| **Bank of N.Y. Mellon Trust Co. v Licari** |
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| 2026 NY Slip Op 31170(U) |
| March 31, 2026 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 611718/2023 |
| Judge: Aletha V. Fields |
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MOT SEQ 3 – INTERIM Mot D
MOT SEQ 4 – Mot D
Next date: April 16, 2026 3:00 p.m.

# State Of New York – Supreme Court
# Suffolk County – Part 81

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| THE BANK OF NEW YORK MELLON TRUST COMPANY,<br>Plaintiff(s),<br><br>-against-<br><br>DONNA MARIE LICARI, et al.,<br>Defendant(s). | Index Number : 611718/2023<br><br>Hon. Aletha V. Fields, AJSC<br><br>Order on Motions |

ROBERTSON ANSCHUTZ SCHNEID CRANE & PARTNERS, LLC, Westbury, New York for plaintiff

JUSTIN F. PANE, P.C., P.C., Patchogue, New York for defendant Donna Marie Licari

Upon the motion papers (NY St Cts Elec Filing [NYSCEF] Doc Nos. 84-97, 101-109) and any efiled documents cited therein (CPLR 2214 [c]) considered on (A) defendant Donna Marie Licari's two-branch motion for summary judgment pursuant to CPLR 3212 and RPAPL § 1501 (4) and for leave to renew this Court's prior order denying defendant's prior summary judgment motion to dismiss the complaint based on non-compliance with real property actions and proceedings law section 1304, and (B) plaintiff's cross motion dismissing each of defendant's three counter-claims, it is hereby

**ORDERED** that defendant's motion for summary judgment on its third counterclaim (RPAPL § 1501 [4]) and for a hearing to be held on whether RPAPL § 282 attorneys' fees should be awarded be, and it hereby is, GRANTED on an interim basis pending further briefing on an issue specified herein, and defendant's motion be, and hereby is otherwise DENIED as academic; and it is further

**ORDERED** that plaintiff's motion be, and it hereby is, DENIED as academic; and it is further

**ORDERED** that counsel for the parties be, and each hereby is, directed to appear before this Court for a virtual chambers conference using this Court's standard Microsoft Teams link available in this Court's part rules, with such conference to cover: (A) any issue this Court or a party wants to raise; (B) settlement; (C) scheduling including for additional briefing, at following date and time certain: April 16, 2026 at 3:00 p.m.

This is a residential mortgage foreclosure action in which plaintiff alleges that Donna Marie Licari and John Licari executed and delivered to Countrywide Home Loans, Inc. (lender) a promissory note in the initial principal amount of four hundred thirteen thousand dollars

($413,000.00) and secured their obligations thereunder by contemporaneously executing and delivering to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for lender a mortgage encumbering certain realty the Town of Brookhaven in Suffolk County. Of the two borrowers, only Donna Marie Licari (defendant) has answered.

This is not plaintiff's first action to foreclose. On July 7, 2011, plaintiff sued defendant and others under supreme court, Suffolk County, index number 21266/2011 (NYSCEF Doc No. 87, certified summons with notice and certified verified complaint). Paragraph seventh of the complaint set forth the election to accelerate the entire debt. The 2011 action ended with a stipulation discontinuing action filed with the Suffolk County Clerk on August 7, 2013 (NYSCEF Doc No. 88).

In a second action, index number 603934/2018, the assigned justice dismissed the action as to John Licari as abandoned by authority of CPLR 3215 (c) and dismissed the action against Donna Licari because of the 3215 (c) dismissal (NYSCEF Doc No. 89, order), and a judgment embodying that dismissal was entered in the Suffolk County Clerk's office on May 11, 2022 (NYSCEF Doc No. 90).

On May 9, 2023, plaintiff filed the summons and complaint in this action (NYSCEF Doc No. 1) thereby commencing this, the third, action (CPLR 304 [a]). Not in its infancy, this action has been the subject of significant conferencing and motion practice. In the prior motion practice, plaintiff moved for summary judgment and related relief, and this Court granted partial summary judgment on the issue of the note and the mortgage, but not on default. In addition, this Court dismissed almost all of defendant's affirmative defenses including that this action was time-barred. This Court left open defendant's affirmative defense alleging noncompliance with RPAPL § 1304. The order denied all other aspects of plaintiff's motion, including so much of it that sought dismissal of defendant's counterclaims, meaning that the counterclaim seeking RPAPL § 1501 (4) relief was not dismissed (NYSCEF Doc No. 70[1], order).

In the prior motion practice, defendant cross-moved to dismiss the complaint because plaintiff did not strictly comply with RPAPL § 1304 in that the list of housing counseling agencies included in the statutory notice consisted of only five housing counseling agencies, and the telephone number of one of the agencies was not the telephone number that the New York State Department of Financial Services had published for that agency. This Court denied defendant's motion (NYSCEF Doc No. 70, order).

The order's net effect regarding RPAPL § 1304 was to leave the issue for trial where the burden of proof differs from that on defendant's motion for summary judgment.

Now, defendant comes seeking summary judgment on its third counterclaim, which "is for equitable, declaratory, and statutory relief to quiet title to the [p]roperty, pursuant to RPAPL [§] 1501 (4)" (NYSCEF Doc No. 28, answer with counterclaims at ¶ 13). Although the remainder of the paragraph speaks of plaintiff and defendant, those references are incorrect. This Court disregards the error because no prejudice arose to plaintiff for what looks a lot like a cut and paste

[1] This is the same document that is found at NYSCEF Doc No. 71.

job from a 1501 complaint (CPLR 2101 [f]). In addition, but not in the alternative, defendant seeks leave to renew the denial of its prior summary judgment motion seeking dismissal for RPAPL § 1304 non-compliance.

"To obtain summary judgment it is necessary that the movant establish [movant's] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [movant's] favor (CPLR 3212, subd [b]), and [movant] must do so by tender of evidentiary proof in admissible form" (***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 1067 [1979]). "The facts must be viewed in the light most favorable to the non-moving party" (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 503 [2012]). "Failure to make this showing [of entitlement to judgment as a matter of law] requires denial of the motion, regardless of the sufficiency of the opposing papers" (***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985]; ***Deutsche Bank Natl. Trust Co. v Idarecis***, 202 AD3d 1051 [2d Dept 2022]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324 [1986]).

"A party with 'an estate or interest' in real property subject to a mortgage may commence an action [or assert a counterclaim] to cancel and discharge of record that mortgage where the applicable statute of limitations for commencing a foreclosure action has expired, provided that the mortgagee, or its successor, was not in possession of the property at the time such action was commenced" (***Trento 67, LLC v OneWest Bank, N.A.***, 230 AD3d 1, 8 [2d Dept 2024] quoting, in part, RPAPL § 1501 [4]). Defendant must prove that it has an estate or interest in the real property, which it did by submission of the vesting deed (NYSCEF Doc No. 86[2]) and "as an essential element of [a counterclaim] pursuant to RPAPL 1501 (4)" the expiration of the six-year statute of limitations (CPLR 213 [4]) on a mortgage foreclosure action (***Smith v Bank of N.Y. Mellon***, 237 AD3d 1128, 1129 [2d Dept 2025]).

"Here, in support of [the] motion, the defendant demonstrated, prima facie, that the six-year statute of limitations began to run on [July 7, 2011], when [plaintiff] commenced the [2011] action and elected in the complaint to call due the entire amount secured by the mortgage. The defendant further demonstrated that the instant action was commenced on [May 9, 2023], more than six years later" (***MTGLQ Invs., L.P. v Korelova***, 246 AD3d 719, 250 NYS3d 177, 179 [2d Dept 2026] [citations omitted] [pagination for official reports unavailable]). The burden shifts to plaintiff.

The plaintiff does not dispute the timeline, nor does it contest that the defendant has made out a prima facie case under RPAPL § 1501 (4). Instead, plaintiff advances two legal objections: First, defendant waived the statute of limitations. Second, this Court's prior dismissal of the statute of limitations defense precludes any reliance on that statute now.

Neither argument persuades this Court.

[2] Because the deed is incorporated into an attorney's affirmation, this Court finds that the deed is a non-hearsay certified copy (CPLR 2105).

In support of its waiver argument, plaintiff relies on ***New York Commercial Bank v J Realty F Rockaway, Ltd.***, (108 AD3d 756, 757 [2d Dept 2013]) where the Second Department addressed a trial court's error in reaching an unasserted defense on a plaintiff's motion for summary judgment. Here, by contrast, when the defendant failed to raise the statute of limitations in response to plaintiff's prior motion, this Court did not reach the issue, exactly as ***J Realty F Rockaway, Ltd.*** directs.

Plaintiff does no better with ***Starkman v City of Long Beach***, (106 AD3d 1076, 1078 [2d Dept 2013]) where as an alternate holding, ***Starkman*** set forth, "those affirmative defenses were either waived (CPLR 3211 [e]) or are without merit." Here, however, defendant pled the defense of the statute of limitations in the answer, no statutory waiver occurred.

Plaintiff's second contention—that dismissal of the affirmative defense extinguishes all future reliance on the statute of limitations—is unsupported by statute or precedent. The argument invokes no recognized preclusion doctrine and, more fundamentally, misapprehends the structure of the governing law.

The Foreclosure Abuse Prevention Act (L 2022 ch 821 [FAPA]) altered prior law to stop what the Legislature identified as abusive practices involving the statute of limitations in mortgage foreclosure actions (***Van Dyke v U.S. Bank, N.A.***, -- NY3d --, 2025 NY Slip Op 06537 [a 1501 action in which the retroactive application of FAPA § § 4, 7, and 8 was upheld]). FAPA addresses precisely the type of serial foreclosure conduct this action presents. FAPA section 4 (CPLR 203[h]) prohibits unilateral manipulation of the statute of limitations. Section 7 (CPLR 213 [4] [a], [b]) codifies an estoppel rule, preventing a foreclosing party from disavowing a prior acceleration when the statute of limitations is invoked—whether defensively or affirmatively under RPAPL § 1501 (4). Section 8 (CPLR 3217 [e]) ensures that a voluntary discontinuance does not reset the limitations period, thereby abrogating ***Freedom Mtge. Corp. v Engel*** , (37 NY3d 1 [2021]).

Those three sections of FAPA target the sort of abuse of serial mortgage foreclosure actions that has occurred here despite ***Engel*** having allowed that conduct. ***Van Dyke*** cites FAPA's legislative history that says point blank that FAPA intends to overrule ***Engel***. A trial court has no authority to disregard the Court of Appeals precedent telling lower courts to give effect to the words and purpose of FAPA. Courts have no liberty to soften the legislative and executive branches' policy determination and implementation.

By enacting parallel estoppel provisions (FAPA § 7; CPLR 213 [4] [a] and [b]), the Legislature demonstrated that the statute of limitations as a defense and RPAPL § 1501 (4) operate independently of one another. Accordingly, dismissal of an affirmative defense at an earlier stage of the proceeding does not, as plaintiff argues, extinguish a 1501 cause of action.

***Van Dyke*** leaves open the possibility of an as-applied constitutional challenge to FAPA's retroactivity. Even if such a challenge is viable in some circumstances (*see*, ***U.S. Bank, N.A. v Nicholson***, 2024 NY Slip Op 50503[U] [Sup Ct, Suffolk County 2024] [invoking the abridgment doctrine based on FAPA's effect as applied]), in ***Van Dyke***, the defendant (mortgagee) "has not shouldered its ultimate burden of demonstrating FAPA's constitutional invalidity" in an as applied

challenge to retroactivity (***Van Dyke***, at * 6 [internal quotation marks and citations omitted]). This plaintiff fares even worse because both the 2018 action and this action were commenced beyond the six-year limitations period measured from the July 7, 2011 commencement of the first action (*cf., e.g.,* ***Oakdale III, LLC v Deutsche Bank Natl. Trust Co.***, 189 AD3d 1685 [2d Dept 2020] [applying pre-FAPA law and requiring that to be timely the second action be commenced within six years of the commencement of the first action[3]]).

If controlling, plaintiff's argument would create value by requiring parties to raise dispositive issues early in litigation. CPLR 3211 (e) embodies this principle. However, allowing these considerations to overcome FAPA's policy basis and intent would minimize FAPA to a nullity by judicial fiat and not by any constitutional or valid exercise of judicial power.

Nor does equity supply a different outcome. No matter how unclean the delinquent defendant defaulter's hands might be, plaintiff would have to overcome its laches-dirtied hands. Reaches to equity do not guard against the minimization of FAPA and raise issues about whether the so-acting court respects the textbook case of checks and balances that FAPA's abrogation of ***Engel*** teaches. The overreach is made all the more apparent because courts can maintain FAPA's purposes while providing proper incentives, which this Court cannot describe here for fear of unintentionally coaching the attorneys' fees hearing.

Applying this analysis to this action, the outcome is obvious. Defendant is entitled to summary judgment on its RPAPL 1501 (4) claim, which is a creature purely of statute and is entitled to a hearing where defendant bears the burden of proving the applicability of RPAPL § 282 and if applicable, defendant's reasonable attorneys' fees and expenses.

Those who see this outcome as conferring a free house windfall to an undeserving delinquent defendant who broke the normative standard of "keep your promises" that lawyers call the sanctity of contract have redress against RPAPL § 1501 and FAPA. But, the place to seek that redress is at the Legislature, not the Judiciary.

Based upon the foregoing, so much of defendant's motion that seeks leave to renew and dismissal based on RPAPL § 1304 and so much of it that seeks other relief except for relief under RPAPL § 282 is denied as academic.

Plaintiff's cross motion seeks to dismiss the three counterclaims in case this Court had not yet done so. This Court's order on prior motion practice denied all requests for relief not specifically granted. Dismissal of the counterclaims was not granted in the prior order, so the prior order denied that relief. Based on the foregoing, the first and third counterclaims stand, so the application to dismiss them is denied; ruling on the second counterclaim would be academic and constitute an impermissible advisory opinion. Therefore, plaintiff's cross motion is denied in its entirety.

[3] In the Second Department, the pre-FAPA revocation of acceleration rule was that a voluntary discontinuance was not in itself is not an affirmative act sufficient to revoke acceleration (***Freedom Mtge. Corp v Engel***, 37 NY3d 1 [2021]).

Left for this Court is just one more issue. Given that defendant John Licari and other parties are in default, does the cancellation and discharge of the mortgage apply to them? The obvious place to start is with the language of the statute that creates the cause of action. The person with "an estate or interest in the real property subject to such encumbrance may maintain an action [or counterclaim] . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff [or counterclaimant] in such real property to be free therefrom" (RPAPL § 1501 [4]). To avoid swaying the parties' arguments, all this Court will say here is that the quoted language can be read in more than one way. One or some of the ways it can be read would, in effect, eliminate the mortgage and promote all other estates' priority. One or some of the other ways it can be read would, in effect, eliminate the mortgage only as to the moving party (or, in a proper case, plaintiff) and promote only that party's estate's priority. This Court determines that additional briefing on this point is required.

Therefore, this decision is an interim decision.

Dated : March 31, 2026
Riverhead, New York

E N T E R

**Hon. Allison V. Fields, AJSC**