THE HOLDER OF A DEED INTENDED AS SECURITY IN THE NATURE OF A MORTGAGE MUST PROCEED BY FORECLOSURE TO EXTINGUISH THE MORTGAGOR'S INTEREST; HERE THE SUBSEQUENT GOOD FAITH PURCHASERS OF THE PROPERTY WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE MORTGAGEE'S CAUSES OF ACTION SEEKING RESCISSION OF THEIR DEED AND A DECLARATION THEIR DEED WAS NULL AND VOID (SECOND DEPT).

The Second Department determined a deed which facially appears to evidence an absolute conveyance was actually intended as security in the nature of a mortgage. The holder of such a deed (here American Lending) must proceed by foreclosure to extinguish the mortgagor's interest. The subsequent purchasers of the property (the Romond defendants) were good faith purchasers. Therefore the Romond defendants were entitled to dismissal of American Lending's complaint seeking rescission of the Romond deed and a declaration the deed was null and void:

> In 2009, the defendant Dana Grigg sought to purchase certain property ... . When financing for the transaction fell through, Grigg entered into an ... agreement with the plaintiff, American Lending Corp. ... to borrow ... $385,000. The terms of the loan, which were memorialized in a note, included a provision that after 90 days, if the loan had not been repaid in full, American Lending would be authorized to file a joint deed in the property records and to "seek a Summary Judgment instead of following a regular foreclosure proceedings [sic]." In June 2009, Grigg purchased the subject property and executed ... a deed from himself to himself and American Lending (... the joint deed). Grigg subsequently defaulted under the terms of the loan. * * *
>
> Real Property Law § 320 provides, in pertinent part, that a "deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage" ... . "The holder of a deed given as security must proceed in the same manner as any other mortgagee—by foreclosure and sale—to extinguish the mortgagor's interest" ... .
>
> ... [T]he Romond defendants established ... that the joint deed was given as security for the loan from American Lending to Grigg. Therefore, pursuant to Real Property Law § 320, the joint deed must be considered a mortgage, and American Lending's sole remedy for Grigg's breach of its terms was to commence an action sounding in foreclosure. Moreover, under the circumstances at bar, the Romond defendants established that they were good faith purchasers of the subject property (see Real Property Law § 290 ...). American Lending Corp. v Grigg, 2020 NY Slip Op 03211, Second Dept 6-10-20

MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED BECAUSE REFERENCE TO EXTRINSIC EVIDENCE WAS REQUIRED; STATUTE OF FRAUDS DID NOT REQUIRE DISMISSAL BECAUSE IT WAS ALLEGED THERE WAS NEW CONSIDERATION FOR THE PROMISE TO PAY THE DEBT OF ANOTHER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the invoices submitted by plaintiff do not qualify for CPLR 3213 relief on the account stated cause of action because reference to extrinsic evidence was required, and defendants were not were not entitled to dismissal based upon the statute of frauds because there was an allegation of new consideration flowing from plaintiff to defendants:

> Plaintiff's motion for summary judgment in lieu of complaint should have been denied. The invoices do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for plaintiff to establish its entitlement to summary judgment on its account stated claim ... . Plaintiff has failed to establish, based on the invoices themselves, that defendants, as opposed to nonparty Impact Sports, are liable based on an account stated claim.
>
> Defendants are not entitled to dismissal of the action based on the statute of frauds (GOL § 5-701[a][2]) as plaintiff has sufficiently alleged that there was new consideration flowing from plaintiff to defendants, which is an exception to the requirement that a promise to pay the debt for another be in writing ... . Peter R. Ginsberg Law, LLC v J&J Sports Agency, LLC, 2020 NY Slip Op 01468, First Dept 3-3-20

THE MORTGAGE-PAYMENT MODIFICATION AGREEMENT DID NOT CONSTITUTE AN ACKNOWLEDGMENT OF THE MORTGAGE DEBT WITHIN THE MEANING OF GENERAL OBLIGATIONS LAW 17-101; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START ANEW; THE FORECLOSURE ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's trial payments as a condition for entering a mortgage-payment modification agreement (the Plan) did not amount to an acknowledgment of the debt such that the statute of limitations would start running anew:

> " General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt'" ... . "The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" ... . "In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" ... . * * *
>
> ... [T]he Plan did not constitute an "unconditional and unqualified acknowledgment of [the] debt" sufficient to reset the statute of limitations ... . While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur. Under these circumstances, it cannot be said that the writing contained "nothing inconsistent with an intention on the part of the debtor to pay" the debt ... . Indeed, the defendant represented in the Plan that he was unable to afford the mortgage payments. Nationstar Mtge., LLC v Dorsin, 2020 NY Slip Op 01354, Second Dept 2-26-20

ALTHOUGH DOCUMENTARY EVIDENCE IS ADMISSIBLE NOTWITHSTANDING THE DEAD MAN'S STATUTE, HERE THE DECEDENT'S SIGNATURE ON THE GUARANTY WAS NOT AUTHENTICATED BY SOMEONE OTHER THAN AN INTERESTED WITNESS; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE GUARANTY SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the personal guaranty signed by decedent was not authenticated. Therefore plaintiff was not entitled to summary judgment on the guaranty:

> We modify, however, with respect to the cause of action under the personal guaranty purportedly signed by the decedent, because although documentary evidence is admissible notwithstanding the dead man's statute, it must be "authenticated by a source other than an interested witness's testimony" ... . Having failed to authenticate the guaranty through "a source other than an interested witness's testimony," plaintiff was not entitled to summary judgment on the guaranty. Galpern v Air Chefs, L.L.C., 2020 NY Slip Op 01021, First Dept 2-13-20

ACCELERATION OF A DEBT DOES NOT AFFECT THOSE INSTALLMENT PAYMENTS DUE MORE THAN SIX YEARS BEFORE THE ACTION ON THE NOTES WAS COMMENCED, ACTION ON THOSE PAYMENTS IS TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that installment payments due prior to six years before the action on the notes could not be recovered despite the allegation that the debt had been accelerated:

> Acceleration causes those future installment payments that are not yet due and payable to become immediately due and payable. It enables a lender to advance the due date for the future installment payments and thus, the statute of limitations runs on the balance of the debt ... . It does not change the due date of those past due installment payments to that of the date of acceleration ... .
>
> Accordingly, plaintiffs demonstrated, prima facie, that defendant breached each of the notes by submitting evidence of the duly executed notes and defendant's failure to make payments in accordance with their payment terms ... . Defendant, however, demonstrated prima facie, that the unpaid installment payments due prior to June 1, 2012 were time-barred. Cannell v Grail Partners,

LLC, 2020 NY Slip Op 00973, First Dept 2-11-20

AN EMAIL EXCHANGE WAS INSUFFICIENT TO RESTART THE STATUTE OF LIMITATIONS FOR AN OTHERWISE TIME-BARRED DEBT PURSUANT TO GENERAL OBLIGATIONS LAW 17-101 (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined that an email exchange did not acknowledge a debt owed to decedent such that the statute of limitations started anew when the exchange took place in 2015. Any action on the debt was time barred:

> Jean M. Hollis (hereinafter Jean) died in October 2015, and was survived by six children. Jean's will, which was admitted to probate in February 2016, provided that "[i]n the event that any of my surviving children shall be indebted to me at the time of my demise, . . . then such indebtedness shall be deducted from any bequest made to said children." In January 2016, Paul James Hollis (hereinafter the decedent), one of Jean's children, died, and his wife, Bernadette Hollis (hereinafter Bernadette), was appointed administrator of his estate. In September 2016, the respondent Peter H. Hollis (hereinafter Peter), as an executor of Jean's estate, filed a notice of claim against the decedent's estate alleging that it was indebted to Jean's estate in the sum of $147,265.35, representing the sum of $146,765.35 borrowed by the decedent from Jean between April 2005 and January 2008, and an additional loan made by Jean to the decedent in December 2011 in the sum of $500. ...
>
> The subject email arguably acknowledged that the decedent owed a pre-existing debt to Jean, inasmuch as it stated that he had been "informed" by his sister, Jeanine Hollis, that "[he] owe[s] around $140,000 to Mom." Although the subject email initially stated that "I have every intention of paying this debt," it then went on to state that "there are some mitigating circumstances that I would like to note sometime in the near future." In an email sent the next day, the decedent stated "I just want the process to be fair and not arbitrary." Since the subject email contained language inconsistent with an intention on the part of the decedent to pay the alleged debt, the court erred in concluding that the subject email renewed the statute of limitations pursuant to General Obligations Law § 17-101 ... . Matter of Hollis, 2020 NY Slip Op 00860, Second Dept 2-5-20

QUESTION OF FACT WHETHER AGREEMENT TO ARBITRATE WAS VOID PURSUANT TO REAL PROPERTY LAW 265-b; NOT CLEAR WHETHER DEFENDANT LAW FIRM WAS ACTING AS A CONSULTANT IN A MATTER CONCERNING A DISTRESSED HOME LOAN; IF SO, THE DEFENDANT CAN VOID THE AGREEMENT TO ARBITRATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant law firm was acting as a consultant in matters related to distressed home loans such that any related agreement to arbitrate was void pursuant to Real Properly Law 265-b. Supreme Court had granted the law firm's motion to compel arbitration:

> Real Property Law § 265-b governs the conduct of distressed property consultants. "Distressed property consultant" or "consultant" is defined as "an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes" ... . A consultant does not include, inter alia, "an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice" ... . Real Property Law § 265-b further provides, in part, that "[a]ny provision in a contract which attempts or purports to require arbitration of any dispute arising under this section shall be void at the option of the homeowner" ... .
>
> Here, the plaintiff raised a question of fact as to whether the Donado defendants directly provided consulting services to the plaintiff in the course of the Donado defendants' regular legal practice ... . The plaintiff asserted in his affidavit, among other things, that he never met with an attorney from Donado Law Firm, P.C. ... . Inasmuch as the plaintiff raised a question of fact as to whether the Donado defendants were consultants within the meaning of former Real Property Law § 265-b[1][e][i], there is a question of fact as to whether the plaintiff would be allowed to void the arbitration provision ... , and a hearing is required. Ventura v Donado Law Firm, P.C., 2020 NY Slip Op 00888, Second Dept 2-5-20

PENSION OF POLICE OFFICER CONVICTED OF MURDER AND ATTEMPTED MURDER CAN, UNDER THE SON OF SAM LAW, BE REACHED TO SATISFY A $1 MILLION JUDGMENT OBTAINED BY THE CRIME VICTIM (THIRD DEPT).

The Third Department determined the Son of Sam Law trumped the CPLR, the Retirement and Social Security Law, and the Administrative Code of the City of New York with respect to the pension of a former NYC police officer who was convicted of murder and attempted murder and against whom plaintiff obtained a personal injury judgment of more than $1 million:

> "Executive Law § 632-a sets forth a statutory scheme intended to improve the ability of crime victims to obtain full and just compensation from the person(s) convicted of the crime by allowing crime victims or their representatives to sue the convicted criminals who harmed them when the criminals receive substantial sums of money from virtually any source and protecting those funds while litigation is pending" ... . [I]n 2001, the Legislature amended the [Son of Sam] law to allow a crime victim to seek recovery from "funds of a convicted person," which includes "all funds and property received from any source by a person convicted of a specified crime," but specifically excludes child support and earned income (Education Law § 632-a [1] [c]). * * *
>
> This Court has found ... that CPLR 5205 (c) is superseded by the Son of Sam Law ... . Defendant's assertions that Retirement and Social Security Law § 110 and Administrative Code of the City of New York § 13-264 protect his pension from assignment to satisfy plaintiff's money judgment are similarly without merit due to the broad reach of the Son of Sam Law ... . Prindle v Guzy, 2020 NY Slip Op 00011, Third Dept 1-2-20

LATE FEES IMPOSED BY THE LANDLORD MAY CONSTITUTE USURIOUS INTEREST; APPEAL HEARD DESPITE PRO SE DEFENDANT-TENANT'S FAILURE TO PERFECT THE APPEAL; THE APPEAL RAISED A PURELY LEGAL ISSUE WHICH IS DETERMINATIVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant tenant raised a question whether the late fees assessed by the landlord constituted usurious interest. The 1st Department heard the appeal despite the pro se defendant's failure to perfect the appeal from the correct judgment, noting that the issue is purely legal:

> ... [T]he court should have considered defendant's argument that the late fees, which along with returned check fees, constitute additional rent under the lease, amount to unenforceable usurious interest rates (see Sandra's Jewel Box v 401 Hotel, 273 AD2d 1, 3 [1st Dept 2000] ["the late charge provision of the lease . . . while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable"] ...). Although defendant raised this argument for the first time in reply, we consider it because the issue is determinative and is purely legal ... .
>
> Plaintiff defined additional rent as "primarily late fees," and it appears that the late fee lease provision permitting a 5% charge on amounts due actually resulted in what would amount to a 60% interest rate or higher, depending on plaintiff's accounting practices. Moreover, even with plaintiff's voluntary reduction of the late fee to 2%, additional rent comprises nearly half the sum demanded for the relevant 27-month period. Accordingly, we remand the matter to the motion court for a determination whether the late fees were "unreasonable and grossly disproportionate to the amount of actual unpaid rent" ... . JW 70th St. LLC v Simon, 2020 NY Slip Op 00042, First Dept 1-2-20

LOAN FUNDED BY THE PROCEEDS OF ILLEGAL GAMBLING IS ENFORCEABLE (CT APP).

The Court of Appeals determined that the loan agreement between plaintiff and defendant was enforceable despite the fact that the loan was funded by illegal gambling:

> Neither the terms of the agreement nor plaintiff's performance — i.e., loaning money to a friend — was intrinsically corrupt or illegal. Although the loan was funded by the parties' illegal gambling operation (for which both were criminally prosecuted), the record does not support a characterization of their conduct as "malum in se, or evil in itself" ... and the source of funds used for a loan is not typically a factor in determining its validity. Defendant argues the agreement should be deemed unenforceable because the courts

should not assist a party in profiting from ill-gotten gains. But, here, where both parties were involved in the underlying illegality, neither enforcement nor invalidation of the contract would avoid that result. Indeed, if the loan is not enforced, defendant receives a windfall despite his participation in the criminal acquisition of the funds. We have been reluctant to reward "a defaulting party [who] seeks to raise illegality as a sword for personal gain rather than a shield for the public good'" ... . Although we do not condone plaintiff's illegal bookmaking business, for which he was prosecuted and fined, the circumstances presented here do not warrant a departure from this tenet. Centi v McGillin, 2019 NY Slip Op 09058, CtApp 12-19-19