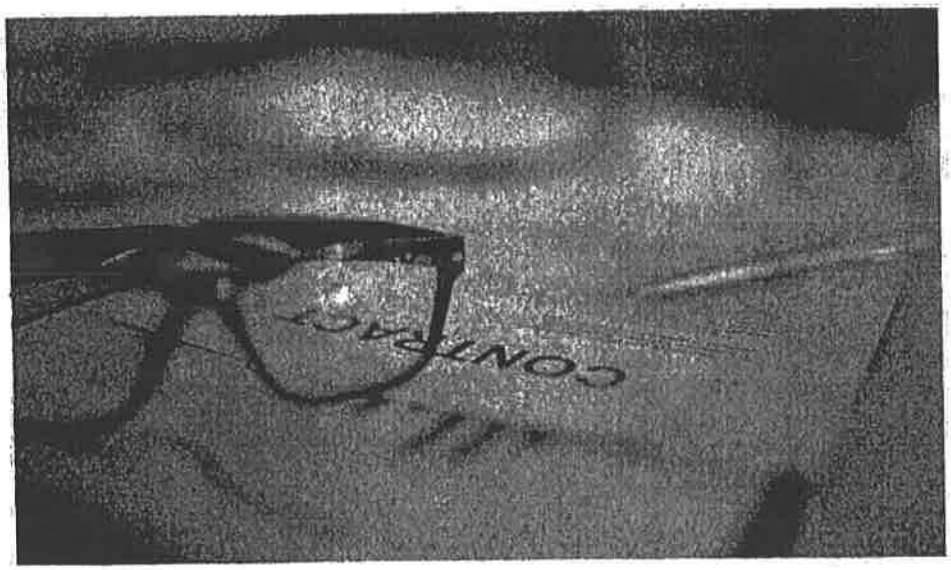
Three Areas Still Confusing the Statute of Limitations: Acceleration Letters, Complaint and Discontinuances

In his foreclosure column, Bruce Bergman discusses three questions still causing confusion when dealing with acceleration and the statute of limitations: (1) What language actually constitutes an acceleration? (2) Does the filing foreclosure complaint evince an acceleration? And (3) does discontinuance of a prior foreclosure revoke an acceleration?

By **Bruce J. Bergman** | December 08, 2020 at 02:27 PM



This is truly critical for lenders—and borrowers. Once the mortgage balance is declared due (acceleration), if six years passes, the statute of limitations has expired (assuming no tolling or extension), the mortgage cannot be enforced and the borrower retains all the borrowed funds. [This assumes that the plaintiff cannot avail itself of the savings provision of CPLR §205(a); see *1 Bergman On New York Mortgage Foreclosures* §2.20[2][a] LexisNexis Matthew Bender (rev. 2020) for review and citation.]. Perhaps surprisingly, and to the extraordinary dismay of lenders, this scenario occurs with frightening frequency.

Most of the issues arise regarding the moment of acceleration as a measuring point for the duration of the statute of limitations. Since much of this is an elemental concept of exceptionally long standing (it was being addressed at least as early as the mid-nineteenth century and likely in old England as well centuries before that) one might conclude that the issues were resolved more than decades ago so that they have long been graven in stone; not so.

There are three aspects which remain at least a bit fuzzy, certainly not as widely and lucidly recognized as they should be:

- What language actually constitutes an acceleration? [See 1 *Bergman On New York Mortgage Foreclosures* §4.05[1b], LexisNexis Matthew Bender (rev. 2020) for expanded discussion, to be reviewed in this article, *infra*.]
- Does the filing of a foreclosure complaint evince an acceleration? [Id.]
- Does discontinuance of a prior foreclosure revoke an acceleration? [See 1 *Bergman On New York Mortgage Foreclosures* § 4.03{1}, LexisNexis Matthew Bender (rev. 2020) for expanded discussion, to be reviewed in this article, infra.]

The answer to each question leads to the proverbial double-edged sword. If an acceleration *is* found, with the action later dismissed, the plaintiff is in danger of being unable to enforce the mortgage if by then the statute of limitations has expired. If, however, an acceleration is ruled *not* to have been declared, then the statute of limitations may not have expired and the plaintiff will be saved.

Acceleration Language

Observing that a letter can serve to manifest an acceleration, [See, *inter alia*, *Deutsche Bank Natl. Trust Co.* v. *Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 530, 48 N.Y.S.3d 597 (1st Dept. 2017), lv denied, 30 N.Y.3d 959, 960, 64 N.Y.S.3d 660, 86 N.E.3d 563 (2017)] abundant case law states that the exercise-the manifestation of the acceleration-must be overt, clear and unequivocal. "Clear" and "unequivocal" are the keys to the issue explored here. In the Second Department, it is insufficient to advise upon default that if payment is not forthcoming, acceleration will thereafter result. [See inter alia, *Bank of New York Mellon* v. *Maldonado*, 170 A.D.3d 1099, 97 N.Y.S.3d 162 (2d Dept. 2019).]

Likewise falling is a letter reciting that if payment in the form of certain future remittances is not made the result will be that the mortgage balance will be called and become payable. [*Pidwell* v. Duvall, 28 AD3d 829, 815 N.Y.S2d 754 (3d Dept. 2006).]. In sum, asserting that foreclosure or acceleration will occur *in the future* is not an efficacious acceleration [*Herzl Dev. Group, LLC* v. *Federal National Mortgage Association*, 175 A.D.3d 665, 108 N.Y.S.3d 197 (2d Dept. 2019)] (in the Second Department).

Examples of such muddy language highlight the point. Where the wording was that if the defendant's failed to cure the delinquency within 35 days, the servicer would "without further demand accelerate the maturity date of account and declare the total balance immediately due and payable," it was held not "clear and unequivocal" but instead a mere expression of future intent that falls short of an acceleration. [*U.S. Bank Natl Assoc.* v. *Sopp*, 170 A.D.3d 776, 95 N.Y.S3d 261 (2d Dept. 2019) (citations omitted).] For another example of many, see *U.S. Bank Natl. Association* v. *Gordon*, 176 A.D.3d 1006, 111 N.Y.S.3d 30 (2d Dept. 2019).

As mentioned, the prior discussion and all the cited cases holding that an expression of future intent cannot serve as a current, unequivocal, declaration are in the Second Department. Without referring to the Second Department, the First Department rules that announcing what will occur in the future *will be* an acceleration. [*Vargas* v. *Deutsche Bank National Trust Company*, 168 A.D.3d 630, 93 N.Y.S.3d 32 (1st Dept. 2019), *citing Deutsche Bank Natl. Trust Co.* v. *Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597 (1st Dept. 2017), lv denied 30 N.Y.S.3d 960, 634 N.Y.S.3d 661, 86 N.E.3d 553 (2017).]

For example, where a lender stated in a letter that the borrower's debt "will [be] accelerate[d]" and "foreclosure proceedings will be initiated" if the borrower failed to cure his default within 32 days of the letter, the First Department ruled that such language does constitute a clear and unequivocal intent to accelerate and commence and action. [*Vargas* v. *Deutsche Bank National Trust Company*, 168 A.D.3d 630, 93 N.Y.S.3d 32 (1st Dept. 2019), *citing Deutsche Bank Natl. Trust Co.* v. *Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597 (1st Dept. 2017), lv denied 30 N.Y.S.3d 960, 634 N.Y.S.3d 661, 86 N.E.3d 553 (2017).]

That it is a *future* intent certainly seems to raise a concern, but in addition, what is an intent at one moment is assuredly subject to change at a later time based upon a host of variable circumstances. In any event, it seems problematic at best to interpret what is declared to occur in the future as being a clear, unequivocal current act. While who in relation to the statute of limitations may benefit from a declaration that an acceleration letter is or is not efficacious will vary depending upon the issues in the particular case, concerns expressed about disparity in opinion here is not a polemic. Rather, it is a suggestion that this issue—the differences between the First and Second Departments—is unfortunate. Lenders and borrowers are entitled to know precisely what an acceleration letter requires to serve the purpose. Resolution in the Court of Appeals would be beneficial.

Filing Complaint as Acceleration?

Answering the query of the subheading, "yes, but..."

There is more than generous case law for the proposition that the filing of a summons and complaint with the court is an overt act which will effectively evidence the election to accelerate. [See, *Inter alia, U.S. Bank* v. *Greenberg*, 170 A.D.3d 1237, 97 N.Y.S.3d 133 (2nd Dept. 2019); *Bank of N.Y. Mellon* v. *Craig*, 169 A.D.3d 627, 93 N.Y.S.3d 425 (3d Dept. 2019); *U.S. Bank Trust, N.A.* v. *Aorta*, 167 A.D.3d 807, 89 N.Y.S.3d 717 (2d Dept. 2018).]. Such a statement however, is incomplete in that it fails to address whether the complaint itself declares an acceleration.

If a valid acceleration letter has been sent, then the complaint need not recite an election to accelerate. But if there has not been such a prior letter (and often such a letter is not sent), then the complaint itself must specifically declare the acceleration lest it be held insufficient to constitute an overt act of acceleration. [See, *inter alia*, *Reverse Mtge. Solutions, Inc.* v. *Fattizzo*, 2019 N.Y App. Div. LEXIS 3340, 99 N.Y.S.3d 361 (2d Dept. 2019); *HSBC Bank* v. *Rinaldi*, 177 A.D.3d 583, 111 N.Y.S.3d 115 (2d Dept. 2018); *U.S. National Bank Association* v. *Gordon*, 176 A.D3d 1006, 111 N.Y.S.3d 30 (2d Dept. 2019); *PennyMac Corp.* v. *McGlade*, 176 A.D.3d 963, 111 N.Y.S3d 367 (2d Dept. 2019).].

Moreover, where a complaint simply reiterates an "intention" delineated in an acceleration letter not before the court it is equivocal and does not effectuate acceleration. [In re Campbell, 513 B.R. (Banks S.D.N.Y. 2014).]. But where the complaint seeks the entire unpaid balanced of principal and interest, then the filing of the summons and complaint does constitute a valid election to accelerate. [See, inter alia, *Reverse Mtge. Solutions, Inc.* v. *Fattizzo*, 2019 N.Y App. Div. LEXIS 3340, 99 N.Y.S.3d 361 (2d Dept. 2019); Bank of New York Mellon v. Dieudonne, 171 A.D.3d 34, 96 N.Y.S.3d 354 (2d Dept. 2019); Caliguri v. Pentagon Federal Credit Union, 168 A.D.3d 802, 91 N.Y.S.3d 481 (2d Dept. 2019).]

If one examines *all* the cases with care, the result on this point is not hazy. The problem is that because so many decisions recite merely that the filing of complaint serves as an acceleration (without observing the necessity to declare an acceleration) the correct maxim can be forgotten. It should not be.

Discontinuances as Revocation of Acceleration

Very much intertwined with the acceleration / statute of limitations scenario is the ability of a plaintiff to revoke an acceleration (and thus remove the start of the running of the statute of limitations). It can be said that to be effective, the revocation must be an affirmative act of the mortgage holder. [See, *inter alia*, *EMC Mortg. Corp.* v. *Patella*, 279 A.D.2d 604, 720 N.Y.S.2d 161 (2d Dept. 2001).]

A main area of focus in this regard is the discontinuance of the foreclosure action which precipitated the acceleration. One might think that when that action vanishes by volition, so too should the acceleration which was such an integral part of that action; it seems like the mentioned affirmative act of the mortgage. But it is not quite that simple. There is some degree of incongruity in the cases, and a few impose additional requirements.

It has been held that a foreclosing plaintiff's pre-answer voluntary discontinuance made prior to expiration of the statute of limitations *may* be sufficient to constitute revocation of an acceleration manifested by filing of the action. [*Deutsche Bank Natl. Trust Co.* v. *Lee*, 2018 N.Y. Misc. LEXIS 392, *citing Assyag* v. *Wells Fargo Bank, N.A.*, 2016 N.Y. Misc. LEXIS 5249 (Sup. Ct. Queens County, Sept. 19, 2016); *4 Cosgrove 950 Corp.* v. *Deutsche Bank National Trust Co.*, 2016 N.Y. Misc. LEXIS 4901 (Sup. Ct. N.Y. Co., May 11, 2016).].

Further Supreme Court level authority rules that a discontinuance order—even post-answer—does serve as revocation of acceleration. Appeal level authority clarifies (in a sense) holding that generally a foreclosure discontinuance order raises a question

of fact as to whether the motion can be deemed an affirmative act of revocation. [*NMNT Realty Corp.* v. *Knoxville 2012 Trust*, 151 A.D.3d 1068, 58 N.Y.S.3d 118 (2d Dept. 2017).]

Perhaps more strongly against the efficacy of a discontinuance generally is the view that it fails to revoke an acceleration if it is silent on the subject of acceleration. [*Bank of N.Y. Mellon* v. *Craig*, 169 A.D.3d 627, 93 N.Y.S.3d (2d Dept. 2019); *U.S. Bank Trust, N.A.* v. *Aorta*, 167 A.D.3d 807, 89 N.Y.S.3d 717 (2d Dept. 2018).]. For example, where a foreclosure was dismissed founded upon expiration of the statute of limitations, the discontinuance order was found wanting to revoke the acceleration because it did not mention acceleration—nor did the record on appeal reveal any motion papers in support of the order which might have elucidated the acceleration issue. [*U.S. Bank N.A.* v. *Leone*, 175 AD.3d 1452, 109 N.Y.S.3d 123 (2d Dept. 2019).]

Similarly, a discontinuance motion and its order, neither of which provided for de-acceleration, nor asserted that the plaintiff would thereafter be accepting installments towards the mortgage, created a question of fact as to any possible revocation of acceleration. [*U.S. Bank N.A.* v. *Charles*, 173 A.D.3d 564, 105 N.Y.S.3d 388 (1st Dept. 2019).]

In sum in this realm, while there is some authority that a discontinuance revokes an acceleration, a foreclosing plaintiff would be unwise to rely on the principle. If the discontinuance is intended to be that revocation it will probably need to specifically say so if there is to be assurance that it will serve the purpose.

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