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COURT OF APPEALS

STATE OF NEW YORK

BATAVIA TOWNHOUSES, LTD.,

Respondent,

-against-

NO. 45

COUNCIL OF CHURCHES HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Appellant.

20 Eagle Street
Albany, New York
April 21, 2022

Before:

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

Appearances:

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Colin Richilano
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. Good afternoon,
2 everyone. The first appeal on this afternoon's calendar is
3 appeal number 45, Batavia Townhouses v. The Council of
4 Churches.

5 Counsel?

6 MR. BRUECKNER: Good afternoon, Your Honor. I'm
7 Bill Brueckner with Woods Oviatt Gilman in Rochester, New
8 York and I'm here this afternoon on behalf of The Council
9 of Churches Housing Development Fund Company, Inc. I would
10 like to ask the court for the ability to reserve two
11 minutes for rebuttal, please.

12 CHIEF JUDGE DIFIORE: You may have two minutes,
13 sir.

14 MR. BRUECKNER: Thank you, Your Honor.

15 CHIEF JUDGE DIFIORE: You're welcome.

16 MR. BRUECKNER: May it please the court. In the
17 sixty years since General Obligations Law 17-105 was
18 enacted, the courts of the State of New York have continued
19 to properly analyze the reaffirmation of debt secured by a
20 mortgage under both the General Obligations Law 17-105 and
21 under General Obligations Law 17-101.

22 JUDGE WILSON: Does that depend on whether you're
23 suing on the note or suing to foreclose?

24 MR. BRUECKNER: Your Honor, it depends on whether
25 the nature of the action is to foreclose a mortgage or to



1 recover real property. We see those phrases used both in
2 17-105(1), which is the provision that provides several
3 mechanisms by which the statute of limitations can be
4 extended in that action. And we know from the supporting
5 language in 17-101 that 17-101 is applicable in all
6 instances except for the recovery of real property. So
7 yes, Your Honor. It depends on what the nature of the
8 action is.

9 JUDGE TROUTMAN: And what was the nature of the
10 action here?

11 MR. BRUECKNER: This action is an action to
12 determine the enforceability of a note and mortgage. And
13 it's important for the court to understand that as we've
14 seen through the legislative revision committee, the
15 critical distinction is that a note is a promise to repay
16 and a mortgage is the grant of an interest in real
17 property.

18 JUDGE TROUTMAN: In your briefs below, I believe
19 it's the - - - yes, with respect to - - - it says, "This
20 declaratory action is the limited partner's effort to
21 invalidate the wraparound note and mortgage and to secure
22 the partnership's ownership of the village free and clear".
23 Free and - - - doesn't that indicate we're talking about
24 the mortgage and freeing the property?

25 MR. BRUECKNER: It does, Your Honor. But there



1 are two separate aspects of what the action is attempting
2 to achieve. The first is attempting to - - - to obtain the
3 property free and clear and the second is to also
4 invalidate the note, the underlying note. And so what's
5 critical here --

6 JUDGE WILSON: But you also have a counterclaim,
7 right?

8 MR. BRUECKNER: I do not have a counterclaim.

9 JUDGE WILSON: Do not.

10 MR. BRUECKNER: We merely asserted affirmative
11 defenses and the cases in the posture of mutual motions for
12 sum - - - cross motions for summary judgment.

13 JUDGE WILSON: So you didn't ask for a
14 declaration?

15 MR. BRUECKNER: I did not ask for a declaration.

16 JUDGE WILSON: Okay.

17 MR. BRUECKNER: No.

18 JUDGE GARCIA: Forgive the basic question here,
19 but is this note a recourse loan? I mean, can you sue on
20 the note independently of the mortgage or is the mortgage
21 the only recourse, in terms of paying the debt?

22 MR. BRUECKNER: It's a nonrecourse loan to the
23 extent that it makes the partners in the partnership non -
24 - - it exculpates the partners in the partnership, but it
25 remains a liability of the maker of the note itself.



1 JUDGE GARCIA: I guess as a practical effect,
2 what does that mean? I mean, can you go after anything
3 other than the property --

4 MR. BRUECKNER: Well --

5 JUDGE GARCIA: - - - to satisfy the debt?

6 MR. BRUECKNER: The property is the primary asset
7 of the partnership.

8 JUDGE GARCIA: All right.

9 MR. BRUECKNER: But we would be able to bring an
10 action for - - - an action on the note, breached contract
11 claim and then use whatever assets were available to
12 satisfy that obligation because --

13 JUDGE WILSON: So to the extent the partnership
14 had bank accounts and where you - - - the nonrecourse
15 element wouldn't prevent you from getting that?

16 MR. BRUECKNER: That's correct, yeah.

17 Clearly, here the financial statements that were
18 provided to The Council of Churches, the creditor, on an
19 annual basis between 2012 and 2019 satisfied all of the - -
20 - all of the elements of a written acknowledgement under
21 17-101. They were in writing. They contained nothing
22 inconsistent with the -- with the intent to repay.

23 JUDGE SINGAS: Were they signed, Counselor?

24 MR. BRUECKNER: They were not signed, but they
25 don't have to be, Your Honor. Under the compelling



1 precedence across the state, we analyze the intent to
2 reaffirm debt using ordinary business understandings and
3 rules of common sense. And what we had here was a
4 transmittal letter signed by the auditor of the partnership
5 and transmitting the financial statements that referred to
6 a note and mortgage payable in the ever-increasing amount
7 of the obligation.

8 JUDGE WILSON: And - - - and --

9 JUDGE SINGAS: But this is an auditor who's
10 independent. And you're saying that satisfies the
11 requirement of conveying to the person who you owe the debt
12 --

13 MR. BRUECKNER: Again, Your Honor, we --

14 JUDGE SINGAS: - - - that it's sufficient?

15 MR. BRUECKNER: We analyze the totality of the
16 circumstances using ordinary business understandings and
17 rules of common sense.

18 JUDGE WILSON: So --

19 MR. BRUECKNER: And though the auditor mean --

20 JUDGE SINGAS: So anybody who files any
21 independent document, some financial forecast, they send it
22 over to an accountant, they send it over as part of
23 partnership paperwork without an acknowledgement, without a
24 signature, your position is that that would toll the
25 statute of limitations indefinitely?



1 MR. BRUECKNER: It would toll the statute of
2 limitations each time that reaffirmation is sent, Your
3 Honor, and transmitted. Because under all of the
4 circumstances, we can - - - we can imply the debtor's
5 intent to repay.

6 JUDGE WILSON: That's actually what I want to ask
7 about, which is that - - - it seems to me that's the
8 crucial questions, right, does it evidence some intent of
9 the debtor to repay? And the financial statements have to
10 be accurate. They have to meet, you know, general
11 accounting principles, right. And that debt is a valid
12 debt that has to be reflected in those statements until the
13 statute of limitations runs. So I'm not sure that I can -
14 - - for anything other than an attempt to comply with
15 accounting rules by listing those.

16 MR. BRUECKNER: Your Honor, if this obligor
17 didn't intend to repay, it would have instructed its
18 auditors, as of March the 2nd, 2018, six years after the
19 last payment on the other obligation, that - - - that there
20 had been an expiration of the statute of limitations and it
21 no longer had an obligation to repay.

22 JUDGE WILSON: So which would be --

23 MR. BRUECKNER: So it effectively carried for
24 another seven years beyond that is what we believe
25 indicates this obligor's intention to repay.



1 JUDGE WILSON: Well, they still have the
2 obligation until the statute runs, right? So what you
3 would really be looking for is a financial statement that
4 showed that obligation after the expiration of the
5 limitations period.

6 MR. BRUECKNER: The statute of limitations - - -
7 six years from the last payment, Your Honor --

8 JUDGE WILSON: Um-hum.

9 MR. BRUECKNER: - - - would be March 2nd, 2018.

10 JUDGE WILSON: '18.

11 MR. BRUECKNER: And there were - - - 2018 was the
12 expiration of the statute of limitations.

13 JUDGE WILSON: Right.

14 MR. BRUECKNER: There were financial statements
15 that were provided from 2012 all the way through 2019, and
16 I understand that they continue to this day.

17 JUDGE WILSON: Right. And so what I'm - - - what
18 I'm - - - in the record, the one we have that is after the
19 limitations period is the 2019 one?

20 MR. BRUECKNER: That's correct.

21 JUDGE WILSON: Okay.

22 MR. BRUECKNER: That's correct.

23 So the acknowledgements meet all of the elements
24 of the acknowledgement under 17-101. We have an implied
25 promise to repay the monetary obligation. The nonrecourse



1 element of the underlying note exculpates the partners in
2 the limited partnership, but not the partnership itself.
3 And it's our contention that there continues to be a
4 monetary obligation that can be enforced by this court.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 MR. BRUECKNER: Thank you, Your Honor.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. GORDON: May it please the court.

9 JUDGE TROUTMAN: What type of action has been
10 litigated throughout?

11 MR. GORDON: It's under RPAPL 1505, Your Honor.

12 JUDGE TROUTMAN: And if it's under the RPAPL,
13 does 101 have any place, any applicability?

14 MR. GORDON: Your Honor, our position is that it
15 does not. The - - - nothing where you're dealing with a
16 mortgage note - - - it's governed by 17-105.

17 JUDGE WILSON: What if you sued on the note only?

18 MR. GORDON: Still governed by 17-105, Your
19 Honor.

20 JUDGE WILSON: And --

21 MR. GORDON: Because it's a mortgage note.

22 JUDGE WILSON: And can you point me to somewhere
23 in the complaint where you mention real property law?

24 MR. GORDON: In the complaint, Your Honor?

25 JUDGE WILSON: Yep.



1 MR. GORDON: Not off the top of my head, but it
2 was - - - the action proceeded that way and has been
3 treated that way and is referenced that way in the
4 decisions of the courts.

5 JUDGE WILSON: So you pleaded it - - - you - - -
6 do you know how you pleaded it or are you not sure?

7 MR. GORDON: I think it was - - - it was pleaded
8 as an action for declaratory judgment, Your Honor.

9 JUDGE WILSON: With reference to the RPAPL or no?

10 MR. GORDON: With - - - with reference to the
11 enforceability of the mortgage note, Your Honor.

12 JUDGE WILSON: Okay.

13 MR. GORDON: The --

14 JUDGE RIVERA: So I'm sorry; I'm on the screen,
15 Counsel. Good afternoon. On the screen. Hi.

16 So I just want to be clear, with respect to this
17 last response. You're saying that the complaint sought a
18 declaration that the note was enforceable?

19 MR. GORDON: Well, it was unenforceable, Your
20 Honor.

21 JUDGE RIVERA: Unen - - - I'm sorry. That the -
22 - - but the reference was to the note; that the note was
23 unenforceable?

24 MR. GORDON: The mortgage and the note. It's a -
25 - - referred to as a wraparound --



1 JUDGE RIVERA: Yes.

2 MR. GORDON: - - - with the note.

3 JUDGE RIVERA: Yes, yes, yes. Unenforceable on
4 the grounds of the statute of limitations that expired?

5 MR. GORDON: That's correct, Your Honor.

6 JUDGE RIVERA: Thank you.

7 MR. GORDON: So even if this case were governed
8 by 17-101, which it's not, we would still prevail. Indeed,
9 the Supreme Court ruled that we prevailed even under
10 17-101. But this case is governed by 17-105; that is the
11 result that is dictated by clear statutory language and by
12 the explicit legislative history of 17-105. Indeed, the
13 whole purpose of the legislature enacting 17-105 in 1961
14 was to establish a bright line rule with respect to
15 mortgage notes. And under the language of 17-105, it
16 governs the tolling or revival of any mortgage note,
17 mortgage and note, regardless of the nature of the court
18 action.

19 And under 17-105, nothing less than an express
20 written promise to pay is - - - suffices to revive in --

21 JUDGE RIVERA: Counsel, can - - - I'm sorry to
22 interrupt you; I'm on the screen. Can you respond to your
23 adversary's point with respect to the back and forth with
24 the bench regarding the nonrecourse aspects of the note?
25 Right, this argument that it - - - it's the partnership



1 that remains liable and so any of the partnership's assets
2 would be subject--

3 MR. GORDON: We don't have to deal with that,
4 Your Honor.

5 JUDGE RIVERA: -- to collection.

6 JUDGE RIVERA: Okay.

7 MR. GORDON: It's a - - - it's a nonrecourse
8 note. It's a real estate deal that's dependent on the real
9 estate. And it was --

10 JUDGE RIVERA: Yeah, but what's - - - what's the
11 nonrecourse part? He's arguing, as I understand it - - - I
12 could be wrong; you'll correct me, he'll correct me - - -
13 that the nonrecourse part is - - - cannot go against the
14 individuals, but it is the partnership that stays on the
15 hook, right? What he - - - what he says, the partnership
16 is not exculpated. And if that's true, then - - - then all
17 of the assets are available; isn't that correct?

18 MR. GORDON: Well, you're - - - if - - - if that
19 were the result, Your Honor, then that would render 17-105
20 a nullity.

21 JUDGE RIVERA: How so?

22 MR. GORDON: Because if the mortgage note is
23 unenforceable, then you can't enforce it either directly or
24 indirectly.

25 JUDGE CANNATARO: Counsel, if I could ask - - -



1 it might be the same question, just a different way. Is it
2 your view that under this nonrecourse note that the only
3 collateral, the only asset that can be recovered, used to
4 satisfy the obligation, is the property or could there be
5 more than that?

6 MR. GORDON: The - - - it was a sole - - - it's
7 the sole asset of the partnership, Your Honor.

8 JUDGE WILSON: Well, the partnership does have
9 some money in a bank account, right?

10 MR. GORDON: It does currently have some money in
11 --

12 JUDGE WILSON: So really, I think the question
13 we're trying to get at is if we look at the face of the
14 note, is there something in there that says what the
15 recourse is? That does - - - does it exculpate the limited
16 partners or does it exculpate the partnership?

17 MR. GORDON: Your Honor, I honestly can't answer
18 that.

19 JUDGE WILSON: Okay. All right.

20 MR. GORDON: I will - - - I would --

21 JUDGE WILSON: We have the note, I think.

22 MR. GORDON: My apologies on that.

23 JUDGE WILSON: Could you turn to - - - just for
24 hypothetically, if we were to conclude that 17-101 applies,
25 what would your argument be?



1 MR. GORDON: Well, our argument, Your Honor, is
2 that neither the - - - the accounting statements nor the
3 tax returns constitutes an acknowledgement of the debt.
4 The Supreme Court's sole - - - held with respect to the
5 accounting statements. It didn't address the tax returns,
6 but I think the - - - the result is self-evident. You
7 know, that under the theory that's been advanced, any kind
8 of a partnership files a federal income tax return, it
9 would be acknowledging debts simply by filling that out.
10 And that cannot be the case.

11 JUDGE WILSON: Well, do you perceive a difference
12 between an acknowledgement that a debt exists during the
13 period of time it can be collected because the statute
14 hasn't run and an acknowledgement that happens after the
15 statutes run?

16 MR. GORDON: No, Your Honor, because the - - -
17 first of all, the financial statements are required by the
18 partnership agreement. The fact that there's a financial
19 statement every year is a function of the partnership
20 agreement, so it doesn't exist for any other reason.

21 JUDGE WILSON: Right. I guess let me - - - let
22 me try it this way. Would you expect that the financial
23 statement that issues after the debt is no longer able to
24 be recovered because the statute of limitations has run to
25 no longer show that as a debt?



1 MR. GORDON: No, Your Honor, I don't because the
2 - - - from an accounting perspective, you want to show - -
3 - the accountants will insist on showing stuff like that
4 without making a legal determination about whether the debt
5 is still enforceable.

6 JUDGE WILSON: Wouldn't they ordinarily at least
7 include a note?

8 MR. GORDON: I'm sorry, Your Honor?

9 JUDGE WILSON: Wouldn't they ordinarily at least
10 include a note towards the back?

11 MR. GORDON: Your Honor, in my experience, no.
12 If they - - - if they catch that, yes, but bear in mind
13 here that the controlling entity, the entity that controls
14 the partnership, that controls who's selected as the
15 accountant is, in fact, the same party that holds the
16 mortgage.

17 JUDGE WILSON: Well, no. Right? It --

18 MR. GORDON: It's - - - it's the general partner
19 --

20 JUDGE WILSON: But it's the general partner.

21 MR. GORDON: The general partner --

22 JUDGE WILSON: But it's not - - - but there is a
23 legal distinction between the partnership and the general
24 partner.

25 MR. GORDON: Of course.



1 JUDGE WILSON: They're different entities.

2 MR. GORDON: I agree with that, Your Honor.

3 JUDGE WILSON: Right.

4 MR. GORDON: But as - - - in practical terms,
5 what's done with a - - - when you bring in your accountants
6 is you flag for them issues. Now, they may spot additional
7 issue for themselves, but my point is that here, the
8 general partner has no interest in flagging this issue --

9 JUDGE WILSON: And that's --

10 MR. GORDON: - - - for the accountant.

11 JUDGE WILSON: That is really sort of what the -
12 - - not that particular issue, but the general issue of - -
13 - of the breach of fiduciary duty is what has existed in
14 the federal court that pre-existed this case, right?

15 MR. GORDON: Yes, Your Honor. There's a - - -
16 there's a fundamental conflict here. And the various
17 actions that would be said to acknowledge the note,
18 particularly after the - - - once the statute of
19 limitations run, it could be viewed as a breach fiduciary
20 of duty at the same time and therefore avoid having an
21 issue.

22 If there are no other questions, then I will
23 submit. Thank you very much.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 Counsel, your rebuttal?



1 MR. BRUECKNER: Your Honor, I think it's
2 important to address this court's precedent in *Petito v.*
3 *Piffath*. And there, we had exactly the same action that we
4 are facing in today's argument. It's an action to
5 determine the enforceability of an open mortgage. And this
6 court in 1994 applied both 17-101 and 17-105 in determining
7 whether those obligations had been - - - the statute of
8 limitations had been extended with respect to those
9 obligations.

10 JUDGE CANNATARO: Isn't *Petito* distinguishable,
11 though? There was an intervening document, specifically
12 the stipulation that resulted from the action, the
13 enforcement action.

14 MR. BRUECKNER: In fact, I don't think it's
15 distinguishable. I think we - - - we have to engage in the
16 same analysis, but come to a different result, Your Honor.
17 And the reason that I say so, there had been an initial
18 foreclosure which was resolved by a stipulation that called
19 for a payment of less than the full amount of the
20 outstanding balance on the note. And when the subsequent
21 action to determine the enforceability of the mortgage and
22 the note was brought, the plaintiff contended that that
23 stipulation, agreeing to pay a lesser amount, was
24 sufficient to toll the statute of limitations with respect
25 to both the note and the mortgage obligation. And this



1 court concluded, applying both 17-101 and 17-105 that the
2 fact that the amount was lesser than the full balance of
3 the mortgage did not include an unmistakable intent to
4 reaffirm that obligation.

5 JUDGE TROUTMAN: Isn't there just --

6 MR. BRUECKNER: So the writing was inadequate.
7 It wasn't that the analysis was different.

8 JUDGE TROUTMAN: Isn't there a distinction - - -
9 with respect to *Petito*, the reviewing court - - - there was
10 an acknowledgement under both the - - - that both sections
11 applied; that 17-01 and 17-105 because in personam and the
12 mortgage were both at play. But here, it's not - - - it's
13 disputed.

14 MR. BRUECKNER: That's right. It's disputed.
15 What - - - what the underlying action attempts to do is to
16 determine the enforceability of both the mortgage and the
17 note and the underlying obligation to pay and --

18 JUDGE TROUTMAN: But in *Petito*, there was no
19 nonrecourse.

20 MR. BRUECKNER: There was no nonrecourse element;
21 that's correct.

22 JUDGE TROUTMAN: So both avenues were available?

23 MR. BRUECKNER: That's correct.

24 JUDGE TROUTMAN: But here, it's--

25 MR. BRUECKNER: Here, the - - - the nonrecourse



1 aspect of the note relates only to the individual partners,
2 not the maker of the note itself, the partnership.

3 JUDGE TROUTMAN: Okay.

4 MR. BRUECKNER: Thank you, Your Honor.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 (Court is adjourned)

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

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of Council of Churches Housing Development Fund Company, Inc. v. Batavia Townhouses, Ltd., No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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