



## All Along the Watchtower: Awaiting the Ruling on FAPA's Retroactive Reach

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In a recent case, *E. Fork Funding LLC v. U.S. Bank, Nat'l Ass'n*, the United States Court of Appeals for the Second Circuit has certified a novel question for the New York Court of Appeals ("NYCOA"): Whether Sections 4 and/or 8 of the Foreclosure Abuse Prevention Act ("FAPA") apply to a unilateral voluntary discontinuance of a mortgage action taken prior to the Act's enactment. In other words, will FAPA apply retroactively to dismiss cases where lenders voluntarily dismissed foreclosure actions in reliance on a resetting of the statute of limitations?

FAPA was enacted in 2022 in response to the NYCOA's decision in *Freedom Mortg. Corp. v. Engel* ("Engel"), a 2021 case in which the court ruled that a voluntary discontinuance of a foreclosure action resets the statute of limitations.<sup>[1]</sup> Specifically, Section 4 and Section 8 of FAPA are at issue in the current case. Section 4 of the Act amended Section 203 of the Civil Practice Law and Rules ("CPLR") to state that, "Once a cause of action upon [a mortgage]...has accrued, no party may...unilaterally...effect a unilateral extension of the limitations period".<sup>[2]</sup> Similarly, Section 8 of FAPA amended Section 3217 of the CPLR to provide that, "...the voluntary discontinuance [of an action on a mortgage]...shall not...toll, extend, revive or reset the limitations period to commence an action".<sup>[3]</sup> *Fork Funding* pertains to a mortgage originated in 2006. The original mortgagors defaulted on the loan in 2010, and the original mortgagee – GMAC Mortgage, LLC ("GMAC") – commenced a foreclosure action. GMAC voluntarily dismissed the action in May of 2011 but subsequently brought a second action for foreclosure in November of 2011. Following an assignment from GMAC to U.S. Bank in 2015, the 2011 foreclosure action was voluntarily discontinued by GMAC in February of 2016. Shortly thereafter, U.S. Bank initiated a third foreclosure action. Due to a separate foreclosure action by the condominium's board of managers, East Fork Funding LLC purchased the subject property in 2016. In 2020, East Fork filed suit to quiet title against U.S. Bank on grounds that Schedule A of the mortgage described a different property than the mortgage was originally filed against. Both U.S. Bank and East Fork filed cross-motions for summary judgment.

While the summary judgment motions were pending in district court, the New York State legislature enacted FAPA. As discussed above, Section 8 of FAPA provides that a voluntary discontinuance of an action on a mortgage will not reset the statute of limitations period.<sup>[4]</sup> Holding that FAPA applied retroactively to the 2010, 2011 or 2016 voluntary dismissals, the district court applied Section 8 of FAPA. Since the statute of limitations began running in 2010 and was not reset by the 2011 or 2016 discontinuances, the district court granted East Fork's motion for summary judgment and denied U.S. Bank's motion for summary judgment.

On appeal, U.S. Bank argued that, as a matter of statutory interpretation, FAPA does not retroactively apply to a voluntary discontinuance. If FAPA does apply retroactively, U.S. Bank asserts that such application would violate the Contracts Clause of the U.S. Constitution. Finally, if FAPA does not apply, then U.S. Bank asserts that the statute of limitations has not run because the 2010 and 2011, foreclosure actions were properly discontinued under *Engel*. East Fork argued the exact opposite. They contend that FAPA does retroactively apply, that its application is not a violation of the Contracts Clause, and that if FAPA does not apply, then the 2010 and 2011 actions were improperly discontinued under *Engel*.

The Court reviewed both parties' arguments but declined to give a ruling on the merits of the case. Instead, the Court states that the NYCOA needs to determine the question because FAPA is a New York State law, its retroactive scope has not previously been addressed by the NYCOA, and the rulings of the state appellate courts are split.

[1] *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 31 (2021).

[2] NY CPLR § 203(h) (2023).

[3] NY CPLR § 3217(e) (2023).

[4] *See Id.*