IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as owner Trustee of the Aspen G Trust, a Delaware Statutory Trust, *Plaintiff,* *v.* Jozef Mucha; Zofia Mucha, Fleet Real Estate Funding Corp.; Unknown Owners and Non-Record Claimants, *Defendants.*	Case Number: 2021 CH 01546 Calendar 60 Honorable William B. Sullivan, Judge Presiding Property Address: 206 North Hale Avenue Bartlett, Illinois 60103

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Defendants JOZEF MUCHA's and ZOFIA MUCHA's ("Muchas") Motion for Summary Judgment ("Motion") pursuant to 735 ILCS 5/2-1001(b) with respect to their statute of limitations affirmative defense raised for the first time within the instant Motion. For the following reasons, the Muchas' Motion for Summary Judgment is hereby GRANTED as to their statute of limitations affirmative defense, and Plaintiff WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE OF THE ASPEN G TRUST's ("Wilmington") Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE.

I. BACKGROUND

The Muchas purchased the property located at 206 North Hale Avenue in Bartlett, Illinois, subject to a 1993 mortgage ("1993 Mortgage") with Fleet Real Estate Funding Corporation as the mortgagee.

On February 24, 2007, Defendants took out a Home Equity Line of Credit and executed a promissory note (the "Note") payable to MidAmerica Bank, FSB ("MidAmerica") in the amount of $97,500.00 secured by a mortgage interest on the property to the lender in a Mortgage Agreement (the "Mortgage") recorded March 19, 2007. The Mortgage was a second and junior mortgage to the 1993 Mortgage. MidAmerica was acquired by National City Bank on February 9, 2008, and National City Bank merged with and into PNC Bank, National Association ("PNC") on November 6, 2009.

Defendants fell behind on the 1993 Mortgage and on May 12, 2011, BAC Home Loans Servicing, LP, the senior lienholder at the time, filed a mortgage foreclosure lawsuit (the "2011 case") against the Muchas and the then-holder of the Mortgage, PNC. PNC took no action in the 2011 case. The Muchas successfully modified the 1993 Mortgage in a modification recorded on March 18, 2014, and the 2011 case was dismissed.

Thereafter, PNC assigned its interest in the Mortgage to US Mortgage Resolution, LLC on October 26, 2018. Subsequently, US Mortgage Resolution, LLC assigned its interest to Trinity Financial Services, LLC on July 26, 2019. Finally,

Trinity Financial Services, LLC assigned its interest to Plaintiff in the instant case, Wilmington, on April 8, 2020.

On March 31, 2021, Plaintiff filed its Complaint to Foreclose Mortgage, alleging that the Muchas defaulted on the Mortgage on December 20, 2012, more than eight years earlier. On April 4, 2022, Defendants filed their Answer and Affirmative Defenses to Plaintiff's Complaint to Foreclose Mortgage, and in this Answer, the Muchas raised three affirmative defenses. In response to the Affirmative Defenses, Plaintiff filed a Motion to Strike Defendants' Affirmative Defenses, and in an Order entered on November 16, 2022, this Court granted in part and denied in part Plaintiff's Motion to Strike Defendants' Affirmative Defenses. Defendants' First Affirmative Defense was allowed to stand as pled while Defendant's Second and Third Affirmative Defenses were stricken with prejudice.

On December 13, 2022, Defendants filed a Motion to Reconsider the Order of November 16, 2022, striking their Second and Third Affirmative Defenses. Following full briefing and a hearing, the Court entered a written Memorandum Opinion and Order on June 29, 2023. That Opinion granted in part and denied in part the Muchas' Motion to Reconsider such that the Second and Third Affirmative Defenses remained stricken, but without prejudice. The Opinion also allowed the Muchas time to replead.

On November 21, 2023, the Muchas filed the Motion for Summary Judgment *sub judice*. On January 18, 2024, a briefing schedule was entered on the Motion and it was subsequently set for hearing on March 21, 2024. On March 6, 2024, by

agreement and at the request of Defendants' Counsel, an Order was entered re-setting the briefing schedule and setting a hearing date for May 15, 2024. On April 24, 2024, by agreement of both parties, an Order was entered re-setting the briefing schedule yet again. On June 25, 2024, Plaintiff filed its Motion for Extension of Time and Motion for Leave to Amend Complaint. On June 26, 2024, Plaintiff's Motion for Extension of Time was denied, and the Muchas' Motion for Summary Judgment granted since Plaintiff never filed a response brief despite being afforded multiple opportunities to do so. On July 24, 2024, Plaintiff filed a Motion to Reconsider the Order of June 26, 2024. On August 13, 2024, this Motion to Reconsider was continued to September 26, 2024, so the Court could issue its written ruling on a similar case dealing with a nearly identical legal defense (*i.e.*, *Bank of New York v. Bartelstein*, No. 2007-CH-38051). The Court entered its Opinion in *Bartelstein* on September 25, 2024. *See Bank of New York v. Bartelstein*, 2007-CH-38051 (Cir. Ct. Cook County, September 25, 2024). This Opinion is attached hereto as Exhibit I.

On September 26, 2024, Plaintiff's Motion to Reconsider in this matter was granted, the Order of June 26, 2024 was vacated, and a new briefing schedule was entered on the Muchas' Motion for Summary Judgment. Plaintiff timely filed its response brief to Defendants' Motion on October 24, 2024. Thereafter, the Muchas filed their reply brief on November 14, 2024. After having read the Motion for Summary Judgment, Plaintiff's Response, and Defendants' Reply, and after having heard oral arguments from the parties' attorneys on December 4, 2024, via Zoom,

the Court entered an Order on December 5, 2024, taking the Muchas' Motion for Summary Judgment under advisement for the issuance of a written opinion. The Court's ruling follows.

II. LEGAL STANDARD

The Muchas now move this Court for summary judgment on their affirmative defense pursuant to 735 ILCS 5/2-1005(b) that allows defenants to move for summary judgment where, "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c). At summary judgment, "the court does not try issues of fact, but must ascertain if any exist." *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 15 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993)). Summary judgment is a drastic measure that should only be granted when the moving party's right to judgment is, "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992). Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010 (1st Dist. 2005).

III. ANALYSIS

Before the Court is the question of whether the Muchas are entitled to judgment as to their newly raised affirmative defense. Specifically, whether the Muchas' Time Barred Defense affirmatively defeats Wilmington's Amended Complaint, demanding judgment in their favor today as a matter of law. As to this affirmative defense, and for the reasons outlined herein, the Court agrees.

As a prefatory matter, it is first necessary to determine whether the affirmative defense that was brought for the first time in the Muchas' instant Motion for Summary Judgment, was properly raised. Generally, an affirmative defense, "must be set out completely in a party's answer to a complaint and failure to do so results in waiver of the defense." *Hanley v. City of Chicago*, 343 Ill. App. 3d 49 (1st Dist. 2003). Importantly, an exception to the rule exists, however, "where a defendant raises an affirmative defense for the first time in a motion for summary judgment and the plaintiff has ample time before trial to respond to the defense." *Hawkins v. Chicago Commission on Human Relations*, 2020 IL App (1st) 191301, ¶ 29; *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2nd Dist. 2010). Thus, "[a] party may assert, without forfeiture concerns, affirmative defenses in a summary judgment motion, even after failing to file them in an answer." *Board of Library Trustees v. Board of Library Trustees*, 2015 IL App (1st) 130672, ¶ 23.

Here, there is no question that Wilmington was given ample time to respond to the affirmative defense raised initially in the Muchas' Motion for Summary Judgment. Movants' Motion for Summary Judgment was filed in November of 2023.

Moreover, while the Motion was initially granted on June 26, 2024, due to Plaintiff's failure to file a response brief despite multiple continuances and opportunities to so, the Court reconsidered this ruling and again re-opened briefing to permit Wilmington to state its position in writing. Eventually, Wilmington did indeed file a response brief on October 24, 2024. There is no doubt that Wilmington was given sufficient time and opportunity to prepare its arguments in response to the Muchas' Motion for Summary Judgment. Furthermore, argument was not heard on Defendants' Motion for Summary Judgment until December 4, 2024, slightly more than a year after the affirmative defense was first raised. Accordingly, the Court maintains, Defendants' Time Barred affirmative defense was timely filed and properly raised—albeit for the first time—in the instant Motion for Summary Judgment, and Wilmington had ample time and opportunity to respond to it. Illinois case law is clear that affirmative defenses can be raised for the first time in a motion for summary judgment. *Hawkins,* 2020 IL App (1st) 191301, at ¶ 29. Thus, Wilmington's procedural due process rights with respect to the Muchas' newly raised affirmative defense were not violated. This Court therefore finds that there was no surprise or prejudice as a result that would prohibit it from ruling on the merits of this affirmative defense herein.

As a final preliminary point, the Court finds that there exists no genuine issue as to any material fact with respect to the affirmative defense currently before it. Only questions of contract interpretation and application of the existing law to the undisputed facts of the case remain—questions of law. *U.S. Bank N.A. v. Gold,*

2019 IL App (2d) 180451, ¶ 10 (citing *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 26). The parties seem to agree that the relevant applicable facts are not in dispute or at issue, thus leaving the Court to decide if Wilmington's action may continue as a matter of law. *Ford v. Dovenmuehle Mortgage*, 372 Ill. App. 3d 240, 244 (1st Dist. 1995) ("Where the facts are not in dispute, the interpretation of a written contract is a question of law and summary judgment is appropriate"). It may not.

Accordingly, the Court now turns to analyze the merits of the affirmative defense presently before it.

A. Discussion

The Muchas' affirmative defense alleges that the time to bring an action on the Note has expired; and, therefore, the Mortgage has been extinguished. Defendants contend that the Note was automatically accelerated 30 days after the December 20, 2012, minimum payment remained unpaid—January 20, 2013. Defendants also argue that Wilmington only filed an action to foreclose on the Mortgage; however, at no point over the course of litigation did it file an action under the Note. Defendants assert that because Wilmington never filed an action on the Note, its statute of limitations was never tolled, continued to run, and, by operation of law, expired on January 20, 2023. Conclusively, because the time to bring an action on the Note has expired, the Mortgage must be extinguished, and Wilmington's Complaint to Foreclose Mortgage must be dismissed.

While this defense has yet to be seen by a reviewing Court of this State, it is not one of first impression for this Court as this Court recently ruled on a very similar—if not nearly identical—defense in the *Bartelstein* case cited above. After having carefully reviewed both parties' arguments, it is clear that this Court has little guidance or precedent to rely upon in ruling on this matter. This Court points out that this issue, while a novel one, does rely on Illinois Supreme Court case law from nearly two centuries ago that has never been overturned.

Plaintiff argues that the statute of limitations on the Note did not run because it believes the loan's acceleration terms were not self-effectuating or automatic, it had previously sought relief under *both* the Note and the Mortgage by requesting a personal money judgment, and that a suit under the Illinois Mortgage Foreclosure Law is both an action on the Mortgage and Note wrapped up as a single cause of action, negating any requirement for a separate suit or count specifically on the Note.

1. *The Note is Unenforceable*

The primary source of contention today as it relates to the Muchas' Time Barred Defense is whether the statute of limitations has expired on the Note. According to 735 ILCS 5/13-206,

> [A]ctions (***) shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay. (***) [A] cause of

> action on a promissory note payable at a definite date accrues on the due date or date stated in the promissory note or the date upon which the promissory note is accelerated. (***) An action to enforce a demand promissory note is barred if neither the principal nor interest on the demand promissory note has been paid for a continuous period of 10 years and no demand for payment has been made to the maker during that period. 735 ILCS 5/13-206.

Based on this statute, this Court must look to the point at which the loan was accelerated to determine when the statute of limitations' clock began to tick on the Note.

First, the Muchas' Note under the "Default-Termination of Credit Line During the Draw Period" states "All amounts owing to the Bank shall be *immediately* due and payable *without notice or demand* if (***) [a] minimum payment is not made and remains unpaid for thirty (30) days after it becomes due." (Pl.'s Compl., Ex. B, 6 (emphasis added).) The Note defines "The Draw Period" as "the first ten (10) years of the twenty (20) year term of the borrower's Home Equity Line of Credit." (*Id.* at 1.) That means that The Draw Period would run from the date of the Note's execution (*i.e.*, February 24, 2007) through the Conversion Date (the date that the Draw Period ended and The Repayment Period ("the second ten (10) years of the twenty (20) year term of the borrower's Home Equity Line of Credit") began) (*i.e.*, April 1, 2017). (*Id.*) Here, the alleged date of default in the Complaint is the December 20, 2012, minimum payment. Looking at the plain language of the contract for what occurs during these conditions, it is clear that the alleged default here would have occurred during the *Draw Period* and not during the Repayment Period. Turning back to the terms of acceleration for a default

during the Draw Period, it is crystal clear that the Note would be "immediately due and payable without notice or demand." (*Id.* at 6).

The sections of the Mortgage and Note Plaintiff cites are not applicable to the type of default that occurred here. This Court must not give them any weight. Since the alleged missed payment was for the December 20, 2012, payment, the Muchas had until January 20, 2013, (30 days later) to cure the default and avoid acceleration. Defendants seemingly did not cure the default by this date; therefore, the Note was accelerated automatically by its own terms, and, pursuant to 735 ILCS 5/13-206, the ten-year clock began to tick on January 20, 2013, for an action on the Mortgage and for an action on the Note to be filed.

Any argument that Plaintiff makes that a notice had to be sent for a default during the Draw Period falls on deaf ears. The contract unambiguously requires no notice or demand be sent for this type of default. This Court will not modify the unambiguous terms contained within the Note. *See Carter Oil Co. v. Dees*, 340 Ill. App. 449, 458, 92 N.E.2d 519, 523 (4th Dist. 1950) ("Courts do not, and cannot, undertake to make a new contract for the parties"); *see also Schweihs v. Davis, Friedman, Zavett, Kane & MacRae*, 344 Ill. App. 3d 493, 499 (1st Dist. 2003) ("In general, courts will enforce contracts as written, and they will not rewrite a contract to suit one of the parties"); *and People ex rel. Illinois State Scholarship Com. v. Harrison*, 67 Ill. App. 3d 359, 360 (1st Dist. 1978) ("[W]hen a contract is unambiguous, the duty of the court is to enforce the terms which the parties included in the contract. (***) A court may not rewrite the contract the parties have

made and in the absence of ambiguous language may not reform the agreement"). The Court's finding is further reinforced by the notion that contract language should be construed most strongly against its maker—here, Wilmington which, as assignee of the Note, stepped into the shoes of the assignors for purposes of interpreting the provisions of the Note. *Scheduling Corporation of America v. Massello*, 119 Ill. App. 3d 355, 361 (1st Dist. 1983); *Bank of America National Association v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 17 ("A debtor may, generally, assert against an assignee all equities or defenses existing against the assignor prior to notice of the assignment"). While it is undisputed that Wilmington has tolled the statute of limitations on the Mortgage when it filed its Complaint to Foreclose upon the Mortgage, it failed to ever file an action on the Note, meaning the time to do so expired on January 20, 2023. Because the statute of limitations has expired, this Court deems the Note to be unenforceable, prohibiting Wilmington from bringing any action on the Note today, or at any point in the future.

Wilmington has presented the argument that by seeking a personal deficiency judgment, a *quasi in rem* action, they have successfully invoked the Note, and thus, tolled its statute of limitations. This Court cannot agree.

According to Black's Law Dictionary, a *quasi in rem* action is "brought against the defendant personally, with jurisdiction based on an interest in property, the objective being to deal with the particular property or subject the property to discharge of the claims asserted." *Quasi in Rem*, Black's Law Dictionary, 30 (7th ed. 1999). A foreclosure action, pursuant to Illinois Mortgage Foreclosure Law, is

undoubtedly understood to be a *quasi in rem* action. *ABN AMRO Mortgage Group, Inc. v. McGahan,* 237 Ill. 2d 526, 528 (2010). Seeking action on a promissory note, on the other hand, is an *in personam* proceeding that "imposes a personal liability or obligation on one person in favor of another." *Turczak v. First American Bank & Lebow*, 2013 IL App (1st) 121964, ¶ 33 (citing *Hanson v. Denckla*, 357 U.S. 235, 238 (1958)). A *quasi in rem* proceeding, although it seemingly has a personal aspect, is not the same as an *in personam* proceeding. In fact, they are so distinct that courts have historically allowed the mortgagee to seek "in personam judgment against the mortgagor for breach of contract of a promissory note [even] after the property was foreclosed upon." *Bank of America, N.A. v. Higgason*, 2022 Ill. Cir. LEXIS 1399, *1.

There is no question that the present action before the Court is a *quasi in rem* action. The fact that Wilmington's Complaint to Foreclose Mortgage contains a request for personal liability against the Muchas, however, does not transform the suit from a *quasi in rem* action to an *in personam* action. Wilmington's suggestion that seeking a personal judgment from a borrower in a *quasi in rem* action carries the same legal consequence as an *in personam* action on a promissory note finds no support in Illinois law and is wholly unavailing. In fact, in *Turczak*, 2013 IL App (1st) 121964, ¶ 33, the court made clear that although a mortgage foreclosure action is a *quasi in rem* proceeding, nothing precludes a lender from taking a separate action on the promissory note that would remain a purely *in personam* proceeding. Therefore, the Court must recognize the inescapable conclusion that Wilmington's request for a personal liability judgment against the Muchas does not carry the

same legal significance as commencing a separate action on the Note, nor can it transform the present action from a *quasi in rem* action to an *in personam* action.

With this understanding, it must follow that Wilmington's timely filing of a foreclosure action solely on the Mortgage was not sufficient to stop the statute of limitations' clock on the underlying Note. An action on an underlying note applies a distinct legal remedy that cannot be applied in a *quasi in rem* proceeding. The timely filing of its complaint, by itself, was, therefore, legally insufficient to toll the statute of limitations as to the Note. Such a tolling could only have occurred had Bank of New York amended its Complaint to add an additional count seeking relief under the Note directly or had it filed a separate action on the Note itself. Had it taken any of the above actions in time, then this action could have continued theoretically into perpetuity without any fear of the statute of limitations barring further legal action. Nothing procedurally in the first ten years after the cause of action arose prevented Wilmington from timely filing an action under the Note potentially for breach of note either herein or in a separate action; it just simply failed to do so.

Beyond the obvious that Wilmington could have filed an action on the Note within the ten-year statute of limitations to stop the limitations' clock, there are a number of other ways the statute of limitations on a note may be tolled. 735 ILCS 5/13-206. For instance, Illinois courts have recognized that an express or implied promise to pay, which constitutes an admission of the unpaid debt, is sufficient to toll the statute of limitations. *Walker v. Freeman*, 209 Ill. 17, 22 (1904). Next,

partial payment of the debt or payment of interest is sufficient to arrest the running of the statute of limitations, which then allows an action to be commenced within ten years from the last payment of interest rather than the initial cause of action. *Meyer v. Nordmeyer*, 332 Ill. App. 165, 171 (2d Dist. 1947). Courts have also held that "if the person against whom the cause of action accrues is out of the state when the cause of action accrues," then the statute of limitations will only begin to run once that person has returned to the state. *Thornton v. Nome & Sinook Co.*, 260 Ill. App. 76, 77 (1st Dist. 1931).

It is also worth noting that a mortgage and note are *two separate contracts. Abdul-Karim v. First Federal Savings & Loan Association,* 101 Ill. 2d 400, 407 (1984) (citing *Conerty v. Richtsteig*, 379 Ill. 360, 365-67 (1942)). Moreover, "[t]he mortgage is applicable to the right to apply the security to the discharge of the debt and the note to the liability of the maker for the payment of that indebtedness." *Conerty*, 379 Ill. at 366-67. Because a note and mortgage are two *separate* contracts, "a mortgagee is allowed to choose whether they proceed on a note (***) or to foreclose upon the mortgage (***) consecutively or concurrently." *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2d Dist. 2004); *Turczak*, 2013 IL App (1st) 121964, ¶ 31; *see also* 735 ILCS 5/15-1511 ("foreclosure of a mortgage does not affect a mortgagee's rights, if any, to obtain a personal judgment against any person for a deficiency"). In an action on the mortgage, "the mortgagee gains possession of the property, but he does not receive a judgment for any deficiency." *Abdul-Karim,* 101 Ill. 2d at 408. Conclusively, an action on a mortgage and an action on a note are

separate rights of action that request separate relief: one, the foreclosure of a title encumbrance, and the other, a money judgment. The Illinois Mortgage Foreclosure Law does not change this principle. Thus, these different remedies require separate actions to enforce those remedies and, likewise, to independently toll their respective statutes of limitations.

Moreover, where a plaintiff is successful and a court enters Judgment of Foreclosure and Sale pursuant to 735 ILCS 5/15-1506, the borrower's promise to pay under the note and all other rights of the lender are merged into the judgment. In essence, obtaining judgment within the ten-year statute of limitations avoids the very heart of the issue before this Court—the expiration of the statute of limitations on *only* the Note. Wilmington could have also escaped the consequences of the limitations period tolling by obtaining judgment in its favor without ever needing to file a distinct action under the Note. Had Plaintiff been successful in a dispositive motion or proven its case to this Court at trial such that this Court would have entered Judgment of Foreclosure and Sale pursuant to 735 ILCS 5/15-1506 prior to January 20, 2023, the Muchas' promise to pay under the Note would have been superseded by a court order establishing liability and damages with a mandate to pay the total amounts found due and owing, if any, and merging all of the bank's rights into the judgment. There would have been no concerns regarding its compliance with 735 ILCS 5/13-206. That is not what happened here, however. No Judgment of Foreclosure and Sale was ever entered by this Court on Plaintiff's foreclosure action.

While 735 ILCS 5/15-1504's statutory short form complaint does permit a plaintiff to seek a personal deficiency, that only occurs (1) in case a deficiency exists and (2) after the judicial sale of the subject property. The Illinois Mortgage Foreclosure Law allows, but does not *require* that a plaintiff seek a personal judgment. While Plaintiff's position that it invoked the Note for the purposes of seeking a personal deficiency might be true if the Court were to allow the judicial sale of the subject property, that has not happened here as no judgment of foreclosure has been entered, the property has not been sold at a judicial sale, and a deficiency does not exist. Who is to say that the property, if permitted to be sold, would not in fact result in a surplus of funds? Determination of a personal deficiency occurs only after the entry of judgment of foreclosure, the sale of the property, and confirmation thereof is requested (*i.e.*, *AFTER* the borrower's promise to pay under the note and all other rights of the lender have already merged into the judgment, not before).

As established above, despite some similarity, an action seeking foreclosure under a mortgage is a wholly different theory than an action seeking a money judgment under a note. Insofar as there is any congruence authorizing further relief of an *in personam* judgment in an otherwise *quasi in rem* foreclosure proceeding, such a determination is not finalized or adjudicated until the sale of the property is conducted and confirmation thereof is pursued—importantly after the borrower's promise to pay under the note and all other rights of the lender have already merged into the judgment of foreclosure, *not* before.

Defendants also raise a very telling point. If this Court were to read Section 15-1504's relief provision as a flat out request for relief of personal deficiency judgment at the outset of a suit, it would cause a lender, simply by filing a complaint in substantially the same form as the statute provides, to potentially be in violation of a bankruptcy stay and/or the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*; although, this is not the factual situation presently before the Court. Additionally, such an interpretation of Section 15-1504 would also insinuate that the Illinois Legislature, when it formulated the statutory complaint, failed to appreciate that some loans are non-recourse meaning that a personal judgment would not even be available, yet the note would still have to be attached to the complaint and a default thereunder proven. This goes against Wilmington's position that including the alleged date of default, the amount alleged due, the *per diem* under the loan, and naming the defendants as the parties to be personally liable under the Note would be adequate invocation of the Note such that it would have established a cause of action sufficient to toll the limitations period. Also, such a reading of the statute would, contrary to the canon of statutory interpretation, culminate in the words "if sought" to be superfluous or meaningless. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010) (A "statute should be read as a whole and construed so that no term is rendered superfluous or meaningless").

Finally, there is a case that could potentially be read to be applicable to the case at bar not cited by either party—*First Midwest Bank v. Cobo*, 2018 IL 123038.

The short answer is that it is *not*. *Cobo* specifically involves the single-refiling rule; however, there is a more important idea to take away from *Cobo* that is entirely independent of this procedural rule. *Cobo*, 2018 IL 123038, ¶ 13 (holding that the transactional test will be used *for the purposes of the single refiling rule* to determine if two or more suits arise out of the same cause of action). *Cobo* specifically deals with multiple lawsuits arising out of the same operative facts; however, it states that "[a] plaintiff seeking to foreclose on a mortgage puts the note at issue and makes those facts 'operative' only if the plaintiff also seeks to adjudicate the parties' rights under the note." *Id.* at ¶ 39. Here, those facts have not become operative since Plaintiff has yet to seek to adjudicate its rights under the Note given that no judgment of foreclosure has been entered, no sale of the property has occurred, and no deficiency exists. The requested relief for an *in personam* judgment was only "if sought" based upon the results of judgment and the bid placed at a hypothetical judicial sale. Parties may not seek relief on mere conjecture that some event may occur in the future. *Village of Willow Springs v. Village of Lemont*, 2016 IL App (1st) 152670, ¶ 48.

Most relevant to the case before this Court is Footnote 2 of *Cobo*. That footnote refers to an old Illinois rule "prohibiting a lender from suing under the mortgage when a statute of limitations or other procedural rule barred a suit under the note." *Cobo,* 2018 IL 123038, n.2 (citing *United Central Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015)). In both *Cobo* and *KMWC*, the notes were barred by the single refiling rule—a procedural rule. Likewise, here, the Note is barred

under a procedural rule—the expiration of statute of limitations on the Note. Despite the fact that there are different reasons as to why the actions had been barred in *Cobo*, *KMWC*, and in the case *sub judice*, it is worth noting that the same legal consequence resulted.

Case law is clear as to how Wilmington could have tolled the statute of limitations on the Note, and simply giving Defendants notice in the Complaint that it might hypothetically and speculatively request a personal deficiency "if sought" is not sufficient to accomplish this task. Wilmington is the cause of its own demise by failing to take action within the statute of limitations. No case law exists to overrule this first-year law school principle. While it has successfully tolled the limitations period on the Mortgage, this is of no import, as the Mortgage, essentially, cannot exist without an enforceable Note. This Court holds that Wilmington's inaction in failing to bring an action under the Note (despite being permitted to do so under 735 ILCS 5/15-1504(b)) has led to the expiration of the Note's statute of limitations. Accordingly, the Note is deemed to be unenforceable, and no action may be sought against the Muchas under it now or at any point in the future.

2. *The Mortgage is Extinguished*

Traditionally in Illinois, a mortgage must be rendered extinguished where the note has become barred by the statute of limitations. *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 560 (1940) ("[W]here the debt paid or barred by the Statute of Limitations, a mortgage being by incident to the debt, is no longer a lien on the property"); *Dunas v. Metropolitan Trust Co.*, 41 Ill. App. 2d 167, 170 (1st Dist.

1963). This fundamental ideology is part of the very foundation of Illinois Mortgage Foreclosure Law, and has repeatedly been imposed by courts around the State. The law is clear: the note is the principal, the mortgage its incident, and a lender may not seek to foreclose on a property where the note is barred by the statute of limitations. *KMWC 845, LLC*, 800 F.3d at 311; *Hibernian Banking Association v. Commercial National Bank*, 157 Ill. 524, 537 (1895).

This Court would like to, once again, call attention to the fact that there exists no Illinois case law that is directly on point as to the unusual and unique fact pattern here; however, there are cases that date back to the mid-nineteenth century that must be used to guide this Court through its re-analysis of the facts before it.

Beginning with *Pollock v. Maison*, the Illinois Supreme Court held that, "it is manifestly more reasonable to hold that where the debt, the principal thing, is gone, the incident, the mortgage is gone also, and that a foreclosure *in any mode* cannot then be had (***). If a bar on the incident should bar the principal, then much more should a bar of the debt, be a bar to its incident." *Pollock v. Maison* 41 Ill. 516, 521 (1866) (emphasis added). Our Supreme Court, over a decade later, when tasked with determining the enforceability of a mortgage where the note had been barred by the statute of limitations, once again held that "the existence of the debt, for securing of which a mortgage is given, is essential to the life of the mortgage, and that when the debt is paid, discharged, released, or barred by the statute of limitations (***) the mortgage is gone, and has effect no longer." *Emory v. Keighan*, 88 Ill. 482, 485 (1878).

In *Hibernian Banking Association v. Commercial National Bank*, our High Court held similar to be true, reinforcing the general notion that because a mortgage is a "mere incident of the debt," it must also be barred when the debt is barred. *Hibernian Banking Association*, 157 Ill. at 537; *see also Dunas*, 41 Ill. App. 2d at 170 ("The running of a statute of limitations [on a note] bars the remedy for enforcing a debt"). And finally, thirty-five years after *Maison*, and utilizing it as precedent, the Supreme Court held that where the debt has been barred "by the statute of limitations the mortgagee's title encumbrance must be extinguished by operation of law." *Ware v. Schintz*, 190 Ill. 189, 193 (1901).

Pursuant to Illinois law, where an underlying debt, such as a note, is "paid, discharged, released, or barred by the Statute of Limitations the mortgage is gone" and is rendered ineffective. *Richey v. Sinclair*, 167 Ill. 184, 193 (1897) (citing *Maison*, 41 Ill. 516). Most relevant to the Court today is the statute of limitations as it relates to bringing an action on the Note, which this Court has ruled that because Wilmington failed to file an action on the Note within the applicable statute of limitations, the statute of limitations forever bars such an action.

Thus, the plain application of these rules leads the Court to the inescapable conclusion that because the statute of limitations on the underlying Note expired on January 20, 2023, the Note was then rendered unenforceable. As a mortgage is a mere incident of a note and becomes barred when the underlying debt is barred, Wilmington's ability to foreclose in the present action is estopped because the Note, as Defendant's counsel put it, died on the proverbial vine. "Among the 'gems' and

'free' offerings of the late Professor Chester Smith of the University of Arizona College of Law was the following analogy. The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow." *Best Fertilizers of Arizona, Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App. 1977), rev'd on other grounds, 570 P.2d 179 (Ariz. 1977) (quoting Professor Chester Smith). This is because the Note here is the real debt and the Mortgage without an enforceable associated note is worthless. Stephen Clowney, James Grimmelmann, Michael Grynberg, Jeremy Sheff, and Rebecca Tushnet, *Open Source Property*, 10.9 H. An Additional Puzzle Piece: The Mortgage and the Note, ¶ 2, Harvard Law School Library (Oct. 2018), https://opencasebook.org/casebooks/510-open-source-property/resources/10.9-h-an-additional-puzzle-piece-the-mortgage-and-the-note/. Although the debt itself might not be extinguished, the statute of limitations bars the remedy for enforcing the debt—an action for mortgage foreclosure. *See Dunas*, 41 Ill. App. 2d at 170.

If this were a straightforward application of the law, it would be a relatively routine problem for the Court to resolve. For example, had Wilmington taken no action whatsoever on both the Mortgage and Note, it would be clear that its ability to file a foreclosure action would have become impossible after January 20, 2023. Such a holding would recognize that once the underlying Note becomes unenforceable by operation of law, an action on the Mortgage would become fruitless as there would no longer exist an enforceable promise to pay, and the mortgage lien would thus be extinguished.

Such an elementary application, however, is not possible with the esoteric fact situation currently before the Court. This is not a case of a bank failing to take action at all as in the previous hypothetical. Here, Wilmington unquestionably filed this foreclosure action timely on the Mortgage. It suggests that such a timely filing of its foreclosure action on the Mortgage alone should be enough to toll the statute of limitations' clock on the Note. As discussed above, despite the intuitive appeal of Wilmington's position, this is simply not the case. As such, Wilmington must accept the consequences of the statute of limitations period lapsing; namely, that as the holder of an unenforceable note, its mortgage is extinguished and its present foreclosure action cannot be permitted to proceed.

As previously mentioned, Illinois case law is clear that where the note, the principal, is procedurally barred, its incident, the mortgage, must be rendered extinguished and may no longer encumber the property. *Dunas*, 41 Ill. App. 2d at 170. Although this case law, and all others cited in this subsection of this Opinion, seem to be antiquated, they have *never* been overturned and thus are still binding precedent handed-down by this State's highest court that this Court and all other inferior courts are obliged to follow. *Certain Underwriters at Lloyd's, London v. Reproductive Genetics Institute*, 2018 IL App (1st) 170923, ¶ 19, (quoting *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (3d Dist. 2006)) ("this court is bound to follow the supreme court's precedent, and 'when our supreme court has declared law on any point, only [the supreme court] can modify or overrule its

previous decisions, and all lower courts are bound to follow supreme court precedent until such precedent is changed by the supreme court'").

As such, Wilmington must accept the consequences of the statute of limitations period lapsing; namely, that as the holder of an unenforceable note, its mortgage is extinguished by operation of law and its present foreclosure action cannot be permitted to proceed. Despite these harsh results, the Court, guided by mandatory precedent, grants the Muchas' Motion for Summary Judgment likewise meaning that Wilmington's Complaint to Foreclose Mortgage is dismissed as well.

3. *Equitable Considerations*

This Court, like others of its kind, must enforce the law as it exists. *See State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 539 (1992) ("A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State"); *See Reproductive Genetics Institute*, 2018 IL App (1st) 170923, ¶ 19 ("[A]ll lower courts are bound to follow supreme court precedent until such precedent is changed by the supreme court"). The law as it exists in Illinois states that no action may be brought on the mortgage if its principal, the note, has been rendered unenforceable. *Hibernian Banking Association*, 157 Ill. 524 at 537; *Markus*, 373 Ill. 557 at 560; *Conerty*, 379 Ill. 360 at 367; *KMWC 845, LLC,* 800 F.3d at 307. By this standard, and based upon the facts that have been presented before this Court, because the statute of limitations on the Note expired, Wilmington may not enforce its Mortgage as it has become extinguished as a matter of law.

Although the case law is clear, this Court questions the equities behind this binding standard. This Court has thought long and hard whether the outcome of this case could be used to permit borrowers to extinguish a mortgage by obtaining a discharge in bankruptcy if they are able to successfully delay the initial foreclosure lawsuit. This is simply not the case, as Congress, through enactment of a statute, patched any holes in state law that would otherwise leave banks vulnerable in these types of situations. Under 11 U.S.C. § 524(a)(1), only the personal liability of the debtor would be discharged. In fact, 11 U.S.C. § 522(c)(2) "provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *see generally Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991). The installation of this exception to the bankruptcy discharge by Congress implies that without this safeguard, Illinois' and other states' laws, as they currently exist, would otherwise *require* that a bankruptcy discharge extinguish foreclosure actions. This would, of course, be absolutely absurd by placing an undue burden on lenders that makes the addition of such a provision appear self-evident. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," that permits statutes like 11 U.S.C. § 524(a) to reign supreme and fill in holes in the law that leave parties, and their interests, too vulnerable (at least in the context of bankruptcy). *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). Unfortunately, and possibly problematically, no such rule exists pertaining to the statute of

limitations as it relates to the present litigation before this Court under Illinois law. As such, this Court must fall back upon the law outlined in this Opinion.

States are seemingly split on how to handle the issues raised in this Opinion, and the inconsistency around the nation regarding this problem is a symptom of such lack of guidance. Dale Joseph Gilsinger's Law Review article, *Survival Creditor's Rights Created by Mortgage or Deed of Trust as Affected by Running of Limitation's Period for Action on Underlying Note* (2008), seeks to shed light on this issue, providing vast information regarding all fifty states' treatment of these cases. Gilsinger's research clearly maps the dichotomy that exists between states with regards to whether or not a lender may seek judgment of foreclosure on the property after the statute of limitations on the note has expired. Dale Joseph Gilsinger, *Survival of Creditor's Rights Created by Mortgage or Deed of Trust as Affected by Running of Limitation Period for Action on Underlying Note*, 36 A.L.R. 6th 387 (2008).

Take for example Nebraska, where courts have historically held that "[t]he right to foreclose [a] mortgage exists after the note it was given to secure is barred by the statute of limitations." *Doty v. West Gate Bank, Inc.*, 292 Neb. 787, 801 (2016) (citing *Omaha Savings Bank v. Simeral*, 61 Neb. 741, 743 (1901)). A similar standard exists in both Massachusetts and Hawaii, and it has long been established there that a lender may still seek to foreclose on a mortgage even after the note has been rendered unenforceable by expiration of its statute of limitations so long as the

debt has remained unpaid. *Thayer v. Mann*, 36 Mass. 535 (1837); *Kipahulu Sugar Co. v. Nakila*, 20 Haw. 620, 621-22 (1911).

Nebraska, Massachusetts, and Hawaii are among the twenty-five states that hold that, "as a matter of common law, the rule that the bar by statute of limitations of an action to collect a promissory note secured by a mortgage does not operate to automatically extinguish the mortgagee's lien holder rights." Gilsinger, *supra*, at *5. These states include: Alabama, Connecticut, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming. *Id.* Illinois is on the other side of the coin, holding that, "as a matter of common law, the statute of limitations of an action to collect a promissory note secured by a mortgage operates to automatically extinguish the mortgagee's lienholder rights." *Id.* at *7. Fourteen other states hold the same to be true, including: Alaska, Arkansas, California, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Texas, and Washington. *Id.* Although Ohio has ruled on the issue, there is an "unresolved conflict" as to whether or not relief may be sought under the mortgage after the statute of limitations on the note has expired. *Id.* at *5. Several other states have not "picked a side," so to speak, namely: Arizona, Colorado, Delaware, Indiana, Missouri, New Hampshire, New Mexico, South Dakota, Utah, and West Virginia.

Gilsinger's extensive work tactfully demonstrates the schism between states, with twenty-five of them on one side of the line, and fifteen on the other. While this

Court cannot be so sure as to which side is the "right side," what can be assured is that this lack of uniformity in what appears to be a coin flip, is indicative of a larger systematic issue in the realm of mortgage foreclosure law where states lack guidance.

There is one reason as to why this Court cannot go so far as to say that our Highest Court got it all wrong—due process. The Constitution of the United States and the Fourteenth Amendment explicitly state that state governments shall not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Section 2 of Article I of the Illinois Constitution contains this exact language, too. Ill. Const. 1970, art. I, § 2. Specifically, "procedural due process claims concern the constitutionality of the specific procedures employed to deny a person's life, liberty, or property." *Segers v. Industrial Commission*, 191 Ill. 2d 421, 434 (2000). "Procedural due process is meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Id.* This is especially relevant to the issue here, as the present law requires sufficient notice, proper advisement to borrowers of their rights under their respective contracts, and necessary disclosure of their involvement in legal proceedings so the defendant might be able to be heard—all of which may be accomplished via filing a separate action on the Note. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) ("This right to be heard has little reality or worth unless one is informed that

the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. (***) An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (***) But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (***) [The notice must be] reasonably certain to inform those affected or (***) not substantially less likely to bring home notice") (internal citations omitted).

California has a unique approach, one that may be the cure to the problem before this Court by avoiding it altogether. The California Code of Civil Procedure requires, at the outset of the suit, the lender to seek an action on both the mortgage *and* the note. Cal. Civ. Proc. Code § 726(a). In doing so, this would prevent the statute of limitations of both the mortgage *and* the note from running, which would eliminate this problem altogether, erasing the divisive line between states.

This proposes an issue that may be worthy of review and statutory revision. Bankruptcy law takes into consideration the negative implications that may arise for banks as they run into situations where borrowers do not pay their debts; however, the same level of sympathy is not extended to lenders, like Wilmington, pertaining to statutes of limitations. Aside from the enactment of a law similar to that of California, another way to combat this issue (and something that Courts in

Illinois already do as a result of the Supremacy Clause) is through the installation of new legislation similar to 11 U.S.C. § 522 to protect lenders' interest and investments. Such a statute would permit a lender to seek foreclosure on a mortgage after the expiration of the statute of limitations on the related note so that they might be able to become whole, or nearly whole, again through judicial sale of the property and an *in rem* judgment only. An undue burden is placed on lenders not only to police borrowers as it relates to their debts, but also to stay on top of the ball with regards to lengthy litigation that may stretch over a decade. Lastly, unless and until the Supreme Court decides to reverse its prior rulings or a new statute is enacted by the Legislature, this Court and all other inferior courts of this State are pigeonholed by this standard.

Accordingly, and after a thorough analysis of the facts and the law, the Muchas' Motion is granted.

IV. CONCLUSION

For all the reasons mentioned herein, the Court's mind is clear and free from doubt that the Muchas are entitled to a judgment as a matter of law as it relates to their Time Barred Affirmative Defense. The Muchas' Motion for Summary Judgment must be granted and it is enough to dismiss Wilmington's Complaint to Foreclose Mortgage. Accordingly, the Court grants Defendants' Motion for Summary Judgment and thus necessarily dismisses Wilmington's Complaint to Foreclose Mortgage. As a final note, because this cause of action accrued on January 20, 2013, Wilmington had ten years, until January 20, 2023, under 735 ILCS

5/13-206, to bring an action to foreclose on the Mortgage and to bring an action the Note. That date passed nearly two years ago. Prior to January 20, 2023, Wilmington was able to amend its Complaint in order to seek relief under the Note and toll the statute of limitations, but it did not. Thus, the Court is left with no other option but to dismiss Wilmington's Complaint to Foreclose Mortgage with prejudice, as the statute of limitations bars it from bringing this claim again.

Accordingly, the Muchas' Motion For Summary Judgment is hereby GRANTED, and Wilmington's Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE.

THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) The Muchas' Motion for Summary Judgment as to their Time Barred Defense is hereby GRANTED;

(2) Wilmington's Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE;

(3) The February 24, 2007, $97,500.00 Home Equity Line of Credit Agreement and Promissory Note that Jozef Mucha and Zofia Mucha executed and delivered to MidAmerica Bank, FSB which was subsequently assigned to Wilmington is hereby deemed unenforceable;

(4) By operation of law, because the underlying debt has been deemed unenforceable, any and all mortgage liens or title encumbrances Wilmington has or might have encumbering the property subject of this litigation in connection to the February 24, 2007, $97,500.00 Promissory Note are hereby declared extinguished;

(5) Within 30 days after the date of entry of this Order, on or before January 11, 2025, Wilmington, at its own expense, is hereby enjoined and ordered to do the following:

(a) Record with the Cook County Clerk's Office a release of mortgage for the mortgage subject of this litigation on the property subject of this litigation pursuant to the Court's holding herein;
(b) File in the Court's Record with the Clerk of the Circuit Court of Cook County a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office;
(c) Send to all parties of record a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office; and
(d) Send to the Court's email address listed below a courtesy copy of the recorded release of mortgage recorded with the Cook County Clerk's Office and filed and stamped by the Clerk of the Circuit Court of Cook County;

(6) Pursuant to 735 ILCS 5/15-1510, Wilmington is hereby found liable to the Muchas for all reasonable attorneys' fees and costs incurred associated with litigating this matter;

(7) The case is hereby set for status on January 30, 2025, at 2:30 PM via Zoom at the below listed Zoom Information;

(8) If the Muchas choose to do so, the Muchas are hereby granted 30 days leave from the date of entry of this Order, on or before January 11, 2025, to file a petition for attorney's fees and costs to prove up damages concerning attorneys' fees and costs awarded to them in (6) *supra* and may, if filed, piggyback and present this petition on the January 30, 2025, status date set in (7) *supra*;

(9) If Wilmington believes there to exist a legitimate and non-frivolous basis for this Court to reconsider the entirety or any portion of its judgment rendered herein, and Wilmington in fact chooses to file a motion to reconsider pursuant to 735 ILCS 5/2-1203 in this Court, Wilmington is hereby granted leave to file said motion to reconsider within the statutory allotted time from the entry of this Order and may, if filed, piggyback and present this motion to reconsider on the January 30, 2025, status date set in (7) *supra*;

(10) All courtesy copies for any petition or motion to be presented to the Court by either party on the January 30, 2025, status date set in (7) *supra* shall be submitted by each petitioner or movant to the Court's email address listed below in strict conformity with the Court's Standing Order no later than 4:30 PM on January 15, 2025; and

(11) Unless Wilmington files a post judgment motion pursuant to (9) *supra* or another similar motion, this is a FINAL and APPEALABLE ORDER.

Zoom Information:
Meeting ID: 810 2556 7672
Passcode: 021601
Call-in: (312) 626-6799

IT IS SO ORDERED.

Date: December 12, 2024

ENTERED:

Honorable William B. Sullivan
Cook County Circuit Judge

ORDER PREPARED BY THE COURT
ccc.mfmlcalendar60@cookcountyil.gov
(312) 603-3894

ENTERED
Judge William B. Sullivan-2142
DEC 12 2024
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

EXHIBIT I

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

The Bank of New York, as trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-J8, Mortgage Pass-Through Certificate, Series 2006-J8, *Plaintiff,* *v.* Debbie Bartelstein a/k/a Deborah Bartelstein; Unknown Owners and Non-Record Claimants, *Defendants.*	Case Number: 2007 CH 38051 Calendar 60 Honorable William B. Sullivan, Judge Presiding Property Address: 321 Woodlawn Avenue Glencoe, Illinois 60022

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Plaintiff BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-J8, MORTGAGE PASS-THROUGH CERTIFICATE, SERIES 2006-J8's ("Bank of New York") Motion to Reconsider this Court's September 27, 2023, Memorandum Opinion and Order pursuant to 735 ILCS 5/2-1203(a) ("Motion to Reconsider"). For the following reasons, Bank of New York's Motion to Reconsider is hereby DENIED and Defendant DEBBIE BARTELSTEIN's ("Bartelstein") fully briefed Verified Amended Fee Petition ("Fee Petition") is hereby SET for hearing as set forth below.

I. INTRODUCTION

"Brevity is the soul of wit." WILLIAM SHAKESPEARE, HAMLET, ACT 2, SCENE 2, LINE 97. Yet, this case has been anything but brief. Thorough analysis of the facts and history of this matter is necessary to properly frame the complex issues before this Court today. Despite this Court's appreciation for brief, direct, and concise arguments, the legal intricacy and complexity of this case require this Court to do a deep dive into uncharted waters, as this is a matter of first impression. This case is, without a doubt, one of the most legally and factually complicated cases this Court has seen, and, after nearly two decades of litigation, it is finally time to adjourn this case and declare a victor—Defendant.

II. BACKGROUND

On October 26, 2006, Bartelstein purchased the property located at 321 Woodlawn Avenue in Glencoe, Illinois ("the Property"). This is the Property that is subject of this litigation. On the same day she purchased the Property, Bartelstein executed a promissory note ("Note") in the amount of $512,800.00 secured by a mortgage ("Mortgage") on the Property payable to Guaranteed Rate, Inc.

Beginning in August of 2007, Bartelstein allegedly failed to pay her monthly installments owed to Bank of New York. Pursuant to contractual conditions precedent set forth in Paragraph 22 of the Mortgage, Bank of New York was required to send Bartelstein presuit notice of her various rights and obligations under the Mortgage. In a letter sent to Bartelstein and dated September 17, 2007, Bank of New York detailed, *inter alia*, the default, the amounts due and owing, and

notified Bartelstein that the default must be cured on or before October 17, 2007. Bartelstein was further informed that her failure to cure this default would result in acceleration of her mortgage payments with the entire amount becoming payable in full and that failure to cure would also result in the initiation of a foreclosure proceeding.

On December 24, 2007, Bank of New York filed its initial Complaint to foreclose on the Property, naming Bartelstein as defendant. Bank of New York filed a single-count action to foreclose upon the Mortgage, therein alleging that Bartelstein failed to pay the monthly installments owed from August 2007 leading up to that point in time. Bank of New York did not file any action on the Note, but did state in its *ad damnum* that a personal deficiency against Bartelstein *could* be sought.

Sometime after Bank of New York filed its initial Complaint, its counsel posited that it had become necessary to attach a true and correct copy of the original Note to the Complaint. Nearly eighteen months after filing its initial Complaint, on June 15, 2009, with leave of Court, Bank of New York filed an Amended Complaint to Foreclose Mortgage. Once again, Bank of New York did not file any action on the Note. Five days later on June 20, 2009, Bartelstein filed her Answer to Plaintiff's Amended Complaint to Foreclose Mortgage and also raised three affirmative defenses therein. On March 10, 2011, Bank of New York filed its Response to Bartelstein's Affirmative Defenses raised in her Answer.

Over three years later, on October 8, 2014, Bank of New York filed its first Motion for Summary Judgment. Thereafter, on April 29, 2015, Judge Michael T. Mullen denied Plaintiff's Motion for Summary Judgment without prejudice. The Court found there to be a genuine issue of material fact as to whether Bank of New York was the holder of the Note when the initial Complaint was filed.

Four and a half years later, on December 19, 2019, Bartelstein filed a Motion for Summary Judgment in which she raised four Affirmative Defenses, two of which were not previously brought or raised in any way until that point in time. In her first Affirmative Defense, she alleged that Plaintiff lacked capacity at the time of filing to bring the lawsuit ("Capacity Defense"). Second, she alleged that Plaintiff lacked standing at the time of filing the lawsuit ("Standing Defense"). Third, she alleged that Plaintiff's acceleration notice failed to strictly comply with Paragraph 22 of the Mortgage ("*Accetturo* Defense"). Fourth, and finally, she alleged that the Note had become unenforceable by operation of law as a result of the expiration of the applicable statute of limitations and that the action on the Mortgage without an enforceable Note could not survive ("Time Barred Defense").

Thereafter, on March 9, 2020, Bank of New York filed its Response to Bartelstein's Motion for Summary Judgment; however, the case went on hold and the motion remained pending due to delays and closures resulting from the COVID-19 pandemic. Eventually, on August 8, 2022, Bank of New York filed its Cross-Motion for Summary Judgment, its second attempt to achieve a judgment as a matter of law.

While both motions remained pending, the Court granted Bartelstein's request for leave to file a combined Reply in support of her Motion for Summary Judgment and Response to Plaintiff's Cross-Motion for Summary Judgment. On December 15, 2022, Bartelstein timely filed this combined brief addressing both motions. Nearly a month later, on January 19, 2023, Bank of New York timely filed its Reply in support of its Cross-Motion for Summary Judgment.

After both motions had been briefed, on February 7, 2023, the Court held a joint hearing on Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment. The next day, on February 8, 2023, the Court entered an Order in which it struck Defendant's *Accetturo* Defense and Time Barred Defense. The Court at that time *sua sponte* opined that these Affirmative Defenses brought Plaintiff surprise and prejudice as they were not mentioned in the litigation prior to Defendant bringing her Motion for Summary Judgment. As such, the Court declined to hear further argument pertaining to these two defenses. With regards to Bartelstein's two other affirmative defenses (Capacity Defense and Standing Defense), this Court found genuine issues of material fact to exist necessitating denial of the remainder of her Motion for Summary Judgment on those grounds. On that account, the Court's February 8, 2023, Order denied the balance of Bartelstein's Motion for Summary Judgment. Likewise in the February 8, 2023, Order, the Court denied Bank of New York's Cross-Motion for Summary Judgment also finding the existence of a genuine issue of material fact as to Plaintiff's standing to bring this suit.

On March 29, 2023, Bartelstein filed an Amended Motion to Reconsider the Court's February 8, 2023, Order. In a similar fashion, two months later, on May 1, 2023, Bank of New York, after having been granted an extension of time, filed its own Motion to Reconsider the same Order. The Court, after hearing oral arguments by both parties regarding their respective Motions to Reconsider, entered an order on August 2, 2023, in which it denied Plaintiff's Motion to Reconsider the Order Denying its Cross-Motion for Summary Judgment. The Court found there to be insufficient grounds under Illinois law to reconsider the February 8, 2023, Order. The Court continued to hold, as both it and Judge Michael T. Mullen had held previously, that there existed a genuine issue of material fact as to whether Bank of New York was the holder of the Note at the time of filing the initial Complaint.

In that same August 2, 2023, Order, the Court granted Defendant's Motion to Reconsider the February 8, 2023, Order that struck the two Affirmative Defenses Bartelstein raised for the first time in her Motion for Summary Judgment. The Court determined that it had erred in its previous application of existing Illinois law and improperly *sua sponte* struck Bartelstein's *Accetturo* Defense and Time Barred Defense in its February 8, 2023, Order. This ruling required the Court to again hold argument on Defendant's Motion for Summary Judgment to resolve the outstanding portions of the Motion because the Court declined to hear further argument *vis-à-vis* these two affirmative defenses at the initial hearing after having struck them originally. The Court then set a hearing on Defendant's *Accetturo* Defense and Time Barred Defense raised in her Motion for Summary Judgment on

August 15, 2023, at which point, the Court heard oral argument on the residuum of the Motion once and for all in its entirety.

After having read the Motion, Response, and Reply, and after having heard oral arguments from both parties as it related to those two Affirmative Defenses, on September 27, 2023, the Court issued a lengthy 48-page written Memorandum Opinion and Order. The Order granted Bartelstein's Motion for Summary Judgment and dismissed with prejudice Bank of New York's Amended Complaint to Foreclose Mortgage. The Court found the Note to be unenforceable, the Mortgage lien thus extinguished, and ordered Bank of New York to file a release of Mortgage within thirty days. Additionally, the Court found Bank of New York liable to Bartelstein for all attorney's fees and other costs pursuant to 735 ILCS 5/15-1510, and required Bartelstein to submit a detailed prove-up of all fees and costs within 30 days. Bank of New York was also invited to file a Motion to Reconsider the ruling under 735 ILCS 5/2-1203.

Twenty-six days after entry of the September 27, 2023, Memorandum Opinion and Order, on October 23, 2023, Bank of New York did, indeed, file a Motion to Reconsider under 735 ILC 5/2-1203(a). Shortly thereafter, on October 27, 2023, (thirty days after the entry of the September 27, 2023, Order) Bank of New York filed a separate Motion to Stay Enforcement of said Order pursuant to 735 ILCS 5/2-1203(b). On the same day, and within the timeframe permitted by the Court, Bartelstein filed her Verified Petition for Attorney's Fees and Costs as ordered by the Court in its September 27, 2023, Memorandum Opinion and Order.

On November 14, 2023, both of Plaintiff's Motions (one brought under Section 2-1203(a) and the other brought under Section 2-1203(b)) and Defendant's Fee Petition were presented before the Court. Thereafter, on November 16, 2023, the Court entered an Order granting Bank of New York's Motion to Stay Enforcement. Therein, over Bartelstein's objection, the Court stayed the portions of its Order requiring the filing of a release of Mortgage and extinguishing the Mortgage pending the Court's ruling on Bank of New York's Motion to Reconsider under Section 2-1203(a). In the same Order, the Court set a briefing schedule on Bank of New York's Motion to Reconsider and on Bartelstein's Fee Petition. Shortly after the November 16, 2023, Order's entry, on November 21, 2023, Bartelstein filed a Motion to Reconsider and Vacate as Void Portion of November 14, 2023, Order Granting Plaintiff's Motion to Stay Enforcement of the September 27, 2023, Judgment Order, and set the Motion for presentment before the Court on December 7, 2023; however, the matter was continued to December 13, 2023. On December 13, 2023, the Court entered an Order striking the briefing schedule on Bank of New York's Section 2-1203(a) Motion to Reconsider and Bartelstein's Fee Petition. The Court instead entered a briefing schedule on Bartelstein's Motion to Reconsider and Vacate.

After various extensions of time and permitted continuances, Bank of New York timely filed its response to Bartelstein's Motion to Reconsider and Vacate on January 18, 2024. On February 29, 2024, Bartelstein timely filed her Reply to the Motion. Then, on March 14, 2024, the Court, after having read the Motion, the

Response, and the Reply, and after having heard oral argument, entered an Order taking the matter under advisement.

On March 18, 2024, the Court issued, yet again, a written Memorandum Opinion and Order in which it granted in part and denied in part Bartelstein's Motion to Reconsider the November Order granting Bank of New York's request to stay enforcement. Bartelstein's Motion to Reconsider and Vacate as Void was denied; however, her Motion to set a briefing schedule on Bank of New York's Motion to Reconsider under Section 2-1203(a) was granted. Additionally, the Court set a status date in its March 18, 2024, Memorandum Opinion and Order to resolve the remaining motions in this matter and to set briefing schedules on Plaintiff's Motion to Reconsider under Section 2-1203(a) and Defendant's Verified Petition for Attorney's Fees and Costs for March 27, 2024.

On March 28, 2024, the Court entered an Order setting a briefing schedule on Plaintiff's Section 2-1203(a) Motion to Reconsider. Given the additional litigation that occurred from when Defendant originally filed her Verified Petition for Attorney's Fees and Costs on October 27, 2023, in the same March 28, 2024, Order, the Court granted Defendant leave to file an amended fee petition by April 10, 2024, and set a briefing schedule on the Amended Fee Petition, too. Thereafter, on May 6, 2024, the Court entered an Agreed Order giving Defendant additional time to file her Amended Fee Petition and reset the briefing schedule on the Amended Fee Petition and on Plaintiff's Section 2-1203(a) Motion to Reconsider. Defendant timely filed her Verified Amended Fee Petition on May 23, 2024. On June 20, 2024, the

Court, once again, entered an Agreed Order resetting briefing on Defendant's Amended Verified Fee Petition and Plaintiff's Motion to Reconsider. Ultimately, on July 8, 2024, the Court entered the final of this series of Agreed Orders resetting the briefing schedule on both the Amended Verified Fee Petition and Plaintiff's Motion to Reconsider for the last time.

On July 8, 2024, Plaintiff timely filed its Response to Defendant's Verified Amended Petition for Attorney's Fees and Costs. Also on July 8, 2024, Defendant timely filed her Response to Plaintiff's Motion to Reconsider. On July 24, 2024, Defendant timely filed her Reply brief in support of her Petition, and on July 29, 2024, Plaintiff timely filed its Reply in support of its Motion. On August 12, 2024, the Court, after having reviewed the Petition, the Motion, the respective Responses, and the respective Replies, held an in-person hearing during which the Court heard oral arguments from the Parties on Plaintiff's Motion to Reconsider. On August 12, 2024, the Court entered an Order entering and continuing Defendant's Verified Amended Fee Petition generally until the entry of this Memorandum and Order resolving Bank of New York's Motion to Reconsider and took Plaintiff's Motion to Reconsider the September 27, 2023, Memorandum Opinion and Order under advisement for the issuance of a written opinion. The Court's ruling follows.

III. LEGAL STANDARD

735 ILCS 5/2-1203(a) of the Code of Civil Procedure pertains to post judgment motions in cases decided without a jury. *Keener v. City of Herrin*, 235 Ill. 2d 338, 348 (2009). Section 2-1203(a) provides: "In all cases tried without a jury, any

party may, within 30 days after the entry of the judgment (***) file a motion for rehearing, or a retrial, or modification of the judgment or to vacate (***) the judgment or for other relief." 735 ILCS 5/2-1203(a).

A motion to reconsider is a "posttrial motion directed against the judgment." *Peraino v. County of Winnebago*, 2018 IL App (2d) 170368, ¶ 14. It is commonly understood that the purpose of a motion to reconsider "is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand." *Conner v. First Chicago Holdings, LLC*, 2021 IL App (1st) 200199, ¶ 26 (citing *River Village I, LLC. v. Central Insurance Companies*, 396 Ill. App. 3d 480, 492 (1st Dist. 2009)).

IV. ANALYSIS

Before the Court is the question as to whether Bank of New York is entitled to reconsideration of the Court's September 27, 2023, Memorandum Opinion and Order.

The Court, before addressing the matter *de jour*, would like to note that this Court undeniably continues to maintain jurisdiction over this case. Plaintiff timely filed its instant Section 2-1203(a) Motion within thirty days, and, up until today, that Motion had remained undisposed. Over the period of time encompassing the filing and ruling on all the various post judgment Motions from both Parties, the Court retained jurisdiction over *the case* and continues to maintain jurisdiction to enter its final ruling herein. *Trentman v. Kappel*, 333 Ill. App. 3d 440, 443 (5th Dist.

2002). As this Court opined in its March 18, 2024, Order, "this Court retained jurisdiction over the *entire controversy* including, but not limited to hearing and adjudicating Plaintiff's Section 2-1203(a) Motion (***) [and] Defendant's Petition for Attorneys' Fees." (Mem. Op. and Ord. 12, Mar. 18, 2024.) With the issue of jurisdiction resolved, the Court's ruling proceeds.

A. Plaintiff's Motion to Reconsider

Bank of New York now moves this Court to reconsider its September 27, 2023, Order, which granted Defendant Bartelstein Summary Judgment as to two of her affirmative defenses raised therein. Case law is clear that when a court's prior judgment is attacked by a motion to reconsider, the court has three lenses through which it may reevaluate its ruling: newly discovered evidence, new law, or a misapplication of existing law. *See Conner*, 2021 IL App (1st) 200199, ¶ 26. Bank of New York unquestionably asks this Court to do so by wearing the third set of spectacles. This is not surprising, as the Court's judgment was in Defendant's favor and the Court, in fact, invited Bank of New York to file the instant motion. Following suit, the Court will look back retrospectively and in sequence re-analyze its ruling through the lens of the arguments that Bank of New York raises, *vis-à-vis* each affirmative defense. For the reasons outlined below, the Court disagrees with Bank of New York's positions.

1. *Accetturo Defense*

Defendant's *Accetturo* Defense, which was first raised in her December 2019, Motion for Summary Judgment, alleges that Bank of New York's presuit notice of default and acceleration ("Notice"), dated September 17, 2007, failed to strictly comply with Paragraph 22 of the Mortgage. Specifically, she alleges that the defective Notice, by its failure to use specific required language as it appears in the Mortgage, did not properly apprise her of her rights as outlined by the Mortgage, thus violating the conditions precedent to bring this action. It is undisputed by both parties that the Notice was sent and its language is not identical to that of Paragraph 22 of the Mortgage.

The Court, after having read both Parties' briefs and hearing oral argument on August 15, 2023, determined that the Notice did, indeed, contain *two* defects. The first defect concerned informing Defendant of her right to assert defenses in the foreclosure proceeding ("The Right to Assert Defenses") and the second defect pertained to informing her of her right and ability to reinstate the Mortgage after acceleration of the loan ("The Right to Reinstate"). (Pl.'s Am. Comp. Ex. A, ¶ 22); (Def.'s Mot. for Summ. J., Ex. 9.) The Court, in its September 27, 2023, Memorandum Opinion and Order ultimately held that the first defect was technical in nature and did not prejudice the borrower, thus not presenting a situation warranting judgment in Bartelstein's favor. Contrarily, as to the latter of the two defects, the Court ruled that there was a substantive omission from the Notice;

therefore, this constituted grounds to grant judgment for Bartelstein on this Affirmative Defense, requiring dismissal of Bank of New York's Complaint.

Plaintiff, in its Motion to Reconsider, urges the Court to rehear this issue, alleging that the Defendant's "late" Affirmative Defenses are prejudicial. Bank of New York, in its Motion, reasons that Bartelstein's lack of urgency in challenging the sufficiency of Plaintiff's presuit Notice, raising this defense *twelve years* after the outset of the suit, then bringing this assertion at which time the statute of limitations on the Note had already run, brought "undue prejudice" to Bank of New York. (Pl.'s Mot. to Reconsider, at 5.) Bank of New York posits that had Bartelstein raised this defense at some point nearer to the outset of the lawsuit, it would have had the opportunity to voluntarily dismiss this action, rectify any alleged deficiencies in the Notice, and file a new action; however, due to Bartelstein's unwillingness to deal with such a pressing matter, Bank of New York has ultimately suffered the consequence of being pressed against the clock while being trapped in costly litigation for nearly two decades. Consequently, Bank of New York has now been deprived of its opportunity to re-notice the default and file a new action.

Additionally, Bank of New York asserts that if it were to release the Mortgage, as ordered by the Court's September 27, 2023, Order, it would be irreparably harmed and prejudiced in the event that it ultimately chooses to appeal this case. By releasing the Mortgage, any other interest in the Property could

potentially jump to the front of the line and Bank of New York would, therefore, lose its alleged priority as a senior lien holder. Because of this, Bank of New York could ultimately prevail on appeal yet still lose its alleged senior interest in the Property. Defendant, on the other hand, will continue to benefit from any delays, while she retains possession of the Property without paying any installments, and will enjoy these benefits regardless of whether she wins or loses on appeal. Plaintiff has requested this Court to not require it to release the Mortgage until the Court's judgment is affirmed or remanded.

Defendant counters Plaintiff's argument in its Response, first asserting that Plaintiff is inadvertently asking the Court to strike its August 2, 2023, Order, *not* to reconsider its September 27, 2023, Order. In its August 2, 2023, Order, the Court determined that it had erred in striking Bartelstein's two Affirmative Defenses in her December 2019 Motion for Summary Judgment, thereby granting Defendant's Motion to Reconsider the Order. The Court, in its September 27, 2023, Order, as a prefatory matter, affirmed its August 2, 2023, Order. Therein, the Court explicitly stated, "[t]his Court therefore finds, once again, that there was *no surprise or prejudice* as a result which would prohibit it from ruling on the merits of those affirmative defenses herein." (Mem. Op. and Ord. at 10, Sept. 27, 2023) (emphasis added.) In addressing Plaintiff's contention regarding what it "could have" done had Bartelstein asserted this Affirmative Defense sooner, Defendant asserts that Plaintiff's mere speculation falls short, as it fails to (1) identify newly discovered

evidence, (2) changes in the law, or (3) errors in the Court's previous application of the law. Moreover, Bartelstein uses as leverage, this Court's statement in its Order that "[n]othing procedurally in the first ten years of litigation prevented Bank of New York from timely filing an action under the Note potentially for breach of the Note either herein or in a separate action; it just simply failed to do so." (Mem. Op. and Ord. 41, Mar. 18, 2024.)

Lastly, Bartelstein addresses Plaintiff's request for the Court to not require Bank of New York to file the release until the Court's decision is affirmed or remanded. Bartelstein contends that this is a request for a stay of judgment, *not* reconsideration. Applying Illinois Supreme Court Rule 305, Bartelstein asserts that Rule 305(k) "protects third-party purchasers of property from appellate reversals of modifications of judgments regarding the property." (Def. Resp to Pl.'s Mot. to Reconsider, at 12.)

Before re-analyzing Bartelstein's two Affirmative Defenses, this Court would like to provide clarity as to Bartelstein's ability to raise these defenses in her December 2019 Motion for Summary Judgment. Typically, if a party fails to bring their affirmative defenses in their answer to the complaint, they have waived their right to do so. 735 ILCS 5/2-613(d). There is, however, an exception to this rule. Where a defendant raises an affirmative defense for the first time in their motion for summary judgment, so long as the plaintiff has ample time to respond, the defendant has not forfeited their right, nor may plaintiff allege prejudice. *Hawkins*

v. Chicago Commision on Human Relations, 2020 IL App (1st) 191301, ¶ 29 (citing *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 54 (1st Dist. 2003). Therefore, "[a] party may assert, without forfeiture concerns, affirmative defenses in a summary judgment motion, even after failing to file them in an answer." *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2d Dist. 2010).

Bearing this in mind, and having already addressed this matter *twice*, this Court, for a *third time*, asserts, yet again, that Bank of New York has *not* been prejudiced. Bank of New York, undoubtedly, had ample time to respond to the Affirmative Defenses raised by Bartelstein. In fact, Plaintiff took nearly four months to respond to her Motion for Summary Judgment. Atop of these four months it took Plaintiff to respond to Bartelstein's Motion, due to the COVID-19 pandemic and its implications, Bank of New York was granted *additional* time to file its own Cross-Motion for Summary Judgment. Due to the delays caused by the cross-motions, COVID-19 holds, and other motions filed pursuant to Supreme Court Rule 183 for extensions of time, this Court finally heard argument on Defendant's Motion for Summary Judgment more than *three years* after her Affirmative Defenses were raised. Time most certainly was *not* of the essence in this case, and there can be no question as to whether or not Bank of New York was deprived of opportunity in which it could respond to Bartelstein's Motion, and its procedural due process rights were not violated. This Court affirms its prior ruling for the third and final time and holds, anew, that Bank of New York was brought neither

surprise nor prejudice as a result of Bartelstein's previously untried Affirmative Defenses that were initially presented in her Motion for Summary Judgment at issue herein.

a. Applicable Law

Plaintiff's Motion to Reconsider requires this Court to analyze case law regarding strict compliance with express conditions precedent in the State of Illinois, which will be applied to the defective presuit Notice sent to Bartelstein by Bank of New York.

To begin, Illinois law has been univocally absolute for over eighty years that a mortgage is a contract. *See Abdul-Karim v. First Federal Savings & Loan Association of Champaign*, 101 Ill. 2d 400, 407 (1984) (quoting *Conerty v. Richtsteig*, 279 Ill. 360, 366-67 (1942)). Provisions regarding presuit notice contained therein are considered to be conditions precedent to that mortgage contract with which a lender must comply in order for them to have grounds to file a foreclosure action they hope to recover upon. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶¶ 26, 49 (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. __, __, (2016); *People v. Pomykala*, 203 Ill. 2d 205-6 (2003)). A "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32 (citing *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶ 21).

Both defects in the presuit Notice here may be scrutinized under the same framework. Illinois has historically required strict compliance with conditions precedent to any contract, such as the preacceleration notice requirement at issue here, for over a century. *See generally International Cement Co. v. Beifeld*, 173 Ill. 179 (1898). Along with this, and as noted by Illinois precedent, "[i]f the lender had not sent an acceleration notice, it would not be entitled to foreclose." *Credit Union 1 v. Carrasco*, 2018 IL App (1st) 172535, ¶ 15 (citing *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16). Although it may produce harsh results, courts have continued to enforce express conditions precedent, punishing non-compliant parties. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 664, 668 (1st Dist. 2007) (citing *Dodson v. Nink*, 72 Ill. App. 3d 59, 64 (2d Dist. 1979) ("It is well established that where a contract contains a condition precedent, the contract does not become enforceable or effective until the condition is performed or the contingency occurs")).

The *Accetturo* court noted that a technical defect will not always necessitate dismissal of a foreclosure action unless such defect is substantive in nature or if that defect is merely technical, but prejudices the borrower. *Accetturo*, 2016 IL App (1st) 152783, ¶ 42. In *Accetturo*, the Bank sent the defendant five notices of default. *Id.* ¶ 39. The first three letters failed to incorporate,

> (i) information about what must be done to cure the default, (ii) date on which to cure the default, (iii) information stating that failure to cure the default may result in acceleration of the sums secured by the

> Security Instrument (***), and (iv) information about Accetturo's right to reinstate or assert defenses to the acceleration and foreclosure. *Id.*

Both the fourth and fifth letters failed to include relevant language from the mortgage, as well as other information, such as acceleration and providing a time frame to cure the default. *Id.* ¶¶ 40-41. There, the *Accetturo* court determined the characteristics of this defect were sufficient to warrant dismissal, as the notice lacked information that was mandated by the mortgage; therefore, the court held that the bank's failure, prior to acceleration, to provide the defendant with a notice containing the specific information mandated by the mortgage divested the lender of its right to file the foreclosure action. *Id.* ¶¶ 42, 50. This particular type of defect is a *substantive* defect, or one that omits specific information, failing to apprise the borrower of their rights under the mortgage. *Id.* ¶¶ 39-42.

In *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, the Second District expanded upon these grounds, namely "clarifying" what characterizes a technical defect. The *Gold* court agreed that a presuit notice of acceleration is a condition precedent set by the mortgage; however, the court clarified that in the event that the notice suffers from a mere technical defect, this "will not automatically warrant a dismissal of a foreclosure action." *Id.* ¶ 11 (citing *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15). The court, then, doubled down, stating that if the mortgagor does not allege that they have suffered prejudice as a result of the defect,

then dismissal to permit new notice would be "futile." *Id.* (citing *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27).

The defendant in *Gold*, asserted that they were misled by the language of the notice of default they received, which notified the defendant that they "may have the right to bring a court action to assert" defenses, rather than informing the defendant of their right to bring defenses in the foreclosure proceeding. *Gold*, 2019 IL App (2d), ¶¶ 11-12. Although the defendant asserted that they were neither adequately nor properly apprised of their rights as a mortgagor, they did *not* allege that they were *prejudiced* by the language of the notice. *Id.* The court in *Gold* determined that because the defendant neither alleged nor argued that they were prejudiced, and because they fully availed themselves of the ability to assert defenses in the foreclosure proceeding, the defect was rendered a technicality and reversal of the trial court's order was not appropriate. *Id.* ¶¶ 12-14.[1]

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[1] The *Gold* court, in coming to its conclusion, relied upon three cases: *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27; *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 17; and *Bank of New York Mellon v. Johnson*, 185 So. 3d 594 (Fla. Dist. Ct. App. 2016). The court, in an explanatory parenthetical, notes that the *Johnson* decision is a

> nonprecedential but on-point case holding that notice advising mortgagor that she, "may have the right to bring a court action to assert" defenses, but not informing her that she could bring defenses in the foreclosure action, substantially complied with the mortgage terms where the variation caused no actual prejudice to the mortgagor. *Gold*, 2019 IL App (2d) 180451 (emphasis omitted).

This Court further notes that the Florida Fifth District Court of Appeal in *Johnson*, 185 So. 3d at 597, applied Florida's substantial compliance standard for contractual conditions precedent. *See, e.g., Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 13 (Dist. Ct. App. 2015) ("In Florida, a party's adherence to contractual conditions precedent is evaluated for substantial compliance or substantial performance"). This differs from Illinois' strict compliance standard for contractual conditions precedent. *See Accetturo*, 2016 IL App (1st) 152783, ¶ 32 ("When a contract contains an express condition precedent, strict compliance with such a condition is required").

Shortly thereafter, the Illinois Appellate Court, once again, expanded upon this legal standard, clarifying that a mere "technical defect" does not necessarily warrant dismissal of an action; however, a defect that lacks in substance *does* demand dismissal of the action. *Associates Asset Management, LLC v. Cruz*, 2019 IL App (1st) 182679, ¶ 35. The court in *Cruz* relied on two cases, the first being *Aurora Loan Services, LLC v. Pajor*, which was also used by the *Accettero* court. In *Pajor*, the plaintiff sent proper presuit notice in accordance with the conditions precedent, but did so prior to it being the formal assignee of the mortgage; however, the court held that since the plaintiff there and the plaintiff in *Cruz* met all of the "substantive requirements," dismissal of the action was not necessary. *Pajor*, 2012 IL App (2d) 110899, ¶ 27. The second case cited by the *Cruz* court was *Bank of America, N.A. v. Luca*, where the plaintiff sent proper presuit notice, but addressed it to only *one* of the defendant mortgagors and not the other. *Luca*, 2012 IL App (2d) 110899, ¶ 9. Once again, the court found this technical defect insufficient to dismiss the entire action. The court justified this decision based upon the fact that both defendants had knowledge of the presuit notice and because they did not allege that any other deficiencies existed. *Id.* ¶ 17.

The *Cruz* court then turned to *Accetturo*, in looking to determine what constitutes a substantive defect. Like *Accetturo*, the court in *Cruz* determined that the defect was substantive in nature because the bank had omitted a large portion of necessary and relevant information required under the mortgage contract,

indicating a failure to satisfy the contractual conditions precedent to default and acceleration. *Cruz*, 2019 IL App (1st) 182678, ¶¶ 39-40. The court ultimately found that because the bank failed to provide the contractually required presuit notice that was sufficient to apprise the borrower of their rights, the bank had been divested of its right to file the action. *Id.*

b. Bartelstein's Mortgage

Paragraph 22 of the Mortgage executed by Bank of New York and Bartelstein requires that in the event of a breach committed by the borrower, prior to acceleration of the loan, the lender must notify the borrower of:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. (Pl's Am. Compl., Mortgage, ¶ 22.)

The acceleration clause requires Plaintiff to provide notice to Bartelstein prior to acceleration, as denoted by the specific language of the clause. Particularly, the use of the word "shall," as opposed to "may" in the clause, which is recognized by the Illinois Supreme Court to hold a mandatory connotation unless otherwise stated, requires Plaintiff to provide presuit notice in a specialized way. *Accetturo*, 2016 IL App (1st) 152783, ¶ 35 (citing *Pomykala*, 203 Ill. 2d at 205-06).

This Court again finds that because the Mortgage contained an acceleration clause with express contractual conditions precedent, Bank of New York had a duty to abide by these obligations, including sending presuit notice of acceleration and default prior to acceleration of Bartelstein's loan. Similarly to *Accetturo*, this Court also finds that Paragraph 22 of the Mortgage (i) is a notice provision containing an acceleration clause, (ii) which provides specific information regarding Bank of New York's duty as a lender (iii) to provide to Bartelstein, as the borrower, presuit notice of acceleration, and (iv) such provision is a condition precedent which must be strictly complied with, pursuant to Illinois Mortgage Foreclosure law, in order for the lender to file an action upon which they hope to recover. *Accetturo*, 2016 IL App (1st) 152783, ¶ 49.

Ergo, the Court must determine if it erred in finding that Bank of New York did not send Bartelstein legally sufficient presuit notice. It has already been well established that there exists two defects in the Notice (which the Parties acknowledge); therefore, the Court must reevaluate using its third pair of glasses (*i.e.*, error in application of existing law) if such defects are substantive in nature (omitting relevant information and substantively failing to inform Bartelstein of specific information in Paragraph 22 of the Mortgage), or if they are merely technical in nature. If the defect falls into the latter category, the Court will once again determine if such defect prejudiced Bartelstein.

i. *Right to Assert Defenses*

The Court, in reconducting its thorough analysis of the presuit notice sent to Bartelstein, must compare the language of the Notice to that contained in Paragraph 22 of the Mortgage.

Paragraph 22 of the Mortgage provides that, prior to acceleration of the loan, the lender:

> ***[S]hall*** ***(***) inform Borrower of (***) the right to assert in the foreclosure proceeding the non-existence of a default or any other defenses to acceleration and foreclosure.*** (Pl's Am. Compl., Ex. A Mortgage, ¶ 22) (emphasis added.)

Contrary to this, the language of the Notice informs Bartelstein that she:

> ***[M]ay have the right to bring a court action to assert the non-existence of a default or any other defenses [she] may have to acceleration and foreclosure.*** (Def.'s Mot. Summ. J. Ex. 9) (emphasis added.)

Even those not as intimately familiar with the English language as the learned counsels here and this Court would immediately notice that the two clauses are not identical. The Mortgage explicitly notes that the assertion of the non-existence of a default or any other defenses can be raised in the *foreclosure proceeding*; however, the Notice states that only a *court action* may be brought. Additionally, Paragraph 22, using the mandatory voice, states that the lender *shall* inform the borrower of her right to assert the non-existence of a default or any other defenses; however, the Notice sent to Bartelstein states, in the permissive voice, that she *may* assert those defenses. The sheer fact that these two statements are objectively not the same, and the possibility of them being interpreted differently, is

sufficient grounds to state that there is a defect in the presuit Notice. Accordingly, this Court must determine whether this defect is substantive or technical in nature.

This Court, once again, finds such defect to be one that is technical in nature, as there exists no substantive omission of information, and this mere technicality did not prejudice Bartelstein in the present lawsuit. Precedent set in *Gold* controls this matter.

In *Gold*, the defendant argued that the statement in the notice of default was *misleading* because the right to assert a defense within a pending lawsuit is different from the right to file a new action to assert those defenses. *Gold*, 2019 IL App (2d) 180451, ¶ 12. Similarly, Bartelstein asserts that there exists a substantive difference between bringing a court action and asserting defenses in the present foreclosure proceeding. *Id.*[2] Defendant seemingly implies that she was not advised of her right to assert defenses in the present foreclosure proceeding and was merely, and somewhat vaguely, informed that she has the right to bring a court action. This

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[2] The factual scenario presently before the court is identical to the facts of *U.S. Bank N.A. v. Casaquite*, 2020 IL App (1st) 191586-U. While this case is non-precedential and in no way influences or controls the legal determination the Court is making in this Opinion, it nonetheless serves to elucidate the First District's positive treatment of the core holding in *Gold*. In *Casaquite*, the court held as follows:

> In *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, this court was confronted with the same "defect" Ms. Casaquite alleges here. In that case, the defendant argued that the notice of acceleration he received from the plaintiff was "misleading" because it informed him that he could raise defenses to foreclosure in a 'new action' as opposed to in the foreclosure proceedings. *Id.* ¶ 12. We held that where the defendant did not allege that he was prejudiced by this language, it was a technical defect that did not preclude enforcement of the mortgage contract. *Id.* The same is true here: Ms. Casaquite has never argued that she was prejudiced by the notice. Indeed, just as the defendant in *Gold*, Ms. Casaquite likewise was aware that she could bring defenses to foreclosure in the foreclosure proceedings, given that she did, in fact, raise defenses in her answer to the foreclosure complaint. For this reason, we conclude that to the extent there was a defect in the notice, it was merely technical, and absent a showing of prejudice, it provides no basis to afford Ms. Casaquite the relief she seeks. *Casaquite*, 2020 IL App (1st) 191586-U, ¶ 24.

Court, as it has previously held, and in upholding the standard so established by *Gold*, finds this linguistic difference still sufficiently notified Bartelstein of her right to raise defenses, provided necessary and specific information to which she is contractually entitled, and adequately informed her of the time and place in which she may assert her defenses.

Logically, it would have been impossible for Bartelstein to raise defenses to this foreclosure action in a separate court action because she may only raise defenses in an existing lawsuit—this case. Based on precedent, the Court, following the *Gold* analysis, must hold the defect in the present case to be one that is technical as well, and the difference in language is of no legal consequence here.

Next, in reapplying the *Gold* analysis, this Court must determine if the technical defect prejudiced Bartelstein in any sort of way, affecting her ability to engage in the present lawsuit. Based upon *Gold*, the Court holds that Bartelstein has *not* been prejudiced. The Court turns to her active engagement in the litigation for nearly *seventeen* years, with the benefit of representation by counsel. Additionally, the Court notes that Bartelstein has raised no fewer than seven affirmative defenses (three in her Answer and four in her December 2019 Motion for Summary Judgment). Her vigorous engagement in the litigation at hand must be construed to indicate a lack of prejudice. *See Cruz*, 2019 IL App (1st) 182678, ¶ 13-14 (holding that when prejudice is neither alleged nor argued and the defendant fully availed themselves of the ability to assert defenses in the lawsuit, the notice defect is rendered a technicality and dismissal is not warranted). This Court would

also like to raise the point that neither Bartelstein nor her counsel has alleged or asserted that she has suffered prejudice as a result of this presuit notice defect, or any other defect for that matter. (Proceeding Tr., 24: 19-21, August 15, 2023.) With that in mind, it would be futile and entirely inequitable for this court to dismiss the lawsuit without a showing of prejudice. *Gold*, 2019 IL App (2d) 180451, ¶ 14.

Utilization of the terms *shall* and *may* should be scrutinized under the same framework as provided herein. Bartelstein has stated that through the use of the permissive word, *may*, it "improperly diverges in substance from the notice required in Paragraph 22," as "Illinois borrowers have the absolute right to assert those defenses they may have in the foreclosure proceeding and subject to the rules of procedure and other applicable law." (Def.'s Mot. Summ. J., at 16.) This Court holds steadfast in its decisions, and it cannot and will not agree with this argument.

While there may still exist some uncertainty as to the precise definitions of substantive and technical defects, there still exists clear Illinois precedent which provides more than vague context clues as to what these sorts of defects comprise. It is well-established here that a substantive defect is one that arises where a presuit notice fails to provide specific information as required by the mortgage which the lender is obligated to present to the borrower. *Accetturo*, 2016 IL App (1st) 152783, ¶ 42. As previously mentioned, it is apparent that the presuit Notice sent to Defendant by Bank of New York does not omit any relevant language or information to which Bartelstein was contractually entitled regarding her right to assert defenses, especially not through its usage of the word *may* versus *shall*.

While in this Court's eyes this small blunder is one that is sloppy and careless, it does not bear enough weight to be deemed one that is substantive in nature.

During oral argument and in the briefs on her Motion for Summary Judgment, Bartelstein urged this Court to disregard the Second District's requirement of prejudice in its technical defect analysis, since it would be at odds with Illinois' historical tradition of requiring strict compliance with conditions precedent in a contract. (Proceeding Tr., 32-40, August 15, 2023.) As this Court has already stated, it must reject this argument, as it is bound by directly on point Illinois precedent, and there exists no Illinois law permitting this Court to deviate from such an established standard of analysis. In fact, this Court *is* undeniably bound by *Gold*. *See State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 553, 542 (1992) ("A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts *throughout the State*" (emphasis added)). Although Bartelstein raises the point that *Accetturo*, *Cruz*, and *Deutsche Bank National Trust Company v. Roongseang* support her suggestion, this Court is bound by precedent which states that it must find prejudice when analyzing a technical defect to establish grounds to dismiss the complaint. *See generally Gold*, 2019 IL App (2d) 180451. Furthermore, Bartelstein's argument is far from bulletproof. Although the *Accetturo* court does not turn to prejudice in conducting its analysis of the defect, it relies on *Luca*, which *does* expressly require a finding of prejudice; therefore, it may be implied that such a finding of prejudice *is* a necessary

component of the technical defect analysis in the First District, as well. *Luca*, 2013 IL App (3d) 120601, ¶¶ 16-17.

The court in *Cruz* endorsed the prejudice requirement as part of the analysis for technical defects, stating that, "[w]ith regard to presuit notice requirements in foreclosure cases, courts have held that dismissal of an action is not warranted where a defect is merely 'technical' and does not prejudice [the] defendant." *Cruz*, 2019 IL App (1st) 182678, ¶ 35. It is worth noting that this case was published after *Gold*, indicating that prejudice most certainly is a necessary component to the technical defect analysis for Illinois courts (including the First District) regarding presuit notice and strict compliance in mortgage foreclosure cases.

Finally, in support of her conclusion that First District precedent rejects the prejudice requirement, Bartelstein cites *Deutsche Bank National Trust Company v. Roongseang*, 2019 IL App (1st) 180948.[3] This Court deems *Roongseang* to be entirely distinguishable from the case at hand. The court in *Roongseang* was presented with the issue of whether a notice of default and acceleration was ever sent, unlike the case at bar in which this Court sought to determine the legal sufficiency of the notice sent to Defendant. *Id.* ¶ 15. It would have been wholly unnecessary for the *Roongseang* court to apply the entirety of the technical defect analysis, as that court was not tasked with conducting an analysis of the contents of the notice. Furthermore, *Roongseang*, while good law, is of no help or use to this

[3] This Court need not question Bartelstein's counsel's firsthand knowledge of and intimate familiarity with the court's opinion in *Roongseang*, as he was counsel of record for the defendant-appellant in that case, as well.

Court with regards to this case, nor does it buttress Bartelstein's position as to the prejudice requirement.

Based on evidence and a thorough re-analysis, the Court once again holds that the defect within Plaintiff's Notice must be deemed a technical defect that did not prejudice Bartelstein. Despite the defect, Defendant was still made aware of the entire substance of her rights. Hence, the Court hereby affirms its judgment, holding this defect to be one that is technical in nature that does not prejudice the borrower. Therefore, the Court does not change its ruling with regard to this defect in the presuit Notice from its September 27, 2023, Memorandum Opinion and Order, and, once again, finds that this defect does not raise sufficient grounds to permit dismissal of Plaintiff's Complaint.

aa. *What is Strict Compliance?*

It should be noted that the presuit Notice contained the requisite information as required by the Mortgage regarding Bartelstein's *right to assert defenses*; however, it did so through different language. In synthesizing Illinois case law, the concept of strict compliance is one that is not so straightforward. It appears that strict compliance, for the purposes of Paragraph 22, is exact copying of the language in the mortgage or inexact copying of such language that contains technical defects that do not prejudice the borrower. Permitting technical defects grants some leeway when it comes to strict compliance notice. On one end of the spectrum, there is, what this court will dub, the "error of omission," which both the *Accetturo* and *Cruz* courts analyzed. *Accetturo*, 2016 IL App (1st) 152783, ¶ 39; *Cruz*, 2019 IL App (1st)

182679, ¶ 38. Where a notice fails to provide its recipient with information required per the Mortgage, such an omission is a substantive defect for which the law shows no mercy.

On the other end of the spectrum, a notice that copies and pastes the language of the mortgage is one that undoubtedly comports with conditions precedent. Nevertheless, courts have shown forgiveness so long as all relevant information is included, although such variations are still considered technical defects. This is the standard so established by *Gold*, where the notice was composed of phrasing from the mortgage, but it did not reflect the mortgage *verbatim*; however, since the notice properly advised the recipient of their rights, they were able to participate in the proceedings, *and* they did not allege prejudice, the variation did not prejudice the mortgagor. *Gold*, 2019 IL App (2d) 180451, ¶ 11. In order for a notice that contains a technical defect to be deemed effective in the court's eyes, it must not prejudice its recipient in any way. *Cruz*, 2019 IL App (1st) 182679, ¶ 35. Additionally, *Gold* relied in part on Florida state precedent, *Bank of New York Mellon v. Johnson*, 185 So. 3d 594 (Fla. Dist. Ct. App. 2016), where the court held that mailing a notice that substantially complies with conditions precedent satisfies Florida's substantial compliance standard. This Court questions the utilization of out-of-state precedent following a *substantial* compliance standard and applying it to a factual situation in a state that follows *strict* compliance. Application of Florida law to an Illinois case seems strange and does not coincide

with what has so been established in this State. Doing so does not follow the logic, reasoning, or holdings of the Illinois Appellate Court in its other cases.

It appears as though requiring compliance that is "strict" does not appropriately express the expectations of reviewing courts in this State despite long-standing Illinois contract law. *Compare Cunningham v. Wrenn*, 23 Ill. 62 (1859); *Beifeld*, 173 Ill. 179; *Housewright v. La Harpe*, 51 Ill. 2d 357 (1972); *Midwest Builder Distributing, Inc.*, *383* Ill. App. 3d 645, 668 (1st Dist.), *with Gold*, 2019 IL App (2d) 180451. According to Black's Law Dictionary, strict means exact, accurate, and precise. *Strict*, Black's Law Dictionary 1275 (5th ed. 1979). Furthermore, utilization of the word "strict" implies rigidity and a lack of latitude. It is clear that this is not the case, and calling this concept *strict* compliance in the context of required mortgage foreclosure presuit notices by any means would be fallacious. Unlike the character in *Through the Looking-Glass*, who says, "when I use a word, it means just what I choose it to mean—neither more nor less," the word *strict* is susceptible but to a *single* interpretation, as in this Court's mind, strict, means strict, means strict. LEWIS CARROLL, THROUGH THE LOOKING GLASS 6 (1872).

Perhaps the First District should revisit this issue, as the word "strict's" traditional meaning has seemingly been modified. Take for example the Second District, which has twisted the traditional meaning of strict with its usage of *Luca* and *Pajor*—which are mailing cases—to create a standard that distorts and disregards common notions of fairness. But seeing as there is no other case law that this Court may rely upon, and all trial courts are bound by the higher courts'

decisions of this State, this Court's hands were, and still are, cuffed, leaving no choice but to rule in line with the directly on point holding in *Gold*. *See Yapejian*, 152 Ill. 2d at 542 (1992) ("A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State").

This Court has previously been presented with an additional intriguing argument in a different case pending before it that had nearly identical facts regarding the same defect present here. *See Freedom Mortgage Company v. Blanton*, No. 2015-CH-10526 (Cir. Ct. Cook County, June 27, 2024).[4] Counsel for the defendant in *Blanton* presented an argument that had yet to be looked at by any court in this State to date. He posited that language that does not match the Mortgage *verbatim* has the capacity to be misleading. This is namely in regards to the difference between the right to "bring a court action," as opposed to asserting defenses "in the foreclosure proceeding." *Gold* deemed this defect to be one that is merely technical and could not prejudice the borrower where the borrower participated in the foreclosure case. *Gold*, 2019 IL App (2d) 180451, ¶ 12. Counsel in *Blanton* argued that *bringing an action* commonly refers to bringing a lawsuit in the mind of an average non-attorney reader, not merely asserting defenses to the foreclosure. In oral arguments there, the plaintiff's counsel made mention that "court actions" could be *any* steps taken in court, including filing an appearance, an answer, counterclaims, affirmative defenses, a motion, or even potentially bringing a declaratory action in a separate action, thus over-informing the borrower of her rights; however, if this is the case, then this serves as a clear indicator of ambiguity

[4] The Memorandum Opinion and Order is attached hereto as Exhibit 1.

and a lack of clarity regarding what the defendant there—and Bartelstein here—had to do. This is problematic because 735 ILCS 5/15-1509(c) is compulsory, meaning that if Defendant does not raise defenses during the foreclosure proceedings, Section 15-1509(c) would forever estop her from doing so even if the defendant still had time to file an action requesting declaratory relief under the applicable statute of limitations for such actions. If this is the case, then such notice could hardly be effective and is vague and misleading.[5]

Another distinct issue lies within the second portion of *Gold*'s framework, namely, determining prejudice, or lack thereof. The court has previously held that active engagement through litigation is an indication of a lack of prejudice. *Gold*, 2019 IL App (2d) 180451, ¶ 13. In upholding this standard, this Court will simply never see a technical defect that *does not* prejudice the borrower. It seems as though any participation in the lawsuit is an indication of lack of prejudice and, therefore, dismissal would be futile, but this is hardly the truth. Borrowers are then faced with a double edged sword, as filing so much as an appearance may amount to a lack of prejudice, while inaction could lead to a multitude of other dilemmas, namely the consequences of Section 15-1509(c). It has become clear that continuing to appropriate this standard is problematic for a number of reasons, as it is capable of repetition yet continuously will evade review. This skewed standard tilts the

[5] The factual situation involving Section 15-1509(c) is not the factual situation before the Court today nor was it the factual situation before the Court in *Blanton*; therefore, while this Court foresees this argument arising under similar circumstances in a different case, it shall not entertain it here and merely points it out for its illustrative effect.

playing field in favor of lenders, forcing borrowers to choose the lesser of two evils whilst enduring financial hardship and potentially losing their property.

The mailing standard further complicates this issue. A mortgage that reflects the "mailbox rule" deems notice given when it is sent via first class mail. *Roongseang*, 2019 IL App (1st) 180948, ¶ 30 (citing *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 39) (where properly addressed letters sent via regular mail carry a presumption of delivery when they are deposited in the mail with postage prepaid)). This standard does not require proof of receipt by the borrower. Seeing as the lender is merely responsible for placing notice into a mailbox, but is not required to ensure that the borrower has received it, read it, and/or understands it, deliberating upon the contents of the notice seems frivolous. Continuing to require any sort of compliance for a written notice appears irrelevant where receipt of such notice is of no import, and, therefore, neither is its content; however, in this Court's mind, delivering proper notice with required information is important from a consumer protection standpoint. The Court does not advocate for this position, but sees how this argument only adds to the complexity of the issue at hand that is strict compliance and its enforcement.

Strict compliance with conditions precedent has traditionally been the law in Illinois for well over a century; however, despite this long standing precedent, its enforcement is hardly strict in the context of mortgage contracts. *See generally Beifeld*, 173 Ill. 179. That being said, if the Illinois Appellate Court wishes to consider allowances for technical defects with respect to Paragraph 22 compliance

when sending required presuit notices in mortgage foreclosure cases, this Court and presumably other trial courts would appreciate clarity, guidance, and potentially, a framework to analyze such technical defects. Additionally, the case law this Court and others must rely on is silent as to the perspective we must use in evaluating notices pursuant to Illinois law. It is unclear as to whether courts should assume the point of view of a reasonable person, a reasonable consumer, a licensed attorney, a sophisticated borrower, an unsophisticated borrower, or some other person. This, alongside the apparent flaws that come with being a mailing state, has further complicated the effectiveness and validity of the current system.

ii. The Right to Reinstate

Having completed its re-analyzation of the defect in the presuit Notice sent to Bartelstein pertaining to her *right to assert defenses*, the Court now turns to the second defect: her *right to reinstate* the Mortgage after acceleration.

This Court begins as it begins all things, by looking at the language contained in the Mortgage for its instruction, which provides that:

> ***The notice shall further inform borrower of the right to reinstate [the mortgage] after acceleration.*** (Pl.'s Am. Compl., Mortgage, ¶ 22 (emphasis added.))

The presuit Notice, on the other hand, states that:

> ***[Borrower] may, if required by law or [her] loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of [her] property if all amounts past due are paid within the time permitted by the law.*** (Def.'s Mot. Summ. J. Ex. 9 (emphasis added.))

There lies yet another blatantly obvious difference between these two clauses, which even the most unobservant reader might spot. The letter of default and acceleration solely informs Bartelstein of her *right to cure the default*; however, Paragraph 22 of the Mortgage is explicit in its language requiring the lender to inform Bartelstein of her *right to reinstate* the Mortgage after acceleration. The Court must, once again, determine if this omission is one that deprived Bartelstein of relevant information regarding her rights and obligations under the Mortgage. It did.

Beginning with the Mortgage's definitions regarding the *right to cure* versus the *right to reinstate*, Paragraphs 19 and 22 provide a crystalline answer. Paragraph 19 of the Mortgage explains that Bartelstein has a right to reinstate the Mortgage after acceleration of the loan, provided that she meets certain conditions first. It requires that Bartelstein may reinstate her Mortgage if she:

> (a) pays lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorney's fees, property inspection and valuation fees, and any other fees incurred for the purposes of protecting Lender's interest in the property and rights under this Security Instrument; and (d) takes such actions as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged unless as otherwise provided under Applicable Law. (Pl.'s Am. Compl., Mortgage, ¶ 19.)

Paragraph 22 of the Mortgage provides relevant information as to Bartelstein's *right to cure* a default, namely that the *right to cure* is the mortgagor's

right to pay the existing default amount owed *prior* to the mortgage being accelerated. (Pl.'s Am. Compl., Mortgage, ¶ 22.) Additionally, the Mortgage provides that a date, no less than thirty days from the date of notice, must be specified as the date by which the default must be cured. *Id.* If, at this point, Borrower fails to cure the default on or before the date specified by the notice, "[l]ender at its option [could have] require[d] immediate payment in full of all sums secured by this Security Instrument without further demand and [could] foreclose [upon the Mortgage] by judicial proceeding"—which is exactly what Bank of New York did. *Id.*

There is a clear indication that these two clauses were intended to define two distinct rights: *the right to cure* and *the right to reinstate.* The contractual language is unambiguous; therefore, this Court need not interject and challenge its plain meaning or substitute its own. *See Virginia Surety Co. v. Northern Insurance Co.*, 224 Ill. 2d 550, 556 (2007) ("The cardinal rule is to give effect to the parties' intent, which is to be discerned from the contract language. If the contract language is unambiguous, it should be given its plain and ordinary meaning") (internal citations omitted). The Parties agreed to the language in the Mortgage, and this Court cannot and will not amend the contract on its own accord to omit a term to suit Bank of New York. *Schweihs v. Davis, Friedman, Zavett, Kane & MacRae*, 344 Ill. App. 3d 493, 499 (1st Dist. 2003) ("In general, courts will enforce contracts as written, and they will not rewrite a contract to suit one of the parties"); *and People ex rel. Illinois State Scholarship Com. v. Harrison*, 67 Ill. App. 3d 359, 360 (1st Dist. 1978) ("[W]hen a contract is unambiguous, the duty of the court is to enforce the

terms which the parties included in the contract. (***) A court may not rewrite the contract the parties have made and in the absence of ambiguous language may not reform the agreement").

Bartelstein's *right to cure* pertains to her ability to pay the defaulted amount *prior* to acceleration of the loan, while her *right to reinstate* regards her ability to decelerate the loan *after* it has already been accelerated, provided that she meets the four separate aforementioned requirements.

Reinstatement of her Mortgage would provide Bartelstein with a "clean slate," allowing her to pay her monthly installments as if the acceleration never happened. It would be entirely inconceivable for her to reinstate a loan that has not yet been accelerated as, by its very definition, deceleration of the loan can *only* happen after the loan has been accelerated.

Bartelstein, in her briefs and during oral argument on her Motion for Summary Judgment, noted that had she followed the instructions of the Notice sent by Bank of New York, she would have only cured the default, which is insufficient to decelerate the loan, and the entire balance would have still remained due and owing. (*See* Reply in Support of Def.'s Mot. Summ. J., at 11.) Curing the default is the first step in reinstating the Mortgage; however, there are three other requirements that must still be met. The intent of the parties is unambiguous to the meaning of these clauses, and this Court will not construe them to mean otherwise.

It is well established that the Mortgage defines these two terms as separate and distinct. With that in mind, it is easy to spot the deficiency in Bank of New

York's Notice sent to Bartelstein. The Notice entirely fails to apprise Bartelstein of her *right to reinstate*, only informing her of her *right to cure* the default. Given that these rights are seemingly related, but *not* the same, this Court has identified a second defect in the Notice, and now must determine its nature and whether it deprived Bartelstein of her rights contractually owed to her under the Mortgage.

Accetturo and *Cruz* are most analogous to the case at hand. In *Accetturo*, the notice failed to provide the defendant with information as to how to cure the default, the date by which it must be cured, potential acceleration of the loan and possible foreclosure proceedings, and information as to asserting defenses pertaining to said acceleration and foreclosure. *Accetturo*, 2016 IL App (1st), ¶¶ 39-40. Similarly, the Notice sent to Bartelstein by Bank of New York omitted information pertaining to Bartelstein's right to reinstate the Mortgage after acceleration had occurred. *Id.* The *Accetturo* court found this omission to be substantive in nature, depriving the borrower of specific information, and this Court must hold the same to be true here.

Cruz is equally as helpful in this matter. There, the court found that regardless of whether the several letters sent to the defendant were analyzed separately or together, they were wholly deficient, failing to provide the overdue amount and an adequate grace-period for repayment, and instead stated that the entire outstanding principal was due. *Cruz*, 2019 IL App (1st) 182678, ¶ 39. Because of this, the court found such defects to be substantive, as they failed to give specific information to the borrower, and also failed to meet the contractual

obligations as specified by the mortgage. *Id.* In the present matter before this Court, Bartelstein was not apprised of her ability to reinstate the mortgage, much less the steps required to decelerate the loan, assuming that the loan would be accelerated. Although the omissions in *Cruz* are distinct from those herein, such precedent has provided this Court with the proper framework to determine that the information missing from the Notice sent to Bartelstein is substantive, or otherwise lacking specific information from Paragraph 22 that Bank of New York was under a contractual duty to provide to the Borrower.

Furthermore, *Cruz* is instructive in this matter as it involved not only an omission of specific information, but also a misstatement of the borrower's legal rights to which they were entitled under the mortgage. The *Cruz* court explained that had the defendant been properly informed of the default and how to rectify the situation, the defendant would have been *incentivized* to work with the bank to avoid acceleration. *Id.* ¶ 41. This Court views the same to be true here, as the presuit Notice sent by Bank of New York to Bartelstein also omitted specific information and misstated her rights. It logically follows that had Bartelstein been properly informed and notified of her rights and obligations, as well as the steps required to reinstate her Mortgage, she would have, at the very least, been given a fair opportunity in which she *could* have taken action before the filing or during the pendency of this cause.

Both *Cruz* and *Accetturo* are undeniably useful, as they are the most analogous despite their facts not being identical to the case at bar. One

distinguishing fact is that the *Cruz* and *Accetturo* courts dealt with multiple letters of default that had been delivered to the borrower, while Bartelstein has only received one—containing two defects. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 39-40; *Cruz*, 2019 IL App (1st) 182678, ¶ 39. Although these are distinguishable facts, they are not enough to complicate the Court's finding and are of no legal consequence. Regardless of the number of letters a lender sends, the lender is contractually obligated to abide by all conditions precedent set forth by the mortgage contract, including strictly complying with sending adequate notices to the borrower if required by its terms. This Court, and others, are tasked with conducting a qualitative review rather than a quantitative review of the letter(s), meaning that the analysis hinges solely on the Notice's contents and compliance with the Mortgage. By this standard, there is no so-called *minimum* number of defects necessary for any court to find a substantive *or* technical defect. With that in mind, had Bank of New York sent Bartelstein multiple letters, this Court, just as the *Accetturo* and *Cruz* courts did, would have analyzed each letter individually to determine if Bank of New York strictly complied with Paragraph 22 of the Mortgage. *Cruz*, 2019 IL App (1st) 182678, ¶ 39 ("Thus we find that AAM's letters, *whether viewed separately or together*, were insufficient to meet the contractual conditions precedent to default and acceleration") (emphasis added).

During oral argument, Bank of New York asserted that it did, in fact, comply with Paragraph 22 of the Mortgage. It contended that the Notice sent to Bartelstein "*substantially* complied with the law," and that had Bartelstein followed the

information provided by the Notice, she would have, ultimately, reinstated her loan by curing the default. (Proceeding Tr., 53-59, August 15, 2023.) It is worth noting, once again, that Illinois is a strict compliance state, unlike Florida. *See Accetturo*, 2016 IL App (1st) 152783, ¶ 32 ("When a contract contains an express condition precedent, strict compliance with such a condition is required"); *Cf. Green Tree Servicing LLC v. Milan*, 177 So. 3d 7, 13 (Dist. Ct. App. 2015). Plaintiff's assertion that this standard was satisfied as it *substantially complied* is a glaring example of faulty logic. Substantial compliance is not the same as strict compliance; therefore, this assertion immediately falls flat as it contradicts Illinois law.

This Court cannot even attempt to follow Bank of New York's logic, as it is wholly incorrect both legally and factually. Most any person who has familiarized themselves with Illinois contract law, or at the very least, is a practicing attorney in the field, would be aware that Illinois is a strict compliance state; therefore, any attempt to prove substantial compliance is simply not enough, not to mention the fact that substantial is not *strict* by any means. Admitting to *substantial* compliance before this *Illinois* Court and asserting it as an adequate effort to follow strict compliance, in and of itself, is a misstatement of the law. Not only does the Mortgage executed by *both* Bank of New York and Bartelstein explicitly state the four requirements to reinstate the Mortgage, but simply skimming Paragraph 22 would clear up any misconceptions that curing the default is sufficient to decelerate this loan. The explicitly clear language of the fourteen page Mortgage is as clear as the fact that this misinterpretation of Illinois law is grossly erroneous.

After having conducted its thorough re-analysis and taking all information into consideration, this Court denies Plaintiff's Motion to Reconsider, as it finds no error in its previous application of the law. Bank of New York has undoubtedly failed to strictly comply with the conditions precedent so established by the Mortgage, and failed to meet its own contractual obligations when it sent Bartelstein inadequate notice that did not inform her of her rights and responsibilities. This "error of omission" is a mistake that this Court cannot overlook, as it is a substantive defect that deprived the Borrower of necessary information. This Court cannot, in good faith or fairness, rule in favor of Bank of New York. Bank of New York drafted the Mortgage and constructed its contents; therefore, there is little to no excuse as to why it could not follow, literally, its own instructions. The Court's ruling is further reinforced by the notion that contract language should be construed most strongly against its maker—here, Bank of New York. *Scheduling Corporation of America v. Massello*, 119 Ill. App. 3d 355, 361 (1st Dist. 1983).

Therefore, as to the *right to reinstate* the Mortgage, Bank of New York's notice was, and still is, not strictly compliant with the express conditions precedent contained within the Mortgage, and there exist no reasonable grounds for this Court to reverse its September 27, 2023, Order. Consequently, dismissal of Bank of New York's Complaint was warranted then, and most certainly is now, despite these harsh results. *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 668. For these

reasons, Bank of New York's Motion to Reconsider is DENIED as to this defect and Plaintiff's Complaint remains dismissed.

Accordingly, Bank of New York's Motion to Reconsider this Court's September 27, 2023, Memorandum Opinion and Order is DENIED as it relates to Bartelstein's *Accetturo* Defense.

2. *Time Barred Defense*

In addition to her *Accetturo* Defense, which Bartelstein raised in her December 2019 Motion for Summary Judgment, she also raised her Time Barred Defense. This second Affirmative Defense alleges that the time to bring an action on the promissory Note has expired; and, therefore, the Mortgage has been extinguished. The Mortgage was accelerated on October 17, 2007, and Bank of New York only filed a *single-count* action to foreclose on the Mortgage; however, at no point over the course of litigation did it file an action under the Note. Defendant contends that because Bank of New York never filed an action on the Note, its statute of limitations was never tolled, continued to run, and, by operation of law, expired on October 17, 2017. Conclusively, because the Note (the debt) has expired, the Mortgage must be extinguished, and Bank of New York's Amended Complaint to Foreclose Mortgage must be dismissed. This Court now affirms its previous ruling.

This new defense is one of first impression for this Court and, from what this Court can glean, the rest of the State of Illinois, too. After having carefully reviewed

both parties' arguments, it has been determined that this defense has yet to be raised in this State with this fact set, and, as a result, this Court has little guidance or precedent to rely upon in ruling on this matter. While this Court agrees that this issue may be a novel one, relying on case law that is from nearly two centuries ago, it is worth noting that a foreclosure case spanning almost two decades is just as much an anomaly in and of itself.

Plaintiff has requested this Court to revisit and reconsider its ruling, as it alleges misapplication of the law regarding Bartelstein's Time Barred Defense. Bank of New York, in its Motion to Reconsider this Court's September 27, 2023, Order, argues that the statute of limitations on the Note did not run because it had previously sought relief under *both* the Note and the Mortgage. Bank of New York, relies on 735 ILCS 5/15-1508(e) which involves deficiency judgments. Section 15-1508(e), states that:

> [i]n any order confirming a sale pursuant to a judgment of foreclosure, the court shall enter a personal judgment for deficiency against any party (***) a judgment may be entered for any balance of money that may be found due to the plaintiff (***) and enforcement may be had for the collection of such balance, the same as when the judgment is solely for the payment of money. 735 ILCS 5/15-1508(e).

Bank of New York's Complaint and Amended Complaint both sought a personal deficiency against Defendant; however, this Court, in its September 27, 2023, Order, found this attempt to be insufficient to invoke the Note as it does not hold the same weight as commencing a *separate* action on the Note. Plaintiff first argues that the statute of limitations has not run out, and that its request for

personal deficiency has created a claim on the Note sufficient to toll the statute of limitations.

Bank of New York avers that this Court's ruling has contradicted the Supreme Court's holding in *First Midwest Bank v. Cobo,* where the Court held "a lawsuit for breach of a promissory note asserts the same cause of action as a prior foreclosure complaint when that foreclosure complaint specifically requested a deficiency judgment based on the same default of the same note." *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 3. This is compounded by the Supreme Court stating "[f]or practical purposes, the request for a personal deficiency judgment asserted a second claim, this one under the note." *Id.* Bank of New York argues that its request for personal deficiency, by this standard, should be sufficient to toll the statute of limitations on the Note, and, as such, the Mortgage should not be extinguished.

This Court, following *Turczak v. First American Bank & Lebow*, 2013 IL App (1st) 121964, has asserted that in order to toll the statute of limitations on the Note, Bank of New York should have filed an action or count on the Note. Bank of New York has challenged this application of *Turczak*, where the plaintiff had originally sought a default judgment on the note, alleging that it is distinguishable from the case at bar. *Turczak* did not address whether seeking a personal deficiency judgment equates to seeking concurrent relief under both a mortgage and a note, although it does recognize that a secured lender may pursue a claim under a

mortgage or a note either consecutively or concurrently. *Turczak*, 2013 IL App (1st) 121964, ¶ 31.

Plaintiff attempts to use *Cobo* advantageously, as it held "First Midwest's predecessor sought relief under the mortgage and note concurrently" by filing an action to foreclosure on the Mortgage and by seeking personal judgment on the Note. *Cobo*, 2018 IL 123038, ¶ 32. Based on this, Bank of New York avers that because it commenced the instant action within ten years of the initial default and because it sought personal deficiency against Bartelstein in both the initial and Amended Complaint, the statute of limitations on the Note did not run. Bank of New York also attempts to buttress this argument using *Weiland v. Weiland*, 297 Ill. App. 293 (1st Dist. 1938). The citation to this case and the parenthetical included in Bank of New York's Motion and Reply show that the quoted material is taken from a WestLaw headnote, which is *not* binding law. (Pl.'s Mot. to Reconsider, at 5); (Pl.'s Reply to Pl.'s Mot. to Reconsider, at 5, 27 Sept. 2023); *Weiland*, 297 Ill. App. 293, West headnote 7. Headnotes may be cited, but there was no indication that the quoted material was a headnote, and it should have been cited as such. *See generally M & W Gear Co. v. AW Dynamometer, Inc.*, 97 Ill. App. 3d 904, 911 (4th Dist. 1981). In any event, Bank of New York's veiled attempt to use *Weiland* is wrong, unavailing, and inapplicable as the action on the note in *that* case was filed *within* the applicable statute of limitations. *Weiland*, 297 Ill. App. at 245-46.

Defendant, in addressing Plaintiff's Motion to Reconsider, argues that Bank of New York has misunderstood the law with regards to seeking a personal deficiency judgment. Bartelstein argues that seeking personal deficiency is not quite the same as seeking judgment on the Note, which is an *in personam* action. Additionally, it is well-established that seeking judgment for personal deficiency is not sufficient to toll the statute of limitations on an accelerated promissory note under 735 ILCS 5/13-206.

Bartelstein reinforces her position, citing *Conerty v. Richsteig*, noting that a lender cannot seek personal judgment against the borrower if the note is no longer enforceable. Bartelstein also points out that "if for any reason the holder of the mortgage *cannot enforce his mortgage* as against the property, the court has no power to enter a judgment in that suit on the personal liability for the payment of the debt." *Conerty*, 379 Ill. 360 at 367 (emphasis added). By this reasoning, and this Court's previous holding that the Note has been rendered unenforceable, it cannot enter a deficiency judgment where the mortgage has become extinguished. *Id.*

Plaintiff has previously asserted that its deficiency request was sufficient to invoke the Note and toll its limitations period; however, Bartelstein argues that this logic is flawed. A deficiency request is part of a *quasi in rem* action, which is not the same as seeking an *in personam* judgment on the Note, and seeking personal liability cannot transform a *quasi in rem* action into an *in personam* action. (Mem. Op. and Ord. 40, Sept. 27, 2023.)

With respect to the application of *Cobo* to the case at bar, Defendant argues that it is inapplicable as it specifically pertains to the single refiling rule in the context of a mortgage foreclosure suit. Bank of New York's so-called "cherry-picked excerpts from the *Cobo* opinion" have allegedly been drawn out of context and distorted to apply to the case at hand. (Def.'s Reply, at 6.) Defendant highlights that *Cobo* strictly pertains to multiple filings and nonsuits within a foreclosure proceeding. Defendant also draws attention to an additional point in *Cobo*'s Footnote 2 which references an old Illinois rule that, "[p]rohibits a lender from suing under the mortgage when a statute of limitations or other procedural rule bar[s] a suit under the note." *Cobo*, 2018 IL 123038, n.2.

a. The Note is Unenforceable

The primary source of contention under reconsideration as it relates to Bartelstein's Time Barred Defense is whether the statute of limitations has expired on the Note. According to 735 ILCS 5/13-206,

> [A]ctions (***) shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay. (***) [A] cause of action on a promissory note payable at a definite date accrues on the due date or date stated in the promissory note or the date upon which the promissory note is accelerated. (***) An action to enforce a demand promissory note is barred if neither the principal nor interest on the demand promissory note has been paid for a continuous period of 10 years and no demand for payment has been made to the maker during that period. 735 ILCS 5/13-206.

Based on this statute, this Court must look to the point at which the loan was accelerated to determine when the statute of limitations' clock began to tick on the Note.

First, Bartelstein's Mortgage requires the lender, Bank of New York, to provide notice of default and acceleration and provide, "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (***) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the Mortgage]" (Pl.'s Am. Compl., Mortgage, ¶ 22.) According to the Notice, dated September 17, 2007, Bartelstein had until October 17, 2007, to cure the default and avoid acceleration. Because she did not cure this default, the Note was accelerated, and pursuant to 735 ILCS 5/13-206, the clock began to tick on October 17, 2007, for an action on the Mortgage and for an action on the Note to be filed. While it is undisputed that Bank of New York has tolled the statute of limitations on the Mortgage when it filed its original Complaint to Foreclose upon the Mortgage, it failed to ever file an action on the Note, meaning the time to do so expired on October 17, 2017. Because the statute of limitations has expired, this Court deems the Note to be unenforceable, prohibiting Bank of New York from bringing any action on the Note today, or at any point in the future.

Bank of New York has presented the argument that by seeking a personal deficiency judgment, a *quasi in rem* action, they have successfully invoked the Note, and thus, tolled its statute of limitations. Plaintiff has supplemented its argument

with *First Midwest Bank v. Cobo*, misappropriating the *Cobo* court's language as it pertains to the refiling rule. This Court cannot agree.

According to Black's Law Dictionary, a *quasi in rem* action is "brought against the defendant personally, with jurisdiction based on an interest in property, the objective being to deal with the particular property or subject the property to discharge of the claims asserted." *Quasi in Rem*, Black's Law Dictionary, 30 (7th ed. 1999). A foreclosure action, pursuant to Illinois Mortgage Foreclosure Law, is undoubtedly understood to be a *quasi in rem* action. *ABN AMRO Mortgage Group, Inc. v. McGahan,* 237 Ill. 2d 526, 528 (2010). Seeking action on a promissory note, on the other hand, is an *in personam* proceeding, which "imposes a personal liability or obligation on one person in favor of another." *Turczak*, 2013 IL App (1st) 121964, ¶ 33 (citing *Hanson v. Denckla,* 357 U.S. 235, 238 (1958)). A *quasi in rem* proceeding, although it seemingly has a personal aspect, is not the same as an *in personam* proceeding. In fact, they are so distinct that courts have historically allowed the mortgagee to seek "in personam judgment against the mortgagor for breach of contract of a promissory note [even] after the property was foreclosed upon." *Bank of America, N.A. v. Higgason*, 2022 Ill. Cir. LEXIS 1399, *1.

It is worth noting that a mortgage and note are *two separate contracts. Abdul-Karim,* 101 Ill. 2d 400, 407 (citing *Conerty*, 379 Ill. 360, 366). Moreover, "[t]he mortgage is applicable to the right to apply the security to the discharge of the debt and the note to the liability of the maker for the payment of that indebtedness." *Conerty*, 379 Ill. at 366-67. Because a note and mortgage are two *separate* contracts,

"a mortgagee is allowed to choose whether they proceed on a note (***) or to foreclose upon the mortgage (***) consecutively or concurrently." *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2d Dist. 2004); *Turczak*, 2013 IL App (1st) 121964, ¶ 31; *see also* 735 ILCS 5/15-1511 ("foreclosure of a mortgage does not affect a mortgagee's rights, if any, to obtain a personal judgment against any person for a deficiency"). Conclusively, an action on the mortgage and an action of the note are separate rights of action that request separate relief: one, the foreclosure of a title encumbrance, and the other, a money judgment. Thus, they require separate actions to enforce those remedies and, likewise, to independently toll their respective statutes of limitations.

There are a number of ways the statute of limitations on a note may be tolled. For instance, Illinois courts have recognized that an express or implied promise to pay, which constitutes an admission of the unpaid debt, is sufficient to toll the statute of limitations. *Walker v. Freeman*, 209 Ill. 17, 22 (1904). Next, partial payment of the debt or payment of interest is sufficient to arrest the running of the statute of limitations, which then allows an action to be commenced within ten years from the last payment of interest rather than the initial cause of action. *Meyer v. Nordmeyer*, 332 Ill. App. 165, 171 (2d Dist. 1947). Courts have also held that "if the person against whom the cause of action accrues is out of the state when the cause of action accrues," then the statute of limitations will only begin to run once that person has returned to the state. *Thornton v. Nome & Sinook Co.*, 260 Ill. App. 76, 77 (1st Dist. 1931). Lastly, and most obviously, seeking any action on the

promissory note within the ten-year statute of limitations, whether it be after the initial default or after the last dated payment of interest, will likewise stop the clock. 735 ILCS 5/13-206.

Moreover, where a plaintiff is successful and the court enters Judgment of Foreclosure and Sale pursuant to 735 ILCS 5/15-1506, the borrower's promise to pay under the note is merged into the judgment. In essence, obtaining judgment within the ten-year statute of limitations avoids the very heart of the issue before this Court—the expiration of the statute of limitations on *only* the Note.

There is contention between the parties as to whether or not *Cobo* is applicable to the case at bar. The short answer is no. *Cobo* specifically involves the single-refiling rule; however, there is a more important idea to take away from *Cobo* that is entirely independent of this procedural rule. *Cobo*, 2018 IL 123038, ¶ 13 (holding that the transactional test will be used *for the purposes of the single refiling rule* to determine if two or more suits arise out of the same cause of action). *Cobo* specifically deals with multiple lawsuits arising out of the same operative facts; however, it states that "[a] plaintiff seeking to foreclose on a mortgage puts the note at issue and makes those facts 'operative' only if the plaintiff also seeks to adjudicate the parties' rights under the note." *Id.* at ¶ 39. Most relevant to the case before this Court is Footnote 2 of *Cobo*. That footnote refers to an old Illinois rule "prohibiting a lender from suing under the mortgage when a statute of limitations or other procedural rule barred a suit under the note." *Cobo*, 2018 IL 123038, n.2 (quoting *United Central Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015)).

In both *Cobo* and *KMWC*, the notes were barred by the single refiling rule—a procedural rule. Likewise, here, the Note is barred under a procedural rule—the expiration of statute of limitations on the Note. Despite the fact that there are different reasons as to why the actions had been barred in *Cobo*, *KMWC*, and in the case *sub judice*, it is worth noting that the same legal consequence resulted.

Case law is clear as to how Bank of New York could have tolled the statute of limitations on the Note, and seeking personal deficiency is not sufficient to accomplish this task; however, it is the cause of its own demise by failing to take action within the statute of limitations. No case law exists to overrule this first-year law school principle. While it has successfully tolled the statute on the Mortgage, this is of no import, as the Mortgage, essentially, cannot exist without an enforceable Note. This Court holds, as it did previously, that Bank of New York's inaction has led to the expiration of the Note's statute of limitations despite the additional law and arguments brought in the instant Motion in an attempt to alter this Court's previous ruling. Accordingly, the Note remains deemed to be unenforceable and no action may be sought against it now or at any point in the future.

b. The Mortgage is Extinguished

Traditionally in Illinois, a mortgage must be rendered extinguished where the note has become barred by the statute of limitations. *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 560 (1940) ("[W]here the debt paid or barred by the Statute of Limitations, a mortgage being by incident to the debt, is no longer a lien on the

property"); *Dunas v. Metropolitan Trust Co.*, 41 Ill. App. 2d 167, 170 (1st Dist. 1963). This fundamental ideology is part of the very foundation of Illinois Mortgage Foreclosure Law, and has repeatedly been imposed by courts around the state. The law is clear: the note is the principal, the mortgage its incident, and a lender may not seek to foreclose on a property where the note is barred by the statute of limitations. *KMWC 845, LLC*, 800 F.3d at 311; *Hibernian Banking Association v. Commercial National Bank*, 157 Ill. 524, 537 (1895).

This Court would like to, once again, call attention to the fact that this is a case of first impression, and there exists no Illinois case law that is directly on point as to the unusual and unique fact pattern here; however, there are cases that date back to the mid-nineteenth century that must be used to guide this Court through its re-analysis of the facts before it.

Beginning with *Pollock v. Maison*, the Illinois Supreme Court held that, "it is manifestly more reasonable to hold that where the debt, the principal thing, is gone, the incident, the mortgage is gone also, and that a foreclosure *in any mode* cannot then be had (***). If a bar on the incident should bar the principal, then much more should a bar of the debt, be a bar to its incident." *Pollock v. Maison* 41 Ill. 516, 521 (1866) (emphasis added). Our Supreme Court, over a decade later, when tasked with determining the enforceability of a mortgage where the note had been barred by the statute of limitations, once again held that "the existence of the debt, for securing of which a mortgage is given, is essential to the life of the mortgage, and that when the debt is paid, discharged, released, or barred by the statute of

limitations (***) the mortgage is gone, and has effect no longer." *Emory v. Keighan*, 88 Ill. 482, 485 (1878).

In *Hibernian Banking Association v. Commercial National Bank*, our High Court held similar to be true, reinforcing the general notion that because a mortgage is a "mere incident of the debt," it must also be barred when the debt is barred. *Hibernian Banking Association*, 157 Ill. at 537; *see also Dunas*, 41 Ill. App. 2d at 170 ("The running of a statute of limitations [on a note] bars the remedy for enforcing a debt"). And finally, thirty-five years after *Maison*, and utilizing it as precedent, the Supreme Court held that where the debt has been barred "by the statute of limitations the mortgagee's title encumbrance must be extinguished by operation of law." *Ware v. Schintz*, 190 Ill. 189, 193 (1901).

Pursuant to Illinois law, where an underlying debt, such as a note, is "paid, discharged, released, or barred by the Statute of Limitations the mortgage is gone" and is rendered ineffective. *Richey v. Sinclair*, 167 Ill. 184, 193 (1897) (citing *Maison*, 41 Ill. 516). Most relevant to the Court today is the statute of limitations as it relates to bringing an action on the Note, which this Court has ruled that because Bank of New York failed to file an action on the Note within the applicable statute of limitations, the statute of limitations forever bars such an action.

As previously mentioned, Illinois case law is clear that where the note, the principal, is procedurally barred, its incident, the mortgage, must be rendered extinguished and may no longer encumber the property. *Dunas*, 41 Ill. App. 2d at 170. Although this case law, and all others cited in this subsection of this Opinion,

seem to be antiquated, they have *never* been overturned and thus are still binding precedent handed-down by this State's highest court that this Court and all other inferior courts are obliged to follow. *Certain Underwriters at Lloyd's, London v. Reproductive Genetics Institute*, 2018 IL App (1st) 170923, ¶ 19, (quoting *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (3d Dist. 2006)) ("this court is bound to follow the supreme court's precedent, and 'when our supreme court has declared law on any point, only [the supreme court] can modify or overrule its previous decisions, and all lower courts are bound to follow supreme court precedent until such precedent is changed by the supreme court'").

Although Plaintiff has not challenged this Court's previous holding as it relates to the extinguishment of the Mortgage, this Court, nevertheless, affirms its holding. As it has already been established, the Note is unenforceable; therefore, by operation of law and pursuant to mandatory Illinois precedent, the Mortgage has been extinguished. Conclusively, Bank of New York's Motion to Reconsider is DENIED on these grounds as the Court did not err in its application of the law and Bank of New York's Complaint remains DISMISSED WITH PREJUDICE.

c. Equitable Considerations

This Court, like others of its kind, must enforce the law as it exists. *See Yapejian*, 152 Ill. 2d ("A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State"); *See Reproductive Genetics Institute*, 2018 IL App (1st) 170923, ¶ 19 ("[A]ll lower courts are bound to follow supreme court precedent until such precedent is changed by the

supreme court"). The law as it exists in Illinois states that no action may be brought on the mortgage if its principal, the note, has been rendered unenforceable. *Hibernian*, 157 Ill. 524 at 537; *Markus*, 373 Ill. 557 at 560; *Conerty*, 379 Ill. 360 at 367; *KMWC 845, LLC*, 800 F.d. at 307. By this standard, and based upon the facts that have been presented before this Court, because the statute of limitations on the Note expired, Bank of New York may not enforce its Mortgage as it has become extinguished as a matter of law.

Although the case law is clear, this Court questions the equities behind this binding standard. Here, Bank of New York has raised the argument that the outcome of this case could be very damaging in the sense that it would permit borrowers to extinguish a mortgage by obtaining a discharge in bankruptcy if they are able to successfully delay the initial foreclosure lawsuit. (Pl.'s Resp. to Def. Mot. Summ. J., p. 10.) This is simply not the case, as Congress, through enactment of a statute, patched any holes in state law that would otherwise leave banks vulnerable in these types of situations. Under 11 U.S.C. § 524(a)(1), only the personal liability of the debtor would be discharged. In fact, 11 U.S.C. § 522(c)(2) "provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *see generally Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991). The installation of this exception to the bankruptcy discharge by Congress implies that without this safeguard, Illinois' and other states' laws, as they currently exist, would otherwise *require* that a bankruptcy discharge extinguish foreclosure actions. This would, of course, be

absolutely absurd by placing an undue burden on lenders, which makes the addition of such a provision appear self-evident. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," which permits statutes like 11 U.S.C. § 524(a) to reign supreme and fill in holes in the law that leave parties, and their interests, too vulnerable (at least in the context of bankruptcy). *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). Unfortunately, and possibly problematically, no such rule exists pertaining to the statute of limitations as it relates to the present litigation before this Court under Illinois law. As such, this Court must fall back upon the law outlined in this Opinion.

States are seemingly split on how to handle this issue, and the inconsistency around the nation regarding this problem is a symptom of such lack of guidance. Dale Joseph Gilsinger's Law Review article, *Survival Creditor's Rights Created by Mortgage or Deed of Trust as Affected by Running of Limitation's Period for Action on Underlying Note* (2008), seeks to shed light on this issue, providing vast information regarding all fifty states' treatment of these cases. Gilsinger's research clearly maps the dichotomy that exists between states with regards to whether or not a lender may seek judgment of foreclosure on the property after the statute of limitations on the note has expired. Dale Joseph Gilsinger, *Survival of Creditor's Rights Created by Mortgage or Deed of Trust as Affected by Running of Limitation Period for Action on Underlying Note*, 36 A.L.R. 6th 387 (2008).

Take for example Nebraska, where courts have historically held that "[t]he right to foreclose [a] mortgage exists after the note it was given to secure is barred

by the statute of limitations." *Doty v. West Gate Bank, Inc.*, 292 Neb. 787, 801 (2016) (citing *Omaha Savings Bank v. Simeral*, 61 Neb. 741, 743 (1901)). A similar standard exists in both Massachusetts and Hawaii, and it has long been established there that a lender may still seek to foreclose on a mortgage even after the note has been rendered unenforceable by expiration of its statute of limitations so long as the debt has remained unpaid. *Thayer v. Mann*, 36 Mass. 535, 19 Pick. 535, 537 (1837); *Kipahulu Sugar Co. v. Nakila*, 20 Haw. 620, 621-22 (1911).

Nebraska, Massachusetts, and Hawaii are among the twenty-five states which hold that, "as a matter of common law, the rule that the bar by statute of limitations of an action to collect a promissory note secured by a mortgage does not operate to automatically extinguish the mortgagee's lien holder rights." Gilsinger, *supra*, at *5. These states include: Alabama, Connecticut, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming. *Id.* Illinois is on the other side of the coin, holding that, "as a matter of common law, the statute of limitations of an action to collect a promissory note secured by a mortgage operates to automatically extinguish the mortgagee's lienholder rights." *Id.* at *7. Fourteen other states hold the same to be true, including: Alaska, Arkansas, California, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Texas, and Washington. *Id.* Although Ohio has ruled on the issue, there is an "unresolved conflict" as to whether or not relief may be sought under the mortgage after the

statute of limitations on the note has expired. *Id.* at *5. Several other states have not "picked a side," so to speak, namely: Arizona, Colorado, Delaware, Indiana, Missouri, New Hampshire, New Mexico, South Dakota, Utah, and West Virginia.

Gilsinger's extensive work tactfully demonstrates the schism between states, with twenty-five of them on one side of the line, and fifteen on the other. While this Court cannot be so sure as to which side is the "right side," what can be assured is that this lack of uniformity in what appears to be a coin flip, is indicative of a larger systematic issue in the realm of mortgage foreclosure law where states lack guidance.

There is one reason as to why this Court cannot go so far as to say that our Highest Court got it all wrong—due process. The Constitution of the United States and the Fourteenth Amendment explicitly state that state governments shall not "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV §1. Section 2 of the Illinois Constitution contains this exact language, too. Ill. Const. 1970, art. I, § 2. Specifically, "procedural due process claims concern the constitutionality of the specific procedures employed to deny a person's life, liberty, or property." *Segers v. Industrial Commission*, 191 Ill. 2d 421, 434 (2000). "Procedural due process is meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Id.* This is especially relevant to the issue here, as the present law requires sufficient notice, proper advisement to borrowers of their rights under their respective contracts, and necessary disclosure of their involvement in legal

proceedings so the defendant might be able to be heard—all of which may be accomplished via filing a separate action on the Note. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. (***) An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (***) But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (***) [The notice must be] reasonably certain to inform those affected or (***) not substantially less likely to bring home notice") (internal citations omitted).

California has a unique approach, one that may be the cure to the problem before this Court by avoiding it altogether. The California Code of Civil Procedure requires, at the outset of the suit, the lender to seek an action on both the mortgage *and* the note. Cal. Civ. Proc. Code § 726(a). In doing so, this would prevent the statute of limitations of both the mortgage *and* the note from running, which would eliminate this problem altogether, erasing the divisive line between states.

This proposes an issue that may be worthy of review and statutory revision. Bankruptcy law takes into consideration the negative implications that may arise for banks as they run into situations where borrowers do not pay their debts; however, the same level of sympathy is not extended to lenders, like Bank of New York, pertaining to statutes of limitations. Aside from the enactment of a law similar to that of California, another way to combat this issue (and something that Courts in Illinois already do as a result of the Supremacy Clause) is through the installation of new legislation similar to 11 U.S.C. § 522 to protect lenders' interest and investments. Such a statute would permit a lender to seek foreclosure on the mortgage after the expiration of the statute of limitations on the note so that they might be able to become whole, or nearly whole, again through judicial sale of the property and an *in rem* judgment only. An undue burden is placed on lenders not only to police borrowers as it relates to their debts, but also to stay on top of the ball with regards to lengthy litigation that may stretch over a decade, or such as the present case at bar, nearly two. Lastly, unless and until the Supreme Court decides to reverse its prior rulings or a new statute is enacted by the state Legislature, this Court and all other inferior courts of this State are pigeonholed by this standard.

Accordingly, and after a thorough analysis of the law and this Court's prior application of existing law and precedent, Bank of New York's Motion to Reconsider this Court's September 27, 2023, Memorandum Opinion and Order is DENIED as it relates to Bartelstein's Time Barred Defense.

V. CONCLUSION

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness." CHARLES DICKENS, A TALE OF TWO CITIES 1 (1859). Just as this Court is bound to apply the law of the State of Illinois, Bank of New York is bound to accept the consequences of the law. Bank of New York is the master of its complaint and is the sole actor in charge of making litigation decisions in the present action. Nothing stopped it, for example, from simply requesting leave from this Court to add an additional count seeking relief under the Note prior to October 17, 2017, as it saw the limitations period creeping ever closer to lapsing. Just as a ship's captain bears responsibility for hitting an iceberg that was once a great distance away and hidden beneath the wave-laden surface of the sea, here too Bank of New York bears the responsibility for failing to act on the Note prior to the statute of limitations period lapsing. Only one person—the captain—may change the course of a ship; and only one party—the Plaintiff—may change the contents of a complaint. Failure to do so is of no concern to this Court. A ship's captain cannot excuse hitting an iceberg looming below the surface when his or her ship sinks. Likewise, a Plaintiff cannot claim *naïveté* of the law obscured by over a century of precedent when its complaint is dismissed. While it may be true that this Affirmative Defense presents a case of first impression in that it applies admittedly abstruse law dating back to the late nineteenth century to a modern foreclosure action, this Court cannot justify disregarding what the law demands based upon a party's ignorance thereto and is bound to enforce it, no matter how archaic. Bank of

New York's Complaint has hit a legal iceberg, and like the RMS *Titanic*, its seafaring days have come to an end. Accordingly, the Court is left with no option but to allow this ship to succumb to the sea and in so doing, dismisses Bank of New York's Amended Complaint to Foreclose Mortgage with prejudice.

With this in mind, and without having *ever* sent Bartelstein proper notice of acceleration and default, Bank of New York never had grounds to file this action in the first place, ultimately resulting in seventeen years of unnecessary litigation between both parties and this Court. Bank of New York's Motion to Reconsider falls short, as this Court can neither snap its fingers or waive its wand to change the law nor ignore mandatory precedent; therefore, its Motion is hereby DENIED.

Equity also reigns supreme here as it is wholly unreasonable and manifestly unjust to continue litigation at this stage. In the interest of justice, this Court, despite the long slough of litigation here, once and for all, adjourns this case and declares Defendant victor. In so doing, the Court would like to offer finality to the parties and accordingly finds that this is a final and appealable order.

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THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) Bank of New York's Motion to Reconsider this Court's September 27, 2023, Memorandum Opinion and Order pursuant to 735 ILCS 5/2-1203(a) is hereby DENIED;

(a) The Court's September 27, 2023 Memorandum Opinion and Order stands and is reaffirmed as set forth herein;
(b) Nothing in this Memorandum Opinion and Order shall be construed as altering the Court's September 27, 2023, Memorandum Opinion and Order; and
(c) All additional citations and analyses contained herein beyond those provided in the Court's September 27, 2023, Memorandum Opinion and Order are to be incorporated therein;

(2) The stay of Paragraphs 5 and 6 of this Court's September 27, 2023, Memorandum Opinion and Order granted in this Court's November 16, 2023, Order is hereby LIFTED as Plaintiff's Motion to Reconsider has been resolved;

(3) The October 26, 2006, $512,800.00 promissory Note that Debbie Bartelstein executed and delivered to Guaranteed Rate, Inc. hereby remains to be deemed unenforceable;

(4) By operation of law, because the underlying debt has been deemed unenforceable, any and all mortgage liens or title encumbrances Bank of New York has or might have encumbering the property subject of this litigation in connection to the October 26, 2006, $512,800.00 promissory Note hereby remain extinguished;

(5) Within 30 days after the date of this Order or within 30 days after the expiration of the stay ordered in (8) *infra*, Bank of New York, at its own expense, is hereby ordered to do the following:

(a) Record with the Cook County Clerk's Office a release of mortgage for the Mortgage subject of this litigation on the Property subject of this litigation pursuant to the Court's holding herein;
(b) File in the Court's Record with the Clerk of the Circuit Court of Cook County a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office;
(c) Send to all parties of record a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office; and

(d) Send to the Court's email address listed below a courtesy copy of the recorded release of mortgage recorded with the Cook County Clerk's Office and filed and stamped by the Clerk of the Circuit Court of Cook County;

(6) Bank of New York's Complaint remains hereby DISMISSED WITH PREJUDICE;

(7) This is a FINAL and APPEALABLE Order;

(8) If a notice of appeal is timely filed, enforcement of the declaratory relief in (4) *supra* and the injunctive relief in (5) and its subsections (a)-(d) *supra* are all hereby STAYED pending resolution of the appeal of this cause; and

(9) Following the grant of liability for attorney's fees and costs in the Court's September 27, 2023, Memorandum Opinion and Order which is collateral to the judgment entered, Bartelstein's Verified Amended Petition for Attorney's Fees and Costs pursuant 735 ILCS 5/15-1510, previously timely filed on May 23, 2024, and entered and continued generally in the Court's August 12, 2024, Order, is hereby set for hearing on **October 22, 2024**, at 2:30 PM via Zoom at the below listed Zoom information. *Moenning v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶¶ 28-29 (holding that where a petition for fees and costs was collateral to original judgment as it did not directly challenge or bear on that judgment and did not modify the judgment, the trial court was not divested of jurisdiction to hear the petition even if a notice of appeal was filed prior to the trial court hearing the petition); *GMC v. Pappas*, 242 Ill. 2d 163, 173-74 (2011) ("The circuit court, however, retains jurisdiction after the notice of appeal is filed to determine matters collateral or incidental to the judgment"); *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 157 Ill. 2d 282, 289-90 (1993) ("[N]otice of appeal from final judgment (***) did not divest [the] trial court of jurisdiction to hear [the] petition for fees and costs" quoting *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1072-73 (2d Dist. 1987)).

Zoom Information: Meeting ID: 810 2556 7672 Passcode: 021601 Call-In: (312) 626-6799

IT IS SO ORDERED.

Date: September 25, 2024

ENTERED:

ENTERED
Judge William R. Sullivan-2142
SEP 25 2024
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

ORDER PREPARED BY THE COURT
ccc.mfmlcalendar60@cookcountyil.gov
(312) 603-3894

Honorable William B. Sullivan
Cook County Circuit Judge

EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

FREEDOM MORTGAGE COMPANY, *Plaintiff,* *v.* MELCINA BLANTON; UNKNOWN HEIRS AND LEGATEES OF MELCINA BLANTON, IF ANY; UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, *Defendant.*	Case Number: 2015 CH 10526 Calendar 60 Honorable William B. Sullivan, Judge Presiding Property Address: 7727 South Bennett Chicago, Illinois 60649

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Defendant MELCINA BLANTON'S ("Blanton") Motion for Summary Judgment and Plaintiff FREEDOM MORTGAGE COMPANY'S ("Freedom") Motion for Summary Judgment. For the following reasons, Defendant's Motion is hereby DENIED, and Plaintiff's Motion is hereby DENIED with prejudice.

I. BACKGROUND

On June 25, 2009, Defendant executed a promissory note ("Note") in the amount of $104,500.00 secured by a mortgage ("Mortgage") on the property located at 7727 South Bennett in Chicago, Illinois 60649.

The Note allegedly went into default for a missed payment due February 1, 2014. Pursuant to Paragraph 22 of the Mortgage, Freedom's predecessor, RoundPoint, was required to deliver proper notice to Blanton to inform her of her various rights that exist under the Mortgage. RoundPoint, in a letter dated March 20, 2014, sent Blanton a presuit notice of default and intent to accelerate. The letter explicitly declares that if the default was not cured on or before April 19, 2014, RoundPoint may take steps to terminate Blanton's ownership of the property.

Nearly one year later, RoundPoint sent another notice of default and intent to accelerate on March 16, 2015. In this new notice, it designated June 2014 as the official date of default with an amount due of $13,633.44 needed to cure the default.

Soon thereafter, RoundPoint filed its initial Complaint to foreclose on the property on July 8, 2015, and served Blanton on July 9, 2015. Blanton was named as defendant and was alleged to have not made payments on the Mortgage from June 2014 through the date of the filing of the complaint, and that an accelerated principal balance of $97,225.00 was due and owing. Plaintiff attached as exhibits to this Complaint a copy of both the Mortgage and Note.

On January 20, 2014, Plaintiff mailed Defendant a check for $3,964.49,[1] intending to refund her all amounts the bank held in a suspense account related to partial payments Defendant allegedly paid that Plaintiff did not apply towards the

[1] The funds in the Suspense Account are alleged to be partial payments made by the Defendant during relevant periods prior to the institution of this matter; however, the record is unclear as to how and in what amounts the partial payments were made.

outstanding balance of the loan. Defendant claimed she never received this check and it was never deposited. As a result, on August 16, 2016, Plaintiff eventually credited the balance towards her loan.

Plaintiff later filed its First Amended Complaint on April 21, 2022. Shortly thereafter, on August 3, 2022, Blanton filed her Answer and six Affirmative Defenses to the Amended Complaint. The Affirmative Defenses are titled, respectively, as follows: Failure of a Condition Precedent, Failure to Apply Funds Held in Suspense Account Before Foreclosure, Failure to Credit Account for Tax/Insurance Payments Made by Borrower, Lack of Standing, Failure of a Condition Precedent, Failure to Apply Suspense Balance, and Material Breach of Contract. Plaintiff replied to Defendant's Answer on October 20, 2022.

In November 2022, RoundPoint filed a Motion to Substitute Party Plaintiff, to name Freedom Mortgage Corporation as Plaintiff. The Court granted this motion on November 16, 2022.

Following this, on May 26, 2023, Freedom filed its Motion for Summary Judgment, arguing that it had presented a *prima facie* case for Foreclosure. Defendant filed her response on April 25, 2024, to which Plaintiff replied on May 16, 2024.

Defendant filed her own Motion for Summary Judgment based upon her First and Fifth Affirmative Defenses on August 30, 2023. Plaintiff responded to the Motion on April 25, 2024, and Defendant replied on May 16, 2024. The Court then

held a joint in person hearing on both parties' Motions for Summary Judgment on June 12, 2024.

The Court having reviewed the pleadings, having read all Motions, Responses, and Replies, and having heard oral arguments from the parties, entered an Order on June 12, 2024, taking the instant Motions under advisement for the issuance of a written opinion. The Court's ruling follows.

II. LEGAL STANDARD

Blanton now moves this Court for summary judgment pursuant to 735 ILCS 5/2-1005(b). Additionally, Freedom moves for summary judgment pursuant to 735 ILCS 5/2-1005(a). Litigants may move for summary judgment where, "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c).

At summary judgment, "the court does not try issues of fact, but must ascertain if any exist." *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 15 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993)). Summary judgment is a drastic measure that should only be granted when the moving party's right to judgment is, "clear and free from doubt." *Outboard MarineCorp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992). Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Id.* If disputes as to material facts exist or if reasonable

minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Il. App. 3d 1010 (1st Dist. 2005).

Penultimately, it should be noted that when parties, as was the case here, file cross-motions for summary judgment, "they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet*, 2012 IL 112064, ¶ 28. Despite this, however, the court is not obligated to render summary judgment, nor does it imply that there is not an issue of material fact. *Id.*

III. ANALYSIS

Before the Court is a question of whether Blanton or Freedom Mortgage Corporation is entitled to judgment as to their respective Motions for Summary Judgment. The Court will analyze both motions in turn.

A. Defendant's Motion for Summary Judgment

Defendant argues that her defenses affirmatively defeat Freedom's Complaint, demanding judgment in her favor. For the reasons outlined herein, the Court disagrees.

In her Motion for Summary Judgment and Reply, Defendant alleges that she was not served with proper notice prior to the institution of this case; and, therefore, Plaintiff never had the right to file this foreclosure action in the first instance. Defendant buttresses this position arguing that Plaintiff did not use the specific language as it appears within the Mortgage; and, therefore, failed to

properly advise Defendant of her rights as outlined in the Mortgage, thus violating the conditions precedent to bringing this action. Plaintiff contends that this is a grave misinterpretation of Paragraph 22 of the Mortgage and that copying and pasting the exact language from the Mortgage is not required to relay the same message, and it is merely a "technical defect." Defendant denounces this argument, stating that "almost perfect" is not perfect enough in the eyes of the law, and that where parties have expressly negotiated the terms of the contract and agreed upon them, they shall be subject to those terms, especially where those terms require strict compliance.

Defendant raises multiple points, including issues with the Notice, misplaced funds, failure to credit an account, and material breach of contract. The primary source of contention is whether Defendant's Motion for Summary Judgment should be granted based upon Plaintiff's failure to serve a particular type of notice as required by the "Acceleration Clause" of the Mortgage and per Illinois law. Defendant asserts that Plaintiff failed to properly apply funds within the suspense account and did not properly notify her of the amount due. The funds in question would have, allegedly, changed Defendant's account status regarding her loan.

Additionally, Defendant argues that notice was improper due to some inconsistencies. The Notice of Default dated March 16, 2015, states that the date of default is June 2014; however, the Amended Complaint alleges that the date of default is February 2015. Defendant believes that this Notice of Default demands

over-performance by her and also was not compliant with the requirements of the loan documents and Illinois law. Defendant, once again, contends that Plaintiff may not recover on this action for its failure to comply with conditions precedent.

In Plaintiff's Response to Defendant's Motion, it argues that the Notice of Acceleration and Default comports with Paragraph 22 of the Mortgage and satisfies the conditions precedent. Plaintiff agrees that the Notice does not match the words of the Mortgage *verbatim*; however, it confidently states that its message is clearly the same and contains all of the necessary information required by the Mortgage.

1. *Applicable Law*

Blanton alleges that Freedom's presuit Notice of Acceleration and Notice of Default failed to comply with Paragraph 22 of the Mortgage. She argues that the defective Notices do not comport with Illinois' standards of strict compliance with express conditions precedent. The fact that the language used in the Notices does not match the Mortgage is undisputed by both parties. The Court acknowledges both notices as defective, as they fail to use the express language featured in Paragraph 22.

Both defective Notices may be scrutinized under the same framework. Provisions regarding notice are considered to be conditions precedent, with which a lender must comply in order for them to have grounds to file an action they hope to recover upon. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 26 (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. __, __, (2016); *People v.*

Pomykala, 203 Ill. 2d 205-206 (2003)). A "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Id.* In Illinois, the law has required strict compliance with conditions precedent in a contract, such as a preacceleration notice requirement for over a century. *See generally International Cement Co. v. Beifeld*, 173 Ill. 179 (1898). Although it may produce harsh results, courts have historically enforced express conditions precedent, punishing non-compliant parties. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc., 383* Ill. App. 3d 645, 668 (1st Dist. 2007) (citing *Dodson v. Nink*, 72 Ill. App. 3d 59, 64 (1979) ("It is well established that where a contract contains a condition precedent, the contract does not become enforceable or effective until the condition is performed or the contingency occurs")).

With regard to presuit notice requirements in foreclosure cases, the *Accetturo* court recognized that while a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a foreclosure action, a failure to provide specific information in strict compliance with the terms of the mortgage is more than a technical defect, constituting a failure to comply with a condition precedent. *Accetturo*, 2016 IL App (1st) 152788, ¶ 42. Before the *Accetturo* court were three defects with the notice of acceleration and default: the bank's notice (1) failed to provide the defendant the requisite 30 days to cure the default; (2) did not advise the defendant that failure to cure the default might result in acceleration and foreclosure; and (3) the final letter of a series of letters described the note as already

having been accelerated. *Id.* ¶¶ 39-42. The court held that the bank's failure, prior to acceleration, to provide the defendant with a notice containing the specific information mandated by the mortgage divested the lender of its right to file the foreclosure action. *Id.* ¶ 50.

In *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, the Second District expanded upon these grounds, namely "clarifying" what characterizes a technical defect. That court does not deny that a presuit notice of acceleration is a condition precedent set by the mortgage; however, in the event that the notice suffers from mere a technical defect, this "will not automatically warrant a dismissal of a foreclosure action." *Id.* ¶ 11 (citing *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15). The court, then, doubled down, stating that if the mortgagor does not allege that they have suffered prejudice as a result of the defect, then dismissal to permit new notice would be "futile." *Id.* (citing *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27).

In *Gold*, 2019 IL App (2d) 180451, ¶ 12, the defendant argued that the statement in the notice of default was "misleading" because the right to assert a defense within a pending lawsuit, as provided by the mortgage, is different from the right to file a new action to assert those defenses, as was instructed within the notice of default. The court determined that because prejudice was neither alleged nor argued, and because the defendant fully availed himself of the ability to assert

defenses in the foreclosure proceeding, the notice defect was rendered a technicality and reversal of the trial court's order was not warranted. *Id.* ¶¶ 12-14.

Shortly thereafter, the Illinois Appellate Court, once again, expanded upon this legal standard, clarifying that a mere "technical defect" does not necessarily warrant dismissal of an action; however, a defect that lacks in substance *does* demand dismissal of the action. *Associates Asset Management, LLC v. Cruz*, 2019 IL App (1st) 182679, ¶ 35. The court in *Cruz* relied on two cases, the first being *Aurora Loan Services, LLC v. Pajor*, which was also used by the *Accettero* court. In *Pajor*, the plaintiff sent proper notice in accordance with conditions precedent, but did so prior to it being the formal assignee of the mortgage; however, the court held that since the plaintiff there and the plaintiff in *Cruz* met all of the "substantive requirements," dismissal of the action was not necessary. *Pajor*, 2012 IL App (2d) 110899, ¶ 27. The second case cited by the *Cruz* court was *Bank of America, N.A. v. Luca*, where plaintiff sent proper presuit notice, but only addressed it to one of the defendant mortgagors. *Luca*, 2012 IL App (2d) 110899, ¶ 9. Once again, the court found this technical defect insufficient to dismiss the entire action. The court justified this decision based upon the fact that both defendants had knowledge of the presuit notice and they did not allege that any other deficiencies existed. *Id.* ¶ 17.

The *Cruz* court then turned to *Accetturo*, in looking to determine what constitutes a substantive defect. Like *Accetturo*, the court in *Cruz* determined that

the defect was substantive in nature because the bank had omitted a large portion of necessary and relevant information required under the mortgage contract, indicating a failure to satisfy the contractual conditions precedent to default and acceleration. *Cruz*, 2019 IL App (1st) 182678, ¶¶ 39-40. The bank's failure to provide sufficient notice divested the bank of its right to file the action in the first instance. *Id.*[2]

2. *Discussion*

In the present case before the Court, Paragraph 22 of the Mortgage requires that in the event the borrower commits a breach of any term of the Mortgage, prior to acceleration of the loan, the lender shall notify the borrower of:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. (Pl's Am. Compl., Mortgage, ¶ 22).

The acceleration clause requires Plaintiff to provide notice to Blanton prior to acceleration, as denoted by the specific language of the clause. Particularly, the use of the word "shall," as opposed to "may," in the clause, which is recognized by the Illinois Supreme Court to hold a mandatory connotation unless otherwise stated,

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[2] For further clarification as to the standards applicable under Illinois Law, please see a prior Opinion issued by this Court in *Bank of New York v. Bartelstein*, No. 2007-CH-38051, 12-16 (Cir. Ct. Cook County, September 27, 2023) attached hereto as Exhibit A.

requires Plaintiff to provide presuit notice in a specialized way. *Accetturo*, 2016 IL App (1st) 152783, ¶ 35 (citing *Pomykala*, 203 Ill. 2d at 205-06).

Similar to *Accettero*, this Court finds that Paragraph 22 of this Mortgage is (i) a notice provision with an acceleration clause, (ii) containing specific notice information that the lender has a mandatory duty to provide to the borrower, (iii) imposing a mandatory duty on the lender to provide notice to the borrower prior to acceleration, and (iv) is a condition precedent which must be strictly complied with for a lender to have a right to file a foreclosure action. *Accetturo*, 2016 IL App (1st) 152783, ¶ 49.

Ergo, the Court must determine if the Notice Freedom sent to Blanton is legally sufficient. If the Court discovers any defects within the presuit notice of acceleration and default provided to Blanton, it must then decide whether such defects substantively fail to inform and advise Blanton of specific information within Paragraph 22 of the Mortgage. If the Court deems there is a defect, but it is merely technical in nature, then the Court must next determine if this defect prejudiced Blanton.

Starting with comparing the language set forth in the Mortgage against the language within the Notice, Paragraph 22 of the Mortgage provides that, prior to acceleration of the loan, the lender:

> ***[S]hall*** *(***) inform Borrower of the right (***) to* ***assert in the foreclosure proceeding*** *the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.* (Pl's Am. Compl., Ex. A Mortgage, ¶ 22) (emphasis added).

Contrary to this, the language in the Notice informs Blanton that:

> ***You have the right to (***) <u>bring a court action</u> to assert the non-existence of a default or any other defense to acceleration or foreclosure sale.*** (Pl's Mot. Summ. J. Ex. C) (emphasis added).

An eagle-eyed reader would immediately notice that the two clauses are not identical. The Mortgage explicitly notes that the assertion of the non-existence of a default or any other defenses can be raised in the *foreclosure proceeding*; however, the Notice states that only a *court action* may be brought. Defendant suggests the Notice suffers from a substantive defect in that she was not advised of her right to assert defenses in the present foreclosure proceeding and was merely, and somewhat vaguely, informed that she has the right to bring a court action.

Precedent set in *Gold* controls the present matter. In *Gold*, the defendant argued that the statement in the notice of default was misleading because the right to assert a defense within a pending lawsuit is different from the right to file a new action to assert those defenses. *Gold*, 2019 IL App (2d) 180451, ¶ 12. Similarly, Blanton asserts that there is a substantive difference between bringing a court action and asserting defenses in the present foreclosure proceeding. Logically, it would have been impossible for Blanton to raise defenses to this foreclosure action in a separate court action because she may only raise defenses in an existing lawsuit—this case. Based on precedent, the Court, following the *Gold* analysis, holds the defect in the present case to be one that is technical, as well.

Next, continuing to follow the *Gold* analysis, the Court must determine if the technical defect prejudiced Blanton in any sort of way, affecting her ability to

engage in the present lawsuit. Based upon *Gold*, the Court holds that Blanton has not been prejudiced. The Court turns to her active engagement in the litigation for years, with the benefit of representation by counsel. Additionally, the Court notes that Blanton had brought six affirmative defenses. Her vigorous engagement in litigation must be construed to indicate a lack of prejudice. *See Cruz*, 2019 IL App (1st) 182678, ¶ 13-14 (holding that when prejudice is neither alleged nor argued and the defendant fully availed themselves of the ability to assert defenses in the lawsuit, the notice defect is rendered a technicality and dismissal is not warranted).[3]

Based on evidence and a thorough analysis, the defect within Plaintiff's Notice must be deemed a technical defect that did not prejudice Blanton. Despite the defect, Defendant was still made aware of the entire substance of her rights. Hence, the Court hereby denies Defendant's Motion for Summary Judgment.

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[3] The factual scenario presently before the court is identical to the facts of *U.S. Bank N.A. v. Casaquite*, 2020 IL App (1st) 191586-U. While this case is non-precedential and in no way influences or controls the legal determination the Court is making in this Opinion, it nonetheless serves to elucidate the First District's positive treatment of the core holding in Gold. In Casaquite, the court held as follows:

> In U.S. Bank N.A. ,U Gold, 2019 IL App (2d) 180451, this court was confronted with the same "defect" Ms. Casaquite alleges here. In that case, the defendant argued that the notice of acceleration he received from the plaintiff was "misleading" because it informed him that he could raise defenses to foreclosure in a 'new action' as opposed to in the foreclosure proceedings. Id. ¶ 12. We held that where the defendant did not allege that he was prejudiced by this language, it was a technical defect that did not preclude enforcement of the mortgage contract. Id. The same is true here: Ms. Casaquite has never argued that she was prejudiced by the notice. Indeed, just as the defendant in Gold, Ms. Casaquite likewise was aware that she could bring defenses to foreclosure in the foreclosure proceedings, given that she did, in fact, raise defenses in her answer to the foreclosure complaint. For this reason, we conclude that to the extent there was a defect in the notice, it was merely technical, and absent a showing of prejudice, it provides no basis to afford Ms. Casaquite the relief she seeks. Casaquite, 2020 IL App (1st) 191586-U, ¶ 24.

3. *What is "strict" compliance?*

It should be noted that the Notice contained the requisite information as required by the Mortgage; however, it did so through different language. In synthesizing Illinois case law, the concept of strict compliance is one that is not so straightforward. It appears that strict compliance, for the purposes of Paragraph 22, is exact copying of the notice or inexact copying of the language that contains technical defects that do not prejudice the borrower. Permitting technical defects grants some leeway when it comes to strict compliance notice. On one end of the spectrum, there is the "error of omission," which both the *Accetturo* and *Cruz* courts deliberated upon. *Accetturo*, 2016 IL App (1st) 152783, ¶ 39; *Cruz*, 2019 IL App (1st) 182679, ¶ 38. Where a notice fails to provide its recipient with information required per the Mortgage, such an omission is a substantive defect for which the law shows no mercy.

On the other end of the spectrum, a notice that copies and pastes the language of the mortgage is one that undoubtedly comports with conditions precedent. Nevertheless, courts have shown forgiveness so long as all relevant information is included, although such variations are still considered technical defects. This is the standard so established by *Gold*, where the notice was composed of phrasing from the mortgage, but it did not reflect the mortgage *verbatim*; however, since the notice properly advised the recipient of their rights, they were able to participate in the proceedings, and they did not allege prejudice, the variation did not prejudice the mortgagor. *Gold*, 2019 IL App (2d) 180451, ¶ 11. In

order for a notice that contains a technical defect to be deemed effective in the court's eyes, it must not prejudice its recipient in any way. *Cruz*, 2019 IL App (1st) 182679, ¶ 35.

It appears as though requiring compliance that is "strict" does not appropriately express the expectations of reviewing courts in this State despite long-standing Illinois contract law. *Compare Cunningham v. Wrenn*, 23 Ill. 62 (1859); *International Cement Co. v. Beifeld*, 173 Ill. 179 (1898); *Housewright v. La Harpe*, 51 Ill. 2d 357 (1972); *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, *383* Ill. App. 3d 645, 668 (1st Dist. 2007), *with Gold*, 2019 IL App (2d) 180451. According to Black's Law Dictionary, strict means exact, accurate, and precise. Black's Law Dictionary 1275 (5th ed. 1979). Furthermore, utilization of the word "strict" implies rigidity and a lack of latitude. It is clear that this is not the case, and calling this concept *strict* compliance in the context of required mortgage foreclosure presuit notices by any means would be fallacious. Perhaps the Appellate Court could visit this issue, as in this Court's mind, strict, means strict, means strict. Clearly, the Second District has modified the traditional meaning of strict with its usage of *Luca* and *Pajor*, which are clearly mailing cases and are picked to create a standard that distorts and disregards common notions of fairness. But seeing as there is no other case law that this Court may rely upon, and all trial courts are bound by the higher courts' decisions of this State, this court had no choice but to rule in line with *Gold*. *See State Farm Fire & Casualty Co. v. Yapejian*,

152 Ill. 2d 553, 542 (1992) ("A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State").

This Court has been presented with an additional intriguing argument that has yet to be looked at by any court in this State to date. Blanton's counsel contends that the language that does not match the Mortgage *verbatim* has the capacity to be misleading. This is namely in regards to the difference between the right to "bring a court action," as opposed to asserting defenses "in the foreclosure proceeding." *Gold* deemed this defect to be one that is merely technical and could not prejudice the borrower where the borrower participated in the foreclosure case. *Gold*, 2019 IL App (2d) 180451, ¶ 12. Defendant argues that *bringing an action* commonly refers to bringing a lawsuit in the mind of an average non-attorney reader, not merely asserting defenses to the foreclosure. In oral arguments, Plaintiff made mention that "court actions" could be *any* steps taken in court, including filing an appearance, an answer, counterclaims, affirmative defenses, a motion, or even potentially bringing a declaratory action in a separate action thus over-informing the borrower of her rights; however, if this is the case, then this serves as a clear indicator of ambiguity and a lack of clarity regarding what Defendant must do. This is problematic because 735 ILCS 5/15-1509(c) is compulsory, meaning that if Defendant does not raise defenses during the foreclosure proceedings, 735 ILCS 5/15-1509(c) would forever estop her from doing so even if the defendant still had time to file an action requesting declaratory relief under the applicable statute of

limitations for such actions. If this is the case, then such notice could hardly be effective and is vague and misleading.[4]

Another distinct issue lies within the second portion of *Gold*'s framework, namely, determining prejudice, or lack thereof. The court has previously held that active engagement through litigation is an indication of a lack of prejudice. *Gold*, 2019 IL App (2d) 180451, ¶ 13. In upholding this standard, the court will simply never see a technical defect that *does not* prejudice the borrower. It seems as though any participation in the lawsuit is an indication of lack of prejudice and, therefore, dismissal would be futile, but this is hardly the truth. Borrowers are then faced with a double edged sword, as filing so much as an appearance may amount to a lack of prejudice, while inaction could lead to a multitude of other dilemmas, namely the consequences of 735 ILCS 5/15-1509(c). It has become clear that continuing to appropriate this standard is problematic for a number of reasons, as it is capable of repetition yet continuously will evade review. This skewed standard tilts the playing field in favor of lenders, forcing borrowers to choose the lesser of two evils whilst enduring financial hardship and potentially losing their property.

The mailing standard further complicates this issue. A mortgage that reflects the "mailbox rule" deems notice given when it is sent via first class mail. *Deutsche Bank National Trust Company v. Roongseang*, 2019 IL App (1st) 180948, ¶ 30 (citing *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 39) (where properly addressed letters sent via regular mail carry a presumption of delivery when they

[4] This is not the factual situation that has been presented before the Court in this case; therefore, while this Court foresees this argument arising under similar circumstances in a different case, it shall not entertain it here.

are deposited in the mail with postage prepaid)). This standard does not require proof of receipt by the borrower. Seeing as the lender is merely responsible for placing notice into a mailbox, but is not required to ensure that the borrower has received it, read it, and/or understands it, deliberating upon the contents of the notice seems frivolous. Continuing to require any sort of compliance for a written notice appears irrelevant where receipt of such notice is of no importance, and, therefore, neither is its content; however, in this Court's mind, delivering proper notice with required information is important from a consumer protection standpoint. The Court does not advocate for this position, but sees how this argument only adds to the complexity of the issue at hand that is strict compliance and its enforcement.

Strict compliance with conditions precedent has traditionally been the law in Illinois for well over a century; however, despite this long standing precedent, its enforcement is hardly strict in the context of mortgage contracts. *See generally International Cement Co. v. Beifeld*, 173 Ill. 179 (1898). That being said, if the Illinois Appellate Court wishes to consider allowances for technical defects with respect to Paragraph 22 compliance when sending required presuit notices in mortgage foreclosure cases, this Court and presumably other trial courts would appreciate clarity, guidance, and potentially, a framework to analyze such technical defects. Additionally, the case law this Court, and others, must rely on is silent as to the perspective we must use in evaluating notices pursuant to Illinois law. It is unclear as to whether courts should use the lens of a reasonable person, a

reasonable consumer, a licensed attorney, a sophisticated borrower, an unsophisticated borrower, or some other person. This, alongside the apparent flaws that come with being a mailing state, has further complicated the effectiveness and validity of the current system.

B. Plaintiff's Motion for Summary Judgment

Plaintiff filed its Motion for Summary Judgment, supported by its Reply, in which it argues that it has presented a *prima facie* case for foreclosure. Plaintiff asserts that all notices of acceleration and default were proper and also addresses Defendant's Six Affirmative Defenses.

Plaintiff contends that a *prima facie* case for foreclosure only requires presentation of two pieces of information: the Mortgage and the Note. Plaintiff need not prove non-payment by the borrower. After having produced both documents, the burden shifts to the non-movant to prove their affirmative defenses. Defendant's alleged failure to make payments constitutes a material breach of contract, and therefore, with the loan in default and proof of default by affidavits, Plaintiff may foreclose on the property. Additionally, Plaintiff asserts that it has served proper notice to Defendant, and that all amounts and information contained in the Notice are accurate, true, and comport with Paragraph 22.

Plaintiff then addresses Defendant's First and Fifth Affirmative Defenses, arguing that there are no genuine issues of material fact with respect to these Defenses. As for the First Affirmative Defense, Plaintiff contends that the Suspense

Balance had already been refunded to Defendant; and, therefore, the March 16, 2015, Notice of Default provided the correct course of action. With regards to the Fifth Affirmative Defense, Plaintiff states that at the time of the March 2015 Notice, the loan had been delinquent since June 1, 2014, so it did not demand more money than necessary to cure the default. Plaintiff addresses Defendant's multiple other Affirmative Defenses, arguing that they are invalid and that there are no genuine issues of material fact.

In Defendant's response, she contends that none of this is relevant without proper notice of acceleration. Conclusively, without proper notice, Plaintiff may not recover on this action.

1. *Applicable Law*

Pursuant to 735 ILCS 5/15-1504(a)(3)(N), several individuals may bring an action for foreclosure, namely, the mortgagee, an agent, the legal holder of the indebtedness, or a successor of the mortgagee. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (1st Dist. 2010). In order to establish a *prima facie* case for foreclosure, the plaintiff must produce that: (1) they are the holder of the mortgage and note, (2) those documents were properly executed, and (3) a default occurred. *Rago v. Cosmopolitan National Bank*, 89 Ill. App. 2d 12, 19 (1st Dist. 1967). Moreover, so long as the complaint comports with 735 ILCS 15/1505(a), attachments of both the note and mortgage are included, *and* conditions

precedent have been met, then they have successfully established a *prima facie* case for foreclosure.

If the plaintiff is able to establish their *prima facie* case, the burden then shifts to the defendant to prove any affirmative defenses. *HSBC Bank USA v. Adams*, 2019 IL App (1st) 190208, ¶ 20; see *Parkway Bank & Trust, Co. v. Korzen*, 2013 IL App (1st) 112455, ¶ 77. "An affirmative defense is one in which the defendant gives color to his opponent's claim but asserts new matter which defeats an apparent right in the plaintiff." *U.S. Bank National Association v. Gagua*, 2020 IL App (1st) 190454, ¶ 34.

2. *Application*

In this case, Defendant has produced necessary documents, namely, the Mortgage and Note in question. There is indication that the documents in question were executed properly. Additionally, they have provided multiple affidavits regarding monetary values and alleged amounts due and owing.

Plaintiff must also prove that a default has occurred. Paragraph 6(b) of the Note defines a default as the failure "to pay the full amount of each monthly payment on the date it is due." Plaintiff has pled under 735 ILCS 5/15-1504(a) that a default has occurred; however, there are genuine issues of material fact as to when, if, and how it occurred.

According to Paragraph 22 of the Mortgage, in order to be strictly compliant, the Notice must specify:

> (a) The default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. (Pl's Am. Compl., Mortgage, ¶ 22).

However, in the Notice sent to Defendant on March 16, 2015, the date of default was specified as being June 1, 2014, while in the First Amended Complaint as well as in Erica D. Tracy's affidavit, the date of default is specified as February 1, 2015.

This discrepancy indicates that the very first requirement of Paragraph 22 of the Mortgage cannot be met. Defendant cannot be properly made aware of the default if she cannot be made certain of when it occurred, if it occurred, or how it occurred.

While Plaintiff has brought forth some materials for a *prima facie* case for foreclosure before this Court, there is a genuine issue of material fact as to whether the Notice comported with conditions precedent required by Paragraph 22 of the Mortgage. Based upon this information, the Court cannot at this time grant Plaintiff's Motion for Summary Judgment as the Court's mind is not clear and free from doubt that no genuine issue regarding the date of default exists, a material fact.

Although this is Plaintiff's first attempt at Summary Judgment, this case has been ongoing for nearly a decade, and it would be entirely inequitable and unreasonable to continue to entertain this matter further. Moreover, this Court has

an obligation to handle cases efficiently and promptly; however, this case has been ongoing for far too long.[6] In Re: Time Standards for Case Closure in Illinois Trial Courts, M.R. 31228. It has been adequately proven that there indeed exist genuine issues of material fact as to liability, and, therefore, it need not be deliberated again. In an effort to preserve not only finite court resources and to be economical, the Court hereby denies Plaintiff's Motion for Summary Judgment with prejudice to prevent itself and the parties from continuing to exhaust their own money, time, and efforts.

IV. CONCLUSION

For all the reasons mentioned herein, Blanton's Motion for Summary Judgment is DENIED and Freedom's Motion for Summary Judgement is hereby DENIED WITH PREJUDICE.

THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) Melcina Blanton's Motion for Summary Judgment is hereby DENIED;

(2) The Court hereby FINDS a genuine issue of material fact as to liability and damages on Plaintiff's foreclosure claim;

(3) Freedom Mortgage Company's Motion for Summary Judgment is hereby DENIED WITH PREJUDICE;

---

[6] The Court recognizes that M.R. 31228 does not apply to this case since the Order only affects cases filed on or after January 1, 2022, and this case was initially filed in 2007. In Re: Time Standards for Case Closure in Illinois Trial Courts, M.R. 31228. The Court simply points out for its illustrative effect that this is exactly the type and length of case that the Illinois Supreme Court and the Court Data & Performance Measures Task Force attempted to prevent so that courts may meet, "their fundamental obligation to resolve disputes fully, fairly, and promptly" Id. (emphasis added).

(4) As this Court has ruled on the parties' Motions, paragraphs (3) and (4) of this Court's Order dated June 12, 2024 requiring the parties to coordinate to provide the Court physical and electronic copies of the June 12, 2024 hearing are hereby VACATED;

(5) Discovery is hereby CLOSED;

(6) This case shall hereby be SET for trial;

(7) This case is hereby SET for status on setting trial on July 11, 2024, at 2:30 PM via Zoom at the below listed Zoom Information;

(8) Both parties SHALL hereby attend the status date ordered in (7) *supra* with a reasonable estimation as to how many witnesses will need to testify at trial, who those witnesses will be, an approximation as to how long the trial will take, *etc.* so that the Court may properly schedule this case for trial; and

(9) If the parties wish to conduct a pretrial settlement conference, they shall jointly contact the Court's law clerk, Michael Kicinski, at Michael.Kicinski@cookcountyil.gov or (312) 603-3894.

Zoom Information:
Meeting ID: 810 2556 7672
Passcode: 021601
Call-In: (312) 626-6799

IT IS SO ORDERED.

Date: June 27, 2024

ENTERED
Judge William B. Sullivan-2142
JUN 27 2024
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

ENTERED:

Honorable William B. Sullivan
Cook County Circuit Judge

ORDER PREPARED BY THE COURT
ccc.mfmlcalendar60@cookcountyil.gov
(312) 603-3894

EXHIBIT A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

The Bank of New York, as trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-J8, Mortgage Pass-Through Certificate, Series 2006-J8, *Plaintiff,* v. Debbie Bartelstein a/k/a Deborah Bartelstein; Unknown Owners and Non-Record Claimants, *Defendants.*	Case Number: 2007 CH 38051 Calendar 60 Honorable William B. Sullivan, Judge Presiding Property Address: 321 Woodlawn Avenue Glencoe, Illinois 60022

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Defendant DEBBIE BARTELSTEIN'S ("Bartelstein") Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005 with respect to two affirmative defenses Bartelstein raises within her Motion for Summary Judgment. For the following reasons, Bartelstein's Motion for Summary Judgment is hereby GRANTED as to both affirmative defenses, and Plaintiff BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-J8, MORTGAGE PASS-THROUGH

CERTIFICATE, SERIES 2006-J8'S ("Bank of New York") Amended Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE.

I. INTRODUCTION

In order to prevent mortgage foreclosure cases from languishing for years as has been the practice in trial courts throughout the State, in 2022, the Illinois Supreme Court instructed foreclosure trial courts that in ninety-eight percent of cases, the final order should be entered within thirty-six months from the filing of the suit. *See In Re: Time Standards for Case Closure in Illinois Trial Courts, M.R. 31228.*[1] For those remaining two percent of cases, the complex course of litigation often warrants careful and in-depth judicial review. This is one such case.

This case presents an astonishing factual and procedural history. Litigation has spanned nearly 16 years; and, of the approximate sixteen-hundred cases on this Court's docket, this case is the oldest by roughly two years. Accordingly, a detailed and thorough review of the factual and procedural history is warranted prior to the Court engaging in a discussion of how these facts and procedure fit into the pending Motion for Summary Judgment on two of Defendant's affirmative defenses currently before it.

II. BACKGROUND

On October 26, 2006, Bartelstein purchased the property located at 321 Woodlawn Avenue in Glencoe, Illinois, 60022 ("the Property"). This is the Property

[1]The Court recognizes that *M.R. 31228* does not apply to this case since the Order only affects cases filed on or after January 1, 2022, and this case was initially filed in 2007. *In Re: Time Standards for Case Closure in Illinois Trial Courts, M.R. 31228.* The Court simply points out for its illustrative effect that this is exactly the type and length of case that the Illinois Supreme Court and the Court Data & Performance Measures Task Force attempted to prevent so that courts may meet, "their fundamental obligation to resolve disputes fully, fairly, and promptly." *Id.* (emphasis added).

that is the subject of this litigation. On the same day, Bartelstein secured a Note (the "Note") in the amount of $512,800.00 payable to Guaranteed Rate, Inc., secured by pledging a mortgage interest in the Property to the lender in a recorded Mortgage (the "Mortgage"). These are the Note and Mortgage that are the subject of this action.

Beginning in August of 2007, Bartelstein allegedly failed to make monthly installment payments owed to Bank of New York. Pursuant to Paragraph 22 of the Mortgage, Bank of New York was obligated to provide presuit notice to Bartelstein, that would inform her of various rights that she enjoyed under the Mortgage. Bank of New York, in a letter dated September 17, 2007, sent Bartelstein the presuit notice of default and acceleration. The letter informed Bartelstein that if the default were not cured on or before October 17, 2007, the mortgage payments would be accelerated with the full amount becoming payable in full and a foreclosure proceeding would be initiated.

On December 24, 2007, Bank of New York then filed its initial complaint to foreclose on the property, naming Bartelstein as defendant. Within its initial Complaint to Foreclose Mortgage, Bank of New York filed a single-count action to foreclose the Mortgage, therein alleging that Bartelstein failed to pay the monthly installments owed for the period of August 2007 to the present. No action was filed on the Note.

Sometime thereafter, Counsel for Bank of New York posited that it had become necessary to add a true and correct copy of the original Note to the

Complaint. On June 15, 2009, nearly eighteen months after filing its initial Complaint, Bank of New York filed an Amended Complaint to Foreclose Mortgage, the current complaint before the Court. Once again, no action was filed on the Note. Five days later, on June 20, 2009, Bartelstein filed her Answer to Plaintiff's Amended Complaint to Foreclose Mortgage and raised three affirmative defenses therein. On March 10, 2011, Bank of New York filed its Response to the affirmative defenses raised in Bartelstein's Answer to the Amended Complaint to Foreclose Mortgage.

On October 8, 2014, Bank of New York filed its first Motion for Summary Judgment. On April 29, 2015, Judge Michael T. Mullen denied the motion without prejudice, finding that there was a genuine issue of material fact as to whether Bank of New York was the holder of the Note at the time of the filing of the Complaint. Four years later, on December 19, 2019, Bartelstein filed a Motion for Summary Judgment, the instant motion which is before the Court today. Within the motion, Bartelstein raises four affirmative defenses, two of which were not previously brought or raised in any way in the action. First, she alleges that Plaintiff lacked capacity at the time of filing the action to bring the lawsuit ("Capacity Defense"). Second, she alleges that Plaintiff lacked standing at the time of filing the lawsuit ("Standing Defense"). Third, she alleges that Plaintiff's acceleration notice failed to strictly comply with Paragraph 22 of the Mortgage ("*Accetturo* Defense"). Fourth, she alleges that the Note has become unenforceable by operation of law as a result of the expiration of the applicable statute of

limitations and that an action on the Mortgage without an enforceable Note cannot survive ("Time Barred Defense"). Bank of New York thereafter filed its Response to Defendant's Motion for Summary Judgment on March 9, 2020; however, the case went on hold and the motion remained pending due to the delays and closures that occurred during the COVID-19 pandemic. Thereafter, on August 2, 2022, Bank of New York filed a Cross-Motion for Summary Judgment, its second foray to achieve a judgment as a matter of law.

While both motions remained pending, this Court entered an Order in which it granted Bartelstein leave to file her combined Reply in Support of Summary Judgment and Response to Cross-Motion for Summary Judgment. This combined brief was then filed on December 15, 2022. On January 19, 2023, Bank of New York filed its reply brief in support of its Cross-Motion for Summary Judgment. Once both motions were fully briefed, the Court held a joint hearing on both Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment on February 7, 2023. After the hearing, this Court entered an Order on February 8, 2023, in which the Court found the *Accetturo* Defense and the Time Barred Defense brought surprise and prejudice to Plaintiff as they were not even mentioned in the litigation prior to Defendant bringing her instant Motion for Summary Judgment. Thus, the Court struck the *Accetturo* Defense and Time Barred Defense. In addition, the Court also denied Bank of New York's Cross-Motion for Summary Judgment, finding that a genuine issue of material fact existed as to Plaintiff's standing and thus declined to hear further argument on the

Capacity Defense and the Standing Defense raised in Defendant's Motion for Summary Judgment.

The February 8, 2023, Order did not mark the end for either party's attempt at summary judgment. On March 29, 2023, Bartelstein filed an Amended Motion to Reconsider the February 8, 2023, Order; and, nearly two months later, on May 1, 2023, Bank of New York, after the Court granted it an extension of time, filed its own Motion to Reconsider the same. The Court, after entertaining oral arguments on July 31, 2023, *vis-á-vis* the parties' respective motions to reconsider the February 8, 2023 Order, entered an Order on August 2, 2023, denying Plaintiff's Motion to Reconsider Order Denying its Cross-Motion for Summary Judgment. In denying the Cross-Motion for Summary Judgment, the Court found there were insufficient grounds under Illinois law to modify the February 8, 2023, Order. The Court continued to maintain, as both it and Judge Michael T. Mullen had previously, that there exists a genuine issue of material fact as to whether Bank of New York was the holder of the Note at the time of the filing of the Complaint.

The Court, in the same August 2, 2023 Order, granted Defendant's Motion to Reconsider the Order Striking Two Affirmative Defenses in Defendant's Motion for Summary Judgment. The Court determined that it had erred in its previous application of existing law and improperly struck the *Accetturo* Defense and Time Barred Defense in its February 8, 2023, Order. As the Court did not entertain oral argument on February 7, 2023, with respect to the merits of the *Accetturo* Defense and the Time Barred Defense, this ruling required the Court to again hold

argument on the Defendant's Motion for Summary Judgment to resolve the outstanding portions of the Motion once and for all in its entirety. Since summary judgment as to these defenses was already fully briefed prior to the February 7, 2023, hearing, the Court found no need for further briefing and set Defendant's Motion for Summary Judgment on her *Accetturo* Defense and Time Barred Defense for hearing on August 15, 2023.

On August 15, 2023, the Court heard oral argument regarding Defendant's Motion for Summary Judgement as it relates to the *Accetturo* Defense and Time Barred Defense. During the hearing, which lasted approximately two hours and ten minutes, the Court questioned the parties as to the merits of their respective arguments. At the conclusion of oral argument, the Court ordered that Defendant's Motion for Summary Judgment be taken under advisement. The Court's ruling follows.

III. LEGAL STANDARD

Bartelstein now moves this Court for summary judgment on her affirmative defenses pursuant to 735 ILCS 5/2-1005, which permits litigants to move for summary judgment where, "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c). At summary judgment, "the court does not try issues of fact, but must ascertain if any exist." *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 15 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993)).

Summary judgment is a drastic measure that should only be granted when the moving party's right to judgment is, "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992). Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010 (1st Dist. 2005). When parties file cross-motions for summary judgment, as occurred here, "they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The filing of cross-motions, however, does not necessarily mean there is not an issue of material fact, nor does it obligate a court to render summary judgment. *Id.*

IV. ANALYSIS

Before the Court is the question of whether Bartelstein is entitled to judgment as to her two affirmative defenses. Specifically, Bartelstein independently argues that both her *Accetturo* Defense as well as her Time Barred Defense affirmatively defeat Bank of New York's Amended Complaint, demanding judgment in her favor today as a matter of law. As to each affirmative defense, and for the reasons outlined herein, the Court agrees.

As a prefatory matter, it is first necessary to determine whether the affirmative defenses that were brought for the first time in Bartelstein's Motion for

Summary Judgment, were properly raised. Generally, an affirmative defense, "must be set out completely in a party's answer to a complaint and failure to do so results in waiver of the defense." *Hanley v. City of Chicago*, 848 Ill. App. 3d 49 (1st Dist. 2008). Importantly, an exception to the rule exists, however, "where a defendant raises an affirmative defense for the first time in a motion for summary judgment and the plaintiff has ample time before trial to respond to the defense." *Hawkins v. Chicago Commission on Human Relations*, 2020 IL App (1st) 191301, ¶ 29; *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2nd Dist. 2010). Thus, "[a] party may assert, without forfeiture concerns, affirmative defenses in a summary judgment motion, even after failing to file them in an answer." *Board of Library Trustees v. Board of Library Trustees*, 2015 IL App (1st) 130672, ¶ 23.

Here, there is no question that Bank of New York was given ample time to respond to the affirmative defenses raised initially in Bartolstein's Motion for Summary Judgment. Bartelstein's Motion for Summary Judgment was filed in December of 2019, and Bank of New York thereafter filed its response to the Motion on March 9, 2020, nearly four months later. Moreover, as the Motion remained pending for a considerable and extraordinary amount of time due to the COVID-19 pandemic and Bank of New York was given additional time to file its own Cross-Motion for Summary Judgment, there is no doubt that Bank of New York was given sufficient time and opportunity to prepare its arguments in response to the Bartelstein Motion for Summary Judgment. Furthermore, due to the lengthy briefing schedule entered into by the Court (as a result of there being cross-motions

for summary judgment, COVID-19 holds, and motions filed pursuant to Illinois Supreme Court Rule 183 for extensions of time), initial argument was not heard on Defendant's Motion for Summary Judgment filed in 2019 until February 7, 2023, slightly more than three years after the affirmative defenses were first raised. Accordingly, the Court continues to maintain, just as it did when it granted Bartelstein's Motion to Reconsider, that the *Accetturo* and Time Barred affirmative defenses were timely filed and properly raised—albeit for the first time—in the instant Motion for Summary Judgment, and Bank of New York had ample time and opportunity to answer them. Illinois case law is clear that affirmative defenses can be raised for the first time in a motion for summary judgment. *Hawkins*, 2020 IL App (1st) 191801, at ¶ 29. Thus, Bank of New York's procedural due process rights with respect to Bartelstein's newly raised affirmative defenses were not violated. This Court therefore finds, once again, that there was no surprise or prejudice as a result which would prohibit it from ruling on the merits of those affirmative defenses herein.

As a final preliminary point, the Court finds that there exists no genuine issue as to any material fact with respect to either of the two affirmative defenses currently before it and only questions of contract interpretation and application of the existing law to the undisputed facts of the case remain—questions of law. *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, ¶ 10 (citing *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 26). When parties, as was the case here, file cross-motions for summary judgment, "they agree that only a question of law is

involved and invite the court to decide the issues based on the record." *Pielet*, 2012 IL 112064, at ¶ 28. However, the filing of cross-motions does not necessarily mean there is not an issue of material fact, nor does it obligate a court to render summary judgment. *Id.* The parties agree that the relevant applicable facts as to the *Accetturo* and Time Barred Defenses are not in dispute or at issue, thus leaving the Court to decide if Bank of New York's foreclosure cause of action contained in its Amended Complaint may continue as a matter of law.

Accordingly, the Court now turns to analyze the merits of each of the two affirmative defenses presently before it: the *Accetturo* Defense and the Time Barred Defense.

A. *Accetturo* Defense

Bartelstein's first affirmative defense alleges that Bank of New York's presuit notice of default and acceleration failed to strictly comply with Paragraph 22 of the Mortgage. Specifically, she alleges that the language within the notice dated September 17, 2007, significantly and inexcusably diverges from the language found in Paragraph 22 of the Mortgage, therefore diluting and substantively failing to apprise Bartelstein of the rights about which Bank of New York was contractually obligated to inform her. There is no dispute between the parties that the language of Paragraph 22 and language of the notice sent to Bartelstein differ.

After hearing oral argument on August 15, 2023; reviewing the transcript from the hearing; and reading the parties' briefs numerous times, the Court now determines that there exist two defects within the presuit notice sent to Defendant.

The first defect concerns, "the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure" ("The Right to Assert Defenses") (Pl.'s Am. Compl. Ex. A, ¶ 22). The second defect concerns, "the right to reinstate the mortgage after acceleration" ("The Right to Reinstate"). *Id.*

1. *Applicable Law*

The legal framework applicable to both defects is the same. A "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32. The First District, in *Accetturo*, a landmark decision for the Illinois mortgage foreclosure bar, determined that satisfaction of the mortgage's preacceleration notice requirement is a condition precedent to filing a mortgage foreclosure action. *Id.* Critical to the court's decision was the maxim that contract language should be construed most strongly against the maker as the bank chose the words in the mortgage. *Id.* ¶ 37. Thus, "[i]f [the lender] had not sent an acceleration notice, it would not be entitled to foreclose." *Credit Union 1 v. Carrasco*, 2018 IL App (1st) 172535, ¶ 15 (citing *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16). When a contract contains express conditions precedent, strict compliance with those conditions is required, and, "[c]ourts will enforce express conditions precedent despite the potential for harsh results for the noncomplying party." *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 388 Ill. App. 3d 645, 668 (1st Dist. 2007) (citing *Dodson v. Nink*, 72 Ill. App. 3d 59, 64 (1979) ("It is

well established that where a contract contains a condition precedent, the contract does not become enforceable or effective until the condition is performed or the contingency occurs")). In fact, Illinois law, for well over a century, has required strict compliance with conditions precedent in a contract. *See generally International Cement Co. v. Beifeld*, 173 Ill. 179 (1898).

With regard to presuit notice requirements in foreclosure cases, the *Accetturo* court recognized that while a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a foreclosure action, a failure to provide specific information in strict compliance with the terms of the mortgage is more than a technical defect, constituting a failure to comply with a condition precedent. *Accetturo*, 2016 IL App (1st) 152783, ¶ 42. Before the *Accetturo* court were three defects with the notice of acceleration and default: the bank's notice (1) failed to provide the defendant the requisite 30 days to cure the default; (2) did not advise the defendant that failure to cure the default might result in acceleration and foreclosure; and (3) the final letter of a series of letters described the note as already having been accelerated. *Id.* ¶¶ 39-42. The court held that the bank's failure, prior to acceleration, to provide the defendant with a notice containing the specific information mandated by the mortgage divested the lender of its right to file the foreclosure action. *Id.* ¶ 50.

Nearly three years later in *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, the Second District picked up where the *Accetturo* court left off. The court continued to make clear that, while a notice of acceleration has been deemed a condition

precedent to foreclosure under Illinois mortgage foreclosure law, "a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a foreclosure action." *Id.* ¶ 11 (citing *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15). Critically, the court explained that where the mortgagor does not allege any prejudice resulting from a technical defect in the notice, dismissal to permit new notice would be "futile." *Id.* (citing *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27).[2]

In *Gold*, 2019 IL App (2d), ¶ 12, the defendant argued that the statement in the notice of default was "misleading" because the right to assert a defense within a pending lawsuit, as provided by the mortgage, is different from the right to file a new action to assert those defenses, as was instructed within the notice of default. The court determined that because prejudice was neither alleged nor argued and because the defendant fully availed himself of the ability to assert defenses in the foreclosure proceeding, the notice defect was rendered a technicality and reversal of the trial court's order was not warranted. *Id.* ¶¶ 12-14.

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[2]The *Gold* court, in coming to its conclusion, relied upon three cases: *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27; *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 17; and *Bank of New York Mellon v. Johnson*, 185 So. 3d 594 (Fla. Dist. Ct. App. 2016). The court, in an explanatory parenthetical, notes that the *Johnson* decision is a

> nonprecedential but on-point case holding that notice advising mortgagor that she, "may have the right to bring a court action to assert" defenses, but not informing her that she could bring defenses in the foreclosure action, substantially complied with the mortgage terms where the variation caused no actual prejudice to the mortgagor. *Gold*, 2019 IL App (2d) 180451 (emphasis omitted).

This Court further notes that the Florida Fifth District Court of Appeal in *Johnson*, 185 So. 3d at 597, applied Florida's substantial compliance standard for contractual conditions precedent. *See, e.g., Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 13 (Dist. Ct. App. 2015) ("In Florida, a party's adherence to contractual conditions precedent is evaluated for substantial compliance or substantial performance"). This differs from Illinois' strict compliance standard for contractual conditions precedent. *See Accetturo*, 2016 IL App (1st) 152783, ¶ 32 ("When a contract contains an express condition precedent, strict compliance with such a condition is required").

Two months later, the First District decided *Associates Asset Management, LLC v. Cruz*, 2019 IL App (1st) 182678. In synthesizing the existing Illinois case law, the *Cruz* court made it clear that a dismissal of an action is not warranted where a defect in notice is merely "technical" and does not prejudice the defendant, but dismissal is warranted where the notice is lacking in substance. *Cruz*, 2019 IL App (1st) 182678, ¶ 35. In alignment with the *Gold* court, the *Cruz* court relied on two important cases: (1) *Aurora Loan Services, LLC v. Pajor* and (2) *Bank of America, N.A. v. Luca*. In *Pajor*, 2012 IL App (2d) 110899, ¶ 8, the plaintiff sent the requisite presuit grace-period notice but did so before it was formally the assignee of the mortgage. Under those circumstances, the court held that the plaintiff fulfilled all "substantive requirements" and dismissal of the action was not required. *Id.* In *Luca*, 2013 IL App (3d) 120601, ¶ 3, prior to filing the lawsuit, the plaintiff sent the required grace-period notice but erroneously addressed it only to one named defendant and not to the other. Again, the court held that this technical error did not warrant vacatur of the ensuing judgment of foreclosure and sale because (1) the record showed that both defendants had actual knowledge of the grace-period notice and (2) defendants did not allege any other deficiencies in the notice. *Id.* ¶ 17.

Thus, the *Cruz* court found the facts of *Accetturo* to be the most analogous in its finding of a substantive defect. Because the bank failed to provide most of the information required under the mortgage contract, the notice was substantively insufficient to meet the contractual conditions precedent to default and acceleration. *Cruz*, 2019 IL App (1st) 182678, ¶¶ 39-40. Therefore, the court held that the bank's

failure to provide *Cruz* with the contractually required notices prior to default and acceleration divested the bank of the right to file its action. *Id.* This is the relevant case law that informs the Court's opinion on Defendant's *Accetturo* Defense before it today.

2. *Bartelstein's Mortgage*

In the present case before the Court, Paragraph 22 of the Mortgage requires that, in the event the borrower commits a breach of any term of the Mortgage, prior to acceleration of the loan, the lender shall notify the borrower of:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this [mortgage], foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure preceding the non-existence of a default or any other defenses of Borrower to acceleration and foreclosure. (Pl.'s Am. Compl., Mortgage, ¶ 22).

The Illinois Supreme Court has held that the word "shall," as used in contracts and statutes, has a mandatory connotation unless otherwise stated. *Accetturo*, 2016 IL App (1st) 152783, ¶ 35 (citing *People v. Pomykala*, 203 Ill. 2d 198, 784 N.E.2d 784 (2003)). Thus, because the mortgage contained an acceleration clause that provided that Bank of New York shall give notice to Bartelstein prior to acceleration, this Court finds that Paragraph 22 of the Mortgage contains contractual conditions precedent that Bank of New York had a mandatory duty to follow. *Inter alia*, Bank of New York had the duty to send presuit notice of acceleration and default to Bartelstein prior to accelerating the mortgage. As in

Accetturo, this Court likewise finds that in this case, Paragraph 22 of the Mortgage (i) is a notice provision with an acceleration clause, (ii) containing specific notice information that the lender has a mandatory duty to provide to the borrower, (iii) imposing a mandatory duty on the lender to provide notice to the borrower prior to acceleration, and (iv) is a condition precedent which must be strictly complied with for a lender to have a right to file a foreclosure action. *Accetturo*, 2016 IL App (1st) 152783, ¶ 49.

With this understanding, the Court must now determine the legal adequacy of the notice sent by Bank of New York. To do so, the Court must first determine whether there exist any defects in the presuit notice of acceleration and default provided to Bartelstein. If defects do exist, the Court will then determine, in compliance with mandatory precedent, whether each defect substantively failed to inform Bartelstein of specific information within Paragraph 22 of the Mortgage. If a defect is not substantive but rather merely technical in nature, the Court will then decide if the technical defect prejudiced (if properly alleged) Bartelstein such that the notice sent did not strictly comply with the conditions precedent permitting Plaintiff to bring this foreclosure action and necessitating dismissal.

a. The Right to Assert Defenses

In conducting this analysis of Bank of New York's Notice of Acceleration and Default, it is necessary to start with a comparison between the language within the Mortgage and the language in the notice sent to Bartelstein.

With regard to the right to assert defenses, Paragraph 22 of the Mortgage provides that, prior to acceleration of the loan, the lender:

> ***[S]hall*** *(***) inform borrower of (***) the right to assert in* ***the foreclosure proceeding*** *the non-existence of a default or any other defenses to acceleration and foreclosure.* (Pl.'s Am. Compl. Ex. A, ¶ 22) (emphasis added).

However, the language within the notice of default and acceleration sent to Bartelstein informs her that she:

> ***[M]ay*** *have the right to bring* ***a court action*** *to assert the non-existence of a default or any other defenses [she] may have to acceleration and foreclosure.* (Def.'s Mot. Summ. J. Ex. 9) (emphasis added).

An eagle-eyed reader will immediately realize that the two clauses are not identical. Notably, the notice of default and acceleration only indicates that *a court action* may be brought and does not specify that the assertion of the non-existence of a default or any other defenses can be raised in *the foreclosure proceeding*. Second, while Paragraph 22, in the mandatory voice, directs that the lender *shall* inform Bartelstein of the right to assert the non-existence of a default or any other defenses, the notice sent to Bartelstein qualifies those rights by indicating in the permissive voice that she *may* assert those defenses. The parties themselves acknowledge the same to be true; and, as such, the aforementioned differences between the language within Paragraph 22 of the Mortgage and the language within the letter of default and acceleration constitute a defect. Accordingly, it becomes the duty of this Court to determine whether the defect was technical or

substantive and, if technical, whether the defect prejudiced Bartelstein (if she alleged the existence of such prejudice).

The Court finds this defect to be a mere technicality that did not prejudice Bartelstein in the present lawsuit. Precedent is instructive, and the holding in *Gold* controls the outcome as it relates to this defect. As in *Gold*, where the defendant suggested to the court that the statement in the notice of default was misleading because the right to assert a defense within a pending lawsuit is different from the right to file a new action to assert those defenses, Bartelstein suggests that there is a substantive difference between the right to bring a court action and the right to assert defenses in the present foreclosure proceeding.[3] *Gold*, 2019 IL App (2d) 180451, ¶ 12. The *Gold* court determined that the defect there was a mere technicality, and this Court holds the same to be true here. *Id.* The linguistic difference does not omit the absolute right to raise defenses, nor does it fail to provide specific information to which Bartelstein was contractually entitled, as was

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[3]The factual scenario presently before the court is identical to the facts of *U.S. Bank N.A. v. Casaquite*, 2020 IL App (1st) 191586-U. While this case is non-precedential and in no way influences or controls the legal determination the Court is making in this Opinion, it nonetheless serves to elucidate the First District's positive treatment of the core holding in *Gold*. In *Casaquite*, the court held as follows:

> In *U.S. Bank N.A. v. Gold*, 2019 IL App (2d) 180451, this court was confronted with the same "defect" Ms. Casaquite alleges here. In that case, the defendant argued that the notice of acceleration he received from the plaintiff was "misleading" because it informed him that he could raise defenses to foreclosure in a 'new action' as opposed to in the foreclosure proceedings. *Id.* ¶ 12. We held that where the defendant did not allege that he was prejudiced by this language, it was a technical defect that did not preclude enforcement of the mortgage contract. *Id.* The same is true here: Ms. Casaquite has never argued that she was prejudiced by the notice. Indeed, just as the defendant in *Gold*, Ms. Casaquite likewise was aware that she could bring defenses to foreclosure in the foreclosure proceedings, given that she did, in fact, raise defenses in her answer to the foreclosure complaint. For this reason, we conclude that to the extent there was a defect in the notice, it was merely technical, and absent a showing of prejudice, it provides no basis to afford Ms. Casaquite the relief she seeks. *Casaquite*, 2020 IL App (1st) 191586-U, ¶ 24.

the case in *Accettturo* and *Cruz*. Instead, it is a technical defect in the rhetoric chosen to inform Bartelstein of the time when and place where she could assert defenses. Logically, it would have been impossible for Bartelstein to raise defenses to this foreclosure action in a separate court action as defenses naturally can only be brought in an existing lawsuit—this case. This serves as an additional reason as to why the difference in language is of no legal consequence.

The Court next determines whether the technical defect prejudiced Bartelstein's ability to engage in the present lawsuit. It did not. Bartelstein has been represented by counsel since the onset of the lawsuit sixteen years ago, and has asserted no fewer than seven affirmative defenses to the present lawsuit; three in her Answer and four in the present Motion for Summary Judgment. Such active engagement in the litigation is evidence of a lack of prejudice. *See Cruz*, 2019 IL App (1st) 182678, ¶ 14 (holding that when prejudice is neither alleged nor argued and the defendant fully availed themselves of the ability to assert defenses in the lawsuit, the notice defect is rendered a technicality and dismissal is not warranted). Additionally, the Court need not look further than Bartelstein's counsel's admission during the August 15, 2023, hearing in which counsel admitted that Bartelstein had not alleged prejudice as it relates to any of the alleged defects. (Tr. 24: 19-21). Without a showing of prejudice, this technical defect does not warrant dismissal of the lawsuit, as resending notice would indeed be futile.

The same technical defect analysis applies to the distinction between the terms *shall* and *may*. Bartelstein suggests that qualifying the statement within the

presuit notice using the term *may*, "improperly diverges in substance from the notice required in Paragraph 22," as, "Illinois borrowers have the absolute right to assert those defenses they may have in the foreclosure proceeding and subject to the rules of procedure and other applicable law." (Def.'s Mot. Summ. J at 16). With this, the Court cannot and does not agree. While no exact definition has been provided for this Court to precisely determine what constitutes a substantive versus a technical defect in Illinois, precedent is clear that a substantive defect arises when the presuit notice fails to provide specific information that a lender is contractually obligated to provide under a borrower's mortgage. *Accetturo*, 2016 IL App (1st), ¶ 42. Here, the core of the notice does inform Bartelstein of her right to raise defenses against the lawsuit and does not omit any of the specific information that Bartelstein was contractually owed under the mortgage. While the qualification of the right with the use of the word *may* is admittedly unnecessary and sloppy on the part of Bank of New York, it does not rise to the level of a substantive defect warranting dismissal of the action.

During oral argument and in the briefs, Bartelstein suggested that this Court disregard the requirement of prejudice in its technical defect analysis. (Tr. 32-40). The Court must reject this argument on its face. According to Bartelstein, three cases support this conclusion: *Accetturo*, *Cruz*, and *Deutsche Bank National Trust Company v. Roongseang*. A careful reading of all three cases, however, leads this Court to the inescapable conclusion that precedent expressly requires a finding of prejudice when analyzing a technical defect in a notice of acceleration and default.

In *Accetturo*, the court made clear that a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a foreclosure action. *Accetturo*, 2016 IL App (1st) 152783, ¶ 42. While the *Accetturo* court does not directly state that a finding of prejudice is necessary, its reliance on *Luca*, a case expressly requiring a finding of prejudice when analyzing a technical defect, is suggestive that a finding of prejudice is a necessary component of the technical defect analysis, even in the First District. *Luca*, 2013 IL App (3d) 120601, ¶¶ 16-17.

Any confusion that may have been left by the *Accetturo* court regarding the prejudice requirement was quickly resolved by the court in *Cruz*. There, the court directly endorsed the prejudice requirement, noting that, "[w]ith regard to presuit notice requirements in foreclosure cases, courts have held that dismissal of an action is not warranted where a defect in notice is merely 'technical' and does not prejudice defendant." *Cruz*, 2019 IL App (1st) 182678, ¶ 35. This decision, notably published after the *Gold* decision, leaves no doubt that prejudice is a necessary component of Illinois courts' (including the First District's) technical defect analysis regarding presuit paragraph 22 compliance in mortgage foreclosure cases.

Lastly, Bartelstein relies upon *Deutsche Bank National Trust Company v. Roongseang*, 2019 IL App (1st) 180948, to support the conclusion that relevant First District precedent rejects the prejudice requirement. This Court believes that case to be both factually and legally distinguishable from the one at bar. In *Roongseang*, the court was presented with an issue concerning whether the notice of default and acceleration was sent, not, as in this case, an issue regarding whether the content of

the notice was legally sufficient under Illinois law. *Id.* at ¶ 15. The *Roongseang* court had no reason to apply a prejudice analysis as the legal question regarding the contents of the presuit notice was never before it. Accordingly, while *Roongseang* remains good law, it is of little use to the Court in analyzing the affirmative defenses currently before it and cannot and does not support Bartelstein's position as it relates to the prejudice requirement.

Under Illinois precedent, which this Court is bound to follow, a technical defect can only warrant dismissal of an action when a defendant has been prejudiced by the defective notice. *Cruz*, 2019 IL App (1st) 182678, ¶ 35.

Accordingly, the *Accetturo* Defense is not applicable as to the defect in the notice regarding the Right to Assert Defenses as this defect is technical in nature and did not prejudice Bartelstein at any point during the sixteen circuitous years of litigation. Thus, Bartelstein's Motion for Summary Judgment on the *Accetturo* Defense as to the defect regarding the Right to Assert Defenses, is denied and Bank of New York's Amended Complaint is not dismissed for this defect. The same cannot be said, however, for the remaining issues of law.

b. The Right to Reinstate

The second alleged defect focuses on the right of a borrower to reinstate their mortgage after acceleration. With regard to this right, the mortgage provides that:

> ***The notice shall further inform borrower of the right to reinstate [the mortgage] after acceleration.*** (Pl.'s Am. Compl., Mortgage, ¶ 22) (emphasis added).

The presuit letter of default and acceleration, however, provides that the:

> ***[Borrower] may, if required by law or [her] loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of [her] property if all amounts past due are paid within the time permitted by law.*** (Def.'s Mot. Summ. J. Ex. 9) (emphasis added).

An eagle-eyed reader, on its second pass, will notice that the language once again differs between these two clauses. The letter of default and acceleration informs Bartelstein that she may, pursuant to the law and her loan documents, have the right to *cure the default*, whereas Paragraph 22 of the Mortgage requires that Bank of New York inform Bartelstein of the *right to reinstate* her mortgage after the loan has already been accelerated. It now becomes the duty of the Court to analyze the consequence of the presuit letter omitting any mention of Bartelstein's right to reinstate her mortgage after acceleration.

It is instructive to start with the language of the Mortgage in order to determine how the parties chose to define the right to cure the default and the right to reinstate the Mortgage. Two provisions of the Mortgage, Paragraph 19 and Paragraph 22, provide the relevant definitions. Paragraph 19 provides the parties' definition of the borrowers right to reinstate the mortgage after acceleration. Therein, the Mortgage provides certain conditions that must be met in order for Bartelstein to reinstate her mortgage after acceleration. It requires that Bartelstein may reinstate the Mortgage if she:

> (a) pays lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and any other fees incurred for the purposes of

> protecting Lender's interest in the property and rights under this Security Instrument; and (d) takes such actions as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged unless as otherwise provided under Applicable Law. (Pl.'s Am. Compl., Mortgage, ¶ 19).

The definition of "the right to cure" the default can be found in Paragraph 22 of the Mortgage. Therein, the Mortgage provides that "the right to cure" is the mortgagor's right to pay the existing default amount owed *prior* to the mortgage being accelerated. (Pl.'s Am. Compl., Mortgage, ¶ 22). The mortgage also provides that a date, not less than 30 days from the date of the notice, shall be specified as the date by which the default must be cured. *Id.* If Bartelstein failed to cure the default on or before the date specified in the notice, then, "Lender at its option [could have] require[d] immediate payment in full of all sums secured by this Security Instrument without further demand and [could] foreclose this Security Instrument by judicial proceeding"—exactly what it did. *Id.*

These provisions clearly indicate that the parties intended to define the right to cure and the right to reinstate as separate and distinct terms, and this Court need not disturb that intent. *See Virginia Surety Co. v. Northern Insurance Co.*, 224 Ill.2d 550, 556 (2007) (holding that the primary objective in construing a contract is to give effect to the intent of the parties). Bartelstein's right to cure concerned her ability to pay the default amount prior to the loan being accelerated, which would return her account to current. This is necessarily the exercise of a right which must occur *before* the loan is accelerated. The right to reinstate the mortgage, however,

provides that, pursuant to Bartelstein meeting four separate requirements, the already accelerated loan would be decelerated and would be reinstated. This would permit Bartelstein to make her monthly payments as if acceleration of the loan never happened in the first place which, by its very definition, can only occur *after* the loan had already been accelerated. It is inconceivable to posit that a note that has not yet been accelerated could be decelerated. To demonstrate the difference, Bartelstein, in both her briefs and during oral argument, rightly illustrated that had she followed the instructions in the notice of default and acceleration sent by Bank of New York and only cured the pre-acceleration default by making all allegedly outstanding payments to Bank of New York, her loan would not have been reinstated, as the entire balance owed under the note would have still remained due and owing. (*See* Reply in Support of Def.'s Mot. Summ. J. at 11). In short, the right to cure the default was only one of four requirements that Bartelstein would have had to have performed for the Mortgage to have been reinstated. It must follow that the intent of the parties was to define the right to cure and the right to reinstate the mortgage as separate and distinct ideas and the Court will not frustrate this choice.

Despite the parties creating a mortgage that defined these two terms separately, the notice of default and acceleration entirely fails to inform Bartelstein of her right to reinstate the mortgage after acceleration. As previously stated, the letter of default and acceleration only informs Bartelstein of her right to cure the default after acceleration and entirely withholds any reference to the right to reinstate. Given that the right to cure and the right to reinstate are not

synonymous, the letter of default and acceleration contains yet another defect, this time relating to Bartelstein's right to reinstate her mortgage. As such, the Court must now determine whether Bank of New York's failure to inform Bartelstein of her right to reinstate the Mortgage constituted a failure to provide specific information contractually owed to Bartelstein under the Mortgage.

Bank of New York's failure to inform Bartelstein of her right to reinstate the Mortgage after acceleration is a substantive defect. Both *Accetturo* and *Cruz* are the most analogous to the facts presently before the Court and are an instructive starting place. In *Accetturo*, the letters of acceleration and default failed to inform the borrower of the specific information required by the mortgage, including information about what must be done to cure the default, the date on which to cure the default, and that the borrower had the right to reinstate the mortgage. *Accetturo*, 2016 IL App (1st), ¶¶ 39-40. Likewise, the letter Bank of New York sent similarly failed to inform Bartelstein of her right to reinstate the mortgage after acceleration had occurred. *Id.* This is not an issue over rhetoric, semantics, or the technique of delivery of the information, but rather is an issue that goes to the very heart of Bank of New York's contractual obligations to Bartelstein. The right to reinstate a mortgage after acceleration is the kind of specific information that rose to the level of a substantive defect for the *Accetturo* court, and this Court sees no reason why the same should not be true here.

Cruz also provides a useful comparison. In *Cruz*, the Court determined that all four letters of default and acceleration, whether viewed separately or together,

were insufficient to meet the contractual conditions precedent to default and acceleration since the letters failed to provide specific information to the borrower. *Cruz*, 2019 IL App (1st) 182678, ¶ 39. This includes information regarding the overdue amount or providing any grace period for repayment and instead requiring the entire outstanding principal to be due. *Id.* Here, Bartelstein was not informed of her ability to reinstate the mortgage and was not provided any specific information detailing the conditions she had to meet in order to decelerate the loan and return to making her monthly payments if, in fact, the loan were accelerated. While *Cruz* did concern separate defects that are not applicable here, those defects are sufficiently analogous for purposes of finding a substantive defect as they all are the exact kind of specific information within Paragraph 22 that Bank of New York was under a contractual duty to provide to its borrowers.

Cruz remains instructive for an additional reason, namely, that *Cruz* involved both an omission of the specific information as well as a misstatement of the legal rights borrower was entitled to under the mortgage. The *Cruz* court explained that had the notice adequately and properly informed the borrower of the steps necessary to cure the default instead of demanding the full amount owed under the security interest, the borrower would have been more inclined to cooperate with the bank to make payments to avoid acceleration. *Id.* ¶ 41. The same is true here; not only did Bank of New York fail to inform Bartelstein that she had the ability to reinstate her loan after acceleration, but it also *misstated* her rights and falsely informed her that curing the default after acceleration would reinstate

the loan prior to foreclosure. Had Bartelstein made all of her outstanding payments and cured the default, this alone would not have been sufficient under Paragraph 19 of the Mortgage to reinstate the loan. The language at bar is the same type of misleading and incomplete notice defect that was before the *Cruz* court. Here, it cannot be said that someone reading the notice would be substantively informed of the steps that they would have needed to take in order to reinstate the Mortgage.

It is worth noting that, although *Accetturo* and *Cruz* provide the most analogous facts to the case at bar, they are not strictly identical. In both *Accetturo* and *Cruz*, the courts were tasked with analyzing multiple letters of default and acceleration that each contained multiple defects, whereas this case only involves one letter of acceleration and two alleged defects. *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 39-40; *Cruz*, 2019 IL App (1st) 182678, ¶ 39. While this does distinguish the present case factually, it is of no legal consequence to the Court's finding of a substantive defect. Lenders must strictly comply with the provisions of mortgage contracts, obligating courts to engage in a qualitative, not quantitative, review of the mortgage to ensure that the specific information required by the mortgage is provided in the letter of default and acceleration. Thus, there is no minimum number of defects necessary for a court to find a substantive defect. Moreover, had Bank of New York elected to send multiple letters of default and acceleration to Bartelstein, this Court would simply review, as the courts in *Accetturo* and *Cruz* did, each letter sent to determine Bank of New York's Paragraph 22 compliance.

Plaintiff did not send multiple letters here, so this Court need not look further than the letter of default and acceleration that is presently before it.

Bank of New York, during oral argument, attempted to argue that the notice it sent to Bartelstein, "substantially complied with the law," as informing Bartelstein of the right to cure the defect was substantially the same as informing her of her right to reinstate. (Tr. 53-55). Plaintiff further argued that had the borrower cured the default, the Mortgage would have been reinstated, evidencing its substantial compliance with Paragraph 22. *Id.* This is both a factually incorrect reading of the mortgage and a legally incorrect understanding of Illinois law that must be rejected. First, as mentioned above, the very mortgage that Bank of New York created specifically defines the right to cure and the right to reinstate separately. Curing the default was only one of the four requirements necessary for the Mortgage to be reinstated. Thus, completing this single criterion cannot and does not in and of itself result in a reinstatement per the language of the Mortgage. As such, Plaintiff's conclusion that curing the default would have reinstated the mortgage cannot be supported by any provision or clause within the fourteen-page mortgage contract. Even if Bank of New York's position was correct, which it is not, it nonetheless would need to be rejected as a gross misinterpretation of Illinois law. Contractual conditions precedent are subject to strict compliance in Illinois, unlike in Florida. *Supra* 14-15 n.2; *See Accetturo*, 2016 IL App (1st) 152783, ¶ 32 ("When a contract contains an express condition precedent, strict compliance with such a condition is required"); *Cf. Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 13

(Dist. Ct. App. 2015). Bank of New York's stance that the notice was substantially compliant with the terms of the Mortgage, while remaining factually incorrect, also does not provide a basis under Illinois law to support its position because in Illinois, a presuit notice must be strictly compliant with the provisions within a mortgage. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32. Failing to inform a borrower of his or her right to reinstate a mortgage is neither strictly nor substantially compliant with Paragraph 22. Instead, it is the exact sort of omission of specific information that warrants a finding of a substantive defect.

Bank of New York therefore failed to meet its contractual obligation to provide Bartelstein with information regarding her right to reinstate the Mortgage after acceleration. This omission of specific information constitutes a substantive defect under Illinois law. Accordingly, this Court now holds that Bank of New York failed to strictly comply with all conditions precedent in the Mortgage before declaring default and accelerating the Note. Where a contract contains express conditions precedent, strict compliance with those conditions is required, and "[c]ourts will enforce express conditions precedent despite the potential for harsh results for the noncomplying party." *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 668. This interpretation is rooted in the contract maxim that contract language should be construed most strongly against the maker, here Bank of New York, because it chose the words in the mortgage. *Scheduling Corp. of America v. Massello*, 119 Ill. App. 3d 355, 361 (1983). Thus, as to the right to reinstate the mortgage, Bank of New York's notice was legally insufficient to comply with the

conditions precedent within Paragraph 22 of the Mortgage. Failing to meet the conditions precedent, Bank of New York never fulfilled its duties under the Mortgage and brought this foreclosure action prematurely, thus divesting it in the first intance of its right to file this foreclosure action. Accordingly, despite its harsh result, Bartelstein's Motion for Summary Judgment as to the Accetturo Defense is hereby granted and Bank of New York's Amended Complaint to Foreclose Mortgage is dismissed.

B. Time Barred Defense

The Court now turns to the second affirmative defense presently before it: the Time Barred Defense. Bartelstein therein contends that, by operation of law, the underlying Note that Bank of New York accelerated on October 17, 2007, became unenforceable on October 17, 2017, due to the ten-year statute of limitations on promissory notes. Because Bank of New York only filed a single-count foreclosure action on the Mortgage and took no direct action on the Note, Bartelstein maintains that Bank of New York's Amended Complaint to Foreclose Mortgage at bar must be dismissed as the underlying Note has become unenforceable by operation of law and the Mortgage thus extinguished. The Court agrees.

This issue presents a new question for the Court, as Bartelstein's Time Barred Defense is a case of first impression not only for this Court, but for the entire State of Illinois. After carefully reviewing the briefs, oral argument, and relevant Illinois case law, the Court has been unable to find a case wherein this affirmative defense has been successful—or even alleged for that matter—providing

little guidance and precedent that binds the Court's ruling herein. Bank of New York's characterization of the theory as "novel" is not necessarily incorrect. (Tr. 101-102). While the theory may be novel in its application to the existing facts before the Court, it harkens back to an era when members of the judiciary still donned powdered wigs, and while this might be an aberrant doctrine, it is equally rare for a mortgage foreclosure action to be stuck in litigation limbo for nearly sixteen protracted years. This case's unusual procedural posture may give rise to novel theories; and, accordingly, the Court must seek to determine what Illinois law requires as it relates to Defendant's Time Barred Defense.

1. *The Note is Unenforceable*

To determine what Illinois law requires as it relates to the Time Barred Defense, the Court starts with statutory authority. 735 ILCS 5/13-206 imposes a ten-year statute of limitations period for a suit to be brought after a cause of action on a promissory note or other evidence of indebtedness arises. Therefore, it becomes necessary for the Court to determine when the statute of limitations' clock began to tick on the Note here. Section 13-206 again provides the relevant answer, as a cause of action on a promissory note payable at a definite date accrues on the due date, the date stated in the promissory note, or the date upon which the promissory note is accelerated. Most relevant to the present action, an acceleration becomes effective on the date specified in a written notice by the mortgagee to the mortgagor delivered after default. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32 (citing Restatement (Third) of Property (Mortgages) § 8.1 (1997)).

Here, because the due date for a single installment cannot permit the creditor to legally demand payment on the fully accelerated Note, this cannot be the date that starts the ticking of the statute of limitations' clock for an action on the full Note. Moreover, the date stated in the Note (*i.e.*, the maturity date) also cannot operate as the date upon which a cause of action would have had accrued on the Note as the date of maturity is rendered irrelevant upon acceleration of the Note. As such, the Court can only look to the date of acceleration as the date upon which the statute of limitations' clock began to tick. Barelstein's Mortgage requires that the lender shall notify the borrower, *inter alia*, of, "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (***) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the mortgage.]" (Pl.'s Am. Compl., Mortgage, ¶ 22). Bank of New York's letter of default and acceleration dated September 17, 2007, indicates that, unless the default was cured, the Mortgage would be accelerated on October 17, 2007. Therefore, the statute of limitations' ten-year clock, pursuant to Section 13-206, began to run on October 17, 2007, and expired on October 17, 2017. No action was brought on the Note prior to October 17, 2017. Accordingly, the Court holds that an action on the Note is barred by the statute of limitations, the Note is deemed unenforceable by operation of law, and any action on the Note if brought today would be prohibited.

2. *The Mortgage is Extinguished*

Generally, a foreclosure action on a mortgage cannot be permitted by law when the underlying note has become barred by the statute of limitations. *Dunas v. Metropolitan Trust Company*, 41 Ill. App. 2d 167, 170 (1963). *United Central Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015), provides a useful illustration of this rule. There, the bank filed and voluntarily dismissed two actions against the defendants for breach of the promissory note that the mortgage secured. The bank then sought to foreclose on that mortgage. *Id.* at 309. The United States Court of Appeals for the Seventh Circuit, applying Illinois law, held that pursuant to the Illinois single refiling rule, the bank was statutorily barred from enforcing the note underlying the Mortgage. *Id.* at 310. Critical to the discussion here, the court recognized that although the foreclosure action was timely filed and did not constitute an impermissible second filing, the underlying note was found to be unenforceable there due to the single refiling rule. Therefore, the foreclosure action necessarily had to be dismissed as long-standing Illinois law precludes a plaintiff from foreclosing on a mortgage when an action on the underlying note is barred by the statute of limitations or another procedural rule. *Id.*

Notwithstanding that the case presently before the Court is not a case involving Illinois' single refiling rule, *KMWC* illustrates that there are consequences when a party files a timely foreclosure action on an unenforceable underlying note. In *KMWC*, the underlying note became barred due to the single refiling rule—a procedural rule. Likewise, the underlying Note here became time barred due to the

statute of limitations period—another procedural stop. As those are admittedly distinct legal concepts, they nevertheless carry the same consequence; they operate to preclude, by operation of law, timely filed foreclosure actions on mortgages when no procedurally proper action on the note was brought.

So, naturally, the Court must now ask: what happened to Bank of New York's foreclosure action on the Mortgage when the statute of limitations for an action on the Note lapsed on October 17, 2017? Although admittedly an unconventional issue in the State of Illinois, there remain cases that are illustrative of what the law demands; however, none are directly on point. The starting place dates back to the mid-19th century. In *Pollock v. Maison*, 41 Ill. 516, 521 (1866), the Illinois Supreme Court held that, "it is manifestly more reasonable to hold that where the debt, the principal thing, is gone, the incident, the mortgage, is gone also, and that a foreclosure in any mode cannot then be had (***). If a bar of the incident should bar the principal, then much more should a bar of the debt, be a bar to its incident." Twelve years later, in *Emory v. Keighan*, 88 Ill. 482, 485 (1878), our Supreme Court, when faced with the question of the enforceability of a mortgage when the underlying note was time barred, held that "the existence of the debt, for securing of which a mortgage is given, is essential to the life of the mortgage, and that when the debt is paid, discharged, released, or barred by the statute of limitations (***) the mortgage is gone, and has effect no longer." Our High Court once again in *Hibernian Banking Association v. Commercial National Bank*, 157 Ill. 524, 537 (1895), came to a similar conclusion, holding that, "it has been repeatedly decided

by this court that the mortgage is a mere incident of the debt, and is barred when the debt is barred." *See also Dunas*, 41 Ill. App. 2d at 170 ("The running of a statute of limitations bars the remedy for enforcing a debt, but does not extinguish the debt itself.").

Thus, under Illinois law, there are three ways for an underlying debt to be deemed unenforceable by operation of law: the debt is (1) paid, (2) discharged, or (3) released or barred by limitations. *Midwest Bank v. Gingell*, Case No. 92 C 20210, 1993 U.S. Dist. LEXIS 16620, at *14 (N.D. Ill. Nov. 24, 1993) (citing *Bradley v. Lightcap*, 201 Ill. 511, 517 (1903)). Most relevant for the Court today is the situation of an underlying debt being barred by the statute of limitations. In those cases where the debt (*i.e.*, the note) is barred by the statute of limitations, the mortgage, which is but an incident to the debt, is no longer a lien on the property. *Dunas*, 41 Ill. App. 2d at 170 (citing *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 560 (1940)).

Thus, a straightforward application of these rules leads the Court to the inescapable conclusion that because the statute of limitations on the underlying Note expired on October 17, 2017, the Note then became unenforceable by operation of law, as held above. As a mortgage is a mere incident of a note and becomes barred when the underlying debt is barred, Bank of New York's ability to foreclose in the present action is estopped because the Note, as Defendant's counsel put it, "died on the vine." (Tr. 86). Although the debt itself might not be extinguished, the

statute of limitations bars the remedy for enforcing the debt—an action for mortgage foreclosure. *See Dunas*, 41 Ill. App. 2d at 170.

If this were a straightforward application of the law, it would be a relatively routine problem for the Court to resolve. For example, had Bank of New York taken no action whatsoever on both the Mortgage and Note, it would be clear that its ability to file a foreclosure action would have become impossible after October 17, 2017. Such a holding would recognize that once the underlying Note becomes unenforceable by operation of law, an action on the Mortgage would become fruitless as there would no longer exist an enforceable promise to pay, and the mortgage lien would thus be extinguished.

Such an elementary application, however, is not possible with the esoteric fact situation currently before the Court. This is not a case of a bank failing to take action at all as in the previous hypothetical. Here, Bank of New York unquestionably filed this foreclosure action timely on the Mortgage. It suggests that such a timely filing of a single-count foreclosure action on the Mortgage alone should be enough to toll the statute of limitations' clock on the Note. To support its position, Bank of New York indicates that a mortgage foreclosure suit is a *quasi in rem* proceeding involving an action against real property as well as a monetary claim for personal liability. *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill.2d 526, 538 (2010). As such, because 735 ILCS 5/15-1508(e) allows a personal money judgment to be entered against a defendant in a foreclosure action based on the promissory note and allows a plaintiff to enforce and collect on that judgment to

the same extent and manner applicable to any money judgment, a separate action on the Note was not necessary. *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, ¶ 14. Bank of New York's position has intuitive appeal. Nevertheless, the question the Court must answer is whether Bank of New York's timely filing of a foreclosure action on the Mortgage was legally sufficient to toll the statute of limitations on the underlying Note, entitling Bank of New York to maintain its present foreclosure action against Bartelstein.

The first portion of Bank of New York's argument is correct; a mortgage foreclosure is a *quasi in rem* action. There exist three types of judgments in any given lawsuit, each of which has its own legal implications for the parties named in the suit. The court in *Turczak v. First American Bank*, 2013 IL App (1st) 121964, illustrates the difference. There, the court explained that:

> A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he [or she] concedes to be the property of the defendant to the satisfaction of a claim against him [or her]. *Turczak*, 2013 IL App (1st) 121964, ¶ 33 (*citing Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958)).

The Illinois Supreme Court has held that a mortgage foreclosure suit is *quasi in rem*, as opposed to *in rem*, because it involves both an action against real property as well as a monetary claim for personal liability. *McGahan*, 237 Ill.2d at 538. This, however, does not alter the ability to bring a separate suit on a promissory note,

which remains a purely *in personam* proceeding. *Turczak*, 2013 IL App (1st) 121964, ¶ 33. The *Turczak* court continued to explain that foreclosure suits on property, *quasi in rem* proceedings, apply a legally distinct remedy from an *in personam* proceeding on a promissory note. *Id.*

There is no question that the present action before the Court is a *quasi in rem* action. Plaintiff's Amended Complaint to Foreclose Mortgage here is a single-count action seeking a foreclosure judgment as well as a monetary claim for personal liability against Bartelstein. The fact that Bank of New York's Amended Complaint to Foreclose Mortgage contains a request for personal liability against Bartelstein, however, does not transform the suit from a *quasi in rem* action to an *in personam* action. Bank of New York's suggestion that seeking a personal judgment from a borrower in a *quasi in rem* action carries the same legal consequence as an *in personam* action on a promissory note finds no support in Illinois law and is wholly unavailing. In fact, in *Turczak*, 2013 IL App (1st) 121964, ¶ 33, the court made clear that although a mortgage foreclosure action is a *quasi in rem* proceeding, nothing precludes a lender from taking a separate action on the promissory note that would remain a purely *in personam* proceeding. Therefore, the Court must recognize the inescapable conclusion that Bank of New York's request for a personal liability judgment against Bartelstein does not carry the same legal consequence as commencing a separate action on the Note, nor can it transform the present action from a *quasi in rem* action to an *in personam* action.

With this understanding, it must follow that Bank of New York's timely filing of a foreclosure action solely on the Mortgage was not sufficient to stop the statute of limitations' clock on the underlying Note. In fact, although the complaint does mention the Note, it only does so in passing twice: once with regards to attorneys' fees and a second time in reference to the inclusion of the Note as an exhibit thereto. An action on the underlying note applies a distinct legal remedy that cannot be applied in a *quasi in rem* proceeding. The timely filing of its complaint, by itself, was therefore legally insufficient to toll the statute of limitations as to the Note. Such a tolling could only have occurred had Bank of New York amended its Complaint to add an additional count seeking relief under the Note directly or had it filed a separate action on the Note itself. Had it taken any of the above actions in time, then this present action could have continued theoretically into perpetuity without any fear of the statute of limitations barring further legal action. Nothing procedurally in the first ten years of litigation prevented Bank of New York from timely filing an action under the Note potentially for breach of note either herein or in a separate action; it just simply failed to do so.

Alternatively, Bank of New York also had a secondary way to escape the consequences of the limitations period tolling; it could have obtained judgment in its favor as it relates to the Amended Complaint to Foreclose Mortgage without ever needing to file a distinct action under the Note. Had Plaintiff been successful in a dispositive motion or proven its case to this Court at trial such that this Court would have entered Judgment of Foreclosure and Sale pursuant to 735 ILCS

5/15-1506 prior to October 17, 2017, Bartelstein's promises to pay under the Note would have been superseded by a court order establishing liability and damages with a mandate to pay the total amounts found due and owing, if any. Such a court order would have created a legal mandate to pay and, given that Bank of New York sought personal liability against Bartelstein, there would have been no concerns regarding its compliance with 735 ILCS 5/13-206. That is not what happened here, however. No Judgment of Foreclosure and Sale was ever entered by this Court on Plaintiff's foreclosure action. In fact, this Court denied Plaintiff's Motion for Summary Judgment and Motion for Entry of Judgment of Foreclosure and Sale twice due to the genuine issues that this Court found to exist with regard to Bank of New York's standing to bring the action in the first place, a material fact. As such, Bank of New York must accept the consequences of the statute of limitations period lapsing; namely, that as the holder of an unenforceable note, its mortgage is extinguished and its present foreclosure action cannot be permitted to proceed.

3. *Ancillary Considerations*

The Court must address a few last points. This affirmative defense, as Bank of New York rightfully noted during oral argument and in briefing, may very well lead to absurd results if permitted to extirpate Plaintiff's foreclosure action and would set an unfathomable prospective precedent in that a mortgage foreclosure defendant could defeat a foreclosure case simply by engaging in ten years of delay tactics. First, the Court would like to point out that it is not permitting a new affirmative defense that would culminate in an absurd result or an unfavorable

public policy outcome. It is merely applying existing Illinois law to the facts of this case. Second, Plaintiff could have prevented this situation easily from arising by moving for and obtaining Judgment of Foreclosure and Sale prior to ten years after the cause of action arose or by simply including an action on the Note—even if such an action might seem duplicative or unnecessary. Thus, the ability to prevent such an outcome as the one rendered herein from occurring in the future lies with plaintiffs.

With regard to its "absurdity" argument, Bank of New York further argues that permitting a borrower to raise this affirmative defense would create situations in which borrowers could extinguish a mortgage through obtaining a discharge in Bankruptcy, so long as they could effectively delay the progression of the foreclosure lawsuit. (Pl.'s Resp., p. 10). That, however, is not necessarily the case. The bankruptcy discharge injunction bars attempting to collect a discharged debt as a personal obligation of the debtors under 11 U.S.C. § 524(a)(2), but the creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. *Johnson v. Home State Bank*, 501 U.S. 78, 82 (1991). Congress specifically created an exception to the bankruptcy discharge, and so defined "claim" in order to ensure that creditors with interests enforceable only against the property of a debtor had "claims" that would survive a bankruptcy action. *Id.* at 83-5. This reflects the idea that, absent a legislative exception, case law in Illinois would *require* that a bankruptcy discharge extinguish foreclosure actions. Given the absurdity of such a result and the unfair burden it would place on lenders, however, a statute was

created to avoid such a problematic outcome. No such rule exists, however, for statute of limitations concerns like the one in the present litigation.

With regard to the issue before the Court today, state legislatures across the country have elected to act on this very issue even though ours has not. Dale Joseph Gilsinger, in surveying all 50 states with regard to how each state deals with the survivability of foreclosure actions when the underlying note is barred, elucidates in his law review article that states are split on how they treat these cases. Dale Joseph Gilsinger, Annotation, Survival of Creditor's Rights Created by Mortgage or Deed of Trust as Affected by Running of Limitations Period for Action on Underlying Note, 36 A.L.R.6th 387 (2008). Some states have created legislative solutions to permit foreclosure actions when the underlying note becomes barred from enforcement. One such state, according to Defendant's counsel, is California, where legislative enactments require lenders to file a foreclosure action on the mortgage as well as an action on the note. (Tr. 109). Other states, like Illinois, prohibit foreclosure actions when the underlying note is barred. *Hibernian Banking Association*, 157 Ill. at 537. Today, this Court need only apply the law as it currently stands.

In so doing, this Court holds that the statute of limitations lapsed on the Note on October 17, 2017. Thus, because the present foreclosure action is proceeding on a mortgage incident to a note that is no longer enforceable, Bank of New York no longer has an actionable or legally viable mortgage foreclosure claim. As such, this Court grants Bartelstein's Motion for Summary Judgment as it relates

to the Time Barred Defense because the Mortgage has become extinguished by operation of law and cannot entitle Bank of New York to the relief it seeks and in so doing, dismisses Bank of New York's Amended Complaint to Foreclose Mortgage.

V. CONCLUSION

For all the reasons mentioned herein, the Court's mind is clear and free from doubt that, as it relates to the two affirmative defenses, Bartelstein's Motion for Summary Judgment must be granted, as each of the affirmative defenses provide independent grounds in and of themselves for the Court to dismiss Bank of New York's Amended Complaint to Foreclose Mortgage. Accordingly, the Court grants Defendant's Motion for Summary Judgment as to her *Accetturo* and Time Barred Defenses and thus necessarily dismisses Bank of New York's Amended Complaint to Foreclose Mortgage. Accordingly, because the Accetturo Defense and Time Barred Defense affirmatively defeat Bank of New York's foreclosure action, all remaining affirmative defenses that have been raised in the present action are hereby deemed moot.

As a final note, because this cause of action accrued on October 17, 2007, Bank of New York had ten years, until October 17, 2017, under 735 ILCS 5/13-206, to bring an action to foreclose on the Mortgage and to bring an action the Note. That date passed nearly six years ago. Prior to October 17, 2017, Bank of New York was able to amend its Complaint for a second time in order to seek relief under the Note and toll the statute of limitations, but did not. Thus, the Court is left with no other option but to dismiss Bank of New York's Amended Complaint to Foreclose

Mortgage with prejudice, as the statute of limitations bars it from bringing this claim again.

Accordingly, Bartelstein's Motion For Summary Judgment is hereby GRANTED, and Bank of New York's Amended Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE.

THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) Debbie Bartelstein's Motion for Summary Judgment as to her *Accetturo* Defense and her Time Barred Defense is hereby GRANTED;

(2) Bank of New York's Amended Complaint to Foreclose Mortgage is hereby DISMISSED in its entirety WITH PREJUDICE;

(3) The Court having granted Debbie Bartelstein's Motion for Summary Judgment, Debbie Bartelstein's remaining and outstanding affirmative defenses as to Bank of New York's Amended Complaint to Foreclose Mortgage are all hereby stricken as moot;

(4) The October 26, 2006, $512,800.00 promissory note that Debbie Bartelstein executed and delivered to Guaranteed Rate, Inc., is hereby deemed unenforceable;

(5) By operation of law, because the underlying debt has been deemed unenforceable, any and all mortgage liens Bank of New York has or might have encumbering the property subject of this litigation in connection to the October 26, 2006, $512,800.00 promissory note are hereby extinguished;

(6) Within 30 days from the date of entry of this Order, on or before October 27, 2023, Bank of New York, at its own expense, is hereby ordered to do the following:
   (a) Record with the Cook County Clerk's Office a release of mortgage for the mortgage subject of this litigation on the property subject of this litigation pursuant to the Court's holding herein;

(b) File in the Court's Record with the Clerk of the Circuit Court of Cook County a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office;
(c) Send to all parties of record a copy of the recorded release of mortgage recorded with the Cook County Clerk's Office; and
(d) Send to the Court's email address listed below a courtesy copy of the recorded release of mortgage recorded with the Cook County Clerk's Office and filed and stamped by the Clerk of the Circuit Court of Cook County;

(7) Pursuant to 735 ILCS 5/15-1510, Bank of New York is hereby found liable to Debbie Bartelstein for all reasonable attorneys' fees and costs incurred associated with litigating this matter;

(8) The case is hereby set for status on November 14, 2023, at 2:30 PM via Zoom at the below listed Zoom Information;

(9) If Debbie Bartelstein chooses to do so, Debbie Bartelstein is hereby granted 30 days leave from the date of entry of this Order, on or before October 27, 2023, to file a motion and prove up damages concerning attorneys' fees and costs awarded to her in (7) *supra* and may, if filed, piggyback and present this motion on the November 14, 2023, status date set in (8) *supra*;

(10) If Bank of New York believes there to exist a legitimate and non-frivolous basis for this Court to reconsider the entirety or any portion of its judgment rendered herein, and Bank of New York in fact chooses to file a motion to reconsider pursuant to 735 ILCS 5/2-1203 in this Court, Bank of New York is hereby granted leave to file said motion to reconsider within the statutory allotted time from the entry of this Order and may, if filed, piggyback and present this motion to reconsider on the November 14, 2023, status date set in (8) *supra*; and

(11) All courtesy copies for any motion to be presented to the Court by either party on the November 14, 2023, status date set in (8) *supra* shall be submitted by the movant to the Court's email address listed below in strict conformity with the Court's Standing Order no later than 4:30 PM on October 31, 2023.

Zoom Information:
Meeting ID: 810 2556 7672
Passcode: 021601
Call-in: (312) 626-6799

IT IS SO ORDERED.

Date: September 27, 2023

ENTERED:

Honorable William B. Sullivan
Cook County Circuit Judge

ENTERED
Judge William B. Sullivan-2142
SEP 27 2023
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

ORDER PREPARED BY THE COURT
ccc.mfmlcalendar60@cookcountyil.gov
(312) 603-3894