Foreclosures and Statute of Limitations

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MORTGAGES, ACCELERATION, STATUTE OF LIMITATIONS

To a great extent the mortgage foreclosure situation is a mess. Major law firms have been driven out of business in an attempt to handle foreclosure matters at the level dictated by those in control. Foreclosures are started – foreclosures are dismissed – foreclosures are abandoned with the result that mortgagors' attorneys have successfully achieved absolution, release, liberation and deliverance for their clients.

THE BASIS OF THE ACTIONS

The issue, of course, is the running of the statute of limitations. The statutory basis upon which all is determined is CPLR **§213 Actions to be Commence Within Six Years** which provides in subdivision 4:

> "4. An action upon a bond or note the payment of which is secured by a mortgage upon real property or upon a bond or note and mortgage so secured or upon a mortgage of real property or any interest therein".

It is to be noted that the statute can be said to go out of its way to make specific its application to bonds or notes secured by mortgages – there is no question about it here.

The trap is acceleration traditionally considered a weapon of choice for foreclosing attorneys – it does away with the nettlesome subsequent filings of judgments, mortgages, transfers, etc. **but** it does start the clock on top of the bomb ticking.

In Milone v. US Bank Natl. Assn., 164 AD3d 145 (2nd Dept. 2018) the Court specified that acceleration may occur in three different ways:

> 1. A clear and unequivocal notice of acceleration delivered to the obligor;
> 2. An obligation by obligor to make a balloon payment under the terms of the note at the end of payback period which acceleration is self-executing;
> 3. Where a creditor commences an action to foreclose upon a note and mortgage seeking in the complaint

payment of the full balance due.

As was said the notice of acceleration must be clear and unequivocal. However, as you might suspect, there is a dispute as to what is clear and unequivocal. In Milone v. US Bank Natl. Assn., supra, at page 152 the Court found the letter stating that "plaintiff's failure to cure her delinquency within 30 days 'will result in the acceleration' of a note was merely an expression of future intent that fell short of an actual acceleration (citing cases). The notice to the plaintiff was not clear and unequivocal as future intentions may always be changed in the interim". The Court noted, however, that their colleagues in the First Department disagree – see Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc., 148 AD3d 529 (1st Dept. 2017). Deutsche Bank, supra, at page 530 held that "the letters from plaintiff's predecessor in interest provided clear and unequivocal notice that it 'will' accelerate the loan balance and proceed with a foreclosure sale unless borrower cure his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgage pursuant to the letters". In accord with Deutsche Bank, supra, is Sharova v. Wells Fargo Bank, N.A., 62 Misc.3d 925 (Sup. Ct., Kings Co. Silber, J 2019). This case is a prime example of the chaos that exists in the mortgage foreclosure arena as set forth above and also has a thorough exposition of just about all the cases in the area an analysis of what they held.

THE SCENARIO IS FAIRLY TYPICAL

The case which seems to be the most often cited and relied upon is EMC Mortgage Corp. v. Patella, 279 AD2d 604 (2nd Dept. 2001). In that case the plaintiff's initial action (and there were several assignments as there so often are) was dismissed after plaintiff failed in a summary judgment motion and subsequently failed to attend a certification conference. The initial

acceleration was pursuant to a demand letter demanding payment of the entire mortgage debt dated August 20, 1992 with a subsequent filing of a Summons and Complaint dated September 14, 1992. Thereafter plaintiff commenced a second action by filing a Summons and Complaint dated April 28, 1999 about six and one-half years later which, of course, was held to be too late. The Court pointed to the general rule that where a note and mortgage are payable in installments the statute runs from the date of each installment but on acceleration the statute of limitations begins to run on the entire debt. In this case defendant attempted to defend on the basis that dismissal by the Court of the prior foreclosure action essentially cancelled the acceleration in the first action. The Court ruled that is not true. In order to revoke a prior acceleration plaintiff must take an affirmative act revoking its election. Here the plaintiff did no such thing.

Then there is death. Not merely the plaintiff's action but literally death. We have matter of US Bank, NA v. Kess, 159 AD3d 767 (2nd Dept. 2018). In this case plaintiff commenced a foreclosure action in 2008 in which it accelerated the obligation. Thereafter, the bank voluntarily discontinued in October, 2014 and commenced a second action on February 22, 2015 more than six years after it accelerated the debt. But wait – plaintiff asserted that the statute had not run because, as the lower Court held, "the death of Kess' wife tolled the statute of limitations for 18 months thereby making the instant action timely", relying upon CPLR§210(b) - "the period of 18 months after death of a person against whom a cause of action exists is not a part of time within which the action must be commenced against his executor or administrator" US Bank, NA v. Kess, supra, at page 768. The Court held that may be true as to Mrs. Kess but it is not true as to Mr. Kess and (as the surviving tenant by the entirely) he was clearly entitled to assert and rely upon the statute of limitations.

More death - the dreaded reverse mortgage – Bank of America, N.A. v. Burton Gulnick, Jr.- Estate of John C. Cascairo, 2019 NY Slip Op. 01878 (App.Div.3d 2019) – 2019 N.Y. App.Div. Lexis 1834. The issue in this case was as to when the running of the statute of limitations commenced in a reverse mortgage. Here the mortgagor died December 20, 2009. Plaintiff took no action to accelerate the mortgage prior to its commencement of an action to foreclose the mortgage on August 11, 2016. When faced with a claim that the statute of limitations had run plaintiff pointed to the language of the note and mortgage - "'[l]ender *may* require immediate payment in full…if: [a] [b]orrower dies and the [p]roperty is not the principal residence of at least one surviving [b]orrower' (emphasis added)" – (in original Court statement). Plaintiff contended that there was no obligation to accelerate and as the debt had not been accelerated the statute did not commence to run. But the issue is not whether plaintiff actually made a demand, but when it had a right to make the demand. It had the right to make the demand upon death of the mortgagor and, accordingly, plaintiff's action is dead.

REVOCATION OF ACCELERATION

First of all there is an issue as to what constitutes revocation of acceleration. In Federal Nat'l Mortgage Ass'n v. Mebane, 208 AD2d 892 (2nd Dept. 1994) plaintiff commenced an action on May 22, 1974. A mistrial was declared in that action and the action was marked off the calendar on December 6, 1976. The instant foreclosure action was commenced on August 5, 1992 or approximately 18 years after initial acceleration. The Court noted that the prior action was never withdrawn but rather dismissed *sua sponte* by the lower Court in the foreclosure action and, accordingly, such does not constitute an affirmative act by the lender to revoke its acceleration specificatlly stating, supra, at page 894 "the prior foreclosure action was never withdrawn by the lender, but rather, dismissed *sua sponte* by the Court. It cannot be said that a

dismissal by the Court constituted an affirmative act by the lender to revoke its election to accelerate". Furthermore, the dismissal need not be on the merits – see Kashipour v. Wilmington Sav. Fund Socy, FSB, 144 AD3d 985 (2nd Dept. 2016) at page 987 "consequently, the plaintiffs establish, prima facie, their entitlement to judgment as a matter of law on the complaint. Contrary to Supreme Court's determination whether the foreclosure action was dismissed on the merits was not relevant to the subject determination".

However, where the lender or bank moves to have the action dismissed as in NMNT Realty Corp. v. Knoxville 2012 Trust, 151 AD3d 1068 (2nd Dept. 2017) such action by the foreclosing plaintiff creates a question of fact. In this case defendant bank's predecessor was granted an order that discontinued the foreclosure action, cancelled the Notice of Pendency and vacated the Judgment of Foreclosure and Sale. The Court distinguished cases which held that where the Court dismissed the action such did not constitute an affirmative act by the bank revoking it acceleration citing to Federal Nat'l Bank Mortgage Ass'n v. Mebane, supra, and stating "contrary to plaintiff's contention this case is distinguishable from the cases in which, because '(t)he prior foreclosure action was never withdrawn by the lender but rather dismissed…by the court, (i)t cannot be said (the) dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate'". On the facts of this case – where the bank asked for the action to be discontinued rather than the Court having discontinued it – there was thereby created a triable issue of fact as to whether the bank intended to revoke its acceleration.

More to the point is Freedom Mortgage Corp. v. Engel, 163 AD3d 631 (2nd Dept. 2018). In that case an action was commenced in July of 2008 thereby resulting in acceleration. However, the case was dismissed on the basis of a stipulation that plaintiff would voluntarily

discontinue the action "without prejudice" as the parties "desire to amicably resolve this dispute". On February 19, 2015 plaintiff commenced a second action. Supreme Court held that the plaintiff bank had effectively withdrawn its acceleration and thereby cancelled the same. The Appellate Court reversed the lower Court stating "contrary to the Supreme Court's determination plaintiff's execution of the January 23, 2013 stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant". The Court cited to Federal Natl. Mtge. Assn. v. Mebane, supra, but indicated a question was raised by NMNT Realty Corp. v. Knoxville, supra, by introducing the case with the cite "cf.".

In any event for a deacceleration letter to be valid it must specifically demand that the obligor make payment. In other words the notice of deacceleration must be coupled with a demand for payment. A simple letter of deacceleration has been held to be a pretext in an attempt to avoid the application of the statute of limitations. See Milone v. US Bank Natl. Assn., supra, at page 154 in which the Court said "(it) must, of course, be mindful of the circumstance where a bank may issue a deacceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge the mortgage and note. Here the deacceleration letter contained a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations constitutes a deacceleration in fact and cannot be viewed as pretextual in any way".

REMEDY

The remedy is RPAPL §1501(4) which provides:

> "Where the period allowed by the applicable statute of limitations for the commencement of an action to

> foreclose a mortgage or to enforce a vendor's lien has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action against any other person or persons known or unknown including one under disability as herein after specified to secure the cancellation and discharge of record of such encumbrance and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom…".

The statute goes on to provide "it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid and whether the mortgage in question was or was not given to secure a part of the purchase price".

This is enormously significant. Think of the bankruptcy situation in which relief is granted to the debtor on the note but does not – unless relief is obtained from the bankruptcy court itself – discharge the mortgage or remove it as a lien against the real property. The debtor/bankrupt is entitled only to a qualified discharge – see Debtor and Creditor Law §150(4)(b) and consider the case of Hulbert v. Clark, 128 NY 295 (1891) which held at page 298 "it is a general rule recognized in this country and in England that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for recovery of the debt is barred". Whether that case is valid or not (and I would not bet the farm on it) it has been followed subsequently both in this State and in Federal Court – it no longer matters in our situation. Why? Because the statute specifically provides that when the statute of limitations has run the debtor is entitled to an Order discharging the mortgage.

As was stated in Milone v. US Bank Natl. Assn., supra at page 151 "(T)he statute provides that a person with an estate or interest in real property subject to any encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance and to adjudge the estate or interest free of it if the applicable statute of limitations for commencing a

foreclosure action has expired (see RPAPL 1501[4]; Lubonty v. U.S. Bank N.A., 159 AD3d 962; 53 PL Realty, LLC v. US Bank N.A., 153 A.D.3d 894; Kashipour v. Wilmington Sav. Fund Socy., FSA, 144 AD3d 985". See MSMJ Realty, LLC v. DLJ Mortgage Capital, Inc., supra.

SOME AFTERTHOUGHTS

Often times during the foreclosure the bank pays the taxes, insurance and other carrying charges. Accordingly, it has been held that even where the second action is dismissed due to the expiration of the statute of limitations the bank may be entitled to recover those sums. In Federal Nat'l Mortgage Ass'n v. Mebane, supra, at pages 894-895 the Court held that the bank or creditor was entitled to maintain an action "sounding in unjust enrichment to recover the sums advanced inter alia for property taxes and insurance within the six year period prior to the commencement of the action.

It should be noted the Courts are very precise – as you would assume and hope – in determining the expiration of the statute. In Milone v. US Bank Natl. Assn., supra, the statute was measured from January 13, 2006, the date on which the first foreclosure action was commenced, and Tuesday, January 13, 2015, the date the second action was commenced. The new action missed by a day.

Deacceleration must occur within the statute of limitations six year period, for an attempt to deaccelerate after the expiration of the statute of limitations is ineffective – Deutsche Bank Natl. Trust Co. v. Adrian, 157 AD3d 934 (2nd Dept. 2018) at page 935 "the plaintiff voluntarily discontinued the prior foreclosure action on April 23, 2014 after the statute of limitations had expired…"; MSMJ Realy, LLC v. DLJ Mortgage Capital, Inc., 157 AD3d 885 (2nd Dept. 2018) at page 887 "the record is barren of any affirmative act of revocation occurring during the six year limitation period subsequent to the initiation of the 2009 action".

The standing is always an issue whether it is acceleration or even deacceleration for the Court held in Milone v. US Bank Natl. Assn., supra, at page 155 "we hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid deacceleration as well".

Finally, the cases consistently quote the provision of RPAPL 1501(4) which states "provided, that no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them, shall be in possession of the affected real property at the time of the commencement of the action". This raises the interplay between an action for a ejectment and an action to determine title pursuant to adverse possession. CPLR §212 **Actions to be Commenced Within Ten Years** provides in subdivision (a) Possession Necessary to Recover Real Property. "An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action". RPAPL §501 **Adverse Possession; Defined** – "For the purposes of this article: 1. Adverse Possessor. A person or entity is an 'adverse possessor' of real property when the person or entity occupies real property of another person or entity with or without knowledge of the others superior ownership rights, in a manner that would give the owner a cause of action for ejectment". Two sides of the same coin.

See 1 Warren's Weed New York Real Property §5.05(1) "although adverse possession is a doctrine largely developed by the courts, a statutory framework has existed in New York since 1848. Article 5 of the Real Property Actions and Proceedings Law sets forth the fundamental requirements of adverse possession. The ten year statute of limitation appears in CPLR 212(a)".