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COURT OF APPEALS
STATE OF NEW YORK

EVERHOME MORTGAGE COMPANY,

Appellant,

-against-

NUCHEM ABER,

Respondent.

NO. 85

20 Eagle Street
Albany, New York
October 19, 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:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: The next appeal is
2 number 85, Everhome Mortgage v. Aber.

3 MS. BLISS: Good afternoon, Your Honors. May it
4 please the court, my name is Mikelle Bliss, and I am
5 representing Everhome Mortgage in this appeal.

6 The key issue before the court today is whether
7 the Appellate Division erred in determining that the
8 information submitted by Equity in support of its motion
9 for summary judgment seeking to dismiss the action was
10 sufficient. We submit that the court did err.

11 The motion to dismiss was based entirely on an
12 allegation that Everhome had commenced an action in 2009,
13 and that as a result, the current action, commenced in
14 2015, was time barred. Once that allegation was
15 established, the burden shifted to Everhome to either
16 establish that the action was timely, or to raise a
17 question, an issue of fact, as to whether it was timely,
18 which would preclude the granting of the motion to dismiss.

19 Now this court held in Freedom Mortgage v. Engel,
20 that whether a foreclosure claim is timely cannot be
21 ascertained without an understanding of the parties'
22 respective rights and obligations under the operative
23 contracts, the note and the mortgage. The noteholders'
24 ability to foreclose on the property securing the debt
25 depends on the language in these documents.



1 JUDGE TROUTMAN: So what happened here?

2 MS. BLISS: So here, we introduced an opposition
3 to the motion to dismiss, a verified answer from Nuchem
4 Aber, the borrower and prior owner, who - - - the current
5 owner has - - - Equity has stepped into the shoes of - - -
6 which claimed that the thirty-day notice of default was not
7 properly served upon him, and as a result, the 2009 - - -
8 the mortgage was invalidly accelerated for failure to
9 receive that notice.

10 JUDGE GARCIA: Did you respond to that defense in
11 the original action?

12 MS. BLISS: The original action was actually
13 dismissed.

14 JUDGE GARCIA: But did you respond before it was
15 dismissed?

16 MS. BLISS: I - - - I don't recall. I - - - it
17 wasn't adjudicated on the merits. The action was actually
18 dismissed for failure to appear.

19 JUDGE GARCIA: By you?

20 MS. BLISS: Yes.

21 JUDGE GARCIA: And so, unlike the Wells Fargo
22 case and the Everhome decision, there's never a decision by
23 that first mortgage court on whether or not there's a
24 reason to dismiss the case for lack of notice, right? All
25 you have is an affirmative defense. We don't know from



1 what you've submitted whether or not Everhome ever
2 responded to that motion, what proof you put in, whether
3 you attached notices that you actually sent. You didn't
4 file any of that in the - - - in this action, right? We
5 don't know that.

6 MS. BLISS: We did not file any of that in this
7 action.

8 JUDGE GARCIA: So what you're asking is the later
9 court, essentially, to adjudicate the notice issue that you
10 didn't adjudicate in the first foreclosure action.

11 MS. BLISS: What we're asking the later court to
12 do is to take judicial notice of the verified answer that
13 was submitted to the court in the 2009 action, which,
14 because it was verified by Mr. Aber, has the same force and
15 effect under CPLR 105(u) as an affidavit, and he disputes
16 that he received the notice. Now - - -

17 JUDGE WILSON: But can we take - - -

18 MS. BLISS: - - - when we raised this - - -

19 JUDGE WILSON: Can we take judicial notice of
20 your subsequent filing that attaches the notices? That's
21 in the record of the court.

22 MS. BLISS: Any notices - - - I would submit to
23 the court, that that - - - first of all, that that was
24 raised in our opposition, whether or not the notices were
25 filed. They were not submitted to the court - - - the



1 trial court. The record before the trial court - - -

2 JUDGE WILSON: To this court, you mean.

3 MS. BLISS: Yes.

4 JUDGE WILSON: To this court.

5 MS. BLISS: To this court.

6 JUDGE WILSON: But not to the 2009 foreclosure
7 action, right?

8 MS. BLISS: Right.

9 JUDGE WILSON: They were submitted there, yes?

10 MS. BLISS: Right.

11 JUDGE WILSON: Can we take judicial notice of
12 something that was submitted in that proceeding?

13 MS. BLISS: You can. And my response to that
14 would be this. Any notice issued on behalf of Everhome - -
15 -

16 JUDGE WILSON: Um-hum.

17 MS. BLISS: - - - that would have been prior to
18 seventeen days before the commencement of the foreclosure
19 action, they would have had - - - they would have not had
20 authority to issue, because the assignment of mortgage into
21 Everhome was issued seventeen days before the 2009 action
22 was commenced. So Everhome would not have had standing - -
23 -

24 JUDGE GARCIA: So, I'm sorry - - - I - - -

25 MS. BLISS: - - - to issue any notice.



1 JUDGE GARCIA: I'm sorry. I thought you just
2 told me you didn't know if you filed a response to that
3 defense in the first action?

4 MS. BLISS: I wasn't sure if that actually was
5 responded to. I did look up last night that there were
6 notices that were of record.

7 JUDGE GARCIA: It seems the way your papers are
8 phrased here, that you know that those notices, as Judge
9 Wilson was saying, were sent by Everhome. So without
10 saying that you filed them, you're saying, well, if there
11 were notices, they were filed by the wrong company,
12 essentially. Right?

13 MS. BLISS: If there were notices, they were
14 filed by the wrong company. I - - - that - - - that issue
15 was not before the - - - the trial court, and the trial
16 court itself - - -

17 JUDGE GARCIA: You mean for submitting, it was -
18 - -

19 MS. BLISS: - - - was confined to the record in
20 determining the motion to dismiss. The - - - the point
21 they were trying to make is that on the motion to dismiss
22 in the trial court, the information that was submitted to
23 Judge Dear was not sufficient to warrant dismissal of the
24 action.

25 JUDGE RIVERA: But I'm a little confused about



1 this, the wrong parties submitting the notices. You're - -
2 - we're in assigning, right? You step into the shoes of
3 the assignor, or did I misunderstand that in the record?

4 MS. BLISS: You step into the shoes of the
5 assignor, but I - - - I - - - I don't - - -

6 JUDGE RIVERA: All right. So if they had issued
7 the notices, you'd take the case as it stands, no?

8 MS. BLISS: If Everhome had - - - had authority
9 to issue the notices, it would have accrued once the
10 assignment of mortgage was given to them. Anything prior
11 to that, they wouldn't have had standing to issue the
12 notices. Just as if a lender without an assignment
13 commences a foreclosure action, they don't have standing to
14 bring the action. It's the same - - - the same
15 proposition.

16 So with respect to the papers that were submitted
17 to Judge Dear on the motion to dismiss, the only thing that
18 was submitted was an unverified complaint. When we raised
19 the issue of 22(b) of the mortgage requiring that a
20 contractual notice of default be sent, we also raised - - -

21 JUDGE TROUTMAN: Was there an objection made with
22 - - - assuming for the sake of argument that the complaint
23 wasn't verified, was an objection made?

24 MS. BLISS: No. So Mr. Aber actually submitted
25 an affidavit in support of the motion to dismiss on reply.



1 There was no response made with respect to verification of
2 the complaint; the submission of the amended answer,
3 constituting a judicial admission that he did not receive
4 the default notices, was not addressed; and the issue of
5 the assignment of mortgage being given to Everhome only
6 seventeen days prior to the commencement of the 2009
7 action.

8 JUDGE WILSON: You seem - - - you seem to - - -

9 JUDGE RIVERA: He could've received the notice
10 and they're defective?

11 MS. BLISS: I'm sorry. I didn't hear.

12 JUDGE RIVERA: He could have received the notices
13 and they were defective?

14 MS. BLISS: He claimed that he did not receive
15 them, and - - -

16 JUDGE RIVERA: I know, but let's say - - -

17 MS. BLISS: - - - as a result, was not a valid -
18 - -

19 JUDGE RIVERA: - - - let's say that that is not
20 what the court found. But they could have still been
21 defective, right?

22 MS. BLISS: They could have been defective.

23 JUDGE RIVERA: Um-hum. So the fact of receipt
24 doesn't resolve the issue, correct? Because you agree that
25 under the agreement, the notices have to be effective.



1 They can't be defective - - -

2 MS. BLISS: Yes.

3 JUDGE RIVERA: - - - notices.

4 MS. BLISS: Yes. They have to be effective.

5 They have to provide thirty days of notice to cure, and
6 they have to - - - and then the borrower has to not respond
7 to the notices. And only until those notices are sent does
8 the right to foreclose occur.

9 JUDGE RIVERA: But I'm saying, the notices
10 themselves - - - let's - - - let's take one example.

11 MS. BLISS: Yes.

12 JUDGE RIVERA: The substance of the notice could
13 have been defective.

14 MS. BLISS: Yes.

15 JUDGE RIVERA: So the fact that they received a
16 defective notice would not have helped - - - would not have
17 satisfied, excuse me, the requirement under the agreement,
18 correct?

19 MS. BLISS: No, it would not have. And the
20 notices must be accurate.

21 JUDGE RIVERA: Okay.

22 JUDGE WILSON: So back to the verification for a
23 moment, isn't there in the record of the court a
24 verification by a Mr. Frank Cassara, the attorney,
25 notarized and submitted, verification of the complaint?



1 MS. BLISS: There - - - there - - - my
2 understanding as to what was submitted to the court to - -
3 -

4 JUDGE WILSON: To Judge Dear. To - - -

5 MS. BLISS: - - - was an unverified complaint.

6 JUDGE WILSON: To Judge Dear.

7 MS. BLISS: To Judge Dear, and we pointed out
8 that the complaint that was submitted to Judge Dear was
9 unverified.

10 JUDGE WILSON: But you're not saying that - - -

11 MS. BLISS: And it was not corrected on reply.

12 JUDGE WILSON: You're not saying that the actual
13 complaint filed in 2009 was unverified. You're saying that
14 Judge Dear didn't have in front of him proof that it was
15 verified.

16 MS. BLISS: Yes, that's what I'm saying.

17 JUDGE WILSON: Okay. And do you know whether it
18 was verified?

19 MS. BLISS: I do not, offhand.

20 JUDGE WILSON: Okay. And can we take judicial
21 notice of a complaint that is filed in the - - - in a court
22 of this state?

23 MS. BLISS: Yes, you may.

24 JUDGE WILSON: Okay.

25 MS. BLISS: I see that my time is running, so



1 just to sum up. The - - - the election to accelerate has
2 to made in accordance with the note mortgage. We do not -
3 - - we did not, in the trial court, need to establish for a
4 fact that the prior action was untimely. What was required
5 was to raise an issue of fact as - - -

6 JUDGE GARCIA: Counsel, I'm sorry to interrupt
7 you - - -

8 MS. BLISS: - - - to whether or not it was
9 untimely.

10 JUDGE GARCIA: - - - because I see your time is
11 almost up, but on this verification issue, I thought the
12 argument you made in the trial court was that it wasn't
13 verified with someone with personal knowledge, so
14 therefore, it couldn't be used under 3212(b). Not that it
15 wasn't sufficient to accelerate the mortgage as an initial
16 complaint, but that your complaint didn't - - - wasn't
17 sufficient or something like that, as proof under the
18 summary judgment standard for this action, right?

19 It wasn't - - - I don't see anywhere in the
20 record in the trial court where you made the argument that
21 the unverified complaint didn't accelerate the mortgage.
22 And I'm looking at page 115, I think, which is where you
23 really discuss this in the trial court, where you make your
24 argument, and it says that no one has personal knowledge of
25 anything because the affidavit isn't submitted by somebody



1 with personal knowledge. I think that's the argument
2 you're making here.

3 MS. BLISS: So, to clarify the - - - we made two
4 arguments based on personal knowledge. The - - - the
5 affidavit that was submitted by counsel in support of the
6 motion to dismiss was not based on personal knowledge. It
7 was an attorney - - -

8 JUDGE GARCIA: Right.

9 MS. BLISS: - - - affirmation that included
10 documentary evidence, but was not based on any personal
11 knowledge.

12 With respect to verification of the complaint, we
13 mention that at page 117 of the record, paragraph 99, where
14 we state that insofar as defendant's counsel relies on the
15 complaint and the prior foreclosure action to assert that
16 no payment or acknowledgment of the indebtedness has been
17 made, such a basis is insufficient. A review of the
18 complaint in the prior foreclosure action shows that the
19 complaint was not verified. And that - - -

20 JUDGE GARCIA: Right, but you didn't - - -

21 MS. BLISS: - - - statement was based on - - -

22 JUDGE GARCIA: - - - you didn't finish the
23 paragraph. The last sentence is, respectfully, plaintiff's
24 prior counsel would have no personal knowledge on the issue
25 of when Defendant Aber defaulted on the subject note or



1 which installment Defendant Aber was due for.

2 MS. BLISS: Yes.

3 JUDGE GARCIA: That's a different argument. I
4 mean, that's not an argument that it didn't accelerate the
5 - - - the mortgage foreclosure action. It's an - - - an
6 argument that plaintiff's prior counsel had no personal
7 knowledge on the issue of when defendant defaulted.

8 MS. BLISS: Well, the - - - the acceleration
9 argument, if I may, rests on whether or not the predicate
10 no - - - notice was properly sent, because the right to
11 accelerate the mortgage by virtue of that complaint does
12 not accrue until that notice is sent. And that issue was
13 specifically placed in dispute by Mr. Aber himself.

14 Now, Equity would have us disregard that in a - -
15 - an attempt to distance themselves from Mr. Aber, but they
16 filed a joint answer in this particular action. So for the
17 - - - for Equity to claim that he's not bound by Nuchem
18 Aber's answer specifically denying receipt of that
19 predicate notice is illogical.

20 ACTING CHIEF JUDGE CANNATARO: Thank you, Ms.
21 Bliss.

22 MS. BLISS: Thank you.

23 MR. FILOSA: Good afternoon, Your Honors, and may
24 it please the court, my name is Anthony Filosa of Rosenberg
25 Fortuna & Laitman. I represent the respondents.



1 The order of the Appellate Division should be
2 affirmed because all that this court's mortgage
3 acceleration jurisprudence requires in order for a lender
4 to exercise an optional acceleration clause is a
5 "unequivocal overt act" demanding immediate payment in
6 full. That is exactly what took place here when plaintiff
7 interposed the 2009 complaint and commenced the 2009
8 foreclosure action. The respondents - - -

9 JUDGE RIVERA: But that - - - isn't that
10 jurisprudence based on situations where there is not the
11 parties' agreement as to what has to occur before the
12 lender can seek to accelerate? And here, the parties
13 entered an agreement, saying the - - - it - - - it's
14 multiple stages. You got to go through these steps before
15 you can actually seek to accelerate.

16 MR. FILOSA: Certainly, and I - - - I'd like to
17 address the Engel language, since what - - - what Your
18 Honor is getting at. I - - - I would submit that it's an
19 oversimplification of this court's jurisprudence to simply
20 state that if the mortgage contracts require steps A and B
21 to accelerate, and if say, for instance, step B did not
22 occur, ipso facto, there was no acceleration. Without
23 first determining what the legal import of what in the eyes
24 of the law, is the missing step. So we must read that
25 Engel language in the context of this court's longstanding



1 contractual condition precedent jurisprudence.

2 So if the missing step is a contractual condition
3 precedent - - - so here, for the sake of argument, the
4 missing step was the thirty-day notice, that's a condition
5 precedent that the lender is obligated to perform. So
6 under our longstanding contract jurisprudence, a party
7 cannot seek to benefit from its own failure to perform a
8 condition precedent. It cannot rely upon or take advantage
9 of its own failure to perform a condition precedent.

10 Likewise, if that condition precedent is for the
11 sole benefit of one party - - - and here, I don't believe
12 there's a credible dispute, that a thirty-day notice which
13 essentially gives us more time to pay, is anything but for
14 the benefit of the borrower - - - only the borrower can
15 waive or - - - or excuse the absence of that condition
16 precedent. And that's exactly what transpired here.

17 I would also just echo, in terms of Engel, I
18 mean, I argued Engel. That Engel language arose in the
19 context - - - we have to recall, Engel had four companion
20 cases.

21 JUDGE RIVERA: All right. Let me just - - - but
22 okay. So they don't benefit from it, I understand your
23 argument on that. But they didn't, right? Because that
24 first action did not result in a foreclosure - - -

25 MR. FILOSA: Well, they can't - - -



1 JUDGE RIVERA: - - - correct? Correct?

2 MR. FILOSA: - - - they can't benefit by escaping
3 a statute of limitations bar here by pointing to their own
4 failure to serve a notice, and saying, oops, well, my prior
5 action really didn't accelerate the complaint - - - or
6 excuse me, the claim, when we have an unequivocal overt
7 demand in a complaint that was verified by the bank's
8 counsel.

9 JUDGE RIVERA: So what do - - - what do we make
10 if - - - if that action had been determined favorably to
11 the borrower? That indeed, they had not properly complied
12 with all of the steps?

13 MR. FILOSA: Right.

14 JUDGE RIVERA: And then they refiled. And now
15 it's outside the statute of limitations. Is the borrower
16 now bound - - -

17 MR. FILOSA: Well, if - - - if I'm understanding
18 - - -

19 JUDGE RIVERA: - - - by the prior decision, or
20 can they make some other argument and say, it doesn't
21 matter, because they were trying to accelerate; that was
22 their intent.

23 MR. FILOSA: If I'm understanding Your Honor's
24 question - - - is the question, had action number one been
25 disposed of successfully on Aber's affirmative defense - -



1 -

2 JUDGE RIVERA: Correct.

3 MR. FILOSA: - - - of lack of - - -

4 JUDGE RIVERA: Correct.

5 MR. FILOSA: - - - (indiscernible). I would
6 submit that the - - - the failure to satisfy a condition
7 precedent that's - - - that one party is obligated to
8 perform, they cannot benefit from. So they cannot obtain a
9 - - - escape in a statute of limitations defense. But
10 relate - - - I guess, relatedly here, I guess this is - - -

11 JUDGE RIVERA: But the statute of limitations
12 goes to whether or not they accelerated? I mean, you have
13 a court that says you didn't comply, and you didn't - - -
14 so you were not able to, and you - - - this is not a valid
15 acceleration.

16 MR. FILOSA: Right. But again - - - but again,
17 dovetailing back to what is an acceleration. An
18 acceleration is an overt demand - - - unequivocal demand
19 for immediate payment in full.

20 JUDGE RIVERA: Um-hum.

21 MR. FILOSA: I - - - I would submit again, Your
22 Honor, that's purely a hypothetical. Obviously, that's not
23 our facts here, where there wasn't a judicial invalidation
24 of the election in action number one. So I - - - that
25 dovetails with the Second Department's analysis here that,



1 where we don't have a judicial invalidation, that for that
2 additional reason, a lender cannot utilize court number two
3 to invalidate what did or did not take place in action
4 number one.

5 On the - - - on the judicial notice front, I
6 think that this - - -

7 JUDGE RIVERA: So then where does - - - I'm
8 sorry. Where would that leave them, then? That they now
9 cannot accelerate, but they can keep asking for the
10 installments if the time hasn't run out on any particular
11 installment, or what did I miss here?

12 MR. FILOSA: Well, if the - - - if the loan is -
13 - - if the loan was accelerated by action number one, and
14 our position is it was accelerated by action number one - -
15 -

16 JUDGE RIVERA: Okay.

17 MR. FILOSA: - - - then the entire debt became
18 immediately due and payable upon the commencement of action
19 number one.

20 JUDGE RIVERA: No, I got that. But let's stay
21 with that original hypothetical I had. What if it had been
22 decided in favor of the borrower?

23 MR. FILOSA: Right. Well.

24 JUDGE RIVERA: What does that mean for them?
25 They can keep asking, installment by installment? They



1 just can't then seek the full debt?

2 MR. FILOSA: I would still submit that again, the
3 failure of a condition precedent does - - - in this - - -
4 in this type of instance - - - this type of condition
5 precedent, which is really just a pre - - - procedural
6 prerequisite to suit, doesn't affect the accrual of the
7 cause of action.

8 JUDGE GARCIA: But why wouldn't that be Wells
9 Fargo part of Engel, where there was a successful motion
10 below? It was a different motion; it wasn't a - - -

11 MR. FILOSA: Right.

12 JUDGE GARCIA: - - - notice motion. But the
13 court determined it and that's it. And now you know you
14 didn't validly accelerate.

15 MR. FILOSA: Right.

16 JUDGE GARCIA: The court's determined that.

17 MR. FILOSA: Right.

18 JUDGE GARCIA: It's a different case, but why - -
19 -

20 MR. FILOSA: Well - - - well - - - again, Wells
21 Fargo v. Ferrato, failed under this court's unequivocal
22 overt demand test, because if we all recall, Ferrato had a
23 situation where a bank was attempting to accelerate
24 instrument one by making a demand under instrument two. So
25 - - -



1 JUDGE GARCIA: Right.

2 MR. FILOSA: - - - logically that's - - - you're
3 not - - - you're not - - -

4 JUDGE GARCIA: But the upshot of that was there
5 was no valid acceleration, which would be the upshot of no
6 - - - giving no notice.

7 MR. FILOSA: Well, I think the upshot there, I
8 think, if we're getting granular, is there was no
9 unequivocal overt demand for immediate payment in full
10 under the instrument. I think the presence or absence of a
11 condition precedent that's inserted solely for the benefit
12 of the borrower doesn't convert a demand and a complaint
13 that's otherwise unequivocal and overt - - -

14 JUDGE GARCIA: I think that's hard to square with
15 Engel's language that you have to accelerate according to
16 the terms of the mortgage.

17 MR. FILOSA: Right. But again, I think if we
18 take that to its - - - too far, then how do we reconcile
19 that with this court's contractual condition precedent
20 jurisprudence, which states that, again, a party cannot
21 benefit from its own failure to perform a condition
22 precedent. It's then are we - - - I guess, essentially,
23 those two rules can't peacefully coexist, if we're saying
24 there was no acceleration here, even though there was an
25 overt unequivocal demand for payment under the right



1 instrument, but we, the bank, just failed to perform a
2 condition precedent that we were obligated - - -

3 JUDGE GARCIA: Yeah, but that condition
4 precedent.

5 MR. FILOSA: - - - to perform.

6 JUDGE GARCIA: Like let's say the case with 150
7 feet of waterfront - - -

8 MR. FILOSA: Right.

9 JUDGE GARCIA: - - - and it was really 130 feet,
10 and you know. And you - - - you get to - - - get the
11 contract, because that's the seller's condition. That's a
12 little bit different than you make a motion and knock out a
13 lawsuit based on a - - - a failure to give notice, and
14 therefore failure to properly accelerate the debt. That's
15 a little bit different than I still get to buy the land on
16 130 acres of, you know, waterfront property - - -

17 MR. FILOSA: Well, I - - -

18 JUDGE GARCIA: - - - isn't it?

19 MR. FILOSA: I would still submit both fit this
20 court's definition of what a condition precedent is, and
21 I'm - - - I'm quoting from the IDT Corp. case from 2009.
22 It essentially adopts - - - and this court has long adopted
23 the restatement definition of what a condition precedent
24 is, "an act or event, other than a lapse of time, which,
25 unless the condition is excused, must occur before a duty



1 arises."

2 The operative phrase on this record is, "unless
3 the condition is excused." So this court can perhaps leave
4 for another day whether the hypothetical, had there been an
5 invalidation of the - - - of the - - - of the notice in
6 action number one, because that's not our case. Focusing
7 strictly on this record, the condition was excused. Mr.
8 Aber took the position in action number two, that the '09
9 action triggered the statute of limitations.

10 JUDGE WILSON: So just so I have your position
11 right on Judge Rivera's hypothetical. The loan is not
12 decelerated if your client wins on the - - - on the
13 condition precedent, right? And - - - hold on - - - and,
14 but - - - but then I'm asking, so could the - - - could the
15 lender the next day send a letter decelerating the loan?

16 MR. FILOSA: Yes.

17 JUDGE WILSON: Okay.

18 MR. FILOSA: Yes. Because under - - - under
19 Engel, yes, the - - - provided the active deceleration
20 occurs within the six-year limitations period, then yes,
21 the lender can deaccelerate.

22 I - - - I want to close on maybe one point with
23 respect to - - - well, again, on - - - on the allocation of
24 the burden of proof here, I just want to make - - -

25 JUDGE RIVERA: May I just - - - may I - - -



1 perhaps - - - for a second. I want to go to this point
2 about they can't benefit from their failure to comply from
3 the condition precedent, but yet, you're holding them to an
4 acceleration that you took the position had not validly
5 occurred. So how are you not trying to benefit from - - -

6 MR. FILOSA: No, it's not our position - - - it's
7 not our position - - -

8 JUDGE RIVERA: Okay.

9 MR. FILOSA: - - - that the loan - - - it's our
10 position - - -

11 JUDGE RIVERA: Okay.

12 MR. FILOSA: - - - that the loan was accelerated
13 with the filing of the 2009 complaint, because that
14 complaint contained an unequivocal overt demand for
15 immediately payment in full.

16 JUDGE RIVERA: But that's contrary to the
17 position you took in the action. That's what I'm saying.

18 MR. FILOSA: Well - - -

19 JUDGE RIVERA: How are you not trying to have it
20 both ways?

21 MR. FILOSA: Well, all right.

22 JUDGE RIVERA: Maybe not - - - to the extent that
23 you're arguing that they are trying to have it both ways -
24 - -

25 MR. FILOSA: Right.



1 JUDGE RIVERA: - - - right? Good. That's what I
2 understood your argument to be. I'm not clear on how
3 you're not trying to have it both ways, so both sides
4 perhaps a little fast and loose?

5 MR. FILOSA: Well, I - - - I would submit that
6 there's no judicial estoppel, if that's what Your Honor is
7 getting at, because again, we didn't prevail in the court
8 below on that affirmative defense, which again, I guess,
9 that - - - that leaves me to another thread - - -

10 JUDGE RIVERA: No, I'm - - - I'm getting to, why
11 not hold both parties to the paragraph? Or the paragraphs,
12 because they do cross-reference other paragraphs, but the
13 main one being 22, of course.

14 MR. FILOSA: Again, be - - -

15 JUDGE RIVERA: I want to hold you to it.

16 MR. FILOSA: Again, because what - - - or here, I
17 guess, this is where the validity of jud - - - no judicial
18 invalidation. Because again, had we prevailed, we would be
19 judicially estopped from taking a contrary position. You
20 can't win - - -

21 JUDGE RIVERA: Correct.

22 MR. FILOSA: - - - at case one, advance that
23 argument successfully, get a court to adopt it, and then
24 take a contrary position in - - - in - - -

25 JUDGE RIVERA: But we - - - we don't know what



1 the outcome would have been.

2 MR. FILOSA: Well - - -

3 JUDGE RIVERA: Right?

4 MR. FILOSA: But again, and that - - - but that's
5 the essence of the estoppel. That - - - that's why there
6 is no estoppel effect as against Mr. Aber here.

7 If - - - if I may on just one - - - one point
8 that I wanted to add before I address Justice Rivera's
9 question. There may be a low hanging fruit here on Hecker
10 v. State. There's an issue of whether a large number of
11 these issues are - - - are even reviewable by this court.
12 I mean, this court, I guess, is aware of the context in
13 which this case came before the court. There was a two-
14 justice partial dissent in the Appellate Division, so it's
15 appealable as of right.

16 However, you'll - - - I'll - - - I'll submit with
17 all due candor, you'll - - - you'll strain in futility to
18 find the phrase "condition precedent" solely for the
19 benefit of the borrower or one party prevailing on its own
20 failure to exercise a condition - - - to exercise condition
21 precedent, in the lower court record. So those weren't - -
22 - if they weren't raised before the lower court, and this
23 record appears that they weren't, they weren't preserved
24 for this court's appellate review.

25 So to the extent that the Appellate Division



1 based its order on those separate rationales, which it did
 2 - - - it's the primary rationales that the Appellate
 3 Division raised at record 386 - - - that must be deemed an
 4 exercise of the Appellate Division's interest-of-justice
 5 jurisdiction, which this court does not have. So under
 6 Hecker v. State, it - - - it would seem that the - - -
 7 there must be an affirmance, because - - -

8 JUDGE GARCIA: I don't - - - I don't see the - -
 9 - the Appellate Division writing exactly that way. It
 10 seems to me, they say that. They say it - - - you know,
 11 they're waivable by the - - - the borrower here. But the
 12 next paragraph, at least in terms of the thirty-day notice,
 13 is that they didn't waive it. They raised it. So the
 14 first part is interesting, but even if that's so, even if
 15 that's so - - -

16 MR. FILOSA: Right.

17 JUDGE GARCIA: - - - they didn't waive it here.
 18 You raised it as a defense in the first action.

19 MR. FILOSA: Right, well, I guess, if I can read
 20 the Appellate Division's mind, as lawyers are apt to do,
 21 they have several alternative grounds for their
 22 determination, right? I - - - if I'm understanding Your
 23 Honor's question, that really boils down to how narrow are
 24 we to define "the issue" or the rationale for preservation
 25 purposes and for Hecker purposes.



1 And I would submit an overly broad definition of
2 "the issue" or the argument, would arrogate Hecker itself,
3 and would ess - - - essentially have this court creating
4 for itself an interest-of-justice jurisdiction, which
5 constitutionally, it doesn't have, and by statute, it
6 doesn't have.

7 JUDGE GARCIA: No, I - - - I understand our
8 jurisdiction, but I just think the - - - the - - - the
9 issue I have with the Appellate Division is, in a - - - as
10 a - - - in a Hecker context, is they didn't rely on that.
11 I mean, you - - - even if you could waive, there was no
12 waiver here. So we can just decide, was it enough in
13 raising it in the answer, the way they have, that you've
14 submitted, was that enough to create an issue of fact. I
15 mean, that seems to me the issue that's before us.

16 MR. FILOSA: Right. Well, I guess, it - - - it
17 seems like the primary rationale advanced by the Appellate
18 Division being that - - - again, irrespective of whether it
19 was or was not served, if the - - - the bank, as the party
20 who had to perform that condition precedent, can't
21 essentially derive a benefit from its own, I believe, the
22 court used the term "breach", its own breach of a contract.
23 So with that, I'll rest, Your Honors. Thank you.

24 ACTING CHIEF JUDGE CANNATARO: Thank you,
25 Counsel.



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Everhome Mortgage Company v. Nuchem Aber, No. APL 2021-130 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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