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Acceleration Clauses in Foreclosure Actions: New Rules

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The use of an acceleration clause in a mortgage foreclosure action provides an important and expedient tool when foreclosing on a property. This article focuses on recent case law and discusses some of the benefits and pitfalls when using an acceleration clause and how to overcome these obstacles.

Under New York CPLR §213(4), a mortgagee faces a six-year statute of limitations to foreclose a mortgage. Since a mortgage is payable in installments, the six-year period begins to run on each default. Upon acceleration, the entire unpaid balance becomes due and the six-year period begins to run on the entire unpaid balance of the mortgage debt.[1]

Depending on the terms of the mortgage, acceleration may be automatic, or at the option of the mortgagee. Generally, in the standard form residential mortgage, acceleration is at the option of the "lender."[2] Where acceleration is optional, an affirmative action must be taken to accelerate. The mortgagee may be required to make its election in compliance with terms within the mortgage. The borrower must be provided with clear and unequivocal notice of the election to accelerate.[3]

Electing to Accelerate

Notice of election to accelerate may be accomplished informally through written notice to the borrower[4] or formally through commencement of a foreclosure lawsuit.[5] In Wells Fargo Bank v. Burke (Burke) 94 A.D.3d at 983 (2d Dept. 2012), the court made clear that no acceleration can be effective and the statute of limitations on the whole does not accrue, unless service of process upon the borrower is effected to give the clear and unequivocal notice necessary for acceleration.

A mortgagee should not accelerate until commencement of the foreclosure action to keep the statute of limitations from accruing

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until the last possible moment. The wording of any notice of default, which is required by the standard form mortgage, is crucial to ensure the notice does not effect an acceleration. The notice of default should state that "failure to pay the total amount past due, plus all other amounts becoming due hereafter [on or before a date certain] may result in acceleration."[6] Stating that failure to cure "will" result in acceleration (or using similar definitive words) may result in a determination that the notice of default itself effected acceleration.[7]

Dismissed Lawsuits

After acquiring a mortgage or servicing rights, a mortgagee may discover a prior dismissed foreclosure lawsuit, a pending dormant foreclosure lawsuit or a mortgage that was referred to foreclosure but the action was never commenced. Before re-commencing or taking any action, some due diligence is necessary to make sure the statute of limitations has not expired.

Such due diligence did not occur in a recent case on the subject. In Kashipour v. Wilmington Savings Fund Society, 144 A.D.3d 985 (2d Dept. 2016), borrowers commenced an action on Sept. 3, 2015 to discharge their first mortgage, alleging the statute of limitations expired. "As proof that the mortgage debt had been accelerated…plaintiffs submitted a copy of the summons and complaint…commenced by the defendant's predecessor-in-interest on Aug. 20, 2009." The prior foreclosure action had been commenced by Greenpoint Mortgage Funding and that case dismissed for failure to serve statutory notices. The lower court found that the prior dismissal was not on the merits and the statute of limitations had not expired. The appellate court reversed, finding that "whether the foreclosure action was dismissed on the merits was not relevant." The appellate court remanded for entry of judgment cancelling the mortgage of record as a result of the more than six years since the exercise of the acceleration clause.

Pro-Active Strategies

Avoiding an outcome like Kashipour requires pro-active strategies to guard mortgage securities. Many of the strategies may also be followed generally as a best practices when administering any defaulted mortgage loan. The first step is to determine if the mortgage has been accelerated: (a) by its terms, (b) by notice to the borrower, or (c) by the commencement of a foreclosure lawsuit. If the mortgage has been accelerated and is still within the six-year statute of limitations, the mortgagee may revoke acceleration so long as "there is no change in the borrower's position" in reliance on acceleration.[8] Some decisions suggest revocation requires delivering a clear and unequivocal notice to borrower, similar to the requirements for acceleration.[9]

Parial Payment of Debt

Incorporating terms complying with Sections 17-105(1) and 17-101 of the General Obligations Law into loss mitigation documents could save a mortgage about to be nullified.[10] Such language may be included in a (1) loan modification application, (2) temporary payment plan agreement, (3) forbearance agreement, (4) settlement agreement, or (5) loan modification agreement.

The drafter must ensure the borrower: (1) expressly acknowledges the debt and (2) expressly promises to repay the debt. Anything less may create a new obligation which will not save a time-barred mortgage.[11]

The following provisions must be followed to

have an enforceable contract:

Section 17-105(1) of the General Obligations Law provides that:

[A] promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective… to make the time limited for commencement of the action run from the date of the waiver or promise.

Section 17-101 of the General Obligations Law provides that:

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

Additionally, Section 17-107 of the General Obligations Law provides that after "a payment on account of a mortgage indebtedness," the statute of limitations begins to "run from the date of payment." When asserting that a part payment has renewed the statute of limitations, "the burden is upon the creditor to show that it was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due."[12]

Voluntary Discontinuance

Dismissal of a foreclosure action by the court does not revoke acceleration,[13] even dismissal sua sponte.[14] Whether voluntary discontinuance of a foreclosure action revokes acceleration is not settled and the subject of pending litigation. If a mortgagee has a pending foreclosure action, but there is some defect that may prevent entry of favorable judgment, it may be best to fail and allow dismissal. After dismissal, the mortgagee may re-commence within six months under CPLR §205.[15]

If a pending foreclosure suit will be dismissed by stipulation, then the stipulation should include: (1) an express agreement and acknowledgement that mortgagee's acceleration is revoked and (2) an acknowledgement of debt by the borrower with an affirmative statement that borrower intends to repay the debt.

Emerging Legal Theories

In addition to traditional tools such as equitable estoppel, there are some new and lesser-known defenses to defeat the statute of limitations. Below is a non-exhaustive list of new and lesser-known defenses.

Standing. Standing is re-emerging, but this time in a favorable way for the mortgagee. Where the defaulted mortgage was the subject of prior foreclosure actions commenced by the wrong party (e.g. MERS), acceleration may have been void. If the party commencing the prior foreclosure action was not a holder or assignee of the note then, "it therefore never had authority to accelerate the debt or to sue to foreclose."[16] The prior foreclosure action did not accelerate the debt and the statute of limitations has not even begun to run.

Service of Process on the Borrower. In Burke, the court explained it was service of the complaint that effected acceleration. Where the complaint was not served, one reported decision found acceleration was ineffective.[17] Another reported decision found that filing, but failing to serve did not effect acceleration until later when the borrower had notice of the lawsuit.[18]

Mortgagee in Possession. Authority holds that the statute of limitations does not run against a "mortgagee in possession" of the collateral property. The legal rationale is that the mortgagor's acquiescence to the mortgagee's possession of the collateral is a "continuing acknowledgement of the debt."[19] Possession must be actual. Thus, where a mortgagee has taken extensive measures to secure and improve or remediate the property, the mortgagee may claim the statute of limitations was tolled because it was a mortgagee in possession.

Pre-Acceleration Notices. Acceleration must conform with contractual requirements in the note or mortgage.[20] The notice of default may be "a condition precedent to the enforcement of the mortgage."[21] At least one reported decision determined that failure to give proper notice of default nullifies acceleration, bringing the mortgage back within the statute of limitations.[22] Courts similarly hold that the notices required under RPAPL §§1303 and 1304 are "condition[s] precedent to the commencement of the action" for which "strict compliance" is required.[23] A similar argument can be made that failure to provide these notices may also nullify an acceleration.

Bankruptcy Plan. The filing of a Chapter 13 petition in the Bankruptcy Court (personal debt restructuring) and a Chapter 13 plan, may renew the limitations period. Often overlooked, the Chapter 13 plan (which may be a court form) requires that the debtor acknowledge the debt and agree to repay it. Such an express acknowledgement and agreement to repay brings the mortgage within Section 17-105(1) of the General Obligations Law, and renews the limitations period.[24]

Conclusion

Recent case law gives powerful weapons to borrowers and lenders in this decade-old foreclosure battle. This article attempts to help practitioners and in-house counsel understand the implications of triggering the acceleration clause to foreclose a mortgage.

Endnotes:

1. Wells Fargo Bank v. Burke, 94 A.D.3d 980, 982 (2d Dept. 2012).
2. See Paragraph 22 of the "New York—Single Family—Fannie Mae/Freddie Mac Uniform Instrument," Form No. 3033, at https://www.fanniemae.com/singlefamily/security-instruments (last visited Jan. 23. 2017 at 10:30 a.m.); www.freddiemac.com/uniform/unifsecurity.html (last visited Jan. 23. 2017 at 10:30 a.m.).
3. Wells Fargo Bank, 94 A.D.3d at 982-83.
4. EMC Mortg. v. Patella, 279 A.D.2d 604, 605–06 (2d Dept. 2001).
5. Clayton Nat. v. Guldi, 307 A.D.2d 982 (2d Dept. 2003).
6. Goldman Sachs v. Mares, 135 A.D.3d 1121, 1122 , (3d Dept. 2016).
7. See, e.g. Deutsche Bank v. Unknown Heirs of Estate of Souto, 52 Misc. 3d 1210(A) (N.Y. Sup. Ct. NY C'nty July 5, 2016) ("Those cases would be controlling if the letter warned that plaintiff 'may accelerate' but the instant notice said 'will accelerate'").
8. Federal Natl. Mtge. Assn. v. Mebane, 208 A.D.2d 892, 894 (2d Dept. 1994).
9. Bank of N.Y. Mellon v. Slavin, 54 Misc. 3d 311, 41 N.Y.S.3d 408, 411 (Sup. Ct. N.Y. Nov. 21, 2016) ("the revocation should be clear, unequivocal, and give actual notice to the borrower of the lender's election to revoke in sum, akin to the manner plaintiff gave notice to exercise the option to accelerate").
10. Possible regulatory restrictions that may be presented are beyond the scope of this Article.
11. Petito v. Piffath, 85 N.Y.2d 1, 8 (1994).
12. Id. at 9
13. Clayton Nat. v. Guldi, 307 A.D.2d 982 (2d Dept. 2003).
14. Fed. Nat. Mortg. Ass'n v. Mebane, 208 A.D.2d 892, 894 (2d Dept. 1994).
15. N.Y. CPLR §205 ("If an action is timely

commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff…may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.").

16. EMC Mtg. v. Suarez, 49 A.D.3d 592, 593 (2d Dept. 2008).

17. See, e.g. MSMJ Realty v. DLJ Mortgage Capital, 52 Misc. 3d 314, 317 (N.Y. Sup. Ct. Kings C'nty Mar 7, 2016) (after borrower successfully established she was not served in the prior foreclosure action and a new action seeking to discharge the mortgage was commenced, the court said "[t]here is no possible interpretation of the law under which the court could find that the mortgage which is held by DLJ has been accelerated.").

18. 21st Mortg. Corp. v. Osorio, 51 Misc.3d 1219(A) (N.Y. Sup. Ct. Queens C'nty May 9, 2016).

19. Ernst v. Lange, 190 A.D. 917, 917 (2d Dept. 1919) ("she was a mortgagee in possession, and the statute of limitations did not run against the debt"); LaPlaca v. Schell, 68 A.D.3d 1478, 1479 (3d Dept. 2009) ("the statute of limitations will not run against a mortgagee in possession").

20. Wells Fargo Bank, N.A., 94 A.D.3d at 983.

21. GMAC Mortg. v. Bell, 128 A.D.3d 772 (2d Dept. 2015).

22. Mejias v. Premium Capital Funding, 23 Misc. 3d 1115(A) (N.Y. Sup. Ct. Richmond C'nty Apr. 7, 2009) ("the requisite notice of default issued to the borrowers on July 6, 2008 was a nullity" because it was sent before the loan was assigned to Wells Fargo.)

23. Aurora Loan Services v. Weisblum, 85 A.D.3d 95 (2d Dept. 2011).

24. See PSP-NC v. Raudkivi, 138 A.D.3d 709 (2d Dept. April 6, 2016).