*To be Argued by:*
ANTHONY R. FILOSA
*(Time Requested: 20 Minutes)*

APL-2019-00114
Orange County Clerk's Index No. 1139/15

# Court of Appeals

*of the*

# State of New York

FREEDOM MORTGAGE CORPORATION,

*Plaintiff-Appellant,*

– against –

HERSCHEL ENGEL,

*Defendant-Respondent,*

– and –

BOARD OF MANAGERS OF THE
FOREST WAY CONDOMINIUM and CITIBANK N.A.,

*Defendants.*

## BRIEF FOR DEFENDANT-RESPONDENT

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## STATUS OF RELATED LITIGATION

Pursuant to Court of Appeals Rules 500.13(a), **Herschel Engel** states that he is unaware of any litigation related to this appeal.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page**

## PRELIMINARY STATEMENT

A stipulation of discontinuance which is silent on the statute of limitations or does not contain the borrower's acknowledgement of the debt and express promise to pay the same cannot waive or extend the statute of limitations or postpone the date from which a cause of action accrues. A lender may not unilaterally impose an extension, postponement or waiver of the statute of limitations upon the borrower by implication or subtlety. The Appellate Division correctly determined that a stipulation which is silent on a lender's revocation of its election to accelerate a debt and does not state that the borrower may resume making monthly payments is insufficient as a matter of law to revoke the accrual of the statute of limitations. Any argument to the contrary is simply a pretext to avoid the statute of limitations. If a lender intends to decelerate a debt, it can and should include explicit language to that effect in a stipulation of discontinuance. Such a rule avoids gamesmanship by lenders concerning the statute of limitations and allows the borrower to govern its affairs accordingly by either not agreeing to the stipulation or resuming making monthly payments to mitigate any detriment to the borrower.

Lenders' practice of "decelerating" mortgage loans (or claiming to do so without clear and objective evidence) to remedy defects in their mortgage foreclosure actions (and evade the statute of limitations) has had insidious effects on

the homeowners and courts of this State. This case presents the Court with the opportunity to affirm a principal which the public policy and statutory and decisional law of this State holds sacred: statutes of limitation further the societal interest of giving repose to human affairs and, thus, individual parties may not unilaterally modify or extend the statute of limitations at their whim.

Lenders in this State have taken to "decelerating" loans — often once these lenders are confronted with the dismissal of an existing foreclosure action and the imminent expiration of the statute of limitations. By "decelerating" the debt (or claiming to do so), these lenders purport to "hit the reset button" on the statute of limitations for an action to foreclose the mortgage. The so-called right to "decelerate" a loan and the alleged consequential effect of resetting or tolling the statute of limitations is enjoyed by no other litigant, and finds no support in the uniform loan documents utilized here, the decisions of this Court or the statutory law of this State.

Judicial condonation of this practice of deceleration has led to an endless cycle of foreclosure actions, some of which have spanned over a decade. Lenders discover some defect with that action and "decelerate" the loan (and allegedly reset the statute of limitations) by moving to voluntarily discontinue the action or stipulating to discontinue the action without articulating the supposed “deceleration” or by a letter to the borrower.

These lenders then commence a successive foreclosure action. Meanwhile, default interest continues to accrue (eroding any equity in the home) and the borrower's right to have the lender accept monthly installment payments is terminated. The homeowners of this State are stuck in a confusing legal purgatory, wondering whether (or when) they may lose their homes or even what the status of their obligations are under the terms of the loan instruments provided by the lender with little to no input from the borrower.

The already overburdened courts of this State are saddled with repeat foreclosure actions and are expected to simply accept that the lender decelerated without even a semblance of objective evidence demonstrating the same. The legislative policies of avoiding litigation over stale claims, increasing the pace with which legal actions are adjudicated and decreasing the number of foreclosures are disregarded, all because lenders do not diligently prosecute their claims within the already generous six-year statute of limitations prescribed by the legislature.

This case is emblematic of the havoc wrought upon the homeowners and courts of this State by the endless cycle of lenders commencing foreclosure actions, discontinuing the foreclosure action when confronted with the threat of an adverse disposition and the imminent expiration of the statute of limitations, and the commencement of a successive foreclosure actions based upon the same default.

Here, Plaintiff-Appellant Freedom Mortgage Corporation ("Freedom Mortgage" or “Lender”) commenced a foreclosure action in July 2008 based upon an alleged March 2008 payment default. When the borrower, Defendant-Respondent Herschel Engel ("Engel" or “Borrower”), moved to dismiss that foreclosure action for lack of personal jurisdiction, Freedom Mortgage and Engel executed a stipulation to discontinue the foreclosure action in 2013. The 2013 stipulation was silent as to any waiver, extension or modification of the statute of limitations. The stipulation contained no language whereby the lender revoked its election to accelerate the debt or agreed to resume accepting monthly payments.

In 2015, i.e., over six (6) years after the accrual of an action to foreclose the mortgage, Freedom Mortgage commenced a second foreclosure action against Engel alleging the same March 2008 payment default which was the basis of the first foreclosure action and seeking interest from the same date. Freedom Mortgage alleges that, while the 2013 stipulation made no reference to any waiver or extension of the statute of limitations or any revocation of the lender's election to accelerate the debt, the 2013 stipulation reset the six-year statute of limitations by operation of law. The record compels the conclusion this purely pretextual argument was raised to avoid the bar of the statute of limitations.

Freedom Mortgage's position is not supported by the loan documents, is contradicted by the statutory and decisional law of this State and is contrary to

public policy. A stipulation which discontinues an action is a contract governed by the principles of contract interpretation. Since the 2013 stipulation was silent as to a waiver or extension of the statute of limitations, a court cannot imply any such term into the stipulation under the guise of interpreting the contract. A plaintiff may discontinue an action for a myriad of reasons. That an action is discontinued sheds no light on the plaintiff's reasons for discontinuing an action. The loan documents contain no provision by which the lender may *decelerate* the debt and purportedly extend or reset the statute of limitations. Basic canons of contract law such as the doctrines of *expressio unius exclusio alterius* and *contra proferentem* preclude the claim of the existence of a right to decelerate. A borrower should not be required to resort to supposition as to what his rights are under the loan documents or to extrapolate the intentions of the lender without clear and objective evidence demonstrating the same.

Nor may the Court imply a right to *decelerate* the debt (and, an agreement to waive or extend the statute of limitations) in the loan documents. Parties may not prospectively agree, before the accrual of any liability, to *extend* the statute of limitations, and a contractual right of "deceleration", as interpreted by lenders, would have just that prohibited effect: resetting (and, thus, waiving and extending) the statute of limitations *before* a foreclosure claim has accrued.

Nor could the 2013 stipulation decelerate the debt or extend or modify the statute of limitations. Once a claim to foreclose a mortgage accrues, an agreement to waive or extend the statute of limitations is effective only if the agreement complies with General Obligations Law §17-105. The 2013 stipulation contains no express agreement to waive or extend the statute of limitations and, thus, does not comply with General Obligations Law §17-105. Nor could any letter by Freedom Mortgage to Engel where it threatened to accelerate the debt anew or demanded immediate payment in full extend, waive or postpone the statute of limitations under General Obligations Law §17-105, given that amongst other deficiencies, this letter was not signed by Engel and contained no express agreement to waive or extend the statute of limitations.

The flaw in Freedom Mortgage's logic is that it presupposes that a lender may decelerate a debt. However, under the doctrine of election of remedies, an election to accelerate a loan, once made, is irrevocable. But even if a lender possessed the right to decelerate a debt, it does not follow that the act of deceleration has the effect of unilaterally waiving or extending the statute of limitations, or postponing the date from which the period of limitation is to be computed. Under CPLR 201, once a cause of action accrues, it must be commenced within the statute of limitations, unless a different time is "prescribed by law" or a *shorter time* is prescribed by written agreement. A lender's unilateral act in decelerating a debt is

neither "prescribed by law" nor imposes a *shorter* statute of limitations by agreement. Lenders should be held to the same standard as all other litigants of this State; after all, a tort plaintiff cannot unilaterally extend the statute of limitations by stipulating to discontinue its action without prejudice or advising the defendant in writing it need not pay damages within the limitations period. The precedent of this Court and the public policy of this State confirm that the statute of limitations is not some plaything which one party can unilaterally manipulate.

For these reasons, the Order of the Appellate Division should be affirmed insofar as it denied summary judgment to Freedom Mortgage and dismissed the action as barred by the statute of limitations.

## QUESTIONS PRESENTED

1. Whether a lender has the right to “decelerate” a debt where the loan documents do not afford the lender an express right to revoke its election to demand immediate payment in full of the amounts alleged to be due.

2. Assuming a lender may decelerate a debt, does the lender’s deceleration reset or toll the statute of limitations of a claim for the entire mortgage debt?

3. Does a stipulation of discontinuance which is silent on the revocation of the lender’s election to accelerate, does not otherwise indicate that the lender would accept installment payments from the borrower and makes no

reference the statute of limitations, reset the state of limitations for an action to foreclose the mortgage?

## STATEMENT OF FACTS

### A. The 2005 Note and Mortgage.

In May 2005, Engel executed a Promissory Note in favor of the alleged predecessor-in-interest of Freedom Mortgage. (A. 21 at ¶3; A. 27 at ¶3). The Note was secured by a mortgage (the "Mortgage"). (A. 62-83). Freedom Mortgage cannot locate the May 2005 Promissory Note. (A. 52-54).

In July 2005, Engel executed a Consolidation, Extension and Modification Agreement ("CEMA") (A. 84-93) and an Amended Promissory Note. (A. 56-58) (the "Note"). Paragraph 6(C) of the Note permits the Lender, upon the Borrower's default, to demand all amounts due under the Note, advancing the Note's maturity date, should the borrower fail to cure its payment default upon the expiration of a thirty (30) day written notice. (A. 57 at ¶6(C)). Paragraph "22" of the Mortgage permits the Lender to demand immediate payment in full of the outstanding principal and interest (i.e., accelerate) under the Note before its stated maturity date (A. 77-78, ¶22). Paragraph "19" of the Mortgage provides the *Borrower* with the right to decelerate the loan by paying the arrears to reinstate the installment nature of the Note after the Lender has accelerated the loan. (A. 76 at ¶19).

In sum, the Note and Mortgage provide a contractual right: (a) for the *Lender* to demand payment in full upon a payment default by the borrower which remains uncured following service of a written notice of default; and (b) for the *Borrower* to reinstate the installment nature of the Note after the lender has exercised its right to acceleration. (A. 57 at ¶6(C); 76 at ¶19; 77-78 at ¶22).

Neither the Note nor the Mortgage contain any provision reinstating the installment nature of the Note if, after acceleration, a foreclosure action is discontinued. (A. 56-58; 63-93). Neither the Note nor the Mortgage contain any provision which permits the *Lender* to revoke its election to accelerate the Note. (A. 56-58; 63-93).

**B. The 2008 Foreclosure Action.**

Freedom Mortgage contends that Engel failed to make the installment payment of principal and interest which came due on March 1, 2008. On July 15, 2008, Freedom Mortgage, through its attorneys, executed a Summons and Verified Complaint ("2008 Verified Complaint") for a foreclosure action which it commenced on July 16, 2008 against Engel in the Supreme Court, Orange County ("2008 Foreclosure Action"). (A. 33-41; A. 32 at ¶4).

In the 2008 Verified Complaint, Freedom Mortgage alleged that Engel defaulted in the March 1, 2008 payment and each payment due thereafter. (A. 37 at ¶9). Freedom Mortgage further alleged that Freedom Mortgage "*has duly elected*

*and does hereby elect* to declare the entire balance of the principal sum secured [by the Note] . . . to become immediately due and payable". (A. 37 at ¶10 (Emphasis added)). Finally, Freedom Mortgage alleged in the 2008 Verified Complaint it "shall not be deemed to have waived, altered, released or changed the election. . . until the costs and disbursements of this action, and all present and future defaults under the Note and Mortgage and occurring prior to the discontinuance of this action are fully paid". (A. 37-38 at ¶16).

In May 2012, Engel moved via Order to Show Cause to dismiss the 2008 Verified Complaint for lack of personal jurisdiction. (A. 42, fourth "whereas" recital). On July 10, 2012, the Supreme Court issued an order directing a traverse hearing to determine whether personal jurisdiction was acquired over Engel. (A. 129-130).

### C. The 2013 Stipulation Which Discontinued the 2008 Foreclosure Action.

Before a traverse hearing could be held, Freedom Mortgage and Engel (through counsel) executed a Stipulation which discontinued the 2008 Foreclosure Action without prejudice on January 23, 2013 ("2013 Stipulation"). (A. 42-43). The 2013 Stipulation made no reference to the statute of limitations, contained no language purporting to revoke the Lender's election to require immediate payment in full and did not state that Freedom Mortgage would accept monthly installment payments from Engel. (A. 42-43). The 2013 Stipulation did not refer to the Note or

Mortgage, contained no express promise by Engel to pay any amount alleged to be due under the Note and contained no acknowledgement by Engel of the debt alleged to be due by Freedom Mortgage. (A. 42-43).

**D. The 2015 Foreclosure Action.**

In a letter dated May 16, 2013, non-party LoanCare demanded that Engel reinstate the loan by making payments which it alleged came due between March 2008 and May 2013. (R. 207). In a letter addressed to Engel dated August 7, 2013, an attorney for Freedom Mortgage alleged that Engel was in default under the Note and Mortgage. (A. 135-138). The letter did not permit Engel to make monthly payments; rather Freedom Mortgage demanded immediate payment in full. (A. 135-138). On February 13, 2015, Freedom Mortgage, through its counsel, executed a Summons and Verified Complaint ("2015 Verified Complaint") for a foreclosure action which Freedom Mortgage commenced before the Orange County Supreme Court against Engel ("2015 Foreclosure Action"). (A. 18-26). The 2015 Foreclosure Action was commenced on February 19, 2015. (A. 48 at ¶8).

The 2015 Verified Complaint alleges the same March 1, 2008 payment default by Engel which supported the 2008 Foreclosure Action. (A. 22 at ¶13). The 2015 Verified Complaint further alleges that Freedom Mortgage has elected and does hereby elect to declare the entire balance due. (A. 22 at ¶14). In the 2015 Verified Complaint, Freedom Mortgage did not allege that it had revoked its 2008

election to demand immediate payment in full, nor did it refer to the 2013 Stipulation. (A. 21-26).

Engel answered the 2015 Verified Complaint and asserted an affirmative defense of, *inter alia*, the expiration of the statute of limitations. (A. 27-29). In June 2015, Engel moved for summary judgment to dismiss the 2015 Foreclosure Action as barred by the statute of limitations. (A. 30-31). Engel argued that a claim for foreclosure for the entire principal and outstanding interest alleged to be due under the Note accrued on July 16, 2008 when Freedom Mortgage commenced the 2008 Foreclosure Action. (A. 32 at ¶7). Thus, Freedom Mortgage's commencement of the 2015 Foreclosure Action on February 19, 2015 was barred by the six (6) year statute of limitations. (A. 32). Freedom Mortgage cross-moved for summary judgment. (A. 44-45).

By Order dated November 12, 2015, the Supreme Court, Orange County denied Engel's motion and granted Freedom Mortgage's cross-motion for summary judgment. (A. 2-17). The Supreme Court held that "the language of the January 2013 Stipulation evinced an affirmative act on the part of the plaintiff to vacate the prior acceleration". (A. 14).

### E. The Order of the Appellate Division Dismissing the 2015 Foreclosure Action as Barred by the Statute of Limitations.

On appeal, the order of the Supreme Court was reversed. (A. 226-228). Instead, the Appellate Division granted Engel's motion and denied Freedom Mortgage's cross-motion for summary judgment, finding that the action was barred by the six-year statute of limitations. (A. 227-228). The Appellate Division reasoned that Freedom Mortgage's execution of the 2013 Stipulation "did not, in itself, constitute an affirmative act to revoke its election to accelerate since, *inter alia*, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant" (A. 228).

## ARGUMENT

## POINT I

## FREEDOM MORTGAGE HAS NO CONTRACTUAL OR STATUTORY RIGHT TO DECELERATE THE MORTGAGE WITHOUT THE CONSENT OF ENGEL, WHICH IS ABSENT HERE

### A. Interpreting the Loan Documents to Permit the Lender to Decelerate the Debt Violates Several Canons of Contractual Interpretation.

Freedom Mortgage’s argument that the 2013 Stipulation decelerated the Mortgage and reset the statute of limitations as a matter of law rests upon the

flawed premises that a lender can decelerate a debt and, thus, unilaterally restart the statute of limitations on a foreclosure action. Yet, support for this supposed "right" to decelerate and, thus, evade the statute of limitations is absent.

The Mortgage expressly provides that the Lender may *accelerate* the debt. Neither the Mortgage nor the Note explicitly provide the Lender the right to *decelerate* the debt. Under the doctrine of "*inclusio unius est exclusio alterius*" (the inclusion of one is the exclusion of another), the omission of an express right for the lender to *decelerate* must be deemed "intentional and unambiguous". *Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 396 (1998); see *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assoc*., 63 N.Y.2d 396, 404 (1984).

This interpretation of the Note and Mortgage is buttressed by paragraph "19" of the Mortgage, which provides the *Borrower* with the right to decelerate the debt upon the satisfaction of specified conditions. (A. 76 at ¶19); see *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 39 (2d Dept. 2019) ("[Paragraph 19 of the Mortgage] effectively gives the *borrower* the contractual *option* to de-accelerate the mortgage when certain conditions are met") (Emphasis added). Freedom Mortgage contends that it may unilaterally compel Engel to exercise his right to reinstate the Mortgage under paragraph 19—a right not afforded to Freedom Mortgage under the Mortgage. Yet, paragraph 16(c) of the Mortgage provides "the word 'may' gives *sole discretion* without any obligation to take any action". (A. 75

at 16(c)) (Emphasis added). An optional clause in a mortgage has no effect until the party who holds the option elects to exercise it. See *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 39 (2d Dept. 2019).

Thus, where it was intended that a party may *decelerate* the debt, the parties explicitly included language to that effect in the loan documents. A court may not imply a right of the *Lender* to decelerate the debt under these circumstances. See *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 603-604 (1981) (rejecting invitation to imply term in agreement where "language to give it effect was readily available had it been the intention of the parties to include this added stipulation"); *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978) ("Courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include").

When certain language is omitted from a provision in a contract but placed in other provisions, it must be assumed that the omission was intentional. See *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233-234 (1986) (holding insurance policy which explicitly stated named insured had to submit to examination under oath but did not state that mortgagee had to submit to examination could not be interpreted to include the omitted requirement for examination under oath of the mortgage). This is especially true "where a sophisticated drafter [here, the Lender] omits a term". *Quadrant Structured Products Co., Ltd. v. Vertin*, 23 N.Y.3d 549,

560 (2014). Under those circumstances, "*expressio unius* precludes the court from implying [the omitted term] from the general language of the agreement". *Quadrant Structured Products Co*., 23 N.Y.3d at 560.

In *Albertina Realty Co. v. Rosbro Realty Corp.,* 258 N.Y. 472 (1932), this Court recognized that had the parties so desired to prescribe what the lender had to do to accelerate the loan, the parties could have explicitly stated so in the mortgage contract. See *id* at 475-746. Had the parties here desired to afford the *Lender* the right to decelerate the loan, they could have provided so in the loan documents. That they did not must be deemed purposeful.

The modern residential mortgage is emblematic of a "contract of adhesion" – the loan documents are on forms promulgated by the lender, and are presented to borrowers with unequal bargaining power on a "take it or leave it" basis. See *Pacheco v Heussler*, 56 A.D.2d 85, 90 (4th Dept. 1977). Under the doctrine of "*contra proferentem*" (interpretation against the drafter), any ambiguities in the Note and Mortgage—and Engel submits there are none—should be construed against the Lender, who drafted and presented the documents to Engel. See *151 W. Assoc. v Printsiples Fabric Corp.*, 61 N.Y.2d 732, 734 (1984).

## B. Interpreting a Contractual Right in the Loan Documents for the Lender to Decelerate the Debt and, thus, Waive or Extend the Statute of Limitations Violates Public Policy.

Freedom Mortgage argues that paragraph "12(b)" of the Mortgage affords the Lender the right to unilaterally decelerate the debt and, thus, extend or waive the statute of limitations. Paragraph "12(b)" of the Mortgage simply provides "even if Lender does not exercise or enforce any right of Lender under the security instrument or applicable law, Lender will still have all of those rights and may exercise and enforce them in the future". (A. 74 at ¶12(b)). No such sweeping right to decelerate the debt and, thus, unilaterally waive or extend the statute of limitations may be gleaned from this boilerplate "no waiver" provision. Paragraph "12(b)" is silent as to the statute of limitations and makes no reference to deceleration or the Lender's revocation of its prior election to demand immediate payment in full of the Note. Thus, a court may not imply or infer these terms into paragraph "12(b)" under the guise of contractual interpretation, especially where, as we have seen, the loan documents in other instances contains express language which permits the *Borrower* to decelerate the debt. Rather, the only objectively reasonable interpretation of paragraph "12(b)", given the plain language used by the parties, is that of a standard "no waiver" provision typically found in commercial contracts; that is, should, the lender fail to exercise a right, that failure would not preclude the lender from

exercising that right. It in no way confer any rights upon the lender to accelerate and then decelerate the debt *ad infinitum*.

Likewise, paragraph "6(D)" of the Note — upon which Freedom Mortgage also relies for its so-called right to decelerate — is nothing more than a typical "no waiver" provision which essentially provides that Freedom Mortgage may accelerate the debt upon a default even if it failed to accelerate the debt upon an earlier default.(A. 57 at ¶6(D)). Nor can a right to decelerate the debt be inferred from language in the Mortgage which permits Freedom Mortgage to delay or change the amount of "Periodic Payments" under the Note (A. 74 at ¶12(a)) since "Periodic Payments" refers to *monthly installment payments* payable under the Note, not the entire sum due. (A. 64 at ¶P).

A borrower's presumed waiver of such a fundamental protection as that of statute of limitations "should not be lightly presumed" and must be based on "a clear manifestation of intent to relinquish a . . . protection". *Fundamental Portfolio Advisers, Inc. v. Tocqueville Asset Mgt. L.P.*, 7 N.Y.3d 96, 104 (2006). Neither the Mortgage nor the Note contain an express waiver by the Borrower of any rights under the statute of limitations. Thus, a court may not imply a term in the Mortgage or Note which imposes upon the borrower of an unknown and nonconsensual waiver of the protections of the statute of limitations.

Even if paragraph "12(b)" of the Mortgage conferred a right upon the lender to decelerate the debt, it does not follow that it (or any other provision of the loan documents) conferred a right to extend or waive the statute of limitations, or delay the date from which the statute of limitations for a claim to foreclose the Mortgage would be computed. The statute of limitations is not only a personal defense but also "expresses a societal interest or public policy of giving repose to human affairs". *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551 (1979) ("*Kassner*"). "The public policy represented by the statute of limitations becomes pertinent where the contract not to plead the statute *is in form or effect a contract to extend the period as provided by statute or to postpone the time from which the period of limitations is to be computed*." *Deutsch Bank Natl. Trust Co. v. Flagstar Capital Mkts.*, 32 N.Y.3d 139, 152 (2018) ("*Flagstar*"), *quoting Kassner*, 46 N.Y.2d at 551 (1979). (Emphasis added).

Parties to a contract may not agree before the accrual of any liability to extend or waive the statute of limitations or to postpone the time from which the period of limitation is to be computed. See *Kassner*, 46 N.Y.2d at 551 ("If the agreement to 'waive' or extend the Statute of Limitations is made at the inception of liability, it is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative"). Interpreting paragraph "12(b)" of the Mortgage (or any other provision of the loan documents) to permit

the Lender to decelerate the debt falls squarely within the prohibition of *Kassner*: an agreement to waive, extend or postpone the period from which the statute of limitations is to be computed before a claim accrues. See *Flagstar*, 32 N.Y.3d at 152 (holding "accrual clause" in commercial agreement which purported to delay the accrual of a breach of contract claim before the claim accrued was unenforceable as against public policy). "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). However, upon the purported deceleration of the mortgage debt, Freedom Mortgage contends that the statute of limitations for a foreclosure action has been reset. This postpones the date from which the statute of limitations for a foreclosure claim is to be computed, violating New York public policy as stated in *Kassner*.

### C. The "Right" to Decelerate is Founded upon Century-Old Dicta.

Freedom Mortgage cites to *Kilpatrick v. Germania Life Ins. Co.*, 183 N.Y. 163 (1905) as support for the proposition that a court may imply in the loan documents a lender's right to *decelerate* from an optional *acceleration* clause in the loan documents. However, *Kilpatrick* reveals this proposition was not even necessary to the decision, and, thus, the Court's statement relied upon by subsequent courts was mere dicta without value as precedent.

In *Kilpatrick*, the plaintiff sued to recover a $1,000.00 premium payment which it claimed was extracted in exchange for a release of a mortgage lien on the premises. The issue was identified by the Court:

> The sole question presented is whether the payment of this bonus of $1,000.00 was, under the circumstances, voluntary or extracted when the plaintiff was under duress.

*Kilpatrick*, 183 N.Y. at 168.

Whether a right to decelerate the loan could be found in the text of the mortgage or note or could be properly inferred from the mortgage and note, was not addressed anywhere in the decision. Rather, the "right" of deceleration was posited as a "given" without comment or analysis.

This "given" was not a dispositive factor in the Court's decision. Rather, the Court found that the lender was equitably estopped from revoking its election to accelerate the mortgage. The Court never addressed whether the right to decelerate was agreed to in the mortgage or the note or whether such a right could be lawfully implied in the documents. This discussion was unnecessary given the Court's holding that the lender was estopped from decelerating the debt. The Court did not address or decide the issues of contract law and public policy that would permit deceleration to waive or extend the statute of limitations or to postpone the date from which a foreclosure claim is to be computed. Nor did the Court analyze

the concept on a purely practical level and discuss the limitations or implications of the same.

### D. "Deceleration" Fosters Uncertainty as to When Payments are Due and When a Claim Accrues.

We ponder what impact deceleration has on past monthly payments never due as monthly installment payments because of the election to accelerate the maturity date of the loan? According to existing law "once the mortgage debt was accelerated, the borrowers' right and obligation to make monthly installments ceased and all sums became immediately due and payable" *Fed. Nat. Mortg. Ass'n v Mebane*, 208 A.D.2d 892, 894 (2d Dept. 1994); see *Albertina Realty Co.*, 258 N.Y. at 476 (1932). If a lender declares all future installment payments due on April 1, 2008, and then revokes that declaration in 2012, then presumably, the borrower is no longer in default of the obligations that, under the contract, were due in the interim. By decelerating, the lender could not retroactively make those interim debts due on the monthly dates that passed after April 1, 2008 since the individual installment payments were already due on April 1, 2008, and it would be unfair to say that the borrower is in default of, say, 48 due dates that accrued in the years since. Upon deceleration, *when* are those interim installment payments due? Determining the due date is a critical question for statute of limitations purposes. Freedom Mortgage contends that by decelerating, it can reimpose the monthly installment obligations retroactively, and thereafter declare the borrower in default

for missing an installment payment it admittedly had no obligation to make at the time and re-accelerate based on the same retroactive default.

### E. A "Right" to Decelerate Violates the Election of Remedies Doctrine.

Implying a right to decelerate from the loan document inclusion of an express right for the lender to accelerate the debt cannot be reconciled with a doctrine of election of remedies. Under the doctrine of election of remedies, where a party may elect between two inconsistent remedies, a party's election of one such remedy is irrevocable:

> [W]here a man has an option to choose one or other of two inconsistent things, when once he has made his election, it cannot be retracted. It is final and cannot be altered . . . When once there has been an election to do one of the two things, you cannot retract it and do the other thing. The election once made in finally made.

*Fowler v. Bowery Sav. Bank*, 113 N.Y. 450, 456 (1889).

Under the Note and Mortgage, Freedom Mortgage could elect to sue solely for the missed monthly installment or Freedom Mortgage had the right to demand immediate payment in full. The two remedies are inconsistent. The former remedy – suing solely on the missed monthly payment – maintains the installment nature of the loan documents and preserves Engel's right to repay the debt in monthly installments over 30 years. The later remedy accelerates the entire principal

and interest balance before the stated maturity date in the Note. Since the two remedies are inconsistent, the election to pursue one over the other is irrevocable. See *Dinsmore v. Duncan*, 57 N.Y. 573, 580 (1874) (holding indorsement by the holder of negotiable government bonds, which by their terms were convertible into non-negotiable bonds, manifested holder's election to convert, and thus was an irrevocable election which rendered them non-negotiable).

By accelerating the mortgage, Freedom Mortgage secured to itself an advantage – the right to immediately recover the entire principal and interest due under the Note before its stated maturity date. This right is to the detriment of Engel, who but for this right, had the privilege of repaying the debt in monthly installment over a term of thirty (30) years. Having elected its remedy, and thus secured to itself an advantage over Engel, Freedom Mortgage may not revoke this election.

*Kilpatrick* held that the lender could not revoke its acceleration because the borrower would be prejudiced. *Kilpatrick*, 183 N.Y. at 168. It did not state that prejudicial reliance by the borrower (equitable estoppel) was the *sole basis* to restrict a lender's right to revoke its election, merely that equitable estoppel is *sufficient*. *Id.* A reading of *Kilpatrick* which restricts a lender's right to revoke its acceleration unduly limits the doctrine of election of remedies, which provides that an election between two inconsistent remedies is irrevocable. See *Fowler*, 113 N.Y. at 456.

"The election of remedies is largely a rule of policy to prevent vexatious litigation." *Clark v. Kirby,* 243 N.Y. 295, 303 (1926). Allowing the right of "deceleration" grants a lender the power to use the borrower as a litigation "yo-yo", pulling the borrower into and out of litigation at the lender's whim and denying the borrower the protection of the statute of limitations. "A court will endeavor to give the [contract] construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other… Language in contracts placing one party at the mercy of the other is not favored by the courts." *Metropolitan Life Ins. Co. v. Noble Lowndes Intl.*, 84 N.Y.2d 430, 438 (1994). A lender must not, after having chosen a limitations period by its affirmative act, be allowed to manipulate the limitations period at its sole whim. A "deceleration" unilaterally imposed upon the borrower without the borrower's agreement serves no purposes other than for the lender to attempt to evade the statute of limitations. There is no "right" in favor of a Freedom Mortgage to decelerate the debt.[1]

[1] To the extent Freedom Mortgage asserts that this argument was not preserved for appellate review, Engel notes that "[a] question of law which could not have been obviated by an evidentiary showing at the court below may be raised for the first time on appeal". *People v Rodriguez y Paz*, 58 N.Y.2d 327, 336-37 (1983), citing *Telaro v Telaro*, 25 N.Y.2d 433 (1969) ("[T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court') (internal citations omitted). The question of whether a right to decelerate exists is purely a

## POINT II

## THE 2013 STIPULATION DID NOT DECELERATE THE DEBT AND DID NOT WAIVE, EXTEND OR POSTPONE THE ACCRUAL OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION

Assuming that a lender may decelerate the debt, the 2013 Stipulation, standing alone – which was silent on deceleration or Freedom Mortgage's revocation of its election to demand immediate payment in full – as a matter of law, did not decelerate the debt or extend the statute of limitations.

### A. The 2013 Stipulation did not Comply with General Obligations Law §17-105, the Exclusive Means Prescribed by the Legislature for Post-Accrual Agreements to Waive, Extend or Modify the Foreclosure Statute of Limitations.

An action to foreclose a mortgage is governed by a six (6) year statute of limitations under CPLR 213(4). See CPLR 213(4). The ability of parties to waive or modify the statute of limitations even after a claim has accrued is severely circumscribed due to the combined private and public interests implicated by the statute of limitations. See *Kassner*, 46 N.Y.2d at 551. General Obligations Law §17-

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question of law, as it requires an interpretation of the unambiguous language of the loan documents. See *Universal Am. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 N.Y.3d 675, 680 (2015) (holding interpretation of unambiguous contract provisions is a question of law for the court). Moreover, questions concerning statutory interpretation or issues of grave public policy are exempt from the preservation requirement. See footnotes 3 and 4, *infra*, at pages 38 and 56.

105 specifies the conditions which must be met for an agreement to waive, modify or extend the state of limitations for a foreclosure action to be effective:

> Promises and waivers affecting the time limited for action to foreclose a mortgage.
>
> 1. A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made *after the accrual* of *a right of action* to foreclose the mortgage and made, either with or without consideration, *by the express terms of a writing signed by the party to be charged* is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run *from the date of the waiver or promise*. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.
>
> ***
>
> 4. Except as provided in subdivision five, no acknowledgement, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose a mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

General Obligations Law §17-105 (emphasis added).

Thus, an agreement made after the accrual of a right of action to foreclose a mortgage to waive, modify or extend the statute of limitations or to postpone the date from which the state of limitations is to be computed, must contain "express terms" to that effect and must be signed by the party to be charged. General

Obligations Law §17-105(1). And such agreement is effective only to make the time limited for commencement run from the date of the waiver or promise. *Id.*

The 2013 Stipulation did not comply with General Obligations Law §17-105(1). It is silent as to the statute of limitations and contains no express terms under which Engel agreed to waive the defense of statute of limitations, modify the otherwise applicable six (6) year statute of limitations or to postpone the date from which the statute of limitations would be computed.[2] See *Petito v. Piffath*, 85 N.Y.2d 1, 8-9 (1994) (holding stipulation settling a mortgage foreclosure action which 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 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). The 2013 Stipulation was not signed "by the party to be charged" (Engel). General Obligations Law §17-105(1); *Bergenfeld v. Midas Collections Inc.*, 38 A.D.2d 939, 939-940 (2d Dept. 1972); *cf.* General Obligations Law §§17-103(1), (4) (authorizing agreement to extend statute of limitations for contract actions (excluding foreclosure claims) to be signed by "the promisor *or his agent*"). (Emphasis added). Except for

[2] For these same reasons and for the additional reason that the Note and Mortgage executed *before* the accrual of any cause of action to foreclose the mortgage, the Note and Mortgage cannot be interpreted to contain an agreement to waive, extend or modify the statute of limitations in compliance with General Obligations Law §17-105.

limited exceptions which are not applicable here (see General Obligations Law §17-105(5), General Obligations Law §17-105(1) prescribes the *exclusive* method by which parties may validly agree to waive, modify or extend the foreclosure statute of limitations after a foreclosure claim has accrued. See General Obligations Law §17-105(4).

Similarly, General Obligations 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". General Obligations Law §17-101. Here, the 2013 Stipulation contains no such express written acknowledgment by Engel of the alleged mortgage debt or any promise by Engel to pay the alleged mortgage debt. See *Petito v. Piffath*, 85 N.Y.2d 1, 9 (holding stipulation settling a mortgage foreclosure action which contain neither an express acknowledgment of the mortgage or its indebtedness nor an express promise to pay the mortgage debt *per se*, did not satisfy General Obligations Law §17-101).

Interpreting the 2013 Stipulation or boilerplate stipulations of discontinuance which do not comply with the General Obligations Law to affect the statute of limitations would render the statutes meaningless. Such an outcome is to be avoided. See *National Energy Marketers Association v. New York State Public*

*Service Commission*, 33 N.Y.3d 336, 348 (2019). [3] "[A] more general statute [here CPLR §3217 which does not reference any waiver or extension of the foreclosure statute of limitations] will not repeal a more specific one [here General Obligations Law §17-105(1), which explicitly addresses a waiver or extension of the foreclosure statute of limitations] unless there be patent inconsistency and the two cannot stand together, so that the Legislature is clearly shown to have intended such a result". *Cimo v. State*, 306 N.Y. 143, 149 (1953).

### B. The 2013 Stipulation was Silent as to Deceleration or the Statute of Limitations and an Agreement to Extend the Statute of Limitations Cannot be Implied Under the Guise of Contract Interpretation.

Even if this Court were to dispense with General Obligations Law §17-105(1) or General Obligations Law §17-101, the 2013 Stipulation here – and boilerplate stipulations of discontinuance in general – would still fail to waive, extend or reset the statute of limitations or to decelerate the debt. Stipulations which settle or discontinue litigation are contracts subject to principles of contract

[3] To the extent Freedom Mortgage argues that Engel did not preserve his arguments under General Obligations Law §17-105 or §17-101 for appellate review, this Court may address a question, even though not presented below, which is solely one of statutory interpretation. See *Richardson v Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 250 (1986) (holding argument raised for the first time in the Court of Appeals that workers' compensation claimant is excluded from benefits if engaged in illegal activity at time of accident raised solely a question of statutory interpretation, and thus could be addressed even though it was not presented below). Moreover, pure questions of law or issues which concern grave public policy are exempt from the preservation requirement. See footnotes 1 and 4, infra, at pages 33 and 56.

interpretation. See *Brad H. v. City of New York*, 17 N.Y.3d 180, 185 (2011); *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 444 (1928). "Courts may not, by construction, add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting a writing." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). Thus, the Appellate Division here was correct in concluding that a stipulation which is silent as to whether the mortgagee was revoking its election to accelerate the entire balance due, or whether the mortgagee would resume accepting monthly installment payments, is ineffective to decelerate the debt or to reset a statute of limitations.

A lender must provide notice of its election to decelerate to the borrower which is "clear and unambiguous". *Milone v. U.S. Bank, N.A.*, 164 A.D.3d 145, 153 (2d Dept. 2018). Where the law requires notice or a manifestation of intention that is "clear, explicit and unequivocal", such notice or manifestation of intention "must not depend on implication or subtlety". *Matter of Waldron*, 61 N.Y.2d 181, 183-184 (1984) ("The agreement [to arbitrate] must be clear, explicit and unequivocal and must not depend upon implication or subtlety"); see *Harrington v. Davitt*, 220 N.Y. 162, 166-167 (1917) (holding subsequent promise of a bankruptcy debtor to repay a discharged indebtedness must be clear and unequivocal, expressed and not implied). The 2013 Stipulation and Stipulations of Discontinuance in general which merely track the language of CPLR 3217(a)(2) are

not "clear and unequivocal" notice of a lender's election to decelerate the debt, given their silence on the lender's revocation of its election to accelerate the debt. A plaintiff may discontinue an action for a variety of reasons unrelated to a desire to decelerate the debt. That an action is discontinued does not decelerate the debt where the stipulation does not expressly state as such. If Freedom Mortgage intended to decelerate the loan and waive, extend or postpone the statute of limitations, explicit language to that effect could have been included in the 2013 Stipulation. The predicament which Freedom Mortgage finds itself in is self-created.

The law is not unsettled regarding the effect of a stipulation of discontinuance upon the statute of limitations for a foreclosure claim and there is no "split" between the First and Second Departments. Both the First and Second Departments hold that a mere discontinuance of a prior foreclosure action, without more, is insufficient as a matter of law to constitute an affirmative act to revoke a lender's election to accelerate. See *Wells Fargo Bank, N.A. v. Liburd*, - - - A.D.3d - - -, 2019 N.Y. Slip Op. 07323 (1st Dept. Oct. 10, 2019) ("[A] mere discontinuance of a prior foreclosure action, without more, is insufficient to constitute an affirmative act to revoke a lender's election to accelerate"); *HSBC Bank, N.A. v. Vaswani*, 174 A.D.3d 514, 515 (2d Dept. 2019) ("The plaintiff's contention that it affirmatively revoked its election to accelerate the debt by voluntarily discontinuing the prior action, without more, is without merit").

Freedom Mortgage argues that the Borrower and the Court should draw inferences from its actions to conclude that it intended to revoke the prior acceleration. The mere discontinuance of an action does not demonstrate or provide any form of notice to the unsophisticated borrower of his reinstated right to make installment payments, to his clear detriment. Had Freedom Mortgage conveyed its intention to restore the loan to installment status, Engel may have been able to make installment payments, mitigating his financial burden. Such ambiguity should not be condoned to the detriment of Engel. Under these circumstances, Freedom Mortgage's argument that the 2013 Stipulation decelerated the debt is a mere pretext to avoid the statute of limitations.

The May 16, 2013 and August 7, 2013 letters addressed to Engel could not and did not decelerate the debt or reset the statute of limitations. These letters were insufficient to create an issue of fact and are properly disregarded by the Court. The 2013 Stipulation is the governing document. Agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract. See *Marin v Constitution Realty, LLC*, 28 N.Y.3d 666, 673 (2017). When the terms of the contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract and not from extrinsic materials. See *Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 N.Y.3d 173, 176 (2008). An ambiguity does not arise from

mere silence or an omission in a contract. See *Nissho Iwai Europe PLC v Korea First Bank*, 99 N.Y.2d 115, 121-122 (2002); *Reiss v Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001). That the 2013 Stipulation is silent as to revocation of acceleration or the statute of limitations does not create an ambiguity in the agreement. Nor may a party rely upon extrinsic evidence to *create* an ambiguity in an agreement. See *Kass v Kass*, 91 N.Y.2d 554, 568 (1998). Freedom Mortgage's self-serving summary judgment affidavit as to the supposed effect of the 2013 Stipulation should also be disregarded, as extrinsic and parol evidence cannot be considered unless it is determined that the agreement itself is ambiguous. See *Consedine v Portville Cent. School Dist.*, 12 N.Y.3d 286, 293 (2009). Since the 2013 Stipulation was unambiguous, its interpretation was purely a question of law for the court without resort to extrinsic or parol evidence. The inquiry ends with the 2013 Stipulation.

Even were these letters properly considered, once a claim for foreclosure accrues, a waiver or extension of the statute of limitations may be accomplished only by an express written agreement signed by the party to be charged (Engel) with the waiver or extension of the statute of limitations. See General Obligations Law §17-105(1). A waiver or extension of the statute of limitations may not be unilaterally imposed upon a party by another. Nor do the letters even advise that Engel may make installment payments and clearly stated that Engel could not

make installment payments, demanding full reinstatement (in the May letter), and immediate payment in full (in the August letter), respectively. There is no proof in the record that the May 2013 letter from non-party LoanCare was accompanied by any proof of authority (standing) of LoanCare to allegedly decelerate the debt. See *Milone*, 164 A.D.3d at 155 (2d Dept. 2018). The demand for reinstatement in the May, 2013 letter is not a "clear and unambiguous" statement to Engel that Freedom Mortgage revoked its election to accelerate the debt. *Milone*, 164 A.D.3d at 153 (2d Dept. 2018). Under the Mortgage, a reinstatement of the loan *presupposes* that Freedom Mortgage has demanded "Immediate Payment in Full" (accelerated the debt) and is a means for Engel to *decelerate* the debt. (A. 75 at ¶19); see generally *Dieuddone*, 171 A.D.3d at 40 (holding borrower's right to reinstate loan under paragraph 19 of mortgage not a condition precedent to the lender's acceleration of the debt).

The August 7, 2013 letter simply states the Engel is "has failed to comply with" the Note and Mortgage and that the lender "has elected to accelerate" the loan (A. 137). These statements cannot constitute a revocation as a matter of law, since they are both *consistent* with the sworn statements in the 2008 Verified Complaint that Engel was in default of the Note and Mortgage and that Freedom Mortgage has elected to accelerate the loan. The letters do not state that Freedom Mortgage had *revoked* any election.

Under the rule stated by the Appellate Division, Freedom Mortgage could have decelerated the loan simply by stating "We revoke our election to accelerate the loan. You may resume making monthly installment payments, which we will accept". That it did not and now asks the Court and Engel to cobble together a deceleration from a stipulation and letters which are silent on this front leads to the inescapable conclusion that Freedom Mortgage is simply trying to "sneak in through the back door" to avoid the statute of limitations. The Appellate Division has cautioned courts to be mindful of circumstance where a supposed "deceleration" is a pretext to avoid the statute of limitations. See *Milone*, 164 A.D.3d at 153 (2d Dept 2018). The claimed "deceleration" was a pretext. If the 2013 stipulation was truly intended to decelerate the debt, where were the contemporaneous monthly statements reflecting Engel's supposed right to resume making monthly payments? See *id*. Where was the contemporaneous demand by *anyone* on behalf of Freedom Mortgage that Engel make a monthly installment payment? See *id*. That Freedom Mortgage relied upon the same alleged default date and sought interest from that date in both foreclosure actions further exposes its supposed "deceleration" as a pretext. An unsophisticated borrower should not be compelled to divine the intentions of the lender without unequivocal, objective evidence demonstrating the same. Public policy dictates the same must be clear, unambiguous, and leave no doubt as to the intentions of the lender.

## POINT III

## A STIPULATION OF DISCONTINUANCE DOES NOT WAIVE OR EXTEND THE FORECLOSURE STATUTE OF LIMITATIONS BY OPERATION OF LAW

Freedom Mortgage relies upon dicta from this Court's holding in *Loeb v. Willis*, 100 N.Y. 231 (1885) to argue that a stipulation of discontinuance nullifies the pleadings and all actions taken in the discontinued action. According to Freedom Mortgage, filing the 2008 Verified Complaint was the act of acceleration which triggered the six-year statute of limitations. Freedom Mortgage reasons that if stipulation of discontinuance nullifies the pleadings in the discontinued action, then the acceleration occasioned by filing the 2008 Verified Complaint was revoked and the statute of limitations reset by the 2013 Stipulation which discontinued the 2008 Foreclosure Action. For several reasons, Freedom Mortgage's argument is not supported by *Loeb* or by the later holdings of this Court.

### A. A Voluntary Discontinuance of a Foreclosure Action Does Not Eliminate the Accrual of the Statute of Limitations under *Loeb*.

*Loeb* did not hold that a stipulation of discontinuance, standing alone, waives or extends the statute of limitations or postpones the date from which the limitations period is to be computed. The term "statute of limitations" does not appear in *Loeb*. Instead, *Loeb* concerned whether a judgment of foreclosure for the mortgagee, in a foreclosure action later discontinued, estopped the mortgagor from

arguing it was not in default in a subsequent action to recover upon the mortgage note. *Loeb*, 100 N.Y. at 234. This Court held that the trial court erred in holding that the mortgagor was estopped by the prior judgment, and announced the rule: "If a suit be discontinued at any stage, or the judgment rendered therein be set aside or vacated or reversed, then *the adjudication therein* concludes no one, and it is not an estoppel or bar in any sense". *Loeb*, 100 N.Y. at 235 (Emphasis added).

*Brown v Cleveland Tr. Co.*, 233 N.Y. 399 (1922), to which Freedom Mortgage also cites, likewise applied the rule of *Loeb* to hold that a *judgment* rendered in an action later discontinued was not *res judicata* of any issue in a subsequent action between the same parties. See *Brown*, 233 N.Y. at 406 ("The action having been discontinued, there was no adjudication in that action which bound any one"). *Brown* did not hold that a stipulation of discontinuance standing alone waived or extended the statute of limitations or postponed the date from which the statute of limitations was to be computed.

## B. Freedom Mortgage Admitted that it Accelerated the Loan Before it Commenced the 2008 Foreclosure Action.

In apparent reliance upon dicta in *Loeb*, an Appellate Division case decided after *Loeb* purported to extend its holding to state that if an action is discontinued, the pleadings are nullified. *Mahon v. Remington*, 256 A.D. 889, 889 (4th Dept. 1939). The *Mahon* memorandum decision consists of two sentences and

provides no facts for the reader to determine in what context or for what purposes an order discontinuing an action "render[s] the pleadings ineffective".

The sweeping interpretation of *Loeb* advanced by Freedom Mortgage cannot be reconciled with the long-standing principle of this Court that a judicial admission from a pleading in a discontinued action constitutes evidence in a subsequent action. "[A]n admission in a pleading in one action is admissible against the pleader in another suit, provided it is shown 'by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction' " *Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 N.Y.2d 94, 103 (1996). "The admissions of a party to a civil action are always competent evidence against him, and it matters not when, where or to whom they are made. This rule applies to a pleading of such party, though in another action and with other parties, if it be shown that the "admissions were inserted in such pleading with his knowledge and sanction or by his direction." *Cook v Barr*, 44 N.Y. 156, 156 (1870). A rule which would require courts and juries to disregard sworn statements simply because the action in which they were made was discontinued is an invitation to commit perjury and would lead to absurd results.

In the 2008 Verified Complaint, Freedom Mortgage affirmed that by reason of the alleged payment default, Freedom Mortgage "*has duly elected*" to accelerate the debt. (A. 37 at 10) (Emphasis added). Freedom's use of the past tense

- "Freedom has duly elected" - in the 2008 Verified Complaint evidences that *before* the date the 2008 Verified Complaint was signed (July 15, 2008) or filed (July 16, 2008), Freedom Mortgage accelerated the Mortgage. Acceleration of the debt *before* the Lender's commencement of a foreclosure action is entirely consistent with the Mortgage, which permits the Lender to accelerate the debt separate from the initiation of a foreclosure action. See (A. 77 at ¶22) ("If Lender requires Immediate Payment in Full [i.e., accelerates the loan], Lender may [thereafter] bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold…this is known as "Foreclosure and Sale"). Thus, even if under *Loeb* a Stipulation of Discontinuance nullifies the pleadings in the discontinued action — which we do not concede — that nullification is ineffective to revoke an election to accelerate which was admittedly made before the signing or filing of the 2008 Verified Complaint.

The *filing* of a complaint which seeks immediate payment in full is not the act of acceleration, but merely a *manifestation* of such election. "To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election". *Albertina Realty Co.*, 258 N.Y. at 476 (1932). Engel submits that the debt was accelerated at the latest when the 2008 Verified Complaint was *signed.* See *Beneficial Homeowner Serv. Corp. v. Tovar*, 150 A.D.3d 657, 658 (2d Dept.

2017 (holding act of verifying complaint constituted election to accelerate; fact that complaint was never served did not destroy election);

*Gold v Brul*, 28 Misc.2d 644, 644 (Sup. Ct. Monroe County 1961) (same).

An extension of *Loeb* to hold that a stipulation of discontinuance nullifies the pleadings and thus waives, extends or modifies the statute of limitations cannot be reconciled with statutory authority regarding agreements to waive, extend or modify the statute of limitations following the accrual of a foreclosure claim. See General Obligations Law §17-105(1) (enacted as part of the Laws of 1963); see Point II supra. Likewise, CPLR 205(a) – the statute of limitations "savings provision" – explicitly exempts an action which has been voluntarily discontinued from the six-month extension of the statute of limitations. See CPLR 205(a) (enacted as part of the Laws of 1962). The predecessor to CPLR 205(a) in effect at the time of *Loeb* — section 405 of the Code of Civil Procedure — exempted from its savings clause an action which was voluntarily discontinued. *Gaines v City of New York*, 215 N.Y. 533, 538-539 (1915). To interpret a stipulation of discontinuance in a foreclosure action to reset the statute of limitations – in effect extending the statute of limitations indefinitely – would be incongruous.

Nor can such a sweeping interpretation of *Loeb* be reconciled with the holding of *Conrow v. Little*, 115 N.Y. 387 (1889) - decided four years *after* Loeb - that an election of one of two inconsistent remedies by the commencement of an

action is irrevocable and the voluntary discontinuance of the action does not revoke the election:

> *It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial*; for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any step to enforce the contract is a conclusive election not to rescind it on account of anything known at the time. After that the option no longer existed, and it is of no consequence whether or not the plaintiffs made their choice effective.

*Conrow*, 115 N.Y. at 394 (Emphasis added).

Once Freedom Mortgage elected its remedy with the 2008 Foreclosure Action to collect the entire amount due under the Note immediately, a voluntary discontinuance of the 2008 Foreclosure Action could not revoke its election.

### C. Freedom Mortgage's Contradictory Positions Concerning Deceleration Failed to Create a Genuine Issue of Material Fact.

Nevertheless, Freedom Mortgage failed to raise a triable issue of fact that the 2015 Foreclosure Action was not barred by the statute of limitations. Engel satisfied his burden by demonstrating that the statute of limitations was triggered at the latest on July 16, 2008 with filing the 2008 Verified Complaint and that the 2015 Foreclosure Action was commenced over six years later. See *Bank of New York Mellon v. Alli*, 175 A.D.3d 1472, 1473 (2d Dept. 2019); see generally *Alvarez v.*

*Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Thus, the burden shifted to Freedom Mortgage to submit evidence in admissible form which raised a genuine issue of material fact. See *Alli*, 175 A.D.3d at 1472; *see also Alvarez*, 68 N.Y.2d at 324. The only evidence which Freedom Mortgage submitted was its attorney's affirmation that the 2013 Stipulation, standing alone, purported to revoke the election to accelerate the debt. But this allegation is contradicted by Freedom Mortgage's prior sworn statements that 1) it elected to accelerate the debt before it signed the 2008 Verified Complaint, and 2) Freedom Mortgage would only revoke its election if Engel paid all arrears and Freedom Mortgage's attorney's fees and costs. A party's own conflicting evidence cannot raise an issue of fact. See *Columbus Trust Co. v. Campolo*, 110 A.D. 616, 616-617 (2d Dept. 1986) *aff'd* 66 N.Y.2d 701 (1985) (holding a plaintiff's self-serving affidavit, submitted to retract a previous admission, cannot avoid summary judgment); *Nieves v. JHH Transp., LLC*, 40 A.D.3d 1060, 1061 (2d Dept. 2007) (holding no triable issue of fact raised by summary judgment affidavit of defendant which contradicted his admission within police report and deposition). There is no objective, contemporaneous evidence in the record that the debt was decelerated before the expiration of the six-year statute of limitations. Freedom Mortgage's pretextual and self-serving assertion that the 2013 Stipulation or subsequent letters had such an effect does not suffice.

## POINT IV

## "DECELERATION" DOES NOT WAIVE, EXTEND OR POSTPONE THE STATUTE OF LIMITATIONS

A lender's unilateral revocation of its demand for payment of the full balance cannot halt the statute of limitations. See CPLR 201 ("An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or *a shorter time* is prescribed by written *agreement*. No court shall extend the time limited by law for the commencement of an action") (Emphasis added). A lender's unilateral revocation of its demand for full payment is not "prescribed by law". See *Sotheby's Inc. v Mao*, 173 A.D.3d 72, 77-78 (1st Dept. 2019) (holding lender's oral waiver of dates of default did not delay accrual date of claim and breach of loan agreement). The holding of *Sotheby's Inc.* makes clear that a party to a contract may not, by orally waiving the other party's accrued obligation to render a performance when due under the contract (but not the performance itself), extend its time under the statute of limitations in which to sue for breach of contract without complying with General Obligations Law. See *Sotheby's Inc.*, 173 A.D.3d at 77-78.

The Legislature specified the methods which the statute of limitations in a mortgage foreclosure action could be waived or extended in the General Obligations Law. See, e.g. General Obligations Law §17-101 (time-barred claim

revived when the debtor has signed a writing which validly acknowledges the debt); General Obligations Law §17-105 (express written agreement to extend, waive or not plead as a defense the statute of limitations); General Obligations Law §17-107 (payment on account of mortgage indebtedness effective to revive statute of limitations). A bare Stipulation of Discontinuance or a lender's unilateral decision to revoke its demand for full payment is not a method prescribed by the Legislature for waiving, extending or modifying the statute of limitations. "Where the Legislature has spoken so plainly, we are reluctant to find further, hidden exceptions". *State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 254 (2002) (declining to add a "sovereign capacity" exception to the statute of limitations where statutory language subjected the State to the statute of limitations).

Deceleration is merely the lender's election to revoke its demand for full payment; it does not "de-accrue" the claim for statute of limitations purposes. A statute of limitations begins to run when the cause of action accrues. See CPLR 203(a). "Under the statute of limitations, the time within which a plaintiff must commence an action 'shall be computed from the time the cause of action accrued to the time the claim is interposed'". *McCoy v. Feinman*, 99 N.Y.2d 295, 300-301 (2002), *quoting* CPLR 203(a). CPLR 201, General Obligations Law §17-101 et seq., the decisional law of this Court, and public policy all demonstrate that the statute of limitations is not some tool which one party can unilaterally manipulate. See *Ely-*

*Cruikshank Co., Inc. v Bank of Montreal*, 81 N.Y.2d 399, 404 (1993) (“Statutes of Limitation are 'statutes of repose' representing ”a *legislative* judgment that ... occasional hardship ... is outweighed by the advantage of barring stale claims”) (Emphasis in original) (internal citations omitted); *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 543 (1994) (rejecting accrual date which "is subject to manipulation, rendering it inconsistent with the definite statutory period"); see also *Flagstar*, 32 N.Y.3d at 146 ("This Court has repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach").

Dicta from this Court’s holding in *Loeb* which Freedom Mortgage now seeks to extend beyond its plain meaning to argue that a voluntary discontinuance waives or extends the statute of limitations for a foreclosure action is not a prescription of law within the meaning of CPLR 201 which eliminates the accrual of the statute of limitations. Deceleration to reset or tolling the statute of limitations "would allow the lender to restart the statute of limitations unilaterally and without notice to the borrower, and would therefore essentially write the statute of limitations out of the CPLR". *US Bank, N.A. v. Szoffer*, 58 Misc.3d 1220 (A), 2017 WL 7611189 at *2 (Sup. Ct. Rockland County Dec. 4, 2017). To permit a lender's unilateral "deceleration" (such as by a so-called "deceleration" notice) or a mere stipulation of discontinuance to reset the statute of limitations would be inconsistent not only with the statute of limitations itself, “but also with the mandate of CPLR

§201 that 'No court shall extend the time limited by law for the commencement of an action." *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38, 42 (1985), quoting CPLR 201; see *McCoy v. Feinman*, 99 N.Y.2d 295, 300-301 (2002) ("While courts have discretion to waive other time limits for good cause (see CPLR 2004), the Legislature has specifically enjoined that '[n]o court shall extend the time limited by law for the commencement of an action'"). "A statute of limitations is not open to discretionary change by the courts, no matter how compelling the circumstances". *Arnold v. Mayal Realty Co.*, 299 N.Y. 57, 60 (1949).

The Legislature prescribed how parties may waive or extend the statute of limitations following the accrual of a foreclosure action. Under these circumstances, a common law "right" to decelerate a loan to manipulate the statute of limitations may not be created out of whole cloth. "Any departure from the policies underlining these well-established precedents [concerning the statute of limitations] is a matter for the Legislature and not the courts". *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38, 43 (1985) (declining to adopt a "discovery" rule for statute of limitations for a breach of contract claim against municipality where Legislature has enacted discovery provisions where it deemed discovery the proper rule).

A lender cannot decelerate unilaterally and, thus, evade the statute of limitations. "[I]t is only upon agreement, explicit or implicit, such as by written

agreement, written acknowledgment of the debt or by payment made and accepted" that the statute of limitations may be waived or extended. *US Bank, N.A. v. Szoffer*, 58 Misc.3d 1220 (A), 2017 WL 7611189 at *2 (Sup. Ct. Rockland County Dec. 4, 2017). "An action on a contract brought after six years from its due date must be brought *on the new promise, expressed or implied, which operates to take the claim out of the statute*". *Peoples Tr. Co. of Malone v. O'Neil*, 273 N.Y. 312, 316 (1937).

Thus, the rule of *Loeb* and its progeny is simple: if an action is discontinued, any "adjudication" (i.e., order or judgment) rendered in that action has no *res judicata* effect. A stipulation of discontinuance without prejudice does not nullify the discontinued action for all purposes. See generally *George v. Mt. Sinai* Hospital, 47 N.Y.2d 170, 179-180 (1977) (holding action discontinued without prejudice via stipulation still constituted a prior action under CPLR 205(a)). Such an interpretation of *Loeb* is faithful to the facts of *Loeb* and permits *Loeb* to peacefully co-exist with the statute of limitations, CPLR 201, General Obligations Law §17-105, and the jurisprudence of this Court concerning judicial admissions and the election of remedies.[4]

[4] To the extent Freedom Mortgage argues in reply that Engel did not preserve these arguments for appellate review — a fact which we do not concede — we note that this Court may address "an issue of grave public policy" even if not presented below. *Massachusetts Nat. Bank v. Shinn*, 163 N.Y. 360, 363 (1900). This Court has repeatedly recognized the significant public policy implications of the statute of limitations. See, e.g., *Flagstar*, 32 N.Y.3d at 153; *Kassner*, 46 N.Y.2d at 550-551. Likewise, pure questions of law and matters of statutory interpretation are exempt from the preservation requirement. See footnotes 1 and 3, infra, pages 33 and 38.

## POINT V

## PROHIBITING LENDERS FROM EVADING OR UNILATERALLY MANIPULATING THE STATUTE OF LIMITATIONS IS CONSISTENT WITH THE PUBLIC POLICY OF NEW YORK

A rule that permits a lender's deceleration of a mortgage to reset the statute of limitations (or a rule which permits a lender to decelerate merely by showing that a previous foreclosure action had been discontinued), would contravene several public policies of New York.

- The Finality and Repose Afforded by the Statute of Limitations. The statute of limitations is not only a personal defense, but also "expresses a societal interest or public policy of giving repose to human affairs". *Flagstar*, 32 N.Y.3d at 151 (2018). "The public policy represented by the statute of limitations, CPLR §201 and General Obligations Law §17-103 would be effectively abolished is contracting parties could circumvent it by *postponing the time from which the period of limitations is to be computed*". *Flagstar*, 32 N.Y.3d at 153. (Emphasis added).

Defendants must be protected from being made to defend against stale claims. See *ACE Secs. Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581, 593 (2015). If the statute of limitations were to be made inoperative, homeowners could be made to wait many months, if not years, anxiously waiting to be foreclosed upon. By that time, "evidence… [may be] lost, memories… [may have]

faded…witnesses… [may have] disappeared" and, thus, homeowners may find themselves at an insurmountable disadvantage. *Flanagan v Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). The six-year foreclosure statute of limitations is generous when weighed against the statute of limitations for other actions. *Cf.* CPLR 215(3) (one-year statute of limitations for assault); CPLR 214-a (two years and six months statute of limitations for medical malpractice). This is a legislative judgment that six years is a sufficient amount of time for a lender to commence a foreclosure action.

- Commercial Certainty in Real Property Transactions. "[I]n the context of real property transactions . . . commercial certainty is a paramount concern". *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). Under the rule advocated by Engel, if, after a foreclosure claim accrues, the parties intend to waive or extend the statute of limitations, they may do so simply by an express written agreement which complies with General Obligations Law §17-105. Likewise, under the rule stated by the Appellate Division, if the lender intends, by its Stipulation of Discontinuance, to decelerate the loan, it may do so by simply explicitly stating as much. The rule advanced by Freedom Mortgage would lead this to be inferred by implication or inserted into a stipulation by a court under the guise of contract interpretation, both outcomes which the law prohibits. Also, a rule which would curtail successive foreclosure actions promotes the free transferability of property

and removes clouds on titles. Successive foreclosure actions create title issues that could forestall the free transfer of property, a basic tenet of property ownership, causing property to be burdened with title issues for longer than necessary. See generally RPAPL §1501(4) (creating cause of action to discharge mortgage upon real property where its enforcement is barred by the statute of limitations). We also ponder what impact "deceleration" as interpreted by Freedom Mortgage would have upon subsequent purchasers of the realty without notice of the deceleration. See generally *Roth v. Michelson*, 55 N.Y.2d 278 (1982); General Obligations Law §17-105(3).

- Decreasing the Number of Foreclosures and Delays in their Adjudication. Permitting deceleration to reset the statute of limitations or a Stipulation of Discontinuance silent on that point to halt the statute of limitations, contradicts recent legislative efforts to *reduce* the number of foreclosure actions and *increase* the speed with which mortgage foreclosure actions are adjudicated. See, e.g., RPAPL §1309 (allowing for an expedited foreclosure process when house is vacant and abandoned), RPAPL §1351 (requiring judgment of foreclosure and sale to provide that judicial auction sale must be held within 90 days of issuance of judgment of foreclosure and sale). These legislative efforts would be undermined if a Stipulation of Discontinuance silent on deceleration may "reset" or toll the statute of limitations, which would allow a lender to commence multiple foreclosure

actions, spanning over a decade, both based upon the same monthly payment default. If the law were to permit lenders to reset the statute of limitations by deceleration or to evade the statute of limitations by showing only that a prior foreclosure action was voluntarily discontinued, a great number of foreclosure cases that would otherwise be time barred could be heard on their merits — with the expenses ultimately being subsidized by New York taxpayers. See *US Bank NA v. Papanikolaw*, 62 Misc.3d 1207[A], 2019 NY Slip Op 50026[U], at *3-4 (Sup. Ct. Rockland County) (recognizing "protracted uncertainty" and "notable . . . expenditure of judicial resources" caused by third consecutive foreclosure action).

- Promotion of Settlements and Diligent Prosecution of Foreclosure Actions. If lenders had advance notice that deceleration did not "reset" the statute of limitations (or that a Stipulation of Discontinuance standing alone is not enough to extend or toll the statute of limitations), they would have more reason to exercise due diligence and act reasonably in their foreclosure efforts (i.e. confirming before initiating a foreclosure action they are the owner or holder of the note, that all predicate statutory and contractual notices have been served, not waiting for the eve of the expiration of the statute of limitations to commence an action), including in entertaining settlement offers. Statutes of limitation reflect the premise that the law favors the vigilant, as opposed to those who sleep on their rights. See *Flanagan*, 24 N.Y.2d at 429-30. ('Statutes of Limitation 'are founded upon the general experience

of mankind that claims, which are valid, are not usually allowed to remain neglected"). The supposed "chilling effect" on settlements which Freedom Mortgage warns if lenders were not permitted multiple bites at the apple to foreclose is unfounded fear mongering. CPLR 3408 imposes obligation upon both parties to negotiate in good faith towards a settlement and thus a legislative framework already exists to promote settlement of foreclosure actions subject to judicial oversight. If parties intended for their stipulation to decelerate the loan, then express language to that effect may be included in the stipulation. Imposing a waiver of the statute of limitations upon borrowers by implication from a boilerplate stipulation of discontinuance is more likely to *discourage* settlements.

- Protection of Consumers. Inferring a "right" to decelerate the debt and thus evade the statute of limitations in either the loan documents themselves or a stipulation of settlement silent on the statute of limitations is contrary to the modern trend of consumer protection in and the full disclosure to borrowers of all material terms of a loan transaction. See generally Banking Law §6-l; Federal Truth-in-Lending Act (15 U.S.C. § 1601, et seq.). Deceleration as practiced by lenders without judicial or legislative oversight is ripe for abuse. See, e.g., *US Bank, NA v Papanikolaw*, 62 Misc3d 1207[A], 2019 NY Slip Op 50026[U] (Sup. Ct. Rockland County 2019) (bank prosecuted appeal from dismissal of foreclosure action seeking immediate payment in full while also sending supposed "de-acceleration" letter on

eve of expiration of statute of limitations); *Deutsche Bank Natl. Trust Co. Ams. v. Bernal*, 56 Misc.3d 915, 919 (Sup. Ct. Westchester County 2017) (letter from attorney for lender purporting to decelerate debt unaccompanied by any proof of attorney's authority was pretextual; letter sent on eve of expiration of statute of limitations and bank immediately commenced successive foreclosure action without ever notifying borrower it had right to resume making monthly payments). Lenders should not be afforded a special immunity from the statute of limitations which no other litigant enjoys. Deceleration, particularly to unilaterally evade the statute of limitations, is inherently prejudicial to the borrower. The borrower not only loses the affirmative defense of the statute of limitations, but the right to affirmative relief to discharge a time barred mortgage under RPAPL §1501(4). Also, we question what happens to the monthly payments which accrued while the lender accelerated the debt? Are they still due? Is the lender entitled to collect default interest upon these sums, even though the borrower's right to make monthly payments was terminated while the Lender had accelerated the debt? What is the borrower required to do or pay in order to not immediately once again fall into default after the lender purported to unilaterally decelerate the debt? This uncertainty confirms that deceleration can be accomplished only by agreement between the lender and borrower in which the parties' rights and obligations are defined. See *US Bank, N.A.*

*v. Balderston*, 163 A.D.3d 1482, 1483 (4th Dept. 2018); *Bank of N.Y. v. Hutchinson*, 57 Misc. 3d 1204[A], 2017 NY Slip Op 51224(U) (Sup. Ct. Kings County 2017).

## CONCLUSION

Owning a home is a cherished part of the American dream. A mortgage loan is the largest financial responsibility undertaken by an overwhelming majority of the citizens of this State. Yet, through the so-called right of "deceleration", lenders have arrogated to themselves a privilege which no other litigant under no other cause of action in this State enjoys: the right to unilaterally manipulate, waive or extend the statute of limitations for a claim to foreclose a mortgage. This "right" deprives borrowers of a valued defense and the courts of this State and society at large of the benefits of repose to human affairs and the preservation of judicial resources that the statute of limitations imparts.

The rule and outcome advanced by Engel follows the decisions of this Court, the will of the legislature as expressed in the statute of limitations and statutes relating thereto, and the public policy goals promoted by the statute of limitations. A lender has no right to "decelerate" a debt, at least insofar as deceleration has been utilized to unilaterally postpone, waive or extend the statute of limitations. Such a "right" is not founded in any statute or in the loan documents. Implication of such a "right" in the loan documents would not only violate canons of contractual

interpretation, but would also violate public policy: parties cannot agree in advance of liability to extend the statute of limitations.

Following the accrual of any foreclosure claim, if the parties mutually intend to extend or waive the statute of limitations, or delay the time from which a cause of action shall be computed, they may only do so by an *express agreement* which complies with General Obligations Law §17-105. A stipulation which does not contain any express terms extending or waiving the statute of limitations and which otherwise does not comply with General Obligations Law §17-105 does not affect the statute of limitations. Nor can a lender's unilateral letter purporting to "decelerate" the debt affect the statute of limitations.

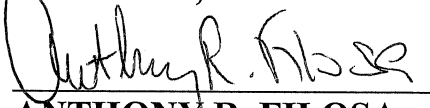
A contrary rule — allowing lenders to start and stop the statute of limitations at their whim — would increase litigation, delay the adjudication of claims and foster doubt in an arena where commercial certainty is paramount. While the pecuniary interest in lenders of getting paid is valid, that interest is already well served by the generous six-year statute of limitations and the statutory protections afforded to lenders — including General Obligations Law §17-105 — to prevent the expiration of the statute of limitations. The statute of limitations is not only a personal defense which prevents a litigant from defending against stale claims; it also promotes the societal interest in giving repose to human affairs. Where the interest of a lender in getting paid can only be served at the expense of the private

and public benefits of the statute of limitations, that interest must yield to the interests of homeowners, the state court system and society.

For these reasons, the Order of the Appellation Division should be affirmed insofar as it denied summary judgment to Freedom Mortgage and dismissed the action as barred by the statute of limitations.

Dated: Garden City, New York
November 6, 2019

**ROSENBERG FORTUNA & LAITMAN, LLP**

By: 

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**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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November 6, 2019

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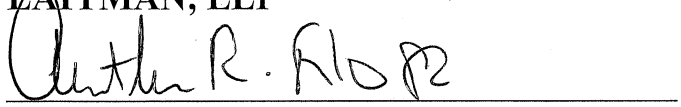
By: 

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# UNREPORTED CASES

WESTLAW

Declined to Extend by In re Taylor, | Bankr.E.D.N.Y., | May 4, 2018

View New York Official Reports version

**Bank of New York v. Hutchinson**
Supreme Court, Kings County, New York. | September 18, 2017 | 57 Misc.3d 1204(A) | 66 N.Y.S.3d 652 (Table) | 2017 WL 4273201 | 2017 N.Y. Slip Op. 51224(U) *(Approx. 9 pages)*

(The decision is referenced in the New York Supplement.)
Supreme Court, Kings County, New York.

The BANK OF NEW YORK as Trustee for the Certicate Holders of CWABS 2004–12, Plaintiff,

v.

Antoinette HUTCHINSON; Schneur Lezell; 861 Eastern Parkway LLC.; NYC Dept. of Finance; Parking Violations Bureau; New York City Transit Adjudication Bureau; New York City Environmental Control Board; Leon Brown; "John Doe" & "Mary Doe", Defendants.

No. 501471/2016.
Sept. 18, **2017**.

## Attorneys and Law Firms

Davidson Fink, LLP, Rochester, Plaintiff's Attorney.

Leon I. Behar, P.C., New York, NY, Defendant's Atty.

HARRIET L. THOMPSON, J.

FACTS AND PROCEDURAL BACKGROUND
***1** This is the second residential foreclosure action between the above captioned parties. The facts as stated in the motion practice before this Court are not in dispute and are stated below.

The premise herein is a three family owner-occupied multiple dwelling (three or more residential apartments), and is located at 861 Eastern Parkway, Brooklyn, N.Y. 11213–3523.

FIRST ACTION FOR FORECLOSURE AND SALE
On October 26, 2004, ANTOINETTE Hutchinson secured and executed a promissory note for the refinance of the above described property in the amount of $370,000.00 payable on December 1, 2004 at a rate of 5 .875 per annum until its maturity on November 1, 2034, and granted Full Spectrum Lending, Inc., its successors and assigns, the Lender, a first mortgage as security for the payment of the promissory note. The mortgage was an adjustable rate mortgage that was recorded in the County Clerk's office on February 1, 2005.

Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for Full Spectrum Lending, Inc., assigned the note and mortgage to Bank of New York as Trustee for the Certificate holders of CWABS 2004–12 by assignment dated March 23, 2006 and recorded on April 17, 2006 in the Office of the County Clerk.

During her ownership and/or occupancy of the subject premises, in or about November 1, 2005, ANTOINETTE Hutchinson defaulted in the payment of the promissory note and the Lender, in accordance with the terms of the note and mortgage, commenced an action in the Supreme Court of the State of New York in the County of Kings to foreclose on the mortgage by service of a summons and complaint, and the filing of a notice of pendency of action. According to the evidence presented to this Court by the Defendant, the summons and complaint was filed in the County Clerk on February 15, 2006 and the notice of

pendency of action was also filed on February 15, 2006. It is averred in the seventh paragraph of the summons and complaint, as follows: "ANTOINETTE HUTCHINSON, have/has failed and neglected to comply with the conditions of said mortgage bond or note by omitting and failing to pay items of principal and interest .. and accordingly, the plaintiff elects to call due the entire amount secured by the mortgage described in paragraph "fifth" hereof".

It appears that ANTOINETTE Hutchinson did not appear in the action, and in or about April 18, 2006, the Plaintiff served a Request for Judicial Intervention; and subsequently, served and filed a motion for an order of reference that was granted by the court on May 17, 2006.

By written agreement labeled "Loan modification agreement" (Adjustable Interest Rate) dated November 6, 2006, executed by ANTOINETTE Hutchinson on December 9, 2006 and by the authorized agent of the Plaintiff, Eric Fleisher, on December 18, 2006, the action was resolved. The pertinent provisions of the Loan modification agreement provide that "as of the 1st day of December 2006, the amount payable under the Note or Security Instrument (the "Unpaid Principal Balance") is U.S. $376,027.06 consisting of the amount(s) loaned to the borrower by the Lender and any interest capitalized to date" (¶ 1). The second provision, states "[t]he borrower promises to pay the Unpaid Principal Balance, plus interest, to the order of the Lender. Interest will be charged on Unpaid Principal Balance from the 1st of November 2006. The Borrower promises to make monthly payments of the principal and interest U.S. $2,283.48 beginning on the 1st day of December 2006" (¶ 2). Lastly, except as provided above, "the Note and Security Instrument will remain unchanged, and the Borrower and Lender will be bound by, and comply with, all terms and provisions thereof, as amended by this Agreement" (¶ 6). The interest rate and monthly payments will adjust in accordance with the Note and Adjustable Rate rider under the Note.

***2** By notice dated March 21, 2007, the Plaintiff agreed to cancel the notice of pendency and on April 2, 2007, voluntarily discontinued the action.

***SECOND ACTION FOR FORECLOSURE AND SALE***

In or about August 1, 2008, ANTOINETTE Hutchinson defaulted in the payment of the above modification agreement, as amended, of the underlying promissory note and the Lender commenced this action in the Supreme Court of the State of New York in the County of Kings to foreclose on the mortgage and note by service of a summons and complaint, and the filing of a notice of pendency of action. The summons and complaint, dated January 28, 2016, was filed in the Supreme Court on February 2, 2016.

The summons and complaint alleges that ANTOINETTE Hutchinson defaulted in the payment of the note and mortgage on August 1, 2008. As in the prior summons and complaint, the pertinent paragraph provides as follows: "the defendant have failed and neglected to comply with the terms and provisions of said mortgage, bond/note/loan agreement by omitting to pay the items of principal and interest and accordingly, the plaintiff hereby elects to call due the entire amount secured by the mortgage." (¶ 7).

The Defendant retained the law office of Leon Behar, PC., as counsel. Mr. Behar, Esq., by letter dated February 16, 2016 to Ms. Olin, Esq., attorney for the Plaintiff, maintains that the subject action is barred by the six-year statute of limitations. Mr. Behar, Esq., cites supporting case law in support of his claims and demanded the immediate withdrawal of the summons and complaint. He further states that the failure of the Plaintiff to withdraw the pending action would result in the service of a motion to dismiss and for sanctions against the Plaintiff and Plaintiff' attorneys for frivolous conduct.

After several email exchanges between the respective attorneys, the Plaintiff refused to discontinue or withdraw the action. The Plaintiff's contention is that the action was not barred by the statute of limitations and the Defendant's claims were "without merit". This motion for summary judgment ensued.

The Defendant moves pursuant to CPLR § 3212 for summary judgment, sanctions and legal fees. After a recitation of the facts above by ANTOINETTE Hutchinson in a supporting affidavit, her attorney, by affirmation, contends that based on the acceleration of the mortgage in the first foreclosure action that was voluntarily discontinued in 2007, the instant action is time barred by CPLR § 213(4). Defendant argues that "Plaintiff alleges that the mortgage default took place on August 1, 2008. However, Plaintiff failed to commence this action until January 28, 2016, more than seven years after the alleged default, and is therefore time—barred by the six (6) year statute of limitations" (Affirmation of Leon Behar, Esq., at ¶ 18). The Defendant's claim is that "NY courts have consistently dismissed such actions as time barred, whereas here, a lender commences a foreclosure action and

thereby accelerates the balance due on the mortgage, subsequently discontinues it, and thereafter refiles a new foreclosure action", the action is time barred by the above statute. (Affirmation of Leon Behar, Esq., at ¶ 20). Defendant relies on *U S. Bank v. Parris,* Index No: 66885/2014 (Sup Ct. Suffolk County), *Ellery Beaver LLC. v. HSBC Bank,* Index No:506700/2014 (Sup Ct., Kings, County), and other case authority to support dismissal.

***3** Additionally, the Defendant seeks sanctions against the Plaintiff for abuse of process, malicious prosecution, and attorney's fees.

The Plaintiff, in opposition, does not dispute the above factual and procedural history. The Plaintiff, not the Defendant, produced a copy of the aforementioned loan modification agreement and informed the Court that the first foreclosure action was discontinued by the Plaintiff based on the amicable resolution of the case. The Plaintiff states that "the 2006 foreclosure was resolved by bringing the loan current through a loan modification agreement dated December 18, 2006, the account was de-accelerated and 2006 Foreclosure properly discontinued March 21, 2007" (Affirmation of Larry T. Powell, Esq., at ¶ 4). Counsel argues that the Defendant has selective memory; failed to notify the Court of this agreement, has reaffirmed the debt by making payments until the new date of default and based on the intentional failure to disclose this fact, the motion should be denied. The Plaintiff argues that the Defendant is responsible for the presentation of a complete record, not a selective record as provided here, and the failure to produce such records for the Court is fatal to the motion for summary judgment.

Substantively, the Plaintiff argues that the loan modification agreement acted to de-accelerate the loan, tolling and reviving the running of the statute of limitations. "[T]he running of the statute of limitations can be suspended or revived. For example, a writing acknowledging the mortgage debt and expressly or by implication promising to repay it would interrupt the running of the statute. Such a proper writing starts the statute of limitations running anew from that point" (*citations omitted* ) (Affirmation of Larry T. Powell, Esq., at ¶ 16). Further, the loan modification agreement, coupled with their continued payments to date of the default oo August 1, 2008, and the prior de-acceleration within the six years of acceleration in 2006, all toll and revive the applicable statute of limitation." (Affirmation of Larry T. Powell, Esq., at ¶ 17). The Plaintiff argues that the Defendant's claims have no merit and the Court should have no judicial sympathy for the Defendant since the Defendant voluntarily entered into the modification agreement—a binding and enforceable contract. Lastly, the Plaintiff states, in anticipation that the Defendant would introduce new evidence in the reply, warns the Court, if the Defendant does so, to disregard it as improper.

In reply, the Defendant reiterates the facts above alleging that "since the instant action was not commenced until January 28, 2016, or nearly eight years after the alleged default, the six year statute of limitations has expired, and Plaintiff is therefore time barred from bringing the instant action" (Affirmation of Leon Behar, Esq., at ¶ 6). He claims that the Plaintiff desperately relies on a document that was not previously available to the Defendant. "However, as any first grader knows, the difference between February 2, 2016 and August 1, 2008, is equal to seven years and six months and is NOT with the applicable six-year statute of limitations. (Affirmation of Leon Behar, Esq., at ¶ 8).

MOTION FOR SUMMARY JUDGMENT

***4** It is now necessary to direct our attention to the Defendant's motion for summary judgment. A brief look at CPLR § 3212 is appropriate. CPLR § 3212(b) provides that a "motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party "[T]he Motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a Cross–Motion."

It has been well-settled that on a motion for summary judgment, "the movant must submit evidentiary proof in admissible form which establishes that she is entitled to judgment as a matter of law, and to defeat the motion, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which she rests her claim or must demonstrate acceptable excuse for his failure to meet the requirements of tender in admissible form." (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980)). Thus, to defeat the motion, it is incumbent on the opponent "to assemble, lay bare and reveal his or her proof that their defenses are real and

capable of being established at trial It is insufficient to merely set forth averments of factual or legal conclusions. [Internal citation omitted]."

To defeat the summary judgment motion, the opposing party must show that there is a material question of fact that requires a trial (*CityFinancial Co. (De) v. McKenny,* 27 A.D.3d 224, 226, 811 N.Y.S.2d 359 [1st Dept., 2006]; *Machinery Funding Corp. v. Stan Loman Enterprises, Inc.,* 91 A.D.2d 528, 456 N.Y.S.2d 401 (1st Dept., 1982); *See also Tabor v. Logan,* 114 A.D.2d 897, 895 (2d Dept., 1985); *Santiago v. Filstein,* 35 A.D.3d 184, 185–186, 826 N.Y.S.2d 216 (1st Dept., 2006); *Mazurek v. Metropolitan Museum of Art,* 27 A.D.3d 227, 228, 812 N.Y.S.2d 12 (1st Dept., 2006); *Smalls v. AJI Industry Inc.,* 10 N.Y.3d 733, 735, 853 N.Y.S.2d 526, 883 N.E.2d 350 (2008); *Melendez v. Parkchester Medical M .D. Servs., P.C.,* 76 A.D.3d 927, 908 N.Y.S.2d 33 [1st Dept., 2010] ). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *Rotuba Extruders v. Ceppos,* 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141, 385 N.E.2d 1068 (1978).

STATUTE OF LIMITATIONS
NY CPLR 213(4) provides, in pertinent part, that the following actions must be commenced within six years. "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage or real property, or any interest therein."

The six-year statute of limitation for the commencement of a foreclosure action has been determined to begin to run on the occurrence of any of the following events:

1. the due date for each unpaid installment on the mortgage; **or**

2. the time the lender is entitled to demand full payment or loan maturity; **or**

***5** 3. when the mortgage has been accelerated by a proper and timely demand; **or**

4. on service of the summons and complaint in which the acceleration is clear and unequivocal.

The above rule of law was determined in the seminal case of *Saini v. Cinelli Enterprises, Inc.,* 289 A.D.2d 770, 771, 733 N.Y.S.2d 824, 826 (3d Dept., 2001) and its progeny. See such cases as *Weisel v. Rubinstein,* 820 N.Y.S.2d 847, 2006 N.Y. **Slip Op**. 51107(U) reaffirming that "if part payment of a debt otherwise outlawed by the statute of limitations is made under circumstances from which a promise to honor the obligation may be inferred, it will be effective to make the time limited for bringing an action start anew from the time of such payment (*citation omitted* )" and finding that debtor made payments in which the debtor unqualifiedly and absolutely acknowledges that additional amounts are due denying dismissal for expiration of the statute of limitations. See also *1077 Madison v. March,* 2015 WL 6455145, finding that the statute of limitations in a mortgage foreclosure actions begins to run six years from the date of 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 action is brought. Once the mortgage is accelerated, the statute of limitations begins to run on the entire mortgage debt. *Loiacono v. Goldberg,* 240 A.D.2d 476, 658 N.Y.S.2d 138, 139 (2nd Dept., 1997). In that case, the mortgage was accelerated on May 5, 2014, after service of a notice of default on February 1, 2008. Thus, six years had not passed and the action was timely.

Even more recently, in *Wells Fargo Bank, N.A. v. Machell,* 55 Misc.3d 1214(A), **2017** N.Y. **Slip Op**. 50579(U), the Court acknowledged that the notion of "de-accelerating" and revoking an election to accelerate appears to be a creature of the Appellate Division, Second Department. The Court reasoned that there was one Third Department case, in the matter of *Lavin v. Elmakiss,* 302 A.D.2d 638, 639, 754 N.Y.S.2d 741 (3rd Dept., 2003, that "partially" reaffirms this "de-acceleration" principle. The Court explicitly opines that "another trial court in the 3rd Dept. builds and adds to this rule establishing that "the revocation should be clear, unequivocal, and give actual notice to the borrower of the lender's election to revoke in sum, akin to the manner plaintiff gave notice to exercise the option to accelerate" (*Bank of New York Mellon v. Slavin,* 54 Misc.3d 311, 315 (Sup. Rensselaer Cty., 2016, Zwack, J) citing Mebane, *supra,* 208 A.D.2d at 894, 618 N.Y.S.2d 88, *Wells Fargo N.A. v. Burke,* 94 A.D.3d 980, 943 N.Y.S.2d 540 (2nd Dept., 2012). The Court found that the Plaintiff's attempt to "de-accelerate" and revoke the election to accelerate three days prior to the date of the expiration of the statute of limitations failed due to the lack of "actual notice" to the borrower. The Court did not find that "de-accelerate" was a misnomer but was not applicable to that case.

*6 In addition, in *Bank of New York Mellon v. Slavin,* 54 Misc.3d 311, 315 (Sup. Rensselaer Cty., 2016, Zwack, J), the Supreme Court held that the mortgagee's failure to comply with a trial loan modification agreement did not revoke acceleration of mortgage's debt where the plan specifically preserved the previous foreclosure action. As important, the foreclosure action was never withdrawn by the mortgagee, but rather was dismissed *sua sponte* by the court. Rather than seeking to revoke its election to accelerate, the mortgagee's failed attempt to revive the prior foreclosure, coupled with the trial plan did not include an acknowledgment by mortgagor of the mortgage debt or promise to repay the debt, was insufficient to act as a waiver or toll, for that matter. of the statute of limitation.

There are many cases in the Second Department that have explicitly discussed the statute of limitations and its application to each of the above commencement dates, especially the effect of prior litigation between the parties.

For mortgages payable in installments, like any debt based on breach of contract, the statute of limitations begins to run on the date that each installment becomes due. *Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2nd Dept., 1997).

In addition, the statute of limitations begins to run on the entire debt on the date of the loan's maturity. So, in such a case, the Lender is precluded from the collection of the unpaid principal balance and installments six years prior to the date of maturity of the loan, if the loan has not been accelerated. See *Quackenbush v. Mapes,* 123 A.D.2d 242, 107 N.Y.S.2d 1047 (1st Dept., 1908). The Court stated that the "statute of limitations was triggered when the party that was owed the money had a right to demand payment, not when it actually made the demand". (See *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.,* 18 N.Y.S3d 765, 771 (2012) and *Wendover Fin. Servs. V. Ridgeway,* 137 A.D.3d 1718, 1719, 28 N.Y.S.3d 535 (4th Dept., 2016)). This is particularly true with reverse mortgages since the lender is entitled to demand full payment on the date that the borrower dies.

The statute of limitations begins to run on the entire unpaid balance or debt including interest on the date the mortgage is accelerated. *Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2nd Dept., 1997). "Even if the mortgage is payable in installments, once the mortgage debt is accelerated, the entire amount is due, and the statute of limitation begins to run on the entire debt". *Nationstar Mtge., LLC v. Weisblum,* 143 A.D.23d at 867, quoting *EMC Mtge. Corp. v. Petella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161(2nd Dept., 2001); *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d at 982, 943 N.Y.S.2d 540; *Plaia v. Safonte,* 45 A.D.3d 747, 748, 847 N.Y.S.2d 101; *Koeppel v. Carlandia Corp.,* 21 A.D.3d 884, 800 N.Y.S.2d 607; Federal Nat'l Mtge. *Assos. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88).

The election to accelerate the mortgage must consist of a notice of election to the borrower or some overt act that is *clear and unequivocal* of such election. See *Goldman Sachs Mortgage Co., v. Mares,* 45 Misc.3d 1218(A), (Tompkins Cty. Supt. Court, 2014) aff'd 135 AD3d 1121, 23 N.Y.S.3d 444 (3rd Dept., 2016) in which the default notice that stated that the failure to pay the sums due *may result* in acceleration of the entire mortgage did not constitute a clear and unequivocal acceleration of the mortgage; *Sarva v. Chakravorty,* 34 A.D.3d 438, 439, 826 N.Y.S.2d 74 (2nd Dept., 2006), default notice stating the lender's wanting "to get paid in full" insufficient to constitute acceleration of the loan; *21st Mortgage Corp., v. Osorio,* 51 Misc.3d 1219(A) (Sup. Court, Queens Cty, 2016), finding that a default notice discussing possible future events does not constitute acceleration.

*7 A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action (*EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161 (2nd Dept., 2001); *Federal National Mtg. Assoc. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88; *Kahsipour v. Wilmington Sav. Fund Socy.,* FSB, 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741). See also the recent case of *U.S. National Bank v. Barnett,* 15 A.D.3d 791 (**2017** N.Y. **Slip Op**. 04490) in which the court dismissed the action of the grounds of the expiration of the statute of limitations finding that "the mortgage debt was accelerated on May 15, 2007, when the plaintiff commenced the first action to foreclose the mortgage. Thus, the six-year statute of limitation expired prior to the commencement of the second action on July 19, 2013". More importantly, "while the lender may revoke its election to accelerate the mortgage, the record in this case is barren of any affirmative act of revocation occurring during the six year limitations period subsequent to the initiation of the prior action" citing *Kahsipour v. Wilmington Sav. Fund Socy., FSB,* 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v.*

*Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741.

There are multiple cases in which the appellate courts have determined that acceleration was not "real" acceleration. For example, see *EMC Mortgage Corp. v. Suarez,* 49 A.D.3d 592, 593, 852 N.Y.S.2d 791 (2nd Dept., 2008) (nullity of acceleration—"recovery limited to only those unpaid installments which accrued within the six year period immediately *preceding* its commencement of the action"); *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 943 N.Y.S.2d 540 (2nd Dept., 2012)(bank had no authority to accelerate debt); *21st Mortgage v. Adames,* 153 A.D.3d 474, **2017** N.Y. **Slip Op** 05925, *citing Goldman Sachs Mtge Co. Mares,* 135 AD3d 1121, 1122–1123, stating that the notice of default dated December 13, 2006 sent prior to the commencement of the 2007 action, was nothing more than a letter discussing acceleration as a possible future event, does not constitute acceleration and "the 2007 action was ineffective to constitute a valid exercise of the option to accelerate since the plaintiff did not have authority to accelerate the debt or sue to foreclose at that time". See also *53 PL Realty, LLC v. U.S. Bank National Assoc.,* 153 AD3d 894, **2017 Slip Op**. 06345b, finding that "the mortgage foreclosure action commenced by the Defendant's predecessor in interest and the order dismissing that action pursuant to CPLR § 3216 which demonstrated that the mortgage was accelerated in 2008 more than six years before the commencement of this action" in 2016 and thus, time barred.

Case authority provides that the following events did not constitute acceleration: **voluntary discontinuance** except under facts as provided below (See *NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 58 N.Y.S.3d 118 (2015–03210)(Index No. 13279/13; *Saini v. Cinelli Enterprises, Inc.,* 289 A.D.2d 770, 733 N.Y.S.2d 824 (3rd Dept., 2001); *Petito v. Piffath,* 85 N.Y.2d 1, 623 N.Y.S.2d 520, 647 N.E.2d 732 (1994); **court dismissal** (*Kashipour v. Wilmington Sav. Fund Socy., FSB,* 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161 (2nd Dept., 2001)); *Citibank, N.A. v. McGlone,* 270 A.D.2d 124, 125, 704 N.Y.S.2d 576, 577–78 (1st Dept., 2000); **acceptance of partial payment** (*UMLIC, LLC. v. Mellace,* 19 A.D.3d 684, 799 N.Y.S.2d 61 (2d Dept., 2005); **acceptance of post acceleration payments** (*Lavin v. Elmakiss,* 302 A.D.2d 638, 639, 754 N.Y.S.2d 741 (3rd Dept., 2003); **service of a new 90 day notice** (*Beneficial Homeowner Service Corp. v. Tovar,* Index No. 61092/2014. NYLJ 120725043582 at*1).

***8** It has also been held even without acceleration, a lender is barred from foreclosing more than six years after default. *Corrado v. Petrone,* 139 A.D.2d 483, 484–85, 526N, 526 N.Y.S.2d 845.Y.S.2d 845 (2nd Dept., 1988); *Phalen–Sobolevsky v. Mullin,* 26 A.D.3d 806, 811 N.Y.S.2d 506 (4th Dept., 2006); *LePore v. Shaheen,* 32 A.D.3d 1330, 821 N.Y.S.2d 532 (4th Dept., 2006). However, those cases are distinguishable from the case at bar. None of those cases involved modification of the underlying mortgage loan. Since there were recently fifteen (15) foreclosure cases argued before the Appellate Division as of August 25, **2017**, the issue of the validity of the revocation of acceleration or de-acceleration remains an evolving issue of law.

Furthermore, where the entire mortgage has yet to become due (maturity date), the lender will be barred from collecting principal and interest payments due six years prior to acceleration or the commencement of the foreclosure action. *Wells Fargo Bank, N.A. b. Cohen,* 80 A.D.2d 753, 754, 915 N.Y.S.2d 569, 571, (2d Dept., 2010); *Khoury v. Alger,* 174 A.D.2d 9918, 191, 571 N.Y.S.2d 829 (3rd Dept., 1991).

In this case, the borrower defaulted on the original loan effective October 1, 2005. According to Exhibit "E" of the first summons and complaint (Exhibit "C" of the Defendant's motion herein), the Defendant owed $365,747.38 at a rate of 5.875% plus late fees of $87.54. In the Modification Agreement, the Defendant acknowledged the unpaid principal amount of $376,027.06, the principal amount payable under the Note; a promise to pay the unpaid principal balance, plus interest in monthly payments of $2,283.48 beginning on the 1st day of December 2006. Based on this new agreement, the Plaintiff discontinued the action and cancelled the Notice of Pendency.

First, if the Court were to accept the facts and law as proffered by the Defendant and in accordance with some of the case law above as cited by the Defendant, the loan here having been accelerated on February 15, 2006, this action should have been commenced on or before February 15, 2012, six years after acceleration, and is time barred. In this case, the facts as argued by the Defendant would establish *prima facie* that the time to commence the action has expired, so the burden shifts to the Plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable.

(*Zabrowoski v. Local 74, Serv. Employs. Int'l Union AFL–CIO,* 91 AD3d at 769; *Baptiste v. Harding,* 88 A.D.3d at 753, 930 N.Y.S.2d 670)

Since the Defendant has met that burden, the burden shifts to the Plaintiff to demonstrate that the statute of limitation is tolled or inapplicable. It is the opinion of this Court that the Plaintiff has met that burden. The prior action was voluntarily discontinued based on the modification agreement in which the Defendant acknowledged the debt and entered into a new agreement to pay the debt pursuant to new terms and conditions. This agreement was final and irrevocable and there is no produced evidence in the record to rebut this fact.

***9** More compelling is the fact that after the modification agreement was signed by the parties, the Plaintiff changed its position in this case by revoking its acceleration of the entire mortgage debt in reliance on the Defendant's assumption of new obligations to pay the mortgage debt. In conformity with this fact, the record supports irrefutable claims that from at least January 1, 2007 to July 31, 2008, the Defendant tender monthly installment payments to the Plaintiff and/or its servicing agent under the new terms of the modified note and mortgage.

According to the new summons and complaint, the monthly payment was $4,369.11, allegedly principal and interest, and does not specifically reference the modification agreement. It appears that the summons and complaint are boilerplate pleadings and do not reflect the modification transaction. Similar to the alleged intentional exclusion of the modification agreement by the Defendant in the instant motion, the Plaintiff has also excluded recitation of the proper transactions and occurrences in the pleadings that constitute the basis for the underlying action (see CPLR § 3013).

In this case then, if the Court accepts as true the contentions of the Plaintiff that the acceleration was revoked by the execution of the modification agreement on December 18, 2006, the statute of limitations was tolled. The record in this case shows that there was "an affirmative act of revocation occurring during the six year limitations period subsequent to the initiation of the prior action". (*Kahsipour v. Wilmington Sav. Fund Socy., FSB,* 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741).

The time to foreclose on the mortgage debt was tolled until the mortgage debt was accelerated by the commencement of this action by the service of the summons and complaint on February 2, 2016. No evidence was presented by either party of any pre-action notice of acceleration. Therefore, by the service of the summons and complaint which explicitly states that the Plaintiff elects to accelerate the note, this action is timely and is commenced within the six-year statute of limitations. *Saini v. Cinelli Enterprises, Inc.,* 289 A.D.2d 770, 771, 733 N.Y.S.2d 824, 826 (3d Dept., 2001); *Weisel v. Rubinstein,* 820 N.Y.S.2d 847, 2006 N.Y. **Slip Op**. 51107(U); *Kahsipour v. Wilmington Sav. Fund Socy., FSB,* 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741).

Based on the above, the Court finds that the first affirmative act of "de-acceleration" or revocation of acceleration was the execution of the modification agreement by the parties. Suffice it to say, the Lender is not required to accept or offer such a modification. The intention of the parties was clearly to preserve the property for the Borrower and to secure repayment of the note for the Lender. The final affirmative act of revocation was the discontinuance of the action and cancellation of the notice of pendency and this act was in reliance on a new promise to pay the debt by the borrower. (*EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161 (2nd Dept., 2001); *Federal National Mtg. Assoc. v. Mebane,* 208 A.D.2d 892, 894, 618 N.Y.S.2d 88; *Kahsipour v. Wilmington Sav. Fund Socy.,* FSB, 144 A.D.3d 985, 41 N.Y.S.3d 738; *Clayton Nat'l, Inc., v. Guldi,* 307 A.D.2d 982, 763 N.Y.S.2d 493; *Lavin v. Elmakiss,* 302 A.D.2d 638, 754 N.Y.S.2d 741).

***10** Notwithstanding this finding that this action is properly before the Court, the Plaintiff is barred from the collection of unpaid principal and interest payments due before February 2, 2010, six years before the 2016 acceleration. Thus, all installment payments between the date of the Defendant's default on August 1, 2008 to February 2, 2010 are barred and uncollectible by the Plaintiff in this action, and accordingly, are severed from this action and dismissed with prejudice as a matter of fact and law. *Wells Fargo Bank, N.A. v. Cohen,* 80 A.D.2d 753, 754, 915 N.Y.S.2d 569, 571, (2d Dept., 2010); *Khoury v. Alger,* 174 A.D.2d 9918, 191, 571 N.Y.S.2d 829 (3rd Dept., 1991).

The Court has reviewed the other contentions by the Defendant and finds that under the above analysis, there are no grounds to impose sanctions for abuse of process or malicious

prosecution against the Plaintiff or Counsel for the Plaintiff and therefore, is denied. Similarly, any claims for attorney's fees by the Defendant is also denied.

For the above stated reasons, the Defendant's motion for summary judgment to dismiss the summons and complaint is granted in part, as set forth above, and is denied, in part.

This constitutes the Decision and Order of this court.

### All Citations

57 Misc.3d 1204(A), 66 N.Y.S.3d 652 (Table), 2017 WL 4273201, 2017 N.Y. Slip Op. 51224(U)

**End of Document**

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62 Misc.3d 1207(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE
**U.S. Bank National Association v. Papanikolaw**
Supreme Court, Rockland County, New York. | January 2, 2019 | Slip Copy | 62 Misc.3d 1207(A) | 2019 WL 190626 (Table) | 2019 N.Y. Slip Op. 50026(U) *(Approx. 10 pages)*

Supreme Court, Rockland County, New York.

U.S. BANK NATIONAL ASSOCIATION, as Trustee on Behalf of the Holders of the Asset Backed Securities Corporation Home Equity Loan Trust, Series MO 2006-HE6 Asset Backed Pass-Through Certificates, Series MO 2006-HE6, Plaintiff,

v.

Helen PAPANIKOLAW A/K/A Helen G. Papanikolaw, James G. Papanikolaw A/K/A James Papanikolaw, Midland Funding, LLC, Equable Ascent Financial LLC, Winthrop Capital LLC, Portfolio Recovery Associates LLC, Rockland Woods Inc., Midland Funding LLC A/S/I/I to Chase Account and "John Doe No.1" Through "John Doe #12," the Last Twelve Names Being Fictitious and Unknown to Plaintiff, The Person or Parties Intended Being the Tenants, Occupants, Persons or Corporations, if Any, Having or Claiming an Interest in or Lien Upon the Premises Being Foreclosed Herein, Defendants.

31424/2018
Decided on January 2, **2019**

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## Opinion

Paul I. Marx, J.

***1** The following papers were read on: (1) this Notice of Motion by defendants Helen Papanikolaw and James Papanikolaw ("the Papanikolaw defendants") for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing plaintiff's complaint, and for an Order pursuant to CPLR § 3211 and RPAPL § 1501(4) granting summary judgment on their counterclaim and discharging the mortgage on the subject property (Motion Sequence # 1); and (2) this Notice of Cross Motion by plaintiff U.S. Bank for an Order pursuant to CPLR § 3212 granting plaintiff summary judgment on the complaint and for an Order pursuant to RPAPL § 1321 appointing a referee to compute (Motion Sequence # 2):

*Motion Sequence # 1*:

Notice of Motion, Affirmation of Regularity

Affidavit in Support, Exhs. A-M

Memorandum of Law in Support

Memorandum of Law in Opposition

Memorandum of Law in Reply

Affidavits of Service

*Motion Sequence # 2*:

Notice of Cross Motion

Affirmation in Support, Exhs. 1-23

Memorandum of Law in Support

Memorandum of Law in Opposition

Affidavits of Service

Upon the foregoing papers, the motions are consolidated for purposes of decision and are determined as follows:

***Background***

This residential foreclosure action is the third consecutive action that plaintiff commenced against defendants concerning the real property located at 4 Crescent Court, New City, New York, where defendant Helen Papanikolaw has resided since she purchased the property on January 17, 1972.

Plaintiff U.S. Bank commenced this action by filing a summons and complaint dated March 10, 2018, which were served personally on the Papanikolaw defendants on March 20, 2018 (NYSCEF Docs. 11-12 [affidavits of service] ). Plaintiff alleges that on September 1, 2006, these defendants received from nonparty Argent Mortgage Company LLC (hereinafter "Argent") a loan in the principal amount of $434,000 secured by the real property, and that the Papanikolaw defendants delivered to Argent a note that plaintiff attaches to its complaint (*see* NYSCEF Doc. 1). The note contains the signatures of both Papanikolaw defendants. Also attached to the summons and complaint is the original mortgage and Argent's recording instrument for the mortgage in the Office of the Rockland County Clerk, effective September 11, 2006 (*see id.*).

On or about July 27, 2011, U.S. Bank, alleging that it was then holder in due course of the Argent note and mortgage pursuant to a valid assignment, commenced a foreclosure action against defendants under the caption *U.S. Bank v. Papanikolaw* (Index No. 31323/2011 [Sup Ct Rockland Co] ) (NYSCEF Doc. 39 [Defs' Exh. A] ) (hereinafter "First Action"). Plaintiff alleged in the First Action that the Argent note and mortgage were assigned to plaintiff on September 8, 2006; that such assignment was recorded in the Office of the Rockland County Clerk on November 24, 2009; and that defendants defaulted on the note and mortgage as of the mortgage payment due March 1, 2011. After the First Action was released from the Foreclosure Settlement Conference Part (hereinafter "FSCP"), the action lay dormant for over three years.

***2** On or about October 7, 2015, U.S. Bank commenced a second foreclosure action against defendants under the caption *U.S. Bank v. Papanikolaw* (Index No. 34456/2015 [Sup Ct Rockland Co] ) (hereinafter "Second Action"). Plaintiff's complaint in the Second Action sought a declaration as to the validity of the mortgage and to compel defendants to execute a replacement bargain and sale deed ostensibly to clear the title in view of certain alleged pre-2005 mortgages and other transactions relating to the subject property. After serving its complaint in the Second Action, U.S. Bank moved to stay the First Action pursuant to CPLR § 2201, on or about November 4, 2015, seeking to delay proceedings in the First Action until final adjudication of the Second Action. By Decision and Order dated November 23, 2015, this Court (Berliner, J.) denied plaintiff's motion on ground that, by then, plaintiff's foreclosure proceeding against defendants (*i.e.* the First Action) had languished for almost five years (*see* NYSCEF Doc. 41). By further Decision and Order dated October 20, 2016, this Court (Christopher, J.) denied plaintiff's motion for partial summary judgment in the Second Action except to the extent of confirming the identity of defendant Helen Papanikolaw. Since then, the record does not indicate that plaintiff took any further steps to prosecute or discontinue the Second Action, which now also has languished for several years.

Meanwhile, in the First Action, defendants moved on April 25, 2016, to dismiss plaintiff's complaint for failure to prosecute, and plaintiff cross moved on June 1, 2006, for summary judgment and appointment of a referee to compute. By Decision and Order dated November 17, 2016, this Court (Alfieri, J.) denied plaintiff's cross motion and granted defendants' dismissal motion (*see* NYSCEF Doc. 45). The Decision and Order narrated that plaintiff had let the First Action lay "virtually dormant for nearly three years" after release from the FSCP; that plaintiff did not proceed even after defendants properly served a 90-day demand to resume prosecution pursuant to CPLR § 3216; and that plaintiff interposed no cognizable excuse for failing to proceed (*see id.*). By then, plaintiff's First Action had been pending for nearly five and one half years.

Plaintiff immediately served a Notice of Appeal in the First Action and filed it on December 29, 2016, only to later move to withdraw the appeal. On June 7, 2017, the Appellate Division granted plaintiff's motion to withdraw its appeal. (*see U.S. Bank v. Papanikolaw*, —— AD3d ——, Mot. M-232409 [2nd Dept 2017] ) (NYSCEF Doc. 46). Rather than prosecute its appeal in the First Action or proceed in the Second Action, on or about March 14, 2018, plaintiff commenced the instant (*i.e.* third) action. By then, the Papanikolaw defendants' alleged default on the underlying mortgage was over seven years old.

The Papanikolaw defendants answered plaintiff's complaint in this action on March 23, 2018, interposing affirmative defenses and counterclaiming to discharge the mortgage. The Papanikolaw defendants' pleadings alleged that plaintiff's current action is untimely under the applicable limitations period because plaintiff failed to bring this action within six years of the alleged default. Plaintiff replied to the counterclaim on April 11, 2018. The Papanikolaw defendants then brought the instant motion for summary judgment on its counterclaim and to dismiss plaintiff's complaint on April 30, 2018, and plaintiff cross moved for summary judgment on the complaint and to appoint a referee to compute - substantially the same relief that plaintiff had sought in the First Action.

***Party Contentions***

In support of their motion to dismiss plaintiff's complaint and for summary judgment on their own counterclaim to discharge the mortgage, defendants plead and prove the foregoing procedural recitation. The gravamen of their argument is that plaintiff's July 2011 commencement of the First Action accelerated the mortgage and total amount due, and that plaintiff has not rescinded this acceleration. Accordingly, under the six-year limitation period applicable under CPLR § 213(4), plaintiff's current action is time barred (*see Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982 [2nd Dept 2012] ["With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due.... 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"] ).

***3** In further support of the foregoing, defendants adduce the complaint in the First Action, in which plaintiff alleged that defendants had paid no amount of the then-principal balance of $476,906.01 with interest from February 1, 2011, at a then-variable interest rate of three percent. By serving the complaint in the First Action, the Papanikolaw defendants aver, plaintiff thereby accelerated the full mortgage debt (*see EMC Mortgage Corp. v. Patella*, 279 AD2d 604, 605-606 [2nd Dept 2001] ). As the full amount became due and payable as of day on which plaintiff commenced the First Action (*i.e.* July 27, 2011), the Papanikolaw defendants reiterate that plaintiff's current action seeking to foreclose for failure to make their payments or to fully pay the mortgage as accelerated is untimely. The Papanikolaw defendants also aver that plaintiff never revoked the acceleration, that the limitations period was not tolled by any means, and that defendants did not waive the limitations period by acknowledging the debt and promising to repay it. Accordingly, the Papanikolaw defendants assert that they met their *prima facie* burden to show entitlement to summary judgment and discharge of the mortgage pursuant to RPAPL § 1501(4).

In opposition to the Papanikolaw defendants' motion and in support of its own cross motion for summary judgment, [1] plaintiff argues that the First Action did not accelerate the mortgage; that in any event plaintiff revoked any election to accelerate prior to the expiration of the limitations period, which plaintiff concedes lapsed on July 27, 2017 (*i.e.* six years after plaintiff commenced the First Action); and that regardless the mortgage still secures sums owed by defendants and thus may be foreclosed (Pl's Aff, at 5, ¶ 28). Plaintiff asserts that, based on the plain language of the mortgage instrument and defendants' contractual right to reinstate, only a judgment adverse to defendants would have the effect of accelerating this mortgage (*see* Pls' Mem of Law [NYSCEF Doc. 84], at 9-10).

Plaintiff further argues that even if commencement of the First Action accelerated the mortgage, plaintiff sent the Papanikolaw defendants a de-acceleration letter [NYSCEF Doc. 70] dated April 10, 2017 (*see id.*, at 6, ¶ 30; Syphus Aff. at ¶ 32). This de-acceleration letter, plaintiff asserts, creates a triable issue of material fact as to whether plaintiff revoked its election to accelerate such that the limitation period did not run. Accordingly, plaintiff concludes, the de-acceleration letter necessarily defeats the Papanikolaw defendants' motion for summary judgment and to discharge the mortgage (*see* Pl's Mem of Law, at 10; *NMNT Realty Corp. v. Knoxville*, 151 AD3d 1069 [2nd Dept 2017] [revocation of mortgage acceleration] ).

Plaintiff further argues that even if plaintiff did not timely revoke its election to accelerate the mortgage prior to the six-year deadline of July 27, 2017, additional sums became due and owing including interest on the principal debt, tax payments that plaintiff allegedly made to the Town of Clarkstown on the property, and property insurance premiums that plaintiff allegedly paid to insure the property. Plaintiff concludes that on the basis primarily of decisional authority arising from Depression-era contexts (*see e.g. Ernst v. Schaack*, 271 App Div 1012 [2nd Dept 1947], *affd* 297 NY 566 [1947]; *Jackson Heights Apartment Corp. v. Staats*, 272 App Div 780 [2nd Dept 1947], these sums remaining due and payable by defendants, that plaintiff therefore properly can foreclose on the property, and therefore defendants' dismissal motion should be denied (*see* Pl's Mem of Law, at 12-13).

In further support of its own cross motion, plaintiff avers that defendants' only affirmative defense relates to the limitations period, and that defendants did not dispute owing the debt secured by the note and mortgage. As noted above, plaintiff attached to its complaint the note and mortgage, and also submits copies of its 90-day notices under RPAPL § 1304 and their registration with the New York State Department of Financial Services pursuant to RPAPL § 1306. Plaintiff also adduces an affidavit from Mark Syphus, who attests that he reviewed plaintiff's records of the subject mortgage and loan kept in the regular course of plaintiff's business; that the subject note and mortgage was transmitted to plaintiff prior to its commencement of this action; and that defendants have defaulted by "failing to pay the installment of principal and interest due on September 1, 2012, and each and every installment of principal and interest thereafter" (Syphus Aff., at ¶ 28). He also attests that SPS, as plaintiff's servicer and agent, sent defendants the de-acceleration notice by first-class mail to the address of the mortgaged property[2] on April 10, 2017 (*see id.* at 11, ¶ 32), and that he personally reviewed the SPS business records and office mailing procedures to confirm that the de-acceleration letter was sent in that manner (*see id.* at 11, ¶ 36). He also attests that each file note for the loan has a unique alphanumeric identifier, and that he reviewed the note in SPS's "contact history report" confirming that the de-acceleration letter was sent. Plaintiff attaches a copy of that report (*see* Pl's Exh 13).

*4 The Papanikolaw defendants, in opposition to plaintiff's cross motion for summary judgment and to appoint a referee to compute, and in further support of their own motion for summary judgment to dismiss and discharge the mortgage, assert that the notice of de-acceleration is facially invalid for instant purposes because plaintiff failed to establish in the letter any proof of authority, that it was not served on defendants' attorneys of record, and because plaintiff failed to demonstrate service of such letter. Moreover, defendants aver that plaintiff allegedly sent the de-acceleration letter on April 10, 2017, while prosecuting the appeal of this Court's dismissal of the First Action. Defendants argue that this "duplicity and inconsistency cannot be tolerated in an equitable action" to foreclose on a mortgage (Defs' Reply Mem [NYSCEF Doc 867], at 4, *citing Norstar Bank v. Morabito*, 201 AD2d 545, 546 [2nd Dept 1994] ). Defendants argue that this alleged "duplicity" — prosecuting the appeal to obtain a foreclosure on the full amount due, on the one hand, while purportedly revoking the acceleration that would undergird plaintiff's entitlement to that result, on the other — constitutes unclean hands by plaintiff that equitably precludes plaintiff from prevailing on this action (*see id., citing National Distillers & Chemical Corp. v. Seyopp Corp.*, 17 NY2d 12, 15-16 [1966] ).

As to plaintiff's argument that lapse of the limitation period would not preclude foreclosure based on after-accrued tax and insurance payments, defendants retort that plaintiff's Depression-era authorities are limited to the circumstances of that era's state mortgage moratorium and are no longer are binding (*see* Defs' Reply Mem of Law, at 7). Defendants also reject plaintiff's argument that this Court should distinguish between an election to accelerate and an actual acceleration, asserting that the Second Department plainly and repeatedly held that acceleration — not mere election to accelerate — is achieved upon commencement of a prior foreclosure action (*see NMNT Realty Corp.*, 151 AD3d at 1068; *EMC Mortgage Corp.*, 27 AD2d at 605-606; *see also Lavin v. Elmakiss*, 302 AD2d 638, 639 [3d Dept 2003] ["once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage"] ).

***Analysis***

A plaintiff in a mortgage foreclosure proceeding may establish its *prima facie* entitlement to judgment as a matter of law by presenting the mortgage, the unpaid note and evidence of the defendant's default (*see Washington Mut. Bank, F.A. v. O'Connor*, 63 AD3d 832, 833 [2nd Dept 2009] ). Unlike many foreclosure actions in which a borrower challenges a plaintiff's standing (*cf. e.g. Nationstar Mortgage, LLC v. Catizone*, 127 AD3d 1151, 1152 [2nd Dept 2015]; *Homecomings Fin., LLC v. Guldi*, 108 AD3d 506, 507 [2nd Dept 2013] ) —

and, for a non-original loan, also the validity of an assignment of mortgage (*see e.g. Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 726 [2nd Dept 2014]; *Deutsche Bank Natl. Trust Co. v. Whalen*, 107 AD3d 931, 932 [2nd Dept 2013] ) — here defendants do not dispute the validity of the loan, their default, or plaintiff's standing as a holder in due course under a valid assignment. Indeed, defendants concede the same.

Especially given the foregoing predicates, this Court cannot help but echo the observations from 2015 (Berliner, J.) and 2016 (Alfieri, J.) that the underlying default — which defendants do not dispute — has now extended fully seven and a half years beyond plaintiff's commencement of the First Action in July 2011. Plaintiff does not offer even a scintilla of explanation, much less availing justification, for why this foreclosure dispute has persisted for so long, or why plaintiff abandoned the First Action and failed to further prosecute the Second Action. Plaintiff's silence is notable, as is the corresponding expenditure of judicial resources, and party resources, on this protracted dispute.

Also notable is the protracted uncertainty that plaintiff's serial proceedings have entailed for defendants. As defendants correctly observe, the Court of Appeals long ago couched the limitations periods of CPLR article 2 as "embody[ing] an important policy of giving repose to human affairs. The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when [a defendant] ought to be secure in his [or her] reasonable expectation that the slate has been wiped clean of ancient obligations" (*Flanagan v. Mt. Egan Gen. Hosp.*, 24 NY2d 427, 429 [1969] ). As narrated below, and especially given the equitable context of foreclosure proceedings, this "fairness" consideration to defendants weighs on this Court's determination of the instant motions, albeit not determinatively.

***5** The Papanikolaw defendants, as initial movants, bear the burden of proof to establish their entitlement to dismissal of plaintiff's complaint and discharge of the mortgage (*see U.S. Bank Trust, N.A. v. Carter*, 164 AD3d 539 [2nd Dept 2018]; *HSBC Mortgage Corp. v. MacPherson*, 89 AD3d 1061, 1062 [2nd Dept 2011] ). Only if defendants' motion to dismiss and discharge fails does plaintiff's cross motion for summary judgment and to appoint a referee to compute present a live controversy.

Against that backdrop, defendants demonstrated their *prima facie* entitlement to summary judgment and discharge of the mortgage pursuant to RPAPL § 1501(4). As recently as December 2018, multiple Second Department panels separately reaffirmed the gravamen of defendants' argument that the six-year limitation period of CPLR § 213(4) for an action to foreclose on a mortgage debt begins to run on the entire mortgage upon commencement of a foreclosure action (*see e.g. 21st Mortgage Corp. v. Osorio*, —— AD3d ——, 2018 NY Slip Op 8618 [2nd Dept 2018]; *U.S. Bank Trust, N.A. v. Aorta*, —— AD3d ——, 2018 NY Slip Op 8528 [2nd Dept 2018] ). Indeed, *Aorta* is particularly relevant to the instant proceeding: *Aorta* concerned a foreclosure plaintiff's predecessor in interest, which commenced a prior foreclosure action more than six years before commencing a new foreclosure action, and which prior action was dismissed. The *Aorta* Court calculated the limitation period for the entire mortgage debt from the day that the first foreclosure action was commenced to collect on any part of such debt.

In this case, it is not plaintiff's predecessor in interest but rather plaintiff itself which commenced the First Action in 2011, then the Second Action, and then the instant action. Thus, *a fortiori*, *Aorta* governs the instant action for the purpose of calculating the limitation period for foreclosing on defendants' mortgage debt. On this basis, defendants are correct that the limitations period presumptively expired six years after plaintiff commenced the First Action in July 2011. By that measure, this action, commenced in March 2018, is presumptively time-barred pursuant to CPLR § 213(4). Defendants therefore met their *prima facie* burden to demonstrate entitlement to summary judgment and discharge of the mortgage, and the burden shifts to plaintiff to demonstrate otherwise (*see Aorta*, —— AD3d ——, 2018 Slip Op 08528 at *2; *Freedom Mortgage Corp. v. Engel*, 163 AD3d 631, 633 [2nd Dept 2018]; *NMNT Realty Corp.*, 151 AD3d at 1070; *Kashipour v. Wilmington Sav. Fund Socy.,* 144 AD3d 985, 987 [2nd Dept 2016], *lv denied* 29 NY3d 919 [2017]; *see also Burke*, 94 AD3d at 982-983).

To be sure, plaintiff is correct that the foregoing time calculations are presumptive and subject to rebuttal. Just as the Court in *Aorta, supra,* reaffirmed that commencement of a foreclosure action accelerates the entirety of the mortgage debt for purposes of calculating the limitation period, these same authorities also restated the well-settled principle that once a foreclosure plaintiff accelerates the mortgage debt (whether by commencing a foreclosure action or otherwise), the plaintiff may revoke such acceleration — albeit only

"by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*Osorio*, —— AD3d ——, 2018 Slip Op 08618, at *1, *quoting NMNT Realty Corp.*, 151 AD3d at 1069-1070; *Aorta*, —— AD3d ——, 2018 Slip Op 08528 at *1 [same] ). Once a foreclosure defendant has pleaded and proved a CPLR § 213(4) defense, the plaintiff can avoid dismissal and cancellation pursuant to RPAPL § 1501(4) only by pleading and proving affirmative and timely revocation of the prior acceleration (*see id.*).

***6** Unlike the foregoing cases in which the lender failed to offer proof of some affirmative act of revocation, plaintiff submits its purported de-acceleration letter of April 10, 2017, and its servicer's affidavit of regularity concerning this de-acceleration letter. This de-acceleration letter is dated within six years of plaintiff's July 2011 commencement of the First Action, and therefore would appear to constitute a timely "affirmative act" of revocation within the meaning of *Osorio*, *Aorta* and the cases on which they rely. Thus, at minimum — and much unlike *Kashipour* — the instant action does not suggest that the "record is barren of any affirmative act of any revocation" (*Kashipour*, 144 AD3d at 987, *lv denied* 29 NY3d at 919). Rather, plaintiff's submission of its de-acceleration letter would appear minimally sufficient to rebut defendants' *prima facie* showing, so long as the de-acceleration or plaintiff's record of it is not facially invalid.

Such, however, is what defendants argue and, to the extent explained below, this Court agrees.

To be sure, certain of defendants' arguments do not bear scrutiny. Defendants argue that plaintiff's de-acceleration is void *ab initio* because the letter ostensibly failed to recite and prove its authority to de-accelerate. Defendants offer no binding authority for the proposition that the validity of a de-acceleration letter turns on the same "authority" requirement as a landlord's notice of termination or a lender's notice of default (*cf. e.g. Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 AD2d 218, 220 [2nd Dept 1985] [landlord notice of termination], *affd* 67 NY2d 792 [1986]; *Mfrs. & Traders Trust Co. v. Korngold*, 162 Misc 2d 669 [Sup Ct Rockland Co 1994] [lender notice of default] ). These contexts also are legally distinguishable in that a notice of termination and notice of default each triggers imminent legal jeopardy and a time-bound duty to act, for which the law accords the tenant or borrower the protection of some notice that the sender of such legal instrument has legal authority to do so. By contrast, de-acceleration does not trigger imminent legal jeopardy or a time-bound duty to act, and thus this Court finds no basis to conclude that the underlying objective of the "authority" requirement should apply.

While this Court recognizes that at least one trial court recently held to the contrary and required that a de-acceleration letter bear some reasonable indicia of the sender's authority (*see Deutsche Bank Natl. Trust Co. Americas v. Bernal*, 56 Misc 3d 915 [Sup Ct Westchester Co 2017] [Scheinkman, J.] ), the instant circumstances are distinguishable. In *Bernal*, the plaintiff failed to demonstrate standing to accelerate, the Court explicitly relied on plaintiff's failure to prove such standing (*see Bernal*, 56 Misc 3d at 920), and such appellate traction as *Bernal* has received to date applied *Bernal* only for the proposition that a valid de-acceleration requires standing at the time of the de-acceleration (*see Milone v. U.S. Bank Natl Assn.*, 164 AD3d 145, 153 [2nd Dept 2018] ). Here, by contrast, defendants do not dispute that plaintiff had standing to de-accelerate in April 2017 much less commence this action in March 2018 and prosecute this action now. Indeed, defendants expressly concede plaintiff's standing. Accordingly, this Court finds no basis to apply *Bernal* to the instant dispute, and defendants' argument concerning the de-acceleration letter's facial invalidity is without merit.

Also without merit is defendants' argument that plaintiff's proffer of de-acceleration fails for lack of sufficient proof of mailing. Even though the Papanikolaw defendants do not argue the fact that the letter was not mailed to the property address, they argue that the proof of mailing is inadequate to create a question of fact. The Court rejects this argument given plaintiff's extensive and detailed affidavit of regularity — which is sufficient, at minimum, to raise a triable issue of fact as to whether plaintiff did, in fact, timely tender to defendants such de-acceleration letter. (Of course, whether the proof would survive a hearing is another matter.) In this regard, this Court also notes that the Papanikolaw defendants have not submitted affidavits from either defendant asserting that they did not receive the de-acceleration letter. Accordingly, there exists no basis in the record, at this time, to dispute whether plaintiff sent such letter much less defeat plaintiff's showing that it did.

***7** Defendants also assert that plaintiff's de-acceleration letter is facially invalid because plaintiff allegedly failed to send it also to defendants' attorney of record pursuant to CPLR §

2103(b). Even if the premise is factually accurate, defendants offer no availing authority for this proposition. CPLR § 2103(b) provides for the manner of serving legal papers on an attorney, but does not require that a de-acceleration letter, or papers not directly bearing on pending litigation, be sent to a borrower's attorney. Even given that defendants' current attorneys (Legal Aid Society of Rockland County, Inc.) had represented defendants in the First Action whose dismissal was pending on appeal at the time of the de-acceleration letter, defendants offer this Court no authority for the proposition that the de-acceleration letter therefore had to be served on defendants' attorneys as well as defendants in order to be valid. CPLR § 2103(b) does not so require, and defendants offer no other authority for this proposition.

However, this Court concludes that the de-acceleration letter is facially invalid as a mere pretext to avoid the six-year limitation period to collect on defendants' mortgage debt that plaintiff itself triggered by commencing the First Action. As the *Milone* Court narrated in 2018:

> "Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note.... Specifically, a de-acceleration letter is not pretextual if... it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration. In contrast, a "bare" and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations"

(*Milone*, 164 AD3d at 154 [internal citations omitted] ). A de-acceleration instrument that a Court finds to be merely pretextual is insufficient to constitute an affirmative and timely revocation of acceleration, with implications for interposing any subsequent action within the CPLR § 213(4) limitations period (*see id.*).

This Court concludes that, on the facts and circumstances of this case, plaintiff's de-acceleration letter fails under *Milone*. The letter provided, in its entirety, as follows:

> "Dear Customer(s):
>
> "Select Portfolio Servicing, Inc. (SPS), the mortgage servicer on the above referenced account, is committed to assisting you with your home mortgage account.
>
> "As you know, a foreclosure action was filed in connection with the property referenced above. That action has been cancelled and the acceleration of the total amount owed is hereby rescinded. Although the total amount owed on the mortgage is no longer accelerated, the account remains delinquent and it is possible legal action may resume in the future.
>
> "SPS has options to help you avoid foreclosure. These options are offered at no cost to our customers and may include structured repayment plans, modifications, or settlement alternatives. If you are experiencing a financial hardship, please call us as soon as possible to discuss your situation and the options that may be available to you.
>
> > "At SPS, any of our trained servicing representatives can assist you with answers to your questions about the status or history of your account, document requirements, or any of our available loan resolution options. If you have any questions or concerns, please contact our Loan Resolution Department. Our toll-free number is [redacted], and representatives are available Monday through Thursday between the hours of 8 a.m. and 11 p.m., Friday from 8 a.m. to 9 p.m., and Saturday from 8 a.m. to 2 p.m. Eastern Time"

(Syphus Aff. & Exh. 10 [NYSCEF Doc. 70], at 1).

***8** Nothing in plaintiff's de-acceleration letter demanded monthly payments, or referred to any attached copies of invoices or any other evidence that the lender was "truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-

acceleration" (*Milone*, 164 AD3d at 154). For instance, the letter did not suggest much less offer a workout, or refer to the then-pending First Action and offer to discontinue it, or reasonably suggest any other non-pretextual purpose whatsoever. To the contrary, the de-acceleration letter explicitly recognized that "it is possible legal action may resume in the future," an assertion that appears to be the only substantive meaning fairly attributable to plaintiff's letter. Moreover, nothing in plaintiff's affidavit in support from the loan servicer suggests that plaintiff tendered with the de-acceleration letter any demand for payment, or copies of monthly invoices, or any other documentation of clear intention to de-accelerate the loan other than the language of plaintiff's letter itself (*see* Syphus Aff. [NYSCEF Doc. 60] ). For his part, plaintiff's counsel also does not assert that the de-acceleration letter was substantive in any respect, but rather argues that its mere existence and mailing constitute affirmative acts of revocation sufficient to survive defendants' dismissal motion (*see* Pl's Aff. in Support, at 6).

The de-acceleration letter's conclusory language, and plaintiff's failure to plead much less prove simultaneous tender of any demand for payment or other documentation evincing genuine intent to de-accelerate, would be sufficient for this Court to conclude that the de-acceleration letter was pretextual. However, there is far more. As noted above, plaintiff sent the de-acceleration letter in April 2017, just months before the expiration of the six-year limitations period. This timing is notable and suggestive of plaintiff's intent to evade the impending expiration of the limitation period to collect on this debt.

The circumstance that most prevails on the Court to deem plaintiff's de-acceleration letter to be pretextual is the undisputed reality that plaintiff sent the de-acceleration letter while simultaneously prosecuting its appeal from this Court's dismissal of the First Action. For months, plaintiff purported to de-accelerate defendants' mortgage debt while also seeking collection of such debt in its entirety. Only in June 2017 — nearly two months after sending its putative de-accleration letter — did plaintiff move to discontinue its appeal in the First Action. Of course, plaintiff then re-commenced this action months later, in March 2018.

Defendants thus are correct that the timing and litigation context of plaintiff's de-acceleration letter together demonstrate that plaintiff tried to have it both ways — purportedly de-accelerating the very mortgage debt that plaintiff simultaneously was litigating to collect in its entirety. Defendants call this odd coincidence a "duplicity" evincing bad faith. However this odd coincidence might be described, plaintiff does not address it in its papers and, given the facts and circumstances, it seems unlikely that plaintiff could address it satisfactorily. Neither is this case one in which the validity of the de-acceleration is only tangential to the matter or not otherwise properly before the court (*cf. Hudson City Savings Bank v. Atanasio*, 60 Misc 3d 1223 [Sup Ct Suffolk Co 2018] [mere inference of pretextual de-acceleration under *Milone* ] ). Here, defendants argue squarely that the de-acceleration letter is invalid as a matter of law and thus cannot constitute a proper and timely act of revocation sufficient to stop the limitations period from expiring on this action.

***9** Given the de-acceleration letter's timing and context, its plain language concerning the prospect of future litigation, the bald and conclusory language of the letter itself, plaintiff's failure to demand payment either in the de-acceleration letter or in a simultaneous accompanying submission, plaintiff's failure to attach invoices or other clear proof of good-faith intent to de-accelerate, and plaintiff's failure to plead much less prove that plaintiff's de-acceleration was in good faith and without pretext, this Court is constrained to conclude that there is no triable issue of material fact as to whether plaintiff's de-acceleration letter of April 2017 was pretextual within the meaning of *Milone*. As a matter of law, this Court finds no record basis upon which a reasonable finder of fact could find anything other than that plaintiff's de-acceleration letter was pretextual.

The pretextual character of plaintiff's de-acceleration letter renders it void *ab initio* under *Milone*. There being no proper de-acceleration, this Court must conclude that plaintiff failed to demonstrate a valid act of revocation of the First Action's acceleration of defendants' entire mortgage debt before elapse of the ensuing six-year limitation period within the meaning of *Aorta* and *Osorio*. Plaintiff having failed to demonstrate that any other toll on the limitation period applies in this action, this Court concludes that plaintiff's foreclosure action is untimely pursuant to CPLR § 213(4). Defendants therefore are entitled to summary judgment on their counterclaim dismissing plaintiff's complaint and cancelling the mortgage pursuant to RPAPL § 1501(4).

Even if plaintiff's de-acceleration letter were not pretextual and thus invalid *ab initio*, this Court would invoke its equity jurisdiction to determine that to credit plaintiff's putative de-acceleration — on the facts and circumstances of this case — would work substantial

prejudice against defendants and should not be allowed (*see Golden v. Ramapo Improvement Corp.*, 78 AD2d 648 [2nd Dept 1980] ). "It is well settled that an action to foreclose a mortgage is equitable in nature and triggers the equitable powers of this Court" (*PHH Mortgage Corp. v. Hepburn*, 128 AD3d 659, 661 [2nd Dept 2015]; *Morabito*, 201 AD2d at 546, *following Notey v. Darien Constr. Corp.*, 41 NY2d 1055 [1977] ). "Once equity is invoked, this Court's power is as broad as equity and justice require" (*Hepburn,* 128 AD3d at 661, Morabito, 201 AD2d at 546; *Ripley v. International Rys. of Central America*, 8 AD2d 310, 328 [1st Dept 1959], *affd* 8 NY2d 430 [1960] ).

Here, as the record overwhelmingly demonstrates, plaintiff commenced its First Action over seven years ago, and let it linger unprosecuted for five years even after defendants served on plaintiff a CPLR § 3216 demand to resume prosecution. Plaintiff then abandoned its appeal from this Court's dismissal of the First Action, while also leaving plaintiff's Second Action to linger without prosecution or discontinuance for years. Under these circumstances, the putative de-acceleration and now this third action work substantial hardship against defendants, in contravention of the "primary consideration ... of fairness to the defendant" that CPLR article 2 seeks to achieve (*Flanagan*, 24 NY2d at 429). Moreover, this Court agrees with defendants' characterization that plaintiff's simultaneous prosecution of its appeal from this Court's dismissal of the First Action, while purporting to de-accelerate that very same debt, is duplicitous. As such, defendants are correct that plaintiff came to this foreclosure action with unclean hands. Plaintiff's own unclean hands having invoked this Court's equity jurisdiction, this Court is well within its equitable authority to deny plaintiff this Court's cooperation to achieve manifest injustice against defendants.

While the residential real estate market requires that "the stability of contract obligations must not be undermined by judicial sympathy" for residential foreclosure defendants (*Emigrant Mortgage Co., Inc. v. Fisher*, 90 AD3d 823, 824 [2nd Dept 2011], *quoting First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630, 638 [1968] ), neither can this Court ignore plaintiff's unexplained and inexplicable pattern of delay and apparent gaming of both defendants and the Court. This Court reiterates what the Court of Appeals held 50 years ago: "there comes a time when [a defendant] ought to be secure in his [or her] reasonable expectation that the slate has been wiped clean of ancient obligations" (*Flanagan,* 24 NY2d at 429). Seven and a half years and three actions later, now is that time for defendants.

***10** The Court has considered plaintiff's remaining arguments and finds them to lack merit or to be moot in light of the foregoing. Accordingly it is hereby

ORDERED that defendants' motion for an order pursuant to CPLR § 3212 and RPAPL § 1501(4) granting summary judgment on their counterclaim and cancelling the mortgage, and for an order pursuant to CPLR § 3211 dismissing this action (Motion Sequence # 1), is GRANTED, plaintiff's action is dismissed with prejudice, and the mortgage on the subject property is cancelled and discharged; and it is further

ORDERED that the County Clerk of the County of Rockland is hereby directed to cancel and discharge the mortgage held by plaintiff on the subject property; and it is further

ORDERED that plaintiff's cross motion for an order pursuant to CPLR § 3212 granting summary judgment on its complaint and to appoint a referee to compute (Motion Sequence # 2) is DENIED as moot; and it is further

ORDERED that counsel for defendants shall serve this Decision and Order, with Notice of Entry, on plaintiff within five days hereof.

The foregoing constitutes the Decision and Order of this Court.

### All Citations

Slip Copy, 62 Misc.3d 1207(A), 2019 WL 190626 (Table), 2019 N.Y. Slip Op. 50026(U)

### Footnotes

1 Plaintiff's papers also request that Brookside Homeowners Association, Inc. (hereinafter "Brookside") be substituted for John Doe # 1, and that the other "John Doe" defendants be dropped from the caption of this action (Pl's Aff, at 4 ¶¶ 24-25). In support thereof, plaintiff avers and shows that Brookside was served with copies of the summons and complaint in this action.

2 The Court notes that the purported de-acceleration letter was addressed to the Papanikolaw defendants at "4 Cres Ct", not "4 Crescent Court", the

address of the mortgaged property. Paragraph 15 of the mortgage requires all notices to be sent to the mortgaged property address, not some abbreviation of it.

**End of Document**

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58 Misc.3d 1220(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)

**US Bank National Association v. Szoffer**

Supreme Court, Rockland County, New York. | December 4, 2017 | Slip Copy | 58 Misc.3d 1220(A) | 93 N.Y.S.3d 628 (Table) | See All Citations (Approx. 3 pages)

US BANK NATIONAL ASSOCIATION, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage Backed Pass–Through Certificates Series 2006–5, Plaintiff,

v.

Leah SZOFFER, Mordechai Szoffer, National City Bank and John Doe, Defendants.

034183/16
Decided on December 4, 2017

## Attorneys and Law Firms

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## Opinion

Gerald E. Loehr, J.

*1 The following papers numbered 1–4 were read on Defendants' motion pursuant to CPLR 3211 to dismiss the Complaint as untimely under the statute of limitations and Plaintiff's motion for summary judgment for an Order of Reference. [1]

Papers Numbered

Notice of Motion—Affirmation—Exhibits 1

Notice of Cross Motion—Affirmation—Affidavit—Exhibits 2

Plaintiff's Memorandum of Law 3

Defendants' Reply Affirmations 4

Upon the foregoing papers, it appears that on January 7, 2006 the Defendants borrowed $400,000 from American Brokers Conduit ("ABC"), evidenced by a Note and secured by a Mortgage on the property located at 7 Wilsher Drive, Monsey, New York. The Mortgage was a uniform Fannie Mae/Freddie Mac New York instrument. Paragraph 22 of the Mortgage gives Plaintiff the right to accelerate the loan upon a default. Paragraph 19 of the Mortgage gives the Defendants the right have a foreclosure discontinued up to the entry of Judgment by paying in full the amount due prior to acceleration together with the Plaintiff's fees and expenses. Other than by such payment by Defendants, the Mortgage does not give the Plaintiff the right to unilaterally de-accelerate the loan once accelerated. In May 2006, the loan was assigned to Plaintiff. The Defendants defaulted on August 1, 2008. Plaintiff, as authorized by the Mortgage and in order to protect its collateral, has advanced $90,259.52 for taxes between July 1, 2011 and August 14, 2017. Plaintiff commenced the first foreclosure on January 29, 2009 (the "First Foreclosure"), accelerating the loan no later than that date. The First Foreclosure was discontinued by a Stipulation dated June 18, 2009. Why is not set forth except that simultaneously Plaintiff's counsel submitted an

Affirmation that "the Plaintiff elected to pursue other contract remedies, rather than foreclosure of the mortgage loan at this time."

On January 19, 2011, Plaintiff commenced its second foreclosure (the "Second Foreclosure"). The Second Foreclosure was discontinued by Stipulation dated August 4, 2011. Why is not set forth except that Defendants' counsel who executed the Stipulation affirms that it was due to the Defendants not having been properly served.

On December 23, 2011, Plaintiff commenced its third foreclosure (the "Third Foreclosure"). On January 23, 2013, the parties filed a Stipulation of Discontinuance. Why is not set forth except that Plaintiff's counsel simultaneously submitted an Affirmation to the effect "that Plaintiff has voluntarily elected to discontinue the subject foreclosure at this time."

*2 On October 5, 2016, Plaintiff commenced the instant foreclosure. In the Complaint, Plaintiff alleges that Defendants failed to pay the December 1, 2010 and subsequent installments. While, at first blush, one might suppose that such later default date resulted from payments having been made in the interim after one or more of the foreclosures had been discontinued and presumably pursuant to some agreement, that was apparently not the case. As averred by Plaintiff's servicer, the Defendants never made a payment after August 1, 2008, and the 2010 default date was inserted in the Complaint as Plaintiff recognized that unpaid installments prior to December 1, 2010 were beyond the statute of limitations.

Defendant answered, raised the statute of limitations and counterclaimed for a declaration that the Mortgage is unenforceable and to vacate its lien and the lis pendens pursuant to RPAPL 1501, and for attorneys fees pursuant to Real Property Law § 282. Both sides move for summary judgment.

Having submitted the Note and Mortgage and evidence of the Defendants' default and the service of condition precedent notices on the Defendants, Plaintiff has established its prima facie entitlement to summary judgment for an Order of Reference. However, the statute of limitations is six years from a default in the payment of any installment or the full amount of the debt once accelerated (CPLR 213[4]; *Wells Fargo Bank, N.A. v. Burke,* 94 AD3d 980, 982 [2d Dept 2012] ). Here, the debt was accelerated no later than January 29, 2009. Accordingly, the statute of limitations expired prior to the commencement of this action on October 5, 2016, unless, as Plaintiff asserts, the loan was de-accelerated. While there is appellate authority for the proposition that a lender may revoke its election to accelerate the mortgage (*US Bank National Association v. Barnett,* 151 AD3d 791, 793 [2d Dept 2017] ), at a minimum, such requires an affirmative act of revocation by the lender (*NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 AD3d 1068, 1069 [2d Dept 2017]; *Kashipour v. Wilmington Savings Fund Society,* 144 AD3d 985, 986 [2d Dept 2016] ). Plaintiff argues that inasmuch as the prior foreclosures were discontinued by Stipulation that, in and of itself, is sufficient. Clearly, if the parties entered into a settlement wherein the loan was reinstated or a trial modification was tried and payments made and accepted, the loan would have been de-accelerated through the express or implied agreement of the parties. Here, however, the only evidence—other than the discontinuance of the prior actions—is that there was no agreement, the Plaintiff never stated or offered to reinstate the loan and no payments were made or accepted. Under such circumstances, the loan was never reinstated and the accelerated loan is unenforceable due to the statute of limitations (*id.; US Bank National Association v. Barnett,* 151 AD3d 791 [2d Dept 2017] ).

Moreover, any other result would allow the lender to restart the statute of limitations unilaterally and without notice to the borrower, and would therefore essentially write the statute of limitations out of the CPLR. And where is the authority? The mortgage allows the lender to accelerate unilaterally on default. It does not allow the lender to de-accelerate unilaterally: it is only upon agreement, explicit or implicit, such as by written agreement, written acknowledgment of the debt or by payment made and accepted (*see* General Obligations Law § 17-101; *see, e.g., Peoples Trust Co. Of Malone, NY v. O'Neil,* 273 NY 312, 315 [1937]; *Bergenfield v. Midas Collections, Inc.,* 38 AD2d 939 [2d Dept 1972]; *cf EMC Mortgage Corp. v. Patella* (279 AD2d 604 [2d Dept 2001]; *Federal National Mortgage Association v. Mebane,* 208 AD2d 892, 894 [2d Dept 1994]; *Golden Ramapo Improvement Corp.,* 78 AD2d 648 [2d Dept 1980]; *Bank of New York, v. Slavin,* 54 Misc 3d 311, 314-15 [Sup Ct, Rensselear Co 2016] ).[2]

*3 Plaintiff also argues that inasmuch as the Defendants had the right to cure their default, even after acceleration, the statute of limitations never started to run. Plaintiff cites no authority for this proposition. Moreover, every borrower has the unilateral right to cure their default and re-instate an even accelerated mortgage under Chapter 13 of the United States

Bankruptcy Code. If, as Plaintiff argues, the mere right to cure, even if not performed, stayed the commencement of the statute of limitations, it would never start with respect to any loan and lenders would be able to delay foreclosure forever.

As no such agreement has been submitted, nor evidence of monthly payments made by Defendants and accepted by Plaintiff, nor an acknowledgment of the debt, the cross motion dismissing the Complaint based on the statute of limitations is granted as is the counterclaim for a declaration that the Mortgage is unenforceable, vacating its lien and the lis pendens, and Plaintiff's motion for summary judgment is denied. (RPAPL 1501; CPLR 3212[b] ). Defendants are therefore entitled to attorneys fees pursuant to Real Property Law 282. Counsel shall submit a fee application setting forth the hours expended and his usual hourly rate. The balance of the counterclaims are dismissed as failing to state a claim.

Plaintiff also seeks, in the alternative, to recover the approximately $90,000 in taxes it paid on the Defendants' behalf within the past six years. While the payment of such taxes certainly enriched the Defendants at Plaintiff's expense such that in equity and good conscience the Defendants should not be able to retain it, as Plaintiff voluntarily made such payments to protect its lien without any fraud by Defendants or any mistake by Plaintiff, the voluntary payment doctrine bars Plaintiff's recovery of such payments (*Wells Fargo Bank, N.A. v. Burke,* —— AD3d——, 2017 WL 4930564 [2d Dept] ).

This constitutes the decision and order of the Court.

### All Citations

Slip Copy, 58 Misc.3d 1220(A), 93 N.Y.S.3d 628 (Table), 2017 WL 7611189, 2017 N.Y. Slip Op. 51976(U)

### Footnotes

1 As Defendants answered—and in fact counterclaimed to quiet title with respect to Plaintiff's mortgage and for attorney's fees—Defendants could not move to dismiss the Complaint, nor for the relief sought in their counterclaims, pursuant to CPLR 3211. However, inasmuch as Plaintiff moved for summary judgment—and apparently treated Defendants' motion as a motion for summary judgment, the Court can and will reach the merits on all issues (CPLR 3212[b] ).

2 While there is dictum in some of these cases that a lender might unilaterally de-accelerate a loan, such is only when it would not prejudice the other party —a proposition clearly inapplicable here.

**End of Document**

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107 N.Y.S.3d 858 (Mem), 2019 N.Y. Slip Op. 07323

**This opinion is uncorrected and subject to revision before publication in the printed**
**Wells Fargo Bank, N.A. v Liburd**
Supreme Court, Appellate Division, First Department, New York | October 10, 2019 | 107 N.Y.S.3d 858 (Mem) | 2019 N.Y. Slip Op. 07323 *(Approx. 2 pages)*

*1 Wells Fargo Bank, N.A., Plaintiff-Respondent,

v.

Shayne Liburd a/k/a Shayne J. Liburd, et al., Defendants-Appellants,
New York City Parking Violations Bereau, et al., Defendants.

**OPINION**
Supreme Court, Appellate Division, First Department, New York
10032 32225/16E
Decided on October 10, 2019

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

**APPEARANCES OF COUNSEL**
Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for appellants.
Reed Smith LLP, New York (Joseph B. Teig of counsel), for respondent.
Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered March 13, 2018, which denied the motion of defendants Shayne Liburd a/k/a Shayne J. Liburd and Daldan Inc. (defendants) to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants sustained their initial burden of demonstrating, prima facie, that this action was untimely because more than six years had passed from the date that the debt on the mortgage was accelerated (CPLR 213[4]; *see MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644 [1st Dept 2019]). In opposition, plaintiff failed to raise a question of fact as to whether the action is timely. Plaintiff's argument that it affirmatively revoked its election to accelerate the mortgage within the six-year limitations period by discontinuing the prior foreclosure action is unavailing as a mere discontinuance of a prior foreclosure action, without more, is insufficient to constitute an affirmative act to revoke a lender's election to accelerate (*see HSBC Bank NA v Vaswani,* 174 AD3d 514 [2d Dept 2019]; *Vargas v Deutsche Bank Natl. Trust Co.*, 168 AD3d 630 [1st Dept 2019]; *HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 507 [1st Dept 2018]). Plaintiff also failed to put forth any facts that show that the statute of limitations was tolled because plaintiff was a mortgagee in possession (*see MTGLQ Invs., LP v Wozencraft*, 172 AD3d at 645).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 10, 2019

CLERK



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