

## Appellate Division, Second Department Clarifies Law Concerning a Lender's Revocation of Acceleration in Foreclosure and Confirms the Sanctity of Settlement

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On January 20, 2021, the Appellate Division, Second Department addressed the often-confounding question of what evidentiary showing a foreclosing lender must make to defeat a defendant's motion for dismissal on statute of limitations grounds. The court found, as many suspected, that a lender's submission of a loan modification agreement coupled with proof of its voluntary discontinuance of a foreclosure action and cancellation of the notice of pendency are sufficient to raise an issue of fact. The decision brings much needed clarity to the Second Department's statute of limitations jurisprudence and, perhaps more importantly, confirms the sanctity of settlement.

The facts in [Bank of N.Y. v. Hutchinson](#), AD 2nd, 2017-13111, are straightforward. The defendant/mortgagor filed motion for summary judgment seeking, *inter alia*, dismissal of the complaint based on the expiration of the six-year statute of limitations period. In support of the motion, the defendant submitted evidence showing that the mortgage debt was accelerated by virtue of a prior foreclosure action commenced on February 15, 2006 (the "2006 action") and that the 2006 action was voluntarily discontinued on April 2, 2007. In opposition, the plaintiff argued that it had revoked its election to accelerate the mortgage debt within the limitations period. The plaintiff submitted a loan modification agreement dated November 6, 2006 and a consent to cancel lis pendens filed March 29, 2007. The Supreme Court denied the motion finding that although the defendant satisfied her *prima facie* burden to show that the action was time-barred, the plaintiff raised a triable issue of fact in opposition. The defendant appealed.

The Appellate Division began its analysis reciting the well-settled law that a mortgage foreclosure action is subject to a six-year statute of limitations under CPLR 213(4). The court noted that where a mortgage is payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due. However, once a mortgage payable in installments is accelerated, the entire balance is due and the statute of limitations begins to run on the entire debt.

This is not the end of the story however. The Second Department has created a new body of law over the past few years concerning a lender's revocation of its election to accelerate the mortgage debt. Under this jurisprudence, a lender may revoke its election to accelerate the mortgage, but it must do so by an "affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the prior foreclosure action."

After setting forth these principles, the Appellate Division applied them to the facts of the case, concluding, in accord with the lower court, that the defendant met her initial burden of demonstrating *prima facie* that the case was time-barred. The court also agreed with the Supreme Court's determination that the plaintiff raised a triable issue of fact in opposition, finding that:

the submission of the loan modification agreement, which clearly and unambiguously demanded a resumption of monthly installment payments on the note, and the consent to cancel lis pendens were sufficient to raise a triable issue of fact as to whether the

plaintiff had revoked its election to accelerate the full balance of the mortgage debt within six years from February 15, 2006 ....

Consequently, the Appellate Division affirmed the lower court's decision denying the defendant's motion.

In reaching its decision, the Appellate Division rejected the defendant's argument that the plaintiff was required to demonstrate that payments were made under the loan modification agreement, holding, based on the facts of this case, that such a showing was not necessary. The court also rejected the defendant's claim of prejudice, holding that any such prejudice was not sufficient to defeat revocation.

The Appellate Division's decision is a welcome relief to the mortgage servicing industry. Lenders no longer need to fear that settlement of a foreclosure action by modification will be used against them years later, after the statute of limitations has expired, as a basis for dismissal. Notwithstanding the foregoing, we recommend that foreclosing lenders make clear when discontinuing actions that they are revoking acceleration of the mortgage debt.