At an IAS Term, FRP 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of August, 2022.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

----------X

1027 BELMONT AVENUE LLC,

Plaintiff,

-against-

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

----------X

DECISION, ORDER, AND JUDGMENT

Index No. 515228/15

Mot. Seq. Nos. 4-5

| The following e-filed papers read herein: | NYSCEF Doc No.: |
|---|---|
| Notice of Motion/Cross Motion, Affirmations, and Exhibits Annexed | 70-73; 75-92 |
| Affirmation in Opposition and Exhibits Annexed | 94 |
| Reply Affirmation | 96 |
| Letters to the Court | 97-98, 100 |

In this action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage, defendant Federal National Mortgage Association ("defendant") moves, and plaintiff 1021 Belmont Avenue LLC ("plaintiff") cross-moves, in each instance, for summary judgment (Seq. Nos. 4 and 5, respectively).

In the related (and since-discontinued) foreclosure action commenced on December 2, 2009 (*Onewest Bank, FSB v McKay*, index No. 30557/09 [Sup Ct, Kings County]) (the "foreclosure action"), defendant's assignor, Onewest Bank, FSB ("Onewest"), sought to foreclose its mortgage on the real property then owned by

plaintiff's transferor, Michael McKay ("McKay"). On February 13, 2014, and while the foreclosure action was pending, McKay transferred the underlying property to plaintiff in consideration of $1,000. On May 28, 2015, Onewest voluntarily discontinued the foreclosure action and canceled the notice of pendency. Onewest's subsequent (*i.e.*, post-discontinuance) litigation in the foreclosure action was precluded by order, dated February 16, 2017 (Knipel, J.), *affd* 172 AD3d 887 (2d Dept, May 8, 2019), on the grounds that its prior voluntary discontinuance of the foreclosure action had rendered moot all subsequent proceedings therein.[1] Meanwhile, the Court, by order, dated February 16, 2018 (Knipel, J.), stayed all proceedings herein pending the outcome of Onewest's appeal of the aforementioned February 16th order in the foreclosure action.

After the instant motion and cross motion were filed but before they fully submitted on August 9, 2022, the Court of Appeals issued a landmark decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021), *rearg denied* 37 NY3d 926 (2021) ("*Engel*"). There, the Court of Appeals, in (among other rulings) reversing the Second Judicial Department's holding to the contrary (163 AD3d 631 [2018]), held that a voluntary discontinuance of a foreclosure action *was* sufficient to de-accelerate a mortgage loan (*id.* at 31). As the Court of Appeals explained in *Engel*:

> "A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes

[1] Onewest's post-discontinuance litigation in the foreclosure action was prompted by the commencement of the instant action on December 16, 2015.

> an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder." (*id.* at 32).

*Engel*'s bright-line rule that the discontinuance of a foreclosure action automatically revokes a prior acceleration effected by the complaint in foreclosure displaced Second Judicial Department's earlier holdings that "require[d] courts to scrutinize the course of the parties' *post-discontinuance conduct* and correspondence to determine whether a noteholder meant to revoke the acceleration when it discontinued the action" (*Engel*, 37 NY3d at 30) (emphasis added).

Here, according full weight to *Engel*'s holding and its encyclopedic caselaw analysis, the Court holds that defendant's mortgage had been (and remained) valid and de-accelerated by virtue of its assignor's prior discontinuance of the foreclosure action in May 2015, or approximately seven months before plaintiff commenced this action in December 2015. Defendant's "post-discontinuance conduct" (*i.e.*, the position it had taken in the course of its *subsequent* appeal of the foreclosure action) did not, under the crystal-clear holding of *Engel*, revoke its earlier deacceleration by way of its voluntary discontinuance of the foreclosure action. The inescapable conclusion flowing from *Engel* (and as reinforced by its ample progeny) is that defendant's mortgage was *not* (and could *not* have been) time-barred when plaintiff commenced the instant action (*see Boreshesky v U.S. Bank Trust*, ___ AD3d ___, 2022 NY Slip Op 04892 [2d Dept, Aug. 10, 2022]; *see also Deutsche Bank Natl. Trust Co. v Fresca*, ___ AD3d ___, 2022 NY Slip Op 04948

[2d Dept, Aug. 17, 2022]; *U.S. Bank Natl. Assn. v Clair*, ___ AD3d ___, 2022 NY Slip Op 04927 [2d Dept, Aug. 10, 2022]).[2]

Accordingly, it is

**ORDERED** that defendant's motion in Seq. No. 4 is *granted*, and the complaint is *dismissed in its entirety* without costs and disbursements; and it is further

**ORDERED** that plaintiff's cross motion in Seq. No. 5 is *denied*; and it is further

**ORDERED** that defendant's counsel is directed to electronically serve a copy of this decision, order, and judgment with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision, order, and judgment of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

[2] Although subsequent legislation (S-5473D) seeking, among other things, to overrule *Engel* passed both the New York Senate and Assembly, it was returned to the Assembly on May 3, 2022, and, as of the date of this decision and order, was not delivered to the Governor for consideration (*see* https://www.nysenate.gov/legislation/bills/2021/s5473#:~:text=The%20aim%20of%20the%20bill, mortgage%20banking%20and%20servicing%20institutions) (last accessed Aug. 29, 2022).