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COURT OF APPEALS
STATE OF NEW YORK

ARTICLE 13 LLC,
Respondent,

-against-

NO. 96

LASALLE NATIONAL 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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1 CHIEF JUDGE WILSON: First case on the calendar
2 is Article 13, LLC, v. LaSalle National Bank.

3 Counsel?

4 MR. BRODERICK: Your Honor, on behalf of
5 defendant-appellant, we'd like to reserve five minutes for
6 rebuttal.

7 CHIEF JUDGE WILSON: Five, yes.

8 MR. BRODERICK: Thank you, Judge. Your Honor, my
9 name is Patrick Broderick. I'm joined here by Steven
10 Lazar. We're from the law firm, Greenberg Traurig. And we
11 represent the defendant-appellant in a federal appeal in
12 which the United States Court of Appeals for the Second
13 Circuit has certified two questions for this court to
14 answer.

15 The first question relates to whether and to what
16 extent Section 7 of the Foreclosure Abuse Prevention Act,
17 codified at NY CPLR 213(4)(b), applied to foreclosure
18 actions commenced before the statute's enactment. Stated
19 differently, the first question relates to whether or not
20 Section 7 of what we're going to refer to as FAPA applies
21 retroactively.

22 The second question addresses whether retroactive
23 application of FAPA, Section 7, would violate the Due
24 Process Clause of the New York Constitution, Article 1,
25 Section 6.

1 Turning to the first question as to whether or
2 not Section 7 of FAPA applies retroactively, there are
3 certain general precepts that this court has - - - has
4 pronounced in prior cases, including but not limited to the
5 Regina Metro case. The first is that there is a deeply
6 rooted presumption - - -

7 CHIEF JUDGE WILSON: Well, doesn't it say what it
8 applies to? I mean, statute says it applies to all
9 foreclosure actions commenced before the statute's
10 enactment if they have not reached a final judgment of
11 foreclosure and sale, if that hasn't been enforced.

12 MR. BRODERICK: Well, then that's the question
13 then, Your Honor. What is encompassed in Section 10 when
14 they refer to actions? Is an action that was brought
15 without standing, which would traditionally be considered a
16 nullity, is that considered an action? And then - - -

17 JUDGE CANNATARO: Well, they say all actions
18 commenced. I believe that's the wording of the statute,
19 isn't it?

20 MR. BRODERICK: The wording of the statute is,
21 this act shall take effect immediately and shall apply to
22 all actions commenced on an instrument described under
23 subdivision - - -

24 JUDGE CANNATARO: There you have it, commenced.
25 I - - - I think there's a pretty common understanding of

1 what commenced means.

2 MR. BRODERICK: Well, I think that it says that
3 it's to apply immediately, which is not a retroactive. It
4 does also - - -

5 CHIEF JUDGE WILSON: Well, that's - - - that's
6 not - - - that's not enough to get you retroactivity. That
7 doesn't mean it's not retroactive, right?

8 MR. BRODERICK: Correct.

9 CHIEF JUDGE WILSON: Okay.

10 MR. BRODERICK: It's not enough by itself.

11 CHIEF JUDGE WILSON: But - - - right.

12 MR. BRODERICK: That's right. But it's not an
13 action at all. I would argue, if an - - - if an action is
14 a nullity, it's not an action at all. It's a nullity of no
15 legal effect. That's been the law in New York for a very
16 long time. In addition, it's not clear at all whether or
17 not this applies to actions that have been dismissed. And
18 I think Judge Menashi in the Second Circuit in the East
19 Fork case issued a concurring opinion drawing that
20 distinction, saying we have to look at whether or not
21 actions imply all pending actions, but does that include
22 dismissed actions? And in - - - in addition, the language
23 here in Section 10 - - -

24 CHIEF JUDGE WILSON: So just let me understand
25 your point - - - your point there. You're worried that it

1 may apply to an action that was started, has been
2 concluded, is - - - it was just by dismissal, is gone, is
3 not on the books any longer at the time that FAPA is
4 enacted, and whether it reaches back to an action that's
5 closed. That's - - -

6 MR. BRODERICK: Correct.

7 CHIEF JUDGE WILSON: That's your concern?

8 MR. BRODERICK: Yeah. That's what Section 7 is
9 addressing. The conduct complained of is relating to an
10 action from 2007. And that 2007 - - -

11 CHIEF JUDGE WILSON: I'm sorry. Not from 2 - - -
12 not just from 2007, but let's say that it was then
13 dismissed in 2008 and hasn't been active since.

14 MR. BRODERICK: Correct. In that dismissed case,
15 Judge Menashi from the Second Circuit expressed the concern
16 that that's stretching the retroactivity even further than
17 the language would - - - would apply.

18 JUDGE CANNATARO: What about if it's dismissed
19 with prejudice or without prejudice? Does that affect the
20 viability of the action?

21 MR. BRODERICK: I think what that does is, Your
22 Honor, a dismissed action as though is never brought. And
23 so with or without prejudice, our position is that a
24 dismissed action is not an action covered under Section 10.

25 JUDGE CANNATARO: Because?

1 MR. BRODERICK: Because at the time of enactment,
2 it's not an action.

3 JUDGE CANNATARO: But it was commenced. I - - -
4 I don't want to become a broken record, but it - - - it - -
5 - it - - - it did have a commencement.

6 MR. BRODERICK: It does say commenced, but it
7 doesn't say commenced at any time. It doesn't say actions
8 pending, dismissed, resolved, or otherwise disposed. And
9 under the - - - the - - - the Campagna case - - - the 35
10 Park Avenue v. Campagna case, I would argue that the
11 language there was even more leading towards a retroactive
12 interpretation.

13 CHIEF JUDGE WILSON: I'm still struggling with
14 why you care, I guess, about - - - let's say there's an
15 action started in 2007. It's dismissed in 2008. Nothing
16 has happened with it since. The - - - the statute of
17 limitations on that has run presumably, no?

18 MR. BRODERICK: No, Your Honor. Because we would
19 - - - we would maintain that that action was never an
20 action. It was a nullity. And because it was a nullity,
21 because it was brought without standing with plaintiff - -
22 -

23 CHIEF JUDGE WILSON: Regardless of why - - -
24 regardless of why it was dismissed.

25 MR. BRODERICK: Well, it wasn't dismissed on

1 those grounds.

2 CHIEF JUDGE WILSON: Okay.

3 MR. BRODERICK: It was a legal nullity from the
4 time it was filed because it was filed by an entity that
5 was not party to the contract, that was a stranger to the
6 contract, that did not have authority to bring that case.

7 CHIEF JUDGE WILSON: What - - - what - - - what
8 if - - - but what if it was an action that was filed by a
9 party that had the note, that had the right to bring it?

10 MR. BRODERICK: Totally different fact pattern,
11 Your Honor.

12 CHIEF JUDGE WILSON: Well, but does the language
13 read differently? I mean, you're - - - you're reading the
14 language as if it would apply equally to both of those
15 cases.

16 MR. BRODERICK: Well, those are two different
17 situations, right? Because if the person filing the case
18 had the note - - -

19 CHIEF JUDGE WILSON: Both were - - - both were
20 commenced.

21 MR. BRODERICK: - - - then it's - - - then it's a
22 valid action. But if it's an action brought by someone
23 without authority, it's a legal nullity. It has been a
24 nullity under New York law since the Albertina case in
25 1932. An action that's a nullity is simply not an action.



1 JUDGE SINGAS: So we have to decide the merits
2 first before we can decide if it's retroactively applied to
3 see if it was a nullity or not?

4 MR. BRODERICK: Well, I think that the - - -
5 whether it's nullity or not will be determined by the
6 federal district court after these questions are answered.
7 But the question here is whether or not FAPA can be fairly
8 read to retroactively apply and potentially find that a
9 nullity has legal effect. That's what Section 7 of FAPA
10 does. It gives legal effect to a legal nullity. That's a
11 complete change in New York law. New York law has always
12 held since 19 - - - at least since 1932 in the Albertina
13 case, that a note holder has to bring the action with a - -
14 - that holds the note, make an unequivocal, overt act to
15 accelerate a loan. Section 7 - - -

16 JUDGE RIVERA: Is it giving effect to the - - -
17 the action null - - - the null action you're talking about
18 the nullified action, or is it giving effect to the
19 representations or lack of representations in that
20 litigation?

21 MR. BRODERICK: It's - - - it's giving effect to
22 the - to the null - - - to the null action because the
23 overt act is now - - - what it used to be required, an
24 overt act by the note holder, now can be a stranger to the
25 contract and - - -

1 JUDGE TROUTMAN: Isn't part of the problem the
2 notes keep moving around to different people at different
3 times, servicers, and bank sells them to different parties?

4 MR. BRODERICK: Yes. Servicing rights change,
5 the ownership of the notes change. And I think that it
6 makes it, I think, even more egregious to read this
7 retroactively because my client - - -

8 JUDGE TROUTMAN: Egregious as to whom?

9 MR. BRODERICK: Well, to my client because my
10 client - - -

11 JUDGE TROUTMAN: But who causes these notes to
12 move around in the manner that we've just discussed?

13 MR. BRODERICK: Well, these notes get exchanged
14 as part of securitized trusts in large pools, and they move
15 back and forth in that respect. But in this case, my
16 client is being held to a statement made by a company
17 called CMC that happened to own the servicing rights at the
18 time the 2000 - - -

19 JUDGE RIVERA: So if - - - if I'm understanding
20 your argument, your position is even beyond retroactivity.
21 Your - - - your position is that the legislature could not
22 pass the statute because - - - because the action was
23 nullified. There's nothing they could have said, no way
24 they could have written this to address what they viewed as
25 their concern. I understand you have arguments about that,

1 but let's - - - let's just assume for one moment they have
2 these genuine concerns. They want to address this.
3 They're using their legislative power to do that. If I'm
4 understanding your argument, you're saying they cannot do
5 this?

6 MR. BRODERICK: I would say that there's
7 constitutional infirmities even across respective places.

8 JUDGE RIVERA: Well, that's the second point.
9 Put - - - put aside that for one moment. Well, let - - -
10 let's assume it would not violate due process. Is there
11 another way they could have written this so that they could
12 - - -

13 MR. BRODERICK: So - - -

14 JUDGE RIVERA: - - - address the concerns that it
15 appears the legislature was trying to - - - to address?

16 MR. BRODERICK: Well, I think that if you wanted
17 a retroactive application, they could have used the word
18 retroactive. That'd be number one. Number two - - -

19 JUDGE RIVERA: Okay.

20 JUDGE HALLIGAN: But I took you to be saying that
21 even if they had used that, it would not be permissible.
22 And I'm trying to understand why.

23 MR. BRODERICK: Well, because a legal nullity is
24 just that, a legal nullity. And under the contract law, we
25 don't believe that this - - - the legislature can rewrite a

1 mortgage contract such that it could give a stranger to a
2 mortgage loan contract the ability to accelerate a mortgage
3 loan contract. And that's what Section 7 does because it
4 precludes any lender from pointing out that this purported
5 acceleration was done by a party with no authority to do
6 it. And the effect of that is to rewrite the mortgage
7 contract itself.

8 JUDGE CANNATARO: Well - - -

9 MR. BRODERICK: And so - - -

10 JUDGE CANNATARO: But to get back to a question
11 that I think Judge Troutman was getting at, you talk about
12 parties who had no authority to do it. But the - - - the
13 reason - - - it seems as if, in a lot of these cases, the
14 reason why the party has no authority to do it is because
15 these mortgages are essentially, you know, investment
16 vehicles. They're financial instruments, and they are
17 passed between entities. They're bought and sold and
18 repackaged. And a person - - - an entity that might have
19 one time had the authority doesn't have the authority. And
20 a lot of times, you get statements, and I think these - - -
21 these cases are illustrative of that, where the person
22 alleges in their - - - in their papers that they are the
23 holder of the note and the entity with authority to bring
24 this action. And that's what the borrower gets. That's
25 what the mortgagee gets. So you know, whose - - - whose -

1 - - whose representation are we to rely on? Or is it
2 simply an operation of law where, if that statement happens
3 not to be true, it doesn't matter that they said that they
4 were the authorized party?

5 MR. BRODERICK: Yeah. I think it doesn't matter;
6 either the contract was accelerated under the - - -
7 properly under the - - - under the contract or it was not.
8 And so I think that the case is - - -

9 JUDGE CANNATARO: So a person could be subject to
10 numerous foreclosure actions, all brought by an entity that
11 makes representations that they have the authority to bring
12 it. But if it turns out in the fullness of time that that
13 note had been sold, it doesn't matter. It's still a
14 nullity. And I guess my question is, how is the borrower
15 supposed to know any of that?

16 MR. BRODERICK: Well, I think that, under the
17 law, the borrowers routinely challenge standing. These
18 issues are routinely litigated in courts where the
19 borrowers then - - -

20 JUDGE CANNATARO: So they have to litigate - - -

21 MR. BRODERICK: Well - - -

22 JUDGE CANNATARO: - - - to get to the truth?

23 MR. BRODERICK: True, if they're going to contest
24 foreclosure. But the point is, if it's a nullity, it's a
25 nullity regardless of what - - - who says what when.

1 JUDGE SINGAS: Doesn't the bank get notice when
2 these change hands so that you could have stepped in
3 earlier and said, this person has no standing? Is there
4 notice?

5 MR. BRODERICK: I think there probably is notice,
6 but either the lawsuit accelerated the note or it did not.
7 And if it did not, I'm not sure it matters.

8 JUDGE SINGAS: If it's a standing issue and your
9 argument is this person never had standing, I'm assuming
10 you knew that twelve years earlier; is that true?

11 MR. BRODERICK: Well, I'm not sure exactly who
12 knew what when. I know - - - do know that to your - - -

13 JUDGE TROUTMAN: Isn't that part of the problem
14 that the legislature was trying to address because of the
15 passage of time, because of the position that it puts the
16 mortgage - - - the person who owes the mortgage in, the - -
17 - there are people who leave these properties upon being
18 told it's accelerated, only to find out years later they're
19 deaccelerated. Who - - - how - - - how do you figure out
20 who's on first with all of that going on?

21 MR. BRODERICK: A - - - a couple responses.
22 First, this court in the Engel case made clear that lenders
23 don't have any incentive to bring multiple actions. All
24 that does is delay recovery. So there isn't the incentive
25 there. To your point - - -

1 CHIEF JUDGE WILSON: Well, except you're - - -
2 you're - - -

3 JUDGE TROUTMAN: But - - -

4 CHIEF JUDGE WILSON: But you're starting with a -
5 - - a - - - with a - - - a point that there are people who
6 don't even have the right to bring a suit who are bringing
7 suits. So it's kind of funny to talk about incentive in
8 that way, right? I mean, incentive - - - lenders don't
9 have incentive to bring a suit. That, presumably, is,
10 you're talking about the people who actually hold the
11 notes.

12 MR. BRODERICK: Correct.

13 CHIEF JUDGE WILSON: But we're dealing with - - -
14 the situation you're concerned about is the situation where
15 somebody doesn't have the note. How are they incentivized
16 or disincentivized?

17 MR. BRODERICK: Well, I think that the - - - the
18 - - - the remedy here by the statute doesn't get to the
19 problem, which is to say, to permit strangers to a contract
20 to accelerate that contract when they have nothing to do
21 with that contract, which is what Section 7 effectively
22 does, because we can no longer point out that the person
23 who brought that lawsuit didn't have authority, so the - -
24 -

25 CHIEF JUDGE WILSON: Would - - - would it be fair

1 to say that they're not exactly strangers to the contract?
2 They are people who, at one point in time or another, had
3 some relationship to the contract, might have been the
4 holder of the note, or might have been somebody else
5 peripherally related to - - - related to the note,
6 literally me suing on your mortgage?

7 MR. BRODERICK: Correct. But if you read Section
8 7, if you sued on - - - sued me on my mortgage, that's
9 going to be considered an accelerating event going forward.

10 CHIEF JUDGE WILSON: Right.

11 MR. BRODERICK: Because that's the problem with
12 Section 7.

13 JUDGE HALLIGAN: So - - -

14 MR. BRODERICK: It goes way beyond what would be
15 necessary to remedy the problem that's being discussed.

16 JUDGE HALLIGAN: You - - - you say in your brief
17 that we could find that Section 7 applies retroactively. I
18 understand you take - - - take the position it doesn't, but
19 nonetheless refuse to give legal effect to lawsuits that
20 you would describe as long-considered nullities. And - - -
21 and I'm not sure why that is. I - - - I - - - I see that
22 you're relying on Judge Menashi's concurrence in East Fork,
23 but that, to me, is a - - - is a textual question that he's
24 raising there. Are you saying that we can't? And - - -
25 and if so, what's the barrier? Or that you wouldn't read

1 Section 7 that way as a - - - as a textual matter and a
2 matter of statutory interpretation?

3 MR. BRODERICK: Well, I think that Judge
4 Menashi's point was that FAPA can be applied retroactively
5 in the sense that it's applying to mortgage loan contracts
6 - - -

7 JUDGE HALLIGAN: Yeah. Right. I - - - I - - - I
8 take - - -

9 MR. BRODERICK: - - - that were existent long ago
10 - - -

11 JUDGE HALLIGAN: I - - -

12 MR. BRODERICK: - - - but not to cases that have
13 been dismissed.

14 JUDGE HALLIGAN: But I - - - I - - -

15 MR. BRODERICK: That's stretching the statutory
16 language too far.

17 JUDGE HALLIGAN: I take him to be saying there
18 are different ways to read the statute. And that's a
19 textual question, right? And I understand you're
20 endorsing, should we think there's any retroactive effect,
21 his reading. But what I'm asking you is, I - - - I thought
22 I heard you also say that we could not read it that way.
23 And I'm trying to understand why - - - what that barrier
24 would be.

25 MR. BRODERICK: Well, the barrier would be long-

1 standing New York contract law that requires a note holder
2 to accelerate the loan. And to the extent - - -

3 JUDGE HALLIGAN: The - - - the legislature - - -

4 MR. BRODERICK: - - - Section 7 changes that - -

5 -

6 JUDGE HALLIGAN: I know your light's on, but the
7 legislature can change long-standing law. It's not barred
8 from doing that.

9 MR. BRODERICK: So that's totally correct, Judge.
10 But when it comes to retroactive legislation, there has to
11 be much more clear legislative intent expressed in the
12 statutory language, and it can't run afoul of the due
13 process clause.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. FILOSA: Good afternoon, Your Honors. May it
16 please the court. Anthony R. Filosa, on behalf of
17 respondent, Article 13, LLC.

18 JUDGE GARCIA: So Counsel, could you start with
19 the retroactivity language in the statute and explain how
20 you believe it applies here?

21 MR. FILOSA: Certainly. I think starting with
22 the text itself, which is always the starting point with
23 the question of statutory construction, we have the
24 language, shall take effect immediately and shall apply to
25 all actions commenced on an instrument, a - - - a mortgage,

1 in which a final judgment of foreclosure and sale has not
2 been enforced. So to deprive retroactivity would
3 effectively render superfluous - - -

4 JUDGE GARCIA: So what does this apply to? What
5 kinds of actions does this apply to?

6 MR. FILOSA: It certainly applies to where you
7 have action, number one, which, as long as it has not been
8 at - - - as long as action, number one, was not dismissed
9 on the basis of an express judicial determination - - -

10 JUDGE GARCIA: That's the language - - -

11 MR. FILOSA: - - - that the loan was not validly
12 accelerated - - -

13 JUDGE GARCIA: That seems to be the language of
14 the statute itself.

15 MR. FILOSA: Sure.

16 JUDGE GARCIA: Right? To me, when I read this
17 language, it's just talking about your action, right?
18 Like, your action was commenced, and it hasn't gone to
19 foreclosure. Why isn't it referring to that?

20 MR. FILOSA: Well, again - - - again, if we - - -
21 if we read Section 10 in conjunction with Section 7, as we
22 must, right? Section 7 imposes an estoppel.

23 JUDGE GARCIA: Right.

24 MR. FILOSA: Well, we necessarily have to look
25 backwards for an estoppel, right? Because what's the

1 definition of estoppel? It's - - -

2 JUDGE GARCIA: But that applies in your case.
3 That effect applies in your case, but it has nothing to do
4 with anything that went on - - - it has nothing to do with
5 that prior action, right? Other than the fact that it was
6 brought and you can't use it in your action, right?

7 MR. FILOSA: Well, no. We necessarily have to
8 look backwards because, again, to - - - the operation of
9 Section 7 stops a lender in a - - -

10 JUDGE GARCIA: Right.

11 MR. FILOSA: - - - second action from disavowing
12 an acceleration event that occurred in a prior action.

13 JUDGE GARCIA: But I believe that effect - - -
14 that clause applies in any action that's ongoing that
15 hasn't gotten to foreclosure yet. Why isn't that the
16 reading of this law?

17 MR. FILOSA: Well, because, again, if - - -
18 looking at the legislative intent, if the intent was to
19 curb the abuse of successive foreclosure actions that are
20 commenced outside of the statute of limitations, that's
21 what we have here. We have, essentially, this revolving
22 door. The - - - the legislature can define certain
23 practices as litigation abuse - - -

24 JUDGE GARCIA: But it would still apply in your
25 action.



1 MR. FILOSA: Right.

2 JUDGE GARCIA: Right? So what's the difference?

3 MR. FILOSA: Well, again - - -

4 JUDGE GARCIA: If I read it as saying, this
5 Section 7 applies in any action that hasn't gone to
6 foreclosure yet, your action hasn't gone to foreclosure
7 yet, it applies.

8 MR. FILOSA: Correct.

9 JUDGE GARCIA: So what - - - are we arguing or
10 are we agreeing?

11 MR. FILOSA: No. I think we - - - we necessarily
12 agree. We agree in that respect that, yes, it does apply
13 to this - - - to this action.

14 JUDGE CANNATARO: Yeah. But your - - - your
15 insinuation is that it's much broader, I think. It's not
16 just the action. It's not your action.

17 MR. FILOSA: Correct.

18 JUDGE CANNATARO: It's every action that touches
19 your action that was commenced all the way to the beginning
20 of time.

21 MR. FILOSA: Correct.

22 JUDGE CANNATARO: That didn't go to a final
23 judgment.

24 JUDGE GARCIA: And how does that change my rule?

25 MR. FILOSA: Well, again, because I think when we

1 read Section 7 and Section 10 in conjunction, we
2 necessarily have to do that in order to reach the
3 legislative aim of curbing the successive foreclosure
4 actions brought about - - -

5 JUDGE GARCIA: But - - - but how does Judge
6 Cannataro's rule differ from my rule in effect?

7 MR. FILOSA: I would say that, again, since in -
8 - - it's an estoppel provision and the language is
9 unqualified, it shall apply to all actions in which a
10 judgment has not been enforced.

11 JUDGE GARCIA: Like yours?

12 MR. FILOSA: Which is my action, correct.

13 JUDGE GARCIA: What additional thing do you get
14 by reading it broader than that?

15 MR. FILOSA: It effectuates the intent of the
16 legislature. That's why.

17 JUDGE GARCIA: No, but what's the difference?
18 What do you get that's added from - - -

19 MR. FILOSA: It - - -

20 JUDGE GARCIA: - - - my definition?

21 MR. FILOSA: Well, again, I think that it - - - I
22 don't know if that's - - - necessarily know if that's the
23 calculus, if what the legislature intended here when we
24 look at the Gleason factors - - -

25 JUDGE GARCIA: It seems to me what the

1 legislature intended was, you have an action. It hasn't
2 gone to foreclosure yet. And so you get the benefit of
3 Section 7, any action that's ongoing, if you've already
4 gotten a foreclosure and sale, then you're out of luck.
5 But if you haven't, I think, to me, I read this provision
6 as kind of cutting off the argument that we've already got
7 a judgment. We're on appeal, and you know, too late. This
8 provision is too late for you. That's how I read that
9 provision. So you - - - if you had a case where you were
10 in the same situation, you had lost, you were on appeal to
11 the Appellate Division, and you want to invoke this now new
12 statute, they couldn't interpose this as a defense because
13 you haven't gone to foreclosure yet. Otherwise, what's the
14 language that hasn't gone to final judgment in foreclosure
15 and sale because a prior judgment that's gone to
16 foreclosure and sale, I don't think it's going to get
17 undone, right?

18 MR. FILOSA: Well, I think it's drawing the line
19 of, here, the enforcement of a judgment of foreclosure and
20 sale under our law is typically recognized as the sale of
21 the property. So under - - -

22 JUDGE GARCIA: Yes. But how does that apply to
23 any action other than yours in this chain? Let's say
24 there's two prior actions.

25 MR. FILOSA: No. I guess, it could - - - it

1 could apply even if you have an action where there is a
2 judgment but that judgment has not been enforced, I would
3 submit, under the plain language of Section - - - Section
4 10, that the estoppel provision would apply because
5 enforcement is demarcated by the gavel falling at the
6 auction.

7 CHIEF JUDGE WILSON: So let me - - - you
8 mentioned estoppel a few times, and I wanted to probe the
9 legislature's use of that language. It's not - - - they
10 could have said bar or some word like that, but instead
11 they said estopped. And my understanding of estoppel is it
12 is a doctrine that is based on one party having engaged in
13 some conduct that essentially estops that party from
14 asserting a right. But it requires counterparties, right?

15 MR. FILOSA: Correct.

16 CHIEF JUDGE WILSON: So how does - - - how - - -
17 if we read estoppel that way, how does that deal on - - -
18 with counsel's concern, that is, I foreclosed on his
19 mortgage, and I have no right to do that. Can I - - - can
20 - - - is there actually an estoppel that can work there?
21 When - - - when the actual bank goes to the actual borrower
22 and I'm - - - I'm a true stranger, that's an unusual use of
23 estoppel.

24 MR. FILOSA: Right. Well, I want to stress that
25 we're not dealing with, as - - - as Your Honor indicated

1 here, a true stranger, right? We're not dealing with a - -
2 - a fraudster.

3 CHIEF JUDGE WILSON: I understand.

4 MR. FILOSA: I understood your hypothetical to
5 deal with a - - - a fraudster. So here, just taking into
6 the facts of the case, a - - - a stranger here is an - - -
7 is an overstatement. They admitted that CMC was their own
8 servicing agent.

9 CHIEF JUDGE WILSON: Well, but try to - - - try
10 to answer my question.

11 MR. FILOSA: I would say - - - say - - - and even
12 in that instance, one, there could be an issue of laches,
13 where you have someone who is a true stranger. Because
14 let's keep in mind, in order for your - - -

15 CHIEF JUDGE WILSON: Okay. But - - - but they -
16 - -

17 MR. FILOSA: - - - your hypothetical to come into
18 play - - -

19 CHIEF JUDGE WILSON: They used - - - they used
20 estoppel - - -

21 MR. FILOSA: Right

22 CHIEF JUDGE WILSON: - - - when focusing this
23 side, they choose - - - chose to use the word estoppel
24 instead of bar or some - - - foreclose or something - - -

25 MR. FILOSA: Right.



1 CHIEF JUDGE WILSON: - - - like that. Why?

2 MR. FILOSA: So in - - - in the true fraudster
3 scenario - - - well, let me ask, in Your Honor's
4 hypothetical, has the borrower not made payments for six
5 years?

6 CHIEF JUDGE WILSON: Perhaps.

7 MR. FILOSA: Okay. Because - - - I mean, if the
8 borrower has made payments, this doesn't come into play
9 because the statute of limitations is revived by a
10 repayment. So this is a no harm, no foul situation. So if
11 I understand Your Honor's hypothetical, we have a true
12 fraudster. The borrower has not made a payment. Fraudster
13 commences an action.

14 CHIEF JUDGE WILSON: Fraudster or some - - - more
15 realistically, some former note holder who no longer holds
16 the note or some future note - - - note holder who doesn't
17 own the note yet.

18 MR. FILOSA: Correct. Well, I think here, we're
19 - - - that's the very scenario, focusing on the former note
20 holder, someone in the chain of title. And now, I guess,
21 we're veering into a substantive due process analysis where
22 the - - - the legislature can rationally hypothesize or
23 generalize.

24 CHIEF JUDGE WILSON: I'm asking what you think
25 they try to do with the word estoppel.

1 MR. FILOSA: Because it is rational to conclude
2 that when a borrower receives a foreclosure lawsuit that
3 contains sworn representations that the loan has
4 accelerated, that the plaintiff has standing - - - the fact
5 that they've commenced the case here prosecuted it for a
6 decade. Those representations went uncorrected even though
7 appellant concedes that they were aware of the foreclosure
8 action throughout the decade.

9 CHIEF JUDGE WILSON: Well, that might provide a
10 basis for an estoppel if you could establish that
11 knowledge, right?

12 MR. FILOSA: Correct. But I think - - -

13 CHIEF JUDGE WILSON: But what if you couldn't?

14 MR. FILOSA: But the - - - but the legislature is
15 free to now - - - again, veering into - - - to - - - to
16 substantive due process. The legislature under substantive
17 due process analysis is free to rationally generalize that
18 a borrower so circumstanced is not going to make
19 installment payments because an acceleration - - -

20 CHIEF JUDGE WILSON: Right. I'm trying to figure
21 out what they did, not what they could do.

22 MR. FILOSA: Well, but that's essentially what
23 they did. The - - - the legislature studied - - - we
24 looked at the sponsors memorandum, which invokes estoppel,
25 which invokes these legislative and regulatory reforms that

1 were meant to interdict this very situation.
2 Administrative order in 2010, championed by Chief Judge
3 Lippman, requiring foreclosure plaintiffs to affirm that
4 before they commenced the action, they assured themselves
5 that they were the holder of the note. That was continued
6 in 2011. The legislature picked up the mantle in 2013 with
7 CPLR 3012, which, again, requires an affirmative
8 representation that the plaintiff who commenced the action
9 is the actual note holder.

10 CHIEF JUDGE WILSON: And actually - - - and - - -
11 and attachment of the note.

12 MR. FILOSA: Correct. So that's - - - under
13 these circumstances, the legislature was free to conclude
14 that a borrower who is - - - again, who receives these
15 pleadings with sworn representations that go a decade
16 without being corrected, coupled with the fact that, under
17 our law, when a loan is accelerated, the bank no longer has
18 an obligation to accept monthly installment payments, so a
19 borrower so circumstanced may not make installment payments
20 to try to stem the tide or stop the bleeding. So it's
21 rational to conclude - - - and here was where we have the
22 rational fit between the means and the ends because who's
23 in a better position to ascertain the truth or falsity of
24 those representations? It's the bank. As Your Honor
25 indicated in his concurrence in Nelson, this - - - this

1 whole standing issue, it's principally controlled by
2 information in the plaintiff's control, so I - - -

3 JUDGE CANNATARO: Is your - - - is the argument
4 you just made premised on the assumption that the note
5 holder always knows when an action has been commenced by a
6 not true note holder?

7 MR. FILOSA: Well, here, we have an admission
8 that CMC was their servicing agent and that, as servicing
9 agent, they provide the trustee, which is the actual holder
10 of the note with monthly investor reports.

11 JUDGE CANNATARO: Yeah.

12 MR. FILOSA: So - - -

13 JUDGE CANNATARO: But this started out as a - - -
14 as a conversation between you and the Chief over this
15 question of estoppel. And I think you made out a lovely
16 case on the balance of the equities vis-a-vis the borrower.
17 But I didn't hear much about anything culpable on the part
18 of the true note holder. So I was just wondering if your -
19 - - if your answer required the note holder to at least be
20 aware that that fraudster had commenced an action?

21 MR. FILOSA: No. The - - - we don't have to - -
22 - I don't - - - 213(4) doesn't require proof of actual
23 knowledge of the quote, "true note holder" of the
24 commencement of the prior action because, again, as between
25 here, we have a principal agent relationship. Our law has

1 always imposed the burden upon the principal, one, to
2 select a proper agent, and that as between the principal
3 and the third-party, if the agent goes off the reservation,
4 so to speak, and acts with mistaken zeal or negligence, the
5 harm to that should be visited upon - - - the law should be
6 visited upon the principal, not the third-party borrower.
7 The borrower is entitled to rely, again, upon sworn
8 pleadings given the fact that part 130 requires an attorney
9 and its litigant to ascertain the truth or falsity before
10 they put their name or at least undertake a reasonably
11 diligent search of the truth of the facts before they sign
12 a pleading.

13 So the - - - the legislature is free to allocate
14 those benefits and burdens consistent with the law of
15 estoppel, the common law of agency. And again, now, under
16 a substantive due process analysis, even if the legislature
17 didn't articulate the law of agency as their basis, it's
18 any rational or conceivable basis even if it's not
19 articulated by the legislature.

20 So my colleague bears the burden of negating -
21 - - negating any and every conceivable basis upon which the
22 legislature could have acted in enacting this estoppel
23 provision. And that's why under, you know, the substantive
24 due process analysis, under rational basis scrutiny, which
25 is a paradigm of judicial restraint, this may not be the

1 provision that you or I, Your Honors, may have enacted, but
2 that's not the calculus under a substantive due process
3 analysis. The inquiry is at an end if we find that there
4 is a legitimate legislative purpose.

5 And I would refer the court to its own precedent,
6 *Montgomery v. Daniels*, interdicting - - - curbing legis - -
7 - or vexatious legislation - - - defining something as
8 vexatious legislation - - - excuse me - - - litigation is a
9 legitimate legislative purpose, right? *Montgomery*
10 concerned the legislature's enactment of the no fault
11 insurance Law, which replaced the common law - - -
12 automobile negligence scheme. The legislature studied the
13 scheme.

14 JUDGE SINGAS: And so supposing - - - supposing
15 we agree with you and we find it's retroactive for - - -
16 just to move this along a minute, why aren't they correct
17 that that property interest is a vested right?

18 MR. FILOSA: There is no vested right in the
19 common law. Our - - - our Constitution recognizes that.
20 Article I, Section 14, the - - - the - - - the legislature
21 - - -

22 CHIEF JUDGE WILSON: Well, they're sort of saying
23 it's a contract they have here, not - - - not a common law
24 right?

25 MR. FILOSA: Right. But there is the - - - it

1 doesn't destroy - - - destroy their contract. I mean,
2 first, there is no contractual term that allows them to
3 commence successive foreclosure actions or better still,
4 disavow sworn representations that they perpetuated for a
5 decade. So in that sense, there is no vested right for the
6 purposes of a substantive due process analysis - - -

7 JUDGE HALLIGAN: But that has to be a function of
8 what - - - over here.

9 MR. FILOSA: Sorry.

10 JUDGE HALLIGAN: That's okay. That has to be a
11 function of what the - - - the contract provides, right?

12 MR. FILOSA: Well, again, now we're veering here.
13 The - - - the constitutional challenges here are rooted in
14 substantive due process and procedural due process. Both
15 require a vested right.

16 JUDGE HALLIGAN: Right. And - - - and I thought
17 you just said that we look to see if there is a vested
18 right by examining what the contract provides; is that
19 correct?

20 MR. FILOSA: Well, not necessarily. Again, I
21 guess, they have the - - - the - - -

22 JUDGE HALLIGAN: And so where would you locate
23 it?

24 MR. FILOSA: Well, rights - - - property rights
25 are created by state law. So here - - -

1 JUDGE HALLIGAN: Yes.

2 MR. FILOSA: Right. So they have no - - - if
3 we're starting with the premise - - -

4 JUDGE HALLIGAN: But - - - but not - - - not in
5 the abstract, right?

6 MR. FILOSA: Correct.

7 JUDGE HALLIGAN: You need something, whether it
8 is, you know, a contract or some agreement along those
9 lines to give rise to a right. So here, what's your view
10 about what - - - what would create those rights or could
11 create those rights?

12 MR. FILOSA: I would say that, again, if the - -
13 - the right that the appellant is resting on is rooted in
14 common law decisions which may have previously condoned the
15 making of inconsistent representations regarding standing
16 so that they can commence a successive foreclosure action
17 beyond the expiration of the statute of limitations, there
18 is no - - - there is no vested right in those common law
19 decisions. There is - - - Montgomery states it stands for
20 that proposition. Our Constitution stands for that
21 proposition, that the legislature is free to alter the
22 common law. And I guess, here, the claim to a so-called
23 vested right in these common law decisions is particularly
24 weak because even in the - - - in the sponsor's memorandum,
25 the sponsor pointed to decisions well predating FAPA, 2002

1 - - -

2 CHIEF JUDGE WILSON: I'm not exactly - - -

3 MR. FILOSA: - - - precluding a lender from
4 making - - -

5 CHIEF JUDGE WILSON: I'm not exactly following.
6 So suppose their contract had said they have the right to
7 decelerate. Suppose it did. Would you still be turning to
8 the common law?

9 MR. FILOSA: No. But again, under a - - - under
10 a due process analysis, then even if there was a vested
11 right, the test still becomes, you can impair a vested
12 right provided that it's in furtherance of a legitimate
13 legislative purpose furthered by rational means, which is
14 the discussion that we just previously had.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. FILOSA: All right.

17 MR. GRUBE: May it please the court. Mark Grube,
18 for the Office of the Attorney General. The legislature
19 enacted FAPA to respond to numerous concerns about the
20 fairness of successive foreclosure actions. During the
21 mortgage foreclosure crisis, lenders often rushed to court
22 with inadequate documentation. Now, nearly two decades
23 later, foreclosure cases arising from default - - -

24 JUDGE RIVERA: So - - - so - - -

25 MR. GRUBE: Yeah.



1 JUDGE RIVERA: Can you just address - - - I think
2 Judge Garcia was asking these questions about how one would
3 interpret this language of whether or not it applies to the
4 - - - to the litigation at hand or it reaches back and
5 whether or not it makes any difference.

6 MR. GRUBE: Right. And I - - - I think we're
7 saying the same things in different words. So let me try
8 to explain by talking about the actions at issue here. So
9 we are here today on a quiet title action filed in 2020.
10 By the plain language of Section 10, FAPA applies to this
11 pending action. There was a prior action that was filed in
12 2007 and discontinued in 2017. I want to be very clear,
13 nobody is reopening that proceeding. Nobody is vacating
14 the judgment. Nobody is changing anything about that case.
15 What we're talking about is the evidentiary - - -

16 JUDGE GARCIA: So does this language apply to
17 that case? Does the language saying any action commenced
18 on an instrument apply to that earlier, let's say, 2007, I
19 think you said, case?

20 MR. GRUBE: I - - - I don't think Section 10
21 operates on that case. Section 7 does, which says that - -
22 - Section 7 talks about the evidentiary significance of
23 that in this case.

24 JUDGE GARCIA: I agree. I agree. But just the -
25 - - the language indicating when this is effective, that

1 goes to the current case?

2 MR. GRUBE: That goes to the current case. And -
3 - - but it - - - it applies to this case and applies to
4 estopping them from - - -

5 JUDGE GARCIA: In that case?

6 MR. GRUBE: In this case.

7 JUDGE GARCIA: Right.

8 MR. GRUBE: Yes. And that's consistent with the
9 legislature's intent, which, as I was saying, responded to
10 the problems of successive foreclosure actions. We're
11 talking about actions that were filed in 2007, 2009, that
12 continued to court - - - clog court dockets, and burden
13 homeowners. And the legislature, during the last fifteen
14 years, made many efforts to prospectively fix these harms.
15 There's a certificate of merit requirement.

16 JUDGE RIVERA: Okay. So why isn't the way they
17 have done this a violation of due process?

18 MR. GRUBE: So they - - - there - - -

19 JUDGE RIVERA: Well, first of all, what's your
20 understanding of the - - - each - - - the - - - the right
21 that they say they have a vested right? And what's your
22 understanding?

23 MR. GRUBE: Well, I think there's two problems
24 with how they frame their vested right. The first goes to
25 substance, and the second goes to the timing of when the

1 court looks to whether the supposed right existed. So as
2 to substance, their problem is that they have an overbroad
3 right. They talk about the right to the underlying
4 collateral. The state's not coming and taking that. The
5 statute of limitations is what forecloses that right. FAPA
6 doesn't change the six-year statute of limitations. So for
7 the substance of the right, the court needs to look at what
8 did FAPA change? And FAPA 7 says - - - and it didn't
9 change anything. It clarified the law, to be clear. But
10 FAPA 7 says that you cannot go back to 2007 and
11 collaterally attack a representation that you made to the
12 court at that time.

13 CHIEF JUDGE WILSON: And what if somebody else
14 made that representation?

15 MR. GRUBE: So the - - - there's a couple
16 responses to that. First of all, all the cases I'm aware
17 of, there's some sort of privity. There's predecessor and
18 interest. The lender stands in the shoes - - -

19 CHIEF JUDGE WILSON: Right. What if there
20 weren't?

21 MR. GRUBE: So I'm going to explain why that's
22 unlikely to happen. I haven't seen that. And if it did
23 happen, this court could entertain an as-applied challenge
24 in that rare circumstance. So - - -

25 CHIEF JUDGE WILSON: So is it possible to read

1 estoppel in a way that obviates that?

2 MR. GRUBE: No. I don't - - - I don't think it's
3 necessary in these cases. And I'll explain why it's not
4 necessary because that - - - that problem will not happen.
5 And it's - - -

6 JUDGE HALLIGAN: Could - - - could you read it
7 that way? I mean, estoppel is a concept that I think
8 generally involves the relationship between two parties and
9 - - - and the consequence of what one party does or says
10 vis-a-vis the other party, right?

11 MR. GRUBE: I - - - I think it's inconsistent
12 with what the legislative intent was here. They're trying
13 to codify a line of Appellate Division cases that said that
14 once somebody makes a misrepresentation to the court, they
15 are bound by it. And I - - - I want to explain - - -

16 CHIEF JUDGE WILSON: Once somebody else makes a -
17 - - a misrepresentation of the court, somebody else is
18 bound by it, is the question we're trying to drill down on.

19 MR. GRUBE: Okay. Well, that's the stranger
20 case. And I would like to explain why that won't happen.

21 CHIEF JUDGE WILSON: Okay.

22 MR. GRUBE: And - - - and that's because the - -
23 - so a stranger forecloses on a house. The homeowner has
24 two choices. They can either keep paying the mortgage, or
25 they can stop. So if they keep paying the mortgage, they

1 want to commit fraud and lull into a sense of security.
2 The problem is that the General Obligations Law provides
3 that each subsequent payment restarts the statute of
4 limitations. So that scheme doesn't work. That's not a
5 problem. There's no statute of limitations issue there.
6 If the homeowner stops paying on the mortgage, then the
7 lender is on notice. They have six years to figure out
8 what's going on. This is consistent with this - - - how
9 the statute of limitations for fraud works, which is that,
10 we look to inquiry notice, whether someone has reasonable
11 notice, and we don't allow people to sit on their rights
12 for ten, fifteen, twenty years. And that's particularly
13 important - - -

14 CHIEF JUDGE WILSON: And so what if - - - what if
15 in the more realistic case, it's a bank that held the note
16 at one point in time. They sold the note. Six months
17 later, they bring - - - the original bank that no longer
18 has the note brings a foreclosure action in error?

19 MR. GRUBE: The - - - there - - - there's
20 estoppel because they are in privity. The - - - the
21 predecessors and successors stand in the shoes and are
22 bound by those statements. And they - - - when they're
23 purchasing those notes, they can do diligence, and they can
24 look at the court dockets and see what's been filed. They
25 can see - - -

1 CHIEF JUDGE WILSON: Nothing's - - - nothing's
2 been done at the - - -

3 MR. GRUBE: Okay.

4 CHIEF JUDGE WILSON: - - - time that they
5 purchased the note. They purchased the note. They have
6 the note. They don't intend to foreclose. Six months
7 later, the bank that sold the note starts foreclosure
8 action.

9 MR. GRUBE: Well, that's - - - that's the same
10 issues that if there's - - - if the bank were - - -

11 CHIEF JUDGE WILSON: Are you saying they're in
12 privity in that circumstance?

13 MR. GRUBE: Well, they'll certainly be on notice.
14 And the point I was getting to is, it's important with - -
15 -

16 JUDGE RIVERA: How are they on notice?

17 JUDGE CANNATARO: I'm sorry. On - - - on notice
18 of what?

19 JUDGE RIVERA: How are they on notice?

20 MR. GRUBE: Because if the homeowner stops paying
21 - - -

22 JUDGE RIVERA: Oh.

23 MR. GRUBE: - - - then they know that there's a
24 problem. If the homeowner keeps paying, then there's no
25 statute of limitations problem.

1 JUDGE RIVERA: And they might start their own
2 foreclosure action?

3 MR. GRUBE: Yeah. They can start the clock.
4 They have six years to start their own foreclosure action
5 or reach some kind of resolution. I know my time is up.
6 There was one point - - -

7 CHIEF JUDGE WILSON: Yeah. Please go ahead.

8 MR. GRUBE: - - - that I was trying to get - - -

9 CHIEF JUDGE WILSON: Yes.

10 MR. GRUBE: - - - to which is the importance in
11 title to real property for sort of clear rules like that,
12 that once there is a foreclosure complaint on file in the
13 courthouse, that serves as notice that the loan has been
14 accelerated. And if - - - the true note holder is the only
15 one who would know that is not true. And so it's certainly
16 within the legislature's prerogative to require them to
17 step up at that time and not twenty years later,
18 collaterally attack the proceeding and unsettle the clarity
19 of time.

20 JUDGE RIVERA: And so what - - - what's the
21 vested right? I don't remember if you answered that.

22 MR. GRUBE: The vested - - - I mean, there is no
23 vested right. The asserted vested - - -

24 JUDGE RIVERA: What do you understand to be their
25 allegation about the vested right? And then respond to

1 that.

2 MR. GRUBE: The ability to collaterally attack
3 prior representations, which is what FAPA 7 speaks to.

4 JUDGE RIVERA: So it's not the rights of the - -
5 - whatever, the money that they get from the note or the
6 mortgage, correct?

7 MR. GRUBE: That is correct because FAPA does not
8 address that.

9 CHIEF JUDGE WILSON: And does - - - does rational
10 basis scrutiny give us some room in imperfection in a
11 legislative solution?

12 MR. GRUBE: Yes. And the - - - as I had
13 mentioned the purpose here, the legislature, for many years
14 have - - - has addressed problems prospectively. The
15 purpose here is fixing these retroactive problems of long -
16 - - cases that have long been lingering in court dockets.
17 So it's directly proportional to the scope of the problem.
18 And I also want to be clear that these are - - - these are
19 the most negligent actions. If a bank filed an action in
20 2007, 2009, and completed a foreclosure sale, those cases
21 are over. FAPA does nothing about those. The only cases
22 that FAPA affects are cases that have been in proceedings
23 for over fifteen years, no payments have been made in all
24 that time, and lenders have sat on their rights.

25 JUDGE CANNATARO: Do you have a number on that

1 class of cases?

2 MR. GRUBE: I - - - I don't have a particular
3 number; I can tell you - - -

4 JUDGE CANNATARO: Ballpark.

5 MR. GRUBE: - - - I have reviewed hundreds of
6 constitutional challenges to FAPA, so I know that this
7 issue has come up in at least - - -

8 JUDGE CANNATARO: There's at least a few hundred
9 cases out there.

10 MR. GRUBE: At least a few hundred cases.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. GRUBE: Thank you.

13 MR. BRODERICK: I just briefly wanted to hit on
14 one or two points. The first is that the - - - it was
15 asserted that there's been no change to the statute of
16 limitations, and we disagree vehemently with that. Section
17 7 of FAPA amends CPLR 213. CPLR 213 is the statute of
18 limitations. Section 7 of FAPA injects two entirely new
19 provisions, 213(4) (a) and (4) (b). That's a new change to
20 the statute of limitations.

21 JUDGE SINGAS: But there's not a new - - -

22 JUDGE RIVERA: Well, there's limitations period
23 didn't change. That's the same.

24 MR. BRODERICK: The six years did not change.
25 But when you start counting - - -

1 JUDGE RIVERA: The statute of limitations.

2 MR. BRODERICK: Well, when you start counting - -

3 -

4 JUDGE RIVERA: That's the accrual date?

5 MR. BRODERICK: Well, the accrual date, yes,
6 which triggers when the six years starts getting counted.
7 That's rather important because if we're going to count to
8 six, you got to know when we're going to start counting.
9 It's the equivalent of the - - - being told that I have
10 fifteen minutes to present my argument, but the argument
11 started an hour ago, and I'm out of luck. I still got
12 fifteen minutes. I just didn't know the fifteen minutes
13 started an hour ago. So that's kind of what FAPA Section 7
14 did here. We think there was a - - - a - - - a change to
15 the statute of limitations. That's why CPLR. 213 was the
16 amended.

17 Second, on the vested rights, we have a - - - the
18 Supreme Court has found that lien holders have a pecuniary
19 property right. And that under the Armstrong case, the
20 Supreme Court looked at a situation just like this in the -
21 - - in the context of a construction lien and said very
22 clearly that before the destruction of the lien, the lien
23 holders had a compensable property interest. Afterward,
24 they had none. Here in FAPA, the moment FAPA - - - if FAPA
25 is to be read retroactively, if we're going to stretch the

1 language to look retroactively to - - - to - - - to address
2 conduct from 2007, then the moment FAPA passed, my client's
3 lien was destroyed. We think that's a clear violation of
4 the - - -

5 CHIEF JUDGE WILSON: Well, it's not quite the
6 same as a lien, right? I mean, it - - - if - - - if I
7 understand your argument correctly, it depends on the - - -
8 the possibility, I guess, that you had the right to
9 decelerate the loan.

10 MR. BRODERICK: Well, no, this turns on whether
11 it was accelerated or not.

12 CHIEF JUDGE WILSON: Or that the - - - or that
13 the loan - - - loan was never accelerated, right?

14 MR. BRODERICK: Yeah. Whether it was
15 accelerated, yeah.

16 CHIEF JUDGE WILSON: And then - - - right. And
17 so that - - - that depends on how you construe the
18 contract, I think.

19 MR. BRODERICK: Yeah. And I think the contract
20 law in New York was very clear since the Albertina case,
21 that a note holder has to make a clear, unequivocal, overt
22 act to accelerate a loan. FAPA Section 7 changes that such
23 that a complete stranger to a loan - - -

24 CHIEF JUDGE WILSON: Well, there were - - - I
25 mean, before - - - there were - - - my recollection is,

1 there were a lot of cases that went different directions
2 about whether a foreclosure action that was discontinued
3 nevertheless started the statute of limitations running,
4 no?

5 MR. BRODERICK: Well, Engel addressed the
6 question of - - -

7 CHIEF JUDGE WILSON: Engel did, but that's pretty
8 late for you to develop - - - I mean, then your property
9 interest, I guess, is limited to the point in time when
10 Engel was decided forward.

11 MR. BRODERICK: No. No. That's not what I'm
12 saying at all.

13 CHIEF JUDGE WILSON: Okay.

14 MR. BRODERICK: What I'm saying is, Engel
15 reaffirmed the Albertina case, which required a note holder
16 to accelerate the loan. And there have been cases which -
17 - - over the years in which the issue of whether or not a -
18 - - a lawsuit was brought withstanding or not triggered the
19 statute of limitations. Some cases found that the
20 borrowers made representations to the courts saying there
21 was no standing, and that was part of the proof.

22 CHIEF JUDGE WILSON: Okay.

23 MR. BRODERICK: Other cases found that the lender
24 made - - - or the lender's agent made representations. The
25 point is, it was litigated. My - - - my clients and the

1 lending industry had the right to point out whether or not
2 the statute started to run or not. Section 7 of FAPA
3 totally changes that. We think that it's unfair and
4 unconstitutional to read Section 7 retroactively because
5 it's putting - - - it's - - - it's applying standards that
6 were not in effect at the time conduct was - - - was
7 enacted. And so unless the court has any other questions,
8 that's all.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. BRODERICK: Thank you.

11 (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 Article 13, LLC v. LaSalle National Bank, No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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