MORTGAGE LITIGATION

Can Laches Ever Defeat a Mortgage?

By **Bruce J. Bergman**

Perhaps unexpectedly, a recent case says "yes" and this is a scary (but salutary) ruling for any mortgage holder—although it is appropriate to add that the reckoning could have been avoided if the mortgage holder was more careful in paying attention to its situation. [*Bank of New York v. Terrapin Industries, LLC*, 189 A.D.3d 620, 139 N.Y.S.3d 149 (1st Dept. 2020).]

There is an immediate perspective as to why laches as a possible defense is particularly worthy of consideration. While in significant commercial cases borrowers' defenses tend to be related to the realities of the transaction (whether foreclosing plaintiffs deem them valid or not), in the residential situation, candor elicits the observation that "shotgun" defenses are oft-encountered. It is not unusual for answers in residential foreclosure cases to contain 10, 20 or even 30 or more affirmative defenses.

While a legitimate defense could of course exist in any given case, it should be apparent that all of those could not possibly apply in a single case. Yet, there is some tendency for borrower defendants to assert every conceivable defense in the hope that something might work. Typical on the list is the doctrine of laches for which there is rarely any colorable support. Even where it might actually be argued in opposition to a motion for summary judgment—beyond merely being recited in any answer—overwhelmingly it is unsuccessful. Given that vantage point, where laches *does* threaten the integrity of a foreclosure action, it is both unusual and noteworthy.

First a reminder as to what laches is and why it typically does not imperil a mortgage holder.

As a general rule, laches is not a defense to a mortgage foreclosure action. [For extensive discussion on the subject see *1 Bergman on New York Mortgage Foreclosures* § 5.10, Matthew Bender LexisNexis (rev. 2021)]. The essence of the doctrine of laches is an estoppel against a party seeking to assert a right; it would be inequitable to exercise a right after the passage of a lengthy period of time during which period the other party has changed its position.

Further defined by case law, the defense of laches is founded upon unreasonable delay by one to the prejudice of another. And the doctrine applies solely where equity is called upon to afford a purely equitable remedy to which the party has no strict legal right.

Laches might on its face appear to be colorable if asserted by a borrower when a lender takes some time—or even years—to initiate its foreclosure action. But delay alone does not support a laches defense—there has to be some damage resulting.

More compelling, and this is the dispositive aspect, where the statute of limitations controls (and in a mortgage foreclosure situation that is six years), laches cannot play a role. If a lender wants to wait five years, for example, to start a foreclosure action, that is certainly a long duration, but because the statute of limitations has not expired, the action is valid and laches offers no defense. In sum, the equitable defense of laches is unavailable in an action commenced within the applicable period of limitation.

But the recent case mentioned presented different circumstances. There, a lender encountered a number of mishaps but was very slow to cure its problems. This is best understood through a graphic presentation of the events, as follows:

4/9/07: Bank A mortgage (on a condo) executed (recorded shortly thereafter, case did not specify)

3/2008: Bank A commences foreclosure

3/2011: Bank A's lis pendens expires

3/2012: Bank A's foreclosure marked by court "disposed"

8/21/14: Borrower enters judgment discharging and cancelling Bank A's mortgage

Early 2015: Bank A makes second motion to restore its foreclosure (not yet granted)

Early 2015: Bank B searches record, finds no prior mortgage and records its own mortgage

Upon digesting these events, it becomes apparent that Bank A waited three years to move to have its marked-off foreclosure restored to the calendar. It is not clear whether the case having been disposed of was appropriate or inappropriate, but Bank A waited far too long to pursue its rights to reinstate the action, thereby allowing another lender to take a mortgage when the record revealed there was no foreclosure action.

In addition, Bank A's mortgage had been cancelled and discharged in 2014, so when Bank B searched the record to file its own mortgage a year later, there wasn't even a record of a prior mortgage in existence.

The legal effect of these events was that the doctrine of laches *was* imposed because Bank A delayed in curing its issues. As an adjunct point, when Bank B searched the public record it found no trace of any mortgage or mortgage foreclosure action. This made Bank B a bona fide purchaser for value so that its later recorded mortgage was valid and superior to Bank A's mortgage which, after all, had been discharged.

As a practical matter, and as mentioned, a laches defense is typically encountered when a borrower seeks to assail a mortgage acceleration, charging that it is somehow late. But if the statute of limitations applicable to the cause of action has not expired, the defense will be to no avail. Beyond that fact pattern laches can *sometimes* appropriately be involved. For a discussion of those instances, see *1 Bergman On New York Mortgage Foreclosures* § 5.10[2], LexisNexis Matthew Bender (rev. 2021).

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While the circumstances of the subject case are not necessarily an everyday occurrence, neither are they so farfetched. In any event, the lesson is clear that attention to litigation status by a mortgage holder is critical: if there is something to be done, it must be addressed with reasonable dispatch lest an undue delay create an untenable situation—that is, application of laches to banish the earlier mortgage.

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