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APPELLATE MORTGAGE NEWSLETTER

ISSUE 3

PIB Appellate Mortgage Newsletter

We are pleased to share with you the latest issue of the PIB Appellate Mortgage Newsletter. This newsletter summarizes recent relevant appellate decisions from the following jurisdictions in which our lawyers practice: New York, New Jersey, Pennsylvania, Massachusetts, Connecticut and California.

For ease of reference, each case summary begins with a brief synopsis of the topics that are generally covered in that case.

Below are a few highlighted cases covered in this edition of the newsletter:

- **New York**: Claim for violation of General Business Law § 349 survives motion to dismiss where the defendant/counterclaimant pled that plaintiff engaged in deceptive conduct by miscommunicating the terms of a forbearance agreement and that the defendant was damaged thereby. (*Ngo*)
- **New York**: Transmission of an email setting forth terms of settlement may be binding under CPLR 2104. (*Kendall*)
- **New York**: Although the foreclosing plaintiff's first affidavit failed to establish compliance with RPAPL 1304, the trial court should have considered the plaintiff's second affidavit, because it was submitted in opposition to the defendant's cross-motion in response to a specific argument raised for the first time in opposition to the plaintiff's motion and in support of the defendant's cross-motion. (*Pickering-Robinson*)
- **New Jersey**: Defendant's allegations of fraud were barred by laches, even though the statute of limitations had not expired. (*Bascom*)
- **California**: A stipulated settlement cannot avoid a prior judgment finding unclean hands against a settling party. (*Phan*)

If there are any particular decisions that you would like to review or discuss, please let us know.

- Scott, Jay and Jim

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Defendant properly asserted a cause of action for damages under GBL 349 against foreclosing plaintiff; a challenge to the terms of the loan is not a "qualified written request": *HSBC Bank USA, N.A. v. Lien This Ngo*, 2021 N.Y. App. Div. LEXIS 5018, 2021 NY Slip Op 04909, 2021 WL 3889863 (2nd Dept. Sept. 1, 2021): Defendant appealed from an order of the Supreme Court, Kings County (Noach Dear, J.), which granted foreclosing plaintiff's cross motion pursuant to CPLR 3211(a) to dismiss defendant's counterclaims, and denied defendant's motion for leave to amend her answer and counterclaims. Appeal granted to the extent of reinstating defendant's GBL 349 counterclaims and granting defendant leave to amend to assert an amended counterclaim to recover damages for violation of GBL 349.

The Supreme Court erred in dismissing defendant's counterclaim to recover damages under GBL. "To state a cause of action to recover damages for violation of General Business Law § 349, the complaint must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice."

Defendant's allegations that "the plaintiff engaged in deceptive conduct by miscommunicating the terms of a temporary forbearance agreement and by failing to timely disclose to the defendant that partial mortgage loan payments made during the forbearance period would result in a default," and that "the defendant suffered damages that were proximately caused by that action, including 'financial . . . harm'", "sufficiently pleaded deceptive conduct that was consumer-oriented, resulting in damages."

Further, defendant's proposed amended GBL 349 claim "sufficiently alleged deceptive conduct that was consumer-oriented, resulting in damages," and "plaintiff did not show that it would be surprised or prejudiced by the amendment."

The Supreme Court properly dismissed the counterclaims seeking to recover damages under RESPA on the basis plaintiff failed to respond to a "qualified written request", because "[a] challenge to the terms of a loan is not a proper subject of a RESPA 'qualified written request.'" Likewise, defendant's proposed amended counterclaim under RESPA "did not allege that she sent to the plaintiff a 'qualified written request.'"

In addition, the proposed counterclaim alleging negligent misrepresentation was meritless. "Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified. An arm's length borrower-lender relationship . . . does not support a cause of action for negligent misrepresentation."

Plaintiff not required to serve an amended complaint in same manner provided for service of process where no new claims are added; defendant opposing a motion to vacate order dismissing action did not waive right to contest personal jurisdiction: *United States Bank N.A. v. Cadoo*, 2021 N.Y. App. Div. LEXIS 4782, 2021 NY Slip Op 04678, 2021 WL 3521023 (2nd Dept. Aug. 11, 2021): Defendants Donmackimber Cadoo and David Cohen appealed from an order of the Supreme Court, Kings County (Mark I. Partnow, J.), denying their cross-motion pursuant to CPLR 3211(a)(8) to dismiss the complaint based upon lack of personal jurisdiction over Cadoo where plaintiff failed to serve the Amended Complaint, which added Cohen's successors and/or heirs as defendants, upon Cadoo. Appeal denied.

The Supreme Court erred in finding that defendants waived the right to contest personal jurisdiction by failing to raise it in opposition to plaintiff's earlier motion to vacate a conditional order of dismissal entered

pursuant to CPLR 3215(c). The Second Department found that, in filing their opposition, "defendants did not demonstrate a clear intent to participate in the litigation, nor did they participate in the lawsuit on the merits, and therefore they did not formally or informally appear in the action." Likewise, as defendants had not formally appeared, the cross-motion to dismiss was not untimely.

Nevertheless, the Second Department found that "the court obtained jurisdiction over [defendant] Cadoo upon the service of the original summons and complaint," and that plaintiff was not required "to serve Cadoo with the amended complaint in the manner provided for service of a summons where, as here, the amended complaint did not add any new claims for relief. Any purported error in the service of the amended pleading upon Cadoo was not jurisdictional in nature and, in the absence of any apparent prejudice to Cadoo, can and should be ignored by the court."

Transmission of an email setting forth terms of settlement is binding under CPLR 2104: *In the Matter of Philadelphia Insurance Indemnity Co. v. Kendall*, 197 AD3d 75 (1st Dept. July 8, 2021): Petitioner appealed from the judgment of the Supreme Court, New York County (Lynn R. Kotler, J.), denying the petition to enforce a settlement agreement. The First Department reversed, holding that, for purposes of CPLR 2104, the transmission of an e-mail is what determines whether a settlement stipulation has been subscribed (*i.e.*, signed), not whether an e-mail "signature" can be shown to be re-typed.

By way of background, after conducting an arbitration of their case (but before the parties became aware of the arbitrator's decision), the parties agreed to settle their case for $400,000.00. Respondent's counsel e-mailed petitioner's counsel: "Confirmed – we are settled for 400K." Below that appeared "Sincerely," followed by counsel's name and contact information. Petitioner's counsel replied via e-mailed, attaching a general release entitled "Release and Trust Agreement", and saying: "Get it signed quickly before any decision comes in, wouldn't want your client reneging." Respondent's counsel responded, "Thank you. Will try to get her in ASAP." That e-mail contained the same signature block from Respondent's counsel as before.

Shortly thereafter, Respondent's counsel refused to sign the Release and Trust Agreement, on the grounds that the arbitrator that heard the parties' claims had issued a decision in favor of Respondent in the amount of $975,000.00. Petitioner responded by bringing a special proceeding to enforce the settlement agreement and to vacate the arbitral award. The Supreme Court denied relief, finding that Respondent's counsel had not "subscribed his email for purposes of CPLR 2104 by retyping his name in addition to his prepopulated contact information block." Further, the Supreme Court held that Respondent's failure to sign the release was a "necessary occurrence to finalize the settlement."

On appeal, the First Department reversed. As the Court observed, CPLR 2104, entitled "Stipulations", reads in pertinent part: "An agreement between parties or their attorneys relating to any matter in an action … is not binding upon a party unless it is in a writing subscribed by him or his attorney …." The Court noted that the New York Court of Appeals has not yet opined on whether e-mail can satisfy CPLR 2104 – but that "email has become ubiquitous, and statutes allowing for electronic signatures have become widespread." Therefore, the First Department found that any previously recognized distinctions between "prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today" – and concluded that, if an attorney sends an e-mail to relay a settlement offer or acceptance, and the e-mail account is identified as the attorney's own, then "it is unnecessary for them to type their own signature."

The First Department recognized the "intuitive" concern that the "ubiquity and ease" of sending e-mail may undercut their intentionality – but that, here, the issue was limited to a "specific subcategory of email on a

subject freighted with ethical obligations." The Court found that the lawyer's ethical obligations regarding the conveyance of settlement offers under New York's Rules of Professional Conduct "help to ensure that an attorney considers their authority before communicating settlement offers and acceptances to opponents, whatever the mode of communication."

Finally, the First Department stated that not every e-mail purporting to settle a case will be "unassailable evidence" that the settlement is binding: (1) because e-mail accounts can be hacked, a party has the right to rebut the authenticity of a settlement e-mail; and (2) an e-mail settlement must, "like all enforceable settlements, set forth all material terms." In this case, the Court found that the "material terms" requirement was satisfied, because the "sole issue" in the case was how much money Respondent was going to accept in settlement of her claim.

Plaintiff's affidavits failed to establish compliance with pre-foreclosure notice requirements: *Bank of N.Y. Mellon v. Deloney*, 2021 N.Y. App. Div. LEXIS 4772, 2021 NY Slip Op 04655 2021 WL 3521007 3521007 (2nd Dept. Aug. 11, 2021): Defendant appealed from an amended order and foreclosure judgment of the Supreme Court, Kings County (Noach Dear, J.), entered upon an order of the same court (Mark Partnow, J.) that granted plaintiff's motion for summary judgment, and denied defendant's cross motion to dismiss the complaint. Appeal granted to the extent of vacating entry of summary judgment in favor of plaintiff.

Plaintiff failed to establish that defendant defaulted on the loan. As the Second Department noted, plaintiff's affiant "did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff or those of the plaintiff's predecessor in interest, or that the records generated by the plaintiff's predecessor in interest were incorporated into the plaintiff's own records or routinely relied upon in its business and failed to attach any business records of the plaintiff or its predecessor in interest to his affidavit." In addition, the affiant did not identify the business records upon which he relied in determining defendant defaulted.

Plaintiff also failed to establish compliance with RPAPL 1304:

> The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served [defendant] pursuant to the terms of RPAPL 1304. The Shellpoint employee's affidavit was insufficient to establish that the notice was sent to [defendant] in the manner required by RPAPL 1304, as the employee did not provide evidence of the plaintiff's standard office mailing procedure and provided no evidence of the actual mailing.

Defendant not entitled to dismissal based on preclusion order where its own documents established standing, and where plaintiff is entitled to call witnesses as to default: *Extraco Banks, N.A. v. Wilson*, 2021 N.Y. App. Div. LEXIS 4777, 2021 NY Slip Op 04660, 2021 WL 3521006 (2nd Dept. Aug. 11, 2021): Defendant, a junior lienholder, appealed from an order of the Supreme Court, Kings County (Noach Dear, J.), denying its motion for summary judgment dismissing the foreclosure complaint insofar as asserted against it. Appeal denied.

The Second Department rejected defendant's argument that plaintiff would not be able to establish standing or defendant's default, where an order had been entered prohibiting plaintiff from offering evidence at trial "that is responsive to [the defendant's] requests but has not been provided by Plaintiff in its discovery responses."

Defendant's own documents demonstrated that plaintiff had attached a copy of the blank endorsed note to the Complaint. Thus, the sufficiency of plaintiff's opposition papers was irrelevant as to the issue of standing. Likewise, as to default, the preclusion order did not restrict "the plaintiff's ability to introduce evidence it had produced to the defendant nor its right to call witnesses at trial, including, but not limited to, the [borrowers]."

Dismissal under CPLR 3215(c) should not have been with prejudice: *Deutsche Bank Nat'l Trust Co. v. Brathwaite*, 2021 N.Y. App. Div. LEXIS 4776, 2021 NY Slip Op 04659, 2021 WL 3521000 (2nd Dept. Aug. 11, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Rockland County (Rolf Thorsen, J.), dismissing the complaint with prejudice pursuant to CPLR 3215(c). Appeal granted to the extent of dismissing the complaint without prejudice rather than with prejudice.

More than six years after commencing the action, the plaintiff moved for leave to enter a default judgment. A non-appearing defendant cross-moved pursuant to CPLR 3215(c) to dismiss the complaint as abandoned, due to the plaintiff's lengthy delay in seeking a default judgment.

The Second Department concluded that the Supreme Court "providently exercised its discretion in finding that the plaintiff failed to proffer a reasonable excuse for its more than six-year delay in seeking a default judgment." It opined that "the plaintiff's conclusory and unsubstantiated assertions that unspecified periods of delay were attributable 'to a variety of reasons out of [the] plaintiff's control,' such as foreclosure settlement conferences, the need to serve a party by publication, compliance with a then newly enacted administrative order, a change in counsel, 'and an abundance of litigation,' were insufficient to constitute a reasonable excuse."

Dismissal with prejudice, however, was in error, as "a dismissal under CPLR 3215(c) is a dismissal for a failure to prosecute and consequently [is] not a dismissal on the merits or with prejudice."

Action erroneously dismissed under CPLR 3215 where less than one year transpired after service by publication: *United States Bank N.A. v. Cadoo*, 2021 N.Y. App. Div. LEXIS 4775, 2021 NY Slip Op 04677, 2021 WL 3521011 (2nd Dept. Aug. 11, 2021): Defendants Donmackimber Cadoo and David Cohen appealed from an order of the Supreme Court, Kings County (Mark I. Partnow, J.), granting the foreclosing plaintiff's motion to vacate an order of the same court (Lawrence Knipel, J.) that conditionally dismissed the action pursuant to CPLR 3215(c), and to restore the action to the calendar. Appeal denied.

By way of background, the foreclosure action was commenced on August 20, 2014. Service of the Complaint on Cadoo was completed by December, 2014. On October 19, 2015 the Court granted plaintiff leave to serve Cohen by publication pursuant to CPLR 316. Service of the Amended Complaint on Cohen was made by publication with the first publication date being January 12, 2016. On October 13, 2016, the court entered an order which found "that issue has not been joined and the plaintiff has failed to proceed to entry of judgment within one year of default." The Order directed that "the instant complaint is dismissed as abandoned unless plaintiff proceeds to entry of judgment within 90 days hereof." On October 17, 2016, the guardian ad litem and military attorney appointed to represent Cohen's interests filed an answer on Cohen's behalf and a waiver of notice of application for an order of reference. On February 10, 2017, the action was marked dismissed without further order of the court. Plaintiff successfully moved to vacate the dismissal, and defendants appealed.

As less than a year had transpired since Cohen's default, it was improper to dismiss the action. CPLR 316 provides that service by publication is complete 28 days after the first date of publication. Since "service by publication upon Cohen was not complete until February 9, 2016, a full year had not transpired since

Cohen's default in the action, either at the time the conditional order of dismissal was issued on October 13, 2016, or at the time the action was marked dismissed on February 10, 2017."

In addition, the plaintiff was not required to demonstrate a reasonable excuse for its noncompliance with the conditional order of dismissal or for its purported delay in moving to vacate that order.

The one year period under CPLR 3215(c) commences upon release from the settlement conference part; date motion for order of reference is filed is the operative date for purposes of calculating the one-year deadline under CPLR 3215(c), and outcome of motion is irrelevant: *Deutsche Bank Nat'l Trust Co. v. Attard*, 2021 N.Y. App. Div. LEXIS 4815, 2021 NY Slip Op 04698, 2021 WL 3641301 (2nd Dept. Aug. 18, 2021): Defendant appealed from an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), denying defendant's motion pursuant to CPLR 3215(c) to dismiss the foreclosure complaint insofar as abandoned. Appeal denied.

> [I]t is undisputed that the one-year period pursuant to CPLR 3215(c) did not begin to run until after January 22, 2016, when the matter was released from the foreclosure settlement conference part. It is also undisputed that the plaintiff moved for an order of reference … less than eight months after the final settlement conference. That the motion was denied due to a technical defect [the return date was a court holiday] was irrelevant for the purpose of satisfying CPLR 3215(c), as it was the filing of the motion, not its outcome, that manifested an intent not to abandon the case but to seek a judgment. Furthermore, contrary to the defendant's contention, once the plaintiff . . . initiated proceedings for the entry of a judgment within one year after the release of the case from the settlement conference part, it was in compliance with CPLR 3215(c) and it was not required, under the plain language of that subdivision, to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c).

Defendant failed to establish plaintiff's "usurious intent" in charging certain fees at closing: *Zanfini v. Chandler*, 2021 N.Y. App. Div. LEXIS 4774, 2021 NY Slip Op 04681, 2021 WL 3521024 (2nd Dept. Aug. 11, 2021): Defendant appealed from an order of the Supreme Court, Suffolk County (Joseph Farneti, J.), denying her motion for summary judgment dismissing the complaint on the ground of usury. Appeal denied.

Defendant claimed that "a $14,000 mortgage broker's commission, a title insurance charge of $7,212.50, and a $1,000 fee paid to her attorney at the closing, were a cover for usury." The Second Department, however, found that this did not prima facie establish that plaintiff entered into the loan with usurious intent:

> Whether a commission is a cover for usury is a factual issue which must be demonstrated by clear and convincing evidence. If itemized in writing to the borrower, reasonable fees, charges and costs for, among other things, title insurance and legal services are not considered interest on a loan secured by a one- or two-family owner-occupied residence (see 3 NYCRR § 4.2[a]; 4.3[b][4], [5]). Notably, an imprecise lending disclosure . . . constitutes a bona fide error of fact which is insufficient to establish the requisite usurious intent.

Foreclosing plaintiff was not required to register as debt collector under New York City's Administrative Code: *Citibank, N.A. v. Yanling Wu*, 2021 N.Y. App. Div. LEXIS 5028, 2021 NY Slip Op 04902, 2021 WL 3889872 (2nd Dept. Sept. 1, 2021): Defendants appealed judgment of foreclosure of the

Supreme Court, Queens County (Denis J. Butler, J.), entered upon an earlier order granting plaintiff summary judgment. Appeal granted.

The Second Department rejected defendant's argument that the foreclosing plaintiff was required to obtain a debt collection license under New York City's Administrative Code. Under Administrative Code § 20-490, "debt collection agencies" are required to be licensed. A "debt collection agency" is defined as "a person engaged in business the principal purpose of which is to regularly collect … collect debts owed or due … to another and shall also include a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt."

Here, plaintiff had acquired the debt after it became delinquent. Defendants, however, made no showing that the "principal purpose" of plaintiff was to buy and collect delinquent debt. In any event, a review of the legislative intent of the statute indicated that the statute "does not apply to an owner of a note acquired after default who is pursuing a judicial mortgage foreclosure [and] plaintiff was not required to be licensed as a 'debt collection agency' pursuant to Administrative Code § 20-490 in order to prosecute this mortgage foreclosure action."

Nevertheless, defendant was entitled to vacate summary judgment, because plaintiff failed to attach to the affidavit of default the business records upon which its affiant relied. Thus, plaintiff failed to establish defendant's default.

Compliance with RPAPL 1304 established by submission of copies of the notices with tracking numbers and proof of adherence to a standard office procedure: *Wells Fargo Bank, N.A. v. Pinnock*, 2021 N.Y. App. Div. LEXIS 4806, 2021 NY Slip Op 04732, 2021 WL 3641412 (2nd Dept. Aug. 18, 2021): Defendant appealed from a judgment of foreclosure and sale of the Supreme Court, Suffolk County (Howard H. Heckman, Jr., J.), entered upon orders granting plaintiff's motion for summary judgment. Appeal denied.

In concluding that plaintiff established compliance with RPAPL 1304 by submitting "copies of the notices with tracking numbers and proof of a standard office mailing procedure which was adhered to in this case," the Second Department noted:

> The plaintiff submitted an affidavit from one of its employees who averred that the plaintiff had complied with the notice provisions of RPAPL 1304. The plaintiff also submitted copies of the notices sent by certified and first-class mail. The defendant opposed the motion, arguing, among other things, that the plaintiff had failed to produce certified mail records to prove compliance with RPAPL 1304. In reply, the plaintiff submitted the affidavit of Kimberly Ann Mueggenberg, a vice president of loan documentation for the plaintiff, who stated that she was familiar with the plaintiff's records and record-keeping practices. Mueggenberg stated that the plaintiff's "regular practice in 2011 was to generate and mail such notices to defaulted borrowers," and that this practice was complied with in this case. Mueggenberg further stated that "[i]n 2011, it was also [the plaintiff's] regular practice to utilize TrackRight to memorialize the mailing of notices to defaulted borrowers."

Plaintiff failed to establish first-class mailing of 90-day notice: *Federal Natl. Mtge. Assn. v. Dononvan***,** 2021 N.Y. App. Div. LEXIS 4867, 2021 NY Slip Op 04748, 2021 WL 3744796 (2nd Dept. Aug. 25, 2021): Defendant appealed from judgment of foreclosure entered in the Supreme Court, Nassau County (Adams,

J.) entered upon an order granting plaintiff summary judgment and denying defendant's motion to vacate the referee report based on failure to comply with RPAPL 1304. Appeal granted.

Plaintiff submitted an affidavit from a document management specialist for its sub-servicer as to the 90-day notice. The affiant averred that she was familiar with the sub-servicer's records and record-keeping practices, that the sub-servicer's records incorporated the records of the prior servicer for the subject loan, that the records showed that a notice of default in accordance with the terms of the mortgage agreement was sent to the defendant on September 2, 2010, and that a 90-day notice pursuant to RPAPL 1304 was mailed to the defendant on March 1, 2016. A copy of the RPAPL 1304 notice and certified mail tracking information for the RPAPL 1304 notice were attached to the affidavit.

Notwithstanding, the affidavit was insufficient to establish that the mailing of the RPAPL 1304 notice by first-class mail actually occurred. The affiant "did not aver that she had personal knowledge of the mailing, did not describe a standard office procedure designed to ensure that items are properly addressed and mailed, and did not attach proof of first-class mailing of the RPAPL 1304 notice." Likewise, plaintiff failed to establish, prima facie, that the mailing of the notice of default in accordance with the terms of the mortgage agreement actually occurred.

Trial court should have considered plaintiff's second affidavit as to mailing of the 90-day notices, which was submitted in opposition to defendant's cross-motion; plaintiff failed to establish standing where it established possession of the loan at origination, but not at commencement of the foreclosure: *U.S. Bank N.A. v. Pickering-Robinson*, 2021 N.Y. App. Div. LEXIS 4862, 2021 NY Slip Op 04775, 2021 WL 3744883 (2nd Dept. Aug. 25, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Kings County (Richard Velasquez, J.), which denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment dismissing the complaint. Appeal granted to the extent of reversing the order dismissing the complaint.

Plaintiff's initial affidavit failed to establish compliance with RPAPL 1304. It did not indicate how it was mailed, or whether it was mailed at all – and no supporting documents, such as proof of mailing by the post office, were attached to establish mailing. The presence of a 20-digit number on the 90-day notice was insufficient on its own to establish mailing. Further, the affiant did not aver that she personally mailed the notices or was familiar with plaintiff's mailing practices and procedures, and there was no evidence as to a standard office practice and procedure for the mailing of the 90-day notices.

The Second Department found, however, that the Supreme Court should have also considered the affidavit submitted by plaintiff in reply and in opposition to the defendant's cross motion, which sufficiently established compliance with RPAPL 1304. The second affidavit was an exception to the general rule that "a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply," because that second affidavit was "submitted in response to a specific argument raised for the first time in opposition to the plaintiff's motion and in support of the defendant's cross motion," and defendant could have responded in his reply in further support of his cross motion.

The second affidavit included a printout from the plaintiff's loan servicing record created "upon the mailing of the RPAPL Notice by certified and first class mail," which consisted of a chart of customer service loan activity, with its contents redacted except for the entry showing the date on the copy of the notice and notes as to the first class and certified mailing thereof. The affiant further explained that "the entry . . . was created in the normal course of U.S. Bank's business and is produced only when the RPAPL Notice is sent by both methods required by RPAPL 1304."

Plaintiff, however, failed to establish standing at the time the action was commenced. Although plaintiff established it originated the loan and had possession of the note at origination, it failed to establish that it continued to be the holder of the note at the time the action was commenced. Plaintiff's initial affidavit failed to aver that plaintiff continued to hold the note, and the second affidavit failed to attach the business records upon which the affiant relied when she attested to possession. Likewise, the affiant did not attest to personal knowledge regarding the physical whereabouts of the consolidated note during the relevant time.

Although it was appropriate to deny Plaintiff's motion for summary judgment, it was improper to grant defendant summary judgment based on lack of standing. "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law. A party cannot succeed on a motion for summary judgment by simply pointing out gaps in the opposing party's case."

Finally, "since the holder of a CEMA and consolidated note need not prove its interest with respect to each of the notes which are the subject of the consolidation, the defendant's contentions regarding the plaintiff's interest in the first note, the validity of the allonge thereto, and the chain of title on the notes used under the 2009 CEMA were irrelevant."

Second affidavit submitted for first time in reply properly considered; copy of note attached to complaint insufficient to establish standing where it is not endorsed and there is no allonge: *CitiMortgage, Inc. v. Goldberg*, 2021 N.Y. App. Div. LEXIS 4842, 2021 NY Slip Op 04697, 2021 WL 3641307 (2nd Dept. Aug. 18, 2021): Defendant appealed from orders of the Supreme Court, Nassau County (Thomas A. Adams, J.) that granted foreclosing plaintiff's motion for summary judgment and denied defendant's cross-motion for summary judgment to dismiss the complaint. Appeal granted to the extent of vacating the entry of summary judgment in favor of plaintiff.

The Second Department concluded that the plaintiff did not improperly submit a second affidavit for the first time in reply. "Although a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, [the] second affidavit was properly considered, since it was submitted in response to the defendant's denial of receipt of a notice of default and clarified that the notice of default was properly sent in accordance with the terms of the mortgage."

Plaintiff also demonstrated compliance with RPAPL 1303 "by submitting an affidavit of service in which the process server attested that he served the defendant with the summons, complaint, and notice of pendency, along with '1303 NOTICE-Help for Homeowners in Foreclosure' in bold, 14-point type and printed on colored paper, and the title to the notice printed in 20-point type, in compliance with RPAPL 1303."

Plaintiff, however, failed to establish standing. In its initial affidavit, the affiant stated that "the plaintiff was the holder of the first note, the second note, and the CEMA, to which was attached the consolidated note, at the time this action was commenced … but the copy of the consolidated note submitted by the plaintiff contained no endorsement or allonge." In addition, the assignment did not purport to also assign the consolidated note.

Notice of de-acceleration sent within six years subsequent to acceleration revoked acceleration: *U.S. Bank N.A. v. Papanikolaw*, 2021 N.Y. App. Div. LEXIS 4876, 2021 NY Slip Op 04777, 2021 WL 3744878 (2nd Dept. Aug. 25, 2021): Plaintiff appealed from: (i) an order of the Supreme Court, Rockland County (Paul I. Marx, J.), denying foreclosing plaintiff's motion for summary judgment and granting defendant's summary judgment to dismiss the complaint and on their counterclaim pursuant to RPAPL 1501(4) to discharge the mortgage based on the expiration of the statute of limitations, and (ii) an order

denying plaintiff's motion for leave to renew, and upon granting plaintiff's motion to reargue, adhering to its original determination. Appeal granted.

A foreclosure action commenced in July 2011 was dismissed for want of prosecution in November 2016. In April 2017, plaintiff sent defendants a letter titled "Notice of De-Acceleration." As such, the Second Department found that the plaintiff revoked its election to accelerate the mortgage debt during the six-year limitations period subsequent to the acceleration. Therefore, the instant action commenced in March 2018 was timely. (citing *Freedom Mtge. Corp. v. Engel*, 37 NY3d 1, 34, 146 NYS3d 542, 169 NE2d 912 (2021))

Defendant's failure to submit prior complaint defeated statute of limitations argument: *United States Bank, N.A. v. Heirs & Distributees of the Estate of Morris Kaplan*, 2021 N.Y. App. Div. LEXIS 4781, 2021 NY Slip Op 04680, 2021 WL 3521025 (2nd Dept. Aug. 11, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Queens County (Allan B. Weiss, J.), which granted defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint. Appeal granted.

The Second Department found that defendant "failed to sustain his initial burden of demonstrating, prima facie, that the action was untimely." Reason being, in support of his motion, defendant failed to submit a copy of the summons and complaint that was filed in the prior action.

Plaintiff entitled to judgment on quiet title complaint where the mortgagee would be barred by the statute of limitations from foreclosing: *Persaud v. U.S. Bank N.A.*, 2021 N.Y. App. Div. LEXIS 5031, 2021 NY Slip Op 04920, 2021 WL 3889839 (2nd Dept. Sept. 1, 2021): Defendant appealed from an order of the Supreme Court, Queens County (Modica, J.) granting plaintiff's motion for summary judgment on the quiet title complaint to cancel and discharge defendant's mortgage. Appeal denied.

In December 2009, an action to foreclose the subject mortgage was commenced. In December 2013, that action was dismissed pursuant to CPLR 3215(c). As Plaintiff's quiet title complaint was filed more than six years after the foreclosure had been commenced, plaintiff demonstrated, prima facie, that the commencement of a new action to foreclose the consolidated mortgage would be time-barred. Further, defendant failed to raise a triable issue of fact as to whether it validly revoked the election to accelerate the debt.

Junior lienholder entitled to priority where senior mortgagee had erroneously filed satisfaction of mortgage prior to origination of junior mortgage: *Deutsche Bank Natl. Trust Co. v. Rose*, 2021 N.Y. App. Div. LEXIS 5020, 2021 NY Slip Op 04907, 2021 WL 3889854 (2nd Dept. Sept. 1, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Kings County (Noach Dear, J.), granting the motion of defendant J & J Realty Associates ("J&J") for summary judgment dismissing the complaint and for a judgment declaring plaintiff's alleged mortgage, if reinstated as a lien on the property, to be subordinate to J&J's mortgage. Appeal denied.

The plaintiff commenced the instant foreclosure action in May 2012. In July 2015, a mortgage was given to J&J on the property. Prior thereto, a satisfaction of foreclosing plaintiff's mortgage had been filed and the notice of pendency in the foreclosure action had expired. In February 2017, an Order was entered granting plaintiff leave to amend the complaint to add an additional cause of action to vacate the satisfaction and to add J&J as a defendant. The plaintiff alleged that the satisfaction was "recorded in error", and that its mortgage was still "due and owing."

In concluding that J&J's mortgage was superior in priority to the plaintiff's mortgage, the Second Department noted that "J&J provided evidence establishing that it gave valuable consideration for its

recorded mortgage, and that it did not have actual knowledge of the plaintiff's alleged mortgage or knowledge of facts that would have put it on inquiry notice of that mortgage." In addition, plaintiff's allegation of fraud was "refuted by its allegation in the amended complaint that the satisfaction of the mortgage was recorded in error." Likewise, plaintiff's argument that "its full name was not included in the satisfaction of the mortgage, and the date of the assignment to it – July 14, 2006 – was incorrect were insufficient errors in the satisfaction to raise a triable issue of fact as to whether J&J failed to use due diligence in examining the title."

Plaintiff failed to establish entitlement to expunge a satisfaction where it failed to attach business records supporting its argument that satisfaction was recorded in error: *United States Bank N.A. v. Kandra*, 2021 N.Y. App. Div. LEXIS 4759, 2021 NY Slip Op 04679, 2021 WL 3521021 (2nd Dept. Aug. 11, 2021): Defendant appealed from an order of the Supreme Court, Suffolk County (Denise F. Molia, J.), granting the plaintiff's cross motion to expunge a satisfaction of mortgage recorded against the subject property. Appeal granted.

After plaintiff commenced this foreclosure action, HSBC, as attorney in fact for the plaintiff, erroneously recorded a Satisfaction of Mortgage. The satisfaction was intended to be in connection with a second mortgage rather than the first mortgage being foreclosed. Judgment of foreclosure was entered thereafter in favor of plaintiff, and a sale was scheduled. Defendant filed a motion to vacate the judgment based on the filing of the satisfaction, and plaintiff filed a cross-motion to expunge the satisfaction.

The Second Department concluded that, even though it "is undisputed that the first mortgage had not been paid, and there is no allegation of any detrimental reliance on the allegedly erroneous recording of the satisfaction of mortgage", defendant was entitled to vacate judgment. Reason being, plaintiff had not established entitlement to judgment, where plaintiff had failed to attach the business records upon which it relied in support of its argument that the satisfaction was filed due to a "clerical error", *i.e.*, failure to include the loan number on the processing request.

Non-borrower defendant not entitled to relief under RPAPL 1303, where the foreclosure action is only against him and not the borrowers, and the prior pending foreclosure was against borrowers only: *Wells Fargo Bank, N.A. v. Mitselmakher*, 2021 N.Y. App. Div. LEXIS 4887, 2021 NY Slip Op 04781, 2021 WL 3747003 (2nd Dept. Aug. 25, 2021): Defendant Adam Plotch appealed from an order of the Supreme Court, Richmond County (Thomas P. Aliotta, J.), denying his motion to vacate an earlier order of the same court (Judith N. McMahon, J.) that granted the plaintiff's motion pursuant to CPLR 306-b to extend the time in which to serve that defendant, and denied defendant's separate motion for summary judgment dismissing so much of the consolidated action as related to an action commenced against him on May 1, 2015. Appeal denied.

By way of background, in 2009, the plaintiff commenced an action to foreclose a consolidated mortgage. In 2012, while that first foreclosure action was pending, Adam Plotch acquired title to the property, subject to plaintiff's lien, by way of an auction by the condominium for unpaid liens.

In July 2014, plaintiff commenced a second action to foreclose against the borrowers and Plotch (the "second foreclosure action"). Plotch filed a motion to dismiss that second foreclosure action; while that motion was pending, plaintiff filed a third foreclosure action against Plotch alone (the "third foreclosure action"). In May 2016, an Order was entered granting plaintiff an extension of time to serve the complaint in the third foreclosure action on Plotch, and Plotch was served in July 2016.

In August 2016, the court consolidated the second foreclosure action and the third foreclosure action. In September 2016, the court granted Plotch's motion to dismiss the second foreclosure action as to him, leaving only the first and third foreclosure actions pending. Plotch then moved to vacate the order granting plaintiff an extension of time to serve him and sought to dismiss the third foreclosure action, on the ground that the third action was barred under RPAPL 1301(3), which prohibits the commencement of an action "to recover any part of the mortgage debt, without leave of court" while another action is already pending.

The Second Department agreed with the Supreme Court that RPAPL 1301 does not bar the third foreclosure action. "The complaints in the second foreclosure action and the third action did not seek identical relief. The third action was commenced against Plotch alone, and not against the borrowers. Plotch is not a mortgagor. Thus, contrary to Plotch's contention, the third action was not a simultaneous action to foreclose on the consolidated note and mortgage."

Date deed was delivered from borrower to current owner determines validity of mortgage that post-dated the deed: *James B. Nutter & Co. v. John Doe 1*, 2021 N.Y. App. Div. LEXIS 5027, 2021 NY Slip Op 04910, 2021 WL 3889865 (2nd Dept. Sept. 1, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Queens County (Marguerite A. Grays, J.), which denied plaintiff's motion for summary judgment seeking to foreclose a reverse mortgage.

By deed dated March 15, 2009, Sarah Lymus ("Lymus") conveyed her interest in the subject property to the Living Trust of Sarah E. Lymus (the "Trust"). Thereafter, on April 24, 2009, Lymus executed a note secured by a reverse mortgage on the property. Lymus died in January 2011, and plaintiff commenced this foreclosure action on the reverse mortgage.

The Second Department concluded that an issue of fact remained as to priority. The mortgage was given by Lymus after the date of the deed to the Trust, and covenants in the mortgage that conflicted with the date of the deed did not "conclusively rebut the presumption that the deed was delivered on its date."

No appeal or motion to renew lies from an order granted on default: *U.S. Bank N.A. v. Fuller-Watson*, 2021 N.Y. App. Div. LEXIS 4865, 2021 NY Slip Op 04776, 2021 WL 3744838 (2nd Dept. Aug. 25, 2021): Defendant appealed from a foreclosure judgment of the Supreme Court, Queens County (Orin R. Kitzes, J.) entered upon plaintiff's unopposed motion, and an order denying defendant's motion for leave to renew plaintiff's unopposed motion for summary judgment. Appeal denied.

In dismissing defendant's appeal, the Second Department opined that "[n]o appeal lies from an order or judgment granted upon the default of the appealing party." Further, since Defendant did not oppose plaintiff's motion for summary judgment, defendant was precluded from doing so on appeal,

Likewise, defendant's motion for leave to renew was properly denied, "as there was no opposition for the defendant to renew. She opposed neither of the plaintiff's motions. To the extent that branch of the defendant's motion could be construed as seeking to vacate, pursuant to CPLR 5015(a), her default in opposing the plaintiff's motions, the defendant failed to offer any excuse for her default in opposing the motions."

Defendant precluded from raising standing and failure to deliver a default notice as defenses where he failed to offer a reasonable excuse so as to vacate entry of default: *CitiMortgage, Inc. v. Weaver*, 2021 N.Y. App. Div. LEXIS 5012, 2021 NY Slip Op 04903, 2021 WL 3889830 (2nd Dept. Sept. 1, 2021): Defendant appealed from an order of the Supreme Court, Kings County (Peter P. Sweeney, J.) that granted

foreclosing plaintiff's motion for leave to enter a default judgment and for an order of reference. Appeal denied.

The affidavit of plaintiff's process server constituted prima facie evidence of proper service pursuant to CPLR 308(4). The borrower's "bare and unsubstantiated denial of receipt" was insufficient to rebut the presumption of proper service. Since he failed to offer a reasonable excuse for his default, he was precluded from raising lack of standing as a defense to this action as well as the nonjurisdictional argument that the lender failed to satisfy a condition precedent in the mortgage by failing to deliver a notice of default in the proper manner.

Conclusory and unsubstantiated allegations of law office failure will not warrant relief from judgment: *Wilmington Sav. Fund Socy., FSB v. Rodriguez*, 2021 N.Y. App. Div. LEXIS 4860, 2021 NY Slip Op 04784, 2021 WL 3744888 (2nd Dept. Aug. 25, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.) that granted the motion of intervening defendant Daniel Echevarria to vacate a judgment of foreclosure and sale entered upon his failure to answer the complaint, and to compel the plaintiff to accept that defendant's late answer. Appeal granted and foreclosure judgment reinstated.

By way of background, defendant had been granted leave to intervene as a defendant in the action and was directed to serve an answer to the complaint within 20 days after service of the order granting leave to intervene. Defendant failed to answer, and plaintiff moved three months after default for leave to enter default judgment against defendant and for a judgment of foreclosure and sale. Judgment was entered. Two days before the scheduled sale, defendant moved to vacate judgment and compel plaintiff to accept his late answer.

The Second Department rejected defendant's argument that he was entitled to relief based on the negligence of his prior attorney:

> Here, in support of his motion, [defendant] submitted an affidavit in which he asserted that his defaults "were due entirely to [the] negligence" of his prior attorney, who, without [defendant's] knowledge, failed to file an answer to the complaint or opposition to the plaintiff's motion for leave to enter a default judgment against [defendant]. According to his affidavit, [defendant] only learned of the defaults upon receiving notice of the foreclosure sale. We agree with the plaintiff that [defendant's] claim of law office failure, which was based solely on the conclusory and unsubstantiated allegations in his affidavit, was insufficient to amount to a reasonable excuse.

In addition, defendant's "claim of law office failure was refuted in an affidavit sworn to by his prior counsel, who stated that he and [defendant] had decided together not to pursue the forgery claim after discovering an error in the translation of the Peruvian document upon which the claim was based. Accordingly, the Supreme Court improvidently exercised its discretion in determining that [defendant] demonstrated a reasonable excuse for his default based upon his affidavit."

Plaintiff entitled to amend caption to substitute heirs and for relief from the automatic stay imposed when the borrower died during proceedings where no deficiency is sought and defendant died intestate: *Wells Fargo Bank, N.A. v. Miglio*, 2021 N.Y. App. Div. LEXIS 4857, 2021 NY Slip Op 04780, 2021 WL 3744875 (2nd Dept. Aug. 25, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Richmond County (Desmond A. Green, J.), which denied plaintiff's unopposed motion to vacate the

automatic stay of the action imposed by the death of the defendant Janice Miglio and to amend the caption to substitute her known and unknown heirs for the decedent. Appeal granted.

> Where a property owner dies intestate, title to real property is automatically vested in his or her distributees. Under such circumstances, a foreclosure action may be commenced directly against the distributees. Thus, where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, the mortgagor/property owner's death does not affect the merits of a case, [and] there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution. Here, the plaintiff submitted evidence establishing that Miglino died intestate. Accordingly, since the plaintiff does not seek a deficiency judgment, Miglino's death did not affect the merits of this action, and the Supreme Court should have granted the plaintiff's motion, inter alia, to vacate the automatic stay of the action imposed by the death of Miglino and to amend the caption to substitute for Miglino her known and unknown heirs-at-law.

Extension of time to serve under CPLR 306-b was not warranted where plaintiff discovered defective service, when plaintiff first sought to enforce judgment six years after its entry: *Citibank, N.A. v. Martinez*, 2021 N.Y. App. Div. LEXIS 5014, 2021 NY Slip Op 04901, 2021 WL 3889856 (2nd Dept. Sept. 1, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Queens County (Robert J. McDonald, J), which denied its motion for leave to renew its application pursuant to CPLR 306-b to extend its time to serve the defendant with the summons and complaint. Appeal denied.

Plaintiff's motion was properly considered a motion to renew, rather than a motion to reargue (which would not have been appealable). The motion was properly identified as a motion for leave to renew, and was supported by "new facts not offered on the prior motion."

Notwithstanding, the "plaintiff failed to demonstrate that the new evidence would have changed the prior determination. In this case, a judgment of foreclosure and sale was entered in September 2010, but the plaintiff only sought to enforce that judgment nearly six years later, at which time the defective service of process upon the defendant discovered. The record demonstrated that there was no good cause shown for an extension of time to serve the summons and complaint upon the defendant pursuant to CPLR 306-b, since the plaintiff's attempt at service was defective, and it was unable to prove otherwise since it was unable to produce the process server to testify at the traverse hearing. Further, in view of the plaintiff's extensive delay, an extension of time to serve the defendant pursuant to CPLR 306-b is not warranted in the interest of justice."

Copy of unendorsed consolidated note attached to CEMA does not create issue as to standing where plaintiff possessed consolidated note at time it commenced action: *U.S. Bank Trust, N.A. v. Pieri*, 2021 N.Y. App. Div. LEXIS 4914, 2021 NY Slip Op 04833, 2021 WL 3782846 (4th Dept. Aug. 26, 2021): Defendant appealed from an order and judgment of foreclosure and sale entered in the Supreme Court, Erie County (M. William Boller, A.J.). Appeal denied.

Defendant's argument that plaintiff lacked standing was meritless. The Second Department found that "plaintiff established standing in its moving papers by demonstrating, inter alia, that it possessed the consolidated note at the time it commenced the action. The presence of a second, unendorsed copy of the consolidated note attached as an exhibit to the consolidation, extension, and modification agreement did not create a triable issue of fact warranting denial of the motion."

Voluntary discontinuance is not the only method to revoke acceleration: *53rd Street, LLC, v. U.S. Bank, National Association*, 2021 U.S. App LEXIS 23159 (2nd Cir. Aug. 5, 2021): Defendant appealed from an order of the United States District Court for the Eastern District of New York (Ann M. Donnelly, J.), which granted plaintiff summary judgment on its quiet title complaint premised on an argument that the statute of limitations expired on defendant's time to foreclose its mortgage. Appeal granted.

A foreclosure action was commenced on June 30, 2008, which was dismissed in April 2013 for nonappearance. In June 2014, within six years of the commencement of the foreclosure, the mortgagee sent letters to borrower stating that the loan, which had been "previously accelerated by [the] filing [of] a [foreclosure] lawsuit," was "de-accelerated" and "re-instituted as an installment loan." A few weeks later, on July 15, 2014, defendant sent borrower a 90-day pre-foreclosure notice and a separate default notice. Subsequently, a junior mortgagee filed foreclosure and the property was sold to plaintiff at auction, who filed this quiet title action to discharge defendant's mortgage.

The Second Circuit rejected defendant's argument that the statute of limitations defense was personal to the borrower. Rather, the plaintiff – as purchaser of the property at auction – had standing to argue that the statute of limitations had expired.

The Second Circuit, however, rejected plaintiff's argument that, under *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1 (Feb. 18, 2021), "a voluntary discontinuance of a foreclosure action is the *only* way to de-accelerate a previously accelerated mortgage". Rather, "the *Engel* opinion did not suggest that such a voluntary discontinuance is the only affirmative act that can successfully de-accelerate a mortgage. To the contrary, *Engel* expressly contemplated other affirmative acts that would suffice."

Accordingly, judgment in favor of plaintiff was vacated, and the matter was remanded for "further consideration in light of *Engel*, including whether, regardless of U.S. Bank's intent in issuing the de-acceleration letters, U.S. Bank clearly, unambiguously, and affirmatively communicated the de-acceleration of the loan within the limitations period."

NEW JERSEY

Defendant's allegations of fraud were barred by laches even though the statute of limitations had not expired: *Bascom Corp. v. Paterson Coalition for Hous.***,** 2021 N.J. Super. Unpub. LEXIS 1846, 2021 WL 3730027 (App. Div. Aug. 24, 2021): Defendant appealed from an order entered by the Chancery Division, General Equity Part denying its motion under Rule 4:50-1 to vacate a final judgment of foreclosure of a tax sale certificate. Appeal denied.

Defendant filed the motion to vacate six months after the sheriff's sale, and more than nine months after the trial court had entered a final judgment of foreclosure. The Appellate Division concluded that defendant was barred by the doctrine of laches from any relief, where the purchaser at the foreclosure sale expended substantial funds to repair the property and where, contrary to plaintiff's contentions, plaintiff was aware of the sheriff sale. In doing so, the Appellate Division rejected defendant's argument that laches was not applicable because its claim was based on fraud, which has a six-year statute of limitations:

> Even where there is an applicable statute of limitations, there is a role for the equitable doctrine of laches. Laches will ordinarily be utilized in suits brought in equity; statutes of limitation, although not ignored, have no obligatory application in such suits. Actions to foreclose and bar the right of redemption are actions in equity. Therefore, the statute of limitations for fraud did not bar application of the laches doctrine in this case.

Collateral attack on foreclosure judgment barred by the entire controversy doctrine and res judicata: *Howard v. Wells Fargo Bank, N.A.*, 2021 N.J. Super. Unpub. LEXIS 2083, 2021 WL 4073608 (App. Div. Sept. 8, 2021): Plaintiff appealed from an order (Law Division) granting defendant's motion to vacate entry of default and dismissing plaintiff's complaint with prejudice, and from an order denying his motion for reconsideration. Appeal denied.

Plaintiff commenced this action challenging a separate foreclosure action filed by defendant. At the time this action was filed, the sheriff sale had been held in the foreclosure action, and plaintiff's appeal filed in the foreclosure action remained pending. Plaintiff's action asserted causes of action for lack of standing to foreclose, fraud in the concealment, fraud in the inducement, intentional infliction of emotional distress, quiet title, slander of title, declaratory relief, and a violation of the Truth In Lending Act. As the Appellate Division noted, "all of plaintiff's claims related to defendant's foreclosure action by alleging defendant did not have standing to foreclose and that the foreclosure action interfered with his title to the property. Plaintiff alleged that the property was not 'properly assigned and transferred to [defendant].'"

The Appellate Division affirmed the lower court's determination that the complaint was barred by the entire controversy doctrine: "Plaintiff had ample opportunity to raise the arguments he makes now in defense to the foreclosure action. All of these claims are germane to the foreclosure case and could have been raised. Having not done so, plaintiff now is barred from asserting them."

Further, the Appellate Division found that the complaint was barred by res judicata:

> A prior judgment acts as a bar where there is substantially similar or identical causes of action and issues, parties, and relief sought. This bar applies to matters actually determined in the previous proceedings, but also all claims that could have been raised in the first action. Here, the Law Division complaint involves the same parties, arises from the same foreclosure action and raises issues that could have been asserted in the first action and now are foreclosed by our affirmance of the orders approving the sale of this property.

Plaintiff's claims as to fraudulent transfers of his loan were barred by res judicata and the entire controversy doctrine, given that he raised the claims in a separate foreclosure action: *Farzan v. Bayview Loan Servicing LLC (In re Farzan)*, 2021 U.S. App. LEXIS 26955, __ Fed. Appx. __, 2021 WL 4075750 (3rd Cir. Sept. 8, 2021): Plaintiff appealed the District Court's order affirming the Bankruptcy Court's dismissal of his adversary complaint. Appeal denied.

In the adversary complaint, plaintiff alleged that defendants violated his rights by prosecuting a separate foreclosure proceeding based on fraudulent and invalid transfers of the loans and affidavit of lost note. While the Third Circuit questioned whether the claims were barred by the *Rooker-Feldman* doctrine, it concluded they were barred by res judicata.

"Res judicata applies if there is (1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, and (4) identity of the cause of action. Here, [Plaintiff] raised most of the same allegations in the foreclosure action—including various iterations of his claims that the defendants violated his rights through the [transfers of the loan and affidavit of lost note]."

Likewise, the adversary proceeding was barred by New Jersey's entire controversy doctrine, which requires a party to "bring in one action all affirmative claims that it might have against another party, including counterclaims and cross-claims, and join all parties with a material interest in the controversy. This doctrine bars any variations of the claims concerning the allegedly fraudulent transactions that [plaintiff] seeks to raise in this action. Claims or defenses that went to the validity of the mortgage, the amount due, or the right of [mortgagee] to foreclose had to be raised in the foreclosure proceeding or they were barred."

In calculating amount of damages, defaulting successful bidder at sheriff sale is entitled to credit in the amount of the third party sale price: *Fannie May v. Cleaves*, 2021 N.J. Super. Unpub. LEXIS 1640, 2021 WL 3278018 (App. Div. Aug. 2, 2021): Plaintiff appealed orders that released monies on deposit from a sheriff's sale. Appeal granted and matter remanded for discovery and a plenary hearing limited to how much of the deposit should have been paid to plaintiff.

By way of background, AC Properties ("AC") successfully bid $297,000.00 for the subject property, sold "as is" at a sheriff's sale, and tendered a $60,000.00 deposit. Upon discovering the property was structurally unsound, AC refused to proceed with closing and demanded a return of the deposit. In December 2017, the court ordered the funds to be held pending resale, and ordered that the "measure of damages shall be the deficiency between the bid at second sale and the bid at the first, plus the costs of the first sale, including Sheriff's costs for the first sale." On resale by the sheriff, plaintiff increased the upset price to $321,000.00 and purchased the property for $1,000.00. Plaintiff subsequently sold the property for $290,000.00.

The Appellate Division agreed with the trial court that the plaintiff was not entitled to use the $1,000.00 purchase price to calculate the deficiency. Rather, plaintiff should have used the $290,000.00 third party sale price, as it "incorporated the notion of fair market value in its damages formula":

> Plaintiff increased the stopping bid by $24,000 just four months after the first sheriff's sale even though defendant claimed the property was structurally unsound. Plaintiff did not explain the increase … A lower price might have been expected, given the property's condition. There was no evidence repairs had been made by that time. When no other bids were made, plaintiff paid a nominal amount for the property. The trial court did not change its previously announced damages formula from that set forth in the September 2017 order; it simply determined that plaintiff's $1000 payment did not qualify as a bid because of the

> ability of plaintiff to control the distribution of the deposit to its advantage by setting the upset price.

The trial court, however, erred in not considering plaintiff's out of pocket expenses – including taxes, rehabilitation costs, brokers' fees and cleanup costs – in calculating the deficiency, where the sheriff indicated that a purchaser who failed to close on the sale would be responsible for "*all losses and expenses*, including but not limited to Sheriff's fees, Sheriff's commission and Attorney's fees incurred by the Sheriff's Office …." In addition, N.J.S.A. 2A:50-64(a)(4) provides that a defaulting bidder is liable "to the foreclosing plaintiff for any additional costs incurred by such default including, but not limited to . . . the difference between the first and second sale."

PENNSYLVANIA

Defendant's unsupported claim that it was not served notice of the sheriff sale did not entitle it to a hearing as to service: *Penn Bus. Credit, LLC v. Pontiac Props., LLC*, 2021 Pa. Super. Unpub. LEXIS 2301, 2021 WL 3782146 (Pa. Super. Ct. Aug. 26, 2021): Defendant appealed from two orders denying its petitions to set aside sheriff's sales of its real property. Appeal denied.

In affirming the lower court's orders, the Superior Court recognized that there must be a clear abuse of discretion in order to reverse the lower court's decision on a petition to set aside a sheriff's sale:

> A petition to set aside a sheriff's sale is grounded in equitable principles and is addressed to the sound discretion of the hearing court. The burden of proving circumstances warranting the exercise of the court's equitable powers rests on the petitioner, as does the burden of showing inadequate notice resulting in prejudice, which is on the person who seeks to set aside the sale. When reviewing a trial court's ruling on a petition to set aside a sheriff's sale, we recognize that the court's ruling is a discretionary one, and it will not be reversed on appeal unless there is a clear abuse of that discretion.

The Superior Court then rejected defendant's argument that it was entitled to a hearing as to whether it was properly served with the notices of sheriff's sale:

> Pontiac's Motions to Set Aside averred only that it "did not receive any service or other notice of the legal proceedings and sheriff's sale," which the trial court concluded clearly did not reach the evidentiary burden required [under Pa.R.C.P. 3132 for vacating the sale]. Pontiac failed to attach to its motions any evidence supporting its contentions regarding the lack of service. Thus, we agree with the trial court that Pontiac failed to meet its burden of establishing equitable grounds for setting aside the sheriff's sales. Moreover, we note that Pontiac fails to explain in its appellate brief how SMS failed to effect service of the notices of sheriff's sale, nor does it set forth any evidence in support of its contentions.

Additionally, the Superior Court found that defendant's claims were directly contradicted by the record. The docket revealed that defendant was properly served in accordance with the trial court's order permitting service by alternative means.

MASSACHUSETTS

Reference to a New York CEMA in a list of additional encumbrances in a satisfaction of a mortgage, which had been consolidated with a later mortgage into the CEMA, did not discharge the consolidated mortgage: *Scubla v. New Rez, LLC*, 2021 Bankr. LEXIS 2204, __B.R.__, 2021 WL 3559334 (1st Cir. Bankr. App. Panel Aug. 11, 2021): The Chapter 11 debtor, Susan Scubla (the "Debtor"), commenced an adversary proceeding to avoid a mortgage in favor of New Rez, LLC, d/b/a Shellpoint Mortgage Servicing ("New Rez"). The debtor appealed from: (1) an amended order denying her motion for summary judgment and granting summary judgment *sua sponte* in favor of New Rez; and (2) partial judgment in favor of New Rez. Appeal denied.

In 2003, debtor and her former spouse, Mr. Hentschel ("Hentschel"), granted a mortgage on a property in New York to Washington Mutual Bank ("WaMu") to secure a $675,000.00 note given by Hentschel ("2003 Note" and "2003 Mortgage"). In 2006, debtor and Hentschel executed a consolidated mortgage to secure a $417,000.00 consolidated note given by Hentschel. Debtor and Hentschel also executed a CEMA providing that the "New Reduced Principal Now due + owing" was $417,000.00. The CEMA modified the terms of the 2003 Note and Mortgage. No additional property was encumbered, and no additional funds were advanced.

The Modification Agreement also provided that: (1) the earlier notes and mortgages were being combined into one mortgage and one loan obligation, and that the "terms of the Notes are changed and restated to be the terms of the 'Consolidated Note'"; (2) Debtor and Hentschel agreed to "pay the amounts due under the Notes in accordance with the terms of the Consolidated Note"; and (3) "the terms of the Mortgages are changed and restated to be the terms of the 'Consolidated Mortgage'", which "secures the Consolidated Note and will constitute in law a single lien upon the Property."

Thereafter, two satisfactions of mortgage were recorded. The first satisfaction, setting forth details as to the 2003 mortgage, provided in part that WaMu, as "holder of a certain mortgage evidencing an indebtedness in the amount of $675,500.00 … does hereby acknowledge that it has received full payment and satisfaction of the same, and in consideration thereof, does hereby satisfy and discharge said mortgage." The second satisfaction recorded in 2016 by JPMorgan Chase Bank, N.A., successor in interest to WaMu, also purported to discharge the 2003 mortgage, and included the CMEA in a "List of Additional Mortgages, Consolidation Extension Modifications and Assignments."

Citing to New York law, the Bankruptcy Appellate Panel opined that the creation of the CEMA did not extinguish the 2003 Mortgage:

> Where the parties have entered into a CEMA for purposes of consolidating existing mortgages, rather than refinancing those mortgages, the CEMA becomes the operative instrument governing the rights and obligations of the parties, however *the underlying mortgages are not extinguished*. (emphasis in original)

In addition, the Bankruptcy Appellate Panel rejected debtor's argument that the satisfactions discharged the consolidated mortgage. The first satisfaction made no reference to the Consolidated Note and Mortgage. The second satisfaction discharging the 2003 mortgage did not state that the "additional mortgages, [CEMAs] and assignments" listed therein were also discharged. The Bankruptcy Appellate Panel opined that a "mere list of encumbrances" that did not reference the 2008 Consolidated Mortgage or the 2008 Consolidated Note, "or resort to any language typically associated with lien extinguishment", did not serve to extinguish those obligations.

CONNECTICUT

Collateral attack on judgment in favor of condominium association disallowed on the ground that jurisdictional prerequisites were not satisfied: *Gibson v. Jefferson Woods Community, Inc.,* 2021 Conn. App. LEXIS 256, 206 Conn. App. 303, 2021 WL 3276684 (App. Ct. of Conn. Aug. 3, 2021): Plaintiff appealed from an order granting defendant's motion to dismiss and rendering judgment thereon. Judgment affirmed.

The plaintiff, Lilly M. Gibson, was the assignee of a mortgage encumbering a condominium unit owned by Priscilla Taylor. Jefferson Woods Community, Inc. was the condominium association for the complex, and had previously obtained a judgment of strict foreclosure against the property in a separate action. No party redeemed the condominium lien and, thus, title to the property passed to the association.

Several years later, Gibson filed an action seeking to foreclose on the mortgage, as well as damages for unjust enrichment. Jefferson Woods moved to dismiss on the ground that Gibson lacked standing. The trial court agreed, and the Appellate Court affirmed, finding that Gibson's claim to the property – and her right to redeem it – had been extinguished by the judgment in the prior action: she did not litigate the issue of subject matter jurisdiction, or file any motion or appearance in that action, nor did she attempt to appeal from the judgment.

Additionally, there were no exceptional circumstances that would have permitted Gibson to collaterally attack the jurisdiction of the trial court in the prior action, in which judgment had been entered approximately three years earlier. Gibson alleged that the jurisdictional prerequisites to maintaining a foreclosure action on a common charge lien under Conn. Gen. Stat. 47-258(m) had not been satisfied in Jefferson Woods' action. The Appellate Court disagreed, noting that this argument overlooked established law that collateral attacks upon a final judgment are disfavored, and it was not obvious from the record of the prior action that there were any questions as to the jurisdictional requirements being satisfied.

The Appellate Court also upheld the trial court's dismissal of Gibson's unjust enrichment claim against Jefferson Woods, finding that she lacked standing because the mortgage had been extinguished after judgment was entered in Jefferson Woods' favor and title to the property became absolute in Jefferson Woods.

Finally, the Appellate Court held that the foreclosing plaintiff's failure to serve a notice in accordance with the Emergency Mortgage Assistance Program prior to the commencement of the subject action deprived the trial court of subject matter jurisdiction, warranting a dismissal of the action.

Settlement agreement is not procedurally or substantively unconscionable where there was no misconduct in the contract formation process, or any evidence of misleading conduct: *Rockstone Capital, LLC v. Caldwell,* 206 Conn. App. 801, 2021 Conn. App. LEXIS 280, 2021 WL 3713870 (App. Ct. of Conn. Aug. 24, 2021): Plaintiff appealed from a judgment granting strict foreclosure as against one defendant and denying it as to another. Judgment affirmed in part and reversed in part, by decision dated August 24, 2021.

Plaintiff Rockstone Capital LLC ("Rockstone") filed an action to foreclose on property jointly owned by defendants Morgan Caldwell and Vicki Ditri, who were domestic partners. Rockstone had purchased a line of credit extended to Caldwell's business. Plaintiff brought a collections action for nonpayment, which was settled by way of an agreement to forbear litigation and reduce the total amount of indebtedness owed. The

settlement agreement also provided for a mortgage to be granted to Rockstone against Caldwell's and Ditri's interests in the subject property, to secure their obligations.

After Caldwell and Ditri defaulted on their mortgage payments, Rockstone proceeded with a foreclosure action. Ditri asserted a separate defense of unconscionability, arguing that she did not read the settlement agreement prior to executing it, and that she was not represented by counsel in connection with the agreement. Following a bench trial, the trial court rendered a judgment of strict foreclosure as against Caldwell, but dismissed the action as against Ditri, finding that the settlement agreement was unconscionable and unenforceable.

The Appellate Court reversed, holding that the trial court erred in finding that the agreement was substantively and procedurally unconscionable as to Ditri. It noted that there was no language barrier between the parties, that Ditri was familiar with the mortgage documents due to her having entered into the prior mortgage, and that her education level and alleged lack of business sophistication were immaterial. Nor was Rockstone responsible for any misconduct during the contract formation process, as it did not mislead or take advantage of Ditri.

Borrower-initiated action was properly dismissed for failure to state a claim: *Arcamone v. Kopnisky*, 2021 U.S. App. LEXIS 25879, __ Fed. Appx. __, 2021 WL 3823629 (2nd Cir. Aug. 27, 2021): Plaintiff appealed from a judgment of the United States District Court for the District of Connecticut dismissing the action. Judgment affirmed.

Plaintiff Ralph Arcamone filed a *pro se* action in the Superior Court of Connecticut arising from a foreclosure on property he owned. Arcamone asserted a claim of equitable subrogation, contending that a different person named Ralph Arcamone was the actual debtor on the subject mortgage loan. He further argued that with his signature, he had discharged the balance of the mortgage and, thus, was entitled to either repayment or title to the property.

The defendants removed the matter to the District of Connecticut, and moved for dismissal under FRCP 12(b)(6) for failure to state a claim. The District Court granted that motion, and plaintiff appealed. The Second Circuit upheld the District Court's judgment, finding that the plaintiff had failed to state a claim of equitable subrogation under Connecticut law. The Second Circuit reasoned that the plaintiff did not plead any facts from which the court could reasonably draw the inference that he paid a debt for which another was primarily liable, and his allegations were "patently frivolous."

Further, the Second Circuit agreed that leave to amend the Complaint was inappropriate, as it would have been futile. Accordingly, the judgment was affirmed in its entirety.

CALIFORNIA

A stipulated settlement cannot avoid a prior judgment finding unclean hands against a settling party: *Meridian Fin. Servs., Inc. v. Phan*, 2021 Cal. App. LEXIS 654, 67 Cal. App. 5th 657, 2021 WL 3508138 (California Court of Appeal, 4th District, Aug. 10, 2021): A loan broker operated a Ponzi scheme that collapsed, resulting in two lawsuits.

The first lawsuit was filed in Orange County, by homeowners who had unconsented and fraudulent deeds of trusts recorded against their properties. The loan broker obtained over $5 million from a private investor and the investor's company ("Appellants"), who were led to believe they were investing in the sale of gold. Appellants made no effort to undertake due diligence or otherwise investigate the propriety of the purported investment. Instead, the loan broker worked with an employee of Chicago Title, among others, to purportedly secure Appellants' investments with fraudulent deeds of trusts recorded against properties owned by persons who had no role in the scheme. After a bench trial, an Orange County judge cancelled the fraudulent deeds of trust, finding that they were forged and that Appellants had acted with unclean hands in procuring them. The parties later settled and, as a condition of settlement, obtained a stipulated order (from a different judge) vacating most of the Orange County decision, including the part that contained the finding of Appellants' unclean hands.

The second lawsuit was filed in Santa Clara County, wherein Appellants sued Chicago Title, alleging they were induced to invest with the loan broker because the title company's involvement in the transactions reassured them that the investment scheme was legitimate. Chicago Title moved for summary judgment based on the defense of unclean hands, arguing in part that Appellants were collaterally estopped from relitigating the earlier finding of their unclean hands in the first lawsuit. The Santa Clara County trial court agreed the Orange County decision was issue-preclusive, and concluded Appellants were barred from any recovery. The trial court granted summary judgment for Chicago Title on this ground and awarded Chicago Title attorney's fees of $943,250.00.

The Court of Appeal affirmed the Santa Clara County judgment against Appellants, holding that the trial court did not err in giving preclusive effect to the Orange County judge's unclean hands finding and granting summary judgment to Chicago Title based on that finding. The Orange County decision was sufficiently firm, and therefore final for purposes of issue preclusion, notwithstanding the stipulated order partly vacating it. The evidence of Appellants' misconduct and the determination that Appellants acted with unclean hands were a substantial focus of the decision, and not mere commentary on extraneous issues of fact or law. Finally, the Court of Appeal found that the Santa Clara County trial court did not abuse its discretion in awarding attorney fees to Chicago Title.

Loan servicers remedied alleged HBOR violations before recording trustee's deed and timely notice of ownership transfer under TILA: *Gordon v. U.S. Bank, N.A.*, 2021 U.S. App. LEXIS 23659, __ Fed. Appx. __, 2021 WL 3509157 (9th Cir. Aug. 10, 2021): Plaintiff filed a complaint against the servicers of his home loan in the United States District Court for the Central District of California, alleging violations of California Civil Code § 2923.6 (*i.e.*, that the defendant loan servicers engaged in dual tracking by seeking to foreclose on plaintiff's home while he attempted to modify his loan) and TILA. The District Court granted summary judgment to the defendants, finding that the defendant servicers acted in accordance with Section 2924.12, and that plaintiff timely received the notice required by TILA. Plaintiff appealed. On appeal, the Ninth Circuit affirmed the district court's rulings, holding that the defendant servicers complied with applicable law in regard to each of plaintiff's claims.

As the Ninth Circuit observed, Section 2924.12 permits a borrower to enforce violations of Section 2923.6 until the servicer has "corrected and remedied" the violation "prior to the recordation of the trustee's deed upon sale." Civil Code § 2924.12(b). Here, the defendant loan servicers never foreclosed on the property, and rescinded all prior notices of default after plaintiff sought modification of his loan. Further, the defendants paused all foreclosure procedures while they considered plaintiff's applications, and issued final determinations on those applications before resuming foreclosure activities.

As for plaintiff's TILA claim, plaintiff had alleged that the defendant loan servicers violated the TILA requirement that a creditor notify a borrower of any change in his loan's ownership within 30 days pursuant to 15 U.S.C. § 1641(g)(1). The parties do not dispute that plaintiff was timely given notice that a trust purchased his loan from U.S. Bank in 2018. Plaintiff, however, argued that the notice was invalid because it came from an agent who had not yet begun servicing his loan, and that only "the creditor" may send such a notice. As the Ninth Circuit found, however, TILA provides only that "the creditor that is the new owner or assignee of the debt" must provide the notice within 30 days of the loan being "sold or otherwise transferred" – and that, because plaintiff timely received the requisite notice, his TILA claim failed.