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MEMORANDUM IN OPPOSITION

May 2, 2022

S.5473D – Sanders (On Senate Third Reading Calendar)
A.7737B – Weinstein (Passed Assembly 3/23/22)

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 seeks to overturn a well-reasoned and persuasive ruling by the New York Court of Appeals in *Freedom Mortgage Corporation* v. *Engel.*[1] But this bill goes far beyond reversing *Engel* by amending other sections of law in ways designed to prevent the statute of limitations on foreclosures and mortgage debt suits from ever extending beyond six years. Together, these amendments single out mortgage holders from all other civil plaintiffs and burden them with special rules calculated to trip them up and run out their time in court.

This legislation 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 more likely serve to benefit defense attorneys at the expense of borrowers and seems to encourage litigation rather than loss mitigation.

I. Amendments to CPLR §§ 203, 3217 and GOB § 17-105.

The addition of subdivision (e) of CPLR Rule 3217 is intended 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 but, in reality, it benefits the defendant, because they are no longer in foreclosure litigation and can remain in the mortgage property. Discontinuances keep people in their homes, but the threat of foreclosure only retreats if discontinuance is paired

[1] Freedom Mortg. Corp. v. Engel, 37 N.Y.3d 1 (2021).

with deacceleration. In *Engel*, the Court of Appeals noted that discontinuance, "allow[s] borrowers to take advantage of the opportunity afforded by the de-acceleration—reinstatement of the right to pay arrears and make installment payments, eliminating the obligation to immediately pay the entire outstanding principal amount in order to avoid losing their homes. A return to the installment plan also makes it more likely that borrowers can benefit from the various public and private programs that exist to help borrowers work out of a default."[2]

Given the mutually beneficial effects of discontinuance, the law should make them easier for lenders to grant, not harder, but that is the opposite of this bill's approach. The overwhelming majority of discontinuances are the product of an agreement with the defendant to establish an alternative payment plan. Yet, this bill would make such agreements less likely because, if the mortgage holder believes the borrower could default again, then they will opt to follow through on the foreclosure rather than risk their investment by working with the borrower to find another solution that allows a borrower to stay in the property.

During the *Engel* case, the consumer bar alleged that many discontinuances were "foreclosure abuse" by banks looking to reset the statute of limitations. But evidence of widespread abuse never materialized, and the Court found that a bright-line rule establishing deacceleration upon discontinuance would provide certainty that would help more borrowers than it hurt while also promoting judicial efficiency. The theoretical possibility for abuse is no justification to upend the court's well-reasoned decision and restructure foreclosure litigation to bias mortgage holders against working with borrowers to keep them in their homes.

II. Amendments to RPAPL § 1301.

The proposed new subdivision 4 of RPAPL § 1301 establishes 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.[3] 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.

This amendment greatly increases the chance that a statute of limitations will expire and surprise the lender with a total loss of their remaining investment. For the mortgage holder, imposing the statute of limitations is a grave conclusion because it effectively extinguishes their interest in the property. For the borrower it can be a windfall; after a

[2] Freedom Mortg. Corp. v. Engel, 37 N.Y.3d 1, 32-33 (2021).
[3] 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.

court finds the statute of limitations has run, they owe nothing on the loan and are still allowed to keep the mortgage property. Moreover, the borrower's gain here is only possible because of their previous default, which started the limitations period running. The law should not incentivize defaults.

The amendments to subdivision 3 of RPAPL § 1301 compound the danger to mortgage holders. New York is already among a minority of states with a "one-action rule" (embodied in subdivision 3) that prohibits the mortgage holder from simultaneously pursuing both a foreclosure and a separate suit to recover on the note at the same time. This bill would insert new language stating that the commencement of one action does not toll the statute of limitations for the other. The chief concern is that New York foreclosures take between 2.75 and 4.6 years to conclude on average; this is one of the nation's longest foreclosure processes.[4] Of course, many mortgage suits take longer, past the 6-year mark. Under this bill, if the chosen first action should fail for any reason, even a procedural one, it may be that the second action is already untimely and the mortgage holder's investment already lost.

Faced with the increased risk of missing the foreshortened recovery period for any number of reasons, lenders will worry about more NY mortgages transforming into bad debt. This potential result will force banks and other lenders to exit the mortgage market in New York and make the ones that remain even more cautious. The new status quo will mean foreclosure relief for some defendants, but at the cost of leaving all borrowers with fewer lending options overall, saving those that are far riskier, more expensive, and less regulated.

III. Amendments to CPLR § 205-a

The 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

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[4] 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).

underlying claim . . . and it is to be liberally construed."[5] This provision has worked well over its many years of 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.[6]

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."[7] 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.

Moreover, the new section would not permit a successor in interest to commence a foreclosure "unless pleading and proving that such assignee is acting on behalf of the original plaintiff."[8] This change has the potential to dramatically shrink access to mortgage credit in New York because it may eliminate the secondary market for some mortgage debt. In reality, once a mortgage in foreclosure is sold, there is not always a substitution of parties. If the action is then dismissed, the purchaser may eventually need to recommence the foreclosure. This section suggests that the purchaser cannot do so unless they are acting on behalf of the original plaintiff in the first foreclosure (the seller). This is rarely the case, and the section effectively makes the mortgage unmarketable. This has the potential to jeopardize the safety and soundness of a financial institution because once some mortgage debt goes bad, the institution cannot remedy its balance sheet by selling it.

IV. Conclusion

If the ultimate goal is to provide deserving borrowers with a way to stay in their properties despite a mortgage default, then this is far from the best and not even a desirable method of accomplishing it. This bill's approach, which fills the foreclosure process with pitfalls and trap door, allocates its relief unpredictably and only after an ordeal for both parties.

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[5] See, *U.S. Bank Natl. Assn.* v. *DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72 (2019).
[6] *Id.*
[7] 2022 Senate-Assembly Bill, A.7737B/S.5473D, § 7.
[8] *Id.*

While this bill is motivated by good intentions, the present relief it will provide some borrowers will be far outweighed by the damage it does to all future borrowers. By making mortgage credit a riskier business, the natural course of compliance will require lenders to make it less available. Borrowers who are still eligible for mortgage credit, but later default, will also find it harder to avoid foreclosure because the law will disincentivize lenders from working with many of them on alternative payment plans. For these reasons, the New York Bankers Association **opposes** this legislation and urges that it be **held**.

Respectfully Submitted,

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