NY Court of Appeals Issues a Landmark Decision on the Statute of Limitations in Mortgage Foreclosure Actions

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On February 18, 2021, the New York Court of Appeals issued a landmark decision in four cases related to the application of the statute of limitations to foreclose a mortgage in New York. Most notable is the long-anticipated decision in *Freedom Mortgage Corporation v. Engel ("Engel")*, which reversed the Appellate Division's prior decision on the requirements to revoke a prior acceleration of a mortgage loan. The Court of Appeals has now held that where an acceleration of the loan occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder.

The common issue in *Engel* and *Ditech Financial, LLC v. Naidu* ("*Naidu*") is whether a valid election to accelerate, effectuated by the commencement of a prior foreclosure action, was revoked upon the noteholder's voluntary discontinuance of that action. Determining whether, and when, a noteholder revoked an election to accelerate is critical to determine whether a foreclosure action commenced more than six years after acceleration is time-barred.

The Plaintiffs in *Engel* and *Naidu* both asserted that their foreclosure actions were timely commenced because they had affirmatively revoked prior elections to accelerate the loan by voluntarily withdrawing those prior foreclosure actions. In both *Engel* and *Naidu,* the Supreme Court held that the respective accelerations were revoked by a voluntary discontinuance of the prior foreclosure action. However, the Appellate Division reversed the decisions of the trial court in each case, dismissing the actions as time-barred.

The Appellate Division departments have consistently held that revocation of an acceleration can be accomplished by an "affirmative act" of the noteholder within six years of the election to accelerate[1]. However, more recently, as reflected in the Second Department's decisions in *Engel* and *Naidu*, a new standard has emerged—that a noteholder's motion or stipulation to withdraw a foreclosure action, "in itself," is *not* an affirmative act of revocation of the acceleration effectuated via the complaint[2].

The Court of Appeals rejected this approach and noted that it is both "analytically unsound as a matter of contract law" and "unworkable from a practical standpoint". It would require the courts to adopt a case-by-case

approach to scrutinize the course of the parties' post-discontinuance conduct and correspondence to determine whether a noteholder meant to revoke the acceleration when it discontinued the action. Under this approach, the revocation inquiry turns on an exploration into the bank's intent, accomplished through an exhaustive examination of post-discontinuance acts.

The Court of Appeals provided its reasoning for the decision, stating that the post-hoc, case-by-case approach adopted by the Appellate Division is incompatible with the policy underlying the statute of limitations, because the timeliness of a foreclosure action "cannot be ascertained with any degree of certainty," an outcome which the Court of Appeals has repeatedly disfavored. The post-hoc, case-by-case approach also leaves the parties without concrete contemporaneous guidance as to their current contractual obligations, resulting in confusion among the parties. Moreover, if the effect of a voluntary discontinuance of a mortgage foreclosure action depended solely on the significance of noteholders' actions taking place months or years later, the parties might not have clarity with respect to their post-discontinuance contractual obligations until the issue is adjudicated in a subsequent foreclosure action (which is exactly what occurred in *Engel* and *Naidu*).

Instead, the Court of Appeals adopted a "clear rule" that where an acceleration of the loan occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder. Now, a voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. The Court of Appeals noted that this clear rule comports with its precedent favoring consistent, straightforward application of the statute of limitations which serves the objectives of "finality, certainty, and predictability," to the benefit of both borrowers and noteholders.

Applying this clear rule, the Court of Appeals reversed the Appellate Division's decisions in *Engel* and *Naidu*, holding that the Plaintiffs validly revoked the prior accelerations by voluntarily withdrawing the prior foreclosure actions within the statute of limitations period.

In *Wells Fargo Bank v. Ferrato ("Ferrato")* and *Vargas v. Deutsche Bank Natl. Trust Co., ("Vargas")* the Court addressed the issue of whether certain actions on behalf of a lender are sufficient to constitute an "unequivocal overt act" so as to effectuate the acceleration of a mortgage debt, thereby commencing the six-year statute of limitations period. In each of these cases, the Court held that the "acts" complained of did not constitute a valid acceleration of the loan which would start the six-year statute of limitations period.

In Ferrato, the Court addressed whether the filing of complaints in two prior dismissed foreclosure actions was sufficient to accelerate the indebtedness, thereby impacting the timeliness of the current pending action commenced in December 2017. There, two prior foreclosure actions had been commenced in 2009 and 2011, respectively. Despite the fact that the loan had been modified in 2008, neither the 2009 nor 2011 complaints referenced the modification of the loan, instead relying on the original amount of the note and mortgage and attaching the original loan documents to the respective complaints. In each of these actions, Ferrato successfully moved to dismiss the complaint based on this deficiency. In the 2017 action, Ferrato moved to dismiss the

complaint on the grounds that the debt was accelerated in September 2009 by commencement of the 2009 foreclosure action, and that the statute of limitations had expired in 2015.

The Supreme Court rejected this argument on the grounds that neither the 2009 or 2011 actions served to accelerate the debt because the complaints therein attempted to foreclose on the original note and mortgage, and not the modified loan. Ferrato appealed, and the Appellate Division reversed and granted the motion to dismiss on the grounds that the 2009 action effected a valid acceleration of the modified loan, even though the modified loan documents were not included therein. On further appeal, the Court of Appeals reversed the Appellate Court's decision insofar as same granted Ferrato's motion to dismiss. In so doing, the Court of Appeals held that the prior foreclosure action did not serve to accelerate the modified loan because Wells Fargo did not reference the loan modification or attach the modified loan agreements which had materially distinct terms, stating that "Under these circumstances – where the deficiencies in the complaints were not merely technical or *de minimis* and rendered it unclear what debt was being accelerated– the commencement of these actions did not validly accelerate the modified loan[3]."

Vargas involves an action commenced in July 2016 by the borrower Juan Vargas under RPAPL 1501(4) against Deutsche Bank, seeking to discharge a mortgage on real property based upon the expiry of the statute of limitations. Vargas alleged that the issuance of a default letter in August, 2008 by the bank's predecessor in interest accelerated the debt, such that the statute of limitations expired prior to the commencement of the quiet title action. The Supreme Court initially found that the default letter was insufficient to accelerate the loan, but on renewal, denied the bank's motion to dismiss and granted summary judgment in favor of Vargas to discharge the mortgage. The Appellate Division affirmed. The Court of Appeals reversed, holding that the default letter did not effectuate an unequivocal acceleration of the debt because it did not seek an immediate payment of the entire balance outstanding on the loan, but rather "referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written." The Court further found that despite the language of the letter stating that the debt "will" be accelerated, the letter indicated that failure to cure the default "may" result in the commencement of a foreclosure action, which not only did not constitute an automatic acceleration, but that such an automatic acceleration upon the expiration of the cure period could be considered inconsistent with the terms of the loan contract.

These decisions each present a significant change in the case law and have a profound effect upon the application of the statute of limitations to foreclose a mortgage in New York. Adopting this clear rule serves the objectives of "finality, certainty and predictability." New York Civil Practice Law and Rules § 213(4) sets the statute of limitations for mortgage foreclosure actions as six years.[4] What is certain now is that **where an acceleration of the loan occurred by virtue of the filing of a complaint in a foreclosure action, a voluntary discontinuance evinces a revocation of that acceleration absent a noteholder's contemporaneous statement to the contrary**. Navigating the wide range of possible applications of these decisions requires careful consideration by competent counsel to guide litigants to a successful resolution of their claims.

For more information, please reach out to the authors or any member of McGlinchey's Consumer Financial Services Litigation team.

[1] *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069 (2d Dept. 2017); *Lavin v Elmakiss*, 302 A.D.2d 638, 639; *Federal Natl. Mtge. Assn. v Rosenberg*, 180 A.D.3d 401, 402 (1st Dept. 2020).

[2] *Freedom Mortgage Corporation v. Engel*, 163 A.D.3d 631, 633 (2d Dept. 2018); *Ditech Financial, LLC v. Naidu*, 175 A.D.3d 1387, 1389 (2d Dept. 2018); *Wells Fargo Bank, N.A. v Liburd*, 176 AD3d 464, 464-465 (1st Dept. 2019).

[3] Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472 at 476 (1932)

[4] CPLR § 213(4)

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