Pace Law Review

Volume 8
Issue 3 *Summer 1988*

Article 7

June 1988

Strict Acceleration in New York Mortgage Foreclosure - Has the Doctrine Eroded?

Bruce J. Bergman

PACE LAW REVIEW

Volume 8 Summer 1988 Number 3

Articles

Strict Acceleration In New York Mortgage Foreclosure — Has The Doctrine Eroded?†

Bruce J. Bergman††

I. Introduction

Without question, the most potent weapon in the arsenal of a mortgagee is the option to declare immediately due and payable the entire balance of principal and interest upon some breach of the mortgage agreement.[1] The leverage obtained, and

† This article is adapted from BERGMAN ON NEW YORK MORTGAGE FORECLOSURES, and used with permission of the publisher, Matthew Bender & Co., Inc. Portions of this material appeared previously in MORTGAGES AND MORTGAGE FORECLOSURES IN NEW YORK, published by Callaghan & Co., and is used with permission of the publisher.

†† Partner, Roach & Bergman, Garden City, New York; Adjunct Associate Professor of Real Estate, New York University Real Estate Institute and Member, American College of Real Estate Lawyers.

1. Although this statement is not open to serious debate, there is an alternative available to be employed under unusual circumstances. For example, where the mortgage contains a prepayment penalty, accelerating the full balance waives the right to insist upon the prepayment penalty. George H. Nutman, Inc. v. Aetna Business Credit, Inc., 115 Misc. 2d 168, 453 N.Y.S.2d 586 (Sup. Ct. Queens County 1982); Kilpatrick v. Germania Life Ins. Co., 180 N.Y. 163, 76 N.E. 1124 (1906). The practical, but little known and infrequently used option, is to foreclose only for the payments in arrears with the property to be sold subject to the continuing lien of the mortgage.

concurrently the power to enforce the mortgage and protect the investment, is obvious. Consequently, the ability of the mortgagee to exercise that option is of paramount importance. When, and under what circumstances, acceleration is available may be, or may be perceived as becoming, elusive.

The suggestion here is that while the various bases upon which a lender may accelerate and foreclose are internally unsettled — and may forever be so — there is nonetheless a lucidity in the confusion. In sum, it has long been accepted that the courts take a strict stance when there is a failure to pay principal or interest due on a mortgage. Notwithstanding some recent pronouncements suggesting a shift in the traditional view, the unwavering approach has not been effectively or persuasively challenged.[2] While defaults of some *other* types are open to a more liberal and sympathetic response from the judiciary, the other breaches should not be confused with neglect to pay principal and interest. In fact, misapprehension of the disparate defaults has led to a false and possibly self-fulfilling prophecy as to where the law in this realm is headed.

As a further brief preliminary, the basis upon which mortgages are accelerated — and thus enforced in modern times — goes back to *Graf v. Hope Building Corp.*,[3] a 1930 court of appeals decision. That ruling set the standard for the strict approach to foreclosure and provided considerable certainty whenever the most common mortgage breach is encountered, that being failure to pay.

But, a serious, not well-recognized, insidious problem has arisen. The *Graf* doctrine has come under attack. Had the court of appeals reversed itself, everyone would understand the applicable law. That is not what has happened. In addition to some peripheral cases suggesting the waning of *Graf*, there are seven cases directly attacking the doctrine. A few are correct in their result, but wholly in error in purporting to assail *Graf*. The others are entirely wrong in both result and as precedent on the subject of the erosion of *Graf*.

As these decisions develop periodically, they cite the prior holdings, and a subtle, steady, and false assault on the stability

2. *See infra* notes 246-285 and accompanying text.
3. 254 N.Y. 1, 171 N.E. 884 (1930).

of mortgage foreclosure precedents is quietly emerging, becoming perhaps, as suggested, a self-fulfilling prophecy. Exploring and clarifying this development is the purpose of this Article.

To expand upon this still further, what these offending cases have done is fail in analysis — in one of two ways. One error is to confuse the thrust of *Graf*. What these cases and the literature fail to recognize, or at least properly emphasize, is that *Graf's* application is primarily for defaults in paying principal and interest. Thus, to rule against acceleration for failure to pay taxes, for example, and suggest concurrently that the *Graf* doctrine is weakening, is misplaced.

Another shortcoming, although perhaps understandable, is that not every court can possess extensive expertise in mortgage foreclosure law. So, when waiver, for example, is the proper basis to reject acceleration, some courts, unfamiliar with all the nuances, convert a decision which is otherwise correct into an assault on *Graf* and thereupon the very critical stability in this area. This Article attempts to clarify the confusion and dispel the misconceptions.

To evaluate coherently the current status of mortgage acceleration requires a review of the basics in this area which were established in 1930 in the leading case of *Graf v. Hope Building Corp.*[4] This Article will then differentiate the types of default as they relate to acceleration and the more recent cases which purport to enfeeble the *Graf* doctrine.

II. Basic Prerequisites

Understanding the manner in which case law treats the concept of acceleration invites attention to some basics. Pursuit of a foreclosure action arises only when there is some breach of the mortgage by the mortgagor and the full amount of a mortgage does not become due simply because an installment is not paid within the applicable grace period.[5] What breach will trigger acceleration depends upon the way the mortgage is written and

4. *Id.*

5. 446 West 44th St., Inc. v. Riverland Holding Corp., 267 A.D. 135, 44 N.Y.S.2d 786 (1st Dep't 1943); Blackman v. Edison, 31 Misc. 2d 746, 221 N.Y.S.2d 411 (Sup. Ct. Kings County 1961)

the statutory and case law interpretations of those words.[6]

Although mortgage provisions can vary widely, acceleration clauses are usually adapted from the long accepted New York Board of Title Underwriters' form, which in turn includes those provisions specifically construed by statute.[7] Typically, in relevant part,[8] the acts of commission or omission authorizing acceleration include:

-default in payment of an installment of principal or interest for fifteen days;[9]

-default in the payment of any tax, water rate, sewer rent, or assessments after notice and demand;[10]

-actual or threatened demolition or removal of any building on the premises without written consent of the mortgagee;

-failure to maintain the buildings on the premises in reasonably good repair;

-failure to comply with any requirement or order of notice of violation of law or ordinance issued by any governmental department within a stated period of issuance thereof.

Should the mortgagor violate any of these provisions, the assumption emerges that the mortgagee would have the option to declare the entire principal balance immediately due. Predictably, it is not quite that simple.

III. Relevant Mechanics

How and when acceleration is manifested influences decisions on the subject and is therefore noteworthy. While acceleration clauses can be couched in terms rendering them self-executing, they are rarely written that way. Although there is a limited

---

6. N.Y. REAL PROP. LAW § 254 subds. 2,4,4-a,6,7 (McKinney 1968 & Supp. 1988).

7. N.Y. REAL PROP. LAW § 254 (McKinney 1968). Theoretically, there is no limit to acceleration provisions which may be adapted or crafted by different lenders and their counsel, especially considering the specifics of a particular transaction. But as a general rule, the terms of these provisions is standard.

8. Neither every default found in the standard NYBTU form, Form 3014/6-81-20M, nor those which might be found in other forms of mortgage will be delineated. Rather, only those with reasonable practical application -- those previously litigated -- will be set forth.

9. Fifteen days is the standard grace period in the NYBTU form of mortgage. While typical, it is open to negotiation and could be shorter or longer.

10. The usual notice provision is thirty days, although this too could be shorter or longer.

minority view that the usual acceleration provision is self-operative,[11] the majority position is clearly to the contrary.[12]

Thus, a mortgagee has the *option* of declaring or not declaring an acceleration.[13] "Any other holding would take the option of accelerating or not accelerating away from the [mortgagee], *for whose benefit the clause is placed in the contract*, and give it to the [mortgagor]."[14] Consequently, adopting a rule of automatic acceleration would anomalously enable a debtor, for example, obligated to pay a high rate of interest for a lengthy period, to compel a mortgagee to accept immediate payment of the debt by deliberately defaulting — contrary to the intention of the parties and to the detriment of the mortgagee.[15]

A. *Default as a Prerequisite*

Before the election to accelerate can be considered, there must be some default,[16] a concept more evasive than it appears. For example, in one case[17] a mortgage had a clause providing that the mortgagee could opt to accelerate upon fifteen days default in payment of principal or interest or after thirty days default in payment of taxes or water or sewer charges, after notice and demand. After learning of defaults in payment of taxes and water and sewer charges, the mortgagee sent a notice on December 22 demanding immediate payment of those items and exhi-

---

11. Banzer v. Richter, 66 Misc. 192, 123 N.Y.S. 678 (Sup. Ct. Kings County 1910), *aff'd*, 148 A.D. 913, 131 N.Y.S. 1103 (2d Dep't 1911).

12. Sherwood v. Greene, 41 A.D.2d 881, 342 N.Y.S.2d 990 (3d Dep't 1973); Seligman v. Burg, 233 A.D. 221, 251 N.Y.S. 689 (2d Dep't 1931); Tymon v. Wobitzer, 39 Misc. 2d 604, 240 N.Y.S.2d 885 (Sup. Ct. Queens County 1963); Gold v. Varsden Bros., 28 Misc. 2d 844, 211 N.Y.S.2d 257 (Sup. Ct. Monroe County 1961); Zausmer v. Susasi, 23 Misc. 2d 783, 196 N.Y.S.2d 482 (Sup. Ct. Nassau County), *modified on other grounds*, 11 A.D.2d 791, 205 N.Y.S.2d 967 (2d Dep't 1960); Wurster v. Clifford, 36 N.Y.S.2d 516 (Sup. Ct. Kings County 1942). *In re* Steinway, 174 Misc. 354, 21 N.Y.S.2d 31 (Sup. Ct. New York County 1940); Purpura v. Pizzuto, 77 N.Y.S.2d 599 (N.Y.C. City Ct. Bronx County 1947); Candee, Smith & Howland Co. v. Bendish Contracting Co., 148 Misc. 262, 265 N.Y.S. 727 (N.Y.C. Mun. Ct. N.Y. County 1933).

13. Tymon, 39 Misc. 2d at 610, 240 N.Y.S.2d at 895; Keene Five Cent Sav. Bank v. Reed, 123 F. 291, 227 (8th Cir. 1903), *cert. denied*, 191 U.S. 567 (1903).

14. *Tymon*, 39 Misc. 2d at 610, 240 N.Y.S.2d at 896.

15. *Id.* at 610-11, 240 N.Y.S.2d at 896.

16. King v. Giordano, N.Y.L.J., June 21, 1978, at 15, col. 3 (Sup. Ct. Kings County); Dale Holding Corp. v. Dale Gardens, Inc., 188 Misc. 940, 69 N.Y.S.2d 210 (Sup. Ct. Queens County 1945).

17. King v. Giordano, N.Y.L.J., June 21, 1978, at 15, col. 3.

bition of paid receipts within ten days. When the mortgagor failed to comply the mortgagee elected to accelerate. The tax items were paid on January 11, within the thirty-day grace period provided in the mortgage. When the mortgagor in the meanwhile tendered the January check on the ninth of that month, it was rejected by the mortgagee.

Since the mortgagor was entitled to a thirty-day grace period to pay the taxes, with taxes actually paid within that time, the letter of December 22 — even if otherwise valid as to form — was premature and could not be a valid election to accelerate.[18]

Of similar import are these facts.[19] Payments were due pursuant to the mortgage on the fifteenth of each month with a twelve-day grace period. On December 26, at 6:45 p.m., payment was mailed. The mortgagee had not yet received the check on the last day of the grace period, December 27, and consequently sent a telegram declaring the acceleration. On December 28, the check arrived and the mortgagor came in person to tender cash. The tender was refused, and the check was returned. Acceleration was held invalid. The mortgagor had until midnight of the last day of the grace period to tender the payment. Thus, the acceleration telegram had been sent before a default existed and was unavailing. Mortgagor's tender the next day had to be accepted.[20]

B. *Notice Requirements*

Some mortgages, most notably the Federal National Mortgage Association (FNMA) version,[21] require notice of default as a prerequisite to acceleration. Since a mortgage is a contract,[22] if the agreement of the parties so provides, it will be enforced. However, absent clear language mandating notice, it will not be necessary.[23]

---

18. *Id.*

19. *See Dale Holding Corp.*, 186 Misc. 940, 59 N.Y.S.2d 210.

20. *Id.* at 944, 59 N.Y.S.2d at 214.

21. *See generally* N. Penney, R. Riggins & R. Cunningham, Land Financing 151-58 (3d ed. 1994) (FNMA/FHLMC Mortgage).

22. *See infra* notes 81-91 and accompanying text.

23. Typically, however, failure to pay taxes does require notice and a period of time to cure. The NYBTU form provides thirty days to cure. Other defaults could also require

In this regard, an important distinction is that "[t]he fact of election should not be confused with the notice or manifestation of such election."[24] In other words, that a mortgagee has actually elected to accelerate — whether by correspondence so declaring, or by filing the summons, complaint, and *lis pendens* with the court containing a statement of such election — is not the same as giving notice of that act. Stated in different terms, "[n]otice of exercise of an option to accelerate is not required; [while] an election to exercise the option is required."[25]

The rule has consistently been stated that where a mortgage contains the statutory acceleration clause,[26] there is no requirement of notice and demand.[27] The mortgagee therefore had "the right to exercise the acceleration option any time after the expiration of the grace period without serving a notice of default or demand for payment."[28] Nor is it in any way oppressive, unconscionable, or a matter of bad faith or fraud to decline to give notice of default prior to acceleration.[29]

C. *The Act of Acceleration*

There should be no doubt that the most common variety of default is the failure to remit a mortgage payment when due. For that defalcation, in the absence of a mortgage clause to the

---

notice as it always depends upon the precise language of the particular mortgage. That notice is not required to accelerate in most instances is a particularly salient point, since some courts are offended when no notice is given and employ that as a factor in arguing against allowing acceleration. *See infra* notes 142-166 and accompanying text.

24. Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 476, 180 N.E. 176, 177 (1932).

25. *Gold*, 28 Misc. 2d at 644, 211 N.Y.S.2d at 759 (emphasis added).

26. *See, e.g.*, N.Y. Real Prop. Law § 254 subd. 2, § 258, echad. N (McKinney 1968).

27. Hudson City Sav. Inst. v. Burton, 55 A.D.2d 728, 451 N.Y.S.2d 855 (3d Dep't 1982); Bowers v. Zeimer, 59 A.D.2d 803, 398 N.Y.S.2d 766 (3d Dep't 1977). *See also Albertina Realty Co.*, 258 N.Y. 472, 180 N.E. 176; Farlazzo v. Riley, 276 N.Y. 289, 16 N.E.2d 286 (1938); Piner v. Herzog, 120 A.D. 102, 105 N.Y.S. 38 (1st Dep't 1907); Northorn v. Louis, 52 A.D. 218, 65 N.Y.S. 155 (2d Dep't 1900), *aff'd*, 170 N.Y. 576, 62 N.E. 1098 (1902); Dale Holding Corp. v. Dale Gardens, Inc., 186 Misc. 940, 58 N.Y.S.2d 210 (Sup. Ct. Queens County 1945); New York Sec. & Trust Co. v. Saratoga Gas & Elec. Light Co., 88 Hun. 569, 34 N.Y.S. 890 (Sup. Ct. Gen. T. 3d Dep't 1895), *aff'd*, 157 N.Y. 689, 51 N.E. 1092 (1898).

28. *Bowers*, 59 A.D.2d at 767, 398 N.Y.S.2d at 804. *Accord, Albertina Realty Co.*, 258 N.Y. at 472, 180 N.E. at 176; *Farlazzo*, 276 N.Y. at 291, 16 N.E.2d at 287. *See also* Cataday-Wait, New York Practice § 92:38 (2d ed. 1967).

29. Ford v. Waxman, 30 A.D.2d 685, 375 N.Y.S.2d 146 (2d Dep't 1975).

contrary, no additional notice or demand is necessary to enable the mortgagee to exercise his right to insist upon payment of the full amount due on the mortgage.[30]

Nevertheless, the election to deem the entire principal due is an affirmative[31] event that must be made in some way. This election may occur before the suit is brought.[32] Whether the election is made by letter or in some other fashion, the exercise must be a clear,[33] unequivocal,[34] overt[35] act.

Where a letter is the mode of exercising the acceleration, there is no required formality,[36] beyond the cited clarity, which will always be a question of fact. However, the letter must be sent by or on behalf of all mortgagees.[37] Thus, an acceleration letter made by one mortgagee and not joined by the other has been held insufficient.[38] Once proper authority can be demonstrated, individuals who can sign the letter include a corporate officer, a person in charge of mortgage servicing, an agent, a

30. See cases cited *supra* note 27.

31. 446 West 44th St. Inc. v. Riverland Holding Corp., 267 A.D. 135, 44 N.Y.S.2d 766 (1st Dep't 1943); Cresco Realty Co. v. Clark, 128 A.D. 144, 145, 112 N.Y.S. 550, 551 (2d Dep't 1908); Federal Nat'l Mortgage Ass'n v. Miller, 123 Misc. 2d 431, 473 N.Y.S.2d 743 (Sup. Ct. Nassau County 1984); *Zausmer*, 23 Misc. 2d at 787-88, 198 N.Y.S.2d at 488; *Purpura*, 77 N.Y.S.2d at 603.

32. *Cresco Realty Co.*, 128 A.D. at 145, 112 N.Y.S. at 551; Matusak v. Bahlorzynski, 128 Misc. 375, 219 N.Y.S. 29 (Sup. Ct. Erie County 1926).

33. Staten Island Sav. Bank v. Carnival, 39 A.D.2d 779, 332 N.Y.S.2d 728 (2d Dep't 1972); *Seligman*, 233 A.D. at 890, 251 N.Y.S. at 222; Randell v. Protzer, 160 N.Y.S.2d 240 (Sup. Ct. Queens County 1956).

34. *Albertina Realty Co.*, 258 N.Y. at 476, 180 N.E. at 177; *446 West 44th St. Inc.*, 267 A.D. at 138, 44 N.Y.S.2d at 768; *Tymon*, 39 Misc. 2d at 511, 240 N.Y.S.2d at 896; Blackman v. Edison, 31 Misc. 2d 746, 747, 221 N.Y.S.2d 411, 412 (Sup. Ct. Kings County 1961); *Dale Holding Corp.*, 166 Misc. at 944, 59 N.Y.S.2d at 214.

35. *Albertina Realty Co.*, 258 N.Y. at 476, 180 N.E. at 177; Jefarmc, Inc. v. Capanegro, 89 A.D.2d 577, 577, 452 N.Y.S.2d 236, 237 (2d Dep't 1982); *Tymon*, 39 Misc. 2d at 511, 240 N.Y.S.2d at 896; *Blackman*, 31 Misc. 2d at 747, 221 N.Y.S.2d at 412-13; Bolmer Bros. v. Bolmer Constr. Co., 114 N.Y.S.2d 530, 535 (Sup. Ct. Queens County 1952).

36. A.C. & H.M. Hall Realty Co. v. Bel-Le-Bus, Inc., 72 N.Y.S.2d 659, 663 (Sup. Ct. N.Y. County 1947). The only possible formality would be compliance with special mailing or delivery requirements which may be specified in the mortgage documents. It then becomes a matter of contract. Neither the NYBTU form nor any other typical mortgages normally contain such provisions.

37. *Seligman*, 233 A.D. at 222, 251 N.Y.S. at 890; Lapidus v. Kollel Avreichim Torah Veyirah, 114 Misc. 2d 451, 452, 451 N.Y.S.2d 958, 959 (Sup. Ct. Sullivan County 1982).

38. *Seligman*, 233 A.D. at 222, 251 N.Y.S. at 890; *Lapidus*, 114 Misc. 2d at 452, 451 N.Y.S.2d at 959.

bookkeeper, a husband, or a wife.[39]

Filing the summons, complaint, and *lis pendens* with the county clerk has repeatedly been held to be the type of *unequivocal* overt act sufficient to evidence the election to accelerate.[40] As is stated in *Albertina Realty Co. v. Rosbro Realty Corp.*,[41] the most oft-cited case on this point:

> It is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election under an acceleration clause. We are satisfied, however, that the unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constituted a valid election. It disclosed the choice of the plaintiff and constituted notice to all third parties of such choice. To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election. The complaint recited that the plaintiff had elected. The mere fact that before the summons could be served, the defendant made a tender did not as a matter of law destroy the effect of the sworn statement that plaintiff had elected.[42]

Although the cited concept is unassailable, there are other factors to be considered. For example, where the relief sought in the complaint filed with the county clerk was not foreclosure, but rather was for a declaration that the mortgage was a valid lien on the premises, the filing was held not to meet the test of an unequivocal overt act.[43]

When a mortgagee sends a letter to the mortgagor clearly manifesting the election to accelerate, whether the subsequent complaint filed with the court specifically contains a statement of election to have the entire principal become due is irrelevant because acceleration has already occurred. Since demonstrating

---

39. *A.C. & H.M. Hall Realty Co.*, 72 N.Y.S.2d at 663.

40. *Lapedus*, 114 Misc. 2d at 452, 451 N.Y.S.2d at 959. *See also Albertina Realty Co.*, 258 N.Y. 472, 180 N.E. 176 (1932); Northampton Nat'l Bank v. Kidder, 106 N.Y. 221, 12 N.E. 577 (1887); Logue v. Young, 94 A.D.2d 827, 463 N.Y.S.2d 120 (3d Dep't 1983); Franklin Soc'y Fed. Sav. & Loan Ass'n v. Par-Pap Corp., 67 A.D.2d 807, 393 N.Y.S.2d 782 (2d Dep't 1977); Fifty-Second St. Operating Corp. v. Regus Realty Corp., 236 A.D. 497, 260 N.Y.S. 28 (1st Dep't 1932), *aff'd*, 261 N.Y. 672, 185 N.E. 786 (1933); *Perer*, 120 A.D. 102, 105 N.Y.S. 38; *King*, N.Y.L.J., June 21, 1978, at 15, col. 3.

41. 258 N.Y. 472, 180 N.E. 176.

42. *Id.* at 478, 180 N.E. at 177.

43. Aliperti v. Larsen, N.Y.L.J., Sept. 12, 1979, at 13, col. 5 (Sup. Ct. Suffolk County).

the acceleration by letter is so common, issues about the contents of the complaint regarding acceleration language are not prevalent. But it has happened.

If an acceleration letter is not sent, then the complaint must recite the acceleration for its filing with the court to be an exercise of the option.[44] Moreover, even filing a complaint with appropriate acceleration language will be ineffective if a tender of arrears had previously been made. If that tender comes after an ineffective acceleration letter, but before the filing of the complaint, the latter cannot cure the defect.[45]

If an acceleration letter is sent, or the declaration is made orally,[46] it must be, as previously set forth, unequivocal. Thus, a statement by mortgagee to mortgagor to see his lawyer was held insufficient as an acceleration.[47] Similarly, where a letter relied upon by the mortgagee simply inquired as to when past due taxes would be paid, calling attention to the acceleration clause, it was found not to be a valid acceleration.[48] Nor is a letter requesting that future payments be made promptly considered to be sufficiently unequivocal.[49] Sometimes a purported correspondence is couched in terms of advising as to default and reciting that if payment is not forthcoming, acceleration will result. Asserting in some demand, however, that a foreclosure or acceleration will occur in *the future*, is not a valid acceleration.[50]

Likewise, a mere mental operation to accelerate will be unavailing.[51] Thus, a decision to accelerate followed by the ordering of a foreclosure search is not sufficient to effectuate

---

44 Walsh v. Hanat, 228 A.D. 198, 200, 235 N.Y.S. 34, 36 (4th Dep't 1929); *Logue*, 94 A.D.2d at 827, 463 N.Y.S.2d at 121; Equitable Fed. Sav. & Loan Ass'n v. Mansfield, N.Y.L.J., Nov. 7, 1968, at 18, col. 1 (Sup. Ct. Suffolk County).

45. *Lapidus*, 114 Misc. 2d at 452, 451 N.Y.S.2d at 969. *See also* Seligman, 233 A.D. 221, 251 N.Y.S. 689; *Walsh*, 228 A.D. 198, 235 N.Y.S. 34; *King*, N.Y.L.J., June 21, 1978, at 15, col. 3.

46. While oral exercise of the right is valid, it impacts upon acceleration because there is always the possibility of a factual dispute as to who said what to whom.

47. *Maturah*, 128 Misc. at 378, 218 N.Y.S. at 30.

48. Norbani Realty Corp. v. A.C. Oaks, Inc., 116 N.Y.S.2d 215 (Sup. Ct. Westchester County 1952).

49. *Lapidus*, 114 Misc. 2d at 452, 451 N.Y.S.2d at 968.

50 *King*, N.Y.L.J., June 21, 1978, at 15, col. 3; *Norbani Realty Corp.*, 116 N.Y.S.2d 215.

51. *Cf. 445 West 44th St. Inc.*, 267 A.D. 135, 44 N.Y.S.2d 766; *Alipertis*, N.Y.L.J., Sept. 12, 1979, at 13, col. 5.

acceleration."[52]

Even when manifestation of acceleration meets the requisite of clarity and avoids equivocation, nevertheless, it must be made upon *all* mortgagors. Notice only to guarantors of the mortgage, for example, is ineffectual.[53]

D. *Relationship of Tender to Acceleration*

When default in paying principal and interest is encountered, the concept of acceleration is inextricably intertwined with the subject of tender of arrears. This connection is one of the most frequently litigated issues on foreclosure law, which should be readily apparent in observing the dual axioms that a mortgage does not mature "simply because an installment is not paid within the grace period"[54] and that the acceleration clause is typically not self-executing.[55]

Thus, even though a default has occurred, and remains uncured after expiration of a grace period, the mortgagor is still free to tender all arrears subsequent to the default, so long as it is prior to the mortgagee's exercise of the election to accelerate.[56] Moreover, "a valid tender of a sum sufficient to expunge fully all defaults prior to" acceleration is a total defense to foreclosure based upon an acceleration clause.[57]

Stated conversely, tender of arrears subsequent to proper acceleration need not be accepted by the mortgagee and is

---

52. *446 West 44th St. Inc.*, 267 A.D. 135, 44 N.Y.S.2d 766; *Alipertí*, N.Y.L.J., Sept. 12, 1979, at 13, col. 5.

53. *Lapidus*, 114 Misc. 2d at 402, 451 N.Y.S.2d at 959.

54. *Blackman*, 31 Misc. 2d at 747, 221 N.Y.S.2d at 472.

55. *See supra* note 12 and accompanying text.

56. *Hudson City Sav. Inst.*, 88 A.D.2d at 728, 451 N.Y.S.2d at 856. *See also Albertina Realty Co.*, 258 N.Y. 472, 180 N.E. at 176; *Jefferis, Inc.*, 89 A.D.2d 577, 452 N.Y.S.2d 236; Dime Sav. Bank v. Norris, 78 A.D.2d 691, 432 N.Y.S.2d 522 (2d Dep't 1980); *Sherwood*, 61 A.D.2d 881, 342 N.Y.S.2d 990; *Staten Island Sav. Bank*, 89 A.D.2d 779, 332 N.Y.S.2d 728; *446 West 44th St. Inc.*, 267 A.D. 135, 44 N.Y.S.2d 766; *Seligman*, 233 A.D. 221, 251 N.Y.S. 689; Cresco *Realty Co.*, 128 A.D. 344, 112 N.Y.S. 550; *Lapidus*, 114 Misc. 2d at 451, 451 N.Y.S.2d at 958; *King*, N.Y.L.J., June 21, 1978, at 16, col. 3; *Tyson*, 39 Misc. 2d 504, 240 N.Y.S.2d 886; *Randell*, 150 N.Y.S.2d 340; *Matusek*, 128 Misc. 375, 219 N.Y.S. 31.

57. *Sherwood*, 61 A.D.2d at 881, 342 N.Y.S.2d at 991. *See also Hudson City Sav. Inst.*, 88 A.D.2d 728, 451 N.Y.S.2d 855; Bieber v. Goldberg, 133 A.D. 207, 117 N.Y.S. 211 (2d Dep't 1909); Celi v. LaBrie, 116 A.D.2d 1034, 498 N.Y.S.2d 552 (4th Dep't 1986).

wholly unavailing.[58] Timely rejection of such purported tender — to avoid any claim of waiver — is therefore authorized.[59]

The right to tender arrears is not, however, to be confused with the right to redeem on the mortgage. An indispensable component of every mortgage, and therefore every foreclosure action, is the legal right of the owner of the land to redeem it from the lien of the mortgage. This right has been favored by equity courts.[60] At any time before the actual auction sale under a judgment of foreclosure, the owner of the equity of redemption always has the right to redeem by paying the full amount of principal, interest, and costs, as well as any other sums which the court may find due pursuant to the mortgage.[61] If the mortgagee declines to accept the full amount due on the mortgage, the mortgagor may avail himself of the provisions of Real Property Actions and Proceedings Law section 1921[62] and compel discharge of the mortgage by issuance of a satisfaction.[63]

When issues of acceleration and tender clash, as they frequently do, it becomes essential to determine just what constitutes a tender. A number of principles are applicable. "Delivery of a check in purported payment of an obligation is not a valid

---

58. *Logue*, 94 A.D.2d at 627, 463 N.Y.S.2d at 121-22. *Cf. Albertine Realty Co.*, 258 N.Y. 472, 180 N.E. 176; Dime Sav. Bank v. Dooley, 84 A.D.2d 604, 444 N.Y.S.2d 146 (2d Dep't 1981); *Bowers*, 59 A.D.2d 803, 398 N.Y.S.2d 786; Fiedler v. Schafer, 54 A.D.2d 751, 387 N.Y.S.2d 711 (2d Dep't 1976); Nelson v. Vanek, Inc., 26 A.D.2d 792, 273 N.Y.S.2d 652 (1st Dep't 1966); Dime Sav. Bank v. Barnes, 67 Misc. 2d 927, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971); Balzarano v. Bertino, 37 Misc. 2d 597, 236 N.Y.S.2d 249 (Sup. Ct. Queens County 1962); *Bolmer Bros.*, 114 N.Y.S.2d 530 (Sup. Ct. Queens County 1952).

59. *Cf.* Jamaica Sav. Bank v. Cohen, 38 A.D.2d 743, 328 N.Y.S.2d 471 (2d Dep't 1971); *Nelson*, 26 A.D.2d 792, 273 N.Y.S.2d 652.

60. Goodell v. Silver Creek Nat'l Bank, 48 N.Y.S.2d 572 (Sup. Ct. Chautauqua County), *aff'd mem.*, 268 A.D. 1020, 53 N.Y.S.2d 529 (4th Dep't 1944).

61. Nutt v. Cutting, 155 N.Y. 309, 49 N.E. 880 (1898); Nelson v. Lodar, 132 N.Y. 288, 30 N.E. 369 (1892); Kortright v. Cady, 21 N.Y. 343 (1860); Beloid Holding Corp. v. Dahm, 12 A.D.2d 499, 207 N.Y.S.2d 91 (2d Dep't 1960). Mann v. Sterling Holding Corp., 14 Misc. 2d 618, 179 N.Y.S.2d 821 (Sup. Ct. Kings County 1958); When the phrases "sale" or "actual sale" are employed, they are intended to mean the auction sale, which precedes the passing of actual title at the closing between referee and bidder. Thus, the right to redeem is extinguished when the property is struck down at the auction. *See* Tothill v. Tracy, 31 N.Y. 157 (1865); Barnard v. Jersey, 39 Misc. 212, 79 N.Y.S. 380 (Sup. Ct. N.Y. County 1902); Brown v. Frost, 10 Paige Ch. 243 (N.Y. Ch. 1843).

62. N.Y. Real. Prop. Acts. Law § 1921 (McKinney 1979).

63. *In re* Joshua Assocs., 104 A.D.2d 534, 535, 479 N.Y.S.2d 38, 39 (1st Dep't 1984).

tender if there are insufficient funds on deposit in the account on which the check is drawn."[64] A tender implies that the mortgagor is ready and able to perform, which cannot be the case if funds are insufficient.[65] Similarly, a check drawn on uncollected funds could not support a tender.[66] A mortgage payment was due on March 17. The grace period expired on April 7. On April 3, a check in the full amount due was mailed. On that day, the mortgagor's bank account was insufficient to cover the check written to pay the mortgage installment. However, on that same day and the next day, checks sufficient to cover the mortgage installment were deposited for collection. On April 8, the mortgagor's check was returned uncollected because it was drawn against uncollected deposits. The resultant foreclosure was ruled valid and the mortgagee's conduct under the circumstances not unconscionable.[67]

Similarly, an offer to pay does not constitute a tender.[68] When a mortgagor "promises" to pay the obligation, as is so often done, he has done nothing. A promise or offer is not the equivalent of an actual tender.[69] An offer to pay arrears does not cure a default.[70] Stated another way, a valid tender requires "not only readiness and ability to perform, but actual production of the thing to be delivered, . . . mortgage payment arrearages."[71]

When a tender is actually made, it must be for the *full* amount of arrears due. A tender of less than the complete sum due is not deemed a tender.[72]

---

64. Dime Sav. Bank v. Barnes, 97 Misc. 2d at 856, 325 N.Y.S.2d at 367.

65. *Id.* (quoting Eddy v. Davis, 116 N.Y. 247, 251, 22 N.E. 382, 383 (1889)).

66. Westfield Holding Corp. v. Pless & Seeman, Inc., 257 N.Y. 536, 537, 178 N.E. 784, 784-85 (1931). It is noteworthy that some decisions purporting to refute *Graf* ignore the existence of *Westfield Holding Corp.*

67. *Id.* at 536-37, 178 N.E. at 784.

68. Jamaica Sav. Bank v. Sutton, 42 A.D.2d 856, 346 N.Y.S.2d 847 (2d Dep't 1973); Ponce De Leon Fed. Sav. & Loan Ass'n v. Nemaroff, 28 A.D.2d 868, 280 N.Y.S.2d 632 (1st Dep't 1967); Lipsal Holding Corp. v. Martens, 270 A.D. 935, 61 N.Y.S.2d 507 (2d Dep't 1946); New York Util. Co. v. Williamsburg Steam Laundry Co., 187 A.D. 110, 175 N.Y.S. 60 (2d Dep't 1919).

69. *See supra* note 68 and accompanying text.

70. *Lipsal Holding Corp.*, 270 A.D. at 936, 61 N.Y.S.2d at 508.

71. *Jamaica Sav. Bank*, 42 A.D.2d at 857, 346 N.Y.S.2d at 848 (citing *Eddy*, 116 N.Y. 247, 22 N.E. 382; *New York Util. Co.*, 187 A.D. 110, 175 N.Y.S. 60).

72. *Hudson City Sav. Inst.*, 88 A.D.2d at 727, 451 N.Y.S.2d at 856; *Sherwood*, 41 A.D.2d at 882, 342 N.Y.S.2d at 991; *Bieber*, 133 A.D. 207, 117 N.Y.S. 211; *Mahoney v.*

For a tender, even of the full amount due, to be effective, it must be submitted unconditionally.[73] Thus, when a mortgagor sent a check for the full arrears, but conditioned the submission upon the out-of-state mortgagee's appearance in New York to litigate a charge of fraud, it was held not to be a tender.[74]

Another key element is the question of when a tender is deemed made. A mortgagor in default claimed to have mailed a check for the full amount due on June 6 between 9:00 p.m. and 10:00 p.m., although the postmark was 1:00 p.m. on June 7. At 9:17 a.m. on June 7, the summons, complaint, and *lis pendens* were filed. At 12:30 p.m. that day, service of process was effected. The check was received at 5:00 p.m. on June 7. The ruling was that the mere mailing of the check did not constitute a tender.[75] The tender was made when the check was *received*, which was too late since the summons, complaint, and *lis pendens* had already been filed, manifesting the acceleration.[76]

Assuming a tender is submitted meeting all the tests of validity, but the mortgagee refuses to accept it, there is no necessity to renew the tender.[77] Where an acceleration is made, albeit invalid, "equity will not require the doing of a vain or useless thing or the performance of an impossible act."[78]

Even though the rules relating to the timing of acceleration and tender are well established, there can always be latitude for issues of fact, inferences to be drawn by the trier of the facts, as well as the court's view of what may be equitable under various

---

McCollum, 148 Misc. 790, 283 N.Y.S. 626 (Sup. Ct. St. Lawrence County 1933); Van Benthuysen v. Central N.E. & W.R. Co., 17 N.Y.S. 709 (Sup. Ct. Gen. T., 2d Dep't 1892).

73. Noyes v. Wyckoff, 114 N.Y. 204, 207, 21 N.E. 158, 158 (1889); Shiland v. Loeb, 58 A.D. 565, 566, 69 N.Y.S. 11, 12 (2d Dep't 1901); *Balsamson*, 37 Misc. 2d at 569, 238 N.Y.S.2d at 251; Wood v. Hitchcock, 20 Wend. 47 (N.Y. Sup. Ct. 1838); Eddy & Hathaway v. O'Hara, 14 Wend. 221 (N.Y. Sup. Ct. 1835).

74. *Balsamson*, 37 Misc. 2d at 569, 238 N.Y.S.2d at 251.

75. *Bulmer Bros.*, 114 N.Y.S.2d at 535-36.

76. *Id.*

77. Strassbourger v. Loerburger, 233 N.Y. 56, 134 N.E. 804 (1922); Mandelberg v. Lampert, 246 A.D. 768, 768, 283 N.Y.S. 937, 938 (2d Dep't 1935); Mahnk v. Blanchard, 233 A.D. 855, 253 N.Y.S. 307 (4th Dep't 1931); Katz v. Sardova Realty Corp., 212 N.Y.S.2d 447, 448 (Sup. Ct. Kings County 1961); Margulis v. Messinger, 34 Misc. 2d 699, 703, 210 N.Y.S.2d 855, 859 (Sup. Ct. Kings County 1960).

78. *Margulis*, 34 Misc. 2d at 703, 210 N.Y.S.2d at 859; Jacobs v. Dakamont Exploration Corp., N.Y.L.J., June 25, 1956, at 8, col. 7; 30 C.J.S. *Equity* §18 (1965).

circumstances. In one case,[79] the mortgage installment was due on April 11, with a fifteen-day grace period. The payment was dated on April 27, one day after expiration of the grace period. The postmark was April 29, and the check was not received by the mortgagee until May 2. On May 3, the mortgagee's attorney returned the check advising the mortgagors that they were in default and that the mortgagee elected to accelerate the entire balance. Not until reply papers on the motion for summary judgment did plaintiff claim an intervening acceleration letter of April 27, sent by regular mail. The mortgagors asserted that they never received such a letter. If the letter of April 27 ever existed, it would have been a valid acceleration. But the decision held that the supposed earlier acceleration letter had never been received. Therefore, tender came before acceleration, and the foreclosure was dismissed.[80] This should not be viewed as weakening the *Graf* doctrine.[81]

In another case,[82] a payment was due on November 1. It was mailed on that date but apparently became lost in the postal system. The mortgagee accelerated on November 3. The mortgagor immediately offered to send a certified check and actually did so two days later.[83] Invoking its equity powers, the court allowed reinstatement and dismissed the foreclosure.[84]

Since the principles in this area are so cogently set forth, there is a modicum of certainty with most fact patterns. But when the mails are involved, or where the record is unclear, or where the courts may suspect a lack of candor, it is easier for the established rules to fall to the general equity principles long established in the arena of mortgage foreclosure. Thus, this is one area where the *Graf* principles may have been subjected to tacit

---

79. Randell v. Protter, 150 N.Y.S.2d 240 (Sup. Ct. Queens County 1956).

80. *Id.* at 242.

81. For a detailed discussion of this concept, see supra notes 54-57 and accompanying text.

82. Nove Holding Corp. v. Schachter, 218 A.D. 479, 218 N.Y.S. 623 (1st Dep't 1926).

83. *Id.* at 481, 483, 487, 218 N.Y.S. at 625, 627, 630.

84. *Id.* at 488, 218 N.Y.S. at 630. *See also* Trowbridge v. Mules Realty Corp., 198 A.D. 656, 191 N.Y.S. 97 (1st Dep't 1921). For other examples of factual issues concerning acceleration and tender, see Presidential Life Ins. Co. v. Sasso, 53 A.D.2d 624, 384 N.Y.S.2d 199 (2d Dep't 1976); Staten Island Sav. Bank, 39 A.D.2d 779, 332 N.Y.S.2d 728; Batum Ass'n v. Travelers Indem. Co., 279 A.D. 1012, 113 N.Y.S.2d 242 (2d Dep't 1952).

modification although, it is suggested, not with special lucidity. *Graf* dealt with an acknowledged default with no issue of a tender having gone astray.

IV. The Mortgage as a Contract

Having examined some of the mechanical requisites of acceleration, we note the exigent basis of the relationship between mortgagor and mortgagee arising from the documents, typically a mortgage note or bond (the promise to pay), and the mortgage (the pledge of security for the promise).

Whatever its terms may be:

> A mortgage is a contract and must be construed in accordance with the intention of the parties as expressed by the language they chose to employ. Courts cannot supply an omitted term of a contract under the guise of construction, and where the language is clear and unambiguous it must be given effect in arriving at the parties' intent.
>
> A mortgagor's default in the performance of any covenant or agreement contained in a mortgage does not operate to accelerate the maturity of the principal debt unless there is a specific stipulation to that effect. An acceleration clause, in order to be enforceable so as to mature the entire debt for purposes of foreclosure, must be clear and certain. It will not be supplied by inference.[86]

Indeed, "[t]he well-established general rule in New York is that a mortgagor is bound by the terms of his contract, including the acceleration clause. . . ."[86] Stated another way, "a mortgagor is bound by the terms of the contract and cannot be relieved of a default in the absence of a waiver by the mortgagee, or estoppel, bad faith, fraud, oppressive or unconscionable conduct on the latter's part."[87]

While these maxims are vital to and seem to provide comfort for a mortgagee, they are not quite as pervasive in effect as

---

86. Reyton v. Pepper, 62 A.D.2d 187, 188-89, 383 N.Y.S.2d 722, 725 (4th Dep't 1978) (citations omitted).

86. Leber v. Minasian, 134 Misc. 2d 543, 546, 511 N.Y.S.2d 516, 518 (Sup. Ct. Nassau County 1987).

87. Massachusetts Mutual Life Ins. Co. v. Transgrow Realty Corp., 101 A.D.2d 770, 475 N.Y.S.2d 418 (1st Dep't 1984).

they appear. Since there are stated reasons where a court could choose not to enforce the mortgage contract as written, there are instances when they will rely upon the "exceptions" to fashion a remedy perceived as equitable under the circumstances.[88]

Where mortgagor's breach of the contract is failure to pay principal and interest, or violation of the due-on-sale clause, enforcement has always been strict.[89] For defaults of other types, the view tends to be more lenient towards the mortgagor.[90] In these latter situations, the *Graf* doctrine seems not to have been controlling in any event. When neglect to make a payment due pursuant to the mortgage is at issue, *Graf* appears to be unassailed. However, some courts have expressed a different and arguably misplaced and ill-conceived idea that the doctrine is eroding.[91]

V. Acceleration Strictly Construed

Two varieties of default support a strict interpretation of a mortgagee's right to accelerate: failure to timely remit an installment of principal and/or interest and breach of the due-on-sale clause.[92] While breach of other covenants or obligations may certainly support acceleration, enforcement in these other areas is too uneven and susceptible to exceptions to merit the adjective "strict."[93] This is not to say that traditional views are no longer applicable. Rather, it has been this way for the greater part of this century.

A. *Principal and Interest Default*

Although the courts in New York have always considered a default in paying principal and interest serious — and most often have authorized acceleration for such default — prior to 1930, the law was perhaps less than firmly established. But the year 1930 brought *Graf v. Hope Building Corp.*,[94] the landmark

88. *See infra* notes 198-245 and accompanying text.
89. *See infra* notes 94-124 and accompanying text.
90. *See infra* notes 125-141 and accompanying text.
91. *See infra* notes 246-325 and accompanying text.
92. *See infra* notes 94-124 and accompanying text.
93. *See infra* notes 125-197 and accompanying text.
94. 254 N.Y. 1, 171 N.E. 884 (1930).

court of appeals decision. The most oft-cited case in all of foreclosure law, this decision set the standard for analyzing defaults and their relationship to acceleration. With two other cases,[95] it forms a triumvirate of decisions, almost invariably cited when mortgage defaults are at issue. As a body of law, these cases and others stand for the proposition that acceleration for failure to pay principal and interest is neither penalty nor forfeiture. A mortgagor is bound by the terms of his contract as made. He cannot be relieved of default in the absence of fraud, waiver by the mortgagee, estoppel, or oppressive or unconscionable conduct on the mortgagee's part.[96] While the qualifying language does seem to present room for relief to a mortgagor, the concept remains, nevertheless, that acceleration for failure to pay principal and interest will be the basis for acceleration once the grace period has expired and such acceleration in and of itself is *not* unconscionable or oppressive.[97]

In *Graf v. Hope Building Corp.*,[98] the mortgagee was the holder of two consolidated mortgages. The acceleration clause contained a twenty-day grace period. The principal of the mortgagor's corporation was the only person authorized to sign checks. Eight years before the maturity date of the mortgage, he

---

95 Ferlazzo v. Riley, 278 N.Y. 289, 16 N.E.2d 286 (1938); Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 180 N.E. 176 (1932).

96. Graf v. Hope Bldg. Corp., 254 N.Y. 1, 4-6, 171 N.E. 884, 885 (1930); *Ferlazzo*, 278 N.Y. 289, 292, 16 N.E.2d 286, 287; *Albertina Realty Co.*, 258 N.Y. 472, 475, 180 N.E. 176, 177; National Bank of N. Am. v. Cohen, 69 A.D.2d 775, 728, 453 N.Y.S.2d 849, 851 (3d Dep't 1982); Hudson City Sav. Inst. v. Burton, 58 A.D.2d 728, 729, 451 N.Y.S.2d 855, 856 (3d Dep't 1982); Mariash v. Bastianich, 58 A.D.2d 829, 829, 452 N.Y.S.2d 190, 190 (1st Dep't 1982); Ford v. Wasmus, 50 A.D.2d 585, 585, 375 N.Y.S.2d 146, 146-47 (2d Dep't 1975); Albany Sav. Bank v. Clifton Park Equity Developers, Ltd., 46 A.D.2d 923, 924, 360 N.Y.S.2d 512, 513 (3d Dep't 1974); Jamaica Sav. Bank v. Cohan, 36 A.D.2d 742, 743, 320 N.Y.S.2d 471, 471 (2d Dep't 1971); Kalmanson v. Boulevard Constr. Corp., 232 A.D. 847, 847, 249 N.Y.S. 46, 46 (2d Dep't 1931); Pine v. Hornig, 120 A.D. 102, 105 N.Y.S. 38 (1st Dep't 1907); Gratton v. Dido Realty Co., 89 Misc. 2d 401, 403, 391 N.Y.S.2d 954, 956 (Sup. Ct. Queens County 1977); Stith v. Hudson City Sav. Inst., 83 Misc. 2d 865, 868, 373 N.Y.S.2d 804, 808 (Sup. Ct. Broome County 1970); Belmar Prop. v. Belmar Constr. Co., 114 N.Y.S.2d 530, 536 (Sup. Ct. Queens County 1952); A.C. & H.M. Hall Realty Co. v. Bel-De-Bus, Inc., 72 N.Y.S.2d 858, 862-63 (Sup. Ct. N.Y. County 1947); Armstrong v. Rogdon Holding Corp., 139 Misc. 549, 551, 247 N.Y.S. 682, 684 (Sup. Ct. N.Y. County 1930).

97. *See* cases cited *supra* notes 31-53 concerning manifestation of the acceleration; *see supra* note 96.

98. 254 N.Y. 1, 171 N.E. 884 (1930).

was departing for Europe. Prior to leaving, a clerk in his employ computed the interest believed to be due. That computation was erroneous. The principal signed the check and went to Europe. Before the date the interest was due, the error was discovered, the mortgagee was advised of the discrepancy and told that when the officer returned from Europe, the balance would be paid. Until that time, only a check for the smaller amount would be forwarded. That check was sent to the mortgagee, was deposited, and was paid. When the principal of the corporation returned, another error was made and he was not informed of the default in the payment of interest. When twenty-one days expired — one day after the grace period — the foreclosure action was begun. It was only then that the mortgagor tendered the deficiency. The mortgagee, however, insisted upon its contract rights, refused the tender, and continued with its foreclosure action.[98] In ruling for the mortgagee, upholding the acceleration, and rejecting the tender by the mortgagor, the court of appeals stated in relevant part as follows:

> On the undisputed facts as found, we are unable to perceive any defense to the action. . . . [The lender] may be ungenerous, but generosity is a voluntary attribute and cannot be enforced . . . . Here there is no penalty, no forfeiture, nothing except a covenant fair on its face to which both parties willingly consented. It is neither oppressive nor unconscionable. In the absence of some act by the [lender] which a court of equity would be justified in considering unconscionable, he is entitled to the benefit of the covenant. The contract is definite and no reason appears for its reformation by the courts. We are not at liberty to revise while professing to construe. Defendant's mishap, caused by a succession of its errors and negligent omissions, is not of the nature requiring relief from its default. Rejection of plaintiff['s] legal right could rest only on compassion for defendant's negligence. Such a tender emotion must be exerted, if at all, by the parties rather than by the court. Our guide must be the precedents prevailing since courts of equity were established in this state. Stability of contract obligations must not be undermined by judicial sympathy. To allow this judgment to stand would constitute an interference by this court between parties whose contract is clear.[99]

---

98 *Id.* at 3-4, 171 N.E. at 684-85.

99 *Id.* at 4-5, 171 N.E. at 685 (citations omitted).

Thus, sympathy is not to be an element considered where acceleration is based upon a default in paying principal and interest.[101] Stated another way, equity may not relieve from default merely because the mortgagee has acted aggressively or where the results are harsh.[102] Hence, electing the acceleration one day after expiration of the grace period for the mortgage payment will be upheld,[103] as will, an election three days[104] or six days[105] after the grace period.

This strict construction of the acceleration clause has also been expressed in findings that "acceleration clauses exist solely for the benefit of the mortgagee,"[106] "and to make the security more effective. . . ."[107]

Clearly then, when a mortgage payment is not made in a timely manner, and the applicable grace period has expired, the mortgagee may manifest the election to accelerate.[108]

B. *Due-On-Sale Clause*

Although a due-on-sale provision is not a standard clause — and is not found in the NYBTU form of mortgage — astute lenders will most often include it in their mortgages. Essentially, it is a contractual agreement authorizing the mortgagee to immediately declare due the entire balance of principal and interest if the property securing the loan is sold or otherwise conveyed.[109]

The clause is of relatively recent vintage. Up until approxi-

---

101. Leber v. Minasian, 134 Misc. 2d 543, 545, 511 N.Y.S.2d 516, 518 (Sup. Ct. Nassau County 1987).

102. Shell Oil Co. v. McCraw, 48 A.D.2d 220, 222, 368 N.Y.S.2d 610, 613 (4th Dep't 1975); Jamaica Sav. Bank v. Cohan, 36 A.D.2d 743, 744, 320 N.Y.S.2d 471, 472 (2d Dep't 1971).

103. *Graf*, 254 N.Y. 1, 171 N.E. 884.

104. *Albertina Realty Co.*, 255 N.Y. 472, 180 N.E. 176.

105. *Bolmer Bros.*, 114 N.Y.S.2d 630.

106. Nutman v. Aetna Business Credit Inc., 115 Misc. 2d 188, 189, 453 N.Y.S.2d 585, 587 (Sup. Ct. Queens County 1982). *See also Stith*, 63 Misc. 2d at 866, 313 N.Y.S.2d at 808.

107. *Stith*, 63 Misc. 2d at 866, 313 N.Y.S.2d at 808.

108. *Graf*, 254 N.Y. 1, 171 N.E. 884.

109. The subject of due-on-sale clauses is itself worthy of lengthy analysis beyond the scope of this article. For a detailed review of the applicable case law, see Bergman, *Due on Sale in New York: Closure with Time?*, 58 NEW YORK STATE BAR JOURNAL 27 (May 1986).

mately the late 1960's, the existence of stable interest rates meant that sales of property encumbered by a mortgage had no deleterious effect upon the lender. When rates became volatile, continuation of older mortgages, at what became below-market interest rates, adversely impacted upon profitability of lenders' mortgage portfolios. That problem precipitated insertion of the due-on-sale provisions in mortgages.

Just as the courts have upheld acceleration for failure to pay principal and interest, a clear majority of the cases have upheld acceleration for breach of the due-on-sale clause.[110]

Lenders derive additional assurance from section 341 of the Garn-St Germain Depository Institutions Act of 1982[111] (the "Act"), which pre-empts any state law prohibitions upon exercise of the due-on-sale clause.[112]

Section 341(a)(1) of the Act defines "due-on-sale clause" as: "a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent. . . ."[113]

While that definition appears all-encompassing, section 341(b)(2) of the Act provides that:

> [e]xcept as otherwise provided in . . . [section 341](d), the exer-

---

110. Beacon Fed. Sav. & Loan Ass'n v. Marks, 81 A.D.2d 1010, 457 N.Y.S.2d 861 (2d Dep't 1982); Bonady Apartments, Inc. v. Columbus Banking Fed. Sav. & Loan Ass'n, 119 Misc. 2d 923, 465 N.Y.S.2d 150 (Sup. Ct. Steuben County 1983); Newburgh Sav. Bank v. Grossman, 110 Misc. 2d 1006, 462 N.Y.S.2d 92 (Sup. Ct. Orange County 1982); Caravolo v. Buckner, 111 Misc. 2d 676, 444 N.Y.S.2d 861 (Sup. Ct. Ontario County 1981); First Fed. Sav. & Loan Ass'n v. Jenkins, 109 Misc. 2d 715, 441 N.Y.S.2d 373 (Sup. Ct. Tompkins County 1981); Mutual Real Estate Inv. Trust v. Buffalo Sav. Bank, 90 Misc. 2d 676, 395 N.Y.S.2d 583 (Sup. Ct. N.Y. County 1977). *See Stith*, 63 Misc. 2d 863, 313 N.Y.S.2d 804.

111. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C., 20 U.S.C., 42 U.S.C.). There are some exceptions to the preemption, not relevant to this article. For a more detailed review of Garn-St Germain, see Coleman, *Federal Preemption of State Law Prohibitions on the Exercise of Due-on-Sale Clauses*, 100 Banking L.J. 712 (Nov.-Dec. 1983); Bated & Layden, *Due-on-Sale Law as Preempted by the Garn-St Germain Act*, 12 Real Estate L. J. 138 (Fall 1983).

112. Garn-St Germain Depository Institutions Act of 1982, § 341(b)(1), 12 U.S.C. § 1701j-3(b)(1) (1983).

113. *Id.* § 341(a)(1), 12 U.S.C. § 1701j-3(a)(1) (1983).

> cise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.[114]

Thus, the significance of this pre-emption nevertheless seems to necessitate reference to the draftsmanship and precise terms of each due-on-sale provision at issue. Since most of the field is indeed pre-empted, only the unusual situation should raise any questions. In this regard the view in New York has always been virtually uncompromising.

To review, arguments that the purchaser's financial position was superior to that of the seller-mortgagor have been rejected as a basis to vitiate enforcement of the due-on-sale clause.[115] Similarly found wanting was the claim that the clause is an illegal restraint upon alienation.[116] Nor is the lender's motive in accelerating for violation of due-on-sale to be considered.[117]

A land sale contract has been found to run afoul of the due-on-sale claims where the provision called for acceleration upon "transfer of all or part" of the subject premises, the court finding significance in the passage of equitable title.[118] Of like import was the upholding of the due-on-sale clause arising from a corporate dissolution.[119]

---

114. *Id.* § 341(b)(2), 12 U.S.C. § 1701j-3(b)(2) (1982).

115. *Mutual Real Estate Inv. Trust*, 90 Misc. 2d 875, 396 N.Y.S.2d 583.

116. *Cervasio*, 111 Misc. 2d 676, 444 N.Y.S.2d 861; *First Fed. Sav. & Loan Ass'n*, 109 Misc. 2d 715, 441 N.Y.S.2d 373.

117. *Bonody Apartments, Inc.*, 119 Misc. 2d 923, 465 N.Y.S.2d 150; *Cervasio*, 111 Misc. 2d 676, 444 N.Y.S.2d 861.

118. *Cervasio*, 111 Misc. 2d at 679, 444 N.Y.S.2d at 863 (citing Ehrman v. Hyman, 192 N.Y. 113, 84 N.E. 937 (1908), Williams v. Haddock, 148 N.Y. 144, 39 N.E. 825 (1895); Sloan v. Pinafore Homes, Inc., 38 A.D.2d 718, 329 N.Y.S.2d 420 (2d Dep't 1972); Occidental Realty Co. v. Palmer, 117 A.D. 308, 102 N.Y.S. 648 (1st Dep't 1907), *aff'd*, 192 N.Y. 588, 85 N.E. 1113 (1908); Marine Midland Bank - N.Y. v. Batoco, 70 Misc. 2d 8, 332 N.Y.S.2d 714 (Sup. Ct. Nassau County 1972); Van Curler Dev. Corp. v. City of Schenectady, 59 Misc. 2d 621, 300 N.Y.S.2d 765 (Sup. Ct. Schenectady County 1969); Charles v. Schaibel, 128 Misc. 276, 218 N.Y.S. 545 (Sup. Ct. Onondaga County 1926), *aff'd*, 221 A.D. 818, 222 N.Y.S. 764 (4th Dep't 1927)). *See also Newburgh Sav. Bank*, 118 Misc. 2d 1036, 462 N.Y.S.2d 92.

119. *Bonody Apartments, Inc.*, 119 Misc. 2d 923, 465 N.Y.S.2d 150 (citing *In re* Loeb' Will, 55 N.Y.S.2d 723 (Sup. Ct. Westchester County 1945)). *See also* Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W.2d 762 (1973). Although of less importance with the passage of Garn-St Germain, note the tacit statutory recognition of the due-on-sale clauses in New York found in Real Property Law §

In a small minority of cases, the due-on-sale clause has not been upheld. In some, the courts have relied upon equity principles to deny enforcement.[114] It would appear, however, that the existence of the Act, assuming the point is argued, would preclude similar results in the future. The few other cases denying enforcement were based upon apparent deficiencies in the breadth or exactitude of the clauses themselves. For example, where consent to assumption was not to be unreasonably withheld, the court construed the language against the drafter and refused to enforce the clause.[121] When the clause imposed constraint upon the lender's decision (i.e., provided that the acceleration had to be based upon factors neither arbitrary nor unreasonable), the court again ruled against the lender-drafter seeking a higher rate of interest from the new owner.[122] Finally, when the clause narrowly provided for acceleration solely upon "sale" of the property, sale of the stock of the corporate mortgagor was held not to fall within the proscription of a sale of the *property*.[123]

The status of the due-on-sale clause as the subject of strict enforcement appears unchanged. Enforcement was always firm, save the unusual cases where courts felt overwhelmed by equity considerations — now rendered moot by the Act. Where the due-on-sale clause is less than artfully drawn, the breach claimed by the lender may not, as a matter of legal inference, exist. Since there must always first be a default before any acceleration clause can be exercised,[124] refusal to enforce under such circumstances is not untoward. Hence, the *Graf* doctrine is not under attack here.

254-a, enacted in 1972 and amended in 1974. It acknowledges the validity and enforceability of the clause but precludes collection of a prepayment penalty when it is invoked. N.Y. Real Prop. Law § 254-a (McKinney Supp. 1988).

120. Home Sav. Bank v. Beer Properties, Ltd., 92 A.D.2d 96, 99-100, 460 N.Y.S.2d 833, 834-35 (3d Dep't 1983); Nichols v. Evans, 92 Misc. 2d 938, 939-41, 401 N.Y.S.2d 426, 427-28 (Dutchess County Ct. 1978).

121. Silver v. Rochester Sav. Bank, 73 A.D.2d 81, 424 N.Y.S.2d 945 (4th Dep't 1980).

122. Ins v. Marine Midland Bank, 114 Misc. 2d 251, 450 N.Y.S.2d 997 (Sup. Ct. Sullivan County 1982).

123. Gasparre v. 68-36 Elmhurst Ave. Realty Corp., 118 Misc. 2d 626, 464 N.Y.S.2d 108 (Sup. Ct. Queens County 1983).

124. *See supra* notes 18-20 and accompanying text.

C. *Breach of Any Condition*

Mortgagees would prefer to assume that the uncompromising approach attendant to principal and interest defaults and violation of due-on-sale clauses is extended to other forms of breach. In a general sense it is. There is authority stating that breach of any condition of the mortgage can be the basis of a foreclosure.[125] Expressed in different language, "[a] foreclosure may be based upon the 'non-performance of any act' required by the mortgage."[126] While the ability to accelerate for failure to pay principal and interest is quite apparent, it may be less obvious for breach of other covenants, such as the covenant to repair. However, breach of the latter can be the reason acceleration may result.[127] At the same time, a default by the mortgagor " 'in the performance of any covenant or agreement contained in the mortgage does not operate to accelerate the maturity of the principal debt . . . unless there is a specific stipulation to that effect.' "[128] The acceleration provisions must be clear and certain and will not be inferred.[129]

A requisite corollary to the noted principles is that a mortgagee is entitled to insist strictly on his contractual rights.[130] Moreover, "[i]n the absence of an estoppel or oppressive and unconscionable acts by plaintiff [the mortgagee], the court is duty bound to enforce the mortgage as written by the parties."[131]

Some of the practical implications of these points arise out of some decisions which follow. In one case,[132] in addition to the usual obligation for payment, the mortgagors bound themselves for a period of some eight years to purchase gasoline and all

125. *In re* Cumberland Garage, Inc., 73 N.Y.S.2d 571, 572-73 (Sup. Ct. Queens County 1947); Mills Land Corp. v. Halstead, 184 Misc. 679, 681, 56 N.Y.S.2d 682, 684 (Sup. Ct. Nassau County 1945).

126. *Mills Land Corp.*, 184 Misc. at 681, 56 N.Y.S.2d at 684.

127. *Id.*

128. 100 Eighth Ave. Corp. v. Morgenstern, 3 Misc. 2d 410, 415, 150 N.Y.S.2d 471, 476 (Sup. Ct. Queens County 1956) (quoting 59 C.J.S. *Mortgages* § 490), *modified on other grounds*, 4 A.D.2d 784, 164 N.Y.S.2d 812 (2d Dep't 1957).

129. *Id.*

130. *Graf*, 254 N.Y. 1, 171 N.E. 884; *Gratton*, 69 Misc. 2d 401, 391 N.Y.S.2d 964.

131. *Gratton*, 69 Misc. 2d at 403, 391 N.Y.S.2d at 966. *See also Feriazzo*, 278 N.Y. at 290, 15 N.E.2d at 287; *Graf*, 254 N.Y. at 4, 171 N.E. at 885; Strochak v. Glass Paper Making Supplies Co., 230 A.D. 312, 313, 247 N.Y.S. 282, 283 (1st Dep't 1930).

132. *Cumberland Garage*, 73 N.Y.S.2d 571.

other petroleum products then or later to be sold at the subject premises from the mortgagee.[133] The mortgage also affirmatively specified that the provision to purchase gasoline would survive payment of the principal sum due under the mortgage.[134] Prior to conclusion of the eight-year period during which mortgagor was to purchase gasoline, it paid all money due on the mortgage and thereupon applied to the court to have the mortgage discharged.[135] The court refused to cancel the mortgage, ruling that "a mortgage may provide for foreclosure upon the breach of any condition or of a single covenant or condition, and that such a provision is not regarded as a penalty, and is binding and legal."[136] In addition, the court held that "a mortgage may be kept alive, even after payment in full, if such was the intention of the parties, provided innocent third persons are not thereby prejudiced."[137]

Another case of similar import involved a mortgage where the mortgagors bound themselves not only to repay the debt, but also to construct a sewer connection and an alternate driveway, along with a number of other obligations.[138] When the mortgagors tendered the full balance of the mortgage due with interest to the date of tender, it was conditioned upon issuance of a satisfaction. But at that time, neither the sewer nor driveway work had been performed. When tender was rejected, mortgagors petitioned the court for cancellation of the mortgage. The decision was in favor of the mortgagee. A valid condition of the mortgage had not been fulfilled — notwithstanding that all the money due had been paid. Discharge of the mortgage was denied.[139]

Accordingly, mortgagees can derive some solace from the case law in this area. Since a mortgage is a contract — to be enforced as written[140] — and since breach of any condition

133. *Id.* at 572.
134. *Id.*
135. *Id.*
136. *Id.* at 572-73.
137. *Id.* at 573. *See also* Salvin v. Myles Realty Co., 227 N.Y. 51, 56, 124 N.E. 94, 96 (1919).
138. Jeffrey Towers, Inc. v. Straus, 31 A.D.2d 319, 297 N.Y.S.2d 450 (2d Dep't 1969).
139. *Id.* at 324-25, 297 N.Y.S.2d at 456.
140. *See supra* notes 85, 86 and accompanying text.

clearly delineated in the documents can be a basis to accelerate, a mortgagee might consider its position to be secure. While as a *general* rule that is correct, not all defalcations under the mortgage are viewed by the courts as equally egregious. Virtually unswerving application is found in case of defaults for payment of principal and interest and upon the due-on-sale clause. Beyond that, otherwise well-founded generalizations about acceleration for breach of the mortgage are helpful as guidance and perspective, but cannot be dispositive of all issues. Past this point, equity begins to play a greater role and diminishes the applicability of general rules.[141] Defaults of various types are treated differently. Moreover, there are gradations of severity within categories — all of which simply state what becomes ineluctably obvious. Most cases other than the previously related categories will have to be considered on their own factual bases.

VI. Areas of Uncertainty

A. *Acceleration for Tax Defaults*[142]

When real property taxes are not paid, the lien of the mortgage will ultimately be extinguished when the taxing jurisdiction divests the mortgagor-owner of his title. Hence, payment of taxes is a matter of significance to the parties.

Unlike an acceleration provision for default in paying principal and interest, where notice of default is *not* a prerequisite to acceleration,[143] acceleration provisions for tax defaults usually do mandate notice, demand, *and* a period to cure — typically thirty days.[144] Since a mortgage is a contract to be enforced as

---

141. *See supra* notes 125-140 and *see infra* notes 142-197 and accompanying text.

142. Reviewing the specific fact patterns for cases of acceleration upon tax defaults is an interesting exercise and serves best to make the point that the courts are exceptionally lenient toward mortgagors in this area. The scope, however, of such detail is beyond the thrust of this article. For an in-depth review of the subject, see Bergman, *When the Mortgagor Defaults in Real Property Taxes*, 56 NEW YORK STATE BAR JOURNAL 24 (Dec. 1984); Bergman, *The Dangers of a Mortgagor's Tax Default to an Existing Mortgage*, 1 THE PRACTICAL REAL ESTATE LAWYER 53 (Jan. 1985).

143. *See supra* notes 25-29 and accompanying text.

144. The relevant portion of paragraph 4 of the standard NYBTU form of mortgages provides "that the whole of said principal sum and interest shall become due at the option of the mortgagee: . . . after default in the payment of any tax, water rate, sewer rent or assessment for thirty days after notice and demand . . ." NYBTU Form 8014/8-

written,[145] and further since acceleration can be based upon nonperformance of any covenant,[146] a mortgagee might conclude that upon a tax default, acceleration would be upheld by the courts. To be sure, there are cases which have affirmatively so held.[147] Although perhaps only a statistical observation, these cases represent a minority of the reported decisions. Most often, the courts decline to uphold acceleration and foreclosure for tax defaults[148] not incidentally creating a perplexing problem for mortgagees.

In synthesizing the elements necessary to maintain acceleration for tax defaults, the cases reveal that some, or a combination of all of the following factors must be found: tax defaults

---

51-20M. Although this thirty-day period is usual, it could be more or less, depending upon the agreement of the parties. While exercising the notice provision in this area is possible, it is not often encountered.

145. See supra notes 85, 86 and accompanying text.

146. See supra notes 125-139, 141 and accompanying text.

147. Barclay's Bank v. Smitty's Ranch, Inc., 122 A.D.2d 323, 504 N.Y.S.2d 295 (3d Dep't 1986); The East N.Y. Sav. Bank v. Carlinda Realty Corp., 64 A.D.2d 874, 347 N.Y.S.2d 138 (2d Dep't 1978), *aff'd*, 47 N.Y.2d 905, 368 N.E.2d 1257, 397 N.Y.S.2d 1003 (1977); Fredler v. Schafer, 54 A.D.2d 751, 387 N.Y.S.2d 711 (2d Dep't 1976); Jamaica Sav. Bank v. Cohan, 36 A.D.2d 743, 320 N.Y.S.2d 47 (2d Dep't 1971); Strochak v. Glass Paper Making Supplies Co., 239 A.D. 312, 267 N.Y.S. 282 (1st Dep't 1933); Fifty-Second St. Operating Corp. v. Regus Realty Corp., 236 A.D. 497, 260 N.Y.S. 28 (1st Dep't 1932), *aff'd*, 261 N.Y. 672, 185 N.E. 786 (1933); Jamaica Sav. Bank v. Alley Spring Apartments Corp., N.Y.L.J., Apr. 2, 1980, at 12, col. 1 (Sup. Ct. Queens County); Jamaica Sav. Bank v. Avon Assocs., N.Y.L.J., Nov. 2, 1977, at 6, col. 3 (Sup. Ct. N.Y. County); Shaker Cent. Trust Fund v. Crusade For Christ, Inc., 26 Misc. 2d 825, 215 N.Y.S.2d 13 (Sup. Ct. Columbia County 1961); Armstrong v. Regdon Holding Corp., 139 Misc. 549, 247 N.Y.S. 682 (Sup. Ct. N.Y. County 1930); New York Baptist Mission Soc'y v. Tabernacle Baptist Church, 17 Misc. 689, 41 N.Y.S. 513 (Sup. Ct. N.Y. County 1896).

148. Karas v. Wasserman, 91 A.D.2d 812, 458 N.Y.S.2d 280 (3d Dep't 1982); Central Nat'l Bank v. Paton, 109 Misc. 2d 42, 439 N.Y.S.2d 619 (Sup. Ct. Orange County 1981); King v. Giordano, N.Y.L.J., June 21, 1978, at 15, col. 6 (Sup. Ct. Kings County); Calta v. Bellin, N.Y.L.J., Jan. 27, 1971, at 2, col. 6 (Sup. Ct. N.Y. County); Weber v. Berkowitz, N.Y.L.J., Dec. 11, 1970, at 20, col. 4 (Sup. Ct. Kings County); Brookman v. 12862 Realty Corp., N.Y.L.J., July 6, 1970, at 11, col. 4 (Sup. Ct. N. Y. County); Lincoln Sav. Bank v. Six Moffat Realty Co., N.Y.L.J., Mar. 25, 1970, at 15, col. 6 (Sup. Ct. Kings County); Clark-Robinson Corp. v. Jet Enter., 159 N.Y.S.2d 214 (Sup. Ct. Bronx County 1957); Norbank Realty Corp. v. A.C. Oaks, Inc., 118 N.Y.S.2d 215 (Sup. Ct. Westchester County 1952); Seaman's Bank for Sav. v. Wallenstein Realty Corp., 8 N.Y.S.2d 706 (Sup. Ct. Kings County 1938); York v. Hutko, 148 Misc. 201, 262 N.Y.S. 52 (Sup. Ct. Madison County 1933); Germania Life Ins. Co. v. Potter, 124 A.D. 814, 109 N.Y.S. 435 (1st Dep't 1908); Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 318 (1891).

are substantial;[149] notice is timely[150] and clearly given;[151] attempts to cure either do not exist or are patently insincere;[152] and the excuse offered for default is not sufficient to constitute a defense.[153]

As noted, however, the decisions will most often reject foreclosure for tax defaults. Foremost, this seemingly incongruous stance is based upon the famous *dissent* of Chief Justice Cardozo in the *Graf* case.[154] There, a distinction was sharply drawn between the acceleration for nonpayment of principal and interest and acceleration for nonpayment of taxes. Acceleration for failure to remit a mortgage payment was seen as the primary obligation. It simply fixes the date of maturity as agreed upon and is to be enforced as written. But the requirement to pay taxes was held to stand on a different footing. Responsibility for taxes does not require payment of anything to the mortgagee.[155] Rather, a provision for tax defaults is a collateral undertaking designed to protect impairment of the mortgagee's security by the accumulation of unpaid tax liens having priority over the mortgage lien. Therefore, a court of equity has the power to grant relief *if the default is cured* and the security is restored

149. *Carlisle Realty Corp.*, 54 A.D.2d 574, 387 N.Y.S.2d 138 (failure to pay approximately $15,000 in real estate taxes); Neuhauser v. Smith, 40 A.D.2d 790, 337 N.Y.S.2d 592 (1st Dep't 1972) (failure to pay real estate taxes for all four quarters of year 1971); *Shaker Cent. Trust Fund*, 26 Misc. 2d 825, 215 N.Y.S.2d 13 (failure to pay town, county and school taxes for two years).

150. *Cohen*, 36 A.D.2d 743, 320 N.Y.S.2d 471 (acceleration of maturity date upheld after timely notice was given); *Armstrong*, 139 Misc. 849, 247 N.Y.S. 682 (acceleration for tax default upheld in case where the giving of proper and timely notice is established).

151. *Smutty's Ranch, Inc.*, 122 A.D.2d 323, 504 N.Y.S.2d 295 (judgment of foreclosure granted where record showed that "plaintiff notified defendants on at least three occasions that nonpayment of taxes would result in foreclosure. . . ."); *Cohen*, 36 A.D.2d 743, 320 N.Y.S.2d 471 (acceleration of maturity date upheld after clear and unequivocal warnings were given).

152. *Fifty-Second St. Operating Corp.*, 226 A.D. 697, 250 N.Y.S. 28; *Alley Springs Apartments Corp.*, N.Y.L.J., Apr. 2, 1980, at 13, col. 1 (Sup. Ct. Queens County); *Avon Assocs., Inc.*, N.Y.L.J., Nov. 2, 1977, at 6, col. 3 (Sup. Ct. N.Y. County).

153. *Neuhauser*, 40 A.D.2d 790, 337 N.Y.S.2d 592; *Shaker Cent. Trust Fund*, 26 Misc. 2d 825, 215 N.Y.S.2d 13 (Sup. Ct. Columbia County 1960).

154. 254 N.Y. 1, 7, 171 N.E. 884, 886 (1930) (Cardozo, J., dissenting). The majority decision took the same view but it is Justice Cardozo's dissent which is cited for the principle.

155. This presupposes, obviously, that the mortgagee is not escrowing for taxes whereby the payments would be made directly to the mortgagee.

unimpaired.[156]

In this regard Justice Cardozo stated the following:

> We have held that such a provision, though not a penalty in a strict or proper sense, is yet so closely akin thereto in view of the forfeiture of credit that equity will relieve against it if default has been due to mere venial inattention and if relief can be granted without damage to the lender. . . .[157]

Justice Cardozo was arguing vainly against the strict majority view, and yet his language became in great measure the basis to deny acceleration for tax defaults (although there were prior holdings of similar thrust) — even though the principle creates terms and conditions which simply do not appear in the language of the mortgage contract.

The fact patterns in these cases and the decisions rendered which deny foreclosure demonstrate extraordinary leniency by the courts.[158]

In analyzing the cases ruling against foreclosure for tax defaults, a recapitulation of the oft-cited principles include: some waiver for forbearance by the mortgagee, in other words, the mortgagee demonstrated that even *it* did not take the default too seriously;[159] principal and interest were otherwise current;[160] failure to pay taxes was not willful, but was excusable as due to venial inattention or error;[161] notice was not given, or if given, was not unequivocal;[162] if notice was given, no opportunity to

---

156. A careful distinction must be drawn here. Where a grace period for paying principal and interest expires, and acceleration ensues, a tender of arrears need not be accepted, even though a full tender would cure the default. Where default in taxes is the issue, cure of default subsequent to acceleration will be sanctioned in a majority of the cases, although not in all instances. None of this is to say that acceleration for tax defaults is ineffectual, only that the courts will often allow a cure and thereby mandate reinstatement.

157. Graf v. Hope Bldg. Corp., 254 N.Y. 1, 9-10, 171 N.E. 884, 887 (1930) (Cardozo, J., dissenting).

158. *See* cases cited *supra* note 148. *See also supra* note 142.

159. Seaman's Bank for Sav. v. Wallenstein Realty Corp., 6 N.Y.S.2d 706 (Sup. Ct. Kings County 1938).

160. York v. Hucko, 14 Misc. 201, 202 N.Y.S. 62 (Sup. Ct. Madison County 1933).

161. *Noyes*, 124 N.Y. at 162-63, 26 N.E. at 318. *See also* Weber v. Berkowitz, N.Y.L.J., Dec. 11, 1970, at 20, col. 4 (Sup. Ct. Kings County 1970); Lincoln Sav. Bank v. Six Moffat Realty Co., N.Y.L.J., Mar. 25, 1970, at 15, col. 8 (Sup. Ct. Kings County).

162. Calta v. Balkin, N.Y.L.J., Jan. 27, 1971, at 2, col. 6 (Sup. Ct. N.Y. County 1971); Lincoln Sav. Bank v. Six Moffat Realty Co., N.Y.L.J., Mar. 25, 1970, at 15, col. 8

cure was provided;[163] there is no damage or prejudice to the mortgagee;[164] and the mortgagor has tendered the arrears for taxes, or has legitimately attempted to, even after foreclosure has begun.[165]

On the subject of the current status of the *Graf* doctrine, a salient point emerges from examination of the tax default cases. While relevant, the *Graf* approach never had pervasive application to this type of default. Therefore, when dicta appears in a tax default case suggesting that the influence of *Graf* is waning, it is an incursion on a nonexistent principle and is clearly misplaced.[166]

B. *Failure to Repair*

This is another arena of some uncertainty and one where *Graf* was never especially important. The traditional stance is found in *Mills Land Corp. v. Halstead*.[167] There, the mortgagee declared the full principal balance due because the building was not maintained in reasonably good repair. The mortgagor contended that the maintenance clause failed to specifically authorize foreclosure for such violation. Ruling that foreclosure could be based upon the " 'nonperformance of any act' required by the mortgage,"[168] the holding went on to say that foreclosure could "rest upon violation of a 'covenant to repair the premises.' "[169]

Whether the foregoing is genuinely a precedent is difficult to assess. *Caspert v. Anderson Apartments*[170] is a later case in-

---

(Sup. Ct. Kings County 1970); Norbani Realty Corp. v. A.C. Oaks, Inc., 116 N.Y.S.2d 215 (Sup. Ct. Westchester County 1952).

163. Germania Life Ins. Co. v. Potter, 124 A.D. 814, 109 N.Y.S. 435 (1st Dep't 1908).

164. *Norbani Realty Corp.*, 116 N.Y.S.2d at 216-17. *See also* Bank, N.Y.L.J., March 26, 1970, at 15, col. 8; Clark-Robinson Corp. v. Jet Enter., 159 N.Y.S.2d 214 (Sup. Ct. Bronx County 1957).

165. Karas v. Wasserman, 91 A.D.2d 812, 458 N.Y.S.2d 280 (3d Dep't 1982); Germania Life Ins. Co. v. Potter, 124 A.D. 814, 109 N.Y.S. 435 (1st Dep't 1908); Van Plank v. Godfrey, 42 A.D. 18, 58 N.Y.S. 784 (1st Dep't 1899); Cake v. Belkin, N.Y.L.J., Jan. 27, 1971, at 2, col. 8 (Sup. Ct. N.Y. County 1971); Clark-Robinson Corp. v. Jet Enter., 159 N.Y.S.2d 214 (Sup. Ct. Bronx County 1957); Norbani Realty Corp. v. A.C. Oaks, Inc., 116 N.Y.S.2d 215 (Sup. Ct. Westchester County 1952).

166. *See infra* notes 252-325 and accompanying text.

167. 184 Misc. 670, 56 N.Y.S.2d 682 (Sup. Ct. Nassau County 1945).

168. *Id.* at 681, 56 N.Y.S.2d at 684 (quoting 41 C.J. Mortgages § 1048 (1926)).

169. *Id.* (quoting C. Wilgus, Mortgage Foreclosures 74 (4th ed. 1927)).

170. 196 Misc. 966, 94 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1949).

volving the related topic of building violations which seems tacitly to accept the concept that foreclosure for lack of repair is authorized, so long as the acceleration is timely made.[171] But there, the mortgagee waited so long to accelerate that the rare defense of laches was invoked.[172] During the period of delay up to acceleration, the property was sold and the new owner invested substantial sums in curing the violations. For this reason, the decision appears well-founded and, therefore, not perforce contrary to the general rule with regard to repair of building violations.

In *Rockaway Park Series Corp. v. Hollis Automotive Corp.*,[173] a somewhat murky case, the mortgagee sold a building subject to known violations relating to lack of repair.[174] For several years the mortgagee refrained from demanding that repairs be made and continued to accept mortgage payments. Many years later, when the mortgagee's inspection of the premises disclosed apparent unsatisfactory progress to cure the violations, an acceleration letter was sent. After acceleration — but before service of the summons and complaint — the violation was removed. Without acknowledging that the lack of repair could be a basis to foreclose, and sensing an injustice, the court relied upon equity to deny foreclosure.[175] Since foreclosure is an action in equity[176] and since this was not a default in payment, the decision is not necessarily at variance with recognized principles.

A different concept grafted on to the requirements of the usual failure to repair clause is found in *W.I.M. Corp. v. Cipulo*,[177] where the mechanical aspect was a motion to dismiss a receiver. For a building worth in excess of three million dollars, foreclosure was instituted based solely upon failure to keep the premises in reasonably good repair. The court noted a paucity of evidence to explain the magnitude of the disrepair, concluding that the repair default was minor and of the type engen-

171. *Id.* at 559, 94 N.Y.S.2d at 525.
172. *Id.* at 560, 94 N.Y.S.2d at 527.
173. 206 Misc. 955, 136 N.Y.S.2d 588 (Sup. Ct. N.Y. County 1954).
174. *Id.* at 956, 136 N.Y.S.2d at 589.
175. *Id.* at 956-58, 135 N.Y.S.2d at 589-90.
176. *See infra* notes 246-251 and accompanying text.
177. 216 A.D. 46, 214 N.Y.S. 718 (1st Dep't 1926).

dered by normal wear and tear.[178] Instead of finding the state of repair reasonable, and thus not violative of the mortgage, the court held that the repair clause could be invoked only where there is a danger of impairment of the mortgage security.[179] Therefore, this case held, it is only where the property is permitted to suffer lack of repair sufficient to jeopardize the security when acceleration will be honored.[180]

There should be no doubt that failure to keep the mortgaged premises in reasonably good repair is a basis to accelerate, although the case law is not as strong on the point as mortgagees would probably prefer. What "reasonably good repair" means could always be expected to be an issue of fact. Whether the definition is now graven in stone as "danger to the security" is unclear — but possible. The conundrum then is what level of lack of repair places the security in jeopardy? The case from which it arose was more a function of whether a receiver should be appointed, combined with inadequacy of proof of the deficient conditions claimed by the mortgagee. This calls the solidity of this doctrine into question. Moreover, and significantly, it does not represent an assault upon *Graf*.

At least insofar as property improved by a residence for four families or more is concerned, some very limited guidance is found in a section of the Real Property Law effective as of October 10, 1984.[181] It construes the covenant stating "good condition or repair" to mean "free from violations of applicable municipal or state laws, codes or regulations concerning the state of such condition and/or repair."[182]

This provision now also has a statutory impact upon acceleration by virtue of this language:

> Upon a finding and certification by any such government or its agency of a violation of any such law, code or regulation involving a serious danger to the health and safety of the occupants of such mortgaged premises and upon the service of one copy thereof on the owner of record such mortgagee may declare the entire balance of the principal sum secured by such mortgage, together

178 *Id.* at 50-51, 214 N.Y.S. at 722-23.
179 *Id.* at 49, 214 N.Y.S. at 721.
180. *Id.*
181. N.Y. REAL PROP. LAW § 254 subd. 4-a (McKinney Supp. 1988).
182. *Id.* § 254 subd. 4-a(a).

> with all accrued interest, immediately due and payable upon the following conditions: the mortgagee shall allow the mortgagor a reasonable opportunity to correct the violation and may commence foreclosure proceedings upon failure of the mortgagor to make such corrections within the time period mandated by local law, rule or code enforcement agency, however, no such action shall be commenced within thirty days of the expiration of the period, if any, specified by local law, rule or code enforcement regulation.[183]

Its further effect upon acceleration arises from a provision that if a foreclosure is commenced for such violation, but not completed because the violation is cured, the mortgagee shall be entitled to recover all reasonable attorney's fees and disbursements incurred in bringing the action.[184]

Again we have a somewhat unsettled arena, but not a place where *Graf* is in question.

C. *Miscellaneous Defaults*

Mindful that acceleration clauses will usually authorize foreclosure for a broad range of defaults, in addition to the more common failure to pay and the others previously evaluated, cases involving violations less frequently encountered merit consideration, noted here under the catchall "miscellaneous." Significantly, this is still another realm where *Graf* has never been of overriding importance.

Beyond the categories already reviewed, other defaults are seen as more technical and less prejudicial in nature to the mortgagee's position. Accordingly, the courts feel free to fashion equitable or practical remedies — often short of sanctioning acceleration. This is not to say that these more obscure breaches cannot be a basis to accelerate, but rather that acceleration is occasionally denied.

For example, where refusal to issue an estoppel certificate was the default, the court acknowledged that under certain circumstances, declining to execute the estoppel is a default.[185] In

---

183. *Id.*

184. *Id.* § 254 subd. 4-a(b)

185. Northern Properties Inc. v. Kul Realty Corp., 30 Misc. 2d 1, 5, 217 N.Y.S.2d 356, 360 (Sup. Ct. Westchester County 1961) (citing N.Y. Real Prop. Law § 254 subd. 7

this case, the refusal was not unconditional, and foreclosure for this default (others were alleged) was disallowed.[186]

In another instance where failure to execute an estoppel certificate was one of the claimed defaults, the court found a question of fact as to possible waiver, noting in addition that the *Graf* doctrine need not apply for a default of this type.[187]

In a case where acceleration was based, in part, upon removal of personalty, the court relied upon equity to deny foreclosure, holding that removal of old fixtures and personalty with substitution of new fixtures and personalty under conditional sales contracts would not justify acceleration where the conditional sales contracts were ultimately satisfied.[188]

Where the asserted breach was alteration without consent, the mortgagor's violation consisted of cutting a door and window in a foundation wall, erection of wooden partitions in the basement, removal of two foundation piers, with substitutions then made, a window made into a door, a stairway removed, and construction of an uncovered wooden porch.[189] Upon discovering the unauthorized alterations, the mortgagee accelerated.[190] Finding that the work did not change the character of the property, the court ruled the acceleration to be "unconscionable."[191]

When the breach was demolition without consent, the mortgagee's claim failed because of an error in drafting the mortgage.[192] The mortgage contained a clause that no building on the premises could be removed or demolished without consent of the mortgagee. In violation of the covenant, the four-room house on the property was demolished without consent. However, the *acceleration clause* did not cover such an event. Although the court stated that the mortgagee could sue for breach of contract, it could not accelerate or foreclose.[193]

(McKinney 1968 & Supp. 1986)).

186. *Id.* at 8, 717 N.Y.S.2d at 360.

187. Kaus v. Wasserman, 91 A.D.2d 812, 458 N.Y.S.2d 290 (3d Dep't 1982).

188. Blomgren v. Tiston 783 Corp., 33 Misc. 2d 1057, 230 N.Y.S.2d 347 (Sup. Ct. Bronx County 1962).

189. Loughery v. Catalano, 117 Misc. 393, 395, 191 N.Y.S. 436, 437 (Sup. Ct. Bronx County 1921).

190. *Id.* at 396, 191 N.Y.S. at 437-38.

191. *Id.* at 397-98, 191 N.Y.S. at 438-39.

192. Brayton v. Pappas, 52 A.D.2d 161, 383 N.Y.S.2d 723 (4th Dep't 1976).

193. *Id.* at 169, 383 N.Y.S.2d at 725. Compare Laber v. Minassian, 134 Misc. 2d 543,

Upon demolition of mortgaged premises pursuant to municipal order to cure a safety hazard, the acceleration clause was interpreted not to authorize foreclosure under the circumstances.[184]

With regard to failure to insure the mortgaged premises, notwithstanding claims of misrepresentations in the contract of sale, where due notice was given and insurance was not obtained, acceleration and foreclosure were upheld.[185] But when a mortgagee demanded insurance beyond the requirements of the mortgage, foreclosure would not be countenanced.[186] On the related subject of displaying receipts for insurance payments, a court invoked equity to avoid acceleration where there was a question about waiver arising from a custom established between the parties.[187]

Thus, in the domain of miscellany, enforcement of the acceleration clause is uncertain and unsettled. Since fact patterns undoubtedly will always influence the outcome, it is unlikely that clarity here will ever be forthcoming. But *Graf* is still not a factor.

VII. Avoiding the *Graf* Doctrine

As pronounced in *Graf* and its progeny, the mortgagor is bound by the terms of his contract as made and cannot be relieved from default "in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct. . . ."[188]

Even for failure to pay principal and interest, the cited moderating factors are to be considered. Significantly though, *Graf* states that it is *not* oppressive or unconscionable to accelerate immediately after expiration of the grace period. But that

---

511 N.Y.S.2d 516 (1987) (properly worded clause held to support acceleration for demolition without consent).

184. Bodnitch v. Allen, 91 A.D.2d 1177, 458 N.Y.S.2d 148 (4th Dep't 1983).

185. Jordon v. Sharpe, 92 A.D.2d 946, 460 N.Y.S.2d 646 (3d Dep't 1983), *appeal denied*, 59 N.Y.2d 968 (1983).

186. Bieber v. Goldberg, 133 A.D. 207, 210, 117 N.Y.S. 211, 213-14 (2d Dep't 1909).

187. Karas v. Wasserman, 91 A.D.2d 812, 812-13, 458 N.Y.S.2d 280, 281-82 (3d Dep't 1982).

188. Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 183, 436 N.E.2d 1256, 1260, 451 N.Y.S.2d 663, 667 (1982). *See also supra* notes 99-108.

still leaves the other items. Fraud, for example, is at once both clear and recondite. It belabors the obvious to recite that if the lender committed a fraud, he certainly should not be permitted to foreclose. Precisely what would be considered a fraud is so bound to factual circumstances as not to be worthy of salutary exploration here.[199]

The idea of bad faith has not found much favor, except as a factor lumped together with the other principles. Oppressive conduct is invariably joined to a finding of unconscionability. Estoppel is the subject of some decisions, although difficult to separate from waiver.

When courts encounter a fact pattern deemed offensive, that is, if it somehow seems fair to reject acceleration, some combination of estoppel, bad faith, oppressive or unconscionable conduct[200] may be found. These, in turn, are tied to invocation of equity as a basis to deny foreclosure. Thus, the tenets of *Graf* are sometimes avoided in the perceived presence of some or all of these factors.[201]

Waiver is appreciably different. When the courts glean a basis for waiver, they essentially recognize the efficacy of *Graf*, or should do so, but then render it ineffectual because of conduct giving rise to a waiver of the right to accelerate.

A. *Waiver*

With the firm advent of waiver as a basis to vitiate acceleration,[202] substantial latitude was given to judges to craft decisions sounding in waiver while in actuality achieving an apparent equitable result. In essence, some conduct by the mortgagee, either

---

189. There is a general proposition that a fraud perpetrated by a lender at the inception will be a defense. Crowe v. Malba Land Co., 76 Misc. 676, 679, 135 N.Y.S. 484, 486 (Sup. Ct. Queens County 1912). However, the fraud may render the mortgage only voidable as opposed to void. Samuels v. Century Fed. Sav. & Loan Ass'n, 36 Misc. 2d 202, 203, 231 N.Y.S.2d 904, 905 (Sup. Ct. N.Y. County 1962). But note the seemingly converse proposition that "a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation." JoAnn Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 122, 250 N.E.2d 214, 219, 302 N.Y.S.2d 799, 806 (1969). *See also* New York State Hous. Fin. Agency v. Promenade Apartments, Inc., N.Y.L.J., June 21, 1979, at 5, col. 4 (Sup. Ct. N.Y. County).

200. *See infra* notes 201-245 and accompanying text.

201. *Id.*

202. Graf v. Hope Building Corp., 254 N.Y. 1, 171 N.E. 884 (1930).

prior or subsequent to acceleration, which is inconsistent with demand for payment of the full principal, can lead to a waiver of acceleration.[203] Nevertheless, claims of waiver are frequently rejected.[204]

Situations where waiver was adopted as a valid defense to foreclosure include the following. In the New York Supreme Court case of *Scheible v. Leinen*,[205] the mortgagee had previously accepted but one payment after the grace period. This was found to create an "issue of waiver" concerning a future right to accelerate.[206] A careful reading of the case, though, indicates that the court believed the mortgagee to be motivated more by a desire to extinguish a low interest rate mortgage and free the funds to invest at a higher yield.[207] Even were this accurate, it incorrectly views the law on acceleration, which is that default in

---

203. *See* Nassau Trust Co. v. Montrose Concrete Prod. Corp., 56 N.Y.2d 175, 186, 436 N.E.2d 1265, 1270, 451 N.Y.S.2d 662, 668 (1982); Lopez v. Highmount Ass'n, 101 A.D.2d 618, 619, 474 N.Y.S.2d 675, 677 (3d Dep't 1984); DiBart v. Erbal Holding Corp., 80 A.D.2d 879, 879, 401 N.Y.S.2d 279, 280 (2d Dep't 1978); Mora Realty Corp. v. Mootchnick, 232 A.D. 705, 706, 247 N.Y.S. 712, 713 (2d Dep't 1931); Federal Nat'l Mortgage Ass'n v. Miller, 123 Misc. 2d 431, 432, 473 N.Y.S.2d 743, 744-45 (Sup. Ct. Nassau County 1984); Scheible v. Leinen, 67 Misc. 2d 457, 459, 324 N.Y.S.2d 197, 200 (Sup. Ct. Monroe County 1971); Scalza v. Ryba, 10 Misc. 2d 186, 188, 169 N.Y.S.2d 482, 484 (Sup. Ct. Nassau County 1957); Dale Holding Corp. v. Dale Gardens, Inc., 186 Misc. 940, 944, 59 N.Y.S.2d 210, 214 (Sup. Ct. Queens County 1945); Rettim Assocs. v. L & L Estates, Inc., 186 Misc. 141, 141, 58 N.Y.S.2d 96, 97 (Sup. Ct. Kings County 1946); French v. Row, 77 Hun 360, 28 N.Y.S. 849 (Sup. Ct. Gen. T. 4th Dep't 1894).

204. *See* Marine Midland Bank v. Village Latch, Inc., 123 A.D.2d 805, 506 N.Y.S.2d 887 (2d Dep't 1986); Barclay's Bank v. Smitty's Ranch, Inc., 122 A.D.2d 323, 504 N.Y.S.2d 295 (3d Dep't 1986); Southold Sav. Bank v. Cutino, 118 A.D.2d 555, 499 N.Y.S.2d 169 (2d Dep't 1986); Marine Midland Bank v. Northeast Kawasaki, Inc., 92 A.D.2d 952, 460 N.Y.S.2d 666 (3d Dep't 1983); Federal Land Bank v. Asapian, 88 A.D.2d 760, 459 N.Y.S.2d 474 (2d Dep't 1983); Mariash v. Bastianich, 88 A.D.2d 829, 452 N.Y.S.2d 190 (1st Dep't 1982); Chemical Bank v. Econ, 87 A.D.2d 706, 448 N.Y.S.2d 899 (3d Dep't 1982), *appeal denied*, 58 N.Y.2d 221, 445 N.E.2d 652, 459 N.Y.S.2d 268 (1983); Hudson City Sav. Inst. v. Bynson, 88 A.D.2d 728, 451 N.Y.S.2d 855 (3d Dep't 1982); Dime Sav. Bank v. Dooley, 84 A.D.2d 804, 444 N.Y.S.2d 148 (2d Dep't 1981); Bowers v. Zaimes, 59 A.D.2d 800, 398 N.Y.S.2d 766 (3d Dep't 1977); Jamaica Sav. Bank v. Avon Assocs., N.Y.L.J., Nov. 2, 1977, at 6, col. 3 (Sup. Ct. N.Y. County); Shell Oil Co. v. McGraw, 48 A.D.2d 220, 368 N.Y.S.2d 610 (4th Dep't 1975); Ford v. Waxman, 50 A.D.2d 585, 375 N.Y.S.2d 145 (2d Dep't 1975); Bolmer Bros. v. Bolmer Constr. Co., 114 N.Y.S.2d 530 (Sup. Ct. Queens County 1952); Armstrong v. Rogdon Holding Corp., 139 Misc. 849, 247 N.Y.S. 682 (Sup. Ct. N.Y. County 1930).

205. 67 Misc. 2d 457, 324 N.Y.S.2d 197 (Sup. Ct. Monroe County 1971) (citing French v. Row, 77 Hun 360, 28 N.Y.S. 849 (Sup. Gen. T. 4th Dep't 1894)).

206. *Id.* at 459, 324 N.Y.S.2d at 200.

207. *Id.*

timely paying principal and interest will precipitate the option to accelerate, with sympathy and other extraneous matters relegated to irrelevancy.[208] Although perhaps not intended as a direct attack on *Graf*, this case sought to avoid the doctrine by finding that the fact pattern created an issue of waiver.[209] The principle remains, however, effectively unassailed by this case.

In a somewhat similar case, the mortgagor's payment was concededly submitted fourteen days after expiration of the grace period.[210] That was the fifth consecutive time of late submission. Mortgagee presented the installment to the bank to be cashed, but was informed that there were insufficient funds available. He tried to cash it again the next day when it was likewise rejected. A few days later, mortgagee's attorney accelerated the mortgage based upon this latest check having been returned by the bank, and incidentally noted the prior late submissions. (It was later learned that mortgagee's bank had made an error and should have honored the check.) One of the gratuitous rulings of the court was that a course of conduct was established by acquiescence on the part of the mortgagee in accepting late payments.[211] Later in the decision, the court, in denying foreclosure, found the mortgagor's default to be neither willful nor in bad faith and due solely to the bank's error. Foreclosure was therefore found to be inequitable.[212] While the latter language seems to show the true reasoning, the decision still contains that language about waiver.[213]

In another case, acceleration was attempted for failure to pay *during* the last day of the grace period.[214] Therefore, at the time of acceleration, no default existed. On that basis, consistent with the law, the court ruled against foreclosure.[215] But the court also noted that a custom had developed between the parties for monthly payments to be transmitted by mail. Mortgagor sent

208. *Graf*, 254 N.Y. at 4, 171 N.E. at 885. *See also supra* cases cited in notes 92-108.

209. *Scheible*, 67 Misc. 2d at 488, 324 N.Y.S.2d at 200.

210. *Scelza*, 10 Misc. 2d at 186, 169 N.Y.S.2d at 462.

211. *Id.* at 187, 169 N.Y.S.2d at 464.

212. *Id.* at 188, 169 N.Y.S.2d at 464.

213. *Id.*

214. Dale Holding Corp. v. Dale Gardens, Inc., 186 Misc. 940, 941, 59 N.Y.S.2d 210, 212 (Sup. Ct. Queens County 1945).

215. *Id.* at 94, 59 N.Y.S.2d at 216.

the check, but made the check payable to the wrong party. By the time mortgagee mailed the check back, mortgagor was in default. Those facts, the court held, would be enough to find a waiver.[216]

The cited rulings, however, must be contrasted with other cases supporting a different posture. For example, where a tender was received after both the grace period and acceleration, retained for five days and then returned, no waiver was found.[217]

Where claim has been made that prior payments had been untimely submitted so as to constitute a waiver of the right to insist upon timely payments, courts have ruled that the record would have to establish knowledgeable acceptance of late payments over an extended period.[218] Moreover, where mortgagor maintained that mortgagee's previous acceptance of late payments raised a triable issue as to whether mortgagor was led to believe such payments would always be accepted, the court found nothing in pleadings or affidavits suggesting that the mortgagor was misled into believing that mortgagee was waiving its right to accelerate.[219]

Even where a mortgagee's conduct did lead mortgagor "to believe strict compliance with the terms of the mortgage was not required, . . . failure to tender the entire amount then due after learning of [mortgagee's] intent to insist on strict compliance neutralize[s] the defense [of waiver, thus supporting acceleration]. . . ."[220]

In addition, there are any number of other principles relied on by the courts in rejecting the defense of waiver. Where a defaulting mortgagor alleged waiver, claiming that the mortgagee's vice president told him mortgage payments could be delayed,

---

216. *Id.* at 942-44, 59 N.Y.S.2d at 212-16.

217. Bolmer Bros. v. Bolmer Constr. Co., 114 N.Y.S.2d at 538 (Sup. Ct. Queens County 1952).

218. For cases where waivers were not found, see Bowers v. Zalmen, 59 A.D.2d 803, 398 N.Y.S.2d 766 (3d Dep't 1977); Ford v. Wasman, 50 A.D.2d 585, 375 N.Y.S.2d 146 (2d Dep't 1975).

219. *Dooley*, 84 A.D.2d at 805, 444 N.Y.S.2d at 148-49.

220. *Burton*, 58 A.D.2d at 729, 451 N.Y.S.2d at 856. *Accord* Jamaica Sav. Bank v. Cohen, 38 A.D.2d 743, 329 N.Y.S.2d 741, 742 (2d Dep't 1971); *Village Latch, Inc.*, 123 A.D.2d at 606, 506 N.Y.S.2d at 888; *Smitty's Ranch, Inc.*, 122 A.D.2d at 324-25, 504 N.Y.S.2d at 297; *Cutino*, 118 A.D.2d at 556, 499 N.Y.S.2d at 170.

the contention was rejected for two reasons.[221] First, even assuming the statement was made, there was no consideration to the mortgagee to support the alleged waiver and therefore none could exist.[222] Second, to claim estoppel — closely related to waiver — the mortgagor would have to produce evidentiary proof in admissible form with more than " 'mere conclusions, expressions of hope, unsubstantiated allegations or assertions' "[223] in order to defeat mortgagee's motion for summary judgment.[224] Of like significance is the concept that a claim of waiver cannot be supported by conclusory and contradictory data.[225]

Where the claim is oral waiver by way of oral modification of the mortgage, there is authority that some writing showing this modification sufficient to contradict the mortgagee's records is required. Failing to produce that, or some compelling reason why some writing cannot be produced, will defeat the waiver claim.[226] However, this must be compared with other cases on point, to the effect that an alleged oral waiver by the mortgagee of its right to accelerate the principal and interest represents a valid affirmative defense to foreclosure.[227] In both these cases, the claim of oral waiver was believed by the courts. In one, an officer of the mortgagor submitted an affidavit detailing at considerable length his discussions with mortgagee's officer which was claimed to constitute a waiver.[228] No affidavit in opposition of the bank's officer was submitted, leading to the inference that the oral waiver did exist.

In the related area of defaults for failure to pay taxes, when taxes were unpaid by the mortgagor, it was held not to be a waiver of acceleration for tax defaults to accept a monthly mort-

---

221. Chemical Bank v. Koon, 87 A.D.2d 706, 448 N.Y.S.2d 668 (2d Dep't 1982).

222. *Id.* at 707, 448 N.Y.S.2d at 669.

223. *Id.* at 706, 448 N.Y.S.2d at 669 (quoting State Bank v. Fiorenzato, 51 N.Y.2d 638, 417 N.E.2d 80, 435 N.Y.S.2d 947 (1980)).

224. *Id.* at 706, 448 N.Y.S.2d at 668. *See also* Flinkote Co. v. Bert Bar Holding Corp., 114 A.D.2d 403, 494 N.Y.S.2d 43 (2d Dep't 1985).

225. Federal Land Bank v. Asapian, 98 A.D.2d 760, 760, 469 N.Y.S.2d 474, 475 (2d Dep't 1983) (citing Northeast Small Business Inv. Corp. v. Wareuhoc Investors, 90 A.D.2d 536, 455 N.Y.S.2d 107 (2d Dep't 1982)).

226. *Northeast Kowanski, Inc.*, 92 A.D.2d at 953, 460 N.Y.S.2d at 668 (citing Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)).

227. *See Nassau Trust Co.*, 56 N.Y.2d at 186, 436 N.E.2d at 1271, 451 N.Y.S.2d at 669.

228. *Nassau Trust Co.*, 56 N.Y.2d at 180, 436 N.E.2d at 1267, 451 N.Y.S.2d at 665.

gage installment."[229] To constitute a waiver, it must be shown that the mortgagors knew and relied upon the acts alleged to indicate a waiver and as a consequence defaulted in their obligation.[230]

Still, there are further cases which have adopted waiver. For example, acceptance of a postdated check was held to be a waiver to accelerate for the payment represented by that check, even though funds were not currently on deposit.[231]

Retaining mortgage installments, even if tendered late, can defeat an attempt to accelerate later.[232] In one case,[233] a mortgage payment due on August 1 was missed. Upon discovering the error, mortgagor mailed the payment on August 31 together with the succeeding installment due for September 1. Ten days later, on September 10, plaintiff began the foreclosure. While the mere fact that tender prior to acceleration could readily have been the ruling, the court assumed a different perspective and based its denial of the foreclosure on waiver, finding that "the retention of [the] checks ought be as significant and effective as the retention of any paper in a lawsuit that is served too late but is not returned."[234]

If a mortgagee promises to forbear, even if that promise is gratuitous, there is authority that if this leads the mortgagor to believe he can pay in a different manner and he relies upon it, the mortgagee must give reasonable notice of his revocation of that promise relied upon or there is a waiver.[235] Where there is consideration for some new promise, then in essence there is a new contract and the issue of the Statute of Frauds is no longer

---

229. *Armstrong*, 139 Misc. at 551, 247 N.Y.S. at 684.

230. Jamaica Sav. Bank v. Avon Assocs., N.Y.L.J., Nov. 2, 1977, at 6, col. 3 (Sup. Ct. N.Y. County).

231. *See* Central Nat'l Bank v. Peter, 109 Misc. 2d 42, 45, 439 N.Y.S.2d 619, 622 (Sup. Ct. Oswego County 1981).

232. *Lopez*, 101 A.D.2d at 619, 474 N.Y.S.2d at 877 (citing Sherwood v. Greene, 41 A.D.2d 891, 892, 342 N.Y.S.2d 990, 991 (3d Dep't 1973)). *See* Bottim Assocs., 136 Misc. at 141, 55 N.Y.S.2d at 97. *See also DiBart*, 60 A.D.2d at 979-80, 401 N.Y.S.2d at 279.

233. Bottim Assocs. v. Lil Estates, Inc., 136 Misc. 141, 55 N.Y.S.2d 96 (Sup. Ct. Kings County 1945).

234. *Id.* at 141, 55 N.Y.S.2d at 97.

235. *See* Rosenthal v. Brown, 247 N.Y. 479, 160 N.E. 921 (1928); Seamen's Bank for Sav. v. Wallenstein Realty Corp., 6 N.Y.S.2d 706 (Sup. Ct. Kings County 1938). *See also* Nassau Trust Co., 56 N.Y.2d 175, 436 N.E.2d 1265, 451 N.Y.S.2d 663.

involved.[236]

B. *Estoppel*

Estoppel as a basis to deny acceleration is closely akin to waiver and difficult to separate from that previously mentioned concept. If there is a waiver, courts concurrently conclude, the mortgagee should be estopped from proceeding.[237]

Although it is an arduous exercise to treat estoppel as a separate topic, some guidelines have been established. For a mortgagee to be equitably estopped, the mortgagor " 'must establish: (1) [c]onduct which amounts to a false representation or concealment of material facts . . . (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.' "[238] Concerning the mortgagor's perspective on estoppel, the essential elements include lack of knowledge, reliance upon the conduct of the party estopped, and action based thereon whereby position is prejudicially changed.[239]

The following represent typical situations where estoppel can interrupt foreclosure. Estoppel was found to be a question of fact sufficient to deny summary judgment where a mortgagor's prior defaults in providing receipts for paid taxes was never the subject of complaint.[240] Moreover where mortgagee led mortgagor to believe that there was still time to make payments according to an arrangement entered into after acceleration was noticed and foreclosure was instituted, the mortgagee was estopped

---

236. Winker v. Robertson, 36 Misc. 2d 804, 807, 233 N.Y.S.2d 981, 985 (Sup. Ct. Niagara County 1962). *See also* Brown v. Farmers Loan & Trust Co., 117 N.Y. 266, 274, 22 N.E. 952, 954 (1889); Dodge v. Crandall, 30 N.Y. 294, 307-08 (1864).

237. *See supra* notes 202-236. Estoppel may also be linked with a finding of oppressive or unconscionable conduct.

238. Gratton v. Dido Realty Co., 89 Misc. 2d 401, 402-03, 391 N.Y.S.2d 954, 955 (Sup. Ct. Queens County 1977), *aff'd*, 62 A.D.2d 969, 405 N.Y.S.2d 1001 (2d Dep't 1978) (quoting New York State Guernsey Breeders Co-op., Inc. v. Noyes, 260 A.D. 240, 248, 22 N.Y.S.2d 132, 140 (3d Dep't), *modified*, 284 N.Y. 197, 30 N.E.2d 471 (1940)). *Cf.* Triple Cities Constr. Co. v. Maryland Gas Co., 4 N.Y.2d 443, 448, 151 N.E.2d 856, 858, 176 N.Y.S.2d 292, 296 (1958).

239. *Gratton*, 89 Misc. 2d at 403, 391 N.Y.S. at 955.

240. Kane v. Waterman, 81 A.D.2d 812, 813, 438 N.Y.S.2d 280, 282 (3d Dep't 1982).

from proceeding.[241]

A more detailed set of facts supporting estoppel is as follows. Based upon default in paying interest, mortgagee instituted foreclosure. During the following year, a settlement was reached giving mortgagor three to five years to liquidate the mortgaged premises to satisfy the obligation. Certain payments were to be made during that period. Mortgagee had the right to reasonably approve all sales and to continue the foreclosure upon mortgagor's default, so long as notice of default was given, in which event mortgagor could give a deed in lieu of foreclosure. An interest payment came due under the stipulation of settlement and was not paid. Mortgagor swore — and was not controverted — that he advised mortgagee's officer of his inability to make that payment and he offered the deed. He was told, however, that the mortgagee preferred a sale and he was urged to continue his efforts to sell. When subsequently the mortgagor submitted a contract of sale, mortgagee rejected it, claiming the mortgagor was in default. The court found issues of fact sufficient to require a trial on the issue of estoppel.[242]

Of like effect was a court's finding that a question of fact existed as to whether mortgagee by its conduct induced mortgagor to believe additional time was available beyond an agreed due date to obtain alternate financing. Further, there existed a question of fact as to whether such belief was reasonable and acted upon to the prejudice of the mortgagor, thereby creating an estoppel.[243]

But a mortgagor carries a heavy burden to demonstrate estoppel,[244] which militates against it being commonly em-

241. Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 185, 436 N.E.2d 1265, 1270, 451 N.Y.S.2d 663, 668 (1982).

242. Manufacturers and Traders Trust Co. v. Cottrell, 71 A.D.2d 538, 540-42, 422 N.Y.S.2d 990, 991-92 (4th Dep't 1979).

243. *See* Marine Midland Bank-W. v. Center of Williamsville, 48 A.D.2d 784, 368 N.Y.S.2d 91 (4th Dep't 1975).

244. Some of the standards are found in Chemical Bank v. Econ, 87 A.D.2d 706, 706, 448 N.Y.S.2d 896, 899 (3d Dep't 1982) (evidentiary proof in admissible form sufficient to require a trial); Northeast Small Business Inv. Corp. v. Waccabuc Investors Inc., 90 A.D.2d 538, 539, 455 N.Y.S.2d 107, 109 (2d Dep't 1982) (beyond conclusory allegations). For cases where mortgagor has not met his burden of demonstrating existence of an issue of fact as to the existence of estoppel, see Barclay's Bank v. Smitty's Ranch, Inc., 122 A.D.2d 323, 504 N.Y.S.2d 285 (3d Dep't 1986); Federal Land Bank v. Azapian, 98 A.D.2d 760, 469 N.Y.S.2d 474 (2d Dep't 1983); Gratton v. Dido Realty Corp., 89 Misc. 2d 401,

ployed.[243] In any event, while estoppel *is* a basis to avoid what would otherwise eventuate from the *Graf* doctrine, conceptually it is not at variance with *Graf*.

C. *Equity and the Assault on Precedent*

It has long been the settled law in New York that mortgage foreclosure is an equitable action[244] and there are a multitude of decisions standing for that proposition for a broad range of defaults.[245] Among the many ways the concept is phrased include:

---

391 N.Y.S.2d 954 (Sup. Ct. Queens County 1977).

245. For example, adjourning a foreclosure sale to permit the mortgagor to arrange new financing is not sufficient for estoppel. National Bank of N. Am. v. Cohen, 89 A.D.2d 725, 728, 453 N.Y.S.2d 849, 850 (3d Dep't 1982).

246. Closely associated with equity is the concept of unconscionability. While uncontroverted that unconscionability is a defense to acceleration, it is almost impossible to separate it from a pronouncement of "equity." Moreover, predicting the circumstances under which a court will employ, semantically, the unconscionability formulation is not readily ascertainable. Some examples where unconscionability was considered are as follows.

In Northern Properties, Inc. v. Kuf Realty Corp., 30 Misc. 2d 1, 217 N.Y.S.2d 355 (Sup. Ct. Westchester County 1961), acceleration by the assignee of the original mortgage was upheld as not unconscionable where mortgagor mailed mortgage payments to the original mortgagee instead of the assignee. In Loughery v. Cassiano, 117 Misc. 353, 191 N.Y.S. 436 (Sup. Ct. Bronx County 1921), *aff'd*, 207 A.D. 886 (1st Dep't 1923), unconscionability was a basis to reject acceleration where alterations to the property were deemed not to jeopardize the security. Although there are decisions to the contrary (not necessarily involving unconscionability), the court in DiMatteo v. North Tonawanda Auto Wash, Inc., 101 A.D.2d 692, 476 N.Y.S.2d 40 (4th Dep't 1984), held that an issue of fact existed regarding the unconscionability of mortgagee's conduct. The mortgagee accelerated the debt for a mortgage payment drawn on insufficient funds when the check would have been good had the mortgagee submitted it for collection earlier or later than it did. Other cases invoking unconscionability include: Fairmont Assocs. v. Fairmont Estates, 99 A.D.2d 895, 472 N.Y.S.2d 208 (3d Dep't 1984); Fort William Henry Corp. v. Lake George Inn, Inc., 27 A.D.2d 884, 277 N.Y.S.2d 782 (3d Dep't 1967); Miller v. Kotsen, N.Y.L.J., Sept. 28, 1983, at 11, col. 2 (Sup. Ct. Bronx County 1983); Schaible v. Lausen, 67 Misc. 2d 457, 324 N.Y.S.2d 197 (Sup. Ct. Monroe County 1971); Blomgren v. Tinsen, 33 Misc. 2d 1057, 225 N.Y.S.2d 347 (Sup. Ct. Bronx County 1962), *modified*, 18 A.D.2d 979, 238 N.Y.S.2d 435 (1st Dep't 1963); Josephson v. Canal Real Estate Co., 200 N.Y.S.2d 1015 (Sup. Ct. N.Y. County 1960); Deenus Realty Corp. v. 3440 Realty Co., 179 Misc. 749, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County 1943), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 940 (1st Dep't 1943). *See infra* notes 273-323 and accompanying text. *See also* Towne Funding Co. v. Macchia, 120 A.D.2d 519, 501 N.Y.S.2d 717 (2d Dep't 1986) (discussion of the standard of unconscionability in Connecticut mortgage law).

247. *See* Nutey v. Durien Constr. Corp., 41 N.Y.2d 1006, 364 N.E.2d 883, 396 N.Y.S.2d 169 (1977); Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 315 (1891); Aetna Life Ins. Co. v. Avalon Orchards, Inc., 118 A.D.2d 297, 505 N.Y.S.2d 216 (3d Dep't 1986); DiMatteo v. North Tonawanda Auto Wash, Inc., 101 A.D.2d 692, 476 N.Y.S.2d 40 (4th

an action to foreclose a mortgage is "equitable in nature and triggers the equitable powers of the court;"[248] "equity will not be exercised when its exercise would result in an injustice or oppression;"[249] mortgage foreclosure is subject to the "cardinal principle of equity jurisprudence that he who seeks equity must do equity;"[250] and equity can require any party to show that it has dealt fairly before giving relief.[251]

But there is no reason why the well recognized equity principles cannot coexist with *Graf*. Yet, equity is almost invariably the rubric invoked when a court seeks a result to avoid the actual or perceived thrust of the *Graf* case. It is important at this juncture to emphasize the essence of *Graf*, which is that the

---

Dep't 1984); Kavas, 91 A.D.2d 812, 458 N.Y.S.2d 280; T.J. Better Co. v. South Falls Corp., 28 A.D.2d 198, 284 N.Y.S.2d 282 (3d Dep't 1967); Nove Holding Corp. v. Schachter, 218 A.D. 479, 218 N.Y.S. 623 (1st Dep't 1926); Trowbridge v. Males Realty Corp., 196 A.D. 656, 191 N.Y.S. 97 (1st Dep't 1921); Bieber v. Goldberg, 133 A.D. 207, 117 N.Y.S. 211 (2d Dep't 1909); Germania Life Ins. Co. v. Potter, 124 A.D. 814, 109 N.Y.S. 435 (1st Dep't 1908); Van Planck v. Godfrey, 42 A.D. 16, 58 N.Y.S. 784 (1st Dep't 1899); Laber v. Minassian, 134 Misc. 2d 543, 511 N.Y.S.2d 516 (Sup. Ct. Nassau County 1987), *Miller*, N.Y.L.J., Sept. 28, 1983, at 11, col. 2 (Sup. Ct. Bronx County 1983); Newburgh Sav. Bank v. Grossman, 118 Misc. 2d 1038, 462 N.Y.S.2d 92 (Sup. Ct. Orange County 1982); Lincoln First Bank, N.A. v. Thayer, 102 Misc. 2d 451, 423 N.Y.S.2d 795 (Sup. Ct. Onondaga County 1979); Nichols v. Evans, 92 Misc. 2d 938, 401 N.Y.S.2d 425 (Sup. Ct. Dutchess County 1978); Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct. Kings County 1975); *Scheuble*, 67 Misc. 2d 457, 324 N.Y.S.2d 197; Griffo v. Swartz, 61 Misc. 2d 504, 306 N.Y.S.2d 64 (Sup. Ct. Monroe County 1969); Baldwin-Bellmore Fed. Sav. & Loan Ass'n v. Stellato, 55 Misc. 2d 1043, 287 N.Y.S.2d 616 (Sup. Ct. Suffolk County 1968); Shapiro v. Housewares Super Mart, Inc., 43 Misc. 2d 107, 250 N.Y.S.2d 340 (Sup. Ct. Nassau County 1964); *Blomgren*, 33 Misc. 2d 1057, 225 N.Y.S.2d 341; *Josephson*, 200 N.Y.S.2d 1016; Karban v. 1374 First Ave. Realty Corp., No. 10571/82, (Sup. Ct. N.Y. County filed Nov. 3, 1982), 100 Eighth Ave. Corp. v. Morgenstern, 3 Misc. 2d 430, 150 N.Y.S.2d 471 (Sup. Ct. Kings County 1956), *modified on other grounds*, 4 A.D.2d 754, 164 N.Y.S.2d 812 (2d Dep't 1957); Rockaway Park Servs. Corp. v. Hollis Automotive Corp., 208 Misc. 955, 135 N.Y.S.2d 568 (Sup. Ct. N.Y. County 1954); Caspert v. Anderson Apartments, Inc., 196 Misc. 355, 94 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1949); *Bettim Assocs.*, 185 Misc. 141, 58 N.Y.S.2d 96; *Domus Realty Corp.*, 179 Misc. 769, 40 N.Y.S.2d 69; Home Owner's Loan Corp. v. Wood, 184 Misc. 216, 206 N.Y.S. 427 (Sup. Ct. Delaware County 1937); *Loughery*, 117 Misc. 393, 191 N.Y.S. 436; French v. Row, 77 Hun 380, 28 N.Y.S. 848 (Sup. Ct. Gen. T. 4th Dep't 1894).

248 Newburgh Sav. Bank v. Grossman, 118 Misc. 2d 1038, 1039, 462 N.Y.S.2d 92, 93 (Sup. Ct. Orange County 1982).

249 *Nichols*, 92 Misc. 2d at 940, 401 N.Y.S.2d at 426.

250 *Ricks*, 83 Misc. 2d at 823, 372 N.Y.S.2d at 494.

251 Griffo v. Swartz, 61 Misc. 2d 504, 515, 306 N.Y.S.2d 64, 76 (Monroe County Court 1969).

mortgage contract is sacred, at least insofar as default in paying principal and interest is concerned.[252] To insist under such circumstances on strict enforcement of the agreement — and thus the right to accelerate — was held *not* to be oppressive, unconscionable or inequitable.[253]

Recall also that in *Graf* the default was not willful. Clearly it was both inadvertent and sympathetic with the mortgagee's response to swiftly avail itself of the acceleration clause.[254] Recognizing these facts, it is difficult to beleaguer the *Graf* doctrine, which after all, was a decision of the court of appeals.

Yet, *Graf* does come under attack in two ways. One mode of assault is application and purported refutation of *Graf* for defaults other than principal and interest. While influential, *Graf* was never the controlling force for these other varieties of default.

Alternatively, some cases tackle *Graf* head on, either erroneously or by possibly creating a refinement of the doctrine. So, the accepted equity principles that apply to foreclosure, and in particular, acceleration, require far more analysis than merely observing the role of equity.

Although the arrival of *Graf* in 1930 diminished somewhat the importance of decisions prior to that time, since earlier cases are still cited, mention of them is appropriate. Even among these, however, most concern defaults for other than principal and interest.

Where taxes were not paid by the mortgagor, equity granted relief[255] — which is consistent with the majority of cases even subsequent to 1930.[256] Also not surprising is the holding in *Loughery v. Catalano*,[257] where, in breach of the mortgage, alterations to the mortgaged premises were made without consent. Equity granted relief when it was shown that the security was not impaired. In *Trowbridge v. Malex Realty Corp.*,[258] where the

252 *See supra* notes 96-108 and accompanying text.

253 *Id.*

254 *Id.*

255 Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 335 (1891); Germania Life Ins. Co. v. Foster, 124 A.D. 814, 109 N.Y.S. 435 (1st Dep't 1908).

256. *See supra* notes 143-186 and accompanying text.

257. 117 Misc. 393, 191 N.Y.S. 436 (Sup. Ct. Bronx County 1921).

258. 198 A.D. 856, 191 N.Y.S. 97 (1st Dep't 1921).

default was on a *prior* mortgage, equity found circumstances to disallow foreclosure.

There are only three decisions prior to *Graf* where equity was the stated basis providing relief for failure to pay principal and interest.[258] In *Nove Holding Corp. v. Schechter*,[259] a mortgage payment was due on November 1. Mortgagor averred that it was mailed on that date although it was never received by the mortgagee.[260] Acceleration occurred on November 3, in response to which mortgagor immediately offered to remit a certified check and actually did so two days later.[261] Finding the default merely technical and not willful, the court applied equity to void the acceleration.[262] Whether the subsequent ruling in *Graf* would have reached a contrary result is problematical because the error causing payment default may not have been on mortgagor's part. Such was a question of fact. Finding the default unintentional, as the court did, is less persuasive since the default in *Graf* was also unintentional, but nevertheless constituted a valid basis to accelerate.

Another case decided before 1930 was *Bieber v. Goldberg*,[263] where a timely tender of principal and interest was rejected by mortgagee because it did not include an amount for insurance. There was a question of both fact and law as to whether the insurance was actually due. Accordingly, the court cited equity to provide relief from the claimed default.[264] This holding does not run counter to the later *Graf* case because here the default itself could be gainsaid.

Finally, there is *French v. Row*,[265] where the court was offended by mortgagee's motive for accelerating, finding that mortgagee was actually trying to compel transfer of the property to himself.[266] Relying upon equity to afford relief from uncon-

---

258. Nove Holding Corp. v. Schecter, 218 A.D. 479, 218 N.Y.S. 623 (1st Dep't 1926); Bieber v. Goldberg, 133 A.D. 207, 117 N.Y.S. 211 (2d Dep't 1909); French v. Row, 77 Hun 380, 28 N.Y.S. 849 (Sup. Ct. Gen. T. 4th Dep't 1894).

260. 218 A.D. 479, 218 N.Y.S. 623 (1st Dep't 1926).

261. *Id.* at 482, 218 N.Y.S. at 625-26.

262. *Id.* at 483, 218 N.Y.S. at 626.

263. *Id.* at 487-88, 218 N.Y.S. at 630.

264. 133 A.D. 207, 117 N.Y.S. 211 (2d Dep't 1909).

265. *Id.* at 210, 117 N.Y.S. at 213-14.

266. 77 Hun 380, 28 N.Y.S. 849 (Sup. Ct. Gen. T. 4th Dep't 1894).

267. *Id.* at 384, 28 N.Y.S. at 851.

scionability, the court granted a new trial, permitting mortgagor to assert a defense based upon a perceived custom of accepting late payments.[268] Thus, the true basis of the decision could, and probably should have been waiver. Whether a waiver finding here would meet present day standards is doubtful,[269] although this is difficult to resolve since it is often an issue of fact on a case by case basis. Absent a waiver finding, however, it certainly would not survive a *Graf* ruling.

Subsequent to 1930, the cases *should* be clearer, and most rulings do adopt the strict approach for failure to pay principal and interest.[270] Other than such default (and breach of the due-on-sale clause) the equity defense is more liberally employed. Many of the cases so doing, however, apply equity for *other* varieties of default — and that is a key distinction. For example, equity is discussed as a defense with reference to a deficiency judgment,[271] substitution of a party,[272] appointment of a receiver,[273] application of HUD Handbook guidelines,[274] due-on-sale clause,[275] taxes,[276] tax receipts and estoppel certificate,[277] overturning foreclosure sale,[278] legal fees,[279] removal of personalty,[280] pleadings,[281] building violations with respect to lack of

268. *Id.* at 387-89, 28 N.Y.S. at 853-54.

269. *See supra* notes 217-219 and accompanying text.

270. *See supra* notes 92-108 and accompanying text.

271. Home Owners' Loan Corp. v. Wood, 164 Misc. 215, 298 N.Y.S. 427 (Sup. Ct. Delaware County 1937).

272. T.J. Bettes Co. v. South Falls Corp., 28 A.D.2d 198, 284 N.Y.S.2d 262 (3d Dep't 1967).

273. Fairmont Assocs. v. Fairmont Estates, 99 A.D.2d 880, 472 N.Y.S.2d 298 (3d Dep't 1984).

274. Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 377 N.Y.S.2d 485 (Sup. Ct. Kings County 1976).

275. Newburgh Sav. Bank v. Grossman, 118 Misc. 2d 1026, 462 N.Y.S.2d 92 (Sup. Ct. Orange County 1982); *See also* Nichols v. Evans, 92 Misc. 2d 928, 401 N.Y.S.2d 426 (Dutchess County Ct. 1978).

276. Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891).

277. Karas v. Wasserman, 91 A.D.2d 812, 448 N.Y.S.2d 280 (3d Dep't 1982).

278. Notay v. Darlan Constr. Corp., 41 N.Y.2d 1065, 364 N.E.2d 833, 396 N.Y.S.2d 169 (1977). *See also* Baldwin-Bellmore Fed. Sav. & Loan Assoc. v. Steffato, 55 Misc. 2d 1043, 287 N.Y.S.2d 516 (Sup. Ct. Suffolk County 1968)

279. Lincoln First Bank v. Thayer, 102 Misc. 2d 451, 423 N.Y.S.2d 795 (Sup. Ct. Onondaga County 1979). Although the issue was denial of a legal fee to a foreclosing plaintiff, the decision is clearly against the weight of all authority on the subject.

280. Blomgren v. Union 753 Corp., 33 Misc. 2d 1067, 225 N.Y.S.2d 435 (Sup. Ct. Bronx County 1962).

281. Josephson v. Coral Real Estate Co., 200 N.Y.S.2d 1016 (Sup. Ct. N.Y. County 1960).

repair,[282] and waste.[283]

The contentious problem, or as suggested here, the error, develops in one of the two mentioned ways. One of those is to presume the fading effect of *Graf* in an area where it never was of paramount importance. A prime example is *Koras v. Wasserman*.[284] Although plaintiff claimed a default in payment, the facts demonstrated that no such breach existed. The two defaults which *were* found included failure to present receipts for taxes and insurance within thirty days of the time due and neglect to submit an estoppel certificate. Defendant admitted these defaults and presented credible excuses. As to taxes and insurance, these were actually paid and receipts had never been furnished during the previous five years of the mortgage's existence. Concerning the estoppel certificate, defendant may have been under a mistaken impression of its nature, believing it to be merely a notice of payment due — which had already been made.

In denying foreclosure, the third department stated that "(p)laintiffs mistakenly rely here on the continued vitality of the majority holding in *Graf v. Hope Bldg. Corp.*, . . . to the effect that acceleration clauses in mortgages will be strictly enforced irrespective of the circumstances and nature of the default."[285]

Plaintiffs may have relied upon and urged the cited construction of *Graf*, but it is clearly not what the court of appeals said. In *Koras*, equity as a defense to both defaults[286] and waiver as to nonsubmission of tax and insurance receipts,[287] would have been consistent with case law. Attacking *Graf* as a means to reach the desired equitable result was unnecessary and ill-founded.

Continuing, the court in *Koras* observed that:

---

282. Rockaway Park Series Corp. v. Hollis Automatic Corp., 206 Misc. 955, 135 N.Y.S.2d 588 (Sup. Ct. N.Y. County 1954); *See also* Caspert v. Anderson Apartments, Inc., 196 Misc. 555, 94 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1949).

283. Aetna Life Ins. Co. v. Avalon Orchards, Inc., 118 A.D.2d 297, 505 N.Y.S.2d 216 (3d Dep't 1986).

284. 91 A.D.2d 812, 458 N.Y.S.2d 280 (3d Dep't 1982).

285. *Id.* at 812, 458 N.Y.S.2d at 281.

286. *See supra* notes 245-247 and accompanying text.

287. *See generally supra* note 203.

> [I]t seems clear that the evolving subsequent [to *Graf*] case law has largely adopted the reasoning of Chief Judge Cardozo's dissenting position in *Graf* . . . that the equitable remedy of foreclosure may be denied in the case of an inadvertent, inconsequential default in order to prevent unconscionably overreaching conduct by a mortgagee. . . .[288]

Significantly, none of the decisions cited by the third department as evolving case law presents either a *Graf* fact pattern or default in making a mortgage payment.[289] For example, its citation of *100 Eighth Ave. Corp. v. Morgenstern*[290] is askew, involving unusual facts and making no mention of a purported contest with *Graf* principles. In that case, the mortgagor sent his check with sufficient funds in the account, but inadvertently neglected to sign the check. Mortgagee retained the check until expiration of the grace period without telling mortgagor of the error. Acceleration and foreclosure ensued. Finding mortgagee's conduct unconscionable, with a minute default of $30.27 on a mortgage of $80,000, relief was granted.[291] With a mortgagee taking knowing and obviously unfair advantage of an inadvertent error, the facts are far enough removed from *Graf* so that this citation is exposed as faint.

Another instance of an attack on *Graf* when principal and interest were not involved is *Karhan v. 1374 First Ave. Realty Corp.*[292] There, the issue was a motion to vacate the *ex parte* appointment of a receiver. In granting the motion, the court gratuitously noted in dicta that in its opinion, the foreclosure would not succeed and that refusal to accept a late payment was unjustified and harsh[293] — a postulation clearly in error.[294]

---

288. *Karhan*, 91 A.D.2d at 812, 456 N.Y.S.2d at 282.

289. For example, the citation to Bloogren v. Tinion 783 Corp., 33 Misc. 2d 1067, 225 N.Y.S.2d 347 (Sup. Ct. Bronx County 1962), *modified*, 18 A.D.2d 979, 238 N.Y.S.2d 435 (1st Dep't 1963) was inapposite. It partly involved acceleration for removal of personality from the property which was in any event replaced. The majority opinion did not even cite *Graf* much less suggest its influence was on the wane. Similarly, reliance upon More Realty Corp. v. Mostchuch, 232 A.D. 705, 247 N.Y.S. 712 (2d Dep't 1931) and Scelta v. Ryba, 10 Misc. 2d 186, 169 N.Y.S.2d 462 (Sup. Ct. Nassau County 1957), is inappropriate since both are waiver cases and do not stand for a weakening of *Graf*.

290. 3 Misc. 2d 410, 150 N.Y.S.2d 471 (Sup. Ct. Kings County 1956), *modified*, 4 A.D.2d 754, 164 N.Y.S.2d 512 (2d Dep't 1957).

291. *Id.* at 418, 150 N.Y.S.2d at 478-79.

292. Index No. 10571/82 (Sup. Ct. N.Y. County filed Nov. 3, 1982).

293. *Id.*

294. *See supra* notes 58, 102 and accompanying text.

The direct frontal assault on *Graf* when principal and interest was the apparent issue is found in seven cases, from 1943 through 1984, five on the supreme court level and two in the appellate division, the latter in the third and fourth departments.[295]

The earliest of these is *Domus Realty Corp. v. 3440 Realty Co.*[296] There, a payment of principal and interest was due on November 15 with a ten-day grace period to November 25. The acceleration letter was sent on November 27, although the mortgagor claimed not to have received it until November 30. While a payment of principal alone was forthcoming, it was not paid until November 30 — *after* expiration of the grace period and subsequent to mailing of the acceleration letter. A full monthly installment of principal and interest was remitted on December 3.[297] Foreclosure pleadings were served on December 3.

Relying upon the *dissent* in *Graf v. Hope Building Corp.*[298] and the holding in *Ferlazzo v. Riley*,[299] the *Domus* court found the default inadvertent and trivial, the mortgagor inexperienced in real estate matters and confused as to the applicable grace period, with no prejudice to the mortgagee.[300] It therefore declined to grant summary judgment to the mortgagee, choosing

---

295. DiMatteo v. North Tonawanda Auto Wash, Inc., 101 A.D.2d 592, 476 N.Y.S.2d 40 (4th Dep't 1984); Fairmont Assocs. v. Fairmont Estates, 99 A.D.2d 896, 472 N.Y.S.2d 208 (3d Dep't 1984); Miller v. Krause, N.Y.L.J., Sept. 28, 1983, at 11, col. 2 (Sup. Ct. Bronx County); Scheible v. Leiman, 67 Misc. 2d 457, 324 N.Y.S.2d 197 (Sup. Ct. Monroe County 1971); Shapiro v. Housewares Super Mart, Inc., 43 Misc. 2d 107, 250 N.Y.S.2d 343 (Sup. Ct. Nassau County 1964); Batum Assocs. v. L & L Estates, 186 Misc. 141, 58 N.Y.S.2d 96 (Sup. Ct. Kings County 1945); Domus Realty Corp. v. 3440 Realty Co., 179 Misc. 750, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 940 (1st Dep't 1943).

296. 179 Misc. 750, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County 1943), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 940 (1st Dep't 1943).

297. The court emphasized that the default, taking the grace period into account, was five days for principal and eight days for interest. But *immediate* default was sanctioned by the court of appeals in Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884 (1930), with acceleration only three days after default likewise approved in Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 180 N.E. 176 (1932). The court also neglected to observe the ruling in Bolmer Bros. v. Bolmer Constr. Co., 114 N.Y.S.2d 530 (Sup. Ct. Queens County 1952), that a tender is good only when received, not when mailed.

298. 254 N.Y. 1, 7, 171 N.E. 884, 886 (1930) (Cardozo, C.J., dissenting).

299. 278 N.Y. 288, 16 N.E.2d 286 (1938).

300. *Domus Realty Corp.*, 179 Misc. at 754, 40 N.Y.S.2d at 73.

instead a hearing on the mortgagor's understanding of the grace period and other claims about correspondence. The court specifically considered *Graf* but, in view of the dissent, found the mortgagee's conduct to be so harsh and unconscionable as to be of a level to fall outside of the *Graf* holding. It is hard to glean, however, how the facts materially differed from *Graf*, with the possible sole exception of mortgagor's claim as to nonreceipt of the acceleration letter. It may have been that the minutiae of the fact pattern would have been sufficient to deny summary judgment, although that is quite doubtful. What *is* clear is that even a sympathetic, inadvertent default is not enough to invoke equity when principal and interest have not been paid.[301]

Baltim Assoc. v. L & L Estates[302] is a terse, curious and misplaced analysis of the role of the *Graf* principles. Payment was due on August 1, but not mailed due to an error by mortgagor's accountant. When the error was discovered on August 31, the installment was mailed, together with the payment due on September 1. No acceleration letter was sent. Manifestation of acceleration occurred by filing a foreclosure pleading with the county clerk on September 10.[303]

Neither the tardy check submitted on August 31 nor the September payment remitted simultaneously were returned. Since acceleration by filing the pleadings came *after* a valid tender curing the default, that should have been the basis to reject foreclosure, although such was not stated. Moreover, even if acceleration had come before tender, retaining the checks could have been a waiver of acceleration.[304] Neither was that principle cited. Rather, the court acknowledged that *Graf v. Hope Bldg. Corp.*[305] was "still the law [but] it seems to be the effort of the courts to escape its effect wherever the facts will permit."[306]

---

301 *Id.*

302. 186 Misc. 141, 58 N.Y.S.2d 96 (Sup. Ct. Kings County 1945).

303. *Id.* at 141, 58 N.Y.S.2d at 96-97. Pursuant to *Albertina Realty Co.*, 256 N.Y. at 476, 180 N.E. at 177, filing the pleadings with the county clerk is a valid election to accelerate. *See also supra* note 40.

304. *See supra* note 57 and accompanying text. *See generally supra* notes 54-84 and accompanying text.

305. 254 N.Y. 1, 171 N.E. 884 (1930).

306. *Baltim Assocs.*, 186 Misc. 141, 58 N.Y.S.2d 96. The court cited Domus Realty Corp. v. 3440 Realty Co., 179 Misc. 749, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 840 (1st Dep't 1943), as authority for this proposition. But if

Such may indeed be the position of the courts — and sometimes is when a default other than principal and interest (and due-on-sale) is concerned. It may also be, as this court noted, "wherever the facts will permit." But these were not such facts nor, significantly, the facts which gave rise to *Graf*. While *Battim* can reinforce the usual waiver concepts, or the maxim that tender of arrears prior to acceleration must be accepted, *Battim* does not vitiate the *Graf* formulation.

Clearly at variance with *Graf* is the decision at special term in *Shapiro v. Housewares Super Mart*[307] which, as did the court in *Battim*, relied upon *Domus Realty Corp. v. 3440 Realty Co., Inc.*[308] as precedent. A check for the June installment was prepared and signed prior to its due date. It was placed in an envelope for mailing but was mislaid. Since mortgagor's checkbook showed the payment as made, the mortgagor was unaware of the actual default — a sympathetic situation no doubt, but no more so than the events in *Graf* and indeed, strikingly similar in essence.[309]

Immediately upon expiration of the grace period, mortgagee accelerated. One month and eight days after default, mortgagor attempted to cure. Adding a new wrinkle that "rights are determined on the facts as they exist at the time of the decree and not at the inception of the suit,"[310] the court found mortgagee's conduct unjustly burdensome, harsh and merciless in the face of an unblemished history of timely payment. Although arguably characterized as harsh, it is still the nature of default upon which *Graf* would grant the remedy of acceleration.[311]

Previously reviewed, on the subject of waiver, is the decision

---

Domus Realty Corp. incorrectly supports the statement, as this article suggests (see *supra* notes 298-301 and accompanying text), the efficacy of *Battim Assoc.* is all the more unapparent.

307. 43 Misc. 2d 107, 250 N.Y.S.2d 343 (Sup. Ct. Nassau County 1964).

308. 179 Misc. 780, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County 1943), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 840 (1st Dep't 1943).

309. *Shapiro*, 43 Misc. 2d at 108, 250 N.Y.S.2d at 344.

310. *Id.* at 109, 250 N.Y.S.2d at 344 (citing Blomgren v. Tinton 783 Corp., 18 A.D.2d 979, 238 N.Y.S.2d 436 (1st Dep't 1963)); Baker v. Salzenstein, 314 Ill. 228, 145 N.E. 355 (1924); Kosmeri v. Sevin, 295 Ill. App. 345, 15 N.E.2d 20 (1938).

311. To adopt the view that rights are to be determined at the time of the decree would render *Graf* absolutely meaningless since courts could always examine what happened *after* acceleration, evaluate such situation based on that, and reject acceleration for payment defaults with virtual impunity.

in *Scheible v. Leinen*.[311] This is a conspicuously anomalous ruling because it denied the efficacy of acceleration while purporting to specifically confirm *Graf*. The court here simply did not wish to countenance foreclosure — at least not without a trial. The facts follow. When mortgagor submitted payments for April and May, he failed to realize they were actually for March and April. When a grace period expired on June 1, mortgagee responded by accelerating on June 3.[312] With a quick acceleration, no prior notice of default and a low interest mortgage — none of which bear on the effect of *Graf* — the court found the possibility of bad faith and unconscionable conduct.[313] Still further, the court determined that acceptance of one prior late payment could give rise to waiver.[314] While that too is against the weight of case law,[315] questions of fact are always difficult to assess from afar. In any event, this is another lower court decision which cannot be seen as effectively challenging *Graf*.

Another supreme court rejection of *Graf* on some unusual and extremely sympathetic facts is found in *Miller v. Kotzen*.[317] The mortgage documents were unclear as to precisely when mortgage payments were due. Nevertheless, the court construed conduct of the parties as establishing the fifteenth of the month as the due date. With a fifteen-day grace period, there could thus be no default until the thirtieth day of the month.

Mortgagor embarked upon timely payments, but then mortgagee went to Florida for the winter, although duly notifying mortgagor of the new address to which payments were to be mailed. The December installment, which should have been mailed to Florida, was posted to mortgagee's New York address. It was, nevertheless, forwarded and received, from which event the court concluded a waiver arose as to mailing destination.[318]

Mortgagor testified that he prepared the January check on January 14. He did not recall what address he placed on the envelope and conceded that he did not personally mail it. It never

312. 67 Misc. 2d 457, 324 N.Y.S.2d 197 (Sup. Ct. Monroe County 1971).
313. *Id.* at 458, 324 N.Y.S.2d at 199.
314. *Id.* at 459, 324 N.Y.S.2d at 200.
315. *Id.*
316. See supra notes 202-226 and accompanying text.
317. N.Y.L.J., Sept. 28, 1983, at 11, col. 2 (Sup. Ct. Bronx County).
318. *Id.*

arrived. Consequently, the mortgagee accelerated by letter dated February 4 — after expiration of the grace period. On February 8 a replacement check was sent. The replacement check and all subsequent checks were dutifully rejected by mortgagee.[319]

The court reviewed *Graf* at length, as well as a series of cases denying foreclosure,[320] and chose to disallow the foreclosure. It found that mortgagor's payment history was such that mortgagee should have known that mortgagor was reliable and creditworthy. Mortgagee should have further recognized, the court said, that the January installment was mortgagee's for the asking and should have realized something was amiss when not timely received. Failure to make inquiry followed by "immediate" acceleration was found to be a lack of good faith with the acceleration held "unconscionable and oppressive under the circumstances."[321]

There being no valid support in case law for the court's findings here, perhaps more significant was the determination that equity is available to provide relief from default arising from a loss in the mails. Such a holding, however, is unfortunate for two reasons. First, the citation in support is *Nove Holding Corp. v. Schechter*[322] a pre-*Graf* decision of questionable application at best. Second, a "lost in the mails" defense creates enormous practical problems since it is a facile defense, easily available without proof. Assuming a court is persuaded that an installment was mailed — although it was less than clear in this case — it *may* be that a loss in the mails is a third party error not to be considered as falling within the proscription of *Graf*. To the extent this case stands for such proposition, it may be a refinement of *Graf*, albeit untested by a higher court. However,

319. *Id.*

320. Conspicuous among the cases cited were Karas v. Wasserman, 91 A.D.2d 812, 458 N.Y.S.2d 280 (2d Dep't 1983), which did not entail a default for principal and interest, 100 Eighth Ave. Corp. v. Morgenstern, 3 Misc. 2d 410, 160 N.Y.S.2d 471 (Sup. Ct. Kings County 1956), which did not encompass a *Graf* fact pattern, Domus Realty Corp. v. 3440 Realty Co., 179 Misc. 750, 40 N.Y.S.2d 69 (Sup. Ct. N.Y. County), *aff'd*, 266 A.D. 725, 41 N.Y.S.2d 940 (1st Dep't 1943), a dubious attack on *Graf* at best, and Blomgren v. Tintoo 780 Corp., 33 Misc. 2d 1057, 225 N.Y.S.2d 347 (Sup. Ct. New York County 1949), which dealt with removal of personalty.

321. *Miller*, N.Y.L.J., Sept. 28, 1983, at 11, col. 2.

322. 218 A.D. 479, 218 N.Y.S. 623 (1st Dep't 1926). Also cited was Cossolo v. Torchinsky, 97 Conn. 353, 116 A. 613 (1922).

if it attempts to alter *Graf* with a sympathy approach, it appears to be incorrect and unsound as precedent.

The penultimate reported case purporting to erode *Graf* is the first at the appellate division level, *Fairmont Assoc. v. Fairmont Estates*.[323] While revolving around a claimed failure to make a payment, the circumstances are so dissimilar to *Graf* as to be a unique situation. Most critical here is that the mortgage contained a rarely encountered clause requiring mortgagee to give five days notice of default as a prerequisite to acceleration.[324] The events surrounding the default and the notice thereof create singular circumstances.

The convoluted facts are as follows. On March 31, mortgagor posted the check for the April installment. When the check was not received by April 4, mortgagee on that date mailed its notice of default. On April 6 the check was received and deposited. Mortgagee learned on April 13 that the check it deposited was to be returned for insufficient funds.[325] The source of what at that time ripened into a breach could not be clearly identified as an inadvertent error on the part of the mortgagor or its bank.

On that same date of April 13, mortgagee wrote to mortgagor to advise of the default — apparent because of the lack of funds — as well as an intention to accelerate.[326] Another cloudy issue develops here because the clarity of the acceleration is not known.[327] On April 15 the letter was received by mortgagor which was the first time mortgagor learned that its check was insufficient. Mortgagor immediately offered to replace the check and on April 18 it actually remitted the sum due. It was only on that day that the April 13 correspondence purporting to accelerate was received.[328]

Because mortgagee refused to accept the replacement check and waive the default, mortgagor instituted an action to declare the mortgage in good standing. Mortgagee counterclaimed for foreclosure and sought appointment of a receiver. Special term

323. 99 A.D.2d 895, 472 N.Y.S.2d 206 (3d Dep't 1984).
324. *Id.* at 895, 472 N.Y.S.2d at 209.
325. *Id.*
326. *Id.*
327. Recall that an acceleration must be clear and unequivocal and is ineffective if threatening acceleration in future. *See supra* notes 33-53 and accompanying text.
328. *Fairmont Assocs.*, 99 A.D.2d at 895, 472 N.Y.S.2d at 209

dismissed the counterclaims and the third department affirmed.[328]

An unresolved issue is whether mortgagee ever gave the notice of default required by the mortgage. Was that notice effective when the check was received or could it have been valid only five days after notification that the check bounced? It is perhaps an open question. The confluence of that conundrum, the unusual facts and the question of the authenticity of the acceleration, make it difficult to quarrel with the decision even if one were inclined to do so. But this was not a *Graf* situation. It is unfortunate that the ruling, which appears otherwise to be the correct result, takes issue with the efficacy of *Graf*. In addition, it again cites *Karas v. Wasserman*[329] as further support for the position, a case which inappropriately contests *Graf* since it does not address a principal and interest default.

The final and most recent instances of *Graf* besieged is found in *DiMatteo v. North Tonawanda Auto Wash, Inc.*,[330] which presents a misconstrued analysis. Payments were due on the first of the month with a seven-day grace period. The March payment was made by a check dated and delivered on March 2. It was deposited by the mortgagee on March 30, in the same bank on which the check was drawn. On the next day it was returned for insufficient funds. Mortgagor apparently attempted a number of times to tender the arrears but each time it was refused by mortgagee. Acceleration was accomplished on October 7 by filing the pleadings with the county clerk.[331]

Mortgagor offered proof that had the check been presented for payment any day up to March 15, or redeposited on March 31, it would have been honored. Hence, there is no *Graf* situation here since part of the fault at least reposed with mortgagee.

The court noted the default as the result of inadvertent mistake, mentioning mortgagor's claim that it was merely an error in balancing its checking account. This, the court found, raised factual issues sufficient to prevent foreclosure and deny

328. *Id.*

329. 91 A.D.2d 812, 458 N.Y.S.2d 280 (3d Dep't 1982). For a discussion of *Karas*, see *supra* text accompanying notes 250-253.

330. 101 A.D.2d 692, 476 N.Y.S.2d 40 (4th Dep't 1984).

332. *Id.* at 692, 476 N.Y.S.2d at 41.

summary judgment.[333] Precisely which factual issues could vitiate *Graf* were unstated.

In any event, this case should not stand as a decision weakening *Graf*. Tender was attempted at various times subsequent to default but prior to acceleration in October. Tender before acceleration is a complete defense,[334] and that alone could have disposed of the case. Nevertheless, the court chose to rely upon unconscionability as a defense. It analyzed *Graf*, observed unconscionability as an exception and analogized the instant facts to a case where acceleration in a lease had been voided by the court of appeals.[335]

VIII. Conclusion

When the court of appeals pronounced its doctrine in *Graf v. Hope Bldg. Corp.*,[336] it created an exigent precedent which gave great stability to the subject of mortgage foreclosure and, not incidentally, extensive comfort to any holder of a mortgage. Obviously, the basic obligation of a mortgage is for payments to be made. There are, of course, additional covenants, some more important than others, some of greater or lesser moment depending upon the peculiar circumstances of each case — factors which can vary so diversely as not to be susceptible to permanent unwavering rules.

Graf may be viewed then as having two applications, one general, one specific. In a broad sense, *Graf* stands for the proposition that the mortgage contract is inviolable, subject to exceptions, stated as waiver, estoppel, bad faith, fraud or oppressive conduct, all circumscribed by considerations of equity.

Specifically, where the default is failure to remit a payment due, relief cannot be granted to the mortgagor merely because his error was inadvertent or minor and even though the end result is perceived as harsh.

Returning to the general proposition, where the breach is

---

333. *Id.* at 693, 476 N.Y.S.2d at 41.

334. *See supra* notes 56, 57 and accompanying text. *See generally supra* notes 54-84 and accompanying text.

335. *DiMatteo*, 101 A.D.2d at 693, 467 N.Y.S.2d at 41 (citing Fifty States Management Corp. v. Pioneer Auto Parts, 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979)).

336. 254 N.Y. 1, 171 N.E. 884 (1930)

neither of the obligation to pay or violation of the due-on-sale clause (especially with the federal override imposed by Garn-St Germain) the courts retain what is apparently broad latitude to examine the exceptions and weigh the role of equity. Mortgagees will still insist upon strict construction of the mortgage contract and point to *Graf* in support of their position. Breaches are not to be taken lightly and foreclosure is indeed authorized and granted for a wide range of defaults. But in this realm, the factual situations will be of paramount importance. Based in part upon Chief Judge Cardozo's exceptionally persuasive dissent in *Graf*, the subsequent decisions based thereupon and the tenets of equity, the courts can and will assess the circumstances to arrive at a conclusion ultimately deemed fair. What precisely the result will be must be dependent upon the facts and therefore remains somewhat elusive.

Addressing again the more specific instances of failure to pay, *Graf* survives as potent as it has always been. Faced with the basic facts encountered in *Graf*, an acknowledged failure to pay, even under sympathetic circumstances, and absent waiver, estoppel or fraud — it being virtually impossible to qualify bad faith — there is no room for courts to fashion a perceived equitable remedy.

If a mortgagor innocently neglects a payment, the breach strikes so deeply to the heart of the sacred mortgage contract that courts are bound to enforce that agreement as written. The noted exceptions still exist, but critically it is *not* bad faith, nor oppressive or unconscionable for the mortgagee to insist strictly upon enforcing its right to immediately declare due the entire balance of principal and interest — that is, to accelerate. Nor can equity circumvent the impact of *Graf* where the failure is in payment.

The obvious discord and discomfort engendered by cases otherwise bound to follow the mandate of *Graf* has created a degree of backlash. But in the zeal of some courts to assuage the harsh result, they have conjured up a straw man on some occasions and attacked *Graf* when it was not necessary to do so. If payment, for example, was made, or validly attempted prior to acceleration, reference to *Graf* has no basis. Similarly, if acceleration has been waived, *Graf* has no application. For some courts then to assert the waning influence of *Graf* is both incorrect and

misleading. Furthermore, it creates an erroneous ground swell of dicta and purported precedent tending to undermine an area which requires stability.

The chagrin of some courts notwithstanding, until the court of appeals specifically addresses *Graf* anew — with regard to defaults for principal and interest — the doctrine, although sometimes criticized, has not been persuasively or effectively limited or changed.