Bruce J. Bergman

EXPERT OPINION

J'Accuse: Proposed Legislation Devastating to Mortgage Holders

In his Mortgage Litigation column, Bruce Bergman discusses what he believes to be a disastrous new legislation, the ominously titled "Foreclosure Process Abuse Prevention Act."

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By Bruce J. Bergman

Since at least 2007, the New York State Legislature has been promulgating multi-faceted borrower-friendly statutes. While politically this was understandable, whether there was ever *empirical* evidence that these statutes were substantively meaningful has never been published.

What has been apparent, though, is that mortgage foreclosure actions in New York became far more difficult, much more time consuming and presented a host of traps for foreclosing mortgage holders, all leading with considerable regularity to foreclosure actions being returned to an earlier stage, or being dismissed outright. A reading of published cases readily confirms this as a fact.

Prominent among the ruinous consequences to foreclosing parties have been case dismissals based upon expiration of the statute of limitations. Indeed, it remains remarkable how often lenders are defeated by a statute of limitations claim—the result of course being that the borrower retains the property and the lender is paid nothing. Short of reading all the reported cases to confirm this, examples can be found at 1 *Bergman on New York Mortgage Foreclosures* §s 2.20(2) and §5.11, LexisNexis Matthew Bender (rev. 2021).

Perhaps not surprisingly, the regular jousting about the statute of limitations has led to some confusion. One aspect was the effect of a discontinuance of a foreclosure action. An underlying concept here is that a declaration that a mortgage balance is due, the acceleration of that sum, can arise either from a letter to that affect sent by a lender, or the commencement of the foreclosure action by the filing of the complaint containing a declaration of acceleration. The statute of limitations begins to run upon either event.

Notwithstanding that the foreclosure might later be dismissed by court order, the acceleration survives and the statute of limitations continues to run.

If, on the other hand, the foreclosure action is *discontinued,* an issue arose as to whether revoking the acceleration was a part of that discontinuance. It had become a thorny, disjointed question of fact.

That latter issue (among others) came to the Court of Appeals which resulted in a particularly clear and incisive ruling in *Freedom Mortgage Corporation v. Engel*, 37 N.Y.3d 1, 169 N.E.3d 912, 146 N.Y.S.3d 542, which held that discontinuance of a foreclosure action does cancel the acceleration created by commencement of the action. That the volitional act of a foreclosing plaintiff in discontinuing an action serves also to cancel the volitional act of declaring the balance due is certainly a sensible, logical

conclusion. The Court of Appeals ruling was well thought out and disposed of the muddle that case law had become in trying to interpret the meaning of a discontinuance.

Whether in direct response to the Court of Appeals holding or not, Senate Bill 5473 was prepared. (It did not come to a vote at the last legislative session, but may yet be considered at the next session.) Its ominous short title is "Foreclosure Process Abuse Prevention Act." This immediately exposes the belief on the part of the Legislature that foreclosure actions are being abused. Where this comes from is unstated, and how such abuse has survived the surfeit of legislative acts since 2007 in aid of borrowers is puzzling indeed.

Although this new legislation has more components than addressed here, it can be observed that it would remove the ability of a foreclosing party to revoke acceleration, reverse the Court of Appeals by providing that discontinuance does not vitiate acceleration, eviscerate the savings provision allowing for an action to be started anew six months after dismissal with "any neglect" being a bar to that restarting, causing the statute of limitations to begin running at a much earlier time and awarding legal fees to borrowers when a foreclosure is dismissed for *any* reason.

CPLR §203: Revocation of Acceleration Barred

Section 2 of the proposed statute adds to CPLR §203 (otherwise benignly headed "Method of Computing Periods of Limitation Generally") a new subsection (h), declaring that upon accrual of a cause of action (read as the running of the statute of limitations in a mortgage foreclosure case), no party can waive, postpone, cancel or reset the accrual or unilaterally extend the

limitations period (howsoever that might be accomplished) unless expressly permitted by law.

This amendment would abrogate the ability of a lender to revoke its own acceleration. There are many good reasons why a lender might wish to withdraw an acceleration it had previously declared—and it always had the ability to do so by sending to the borrower a clear letter saying just that. Case law since 1905 always supported this ability on a lender's part (unless the borrower would be prejudiced by the cancellation). It may now be gone should the statute pass.

CPLR §317: Voluntary Discontinuance

Section 8 of the proposed statute amends CPLR §3217 (relating to voluntarily discontinuance of an action), adding new subsections (d) and (e), patently designed to void the effect of the recent Court of Appeals ruling in *Freedom Mortgage Corporation* v. *Engel*, *supra*. The new subdivision (d) provides in essence that a discontinuance of a foreclosure action will *not* vitiate the acceleration created by the filing of the complaint and the initiation of the action – unless the discontinuance is accompanied by documentation provided for in General Obligations Law Article 17—a strict and careful writing waiving the statute of limitations. [The new subdivision (e) requires that any such notice or stipulation or certificate waiving or revoking the statute of limitations must henceforth be filed with the County Clerk by the defendant.]

CPLR §205: Six Month Savings Provision

Section 3 of the proposed statute amends CPLR §205(a) which is the savings provision. As now constituted, if the foreclosure action has been dismissed, at which time the statute of limitations has expired, there is limited authority

which allows the action to be initiated anew. If an action was timely commenced but later terminated, the plaintiff is permitted to commence a new action upon the same transaction within six months after the termination.

A number of provisos in the existing statute, however, already limit the ability to restart the action. The most critical existing practical limiting factor is its unavailability if termination of the action was accomplished by voluntary discontinuance, neglect to obtain jurisdiction over the defendant, dismissal for want of prosecution or final judgment on the merits. This provision has worked well over the many years of its existence and indeed, in 2019 the Court of Appeals reviewed the statute, explained its meaning and interpreted it liberally, suggesting strongly the value of this statute as presently constituted. [*U.S. Bank Natl. Assn.* v. *DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72 (2019)]

The new statute would replace "neglect to prosecute the action" with the encyclopedic "any form of neglect", including those specified in subdivision (c) of CPLR §3215 (the one year rule to file a default judgment), §3216 (want of prosecution) and §3404 (action stricken and not restored within one year) as well as NYCRR §202.27 (failure to appear for a calendar call) or §202.48 (failure to settle or submit a judgment within sixty days).

It is readily apparent that this change has the potential to *severely* restrict the ability of a foreclosing plaintiff to avail itself of the savings provision. First, "any form of neglect" is exceptionally broad and ultimately indefinable. It will subject many an attempt to employ CPLR §205 to a charge that there *was* neglect. While a delineation in the proposed new statute of various sections as examples of neglect certainly give a clue as to the legislature's intention, it is not an exclusive list. Moreover, the aspects cited as examples

are categories where any party to litigation could be inadvertently trapped for innocuous reasons. Again, this legislation emphasizes the assumption that foreclosing parties are purposefully punishing foreclosure defendants with delay when in actuality such delays are unwanted and unwelcome by plaintiffs. But such missteps can occur in the natural course of litigation; they are almost never purposeful.

Further, the proposed new language adds to the definition of the plaintiff seeking to avail itself of the statute the word "original". This is confusing at best and very likely perilous. An "original" plaintiff in a foreclosure action is often replaced by a successor or assignee in the course of modern mortgage commence. If only the "original" plaintiff is authorized to avail itself of this savings provision, the existing statute will too often have no application at all. While clarification is noted that the assignee of a plaintiff shall not be deemed the plaintiff unless acting on behalf or asserting the rights of the original plaintiff, it will still be fertile for confusion; suppose for example that the assignee had entered into a forbearance agreement. Are those the same rights as the "original" plaintiff? The various settlement path attempts commonplace in mortgage foreclosure actions will too often raise questions as to whether the remedy being pursued by an assignee is precisely the same as the remedy which was sought by the original plaintiff.

CPLR §206: Commencement of Statute of Limitations

Section 4 of the proposed statute seeks to amend CPLR §206, subsection (a) of which provides that where a demand is necessary to entitle commencement of an action, the time in which the action must be commenced is computed from the time the right to make the demand is complete. This, however, has had little application to mortgage foreclosure actions, primarily because the right to accelerate the mortgage balance has always been, as a matter of law

and as a matter of typical mortgage drafting, an *option* on the part of the plaintiff. Acceleration of a mortgage, and the need to begin an action (although acceleration can be accomplished by the filing of an action) was never automatic and the encouragement of foreclosure litigation was always to be discouraged.

The proposed statute would add a subsection (e) which provides that where a standard Fannie Mae or Freddie Mac form of mortgage is employed (which requires a 30-day notice as prerequisite to accelerating the mortgage balance) "the time in which the action must be commenced shall be computed from the time the right to demand immediate payment in full of all sums so secured thereby may be exercised."

This may be difficult to interpret and the precise intention is not clear, but it apparently intends to start the statute of limitations running very early. To explain, the moment a borrower defaults on the mortgage (typically in making a payment), a lender has the right (the option) to accelerate the balance, either by sending a letter so declaring, or by filing the summons and complaint to initiate the foreclosure action. In the case of the Fannie Mae or Freddie Mac uniform instrument, the ability to accelerate does not exist until the day letter is sent. Once that is done, then the right to demand full payment flowers.

But the current status of law is that the mortgage holder retains the option to accelerate notwithstanding that the 30-day notice has been sent. With acceleration not having been manifested, the statute of limitations does not commence. The new statute would start the statute of limitations running (it appears) the moment the 30-day period was complete. The optional aspect of acceleration is destroyed. At the very least this will compel mortgage holders

to initiate foreclosures as rapidly as possible—hardly, it would seem, a desired practice.

If a lender might fear the running of the statute of limitations at that early date, then it would need to volitionally *refrain* from sending the letter. If the statute of limitations will begin to run that early, in addition to removing the optional component of declaring the mortgage balance due, it may discourage settlement negotiations by way of forbearance agreements, modification agreements and any other methodologies. Lenders would be reluctant to pursue settlement unless the foreclosure has been initiated. Discouraging settlements certainly should not be a goal.

RPL §282: Legal Fees to Borrower

Section 12 of the proposed statute amends to some extent, but as is most meaningful, adds a new subsection 3 to RPL §282. What exists now is a provision that affords legal fees to a mortgagor if he successfully defends a foreclosure action where the mortgage has allowed legal fees to the mortgagee.

This statute in present form is adapted from RPL §234 providing for legal fee recompense to a tenant in an action or summary proceeding where the tenant is successful and there had been a legal fee provision in the lease providing for such recovery to the landlord.

Given that origin, there had always been the expectation that the standards of §234 would apply in the foreclosure arena and that has essentially been confirmed by case law. That is to say, the tenant victory which elicits a legal fee award is generally substantive, not based for example upon a notice error.

Per case law, voluntary discontinuance of a foreclosure without prejudice and absent substantive determination on the merits of either a plaintiff's cause of action or a defendant's counterclaim precludes a finding of successful defense and bars a conclusion that a defendant was a prevailing party; thus no award of counsel fees to that defendant.

Similarly, where a foreclosure has been dismissed upon a borrower defendant's motion founded upon plaintiff's lack of standing, but without prejudice, the defendant is deemed not to have prevailed in an ultimate outcome and is not entitled to attorney's fees.

The proposed addition, however, provides that "for the purposes of this section 'successful defense' of any action…commenced by the mortgagee shall mean any form of dismissal action…with or without prejudice, on the court's own initiative, after trial or upon application or motion made by the mortgagor… ."

This *assures* that if a foreclosing party errs, or stumbles in any way, whether it be failing to dot an "i" in a notice, or having an issue with process service, or any one of scores of reasons nowadays why a foreclosure action can be dismissed or must be started anew, the mortgagor would still be entitled to legal fees. This truly presents a peril to any mortgagee simply wishing to enforce its rights when a borrower has defaulted upon a mortgage.

CPLR §306-b: 120-Day Service Rule

Section 5 of the proposed statute adds an amendment to CPLR §306-b which is the 120-day rule: service of process must be effected within 120 days of initiating the action. Sometimes, however, defendants can be difficult to serve, and it is hardly unheard of that defaulting mortgagors may sometimes

seek to avoid service of process. If service cannot be made within 120 days, there is a basis—good cause shown or the interest of justice—for the plaintiff to seek an extension of time.

If a motion is made to dismiss for want of compliance with the 120 day rule, dismissal is to be without prejudice. One would think that a foreclosing party would respond to such a motion, but it is possible that notice can be misdirected or misplaced or some other mishap can befall that plaintiff.

The new statute provides that "a motion to extend the time for service upon a defendant under this section shall be denied as untimely if it is made after the entry of any order or judgment of dismissal." In other words, if the foreclosing plaintiff misses a motion to dismiss for want of service during the 120-day period, regardless of any excuse it may have, and regardless of the interests of justice, and even where the plaintiff has a perfectly good cause of action, that foreclosure is simply gone.

Conclusion

As things are now, and without any further legislation, foreclosing parties are having a very difficult time negotiating the statutory framework and prosecuting foreclosure actions which now literally consume years and are often set back to their outsets or dismissed outright. What reason then could there be for all the draconian changes proposed by the subject litigation? It is particularly ironic that the extensive delays imposed upon the progress of foreclosure actions by prior legislation will now serve to create foreclosure dismissals for the running of the statute of limitations even more often, dramatically abetted by this new legislation.

One could inquire again about the reason for that, but then the title of the proposed legislation answers the question: Our solons believe that foreclosure litigation is being abused and that somehow borrowers are suffering thereby. Mortgage holders could not disagree more strongly.

Bruce J. Bergman *is a partner with Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is the author of "Bergman on New York Mortgage Foreclosures" (four vols., LexisNexis Matthew Bender, rev. 2021).*