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.

[Remainder of Page Intentionally Left Blank]

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