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Financial Services Litigation Update

Discontinued and Revoked:
Court of Appeals Changes Landscape of Foreclosure Statute of Limitations Jurisprudence in Reversing Quartet of Appellate Division Cases

By Kenneth J. Flickinger

On February 18, 2021, the Court of Appeals reversed four (4) decisions from the Appellate Divisions, which greatly affect the prosecution of mortgage foreclosure actions in New York with respect to the statute of limitations[1]. The major takeaways from the decisions are as follows:

- A notice expressing intent to accelerate the debt in the future is not an act of acceleration, and will not commence the running of the statute of limitations. If such a notice, typically referred to as a "default notice" or "thirty-day notice", merely states that the lender "shall", "may" or "will" accelerate the debt if the default is not cured, the notice is equivocal as to acceleration, and will not be considered an overt act of acceleration for statute of limitations purposes.
- Where the only act of acceleration is the commencement of a foreclosure action, voluntary discontinuance of the foreclosure action, without more, constitutes an act of revocation of the acceleration for statute of limitations purposes.
- A mortgagee's motive in revoking acceleration is irrelevant. A lender should not be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt.

CERTAINTY GOING FORWARD

The implication of these decisions for the mortgage servicing industry cannot be understated. The Court of Appeals has laid out rules that are clear and easy to apply, creating much needed certainty going forward. There is no longer a need to prove the subjective intent behind a revocation of acceleration. The act of revocation, whether by voluntary discontinuance of a foreclosure action, or by notice, is sufficient, and may not be assailed as insincere.

WHAT ABOUT LOOKING BACKWARDS?

Hundreds of mortgages have been wiped out over the last few years based on the Appellate Division case law that was reversed in these cases. Can a lender that lost its mortgage on similar issues get a do-over? A motion for leave to renew may provide a remedy. CPLR 2221(e) allows a party to seek to correct an adverse determination on the grounds that "there has been a change in the law that would change the prior determination."

[1] The cases are *Freedom Mortg. Corp. v. Engel, et al., etc.*, 2021 WL 623869.

The action must still be "sub judice" to permit such a motion. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case. *See* Siegel, N.Y. Prac. §254 (6th ed.).

If final judgment has not been entered, an action will be deemed pending, allowing for a timely motion to renew on the basis of a change in law. *See State of New York Mortg. Agency v. Braun*, 182 A.D.3d 63 (2d Dep't 2020) ("an action is deemed pending until there is a final judgment. Here, while there was an order granting the defendant's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered.").

After a final judgment has been entered, a party may resort to CPLR § 5015. While a change in law is not one of the enumerated grounds for vacatur of a judgment, "[t]he Supreme Court has the inherent authority to vacate a judgment in the interest of justice." *Goldenberg v. Godenberg*, 123 A.D.3d 761 (2d Dep't 2014). A mortgagee that lost a foreclosure based on the expiration of the statute of limitations should move quickly to determine whether there are grounds for relief.

TOO GOOD TO BE TRUE?

However, a concurrence, and separate dissent, on these appeals left open the question whether the notes and mortgages permit a lender the contractual right to revoke an acceleration, as the arguments were not raised in the three (3) of the four (4) appeals decided, and the argument was raised for the first time on appeal in the other, and, therefore, was unpreserved for appellate review. Might this victory be short lived? We certainly expect to see this argument raised by the defense bar. How will the Appellate Divisions receive it? We will not know the answer to that question for years. But the Court of Appeals provided a hint in referencing *Kilpatrick v. Germania Life Ins. Co.*, 83 N.Y. 163, 168 (1905), in which the Court of Appeals held that the noteholder was estopped from revoking acceleration after the borrower changed his position in reliance on the noteholder's election to accelerate. This appears to be justification for a noteholder's right to revoke acceleration, so long as the borrower has not detrimentally relied on the election. We will see if the Appellate Divisions follow the Court of Appeals' lead. In the meantime, the mortgage finance and servicing industries can enjoy a rare victory.

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This Legal Update is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact Kenneth J. Flickinger at 914-286-2817 or kflickinger@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.