At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 25th day of November 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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M & SS Group Inc.,

Plaintiff(s)

-against-

U.S. BANK NATIONAL ASSOCIATION; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, intended as persons or entities having some claim or interest in the premises described in the complaint

Defendant(s)

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Index No: 515523/2019

Motion Seq. 3,4, 8

ORDER

The following; e-filed papers read herein:	NYSCEF Nos.:
Motion Seq. 3:	
Notice of Motion/Affidavits Annexed Exhibits Annexed/Reply……..	63-73; 94
Motion Seq. 4:	
Notice of Motion/Affidavits Annexed Exhibits Annexed/Reply……..	74-92; 106
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed…….	97-101; 103-106; 121-125; 176
Motion Seq. 8:	
Notice of Motion/Affidavits Annexed Exhibits Annexed/Reply……..	160-175; 183-187
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed……..	179-181

This action pertains to real property located at 120 Stuyvesant Avenue, Brooklyn, New York 11221 (the "Subject Premises"). M & SS Group Inc. ("Plaintiff") commenced this action pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") § 1501(4) to compel the determination of claims and to discharge two mortgages regarding the Subject Premises. On December 23, 2020, U.S. Bank National Association ("U.S. Bank") moved for summary judgment (Motion. Seq. 3) and on January 28, 2021, Plaintiff cross-moved for the same relief (Motion Seq. 4). Oral argument of the motions was held on June 23, 2021, and an Order was entered on June 29, 2021,[1] wherein the U.S. Bank's motion for summary judgment was marked off for failure to appear, and Plaintiff's cross-motion was granted on default. Thereafter, U.S. Bank moved by Order to Show Cause (Motion Seq. 5) to vacate the June 29, 2021, Order.

[1] NYSCEF Doc. #106.

After oral argument, the Court, in an order dated August 10, 2021, granted U.S. Bank's motion to the extent that Motion Seq. 3 was restored, the Order on Motion Seq. 4 was vacated, and the motions were submitted for decision. However, on July 8, 2022, the Final Conference Part dismissed the instant action for failure to comply with an order that required the Plaintiff to file a Note of Issue on or about July 1, 2022. On August 23, 2022, Plaintiff moved to restore the instant action to the active calendar (Motion Seq. 6) and on September 23, 2022, U.S. Bank cross-moved to dismiss the action pursuant to CPLR § 3211(a)(4); 22 NYCRR § 202.27 and for failure to comply with court ordered deadlines. By Order Dated September 23, 2022,[2] Plaintiff's motion was granted to the extent, inter alia, that the action was restored to the active calendar and Plaintiff was directed to file a new Note of Issue on or before November 3, 2023. U.S. Bank's cross motion was denied. Finally, on February 6, 2024, Plaintiff filed a motion (Motion Seq. 8) wherein it seeks to withdraw its motion for summary judgment (Motion Seq. 4) and substitute it with the instant motion (Motion Seq. 8) on the grounds that new case law, legislation, and statutory clarifications, including the Foreclosure Abuse Prevention Act ("FAPA") impact the Court's decision. Accordingly, at the outset, the Court must first address whether Plaintiff has sufficient cause for an exception to the rule discouraging multiple summary judgment motions.[3]

In opposition to Plaintiff's motion to substitute its motion for summary judgment (Motion Seq. 8), U.S. Bank argues that Plaintiff's motion is untimely and improper. U.S. Bank asserts that pursuant to CPLR § 3212, a motion for summary judgment must be made no later than 120 days after the filing of the Note of Issue, and that untimely motions must be denied irrespective of the merits of the motion. U.S. Bank states that the Note of Issue herein was filed on September 26, 2023, and that Plaintiff's instant motion was filed on February 6, 2024 – 133 days after the filing of the Note of Issue. Furthermore, U.S. Bank contends that Plaintiff has failed to proffer a reasonable excuse or good cause for its failure to timely file its motion for summary judgment and in a conclusory manner, states that there are "changes to the current legal landscape," – namely that FAPA, warrants the untimely filing. Additionally, U.S. Bank contends that a motion cannot be unilaterally withdrawn once it is fully briefed and submitted for decision, and that the parties' respective motions for summary judgment were reserved for decision by the order dated August 10, 2021.

Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause (*SK Park Lane II, LLC v Dickinson*, 237 AD3d 769 [2d Dept. 2025]; *U.S. Bank N.A. v. Kelly,* 223 AD3d 932 [2d Dept. 2024]; quoting *Hillrich Holding Corp. v. BMSL Mgt., LLC,* 175 AD3d 474 [2d Dept. 2019]). However, successive motions for summary judgment

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[2] NYSCEF Doc. # 157.
[3] See (*Brill v City of NY*, 2 NY3d 648 [2004]; *Varsity Tr., Inc. v. Bd. of Educ. of City of New York*, 300 AD2d 38, 39 (1st Dept. [2002]); *CPLR* 2004 and 3212[a]).

may be entertained when that motion is "substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the court" (*SK Park Lane II, LLC.* at 770; *Aurora Loan Servs., LLC v. Yogev,* 194 AD3d 996 [2d Dept. 2021]; see *American Equity Ins. Co. v. A & B Roofing, Inc.,* 106 AD3d 762 [2d Dept. 2013]). Such a showing may be demonstrated by newly discovered evidence or other good cause (*Verizon New York, Inc. v Supervisors of Town of North Hempstead*, 169 AD3d 740 [2d Dept. 2019]; see *Burbige v. Siben & Ferber*, 152 AD3d 641 [2d Dept. 2017]; *Tolpygina v. Teper*, 63 AD3d 641 [2d Dept. 2017]).

Although Plaintiff moved for summary judgment more than 120 days after the Note of Issue was filed, the Court has discretion in determining whether to consider such motions. Here, the Court finds that good cause is shown to allow the late motion, and that it is not barred by the general proscription against successive motions for summary judgment. Due to the age and circumstances of the action, the substitution of this motion would facilitate a more prompt resolution of this matter on the merits, further the interest of justice and eliminate an unnecessary burden on the courts. Parties' respective motions herein were submitted and reserved for decision before the enactment of FAPA. If the Court were to deny Plaintiff's request, and ruled solely on the outstanding motions submitted by parties, the Court and the parties would be subjected to an unnecessary delay in litigation because Plaintiff would still be afforded the opportunity to renew its motion pursuant to CPLR § 2221 on the grounds that the enactment of FAPA "constituted new facts not offered on the prior motion that would change the prior determination or demonstrated that there has been a change in the law that would change the prior determination." Furthermore, as it pertains to this motion, U.S. Bank has been afforded the opportunity to oppose the motion, the matter is fully briefed, and oral argument was held. Thus, U.S. Bank fails to demonstrate that it will be prejudiced by the substitution and consideration of the motion. Accordingly, the Court will address U.S. Bank's motion for summary judgment (Motion Seq. 3) and substitute Plaintiff's instant motion (Motion Seq. 8) in place of its prior motion (Motion Seq. 4).

On or about July 22, 2008, non-party Jamaal Sylvester ("Sylvester"), acquired title by deed[4] to the Subject Premises, as well as a mortgage loan in the original principal amount of $533,850 (the "First Mortgage Loan") as memorialized in a note (the "First Note") to U.S. Bank.[5] On or about October 20, 2015, MERS allegedly assigned the First Mortgage Loan directly to Defendant U.S. Bank via an Assignment of Mortgage and recorded it in the Office of the City Register in CRFN No. 2015000399623 on or about November 9, 2015.

[4] Deed was recorded on or about August 6, 2008, in the Office of the City Register in CRFN No. 2008000313306.
[5] The First Note and First Mortgage Loan were recorded in the Office of the City Register of the City of New York, on or about August 6, 2008, at CRFN2008000313307.

Also on July 22, 2008, Sylvester allegedly obtained another mortgage loan (the "Second Mortgage Loan") in the original principal amount of $82,650.00, as memorialized in a note (the "Second Note") and secured by a mortgage (the "Second Mortgage") on the Subject Premises.[6] MERS allegedly assigned the Second Mortgage Loan directly to Defendant U.S. Bank by two Assignments of Mortgage dated on or about October 28, 2009 and August 26, 2014, and recorded them in the Office of the City Register on or about January 20, 2010, in CRFN No 201000019619 and on or about September 12, 2014 in CRFN No. 2014000303240. On January 13, 2010, U.S. Bank commended a foreclosure action seeking to foreclosure the First Mortgage Loan under *US Bank, NA, v Sylvester* et al Index #1005/2010 (the "First Foreclosure Action"), and on or about December 10, 2010, U.S. Bank commenced a second foreclosure action seeking again to foreclose the First Mortgage Loan under *US Bank, NA v Capital One Bank (USA), N.A.*, Index #30225/2010 (the "Second Foreclosure Action"). The First Foreclosure Action was not pursued and was eventually marked "disposed," and a conditional order of dismissal was entered on May 14, 2015. The Second Foreclosure Action was marked dismissed on or about August 17, 2015. Subsequently, on or about July 16, 2019, the Plaintiff commenced the instant action by filing a Notice of Pendency and the Summons and Complaint, which seek to cancel and discharge both mortgages pursuant to RPAPL Article 15. In its complaint, the Plaintiff alleges that by deed dated March 25, 2015, and recorded in the Office of the City Register on or about May 4, 2015, in CRFN No. 2015000148016, that Sylvester transferred ownership in the Subject Premises to non-party M & S Group Inc. Plaintiff, though, alleges that it acquired title to the Subject Premises pursuant to a deed dated November 16, 2017, and recorded in the Office of the City Register on or about December 1, 2017 in CRFN No. 2017000442292.

In support of its motion (Motion Seq. 3), U.S. Bank argues, that while RARPL 1501(4) provides that "a person with an interest in real property subject to an encumbrance may maintain an action to cancel and discharge said encumbrance, if the applicable statute of limitations has expired," that Plaintiff erroneously claims that the six-year statute of limitations for a foreclosure claim has expired. U.S. Bank contends that in instances where an installment loan is accelerated, the entire amount of the loan becomes due, and the statute of limitations begins running on the entirety of the debt. However, U.S. Bank asserts that while the First Mortgage Loan may have been accelerated in 2010 by the filing of the First Foreclosure Action, the First Mortgage Loan was timely and properly de-accelerated in October 2015, when U.S. Bank sent a De-Acceleration Letter to Sylvester. Thus, U.S. Bank claims that the First Mortgage Loan had reverted to an installment loan in 2015. U.S. Bank also claims that after the mortgage loan had reverted into an installment loan in 2015, that it resumed sending regular monthly mortgage statements to Sylvester. U.S. Bank notes that Plaintiff is not the borrower on the Mortgage Loan, but a third-party purchaser who purports

[6] The Second Note and Second Mortgage Loan were recorded in the Office of the City Register of the City of New York, on August 6, 2008, at CRFN2008000313308.

to have standing in this action by virtue of the deed dated November 16, 2017, which is after the alleged January 13, 2016, date expiration date of the statute of limitations. Therefore, U.S. Bank claims that while the Plaintiff was likely unaware of the de-acceleration when it did business with Sylvester, that U.S. Bank properly preserved its rights, and that discharge of the mortgage is not warranted.

In support of its cross-motion (Motion Seq. 8), Plaintiff argues that it is entitled to summary judgment because U.S. Bank's right to foreclose the aforementioned mortgage is barred by the statute of limitations. Therefore, U.S. Bank does not have a claim to an estate, trust, or other interest in the Subject Premises. Plaintiff states that U.S. Bank accelerated the First Mortgage on January 13, 2010, when it commenced the First Foreclosure Action. However, Plaintiff states that the complaints in both prior actions specifically state that "Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal," thus the time to enforce the First Mortgage expired on January 13, 2016. With respect to the Second Mortgage Loan, Plaintiff asserts that no payments have been made since approximately September 2008, and that U.S. Bank accelerated the Second Mortgage more than six years prior to the filing of this instant action but has not taken any steps to initiate foreclosure proceedings regarding the Second Mortgage Loan. Additionally, Plaintiff contends that U.S. Bank's de-acceleration letter is not a viable defense because pursuant to CPLR § 203(h), once the First and Second Mortgages were accelerated, Defendant could not do anything to unilaterally "in form or effect" to impact upon the statute of limitations. Plaintiff also requests attorney fees pursuant to Real Property Law ("RPL") § 282 on the grounds that the mortgages contain covenants providing for recovery of attorneys' fees and/or expenses incurred in enforcing the loan.

In opposition to Plaintiff's cross-motion, regarding the First Mortgage Loan, U.S. Bank argues that Plaintiff has failed to satisfy its prima facie burden establishing that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations. U.S. Bank contends that while the statute of limitations to foreclose begins to run on the entire mortgage debt once a mortgage debt is accelerated, that U.S. Bank timely revoked any prior acceleration of the First Mortgage Loan. U.S. Bank notes that Plaintiff's argument that the de-acceleration letter revoking the acceleration of the First Mortgage Loan has been effectively nullified retroactively by FAPA, that accordingly, the statute of limitation period to foreclose the First Mortgage Loan has then expired. However, U.S. Bank contends that FAPA is unconstitutional and that retroactive application of FAPA would violate U.S. Bank's procedural and substantive due process rights, and that FAPA constitutes an improper taking. U.S. Bank opposes Plaintiff's request for attorney fees because Plaintiff is not the mortgagor and does not have grounds to seek relief under RPL § 282, which by its express terms applies only to mortgagors.

With respect to the Second Mortgage Loan, U.S. Bank argues that while Plaintiff alleges that U.S. Bank accelerated the Second Mortgage Loan by a "Notice of Acceleration," that Plaintiff has failed to

submit a copy of the purported "Notice of Acceleration", or any relevant or admissible testimony as to the date of the purported notice, or its contents. U.S. Bank contends that Plaintiff's submitted affidavit by Nir Dankner ("Dankner"), President of Plaintiff M & SS GROUP INC., regarding the "Notice of Acceleration" is inadmissible hearsay. U.S. Bank contends that, assuming arguendo that Plaintiff had provided a copy of the purported Notice of Acceleration, or had otherwise proved its existence, that controlling appellate precedent has consistently rejected the proposition that a loan can be accelerated through a notice of acceleration or a notice of default.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

RPAPL § 1501(4) provides that a person with an interest in real property, subject to an encumbrance, may maintain an action to cancel and discharge said encumbrance, if the applicable statute of limitations has expired for the commencement of an action to foreclose the mortgage, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage of record was commenced. An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR § 213[4]; *DePalma v RoundPoint Mtge. Serving Corp.*, 179 AD3d 1145 [2d Dept. 2021]). The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (CPLR § 213[4]; *DePalma* at 1146; *Daldan, Inc. v Deutsche Bank Natl. Trust Co.*, 188 AD3d 989 [2d Dept. 2020]; see *Ditmid Holdings, LLC v JPMorgan Chase Bank, N.A.*, 180 AD3d 1002 [2d Dept. 2020]). A mortgage can be accelerated by a proper demand or through the commencement of a foreclosure action in which the verified complaint includes an election to exercise the mortgagor's contractual right to accelerate under the terms of the note and mortgage (*Wilmington Savings Fund Society, FSB v Avenue Basin*

Management, Inc., 240 AD3d 552 [2d Dept. 2025]; *Deutsche Bank National Trust Company v DiGiorgio*, 237 AD3d 899 [2d Dept. 2025]; *Saini v Cinelli Enterprises Inc.*, 289 AD2d 770 [3d Dept. 2001]).

Prior to the enactment of FAPA, controlling law in New York held that noteholders had authority to revoke their acceleration of a mortgage loan via an affirmative act of revocation during the six-year limitations period, resetting the statute of limitations (see *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 [2021]; *Milone v U.S. Bank N.A.*, 164 AD3d 145 [2d Dept. 2018]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept. 2017]). A deacceleration letter constituted an affirmative act sufficient to de-accelerate a mortgage (*Milone* at 153-154). However, the enactment of FAPA on December 30, 2022, overrode part of *Engle* and amended, inter alia, statutory provisions CPLR § § 3217, 203, 295, 213, RPAPL § 1301, GOL § 17-105, and added CPLR § 205-a.

CPLR § 203(h) states:

> 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(e) states:

> In 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.

To note, CPLR § 1012[b][3] mandates that a party challenging the constitutionality of a state statute, local law, ordinance, or regulation file proof of service on the Attorney General. U.S. Bank submits an Affidavit of Service of its opposition papers upon the Attorney General. The Attorney General did not respond to or appear on this motion.

It is well-settled that "acts of the Legislature are entitled to a strong presumption of constitutionality" (*County of Chemung v Shah*, 28 NY3d 244 [2016]; *Cohen v Cuomo*, 17 NY3d 196 [2012]). This presumption may only be overcome by a showing of unconstitutionality beyond a reasonable doubt (*id.*). The Court should only strike down legislation on the grounds of unconstitutionality as a last resort (see *Lighthouse Shores, Inc. v Islip*, 41 NY2d 7 [1976]). Although statutory amendments 'are presumed to have prospective application' in the absence of an expression of legislative intent that the statute be retroactively applied, it is another axiom of statutory interpretation, and an exception to the presumption against retroactive application, that 'remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose' (*Matter of Gleason [*see *Michael Vee, Ltd.]*, 96 NY2d 117 [2001];

Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577 [1998]; *Posillico v Southold Town Zoning Bd. of Appeals*, 219 AD3d 885 [2d Dept. 2023]; *Nelson v HSBC Bank USA*, 87 AD3d 995 [2d Dept. 2011]). A remedial statute is one which is 'designed to correct imperfections in prior law, by generally giving relief to the aggrieved party (*Nelson* at 998; *Matter of Mia S.*, 212 AD3d 17 [2d Dept. 2022]). Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be (*Matter of Gleason [Michael Vee, Ltd.]* at 122; *Matter of Mia S.* at 22).

Here, the Court finds that the Legislature clearly and unambiguously intended FAPA to have retroactive effect as is evident by the express language of the statute, to wit "[t]his act shall take effect immediately and shall apply to all [residential and commercial foreclosure actions] in which a final judgment of foreclosure and sale has not been enforced" (FAPA § 10). Additionally, FAPA was designed, in part, "to rewrite unintended judicial interpretations, and to reaffirm legislative judgment about what certain laws relating to the application of the statute of limitations to mortgage foreclosure actions should be" (*Deutche Bank National Trust Company v Dagrin*, 223 AD3d 1065 [2d Dept. 2024]; *Bayview Loan Servicing, LLC v Dalal*, 232 AD3d 487 [1st Dept. 2024]; *Genovese v Nationstar Mtge. LLC*, 223 AD3d 37 [1st Dept. 2023]). Thus, FAPA is intended to apply to all pending actions, such as this proceeding. Furthermore, contrary to U.S. Bank's contentions and consistent with settled precedent, FAPA has been applied retroactively by the Appellate Divisions, regarding mortgage foreclosure actions pending before them.[7]

In addressing Plaintiff's claims that the First Mortgage Loan is time barred, the Court finds that Plaintiff has established that the six-year statute of limitations began to run on the entire debt of the First Mortgage Loan, at the latest on January 13, 2010, when U.S. Bank commenced the First Foreclosure Action and that the time to enforce the First Mortgage expired on or about January 13, 2016. In opposition, U.S. Bank has failed to raise a triable issue of fact as to whether the action was timely. While the First Foreclosure Action was discontinued on December 10, 2010, upon the commencement of the Second Foreclosure Action, the statute of limitations was unaffected by the acceleration.[8] Additionally, pursuant to

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[7] (CPLR § 3217[e]; *Dagrin* at 1067; *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915 [2d Dept. 2023]; *MTGLQ Investors, L.P. v Singh*, 216 AD 3d 1087 [2d Dept. 2023]; *U.S. Bank Nat'l Ass'n. v Outlaw*, 217 AD3d 721 [2d Dept. 2023]; *Bank of New York Mellon v. Del Rio*, 233 A.D.3d 529 (1st Dept. 2024); *U.S. Bank National Association v. Lynch*, 233 A.D.3d 113 (3d Dept. 2024).

[8] (see RPAPL § 1301[3] stating that in instances where another action "is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action;" see also CPLR § 3217[3], stating that the voluntary discontinuance of the action, whether on motion, order, stipulation or by notice shall not...revive or reset the statute of limitations unless expressly prescribed by statute)."

CPLR § 203, as amended by FAPA, U.S. Bank's unilateral acts of de-acceleration could not have reset or tolled the statute of limitations once the First Mortgage Loan was accelerated upon the commencement of the First Foreclosure Action.[9]

With respect to the Second Mortgage Loan, Plaintiff alleges that U.S. Bank accelerated the mortgage via a "Notice of Acceleration," and that no payments have been made since approximately September 2008, nor has U.S. Bank taken any steps to initiate foreclosure proceedings. Plaintiff however has not proffered the letter, and relies on the affidavit of Dankner, who states in relevant part that:

> Mr. Sylvester not only informed me of the existence of the Second Mortgage, but he further disclosed that no payments had been made in connection with the same since on or about September 1, 2008, and that shortly thereafter, in late 2008, Mr. Sylvester received a "Notice of Acceleration" from U.S. Bank, fully accelerating the Second Mortgage and demanding payment in full of the outstanding amounts allegedly owed in connection with the same.[10]

Here, the Court finds that Dankner's conclusory affidavit is inadmissible hearsay to the extent that the records he purports to describe were not submitted with his affidavit. Accordingly, Plaintiff has failed to establish its prima facie entitlement to summary judgment as to the Second Mortgage.

Next, the Court will address U.S. Bank's constitutionality claims regarding FAPA. U.S. Bank argues that applying FAPA retroactively would violate due process, both substantively and procedurally. To comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by 'a legitimate legislative purpose furthered by rational means' (*Deutsche Bank Natl. Trust Co. v Vista Holding, LLC.*, 239 AD3d 830 [2d Dept. 2025]; *Deutsche Bank Natl. Trust Co. v Dagrin*, 233 AD3d 1065 [2d Dept. 2024]; quoting *Matter of Regina Metro Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). This standard is not exacting, and the challenged legislation will survive so long as it is rationally related to any conceivable legitimate State purpose (*Dagrin* at 1069; citing *U.S. Bank N.A. v Lynch*, 233 AD3d 113 [3d Dept. 2024] quoting *American Economy Insc Co. v State*, 30 NY3d 136 [2017]).

Here, the legislative purposes, as noted, was to rewrite unintended judicial interpretations, and to reaffirm legislative judgment about what certain laws relating to the application of the statute of limitations to mortgage foreclosure actions should be. Any retroactive impact of the legislation is rationally related to a legitimate governmental interest, and does not violate substantive due process (*Forti v New York State Ethics Commn.*, 75 NY2d 596 [1990]). U.S. Bank cites, inter alia, *Brothers v Florence*, 95 NY2d 290

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[9] Pursuant to General Obligations Law ("GOL") § 17-105(1), parties to a contract may continue to "effect, postpone, cancel, reset, toll [or] revive" the statute of limitations by the express terms of a writing signed by the party to be charged.

[10] see Nir Dankner Affidavit at 18.

(2000), to support its procedural argument that there should be a "grace period" where a statute enactment shortens the existing statute of limitation. In that case, there was an amendment to a statute of limitations provision. FAPA however does not affect the statute of limitations nor the time the cause of action accrues. Rather, it limits the methods which a plaintiff may utilize a foreclosure action to reset the accrual date. Therefore, U.S. Bank has not established a basis for finding that retroactive application of FAPA constitutes a procedural due process violation nor has it established a basis warranting a "grace period" when applying FAPA (see *HSBC Bank USA, N.A. as Tr. Of Ace Sec. Corp. Home Equity Loan Tr. v IPA Asset Mgt., LLC*, 79 Misc 3d 821, 825 [Sup Ct 2023]; citing *Matter of County of Chemung v Shah*, 28 NY3d 244 [2016]).

With respect to U.S. Bank's claim that FAPA's application would impair its vested rights, U.S. Bank has failed to identify a right vested by the Constitution that FAPA affects to its detriment. The Constitutional impediments to retroactive application of civil legislation are "modest" and without a violation of an explicit Constitutional provision, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope" (see *Landgraf v USI Film Products*, 511 US 244 [1994]; see also *Wilmington Trust, N.A. v Farkas*, 232 AD3d 524, 526 [1st Dept 2024]). U.S. Bank's reliance on the purported longstanding right to unilaterally de-accelerate a mortgage is misplaced, as unilateral de-acceleration was not permissible in every case, nor did all of the courts apply the principle as a matter of course prior to *Engel*. By the time that the statute of limitations expired in January of 2016, neither statute nor clear case law gave U.S. Bank a right to reset the statute of limitations solely by a de-acceleration letter. Furthermore, U.S. Bank cannot claim to have a vested interest in the law as pronounced by the Court of Appeals in *Engel*, because it was handed down in 2021, several years after both foreclosure actions were either disposed of, dismissed, and after this instant action was commenced. Accordingly, the Court finds that U.S. Bank has failed to establish that the application of FAPA would violate its due process rights.

The Contracts Clause of the U.S. Constitution prohibits states from enacting laws impairing the "Obligation of Contracts" (*U.S. Cons. Art 1, 10, cl. 1*). This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial (*Sveen v Melin*, 138 US 811 [2018]; *Gen. Motors Corp. v Romein*, 503 US 181, [1992]; *Allied Structural Steel Co. v Spannaus*, 438 US 234 [1978]). It is well settled that "where there is no contractual agreement concerning the terms changed by the legislation, there is no need to consider whether there was in fact an impairment and whether it was substantial" (*Consumers Union of US, Inc. v State*, 5 NY3d 327 [2005]; *Romein* at 188; see also *Funkhouser v J.B. Preston Co.*, 290 US 163 [1993]). In those instances, the legislation cannot be viewed to have violated the Contracts Clause (*id.*; *Ballentine v Koch*, 89 NY2d 51 [1996]).

Here, there was no express language in the mortgage or note which allowed U.S. Bank to "revoke acceleration" or "de-accelerate" the loan or to reset the statute of limitations, and thus it cannot be said that the enactment of FAPA is a violation of the Contracts Clause.[11] In circumstances, prior to the enactment of FAPA, a party's right to de-accelerate its prior acceleration of a mortgage debt was subject to the constraints of judicial decisions and legislative determinations, and "no clear rule" existed as to whether this right existed, absent a precise provision on this issue in the operative documents (see *U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v Miele*, 80 Misc 3d 839 [Sup. Ct. 2023]; *Engel* at 28).

U.S. Bank also asserts that retroactive enforcement of FAPA would violate the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution on the grounds that "FAPA constitutes a per se taking without just compensation because it appropriates U.S Bank's vested rights in its pending foreclosure action, that was timely when commenced, and retroactively strips U.S. Bank of that right by purportedly making the action untimely." The Takings Clause, which was made applicable to the States through the Fourteenth Amendment, prohibits "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' (U.S. Const. 5th Amend.; *Landgraf v USI Film Products,* 511 US 244 [1994]; *James Square Associates LP v Mullen*, 21 NY3d 233 [2013]; *Phillips v Washington Legal Foundation*, 544 US 156 [1998]; *American Economy Ins. Co. v State*, 30 NY3d 136 [2017]; see also NY Const., art 1, § 7).

The law recognizes two types of takings – physical and regulatory (*Cedar Point Nursery v Hassid*, 594 US 139 [2021]; *Buffalo Tchrs. Fed'n v Tobe*, 464 F.3d 362 [2d Cir. 2006]; *Monroe Equities, LLC v State*, 145 AD3d 680 [2d Dept. 2016]). A physical taking occurs when the government has committed or authorized a permanent physical occupation of property (*Tobe* at 374; *Tahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency*, 533 US 302 [2002]). A regulatory taking, by contrast, occurs when the government acts in a regulatory capacity (*Tobe* at 374; *Village of Euclid v Ambler Realty Co.*, 272 US 365 [1926]). Regulatory takings do not involve a physical assumption of property, and while property may be

[11] Moreover, Contrary to U.S. Bank's contentions that FAPA limits a creditor's ability to pursue the equitable remedy of foreclosure, upon commencement of the First Foreclosure Action, U.S. Bank chose to declare all sums due immediately, which in itself, constitutes an election of remedies, and once an election of remedies is made it cannot be retracted, (see *Clark v Kirby*, 243 NY 295 [1926]; *Kilpatrick v Germania Life Ins. Co.*, 183 NY 163 [1905]; *Ost v Mindlin*, 170 AD 558 [1st Dept. 1915]). Furthermore, FAPA did not disturb the Court of Appeal's opinion in *Engel*, which held that absent a contemporaneous statement to the contrary, a discontinuance of a foreclosure will revoke prior election to accelerate (*Ditech Fin. LLC v Naidu*, 82 Misc 3d 452, 460 [Sup Ct 2023]). Instead FAPA, merely addresses the effect of revoking acceleration as it pertains to the statute of limitation so as to reconcile with General Obligations Law 17-105 and CPLR 201-- in that GOL 17-105 by its express terms, is the sole statute governing the tolling or revival of the statute of limitations for an action to foreclose a mortgage (*id.* at 459 citing *Batavia Townhouses, Ltd. V Council of Churches Hous. Dev. Fund Co., Inc.*, 38 NY3d 467 [2022]; *U.S. Bank N.A. v Williams*, 80 Misc.3d 258 [Sup Ct Putnam 2023]; see generally *Petito v Piffath*,85 NY2d 1 [1994]; *John J. Kassner & Co. v City of New York*,46 NY2d 544 [1979]).

regulated to a certain extent, the gravamen of a regulatory takings claim is that if the state regulation goes too far, it in essence "effects a taking" (*Tobe* at 374; *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 [1922]; *Meridan Trust & Safe Deposit Co. v F.D.I.C.*, 62 F.3d 449 [2d Cir. 1995]).

Regulatory takings can either be considered as either per se categorical takings, or non-categorical takings (see *Ditech Fin. LLC v Naidu*, 82 Misc 3d 452, 465 [Sup Ct 2023]; *Tahoe-Sierra Pres. Council, Inc* at 330; *Lucas* at 1026; *Palazzolo v Rhode Island*, 533 U.S. 606 [2001]). A regulation is a per se categorical taking, in the extraordinary circumstance where no productive or economically beneficial use of property is permitted (*Lucas v South Carolina Coastal Council*, 505 U.S. 10003 [1992]; *Tahoe-Sierra Pres. Council Inc. v Tahoe Reg'l Planning Agency*, 535 U.S. 302 [2002]). Thus, a property owner must suffer a literal total loss in value to trigger liability on the part of the government for a per se categorical taking (*id.*). Generally, per se categorical takings require compensation without further factual inquiry (*Lucas* at 1015; *1256 Hertel Ave. Associates, LLC v Calloway*, 761 F3d 252 [2d Cir. 2014]; *Friedenburg v New York State Dept. of Environmental Conversation*,3 AD3d 86 [2d Dept. 2003]). Consequently, anything less than a complete elimination of value, or a total loss, is a non-categorical regulatory taking, which is analyzed under an ad hoc facial inquiry framework created in *Penn Central Trans. Co. v New York City*, 438 US 104 (1978), wherein the court considers the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations and the character of the governmental action (see also *Naidu* at 462; *Tahoe-Sierra Pres. Council, Inc* at 330; *Lucas* at 1026; *Horne v Dept. of Agric.*, 576 U.S. 350 [2015]; *Lingle v Chevron U.S.A. Inc.*, 544 U.S. 528 [2005]; *1256 Hertel Ave. Assoc., LLC v Calloway*,761 F.3d 252 [2d Cir. 2014]). When a court exmploys a Takings Clause analysis, the court must first determine whether a vested property interest has been identified before deciding the more complex, discretionary question of whether the property was "taken" (see *Lucas*, 505 U.S. at 1027; see *Tobe* at 464; *American Economy Ins. Co. v State of New York*, 30 NY3d [2017]). It has been held that, no person has a vested interest or constitutional right in any rule of law entitling them to have the law remain unaltered (see *Bueno Realty Corp. v Berman*, 30 AD2d 860 [2d Dept. 1968]; citing *I. L. F. Y. Co. v Temporary State Housing Comm.*, 10 NY2d 263 [1961]; see also *Eagan v Livoti*, 287 NY 464 [1942]; *J.B. Preston Co. v Funkhouser*, 261 NY 140 [1933]; *Duke Power Co. v Carolina Environmental Study Group Inc.*, 438 U.S. 59 [1978]).

Here, the Court finds that contrary to U.S. Bank's contentions, retroactively applying FAPA does not impair a vested right. As aforementioned, the instant mortgage document does not contain any express language that U.S. Bank enjoyed a specific right to revoke acceleration or the right to reset the statute of limitations. Therefore, FAPA does not take away any express right of U.S. Bank. Additionally, the right to unilaterally revoke an acceleration, is not a core principle of New York State Property law, thus FAPA does not deprive U.S. Bank of protected property rights. Prior to *Engel*, there was no clear case law that gave

U.S. Bank a right to reset the statute of limitations solely by a de-acceleration letter, thus U.S. Bank cannot argue that it relied on it to have a vested right in being able to manipulate the statute of limitations in foreclosure actions. The passage of FAPA, and the legislative intent behind it, was to prevent instances where a plaintiff in a foreclosure action could start, stop, and restart the statute of limitations at will inasmuch as "the amendment was to clarify what the law was always meant to do and say," and assuming arguendo that FAPA encroached upon U.S. Bank's constitutionally protected vested rights, U.S. Bank fails to demonstrate how FAPA's application offends the contemporary vested rights analysis wherein modern cases reflect a less rigid view of the Legislature's right to pass such legislation and a more candid consideration – on a case-by-case basis – of the various policy considerations upon which the constitutionality of retroactive legislation depends (*Hoades v Axelrod*, 70 NY2d 364 [1987]; see also *Ditech Fin. LLC v Naidu*, 82 Misc 3d 452, 465 [Sup Ct 2023]; citing *Matter of Gleason [Michael Vee Ltd.]*, 96 NY2d 117 [2001]). Furthermore, U.S. Bank's argument that FAPA effects a regulatory taking of private property without just compensation because it had "every reason to expect that it would be able to enforce its rights pursuant to the mortgage when it timely commenced the action at bar pursuant to the statutes and case law in place at the time the action was commenced" also fails. A person has no property right or vested interest, in any rule of the common law *(Kim v City of New York*, 90 NY2d 1 [1997]; *Mondou v New York, N.H. & H.R. Co.*, 223 U.S. 1 [1912]). The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby (see *Duke Power Co. v Carolina Environmental Study Group Inc.*, 438 U.S. 59 [1978]; citing *Silver v Silver*,280 U.S. 117 [1929]; *Naidu* at 464). Case law makes clear that only a law in the nature of a contract may create vested rights which are not divested by its repeal (*Naidu* at 464; citing *American Economy Ins. Co. v State*, 30 NY3d 136 [2017]; *U.S. v Little Lake Misere Land Co., Inc.*, 412 U.S. 580 [1973]; *Pennsylvania R. Co. v State*, 11 NY2d 504 [1962]). This is true even when a change in law mandates the dismissal of an action that was viable at the time of commencement (*Naidu* at 465; *Blum v West End Associates.*, 64 NY2d 939 [1985]). Therefore, even if *Engel* afforded a party the ability to "revoke acceleration" and reset the statute of limitations, that common law rule was not in the nature of a contract and therefore was divested upon the enactment of FAPA.

Accordingly, the Court finds that U.S. Bank's constitutionality claims regarding FAPA are denied.

With respect to Plaintiff's request for attorney's fees, RPL § 282(1) states that,

> "Whenever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage, or that amounts paid by the mortgagee therefor shall be paid by the mortgagor as additional payment, there shall be implied in such mortgage a covenant by the mortgagee to

> pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor as the result of the failure of the mortgagee to perform any covenant or agreement on its part to be performed under the mortgage or in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the mortgagee or by way of counterclaim in any action or proceeding commenced by the mortgagee against the mortgagor."

To qualify for attorneys' fees under RPL § 282(1), a mortgagor must meet several requirements listed in the statute. As a threshold matter, the mortgage must include a provision allowing for the mortgagee to recover attorneys' fees in an action against the mortgagor under the mortgage (*Id.*; see also *53rd Street, LLC v U.S. Bank N.A.*., 118CV4203AMDVMS, 2020 WL 13546412 [EDNY Aug. 27, 2020]; *Avail Holding LLC v Ramos*, No. 19-CV-119 2019 WL 6498170 [EDNY Dec. 3. 2019]). If such a provision exists, an implied covenant by the mortgagee to pay the mortgagor's reasonable attorneys' fees applies in three situations: (1) when the mortgagee neglects to perform a covenant it agreed upon under the mortgage; (2) if the mortgagor successfully defends any action commenced by the mortgagee against the mortgagor arising out of the mortgage contract; or (3) if the mortgagor brings a successful counterclaim in an action commenced by the mortgagee against the mortgagor (*DKR Mortg. Asset Tr. 1 v Rivera*, 130 AD3d 774 [2d Dept. 2015]).

Here the Court finds that Plaintiff is not entitled to attorneys' fees pursuant to RPL § 282(1). The mortgage at issue herein includes a covenant allowing the mortgagee to recover attorneys' fees and/or expenses incurred in enforcing the loan.[12] However, none of the statutory prerequisites for an award of attorneys' fees are present herein. For instance, U.S. Bank, the Defendant mortgagee, did not fail to perform a covenant to which it agreed under the mortgage, nor did the Plaintiff successfully defend an action commenced by the mortgagee against the mortgagor arising out of the contract (see *53rd Street, LLC v U.S. Bank N.A.*, 118CV4203AMDVMS, 2020 WL 13546412 [EDNY Aug. 27, 2020]; citing *Citimortgage, Inc v Ramirez*, 59 Misc. 3d 1212[A], 101 NYS3d 600 [NY Sup. Ct. 2018]). Rather, this action is a quiet title claim brought by the Plaintiff arising out of the expiration of the statute of limitations to foreclose on a mortgage.

Plaintiff's reliance on *839 Cliffside Ave. LLC v. Deutsche Bank Natl. Tr. Co. for First Franklin Mtge. Loan Tr. 2006-FF3 Mtge. Pass-Through Certificates*, Series 2006-FF3, No. 15-CV-4516, 2018 WL 4608198, (E.D.N.Y. Sept. 25, 2018), does not compel a different result.[13] In that case, the mortgagor brought a quiet title action seeking to discharge a mortgage under RPAPL Article 15, and the mortgagee responded

[12] See NYSCEF Doc. No. 5 at ¶¶ 9, 14, 19, and 22; see also NYSCEF Doc. No. 10 at ¶¶ 7, 16, 21.
[13] See *53rd Street, LLC v U.S. Bank N.A.*, 118CV4203AMDVMS, 2020 WL 13546412, at *2 (EDNY Aug. 27, 2020).

by filing several counterclaims, including one to foreclose on the property, which the Court dismissed as time-barred. Thereafter the parties cross-moved for summary judgment and the court denied the defendant's motion in its entirety, granted the plaintiff's request to dismiss the remaining counterclaims, and declared that the plaintiff was entitled to recover attorneys' fees and costs pursuant to RPL § 282(1). The court therein noted that "in light of this Court's Order dated August 25, 2017, dismissing Deutsche Bank's *foreclosure counterclaim*, ... it is without question that Plaintiff successfully defended an action arising from the Mortgage." Similar to *53rd Street, LLC v U.S. Bank N.A.*, in this action, the Defendant did not bring a counterclaim against the Plaintiff seeking foreclosure, and therefore the Plaintiff did not engage in a "successful defense" against an action brought by the mortgagee under the mortgage and Plaintiff has not cited any case in which a court has allowed a mortgagor who successfully *prosecutes* an action against the mortgagee to recover attorneys' fees under the statute (see *53rd Street, LLC* at 2; citing *Citimortgage, Inc. v Ramirez*, 59 Misc. 3d 1212 [A] [N.Y. Sup. Ct. 2018]; see also *Deutsche Bank Nat'l Tr. Co. v Gordon*, 179 AD3d 770 [2d Dept. 2020]; *21st Mortg. Corp., rtc. v Nweke*, 165 AD3d 616 [2d Dept. 2018]). Moreover, Plaintiff has failed to submit any proof as to the amount of attorneys' fees and expenses incurred in this matter. Plaintiff's counsel did not submit a retainer agreement, time records, or any billing statements for the legal services performed. Without such proof, the Court is unable to determine what a fair and reasonable award would be. Accordingly, Plaintiff's request for attorneys' fees is denied.

Accordingly, it is hereby,

ORDERED, that Defendant's motion (Motion Seq. 3) is denied, and it is further,

ORDERED, that Plaintiff's motion (Motion Seq. 4) is withdrawn and Motion Seq 8 is substituted in its place, and it is further,

ORDERED, that Plaintiff's motion (Motion Seq. 8) is granted to the extent that the branch of Plaintiff's motion seeking to discharge the First Mortgage Loan is granted and U.S. Bank's right to foreclose on the First Mortgage Loan is time barred. Plaintiff has not established its prima facie burden for entitlement to discharge the Second Mortgage Loan and that branch of Plaintiff's motion is denied, and it is further,

ORDERED, that Plaintiff's request for attorney's fees is denied.

Any issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice