BORROWER SETTLEMENT NEGOTIATIONS AND THE STATUTE OF LIMITATIONS – PERIL AND AVOIDANCE

*By Bruce J. Bergman

If the statute of limitations to foreclose a mortgage is expiring, do settlement negotiations with the borrower serve to save the lender from the defense of the statute of limitations if it then expires? The best answer is "maybe", and it depends upon the facts – all both obscure and important enough to be worthy of exploration. This can be a dangerous realm; examining the controlling principles should be meaningful.

The statute of limitations under consideration – that is, for foreclosure of a mortgage - is six years[1]. The knowledgeable mortgage lender or servicer, or their counsel, might immediately wonder why a lengthy six year statute of limitations would even be a factor. What lender would wait six years to begin a foreclosure action and run afoul of the statute of limitations? Who would dawdle for that long? To be sure, it seems like a bizarre notion, but experience confirms that it does indeed happen, and not so infrequently.

First a few basics will help. The six year statute of limitations begins to run from the due date of each unpaid mortgage installment[2], or (more common as a practical matter) the moment at which the mortgagee is entitled to demand full payment – when the mortgage balance is accelerated by proper demand[3].

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Referring to installments, although recovery is barred for installments due more than six years before the mortgage foreclosure action was commenced[4], the statute of limitations does not preclude recovery for the principal sum due which matured within those six years[5]. Rather, the compelling rule is to the contrary: an action can be brought on each installment within six years of the time it matured or came due[6].

Regarding acceleration – which is a typical event – once a lender has exercised the option to accelerate, each subsequent payment which would otherwise have been due cannot start a new period of limitations. Even though a mortgage may be payable in installments, once acceleration has been declared, the entire amount is due and the statute of limitations begins to run at that moment on the entire debt[7]. Therefore, any action brought within six years of acceleration encompasses all sums which would have become due after acceleration, although any payments due before acceleration which are more than six years overdue would be barred[8].

So, when a monthly installment is delinquent, should a lender wait six years and one day to initiate a foreclosure action, the statute of limitations has expired *only* as to that one installment which is now more than six years old. But mortgage holders will typically accelerate the mortgage balance some months after initial delinquencies have accrued. Once that balance is declared due, the statute of limitations of six years begins to run on that *full* sum. Starting the foreclosure action tolls the statute of limitations so presumably it is not a factor – again why lenders would wonder how it is that the statute of limitations merits this exegesis.

The response is that sometimes files are misplaced or sold and the mortgage holder only awakens near the conclusion of some critical six year period. More insidious is the instance where a foreclosure is begun, it drags on or is litigated for five years plus (yes it does indeed happen)[9] and the case is then dismissed. (That, too, can and does occur.) At that moment, the tolling that the foreclosure action had afforded is gone and the statute of limitations is now about to expire. If a new action is not begun *within* the six year period, the statute of limitations will be a bar to prosecuting the case and all will be lost.

Now we have the intersection of an expiring statute of limitations and the possibility (often a likelihood) that settlement negotiations between the lender and the borrower will ensue. There are more than a few pervasive compulsions which impel settlement imperatives: public relations considerations, the overall view that cases should be settled, encouragement from sundry regulators and regulations, to say nothing of the parties own desires. If in a sincere effort to settle the matter those negotiations proceed for weeks or months, or more, and *then* the statute of limitations has expired, can the defendant/borrower still use the statute of limitations as a defense? And now we arrive at inquiry into the maxims previously mentioned.

The general rule is that a party may be estopped to plead the statute of limitations where the plaintiff (that is our lender or servicer) was induced by fraud, misrepresentations or deception to refrain from timely beginning the action[10]. Another way to say this in case law is that a defendant can be estopped to invoke the statute of limitations where that defendant's deceptive conduct caused the plaintiff to delay

instituting suit until after the statute of limitations has expired[11]. But to be entitled to avail itself of estoppel, the lender/plaintiff must present real evidence showing the inducement by fraud, misrepresentation or deception to refrain from timely initiating the action[12] – and, it must *prove* that the conduct engaged in by the defendant was calculated to mislead and that it was reliance on that conduct which elicited the neglect to timely commence the action[13].

So how does this translate into any help from the existence of settlement negotiations? The fact is, the mere actuality that settlement negotiations were ongoing is *not* sufficient to create an estoppel against the statute of limitations as a defense.[14] Rather, for that estoppel against the defendant to arise, it needs to be shown that by engaging in lengthy settlement negotiations, the defendant intended to lull the plaintiff both into inactivity and to induce continued discussions until the statute of limitations expired[15].

Thus, it *might* be that settlement negotiations could be of a nature that it would prohibit the borrower from invoking the statute of limitations defense. But there would be a heavy burden upon the mortgage holder to demonstrate that the borrower was somehow insincere and that the settlement negotiations were just a device to fool the plaintiff into neglecting the beginning of an action. That may not be easy to show.

In sum, a lender or servicer must be very careful indeed when expiration of the foreclosure statute of limitations is approaching. Settlement negotiations may be a fine idea, but the lender is best advised to begin its action and preserve the timeliness of the

case. If the settlement negotiations lead to an amenable conclusion, that is certainly welcome. But if they fail, the plaintiff lender or servicer does not want to be in a position of having to prove the nature of the defendant's conduct as the only basis to save the timeliness of the action. All would be in danger of being lost. And so, there is here a serious issue – and lesson.

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[1] CPLR §213(4). See, *inter alia*, *Buywise Holdings, LL v. Harris*, 31 A.D.3d 681, 821 N.Y.S.2d 213 (2d Dept. 2006); CPLR §213(4). See *Lavin v. Elmakiss*, 302 A.D.2d 638, 754 N.Y.S.2d 741 (3d Dept. 2003); *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 720 N.Y.S.2d 161 (2d Dept. 2001); *Donatelli v. Siskind*, 170 A.D.2d 433, 565 N.Y.S.2d 224 (2d Dept. 1991); *Khoury v. Alger*, 174 A.D.2d 918, 571 N.Y.S.2d 829 (3d Dept. 1991); See generally, *LaPlaca v. Schell*; 68 A.D.3d 1478, 892 N.Y.S.2d 244 (3d Dept. 2009) and extensive discussion at 1 *Bergman on New York Mortgage Foreclosure*, §5.11, LexisNexis Matthew Bender (rev. 2015).

[2] *Cadelrock, L.L.C. v. Renner*, 72 A.D.3d 454, 898 N.Y.S.2d 127 (1st Dept. 2010), citing *Phoenix Acquisition Corp. v. Campcore, Inc.*, 81 N.Y.2d 138, 141, 596 N.Y.S.2d 752, 612 N.E.2d 1219 (1993).

[3] *Plaia v. Safonte*, 45 A.D.3d 747, 847, N.Y.S.2d 101 (2d Dept. 2007); *Saini v. Cinelli Enters*., 289 A.D.2d 770, 733 N.Y.S.2d 824 (3d Dept. 2001), leave denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835 (2002); *Pidwell v. Duvall*, 28 A.D.3d 829, 815 N.Y.S.2d 754 (3d Dept. 2006). See also, *Sce v. Ach*, 56 A.D.3d 457, 867 N.Y.S.2d 140 (2d Dept. 2008).

[4] *Khoury v. Alger*, 174 A.D.2d 918, 571 N.Y.S.2d 829 (3d Dept. 1991); *Corrado v. Petrone*, 139 A.D.2d 483, 526 N.Y.S.2d 845 (2d Dept 1988); *Quackenbush v. Mapes*, 123 A.D.242, 107 N.Y.S.1047 (1st Dept. 1908); *Gignac-Cornell v. Klinger*, 71 N.Y.S.2d 886 (Sup. Ct. 1947); *True v. Brainard*, 130 Misc.191, 223 N.Y.S.672 (1927).

[5] *Heburn v. Reynolds*, 73 Misc.73, 132 N.Y.S.460 (1911).

[6] See, *inter alia*, *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dept. 2012), citing, *inter alia*, *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569 (2d Dept. 2011); *Pagano v. Smith*, 201 A.D.2d 632, 633, 608 N.Y.S.2d 268 (2d Dept. 1994); *Sce v. Ach*, 56 A.D.3d 457, 867 N.Y.S.2d 140 (2d Dept. 2008); *Medalie v. Jacobson*, 120 A.D.2d 652, 502 N.Y.S.2d 247 (2d Dept. 1986); *Utica Mutual Ins. Co. v. Knox*, 71 A.D.2d 763, 419 N.Y.S.2d 332 (3d Dept. 1979).

[7] See, *inter alia*, *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dept. 2012); *Lavin v. Elmakiss*, 302 A.D.2d 638, 754 N.Y.S.2d 741 (3d Dept. 2003); *Clayton Nat'l v. Guldi*, 307 A.D.2d 982, 763 N.Y.S.2d 493 (2d Dept. 2003); *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 720 N.Y.S.2d 161 (2d Dept. 2001).

[8] *Newgold v. Woodstock Dev. Corp.*, 26 A.D.2d 142, 271 N.Y.S.2d 904 (3d Dept. 1966), aff'd 19 N.Y.2d 894, 281 N.Y.S.2d 87, 227 N.E.2d 886 (1967); *Ziegler v. Von Sebo*, 271 A.D.604, 66 N.Y.S.2d 900 (3d Dept. 1946); *Haberkorn v. DaSilva*, 210 N.Y.S.2d 391 (Sup. Ct. 1960); *Boulukos v. Chresafes*, 20 Misc.2d 673, 187 N.Y.S.2d 141 (1959); *Capitol Finance Corp. v. Fisher*, 14 Misc.2d 412, 179 N.Y.S.2d 951 (1958).

[9] This is a particularly insidious arena which can unexpectedly torpedo a foreclosing party. It was examined at length in an article in these pages: "The Phantom Menace – Reviewing the Statute of Limitations Nightmare", Oct. 10, 2001, at 5, col. 2. The essence of the problem is that when a foreclosure is dismissed by a court (exacerbated when the dismissal comes near expiration of the statute of limitations) the acceleration nonetheless survives – thus continuing its running and endangering pursuit of foreclosure anew. See, for example,

EMC Mortg. Corp. v. Patella, 279 A.D.2d 604, 720 N.Y.S.2d 161 (2d Dept. 2001); *Federal Nat'l Mortgage Ass'n v. Mebane*, 618 N.Y.S.2d 88 (2d Dept. 1994), citing CPLR 213(4); *Thompson v. Wilson*, 183 Misc.949, 952, 51 N.Y.S.2d 665, aff'd 269 A.D.829, 56 N.Y.S.2d 415; *Duval v. Skouras*, 181 Misc.651, 44 N.Y.S.2d 107, aff'd 267 A.D.811, 46 N.Y.S.2d 888.

[10] *Simkuski v. Saeli*, 44 N.Y.442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978); See, also, *Doe v. Holy See (State of Vatican City)*, 17 A.D.3d 793, 793 N.Y.S.2d 565 (3d Dept 2005); *Murphy v. Wegman's Food Market, Inc.*, 140 A.D.2d 973, 529 N.Y.S.2d 648 (4th Dept. 1988).

[11] *Procco v. Kennedy*, 88 A.D.2d 761, 451 N.Y.S.2d 487 (4th Dept. 1982), citing, *inter alia*, *Arbutina v. Bahuleyan*, 75 A.D.2d 84, 86, 428 N.Y.S.2d 99.

[12] *Kiernan v. Long Island Rail Road*, 209 A.D.2d 588, 819 N.Y.S.2d 723 (2d Dept. 1994) citing *Rains v. Metropolitan Transp. Auth.*, 120 A.D.2d 509, 501 N.Y.S.2d 709.

[13] *Kiernan v. Long Island Rail Road*, 209 A.D.2d 588, 819 N.Y.S.2d 723 (2d Dept. 1994) citing *Robinson v. City of New York*, 24 A.D.2d 260, 263, 265 N.Y.S.2d 566.

[14] *Kiernan v. Long Island Rail Road*, 209 A.D.2d 588, 819 N.Y.S.2d 723 (2d Dept. 1994) citing *Cransville Block Co. v. Niagara Mohawk Power Corp.*, 175 A.D.2d 444, 572 N.Y.S.2d 495; *Marvel v. Capital Dist. Transp. Auth.*, 114 A.D.2d 612, 494 N.Y.S.2d 215; *Procco v. Kennedy*, 88 A.D.2d 761, 451 N.Y.S.2d 487.

[15] *Murphy v. Wegman's Food Market, Inc.*, 140 A.D.2d 973, 529 N.Y.S.2d 648 (4th Dept. 1988), citing, *inter alia*, *Triple Cities Constr. Co. v. Maryland Cas. Co.*, 4 N.Y.2d 443, 448, 176 N.Y.S.2d 292, 151 N.E.2d 856.