BERGMAN ON MORTGAGE FORECLOSURES:
Another Statute of Limitations Loss for a Mortgage Holder

By Bruce J. Bergman

Faithful readers of this column should by now be familiar with the scary hidden dangers the statute of limitations presents for mortgagees in New York. It has happened yet again so the point is well worth reemphasizing. [See *Lavin v. Elmakiss*, 302 A.D.2d 638, 754 N.Y.S.2d 741 (3d Dept. 2003)]. That it was a private (rather than an institutional) lender who suffered the defeat doesn't diminish the peril.

Briefly mentioning anew the underlying principles will help explain the danger. The statute of limitations for a mortgage in New York is six years and it begins to run on each unpaid installment—*unless* the debt has been accelerated. Acceleration, of course, declares the debt due so that means the time period begins running at that moment. (Always remember that acceleration can be accomplished either by sending the appropriate letter declaring the balance due—which is typical—or by the filing of a complaint containing that declaration.)

The facts of the cited case are somewhat intertwined, but they set the stage for the underlying result. A Mr. Lavin bought a mobile home park, secured a first mortgage and a purchase money mortgage second mortgage from the seller (let's call him Elmakiss). By March, 1991, Lavin had defaulted on the second mortgage so Elmakiss duly sent an acceleration letter. There was a default on the first mortgage as well, which elicited a foreclosure action on that mortgage, intercepted by a bankruptcy filing by Elmakiss. The senior foreclosure did not proceed to sale and the junior never began a foreclosure.

The result of all the events (which we needn't relate here) was that in 1997, the borrower (Lavin) started an action against the second mortgagee (Elmakiss) to declare the debt unenforceable. Mortgagee Elmakiss counterclaimed for the outstanding sums due on the mortgage note—and lost.

The debt was accelerated in April of 1991. The junior mortgage holder for whatever reason never pursued its rights, until expressed in the counterclaim when sued by the borrower in 1998. But the acceleration had never gone away; it needed an affirmative act for that to happen.

Whether through foreclosure as plaintiff, or counterclaim as defendant, the action on the debt (foreclosure or on the note) was viable for six years. That expired in 1997 so the lender's counterclaim in 1998 was no good: barred by the statute of limitations.

So the slight twist here: Once there is an acceleration, the lender needs to attend to its rights. And saving those rights some day for a counterclaim won't avoid the calamity of the statute of limitations.

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