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COURT OF APPEALS
STATE OF NEW YORK

VAN DYKE,

Respondent,

-against-

NO. 97

U.S. BANK,

Appellant.

20 Eagle Street
Albany, New York
October 16, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Van Dyke v. U.S. Bank.

3 MR. ROBBIN: If I may reserve five minutes, Your
4 Honor.

5 CHIEF JUDGE WILSON: Five minutes, sure.

6 MR. ROBBIN: Thank you. My name is Jonathan
7 Robbin. I'm joined by Jacqueline Pacheco. We represent
8 the appellant, U.S. Bank. I'm going to skip right to the
9 facts of our case because I've listened to Your Honor's
10 arguments and heard where you're going. And so I want to
11 get to why our case is a bit different and why Section 7
12 does not apply in our case.

13 JUDGE HALLIGAN: Are Section 4 and Section 8
14 squarely implicated here? And if so, how?

15 MR. ROBBIN: Section 4 and Section 8 are
16 implicated if the court determines that Section 7 applies.
17 Either one of the - - - one of two things happened, Your
18 Honor. Either the case in 2009 was brought - - - was a
19 nullity, or Section 4 and 8 applied because in 2022, it was
20 discontinued making it, under Engel, a nullity.

21 JUDGE HALLIGAN: And I think there's an argument
22 that maybe you - - - you distinguished a case with Section
23 4 and Section 8 below. You don't view that as - - - as
24 taking that argument and those issues off the table?

25 MR. ROBBIN: I do not believe it's taking it off

1 the table.

2 JUDGE HALLIGAN: Why is that?

3 MR. ROBBIN: Because I believe, we - - - first
4 off, we raised it below, and we talked - - -

5 JUDGE HALLIGAN: So one can raise an argument and
6 then later abandon it. The - - - I think that's the
7 suggestion.

8 MR. ROBBIN: Oh, I don't - - - I don't believe it
9 was abandoned. I believe we raised it in both the lower
10 court as well as the Appellate Division. And we - - -
11 while we focused on the fact that our - - - the predecessor
12 plaintiff lacks standing, we also note - - -

13 JUDGE HALLIGAN: You mean under Section 7?

14 MR. ROBBIN: Under Section - - - under Section -
15 - - under - - - the argument they're - - -

16 JUDGE HALLIGAN: Yeah.

17 MR. ROBBIN: - - - making under Section 7, we
18 noted that we still discontinued it prior to the passage of
19 FAPA.

20 CHIEF JUDGE WILSON: What about the - - - the
21 September 10th letter? I think you know what I mean.

22 MR. ROBBIN: Yes.

23 CHIEF JUDGE WILSON: Why doesn't that accelerate
24 the loan as of that date?

25 MR. ROBBIN: Because as of - - - under - - - as

1 Your Honors made clear in Engel under the Vargas decision,
2 that letter was not an overt act. Yes, there was the - - -

3 CHIEF JUDGE WILSON: Why not?

4 MR. ROBBIN: Because all it did was provide
5 information, as Your Honor said - - -

6 CHIEF JUDGE WILSON: Well, except the information
7 is a \$435,000 due. It's not a monthly payment due.

8 MR. ROBBIN: It - - - but it said that they could
9 make the payment. It also said that there was a pending
10 for - - -

11 CHIEF JUDGE WILSON: I'm sorry. Which - - -
12 which - - -

13 MR. ROBBIN: - - - it - - - it provided
14 information - - -

15 CHIEF JUDGE WILSON: I'm sorry. What payment
16 could they make?

17 MR. ROBBIN: They could pay the amount that was
18 due.

19 CHIEF JUDGE WILSON: The \$435,000?

20 MR. ROBBIN: That had been - - -

21 CHIEF JUDGE WILSON: That's the accelerated
22 amount.

23 MR. ROBBIN: That was - - - had been previously
24 accelerated by a party without acceleration.

25 CHIEF JUDGE WILSON: Yeah. But the - - - but at

1 the point this letter comes, you now hold the note, no? Or
2 at least the part the - - - the - - - the party on whose
3 behalf Ocwen sent the note - - - sent the letter, owned the
4 note.

5 MR. ROBBIN: A party owned the note, yes.

6 CHIEF JUDGE WILSON: Well, that party.

7 MR. ROBBIN: Yeah. That party, yes.

8 CHIEF JUDGE WILSON: Right.

9 MR. ROBBIN: Yes.

10 CHIEF JUDGE WILSON: So there's no question that
11 when this note was sent - - -

12 MR. ROBBIN: When the letter was sent.

13 CHIEF JUDGE WILSON: Sorry. When the letter - -
14 -

15 MR. ROBBIN: Yes.

16 CHIEF JUDGE WILSON: - - - was sent - - - yes.

17 Thanks for correcting me.

18 MR. ROBBIN: I'm - - - I'm sorry.

19 CHIEF JUDGE WILSON: When the letter was sent - -
20 -

21 MR. ROBBIN: Yes.

22 CHIEF JUDGE WILSON: - - - the - - - there was no
23 question that they had the authority to send the letter.

24 MR. ROBBIN: Correct.

25 CHIEF JUDGE WILSON: Okay. So - - -



1 MR. ROBBIN: I - - - I don't - - - we're not - -
2 - I'm not questioning the authority - - -

3 CHIEF JUDGE WILSON: Yes. Why don't - - -

4 MR. ROBBIN: - - - on that.

5 CHIEF JUDGE WILSON: So why doesn't that
6 accelerate the debt?

7 MR. ROBBIN: That would - - - if the - - - if - -
8 - assuming that accelerated the debt - - -

9 CHIEF JUDGE WILSON: Yeah.

10 MR. ROBBIN: - - - which, again, I don't think it
11 did - - -

12 CHIEF JUDGE WILSON: Okay.

13 MR. ROBBIN: - - - then we go to the Section 4
14 and 8 issue that we have because we then deaccelerated the
15 debt by discontinuing the action soon thereafter.

16 CHIEF JUDGE WILSON: No. No. That only - - -
17 that - - - that only works for actions that are the - - -
18 for foreclosures - - - sorry - - - for statute of
19 limitations that are started by a foreclosure action,
20 right? Not for ones that are started by a letter. I don't
21 think it reads that way.

22 MR. ROBBIN: But I also don't - - - I - - - and
23 while Engel did make clear that a - - - a action could be
24 started by a letter, I - - - I'm not aware of what - - -
25 what such a letters exist because it has to be - - -

1 CHIEF JUDGE WILSON: Well, I guess the question
2 is, is this such a letter?

3 MR. ROBBIN: I - - - I - - - I don't view that as
4 an overt act.

5 CHIEF JUDGE WILSON: It appears to be asking for
6 payment of the entire accelerated amount at a time when the
7 person who sent the letter or on whose authority the letter
8 was sent, had the legal right - - - was - - - was the
9 counterpart to the contract. And I take your point about 4
10 and 8, but that seems to only apply as to foreclosure
11 actions. And this would not be an acceleration by a
12 foreclosure action, but by a letter.

13 MR. ROBBIN: So the - - - that - - - that letter
14 informed respondent - - - I agree - - - of the total amount
15 that was due. It indicated that it could choose to pay off
16 the loan.

17 CHIEF JUDGE WILSON: Well, but does it give any
18 other option? We'll send it to debt collection, otherwise,
19 for the whole amount. It doesn't say you can pay an
20 installment.

21 MR. ROBBIN: But it doesn't say that - - -

22 CHIEF JUDGE WILSON: You can't? I think it does.

23 MR. ROBBIN: It does. But it also - - - it
24 doesn't say that we are - - - that there's no indication of
25 a future foreclosure action, there's no indication of - - -

1 it simply says you're in foreclosure. This is how much is
2 owed, and - - -

3 CHIEF JUDGE WILSON: Okay.

4 MR. ROBBIN: - - - thereafter, a discontinuance
5 was filed, which said - - - which, as this court has made
6 clear, that equates to a deacceleration.

7 JUDGE SINGAS: When was that done?

8 MR. ROBBIN: The - - - the discontinuance?

9 JUDGE SINGAS: Yeah.

10 MR. ROBBIN: That was done in 2022. I believe -
11 - -

12 JUDGE SINGAS: Is it more than - - -

13 MR. ROBBIN: - - - it was - - -

14 JUDGE SINGAS: - - - six years?

15 MR. ROBBIN: - - - it was - - - it was more than
16 six years after.

17 JUDGE SINGAS: So aren't you out of the box there
18 too?

19 MR. ROBBIN: No. Because the court in Engel did
20 not say that the - - - that the deacceleration had to be
21 done within six years. I think that would be reading too
22 much into that court's - - - unfortunately, case - - -
23 foreclosure cases in New York take longer than six years.

24 JUDGE RIVERA: I'm a little confused. I thought
25 that the deacceleration was the attempt to stop - - - stop

1 the statutory time limit. Have I misunderstood?

2 MR. ROBBIN: But the deacceleration brings it
3 back to zero, that was what the court in Engel said.
4 Deacceleration is - - - make - - - annuls any actions.

5 JUDGE RIVERA: Yes. But that - - -

6 MR. ROBBIN: It's as if no - - -

7 JUDGE RIVERA: - - - getting - - - getting to
8 zero only has meaning if you've actually stopped the prior
9 clock.

10 MR. ROBBIN: Correct.

11 JUDGE RIVERA: Otherwise, it doesn't matter.

12 MR. ROBBIN: Correct. But if it - - - if - - -
13 if - - - if it annuls an action as if no actions have ever
14 been taken, it doesn't matter if it's done within six years
15 or not because no action was ever taken to begin with. The
16 - - - the - - -

17 JUDGE RIVERA: I don't think one - - - I don't
18 think one would call it a deacceleration when it's a
19 nullification, but okay.

20 MR. ROBBIN: Well, no, no, but I'm - - - I'm
21 talking about the discontinuance now, not the - - -

22 JUDGE RIVERA: Yes.

23 MR. ROBBIN: - - - not the nullification.

24 JUDGE RIVERA: I see.

25 MR. ROBBIN: So what I said is that either the

1 action that was started was a - - - was a nullity to begin
2 with because it was started by a party without - - -

3 JUDGE RIVERA: Okay.

4 MR. ROBBIN: - - - or if Your Honors takes the
5 position that the letter accelerated, there was a
6 deacceleration when - - - in 2022 prior to the passage of
7 FAPA when the notice of discont - - - stipulation of
8 discontinuance, which I emphasize is different than the
9 notice of discontinuance in Engel, because in that case, it
10 is - - - in this case, it is not a unilateral
11 discontinuance. It is a joint discontinuance. The parties
12 agreed to discontinue. And the reason the parties agreed
13 to discontinue in this particular case, the 2009 action, as
14 compared to a notice of discontinuance was because it was
15 determined that that plaintiff lacked standing. And so the
16 parties went ahead. They stipulated to it. Both parties
17 signed the stipulation, and then, actually, went a step
18 further and got the court to so order that stipulation.

19 CHIEF JUDGE WILSON: Right. But my - - - my
20 issue is that (4)(a), which, I think, is what you're
21 turning to, applies only to accelerations that happen
22 because of the initiation of a foreclosure action. And if
23 we think that there's an acceleration here that was
24 initiated by the letter, I don't see that you - - - the
25 stipulation matters.

1 MR. ROBBIN: Well, I would - - - I would argue
2 that a - - - a - - - that the - - - the overt act still
3 would be undone by the stipulation of discontinuance, which
4 says that we are bringing this back to zero. That was the
5 intent of the stipulation of discontinuance.

6 CHIEF JUDGE WILSON: But the wording of the
7 stipulation of discontinuance, I think, is also framed in
8 terms of a foreclosure action, not a letter.

9 MR. ROBBIN: Understood. Regardless, a new
10 foreclosure action in our case was started prior to the
11 passage of FAPA. So this goes to the questioning as to the
12 timing that you were asking prior counsel on. And what's
13 important with the - - - with the retroactivity and the
14 question as to timing is that this court has consistently
15 held in Chu and in other cases that parties should be
16 allowed to rely on the law that is in effect at the time it
17 does its actions.

18 JUDGE SINGAS: Well, what is the vested right?
19 How would you define the vested right or rights that you're
20 now - - - yeah.

21 MR. ROBBIN: Our vested rights would be twofold.
22 One, we have the property interest right in the - - - in
23 the mortgage contract, but we also have a vested right the
24 moment we bring that litigation the - - -

25 JUDGE HALLIGAN: In what?

1 MR. ROBBIN: In the fore - - - in the litigation,
2 in the actual foreclosure action.

3 JUDGE CANNATARO: You have a vested right in
4 litigation?

5 MR. ROBBIN: Yes. Your - - - the - - - this
6 court held so in 1832.

7 JUDGE CANNATARO: Oh, wow.

8 MR. ROBBIN: In the - - -

9 JUDGE CANNATARO: I guess I wasn't there.

10 JUDGE SINGAS: He wasn't paying attention.

11 MR. ROBBIN: Nor - - - nor was I. Nor was I,
12 Your Honor. But it said it's a general rule, yada, yada,
13 yada. It says - - -

14 JUDGE RIVERA: That's the part we're going to
15 quote, that yada, yada, yada.

16 MR. ROBBIN: No, no, no.

17 JUDGE RIVERA: Just so you know.

18 MR. ROBBIN: It may have such retrospect, but not
19 to take away a right of action which the plaintiff was
20 entitled to before the time of its commencement. So before
21 the time of the statute's commencement - - - commencement,
22 we were entitled to bring a new foreclosure action. FAPA
23 cannot take that right away.

24 JUDGE SINGAS: Now, what are you basing that on?
25 What's your authority for - - - you were able to do that?

1 MR. ROBBIN: That we're able to bring the action?

2 JUDGE SINGAS: Yeah, to bring the action.

3 MR. ROBBIN: The - - -

4 JUDGE SINGAS: Are you - - - are you talking
5 about the law before Engel?

6 MR. ROBBIN: I'm talk - - - the law - - - yes.
7 The - - - the law - - -

8 JUDGE SINGAS: Okay.

9 MR. ROBBIN: - - - has - - - has been the law in
10 this country - - - or in this state - - - excuse me - - -
11 for over a hundred years. The law before Engel was the
12 same as the law after Engel. Engel did not make new law.
13 Engel reaffirmed the law.

14 JUDGE SINGAS: Okay.

15 MR. ROBBIN: Engel was clear on that. Engel was
16 clear that the law had been that way since the Loeb case,
17 since Albertina for centuries.

18 JUDGE SINGAS: Well, I might read Engel a little
19 differently because I know - - - I think we said in Engel
20 that no clear rule had emerged before, but okay. Go ahead.

21 MR. ROBBIN: You said in - - - respectfully, you
22 said in Engel that no clear rule as to what constituted a
23 deacceleration, not that it could not be deaccelerated.
24 And what you said is that you had never looked at whether a
25 notice of discontinuance constituted a deacceleration. And

1 that you determined that a notice of discontinuance did in
2 fact constitute a deacceleration. And so that's the
3 distinction.

4 Back to the question as to the vested right, we
5 had it as soon - - - all of the actions in this case, every
6 single thing that took place took place before FAPA.
7 Applying FAPA to undo what my client, the appellant, relied
8 on - - -

9 JUDGE HALLIGAN: That's not - - - that's not in -
10 - - that's not inviolate though, right? Isn't that - - -
11 that - - - to the extent - - - you're saying that you had a
12 vested right in the action?

13 MR. ROBBIN: Yes.

14 JUDGE HALLIGAN: Right? And - - - and if that
15 were to be correct, even then that right wouldn't be
16 inviolate, would it?

17 MR. ROBBIN: It wouldn't it be what?

18 JUDGE HALLIGAN: The legislature could adopt a
19 statute that would have retroactive effect that might
20 impact the extent of your right, and then it would be
21 subject to some scrutiny. But - - - but are - - - are you
22 arguing that the legislature lacks all power?

23 MR. ROBBIN: I am not - - - the - - - the
24 legislature can do what it - - - what - - - what it sees
25 fit. But it's this court's job to make sure it doesn't

1 extend its power. And I think it goes beyond what it can
2 do in it - - - when it retroactively removes a - - -

3 JUDGE HALLIGAN: Okay. But - - -

4 MR. ROBBIN: - - - vested right. And it - - -

5 JUDGE HALLIGAN: But retro - - - retroactivity is
6 - - - is permissible but needs to meet certain standards.
7 Would you agree with that?

8 MR. ROBBIN: Yes.

9 JUDGE HALLIGAN: Okay. And so why is it that
10 that would not be satisfied here? Because I took you to be
11 saying that the legislature simply could not act at all.
12 And I - - - it - - - it strikes me that perhaps the
13 question is a little bit different, which is, you know, if
14 - - - if we were to agree that you had some vested right,
15 was it impermissibly impaired?

16 MR. ROBBIN: Yeah. And - - - and the law - - -
17 my understanding - - - and again - - - is that it's
18 unconstitutional, whereas here, it deprives one of this
19 right retroactively. A statute, it can't - - - cannot take
20 away its vest - - - a vested right in any situation. I - -
21 -

22 JUDGE TROUTMAN: And again, what's the vested
23 right that was taken away here?

24 MR. ROBBIN: So in here in our - - - in - - - in
25 our case, it's two things. One, it's the property right

1 that we have via the mortgage. But it's also the
2 litigation that's pending, the prior action that we filed
3 before the filing - - - before the passage of FAPA.

4 JUDGE SINGAS: Was that the 2022 litigation?

5 MR. ROBBIN: The 2022 litigation.

6 JUDGE SINGAS: But wasn't it untimely in 2022
7 because - - -

8 MR. ROBBIN: No.

9 JUDGE SINGAS: - - - more than six years had
10 passed since Bank of New York had filed theirs?

11 MR. ROBBIN: No. It was - - -

12 JUDGE SINGAS: Why not?

13 MR. ROBBIN: Because Bank of New York was not a -
14 - - if - - - if - - - if - - - if we just take FAPA off the
15 board, Bank of New York was not a part - - - was not the
16 proper party. We would have the ability - - - and again, a
17 court could theoretically still find that Bank of New York
18 was the proper party, and they had the authority to
19 accelerate, and therefore, our action is time barred. But
20 both lower court and the Appellate Division determined that
21 we were unable to establish - - - or not we - - - excuse me
22 - - - Bank of New York was unable to establish its standing
23 to - - - to foreclose. And it was not the proper party.
24 Therefore, when it was discontinued, it was discontinued
25 because it was not the proper party. If it was not the



1 proper party - - -

2 JUDGE SINGAS: Well, did they - - - did they make
3 an explicit finding, or didn't they just say, we can't make
4 a finding at this point, and we need more evidentiary
5 evidence, so go back and figure it out?

6 MR. ROBBIN: They did - - - yeah, it - - -

7 JUDGE SINGAS: Right. That's very different than
8 a finding.

9 MR. ROBBIN: But at the time, it did not need an
10 explicit finding. When the - - - when that decision was
11 made in 2022, there was no requirement that it be an
12 explicit finding. We would have been able to argue it
13 every day of the week, it does - - - it - - - it - - -

14 JUDGE SINGAS: Well, you're arguing now that
15 there was a finding that they didn't have standing, and I'm
16 just saying there wasn't a finding that they didn't have
17 standing.

18 MR. ROBBIN: Well, there was a finding that they
19 weren't able to prove standing, which I understand is a - -
20 - I understand there is a distinction there, but there
21 still was that finding. And to say you should have argued
22 - - - you should have - - -

23 CHIEF JUDGE WILSON: That was on - - - that was
24 on a motion for summary judgment?

25 MR. ROBBIN: Yes.

1 CHIEF JUDGE WILSON: We don't usually think of
2 those as findings, right? We think of those as absence of
3 proof to meet the summary judgment standard. But that
4 means there's issues to be tried.

5 MR. ROBBIN: Correct. And again, not to say that
6 - - - the problem is, we will never, because of FAPA, even
7 be allowed to argue that anymore. Had it - - - when - - -
8 when we made the decision not to litigate the case, it was
9 because at that time, the rule was, you could bring it up
10 with the proper party. FAPA has stripped that right away
11 from us because now it says, no, you can't even raise that.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. ROBBIN: Thank you.

14 MR. CURTIS: May it please the court. Tom
15 Curtis, for Patti Van Dyke. I'm going to address one issue
16 first. And that has to do with the decisions of the courts
17 below on summary judgment. It's not just two decisions
18 that denied the BNY summary judgment. It was my motion as
19 well asking for summary judgment to dismiss the case on the
20 lack of standing, which was denied by the court below in
21 Bronx Supreme and the First Department.

22 The First Department decision on that issue is
23 law of the case. There was no decision denying or no
24 decision holding that BNY did not have standing. It was
25 reserved for trial. And this is the false narrative that

1 runs through appellant's papers because it's absolutely
2 untrue. It is hornbook law that a motion that's denied on
3 summary judgment reserves the issue for trial.

4 Now, that means also that the action could only
5 be annulled had there been a dismissal on the merits of
6 that case, that is, that there was no standing. Otherwise,
7 there's nothing to annul, okay? You can't withdraw
8 something that didn't happen in the first place. So either
9 they are still the - - - that is, it's been decided that
10 BNY had the opportunity at trial to show that it had
11 standing. And the fact of the matter is, and I know this
12 from the history of the case since 2009, BNY had a problem
13 with that issue in the first place. The - - - the note was
14 not attached to the complaint in the BNY action. And
15 that's the first tip-off to a lawyer.

16 Now, I will say that I'm in favor of borrowers
17 paying their lender. But that's not what this is about
18 here. This is about a lawyer's duty to a client to expose
19 a bad case. And in fact, when there is a bad case, a
20 lawyer is supposed to deal with that in an appropriate way,
21 which is, raise the defense. It's an affirmative defense.

22 So now, when that defense was raised, BNY was on
23 notice that they had an issue. They moved for summary
24 judgment in 2014, and they lost. And it's quite clear what
25 the terms of losing were. They failed to annex the

1 documents which supported the affidavit. And the affidavit
2 was as wishy-washy as you could get. They were given an
3 opportunity to come back.

4 At that time, we had already tried to settle the
5 case several times without effect. And because I knew
6 there was a flaw here, they could have easily withdrawn the
7 case at that time within the statute of limitations,
8 refiled, and my client would have been on the hook for the
9 whole mortgage. There's no question about that. The
10 lawyers screwed up here. They sat on their butts and did
11 nothing.

12 JUDGE SINGAS: So by 2022, it's your position - -
13 - here.

14 MR. CURTIS: I'm - - - I'm sorry?

15 JUDGE SINGAS: Right here, Counsel. So by 2022,
16 it's your position that they're out of luck and out of
17 time?

18 MR. CURTIS: I'm - - - I'm sorry. I'm not
19 understanding you.

20 JUDGE SINGAS: So by 2022, when they're bringing
21 the foreclosure action, it's your position that it's
22 completely untimely?

23 MR. CURTIS: Not only is that completely
24 untimely, but they lie like hell in that foreclosure
25 complaint because they claimed that my client - - -

1 JUDGE SINGAS: Right. Well - - -

2 MR. CURTIS: - - - stopped paying in 2018, when
3 we all know she stopped paying in 2009.

4 JUDGE RIVERA: It might not matter if it's
5 untimely.

6 MR. CURTIS: I'm sorry?

7 JUDGE RIVERA: I mean, the lies might not matter
8 if it's already untimely, right? The lies may - - -
9 whatever these lies - - - alleged lies are, do they matter
10 to the timeliness assessment?

11 MR. CURTIS: I'm - - - I'm sorry. Whatever the
12 lies - - -

13 JUDGE RIVERA: The - - - what you say are the
14 alleged lies, do they address the question of timeliness?

15 MR. CURTIS: Yes. They claim that she defaulted
16 on the loan in 2018 or it's 2016, not 2009, all right? And
17 it's a misstatement in the - - - this new foreclosure that
18 really is unfortunate in the sense that a lawyer certified
19 to the truth of the facts, which is reason for having FAPA
20 enforced because lawyers - - -

21 JUDGE GARCIA: So as I understand it, in fact,
22 your client had not been paying rent - - -

23 MR. CURTIS: I can't hear you, Your Honor.

24 JUDGE GARCIA: In fact, your client had not been
25 paying rent or mortgage payments at all since 2009?

1 MR. CURTIS: Not since 2009. Not a dime.

2 JUDGE GARCIA: And they made it seem like she
3 actually was paying?

4 MR. CURTIS: And they made it seem like she had,
5 yes.

6 JUDGE GARCIA: Okay.

7 MR. CURTIS: Yes. And so I haven't addressed
8 that. They also happened - - - they also served me instead
9 of serving her with the requisite notice on the
10 foreclosure. And I moved to dismiss on that ground. And
11 Justice Gonzalez said that the service was acceptable
12 because I was her attorney, in fact. So I mean, that was a
13 very limited motion here.

14 Let me get to what this case is really all about.
15 When I drafted this complaint, I knew there was an issue
16 that might be raised regarding the validity of the BNY
17 action. Now, the note and mortgage were assigned about
18 three weeks after the action was commenced on October 30th
19 that was assigned as a matter of record. And that
20 assignment is very careful to include the note. It's in
21 your record on appeal. And when that assignment took
22 place, BNY had the authority to do whatever it wanted to do
23 because it demo - - - demonstrably was the owner of the
24 note and mortgage.

25 CHIEF JUDGE WILSON: And that's of about - - -



1 about December, I think - - - December 1st?

2 MR. CURTIS: That was December, yes.

3 CHIEF JUDGE WILSON: Yeah.

4 MR. CURTIS: Yes. And so - - -

5 CHIEF JUDGE WILSON: And so that - - - that
6 happened - - - that's Bank of New York got the note
7 December of 2009, right? Which is before the letter - - -

8 MR. CURTIS: Correct.

9 CHIEF JUDGE WILSON: - - - that we referred to
10 was sent?

11 MR. CURTIS: Correct.

12 CHIEF JUDGE WILSON: By about nine months?

13 MR. CURTIS: By about nine months, correct. And
14 that letter was sent. And that letter is in no way, shape,
15 or form similar to the Vargas letter which you decided in
16 Engel, did not require an immediate payment of the full
17 principal and interest. That Vargas letter is in our
18 record. I think it's at page 222. I'm doing this from
19 memory. But we have a similar letter that was sent in
20 early 2009 - - - in May, I believe, of 2009, that
21 corresponds to the Vargas letter in Engel. And what it
22 does is it threatens to bring a foreclosure action in the
23 event that you don't resume payments and - - - and pay the
24 - - - pay the loan on a regular basis.

25 Now, the - - - the 2010 letter does not say that



1 at all. It demands payment of principal and interest. And
 2 it does not give an opportunity to reinstate the loan and
 3 to offer to forego a - - - an acceleration or anything, or
 4 demanding full payment because - - - because the note in
 5 mortgage, which is the contract here, does not use the word
 6 acceleration. All it uses is a demand for payment in full.

7 So this letter does not offer that exception like
 8 the Vargas letter offered. It demands payment in full, and
 9 then it does like it does for every other closing where you
 10 want a payoff statement. It says, you'll pay interest
 11 until the date you pay off the entire amount.

12 Now, this action comes here on a motion to
 13 dismiss the plaintiff's complaint. And in order to hold
 14 the complaint sufficient, you have to decide that this
 15 letter demands payment in full, okay? And then it's an
 16 unequivocal demand for payment in full.

17 Now, there's another reason to hold that it's an
 18 unequivocal demand in payment in full. It's because
 19 there's an admission against interest by U.S. Bank because
 20 we have an affidavit saying they accelerated the loan. And
 21 that affidavit is provided by senior vice president of
 22 Rushmore, who also attached an affidavit. It's in the
 23 record, showing - - - not an affidavit, an - - - a - - - a
 24 power of attorney that he was acting for U.S. Bank.

25 Now, it seems to me it's rather impossible to

1 hold that they didn't accelerate the loan and demand full
2 payment if there's an affidavit from U.S. Bank's
3 representative that that's exactly what they did. Now,
4 there's another reason for holding this letter to be an
5 effective demand for full payment.

6 Not every lender wants to foreclose. There are
7 times when a lender may decide to bring an action on the
8 note. And if he - - - you can't make this a letter that
9 demands full payment, how, under the standard Freddie Mac
10 Fannie Mae documents, do you establish that you are
11 demanding full payment if you haven't foreclosed?

12 Because I can give you a case involving Stewart
13 Title, where they brought an action in foreclosure, wanted
14 to withdraw it, and substitute a complaint instead for - -
15 - for an action on the note. And that case citation is
16 Stewart Title v. Zaitman - - - Zaltsman. It's not in my
17 brief. It was an afterthought, Second Department, 208 AD
18 3d 916.

19 JUDGE CANNATARO: Counsel, what - - - what do you
20 get at the end of a successful action on the note? Is it
21 just a judgment?

22 MR. CURTIS: You get a judgment against any asset
23 that the defendant has, which, if you have a wealthy
24 defendant and a property that's underwater, you might
25 choose to sue on the note instead of suing them on the

1 mortgage. And you have to elect your remedy here.

2 And so if you get delivery of the note and you
3 choose to do that, you still have to notify under Chap - -
4 - Article - - - it's Article 7 in the note, the standard
5 Freddie Mae - - - Fannie Mae Freddie Mac note. Article 7
6 tells them - - - the borrower that they can accelerate,
7 that is, they can demand full payment, okay? And how would
8 you do that if you don't say that this is a demand for full
9 payment? Because if you're suing on the note, you're just
10 going to sue seeking summary judgment right away without
11 all the nonsense of the foreclosure action. And you're
12 going to go after all the other assets, which is the choice
13 of the lender, so - - -

14 JUDGE SINGAS: I - - - I might regret this
15 question, but I'm looking at the letter, and it says in it,
16 this letter is in no way intended as a payoff statement for
17 your mortgage. It merely states the amount of the debt as
18 of the date of this letter.

19 MR. CURTIS: Justice - - - Judge Singas?

20 JUDGE SINGAS: Yes.

21 MR. CURTIS: That's in every closing that you go
22 to. You get a payoff letter, and it says that they're
23 going to increase the interest until the actual funds are
24 deposited by the party. So that is until it's cleared - -
25 - until cleared funds have been paid. So the interest item

1 is a moving target. And there is no way that any lender
2 would agree to accept the principal and interest to a day
3 and then forego interest until they actually receive the
4 funds.

5 So that is not a condition here that would change
6 the aspect of this letter, which is, you owe - - - you have
7 to pay us in full, okay? Because first of all, this is a
8 contract action. And under contract law, you look at the
9 terms of the contract. If it's unambiguous, then you have
10 to apply the contract as it's written.

11 Now, nowhere in that Fannie Mae Freddie Mac
12 documents does it say, if you offer to pay the due amount
13 on the due date, you're going to not have to pay interest
14 afterwards. You pay interest until the day you actually
15 make payment. So that being said, unless there are more
16 questions about this document, I would like to address the
17 FAPA issue.

18 CHIEF JUDGE WILSON: Sure. Please do.

19 MR. CURTIS: So two things. The court should
20 follow its decision in Police Benevolent Association v.
21 City of New York and Glen Oaks Village of City of New York,
22 again, v. City of New York. And there the key question
23 was, what did the legislature intend?

24 Now, you've been asked those questions before.
25 You've gone - - - gone back and forth on it. So I don't



1 want to get more into that. I want to go to some other
2 parts of this because the fact of the matter is that I
3 think you know what the legislature intended.

4 What we have here is the reality that the law - -
5 - the - - - the - - - there was no proof that they could
6 not - - - that BNY could not provide a witness who would
7 testify as to the delivery of the note prior to the
8 commencement of the action. And so at the time the
9 stipulation of discontinuance was presented for my
10 signature, I refused the first several drafts.

11 That stipulation reflects the fact only that
12 summary judgment motions were denied. That's what it says.
13 It does not in any way, shape, or form reflect anything
14 else. And it was done as an accommodation to Judge
15 Gonzalez, who didn't want to try this case because we all
16 knew that they didn't have a witness - - - a credible
17 witness to testify. And how did I know that? Because I
18 had deposed BNY's - - - that is Rushmore. And I knew from
19 the deposition that they had no witness. And that being -
20 - -

21 CHIEF JUDGE WILSON: Counsel, your time is up.
22 If you'd wrap up.

23 MR. CURTIS: Okay. So the fact of the matter is
24 that that withdrawal of the action was for the convenience
25 of the court and parties, and not to allow the - - - the -



1 - - the plaintiff to get out of a trial scot free - - - he
2 would have lost a trial, for sure, okay? So you can't look
3 at that as a nullification of the standing issue when
4 there's no proof that BNY didn't have standing. They - - -
5 had they had a witness, they would have had standing.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. CURTIS: Thank you.

8 MR. GRUBE: May it please the court. Mark Grube,
9 for the Office of the Attorney General. I'd like to
10 address a few distinct constitutional questions in this
11 case - - -

12 JUDGE HALLIGAN: Can I ask you first, Counsel,
13 what provisions of FAPA do you think are properly before us
14 in this case?

15 MR. GRUBE: I think that all of the FAPA
16 provisions are properly before you. We flagged that there
17 is an issue with - - -

18 JUDGE HALLIGAN: Right.

19 MR. GRUBE: - - - respect to foreign aid. They
20 did raise it. The courts below did address it. I think
21 the cursory nature in which they raised it below caused
22 some confusion. And so I - - - I think the courts below
23 didn't get the point that you cannot do this discontinuance
24 six year - - - more than six years after the statute of
25 limitations has run. That's not - - - that wasn't the law

1 under Engel. That wasn't the law before Engel. That
2 wasn't ever the law.

3 And I'm surprised to hear counsel take that
4 position because it would give lenders the opportunity to
5 unilaterally restart the statute of limitations at any
6 point, and then there would be no statute of limitations.

7 And notably, in Article 13, this - - - the
8 District Court addressed this issue. It was a similar
9 posture there. But there was a - - - in Article 13, the
10 first action was in 2007. It was discontinued in 2017.
11 The District Court said that that's too late to restart
12 under Engel, and the other counsel for U.S. Bank never
13 challenged that on appeal. And I - - - I think it's a
14 fairly - - - so that makes the Engel issue - - - the
15 foreign aid issue fairly straightforward as a textual
16 matter they apply to this case. And in terms of vested
17 rights, there - - - there never was any right at any point
18 in time.

19 JUDGE HALLIGAN: Why not?

20 MR. GRUBE: Because there were - - - so first of
21 all, there was no right in a common law rule. There was
22 never any common law rule that held that you could restart
23 the statute of limitations more than six years after it had
24 already run. I - - - I do want to address Kilpatrick,
25 which they talk about creating this hundred-year tradition

1 of deacceleration.

2 So in Kilpatrick, it had nothing to do with the
3 statute of limitations. And the court actually held that
4 the lender could not revoke deacceleration in that case.
5 So how this stands for a hundred-year tradition of
6 acceleration, let alone restarting the statute of
7 limitations, I don't know.

8 The statute of limitations issue did not really
9 percolate until the mortgage foreclosure crisis, where we
10 had these cases in 2007, 2009, with inadequate
11 documentation. We're getting to around six years later,
12 2013, 2015, and some clever lawyers need to figure out how
13 are we going to deal with this problem. They have a clear
14 mechanism. The General Obligations Law since the 1960s has
15 provided a mechanism for restarting the statute of
16 limitations.

17 They chose not to pursue that clear rule, and
18 they took the risk that we can unilaterally deaccelerate
19 and claim that that restarts the statute of limitations.
20 And the fact that they took their risk on a contested point
21 of law, that does not give rise to a constitutional right
22 or a constitutional injury.

23 I do want to address the timing question that I
24 didn't get to in Article 13 because I think there's some
25 confusion about what point in time this court looks to as

1 to whether there is a constitutional right. So we have a
2 contracts clause claim in this case. So that's pretty
3 clear. The court looks to when the parties executed the
4 contract.

5 And as for the due process question, the United
6 States Supreme Court has said that the court looks to,
7 would appellant's conduct have been different if it had
8 known the rule in advance? So we're not talking about when
9 you file a complaint, hoping that the law will stay the
10 same, otherwise, you can never have retroactive
11 legislation. Rather, we're talking about when they acted.

12 So with respect to Section 7, when the initial
13 representation was made to the court, was there a
14 reasonable belief that they could disavow that at a later
15 point in time, or with respect to Engel and Section 4 and
16 8, when the discontinuance was made often in 2013, 2015,
17 could they have relied on that? Here, the discontinuance
18 was in 2022 and has a distinct problem that it was just
19 already too late. But that - - - that's sort of the - - -
20 the substantive due process issue. I would like to - - -

21 JUDGE SINGAS: But why aren't they entitled to a
22 grace period?

23 MR. GRUBE: Sure. So the grace period applies in
24 Brothers v. Florence, when the statute of limitations was
25 changed from, say, six to three years. So if you're

1 somewhere in this period between three and six years, you
2 didn't have a chance to file a timely claim. And the court
3 said, we will give you a grace period. Here, we are
4 talking about defaults from 2007, 2009. There's been ample
5 opportunity for banks to foreclose and participate. And
6 they've had ample incentive to do so since they haven't
7 been paid on the note since 2007, 2009. And so there's no
8 need for an additional grace period beyond the already
9 years the - - -

10 JUDGE SINGAS: Well, suppose they had - - - they
11 had filed suit within a six period just hypothetically.
12 Would they be entitled to a grace period then?

13 MR. GRUBE: Well, that - - - that - - - that
14 situation is unlikely to happen because before 2021, there
15 was no reasonable reliance on the Engel rule. As Your
16 Honor noted, no clear rule had emerged at that time. And
17 so for cases after Engel, perhaps there would be a
18 different analysis. But I'm not really aware of many cases
19 because Engel happened in 2021. So if you go back six
20 years, it would be 2015 or later that somebody could
21 theoretically have relied on the Engel rule. But by that
22 time, you already had the certificate of merit requirement.

23 We've already solved a lot of these problems. So
24 these problems are really reaching far back in time, where
25 there was no clear rule, and they've had ample time and

1 don't need a grace period. I'd be happy to briefly address
2 the contracts clause claim, but I know my red light is on,
3 so - - -

4 CHIEF JUDGE WILSON: Why don't you take a minute?

5 MR. GRUBE: Okay. So on the contracts clause,
6 first of all, the question is whether there's an express
7 term. There is not. The only deacceleration term is that
8 the borrower can reinstate the loan under certain
9 conditions, but there's no provision for the lender.

10 Then the question of whether there's an implied
11 right, I think this is important because federal courts
12 look to this court's guidance on this question. The U.S.
13 Supreme Court has said that, while federal courts analyze
14 it on their own, background principles of state contract
15 law, we will defer to the state high court.

16 And so there's no implied right here because, as
17 we've discussed, the - - - there was no settled rule at
18 that time. And what's - - - an implied right looks to - -
19 - and - - - and I don't want to go too far, but I - - - I
20 just want to talk about a seminal Supreme Court case on
21 this looked at negotiations between General Motors and the
22 Labor Union. And the court was looking at, these are hard-
23 fought negotiations between the parties, and was looking at
24 if there's a background principle of state statutory law,
25 does that take that issue off the table and affect the back

1 and forth of the negotiation?

2 And this context is the complete opposite. These
3 are form contracts that are take it or leave it agreements
4 purposely so that they can be sold. And so there's no
5 back-and-forth negotiations. So there's no implied right.

6 And just finally, the court has recognized that
7 when the state is not a party to the contract, we're
8 talking about contracts between two private parties, that
9 there's a lot of deference to the legislature in terms of
10 whether it's - - - it's a legitimate purpose and rational
11 goals. And for the reasons I've talked about with respect
12 to the due process analysis, the tailoring analysis under
13 the contracts clause is the same. So unless there's any
14 further questions, we ask that you reject the
15 constitutional challenges to FAPA.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. ROBBIN: The AG's Office just talked about,
18 would the conduct have been different had the parties known
19 the law. And respondent's counsel made very clear that the
20 very reason for the discontinuance in the 2009 action was
21 because the judge knew that it - - - that BNY could not
22 establish its standing. Had we known at that time that we
23 later could not make that argument, we would have wasted
24 the judicial resources and litigated to the fact that BNY
25 can't. We didn't know that legislature months - - - or

1 months later would pass a law that says, now you can no
2 longer argue, despite the fact that respondent argued for
3 years - - -

4 CHIEF JUDGE WILSON: I'm not sure what you meant
5 by waste judicial resources.

6 MR. ROBBIN: Well, because, as Judge Gonzalez
7 made clear, she didn't want to litigate a case that she
8 knew BNY couldn't prove.

9 CHIEF JUDGE WILSON: Well, I guess more to the
10 point is whether you knew you couldn't prove.

11 MR. ROBBIN: Well, we knew we couldn't prove it
12 too. So that's why we stipulated to discontinue it. And
13 had we known at the time - - -

14 CHIEF JUDGE WILSON: Well, presumably, you knew
15 you couldn't prove it ten years before that?

16 MR. ROBBIN: No. The - - - that - - - we thought
17 that we had sufficient evidence. And the court determined
18 that that evidence was insufficient.

19 CHIEF JUDGE WILSON: And determined that still
20 when? Within the statute of limitations period?

21 MR. ROBBIN: Yes. Well, arguably - - - again, we
22 were at the behest of the judicial system and the - - - the
23 length of time that it took. So I - - - I would say it was
24 still within the period because, again, if we did not have
25 standing to begin with - - -

1 JUDGE TROUTMAN: So you're saying the process was
2 slowed because of the judicial system itself and not
3 because of decisions - - - litigation strategies that were
4 taken?

5 MR. ROBBIN: The - - - I mean, motions for
6 summary - - - yes. I mean, it takes time. Unfortunately -
7 - -

8 JUDGE TROUTMAN: But if people litigate
9 expeditiously, they can be resolved expeditiously.

10 MR. ROBBIN: At times, but un - - -
11 unfortunately, decisions also take time to get made.

12 JUDGE TROUTMAN: It doesn't take that much time
13 if people pursue the cases - - -

14 MR. ROBBIN: Under - - -

15 JUDGE TROUTMAN: - - - expeditiously.

16 JUDGE CANNATARO: I mean, you're - - - you're - -
17 -

18 MR. ROBBIN: Under - - - understood.

19 JUDGE CANNATARO: - - - you're talking about
20 thirteen years here, right?

21 MR. ROBBIN: I'm not - - - and I'm not saying it
22 took thirteen years. What I'm saying is, the process - - -
23 we - - - we - - - we let the process play out. As soon as
24 it became apparent that we were not able to establish based
25 on the law that was in effect at that time, the parties

1 made a decision to discontinue - - - discontinue the
2 action.

3 JUDGE TROUTMAN: When you say the law, do you
4 mean common law or statutory law that was in existence?

5 MR. ROBBIN: Statutory law. There was no
6 statutory law that said, zero statute - - - that said, you
7 cannot raise the argument - - - you are estopped from
8 raising an argument that a predecessor lacks standing.
9 This - - - Section 7 of FAPA codified at CPLR 213(4), that
10 is new law. That did not exist before FAPA.

11 CHIEF JUDGE WILSON: Was there law at the time
12 the suit was filed that said you had to hold the note to be
13 able to start the foreclosure action?

14 MR. ROBBIN: There was - - - yes.

15 CHIEF JUDGE WILSON: And it looks like the record
16 we have shows that you didn't have the note - - -

17 MR. ROBBIN: Not we.

18 CHIEF JUDGE WILSON: Bank of New York didn't have
19 the note.

20 MR. ROBBIN: Yeah. Bank of New York did not have
21 the note.

22 CHIEF JUDGE WILSON: Okay. So if the - - -

23 MR. ROBBIN: So then it would be - - - then - - -
24 then under this court's - - -

25 CHIEF JUDGE WILSON: Right. So I'm sorry.

1 MR. ROBBIN: - - - that it's a nullity.

2 CHIEF JUDGE WILSON: You don't have my question
3 yet.

4 MR. ROBBIN: Sorry.

5 CHIEF JUDGE WILSON: So when was it that you
6 found out that Bank of New York didn't have the note until
7 December?

8 MR. ROBBIN: I - - - I am not aware.

9 CHIEF JUDGE WILSON: Was it within the
10 limitations period?

11 MR. ROBBIN: I - - - I - - - I do not have that
12 answer - - -

13 CHIEF JUDGE WILSON: Okay.

14 MR. ROBBIN: - - - Your Honor. I - - - I
15 apologize.

16 CHIEF JUDGE WILSON: That's all right. So why
17 would - - - do you know why it was you thought you could -
18 - - you had sufficient evidence to win on summary judgment?

19 MR. ROBBIN: I believe that I - - - I was not - -
20 - I was not the attorney - - -

21 CHIEF JUDGE WILSON: Okay.

22 MR. ROBBIN: - - - at the time.

23 CHIEF JUDGE WILSON: Fine. Fair enough.

24 MR. ROBBIN: And so I - - - I - - - I defer to
25 that.

1 CHIEF JUDGE WILSON: Okay.

2 MR. ROBBIN: Regardless, applying Section 7
3 retroactively changes the calculus for my client. I
4 briefly want to discuss the letter. A couple of things.
5 It's at the record on page 118. It is an informational
6 letter that was sent by a servicer. There is - - - as - -
7 - as - - - as Justice Singas pointed out, there is no
8 demand in here for payment. There is no requirement that
9 payment be made. There is no statement of any time saying,
10 you must make this payment. There is no overt act, as this
11 court has said must be done. So - - -

12 CHIEF JUDGE WILSON: The - - -

13 MR. ROBBIN: - - - this - - - this letter - - -

14 CHIEF JUDGE WILSON: \$450,000, if you don't pay,
15 this is going to debt collection?

16 MR. ROBBIN: It - - -

17 CHIEF JUDGE WILSON: You owe this money right
18 now, overdue?

19 MR. ROBBIN: Please be advised - - - yeah. It
20 says, this is - - - this is what you owe. But it doesn't
21 say this is an overt act. There is no - - - the overt act
22 that this court - - -

23 CHIEF JUDGE WILSON: What would it - - - what
24 would it have to say? This is an overt act?

25 MR. ROBBIN: No. It would have - - - it would

1 have to say, we are seeking - - - we - - -

2 JUDGE RIVERA: What's - - -

3 MR. ROBBIN: I'm sorry.

4 JUDGE RIVERA: When you say informational, what -
5 - - what's the point of it?

6 MR. ROBBIN: What is - - - it's required - - -

7 JUDGE RIVERA: The - - - just as cited?

8 MR. ROBBIN: It's required under the Fair Debt
9 Collection Practices Act.

10 JUDGE RIVERA: But why would it be required if
11 not to let - - -

12 MR. ROBBIN: Because Ocwen - - - under 1692(g),
13 which is under the Fair Debt - - -

14 JUDGE RIVERA: I see.

15 MR. ROBBIN: - - - Debt Collection Practices Act
16 - - -

17 JUDGE RIVERA: Yes.

18 MR. ROBBIN: - - - Ocwen has to send this
19 informational letter as it is the service - - - the
20 servicer for the - - -

21 JUDGE RIVERA: But there's a purpose behind - - -
22 there's a point to - - - to the notification.

23 MR. ROBBIN: It's to provide the information to
24 the borrower.

25 JUDGE RIVERA: So they know how to act, which the



1 act is - - -

2 MR. ROBBIN: So the - - -

3 JUDGE RIVERA: - - - to pay.

4 MR. ROBBIN: The act is to pay, but that is not
5 the - - - it is not an overt act. As this court stated in
6 Engel, there had to be a specific overt act. And I take
7 the position that this is not that. Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Van Dyke v. U.S. Bank, No. 97 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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