding damages for loss of use in accordance with the parties' stipulation.

LexisNexis® Headnotes

Governments > Courts > Creation & Organization

Governments > Courts > Judicial Precedent

HN1[] **Courts, Creation & Organization**

The Appellate Division is a single state-wide court divided into departments for administrative convenience and, therefore, the doctrine of stare decisis requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division of its department pronounces a contrary rule. This is a general principle of appellate procedure necessary to maintain uniformity and consistency.

Governments > Courts > Judicial Precedent

HN2[] **Courts, Judicial Precedent**

While the court should accept the decisions of sister departments as persuasive, the court is free to reach a contrary result. Denial of leave to appeal by the New York Court of Appeals is without precedential value.

Torts > ... > Types of Damages > Property Damages > Loss of Use

Torts > ... > Types of Damages > Property Damages > General Overview

HN3[] **Property Damages, Loss of Use**

Where a motor vehicle is harmed as a result of a tortious act, the plaintiff is entitled to damages for loss of use during the time reasonably required to make repairs. While some early lower court cases hold that recovery for loss of use is barred unless a substitute is actually hired. These holdings are at variance with the rule generally prevailing in New York and elsewhere.

Headnotes/Summary

Headnotes

Motor Vehicles -- Collision -- Damages for Loss of Use

1. Plaintiff bus company is entitled to recover damages for loss of use of a bus placed out of service as a result of defendant's negligence, where plaintiff did not hire a substitute bus during the period of repairs, but utilized one it maintained in reserve instead; where a motor vehicle is harmed as a result of a tortious act, the plaintiff is entitled to damages for loss of use during the time reasonably required to make repairs, and there is no logical or practical reason why a distinction should be drawn between cases in which a substitute vehicle is actually hired and those in which the plaintiff utilizes a spare.

Courts -- Stare Decisis

2. The doctrine of *stare decisis* **[***2]** requires trial courts to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division of the department wherein the trial court is located pronounces a contrary rule; while the Appellate Division should accept the decisions of sister departments as persuasive, it is free to reach a contrary result. Denial of leave to appeal to the Court of Appeals is without precedential value.

Counsel: *George A. Roland* for appellant.

Owen & Grogan (*Thomas N. O'Hara* of counsel), for respondent.

Judges: Titone, J. Mollen, P. J., Weinstein and Rubin, JJ., concur.

Opinion by: TITONE

Opinion

[*663] OPINION OF THE COURT

[919]** Plaintiff appeals from so much of a judgment of the Supreme Court, Dutchess County, as dismissed its claim for damages for loss of use of a bus placed out of service as a result of defendant's negligence. The core issue is whether damages for loss of use are interdicted because plaintiff did not hire a substitute bus, utilizing one it maintained in reserve instead. We hold that loss of use damages are recoverable in such circumstances and decline to follow two Third Department cases to the contrary **[***3]** (*Mountain View Coach Lines v Gehr, 80 AD2d 949*; *Mountain View* ***[*664]*** *Coach Lines v Hartnett*, 99 Misc 2d affd *69 AD2d 1020*, as amd *70 AD2d 977*, mot for lv to app den *47 NY2d 710*).

On October 28, 1980, a collision occurred between a bus owned by the plaintiff and a motor vehicle owned by the defendant. The parties stipulated that the defendant was negligent, that the cost of repairs was $ 983.23, that the damages sustained for loss of use were $ 3,200, and that the facts supporting the claim for loss of use were the same as those in the two Third Department cases (*Mountain View Coach Lines v Gehr, supra; Mountain View Coach Lines v Hartnett, supra*) i.e., that no substitute was hired by the plaintiff during the period of repairs, plaintiff having substituted one of its own buses for the damaged bus. The loss of use claim was thus submitted to the Supreme Court as an issue of law, and was dismissed solely on constraint of the Third Department cases. We reverse the judgment insofar as appealed from and remit the case to the Supreme Court, Dutchess County, for entry of a judgment awarding plaintiff damages for loss of use.

At the outset, we note that if the Third Department **[***4]** cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level. ***HN1***[] The Appellate Division is a single State-wide court divided into departments for administrative convenience (see *Waldo v Schmidt, 200 NY 199, 202*; Project, The **[**920]** Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court, 47 Ford L Rev 929, 941) and, therefore, the doctine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., *Kirby v Rouselle Corp., 108 Misc 2d 291, 296*; *Matter of Bonesteel, 38 Misc 2d 219, 222*, affd *16 AD2d 324*; 1 Carmody-Wait 2d, NY Prac, § 2:63, p 75). This is a general principle of appellate procedure (see, e.g., *Auto Equity Sales v Superior Ct. of Santa Clara County, 57 Cal 2d 450, 455*; *Chapman v Pinellas County, 423 So 2d 578, 580* [Fla App]; *People v Foote, 104 Ill App 3d 581*), necessary to maintain uniformity **[***5]** and consistency (see *Lee v Consolidated Edison Co.,* ***[*665]*** *98 Misc 2d 304, 306)*, and, consequently, any cases holding to the contrary (see, e.g., *People v Waterman, 122 Misc 2d 489, 495, n 2*) are disapproved.

Such considerations do not pertain to this court. ***HN2***[] While we should accept the decisions of sister departments as persuasive (see, e.g., *Sheridan v Tucker, 145 App Div 145, 147*; 1 Carmody-Wait 2d, NY Prac, § 2:62; cf. *Matter of Ruth H., 26 Cal App 3d 77, 86)*, we are free to reach a contrary result (see, e.g., *Matter of Johnson, 93 AD2d 1, 16*, revd on other grounds *59 NY2d 461*; *State v Hayes, 333 So 2d 51, 53* [Fla App]; *Glasco Elec. Co. v Department of Revenue, 87 Ill App 3d 1070*, affd 86 I11 2d 346). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (*Giblin v Nassau County Med. Center, 61 NY2d 67, 76*, n). We find the Third Department decisions little more than a "conclusory assertion of result", in conflict with settled principles, and decline to follow them (*People v Hobson, 39 NY2d 479, 490)*.

It is beyond dispute that ***HN3***[↑] where a motor vehicle is harmed as a result of a tortious act, the plaintiff **[***6]** is entitled to damages for loss of use during the time reasonably required to make repairs (*Johnson v Scholz, 276 App Div 163*; *Restatement, Torts 2d, § 928*; 10 Fuchsberg, Encyclopedia NY Law, Damages, § 875). While some early lower court cases held that recovery for loss of use was barred unless a substitute was actually hired (e.g., *Murphy v New York City Ry. Co., 58 Misc 237*), the Appellate Term, Second Department, later noted that these holdings were at variance with the rule generally prevailing in this State and elsewhere (*Dettmar v Burns Bros., 111 Misc 189*; see, also, Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed, Ann., *18 ALR3d 497, 528)*. *Dettmar* states the correct rule and is in accord with subsequent New York authority (*Nicholas v Mellon Constr. Co., 241 App Div 771*; *Denehy v Pasarella, 230 App Div 707*; *Sellari v Palermo, 188 Misc 1057*; *Pittari v Madison Ave. Coach Co., 188 Misc 614*; 10 Fuchsberg, *op. cit.*, § 878).

There is no logical or practical reason why a distinction should be drawn between cases in which a substitute vehicle is actually hired and those in which the plaintiff utilizes a spare. The point is well **[***7]** illustrated by then **[*666]** Justice Cardozo's opinion in *Brooklyn Eastern Term. v United States* (287 U.S. 170, 176-177), explaining the so-called "spare boat" doctrine applied in admiralty: "Shipowners at times maintain an extra or spare boat which is kept in reserve for the purpose of being utilized as a substitute in the contingency of damage to other vessels of the fleet. There are decisions to the effect that in such conditions the value of the use of a boat thus **[**921]** specially reserved may be part of the demurrage * * * If no such boat had been maintained, another might have been hired, and the hire charged as an expense. The result is all one whether the substitute is acquired before the event or after." [1]

[*8]** This reasoning is persuasive and is fully applicable to the case before us. The rule has the support of the Restatement of Torts, Second (§ 931, Comment *c*) and numerous commentators (11 Blashfield, Automobile Law & Practice [rev 3d ed], § 429.2; Dobbs, Remedies, § 5.11, pp 387-389; 10 Fuchsberg, *op. cit.*, § 878; McCormick, Damages, § 124, pp 470-476; 1 Sedgwick, Damages [9th ed], §§ 195, 243b). Moreover, it has been consistently followed in this department (see *Nicholas v Mellon Constr. Co., supra; Denehy v Pasarella, supra; Dettmar v Burns Bros., 111 Misc 189, supra*), in the United States Court of Appeals for the Second Circuit applying New York law (*Koninklijke Luchtvaart Maatschaapij, N.V. v United Technologies Corp., 610 F2d 1052*), [2] and is in accord with the overwhelming weight of authority elsewhere (*Malinson v Black*, 83 Cal Appn 2d 375; *Hillaman v Bray Lines, 41 Col App 493*, affd Col , 625 P2d 364; *Graf v Rasmussen Co.*, 399 Ore App 311; *Holmes v Raffo, 60 Wn 2d 421*; **[*667]** Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed, Ann., *18 ALR3d 497*, § 13).

[*9]** For these reasons, the judgment should be reversed insofar as appealed from, with costs, and the matter remitted to the Supreme Court, Dutchess County, for entry of an appropriate judgment awarding damages for loss of use in accordance with the stipulation.

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[1] It is true that the Supreme Court declined to extend the "spare boat" doctrine to a boat acquired and maintained for the general uses of the business, limiting recoverable damages to "the additional wear and tear on the over-worked vessels"(Dobbs, Remedies, § 5.11, p 389). While that result has been criticized (Note, 39 Hary L Rev 760), that portion of the holding is irrelevant to the case now before us as plaintiffs utilized a spare bus and the parties have stipulated the amount of damages incurred as a result of the loss of use.

[2] After this opinion was filed we became aware of ***CIT Int. v Lloyds Underwriters (735 F2d 679)*** in which the Second Circuit retreated from this decision on constraint of ***Mountain View Coach Lines v Gehr (80 AD2d 949)***, and *Mountain View Coach Lines v Harnett* (999 Misc 2d 271, affd ***69 AD2d 1020***, as amd ***70 AD2d 977***, mot for lv to app den *47 NY2d 710*). As we have previously explained, these decisions are contrary to settled New York authority.

Nationstar Mtge., LLC v Dorsin

Supreme Court of New York, Appellate Division, Second Department

February 26, 2020, Decided

2017-07971 (Index No. 711257/15)

Reporter
180 A.D.3d 1054 *; 119 N.Y.S.3d 435 **; 2020 N.Y. App. Div. LEXIS 1407 ***; 2020 NY Slip Op 01354 ****; 2020 WL 912792

[**1]** Nationstar Mortgage, LLC, respondent, v Jean Dorsin, etc., appellant, et al., defendants.

Core Terms

mortgage, summary judgment, modification, counterclaims, time-barred, statute of limitations, cross motion, promise

Case Summary

Overview

HOLDINGS: [1]-A lender's summary judgment in its mortgage foreclosure action was error as the debt had been previously accelerated by the lender's predecessor outside the six-year limitation period, and an agreement signed by the borrower under the Home Affordable Mortgage Program did not constitute an unconditional and unqualified acknowledgment of the debt sufficient to reset the limitation period because in it the borrower merely agreed to make three trial payments so as to receive a permanent modification offer, and any intention to repay the debt was conditioned reaching a permanent modification agreement, which did not occur. The unconditional promise did not reset the statute of limitations; [2]-Borrower's *Real Property Law § 282* cross motion for attorneys' fees should also have been granted.

Outcome

Orders reversed on the law, with costs and attorneys' fees awarded to borrower.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

Real Property Law > Financing > Foreclosures

Contracts Law > ... > Negotiable Instruments > Enforcement > Overdue Instruments

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN1[] **Discharge & Payment, Time for Payments**

An action to foreclose a mortgage is governed by a six-year statute of limitations. *CPLR 213[4]*. 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.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN2[] **Statute of Limitations, Extensions & Revivals**

General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the 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. 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. *General Obligations Law § 17-107*.

Business & Corporate Compliance > ... > Default > Foreclosure & Repossession > Agreements, Variances & Waivers

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Contracts Law > ... > Negotiable Instruments > Enforcement > Overdue Instruments

HN3[] **Foreclosure & Repossession, Agreements, Variances & Waivers**

Modifications pursuant to the Home Affordable Mortgage Program can include interest rate reduction, principal forbearance, and principal forgiveness.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN4[] **Statute of Limitations, Extensions & Revivals**

Just as an express conditional promise or acknowledgment does not serve to reset the statute of limitations, an implied conditional promise also does not have that effect.

Counsel: [*1]** Queens Legal Services, Jamaica, NY (Franklin Romeo of counsel), for appellant.

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

Judges: WILLIAM F. MASTRO, J.P., RUTH C. BALKIN, JOHN M. LEVENTHAL, BETSY BARROS, JJ. MASTRO, J.P., BALKIN, LEVENTHAL and BARROS, JJ., concur.

Opinion

[436]** **[*1054]** DECISION & ORDER

In an action to foreclose a mortgage, the defendant Jean Dorsin appeals from an order of the Supreme Court, Queens County (Pam Jackman Brown, J.), entered June 5, 2017. The order, insofar as appealed from, upon a decision of the same court (Robert L. Nahman, J.) dated November 14, 2016, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against that defendant and for an order of reference, denied those branches of that defendant's cross motion which were for summary judgment dismissing the complaint insofar as asserted against him on the ground that the action was time-barred and for summary judgment on his counterclaims to cancel and discharge of record the mortgage pursuant to *RPAPL 1501(4)* and for an award of attorneys' fees and expenses pursuant to *Real Property Law § 282*, and referred the matter to a referee to compute the amount due to **[***2]** the plaintiff.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Jean Dorsin and for an order **[**437]** of reference are denied, and those branches of that defendant's cross motion which were for summary judgment dismissing the complaint insofar as asserted against him on the ground that the action was time-barred and for summary judgment on his counterclaims to cancel and discharge of record the mortgage pursuant to *RPAPL 1501(4)* and for an award of attorneys' fees and expenses pursuant to *Real Property Law § 282* are granted.

The defendant Jean Dorsin (hereinafter the defendant) executed certain notes in favor of GreenPoint Mortgage Funding, Inc. (hereinafter GreenPoint), and, securing those notes, a **[*1055]** consolidated mortgage on residential property located in St. Albans. On April 23, 2009, GreenPoint commenced an action (hereinafter the 2009 action) against the defendant and others to foreclose the consolidated mortgage. By order dated February 25, 2015, the Supreme Court directed dismissal of the 2009 action without prejudice.

The consolidated mortgage was thereafter **[***3]** assigned to the plaintiff. On October 29, 2015, the plaintiff commenced this action against the defendant, among others, to foreclose the consolidated mortgage. The defendant interposed an amended answer asserting as an affirmative defense that the action was time-barred. The defendant also asserted counterclaims, inter alia, to **[****2]** cancel and discharge of record the mortgage pursuant to *RPAPL 1501(4)* and for an award of attorneys' fees and expenses pursuant to *Real Property Law § 282*.

Thereafter, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. The defendant cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against him as time-barred and for summary judgment on the aforementioned counterclaims. In an order entered June 5, 2017, the Supreme Court, upon a decision dated November 14, 2016, granted the plaintiff's motion, denied the defendant's cross motion, and referred the matter to a referee to compute the amount due to the plaintiff. The defendant appeals.

HN1[↑] An action to foreclose a mortgage is governed by a six-year statute of limitations (*see CPLR 213[4]*; *Ditech Fin., LLC v Naidu, 175 AD3d 1387, 109 N.Y.S.3d 196*). Even if a mortgage is payable in installments, **[***4]** once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (*see Bank of N.Y. Mellon v Craig, 169 AD3d 627, 629, 93 N.Y.S.3d 425*; *Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d 985, 986, 41 N.Y.S.3d 738)*. Here, the mortgage debt was accelerated on April 23, 2009, when GreenPoint commenced the 2009 action and elected in the complaint to accelerate the debt (*see Pennymac Corp. v McGlade, 176 AD3d 963, 965, 111 N.Y.S.3d 367)*. The instant action was commenced on October 29, 2015, more than six years later.

Nevertheless, the plaintiff contends that the defendant's execution of a Home Affordable Modification Trial Period Plan (hereinafter the Plan) after commencement of the 2009 action, as well as payments made pursuant to that Plan, served to renew the running of the statute of limitations, thus making this action timely, as it was commenced less than six years after the Plan was executed and the payments made.

[*1056] "*General Obligations Law § 17-101* ***HN2***[↑] 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, 83 N.Y.S.3d 173*, **[**438]** quoting *Lynford v Williams, 34 AD3d 761, 762, 826 N.Y.S.2d 335)*. "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" (*Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 521, 355 N.E.2d 369, 387 N.Y.S.2d 409*; *see Yadegar v Deutsche Bank Natl. Trust Co., 164 AD3d at 947*). "In order to demonstrate that the statute of limitations has been renewed by a partial payment, **[***5]** 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'" (*U.S. Bank N.A. v Martin, 144 AD3d 891, 892-893, 41 N.Y.S.3d 550*, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d at 521*; *see General Obligations Law § 17-107*; *Petito v Piffath, 85 NY2d 1, 9, 647 N.E.2d 732, 623 N.Y.S.2d 520)*.

Here, under the Plan, which the defendant admitted having executed, the defendant represented, among other things, that he was unable to afford his mortgage payments, and agreed to make three trial payments, at a reduced rate, over the course of three months. If the defendant complied, and his representations continued to be true, then the Plan provided that the defendant would be offered a permanent modification agreement. ***HN3***[↑] Modifications pursuant to the Home Affordable Mortgage Program can include interest rate reduction, principal forbearance, and principal forgiveness (*see US Bank N.A. v Sarmiento, 121 AD3d 187, 198, 991 N.Y.S.2d 68)*. In this case, the defendant made all of the trial payments but was not offered a permanent modification agreement.

Contrary to the plaintiff's contention, the Plan did not constitute an "unconditional and unqualified acknowledgment of [the] debt" sufficient to reset the statute of limitations (*Hakim v Peckel Family Ltd. Partnership, 280 AD2d 645, 721 N.Y.S.2d 543*; *see Yadegar v Deutsche Bank Natl. Trust Co., 164 AD3d at 947*). While the writing arguably acknowledged the existence of indebtedness, the defendant **[***6]** 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. Under these circumstances, it cannot be said that the writing contained "nothing inconsistent with an intention on the part of the debtor to pay" the debt (*Lew Morris Demolition* ***[*1057]*** *Co. v Board. of Educ. of City of N.Y., 40 NY2d at 521*; *see* ***[****3]*** *Sotheby's, Inc. v Mao, 173 AD3d 72, 81, 100 N.Y.S.3d 27*; *Hakim v Peckel Family Ltd. Partnership, 280 AD2d 645, 721 N.Y.S.2d 543*; *National Westminster Bank USA v Petito, 202 AD2d 193, 195, 608 N.Y.S.2d 427*; *Sichol v Crocker, 177 AD2d 842, 843, 576 N.Y.S.2d 457*; *Flynn v Flynn, 175 AD2d 51, 52, 572 N.Y.S.2d 307*; *cf. Bank of N.Y. Mellon v Bissessar, 172 AD3d 983, 985, 100 N.Y.S.3d 341*; *U.S. Bank, N.A. v Kess, 159 AD3d 767, 768-769, 71 N.Y.S.3d 635)*. Indeed, the defendant represented in the Plan that he was unable to afford the mortgage payments.

Similarly, contrary to the plaintiff's further contention and the Supreme Court's conclusion, the trial payments made pursuant to the Plan did not constitute an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise could be inferred to **[**439]** pay the remainder. Rather, the payments were made for the purpose of reaching an agreement to modify the terms of the parties' contract (*cf. Petito v Piffath, 85 NY2d at 9*; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d at 521-522*), 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 (*see U.S. Bank N.A. v Martin, 144 AD3d at 893*). ***HN4***[↑] Just as an express conditional promise or acknowledgment **[***7]** does not serve to reset the statute of limitations, an implied conditional promise also does not have that effect. Although the Appellate Division, Third Department, held to the contrary in *Wells Fargo Bank, N.A. v Grover (165 AD3d 1541, 86 N.Y.S.3d 299*), we disagree and decline to follow that holding.

Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference, and should have granted those branches of the defendant's cross motion which were for summary judgment dismissing the complaint insofar as asserted against him as time-barred and for summary judgment on his counterclaim to cancel and discharge of record the mortgage pursuant to *RPAPL 1501(4)* (*see BH 263, LLC v Bayview Loan Servicing, LLC, 175 AD3d 1375, 1376, 109 N.Y.S.3d 142*; *Bank of N.Y. Mellon v Bissessar, 172 AD3d at 985*).

Lastly, the Supreme Court should have granted that branch of the defendant's cross motion which was for summary judgment on his counterclaim for an award of attorneys' fees and expenses pursuant to *Real Property Law § 282* (*see 21st Mtge. Corp. v Nweke, 165 AD3d 616, 619, 85 N.Y.S.3d 127)*.

The plaintiff's remaining contentions are without merit.

MASTRO, J.P., BALKIN, LEVENTHAL and BARROS, JJ., concur.

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Pennington v. HSBC Bank USA, N.A.

United States Court of Appeals for the Fifth Circuit

October 3, 2012, Filed

No. 12-50064

Reporter
493 Fed. Appx. 548 *; 2012 U.S. App. LEXIS 20605 **; 2012 WL 4513333

ELLERY G. PENNINGTON; LAURA M. PENNINGTON; TRACI SMITH, Plaintiffs-Appellants, versus HSBC BANK USA, N.A.; WELLS FARGO BANK, N.A., Wells Fargo Home Mortgage, Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by *Pennington v. HSBC Bank USA, NA., 133 S. Ct. 1272, 185 L. Ed. 2d 185, 2013 U.S. LEXIS 1164 (U.S., Feb. 19, 2013)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 1:10-CV-785.

Pennington v. HSBC Bank USA, N.A., 2011 U.S. Dist. LEXIS 147411 (W.D. Tex., Dec. 22, 2011)

Core Terms

modification, borrower, lender, modification agreement, courts, modified, terms, conditions, monthly payment, take effect, signature

Case Summary

Procedural Posture
Plaintiff borrowers, sued defendant banks in state court, alleging various state-law claims including breach of contract and violation of the Texas Constitution and Texas Deceptive Trade Practices Act, seeking injunctive relief to forestall foreclosures. The banks removed to federal court based on diversity of citizenship. The U.S. District Court for the Western District of Texas granted the banks' motion to dismiss. The borrowers appealed.

Overview
The court did not need to determine whether the Trial Period Plans (TPP) at issue constituted a loan modification or whether such a modification meant the loans no longer complied with Tex. Const. § 50(a)(6), because the borrowers failed to satisfy the conditions of the TPP and modification agreement. None of the facts pled by the first borrower supported eligibility and because financial eligibility was a condition for the TPP, she was not entitled to any benefits the TPP might have provided. As to the other two borrowers, their TPP did not form a contract because the bank never expressed an intent to be bound. The TPP expressly required that before the contract was final, the lender had to send a signed copy to the borrower, and the borrowers never alleged that they received such a signed copy. The borrowers' negligent misrepresentation claims failed because they did not suffer a pecuniary loss by justifiably relying on the banks' alleged representation; interest and fees that accrued while the borrowers were following the TPP did not arise because of the TPP.

Outcome
The judgment of the district court was affirmed.

LexisNexis® Headnotes

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

HN1 **State Law Exemptions, Specific Exemptions**

See Tex. Const. § 50(a)(6).

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN2 **Breach of Contract Actions, Elements of Contract Claims**

To succeed on a breach-of-contract claim, a plaintiff must show (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages.

Contracts Law > Contract Formation > General Overview

HN3 **Contracts Law, Contract Formation**

A valid contract in Texas requires (1) an offer; (2) acceptance in strict compliance with the offer's terms; (3) meeting of the minds; (4) each party's consent to the terms; (5) the contract to be executed and delivered with intent that it be mutual and binding; and (6) consideration.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4 **Standards of Review, De Novo Review**

Appellate courts review the grant of a motion to dismiss de novo, accepting all well-pleaded facts as true, viewed in the light most favorable to the plaintiff.

Business & Corporate Compliance > ... > Acceptance > Apparent Acceptance > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN5 **Acceptance, Apparent Acceptance**

When deciding whether parties intended to be bound by the statements in a document, courts examine how plainly the document indicates it is meant to be non-binding. Provisions expressly requiring the agreement be executed before it binds the parties are considered particularly significant.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN6[] **Breach of Contract Actions, Elements of Contract Claims**

A breach-of-contract claim cannot succeed absent a binding contract.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN7[] **Negligent Misrepresentation, Elements**

The elements of negligent misrepresentation are that (1) the representation is made by a defendant in the course of its business, or in a transaction in which it has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN8[] **Consideration, Promissory Estoppel**

The elements of promissory estoppel are (1) a promise; (2) foreseeability of reliance thereon by the promissor, and (3) substantial reliance by the promisee to his detriment.

Counsel: For ELLERY G. PENNINGTON, LAURA M. PENNINGTON, TRACI SMITH, Plaintiffs - Appellants: James Patrick Sutton, Austin, TX.

For HSBC BANK USA, N.A., Incorrectly named as HSBC Bank USA, National Association, WELLS FARGO BANK, N.A., Wells Fargo Home Mortgage, Defendants - Appellees: William Scott Hastings, Esq., Daron L. Janis, Esq., Robert Thompson Mowrey, Locke Lord, L.L.P., Dallas, TX; Benjamin David Lee Foster, Esq., Amanda M. Schaeffer, Attorney, Locke Lord, L.L.P., Austin, TX.

Judges: Before KING, SMITH, and HIGGINSON, Circuit Judges.

Opinion by: JERRY E. SMITH

Opinion

[*550] JERRY E. SMITH, Circuit Judge: *

Ellery and Laura Pennington (jointly) and Traci Smith sued HSBC Bank USA, N.A., and Wells Fargo Bank, N.A. (jointly, "the bank"), in state court, alleging various state-law claims including breach of contract and negligent misrepresentation and violation of the Texas Constitution and Texas Deceptive Trade Practices Act; plaintiffs sought **[**2]** injunctive relief to forestall foreclosures. The banks removed to federal court based on diversity of citizenship. The district court granted the bank's motion to dismiss, and we affirm.

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* Pursuant to ***5TH CIR. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5TH CIR. R. 47.5.4***.

I.

The Penningtons took out a home equity loan in 2004. In 2009, after Ell-ery Pennington lost his job, they sought a loan modification to reduce their monthly payments. The bank identified the Penningtons as candidates for the federal Home Affordable Modification Program ("HAMP") and sent them, as Step One in the HAMP documentation process, a Trial Period Plan ("TPP") offer, which set out a schedule of three payments as one of the conditions to obtaining a loan modification. The TPP also required the Penningtons to certify that they were unable to afford their current mortgage payments.

[*551] The scheduled payments set by the TPP were less than the payments required to cover all the interest and principal owed on the home equity loan with each installment. After paying ten trial payments without being offered a loan modification, during which the bank kept separate accounts for the interest due under the original note and applied late charges, [1] the Penningtons were told that because of the Texas Cash Out **[**3]** Policy—which prohibited modifying a loan if the amount owed exceeds the original amount borrowed—they could not obtain a modification.

Smith was not late or behind on payments but just wanted to reduce her payments. The bank had her stop making her usual payments and instead make trial payments under the TPP starting in September 2010. In January 2011, the bank told her on the phone that she would be approved for the second step of the HAMP documentation process, termed Step Two. In February 2011, the bank sent her a letter congratulating her and giving her the Step Two document, which included a loan modification agreement. In May 2011, the bank told Smith that she would not receive a loan modification; the bank's representative said there was nothing he could do, because the bank would be breaking the law by modifying the loan. Smith alleges that if **[**4]** she had never entered the loan modification process, she would not have missed a payment.

Plaintiffs allege that the TPP violated *Section 50(a)(6) of the Texas Constitution*, which includes homestead protections prohibiting forced sales except for certain qualifying extensions of credit. [2] They also claim the bank breached their TPP contracts by failing to give them loan modifications and that the bank is liable for negligent misrepresentation for suggesting that HAMP loan modifications are legal in Texas when in fact they are not. Finally, Smith argues that the bank is estopped from providing any basis for declining to give her a loan modification other than perceived illegality, so if the modification is legal, it should be granted.

II.

Although plaintiffs contend that their TPPs violate Texas constitutional provisions never previously addressed by this court, we need not determine whether the TPP constitutes a loan modification or whether such a **[**5]** modification means the loans no longer comply with *Section 50(a)(6)*, because the plaintiffs failed to satisfy the conditions of the TPP and, in the case of Smith, her Modification Agreement. No one disputes that their initial home equity loans met Section 50(a)(6)'s requirements. Thus, the loans can violate that section now only if they were modified by the TPP or the Step Two Modification Agreement. Regardless

[1] The complaint does not detail the exact amount of late charges compared to other penalties, but the timeline attached to the complaint as Exhibit 1 states that on July 22, 2010, a woman at Wells Fargo said that to get out of the foreclosure process, the Penningtons would need to pay all late payments and penalties, totaling $21,477.39.

[2] *Section 50(a)(6)* provides, ***HN1***[↑] "The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for . . . an extension of credit that [meets numerous requirements]."

of whether the TPP modifies a loan when a borrower meets his obligations, it does not modify a loan when he fails to meet the conditions the TPP specifies are necessary to obtain a modification. [3]

[*552] The plaintiffs claim the bank breached the TPP by failing to offer them the Step Two Permanent Loan Modification. Smith also argues that the bank breached the Step Two Modification Agreement she signed by not changing the terms of her loan. ***HN2***[↑] To succeed on a breach-of-contract claim, Smith must show "(1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages." *Rice v. Metro. Life Ins. Co., 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.)* (internal quotation marks omitted). ***HN3***[↑] A valid contract in Texas requires (1) an offer; (2) acceptance in strict compliance with the offer's terms; (3) meeting of the minds; (4) each party's consent to the terms; (5) the contract to be executed and delivered with intent that it be mutual and binding; and (6) consideration. *Id. at 670*.

Whether the TPP itself is a contract, and what obligations it imposes, are questions of first impression in this circuit. Courts have proposed a wide variety of answers to whether the TPP is a contract requiring the **[**8]** lender to provide a permanent modification under HAMP even to a borrower who complies with the TPP requirements. Some courts have used general reasoning to resolve the issue for all TPPs at once, attacking the plan for lack of consideration or definite terms or as being an attempted end-run around HAMP's lack of a private cause of action. Courts finding no consideration reason that all the terms are either required by the initial loan (i.e. regular payments) or are best understood as conditions of applying for the HAMP program. *E.g.*, *Senter v. JPMorgan Chase Bank, N.A., 810 F. Supp. 2d 1339, 1348-49 (S.D. Fla. 2011)*.

Other courts have decided that the additional terms in the TPP constitute consideration, namely opening new escrow accounts, undergoing credit counseling if asked, and proving financial information. *E.g.*, *Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 564 (7th Cir. 2012)*. A few courts have declared that state breach-of-contract claims fail to state a cause of action independently of HAMP. *E.g.*, *Bourdelais v. J.P. Morgan Chase, No. 3:10CV670-HEH, 2011 U.S. Dist. LEXIS 35507, 2011 WL 1306311, at *4 (E.D. Va. Apr. 1, 2011)*. Because HAMP affords no private right of action, *Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 **[*553]** (11th Cir. 2012)*, **[**9]** the *Bour-delais* court's reasoning means dismissal of a claim.

Various courts have more narrowly addressed whether particular TPPs required lenders to offer a permanent modification, regardless of whether a TPP in general is a contract. Some of those courts have determined that the TPP does not require a lender to offer a permanent loan unless the plaintiff alleges that the lender determined that the plaintiff met the requirements of the TPP or provides evidence of a loan modification with a new monthly payment that both lender and borrower agreed to in

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[3] The TPP states,

> I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed.

Even if that were not clear enough on its own, the TPP also states,

> I agree to the following . . . . 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 **[**6]** or release in whole or in part of the obligations contained in the Loan Documents.

The plain language of the TPP demonstrates that the initial trial period does not modify the loan.

Instead of constituting a modification, as the Plaintiffs argue, the initial payments operate as a forbearance agreement that is to be in effect until the lender decides whether it will grant a modification under HAMP. According to the eligibility criteria in the plan, the plaintiffs

> certify, represent to the lender and agree . . . 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 access to sufficient liquid assets to make monthly mortgage payments now or in the near future.

A borrower eligible for Step One has certified that he will fall behind on payments. Thus, beginning initial payments under the TPP is not a "foreclosure trap," nor an installment of a balloon payment contrary to the purpose of *Section 50*, *see* *Cerda v. 2004-EQR1 L.L.C., 612 F.3d 781, 790-91 (5th Cir. 2010)*; it allows those who know they cannot make their **[**7]** loan payments to avoid foreclosure while seeking a way to salvage their financial circumstances.

executed loan documents. *E.g.*, *Lonberg v. Freddie Mac, 776 F. Supp. 2d 1202, 1210 (D. Or. 2011)*. Other courts have found that the TPP is not effective unless

> after [the borrower] sign[s] and return[s] two copies of this Plan to the Lender, the Lender [sends] [the borrower] a signed copy of this Plan if [the borrower] qualif[ies] for the Offer or [sends] [the borrower] written notice that [the borrower] does not qualify for the Offer. This plan will not take effect unless and until both [the borrower] and the lender sign it and Lender provides [the borrower] with a copy of this Plan with the Lender's signature.

*Soin v. Fed. Nat'l Mortg. Ass'n, No. 2:12-634, 2012 U.S. Dist. LEXIS 51824, 2012 WL 1232324, at *5 (E.D. Cal. Apr. 12, 2012)* **[**10]** (analyzing contractual language that matches the TPP in the instant case).

III.

HN4[] We review the grant of a motion to dismiss *de novo*, accepting all well-pleaded facts as true, viewed in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)*. We need not determine whether TPPs in general are contracts, because these plaintiffs have not met the conditions set by the TPPs and Modification Agreements. Smith's allegations demonstrate her financial disqualification from the program; the bank never signed the TPP for the Penningtons or the Modification Agreement for Smith, which is required for the provisions to take effect.

A.

By Smith's own pleadings, she was ineligible for a HAMP loan modification, because she cannot meet the financial-hardship requirement. [4] Section 1 of the TPP requires that the borrower be unable to make the monthly payments "now or in the near future." Yet, Smith insists, "[h]ad Smith never entered the loan modification process and acquiesced to [the bank's] demand that she quit making her regular monthly payments, she would never have missed a **[**11]** payment at all."

None of the facts Smith pleaded supports eligibility. In the light most favorable to Smith, her assertion that she would not have fallen behind absent HAMP shows she was ineligible for the loan modification.

The TPP and Modification Agreement include a continuing obligation to satisfy the financial-eligibility requirements. Section 2(F)(i) of the TPP says that the TPP terminates if the Lender does not provide a fully executed copy of the Plan and Modification Agreement. [5] The beginning of the TPP states that, "[i]f . . . my representations in Section 1 continue to be true **[*554]** in all material respects, then the Lender will provide me with a Loan Modification Agreement." Furthermore, effecting the Modification Agreement is contingent on the financial-hard-ship representations continuing to be true. [6] Combined, these show that if the financial-hardship representations are ever not true, the lender does not have to give an effected modification agreement to the borrower, **[**12]** and if that does not happen, the TPP terminates. Thus, if the borrower no longer meets the criteria in Section 1 before the Modification Effective Date, his TPP will terminate, and he will be unable to receive a loan modification. [7] Because financial eligibility is a condition for the TPP, Smith is not entitled to any benefits the TPP might provide.

B.

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[4] "Because th[is] appeal[] is from dismissal[] on the action['s] pleadings, we must assume the allegations are true and describe them as if they were fact." *Little v. KPMG LLP, 575 F.3d 533, 535 (5th Cir. 2009)*.

[5] "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 . . . the Loan Documents will not be modified and this Plan will terminate."

[6] Section 2(B) of the Modification Agreement expressly states that "the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement." And, the second paragraph is clear that effectuation of the Modification Agreement is contingent on the representations regarding financial hardship "continu[ing] to be true in all material respects."

[7] Because the language of the agreement requires that a borrower continue to satisfy the financial hardship requirements in order to receive a loan modification, we decline to follow *Wigod, 673 F.3d at 562*, **[**13]** to the extent it permits a lender to check whether the borrower's income qualified him for financial hardship only before the TPP is signed.

The Penningtons' claim for breach of the TPP fails for an even more basic reason: Their TPP did not form a contract, because the bank never expressed an intent to be bound. [8] The TPP expressly requires that before the contract is final, the lender must send a signed copy to the borrower. The Penningtons never alleged that they received such a signed copy. Their contract contained the same language as in *Soin, 2012 U.S. Dist. LEXIS 51824, 2012 WL 1232324, at *5*, that the TPP does not take effect until the borrower and the lender sign it and the lender provides the borrower a signed copy. Just as with the borrower in that case, the Penningtons made regular TPP payments, but they neither produced such a signed contract nor allege such a signed contract exists.

The Penningtons, unlike Smith, also admit that the bank did not send them a contract saying they were approved to move on to Step Two. Whenever they checked the status of their application, they were told it was "in review." The complaint therefore does not demonstrate that the Penningtons' TPP ever took effect, so there could be no contract for the bank to breach.

The above reading of the TPP, supported by *Soin*, is further bolstered by the fact that Texas courts give significant weight to express requirements that contracts be executed by the parties before they become binding. [9] ***HN5***[↑] When deciding **[*555]** whether parties intended to be bound by the statements in a document, courts examine how plainly the document **[**15]** indicates it is meant to be non-binding. Provisions expressly requiring the agreement be executed before it binds the parties are considered particularly significant. [10]

Although the bank's acceptance of the trial payments from the Penningtons lends some support to finding that the parties intended to be bound, [11] that weight is reduced, because the Penningtons already owed regular payments. Although the fact that they paid under the TPP indicates that they hoped to be bound, the question is whether the bank expressed a similar intent despite the fact that conditions in the TPP remained unfulfilled. The bank deposited the payments, but the Penningtons owed more than that. Even if the bank intended to refuse to accept the TPP, it would still take the money in partial satisfaction of the amount owed while interest accrued.

C.

Smith's claim for a breach of the Modification Agreement fails for the same reason the Penningtons' claim under their TPP does: ***HN6***[↑] A breach-of-contract claim cannot succeed absent a binding contract. Smith argues that because the bank would have signed but for its perception that the loan modification was illegal, if the modification is in fact legal we should consider the bank to have signed the loan modification to give effect to the parties' "manifest mutual assent."

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[8] Despite the bank's assertion to the contrary, plaintiffs' brief does indicate that they appeal the rejection of the Penningtons' breach-of-contract claim. The brief merely states, "There is no allegation that the Penningtons ever received the 'Step Two,' but rather than [*sic*] [the bank] was obligated to provide it once **[**14]** the Penningtons satisfied all the conditions of 'Step One.'" The general arguments at the beginning of the section also discuss how some courts consider the TPP a contract, while others do not based on lack of consideration, but that they believe they have shown adequate consideration. Although the brief does not set forth a thoroughly explored argument, it does indicate that the Penningtons believe the TPP was a contract entitling them to receive the Step Two Permanent Loan Modification.

[9] *See, e.g.*, *RHS Interests, Inc. v. 2727 Kirby Ltd., 994 S.W.2d 895, 897-99 (Tex. App.—Houston [1st. Dist.] 1999, no pet.)* (construing a document that specifically was not binding until a contract was signed and permitted inspection of the property before signing as non-binding, because the language of the document showed "[a] deal would be consummated only by 'the execution of the binding Purchase and Sale Agreement.'"); *Coastal Corp. v. Atl. Richfield Co., 852 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ)* (enumerating among the reasons there was no valid contract, that "[w]hile all of the parties do concede that they reached agreement on particular issues, it is clear that the owners did not consider themselves to have a contract. The document memorializing the agreement expressly required that it be executed. . . . No owner has admitted executing a contract with Coastal."); *see also John Wood Grp. USA, Inc. v. ICO, Inc., 26 S.W.3d 12, 17 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)* (comparing cases **[**16]** and determining that case was more like those in which no contract was formed, because "the language of the letter agreements specifically stated that the agreements would not be binding until further actions took place.").

[10] *John Wood Grp. USA, Inc., 26 S.W.3d at 17 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)* (citing two cases that mention the significance of the fact that the contracts expressly required execution).

[11] *See Murphy v. Seabarge, 868 S.W.2d 929, 933 (Tex. App.—Houston [14th Dist.] 1994)* (finding that a partner beginning **[**17]** to pay himself according to a contract that claimed it was not binding on the parties created a fact issue as to whether he intended to be bound).

The lack of a signature from the bank indicates that it did not intend to be bound by the Modification Agreement. The Step Two agreement states, "This agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied." Section 2(B) explains that the Loan Documents will not be modified unless and until "the Lender accepts this Agreement by signing and returning a copy of it to me." The Step Two agreement specifies that the bank is accepting the agreement by signing it, so its signature is an expression of its intent to be bound. Considering the **[**18]** explicit signature requirements of the Step Two Agreement, there was no Modification Agreement without the bank's signature. [12]

[*556] IV.

The plaintiffs allege that the bank negligently misrepresented "that a modification was *legal*." ***HN7***[↑] The elements of negligent misrepresentation are that

> (1) the representation is made by a defendant in the course of its business, or in a transaction in which it has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co., 137 S.W.3d 311, 321 (Tex. App.—Beaumont 2004, no pet).

Assuming without deciding elements one through three are met, the plaintiffs cannot satisfy the fourth: interest and fees that accrued while **[**19]** the plaintiffs were following the TPP did not arise because of the TPP. As a prerequisite of entering the TPP, plaintiffs certified that they were unable to continue making their monthly payments. If they truly were unable to make the payments, they still would have fallen behind, accrued interest, suffered late charges, and owed addition payments on that interest. If the plaintiffs were able to make all their payments as they came due, they would have been ineligible for the HAMP program for lacking the requisite hardship and would have been rejected from Step Two—landing them in the same predicament they face now. [13] Accrual of unpaid interest was a foregone conclusion, not a result of negligent misrepresentation.

V.

Smith claims that the bank is bound by promissory estoppel to modify her loan, if doing so is legal, basing the claim on the bank's telling her she would get the loan modification and then later refusing because doing so was illegal. ***HN8***[↑] The elements of promissory estoppel are (1) a promise; (2) foreseeability of reliance thereon by the promissor, and (3) substantial reliance by the promisee to his detriment. *English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)*.

First, there were no promises on which Smith was entitled to rely. Even the statement from the bank in January that she would be approved was still subject to maintaining the requirements of the TPP, including her inability to make her payments on the loan; it was not an absolute guarantee. Her reliance is especially improper, because she could make those payments and thus should have known she would not receive a loan modification. Until the modification is executed and the Modification Effective Date arrives, loan modification will **[**21]** fail to occur if the borrower ceases to meet the requirements of Section 1 in the TPP.

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[12] Step Two also requires the same financial qualifications that Smith's complaint contends she failed to meet, so her breach-of-contract claim for the Modification Agreement also fails for the same reason her breach-of-contract claim for the TPP does.

[13] It may be possible for a plaintiff to suffer damages from the TPP if he was unable to make his regular payments, but absent the TPP he would have paid more than the monthly trial payment. Then, the damages would be interest he had to pay beyond what he would have had to pay if he had made their higher-but-still-incomplete payments (likely a very small amount if anything). Plaintiffs have not alleged that they would have made payments above the TPP yet below the full amount, **[**20]** and they have not pleaded any facts from which such a situation can be inferred, so they have not alleged any pecuniary damages that resulted from a Wells Fargo representation that the TPP was legal.

Second, though Smith may have reliance damages, she, by insisting they equal the money she spent renovating her house and her TPP payments, she fails to allege any damages that satisfy the reliance requirement. The bank could not foresee that Smith would spend money **[*557]** renovating her house after believing she would receive a loan modification. The HAMP program is for those in dire financial straights. The bank would not expect that a borrower in the program would have enough cash on hand to begin spending it on home renovations. Nor do the TPP payments constitute detrimental reliance because they were just applied to the loan. As the *Wigod* court noted, *673 F.3d at 566*, the detriment suffered is the lost opportunity to alleviate ones home-equity indebtedness more significantly by foregoing utilizing another remedy, bankruptcy. Smith, however, has not alleged any alternative course of action she would have taken, except for never falling behind, which prevents her from relying on promissory estoppel in any event.

The judgment of dismissal is AFFIRMED.

End of Document

People v Garvin

Court of Appeals of New York

September 13, 2017, Argued; October 24, 2017, Decided

No. 82

Reporter
30 N.Y.3d 174 *; 88 N.E.3d 319 **; 66 N.Y.S.3d 161 ***; 2017 N.Y. LEXIS 3201 ****; 2017 NY Slip Op 07382; 2017 WL 4779544

[1] The People of the State of New York, Respondent, v Sean Garvin, Appellant.

Subsequent History: US Supreme Court certiorari denied by *Garvin v. New York, 2018 U.S. LEXIS 5800 (U.S., Oct. 1, 2018)*

Prior History: Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered July 1, 2015. The Appellate Division affirmed a judgment of the Supreme Court, Queens County (Daniel Lewis, J.), which had convicted defendant, after a nonjury trial, of robbery in the third degree (four counts) and attempted robbery in the third degree. The appeal to the Appellate Division brought up for review that Supreme Court's denial, after a hearing, of those branches of defendant's omnibus motion which were to suppress physical evidence and his postarrest statements to law enforcement officials.

People v. Garvin, 130 A.D.3d 644, 13 N.Y.S.3d 215, 2015 N.Y. App. Div. LEXIS 5552 (July 1, 2015)

Disposition: Order affirmed.

Core Terms

arrest, sentencing, door, threshold, apartment, persistent, felony offender, doorway, warrantless, privacy, circumstances, inside, enhanced, knocked, warrantless arrest, right to counsel, two-family, cases, marks, convictions, quotation, felony, space, enhanced sentence, residents, suppress, law enforcement officer, search and seizure, sentencing court, public interest

Case Summary

Overview

HOLDINGS: [1]-In a case in which defendant was convicted of four counts of third-degree robbery and one count of attempted third-degree robbery, the court of appeals reaffirmed its longstanding rule that a warrantless arrest of a suspect in the threshold of a residence is permissible under the *Fourth Amendment*, provided that the suspect has voluntarily answered the door and police have not crossed the threshold; [2]-It rejected defendant's claim that his warrantless arrest violated his right to be free from unreasonable searches and seizures because he opened his door only in response to knocking by police officers who were there for the sole purpose of arresting him without a warrant; [3]-There was no compelling justification to overrule prior cases in order to expand People v. Harris by recognizing a new category of Payton violations based on subjective police intent.

Outcome

Order affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN1[] **Search & Seizure, Scope of Protection**

A warrantless arrest of a suspect in the threshold of a residence is permissible under the *Fourth Amendment*, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN2[] **Search & Seizure, Scope of Protection**

Although it is axiomatic that warrantless entries into a home to make an arrest are presumptively unreasonable, the *Fourth Amendment* is not violated every time police enter a private premises without a warrant. There are a number of carefully delineated exceptions to the Fourth Amendment's warrant clause in that context. One of those exceptions is consent to entry. Even where the police could have obtained an arrest warrant for a defendant from a neutral magistrate before it dispatched. members from its force to the defendant's home, there is nothing illegal about the police going to a defendant's apartment and requesting that he or she voluntarily come out.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN3[] **Search & Seizure, Scope of Protection**

The *Fourth Amendment* prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest despite ample time to obtain a warrant. The *Fourth Amendment* has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN4[] **Search & Seizure, Scope of Protection**

Payton v. New York does not prohibit the police from knocking on a suspect's door because, when law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. Whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. However, police may not compel a suspect to open a door by threatening to violate the *Fourth Amendment* by, for example, announcing that they would break down the door if the occupants did not open the door voluntarily. Nor does Payton prohibit a warrantless arrest in the doorway; indeed, the warrant requirement makes sense only in terms of the entry, rather than the arrest because the arrest itself is no more threatening or humiliating than a street arrest.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN5[] **Search & Seizure, Scope of Protection**

For purposes of determining whether there was a Payton violation, New York courts have deemed it to be irrelevant whether the defendant was actually standing outside his home or was standing in the doorway, and New York courts have upheld a threshold arrest.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN6[] **Search & Seizure, Scope of Protection**

The Second Circuit has held that, where law enforcement officers have summoned a suspect to the door of his home, and he remains inside the home's confines, they may not effect a warrantless across the threshold arrest in the absence of exigent circumstances. That is, a police officer not armed with a warrant may approach a home and knock, but may not go to a person's home and then arrest him while he remains in his home.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Attenuation

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN7[] **Criminal Process, Assistance of Counsel**

The New York State Constitution requires that statements obtained from an accused following a violation of Payton v. New York must be suppressed unless the taint resulting from the violation has been attenuated. Under both federal and state law, the right to counsel attaches once criminal proceedings have commenced. However, while under the federal rule criminal proceedings do not necessarily start when an arrest warrant is issued, criminal proceedings must be instituted before the police

can obtain a warrant in New York. Thus, in New York, police are prohibited from questioning a suspect after an arrest pursuant to a warrant unless counsel is present, creating an incentive to violate Payton because doing so enables them to circumvent the accused's indelible right to counsel.

Governments > Courts > Judicial Precedent

HN8[] **Courts, Judicial Precedent**

The doctrine of stare decisis holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem.

Constitutional Law > The Judiciary > Case or Controversy > Constitutional Questions

Governments > Courts > Judicial Precedent

HN9[] **Case or Controversy, Constitutional Questions**

While the doctrine of stare decisis is applied less rigidly in resolving constitutional issues, even under the most flexible version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overruled unless a compelling justification exists for such a drastic step. Such compelling justifications have been found when a prior decision has led to an unworkable rule, or created more questions than it resolves; adherence to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience; or a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN10[] **Search & Seizure, Scope of Protection**

A person enjoys enhanced constitutional protection from a warrantless arrest in the interior of the home, but not on the threshold itself or the exterior.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN11[] **Search & Seizure, Scope of Protection**

The touchstone of the *Fourth Amendment* is reasonableness - not the warrant requirement. Therefore, the *Fourth Amendment's* concern with reasonableness allows certain actions to be taken in certain circumstances, whatever the subjective intent.

Headnotes/Summary

Headnotes

Crimes — Arrest — Warrantless Arrest of Defendant in Apartment Doorway

1. Defendant's motion to suppress statements and physical evidence obtained after his warrantless arrest in the doorway of his apartment was properly denied because defendant voluntarily answered the door and the arresting officer did not enter defendant's apartment. The *Fourth Amendment* prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest despite ample time to obtain a warrant, and has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. It is irrelevant whether the defendant was actually standing outside his home or was standing in the doorway; if the police never enter the defendant's home, a prohibited intrusion does not occur.

Courts — Stare Decisis — Compelling Justification for Overruling Precedent

2. In a criminal prosecution in which defendant was arrested without a warrant in the doorway of his apartment after he voluntarily opened the door in response to knocking by police who were there for the sole purpose of arresting him, the Court of Appeals declined, based on the principle of stare decisis, to overrule precedent holding that preplanned, warrantless arrests do not violate *Payton v New York (445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 [1980])* where the defendant exited his or her residence or stood on the threshold either due to a police request or to a ruse employed by the police. Even under the most flexible version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overruled unless a compelling justification exists for such a drastic step. The current rule, that a person enjoys enhanced constitutional protection from a warrantless arrest in the interior of the home, but not on the threshold itself or the exterior, is clear and easily understood. Moreover, overruling such precedent would result in adoption of a rule that looks to the subjective intent of the police and is, therefore, fundamentally inconsistent with *Fourth Amendment* jurisprudence. Overturning prior cases addressing the issue would both undermine the purposes of stare decisis, which are to promote efficiency and provide guidance and consistency in future cases, and unsettle the belief that bedrock principles are founded in the law rather than in the proclivities of individuals.

Counsel: [**1]** *Lynn W.L. Fahey, Appellate Advocates*, New York City (*Tammy E. Linn* of counsel), for appellant. I. Appellant's federal and state constitutional rights to be free from unreasonable searches and seizures were violated when the police arrested him without an arrest warrant in the threshold of his apartment in a two-family home. (*Payton v New York, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639*; *People v Harris, 77 NY2d 434, 570 NE2d 1051, 568 NYS2d 702*; *People v McBride, 14 NY3d 440, 928 NE2d 1027, 902 NYS2d 830*; *People v Levan, 62 NY2d 139, 464 NE2d 469, 476 NYS2d 101*; *Johnson v United States, 333 US 10, 68 S Ct 367, 92 L Ed 436*; *Kentucky v King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865*; *United States v Allen, 813 F3d 76*; *Washington v Chrisman, 455 US 1, 102 S Ct 812, 70 L Ed 2d 778*; *United States v Berkowitz, 927 F2d 1376*; *Mitchell v Shearrer, 729 F3d 1070*.) II. Appellant's statements were involuntary because he was led to believe that his choice to exercise his constitutional right to remain silent could result in the criminal prosecution of his girlfriend. (*Garrity v New Jersey, 385 US 493, 87 S Ct 616, 17 L Ed 2d 562*; *People v Thomas, 22 NY3d 629, 985 NYS2d 193, 8 NE3d 308*; *People v Avant, 33 NY2d 265, 307 NE2d 230, 352 NYS2d 161*; *People v Guilford, 21 NY3d 205, 991 NE2d 204, 969 NYS2d 430*; *Culombe v Connecticut, 367 US 568, 81 S Ct 1860, 6 L Ed 2d 1037*; *Rogers v Richmond, 365 US 534, 81 S Ct 735, 5 L Ed 2d 760*; *People v Mateo, 2 NY3d 383, 811 NE2d 1053, 779 NYS2d 399*; *People v Keene, 148 AD2d 977, 539 NYS2d 214*; *People v Helstrom, 50 AD2d 685, 375 NYS2d 189, 40 NY2d 914, 357 NE2d 1021, 389 NYS2d 366*.) III. In light of recent Supreme Court decisions in *Hurst v Florida (577 US —, 136 S Ct 616, 193 L Ed 2d 504 [2016])*, and *Descamps v United States (570 US 254, 133 S Ct 2276, 186 L Ed 2d 438 [2013])*, appellant's adjudication as a discretionary persistent felony offender violated his constitutional rights to due process and a jury trial to have any fact used to increase his sentence proved beyond a reasonable doubt. (*Apprendi v New Jersey, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435*; *Blakely v Washington, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403*; *Cunningham v California, 549 US 270, 127 S Ct 856, 166 L Ed 2d 856*; *People v Rivera, 5 NY3d 61, 833 NE2d 194, 800 NYS2d 51*; *United States v Grayson, 438 US 41, 98 S Ct 2610, 57 L Ed 2d 582*; *Williams v New York, 337 US 241, 69 S Ct 1079, 93 L Ed 1337*; *United States v Booker, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621*; *Ring v Arizona, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556*; *People v Quinones, 12 NY3d 116, 906 NE2d 1033, 879 NYS2d 1*; *People v Rosen, 96 NY2d 329, 752 NE2d 844, 728 NYS2d 407*.)

Richard A. Brown, District Attorney, Kew Gardens (*Danielle S. Fenn, John M. Castellano* and *Joseph N. Ferdenzi* of counsel), for respondent. I. The Appellate Division properly held that defendant's threshold arrest complied with *Payton v New York (445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 [1980])*. In any event, there were exigent circumstances necessitating defendant's immediate arrest, his precinct statements were attenuated from any possible taint, and any possible error was harmless. (*People v Reynoso, 2 NY3d 820, 814 NE2d 456, 781 NYS2d 284*; *People v Aiken, 4 NY3d 324, 828 NE2d 74, 795 NYS2d 158*; *United States v Santana, 427 US 38, 96 S Ct 2406, 49 L Ed 2d 300*; *People v Correa, 55 AD3d 1380, 864 NYS2d 643*; *People v Ashcroft, 33 AD3d 429, 823 NYS2d 23*; *People v Burke, 24 AD3d 129, 805 NYS2d 311*; *People v Rodriguez, 21 AD3d 1400, 804 NYS2d 160*; *People v Brown, 13 AD3d 1194, 786 NYS2d 781*; *People v Arthur, 290 AD2d 387, 738 NYS2d 15*; *People v Andino, 256 AD2d 153, 681 NYS2d 518*.) II. Defendant's post-*Miranda* statements were voluntary. (*People v Madison, 73 NY2d 810, 534 NE2d 28, 537 NYS2d 111*; *People v Winchell, 64 NY2d 826, 476 NE2d 329, 486 NYS2d 930*; *People v Guilford, 21 NY3d 205, 991 NE2d 204, 969 NYS2d 430*; *People v Anderson, 42 NY2d 35, 364 NE2d 1318, 396 NYS2d 625*; *People v Mateo, 2 NY3d 383, 811 NE2d 1053, 779 NYS2d 399*; *Colorado v Connelly, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473*; *People v Ward, 241 AD2d 767, 661 NYS2d 303*; *People v Thomas, 22 NY3d 629, 985 NYS2d 193, 8 NE3d 308*; *People v Jin Cheng Lin, 26 NY3d 701, 27 NYS3d 439, 47 NE3d 718*; *People v Dale, 115 AD3d 1002, 981 NYS2d 821*.) III. As this Court has held three times in the past, New York's discretionary persistent felony offender statute is constitutional. Defendant's adjudication as a persistent felony offender was correct and defendant was properly sentenced. (*Apprendi v New Jersey, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435*; *People v Rosen, 96 NY2d 329, 752 NE2d 844, 728 NYS2d 407*; *People v Rivera, 5 NY3d 61, 833 NE2d 194, 800 NYS2d 51*; *People v Quinones, 12 NY3d 116, 906 NE2d 1033, 879 NYS2d 1*; *People v Daniels, 5 NY3d 738, 833 NE2d 704, 800 NYS2d 369*; *People v Battles, 16 NY3d 54, 942 NE2d 1026, 917 NYS2d 601*; *Almendarez-Torres v United States, 523 US 224, 118 S Ct 1219, 140 L Ed 2d 350*; *Jones v United States, 526 US 227, 119 S Ct 1215, 143 L Ed 2d 311*; *Ring v Arizona, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556*; *Blakely v Washington, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403*.)

Wilmer Cutler Pickering Hale and Dorr LLP, New York City (*Mark G. Matuschak* and *Tiffany E. Payne* of counsel), *Lindsay A. Lewis, Amicus Curiae Committee of the National Association of Criminal Defense Lawyers*, New York City and *Richard D. Willstatter, Amicus Curiae Committee of the New York State Association of Criminal Defense Lawyers*, White Plains, for National Association of Criminal Defense Lawyers and another, amici curiae. I. Under *Penal Law § 70.10* and *CPL 400.20*, a court may sentence a convicted felon with prior felony convictions as a "persistent felony offender" only upon findings made by a judge under a preponderance of the evidence standard. II. New York's sentencing scheme under *Penal Law § 70.10* and the CPL is functionally the same as the statutory scheme found unconstitutional by the United States Supreme Court in *Hurst v Florida (577 US —, 136 S Ct 616, 193 L Ed 2d 504 [2016])*. (*Apprendi v New Jersey, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435*; *Southern Union Co. v United States, 567 US 343, 132 S Ct 2344, 183 L Ed 2d 318*; *Cunningham v California, 549 US 270, 127 S Ct 856, 166 L Ed 2d 856*; *United States v Booker, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621*; *Blakely v Washington, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403*; *Ring v Arizona, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556*; *People v Quinones, 12 NY3d 116, 906 NE2d 1033, 879 NYS2d 1*; *People v Rivera, 5 NY3d 61, 833 NE2d 194, 800 NYS2d 51*; *People v Rosen, 96 NY2d 329, 752 NE2d 844, 728 NYS2d 407*; *United States v Gonzalez, 420 F3d 111*.)

Judges: Opinion by Judge Stein. Chief Judge DiFiore and Judges Garcia and Feinman concur. Judge Fahey dissents in part in an opinion. Judge Rivera dissents in an opinion in which Judge Wilson concurs, Judge Wilson in a separate dissenting opinion.

Opinion by: STEIN

Opinion

[321] [***163] [*177]** Stein, J.

In this case, we are asked to overrule our prior decisions holding that ***HN1***[↑] a warrantless arrest of a suspect in the threshold of a residence is permissible under the *Fourth Amendment*, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold. We decline to do so, and now reaffirm our long-standing rule.

I.

Defendant was convicted of four counts of third-degree robbery and one count of attempted third-degree robbery in connection with a string of bank robberies. He was arrested without a warrant inside the doorway of his home on the same **[*178]** day that police obtained a match for his fingerprint on a demand note used during one of the robberies. The arresting officer testified that he was instructed by a detective to go to defendant's residence to arrest him. Upon arriving there, three **[****2]** officers in plain clothes walked to the top of an interior staircase in the two-family house, while two detectives went to the rear of the building. One of the officers knocked on the apartment door, which was opened by another person in the residence. The officer did not know whether defendant lived on the first or the second floor and, **[***164]** **[**322]** because she did not recognize defendant when he appeared in the doorway, the officer asked if his girlfriend lived there.[1] After defendant stated that his girlfriend was not there and closed the door, the officers walked down the stairs, and the arresting officer announced that he had recognized defendant from a photograph. The officers then returned to the apartment door.

The arresting officer knocked on the door, and defendant opened it. While defendant was standing in the doorway of his apartment, the officer told him that he was under arrest and, when defendant turned around and put his hands behind his back, the officer handcuffed him. The officer did not enter defendant's apartment—he placed the handcuffs on defendant as defendant stood in the doorway. Defendant was transported to the precinct, where he waived his *Miranda* rights, agreed to speak **[****3]** with the detectives, and initially denied involvement in the robberies. After the investigating detective informed defendant that both his and his girlfriend's fingerprints were found on demand notes recovered from the locations of the robberies, defendant confessed.

At his subsequent suppression hearing, defendant argued that the police violated *Payton v New York (445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 [1980])* by entering his home without consent or a warrant; he maintained that there was an absence of exigent circumstances once police had surrounded the home so that he could not leave. He further asserted that the police did not wait for him to exit the premises before he was arrested, and that the police had ample time to obtain an arrest warrant, but did not do so because they wanted to question him without counsel.

Supreme Court denied the motion to suppress. Following a bench trial, defendant was convicted as stated above. The **[*179]** People requested that defendant be adjudicated a persistent felony offender based upon prior first- and second-degree robbery convictions. Following a hearing, the court adjudicated defendant a persistent felony offender and sentenced him to an aggregate term of 15 years to life in prison.

The Appellate Division affirmed, **[****4]** with one Justice dissenting *(130 AD3d 644, 13 NYS3d 215 [2d Dept 2015])*. That Court concluded that defendant's warrantless arrest did not violate *Payton* (*see id. at 645*). The Appellate Division made factual findings that, after entering the front door of the house, passing through a vestibule and climbing the stairs, "[o]ne of the officers knocked on the closed apartment door, the defendant opened it, and the officer effectuated the arrest in the doorway. The arresting officer did not go inside the defendant's apartment, or reach in to pull the defendant out" (*id.* [citations omitted]). Most critically here, the Appellate Division found that "defendant was arrested at the threshold of his apartment, after he voluntarily emerged" (*id.* [internal quotation marks and citation omitted]).[2] Thus, the Appellate Division concluded that defendant had voluntarily "surrendered the enhanced constitutional protection of the home" (*id.* [internal quotation marks and **[***165]** **[**323]** citation omitted]). The Appellate Division also upheld the persistent felony offender adjudication. The dissenting Justice diverged from the majority only with respect to the denial of defendant's motion to suppress, concluding that the People failed to establish that the initial police entry **[****5]** into the building where defendant lived was lawful because there was no evidence that the police knew the building was a two-family house, rather than a one-family house, prior to entering it (*see id. at 646*).

The dissenting Justice thereafter granted defendant leave to appeal.

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[1] Police had also obtained a fingerprint from defendant's girlfriend on a demand note used in one of the robberies.

[2] In his dissent, Judge Wilson acknowledges that we are bound by the Appellate Division's findings of facts, but takes issue with our "interpretation of those findings" (Wilson, J., dissenting op at 212). Judge Wilson's lengthy "interpretation" of the facts, however, conflicts with the findings of the Appellate Division.

II.

[1] Defendant's primary argument is that his post-arrest statements and the physical evidence recovered from him at the precinct should have been suppressed because his warrantless arrest in the doorway of his apartment was unconstitutional under *Payton*. Specifically, he asserts that the arrest **[*180]** violated his constitutional right to be free from unreasonable searches and seizures because he opened his door only in response to knocking by police officers who were there for the sole purpose of arresting him without a warrant. Defendant's arguments are refuted by our precedent.

HN2[] Although "[i]t is axiomatic that *warrantless entries into a home* to make an arrest are presumptively unreasonable" (*People v McBride, 14 NY3d 440, 445, 928 NE2d 1027, 902 NYS2d 830 [2010]* [internal quotation marks and citation omitted and emphasis added]), we "have long recognized that the *Fourth Amendment* is not violated every time police enter a private premises without a warrant" (*People v Molnar, 98 NY2d 328, 331, 774 NE2d 738, 746 NYS2d 673 [2002]*). There are "a number of 'carefully delineated' **[2]** exceptions **[****6]** to the *Fourth Amendment's Warrant Clause*" in that context (*Molnar, 98 NY2d at 331*, quoting *Welsh v Wisconsin, 466 US 740, 749-750, 104 S Ct 2091, 80 L Ed 2d 732 [1984]*). One of those exceptions is consent to entry (*see id. at 331 n 1*; *People v Levan, 62 NY2d 139, 142, 464 NE2d 469, 476 NYS2d 101 [1984]*). Similarly, we have repeatedly and consistently recognized that, even where "the police could have obtained an arrest warrant for [a] defendant from a neutral magistrate before it dispatched . . . members from its force to [the] defendant's home . . . , there [i]s nothing illegal about the police going to [a] defendant's apartment and requesting that he [or she] voluntarily come out" (*McBride, 14 NY3d at 447*; *see People v Spencer, 29 NY3d 302, 312, 56 NYS3d 494, 78 NE3d 1178 [2017]*; *People v Reynoso, 2 NY3d 820, 821, 814 NE2d 456, 781 NYS2d 284 [2004]*; *People v Minley, 68 NY2d 952, 953-954, 502 NE2d 1002, 510 NYS2d 87 [1986]*).

The Supreme Court of the United States held in *Payton* itself that ***HN3***[] "the *Fourth Amendment* . . . prohibits the police from making a *warrantless and nonconsensual entry into a suspect's home* in order to make a routine felony arrest" (*445 US at 576* [emphasis added]) despite "ample time to obtain a warrant" (*id. at 583*). The Court explained that "the *Fourth Amendment* has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant" (*id. at 590*).

As the Supreme Court has subsequently explained, ***HN4***[] *Payton* does not prohibit the police from knocking on a suspect's door because, **[***166]**

> **[**324]** "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might **[****7]** do. And whether the person who knocks on the door and requests the **[*181]** opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak" (*Kentucky v King, 563 US 452, 469-470, 131 S Ct 1849, 179 L Ed 2d 865 [2011]*).

However, police may not compel a suspect to open a door by threatening to violate the *Fourth Amendment* by, "for example, . . . announcing that they would break down the door if the occupants did not open the door voluntarily" (*id. at 471*).[3] Nor does *Payton* prohibit a warrantless arrest in the doorway; indeed, "the warrant requirement makes sense only in terms of the *entry*, rather than the arrest [because] the arrest itself is no more threatening or humiliating than a street arrest" (3 Wayne R. LaFave, Search and Seizure § 6.1 [e] [5th ed 2012] [internal quotation marks omitted]).

Consistent with that understanding of *Payton* as prohibiting only "the police . . . crossing the threshold of a suspect's home to effect a warrantless arrest in the absence of exigent circumstances" (*Minley, 68 NY2d at 953*), we have upheld warrantless arrests—both planned and unplanned—of defendants who emerged from their homes after police knocked on an open door and

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[3] In *Florida v Jardines*, the Supreme Court further recognized that there is an

> "implicit license [that] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do' " *(569 US 1, 8, 133 S Ct 1409, 185 L Ed 2d 495 [2013]*, quoting *Kentucky v King, 563 US 452, 469, 131 S Ct 1849, 179 L Ed 2d 865 [2011]*; *see People v Kozlowski, 69 NY2d 761, 762-763, 505 NE2d 611, 513 NYS2d 101 [1987]*).

requested that the defendant come out (*see Spencer, 29 NY3d at 312, revg on other grounds* **[****8]** *135 AD3d 608, 24 NYS3d 48 [1st Dept 2016])*, used a noncoercive ruse to lure the defendant outside (*see People v Roe, 73 NY2d 1004, 1005, 539 NE2d 587, 541 NYS2d 759 [1989], affg 136 AD2d 140, 525 NYS2d 966 [3d Dept 1988])*, or directed the defendant to come out after seeing him peek through a window (*see Minley, 68 NY2d at 953*). We also upheld a planned, warrantless arrest where the defendant either voluntarily exited his house, or stood behind his mother in the front doorway, and stuck his head out of the door in response to a police request that he come outside (*see Reynoso, 2 NY3d at 821, affg 309 AD2d 769, 765 NYS2d 54 [2d Dept 2003])*. In other words, ***HN5***[↑] for purposes of determining whether there was a *Payton* violation, we have deemed it to be irrelevant whether the defendant was actually standing outside his home or was standing "in the doorway," and we have upheld a threshold arrest, **[*182]** like that at issue here.[4] Critically, **[***167]** **[**325]** the police never entered the defendants' homes in these cases and, thus, the intrusion prohibited by *Payton* did not occur.

III.

Despite our jurisprudence on this issue, defendant and two of our dissenting colleagues, Judges Wilson and Rivera, urge us to adopt a new rule that warrantless "threshold/doorway arrests" violate *Payton* when the only reason the arrestee is in the doorway is that he or she was summoned there by police. Defendant purports to find support for this rule in *United States v Allen (813 F3d 76 [2d Cir 2016])*, which he urges us to adopt and characterizes as holding that the police may not go to a suspect's home and lure him or her to the doorstep for **[3]** the sole purpose of making a warrantless arrest.[5] However, we are not bound by *Allen*[6] and, in any event, it is distinguishable. In that case, police went to the defendant's apartment with the plan of arresting him (*see id. at 78*). After they knocked on the defendant's door, he stepped out onto his second floor porch and police requested that he come down to speak with them (*see id. at 79*). The defendant complied and, after speaking to **[*183]** the officers for several minutes, they told him that he would have to come down to the police station to be processed for an alleged assault—i.e., that he was under arrest (*see id.*). The Second Circuit noted **[****9]** that "neither party dispute[d] that [the defendant] was arrested while he was still inside his home" or that the defendant "was arrested while standing inside the threshold of his home" (*see id. at 80 n 6*). Thus, "th[e] case concern[ed] an 'across the threshold' arrest" (*id.*)—i.e., while the police remained outside on the sidewalk (*see id. at 79*), the defendant "was arrested specifically 'in' his home rather than 'on' the threshold or in a 'public place' " (*id. at 89* [Lohier, J., concurring]). After the defendant was arrested, police accompanied him upstairs in his home so that he could retrieve a pair of shoes; once inside, the officers saw, among other things, drug paraphernalia and obtained a search warrant (*see id. at 79*).

HN6[↑] The Second Circuit held that, "where law enforcement officers have summoned a suspect to the door of his home, *and he remains inside the home's confines*, they may not effect a warrantless 'across the threshold' arrest in the absence of exigent circumstances" (*id. at 82* [emphasis added]). That is, "[a] police officer not armed with a warrant may approach a home and **[***168]** **[**326]** knock," but "may [not] go to a person's home . . . and then arrest him *while he remains in his home*"

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[4] Defendant argues that *Reynoso* is distinguishable because that case did not address instances in which police go to a suspect's residence with the subjective intent to make a warrantless arrest and lure the suspect to the doorstep for that purpose. However, the facts in *Reynoso* demonstrate that the police did just that—they used a ruse to get the defendant to the door, where the officers requested that he come outside and he either voluntarily exited the house or stood in the doorway (*see 309 AD2d 769, 771, 765 NYS2d 54 [2d Dept 2003*, McGinity, J., dissenting]). Thus, we reject defendant's argument that there is any meaningful distinction between *Reynoso* and this case.

[5] Two of the dissenters would go further and hold that "if the police plan to arrest someone who is at home, absent exigent circumstances, until they have an arrest warrant, they may not go to the person's door to arrest him or cause him to leave his home to arrest him outside of it" (Wilson, J., dissenting op at 214), and that an "arrest is constitutionally invalid" when "the sole reason the police went to defendant's home was to effect his arrest . . . without a warrant" (Rivera, J., dissenting op at 205). As explained below, a rule turning on subjective police intent is "fundamentally inconsistent with . . . *Fourth Amendment* jurisprudence" (*Kentucky v King, 563 US 452, 464, 131 S Ct 1849, 179 L Ed 2d 865 [2011])*.

[6] To the extent Judge Wilson suggests that we should adopt *Allen* to "ensur[e] our protections are no less than those guaranteed by the local federal courts" (Wilson, J., dissenting op at 213 n 4), we emphasize that, while "the interpretation of a Federal constitutional question by the lower Federal courts may serve as useful and persuasive authority for our Court[,] [it is] not binding [on] us" (*People v Kin Kan, 78 NY2d 54, 60, 574 NE2d 1042, 571 NYS2d 436 [1991]*; *see People v Pignataro, 22 NY3d 381, 386 n 3, 980 NYS2d 899, 3 NE3d 1147 [2013])*. In other words, we do not abandon our jurisprudence in response to every new lower federal court decision.

(*id. at 84* [emphasis added]). Although the Second **[****10]** Circuit recognized that a federal "circuit split" exists on the issue, with some courts holding that police do not violate *Payton* unless they enter the home, that court reasoned that *Payton* turns on the arrested person's location, not the location or conduct of the officers (*see id. at 78, 81-82, 85)*.[7]

[*184] Here, the issues of where defendant was standing at the time of his arrest and whether he was in that location voluntarily are mixed questions of law and fact (*see Spencer, 29 NY3d at 312*). We are, therefore, bound by the Appellate Division's finding that defendant was arrested "in the doorway" after he "voluntarily emerged," for which there is record support (*130 AD3d at 645*; *see People v Bradford, 15 NY3d 329, 937 NE2d 528, 910 NYS2d 771 [2010])*. Thus, *Allen*, which applies to " 'across the threshold' arrests" (*813 F3d at 81, 85, 87, 88)*, is distinguishable and does not apply here.

IV.

Defendant further claims that this case is ultimately about closing a loophole to **[4]** our decision in *People v Harris*, in which "we h[e]ld that ***HN7***[↑] our State Constitution requires that statements obtained from an accused following a *Payton* violation must be suppressed unless the taint resulting from the violation has been attenuated" *(77 NY2d 434, 437, 570 NE2d 1051, 568 NYS2d 702 [1991])*. We explained that, "[u]nder both Federal and State law, the right to counsel attaches once criminal proceedings have **[****11]** commenced" (*id. at 439*). However, while "[u]nder the [f]ederal rule, . . . criminal proceedings do not necessarily start when an arrest warrant is issued . . . , criminal proceedings must be instituted before the police can obtain a warrant" in New York (*id. at 439-440*). Thus, in New York, "police are prohibited from questioning a suspect after an arrest pursuant to a warrant unless counsel is present," creating an incentive "to violate *Payton* . . . because doing so enables them to circumvent the accused's indelible right to counsel" (*id. at 440*). Defendant, as well as Judges Rivera and Wilson in their respective dissents, focuses on the intent of the police in going to a defendant's home and urges that sanctioning preplanned doorway arrests—or, presumably, arrests where the police request that the defendant step outside to speak to them with the intent of effectuating a preplanned arrest—similarly permits police to circumvent a suspect's right to counsel. Thus, **[***169]** **[**327]** defendant contends, and the two dissenters on this issue agree, that we should prohibit arrests where the police lure a suspect to the door with the subjective intent of making a preplanned, warrantless arrest.

Inasmuch as *Harris* applies only to statements obtained **[****12]** following a *Payton* violation, suppressing defendant's statements **[*185]** here would require us to overrule our prior cases holding that preplanned, warrantless arrests do not violate *Payton* where the defendant exited his residence or stood on the threshold either due to a police request or to a ruse employed by the police.[8] We decline to do so based upon the principle of stare decisis, ***HN8***[↑] "the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases **[5]** presenting the same legal problem" (*People v Peque, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013]* [internal quotation marks and citation omitted], *cert denied sub nom. Thomas v New York, 574 US ___, 135 S Ct 90, 190 L Ed 2d 75 [2014]*). Stare decisis "rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court

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[7] The Second Circuit further declined to adopt the rationale of other Federal Circuit Courts that do *not* require police entry into a home to invalidate an arrest, rejecting what it deemed "the legal fiction of constructive or coercive entry, a doctrine under which certain types of police conduct will be deemed an entry" (*United States v Allen, 813 F3d 76, 81 [2d Cir 2016]*; *see e.g. United States v Reeves, 524 F3d 1161, 1164-1165 [10th Cir 2008]* [holding that defendant opened his door and stepped out of motel room in response to coercive police conduct after officers made phone calls to the room, knocked on the door and window with flashlights, and loudly identified themselves as police officers over the course of 20 minutes]). As recognized by the Second Circuit, that doctrine applies only if a police "command to the occupant to submit to arrest is sufficiently forceful and compelling" (*Allen, 813 F3d at 88*). Here, no such command was given before defendant voluntarily entered the threshold of his apartment door—there was simply a knock on the door. Moreover, defendant does not ask us to apply the constructive entry rule in this case.

[8] In addition to advocating that we overrule our prior cases, Judge Wilson views those cases as irrelevant because they concern only the application of *Payton* and the *Fourth Amendment* and do not address whether greater protection is warranted under the State Constitution. Any issues regarding whether *New York Constitution, article I, § 12* provides *greater* protection or "should" "provide[ ] greater clarity" (Wilson, J., dissenting op at 213) are unpreserved here because, in the suppression hearing, defendant did not argue that the State Constitution provides greater protections than its federal counterpart to defendants subject to warrantless arrests in the home. Therefore, we do not opine on the merits of such an argument.

changes" (*People v Bing, 76 NY2d 331, 338, 558 NE2d 1011, 559 NYS2d 474 [1990]*), as well as the "humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors" (*People v Hobson, 39 NY2d 479, 488, 348 NE2d 894, 384 NYS2d 419 [1976]*).

HN9[↑] While we apply the doctrine less rigidly in resolving constitutional issues (*see Bing, 76 NY2d at 338*), "[e]ven under the most flexible **[****13]** version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overruled unless a 'compelling justification' exists for such a drastic step" (*Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 25 NY3d 799, 819, 16 NYS3d 796, 38 NE3d 325 [2015]*). We have found such "compelling justification[s]" when a prior decision has led

> "to an unworkable rule, or . . . create[d] more questions than it resolves; adherence to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience; or a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience" **[*186]** (*Peque, 22 NY3d at 194* [internal quotation marks and citations omitted]).

None of those justifications exist here; nor are we persuaded that the "lessons of experience and the force of better reasoning" (*Bing, 76 NY2d at 338* [internal quotation marks and citations omitted]) compel us to abandon our line of prior decisions on the issue that is now before us yet again.

[328]** **[***170]** **[2]** Far from being unworkable, as the Appellate Division noted in this case, the current rule "is clear and easily understood: ***HN10***[↑] a person enjoys enhanced constitutional protection from a warrantless arrest in the interior of the home, but not on the threshold itself **[****14]** or the exterior" (*130 AD3d at 645*). Moreover, we are not asked to overrule a recent precedent that conflicts with a broader, preexisting doctrine, but to adopt a rule that looks to the subjective intent of the police and is, therefore, "fundamentally inconsistent with . . . *Fourth Amendment* jurisprudence" itself (*Kentucky v King, 563 US at 464*). Both this Court and the Supreme Court have "rejected a subjective approach, asking only whether the circumstances, viewed *objectively*, justify the action" (*id.* [internal quotation marks omitted]; *see People v Robinson, 97 NY2d 341, 349, 767 NE2d 638, 741 NYS2d 147 [2001]*). As both Courts have explained, ***HN11***[↑] " '[t]he touchstone of the *Fourth Amendment* is reasonableness'—not the warrant requirement" (*see Molnar, 98 NY2d at 331*, quoting *United States v Knights, 534 US 112, 118, 122 S Ct 587, 151 L Ed 2d 497 [2001]*). Therefore, this Court has emphasized that "the '*Fourth Amendment*'s concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever the subjective intent*' " (*People v Robinson, 97 NY2d at 349* [emphasis added], quoting *Whren v United States, 517 US 806, 814, 116 S Ct 1769, 135 L Ed 2d 89 [1996]*). Based on long experience, we "acknowledge[d] the difficulty, if not futility, of basing the constitutional validity of searches or seizures on judicial determinations of the subjective **[6]** motivation of police officers" (*id. at 350* [internal quotation marks and citation omitted]). Thus, under the circumstances presented here, it is not our prior precedent that "involves collision **[****15]** with a prior doctrine more embracing in its scope" (*Peque, 22 NY3d at 194*), but the rule proposed by defendant, as well as the even broader rule proposed by Judges Wilson and Rivera in dissent.

With respect to the effect of the current rule on our own jurisprudence, it certainly cannot be said that "the Judges considering these cases [have been] sharply divided . . . about how to apply the . . . rule [or] about the more fundamental **[*187]** question of whether the facts presented are even encompassed within it" (*Bing, 76 NY2d at 348*). Rather, all of our prior cases addressing the issue over the last 30 years—from *Minley* to *Spencer*—have been unanimous and posed little difficulty. Moreover, *Spencer*, decided just a few months ago, reaffirmed both *Reynoso* and *Minley*. Overturning those cases now would both undermine the purposes of stare decisis—which are "to promote efficiency and provide guidance and consistency in future cases" (*Bing, 76 NY2d at 338*)—and "unsettle the belief 'that bedrock principles are founded in the law rather than in the proclivities of individuals' " (*id. at 361* [Kaye, J., concurring in part and dissenting in part], quoting *Vasquez v Hillery, 474 US 254, 265, 106 S Ct 617, 88 L Ed 2d 598 [1986]*). Furthermore, the various rules urged by defendant and Judges Wilson and Rivera would throw into confusion a " 'bright **[****16]** line' rule[ ]" that has long " 'guide[d] the decisions of law enforcement and judicial personnel who must understand and implement our decisions in their day-to-day operations in the field' " (*People v Garcia, 20 NY3d 317, 323, 983 NE2d 259, 959 NYS2d 464 **[***171]** **[**329]** [2012]*, quoting *People v P.J. Video, 68 NY2d 296, 305, 501 NE2d 556, 508 NYS2d 907 [1986]*, *cert denied 479 US 1091, 107 S Ct 1301, 94 L Ed 2d 156 [1987]*).

As for the cold light of logic and experience, "[p]ermitting the police to make a warrantless arrest of a person who answers the door (or who is properly summoned to the door . . .)" has been described as "mak[ing] great sense" (3 Wayne R. LaFave, Search and Seizure § 6.1 [e] [5th ed 2012]). Under that rule, to which we have consistently adhered,

> "the police are quite properly relieved from having to obtain arrest warrants in a large number of cases in advance, and the warrant process is thereby not overtaxed (thus giving greater assurance it will not become a mechanical routine). But if in a particular case in which there were no exigent circumstances to start with the intended arrestee at the door elects to exercise the security of the premises by not submitting to the arrest, then it is hardly unfair that the police should be required to withdraw and return another time with a warrant" (*id*.).

In contrast, the Supreme Court has rejected the approach advanced by defendant—and that **[****17]** forms the basis of the reasoning of two of the dissenters (*see* Wilson, J., dissenting op at 218-220; Rivera, J., dissenting op at 208-209)—that "fault[s] law enforcement officers if, after acquiring **[7]** evidence that is sufficient to establish probable cause to search particular **[*188]** premises, the officers do not seek a warrant but instead knock on the door and seek . . . to speak with an occupant" (*Kentucky v King, 563 US at 466*). The Court explained that such an approach "unjustifiably interferes with legitimate law enforcement strategies" (*id*.).[9]

In short, there is no compelling justification to overrule our prior cases in order to expand *Harris* by recognizing a new category of *Payton* violations based on subjective police intent. Rather, overruling our prior cases would present an unacceptable obstruction to law enforcement, eliminate a clear and workable rule that has guided the courts for decades, undermine predictability in the law and reliance upon our decisions, and suggest that "our decisions arise [not] from a continuum of legal principle[,] [but] the personal caprice of the members of this Court" (*Peque, 22 NY3d at 194*). Such a result is untenable.

V.

Defendant's remaining arguments do not require extended discussion. His additional challenges to the legality of his arrest **[****18]** and the lack of attenuation of his subsequent statements from that arrest are either unpreserved, academic or unreviewable pursuant to the *LaFontaine*/*Concepcion* rule, which precludes us "from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court" (*People v Ingram, 18 NY3d 948, 949, 967 NE2d 695, **[***172]** **[**330]** 944 NYS2d 470 [2012]*; *see People v Concepcion, 17 NY3d 192, 953 NE2d 779, 929 NYS2d 541 [2011]*; *People v LaFontaine, 92 NY2d 470, 705 NE2d 663, 682 NYS2d 671 [1998])*.[10] His claim that his statement to police was involuntary presents a mixed question, **[8]** and there is record support **[*189]** for the conclusion of the Appellate Division to the contrary. Finally, defendant's challenge to his persistent felony offender adjudication is governed by our decision in *People v Prindle (29 NY3d 463, 58 NYS3d 280, 80 NE3d 1026 [2017])*, which requires an affirmance here. Contrary to defendant's contentions, neither *Hurst v Florida (577 US , 136 S Ct 616, 193 L Ed 2d 504 [2016])* nor *Descamps v United States (570 US 254, 133 S Ct 2276, 186 L Ed 2d 438 [2013])* compels a different result. Nor have any new reasons been presented that would otherwise require us to retreat from an interpretation that we reaffirmed as recently as *Prindle*.

Accordingly, the order of the Appellate Division should be affirmed.

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[9] In contrast to Judge Wilson's unsupported assumptions about the "relative ease of securing an arrest warrant" (Wilson, J., dissenting op at 220), the Supreme Court observed that "the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant" and that such a reason is "entirely proper" (*Kentucky v King, 563 US at 466-467*). In any event, there may be many legitimate reasons why it would be impractical in a particular situation to obtain a warrant or wait for a defendant to exit the home.

[10] With respect to the issue of defendant's reasonable expectation of privacy addressed by Judge Rivera in her dissent, in *People v Hansen (99 NY2d 339, 346 n 6, 786 NE2d 21, 756 NYS2d 122 [2003]*, *affg 290 AD2d 47, 736 NYS2d 743 [2002])*, this Court recognized that a "distinction" can exist "between the two residences—a single-family house and a two-family house—impacting the constitutional analysis" (Rivera, J., dissenting op at 201). Therefore, the burden was on defendant to establish a reasonable expectation of privacy in the shared area of the two-family house (*see e.g.* ***People v Leach, 21 NY3d 969, 993 NE2d 1255, 971 NYS2d 234 [2013])***. Defendant, however, not only made no specific offer of proof, but also failed to make any arguments in this regard and, thus, the issue is not preserved for our review (*see CPL 470.05 [2]*).

Dissent by: FAHEY (In Part); RIVERA; WILSON

Dissent

Fahey, J. (dissenting in part). I would vacate defendant's sentence and remit to Supreme Court for resentencing. New York's persistent felony offender sentencing scheme is unconstitutional under *Apprendi v New Jersey (530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 [2000])*. I disagree **[****19]** with this Court's line of cases from *People v Rosen (96 NY2d 329, 752 NE2d 844, 728 NYS2d 407 [2001])* to *People v Prindle (29 NY3d 463, 58 NYS3d 280, 80 NE3d 1026 [2017])*, holding that the statutory sentencing scheme lies "outside the scope of the *Apprendi* rule, because it exposes defendants to an enhanced sentencing range based only on the existence of two prior felony convictions" (*Prindle, 29 NY3d at 466*). However, I agree with the majority's analysis of the *Payton* issue in this case and with the Court's disposition of defendant's remaining arguments. Consequently, I dissent, but only in part.

I.

A persistent felony offender is, by definition, an individual, "other than a persistent violent felony offender as defined in [*Penal Law §] 70.08*, who stands convicted of a felony after having previously been convicted of two or more felonies," specifically defined (*Penal Law § 70.10 [1] [a]*). Being a "persistent felony offender" is, however, only one of two necessary conditions for the imposition of an enhanced sentence under the pertinent sentencing statute, *Penal Law § 70.10*. The other necessary condition is that the sentencing court must be of **[9]** the reasoned opinion, as set out in the sentencing record, "that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best **[***173]** **[**331]** serve the public **[*190]** **[****20]** interest" (*Penal Law § 70.10 [2]*). If the first necessary condition is met, but not the second, a persistent felony offender may not be given enhanced sentencing.

The Criminal Procedure Law confirms that both conditions are necessary, and that neither is on its own sufficient. Persistent felony offender enhanced sentencing

> "*may not be imposed unless* . . . the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of *section 70.10 of the penal law*, *and* (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest" (*CPL 400.20 [1]* [emphases added]).

On the second prong, the sentencing court, in order to reach the "opinion" that enhanced sentencing is warranted, "must . . . make such *findings of fact* as it deems relevant" (*CPL 400.20 [9]* [emphasis added]). Moreover, a record of the basis for the sentencing court's findings must be set forth (*see CPL 400.20 [3] [b]*).

The two necessary conditions have differing standards of proof. "A finding that the defendant is a persistent felony offender, as defined in [*Penal Law § 70.10 (1)*], must be based upon proof beyond a reasonable doubt **[****21]** by evidence admissible under the rules applicable to the trial of the issue of guilt," whereas "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence" (*CPL 400.20 [5]*).

II.

The United States Supreme Court held in *Apprendi v New Jersey (530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 [2000]*) and its progeny that, under the *Due Process Clause of the Fourteenth Amendment* and the right to a jury trial guaranteed by the *Sixth Amendment*, a jury must determine each element of a crime beyond a reasonable doubt, including any fact that has the effect of increasing the prescribed range of penalties to which a defendant is exposed **[*191]** at sentencing (*see Apprendi, 530 US at 489-490*; *see also Alleyne v United States, 570 US 99, 103, 133 S Ct 2151, 2155, 186 L Ed 2d 314 [2013]* ["Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt"]). One exception is a fact admitted by the defendant (*see Blakely v Washington, 542 US 296, 303, 124 S Ct 2531, 159 L Ed 2d*

403 [2004]), and the other is the established fact of a prior felony conviction (*see Almendarez-Torres v United States, 523 US 224, 118 S Ct 1219, 140 L Ed 2d 350 [1998])*.

At issue in *Apprendi* was a hate crime sentencing scheme that allowed a judge to increase a defendant's penalty beyond **[****22]** the maximum sentence range authorized for a particular **[10]** crime, based on the judge's finding by a preponderance of the evidence that defendant committed a crime with the intent to intimidate based on race, religion, color, gender, ethnicity, sexual orientation, or handicap. *Apprendi* ruled that a jury, not a judge, must find, beyond a reasonable doubt, that a defendant acted with such a biased purpose, in order for the sentencing enhancement to be imposed. The hate crime statute violated the Constitution **[***174]** **[**332]** because it required a judge to find an element that would increase the defendant's sentence, instead of submitting that question of fact to the jury, and it allowed the judge to decide the fact using a lesser standard of proof.

In subsequent years, the *Apprendi* doctrine has been applied "to instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and . . . capital punishment" (*Hurst v Florida, 577 US ___, ___, 136 S Ct 616, 621, 193 L Ed 2d 504 [2016]* [citations omitted], citing *Blakely v Washington, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 [2004]*; *United States v Booker, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 [2005]*; *Southern Union Co. v United States, 567 US 343, 132 S Ct 2344, 183 L Ed 2d 318 [2012]*; *Alleyne, 570 US 99, 133 S Ct 2151, 186 L Ed 2d 314 [2013]*; *Ring v Arizona, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556 [2002])*.

This Court first considered the import of *Apprendi* in *People v Rosen (96 NY2d 329, 752 NE2d 844, 728 NYS2d 407 [2001])*, in which the defendant contended that the persistent felony offender sentencing provisions of *Penal Law § 70.10* and *CPL 400.20 (5)* violated his right to trial by jury under *Apprendi*. This Court analyzed the statutes as follows:

> "Under New York law, **[****23]** to be sentenced as a persistent felony offender, the court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year was imposed. Only after it has been **[*192]** established that defendant is a twice prior convicted felon may the sentencing court, based on the preponderance of the evidence, review '[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct . . . established by any relevant evidence, not legally privileged' to determine whether actually to issue an enhanced sentence (*CPL 400.20 [5]*). It is clear from the foregoing statutory framework that the prior felony convictions are the sole [determinant] of whether a defendant is subject to enhanced sentencing as a persistent felony offender." (*Rosen, 96 NY2d at 334-335*.)

This analysis was fundamentally flawed. It is true, of course, that under *Penal Law § 70.10*, for a defendant to be sentenced as a persistent felony offender, the court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year had been imposed. That is the first necessary condition of persistent felony offender enhanced sentencing. **[****24]** It is also true that the sentencing court would only review the defendant's history and character and the nature and circumstances of his or her criminal **[11]** conduct after concluding that the first condition had been met. However, it was a complete non sequitur to conclude from these propositions that prior felony convictions are the *sole* determinant of whether a defendant is subject to persistent felony offender enhanced sentencing.

The statute is clear that a defendant is subject to enhanced sentencing—i.e., may have enhanced sentencing imposed on him—as a persistent felony offender only if *both* statutory necessary conditions are met. Only "[w]hen the court has found . . . that a person is a persistent felony offender, *and* . . . it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest," may the court impose the enhanced sentence (*Penal Law § 70.10 [2]* [emphasis added]).

[*175]** **[**333]** The *Rosen* Court, after thus misreading the statutory language, added that the sentencing court, in deciding whether extended incarceration and lifetime supervision **[****25]** will best serve the public interest, is "only fulfilling its traditional role . . . in determining an appropriate sentence within the permissible statutory range" (*Rosen, 96 NY2d at 335*). This analysis, clearly **[*193]** designed to suggest that the second necessary condition of persistent felony offender enhanced sentencing is purely discretionary, rather than a fact-finding exercise, misstated the sentencing court's task. Deciding whether "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (*Penal Law § 70.10 [2]*) is deciding a question that has one of only two answers: yes, the public interest is best served by extended incarceration and lifetime supervision, or no, it

is not. It is not an exercise in determining a sentence within a range. That comes later, when the sentencing court actually imposes the sentence. Moreover, as the statutes themselves clarify, the *Penal Law § 70.10 (2)* determination involves making "findings of fact" (*CPL 400.20 [9]*).

In *People v Rivera (5 NY3d 61, 833 NE2d 194, 800 NYS2d 51 [2005])*, the defendant—one of many to do so—asked the Court to overturn *Rosen*. The Court declined. While properly analyzing the question to be "whether any facts **[****26]** beyond those essential to the jury's verdict (other than prior convictions or admissions) were necessary for the trial judge to impose the persistent felony offender sentence" (*Rivera, 5 NY3d at 65-66*), the Court reiterated its earlier flawed conclusion that a defendant's prior convictions constitute the sole determinant for whether he or she is subject to persistent felony offender sentencing, suggesting that *Penal Law § 70.10* "authorizes" sentencing as a persistent felony offender "once the court finds persistent felony offender status" (*id. at 66*). *Rivera* ignored the clear statutory language making the *Penal Law § 70.10 (2)* determination a necessary condition of the imposition of persistent felony offender sentencing.

Contrary to *Rivera*, the mere existence of the prior felonies is not a "sufficient condition[ ] for imposition of the authorized sentence for recidivism" (*Rivera, 5 NY3d at 68*; *see also Prindle, 29 NY3d at 467*), but only a necessary condition. As Chief Judge Kaye observed in **[12]** her dissent,

> "[f]itting the definition of a persistent felony offender under *Penal Law § 70.10 (1)* is necessary but not sufficient to render a defendant eligible for enhanced sentencing under *CPL 400.20*. Rather, an enhanced sentence is available only for those who additionally are found to be of such history and character, and to have committed **[****27]** their criminal **[*194]** conduct under such circumstances, that extended incarceration and lifetime supervision will best serve the public interest. The persistent felony offender statute thus stands in stark contrast to *Penal Law § 70.08*, which requires that all three-time violent felons be sentenced to an indeterminate life term on the basis of the prior convictions alone" (*Rivera, 5 NY3d at 73* [Kaye, Ch. J., dissenting] [citation omitted]).

Other Judges of this Court have dissented in persistent felony offender sentencing cases for the same reason, among others (*see Rivera, 5 NY3d at 79-80* [Ciparick, J., **[***176]** **[**334]** dissenting]; *People v Battles, 16 NY3d 54, 63-65, 942 NE2d 1026, 917 NYS2d 601 [2010*, Lippman, Ch. J., dissenting in part]; *People v Giles, 24 NY3d 1066, 1073-1074, 2 NYS3d 30, 25 NE3d 943 [2014*, Abdus-Salaam, J., concurring in part and dissenting in part]). As Judge Ciparick noted, review of related statutes confirms Chief Judge Kaye's insight.

> "Had the Legislature intended for the inquiry to end at recidivism, it could, for example, have replicated the language of *Penal Law § 70.08*, which mandates sentencing for persistent violent felony offenders based solely on recidivism, or it could have used the [similar] language of *Penal Law § 70.04* or *§ 70.06* as it relates to second felony offenders and second violent felony offenders" (*Rivera, 5 NY3d at 80* [Ciparick, J., dissenting]).

III.

The *Rivera* Court further erred by holding that a sentencing court's *Penal Law § 70.10 (2)* determination—that the defendant's **[****28]** character and criminality indicate that the public interest is best served by extended incarceration and lifetime supervision—"describes the exercise of judicial discretion characteristic of indeterminate sentencing schemes" (*id. at 66*) and "falls squarely within the most traditional discretionary sentencing role of the judge" (*id. at 69*). As the Court put it, "[o]nce the defendant is adjudicated a persistent felony offender, the requirement that the sentencing justice reach an opinion as to the defendant's history and character is merely another way of saying that the court should exercise its discretion" (*id. at 71*).

This was an attempt to give an alternate source of support for the *Rosen* Court's notion that a sentencing court's determination that enhanced sentencing would serve the public interest **[*195]** was simply a matter of the sentencing court's "fulfilling its traditional role" (*Rosen, 96 NY2d at 335*). In a footnote, the *Rivera* Court suggested that judicial findings prohibited by **[13]** *Apprendi* "relate to the crime for which the defendant was on trial and, as quintessential fact questions, would properly have been subject to proof before the jury, in stark contrast to traditional sentencing analysis of factors like the defendant's **[****29]** difficult childhood, remorse or self-perceived economic dependence on a life of crime" (*Rivera, 5 NY3d at 69 n 8*).

Rivera, however, was inconsistent with *Apprendi* and its progeny. The exercise of determining whether enhanced sentencing would serve the public interest may involve the application of the sentencing judge's discretion, but it is no less factual for

being, in the end, discretionary in nature. In order to exercise discretion on the subject of whether enhanced sentencing would serve the public interest, the sentencing court must first make findings concerning "the facts surrounding defendant's history and character" (*Rivera, 5 NY3d at 67*), or, as the Criminal Procedure Law puts it, "must . . . make such *findings of fact* as it deems relevant" (*CPL 400.20 [9]* [emphasis added]). Furthermore, as Chief Judge Kaye noted in her dissent in *Rivera*, the Supreme Court has made it "clear that any factfinding essential to sentence enhancement must be decided by a jury, even if it is general and unspecified in nature, and even if the ultimate sentencing determination is discretionary" (*Rivera, 5 NY3d at 73-74* [Kaye, Ch. J., dissenting] [footnote and emphasis omitted]).

[*177] [**335]** The Supreme Court had clarified that point in *Blakely v Washington (542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 [2004]* [holding that *Apprendi* was violated where the sentencing court had to find that defendant **[****30]** acted with "deliberate cruelty" in order to impose enhanced sentencing]). In *Blakely*, the Supreme Court observed that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or any aggravating fact . . . , it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact" (*Blakely, 542 US at 305* [emphasis omitted]). Moreover, the Supreme Court explained, it does not

> "matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He [or she] cannot **[*196]** make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence" (*Blakely, 542 US at 305 n 8* [emphasis omitted]).

In other words,

> "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from [*Apprendi*]. If the jury's verdict alone does not authorize the sentence, if, instead, **[****31]** the judge must find an additional fact to impose the longer term, the *Sixth Amendment* requirement is not satisfied" (*Cunningham v California, 549 US 270, 290, 127 S Ct 856, 166 L Ed 2d 856 [2007])*.

Rivera, like *Rosen* before it, was not correctly decided, because the findings contemplated by *Penal Law § 70.10 (2)* involve facts that have the effect of increasing the prescribed range of penalties to which a defendant is exposed at sentencing, within the meaning of *Apprendi*. In sum, it is clear that a sentencing court, in deciding "that the history and character **[14]** of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (*Penal Law § 70.10 [2]*), is necessarily making factual findings that must instead be made by the jury, under *Apprendi*.

IV.

"The constitutionality of sentences imposed under this sentencing scheme has, not surprisingly, been a practically constant subject of litigation since *Apprendi*" (*Battles, 16 NY3d at 61* [Lippman, Ch. J., dissenting in part]). In the years since *Rosen* and *Rivera*, this Court has reiterated the misguided analysis provided in those opinions: that the first prong of *Penal Law § 70.10* is the sole determinant of persistent felony offender sentencing, and that

> "New York's sentencing scheme, by requiring that sentencing **[****32]** courts consider defendant's 'history and character' and the 'nature and circumstances' of defendant's conduct in deciding where, within a range, to impose an enhanced sentence, sets the **[*197]** parameters for the performance of one of the sentencing court's most traditional and basic functions, i.e., the exercise of sentencing discretion" (*People v Quinones, 12 NY3d 116, 130, 906 NE2d 1033, 879 NYS2d 1 [2009]*; *see also Prindle, 29 NY3d at 466-467*).

[336] [***178]** The foregoing discussion of the statutes, however, demonstrates that *Penal Law § 70.10 (2)* is a separate necessary condition, and does not simply allow a sentencing court to "decid[e] where, within a range, to impose an enhanced sentence" (*Quinones, 12 NY3d at 130*); rather, it requires that a sentencing court decide *whether* the factual circumstances of defendant's crimes and character warrant enhanced sentencing, before imposition of any enhanced sentence is permissible.

As my colleague Judge Abdus-Salaam wrote, a "recitation of the statutory terms suffices to show that . . . the persistent felony offender sentencing scheme violates the *Apprendi* rule," and the Court's "*Apprendi* precedents have devolved into hollow and discredited words supporting a clearly unconstitutional sentencing framework" (*Giles, 24 NY3d at 1074, 1076* [Abdus-Salaam, J., concurring in part and dissenting in part]).

V.

I do not quarrel with the majority's statement that the resolution **[****33]** of the *Apprendi* issue here "is governed by" our precedents (majority op at 189), but I believe there is "compelling justification for" overruling our prior holdings in this area, because they "create[ ] more questions than [they] resolve[ ]" and "no longer serve[ ] the ends of justice or withstand[ ] the cold light of logic and experience" (*People v Peque, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013]* [internal quotation marks and citations omitted]).

I add a final comment on their larger significance and "real effect" (*Battles, 16 NY3d at 65* [Lippman, Ch. J., dissenting in part]) in our system of justice. Exposing defendants to criminal penalties more severe than could be imposed based upon the jury verdict and prior convictions alone, without a jury making the factual determinations necessary for the **[15]** enhancement in punishment, is abhorrent not only to the Federal Constitution but also to basic justice. For example, under *Penal Law § 70.10*, a nonviolent serial shoplifter convicted of criminal possession of stolen property in the fourth degree, a class E felony for which the maximum sentence is four years' imprisonment (*see Penal Law § 70.00 [2] [e]*), may be given "the sentence of **[*198]** imprisonment authorized by [*Penal Law § 70.00*] for a class A-I felony" (*Penal Law § 70.10 [2]*), which is a minimum sentence of 15 years to life (*see Penal Law § 70.00 [3] [a] [i]*; *see People v Ellison, 124 AD3d 1230, 1 NYS3d 594 [4th Dept 2015], lv denied 25 NY3d 1201, 16 NYS3d 523, 37 NE3d 1166 [2015], **[****34]** vacated and mot for writ of error coram nobis granted 136 AD3d 1354, 24 NYS3d 556 [2016]* [granting motion in light of defense counsel's failure to challenge finding that defendant is a persistent felony offender]). Applying the Court's interpretation of the statutory sentencing scheme allows a judge, without jury fact-finding on the factual circumstances of defendant's history and character, to punish such a shoplifter with the penalty associated with violent crimes such as kidnapping in the first degree (*Penal Law § 135.25*), aggravated murder (*Penal Law § 125.26*), or murder in the first or second degree (*Penal Law §§ 125.27*, *125.25*). Silence in the face of such injustice would amount to acquiescence. Accordingly, I dissent.

Rivera, J. (dissenting). The *Fourth Amendment* and our State Constitution provide "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable **[***179]** **[**337]** searches and seizures" (*US Const 4th Amend*; *NY Const, art I, § 12*; *Payton v New York, 445 US 573, 576, 100 S Ct 1371, 63 L Ed 2d 639 [1980])*. These constitutional protections afforded individuals reflect the societal recognition of the home as "the sacred retreat to which families repair for their privacy and their daily way of living" (*Gregory v Chicago, 394 US 111, 125, 89 S Ct 946, 22 L Ed 2d 134 [1969*, Black, J., concurring]). Hence, a warrantless entry by police to effectuate a home arrest, the most intrusive of government invasions **[****35]** into a person's privacy, is "presumptively unreasonable" (*Payton v New York, 445 US 573, 586, 100 S Ct 1371, 63 L Ed 2d 639 [1980])*. The People bear "the burden of overcoming that presumption" (*People v Hodge, 44 NY2d 553, 557, 378 NE2d 99, 406 NYS2d 736 [1978])*, and thus "defendant has no burden to show he had an 'expectation of privacy' in his apartment" (*People v Levan, 62 NY2d 139, 144, 464 NE2d 469, 476 NYS2d 101 [1984])*.

The People did not rebut that presumption here because they failed to establish, as a constitutional matter, that defendant lacked any reasonable expectation of privacy in the location of the house where he was arrested, and that the arrest comes within one of the "carefully delineated" narrow exceptions to the warrant requirement (*People v Molnar, 98 NY2d 328, 331, 774 NE2d 738, 746 NYS2d 673 [2002]*, citing *Welsh v Wisconsin, 466 US 740, 749-750, 104 S Ct 2091, 80 L Ed 2d 732 [1984])*. This is enough, in **[16]** my opinion, to find the police violated defendant's rights. However, the unreasonable intrusions **[*199]** that mark this case are not limited to a single constitutional violation caused by entering the commonly-shared areas of a two-family house. The People also failed to justify the police visit to defendant's home for the sole purpose of making a warrantless arrest, as this action undermined defendant's constitutionally protected indelible right to counsel (*NY Const, art I, § 6*; *People v Lopez, 16 NY3d 375, 377, 947 NE2d 1155, 923 NYS2d 377 [2011])*. Therefore, unlike the majority, I conclude that defendant's post-arrest statements were obtained in violation of his rights, and I dissent.

I.

A.

After establishing **[****36]** probable cause for defendant's arrest, the police proceeded without a warrant to his home to make the arrest. Within minutes of arriving at the home, the police made two uninvited and unannounced entries through the front door of the two-family house where defendant lived. Both times they walked through the vestibule immediately behind the front door and proceeded up the stairs that lead to defendant's second-floor apartment. At the top of the stairs the police knocked and spoke briefly to the person who opened the door. On the second trip through defendant's house and back up the stairs, the police again knocked on defendant's apartment door, and this time, when defendant opened the door and while standing in the doorway, the police told him he was under arrest.

The People incorrectly argue that defendant has absolutely no privacy expectation in the area between the front door of the house and the door leading directly to his living space because his privacy interests only attach on the apartment side of the upstairs door threshold. In support of this claim, the People rely on evidence at the suppression hearing that established that defendant lived in a second floor apartment of a **[****37]** two-family house. That alone, however, is insufficient to meet the People's **[***180]** **[**338]** heavy burden.[11] The constitutional inquiry centers on whether it **[17]** was reasonable for defendant to assume that the **[*200]** vestibule and stairway inside his house are private areas, which the police may not enter without consent or some other lawful basis (*Levan, 62 NY2d at 144*).

It is a basic principle of *article I, § 12 of the New York Constitution* and the *Fourth Amendment to the United States Constitution* that warrantless searches and seizures inside a home are presumptively unreasonable (*People v Knapp, 52 NY2d 689, 694, 422 NE2d 531, 439 NYS2d 871 [1981]*; *Brigham City v Stuart, 547 US 398, 403, 126 S Ct 1943, 164 L Ed 2d 650 [2006]*). This holds true even in a two-family house where the residents share common areas. The United States Supreme Court has made clear that an individual can have a reasonable expectation of privacy in an area despite not having its exclusive use (*Mancusi v DeForte, 392 US 364, 368, 88 S Ct 2120, 20 L Ed 2d 1154 [1968]*). Further, the United States Supreme Court long ago rejected the notion that a defendant has no privacy expectations simply because a space may be accessible to the public since what a defendant "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (*Katz v United States, 389 US 347, 351, 88 S Ct 507, 19 L Ed 2d 576 [1967]*). Thus, the fact that defendant lived in the second floor apartment of a two-family house does not automatically strip him of the constitutional protections afforded to the residents of the house in areas **[****38]** that they share in common. The concept of the house as a home would be meaningless if it could be so easily compartmentalized into publicly unprotected spheres.

Even under the majority's analysis that the current law establishes a bright-line rule that the police may not cross the house threshold to make a warrantless arrest (majority op at 180), I cannot agree that the threshold is yards beyond the front door of the house and up a flight of stairs. Whether it is reasonable to view this area as holding some modicum of privacy depends on the relationship between the individual and the space (*Katz, 389 US at 351*). Residents would not imagine that simply by living in a two-family house, they effectively forfeit their privacy to all areas except for that space which is not commonly shared by the residents of the house or invited guests. Nor would they believe that they have exited their **[*201]** "sacred retreat" and the sanctuary of their home by stepping into an area with limited access to outsiders. Human experience leads to the conclusion that a resident of an upstairs living area in a two-family house has a privacy interest effective at the door leading into the building. The purpose of a front door to someone's home **[****39]** is to ensure the privacy and security of those living behind it. It **[***181]** **[**339]** signals for all who approach that the home is not a public venue. When one approaches a door to a house, one seeks permission to enter because of our common understanding that this is a private residence.

Unrelated cohabitants with individual apartments in a two-family house may share the doorway vestibule area and the steps leading to various parts of the home, storing personal items and engaging in private conversations in these spaces, further illustrating that these living arrangements are based on the presumption that the space behind the front door is part of the home and within the residents' zone of privacy. Even the shared use of common areas by other residents and guests, "does not render

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[11] The majority recognizes that a resident of a two-family house may have a privacy interest in a common area, yet suggests that we have previously decided that the burden of establishing this interest always shifts to defendant. The citation to *People v Leach (21 NY3d 969, 993 NE2d 1255, 971 NYS2d 234 [2013])*, however, betrays the infirmity of this position. In that case, defendant resided in his grandmother's apartment, and there was record support that his grandmother did not want defendant to have unfettered access to all areas of the apartment, including a guest room used solely by other grandchildren in which a weapon was found (*id. at 971-972*). This suggests nothing about an individual's expectation of privacy inside the shared, enclosed hallway of their two-family home—defendant here does not claim to have a reasonable expectation of privacy in his downstairs neighbor's living quarters.

such areas 'public' with respect to the constitutional prerequisites for permissible entry by the police" (*People v Garriga, 189 AD2d 236, 241, 596 NYS2d 25 [1st Dept 1993]*). It is one thing to accept that in a shared home you will come across other residents at the front door, in the hallway, perhaps at the steps leading to the basement, attic, or upstairs apartment; it is quite another to give up all rights to privacy from government intrusion into these same shared spaces. The former **[****40]** is a necessary and inherent consequence of the living arrangement itself; the latter requires voluntary abnegation of all expectations of privacy. Absent conduct by residents suggesting a shared environment is actually public, a resident of a two-family house is entitled to the same constitutional protections as those in a single-family house in these common areas. There is no distinction as matter of law between the two residences—a single-family house and a two-family house—impacting the constitutional analysis.

There are also societal interests in protecting a resident's privacy in these common areas of the home (*Oliver v United States, 466 US 170, 178, 104 S Ct 1735, 80 L Ed 2d 214 [1984]* ["In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the *Fourth Amendment* . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion"]; *Johnson v United States, 333 US 10, 14, **[*202]** 68 S Ct 367, 92 L Ed 436 [1948]* ["The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance"]). The conception of "home" may "extend to facilities shared by several persons not **[****41]** related to each other" (*see People v Powell, 54 NY2d 524, 531 [1981]*). People's lives are not so atomized and impersonal in these shared environments to negate the constitutional protection of privacy afforded a resident whose home includes communal space. As our shared living arrangements necessarily reflect family commitments, evolving social norms, limited personal finances, and market forces that drive housing preferences and vacancy rates, these factors redefine concepts of "intimacy" and communal interaction. Residents, like defendant, should not be penalized and stripped of their constitutional protections based on choices driven, in part, by financial and family concerns (*Garriga, 189 AD2d at 241*).

Here, the People failed to present any evidence that defendant's expectation of privacy in the shared area of a two-family house should be treated any differently from that of a resident living in a single-family house. Nor did they establish that defendant's expectation is unreasonable as a constitutional matter because he had forgone any privacy interest in the **[18]** entrance to the house and the stairs leading to his **[***182]** **[**340]** apartment. The People did not introduce evidence that the vestibule and staircase were generally open and accessible to the public. **[****42]** There was no testimony that the officers observed unannounced people freely entering and exiting the house (*cf. People v Hansen, 290 AD2d 47, 52-53, 736 NYS2d 743 [2002]* [testimony established hallway of two-family home was "a public hallway, open to anyone who wants to walk in off the street"]). The police did not even testify as to how the front door was open, thus failing to establish the means for some public access to this area, or that they had consent to enter the house. Even if the vestibule was accessible to the public, the people failed to elicit evidence to suggest that defendant did not have an expectation of privacy to the only internal means to reach him: the steps and area immediately outside his apartment door. It is the People's burden to rebut the presumption that the space was private, and their evidence fell far short of establishing a basis for the police to cross the "firm line at the entrance of the house" that marks the constitutional perimeter of the "home" (*Payton, 445 US at 590*; *Kirk v Louisiana, 536 US 635, 638, 122 S Ct 2458, 153 L Ed 2d 599 [2002]*; *Hodge, 44 NY2d at 557*).

[*203] The People argue that defendant had no more privacy interest in the vestibule and stairs leading to his second-floor living space than a tenant in a large apartment complex or multiunit apartment building has in the building lobby and stairwell. This comparison **[****43]** ignores the intimacy inherent in living in a house that distinguishes it from a multiunit building where the first floor is open and accessible to the public. Unlike the small foyer entry of a home which is closed off to the public, a building lobby may be open to the public and serve as an extension of the steps or path leading to the building. As such, the lobby is transformed into public space, where strangers walk through and sometimes ascend the stairs. For some buildings, a visitor must enter the lobby in order to be announced to the tenant. For these reasons we have held that "hallways and stairways of large multiple dwellings, where delivery [and] service [personnel], visitors and other strangers are continually moving, must be considered public places" (*People v Peters, 18 NY2d 238, 244, 219 NE2d 595, 273 NYS2d 217 [1966]*, *affd sub nom. Sibron v New York, 392 US 40, 88 S Ct 1889, 20 L Ed 2d 917 [1968]*; *see also People v Powell, 54 NY2d 524, 430 NE2d 1285, 446 NYS2d 232 [1981]* [lobby of six story men's shelter was public place and not part of home]; *cf. People v Allen, 54 AD3d 868, 869, 865 NYS2d 231 [2d Dept 2008]* ["Although the apartment building had only six apartments, the defendant failed to demonstrate that he had any legitimate expectation of privacy in the apartment building's vestibule, as it was accessible to all tenants and their invitees"]). Given the number of people who pass through a lobby, tenants in these multiple-

unit **[****44]** dwellings have a diminished expectation of privacy in these open, publicly-accessible spaces that is not experienced by persons who share closed, common areas in a two-family house.

Other jurisdictions have recognized the need for some evidence of public access akin to that found in a larger, multiunit building before reducing residents' expectations of privacy. The Sixth Circuit, for example, has held that the "nature of the living arrangement in a **[19]** duplex, as opposed to a multi-unit building, leads [to the conclusion] that a tenant in a duplex has a reasonable expectation of privacy in common areas shared only by the duplex's tenants and the landlady" (*United States v King, 227 F3d 732, 746 [6th Cir 2000]* [emphasis omitted], quoting *United States v McCaster, 193 F3d 930, 935 [8th Cir 1999]* ***[***183] [**341]***, Heaney, J., concurring in part and dissenting in part]). The Ninth Circuit has similarly held that in a building containing two apartments and the landlord's living quarters, the tenants **[*204]** "exercised considerably more control over access to [the entryway to the two apartments] than would be true in a multi-unit complex, and hence could reasonably be said to have a greater reasonable expectation of privacy than would be true of occupants of large apartment buildings" (*United States v Fluker, 543 F2d 709, 716 [9th Cir 1976]*). The Supreme Court of Connecticut has held that a defendant **[****45]** has an expectation of privacy in the common basement of a two-family house (*State v Reddick, 207 Conn 323, 332, 541 A2d 1209, 1214 [1988]*). As the Fifth Circuit has noted, "[c]ontemporary concepts of living such as multi-unit dwellings must not dilute [a defendant's] right to privacy any more than is absolutely required" (*Fixel v Wainwright, 492 F2d 480, 484 [5th Cir 1974]*).

Like other persons living in two-family houses, absent evidence evincing intent to create an "open house" environment, defendant had a reasonable expectation of privacy in the vestibule and staircase for these constituted part of his home. As such, he was entitled to the constitutional protection against a warrantless home arrest, and the police entry violated *Payton*.[12]

B.

Contrary to the People's argument the issue is preserved for our review. In order to preserve an issue, a defendant must register a protest at a time when the court has the opportunity of effectively altering its response (*see CPL 470.05 [2]*; *People v Graham, 25 NY3d 994, 996, 10 NYS3d 172, 32 NE3d 387 [2015]*). Here, defense counsel argued that the police entered defendant's home in violation of *Payton*, and the People responded that he had no legitimate right to privacy in the hallway. Defense counsel argued that since the police were "unaware as to how they gained entry into the two-family home," the judge should be careful when considering **[****46]** *Payton*, as there was no testimony defendant "actually exited the residence before he was arrested." This protest sufficiently preserved the issue.

Even assuming arguendo that defense counsel's statements lacked specificity, an issue is preserved if "the court expressly decided the question raised on appeal" (*CPL 470.05 [2]*). The **[*205]** court, by necessity if not implication, decided that defendant had no privacy interest in **[20]** the area between the front doorway and the door leading to defendant's living space when it denied defendant's motion to suppress and concluded the arrest was outside the home because it was conducted "in the hallway of his apartment building." Unsurprisingly, the Appellate Division treated the issue as preserved, holding that "where the defendant lived in the upstairs apartment of a building containing two separate apartments, there is clearly a distinction between homes and common areas such as halls and lobbies . . . which are not within an individual tenant's zone of privacy" (*People v Garvin, 130 AD3d 644, 645, 13 NYS3d 215 [2d Dept 2015]* [internal quotation marks omitted]).

II.

A.

There is a second ground for concluding the arrest is constitutionally invalid. Like **[***184] [**342]** Judge Wilson, I would apply *Payton* where, as here, the sole reason the police went **[****47]** to defendant's home was to effect his arrest, and in doing so without a warrant, they undermined defendant's indelible right to counsel. I agree with Judge Wilson that the majority's reasons for not applying *Payton* are unpersuasive (Wilson, J., dissenting op at 213-216). I write separately to discuss the interplay between these constitutional protections.

B.

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[12] Nor did the People establish that the warrantless arrest was justified under one of the narrow exceptions to the warrant requirement, such as when emergency aid is required, when in hot pursuit of a fleeing suspect, to prevent the imminent destruction of evidence, etc. (*see Kentucky v King, 563 US 452, 460, 131 S Ct 1849, 179 L Ed 2d 865 [2011]*).

"[W]e have delineated an independent body of search and seizure law under the State Constitution" that implicates the defendant's indelible right to counsel (*People v Harris, 77 NY2d 434, 438, 570 NE2d 1051, 568 NYS2d 702 [1991]*). As the Court has emphasized,

> "The safeguards guaranteed by this State's Right to Counsel Clause are unique (*NY Const, art I, § 6*). By constitutional and statutory interpretation, we have established a protective body of law in this area resting on concerns of due process, self-incrimination and the right to counsel provisions of the State Constitution which is substantially greater than that recognized by other State jurisdictions and far more expansive than the Federal counterpart. The Court has described the New York **[*206]** rule as a 'cherished principle,' rooted in this State's prerevolutionary constitutional law and developed 'independent of its Federal counterpart.' The highest degree of judicial vigilance is required to safeguard it. Manifestly, **[****48]** protection of the right to counsel has become a matter of singular concern in New York and it is appropriate that we consider the effect of *Payton* violations upon it" (*Harris, 77 NY2d at 439* [internal quotation marks, brackets and citations omitted]).

In New York, the indelible right to counsel attaches when the police commence formal proceedings by filing an accusatory instrument (*People v Samuels, 49 NY2d 218, 221, 400 NE2d 1344, 424 NYS2d 892 [1980]*). Under the Criminal Procedure Law, an arrest warrant may not issue until an accusatory instrument has been filed (*CPL 120.20*). "Thus, in New York once an arrest warrant is **[21]** authorized, criminal proceedings have begun, the indelible right to counsel attaches and police may not question a suspect in the absence of an attorney" (*Harris, 77 NY2d at 440*, citing *Samuels, 49 NY2d at 221-222*). It would be the simplest of things for police to avoid the mandates of our Constitution and sidestep a defendant's indelible right to counsel by visiting a defendant solely to effectuate a house arrest without a warrant. Surely that is not what we intended when this Court recognized the broader protections afforded under our Constitution (*People v Bing, 76 NY2d 331, 339, 558 NE2d 1011, 559 NYS2d 474 [1990]* [state right to counsel "far more expansive than the Federal counterpart"]).

Fourth Amendment jurisprudence and our independent analysis under our constitutional search and seizure and indelible right to counsel **[****49]** provisions dictate that defendant's statements were obtained in violation of his constitutional rights. Any other decision would make it too easy for police to avoid the warrant requirement and its attendant right to counsel. As my dissenting colleague points out, there are various ways in which the "doorway threshold" rule adopted by the majority undermines defendant's rights and potentially escalates the tension inherent in a visit from the police (Wilson, J., dissenting op at 218-220). An attempted warrantless **[***185]** **[**343]** home arrest places a defendant in the dangerous position of risking a forced entry if defendant refuses to open the door, or after initially opening and then attempting to close the door to retreat inside. These actions may raise suspicion or suggest the existence of exigent circumstance. Police may very well believe, for example, **[*207]** that evidence is being or about to be destroyed, that defendant is attempting to secure a weapon, placing the officers in imminent danger of bodily harm, or that defendant is attempting to flee (*see People v McBride, 14 NY3d 440, 928 NE2d 1027, 902 NYS2d 830 [2010]*; *People v Riffas, 120 AD3d 1438, 994 NYS2d 136 [2d Dept 2014]*). A rule that prevents these situations benefits defendants, police, and society.

We must be mindful that the police interaction illustrated by this case implicates **[****50]** express constitutional provisions intended to protect the individual from government overreach and abuse of power—the right to be secure from unreasonable warrantless government intrusions of the home, and the indelible right to counsel—and, as such, requires robust judicial oversight. The Court has made it abundantly clear that our "independent body of search and seizure law" be read so as to "best promote[ ] the protection of the individual rights" of the People of the State of New York, and that our indelible right to counsel is a "cherished principle" entitled to "[t]he highest degree of judicial vigilance . . . to safeguard it" (*Harris, 77 NY2d at 438, 439* [internal quotation marks, brackets and citations omitted]; *see also People v Lopez, 16 NY3d 375, 380, 947 NE2d 1155, 923 NYS2d 377 [2011]*; *People v Jones, 2 NY3d 235, 240, 810 NE2d 415, 778 NYS2d 133 [2004]*).

This right to counsel must be kept inviolate. Otherwise, we would encourage warrantless home arrests and normalize behavior that both the State and Federal Constitutions expressly prohibit. The possibility of suppressing unlawfully obtained information is insufficient to offset countervailing forces seeking to secure inculpatory information. We have warned **[22]** against this danger in the federal context where the right to counsel does not attach with the issuance of an arrest warrant (*Harris, 77 NY2d at 440*). The **[****51]** practical effect of the federal rules "is that little incentive exists for police to evade *Payton* in the hopes of securing a statement" and "the incremental deterrent resulting from suppressing statements made afer an illegal arrest in the home [is] minimal" (*Harris, 77 NY2d at 440*).

Federal law does not dictate or guide the analysis of our broader protections under the State Constitution (*People v P.J. Video, 68 NY2d 296, 304, 501 NE2d 556, 508 NYS2d 907 [1986]* ["(T)his (C)ourt has adopted independent standards under the State Constitution when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens" (internal quotation marks omitted)]). In any case, federal jurisprudence does not support the conclusion **[*208]** that every warrantless threshold arrest is constitutionally permissible. Significantly, the specific question presented in defendant's appeal—whether a warrantless home arrest is permissible when the police summon a person to the door for the sole purpose of making an arrest—is an open question not resolved by United States Supreme Court precedent. Contrary to the majority's conclusion, *Kentucky v King (563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 [2011])* does not provide clear guidance as to how the Supreme Court would rule if the question **[***186]** **[**344]** were squarely presented to that **[****52]** Court (majority op at 186).

In *King*, the Court considered the limited question of the circumstances under which police impermissibly create an exigency (*563 US at 471*). Officers ended up outside the defendant's apartment immediately after a fellow officer observed a controlled drug buy involving a resident of a neighboring apartment. Smelling marijuana smoke, they banged on the apartment door, and announced themselves as police (*id. at 456*). Immediately afterwards they heard people and things moving inside the apartment, leading them to believe that evidence was about to be destroyed, at which point they forcibly entered by kicking in the door (*id.*). The Supreme Court held that the officers' conduct was entirely consistent with the *Fourth Amendment* (*id. at 471*). In contrast to *King*, here the police had probable cause before they set out to defendant's apartment, and yet went directly to his home with the sole intention of making a warrantless arrest, without any suggestion of exigent circumstances. Their intent in avoiding the warrant requirement was not solely to make an inquiry, gather more evidence, or seek consent for a search (*id. at 466-467*), but to arrest defendant, take him to the precinct, and ask him questions outside the presence of a lawyer. **[****53]** [13]

In upholding the warrantless search in *King*, the Court recognized that the police may approach a suspect, even in the privacy of the person's home to ask questions, because "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private [person] **[*209]** might do" (*id. at 469*). However, when law enforcement's only reason to approach a person at the home is to make an arrest, the police are attempting something quite different from the uninvited knock of the average person. It is true that a suspect can lawfully ignore a police officer's knock and inquiry (*id. at 469-470* ["(W)hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak"]). In reality, it cannot be denied that a police officer's statement carries the force of an official command not easily disregarded. Of course, the presence of the police at one's home for any reason would cause concern or apprehension for anyone, but an officer seeking to make an arrest intensifies this natural reaction.

Furthermore, as the majority acknowledges (majority op at 182), there are federal circuit **[****54]** courts that have interpreted the *Fourth Amendment* to prohibit certain warrantless home arrests outside the home as *Payton* violations (*see Fisher v City of San Jose, 558 F3d 1069, 1074-1075 [9th Cir 2009* en banc] [defendant seized when police surrounded his home, even though arrest happened outside]; *United States v Saari, 272 F3d 804, 807-808 [6th Cir 2001]* [defendant under arrest when cops knocked forcefully on door with guns **[***187]** **[**345]** drawn]; *United States v Reeves, 524 F3d 1161, 1165 [10th Cir 2008]* [officers effectively commanding defendant to open door constituted an arrest]; *see also United States v Allen, 813 F3d 76, 81 [2d Cir 2016]* [recognizing circuit courts holding officers may violate *Payton* without entering defendant's home]). These decisions are animated by the purposes of the *Fourth Amendment* to protect the individual's right to be secure in the home and free from potential abuse and deployment of coercive tactics that render the protections all but illusory.

If the police determine that securing a warrant is too time-consuming or impractical under the circumstances (not argued here), the police may wait for a defendant to exit the home. Of course, such a warrantless arrest is also subject to certain constitutional constraints (*see People v De Bour, 40 NY2d 210, 222-223, 352 NE2d 562, 386 NYS2d 375 [1976]* [officers cannot ask pointed questions of an individual without a founded suspicion that criminality is afoot, cannot forcibly stop and detain without

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[13] The majority's claim that the Court has rejected the subjective approach and only considers the reasonableness of police conduct misses the point (majority op at 186). The undisputed purpose of the police visit to the defendant's home is an appropriate consideration here, just as it was in *King*. As Judge Wilson and I explain, viewed objectively, the circumstances did not justify the action, which was unreasonable and thus a violation of defendant's rights (*see King, 563 US at 464*, citing *Brigham City, 547 US at 404*; *see* Wilson, J., dissenting op at 218).

reasonable suspicion, cannot arrest without probable cause]). **[****55]** So long as police action comports with the law, the question of where to execute an arrest is left to the discretion of **[23]** the officials in charge.

III.

[*210] The police violated defendant's constitutional rights against a warrantless home arrest and his indelible right to counsel when they went to his home without a warrant for the sole purpose of arresting him, and effectuated the arrest in the absence of exigent circumstances. I dissent from the majority's suggestion that such conduct is both constitutionally permissible and a required outcome of our case law.

Whether this violation requires the reversal of defendant's conviction is a different question and one not properly before us on this appeal. In this case, because the courts below did not address the People's alternative grounds in support of defendant's conviction, the matter should be reversed and remitted to permit consideration of those arguments.[14]

Wilson, J. (dissenting). Absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant. The majority's analysis neither satisfies the Federal and State Constitutions nor serves the interests of New York citizens and law enforcement **[****56]** officers. Indeed, the precedents on which the majority relies "recognize that it would have been more prudent if the police obtained a warrant for defendant's arrest before going to his home" (*People v McBride, 14 NY3d 440, 447, 928 NE2d 1027, 902 NYS2d 830 [2010]*). Because the police planned to arrest him, did not obtain a warrant, and no exigent circumstances were present, Mr. Garvin's threshold arrest was unlawful and his case should be remanded to the Appellate Division to consider whether the fruits of that arrest were sufficiently attenuated to admit into evidence or whether any error in admitting them was harmless beyond a reasonable doubt.

I. *Payton v New York* and the United States Constitution

In *Payton v New York (445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 [1980])*, the Supreme Court held that, in the absence of exigent circumstances, the *Fourth Amendment* prohibits law enforcement officials from making a warrantless and nonconsensual entry into a suspect's home to arrest **[***188]** **[**346]** him. Although **[24]** *Payton* addressed one oft-reserved question—whether and under what circumstances federal law enforcement officers may enter the home of a suspect—it, and its failure to grapple squarely with the legacy **[*211]** of *United States v Santana (427 US 38, 96 S Ct 2406, 49 L Ed 2d 300 [1976])*, raised numerous others.[15] In *United States v Allen (813 F3d 76 [2016])*, the United States Court of Appeals for the Second Circuit resolved two of the most vexing: where is the threshold, **[****57]** and whose position relative to it is determinative? For the reasons stated in its thorough opinion, which I would adopt in full, the Second Circuit concluded that "where law enforcement officers summon a suspect to the door of his home and place him under arrest while he remains within his home, in the absence of exigent circumstances, *Payton* is violated regardless of whether the officers physically cross the threshold" (*id. at 88-89*).[16]

The majority does not take issue with *Allen*'s conclusion. Instead, it attempts to distinguish the facts of that case from those before us (majority op at 182-183). Dennis Allen, Jr. was arrested "at the front door" or "inside the threshold" of his home (*Allen, 813 F3d at 78, 79*). Sean Garvin was arrested "at the threshold" or "in the doorway" of his (*People v Garvin, 130 AD3d 644, 645, 13 NYS3d 215 [2d Dept 2015]*); he did not step into the hallway. Although the Appellate Division found, in language borrowed from a prior opinion, that Mr. Garvin "voluntarily emerged," there is nothing in its decision to indicate that he

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[14] Given my conclusion that the matter should be remitted, I do not opine on the merits of defendant's challenge to the persistent felony offender statute (*Penal Law § 70.10*).

[15] Among them: what constitutes a defendant's home, whether force or ruses of various descriptions can induce a defendant to leave it, how to determine the admissibility of statements made subsequent to a violation, and if its protections apply when a defendant either briefly exits his home and is pursued back into it or is in the home of a third party. "In following the rule enunciated in *Payton*, New York courts have had to resolve numerous issues that have arisen in the wake of its interpretation" (1-3 Barry Kamins, New York Search & Seizure § 3.04 [2017]).

[16] As the majority correctly points out, the Second Circuit did not go so far as to require a warrant before the police could arrest a suspect who voluntarily departed the home's confines and joined the police on the exterior of the threshold prior to her arrest (*Allen, 813 F3d at 78* ["if Allen had come out of the apartment into the street and been arrested there, no warrant would be required" (emphasis omitted)]).

emerged *from the apartment and into the hall*, as opposed to from the recesses of the apartment to the door. In neither instance did law enforcement officers enter the apartment.

I understand the majority to be saying that the factfinders **[****58]** concluded Mr. Allen was inside his apartment, beside the open door, where Mr. Garvin had advanced until he was standing between the doorjambs: his toes in the hallway; his heels in his home. Under the majority's rule, the threshold is the narrow area between the doorjambs, and a suspect who pierces the plane of **[25]** the door with any part of his body, for any length of **[*212]** time, forgoes the protection of his home. Under its interpretation of the Appellate Division's findings, Mr. Garvin (however unwittingly) did exactly that.

We are bound by the findings of fact made by the Appellate Division. I am not bound, however, by the majority's interpretation of those findings, and I see nothing in the Appellate Division's choice of prepositions that constitutes a finding that the People met their burden to prove Mr. Garvin (or a portion of him) had crossed the threshold of his apartment. Even were I to assume that was the relevant **[***189]** **[**347]** threshold—a proposition I join Judge Rivera in doubting—the protections of the Federal and State Constitutions and the prospect of a life behind bars should not turn on the vagaries of a prepositional phrase. Those vagaries are amply illustrated in this case by the People's **[****59]** key witness, who testified that both he and the defendant were simultaneously standing "in the doorway"—an implausible scenario if that witness, like the majority, understood the phrase to mean precisely the space between the doorjambs, and one that suggests he, like most people, understood "in the doorway" to mean "near it," possibly in- or outside, or some of each.

Nor does a consultation of the record, which includes the following colloquy with that witness, whose testimony the court credited, resolve the ambiguity:

"[Detective:] . . . we placed handcuffs on him at the doorway.
"[Defense:] Inside the apartment or outside the apartment?
"[Detective:] Inside the doorway.
"[Defense:] He had stepped out of his apartment?
"[The People]: Judge, I'm going to object.
"THE COURT: Counsel, rephrase it.
"[Defense:] When you say, 'inside the doorway', in the apartment or outside the apartment?
"[Detective:] Inside the doorway.
"[Defense:] Inside the doorway.
"[Detective:] He was standing at the doorway.
"[Defense:] Okay. And the handcuffs, detective, were placed on him when he was by the doorway?

[*213] "[Detective:] Yes."[17]

Thus, contrary to the majority, I understand the Appellate Division to have found Mr. Garvin was inside, rather than partially **[****60]** outside, his apartment and thus subject to the protections of the Federal Constitution elaborated in *Allen*.[18] At the very least, there is no record evidence to support a finding that he was fully outside when arrested.

However, because the majority treats this case as one in which some fragment of the defendant's body exited his home before he was arrested, I note that nothing in today's decision precludes a lower court or a latter decision from adopting *Allen* when confronted by a case in which a defendant consented to an arrest while remaining entirely inside his home. Similarly, because no police officer crossed the threshold or otherwise conducted a search of Mr. Garvin's apartment, nothing in today's decision

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[17] The arrest, furthermore, took place when the police first told Mr. Garvin he was under arrest—several seconds before he was handcuffed. In the words of the People's witness, "When I knocked on the door, he answered the door this time. I looked at him. He looked at me. I said, you're under arrest. He turned around, put his hands behind his back, and I handcuffed him." This version of the story further supports the suggestion that it is fair to understand the Appellate Division's finding Mr. Garvin was "in the doorway" to mean "just inside the doorway" rather than "on the sill." The witness does not describe Mr. Garvin stepping forward after opening the door, and it would be surprisingly aggressive for any person to open a door and advance on a trio of officers.

[18] In addition to *Allen*'s persuasive force, we have an interest in ensuring our protections are no less than those guaranteed by the local federal courts.

prevents a future court from announcing a rule that would suppress evidence seized during a consensual search after a warrantless threshold arrest.

II. The New York Constitution

The Court's disagreement over the present facts and their implication, as well as **[***190]** **[**348]** the at least three-way circuit split over how to apply *Payton* in similar circumstances (*see* *Allen, 813 F3d at 81*), suggest it is time for us to consider whether the New York Constitution provides greater clarity to police officers, private **[****61]** citizens, and future litigants than the present federal rule, which implicates defendants in a high-stakes game of inches that they do not know they are playing. I believe that it should.

I would therefore go further than *Allen* and prohibit purposeful warrantless arrests of suspects who are induced to leave their homes by the actions (be they direct or furtive, and **[*214]** however noncoercive) of the police. In other words, if the police plan to arrest someone who is at home, absent exigent circumstances, until they have an arrest warrant, they may not go to the person's door to arrest him or cause him to leave his home to arrest him outside of it.

As an initial matter, "we have not hesitated in the past to interpret article I, § 12 of the State Constitution independently of its Federal counterpart when necessary to assure that our State's citizens are adequately protected from unreasonable governmental intrusions" (*People v Scott, 79 NY2d 474, 496-497, 593 NE2d 1328, 583 NYS2d 920 [1992]* **[26]**). In case after case, "this court has demonstrated its willingness to adopt more protective standards under the State Constitution when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection **[****62]** of the individual rights of our citizens' " (*People v Torres, 74 NY2d 224, 228, 543 NE2d 61, 544 NYS2d 796 [1989]*, *quoting* *People v P.J. Video, 68 NY2d 296, 304, 501 NE2d 556, 508 NYS2d 907 [1986]*, and *People v Johnson, 66 NY2d 398, 407, 488 NE2d 439, 497 NYS2d 618 [1985])*.

One of the most significant of those cases, despite our initial failure to anticipate the Supreme Court's holding in *Payton* (*see* *People v Payton, 45 NY2d 300, 380 NE2d 224, 408 NYS2d 395 [1978])*, is *People v Harris (77 NY2d 434, 570 NE2d 1051, 568 NYS2d 702 [1991])*. That case held, as I would here, that "the Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York" and that our constitution provided greater protections than its federal counterpart to defendants subject to warrantless home arrests (*id. at 437*). It also instructed that "[s]tate courts, when asked to do so, are *bound* to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court" (*id.* [emphasis added]), as "the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy" (*Scott, 79 NY2d at 496*). Mr. Garvin asks us to apply ours here.[19]

[349]** **[***191]** **[*215]** The application of the New York Constitution to the present case is affected by the principle of stare decisis. The majority points to four prior cases in which this Court has held **[27]** that certain warrantless threshold arrests do not violate *Payton*: *People v Minley (68 NY2d 952, 502 NE2d 1002, 510 NYS2d 87 [1986])*, *People v Reynoso (2 NY3d 820, 814 NE2d 456, 781 NYS2d 284 [2004])*, *People v McBride (14 NY3d 440, 928 NE2d 1027, 902 NYS2d 830 [2010])*, and *People v Spencer (29 NY3d 302, 56 NYS3d 494, 78 NE3d 1178 [2017])*.

None of those four cases, however, addresses the **[****63]** question Mr. Garvin raises. They deal, as the majority itself concedes (majority op at 180), only with the application of *Payton* and the *Fourth Amendment*. Because they do not consider whether any matters peculiar to this state warrant greater protection under article I, § 12, I approach that inquiry as an issue of first impression. Even were our decisions in *Minley*, *Reynoso*, *McBride*, and *Spencer* to bear on today's issue, both "lessons of

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[19] The majority declines to address this argument on the ground that Mr. Garvin failed to raise the lawfulness of his arrest under the New York Constitution at the suppression hearing (majority op at 185 n 8). At the suppression hearing, Mr. Garvin's counsel expressly advised the Court that he was relying on the omnibus motion papers previously filed with the Court. Those papers expressly state: "The Defendant moves for a hearing to determine whether Defendant was improperly seized and unlawfully detained in violation of the Defendant's constitutional rights derived from both the *United States Constitution, Fourth* and *Fourteenth Amendments*, *New York State Constitution, Article [I], Section 12*" (emphasis added). Furthermore, Mr. Garvin maintained at the hearing that the violation of "both his federal and state constitutional rights" was specifically intended to circumvent his right to counsel. These arguments sufficed to preserve the issue for the review he now requests. As the majority believes the issue was not preserved, the question of whether our constitution affords more protection in this regard than its federal counterpart remains open.

experience and the force of better reasoning" (*People v Bing, 76 NY2d 331, 338, 558 NE2d 1011, 559 NYS2d 474 [1990])* would compel me to abandon that line of decisions.

As to the force of better reasoning, it is indisputable that none of the cases cited by the majority elaborate on how to apply *Payton* to threshold arrests. *Minley* and *Reynoso* are mere memoranda, devoid of any reasoning. *Minley* treats an issue the Appellate Division had concluded was "not properly preserved for appeal"; indeed, the Appellate Division "assume[d] . . . that the warrantless arrest was illegal under *Payton*" (*People v Minley, 112 AD2d 712, 712, 492 NYS2d 199 [4th Dept 1985])*. *Reynoso* disposes in two sentences of disputed facts, without remanding for the Appellate Division's determination the possibility that a detective reached across the threshold to pull defendant out of his home (*People v Reynoso, 309 AD2d 769, 765 NYS2d 54 [2d Dept 2003])*—a scenario that seems unlikely to comport **[****64]** with even a narrow reading of *Payton* or our application thereof in *People v Levan (62 NY2d 139, 464 NE2d 469, 476 NYS2d 101 [1984]*; *but see People v Ashcroft, 33 AD3d 429, 429, 823 NYS2d 23 [1st Dept 2006]* ["The police did not violate defendant's *Fourth Amendment* rights when they reached in and pulled him out as he stood in close proximity to his doorway, since, by his actions, defendant knowingly and voluntarily **[*216]** presented himself for public view"]). *McBride* is about whether the police created the exigent circumstances they used to justify their entry, not threshold arrests, and occasioned both a two-Judge dissent and a cautionary aside from the majority that anticipated the rule I suggest today (*14 NY3d at 449* [Pigott, J., dissenting] ["(T)he real issue is 'could the police, as required by the *Fourth Amendment* and legions of cases, have obtained a warrant prior to going to defendant's apartment when they clearly intended to effect an arrest?' "]). *Spencer*, as well as Mr. Spencer's brief, treated the *Payton* issue in that case as a footnote to the central contest over juror disqualification. Measured against the depth of analysis provided by the federal courts, and against fresh reasoning occasioned by the lessons of experience, the precedents on which the majority relies **[***192]** **[**350]** suggest a nearly weightless brand of stare decisis.

As to those lessons of experience, they **[****65]** demonstrate that, contrary to the majority and the Appellate Division's contention, the current rule is not clearly and easily understood. Perhaps because, as Supreme Court recently bemoaned, "[n]o New York case since Payton appears to have addressed the issue" of what constitutes a "threshold" (*People v Mendoza, 49 Misc 3d 1007, 1012, 18 NYS3d 291 **[28]** [Sup Ct, NY County 2015])*, the current rule has failed to protect New York citizens from illegal searches (*People v Kozlowski, 69 NY2d 761, 505 NE2d 611, 513 NYS2d 101 [1987]*; *People v Riffas, 120 AD3d 1438, 994 NYS2d 136 [2d Dept 2014]*; *Mendoza, 49 Misc 3d 1007, 18 NYS3d 291* [finding that police had violated the defendant's *Fourth Amendment* rights]; *see also People v Correa, 55 AD3d 1380, 864 NYS2d 643 [4th Dept 2008]*; *Reynoso, 309 AD2d 769, 765 NYS2d 54*; *People v Anderson, 146 AD2d 638, 536 NYS2d 543 [2d Dept 1989]* [declining to suppress evidence gathered by police who breached the threshold]). For the same reason, it has failed to safeguard the court system from constant appellate litigation (*see e.g. Kozlowski, 69 NY2d 761, 505 NE2d 611, 513 NYS2d 101*; *People v Spencer, 135 AD3d 608, 24 NYS3d 48 [1st Dept 2016]*; *Garvin, 130 AD3d 644, 13 NYS3d 215*; *Riffas, 120 AD3d 1438, 994 NYS2d 136*; *People v Pearson, 82 AD3d 475, 918 NYS2d 409 [1st Dept 2011]*; *Correa, 55 AD3d 1380, 864 NYS2d 643*; *People v Rodriguez, 21 AD3d 1400, 804 NYS2d 160 [4th Dept 2005]*; *Reynoso, 309 AD2d 769, 765 NYS2d 54*; *People v Andino, 256 AD2d 153, 681 NYS2d 518 [1st Dept 1998]*; *Mauceri v County of Suffolk, 234 AD2d 350, 650 NYS2d 788 [2d Dept 1996]*; *People v Schiavo, 212 AD2d 816, 623 NYS2d 273 [2d Dept 1995]*; *People v Francis, 209 AD2d 539, 619 NYS2d 71 [2d Dept 1994]*; *People v Min Chul Shin, 200 AD2d 770, 607 NYS2d 369 [2d Dept 1994]*; *People v Rosario, 179 AD2d 442, 579 NYS2d 12 [1st Dept 1992]*; *People v Lewis, 172 AD2d 775, 569 NYS2d 152 [2d Dept 1991]*; *People v **[*217]** Marzan, 161 AD2d 416, 555 NYS2d 345 [1st Dept 1990]*; *Anderson, 146 AD2d 638, 536 NYS2d 543*; *People v Brown, 144 AD2d 975, 534 NYS2d 278 [1st Dept 1988]*; *People v Nonni, 141 AD2d 862, 530 NYS2d 205 [2d Dept 1988])*.

As this Court's first sustained consideration of the validity of threshold arrests, today's opinion may resolve some of that ambiguity by defining the threshold to mean only the narrow space between the doorjambs. But in doing so, it provides not only a uniform line to lower courts but also a better guide to those witnesses willing to tailor their testimony to the law. The rule the majority upholds invites both parties—but especially those parties better versed in the law—to engage **[****66]** in unverifiable he-said, he-said contests on the stand. Even for honest witnesses—and I assume the witnesses here were completely truthful—the rule presents defendants who may not wish to testify with an unpleasant dilemma and tests the precise spatial recall of participants in what is typically a tension-fraught situation where all parties are focused on their safety, not architectural niceties. Moreover, a clear rule can founder on everyday imprecisions of language, as illustrated by the difference the majority and I have about what the Appellate Division found here. A rule requiring police, in the absence of exigent circumstances, to obtain a warrant before (a) going to a home for the purpose of arresting a suspect or (b) causing that suspect to enter or cross the threshold, offers a far brighter line (*see United States v Holland, 755 F2d 253, 259 [2d Cir 1985, Newman,*

*J., [***193] [**351] dissenting]* ["I appreciate the majority's preference for a 'clearly-defined boundary line' that will be readily apparent to an officer in the field. However, that line already exists for cases such as this: the line between arrests with a warrant and those without a warrant"]). Although the majority criticizes that alternative for looking to the **[****67]** subjective intent of the police (majority op at 184), it will prove easier to verify whether the police visited a house to make an arrest or merely to further an investigation than whether a **[29]** suspect's nose crossed the threshold (*see United States v Titemore, 335 F Supp 2d 502 [D Vt 2004]*). The cases the majority cites discourage investigations into whether individual officers acted in bad faith or with an invidious purpose (*Kentucky v King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 [2011]*; *Whren v United States, 517 US 806, 814, 116 S Ct 1769, 135 L Ed 2d 89 [1996]*); far from requiring that kind of subjective analysis, a rule declaring purposeful at-home arrests absent exigent circumstances unreasonable searches and seizures under the New York Constitution takes an objective view of the circumstances. **[*218]** The Second Circuit had no difficulty establishing police officers in *Allen* planned to arrest the defendant (*813 F3d at 78* ["four Springfield police officers went to Allen's apartment with the pre-formed plan to arrest him" (internal quotation marks omitted)]).

The present rule is not only subject to confusion and manipulation, but also has practical repercussions that subvert both the ideals of the New York bill of rights and the goals of our law enforcement officers.

Adherence to the majority's rule "involves collision with a prior doctrine more embracing in its scope" **[****68]** (*People v Peque, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013]*). As Judge Rivera explains in her dissent, "the safeguards guaranteed by the State's Right to Counsel Clause are unique . . . and far more expansive than the federal counterpart" (*77 NY2d at 439*). Their protection requires the "highest degree of judicial diligence" (*id.*). New York police "have every reason to violate *Payton* . . . because doing so enables them to circumvent the accused's indelible right to counsel," which would attach were an arrest warrant obtained (*id. at 440*). Indeed, the evidence indicated that the police were motivated by just such considerations in this case. Even though they had developed probable cause for Mr. Garvin's arrest by 2:45 p.m. on the day of the arrest, they did not attempt to secure a warrant or stake out his house. Instead, to question him in the absence of an attorney and while his girlfriend's presence in police custody—secured through deceitful statements by a detective—might motivate a confession, they elected to effect a warrantless threshold arrest. Here as in *Harris*, "this interplay between the right to counsel rules established by New York law and the State's search and seizure provisions . . . provides a compelling reason for deviating" from the federal rule (*id.*).

When the police call on **[****69]** a suspect's home with the intention of making an arrest, one of several scenarios can unfold. In most instances, that suspect will acquiesce to the police's simple request to leave the home—an exchange that results in peaceful arrests but operates in derogation of the right to counsel and, in some instances, as an unwitting waiver of the suspect's right to avoid unreasonable searches of that home (*see e.g. Allen, 813 F3d at 79* ["Allen, who had appeared at the door in his stocking feet, asked whether he could retrieve his shoes and inform his 12-year- **[***194]** **[**352]** old daughter, who was upstairs in the apartment, that he would be leaving with the officers. **[*219]** The officers advised Allen that he could not return upstairs unless they accompanied him, which they did"]; *Nonni, 141 AD2d at 862* ["Detective McCormack then announced from **[30]** his position outside the doorway that the defendant was under arrest. The defendant responded by stating, 'Let's take it off the street'. The defendant thereupon turned and walked into the house with the police following him"]; *Rosario, 179 AD2d at 442* ["The police officers identified themselves and arrested defendant at the doorway of his apartment. Defendant, who wore nothing above the waist, was told to get a shirt. The police officers **[****70]** followed defendant into his apartment as he went to retrieve his shirt"]).

In other instances, law enforcement officers will resort to a variety of ruses to achieve the same result. The lower courts have upheld arrests subsequent to noncoercive subterfuges that, although validated by this Court's memoranda upholding *Reynoso* and *People v Roe (73 NY2d 1004, 539 NE2d 587, 541 NYS2d 759 [1989])*, hardly instill a community's trust in the police (*see e.g. People v Robinson, 8 AD3d 131, 779 NYS2d 40 [1st Dept 2004]* [police fabricated a noise complaint]; *People v Hollings, NYLJ, June 15, 2004 at 17, col 2, 2004 NYLJ LEXIS 2511 [Sup Ct, Bronx County 2004]* [police asked the defendant to help solve a fictitious crime]; *Reynoso, 309 AD2d 769, 765 NYS2d 54* [police had defendant's mother wake him at midnight because a fictitious friend was suffering an undisclosed emergency]; *People v Williams, 222 AD2d 721, 636 NYS2d 347 [2d Dept 1995]* [police said that there had been an accident involving defendant's vehicle]; *People v Gutkaiss, 206 AD2d 628, 614 NYS2d 599 [3d Dept 1994]* [police had defendant's relative call about construction work]; *People v Coppin, 202 AD2d 279, 608 NYS2d 661 [1st Dept 1994]* [police officer said she might go out with defendant]). They have also derailed what should have been clean convictions because the police used impermissibly coercive means (*see e.g. People v Fernandez, 158 Misc 2d 165, 599 NYS2d*

405 [Sup Ct, NY County 1993] [police impersonated a parole officer conducting a residence check]; *see also People v Roe, 136 AD2d 140, 525 NYS2d 966 [3d Dept 1988]* ["if police had falsely informed defendant that there was a gas leak requiring his evacuation, his departure from his home would be no more voluntary **[****71]** than it would be had the police surrounded the premises and ordered him out with guns drawn"]).

In a final category of instances, the suspect will respond to the police's arrival either by refusing to answer or by opening and then attempting to close the door—the other horn of the "unfair dilemma" confronting suspects subject to warrantless **[*220]** home arrests (*United States v Reed, 572 F2d 412, 423 n 9 [2d Cir 1978]*). Whereas officers equipped with an arrest warrant would have more authority in the eyes of their suspect and the clear right to enter the house if the situation required, the majority's rule creates unfortunate uncertainties for all parties to the encounter. On some occasions, that uncertainty tempts the officers into compromising their case by effecting an unlawful arrest (*see e.g. Riffas, 120 AD3d at 1438-1439* [when defendant, who had never crossed the threshold of his apartment, attempted to shut the door, the police violated his *Payton* rights by pushing the door open, pulling the defendant into the public hallway, and arresting him]). On others, the mounting frustration of officers trapped outside the threshold presents a danger to the suspect, bystanders, **[***195]** **[**353]** and the arresting officers (*see e.g. McBride, 14 **[31]** NY3d at 444* [police, frustrated by defendant's **[****72]** refusal to open the door, climbed his fire escape and knocked, guns drawn, on the window, sending the defendant's guest crying to the door]). This scenario also presents a danger to the People's case, as the police, who cannot enter the home without a warrant and "cannot by their own conduct create an appearance of exigency" (*Levan, 62 NY2d at 146*), have provided notice to a suspect who now has an opportunity to flee, destroy physical evidence inside the home, or even arm himself in anticipation of resisting arrest.

None of these scenarios is desirable. They, and a variety of other questions occasioned by the current rule (*see* 211 n 1), can be avoided by creating a warrant requirement for the purposeful at-home arrests of suspects.[20] That requirement would protect the rights of citizens from abuse, our law enforcement officers from the threat of escalating circumstances, and the People from having a carefully planned case upended by credible testimony that a defendant had been securely inside his threshold or an officer had been, even inadvertently, out of bounds. It would not, because of the exigent circumstances exception and the relative ease of securing an arrest warrant when probable cause exists, unduly **[****73]** hamper the important work of our police forces.

[*221] Although the People suggest they can meet their burden of demonstrating exigent circumstances justified the warrantless arrest in this case, there is no evidence to suggest the police faced an "urgent need" to apprehend their suspect (*McBride, 14 NY3d at 446*, quoting *United States v Martinez-Gonzalez, 686 F2d 93, 100 [2d Cir 1982]*). Any speculative danger that Mr. Garvin might commit another robbery, use a weapon, or attempt to flee could have been prevented by the simple expedient of stationing an officer outside his home while an arrest warrant was obtained. Any risk that he would realize the game was up and destroy the evidence was occasioned by the police and their scheme to bring Mr. Garvin's girlfriend and her daughter to the station as a form of leverage over the defendant. There is no record support for the conclusion that the police were faced with an exigency other than that which they created. To conclude otherwise would be to allow the exception to swallow the proposed rule. Applying that rule to the present circumstances, Mr. Garvin's arrest violated the State Constitution.

As a result, I would reverse the order of the Appellate Division and remit the case to that Court to determine whether the People have **[****74]** established that Mr. Garvin's statement, and the **[32]** money recovered at the precinct, were attenuated from the violation or that the hearing court's refusal to suppress them was harmless beyond a reasonable doubt.

[*196]** **[**354]** Chief Judge DiFiore and Judges Garcia and Feinman concur; Judge Fahey dissents in part in an opinion; Judge Rivera dissents in an opinion in which Judge Wilson concurs, Judge Wilson in a separate dissenting opinion.

Order affirmed.

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[20] The rule would not prevent the police from staking out a home and conducting a public arrest based on probable cause after a suspect exits that home without the State's prompting, although officers not wishing to wait could instead obtain an arrest warrant. It also would not prevent the police from effecting the unplanned arrest of a person whose home they approached for the purposes of making an inquiry (*cf. King, 563 US 452, 131 S Ct 1849, 179 L Ed 2d 865*; *Allen, 813 F3d at 84-85* [discussing *United States v Titemore, 437 F3d 251 (2006)*]).

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People v Peque

Court of Appeals of New York

September 11, 2013, Argued; November 19, 2013, Decided

No. 163, No. 164, No. 165

Reporter
22 N.Y.3d 168 *; 3 N.E.3d 617 **; 980 N.Y.S.2d 280 ***; 2013 N.Y. LEXIS 3182 ****; 2013 NY Slip Op 7651

[1] The People of the State of New York, Respondent, v Juan Jose Peque, Also Known as Juan Jose Peque Sicajan, Appellant. The People of the State of New York, Respondent, v Richard Diaz, Appellant. The People of the State of New York, Respondent, v Michael Thomas, Also Known as Neil Adams, Appellant.

Subsequent History: US Supreme Court certiorari denied by *Thomas v New York, 190 L Ed 2d 75, 2014 U.S. LEXIS 6311 (U.S., Oct. 6, 2014)*

Prior History: **[****1]** Appeal, in the first above-entitled action, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered October 6, 2011. The Appellate Division affirmed a judgment of the Chemung County Court (James T. Hayden, J.), which had convicted defendant, upon a plea of guilty, of rape in the first degree.

Appeal, in the second above-entitled action, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 2, 2012. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), which had convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree.

Appeal, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 15, 2011. The Appellate Division affirmed a judgment of the Supreme Court, Queens County (Richard L. Buchter, J.), which had convicted **[****2]** defendant, upon a plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

People v Diaz, 92 AD3d 413, 937 NYS2d 225, 2012 N.Y. App. Div. LEXIS 758 (N.Y. App. Div. 1st Dep't, 2012), modified.
People v Thomas, 89 AD3d 964, 932 NYS2d 703, 2011 N.Y. App. Div. LEXIS 8186 (N.Y. App. Div. 2d Dep't, 2011), affirmed.
People v Peque, 88 AD3d 1024, 930 NYS2d 492, 2011 N.Y. App. Div. LEXIS 6831 (N.Y. App. Div. 3d Dep't, 2011), affirmed.

Disposition: For Case No. 163: Order affirmed. For Case No. 164: Order modified by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. For Case No. 165: Order affirmed.

Core Terms

deportation, guilty plea, noncitizen, trial court, immigration, plurality, due process, sentence, collateral consequence, immigration consequences, withdraw, advise, advice, supervision, ineffective, postrelease, removal, cases, defendant's plea, collateral, felony, vacate, preservation, intelligent, allocution, convicted, inform, criminal conviction, direct consequence, automatic

Case Summary

Overview

HOLDINGS: [1]-Due process, pursuant to *U.S. Const. amend. 14* and *N.Y. Const., art. I, § 6*, required a trial court to apprise a defendant that, if the defendant was not an American citizen, he or she could be deported as a consequence of a guilty plea to a felony; [2]-To the extent *People v. Ford, 86 N.Y. 2d 397 (1995)*, stood for the proposition that the court's complete omission of any discussion of deportation at the plea proceeding could never render a defendant's plea involuntary, that discrete portion of the opinion in Ford no longer served the ends of justice or withstood the cold light of logic and experience. The court overruled only so much of Ford as suggested that a trial court's failure to tell a defendant about potential deportation was irrelevant to the validity of the defendant's guilty plea.

Outcome
One defendant was entitled to a remittal. In two cases, the order was affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Immigration Law > Constitutional Foundations > Due Process

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN1[] **Procedural Due Process, Scope of Protection**

Due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Guilty Pleas

HN2[] **Guilty Pleas, Allocution & Colloquy**

Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to *CPL 440.10*. Under certain circumstances, this preservation requirement extends to challenges to the voluntariness of a guilty plea. However, where a deficiency in the plea allocution is so clear from the record that the court's attention should have been instantly drawn to the problem, the defendant does not have to preserve a claim that the plea was involuntary because the salutary purpose of the preservation rule is arguably not jeopardized.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Guilty Pleas

HN3[] **Guilty Pleas, Changes & Withdrawals**

A defendant need not move to withdraw a guilty plea in order to obtain appellate review of a claim that the trial court's failure to inform the defendant of the postrelease supervision component of the defendant's sentence rendered the plea involuntary. The Court of Appeals of New York carved out that exception to the preservation doctrine because of the actual or practical unavailability of either a motion to withdraw the plea or a motion to vacate the judgment of conviction, reasoning that a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge. Where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

HN4[] **Procedural Due Process, Scope of Protection**

The State and Federal Constitutions guarantee that the State shall not deprive any person of his or her liberty without due process of law (*U.S. Const. amend. 14*; *N.Y. Const., art. I, § 6*). To ensure that a criminal defendant receives due process before pleading guilty and surrendering his or her most fundamental liberties to the State, a trial court bears the responsibility to confirm that the defendant's plea is knowing, intelligent and voluntary. In particular, it must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. To that end, while the court need not inform the defendant of every possible repercussion of a guilty plea prior to its entry, the court must advise the defendant of the direct consequences of the plea. On the other hand, the court generally has no obligation to apprise the defendant of the collateral consequences of the plea. A direct consequence of a guilty plea is one which has a definite, immediate and largely automatic effect on the defendant's punishment, whereas a collateral consequence is one peculiar to the individual's personal circumstances and one not within the control of the court system.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

HN5[] **Guilty Pleas, Allocution & Colloquy**

CPL 220.50(7) requires a court to inform a non-citizen defendant that a guilty plea may subject the defendant to deportation, but it also states that the failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN6[] **Grounds for Deportation & Removal, Criminal Activity**

Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of amendments to the Immigration and Nationality Act, his removal is practically inevitable but for the possible exercise of limited remnants of

equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN7 **Grounds for Deportation & Removal, Criminal Activity**

Deportation is not technically a criminal punishment for past behavior, but rather a civil penalty imposed upon non-citizens whose continuing presence in the country is deemed undesirable by the federal government based on their misconduct or other aggravating circumstances.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN8 **Grounds for Deportation & Removal, Criminal Activity**

Under current federal law, deportation is a virtually automatic result of a New York felony conviction for nearly every non-citizen defendant.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN9 **Procedural Due Process, Scope of Protection**

Fundamental fairness requires a trial court to make a non-citizen defendant aware of the risk of deportation because deportation frequently results from a non-citizen's guilty plea and constitutes a uniquely devastating deprivation of liberty.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

HN10 **Guilty Pleas, Allocution & Colloquy**

While counsel's participation in the relevant proceedings may tend to support the validity of a plea, the court has an independent obligation to ascertain whether the defendant is pleading guilty voluntarily, which the court must fulfill by alerting the defendant that he or she may be deported.

Governments > Courts > Judicial Precedent

HN11 **Courts, Judicial Precedent**

Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem. Stare decisis promotes predictability in the law, engenders reliance on our decisions, encourages judicial

restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of the court. Under stare decisis principles, a case may be overruled only when there is a compelling justification for doing so. Such a compelling justification may arise when the court's prior holding leads to an unworkable rule, or creates more questions than it resolves; adherence to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience; or a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience. In determining the precedential effect to be given to a prior decision, the court must consider the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete doctrine which has lost its touch with reality.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

HN12[] **Guilty Pleas, Allocution & Colloquy**

To the extent *People v. Ford, 86 N.Y. 2d 397 (1995)*, stands for the proposition that the court's complete omission of any discussion of deportation at the plea proceeding can never render a defendant's plea involuntary, that discrete portion of the opinion in Ford no longer serves the ends of justice or withstands the cold light of logic and experience.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

HN13[] **Guilty Pleas, Allocution & Colloquy**

To protect the rights of the large number of non-citizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation. Mindful of the burden this rule imposes on busy and calendar-conscious trial courts, they are to be afforded considerable latitude in stating the requisite advice. Trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea. As long as the court assures itself that the defendant knows of the possibility of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN14[] **Guilty Pleas, Allocution & Colloquy**

The trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea. The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in *CPL 220.50(7)* that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United

States or denial of naturalization pursuant to the laws of the United States. These examples are illustrative, not exhaustive, of potentially acceptable advisements regarding deportation.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Evidence > Burdens of Proof > Allocation

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

HN15[] **Guilty Pleas, Allocution & Colloquy**

The failure to apprise a defendant of deportation as a consequence of a guilty plea only affects the voluntariness of the plea where that consequence was of such great importance to him that he would have made a different decision had that consequence been disclosed. Therefore, in order to withdraw or obtain vacatur of a plea, a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation. In determining whether the defendant has shown such prejudice, the court should consider, among other things, the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many non-citizen defendants. To aid in this undertaking, where possible, the defendant should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

HN16[] **Guilty Pleas, Changes & Withdrawals**

Upon a facially sufficient plea vacatur motion, the court should hold a hearing to provide the defendant with an opportunity to demonstrate prejudice.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Reviewability

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN17[] **Counsel, Effective Assistance of Counsel**

Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, advice or preparation that do not appear on the face of the record, the defendant must raise his or her claim via a *CPL 440.10* motion.

Headnotes/Summary

Headnotes

Crimes — Appeal — Preservation of Issue for Review — Court's Failure to Advise Defendant of Deportation Consequences

1. In a criminal prosecution in which defendant, a noncitizen, legal permanent resident, pleaded guilty to a felony after he acknowledged his understanding when the court stated, "And if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you," defendant's claim that his guilty plea must be vacated based on the trial court's failure to inform him that his plea would subject him to deportation was reviewable, notwithstanding his failure to preserve the claim. A defendant must preserve a claim that a guilty plea is invalid by moving to withdraw the plea on the same grounds subsequently alleged on appeal or by filing a motion to vacate the judgment of conviction. No preservation **[****3]** is required, however, where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record. Here, the court provided defendant with inaccurate advice by implying that the plea would entail adverse immigration consequences only for someone who was in the country illegally or who had existing immigration issues, neither of which applied to defendant. Since defendant did not know about the possibility of deportation during the plea and sentencing proceedings, he had no opportunity to withdraw his plea based on the court's failure to apprise him of potential deportation.

Crimes — Appeal — Preservation of Issue for Review — Court's Failure to Advise Defendant of Deportation Consequences

2. In a criminal prosecution where, at the sentencing proceeding following defendant's plea of guilty to first degree rape, defense counsel stated on the record that defendant was a noncitizen subject to deportation following the completion of his sentence and defendant asked the court to allow him to be deported within five years, defendant failed to preserve his claim that the plea was invalid based on the trial court's failure to advise him of **[****4]** the deportation consequences of his plea. A defendant must preserve a claim that a guilty plea is invalid by moving to withdraw the plea on the same grounds subsequently alleged on appeal or by filing a motion to vacate the judgment of conviction. While an exception to the preservation requirement exists where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, the exception did not apply here. Defendant knew of his potential deportation, and thus had the ability to tell the court, if he chose, that he would not have pleaded guilty if he had known about deportation and could have sought to withdraw his plea on that ground. Thus, he was required to preserve his claim regarding the involuntariness of his plea and his failure to do so prohibited review.

Crimes — Plea of Guilty — Due Process — Court's Obligation to Notify Noncitizen Defendant of Deportation Consequences

3. Due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony. Deportation is a plea consequence of such tremendous importance, grave **[****5]** impact and frequent occurrence that, as a matter of fundamental fairness, a defendant is entitled to notice that it may ensue from a plea.

Crimes — Plea of Guilty — Court's Obligation to Notify Defendant of Deportation Consequences — Voluntariness of Plea

4. To the extent that *People v Ford (86 NY2d 397, 657 NE2d 265, 633 NYS2d 270 [1995])* stands for the proposition that a trial court's complete omission of any discussion of deportation at a plea proceeding can never render a defendant's plea involuntary, it is overruled. Under stare decisis principles, a case may be overruled only when there is a compelling justification for doing so. A compelling justification may arise when a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience. *Ford* rested largely on the weight of authority at the time, before the 1996 amendments to the Immigration and Nationality Act. However, the current immigration laws and the realities of the present-day immigration system have robbed *Ford* of much of its logical and experiential foundation. Given the nearly inevitable consequence of deportation, it no longer serves the ends of justice to perpetually uphold, without regard to the significance **[****6]** of deportation to the individual's decision to plead guilty, every guilty plea of a noncitizen defendant entered in ignorance of the likelihood of removal from this country.

Crimes — Plea of Guilty — Court's Failure to Notify Defendant of Deportation Consequences — Remedy

5. A trial court's failure to warn a noncitizen defendant that he or she may be deported as a result of a guilty plea to a felony does not entitle the defendant to automatic withdrawal or vacatur of the plea. The defendant may receive the plea back only upon a showing of prejudice. Thus, to overturn his or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned him or her of the possibility of deportation, he or she would have rejected the plea and opted to go to trial. Among the things the court should consider in determining whether the defendant has shown prejudice are the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. **[****7]** The assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants. In addition, the defendant should make every effort to develop an adequate record of the circumstances surrounding the plea and sentencing.

Crimes — Plea of Guilty — Court's Failure to Notify Defendant of Deportation Consequences — Prejudice

6. Defendant, a noncitizen, legal permanent resident who pleaded guilty to a felony after he acknowledged his understanding when the court stated, "And if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you," was entitled to remittal of his case to Supreme Court to allow him to move to vacate his plea and develop a record relevant to the issue of prejudice with regard to the court's failure to notify him of the immigration consequences of his plea. Due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony. However, a court's failure to warn does not entitle the defendant to automatic vacatur of the plea. To overturn his **[****8]** or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned him or her of the possibility of deportation, he or she would have rejected the plea and opted to go to trial. Here, the court provided inaccurate advice to defendant by implying that the plea would entail adverse consequences only for someone who was in the country illegally or had existing immigration issues, neither of which applied to defendant. Thus, the trial court failed to tell defendant that he might be deported if he pleaded guilty and it did not assess prejudice to the defendant resulting from the deficiency in the plea allocution.

Crimes — Plea of Guilty — Court's Failure to Notify Defendant of Deportation Consequences — Prejudice

7. Defendant, a legal permanent resident of the United States who pleaded guilty to a felony in 1992, then absconded and faked his own death, but was apprehended, returned to court in 2008 and sentenced after the court denied his motion to withdraw his guilty plea based on the court's failure to warn him that he might be deported as a result of his plea, was not entitled to vacatur of his conviction on that ground. Defendant's challenge **[****9]** to the voluntariness of his plea must be evaluated in light of the practical and legal relationship between a criminal conviction and deportation at the time he pleaded guilty in 1992. At that time, deportation was a far less certain consequence of most guilty pleas because the federal government deported far fewer convicts and possessed broader discretion to allow them to remain in the country. In 1992, deportation was an entirely collateral consequence of a guilty plea for which trial courts had no general duty to advise.

Crimes — Appeal — Matters Reviewable — Right to Counsel — Effective Representation

8. In a criminal prosecution where, at the sentencing proceeding on defendant's plea of guilty to first degree rape, defense counsel stated on the record that defendant was a noncitizen subject to deportation following the completion of his sentence and that he had advised defendant of his right to access the Guatemalan consulate, defendant's claim that his attorney was ineffective for failing to tell him that his guilty plea could result in deportation was unreviewable. Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, advice or preparation **[****10]** that do not appear on the face of the record, the defendant must raise his or her claim via a *CPL 440.10* motion. Here, the plea and sentencing minutes do not reveal whether defense counsel misadvised or failed to advise defendant about the possibility of deportation before he pleaded guilty. Counsel's statements at sentencing indicate that he may have advised defendant on those matters prior to his plea. In light of the record evidence tending to contradict defendant's complaints about his lawyer, it was incumbent on defendant to substantiate his allegations about counsel's advice below by filing a *CPL 440.10* motion.

Crimes — Right to Counsel — Effective Representation — Failure to Advise Defendant of Deportation Consequences of Plea

9. Defendant, a legal permanent resident of the United States, who pleaded guilty to a felony in 1992, then absconded and faked his own death, but was apprehended in 2008 at which time he made a motion to withdraw his guilty plea two days after the issuance of a public notice of the murder of his plea counsel, was not entitled to vacatur of his plea based on counsel's failure to advise him of the deportation consequences of his plea. The trial court did not abuse its discretion **[****11]** in finding that defendant's allegations regarding his attorney's advice were contradictory and incredible and that defendant generally lacked credibility because he absconded and faked his own death. The record of the plea proceeding did not reveal whether counsel had apprised defendant of the immigration consequences of his plea. Moreover, defendant's current claims belied his claims in support of the plea withdrawal motion and defendant's new counsel had no personal knowledge of plea counsel's advice.

Counsel: *Melissa A. Latino*, Albany, for appellant in the first above-entitled action. I. Given that the trial court, as well as defense counsel, failed to properly advise appellant of the consequences of deportation prior to his plea of guilty, appellant did not enter a knowing, voluntary and intelligent plea. (*People v Santalucia, 9 AD3d 740, 779 NYS2d 793*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *People v Fitzgerald, 65 AD3d 747, 883 NYS2d 742*; *Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *People v Marshall, 66 AD3d 1115, 887 NYS2d 308*; *People v McDonald, 1 NY3d 109, 802 NE2d 131, 769 NYS2d 781*.) II. Appellant did not receive effective assistance of counsel granted him pursuant to the *Sixth Amendment to the United States Constitution*. (*People v Eastman, 85 NY2d 265, 648 NE2d 459, 624 NYS2d 83*; *United States v Orocio, 645 F3d 630*; *Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674*; *People v Nunez, 30 Misc 3d 55, 917 NYS2d 806*; *People v Reynoso, 88 AD3d 1162, 931 NYS2d 430*; *People v Garcia, 29 Misc 3d 756, 907 NYS2d 398*; *Hill v Lockhart, 474 US 52, 106 S Ct 366, 88 L Ed 2d 203*; *McMann v Richardson, 397 US 759, 90 S Ct 1441, 25 L Ed 2d 763*.) III. Appellant's sentence was unduly harsh and excessive, especially in light of deportation.

Weeden A. Wetmore, District Attorney, Elmira (*Susan Rider-Ulacco* of counsel), for respondent in the first above-entitled action. I. The trial court properly accepted defendant's **[****12]** guilty plea. (*People v Toxey, 86 NY2d 725, 655 NE2d 160, 631 NYS2d 119, 86 NY2d 839, 658 NE2d 225, 634 NYS2d 447*; *People v Lopez, 71 NY2d 662, 525 NE2d 5, 529 NYS2d 465*; *People v Lopez, 6 NY3d 248, 844 NE2d 1145, 811 NYS2d 623*; *People v Seaberg, 74 NY2d 1, 541 NE2d 1022, 543 NYS2d 968*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *People v Owusu, 93 NY2d 398, 712 NE2d 1228, 690 NYS2d 863*; *People v Finnegan, 85 NY2d 53, 647 NE2d 758, 623 NYS2d 546*; *People ex rel. Harris v Sullivan, 74 NY2d 305, 545 NE2d 1209, 546 NYS2d 821*; *People v Heine, 9 NY2d 925, 176 NE2d 102, 217 NYS2d 93*; *Bright Homes v Wright, 8 NY2d 157, 168 NE2d 515, 203 NYS2d 67*.) II. Defendant received the effective assistance of counsel. (*People v Rivera, 71 NY2d 705, 525 NE2d 698, 530 NYS2d 52*; *People v Droz, 39 NY2d 457, 348 NE2d 880, 384 NYS2d 404*; *People v Baldi, 54 NY2d 137, 429 NE2d 400, 444 NYS2d 893*; *People v Benevento, 91 NY2d 708, 697 NE2d 584, 674 NYS2d 629*; *People v Jackson, 48 AD3d 891, 851 NYS2d 677, 10 NY3d 841, 889 NE2d 87, 859 NYS2d 400*; *Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674*; *People v Harnett, 16 NY3d 200, 945 NE2d 439, 920 NYS2d 246*.) III. Defendant's sentence was neither harsh nor excessive. (*People v Thompson, 60 NY2d 513, 458 NE2d 1228, 470 NYS2d 551*; *People v Rytel, 284 NY 242, 30 NE2d 578*; *People v Potskowski, 298 NY 299, 83 NE2d 125*.)

Richard M. Greenberg, Office of the Appellate Defender, New York City (*Rosemary Herbert* of counsel), for appellant in the second above-entitled action. I. Where the trial court failed to warn Richard Diaz that he would be automatically deported as a consequence of his conviction, his guilty plea was not knowing, intelligent and voluntary. (*Matter of Chaipis v State Liq. Auth., 44 NY2d 57, 375 NE2d 32, 404 NYS2d 76*; *Brady v United States, 397 US 742, 90 S Ct 1463, 25 L Ed 2d 747*; *Boykin v Alabama, 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274*; *Kercheval v United States, 274 US 220, 47 S Ct 582, 71 L Ed 1009*; *People v Harris, 61 NY2d 9, 459 NE2d 170, 471 NYS2d 61*; *People v Nixon, 21 NY2d 338, 234 NE2d 687, 287 NYS2d 659*; *North Carolina v Alford, 400 US 25, 91 S Ct 160, 27 L Ed 2d 162*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *People v Gravino, 14 NY3d 546, 928 NE2d 1048, 902 NYS2d 851*.) II. Where the only information regarding the immigration consequences of Richard Diaz's guilty plea was inaccurate and misleading, Mr. Diaz's guilty plea was not knowing, intelligent and voluntary. (*Matter of Chaipis v State Liq. Auth., 44 NY2d 57, 375 NE2d 32, 404 NYS2d 76*; *North Carolina v Alford, 400 US 25, 91 S Ct 160, 27 L Ed 2d 162*; *People v Harris, 61 NY2d 9, 459 NE2d 170, 471 NYS2d 61*; *Zhang v United States, 506 F3d 162*; *People v Gravino, 14 NY3d 546, 928 NE2d 1048, 902 NYS2d 851*.)

Cyrus R. Vance, Jr., District Attorney, New York City (*Vincent Rivellese* and *Hilary Hassler* of counsel), for respondent in the

second above-entitled action. Defendant's guilty plea was knowing, intelligent and voluntary; *Padilla v Kentucky (559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 [2010])* does not impose new duties upon trial courts taking guilty pleas, and the court in this case did not misinform defendant about the immigration consequences of his plea. (*People v Fiumefreddo, 82 NY2d 536, 626 NE2d 646, 605 NYS2d 671*; *People v Francis, 38 NY2d 150, 341 NE2d 540, 379 NYS2d 21*; *People v Nixon, 21 NY2d 338, 234 NE2d 687, 287 NYS2d 659*; *People v Harris, 61 NY2d 9, 459 NE2d 170, 471 NYS2d 61*; *People v Harnett, 16 NY3d 200, 945 NE2d 439, 920 NYS2d 246*; *People v Gravino, 14 NY3d 546, 928 NE2d 1048, 902 NYS2d 851*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *Matter of Randall v Rothwax, 161 AD2d 70, 560 NYS2d 409, 78 NY2d 494, 583 NE2d 924, 577 NYS2d 211*; *People v Lopez, 71 NY2d 662, 525 NE2d 5, 529 NYS2d 465*.)

Lynn W.L. Fahey, *Appellate Advocates*, New York City, **[****13]** for appellant in the third above-entitled action. I. The court failed to establish that appellant pleaded guilty knowingly, intelligently, and voluntarily when, despite appellant's statement that he was not a United States citizen, it failed to inform him that his plea could have adverse immigration consequences. (*Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *People v Callahan, 80 NY2d 273, 604 NE2d 108, 590 NYS2d 46*; *People v Hansen, 95 NY2d 227, 738 NE2d 773, 715 NYS2d 369*; *People v Seaberg, 74 NY2d 1, 541 NE2d 1022, 543 NYS2d 968*; *Fong Haw Tan v Phelan, 333 US 6, 68 S Ct 374, 92 L Ed 433*; *Delgadillo v Carmichael, 332 US 388, 68 S Ct 10, 92 L Ed 17*; *Ng Fung Ho v White, 259 US 276, 42 S Ct 492, 66 L Ed 938*; *Galvan v Press, 347 US 522, 74 S Ct 737, 98 L Ed 911*; *Klapprott v United States, 335 US 601, 69 S Ct 384, 93 L Ed 266*; *Bridges v Wixon, 326 US 135, 65 S Ct 1443, 89 L Ed 2103*.) II. Appellant was entitled to a hearing on his claim that he was denied his Sixth Amendment right to the effective assistance of counsel by his attorney's failure to inform him of the immigration consequences of his guilty plea. (*People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674*; *Jones v Barnes, 463 US 745, 103 S Ct 3308, 77 L Ed 2d 987*; *Hill v Lockhart, 474 US 52, 106 S Ct 366, 88 L Ed 2d 203*; *McMann v Richardson, 397 US 759, 90 S Ct 1441, 25 L Ed 2d 763*; *Von Moltke v Gillies, 332 US 708, 68 S Ct 316, 92 L Ed 309*; *INS v St. Cyr, 533 US 289, 121 S Ct 2271, 150 L Ed 2d 347*; *Libretti v United States, 516 US 29, 116 S Ct 356, 133 L Ed 2d 271*; *Matter of Kelvin D., 40 NY2d 895, 357 NE2d 1005, 389 NYS2d 350*.)

Richard A. Brown, District Attorney, Kew Gardens (*Jennifer Hagan, Robert J. Masters* and *John M. Castellano* of counsel), for respondent in the third above-entitled action. I. Defendant forfeited his right to rely on any change in the law that occurred after the date of his initial fraud on the plea court. (*Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *People v Avila, 177 AD2d 426, 576 NYS2d 534*; *United States v Campbell, 778 F2d 764*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *Fruchtman v Kenton, 531 F2d 946*; *United States v Russell, 686 F2d 35, 222 US App DC 313*; *United States v Mastrangelo, 693 F2d 269*; *People v Geraci, 85 NY2d 359, 649 NE2d 817, 625 NYS2d 469*; *Reynolds v United States, 98 US 145, 25 L Ed 244*.) II. The Appellate Division correctly held that the lower court was not required to advise defendant about the potential immigration consequences of his guilty plea. (*Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *INS v St. Cyr, 533 US 289, 121 S Ct 2271, 150 L Ed 2d 347*; *Boykin v Alabama, 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274*; *People v Hill, 9 NY3d 189, 879 NE2d 152, 849 NYS2d 13*; *Brady v United States, 397 US 742, 90 S Ct 1463, 25 L Ed 2d 747*; *People v Harnett, 16 NY3d 200, 945 NE2d 439, 920 NYS2d 246*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *People v Avila, 177 AD2d 426, 576 NYS2d 534*; *United States v Campbell, 778 F2d 764*.) III. Defendant's claim that his attorney failed to advise him of the potential immigration consequences of his plea is based **[****14]** on matters dehors the record and, in any event, the Appellate Division correctly held that the lower court properly denied defendant's motion to withdraw his plea without a hearing. (*People v Cass, 18 NY3d 553, 965 NE2d 918, 942 NYS2d 416*; *People v Kim, 91 NY2d 407, 694 NE2d 421, 671 NYS2d 420*; *People v Brown, 14 NY3d 113, 924 NE2d 782, 897 NYS2d 674*; *People v Fiumefreddo, 82 NY2d 536, 626 NE2d 646, 605 NYS2d 671*; *People v Baret, 11 NY3d 31, 892 NE2d 839, 862 NYS2d 446*; *People v Tinsley, 35 NY2d 926, 324 NE2d 544, 365 NYS2d 161*; *People v Frederick, 45 NY2d 520, 382 NE2d 1332, 410 NYS2d 555*; *People v Ramos, 63 NY2d 640, 468 NE2d 692, 479 NYS2d 510*; *People v Gruden, 42 NY2d 214, 366 NE2d 794, 397 NYS2d 704*; *People v Avila, 177 AD2d 426, 576 NYS2d 534*.)

Kramer Levin Naftalis & Frankel LLP, New York City (*Craig L. Siegel, Carl D. Duffield, Ashley S. Miller* and *Anna K. Ostrom* of counsel), and *Dawn Seibert* for Immigrant Defense Project, amicus curiae in the first, second and third above-entitled actions. I. Significant changes in the law justify the Court reexamining and overruling *People v Ford (86 NY2d 397, 657 NE2d 265, 633 NYS2d 270 [1995])*. (*People v Taylor, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554*; *People v Bing, 76*

NY2d 331, 558 NE2d 1011, 559 NYS2d 474; *People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419*; *Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3*; *Helvering v Hallock, 309 US 106, 60 S Ct 444, 84 L Ed 604, 1940-1 CB 223*; *People v Damiano, 87 NY2d 477, 663 NE2d 607, 640 NYS2d 451*; *People v Berrios, 28 NY2d 361, 270 NE2d 709, 321 NYS2d 884*; *People v Ressler, 17 NY2d 174, 216 NE2d 582, 269 NYS2d 414*; *United States v Parrino, 212 F2d 919*; *Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*.) II. Deportation has become a sufficiently definite, immediate, and largely automatic consequence of conviction that trial courts should be constitutionally required to notify noncitizens about its possibility before accepting a plea of guilty to a felony offense. (*Padilla v Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *United States v Graham, 169 F3d 787*; *Brooks v Holder, 621 F3d 88*; *Vargas-Sarmiento v United States Dept. of Justice, 448 F3d 159*; *Perez v Greiner, 296 F3d 123*; *United States v Fernandez-Antonia, 278 F3d 150*; *Mugalli v Ashcroft, 258 F3d 52*; *Fuentes-Cruz v Gonzales, 489 F3d 724*.) III. Due process requires automatic vacatur of a plea-based conviction where a trial court fails to notify a noncitizen defendant about the possibility of deportation. (*People v Van Deusen, 7 NY3d 744, 853 NE2d 223, 819 NYS2d 854*; *People v Coles, 62 NY2d 908, 467 NE2d 885, 479 NYS2d 1*; *People v Grant, 45 NY2d 366, 380 NE2d 257, 408 NYS2d 429*; *People v Crimmins, 36 NY2d 230, 326 NE2d 787, 367 NYS2d 213*; *United States v Akinsade, 686 F3d 248*; *People v Ford, 86 NY2d 397, 657 NE2d 265, 633 NYS2d 270*; *Brady v United States, 397 US 742, 90 S Ct 1463, 25 L Ed 2d 747*; *Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674*; *Zhang v United States, 506 F3d 162*.)

Judges: ABDUS-SALAAM, J. For Case No. 163: Opinion by Judge Abdus-Salaam. Judges Graffeo and Read concur. Judge Pigott concurs in result in an opinion in which Judge Smith concurs. Chief Judge Lippman dissents **[****15]** and votes to reverse in an opinion in which Judge Rivera concurs in a separate opinion. For Case No. 164: Opinion by Judge Abdus-Salaam. Judges Graffeo and Read concur. Judge Smith concurs in result. Chief Judge Lippman dissents and votes to reverse in an opinion in which Judge Rivera concurs in a separate opinion. Judge Pigott dissents and votes to affirm in an opinion. For Case No. 165: Opinion by Judge Abdus-Salaam. Judges Graffeo and Read concur. Judge Pigott concurs in result in an opinion in which Judge Smith concurs. Judge Rivera concurs in result in a separate opinion. Chief Judge Lippman dissents and votes to reverse in an opinion.

Opinion by: ABDUS-SALAAM

Opinion

[621]** **[*175]** **[***284]** Abdus-Salaam, J.

In these criminal appeals, we are called upon to decide whether, prior to permitting a defendant to plead guilty to a felony, a trial court must inform the defendant that, if the defendant is not a citizen of this country, he or she may be deported as a result of the plea. Our resolution of this issue is grounded in the right to due process of law, the bedrock of our constitutional order. That guarantee, most plain in its defense of liberty yet complex in application, requires us to strike a careful balance between the **[****16]** freedom of the individual and the orderly administration of government.

Upon review of the characteristics of modern immigration law and its entanglement with the criminal justice system, a **[*176]** majority of this Court, consisting of Chief Judge Lippman, Judges Graffeo, Read, Rivera and me, finds that deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea. We therefore hold that ***HN1***[] due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony.[1] In

[1] Judge Pigott, in an opinion joined by Judge Smith, dissents from the Court's due process holding and concludes that a defendant has only a *Sixth Amendment* right to advice from counsel concerning deportation, but does not have a due process entitlement to a warning about the possibility of deportation from the trial court (*see* dissenting in part op at 204-205). While Judge Smith agrees with Judge Pigott that the court's failure to warn a defendant about the possibility of deportation does not implicate due process, he nonetheless agrees with Judges Graffeo, Read and me to the extent that, if this were indeed **[****18]** a failure to mention a particularly unique and significant plea consequence in violation of a due process obligation as described by the Court today, the appropriate remedy would be remittal to the trial court to afford the defendant an opportunity to demonstrate prejudice and not automatic vacatur of the plea. Thus, Judge Smith concurs that,

reaching this conclusion, **[***285] [**622]** we overrule the **[2]** limited portion of our decision in *People v Ford (86 NY2d 397, 657 NE2d 265, 633 NYS2d 270 [1995])* which held that a court's failure to advise a defendant of potential deportation never affects the validity of the defendant's plea. However, a separate majority, consisting of Judges Graffeo, Read, Smith and me, reaffirms the central holding of *Ford* regarding the duties of a trial court and the distinction between direct and collateral consequences of a guilty plea, and we make clear that our precedent in this area is not otherwise affected **[****17]** by today's decision. Judges Graffeo, Read, Smith and I further hold that, in light of the Court's conclusion that a trial court must notify a pleading noncitizen defendant of the possibility of deportation, the trial court's failure to provide such advice does not entitle the defendant to automatic withdrawal or vacatur of the plea. Rather, to overturn his or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial (*see* n 1, *supra*).[2]

[*177] I

Because the disposition of these appeals varies with the facts of each one, I begin by reviewing the factual background and procedural **[****19]** history of each case.

People v Peque

Shortly after midnight on June 20, 2009, defendant Peque, a native of Guatemala, was arrested for allegedly raping a bartender in a bathroom stall at an inn. Defendant was later indicted on one count of rape in the first degree (*see Penal Law § 130.35 [1]*). At arraignment, defendant told the court that he was from Guatemala City and lacked a Social Security number, and during their bail application, the People informed the court that, in prison, defendant had **[3]** made statements indicating he was in the United States unlawfully.

After a series of later court appearances and plea negotiations, defendant pleaded guilty to first-degree rape in exchange for a promised sentence of a 17½-year determinate prison term to be followed by five years of postrelease supervision. Defendant indicated that he had discussed his plea with his attorney, and when the court asked defendant, "Is there anything at this point in the process that you do not understand," **[***286] [**623]** he replied, via an interpreter, "No, everything is clear." The court accepted defendant's guilty plea without advising him that his first-degree rape conviction might result in his deportation because it qualified as a conviction **[****20]** for an "aggravated felony" under federal immigration statutes (*see 8 USC §§ 1101 [a] [43] [A]*; *1227 [a] [2]*).

At sentencing, the court asked defense counsel whether there was "any legal reason sentence should not be pronounced," and counsel responded, "Not that I'm aware, Judge." Counsel then stated for the record that defendant was "subject to deportation following the completion of his sentence" and that counsel nonetheless wished for the court "to ratify the sentence as agreed upon." Counsel also mentioned that he had informed defendant of his "right of access to the Guatemalan consulate," which defendant had declined to exercise. Defendant, in turn, said, "I **[*178]** will ask your Honor to have mercy and allow me to be deported to my country within five years." Noting that it had no control over the immigration process, the court sentenced defendant as promised.

Defendant appealed, asserting that his guilty plea was not knowing, intelligent and voluntary because the trial court had not mentioned the possibility of deportation at the time of the plea. Defendant also claimed that his lawyer had been ineffective for not apprising him that he could be deported if he pleaded guilty. The Appellate Division affirmed defendant's conviction **[****21]** *(88 AD3d 1024, 1024-1025, 930 NYS2d 492 [3d Dept 2011])*. Relying on *Ford*, the Appellate Division found that "[i]nasmuch as a defendant's potential for deportation is considered a collateral consequence of a criminal conviction, County Court's failure to advise defendant of such consequence does not render the plea invalid" (*88 AD3d at 1025*). The Court rejected defendant's ineffective assistance of counsel claim as unreviewable because it "involves matters

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given the majority's view that there has been a due process violation, the appropriate remedy in *People v Diaz* is a remittal to allow defendant to show prejudice.

[2] In a dissenting opinion in which Judge Rivera largely concurs, Chief Judge Lippman determines that *Ford*'s analytical framework regarding plea consequences does not apply to deportation, and that a trial court's failure to warn a defendant that deportation may result from his or her guilty plea mandates automatic vacatur of the plea without any showing of prejudice (*see* dissenting op at 208-210). In a separate opinion, Judge Rivera expresses the same view, but joins the Court's disposition of defendant Thomas's appeal (*see* op of Rivera, J., at 218-219).

largely outside of the record and is more appropriately addressed by a CPL article 440 motion" (*id.*). A Judge of this Court granted defendant leave to appeal *(19 NY3d 977, 973 NE2d 770, 950 NYS2d 360 [2012])*, and we now affirm.

People v Diaz

On the night of October 11, 2006, defendant Diaz, who was a legal permanent resident of the United States originally from the Dominican Republic, was allegedly riding in the back of a taxicab with codefendant Castillo Morales. Police officers stopped the cab and, after searching the back seat, recovered a bag containing a two-pound brick of cocaine. The officers arrested defendant and Morales, and thereafter, both men were indicted on one count of criminal **[4]** possession of a controlled substance in the first degree (*see* Penal Law § 220.21 [1]) and one count of criminal possession of a controlled substance in the third degree (*see* Penal Law § 220.16 [1]).

At a court appearance held **[****22]** for consideration of the People's bail application, defense counsel opposed setting bail, noting that defendant was not a flight risk because he had a green card. Later, immediately prior to the scheduled start of a suppression hearing, defendant agreed to accept the People's plea offer of a 2½-year determinate prison term plus two years of postrelease supervision in exchange for his plea of guilty to third-degree drug possession. After conducting a standard plea allocution, the court said, "And if you're not here legally or if you have any immigration issues these felony pleas could **[*179]** adversely affect you," adding, "Do you each understand that?" Defendant replied, "Yes." At sentencing, the court imposed the negotiated sentence. At no **[***287]** **[**624]** point did the court state that defendant could be deported based on his conviction of a removable controlled substances offense (*see* 8 USC § 1227 [a] [2] [B] [i]).

Defendant completed his prison term, and upon his release to postrelease supervision, United States Immigration and Customs Enforcement (ICE) initiated proceedings to remove him from the country based on his drug conviction. ICE initially detained defendant pending the outcome of those proceedings. However, defendant appealed **[****23]** his conviction and challenged the validity of his guilty plea, alleging that the court's failure to warn him of the possibility of deportation rendered his plea involuntary. As a result, ICE conditionally released defendant pending the resolution of his appeal, and he completed his term of postrelease supervision. While his appeal was pending, defendant also moved, pursuant to CPL 440.10, to vacate his conviction on the ground that his attorney had been ineffective for failing to advise him of the immigration consequences of his guilty plea. After a hearing, Supreme Court denied that motion, and the Appellate Division subsequently denied defendant permission to appeal from the hearing court's decision.

On defendant's direct appeal, the Appellate Division affirmed his conviction *(92 AD3d 413, 413-414, 937 NYS2d 225 [1st Dept 2012])*. The Court found that defendant had failed to preserve his challenge to the validity of his guilty plea (*id. at 413*). As an alternative holding, the Court rejected defendant's claim on the merits (*id.*). The Court determined that, "[w]hile the duty to advise a defendant of the possibility of deportation before accepting a plea of guilty is imposed on the trial courts by statute (*CPL 220.50 [7]*), the court's 'failure to do so does not affect the voluntariness **[****24]** of a guilty plea' " (*id. at 413-414*, quoting *Ford, 86 NY2d at 404 n*). The Court further held that "the duties of a trial court upon accepting a guilty plea are not expanded by *Padilla v Kentucky (559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 [2010])*, which deals exclusively with the duty of defense counsel to advise a defendant of the consequences of pleading guilty when it is clear that deportation is mandated" (*id. at 414*). Finally, in the Court's estimation, the trial court's warning **[5]** about immigration matters "sufficed to apprise defendant that the consequences of his guilty plea extended to his immigration status" (*id.*). A Judge of this Court granted defendant leave to appeal *(19 NY3d 972, 973 NE2d 765, 950 NYS2d 355 [2012])*, **[*180]** and we now conditionally modify the Appellate Division's decision and remit the matter to Supreme Court to afford defendant the opportunity to move to vacate his plea.

People v Thomas

On February 15, 1992, defendant Thomas, a legal permanent resident of the United States originally from Jamaica, was arrested for selling cocaine to two individuals. He was later charged in a superior court information with two counts of criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39 [1]).

On February 20, 1992, defendant appeared with counsel in Supreme Court, waived indictment and pleaded guilty to one count of attempted criminal **[****25]** sale of a controlled substance in the third degree. In exchange for defendant's plea, the court promised to sentence him to 30 days in jail plus five years of probation. However, the court conditioned defendant's receipt of

that sentence upon his return to court for sentencing, abstinence from committing further crimes and cooperation with the Department of Probation. At the plea **[***288] [**625]** proceeding, the court asked defendant whether he was a citizen of the United States. Defendant answered that he was not a United States citizen and was from Jamaica.

While defendant was at liberty pending sentencing, he failed to show up for a scheduled court appearance, and the court issued a bench warrant for his arrest. On April 28, 1992, defendant's attorney appeared in court and gave the trial judge a copy of defendant's death certificate, which indicated that defendant had committed suicide. The court vacated the bench warrant as abated by death.

About 16 years later, on February 28, 2008, defendant arrived at JFK International Airport and, using an alias, asked customs officials for admission to the United States as a returning lawful permanent resident. A few days later, the United States Department **[****26]** of Homeland Security ran defendant's fingerprints and discovered his true identity. The Department of Homeland Security notified the People of defendant's return to the country, and the People then informed the court of this turn of events. The court restored the case to its calendar and issued a bench warrant for defendant's arrest.

Two days after the issuance of a public notice of the murder of the lawyer who had represented defendant at the time of his plea, defendant moved to withdraw his guilty plea with the assistance **[*181]** of a new attorney. Defendant asserted that the court's failure to warn him that he might be deported as a result of his plea rendered his plea involuntary. Defendant also contended that his previous lawyer had been ineffective for failing to provide advice on the immigration consequences of his plea. In support of the motion, defense counsel submitted an affirmation stating that defendant's previous attorney had not advised defendant at all concerning the possibility of deportation. By contrast, defendant himself averred that his attorney had **[6]** specifically promised him he would not be subject to deportation if he pleaded guilty.

The trial court denied defendant's **[****27]** plea withdrawal motion. The court found that defendant's allegations regarding his attorney's advice were contradictory and incredible, and that defendant generally lacked credibility because he had absconded and faked his own death. Thus, the court opined, defendant had not credibly established that his attorney's advice had been deficient at the time of his plea or that he had been prejudiced by his attorney's allegedly poor performance. Citing *Ford*, the court concluded that defendant was not entitled to withdraw his plea based on the court's or counsel's failure to apprise him of potential deportation. The court then sentenced defendant to an indeterminate prison term of from 2 to 6 years.

Defendant appealed, renewing his complaints about counsel's advice and the voluntariness of his guilty plea. While defendant's appeal was pending, the Department of Homeland Security charged him with being subject to removal from the United States based on his conviction in this case. Upon learning of defendant's appeal, the federal agency amended the charges to seek defendant's removal based on his failure to disclose his conviction when he applied for an immigrant visa. Defendant was paroled **[****28]** to ICE custody, and an immigration judge later ordered his removal from the country.

Thereafter, the Appellate Division affirmed defendant's conviction *(89 AD3d 964, 964-965, 932 NYS2d 703 [2d Dept 2011])*. The Court concluded that defendant's ineffective assistance claim was unpreserved and premised on incredible allegations regarding matters outside the record **[***289] [**626]** (*see id. at 964-965*). Finding *Ford* to be controlling, the Court also held that defendant was not entitled to withdraw his guilty plea due to the trial court's failure to mention potential deportation at the plea proceeding (*see 89 AD3d at 965*). A Judge of this Court granted defendant leave to appeal *(19 NY3d 1002, 975 NE2d 924, 951 NYS2d 478 [2012])*, and we now affirm.

[*182] II

A

Each defendant maintains that his guilty plea must be vacated because the trial court did not inform him that his plea would subject him to deportation, thereby failing to provide constitutionally mandated notice of a critically important consequence of the plea. However, before we may reach defendants' claims, we must determine whether those claims have been preserved as a matter of law for our review (*see NY Const art VI, § 3 [a]*; *CPL 470.05 [2]*; *People v Hawkins, 11 NY3d 484, 491-492, 900 NE2d 946, 872 NYS2d 395 [2008]*).

HN2[↑] Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else **[****29]** file a motion to vacate the judgment of conviction pursuant

to CPL 440.10 (*see* CPL 220.60 [3]; 440.10; *People v Clarke, 93 NY2d 904, 906, 712 NE2d 668, 690 NYS2d 501 [1999]*; People v Toxey, 86 NY2d 725, 726, 655 NE2d 160, 631 NYS2d 119 [1995]; People v Lopez, 71 NY2d 662, 665, 525 NE2d 5, 529 NYS2d 465 [1988]). Under certain circumstances, this preservation requirement extends to challenges to the voluntariness of a guilty plea (*see* People v Murray, 15 NY3d 725, 726, 932 NE2d 877, 906 NYS2d 521 [2010]; Toxey, 86 NY2d at 726) **[7]** .

However, under *People v Lopez*, where a deficiency in the plea allocution is so clear from the record that the court's attention should have been instantly drawn to the problem, the defendant does not have to preserve a claim that the plea was involuntary because "the salutary purpose of the preservation rule is arguably not jeopardized" (71 NY2d at 665-666). And, in People v Louree (8 NY3d 541, 869 NE2d 18, 838 NYS2d 18 [2007]) we concluded that ***HN3***[↑] a defendant need not move to withdraw a guilty plea in order to obtain appellate review of a claim that the trial court's failure to inform the defendant of the postrelease supervision component of the defendant's sentence rendered the plea involuntary (*see* id. at 545-547). We carved out that exception to the preservation doctrine because of the "actual or practical unavailability of either a motion to withdraw the plea" or a "motion to vacate the judgment of conviction," reasoning that "a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge" (id. at 546). Taken together, *Lopez* and *Louree* ***[****30]*** establish that where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required. At the same time, there are significant constraints on this exception to the **[*183]** preservation doctrine. Recognizing as much, in *People v Murray*, we held that the defendant had to preserve his claim that the trial court's imposition of a nonconforming term of postrelease supervision rendered his guilty plea involuntary because the court had mentioned the nonconforming postrelease supervision term at sentencing, thereby providing the defendant **[***290]** **[**627]** with an opportunity to challenge the voluntariness of his plea (*see* Murray, 15 NY3d at 726-727).

[1] Here, in *Diaz*, the trial court never alerted defendant that he could be deported as a result of his guilty plea. In fact, the court provided defendant with inaccurate advice, as the court implied that defendant's plea would entail adverse immigration consequences only for someone who was in the country illegally or had existing immigration issues—circumstances which did not apply to defendant. Since defendant did not know about the possibility of deportation during the plea and sentencing proceedings, he **[****31]** had no opportunity to withdraw his plea based on the court's failure to apprise him of potential deportation. Thus, defendant's claim falls within *Lopez*'s and *Louree's* narrow exception to the preservation doctrine.

[2] By contrast, in *Peque*, because defendant knew of his potential deportation, and thus had the ability to tell the court, if he chose, that he would not have pleaded guilty if he had known about deportation, he was required to preserve his claim regarding the involuntariness of his plea.[3] At sentencing, defendant plainly knew that he might be deported as a result of his **[8]** guilty plea, and he even implored the court "to have mercy and allow [him] to be deported to [his] country within five years." Given his awareness of the deportation issue at that point, defendant could have sought to withdraw his plea on that ground. The salutary purpose of the preservation doctrine, including the development of a full record and the efficient resolution of claims at the earliest opportunity, is served by requiring preservation in his case. In light of defendant's failure to raise the deportation issue below or move to withdraw his plea, we cannot entertain his newly minted challenge to its validity. **[****32]**

In *Thomas*, defendant fully preserved his claim that the trial court should have informed him that he could be deported as a **[*184]** result of his guilty plea, and therefore defendant's challenge to his plea is properly before us.

B

HN4[↑] The State and Federal Constitutions guarantee that the State shall not deprive any person of his or her liberty without due process of law (*see* US Const 14th Amend; NY Const, art I, § 6). To ensure that a criminal defendant receives due process before pleading guilty and surrendering his or her most fundamental liberties to the State, a trial court bears the responsibility to confirm that the defendant's plea is knowing, intelligent and voluntary (*see* United States v Ruiz, 536 US 622, 629, 122 S Ct 2450, 153 L Ed 2d 586 [2002]; Boykin v Alabama, 395 US 238, 243-244, 89 S Ct 1709, 23 L Ed 2d 274 [1969]; Louree, 8 NY3d at 544-545; Ford, 86 NY2d at 402-403). In particular, it "must be clear that 'the plea represents a voluntary and intelligent

[3] In their respective opinions, the Chief Judge and Judge Rivera disagree with the Court's conclusion that defendant Peque had to preserve his claim and failed to do so, and therefore they do not join in this section of our opinion with respect to Peque (*see* Lippman, Ch. J., dissenting op at 216; *see also* op of Rivera, J., at 218-219 n).

choice among the alternative courses of action open to the defendant' " (*Ford, 86 NY2d at 403*, quoting *North Carolina v Alford, 400 US 25, 31, 91 S Ct 160, 27 L Ed 2d 162 [1970]*; *see People v Gravino, 14 NY3d 546, 553, 928 NE2d 1048, 902 NYS2d 851 [2010]*). **[***291] [**628]** To that end, while the court need **[****33]** not inform the defendant of every possible repercussion of a guilty plea prior to its entry (*see Ruiz, 536 US at 629-630*; *Gravino, 14 NY3d at 553*), the court must advise the defendant of the direct consequences of the plea (*see People v Catu, 4 NY3d 242, 244, 825 NE2d 1081, 792 NYS2d 887 [2005]*; *Ford, 86 NY2d at 403*; *see also Brady v United States, 397 US 742, 755, 90 S Ct 1463, 25 L Ed 2d 747 [1970]*). On the other hand, the court generally has no obligation to apprise the defendant of the collateral consequences of the plea (*see Gravino, 14 NY3d at 553*; *Ford, 86 NY2d at 403*).

A direct consequence of a guilty plea is one "which has a definite, immediate and largely automatic effect on [the] defendant's punishment" (*Ford, 86 NY2d at 403*; *see People v Monk, 21 NY3d 27, 32, 989 NE2d 1, 966 NYS2d 739 [2013]*; *see also United States v Youngs, 687 F3d 56, 60 [2d Cir 2012]*; *United States v Delgado-Ramos, 635 F3d 1237, 1239-1240 [9th Cir 2011]*), whereas a collateral consequence is one "peculiar to the individual's personal circumstances and one not within the control of the court system" (*Ford, 86 NY2d at 403*; *see People v Belliard, 20 NY3d 381, 385, 985 NE2d 415, 961 NYS2d 820 [2013]* **[9]**). Examples of direct consequences include the forfeiture of trial rights (*see Boykin, 395 US at 243-244*), the imposition of a mandatory term of imprisonment that results from an unconditional guilty plea (*see id. at 244 n 7*; *Jamison v Klem, 544 F3d 266, 277 [3d Cir 2008]*; *People v Harnett, 16 NY3d 200, 205, 945 NE2d 439, 920 NYS2d 246 [2011]*), and the imposition of mandatory postrelease **[*185]** supervision (*see Catu, 4 NY3d at 244-245*). By contrast, "[i]llustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms[,] . . . an undesirable discharge from the Armed Services" (*Ford, 86 NY2d at 403* [citations omitted]), the imposition of a prison **[****34]** term upon revocation of postrelease supervision (*see Monk, 21 NY3d at 33*), sex offender registration under the Sex Offender Registration Act (SORA) (*see Gravino, 14 NY3d at 559*), and civil confinement under the Sex Offender Management and Treatment Act (SOMTA) (*see Harnett, 16 NY3d at 206*).

Furthermore, in *Ford*, this Court held that "[d]eportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system" (*Ford, 86 NY2d at 403*). Likewise, certain federal circuit courts have held that a court need not advise a pleading defendant of the possibility of deportation because deportation is a collateral consequence of a guilty plea (*see e.g. Delgado-Ramos, 635 F3d at 1241*; *Santos-Sanchez v United States, 548 F3d 327, 336-337 [5th Cir 2008]*; *El-Nobani v United States, 287 F3d 417, 421 [6th Cir 2002]*; *United States v Gonzalez, 202 F3d 20, 27 [1st Cir 2000]*). Additionally, shortly before this Court's decision in *Ford* and after the defendant's guilty plea in that case, the Legislature passed *CPL 220.50 (7)*. ***HN5***[↑] That statute requires a court to inform a noncitizen defendant that a guilty plea may subject the defendant to deportation, **[***292] [**629]** but it also states that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction" (*id.*).

Here, defendants' convictions upon their guilty pleas rendered them subject to deportation, **[****35]** and in each case, the trial court did not alert the defendant to that circumstance. Defendants claim that recent changes in federal immigration law have transformed deportation into a direct consequence of a noncitizen defendant's guilty plea, and that therefore the courts' failure here to mention the possibility of deportation rendered their pleas involuntary. Defendants thus urge us to overrule so much of *Ford* as holds otherwise. In opposition, the People maintain that, because federal authorities retain a significant degree of discretion in determining whether to deport a convicted felon, deportation remains a strictly collateral consequence of a guilty **[*186]** plea which does not have to be set forth during the plea allocution. The parties' arguments necessitate an examination of the evolving relationship between the immigration system and a New York criminal conviction before and after *Ford*.

C

As early as the mid-seventeenth century, the Dutch colony that would become **[10]** New York experienced widespread immigration. By the late 1650s, non-Dutch European immigrants comprised about half the colony's population, and it appears that there were few, if any, legal restrictions on immigration at **[****36]** that time (*see* Milton M. Klein et al., The Empire State: A History of New York 45, 49-51 [2001] [hereinafter "Klein"]). This situation essentially continued through British rule of the colony and New York's early days as a state in post-revolutionary America (*see* Klein 153-154, 157-159, 308-311). During that span of history, immigrants contributed significantly to the constitutional tradition underlying today's decision. In the seventeenth century, the original foreign-born colonists brought with them the common-law tradition of individual rights, and in 1821, naturalized immigrants in certain progressive counties of the State provided the population, clout and votes needed

to call for a constitutional convention, resulting in New York's becoming the first state to add a *due process clause* to its constitution (*see* J. Hampden Dougherty, Constitutional History of the State of New York 29, 42-43, 97-99 [1915]; Peter J. Galie & Christopher Bopst, The New York State Constitution 68-69 [2d ed 2012]).

Immigration laws began to change in the mid-nineteenth century. Prior to that time, New York City modestly regulated immigration, imposing various capitations on merchant shipmasters who transported impoverished **[****37]** immigrants to this country by sea and requiring those shipmasters to report certain identification information about their immigrant passengers to the Mayor (*see* Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J Am Hist 1092, 1095 [2013] [hereinafter "Hirota"]; *see also Henderson v Mayor of New York, 92 US 259, 265-275, 23 L Ed 543 [1875]* [describing New York City's immigration laws and striking down some of them as violative of the federal government's exclusive power to regulate commerce with foreign nations under the Federal Constitution]). In 1847, however, New York State passed laws which excluded from entry to the State any foreigner "likely to become **[*187]** permanently a public charge" as a penalty for a shipmaster's nonpayment of a bond for such a person (Hirota, 99 J Am Hist at 1095). Furthermore, in 1882, the State successfully lobbied Congress to pass the Immigration Act, which prohibited **[***293]** **[**630]** entry into the United States of "convict[s]" (22 US Stat 214 [1882]; *see* Hirota, 99 J Am Hist at 1097-1098).

Even after the onset of federal regulation of immigration, removal from the country was largely discretionary and relatively uncommon. When Congress passed the Immigration Act **[****38]** of 1917, it authorized for the first time the deportation of noncitizens who had been convicted of crimes of "moral turpitude" and had served a sentence of a year or more in prison (39 US Stat 874, 889-890 [1917]). Under the 1917 Act, a state sentencing court had discretion to grant a noncitizen defendant a judicial recommendation against deportation, or JRAD, which prevented the federal government from deporting the defendant (*see* 39 US Stat at 889-890). New York officials also saw fit to extend discretionary relief to alien convicts to **[11]** prevent their deportation. As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938, the Governor would sometimes, where the facts warranted it, pardon a prisoner to "restore citizenship . . . or to prevent deportation or to permit naturalization" (*Problems Relating to Executive Administration and Powers*, 1938 Rep of NY Constitutional Convention Comm, vol 8 at 66 [1938]).

Executive discretion in the immigration field, however, did not remain untrammeled for long. By successive revisions to the Immigration and Nationality Act (INA) in 1952 and 1990, Congress first curtailed and then eliminated the availability **[****39]** of JRADs, while preserving the United States Attorney General's discretion to grant relief from deportation (*see* 66 US Stat 163, 201-208 [1952]; 104 US Stat 4978, 5050-5052 [1990]). In 1996, Congress finally stripped the Attorney General of his discretion to prevent a noncitizen defendant's deportation (*see* 110 US Stat 3009-546, 3009-567, 3009-594, 3009-596, 3009-597 [1996]). And, under the current version of the INA, an alien may be deported for a wide array of crimes, including most drug offenses, "aggravated felonies," domestic violence crimes, and any crime for which a sentence of more than a year is authorized (*see 8 USC §§ 1101 [a] [43]*; *1227 [a] [2]*). Therefore,

> ***HN6***[] "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective **[*188]** date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses" (*Padilla, 559 US at 363-364*; *see generally 8 USC § 1227*; 110 US Stat 1214 [1996]).

Changes in immigration enforcement have also increased the likelihood that a noncitizen defendant will be deported after a guilty plea. For example, at the time of the passage **[****40]** of the 1996 amendments to the INA, the number of annual deportations resulting from criminal convictions stood at 36,909 (*see* Department of Homeland Security, 1996 Yearbook of Immigration Statistics, Annual Report on Immigration Enforcement Actions at 171 [1997], available at *http://www.dhs.gov/archives* [accessed Sept. 18, 2013]). Thereafter, the federal government deported an ever-growing number of individuals each year, and in 2011, the United States removed 188,382 noncitizens based on their criminal convictions (*see* Department of Homeland Security, 2011 Yearbook of Immigration Statistics, Annual Report on Immigration Enforcement Actions at 5-6 [2012], available at *http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf* [accessed Sept. 18, 2013]; *see also* Douglas S. Massey & **[***294]** **[**631]** Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 Population & Dev Rev [Issue 1] 1, 15-16 [2012]). And, since 1995, the Institutional Removal Program, a joint initiative of New York and

federal authorities, has enabled New York to transfer thousands of convicted foreign-born criminals from state custody to ICE custody prior to the expiration of their prison terms (*see* Correction Law § 5 [4]; *Executive Law § 259-i [2] [d] [i]* **[12]** ; New York State Department of Corrections and Community **[****41]** Supervision, Research Report: The Foreign-Born under Custody Population and the IRP at 1, 9-11 [2012], available at http://www.doccs.ny.gov/Research/Reports/2013/ForeignBorn_IRP_Report_2012.pdf [accessed Sept. 18, 2013]; *see also* brief of Immigrant Defense Project, as amicus curiae, at 15-20).

Present-day immigration law and enforcement practice impose what can only be described as an enormous penalty upon noncitizen convicts. Once state and federal authorities identify a defendant as a potentially removable alien, ICE may detain the defendant until administrative or judicial review **[*189]** causes him to be released or adjudged deportable, and that detention will last at least several days and, in some cases, for months or years before the defendant's removal status is finally settled (*see* 8 USC § 1226 [c] [1]; Demore v Kim, 538 US 510, 529, 123 S Ct 1708, 155 L Ed 2d 724 [2003] [noting average detention period of 47 days]; *see also* Amnesty International, *Jailed without Justice: Immigration Detention in the USA* at 1, 22 [2009] [describing an alien convict's four-year detention during removal proceedings], available at http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf [accessed Sept. 21, 2013]; Joren Lyons, *Recent Development: Mandatory Detention During Removal Proceedings: Challenging the Applicability of Demore v Kim to Vietnamese and Laotian Detainees*, 12 Asian LJ 231, 231-232 [2005] [recounting an immigrant convict's 16-month **[****42]** detention]). If an immigration judge orders the defendant's deportation, ICE can automatically hold the defendant in custody for another 90 days and may continue to confine the defendant beyond that period subject to a judicial determination that further detention is reasonably necessary to secure the defendant's removal (*see* Zadvydas v Davis, 533 US 678, 682-684, 699-701, 121 S Ct 2491, 150 L Ed 2d 653 [2001]). Additionally, immigrant detention resembles criminal incarceration, and the conditions of that detention are such that "in general, criminal inmates fare better than do civil detainees" (Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 Am Crim L Rev 1441, 1445 [2010]).[4]

Of course, a convicted noncitizen defendant's actual removal from the country exacts the greatest toll on the defendant and his or her family. Once the federal government forces the defendant beyond our borders, the defendant loses the precious rights and opportunities available to all residents of the United States. After being removed from **[****43]** the country, the defendant rarely, if ever, has further in-person contact with any family members remaining in America. Additionally, deportation effectively strips the defendant of any employment he or she had in this country, thus depriving the defendant and his or her family of **[13]** critical financial **[***295]** **[**632]** support. And, the defendant must begin life anew in a country that, in some cases, is more foreign to the defendant than the United States.

[*190] Despite those severe qualities, ***HN7***[] deportation is not technically a criminal punishment for past behavior, but rather a civil penalty imposed upon noncitizens whose continuing presence in the country is deemed undesirable by the federal government based on their misconduct or other aggravating circumstances (see Padilla, 559 US at 365; INS v St. Cyr, 533 US 289, 324, 121 S Ct 2271, 150 L Ed 2d 347 [2001]; INS v Lopez-Mendoza, 468 US 1032, 1038, 104 S Ct 3479, 82 L Ed 2d 778 [1984]; Morris v Holder, 676 F3d 309, 317 [2d Cir 2012]). However, in Padilla v Kentucky, the United States Supreme Court recognized that deportation could not be neatly confined to the realm of civil matters unrelated to a defendant's conviction.

Specifically, the Court held that, because deportation is so closely related to the criminal process and carries such high stakes for noncitizen defendants, a defense attorney deprives a noncitizen defendant of his or her Sixth Amendment right to the **[****44]** effective assistance of counsel by failing to advise, or by misadvising, the defendant about the immigration consequences of a guilty plea (*see* 559 US at 366-374). In discussing the significance of the possibility of deportation and the need for competent advice from counsel on the subject, the Court observed, "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . [a]nd, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders" (*id. at 365-366*). The Court continued, "Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence" of a guilty plea for *Sixth Amendment* purposes (*id. at 366*).

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[4] We commend the defendants' attorneys, the prosecutors and counsel for amicus for their excellent work in bringing a wealth of authorities, research, data and scholarly articles to our attention to assist us in our resolution of these appeals.

In determining whether the Supreme Court's discussion of the character of deportation holds true for due process purposes, it is necessary to account for the distinct nature of the right to due process and the right to the effective assistance of counsel at issue in *Padilla*. Although both of those rights exist to preserve the defendant's entitlement to a fair trial or plea proceeding, they operate in **[****45]** discrete ways in the plea context. The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, gives the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the **[*191]** defendant understands the most fundamental and direct consequences of the plea (*see* *Alford, 400 US at 31*; *Strickland v Washington, 466 US 668, 684-687, 104 S Ct 2052, 80 L Ed 2d 674 [1984]*; *Hill v Lockhart, 474 US 52, 56-58, 106 S Ct 366, 88 L Ed 2d 203 [1985]*; *People v Angelakos, 70 NY2d 670, 672-674, 512 NE2d 305, 518 NYS2d 784 [1987]*; *People v Harris, 61 NY2d 9, 18-19, 459 NE2d 170, 471 NYS2d 61 [1983]*). Given the distinct duties of counsel and the court under these two constitutional doctrines, *Padilla*'s legal classification of deportation as a plea consequence necessitating counsel's advice under the *Sixth Amendment* does not inexorably **[14]** compel the conclusion that deportation implicates the court's responsibility to ensure the voluntariness of a guilty plea.

[633]** **[***296]** Nonetheless, the *Padilla* Court's factual observation about the nature of deportation rings true in both the due process and effective assistance contexts; it is difficult to classify deportation as either a direct or collateral consequence of a noncitizen defendant's guilty plea.[5] On the one hand, **[****46]** deportation is not always an immediate consequence of an alien defendant's guilty plea because the federal government must await the defendant's release from state custody and the outcome of a removal hearing before deporting the defendant. And, immigration authorities may not even initiate that process, much less complete it, until many years after the defendant's criminal conviction. Furthermore, deportation is not a part of the defendant's criminal punishment and sentence, making it distinct from other direct consequences of a guilty plea such as the imposition of postrelease supervision. So, too, deportation, like most collateral consequences, remains a matter "not within the control of the court system" (*Ford, 86 NY2d at 403*).

However, ***HN8***[] under current federal law, deportation is a virtually automatic result of a New York felony conviction for nearly every noncitizen defendant (*see* *Padilla, 559 US at 363-366*), and New York defendants are often released to ICE custody even before they finish serving their prison sentences. Significantly, deportation has punitive qualities not entirely unlike the core components of a criminal sentence. Judges Graffeo, Read and I conclude that those circumstances cause deportation to **[*192]** resemble in many respects a direct consequence of a guilty plea, even though we concur with Judges Pigott and Smith that it is technically on the collateral side of the direct/collateral divide.[6] **[15]**

We have previously contemplated the existence of such a peculiar consequence of a guilty plea, though we had not actually encountered one until now. And, in prior decisions, we discussed how a trial court must address these most uncommon consequences at a plea proceeding. Particularly, we stated that there may be a "rare" case where a court must inform the defendant of "a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*Gravino, 14 NY3d at 559*; *see* *Harnett, 16 NY3d at 207*). This is that rare case.

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[5] Chief Judge Lippman and Judge Rivera conclude that the direct/collateral framework does not apply to deportation, and that regardless of deportation's particular classification as a plea consequence, it is sufficiently important to warrant the court's advisement on the matter (*see* Lippman, Ch. J., dissenting op at 207, 208-209; *see also* op of Rivera, J., at 219). Accordingly, they do not agree with us that deportation is a technically collateral consequence of a guilty plea, **[****47]** and they do not join this opinion to the extent it contradicts the views expressed in their respective opinions.

[6] Judges Pigott and Smith agree that deportation is not a direct consequence of a guilty plea, but they would go further and hold that deportation is a strictly collateral consequence of a guilty plea, such that a trial court's failure to mention deportation can never invalidate a guilty plea (*see* Pigott, J., dissenting in part op at 204-205). As already noted, Chief Judge Lippman and Judge Rivera find the distinction between **[****48]** direct and collateral consequences to be inapplicable to this case. Accordingly, with the exception of the Chief Judge's and Judge Rivera's concurrence in the last paragraph of this section of this opinion regarding the necessity of a trial court's advisement about deportation, those four Judges do not join the remainder of this section.

[*297] [**634]** As discussed, deportation is an automatic consequence of a guilty plea for most noncitizen defendants; absent some oversight by federal authorities, a defendant duly convicted of almost any felony will inevitably be removed from the United States. Unlike SORA registration, **[****49]** SOMTA confinement or other collateral consequences, the deportation process deprives the defendant of an exceptional degree of physical liberty by first detaining and then forcibly removing the defendant from the country. Consequently, the defendant may not only lose the blessings of liberty associated with residence in the United States, but may also suffer the emotional and financial hardships of separation from work, home and family. Given the severity and inevitability of deportation for many noncitizen defendants, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes" (*Padilla, 559 US at 364*). Thus, a noncitizen defendant convicted of a removable crime can hardly make "a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*Ford, 86 NY2d at 403*) unless the court informs **[*193]** the defendant that the defendant may be deported if he or she pleads guilty.

But, the People protest, that is not the case. In their view, deportation remains a strictly collateral consequence of a guilty plea, about which a trial court has no duty to inform a defendant. They observe that ICE retains **[****50]** considerable discretion to decline to enforce federal immigration laws against any particular defendant, making deportation such an uncertain outcome that the court should never be compelled to notify a defendant of the possibility of it. **[16]** However, the roughly 188,000 noncitizen convicts who are deported each year would probably beg to differ on this point, and rightly so. After all, although New York courts have no role in ICE's enforcement decisions, they do render judgments of conviction which routinely ensure the defendants' eventual transfer, by way of state correctional authorities, into federal custody, where they will almost certainly be deported. At bottom, the factors cited by the People merely show that deportation does not fit squarely within the direct consequences mold. Although that is true, ***HN9***[↑] fundamental fairness still requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty.

The People assure us there is no need for the trial court to tell a noncitizen defendant about the possibility of deportation because ***[****51]*** *Padilla* now requires defense counsel to provide a noncitizen defendant with specific and detailed advice about a guilty plea's impact on his or her immigration status. However, "assuming defense counsel 'will' do something simply because it is required of effective counsel" is "an assumption experience does not always bear out" (*Moncrieffe v Holder, 569 US ___, ___, 133 S Ct 1678, 1692, 185 L Ed 2d 727 [2013]*). More to the point, ***HN10***[↑] while counsel's participation in the relevant proceedings may tend to support the validity of the plea (*see People v Harris, 61 NY2d 9, 16, 459 NE2d 170, 471 NYS2d 61 [1983]*; *People v Nixon, 21 NY2d 338, 353, 234 NE2d 687, 287 NYS2d 659 [1967]*), the court has an independent obligation to ascertain whether the defendant is pleading guilty voluntarily (*see People v Francis, 38 NY2d 150, 153-154, 341 NE2d 540, 379 NYS2d 21 [1975]*), which the court must fulfill by alerting the defendant that he or she may be deported.

[*298] [**635] [3]** In short, Chief Judge Lippman, Judges Graffeo, Read, Rivera and I conclude that deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness.

[*194] D

Because the Court's conclusion regarding a trial court's duty is at odds with *Ford*'s pronouncement that a court's failure to warn a defendant about potential deportation never impacts the validity of the defendant's guilty plea, that aspect of *Ford* must be reexamined in light **[****52]** of the doctrine of stare decisis.

HN11[↑] "Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future" and that a rule of law "once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*People v Damiano, 87 NY2d 477, 488, 663 NE2d 607, 640 NYS2d 451 [1996*, Simons, J., concurring]). Stare decisis promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court (*see People v Taylor, 9 NY3d 129, 148, 878 NE2d 969, 848 NYS2d 554 [2007]*).

Under stare decisis principles, a case "may be overruled only when there is a compelling justification for doing so" (*People v Lopez, 16 NY3d 375, 384 n 5, 947 NE2d 1155, 923 NYS2d 377 [2011]*; *see* **[17]** *Taylor, 9 NY3d at 148-149*; *Eastern Consol. Props. v Adelaide Realty Corp., 95 NY2d 785, 787, 732 NE2d 948, 710 NYS2d 840 [2000]*). Such a compelling justification

may arise when the Court's prior holding "leads to an unworkable rule, or . . . creates more questions than it resolves" (*Taylor, 9 NY3d at 149*); adherence to a recent precedent "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" (*People v Hobson, 39 NY2d 479, 487, 348 NE2d 894, 384 NYS2d 419 [1976]*, quoting *Helvering v Hallock, 309 US 106, 119, 60 S Ct 444, 84 L Ed 604, 1940-1 CB 223 [1940]*); or "a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience" **[****53]** (*Policano v Herbert, 7 NY3d 588, 604, 859 NE2d 484, 825 NYS2d 678 [2006]* [internal quotation marks and citation omitted]). In determining the precedential effect to be given to a prior decision, this Court must consider "the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete doctrine which has lost its touch with reality" (*Hobson, 39 NY2d at 487*).

As noted above, in *Ford*, we concluded that, because deportation was a collateral consequence of a guilty plea, the trial court did not have to advise the defendant of the possibility of deportation during the plea allocution (*see 86 NY2d at 403-404*). Specifically, after setting forth the general factors distinguishing direct **[*195]** and collateral consequences and providing some illustrative examples, we stated

> "Deportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system. Therefore, our Appellate Division and the Federal courts have consistently held that the trial court need not, before accepting a plea **[***299]** **[**636]** of guilty, advise a defendant of the possibility of deportation. We adopt that rule and conclude that in this case the court properly allocuted **[****54]** defendant before taking his plea of guilty to manslaughter in the second degree." (*id. at 403-404* [citations omitted].)

Thus, we determined, "The [plea] court was under no obligation to inform the defendant of any possible collateral consequences of his plea, including the possibility of deportation, nor was defendant denied effective assistance of counsel" due to counsel's lack of advice on the subject (*id. at 405*). Accordingly, *Ford* rested largely on the weight of authority at the time, i.e., prior to the 1996 amendments to the INA, which held deportation to be a collateral consequence of a guilty plea (*see e.g. United States v Parrino, 212 F2d 919, 921-922 [2d Cir 1954]*).

[4] However, the weight of authority and the will of Congress have shifted since our decision in *Ford*. ***HN12***[↑] To the extent *Ford* stands for the proposition that the court's complete omission of any discussion of deportation at the plea proceeding can never render a defendant's plea involuntary, that discrete portion of our opinion in *Ford* "no longer serves the ends of justice or withstands the cold light of logic and experience" (*Policano, 7 NY3d at 604*). *Ford*'s discussion of deportation was rooted in a legal and practical landscape that no longer exists, and the realities **[18]** of the present-day immigration system have robbed **[****55]** it of much of its logical and experiential foundation. Given the nearly inevitable consequence of deportation, it no longer serves the ends of justice to perpetually uphold, without regard to the significance of deportation to the individual's decision to plead guilty, every guilty plea of a noncitizen defendant entered in ignorance of the likelihood of removal from this country. We therefore overrule only so much of *Ford* as suggests that a trial **[*196]** court's failure to tell a defendant about potential deportation is irrelevant to the validity of the defendant's guilty plea.[7]

In taking this extraordinary **[****56]** step, Judges Graffeo, Read and I do not treat as inconsequential the considerable reliance which *Ford*'s assessment of deportation has engendered among prosecutors and trial courts throughout the State. Certainly, our repeated approving citations of *Ford* provided no reason to doubt the continued vitality of its pronouncement with respect to the immigration consequences of a guilty plea. So, too, we are mindful that *Ford*'s discussion of deportation reinforced the repose afforded to the People by a noncitizen defendant's guilty plea. And, for nearly two decades, trial courts have relied on *Ford*'s characterization of deportation as a collateral consequence of a plea to avoid potentially time-consuming litigation regarding the possibility of deportation. However, those significant reliance interests cannot overcome the fundamental injustice that would result from completely barring a noncitizen defendant from challenging his or her guilty plea based on the court's failure to advise the **[***300]** **[**637]** defendant that he or she might be deported as a result of the plea.

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[7] Chief Judge Lippman and Judge Rivera concur in the Court's decision to overrule this specific portion of *Ford*'s holding, but unlike a majority of this Court, comprised of Judges Graffeo, Read, Smith, Pigott and me, they doubt the validity of our precedents following *Ford* (*compare* Lippman, Ch.J., dissenting op at 211 [stating that *Ford* "is in its two principal holdings, if not in its ratio decidendi, no longer viable"], *with* Pigott, J., dissenting in part op at 205 ["creat(ing) no new law"]). Therefore, the Chief Judge and Judge Rivera do not join the remainder of this section of this opinion.

To avoid any confusion about the scope of our decision, we emphasize that it is quite narrow. Nothing in this opinion should be construed **[****57]** as casting doubt on the long-standing rule that, almost invariably, a defendant need be informed of only the direct consequences of a guilty plea and not the collateral consequences. We continue to adhere to the direct/collateral framework, and we do not retreat from our numerous prior decisions holding a variety of burdensome consequences of a guilty plea to be strictly collateral and irrelevant to the voluntariness of a plea (*see* *Monk, 21 NY3d at 32*; *Belliard, 20 NY3d at 385*; *Harnett, 16 NY3d at 205-206*; **[19]** *Gravino, 14 NY3d at 553-554*). Indeed, the Court's decision in the instant appeals arises from the truly unique nature of deportation as a consequence of a guilty plea; there is nothing else quite like it.

[*197] E

[3] As the Court[8] recognizes today, ***HN13***[↑] to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation.[9] Mindful of the burden this rule imposes on busy and calendar-conscious trial courts, they are to be afforded considerable latitude in stating the requisite advice. As this Court has repeatedly held, "trial courts are not required to engage in any particular litany during an allocution **[****58]** in order to obtain a valid guilty plea" (*People v Moissett, 76 NY2d 909, 910, 564 NE2d 653, 563 NYS2d 43 [1990]*). As long as the court assures itself that the defendant knows of the possibility of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary.

HN14[↑] The trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea. The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in *CPL 220.50 (7)* that "if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." Again, these examples are illustrative, not exhaustive, **[****59]** of potentially acceptable advisements regarding deportation.

F

As explained above, a majority of the Court, including Chief Judge Lippman, Judges Graffeo, Read, Rivera and me, concludes that due process requires a trial court to warn a defendant that, if the defendant is not a citizen of this country, the defendant may be deported as a result of a guilty plea to a felony. A separate majority of the Court, comprised of Judges **[20]** Graffeo, **[*198]** Read, Smith and me, now turns **[***301]** **[**638]** to the question of the proper remedy.[10] In this section of the opinion, this remedial majority describes the general parameters of the proper remedy of the relevant due process violation, and in section G, infra, we apply that remedy to defendants in these cases.

[5] ***HN15***[↑] The failure to apprise a defendant of deportation as a consequence of a guilty plea only affects the voluntariness of the plea where that consequence "was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*Gravino, 14 NY3d at 559*). Therefore, in order to withdraw **[****60]** or obtain vacatur of a plea,

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[8] The Court here refers to Chief Judge Lippman, Judges Graffeo, Read, Rivera and me.

[9] Given that defendants were convicted of felonies here, we have no occasion to consider whether our holding should apply to misdemeanor pleas.

[10] Again, Judge Smith does not concur in the Court's due process holding, but rather concurs only in the remedy which this opinion specifies in light of that holding.

a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation.[11] **[21]**

[*199] In determining whether the defendant has shown such prejudice, the court should consider, among other things, the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants. To aid in this undertaking, where possible, the **[***302]** **[**639]** defendant should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing, which will permit the trial court to efficiently determine the plea's validity and enable appellate **[****63]** review of the defendant's claim of prejudice.[12] **[22]**

Chief Judge Lippman, with whom Judge Rivera joins, maintains that we are unfaithful to our *Catu* line of cases because we do not mandate automatic vacatur of a plea as the result of the court's failure to mention the possibility of deportation at the plea allocution (*see* Lippman, Ch. J., dissenting op at 209-212; *see* ***[****64]*** *also* op of Rivera, J., at 218-219). However, we are simply adhering to *Gravino* and *Harnett*, not departing from *Catu*. *Gravino* and *Harnett* make clear that when a uniquely significant plea consequence, while technically collateral, impacts the voluntariness of a defendant's plea, the defendant may receive his plea back only upon a showing of prejudice (*see* *Harnett, 16 NY3d at 206-207*; *Gravino, 14 NY3d at 559*). By contrast, the defendant is entitled to automatic vacatur of the **[*200]** plea only where, as in *Catu*, the court fails to mention a direct consequence of the defendant's plea (*see* *Catu, 4 NY3d at 245*). Here, as we have explained, deportation is a consequence of the sort described in *Gravino* and *Harnett* rather than a direct consequence, and to obtain vacatur of a plea based on the court's failure to mention deportation at the plea proceeding, a noncitizen defendant must demonstrate that he or she was prejudiced by the court's omission. Thus, our opinion is consistent with *Gravino*, *Harnett* and *Catu*.

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[11] Judge Pigott's opinion dissenting in part reaches "a very similar conclusion" to our own and "would create no new law" (Pigott, J., dissenting in part op at 205), but the dissent faults us for, in its view, implicitly "contradict[ing]" our decisions in *Gravino* and *Harnett* (*id.* at 205) and failing to provide noncitizen defendants with any practical benefit beyond that to which they are already entitled under *Padilla* (*id.* at 206). But, as stated at length above, our decision does nothing to disturb *Gravino*, *Harnett* or our settled jurisprudence in this area; as was the case with SORA registration or SOMTA confinement at issue in those decisions, the direct or collateral character of deportation, and the necessity of the trial court's advice with respect to it, depends on its particular qualities.

In addition, our decision here provides noncitizen defendants with a significant practical benefit in addition to *Padilla*'s mandate. After all, a defendant challenging his plea under *Padilla* must **[****61]** possess an adequate record of both counsel's deficient performance and prejudice, and because counsel's advice or omissions with respect to the immigration consequences of a plea are often outside the record on direct appeal, the defendant must usually resort to a postjudgment motion to satisfy the performance prong of *Padilla*, not to mention the prejudice prong. By contrast, the defendant may raise a due process claim on direct appeal based on the court's failure to mention deportation as a consequence of the plea, which will be apparent on the face of the record. Thus, the defendant will be entitled to a remittal to attempt to establish prejudice stemming from the readily apparent error. So, too, in some cases, the record on direct appeal may reveal factors which would have strongly compelled the defendant to reject the plea in an effort to avoid deportation, and thus the defendant could establish prejudice for due process purposes on direct appeal, without remittal, even though he could not show that his attorney was ineffective under *Padilla*. Indeed, there may be a variety of cases involving an ineffective assistance claim under *Padilla* and a due process claim under the instant **[****62]** decision where a showing sufficient to warrant vacatur of the plea under one of those two doctrines will not satisfy the requirements of the other one. Accordingly, while we exercise restraint in balancing defendants' liberty and the State's interests to resolve the instant appeals, our decision is not the empty gesture that Judge Pigott's opinion mistakes it for.

[12] In light of our conclusion that a trial court's failure to inform a defendant of potential deportation may render his or her guilty plea involuntary under certain circumstances, *CPL 220.50 (7)* cannot be read to deny vacatur of a plea when due process commands that relief. Rather, the statutory language stating that the court's failure to inform the defendant of potential deportation "shall not be *deemed* to affect the voluntariness of a plea of guilty" (*id.* [emphasis added]) can be plausibly read as an instruction to the court that it may not automatically "deem" the plea to be invalid based on the court's inadequate advice alone but rather must determine whether the defendant has been prejudiced before concluding that the plea was in fact involuntary. Indeed, we adopt this interpretation in large part to avoid constitutional concerns (*see* *Tauza v Susquehanna Coal Co., 220 NY 259, 267, 115 NE 915 [1917]*).

In the Chief Judge's view, we are "telescop[ing]" the remedy for a due process violation and the ineffective assistance of counsel (Lippman, Ch. J., dissenting op at 211). But, to the extent our remedial approach to the instant appeals resembles the remedy for an attorney's **[****65]** constitutionally deficient performance, that makes eminent sense because, as we have previously observed, "the issue of whether [a] plea was voluntary," a matter of core concern for due process purposes, "may be closely linked to the question of whether a defendant received the effective assistance of counsel" (*Harnett, 16 NY3d at 207*). Thus, while the remedy for a due process violation as identified by the Court in these appeals is not coextensive with *Padilla's* remedial rule in the ineffective assistance context, the two doctrines are similar.

G

As previously noted, defendant Peque did not preserve his claim that his plea was involuntary, and therefore we consider **[***303]** **[**640]** the application of the principles delineated above only in *Diaz* and *Thomas*.

[6] In *Diaz*, the trial court clearly failed to tell defendant that he might be deported if he pleaded guilty. Thus, if defendant has been prejudiced by that error, he is entitled to vacatur **[23]** of his plea. Given that Supreme Court did not address the deficiency in the plea allocution at all, much less assess prejudice, defendant is entitled to a remittal to that court to allow him to move to vacate his plea and develop a record relevant to the issue of prejudice. Likewise, in **[****66]** future cases of this kind, where the deficiency in the plea allocution appears on the face of the record, the case should be remitted to the trial court to allow the defendant to file a motion to vacate the plea. ***HN16***[↑] Upon a facially sufficient plea vacatur motion, the court should hold a hearing to provide the defendant with an opportunity to demonstrate prejudice. In the instant case, if defendant can demonstrate that he **[*201]** was prejudiced by the defect in the plea allocution upon remittal to Supreme Court, the court must vacate his plea. In the absence of a showing of prejudice, the court should amend the judgment of conviction to reflect its ruling on defendant's plea vacatur motion and otherwise leave the judgment undisturbed.[13]

[17] Unlike defendant Diaz, however, defendant Thomas cannot obtain relief based on the trial court's plea allocution in his case. Specifically, defendant Thomas's challenge to the voluntariness of his plea must be evaluated in light of the practical and legal relationship between a criminal conviction and deportation at the time he pleaded guilty in 1992. As discussed in detail above, at that time, deportation was a far less certain consequence of most defendants' guilty pleas because the federal government deported far fewer convicts and possessed far broader discretion to allow them to remain in the United States. Indeed, in acknowledgment of the federal government's broad discretion and latitude pertaining to deportation of immigrants around **[****68]** the time of defendant's plea, this Court and many federal courts recognized the strictly collateral nature of the immigration consequences of a guilty plea and held that a trial court did not have to advise a noncitizen defendant that his or her plea might subject the defendant to **[24]** deportation (*see e.g. Ford, 86 NY2d at 403-405*; *United States v Littlejohn, 224 F3d 960, 965 [9th Cir 2000]*; *Gonzalez, 202 F3d at 27*; *United States v United States Currency in the Amount of $228,536.00, 895 F2d 908, 915 [2d Cir 1990]*; *United States v Romero-Vilca, 850 F2d 177, 179 [3d Cir 1988]*; *Fruchtman v Kenton, 531 F2d 946, 948-949 [9th Cir 1976]*). That being so, trial courts then had no general duty to advise noncitizen defendants of the possibility of deportation as a consequence of their guilty pleas. And, here, the court had every reason to believe that defendant could avoid deportation as a result of his **[***304]** **[**641]** plea, notwithstanding that, **[*202]** unbeknownst to the court, he had not resided in the United States for a sufficient period of time to avail himself of the Attorney General's discretionary power to exempt him from deportation (*see 8 USC § 1182 [c]* [1994]). Thus, defendant Thomas is not entitled to vacatur of his plea based on the trial court's failure to advise defendant of what was, at the time, an entirely collateral consequence of his plea.

III

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[13] As mentioned above, defendant Diaz previously filed a *CPL 440.10* motion seeking relief under *Padilla*, and Supreme Court denied the motion because defendant did not establish that he was prejudiced by his attorney's failure to inform him that his guilty plea could lead to his deportation. Notably, though, the Appellate Division denied defendant permission to appeal from the lower court's decision, and therefore we have no occasion to consider the denial of defendant's postjudgment **[****67]** motion in determining whether he should be granted relief on direct appeal. Furthermore, the People do not argue that the court's rejection of defendant's claim under *Padilla* should estop him from seeking to establish that the court's failure to warn him about potential deportation caused him prejudice. Accordingly, on these specific facts, defendant's prior postjudgment motion does not warrant an affirmance of his conviction without a remittal.

Relying on *Padilla*, defendants Peque and Thomas additionally contend that their attorneys were ineffective for failing to tell them **[****69]** that their guilty pleas could result in deportation.[14] We must first determine whether those claims are properly before us on direct appeal. In that regard, we have admonished defendants claiming ineffective assistance of counsel to develop a record sufficient to allow appellate review of their claims (*see* *People v Haffiz, 19 NY3d 883, 885, 976 NE2d 216, 951 NYS2d 690 [2012]*; *People v McLean, 15 NY3d 117, 121, 931 NE2d 520, 905 NYS2d 536 [2010]*). ***HN17***[↑] Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, advice or preparation that do not appear on the face of the record, the defendant must raise his or her claim via a *CPL 440.10* motion (*see* *People v Denny, 95 NY2d 921, 923, 743 NE2d 877, 721 NYS2d 304 [2000]*; *People v Love, 57 NY2d 998, 1000, 443 NE2d 486, 457 NYS2d 238 [1982]*).

[8] In *Peque*, the plea and sentencing minutes do not reveal whether defense counsel misadvised or failed to advise defendant about the possibility of deportation before he pleaded guilty. At sentencing, counsel stated that defendant would be subject to deportation as **[****70]** a result of his plea and that counsel had informed defendant of his right to access the Guatemalan consulate, thereby indicating that counsel may have advised defendant on those matters prior to his plea. In light of the record evidence tending to contradict defendant's current complaints about his lawyer, **[25]** it was incumbent on defendant to substantiate his allegations about counsel's advice below by filing a *CPL 440.10* motion, and his failure to file a postjudgment motion renders his claim unreviewable (*see* *Haffiz, 19 NY3d at 885* [because the defendant's *Padilla* claim was "predicated on **[*203]** hearsay matters and facts not found in the record on appeal," it should have been "raised in a postconviction application under CPL article 440"]).[15]

[9] In *Thomas*, the limited record here and the trial court's credibility determinations doom defendant's claim. The record of **[****71]** the plea proceeding does not reveal whether defense counsel apprised defendant of the immigration consequences of his guilty plea. In support of his plea withdrawal motion, defendant averred that **[***305]** **[**642]** counsel had spoken with him about the immigration consequences of his plea and had misled him on that score, thus belying his current assertion that counsel completely failed to advise him about immigration issues. Additionally, defendant's newly retained attorney did not have personal knowledge of his prior counsel's advice, and therefore new counsel's allegation that predecessor counsel had failed to advise defendant about deportation did not reliably establish the nature of predecessor counsel's advice. Furthermore, the court did not abuse its discretion by discrediting defendant's contradictory allegations about counsel's performance (*see* *People v Baret, 11 NY3d 31, 33-34, 892 NE2d 839, 862 NYS2d 446 [2008]*), and there is "no basis for disturbing the conclusion of both courts below" that defendant's claim was "too flimsy to warrant further inquiry" or vacatur of his plea (*id. at 34*).

IV

Accordingly, in *People v Diaz*, the order of the Appellate Division should be modified by remitting the matter to Supreme Court for further proceedings in accordance with this opinion **[****72]** and, as so modified, affirmed. In *People v Peque* and *People v Thomas*, the order of the Appellate Division should be affirmed.

Pigott, J. (concurring in *People v Peque* and *People v Thomas*, and dissenting in *People v Diaz*).

Concur by: PIGOTT; Rivera

Dissent by: PIGOTT; LIPPMAN; Rivera

Dissent

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[14] Because Chief Judge Lippman would reverse Peque's and Thomas's convictions on due process grounds, he does not express any view of their ineffective assistance claims. For the same reason, Judge Rivera does not address Peque's ineffective assistance claim, but she concurs with the Court's disposition of Thomas's due process and ineffective assistance claims (*see* op of Rivera, J., at 218).

[15] Defendant Peque also asks us to reduce his sentence as a matter of discretion in the interest of justice. However, because defendant received a lawful and statutorily authorized sentence in this noncapital case, his claim is beyond our purview, as only an intermediate appellate court is authorized to grant the discretionary sentencing relief which he seeks (*see* *CPL 470.15 [6] [b]*; *People v Discala, 45 NY2d 38, 44, 379 NE2d 187, 407 NYS2d 660 [1978]*).

[26] PIGOTT, J. (concurring in No. 163 and No. 165, dissenting in No. 164):

I

In my view, the majority (for want of a better word), seeking a middle ground between the diametrically opposed positions of **[*204]** the People and the defendants in these cases, creates no new law, and simply leaves us where we were before. One majority, comprised of Chief Judge Lippman, and Judges Graffeo, Read, Rivera and Abdus-Salaam, concludes that the risk of deportation "must be mentioned by the trial court to a defendant as a matter of fundamental fairness" (op of Abdus-Salaam, J., at 193). Then, a different majority, Judges Graffeo, Read, Smith and Abdus-Salaam, which refers to itself as the "remedial majority" (*id.* at 198), takes away with one hand what had been given with the other. A court's failure to warn of the possibility of deportation does *not* automatically invalidate the plea (unlike the failure to warn a defendant of direct consequences of his plea, **[****73]** such as postrelease supervision). Rather, according to the remedial majority, a defendant's recourse is merely "a hearing to provide the defendant with an opportunity to demonstrate prejudice" (*id*. at 200). But that remedy was already available to defendants under *CPL 440.10*. In short, the remedial majority's analysis takes us nowhere new.

I would take a more straightforward approach. Deportation is a collateral consequence of a guilty plea, as the remedial majority concedes. We can infer from this that a defendant has no constitutional right to be informed by a state trial court judge of the possibility that the federal government may deport him or her.* **[***306]** **[**643]** However, under *Padilla v Kentucky (559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 [2010])*, the *Sixth Amendment* requires a defendant's *counsel* to "inform her client whether his plea carries a risk of deportation" (*559 US at 374*). "Whether he is entitled to relief depends on whether he has been prejudiced" (*id. at 360*), and, in showing prejudice, defendant **[27]** must demonstrate that, in addition to his counsel's failure to give the required advice, he was not informed by the trial court of the risk of deportation. If defendant can show that neither his counsel nor the trial court informed him of the possibility of deportation, and that he would not have pleaded **[****74]** guilty **[*205]** had he been so informed, he will prevail at his postjudgment proceeding.

In short, I would reach a very similar conclusion to the remedial majority's, and, like the remedial majority, I would create no new law, but I would follow a far more direct path, based strictly on *Padilla*. The remedial majority's analysis gives defendants no practical benefit that *Padilla* does not already give them.

II

Another, equally fundamental weakness affects the "majority" opinion. The majority comprised of Chief Judge Lippman, and Judges Graffeo **[****75]** , Read, Rivera and Abdus-Salaam does not agree on a rationale for its due process holding. Although Judge Abdus-Salaam does not say so expressly, no precedential analysis emerges from her opinion.

Judges Graffeo, Read and Abdus-Salaam "reaffirm[ ] the central holding of *[People v] Ford [(86 NY2d 397, 657 NE2d 265, 633 NYS2d 270 [1995])*] regarding . . . the distinction between direct and collateral consequences of a guilty plea" (op of Abdus-Salaam, J., at 176; *see id*. at 196). The same Judges also reaffirm *Ford*'s holding that deportation is a collateral consequence of a guilty plea, adding only the qualifier "technically" before "collateral" (*id*. at 191 n 5, 191-192, 199), but never retreating from the basic premise.

So far, I have no quarrel; Judge Smith and I agree with Judges Graffeo, Read and Abdus-Salaam that deportation is a collateral consequence of a guilty plea. However, the plurality consisting of Judges Graffeo, Read and Abdus-Salaam (*see* op of Abdus-

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* Such a warning is required by a statute, *CPL 220.50 (7)*, which courts should, of course, follow, even if failure to do so is not reversible error. The statute was added

> "as a component of budget legislation designed to reduce prison population by facilitating deportation of convicted felons who are not citizens of the United States. The admonition the court is required to impart . . . is aimed at diluting the effectiveness of arguments made by aliens at deportation hearings that they would not have pleaded guilty had they known the conviction would result in loss of the privilege of remaining in this country" (Peter Preiser, McKinney's Cons Laws of NY, Book 11A, *CPL 220.50* at 167).

Salaam, J., at 191-192) then attempts to treat deportation as a *sui generis* consequence that is at once collateral and uniquely significant. In doing so, the plurality fails to do justice to the severity of collateral consequences such as SORA registration and SOMTA confinement. A person who **[****76]** has been civilly confined, possibly for the rest of his life, under *Mental Hygiene Law article 10*, would be surprised to learn that three members of our Court believe that he has not been "deprive[d] . . . of an exceptional degree of physical liberty" (op of Abdus-Salaam, J., at 192). In my view, the plurality's position contradicts our holdings in *People v Gravino (14 NY3d 546, 928 NE2d 1048, 902 NYS2d 851 [2010]* [SORA registration is a significant, but a collateral, consequence of a conviction]) and **[**644] [***307]** *People v Harnett (16 NY3d 200, 945 NE2d 439, 920 NYS2d 246 [2011]* [same with respect to SOMTA commitment]).

[*206] III

I agree that the Appellate Division orders in *People v Peque* and *People v Thomas* should be affirmed. However, with respect to *People v Diaz*, I do not agree that "the trial court clearly failed to tell defendant that he might be deported if he pleaded guilty" (op of Abdus-Salaam, J., at 200), the view taken by Chief Judge Lippman, and Judges Graffeo, Read, Rivera and Abdus-Salaam. Supreme Court told Diaz, "if you're not here legally *or if you have any* ***[28]*** *immigration issues* these felony pleas could adversely affect you" (emphasis added), and the court elicited an acknowledgment that Diaz understood this. Although Diaz was a legal permanent resident of the United States, he was not a citizen. As such, he was not able to vote in United States elections, **[****77]** or remain outside the United States for lengthy periods of time, without running the risk of his permanent residency being deemed abandoned. In the circumstances, I believe that the reference to "immigration issues" was sufficient to make Diaz aware that the trial court's warning applied to him. It might have been preferable for Supreme Court to advise Diaz that, even if he was in the United States legally, a guilty plea might result in his deportation if he was not a United States citizen. But I cannot accept that, as a matter of law, Supreme Court's words implied that a guilty plea would not entail adverse immigration consequences for Diaz.

IV

Nor should Diaz be permitted a second bite of the apple. Supreme Court denied Diaz's *CPL 440.10* motion, agreeing with Diaz that his defense attorney had been ineffective, but holding that Diaz had not met his burden of showing prejudice, i.e. showing that he would not have pleaded guilty if warned by counsel of the risk of deportation. The Appellate Division denied Diaz leave to appeal Supreme Court's order, and consequently the proceeding did not reach us. Now the remedial majority remits the direct appeal to the trial court to, once again, "allow [defendant] **[****78]** to move to vacate his plea and develop a record relevant to the issue of prejudice" (op of Abdus-Salaam, J., at 200). But Diaz has already had his *440.10* proceeding (*see id*. at 179), and failed to establish any prejudice. It is therefore difficult to see what proceeding the remedial majority imagines should now occur.

[*207] V

For these reasons, I cannot join Judge Abdus-Salaam's opinion. I would affirm in all three appeals (*but see People v Hernandez, 22 NY3d 972, 977, 978 NYS2d 711, 1 NE3d 785 [2013*, Pigott, J., dissenting and voting to vacate defendant's plea following a *CPL 440.10* proceeding] [decided today]).

Chief Judge Lippman (dissenting). I respond to the opinion subscribed to by three Judges, whom I refer to as the **[29]** plurality, because that is the only writing offering reasons for the results announced in the above-captioned appeals. Although I would join a writing finding a due process entitlement on the part of a noncitizen defendant to be advised by the court of the possible immigration consequences of pleading guilty *and* making relief available when that entitlement is not honored, the plurality opinion does not meet the latter condition and I accordingly do not join it. **[***308] [**645]** I do, however, agree with the Judges who have signed the plurality opinion and with Judge Rivera **[****79]** , that deportation is such an important plea consequence that "it must be mentioned by the trial court to a defendant as a matter of fundamental fairness" (plurality op at 193).

The United States Supreme Court acknowledged in *Padilla v Kentucky (559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 [2010]*) that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence" (*id. at 366*). The Court, accordingly, declined to use the direct/collateral distinction to ascertain whether deportation was a conviction consequence of which a pleading noncitizen defendant was required to be advised. Instead, the Court took note of certain realities whose crucial bearing upon a noncitizen's decision whether to enter a plea of guilty were, by the time of the Court's decision, undeniable. Prominent among these was that deportation had, since the mid-1990s, become for noncitizen defendants a virtually automatic consequence of convictions falling within several very broad penal categories, and that deportation was a particularly harsh superadded exaction—one that the Court did not shrink from referring to as a "penalty" (*559 US at 364*). Indeed, the Court had already recognized that **[****80]** deportation was a conviction consequence often more dreaded by noncitizen defendants than any prison sentence that might be imposed, either pursuant to a plea agreement or after trial (*see* **[*208]** *559 US at 368*, citing *INS v St. Cyr, 533 US 289, 322, 121 S Ct 2271, 150 L Ed 2d 347 [2001]*). In holding then that the constitutionally effective representation of a noncitizen contemplating the entry of a guilty plea required the provision of accurate advice as to the immigration consequences of the conviction that would ensue, the Court was driven by the recognition that a plea entailing deportation very often will be impossible to characterize as voluntary where that uniquely important consequence has not been disclosed to the defendant—that such pleas are categorically different from "the vast majority . . . [in which] the overwhelming consideration for the defendant is whether he will be imprisoned and for how long" (*People v Gravino, 14 NY3d 546, 559, 928 NE2d 1048, 902 NYS2d 851 [2010]*).

The question now presented is whether, after *Padilla*, the description of deportation as a direct or a collateral plea consequence retains viability as a means of defining, not counsel's, but the court's duty in assuring the voluntariness of a plea. The plain answer to this question must be that it does not. If deportation is "uniquely difficult to classify **[****81]** as either a direct or a collateral consequence," logically it is so for all purposes, not simply for the purpose of **[30]** determining what advice counsel must give in satisfaction of the *Sixth Amendment* requirement of effective representation.

Once it is settled that the relevant inquiry is not whether deportation may be formally categorized as a direct or collateral consequence, but whether it is, as the *Padilla* Court observed, a consequence so certain, potentially pivotal and prevalent as to make its disclosure essential to assuring that the guilty plea of a noncitizen is knowing, intelligent and voluntary, it should be clear that the court's allocutional obligations in taking a noncitizen's plea are fully implicated. The realities shaping the court's obligations, with respect to the conviction consequence of deportation, are not **[***309]** **[**646]** essentially different from those to which counsel must be responsive in advising a noncitizen defendant.

It is by now practically self-evident that the judicial obligation in taking a plea—i.e., assuring on the record that the defendant fully understands what the plea connotes and its consequences (*see Boykin v Alabama, 395 US 238, 244, 89 S Ct 1709, 23 L Ed 2d 274 [1969]*), or, in other words, that "the plea represents a voluntary and intelligent **[****82]** choice among the alternative courses of action open to the defendant" (*North Carolina v Alford, 400 US 25, 31, 91 S Ct 160, 27 L Ed 2d 162 [1970]*, citing *Boykin, 395 US at 242*)—cannot realistically be met in the case of a noncitizen defendant unless the court's canvass extends to ascertaining that the plea is made with the awareness that it may well result in the pleader's deportation.

[*209] The plurality, wisely, does not avoid this conclusion; to do so would, in a very large number of cases, be to reduce to a painfully obvious fiction the notion so favored by the law that the taking of a plea in open court serves as an effective procedural bulwark against an uninformed and thus involuntary surrender of basic constitutional protections to which the defendant would otherwise be entitled prior to any adjudication of guilt (*see e.g. Brady v United States, 397 US 742, 747 n 4, 90 S Ct 1463, 25 L Ed 2d 747 [1970]* ["the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily"]; *Boykin, 395 US at 242* ["prosecution (must) spread on the record the prerequisites of a valid waiver"]; *Carnley v Cochran, 369 US 506, 516, 82 S Ct 884, 8 L Ed 2d 70 [1962]* ["The record must show . . . that an accused . . . intelligently and understandingly rejected (a constitutional right). Anything less is not waiver"]; *and see People v Cornell, 16 NY3d 801, 802, 946 NE2d 740, 921 NYS2d 641 [2011]* ["due process requires that the record must be clear that the plea represents a voluntary **[****83]** and intelligent choice among . . . alternative courses of action" (internal quotation marks and citations omitted)]; *People v Louree, 8 NY3d 541, 544-545, 869 NE2d 18, 838 NYS2d 18 [2007]*; *see also* plurality op at 184). Yet, while recognizing that the court has an independent due process obligation to notify a noncitizen defendant that his or her plea may result in deportation (plurality op at 176 ["We . . . hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a

felony"])—a proposition with which I certainly agree—the plurality affords no remedy where that condition of due process has not been met, and in fact not **[31]** one of the present appellants will in the end obtain relief.

If a plea proceeding fails of its essential purpose—if it does not create a record from which the knowing and voluntary nature of the defendant's waiver and concomitant choice between available alternative courses of action may be readily understood—the plea is infirm. And, in that case, the appropriate response is to permit the plea's withdrawal, not to cast about for a means of deeming the infirmity harmless (*see* *McCarthy v United States, 394 US 459, 466, 89 S Ct 1166, 22 L Ed 2d 418 [1969]* ["if a defendant's guilty plea is not equally **[****84]** voluntary and knowing, it has been obtained in violation of due process and is therefore void"]). We have, in fact, permitted withdrawal as a matter of course where the defect in the plea amounts to a due process violation. In *People v Catu (4 NY3d 242, 825 NE2d 1081, 792 NYS2d 887 [2005]*), for example, we said:

> **[**647]** **[*210]** **[***310]** "Because a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, *the failure of a court to advise of postrelease supervision requires reversal of the conviction. The refusal of the trial court and Appellate Division to vacate defendant's plea on the ground that he did not establish that he would have declined to plead guilty had he known of the postrelease supervision was therefore error* (*see also* *People v Coles, 62 NY2d 908, 910, 467 NE2d 885, 479 NYS2d 1 [1984]* ['harmless error rules were designed to review trial verdicts and are difficult to apply to guilty pleas']).
>
> "*In light of this result, we do not reach defendant's alternative claim of ineffective assistance of counsel*" (*id. at 245* [emphasis supplied]).

The Court's[1] present approach to dealing with a due process violation identical in kind to that addressed by *Catu*, although practically far **[****85]** more consequential, is precisely contrary to that deemed "require[d]" in *Catu*. The defendant's remedy now is said to lie in a postconviction motion in which it will be up to him or her—often without the aid of counsel and in a **[32]** non-native tongue[2]—to navigate the postconviction relief maze in order to prove a circumstance that should have been, but was not, negated by the accepted plea—namely, that the plea was entered in ignorance of its deportation consequence, which, if disclosed, would, with reasonable probability, have caused its rejection. In short, having demonstrably been denied due process, a defendant is, under today's decision, relegated to a claim that reduces to one for ineffective assistance—a claim that would, in the vast majority of cases, have been obviated by a constitutionally adequate plea. It was, of course, in recognition of the primacy of the plea court's due process obligation, that *Catu* premised the right to plea withdrawal exclusively on the plea court's default, and consequently did not reach Catu's ineffective assistance claim. While the plurality stresses that the judicial obligation in **[*211]** taking a plea is independent of the obligation of counsel to provide accurate advice **[****86]** as to a plea's immigration consequence (plurality op at 193), the net effect of its decision is remedially to telescope the two, so that a due process claim based on a judicial default will not occasion relief except where there is also an attendant meritorious *Padilla* claim. The plurality acknowledges that this is so but says that it is appropriate since in *People v Harnett (16 NY3d 200, 945 NE2d 439, 920 NYS2d 246 [2011])* it was observed in a purely theoretical aside that "the issue of whether the plea was voluntary may be closely linked to the question of whether a defendant received the effective assistance of counsel" (*id. at 207*). But the issue of whether a plea is actually voluntary, appropriately implicated in determining whether a plea should in fairness be vacated where the plea is not facially deficient—the circumstance **[***311]** **[**648]** to which the above-quoted language from *Harnett* speaks—is not the issue presented here. The issue posed in the present appeals is instead whether the plea itself comports with due process when its canvass does not extend to its immigration consequence. Having evidently held that it does not, it makes no sense at all to then require, as a condition of relief, that a defendant whose plea was facially deficient prove a negative—namely, **[****87]** that the due process denial was not harmless. Due process violations are presumptively prejudicial—that is why they are so classified. The accommodation of the contrary, illogical premise, could not have been within *Harnett*'s contemplation.

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[1] I refer here to the approach shared by the plurality and the dissenters for whom Judge Pigott has written, for as Judge Pigott has noted, those approaches are in their resolution practically indistinguishable. Neither affords noncitizen defendants relief from pleas that fail to establish the defendants' awareness of their deportation consequence.

[2] We speak here of what *Padilla*, with doubtless accuracy, described as the "class . . . least able to represent themselves" (*559 US at 370-371*).

The delicacy with which the plurality treats *People v Ford (86 NY2d 397, 657 NE2d 265, 633 NYS2d 270 [1995])*—a decision which, after *Padilla*, is in its two principal holdings, if not in its *ratio decidendi*, no longer viable—stands in strikingly awkward contrast to its abandonment of the remedial course charted in and required by *Catu*. Perhaps the plurality reasons that because deportation does not precisely fit the description of a direct conviction consequence and is, in its view "technically" a collateral consequence (plurality op at 192), that **[****88]** it is not governed by *Catu*. But this simply **[33]** revives the direct/collateral distinction as a meaningful tool in characterizing deportation as a plea consequence. Not only is this use of the distinction demonstrably inapt after *Padilla*, it is utterly inconsistent with the plurality's correct conclusion that due process requires the plea to establish that a noncitizen defendant was advised of its possible deportation consequence. If, in fact, it continues to be material—even after *Padilla*—that deportation is not, strictly speaking, a "direct" conviction consequence within the meaning of *Ford*, it should follow that a plea court's nondisclosure of that consequence does not rise to **[*212]** the level of a due process defect. But, that is a conclusion that the plurality, with ample empirical and legal justification, rightly eschews.

The plurality does not, however, eschew the remedial path hypothetically sketched in *Gravino (14 NY3d at 559)* and *Harnett (16 NY3d at 207)*. Traveling it, however, is, as noted, inappropriate where the plea is affected by a due process deficiency such as the one the plurality identifies today. Plainly, the address of a due process violation was not what was intended when it was suggested in *Gravino* that a court might, **[****89]** as an "exercise [of] discretion" (*14 NY3d at 559*) vacate a plea if various conditions were met, among them that the defendant proved that, but for the nondisclosure of a consequence "of such great importance to him" (*id.*; *and see Harnett, 16 NY3d at 207*), he would not have pleaded guilty. The relief adverted to in *Harnett* and *Gravino* did not depend upon or respond to a default by the court in establishing the voluntariness of the plea; its purpose was rather to allow for a remedy precisely in those situations where the defendant was materially uninformed as to a plea consequence which, although of "great importance to him," was not one about which the plea court was obliged to warn. In the cases before us, by contrast, we deal with judicial omissions incompatible with due process and bearing critically upon the very basis of the plea. The remedy in that latter circumstance is not "discretionary" as per *Gravino*'s dicta, it is "required" as per *Catu*'s holding.

Today's plurality decision speaks eloquently of the severity of deportation as a conviction consequence (plurality op at 192-193), **[***312]** **[**649]** but in the end treats removal as just another collateral consequence that may be of "great importance" to a defendant, leaving the defendant **[****90]** to prove to the satisfaction of the court that took the plea, that the plea was uninformed as to the important consequence, and that, had that consequence been disclosed, the plea would not have been entered—or, at least, that the plea's rejection would have been reasonably probable. Thus, although the Court now roots the judicial obligation to inform a pleading noncitizen of immigration consequences in due process, as a practical matter judges and defendants remain just as they were—a judge's default in informing a noncitizen defendant that he may be deported will only be rectified in the context of a claim for what is essentially ineffective assistance of counsel, which is to say in the context of a claim that, of course, already exists, but is extraordinarily difficult to make **[*213]** out (*see e.g. People v Hernandez, 22 NY3d 972, 1 NE3d 785, 978 NYS2d 711 [2013]* [no reasonable probability that a defendant with six young children in this country would have rejected a plea to preserve a possibility of avoiding deportation]). The disjunction between the right recognized **[34]** and the remedy offered is palpable. If due process requires a warning "to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York" (plurality **[****91]** op at 197), it must be that the failure to give the warning is at least presumptively prejudicial. Here, however, the plurality illogically and unfairly places upon the demonstrably unwarned members of the vulnerable noncitizen class the formidable burden of proving individual prejudice.

In advocating the conceptually straightforward and until now legally uncontroversial notion, that a guilty plea unequal to the basic due process purpose of demonstrating that its entry was knowing and voluntary should be permitted to be withdrawn, I acknowledge the inevitable concern that its embrace in the present context would provoke a stampede to the courthouse. That concern, rationally assessed, I believe is exaggerated. New York has required by statute, now for some 18 years, that judges warn noncitizens of their pleas' potential immigration consequences (*see CPL 220.50 [7]*). It cannot be presumed that the statute has been pervasively ignored (*see Padilla, 559 US at 372* ["For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea . . . We should, therefore, presume that counsel satisfied their obligation to render competent **[****92]** advice at the time their clients considered pleading guilty"]). But, if it has been, that is all the more reason to doubt the efficacy of substituting one toothless

command[3] for another, as the plurality today proposes. Nor is there reason to believe that noncitizen defendants will rush to scuttle pleas that were genuinely advantageous, notwithstanding an unallocuted deportation consequence (*see Padilla, 559 US at 372-373*). Moreover, inasmuch as *Padilla* broke new ground "by **[*214]** breaching the previously chink-free wall between direct and collateral consequences" **[***313] [**650]** (*Chaidez v United States, 568 US ___, ___, 133 S Ct 1103, 1110, 185 L Ed 2d 149 [2013]*), there is strong reason to suppose that any remedy stemming from the demise of that "chink-free wall" would be limited to cases still on direct appeal (*see id.*). Finally, in the long term, affording noncitizens prompt and effective relief from pleas that manifestly fail to provide the assurance of voluntariness that due process requires, will reduce rather than increase postconviction claims and thus protect rather than subvert the finality of plea-based judgments of conviction. **[35]**

The conscientious provision of the already statutorily prescribed judicial warning—which all of the present appellants agree is adequate—would itself obviate the overwhelming majority of postconviction claims relating to undisclosed immigration consequences. And, in those presumably rare cases where, despite the remedy of plea withdrawal, there was a judicial default, all of the concerned parties would be spared complicated and prolonged motion practice; the defendant would simply, logically, fairly and expeditiously be given his or her plea back and proceed to trial on the indictment. I note that several jurisdictions have such a rule (*see RI Gen Laws § 12-12-22 [c]*; *Cal Penal Code § 1016.5 [b]*; *Conn Gen Stat Ann § 54-1j [c]*; *DC Code § 16-713 [b]*; *Mass Gen Laws ch 278, § 29D*; *Ohio Rev Code Ann § 2943.031 [D]*; *Vt Stat Ann tit 13, § 6565 [c] [2]*; *Wash Rev Code § 10.40.200 [2]*; *Wis Stat Ann § 971.08 [2]*); the sky has not fallen as a result.

The literal-minded application of the direct/collateral distinction, *Padilla* notwithstanding, has given rise to a state of affairs where a court must, on pain of reversal, inform a pleading defendant of a term **[****94]** of postrelease supervision (PRS) but may, without consequence, fail to disclose to the same defendant that the plea will result in deportation, an outcome not merely overshadowing but usually nullifying the term of postrelease supervision.[4] An analytic paradigm that would yield such an objectively skewed ordering of interests and corresponding **[*215]** judicial concerns cannot and will not be viewed except as unmoored from the considerations of fundamental fairness that ought to animate our jurisprudence in passing upon pleas, the means by which guilt is established in the vast majority of criminal cases. Nothing in today's very long plurality decision functions to diminish this signal anomaly one whit. Calling the court's failure to advise of an immigration consequence a due process denial without affording the defendant a remedy for that denial amounts to no more than a verbal gesture. While the plurality insists that our precedents do not allow more, that is transparently incorrect. As noted, this Court has been clear as to the remedy required when a plea court fails to establish on the record, to the extent that due process requires, that a plea is a knowing and intelligent choice between **[****95]** available alternative courses of action. The notion, then, that the plurality is somehow constrained to withhold relief for the nonperformance of the "distinct" and "independent" judicial due process **[36]** obligation it has postulated is altogether puzzling. It would be one thing if, like Judge Pigott, the plurality simply found that, *Padilla* **[***314] [**651]** notwithstanding, *Ford* remained good law for the proposition that judges have no due process duty to advise pleading noncitizens of immigration consequences. But, having found to the contrary, the failure to afford any logically and legally responsive remedy to noncitizen defendants left unwarned by the court as to the possible immigration consequences of their pleas represents a perplexing election—one that is in no way explained post-*Padilla* by clinging, practically as an article of faith, to an orthodoxy that, as the plurality opinion acknowledges at length, time and circumstance have overwhelmed, at least with respect to the characterization of immigration consequences for plea purposes.

Given the plurality's indisposition to navigate the not so complicated route from its understanding of what due process requires of a court taking a plea, to a logical and efficacious remedy when the standard it has set has not been met—indeed, its evident determination instead to follow a tortuous path influenced by what is, in the present context, a thoroughly discredited

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[3] After requiring that noncitizen defendants be warned as to the possible immigration consequences of their contemplated pleas, *CPL 220.50 (7)* adds the proviso that the failure to give the prescribed **[****93]** warning "shall not be deemed to affect the voluntariness of a plea of guilty." That the plurality ultimately finds this proviso compatible with its notion of what due process avails a pleading defendant (plurality op at 199 n 12) is strikingly indicative of how very narrow its decision is.

[4] The nullifying effect of deportation upon a PRS term was, of course, the circumstance about which defendant Peque's attorney wondered aloud, when the deportation **[****96]** issue surfaced at Peque's sentencing. He said, "Mr. [Peque] is subject to deportation following the completion of his sentence. I'm not sure how that's going to impact, assuming the Court imposes the sentence that's been agreed upon, I'm not sure how that will affect the post-release supervision aspect of it."

formalism—a legislatively prescribed remedy will be necessary to untie the Gordian knot now fashioned and protect the adjudicative rights of noncitizen criminal defendants.

I would reverse in each of the cases before us.

[*216] In *Peque*, although there was some fairly random mention of deportation at the sentencing proceeding (*see* n 4, *supra*), there was no judicial advisement at either plea or sentence as to the prospect of deportation, and Peque was manifestly confused as to what his plea involved. I do not, moreover, **[****97]** believe it reasonable to require preservation in this context. The purpose of the judicial advisement here at issue is to assure that the defendant is aware of the plea consequence. A preservation requirement presumes knowledge that would make the advisement unnecessary—a classic "Catch-22," particularly inappropriate when dealing with the class of defendants "least able to represent themselves" (*Padilla, 559 US at 370-371*) and where a meritorious claim for plea withdrawal—at least under the plurality formulation—presupposes that the defendant has been ineffectively represented.[5] **[37]**

The advisement provided in connection with defendant Diaz's plea was, I believe, affirmatively misleading as to the likelihood of any immigration consequence and, on that ground, Diaz should be permitted to withdraw his plea and face trial on the indictment charging an A-I drug felony; if that is a risk he wishes to take to preserve the possibility of remaining in this country where he has resided legally for most of his life and has an infant child, he should be permitted to do so.

[*315]** **[**652]** I would note in passing that Diaz's case illustrates the extreme procedural difficulty of obtaining relief by the means now prescribed. Although the plurality acknowledges that the "trial court clearly failed to tell [Diaz] that he might be deported" (plurality op at 200), and purports to afford him the possibility of relief, it logically precludes him from prevailing in any ensuing litigation, since the showing of prejudice it requires has already been made and found wanting; Diaz's *CPL 440.10* motion was denied on the ground that **[****99]** he failed to satisfy the **[*217]** *Strickland* prejudice prong, and leave to appeal was thereafter denied by an Appellate Division Justice. Like Diaz, all defendants alleging a due process violation by reason of an inadequate plea, in order to obtain relief, would, under today's plurality decision, be compelled to split their claim between a direct appeal and a separate *440.10* proceeding—a complication that is pointless, since a defendant under current law, which the plurality does not alter in any practical respect, can in the end only obtain relief via a *440.10* claim for ineffective representation. Rather than temporize, I would afford Diaz actual relief from a plea that was not demonstrably knowing and voluntary.

Finally, as to defendant Thomas, inasmuch as his case is on direct appeal, I believe he is entitled to the benefit of our current jurisprudence. His postplea fraud upon the court logically has no bearing upon whether his plea was knowing, intelligent and voluntary, and there is no ground advanced by the plurality or the People to except from the rule that, ordinarily, a direct appeal from a judgment of conviction will be governed by the law as it exists at the time the appeal is decided (*see People v Jean-Baptiste, 11 NY3d 539, 542, 901 NE2d 192, 872 NYS2d 701 [2008]*) **[****100]** —a bright line demarcation we have adhered to, even where there has been lengthy delay attributable to the appellant (*see e.g. People v Martinez, 20 NY3d 971, 983 NE2d 751, 959 NYS2d 674 [2012]*).

The People, I note, really do not identify any relevant prejudice traceable to **[38]** defendant's fabrication of his demise. Thomas has already served his enhanced sentence. Even if his plea withdrawal motion is granted, and the People are unable to reprosecute him for lack of witnesses or physical evidence,[6] he will have been amply punished for his criminal conduct and for his chicanery. There is nonetheless a real and persisting issue as to the validity the plea upon which this punishment was based,

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[5] In view of this latter circumstance, the utility of the plurality's advice that a noncitizen defendant seeking plea withdrawal for nonadvisement as to an immigration consequence "should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing" (plurality op at 199) is dubious. If counsel has, by hypothesis, been ineffective it does not seem reasonable to expect the same attorney to make a record as to the very matter as to which the representation was deficient. If, as the plurality points out, it is not generally prudent to assume that "defense counsel 'will' do something simply because **[****98]** it is required of effective counsel" (*Moncrieffe v Holder*, 569 US ___, ___, 133 S Ct 1678, 1692, 185 L Ed 2d 727 [2013]) (plurality op at 193), surely it cannot be prudent to suppose that ineffective counsel will do something because it is required of effective counsel.

[6] It is noted that while the People raise these impediments to reprosecution on appeal in a general way, they have never made any concrete allegation that they would be unable to proceed against defendant on the sale counts with which he was initially charged.

and, in that connection, the People can claim no vested interest in the application of outdated precedent, or, in other words, the retention of the pre-*Padilla* legal context. This is especially so since *Padilla* was remedial; it responded to circumstances existing long before its issue in 2010 (*see* *Padilla, 559 US at 362-363*). Indeed, by 1992, the year of defendant's plea, deportation had become mandatory for noncitizens convicted of crimes falling into several broadly defined categories, one of which was for drug offenses; with a few closely drawn exceptions not applicable **[*218]** to defendant, virtually **[****101]** all drug convictions by that time entailed automatic removal.[7]

[*316]** **[**653]** The People, whose interest properly lies not simply in winning this appeal but doing justice, can claim no prejudice from *Padilla*'s application to Thomas's case. To the extent that the decision's "new rule" retroactively applied may unduly impair the finality of convictions, that has been dealt with by the Supreme Court in *Chaidez*, which limits *Padilla*'s backward reach to cases that have not become final, i.e., those, like defendant's, still on direct appeal (568 US at ___, 133 S Ct at 1113).

In my view, Thomas's right to relief is made out by the record of his plea proceeding at which, five days after his alleged wrongdoing **[****102]** and before being indicted, Thomas, then a 21-year-old novice to the criminal justice system, entered a plea to attempted criminal sale of a controlled substance in the third degree in exchange for a disarmingly attractive 30-day jail sentence without being advised by the court, or indeed by anyone present, that, upon his release, he would be deported. It is, I believe, clear that Thomas's was not a knowing and voluntary plea. **[39]**

Rivera, J. (dissenting in *People v Peque* and *People v Diaz*, and concurring in *People v Thomas*). I concur with Judge Abdus-Salaam's opinion in *People v Thomas* that "defendant Thomas's challenge to the voluntariness of his plea must be evaluated in light of the practical and legal relationship between a criminal conviction and deportation at the time he pleaded guilty in 1992" (op of Abdus-Salaam, J., at 201), and as such, defendant is not entitled to relief for the reasons stated therein.

I join the Chief Judge's dissent in *People v Peque* and *People v Diaz* in all respects because I believe the trial court's failure to advise a noncitizen that the plea may potentially subject defendant to deportation requires automatic vacatur.[*] I write separately because, in **[40]** addition **[****103]** to all of the arguments so cogently and comprehensively discussed in the Chief Judge's dissent, to the extent Judge Abdus-Salaam's opinion grounds its **[*219]** due process analysis on the immigration status of noncitizen defendants, then violation of these defendants' rights as so recognized mandates a status-based response. The "reasonable probability" test, however, is not status-based, but rather an individualized multifactor balancing test under which the defendant must establish prejudice.

If deportation implicates due process for a noncitizen defendant, **[****104]** based solely on, and because of, that very immigration status and its attendant devastating consequences, then those consequences are no less consequential as an individualized matter. By locating noncitizen defendants in a rarefied criminal justice system—one that recognizes immigration status as the basis for a due process claim, but which simultaneously denies a status-based remedy—the opinion constructs an ultimately flawed legal framework.

Judges Graffeo and Read concur with Judge Abdus-Salaam; Judge Pigott concurs in result in an opinion in which Judge Smith concurs; Chief Judge Lippman dissents and votes to reverse in an opinion in which Judge Rivera concurs in a separate opinion.

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[7] As defendant observes, the immigration consequences of his plea to an attempted drug sale were dictated by *8 USC § 1251 (a) (2) (B) (i)*, a statute materially identical to its successor, *8 USC § 1227 (a) (2) (B) (i)*, the provision that applied to Padilla, and which was described by the Supreme Court as "succinct, clear, and explicit" (*559 US at 368*).

[*] I also agree with the Chief Judge's dissent in *Peque* that requiring preservation is not reasonable. In my opinion, defendant should not be penalized by demanding preservation when at the time that defendant Peque entered a plea the law in New York specifically foreclosed the relief he now seeks (*see* *People v Ford, 86 NY2d 397, 403-404, 657 NE2d 265, 633 NYS2d 270 [1995]* [finding deportation is a collateral consequence of a guilty plea and therefore the court has no duty to inform defendant of such consequence during allocution]; *see also* *CPL 220.50 [7]* [failure to advise defendant that guilty plea could result in deportation "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction"]).

In *People v Peque*: Order affirmed.

Judges Graffeo and Read concur with Judge Abdus-Salaam; Judge Smith concurs in result; Chief Judge Lippman dissents and votes to reverse in an opinion in which Judge Rivera concurs in a separate opinion; Judge Pigott dissents and votes to affirm in an opinion.

In *People v Diaz*: Order modified by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Judges Graffeo and Read concur with **[****105]** Judge Abdus-Salaam; Judge Pigott concurs in result in an opinion in which Judge Smith concurs; Judge Rivera concurs in result in a separate opinion; Chief Judge Lippman dissents and votes to reverse in an opinion.

In *People v Thomas*: Order affirmed.

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People v. Hobson

Court of Appeals of New York

February 20, 1976, Argued ; May 4, 1976, Decided

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The People of the State of New York, Respondent, v. Henry Cornelius Hobson, Appellant

Prior History: [**1]** *People v Hobson, 47 AD2d 716.*

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 24, 1975, which affirmed a judgment of the Suffolk County Court (Ernest L. Signorelli, J.), convicting defendant, upon his plea of guilty, of robbery in the third degree.

Disposition: Order reversed, etc.

Core Terms

cases, stare decisis, courts, right to counsel, intelligently, interrogation, stability, warnings, charges, custody, waive, incrimination, indictment, adherence, assigned, robbery, rights

Case Summary

Procedural Posture
Defendant appealed a judgment from the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed his conviction for robbery and the denial of his motion to suppress incriminating statements made by defendant while in custody, and in the absence of his attorney, when police knew that he was represented by counsel.

Overview

An attorney was appointed to represent defendant before his placement in a lineup at which defendant was identified as the person who had committed a robbery several months earlier. After defendant's attorney left the lineup, a detective began to talk to defendant, and, at a deputy's request, defendant signed a waiver form. Defendant indicated that he wanted to discuss the case without his attorney present, and he confessed to the robbery. His motion to suppress was denied, and he was convicted of robbery. Defendant's conviction was upheld by the appellate division, and he appealed. In reversing, the court ruled that the statements should have been suppressed because they were obtained in violation of his right to counsel. Longstanding precedent provided that police could not question a defendant in the absence of counsel unless there was an affirmative waiver made in the presence of that counsel. Two recent cases to the contrary, *People v. Robles, 27 N.Y.2d 155 (1970)*, and *People v. Lopez, 28 N.Y.2d 23 (1971)*, were overruled in principle, notwithstanding the doctrine of stare decisis, because they conflicted with that longstanding prior precedent.

Outcome
The judgment affirming the conviction was reversed and the statements ordered suppressed because they were obtained in violation of defendant's right to counsel and the longstanding rule that police were prohibited from questioning a defendant in the absence of counsel unless an affirmative waiver was made while the attorney was present. Recent precedent to the contrary was overruled in principle.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Commencement of Criminal Proceedings > Eyewitness Identification > Lineups

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN1[] **Criminal Process, Assistance of Counsel**

Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer. Any statements elicited by an agent of the State, however subtly, after a purported "waiver" obtained without the presence or assistance of counsel, are inadmissible. Where the purported "waiver" of the defendant's right to counsel was obtained in the absence of his lawyer, who had represented him at a just-completed lineup in connection with the criminal charges, his statements are inadmissible and should be suppressed.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN2[] **Criminal Process, Assistance of Counsel**

Once an attorney enters a criminal proceeding, the police may not question a defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant. This unequivocal and statement of the law in New York is no mere dogmatic claim or theoretical statement of the rule, it is, instead, a rule grounded in the state's constitutional and statutory guarantees of the privilege against self incrimination, the right to the assistance of counsel, and due process of law. Indeed, the rule has resisted narrow classification of defendants entitled to its protection; it is applicable to a defendant when taken into custody, whether as an accused, a suspect, or a witness.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Noncustodial Confessions & Statements

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Spontaneous Statements

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN3 **Criminal Process, Assistance of Counsel**

While it is a rule that once an attorney enters the proceeding, the police may not question a defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel, that rule is not an absolute. Thus, the fact that a defendant is represented by counsel in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule. The rule applies only to a defendant who is in custody; it does not apply to noncustodial interrogation. Moreover, the rule does not render inadmissible a defendant's spontaneously volunteered statement.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Procedural Matters

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN4 **Criminal Process, Assistance of Counsel**

Notwithstanding that warnings alone might suffice to protect the privilege against self incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel. The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent, and voluntary. Indeed, it may be said that a right too easily waived is no right at all. Moreover, an attempt to secure a waiver of the right of counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter.

Legal Ethics > Prosecutorial Conduct

HN5 **Legal Ethics, Prosecutorial Conduct**

It would not be rational, logical, moral, or realistic to make any distinction between a lawyer acting for the State who violates the ethical rule against communicating with a defendant known to already have an attorney directly and one who indirectly uses the admissions improperly obtained by a police officer, who is the badged and uniformed representative of the State. To do so would be, in the most offensive way, to permit that to be done indirectly what is not permitted directly.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

Stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. While certain cases in collision with the prior doctrine, may present recency in time, they do not merit application of a mechanical formula of adherence, just because of their recency. Stare decisis, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Governments > Courts > Judicial Precedent

Governments > Courts > General Overview

HN7[] **Counsel, Right to Counsel**

Stare decisis does not spring full-grown from a "precedent" but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel. Distinctions in the application and withholding of stare decisis require a nice delicacy and judicial self-restraint. At the root of the techniques must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. Without this assumption there is jurisprudential anarchy.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

Governments > Courts > Judicial Precedent

Constitutional Law > Bill of Rights > General Overview

HN8[] **Case or Controversy, Constitutional Questions**

In cases interpreting the federal Constitution, courts will, if convinced of error in prior cases, correct the error, notwithstanding the rule of stare decisis. But the conviction of error must be imperative.

Governments > Courts > Judicial Precedent

HN9[] **Courts, Judicial Precedent**

Always critical to justifying adherence to precedent is the requirement that those who engage in transactions based on the prevailing law be able to rely on its stability. This is especially true in cases involving property rights, contractual rights, and property dispositions, whether by grant or testament. The absence of such factors, on the other hand, makes easier the reassessment of aberrational departures from precedents and accepted principles. Precedents involving statutory interpretation are entitled to great stability. After all, in such cases courts are interpreting legislative intention and a sequential contradiction is

a grossly aggregated legislative power. Moreover, if the precedent or precedents have misinterpreted the legislative intention, the legislature's competency to correct the misinterpretation is readily at hand.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Governments > Courts > Judicial Precedent

HN10[] **Self-Incrimination Privilege, Right to Counsel During Questioning**

A precedent is less binding if it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes. On the contrary, a precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis. Indeed, that constitutes one of the bases for treating the cases of *People v. Robles, 27 N.Y.2d 155 (1970)*, and *People v. Lopez, 28 N.Y.2d 23 (1971)*, as overruled in principle, just because they did not satisfy the rational test when compared to the prior line of reasoned and consciously developed cases which a bare majority in the Lopez and Robles cases found unsatisfactory.

Headnotes/Summary

Headnotes

Crimes -- confessions -- once lawyer has entered criminal proceeding representing defendant in connection with charges under investigation, defendant in custody may not waive his right to counsel in absence of his lawyer and, accordingly, confession by defendant, who had been represented by counsel at time of lineup and then had agreed to speak to detective without counsel, should have been suppressed -- cases which departed from rule set forth in earlier cases with respect to right to counsel are overruled; stare decisis does not require adherence to latest decision when that adherence involves collision with prior decision which is more embracing in its scope, is sounder and has been verified by experience.

1. Defendant, while being held in a county jail on unrelated **[****2]** charges, was placed in a lineup and the complainant identified as the man who had robbed his delicatessen several months before. Because defendant had requested counsel, a lawyer was assigned and was present to represent him. After the lawyer had left, defendant signed a "waiver" and agreed to speak to a detective who then read the standard preinterrogation warnings to defendant. Defendant indicated that he did not wish to contact a lawyer and thereafter confessed to the robbery. A motion to suppress the confession should have been granted. Once a lawyer has entered a criminal proceeding representing a defendant in connection with charges under investigation, a defendant in custody may not waive his right to counsel in the absence of his lawyer. (See *People v Arthur, 22 NY2d 325*.) The right to the continued advice of his lawyer is a defendant's real protection against an abuse of power by the State.

2. The cases of *People v Robles (27 NY2d 155*) and *People v Lopez (28 NY2d 23*), which departed from the rule with respect to the right to counsel set forth in *People v Arthur (22 NY2d 325*) and the line of cases out of which the *Arthur* case arose, are overruled. **[****3]** The doctrine of *stare decisis* does not require adherence to the latest decision when that adherence involves collision with a prior doctrine, such as that in the *Arthur* and like cases, which is more embracing in its scope, is intrinsically sounder and has been verified by experience. The *Robles* and *Lopez* cases are in collision with the prior doctrine and do not merit application just because of their recency.

3. With respect to the doctrine of *stare decisis*, those who engage in transactions based on the prevailing law must be able to rely on its stability. However, even in cases interpreting a constitutional guarantee such as the right to counsel, courts will, if convinced of prior error, correct the error, but the conviction must be imperative. A line of precedent which is found to be analytically unacceptable and out of step with the times and the reasonable expectations of members of society will be re-examined.

Counsel: *Gerald J. Callahan, John F. Middlemiss, Jr.*, and *Leon J. Kesner* for appellant. I. The People violated the constitutional rights of appellant in questioning him without his attorney being present. *(People v Arthur, 22 NY2d 325*; **[****4]** *People v Vella, 21 NY2d 249*; *People v Donovan, 13 NY2d 148*.) II. The trial court had insufficient evidence presented to determine that appellant waived his constitutional rights. *(Blyden v Hogan, 320 F Supp 513*; *Inmates of Attica Correctional Facility v Rockefeller, 453 F2d 12*; *People v Horowitz, 21 NY2d 55*; *People v Custis, 32 AD2d 966*.)

Henry F. O'Brien, District Attorney (Charles M. Newell of counsel), for respondent. I. Appellant's confession was not rendered inadmissible by the fact that it was made in the absence of his attorney. *(People v Huntley, 15 NY2d 72*; *People v Valerius, 31 NY2d 51*; *People v Leonti, 18 NY2d 384, 19 NY2d 922, 389 U.S. 1007*; *Blackburn v Alabama, 361 U.S. 199*; *People v Stephen J. B., 23 NY2d 611*; *People v Chaffee, 42 AD2d 172*; *People v Paulin, 25 NY2d 445*; *People v Arthur, 22 NY2d 325*; *People v Gunner, 15 NY2d 226*; *People v McIntyre, 31 AD2d 964, 41 AD2d 776, 36 NY2d 10*.) II. The record contains ample evidence that appellant freely and knowingly waived his constitutional rights and made a voluntary confession. *(Blyden v Hogan, 320 F Supp 513*; *Miranda v Arizona, 384 U.S. 436*; **[****5]** *People v Cerrato, 24 NY2d 1, 397 U.S. 940*; *People v Huntley, 15 NY2d 72*; *People v Fairley, 32 AD2d 976*; *Johnson v Zerbst, 304 U.S. 458*; *People v Jennings, 40 AD2d 357, 33 NY2d 880*; *United States ex rel. Stephen J. B. v Shelly, 430 F2d 215*; *People v Tanner, 30 NY2d 102*; *People v Anthony, 24 NY2d 696*.)

Judges: Judges Jones, Wachtler, Fuchsberg and Cooke concur with Chief Judge Breitel; Judge Jasen concurs in a separate opinion; Judge Gabrielli concurs in result in another separate opinion.

Opinion by: BREITEL

Opinion

[*481] [896] [***420]** Defendant, following denial of a motion to suppress his incriminating statements, was convicted, after a guilty plea, of third degree robbery (*Penal Law, § 160.05*). He was sentenced to seven years' imprisonment. His conviction was affirmed, and he appeals.

The issue is whether a defendant in custody, represented by a lawyer in connection with criminal charges under investigation, may validly, in the absence of the lawyer, waive his right to counsel.

There should be a reversal. ***HN1***[] Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the **[****6]** defendant in custody may not waive his right to counsel in the absence of the lawyer *(People v Arthur, 22 NY2d 325, 329)*. Any statements elicited by an agent of the State, however subtly, after a purported "waiver" obtained without the presence or assistance of counsel, are inadmissible. Since the purported "waiver" of defendant's right to counsel was obtained in the absence of his lawyer, who had represented him at a just-completed lineup in connection with the criminal charges, his **[*482]** statements were inadmissible and should have been suppressed.

The facts are undisputed. On February 7, 1973, at approximately 8:30 p.m., defendant entered a delicatessen in Central Islip in Suffolk County. After asking for directions from the owner, George Gundlach, defendant drew a gun and demanded all the cash in the register. After he had received the cash and a number of packages of cigarettes, defendant left.

When the police arrived shortly thereafter, Mr. Gundlach described the robber to Suffolk County Detective Dolan. He then accompanied the detective to the police station, where he eventually identified photographs of defendant as those of the culprit. Mr. Gundlach did state, **[****7]** however, that to be **[***421]** positive he would have to see defendant in person.

Nine months later, on September 26, 1973, defendant was being held in the Suffolk County Jail on charges unrelated to the delicatessen robbery. He was not under arrest for the robbery at that time, although he was a photograph-identified suspect. Defendant was placed in a five-man lineup. Because defendant had requested counsel, Samuel McElroy, a Legal Aid lawyer, was assigned and present to represent him. Mr. Gundlach identified defendant as the robber. Mr. McElroy then left.

After Mr. McElroy left, a Sheriff's deputy asked Detective Dolan if he desired to speak to defendant. Despite his admitted knowledge that defendant was now represented by counsel on the robbery charge, Dolan replied that he would. The detective had not told Mr. McElroy that he was going to speak to defendant, nor did he make any effort to reach counsel before seeing defendant. At the deputy's request, defendant signed an undescribed form of "waiver" (which Dolan testified he had never seen) and agreed to speak to Dolan. Defendant was then brought to an "interview" room in the jailhouse.

Detective Dolan read to defendant **[****8]** the standard preinterrogation warnings and asked him if he understood. Defendant said that he did. The detective then asked defendant "Do you wish to contact a **[**897]** lawyer?" Defendant shook his head, indicating "No". The detective then asked "Having these rights in mind, do you wish to talk to me now without a lawyer?" Defendant replied "Yes".

Defendant then inquired of Dolan whether he had been identified by Mr. Gundlach, and the detective told him that he **[*483]** had. Expressing a desire to "clear up everything", defendant in effect confessed to the robbery.

In *People v Arthur (22 NY2d 325, 329, supra)*, the court held: ***HN2***[↑] "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel *(People v. Vella, 21 N Y 2d 249)*. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant." The rule of the *Arthur* case has been restated many times (see *People v Hetherington, 27 NY2d 242, 244-245*; *People v Paulin, 25 NY2d 445, 450*; *People v McKie [****9] , 25 NY2d 19, 26*; *People v Miles, 23 NY2d 527, 542*, cert den *395 U.S. 948*; cf. *People v Stephen J. B., 23 NY2d 611, 616)*.

This unequivocal and reiterated statement of the law in this State is no mere "dogmatic claim" or "theoretical statement of the rule" (see, contra, *People v Robles, 27 NY2d 155, 158*, cert den *401 U.S. 945*, thus characterizing the rule). It is, instead, a rule grounded in this State's constitutional and statutory guarantees of the privilege against self incrimination, the right to the assistance of counsel, and due process of law (see *People v Arthur, 22 NY2d 325, 328, supra; People v Failla, 14 NY2d 178, 180*; *People v Donovan, 13 NY2d 148, 151*; Richardson, Evidence [10th ed], § 545, at p 546). Indeed, the rule resisted narrow classification of defendants entitled to its protection; it is applicable to a defendant when taken into custody, whether as an "accused", a "suspect", or a "witness" (cf. *People v Sanchez, 15 NY2d 387, 389)*.

Of course, as with all verbalizations of constitutional principles, ***HN3***[↑] the rule of **[***422]** the *Arthur* case *(supra)* is not an absolute. Thus, the fact that a defendant is represented by counsel **[****10]** in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule (see *People v Hetherington, 27 NY2d 242, 245, supra; People v Taylor, 27 NY2d 327, 331-332)*. The rule applies only to a defendant who is in custody; it does not apply to noncustodial interrogation *(People v McKie, 25 NY2d 19, 28, supra)*. Moreover, the rule of the *Arthur* case *(supra)* does not render inadmissible a defendant's spontaneously volunteered statement *(People v Kaye, 25 NY2d 139, 144*; cf. *People v Robles, 27 NY2d 155, 159*, cert den *401 U.S. 945, supra)*.

The *Donovan* and *Arthur* cases *(supra)* extended constitutional protections of a defendant under the State Constitution **[*484]** beyond those afforded by the Federal Constitution (compare *People v Arthur, 22 NY2d 325, 329, supra*; and *People v Donovan, 13 NY2d 148, 151, supra*; with *Miranda [**898] v Arizona, 384 U.S. 436, 475*; and *Escobedo v Illinois, 378 U.S. 478, 486-487*; see Richardson, Evidence [10th ed], *op. cit*., at pp 548-549; but cf., e.g., *Massiah v United States, 377 U.S. 201, 205-206*; *United States v Thomas, 474 F2d 110, 112*, **[****11]** cert den *412 U.S. 932*; *United States ex rel. Lopez v Zelker, 344 F Supp 1050, 1054*, affd *465 F2d 1405*, cert den *409 U.S. 1049*, dealing with the right to counsel after the commencement of adversary judicial proceedings).

HN4[↑] Notwithstanding that warnings alone might suffice to protect the privilege against self incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel (see *United States v Massimo, 432 F2d 324, 327* [Friendly, J., dissenting], cert den *400 U.S. 1022*; compare ALI, Model Code of Pre-Arraignment Procedure [Tent Draft No. 6, 1974], § 140.8, subd [2]; *Miranda v Arizona, 384 U.S. 436, 475, supra)*. The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary (see *People v Witenski, 15 NY2d 392, 395*; *Matter of Bojinoff v People, 299 NY 145, 151-152*; *Johnson v Zerbst, 304 [****12] U.S. 458, 464)*. Indeed, it may be said that a right too easily waived is no right at all.

Moreover, an attempt to secure a waiver of the right of counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter (see ABA Code of Professional Responsibility, DR7-104, subd [A], par [1]; *People v Robles, 27 NY2d 155, 162* [Fuld, Ch. J., dissenting], cert den *401 U.S. 945*, *supra; United States v Thomas, 474 F2d 110, 111-112*, cert den *412 U.S. 932*, *supra; United States v Springer, 460 F2d 1344, 1355* [Stevens, J., dissenting], cert den *409 U.S. 873*; *United States v Durham, 475 F2d 208, 211* [Swygert, Ch. J.]; *Coughlan v United States, 391 F2d 371, 376* [Hamley, J., dissenting], cert den *393 U.S. 870*; Drinker, Legal Ethics, p 202; Broeder, *Wong Sun v United States*: A Study in **[***423]** Faith and Hope, 42 Neb L Rev 483, 601; cf. *People v Lopez, 28 NY2d 23, 29* [dissenting opn], cert **[*485]** den *404 U.S. 840*). Since the Code of Professional Responsibility is applicable, it would be grossly incongruous for the courts to **[****13]** blink its violation in a criminal matter.

Of course, ***HN5***[↑] it would not be rational, logical, moral, or realistic to make any distinction between a lawyer acting for the State who violates the ethic directly and one who indirectly uses the admissions improperly obtained by a police officer, who is the badged and uniformed representative of the State. To do so would be, in the most offensive way, to permit that to be done indirectly what is not permitted directly. Indeed, in each of the cases cited above the rejected "waiver" was secured by investigators and not by lawyers.

Moreover, the principle is not so much, important as that is, to preserve the civilized decencies, but to protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State. The right to **[**899]** the continued advice of a lawyer, already retained or assigned, is his real protection against an abuse of power by the organized State. It is more important than the preinterrogation warnings given to defendants in custody. These warnings often provide only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his **[****14]** need, unadvised by anyone who has his interests at heart. The danger is not only the risk of unwise waivers of the privilege against self incrimination and of the right to counsel, but the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described. Surely, the need for and right to a lawyer at an identification lineup is insignificant compared to the need in an ensuing interrogation. If Dick the Butcher said, "The first thing we do, let's kill all the lawyers", the more zealous policeman in the station or jailhouse may well say, "The first thing we do, let's get rid of all the lawyers" (Shakespeare, Henry VI, pt II, act IV, sc ii).

The rule to be applied in this case would be evident, unquestionably evident, on the basis of what has been discussed thus far, but for one significant circumstance. Between September, 1970 and September, 1972 three cases were decided in this court which departed from the evident rule. The reasons for the departure were never made explicit, but nice distinctions were used, if the fact of departure was mentioned at all. On the other hand, the line of cases out of which the *Arthur* case **[****15]** *(supra)* arose, as well as the *Arthur* case itself, was an elaborated legal development, consciously evolved as **[*486]** such, stretching back at least to 1960 (see *People v Di Biasi, 7 NY2d 544*; and *People v Spano, 4 NY2d 256, 264-267* [Desmond J., dissenting], revd *360 U.S. 315*). It was not a string of happenstances (see *People v Lopez, 28 NY2d 23, 26-28* [dissenting opn], cert den *404 U.S. 840*, *supra*, for a detailed analysis of the development of the right to counsel in this State; but see, in contrast, *People v Robles, 27 NY2d 155, 158-160*, cert den *401 U.S. 945*, *supra)*. The three cases were *People v Robles (supra); People v Lopez (28 NY2d 23*, cert den *404 U.S. 840*, *supra)*, and *People v Wooden (31 NY2d 753*). The *Wooden* case simply relied on the *Lopez* case, without opinion, three Judges concurring on constraint of the *Lopez* case. The *Robles* case involved an egregiously brutal and unnatural double murder. The *Lopez* case also involved a murder. That is perhaps the best that one can speculate about what moved the court, reminiscent of the adage about the influence of "hard cases".

[*424]** In the *Robles* **[****16]** case (p 158), the *Arthur* rule was discussed as "merely a theoretical statement" and it was said that "this dogmatic claim is not the New York law" citing *People v Kaye (25 NY2d 139*, *supra)* and *People v McKie (25 NY2d 19*, *supra)*, cases which applied as exceptions to the right to counsel doctrine spontaneous statements and noncustodial interrogation. There was further discussion of cases quite beside the issue, turning on coercion, trickery, and the like, as conditions which would require exclusion of interrogations of uncounseled defendants.

Actually the stability of these odd cases has already been undermined, albeit collaterally. The hapless Lopez, defeated in the State courts, went to the Federal courts. There the District Court in an extensive opinion by Judge Marvin Frankel granted habeas corpus relief, adopting the reasoning of the dissenters in the State court as **[**900]** a statement of Federal constitutional principles *(United States ex rel. Lopez v Zelker, 344 F Supp 1050, 1054*, *supra)*. The Court of Appeals for the Second Circuit affirmed unanimously from the Bench, without opinion (*465 F2d 1405*, cert den *409 U.S. 1049*). (See, also, *People **[****17]** v Santos, 85 Misc 2d 602, 608* [NYLJ, March 24, 1976, at p 8, col 6], declining to follow the *Lopez* case,

supra.) As for the *Robles* case *(supra)*, the Richardson treatise is unsure of its effect on the *Arthur* line of cases (Richardson, Evidence [10th ed], *op. cit.*, at pp 547-548, listing five unanswered questions). Nor were the distinguished Justices in the Appellate Division for the Fourth Department able to agree (see *People v Pellicano, **[*487]** 40 AD2d 169* [opn by Mr. Justice Del Vecchio and dissenting opn by Mr. Justice Cardamone]).

The problem this departure from a deliberately elaborated line of cases raises is: What is required of a stable court in applying the eminently desirable and essential doctrine of *stare decisis*. Which is the *stare decisis*: The odd cases or the line of development never fully criticized or rejected?

Frankfurter, a stalwart for stability and systemic values in a jurisprudence, and no evanescent impulsive innovator, answered the question rather succinctly. In *Helvering v Hallock (309 U.S. 106, 119)* he said: "We recognize that ***HN6***[↑] *stare decisis* embodies an important social policy. It represents an **[****18]** element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

The *Di Biasi-Arthur* line of cases, stretching over almost two decades, represents "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience". The three odd cases of uncertain root, present recency in time, but surely are in collision with the "prior doctrine", and in each instance decided by the closest possible margin in the court. They do not merit application of "a mechanical formula of adherence", just because of their recency.

Stare decisis, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan. The odd cases rode roughshod over *stare decisis* **[****19]** and now would be accorded *stare decisis* as their legitimate right, whether or not they express sound, good, or acceptable doctrine.

There are many thinkers in the law whose comments on *stare decisis* bear directly on the problem in this case. Invariably, the concern is with the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete **[***425]** doctrine which has lost its touch with reality (see, e.g., *Heyert v Orange & Rockland Utilities, 17 NY2d 352, 360-361* [Van Voorhis, J.], and cases and materials cited). But one comment **[*488]** by Mr. Justice Von Moschzisker, as long ago as 1924, is especially useful. He said: "From the very nature of law and its function in society, the elements of certainty, stability, equality, and knowability are necessary to its success, but reason and the power to advance justice must always be its chief essentials; and the principal cause for standing by precedent is not to be found in the inherent probable virtue of a judicial decision, it 'is to be drawn from a consideration of the nature and object of law itself, considered as a system or **[****20]** a science'." (Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv L Rev 409, 414.)

[901]** The nub of the matter is that ***HN7***[↑] *stare decisis* does not spring full-grown from a "precedent" but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.

While this case involves a narrow issue of the right to counsel in a criminal matter, it necessarily turns on what appears to be binding precedent, and hence, the doctrine of *stare decisis*. It is not sufficient to limit the discussion of the doctrine to its application to this case. There is the danger, otherwise, of a misunderstanding of the doctrine's role in the larger perspective in which this case is but an isolated instance. Indeed, this case is another example in which a treatment of the particular requires treatment of the universal under which it falls.

Distinctions in the application and withholding **[****21]** of *stare decisis* require a nice delicacy and judicial self-restraint. At the root of the techniques must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. Without this assumption there is jurisprudential anarchy. There are standards for the application or withholding of *stare decisis*, the ignoring of which may produce just that anarchy.

For one, in this case the court deals with constitutional limitations contained in the Bill of Rights. Legislative correction is confined. Although the limitations are designed to protect the individual against the encroachments of a transitory majority, the principle is well established that ***HN8***[↑] in cases interpreting the Constitution courts will, nevertheless, if convinced **[*489]** of prior error, correct the error (see, e.g., *Glidden Co. v Zdanok, 370 U.S. 530, 543*; *Smith v Allwright, 321 U.S. 649, 665-666*; *Burnet v Coronado Oil & Gas Co., 285 U.S. 393, 406-407* [Brandeis, J., dissenting]; Von Moschzisker, 37 Harv L Rev 407, 420-421). But the conviction of error must be imperative.

Tort cases, but especially personal injury cases, **[****22]** offer another example where courts will, if necessary, more readily re-examine established precedent to achieve the ends of justice in a more modern context (see, e.g., *Victorson v Bock Laundry Mach. Co., 37 NY2d 395*; *Goldberg v Kollsman Instrument Corp., 12 NY2d 432*; *Bing v Thunig, 2 NY2d 656*; *Woods v Lancet, 303 NY 349*). Significantly, in these cases the line of precedent, although well established, was found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society.

HN9[↑] Always critical to justifying adherence to precedent is the requirement that those who engage in transactions based on the **[***426]** prevailing law be able to rely on its stability. This is especially true in cases involving property rights, contractual rights, and property dispositions, whether by grant or testament (see, e.g., *United States v Title Ins. Co., 265 U.S. 472, 486-487*; *Heyert v Orange & Rockland Utilities, 17 NY2d 352, 360, 362-363*, *supra* [property rights]; *United States v Flannery, 268 U.S. 98, 105* [commercial transactions]; *Matter of Eckart, 39 NY2d 493*, decided herewith; Douglas, **[****23]** Stare Decisis, 49 Col L Rev 735-736 [wills]; cf. *Endresz v Friedberg, 24 NY2d 478, 488-489* [wrongful death **[**902]** action under *EPTL 5-4.1*]; *Matter of Brown, 362 Mich 47, 52* [statute pertaining to the descent and distribution of property]). The absence of such factors, on the other hand, makes easier the reassessment of aberrational departures from precedents and accepted principles.

Precedents involving statutory interpretation are entitled to great stability *(* *Matter of Schinasi, 277 NY 252, 265-266*; see 20 Am Jur 2d, Courts, § 198). After all, in such cases courts are interpreting legislative intention and a sequential contradiction is a grossly aggrogated legislative power. Moreover, if the precedent or precedents have "misinterpreted" the legislative intention, the Legislature's competency to correct the "misinterpretation" is readily at hand. (See, e.g., *People v Butts, 32 NY2d 946, 947*; *People v Cicale, 35 NY2d 661, 662*, concurred in on constraint and decided on authority of *People v Carter, 31 NY2d 964*.)

There is a more rarely recognized principle, a sort of exception **[*490]** to the general rule about the interpretation of statutes **[****24]** by courts. There are statutes drawn in such general terms that it is evident that the legislative intention is that the courts, by their interpretation, indeed construction, fill in, by a case-by-case approach, the skeletal outlines. Those are statutes which apply general and therefore flexible standards. The classic example is that of the antitrust statutes, Federal and State, which apply "rules of reason". In such cases the degree of flexibility in handling statutory precedents is that much the greater, but still not unlimited. (See Breitel, The Lawmakers, 65 Col L Rev 749, 761.)

There are obviously other principles that do not now come to mind but most likely would share the rationale of those already discussed. Throughout, however, ***HN10***[↑] a precedent is less binding if it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes. On the contrary, a precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis. Indeed, that constitutes one of the bases for treating the *Robles* and *Lopez* cases as overruled in principle, **[****25]** just because they did not satisfy the rational test when compared to the line of reasoned and consciously developed cases which a bare majority in the *Lopez* and *Robles* cases found unsatisfactory.

The closeness of a vote in a precedential case is hardly determinative *(* *Semanchuck v Fifth Ave. & 37th St. Corp., 290 NY 412, 420*; see 21 CJS, Courts, § 189, at p 307). It certainly should not be. Otherwise, every precedent decided by a bare majority is a nonprecedent -- one to be followed if a later court likes it, and not to be followed if it does not like it. In the *Semanchuck* case, Chief Judge Lehman stated the rule precisely: "Three judges, including the writer of this opinion, dissented from the decision in the earlier case, insofar as it held that the general contractor was not, under the contract, entitled to indemnity from the subcontractor. The controversy over the applicable rule to be followed in the construction of **[***427]** the indemnity agreement has been resolved by that decision. The authoritative force of a decision as a precedent in succeeding cases is not determined by the unanimity or division in the court. The controversy settled by a decision **[****26]** in which a majority

concur should not be renewed without sound reasons, not existing here. All the judges of the court accept the **[*491]** decision in the *Walters* case *[Walters v Rao Elec. Equip. Co., 289 NY 57]* and the rules which form the basis for that decision as guides in analogous cases."

[903]** Similarly, the accident of a change of personalities in the Judges of a court is a shallow basis for jurisprudential evolution *(Simpson v Loehmann, 21 NY2d 305, 314* [concurring opn]; see *Minichiello v Rosenberg, 410 F2d 106, 109* [Friendly, J.], cert den *396 U.S. 844*). In the *Simpson* case, the troublesome precedent was all but mint-new; its symmetrical conformance to prior law was facially absent. Nevertheless, the precedent was followed just because it would have been scandalous for a court to shift within less than two years because of the replacement of one of the majority in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one.

The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower **[****27]** not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men.

Accordingly, the order of the Appellate Division should be reversed, the plea vacated, and the statements of defendant suppressed.

Concur by: JASEN; GABRIELLI

Concur

Jasen, J. (concurring). Convinced as I am that the reasoning which prompted the holdings in the *Robles* and *Lopez* cases has failed to produce a stable and recognized rule, I concur in the majority opinion and particularly for the respect it accords to the doctrine of *stare decisis* and the limited exceptions which it would allow.

Gabrielli, J. (concurring). I concur in the result reached by the majority. In doing so, however, I am unable to join in overruling *People v Lopez (28 NY2d 23*). I would adhere to the established view that, until counsel is assigned or retained by a defendant in a criminal action, he is perfectly free, after suitable and proper admonitions, to waive his right to the presence and assistance of counsel and make voluntary statements *(People v Bodie, 16 NY2d 275*; cf. *People v Meyer, 11 NY2d 162, 165)*. It is always the task of the courts, **[****28]** of course, to assure that such a waiver is knowingly and intelligently made and that statements following a waiver are voluntarily given.

We succinctly stated in *People v Bodie (supra, p 279*) that **[*492]** "since the right to counsel also imports the right to refuse counsel, we hold that a defendant may effectively waive his right to an attorney." This holding is qualified, of course, in the situation where counsel has been assigned or retained in which case we have held that a defendant may not be interrogated without the presence or consent of counsel *(People v Arthur, 22 NY2d 325*; *People v Vella, 21 NY2d 249*; *People v Donovan, 13 NY2d 148*). Under the circumstances of the instant case, it is this rule which is applicable as the majority ably demonstrates. To reach the result in the case before us, it is unnecessary to consider *People v Lopez (supra)*. As noted in the majority opinion, defendant Hobson was represented by counsel at the time of the interrogation, while, in *Lopez*, the defendant decided to forego representation by counsel.

[*428]** While the rule in the Federal courts may be unsettled, several of them have recognized the admissibility **[****29]** of postindictment statements made after a waiver of right to counsel. Thus, in *United States ex rel. O'Connor v State of New Jersey (405 F2d 632, 636)* the Third Circuit Court of Appeals, focusing on the quality of the waiver, stated that "only a clear, explicit, and **[**904]** intelligent waiver may legitimate interrogation without counsel following indictment" (see, also, *United States v Crisp, 435 F2d 354, 358-359*. And, in *United States v Garcia (377 F2d 321, 324*, cert den *389 U.S. 991*), the Second Circuit indicated that"*Massiah [v United States, 377 U.S. 201]* does not immunize a defendant from normal investigation techniques after indictment".

In the landmark decision of *Massiah v United States (377 U.S. 201, 206, supra)*, the United States Supreme Court held that the defendant "was denied the basic protections of that guarantee [Sixth Amendment right to counsel] when there was used against

him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." In *Massiah*, the defendant had retained counsel before the statements were elicited **[****30]** from him and, significantly, the court noted that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant * * * even though the defendant had already been indicted" *(supra, p 207)*.

I do not view the Federal District Court decision in *United States ex rel. Lopez v Zelker (344 F Supp 1050*, affd *465 F2d [*493] 1405*) as requiring a contrary result. The essence of Judge Frankel's decision in the *Lopez* habeas corpus proceeding was that defendant's waiver of the right to counsel was not knowingly and intelligently rendered because he was not aware of the outstanding indictment against him for the crime of murder. The decision, therefore, is predicated upon a view of the facts which is divergent from the facts as developed in the proceedings against Lopez in our State courts. The majority of this court in *Lopez* observed that "[defendant] does not dispute either the waiver or the sufficiency of the evidence to find that it was intelligently and understandingly made" *(supra, p 25)*. The trial court in *Lopez*, affirmed by an unanimous Appellate Division, found, following a suppression hearing, that "the People **[****31]** have proven beyond a reasonable doubt that the defendant intelligently understood the warnings and knowingly expressed his waiver of Constitutional rights," and we held that there was evidence in the record to sustain such a finding (p 25). Thus, three New York courts found that Lopez made voluntary statements following a knowing and intelligent waiver of the right to counsel.

I would only add that adopting the position proposed by the majority would bar the admissibility of any statements which a defendant might wish to tender in response to any police inquiry, no matter how knowingly and intelligently made, following the commencement of any criminal action by the filing of an accusatory instrument even so minor as a simplified traffic information. *

End of Document

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* ***CPL 1.20*** (subd [1]) defines an accusatory instrument as "an indictment, an information, a simplified traffic information, a prosecutor's information, a misdemeanor complaint or a felony complaint."

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Petito v. Piffath

Court of Appeals of New York

October 25, 1994, Argued ; December 13, 1994, Decided

No. 199

Reporter
85 N.Y.2d 1 *; 647 N.E.2d 732 **; 623 N.Y.S.2d 520 ***; 1994 N.Y. LEXIS 4127 ****

Joseph Petito, Respondent, v. Alice-Mary Piffath, as Administratrix of the Estate of Ralph P. Piffath, Appellant, et al., Defendants.

Prior History: [**1]** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 6, 1993, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Harold Hyman, J.H.O.), entered in Queens County in favor of plaintiff Joseph Petito in a consolidated proceeding pursuant to *RPAPL 1501 (4)* for a declaration that a mortgage no longer had legal effect and an action to foreclose the mortgage, awarding plaintiff the total sum of $ 351,486.18 as against defendant Ralph P. Piffath. The modification consisted of changing the last date for the assessment of interest and remitting the matter to Supreme Court, Queens County, for recalculation of interest and entry of an appropriate amended judgment.

Petito v Piffath, 199 AD2d 252, reversed.

Disposition: Order reversed, with costs, the Petito complaint dismissed and, on the Piffath complaint, judgment granted in accordance with the opinion herein.

Core Terms

mortgage, mortgage debt, acknowledgment, promise to pay, settlement, foreclosure action, assigned, indebtedness, outstanding, partial

Case Summary

Procedural Posture
Appellant estate's decedent filed an action against appellee assignee seeking a declaration that enforcement of a mortgage executed by the decedent was barred by the statute of limitations, and the assignee filed a foreclosure action. The trial court awarded damages to the assignee, and the Appellate Division of the Supreme Court in the Second Judicial Department (New York) affirmed its order. The estate appealed.

Overview

The estate's decedent executed a mortgage and later defaulted. The lender initiated foreclosure proceedings, and the decedent and the lender entered into a settlement under which the decedent paid a certain sum and the lender assigned the mortgage to the decedent's brother. The mortgage was later assigned to the assignee. The decedent brought an action against the assignee seeking a declaration that the mortgage was no longer of any legal effect because any action to enforce it was barred by the statute of limitations. The assignee filed a foreclosure action. The decedent died and was succeeded in interest by his estate. The assignee prevailed in his action and won a judgment against the estate. The estate claimed that the foreclosure action was not timely filed, and the assignee claimed that the settlement agreement caused the statute of limitations to run anew and that the action was therefore timely filed. The court held that the foreclosure action was time-barred. The court found that the

language of the settlement agreement was not an acknowledgement of an outstanding debt sufficient to restart the running of the statute of limitations under *N.Y. Gen. Oblig. Law § 17-101*.

Outcome
The court reversed the order of the lower court, dismissed the assignee's complaint, and granted declaratory judgment in favor of the estate.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Defenses, Demurrers & Objections, Affirmative Defenses**

A party may be estopped from pleading the statute of limitations as a defense where a defendant's affirmative wrongdoing produced the long delay in bringing suit.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Civil Procedure > ... > Pleadings > Complaints > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN2[] **Contract Formation, Execution & Delivery**

N.Y. Gen. Oblig. Law § 17-101 provides that 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. Under *N.Y. Gen. Oblig. Law § 17-105(1)*, a written promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage, either with or without consideration makes the time limited for the commencement of the action run from the date of the promise. Under *N.Y. Gen. Oblig. Law § 17-107(2)(b)*, a partial payment on account of the indebtedness secured by a mortgage, is effective to revive an action to recover such indebtedness in favor of the mortgagee or his assignee or any other party who subsequently succeeds to an interest in the mortgage's enforcement.

Real Property Law > Financing > Foreclosures > General Overview

HN3[] **Financing, Foreclosures**

In order to make a money payment a part payment within the meaning of the predecessor to *N.Y. Gen. Oblig. Law § 17-107(2)(b)*, the burden is upon the creditor to show that it was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due. The rule is a natural corollary of the principle that there must be sufficient basis as would warrant a jury in finding an implied promise to pay the balance.

Headnotes/Summary

Headnotes

Limitation of Actions -- Revival of Time-Barred Claims -- Written Acknowledgment of Underlying Debt- - Stipulation Settling Mortgage Foreclosure Action

1. A stipulation settling a mortgage foreclosure action, which contains neither an express acknowledgment of the mortgagor's indebtedness nor an express promise to pay the mortgage debt per se, cannot properly be construed as a written acknowledgment of the underlying debt sufficient to revive an otherwise time-barred claim based upon the mortgage under *General Obligations Law § 17-101*. The stipulation contained only a promise to pay the mortgagee a specific sum in exchange for the mortgagee's agreement to forego prosecution of its foreclosure action and assign the mortgage to the mortgagor's nominee, and was followed by actual payment of the outstanding debt that arose pursuant only to that stipulation. Thus, the stipulation cannot be deemed an acknowledgment of an outstanding debt sufficient to restart the running of the Statute of Limitations under *section 17-101*.

Limitation of Actions -- Revival of Time-Barred Claims -- Promise to Pay Mortgage Debt -- Stipulation Settling Mortgage Foreclosure Action

2. A stipulation settling a mortgage foreclosure action, which contains only a promise to pay the mortgagee a specific sum in exchange for the mortgagee's agreement to forego prosecution of its foreclosure action and assign the mortgage to the mortgagor's nominee, is not a promise to pay a "mortgage debt" under *General Obligations Law § 17-105 (1)* sufficient to revive an otherwise time-barred claim based upon the mortgage.

Limitation of Actions -- Revival of Time-Barred Claims -- Partial Payment on Account of Mortgage Indebtedness -- Stipulation Settling Mortgage Foreclosure Action

3. Payment of a sum by a mortgagor to a mortgagee pursuant to a stipulation settling a mortgage foreclosure action, which contains only a promise to pay the mortgagee a specific sum in exchange for the mortgagee's agreement to forego prosecution of its foreclosure action and assign the mortgage to the mortgagor's nominee, cannot be deemed a partial payment "on account of a mortgage indebtedness" under *General Obligations Law § 17-107 (2) (b)* sufficient to revive an otherwise time-barred claim based upon the mortgage. Both the promise to pay and "part payment" are referable not to the mortgage debt sought to be enforced, but rather to the agreement between the mortgagee and mortgagor. Moreover, the mortgagor's payment to the mortgagee does not satisfy the long-standing rule under *section 17-107 (2) (b)*'s predecessor that in order to make a money payment a part payment within the statute, the burden is upon the creditor to show that it was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due.

Limitation of Actions -- Estoppel to Plead Statute of Limitations

4. Where decedent's mortgage, which had survived a settled and discontinued foreclosure action by the original mortgagee, was assigned to his brother to preserve it as a means of preventing other lien creditors from levying against his property, and the mortgage was then assigned to plaintiff in connection with the refinancing of the debt of a corporation controlled by decedent and his brother, decedent's administratrix is not estopped from asserting the Statute of Limitations to bar plaintiff's enforcement of the mortgage because of decedent's so-called fraudulent conduct in initially assigning the mortgage, inasmuch as the "fraudulent" conduct was not aimed at plaintiff and did not in any way prevent plaintiff from commencing a timely action.

Counsel: *Horn & Horn*, Huntington (*Jeffrey S. Horn* of counsel), for appellant. The Court below's decision and order violated the long-standing public policy by permitting a third-party **[****2]** to utilize a stipulation of settlement entered into in a subsequent lawsuit asserting a cause of action arising out of the same transaction. *(Aleci v Tinsl ey's Enters., 102 AD2d 808*; *Arnold v Mayal Realty Co., 299 NY 57*; *White v Old Dominion S. S. Co., 102 NY 661*; *Smith v Satterlee, 130 NY 677*; *Tennant v Dudley, 144 NY 504*; *Dermatossian v New York City Tr. Auth., 67 NY2d 219*; *Mitchell v New York Hosp., 61 NY2d 208*; *West v Smith, 101 US 263*; *Baesens v New York Cent. R. R. Co., 201 App Div 191*; *Cook v State of New York, 105 Misc 2d 1040*.)

Sharon Weintraub Dashow, Brooklyn, for respondent. I. The holding of the Court below that appellant's agreement to pay the then mortgagee the amount due on the mortgage constituted a promise to pay a mortgage debt was not violative of public policy regarding the use of settlements in evidence since this prior settlement was not utilized to establish liability of the underlying claim. (*Hulbert v Clark, 128 NY 295*; *Coakley & Williams Constr. v Structural Concrete Equip., 973 F2d 349*; *Gestetner Holdings v Nashua Corp., 784 F Supp 78*; *B & B Inv. Club v Kleinert's, Inc., 472 F Supp 787*; **[****3]** *Central Soya Co. v Epstein Fisheries, 676 F2d 939*; *Matter of New York, Lackawanna & W. R. R. Co., 98 NY 447*; *Mitchell v New York Hosp., 61 NY2d 208*; *Smith v Glen's Falls Ins. Co., 62 NY 85*; *Sears v Grand Lodge Ancient Order of United Workmen, 163 NY 374*; *Yonkers Fur Dressing Co. v Royal Ins. Co., 247 NY 435*.) II. The Court below did not exceed the permissible scope of its review in holding that the amount set forth in the stipulation of settlement constituted the full amount of the debt. (*Wallace v McCabe, 41 Misc 2d 483*.) III. The Court below correctly found that the stipulation of settlement constituted a promise to pay a mortgage debt, the effect of which was to cause the Statute of Limitations to run anew. (*Morris Demolition v Board of Educ., 40 NY2d 516*; *Lincoln-Alliance Bank & Trust Co. v Fisher, 247 App Div 465*; *In re Gilman, Son & Co., 57 F2d 294*; *Comprehensive Foot Care Group v Lincoln Natl. Life, 135 Misc 2d 862*.) IV. The failure to plead estoppel does not preclude respondent from foreclosing on the mortgage.

Judges: Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur.

Opinion by: Titone **[****4]**

Opinion

[*4] [733] [***521]** Titone, J.

[1-3] This case presents the question whether under *General Obligations Law §§ 17-101*, *17-105 (1)* or *§ 17-107 (2) (b)* a stipulation settling a foreclosure action could properly be construed as a written acknowledgment of the underlying mortgage debt, a promise to pay or a part payment of that debt sufficient to revive an otherwise time-barred claim based upon the mortgage. Under the circumstances presented in this somewhat idiosyncratic case, we hold that plaintiff's stale claim on the mortgage was not revived.

Defendant's decedent, Ralph Peter Piffath, initially borrowed approximately $ 200,000 from Roslyn Savings Bank (Roslyn) in order to purchase real property located at 35 Gilpin Ave., Hauppauge, New York. In exchange for the loan, he executed a note and a mortgage whose terms required monthly payments for a period of 10 years, with a balloon payment of the remaining principal to be paid on April 1, 1980. Piffath evidently failed to make the balloon payment on time. He and his wife did make a payment of $ 1,932 on August 7, 1980, but this payment left a substantial balance outstanding. Accordingly, Roslyn instituted foreclosure **[****5]** proceedings.

These proceedings terminated in a settlement that was embodied in a stipulation executed on June 24, 1981. The **[*5]** stipulation provided that the action was settled "upon the following terms and conditions":

> "1. That defendant, RALPH PETER PIFFATH, shall pay to the plaintiff the sum of . . . $ 197,455.57. That in consideration for said payment and subject to collection, [Roslyn] shall deliver an assignment of mortgage in recordable form to defendant's designee, GERALD PIFFATH [Ralph Piffath's brother]. The aforesaid assignment shall be without recourse or warranty of any kind . . . .
>
> "2. [Roslyn's] attorneys agree to make application to the Court for an order vacating the judgment of foreclosure and sale, discontinuing the action and cancelling the notice of pendency of action without cost to either party."

It is undisputed that Roslyn was paid the $ 197,455.57 specified in the stipulation, that the foreclosure action was discontinued and that the mortgage was, in fact, assigned to Piffath's brother. It is also undisputed that Piffath decided to have the mortgage assigned to his brother rather than satisfied and extinguished because he wanted to preserve **[****6]** it as a means of preventing his other lien creditors from levying against his property.

Shortly after this transaction was completed, the mortgage was used as collateral to secure a $ 50,000 loan made by Marine Midland Bank to Hydrodyne Industries, a corporation that was then controlled by Piffath and his brother. [1] As a result of Hydrodyne's continuing financial difficulties, the Piffaths entered into an arrangement with plaintiff Petito in 1982 under which plaintiff agreed to refinance Hydrodyne's debt and the mortgage on Piffath's Hauppauge property was **[**734]** **[***522]** assigned to plaintiff (subject to the pledge to Marine Midland).

In October of 1986, Piffath commenced an *RPAPL 1501 (4)* proceeding for a declaration that the mortgage no longer had any legal effect because its enforcement was barred by the six-year Statute of Limitations (*see*, *CPLR 213 [4]*). In response, **[****7]** plaintiff commenced a plenary foreclosure action in Suffolk County in February 1987. The Supreme Court, Suffolk County (Friedenberg, J.), consolidated the two cases for trial in Queens County, and a bifurcated hearing was held before a Judicial Hearing Officer (JHO).

[*6] With regard to the enforceability of the mortgage, the JHO held that Piffath should be equitably estopped from asserting the Statute of Limitations as a defense because of his conduct in keeping the mortgage alive as a means of "defrauding" his creditors. The JHO also concluded that Piffath was properly held responsible because he had intentionally placed the mortgage in "the field of commerce" when he assigned it to his brother. With regard to the amount owed, the JHO determined that the sum of $ 183,586.45 was due and that, with interest, costs and disbursements, plaintiff was entitled to recover the sum of $ 351,486.18. A judgment for that amount was entered against Piffath. [2]

[**8]** On cross appeals by plaintiff and Piffath's administratrix, the Appellate Division modified by changing the last date for the assessment of interest and otherwise affirmed. [3] The Court rejected the JHO's conclusion that Piffath was equitably estopped from asserting the Statute of Limitations because of his intent to "defraud" his creditors, since "there [was] no evidence that . . . Piffath misled the plaintiff" (*199 AD2d 252, 253)*. Nonetheless, the Court held that enforcement of the mortgage was not barred by the Statute of Limitations. In the Court's view, Piffath's 1981 stipulation with Roslyn "amounted to a promise to pay a mortgage debt … thereby causing the Statute of Limitations to run anew" (*id., at 253*, citing *General Obligations Law § 17-105*; *Aleci v Tinsley's Enters., 102 AD2d 808*). Plaintiff's 1987 foreclosure action was therefore timely under *CPLR 213 (4)*. Piffath's administratrix now appeals by permission of this Court, challenging the latter aspect of the Appellate Division's analysis.

[**9]** **[4]** At the outset, we note our agreement with the Appellate Division's conclusion that Piffath's administratrix cannot be estopped from asserting the Statute of Limitations because of Piffath's so-called "fraudulent" conduct. Although this Court has held that ***HN1***[↑] a party may be estopped from pleading the Statute of Limitations as a defense where a "defendant's **[*7]** affirmative wrongdoing … produced the long delay [in bringing suit]" (*General Stencils v Chiappa, 18 NY2d 125, 128*; *see*, *Simcuski v Saeli, 44 NY2d 442*), that principle has no application where, as here, the decedent's "fraudulent" conduct was not aimed at the plaintiff and did not in any way prevent the plaintiff from commencing a timely action.

The remaining substantive issue, however, is not so easily resolved. Whether an unadorned agreement to pay a sum of money to settle an action on a debt constitutes an acknowledgement of the debt sufficient to renew the running of the Statute of Limitations for enforcement of the debt itself has not been squarely addressed by this or any other appellate court in this State. The issue is squarely presented here because, unlike in most situations in which an action **[****10]** is settled, the settlement in this case did not result in an extinguishment of the underlying instrument evidencing the debt, i.e., the Roslyn mortgage. Instead, because of Piffath's **[**735]** **[***523]** desire to obstruct his other creditors, the settlement with Roslyn was structured so as to preserve the enforceability and legal effect of that instrument.

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[1] The $ 50,000 had been borrowed to enable Piffath to pay Roslyn the full amount of the agreed-upon settlement.

[2] Further proceedings for a foreclosure sale had been rendered unnecessary, because, by agreement of the parties, the Hauppauge property securing the mortgage had been sold and the proceeds secured by a bond to provide a fund against which any judgment in the foreclosure action could be enforced. The parties' actions in this regard thus resulted in a de facto conversion of the foreclosure action to one for a money judgment alone.

[3] The Appellate Division remitted to Supreme Court for a ministerial "recalculation of interest" in accordance with its conclusion that interest should be computed to July 12, 1990 rather than May 24, 1990.

Resolution of this controversy depends on the proper application of *General Obligations Law §§ 17-101*, *17-105 (1)* and *§ 17-107 (2) (b)*. ***HN2***[↑] *Section 17-101* provides that "[a]n 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 [CPLR]." Under *General Obligations Law § 17-105 (1)*, "a [written] promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage . . . , either with or without consideration" makes the time limited for the commencement of the action "run from the date of the . . . promise." Finally, under *General Obligations Law § 17-107 (2) (b)*, a partial **[****11]** payment "on account of the indebtedness secured by a mortgage," is effective to revive an action to recover such indebtedness in favor of the mortgagee "or his assignee" or any other party who subsequently succeeds to an interest in the mortgage's enforcement.

Plaintiff, the assignee of Roslyn's mortgage, argues that Piffath's 1981 agreement to pay Roslyn the sum of $ 197,455.57 constituted either an acknowledgment of the outstanding mortgage debt within the meaning of *General Obligations Law **[*8]** § 17-101* or a new promise to pay within *section 17-105 (1)*. Alternatively, plaintiff argues that Piffath's payment of the amount specified in the settlement agreement constituted a partial payment "on account of the indebtedness secured by a mortgage" within *General Obligations Law § 17-107 (2) (b)* and was therefore sufficient to recommence the running of the six-year Statute of Limitations governing such debts. However, the application of the debt-acknowledgment and partial-payment statutory provisions to these facts is not so clear.

[1] Piffath's agreement to pay Roslyn $ 197,455.57 contains neither an express acknowledgment of his indebtedness nor an express promise to pay the **[****12]** mortgage debt per se. Rather, the agreement contained only a promise to pay Roslyn a specific sum in exchange for Roslyn's agreement to forego prosecution of its foreclosure action and assign the mortgage to Piffath's nominee. The facts in this case are thus analogous to those in *Morris Demolition Co. v Board of Educ. (40 NY2d 516)*, in which this Court held that an executed stipulation partially settling a contractor's claim for payment for work performed did not constitute an acknowledgment of a larger debt or partial payment of that debt within the meaning of *General Obligations Law § 17-101*, because the writing "did not recognize an existing debt" (*id., at 521*; *see also*, *Connecticut Trust & Safe Deposit Co. v Wead, 172 NY 497*). A fortiori, the stipulation in this case, which was followed by actual payment of an outstanding debt that arose pursuant only to that stipulation, cannot be deemed an acknowledgment of an outstanding debt sufficient to restart the running of the Statute of Limitations under *General Obligations Law § 17-101*. [4]

[**13]** **[2]** Plaintiff's argument predicated on the provisions of *General Obligations Law § 17-105 (1)* regarding "a [written] promise to pay the mortgage debt" is no more persuasive. The promise to pay $ 197,455.57 that is contained in the settlement agreement represents Piffath's undertaking of a new obligation in exchange for Roslyn's promises to terminate the foreclosure action and assign the mortgage to Piffath's brother. As **[*9]** such, it is not a "promise to pay *the mortgage debt*" and consequently does not suffice to satisfy the statute.

[3] **[**736]** **[***524]** For similar reasons, Piffath's payment of $ 197,455.57 cannot be deemed a partial payment "on account of the indebtedness secured by a mortgage" under *General Obligations Law § 17-107 (2) (b)*. The defect in plaintiff's claim under *section 17-107 (2) (b)* is no different from that of his claim under *section 17-105 (1)*: both the promise to pay and the "part payment" on which plaintiff relies are referable not to the mortgage debt that plaintiff seeks to enforce, but rather to the agreement between Piffath and Roslyn, as to which plaintiff has no rights at all.

Moreover, Piffath's payment to Roslyn did not satisfy **[****14]** the long-standing rule under *section 17-107 (2) (b)*'s predecessor that ***HN3***[↑] "[i]n order to make a money payment a part payment within the statute, the burden is upon the creditor to show that it was . . . accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due" (*Crow v Gleason, 141 NY 489, 493)*. The rule is a natural corollary of the principle that there must be sufficient basis "as [would] warrant a jury in finding an implied promise to pay the balance" (*id., at 493*). Manifestly,

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[4] The parties to this appeal have not made any arguments regarding the applicability of *General Obligations Law § 17-101*'s debt-acknowledgment provisions to a situation where the claimed "acknowledgment" was made to a third-party rather than to the person seeking to enforce the debt. We have thus not considered the degree to which plaintiff's rights under the statute may have been affected by the fact that Piffath's purported "acknowledgment" was made to Roslyn and not to him (*see generally*, *Matter of Kendrick, 107 NY 104*; *DeFreest v Warner, 98 NY 217*; *cf.*, *General Obligations Law § 17-107 [2] [b]*).

such a showing cannot be made where, as here, the payment was pursuant to a settlement intended to put the outstanding monetary obligations between the parties to rest.

In short, neither the settlement agreement nor the payment Piffath made pursuant thereto provides a cognizable basis for ruling that the Statute of Limitations on Piffath's mortgage debt began to run anew in 1981. Thus, by 1986--the first time that the courts were called upon to consider the enforceability of the debt--it was time-barred. It follows that the courts below erred in granting plaintiff judgment on that debt.

Accordingly, the order of the Appellate Division **[****15]** should be reversed, with costs, and the Petito complaint dismissed and, on the Piffath complaint, judgment granted declaring that all claims under the bond and mortgage are barred by the Statute of Limitations.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur.

Order reversed, with costs, the Petito complaint dismissed and, on the Piffath complaint, judgment granted in accordance with the opinion herein.

End of Document

Saini v. Cinelli Enters.

Supreme Court of New York, Appellate Division, Third Department

December 13, 2001, Decided ; December 13, 2001, Entered

89803

Reporter
289 A.D.2d 770 *; 733 N.Y.S.2d 824 **; 2001 N.Y. App. Div. LEXIS 11971 ***

Surjit S. Saini et al., Respondents, v. Cinelli Enterprises, Inc., Formerly Known as Len-Cin Enterprises, Inc., Appellant, et al., Defendants.

Prior History: [*1]** Appeal from an order of the Supreme Court (Kramer, J.), entered August 24, 2000 in Schenectady County, which denied a motion by defendant Cinelli Enterprises, Inc., to dismiss the complaint against it as barred by the Statute of Limitations.

Disposition: Trial court order reversed without costs; motion granted and complaint dismissed against defendant Cinelli Enterprises Inc.

Core Terms

plaintiffs', first action, mortgage, renew, receiver, discontinuance, predecessors, bankruptcy petition, foreclosure action, predecessor in interest, partial payment, court-appointed, acknowledgment, inferred, six-year, promise, mortgage foreclosure action, bankruptcy proceedings, authorized agent, circumstances, accompanied, unqualified, amounting, collected, mortgagee, pendency, supplied, listing, rents, toll

Case Summary

Procedural Posture

Defendant mortgage debtor appealed from an order of the Supreme Court, Schenectady County (New York), in a foreclosure action by plaintiff successors to the original mortgage lender, denying the debtor's motion to dismiss the proceeding as time-barred pursuant to *N.Y. C.P.L.R. 213(4)*.

Overview

The debtor obtained a mortgage loan from the lenders' predecessor, and defaulted. More than a decade before the instant proceeding, the predecessor commenced foreclosure proceedings, which were dismissed when the debtor's receiver made a few payments. When the successor lenders began their own foreclosure proceeding, the appeals court held that it was time-barred by *N.Y. C.P.L.R. 213(4)*, which prescribed a six-year limitations period for foreclosure actions. The statutory period clearly began to run when the first proceeding was commenced, and nothing that the debtor did in the intervening decade--not payments made by a receiver, and certainly not the debtor's unsuccessful attempt to have the debt discharged in bankruptcy--evidenced an intention to make any further payments on the debt.

Outcome

The court reversed the order denying the motion to dismiss, granted the motion to dismiss, and dismissed the foreclosure complaint.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN1 **Statute of Limitations, Time Limitations**

The statute of limitations in a mortgage foreclosure action, *N.Y. C.P.L.R. 213(4)*, begins to run six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage has been accelerated by a demand or an action is brought.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > Financing > Foreclosures > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN2 **Statute of Limitations, Extensions & Revivals**

In order for a partial payment to extend or renew the *N.Y. C.P.L.R. 213(4)* statute of limitations pursuant to *N.Y. Gen. Oblig. Law § 17-107*, the creditor must show that there was a payment by the debtor or the debtor's agent 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 remaining balance.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgage Formalities

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures > General Overview

HN3 **Statute of Limitations, Extensions & Revivals**

A partial payment does not have the effect of renewing or extending the statute of limitations applicable to a debt, pursuant to *N.Y. Gen. Oblig. Law § 17-107*, unless the payment is accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > Bankruptcy > Automatic Stays

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Bankruptcy > Secured Claims

Real Property Law > Financing > Foreclosures > General Overview

HN4[] **Statute of Limitations, Extensions & Revivals**

The fact that a debtor lists a mortgage on its schedule of secured claims on its disclosure statement to its bankruptcy petition does not constitute a promise to pay the mortgage so as to renew or extend the applicable statute of limitations, but, rather, signifies the debtor's intent not to pay it.

Counsel: Law Office of Wayne P. Smith (Wayne P. Smith of counsel), Schenectady, for appellant.

Harris, Beach & Wilcox (Brendan F. Chudy of counsel), Albany, for respondents.

Judges: Before: Cardona, P.J., Peters, Spain, Carpinello and Mugglin, JJ. Cardona, P.J., Peters, Carpinello and Mugglin, JJ., concur.

Opinion by: Spain

Opinion

[*770] [825]** Spain, J.

Plaintiffs commenced this foreclosure action against defendant Cinelli Enterprises, Inc. (hereinafter defendant) and others on October 6, 1999 seeking to recover on a note executed by defendant on February 5, 1979 evidencing a loan of $ 225,000 secured by a mortgage in the same amount on property located in the Town of Rotterdam, Schenectady County. Plaintiffs are the assignees of the note and mortgage. A previous foreclosure **[***2]** action (hereinafter the first action) commenced by plaintiffs' predecessor in interest had been dismissed by order of Supreme Court (Viscardi, J.) dated January 5, 1997, on consent of all parties. Defendant moved to dismiss the **[**826]** complaint in this action asserting, among other defenses, that it is barred by the six-year Statute of Limitations applicable to mortgage foreclosure actions as set forth in *CPLR 213 (4)*, which began to run on the date that plaintiffs' predecessor in interest commenced the first action in 1990.

Supreme Court denied defendant's motion, orally ruling that the Statute of Limitations had been renewed or extended by **[*771]** payments made by the court-appointed receiver to plaintiffs' predecessors, as well as by defendant's 1997 consent to the discontinuance of the first action and listing of the mortgage debt in its 1997 bankruptcy petition. On defendant's appeal we reverse, finding that plaintiffs' action is barred by the Statute of Limitations (*see*, *CPLR 213 [4]*).

HN1[] The Statute of Limitations in a mortgage **[***3]** foreclosure action begins to run six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage has been accelerated by a demand or an action is brought (*see*, *Serapilio v Staszak, 255 AD2d 824*; *Loiacono v Goldberg, 240 AD2d 476, 477*; *Pagano v Smith, 201 AD2d 632, 633)*. Here, defendant claims--and plaintiffs have not disputed--that the six-year Statute of Limitations began to run no later than May 22, 1990, the date plaintiffs' predecessors filed the notice of pendency and commenced the first

action. * Contrary to plaintiffs' contentions which Supreme Court adopted, the partial payments made by the court-appointed receiver to plaintiffs' predecessors in 1993 and 1994 did not renew the Statute of Limitations pursuant to General Obligations Law ***HN2***[↑] *§ 17-107*. In order for a partial payment to extend or renew the Statute of Limitations, the creditor must show that there was a payment by the debtor or the debtor's agent of an admitted debt, made **[***4]** 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 [remaining balance]" (*Crow v Gleason, 141 NY 489, 493* [emphasis supplied]; *see, Petito v Piffath, 85 NY2d 1, 8, cert denied 516 US 864*; *Roth v Michelson, 55 NY2d 278, 281*; *Morris Demolition Co. v Board of Educ., 40 NY2d 516, 521*; *Commissioners of State Ins. Fund v Warner, 156 AD2d 131*; *New York State Higher Educ. Servs. Corp. v Muson, 117 AD2d 947, 947-948*; *see also, 78 NY Jur 2d, Mortgages and Deeds of Trust, § 446*; 75A NY Jur 2d, Limitations and Laches, § 349).

Here, the two payments to plaintiffs' predecessor were made by the receiver in 1993 and 1994 during **[***5]** the pendency of the first action; they were not made by defendant or its authorized agent (*see, Security Bank v Finkelstein, 160 App Div 315, 320, affd 217 NY 707*; *see also, Brooklyn Bank v Barnaby, 197 NY 210*; *cf., New York State Higher Educ. Servs. Corp. v Muson, supra*). Clearly, these payments did not constitute any kind of acknowledgment *by defendant* of a remaining debt nor did they **[*772]** support inferring a promise by defendant to pay any balance (*see, Morris Demolition Co. v* ***[**827]*** *Board of Educ., supra, at 521-522*; *Flynn v Flynn, 175 AD2d 51, 51-52, lv denied 78 NY2d 863*; *cf., Skaneateles Sav. Bank v Modi Assocs., 239 AD2d 40, 43, lv denied 92 NY2d 803*; *National Heritage Life Ins. Co. in Liquidation v Hill St. Assocs., 262 AD2d 378*; *Lorenzo v Bussin, 7 AD2d 731, affd 7 NY2d 1039*). Thus, these payments by the receiver did not revive or extend the Statute of Limitations.

Likewise, the payment by the receiver of $ 51,841.53 to plaintiffs' predecessor pursuant **[***6]** to the order of Supreme Court dated November 15, 1997 which discontinued the first action did not constitute a partial payment *by defendant* or its authorized agent that had the effect of renewing or extending the Statute of Limitations (*see,* General Obligations Law § 17-1707). The 1997 court order discontinuing the first action directed the receiver to pay the balance of the proceeds collected to the holder of the mortgage at that time. While defendant consented to this provision of the discontinuance, thereby acknowledging that the mortgagee and not defendant was entitled to the rents collected, this consent was not ***HN3***[↑] "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*" (*Morris Demolition Co. v Board of Educ., 40 NY2d 516, 521, supra* [emphasis supplied]; *see, Crow v Gleason, supra, 141 NY 489, 493, supra*).

With regard to the claimed effect of defendant's bankruptcy filing on **[***7]** the Statute of Limitations, we find that it neither renewed nor tolled the six-year Statute of Limitations. The first action had been discontinued prior to the time that defendant filed its bankruptcy petition in December 1997 and the bankruptcy petition was dismissed in December 1998, long before this second foreclosure action was commenced and, thus, the bankruptcy proceeding never operated to toll a pending foreclosure action (*see, Zuckerman v 234-6 W. 22 St. Corp., 167 Misc 2d 198*; *11 USC § 362*; *cf., Zuckerman v 234-6 W. 22 St. Corp., 267 AD2d 130, lv denied 94 NY2d 764*). Also, ***HN4***[↑] the fact that defendant listed this mortgage on its schedule of secured claims on its disclosure statement to its bankruptcy petition did not constitute a promise to pay the mortgage so as to renew or extend the Statute of Limitations but, rather, signified defendant's intent not to pay it (*see, Filigree Films Pension Plan v CBC Realty Corp., 229 AD2d 862, 863*; *Petito v Piffath, 85 NY2d 1, 9, supra; Morris Demolition Co. v Board of Educ., supra, at 521*; **[***8]** *Crow v Gleason, supra, at 493*; *see also, Federal* **[*773]** *Deposit Ins. Corp. v Cardona, 723 F2d 132, 137*; *Matter of Povill, 105 F2d 157, 160*; *cf., Albin v Dallacqua, 254 AD2d 444, 445)*. Bankruptcy Court dismissed defendant's petition without endorsing any inconsistent position that the note or mortgage were defendant's valid debts and, thus, principles of judicial estoppel do not preclude defendant's reliance on the Statute of Limitations defense in this action (*see, McIntosh Bldrs. v Ball, 264 AD2d 869, 870*; *Koch v National Basketball Assn., 245 AD2d 230, 231*; *Prudential Home Mtge. Co. v Neildan* ***[**828]*** *Constr. Corp., 209 AD2d 394, 395*; *see also, Bates v Long Is. R. R. Co., 997 F2d 1028, 1038, cert denied 510 US 992*).

Accordingly, since neither the court-appointed receiver's payment of rents and profits to plaintiffs' predecessors in interest nor the listing of the debt in the bankruptcy proceeding extended or renewed the Statute of Limitations, plaintiffs' foreclosure action--commenced in October 1999--should have **[***9]** been dismissed as untimely (*see, CPLR 213 [4]*).

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* Plaintiffs do not allege a default date in their complaint, although defendant's last payment appears to have been in 1989.

Cardona, P. J., Peters, Carpinello and Mugglin, JJ., concur.

Ordered that the order is reversed, on the law, without costs, motion granted and complaint dismissed against defendant Cinelli Enterprises, Inc.

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Sheridan v. Tucker

Supreme Court of New York, Appellate Division, Fourth Department

May 3, 1911, Decided

No Number in Original

Reporter
145 A.D. 145 *; 129 N.Y.S. 18 **; 1911 N.Y. App. Div. LEXIS 1752 ***

Martin Sheridan, Plaintiff, v. Benjamin M. Tucker, Defendant.

Prior History: [*1]** Motion by the plaintiff, Martin Sheridan, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, the verdict of a jury having been rendered in favor of the defendant by a direction of the court at the close of plaintiff's case on a trial at the Monroe Trial Term in October, 1910.

Disposition: Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs.

Core Terms

pay tax, stamps, affix, time of transfer, forfeiture, costs, stock, failure to pay, stock transfer, duly excepted, inadvertence, provisions, ignorance, omission, pleaded, courts, evaded, admit

Case Summary

Procedural Posture
In an action before a trial court (New York) to recover upon the unpaid balance of the purchase price of shares of stock, the jury returned a verdict in favor of defendant buyer by the direction of the trial court at the close of plaintiff seller's case. The seller filed a motion for a new trial.

Overview
The seller entered into an agreement with the buyer to transfer certain stock. The trial court directed a verdict against the seller on the basis that the seller failed to pay the applicable taxes at the time of the transfer, in violation of 1905 N.Y. Laws ch. 241, as amended by 1906 N.Y. Laws ch. 414. The seller admitted the failure to pay the taxes, but maintained that the failure was inadvertent. Based upon a prior decision, the court ruled that any inadvertence on the seller's part was no defense to the failure to pay the appropriate tax. The court noted that the prior decisions pointed out the fact that the governing statute failed to provide for validation of the transfer by later paying the tax. The governing statute clearly limited the right to judicial enforcement of a stock transfer upon the payment of the taxes at the time of the transfer. In so ruling, the court rejected the seller's argument that the statute was unconstitutional because it deprived him of his property without due process. The statute did not deprive the seller of his property; it merely deprived him of the right to enforce the sales contract because of his own inadvertence.

Outcome
The court denied the seller's exceptions to the jury's verdict, and denied the seller's motion for a new trial. The court further affirmed the trial court's judgment upon the jury's verdict, and assessed costs against the seller.

LexisNexis® Headnotes

Tax Law > State & Local Taxes > Administration & Procedure > Failure to Pay

Commercial Law (UCC) > Investment Securities (Article 8) > Transfers

Tax Law > State & Local Taxes > Administration & Procedure > Tax Avoidance & Evasion

Tax Law > ... > Personal Property Taxes > Intangible Personal Property > General Overview

HN1[] **Administration & Procedure, Failure to Pay**

1905 N.Y. Laws ch. 241, as amended by 1906 N.Y. Laws ch. 414, radically differs from laws under which it was permissible to validate the transfer by subsequently affixing stamps. Chapter 241 not only omits to provide for doing that, but distinctly provides that the transfer shall not be made the basis of any action or legal proceedings unless the tax is paid at the time of such transfer. The payment of the tax might easily be evaded if a transfer could be rendered valid by subsequently affixing stamps, and so by language, which does not admit of construction, the New York Legislature has provided as stated. The failure to pay the tax and affix stamps at the time of the transfer is fatal to the seller's right to recover on the purchase price of the stock.

Business & Corporate Law > Foreign Corporations > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Business & Corporate Law > Corporations > Dissolution & Receivership > Involuntary Dissolution

Tax Law > ... > Personal Property Taxes > Intangible Personal Property > General Overview

HN2[] **Business & Corporate Law, Foreign Corporations**

The effect of 1905 N.Y. Laws ch. 241, as amended by 1906 N.Y. Laws ch. 414, is not to impose upon the offender, who violates its provisions, either intentionally, or through ignorance, forfeiture of property; but is rather to deny to him the right to enforce by the power of the courts of the State of New York a contract, which he, by his own omission, or neglect, has made unenforceable. Like a contract made in the State of New York by a foreign stock corporation, which is doing business in the State of New York without having filed the required statutory certificate, the contract itself may not be invalid, but enforcement of it in the courts of the State of New York cannot be had.

Headnotes/Summary

Headnotes

Tax -- transfer of stock -- failure to pay tax -- constitutional law.

Syllabus

A vendor of certificates of stock who fails to pay the tax imposed by the Tax Law at the time of the transfer cannot maintain an action against his vendee to recover the purchase price even though the failure to pay the tax was inadvertent.

The effect of the provisions of the Tax Law which bar such action is not to impose upon the vendor who fails to pay the tax forfeiture of property, but simply denies him the right to enforce the contract of sale in the courts of this State, and hence the statute is not unconstitutional.

Counsel: James G. Greene [Cogswell Bentley of counsel], for the plaintiff.

Merton E. Lewis, **[***2]** for the defendant.

Henry Selden Bacon, Deputy Attorney-General [Edward J. Mone, Deputy Attorney-General with him on the brief], for the Attorney-General, intervening.

Judges: Robson, J. All concurred.

Opinion by: ROBSON

Opinion

[*145] **[**19]** Robson, J.:

Plaintiff seeks to recover of defendant in this action an unpaid balance of the purchase price of twenty-seven shares of the **[*146]** capital stock of a domestic stock corporation sold and transferred by him to defendant on or about March 20, 1907. The ground upon which the court at Trial Term directed the dismissal of plaintiff's complaint was that plaintiff did not at the time of the transfer pay the tax imposed by chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906. This defense was duly pleaded by defendant, and plaintiff admits that the tax was not paid. He does claim, and offered to show on the trial, that the omission to pay the tax was on his part inadvertent, and due to ignorance that such tax was required to be paid, and was without any intention of evading the provisions of the law. This evidence was excluded, and plaintiff duly excepted. It seems also to have been conceded that after the commencement **[***3]** of the action plaintiff went to the secretary of the corporation with the requisite amount of stamps to pay the tax and offered to affix them. At the close of plaintiff's case the court directed a verdict for defendant, and plaintiff duly excepted.

Plaintiff urges that his transfer of stock to defendant was not immoral nor illegal, except only so far as it was by the statute made so by reason of his failure to pay the tax, and that no intention of the Legislature to penalize by a forfeiture of one's property an unwitting violation of the statute should be imputed without convincing evidence of such intention. The First Department has considered the effect of this statute and its application to an action to enforce a claim based upon a transfer of stock upon which the required tax had not been paid. (*Bean v. Flint, 138 A.D. 846*.) In that **[**20]** case Miller, J., after reciting the provisions of the statute in question, continues: "It will be observed that ***HN1***[↑] the statute radically differs from those under which it has been held permissible to validate the transfer by subsequently affixing stamps. This statute not only omits to provide for doing that, but distinctly provides that the **[***4]** transfer shall not be made the basis of any action or legal proceedings unless the tax is paid '*at the time of such transfer*.' The payment of the tax might easily be evaded if a transfer could be rendered valid by subsequently affixing stamps, and so by language, which does not admit of construction, the Legislature has provided **[*147]** as stated. We think, therefore, that the failure to pay the tax and affix stamps at the time of the transfer is fatal to plaintiff's right of recovery, provided the question is before us." It is true that in this case it was held that defendant was not entitled to the benefit of this defense, but this resulted solely because of his failure to plead it. It is apparent that the effect of such a defense, if properly pleaded, was not only carefully considered by the court, but was directly passed upon and determined. That uniformity of decision in this court may be fostered, if for no other reason, this branch of the court should, even in a doubtful case, accept as controlling the previous unanimous decision in another department, which is not otherwise authoritatively questioned.

Plaintiff's further claim that this provision of the statute is **[***5]** unconstitutional, if it precludes him from recovering upon his contract when he pays the tax, which he has failed to pay only through inadvertence, it being, as is claimed, in effect a forfeiture of his property and a taking thereof without due process of law, does not seem to be tenable. ***HN2***[↑] The effect of the statute is not to impose upon the offender, who violates its provisions, either intentionally, or through ignorance, forfeiture of property; but is rather to deny to him the right to enforce by the power of the courts of the State a contract, which he, by his

own omission, or neglect, has made unenforcible. Like a contract made in this State by a foreign stock corporation, which is doing business in this State without having filed the required statutory certificate, the contract itself may not be invalid, but enforcement of it in the courts of this State cannot be had.

The plaintiff's exceptions should be overruled and judgment ordered for defendant on the directed verdict, with costs.

All concurred.

Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs.

State v. Hayes

Court of Appeal of Florida, Fourth District

June 11, 1976

No. 75-1034

Reporter
333 So. 2d 51 *; 1976 Fla. App. LEXIS 14473 **

STATE of Florida, Appellant, v. Primus HAYES, Appellee

Core Terms

courts, district court, circuit court, trial court, print, binding

Case Summary

Procedural Posture

The state of Florida appealed from an order of the trial court, which granted defendant's motion to dismiss under *Fla. R. Crim. P. 3.190(c)(4)*, the information charging him with breaking and entering with intent to commit petty larceny, and petty larceny.

Overview

Defendant was charged by information with breaking and entering with intent to commit petty larceny, and petty larceny. Defendant moved to dismiss the information under *Fla. R. Crim. P. 3.190(c)(4)*. The trial court felt bound to grant the motion based on a holding from a district court of appeal of another district. On appeal, the state argued that the trial court was not so bound, but the court affirmed, saying that the decision of any district court of appeal was binding on any trial court, regardless of what district it was in. On the merits of the dismissal, the court affirmed based on the absence of any evidence to connect defendant with the crime. Defendant's fingerprints were found on a window, which was found in the bushes near the home, but it was not shown if the prints were inside or outside the window, or if the window was the point of entry, or even when the prints were made. Dismissal was mandated because the state did not show that defendant's fingerprints could only have been made at the time the crime was committed.

Outcome

The court affirmed the trial court's order dismissing the charges of breaking and entering and petty larceny because there was no proof that defendant's fingerprints found on window near the house could only have been made when the crime was committed. The trial court was bound to follow decisions from any district court of appeal, which were on point.

LexisNexis® Headnotes

Governments > Courts > Judicial Precedent

HN1[] **Courts, Judicial Precedent**

A Circuit Court wheresoever situate in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district.

Governments > Courts > Judicial Precedent

HN2[] **Courts, Judicial Precedent**

Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy.

Governments > Courts > Judicial Precedent

HN3[] **Courts, Judicial Precedent**

In Florida the District Courts of Appeal are courts of final appellate jurisdiction except for a narrow classification of cases made reviewable by the Florida Supreme Court. The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts - District Courts of Appeal.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district court level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

Where a question has not yet been decided by the appellate courts in a certain department, inferior courts in that department must follow the determinations of the appellate courts in any other department until such time as their own appellate tribunals or the court of appeals passes upon the question.

Counsel: [1]** David H. Bludworth, State's Atty., and Gerald A. McGill, Asst. State's Atty., West Palm Beach, for Appellant.

Richard L. Jorandby, Public Defender, and James R. Merola, Special Asst. Public Defender, West Palm Beach, for Appellee.

Judges: Walden, Chief Judge. Downey, J., and Woodrow M. Melvin, Associate Judge, concur.

Opinion by: WALDEN

Opinion

[*52] A two count information was filed against defendant charging him with (1) breaking and entering with intent to commit petty larceny, and (2) petty larceny.

Defendant moved to dismiss the Information under Rule 3.190(c)(4), F.R.Cr.P. The stipulated facts were:

"1. The home of Thomas Wright located at 1601 N.E. 1st Court, Boynton Beach, Florida, was broken into and property was taken on or about October 28, 1974.

"2. During police investigation a latent fingerprint matching that of Defendant's rolled print was found on a jalousie window which was found in the bushes near Mr. Wright's home.

"3. The State cannot determine when the latent print was made.

"4. Mr. Wright has never given the Defendant permission to be on his premises.

"5. Mr. Wright's house was up for sale for a period of six months, including the month of **[**2]** October, 1974. A 'For Sale' sign was located on the front lawn and Berg Realty had permission to show the house. There is no evidence whether the house was ever shown to the Defendant.

"6. Mr. Wright's home was broken into three weeks prior to October 28, 1974, although a different entry was apparently used than the one in this case. Nothing was taken and no suspects were apprehended in that prior burglary.

"7. There is no other circumstantial or direct evidence connecting Defendant with the burglary."

The trial court granted the defendant's motion and dismissed the Information, stating:

"The court believes that the matter is governed by *Williams v. State, 308 So.2d 598* [595] (1 DCA 1975). But for the *Williams* case, the court would have considered the evidence sufficient to be presented to the jury under the circumstantial evidence available."

The state appeals. We affirm.

We are faced with two points on appeal. The first is particularly provocative and apparently one of first impression in Florida. The state cited no case in support of it.

POINT I

Is a Circuit Court of the Fifteenth Circuit of Florida "bound" **[**3]** by the decision of a District Court of Appeal other than the Fourth District Court of Appeal?

We opine and answer the question in the affirmative by flatly stating that ***HN1***[⬆] a Circuit Court wheresoever situate in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district.

The basic principle:

"***HN2***[⬆] Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy . . .." 21 C.J.S. *Courts* § 187.

The purpose of the rule is to preserve harmony and stability and predictability in the law, *Forman v. Florida Land Holding Corporation, 102 So.2d 596 (**Fla**.1958)*; *Old Plantation Corp. v. Maule Industries, Inc., 68 So.2d 180 (**Fla**.1953)*, *see* 20 Am.Jur.2d *Courts* § 183 et seq. The doctrine is generally applied to courts of last resort, *see United States Steel Corporation **[*53]** v. Save Sand Key, Inc., 303 So.2d 9 (**Fla**.1974)*. ***HN3***[⬆] In Florida the District Courts of Appeal are courts of final appellate jurisdiction except for a narrow classification of **[**4]** cases made reviewable by the Florida Supreme Court, *Ansin v. Thurston, 101 So.2d 808 (**Fla**.1958)*; *Taylor v. Knight, 234 So.2d 156 (1st DCA **Fla**.1970)*. The District Courts of Appeal are required to follow Supreme Court decisions. *Hoffman v. Jones, 280 So.2d 431 (**Fla**.1973)*. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts [1] - District Courts of Appeal. ***HN4***[⬆] The proper hierarchy of decisional holdings would

[1] The panel dislikes the characterization of courts as being "higher" or "lower" and prefers to distinguish them either by proper name or by the terms "appellate court" or "trial court" inasmuch as they differ, not in importance, but only in their jurisdictional mandates. However, the issue here and the cases discussing it make necessary such references.

demand that in the event the only case on point on a district court level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision, *see* 21 C.J.S. *Courts* § 196, § 198. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it, 21 C.J.S. *Courts, supra.* Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive. *Spencer Ladd's, Inc. v. Lehman, 167 So.2d 731 (1st DCA **Fla**.1964)*, modified on different grounds at *182 **[**5]** So.2d 402 (**Fla**.1965)*.

No Florida case has spoken directly to this issue, *see Bunn v. Bunn, 311 So.2d 387, 389 (4th DCA **Fla**.1975)* ("Additionally, under the doctrine of stare decisis, an appellate court's decision on issues properly before it and decided in disposing of the case, are, until overruled by a subsequent case, binding as precedent on courts of lesser jurisdiction.")

Courts in other jurisdictions have decided this issue. In *People v. Blount, 82 Misc.2d 964, 370 N.Y.S.2d 437 (Nassau County Ct. N.Y.1975)*, the court noted:

> "*HN5*[↑] Where a question has not yet been decided by the appellate courts in a certain department, inferior courts in that **[**6]** department must follow the determinations of the appellate courts in any other department until such time as their own appellate tribunals or the Court of Appeals passes upon the question." *Id. at 442*.

Likewise, the court in *Garcia v. Hynes & Howes Real Estate, Inc., 29 Ill.**App**.3d 479, 331 N.E.2d 634 (3rd DCA 1975)*, held that the ". . . opinions of any Appellate Court necessarily are binding on all Circuit Courts across the State, but not on the other branches of the Appellate Court." *Id. at 636*. The court then set forth the following ranking, "A trial court, located in an appellate district where a conclusion on an issue is reached, should adhere to that conclusion and not to one promulgated in another district. A decision by the Illinois Supreme Court . . . would be binding on all courts." *Id.*

One further illustration is *Hale v. Superior Court of City and County of San Francisco, 15 Cal.3d 221, 124 Cal.Rptr. 57, 539 P.2d 817 (1975)*. In a footnote the court states, "Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state . . .." *Id. 124 Cal.Rptr. **[**7]** at 62, 539 P.2d at 822*.

These cases set forth the hierarchy best designed to promote judicial stability and predictability. Therefore, in the absence of a contrary Fourth District Court of Appeal opinion a Palm Beach County Circuit Court is bound to follow an opinion of another District Court of Appeal, such as a First District Court of Appeal opinion. This would also promote the constitutional provision that the Supreme Court hear cases **[*54]** in which there is conflict between the District Courts of Appeal. Hence, if a circuit court is bound to follow a "foreign" district's decision, on appeal the circuit court's territorial district court will have the opportunity to follow the other District Court of Appeal opinion or to go a different route, inasmuch as the other district's opinion is only persuasive authority for a court of the same level, *Spencer Ladd's, Inc., supra.* It is then the prerogative of the Supreme Court to resolve any resulting conflict.

POINT II

> Assuming, arguendo, that the above issue is answered in the affirmative, does *Williams v. State* compel the granting of the amended Motion to Dismiss in the instant case?

We agree that the **[**8]** *Williams* case mandates the dismissal of the Information inasmuch as the state has not shown, from the scant stipulated facts, that the defendant's fingerprints could only have been made at the time the crime was committed, *Knight v. State, 294 So.2d 387 (4th DCA **Fla**.1974)*; *Tirko v. State, 138 So.2d 388 (3rd DCA **Fla**.1962)*.

We offer these thoughts with reference to the facts:

1. It was not shown whether the print was found on the inside or outside of the window.

2. It was not shown whether the jalousie window was at the place of entry.

3. It was not shown when the print was made.

4. The defendant could have made the print either when being shown the house by Berg or when independently viewing the house and either picking up the window from the bushes or by touching it before removal.

5. The defendant could have made the print if he were on the premises on October 28, 1974, even though a different entry was used.

Since the state suggests that there is confusion and uncertainty abroad among the circuit courts as to whether they are bound to follow the decision of a foreign District Court of Appeal (a suggestion which surprises us), and since under that rationale **[**9]** Circuit Courts in the First, Second and Third Appellate Districts would not feel bound by this instant decision, we do hereby offer *upon appropriate application* to certify the question contained in Point I as being one of great public interest.

AFFIRMED.

DOWNEY, J., and MELVIN, WOODROW M., Associate Judge, concur.

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Thomas v. New York

Supreme Court of the United States

October 6, 2014, Decided

No. 13-10277.

Reporter
2014 U.S. LEXIS 6311 *; 574 U.S. 840; 135 S. Ct. 90; 190 L. Ed. 2d 75; 83 U.S.L.W. 3186

Michael Thomas, aka Neil Adams, Petitioner v. New York.

Prior History: *People v. Peque, 22 N.Y.3d 168, 2013 N.Y. LEXIS 3182, 980 N.Y.S.2d 280, 3 N.E.3d 617 (2013)*

Judges: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the Court of Appeals of New York denied.

End of Document

U.S. Bank N.A. v Caruana

Supreme Court of New York, Appellate Division, First Department

November 12, 2020, Decided; November 12, 2020, Entered

Appeal No. 12335, Case No. 2020-02010

Reporter
188 A.D.3d 511 *; 132 N.Y.S.3d 286 **; 2020 N.Y. App. Div. LEXIS 6755 ***; 2020 NY Slip Op 06473 ****; 2020 WL 6600022

[**1]** U.S. Bank National Association, as Trustee for JPMorgan Mortgage Trust 2006-6, Plaintiff-Appellant, v Quentin P. Caruana, Also Known as Quentin Phillip Caruana, etc., et al., Defendants-Respondents, JPMorgan Chase Bank N.A. et al., Defendants. Index No. 850103/17

Prior History: *U.S. Bank N.A. v. Caruana, 2019 N.Y. Misc. LEXIS 5246 (N.Y. Sup. Ct., Sept. 27, 2019)*

Core Terms

promise to pay, acknowledgement of debt, summary judgment motion, mortgage foreclosure, bankruptcy petition

Counsel: **[***1]** Hinshaw & Culbertson LLP, New York (Ashley R. Newman of counsel), for appellant.

Charles Wallshein, Melville, for respondent.

Judges: Before: Gische, J.P., Gesmer, Kern, Kennedy, JJ.

Opinion

[*511] **[**286]** Order, Supreme Court, New York County (Melissa A. Crane, J.), entered September 30, 2019, which denied plaintiff's motion for summary judgment on its mortgage foreclosure complaint and granted defendants Quentin P. Caruana and Lina Caruana's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly dismissed the complaint as time-barred on the ground that the statement of intention filed by defendant Quentin P. Caruana in connection with his bankruptcy petition, in which he indicated, by checking a box, that the condominium would be retained and kept current, did not constitute the acknowledgment of the debt that is required to restart the expired statute of limitations under General Obligations Law (GOL) *§ 17-101*, as plaintiff urged.

Initially, we note that, while *GOL § 17-101* applies to contractual debts generally, the provision applicable to mortgage foreclosures in particular, and therefore controlling in this case, is *§ 17-105(1)* (*Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc., AD3d , 2020 NY Slip Op 05331 [4th Dept 2020]*; *National Loan Invs., L.P. v Piscitello, 21 AD3d 537, 538 [2d Dept 2005]*).

GOL § 17-101 requires an acknowledgment of the debt or a promise **[***2]** to pay it; *GOL § 17-105(1)* requires a promise to pay the debt. Quentin's bankruptcy petition did not satisfy either provision, because it merely listed the mortgage debt at issue,

neither expressly acknowledging the debt nor promising to pay it (*see* *Petito v Piffath, 85 NY2d 1, 8, 647 N.E.2d 732, 623 N.Y.S.2d 520 [1994], cert denied 516 U.S. 864 [1995]*; *Batavia Townhouses, Ltd., 2020 NY Slip Op 05331 at *3* ***[**287]*** ; *Piscitello, 21 AD3d at 538*).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: November 12, 2020

End of Document

U.S. Bank, N.A. v Kess

Supreme Court of New York, Appellate Division, Second Department

March 7, 2018, Decided

2016-06713

Reporter
159 A.D.3d 767 *; 71 N.Y.S.3d 635 **; 2018 N.Y. App. Div. LEXIS 1424 ***; 2018 NY Slip Op 01498 ****; 2018 WL 1179153

[**1]** U.S. Bank, National Association, as Trustee for the Holders of SASCO AAMES Mortgage Loan Trust, Mortgage Pass-Through Certificates, Series 2003-1, Respondent, v Philip Kess, Individually and on Behalf of the Estate of Winifred Kess, Deceased, Appellant, et al., Defendants. (Index No. 600988/15)

Core Terms

foreclosure action, mortgage, statute of limitations, time-barred, raise a question, limitations, foreclose, six-year, tolled

Headnotes/Summary

Headnotes

Mortgages—Foreclosure—Statute of Limitations—Toll of Period and Death

Counsel: **[***1]** Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale, NY (David Gise of counsel), for appellant.

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

Judges: REINALDO E. RIVERA, J.P., JEFFREY A. COHEN, SYLVIA O. HINDS-RADIX, VALERIE BRATHWAITE NELSON, JJ. RIVERA, J.P., COHEN, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

Opinion

[*767] **[**636]** In an action to foreclose a mortgage, the defendant Philip Kess appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Santorelli, J.), dated May 4, 2016, as denied that branch of his motion which was pursuant to *CPLR 3211 (a) (5)* to dismiss the complaint insofar as asserted against him as time-barred.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Philip Kess which was pursuant to *CPLR 3211 (a) (5)* to dismiss the complaint insofar as asserted against him as time-barred is granted.

The plaintiff commenced this mortgage foreclosure action on February 2, 2015, against, among others, the defendant Philip Kess, individually and on behalf of the estate of Winifred Kess. Kess moved, inter alia, pursuant to *CPLR 3211 (a) (5)* to dismiss the complaint **[***2]** insofar as asserted against him, individually and in his representative capacity, on the ground that the six-year statute of limitations had run. In support of the motion, he submitted, among other things, the complaint in a prior action commenced by the plaintiff in May 2008 to foreclose the same mortgage (hereinafter the 2008 foreclosure action), in which the plaintiff elected to call due the entire amount secured by the mortgage, and proof that the 2008 foreclosure action

was voluntarily discontinued by the plaintiff in October 2014. The plaintiff opposed the motion, arguing that the statute of limitations was tolled for 18 months pursuant to **[*768]** *CPLR 210 (b)* by the June 4, 2013 death of Kess's wife, who was named as a **[**637]** defendant in the 2008 foreclosure action. In the order appealed from, the Supreme Court denied that branch of Kess's motion, finding that the death of Kess's wife tolled the statute of limitations for 18 months, thereby making the instant action timely.

In support of his motion, Kess demonstrated that the six-year statute of limitations (*see CPLR 213 [4]*) began to run on May 6, 2008, when the plaintiff accelerated the mortgage debt and commenced the 2008 foreclosure action (*see Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472, 476, 180 NE 176 [1932]*; *Deutsche Bank Natl. Trust Co. v Gambino, 153 AD3d 1232, 1233, 61 NYS3d 299 [2017]*; *U.S. Bank N.A. v Martin, 144 AD3d 891, 892, 41 NYS3d 550 [2016]*; *EMC Mtge. Corp. v Smith, 18 AD3d 602, 603, 796 NYS2d 364 [2005]*). Since **[***3]** the plaintiff did not commence the instant foreclosure action until more than six years later, Kess sustained his initial burden of demonstrating, prima facie, that this action was untimely (*see U.S. Bank N.A. v Martin, 144 AD3d at 892*; *Lessoff v 26 Ct. St. Assoc., LLC, 58 AD3d 610, 611, 872 NYS2d 144 [2009]*). The burden then shifted to the plaintiff to present admissible evidence establishing that the action was timely or to raise a **[****2]** question of fact as to whether the action was timely (*see U.S. Bank N.A. v Martin, 144 AD3d at 892*; *Lessoff v 26 Ct. St. Assoc., LLC, 58 AD3d at 611*).

Contrary to the Supreme Court's determination, the plaintiff failed to establish that the action was timely or to raise a question of fact with respect thereto. *CPLR 210 (b)* provides that "[t]he period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his [or her] executor or administrator." The statute plainly is limited in scope to the executor or administrator of the decedent's estate and does not extend to other defendants in the same action (*see Laurenti v Teatom, 210 AD2d 300, 301, 619 NYS2d 754 [1994]*; *Anselmo v Copertino 134 Misc 2d 956, 513 NYS2d 596 [Sup Ct, Suffolk County 1987]*). Consequently, *CPLR 210 (b)* could not extend the statute of limitations period as to Kess individually. Furthermore, the plaintiff failed to establish that Kess was the administrator or executor of his deceased wife's estate, a point which Kess denied in reply **[***4]** to the plaintiff's opposition. Thus, the Supreme Court erred in finding that the action was timely pursuant to *CPLR 210 (b)*.

In addition, the purported loan modification application submitted by the plaintiff in opposition to the motion was not an acknowledgment of the debt and an unconditional promise **[*769]** to repay the debt sufficient to reset the running of the statute of limitations (*see Sichol v Crocker, 177 AD2d 842, 843, 576 NYS2d 457 [1991]*; *see also National Loan Invs., L.P. v Piscitello, 21 AD3d 537, 538, 801 NYS2d 331 [2005]*; *Albin v Dallacqua, 254 AD2d 444, 445, 679 NYS2d 402 [1998]*; *see generally Petito v Piffath, 85 NY2d 1, 8, 647 NE2d 732, 623 NYS2d 520 [1994]*).

The plaintiff's remaining contentions are improperly raised for the first time on appeal (*see Hudson City Sav. Bank v 59 Sands Point, LLC, 153 AD3d 611, 613, 57 NYS3d 398 [2017]*; *Beneficial Homeowner Serv. Corp. v Tovar, 150 AD3d 657, 659, 55 NYS3d 59 [2017]*).

Accordingly, the Supreme Court should have granted that branch of Kess's motion which was to dismiss the complaint insofar as asserted against him as time-barred. **[**638]** Rivera, J.P., Cohen, Hinds-Radix and Brathwaite Nelson, JJ., concur.

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Wells Fargo Bank N.A. v Grover

Supreme Court of New York, Appellate Division, Third Department

October 25, 2018, Decided ; October 25, 2018, Entered

526095

Reporter
165 A.D.3d 1541 *; 86 N.Y.S.3d 299 **; 2018 N.Y. App. Div. LEXIS 7169 ***; 2018 NY Slip Op 07219 ****; 2018 WL 5288904

[**1]** Wells Fargo Bank N.A., Successor by Merger to Wells Fargo Bank Minnesota N.A., Formerly Known as Norwest Bank Minnesota N.A., Renaissance Home Equity Loan Asset-Backed Certificates Series 2002-1, Respondent, v William P. Grover, Appellant, et al., Defendants.

Core Terms

mortgage, summary judgment, borrower, partial payment, mortgage debt, default

Case Summary

Overview
HOLDINGS: [1]-The creditor submitted evidence that, while the 2009 action was pending, the debtor entered into an agreement to make three reduced mortgage payments during a trial period under a federal mortgage debt relief program known as the Home Affordable Mortgage Program (HAMP), and that he then made payments due in September and October 2010, but failed to make the third payment; [2]-Partial payment and an implied promise to pay the remainder may be proven by extrinsic evidence, such as canceled checks or a borrower's admissions; [3]-The debtor's self-serving argument that he did not intend to make these payments against the mortgage debt, but instead against a purported separate indebtedness established by the HAMP agreement, was unsupported by any proof of such an indebtedness.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures > Defenses

HN1[] **Foreclosures, Defenses**

A debtor's partial payment toward a mortgage debt may renew the statute of limitations in a foreclosure action if the creditor shows that there was a payment by the debtor or the debtor's agent 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 remaining balance.

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Federal Acts

Real Property Law > Financing > Federal Programs

HN2[] **Banking Law, Federal Acts**

The purpose of the Home Affordable Mortgage Program (HAMP), which was established in response to the 2008 mortgage foreclosure crisis pursuant to the Emergency Economic Stablization Act of 2008, *12 U.S.C.S. § 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. As part of the process of obtaining a HAMP mortgage modification, eligible borrowers agreed to make three reduced payments during a trial period; if these payments were made and all other requirements were satisfied, the process resulted in the permanent modification of the mortgage. A borrower entering into a HAMP agreement was required, among other things, to acknowledge that he or she was unable to afford mortgage payments and was in default or in danger of default, that partial payments under the HAMP agreement did not cure the borrower's default, and that the provisions of the underlying note and mortgage remained in full force and effect. Thus, 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.

Headnotes/Summary

Headnotes

Limitation of Actions—Revival of Time-Barred Claims—Mortgage Foreclosure—Partial Payment against Mortgage Indebtedness and Implied Promise to Pay Remainder

Counsel: **[***1]** The Crossmore Law Office, Ithaca (Edward Y. Crossmore of counsel), for appellant.

Hinshaw & Culbertson LLP, New York (Dana B. Briganti of counsel), for respondent.

Judges: Before: Garry, P.J., McCarthy, Lynch, Aarons and Rumsey, JJ. McCarthy, Lynch, Aarons and Rumsey, JJ., concur.

Opinion by: Garry

Opinion

[300]** **[*1541]** Garry, P.J. Appeal from an order of the Supreme Court (Faughnan, J.), entered April 19, 2017 in Tompkins County, which, among other things, denied William P. Grover's motion for summary judgment dismissing the complaint against him.

In 2002, defendant William P. Grover (hereinafter defendant) borrowed a sum of money from plaintiff's predecessor in interest **[*1542]** and executed a note secured by a mortgage on property in the City of Ithaca, Tompkins County. In February 2009, plaintiff commenced a foreclosure action arising from defendant's failure to pay the mortgage installment due in May 2008. In April 2013, plaintiff moved to voluntarily discontinue the 2009 action without prejudice, **[**301]** as it could not verify the validity of the execution or notarization of all the documents that had been filed. Plaintiff also sought to cancel the notice of pendency and to discharge the referee. Supreme Court (Mulvey, J.) **[***2]** granted the motion in its entirety.

In January 2016, plaintiff commenced this foreclosure action based upon defendant's continued failure to make payments. After joinder of issue, defendant moved for summary judgment dismissing the complaint against him, asserting that the action was time-barred. Plaintiff cross-moved for summary judgment and an order of reference. Supreme Court (Faughnan, J.) found that the action was timely because the voluntary discontinuance of the 2009 action had brought about a revocation of the acceleration of the debt that had resulted from the **[****2]** commencement of that action and, thus, denied defendant's motion and granted plaintiff's cross motion. Defendant appeals.

We affirm, albeit on grounds different from those upon which Supreme Court based its decision.***HN1***[] A debtor's partial payment toward a mortgage debt may renew the statute of limitations in a foreclosure action if the creditor "show[s] that there was a payment by the debtor or the debtor's agent 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 **[***3]** remaining balance" (*Saini v Cinelli Enters., 289 AD2d 770, 771, 733 NYS2d 824 [2001]* [internal quotation marks, brackets, emphasis and citations omitted], *lv denied 98 NY2d 602, 771 NE2d 835, 744 NYS2d 762 [2002]*; *see General Obligations Law § 17-107 [1], [2] [b]*; *Petito v Piffath, 85 NY2d 1, 7, 647 NE2d 732, 623 NYS2d 520 [1994]*; *see generally Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 521, 355 NE2d 369, 387 NYS2d 409 [1976])*. We find that plaintiff demonstrated its entitlement to judgment as a matter of law on the ground that defendant made partial payments against the mortgage debt under circumstances sufficient to renew the statute of limitations and thus render this action timely.

Plaintiff submitted evidence that, while the 2009 action was pending, defendant entered into an agreement to make three reduced mortgage payments during a trial period under a federal mortgage debt relief program known as the Home Affordable Mortgage Program (hereinafter HAMP), and that he **[*1543]** then made payments due in September and October 2010, but failed to make the third payment. ***HN2***[] The purpose of HAMP, which was established in response to the 2008 mortgage foreclosure crisis pursuant to the *Emergency Economic Stablization 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" (*US Bank N.A. v Sarmiento, 121 AD3d 187, 197-198, 991 NYS2d 68 [2014]* [internal quotation marks and citation omitted]). As part **[***4]** of the process of obtaining a HAMP mortgage modification, eligible borrowers agreed to make three reduced payments during a trial period; if these payments were made and all other requirements were satisfied, the process resulted in the permanent modification of the mortgage.[1] A borrower entering into a HAMP agreement **[**302]** was required, among other things, to acknowledge that he or she was unable to afford mortgage payments and was in default or in danger of default, that partial payments under the HAMP agreement did not cure the borrower's default, and that the provisions of the underlying note and mortgage "remain[ed] in full force and effect" (*Thomas v JPMorgan Chase & Co., 811 F Supp 2d 781, 787-788 [SD NY 2011]*; *see US Bank N.A. v Sarmiento, 121 AD3d at 197-199*). Thus, 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.

The contract documents that defendant executed when he entered into the HAMP agreement are not part of the record on this appeal.[2] However, partial payment and an implied promise to pay the remainder may be proven by extrinsic evidence, such as canceled checks or a borrower's admissions (*see Education Resources Inst., Inc. v Piazza, 17 AD3d 513, 514, 794 NYS2d 65 [2005]*; *Costantini v Bimco Indus., 125 AD2d 531, 531, 510 NYS2d 136 [1986]*; *Bernstein v Kaplan, 67 AD2d 897, 897, 413 NYS2d 186 [1979])* **[***5]** .

Here, plaintiff met its prima facie burden on its cross motion for summary judgment by submitting the note and mortgage and evidence of defendant's default (*see e.g. Bank of N.Y. Mellon v Slavin, 156 AD3d 1073, 1075-1076, 67 NYS3d 328 [2017])*, as well as evidence **[*1544]** that the action was **[****3]** timely because of defendant's payments under the HAMP agreement. The burden thus shifted to defendant to submit admissible evidence demonstrating the existence of an issue of fact as to his defense of untimeliness (**see generally** *HSBC Bank USA, N.A. v Szoffer, 149 AD3d 1400, 1400-1401, 52 NYS3d 721 [2017])*. He did not do so. Instead, he conceded the facts relative to the HAMP agreement and resulting payments. He further submitted related documents that included copies of his cashier's checks for these payments, one of which bore the identifying number of the mortgage loan. Moreover, he conceded that the payments were credited against the mortgage debt. Defendant's self-serving argument that he did not intend to make these payments against the mortgage debt, but instead against a purported separate indebtedness established by the HAMP agreement, is unsupported by any proof of such an indebtedness. It is further belied by the nature and purpose of HAMP agreements. As previously noted, these agreements do not establish any new indebtedness and serve the sole **[***6]** purpose of modifying existing mortgages.[3] Accordingly, plaintiff established as a matter of law that

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[1] Because defendant did not make the third reduced payment, no HAMP modification of the underlying mortgage was obtained.

[2] A separate forbearance agreement, executed by defendant in 2008, appears in the record but was no longer in effect at the pertinent time and is not relevant here.

this action was timely commenced, as defendant's 2010 partial payments were made under circumstances that constituted an unqualified acknowledgment that more was due and from which a promise could be inferred to pay the balance (*see National Heritage Life Ins. Co. in Liquidation v Hill St. Assoc., 262 AD2d 378, 378, 691 NYS2d 186 [1999]*; *compare Saini v Cinelli Enters., 289 AD2d at 771-772*; **[**303]** *see also Mundaca Inv. Corp. v Rivizzigno, 247 AD2d 904, 906, 668 NYS2d 854 [1998])*. Further, defendant failed to meet his prima facie burden on his motion for summary judgment dismissing the complaint to establish that this action is untimely (*compare Bank of N.Y. Mellon v Slavin, 156 AD3d at 1073-1074*). Plaintiff's cross motion for summary judgment was properly granted, and defendant's motion for summary judgment was properly denied.

As for the second issue argued by the parties—whether plaintiff's voluntary discontinuance of the 2009 action revoked the acceleration of the mortgage, such that the action was timely commenced—no appellate court in New York had ruled upon that issue when Supreme Court found that the acceleration of defendant's mortgage debt had been revoked. We note that, thereafter, the Second Department ruled on the issue in a **[*1545]** matter involving somewhat similar facts (*NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d 1068, 1070, 58 NYS3d 118 [2017]*). However, in view of our determination that defendant's partial payments rendered **[***7]** the action timely, we need not address the revocation issue.

McCarthy, Lynch, Aarons and Rumsey, JJ., concur. Ordered that the order is affirmed, with costs.

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[3] For this reason, we are unpersuaded by defendant's argument that a notice of intent to terminate the HAMP agreement sent to him after he failed to make the third payment constitutes proof of a separate indebtedness simply because it lists the amount of the unpaid HAMP installment separately from the amount due under the original note.

Wigod v. Wells Fargo Bank, N.A.

United States Court of Appeals for the Seventh Circuit

October 26, 2011, Argued; March 7, 2012, Decided

No. 11-1423

Reporter
673 F.3d 547 *; 2012 U.S. App. LEXIS 4714 **; 2012 WL 727646

LORI WIGOD, Plaintiff-Appellant, v. WELLS FARGO BANK, N.A., Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:10-cv-02348—Blanche M. Manning, Judge.

Wigod v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 7314 (N.D. Ill., Jan. 25, 2011)

Core Terms

modification, permanent, terms, servicers, borrower, promise, mortgage, alleges, state law, federal law, preempted, conditions, district court, guidelines, preemption, state-law, modify, private right of action, trial period, obligations, regulations, end-run, promissory estoppel, fraudulent misrepresentation, special trust, contractual, supervision, directives, Contracts, documents

Case Summary

Overview

HOLDINGS: [1]-Borrower's allegations that home mortgage servicer agreed to permanently modify her home loan, deliberately misled her into believing it would do so, and then refused to make good on its promise, supported claims for breach of contract or promissory estoppel; [2]-The borrower's claims for negligent hiring or supervision and for negligent misrepresentation or concealment were barred by Illinois's economic loss doctrine because she alleged only economic harms arising from a contractual relationship; [3]-The borrower plausibly alleged that the servicer engaged in unfair or deceptive business practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/2*, because it was enough to allege that the servicer committed a deceptive or unfair act and intended that the borrower rely on that act.

Outcome
Judgment affirmed in part and reversed in part.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1 **Standards of Review, De Novo Review**

The court of appeals reviews de novo the district court's decision to dismiss the plaintiff's complaint for failure to state a claim. The court must accept as true all factual allegations in the complaint. Under the federal rules' notice pleading standard, a complaint must contain only a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. The complaint will survive a motion to dismiss if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A party who appeals from a *Fed. R. Civ. P. 12(b)(6)* dismissal may elaborate on her allegations so long as the elaborations are consistent with the pleading.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2 **Motions to Dismiss, Failure to State Claim**

In deciding a *Fed. R. Civ. P. 12(b)(6)* motion, the court may also consider documents attached to the pleading without converting the motion into one for summary judgment. *Fed. R. Civ. P. 10(c)*. The court may also consider public documents and reports of administrative bodies that are proper subjects for judicial notice, though caution is necessary, of course.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN3 **Breach of Contract Actions, Elements of Contract Claims**

The required elements of a breach of contract claim in Illinois are the standard ones of common law: (1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages.

Contracts Law > Contract Formation > Offers > General Overview

HN4 **Contract Formation, Offers**

The test for an offer is whether it induces a reasonable belief in the recipient that he can, by accepting, bind the sender. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Contracts Law > Contract Formation > Offers > General Overview

HN5 **Contract Formation, Offers**

Under contract law principles, when some further act of the purported offeror is necessary, the purported offeree has no power to create contractual relations, and there is as yet no operative offer. Thus, a person can prevent his submission from being treated as an offer by using suitable language conditioning the formation of a contract on some further step, such as approval by corporate headquarters. When the promisor conditions a promise on his own future action or approval, there is no binding offer. But when the promise is conditioned on the performance of some act by the promisee or a third party, there can be a valid offer. A condition of subsequent approval by the promisor in the promisor's sole discretion gives rise to no obligation. However, the mere fact that an offer or agreement is subject to events not within the promisor's control will not render the agreement illusory. An offer is an act on the part of one person giving another person the legal power of creating the obligation called a contract. A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or

has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Contracts Law > Contract Formation > Offers > General Overview

HN6 **Contract Formation, Offers**

The test for an offer is whether it induces a reasonable belief in the offeree that he can, by accepting, bind the offeror.

Contracts Law > Contract Interpretation > General Overview

HN7 **Contracts Law, Contract Interpretation**

If possible, a court must interpret a contract in a manner that gives effect to all of the contract's provisions.

Contracts Law > Contract Formation > Consideration > General Overview

HN8 **Contract Formation, Consideration**

Under Illinois law, consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them. If a debtor does something more or different in character from that which it was legally bound to do, it will constitute consideration for the promise.

Contracts Law > Contract Formation > General Overview

HN9 **Contracts Law, Contract Formation**

A contract is enforceable under Illinois law if from its plain terms it is ascertainable what each party has agreed to do. A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.

Contracts Law > Contract Formation > General Overview

HN10 **Contracts Law, Contract Formation**

In order for a contract with open terms to be enforceable, however, it is necessary that the terms to be agreed upon in the future can be determined independent of a party's mere wish, will, and desire, either by virtue of the agreement itself or by commercial practice or other usage or custom. This may be the case, even though the determination is left to one of the contracting parties, if he is required to make it in good faith in accordance with some existing standard or with facts capable of objective proof.

Contracts Law > Contract Formation > General Overview

HN11 **Contracts Law, Contract Formation**

When one party to a contract has discretion to set open terms in a contract, that party must do so reasonably and not arbitrarily or in a manner inconsistent with the reasonable expectations of the parties.

Business & Corporate Compliance > ... > Acceptance > Apparent Acceptance > General Overview

HN12 **Acceptance, Apparent Acceptance**

Where the parties intend to contract but defer agreement on certain essential terms until later, the gap can be cured if one of the parties offers to accept any reasonable proposal that the other may make. The other's failure to make any proposal is a clear indication that the missing term is not the cause of the contract failure.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN13 **Consideration, Promissory Estoppel**

Promissory estoppel makes a promise binding where all the other elements of a contract exist, but consideration is lacking. The doctrine is commonly explained as promoting the same purposes as the tort of misrepresentation: punishing or deterring those who mislead others to their detriment and compensating those who are misled. To establish the elements of promissory estoppel, the plaintiff must prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN14 **Consideration, Promissory Estoppel**

A foregone opportunity would be reliance enough to support a claim of promissory estoppel.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN15 **Types of Losses, Economic Losses**

The economic loss doctrine bars recovery in tort for purely economic losses arising out of a failure to perform contractual obligations. The Moorman economic loss doctrine precludes liability for negligent hiring and supervision in cases where, in the course of performing a contract between the defendant and the plaintiff, the defendant's employees negligently cause the plaintiff to suffer some purely economic form of harm.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN16 **Types of Losses, Economic Losses**

There are a number of exceptions to the Moorman economic loss doctrine, each rooted in the general rule that where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty. To determine whether the Moorman doctrine bars tort claims, the key question is whether the defendant's duty arose by operation of contract or existed independent of the contract.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN17 **Types of Losses, Economic Losses**

Illinois courts expressly recognize an exception to the Moorman economic loss doctrine where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, i.e., fraud.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN18 **Actual Fraud, Elements**

The elements of a claim of fraudulent misrepresentation in Illinois are: (1) a false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from that reliance.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN19 **Heightened Pleading Requirements, Fraud Claims**

Under the heightened federal pleading standard of *Fed. R. Civ. P. 9(b)*, a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. This heightened pleading requirement is a response to the great harm to the reputation of a business firm or other enterprise a fraud claim can do. The particularity requirement calls for the first paragraph of any newspaper story: "the who, what, when, where, and how."

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN20 **Actual Fraud, Elements**

In the context of fraudulent misrepresentation, under Illinois law, justifiable reliance exists when it was reasonable for plaintiff to accept defendant's statements without an independent inquiry or investigation. The crucial question is whether the plaintiff's conduct was so unreasonable under the circumstances and in light of the information open to him, that the law may properly say that this loss is his own responsibility.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN21 **Fraud & Misrepresentation, Actual Fraud**

Promissory fraud is generally not actionable in Illinois unless the plaintiff also proves that the act was a part of a scheme to defraud. But this "scheme exception" is broad, so broad it tends to engulf and devour the rule. To invoke the scheme exception, the plaintiff must allege and then prove that, at the time the promise was made, the defendant did not intend to fulfill it. In order to survive the pleading stage, a claimant must be able to point to specific, objective manifestations of fraudulent intent — a scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief. Such evidence would include a pattern of fraudulent statements, or one particularly egregious fraudulent statement.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN22[] **Heightened Pleading Requirements, Fraud Claims**

The heightened pleading standard of *Fed. R. Civ. P. 9(b)* applies to fraudulent concealment claims.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN23[] **Nondisclosure, Elements**

To plead fraudulent concealment properly, in addition to meeting the elements of fraudulent misrepresentation, a plaintiff must allege that the defendant intentionally omitted or concealed a material fact that it was under a duty to disclose to the plaintiff. A duty to disclose would arise if plaintiff and defendant are in a fiduciary or confidential relationship or in a situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN24[] **Nondisclosure, Elements**

In the context of fraudulent concealment, the standard for identifying a special trust relationship is extremely similar to that of a fiduciary relationship. Accordingly, state and federal courts in Illinois have rarely found a special trust relationship to exist in the absence of a more formal fiduciary one.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN25[] **Nondisclosure, Elements**

In the context of fraudulent concealment, the special relationship threshold is a high one: the defendant must be clearly dominant, either because of superior knowledge of the matter derived from overmastering influence on the one side, or from weakness, dependence, or trust justifiably reposed on the other side Factors to be considered in determining the existence of a confidential relationship include the degree of kinship of the parties; any disparity in age, health, and mental condition; differences in education and business experience between the parties; and the extent to which the allegedly servient party entrusted the handling of her business affairs to the dominant party, and whether the dominant party accepted such entrustment. In short, the defendant accused of fraudulent concealment must exercise overwhelming influence over the plaintiff.

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN26[] **Financing, Mortgages & Other Security Instruments**

In the context of fraudulent concealment, as a matter of law, a conventional mortgagor-mortgagee relationship standing alone does not give rise to a fiduciary or confidential relationship.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN27[] Negligent Misrepresentation, Elements

Negligent misrepresentation involves the same elements as fraudulent misrepresentation, except that (1) the defendant need not have known that the statement was false, but must merely have been negligent in failing to ascertain the truth of his statement; and (2) the defendant must have owed the plaintiff a duty to provide accurate information.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN28[] Deceptive & Unfair Trade Practices, State Regulation

The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) protects consumers against unfair or deceptive acts or practices, including fraud, false promise, and the misrepresentation or the concealment, suppression or omission of any material fact. *815 ILCS 505/2*. The Act is liberally construed to effectuate its purpose. The elements of a claim under the ICFA are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce. In addition, a plaintiff must demonstrate that the defendant's conduct is the proximate cause of the injury.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN29[] Deceptive & Unfair Trade Practices, State Regulation

"Intent to deceive" is not a required element of a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, which provides redress not only for deceptive business practices, but also for business practices that, while not deceptive, are unfair.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN30[] Deceptive & Unfair Trade Practices, State Regulation

To satisfy the Illinois Consumer Fraud and Deceptive Business Practices Act's (ICFA) intent requirement, plaintiff need not show that defendant intended to deceive the plaintiff, but only that the defendant intended the plaintiff to rely on the (intentionally or unintentionally) deceptive information given. A defendant need not have intended to deceive the plaintiff; innocent misrepresentations or omissions intended to induce the plaintiff's reliance are actionable under the ICFA. The ICFA applies to innocent misrepresentations. The Consumer Fraud Act eliminated the requirement of scienter, and innocent misrepresentations are actionable as statutory fraud.

Constitutional Law > Supremacy Clause > Federal Preemption

HN31[] Supremacy Clause, Federal Preemption

Preemption can take on three different forms: express preemption, field preemption, and conflict preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

HN32[] Supremacy Clause, Federal Preemption

In all preemption cases, the court starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Under the doctrine of field preemption, however, a state law is preempted if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Banking Law > Consumer Protection > State Law > Federal Preemption

Constitutional Law > Supremacy Clause > Federal Preemption

HN33 **State Law, Federal Preemption**

In one of its regulations, the Office of Thrift Supervision announced that it hereby occupies the entire field of lending regulation for federal savings associations. *12 C.F.R. § 560.2(a)*. In the same section, however, the regulation contains the following saving clause: state tort, contract, and commercial laws are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section. *12 C.F.R. § 560.2(c)*. Read together, these provisions mean that state laws that establish licensing, registration, or other requirements specific to financial institutions cannot be applied to national banks, while laws of general applicability survive preemption so long as they do not effectively impose standards that conflict with federal ones.

Banking Law > Consumer Protection > State Law > Federal Preemption

Constitutional Law > Supremacy Clause > Federal Preemption

HN34 **State Law, Federal Preemption**

The Home Owners Loan Act preempts generally applicable state laws only when they could interfere with federal regulation--that is, those that actually conflict with the regulatory program.

Constitutional Law > Supremacy Clause > Federal Preemption

HN35 **Supremacy Clause, Federal Preemption**

The Supreme Court has found implied conflict pre-emption where either (1) it is impossible for a private party to comply with both state and federal requirements, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > Federal Preemption

HN36 **Supremacy Clause, Federal Preemption**

Where federal law supplies the standard of care imposed by state law, it is hard to see how they could conflict. A state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law.

Constitutional Law > Supremacy Clause > Federal Preemption

HN37 **Supremacy Clause, Federal Preemption**

The purpose of Congress is the ultimate touchstone in every preemption case. Because the States are independent sovereigns in the federal system, it has long been presumed that Congress does not cavalierly preempt state-law causes of action.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN38 **Standards of Review, Deference to Agency Statutory Interpretation**

Agencies have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > Federal Preemption

HN39 **Supremacy Clause, Federal Preemption**

The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead.

Constitutional Law > Supremacy Clause > Federal Preemption

HN40 **Supremacy Clause, Federal Preemption**

When the federal court's jurisdiction over state-law claims is based on diversity of citizenship, the absence of a private right of action in a federal statute actually weighs against preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

HN41 **Supremacy Clause, Federal Preemption**

There is no general rule that where a state common law theory provides for liability for conduct that is also violative of federal law, a suit under the state common law is prohibited so long as the federal law does not provide for a private right of action. Indeed, it seems the only justification for such a rule would be federal preemption of state law. In short, a state-law claim's incorporation of federal law has never been regarded as disabling, whether the federal law has a private right of action or not.

Counsel: For LORI WIGOD, on her own behalf and on behalf of all others similarly situated, Plaintiff - Appellant: Steven Lezell Woodrow, Attorney, EDELSON MCGUIRE, LLC, Chicago, IL.

For WELLS FARGO BANK, NA, Defendant - Appellee: Irene C. Freidel, Attorney, K&L GATES LLP, Boston, MA.

Judges: Before RIPPLE and HAMILTON, Circuit Judges, and MYERSCOUGH, District Judge.* RIPPLE, Circuit Judge, concurring.

Opinion by: HAMILTON

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* The Honorable Sue E. Myerscough of the Central District of Illinois, sitting by designation.

Opinion

[*554] HAMILTON, *Circuit Judge*. We are asked in this appeal to determine whether Lori Wigod has stated claims under Illinois law against her home mortgage servicer for refusing to modify her loan pursuant to the federal Home Affordable Mortgage Program (HAMP). The U.S. Department of the Treasury implemented HAMP to help homeowners avoid foreclosure amidst the sharp decline in the nation's housing market in 2008. In 2009, Wells Fargo issued Wigod a four-month "trial" loan modification, under which it agreed to permanently modify the loan if she qualified under HAMP guidelines. **[**2]** Wigod alleges that she did qualify **[*555]** and that Wells Fargo refused to grant her a permanent modification. She brought this putative class action alleging violations of Illinois law under common-law contract and tort theories and under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). The district court dismissed the complaint in its entirety under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. *Wigod v. Wells Fargo Bank, N.A., No. 10 CV 2348, 2011 U.S. Dist. LEXIS 7314, 2011 WL 250501 (N.D. Ill. Jan. 25, 2011)*. The court reasoned that Wigod's claims were premised on Wells Fargo's obligations under HAMP, which does not confer a private federal right of action on borrowers to enforce its requirements.

This appeal followed, and it presents two sets of issues. The first set of issues concerns whether Wigod has stated viable claims under Illinois common law and the ICFA. We conclude that she has on four counts. Wigod alleges that Wells Fargo agreed to permanently modify her home loan, deliberately misled her into believing it would do so, and then refused to make good on its promise. These allegations support garden-variety claims for breach of contract or promissory estoppel. She has also **[**3]** plausibly alleged that Wells Fargo committed fraud under Illinois common law and engaged in unfair or deceptive business practices in violation of the ICFA. Wigod's claims for negligent hiring or supervision and for negligent misrepresentation or concealment are not viable, however. They are barred by Illinois's economic loss doctrine because she alleges only economic harms arising from a contractual relationship. Wigod's claim for fraudulent concealment is also not actionable because she cannot show that Wells Fargo owed her a fiduciary or other duty of disclosure.

The second set of issues concerns whether these state-law claims are preempted or otherwise barred by federal law. We hold that they are not. HAMP and its enabling statute do not contain a federal right of action, but neither do they preempt otherwise viable state-law claims. We accordingly reverse the judgment of the district court on the contract, promissory estoppel, fraudulent misrepresentation, and ICFA claims, and affirm its judgment on the negligence claims and fraudulent concealment claim.

I. *Factual and Procedural Background*

HN1[↑] We review *de novo* the district court's decision to dismiss Wigod's complaint for failure to **[**4]** state a claim. *E.g.*, *Abcarian v. McDonald, 617 F.3d 931, 933 (7th Cir. 2010)*. We must accept as true all factual allegations in the complaint. *E.g.*, *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. Under the federal rules' notice pleading standard, a complaint must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, , 129 S. Ct. 1937, 173 L. Ed.2d 868 (2009)*, quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A party who appeals from a *Rule 12(b)(6)* dismissal may elaborate on her allegations so long as the elaborations are consistent with the pleading. See *Chavez v. Illinois State Police, 251 F.3d 612, 650 (7th Cir. 2001)*; *Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 439-40 (7th Cir. 1994)* (reversing dismissal in relevant part based on **[**5]** such new elaborations); *Dawson v. General Motors **[*556]** Corp., 977 F.2d 369, 372 (7th Cir. 1992)* (reversing dismissal based on new elaborations).

HN2[↑] In deciding a *Rule 12(b)(6)* motion, the court may also consider documents attached to the pleading without converting the motion into one for summary judgment. See *Fed. R. Civ. P. 10(c)*. Wigod attached to her complaint her trial loan modification agreement with Wells Fargo, along with a variety of other documents produced in the course of the parties' commercial relationship. The court may also consider public documents and reports of administrative bodies that are proper subjects for judicial notice, though caution is necessary, of course. See *Papasan v. Allain, 478 U.S. 265, 268 n.1, 106 S. Ct.*

2932, 92 L. Ed. 2d 209 (1986); 520 South Michigan Ave. Associates, Ltd. v. Shannon, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008); Radaszewski ex rel Radaszewski v. Maram, 383 F.3d 599, 600 (7th Cir. 2004); Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998). We have done so here to provide background information on the HAMP program.

A. *The Home Affordable Mortgage Program*

In response to rapidly deteriorating financial market conditions in the late summer and early **[**6]** fall of 2008, Congress enacted the Emergency Economic Stabilization Act, *P.L. 110-343, 122 Stat. 3765*. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury, among many other duties and powers, to "implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures." 12 U.S.C. § 5219(a). Congress also granted the Secretary the authority to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures." *Id.*

Pursuant to this authority, in February 2009 the Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure. The Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers, including Wells Fargo. Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible **[**7]** under the program. In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers "shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other communications . . . issued by the Treasury." In such supplemental guidelines, Treasury directed servicers to determine each borrower's eligibility for a modification by following what amounted to a three-step process:

First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower's primary residence; the mortgage payments were more than 31 percent of the borrower's monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than $729,750.

Second, the servicer calculated a modification using a "waterfall" method, applying enumerated changes in a specified order until the borrower's monthly mortgage **[*557]** payment ratio dropped "as close as possible to 31 percent."[1]

Third, the servicer applied a Net Present Value (NPV) test to assess whether the modified mortgage's value to the servicer would be greater than the return on the mortgage if unmodified. The NPV test is "essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure." Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757380, at *3 n.3 (D. Minn. Nov. 9, 2009). If the NPV result was negative — that is, the value of the modified mortgage would be lower than the servicer's expected return after foreclosure — the servicer was not obliged to offer a modification. If the NPV was positive, however, the Treasury directives **[**9]** said that "the servicer MUST offer the modification." Supplemental Directive 09-01.

B. *The Trial Period Plan*

Where a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages. After determining a borrower was eligible, the servicer implemented a Trial Period Plan (TPP) under the new loan repayment terms it formulated using the waterfall method. The trial period under the TPP lasted three or more months, during which time the lender "must service the mortgage loan . . . in the same manner as it would service a loan in forbearance." Supplemental Directive 09-01. After the trial period, if the borrower complied with all terms of the TPP Agreement — including making all required payments and providing all required documentation — and if the borrower's representations remained true and correct,

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[1] The order of **[**8]** operations in the waterfall method is: (1) capitalize accrued interest and escrow advances to third parties; (2) reduce the annual interest rate to as low as 2 percent; (3) extend the term up to 40 years and reamortize the loan; and (4) if necessary, forbear repayment of principal until the loan is paid off and waive interest on the deferred amount. U.S. Dep't of the Treasury, Home Affordable Modification Program Supplemental Directive 09-01 (Apr. 6, 2009) (hereinafter "Supplemental Directive 09-01").

the servicer had to offer a permanent modification. See Supplemental Directive 09-01 ("If the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the trial period . . . .").

Treasury modified its directives on the timing of the verification process **[**10]** in a way that affects this case. Under the original guidelines that were in effect when Wigod applied for a modification, a servicer could initiate a TPP based on a borrower's undocumented representations about her finances. See Supplemental Directive 09-01 ("Servicers may use recent verbal [sic] financial information to prepare and offer a Trial Period Plan. Servicers are not required to verify financial information prior to the effective date of the trial period."). Those guidelines were part of a decision to roll out HAMP very quickly.[2]

C. *Plaintiff's Loan*

In September 2007, Wigod obtained **[**11]** a home mortgage loan for $728,500 from **[*558]** Wachovia Mortgage, which later merged into Wells Fargo. (For simplicity, we refer only to Wells Fargo here.) Finding herself in financial distress, Wigod submitted a written request to Wells Fargo for a HAMP modification in April 2009. At that time, Treasury's original guidelines were still in force, so Wells Fargo could choose whether (A) to offer Wigod a trial modification based on unverified oral representations, or (B) to require her to provide documentary proof of her financial information before commencing the trial plan.

Wigod alleges that Wells Fargo took option (B). Only after Wigod provided all required financial documentation did Wells Fargo, in mid-May 2009, determine that Wigod was eligible for HAMP and send her a TPP Agreement. The TPP stated: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the [permanent modification] Offer or will send me written notice that I do not qualify for the Offer." TPP ¶ 2.

On May 28, 2009, Wigod signed two copies of the TPP Agreement and returned them to the bank, along with additional documents and the **[**12]** first of four modified trial period payments. Wells Fargo then executed the TPP Agreement and sent a copy to Wigod in early June 2009. The trial term ran from July 1, 2009 to November 1, 2009. The TPP Agreement provided: "If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement." TPP ¶ 1.

Wigod timely made, and Wells Fargo accepted, all four payments due under the trial plan. On the pleadings, we must assume that she complied with all other obligations under the TPP Agreement. Nevertheless, Wells Fargo declined to offer Wigod a permanent HAMP modification, informing her only that it was "unable to get you to a modified payment amount that you could afford per the investor guidelines on your mortgage." After the expiration of the TPP, Wells Fargo warned Wigod that she owed the outstanding balance and late fees and, in a subsequent letter, that she was in default on her home mortgage loan. Over the next few months, Wigod protested Wells Fargo's decision in a number of telephone conversations, but to no avail. During that time, she continued **[**13]** to make mortgage payments in the reduced amount due under the TPP, even after the trial term ended on November 1, 2009. In the meantime, Wells Fargo sent Wigod monthly notices threatening to foreclose if she failed to pay the accumulating amount of delinquency based on the original loan terms.

According to Wigod, Wells Fargo improperly re-evaluated her for HAMP after it had already determined that she was qualified and offered her a trial modification, and that it erroneously determined that she was ineligible for a permanent modification by miscalculating her property taxes. Wells Fargo responds that Treasury guidelines then in force allowed the servicer to verify, after initiating a trial modification, that the borrower satisfied all government and investor criteria for a permanent modification, and that Wigod did not. In the course of this proceeding, however, Wells Fargo has not identified the specific criteria that Wigod failed to satisfy, except to say that it could not craft a permanent modification plan for her that would be

[2] Treasury changed this policy in 2010, however, to allow servicers to offer a trial modification only after reviewing a borrower's documented financial information. The reason for the change was that loan servicers were converting trial modifications to permanent ones at a rate far below Treasury's expectations. Treasury originally projected that 3 to 4 million homeowners would receive permanent modifications under HAMP. Yet one year into the program, only 170,000 borrowers had received permanent modifications — fewer than 15 percent of the 1.4 million homeowners who had been offered trial plans.

consistent with its investor guidelines. Because we are reviewing a *Rule 12(b)(6)* **[**14]** dismissal, we disregard Wells Fargo's **[*559]** effort to contradict the complaint.[3]

D. *Procedural History*

On April 15, 2010, Wigod filed a class action complaint in the Northern District of Illinois on behalf of all homeowners in the United States who had entered into TPP Agreements with Wells Fargo, complied with all terms, and were nevertheless denied permanent modifications. Wigod's complaint contains seven counts: (I) breach of contract (and breach of implied covenants) for violating the TPP; (II) promissory estoppel, also based on representations made in the TPP; (III) breach of the Servicer Participation Agreement; (IV) negligent hiring and supervision; (V) fraudulent misrepresentation or concealment; (VI) negligent misrepresentation or concealment; and (VII) violation of the ICFA.

The district court dismissed Counts I, II, IV, and VI because each theory of liability **[**15]** was "premised on Wells Fargo's obligations" under HAMP, which does not provide borrowers a private federal right of action against servicers to enforce it. In the district court's view, Wigod's common-law claims for breach of contract, promissory estoppel, negligent hiring and supervision, and fraud were "not sufficiently independent to state . . . separate state law cause[s] of action." The district court dismissed Count III because a borrower lacks standing to sue as an intended third-party beneficiary of the Servicer Participation Agreement. Count VI was dismissed because the district court concluded that Wigod could not reasonably have relied on Wells Fargo's representation in the TPP that she would receive a permanent modification so long as she made all four trial payments and her financial information remained true and accurate, since elsewhere the TPP required Wigod to meet all of HAMP's requirements for permanent modification. Finally, the district court dismissed Count VII because Wigod had not plausibly alleged that Wells Fargo acted with intent to deceive her, which the court concluded was a required element under the ICFA. Wigod appeals the district court's decision as **[**16]** to all claims but Count III.

We first examine whether Wigod has adequately pled viable claims under Illinois law, and we conclude that she has done so for breach of contract, promissory estoppel, fraudulent misrepresentation, and violation of the ICFA. We then consider whether federal law precludes Wigod from pursuing her state-law claims, and we hold that it does not.[4]

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[3] Wells Fargo also asserted for the first time in oral argument that Wigod had never actually been qualified for loan modification. The assertion must be disregarded because it presents a factual question that cannot be resolved in deciding a ***Rule 12(b)(6)*** motion. *E.g.*, *Morrison v. YTB Int'l, Inc., 649 F.3d 533, 538 (7th Cir. 2011)*.

[4] We have identified more than 80 other federal cases in which mortgagors brought HAMP-related claims. The legal theories relied on by these plaintiffs fit into three groups. First, some homeowners tried to assert rights arising under HAMP itself. Courts have uniformly rejected these claims because HAMP does not create a private federal right of action for borrowers against servicers. *See, e.g.*, *Simon v. Bank of Am., N.A., No. 10-cv-00300-GMN-LRL, 2010 U.S. Dist. LEXIS 63480, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010)* (dismissing claim because HAMP "does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify an eligible loan").

In the second group, plaintiffs claimed to be third-party beneficiaries of their loan servicers' SPAs with the United States. **[**17]** Most but not all courts dismissed these challenges as well, holding that borrowers were not intended third-party beneficiaries of the SPAs. Compare *Villa v. Wells Fargo Bank, N.A., No. 10CV81 DMS (WVG), 2010 U.S. Dist. LEXIS 23741, 2010 WL 935680, at *2-3 (S.D. Cal. Mar. 15, 2010)* (granting motion to dismiss claims of plaintiff pursuing third-party beneficiary theory), and *Escobedo v. Countrywide Home Loans, Inc., No. 09 cv1557 BTM (BLM), 2009 U.S. Dist. LEXIS 117017, 2009 WL 4981618, at *2-3 (S.D. Cal. Dec. 15, 2009)* (same), with *Sampson v. Wells Fargo Home Mortg., Inc., No. CV 10-08836 DDP (SSx), 2010 U.S. Dist. LEXIS 137635, 2010 WL 5397236, at *3 (C.D. Cal. Nov. 19, 2010)* ("Here, the court is persuaded that Plaintiff — an individual facing foreclosure of her home — has made a substantial showing that she is an intended beneficiary of the HAMP, a federal agreement entered into by Defendants."). The courts denying motions to dismiss may have been led astray by *County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237 (9th Cir. 2009)*, which was reversed by the Supreme Court. See *Astra USA, Inc. v. Santa Clara County, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011)*. In *Astra*, the Supreme Court held that health care facilities covered by *§ 340B* of the Public Health Services Act could not sue as third-party **[**18]** beneficiaries of drug price-ceiling contracts between pharmaceutical manufacturers and the government because Congress did not create a private right of action under the Act. *Id. at 1345*. Here, too, Congress did not create a private right of action to enforce the HAMP guidelines, and since *Astra*, district courts have correctly applied the Court's decision to foreclose claims by homeowners seeking HAMP modifications as third-party beneficiaries of SPAs. *See, e.g, Boyd v. U.S. Bank, N.A. ex rel. Sasco Aames Mortg. Loan Trust, Series 2003-1, 787 F. Supp. 2d 747, 757 (N.D. Ill. 2011)*.

[*560] II. *State-Law Claims*

A. *Breach of Contract*

At the heart of Wigod's complaint is her claim **[**20]** for breach of contract. ***HN3***[] The required elements of a breach of contract claim in Illinois are the standard ones of common law: "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages." *Ass'n Ben. Servs. v. Caremark Rx, Inc., 493 F.3d 841, 849 (7th Cir. 2007)*, quoting *MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC, 364 Ill. App. 3d 6, 845 N.E.2d 22, 30, 300 Ill. Dec. 601 (Ill. App. 2006)*.

In two different provisions of the TPP Agreement, paragraph 1 and section 3, Wells Fargo promised to offer Wigod a permanent loan modification if two conditions were satisfied: (1) she complied with the terms of the TPP by making timely payments and disclosures; and (2) her representations remained true and accurate.[5] **[*561]** Wigod alleges that she met both conditions and accepted the offer, but that Wells Fargo refused to provide a permanent modification. These allegations state a claim for breach of contract. Wells Fargo offers three theories, however, to argue that the TPP was not an enforceable contract: (1) the TPP contained no valid offer; (2) consideration was absent; and (3) the TPP lacked clear and definite **[**21]** terms. We reject each theory.

1. *Valid Offer*

In Illinois, ***HN4***[] the "test for an offer is whether it induces a reasonable belief in the recipient that he can, by accepting, bind the sender." *Boomer v. AT&T Corp., 309 F.3d 404, 415 (7th Cir. 2002)*, quoting *McCarty v. Verson Allsteel Press Co., 89 Ill. App. 3d 498, 411 N.E.2d 936, 943, 44 Ill. Dec. 570 (Ill. App. 1980)*; see also *Restatement (Second) of Contracts § 24* (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding **[**22]** that his assent to that bargain is invited and will conclude it."). To determine whether the TPP made a definite (though conditional) offer of permanent modification, we examine the language of the agreement itself and the surrounding circumstances. See *Restatement (Second) of Contracts § 26, cmts. a & c* (1981), citing *R.E. Crummer & Co. v. Nuveen, 147 F.2d 3, 5 (7th Cir. 1945)*.

Wigod is in the third group, basing claims directly on the TPP Agreements themselves. These plaintiffs avoid *Astra* because they claim rights not as third-party beneficiaries but as parties in direct privity with their lenders or loan servicers. In these third-generation cases, district courts have split. Including first and second-generation cases, about 50 of the courts granted motions to dismiss in full. *See, e.g., Nadan v. Homesales, Inc., No. CV F 11-1181 LJO SKO, 2011 U.S. Dist. LEXIS 89946, 2011 WL 3584213 (E.D. Cal. Aug. 12, 2011)*; *Vida v. OneWest Bank, F.S.B., No. 10-987-AC, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473 (D. Or. Dec. 13, 2010)*. In 30 or so **[**19]** cases, courts denied the motions in full or in part, allowing claims based on contract, tort, and/or state consumer fraud statutes to go forward. *See, e.g., Allen v. CitiMortgage, Inc., No. CCB-10-2740, 2011 U.S. Dist. LEXIS 86077, 2011 WL 3425665 (D. Md. Aug. 4, 2011)*; *Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342 (D. Mass. 2011)*. For particularly instructive discussions of some of the issues involved in these cases, compare *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, No. 10-md-02193-RWZ, 2011 U.S. Dist. LEXIS 72079, 2011 WL 2637222, at *3-6 (D. Mass. July 6, 2011)* (multi-district litigation) (denying defendant's motion to dismiss claims for breach of contract and violation of state consumer protection statutes), with *Bourdelais v. J.P. Morgan Chase, No. 3:10CV670-HEH, 2011 U.S. Dist. LEXIS 35507, 2011 WL 1306311, at *3-6 (E.D. Va. Apr. 1, 2011)* (dismissing claims for breach of contract). See generally John R. Chiles & Matthew T. Mitchell, *Hamp: An Overview of the Program and Recent Litigation Trends*, 65 Consumer Fin. L. Q. Rep. 194, 195 (2011) (examining the "current litigation trends in this recent spate of HAMP-related lawsuits").

[5] Paragraph 1 provided:

> If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan 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.

Section 3 stated:

> If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Lender will send me a Modification Agreement for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date.

Wells Fargo contends that the TPP was not an enforceable offer to permanently modify Wigod's mortgage because it was conditioned on Wells Fargo's further review of her financial information to ensure she qualified under HAMP. ***HN5***[↑] Under contract law principles, when "some further act of the purported offeror is necessary, the purported offeree has no power to create contractual relations, and there is as yet no operative offer." 1 Joseph M. Perillo, *Corbin on Contracts* § 1.11, at 31 (rev. ed. 1993) (hereinafter "*Corbin on Contracts* (rev. ed.)"), citing *Bank of Benton v. Cogdill, 118 Ill. App. 3d 280, 454 N.E.2d 1120, 1125-26, 73 Ill. Dec. 871 (Ill. App. 1983)*. Thus, "a person can prevent his submission from being treated as an offer by [using] suitable language conditioning the formation of a contract on some further step, such as approval by corporate **[**23]** headquarters." *Architectural Metal Systems, Inc. v. Consolidated Systems, Inc., 58 F.3d 1227, 1230 (7th Cir. 1995)* (Illinois law). Wells Fargo contends that the TPP did just that by making a permanent modification expressly contingent on the bank taking some later action.

That is not a reasonable reading of the TPP. Certainly, when the promisor conditions a promise on *his own* future action or approval, there is no binding offer. But when the promise is conditioned on the performance of some act *by the promisee* or a third party, there can be a valid offer. See 1 Richard A. Lord, *Williston on Contracts* § 4:27 (4th ed. 2011) (hereinafter "*Williston on Contracts*") ("[A] condition of subsequent approval by the promisor in the promisor's sole discretion gives rise to no obligation. . . . However, the mere fact that an offer or agreement is subject to events not within the promisor's control **[*562]** . . . will not render the agreement illusory."); compare *McCarty, 411 N.E.2d at 942* ("An offer is an act on the part of one person giving another person the legal power of creating the obligation called a contract."), with *Village of South Elgin v. Waste Management of Illinois, Inc., 348 Ill. App. 3d 929, 810 N.E.2d 658, 672, 284 Ill. Dec. 868 (Ill. App. 2004)* **[**24]** ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."), quoting *Restatement (Second) of Contracts § 26* (1981).

Here the TPP spelled out two conditions precedent to Wells Fargo's obligation to offer a permanent modification: Wigod had to comply with the requirements of the trial plan, and her financial information had to remain true and accurate. But these were conditions to be satisfied by the promisee (Wigod) rather than conditions requiring further manifestation of assent by the promisor (Wells Fargo). These conditions were therefore consistent with treating the TPP as an offer for permanent modification.

Wells Fargo insists that its obligation to modify Wigod's mortgage was also contingent on its determination, after the trial period began, that she qualified under HAMP guidelines. That theory conflicts with the plain terms of the TPP. At the beginning, when Wigod received the unsigned TPP, she had to furnish Wells Fargo with "documents to permit verification of . . . [her] income **[**25]** . . . to determine whether [she] qualif[ied] for the offer." TPP ¶ 2. The TPP then provided: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan *if I qualify for the Offer* or will send me written notice that I do not qualify for the offer." TPP ¶ 2 (emphasis added). Wigod signed two copies of the Plan on May 29, 2009, and returned them along with additional financial documentation to Wells Fargo.

Under the terms of the TPP Agreement, then, that moment was Wells Fargo's opportunity to determine whether Wigod qualified. If she did not, it could have and should have denied her a modification on that basis. Instead, Wells Fargo countersigned on June 4, 2009 and mailed a copy to Wigod with a letter congratulating her on her approval for a trial modification. In so doing, Wells Fargo communicated to Wigod that she qualified for HAMP and would receive a permanent "Loan Modification Agreement" after the trial period, provided she was "in compliance with this Loan Trial Period and [her] representations . . . continue[d] to be true in all material respects." TPP ¶ 1.

In more abstract terms, then, when Wells Fargo **[**26]** executed the TPP, its terms included a unilateral offer to modify Wigod's loan conditioned on her compliance with the stated terms of the bargain. "***HN6***[↑] The test for an offer is whether it induces a reasonable belief in the [offeree] that he can, by accepting, bind the [offeror]." *Architectural Metal Systems, 58 F.3d at 1229*, citing *McCarty, 411 N.E.2d at 943*; see also 1 *Williston on Contracts* § 4.10 (offer existed if the purported offeree "reasonably [could] have supposed that by acting in accordance with it a contract could be concluded"). Here a reasonable person in Wigod's position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions.

This is so notwithstanding the qualifying language in section 2 of the TPP. An acknowledgment in that section provided: **[*563]** "I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be

modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of the Modification Agreement, and (iii) the Modification Effective Date has passed." TPP § 2.G.[6] According to Wells Fargo, **[**27]** this provision meant that all of its obligations to Wigod terminated if Wells Fargo itself chose not to deliver "a fully executed TPP *and* 'Modification Agreement' by November 1, 2009." In other words, Wells Fargo argues that its obligation to send Wigod a permanent Modification Agreement was triggered only if and when it actually sent Wigod a Modification Agreement.

Wells Fargo's proposed reading of section 2 would nullify other express provisions of the TPP Agreement. Specifically, it would nullify Wells Fargo's obligation to "send [Wigod] a Modification Agreement" if she "compl[ied] with the requirements" of the TPP and if her "representations . . . continue to be true in all material **[**28]** respects." TPP § 3. Under Wells Fargo's theory, it could simply refuse to send the Modification Agreement for any reason whatsoever — interest rates went up, the economy soured, it just didn't like Wigod — and there would still be no breach. Under this reading, a borrower who did all the TPP required of her would be entitled to a permanent modification only when the bank exercised its unbridled discretion to put a Modification Agreement in the mail. In short, Wells Fargo's interpretation of the qualifying language in section 2 turns an otherwise straightforward offer into an illusion.

The more natural interpretation is to read the provision as saying that no permanent modification *existed* "unless and until" Wigod (i) met all conditions, (ii) Wells Fargo executed the Modification Agreement, and (iii) the effective modification date passed. Before these conditions were met, the loan documents remained unmodified and in force, but under paragraph 1 and section 3 of the TPP, Wells Fargo still had an obligation to *offer* Wigod a permanent modification once she satisfied all her obligations under the agreement. This interpretation follows from the plain and ordinary meaning of the contract **[**29]** language stating that "the Plan is not a modification . . . unless and until" the conditions precedent were fulfilled. TPP § 2.G. And, unlike Wells Fargo's reading, it gives full effect to all of the TPP's provisions. See *McHenry Savings Bank v. Autoworks of Wauconda, Inc., 399 Ill. App. 3d 104, 924 N.E.2d 1197, 1205, 338 Ill. Dec. 671 (Ill. App. 2010)* (***HN7***[↑] "If possible we must interpret a contract in a manner that gives effect to all of the contract's provisions."), citing *Bank of America Nat'l Trust & Savings Ass'n v. Schulson, 305 Ill. App. 3d 941, 714 N.E.2d 20, 24, 239 Ill. Dec. 462 (Ill. App. 1999)*. Once Wells Fargo signed the TPP Agreement and returned it to Wigod, an objectively reasonable person would construe it as an offer to provide a permanent modification agreement if she fulfilled its conditions.

2. *Consideration*

HN8[↑] Under Illinois law, "consideration consists of some detriment to the offeror, **[*564]** some benefit to the offeree, or some bargained-for exchange between them." *Dumas v. Infinity Broadcasting Corp., 416 F.3d 671, 679 n.9 (7th Cir. 2005)*, quoting *Doyle v. Holy Cross Hospital, 186 Ill. 2d 104, 708 N.E.2d 1140, 1145, 237 Ill. Dec. 100 (Ill. 1999)*. "If a **[**30]** debtor does something more or different in character from that which it was legally bound to do, it will constitute consideration for the promise." 3 *Williston on Contracts*, § 7:27.

Here the TPP contained sufficient consideration because, under its terms, Wigod (the promisee) incurred cognizable legal detriments. By signing it, Wigod agreed to open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information. Wigod's complaint alleges that she did more than simply agree to pay a discounted amount in satisfaction of a prior debt. In exchange for Wells Fargo's conditional promise to modify her home mortgage, she undertook multiple obligations above and beyond her existing legal duty to make mortgage payments. This was adequate consideration, as a number of district courts adjudicating third-generation HAMP cases have recognized. *See, e.g.*, *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, No. 10-md-02193-RWZ, 2011 U.S. Dist. LEXIS 72079, 2011 WL 2637222, at *4 (D. Mass. July 6, 2011)* (multi-district litigation) ("The requirements of the TPP all constitute new legal detriments."); *Ansanelli v. JPMorgan Chase Bank, N.A., No. C 10-03892 WHA, 2011 U.S. Dist. LEXIS 32350, 2011 WL 1134451, at *4 (N.D. Cal. Mar. 28, 2011)* (same). **[**31]**

3. *Definite and Certain Terms*

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[6] The immediately preceding paragraph of the TPP contains a substantially similar acknowledgment: "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; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and the Plan will terminate." TPP § 2.F.

HN9[] A contract is enforceable under Illinois law if from its plain terms it is ascertainable what each party has agreed to do. Academy Chicago Publishers v. Cheever, 144 Ill. 2d 24, 578 N.E.2d 981, 983, 161 Ill. Dec. 335 (Ill. 1991). "A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." Id. at 984. Wells Fargo contends that the TPP is unenforceable because it did not specify the exact terms of the permanent loan modification, including the interest rate, the principal balance, loan duration, and the total monthly payment.[7] Because the TPP allowed the lender to determine the precise contours of the permanent modification at a later date, Wells Fargo argues, it reflected no "meeting of the minds" as to the permanent modification's essential terms, so that it was an unenforceable "agreement to agree."

It is true that Wigod's trial period terms were an "estimate" of the terms of the permanent modification and that Wells Fargo had some limited discretion to modify permanent terms based on its determination of the "final amounts of unpaid interest and other delinquent amounts." TPP §§ 2, 3. But this hardly makes the TPP a mere "agreement to agree." This court, applying Illinois law, has explained that a contract with open terms can be enforced:

> **[*565]** HN10[] In order for such a contract to be enforceable, however, it is necessary that the terms to be agreed upon in the future can be determined "independent of a party's mere 'wish, will, and desire' . . ., either by virtue of the agreement itself or by commercial practice or other usage or custom."

United States v. Orr Construction Co., 560 F.2d 765, 769 (7th Cir. 1977), quoting **[**33]** 1 Arthur Linton Corbin, *Corbin on Contracts* § 95, at 402 (1960 ed.) (hereinafter "*Corbin on Contracts* (1960 ed.)") (internal quotation marks omitted). Professor Corbin's treatise continues: "This may be the case, even though the determination is left to one of the contracting parties, if he is required to make it 'in good faith' in accordance with some existing standard or with facts capable of objective proof." 1 *Corbin on Contracts* § 95, at 402 (1960 ed.).

In this case, HAMP guidelines provided precisely this "existing standard" by which the ultimate terms of Wigod's permanent modification were to be set. HN11[] When one party to a contract has discretion to set open terms in a contract, that party must do so "reasonably and not arbitrarily or in a manner inconsistent with the reasonable expectations of the parties." Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 395 (7th Cir. 2003) (applying Illinois law). In its program directives, the Department of the Treasury set forth the exact mechanisms for determining borrower eligibility and for calculating modification terms — namely, the waterfall method and the NPV test. These HAMP guidelines unquestionably informed the reasonable **[**34]** expectations of the parties to Wigod's TPP Agreement, which is actually entitled "*Home Affordable Modification Program* Loan Trial Period." In Wigod's reasonable reading of the agreement, if she "qualif[ied] for the Offer" (meaning, of course, that she qualified under HAMP) and complied with the terms of the TPP, Wells Fargo would offer her a permanent modification. TPP ¶ 2. To calculate Wigod's trial modification terms, Wells Fargo was obligated to use the NPV test and the waterfall method to try to bring her monthly payments down to 31 percent of her gross income. Although the trial terms were just an "estimate" of the permanent modification terms, the TPP fairly implied that any deviation from them in the permanent offer would also be based on Wells Fargo's application of the established HAMP criteria and formulas.

Wells Fargo, of course, has not offered Wigod *any* permanent modification, let alone one that is consistent with HAMP program guidelines. Thus, even without reference to the HAMP modification rules, Wigod's complaint alleges that Wells Fargo breached its promise to provide her with a permanent modification once she fulfilled the TPP's conditions. Although Wells Fargo may **[**35]** have had some limited discretion to set the precise terms of an offered permanent modification, it was certainly required to offer *some* sort of good-faith permanent modification to Wigod consistent with HAMP guidelines. It has offered none. See *Corbin on Contracts* § 4.1, at 532 (rev. ed.) ("HN12[] Where the parties intend to contract but defer agreement on certain essential terms until later, the gap can be cured if one of the parties offers to accept any reasonable proposal that the other may make. The other's failure to make any proposal is a clear indication that the missing term is not the cause of the contract failure."). We must assume at the pleadings stage that Wigod met each of the TPP's conditions, and it is undisputed that Wells Fargo offered no permanent modification at all. The terms of the TPP are clear and definite enough to

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[7] The TPP stated that its monthly payment schedule "is an estimate of the payment that will be required under the modified **[**32]** loan terms, which will be finalized in accordance with Section 3 below." TPP § 2. Section 3 provided: "I understand that once Lender is able to determine the final amounts of unpaid interest and any other delinquent amounts . . . and after deducting . . . any remaining money held at the end of the Trial Period . . . the Lender will determine the new payment amount." TPP § 3.

support Wigod's breach of contract theory. Accord, *e.g.*, *Belyea v. Litton Loan Servicing, LLP, No. 10-10931-DJC, 2011 U.S. Dist. LEXIS 77734, 2011 **[*566]** WL 2884964, at *8 (D. Mass. July 15, 2011)* ("At a minimum, then, the TPP contains all essential and material terms necessary to govern the trial period repayments and the parties' related obligations."), quoting *Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 352 (D. Mass. 2011)*. **[**36]** Wigod's complaint sufficiently pled each element of a breach of contract claim under Illinois law. The relevant documents do not undermine her claim as a matter of law.

B. *Promissory Estoppel*

Wigod also asserts a claim for promissory estoppel, which is an alternative means of obtaining contractual relief under Illinois law. See *Prentice v. UDC Advisory Services, Inc., 271 Ill. App. 3d 505, 648 N.E.2d 146, 150, 207 Ill. Dec. 690 (Ill. App. 1995)*, citing *Quake Construction, Inc. v. American Airlines, Inc., 141 Ill. 2d 281, 565 N.E.2d 990, 152 Ill. Dec. 308 (Ill. 1990)*. ***HN13***[↑] Promissory estoppel makes a promise binding where "all the other elements of a contract exist, but consideration is lacking." *Dumas v. Infinity Broadcasting Corp., 416 F.3d 671, 677 (7th Cir. 2005)*, citing *Bank of Marion v. Robert "Chick" Fritz, Inc., 57 Ill. 2d 120, 311 N.E.2d 138 (Ill. 1974)*. The doctrine is "commonly explained as promoting the same purposes as the tort of misrepresentation: punishing or deterring those who mislead others to their detriment and compensating those who are misled." Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, *105 Yale L.J. 1249, 1254 (1996)*. To establish the elements of promissory estoppel, "the plaintiff must prove that **[**37]** (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 233 Ill. 2d 46, 906 N.E.2d 520, 523-24, 329 Ill. Dec. 322 (Ill. 2009)*.

Wigod has adequately alleged her claim of promissory estoppel. She asserts that Wells Fargo made an unambiguous promise that if she made timely payments and accurate representations during the trial period, she would receive an offer for a permanent loan modification calculated using the required HAMP methodology. She also alleges that she relied on that promise to her detriment by foregoing the opportunity to use other remedies to save her home (such as restructuring her debt in bankruptcy), and by devoting her resources to making the lower monthly payments under the TPP Agreement rather than attempting to sell her home or simply defaulting. A lost opportunity can constitute a sufficient detriment to support a promissory estoppel claim. See *Wood v. Mid-Valley Inc., 942 F.2d 425, 428 (7th Cir. 1991)* (noting that ***HN14***[↑] a "foregone . . . opportunity" would be "reliance enough to support **[**38]** a claim of promissory estoppel") (applying Indiana law). Wigod's complaint therefore alleged a sufficiently clear promise, evidence of her own reliance, and an explanation of the injury that resulted. She also contends that Wells Fargo ought to have anticipated her compliance with the terms of its promise. This was enough to present a facially plausible claim of promissory estoppel.[8]

[*567] C. *Negligent Hiring and Supervision*

Wigod's next claim is that Wells Fargo deliberately hired unqualified customer service employees and refused to train them to implement HAMP effectively "so that borrowers **[**39]** would become too frustrated to pursue their modifications." Compl. ¶ 96. Wigod also alleges that Wells Fargo adopted policies designed to sabotage the HAMP modification process, such as a rule limiting borrowers to only one telephone call with any given employee, effectively requiring borrowers to start from scratch with an unfamiliar agent in any follow-up call.[9]

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[8] Because Wigod has successfully pled a breach of contract claim, including consideration, at this stage of the litigation there is "no gap in the remedial system for promissory estoppel to fill." *Dumas, 416 F.3d at 677*, quoting *All-Tech Telecom Inc. v. Amway Corp., 174 F.3d 862, 869 (7th Cir. 1999)*. One or more of Wells Fargo's contract defenses may remain in dispute for the remainder of the litigation. For this reason, Wigod may preserve her promissory estoppel claim as an alternative in the event the district court or a jury later concludes as a factual matter that an enforceable contract did not exist.

[9] The Treasury directives require servicers to have "adequate staffing, resources, and facilities for receiving and processing HAMP documents" and to "ensure that . . . inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution." Supplemental Directive 09-01. Additionally, in the Servicer Participation Agreement it executed with the government, Wells Fargo agreed to "use qualified individuals with suitable training, education, experience and skills to perform the services."

The economic loss doctrine forecloses Wigod's recovery on this negligence claim. Known as the *Moorman* doctrine in Illinois, ***HN15***[] this doctrine bars recovery in tort for purely economic losses arising out of a failure to perform contractual obligations. See *Moorman Mfg. Co. v. National Tank Co.., 91 Ill. 2d 69, 435 N.E.2d 443, 448-49, 61 Ill. Dec. 746 (Ill. 1982)*. **[**40]** The *Moorman* doctrine precludes liability for negligent hiring and supervision in cases where, in the course of performing a contract between the defendant and the plaintiff, the defendant's employees negligently cause the plaintiff to suffer some purely economic form of harm. See, *e.g.*, *Freedom Mortg. Corp. v. Burnham Mortg., Inc., 720 F. Supp. 2d 978, 1002 (N.D. Ill. 2010)* (plaintiff's "negligent retention and supervision claims violate *Moorman* because they relate to [its] contractual and commercial relationship" with defendant); *Soranno v. New York Life Ins. Co., No. 96 C 7882, 1999 U.S. Dist. LEXIS 1963, 1999 WL 104403, at *16 (N.D. Ill. Feb. 24, 1999)* (Plaintiffs' negligent supervision claims "cannot survive *Moorman* to the extent that they relate to . . . [the] actions [of the defendant's agent] in selling the insurance contracts and annuities [to plaintiffs]. Those acts — and the related duty to supervise them — appear to have arisen under the contract."); *Johnson Products Co. v. Guardsmark, Inc., No. 97 C 6406, 1998 U.S. Dist. LEXIS 2491, 1998 WL 102687, at *8 (N.D. Ill. Feb. 27, 1998)* (economic loss doctrine barred negligent hiring and supervision claims against security firm whose guards stole from the plaintiff because no Illinois **[**41]** case law imposed "specific duties upon providers of security services to employ honest personnel and to use reasonable care to supervise them").

HN16[] There are a number of exceptions to the *Moorman* doctrine, each rooted in the general rule that "[w]here a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty." *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill. 2d 137, 636 N.E.2d 503, 514, 201 Ill. Dec. 71 (Ill. 1994)*. To determine whether the *Moorman* doctrine bars tort claims, the key question is whether the defendant's duty arose by operation of contract or existed independent of the contract. See *Catalan v. GMAC Mortg. Corp., 629 F.3d 676, 693 (7th Cir. 2011)* ("These exceptions [to the economic loss doctrine] have in common the existence of an extra-contractual duty between the parties, giving rise to a cause **[*568]** of action in tort separate from one based on the contract itself."); *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill. 2d 302, 555 N.E.2d 346, 351, 144 Ill. Dec. 227 (Ill. 1990)* ("the concept of duty is at the heart of distinction drawn by the economic loss rule"). If, for example, an architect bungles a **[**42]** construction design, the *Moorman* doctrine bars the aggrieved owner's suit for negligence. See *id*. The shoddy workmanship is a breach of the design contract rather than a failure to observe some independent duty of care owed to the world at large.

To the extent Wells Fargo had a duty to service Wigod's home loan responsibly and with competent personnel, that duty emerged solely out of its contractual obligations. As we recently noted, a mortgage contract itself "cannot give rise to an extra-contractual duty without some showing of a fiduciary relationship between the parties," and no such relationship existed here. *Catalan, 629 F.3d at 693* (applying *Moorman* doctrine). Although Wigod has a legally viable claim that the TPP Agreement bound Wells Fargo to offer her a permanent modification, Wells Fargo owed her no independent duty to employ qualified people and to supervise them appropriately in servicing her home loan. Cf. *Johnson Products Co., 1998 U.S. Dist. LEXIS 2491, 1998 WL 102687, at *9* ("The manufacturer of a defective product that simply does not work properly does not owe a duty in tort to the purchaser of the product to use reasonable care in producing the product. Rather, the purchaser's remedy lies in **[**43]** breach of contract or breach of warranty. . . . [Defendant] had no obligation to use reasonable care in performing its duties, for its only obligations arose under the contract itself."). Wigod's rights here are contractual in nature. If Wells Fargo failed to honor their agreement — whether by hiring incompetents or simply through bald refusals to perform — contract law provides her remedies.

Wigod argues that the *Moorman* doctrine does not bar her negligent hiring and supervision claims because she seeks equitable relief and therefore her asserted harm goes beyond pure economic injury. But this theory assumes that there is some necessary connection between the nature of the loss alleged and the appropriate form of relief. This is not so. Purely economic losses may sometimes be best remedied through injunctive relief — when, for instance, specific performance of a contract is required to make the plaintiff whole, or when the risk of under-compensation is very high. See Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 362 (1978) (theorizing that specific performance is awarded where a court "cannot obtain, at reasonable cost, enough information about substitutes to permit **[**44]** it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee"). Conversely, it is routine for tort plaintiffs who have incurred non-economic losses (such as physical injury) to seek and receive monetary damages. Wigod has suffered no injury to person or property. The harm she alleges is that Wells Fargo did not restructure the terms of her mortgage

and thereby caused her to default. This is a purely economic injury if ever we saw one. Wigod's claim for negligent hiring and supervision was properly dismissed.

D. *Fraud Claims*

HN17[↑] Illinois courts expressly recognize an exception to the *Moorman* doctrine "where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, *i.e.*, fraud." *Catalan, 629 F.3d at 693*, quoting *First Midwest* ***[*569]*** *Bank, N.A. v. Stewart Title Guaranty Co., 218 Ill. 2d 326, 843 N.E.2d 327, 333, 300 Ill. Dec. 69 (Ill. 2006)*; see also *Stein v. D'Amico, No. 86 C 9099, 1987 U.S. Dist. LEXIS 4765, 1987 WL 4934, at *3 (N.D. Ill. June 5, 1987)* (applying fraud exception to *Moorman* doctrine for claim of fraudulent concealment). Because of this exception, the economic loss doctrine does not bar Wigod's claim for fraudulent misrepresentation. She **[**45]** has adequately pled the elements of fraudulent misrepresentation but not fraudulent concealment.

1. *Fraudulent Misrepresentation*

HN18[↑] The elements of a claim of fraudulent misrepresentation in Illinois are:

> (1) [a] false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from that reliance.

Dloogatch v. Brincat, 396 Ill. App. 3d 842, 920 N.E.2d 1161, 1166, 336 Ill. Dec. 571 (Ill. App. 2009), quoting *Soules v. General Motors Corp., 79 Ill. 2d 282, 402 N.E.2d 599, 601, 37 Ill. Dec. 597 (Ill. 1980)*. ***HN19***[↑] Under the heightened federal pleading standard of *Rule 9(b) of the Federal Rules of Civil Procedure*, a plaintiff "alleging fraud . . . must state with particularity the circumstances constituting fraud." See *Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 507 (7th Cir. 2007)* ("This heightened pleading requirement is a response to the great harm to the reputation of a business firm or other enterprise a fraud claim can do.") (internal quotation marks omitted). We have summarized the particularity requirement as calling for the first paragraph of any newspaper story: "the who, **[**46]** what, when, where, and how." *E.g.*, *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc., 536 F.3d 663, 668 (7th Cir. 2008)*. Wigod's complaint satisfies that standard. She identifies the knowing misrepresentation as Wells Fargo's statement in the TPP that it would offer her a permanent modification if she complied with the terms and conditions of the TPP. She also alleges that Wells Fargo intended that she would act in reliance on promises it made in the TPP and that she reasonably did so to her detriment. Fraudulent intent may be alleged generally, see *Fed. R. Civ. P. 9(b)*, so the only element seriously at issue on the pleadings is reasonable reliance.

The district court held that "Wigod could not reasonably have relied on" the TPP's promise of a permanent modification because this "would have required her to ignore the remainder of the contract which required her to meet *all* of HAMP's requirements." We disagree. ***HN20***[↑] Under Illinois law, justifiable reliance exists when it was "reasonable for plaintiff to accept defendant's statements without an independent inquiry or investigation." *InQuote Corp. v. Cole, No. 99-cv-6232, 2000 U.S. Dist. LEXIS 12619, 2000 WL 1222211, at *3 (N.D. Ill. Aug. 24, 2000)*; **[**47]** see *Teamsters Local 282 Pension Trust Fund v. Angelos, 839 F.2d 366, 371 (7th Cir. 1988)* ("the crucial question is whether the plaintiff's conduct was so unreasonable under the circumstances and 'in light of the information open to him, that the law may properly say that this loss is his own responsibility'"), quoting *Chicago Title & Trust Co. v. First Arlington Nat'l Bank, 118 Ill. App. 3d 401, 454 N.E.2d 723, 729, 73 Ill. Dec. 626 (Ill. App. 1983)*. As explained above, the TPP as a whole supports Wigod's reading of it to require Wells Fargo to offer her a permanent modification once it determined she was qualified and sent her an executed copy, and she satisfied the conditions precedent. Based on the pleadings, we cannot say that her alleged reliance on Wells Fargo's promise was objectively unreasonable.

[*570] Wigod's fraudulent misrepresentation claim at first seems vulnerable on other grounds, however, since it represents a claim of promissory fraud — that is, a "false statement of intent regarding future conduct," as opposed to a false statement of existing or past fact. *Association Benefit Services, Inc., 493 F.3d at 853*. ***HN21***[↑] Promissory fraud is "generally not actionable" in Illinois "unless the plaintiff also proves that the **[**48]** act was a part of a scheme to defraud." *Id.*, citing *Bradley Real Estate Trust v. Dolan Associates, Ltd., 266 Ill. App. 3d 709, 640 N.E.2d 9, 12-13, 203 Ill. Dec. 582 (Ill. App. 1994)*. But this "scheme exception" is broad ? so broad it "tends to engulf and devour" the rule. *Stamatakis Industries, Inc. v. King, 165 Ill. App. 3d 879, 520 N.E.2d 770, 772, 117 Ill. Dec. 419 (Ill. App. 1987)*. To invoke the scheme exception, the plaintiff must allege

and then prove that, at the time the promise was made, the defendant did not intend to fulfill it. *Bower v. Jones, 978 F.2d 1004, 1011 (7th Cir. 1992)* ("In order to survive the pleading stage, a claimant must be able to point to specific, objective manifestations of fraudulent intent — a scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief."), quoting *Hollymatic Corp. v. Holly Systems, Inc., 620 F. Supp. 1366, 1369 (N.D. Ill. 1985)*. Such evidence would include a "a pattern of fraudulent statements, or one particularly egregious fraudulent statement." *BPI Energy Holdings, Inc. v. IEC (Montgomery), LLC, 664 F.3d 131, 136 (7th Cir. 2011)* (internal citations omitted).

Wigod alleges that she was a victim of a scheme to defraud: in her complaint, she accuses Wells Fargo **[**49]** of deliberately implementing a "system designed to wrongfully deprive its eligible HAMP borrowers of an opportunity to modify their mortgages." Compl. ¶ 8. Whether she has alleged "specific, objective manifestations" of this scheme is a closer question, but we think it likely that Illinois courts would say yes.

The scheme alleged here does not rest solely on Wells Fargo's single broken promise to Wigod. She claims that thousands of HAMP-eligible homeowners became victims of Wells Fargo's "intentional and systematic failure to offer permanent loan modifications" after falsely telling them it would. Compl. ¶ 1. Illinois courts have found as few as two broken promises enough to establish a scheme to defraud. See, *e.g.*, *General Electric Credit Auto Lease, Inc. v. Jankuski, 177 Ill. App. 3d 380, 381-83, 532 N.E.2d 361, 126 Ill. Dec. 676 (Ill. App. 1988)* (finding that plaintiffs pled fraudulent scheme by alleging that auto dealership falsely promised that (1) the "holding agreement" executed with plaintiffs would be cancelled once their son signed a lease for the vehicle; and (2) the son could cancel his lease if he was later transferred overseas); *Stamatakis Industries, 520 N.E.2d at 772-74* (holding that plaintiff properly pled **[**50]** a scheme to defraud by alleging that defendant broke his promises to (1) make good on a contract for the purchase of equipment; and (2) enter into an employment contract for five years with a covenant not to compete). But see *Doherty v. Kahn, 289 Ill. App. 3d 544, 682 N.E.2d 163, 224 Ill. Dec. 602 (Ill. App. 1997)* (holding that plaintiff did not plead scheme to defraud by alleging that defendant's broken promises that (1) plaintiff would be president of company, (2) own 65 percent of the stock, and (3) earn a specified monthly salary). In another case, the Illinois Supreme Court found that a single false promise made to the public at large satisfied the scheme exception to the general rule against promissory fraud. See *Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371 N.E.2d 634, 641, 13 Ill. Dec. 699 (Ill. 1977)* (finding a scheme to defraud alleged against a medical school that promised **[*571]** in its catalog to evaluate and admit applicants based on merit when in fact the school intended to make decisions based on monetary contributions). Wigod alleges that Wells Fargo made and broke promises of permanent modifications to her and to thousands of other potential class members as well. If true, such a widespread pattern of deception could reasonably be considered **[**51]** a scheme under Illinois law and thus actionable as promissory fraud. See *HPI Health Care Services v. Mount Vernon Hospital, Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 682, 137 Ill. Dec. 19 (Ill. 1989)*; *Steinberg, 371 N.E.2d at 641*.

2. *Fraudulent Concealment*

HN22[↑] The heightened pleading standard of *Rule 9(b)* also applies to fraudulent concealment claims. ***HN23***[↑] To plead this tort properly, in addition to meeting the elements of fraudulent misrepresentation, a plaintiff must allege that the defendant intentionally omitted or concealed a material fact that it was under a duty to disclose to the plaintiff. *Weidner v. Karlin, 402 Ill. App. 3d 1084, 932 N.E.2d 602, 605, 342 Ill. Dec. 475 (Ill. App. 2010)*. A duty to disclose would arise if "plaintiff and defendant are in a fiduciary or confidential relationship" or in a "situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff." *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (Ill. 1996)*.

Wigod alleges that Wells Fargo knowingly concealed that it would (1) report her to credit rating agencies as being in default on her mortgage; and (2) reevaluate her eligibility for a permanent modification in contravention of HAMP directives. The district **[**52]** court dismissed this fraudulent concealment claim due to "the absence of any fiduciary or other duty to speak" on the part of Wells Fargo as a mortgagee. See *Graham v. Midland Mortg. Co., 406 F. Supp. 2d 948, 953 (N.D. Ill. 2005)* ("A mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law."), quoting *Teachers Ins. & Annuity Ass'n of America v. LaSalle Nat'l Bank, 295 Ill. App. 3d 61, 691 N.E.2d 881, 888, 229 Ill. Dec. 408 (Ill. App. 1998)*. In the district court, Wigod apparently conceded that Wells Fargo was not a fiduciary under Illinois law, but she argued that she placed a special trust and confidence in the bank as her HAMP servicer. The district court rejected this theory on the ground that any special trust relationship between Wigod and Wells Fargo existed solely through the lender's participation in HAMP, which does not provide the borrower with a private right of action.

For two reasons, we affirm the dismissal of the fraudulent concealment claim. First, Wigod's special trust argument is waived: in this appeal, Wigod raised the issue only in her reply brief, and arguments raised for the first time in a reply brief are waived. *Padula v. Leimbach, 656 F.3d 595, 605 (7th Cir. 2011)*. **[**53]** Second, even if we overlooked the waiver, we would agree with the district court that no special trust relationship existed here. Wells Fargo's participation in HAMP is not sufficient to create a special trust relationship with Wigod and the roughly 250,000 other homeowners with whom it entered TPP Agreements. The Illinois Appellate Court has recently stated that ***HN24***[↑] the standard for identifying a special trust relationship is "extremely similar to that of a fiduciary relationship." *Benson v. Stafford, 407 Ill. App. 3d 902, 941 N.E.2d 386, 403, 346 Ill. Dec. 828 (Ill. App. 2010)*.

Accordingly, state and federal courts in Illinois have rarely found a special trust relationship to exist in the absence of a more formal fiduciary one. See, *e.g.*, *Go For It, Inc. v. Aircraft Sales Corp., No. 02 **[*572]** C 6158, 2003 U.S. Dist. LEXIS 11043, 2003 WL 21504600, at *2 (N.D. Ill. June 27, 2003)* (finding no confidential relationship in sale of airplane because "the parties' relationship did not possess sufficient indicia of disparity in experience or knowledge such that defendants could be said to have gained influence and superiority over the plaintiff," since "a slightly dominant business position does not operate to turn a formal, contractual relationship into a confidential **[**54]** or fiduciary relationship"); *Benson, 941 N.E.2d at 403* (declining to find special trust relationship between options traders who had formed joint ventures because the plaintiffs alleging fraud could not show "that they trusted defendant" or that the defendant was in "a position of influence and superiority"); *Martin v. State Farm Mutual Auto. Ins. Co., 348 Ill. App. 3d 846, 808 N.E.2d 47, 52, 283 Ill. Dec. 497 (Ill. App. 2004)* (finding that holders of automobile insurance policy did not have a special trust relationship with their insurer because "[t]here are no allegations of a history of dealings or long-standing relationship between the parties, or that plaintiffs had entrusted the handling of their insurance affairs to State Farm in the past, or that State Farm was in a position of such superiority and influence by reason of friendship, agency, or experience"); *Miller v. William Chevrolet/GEO, Inc., 326 Ill. App. 3d 642, 762 N.E.2d 1, 13-14, 260 Ill. Dec. 735 (Ill. App. 2001)* (holding that the "arms length transaction" between a car dealer and a prospective customer "did not give rise to a confidential relationship sufficient to impose a general duty of disclosure under the fairly rigorous principles of common law" because "this dealer-customer relationship **[**55]** did not possess sufficient indicia of disparity in experience or knowledge such that the dealer could be said to have gained influence and superiority over the purchaser."). But see *Schrager v. North Community Bank, 328 Ill. App. 3d 696, 767 N.E.2d 376, 386, 262 Ill. Dec. 916 (Ill. App. 2002)* (finding, despite absence of fiduciary relationship, that special trust relationship existed between the plaintiff, an investor in a real estate venture, and the defendant bank who had induced the plaintiff to invest, "because defendants' superior knowledge and experience of [the developers' problematic] financial history, as well as the status of the . . . development project, including the necessity of a fresh guarantor, placed defendants in a position of influence over" the plaintiff).

HN25[↑] The special relationship threshold is a high one: "the defendant must be 'clearly dominant, either because of superior knowledge of the matter derived from . . . overmastering influence on the one side, or from weakness, dependence, or trust justifiably reposed on the other side.'" *Miller, 762 N.E.2d at 13* (internal quotation marks omitted), quoting *Mitchell v. Norman James Construction Co., 291 Ill. App. 3d 927, 684 N.E.2d 872, 879, 225 Ill. Dec. 881 (Ill. App. 1997)*. As the *Mitchell* court **[**56]** explained:

> Factors to be considered in determining the existence of a confidential relationship include the degree of kinship of the parties; any disparity in age, health, and mental condition; differences in education and business experience between the parties; and the extent to which the allegedly servient party entrusted the handling of her business affairs to the dominant party, and whether the dominant party accepted such entrustment.

684 N.E.2d at 879. In short, the defendant accused of fraudulent concealment must exercise "overwhelming influence" over the plaintiff. *Miller, 762 N.E.2d at 14*.

In light of the weight of Illinois authority, Wells Fargo's role as a HAMP servicer was not sufficient to find a special trust **[*573]** relationship with Wigod with respect to negotiating any modification. She claims that "HAMP requires servicers to provide borrowers with information to help them 'understand the modification terms' and to 'minimize potential borrower confusion,'" and that she "relied on Wells Fargo to convey accurate information about the Program." Reply Br. at 33. That may be so, but asymmetric information alone does not show the degree of dominance needed to establish a special trust **[**57]** relationship. See *Miller, 762 N.E.2d at 13-14*. Otherwise, virtually any mortgage lender would have a special trust relationship with its borrowers, regardless of HAMP participation — a proposition Illinois courts have clearly rejected. See, *e.g.*, *id.*, *762 N.E.2d at 14* ("Like the conventional mortgagor-mortgagee relationship that the *Mitchell* court found to fall short

of a confidential relationship, this dealer-customer relationship did not possess sufficient indicia of disparity in experience or knowledge such that the dealer could be said to have gained influence and superiority over the purchaser."); *Mitchell, 684 N.E.2d at 879* ("***HN26***[] As a matter of law, a conventional mortgagor-mortgagee relationship standing alone does not give rise to a fiduciary or confidential relationship.").[10] The HAMP modification is an arm's-length transaction between servicer and borrower, no less than is a home mortgage loan itself. By becoming Wigod's HAMP servicer, Wells Fargo did not assume significant additional responsibility for handling Wigod's business affairs. Like the original mortgagor-mortgagee relationship itself, the relevant aspects of the HAMP servicer-borrower relationship do not bear the fiduciary-like **[**58]** hallmarks of a special trust relationship under Illinois law. We affirm the dismissal of Wigod's fraudulent concealment claim.

E. *Negligent Misrepresentation or Concealment*

In the alternative to her fraudulent misrepresentation and concealment claims, Wigod alleges that Wells Fargo negligently or carelessly (rather than intentionally) misrepresented or omitted material facts. ***HN27***[] Negligent misrepresentation involves the same elements as fraudulent misrepresentation, except that (1) the defendant need not have known that the statement was false, but must merely have been negligent in failing to **[**59]** ascertain the truth of his statement; and (2) the defendant must have owed the plaintiff a duty to provide accurate information. See *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd., 376 Ill. App. 3d 1006, 876 N.E.2d 218, 228, 315 Ill. Dec. 218 (Ill. App. 2007)*.[11]

[*574] Whether or not Wigod has successfully pled the elements of negligent misrepresentation and concealment, this claim is also barred by the economic loss doctrine. Any duty Wells Fargo may have had to provide accurate information to Wigod arose directly from their commercial and contractual relationship. Wigod is right that HAMP requires servicers to help borrowers understand the modification terms. But this obligation is not owed to the general public — only to mortgagors in the HAMP modification process. If Wells Fargo had such obligations to Wigod, then, it was only because it executed a TPP agreement with her under HAMP. Any disclosure duties owed here are contractual ones and therefore do not sound in the torts of negligent misrepresentation or negligent concealment. We affirm the dismissal of these claims, and proceed to Wigod's final cause of action.[12]

F. *The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)*

HN28[] The ICFA protects consumers against "unfair or deceptive acts or practices," including "fraud," "false promise," and the "misrepresentation or the concealment, suppression or omission of any material fact." *815 ILCS 505/2*. The Act is "liberally construed to effectuate its purpose." *Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951, 960, 266 Ill. Dec. 879 (Ill. 2002)*. The elements of a claim under the ICFA are: "(1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." *Siegel v. Shell Oil Co., 612 F.3d 932, 934 (7th Cir. 2010)*, citing

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[10] Illinois recognizes that a mortgagee owes a fiduciary duty to a mortgagor in some narrow aspects of the relationship, such as when the mortgagor retains control of borrowed money to pay expenses as an agent for the mortgagor, such as title insurance costs, as in *Janes v. First Federal Savings and Loan Ass'n of Berwyn, 57 Ill. 2d 398, 312 N.E.2d 605, 610-11 (Ill. 1974)*. See also *Orman v. Charles Schwab & Co., 179 Ill. 2d 282, 688 N.E.2d 620, 621, 227 Ill. Dec. 927 (Ill. 1997)*. Wigod's claim does not implicate those aspects of the relationship where the mortgagee acts as an agent for the mortgagor-principal and has a fiduciary duty to the mortgagor.

[11] There is a dearth of Illinois case law on negligent concealment, and we can identify no cases that actually set forth the elements of the tort. One state appellate judge has denied that it is a distinct cause of action, at least in the context of contractor liability. See *Moore v. Everett Snodgrass, Inc., 87 Ill. App. 3d 388, 408 N.E.2d 1166, 1172, 42 Ill. Dec. 457 (Ill. App. 1980)* (Stouder, J., concurring in part and dissenting in part) ("it is obvious that merely negligent concealment, without some type of fraud or intent to deceive, is not enough to make the contractor liable"). Nevertheless, the Illinois courts do appear to accept it, at least in theory, even if its contours remain nebulous. See *id. at 1170* (majority opinion). We assume the elements of negligent concealment are equivalent to those of a negligent misrepresentation claim, meaning the defendant must have negligently — but not intentionally — failed to disclose a material fact, and that he also must have owed some duty to **[**60]** the plaintiff to disclose it (which is also a requirement of the fraudulent concealment tort).

[12] The same analysis of course would apply to Wigod's claim for fraudulent concealment, which also requires the existence of a duty to disclose. But recall that the *Moorman* doctrine admits an exception for claims alleging fraud. This exception **[**61]** saves the fraudulent concealment claim but not the negligent misrepresentation or concealment claim. See, *e.g.*, *Orix Credit Alliance, Inc. v. Taylor Machine Works, Inc., 125 F.3d 468, 475-77 (7th Cir. 1997)* (applying *Moorman* doctrine to bar claim for negligent misrepresentation).

Robinson, 775 N.E.2d at 960. In addition, "a plaintiff must demonstrate that the defendant's conduct is the proximate cause **[**62]** of the injury." *Id. at 935*.

Wigod accuses Wells Fargo of practices that are both deceptive and unfair. In her complaint, Wigod incorporates by reference her common-law fraud claims, alleging that Wells Fargo's misrepresentation and concealment of material facts constituted deceptive business practices. Compl. ¶¶ 123-25. She also alleges that Wells Fargo dishonestly and ineffectually implemented HAMP, and that this conduct constituted "unfair, immoral, unscrupulous business practices." Compl. ¶ 126. The district court dismissed Wigod's ICFA claim on two grounds: first, because Wigod did not allege that Wells Fargo acted with an intent to deceive her; and second, because Wigod did not plausibly plead that Wells Fargo's conduct caused her any actual pecuniary injury. On both points, we disagree.

First, ***HN29***[↑] "intent to deceive" is not a required element of a claim under the **[*575]** ICFA, which provides redress "not only for deceptive business practices, but also for business practices that, while not deceptive, are unfair." *Boyd v. U.S. Bank, N.A. ex rel. Sasco Aames Mortg. Loan Trust Series 2003-1, 787 F. Supp. 2d 747, 751 (N.D. Ill. 2011)* (holding that a loan servicer's alleged failure to consider **[**63]** the plaintiff's eligibility for a HAMP modification was a sufficient predicate for an ICFA claim); see *815 ILCS 505/2* ("[U]nfair *or* deceptive acts or practices . . . are hereby declared unlawful . . . .") (emphasis added); *Siegel, 612 F.3d at 934-35* ("A plaintiff may allege that conduct is unfair under ICFA without alleging that the conduct is deceptive."), citing *Saunders v. Michigan Ave. Nat'l Bank, 278 Ill. App. 3d 307, 662 N.E.2d 602, 608, 214 Ill. Dec. 1036 (Ill. App. 1996)*. Wigod alleges that Wells Fargo engaged in both deceptive (fraudulent) and unfair business practices. Moreover, even if she had alleged only deceptive practices, pleading intent would still be unnecessary, since a "claim for 'deceptive' business practices under the Consumer Fraud Act does not require proof of intent to deceive." *Siegel v. Shell Oil Co., 480 F. Supp. 2d 1034, 1044 n.5 (N.D. Ill. 2007)*, *aff'd*, *612 F.3d 932*.[13] It is enough to allege that the defendant committed a deceptive or unfair act and intended that the plaintiff rely on that act, and Wigod has done so.

The district court also concluded that Wigod did not identify any "actual pecuniary loss" that she suffered. Because Wigod's reduced trial plan payments were less than the amount she was legally obliged to pay Wells Fargo under the terms of her original loan documents, the court reasoned that Wigod was better off than she would have been without the TPP. This reasoning overlooks Wigod's allegations that she incurred costs **[**65]** and fees, lost other opportunities to save her home, suffered a negative impact to her credit, never received a Modification Agreement, and lost her ability to receive incentive payments during the first five years of the modification. Prior to entering the trial plan, Wigod also could have taken the path of "efficient breach" and defaulted immediately rather than executing the TPP and making trial payments. By the time Wigod realized she would not receive the permanent modification she believed she had been promised, late fees had mounted and she found herself in default on her loan and with fewer options than when the trial period began. Whether any of these alternatives might have saved her home, or at least cut her losses, is impossible to determine from the pleadings. Her allegations are at least plausible. She has alleged pecuniary injury caused by Wells Fargo's deception and successfully pled the elements of an ICFA violation. Accord *Boyd, 787 F. Supp. 2d at 754* (allegations of "damage to [homeowner's] credit" and "the inability 'to fairly negotiate a plan to stay in [his] home'" sufficiently pled economic **[*576]** damages under the ICFA); *In re Bank of America Home Affordable Modification (HAMP) Contract Litigation, No. 10-md-02193-RWZ, 2011 U.S. Dist. LEXIS 72079, 2011 WL*

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[13] Accord *Chow v. Aegis Mortg. Corp., 286 F. Supp. 2d 956, 963 (N.D. Ill. 2003)* ("***HN30***[↑] To satisfy [the ICFA's] intent requirement, plaintiff need not show that defendant intended to deceive **[**64]** the plaintiff, but only that the defendant intended the plaintiff to rely on the (intentionally or unintentionally) deceptive information given."); *Capiccioni v. Brennan Naperville, Inc., 339 Ill. App. 3d 927, 791 N.E.2d 553, 558, 274 Ill. Dec. 461 (Ill. App. 2003)* ("A defendant need not have intended to deceive the plaintiff; innocent misrepresentations or omissions intended to induce the plaintiff's reliance are actionable under [the ICFA]."); *Grove v. Huffman, 262 Ill. App. 3d 531, 634 N.E.2d 1184, 1188, 199 Ill. Dec. 830 (Ill. App. 1994)* ("Courts of this State have consistently held that [the ICFA] applies to innocent misrepresentations."); *Duran v. Leslie Oldsmobile, Inc., 229 Ill. App. 3d 1032, 594 N.E.2d 1355, 1361, 171 Ill. Dec. 835 (Ill. App. 1992)* ("The Consumer Fraud Act eliminated the requirement of *scienter*, and innocent misrepresentations are actionable as statutory fraud.").

2637222, at *5-6 (D. Mass. July 6, 2011) **[**66]** (multi-district litigation) (denying motion to dismiss claims under fourteen states, consumer protection acts, including the ICFA).[14]

III. *Preemption and the "End-Run" Theory*

We have now determined that Wigod has plausibly stated four claims arising under state law: breach of contract, promissory estoppel, fraudulent misrepresentation, and violation of the ICFA. We next examine whether federal law preempts or otherwise displaces them. "***HN31***[] Preemption can take on three different forms: express preemption, field preemption, and conflict preemption." *Aux Sable Liquid Products v. Murphy, 526 F.3d 1028, 1033 (7th Cir. 2008)*. Wells Fargo concedes that Wigod's claims are not expressly preempted, but argues for both field preemption and conflict preemption. Wells Fargo also advances the novel theory that Wigod's claims are displaced because they attempt an "end-run" on the lack of a private right of action under HAMP itself. We reject this "end-run" theory, along with Wells Fargo's formal preemption arguments. Federal law does not displace Wigod's state-law claims.

A. *Field Preemption*

HN32[] In all preemption cases, "we start with the assumption **[**68]** that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (internal quotation marks omitted), quoting *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*. Under the doctrine of field preemption, however, a state law is preempted "if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)* (internal quotation marks omitted), quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)*.

Wells Fargo argues that the Home Owners Loan Act (HOLA) occupies the relevant field. Enacted to provide emergency relief from massive home loan defaults during the Great Depression, HOLA "empowered what is now the Office of Thrift Supervision [OTS] in the Treasury Department to authorize the creation of federal savings and loan associations, to regulate them, and by its regulations to preempt conflicting state law." *In re Ocwen Loan Servicing, LLC Mortg. Servicing [*577] Litigation, 491 F.3d 638, 642 (7th Cir. 2007)*. **[**69]** ***HN33***[] In one of its regulations, OTS announced that it "hereby occupies the entire field of lending regulation for federal savings associations." *12 C.F.R. § 560.2(a)*. In the same section, however, the regulation contains the following saving clause: state tort, contract, and commercial laws are "not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of *paragraph (a)* of this section." *12 C.F.R. § 560.2(c)*. Read together, these provisions mean that state laws that establish licensing, registration, or other requirements specific to financial institutions cannot be applied to national banks, while laws of general applicability survive preemption so long as they do not effectively impose standards that conflict with federal ones. Cf. *Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007)* ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of [federal banking law].") (analyzing preemption under the National Bank Act, which is applied analogously to HOLA).[15]

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[14] In a number of third-generation HAMP cases, district courts have found that plaintiffs successfully pled claims under other states' analogous consumer fraud statutes. *See, e.g.*, *Allen v. CitiMortgage, Inc., No. CCB-10-2740, 2011 U.S. Dist. LEXIS 86077, 2011 WL 3425665, at *10 (D. Md. Aug. 4, 2011)* ("The plaintiffs have alleged that CitiMortgage's misleading letters led to the following damages: damage to Mrs. Allen's credit score, emotional damages, and forgone alternative legal remedies to save their home. Accordingly, at this stage, the plaintiffs have stated sufficiently an actual injury or loss as a result of a prohibited practice under [the Maryland Consumer Protection Act]."); *Stagikas v. Saxon Mortg. Services, Inc., 795 F. Supp. 2d 129, 137 (D. Mass. 2011)* ("The complaint also alleges several injuries resulting from defendant's allegedly deceptive representations about plaintiff's HAMP eligibility, including increased interest on the debt, a negative impact on plaintiff's credit **[**67]** history, and the loss of other economic benefits of the loan modification. That is enough to sustain a claim of injury under [the Massachusetts Consumer Protection Act].") (internal citation omitted).

[15] Regulations, **[**70]** as much as statutes, may have preemptive force. See *Wyeth, 555 U.S. at 576* ("This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements."); *De la Cuesta, 458 U.S. at 153* ("Federal regulations have no less pre-emptive effect than federal statutes.").

Arguing for field preemption, Wells Fargo contends that HOLA and the corresponding OTS regulations displace state common-law suits that effectively impose any standards for the processing and servicing of mortgage loans, whether they conflict with federal policy or not. This argument is directly at odds with the saving clause of *12 C.F.R. § 560.2(c)*, and inconsistent with our decision in *Ocwen*. There we noted that HOLA gave OTS the "exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages." *491 F.3d at 643*. Despite its regulatory authority, however, OTS "has no power to adjudicate disputes between [savings and loan associations] **[**71]** and their customers," and "HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations." *Id*. "Against this background of limited remedial authority," we held that HOLA and the OTS regulations did not preempt suits by "persons harmed by the wrongful acts of savings and loan associations" seeking "basic state common-law-type remedies," and we allowed state-law claims like those in this case — breach of contract, fraud, and violation of consumer protection statutes — to go forward. *Id*. Some federal statutes do receive such wide berths as to displace virtually all state laws in the neighborhood. (The National Labor Relations Act and ERISA are the best examples.) Such laws are "exceptional," though, and HOLA is not one of them. *Id. at 644*. *Ocwen* thus stands for the principle that ***HN34***[↑] HOLA preempts generally applicable state laws only when they "could interfere with federal regulation" — that is, those that actually conflict with the regulatory program. *Id. at 646*. We decline to disturb this holding, which forecloses Wells Fargo's argument for field preemption.

B. *Conflict Preemption*

HN35[↑] The Supreme Court has "found implied conflict pre-emption where" either **[**72]** **[*578]** (1) "it is impossible for a private party to comply with both state and federal requirements," or (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995)* (internal quotation marks omitted). Wells Fargo does not contend that it would be impossible, without violating federal law, for it to comply with the state-law duties Wigod's suit seeks to impose. Instead, it invokes the second species of conflict preemption, which is known as "obstacle" preemption. Wells Fargo says that entertaining Wigod's state-law claims here would undermine the purposes of Congress in two ways: First, it would "substantially interfere with Wells Fargo's ability to service residential mortgage loans" in accordance with HOLA and OTS regulations.[16] Second, it would "frustrate Congressional objectives in enacting [the 2008 Act] . . . to stabilize the economy and provide a program to mitigate 'avoidable' foreclosures."

The first **[**73]** argument for obstacle preemption, like Wells Fargo's theory of field preemption, is inconsistent with *Ocwen*. There we held that the plaintiff-mortgagors' "conventional" state law claims against a federal savings and loan association for breach of contract, fraud, and deceptive business practices complemented rather than conflicted with HOLA:

> Suppose an S & L signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of contract. Or if the mortgagee . . . fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud. . . . Enforcement of state law in either of the mortgage-servicing examples above would complement rather than substitute for the federal regulatory scheme.

Ocwen, 491 F.3d at 643-44. In our attempt to untangle in that case the complaint's "gallimaufry" of alleged **[**74]** "skullduggery," we distinguished claims asserting "conventional" misrepresentation or breach of contract (which were not preempted) from those that would have effectively imposed state-law rules governing mortgage servicing and thereby "interfere[d] with federal regulation of disclosure, fees, and credit terms" (which were preempted). *Id. at 644-46*. Thus a claim under Connecticut's consumer protection statute alleging "exorbitant and usurious mortgages" was preempted, while "straight fraud claims" arising under both state common-law and consumer fraud statutes were not preempted. *Id. at 647* (internal quotation mark omitted).

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[16] In Wells Fargo's brief, this argument appears in the section on field preemption. Because in substance it is an argument for conflict preemption, we address it here.

Wells Fargo appears to concede, as it must in light of *Ocwen*, that HOLA does not preempt Wigod's breach of contract claim or her common-law fraudulent representation claim. Wells Fargo nevertheless maintains that conflict preemption principles bar Wigod's ICFA claims, attempting to distinguish *Ocwen* by arguing that these claims "would necessarily establish new standards for servicers' customer relation policies." The argument is not persuasive. The gist of Wigod's ICFA claims is that **[*579]** Wells Fargo failed to disclose that it was going to reevaluate her eligibility **[**75]** for a permanent modification — contrary to the terms of both her TPP and HAMP program guidelines — and that it deceived her into believing it would modify her mortgage. Allowing these claims to proceed against Wells Fargo would not create state-law duties for servicing home mortgages, let alone ones that "actually conflict" with HOLA "or federal standards promulgated thereunder." See *Geier v. American Honda Motor Co., 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)*. In *Ocwen*, we found that the "straight fraud claims" arising under various state consumer protection statutes were not subject to conflict preemption under HOLA. *491 F.3d at 644-45, 647*. Here, too, Wigod's ICFA claims "sound[ ] like conventional fraud charge[s]," the prosecution of which appears perfectly consistent with federal mortgage rules. *Id. at 645*. HOLA does not preempt them.

Wells Fargo's second conflict preemption theory is that a finding of liability in Wigod's suit would frustrate Congressional objectives in enacting the 2008 Act that authorized HAMP. Wells Fargo argues that claims like Wigod's would generate such friction in three ways: First, they would force servicers to modify mortgages in violation of both Treasury directives and **[**76]** the servicers' contractual obligations to the government. Second, they would invite many uncoordinated lawsuits, exposing servicers to varying standards of conduct. Third, they would discourage servicers from participating in HAMP. The arguments are not persuasive.

The first theory is inapplicable because none of Wigod's claims, at least as she has framed them, would impose on Wells Fargo any duties that go beyond its existing obligations under HAMP. As Wigod puts it, "if Wells Fargo followed the letter of the Program it would not have breached its contracts, acted negligently or fraudulently, or violated the ICFA." The whole thrust of this suit is that Wells Fargo failed to do what it agreed to do and what *HAMP required* it to do. The breach of contract and fraudulent misrepresentation claims allege that the TPP Agreement required Wells Fargo to offer Wigod a modification if she qualified under HAMP — and that she did and it didn't.

One Wells Fargo defense, among others, will be that Wigod was not actually qualified, but that presents a factual dispute that cannot be resolved now. Likewise, the ICFA claim alleges that Wells Fargo failed to disclose that it would not follow HAMP guidelines. **[**77]** Again, it would be a complete defense that Wells Fargo did follow HAMP guidelines as they were incorporated into the terms of Wigod's TPP, but that also presents a factual issue. For each of these claims, the state-law duty allegedly breached is imported from and delimited by federal standards established in HAMP's program guidelines. ***HN36***[↑] Where federal law supplies the standard of care imposed by state law, it is hard to see how they could conflict. See, *e.g.*, *Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)* ("a state cause of action that seeks to enforce a federal requirement 'does not impose a requirement that is different from, or in addition to, requirements under federal law.'") (internal quotation marks omitted), quoting *Lohr, 518 U.S. at 513* (O'Connor, J., concurring in part and dissenting in part); *Lohr, 518 U.S. at 495* (majority opinion) ("Nothing . . . denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."); *Bausch v. Stryker Corp., 630 F.3d 546, 556 (7th Cir. 2010)* (holding that the Food, **[*580]** Drug, and Cosmetic Act did not preempt the plaintiff's tort claims against medical device **[**78]** manufacturer because the state tort duty allegedly breached was parallel to FDA regulations promulgated under the Act; "claims are not . . . preempted by federal law to the extent they are based on defendants' violations of federal law").

For the same reason, we do not foresee any possibility that permitting suits such as Wigod's will expose mortgage servicers to multiple and varied standards of conduct. So long as state laws do not impose substantive duties that go beyond HAMP's requirements, loan servicers need only comply with the federal program to avoid incurring state-law liability. This is not a case in which the federal requirements leave much room for interpretation, but to the extent Wigod's case hinges on construing Treasury directives, they "present questions of law for the court to decide, not questions of fact for a jury to decide." See *Bausch, 630 F.3d at 556*.

As for its contention that the potential exposure to state liability may discourage servicers from participating in HAMP, Wells Fargo may be right. But that is hardly an argument for conflict preemption. ***HN37***[↑] "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth, 555 U.S. at 565*, quoting **[**79]** *Lohr, 518 U.S. at 485*. "Because the

States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Bates, 544 U.S. at 449*, also quoting *Lohr, 518 U.S. at 485*. We can reasonably assume that one purpose of Congress in enacting the 2008 Act was to ensure mortgage servicers participated in the foreclosure mitigation programs it empowered Treasury to set up. But another goal was surely to prevent these banks from hoodwinking borrowers in the process. Nothing in the 2008 Act suggests that Congress saw servicer participation as the Act's paramount purpose that would trump any concerns about whether servicers were actually complying with the program and with their contractual obligations. See *Rodriguez v. United States, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987)* ("no legislation pursues its purposes at all costs"). There is no indication that Congress meant to foreclose suits against servicers for violating state laws that impose obligations parallel to those established in a federal program.

In addition, Treasury's own HAMP directive states that servicers must implement the program in compliance with state common law **[**80]** and statutes. See Supplemental Directive 09-01 ("Each servicer . . . must be aware of, and in full compliance with, all federal state, and local laws (including statutes, regulations, ordinances, administrative rules and orders that have the effect of law, and judicial rulings and opinions). . . ."). This would be an odd provision if Treasury had anticipated that HAMP would preempt state-law claims, especially ones that mirror its own directives. In this context, the agency's own tacit view of its program's lack of preemptive force is entitled to some weight. See *Wyeth, 555 U.S. at 577* (***HN38***[] agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"), quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*; *Geier, 529 U.S. at 883* (placing "some weight" on agency's interpretation of its own regulation's objectives and its conclusion "that a tort suit . . . would **[*581]** 'stand as an obstacle to the accomplishment and execution' of those objectives") (internal citations and quotation marks omitted).

C. **[**81]** *The "End-Run" Theory*

Finally, Wells Fargo insists that Wigod's case cannot go forward because her allegations are "HAMP claims in disguise" and an "impermissible end-run around the lack of a private action in [the 2008 Act] and HAMP." This "end-run" theory was the primary basis on which the district court dismissed Wigod's complaint. That court explained that "'the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent to state a separate state law cause of action.'" *Wigod, 2011 U.S. Dist. LEXIS 7314, 2011 WL 250501, at *4*, quoting *Vida v. One West Bank, F.S.B., No. 10-987-AC, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, at *3-4 (D. Or. Dec. 13, 2010)*. Wells Fargo has developed the same theory before this court, arguing: "If Congress had intended courts to be adjudicating whether a borrower qualified for a loan modification under [the 2008 Act] or HAMP, it would have provided a private right of action — but it chose not to do so."

The end-run theory is built on the novel assumption that where Congress does not create a private right of action for violation of a federal law, no right of action may exist under state law, either. Wells Fargo and the **[**82]** district court appear to have conflated two distinct lines of cases — one involving the existence of a federal private right of action, see *Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979)*, and the other about federal preemption of state law. Wells Fargo invokes *Touche Ross* for the proposition that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." Appellee's Br. at 15, quoting *Touche Ross, 442 U.S. at 572*. If this case involved whether to recognize a federal right of action under HAMP, *Touche Ross* and its progeny would certainly weigh in favor of judicial caution. See *Karahalios v. Nat'l Federation of Federal Employees, Local 1263, 489 U.S. 527, 533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989)* ("It is also an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies [under federal law]."), quoting *Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)*. The issue here, however, is not whether federal law itself provides private remedies, but whether it displaces remedies otherwise available under state law. ***HN39***[] The absence of a private right of action from **[**83]** a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. See, *e.g.*, *Bates, 544 U.S. at 448* ("although [the Federal Insecticide, Fungicide, and Rodenticide Act] does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in [the statute] precludes States from providing such a remedy"). To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead.

To appreciate the novelty of Wells Fargo's argument, consider the many cases in which the Supreme Court has confronted issues of subject matter jurisdiction presented by state common-law claims that incorporate federal standards of conduct, without so much as a peep about whether state law may do so without being preempted. See, *e.g.*, *Grable & Sons Metal Products, Inc. v. Darue Engineering & [*582] Mfg., 545 U.S. 308, 312, 311, 315, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* (quiet title action brought under state law "turn[ed] on substantial question[ ] of federal law" because "the interpretation of **[**84]** the notice statute in the federal tax law" was an "essential element of [plaintiff's] quiet title claim); *Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 805-07, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)* (violation of federal labeling requirements in the Federal Food, Drug, and Cosmetic Act created a rebuttable presumption of negligence and proximate cause under state tort law); *Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 214-15, 54 S. Ct. 402, 78 L. Ed. 755 (1934)* (Kentucky worker's compensation statute provided that employer railroad's violation of Federal Safety Appliance Acts would constitute negligence per se under state law).

Of course, these well-known cases grappled with an issue different from the one before this court: whether the presence of a federal issue in a state-created cause of action gives rise to federal question jurisdiction under *28 U.S.C. § 1331*. In none of these cases has the Supreme Court even suggested that the absence of a private right of action under a federal statute would prevent state law from providing a cause of action based in whole or in part on violations of the federal law. When the issue is whether "arising under" jurisdiction is available, Congressional silence matters a great deal, for our jurisdiction **[**85]** under *§ 1331* is determined by Congress. See *Merrell Dow, 478 U.S. at 812* (stating that it would "undermine . . . congressional intent to . . . exercise federal-question jurisdiction and provide remedies for violations of [a] federal statute" that contains no private right of action, "solely because the violation of the federal statute" is an element of state law claim).

HN40[↑] When the federal court's jurisdiction over state-law claims is based on diversity of citizenship, however, the absence of a private right of action in a federal statute actually weighs *against* preemption. See, *e.g.*, *Wyeth, 555 U.S. at 574* ("Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers."). We realize that Wells Fargo does not style its "end-run" theory as a preemption argument. But in the absence of any other doctrinal foundation for it, we see no other way to classify it. As Judge Hibbler wrote in one of the HAMP cases in which claims under Illinois law survived a motion to dismiss,

> ***HN41***[↑] [There is no] general **[**86]** rule that where a state common law theory provides for liability for conduct that is also violative of federal law, a suit under the state common law is prohibited so long as the federal law does not provide for a private right of action. Indeed, it seems the only justification for such a rule would be federal preemption of state law.

*Fletcher v. OneWest Bank, FSB, 798 F. Supp. 2d 925, 2011 WL 2648606, at *4 (N.D. Ill. 2011)*; see also *Bosque, 762 F. Supp. 2d at 351* ("The fact that a TPP has a relationship to a federal statute and regulations does not require the dismissal of any state-law claims that arise under a TPP."). In short, a state-law claim's incorporation of federal law has never been regarded as disabling, whether the federal law has a private right of action or not. See *Grable & Sons, 545 U.S. at 318-19* ("The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings."), quoting **[*583]** *Restatement (Third) of Torts § 14, Reporters' Note, cmt. a*, p. 195 (Tent. Draft No. 1, Mar. 28, 2001); *Merrell Dow, 478 U.S. at 816* ("violation of the federal standard as an element of state tort recovery did not fundamentally change the **[**87]** state tort nature of the action"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 36, p. 221, n.9 (5th ed. 1984) ("the breach of a federal statute may support a negligence per se claim as a matter of state law").

Wells Fargo has tried to find some support for its end-run theory in two Second Circuit cases involving very different statutes. In *Grochowski v. Phoenix Construction, 318 F.3d 80 (2d Cir. 2003)*, a construction contract between the City of New York and some general contractors required the latter to pay their laborers in accordance with the Davis-Bacon Act (DBA), a federal law that accords no private right of action, at least under Second Circuit precedent.[17] The contractors did not do so, and their laborers sued them under New York common law for breach of contract as third-party beneficiaries. The district court granted the contractors' motion to dismiss. A divided panel of the Second Circuit affirmed, reasoning that "no private right of action exists under" the DBA and that "the plaintiffs' efforts to bring their claims as state common-law claims are clearly an

[17] Compare *Chan v. City of New York, 1 F.3d 96, 103 (2d Cir. 1993)* (holding that DBA confers no private right of action), with *McDaniel v. University of Chicago, 548 F.2d 689, 695 (7th Cir. 1977)* (finding private right of action in the DBA).

impermissible '*end run*' around the DBA." *Id. at 86* (emphasis added). The majority's **[**88]** only elaboration of this theory was the following:

> At bottom, the plaintiffs' state-law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA. To allow a third-party private contract action aimed at enforcing those wage schedules would be "inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute." *Davis v. United Air Lines, Inc., 575 F. Supp. 677, 680 (E.D.N.Y. 1983)*.

Grochowski, 318 F.3d at 86.

Judge Lynch dissented, criticizing the majority's reliance on the "proposition[ ] that the plaintiffs may not make an 'end-run' around the absence of a private right of action" in the DBA.

> That, I respectfully submit, is a slogan, not an argument. And it is an erroneous slogan at that. . . .
>
> . . . The majority fails to cite any actual evidence, in the language or legislative **[**89]** history of the DBA, that Congress intended to prevent state law contract suits based on contractual promises to pay DBA prevailing wages — promises that Congress specifically required to be written into *contracts* that it must have assumed would be enforceable, like any other contracts, under state law. . . .
>
> . . . If New York law provides a right or remedy, any plaintiff has an absolute right to invoke it, unless the New York law is contrary to or pre-empted by federal law. But the majority does not even make a pass at demonstrating that the DBA displaces state contract law, or that New York's willingness to enforce contractual promises to pay the prevailing wage is contrary to, rather than supportive of, the federal policy embodied in the DBA.

Id. at 90-91 (Lynch, J., dissenting in part). We think Judge Lynch has the better of **[*584]** this argument.[18] The end-run theory, as it is described by the majority, bears a striking resemblance to obstacle preemption, with its reference to the state law's "inconsisten[cy] with the underlying purpose of the [federal] regulatory scheme." *Id. at 86*. Yet, as Judge Lynch pointed out, there is no evidence that Congressional intent — the touchstone of any preemption **[**90]** inquiry — was to preempt state

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[18] As it happens, so did the New York Court of Appeals, which unanimously endorsed Judge Lynch's interpretation of New York common law and held that "when a contractor has promised to pay its workers the prevailing wages required by the United States Housing Act, the workers may sue under state law to enforce the promise" as a third-party beneficiary. *Cox v. NAP Construction Co., 10 N.Y.3d 592, 891 N.E.2d 271, 273, 861 N.Y.S.2d 238 (N.Y. 2008)*. The court dismissed the end-run theory in *Grochowski* as "flawed": "We agree with Judge Lynch . . . . To say that Congress, in enacting the DBA, did not intend to create a federal right of action is not to say that Congress intended to prohibit, or preempt, state claims." This raises a further puzzle with respect to the end-run theory. If a state court — or legislature, for that matter — expressly creates a state-law remedy for a violation of a federal law that lacks a private right of action, do federal courts have the authority to abrogate it under the *Supremacy Clause*? If the **[**91]** end-run theory were a species of federal preemption, the answer would clearly be yes. See, *e.g.*, *Rose v. Arkansas State Police, 479 U.S. 1, 3, 107 S. Ct. 334, 93 L. Ed. 2d 183 (1986)* (per curiam) ("There can be no dispute that the *Supremacy Clause* invalidates all state laws that conflict or interfere with an Act of Congress."); *Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824)* ("In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."). But the interplay between the Second Circuit and the New York Court of Appeals in *Grochowsk*i and *Cox* suggests that some other legal principle was at work. The confusion further convinces us that the end-run theory lies in a doctrinal no-man's land, and its adoption would upset a century or two of preemption and arising-under jurisdictional precedents. See, *e.g.*, *Gully v. First National Bank, 299 U.S. 109, 115, 57 S. Ct. 96, 81 L. Ed. 70 (1936)* ("Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."); see also *Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 215, 41 S. Ct. 243, 65 L. Ed. 577 (1921)* (Holmes, J., dissenting) ("The mere adoption by a State law of a United **[**92]** States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this Court again and again.").

law with the DBA. It seems to us that the *Grochowski* end-run theory is really just an "end-run" around well-established preemption doctrine, and we decline to adopt it.[19]

Wells Fargo also cites *Broder v. Cablevision Systems Corp., 418 F.3d 187 (2d Cir. 2005)*, which contains a brief and tepid reference to *Grochowski*. The case involved **[*585]** a cable television provider that extended a discounted rate to certain customers without offering or disclosing it to others — a practice the plaintiff alleged to violate both the federal Consumer Protection and Competition Act (CPCA) and a New York state statute. Neither law, however, provided for a private right of action, so the plaintiff sued for common-law breach of contract and fraud and for deceptive practices under the New York General Business Law. The Second Circuit affirmed the dismissal of the plaintiff's breach of contract claim on the ground that "the contract language . . . unambiguously foreclose[d] his claims." *Broder, 418 F.3d at 197*. **[**94]** The court did not rely on *Grochowski*, but noted that the district court had embraced its end-run theory in an "alternative ground of decision." *Broder, 418 F.3d at 198* (emphasis added). The panel wrote:

> However narrow or broad the proper interpretation of our holding in *Grochowski* may be, that case stands at least for the proposition that a federal court should not strain to find in a contract a state-law right of action for violation of a federal law under which no private right of action exists.

Broder, 418 F.3d at 198. Here, however, we have found that Wigod has alleged a breach of contract claim under the plain language of the TPP agreement, with no "straining" required to reach this conclusion. Thus, even if *Broder* had endorsed *Grochowski's* end-run theory, and even if it had done so in its holding rather than in dicta, it would not apply to Wigod's breach of contract claim.

The end-run theory made a second appearance in *Broder* during the court's discussion of the plaintiff's deceptive practices claims under the New York General Business Law, although the court did not call it that or even cite *Grochowski*. Instead, the court used the term "circumvention," holding that the plaintiff **[**95]** was not allowed to "circumvent the lack of a private right of action for violation of" the CPCA by alleging that non-uniform rates were deceptive under state law. *Id. at 199*. From Congress's omission of a private right of action in the CPCA, the court inferred that it intended to foreclose state remedies as well, and declined to "attribute[ ] to the New York legislature an intent to thwart Congress's intentions." *Id*.

We find that inference difficult to reconcile with cases like *Bates, 544 U.S. at 448*, and *Wyeth, 555 U.S. at 574*, but it matters little since this part of *Broder's* holding is easily distinguishable. *Broder* dealt with a different federal law altogether and expressly confined its holding to apply only to the CPCA. *Broder, 418 F.3d at 199*. Furthermore, Wigod's ICFA claims do not allege that Wells Fargo engaged in unfair or deceptive business practices by violating HAMP guidelines. Rather, she contends that Wells Fargo's misrepresentation and omission of material facts misled her to believe she would receive a permanent modification under HAMP and that it implemented its HAMP compliance procedures in a way designed to thwart borrowers' legitimate expectations. The plaintiff **[**96]** in *Broder*, in contrast, alleged that Cablevision's violation of the CPCA's uniform rate requirement was itself a deceptive practice. In his reply brief to the Second Circuit, he refined his argument along the lines of Wigod's. The court indicated that this "subtler argument" was more passable but declined to consider it because it was waived. *Id. at 202*. Wigod has made this argument all along, and so her ICFA claims are not inconsistent with *Broder*.

IV. *Conclusion*

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[19] To the extent the Supreme Court's citation of *Grochowski in Astra USA, Inc. v. Santa Clara County, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011)*, connotes an endorsement, we think it is limited to the third-party beneficiary context. See *Astra, 131 S. Ct. at 1348* (citing *Grochowski* as holding that "when a government contract confirms a statutory obligation, 'a third-party private contract action [to enforce that obligation] would be inconsistent with . . . the legislative scheme . . . to the same extent as would a cause of action directly under the statute'"). In any third-party beneficiary case, a "nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend." *Id*. In *Astra*, the absence of a private right of action in the federal program was important because it showed that Congress did not intend plaintiffs to be third-party beneficiaries. See *id*. In this case, however, the question is not whether **[**93]** HAMP mortgagors were intended third-party beneficiaries of the federal contracts with servicers but whether Congress intended to preclude them from enforcing contracts to which they themselves were parties. That is a preemption question not addressed in *Astra*, which mentions preemption only once, in a footnote dealing with a tertiary issue on which the Court took no position. *Id. at 1349 n.5*.

We predict that the Illinois courts would find some of Wigod's claims actionable under **[*586]** the laws of their state, and we can find no basis in the law of federal preemption that would bar those claims. The judgment of the district court is therefore Reversed as to Counts I, II, and VII, and the fraudulent misrepresentation claim of Count V, and Affirmed as to Counts IV, VI, and the fraudulent concealment claim of Count V. The case is Remanded for further proceedings on the surviving counts.

Concur by: RIPPLE

Concur

RIPPLE, *Circuit Judge*, concurring. I am very pleased to join the excellent opinion of the court written by Judge Hamilton. I write separately only to note that, in my view, our task of adjudicating this matter would have been assisted **[**97]** significantly if the United States had entered this case as an amicus curiae.

The Emergency Economic Stabilization Act, *P.L. 110-343, 122 Stat. 3765*, and the programs implemented under its authority are of vital importance to the economic health of the Country. Prolonged litigation is hardly a catalyst to the effective administration of these programs. As the opinion for the court details with great care, the program at issue here has been the subject of many cases in the district courts. Efficient and accurate resolution in this court is important to the effective administration of the legislative program and, in that respect, the views of the executive department charged with the administration of the statute undoubtedly would have been of great assistance.

I hasten to add that, in suggesting that the participation of the United States would have been helpful to us, I do not mean to criticize in the least the efforts of counsel for the private parties before us. The perspective brought to a case such as this by the Government is simply different. It is uniquely qualified to express the purpose and the operation of the statute and to represent the public interest.

I also must qualify **[**98]** my view in another respect. From my vantage point, I am not privy, of course, to the myriad of considerations that must govern the allocation of legal resources in a Government whose legal talent is certainly not under-used. Indeed, the demands on those resources are overwhelming. It may well be that the participation of the Government in a case such as this one is simply not possible in the real world of limited resources in which we live.

I note that it is possible for the court to invite the Government's participation as an amicus in cases of such public importance. Indeed, we do so with some regularity. There are, however, costs to proceeding in that manner. The need for such participation often becomes apparent only after there has been significant judicial scrutiny of the case. Such scrutiny is possible, at least in this circuit, only shortly before oral argument. As a practical matter, seeking the participation of the Government at that point in the life of an appellate case inevitably increases, often significantly, the elapsed time before final adjudication.

In this case, this last consideration justifies the decision to proceed without further delay. Prompt resolution of this **[**99]** matter is necessary not only for the good of the litigants but for the good of the Country. As the quality of my colleague's opinion reflects, moreover, there is no reason for further delay. Nevertheless, the salutary practice of the Government's participating in private litigation of public importance must remain alive and well in the tradition of the court.

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Yadegar v Deutsche Bank Natl. Trust Co.

Supreme Court of New York, Appellate Division, Second Department

August 29, 2018, Decided

2016-05931, 2016-05940, 2016-08253

Reporter
164 A.D.3d 945 *; 83 N.Y.S.3d 173 **; 2018 N.Y. App. Div. LEXIS 5884 ***; 2018 NY Slip Op 05957 ****; 2018 WL 4100824

[**1]** Sharona Yadegar, Respondent, v Deutsche Bank National Trust Company, as Trustee for Harborview Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-9, Appellant, et al., Defendant. (Index No. 607556/15)

Core Terms

mortgage, cross motion, statute of limitations, summary judgment, leave to renew, cancel, foreclosure action, defense motion, orders, summary judgment motion, real property, commencement of the action, triable issue of fact, action to foreclose, accelerated, time-barred, foreclose, quotation, six-year, revived, facie, marks

Case Summary

Overview

HOLDINGS: [1]-In a borrower's action pursuant to *RPAPL 1501(4)* to cancel and discharge of record a mortgage, the borrower met her prima facie burden for summary judgment on her complaint by establishing that the lender's commencement of a new foreclosure action would be time-barred by the six-year statute of limitations in *CPLR 213(4)*; [2]-The lender failed to raise a triable issue of fact as to whether the statute of limitations was tolled or revived by the borrower's acknowledgement of the debt pursuant to *General Obligations Law § 17-101* because the borrower's letter seeking authorization for a short sale of the property and other documents did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations; [3]-The letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with her own funds.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures > Defenses

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN1[] **Statute of Limitations, Time Limitations**

Pursuant to *RPAPL 1501(4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession of the subject real property at the time the action to cancel and discharge the mortgage is commenced. An action to foreclose a mortgage is governed by a six-year statute of limitations. *CPLR 213(4)*. 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.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN2[] **Statute of Limitations, Extensions & Revivals**

General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt. 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.

Headnotes/Summary

Headnotes

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Revival of Time-Barred Claim

Motions and Orders—Reargument or Renewal—No Reasonable Justification for Failure to Present Facts on Original Motion

Counsel: [*1]** McGlinchey Stafford, New York, NY (Brian S. McGrath of counsel), for appellant.

Rivkin Radler LLP, Uniondale, NY (David M. Grill, Evan R. Schieber, and Cheryl Korman of counsel), for respondent.

Judges: RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, SYLVIA O. HINDS-RADIX, FRANCESCA E. CONNOLLY, JJ. BALKIN, J.P., AUSTIN, HINDS-RADIX and CONNOLLY, JJ., concur.

Opinion

[173] [*945]**

In an action pursuant to *RPAPL 1501 (4)* to cancel and discharge of record a mortgage, the defendant Deutsche Bank National **[**174]** Trust Company appeals from three orders of the Supreme Court, Nassau County (Julianne T. Capetola, J.), dated April 12, 2016, May 16, 2016, and June 22, 2016. The orders dated April 12, 2016, and May 16, 2016, each granted the plaintiff's motion for summary judgment on the complaint, **[*946]** denied that defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against it, and directed the Nassau County Clerk to cancel and discharge of record the subject mortgage. The order dated June 22, 2016, denied that defendant's motion for leave to renew with respect to the plaintiff's motion and its cross motion.

Ordered that the appeal from the order dated April 12, 2016, is dismissed, as that order was superseded **[***2]** by the order dated May 16, 2016; and it is further,

Ordered that the orders dated May 16, 2016, and June 22, 2016, are affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

In October 2004, the plaintiff obtained a loan from Washington Mutual Bank, FA, which was secured by a mortgage on real property located in Old Westbury. In March 2008, the defendant Deutsche Bank National Trust Company (hereinafter the defendant), as Washington Mutual Bank, FA's assignee, accelerated the debt by commencing an action to foreclose the mortgage (hereinafter the 2008 foreclosure action). In April 2009, the defendant commenced a second action to foreclose the same mortgage (hereinafter the 2009 foreclosure action). The 2008 foreclosure action was discontinued in January 2012, and the 2009 foreclosure action was dismissed as abandoned pursuant to *CPLR 3215* in September 2012.

On November 19, 2015, the plaintiff commenced this action pursuant to *RPAPL 1501 (4)* to cancel and discharge of record the subject mortgage. The plaintiff moved for summary judgment on the complaint, and the defendant cross-moved for summary judgment dismissing the complaint insofar as asserted against it. In orders dated **[***3]** April 12, 2016, and May 16, 2016, the **[****2]** Supreme Court, in both orders, granted the plaintiff's motion for summary judgment, denied the defendant's cross motion, and directed the Nassau County Clerk to cancel and discharge of the record the mortgage.

The defendant moved for leave to renew with respect to the plaintiff's motion and its cross motion. In an order dated June 22, 2016, the Supreme Court denied the defendant's motion for leave to renew.

HN1[↑] Pursuant to *RPAPL 1501 (4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession **[*947]** of the subject real property at the time the action to cancel and discharge the mortgage is commenced (*see RPAPL 1501 [4]*; *Lubonty v U.S. Bank N.A., 159 AD3d 962, 963, 74 NYS3d 279 [2018])*. An action to foreclose a mortgage is governed by a six-year statute of limitations (*see CPLR 213 [4]*; *Lubonty v U.S. Bank N.A., 159 AD3d at 963*). "[E]ven 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" (*Lubonty v U.S. Bank N.A., 159 AD3d at 963* [internal quotation **[***4]** marks omitted]).

Here, the plaintiff met her prima facie burden for summary judgment on her complaint by establishing that the **[**175]** commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (*see U.S. Bank N.A. v Martin, 144 AD3d 891, 891, 41 NYS3d 550 [2016]*; *JBR Constr. Corp. v Staples, 71 AD3d 952, 953, 897 NYS2d 223 [2010])*. Thus, the burden shifted to the defendant to raise a triable issue of fact as to whether the statute of limitations was tolled or revived (*see JBR Constr. Corp. v Staples, 71 AD3d at 953*).

HN2[↑] "*General Obligations Law § 17-101* effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt" (*Lynford v Williams, 34 AD3d 761, 762, 826 NYS2d 335 [2006]*; *see Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d 732, 733, 2 NYS3d 197 [2015])*. 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" (*Sichol v Crocker, 177 AD2d 842, 843, 576 NYS2d 457 [1991]* [internal quotation marks omitted]; *see U.S. Bank N.A. v Martin, 144 AD3d at 892-893*; *Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d at 733*).

Contrary to the defendant's contention, the plaintiff's letter accompanying her request for the defendant to authorize a short sale of the property, and the other documents relied on by the defendant, did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations (*see U.S. Bank, N.A. v Kess, 159 AD3d 767, 768, 71 NYS3d 635 [2018]*; *U.S. Bank N.A. v Martin, 144 AD3d at 892-893*; *Hakim v Peckel Family Ltd. Partnership, 280 AD2d 645, 721 NYS2d 543 [2001]*; *Sichol v Crocker, 177 AD2d at 843*). The plaintiff's letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the plaintiff's **[***5]** own funds (*see Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 520-521, 355 NE2d 369, 387 NYS2d 409 [1976]*; *U.S. Bank, N.A. v Kess, 159 AD3d at 768-769*; *Sichol v Crocker, 177 AD2d at 843*). Thus, the defendant failed to raise a triable issue of fact in opposition to the **[*948]** plaintiff's motion for summary judgment and, with respect to its cross motion, the defendant failed to establish its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it.

We agree with the Supreme Court's denial of the defendant's motion for leave to renew with respect to the plaintiff's motion and its cross motion. The defendant did not provide a reasonable justification for the failure to present the new facts in opposition to the plaintiff's motion and in support of its cross motion (*see CPLR 2221 [e] [3]*; *Flagstar Bank, FSB v Damaro, 145 AD3d 858, 859, 44 NYS3d 128 [2016]*; *Matter of Kopicel v Schnaier, 145 AD3d 599, 599, 42 NYS3d 789 [2016]*; *Cioffi v S.M. Foods, Inc., 142 AD3d 526, 530, 36 NYS3d 664 [2016]*; *Fardin v 61st Woodside Assoc., 125 AD3d 593, 3 NYS3d 101*

[2015]; *Jovanovic v Jovanovic, 96 AD3d 1019, 1020, 947 NYS2d 554 [2012]*; *Rowe v NYCPD, 85 AD3d 1001, 1003, 926 NYS2d 121 [2011]*; *Foley v Roche, 68 AD2d 558, 568, 418 NYS2d 588 [1979])*. In any event, the new evidence submitted by the defendant would not have changed the prior determination (*see Deutsche Bank Natl. Trust Co. v Adrian, 157 AD3d 934, 935, 69 NYS3d 706 [2018]*; *Wells Fargo Bank, N.A. v Eisler, 118 AD3d 982, 983, 988 NYS2d 682 [2014]*; *EMC Mtge. Corp. v Patella, 279 AD2d 604, 720 NYS2d 161 [2001]*). Contrary to the defendant's contention, the court providently exercised its discretion in considering **[**176]** the plaintiff's untimely **[****3]** opposition papers to the defendant's motion for leave to renew (*see CPLR 2004*, *2214*; *Fernandez v City of Yonkers, 139 AD3d 895, 896, 31 NYS3d 595 [2016])*.

Accordingly, we agree with the Supreme Court's determination to grant the plaintiff's motion for summary judgment on the complaint, deny the defendant's cross motion for summary judgment dismissing the complaint **[***6]** insofar as asserted against it, and deny the defendant's motion for leave to renew. Balkin, J.P., Austin, Hinds-Radix and Connolly, JJ., concur.

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