To be Argued by:
BRIAN MCCAFFREY
(Time Requested: 15 Minutes)

APL-2021-00151
Kings County Clerk's Index No. 502866/15
Appellate Division-Second Department Docket No. 2019-00544

Court of Appeals
of the
State of New York

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

Plaintiff-Appellant,

-Against-

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

Defendants-Respondents

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

BRIEF FOR RESPONDENTS

Brian McCaffrey, Attorney at Law, P.C.
Attorneys for Defendant-Appellant
88-18 Sutphin Bvld. (1st Fl.)
Jamaica, N.Y. 11435
Tel: (718) 480-8280
info@mynylawfirm.com

DISCLOSURE STATEMENT

PURSUANT TO COURT OF APPEALS RULE 500.1(f)

Pursuant to Court of Appeals Rules 500.1(f) and 500.22(b)(5), Defendant-Respondents, MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty, states that they are individuals and have the following corporate parents, affiliates, or subsidiaries: None.

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Defendant-Respondents, MAXI JEANTY a/k/a Maxi Jeanty, Jr. ("Maxi Jeanty") and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty ("Sherley Jeanty")

respectfully submits this brief in support of its opposition to Plaintiff-Appellant's appeal from the decision & order of the Appellate Division, Second Department dated November 12, 2020.

This is another case, where an intransigent lender, lured an unsuspecting borrower into executing a Home Affordable Modification Trial Period Plan ("HAMP Agreement"), where the lender never executed the agreement themselves, collected seven payments made thereunder and ultimately refused to permanently modify the borrower's loan. Here, the lender is attempting to take advantage of the HAMP Agreement, that they never executed, as a deceleration of the loan, obfuscating the fact that the HAMP Agreement specifically states that the agreement is not a waiver of acceleration and never went "into effect" because it was never signed by the Appellant. (R. 177)

Indeed, the record shows that the HAMP Agreement was nothing more than a deceptive ruse to meant deny the Respondents the relief that they sought and allow the Appellant's to extract payments from yet another unsuspecting borrower during a foreclosure where the lender had no intent of ever actually granting a final loan modification. Notably, more than a decade later, absolutely nothing in the record explains WHY the lender never modified this loan.

To be clear, Appellant relies on and has provided an exhibit of the HAMP agreement that they never executed (R177), notwithstanding the fact that the Appellant never executed the HAMP Agreement, nothing in the HAMP

Agreement provided for deceleration, and in this case, the foreclosure action continued for nearly 5 years after the HAMP Agreement purportedly decelerated the mortgage.

Appellant alleges that "Under the HAMP Agreement, which is a form document, if a permanent HAMP modification was not ultimately offered to a borrower, the parties agreed, "any payment I make under the Plan shall be applied to the amounts I owe under the Loan Documents and shall not be refunded to me." When this occurred, as it did in this case, the mortgage holder would apply the payments received under the HAMP Agreement to pay the mortgage loan in accordance with its original and unmodified terms, and then proceed with enforcing the unmodified mortgage." (B. 2)[1]

What the Appellant has conveniently excluded and seeks to avoid, is the fact that the HAMP Agreement was conditional, and the conditions imposed by the Appellant itself were not met, for example the HAMP Agreement specifically states at ¶2 of the Agreement that "This Plan will not take effect unless and until both the Lender and I sign it and Lender provides me with a copy of this Plan with the Lender's signature." Respondent respectfully request that this Court take notice that the HAMP Agreement in the Record (**R177**) is not signed by the Appellant, as such, the lender never provided the borrower "with a copy of this Plan with the

[1] B denotes "Brief" and the numeral denotes the page number throughout this document

Lender's signature" and the Plan never took effect. You see, this is yet another case where the Lender held all the cards, never executed the agreement, extracted payments and led the borrower around by the nose in the hopes that the benevolent lender would offer real assistance – Unfortunately, in this case, as well as hundreds of thousands of others, no such assistance ever came.

In the recent *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, decision, this Court discussed "gamesmanship" on the part of lender's and declined to adopt a rule that would allow for gamesmanship – Here, the Appellant who purposefully never executed the HAMP Agreement (**R177**) but took payments under that unexecuted agreement and never permanently modified the loan, seeks to rely on that unexecuted agreement to sidestep the Statute of Limitations – THAT is the definition of "Gamesmanship".

Additionally, as will be outlined further herein, even if this Court were to consider enforcing the unexecuted HAMP Agreement, the plain language of the unexecuted agreement specifically addresses acceleration and makes it clear and unequivocal that nothing in the agreement can be deemed to be a waiver of acceleration. In fact, at ¶2(E) of the unexecuted agreement that Appellant relies on, it states: "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] (**R177**). Here, a clear reading of the Agreement shows that it is impossible and implausible to assert that this unexecuted agreement could have in any way, shape or form, conveyed a clear and unequivocal deceleration of the mortgage.

Here, the Supreme Court evaluated the circumstances and evidence before it and correctly determined that the unexecuted HAMP Agreement and Borrowers' seven payments under the Agreement which was not executed by the Lender, were of no consequence and did not renew the statute of limitations stating: "To constitute a valid acknowledgment, ***a writing must be signed*** and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Yadegar v. Deutsche Bank*, 164 AD3d 945, 947 [2d Dept 2018] [internal quotation marks omitted]). While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it - rather, the signors thereof agreed to make three trial payments. If they did so - and if the lender decided that they qualified - a permanent modification would be offered. Put differently, the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to[2]. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute

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

of limitations was not restarted (see, *U.S. Bank, National Association v. Kess*, 159 AD3d 767, 768 [2d Dept 2018] ; *Sichol v. Crocker*, 177 A.D.2d 842, 843 [3d Dept 1991])." **See** Order Appealed from (R.130)

The Second Department affirmed and reaffirmed upon re-argument and correctly applied this Court's precedent in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976) ("*Lew Morris*"), stating: "Contrary to the plaintiff's contention, Maxi's execution of the HAMP plan, and the trial payments made pursuant thereto, did not constitute an "unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1054, 1056-1057 [internal quotation marks omitted]). Rather, because "[a]ny intention to repay the debt was conditioned on the parties reaching a permanent modification agreement . . . it cannot be said that the writing contained 'nothing inconsistent with an intention on the part of the debtor to pay' the debt" (id. at 1056, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521; see *U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769). Similarly, the trial payments made by Maxi pursuant to the HAMP plan "were made for the purpose of reaching an agreement to modify the terms of the parties' contract, and any promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1057)".

In this case, the fact pattern is substantially similar to *Dorsin*, where the the appellant argued in their brief that the language in the HAMP Agreement stated: "This Plan will not take effect unless and until both I and the Servicer sign it and Servicer provides me with a copy of this Plan with the Servicer's signature." In *Dorsin,* the appellant also argued in their brief, that "although Mr. Dorsin submitted payments in accordance with the schedule set forth in the trial offer, which were accepted by Nationstar's predecessor-in-interest, Mr. Dorsin never received a signed copy of the offer." *Nationstar Mtge., LLC v Dorsin*, 180 AD3d

It should be noted that Appellant seeks to make an unpreserved argument before this Court by introducing for the first time in this action, under its "Questions Presented" "(4) Was the election to accelerate contained in the 2008 foreclosure complaint revoked by the motion to voluntarily discontinue that action?" This argument was not raised in the Appellate Division, as such, raising it before this Court is improper.

The only issue raised by the Appellant regarding the statute of limitations in front of the Appellate Division was Appellant's attempt to utilize the saving provision of CPLR 205(a) as a defense to the Respondents motion to dismiss the time barred filing of the case at bar, in ruling on the arguments before it, the Appellate Division stated: "The plaintiff's alternative contention that it was entitled to the benefit of the six-month saving provision of CPLR 205(a) is without merit. "CPLR 205(a) extends the time to commence an action after the termination

of an earlier related action, where both actions involve the same transaction or occurrence or series of transactions or occurrences" (*Sokoloff v Schor*, 176 AD3d 120, 126). The statute provides for a six-month grace period "where the previous action has been dismissed for any 'other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits'" (*Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 260, quoting CPLR 205[a]). Here, since the 2008 action was terminated by voluntary discontinuance, the instant action cannot benefit from the six-month grace period afforded by CPLR 205(a) (see *Ventures Trust 2013-I-H-R v Chitbahal*, 167 AD3d 682, 683-684; *EB Brands Holdings, Inc. v McGladrey, LLP*, 154 AD3d 646, 647-648; *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768, 768-769; cf. *Censor v Mead Reinsurance Corp*., 176 AD2d 600, 601).

Notwithstanding the fact that Appellant's argument is unpreserved, Appellant has failed to provide any evidence that their unopposed motion to discontinue the 2008 action was ever served upon the Respondents, Pursuant to CPLR § 2211 and as outlined further herein, this is fatal to their claim that their motion to discontinue decelerated the mortgage loan at issue in this case.

Indeed, if this Court is inclined to entertain unpreserved arguments, Respondent, also relying on *Engel*, seeks to obtain a ruling on an issue that this

Court declined to rule on in *Engel.* Namely that the noteholder does not have a contractual right to unilaterally revoke an acceleration.

QUESTIONS PRESENTED

1. Was the Second Department's decision, correct?
2. Can a lender who never executed an agreement rely on that agreement to argue:
    a. That the HAMP Agreement was sufficient to renew the statute of limitations under either GOL 17-101 or GOL 17-105(1)?
    b. That the seven conditional trial plan payments renew the statute of limitations under the common law and GOL 17-107?
3. Is the Appellant's unpreserved voluntary discontinuance argument properly before this Court?
4. Does the noteholder have a contractual right to unilaterally revoke an acceleration, where the plain language of the contract does not provide for it?

STATEMENT OF FACTS

A. The Note and Mortgage and 2008 Foreclosure Action

As alleged by Appellant, On June 20, 2007, Borrowers, Maxi Jeanty and Ingrid Adrien borrowed the principal amount of $384,000.00 to purchase property at 42 Paerdegat 10th Street, Brooklyn, New York 11236, Block 8069, Lot 138 ("Property"). To evidence their debt, Borrowers executed a promissory note ("Note") and to secure their debt, Borrowers mortgaged the Property ("Mortgage") (collectively, the "Mortgage Loan"). The Mortgage was recorded July 16, 2007, in

the Office of the City register of the City of New York as City Register File No. 2007000362095. (R. 22-26; R. 33-61.)

The Mortgage Loan went into default and on August 27, 2008, Fannie Mae's predecessor commenced an action to foreclose the Mortgage under Index No.: 24539/2008 (the "2008 Foreclosure Action"). (R. 238-247; R. 258.) On June 3, 2009, shortly after the 2008 Foreclosure Action was commenced, Borrowers executed a HAMP Agreement which contained a condition that stated "I understand that after I sign and return two copies of this Pan 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. *This Plan will not take effect unless and until both I and the Lender sign it and Leader provides me with a copy of this Plan with the Lenders signature*." [emphasis added] (R. 177) The record shows that the lender never executed the agreement, which is discussed in more detail below. For reasons that do not appear in the record, the HAMP Agreement did not lead to a permanent modification of the Mortgage or resolve the 2008 Foreclosure Action. (R. 177.) One year later, Borrower, Ingrid Adrien filed for bankruptcy on June 17, 2010, and was granted a discharge on October 4, 2010. (R. 83; R. 125; R. 296.) The Property was subsequently transferred for nominal consideration from Borrowers to Defendants-Respondents, Maxi Jeanty and Sherley Jeanty a/k/a Sherley Adrien Jeanty (collectively, "Respondents") by deed dated April 17, 2013. (R. 27-32.)

As outlined above, this case has a long and tortured history spanning more than 13 years, 2 foreclosure actions and 2 attempts to overrule the lower court in front of the Appellate Division. Never once has the Appellant alleged that they decelerated the Borrower's mortgage, because it is clear that they never did and never had any intent to decelerate. Rather, now, the Appellant who kept the 2008 action open for more than 5 years after the HAMP agreement was executed by the Borrowers[3] more than 12 years after the HAMP agreement payments were made, and more than 7 years since the 2008 action was discontinued raises for the very first time since the 2008 Action On December 10, 2014, more than 5 years after the payments were made on the HAMP Agreement, a motion to voluntarily discontinue the 2008 Foreclosure Action was filed. (R. 258; R. 260.) That motion was granted by order dated February 13, 2015. (R. 127-128.)

B. The HAMP Agreement

The Appellant incorrectly states on page 8 of their brief that "during the pendency of the 2008 Foreclosure Action Borrowers entered into the HAMP Agreement, which became effective on May 1, 2009. (R. 177.)" As outlined herein, the Supreme Court appears to have taken notice of the fact that the Lender

[3] Demonstrating clearly that the HAMP agreement, notwithstanding the fact that the lender never executed it, did not decelerate the loan.

never executed the HAMP Agreement by stating in their November 27, 2018 Order Appealed From (R. 5) “"To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (Yadegar v Deutsche Bank, 164 AD3d 945, 947 [2d Dept 2018)”. Appellant’s claim here, is in direct contradiction with the conditions that they themselves incorporated into the HAMP Agreement, because the HAMP Agreement in the record was in fact never executed by the Appellant and the Appellant never provided the Borrowers with a fully executed copy. (R. 177)

Notwithstanding the fact that the HAMP Agreement never went into effect due to the lenders failure to execute it and return it to the Borrowers, the Borrowers made payments during the course of the early part of the 2008 action in the hopes that they would be given a lifeline in the form of a loan modification, unfortunately that lifeline never came and the 2008 action continued for more than 5 additional years until, for reasons never explained to the Borrower or the courts, Appellant moved to discontinue the 2008 action. and HAMP Agreement.

Further, the HAMP Agreement relied on by the Appellant, contained terms and conditions that expressly prevent utilizing it for the purpose of deceleration. At paragraph 2E of the HAMP Agreement it states: “When the Lander accepts and posts o 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 debut under the Loan Documents unless such payments are sufficient to completely cure my default under the Loan Documents;.

Paragraph 2D of the HAMP Agreement states "If prior to the Modification Effective Date, (i) the Lander 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 determine that my representations In Section 1 are no longer true and correct, 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:"

The language in the HAMP Agreement is clear and unambiguous. The HAMP Agreement ensures that the lender can accept the payments without prejudice to its acceleration in foreclosure and that the lender can continue the foreclosure without a challenge by the Borrower on the basis that foreclosure must be discontinued due to deceleration.

The Appellant's attempt to divert this Court's attention from these terms and conditions by pointing to other vague language in the unexecuted HAMP Agreement. Appellant argues that the HAMP Agreement and the payments made

in connection with it somehow served to decelerate the loan – They did not, because they could not as expressly provided in the agreement.

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

Fannie Mae commenced this action on March 12, 2015, to foreclose the Mortgage. (R. 11.) Respondents filed an Answer with Affirmative Defenses on December 19, 2017, alleging, inter alia, the statute of limitations as an affirmative defense. (R. 73-77.)

Fannie Mae moved for summary judgment in April 2018 and Respondents cross-moved for summary judgment dismissing the action as barred by the statute of limitations. (R. 78; R. 208.) In support of its motion and in opposition to the cross-motion, Fannie Mae argued that, inter alia, enforcement of the Mortgage was not barred by the statute of limitations because Borrowers had executed the HAMP Agreement under which they made seven trial payments that were applied against the Mortgage loan balance as they had agreed. (R. 98-102; R. 281-286.) Fannie Mae argued that the statute of limitations was renewed (1) under either GOL 17-101 or GOL 17-105(1) and (2) by part payment of the debt under the common law and GOL 17-107. (R. 98-102; R. 281-286.) It is undisputed that the Borrowers executed the HAMP Agreement and made seven (7) trial payments.

ARGUMENT

I. THE STATUTE OF LIMITATIONS WAS NOT RENEWED BY THE UNEXECUTED HAMP AGREEMENT

The Appellant/Lender fails to inform this Court that the HAMP Agreement that they rely on was never executed by Appellant and as such never went into effect (R. 177). "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" [emphasis added] *Yadegar v. Deutsche Bank*, 164 AD3d 945, 94 7 [2d Dept 2018]. Indeed, in the second Paragraph of the HAMP Agreement it states"

> "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 this offer. This plan will not take effect unless and until both I and the Lender sign it and Lender provides me with a copy of this Plan with the Lender's signature"

There is nothing in the Record that shows that the Lender ever executed the HAMP Agreement or provided the Borrowers with a copy executed by the Lender, as such, by its very language, the HAMP Agreement never went into effect.

The Appellant has avoided explaining why they did not execute the HAMP Agreement. The Supreme Court (Dear, J.S.C.) denied Fannie Mae's motion for summary judgment and granted Respondents' summary judgment motion, dismissing the Complaint finding the foreclosure suit time-barred recognizing that the agreement was not signed and ruling that "The HAMP Trial Period Plan is insufficient to serve as an acknowledgment of the debt pursuant to GOB 17-101. "To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of

the debtor to pay it" (Yadegar v. Deutsche Bank, 164 AD3d 945, 94 7 [2d Dept 2018] [internal quotation marks omitted]). “the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to'. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute of limitations was not restarted (see, *U.S. Bank, National Association v. Kess,* 159 AD3d 767, 768 [2d Dept 2018]; *Sichol v. Crocker*, 177 A.D.2d 842, 843 [3d Dept 1991]). (R. 14)”.

Notwithstanding the fact that the HAMP Agreement never went into effect, Appellant argues in its brief that “No evidence was offered by Respondents to support the finding that Borrowers’ promise was “conditional” and, therefore Supreme Court relied exclusively on the four corners of the HAMP Agreement to reach its conclusion.” The lower court as well as the Appellate Division Second Department both understood that, it is axiomatic that the Respondents made trial payments in the hopes of obtaining a permanent loan modification during the foreclosure settlement conference phase of the 2008 Foreclosure Action.

CPLR § 3408 went into effect on August 5, 2008. CPLR § 3408 requires mandatory settlement conferences in residential foreclosure actions. CPLR § 3408(i) provides that the purpose of these conferences is as follows:

> (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not

limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option;

It is clear that the legislative intent of CPLR § 3408 is to encourage settlement between the parties. Appellant and other lenders and servicers in the mortgage industry participated in the development of HAMP which requires a "trial period" where the borrower demonstrates good faith by making trial payments while the lender/servicer determines whether the borrower qualifies for a loan modification. In light of the enactment of CPLR § 3408, the Respondents and most other borrowers, feel obligated to make the trial payments as part of the settlement conference process to ensure that they do not upset the courts or judges presiding over their case and to curry favor with their lender/servicer in obtaining a loan modification. Thus, it is clear that the borrower's payments and executing of the HAMP Agreement is conditioned on one thing and one thing only, that they ultimately get a loan modification that modifies their mortgage and lowers their monthly payment by changing the interest rate, decreasing the principal balance through forgiveness or deferral and/or changing the maturity date of the loan. Respondents made those three trial payments and were instructed by the Appellants to continue to make those payments until a decision was reached, ultimately after seven (7) trial payments, the Respondents were informed that their loan would not be modified (with no further explanation).

a. A Trial Loan Modification Offer and in Furtherance of Settlement Negotiations Does Not Constitute an Absolute and Unqualified Acknowledgment of the Subject Mortgage Debt Under GOL § 17-107

"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' *U.S. Bank Nat'l Ass'n v. Martin*, 144 A.D. 3d 891, 892–93 (2d Dep't 2016) (quoting *Lew Morris Demolition Co. v. Bd. of Educ. of City of N.Y.*, 40 N.Y.2d 516, 521 (1976)). This reasoning was upheld in *Dorsin, w*here it was argued that: "The Court of Appeals held that a payment made to settle a foreclosure was not sufficient to extend the statute of limitations on a mortgage debt. *Petito v. Piffath*, 85 N.Y.2d 1, 9 (1994). In *Piffath,* this Court held that the settlement payment represented a new obligation, as it was made in exchange for the foreclosing plaintiff's promise to terminate the foreclosure action, not as a "promise to pay the mortgage debt," and therefore did not constitute an acknowledgment of the debt sufficient to satisfy the requirements of GOL § 17-107. *Id*.

b. The HAMP Trial Period Plan Did Not Constitute a Written Acknowledgment of the Subject Mortgage Debt Under GOL § 17-101

Section 17-101 of the GOL 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 other than an action for the recovery of real property. N.Y. G.O.L. § 17-101.

Again, in *Petito v Piffath*, (85 NY2d 1 [1994], rearg denied, 85NY2d 858, cert. denied, 516 US 864 [1995]), a precedent-setting case, this Court held that a settlement agreement, or the payments made thereunder, 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 light of the foregoing, Appellant's arguments regarding the HAMP Agreement (that never went into effect) being sufficient to renew the statute of limitations is a misinterpretation of the law under both GOL 17-101 and 17-105(1)

c. Trial Payment Plans/HAMP Agreements are Unenforceable

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 ("HAMP Agreements" or "TPP") but never received

permanent modifications. In response, many a borrower sought to bring an action to enforce these HAMP Agreements and TPP's. Of course, intransigent Lenders such as the Appellant argued that these agreements are not enforceable. Courts in this State and across the Country agreed and 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. Indeed, a decision that allows an agreement (like the HAMP Agreement) between the parties during settlement conferences, that does not settle the case, would prevent future borrowers from entering into any such agreement and would put borrowers attorney’s in a position of having to advise against entering into settlement

agreements similar to the HAMP Agreement, because they prejudice the client's defenses and interests.

II. APPELANT'S ARGUMENT REGARDING DISCONTINUANCE OF THE 2008 FORECLOSURE IS UNPRESERVED AND IMPROPER

Appellant's contention that their discontinuance of the 2008 Foreclosure Action was a deceleration of the Respondents' loan is made for the first time at the Appellate level in this Court. The argument was not made in on appeal in front of the Appellate Division Second Department. The well-settled rule is that this Court will not consider new arguments, whether of law or fact, or both, where it appears that if they had been raised at the trial an adequate defense might have been adduced by the other party. *Osgood v. Toole*, 60 N. Y. 475; *Persky v. Bank of America Nat. Assn.*, 261 N. Y. 212; Cohen and Karger, Powers of the New York Court of Appeals [1952], § 162. Quite obviously, the assertion of deceleration comes within the above description of arguments that may not be made on appeal for the first time in this court. *Farr v. Newman*, 14 N.Y.2d 183, 188. "Additionally, because the Appellant raises this issue for the first time on appeal, it is unpreserved for our review" (see *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359, 786 N.E.2d 28, 756 N.Y.S.2d 129 [2003]).

As a general matter, appellate courts are reluctant to review legal arguments raised for the first time on appeal. Several policy reasons underlie this rule, such as avoiding unfairness to the other party, giving deference to the lower courts and encouraging the proper administration of justice by demanding an end to litigation and requiring the parties and trial courts to focus the issues before they reach the Court of Appeals (*Bingham v New York City Trans. Auth.*, 99 NY2d 355, 359 [2003]).

The parties do not dispute that under CPLR § 213 (4), a mortgage foreclosure claim is governed by a six-year statute of limitations (see *Lubonty v U.S. Bank N. A.*, 34 NY3d 250, 261, 116 N.Y.S.3d 642, 139 N.E.3d 1222 [2019]).

"The law is well settled that with respect to a mortgage payable in installments. there are 'separate causes of action for each installment accrued. and the Statute of Limitations [begins] to run. on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated. the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476,477 [2d Dept. 1997]). "Generally, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action" (*Bank of N.Y. Mellon v Ahmed*, 181 AD3d 634, 635; see CPLR § 213[4]). "However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of

Limitations begins to run on the entire debt" (*Deutsche Bank Natl. Trust Co. v Gordon*, 179 AD3d 770, 772 [internal quotation marks omitted]; see *Freedom Mtge. Corp. v Engel,* 163 AD3d 631, 632, Iv granted in part 33 NY3d 1039).

Here, a prior action was filed on August 27, 2008 accelerating the debt. The instant action was filed on March 12, 2015, more than six years later. The Appellate Division Second Department held that "the defendants sustained their initial burden of demonstrating, prima facie, that this action is time-barred (see *Deutsche BankNatl. Trust Co. v Gordon*, 179 AD3d at 773; *Bank of N.Y. Mellon v Alli*, 175 AD3d 1472,1473; *Freedom Mtge. Corp. v Engel*, 163 AD3d at 631)." (R. 314).

Once Respondent's sustained their initial burden of establishing that this action was time barred, the burden then shifted to the Appellant to present admissible evidence establishing that the action was timely or to raise a triable issue of fact as to whether the action was timely (see *Bank of N.Y. Mellon v Craig, 169 AD3d at 629; U.S. Bank N.A. v Martin*, 144 AD3d at 892). *Wilmington Trust, N.A. v Dawson*, 174 A.D.3d 673, 675

Here, on Appeal, Appellant made absolutely no argument whatsoever that there was a deceleration of the loan. As such, the Appellant failed to present admissible evidence establishing that the action was timely or to raise a triable issue of fact as to whether the action was timely. Indeed, rather than argue that they had decelerated the loan, Appellant argued that the savings provision of

CPLR § 205(a) applied to this case, and the Appellate Division Second Department roundly rejected that argument by holding “The plaintiffs alternative contention that it was entitled to the benefit of the six-month saving provision of CPLR 205(a) is without merit. "CPLR 205(a) extends the time to commence an action after the termination of an earlier related action, where both actions involve the same transaction or occurrence or series of transactions or occurrences" (*Sokoloffv Schor*,176 AD3d 120, 126). The statute provides for a six-month grace period "where the previous action has been dismissed for any ` other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits "' (*Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 260, quoting CPLR 205[a]). Here, since the 2008 action was terminated by voluntary discontinuance, the instant action cannot benefit from the six-month grace period afforded by CPLR 205(a) (see *Ventures Trust 2013-I-H-R v Chitbahal*,167 AD3d 682,683-684; *EB Brands Holdings, Inc. v McGladrey, LLP*,154 AD3d 646, 647-648; *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768, 768-769; cf. *Censor v Mead Reinsurance Corp*., 176 AD2d 600, 601). (R. 315)

In the case at bar, Appellant failed to raise the issue of discontinuance in front of the Appellate Division, as such the argument is unpreserved and should not be reviewed by this Court.

III. APPELLANTS ARGUMENT REGARDING DISCONTINUANCE IS A RUSE ESPECIALLY WHEN WEIGHED AGAINST THEIR OBVIOUS INTENT

In the case at bar, it is clear from the record that Appellant never decelerated the Respondents' loan and never had any intent to decelerate the Respondent's loan. Nowhere in the record is there any evidence that the Appellant ever claimed that they had decelerated the loan. Indeed, Appellant who now argues that the unexecuted HAMP Agreement decelerated the loan, did not discontinue the 2008 action for more than 5 years after the HAMP Agreement trial payments that they rely on for deceleration took place. Notwithstanding the fact that the HAMP Agreement was never executed by Appellant and never went into effect, it is obvious to any reasonable person that Appellant had no intention of decelerating the loan based on the HAMP Agreement and payments made thereunder.

IV. THE MOTION AND RESULTANT ORDER DISCONTINUING THE ACTION CAME AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED

Notwithstanding the fact that this argument is unpreserved, the Appellant argues that their Motion to Discontinue the 2008 Action decelerated the mortgage loan at issue in this case. Appellant has mistakenly utilized the date that the Motion was filed rather than the date that the Motion was served or the Order discontinuing the action was entered.

Here, Appellant charted its own course by choosing to file a motion to discontinue rather than filing a notice of discontinuance or stipulation to discontinue the action which would have been effective as of the date of filing.

According to the Record, there are several dates in the 2008 Action that are pertinent to this argument as follows:

1. Summons & Complaint dated August 27, 2008 (R. 11)
2. Borrower, Ingrid Adrien's bankruptcy from June 17, 2010 to October 4, 2010 – Tolling SOL for 109 days to December 14, 2014 (R. 125)
3. Appellant Moved to Discontinue on December 10, 2014, choosing December 30, 2014 as the return date for said motion (R. 127)
4. Evidence of Appellant's service of the motion upon Respondent. (Nothing in the Record)
5. Supreme Court, Hon. David I. Schmidt, issues Order Granting Appellant's motion to discontinue the 2008 Action on February 13, 2015. (R. 127)
6. To Date the Order Discontinuing the 2008 Action has never been filed with a Notice of Entry. (Nothing in the Record)

For purposes of calculating the above time periods a motion is made when it is served and any resultant order becomes effective upon its entry, as opposed to when it is signed.

CPLR § 2211 provides that A motion is an application for an order. A *motion on notice is made when a notice of the motion or an order to show cause is served*. (*Foley v Fitzpatrick Container Co.*, 267 AD2d 637, 699 N.Y.S.2d 598 [3d Dept. 1999]; *Cespedes v City of New York*, 172 AD2d 640, 568 N.Y.S.2d 440 [2d Dept. 1991]). *Cramer v Saratoga County Maplewood Manor*, 2016 N.Y. Misc. LEXIS 5054, *8;

This law is well settled. Motion under CPA § 1524 (§§ 2505, 8501(a), 8502, 8503 herein) for security for costs was held made when it was served. *Kleinman v Metropolitan Life Ins. Co.*, 298 N.Y. 217, 81 N.E.2d 818, 298 N.Y. (N.Y.S.) 217, 1948 N.Y. LEXIS 799 (N.Y. 1948). Motion for deficiency judgment under former CPA § 1083-a was held "made" when "notice thereof" was "duly served" and not when it was returnable. *Bushwick Sav. Bank v Sohmer*, 28 N.Y.S.2d 339, 176 Misc. 617, 1941 N.Y. Misc. LEXIS 1897 (N.Y. Sup. Ct. 1941). A motion is made by service of process and not by its mere issuance. *In re Walker*, 50 N.Y.S.2d 277, 1944 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1944). Motion under RCP 106 (Rule 3211 herein) was made when notice of motion was served. *Wickowski v Montgomery Ward Co.*, 82 N.Y.S.2d 127, 1948 N.Y. Misc. LEXIS 3035 (N.Y. Sup. Ct. 1948).

In the case at bar, the Appellant does not allege to having ever served their Motion to Discontinue the 2008 action and there is nothing in the Record to evidence when or if the Motion was ever served upon the Respondents. Here the

Record shows that the Motion was made on December 10, 2014 and the Statute of limitations expired on December 14, 2014. The Motion had a return date of December 30, 2014. The Motion was unopposed and on February 13, 2015 the Order discontinuing the 2008 Action was issued and no Notice of Entry was ever filed. (R. 127 and R. 258)

In light of the fact that Appellant has not met its burden of proving service of the Motion, the Appellant has not establish their Motion was served before the Statute of Limitations was filed. As such, the 2015 Action was in fact time barred.

V. THE CONTRACTUAL RIGHTS OF THE PARTIES

Appellant argued that "From time immemorial, acceleration has been recognized as a creature of contract. Indeed, case law thoroughly establishes that the terms of a contract, in this case the note and mortgage, control a determination on the issue of acceleration" (R. 287). The Appellate Division Second Department rejected that argument and held that "Plaintiff's argument that there is no acceleration until judgment has been explicitly rejected by the Appellate Division (see. *Milone v US Bank Natl. Assn*., - NY Slip Op 05760 12d Dept" (R. 287)

In light of Appellant's attempt to raise for the first time on the Appellate level, that their voluntary discontinuance was a deceleration of the mortgage, Respondents respectfully request that if this Court is going to allow that unpreserved argument, Respondents be permitted to argue in opposition the fact

that the mortgage contract does not provide the lender with the unilateral right to revoke its acceleration. This issue is one that needs to be resolved.

In the *Engel* case, the Hon. Rowan D. Wilson concurred and wrote "We have not decided whether the notes and mortgages at issue here permit a lender to revoke an acceleration." *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1, 36. The Hon. Jenny Rivera dissented in *Engel* and wrote "As Judge Wilson notes, only the borrower in Freedom Mortgage has challenged the revocation on the ground that the noteholder does not have a contractual right to unilaterally revoke an acceleration (concurring op at 2). I agree with my colleague that because the borrower raises this challenge for the first time on appeal, it is unpreserved for our review (see *Bingham v New York City Tr. Auth*., 99 NY2d 355, 359, 786 N.E.2d 28, 756 N.Y.S.2d 129 [2003]). Depending on whether and when we resolve that question, the rule adopted by the majority in these appeals may stand without further consideration, or be affirmed, modified, or discarded in the future. *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1, 37 [20l8].

This Court has held that "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole (see *Greenfield v Philles Records*, 98 NY2d 562, 569, 780 NE2d 166, 750 NYS2d 565 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163, 566 NE2d 639, 565 NYS2d 440 [1990]). "The words and phrases used by

the parties must, as in all cases involving contract interpretation, be given their plain meaning" (*Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534, 663 NE2d 635, 640 NYS2d 479 [1996]; see *Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 564, 992 NYS2d 687, 16 N.E.3d 1165 [2014]; *J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 119, 980 NE2d 940, 957 NYS2d 275 [2012]). *Ellington v EMI Music, Inc*., 24 N.Y.3d 239, 244 (N.Y. October 23, 2014)

"An agreement is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield*, 98 NY2d at 569, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 385 NE2d 1280, 413 NYS2d 352 [1978]). Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent (see *Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534, 663 NE2d 635, 640 NYS2d 479 [1996]), or when specific language is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 486 NE2d 827, 495 NYS2d 969 [1985]; see *Chimart Assoc. v Paul*, 66 NY2d 570, 573, 489 NE2d 231, 498 NYS2d 344 [1986]). "The best evidence of what parties to a written agreement intend is what they say in their writing . . . a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its

terms" (*Greenfield,* 98 NY2d at 569 [citation and internal quotation marks omitted]). *Ellington v EMI Music, Inc*., 24 N.Y.3d 239, 244-245 (N.Y. October 23, 2014)

Whether a foreclosure claim is timely cannot be ascertained without an understanding of the parties' respective rights and obligations under the operative contracts: the note and the mortgage. The noteholder's ability to foreclose on the property securing the debt depends on the language in these documents (see *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581, 69 N.Y.S.3d 520, 92 N.E.3d 743 [2017]; *W.W.W. Assocs. v Giancontieri*, 77 N.Y.2d 157, 162-163, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990]). *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1, 20

Our rules governing contract interpretation—the principle that agreements should be enforced pursuant to their clear terms—similarly promotes stability and predictability according to the expectations of the parties (see 159 *MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 358, 104 N.Y.S.3d 1, 128 N.E.3d 128 [2019]). *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1, 20

For over a century, residential mortgage contracts have typically provided noteholders the right to accelerate the maturity date of the loan upon the borrower's default, thereby demanding immediate repayment of the entire outstanding debt (see e.g., *Odell v Hoyt*, 73 NY 343, 345 [1878]). In these cases, the mortgages provide that the noteholder "may" require immediate payment of the outstanding

debt—i.e., accelerate the maturity of the loan—upon the borrower's default 2Link to the text of the note. It is plain from this language that whether to exercise this contractual right is a matter within the noteholder's discretion—the noteholder is not obliged to accelerate the loan upon a default (*Adler v Berkowitz*, 254 NY 433, 436, 173 N.E. 574 [1930]). *Freedom Mtge. Corp. v Engel*, 37 N.Y.3d 1, 20

The Mortgage at issue in this action (R. 39) contains the following language pertaining to acceleration:

"PLAIN LANGUAGE SECURITY INSTRUMENT: This Security Instrument contains promises and agreements that are used in real property security instruments all over the country. It also contains other promises and agreements that vary in different parts of the country. My promises and agreements are stated in "plain language." (R. 45)

NON- UNIFORM COVENANTS

I also promise and agree with Lender as follows:

22. Lender's Rights If Borrower Fails to Keep Promises and Agreements. Except as provided in Section 18 of this Security Instrument, if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument Lender may do this without making any further demand for payment. This requirement is called " Immediate Payment in Full." If Lender requires Immediate Payment in Full, Lender may bring a

lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale Lender or another Person may acquire the Property. This is known as " Foreclosure and Sale." In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured.

Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met:

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

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

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

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

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

(4) That if 1 do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;

(5) That if 1 meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and

(6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that 1 may have; and

(c) 1 do not correct the default stated in the notice from Lender by the date stated in that notice." (R. 55 and R. 56)

Notably, nothing in the "Plain Language" of the Mortgage contract provides the lender with the contractual right to decelerate once they have accelerated by calling all amounts due. Rather, that right is specifically addressed and provided to the Borrower and only the Borrower by meeting certain conditions (none of which include a voluntary discontinuance of a foreclosure action). The "Plain Language" of the contract provides that only the Borrower can decelerate the loan at paragraph 22(5) wherein it states: "That if I [borrower] meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this

Security Instrument remain fully effective as if Immediate Payment in Full had never been required;" (R. 56)

Thus, the principle that agreements should be enforced pursuant to their clear terms requires this Court to read the "Plain Language" of the Mortgage contract. It is obvious that nowhere in the Mortgage contract does the Lender have the right to decelerate once they have called the loan due. Here, the lender unequivocally called the loan due at paragraph FIFTH of the complaint in the 2008 Action by stating: "That the Defendant(s) INGRID ADRIEN, MAXI JR. JEANfY A/]UA MAXI JEANTY, JR.. so named, has/have failed to comply with the conditions of the mortgage and note by failing to pay principal and interest and/or taxes, assessments, water rates, insurance premiums, escrow and/or other charges that came due and payable on the 1st day of March, 2008 as more fully set forth below. *Accordingly, Plaintiff elects to call due the entire amount secured by the mortgage*. [emphasis added]. (R. 239)

Here, Respondents respectfully request that this Court finally address the issue of the party's rights to deceleration as outlined by the "plain language" of the contract pursuant to the principle that agreements should be enforced pursuant to their clear terms and in so doing, find that the lender has no right to decelerate once they have called the loan due without an agreement between the parties that would satisfy the conditions outlined in paragraph 22 of the mortgage in this case.

VI. CONCLUSION

For the reasons set forth above, the Second Department's November 12, 2020 decision and order should be affirmed.

Dated: February 28, 2022

Respectfully Submitted,

BRIAN MCCAFFREY ATTORNEY AT LAW, P.C.

Brian McCaffrey, Esq.
Attorneys for Plaintiff-Appellant
88-18 Sutphin Blvd.
Jamaica, NY 11435
Tel (718) 480-8280
Fax: (718) 480-8279

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.l(j) that the foregoing brief was prepared on a computer using [name of word processing system].

Type. A proportionally spaced typeface was used, as follows:

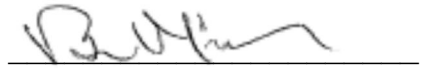
Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 9,237 words.

Dated: New York, New York
February 28, 2022

Respectfully Submitted,

BRIAN MCCAFFREY ATTORNEY AT LAW, P.C.



Brian McCaffrey, Esq.
Attorneys for Plaintiff-Appellant
88-18 Sutphin Blvd.
Jamaica, NY 11435
Tel (718) 480-8280
Fax: (718) 480-8279