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COURT OF APPEALS
STATE OF NEW YORK

FEDERAL NATIONAL MORTGAGE,

Appellant,

-against-

JEANTY,

Respondent.

NO. 84

20 Eagle Street
Albany, New York
October 18, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

ADAM M. SWANSON, ESQ.
MCCARTER & ENGLISH
Attorney for Appellant
One Canterbury Green
201 Broad Street
Stamford, CT 06901

BRIAN MCCAFFREY, ESQ.
BRIAN MCCAFFREY ATTORNEY AT LAW
Attorney for Respondent
88-18 Sutphin Boulevard
First Floor
Jamaica, NY 11435

Ellen S. Kolman
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 84, Federal National Mortgage v. Jeanty.

3 We'll let them clear the room.

4 JUDGE GARCIA: It's nothing personal.

5 MR. SWANSON: We lost our audience.

6 ACTING CHIEF JUDGE CANNATARO: Your audience is
7 gone. Okay, Counsel. Whenever you're ready.

8 MR. SWANSON: May I please reserve two minutes
9 for rebuttal?

10 ACTING CHIEF JUDGE CANNATARO: Two minutes.

11 MR. SWANSON: Good afternoon, Your Honors, and
12 may it please the Court, my name is Adam Swanson with
13 McCarter & English and I represent the appellant, Federal
14 National Mortgage Association.

15 To understand why Mr. Jeanty's acknowledgment and
16 promise to pay the mortgage payment - - -

17 JUDGE RIVERA: But what's the purpose of the HAMP
18 agreement? What is the purpose?

19 MR. SWANSON: The purpose of the HAMP agreement
20 is to see whether or not the lender will be able to accept
21 payments, monthly payments, under the mortgage at an
22 affordable level - - - level for the borrower. And - - -

23 JUDGE RIVERA: So all - - - I'm sorry. Just - -
24 - we get the temporary eventually perhaps, not in this
25 case, the permanent, that's part of the problem. And so -



1 - - so what's being negotiated back and forth is the amount
2 of the installments. It is not the actual total amount
3 that has been agreed to as the debt. Am I understanding
4 that correctly? That would not change; is that right?

5 MR. SWANSON: Precisely. That's precisely. And
6 if you look at the HAMP rules - - -

7 JUDGE WILSON: Well, is that right? Sorry; over
8 here. Because the monthly payments went up.

9 MR. SWANSON: The monthly payments could go up;
10 that's correct.

11 JUDGE WILSON: They actually did in this case, I
12 think. The HAMP payments were greater than the mortgage
13 payments had been.

14 MR. SWANSON: That's right.

15 JUDGE WILSON: And does that represent
16 accumulated unpaid interest that is then worked into the
17 HAMP payments - - -

18 MR. SWANSON: Sometimes - - -

19 JUDGE WILSON: - - - or does - - - well, I'm
20 asking about this case.

21 MR. SWANSON: All right. So in this case, I
22 don't think it's in the record exactly what it was. But
23 what I can say to Your Honor is that it could have
24 represented escrow payments for real estate taxes, they
25 were recapitalized into the loan.



1 To understand exactly what this represents - - -

2 JUDGE WILSON: For an adjustment in the interest
3 rate, or was it an adjustable mortgage?

4 MR. SWANSON: My understanding is that - - - so
5 to step back. Under the HAMP program, HAMP followed what
6 it called waterfalls. And the idea behind the HAMP program
7 was to try and apply the waterfall to determine when you
8 could reach a certain percentage of the borrower's income.
9 It was set at thirty-five percent.

10 So the first task in the HAMP program was to
11 ascertain the borrower's income. Once that was
12 ascertained, you then had to figure out what was thirty-
13 five percent of the income so that you could make what
14 would be an affordable payment. And once you came to that
15 - - - once you came to that number, you then looked at the
16 debt. You capitalized all of the arrears, interest, escrow
17 payments, late payment - - - late fees were waived. And
18 then you brought the percentage interest rate down to two
19 percent. Two percent was the base line. And if you
20 brought it all the way down to two percent and you still
21 couldn't achieve that thirty-five percent affordability
22 level, you then had to do other things with the loan.

23 For example, the loan's maturity date could have
24 been extended. The loan could have been recast over forty
25 years. Sometimes that happens. It all depended upon the



1 specific circumstances of the mortgage. But the idea was
2 to reach the number at which you could make an affordable
3 payment for this borrower, and if you could reach that
4 number and do what was called a net present value test, and
5 this evidence is not in the record. I don't know what it
6 was here. But if that net present value test showed you
7 that it was more economically beneficial to - - -

8 JUDGE TROUTMAN: So what is the effect of what
9 happened here with the HAMP agreement?

10 MR. SWANSON: So the effect of what happened here
11 is that the HAMP - - - Mr. Jeanty did not qualify for a
12 HAMP permanent modification, but he did sign the trial
13 payment plan in an attempt to be evaluated for the HAMP
14 modification program. And under the trial payment plan, as
15 was just pointed out, there was no question about the full
16 principal indebtedness. The borrower's primary obligation
17 on the loan documents was to pay that full principal
18 indebtedness.

19 JUDGE TROUTMAN: But it says when you're - - -
20 you're signing onto the HAMP agreement, I can't pay. I
21 can't pay my mortgage. I'm behind.

22 MR. SWANSON: Right.

23 JUDGE TROUTMAN: So how does that translate into
24 an acknowledgement of the entire debt and willingness to
25 pay it?



1 MR. SWANSON: That's correct. So what you have
2 to do is when you look at a debt - - - a debt, a mortgage
3 debt, there's a bundle of rights. And those rights,
4 primary among the bundle, is the obligation to pay the full
5 principal indebtedness. That's the primary obligation.
6 And the mortgage contract is an alternative contract,
7 because it allows the borrower various methods by which
8 they could pay the full principal indebtedness. They could
9 pay it in monthly installment payments; perhaps over thirty
10 years. The borrower could pay the debt with liquid assets.
11 Perhaps refinance the property or perhaps they have the
12 cash. Or the borrower can pay the debt through the
13 property: sell the property, or in a foreclosure
14 proceeding where there's a judicial sale of the property.

15 But common to all four of those threads, Your
16 Honor, is the primary obligation to pay the debt. And that
17 is what is important for the General Obligations Law
18 analysis, because Mr. Jeanty would request - - -

19 JUDGE RIVERA: Right. So then if I'm
20 understanding you, your position - - - and you correct me
21 if I'm wrong - - - is that the agreement is a recognition
22 by the borrower - - -

23 MR. SWANSON: Right.

24 JUDGE RIVERA: - - - yes, I owe all this money,
25 but I can't pay at this level of installments. Perhaps we



1 can negotiate a different payment scheme. Is that why it's
2 still an acknowledgement of the debt because what they're
3 trying to do is come to an agreement so that they can
4 preserve their property interests?

5 MR. SWANSON: That's right. That's exactly
6 right.

7 So when the 2008 foreclosure complaint was filed
8 against Mr. Jeanty, the lender demanded immediate payment
9 in full, the second way that the primary obligation could
10 be satisfied. And Mr. Jeanty, through the trial payment
11 plan, was attempting to recapture his ability to make those
12 monthly payments and to discharge the very same obligation
13 in this very same manner. And the Third Department
14 recognized that in Grover where it said there is no new
15 debt here. We're not talking about a new debt. It's the
16 same debt. It's one primary obligation to pay that debt,
17 and that's what's been acknowledged in the agreement.

18 In the Fourth Department's case, Judge Troutman,
19 you were on the panel and asked the question was it signed.
20 It was signed here. It was not there.

21 In the Bradley v. New Penn Financial case, there
22 was an unsigned agreement. Here, we have a signed
23 agreement for Mr. Jeanty - - -

24 JUDGE WILSON: But not - - - but not signed by
25 the lender?



1 MR. SWANSON: That's right. And the General
2 Obligations Law 17-105 only requires that it be signed by,
3 "the party to be charged", which is the borrower here. So
4 it did not matter that it's not signed by the lender.

5 I'd also observe that we don't know if the
6 agreement was ever signed by the lender or not. We just
7 know that the agreement was put in the record in the court
8 below and nobody disputed that all the way until the Court
9 of Appeals briefing.

10 JUDGE GARCIA: Counsel, one of the things that
11 strikes me is in '08, credit assessor accelerates the
12 mortgage debt, right, files a foreclosure action. In '09
13 HAMP is signed, right. But you've got a clear acceleration
14 in '08. And then from '09 to at least 2014, the foot's
15 still on the gas on the foreclosure motion, right? So
16 you've never deaccelerated the loan in all of that time.

17 MR. SWANSON: I would say that the foot's not
18 still on the gas, Your Honor. If you look historically and
19 look at cases like *Albertina v. Rosbro*, traditionally, the
20 situation Your Honor described is exactly right: borrower
21 breaches, there's an acceleration, foreclosure. It's done
22 in a year. But we have a new regime since the financial
23 crisis, and what we do in this new regime that's come about
24 since the financial crisis is search for foreclosure
25 alternatives.



1 We have an entire part in the judiciary - - -

2 JUDGE GARCIA: That's in your control. It's in
3 control of the debtor, right. You could discontinue the
4 action and sign the HAMP agreement, right? You could send
5 a letter saying I'm deaccelerating my loan. They're not
6 mutually exclusive.

7 MR. SWANSON: We're in the process of attempting
8 to find those foreclosure alternatives through the HAMP
9 program through other - - -

10 JUDGE GARCIA: It seems like you want to keep
11 your options open, right? Well, maybe this will work, but
12 we still have a foreclosure action going.

13 MR. SWANSON: Well, it's happening during the
14 foreclosure process. In the 3408 settlement conferences in
15 the court it happens every day. So it's the foreclosure
16 process generally that triggers the parties to come
17 together and search for those foreclosure alternatives, and
18 this part - - -

19 JUDGE TROUTMAN: But it's still being accelerated
20 because that process is moving forward.

21 MR. SWANSON: The demand for - - - the demand for
22 payment in full is still there in the complaint, that's
23 correct, Your Honor.

24 JUDGE TROUTMAN: Right.

25 MR. SWANSON: So the borrower is trying to



1 recapture the ability to make installment payments.

2 JUDGE TROUTMAN: And until you deaccelerate, the
3 statute of limitations is going forward, correct?

4 MR. SWANSON: Until you deaccelerate - - - well,
5 the statute - - -

6 JUDGE TROUTMAN: If you accelerate by demanding,
7 by letter, or by suit that accelerates the loan. It's all
8 due, correct?

9 MR. SWANSON: That's correct, Your Honor. At the
10 moment of acceleration, the statute of limitations to
11 foreclose the mortgage.

12 JUDGE RIVERA: Are you revoking acceleration by
13 this attempt to try and negotiate salvaging?

14 MR. SWANSON: No. No, no. We're not revoking
15 the acceleration - - -

16 JUDGE RIVERA: Okay. Okay.

17 MR. SWANSON: - - - to the TPP. It's not being -
18 - - it's not a deacceleration. The TPP is a General
19 Obligations Law 105, promise to pay the debt signed by the
20 parties to be charged.

21 JUDGE GARCIA: Let's say that happens. Forget
22 the hypothetical. Same facts. The foreclosure action is
23 brought, and during the pendency of that foreclosure
24 action, the debtor makes a payment and says I want to pay,
25 I'm making this payment. Does that stop the statute of



1 limitations even though you never deaccelerate and you keep
2 going towards foreclosure?

3 MR. SWANSON: I don't believe it stops the
4 statute of limitations, but under Section 17-107 of the
5 General Obligations Law that would reset the statute of
6 limitations. So it would be renewed. Because as Your
7 Honor points out, it continues to run. So that payment
8 that gets made - - - and when we look at 107, the
9 interesting thing about 107 - - -

10 JUDGE WILSON: Is what you said applicable if the
11 payment is made before the statute of limitations has run
12 on the accelerated debt or only after?

13 MR. SWANSON: It's - - - it's made any time a
14 payment is made. The constraint in the statute is only
15 after - - - after which your claim has accrued. It's not
16 where your claim has expired. But the payment would revive
17 if it was after the statute had expired, and the payment
18 would reset if the statute is still running.

19 JUDGE TROUTMAN: But in order - - -

20 JUDGE RIVERA: It's your position these payments
21 in the HAMP agreement - - - the temporary payments fall
22 within that. That's your argument?

23 MR. SWANSON: That's right.

24 JUDGE RIVERA: The alternative argument on the
25 part of the - - -



1 MR. SWANSON: That's correct. Well - - -

2 JUDGE TROUTMAN: But for revival to occur, it has
3 to be accompanied by circumstances amounting to an absolute
4 and unqualified acknowledgment of the stay?

5 MR. SWANSON: The statute 17-107 in General
6 Obligations Law doesn't provide that. And what's
7 interesting about 17-107 - - -

8 JUDGE WILSON: What about the common - - - what
9 about the common law?

10 JUDGE TROUTMAN: It doesn't? The common law?

11 MR. SWANSON: The common law talks about it, but
12 it's not about mortgage foreclosure actions. When you look
13 at the case law, you look at - - - at the various cases,
14 the Lew Morris case, you look at *Petito v. Piffath*. Those
15 were not about foreclosures.

16 17-107 is the only statute in the scheme, aside
17 from 105, which specifically talks about mortgage
18 foreclosures.

19 JUDGE GARCIA: But weren't those cases talking
20 about 107, *Petito* and *Lew Morris*?

21 MR. SWANSON: They were talking about it kind of
22 as a sidebar, Your Honor. Because in *Petito* what you had
23 going on there was this very strange agreement where PNC
24 was paid a sum of money in exchange for the transfer of its
25 mortgage, I believe, to *Petito's* nominee, right. And what



1 this court said was the payment was on account of a
2 completely different obligation. It wasn't on account of
3 the mortgage debt. So where you have a payment that's on
4 account of the mortgage debt, you've got to look at 17-107
5 in the general statutes. And that 17-107 says that it
6 doesn't reset the statute only if it puts the burden on the
7 borrower to disclaim the intention if a written disclaimer
8 of intention is provided. And the legislative history,
9 this tells us why this is.

10 The legislative history says in almost all
11 jurisdictions in the country, the payment is a sufficient
12 acknowledgement to imply - - -

13 JUDGE TROUTMAN: And you're saying common law - -
14 -

15 JUDGE RIVERA: So let's say we disagree - - -
16 let's say we disagree with you, okay. Is that going to
17 encourage or discourage any particular type of action?
18 Perhaps, you'll do as Judge Garcia has suggested, you'll
19 just send a letter to protect your position moving forward.

20 MR. SWANSON: I'm not sure I understand.

21 JUDGE RIVERA: I'm trying to understand whether
22 or not a decision that is disfavorable to you, that it's to
23 affirm the decision below would discourage entering these
24 types of agreements, or you really find - - - as I say, one
25 - - - one - - - maybe as Judge Garcia has recommended to



1 protect your position.

2 MR. SWANSON: That's right, Your Honor. And the
3 decision that would affirm - - -

4 JUDGE RIVERA: This is meant to help both
5 parties.

6 MR. SWANSON: That - - - that - - -

7 JUDGE RIVERA: You get your money; they keep
8 their property, right?

9 MR. SWANSON: That's absolutely right. And Your
10 Honor points upon a give-and-take problem. We have this
11 new regime where we're looking for foreclosure
12 alternatives, and in the process, this new regime needs to
13 have that give-and-take.

14 JUDGE GARCIA: Could you get a toll under the
15 federal regs or - - - could you get a toll in exchange for
16 the HAMP signing? Did you toll the statute?

17 MR. SWANSON: That - - - that certainly would be
18 something that could be in the agreement, that's right.
19 There's no reason it couldn't.

20 JUDGE GARCIA: I see your time is up but - - -

21 ACTING CHIEF JUDGE CANNATARO: No, go ahead.

22 JUDGE GARCIA: - - - but with the Chief Judge's
23 permission, let's assume we don't agree with you on the
24 General Obligations Law and your arguing angle
25 discontinuance; what's the difference between the filing of



1 the motion to discontinue and the grant?

2 MR. SWANSON: So the difference, Your Honor, is
3 when you look at the Engel case, what the court was focused
4 on was the party's action, right, the party's action in
5 revoking the acceleration. That the court was not focused
6 upon the effect of the actual discontinuance.

7 I believe the question was asked about whether or
8 not the Newman v. Newman authorities in Engel should be
9 carried forward. And the response from the bench in oral
10 argument was I'm concerned that if we rely upon the Newman
11 v. Newman authorities, what is the impact of saying that
12 everything is nullified that ever happened in an action.
13 So this court, instead, focused upon the act of revoking
14 the election to accelerate, and the act is the most - - -

15 ACTING CHIEF JUDGE CANNATARO: And is making the
16 motion for a discontinuance, an affirmative act that - - -
17 that decelerates?

18 MR. SWANSON: That's right. It does everything
19 that the filing of the stipulation in Engel did. The only
20 thing was you had some judicial discretion - - -

21 JUDGE TROUTMAN: But is it enough to simply make
22 the motion when you're at - - - the courts are involved.
23 You have the ability by letter to say I deaccelerate. But
24 when you involve the courts, isn't it more - - - isn't more
25 required than simply the making of the motion itself?



1 MR. SWANSON: It only matters - - - only the
2 court's decision granting it matters if the reason that
3 Engel holds is because everything is nullified by the
4 judicial action, whether by stipulation or motion. But
5 this court focused on the intention of the party - - -

6 ACTING CHIEF JUDGE CANNATARO: So if you made the
7 motion and the court for whatever reason denied the motion,
8 you'd still have your deceleration because your act of
9 making the motion communicated your intent?

10 MR. SWANSON: If the court denied the motion,
11 you'd have a pending action so you wouldn't need it - - -
12 you wouldn't need to revoke the statute on the
13 deceleration.

14 ACTING CHIEF JUDGE CANNATARO: I think the
15 problem here is that unlike the situation which Judge
16 Troutman was saying where you serve a notice of
17 discontinuance, that is entirely within your control. But
18 you left - - - by making a motion, you left part of the
19 question up to the court, which is certainly not your
20 initiative, it's the court's.

21 MR. SWANSON: Sure. There's some discretion with
22 the court. And if we were to hold the rule that says it's
23 only when it's actually effective, then we're actually
24 looking at the Newman v. Newman case law, for the
25 proposition, the discontinuance occurs because of the



1 nullification.

2 ACTING CHIEF JUDGE CANNATARO: Well, I'm not
3 focusing on the effect of the order. What I'm saying is as
4 a statement of what your intent was through your actions,
5 you said I'm going to leave it to the court to decide. I'm
6 not - - - I'm not decelerating it. I'm going to wait for
7 an order that comes - - - that the - - - that effectively
8 decelerates it for me.

9 MR. SWANSON: I don't think you're leaving it to
10 the court's discretion. I think the CPLR constrains you to
11 have to seek your deacceleration, you revocation in that
12 manner.

13 ACTING CHIEF JUDGE CANNATARO: You didn't have to
14 make a motion though.

15 MR. SWANSON: Yes. Yes - - -

16 ACTING CHIEF JUDGE CANNATARO: You could - - -
17 you could have just discontinued, couldn't you?

18 MR. SWANSON: Because you had other parties
19 appearing. The CPLR requires a motion be made. It can't
20 be done just by a notice.

21 JUDGE WILSON: There's a difference between
22 making a motion and serving also, right? Those could be
23 done on two different times, and the party might not have
24 notice until it's served?

25 MR. SWANSON: That's correct. The CPLR - - -



1 JUDGE WILSON: So why shouldn't we make it
2 service instead of - - - even if we accepted your argument
3 - - - service instead of filing - - - the date of filing?
4 I mean, don't you want the borrower to have notice?

5 MR. SWANSON: Well, if you - - - if you look back
6 at the law, the question is not whether the borrower has
7 notice, and that goes back to *Albertina v. Rosbro* where you
8 can have an acceleration without the notice to the
9 borrower.

10 If you were delving into the intent in what the
11 lender is trying to accomplish, it's the act of bringing
12 that motion on through its service.

13 ACTING CHIEF JUDGE CANNATARO: Thank you,
14 Counsel.

15 MR. SWANSON: Thank you, Your Honors.

16 MR. MCCAFFREY: Good afternoon, Your Honors. May
17 it please the Court, Brian McCaffrey for the respondent.

18 I would like - - - I have my notes, but I would
19 like to jump right in at, I think, a very crucial point is
20 the running of the statute of limitations and the
21 acceleration is rather amorphous, isn't it? I mean, it's
22 not something we can really put our finger on. It's - - -
23 it's triggered in this case, as we've - - - I think all the
24 courts agree by the commencement of the foreclosure action.
25 So at that point, it starts running. It's tick, tick, tick



1 and it's going off, and it doesn't stop and it has six
2 years to run when it would expire.

3 Now, in this case, with this trial HAMP
4 agreement, our adversary wants to argue that by Jeantys and
5 Ms. Ingrid executing it, it's somehow resetting. I won't
6 use the word revived, because that would seem to be if it -
7 - - the statute hadn't expired. At that point, it had and
8 it was still early in the action of 2009. So he says it
9 reset it. But by the very language of the trial - - - the
10 agreement, it says this cannot be deemed as a
11 deacceleration and that the law will continue to
12 accelerate. So those two positions seem to be mutually
13 exclusive.

14 On one hand, the agreement - - -

15 ACTING CHIEF JUDGE CANNATARO: Well, but isn't
16 that the - - -

17 MR. MCCAFFREY: - - - says it's running - - -

18 ACTING CHIEF JUDGE CANNATARO: Counsel?

19 MR. MCCAFFREY: - - - and the other hand the
20 agreement says it was set back.

21 ACTING CHIEF JUDGE CANNATARO: I'm sorry; but
22 isn't his point with respect to that is that the signing of
23 the HAMP agreement is acknowledgement of the debt? It's
24 not the effect of the agreement itself. It's - - - it's an
25 acknowledgement under the General Obligations Law.



1 MR. MCCAFFREY: I - - - I think he's wrong. But
2 I think what he really needs to prove to the court is that
3 it reset and/or deaccelerated. But to answer that
4 question, I - - - I disagree that it is - - - and first of
5 all, it can't be just an acknowledgement - - -

6 JUDGE WILSON: Those are two different things,
7 right. The deacceleration and the resetting are two
8 different things, right?

9 MR. MCCAFFREY: No, I would sort of say they are
10 the same.

11 JUDGE WILSON: Well - - -

12 MR. MCCAFFREY: And when I say reset, it would
13 set it back to the beginning. But yeah, decelerate. In
14 other words, it's no longer running, it's no longer
15 accelerated.

16 JUDGE WILSON: Well, the - - -

17 MR. MCCAFFREY: And the only thing you could
18 maybe do that is - - -

19 JUDGE WILSON: I think they are - - -

20 MR. MCCAFFREY: - - - is to reinstate our loan.

21 JUDGE WILSON: - - - I think they are two
22 different things, right? If - - - if let's say three years
23 has run out of the six years, and then there's a HAMP
24 agreement, right, if we're saying it resets, that would
25 mean starting at the date of the HAMP agreement, you've got



1 a new six years, right?

2 If we say it decelerates it hasn't changed the
3 six-year statute of limitations. It simply has decelerated
4 the debt. So the coupons, if another four years go by,
5 let's say, the coupons that were due a long time ago,
6 they're still subject to that original six-year statute of
7 limitations. There is a difference between saying reset
8 and saying it's decelerated.

9 MR. MCCAFFREY: Decelerate, yes. I think
10 deaccelerated would be - - -

11 JUDGE WILSON: Well, what happened here?
12 Nothing?

13 MR. MCCAFFREY: Nothing. It - - - the agreement
14 wasn't countersigned.

15 JUDGE WILSON: You - - -

16 MR. MCCAFFREY: I understand my adversary has
17 pointed - - - it's to the party to be charged, but by - - -
18 by the - - - by the essence of the agreement it was I'm
19 making a - - - it's not a - - -

20 JUDGE WILSON: I guess I don't even look at this
21 as an agreement so much as an offer. Is that an incorrect
22 way to characterize it? You have to make three payments,
23 and then they get to decide whether they want to accept
24 this - - - that's the terms of you purchasing an offer. An
25 option essentially.



1 MR. MCCAFFREY: Well, it's an offer.

2 JUDGE WILSON: And it's a one-way option. They
3 can decline for whatever reason they want. It's not in the
4 record why they declined it. Counsel says it may actually
5 have been signed but we don't know that, we don't have a
6 signed version of it. So I view it as you having paid
7 three payments to see if they would accept your offer and
8 they declined your offer.

9 MR. MCCAFFREY: We actually made - - - I don't
10 know if it makes any difference - - -

11 JUDGE WILSON: Well, I do want to ask you about
12 that. I do want to ask you about that, because then
13 there's four gratuitous payments that are made outside of
14 the terms of the offer. What do we make of that in terms
15 of that either being sufficient legally to revive the debt,
16 or creating an issue of fact as to what the borrower's
17 intent was in making those payments?

18 MR. MCCAFFREY: I don't think that you can - - -
19 it's reasonable to think that - - - I can't say otherwise
20 before Your Honors that it wouldn't be - - - a reasonable
21 person couldn't say that the Jeantys may have had an intent
22 to - - - to recapture their ability, as my adversary put
23 it, to - - - under the mortgage rate to repay, but let's
24 look at other factors. The - - - the - - - and this is
25 what the court started off with when it asked Mr. Swanson,



1 the payment - - - the new - - - the old payments under the
2 note were principal and interest. That was 2,452 dollars.
3 Under the HAMP agreement, they're asking 2,553 dollars. So
4 it seems to have gone up. But actually it went down,
5 because under the - - - the original note and mortgage
6 agreement, it was principal, interest, taxes, and
7 insurance.

8 JUDGE GARCIA: But they know when they sign the
9 HAMP agreement, according to Judge Wilson's point when
10 they're making, especially, these four additional payments,
11 they know that if they don't get this deal, the offer isn't
12 accepted, that those are going to go towards original
13 mortgage payments, right?

14 MR. MCCAFFREY: Yeah.

15 JUDGE GARCIA: So why aren't they just at that
16 point, they're making four payments, they're kind of - - -
17 with the understanding that those are going to be applied
18 to the original amounts?

19 MR. MCCAFFREY: The Jeantys, my understanding is,
20 didn't know what was going to happen in the future. They
21 didn't know whether the bank was going to countersign or
22 not. In this case they didn't, or at least we don't have a
23 signed agreement. They don't - - - even in the HAMP
24 agreement it says the 2,553 might not be your final
25 payment. This is an estimate. It could have went up; it



1 could have gone down.

2 How could they make an unequivocal promise - - -

3 JUDGE RIVERA: Well, what they did - - - what
4 they didn't know - - - what they didn't - - -

5 MR. MCCAFFREY: - - - without knowing what the
6 end result might be?

7 JUDGE RIVERA: What they didn't know was whether
8 or not they were going to get out of this foreclosure and
9 be able to keep the property. That's what they didn't
10 know.

11 It strikes me what they do know when they entered
12 this agreement is that they have a debt, they're
13 recognizing the debt, and they're trying to negotiate a
14 payment that allows them to moving forward continue to pay
15 down that debt.

16 MR. MCCAFFREY: And I say that's a new agreement,
17 and this court in *Petito* said well, if you have a new
18 agreement then you're not - - - I'm not unequivocally - - -
19 I'm not - - -

20 JUDGE RIVERA: No, you don't - - - it's not - - -

21 MR. MCCAFFREY: Here's a promissory note; you
22 sign it.

23 JUDGE RIVERA: It is not a new agreement - - -

24 MR. MCCAFFREY: You start a new agreement.

25 JUDGE RIVERA: It's not a new agreement in the



1 sense that you don't have the terms, because they haven't
2 decided what the amount is going to be, correct?

3 MR. MCCAFFREY: I - - -

4 JUDGE RIVERA: But it is an acknowledgment of the
5 debt, because what you're doing is paying towards that.

6 MR. MCCAFFREY: This court has ruled in Batavia
7 that under 17-101 a mere acknowledgement is not enough. I
8 need an unequivocal promise to repay the entire future
9 amount.

10 One of the other things, Your Honor - - -

11 JUDGE TROUTMAN: Do you agree - - -

12 JUDGE RIVERA: But that's what I had asked him
13 before, so you can tell me if - - - if I misunderstood.

14 MR. MCCAFFREY: Well - - -

15 JUDGE RIVERA: Are they not - - - excuse me.

16 MR. MCCAFFREY: Sorry.

17 JUDGE RIVERA: Are they not still on the hook for
18 the entire amount of the mortgage or were they also
19 negotiating a lower debt?

20 MR. MCCAFFREY: Negotiating a lower debt. One of
21 the things that - - - and I don't think you did it on
22 purpose, but under the waterfall, one of the things that
23 could be is a principal reduction. I've got lots of HAMP
24 modifications eventually or other kinds of modifications
25 from borrowers where the Jeantys borrowed 384,000 dollars,



1 interest has accrued, we're going to make a deal, we're
2 going to change it in a lot of ways. We're going to extend
3 it forty months, we're going to - - - if you make twelve
4 consecutive payments, we'll reduce it by ten percent. Now,
5 your debt is only, whatever it is, 250,000 dollars.

6 So a lot - - -

7 JUDGE SINGAS: Yes, but fundamentally - - -

8 MR. MCCAFFREY: - - - is going to change this.

9 JUDGE SINGAS: - - - fundamentally, Counsel,
10 aren't they agreeing when they signed the HAMP agreement to
11 all the terms and obligations of the original loan
12 documents? How do you get around that?

13 MR. MCCAFFREY: Well - - - well, your - - - Judge
14 Singas, if you mean by that the other agreements that go
15 along with the modif - - - the mortgage agreement
16 continuing to occupy the property, continuing to pay taxes;
17 yes, but not as to the payments that are to be made. I - -
18 - the - - - they changed the payment in the HAMP agreement.
19 They changed it to 2,500 dollars. It was 2,400 dollars.
20 They said this is an estimate. We don't know. Well, this
21 could be - - - there could be a principal reduction. How -
22 - - I don't think you can make an unequivocal promise if
23 you don't know what you're going to get tomorrow.

24 ACTING CHIEF JUDGE CANNATARO: Well, that's the
25 point. You don't know what you're going to get, and in



1 this case they didn't get a modification, but they were on
2 notice when - - - when they signed - - -

3 MR. MCCAFFREY: Well, I have to - - -

4 ACTING CHIEF JUDGE CANNATARO: - - - the HAMP
5 agreement that yes. And not only that that might not - - -
6 that they might not get a modification, but if they didn't,
7 they would be left with the original loan agreement - - -

8 JUDGE SINGAS: And in fact - - -

9 ACTING CHIEF JUDGE CANNATARO: - - - and that's
10 what payments were applied towards.

11 JUDGE SINGAS: And in fact, the extra payments
12 were applied.

13 MR. MCCAFFREY: I can't ignore that happening,
14 that fact, but I still believe that he did not re-execute
15 his original promissory note. He was trying to enter into
16 a new agreement - - -

17 JUDGE TROUTMAN: When he signed - - -

18 MR. MCCAFFREY: - - - negotiation.

19 JUDGE TROUTMAN: When he signed the HAMP
20 agreement, he said I can't pay.

21 MR. MCCAFFREY: Yes.

22 JUDGE TROUTMAN: And I'm in default.

23 MR. MCCAFFREY: So how am I agreeing to pay if I
24 can't pay?

25 JUDGE GARCIA: But when you're making those four



1 extra payments, are you making them under the HAMP
2 agreement, because you only had to make three under that,
3 right?

4 MR. MCCAFFREY: I guess he was continuing on in
5 hopes that he was going to be given what - - -

6 JUDGE WILSON: That's - - - see that's what - - -

7 MR. MCCAFFREY: - - - he was promised.

8 JUDGE WILSON: See that's what gives me pause
9 here is when you start out by saying I guess that's why.
10 And when I look at our case law, particularly Crow v.
11 Gleason which suggests this is a question of fact, the
12 borrower's intent and why the borrower made payments
13 outside of the statute of limitations period and whether
14 that restarts the - - - you know, reaffirms and then
15 restarts it is a question of fact. When you start your
16 answer I guess why, what occurs to me is we can't be
17 guessing. If the record isn't complete, then there's a
18 factual issue.

19 MR. MCCAFFREY: Well, then I think what we have
20 enough on the record is that the most we can see is the
21 borrower's intent was to renegotiate his loan.

22 JUDGE WILSON: Well, not at the point where he's
23 make - - - where the HAMP offer has expired by its own
24 terms, right, and there's four additional payments made
25 well after that.



1 MR. MCCAFFREY: But the HAMP trial agreement
2 changed the terms.

3 JUDGE WILSON: Only for those three first
4 payments, no?

5 MR. MCCAFFREY: Well - - -

6 JUDGE WILSON: And it says if the - - - if it's
7 not accepted, if it's not signed and returned by a date
8 certain, it's done. It's over.

9 MR. MCCAFFREY: But the four payments that he
10 continued to make totaling the seven were also the 2,553.
11 He didn't go back and say, well, then I'll pay you what was
12 originally due under the note.

13 JUDGE WILSON: That sounds like a fact question,
14 doesn't it? Why?

15 MR. MCCAFFREY: But, it's a fact - - -

16 JUDGE WILSON: Why make it a payment - - -

17 MR. MCCAFFREY: - - - not a question, I think,
18 Your Honor.

19 JUDGE WILSON: Why make any payments at all?

20 MR. MCCAFFREY: It's a fact that that's what he
21 did.

22 JUDGE WILSON: Yeah, and why did he do it?

23 MR. MCCAFFREY: I can't say.

24 JUDGE WILSON: I can't say either.

25 MR. MCCAFFREY: I mean, I don't - - - I don't



1 have the machinations of Mr. Jeanty's mind. I can't go - -
2 - delve that deep. I wouldn't - - -

3 JUDGE RIVERA: Well, what's the - - - what's the
4 fact to find? He's paying them knowing they're going
5 toward the debt. It's a recognition of the debt that he
6 still owes this debt.

7 MR. MCCAFFREY: I can - - - I cannot concede that
8 point. I have to say that is a - - - if - - - if it is an
9 attempt to - - -

10 JUDGE RIVERA: If he wants to line the pockets of
11 Fannie Mae gratuitously? I mean, no.

12 MR. MCCAFFREY: Well, we had a - - - he had a - -
13 - he wanted to - - - he wanted to get out of foreclosure,
14 and he wanted to - - -

15 JUDGE RIVERA: Okay.

16 MR. MCCAFFREY: - - - be reinstated, but since he
17 never was reinstated, then I go back to my initial point,
18 then since - - - then the loan is never deaccelerated.
19 They're - - - those things are not mutually exclusive.
20 Those things tie hand in hand.

21 If they reinstate him, say you're no longer in
22 foreclosure, you're back to your monthly payments, they're
23 new, and you're now deaccelerated. That's what my
24 adversary point has my make here, is that there was a
25 deacceleration. I can't see that he can convince this



1 panel of that considering that it was never reinstated, and
2 hence, never deaccelerated. I think those two things are
3 inseparable.

4 ACTING CHIEF JUDGE CANNATARO: Thank you,
5 Counsel.

6 MR. MCCAFFREY: Thank you, Your Honor.

7 JUDGE TROUTMAN: Counselor, I wish to clarify
8 your argument.

9 Is it that the payments alone, absent a
10 disclaimer restarted the statute of limitations and the
11 Appellate Division improperly considered whether the
12 borrowers intended to pay the remainder of the debt?

13 MR. SWANSON: That's what - - - yes, for purposes
14 of 17-107 of the General Obligations Law. Subset of 107
15 and 105 set out two wholly independent ways that a debt may
16 be - - - the statute of limitations may be renewed.

17 105 speaks about a promise, right. 105 speaks
18 about a promise. And this court just held in Batavia that
19 101 doesn't apply to mortgage debt.

20 JUDGE TROUTMAN: So there's a question was asked
21 about going back for a hearing on - - - there being a
22 question of fact. Is it irrelevant as to what the intent
23 of the debtor is here?

24 MR. SWANSON: I believe that to be true. And if
25 you see on page 24 of our brief, we speak about the Law



1 Revision Commission's reasonings when this was passed, and
2 their reasonings, and I'll quote, "The effect of a part
3 payment is, in almost all jurisdictions, recognized to be
4 an acknowledgment of the existence of a larger debt from
5 which a promise to pay the balance can be implied so as to
6 remove it from the bar of the statute of limitations". So
7 17-107 has a unique feature. It then says, "Unless that
8 payment's accompanied with a disclaimer by the borrower",
9 and that wasn't true here.

10 So we have the implied promise by the payment.
11 The payment is sufficient. We need the disclaimer to not
12 reset the statute - - -

13 JUDGE RIVERA: Payments under the HAMP agreement,
14 post-agreement? Either? Both? Which one are you focusing
15 on?

16 MR. SWANSON: I would say it applies to all seven
17 payments, but especially the extra four payments.

18 JUDGE GARCIA: Counsel - - - I'm sorry. I didn't
19 mean to cut you off.

20 MR. SWANSON: No, Your Honor. I'd rather have
21 your question.

22 JUDGE GARCIA: I just have a question, maybe you
23 can answer this. But the last payment is made, even the
24 extended payments, in March 2010, why are you discontinuing
25 the action four years later? You could have foreclosed?



1 MR. SWANSON: I'm not certain of why it was
2 discontinued, Your Honor, and I don't believe that
3 information is in the record. I would only be speaking
4 from conjecture, but in my experience, oftentimes there may
5 be some procedural defect and, therefore, the lender elects
6 to discontinue an action as opposed to pursuing an appeal
7 of an adverse decision.

8 ACTING CHIEF JUDGE CANNATARO: Is it of any
9 significance that the motion was made days before the
10 statute of limitations was set to expire?

11 MR. SWANSON: It's significant because it wasn't
12 made after. It's significant for that reason. I don't
13 know that I could impute that to the decision-making that -
14 - - undertook below, but it was done before the statute
15 actually did expire. That's what's most - - -

16 ACTING CHIEF JUDGE CANNATARO: What was done? It
17 was filed? It was served?

18 MR. SWANSON: No.

19 ACTING CHIEF JUDGE CANNATARO: It was decided?
20 Which - - - what - - - what was done?

21 MR. SWANSON: It was - - - it was not decided. I
22 have a - - -

23 ACTING CHIEF JUDGE CANNATARO: Decided nominally
24 after the statute of limitations ran, right?

25 MR. SWANSON: That's correct. Okay. So it's



1 record 258 - - - record page 258, and - - - and my notes
2 say that it was filed.

3 ACTING CHIEF JUDGE CANNATARO: It was filed.

4 MR. SWANSON: That's right.

5 ACTING CHIEF JUDGE CANNATARO: And we don't know
6 on this record about when it was served, right? That's not
7 part of the record in this case?

8 MR. SWANSON: I think - - -

9 ACTING CHIEF JUDGE CANNATARO: Don't know when it
10 was served?

11 MR. SWANSON: I don't believe so. It's not part
12 of the record. The affidavit of service, of course, would
13 be court record.

14 JUDGE SINGAS: Does Engel require that?

15 MR. SWANSON: No, Engel, you just look at the
16 action in revoking, the action of the - - - the holder of
17 the option and their intent to revoke through their action,
18 and that is the filing of the motion or its service.

19 ACTING CHIEF JUDGE CANNATARO: Thank you,
20 Counsel.

21 MR. SWANSON: Thank you, Your Honors.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Federal National Mortgage v. Jeanty, No. APL-2021-151 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Ellen S. Kolman

Signature: _____

Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: October 23, 2022

