MORTAGE FORECLOSURE

Foreclosure Abuse Prevention Act: Time and Settlement

By **Bruce J. Bergman**

Time has always been a vital factor in the prosecution of mortgage foreclosure actions—whether commercial or residential—in part because recouping the lender's money with some dispatch (a word which too seldom finds fulfillment in New York foreclosure actions) was desirable.

More important, the passage of time generates accrual of interest, lender advances for taxes and insurance (perhaps as well property maintenance costs and advances to senior mortgages). In short, time has genuine, practical meaning.

Notwithstanding this verity, New York State legislators have since the millennium promulgated a striking series of borrower-friendly statutes. Not incidentally, and a concept which seems to go unnoticed, these very statutes graft considerable time onto the foreclosure process, both by virtue of their own directives and by fostering requirements which are landmines for lenders; there is just ready room for the foreclosing party to err and thereby incur yet further time.

Despite these multiple aids to borrowers, the legislators concluded that borrowers were still suffering as disadvantaged, nay, oppressed—hence passage of the Foreclosure *Abuse* Prevention Act effective Dec. 29, 2022 (Emphasis supplied).

The conspicuous aspects of the statute have been written about (this was hardly a minor tweak), the borrower defense bar, delighted with benefits abundantly bestowed upon borrowers, praised the provisions. Lenders condemned it for its clearly deleterious effects. One facet not directly addressed, however, was the specific relationship of the statute to the consumption of time in the foreclosure process and in turn the ability to employ time in settling any particular case.

The Act amends a mélange of different statutes. Discussion here will focus upon only those provisions relating to a time-barred result and settlement considerations.

Changes Imposed by the Act

Lenders have always been comfortable with the knowledge that once an acceleration of the mortgage debt is manifested, they retain the right to cancel the acceleration on their own, whether that acceleration was accomplished by letter or commencement of a foreclosure action.

Because mortgage foreclosure actions in New York can, not infrequently, consume up to and more than six years, the existential peril to lenders was that an action could be dismissed at which time the statute of limitations (six years) could have expired.

Therefore, if a particular case could be foreseen as heading to that predicament, a lender could choose to withdraw the acceleration, so long as there was compliance with certain standards, which was not difficult to accomplish. (There is a fair amount of case law on that but it was something that could be handled.)

The Act, however, adds a new CPLR §203(h) which in sum provides that no party may in form or effect unilaterally waive, postpone or cancel in any way or purport to affect an extension of the statute of limitations. In other words, the right to unilaterally cancel an acceleration has been eliminated.

This greatly increases the danger of a lender being bogged down in a foreclosure, and abetted by a litigious borrower and the difficult borrower friendly statutes, suffering dismissal of an action after the statute of limitations has expired.

The rescue of cancelling the acceleration and starting the statute of limitations running anew has been eliminated by the Act. Moreover, if at any time during the course of an action in such danger the lender wished to settle the case, the duration of any settlement might contribute to the time consumed by the case, therefore amplifying the danger of invocation of the statute of limitations.

To the extent that lenders and borrowers can benefit from foreclosure settlements, a lender's incentive to participate in that may very well be reduced by provisions of the Act.

It has long been the law [CPLR §205(a)] that if a foreclosure action has been dismissed, by which time the statute of limitations has expired, the plaintiff is permitted to commence a new action upon the same transaction within six months after termination. This is conditioned upon certain standards: termination of the action cannot have arisen from voluntary discontinuance, or lack of personal jurisdiction, or want of prosecution or final judgment on the merits.

The Act creates a new section 205-a, adding to the events which preclude starting a new action: dismissal of the complaint for any form of neglect, including, but not limited to a host of statutory violations, including the breach of any court rule or individual part rule for failure to comply with any court scheduling order, or by default due to non-appearance for conference at a calendar call or by failure to timely submit any order or judgment.

The practical effect of this, which might be lost on non-practitioners, is that the sundry disqualification events can readily befall a case for the most innocent of reasons. The Act greatly increases the likelihood that an action which has run afoul of the statute of limitations will not benefit from the ability to start the action anew within six months.

Yet again, the accrual of time imposed by prior statutes and resulting from procedure in New York threaten any foreclosing party. They also militate against devoting time to any settlement of the foreclosure action.

Further jeopardy arises from the Act's addition to CPLR §213(4) of new subparagraphs (a) and (b) which effect another not uncommon situation. Especially with mortgage loans being regularly assigned, a foreclosure may be commenced by a party which actually did not have the standing to start the action.

If that action is dismissed or discontinued and a later foreclosure is begun, depending upon the timing, a defendant might interpose the defense of the statute of limitations in the latter action because six years could have expired from the initiation of the first action.

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In such an instance, the foreclosing party would oppose the defense of the statute of limitations by arguing that the initial acceleration was invalid because the party which exercised it was bereft of authority to do so. The new statute, however, bars that defense *unless* that first action was dismissed for the very reason of lack of standing or authority to have accelerated.

The other change applies this concept to a bar claim or quiet title action where a property owner is seeking to dismiss a mortgage of record. The holder of that mortgage is precluded from arguing that any prior action never started the statute of limitations running – unless a court had dismissed that prior action for that reason of lack of authority or standing. These are thus two additional instances where the threat of the statute of limitations is elevated against the lender.

Just as insidious as the Act's removal of a lender's ability to withdraw an acceleration (discussed, *supra*) is amendment of CPLR R 3213 adding a new subsection (e) which declares that discontinuance of a foreclosure action cannot serve to cancel the acceleration even though acceleration was effectuated by initiation of the action. This is yet again another assurance that the passage of time is more likely to torpedo a lender and a warning that any time consumed by settlement efforts could create jeopardy for a lender.

Conclusion, and Hope

It should be apparent from the foregoing, and it needs no further exploration, that the Act creates serious time and settlement problems for any foreclosing party. That observed, what nonetheless remains are the provisions of General Obligations Law §1705 (albeit changed somewhat by the Act) which permit the statute of limitations to be extended, tolled or reset by a writing signed by both the lender and the borrower.

Thus, any stipulation or forbearance agreement, as a method to settle a foreclosure action, will be wise to clearly set forth agreement to the extension of the statute of limitations.

Failing in that, there will be too many fact patterns which could allow the statute of limitations to expire with the result that the borrower retains the property with no threat of an action to foreclose it, while the hapless lender derives no money. Whether a borrower would be willing to volitionally extend the statute of limitations in writing will always be a question, but absent pursuit of that path, unacceptable consequences to the lender would continue to exist.