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Discontinuances of Foreclosure Actions May Require Accompanying De-Acceleration Notices in Order to Preserve the Statute of Limitations

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At some point after a borrower misses a monthly mortgage payment or is otherwise in default on a mortgage loan, the lender may choose to accelerate that debt to demand all amounts due under the loan and seek to collect that debt by initiating a foreclosure action. A recent New York appeals court case sheds light on when it may be too late to foreclose if a prior action had already been commenced and then discontinued.

On June 3, 2020, New York's Appellate Division Second Department issued a split decision in *Christiana Trust v. Barua*[1] holding that a mortgage foreclosure action is barred by the statute of limitations where the mortgage loan had been accelerated in a prior action more than six years prior to the commencement of the second action, even though the prior action had been discontinued. The Appellate Division reasoned that the discontinuance of the first action in and of itself, without additional communication of a de-acceleration or revocation of acceleration, did not nullify the prior acceleration.

This decision is important because of its potential impact on so many loans, mainly residential, that were accelerated years ago but have not yet been "properly" de-accelerated. Where more than six years have elapsed since acceleration and a foreclosure action has either not been commenced or where it has merely been discontinued, lenders face the prospect of a court dismissing any subsequent foreclosure action and discharging the mortgage of record.

Background

As a result of an alleged monthly mortgage payment default on and after April 1, 2009, the lender commenced a foreclosure action against Himon Barua ("Barua") by filing a Summons and Complaint in Orange County Supreme Court on November 6, 2009. The Complaint included an allegation that the loan was being accelerated. Later, that action was discontinued voluntarily by a court order dated October 15, 2013.

On November 10, 2015, Christiana Trust, as trustee ("Plaintiff"), commenced a foreclosure action alleging that it was then the holder of the note and the assignee of the mortgage, that Barua was in default on his payment obligations and that the loan was being accelerated. Barua filed a motion seeking, among other things, to dismiss the Plaintiff's Complaint on the grounds that it was barred by the six-year statute of limitations, arguing

that this second action was filed more than six years after the debt was initially accelerated on November 6, 2009. Plaintiff opposed that motion by arguing that the discontinuance of the first action operated as a de-acceleration of the debt. The Orange County Supreme Court agreed with Plaintiff and allowed the case to proceed.

However, on appeal, the Appellate Division reversed that order and dismissed Plaintiff's foreclosure action.

The Majority Opinion

The Appellate Division's majority relied upon its prior decisions holding that de-acceleration notices must be clear and unambiguous and cannot be utilized as a mere pretext to avoid the onerous effect of the statute of limitations. Further, the Court noted that the mere act of discontinuing an action, without more, does not in and of itself, constitute an affirmative act revoking an earlier acceleration and that "various reported trial level decisions and orders holding to the contrary should no longer be followed."

The majority noted that the Plaintiff did not "demonstrate any language in the motion to discontinue, or in the order rendered thereon, that clearly and unambiguously repudiated [the prior acceleration]." The Court noted the absence of evidence such as (i) a demand for the resumption of monthly mortgage payments, (ii) the voluntary vacatur of the notice of pendency of action, or (iii) a forbearance agreement evincing a clear intent to revoke a prior acceleration and reinstate monthly payments. In support of its decision, the majority also cited to the public policy of having lenders act in good faith in rescinding the acceleration for those borrowers who, after acceleration, obtain the ability to pay arrears and make monthly payments.

The Partially Concurring and Dissenting Opinion

In a separate lengthy opinion, Justice Robert J. Miller stated that Barua's motion to dismiss should have been granted only to the extent of "dismissing so much of the complaint as sought to recover damages for any unpaid installments that were due prior to November 10, 2009."[2] In this regard, he noted that each default in making monthly mortgage payments constitutes a separate breach and cause of action, such that "recovery is time-barred for any unpaid installments that were due prior to November 10, 2009—to wit, from the installment due on April 1, 2009, up to and including the installment due on November 1, 2009." Also, since the statute of limitations is an affirmative defense, Justice Miller found that as a result of the submission of evidence of the prior discontinuance on his motion to dismiss, Barua actually "failed to sustain his initial burden of eliminating all questions of fact as to whether the entire action is time-barred."

Justice Miller noted that "as recently as last year, ten of the thirteen New York trial courts that have considered this issue have found that withdrawing the prior foreclosure action is an affirmative act of revocation that tolls the statute of limitations."

He noted that the majority was improperly relying on (i) principles of equity and fairness, and (ii) a heightened burden, based on other cases, that evidence of a voluntary discontinuance would only raise a triable issue of fact if it "explicitly stated that it was being executed in order to revoke the election to accelerate, or otherwise specifically provided that the holder of the note and mortgage would resume accepting monthly installment

payments until the next default." [3] However, he responded that (i) there has been no showing of prejudice or impairment to Barua's ability to defend this case on the merits, which would otherwise warrant invoking equity, and (ii) a review of the Court's prior decisions being relied upon by the majority show that they "appear to be the product of judicial drift, as they fail to articulate any applicable legal theory, much less legal authority, to support their deviation from this Court's prior precedent."

Key Takeaways

The majority opinion seems to indicate that a court can inquire into the lender's subjective intent in discontinuing an action to determine the effectiveness of a revocation of acceleration. This decision instructs trial courts in downstate New York to specifically look for language accompanying a discontinuance which revokes an earlier acceleration or calls for the resumption of monthly payments. Rarely does a discontinuance contain any language other than what is required by the requisite court rule governing discontinuances (CPLR 3217). Thus, a standalone letter to the borrower revoking the earlier acceleration may be necessary to meet the requirement imposed by this decision. Still, the extent to which a court can interject its own notion of equity into that analysis remains unclear, although it appears to have been broadened by the majority, despite the burdens and standards that govern motions to dismiss.

Depending on when a loan has been accelerated, it is possible to keep track of when the statute of limitations expires. As that date approaches, foreclosing plaintiffs may seek to conduct a review of the likelihood of success in obtaining a judgment of foreclosure and sale and decide whether to actually discontinue a foreclosure action. [4] Under this latest decision, if the action is discontinued, borrowers should also be notified of the revocation of acceleration. This will give them an opportunity to pay arrears and make monthly payments, and only if they fail to do so should lenders then re-accelerate and foreclose. It is possible that this decision will be reargued or further appealed to New York's highest court, the Court of Appeals, which will also be addressing similar issues in the pending *Freedom Mtg. Corp. v. Engel* appeal, any of which may result in further developments and guidance.

Please note that this is a summary of developments in the law and does not constitute legal advice. This summary is not intended to constitute legal advice or a definitive review of all potential issues that may arise. If you have any questions regarding this matter or foreclosures in general, please feel free to contact Samit G. Patel at (212) 510-2286 or via email at **spatel@cullenllp.com**.

Footnotes

[1] 2020 N.Y. Slip Op. 03095, 2020 WL 2892827.

[2] Under this reasoning, since Plaintiff accelerated on November 10, 2015, any payments due on or before November 10, 2009, six years prior to that acceleration date, would be time-barred.

[3] *See Freedom Mtg. Corp. v. Engel*, 163 A.D.3d 631, 81 N.Y.S.3d 156, 2018 N.Y. Slip Op. 05140 (2d Dep't. 2018), *lv granted in part*, 33 N.Y.3d 1039. *Engel* is now on appeal with the New York Court of Appeals and involved a summary judgment motion, as opposed to a motion to dismiss involved here. The majority opinion does not distinguish between the different applicable burdens and standards that govern each motion.

[4] This may involve an analysis of the number of past due monthly payments and other sums of money that might not be recovered by a future acceleration.

Practices

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