BERGMAN ON MORTGAGE FORECLOSURES: Statute of Limitations Sinks Lender—Again

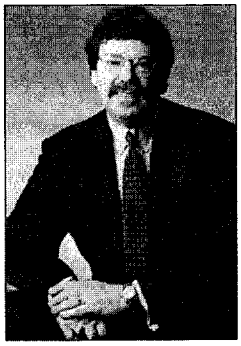
By Bruce J. Bergman

There is this scary glitch in New York law in the realm of statute of limitations which presents substantial peril to mortgagees. A recent cases emphasizes yet again how true this is. [*Secured Equities Investments v. McFarland*, 300 A.D.2d 1137, 753 N.Y.S.2d 264 (4th Dept. 2002)].

Because the underlying concept may be counterintuitive for some, we begin with a quick basic review of the statute of limitations formula. This is also necessary because mortgagees would typically be incredulous that the applicable six year statute of limitations would ever play a role in a foreclosure because mortgage holders are not in the habit of doing nothing for six years while the clock ticks away. That is why it is so surprising.

In any event, here's how to understand the point. Suppose a mortgage originates today and the first payment is due in a month. No installments are ever paid. The lender or servicer does absolutely nothing (bizarre though that is) except to awaken six years and one day after that first payment was due. At that moment it begins a foreclosure. Although by then that very first overdue installment could not be collected in any lawsuit or in a foreclosure, the remainder of all sums due—all being within six years—*are* collectible. Hence, in such a scenario the statute of limitations presents virtually no problem.

What happens if after the first month's default the mortgagee accelerates the balance? (Put aside the typical need to first send a 30-day cure letter and the fact that it would be so unusual to accelerate after a mere month.) If after acceleration the mortgagee did nothing for six years and a day, then the *entire* balance



of the mortgage would be barred by the statute of limitations and therefore uncollectible. Because it would be highly unlikely that any mortgage holder would accelerate and then do nothing for six years, this hardly seems to be a perilous situation.

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But now let's turn to the usual case where after a certain number of months after default, the lender accelerates and promptly initiates a mortgage foreclosure action. Starting that action *stops* the statute of limitations from running and if the case proceeds to a conclusion, the statute of limitations never becomes an issue. The problem, though, occurs if after some lengthy time, the foreclosure is dismissed. If by then more than six years have passed since acceleration, the statute of limitations just rendered enforcement of that mortgage void.

Our dedicated readers may recall that this has occurred a number of times and here it has happened yet again with these mundane but scary facts. Mortgage is delivered in 1986. The mortgage is then assigned and in the face of a later default, in March of 1988, the assignee commences a mortgage foreclosure action on July 11, 1989. The foreclosure proceeds to judgment of foreclosure and sale but that judgment is vacated—and the complaint dismissed—because the assignee /foreclosing plaintiff had not sought the default judgment in a timely fashion. (This impediment is a creature of the CPLR which needn't be reviewed here.)

Even though the foreclosure had been dismissed, the mortgage itself was later again assigned and, understandably, the new assignee began a foreclosure in 1998. The borrower defendant moved to dismiss the case arguing it was barred by the statute of limitations. The court agreed, ruling that acceleration occurred when the complaint was filed in the earlier foreclosure on July 11, 1989. So, six years thereafter—on July 11, 1995—the statute of limitations had expired. This new action, having been brought in 1998, was simply too late.

The critical proposition underlying all this is that even though the earlier foreclosure action was dismissed, the acceleration upon which a statute of limitations could run survived.

Mortgage holders would like to believe that if the foreclosure action goes away, so too does the acceleration—but that is precisely what courts have repeatedly said is not the case—all to the obvious and repeated detriment of foreclosing plaintiffs. And this particular case adds yet another wrinkle. The lender, aware of its jeopardy, attempted to argue that its initial acceleration back in

1989 was a nullity so that the statute of limitations could never have run on the mortgage balance (presumably only on installments older than six years). Aside from a finding that the mortgage holder was unable to submit evidence to support the claim that its acceleration was meaningless, the court also invoked the doctrine of judicial estoppel. That is a philosophy which precludes a party from presenting a pleading in a manner inconsistent with a position taken in an earlier judicial proceeding. The point of this is to observe that there appears to be no alternative argument that lenders can use to avoid this particular statute of limitations problem.

Sadly, there is no lesson that emerges from this case and the earlier decisions on the same point because their essence is that foreclosure cases need to be done correctly to avoid being dismissed and engendering the statute of limitations dilemma. Mindful that mortgage lenders, servicers and their counsel always intend to do these things right, it is not a matter of volitionally failing to take care of these things, but rather a matter of dedication, skill and sometimes luck.

Mr. Bergman is the author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender & Co., Inc. (rev. 2009) and is a member of Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York. He is also a member of the USFN and the American College of Real Estate Lawyers, and a Fellow of the American College of Mortgage Attorneys.