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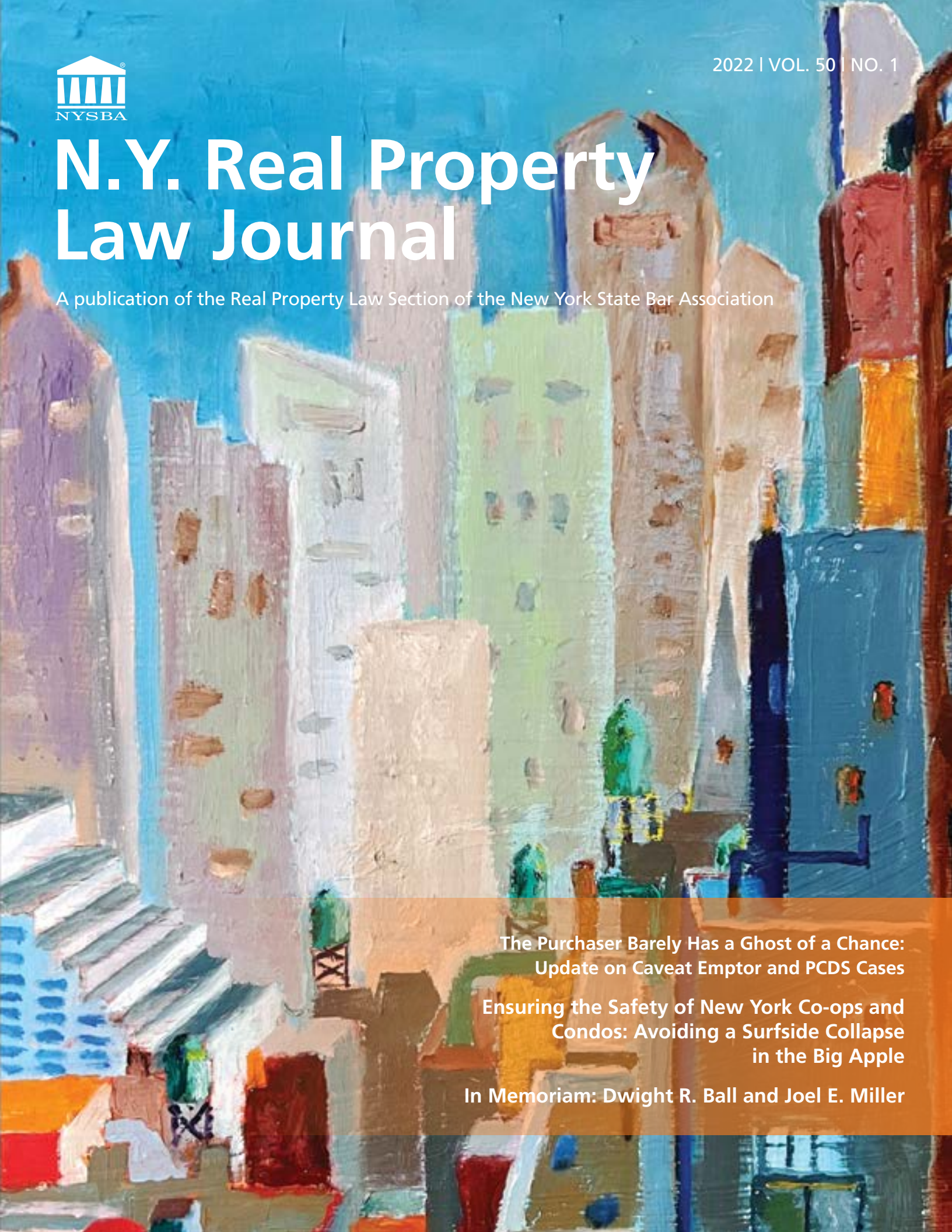
NYSBA

N.Y. Real Property Law Journal

A publication of the Real Property Law Section of the New York State Bar Association



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In Memoriam: Dwight R. Ball and Joel E. Miller

In Memoriam

Dwight R. Ball

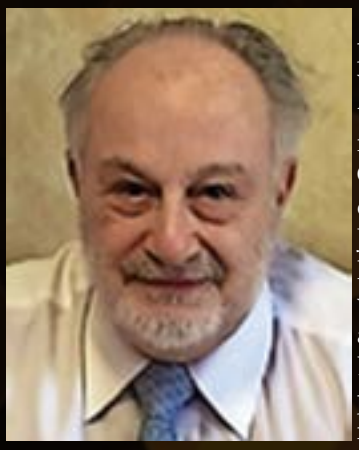
Dwight R. Ball passed away on October 22, 2021, in Sarasota, Florida at the age of 86. Dwight was the Chair of the Executive Committee of the Real Property Law Section from 1986 to 1987. Dwight remained active in the New York State and Broome County Bar Associations after his tenure as Section Chair, and he encouraged many lawyers to become involved with the Real Property Law Section. Dwight and his wife Aija were frequent doubles partners at the Section's summer meetings.

Born in Saugerties, N.Y., Dwight graduated from Union College and Cornell Law School. He began his practice in Binghamton in 1960 with the law firms of Gerhart & Kuhnen and then Night and Keller, which was located on the third floor of the Security Mutual Building. Dwight left to establish a highly respected practice with several local attorneys, including Kevin McDonough, Phil Johnson, Phil Artz, and Gary Farnetti. Dwight was a good mentor and resource for other attorneys, and he ultimately returned to the third floor of the Security Mutual building in 2004 to serve as special counsel to Hinman, Howard & Kattell, LLP and as officer, director, and trustee of the George A. and Margaret Mee Charitable Foundation.

Dedication to clients and hard work would be Dwight's hallmark as he developed a very successful practice specializing in real estate and trusts and estates. Dwight's clients were extremely loyal to him, and his counsel was highly valued. Dwight was always looking out for his clients and frequently sought answers to questions his clients may not have asked him, but that he thought they should be thinking about. As he spent more time in Florida, Dwight still maintained an active practice in part because his clients valued his opinion so much and would not let him retire. Dwight kept the overnight couriers busy sending title work and dictation tapes back and forth between Florida and the Binghamton office.

This brief tribute cannot do justice to the many stories of Dwight's sense of humor and generosity that his friends and colleagues have shared with us since his passing. Dwight is survived by his wife Aija, sister Linda, daughters, Andrea and Jennifer, his sons-in-law, Steve and George, and his two grandsons, Eric and Mark.

Joel E. Miller



Joel E. Miller, who passed away in January, was a unique presence in the legal community. First in his law school class at Columbia, then clerking on the Second Circuit for Judge Harold Medina, earlier in his career practicing with prominent law firms and teaching at St. John's Law School, he is still probably best known to many as an independent presence.

Joel enjoyed intellectual challenges—whether legal or linguistic—and was relentlessly curious about how to make things consistent and, ideally, correct. To work with Joel on a transaction, an article, or legislation was to be instructed in precision and clarity.

With good humor, Joel was always available to friends, which almost to a member included the New York State Bar Association Real Property Law Section (let alone his activities in the ABA and other bar associations). Joel wrote all the time. Examples are his constant appearances in the *Tax Law Review*, *The Journal of Real Estate Taxation*, and the *Journal of Taxation*; his volume on Federal Taxation of Trusts; and the seminal *Tax Management Portfolio on Cooperatives and Condominiums*.

Joel is survived by his lawyer sons, Martin, who continues the practice of Miller & Miller, LLP, and Michael, who is a partner in Roberts and Holland LLP. Condolences and support to them and their families. We all miss him.

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Submission Guidelines

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors. Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles. Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein. For more information go to NYSBA.ORG/REALPROPERTY.

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Message From the Chair

Our Section held our second virtual Annual Meeting in January. While we missed meeting in person, the silver lining is that the meeting continues to be available online for CLE credit if you were previously unable to attend. Our meeting included a presentation by David Fitzhenry of Ganfer Shore Leeds & Zauderer, and Howard L. Zimmerman, the founder and principal at Howard L. Zimmerman Architects & Engineers, on the Surfside condo collapse. The presentation reviewed the history of the condo and its management as discerned from available public documents. David and Howard also discussed the role of counsel in handling matters involving condominiums and cooperatives.

Michelle H. Wildgrube

The second hour of our CLE included a review of the effect of the pandemic on commercial leasing. A panel of landlord-tenant attorneys, Adam M. Endick of Vinson & Elkins, and Hope K. Plasha and Jason T. Polevoy of Patterson Belknap Webb & Tyler, along with Barbara Winter, managing director of Jones Lang LaSalle Brokerage, discussed the new leasing landscape, the effects of COVID-19 and the ability to work from home on the leasing market.

Commercial Property Assessed Clean Energy Financing, known as C-PACE, was discussed by a panel headed by Joel I. Binstok, of the York Group, with Joshua S. Winefsky, of Kramer Levin Naftalis & Frankel, Laura Y. Rapport of North Bridge Opportunities, and Jessica Bailey, president and CEO of Greenworks Lending from Nuveen. This is a relatively new type of financing for environmental improvements. The financing can be greatly beneficial to commercial properties with interest in reducing environmental impact, but it can also be used to rescue and improve defaulting properties.

We were pleased to welcome back Nancy Connery of Schoeman Updike Kaufman & Gerber, who presented "A Brief Primer on Everyday Ethics." Nancy reviewed escrow agreement requirements, representation of clients in out-of-state transactions, and payment and credit issues for law practices.

Every year, we award our Section's Professionalism and Communities Page Awards and scholarships at the Annual Meeting. This year, we awarded the Professionalism Award to Dennis Greenstein, a longtime member of our Section who has generously provided insights and wise counsel to colleagues and who embodies the ideals of the award. Our Section gave the Communities Page Award to Lisa Ornest. Lisa has often contributed to our communities page, sharing her experiences and lending to the discussions that enrich our members. Our Melvin Mitzner Scholarship was given to Katherine Mazder of Syracuse University, and the Lorraine Power Tharp Scholarship was given to Katherine Baurs-Kreyand of Touro University. Thanks to our award committees and congratulations to our awardees!

We also took the opportunity to recognize the dedication of our *Real Property Law Journal*'s student editors and editorial staff from St. John's Law School who make this publication possible. We much appreciate the ongoing efforts of the students and Professor Robert Sein to produce this publication.

Many thanks to Spencer Compton, our vice chair, and the program chair of the Annual Meeting, for putting together a wonderful program. Spencer had also planned an in-person meeting for the summer of 2021 which was instead held online. For summer 2022, Gilbert Hoffman, our second vice chair, has picked up the planning that Spencer started and has scheduled the 2022 summer meeting at the Ritz Carlton in Philadelphia July 21-24. I hope that you will join us!

Michelle H. Wildgrube

Mortgage Commitment Contingency Clause Case Update

By Karl B. Holtzschue

I. Mortgage Commitment Contingency Clause Cases from July 2000 through June 2021

A. Prior Articles and Update on Cases

Residential contracts of sale usually contain a mortgage commitment contingency clause providing that the obligation of the purchaser to purchase is conditioned on the issuance within a stated number of days of a commitment from an institutional lender to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, of a stated dollar amount for a term of at least a stated number of years at the prevailing fixed or adjustable rate and on other customary commitment terms.[1] If the purchaser does not get a commitment in accordance with the contract, the purchaser has the option to cancel the contract. Some contracts, like the 2000 Multibar Residential Contract used in downstate New York, also allow the seller to cancel the contract. In a seller's market, some contracts eliminate the clause. The ABCNY model Contract of Sale for Office, Commercial and Multi-Family Residential Premises does not contain a mortgage commitment contingency clause,[2] as is the case with most commercial contracts. Contingency clauses in commercial contracts must be negotiated and vary widely.

In my first article about this subject, in 1998, I reported on a survey of over 100 cases. I found that purchasers won almost twice as often as sellers. Even more remarkable were numerous cases where courts allowed purchasers to obtain refunds of their down payments after revocation of their commitments in circumstances where the contract provisions were silent and/or indicated a contrary result.[3]

In 2000 I wrote an article about the newly revised Multibar Residential Contract of Sale used downstate (1st and 2d Dep'ts), where the most important changes were to Paragraph 8, the mortgage commitment contingency clause.[4] The new clause did not change the fundamental approach of the prior clause: the contract of sale is conditioned on issuance of a mortgage commitment on stated terms, not on funding of the loan. The clause expressly states that the purchaser must accept a commitment conditioned on the sale of the current home, payment of debt and no material adverse change in the purchaser's financial condition. The form allowed the seller to cancel. The new form included some notes at the end that carefully explain the risks to both parties under the form.

Karl Holtzschue was Chair of the Section (2007-2008), co-chair of the Title and Transfer Committee (1998-2004), co-chair of the Legislation Committee (2008-2014) and recipient of the Section's Professionalism Award in 2012. He is author of Holtzschue on Real Estate Contracts and Closings (PLI).

In 2005 I wrote an article about responses of the Legislature and the bar associations to court decisions, including those on the mortgage commitment contingency clause.[5] The article contained a discussion of the opinion and dissent in the *Kapur* case[6] where the purchaser got a loan commitment but lost his job before the closing, causing revocation of his commitment, and he sued to recover his down payment. In a relatively short opinion, the majority held that because they could not find an express provision in the contract as to whether the purchaser could cancel in that situation, they would read in a test of good faith and allow the purchaser to cancel because he showed good faith. The majority could not find that provision in the contract because it was deliberately omitted by the draftsmen of the contract. A lengthy dissent by Judge Saxe said that the majority had misread the clear language of the contract and departed from the law of contracts and conditions, applying an equity-laden analysis founded in sympathy for the purchaser. The draftsmen of the contract agreed with that analysis. The seller bears the risk until the purchaser obtains a commitment; thereafter, the contract allocates to the purchaser the risk of his financing falling through prior to the closing, whatever the reason. For a further discussion of this issue, see "Loss of Commitment" below.

In my 2005 article I noted that a critical aspect in dealing with a failure of financing for the purchaser is the well-established Court of Appeals rule in the *Maxton* case[7] that *a defaulting purchaser cannot recover the deposit* (usually 10% of the price in downstate contracts), whether or not the seller suffered any loss. The decision noted that this rule has been criticized as out of harmony with the principle that actual damages is the proper remedy for breach of contract. But the court said that the actual damage rule would cause disputes over actual damages. This liquidated damages rule can be very harsh on purchasers, particularly in a market where prices are rising

and sellers suffer little or no actual damages, but, as we will see, sellers have won downstate about as much as purchasers in the period covered by this article. This rule tries to provide certainty, but may not provide fairness.

This article is an update of cases on the mortgage commitment contingency clause from July 2000 through June 2021, using subject matter searches in Westlaw. During this period, the cases were won in about the same number by purchasers and by sellers.

From July 2000 through June 2021, purchasers won 42 cases and sellers won 39.

1st Dep't purchasers won 6, sellers won 5.

2nd Dep't purchasers won 31, sellers won 32.

3rd Dep't purchasers won 3, sellers won 1.

4th Dep't purchasers won 2, sellers won 1.

Where more than one reason was given for the result, I have placed the case under the main reason given. Where a fact issue prevented a decision, I have listed the case as won by the party whose claim was not dismissed.

B. Application for Commitment

The purchaser is required to make prompt application to an institutional lender for the commitment, pursue the application with diligence and cooperate in good faith to obtain the commitment.

1. Wins by PURCHASERS (17)

In *Long v. Legg*,[8] the App. Div. 2d Dep't held that a purchaser who made an unsuccessful good faith effort to obtain a mortgage commitment was entitled to a refund.

In *Fallah v. Hix*,[9] the App. Div. 2d Dep't held that the purchaser's use of a mortgage broker to obtain a loan did not violate the contract where the broker forwarded the application to an institutional lender.

In *Commins v. Couture*,[10] the App. Div. 3d Dep't held that nothing in the contract prevented the purchaser from obtaining a commitment contingent on the prior sale of her property.

In *Gupta v. 211 Street Realty Corp.*,[11] the App. Div. 1st Dep't held that the mortgage contingency clause was intended for the sole benefit of the purchaser and that the purchaser's failure to timely comply with the contingency clause was not a ground for the seller to cancel the contract.

In *Markovitz v. Kachian*,[12] the App. Div. 1st Dep't held that the purchaser made a good faith attempt to obtain a mortgage where the purchaser applied for an acquisition/construction loan for more than twice the amount specified in the mortgage contingency clause, but the bank denied the application because the income would be unable to support the debt and carrying costs for an acquisition-only loan.

In *Del Pozo v. Impressive Homes, Inc.*,[13] the purchaser sued for specific performance, a Supreme Court in Queens County granted the seller's motion to dismiss the complaint, and the App. Div. 2d Dep't reversed, holding that *fact issues* precluded dismissal of the purchaser's suit where the purchaser failed to obtain a mortgage commitment within the specified time and the seller never began construction of the home.

In *Krainin v. McCusker*,[14] the App. Div. 2d Dep't held that a printout of a website underwriting report was not a commitment under the mortgage commitment contingency clause, and that the purchasers were entitled to recover the down payment.

In *Gorgolione v. Gillenson*,[15] the App. Div. 1st Dep't held that the purchaser did not breach the contract by obtaining a commitment for a higher amount than stated in the contract contingency but within the coop's guidelines. The seller waived its right to cancel for non-conformance.

In *Astrada v. Archer*,[16] the App. Div. 2d Dep't held that the purchaser was entitled to return of the down payment where the contract provided for recovery if the mortgage was "not in fact approved through no fault of their own."

In *Hoft v. Frenkel*,[17] the App. Div. 2d Dep't held that the purchaser was entitled to return of the down payment where the loan application was denied due to insufficient income. The seller's speculations as to reasons for the denial failed to raise a triable issue of fact.

In *Buxton v. Streany*,[18] the App. Div. 2d Dep't held that the purchasers were entitled to cancel for failure to obtain a mortgage commitment despite the inclusion of a contingency clause in a rider, without a loan amount, as well as in the printed form.

In *Nambiar v. Alexander*,[19] a Supreme Court in Suffolk County held that the purchasers had applied for a mortgage in good faith, that E-Trade Mortgage Corp. was an "institutional lender," and that the purchasers were entitled to cancel when their application was denied for insufficient income.

In *Bildirici v. Smartway Realty, LLC*,[20] a commercial real estate case, the App. Div. 2d Dep't held that the purchaser was entitled to return of the down payment where he made a good faith application that was denied because the net income generated by the property was insufficient to support the loan.

In *Schramm v. Mei Chu Solow*,[21] the App. Div. 2d Dep't held that the purchaser was entitled to the return of his deposit where the seller failed to establish that the purchaser's inaccurate loan application, with an inflated income, was the cause of the failure to obtain the commitment in the required amount.

In *Ettienne v. Hochman*,[22] the App. Div. 2d Dep't held that the purchasers showed that they applied to an institutional lender, that their application was denied through no fault of their own, based on their credit history, and that they gave the sellers timely notice of cancellation. Their failure to apply for a no-income-check mortgage would have been futile.

In *Ferchaw v. Troxel*,[23] the App. Div. 4th Dep't held that the contract satisfied the statute of frauds even though the mortgage contingency did not include an interest rate and term of the mortgage.

In *Goetz v. Trinidad*,[24] the seller sued to keep the down payment, a Supreme Court in Nassau County denied the seller's motion for summary judgment, and the App. Div. 2d Dep't affirmed, holding that a *fact issue* existed whether lender's denial of purchaser's mortgage application qualified as a lawful excuse for his default or whether he willfully defaulted.

(a) Some courts have been lenient on purchasers as to time periods for the time to apply for the loan, the time to obtain the commitment and the time cancel where no date for cancellation was specified.

In *Combs v. Lewis*,[25] the App. Div. 1st Dep't held that where no stated time to cancel due to a non-conforming commitment was provided for, a reasonable time for cancellation was implied, and a written application by the purchaser was not required by the contract.

In *Yuen v. Kwan Kam Cheng*,[26] the App. Div. 1st Dep't held that where the contract contained no time limit for the purchaser to cancel, a reasonable time is implied.

2. Wins by SELLERS (18)

In *Big Apple Meat Market, Inc. v. Frankel*,[27] the seller sued for damages, a Supreme Court in Nassau County denied the seller's motion for summary judgment and the App. Div. 2d Dep't modified, holding that where the contingency clause did not specify the deadline for purchaser's cancellation, the purchaser may do so within a reasonable time—30 days. There was a *triable issue of fact* as to whether purchaser made a diligent, prompt and truthful application.

In *Dairo v. Rockaway Blvd. Properties, LLC*,[28] the App. Div. 2d Dep't held that the purchaser failed to submit evidence that the seller frustrated her attempt to obtain a commitment by denying an appraiser access to the property. The purchaser was denied specific performance due to her failure to show that she had the financial capacity to purchase.

In *DiBlanda v. ADC Pinebrook, LLC*,[29] the App. Div. 2d Dep't held that the sellers were entitled to retain the down payment where the purchaser completely failed to apply for a mortgage commitment.

In *O'Connell v. Soszynski*,[30] the App. Div. 2d Dep't held that the purchaser's failure to secure a mortgage commitment by the time allowed in the contract allowed the sellers to cancel and defeated the purchaser's claim for specific performance.

In *Bowery Boy Realty v. H.S.N. Realty Corp.*,[31] the App. Div. 2d Dep't held that the seller's denial of access to the property to conduct environmental remediation, as required by the purchaser's mortgage commitment, was consistent with the terms of the contract.

In *Balkhiyev v. Sanders*,[32] the seller sued for breach of contract, a Supreme Court in Queens County denied the purchaser's motion for summary judgment, and the App. Div. 2d Dep't held that there were *triable issues of fact* whether the purchaser acted in good faith to secure mortgage financing where their application was denied for inability to verify income, income was insufficient and there was an excessive obligation in relation to income.

In *Samson v. Sapphire Capital, Inc.*,[33] the purchaser sued for return of the down payment, a Supreme Court in Nassau County denied a motion for summary judgment for the purchaser, and the App. Div. 2d Dep't held that *issues of fact* whether the purchasers fulfilled their obligation to use diligent efforts to obtain a mortgage commitment precluded summary judgment for the purchaser.

In *Humbert v. Allen*,[34] the App. Div. 2d Dep't held in a suit by the purchasers against their attorneys for malpractice, that due to the purchasers' attorney's alleged failure to file written notice of cancellation, the purchasers independently breached the contract when they sought a loan in a far greater amount than that specified in the contingency clause.

In *2 Old, LLC v. Mayer*,[35] the App. Div. 2d Dep't held that where the plaintiff purchasers were self-directed IRAs, had a contingency for a "conventional mortgage," and failed to establish that it would be impossible for IRAs to secure a "conventional" mortgage, they failed to act in good faith.

In *Mancuso v. Silvey*,[36] a Supreme Court in Nassau County held that where only one of two borrowers applied for the mortgage, and had insufficient income to pay the loan, the purchasers failed to act in good faith.

In *Reid v. I Grant, Inc.*,[37] the purchaser sued for return of the down payment, a Supreme Court in Bronx County granted the seller's motion to dismiss, and the App. Div. 1st Dep't held that *triable issues of fact* existed whether the purchaser's lender declined to issue a mortgage commitment due to existing violations that neither party to the contract had an obligation to cure.

In *Hsieh v. Pravader*,[38] the purchaser sued to recover the down payment, a Supreme Court in Nassau County granted the seller's motion to dismiss the complaint, and the App. Div. 2d Dep't affirmed, holding that a *triable issue of fact* existed whether the purchaser made a good faith effort to secure mortgage financing where the denial was for "insufficient cash."

In *So Young Han v. Furst*,[39] the App. Div. 2d Dep't held that the purchasers' failure to submit a mortgage application to an institutional lender warranted forfeiture of the down payment. Inquiry to the mortgage broker, who never submitted an application, did not suffice.

In *Miloslavskaya v. Gokhberg*,[40] the App. Div. 2d Dep't held that where the purchasers failed to submit applications for financing and there were notices rejecting such applications and affidavits from loan officers, they showed no good faith effort to secure financing, and they were not entitled to return of their down payment.

In *Kweku v. Thomas*,[41] the App. Div. 2d Dep't held that the purchaser breached the contract where he applied for an amount greater than that permitted by the contract mortgage contingency clause and applied for an FHA loan in contravention of the clause.

In *New York Center for Esthetic & Laser Dentistry v. VSLP United LLC*,[42] the App. Div. 1st Dep't held that the purchaser breached the contract where it sought a loan in a greater amount than that contemplated in the contingency clause. Damages were properly calculated by the difference between the contract price and the fair market value at the time of the breach.

In *Jian Chen v. McKenna*,[43] the purchasers sued to recover a down payment, a Supreme Court in Queens denied both parties' motions, and the App. Div. 2d Dep't held that there was an *issue of fact* whether the purchasers made diligent good faith efforts to secure mortgage financing where only one of the purchasers applied for mortgage loan.

In *Bigfoot Media Properties, LLC v. Cushman In T, LLC*,[44] the App. Div. 2d Dep't held that the LLC's sole member's application for a $2,000,000 mortgage loan as investment property on behalf of himself did not satisfy the LLC's obligation as purchaser to apply for a 30-year mortgage. The purchaser was not entitled to a return of the down payment where the contract price was $3,150,000, the purchaser tried to cancel because the commitment letter was for $1,950,000, and the property was appraised at $3,000,000.

C. Cancellation Because Commitment Not "Firm"

Several courts have allowed purchasers to cancel on the ground that the commitment was not "firm" (that is, unconditional), often without considering whether the contract clause specified that the commitment had to be firm" (the Multibar Contract does not do so)

1. Wins by PURCHASERS (5)

In *Chavez v. Eli Homes, Inc.*,[45] the purchaser sued for specific performance, a Supreme Court in Kings County granted the seller's motion for summary judgment, and the App. Div. 2d Dep't reversed, holding that the commitment was not firm or for a conventional loan, but the seller failed to timely exercise its right to cancel for the purchaser's failure to obtain a commitment by a date certain. The purchaser was not ready, willing and able due to

the lack of a commitment There was a *fact issue* whether the purchaser was entitled to reclaim the down payment.

In *Severini v. Wallace*,[46] the App. Div. 2d Dep't held that a commitment conditioned on the sale of a coop apartment "did not become firm," so the contract was not binding on the purchaser.

In *Eves v. Bureau*,[47] the App. Div. 3d Dep't held that a bank's commitment letter conditioned on making repairs and appraisal greatly in excess of the purchase price was not a firm commitment.

In *Zellner v. Tarnell*,[48] the App. Div. 2d Dep't held that a letter issued by the mortgagee that stated that the commitment could be withdrawn if there was a change in the facts stated in the credit report was not a binding commitment within the meaning of the rider to the contract, which provided that the commitment would be deemed binding if it contained only conditions within the control of the purchasers.

In *Walsh v. Catalano*,[49] the App. Div. 2d Dep't held that where the contract expressly provided that a commitment conditioned on the lender's approval of an appraisal shall not be deemed a "commitment" until the appraisal was approved, and the appraisal was not approved due to damage from a hurricane, the purchasers were entitled to recover their down payment because they did not receive a firm commitment and because a material part of the property was destroyed by a hurricane.

2. Wins by SELLERS (2)

In *1550 Fifth Ave. Bay Shore, LLC v. 150 Fifth Ave., LLC*,[50] the App. Div. 2d Dep't held that the seller was entitled to cancel a commercial contract where it allowed the seller to cancel if a "firm commitment" was not obtained, and the commitment was subject to an environmental assessment not obtained in time.

In *Mauro v. Collins*,[51] the App. Div. 2d Dep't held that a contract providing that a commitment would be considered firm even though conditioned on the sale of the purchasers' home precluded the purchasers from repudiating the contract by relying on the failure to sell their home.

D. Acceptance of Commitment

The purchaser must accept the commitment and comply with its requirements.

1. Wins by SELLERS (2)

In *Federico v. Dolitsky*,[52] the App. Div. 2d Dep't held that the purchasers willfully defaulted and anticipatorily breached the contract by canceling during the mortgage contingency period. The record did not support the purchaser's contention that the mortgage application was denied on the ground that the property constituted "unacceptable collateral."

In *McQuade v. Aponte–Loss*,[53] the App. Div. 3d Dep't held that the purchasers' failure to accept a commitment letter was a breach where the purchasers did not give notice of termination until over two months after the commitment date had passed.

E. Cancellation Due to Lack of Timely Commitment

The purchaser has the right to cancel if the purchaser does not obtain a commitment in time.

1. Wins by PURCHASERS (14)

In *Hong Yun Cho v. Franks*,[54] the App. Div. 2d Dep't held that a condo contract automatically terminated by its terms on the failure of the sellers to respond within 5 business days to the purchaser's notice requesting extension of the mortgage contingency date.

In *Young v. Leger*,[55] the App. Div. 4th Dep't held that the purchaser was entitled to cancel under the mortgage commitment clause permitting cancellation if it was not obtained by Sept. 8, 1998 when the commitment was obtained on the next day (Sept. 9, 1998).

In *Teitlebaum v. Brumaire*,[56] the App. Div 2d Dep't held that the seller could not exercise an option to cancel that was granted only to the purchaser.

In *Gold v. First Tire Shop, Inc.*,[57] the App. Div. 2d Dep't held that the purchaser properly exercised its right to cancel due to its inability to obtain a mortgage loan.

In *Jian Zheng v. Evans*,[58] the App. Div. 2d Dep't held that the purchasers established that cancellation of the contract pursuant to the mortgage contingency clause was done in good faith.

In *Pesa v. Yoma Development Group, Inc.*,[59] the App. Div. 2d Dep't held that the seller committed an anticipatory breach by transferring properties to a third party three years later while the contract was still in effect, having failed to cancel by written notice for failure of the purchaser to obtain a mortgage commitment within 60 days.

Giving the purchaser an option to cancel allows the purchaser to waive the option and continue the purchase.

In *28 Properties, Inc. v. Akleh Realty Corp.*,[60] the App. Div. 1st Dep't held that the purchaser was entitled to waive a mortgage contingency clause inserted solely for its benefit.

In *Herbst v. 1514 E. Parkway, Ltd.*,[61] the App. Div. 2d Dep't held that the assignee of the purchaser was entitled to specific performance where the seller repudiated the contract with a mortgage contingency clause that ran solely to the benefit of the purchaser.

(a) The Multibar Contract also gives the seller the right to cancel if a commitment is not issued.

In *Yitzhaki v. Sztaberek*,[62] the App. Div. 2d Dep't held that the purchaser was awarded specific performance where the commitment was obtained after the time specified in the contract, time was stated to be of the essence, and the seller failed to respond to a request for extension or to cancel.

In *Peek v. Scialdone*,[63] the App. Div. 2d Dep't held that the seller's termination of the contract for not receiving a mortgage commitment one week before the closing date was an anticipatory breach, so the purchasers were entitled to a refund of the down payment.

In *Lot 57 Acquisition Corp. v. Yat Yar Equities Corp.*,[64] the App. Div. 2d Dep't held that the seller's cancellation was not valid because it was asserted before it knew of the purchaser's failure to obtain a mortgage commitment within the permitted period and that the purchaser was entitled to specific performance.

In *Schapfel v. Taylor*,[65] the purchaser sued for breach of contract, a Supreme Court in Suffolk County denied a motion to dismiss the complaint, and the App. Div. 2d Dep't held that there were *triable issues of fact* whether conduct of the defendant seller constituted a waiver of the time limit in the mortgage contingency clause inducing the plaintiff purchaser to justifiable rely thereon to his detriment.

In *Eichengrun v. Matarazzo*,[66] the App. Div. 3d Dep't held that the seller failed to establish that the contract was unenforceable due to termination under the mortgage contingency clause where neither party exercised the right to terminate within the required time. The seller failed to send a time of the essence notice to the purchaser.

In *Guzman v Ramos*,[67] the seller sued for damages, a Supreme Court in Richmond County granted the purchaser's motion for summary judgement, and the App. Div. 2d Dep't held that where both parties had a right to cancel if the purchaser was unable to secure financing, but neither did in the time specified, and the purchaser had an alternative source of funds, there were *issues of fact* whether seller's notice of intent to cancel sent years later was effective and whether the purchaser was ready, willing and able to close.

2. Wins by SELLERS (9)

In *Velazquez v. Equity LLC*,[68] the App. Div. 2d Dep't held that where the purchaser's notice of cancellation of an extension was not granted and defective because not accompanied by required documentation, the seller was entitled to treat it as an anticipatory repudiation and to rescind, even though the purchaser thereafter received a commitment and attempted to revoke its notice.

In *Smith v. Tenshore Realty, Ltd.*,[69] the App. Div. 2d Dep't held that the seller was entitled to consider the purchasers' notice of cancellation if the mortgage contingency period was not extended to be an anticipatory repudiation because it was not accompanied by required documentation, despite the purchaser's attempt to rescind cancellation upon obtaining a commitment.

In *Weiss v. Feldbrand*,[70] the App. Div. 2d Dep't held that where the purchasers did not obtain a mortgage commitment, their assertion that a relative could supply the funds necessary to close was not substantiated by any documentary evidence.

In *Nuzzi v. Gallagher*,[71] the App. Div. 2d Dep't held that the purchasers failed to exercise their right to cancel for their failure to obtain a commitment. Their claim of an oral extension was unsubstantiated.

In *Dazzo v. Kilcullen*,[72] the purchaser sued for return of the down payment, a Supreme Court in Suffolk County denied the purchaser's motion for summary judgment, and the App. Div. 2d Dep't affirmed, holding that the purchaser's suit was denied due to a *fact issue* whether the purchaser's letter that the lender was unable to make a decision on the mortgage loan constituted a notice of cancellation.

(a) The 2000 Multibar Contract also gives the seller the right to cancel if a commitment is not issued.

In *Degree Security Systems, Inc. v. F.A.B. Land Corp.*,[73] the App. Div. 2d Dep't held that where either party was entitled to cancel under the mortgage contingency clause, the purchaser could not unilaterally waive the right to cancel.

In *Toobe v. Scarlato*,[74] the App. Div. 2d Dep't held that the purchaser was not entitled to specific performance absent evidence that the seller had not rightfully exercised its option to cancel due to the failure to obtain a mortgage commitment within the time specified.

In *O'Connell v. Soszynski*,[75] the App. Div. 2d Dep't held that the purchaser's failure to secure a mortgage commitment by the time allowed in the contract allowed the sellers to cancel and defeated the purchaser's claim for specific performance.

In *Regal Realty Services, LLC v. 2590 Frisby, LLC*,[76] the App. Div. 1st Dep't held that the seller did not waive the mortgage contingency clause by suggesting application to the seller's lender, and the purchaser's action for return of the down payment was denied.

F. Loss of Commitment

Several recent cases have allowed purchasers to cancel if the commitment is canceled by the lender through no fault of the purchaser (the judge-created so-called "innocent buyer rule") (for example, when the purchaser lost his job or was unable to sell a prior home).[77] This is problematic because the clause in the contract does not allow this—it puts the risk of loss of the commitment on the purchaser (see the discussion of the dissent in the *Kapur* case in section 1.A. above).

1. Wins by PURCHASERS (7)

In *Anderson v. Meador*,[78] the seller sued for breach of contract, a Supreme Court in Tompkins County granted the sellers' motion for summary judgment, and the App. Div. 3d Dep't reversed, holding that there was an *issue of fact* whether revocation of the mortgage commitment letter due to title defects was attributable to any bad faith on the part of the purchaser.

In *Helig v. Maron-Ames*,[79] a Civil Court in Kings County held that where a coop purchaser obtained a loan commitment but was later laid off from work and the commitment was terminated by lender, the purchaser was entitled to cancel under a rider that gave the purchaser the right to cancel if withdrawal of the commitment was not due to the purchaser's willful acts.

In *Carmona v. McKiernan*,[80] the App. Div. 2d Dep't held that the commitment was revoked through no fault of the purchaser.

In *Blair v. O'Donnell*,[81] the App. Div. 2d Dep't held that the purchasers were entitled to rescind where the mortgage commitment was revoked due to encroachments on the property and the purchasers acted in good faith. The court said that the clause is a *condition precedent*, citing *Kapur*, and that the contract did not provide for the seller to retain the down payment when the commitment was revoked.

In *MD3 Holdings, LLC v. Buerkle*,[82] the seller sued for breach of contract, a Supreme Court in Onondaga County granted the seller's motion for summary judgment, and the App. Div. 4th Dep't reversed, holding that the lender's revocation of a mortgage commitment based on information provided by the purchaser's accountant that cast doubt on the financial viability of the planned use of a commercial building relieved the purchaser of obligations under contract, but there was a *triable issue of fact* as to the bad faith by the purchaser.

In *Chahalis v. Roberta Ebert Irrevocable Trust*,[83] the App. Div. 2d Dep't held that the lender's revocation of a mortgage commitment due to the purchaser's termination of employment relieved the purchaser of its obligations under the contract, in the absence of bad faith by the purchaser.

In *Goetz v. Trinidad*,[84] the seller sued to retain the down payment, a Supreme Court in Nassau Country denied the seller's motion for summary judgment, and the App. Div. 2d Dep't affirmed, holding that a *fact issue* existed whether the lender's denial of the purchaser's mortgage application qualified as a lawful excuse for his default or whether he willfully defaulted.

2. Wins by SELLERS (6)

In *Morris v. Hochman*,[85] the App. Div. 2d Dept held that summary judgment was denied to a purchaser whose mortgage commitment was revoked when the purchaser accepted a new position and relocated, because discovery was needed to establish a claim of good faith.

In *Garber v. Giordano*,[86] the App. Div. 2d Dep't held that the purchaser was denied summary judgment when the commitment was revoked due to the purchaser's decision to curtail working hours due to illness.

In *Applied Behavior Analysis, Inc. v. Greater N.J. Annual Conference of United Methodist Church*,[87] the App. Div. 2d Dep't held that the lender's rescission of the commitment was due to the fault of the purchaser where the purchaser notified the lender that a new lease extension would put a significant strain on its budget.

In *Duryee v. Kangesier*,[88] the Supreme Court Appellate Term, 9th and 10th Judicial Districts, granted summary judgment dismissing purchasers' complaint. Purchasers had contracted to buy a two-family dwelling, but a two-family certificate of occupancy was not issued until some time after execution of the contract. Purchasers obtained a mortgage commitment. Purchasers alleged that they permissibly stated in the mortgage application that the property was a single-family dwelling because the two-family certificate of occupancy had not been issued at the time of the application, and that the bank, upon learning of the issuance of the two-family certificate of occupancy, informed them that the amount of financing would be reduced and the interest rate would increase. Purchasers then purported to cancel the contract. The court found that there was no proof that the purchasers' mortgage commitment had been revoked, that the purchasers acted in good faith when they identified the premises as single-family on their loan application, or that the bank was going to change the terms when it learned that the premises was a two-family dwelling. Therefore, the purchasers were not entitled to cancel and the seller was awarded liquidated damages of 10%. The court stated that the contingency clause was a *condition precedent* to the contract of sale, citing *Kapur*.

In *Mendez v. Abel*,[89] a Supreme Court Appellate Term, 9th and 10th Judicial Districts, held that the risk of loss of the commitment was on the purchaser where the contract provided that after obtaining a mortgage commitment the purchaser would have no right to terminate irrespective of whether the purchaser failed to satisfy any conditions in the commitment.

In *Sanjana v. King*,[90] the App. Div. 1st Dep't held that where the purchasers obtained a conditional loan approval and argued that revocation of the commitment was not attributable to any bad faith on their part, there was no occasion to inquire whether the post-contingency-period revocation of the mortgage commitment was attributable to the purchasers' bad faith because the purchaser failed to cancel, thus waiving the contingency, so the purchaser's action for return of the deposit was dismissed.

G. Suits by Purchasers for Malpractice by Their Attorneys

Some purchasers have sued their attorneys for malpractice.

In *Bells v. Foster*,[91] the App. Div. 2d Dep't held that in malpractice action against the purchaser's attorney, summary judgment for the purchaser was denied where the purchaser failed to demonstrate that negligence on the part of her attorney in failing to timely cancel the contract for the inability to obtain a mortgage was the sole proximate cause of her damages, and the attorney alleged that the purchaser was in breach of the contract and her own actions were the sole proximate cause of her damages.

In *Humbert v. Allen*,[92] 'in a suit by purchasers against their attorneys for malpractice based on the attorneys' ''alleged failure to file written notice of cancellation, the App. Div 2d Dep't held that such failure was not the proximate cause of purchasers' damages. The purchasers independently breached the contract when they sought a loan in a far greater amount than that specified in the contingency clause.

In *Jorge v. Hector Atilio Marichal, P.C.*,[93] the purchaser sued his attorney to recover damages for malpractice in connection with a contract of sale for a co-op, the Supreme Court in Queens County granted the purchaser's motion for summary judgment, but the App. Div. 2d Dep't held that there were issues of fact as to whether the purchaser complied with the provisions of the contract, whether the attorney breached its duty of care by failing to give timely notice of purchaser's intention to cancel the contract, and whether the alleged breach was a proximate cause of the purchaser's damages.

H. Condition Precedent or Condition Subsequent?

In *Duryee v. Kangesier*,[94] the Supreme Court Appellate Term, 9th and 10th Judicial Districts, granted summary judgment dismissing purchasers' complaint. Purchasers had contracted to buy a two-family dwelling, but a two-family certificate of occupancy was not issued until some time after execution of the contract. Purchasers obtained a mortgage commitment. Purchasers alleged that they permissibly stated in the mortgage application that the property was a single-family dwelling because the two-family certificate of occupancy had not been issued at the time of the application, and that the bank, upon learning of the issuance of the two-family certificate of occupancy, informed them that the amount of financing would be reduced and the interest rate would increase. Purchasers then purported to cancel the contract. The court found that there was no proof that the purchasers' mortgage commitment had been revoked, that the purchasers acted in good faith when they identified the premises as single-family on their loan application, or that the bank was going to change the terms when it learned that the premises was a two-family dwelling. Therefore, the purchasers were not entitled to cancel and the seller was awarded liquidated damages of 10 percent. The court stated that the contingency clause was a *condition precedent* to the contract of sale, citing *Kapur*. In *Blair v. O'Donnell*,[95] the App. Div. 2d Dep't held that the purchasers were entitled to rescind where the mortgage commitment was revoked due to encroachments on the property and the purchasers acted in good faith. The court said that the clause is a *condition precedent* to the contract of sale, citing *Kapur*, and that the contract did not provide for the seller to retain the down payment when the commitment was revoked.

In *Lin Shi v. Alexandratos*,[96] the App. Div. 1st Dep't held that the purchaser's claim that mortgage contingency clause was a *condition precedent* to the purchase was belied by the contract language and by purchaser's own conduct in requesting an extension before the initial contingency period expired.

The mortgage commitment contingency clause imposes obligations on the purchaser to properly apply for a commitment. In my view the right to cancel for failure to obtain a mortgage commitment should more properly be characterized as a *condition subsequent* to the contract of sale. It is not a *condition precedent* to *formation of the contract* and imposition of obligations on the purchaser, but rather it is a *condition subsequent* to the contract that allows the purchaser who fails obtain a mortgage commitment to cancel the contract and refuse to close the purchase. It is a *condition precedent* to the closing, not the contract. I think it is important not to mischaracterize it as a *condition precedent* to the contract and ignore the purchaser's obligation to properly apply for a commitment (*see* the discussion of the dissent in the *Kapur* case in section 1.A. above).

II. Conclusion

Mortgage commitment contingency clauses enable purchasers to enter into contracts of sale before they have obtained a commitment for a mortgage loan. The clauses require the purchasers to make and pursue a proper application and make a timely cancellation if they don't get a timely commitment.

In the caveat emptor cases, which I have also studied,[97] the issue is whether a purchaser can recover from the seller for the cost to cure condition defects in the property. In the mortgage commitment cases, the seller runs the risk of a delay in knowing whether the purchaser will have the funds to close at the agreed price, but the purchaser runs the risk of being in default for failure to comply with the terms of the contingency clause, resulting in the loss of the down payment under the Maxton liquidated damages rule, whether or not the seller has suffered an actual loss.

The main unresolved issue I see in the mortgage commitment cases arises from the cases where the purchaser's obtains a commitment but it is then withdrawn by the lender through no fault of the purchaser and the

court allows the purchaser to cancel, despite the provisions to the contrary in the approved contract. I think the "innocent purchaser" rule may be fair, particularly if the defaulting purchaser faces loss of the entire down payment due to the Maxton rule and the seller has not suffered any actual loss. But a better solution might be for the rule to be added by purchasers as a rider to the contract or to by a revision of the bar association-approved contract form, so that purchasers do not suffer an unmerited loss. If the purchaser defaults due to the failure to obtain financing not due to its fault, the purchaser is left in the position of arguing for a return of all or a portion of the down payment, so that the parties can both avoid the costs of litigation. The attorneys for both parties should be prepared to advise their clients in that situation.

A final complication is that the down payment is held in escrow, and release requires the consent of both parties. In the event of a dispute, the parties are likely to compromise because of the high cost of litigation, either splitting the difference or favoring the party who suffers the most loss.

Endnotes

1. *See, e.g.*, Residential Contract of Sale ¶ 8 (2000). *See also* Karl B. Holtzschue, Holtzschue on Real Estate Contracts and Closings: A Step-by-Step Guide to Buying and Selling Real Estate § 2:3.1 (3rd ed. 2007).
2. Karl B. Holtzschue, Holtzschue on Real Estate Contracts and Closings: A Step-by-Step Guide to Buying and Selling Real Estate § 2:3.1[G] (3rd ed. 2007). The author was the chair of the subcommittee of the ABCNY Real Property Law Committee that drafted the form.
3. Karl B. Holtzschue, *Mortgage Contingency Clauses: Courts Favor Purchasers*, N.Y. Real Prop. L.J., vol. 26, no. 2, at p. 53 (Spring 1998).
4. Karl B. Holtzschue, *2000 NYSBA Residential Contract of Sale: Mortgage Commitment Contingency Clause and Other Changes*, N.Y. Real Prop. L.J., vol. 28, no. 4, at p.107 (Fall 2000). The form, which I call the Multibar Form, was approved by NYSBA, NYSLTA, ABCNY and NYCLA. The author was chair of a joint committee of NYSBA, ABCNY and NYCLA that the drafted the form..
5. Karl B. Holtzschue, *Responses of the Legislature and the Bar Associations to Court Decisions on Sales of Residences*, N.Y. Real Prop. L.J., vol. 33, no. 2, at p. 78 (Spring 2005).
6. *Kapur v. Stiefel*, 264 A.D. 2d 602, 603-06, 695 N.Y.S.2d 330, 331-36 (1st Dep't 1999).
7. *Maxton Bldrs v. Lo Galbo*, 68 N.Y.2d 373, 378-82, 509 N.Y.S.2d 507, 509-12, 502 N.E.2d 184, 187-89 (1986).
8. *Long v. Legg*, 264 A.D.2d 718, 695 N.Y.S.2d 367, 368 (2d Dep't 1999), *appeal denied*, 94 N.Y.2d 941, 731 N.E.2d 154, 709 N.Y.S.2d 497 (2000).
9. *Fallah v. Hix*, 268 A.D.2d 501, 502, 702 N.Y.S.2d 352, 532-34 (2d Dep't 2000).
10. *Commins v. Couture*, 12 A.D.3d 999, 1000-02, 785 N.Y.S.2d 160, 162 (3d Dep't 2004).
11. *Gupta v. 211 Street Realty Corp.*, 16 A.D.3d 309, 311, 793 N.Y.S.3d 13, 14-15 (1st Dep't 2005).
12. *Markovitz v. Kachian*, 28 A.D.3d 358, 814 N.Y.S.2d 60, 60-61 (1st Dep't 2006).
13. *Del Pozo v. Impressive Homes, Inc.*, 29 A.D.3d 621, 622, 816 N.Y.S.2d 123, 124-25 (2d Dep't 2006).
14. *Krainin v. McCusker*, 45 A.D.3d 738, 378-79, 846 N.Y.S.2d 312, 312-13 (2d Dep't 2007).
15. *Gorgolione v. Gillenson*, 47 A.D.3d 472, 473-74, 849 N.Y.S.2d 526, 527-28 (1st Dep't 2008).
16. *Astrada v. Archer*, 51 A.D.3d 954, 955, 858 N.Y.S.2d 796, 796-97 (2d Dep't 2008).
17. *Hoft v. Frenke*l, 52 A.D.3d 779, 780-81, 860 N.Y.S.2d 209, 210-11 (2d Dep't 2008).
18. *Buxton v. Streany*, 68 A.D.3d 1036, 1037-38, 892 N.Y.S.2d 165, 166-67 (2d Dep't 2009).
19. *Nambiar v. Alexander*, 30 Misc.3d 341, 348-50, 911 N.Y.S.2d 766, 772-74 (County Ct., Suffolk Co. 2010).
20. *Bildirici v. Smartway Realty, LLC*, 89 A.D.3d 973, 975, 933 N.Y.S.2d 350, 351 (2d Dep't 2011).
21. *Schramm v. Mei Chu Solow*, 91 A.D.3d 624, 625, 935 N.Y.S.2d 659, 659-60 (2d Dep't 2011).
22. *Ettienne v. Hochman*, 105 A.D.3d 805, 806, 962 N.Y.S.2d 652, 653-54 (2d Dep't 2013).
23. *Ferchaw v. Troxel*, 112 A.D.3d 1310, 1312-13, 979 N.Y.S.2d 206, 208-09 (4th Dep't 2013).
24. *Goetz v. Trinidad*,168 A.D.3d 688, 688-90, 91 N.Y.S.3d 513, 514-15 (2d Dep't 2019).
25. *Combs v. Lewis*,1 A.D.3d 236, 236-37, 767 N.Y.S.2d 425 (1st Dep't 2003).
26. *Yuen v. Kwan Kam Cheng*,69 A.D.3d 536, 536-37, 895 N.Y.S.2d 37, 38 (1st Dep't 2010).
27. *Big Apple Meat Market, Inc. v. Frankel*,276 A.D.2d 657, 657-59, 714 N.Y.S.2d 333, 334-35 (2d Dep't 2000).
28. *Dairo v. Rockaway Blvd. Properties, LLC*,44 A.D.3d 602, 602-03, 843 N.Y.S.2d 642, 642-43 (2d Dep't 2007).
29. *DiBlanda v. ADC Pinebrook, LLC*,44 A.D.3d 702, 702, 843 N.Y.S.2d 429, 430 (2d Dep't 2007).
30. *O'Connell v. Soszynski*,46 A.D.3d 644, 644-46, 847 N.Y.S.2d 605, 605-06 (2d Dep't 2007).
31. *Bowery Boy Realty v. H.S.N. Realty Corp.*,55 A.D.3d 766, 766-69, 869 N.Y.S.2d 551, 552 (2d Dep't 2008).
32. *Balkhiyev v. Sanders*, 71 A.D.3d 611, 612, 896 N.Y.S.2d 147, 148 (2d Dep't 2010).
33. *Samson v. Sapphire Capital, Inc.*, 74 A.D.3d 1172, 1173 904 N.Y.S.2d 152 (2d Dep't 2010).
34. *Humbert v. Allen*, 89 A.D.3d 804, 805-07, 932 N.Y.S.2d 155 (2d Dep't 2011).
35. *2 Old, LLC v. Mayer*, 90 A.D.3d 911, 912, 935 N.Y.S.2d 58 (2d Dep't 2011),.
36. *Mancuso v. Silvey*, 31 Misc.3d 1234(A), 2, 932 N.Y.S.2d 761 (Table) (Sup. Ct., Nassau Co. 2011).
37. *Reid v. I Grant, Inc.*, 94 A.D.3d 500, 501, 942 N.Y.S.2d 470 (1st Dep't 2012).
38. *Hsieh v. Pravder*, 106 A.D.3d 694, 695, 964 N.Y.S.2d 243 (2d Dep't 2013).
39. *So Young Han v. Furst,* 118 A.D.3d 975, 976, 988 N.Y.S.2d 676, 677-78 (2d Dep't 2014).
40. *Miloslavskaya v. Gokhberg*, 126 A.D.3d 678, 679, 5 N.Y.S.3d 205 , 205-06 (2d Dep't 2015).
41. *Kweku v. Thomas*, 144 A.D.3d 1109, 1111, 42 N.Y.S.3d 261, 262-64 (2d Dep't. 2016).
42. *New York Center for Esthetic & Laser Dentistry v. VSLP United LLC*, 159 A.D.3d 567, 568, 73 N.Y.S.3d 52, 53 (1st Dep't 2018).
43. *Jian Chen v. McKenna*, 181 A.D.3d 577, 678, 119 N.Y.S.3d 547, 549 (2d Dep''t 2020).

44. *Bigfoot Media Properties, LLC v. Cushman In T, LLC*, 185 A.D.3d 772, 772-73, 128 N.Y.S.3d 36, 37-38 (2d Dep't 2020).

45. *Chavez v. Eli Homes, Inc.*, 7 A.D.3d 657, 659, 777 N.Y.S.2d 181, 183 (2d Dep't 2004).

46. *Severini v. Wallace*, 13 A.D.3d 434, 435, 787 N.Y.S.2d 50, 50-51 (2d Dep't 2004).

47. *Eves v. Bureau*, 13 A.D.3d 1004, 1005-06, 788 N.Y.S.2d 211, 212-13 (3d Dep't 2005).

48. *Zellner v. Tarnell*, 65 A.D.3d 1335, 1136-37, 885 N.Y.S.2d 745, 746 (2d Dep''t 2009).

49. *Walsh v. Catalano*, 129 A.D.3d 1063, 1064, 12 N.Y.S.3d 226, 227-28 (2d Dep't 2015).

50. *1550 Fifth Ave. Bay Shore, LLC v. 1550 Fifth Ave., LLC*, 297 A.D.2d 781, 782-83, 748 N.Y.S.2d 601, 602-03 (2d Dep't 2002).

51. *Mauro v. Collins,* 17 A.D.3d 549, 793 N.Y.S.2d 186, 187 (2d Dep't 2005).

52. *Federico v. Dolitsky*, 176 A.D.3d 916, 917 111 N.Y.S.3d 35, 38 (2d Dep't. 2019).

53. *McQuade v. Aponte-Loss*,195 A.D.3d 1219, 1220-21, 150 N.Y.S.3d 350, 353 (3d Dep't 2021).

54. *Hong Yun Cho v. Franks*, 283 A.D.2d 552, 553, 724 N.Y.S.2d 499, 499-500 (2d Dep't 2001).

55. *Young v. Leger*, 288 A.D.2d 857, 732 N.Y.S.2d 782, 783 (4th Dep't 2001).

56. *Teitelbaum v. Brumaire*, 308 A.D.2d 442, 764 N.Y.S.2d 110, 111 (2d Dep't 2003).

57. *Gold v. First Stop Tire Shop, Inc.*, 50 A.D.3d 738, 855 N.Y.S.2d 640, 640-41 (2d Dep't 2008).

58. *Zheng v. Evans*, 63 A.D.3d 791, 881 N.Y.S.2d 461, 462 (2d Dep't 2009).

59. *Pesa v. Yoma Development Group, Inc.*,74 A.D.3d 769, 769-770, 903 N.Y.S..2d 83, 84-85 (2d Dep't 2010).

60. *28 Properties, Inc. v. Akleh Realty Corp.*, 309 A.D.2d 632, 766 N.Y.S.2d 18, 19 (1st Dep't. 2003).

61. *Herbst v. 1514 E. Parkway, Ltd.*, 46 A.D.3d 751, 652, 848 N.Y.S.2d 343, 343-44 (2d Dep't 2007).

62. *Yitzhaki v. Sztaberek,* 38 A.D.3d 535, 536-37, 831 N.Y.S.2d 267, 269 (2d Dep't 2007).

63. *Peek v. Scialdone*, 56 A.D.3d 743, 743-44, 868 N.Y.S.2d 700, 701-02 (2d Dep't 2008).

64. *Lot 57 Acquisition Corp. v. Yat Yar Equities Corp.*, 63 A.D.3d 1109, 1110, 882 N.Y.S.2d 454, 455-56 (2d Dep't 2009).

65. *Schapfel v. Taylor*,65 A.D.3d 620, 620-21, 884 N.Y.S.2d 764 (2d Dep't 2009).

66. *In Eichengrun v. Matarazzo*,136 A.D.3d 1184, 1185, 25 N.Y.S.3d 431, 432-33 (3d Dept. 2016).

67. *Guzman v Ramos*,191 A.D.3d 644, 647, 139 N.Y.S.3d 648, 651-52 (2d Dep't 2021).

68. *Velazquez v. Equity LLC*, 28 A.D.3d 473, 474, 814 N.Y.S.2d 182, 183 (2d Dep't 2006).

69. *Smith v. Tenshore Realty, Ltd.*, 31 A.D.3d 741, 742, 820 N.Y.S.2d 292, 293 (2d Dep't 2006).

70. *Weiss v. Feldbrand*, 50 A.D.3d 673, 647, 854 N.Y.S.2d 740, 741 (2d Dep't 2008).

71. *Nuzzi v. Gallagher*, 60 A.D.3d 653, 653-54, 874 N.Y.S.2d 248, 249-50 (2d Dep't 2009).

72. *Dazzo v. Kilcullen*, 127 A.D.3d 1126, 7 N.Y.S.3d 552 (2d Dept. 2015).

73. *Degree Security Systems, Inc. v. F.A.B. Land Corp.*, 17 A.D.3d 402, 794 N.Y.S.2d 62 (2d Dep't 2005).

74. *Toobe v. Scarlato*, 45 A.D.3d 759, 845 N.Y.S.2d 456 (2d Dep't 2007).

75. *O'Connell v. Soszynski*, 46 A.D.3d 644, 847 N.Y.S.2d 605 (2d Dep't 2007).

76. *Regal Realty Services, LLC v. 2590 Frisby, LLC*, 62 A.D.3d 498, 878 N.Y.S.2d 363 (1st Dep't 2009).

77. *See* Miller, *Is Your Otherwise Firm Sale Contract Subject to Buyer Cancellation Under the "UCIB" Rule*, 47 N.Y. Real Prop. L.J. 4 (Spring 2019), arguing that the "unclosed commitment innocent buyer rule" is unjust and should be abrogated by the Court of Appeals. I disagree with the suggestion because I think the cases reached a fair result. See discussion in my 2005 article above.

78. *Anderson v. Meador*, 56 A.D.3d 1030, 869 N.Y.S.2d 233 (3d Dep't 2008).

79. *Heilig v. Maron-Ames*, 25 Misc. 3d 838, 842, 885 N.Y.S.2d 563, 566 (N.Y. City Civ. Ct., Kings Co. 2009).

80. *Carmona v. McKiernan*, 66 A.D.3d 729, 886 N.Y.S.2d 350 (2d Dep't 2009).

81. *Blair v. O'Donell*, 85 A.D.3d 954, 955-56, 925 N.Y.S.2d 639, 641-42 (2d Dep't 2011).

82. *MD3 Holdings, LLC v. Buerkle*, 159 A.D.3d 1483, 1484-485, 72 N.Y.S.3d 310, 312 (4th Dep't 2018).

83. *Chahalis v. Roberta Ebert Irrevocable Trust*, 163 A.D.3d 623, 624-25, 81 N.Y.S.3d 159, 160-61 (2d Dep't 2018).

84. *Goetz v. Trinidad*, 168 A.D.3d 688, 688-90, 91 N.Y.S.3d 513, 514-15 (2d Dep't 2019).

85. *Morris v. Hochman*, 296 A.D.2d 481, 482, 745 N.Y.S.2d 549, 550 (2d Dep't 2002).

86. *Garber v. Giordano*, 16 A.D.3d 454, 454-55, 791 N.Y.S.2d 175, 176-77 (2d Dep't 2005).

87. *Applied Behavior Analysis, Inc. v. Greater N.J. Annual Conference of United Methodist Church*, 67 A.D.3d 714, 715-16, 888 N.Y.S.2d 207, 208 (2d Dep't 2008).

88. *Duryee v. Kangesier*, 31 Misc.3d 73, 74-75, 924 N.Y.S.2d 731, 732-33 (Supreme Court, App. Term, 2d Dep't, 9th & 10 Judicial Districts 2011).

89. *Mendez v. Abel*,35 Misc.3d 61, 62-64, 945 N.Y.S.2d 840, 841-42 (Supreme Court, App. Term, 2d Dep't, 9th & 10th Judicial Districts 2012).

90. *Sanjana v. King*, 172 A.D.3d 476, 477, 101 N.Y.S.3d 289, 290 (1st Dep't 2019).

91. *Bells v. Foster*, 83 A.D.3d 876, 876-77, 922 N.Y.S.2d 124, 126 (2d Dep't 2011).

92. *Humbert v. Allen*, 89 A.D.3d 804, 806-07, 932 N.Y.S.2d 155, 157-58 (2d Dep't 2011).

93. *Jorge v. Hector Atilio Marichal, P,C.*, 140 A.D.3d 1020, 34 N.Y.S.3d 485 (2d Dep't 2016).

94. *Duryee v. Kangesier* 31 Misc.3d 73, 74-75, 924 N.Y.S.2d 731, 732-33 (Supreme Court, App. Term, 2d Dep't, 9th & 10 Judicial Districts 2011).

95. *Blair v. O'Donnell*, 85 A.D. 3d 954, 954-57, 925 N.Y.S.2d 639, 640-42 (Supreme Court, App. Term, 2d Dep't).

96. *Lin Shi v. Alexandratos*, 137 A.D.3d 451, 26 N.Y.S.3d 523, 524 (1st Dep't 2016).

97. *See* Holtzschue, *The Purchaser Barely Has a Ghost of a Chance: Update on Caveat Emptor and PCDS Cases*, included in this edition of the *Journal*.

The Purchaser Barely Has a Ghost of a Chance: Update on Caveat Emptor and PCDS Cases

By Karl B. Holtzschue

Under the New York case law of caveat emptor, the seller has no duty to disclose any information about a residential or commercial property to be sold—particularly as to its condition—unless there is a confidential or fiduciary relationship, or some conduct that constitutes active concealment, affirmative misrepresentation or partial disclosure. Most contracts of sale include a disclaimer provision that the property is sold "as is," based solely on its inspection thereof and not upon any information or representations by the seller, and that if any representations are made, they are said not to survive the closing. The Property Condition Disclosure (PCDA), effective on March 1, 2002, modified the case law by requiring delivery of a 48-question Property Condition Disclosure Statement (PCDS) from the seller to the purchaser of residential property prior to signing a binding contract of sale, or, failing that, delivery of a $500 credit to the purchaser at the closing.[1] If a PCDS is not given, the case law will apply.

I. Caveat Emptor Cases From July 2012 to June 2021

A. Prior Articles and Update on Caveat Emptor Cases

In my 2007 and 2013 articles on caveat emptor and PCDS cases under the PCDA, I reported my findings that purchasers had a small chance of succeeding in claims against sellers about condition defects.[2]

This is an update for the period from July 2012 through June 2021, using subject matter searches in Westlaw. *During this period the results have not improved for purchasers*: sellers and sellers' brokers won 28 cases, but purchasers only won 12.

1st Dep't sellers won 10, purchasers won 2.

2d Dep't sellers won 16, purchasers won 6.

3d Dep't sellers won 2, purchasers won 3.

4th Dep't sellers won 0, purchasers won 1.

B. Rationales for Wins by Sellers in Caveat Emptor Cases Remain the Same

Where more than one reason was given for the result, I have placed the case under the main reason given. Contractual "as is" disclaimers and merger in the deed were often given as an additional reason. Where a fact issue prevented a decision, I have listed the case as won by the party whose claim was not dismissed.

(1) The seller had no duty to disclose or did not make a material misrepresentation

In Circle Assocs., L.P. v. Starlight Props., Inc.,[3] the App. Div. 2d Dep't held that the *seller did not make any material misrepresentation* about the amount of excess material on the site to induce the purchaser to agree to pay for the excess material removed.

In *Wild West Ventures, LLC v. 703 Wash. Corp.*,[4] the App. Div. 1st Dep't held that *the sellers' failure to disclose a pending slip and fall action prior to the closing date was not a material breach of its obligation to disclose actions or proceedings* in a sale for $34 million, as the action was well within liability insurance limits and the insurance premium would increase by only $582.

In *Schottland v. Brown Harris Stevens Brooklyn, LLC*,[5] the App. Div. 2d Dep't held that the sellers and their brokers had *no duty to disclose to the purchasers of a residential property a conservation easement* granted by the sellers to National Architectural Trust as to the facade and exterior.

In *West 17th St. and Tenth Ave. Realty, LLC v. The N.E.W. Corp.*,[6] the App. Div. 1st Dep't held that the purchaser's post-transaction discovery of underground storage tanks was not evidence of a breach of contract where the managing member of the seller testified that he was unaware of the tanks. The seller warranted only that it had no knowledge of hazardous materials and *disclaimed making any warranties concerning environmental conditions*, and the purchaser acknowledged that it was relying solely on its own consultants The seller's failure to disclose $87,000 in rent arrears was not material to a $32.5 million transaction.

In *McDonald v. O'Connor*,[7] the App. Div. 2d Dep't held that the contract and rider refuted fraud allegations. *The sellers had no duty to disclose the property's landmark status* and the complaint failed to allege that the sellers actively concealed the possibility that the property could attain landmark status or how the sellers thwarted the purchaser's efforts to discover that.

(2) The seller did not actively conceal a defect

In *Pesca v. Barbera Homes, Inc*,[8] the Sup. Ct. Albany County held that the new home purchasers' allegations of fraud against the seller premised on the seller's alleged failure to disclose certain deviations from the master plan

for the subdivision were barred by caveat emptor, absent any claim or proof of active concealment.

In *Rojas v. Paine*,[9] the App. Div. 2d Dep't held the claim that the sellers intentionally concealed that a subdivision lot had been illegally subdivided by two deeds was insufficient to support a fraud claim because the seller had no duty to disclose any information. Because the deeds were recorded, the failure to disclose was not active concealment. Specific performance was denied to the purchasers on their claim that the deed delivered only described the property described in one of the deeds because the claims were extinguished by merger in the deed (but the delivered deed described it as the same property transferred by two recorded deeds, while schedule A only contained a description of one.

In *Mo v. Rosen*,[10] the App. Div. 2d Dep't held that the purchaser failed to raise a triable issue of fact whether the seller engaged in active concealment as to flooding and inoperable mechanical systems.

(3) Purchasers lost where they failed to use available means to discover the condition (the most common rationale)

In *Perez-Faringer v. Heilman*,[11] the App. Div. 2d Dep't held that the seller did not actively conceal or fraudulently misrepresent purportedly defective conditions, where *the problems were discoverable on inspection and were matters of public record*. The claims were merged in the deed.

In *Rosenblum v. Glogoff*,[12] the App. Div. 1st Dep't held that alleged misrepresentations by the seller's agent as to the existence of through-wall air conditioning in a co-op unit did not excuse the purchasers' failure to close where the contract disavowed representations as to air conditioning, had a merger clause, and the purchasers had inspected. The express disclaimer barred a fraud claim. *The purchasers failed to use means to discover the condition*.

In *Revell v. Guido*,[13] the purchasers sued alleging that the seller fraudulently misrepresented the condition of a septic system on a commercial rental property. The Supreme Court granted the purchaser's motion on the issue of the seller's liability. The App. Div 3d Dep't reversed, holding that there was a *fact issue* whether the purchasers reasonably relied on the sellers' alleged misrepresentations where the contract contained a septic system contingency, but *the purchasers chose not to have the system tested or inspected*.

In *Estrada v. Metropolitan Prop. Grp., Inc.*,[14] the App. Div. 1st Dep't held that the purchaser of a residential co-op apartment did not act reasonably in relying on the broker's alleged misstatement about the unit's square footage, as a discrepancy in various advertisements should have alerted the purchaser to the possibility that the advertisements were not accurate, but mere puffery. *The purchaser should have inspected before buying*.

In *Behar v. Glickenhaus Westchester Dev., Inc.*,[15] the App. Div. 2d Dep't held that the seller had no duty to disclose to the purchaser the risks posed by errant golf balls on his property adjacent to a golf course. *The purchaser had the means to ascertain a risk not peculiarly within the knowledge of the seller*.

In *Hecker v. Paschke*,[16] the App. Div. 2d Dep't held the seller not liable for fraudulent misrepresentation or fraudulent concealment where the purchasers were aware that the property had been treated for wood destroying insects, *the purchasers did not further investigate the condition of the property* and were not thwarted in their efforts to discover any termite or mold damage.

In *Harmit Realties LLC v. 835 Ave, of the Ams, L.P.*,[17] the App. Div. 1st Dep't held that express disclaimers by the owners of any representations concerning the amount of utilized and excess development rights precluded fraud or negligent misrepresentation and reformation counterclaims by the developers where *they had means to discover the correct amounts*.

In *Wang v. Martinez*,[18] the Sup. Ct. App. Term 2d Dep't held that because the seller as landlord was unaware of the lead paint condition and *the purchaser did not investigate before closing*, the seller did not thwart the purchaser's responsibilities under caveat emptor.

In *Rosner v. Bankers Std. Ins. Company*,[19] the App. Div. 2d Dep't held that the sellers were not liable for the purchaser's discovery after the closing of extremely elevated levels of mold that allegedly made the house uninhabitable, as the claims were extinguished by the doctrine of merger. The rider to the contract stated that the sellers were not aware of mold. The purchaser's inspection report had recommended a professional mold inspection, but *the purchasers did not have such an inspection*.

(4) "As is" disclaimer or merger by deed clauses prevented reliance on prior representations

Contractual "as is" clauses usually state that the purchaser is aware of the physical condition of the property, and that the purchaser is entering into the contract based solely on its inspection thereof and not upon any information or representations, written or oral, by the seller or its representatives, and accepts the same "as is," subject to reasonable wear and tear until the closing.[20] Where representations are made by the seller in the contract form, they are usually said not to survive the closing (known as "merger by deed").[21]

In *B & C Realty, Co, v. 159 Emmut Props. LLC*, [22] the App. Div. 1st Dep't held that the purchaser's claim of fraud as to the number of floors in a rental building was *dismissed due to the "as is" clause* and because the purchaser should have been alerted by comparing temporary certificates of occupancy to the "as-built" plans.

In *Natoli v. NYC Partnership Hous, Dev. Fund Co., Inc.*,[23] the App. Div. 2d Dep't held that the *specific disclaimer provisions* in the contract to sell a three-family house prevented a fraud claim.

In *Hu v. Leff*,[24] the App. Div. 1st Dep't held that the sellers were entitled to keep the down payment after the purchasers refused to pay the balance of price due to structural defects discovered after the contract was signed. *The defects were covered by the "as is" clause* in the contract, even if they were unknown to the parties at the time. The purchaser refused at the closing to accept a credit to repair the defects.

In *Comora v. Franklin*,[25] the App. Div. 2d Dep't held that a complaint of fraud against the sellers and the broker for alleged active concealment of a recurring mold-causing condition and the failure to disclose was *dismissed due to the disclaimer in the contract of sale*.

In *116 Waverly Place LLC v. Spruce 116 Waverly LLC*,[26] the App. Div. 1st Dep't held that a gut-renovated townhouse was not a "new home" under GBL 777(5). *The "as is" clause prevented claims for fraudulent misrepresentation, concealment, and inducement*. The contract provision that purchaser had the right to inspect rendered untenable the claim that information regarding the condition was peculiarly within sellers' knowledge.

In *Kollatz v. KOS Bldg, Group, LLC*,[27] the App. Div. 2d Dept. held that where purchaser of a newly constructed house sued the seller and the contractor, the purchaser stated a fraud claim against the contractor based on an alleged misrepresentation which induced the purchaser to purchase, *but the disclaimer in contract as to representations extrinsic to the contract precluded a fraudulent inducement claim* against the seller.

(5) Sellers' brokers not liable

In *Hefter v. Citi Habitats, Inc.*,[28] the App. Div. 1st Dep't held that the brokers' truthful statement to the purchaser that he did not know if co-op maintenance fees were expected to increase, the failure to provide minutes of the shareholders' meeting that were available to the purchaser on request, and the guess that any increase might be 15% were not actionable as fraud.

In *Sandler v. Eric G. Ramsay, Jr. Assocs., LLC*,[29] the Sup. Court App. Term, 2d Dep't, 9th and 10th Judicial Districts, held that the purchaser's reliance on the broker's alleged misrepresentations that the home was connected to the public sewer system was unreasonable. The purchasers could have ascertained that the home was connected to four cesspools through ordinary means.

In *Nerey v. Greenpoint Mortgage Funding, Inc.*,[30] the App. Div. 2d Dep't held that the seller's broker did not make a misrepresentation to the purchasers as to the terms of mortgages absent evidence that the agent had an involvement in setting the terms of the mortgages or had an intent to deceive the purchasers.

In *Belizaire v. Keller Williams Landmark II*,[31] the Supreme Court, Nassau County held that the purchasers' suit against the listing broker for intentional or negligent misrepresentation of real estate taxes was dismissed where the MLS data sheet was inaccurate, but the amount of taxes could have been ascertained on the public website, and the purchasers were made aware prior to the closing of the actual amount and knowingly proceeded to close.

C. The Rationales for Wins by Purchasers in Caveat Emptor Cases Also Remained the Same

(1) Failure to disclose, misrepresentation or active concealment by the seller

In *Lius Group International Endwwell, LLC v. HFS International, Inc.*,[32] the App. Div. 2d Dep't held that where the purchaser of commercial property alleged that the seller corporation and its president represented in a pre-closing structural disclosure form *that the president was not aware that the premises was located in a flood zone, which was untrue*, the purchaser was entitled to a default judgment (for defendants' failure to answer) on the breach of contract claim. The fraud claim against the corporation was duplicative, but it was not duplicative against the president because the president was not a party to the contract and thus the plaintiff sought compensatory damages which are not recoverable for breach of contract. In *Revell v. Guido*,[33] the 3d Dep't held that a jury verdict for the purchasers on a fraud claim was not against weight of the evidence where *the seller made misrepresentations as to the septic system* on a commercial property information sheet and environmental questionnaire to the purchaser's lender and *the purchaser's reliance was reasonable*.

In *Whitney Land Holdings, LLC v. Don Realty, LLC*,[34] the App. Div. 3d Dep't did not dismiss the purchaser's fraud claim against the sellers for allegedly *intentionally misrepresenting that the town had no plan to acquire a portion of a commercial property by eminent domain*.

In *Square Max LLC v. Trickey*,[35] the App. Div. 4th Dep't held that the purchaser stated a claim for fraud by alleging that *the seller's representations regarding occupancy of a building and rental values for certain floors were false and made with intent to deceive*.

In *Mineroff v. Lonergan*,[36] the App. Div. 2d Dep't held that the sellers breached the contract in which *the sellers represented that the premises was free and clear of any mold or mold remediation* and a professional engineer stated that he observed mold. The purchasers' cancellation of the contract was not an anticipatory breach because of evidence that mold remediation was incurable.

In *Razdolskaya v. Lyubarsky*[37] the App. Div. 2d Dep't held that the purchasers' complaint sufficiently stated

a cause of action to recover damages for fraud that *the sellers actively concealed mold and water damage* to a unit's balcony and for defects throughout common areas of the condominium building, which might have thwarted the purchasers' efforts to inspect.

In *Whitney Lane Holdings, LLC v. Don Realty, LLC*,[38] the App. Div. 3d Dep't held that the purchasers' breach of contract claim that *the sellers failed to disclose prior to the closing the town's proposed taking of a portion of a commercial property* was not barred under caveat emptor, since *the duty to disclose arose out of a representation in the contract of sale*.

In *Sforza v. Sarro*,[39] the Sup. Ct. App. Term, 2d Dep't, 11th and 13th Judicial Districts, held that where the contract provided for the septic system to be in working order, the house was not connected to the sewer system and the cesspool was filled in and blacktopped over, the record was sufficient to establish that *the seller actively concealed the lack of a septic system*.

(2) The purchaser did not have means to detect the defect

In *TIAA Global Investments, LLC v. One Astoria Square LLC*,[40] the App. Div. 1st Dep't held that the seller of a commercial property's motion to dismiss fraud claims was denied where the purchaser took title to a seriously defective apartment building. Representations by the seller were explicitly intended to merge in the deed. Fraud allegations were sufficient where the facts presented were matters peculiarly with the seller's knowledge and *the purchaser alleged that it did not have the means to detect the defects in insulation and of air infiltration*. Despite broad due diligence rights, whether detection was practical was an *issue for the trier of fact*. An escrow agreement at the closing as to testing and remediation of air infiltration was not a waiver of all claims or an accord and satisfaction.

(3) "As is" clause did not bar a claim by the purchaser

In *Board of Managers of Loft Space Condominium v. SDS Leonard, LLC*,[41] the App. Div. 1st Dep't held that the "as is" clause in the condo offering plan did not bar the board of managers' breach of contract claim against the sponsor based on *items that were hazardous, dangerous, and/or violated the law*, since a temporary certificate of occupancy merely created a rebuttable presumption that the condo complied with the law.

D. Purchasers Suits Against Inspectors and Brokers

(1) Purchasers have won some suits against brokers

In *McDermott v. Related Assets, LLC*,[42] the Civil Court Richmond County held that *the seller's broker was responsible to check public records* to confirm the listing that the property was serviced by the city sewer, when there was only a septic tank, and was liable to the purchaser for the cost of hook up.

In *Widlitz v. Douglas Elliman, LLC*,[43] the purchaser sued the broker for fraudulent misrepresentation and his attorney for malpractice and breach of fiduciary duty. The Supreme Court N.Y. County denied motions by defendants' attorney and broker to dismiss the complaint where the purchaser alleged that she had *assurances by the broker that 12th floor condo apartment under construction would have city views* and purchaser's attorney was retained to conduct due diligence. The completed apartment only had views of brick walls of a nearby 12-story building.

(2) Purchasers have won some suits against inspectors

In *Encore Lake Grove Homeowners Assn, Inc. v. Cashin Assocs., P.C.*,[44] the App. Div. 2d Dep't held that the condominium and the HOA could be third-party beneficiaries of a contract between a village and the village engineer to conduct inspections, but the claim of a failure to detect defects sounded in contract not in professional malpractice.

II. PCDS Cases from July 2012 to June 2021

A. Prior Articles and Update on PCDS Cases

In my 2007 and 2013 articles, I found that from 2003 through June 2006, purchasers in PCDS cases won 1.7 (17%) of the cases and sellers won 8.3 (83%).[45] This was better than the 9% rate of success for purchasers under common law caveat emptor from 1999 to 2006, but not as good as the rate to 2006 of 32%. From July 2006 through June 2012, purchasers won 6.2 PCDS cases (41%) and sellers won 8.8 cases. For the full ten-year period, purchasers won 7.9 cases (32%) and sellers won 17.1 cases. Fifteen of the 25 PCDS cases from 2003 through June 2012 occurred upstate (3d and 4th Dep'ts), where it is more customary for brokers to prepare the initial contracts and request delivery of a PCDS. Downstate (1st and 2d Dep'ts), many/most attorneys for sellers advise their clients to give the $500 credit under the PCDA instead of giving a PCDS, because the PCDS has many over-broad questions that might unfairly trap sellers.

From July 2012 through June of 2021, all 6 PCDS cases occurred upstate. During this period the results have not improved for purchasers: sellers won 5, but purchasers only won 3.

3d Dep't sellers won 2, purchasers won 0.

4th Dep't sellers won 3, purchasers won 3.

B. Rationales for Wins by Purchasers in PCDS Cases Remain the Same

(1) The seller made a fraudulent misrepresentation or actively concealed

In *Kier v. Wilcox*,[46] City Court Canandaigua held the sellers liable for damages for failure to revise a PCDS af-

ter the seller's broker notified that the septic system leach field encroached on a neighbor's property. The seller's broker's knowledge was imputed to the seller, constituting concealment.

In *Mikulski v. Battaglia*,[47] the App. Div. 4th Dep't did not dismiss the purchaser's fraud claim against the seller. Purchaser raised a triable issue of fact as to whether or not seller knowingly misrepresented a material fact in the PCDS as to flooding. *A false representation in a PCDS may constitute active concealment in the context of fraudulent nondisclosure, but to maintain such a cause of action, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor*.

(2) The seller had actual knowledge of the defect or the purchaser reasonably relied on misrepresentation

In *Sicignano v. Dixey*,[48] the purchaser sued for damages for violation of the PCDA, fraud and breach of contract. The Supreme Court granted the sellers' motion to dismiss the purchasers' complaint. The App. Div. 4th Dep't reversed, holding that *a genuine issue of material fact* existed as to whether *the sellers had actual knowledge of basement flooding*, which the sellers denied in a PCDS, and whether the purchaser reasonably relied on the sellers' alleged misrepresentation.

(3) The "as is" or merger by deed clauses did not prevent a breach of contract claim

In *Sicignano v. Dixey*,[49] the App. Div 4th Dep't held that a genuine issue of material fact existed as to whether the sellers had actual knowledge of basement flooding, which the sellers denied in a PCDS, and whether the purchaser reasonably relied on sellers' alleged misrepresentation. The provisions of the contract of sale did not merge with the deed, such that the purchaser could assert a breach of contract claim.

C. Rationales for Wins by Sellers in PCDS Cases Remain the Same

(1) The purchaser failed to prove fraud by the seller or justifiable reliance by the purchaser

In *Gallagher v. Ruzzine*,[50] the App. Div. 4th Dep't dismissed the purchasers' complaint against (1) persons who sold to the sellers, who provided a prior inspection report and a PCDS which recited some basement water seepage and drainage issues and repaired basement cracks; (2) the sellers, who did not disclose the prior inspection report, repaired a basement crack, and provided a PCDS that was silent as to seepage and dampness, where *the purchaser's inspection report put them on notice*; and (3) the seller's agents for fraud or failure to disclose under CPLR 443 where there was no conduct that constituted active concealment.

In *Chapman v Jacobs*,[51] the App. Div. 4th Dep't held that even assuming that the representations in the PCDS constituted active concealment, *the sellers established that they did not thwart the purchaser's ability to ascertain from the public record that the certificate of occupancy had been voided* due to the encroachment of a barn on the adjoining property.

In *DeMarco v. Petrou*,[52] a justice court in Monroe County held that where the PCDS stated that there were no known material defects in the plumbing system and shower leaks were discovered after the closing, the purchaser's claim of fraudulent misrepresentation was dismissed as *there was not any attempt to actively conceal the defect and the purchaser had unfettered opportunity to inspect*).

(2) The purchaser failed to prove that seller had actual knowledge of the defect

In *Kazmark v. Wasyln*,[53] the App. Div. 3d Dep't dismissed the purchaser's complaint where seller gave a PCDS answering "unknown" whether the structure had water damage and "no" as to problems with the foundation or the wall or standing water, though the seller made prior repairs that he felt resolved water infiltration issues, because *the purchaser did not establish that seller had actual knowledge of any material defect*. The claim of concealment with drywall was rejected.

In *Amiri v. Gurusamy*,[54] a county court in Albany County held that the sellers did not raise triable issues of fact where they gave a PCDS, the purchasers had an inspection, and the sellers denied actual knowledge of water damage or flooding; claims for breach of contract, fraudulent inducement, unjust enrichment, and quantum meruit were denied.

(3) The PCDA failed to create a statutory cause of action

In *DeMarco v. Petrou*,[55] a justice court in Monroe County held that where a PCDS stated that there were no known material defects in the plumbing system and shower leaks were discovered after the closing, the purchaser's claim based on a PCDS was dismissed as *the PCDA did not create a cause of action*. But the claim that the PCDA did not create a cause of action was expressly rejected by the Appellate Division, 3d Dep't, in the *Meyers v. Rosen* case in 2010.[56]

III. Conclusion

Sellers have continued to win much more often than purchasers in caveat emptor cases. The most common defense of sellers has been that purchasers have not used means available to discover the condition. In those cases, I think a better understanding of caveat emptor is "buyer take care" rather than "buyer beware." This better reflects the full Latin phrase: that the purchaser should exercise "proper caution."[57]

"The most common defense of sellers has been that purchasers have not used means available to discover the condition. In those cases, I think a better understanding of caveat emptor is 'buyer take care' rather than 'buyer beware.'"

The theoretical gap for purchasers in the doctrine of caveat emptor is that the purchasers are usually left without a remedy in New York if the sellers have knowledge of a defect, the purchasers have a professional inspection, and they and their inspectors are unable to observe a material defect affecting health or safety, such as a faulty septic or sewer system, structural defects, landfill, mold, or a defective heating system or elements when the purchase is made in a warm month or a defective cooling system or elements when the purchase is made is a cool month. In my 1997 article, I noted that some states had plugged this gap with a "superior knowledge" exception to caveat emptor,[58] but I have found only one court in New York that has expressly adopted this concept.[59] The closest most come is to find active concealment by the seller.[60] To fill that gap in New York, purchasers could propose adding a rider to the contract allowing them to claim reimbursement of the cost to cure where the seller had superior knowledge of a defect that is undiscoverable, if the claim is made within one year, with that right to survive the closing. Unfortunately, it is unlikely for attorneys representing sellers to agree to that.

Though there are many fewer PCDS cases, sellers have also won those much more often than purchasers. Limiting the risk to sellers who give a PCDS has recently been proposed.[61] So, purchasers barely have a ghost of a chance to succeed on claims of condition defects. Attorneys for purchasers should be prepared to explain these case results to their clients.

Endnotes

1. Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (Winter 2002).
2. Holtzschue, *The Purchaser Hasn't a Ghost of a Chance: Update on PCDA Cases and PCDA Revision*, 35 N.Y. Real Prop. L.J. (Winter 2007), and Holtzschue, *With a PCDS, the Purchaser Now Has More Than a Ghost of a Chance: an Update on PCDS and Caveat Emptor Cases*, 41 N.Y. Real Prop. L.J. 24 (Winter 2013). The quote that the purchaser hasn't "a ghost of a chance" is a witticism from *Stambovsky v. Ackley*, 169 A.D.2d 254, 256, 572 N.Y.S.2d 672, 674 (1st Dep't 1991), where the seller had written an article claiming the house was haunted by a ghost. For more analysis and prior cases on caveat emptor see *Holtzschue on Real Estate Contracts and Closings* (PLI) § 2:2.11.
3. *Circle Assoc., L.P. v. Starlight Props., Inc.*, 98 A.D.3d 596, 598, 949 N.Y.S.2d 750, 751 (2d Dep't 2012).
4. *Wild W Ventures, LLC v. 703 Wash. Corp.*, 95 A.D.3d 740, 741, 945 N.Y.S.2d 89, 90 (1st Dep't 2012).
5. *Schottland v. Brown Harris Stevens Brooklyn , LLC*, 107 A.D.3d 684, 686, 968 N.Y.S.2d 90, 92 (2d Dep't 2013).
6. *W. 17th St. & Tenth Ave. Realty, LLC v. N.E.W. Corp.*, 155 A.D.3d 478, 65 N.Y.S.3d 132, 133 (1st Dep't 2017).
7. *McDonald v. O'Connor*, 189 A.D.3d 1208, 1211, 138 N.Y.S.3d 100, 103 (2d Dep't 2020),
8. *Pesca v. Barbera Homes, Inc.*, 35 Misc.3d 747, 759, 942 N.Y.S.2d 313, 321-22 (Sup. Ct. Albany County 2012).
9. *Rojas v. Paine*, 101 A.D.3d 843, 844-47, 956 N.Y.S.2d 81, 83-85 (2d Dep't 2012).
10. *Mo v. Rosen*, 116 A.D.3d 933, 934-35, 983 N.Y.S.2d 867-68 (2d Dep't. 2014).
11. *Perez-Faringer v. Heilman*, 95 A.D.3d 853, 854, 944 N.Y.S.2d 170, 171-73 (2d Dep't 2012).
12. *Rosenblum v. Glogoff*, 96 A.D.3d 514, 514-15, 946 N.Y.S.2d 167, 167-69 (1st Dep't 2012).
13. *Revell v. Guido*, 101 A.D.3d 1454, 1454-58, 956 N.Y.S.2d 343, 344-47 (3d Dep't 2012).
14. *Estrada v. Metropolitan Prop. Grp., Inc.*, 110 A.D.3d 497, 974 N.Y.S.2d 147 (1st Dep't 2013).
15. *Behar v. Glickenhaus Westchester Dev., Inc.*, 122 A.D.3d 784, 786, 996 N.Y.S.2d 678, 680-81 (2d Dep't 2014).
16. *Hecker v. Paschke*, 133 A.D.3d 713, 714-17, 19 N.Y.S.3d 568, 568-72 (2d Dep't 2015).
17. *Harmit Realties L.L.C. v. 835 Ave. of the Ams., L.P.*, 135 A.D.3d 564, 23 N.Y.S.3d 230, 231 (1st Dep't 2016).
18. *Wang v. Martinez,* 51 Misc.3d 145(A), 37 N.Y.S.3d 209 (Sup. Ct., App. Term, 2d Dept., 11th and 13th Jud. Dist. 2016).
19. *Rosner v. Bankers Standard Ins. Co.*,172 A.D.3d 1257, 102 N.Y.S.3d 200 (2d Dep't 2019).
20. Section 12 of the Multibar form. The "as is" clause, section 12 in the bar association-approved contract used downstate (the "Multibar form") is very lengthy. An even more precise phrase used by some is "as is, with all faults." Laymen may equate "as is" with "damaged," as a seller of a used car did in describing it as "slightly as is."
21. Section 11(c) of the Multibar form.
22. *B & C Realty, Co. v. 159 Emmut Props. L.L.C.*, 106 A.D.3d 653, 655, 966 N.Y.S.2d 402, 404 (1st Dep't 2013).
23. *Natoli v. NYC P'ship Hous. Dev. Fund Co.*, 103 A.D.3d 611, 612-13 960 N.Y.S.2d 137 (2d Dep't 2013).
24. *Hu v. Leff*, 158 A.D.3d 419, 419-20, 69 N.Y.S.3d 862 (1st Dept. 2018).
25. *Comora v. Franklin*, 171 A.D.3d 851, 852-54, 97 N.Y.S.3d 734, 736-37 (2d Dept. 2019).
26. *116 Waverly Place LLC v. Spruce 116 Waverly LLC*, 179 A.D. 3d 511, 512, 119 N.Y.S. 3d 78, 79 (1st Dep't 2020).
27. *Kollatz v. KOS Bldg, Group, LLC*, 188 A.D.3d 1175, 1176, 1179, 137 N.Y.S.3d 491, 493-96 (2d Dep't 2020).

28. *Hefter v. Citi Habitats, Inc.*,121 A.D.3d 408, 409, 993 N.Y.S.2d 692, 692-93 (1st Dep't 2014).

29. *Sandler v. Eric G. Ramsay, Jr. Assocs., LLC*,49 Misc.3d 1, 2-3, 16 N.Y.S.3d 894, 894-95 (Sup. Ct., App. Term, 2d Dep't, 9th and 10th Jud. Dist. 2015).

30. *Nerey v. Greenpoint Mortgage Funding, Inc.*, 144 A.D.3d 646, 647, 40 N.Y.S.3d 510,512-13 (2d Dep't 2016).

31. *Belizaire v. Keller Williams Landmark II*, 61 Misc.3d 1223(A), 1, 3, 111 N.Y.S.3d 800 (Sup. Ct. Nassau County 2018).

32. *Lius Group International Endwwell, LLC v. HFS International, Inc.*, 92 A.D.3d 918, 918-20, 939 N.Y.S.2d 525, 525-27 (2d Dep't 2012).

33. *Revell v. Guido*, 124 A.D.3d 1006, 1006, 1010-11, 2 N.Y.S.3d 252, 252, 258-59 (3d Dep't 2015).

34. *Whitney Lane Holdings, LLC v. Don Realty, LLC*, 130 A.D.3d 1218, 1218-20, 14 N.Y.S.3d 516 (3d Dep't 2015).

35. *Square Max LLC v. Trickey*, 138 A.D.3d 1511, 1511-12, 31 N.Y.S.3d 344, 344-45 (4th Dep't 2016).

36. *Mineroff v. Lonergan*, 152 A.D.3d 506, 509, 58 N.Y.S.3d 136, 136-39 (2d Dep't 2017).

37. *Razdolskaya v. Lyubarsky*, 160 A.D.3d 994, 994-96, 76 N.Y.S.3d 95, 95-98 (2d Dep't 2018).

38. *Whitney Lane Holdings, LLC v. Don Realty, LLC*, 159 A.D.3d 1163, 1163-66, 72 N.Y.S.3d 213 213-16 (3d Dep't 2018).

39. *Sforza v. Sarro*, 63 Misc3d 134(A), 1, 2, 114 N.Y.S.3d 555 (Sup. Ct. App. Term, 2d Dep't, 9th and 10th Jud Dist. 2019)

40. *TIAA Global Invs., LLC v. One Astoria Sq. LLC*, 127 A.D.3d 75, 75-90, 7 N.Y.S.3d 1, 1-5 (2015).

41. *Board of Mgrs. of Loft Space Condominum v. SDS Leonard, LLC* 142 A.D.3d 881, 881-82, 38 N.Y.S.3d 23, 23-25 (1st Dep't. 2016).

42. *McDermott v. Related Assets, LLC.*, 45 Misc.3d 1205(A), 998 N.Y.S.2d 306 (Civ. Ct., Richmond Co. 2014).

43. *Widlitz v. Douglas Elliman, LLC.*, 55 Misc.3d 1214(A), 58 N.Y.S.2d 876 (Sup. Ct., N.Y. Co. 2017).

44. *Encore Lake Grove Homeowners Ass'n Inc. v. Cashin Assoc., P.C.*, 111 A.D.3d 881, 882, 884, 976 N.Y.S.2d 143, 145-46 (2d Dep't 2013)..

45. Karl B. Hotzschue, *With a PCDS, the Purchaser Now Has More Than a Ghost of a Chance: An Update on PCDS and Caveat Emptor Cases*, 41 N.Y. Real Prop. L.J. 25, 25 (Winter 2013); Karl B. Hotzschue, *The Purchaser Hasn't a Ghost of a Chance: Update on PCDA Cases and PCDA Revision*, 35 N.Y. Real Prop. L.J. 7 (Winter 2007).

46. *Kier v. Wilcox*, 43 Misc.3d 1229(A), 1229(A), 993 N.Y.S.2d 644, 664 (City Ct., Canandaigua Co. 2014).

47. *Mikulski v. Battaglia*, 112 A.D.3d 1355, 977 N.Y.S.2d 839 (Sup. Ct. App. Term. 4th Dep't).

48. *Sicignano v. Dixey*, 124 A.D.3d 1301, 1301, 2 N.Y.S.3d 301, 302-03 (4th Dep't 2015).

49. *Id.* at 1302.

50. *Gallagher v. Ruzzine*, 147 A.D.3d 1456, 1457-60, 46 N.Y.S.3d 323, 326-28 (4th Dep't 2017) (citing *Ader v. Guzman*, 135 A.D.3d 668, 22 N.Y.S.3d 576 (2d Dep't 2016)).

51. *Chapman v. Jacobs*, 197 A.D.3d 851, 852, 153 N.Y.S.3d 245, 246 (4th Dep't 2021).

52. *Demarco v. Petrou*, 71 Misc.3d 1129, 1143, 147 N.Y.S.3d 395, 404 (Justice Ct,, Monroe County 2021).

53. *Kazmark v. Wasyln*, 167 A.D.3d 1386, 1387, 91 N.Y.S.3d 560, 562 (3d Dept. 2018).

54. *Amiri v. Gurusamy*, 2021 N.Y.Misc. LEXIS 6835 (N.Y. Co. Ct., Albany County 2021).

55. *Demarco v. Petrou*, 71 Misc.3d 1129, 1135, 147 N.Y.S.3d 395, 400, 405 (Justice Ct., Monroe County 2021).

56. *Meyers v. Rosen*, 69 A.D.3d 1095, 1097, 893 N.Y.S.2d 354, 357 (3d Dep't 2010).

57. Leung, *Caveat Emptor ot Vaveat Broker?*, 23 Real Est. Rev. 91 (Summer 1993) *Caveat emptor, qui ignorare non debuit quod jus alienum emit, "meaning "Let a purchaser, who ought not be ignorant of the amount and nature of the interest to be acquired, exercise proper caution,"* 23 Real Est. Rev. 91 (Summer 1993).(construing Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133 (1931).

58. Karl B. Holtzschue, *Caveat Emptor Ain't What It Used to Be: New Development, Trends and Practice Tips*, 25 N.Y. Real Prop. L.J. 3 (Winter 1997).

59. *Young v. Keith*, 112 A.D.2d 625, 627, 492 N.Y.S.2d 489, 490 (3d Dep't 1985) (failure to disclose serious disrepair of water and sewer systems of mobile home park held to be concealment of material fact with intent to defraud).

60. *Cetnar v. Kinowski*, 263 A.D.2d 842, 844, 693 N.Y.S.2d 730, 732 (3d Dep't 1999) (seller had duty to disclose faulty sewer system; seller also made misrepresentation).

61. F. Randy Lee, *Beware: The Doctrine of Caveat Emptor is Alive and Well in New York*, 48 N.Y. Real Prop. L.J. 4, at 5, (Winter 2020) (proposing an overly long merger and disclaimer clause to protect a seller who has given a PCDS, limiting the seller's PCDS damages to $500 and limiting any PCDS action to one year from the date of the contract). While I agree that caveat emptor is alive and well, I imagine that attorneys for purchasers will not agree to the proposed disclaimer clause.

Mortgage Foreclosures and the Statute of Limitations

By Peter Coffey

We have the unfortunately common situation today where a homeowner defaults in making monthly payments as called for in a note that is secured by a mortgage on a homeowner's house. Simple enough: the holder/bank (hereinafter the "bank") accelerates, proceeds to complete foreclosure, and sells the property. Ah, the good old days. They are gone, and today there exists a quagmire of mortgage foreclosures. In that quagmire is the ever-present statute of limitations time bomb. Consequently, the following questions arise: what is sufficient notice of acceleration to light the fuse; who has standing to light the fuse; and in a reverse mortgage, does death light the fuse? Moreover, what events after the lighting of the fuse will snuff it out: is it court dismissal, voluntary withdrawal, or agreement between the parties? It is litigation in which defense attorneys can achieve enormous rewards. Legitimate million-dollar obligations "go poof" and it is immaterial whether these obligations were paid or not. Is this right? Well, as Holmes pointed out in *The Common Law* (1881), the law is to be disassociated from morality. Onward!

The Statute of Limitations as Applicable to Notes and Mortgages

The basic principles are statutorily well-defined. First we have:

CPLR 203 Method of Computing Periods of Limitation Generally

> (a) Accrual of a cause of action and interposition of a claim. The time within which an action must be commenced… shall be computed from the time the cause of action accrued to the time the claim is interposed.[1]

The issue, of course, is the time within which an action must be interposed, or in other words, commenced. The statutory basis upon which all is determined is:

CPLR 213. Actions To Be Commenced Within Six Years

> The following actions must be commenced within six years: … 4. 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 of real property or any interest therein.[2]

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As can be seen, the statute is quite specific; there is no question that it applies to bonds or notes secured by mortgages.

Our general discussion continues with the question of who may maintain an action under RPAPL § 1501(4), which says:

> Where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage, or to enforce a vendor's lien has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons, known or unknown, including one under disability as hereinafter specified, to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom; provided, however, that no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them shall be in possession of the affected real property at the time of the commencement of the action. In any action brought under this section it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid; and also whether the mortgage in question was, or was not, given to secure a part of the purchase price.[3]

In the case of a demand note an action is governed by UCC § 3-122(1)(b) which specifies "a cause of action against a maker or an acceptor accrues. . . in the case of a demand instrument upon its date or if no date is stated the date of issue."[4] Accordingly, if the mortgage secures a demand note or a note in which no date is stated, the cause of action accrues immediately upon the execution of the instrument, obviating the need for notice of acceleration. Where the note provides that it is immediately due and payable upon the happening of an event, the cause of action accrues upon the happening of the event and no acceleration is required to commence the running of the statute of limitations. Specifically, for purposes of our discussion, there is the reverse mortgage situation.[5] For example, in *Bank of America, N.A. v. Gulnick,* the issue concerned the timing when the running of the statute of limitations commenced in a reverse mortgage. There, the mortgagor died December 20, 2009, and the plaintiff commenced an action to foreclose the mortgage on August 11, 2016. When faced with a claim that the statute of limitations had passed, the plaintiff pointed to the language of the note and mortgage–"'[l]ender *may* require immediate payment in full…if: [a] [b]orrower dies and the [p]roperty is not the principal residence of at least one surviving [b]orrower' (emphasis added)."[6] Plaintiff contended that there was no obligation to accelerate, and as the debt had not been accelerated, the statute did not commence to run—the fuse was not lit. The court rejected this, stating, "defendant contends that the cause of action arose upon decedent's death when plaintiff had the right to demand payment in full."[7] Plaintiff noted that because 'may' is ordinarily read as permissive language (citation omitted) it had no obligation to demand payment in full and argued therefore that no cause of action accrues until payment is demanded. Unfortunately, for the plaintiff, their argument was unavailing:

> [W]here the claim is for payment of a sum of money allegedly owed pursuant to contract the cause of action accrues when the party making the claim possesses a legal right to demand payment. In other words, the statute of limitations [is] triggered when the party that was owed the money had the right to demand payment not when it actually made the demand.[8]

This rule applies even though the party that is owed money does not have knowledge of the event giving rise to the cause of action.[9] A contrary rule providing that a cause of action accrues only when a demand is made that would permit the plaintiff "to extend the statute of limitations indefinitely by simply failing to make a demand."[10]

Furthermore, in *Bank of America v. Gulnick*, the plaintiff also claimed that inasmuch as reverse mortgages are insured by HUD, the statute of limitations cannot run against a federal agency.[11] This was rejected on the basis that although HUD insured the loan, it never was the assignee of the loan. Regarding this last point, the case of *Windward Borah, LLC v. Wilmington Savings Fund Society* distinguished *Bank of America v. Gulnick*, stating as follows, "in that case, the plaintiff alleged the loan was insured by HUD but failed to show that HUD ever held the mortgage. Here, the parties do not dispute that HUD did hold the mortgage."[12] Accordingly, if HUD is an actual assignee of the mortgage, even though it may subsequently assign it and there may subsequently be several assignments, the statute of limitations cannot apply. However, the simple fact that HUD insured the mortgage does not prevent an application of the statute of limitations.

Once again, the Appellate Departments are in direct conflict just as in the case of their determination of what was "unequivocal." In the case of *Reverse Mtge. Solutions, Inc. v. Fattizzo*, the Second Department addressed the issue that arises when the statute of limitations commences to run in a reverse mortgage.[13] There, the court totally missed the point, stating "[h'ere, the plaintiff had the option, but was not required, to accelerate the debt upon the death of the borrower. The loan did not automatically become due and payable upon the death of the borrower (internal citations omitted)."[14] Of course it did, and of course the plaintiff was not required to accelerate the debt. As we have seen before where the debt becomes due upon the happening of an event, acceleration is irrelevant. The plaintiff, in a reverse mortgage, had the right to commence an action. Once having given that right the fuse is lit. The analysis in *Bank of America, N.A. v. Gulnick* is spot on. The analysis of the Second Department in *Reverse Mortgage* is spot off. It should also be noted that neither of the two cases cited by the Second Department in its *Reverse Mortgage Solutions, Inc.* decision—*U.S. Bank N.A. v. Gordon*, and *Wells Fargo Bank, N.A. v. Burke*—involved a reverse mortgage.[15]

Where the note secured by the mortgage is payable in installments—which is the usual situation—the cause of action accrues (absent acceleration which will be discussed later) on the date of each payment called for in the note:

> The mortgage also included an optional acceleration clause which Pagano did not exercise.[16] Consequently, separate causes of action for each installment accrued and the Statute of Limitations began to run on the date each installment became due. The Court therefore properly found that the action was not necessarily time barred as to those installments due six years prior to 1986 when the action was commenced.

Prospective Waiver of the Statute of Limitations

Cannot be done. The statute of limitations may not be waived prospectively as in the instrument creating the obligation. This proposition was conclusively settled in the case of *Deutsche Bank Nat'l. Co. v. Flagstar Capital Mkts*.[17] Essentially, the case involved the sale of residential mortgage-backed securities by Quicken Loans, Inc. to defendant Morgan Stanley Mortgage Capital, Inc. pursuant to a residential mortgage-backed securities contract—"second amended and restated mortgage loan purchase and warranty agreement (MLPWA)."[18] The loans were sold in groups with the closing dates for each sale occurring between December 7, 2006, and May 31, 2007. The *Deutche Bank Nat'l* action was commenced by filing a Summons with Notice on August 30, 2013—the statute of limitations passed by three months. The contract at issue had representations and warranties concerning the sale. The issue was when the cause of action for a breach of the warranties accrued—at the time of the execution of the contract or at the time it was discovered that the warranties were breached.[19] The court held that the cause of action for breach of warranty arose at the time of the execution of the contract and not at the time of the discovery of a breach.[20] This is consistent with the statement in *Bank of America v. Gulnick*, where the court stated that the fuse was lit even though the party that is owed the money does not have knowledge of the event giving rise to the cause of action.[21] Accordingly, even if the purchaser of the mortgage backed securities did not know that some of the securities were invalid for whatever reason, this is irrelevant. The cause of action arose at the time of the execution of the agreement. But that does not end the discussion.

Plaintiff argued further that the statute of limitations did not run pursuant to the "accrual clause" of the agreement which stated:

> [a]ny cause of action against the Seller relating to or arising out of the breach of any representations and warranties made in Subsections 9.01 and 9.02 shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure such breach, substitute a Qualified Substitute Mortgage Loan or repurchase such Mortgage Loan as specified above and (iii) demand upon the Seller by the Purchaser for the compliance with this Agreement.[22]

Ultimately, the court held that the accrual clause was also irrelevant stating "[w]e need not resolve this dispute regarding the meaning of the accrual clause, however, because assuming . . . for the sake of argument that plaintiff's alternative interpretation is correct, the accrual clause cannot be enforced in that manner because it conflicts with New York law and public policy."[23] As for the law the provisions of General Obligations Law § 17-103(1) states:

> [a] promise to waive, to extend, or not to plead the statute of limitations applicable to an action arising out of a contract express or implied in fact or in law, if made *after* the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promissor or his agent is effective, according to its terms, to prevent the interposition of the defense of the statute of limitations in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise.[24]

Any agreement to extend the statute of limitations must be made in accord with that section. However, in this case, the applicable provision is General Obligations Law § 17-103(3), which provides as follows:

> A promise to waive, to extend, or not to plead the statute of limitations has no effect to extend the time limited by statute for the commencement of an action or proceeding for any greater time or in any other manner than that provided in this section, unless made as provided in this section.[25]

That means an agreement made prospectively is ineffectual. The court held that plaintiff's interpretation contravenes GOL § 17-103 in two ways:

> (1) it is an agreement to effectively extend the limitations period that was made *before* a breach of contract cause of action accrued; and (2) it would extend the limitation period to a future date uncertain, inasmuch as plaintiff's discovery of the breach or defendant's notice of the breach might occur decades into the future for the life of mortgage loans.[26]

The court went on to explain that "the public policy represented by the statute of limitations CPLR 201 and General Obligations Law § 17-103 . . ." would be effectively abolished if contracting parties could circumvent it by 'postpon[ing] the time from which the period of limitations is to be computed.'"[27]

Finally, the court concluded:

> [w]hen the public policy favoring freedom of contract and the public policy prohibiting extensions of the limitations period *before* accrual of a cause of action come into conflict, however, the latter must prevail inasmuch as "the parties to a contract are basically free to make whatever agreement they may wish" only (a)sent some violation of law or transgression of a strong public policy. Parties to a contract may not prospectively waive the statute of limitations.[28]

It provides in language similar to § 17-103(1) and 1 *Bergman on New York Mortgage Foreclosures* § 5.11, which explains what occurs if someone attempts to waive a statute of limitations in an effective agreement:

> [w]hile the statute of limitations is a waivable defense, an agreement made at the inception of liability to waive (or extend) the statute of limitations is unenforceable because a party cannot make a valid promise in advance to render inoperative a statute founded upon a matter of public policy[29]

Acceleration of the Standard Note and Mortgage Obligations—Calling for Monthly Payments

We have discussed the accrual of a cause of action where there is a demand note, a time note, or a note due upon the happening of a given event. We have also discussed the accrual of a cause of action on a note having periodic payments as to each periodic payment. We now address a situation where the obligor on a standard note and mortgage has defaulted and the holder of the note seeks to accelerate the obligation and declare the entire sum due and owing. Hang on, it's a bumpy ride.

The rule regarding methods of acceleration was stated in *Malone v. U.S. Bank National Association*.[30] In *Malone*, the court specified that acceleration may occur in three different ways:[31]

1. A clear and unequivocal notice of acceleration delivered to the obligor.
2. An obligation by the obligor to make a balloon payment under the terms of the note at the end of the payback period which acceleration is self-executing (see prior discussion of time notes and demand notes).
3. Where a creditor commences an action to foreclose upon a note and mortgage seeking in the complaint payment of the full amount due.

Significant confusion and conflict arose in the Appellate Division decisions as to the required context of a notice of acceleration. Just what does "unequivocal" mean? The confusion was generated in major part by the uniform instruments issued by Fannie Mae for use in New York—mortgage form 333; note form 3233; 3518—which provided that the option to accelerate may be exercised only upon the satisfaction of certain conditions including notice and an opportunity for the borrower to correct the default. In *Malone*, the court held that the plaintiff's

> failure to cure her delinquency within 30 days will 'result in the acceleration' of a note was an expression of future intent and fell short of an actual acceleration [citing cases]. The notice to the plaintiff was not clear and unequivocal as future intentions may always be changed in the interim.[32]

The court noted, however, that their colleagues in the First Department disagree.[33] In *Deutsche Bank Nat'l. Trust Co. v. Royal Blue Realty Holdings, Inc.*, the court cites that "[t]he letters from plaintiff's predecessor in interest provide a clear and unequivocal notice that it 'will' accelerate the loan balance a proceed with a foreclosure sale unless the borrower cured his defaults within 30 days of the letter."[34] The Fourth Department agreed with the Second Department in *Ditech Fin., LLC v. Corbett*,[35] holding that, if certain conditions are not met the bank will foreclose, "the lender's intention to accelerate the debt in the future if certain preconditions were not met, 'falls far short of providing clear and unequivocal notice to the defendants that entire mortgage debt was being accelerated.'"[36]

The Third Department went both ways. In *Colobie Block & Supply Co., v. D. H. Overmyer Co.*, the court held that "[o]n December 16, 1968, respondent sent a letter to appellant stating the past due interest on the note by reason of late payments amounted to $326.23 and advising appellants that the option to accelerate would be exercised unless the delinquency was cured with 60 days."[37] The court then went on to say "[t]he election by the respondent to accelerate the maturity of the note was clear and unequivocal."[38] Still, the Third Department changed its opinion in *Goldman Sachs Mtg. Co. v. Mares*.[39] The default letter in *Mares* stated that "[f]ailure to pay the total amount past due, plus all other installments and other amounts becoming due hereafter . . . on or before the [30th] day after the date of this letter *may* result in acceleration of the sum secured by the mortgage."[40] The court found that the letter "falls far short of providing clear and unequivocal notice to the defendant that the entire mortgage debt was being accelerated."[41] Effectively, the court believes that the Supreme Court correctly held that a "'letter discussing a possible future event,' . . . does not constitute an exercise of the . . . mortgagee's optional acceleration clause.'"[42]

However, the Third Department went the other way in *MTGLQ Inbs. LLP v. Lunder*, where the letter stated "if the default is not cured on or before January 21, 2011, the mortgage payments *will* [emphasis in original] be accelerated . . . . "[43] The Third Department held, "As such the notice clearly and unequivocally indicates that the outstanding mortgage payments would be accelerated . . . "[44]

Now, the confusion is over. The Court of Appeals, in what could be said without hyperbole is a landmark decision—*Freedom Mortgage Corp v. Engel*—undertook to entertain an appeal of four lower court decisions, reverse them all and established an approach which "comports with our precedent favoring consistent, straightforward application of the statute of limitations which serves with objectives of 'finality, certainty and predictability' to the benefit of both the borrowers and the noteholders."[45] The following four cases were appealed and reviewed by the Court of Appeals: *Freedom Mortgage Corp. v. Engel*; *Dietech Financial LLC v. Naidu*, 1; *Vargas v. Deutsche Bank Nat'l Trust Co.*; *Wells Fargo Bank, N.A. & c. v. Ferrato*; and *Wells Fargo Bank, N.A. & c. v. Ferrato and Capitol One Bank (USA), N.A.*[46] The Court of Appeals reviewed each decision specifically addressing the issues raised and thereby resolving the conflict which existed at the lower level.[47]

The Court of Appeals addressed two issues that were intensely contested at the lower level.[48] (Given the number of requests to file an *amicus curiae* brief one might consider describing the situation as volcanic.)

The Court of Appeals spelled out just what it was undertaking stating "[w]e have had few occasions to address how a lender may effectuate an acceleration of the maturity of a debt secured on real property."[49]

The first issue was the action necessary to accelerate the debt, and second addressed the actions necessary to de-accelerate the debt. The first issue was addressed by the Court of Appeals in its analysis of *Wells Fargo v. Ferrato*, and *Vargas v. Deitech National Trust Co.*, which set forth its reasoning as follows:

> There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." Acceleration in this context is a demand for payment of the outstanding loan in full that terminates the borrower's right to repay the debt over time through the vehicle of monthly installment payments (although the contracts may pride the borrower the right to cure) (citation omitted). Such a significant acceleration of the borrower's obligations under the contract—replacing the right to make recurring payments of perhaps a few thousand dollars a month or less with a demand for immediate payment of a lump sum of hundreds of thousands of dollars—should not be presumed or inferred; noteholders must unequivocally and overtly exercise an election to accelerate. With these principles in mind, we turn to the two appeals before us in which the parties dispute whether, and when, a valid acceleration of the debt occurred, triggering the six-year limitations period to commence a foreclosure claim.[50]

As a subset of the first issue we have the determination of the necessary contents of a letter accelerating the debt. Are the letters which have been sent, generally dictated by the Fannie Mae documents, sufficient to accelerate? Do the letters constitute, in accordance with *Malone*, a "clear and unequivocal" notice of acceleration delivered to the obligor?[51] The Appellate Division in *Vargas* set forth the facts as follows:

> The 2008 letter from defendant's predecessor in interest informed plaintiff that his debt "will [be] accelerate[d]" and "foreclosure proceedings will be initiated" if he failed to cure his default within 32 days of the letter. The letter highlighted that time was of the essence and it is undisputed that plaintiff did not cure his default within the time period.[52]

The Appellate Division held that language constituted a clear and unequivocal intent to accelerate, citing to its *Deutsch Bank Nat. Trust Co.* decision.[53] The Court of Appeals was having none of this and rejected the contention that the letter accelerated the debt, stating:

> first and foremost, the letter did not seek immediate payment of the entire outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was sent. Nor was this letter a pledge to acceleration would immediately and automatically occur upon the expiration of the 32-day cure period. . . . Although the letter states that the debt "will [be] accelerate[d]" if Vargas failed to cure the default within the cure period, it subsequently makes clear that the failure to cure "may" result in foreclosure of the property, indicating that it was far from certain that either the acceleration or foreclosure action would follow, let alone ensue immediately at the close of the 32-day period.[54]

Additionally, the Court of Appeals noted at footnote 2:"[i]n addition, the Fannie Mae form 3033 mortgage provides that the option to accelerate may be exercised only upon satisfaction of certain conditions, including

notice and an opportunity for the borrower to correct the default."[55]

The Court of Appeals went on to state: "[t]his case demonstrates why acceleration should not be deemed to occur absent an overt, unequivocal act."[56] It could be stated that the Court of Appeals concluded that it would be impossible to compose a letter which contained an overt unequivocal act of acceleration when the Fannie Mae forms are used. The Court of Appeals rejected the First Department's decisions and held the Second Department's decisions had the correct reasoning.[57]

The second subset of the actions necessary to accelerate a debt is that addressed at number three in *Malone v. U.S. Bank National Assoc.*, "when creditor commences an action to foreclose upon a note and mortgage seeks, in the complaint, payment of the full amount due."[58]

It is generally believed that the filing of a summons and complaint demanding payment in full constitutes an unquestioned acceleration. However, this is not always the case. The Court of Appeals addressed the issue in its discussion of *Wells Fargo v. Ferrato*.[59] *Wells Fargo* involved the filing of at least two actions to foreclose the mortgage. However, Ferrato moved to dismiss the actions on the basis that the complaint accelerated the original debt and not the subsequently modified debt.[60] Ferrato was successful, and the actions were dismissed. Nevertheless, even though the complaints were dismissed, Ferrato argued that the acceleration in the fifth complaint was adequate to trigger the running of the statute of limitations and the fifth action was thereby barred by the statute of limitations.[61] The Appellate Division specifically addressed the issue stating that the fifth action is time barred in that Wells Fargo had accelerated the mortgage debt when it commenced the second foreclosure action, and holding "the fact that the prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt."[62] The Court of Appeals in its discussion of *Wells Fargo* rejected this.

> It is well-settled that the filing of a verified foreclosure complaint may evince an election to accelerate, but here the filings did not accelerate the modified loan (underlying the current foreclosure action) because the bank failed to attach the modified agreements or otherwise acknowledge those documents, which had materially distinct terms. Under these circumstances—where the deficiencies in the complaints were not merely technical but *di minimis* and rendered it unclear what debt was being accelerated—the commencement of these actions did not validly accelerate the modified loan (citations omitted).[63]

(It should be noted the Court of Appeals cites here, and on several other occasions, to its *Albertina* decision, thereby establishing *Albertina* as the definitive case regarding the elements of acceleration of a debt.)

The filings may be deficient in another aspect. As noted previously, the Court of Appeals failed to cite *Malone v. U.S. Bank Nat. Assoc.*, which clearly laid out the standards for proper acceleration of the debt.[64] Instead the Court relied upon its own decision *Albertina Realty Co. v. Rosebro Realty Corp.*[65] In what must be considered prescient reading of the *Albertina* case Judge Thomas F. Whalen, J.S.C., in *HSBC Bank USA, N.A. v. Margineau*, focused on the provision or aspect of the *Albertina* case which called for a verified complaint.[66] The decision states "[a]ny discussion of the law of acceleration of a mortgage debt must begin with the seminal mortgage acceleration case of *Albertina Realty Co. v. Rosebro Realty Corp.*"[67] The Court in *HSBC Bank* states further "it is clear that an unverified complaint cannot stand as a basis for a default judgment pursuant to CPLR 3215 [citing cases]"[68] and further, "[i]t therefore makes compelling sense that a verified complaint would be essential to constitute 'the sworn statement that the plaintiff had elected to accelerate the maturity of the debt.'"[69] The Court of Appeals consistently mentions a "verified complaint" stating at "indeed, in *Albertina*, we held that the debt was accelerated when the verified complaint and lis pendens were filed even though papers had not yet been served on the borrower.'"[70] Accordingly, it is submitted that the Court of Appeals decision in *Albertina* does not say an unverified complaint would not work, and, similarly, the Court of Appeals in *Freedom Mortgage Corp.* does not hold that that Judge Whalen is correct to hold that the filing of an unverified complaint is insufficient to accelerate the mortgage.

An observation here is called for. The Court of Appeals, and indeed the lower courts, make constant reference to the Fannie Mae form—to the fact that a party seeking to accelerate the debt and indeed the lawyer representing that party must send a notice consistent with the requirements of the Fannie Mae form which specify the notice of acceleration requirements. Accordingly, it may be reasoned from a reading of the mortgage and the Court of Appeals decision that the only effective way a mortgagee holding a Fannie Mae paper may accelerate the debt is by filing a foreclosure action. As will be discussed later, even that manner of debt acceleration may be problematic.

In conclusion, a notice of acceleration must be clear, overt, and unequivocal. A "what if letter" simply does not do it.

Standing

In order for a notice of acceleration to be valid, the accelerator must have standing. For purposes of our dis-

cussion, standing is determined by whether or not the accelerator had possession of the Note. The Note is the substance; the Mortgage is merely its shadow. As was said in *Aurora Loan Services, LLC v. Taylor*, contrary to the Taylors' assertions, it is not necessary to have possession of the mortgage at the time the action is commenced.[71] This conclusion follows from the fact that the note, and not the mortgage, is the depositive instrument that conveys standing to foreclose under New York law. In the *Aurora* case, the note was transferred to Aurora before the commencement of the foreclosure action—that is what matters.[72] "A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage" (internal citation omitted).[73] Without standing acceleration is invalid.[74]

Accordingly, acceleration of the debt by a party not having standing is ineffective to commence the running of the statute of limitations.

Standing is also a factor where de-acceleration is the issue. The Court held in *U.S. Bank National Assoc.*: "[w]e hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well."[75]

It should be noted here that the positions of the parties are somewhat counterintuitive. The debtor is stating that the noteholder did a fine job in accelerating the debt. The noteholder is stating that obviously it does not know how to accelerate the debt.

Right to Cure

Once again, we are presented with an issue raised by the language of the standard Fannie Mae/Freddie Mac mortgage. For example, the case of *Nationstar Mortgage, LLC v. MacPherson*, addresses this issue raised by the language of the standard Fannie Mae/Freddie Mac mortgage.[76] In *Nationstar Mortgage, LLC v. MacPherson*, the relevant acceleration clause provides:

> Except as provided in Section 18 of this Security Instrument, if all of the conditions stated in subsections (a), (b) and (c) of this section 22 are met, Lender may required that I (sic) pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called "immediate payment in full."[77]

But hold on. Section 19 provides:

> Even if Lender has required Immediate Payment in Full, I may have the right to have the enforcement of the Security Instrument stopped. I will have this right at any time before the earliest of: (a) five days before the sale of the property under any power of sale granted by the Security Instrument; (b) another period as Applicable law might specify for the termination of my right to have the enforcement of the Loan Stopped; or (c) a judgment has been entered enforcing this Security Instrument . . . .[78]

Similar language can be found in Fannie Mae/Freddie Mac Uniform Instrument Form 3033 1/01 in Paragraph 18.

Accordingly, the Court in *Nationstar* held that

> . . . lender bargained away its right to demand payment in full simply upon a default of an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law section 258 or under the holding in *Albertina*.[79]

The *MacPherson* Court further held, "[u]nder the express wording of the mortgage document, plaintiff has no right to reject borrower's payment of arrears in order to reinstate the mortgage, until a judgment is entered."[80] Essentially, the Court is holding that the bank had no effective right to accelerate and demand immediate payment in full.[81] The bank, in this case, took the position that it had no right to accelerate the mortgage loan, given the borrower's right under the standard Fannie Mae/Freddie Mac mortgage form to reinstate it any time prior to final judgment.

In a subsequent decision, *HSBC Bank USA, N.A. v. Margineanu*, Judge Whalen made it specific stating: "[w]ithout going to judgment, the discontinued prior action cannot operate under the doctrine of *res judicata* and collateral estoppel as a restriction on plaintiff's rights in this case…[u]nder the Terms of the Mortgage, the Acceleration of the Loan does not occur until after Judgment is entered."[82] Judge Whalen goes on to state again in *HSBC Bank USA*, "[u]nder the express wording of the mortgage document, plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action . . . Here, only a foreclosure judgment triggers the acceleration in full of the entire mortgage debt."[83] In short, if at any time during the foreclosure proceeding the borrower wishes to make up the past due payments, the borrower is entitled to do so, thereby canceling the foreclosure proceeding.

The case of *Bank of New York Mellon v. Laskin*, discussed the issue and determined not to side with Judge Whalen.[84] The Mellon Court cites from *MacPherson* in set-

ting forth the holding that plaintiff does not have a legal right to require payment in full with the simple filing of a "foreclosure action."[85] Judge Adams in *Bank of New York Mellon* then goes on to note that the case law citing to the *MacPherson* decision is inconsistent, setting forth numerous cases decided in both directions, and ultimately stating that:

> [t]he Second Department has not yet directly addressed the scenario addressed in that case. However, "the Second Department has repeatedly and unwaveringly held . . . that acceleration of a mortgage occurs by the commencement of a foreclosure action with the filing of a summons and complaint (citations omitted). In view of the foregoing, the court rejects the plaintiff's argument that the mortgage language prevented the acceleration of the note and mortgage via the commencement of an action.[86]

Again, it is to be noted that the position of the parties here is counterintuitive. It is the bank that is arguing that the provision for reinstatement of the borrower negated the bank's acceleration thereby avoiding the consequences of the application of the statute of limitations.

Subsequently, the Second Department did address the scenario.[87] The court, in *Bank of New York Mellon v. Dieudinne*, stated that

> [t]his appeal presents an issue of first impression for this Court. The plaintiff in this mortgage foreclosure action contends that it lacked the authority to exercise its contractual option to accelerate the maturity of the entire balance of the loan it seeks to recover . . . The plaintiff further argues that the statute of limitations did not begin to run until the borrower's rights under the reinstatement provision in the subject mortgage were extinguished. The mortgage at issue is a uniform instruments issued by Fannie Mae and Freddie Mac for use in New York.[88]

The court noted that, given the prevalence of the use of these instruments and the diverse conclusions reached at the trial level, it was appropriate to clarify the legal principle.[89]

The court holds that paragraph 22 (again note that while there is some inconsistency with the paragraph numbering of the Fannie Mae instruments, there is no inconsistency in the language set forth in any of the instruments) of the standard mortgage:

> [U]nequivocally sets forth the conditions that had to be satisfied before the plaintiff was contractually entitled to exercise its option to accelerate the entire outstanding debt. The language of the mortgage makes clear that the plaintiff is entitled to exercise its option to accelerate 'if all those conditions…are met'. The reinstatement provisions in paragraph 19 of the mortgage were not referenced in or included among those conditions listed in paragraph 22 nor does the reinstatement provision in paragraph 19 of the mortgage include any language indicating that it serves as a condition precedent to plaintiff's right to accelerate the outstanding debt. To the contrary, the language of paragraph 19 indicates that the plaintiff's right to accelerate the entire debt may be exercised **before** the defendants' rights under the reinstatement provision in paragraph 19 are exercised or extinguished.[90]

The court then goes on to state that "to the extent that decisional law interpreting the same contractual language holds otherwise (citing several cases including *HSBC Bank USA, NA v. Margineau*, and *Nationstar Mortgage, LLC v. MacPherson*), it should not be followed."[91] The Court set forth each of the decicions that should not be followed.

The Third Department in the case of *Wells Fargo Bank, N.A. v. Portu*, decided January 2, 2020, without significant discussion of the issue agreed with *Bank of New York Mellon v. Dieudonne*.[92] It is also noted that this case held that the de-acceleration statement of the bank was insufficient in that it did not call for the resumption of monthly payments and it was pretextual in its attempt to avoid the statute of limitations. As has been seen, the Court of Appeals rejected that, and to that extent this case has been overruled.

The Fourth Department has chimed in.[93] The court stated specifically in *Tortora*:

> Fannie Mae's central contention is that the mortgage debt could not have been accelerated in 2009; rather it could only be accelerated once there was a final judgment of foreclosure inasmuch as the reinstatement provision of the mortgage precludes earlier acceleration of the full debt by granting the borrower the right to restore the loan to its pre-default status until the time of final judgment.[94]

The *Tortora* court goes on to say:

> As Fannie Mae notes, however, the Second Department recently rejected the argument in *Bank of New York Mellon v.*

Dieudonne (hereinafter referred to as "Dieudonne"), a case involving a mortgage identical to the one at issue here. Inasmuch as we agree with Second Department's conclusion that the presence of a reinstatement provision does not, by itself, automatically preclude a lender from accelerating the full mortgage debt we reject Fannie Mae's contention that we should decline to follow that case. Importantly, we conclude that the mortgagee's reinstatement provision does not in any way affect or impede acceleration of the full mortgage debt (internal citations omitted).[95]

De-acceleration

As was said once the obligation is accelerated—and here we are talking about notes with monthly payment time notes or demand notes—the fuse is lit and unless an action is timely brought thereafter the statute of limitations will explode in the holder's hands. However, the fuse may be quenched by the holder by revoking the acceleration. Again, as was the case regarding acceleration there was much conflict in the lower court decisions as to what constituted de-acceleration.

There are basically three scenarios involved in de-acceleration. In the first scenario, a court dismisses the action for whatever reason without any involvement on the part of the holder. The second takes place when the holder clearly and to borrow a phrase from the acceleration discussion unequivocally discontinues the prior action and the obligor is involved and consents. The third scenario occurs when the holder claims its act(s) constituted deacceleration. In this last scenario some of the cases involve the courts and/or the obligor but not to the extent of scenario number two.

The first scenario is illustrated in *EMC Mortgage Corp. v. Patella*.[96] There, the lender was met with the defense of the running of the statute of limitations based upon the acceleration in a prior foreclosure action. In that case, the acceleration was accomplished by a demand letter dated August 20, 1992. The filing of a summons and complaint were filed on September 14, 1992. After an unsuccessful summary judgment motion Supreme Court dismissed plaintiff's foreclosure action as a result of a failure to appear at a certification conference. Plaintiff never moved to vacate the default. Thereafter the mortgage proceeded through a series of assignments and the ultimate assignee filed a summons and complaint on April 28, 1999. The lender maintained that this dismissal by the court essentially cancelled the acceleration in the prior action. However, the court ruled that is not true. In order to revoke a prior acceleration plaintiff must take an affirmative act in revoking its election. Here the plaintiff did no such thing. Specifically, the *EMC* court held:

> [a]lthough a lender may revoke its election to accelerate the mortgage, the dismissal of the prior foreclosure action by the Court did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior action. Consequently,

> this foreclosure action is time barred . . . (internal citations omitted).[97]

In Federal *Nat'l Mortgage Ass'n v. Mebane*, the court stated that "[the] prior foreclosure action was never withdrawn by the lender, but dismissed *sua sponte* by the court; it cannot be said that a dismissal by the court constituted an affirmative act by lender to revoke its election to accelerate . . . (emphasis added)"[98] (internal citations omitted).

Furthermore, the dismissal need not be on the merits.[99] Accordingly a dismissal by the court of the action without any action on behalf of the lender is insufficient to de-accelerate.

The second scenario is where the instrument evincing the de-acceleration is clear and explicit and signed by both parties. Here there is no question that de-acceleration occurred.[100] The court in *Ruddick* stated:

> . . . the subsequent forbearance agreement—a copy of which was submitted by plaintiff in opposition to the defendant's motion—evinced a clear intent by Chase, with the defendant's knowledge and consent, to revoke its prior election and reinstate the defendant's right to repay the underlying debt in monthly installments, subject to the new terms and conditions set forth in the forbearance agreement.[101]

The Court of Appeals in *Freedom Mortgage Corp. v. Engel* agreed, stating that:

> For example, an express statement in a forbearance agreement that the noteholder is revoking its prior acceleration and reinstating the borrower's right to pay in monthly installments has been deemed an 'affirmative act' of de-acceleration (internal citation omitted).[102]

It is the third scenario—where the holder takes action to de-accelerate in which the conflict among the lower courts existed.

A summary review of some cases will expose the issues. In *NMNT Realty Corp. v. Knoxville 2012 Trust*, the noteholder moved and was granted an order discontinuing the foreclosure action, canceling the notice of pendency and vacating the judgment of foreclosure and sale.[103] The court held "the defendant thereby raised a triable issue of fact [citing cases] as to whether Homecomings' motion 'constituted an affirmative act to revoke its action to accelerate'."[104] In *Wells Fargo Bank, N.A. v. Portu*, the issue was whether or not the de-acceleration was a "pretextual de-acceleration" to avoid the statute of limitations.[105] The court in *Portu* held that: ". . . 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 other comparable evidence."[106] Here, the courts are encrusting requirements upon the de-acceleration attempts by stating that any de-acceleration must state as set forth the demand that payments on the notes resume and other requirements. Significantly, the *Portu* court also mentions that the lender did not "provide monthly invoices for payments due."[107] This is significant—the courts are holding that de-acceleration must be more than a simple expression of de-acceleration—the de-acceleration must include other requirements such as a demand for resumption of monthly payments, etc:[108]

> [the bank's execution of the] stipulation [of discontinuance] 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 election to accelerate, and did not otherwise indicate that plaintiff would accept installment payments from the defendant.[109]

So, this leads to the two cases involved in the *Engel* appeal. The *Freedom Mortgage Corp. v. Engel* contains language almost identical to the *Bank of New York Mellon v. Craig*, decision:

> In opposition, the plaintiff failed to raise a triable issue of fact as to whether it . . . revoked its election accelerate the mortgage within the six-year . . . [limitations period]. Contrary to Supreme Court's determination, the plaintiff's execution of the February 2014 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 revocation of election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the appellant (emphasis added).[110]

In the second case involving this issue of what constitutes de-acceleration in which the Court of Appeals in *Engel* entertained an appeal. That is the case of *Ditech Fin. LLC v. Naidu*, This case contains the language similar to the language of the Appellate Division in *Engel*, which is as follows:

> contrary to the Supreme Court determination the plaintiff's execution of the February 2014 stipulation did not in itself constitute an affirmative act to revoke its election to accelerate, since, *inter alia*, the which discontinued the prior

> foreclosure action 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 appellant.[111]

Given all that the Court of Appeals in its *Engel* decision sets forth in its analysis of the law as it existed prior to its determination of this appeal:

> However, no clear rule has emerged with respect to the issue raised here—whether a noteholder's voluntary motion or stipulation to discontinue a mortgage foreclosure action which does not expressly mention de-acceleration or a willingness to accept installment payments constitutes a sufficiently "affirmative act." Prior to 2017, without guidance from the Appellate Division, multiple trial courts have concluded that a noteholder's voluntary withdrawal of its foreclosure action was an affirmative act of revocation as a matter of law (internal citations omitted). . . .In 2017, Second Department first addressed the issue in *NMNT Realty*, denying a borrower's summary judgment motion to quiet title on the rationale that the noteholder's motion to discontinue a prior foreclosure action raised a "triable issue of fact" as to whether the prior acceleration had been revoked. The First Department has at times articulated the same rule (internal citations omitted). . . . However, more recently, as reflected in the Second Department's decision in *Freedom Mortgage* and *Ditech* (among other cases), a different rule has emerged—that a noteholder's motion or stipulation to withdraw a foreclosure action, "in itself" is not an affirmative act of revocation of the acceleration effectuated via the complaint [citing *Freedom Mtge. Corp.* and *Ditech*]. Both approaches require courts to scrutinize the course of the parties' post discontinuance conduct and correspondence, to the extent raised, to determine whether a noteholder meant to revoke the acceleration when it discontinued the action. [citing case.][112]
>
> For example, in *Christiana Trust v. Barua*, (internal citation omitted)—after determining that the voluntary discontinuance was of no effect under the more recent approach described above—the court faulted the bank for failing to come forward with evidence that, after the discontinuance, it demanded resumption of monthly payments, invoiced the borrower for such payments, or otherwise demonstrated "it was truly seeking to de-accelerate the debt". (sic) Thus, the court suggested that the revocation inquiry turns on an exploration into the bank's intent, accomplished through an exhaustive examination of post-discontinuance acts. . . . [113]

This approach is both analytically unsound as a matter of contract law and unworkable from a practical standpoint. As is true with respect to the invocation of other contractual rights, either the noteholder's acts constitute a valid revocation or it did not; what occurred thereafter may shed some light on the parties perception of the event but cannot retroactively alter the character or efficacy of the prior act.[114]

The court concluded:

> Rather, we are persuaded that, when a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—i.e., the withdrawal of the complaint—constitutes a revocation of that acceleration.[115] In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" a filing of a foreclosure complaint "destroy[s] the effect" of the election (internal citation omitted). . . . Accordingly, we conclude that where acceleration occurred by virtue of the filing of the complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder.[116]

Finally, the court specifically reversed the Second Department's decisions in *Freedom Mortgage*, and *Ditech*:

> The appeals in *Freedom Mortgage* and *Ditech* are easily resolved by application of this rule . . . . In *Freedom Mortgage*, the Appellate Division reasoned that the acceleration was not revoked because the stipulation was "silent" as to revocation. Applying the rule articulated above, *Freedom Mortgage* validly revoked the prior acceleration evinced by the commencement of the July 2008 foreclosure

> action, when it voluntarily withdrew that action in January 2013. . . .
>
> [The] reversal is also warranted in *Ditech*, where the Appellate Division that the voluntary withdrawal of the prior action "did not in itself constitute an affirmation act" of revocation.[117] [Yes it did.]

Timing of Revocation

It may be obvious to some, but the law needs to be set forth.[118] This case had many of the issues regarding de-acceleration, but essentially the Court held that de-acceleration was not accomplished within the six-year time period for the expiration of the statute of limitations. The Court set forth factually that the expiration of the statute of limitations expired on May 9, 2014. May's motion to discontinue was dated May 8, 2014, but not entered in the Queens County Clerk's Office until May 15, 2014.[119] The Court held that that was too late.[120] "[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.'"[121] The plaintiff voluntarily discontinued the prior foreclosure action on April 23, 2014, after the statute of limitations had expired.[122] (It is noted that in this case the revocation had all the issues previously discussed but in any event but whether it was effective or not it did occur within the six-year period.)

Quantum Meruit

In these cases, the bank generally pays the taxes and insurance on the property on a regular basis—for even six, seven, or eight years—and then along comes the statute of limitations. As a result, the obligation owed to the bank and the security for the obligation all goes "poof," or disappears. The bank cannot recover on the obligation or foreclose on the property, but can it recover for all the expenses paid on the property. In the case of *Federal Nat'l Mortgage Ass'n v. Mebane*, the court states "[h]owever, contrary to the borrowers' contention, Metmor stated a valid cause of action sounding in unjust enrichment to recover the sums advanced, *inter alia*, for property taxes and insurance, within the six year period prior to the commencement of this action (citing cases)."[123] Not so fast. The Appellate Division, Third Department in *Clark v. Dabie*, specifically rejected that.[124] In that case the obligor defended a foreclosure action on the basis of usury and prevailed. The case went on appeal and, while on appeal, the bank—Clark—elected to pay $10,786.77 to redeem the property from an impending tax sale by the Essex County Treasurer.[125] When plaintiffs' appeal was denied, they brought an action for unjust enrichment. The court rejected the claim holding,

> Although there can be no question that plaintiffs' payment of real estate taxes on the property worked to defendant's benefit by relieving him of that burden, it is equally clear that plaintiffs operated under no mistake of fact or law, but, rather, their sole motivation in making the payment was to protect their own interest. . . . The fact that plaintiffs' calculated risk failed makes their conduct no less voluntarily, and there is no evidence or claim that defendant's conduct with regard to this matter was in any way tortuous or fraudulent.[126]

The case of *Costa v. Deutsche Bank Nat'l Trustco* specifically discusses the *Mebane* case and dismisses it on the basis that it consisted of a one sentence holding at the end of the decision without any discussion or analysis.[127] In the *Costa* case, the court did note that defendants argued "'because there is no genuine dispute that [DB] has borne ultimate responsibility for the payment of the carrying costs dating back to [Vito's] default in December 1, 2007' and '[t]here is no disputing the clear benefit received by the Plaintiffs through [DB's] payment of the Carrying Costs[]'"[128] defendants are entitled to reimbursement. The court states:

> [F]air enough. Defendants appear to have paid nearly $150,000 in Carrying Costs, much of which would otherwise have been Plaintiff's responsibility. And Plaintiffs' efforts to obtain the property unencumbered and also walk away from the Carrying Costs certainly provokes a visceral reaction. But a more nuanced look at unjust-enrichment doctrine reveals a fatal flaw in Defendant's claim.
>
> Looking beyond the superficiality capricious elements of an unjust-enrichment claim, it is well-settled that "the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action of unjust enrichment…"[129]

The *Costa* court concludes:

> . . . that the unique facts of this case are governed by the Third Department reasoning and holding in *Clark*: defendants took a calculated risk in continuing to pay the Carrying Costs in order to maintain the Property following Plaintiff's December, 2007 default. Defendants point to no evidence that this was done for Plaintiff's benefits. . . . Indeed, if the 2008 Foreclosure Action or the instant one had been successful, Defendants would have enjoyed the fruits of their investment. That the Carrying Costs in-

> vestment turns out, in hindsight, to have been a losing gamble determined who ultimately (and incidentally) benefits, but it does not retroactively alter for whom the benefit was intended.[130]

The court denied defendant's motion for summary judgment in favor of their unjust enrichment counterclaim and granted plaintiff's motion for judgment against the counterclaim. It should be noted that in the case of *Wells Fargo Bank N.A. v. Portu*, the court states at the conclusion of the opinion:

> Finally, we reject plaintiff's contention that it remains entitled to recover accrued interest on the time-barred principal (internal citation omitted).[131] To the extent that the Supreme Court granted plaintiff's motion to recover taxes and insurance paid as a claim for unjust enrichment, the Court also scheduled the matter for a conference to discuss whether a referee should be appointed to determine the amount owed. As such, we agree with the defendant that the issue as to the recovery of escrow advances is premature.[132]

Remedy

The statute describing remedy, RPAPL § 1501(4), provides:

> Where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage, or to enforce a vendor's lien has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons, known or unknown, including one under disability as herein after specified, to secure the cancellation and discharge of record of such encumbrance and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom . . . .[133]

The statute goes on to provide:

> . . it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid; and whether the mortgage in question was, or was not, given to secure a part of the purchase price.[134]

This is enormously significant. Think of the bankruptcy situation in which relief is granted to the debtor on the note but does not—unless relief is obtained from the bankruptcy court itself—discharge the mortgage or remove it as a lien against the real property. The debtor/bankrupt is entitled only to a qualified discharge:"[i]t is a general rule, recognized in this country and in England, that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for recovery of the debt is barred."[135] Whether that case is valid or not (and I would not bet the farm on it), it has been followed subsequently both in this state and in federal court; however, that no longer matters in our situation. Why? Because the statute specifically provides that the debtor is entitled to an order discharging the mortgage when the statute of limitations has run.

As was stated in *Milone v. US Bank Natl. Assn.*,

> [T]he statute provides that a person with an estate or interest in real property subject to any encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired.[136]

So it can be seen why there is so much litigation this. The chaos existing in the current mortgage foreclosure environment has opened a land of opportunity. There are seven figure obligations involved in the cases set forth, and, if RPAPL 1501(4) applies the obligation, all goes "poof." As the ad for selling your insurance policy goes, "Who knew?"[137]

Some Afterthoughts

It should be noted the courts are very precise—as you would assume and hope—in determining the expiration of the statute. In *Milone v. US Bank Natl. Assn.*, the statute was measured from January 13, 2009, the date on which the first foreclosure action was commenced, and Tuesday, January 13, 2015, the date the second action was commenced.[138] The new action missed by a day. In *Albertina Realty Co. v. Rosbro Realty Corp*, on July 15, 1930, obligor missed a payment ($166.66).[139] On July 18, the plaintiff caused to be filed the summons and verified complaint and *lis pedens* (now of course notice of pendency).[140] Three days later on July 21 the appellant, then owner of the premises, tendered to the plaintiff the amount of the installment of principal which became due on July 15.[141] It should be noted the papers had not been served on the obligor on July 24, the date on which the obligor tendered the past due payment. The holder refused tender, and the court held that that was a proper refusal.

Putting aside for the moment the requirements of the Fannie Mae/Freddie Mac papers let us assume that the attorney for the noteholder sends that unequivocal notice of acceleration and some 18 months later files a summons

and complaint and notice of pendency in the appropriate county clerk's office. Thereafter, within six years of the filing of the summons, complaint and notice of pendency, but more than six years after the original unequivocal notice of acceleration has been sent, the noteholder withdraws the action. It is submitted that the act of de-acceleration came too late. The statute had already run by virtue of the unequivocal letter exercising the right of acceleration.

The issue of de-acceleration merits further analysis. It is submitted that the Court of Appeals struggled mightily to hold that the core elements of a valid notice of de-acceleration as established by the lower courts spoke only of future events thereby rendering the situation indefinite. Yes, if the courts hold that notice of deacceleration must be coupled with an explicit statement that payments are to be reinstituted, it speaks of future events, but the notice itself is not in the future. It is contemporaneously clear.

The language of the case indicates a sympathy for the borrower. As stated by the Court of Appeals, the de-acceleration "provides borrowers a renewed opportunity to remain in their homes, despite a prior default."[142] It further states:"[a] return to the installment plan also makes it more likely the borrowers can benefit from the various public and private programs that exist to help borrowers work out a default."[143] Thus, it would seem that the sympathy of the Court is with the borrower. However, that is not the effect of the Court of Appeals' holding that de-acceleration may take place without any formal requirements. It lets the noteholder revoke its notice of acceleration willy-nilly. But whom is this helping? It is not helping the borrower. It is helping the noteholder. This is the situation where the borrower is attempting to maintain that the noteholder has accelerated the obligation and has not brought a foreclosure proceeding within the required six-year statute of limitations period. Judge Wilson in his concurring opinion is more specific. Judge Wilson states: "We have not decided whether the notes and mortgages at issue here permit a lender to revoke an acceleration."[144] Judge Wilson points out that in three of the four cases no claim was raised regarding this issue and that although

> Mr. Engel argued at length that the note and mortgage grant the noteholder the contractual right to accelerate the loan but lack any contractual authorization to revoke that election (absent consent of the borrower). However, Mr. Engel raised that issue for the first time on appeal. Thus, it was not properly preserved for our review.[145]

Judge Rivera concurs with Judge Wilson and further points out that she would put requirements on the notice of de-acceleration. "I see no reason why an acceleration requires an unequivocal overt act—one that leaves no doubt as to the noteholder's intent—but revocation may be assumed by implication, requiring only that the noteholder affirmatively disavow an intention to revoke (internal citations omitted)." This is exactly what the majority struggled mightily to avoid.

The current situation is in so many cases tragic. There is currently a lending outfit that is lending to a specific group of people and promising it will give them a 100% loan on their home even if the bank would disapprove that. This is an invitation to the loss of the home—eviction. In many cases it would appear that the owners are secure in their home. The invitation to mortgage is propelled by greed and it is suggested that is what created the current situation. We have a despicable situation where victims are taken in by promises of easy credit, given a home which is a dream come true and then thrown out on the street at the hands of foreclosure mills representing financial institutions that have no regard for the people being preyed upon.

On the other hand, if given the situation which is recognized by the legislature we pass so many rules and laws and regulations that it becomes effectively impossible to foreclose and recover the debt secured by the mortgage, we are going to destroy the very "place where capital is born" (as described hereinafter).

Finally, issue is taken with the statement by the majority: "Precipitous acceleration of the debt serves neither party as it works a fundamental alteration of the status quo."[146] What is precipitous about accelerating the obligation pursuant to the terms—30 days. This has never been held by the Court. Of course, it alters the status quo. That is the whole point of the instrument. There are many statements in the majority opinion that attempt to alter the situation to make it a fluid and uncertain situation. *THE MYSTERY OF CAPITAL: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000)—states:

> In the west this formal property system begins to process assets into capital by describing and organizing the most economically and socially useful aspect about assets preserving this information and recording system—as assertions in a written ledger or a blip on a computer disc—and then embodying them in a title. A set of detailed and precise legal rules govern the entire process. Formal property records and titles thus represent our shared concept of what is economically meaningful about any assets. They capture and organize all of the relevant information required to conceptualize the potential value of an asset and so allow us to control it. Property is the realm where we identify and explore assets, combine them and link them to other assets. The formal property system is

> capital's hydroelectric plant. This is the place where capital is born.[147]

By describing the situation as a fluid, ever-changing situation which may extend over many years, this decision has the potential of striking at the heart of the hydroelectric plant.

Finally, the cases consistently quote the provision of RPAPL § 1501(4) which states that "provided, that no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them, shall be in possession of the affected real property at the time of the commencement of the action."[148] This raises the interplay between an action for ejectment and an action to determine title pursuant to adverse possession. CPLR 212 (Actions To Be Commenced Within Ten Years) provides in subdivision (a) (Possession Necessary to Recover Real Property). "An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action."[149] RPAPL § 501 (Adverse Possession; Defined):"For the purposes of this article: 1. Adverse Possessor. A person or entity is an 'adverse possessor' of real property when the person or entity occupies real property of another person or entity with or without knowledge of the others superior ownership rights, in a manner that would give the owner a cause of action for ejectment."[150] Two sides of the same coin.[151] Article 5 of the Real Property Actions and Proceedings Law sets forth the fundamental requirements of adverse possession.[152] The 10-year statute of limitation appears in CPLR 212(a).

Conclusion

It is not the purpose of this article to analyze the reasoning of the Court of Appeals decision but to set forth the law as a result of that decision and as set forth in lower court decisions regarding ancillary issues. I have serious issues with the reasoning of the Court of Appeals in many instances. For example, "agreements should be enforced pursuant to their clear terms," but the Court refused to enforce the clear provision of Fannie Mae note and mortgage regarding acceleration requirements. Is it against public policy? If so, why didn't the court say so? However, it is what is, and, hopefully, this article tells like it is.

Endnotes

1. N.Y. Civil Practice Law and Rules § 203(a) (CPLR).
2. CPLR 213(4).
3. N.Y. Real Property Actions and Proceedings Law § 1501(4) (RPAPL).
4. Uniform Commercial Code § 3-122(1)(b) (UCC).
5. *See* Bank of America, 170 A.D.3d 1365, 95 N.Y.S.3d 639, 641-2 (3d Dep't 2019).
6. *Id.* at 1366.
7. *Id.*
8. *Hahn Automotive Warehouse, Inc. v. American Zurich Insurance Co.*, 18 N.Y.3d 765, 770-771, 944 N.Y.S.2d 742, 745 (2012).
9. *See* CPLR 206(a); *Gower v. Weinberg*, 184 A.D.2d 844, 845, 584 N.Y.S.2d 496 (3rd Dep't 1992); *see also Windover Finn Servs. v. Ridgeway*, 137 A.D.3d 1718, 1719, 28 N.Y.S.3d 535 (2016); *lv. denied,* 140 A.D.3d 715 (2016).
10. *Hahn Automotive Warehouse, Inc.*, 18 N.Y.3d at 7701.
11. *Bank of America*, 170 A.D.3d 1365, 1366-67, 95 N.Y.S.3d 639, 641-2 (3d Dep't 2019).
12. *See Windward Bora, LLC v. Wilmington Sav. Fund Soc'y, FS*, No. 18-CV-402, 2019 U.S. Dist. LEXIS 166595, at *16-17 (N.D.N.Y. Sept. 27, 2019) (Stewart, J., dissenting); *see also Fleet National Bank v. D'Orsi*, 26 A.D.3d 898, 900, 811 N.Y.S.2d 502, 504 (4th Dep't 2006) (plaintiff failed to establish a federal agency ever held the mortgage or had the right to foreclose on the mortgage).
13. *Reverse Mtge. Solutions, Inc. v. Fattizzo*, 172 A.D.3d 768, 770 (2d Dep't 2019).
14. *Id*.
15. *Id.*; *see U.S. Bank N.A. v. Gordon*, 158 A.D.3d 832 (2d Dep't 2018); *see also Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980 (2d Dep't 2018).
16. *See Pagano v. Smith*, 201 A.D.2d 632, 633-4 (2d Dep't 1994) (citing *Khoury v. Alger*, 174 A.D.2d 918, 571 N.Y.S.2d 829 (3d Dep't 1991); *Utica Mut. Ins. Co. v. Knox*, 71 A.D.2d 763, 419 N.Y.S.2d 332 (3d Dep't 1979); CPLR § 213(4)).
17. *Deutsche Bank Natl. Co. v. Flagstar Capital Mkts.*, 32 N.Y.3d 139, 151, 88 N.Y.S.3d 96, 103-04 (2018).
18. *Id.* at 143.
19. *Id.* at 144.
20. *Id.* at 155.
21. *Bank of America*, 170 A.D.3d 1365, 1366-67, 95 N.Y.S.3d 639, 641-2 (3d Dep't 2019).
22. *Deutsche Bank Natl. Trust Co.*, 32 N.Y.3d 144-45.
23. *Id*. at 150.
24. N.Y. General Obligations Law § 17-103(1) (GOL) (emphasis added).
25. GOL § 17-103(3).
26. *Deutsche Bank Natl. Trust Co.*, 32 N.Y.3d at 153 (citing *Kassner v. New York*, 46 NY2d 544,551, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785, 789 (1979)); *see Bayridge Air Rights, Inc. v. Blitman Constr. Corp.*, 80 N.Y.2d at 777, 779-780, 599 N.E.2d 673, 674-75, 587 N.Y.S.2d 269, 270-71 (1992)).
27. *Id.*
28. *Id.* at 154 (citing *Rowe v. Great Atl. & Pac. Tea Co*., 46 NY2d 62, 67-68, 385 N.E.2d 566, 412 N.Y.S.2d 827 (1978).); *see also* GOL § 17-105.
29. 1 Bergman on New York Mortgage Foreclosures § 5.11[1] [2021].
30. *Milone v. U.S. Bank, N.A.*, 164 A.D.3d 145, 151, 83 N.Y.S.3d 524 (2d Dep't 2018).
31. *Id*. at 152.
32. *Id.*
33. *Id.*; *See Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 530 48 N.Y.S. 3d 597 (1st Dep't 2017).
34. *Id.*
35. *See Ditech Fin., LLC v. Corbett*, 166 A.D.3d 1568, 85 N.Y.S.3d 906 (4th Dep't 2018).
36. *Id.* at 1568-69.
37. *Colonie Block & Supply Co. Overmyer Co.*, 35 A.D.2d 897, 315 N.Y.S.2d 713 (3d Dep't 1970).
38. *Id.*

39. *Goldman Sachs Mtge. Co. v. Mares*, 135 A.D.3d 1121, 1122, 23 N.Y.S.3d 444 (3d Dep't 2016).

40. *Id.* at 1122 (emphasis in original).

41. *Id.*

42. *Id.*; *see Pidwell v. Duvall*, 28 AD3d 829, 831, 815 N.Y.S.2d 754, 756-57 (3d Dep't 2006),

43. *MTGLQ Inbs. LLP v. Lunder*, 183 A.D.3d 967, 968 123 N.Y.S.3d 711, 713 (3d Dep't 2020).

44. *Id.* at 968.

45. *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 32, 146 N.Y.S.3d 542, 556 (2021).

46. *Id.*

47. *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631, 81 N.Y.S.3d 156 (2d Dep't 2018); *Dietech Finan., LLC v. Naidu*, 175 A.D.3d 1387, 109 N.Y.S.3d 196 (2d Dep't 2018); *Vargas v. Deutsche Bank Nat'l Trust Co.*, 168 A.D.3d 630, 93 N.Y.S.3d 32 (1st Dep't 2019); *Wells Fargo Bank, N.A. v. Ferrato*, 183 A.D.3d 529, 122 N.Y.S.3d 884 (1st Dep't 2020).

48. *Freedom Mortg. Corp.*, 37 N.Y.3d at 20.

49. *Id.* at 22.

50. *Id.* at 23.

51. *Milone,* 164 A.D.3d at 152.

52. *Vargas*, 168 A.D.3d at 33.

53. *Freedom Mortg. Corp*, 37 N.Y.3d at 27**.**

54. *Id.*

55. *Id.* at 21.

56. *Id.* at 27.

57. *Id.*

58. *Milone,* 164 A.D.3d at 152.

59. *Freedom Mortg. Corp,* 37 N.Y.3d at 23.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Freedom Mortg. Corp. v. Engel*, 103 N.E.3d 1052 (2019) (citing *Albertina Realty Co. v. Rosebro Realty Corp*., 258 N.Y. 472 (1932)).

64. *Id.* (quoting *Malone v. U.S. Bank Nat. Assoc*., No. 12-3019-STA (W.D. Tenn. Jan. 30, 2013).

65. *Albertina Realty Co. v. Rosebro Realty Corp.*, 258 N.Y. 472 (1932).

66. *HSBC Bank USA, N.A. v. Margineau*, 61 Misc.3d 973 (Sup. Ct., Suffolk Co. 2018).

67. *Id.*

68. *Id.* at 978; *see HSBC Bank USA, N.A. v. Cooper,* 157 A.D.3d 775 (2d Dep't 2018); *see also HSBC Bank USA, N.A. v. Simms,* 163 A.D.3d 930 (2d Dep't 2018); *see also Michael v. Atlas Restoration Corp.,* 159 A.D.3d 980 (2d Dep't 2018); *Id.* at 978.

69. *Margineau,* at 61 Misc.3d at 979 (quoting *Beneficial Homeowner Serv. Corp. v. Tovar,* 150 A.D.3d 657, 658 (2d Dep't 2017)).

70. *Freedom Mortg. Corp. v. Engel,* 37 N.Y.3d 1, 23, 146 N.Y.S.3d 542, 550 (2021).

71. *Aurora Loan Services, LLC v. Taylor*, 25 NY3d 355, 361, 12 N.Y.S.3d 612, 615 (2015)

72. *Id.*

73. *Id.* at 366.

74. *Milone v. U.S. Bank, N.A.*, 164 A.D.3d 145, 151, 83 N.Y.S.3d 524, 530 (2d Dep't 2018) ("[O]f course we have held and it is now well settled that an acceleration of a mortgage debt by either written notice or commencement of an action is only valid if the party making the acceleration had standing at that time to do so."); *US Bank v. Gordon*, 158 A.D.3d 832, 836 (2d Dep't 2018) ("[P]rior plaintiff in the 2007 did not have standing to commence the action because it was not the holder of the note and mortgage at the time the 2007 action was commenced); *Stewart Title Insurance Co. v. Bank of New York Mellon*, 154 AD3d 656, 658, (2d Dep't. 2017); *DLJ Mortgage Capital, Inc. v. Pittman*, 150 AD3d 818, 819 (2d Dep't. 2017) (finding that the defendant failed to carry his burden of proof that plaintiff lacked standing—issue was the question of assignment); *Wells Fargo Bank, NA v. Burke*, 94 AD3d 980, 983 (2d Dep't 2012) ("[H]ere the predecessor had not been assigned the note or the mortgage at the time of the 2002 complaint was served upon Burke. Accordingly, service of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt…"); *EMC Mtge. Corp. v. Suarez*, 49 A.D.3d 592, 539 (2d Dep't 2008) ("[T]he note was never assigned to that entity and it therefore never had authority to accelerate the debt or to sue to foreclose. Accordingly, the purported acceleration was a nullity…").

75. *Milone,* 164 A.D.3d at 155.

76. *Nationstar Mortgage, LLC v. MacPherson*, 56 Misc.3d 339, 342 (Sup. Ct., Suffolk Co. 2017).

77. *Id.*; *see also* New York Security Instrument Form 3033 ¶ 18.

78. *Nationstar Mortgage, LLC*, 56 Misc.3d at 348.

79. *Id.* at 348.

80. *Id.*at 351.

81. *Id.*

82. *HSBC Bank, USA, N.A. v. Margineanu*, 61 Misc.3d 973, 981, 86 N.Y.S.3d 694 (Sup. Ct., Suffolk Co. 2018).

83. *Id.* at 974.

84. *Bank of New York Mellon v. Laskin*, 604747/18, 2019 NY Misc. Lexis 1999 (Sup. Ct., Nassau Co. 2019).

85. *Nationstar Mortgage, LLC*, 56 Misc.3d at 351.

86. *Bank of New York Mellon v. Laskin*, 2019 N.Y. Misc. Lexis 1999 at *8 (Sup. Ct., Nassau Co. 2019).

87. *Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d 34,40 (2d Dep't 2019); motion granted 2020 NY Lexis 147 (N.Y. Feb. 18, 2020); motion granted 2020 NY Lexis 155 (N.Y. Feb. 18, 2020); *lv to appeal denied,* 2020 N.Y. Lexis 159 (N.Y. Feb. 18, 2020); motion granted 2020 N.Y. Lexis 192 (N.Y. Feb. 18, 2020); motion granted 2020 NY Lexis 167 (N.Y. Feb. 18, 2020).

88. *Id.* at 35-36.

89. *Id.*

90. *Id.* at 34 (emphasis in original).

91. *Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d 34 (2d Dep't 2019).

92. *Wells Fargo Bank, N.A. v. Portu*, 179 A.D.3d 1204, 1207 (3d Dep't 2020).

93. *Fed. Nat'l Mortg. Ass'n v. Tortora*, 188 A.D.3d 70 (4th Dep't 2020).

94. *Fed. Nat'l Mortg. Ass'n v. Tortora*, 188 A.D.3d 70 (4th Dep't 2020).

95. *Id.*

96. *E.M.C. Mortg. Corp. v. Patella*, 279 A.D.2d 604 (2d Dep't 2001).

97. *Id.*

98. *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892 (2d Dep't 1994); *see also Kashipour v. Wilmington Sav. Fund Soc'y., FSB*, 144 A.D.3d 985 (2d Dep't 2016); *Clayton Nat'l Inc. v. Guidi*, 307 A.D.2d 982, 982 (2d Dep't 2003) (contrary to the plaintiff's contention, the dismissal of the 1982 action for lack of personal jurisdiction did not constitute an affirmative act by lender or revoke its election to accelerate).

99. *Kashipour v. Wilmington Sav. Fund Soc'y, FSB*, 144 A.D.3d 985 (2d Dep't 2016).

100. *U.S. Bank Trust, N.A. v. Rudick*, 172 A.D.3d 1430 (1st Dep't 2019).
101. *Id*. at 1431.
102. *Freedom Mtge. Corp. v. Engel*, 163 A.D.3d 631, 633 (2d Dep't 1994).
103. *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068,1070 (2d Dep't 2017).
104. *Id.* (emphasis added).
105. *Wells Fargo Bank, N.A. v. Portu*, 179 A.D.3d 1204, 1204 (3d Dep't 2020).
106. *Id*. (quoting *Milone v. U.S. Bank Nat.*, 164 A.D.3d 145, 153 (2018), *lv. dismissed*, 34 N.Y.3d 1009 (2019).
107. *Portu*, 179 A.D.3d at 1207.
108. *NMNT Realty Corp.*, 151 A.D.3d 1070; *see also Portu*, 179 A.D.3d at 1204; *see also Milone*, 164 A.D.3d at 154.
109. *See Bank of New York Mellon v. Craig*,169 A.D.3d 627, 628 (2d Dep't 2019).
110. *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631, 633; *see also*, *Fed. Nat'l Mtge. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994).
111. *Ditech Fin.*, 85 N.Y.S.3d at 1389.
112. *Freedom Mtge. Corp.*, 146 N.Y.S.3d at 554.
113. *Id.* at 555.
114. *Id.*
115. *Id*. at 556.
116. *Id*. at 557.
117. *See HSBC Bank USA, N.A. v. Islam*, 63 Misc. 3d 796, 97 N.Y.S.3d 447 (Sup. Ct., Queens Co. 2019).
118. *Id.*
119. *Id*. at 798.
120. *Id.* at 801; *See also NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, N.Y.S.3d 118 (2d Dep't 2017).
121. *See EMC Mortgage Corp. v. Patella*, 279 A.D.2d 604, 606 (2d Dep't 2001); ("The record is barren of any affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior action."); *see also Federal National Mortgage Association v. Mebane*, 208 A.D.2d 892, 618 N.Y.S2d 88 (2d Dep't 1994) ("The record is barren of any affirmative act of revocation occurring within the six-year statute of limitations period subsequent to the service of the complaint…"). It is noted that these last two cases are firm in their holdings regarding the necessary requirements of de-acceleration were reversed by the Court of Appeals. The point that the revocation, if it does occur, must occur within the six-year statute of limitations period; *see Deutsche Bank National Trust Co. v. Adrian*, 157 A.D.3d 934, 69 N.Y.S 3d 706 (2d Dep't 2018).
122. *Id.* at 935.
123. *Federal Nat'l Mortgage Ass'n v. Mebane*, 208 A.D.2d 892 at 894-95.
124. *Clark v. Daby*, 300 A.D.2d 732, 751 N.y.S.2d 622 (2d Dep't 2002).
125. *Id.*
126. *Id.* at 624.
127. *Costa v. Deutsche Bank Nat'l Trust Co.*, 247 F. Supp. 3d 329 (S.D.N.Y. 2017).
128. *Id.*
129. *Id.* at 354.
130. *Id.* at 355.
131. *Wells Fargo Bank, N.A. v. Portu*, 179 A.D.3d 1204, 116 N.Y.S.3d 761 (3d Dep't 2020).
132. *Id.* at 1208-09.
133. RPAPL § 1501(4).
134. *Id.*
135. *Hulbert v. Clark*, 128 N.Y. 295, 298 (1891); *see also* N.Y. Debtor and Creditor Law § 150(4)(b).
136. *Milone v. U.S. Bank Nat'l. Assn.*, 164 A.D.3d 145, 151, 83 N.Y.S.3d 524, 528 (2d Dep't 2018).
137. RPAPL § 1501(4).
138. *Milone*, 164 A.D.3d at 153.
139. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 474 (1932).
140. *Id.*
141. *Id.*
142. *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 28, 146 N.Y.S.3d 542, 553 (2021).
143. *Id.* at 36.
144. *Id.* at 37.
145. *Id.*
146. *Id.*
147. Hernando De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else, 46–47 (2000).
148. RPAPL § 1501(4).
149. CPLR 212(a).
150. RPAPL § 501.
151. 1 Warren's Weed, New York Real Property, "Adverse Possession," § 5.05[1].
152. RPAPL §§ 501-551.

New York State and City Real Estate Legislative Update: Looking Back and Looking Ahead

By S.H. Spencer Compton and Robert J. Sein

Over the past 18 months, several state and local laws affecting New York real estate have been enacted or have taken effect. In addition, as of this writing (March 11, 2022), the New York State Legislature is considering dozens of real-estate related bills, some of which may have far-reaching consequences for players in the real estate industry and their counsel. This article will describe the status and substance of a few of these laws and pending bills that, in our view, are of particular interest to the New York real estate law bar.

I. Looking Back: Enacted Legislation and Related Events

A. Expiration of NYS Eviction and Foreclosure Moratoria

On September 2, 2021, following an extraordinary joint session of the Legislature, Gov. Hochul signed legislation that extended the moratoria on evictions of residential and small business tenants through January 15, 2022.[1] In *Chrysafis v. Marks*,[2] the United States Supreme Court found that the previous moratorium legislation violated landlords' due process rights by not permitting the contest of financial hardship declarations. To address the constitutional issue, the new legislation stated that hardship declarations created a "rebuttable presumption that the tenant is experiencing financial hardship." The *Chrysafis v. Marks* plaintiffs subsequently amended their complaint in the district court to challenge the new right of contest as illusory, but these efforts have been unavailing to date.[3] With the expiration of the moratoria on January 15, lawmakers have now largely turned their focus to longer-term solutions to the problem of evictions such as the emergency rental assistance programs and, potentially, good cause eviction (see section IIA below).[4]

B. New Power of Attorney Form

A new power of attorney (POA) form took effect on June 13, 2021, pursuant to legislation signed into law on December 15, 2020.[5] A POA is one of the most widely used legal documents. It allows an individual ("Agent") to legally act on behalf of another ("Principal") when it is inconvenient or impossible for the Principal to be present. The law effects major changes to the law governing POAs, which, in the aggregate, represent an attempt to simplify the process of appointment, create protections for third parties who accept POAs in good faith, and limit unreasonable rejections of POAs. The law does not impact the validity of any POA or statutory gift rider executed prior to June 13, 2021.[6]

C. Real Estate Transfer Tax Liability Expanded

The New York State budget bill for fiscal year 2022[7] enacted significant changes to New York State's real estate transfer tax with respect to conveyances made on or after July 1, 2021, unless the conveyance was made pursuant to a binding written contract entered on or before April 1, 2021. Real estate transfer tax is generally imposed on every conveyance of New York State real property or interest therein when the consideration exceeds $500.[8] Absent a written agreement to the contrary, the obligation to pay the transfer tax is imposed on the grantor, but both the grantor and grantee are jointly liable for it.[9] Under the law, the grantee now has a statutory cause of action to recover transfer tax paid by it from the grantor if the grantor fails to pay the transfer tax, in effect clarifying that the grantor is the true obligor. Notably, the law expands the definition of who is responsible to pay the transfer tax to include the grantor's officers, employees, managers, or members who are "under a duty to act" with respect to the transfer tax. Officers, employees, managers and members beware! The legislation does not change any provision of the New York City transfer tax.

D. Remote Co-op Board Meetings Legalized

On November 8, 2021, A1237/S1182 were signed into law,[10] thereby amending the Business Corporation Law, the Not-for-Profit Corporation Law and the Religious Corporation Law to allow business corporations, not-for-profit corporations, religious institutions and cooperatives to hold meetings of shareholders, members, trustees, etc., via electronic communication. A8185/S7278A, currently in committee with both chambers of the state Legislature, would make a similar change to Section 339-v of the Real Property Law.[11]

E. Reverse Loans on Co-op Units Legalize

On December 1, 2021, Gov. Hochul signed into law A01508/S00760,[12] which amends the Banking Law, Uniform Commercial Code and Civil Practice Law and Rules so as to authorize "reverse" loans on cooperative apartments in New York State. The law, which does not take effect until May 30, 2022, includes a litany of requirements and borrower protections: for instance, the loans will only be available to persons 62 years of age and older, are non-recourse, and are subject to prior approval by the Board. At least initially, it appears that these loans will be

originated and held exclusively in the private market as the Federal Housing Association (FHA) and other federal agencies do not presently recognize them. It remains to be seen what type of market for these loans will develop in time.[13]

F. Co-ops and Seasonal Dwelling Units Excluded From Certain HSTPA Provisions

Legislation has been enacted that modifies the Housing Stability and Tenant Protection Act of 2019 (HSTPA)[14] insofar as cooperative housing corporations and seasonal dwelling units are concerned. As to co-ops, on December 22, 2021, the governor signed legislation[15] amending the General Obligations Law, the Real Property Law, and the Real Property Actions and Proceedings Law to exclude co-ops from the ambit of HSTPA provisions, including the limitations on security deposits (capped at a single month's rent),[16] limitations on late fees (capped at $50 or 5% of monthly maintenance),[17] and prohibition on landlord's recovery of attorneys' fees following a default judgment.[18.] The December 22, 2021 law does not change the HSTPA as it applies to cooperative housing corporations subject to the provisions of articles 2, 4, 5 or 11 of the Private Housing Finance Law (so-called "PHFL Affordable Developments"). Lawyers who work with cooperative apartments should familiarize themselves with the complete list of co-op carveouts from the HSTPA and the new limitations introduced by the December 22, 2021 law.[19] As to seasonal dwelling units, the governor signed legislation[20] amending the General Obligations Law to exclude seasonal dwelling units from the HSTPA limitation on security deposits, but only if the units are rented for 120 or fewer days in any calendar year and are registered with local authorities.

G. Remote Online Notarization

During the pandemic, Executive Orders permitted a Remote Ink Notarization (RIN) procedure whereby notaries were permitted to notarize documents remotely, provided that the notary and the signer were physically situated in New York, the notary viewed the transaction remotely, and the notary physically acknowledged the document.[21] RIN pursuant to the Executive Orders was rescinded effective June 25, 2021. On February 22, 2022, Gov. Hochul signed legislation that allows notarization to occur through a complete electronic format, also referred to as remote online notarization (RON), effective January 31, 2023 (at which point it is anticipated that the Department of State will have promulgated regulations necessary to implement the RON system[22]) ("RON Law").[23] The RON Law also establishes an interim RIN system that will be available until January 31, 2023.[24] The interim RIN system in effect until January 31, 2023 differs from the EO RIN System in a few significant respects: for instance, principals are not necessarily required to be physically present in New York at the time of the notarial act, and a form of "Certificate of Authenticity" is prescribed.

H. Anti-Housing Discrimination Package

On December 22, 2021, Gov. Hochul signed a legislative package comprised of nine different bills designed to combat housing discrimination.[25] The package "addresses many of the issues identified in an expose by *Newsday*, "Long Island Divided," which explored discrimination and both explicit and implicit bias that exists in the real estate industry.[26] The legislation, among other things, creates an anti-discrimination housing fund; adds a surcharge to licensing fees for brokers and salespeople; requires state and local housing agencies to affirmatively further fair housing; increases required trainings for real estate professionals on fair housing, implicit bias and cultural competency; and requires brokers to follow standardized client intake procedures. Efforts to address fair housing issues continue in the current legislative session. On February 28, 2022, S2525A,[27] which would require real estate brokers and salespersons to compile and report client demographic data to the Secretary of State, passed the Senate and was delivered to the Assembly.

I. Housing Our Neighbors With Dignity Act

On August 13, 2021 the governor signed this legislation,[28] which, "subject to amounts available by appropriation therefore," directs a new housing trust fund corporation to develop a program that would allow the state to finance the acquisition of financially distressed hotels and office properties by appropriate nonprofit organizations for the purpose of maintaining and increasing affordable housing. It remains to be seen how much funding will be allocated to this program and how successful it will ultimately be.

J. Solar Rights Act

On August 2, 2021, the Solar Rights Act became law. It adds a new section to the Real Property Law[29] that prohibits homeowner's associations from adopting or enforcing any rules or regulations that would effectively prohibit, or impose unreasonable limitations on, the installation or use of solar power systems.

K. New York City: Guaranty Law Challenged

Local Law 55 of 2020 prohibits landlords from enforcing "personal guaranties" by natural persons of payments accrued between March 7, 2020 and June 30, 2021 included in commercial leases with certain tenants.[30] In November 2020, in *Melendez v. City of New York*,[31] the Southern District of New York dismissed the plaintiffs' request to enjoin enforcement of this law on the basis that it violated the contracts clause because, even though the plaintiffs were able to plausibly allege that it represented a substantial impairment of their contract rights, the law advanced a legitimate public purpose and constituted a reasonable and necessary response to a real emergency. On October 28, 2021, the Second Circuit reversed the dis-

missal in part, and found that the district court erred in entering the judgment in favor of defendants as a matter of law on a motion to dismiss.[32] The case was remanded to Judge Abrams in the Southern District for the development of the facts and the determination of the likelihood of success on the merits, which is required for the injunction being sought. Landlords and their counsel are closely watching these proceedings as there remains the possibility that the guaranty law "could ultimately be struck down and that the obligations shielded from liability under it could become enforceable."[33]

L. New York City: Tenant Data Privacy Act

On May 28, 2021, New York City enacted the Tenant Data Privacy Act (TDPA), privacy legislation that applies only to owners of Class A multifamily dwellings.[34] The TDPA addresses privacy issues concerning "smart access systems," which include "any system that uses electronic or computerized technology, a radio frequency identification card, a mobile phone application, biometric identifier information, or any other digital technology in order to grant entry." Under the TDPA, owners of affected Class A multiple dwellings must provide tenants with a privacy notice, obtain tenants' consent for the use of smart access systems, establish data retention periods for collected data, ensure that collected data is not sold or shared, establish parameters surrounding the tracking of tenants, and protect all collected data. The TDPA went into effect on July 28, 2021, but multifamily residential landlords in New York City who own existing smart access buildings were given until Jan. 1, 2023 to comply. The TDPA creates a private right of action for tenants whose data is sold and used in violation of the TDPA. It is not clear whether this right of action is available to tenants of a cooperative. Practitioners who represent owners of and tenants in affected buildings should educate themselves on these new statutory requirements.[35]

M. New York City: Loft Tenant Access to NYC Housing Court

Buildings in New York City that meet the criteria set forth in the Loft Law[36] are subject to the jurisdiction of the New York City Loft Board. A7667/S6950 makes it unlawful to disrupt or fail to provide essential services and habitability for loft apartments and allows tenants to pursue claims in housing court.[37]

N. New York City: First Deadline Under the Climate Mobilization Act (CMA)

In New York City, the deadline for owners of covered buildings with high emissions intensities to apply for an emissions limit adjustment from the Department of Buildings under the CMA[38] was July 1, 2021. Although Local Law 97 is not a recently enacted law (it was signed into law in 2019) and does not mandate annual emissions intensity reports until May 1, 2025, covered building owners, their counsel and consultants will need to prepare for it well in advance. The primary financing program available to help building owners pay for mandated energy efficiency improvements is the Commercial Property Assessed Clean Energy (C-PACE) loan program pursuant to Local Law 96.[39] The first C-Pace financing deal was approved this past summer.[40]

O. NYC: Registration of Short-Term Rentals

Intro 2309-2021, which became law in January 2022,[41] requires short-term rental hosts to register with the city.

II. Looking Ahead: Pending Legislation

A. Good Cause Eviction (GCE)

State lawmakers are considering A5573/S3082, [42] sometimes referred to as the Good Cause Eviction bill. The legislation seems to be advancing,[43] though it is not clear that it has majority support, and even less clear that it would be supported by Gov. Hochul in its current form. As presented, GCE would apply to all apartments in New York other than apartments currently subject to rent regulation and owner-occupied buildings with fewer than four units. The legislation would prohibit landlords from evicting tenants, subtenants or occupants (seemingly including hotel room occupants for 30 days or more and occupants without valid leases), without demonstrating "good cause." "Good cause" is defined to include, among other things, the failure to pay rent, unless the tenant received a rent increase that was "unreasonable" (an annual increase of greater than 3% or 1.5 times the increase in the CPI, whichever is higher, is presumptively unreasonable, but a lesser annual increase is not presumptively reasonable). Landlords must offer every affected tenant a renewal lease at a rent that is not "unreasonable." Recovery for owner's own use is only available if the building is fewer than 12 units and the owner can show an "immediate and compelling necessity." To put it mildly, GCE inspires strong feelings among its supporters and opponents. To its supporters, GCE "prevents the potential exploitation of struggling tenants through exorbitant rent hikes and ensures fair and equal access to housing security by subjecting rent increases, particularly those above 5%, to rigorous judicial scrutiny in eviction court."[44] Meanwhile, its opponents posit that GCE is, in effect, universal rent control and ". . . is not the solution as it will result in degraded housing quality over time and fewer affordable housing options on the market while failing to address real problems with a lack of code enforcement by local municipalities."[45] As of this writing, the GCE bills are in the Assembly Housing Committee and the Senate Judiciary Committee. Sen. Brad Hoylman has introduced a commercial version of GCE, S428 (no Assembly counterpart as of the date hereof), that would prohibit the eviction of small retail tenants in New York City other than for "good cause" as defined in that bill. That bill is in committee in the Senate.

B. Statewide Right to Counsel in Eviction Proceedings

Citing the "eviction crisis of unfathomable proportions" in New York State and the success of New York City's 2017 right to counsel legislation[46] in reducing evictions in the five boroughs, legislators in Albany are debating the "Civil Right to Council in Eviction Proceedings Act," which would enact a statewide government-funded right to counsel for covered individuals in eviction proceedings and establish a New York State Office of Civil Justice to enforce the law.[47] As of this writing, the legislation is in committee in both chambers of the state Legislature.

C. Commercial Lessor Duty To Mitigate

Currently, in the commercial context, New York landlords have no duty to mitigate damages when a tenant vacates in violation of the terms of the lease, absent an express obligation in the lease itself.[48] The opposite rule has applied in the residential context since 2019, when § 227-e was added to the Real Property Law pursuant to the HSTPA.[49] Pursuant to § 227-e, where a tenant under a lease "covering premises occupied for dwelling purposes" vacates a premises in violation of the lease terms, the landlord must, "in good faith and according to the landlord's resources and abilities, take reasonable and customary actions" to rent the premises at the lower of fair market value or at the rate agreed to in the defaulted lease. If the landlord so rents the premises, the new tenant's lease will terminate the previous tenant's lease and mitigate damages otherwise recoverable against the previous tenant. Significantly, any lease provisions exempting a landlord from this duty is void as contrary to public policy. A6906/S1129 would amend § 227-e to delete the words "covering premises occupied for dwelling purposes."[50] In so doing, it would impose a non-waivable duty to mitigate on landlords under commercial leases. The bill has passed in the Assembly but appears to have stalled in the Senate as of this this writing**.**

D. Yellowstone Waivers

Senator Brian Kavanagh has sponsored S3133, a bill that would legislatively overturn the Court of Appeals' 4-3 decision in *159 MP Corp. v. Redbridge*[51] that upheld the enforceability of Yellowstone injunction waivers in commercial leases. Sponsors state that this decision will deny commercial tenants access to the courts because landlords will "undoubtedly include a waiver of declaratory and Yellowstone relief in their leases as a matter of course…[which]… will enable them to terminate leases based on a tenant's technical or dubious violation . . ." The bill renders such waivers void as contrary to public policy, among other provisions. The authors are aware of no counterpart bill in the Assembly as of this writing.

E. Mold History Disclosures

A417/S5097[52] would amend the Public Housing Law, the Public Health Law, and the Real Property Law, as applicable, to (i) add to the Property Condition Disclosure Statement questions as to mold history and mold testing, (ii) require that prospective lessees be notified of mold history and mold testing and (iii) direct state agencies to promulgate rules and standards for the remediation and prevention of indoor mold. On March 9, 2022, the bill was approved by the Senate Housing, Construction and Community Development Committee and referred to the Finance Committee. In the Assembly, it remains with the Housing Committee.

F. Lead-Based Paint Disclosure Act

A6608/S2142A[53] would require each seller of real property to provide the buyer with a certificate that the property has been tested for lead-based paint along with the results of the test prior to the closing. The certificate would also be filed with the state Department of Health. Prospective lessees would be required to be notified of lead-based paint test reports. The Property Condition Disclosure Statement would be amended to include the newly created disclosure requirements. The bill is on the Senate's floor calendar and remains in committee with the Assembly.

G. Co-op Sale Approvals

At least two bills are currently under consideration which would mandate processes for applications for, and approvals of, cooperative apartment sales.

1. **A1623/S2874.** This proposed legislation would amend the Not-for-Profit Corporation Law and the Business Corporation Law to require residential cooperative corporations to establish a uniform process for considering purchase applications to ensure that the process "is fair, transparent and does the utmost to protect against illegal discrimination."[54] The bill requires that written notice of such process be made available to prospective purchasers and sellers promptly upon request. At minimum, the processes must require co-op boards to acknowledge receipt of applications within 21 days and advise the purchaser of any incomplete items; following submission of a complete application, the board must notify the purchaser that the application is complete and the date by which review will be complete. The purchaser must be notified of the decision no more than 90 days after completion of the application; if no notice is given, consent will be deemed granted. If consent is denied, the notice must state the reason for denial. This legislation is currently in committee in the Senate and Assembly.[55]

2. **A5856/ S2846**. The Fairness in Cooperative Homeownership Act would amend the Real Property Law to require cooperative corporations to maintain standardized applications and lists of requirements, provide them to prospective purchasers and sellers promptly upon request, and include instructions as to how to submit the materials.[56] Prospective purchasers must submit their applications by registered mail. Co-op corporations are required to acknowledge receipt of the application, and any subsequent submissions, within 10 business days by registered mail, failing which, the application is deemed complete. An acknowledgment of receipt must set forth with specificity whether the submitted application fully satisfies the requirements, and, if applicable, a list of deficiencies and additional materials requested. The purchaser must be notified of the decision no more than 45 days after completion of the application (this time period is extendable with the consent of the purchaser or unilaterally by 14 days with written notice to the purchaser). If the corporation fails to timely act on the application, then the purchaser may inform the board that if no action is taken within 10 days, then failure to act with constitute consent. A mechanism is included that permits boards to extend the notice and approval periods for applications received between July 1 and September 10 of each year. This legislation is currently in committee in the Senate and Assembly.

H. Removal of Illegal Restrictive Covenants

Covenants, conditions and restrictions in recorded documents that discriminate based on race have been illegal for over half a century.[57] Nevertheless, these loathsome provisions remain in property records throughout the United States, including New York.[58] In recent years, states have sought to make it easier for property owners to remove these restrictions: at least eight states have enacted legislation, and legislation is pending in at least six states, including New York. New York's legislation[59] would amend the RPL to require "sellers" to have "any covenants, conditions and restrictions [that] exist in a document to be recorded which discriminate on the basis of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry . . . removed from such document by submitting a restrictive covenant modification document … either with the deed for recording, or separately." No filing fee will be assessed for a restrictive covenant modification document. The legislation also requires, within one year from the effective date of the legislation, condominium and cooperative boards and homeowners' associations to "delete or amend" any such covenants, conditions or restrictions that exist in a recorded document, without the necessity of any approval from the property owners. Further, the legislation permits any person holding an ownership interest in real property that he or she believes is subject to an unlawful restrictive covenant in violation of state or federal law to record a "restrictive covenant modification document" containing a complete copy of the original document with the unlawful language stricken, signed under penalty of law. The law directs county recorders to make available forms of the restrictive covenant modification documents. This legislation is on the floor calendar at the Assembly and in committee at the Senate.

I. Closure of FAR Calculation Loopholes

A2128/S2016[60] would amend the Multiple Dwelling Law to close perceived loopholes with respect to the calculation of floor area ratio (FAR) that presently allow developers to maximize building height and mass by locating mechanical void spaces throughout a building (as opposed to in a basement or on a roof), increase the ceiling heights on individual floors, and build large terraces, balconies and porches, all without increasing a building's total FAR. The so-called "mechanical void loophole" came to the fore in January 2019, when the city revoked Extell Development's permits to use a 160-foot mechanical space at 50 West 66th Street which the Department of Buildings said violated zoning rules.[61] This legislation imposes restrictions on the size of allowable mechanical voids, sets a ceiling height cap of 12 feet for a given floor's area to only be counted once and ensures that balconies and terraces will be counted toward a building's total floor area. As of this writing, this legislation is currently in committee in both houses of the state Legislature.

J. Willful Neglect/Compulsory Repairs

Two pending bills attempt to address a perceived trend by predatory landlords to willfully debilitate rent-regulated properties to the point of condemnation or demolition in order to develop market rate units. A4487/S3307[62] would give the city the right to assign a community-based organization to make repairs and impose a lien in an amount equal to the cost thereof if (i) there have been multiple good-faith tenant complaints about conditions that have not been addressed or remedied within 120 days and (ii) 50% or more of the tenants have consented to the repairs. This program would be financed by a New York State Housing Finance Agency bond issuance. At present, this legislation is in committee in both houses of the state Legislature. S2842/A2434[63] would amend the Real Property Actions and Proceedings Law to establish a cause of action in favor of tenants against landlords who willfully neglect their properties. The tenant is provided with the choice of two remedies: treble damages or relocation to a comparable location. This bill is in committee in both houses of the state Legislature.

K. Additional LLC Disclosures

Over the past five years, federal and New York laws and regulations have required increasing amounts of disclosure of the "beneficial ownership" of limited liability companies transacting in real property in New

York State.[64] The required disclosures under the existing laws are not generally publicly available because they are made to the government or agencies thereof. Legislation pending in Albany aims to change that. A9415/S8439[65] "aims to provide full transparency for the beneficial owners of limited liability companies in New York by defining beneficial ownership, requiring annual disclosure on tax returns, and publishing beneficial owners of limited liability companies in New York's publicly searchable corporation and business entity database." These bills are pending in Senate and Assembly committees at the time of this writing. Another bill pending in the Senate, S4592,[66] takes a more limited approach. It would require that any deed for a property with 1-4 family dwelling units by or to a limited liability company be accompanied by a document that makes "full disclosure of ultimate ownership by natural persons." This bill is at present pending in a Senate committee. The authors are not aware of any counterpart bill in the Assembly. It will be interesting to see if growing calls to identify and seize real property assets of certain designated Russian nationals will accelerate the advancement of this legislation.

L. Business Interruption Insurance: Mandated Pandemic Coverage

A1937/S4711[67] would require certain perils to be covered under business interruption insurance during the COVID-19 pandemic. The bill would hold harmless businesses and non-profits who currently maintain business interruption insurance, for losses sustained because of the COVID-19 health emergency, but for which no such coverage is currently offered. This legislation is presently in committee in both houses of the state Legislature.

M. Affordable Housing Legislation

The need for additional affordable housing in New York State has been widely acknowledged and reported. In New York City alone, it has been forecast that 560,000 new housing units will need to be created by 2030 to keep up with expected population and job growth.[68] Gov. Hochul has announced a new $25 billion five-year housing plan, which includes a renewed version of 421-a, called "485-w," which has proven to be controversial.[69] An array of legislation aimed at increasing the supply and availability of affordable housing is pending in the state Legislature, including a bill that would establish a housing access voucher program,[70] bills that would reform zoning laws to be less exclusionary,[71] bills that would establish new incentives and funding sources,[72] and bills that would recognize and incentivize new social housing models through community land trusts and tenant opportunities to purchase.[73] At the same time, proposals to incentivize and facilitate the conversion of vacant commercial space to residential apartments are being considered, including possible amendments to the Multiple Dwelling Law. A summary of a few of these interesting legislative proposals follows.

1. **Accessory Dwelling Units**. A4854A/S4547A[74] would require local governments to promulgate laws permitting the creation of accessory dwelling units (ADUs) in lots zoned for residential use. An ADU is an attached or detached residential dwelling unit located on a lot with a proposed or existing primary residence that provides complete independent living facilities for one or more persons. ADUs would not be counted toward allowable residential density. Local governments would be permitted to provide reasonable standards such as height, landscape, architectural review, and maximum size (all with certain limitations). Localities would also be able to prohibit seasonal or vacation rentals of ADUs and require that the primary dwelling be owner-occupied for an ADU to be lawfully rented. The legislation includes a lending program to assist low- and moderate-income homeowners with financing for the creation of ADUs and protections for tenants in ADUs, including anti-discrimination, rent regulation and eviction protections. While this legislation is presently in committee in both houses of the state Legislature, it appears doubtful that it will pass in its current form, given stiff opposition from suburban legislators. The governor has indicated that she will support a more limited ADU proposal that aims to legalize existing ADUs in New York City.[75]

2. **Community Land Trusts**. Senators Brian Kavanagh and Robert Jackson introduced legislation, S8265,[76] that would create a Community Land Trust Acquisition Fund. Community land trusts are "nonprofit organizations that own land to ensure that housing on it is and remains affordable to low- and moderate-income families."[77] The bill would support the growth of community land trusts through a dedicated funding mechanism. The bill is in committee in the Senate and does not at present have any Assembly counterpart.

3. **Tenant Opportunity to Purchase Act.** A5971/S3157[78] would add a new Article 7-C to the Real Property Actions and Proceedings Law which "establishes a comprehensive procedure that allows tenants either acting individually or as a group to purchase the buildings in which they are renters at a price that is fair to the seller and purchaser." Under the act, "when rental buildings go up for sale, tenants would have the right of first refusal to either buy the building themselves and turn it into a limited-equity cooperative or designate a preferred buyer who would steward the building under a social housing model." Similar legislation was first enacted in the District of Columbia in the 1980s and is now being considered in California and Massachusetts in addition to New York.

These bills are in committee in both legislative chambers.

N. Prohibition on Gas Appliances in New Construction

A8431/S6843A, AKA the All-Electric Building Act, would ban gas hookups in new construction in New York State starting in 2024, unless certain exceptions apply. The legislation appears to be advancing at the committee level in the Senate and the Assembly. This legislation follows New York City's Local Law 154,[79] signed into law by Mayor de Blasio shortly before he left office, which prohibits the combustion of substances with certain emissions profiles in New York City buildings. The New York City law requires compliance within two years for buildings less than seven stories; larger buildings have until 2027.

O. Tax Bills

Last year, many in the New York real estate industry breathed a collective sigh of relief when the 2022 budget legislation made no provision for the so-called "mezzanine recording tax"[80] and "pied-à-terre tax";[81] nevertheless, these bills, while apparently dormant right now, remain pending in legislative committees. Several additional tax bills are under consideration at present:

1. **Mom and Pop Rent Increase Exemption.** A2418/S2957[82] would amend the Real Property Tax Law to create a partial tax exemption in New York City for non-residential or mixed-use buildings where the landlord enters into a ten year lease with a small business tenant (defined to include businesses that employ 50 or fewer people) that includes a renewal clause that limits rent increases to no more than 3% annually. The abatement would be for up to ten years, calculated using the small business tenant's percentage share of the building's total square footage multiplied by a prescribed abatement base. As of this writing, the Senate version of the bill has passed the Cities 1 Committee and been added to the floor calendar. The COVID-19 Small Business Recovery Lease Act, A2380/S2140, would provide a similar tax exemption, but only with respect to leases with Covid-impacted tenants and defers annual rental increase cap to later local legislation. This bill is in committee with the Senate and the Assembly.

2. **Green Development Neighborhoods**. A290/S49[83] would establish a "green development neighborhood" tax exemption program. The bills would amend the Real Property Tax Law to authorize municipalities to provide for a 35% tax exemption for a maximum of 20 years for 1-3 story homes that are designated a green development or are LEED-ND certified. As of this writing, this bill has passed the Senate.

3. **Exclusion of For-Profit Companies from § 420-c**. Section 420-c of the Real Property Tax Law provides for certain local real property tax exemptions for real property owned by a "non-profit housing development fund companies." A5559/S1911[84] would amend § 420-c to exclude from the tax exemption companies established or controlled by for-profit entities. As of this writing, this bill is in committee in both houses of the state Legislature.

4. **Amended NYS Historic Tax Credits**. A3670/S4539[85] would amend the New York State Historic Tax Credit program, which has been used to incentivize the preservation and renovation of historic properties, particularly upstate. Among other things, it would provide small projects of $2,500,000 or less with a credit equal to 150% of the amount of credit allowed the taxpayer under the Internal Revenue Code. As of this writing, this bill is in committee in both houses of the state Legislature.

P. Foreclosure Abuse Prevention Act

A7737-B/S5473-D[86] would amend the Real Property Actions and Proceedings Law, the General Obligations Law and the Civil Practice Law and Rules to clarify the existing law and rectify certain "erroneous judicial interpretations" of statutes of limitations as they apply to mortgage foreclosure actions. This legislation appears to be an attempt to legislatively overturn the Court of Appeal's decision in *Freedom Mortg. Corp. v. Engel*,[87] which, among other things, held that mortgage loans accelerated through filing a verified complaint could be reinstated or "de-accelerated" through a voluntary dismissal of the action. As of this writing, this legislation is in committee in both houses of the state Legislature. In the Assembly, it had advanced to the third reading.

Q. New York City: Prohibition on Use of Tenant Criminal History and "Blacklists"

Intro. 2047-2020[88] would prohibit housing discrimination in rentals, sales, leases, subleases or occupancy agreements on the basis of arrest record or criminal history. Landlords, sellers, and their agents would be prohibited from obtaining criminal record information at any stage in the process, though they may consult the sex offender registry, provided they notify the applicant written notice of the inquiry and a reasonable amount of time (not more than 3 days) to withdraw the application. Two family owner-occupied housing and rooms in owner-occupied housing are exempt. Intro. 77-2022[89] would mirror recent state law changes by prohibiting landlords from refusing to rent to tenants solely because they appear on tenant screening lists.

R. NYC: "Commercial Rent Control" Legislation

Int. 82-2022[90] would create a Storefront Business Bill of Rights, including lease renewal procedures and

the option to extend the lease in certain cases for up to one year with not more than a ten percent rent increase. Int. 1796-2019[91] would establish a system of commercial rent registration and regulation applicable to retail stores of 10,000 square feet or less, manufacturing establishments of 25,000 square feet or less, and professional services or other offices of 10,000 square feet or less. The mayor would appoint a seven-member Commercial Rent Guidelines Board responsible for annually establishing guidelines and the rate of rent adjustments for covered commercial spaces. In Albany, legislators are considering S7571/A3110,[92] which would establish commercial rent regulation (authorizing the rent guidelines board to establish maximum rents) and a right to renew commercial leases in New York City.

In summary, state and local legislation in the pipeline, including that summarized above, stands to affect nearly every aspect of the New York real estate industry, including commercial and residential leasing, development, finance, land use, and tax. Practitioners should make efforts to stay abreast of these legislative developments, many of which, if ultimately signed into law, could have significant impact on their clients.

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Endnotes

1. 2021 N.Y. Laws ch. 417.
2. *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021).
3. *Chrysafis v. Marks*, No. 21-CV-2516 (GRB), 2021 WL 5563571, at *1 (E.D.N.Y. Nov. 29, 2021).
4. It should be noted that the COVID-19 Housing Recovery and Relief for All Act, sometimes referred to as the "cancel rent" bill, remains in committee in both houses of the state Legislature. A.2617, 2021-2022 N.Y. Leg. Sess.; S.4050A, 2021-2022 N.Y. Leg. Sess. In addition, bills are pending that would further extend the moratoria on evictions and foreclosures. *See, e.g.*, S.8397, 2021-2022 N.Y. Leg. Sess. (foreclosure moratorium extension to May 15, 2022).
5. 2020 N.Y. Laws ch. 323. The 2020 legislation was amended by chapter amendments enacted in March 2021. 2021 N.Y. Laws ch. 84.
6. For a useful overview of the POA changes, *see* Robert D. Lillienstein, *Big Changes to New York's Power of Attorney Law Are Now in Effect*, Moses & Singer LLP (July 1, 2021), https://www.mosessinger.com/articles/big-changes-to-new-yorks-power-of-attorney-law-are-now-in-effect.
7. 2021 N.Y. Laws ch. 59.
8. N.Y. Tax Law § 1402(a) (McKinney 2020).
9. N.Y. Tax Law § 1404(a) (McKinney 2021).
10. 2021 N.Y. Laws ch. 588.
11. A.8185, 2021-2022 N.Y. Leg Sess.; S.7278A, 2021-2022 N.Y. Leg. Sess.
12. 2021 N.Y. Laws ch. 643.
13. For a useful summary of the law, *See, e.g.,* Daniel G. Fish, *Reverse Mortgages and Seniors in Co-ops in New York*, N.Y.L.J. (Feb. 16, 2022), https://www.law.com/newyorklawjournal/2022/02/16/reverse-mortgages-and-seniors-in-co-ops-in-new-york/.
14. 2019 N.Y. Laws ch. 36.
15. 2021 N.Y. Laws ch. 789; *See also* chapter amendments enacted in Feb. 2022 at 2022 N.Y. Laws ch. 93.
16. N.Y. GOL § 7-108 (McKinney 2021).
17. N.Y. Real Property Law § 238-a (McKinney 2021).
18. N.Y. RPL § 234 (McKinney 2021).
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20. 2021 N.Y. Laws ch. 428; *See also* chapter amendments enacted on Feb. 24, 2022 as 2022 N.Y. Laws ch. 111.
21. *See* N.Y. Exec. Order No. 202.7 (Mar. 19, 2020).
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23. 2022 N.Y. Laws ch. 104. This legislation is a "chapter amendment" to RON legislation signed into law in December 2021. 2021 N.Y. Laws ch. 767. The December 2021 legislation was to take effect by its terms on June 20, 2022; however, there was a recognition that the Department of State will likely not have completed the necessary regulations by that date, and that an interim RIN system would need to be put in place to cover the gap. *See* Approval Memorandum, *supra* note 22. The 2022 legislation defers the effective date of the December 2021 RON legislation and establishes an interim RIN system.
24. 2022 N.Y. Laws ch. 104, § 1.

25. 2021 N.Y. Laws ch. 687, 2021 N.Y. Laws ch. 698, 2021 N.Y. Laws ch. 690, 2021 N.Y. Laws ch. 697, 2021 N.Y. Laws ch. 686, 2021 N.Y. Laws ch. 688, 2021 N.Y. Laws ch. 696, 2021 N.Y. Laws ch. 699, and 2021 N.Y. Laws ch. 701.
26. Press Release, Sen. Brian Kavanagh, *Governor Hochul Signs Legislative Package to Combat Housing Discrimination* (Dec. 22, 2021), https://www.nysenate.gov/newsroom/press-releases/brian-kavanagh/governor-hochul-signs-legislative-package-combat-housing.
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30. N.Y. City Local Law No. 55 (2020).
31. *Melendez v. City of N.Y.*, 503 F.Supp.3d 13, 19, (S.D.N.Y. 2020), *aff'd in part, vacated in part, rev'd in part*, 16 F.4th 992 (2d Cir. 2021).
32. *Melendez v. City of N.Y.*, 16 F.4th 992, 996 (2d Cir. 2021).
33. Warren A. Estis and Alexander Lycoyannis, *Could NY's Guaranty Law Be Found Unconstitutional?*, N.Y.L.J., Dec. 1, 2021, at 5.
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38. N.Y. City Local Law No. 97 (2019).
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43. *See* Holly Dutton, *Eviction Legislation Gains Steam*, Multi-Housing News (Feb. 3, 2022), https://www.multihousingnews.com/eviction-legislation-continues-to-gain-steam/.
    It should be noted that, since the summer of 2021, at least four upstate cities have passed good cause eviction laws, including Albany, Poughkeepsie and Newburgh.
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48. *See Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995).
49. 2019 N.Y. Laws ch. 36, adding RPL § 227-e.
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51. *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 104 N.Y.S.3d 1 (2019).
52. A.417, 2021-2022 N.Y. Leg. Sess.; S.5097, 2021-2022 N.Y. Leg. Sess.
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54. A.1623, 2021-2022 N.Y. Leg. Sess.; S.2874, 2021-2022 N.Y. Leg. Sess.
55. Note that other localities in New York State already regulate cooperative apartment sale approvals in a similar manner. In 2021, in Westchester County, the notification and disclosure requirements already required by Local Law 2018-11 were amended to, among other things, require boards to provide the Westchester County Human Rights Commission with the reason for the rejection of the purchaser's application, in addition to notice of the fact of the rejection. Westchester County Local Law 2018-11, § 1. Since 2009, Suffolk County Local Law 2009-28, as amended by Suffolk County Local Law 2009-36, has mandated an application and approval process.
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57. *See* Fair Housing Act of 1968, 42 U.S.C. § 3601; *see also Shelley v. Kraemer*, 334 U.S. 1, 22-23 (1948).
58. *See* Sara Clemence, *Is There Racism in the Deed to Your Home?*, N.Y. Times (August 17, 2021), https://www.nytimes.com/2021/08/17/realestate/racism-home-deeds.html.
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60. A.2128, 2021-2022 N.Y. Leg. Sess.; S.2016, 2011-2022 N.Y. Leg. Sess.
61. *See* Will Parker, *City To Revoke Permits For Extell's Kazakh-Backed Tower At 50 West 66th Street*, The Real Deal (Jan. 17, 2019), https://therealdeal.com/2019/01/17/city-revokes-permits-for-extells-kazakh-backed-tower-at-50-west-66th-street/.

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63. A.2434, 2021-2022 N.Y. Leg. Sess.; S.2842, 2021-2022 N.Y. Leg. Sess.

64. *See, e.g.,* FinCEN, Geographic Targeting Order Covering Title Insurance Company (May 8, 2020) (one iteration of a series of orders the first one of which was issued in 2016); N.Y. Tax Law § 1409(a) (McKinney 2021); N.Y. City Admin. Code § 11-2015 (2019); and, most recently, the federal Corporate Transparency Act (§ § 6401-03 of the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388).

65. A.9415, 2021-2022 N.Y. Leg. Sess.; S.8439, 2021-2022 N.Y. Leg. Sess.

66. S.4592, 2021-2022 N.Y. Leg. Sess.

67. A.01937, 2021-2022 N.Y. Leg. Sess.; S.04711, 2021-2022 N.Y. Leg. Sess.

68. *See* Eddie Small and Natalie Sachmechi, *As Eviction Freeze Expires, Advocates Eye Systemic Reform*, Crain's N.Y. Business, January 17, 2022, at 7.

69. Whether 421-a will be extended and on what terms remains to be seen. *See* Daniel Bernstein, *NYC Affordable Housing: The End of 421-a and The Future of Housing Incentives*, Rosenberg & Estis, P.C. (Jan. 31, 2022), https://www.rosenbergestis.com/blog/2022/01/re-q1-2022-newsletter/.

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71. A.8883, 2021-2022 N.Y. Leg. Sess.; S.7635, 2021-2022 N.Y. Leg. Sess. (would allow local zoning boards of appeals to approve affordable housing developments, provide for an appeal process to DHCR, create a state zoning board of appeals within the DHCR to hear such appeals, and direct DHCR to conduct a study to integrate low-income housing tax credit applications with this new zoning application process); A.9246, 2021-2022 N.Y. Leg. Sess.; S.7574, 2021-2022 N.Y. Leg. Sess. (would prohibit cities and villages from establishing minimum lot sizes of more than 1,200 square feet, requiring the construction of off-street parking (except for freight loading and unloading), or disallowing the construction of multifamily dwellings in districts zoned for residential use. The minimum number of residential units to be permitted on each lot range from 2 to 6, depending on whether the lot is in a city or in a village and whether it is within a quarter mile of a rail or subway station. Towns would be prohibited from establishing minimum lot sizes of more than 20,000 square feet (5,000 square feet for lots with access to sewer and water lines)).

72. *See, e.g.,* A.3531, 2021-2022 N.Y. Leg. Sess.; S.3006, 2021-2022 N.Y. Leg. Sess.; A.3669, 2021-2022 N.Y. Leg. Sess.; S.2731, 2021-2022 N.Y. Leg. Sess.; A.3798, 2021-2022 N.Y. Leg. Sess.; S.2732, 2021-2022 N.Y. Leg. Sess.

73. *See infra.* notes 74 and 76.

74. A.4854-A, 2021-2022 N.Y. Leg. Sess.; S.4547-A, 2021-2022 N.Y. Leg. Sess.

75. Andrew Coen, *Squirreling Away New Space*, Commercial Observer, Mar. 1, 2022, at 22.

76. S.8265, 2021-2022 N.Y. Leg. Sess.

77. Sen. Brian Kavanagh and Katrell Lewis, *Op-ed: Community Land Trusts Are a Bridge to Affordable Homeownership,* Crain's N.Y. Business (Mar. 3, 2022), https://www.crainsnewyork.com/op-ed/community-land-trusts-are-bridge-affordable-homeownership.

78. A.5971, 2021-2022 N.Y. Leg. Sess.; S.3157, 2021-2022 N.Y. Leg. Sess.

79. N.Y. City Local Law No. 154 (2021).

80. A.3139, 2021-2022 N.Y. Leg. Sess.; S.3074, 2021-2022 N.Y. Leg. Sess.

81. A.9041-A, 2021-2022 Leg. Sess.; S.4199, 2021-2022 Leg. Sess.

82. A.2418, 2021-2022 N.Y. Leg. Sess.; S.2957, 2021-2022 N.Y. Leg. Sess.

83. A.290, 2021-2022 N.Y. Leg. Sess.; S.49, 2021-2022, N.Y. Leg. Sess.

84. A.5559, 2021-2022 N.Y. Leg. Sess.; S.1911, 2021-2022 N.Y. Leg. Sess.

85. A.3670, 2021-2022 N.Y. Leg. Sess.; S.4539, 2021-2022 N.Y. Leg. Sess.

86. A.7737, 2021-2022 N.Y. Leg. Sess; S.5473D, 2021-2022 N.Y. Leg. Sess.

87. *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 28, 146 N.Y.S.3d 542, 553 (2021). It has been stated that this decision "seems to eliminate the statute of limitations for foreclosure actions except on some very odd or extreme sets of facts." *Foreclosure: New York Court of Appeals Issues Important Clarifications on Statute of Limitations*, 50-APR Real Est. L. Rep. NL 1.

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Ira's Co-op/Condo Corner

By Ira Brad Matetsky

Ira Brad Matetsky is a partner at Ganfer Shore Leeds & Zuderer LLP in Manhattan and a member of the firm's litigation and cooperative and condiminium practices.

Ensuring the Safety of New York Co-ops and Condos: Avoiding a Surfside Collapse in the Big Apple

Last June, the nation's attention was riveted by the collapse of the 12-story Champlain Towers South condominium building in Surfside, Florida. Ninety-eight people died, dozens more were injured, and everyone in the building lost their homes and their investments.

As everyone processed these events, questions were inevitably raised as to how something like this could have happened. While investigations are still ongoing, early findings revealed that in 2018, in anticipation of a 40-year safety recertification required under Florida law, the condominium board retained an engineering consulting firm, which provided a detailed report to the board members that outlined extensive structural issues affecting the building. The report firmly recommended that significant repairs and maintenance take place to ensure the building's "structural integrity" and general safety. Yet the repairs and maintenance were deferred for years, with tragic results.

Why? Because—in a scenario that will be familiar to anyone experienced with the dynamics of New York co-ops and condos—Champlain Towers' board members and unit owners apparently spent significant time debating the necessity and cost involved with respect to the repairs. In addition, the decision-making process may have been further handicapped by turnover among board members, several of whom reportedly resigned over the years because relationships in the building had become so acrimonious. This impasse between the board and the unit owners it represented, which prevented the board from timely addressing the urgent safety issues, has been cited as a contributing factor to the horrifying Surfside calamity.

So now every property owner must ask: could it happen here? Hopefully, relatively few New York buildings suffer from such serious design and maintenance problems that they are at risk of literally falling down. In addition, parts of Florida are affected by specific geological factors that are typically not found in New York. However, health and safety problems requiring prompt attention—and the expenditure of significant funds, no matter how unpopular that may be with the owners who will need to come up with the money—can exist in any property, regardless of its form of ownership or the property's stage in its life-cycle.

In New York City, everyone in the real estate industry is familiar with the façade inspection program requiring all buildings over six stories to undergo detailed periodic exterior inspections to ensure that any dangerous conditions, such as façade elements at risk of becoming dislodged and injuring people on the ground, are identified and corrected.[1] Similar requirements also exist for periodic inspection of specific building components such as elevators, boilers, gas piping, and (the most recent addition) parking garages. However, outside of the general obligation to keep the building in good repair, there is no specific requirements for buildings to be routinely inspected for structural issues—even in the thousands of buildings statewide that are 40, 50, 75, or even more years old.[2]

On the one hand, this might seem like a good thing to co-op and condo boards, as the last thing that most board members and property managers would want to see is yet another governmental mandate, enforced through a set of bureaucratic regulations. On the other hand, a required periodic structural inspection report would at least have the advantage of forcing board members, as well as tenant-shareholders or unit owners, to focus every few years on the condition of their buildings. In the absence of such a structural inspection requirement, it is

up to board members—who, of course, are volunteers—to decide whether and when they should commission an inspection, how thorough any inspection should be, and how to address the results.

Even in the absence of a structural inspection requirement, sometimes a board will realize that a serious safety or maintenance issue exists that will require a major capital expenditure to address. Perhaps the issue is obvious, such as a chronically leaky roof. Perhaps an inspection has been commissioned, either voluntarily by the board or as a requirement for financing. In any event, let's assume the board, assisted by its professionals, has identified necessary repairs and calculated the likely expense, bearing in mind that very often such projects will ultimately cost more than their original budget.

That brings us to the next question: how to pay for it. In a fortunate few buildings, cash on hand or reserve funds may be sufficient to cover the expense of a significant capital project. Typically, though, this will not be the case, and the board will be required to raise additional funds, either by increasing maintenance fees or common charges or by imposing a special assessment. Another option that the board may explore is to seek outside financing for the project. This may alleviate short-term cash-flow issues, but ultimately the owners will still wind up paying the bills.

In an ideal world, good communications between the board and the owners will help the latter understand that the board is protecting the owners' safety as well as their investments in the building, and that the cost of the recommended repairs is a necessary price to pay. But too often, the tenant-shareholders or unit owners are unreceptive to this message. Perhaps they are not convinced the work is necessary, perhaps they believe it can be deferred to a later time without worsening the problem, or perhaps some owners simply cannot afford the increased expenditure.

Worse still: In many buildings, the bylaws may restrict the board's authority to expend funds, above a specified (and often nominal) level, without shareholder or unit owner approval. There may even be a requirement for a two-thirds vote to approve such an expenditure. The bylaws may not exempt even necessary structural repairs from the requirement, and the shareholders or unit owners may not agree with the board on the desirability of funding repairs even when presented with a professional's opinion that they are needed.

What can cooperatives and condominiums do to avoid finding themselves in this situation? We'll explore some potential solutions in our next column.

The auhor would like to than John P. Amato, an associate at his firm, for assistance in preparing this article.

Endnotes

1. New York City Buildings, Façade Inspection & Safety Program (FISP) Filing Instructions, https://www1.nyc.gov/site/buildings/safetyfacade-inspection-safety-program-fisp-filing-instructions.page.
2. N.Y.C. Admin. Code § 27-2005.

Bergman on Mortgage Foreclosures

By Bruce J. Bergman

Bruce Bergman is the author of the four-volume treatise *Bergman on New York Mortgage* and a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

Foreclosure Judgment Bars Borrowers From Later Suing for Fraud

Lenders and their attorneys have seen this type of case before, but they keep on coming. So, the principles—comforting to lenders—are worthy of reciting anew when encountered, as is so in a recent case.[1]

This started out as a garden variety bank foreclosure which proceeded to judgment of foreclosure and sale—which happened to be on default—then to actual sale. Sometime thereafter, the former borrower, claiming to be aggrieved, brought a quiet title (or bar claim) action against the lender and its various attorneys for damages for fraud, and violation of Judiciary Law § 487 (this aspect against the attorneys) arising out of the prior foreclosure action.

Could this possibility succeed? If it could, lenders would be in almost eternal danger of disgruntled borrowers who had every opportunity to litigate through appeals of the foreclosure action, later suing lenders who were merely enforcing their rights under the mortgage. It is not quite an upside-down world, so the answer is "no," the borrowers' actions would not succeed.

Three critical related principles support the banishment of borrower assaults such as these.

One is the doctrine of res judicata, which holds that a final adjudication of a claim on the merits (as in the underlying mortgage foreclosure) precludes relitigating that claim—and all claims arising out of the same transaction or series of transactions.[2]

Next, and specifically applicable to the foreclosure case, a judgment of foreclosure and sale is final as to all questions at issue between the parties and concludes all matters of defense which were or could have been litigated in the foreclosure action.[3]

Finally, even a judgment obtained on default (as was so in this case), which has not been vacated, is conclusive for res judicata purposes and encompasses issues that were or could have been raised in the prior action[4]—for our purposes here, the earlier foreclosure.

To restate it all in the vernacular, the borrower had his chance in the foreclosure to make his arguments. Had he done so and lost, the judgment would have served to take away any power to sue the lender later in another action. Even where the borrower defaults in the foreclosure, the judgment is effective as to any arguments the borrower might have raised had he chosen to do so. He elected not to and cannot later be given the proverbial second bite of the apple.

Will we see these cases yet again? Undoubtedly. But mortgage holders can rely on the maxims recited here to confidently fend off attacks.

Endnotes

1. *Eaddy v. U.S. Bank, N.A.*, 180 A.D.3d 756, 119 N.Y.S.3d 756 (2d Dept. 2019).
2. *Eaddy,* 180 A.D.3d at 756 (*citing Ciraldo v. JP Morgan Chase Bank, N.A.*, 140 A.D.3d 912, 913 (2016)); *see Djoganopoulos v. Polkes*, 67 A.D.3d 726, 727 (2009); *see also Sclafani v. Story Book Homes*, 294 A.D.2d 559, 559 (2002).
3. *Eaddy,* 180 A.D.3d at 756 (*citing Ciraldo, N.A.*, 140 A.D.3d at 913; s*ee SSJ Dev. of Sheepshead Bay I, LLC v. Amalgamated Bank*, 128 A.D.3d 674, 675 (2015); *see also Dupps v. Betancourt*, 121 A.D.3d 746, 747 (2014).
4. *Eaddy*, 180 A.D.3d at 756 (*citing Richter v. Sportsmans Props., Inc.*, 82 A.D.3d 733, 734 (2011); *83-17 Broadway Corp. v. Debcon Fin. Servs., Inc.*, 39 A.D.3d 583, 585 (2007); *Rosendale v. Citibank*, 262 A.D.2d 628 (1999).

Statute of Limitations: Some Clarity on the 'Savings Provision'

Lenders, servicers and their counsel need not be reminded of the continuing threat that the expiration of the statute of limitations presents to the successful prosecution of a mortgage foreclosure action. That is why the rescue provision afforded by CPLR 205(a) is so meaningful.[1] As readers will know from earlier articles, a plaintiff (in our context a mortgage holder) is permitted to bring a new action on the transaction within six months of termination of a prior action, where that action is terminated in any manner other than

a.) Voluntary discontinuance;

b.) Failure to obtain personal jurisdiction;

c.) Dismissal of the complaint for neglect to prosecute the action; or

d.) Final judgment upon the merits.

The practicalities of what underlies the importance of this statute is the problem that when a foreclosure may be dismissed, by then, the six year statute of limitations since the acceleration of the mortgage may have passed. That would then bar the initiation of a new foreclosure action – except that the statute does indeed allow a new action to be brought if the dismissal of the first action did not fall into one of the delineated categories.

But then the question becomes, precisely when after the dismissal of the first action must the mortgage holder begin the new action—understanding of course that the statute says it must be within six months of termination of the prior action? But what is that exact moment?

A new case offers some clarification and confirms that minutia of this type always remains meaningful in the legal arena.[2]

Here, the mortgage holder argued that the six-month period should be calculated from the date the dismissal order is served with notice of entry (and service of such an order in that fashion is typical and commonplace).[3] Citing previous authority, the court ruled, however, that service of the order with notice of entry was not the measuring point.[4] Rather, for the purposes of this statute, an action from which no appeal has been taken is considered terminated 30 days after mere entry of the court's dismissal order, this date representing the expiration of the party's right to appeal.

In a sense, it is fairly simple, but counsel needs to understand the point. When a foreclosure is dismissed, if a new action can be initiated, it must begin within six months of entry of that order of dismissal. Nothing else is involved. Thinking about or relying upon other events could lead to what is in essence a disaster. The beginning of a new action is something to be considered with dispatch in any event, but if it starts approaching the last minute, this rule offers needed clarification.

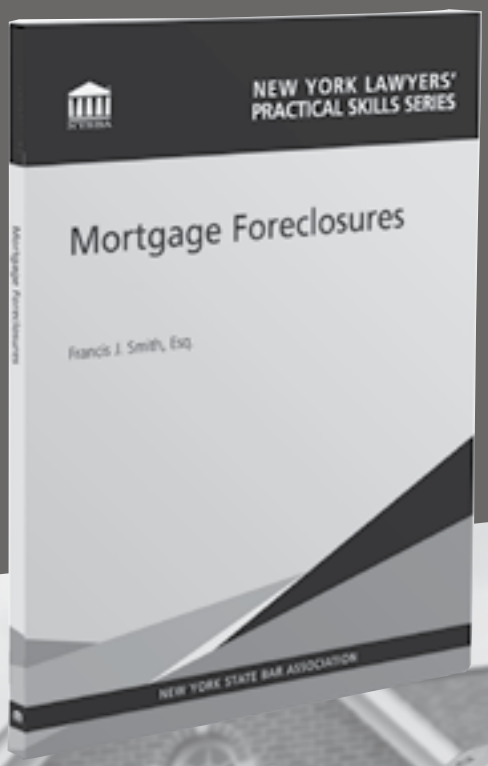
Endnotes

1. *See* N.Y. CPLR 205(a).
2. *Specialized Loan Servicing Inc. v. Nimec*, 183 A.D.3d 962, 123 N.Y.S.3d 713 (3d Dep't 2020).
3. *Id.* at 965.
4. *Id.* (citing *Pi Ju Tang v. St. Francis Hosp.*, 37 A.D.3d 690, 691 [2d Dep't 2007]).

PUBLICATIONS

Mortgage Foreclosures

Author
Francis J. Smith, Esq.



Mortgage Foreclosures guides the practitioner through the basics of a mortgage foreclosure proceeding. Covering the basics of a mortgage foreclosure proceeding, this practice guide addresses service on tenants, the attorney affirmation of compliance in residential foreclosure actions, consumer protection legislation and its application to a mortgage foreclosure proceeding.

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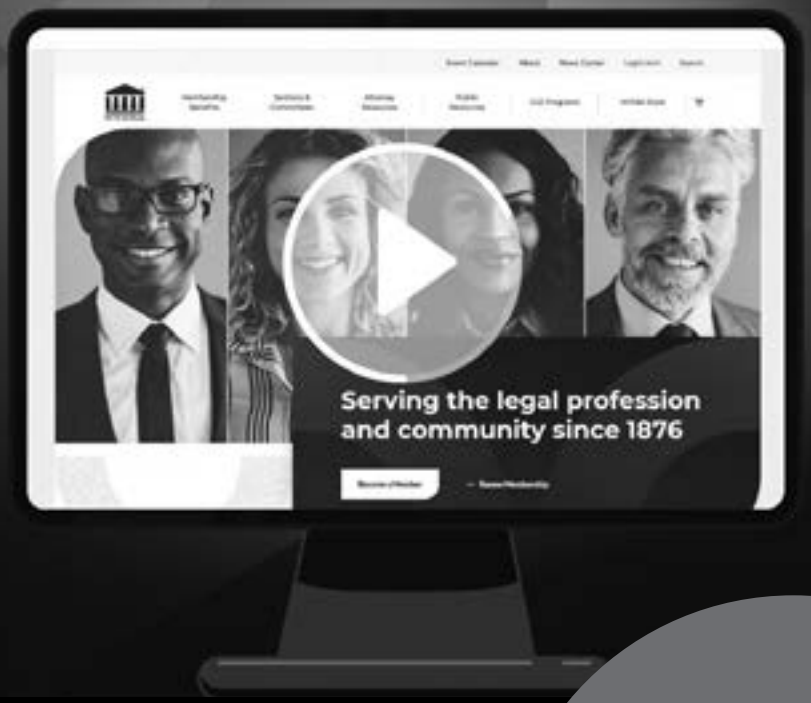

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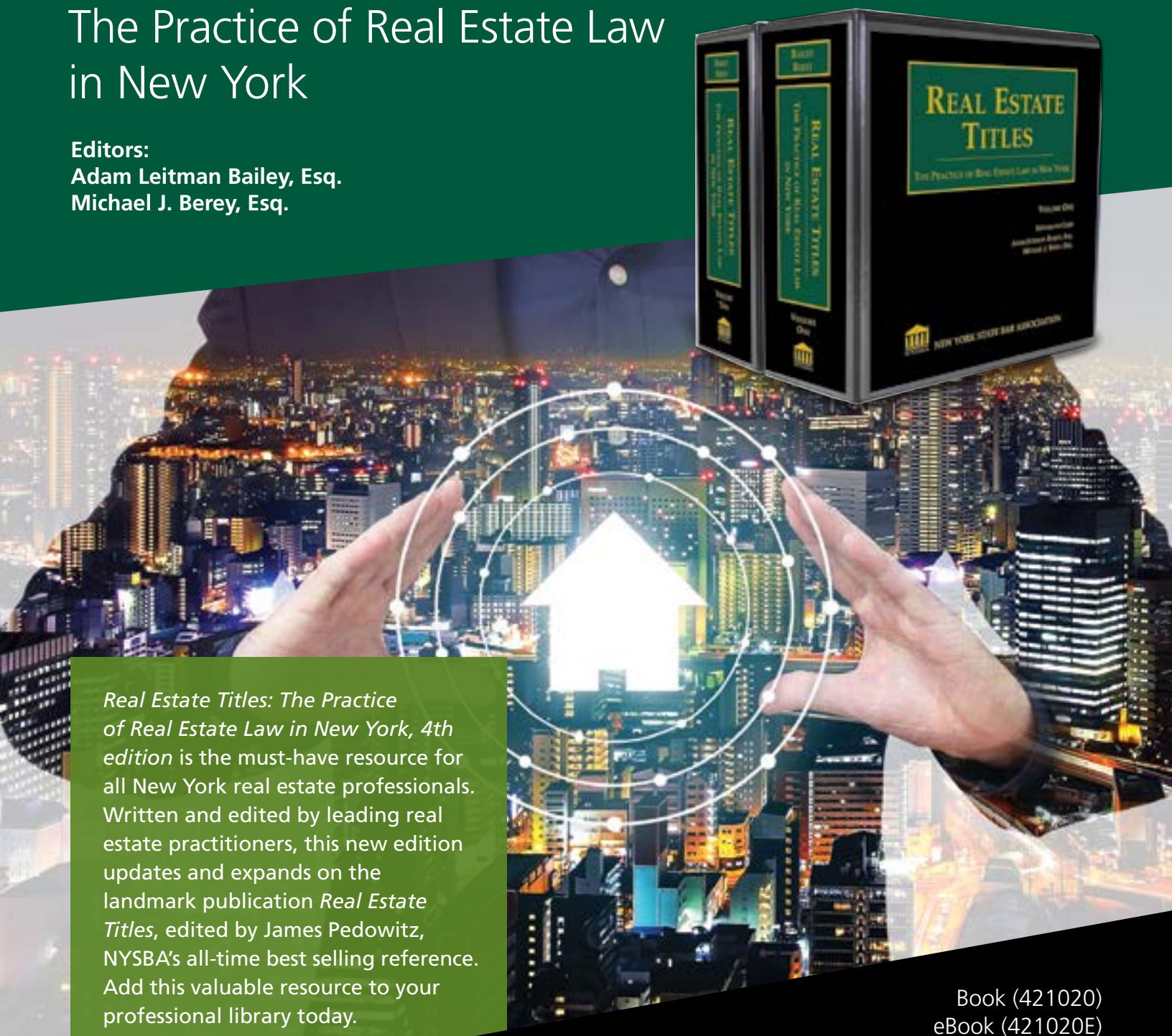

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