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Court of Appeals

STATE OF NEW YORK

FREEDOM MORTGAGE CORPORATION,

Plaintiff-Appellant,

—against—

HERSCHEL ENGEL,

Defendant-Respondent,

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

Defendants.

BRIEF FOR APPELLANT IN RESPONSE TO *AMICI CURIAE* LEGAL SERVICE PROVIDERS

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PRELIMINARY STATEMENT

The amici curiae brief filed by Legal Services NYC et al., a coalition of non-profit legal service providers, largely rehashes the arguments that defendant-respondent Herschel Engel made in his brief. Those arguments fail for the reasons stated in Freedom Mortgage's briefs already on file with this Court. Freedom Mortgage submits this response to address additional points raised by the non-profit legal service providers.

ARGUMENT

I. The Legal Service Providers Ignore the Undisputed Facts of This Case

The legal service providers have written an amicus brief for the apparent purpose of assailing alleged robo-signing practices that are not at issue in this case. They fail to address the facts or circumstances of *this* case in any respect. And their experience has little relevance because, by their own admission, they do not serve individuals like Engel, a real estate investor and landlord who did *not* live in the home that he purchased with borrowed money.

The legal service providers begin by suggesting that most foreclosing entities relied on "fabricated 'robo-signed' evidence" until the courts and Legislature required them to certify that the foreclosure complaint had merit. Legal Services Br. 1. According to the legal service providers, the foreclosing entities could not meet this certification requirement and abandoned foreclosure actions in droves. *See id.* at 1-2. This Court should reject the legal service providers' suggestion that all foreclosures of a certain vintage are inherently suspect. Robo-signing is not an issue in this case. Freedom Mortgage was entitled to foreclose in both 2008 and 2015 and complied with all applicable statutory and contractual requirements.

The legal service providers also ignore the fact that Engel, not Freedom Mortgage, caused delay and frustrated the foreclosure process in this case. They state that Engel had a "service defense," without addressing or acknowledging Engel's contradictory statements as to whether he was served. Legal Services Br. 20. When Engel moved to vacate the judgment, he swore that he was *not* served. (A. 133 [¶ 7]) Then, in his counseled stipulation, he stated that he "was served with a copy of the Summons and Verified Complaint." (A. 42) The Appellate Division

relied on the stipulation in rejecting Freedom Mortgage's argument that "the loan had never been accelerated since the defendant had not been served …." (A. 228) Thus, Engel escaped the first foreclosure judgment on the ground that he had *not* been served and, according to the Appellate Division, escaped the second foreclosure judgment on the ground that he *was* served. The legal service providers do not address his gamesmanship; instead, they pretend it does not exist.

The legal service providers may have nothing to say about the actual facts of *this* case because they have never encountered a client like Engel before and their institutional mission does not include win-at-all-costs litigation tactics. They provide "free legal services to distressed homeowners and low-income New Yorkers." Legal Services Br. 4. They represent the "poor," "low-income" individuals, "tenants," and "victims," among others. *See id.* at 4-13. Not one of the legal service providers claims to represent landlords and real estate investors who do *not* live in the property at issue and collect rent from tenants while refusing to honor their loan agreements. The legal service providers' experience in working with clientele that, by definition, cannot afford private counsel, has seemingly blinded them to the possibility that some borrowers are

sophisticated, counseled, non-resident landlords who have the wherewithal to honor their agreements but simply choose not to do so.

In any event, the rule that should resolve this case—that a lender may revoke an election to accelerate and thereby restore the parties to their original terms unless the revocation would be inequitable—will protect the interests of the legal service providers' low-income clients. If a lender revokes an acceleration for reasons that are prejudicial or unfair, then principles of equitable estoppel may preclude the revocation. *See* Freedom Mortgage Opening Br. 2, 21; Freedom Mortgage Reply 10, 21-22. But no case holds that revoking an election to accelerate and restoring the parties to their original terms is always or even presumably inequitable, which would be tantamount to saying that an option to accelerate is irrevocable. This Court should not be the first.

The legal service providers nevertheless argue, in substance, that restoring the parties to their original terms is always and inherently unfair if the original terms require the borrower to pay past monthly amounts due (arrears), along with interest and late fees. *See* Legal Services Br. 26-30. But they do not explain why charging interest or late

fees in the event of the borrower's default would be unfair or inequitable, much less do they make such an argument based on the facts of this case.

For example, the legal service providers seem to suggest that a late charge of "5% of the mortgage payment" is unfair or somehow renders revocation inequitable. Legal Services Br. 27. But that unexplained contention has nothing to do with this case, in which the one-time monthly late fee was 2% of the monthly amount. (A. 57 [¶ 6(A)]) As shown in Freedom Mortgage's August 7, 2013 acceleration letter, the late charges in this case were minimal in comparison with the principal and interest that Engel willfully refused to pay. (A. 135) The legal service providers also reference "management fees," "illegal fees," and "other" fees (Legal Services Br. 27-28), but nothing in the record shows that Freedom Mortgage charged such fees (A. 135). Neither the foreclosing entity nor the low-income resident borrower that the legal service providers have in mind is before this Court.

II. The Legal Service Providers' Arguments Are Wrong

While the legal service providers mainly repeat Engel's arguments, they also raise additional points. As explained below, their additional arguments are meritless.

A. Lenders Do Not Have Unfettered Discretion to Discontinue a Foreclosure Action

The legal service providers argue that lenders "have widely unfettered discretion to discontinue a foreclosure action after filing it." Legal Services Br. 3. They are incorrect. While a lender may unilaterally revoke its discretionary election to accelerate (subject to equitable constraints), if it chooses to effectuate the revocation by discontinuing the action that had accelerated the loan, it must comply with CPLR 3217. Contrary to the legal service providers' argument, that statute provides constraints on a lender's ability to use discontinuance as a pretext for avoiding the statute of limitations.

Under CPLR 3217, a plaintiff may unilaterally discontinue a foreclosure action until the defendant serves a responsive pleading. CPLR 3217(a)(1). After the defendant serves a responsive pleading, however, the plaintiff must obtain the consent and stipulation of the defendant or file a motion to discontinue. *See* CPLR 3217(a)(2), (b). Therefore, a defendant may oppose and resist a plaintiff's request for discontinuance at any time after serving a responsive pleading, and if the discontinuance would be "unjust or inequitable" (*Willetts v. Browning*, 198 A.D. 551, 552 (1st Dep't 1921)), courts may deny the request. *See id.*;

Tucker v. Tucker, 55 N.Y.2d 378, 383-84 (1982); *GMAC Mortgage, LLC v. Bisceglie*, 109 A.D.3d 874, 876 (2d Dep't 2013). The standard for denying a motion to discontinue mirrors the standard for refusing to enforce a lender's revocation of an election to accelerate—each depends on whether allowing the act (discontinuance or revocation) would be inequitable.

Tellingly, the legal service providers argue that foreclosure defendants are "rarely" able to show that a court should deny a motion to discontinue. Legal Services Br. 22-23. This concession supports Freedom Mortgage, not Engel, because this is not one of those rare cases. To the contrary, Engel (through private counsel) consented and stipulated to discontinue the action in this case. (A. 42-43)

B. The Stipulation to Discontinue Revoked Freedom Mortgage's 2008 Acceleration of the Loan

The legal service providers replay Engel's argument that a stipulation to discontinue a foreclosure action is ineffective to revoke an acceleration unless the stipulation includes "a provision expressly stating that the acceleration was revoked[.]" Legal Services Br. 20. To Engel's erroneous argument they have added a description of this Court's decision in *Terminal Auxiliar Maritima v. Winkler Credit Corp.*, 6 N.Y.2d

294 (1959) ("*Winkler*"), claiming that it is "the decision most relevant here." Legal Services Br. 19. They are wrong; *Winkler* is inapposite.

Winkler held that a foreign defendant did not waive its contractual right to compel arbitration by stipulating that the New York court had personal jurisdiction over it. 6 N.Y.2d at 300. In *Winkler*, the stipulation's purpose was to secure the withdrawal of attachments. Terminal Auxiliar agreed to appear in New York and post a bond in exchange for Winkler's agreement to withdraw the attachment of property in New York and Rotterdam. 6 N.Y.2d at 297. Because the stipulation did not address arbitration and addressed a different subject, there was no good reason to infer that Terminal Auxiliar intended to waive its arbitration rights.

The question here, however, is not whether Engel waived anything, but whether Freedom Mortgage revoked the 2008 acceleration. And it did: because the 2008 complaint itself effectuated the first acceleration, a discontinuance of that same complaint necessarily canceled the acceleration. *See* Freedom Mortgage Opening Br. 22-26; Freedom Mortgage Reply 13-17. The terms "discontinue" and "revoke" are functionally equivalent and have the same effect on the acceleration at issue here.

Thus, nothing was "omitted" from the stipulation in this case that one would necessarily expect to see and the stipulation is not "silent" as to whether it revoked the 2008 demand for accelerated payments. Legal Services Br. 20, 21. The stipulation expressly states that "Plaintiff's action will be discontinued without prejudice and the Notice of Pendency will be cancelled without any further application to the court." (A. 42-43) Thus, the stipulation cancels, annuls, terminates, discontinues, and revokes the acceleration. The stipulation's core purpose was to end a lawsuit for accelerated payments, without which no demand for accelerated payments remained.

Rather than address the language and circumstances of the stipulation at issue here, the legal service providers argue that "in the vast majority of residential foreclosure actions, stipulations are drafted solely by counsel for the lender, the foreclosure plaintiff." Legal Services Br. 21. But this unsupported assertion has nothing to do with this case. Engel is a landlord, not a resident. He was represented by private counsel. (A. 43) And Freedom Mortgage had no unilateral right to vacate the judgment and discontinue the action. *See* CPLR 3217(b).

C. This Case Will Not Disturb Judgments Discharging a Mortgage under RPAPL § 1501

Without citing anything or providing any reasoning, the legal service providers warn this Court that if a voluntary discontinuance is sufficient to revoke an acceleration, then lenders will seek to foreclose on mortgages that "have already been discharged pursuant to R.P.A.P.L. § 1501(4), wreaking havoc on New York's property markets." Legal Services Br. 25. But no such havoc will ensue because the doctrines of res judicata and collateral estoppel protect a judgment of discharge under RPAPL § 1501(4) from a new foreclosure action.

The statute that the legal service providers invoke, RPAPL § 1501, provides that where the statute of limitations for commencement of a foreclosure action on a mortgage has expired, a person with an interest in real property subject to the mortgage may maintain an action to secure the cancellation and discharge of record of such encumbrance. *See* RPAPL § 1501(4). Thus, a borrower cannot obtain a judgment under RPAPL § 1501(4) without demonstrating that the statute of limitations has expired.

If the borrower obtains a judgment of discharge under RPAPL § 1501, that judgment prevents a lender from foreclosing on the same mortgage that was the subject of the RPAPL proceeding. In that situation, a court would have already decided that such an action is time-barred, precluding relitigation of that same issue. *See Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) ("Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity[.]"). Accordingly, the legal service providers' concern that lenders will seek to reopen judgments of discharge in other cases is misplaced.

III. Reversal of the Appellate Division's Decision Will Allow and Promote Settlements

The legal service providers state that they "are unaware of a single instance since the start of the foreclosure crisis in 2008 in which a lender agreed to discontinue a foreclosure action and allow borrowers to resume making regular monthly installments in the hopes that the parties will ultimately reach a long-term solution." Legal Services Br. 26. By this statement, they apparently mean to convey that they are unaware of a situation in which a discontinuance allowed the borrower to make *only* regular monthly payments, *without* "paying all arrears." *Id.* But their

statement makes no sense, because a revocation of acceleration is, by definition, *not* a loan modification. Rather, a revocation of acceleration restores the parties to their original terms, under which the borrower must pay past monthly amounts due, accrued interest, escrow disbursals, and late charges. *See* Freedom Mortgage Reply 25-27.

Similarly, the legal service providers argue, incorrectly, that Freedom Mortgage suggested that "no lender will agree to discontinue a foreclosure case that settles during a CPLR 3408 conference, unless the Appellate Division is reversed," and that the purported "suggestion" is "not reflected by reality." Legal Services Br. 26 (citing Freedom Mortgage Opening Br. 32). They go on to say that a borrower and lender may "enter into an agreement to modify the subject loan" and "re-set" the limitations period under sections 17-105 and 17-107 of the General Obligations Law. Legal Services Br. 26. Once again, they seemingly assume that the only valid reason to discontinue is to modify a loan. Not so; parties may stipulate to discontinue and thereby effectuate a revocation before, during, or after a settlement conference under CPLR 3408 or at any time, but lenders will be reluctant to do so if there is a risk that the

discontinuance has no effect on the acceleration. *See* Freedom Mortgage Opening Br. 31-32; Freedom Mortgage Reply 29-32.[1]

To the extent that the legal service providers are arguing that only a loan modification has any value for the borrower, or that a stipulation effectuating a revocation of acceleration has no value for the borrower, they are mistaken. Here, for example, the stipulation vacated an existing foreclosure judgment, ended a lawsuit for accelerated payments, and canceled a notice of pendency—all to Engel's benefit. (A. 42-43) Moreover, the revocation of Freedom Mortgage's election to accelerate eliminated Engel's contractual obligation to pay the entire amount of the loan immediately. Thus, the revocation reduced the amount that Engel had a contractual obligation to pay by June 15, 2013, by more than $100,000. *See* Freedom Mortgage Reply 26.

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[1] Freedom Mortgage cited CPLR 3408 in its opening brief in support of the proposition that settlement of a mortgage foreclosure action serves the public interest. Opening Br. 31-32. That statute did not apply to the 2008 foreclosure action because Freedom Mortgage commenced it in July 2008, before the earliest possible effective date. 2008 N.Y. Laws, Ch. 472, §§ 3, 3-a. Even though Engel did not reside at the property subject to foreclosure, a settlement conference was scheduled in connection with the 2015 foreclosure action, but Engel did not appear. (A. 144)

Given that every known case holds that a lender may revoke an election to accelerate, the parties were entitled to enter into this form of settlement, *i.e.*, a stipulation to discontinue that revoked the acceleration. (A. 42-43) Freedom Mortgage had no obligation to enter into a loan modification in which it forgave past monthly amounts due so that Engel could increase his landlord and real estate investment profits. And Freedom Mortgage did not obtain any benefit from vacating the 2010 judgment. Instead, it gave up statutory interest running at the statutory rate of 9% per year from the date of acceleration (July 15, 2008), which is significantly *higher* than the 6.375% rate on the loan (A. 59 [¶ 2]). *See* CPLR 5001, 5004; 1 Bergman on New York Mortgage Foreclosures § 1.11 & nn. 3, 3.1 (2019) (citing cases). Thus, contrary to the legal service providers' argument (Br. 28), the revocation substantially *decreased* the amount of interest that Engel owed.

In short, the notion that Freedom Mortgage is somehow benefiting or benefited from Engel's evasion of service and gaming the system has no basis in reality or the record in this case. Freedom Mortgage, not Engel, is the injured party here. And a ruling that a discontinuance is insufficient to revoke an acceleration would multiply its injuries, thereby

discouraging lenders in Freedom Mortgage's position from discontinuing foreclosure actions.

To be sure, the legal service providers might prefer a world in which an option to accelerate is irrevocable, such that a lender has only two choices after having elected to accelerate: (1) foreclosure and forced sale of the property and (2) loan modification. The legal service providers apparently assume that eliminating the possibility of revocation will, as a practical matter, cause lenders to choose option "(2)" instead of option "(1)." That assumption is mistaken, and even if it were not, revocation of acceleration is and long has been proper, except in cases in which the revocation would be inequitable. This is not such a case.

CONCLUSION

This Court should reverse the Appellate Division's order and reinstate the trial court's judgment in favor of Freedom Mortgage.

Dated: February 26, 2020 Respectfully submitted,

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I, Brian Sutherland, hereby certify pursuant to Rule 500.13(c)(1) that the total word count for all printed text in the body of the reply brief is 2,899 words.

/s/ Brian A. Sutherland