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MEMORANDUM IN OPPOSITION

May 25, 2021

A.7737 Weinstein (On Assembly Judiciary Committee Agenda 5/26/21)

AN ACT to amend the real property actions and proceedings law and the civil practice law and rules, in relation to the rights of parties involved in foreclosure actions

This memorandum in ***opposition*** is written on behalf of our client, the New York Bankers Association (NYBA). NYBA is comprised of the smaller community, mid-size regional, and large banks across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans. NYBA members also support their communities through an estimated $200 million in community donations and 500,000 employee volunteer hours.

This bill, which is an obvious attempt to overturn a well-reasoned and persuasive recent ruling by the New York Court of Appeals in *Freedom Mortgage Corporation* v. *Engel*[1], will have a devastating effect on the mortgage market in New York. While a few borrowers may benefit, the vast majority will suffer. The bill will leave lenders with no choice but to forego all of the various options available to work with a borrower before final judgement of foreclosure, in favor of speedy foreclosures. Thus, the bill will benefit defense attorneys at the expense of borrowers—and seems to encourage litigation rather than loss mitigation.

Specifically, the proposed new subdivision 4 of RPAL § 1301 states in essence that if the action brought by the holder of a note and mortgage is dismissed as barred by the statute of limitations, then recovery upon the debt in *any* form is therefore barred. This casts aside the bedrock legal principle that an action on the note is different from an action to foreclose a mortgage.[2] The plaintiff most often has the choice of pursuing one or the other. Volumes of case law hold that it is entirely possible that under some circumstances an action on the note remains timely even when a mortgage foreclosure action may be barred by the statute of limitations. Imposing the statute of limitations is a grave conclusion for the mortgage holder, who loses the entire investment while the borrower owes nothing and derives a windfall. This will also greatly increase the chance that a statute of limitations will expire and surprise the lender with a total loss of their remaining investment. Meanwhile, the borrower experiences an unearned bonus from their previous default because after a court finds the statute of limitations has run, the borrower need not make any additional payments on the loan and is still allowed to keep the mortgage property. The

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[1] , ____ N.E.3d ____; 2021 WL623869; 2021 N.Y. LEXIS 103; 2021 NY Slip Op 01090.

[2] The action on a note is an action at law for the debt (having nothing to do with ownership of the property). An action to foreclose the mortgage is an action in equity which calls for the sale of the property securing the debt.

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law should not incentivize defaults. The potential result will force banks and other lenders to exit the mortgage market in New York, leaving borrowers with less lending options that are far riskier, more expensive, and less regulated.

Secondly, the addition of subdivision (e) of CPLR Rule 3217 is also obviously designed to reverse the *Engel* decision, which held that the discontinuance of a foreclosure action automatically revokes the mortgage acceleration created by commencement of the action unless the noteholder makes a contemporaneous statement to the contrary. Discontinuance is a voluntary act by the foreclosing party and the Court's well-reasoned rule has the desirable effect of dispelling any confusion about the obligations between a defendant and the plaintiff discontinuing the foreclosure action. The Court itself noted its desired "reliable and objective" rule for this reason. This bright-line rule supports judicial efficiency and consumer clarity, as it eliminates the need for courts to scrutinize the underlying intent of the discontinuance and prolonged arguments on the same. This legislation will muddle that clarity in favor of uncertainty, once again requiring courts to spend time analyzing the post-discontinuance communications for traces of the noteholder's intent.

Thirdly, two aspects of the proposed CPLR § 3217(e) are also problematic. First, a discontinuance must occur within six years of commencement of the foreclosure action that accelerates the mortgage, otherwise the noteholder can never seek payment on the note again. Unfortunately, the combination of vigorous borrower litigation and extensive undue court delays means that a foreclosure action can stretch past six years – completely without the fault of the foreclosing party. It is notable that New York State has one of the nation's longest foreclosure processes in the country with estimates of the average time to complete a foreclosure estimated between 2.75 and 4.6 years.[3] While there could, even after the six years, be compelling reasons to discontinuance the action, the plaintiff would be unable to do so lest its remedy be forever barred.

To further confuse matters, this proposed subsection imposes two stages of requirements upon the foreclosing party for a discontinuance to revoke an acceleration. One is that the plaintiff must explicitly advise the defendants that the acceleration is revoked. The other is that the plaintiff must recite that it will resume accepting installment payments. This is potentially confusing and problematic. If the action is being discontinued the mortgage arrears are likely to be substantial. But if the plaintiff is bound to recite, and therefore actually accept, installment payments, how is the plaintiff to then enforce recompense for the arrears? If it accelerates anew, it will have breached the statement to the borrower that installments will be accepted. This creates an impossible situation which will prove utterly unworkable and fatally prejudicial to lenders.

[3] Amy Loftsfgordon, *States With Long Foreclosure Timelines*, NOLO.COM ("New York had the third-longest foreclosure timeline, averaging 1,691 days.") (https://www.nolo.com/legal-encyclopedia/states-with-long-foreclosure-timelines.html); Cortney Moore, *How Long Does Foreclosure Take?* FOXBUSINESS.COM (July 2, 2020) ("As of the third quarter of 2019, the following states have recorded timelines that are more than two years long on average. . . New York: 1,003 days.") (https://www.foxbusiness.com/real-estate/how-long-home-foreclosure-take).

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The final portion of the bill, proposed CLPR § 205-a, would completely undermine well settled law that created a Six-Month Savings Clause. Under current law, if an action was timely commenced but later terminated after the statute of limitations has expired, then the plaintiff is permitted six months to commence a new action upon the same transaction. As the Court of Appeals has explained, this Savings Clause is founded upon the sound premise of remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has previously had timely notice of the claim. Accordingly, it allows a Plaintiff whose case has been dismissed to reinstitute litigation within six months of a dismissal—even if the case would otherwise be time-barred. As that Court said, the Savings Clause "by its very terms comes into operation in instances where a proceeding has been terminated for some fatal flaw unrelated to the merits of the underlying claim ... and it is to be liberally construed."[4] This provision has worked well over the many years of its existence. In 2019 the Court of Appeals reviewed the statute, explained its meaning and interpreted it liberally, suggesting strongly the value of this statute as presently constituted.[5]

The new statute would replace the basis for the Savings Clause: "neglect to prosecute the action" with the encyclopedic and vague "any form of neglect." It would also add violation of any uniform court rules or individual part rules, failure to comply with any court scheduling orders, default due to nonappearance for conference or at a calendar call, and failure to timely submit any order or judgment to the restrictions on the Clause.

This change will *severely* restrict the availability of the Six-Month Savings Clause. First, "any form of neglect" is exceptionally broad and ultimately nebulous; it will subject many attempts to employ CPLR § 205 to a charge that there was neglect. Moreover, many forms of termination that would eliminate the six-months savings period are effectively traps for the unwary, which often trigger for innocuous reasons. Indeed, such miscues are often the subject of litigation allowing parties to present an excuse for the very reason that the miscues are commonplace and benign. This provision alone will clog courts for indeterminate amounts of time, while leaving lenders and borrowers in a never-ending spiral of uncertainty when it comes to mortgages and foreclosures.

For these reasons, the New York Bankers Association **opposes** this legislation and urges that it be **held**.

Respectfully Submitted,

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[4] See, *U.S. Bank Natl. Assn.* v. *DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72 (2019).

[5] *Id.*

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