Louis Civello, Jr.,	:	
	:	**Superior Court of**
Plaintiff-Respondent,	:	**New Jersey**
v.	:	**Appellate Division**
	:	
Vadim Chepovetsky, and Spouse Of Vadim Chepovetsky; John Doe 1 : (Name Being Fictitious) Tenant / Occupant; John Doe 2 (Name Being Fictitious) Tenant / Occupant; John Doe 3 (Name Being Fictitious) Tenant / Occupant; John Doe 4 (Name Being Fictitious) Tenant / Occupant; Jane Doe 1 (Name Being Fictitious) Tenant / Occupant; Jane Doe 2 (Name Being Fictitious) Tenant / Occupant; Jane Doe 3 (Name Being Fictitious) Tenant / Occupant; Jane Doe 4 (Name Being Fictitious) Tenant / Occupant; Svetlana Nashtatik; Julia Maizlik; Simio & Jones Llp; Platinum Credit Resources LLC; Nii A. Okyne; State Of New Jersey; Ltd Acquisitions, LLC; Paymentech, LP D/B/A Chase Paymentech; Heather M. Brito,	:	**No. A-000324-24 T2**
	:	
	:	**Civil Action**
	:	
	:	**On Appeal from Final Judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County**
	:	
	:	**Docket No. Below: F-004193-23**
	:	**Sat Below: Hon. Lisa M. Vignuolo, P.J.Ch.**
Defendants.	:	
_____	:	
	:	
Vadim Chepovetsky, and Svetlana Nashtatik,	:	
	:	
Defendants-Appellants	::	

BRIEF OF DEFENDANTS-APPELLANTS (CORRECTED)

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Statement of Items Submitted to the Court Below on the Summary Judgment Motion

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Notice of Motion for Summary Judgment (filed January 29, 2024)	Yes	155a
Plaintiff's Statement of Undisputed Material Facts (extracted from Plaintiff's Brief in Support of Motion for Summary Judgment) (filed January 29,2024)	Yes	157a
Certification (of Louis Civello, Jr.) (filed January 29, 2024)	Yes	161a
Exhibit A to Certification of Louis Civello, Jr., promissory note (filed January 29, 2024)	Yes	164a
Exhibit B to Certification of Louis Civello, Jr., Mortgage (filed January 29, 2024)	Yes	169a
Exhibit C to Certification of Louis Civello, Jr., Guaranty (filed January 29, 2024)	Yes	177a
Exhibit D to Certification of Louis Civello, Jr., checks from Bayview Auto (filed January 29, 2024)	Yes	182a
Exhibit E to Certification of Louis Civello, Jr., Notice of Intention to Foreclose (filed January 29, 2024)	Yes	186a
Exhibit F to Certification of Louis Civello, Jr., Order for Final Judgment on Remand (highlighting as on filed exhibit) (filed January 29, 2024)	Yes	207a
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Exhibit 1 to Certification of Counsel in Support of Motion for Summary Judgment, Complaint (filed as exhibit January 29, 2024)	Yes	27a, 243a,
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Exhibit A to Attorney Certification (in reply on motion for summary judgment), Order for Final Judgment on Remand	Yes	207a, 385a
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Exhibit C to Attorney Certification (in reply on motion for summary judgment), Svetlana Nashtatik's Response to Defendant's Interrogatories in *Chepovetsky et. al v. Civello*, Chancery Division, Middlesex County, Docket No. C-8-19	Yes	399a
Exhibit D to Attorney Certification (in reply on motion for summary judgment), Transcript of August 27, 2021 in *Chepovetsky et. al v. Civello*, Chancery Division, Middlesex County, Docket No. C-8-19	Yes	420a
Exhibit E to Attorney Certification (in reply on motion for summary judgment), June 16, 2022 decision in *Chepovetsky et. al v. Civello*, Appellate Division Docket No. A-0476-21	Yes	434a
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PRELIMINARY STATEMENT

This is a belated action brought by Plaintiff, Louis Civello, Jr. ("Civello") in retaliation for Defendants, Vadim Chepovetsky ("Chepovetsky") and Svetlana Nashtatik ("Nashtatik") (collectively, "Mortgagors" and "Defendants") having brought an action to quiet title to the subject property and having successfully challenged and defeated Civello's counterclaim for personal liability in a prior action, *Chepovetsky v. Civello,* Docket No. C-08-19, Chancery Division, Middlesex County. In that prior action, Civello studiously avoided asserting a claim to foreclose the Mortgage that is the subject of this action. Indeed, it was not until after Civello's claim for personal liability on the guaranty was rejected by the Appellate Division that Civello commenced an action to foreclose the Mortgage.

The defense to the foreclosure action includes the defense that the purported signature of Nashtatik on the Mortgage is fraudulent. The fraudulent nature of the signature is supported by a number of facts, including, but not limited to, Nashtatik's denial of the signature, that the signature did not match other valid signatures by her, that it could not have been validly notarized because she never even met the purported person taking an acknowledgement of the signature, that the mortgage was not and could not have been signed by her since Civello's story of how it was signed was not possible because she was not and could not have been at the alleged signing

at the time it was supposedly signed. Additionally, there are multiple irregularities in the purported acknowledgment of her signature indicative that the notarization was phony. It is submitted that Civello was fully aware at all times that the signature was a forgery, which explains why he attempted to avoid foreclosure until his action for personal liability was rejected on appeal. Only then, with no other alternative, Civello decided to risk pursuing a foreclosure action based on a forged mortgage.

The Court below seriously erred when it placed the burden of proof on the Defendants after they had produced sufficient evidence to overcome any presumption of validity that might exist as a result of the fraudulent notarization and acknowledgment, and Civello produced no evidence (let alone clear and convincing evidence) other than his self-serving account of events that did not take place.

PROCEDURAL HISTORY

For the sake of brevity of the appendix, a number of the background facts are taken from the reported Appellate Division Opinion in the related matter of *Chepovetsky v. Civello*, 472 N.J. Super. 631 (App. Div., 2022).

This is an action to foreclose a mortgage allegedly granted by Vadim Chepovetsky and Svetlana Nashtatik to Louis Civello, Jr., in 2007. *Chepovetsky v. Civello*, 472 N.J. Super. 631, 638 (App. Div., 2022). The mortgage was issued as

security for a guarantee granted by Vadim Chepovetsky in support of the purchase of a business from Civello by a third person. *Id.* DA at 171a. The mortgage expressly provided that payment was due no later than February 22, 2012. *Id.*

In 2011, both Mortgagors filed for Chapter 7 Bankruptcy and were granted a discharge in bankruptcy from all personal liability on any debts or obligations. *Id.* at 640.

In 2019, after no action was commenced to foreclose on the mortgage within the next six years after the maturity date of the mortgage, the Mortgagors commenced an action to quiet title based on the statute of limitations. 472 N.J. Super. at 640; DA-388a. In that action, Civello did not assert any claim for foreclosure, but instead chose to sue Chepovetsky personally on the guaranty. In 2021, the trial court entered a personal judgement against Chepovetsky on the guaranty; but upon becoming aware of his bankruptcy, the trial court vacated the personal judgment and in the course of vacating a default that had been entered against the Mortgagor stated in dicta that the limitations of both *N.J.S.A.* 2A:50-56.1(a) and 2A:50-56.1(c) barred any action on the mortgage. *Id.* at 640-644. During the course of an interlocutory appeal, Civello asserted for the first time that subsection (c) of *N.J.S.A.* 2A:50-56.1 did not bar a foreclosure action because the effective date of subsection (c) was in 2019.

On remand, the trial court held that subsection (a) of *N.J.S.A.* 2A:50-56.1 did not bar the action even though subsection (a) became effective in 2009, the maturity date was not reached until 2012 after the effective date of subsection (a) of the statute, and no action to foreclose was commenced within the next six years following the maturity date of the mortgage. The trial court also fixed the amount due on the mortgage. DA-208a *et seq*. The Appellate Division affirmed that ruling in *Chepovetsky v. Civello*, Appeal No. A-2153-22 (July 3, 2024). DA-575a.

It was not until April 5, 2023, more than 10 years after the maturity date of the mortgage and after the trial court held that the six-year statute of limitations running from the maturity date of the mortgage did not bar a foreclosure action, that Civello commenced an action for foreclosure of the Mortgage. DA-27a. In response to the foreclosure, Mortgagors asserted various defenses, including that the action was barred by *N.J.S.A.* 2A:50-56.1(a) and that the alleged signature of Nashtatik on the mortgage was a forgery. DA-145a *et seq*. A motion for summary judgment made by Civello was heard on March 1, 2024, and resulted in an order granting summary judgment that was entered on March 4, 2024. DA-1a. Thereafter, Judge Vignuolo granted reconsideration of that order based upon the existence of disputed facts in this action relating to the validity of Nashtatik's signature on the mortgage. DA-483a. The trial court held a hearing on May 30, 2025, with respect to the

signature on the Mortgage. *See*, 2T,[1] previously filed in this appeal. On July 23, 2024, the trial court issued its decision granting summary judgment to Civello. DA-21a. On July 31, 2024, Mortgagors filed their Notice of Appeal (which was subsequently amended on August 5, 2024) and assigned Docket No. A-003754-23T4. On August 5, 2024, the Clerk's office issued a "Non-Finality Letter" to which Mortgagors filed a responding letter on August 5, 2024, showing why the July 23, 2024, decision is a final decision. By Order dated September 6, 2024, the Appellate Division dismissed the appeal as being from a non-final order, and denied the motion by Chepovetsky and Nashtatik for leave to appeal.

On September 27, 2024, the court below entered its Final Judgment. DA-23a. On October 2, 2024, this appeal was filed. DA-559a.

STATEMENT OF FACTS

Defendants, Vadim Chepovetsky and Svetlana Nashtatik, resided in the property known as 11 Yellowstone Drive, Old Bridge, New Jersey (the "Subject

[1] There are four transcripts in this matter. The dates of the transcripts and their abbreviated designation herein are March 1, 2024 ("1T"), May 30, 2024 ("2T"), July 23, 2024 ("3T") and September 27, 2024 ("4T").

Property"). Nashtatik currently occupies the Subject Property. DA-381a. Chepovetsky no longer resides at the Subject Property. *Id.*

On January 23, 2007, Artem Boguslavskiy executed a Promissory Note for $184,000, borrowed from Plaintiff Louis Civello, Jr. for the purchases of a used car dealership from Civello, and promised to pay $4,000 per month. DA-165a; DA-381a. The Note refers to payment of $4,000 per month for the business, reflected by the checks produced in Plaintiff's motion herein. The checks were all from Bayview Auto and Truck Inc. and Bayview Auto, the used car dealership that Boguslavskiy was purchasing from Plaintiff. DA-182a.

Chepovetsky, but not Nashtatik, signed a Guaranty to Plaintiff on January 23, 2007, for payment of the Promissory Note if Boguslavsky failed to pay it. DA-178a *et seq.*; DA-381a. The Guaranty refers to Boguslavskiy's Stock Purchase Agreement with Plaintiff. DA-178a.

Chepovetsky, but not Nashtatik, signed a mortgage to Plaintiff (the "Mortgage"), on or about January 23, 2007, as collateral on the Guaranty and refers to Boguslavskiy's loan. DA-169a *et seq.*; DA-381a. The maturity date of the Mortgage was February 23, 2012, and that maturity date was not extended by any written agreement. *Id.* Nashtatik had never agreed to a mortgage to be used as collateral for the Guaranty of January 23, 2007. *Id.*

Nashtatik's signature on the mortgage document was forged and the signature that was recorded is not her signature. DA-381a; DA-382a. She never met the alleged notary, Katherine D. Bowers, that purportedly signed the Mortgage, nor went to the attorney's office that prepared the Mortgage for the purpose of signing the Mortgage document. DA-382a. To Nashtatik's knowledge, the attorney that prepared the Mortgage document did not represent her. DA-381a; DA-382a.

Nashtatik was not asked for her driver's license or for any other form of identification by any notary, Katherine D. Bowers, or otherwise, for the purpose of signing the Mortgage document. DA-382a. Further, Katherine D. Bowers is not listed on the list of notaries in New Jersey when searching the New Jersey Treasury Department for a list of notaries online using her last name. The list included those with expired commissions. DA-277a, DA-313a.

Nashtatik was not with Plaintiff when the Mortgage or any other documents were signed. DA-382a.

The purported acknowledgement on the mortgage document is false because Nashtatik: (i) did not sign the mortgage, (ii) never appeared before the purported notary, and (iii) never acknowledged the signature. Therefore, the mortgage document that Plaintiff relies upon is invalid because (a) it was not signed by Nashtatik, (b) the signature purporting to be hers is not her signature but a forgery, and (c) the "acknowledgement" on the mortgage fails to comply with the statutory

requirements for an acknowledgement of a mortgage, and (d) the "acknowledgement" on the mortgage document is false, if not an outright forgery. The signatures on the purported mortgage were not witnessed by anyone other than the alleged notary.

Plaintiff's counsel, in a Certification in Opposition to Vacate the Default of the Defendants, provided copies of Nashtatik's signature, dated July 11, 2019, from Nashtatik's discovery responses in the quiet title action, *Vadim Chepovetsky and Svetlana Nashtatik v. Louis Civello, Jr.* in the Superior Court of New Jersey, Middlesex County, Chancery Division, under Docket No. MID-C-8-19. DA-279a *et seq*.; DA-306a *et seq*.; DA-382a. Nashtatik has stated in her Certification that the July 11, 2019 signatures are her signatures. DA-382a. Significantly, at page 5 in Civello's Supplemental Brief dated August 26, 2022, in the quiet title action, *Vadim Chepovetsky and Svetlana Nashtatik v. Louis Civello, Jr.,* Civello took the position that between those July 11, 2019 signatures and the Mortgage, one set was clearly a forgery. Nonetheless, in this matter, the Court held that the exemplar signatures were genuine.

Civello's attorney also provided copies of signatures from the County Clerk which purported to be her signature, including the allegedly Bowers-notarized signature. DA-310a; DA-382a. Also, there is another mortgage from August 9, 2004. DA-315a. The Nashtatik signature on that mortgage does not match the

Katherine D. Bowers notarized signature. Compare, DA-318a with DA-174a. Nashtatik has consistently denied that the Bowers-notarized signature is hers. DA-382a.

The various exemplars of Nashtatik's signatures are not the same as the one on the Mortgage. For example, while the letter "S" is similar, there are 4 or 5 more letters on the last 2 signatures. DA-382a. Civello provided no evidence that the signatures which Nashtatik stated were her signature were the false ones. Civello did not provide any report from a handwriting expert even though Nashtatik's certification was sufficient to overcome any presumptions that her signature on the Mortgage was valid.

Nashtatik also denied that she signed the Mortgage in the Defendants' Request for Admissions and Answers to Interrogatories dated November 23, 2023. DA-382a; DA-323a; DA-331a.

The court below agreed that the various purported signatures on the Mortgage and exemplars differed. 3T at 9:15 – 10:18. Nashtatik was consistent in denying that she signed the Mortgage or ever met the alleged notary, and fully contradicted Civello's story of how the Mortgage was signed. 2T at 28:15 – 41:17. She was consistent in her testimony that she was working in New York on the day that the Mortgage was allegedly signed in person before a notary in New Jersey. 2T at 64:20 – 68:14. That testimony was uncontradicted, and was corroborated by the fact that

she worked Mondays through Saturdays, the alleged date of the Mortgage was a Tuesday that year, that the alleged date of the Mortgage signed was just 3 days before Nashtatik's birthday, and that she was never away on vacation during the week of her birthday. *Id*. Moreover, as to a statement made in a complaint in another action which indicated Nashtatik signed the mortgage, and on which the court below heavily relied in rendering its decision, the uncontroverted evidence was that Nashtatik never saw that complaint and would have had that statement corrected if she had seen it. 2T at 60:18 – 61:16; 63:8 – 64:63.

Chepovetsky's testimony corroborated Nashtatik's testimony, that she was never presented with or signed the Mortgage and that the Mortgage was signed at a diner and not signed before a notary in a real estate office as claimed by Civello. 2T at 23:8 – 26:6.

The evidence at trial was sufficient that the allocation of the burden of proof on Nashtatik and Chepovetsky, and the raising of that burden to one of "clear and convincing" evidence, produced an erroneous decision that cannot be sustained.

In this action, Chepovetsky and Nashtatik denied the validity of Nashtatik's signature on the Mortgage, and pled as defenses both that it was a forgery and that the statute of limitations for this foreclosure action had expired before it was commenced. The court below denied the defense of the statute of limitations in its

Order of March 4, 2024 (DA-1a *et* seq.) and denied the defense of forgery in its Order of July 23, 2024 (DA-21a).

With respect to the issue of the signature on the Mortgage, the court below placed the burden of proof on Nashtatik and Chepovetsky. 3T at 7:1-4 ("It being Defendant's burden . . . to establish that her signature is, in fact, a forgery"). The court below also held that the burden placed on them was one of clear and convincing evidence. 3T at 6:11-20. In denying the assertion that Nashtatik's signature on the mortgage was a forgery, the court below clearly held that the basis of that ruling was that Nashtatik and Chepovetsky failed to prove that the signature was a forgery. 3T at 11:19 – 12:3; 13:2-3. This basis for the decision below was reiterated by the court below in the September 27, 2024 hearing. 4T at 5:12-15.

ARGUMENT

POINT I

THE SUMMARY JUDGMENT BELOW MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED WHEN IT PLACED THE BURDEN OF PROOF ON THE DEFENDANTS

(Burden of Proof Placed on Defendants at 3T at 7:1-4; 11:19-12.3; 13:2-3; and 4T at 5:12-15. Placement of Burden of Proof on Defendants Opposed in Post-hearing Brief at pp. 3-6)

A. The Standard Of Review of Summary Judgments.

Appellate courts review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. *Samolyk v. Berthe*, 251 N.J. 73 (2022); *Stewart v. N.J. Tpk. Auth./Garden State Parkway*, 249 N.J. 642, 655 (2022); *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021). The appellate court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). Under *Brill*, granting a summary judgment requires "evaluation, analysis or sifting of evidential materials as required by *Rule* 4:37-2(b) ***in light of the burden of persuasion that applies*** if the matter goes to trial." *Id.* (emphasis added). Summary judgment will be appropriate "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be

considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2." *Id*.

B. The Proof Required to Support the Judgment was Not Established.

The validity of the mortgage is one of the material issues in the foreclosure proceeding. *Great Falls Bank v. Pardo*, 263 N.J. Super. 388 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994), citing *Central Penn Nat'l. Bank v. Stonebridge, Ltd.*, 185 N.J. Super. 289, 302 (App. Div. 1982). The other material issues are the amount of indebtedness, and the right of the mortgagee to resort to the mortgaged premises. *Id*. Defendants' meritorious defenses in a foreclosure action include fraud, which is the pertinent meritorious defense for the purposes of the within action as the Mortgage document was obtained through fraud, in addition to being barred by the statute of limitations.

Nashtatik came forward with evidence that she never signed the Mortgage that Civello is trying to foreclose upon, and that the signature was fraudulent. Not only did she so testify under oath, but there are several other samples of her purported signatures and they do not match the one on the Mortgage. In particular, the notarized signature from the August 9, 2004 mortgage does not match the signature on the purported Mortgage document from 2007 that Civello claims Nashtatik

signed.[2] It does not match any other exemplar either. Plaintiff has never submitted any handwriting expert to show that the alleged Mortgage signature from 2007 was Nashtatik's signature and she has maintained that it was not.

In addition, there are issues with the alleged notary, which are important in that Nashtatik has never signed the Mortgage. Nashtatik has never met the notary, Katherine D. Bowers, and has never been to the attorney's office who prepared the document for the purpose of signing a Mortgage. She was never asked for any proof of who she was, such as a driver's license. The notary herself does not appear on a list of notaries on-line from the New Jersey Treasury Department when her last name is searched (and which includes expired commissions) (DA-277a, DA-313a). Additionally, there are problems due to the irregular form of the notarization. For example, the notarization does not state where the document was signed, which is something that a notarization is required to have and which a genuine notary would be expected to know. Indeed, the "notarized" "acknowledgement" itself is another fraud and forgery that infects the mortgage to its core.

Because of these issues, the Mortgage document from 2007 is not a valid document. As such, there were genuine issues of material fact and the Motion for

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[2] Since that signature was also notarized, it is entitled to the same presumption of genuineness that Civello claims for the signature on the Mortgage.

Summary Judgment and to strike the Answer to the Complaint should have been denied.

It is a cardinal principle that issues of fact cannot be decided by the judge on a motion for summary judgment. In circumvention of this rule, the court below held a bench hearing on the issue. However, the response of Nashtatik and Chepovetsky to the Complaint was entitled "Defendants' Answer, Separate Defenses, and Jury Demand," and the court simply usurped the power of the jury to make the determination of fact.

C. The Court Below Erroneously Placed the Burden of Proof on the Defendants.

More important, the court below misplaced the burden or proof as it relates to the signature. To obtain relief in a mortgage foreclosure action, the mortgagee must establish, among other things, that the mortgage and loan documents are valid. *See*, *Great Falls Bank v. Pardo*, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994); *Somerset Trust Co. v. Sternberg*, 238 N.J. Super. 279, 283-84 (Ch. Div. 1989). The effect of a forged signature on a mortgage is that the forged document is null and void. *See*, *Cornell v. Moussavian*, 2011 N.J. Super. Unpub. LEXIS 2861 (Ch. Div. 2011) ("It appears well-established that the effect of a forgery is that the forged document is null and void…. ... the long-established rule

in New Jersey is that '[a] forgery can pass no right, even to a bona fide purchaser.'") (quoting *Szelc v. Stanger*, 2011 U.S. Dist. LEXIS 41827 (D.N.J. 2011).

Generally speaking, a mortgage is defined as "security for the payment of a debt that involves real estate." *Estate of Hammerle v. Director, Div. of Taxation*, 22 N.J. Tax 342 (N.J. Tax 2005). In *Feldman v. Urban Commercial, Inc.*, 64 N.J. Super. 364, 373 (Ch. Div. 1961), the court explained:

> We recognize that, in form and under common law interpretation, a mortgage, in New Jersey, has been held to be in the nature of a 'transfer or conveyance' of the legal title from the mortgagor to the mortgagee, subject to a re-vesting of title in the mortgagor upon payment of the mortgage.

Feldman, 64 N.J. Super. at 373. The right to foreclose is an equitable right inherent in a mortgage, triggered by a borrower's failure to comply with the terms and conditions of the associated loan. *Chase Manhattan Mortg. Corp. v. Spina*, 325 N.J. Super. 42, 50 (Ch. Div. 1998), aff'd sub nom. *Chase Manhattan Mortg. Corp. v. Heritage Ass'n*, 325 N.J. Super. 1 (App. Div. 1999).

In New Jersey, duly executed, notarized and recorded mortgage instruments are presumptively valid and enforceable, and are presumed to have been made for good and valuable consideration.[3] See, e.g., *In re Shaw*, 51 F. Supp, 566, 568 (D.N.J.

[3] Civello's proofs also failed to show any consideration given by or to Nashtatik, especially since the underlying transaction to be secured was between Civello and Artem Boguslavskiy.

1943), and *N.J.S.A.* 12A:3-308. However, where the validity and authenticity of a signature on a mortgage is denied, the burden of proof on establishing a signature's validity rests with the party asserting that it is valid.

N.J.S.A. 12A:3-308 provides:

> a. In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. ***If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity***, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under subsection a. of 12A:3-402.
>
> b. If the validity of signatures is admitted or proved and there is compliance with subsection a. of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under 12A:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

N.J.S.A. 12A:3-308(a)-(b) (emphasis added). Under the unambiguous language of the statute, the burden of proof is on the person claiming validity (here, Civello), and instead of being conclusively valid there is only a *presumption* of validity. Yet

contrary to the statute, the court below imposed the *burden of proof* on Nashtatik and Chepovetsky.

The Official Comments to *N.J.S.A.* 12A:3-308(1) provide important context and explanation of the statute:

> 1. Section 3-308 is a modification of former section 3-307. The first two sentences of subsection (a) are a restatement of former section 3-307(1). The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice of the defendant's claim of forgery or lack of authority as to the particular signature, and to afford the plaintiff an opportunity to investigate and obtain evidence. If local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. In the absence of such specific denial the signature stands admitted, and is not in issue. Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case.
>
> The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in section 1-201. ***The burden is on the party claiming under the signature***, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). "Presumed" is defined in section 1-201 and means that ***until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very common, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a***

> ***directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.*** The presumption does not arise if the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. "Action" is defined in section 1-201 and includes a claim asserted against the estate of a deceased or an incompetent.
>
> The last sentence of subsection (a) is a new provision that is necessary to take into account section 3-402(a) that allows an undisclosed principal to be liable on an instrument signed by an unauthorized representative. In that case the person enforcing the instrument must prove that the undisclosed principal is liable.

Official Comment, *N.J.S.A.* 12A:3-308(1) (emphasis supplied).

Thus, under this statutory scheme, the burden of proving validity is always upon the party seeking to enforce the signed document. If a presumption were to arise, once the party against whom the mortgage is sought to be enforced comes forth with evidence questioning the validity of her signature on the mortgage (which is the circumstance in this action), the presumption is overcome and the burden of proof is upon the plaintiff to prove that the signature is valid. As described in the comments to *N.J.S.A.* 12A:3-308(1), the presumption "vanishes" or "bursts" upon the production of evidence that could support the denial of the validity of the signature.

A certificate of acknowledgement as to the execution of a mortgage is open to attack in the case of fraud, but *in the absence of alleged fraud*, the execution is conclusive even as to bona fide purchasers. *See*, *Mitschele-Baer, Inc. v. Livingston Sand & Gravel Sales Co.*, 108 N.J. Eq. 286 (N.J. Ch. 1931). "It should be the aim of the courts, when the mortgage is bona fide, to preserve and not to destroy." *McDonald vs. H.B. McDonald Const. Co.*, 117 N.J. Eq. 181 (1934), citing *Howell v. Stone & Downey*, 75 N.J. Eq. 289 (E. & A. 1909). Our courts have long recognized that when the bona fides surrounding the giving of a mortgage are not questioned, "[T]he statute should not be used as an instrument of inequity any more than of fraud." *McDonald*, 117 N.J. Eq. at 183, citing *Patrisco v. Nolan's Point Amusement Co.*, 10 N.J. Misc. 397 (N.J. Ch. 1932). Conversely, ***when execution of a mortgage instrument is questioned, its validity and enforceability is not judicially accorded the conclusiveness with respect to the declarations therein contained for which the plaintiff contends***. *Marsh v. Mitchell*, 26 N.J. Eq. 497 (Ch. 1875), aff'd 27 N.J. Eq. 631 (E. & A. 1876); *Potter v. Steer*, 95 N.J. Eq. 102 (Ch. 1923); *Walkowitz v. Walkowitz*, 95 N.J. Eq. 249 (E. & A. 1923); *Dencer v. Erb*, 142 N.J. Eq. 422, 426 (Ch. 1948); *N.J.S.A.* 2A:82-17 (certificate of acknowledgement is merely *prima facie* evidence that the instrument was signed). Nothing in this body of law relieves the person asserting validity from the ultimate burden of proving validity.

Other irregularities in the instrument are by themselves capable of invalidating a mortgage. Some examples where our courts have invalidated mortgages based on irregularities include where the mortgage instrument misidentified the parties, *New Jersey Bank v. Azco Realty Co., Inc.*, 148 N.J. Super. 159 (App. Div. 1977), certif. denied 74 N.J. 280 (1977) (Acknowledgment of mortgage held invalid under now repealed *N.J.S.A.* 46:14-6 where on the face of the mortgage it listed mortgagee as mortgagor in three separate places); where a corporation gives a mortgage and it is signed by a person lacking authority to act on behalf of the corporation, *see Pincus v. U.S. Dyeing & Cleaning Works*, 99 N.J. Eq. 160 (N.J. Ch. 1926); and where the lender was unlicensed, *see Gottesfeld v. Kaminski*, 216 N.J. Super. 679 (App. Div. 1987) (Mortgage held void and unenforceable where lender engaged in secondary mortgage loan business without a license).

In the instant case, there can be no serious question regarding whether Nashtatik has come forward with evidence of forgery. During the hearing, Nashtatik testified under oath that she did not sign the mortgage. 2T at 30:7-14. She testified she never appeared before any notary – and specifically not Katherine Bowers – to sign the mortgage. 2T at 30:1-6. She testified that she never met Mr. Civello.

> Q: You heard Mr. Civello testify that you went with him.
>
> A: Yes.

> Q: He greeted you at your car one day on a cold day in January, 2007. Did that happen?
>
> A: No. No.
>
> Q: And then he testified that he went with you and Mr. Chepovetsky and walked a hundred and some odd feet to a realtor's office.
>
> A: I never went anywhere.
> Q: I'm sorry?
>
> A: I never went anywhere with them.
>
> Q: So, that never happened?
>
> A: Never happened.

2T at 29:12-25. Additional evidence that the signature was a forgery include"

- She provided exemplars of her signature.
- She testified about how she writes in cursive and the distinctive curve of her writing that she learned at an early age.
- Chepovetsky testified that the supposed meeting with the notary never happened. .
- Chepovetsky testified about the diner signing and that she wasn't there.

Any of the above singularly, as well as all of the above collectively, were more than sufficient to cause any presumption to vanish. Once a party produces evidence that would enable a finder of fact to determine that the facts are contrary to the

asserted presumption, the presumption vanishes and the burden of proof returns to the proponent of the fact. *N.J. Rule Evid.* 301(b) ("If evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination unless the evidence is such that reasonable persons would not differ as to the existence or nonexistence of the presumed fact"). *See also*, *In re Diet Drug Litig.*, 384 N.J. Super. 525, 544 (Law Div. 2005).

As stated in *Rumson Borough v. Peckham*, 7 N.J. Tax 539, 546 (1985):

> a presumption can provide the rule of law to be applied in a particular case, given the appropriate set of underlying facts. It "compels the particular conclusion [for the trial judge] in the absence of evidence contra." *In re Blake's Will*, 21 N.J. 50, 58, 120 A.2d 745 (1956). However, ***a presumption is not evidence in itself and has no artificial probative force of its own***. *Meltzer v. Division of Tax Appeals*, 134 N.J.L. 510, 512, 48 A.2d 842 (Sup.Ct.1946). The procedural effect and consequences of the presumption disappear when "substantial and trustworthy" evidence is introduced by the party against which it operates and which rebuts or contradicts the result that it dictates. *Ibid.* This traditional view of the effect of presumptions and the adduction of rebuttal evidence is commonly referred to as the "bursting bubble" theory. 9 Wigmore, supra, § 2493a at 309. See also *Womack v. Fenton*, 28 N.J. Super. 345, 349, 100 A.2d 690 (App.Div.1953) (A presumption "vanishes in the face of positive, substantial, trustworthy, uncontradicted and repellent evidence"); *Dwyer v. Ford Motor Co.*, 36 N.J. 487, 507, 178 A.2d 161 (1962). (Presumption that disability or death which occurs following a heart attack resulted from natural physiological causes, for purposes of workmen's compensation benefits, "is emptied of all probative force and disappears from the case upon the introduction of any proof to the contrary"). [Emphasis added].

The principle that a presumption vanishes in the face of contrary evidence has long been a recognized feature in the jurisprudence of New Jersey. *See*, *Passaic v. Botany Mills, Inc.*, 59 N.J. Super. 537, 543 (App. Div. 1960), certif. denied *sub nom, In re Orsini*, 37 N.J. 500 (1962); *Flanagan v. Equitable Life Assurance Soc'y*, 14 N.J. 309, 314 (1954); *Vide, Dunn v. Goldman*, 111 N.J.L. 249 (Sup. Ct. 1933); *Kirschbaum v. Metropolitan Life Insurance Co.*, 133 N.J.L. 5 (E. & A. 1945); *Meltzer v. Division of Tax Appeals*, 134 N.J.L. 510 (Sup. Ct. 1946); *Gaudreau v. Eclipse Pioneer, &c., Bendix Air Corp.*, 137 N.J.L. 666 (E. & A. 1948); *Grand View Gardens, Inc. v. Hasbrouck Heights*, 14 N.J. Super. 167 (App. Div. 1951).

In discussing the relationship between a presumption and the burden of proof, the court in *Rumson Borough v. Peckham*, 7 N.J. Tax 539, 548-49 (1985) stated:

> In terms of burdens of proof, when a presumption is operative in a case, it places the burden of going forward with evidence upon the party against whom it operates. This party may or may not have the ultimate burden of proof, that is, the risk of non-persuasion, on the particular issue; but, in any event, ***the presumption in no way affects this latter burden***. Evid.R. 14, Comment 2, supra. Even where the presumption is rebutted, ***the risk of non-persuasion remains with the party upon whom it was originally placed***. [Emphasis added].

Thus, in the present matter, the evidence presented by Nashtatik and Chepovetsky was sufficient to vanish any presumption arising from the certificate of acknowledgment. This resulted in the burden of proof of the validity of the signature remaining on Civello. However, the court below made clear that its

decision was based on a failure of Nashtatik and Chepovetsky to prove that the signature was a forgery – a burden which they did not have.

The entry of the judgment below was in error and must be vacated because the court below erred by applying the wrong burden of proof. Any presumption vanished when Nashtatik denied that the signature purporting to be her signature on the Mortgage document between her, Chepovetsky, and Civello, is her signature. Chepovetsky also denied that the Mortgage was signed as alleged by Civello. Those denials were supported by additional, credible evidence. The burden of proving the validity remained on Civello when the presumption was burst, yet the court below improperly shifted the burden of proof to Nashtatik and Chepovetsky.

Civello made no effort to objectively establish that the signature was genuine. Even though the burden of proof remained on him, he presented no expert evidence that the signature was genuine even though it would be admissible. *N.J.S.A.* 2A:82-1 provides as follows:

> In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by the witnesses; and such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; provided nevertheless that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings before they can be compared with the signature or

> writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy.

In the present matter, there were no witnesses that signed the mortgage (other than perhaps Ms. Bowers who did not testify in the proceedings). Consequently, the validity of the signature had to be proven by means of a handwriting analysis by an expert witness, performed by making comparisons between handwriting exemplars and disputed writing which is an accepted method of authentication. *State v. Sabol*, No. A-0177-14T2, 2016 N.J. Super. Unpub. LEXIS 2606 (App. Div. Dec. 8, 2016). See also, *State v. Carroll*, 256 N.J. Super. 575, 593-94 (App. Div. 1992), certif. denied, 130 N.J. 18 (1992) (allowing a jury to make such comparisons), certif. denied, 130 N.J. 18 (1992); *In re D'Agostino*, 6 N.J. Super. 549, 555-56 (Ch. Div. 1949), aff'd, 9 N.J. Super. 230 (App. Div. 1950) (rejecting testimony by lay witnesses who were unfamiliar with the signatures involved and had no expertise in handwriting analysis); *State v. Skillman*, 76 N.J.L. 464, 466-67 (Sup. Ct. 1908), aff'd, 77 N.J.L. 804 (E. & A. 1909) (upholding a conviction for falsifying a will and sustaining the admission of expert testimony concerning a traced signature).

In a similar case to the case at bar, defendants alleged forgery of the mortgage and defective assignments in *United States Bank Nat'l Ass'n v. Bernardez-Hicks*, No. A-4458-17T4, 2020 N.J. Super. Unpub. LEXIS 1413, at *1 (App. Div. July 15,

2020). The Court found defendants did not establish the signature was a forgery because when plaintiff requested signature exemplars, Defendants only pointed plaintiff to the answers to interrogatories and signatures on other documents. The Court found that the signature in question on the interrogatories or on a photocopy form would be inadmissible because they were not "original signature exemplars that predate[d] this controversy." Thus, in that case, and contrary to this case where the evidence included acknowledged, certified, and recorded documents as well as the testimony of the alleged signer, the defendants in *United States* Bank did not come forward with evidence to cause any presumption to vanish.

Civello had provided different exemplars of handwriting purporting to be Nashtatik's handwriting in a certification from his counsel in the quiet title action from documents filed with the Middlesex County Clerk's office, along with copies of Nashtatik's actual signature. The signature exemplars that were legitimately Nashtatik's signature were copies from Nashtatik's certifications to her discovery responses from 2019 in the quiet title action. DA-297 *et seq.,* DA-382.

The problem with Civello's proofs is, simply stated, there are so many signatures outside of the claimed signature on the Mortgage that do not match the purported signature on the Mortgage. Civello should have, but has not submitted, a handwriting expert report in order to meet his burden of proof.

Further, Nashtatik was not with Chepovetsky when the document was signed. She has no idea who the alleged notary, Katherine D. Bowers, is, because she never met her. She was never asked for the proper identification to prove who she was. She never went to the Plaintiff's counsel's office (nor to the alleged real estate office) to sign any mortgage.[4] Further, Katherine D. Bowers did not appear on the notary list from the state Department of Treasury. DA-313a. For all of these reasons, the purported "acknowledgement" on the Mortgage is an apparent forgery or fraud.

Here, the matter is quite different from the *United States Bank* case, supra. Nashtatik has maintained that the signature on the Mortgage document that was purported to be her signature is forged and fraudulent. Civello submitted the signature exemplars in the quiet title action that are purported to be her signature which are all photocopies, and none seem to be "certified" copies. Indeed, while Civello asserted in the quite title action that the signatures on those other exemplars are different and therefore one set of signatures was a forgery, he offered no evidence to establish which one(s) are genuine. He simply invited the court to make a finding

[4] Unlike *Wells Fargo Bank, N.A. v. Awadallah*, 2018 N.J. Super. Unpub. LEXIS 417(App. Div. February 23, 2018), where the notary provided a certification where he stated that at the time he notarized defendant's signature, not only was she present, but he had her passport in front of him. Civello presented no such evidence here, and Nashtatik testified that she was never present before the notary and no identification was produced. Nashtatik's testimony on this point is unrebutted and uncontradicted.

in the absence of evidence, even though it is his burden to prove that the signature on the Mortgage is genuine. Civello also did not submit the August 9, 2004 signature on a different mortgage, which, despite being a photocopy, was acknowledged and did have the Middlesex County Clerk's filing record attached, and therefore, under his own arguments, was presumed to be valid. However, that signature was notably different from the one on the Mortgage. That failure to submit that duly notarized signature is telling – because it provides a presumption that the signature on that mortgage is not only different from the Mortgage in question but is genuine and thereby provides an additional evidential basis that the signature on the Mortgage is not genuine.

In addition, the acknowledgement on the Mortgage does not comply with New Jersey law and therefore not only voids any presumption of genuineness, but also renders the Mortgage void.

N.J.S.A. 46:14-2.1(c) requires that:

> The officer taking an acknowledgment or proof shall sign a certificate stating that acknowledgment or proof. The certificate shall also state:
>
> (1) that the maker or the witness personally appeared before the officer;
>
> (2) that the officer was satisfied that the person who made the acknowledgment or proof was the maker of or the witness to the instrument;

(3) the jurisdiction in which the acknowledgment or proof was taken;

(4) the officer's name and title;

(5) the date on which the acknowledgment was taken.

See also, *N.J.S.A.* 52:7-10.8(c), which reads as follows: "A notarial officer who witnesses or attests to a signature shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and signing the record has the identity claimed."

Aside from the fact that the acknowledgement is forged or fraudulent because Nashtatik never met the notary, Katherine D. Bowers, Civello has never submitted documentation to show that the notarization is real. First, the name Katherine D. Bowers does not appear on the New Jersey Treasury Department's List of Notaries under the name Bowers, which includes expired commissions. Moreover, Civello made no effort whatsoever to establish that Ms. Bowers was even a notary at the time of the alleged mortgage; he could have, but he did not, produce a record from the Secretary of State's office that she *had* been a notary. It stands to reason that where an alleged signature of the maker of the instrument is not genuine, so too the purported notarization is also a fraud, and vice versa.

On the third page of the purported notarization documents, the spot that indicates where the document was allegedly signed is left blank ("County of

_____"), and the date, which says 2006, is crossed out and written in by hand as 2007. The New Jersey Notary Public Manual, a publication of the New Jersey Department of the Treasury, Division of Revenue and Enterprise Services, dated October 22, 2021, states that the certificate that the notary signs has to identify the jurisdiction in which the notarial act is performed. DA-365a; DA-366a. *See also,* https://www.nj.gov/treasury/revenue/pdf/NotaryPublicManual.pdf. In fact, according to the manual, the form that the notary was supposed to use when "witnessing or attesting a signature," as was alleged to have taken place here, is as follows:

> For witnessing or attesting a signature:
>
> State of _____
> County of _____
>
> Signed (or attested) before me on (date) _____
>
> _____
> (Name(s) of individual(s))
> _____
> Signature of notarial officer
> Stamp
>
> _____
> Name of Notary Public
> Notary Public, State of New Jersey Title of office
> My commission expires (date)

That is not the form used in the within action. Further, on page 12 of the manual, it states that "an official stamp shall be affixed or embossed on the certificate

near the signature of the notary public to be clear and readable." It appears that this did not take place. Compare DA-295a with the notarized 2004 mortgage at DA-319a.

In addition, if one were to look at the purported witness signatures themselves on pages 4 and 5 of Ex. F (DA-293a and DA-294a), it is obvious that they are stamps. The angle of the signatures is exactly the same and the letters look identical.

By failing, *inter alia*, to identify the county where the notarization occurred and to clearly and readably affix and emboss an official stamp, this certificate is invalid. As such, it is *insufficient to give rise to any presumption* that would shift the burden of proof on to Nashtatik and Chepovetsky.

On page 17, the Notary Manual states: "A notarial officer who takes an acknowledgment or verification of a record or who witnesses or attests to a signature, shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and making the acknowledgment has the identity claimed and that the signature on the record is the signature of the individual." DA-371a. Nashtatik was never asked by any notary, Katherine D. Bowers, or otherwise, to provide any proof of her identity. While on page 18 of the manual (DA-372a), it indicates that personal knowledge of the person would be satisfactory as well, Nashtatik and Katherine D. Bowers had never met.

Overall, the jurat does not comply with New Jersey law, there is no proof that Nashtatik signed the document and, as such, the Mortgage document itself is void. These deficiencies and irregularities also preclude the raising of a presumption in the first that the signature was genuine and therefore the burden of proof was improperly placed by the court below on Nashtatik and Chepovetsky (or, in the alternative, burst the bubble of the presumption and caused it to vanish). The judgment must be reversed because the court below applied an incorrect legal standard when it placed the burden of proof on Defendants.

POINT II

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED, AS THE ACTION TO FORECLOSE IS BARRED BY THE STATUTE OF LIMITATIONS WHICH PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AS A MATTER OF LAW

(In the Record Below at Exhibit A to July 25. 2023 Certification of Counsel, Brief in Support of Appeal in *Chepovetsky et al. v Civello*, Appellate Division of the Superior Court of New Jersey, Appeal No. A-002153-22T4)

Chepovetsky and Nashtatik have raised as a separate defense in this action that the statute to limitations applicable to residential mortgages bars this action as a matter of law. *See*, Answer to the Complaint at Second Separate Defense, Twentieth Separate Defense, and Twenty-Fourth Separate Defense (DA-145a *et seq.)*. The legal basis as to why an action to foreclose the Mortgage was set forth in

more detail in the Appellate Division Brief which was attached as Exhibit L to the Certification of Counsel Certification In Opposition to Motion for Summary Judgment.

The essence of that defense is that the statute of limitations at issue in this matter, *N.J.S.A.* 2A:50-56.1 was enacted in 2009 ("the 2009 Statute"). The Legislative History indicates that while the Legislature was willing to codify ***in part*** a court decision that the statute of limitations for actions on mortgages was 20 years ***from the date of default*** on a mortgage, there was still a problem with stale mortgages which would be barred by a six year contractual statute of limitations remaining of record and constituting a cloud on title and an impediment to the transfer of real property. To address that problem, the Legislature expressly added two alternative limitations periods in the statute it passed: six years ***from the maturity date of the mortgage***, and an outside date of 36 years from the recording of the mortgage. It also expressly stated that no action for foreclosure could be commenced after the passage of the earlier of the possible three statutory time bars. The 2009 Statute, as enacted, provided that it takes effect immediately.

That statute was originally enacted in 2009 as an amendment to the Fair Mortgage Foreclosure Act of 1995. As originally enacted, this 2009 statute provided:

> 1. An action to foreclose a residential mortgage shall not be commenced following the earliest of:
>
> a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;
>
> b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or
>
> c. Twenty years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been extended by a written instrument or payment on account has been made, the action to foreclose shall not be commenced after twenty years from the date on which the default or payment on account thereof occurred under the terms of the written instrument.
>
> 2. This Act shall take effect immediately.

In 2019, the Legislature amended only that *portion* of law that sets forth a limitations bar *based on a default* by shortening the time from the previous 20 years to six years, but provided that the 2019 enactment only applies to mortgages granted after the 2019 enactment.

In enacting the 2009 Statute, both houses of the Legislature recognized the public importance of the problems created by stale mortgages remaining of record when they stated:

> The bill is ***intended to address some of the problems caused by the presence on the record of residential mortgages which have been paid or which are otherwise unenforceable***. These mortgages constitute clouds on title which may render real property titles unmarketable and delay real estate transactions.

See, Senate Sponsor's Statement; Assembly Financial Institutions and Insurance Committee report; Senate Commerce Committee Statement.

To remedy those problems, the Legislature enacted *N.J.S.A.* 2A:50-56.1 in 2009. The means by which the Legislature chose to address those problems was to create a statutory system whereby there would be three potentially applicable statutes of limitations for commencing foreclosure actions on residential mortgages. In doing so, it chose to continue the recognition of a common law 20 year property law adverse possession limitation period from the date of default on the mortgage on the basis that possession becomes adverse upon default. However, it also chose to add a separate and independent six year contract law limitation from the maturity date of the mortgage (or the date on which the last payment is due) on the basis that a breach of the contract occurs when the mortgage is not paid on or before its maturity date. Lastly, it chose to put into effect a third and maximum period of limitation, being 36 years from the date the mortgage is recorded in apparent

recognition of the prevalence of 30 year mortgages plus six years from its maturity date. As expressed in the House report and the Senate Statement cited above, the reasoning behind the statute was to allow "a determination that certain mortgages are not clouds on title because a party can no longer bring an action to foreclose them beyond the bill's expressly stated statute of limitations, as borrowed from actions in contract law or adverse possession, as applicable." As to which of the three applied, the Legislature unambiguously expressed in the statute its intent that the applicable limitation would be "the earliest of" the three limitation periods to expire.

As to the applicability of that 2009 Statute to mortgages, the Legislature stated that it shall "take effect immediately." No other qualification or restriction on the application of the 2009 Statute was imposed by the Legislature. The Legislative intent, as expressed in the language of the 2009 Statute is clear and unambiguous: after the effective date of the statute (August 6, 2009), thou shalt not commence a foreclosure action more than six years after the maturity date of the mortgage. With respect to determining at what point the prohibition on commencing an action to foreclose a mortgage after its maturity date has passed, the statutory language answers that question with the word "immediately." The online Merriam-Webster Dictionary defines "immediately" at https://www.merriam-webster.com/dictionary/immediately as "without interval of time." Among the synonyms recognized by that dictionary are "right away," "instantly," "right now,"

"forthwith," "instantaneously," and "now." This definition and these synonyms all impress that "immediately" means as of the present moment and not at some future time. Thus, the clear and generally accepted meaning of this language as used in the statute requires that the time bar of six years from the maturity date of the mortgage take effect as of the date of the passage of the statute on August 6, 2009. Significantly, and in stark contrast to the effective date of the 2019 Amendment, the Legislature did not express any intent that the 2009 Statute only apply to mortgages granted after its August 6, 2009, effective date.

The application of the 2009 Statute to the Mortgage is not precluded under any claim that it is incapable of being applied retroactively to the 2007 Mortgage for two reasons.

First, where as here, the statute is being applied to the Mortgage, and it is a prospective application in that the event that commences the running of the statute took place after the effective date of the statute, i.e., on the maturity date in February 2012. Still further, Civello had the full six years of the statute in which to commence a foreclosure action but did not. That prospectivity is particularly valid when the statute relates to a remedy and a statute of limitation whose bar has not yet fallen. *See*, *Sarasota-Coolidge Equities II, L.L.C. v. S. Rotondi & Sons, Inc.*, 339 N.J. Super. 105, 113 (App. Div. 2001) (concluding that "'until the period fixed by such a statute has arrived, the statute is a mere regulation of the limitation, and, like other such

regulations, subject to legislative control.' *Bretthauer v. Jacobson*, 79 N.J.L. 223, 225, 75 A. 560 (Sup.Ct.1910)"). In this matter, the statute's application is prospective because the bar did not arise until after its effective date and is not barred by any prohibition on retroactivity.

Second, even if the statute's application to the Mortgage is not prospective, retroactive application of the statute is not prohibited. Retroactive application of a statute is permissible even in the absence of an express legislative declaration that it be applied retroactively when necessary to carry out the intent of the statute. *Gibbons v. Gibbons*, 86 N.J. 515, 522 (1981). The rule stated in *Gibbons* is that an intent that a statute be applied retroactively may be "implied, that is, retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation." *Id*. at 522 (emphasis added). Such an implied intent will be found when the statute is ameliorative or curative.

One significant factor permitting retroactive application of a statute is how long it would take for the statute to become fully effective. *See*, *Rothman v. Rothman*, 65 N.J. 219, 224 (1974), retroactively applying the equitable distribution statute to pre-existing relationships because "if [the statute were to be prospectively applied,] it has been estimated, apparently without exaggeration, that the full effect of the statute would not be felt for at least a generation." *Rothman*, 65 N.J. at 223-224. Such is the case in the present matter where, if the statute's prospective

application to mortgages that existed at the time of the statute's effective date, subsection (a) of the statute would not apply for up to thirty-six years after the 2009 enactment to certain mortgages when the Legislature indicated it should be effective immediately and was intending to remedy existing problems relating to stale mortgages being of record. Such a result is not reasonable and fails to give a sensible interpretation to the statute.

In addition, the 2009 Statute was expressly intended by both the Assembly and the Senate to remedy and correct problems identified in the then-existing law relating to mortgage foreclosure actions. As indicated by the language of the 2009 enactment and the statements of the sponsors and committees, one of the corrective purposes and one intent of this statute is to enable those involved in determining title to property to be able to make the determination solely from the written instruments. Another remedial and corrective purpose was to clear clouds on title that were caused by stale mortgages that would be barred by contract law's six-year bar for bringing an action (from maturity date) or the twenty-year bar under the doctrine of adverse possession for bringing an action (from the date of default), whichever bar occurs first. Significantly absent from these statements of legislative intent is that the Legislature intended to delay the implementation of the six-year bar based on maturity date for up to thirty-six years.

In addition, the Fair Mortgage Foreclosure Act (P.L. 1995, c. 244), of which *N.J.S.A.* 2A:50-56.1 is a part, has been applied to mortgages granted before the enactment of that Act. *Bank v. Kim*, 361 N.J. Super. 331 (App. Div. 2003); *N.J.S.A.* 2A:50-55 (under the definition of residential mortgage: "This act shall apply to all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey . . . .). Indeed, in that Act, the Legislature expressed an intent that when it came to foreclosure actions, the application of its enactment was not dependent upon whether the mortgage existed at the time of enactment but rather on when any foreclosure action is commence when it stated "This act shall take effect on the 90th day after enactment and shall apply to foreclosure actions commenced on or after the effective date." (Emphasis added). The application is to foreclosure actions commenced after the effective date, not just to mortgages granted after the effective date. This precedent, known to the Legislature, further supports that *N.J.S.A.* 2A:50-56.1 can and should be applied to foreclosure actions commended after the August 6, 2009, effective date and not just to mortgages granted after the August 6, 2009, effective date.

The 2019 enactment did not amend subsection (a), which was already effective as of 2009, nor did it purport to enact a whole new statute. All it did was change the applicable time period under subsection (c) (and only under subsection (c)) from twenty years to six years from the date of default. However, that change

is inapplicable to the subject Mortgage since the earlier (applicable) of the three possible bars is the one under subsection (a). Thus, the provision that the 2019 enactment shall "apply to residential mortgages executed on or after the effective date" applies only to that which was amended, i.e., the time period of subsection (c) based upon a date of default. Subsection (a), which is based on the maturity date and was the basis for this motion, was unaffected, and it remains effective as of the date of its initial enactment without any other qualification on the mortgages to which it applies.

Indeed, the 2019 Amendment was not capable of amending the limitation period of subsection of (a) of the 2009 Statute once that bar had fallen on this Mortgage on February 22, 2018. *State by Parsons v. Standard Oil Co.*, 5 N.J. 281, 293-94, 296 (1950), affirmed, 341 U.S. 428, 71 S. Ct. 822, 95 L.Ed. 1078 (1951). While a statute of limitations may be extended prior to the falling of the bar created by the statute, once the limitations period has completely run, the defendant has a vested interest in the running of the statute of limitations, and a later statute that would impair such an interest is unconstitutional. *Sarasota-Coolidge Equities II, L.L.C. v. S. Rotondi & Sons, Inc.*, 339 N.J. Super. 105 (App. Div. 2001).

In addition, it is clear that there is no express repealer in the 2019 amendment of the 2009 statute's effective date regarding the effective date of August 6, 2009, for subsections (a) or (b) of the 2009 statute; and there is nothing in the legislative

history of the 2019 enactment to indicate that there was ever any intent by the Legislature to repeal the effective date of the 2009 statute, or to revive mortgages as to which any action was already barred by the 2009 statute. In the absence of an express repealer, a repeal by implication requires clear and convincing evidence, *Mahwah v. Bergen Cty. Bd. of Taxation*, 98 N.J. 268, 280-81 (1985), cert. denied sub nom, *Demarest v. Mahwah*, 471 U.S. 1136, 105 S. Ct. 2677, 86 L. Ed. 2d 696 (1985). The required "clear and compelling" evidence for an implied repealer of the 2009 effective date of the 2009 Statute is wholly lacking.

Thus, as of 2009, any action to foreclose on the Mortgage was required to be commenced within six years of the Mortgage's maturity date. On its face, the Mortgage's maturity date was February 22, 2012. No action was commenced on the Mortgage until this action was commenced in 2023 –six years after the maturity date of the Mortgage. As such, the action to foreclose is barred by the statute of limitations and, because the action on the Mortgage was not commenced within the time required by the statute of limitations, a judgment of foreclosure should not have been entered against Chepovetsky and Nashtatik in this action.

CONCLUSION

Because the court below erred by placing the burden of proof on Chepovetsky and Nashtatik in this foreclosure action, and because this foreclosure action is wholly

barred by the statute of limitations set forth in *N.J.S.A.* 2A:50-56.1, the judgment of foreclosure must be reversed, and the action should be dismissed in its entirety.

Respectfully submitted,

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Dated: as of January 2, 2024

By: Kenneth L. Winters, Esq. (017621980)

LOUIS CIVELLO, JR.,

Plaintiff-Respondent,

v.

VADIM CHEPOVETSKY AND SPOUSE OF VADIM CHEPOVETSKY; JOHN DOE 1 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JOHN DOE 2 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JOHN DOE 3 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JOHN DOE 4 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JANE DOE 1 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JANE DOE 2 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JANE DOE 3 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; JANE DOE 4 (NAME BEING FICTITIOUS) TENANT/OCCUPANT; SVETLANA NASHTATIK; JULIA MAIZLIK; SIMIO & JONES LLP; PLATINUM CREDIT RESOURCES LLC; NII A. OKYNE; STATE OF NEW JERSEY; LTD ACQUISITIONS, LLC; PAYMENTECH, LP D/B/A CHASE PAYMENTECH; HEATHER M. BRITO,

Defendants,

VADIM CHEPOVETSKY and SVETLANA NASHTATIK,

Defendants-Appellants.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
A-0324-24

Civil Action

On Appeal from Final Judgment,
Superior Court of New Jersey,
Middlesex County, Chancery
Division

Sat Below:
Hon. Lisa M. Vignuolo, J.S.C.

Date Submitted:
March 3, 2025

BRIEF OF PLAINTIFF-RESPONDENT LOUIS CIVELLO, JR.

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PRELIMINARY STATEMENT

This Court, on a prior appeal, decided the same statute of limitations argument by the same parties, same lawyers, and same facts. Counsel for Vadim Chepovetsky and Svetlana Nashtatik then made the same argument – with no new facts on the SOL issue - to a judge hearing a second litigation. The judge rejected it. They raise it again on this appeal.

They also argued below that the Mortgage on file for years, that they attached to a prior Complaint they filed when seeking affirmative relief, that they represented in prior litigation they signed, provided as collateral, and which they relied on throughout prior litigation including on appeal - was really a forgery. We are now told the signature of Svetlana Nashtatik is not her signature. Legally, it makes no difference because she was not the owner of the property and her ex-husband, who was the owner, signed the Mortgage. Factually, the implausible story about the forgery failed miserably at the plenary hearing.

Svetlana Nashtatik stumbled through direct and cross-examination, and the court found her lacking credibility. Vadim Chepovetsky tried to perpetuate the forgery story, but the judge found he too lacked credibility. The forgery claim was also contradicted by a witness the court found credible who saw her sign the Mortgage. It was also contradicted by a Notary.

On appeal, Vadim Chepovetsky and Svetlana Nashtatik argue the court below should have believed their story. They claim the court below applied the wrong burden of proof. They are incorrect. The court applied the correct burden. Even if the court below applied an incorrect burden, the outcome is the same.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On or about December 11, 2003, Vadim Chepovetsky acquired property that became subject to the Mortgage implicated in this case. Pa41-43. On or about January 23, 2007, Vadim Chepovetsky and Svetlana Nashtatik executed a Mortgage on the property in favor of Louis Civello, Jr. Da171-176, to secure a Guaranty and Promissory Note arising out of Mr. Civello's sale of a business. Da165-181.

On January 10, 2019, as Plaintiffs, Vadim Chepovetsky and Svetlana Nashtatik filed a Complaint to quiet title against Louis Civello, Jr. Da388. For that lawsuit, they represented, "Plaintiffs provided a Mortgage . . . as collateral in support of a Promissory Note and Guaranty[.]" Da389 (¶3). They attached the Mortgage, as "[a] true and correct copy of said Mortgage." Da389 (¶3). They referred to their "obligations pursuant to the Mortgage[,]" Da390 (¶9), and relied on their "execution of the Subject Mortgage" for the relief sought in the Complaint. Da390 (¶11).

Their Complaint informed the court their property is "encumbered by the Mortgage." Da391 (¶13). They asserted the Mortgage is unenforceable due to the

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[1] The Procedural History and Statement of Facts are inextricably intertwined. Transcripts are designated as follows:

1T = March 1, 2024 oral argument on summary judgment;
2T = May 30, 2024 plenary hearing for summary judgment;
3T = July 23, 2024 decision on summary judgment; and
4T = September 27, 2024 decision on entry of Final Judgment.

statute of limitations ("SOL"), Da391 (¶14), and therefore they "are no longer obligated to perform pursuant to said . . . Mortgage," Da393 (¶23), without any claim the signature of Svetlana Nashtatik is a forgery. They sought injunctive relief to preclude Mr. Civello from exercising his rights "arising from the . . . Mortgage." Da391 (¶15). The Wherefore Clause references the "attached" Mortgage as the basis for the affirmative relief. Da391-392.

On April 29, 2019, Mr. Civello filed an Answer and Counterclaim. Pa1. The Answer relies on the validity of the Mortgage that Vadim Chepovetsky and Svetlana Nashtatik attached to their Complaint, Pa1, and the Counterclaim seeks to "maintain[] the mortgage." Pa7 (Wherefore Clause). The Counterclaim asserts as fact, "Svetlana Nashtatik expressed her status as a third party beneficiary of the Guaranty by signing, on conjunction with the Guaranty, a Mortgage related to the same business transaction giving rise to the Guaranty." Pa6 (¶17).

On June 14, 2019, Vadim Chepovetsky and Svetlana Nashtatik, through counsel, filed an Answer. Da17. They did not assert any Affirmative Defense based on the Mortgage allegedly being a forgery. Da17-20. Svetlana Nashtatik instead denied being a third-party beneficiary of the business transaction "**except to admit that Svetlana signed the Mortgage at issue**." Da18 (¶17) (emphasis added).

On July 11, 2019, Svetlana Nashtatik provided answers to interrogatories, Da419, which stated, in response to being asked about communications with Mr.

Civello, "[I]t is impossible to recall 'all' communications that took place [the year of the Mortgage] **when she and Vadim entered into the . . . Mortgage**." Da412 (¶22) (emphasis added).

On February 7, 2020, we proceeded to trial and introduced into evidence the Mortgage, without objection. Pa11 (T40-17 to -25). On June 24, 2021, the court entered Judgment for Mr. Civello on the Counterclaim. Pa12-18. The Opinion notes Vadim Chepovetsky and Svetlana Nashtatik's "contradictory arguments," their arguments "[c]ontrary" to case law, and arguments "[c]ontradicting [Chepovetsky's] own argument[s]" made elsewhere to the court. Pa16.

In lieu of an appeal and after missing the deadline to seek a new trial, on July 29, 2021, they filed a Rule 4:50 motion, and challenged the Mortgage based on discharge in bankruptcy and the SOL, Pa19-20, both issues being raised for the first time. Their brief for the motion identifies "[t]he mortgage given by Chepovetsky to Civello as security for the guaranty of payment of the sale of a business[.]" Pa21-22. For affirmative relief they sought, they quote from the Mortgage. Pa22. They concede Mr. Civello had "the right to foreclose" based on the Mortgage, but they argued the SOL expired. Pa21. They again refer to the property as "the mortgaged premises" and, in addition to the SOL, they argued a prior bankruptcy prevents enforcement of the Mortgage. Pa22.

While the SOL precluded enforcement, they argued, the Mortgage was "legally void" only because of the bankruptcy, Pa22, with no mention of a forgery. The Legal Argument in their brief argued, "Under [the law], the only relevant facts are (1) the date of and **existence of the mortgage (which is not the subject of any genuine dispute)** . . ." Pa23 (emphasis added).

On August 27, 2021, in the other litigation, when arguing the motion to vacate our Judgment, their counsel states our Mortgage "indisputably is a residential mortgage" that cannot be enforced due to "the [SOL] for residential mortgages," Da425 (T8-5 to -12), without reference to any forgery. "Civello can not sue upon the mortgage because he didn't file suit" in time, they argued. Da425 (T8-15 to -17).

On September 3, 2021, the court below vacated Judgment based on the bankruptcy, and on June 16, 2022, this Court affirmed our Judgment as it relates to enforcing the Mortgage, and reversed in part because our Judgment included individual liability that the bankruptcy extinguished. Da435-461. This Court observed the Mortgage was admitted into evidence, Da441, the trial court found Svetlana Nashtatik to be "a mortgagor," Da441, and identified a due date for payment on "the mortgage." Da444.

This Court discussed the parameters for a bankruptcy discharge on a mortgage lien, Da457-459, and held Mr. Civello had a right to have the court on remand set a higher amount of the mortgage lien for his future foreclosure action. Da458-459; see

also Da459 n.8 ("We note that Plaintiffs executed the mortgage[.]"). The remand also allowed the court to address in detail the SOL argument. Da460-461.

On February 21, 2023, the the court below rejected their SOL argument and entered an amended Final Judgment in Mr. Civello's favor. Da87. The Order refers to both Vadim Chepovetsky and Svetlana Nashtatik as "mortgagors." Da88. The decision held both "pledged and delivered a mortgage[,]" Da92, and referred to the Mortgage "the parties entered into," Da100, and held, "**Chepovetsky signed it** when the [SOL] was 20 years, **as did his wife**," i.e., Svetlana Nashtatik. Da100 (emphasis added). The court proceeded, "[I]t is incontrovertible that the Mortgage at issue was executed[,]" Da105, and the debt to Mr. Civello was "secured by the Mortgage pledged on the residence of Chepovetsky and Nashtatik[.]" Da106; and see Da115 (discussing the Mortgage "pledged" by both). The decision required a facially-valid Mortgage. Da107.

The court further held, "the Mortgage remains viable, enforceable, and the right to foreclosure" remains. Da107. "Civello has the unalterable right to take action to foreclose the Subject Mortgage[.]" Da114; see also Da109 (referring to "the mortgaged property of Chepovetsky and Nashtatik"). As the forgery story was not raised, after ruling against them on the SOL issue, the court stated, "There is nothing left for the Court to decide." Da114.

On March 23, 2023, Vadim Chepovetsky and Svetlana Nashtatik, through counsel, filed an appeal, Pa24, that included seven issues, but no mention the Mortgage is a forgery. Pa25-26. They did not challenge the court's fact-finding that they both signed the Mortgage. Pa25-26. They filed a brief with this Court that included three legal arguments, with four subparts - none of which made any mention of the Mortgage being a forgery. Pa29-30.

As for the foreclosure case now being appealed, on April 5, 2023, Plaintiff Louis Civello, Jr. filed a Complaint to foreclose. Da27. After entry of default, and as part of an application to vacate default, counsel for Vadim Chepovetsky and Svetlana Nashtatik certified, "[T]here is a related . . . Appellate Division appeal pending, filed by Defendants, which involves the same parties, the same facts, the same actions and the same set of circumstances, with regard to the same property, . . . and same rights of the parties." Da71 (¶2).

On July 21, 2023, for the foreclosure, Vadim Chepovetsky certified the issues are the same legal issues implicated in the then-pending appeal. Da136. Specifically, "[T]here is a pending case regarding the same property and the same set of circumstances and facts." Da136 (¶2). He identified his defenses to foreclosure as being those raised in his then-pending appeal, Da137 (¶6), with forgery not being one of them. He identified Svetlana Nashtatik as his ex-wife. Da137 (¶1).[2]

[2] Vadim Chepovetsky no longer resides at the property. Da272 (¶11).

On September 1, 2023, the court vacated default in the foreclosure action. Da143. On September 11, 2023, Vadim Chepovetsky and Svetlana Nashtatik filed their Answer, Da145, and enumerated twenty-five affirmative defenses without mentioning an alleged forgery. Da148-151. They did include, however, as the twentieth defense, "[T]here is a pending action with regard to the same and related issues before the Appellate Division[.]" Da150.

On January 29, 2024, Mr. Civello moved for summary judgment in the foreclosure action. Da155-156. In opposition, Vadim Chepovetsky and Svetlana Nashtatik's lawyer filed a certification that represents, "The Court should be aware that an appeal is currently pending before the Appellate Division, in the related matter . . . .The matter has the same set of facts and circumstances." Da278 (¶15).

Their facts in opposition to summary judgment state, "An appeal is currently pending before the Appellate Division, in the related matter . . . .The matter has the same set of facts and circumstances." Da275 (¶30). Counsel attached his appellate brief, and said, "The arguments and facts set forth in that brief are incorporated herein by reference." Pa31. The opposition argues Vadim Chepovetsky signed the Mortgage, but Svetlana Nashtatik did not. Da273 (¶14).[3]

[3] There was a disagreement as to whether Defendants disclosed the forgery issue in discovery. Accepting their date, November 14, 2023, Da478, it is still after they lost the prior case and it is while their appeal was pending with this Court.

Like her lawyer and Vadim Chepovetsky, Svetlana Nashtatik certified, "The matter has the same set of facts and circumstances" as the then-pending appeal. Da275 (¶30); see also Da381(¶3) (she certified it is "the same parties, that also covers the same facts, actions and set of circumstances.").

On March 4, 2024, the court granted Mr. Civello summary judgment. Da1. "Defendants submit that these exact same facts and circumstances are the subject of the pending appeal . . ., which shall determine whether Plaintiff's right to foreclosure on the Mortgage is barred by the [SOL]." Da5. The court independently considered the SOL despite the pending appeal, and rejected their argument. Da9-10.

The court also rejected the belated forgery claim, and observed Defendants could have produced a handwriting expert, but failed to. Da12. Also, the record "directly contradicts" the forgery claim, and the person claiming her signature is forged admitted in prior litigation she signed the Mortgage. Da12. "Defendants here have consistently relied on the validity of the Mortgage in their prior proceedings and have never alleged forgery until now," Da12, and the court observed, the Appellate Division was similarly led to believe the Mortgage was legitimate in the parties' then-pending appeal. Da12.

The court included Entire Controversy Doctrine as a basis to reject the SOL claim. In terms of defense counsel's attempt to refute the Notary's observation by presenting an internet search he performed that did not identify the Notary as

licensed, his search was not for the time period the Notary witnessed Svetlana Nashtatik sign the Mortgage. Da13-14.

On March 22, 2024, Defendants moved for reconsideration, Da465-466, and on April 18, 2024, the court granted reconsideration in favor of conducting a plenary hearing, Da483, which occurred on May 30, 2024. 2T.

At the May 30, 2024 hearing, Mr. Civello testified, and the court found his testimony to be credible. 3T12-22 to -24. Mr. Civello testified to being present as Vadim Chepovetsky and Svetlana Nashtatik signed the Mortgage. 2T10-10 to -19. The three walked from the business Mr. Civello was selling to a Century 21 real estate office where a Notary worked approximately a hundred feet away. 2T11-15 to -24; 2T13-16 to -21. The Mortgage included the signature of Svetlana Nashtatik and the Notary, 2T17-22 to -24; he personally observed it being signed by Svetlana Nashtatik, 2T18-5 to -7, and the Notary. 2T18-16 to -18. The attorney who recorded the Mortgage testified he recorded the Mortgage. 2T55-8 to -13.

Vadim Chepovetsky testified, but the court did not find him credible. 3T7-23 to -24. For the Mortgage signed more than a decade earlier, he recalled that day having a meeting with Mr. Civello for lunch, chicken cutlets were ordered, and Mr. Civello was told, "[M]y wife will never sign" a Mortgage, and Mr. Civello said, "[N]o problem" because the Mortgage was simply going to be for Mr. Civello's

"piece of mind." 2T23-25 to 24-6. Vadim Chepovetsky testified he signed the Mortgage. 2T26-2 to -3.

Svetlana Nashtatik testified, but the court did not find her credible, and found her testimony about her signature "contradictory and inconsistent." 3T10-19 to -25. Svetlana Nashtatik testified generally about her signature, and all the variations she employed as her signature over the years. Upon being given her answers to interrogatories for the foreclosure case, and asked by her lawyer if it was her signature, she first said, "I don't think so," 2T32-5 to -16, but then said, "It's – it might be mine," followed by, "It looks – yeah. That's mine. Yeah." 2T32-17 to -20. She testified she has a "few" ways of signing documents. 2T42-5 to -15. She uses her full last name "most of the time," 2T42-20 to 43-14, and "pretty much" signs legal documents the same, but "in some, it's like a variation" of her name. 2T44-4 to -10.

In addition to variations, she sometimes modifies her first name altogether, and also has "[a] full signature and [she has a] short signature." 2T44-11 to -18. When asked how she decides which signature to use, she said, "I don't know how to answer this question. When like I feel like it," 2T44-19 to -21, and it can change one day to the next. 2T44-22 to 45-1.

She admitted her prior litigation was "to invalidate the mortgage," 2T47-11 to -14, and of all the claims raised, her signature being a forgery was not one of them.

2T47-15 to -17. When asked why she said she signed the Mortgage for the prior litigation, Da18 (¶17), she said she did not remember. 2T52-12 to -14.

On July 3, 2024, for the then-pending appeal and prior to a decision on summary judgment, this Court ruled against Vadim Chepovetsky and Svetlana Nashtatik on the SOL. Da575-593. "Based on our careful consideration of the record and applicable law, we affirm substantially for the reasons set forth by [the judge below] in his cogent twenty-seven-page written decision." Da576. This Court held, "The promissory note was secured by a mortgage," Da576, Vadim Chepovetsky and Svetlana Nashtatik sought to quiet title "on the mortgaged property[,]" Da577, and the SOL has not run to foreclose (the SOL expires in 2027). Da592-593.

On July 23, 2024, on the foreclosure matter, on reconsideration and after the plenary hearing, the court again rejected the forgery claim and again granted Mr. Civello summary judgment. Da21. On or about July 22, 2024, and for the prior litigation, Vadim Chepovetsky and Svetlana Nashtatik filed a petition for certification on the issue of the SOL. Pa32-33. Their petition raised the same exact SOL issue they again raise on this appeal. Pa34.

On August 20, 2024, for the foreclosure, Plaintiff filed a motion for entry of Final Judgment. Da515-516. Rather than oppose on the merits entry of Final Judgment, on August 30, 2024 Defendants filed a cross-motion for a stay of execution of Final Judgment pending appeal. Da35-36.

The brief for their cross-motion for a stay represents, "[T]here are two cases that exist and revolve around the events in this case," followed by a citation to "this case," i.e., the foreclosure, and the "still pending" appeal of the prior case. Pa37. As for the SOL, the brief informs the court Defendants are "appealing the [SOL] issue in the Petition for Certification to the Supreme Court," Pa38-39, and "The subject[] of [that] appeal[] – the application of the [SOL] to the mortgage . . . [is] central to the resolution of this case," i.e., the foreclosure. Pa39.

On September 27, 2024, at oral argument on the motion for entry of Final Judgment, 4T, counsel repeated that Defendants are not opposing its entry:

> Plaintiff is correct, we weren't objecting to the entry of judgment that's already been adjudicated through this entire process and that is exactly what we were submitting to the Appellate Division to appeal was the ent -- not the entry of the final judgment, but the final judgment in and of itself, which obviously Your Honor pointed out that the Appellate Division decided that that was premature because the judgment hasn't been entered.
>
> [4T12-8 to -16.]

On September 27, 2024, the court entered Final Judgment. Da23-26; 4T. On October 2, 2024, Defendants filed a notice of appeal. Da559-567. On December 3, 2024, the Supreme Court denied the petition challenging the SOL ruling. Pa40.

LEGAL ARGUMENT

POINT I

THE STATUTE OF LIMITATIONS ARGUMENT INVOLVING "THE SAME PARTIES, THE SAME FACTS, THE SAME ACTIONS AND THE SAME SET OF CIRCUMSTANCES, WITH REGARD TO THE SAME PROPERTY, . . . AND SAME RIGHTS OF THE PARTIES" HAS ALREADY BEEN ADJUDICATED BY THIS COURT.

Defendants ask this Court to again address their statute of limitations ("SOL") argument. It has been adjudicated by trial judges, a three-judge panel of this Court, and the Supreme Court. The argument involves, per Defendants, "the same parties, the same facts, the same actions and the same set of circumstances, with regard to the same property, . . . and same rights of the parties."

Defendants' SOL argument is wrong, but had it been correct, the regurgitated argument is barred by res judicata. "[T]he doctrine of res judicata provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velasquez v. Franz, 123 N.J. 498, 505 (1991). "Res judicata . . . contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." Lubliner v. Board of Alcoholic Beverage Control, 33 N.J. 428, 435 (1960).

To vacate default, Defendants argued to the court below, "[T]here is a related . . . Appellate Division appeal pending . . ., which involves the same parties, the same facts, the same actions and the same set of circumstances, with regard to the same property, . . . and same rights of the parties." Da71 (¶2). Their pleading includes as a defense, "[T]here is a pending action with regard to the same and related issues before the Appellate Division[.]" Da150. Their lawyer certified, "[A]n appeal is currently pending . . ., in the related matter . . . .The matter has the same set of facts and circumstances." Da278 (¶15). Their facts for summary judgment assert, "An appeal is currently pending before the Appellate Division, in the related matter entitled [A-2153-22T4]. The matter has the same set of facts and circumstances." Da275 (¶30). Their lawyer attached the appellate brief that he "incorporated herein by reference." Da31.

For their motion for a stay, their brief references the "still pending" appeal, Pa37, and their brief argues Defendants are "appealing the [SOL] issue in the Petition for Certification to the Supreme Court," Pa38-39, and "The subject[] of [that] appeal[] – the application of the statute of limitations to the mortgage . . . [is] central to the resolution of this case." Pa39.

Vadim Chepovetsky certified for the motion, "[T]here is a pending case regarding the same property and the same set of circumstances and facts." Da137 (¶2). Svetlana Nashtatik certified, "The matter has the same set of facts and

circumstances" as the then-pending appeal, Da275 (¶30), and the appeal involves "the same parties, that also covers the same facts, actions and set of circumstances." Da381(¶3).

Defendants raised the SOL in prior litigation at the trial level and lost. Da87. They filed an appeal on the SOL issue, Pa24-26, and lost. Da575-593. They sought certification, Pa32-34, and lost. Pa40. They cannot relitigate the issue. Velasquez, 123 N.J. at 505; Lubliner, 33 N.J. at 435.

Even if they could relitigate the SOL, they omit the SOL issue went against them for several reasons. As asserted in the prior appeal, they failed to timely raise the SOL, failed to refute the judge's finding on contractual intent, and failed to counter the judge's ruling that equitable estoppel bars enforcement of a SOL. The Mortgage also includes an anti-waiver clause. It is too late for Defendant to address these issues in a reply brief. Musto v. Vidas, 333 N.J. Super. 52, 67 (App. Div. 2000); L.J. Zucca, Inc. v. Allen Bros. Whole. Dist., Inc., 434 N.J. Super. 60, 87 (App. Div. 2014).

This Court should not reconsider its decision on the SOL. Defendants exhausted appellate remedies the first time around. The issue has been conclusively adjudicated under the applicable SOL law and also the fact findings and legal conclusions for why the SOL is unenforceable.

POINT II

THE COURT BELOW PROPERLY REJECTED DEFENDANTS' BELATED, CONTRADICTORY FORGERY CLAIM; REGARDLESS, IT IS BARRED BY COLLATERAL ESTOPPEL, THE ENTIRE CONTROVERSY DOCTRINE, AND THE MORTGAGE IS VALID EVEN IF ONE OF THE SIGNATURES IS FORGED.

The court below rejected the forgery claim because Defendants failed to present credible evidence of a forgery. Their evidence of a forgery was themselves, and the court found both lacked credibility. The court also properly and alternatively rejected the forgery claim due to the Entire Controversy Doctrine. The claim is barred due to collateral estoppel, too. Last, even if credible evidence existed that the non-property owner's signature is forged, it does not change the validity of the Mortgage for purposes of foreclosure against the owner who signed the Mortgage.

Preliminarily, Defendants waived the right to appeal entry of Final Judgment and, in turn, the interlocutory Order granting summary judgment. Defendants chose to file a motion for a stay of Final Judgment instead of opposing its entry. Then, at oral argument, defense counsel reiterated they were not objecting to Final Judgment, but instead the interlocutory decisions leading up to it. 4T12-8 to -16.

An issue on appeal is moot when a party consents to entry of judgment that implicates the issue. Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 208 (App. Div. 2009); Infante v. Gottesman, 233 N.J. Super. 310, 318-319 (App. Div. 1989).

A party should also not be heard to complain on appeal if the party failed to properly oppose a motion below. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). Failing to oppose entry of judgment is not just a matter of invited error and mootness. It removes standing on appeal. Yun v. Ford Motor Co., 276 N.J. Super. 142, 149 (App. Div. 1994) (citations omitted), rev'd on dissent, 143 N.J. 162 (1996) (the dissent, however, agreed the failure to oppose the motion compels affirmance). Defendants were required to oppose entry of Final Judgment to be able to challenge interlocutory rulings leading up to it.

As for a challenge to the interlocutory ruling, it should fail. To prevail on summary judgment (and entry of Final Judgment), Plaintiff needed only to present evidence the Mortgage was executed, recorded, and not paid. Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). Mr. Civello testified he signed the Mortgage and observed Defendants sign it. 2T10-10 to -19; 2T11-15 to -24; 2T13-16 to -21; 2T17-22 to -24; 2T18-5 to -7. The attorney who recorded the Mortgage testified he recorded the Mortgage. 2T55-8 to -13. Defendants admit they defaulted and never cured their default. Da323 (¶4). Plaintiff presented a prima facie case to foreclosure. Thorpe, 20 N.J. Super. at 37.

In addition to testimony heard by the court below, a notarized document is prima facie evidence Svetlana Nashtatik signed the document without any need for

the Notary to testify. N.J.R.E. 902(h) (a Mortgage is self-authenticating); see also N.J.S.A. 2A:82-17 (notary stamp is prima facie evidence of the signature).

Defendants bore the burden to dispel the prima facie case. They were required in their Answer to raise the forgery issue, but they failed to do so. The issue is waived. "[A]n affirmative defense is waived if not pleaded or otherwise timely raised." Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986); see also Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375-76 (App. Div. 1997) (failing to raise a defense in a pleading and first alluding to it in a motion for summary judgment is too late - it is waived); see generally, N.J.S.A. 12:3-308a (signature on an instrument is presumed valid and beyond challenge if its validity is not denied in the pleading); N.J.S.A. 2A:82-17 (there is a presumption as to the validity of a Mortgage that is notarized).

Setting aside waiver, the burden to rebut the prima facie case is a high one. In a foreclosure matter it is Defendants' "burden to exclude all reasonable doubt" with "competent proof" and an "affirmative demonstration." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). Unexplained conclusions and "[b]ald assertions" are insufficient. Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014).

Defendants chose to rely on their own self-serving denials. They failed to present competent evidence in response to Mr. Civello's testimony and the Notary.

They failed to counter Svetlana Nashtatik's damaging testimony about her various signatures. Her testimony helped explain why even she at times does not recognize her own signature. Her testimony helped explain why different notaries observed her sign different documents that may appear to the naked eye to be different.

The argument made on appeal about the burden of proof is incorrect. Forgery is a form of fraud and must be established with clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989); see also Dencer v. Erb, 142 N.J. Eq. 422, 426 (Ch. 1948) (rebutting an acknowledged document requires clear and convincing evidence); Potter v. Steer, 95 N.J. Eq. 102, 104 (Ch. 1923) (rebutting the presumption of the validity of a Mortgage requires "clear, satisfactory and convincing" evidence). A challenger's "uncorroborated testimony" is insufficient. Resolution Trust Corp. v. Associated Gulf Contractors, Inc., 263 N.J. Super. 332, 344 (App. Div. 1993) (citations omitted). Stated differently, sworn testimony alone does not rebut the Mortgage's presumption of validity. See generally, Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004) (unexplained, unqualified sworn testimony does not create a disputed fact).

Even a lesser evidentiary burden would not help Defendants on their appeal. Their evidence still consisted of their uncorroborated denials. Regardless of the burden below, the court found Mr. Civello credible. 3T12-22 to -24. He testified he

was present when Vadim Chepovetsky and Svetlana Nashtatik signed the Mortgage. The court found Vadim Chepovetsky and Svetlana Nashtatik not credible. 3T7-23 to -24; 3T10-19 to -25. Since they were their only evidence, there is no credible evidence in the record in their favor. They cannot satisfy the lowest evidentiary burden our law offers. Thus, if error occurred, it was harmless.

An insurmountable flaw in Defendants' argument remains the representations they made in their prior litigation. Their argument is barred by the broader notion of collateral estoppel. "Collateral estoppel applies when either party attempts to relitigate facts necessary to a prior judgment." T.W. v. A.W., 224 N.J. Super. 675, 682 (App. Div. 1988). Collateral estoppel completely bars their argument and serves the dual purpose of defeating their claim the court below erred. A party does not create an issue of fact by raising arguments contradicting one's prior statements and representations. Mosior v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984). They both admitted in prior litigation to signing the Mortgage. They both relied on the validity of the Mortgage when seeking relief from the court.

Another basis to deny relief is the Entire Controversy Doctrine, as cited by the court below. The doctrine "requires a litigant to present all aspects of a controversy in one legal proceeding." Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 240 (App. Div. 2002) (citation and internal quotation omitted). All the court needs to invoke the doctrine is facts that demonstrate the party "has had

a fair and reasonable opportunity to litigate that claim" and, in invoking the doctrine, "a court must [] be sensitive to the possibility that a party has purposely withheld claims from an earlier suit for strategic reasons or to obtain 'two bites at the apple.' A court should not permit itself to be made a party to such strategic choices that wreak unfair results upon others." Id. at 241 (citations omitted).

The doctrine "embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015) (citation omitted); see also Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991) (the doctrine is broad enough to preclude a second litigation of "relevant matters that could have" been raised); and see Villa Contracting Co., Inc. v. Summit Bancorporation, 302 N.J. Super. 588, 591-92 (Law Div. 1996) (barring a forgery claim omitted from a prior claim).

All this Court needs to apply the doctrine is Defendants' representations to the court below: Vadim Chepovetsky certified the prior case involved "the same property and the same set of circumstances and facts," Da136 (¶2); and Svetlana Nashtatik certified it involved "the same set of facts and circumstances," Da275 (¶30), with "the same parties, that also covers the same facts, actions and set of

circumstances." Da381(¶3). Their lawyer certified the prior case "involves the same parties, the same facts, the same actions and the same set of circumstances, with regard to the same property, . . . and same rights of the parties." Da71 (¶2).

Another issue is that Vadim Chepovetsky signed the Mortgage. As the sole person listed as the property owner, the Mortgage is valid. The signature of Svetlana Nashtatik, while preferable, does not affect the facial validity of the Mortgage, even if she established below the signature is not hers. And had her signature been required, by accepting the fruits of the sale of the business that used the property as security, Mr. Civello acquired an equitable lien/mortgage.

Last, the judge's conclusion after the plenary hearing that Defendants failed to establish the Mortgage is a forgery is entitled to almost unfettered deference. This Court does not "engage in an independent assessment of the evidence as if it were the court of first instance," State v. Locurto, 157 N.J. 463, 471 (1999), nor does this Court "weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (citation omitted)).

The findings below should not be disturbed unless "so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. Investors Ins. Co. of Am., 65 N.J. 474, 486-84 (1974) (citations omitted). "When more than one reasonable inference can be drawn from the review of" documentary evidence, "then the one

accepted by a trial court cannot be unreasonable" and "the mere substitution of an appellate court's judgment for that of the trial court's advances no greater good." State v. S.S., 229 N.J. 360, 380 (2017).

The court below found the Mortgage facially valid. The court below found Defendants failed to rebut the presumption of its validity, regardless of the standard employed. The court below found Defendants lacking in credibility. There is no basis to disturb the decision below.

CONCLUSION

For the foregoing reasons, we respectfully request the decision below be affirmed in its entirety.

LAW OFFICES OF
JEFFREY S. MANDEL LLC
Attorneys for Plaintiff-
Respondent

By: /s/ Jeff Mandel
Jeffrey S. Mandel

Dated: March 3, 2025

Louis Civello, Jr.,	:	
	:	**Superior Court of**
Plaintiff-Respondent,	:	**New Jersey**
v.	:	**Appellate Division**
	:	
Vadim Chepovetsky, and Spouse Of Vadim Chepovetsky; John Doe 1 : (Name Being Fictitious) Tenant / Occupant; John Doe 2 (Name Being Fictitious) Tenant / Occupant; John Doe 3 (Name Being Fictitious) Tenant / Occupant; John Doe 4 (Name Being Fictitious) Tenant / Occupant; Jane Doe 1 (Name Being Fictitious) Tenant / Occupant; Jane Doe 2 (Name Being Fictitious) Tenant / Occupant; Jane Doe 3 (Name Being Fictitious) Tenant / Occupant; Jane Doe 4 (Name Being Fictitious) Tenant / Occupant; Svetlana Nashtatik; Julia Maizlik; Simio & Jones Llp; Platinum Credit Resources LLC; Nii A. Okyne; State Of New Jersey; Ltd Acquisitions, LLC; Paymentech, LP D/B/A Chase Paymentech; Heather M. Brito,	:	**No. A-000324-24 T2**
	:	
	:	**Civil Action**
	:	
	:	**On Appeal from Final Judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County**
	:	
	:	**Docket No. Below: F-004193-23**
	:	**Sat Below: Hon. Lisa M. Vignuolo, P.J.Ch.**
Defendants.	:	
_____	:	
	:	
Vadim Chepovetsky, and Svetlana Nashtatik,	:	
	:	
Defendants-Appellants	::	

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT IN REPLY

In his Opposition Brief, Plaintiff, Louis Civello, Jr. ("Civello"), plays fast and loose, and cute with the Court to create a superficial argument in his favor. Throughout his Procedural History and Statement of Facts, he presents statements in support of his position that are either unsupported or actually do not support his position.

For example, Civello notes that in the prior litigation Defendants, Vadim Chepovetsky ("Chepovetsky") and Svetlana Nashtatik ("Nashtatik") (collectively, "Mortgagors" and "Defendants") attached a true copy of the mortgage at issue. (Pb at 3). From this, Civello implies that thereby the signatures on the mortgage were all genuine. However, that implication is a complete *non sequitur*. Yes, the mortgage was attached because it was recorded and constituted a cloud on the title regardless of whether or not the signatures were genuine. Contrary to Civello's implied assertion, it was *not* a concession or admission by the Defendants that in fact the signatures were genuine; it was nothing more than a concession that the document existed as a cloud on the title.

For another example, Civello implies that Defendants admitted they had obligations because of that mortgage (Pb at 3) when in fact Defendants denied having any obligations under that mortgage. DA- 389a at para. 9. The validity *vel non* of the Nashtatik signature was not germane in the quite title action since any

obligations under the mortgage were no longer extant.

Still further, Civello relies on determinations that were made in the course of proceedings which the Appellate Division, in the first appeal between the parties, found to be void. See, Pb at 5 and DA-452a to 454a. Nonetheless, Civello has the temerity to suggest that this Court should rely on findings that are void to affirm the decision below.

Civello also mis-cites to the record. He states that Defendants conceded that Civello "had 'the right to foreclose'" (Pb at 5) and cites to PA-21a for that proposition. However, *nowhere does any such concession appear on the cited page of Plaintiff's Appendix.* If that was not enough, immediately thereafter Civello affirmatively misstates the record when he says Defendants "argued a prior bankruptcy prevents enforcement of the Mortgage." Pb at 5. In fact, that argument was never made, and Civello's citation to PA-22a does not support that assertion. Rather, the bankruptcy issue in that prior action pertained solely to a judgment on a personal guaranty that was discharged in bankruptcy and which *guaranty* thereby became unenforceable. Civello knows better, or should know better, than to conflate the issues in an attempt to create a non-existent contradiction.

So too, Civello attempts to mislead the Court by implying that a statement by Defendants that there is no question that the Mortgage exists means that the Mortgage is valid. A mortgage that has been recorded does not need to be valid to

create a cloud on the title; its mere existence in the record is what clouds title. This is another disingenuous and desperate attempt by Civello to create an admission where none exists.

Civello also takes out of context dicta stated by the trial court in the quiet title action regarding the Defendants being mortgagors and having signed it. Pb at 7. That they are identified as mortgagors on the document in question does not establish that they factually signed it. In addition, the quiet title action was a declaratory judgment action that was limited in its scope to the applicability of the statute of limitations; it did not include a claim by Civello for foreclosure as to which the issue of forgery could be asserted as a defense resulting in the validity of the signatures not being actually litigated.

While Civello is quick to make the assertion that the Separate Defenses in this action did not mention forgery by name (Pb. at 9), he totally disregards that the court below rejected that assertion (DA-483a *et seq.*) *and that he did not appeal or cross appeal from that rejection*.

Civello also raises a litany of inane and false assertions at Pb.17 in a transparent effort to distract this Court from the real issue before it (the misapplication by the court below of an incorrect burden of persuasion). On the issue of the statute of limitations, he asserts that Mortgagors "failed to timely raise the SOL" in the prior quite title action. This incredible assertion is demonstrably

false because the entire declaratory judgment action to quiet title was based upon the expiration of the statute of limitations. DA-388a *et seq.* Civello also disingenuously asserts that the Mortgagors "failed to refute the judge's finding on contractual intent," an assertion that was and is completely irrelevant in that a statute of limitations arises from the intent of the Legislature and not of the intent of the parties. He also asserts that the Mortgagors "failed to counter the judge's ruling [in the quite title action] that equitable estoppel bars enforcement of a SOL", yet disregards the legal reality that the ruling was null and void because the Mortgagors' bankruptcy rendered all proceedings on Civello's claims void in that action.

Astoundingly, Civello asserts that "the Mortgage also includes an anti-waiver clause" (which pertains to waivers by the mortgagee) prevents the assertion of the statute of limitations. This is another astounding red herring since a statute of limitations is not a wavier but is a matter of law. In a transparent effort to avoid having to defend these desperate assertions, Civello states "[i]t is too late for Defendant to address these issues in a reply brief." This is a ridiculous assertion since Civello is raising these issues in his initial appellate opposition brief, which thereby makes these issues the proper subject of a reply brief.

The inanity of Civello's positions is manifest by his audacious argument that the Defendants waived their right to appeal from the final judgment when they filed a motion *to stay judgment pending appeal.* Pb. at 14. This is not a case where a

consent judgment has been entered, or the issue has been unopposed. Rather, this is a case where the issue has been fully litigated, the issue has been adjudicated, and the court merely engages in the ministerial act of reducing its rulings to a form of judgment. Civello presents no authority for any assertion that one must oppose every ministerial act by the lower court, even those that were previously determined by the court over opposition, to pursue an appeal from the final judgment.[1] The appeal is not from the form of the judgment, but the substance of the previous July 23, 2024 granting of summary judgment; as shown by Defendants' prior attempt to appeal the summary judgment which was dismissed for non-finality, the existence of a final judgment to obtain review of the ruling on the forgery. This Court should not let this procedural argument of Civello, which is the equivalent of taking issue with how many angels can dance on the head of a pin, distract it from effectuating a determination on the merits of an appeal that has been preserved and effected.

The Court can, and should, conclude that Civello is overreaching and overstating his case because the decision below cannot survive appellate scrutiny.

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[1] If accepted, Civello's position would require every form of order setting forth a court's earlier substantive ruling, even if the order is otherwise unobjectionable, to be opposed and re-argued anew regardless of the lack of grounds for further opposition. Such a course would clog the courts with meritless oppositions to forms of order (and would be akin to requiring a motion for reconsideration of every order for every ruling before it could be appealed – a requirement that simply does not exist in New Jersey procedure).

ARGUMENT

POINT I

THE FORGERY OF THE SIGNATURE OF NASHTATIK IS NOT BARRED BY THE ENTIRE CONTROVERSY DOCTRINE

While arguing that the Defendants are barred by the entire controversy doctrine from asserting forgery because it was not asserted in the prior quiet title action, Civello offers no argument or basis as to why his claim for foreclosure is not also barred by the entire controversy doctrine because he did not assert his claim for foreclosure in the prior quiet title action.[2] Once again, Civello is overreaching. He is clearly seeking the application of a double standard, one that would preclude his adversary from asserting a claim that was not raised in the prior action while permitting him to assert a claim that he withheld from the prior action.[3]

Civello's argument disregards the crucial fact that the complaint in the prior action was limited to a declaratory judgment action for a declaration that the Mortgage was barred by the statute of limitations, and an accompanying injunction against Civello asserting rights in the property. The quiet title action did not assert

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[2] Defendant pleaded in this action that Civello's claim was barred by the entire controversy doctrine. DA-128a.

[3] It is clear that he did not assert it, because if he did he would not have had to file the present action. However, if it was asserted in that quite title action, he was not granted foreclosure in that action and therefore is precluded under the doctrine of *res judicata* from pursuing it in this action.

a claim by Civello for foreclosure of the Mortgage, to which the forgery would be a defense required to be asserted if a claim for foreclosure were asserted. It is unreasonable to assert, as Civello necessarily does, that a party to a limited declaratory judgment action seeking specific relief is required to assert a defense against a claim that has not been asserted upon pain of preclusion if such a claim is later asserted in a subsequent action.

The principles governing the entire controversy doctrine were described in *K-Land Corp. No. 28 v. Landis Sewerage Auth.*, 173 N.J. 59, 70 (2002) (quoting from Pressler, *Current N.J. Rules,* comments 1 & 2 on *R.* 4:30A (2002) (emphasis added by the court):

> The entire controversy doctrine, an equitable preclusionary doctrine whose purposes are to encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency, was originally conceived of as a claim-joinder mandate, requiring all parties in an action to raise in that action all transactionally related claims each had against any other whether assertible by complaint, counterclaim, or cross-claim . . . . Although the court rules had not initially contained any provision expressly referring to the entire controversy doctrine, *R.* 4:27-1(b) was added to the rule governing joinder of claims effective September 1979 to provide for mandatory joinder of claims under the doctrine, which, however, was undefined, it having been then and remains still the Supreme Court's view that development of the substantive content of the doctrine is best left to case law.
> . . . .
> The rule as to claim joinder continues to require, as a general matter, that all aspects of the controversy between those who are parties to the litigation be included in a single action.
> . . . .
> *[T]he equitable nature of the doctrine[] bar[s] its application where to*

> *do so would be unfair in the totality of the circumstances and would not promote any of its objectives, namely, the promotion of conclusive determinations, party fairness, and judicial economy and efficiency.*
> . . . .
> *Nor does the doctrine apply to bar component claims either unknown, unarisen or unaccrued at the time of the original action.*

"The entire controversy doctrine is fact sensitive and dependent upon the particular circumstances of a given case." *700 Highway 33 LLC v. Pollio*, 421 N.J. Super. 231, 236 (App. Div. 2011). A court has the discretion not to apply the entire controversy doctrine when doing so would be inequitable on the facts of a particular case, or it would not promote the doctrine's underlying goals. *Carrington Mortg. Services, LLC*, 464 N.J. Super. 59, 68 (App. Div. 2020). The purposes of the doctrine include the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition. *Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 15 (1989). Its aim is to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness. Id.

As applied to the present matter, precluding the assertion of the defense of forgery because it was not pre-emptively asserted in the quiet title action would run counter to reasons for the entire controversy doctrine. Since the Mortgagors' quiet title action was limited to unenforceability of the Mortgage as a result of the statute of limitations, and since Civello chose not to assert a claim for foreclosure in that action to which the forgery would be relevant and material, requiring the assertion

of that forgery defense to a claim that not had been asserted would not be judicially efficient, would only serve to needlessly expand the scope of the action by asserting factual controversies that were not germane to the limited issues in that declaratory judgment action, would further delay the resolution of the quiet title action, and would waste the time and efforts of the parties at that time by requiring them to litigate over a claim that may be barred and would thus clog the judicial system. Accord, *Hillsborough Tp. Bd. of Educ. v. Faridy Thorne Frayta, P.C.*, 321 N.J. Super. 275 (App. Div. 1999) (entire controversy doctrine not applied when first action was a declaratory judgment action with a limited scope).

Accordingly, the entire controversy doctrine did not, and does not, bar the litigating of the forgery issue.

POINT II

THE ARGUMENT REGARDING THE STATUTE OF LIMITATIONS, N.J.S.A. 2A:50-56.1, IS NOT BARRED FROM CONSIDERATION BY THIS COURT

Defendants pled and preserved in this action the defense of the statute of limitations, N.J.S.A. 2A:50.56.1. DA-126a. Thus, the defense is a part of this action and concomitantly it is a matter that can be raised on appeal.

It is well settled that, in the absence of a directive from a court higher than the one which is presently hearing the matter, the law of the case doctrine is a matter of discretion. *Lombardi v. Masso*, 207 N.J. 517, 538 (2011). In the present matter, the

New Jersey Supreme Court declined to take up and rule upon the issue of the statute of limitations so that, at most, there is only a decision in this matter by a court of coordinate standing with this Court. Thus, it is incumbent upon this Court "to balance the value of judicial deference for the rulings of a coordinate [panel] against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" Id., (quoting form *Hart v. City of Jersey City*, 308 N.J. Super. 487, 498 (App.Div.1998)). By the Supreme Court not addressing the merits of the statute of limitations, and the preservation of that issue in this action while this action was still pending, there has not been a final decision on the merits of that issue that is required to be followed by this Court. Finally, Civello failed to plead *res judicata* in the Court below as an avoidance of the defense of the Statute of Limitations, and accordingly he has failed to preserve that argument for appeal.

POINT III

CIVELLO FAILS TO ADDRESS THE EFFECT OF A FAILURE OF THE COURT BELOW TO APPLY THE CORRECT LEGAL STANDARD GOVERNING THE BURDEN OF PROOF

The issue before this Court on this appeal is the issue of whether the court below applied the correct legal standard in concluding that Nashtatik's signature on the Mortgage was not a forgery. Simply stated, the conclusions of the court below are probative of nothing if the court applied the wrong standard for making its decision. Thus, all of Civello's statements relying on the "findings" of the court

below are meaningless if the burden of proof was misallocated.

As set forth in the Defendants' initial brief on this appeal, the court below wrongly allocated the burden of proof onto the Defendants after they came forward with evidence that caused any presumption of validity to burst. It is uncontroverted that the effect of a forged signature on a mortgage is that the forged document is null and void. *See*, *Cornell v. Moussavian*, 2011 N.J. Super. Unpub. LEXIS 2861 (Ch. Div. 2011). Where the validity and authenticity of a signature on a mortgage is denied, the burden of proof on establishing a signature's validity rests with the party asserting that it is valid. In circumstances where a presumption of validity might arise, the presumption "vanishes" or "bursts" upon the production of evidence that could support the denial of the validity of the signature, *N.J.S.A.* 12A:3-308(1), and the burden of persuasion is on the proponent of the document.

In the instant case, there can be no serious question that Nashtatik has come forward with evidence of forgery, including the presentation of genuine signatures that did not match the one on the mortgage, testimony under oath by two witnesses that she did not sign the mortgage, testimony that she never appeared before any notary to sign the mortgage, and testimony that Civello's account of the events never took place. All of this evidence was sufficient to overcome any presumption. Yet the court below squarely misplaced the burden of persuasion on Defendants even after any presumption vanished.

Once a party produces evidence that would enable a finder of fact to determine that the facts are contrary to the asserted presumption, the presumption vanishes and the burden of proof returns to the proponent of the fact. *N.J. Rule Evid.* 301(b). The principle that a presumption vanishes in the face of contrary evidence has long been a recognized feature in the jurisprudence of New Jersey. *See*, *Passaic v. Botany Mills, Inc.*, 59 N.J. Super. 537, 543 (App. Div. 1960), certif. denied *sub nom, In re Orsini*, 37 N.J. 500 (1962); *Flanagan v. Equitable Life Assurance Soc'y*, 14 N.J. 309, 314 (1954); *Vide, Dunn v. Goldman*, 111 N.J.L. 249 (Sup. Ct. 1933); *Kirschbaum v. Metropolitan Life Insurance Co.*, 133 N.J.L. 5 (E. & A. 1945); *Meltzer v. Division of Tax Appeals*, 134 N.J.L. 510 (Sup. Ct. 1946); *Gaudreau v. Eclipse Pioneer, &c., Bendix Air Corp.*, 137 N.J.L. 666 (E. & A. 1948); *Grand View Gardens, Inc. v. Hasbrouck Heights*, 14 N.J. Super. 167 (App. Div. 1951).

On appeal, Civello argues it is Defendants' "burden to exclude all reasonable doubt" with "competent proof" and an "affirmative demonstration." Pb. at 20. The flaw in this argument is the same flaw in the decision below, *i.e.*, it presumes that the Defendants have the burden of proof when, as set forth above, the burden of proof on the genuineness of the mortgage remains on the person seeking foreclosure especially where (as here) evidence is presented showing that it is not valid. Further seeking to buttress that flawed argument is Civello's assertion that "unexplained conclusions" and "bald assertions" are insufficient (Pb. at 20) and that

"uncorroborated testimony" is insufficient (Pb. at 21). In reality, the Defendants' assertion that the signature was a forgery was not a bald assertion but was corroborated by the documentary evidence introduced by the Defendants at the hearing, *i.e.*, the signatures on multiple genuine documents which were significantly different from the signature on the Mortgage. Civello goes further than just ignoring the record with respect to the evidence supporting the forgery of the Mortgage; he affirmatively misstates the law regarding his claimed insufficiency of evidence when he states "[s]tated differently, sworn testimony alone does not rebut the Mortgage's presumption of validity. See generally, *Carroll v. N.J. Transit*, 366 N.J. Super. 380, 388 (App. Div. 2004) (unexplained, unqualified sworn testimony does not create a disputed fact)." Pb. at 21. *Carroll* does not stand for the proposition that sworn testimony does not create a disputed fact; what it does stand for is that when a party's own "contradiction is unexplained and unqualified," simply raising *arguments* contradicting one's own prior statements does not create an issue of fact. That proposition has no application in the present matter, where Nashtatik explained (without contradiction) that any difference between her consistent position in this action and a statement made by an attorney in an unsworn and unverified pleading in another action is explained by the fact that she was not given an opportunity to review that pleading before it was filed.

Still ignoring that the burden of persuasion was on the Plaintiff after any

presumption that may relate to the validity of the signature was burst by the evidence presented by the Mortgagors. Civello argues that to overcome the signature the proof must be clear and convincing. That argument conflates the quantum of evidence which may be required to satisfy a burden of persuasion and where the burden of persuasion is placed.

Civello argues that self-serving claims by the Defendants are insufficient, yet his own case is based on nothing more than his own self-serving testimony.

In stating that its conclusions and findings were based on a failure of Nashtatik and Chepovetsky to prove that the signature was a forgery (3T 12:25 – 13:3) – a burden which they did not have – the court's findings were the result of an application of an improper legal standard and thus cannot be sustained (nor relied upon by Civello to support an affirmance). It is well-settled that when a court applies an incorrect legal standard to reach a determination, its findings and that determination must be reversed. *Thigpen v. City of E. Orange*, 408 N.J. Super. 331, 337 (App. Div. 2009) ("We reverse, because we conclude that the trial judge utilized an incorrect standard"); *Silver v. Bd. of Review*, 430 N.J. Super. 44, 46 (App. Div. 2013) ("applied an incorrect legal standard . . . and [we] reverse"). '[i]f the trial judge misconceives the applicable law or misapplies it . . . the exercise of legal discretion lacks a foundation and becomes an arbitrary act.' " *Summit Plaza Assocs. v. Kolta*, 462 N.J. Super. 401, 409 (App. Div. 2020), certif. denied, 244 N.J. 145

(2020) (quoting *Alves v. Rosenberg*, 400 N.J. Super. 553, 563 (App. Div. 2008)).

The entry of the judgment below was in error and must be vacated because the court below erred by applying the wrong burden of proof. Any presumption vanished when Nashtatik denied that the signature purporting to be her signature on the Mortgage document between her, Chepovetsky, and Civello, is her signature. Those denials were supported by additional, credible documentary evidence. The burden of proving the validity of the signature remained on Civello when the presumption was burst, yet the court below improperly shifted the burden of proof to Nashtatik and Chepovetsky.

CONCLUSION

Because the court below erred by placing the burden of proof on Chepovetsky and Nashtatik in this foreclosure action, the judgment of foreclosure must be reversed, and the action should be dismissed in its entirety.

Respectfully submitted,

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Dated: as of March 14, 2025

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