2011 IL App (2d) 100793-U
No. 2-10-0793
Order filed December 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JPMORGAN CHASE BANK, NA, Successor in Interest to Bank One NA, Successor by Merger to First National Bank of Chicago, Plaintiff and Counterdefendant-Appellee, v. AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Successor Trustee Under Trust Agreement Dated June 19, 1992, known as Trust No. 1468, UNKNOWN OWNERS, AND NON-RECORD CLAIMANTS, Defendants (David Minnis, Norma Minnis, Logical Investments Corp., James Minnis, Helen Minnis, and Michael Berland, as Chapter 7 Trustee, Defendants and Counterplaintiffs-Appellants).	)	Appeal from the Circuit Court of Kendall County. No. 03-CH-102 Honorable Timothy J. McCann, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court erred in not determining that plaintiff's failure to timely execute a mortgage release was a continuing violation. As a result, defendants' Mortgage Act claim (765 ILCS 905/4 (West 2004) accrued on March 23, 2005, and defendants' counterclaim, filed no later than March 5, 2007, was timely. The trial court thus erred in granting summary judgment in favor of plaintiff on defendants' Mortgage Act claim on the basis that it had been filed outside of the limitations period.

¶ 1 Defendants and counterplaintiffs David Minnis, Norma Minnis, Logical Investments Corp., James Minnis, Helen Minnis, and Michael Berland, as Chapter 7 Trustee (defendants), appeal the judgment of the circuit court of Kendall County granting summary judgment in favor of plaintiff and counterdefendant, JPMorgan Chase Bank, NA (plaintiff or Chase Bank) and against defendants on defendants' counterclaim alleging that plaintiff's failure to execute a release after a mortgage held by a predecessor had been paid off violated the Mortgage Act (Act) (765 ILCS 905/1 *et seq.* (West 2004)). Defendants argue that the trial court erred in determining that the statute of limitations had run before the time that they first tried to file the counterclaim, that a savings provision tolled the statute of limitations, and that there was a factual issue regarding whether plaintiff concealed the satisfaction and payoff of the mortgage from them. We reverse and remand.

¶ 2 In 2003, plaintiff's predecessor filed an action to foreclose on a business property belonging to Logical Investments and guaranteed by the individual defendants. In 2004, defendants filed an answer to the foreclosure complaint and included counterclaims and affirmative defenses. In 2005, three weeks before trial was scheduled to commence, plaintiff filed a motion for summary judgment on defendants' counterclaims. Eventually, on January 11, 2007, the trial court denied plaintiff's motion for summary judgment.

¶ 3 During the time that plaintiff's motion for summary judgment was pending, developments concerning the mortgage of the subject property continued. Apparently, in a deposition, Brian Bellot, an officer for plaintiff, testified that there was still a valid lien on the subject property from

the mortgage. On March 23, 2005, Angela Wilder, also an officer with plaintiff, executed a release of the subject mortgage. As a result of this release, defendants, on June 13, 2005, sought leave to file an additional counterclaim, namely, the Mortgage Act claim. Defendants alleged that plaintiff had violated the Mortgage Act by failing to timely release the mortgage after it had been satisfied. No decision was reached on defendant's request for leave to file their Mortgage Act claim until March 5, 2007, when leave was finally granted. On March 5, 2007, defendants field their Mortgage Act claim along with their other counterclaims and affirmative defenses. Thereafter, defendants modified all of their counterclaims and, on October 11, 2007, filed their second amended counterclaims and affirmative defenses. Included in this filing was the precise Mortgage Act claim at issue here.

¶ 4 We note that the parties dispute when the Mortgage Act counterclaim was first raised. Defendants contend that it was in 2005, when they first sought leave to file the Mortgage Act counterclaim. Plaintiff contends that the counterclaim was filed only after the trial court granted defendants leave to file it on or before March 5, 2007, and specifically argue that it was not filed until October 11, 2007.

¶ 5 On November 2, 2007, plaintiff moved to dismiss all of defendants' counterclaims and affirmative defenses. On February 14, 2008, the trial court granted plaintiff's motion with respect to all counterclaims, except the Mortgage Act claim. Plaintiff then filed a motion for summary judgment on all counts of its foreclosure complaint, and the trial court granted the motion. Defendants appealed that judgment.

¶ 6 Defendants also moved to set the Mortgage Act counterclaim for a bench trial, and the trial court granted the motion. On November 4, 2009, plaintiff filed a motion for summary judgment on

the outstanding Mortgage Act counterclaim, alleging that the five-year statute of limitations (735 ILCS 5/13-205 (1998)) had elapsed. On January 6, 2010, the trial court heard argument on the motion. We note that defendants decided not to file a response brief to plaintiff's motion for summary judgment; instead, defendants submitted a letter listing their authority to the trial court and orally argued the motion. On January 22, 2010, the trial court granted plaintiff's motion for summary judgment. The trial court held that defendants "knew or reasonably should have known that no release of the mortgage in question was provided in 1999," and that the limitations period had lapsed on July 21, 2004, while the present claim was not filed until 2007.

¶ 7 Defendants timely filed a motion for reconsideration. On July 7, 2010, the trial court denied defendants' motion for reconsideration. Defendants timely appeal.

¶ 8 On appeal, defendants argue that the trial court erred in granting summary judgment in favor of plaintiff because their counterclaim was timely filed within three months after plaintiff produced the release of mortgage. In addition, defendants posit that there is a "savings" provision that allows a defendant to plead a counterclaim against a plaintiff even if the counterclaim would have been barred by the statute of limitations. See 735 ILCS 5/12-207 (West 2004). In any event, according to defendants, there were material factual issues regarding whether plaintiff concealed the satisfaction of the mortgage from them that should have precluded the grant of summary judgment. Last, defendants argue that the trial court erred in denying their motion for reconsideration, essentially for the same reasons that defendants contend the summary judgment was erroneously granted. We consider each contention in turn.

¶ 9 As a preliminary matter, plaintiff raises a number of arguments attempting to limit or dispose of some or all of the issues on appeal. Plaintiff first contends that we are limited to considering only

those arguments concerned with defendants' motion for reconsideration because defendants' notice of appeal specifies only with the July 7, 2010, order denying the motion for reconsideration. Plaintiff contends that, because the notice of appeal references only the July 7, 2010, order, any issues outside of that order, such as the order granting summary judgment in favor of plaintiff, were not preserved for appeal and may not be considered by this court. We disagree.

¶ 10 Rule 303 (Ill. S. Ct. R. 303 (eff. May 30, 2008)) provides that the notice of appeal shall specify the judgment or issue appealed from and the relief being sought. The notice of appeal is to be liberally construed because its purpose is to inform the prevailing party in the trial court below that the opposing party is seeking review of the trial court's judgment. *Jackson v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 293 Ill. App. 3d 694, 698 (1997). It is further well settled that an appeal from a final judgment draws into issue all prior nonfinal orders that produced the final judgment, meaning that an unspecified judgment may be reviewed if it is a step in the procedural progression leading to the judgment actually specified in the notice of appeal. *Jackson*, 293 Ill. App. 3d at 698.

¶ 11 *Jackson* is illustrative of the principle. In that case, the plaintiff specifically appealed from the order of the trial court that denied her motion for reconsideration. However, the order necessarily referred to the judgment sought to be reconsidered, and the court held that the earlier order was also preserved for appeal. *Jackson*, 293 Ill. App. 3d at 698. The same result obtains here. Defendants' notice of appeal specifically referenced only the July 7, 2010, order denying their motion for reconsideration. However, the July 7 order necessarily refers to the earlier grant of summary judgment in the January 22, 2010, order. Accordingly, we have jurisdiction over the January 22,

2010, order on appeal and may consider issues arising from that order on appeal. See *Jackson*, 293 Ill. App. 3d at 698.

¶ 12 Plaintiff contends that it is also well established that this court's review is limited to only those matters which are raised in the notice of appeal. Plaintiff purports to provide an impressive pedigree for its rule, citing no less than 10 cases in support. The cases cited by plaintiff, however, are all distinguishable. In addition, we note that the rule as formulated by plaintiff, that the appellate court's jurisdiction on appeal is limited to the matters raised in the notice of appeal, does not conflict with the rule we are following, namely that underlying judgments in the procedural progression leading to the order appealed from may also be considered.

¶ 13 We turn to plaintiff's authority. Plaintiff first cites *Lewanski v. Lewanski*, 59 Ill. App. 3d 805, 815 (1978), for the proposition that the court limited the appeal to the judgment of divorce because that was the only order mentioned in the notice of appeal. *Lewanski* is distinguishable, however, because the appellant sought to raise issues from an order entered after the notice of appeal was filed. Here, by contrast, defendants seek to raise the issues decided in the earlier summary judgment order, which was the order being reconsidered. *Lewanski* is therefore inapposite.

¶ 14 Plaintiff next cites *Intaglio Service Corp. v. J.L. Williams & Co., Inc.*, 112 Ill. App. 3d 824, 831 (1983), for the proposition that, because there was no mention of the order denying the defendant's motion to voluntarily dismiss the action in their notice of appeal, the order denying that motion was not properly before the court. The defendants in that case sought to voluntarily dismiss the matter, but they did not give adequate notice to the opponent. The trial court conditioned the dismissal on payment of attorney fees incurred in preparing for a hearing. The defendants chose not to pay the fees and withdrew their motion to voluntarily dismiss. *Intaglio Service*, 112 Ill. App. 3d

at 828. On appeal, however, the defendants were challenging the trial court's judgment that the opponent could validly retain litigation records and the defendants had to pay a certain amount of money to recover the records. *Intaglio Service*, 112 Ill. App. 3d at 830. The rule plaintiff seeks to draw is inapposite to the situation in this case because the order on the attempt to voluntarily dismiss the matter was not related to or in the procedural progression of the final order on the validity of the opponent's attorney's lien on the defendants' records and the necessary measures the defendants had to undertake to recover their records. Here, by contrast, the judgment on the motion for summary judgment was necessarily referred to in the judgment on the motion to reconsider; likewise, the summary judgment was in a direct progression to the ruling on the motion to reconsider.

¶ 15 Plaintiff cites *Illinois Central Gulf R.R. Co. v. Sankey Bros., Inc.*, 78 Ill. 2d 56, 61 (1979), in which the supreme court held that, because the defendant did not include mention of a December 6, 1977, order dismissing its counterclaim in its notice of appeal from an April 5, 1978, order granting summary judgment against it, the propriety of the dismissal order was not before the court. There is no indication, however, that the dismissal order was related to the issues involved in the summary judgment. Indeed, it appears that the dismissal was of the defendant's counterclaim, while the summary judgment was based on the allegations of the plaintiff's complaint, suggesting that the order of dismissal was not within the progression to the summary judgment order appealed from. Accordingly, *Sankey* is inapposite.

¶ 16 Plaintiff next notes that, in *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 451-52 (1983), the appellate court held that, where none of the five notices of appeal mentioned the order denying the appellant's petition, that order was not properly before the court on appeal. *Harvey* is distinguishable. In that case, the plaintiff was appealing the trial court's order holding her in

contempt. The petition referred to was a petition for change of venue (substitution of judge), while the contempt occurred during the trial proceedings on plaintiff's complaint. *Harvey*, 117 Ill. App. 3d at 449, 451. It is apparent that the denial of the petition for substitution of judge was not in the direct procedural progress leading to the appealed finding of contempt. Accordingly, *Harvey* is distinguishable.

¶ 17 Plaintiff looks to *Place v. Improvement Federal Savings & Loan Ass'n*, 24 Ill. 2d 245,247 (1962), and *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 5-6 (2006), for the proposition that the appellant's appeal must be limited to those orders specifically mentioned in the notice of appeal and issues not mentioned in the notice of appeal are not properly before the reviewing court. While this may be a true statement of law, it does not conflict with the principle we follow from *Jackson*. See *Jackson*, 293 Ill. App. 3d at 698. Additionally, in *Place*, the notice of appeal referenced a nonexistent order, so the reviewing court properly refused to consider it. Here, by contrast, the summary judgment order is the order under reconsideration, so it is necessarily referenced in the order on the motion for reconsideration as well as being in the procedural progress. In *Burtley*, the order referenced in the notice of appeal did not deal with the issue the appellant sought to raise on appeal, so that issue was not properly before the reviewing court. Here, by contrast, the summary judgment order was the subject of the motion for reconsideration, so it is before the reviewing court and at least in the procedural progression to the actual order challenged in the notice of appeal. Accordingly, both *Place* and *Burtley* are distinguishable.

¶ 18 Plaintiff cites *Illinois Health Maintenance Organization Guaranty Ass'n v. Shapo*, 357 Ill. App. 3d 122, 148 (2005), for the proposition that only issues raised in a notice of appeal or cross-appeal will be considered. In that case, the defendant raised the issue of prejudgment interest in the

notice of cross-appeal, but did not include postjudgment interest. The court would not allow the defendant to pursue the issue of postjudgment interest on appeal because it had not been included in the notice of cross-appeal. *Shapo*, 357 Ill. App. 3d at 148. Here, by contrast, the motion to reconsider necessarily implicates the issues raised in the motion for summary judgment. We cannot say that these issues are not before us. Therefore, *Shapo* is distinguishable.

¶ 19 Plaintiff next cites *In re V.M.*, 352 Ill. App. 3d 391, 397 (2004), and *In re J.P.*, 331 Ill. App. 3d 220, 234 (2002), for the proposition that, when an appeal is taken from a specific judgment, the reviewing court has no jurisdiction to review other judgments or parts of judgments not specified in the notice of appeal. Actually, *V.M.* includes the proviso, "or fairly inferred from the notice of appeal." *V.M.*, 352 Ill. App. 3d at 397. This directly supports our view in this case, as the motion for summary judgment is necessarily implicated in the review of the motion for reconsideration of the judgment on the motion for summary judgment. Likewise, *J.P.* contains precisely the same language to precisely the same result. *J.P.*, 331 Ill. App. 3d at 234. We reject plaintiff's contention in this regard.

¶ 20 Last, plaintiff attempts to analogize the circumstances in this case with those in *Mooring v. Village of Glen Ellyn*, 57 Ill. App. 3d 329, 331 (1978). In *Mooring*, the court held that it did not have jurisdiction over the plaintiff's summary judgment motion where the plaintiff only mentioned the order granting the defendant's motion for summary judgment without mentioning the denial of plaintiff's motion for summary judgment. *Mooring*, 57 Ill. App. 3d at 331. This situation is not at all similar to this case. Here, defendant appeals the judgment on the motion for reconsideration, which necessarily implicates the judgment on the earlier motion for summary judgment. To be similar, this case would have to have the resolution of simultaneous motions, one of which is

specifically addressed while the other is not, rather than the judgment on the final motion in a sequence of motions. *Mooring* is plainly distinguishable.

¶ 21 Plaintiff's initial argument, that we may not address any issues arising from the decision on the motion for summary judgment fails because the order on the motion for summary judgment is in the procedural progress to the judgment on the motion to reconsider. *Jackson*, 293 Ill. App. 3d at 698. In addition, plaintiff's cases either are distinguishable or actually support our view of the issue. Accordingly, we reject plaintiff's contention on this issue.

¶ 22 Next, plaintiff contends that defendants waived their right to oppose the motion for summary judgment when defendants did not file a response to plaintiff's motion for summary judgment. Plaintiff contends that there is no provision for orally responding to a motion for summary judgment and that defendants intentionally relinquished their right in the trial court to contest the summary judgment motion when they provide a written response. Plaintiff further argues that this waiver extends to appeal, nodding to the well-established rule that a party may not raise new arguments not presented to the trial court below on appeal, but failing to provide a citation to authority for the proposition. Indeed, the authority cited by plaintiff is diffuse and tangential at best. Plaintiff cites no case directly on point for the proposition that a party must file a written response to a motion for summary judgment. Instead, plaintiff adverts to the idea that a party may not place the burden of researching and developing arguments for it on the reviewing court, citing *Hassan v. Wakefield*, 204 Ill. App. 3d 155, 159 (1990). Unfortunately, plaintiff cites this authority in the context of what defendant did in the trial court, and the proposition is facially unsuited for that context. In essence then, plaintiff makes the unsupported assertion that defendants were required to file a written response to its motion for summary judgment in order to preserve any issues arising from the

summary judgment for appeal. This lack of direct support for the proposition funs afoul of Supreme Court Rule 341(h)(7) (eff. July 1, 2008).

¶ 23 In addition, plaintiff overlooks the effect of defendants' letter to the court, presenting the authority on which they would rely during the oral argument on the motion for summary judgment. Defendants at least suggested the legal issues they would dispute (albeit without providing written analysis for the trial court). While this might not be enough to satisfy *Hassan*, *Hassan* is only directly applicable to an appellate court and defendants supplied written argument to this court. We do believe, however, that the citation of authority to the trial court was sufficient to preserve defendants' arguments on appeal, especially in light of the fact that plaintiff presented no authority to directly support its contentions on this point.

¶ 24 Finally, plaintiff also faults defendants' motion to reconsider as only an attempt to re-argue that which the should have done in the motion for summary judgment. Plaintiff notes that a motion to reconsider properly addresses the discovery of new facts and is not proper to raise arguments for the first time when those arguments were available before and at the time of the hearing on the motion for summary judgment, citing to *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006). Of course, plaintiff makes this contention only by overlooking *North River*'s actual statement of the law: "The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or *errors in the court's previous application of existing law*." (Emphasis added.) *North River*, 369 Ill. App. 3d at 572. Defendants note that they were attempting to point out, in their motion to reconsider, errors in the trial court's application of the law, and we note that this is a proper purpose for a motion to reconsider. (To be fair, defendants trod a very fine line between raising arguments

for the first time in their motion to reconsider and pointing out the trial court's purported errors in applying the law.) Plaintiff's contention was not baseless, but it is without merit because defendants' motion to reconsider was directed at the trial court's application of the law.

¶ 25 Next, plaintiff contends, both in its brief and in a motion taken with the case, that defendants' claim is moot. Plaintiff contends that defendants admit that plaintiff filed a release of mortgage before defendants filed their Mortgage Act claim (or at least that the release has been given during the pendency of this claim). According to plaintiff, this moots defendants' claim because defendants have received the relief to which they are entitled. We disagree.

¶ 26 Section 2 of the Act (765 ILCS 905/2 (West 2004)) requires the mortgagee to create a written release of the mortgage when the mortgagee has paid it in full. Section 4 of the Act provides:

> "If any mortgagee or trustee, in a deed in the nature of a mortgage, of real property, or his executor or administrator, heirs or assigns, knowing the same to be paid, shall not, within one month after the payment of the debt secured by such mortgage or trust deed, comply with the requirements of Section 2 of this Act [(765 ILCS 905/2 (West 2004))], he shall, for every such offense, be liable for and pay to the party aggrieved the sum of $200 which may be recovered by the party aggrieved in a civil action, together with reasonable attorney's fees. In any such action, introduction of a loan payment book or receipt which indicates that the obligation has been paid shall be sufficient evidence to raise a presumption that the obligation has been paid. Upon a finding for the party aggrieved, the court shall order the mortgagee or trustee, or his executor or administrator, heirs or assigns, to make, execute and deliver the release as provided in Section 2 of this Act. The successor in interest to the mortgagee or trustee in a deed in the nature of a mortgage shall not be liable for the

penalty prescribed in this Section if he complies with the requirements of Section 2 of this Act within one month after succeeding to the interest." 765 ILCS 905/4 (West 2004).

We have held that the "Mortgage Act allows a mortgagor, who has paid in full, to compel a release of his mortgage and to recover a penalty and reasonable attorney fee from his mortgagee." *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1150 (2004). While plaintiff has released the mortgage and provided a written release of the mortgage to defendants, plaintiff has not tendered to defendants any amount for the penalty or for defendants' reasonable attorney's fees. Thus, while defendants have received a part of the relief to which they are entitled to under the Act, they have not received all of their potential relief. In other words, the court still can grant meaningful relief to defendants, and there is a matter still in controversy between the parties. Accordingly, defendants' Mortgage Act claim is not moot, so we reject plaintiff's argument on appeal, and we deny plaintiff's motion to dismiss the appeal that we ordered to be taken with the case.

¶ 27 Plaintiff next argues that *laches* should operate to bar defendants' Mortgage Act claim. "*Laches*" is defined a party's neglect or omission to assert a right coupled with a lapse of time and other circumstances sufficient to cause prejudice to the adverse party operating to bar relief in equity. *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 270 (2001). In order to prevail on a claim of *laches*, the party asserting the defense must prove: (1) that there was a lack of due diligence by the adverse party in bringing suit; and (2) the adverse party's delay resulted in prejudice to the party asserting the defense. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 822 (2008). In order to show the party's lack of diligence, the party must have failed to seek prompt redress after it knew or should have known of the facts on which its claim is based. *Lozman*, 379 Ill. App. 3d at 822. Actual knowledge of the facts on which a party's claim is based is not necessary if the knowledge of the

facts can be imputed because of its easy availability through regular channels and circumstances under which a reasonable party would have inquired about the facts. *Lozman*, 379 Ill. App. 3d at 822. We review a trial court's determination on a claim of *laches* for an abuse of discretion. *Lozman*, 379 Ill. App. 3d at 822. We further note that the burden of pleading and proving the defense of *laches* is on the party claiming that defense. *Lozman*, 379 Ill. App. 3d at 822.

¶ 28 Plaintiff contends that the mortgage was paid off in 1999, and, at that time, the Mortgage Act claim accrued. Plaintiff argues that defendants did not raise their Mortgage Act claim until 2007, when they were granted leave to file their amended counterclaims. Plaintiff argues that the eight-year lapse of time prejudiced it because the mortgage had been assumed by different entities as the original mortgagor was acquired through merger by other banks, culminating with plaintiff's acquisition of the mortgage, and the people having personal knowledge of the mortgage are no longer affiliated with plaintiff and cannot be located.

¶ 29 Initially, we note that in making its prejudice claim, plaintiff provides no citation to the record to support its contention that people with personal knowledge are no longer affiliated with it and cannot be located; additionally, plaintiff does not point to where in the record it raised the affirmative defense of *laches*. These deficiencies run afoul of Rule 341 and would be sufficient justification to result to reject plaintiff's *laches* claim. In addition, we note that *laches* is an affirmative defense and that plaintiff did not actually raise it in the trial court below (thus explaining its failure to cite to the record). It is well established that an affirmative defense must be raised in the trial court and cannot be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536-40 (1996). We need not decide the *laches* issue or plaintiff's ability to raise it on appeal at this time, however, because the substantive arguments of this case center on the accrual

of the Mortgage Act claim. If we find that defendants filed their claim within the limitations period, that would likely resolve the *laches* claim. See *Sundance Homes*, 195 Ill. 2d at 270 (the limitations period usually governs the determination of timeliness of a claim; however, *laches* may be applied to a term shorter than the limitations period, or it may not be applied at all even though the limitations period has run, depending upon the circumstances). If defendants filed their claim outside of the limitations period, we would not need to resolve the *laches* argument as the claim would be barred by the statute of limitations.

¶ 30 Having considered plaintiff's purportedly dispositive contentions, we now turn to defendants' contentions on appeal. The principal issue to be resolved is the date that defendants' counterclaim accrued. Plaintiff contends that the claim accrued in 1999 when its predecessor did not file a release of the mortgage after it had been paid off. Defendants contend that their claim continued accruing until March 23, 2005, when plaintiff finally executed a release of the mortgage. To determine the correct accrual date (and whether the failure to release the mortgage is a continuing violation for purposes of accrual) requires us to interpret the Mortgage Act. The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intention. *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 441 (2005). We determine the legislature's intent by reading the statue as a whole and considering all relevant parts. *Barragan*, 216 Ill. 2d at 441. When the statutory language is unambiguous, it is given effect without resort to other tools of interpretation. *In re Marriage of Peterson*, 2011 IL 110984, ¶15.

¶ 31 In our view, the key to discerning the legislative intent is contained in section 4 of the Mortgage Act, which provides, pertinently:

> "If any mortgagee or trustee, in a deed in the nature of a mortgage, of real property, or his executor or administrator, heirs or assigns, knowing the same to be paid, shall not, within one month after the payment of the debt secured by such mortgage or trust deed, comply with the requirements of Section 2 of this Act [(765 ILCS 905/2 (West 2004))], he shall, for every such offense, be liable for and pay to the party aggrieved the sum of $200 which may be recovered by the party aggrieved in a civil action, together with reasonable attorney's fees. *** The successor in interest to the mortgagee or trustee in a deed in the nature of a mortgage shall not be liable for the penalty prescribed in this Section if he complies with the requirements of Section 2 of this Act within one month after succeeding to the interest." 765 ILCS 905/4 (West 2004).

Defendants contend that the language of section 4 plainly contemplates a continuing violation; plaintiff argues that there is only a single accrual coming one month after the mortgage is paid off. Plaintiff also seeks to draw support for its view by referring to *Franz*, in which this court stated the development was entitled to only one $200 fine despite the plaintiff's practice of giving a mortgage relief for each lot sold out of a subdivision because "there [was] only one underlying mortgage on the [subdivision] property. Therefore, there [was] only one offense under section 4 of the Mortgage Act." *Franz*, 352 Ill. App. 3d at 1151. However, to adopt plaintiff's view would result in rendering some of the words of the provision meaningless or reaching an absurd and presumptively unintended result. It is well settled that, where possible, every word, clause, and sentence will be given effect. *In re Marriage of Murphy*, 203 Ill. 2d 212, 219 (2003). Likewise, the legislature is presumed not to have intended an absurd, inconvenient, or unjust result. *Marriage of Peterson*, ¶15.

¶ 32 An example will illustrate the difficulty with plaintiff's view. If there is but a single accrual of an action under the Mortgage Act, what happens when the original mortgagee merges with another bank, which in turn, is acquired by a third bank? Let us suppose that the original mortgagee still holds the mortgage when it is paid in full, but fails to execute a release of mortgage. Under plaintiff's view, upon the second mortgagee succeeding to the interests of the original mortgagee, it would be liable for a Mortgage Act violation for the first 30 days, or else it would not be liable at all, because there was but a single accrual of the Mortgage Act claim occurring on the original mortgagee's tenure. The second alternative, complete nonliability, renders the final sentence of section 4, concerning the successors to the mortgagee, superfluous and contravenes the established rules of construction. When the third mortgagee acquires the second's interest, once again, there is a one-month window to avoid liability under the Act or else there is no liability, again rendering the final sentence of section 4 superfluous. If the first alternative is considered, that the chance to avoid liability under the Act flickers into life for the first month after the acquisition, then we have an absurd result. This would mean that even after the limitations period had expired, the successor would be liable (because it has a one-month period to avoid liability under the Act per section 4) even though the original mortgagee would no longer have been liable. In other words, there is potentially no finality, and this is an absurd result.

¶ 33 The more straightforward approach is defendants', namely, that the final sentence of section 4 of the Act contemplates a continuing violation until the mortgage release is executed. Under this view, the final sentence is always given effect and no absurd result can be reached, because the limitations period will begin to run upon the completion of the violation, or in other words, the

execution of the mortgage release or the mortgagor's demand. Accordingly, we hold that defendants' interpretation of the Mortgage Act as providing for a continuing violation to be correct.

¶ 34 Plaintiff argues that *Franz* suggests that the continuing violation view cannot stand, because of its pronouncement that there can be only "one offense" where there is but a single mortgage. See *Franz*, 352 Ill. App. 3d at 1151. We do not see the incompatibility. There is but a single offense, yet the single violation continues until either the mortgagor makes a demand for the mortgage release, or the mortgagee (or its successor down the line) executes a mortgage release more than one month after the mortgage is paid off or more than one month after succeeding to the original mortgagee's interests.

¶ 35 Plaintiff also cites to *Belleville Toyota, Inc. v. Toyota Motor Sales USA, Inc.*, 199 Ill. 2d 325, 347-48 (2002), noting that it rejected a continuing violation. Instead it found that each repeated violation was the result of a discrete decision by the defendant. Here, by contrast, we have the omission to act and, in fact, the continuing omission to act until March 23, 2005, when plaintiff finally acted by executing the mortgage release. We find *Belleville Toyota* to be distinguishable on this bases, as there is a difference between discrete, positive acts and a longstanding omission to act.

¶ 36 Plaintiff also cites several cases for the proposition that it is not a continuing violation when there is a discrete act with lingering consequences or ill effects arising from the violation. We need not explicitly consider them because plaintiff mischaracterizes the circumstance of this case in order to bring it within the ambit of the holding of its cited cases. The failure to perform a required act is not a "lingering consequence" or "ill effect," but it is a continuing inaction. We reject plaintiff's suggestion.

¶ 37 Last, plaintiff cites to *Blair v. Nevada Landing Partnership, RBG, LP*, 369 Ill. App. 3d 318, 323-24 (2006), suggesting that this case is analogous to that, in which multiple publications of the plaintiff's picture in multiple media were deemed to be a single overt act with continuing ill effects. Again, we believe that *Blair* is distinguishable on the basis that here, we did not have an overt act, but a continuing omission to act. The omission was a continuing failure, not a lingering effect. *Blair* is also inapposite. Accordingly, we determine that plaintiff's Mortgage Act claim accrued in March 2005, when plaintiff finally executed the mortgage release.

¶ 38 Next, we must determine the proper limitations period. Plaintiff argued below that it was the five-year period specified in section 13-205 of the Code of Civil Procedure (Code) (735 ILCS 5/13-205 (West 2004)). Plaintiff also claims that defendant cannot raise for the first time on appeal the two-year period of section 13-202 of the Code (735 ILCS 5/13-202 (West 2004)) applicable to statutory penalties. Defendants note that section 13-202 is the proper section in which to find the limitations period because it applies to statutory penalties, and the $200 fine is such a statutory penalty. In contrast, section 13-205 applies to all civil actions for which a specific limitations period is not specified. According to defendants, because section 13-202 is more specific, it trumps section 13-205. We agree with defendants.

¶ 39 A statutory penalty is one that imposes automatic liability for a violation, and the amount of the liability is fixed within the terms of the statute without actual damages being suffered by the plaintiff (or counterplaintiff). *In re Marriage of Stockton*, 401 Ill. App. 3d 1064, 1075 (2010). Under such a penal statute, the liability is imposed automatically when a violation of the statute is established, and the statute's object is to inflict punishment upon the party violating it, even though

a remedy may be afforded to those interested in the observance of the statute. *Marriage of Stockton*, 401 Ill. App. 3d at 1075.

¶ 40 Here, section 4 of the Mortgage Act prescribes a $200 penalty for any violation of the requirement that a mortgagee execute a mortgage release within one month of that mortgage being paid in full. There need be no other injury or damages suffered by the mortgagor. Section 4 of the Mortgage Act falls squarely within the definition of "statutory penalty." Therefore, the limitations period is determined by section 13-202 of the Code, pertaining to statutory penalties.

¶ 41 Plaintiff does not offer meaningful argument to oppose this determination. Indeed, the determination actually favors plaintiff, because if the accrual is March 23, 2005, then defendants had until March 23, 2007, to file their Mortgage Act counterclaim as opposed to the five-year window advocated by plaintiff. In any event, plaintiff purports to claim that the two-year limitations period of section 13-202 was not sufficiently raised below. We have rejected plaintiff's arguments seeking to dispose of the appeal or limit its scope above and continue to do so at this point for the reasons expressed above.

¶ 42 The next issue is whether defendants filed their claim in time. The record shows that, on March 5, 2007, defendants first formally filed their Mortgage Act claim. In 2005, defendants filed a motion for leave to file their Mortgage Act counterclaim, but there appears no order in the record until March 5, 2007, when the trial court granted defendants leave to file and defendants did in fact file their counterclaims, including the Mortgage Act claim. Thus, we hold that defendants timely filed their Mortgage Act claim.

¶ 43 Plaintiffs argue that defendants did not file their Mortgage Act claim until October 2007, outside of the limitations period, because that is when the version at issue in this appeal was filed.

While it is true that defendants' second amended counterclaims (including the Mortgage Act claim) was filed in October 2007, this was the *second amended* version of this filing. In other words, defendants filed previous versions at earlier times. The record affirmatively and definitely shows that the Mortgage Act claim was filed with the trial court's leave no later than March 5, 2007, within the limitations period. Plaintiff's argument is, at best, semantical and borders on outright misrepresentation. Plaintiff has trod a dangerous line throughout this appeal, overstating, understating, and misstating both facts and law whenever it perceived advantage to do so. While we welcome zealous argument, plaintiff appears to stray into the realm of zealotry, by which we mean that it appears that plaintiff has pushed or twisted the facts and law to serve its argument instead of making its argument conform to the established facts and applicable law. We caution plaintiff to balance zealousness and zealotry: the former is acceptable, the latter is intolerable.

¶ 44 Having determined that defendants' Mortgage Act accrued in March 2005, when plaintiff executed the release of mortgage, and that defendants filed their Mortgage Act claim within the limitations period, we need not address defendants' remaining contentions. Defendants also contend that the trial court erred in denying their motion for reconsideration. For the same reasons it erred in granting summary judgment based on the statute of limitations, the accrual of the Mortgage Act claim in 2005, and defendants' timeliness in raising their Mortgage Act claim, the trial court erred in denying the motion for reconsideration.

¶ 45 For the foregoing reasons, we reverse the judgment of the circuit court of Kendall County and remand the matter for further proceedings consistent with this disposition.

¶ 46 Reversed and remanded.