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

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

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

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

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

I. INTRODUCTION

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

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. LEGAL STANDARD

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

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

IV. ANALYSIS

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

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

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

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

for summary judgment, COVID-19 holds, and motions filed pursuant to Illinois Supreme Court Rule 183 for extensions of time), initial argument was not heard on Defendant's Motion for Summary Judgment filed in 2019 until February 7, 2023, slightly more than three years after the affirmative defenses were first raised. Accordingly, the Court continues to maintain, just as it did when it granted Bartelstein's Motion to Reconsider, that the *Accetturo* and Time Barred affirmative defenses were timely filed and properly raised—albeit for the first time—in the instant Motion for Summary Judgment, and Bank of New York had ample time and opportunity to answer them. Illinois case law is clear that affirmative defenses can be raised for the first time in a motion for summary judgment. *Hawkins,* 2020 IL App (1st) 191301, at ¶ 29. Thus, Bank of New York's procedural due process rights with respect to Bartelstein's newly raised affirmative defenses were not violated. This Court therefore finds, once again, that there was no surprise or prejudice as a result which would prohibit it from ruling on the merits of those affirmative defenses herein.

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

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

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

A. *Accetturo* Defense

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

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

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

1. *Applicable Law*

The legal framework applicable to both defects is the same. A "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32. The First District, in *Accetturo*, a landmark decision for the Illinois mortgage foreclosure bar, determined that satisfaction of the mortgage's preacceleration notice requirement is a condition precedent to filing a mortgage foreclosure action. *Id.* Critical to the court's decision was the maxim that contract language should be construed most strongly against the maker as the bank chose the words in the mortgage. *Id.* ¶ 37. Thus, "[i]f [the lender] had not sent an acceleration notice, it would not be entitled to foreclose." *Credit Union 1 v. Carrasco*, 2018 IL App (1st) 172535, ¶ 15 (citing *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16). When a contract contains express conditions precedent, strict compliance with those conditions is required, and, "[c]ourts will enforce express conditions precedent despite the potential for harsh results for the noncomplying party." *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 668 (1st Dist. 2007) (citing *Dodson v. Nink*, 72 Ill. App. 3d 59, 64 (1979) ("It is

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

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

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

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

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

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

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

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

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

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

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

2. *Bartelstein's Mortgage*

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

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

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

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

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

a. The Right to Assert Defenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The Right to Reinstate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Time Barred Defense

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

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

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

1. *The Note is Unenforceable*

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

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

2. *The Mortgage is Extinguished*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Ancillary Considerations*

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Date: September 27, 2023

ENTERED:

Honorable William B. Sullivan
Cook County Circuit Judge

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

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