SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE (CWALT 2007-24),

Plaintiff,

- v -

DORLINE BOSBOOM, STEVEN DECRESCENZO, BOARD OF MANAGERS OF THE 140 EAST 56TH STREET CONDOMINIUM, UNITED STATES OF AMERICA BY THE INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, COMMISSIONER OF LABOR STATE OF NEW YORK DEPARTMENT OF LABOR, JOHN DOE

Defendant.

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INDEX NO. 850016/2018

MOTION DATE _____

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 232, 233, 234, 235, 236, 237, 243, 244, 245

were read on this motion to/for RENEWAL.

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property identified as 140 East 56th Street a/k/a 140 East 56 Street Unit 1-B a/k/a 140 East 56 Street Unit IB, a/k/s 140 East 56th Street Apt IB a/k/a 140 East 56th Street Apt 16D, New York, New York. The mortgage, dated May 15, 2007, was given by Defendants Dorline Bosboom ("Bosboom") and Steven Decrescenzo ("Decrescenzo") to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for National Fidelity Mortgage, Inc ("National"). The mortgage secures a loan with an original principal amount of $800,000.00 which is evidenced by a note of the same date as the mortgage.

Plaintiff alleges Mortgagors defaulted in repayment of the loan on or about March 1, 2010. Non-party The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2007-24 Mortgage Pass-Through Certificates, Series 2007-24 ("BONY"), the alleged noteholder at the time, commenced an action to foreclose the mortgage on July 29, 2011 (*see BONY v Bosboom, et al.*, NY Cty Index No 810238/2011). In its complaint, that BONY pled it elected to declare the entire principal balance due and owing. By order dated May 30, 2013, Justice Manuel J. Mendez granted BONY's motion pursuant to CPLR §3217 to discontinue the action.

Plaintiff commenced this action on January 22, 2018, again seeking foreclosure of the mortgage based on the 2010 default. Mortgagors answered and pled some ten affirmative defenses. By order dated December 11, 2019, Justice Arlene Bluth denied Plaintiff's motion for summary judgment and

granted Mortgagors' cross-motion to amend their answer to include, among other things, an affirmative defense of expiration of the statute of limitations. The Court record contains no indication that Defendant Board of Managers of the 140 East 56th Street Condominium ("Board") ever appeared or answered in this matter. By order of this Court dated May 3, 2021, Mortgagors' motion for summary judgment dismissing the complaint based upon expiration of the statute of limitations was denied. This Court's decision was founded on the then recently decided Court of Appeals decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021).

By order dated October 23, 2023, Plaintiff's motion for *inter alia* summary judgment and an order of reference was denied as *prima facie* proof of compliance with RPAPL §1304 was not demonstrated. A cross-motion by Board to dismiss was denied as it failed to seek vacatur of its default. Mortgagor Defendants' cross-motion to dismiss the action as barred by the statute of limitations and the Foreclosure Abuse Prevention Act ("FAPA")(L 2022, ch 821 [eff Dec. 30, 2022]) was denied as it did not seek renewal or reargument as required.

Now, Mortgagor Defendants move for renewal, pursuant to CPLR §2221[e], of the May 3, 2021 order, and to dismiss the complaint based upon expiration of the statute of limitations. Defendants assert renewal should be granted based upon a change in the law that occurred with the enactment of FAPA. Plaintiff opposes the motion.

"Renewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]). As relevant here, CPLR §2221[e][2] provides that a motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination". Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, citing Siegel & Connors, New York Practice § 449 [6th ed 2018]). Even if a change in the law is found, unless it would alter the prior determination, it is of no moment *(see eg 515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 44 AD3d 707, 708 [2d Dept 2007]).

The initial inquiry must be whether the enactments in FAPA are applicable to this action. The Appellate Division, First Department has held that the statutory amendments therein are to be retroactively to previously commenced and pending actions (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37 [1st Dept. 2023]). The First Department reasoned that application of FAPA's amendments to pending litigation furthers the "the Legislature's goal, expressed in the language of FAPA and its legislative history" (*id.*).

The express purpose of FAPA, according to the Senate Sponsor Memo, was to "overrule the Court of Appeals' recent decision in Freedom Mtge. Corp. v Engel" as well as certain other judicial decisions perceived to be "inconsistent with the intent of the Legislature" (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary "to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions" (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA's legislative "response" which, by its reasoning, "restore[s] longstanding law that made it clear that a lenders' discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset

the statute of limitations" (*id.*). As to its applicability, Section 10 of FAPA provides that it "shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced" (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. As relevant here, the applicable statute of limitations, CPLR §213[4], was amended to provide that "[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." (CPLR §214[4][a]). CPLR §203 was also amended to add subdivision [h] which provides that:

> Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

CPLR §3217 was also amended to add a new subdivision [e] which states that "[i]n any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" (CPLR §3217[e]). Relatedly, section 17-105 of the General Obligations Law was amended "to clarify that the statute represents the exclusive means for parties to effectuate a waiver, postponement, cancellation, resetting, tolling, revival or extension of the time limited by statute for commencement of an action or proceeding based on a cause of action to foreclose a mortgage, in part or whole." (NY State Senate Bill S5473D at Sponsor Memo, Summary of Specific Provisions).

The enactment of the above amendments was undeniably a substantial change in the law from what existed when the Court issued its May 24, 2021, decision and could change the prior determination. Specifically, as this action was commenced more than six-years after the 2011 action was filed, the above amendments ostensibly render this action time barred. Accordingly, the Court grants leave to renew Mortgagor's motion for summary judgment (CPLR §2221[e][2]).

A motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). The commencement of the 2011 action was an unequivocal act of acceleration of the debt because, among other things, the complaint expressly stated that Plaintiff elected to declare the entire principal balance to be due and owing. Thus, Defendants established that the statute of limitations in this matter accrued in 2011 and that more than six-years transpired before this action was commenced.

Accordingly, the burden shifted to Plaintiff to demonstrate that a toll, stay or extension is applicable or that an issue of fact exists (*see eg Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). Initially, Plaintiff's claim of de-acceleration by discontinuance of the action in 2013 did not reset the statute of limitations (CPLR §3217[e]; *CIT Bank, NA v Byers*, 220 AD3d 673 [2d Dept 2023]). Plaintiff also posits that retroactive application of FAPA is violative of its due process rights under the US Constitution as well as the Contracts Clause thereunder. As a rule, "[l]egislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002] [citations omitted]). The United States Supreme Court recognized almost 30 years ago that the constitutional impediments to retroactive application of civil legislation are "modest" and that without a violation of an explicit constitutional proclamation "the potential unfairness of retroactive civil legislation is not [in and of itself] a sufficient reason for a court to fail to give a statute its intended scope" (*Landgraf v Usi Film Prods.*, 511 US 244, 267-272 [1994]; *see also Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332, 365 [2020][Noting the Court of Appeals adoption of the *Landgraf* analytical framework in *American Economy Ins. Co. v State of New York*, 30 NY3d 136 [2017]]).

While entitled to the presumption of constitutionality, retroactive legislation must meet a burden not faced by entirely prospective legislation, specifically that the questioned statute is supported by "'a legitimate legislative purpose furthered by rational means'" (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 157-158 [2017], *citing General Motors Corp. v Romein*, 503 US 181, 191 [1992]). Explained differently, constitutional muster is passed when "the retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corporation v R. A. Gray & Co.*, 467 US 717, 730 [1984]). When applying this standard, the Court of Appeals has "suggested that, in order to comport with due process, there must be a 'persuasive reason' for the 'potentially harsh' impacts of retroactivity" (*Regina,* supra at 375). The question presented is one of degree requiring consideration of: [1] the length of the retroactivity period as affecting a party's repose, [2] the forewarning of legislative change relevant to reliance on existing law and [3] the public purpose for the statute (*see Replan Dev., Inc. v Department of Housing Preservation & Dev.*, 70 NY2d 451, 456 [1987]; *see also Regina*, supra at 376).

In this case, by making FAPA applicable to all unenforced foreclosure actions –ie. those where are sale has not occurred—the period of retroactivity could, in many cases, be lengthy. Nevertheless, claim of reliance on the pronouncements by the Court of Appeals in *Engel* is unavailing. Prior to that decision, the Court of Appeals "never addressed what constitute[d] a revocation in [the present] context" (*Engel*, supra at 28). Moreover, the *Engel* court observed that "no clear rule has emerged with respect to the issue raised here—whether a noteholder's voluntary motion or stipulation to discontinue a mortgage foreclosure action, which does not expressly mention de-acceleration or a willingness to accept installment payments, constitutes a sufficiently 'affirmative act.'" (*id.* at 29). In this case, the voluntary discontinuance occurred some eight years before *Engel* was decided.

Reliance on *Engel* and other existing law dovetails into the issue of whether forewarning of a change in the law had any impact under the circumstances. The twenty-two-month period between the ruling in *Engel* (issued February 18, 2021), and the enactment of FAPA (effective December 30, 2022), has been found sufficient in length to support a claim of reliance on existing precedent (*see Matter of Handler, P.C. v DiNapoli,* 23 NY3d 239, 248-250 [2014]). But closer scrutiny reveals that the legislative reaction which resulted in FAPA was more than conceivable. The issuance of the *Engel*

decision was decried by multiple state and local politicians[1]. This included Senator James Sanders who sponsored the original version of FAPA which was introduced less than a month[2] after issuance of the *Engel* decision. Another bill, which would ultimately replace the far broader Senate version[3], was introduced in the Assembly not long thereafter[4]. Given this swift reaction by the legislature and considering that the applicable holdings in *Engel* were questions of first impression before the Court of Appeals which settled an area of the law without clarity, any expected repose by lenders in *Engel* subsisting indefinitely was not reasonable (*see Tegreh Realty Corp. v Joyce,* supra at 100).

The political resolve which gave rise to FAPA is far from new. The Legislature's statutory forays into the area of foreclosure law, particularly residential foreclosures, has been ubiquitous over the last fifteen years. In that period, and before, multiple perceived ills in the home lending and foreclosure arenas have been addressed with the institution of various procedural and substantive requirements that did not exist at common-law as well as the amendment of existing laws [5]. Further, these novel statutes have been routinely amended when application of these edicts were found ineffective or insufficiently expansive. Legislative enactments have also been accompanied by the adoption of various codes, rules and regulations by both executive agencies and the judiciary. Ongoing uncertainty in foreclosure law has been injected by the judiciary as well. In addition to the titanic shift *Engel* caused, the Appellate Division, Second Department's decision in *Bank of America, N.A. v Kessler*, 202 AD3d 10 [2nd Dept. 2021], and its subsequent reversal by the Court of Appeals[6], also generated a flurry of litigation machinations. The upshot of all this is that forewarning to the lending industry of the likelihood of change in any portion of this area of law has not been just heralded these many years, but virtually foregone.

The public purpose of FAPA is well documented in the statute's history and the intention of the legislature that it be applied to all existing cases is express. FAPA's purpose is broadly stated as to protect homeowners from "abuses of the judicial foreclosure process" through "an onslaught of successive foreclosure actions that would otherwise be barred by the statute of limitations". To accomplish this aim, the legislature clearly stated its intention to undo judicial pronouncements which permitted lenders to "manipulate the statutes of limitation to their advantage through clarification and restoration of "long standing law". The desire to protect property owners from foreclosure abuses is rationally based on well documented wide-spread misconduct by certain mortgage lenders (*see eg* Jackie Calmes and Sewell Chan, *President Presses Bid To Rein In Loan Abuse*, NY Times, Jan. 20, 2010 §B at 1, col 0) as well as entities in the mortgage foreclosure business (*see eg* Barry Meier, *A Foreclosure Mess Draws In the Filing Lawyers, Too*, NY Times, Oct. 16, 2010 §B at 1, col 1). The Legislature's repeated references to toppling judicial decisions which it views misinterpreted its intent and to codify

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[1] *see eg* https://www.nysenate.gov/newsroom/press-releases/2021/james-sanders/senator-james-sanders-jr-pushes-bill-help-stop-unjust.

[2] S5473 was filed March 8, 2021.

[3] For example, the Senate bill included an amendment to CPLR 206 to add a new subdivision [e] that would have set the accrual date of a foreclosure action of certain mortgage instruments "at the first moment in time where the right to demand immediate payment in full may be exercised-not when, if ever, the demand is actually made." Also contained in that version was a proposal to amend CPLR 3212 to "clarify" that a successive motion for summary judgment is a motion affecting a prior order which must be made in accordance with the applicable subdivisions of CPLR 2221 and 5015.

[4] A7737 was filed May 20, 2021.

[5] Since 2000, the following are some of the New York statutes that have been enacted in response to perceived ills, inequities and abuses in the mortgage and foreclosure businesses" CPLR §§3021-b and 3408; RPAPL §§1302, 1302-a, 1303, 1304, 1305, 1306, 1307, 1308, 1393; RPL §§265-a, 265-b, 280-b, 280-d; 22 NYCRR §202.12-a. The federal legislative and regulatory enactments are too legion to recount in this footnote.

[6] *Bank of America, NA v Kessler*, 39 NY3d 317 [2023].

opinions in accord therewith, evidence that retroactivity was central to the enactment of FAPA (*see Regina* at 366). Based on the foregoing analysis, the Court determines that, under the circumstances presented, retroactive application of FAPA does not violate Plaintiff's constitutional due process rights.

Plaintiff's reliance on the Contract Clause of the US Constitution is also unavailing. That part proscribes states from "pass[ing] any . . . [l]aw impairing the [o]bligation of [c]ontracts" (*see* US Const, art I, § 10 [1]). "The absolute prohibition set forth in the Contract Clause is not to be read literally; instead, states retain a paramount interest in protecting public welfare through legislation" (*Schantz v O'Sullivan*, 11 AD3d 22, 24 [3d Dept 2014]). As a result, "the State may impair such contracts by subsequent legislation or regulation so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose" (*Crane Neck Ass'n v New York City/Long Island County Servs. Group*, 61 NY2d 154, 167 [1984]). The United States Supreme Court has fashioned a three-part test to discern whether a piece of legislation violates the Contract Clause (*see Energy Reserves Group v Kansas Power & Light Co.*, 459 U.S. 400, 411-412 [1983]). The initial inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship" (*Allied Structural Steel Co. v Spannaus*, 438 US 234, 244 [1978]). The extent of the impairment is a factor, but eradication of contractual expectations is not required (*id.*). Also considered is "whether the industry the complaining party has entered has been regulated in the past" (*id.*).

In this case, Plaintiff has cited no provision of the note, mortgage or other loan documents that has been impaired. All those documents are silent as to what act would constitute a de-acceleration of the indebtedness. Notably, no right to unilateral de-acceleration is afforded Plaintiff in the loan documents. Thus, no contract provision on this issue is substantially modified by retroactive application of FAPA to this action. Any claim that a common-law implied right to unilateral revocation existed before *Engel* was decided is unavailing. As noted above, prior to *Engel*, the Court of Appeals "never addressed" whether a voluntary discontinuance or stipulation which did not mention de-acceleration or readiness to accept installment payments de-accelerated the indebtedness (*Engel*, supra at 28). Moreover, the Court in *Engel* observed that absent a precise provision on this issue in the operative documents, "no clear rule" appellate rule emerged as to whether this right existed (*id.* at 29). Lastly, as also recounted supra, the mortgage industry and foreclosure business, particularly in the preceding two decades, has been subject to regular and robust legislative regulation. Therefore, no substantial impairment of Plaintiff's right to contract is demonstrated by retroactive application of FAPA. As the existence of a substantial impairment is a "threshold inquiry", the absence of same obviates any need for an analysis of the remaining two factors (*see 19th Street Assoc. v State*, 79 NY2d 434, 442 [1992]).

To the extent Plaintiff asserts that retroactive enforcement of FAPA would violate its "vested" rights herein, the Court will assume that Plaintiff is invoking the Takings Clause of the Fifth and Fourteenth Amendments to the US Constitution. This right proscribes "the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation'" (*Landgraf*, supra at 266). "The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified" (*American Economy Ins. Co. v State of New York*, supra at 155). No person has a vested interest or constitutional right in any rule of law entitling them to have the precept remain unaltered (*see I. L. F. Y. Co. v Temporary State Housing Comm.*, 10 NY2d 263, 270 [1961]; *J. B. Preston Co. v Funkhouser*, 261 NY 140, 144 [1933]). Similarly, "[p]arties obtain no vested rights in the orders or judgments of courts while they are subject to review" (*Boardwalk & Seashore Corp. v Murdock*, 286 NY 494, 498 [1941]). Resultantly, Plaintiff in this case had no vested right in either the "savings statute" or any finding of this

Court since no unappealable final judgment has been issued (*see U.S. Bank Trust, N.A. v Miele*, ___Misc3d___, 2023 NY Slip Op 23186 [Sup Ct West. Cty. 2023]).

Accordingly, it is

ORDERED that Defendants Dorline Bosboom and Steven Decrescenzo to renew is granted, and it is further

ORDERED that upon renewal Defendant' motion to dismiss the Plaintiff's complaint pursuant to CPLR §3211[a][5] is granted and Plaintiff's complaint is dismissed.

5/10/2024
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE