MORTGAGE FORECLOSURES

Acceleration (and SOL): Stronger Than Death

By **Bruce J. Bergman**

Practitioners who have seen old mummy movies from the 1930s may notice an analogy. No matter how often the creature was destroyed, he rose again—hence "The Mummy," "Return of the Mummy," "Ghost of the Mummy," among others. So too acceleration of a mortgage seems to have eternal life, even were it not abetted by the Foreclosure Abuse Prevention Act (FAPA).

It is perhaps remarkable that nuances attendant to acceleration of a mortgage debt and the running of the statute of limitations continue to arise and surprise. A recent case in this category highlights the continuing, ever-present danger foreclosing lenders and servicers confront with the statute of limitations, under what surely must be seen as counterintuitive circumstances [See *Wilson 3 Corp.* v. *Deutsche Bank National Trust Company*, 219 A.D.3d 870, 195 N.Y.S.3d 497 (2d Dept. 2023)].

Particularly unusual here is the unique confluence of events: death of a party prior to foreclosure action and its effect upon the litigation, more than six years of delay with the action lying fallow, the role of acceleration in this mix, all followed by an owner's action to cancel the mortgage.

Recognizing that the decision under consideration ruled the statute of limitations expired, a didactic aside is tempting. FAPA was designed in significant part to strengthen the position of borrowers when asserting a statute of limitations defense. The recent case discussed here confirms yet again how often foreclosing parties lose on the statute of limitations issue, calling into question the need for the remedies of FAPA.

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Briefly reciting the facts of this case, followed then by the legal principles applied will best serve to make sense of what lenders and servicers just might find perplexing. It also exposes missteps to avoid.

Borrower signed a note and mortgage in November 2006 and thereafter died. In June 2008 lender commenced a foreclosure action naming that borrower who, presumably unbeknownst to the foreclosing plaintiff, was by that time deceased.

As part of the complaint, the plaintiff pleaded that it thereby declared due the full balance of the mortgage. This is typical and recommended to empower filing of the complaint to accelerate the mortgage balance; without such a declaration in the complaint there would be no required acceleration.

Why the plaintiff took no further action after beginning the case is unstated. Long delays often portend potential peril to a foreclosing party and this case is a prime exemplar. Something was likely to happen and it did.

In August 2014, more than six years after initiation of the action, the court dismissed the foreclosure for failure to prosecute. On appeal, the court vacated the dismissal, founded upon one of the central principles: Because the borrower died prior to commencement of action, the foreclosure was a legal nullity from its inception. (Thus, there was no need to vacate an action which in essence never existed.)

Meanwhile in 2016 [which would be eight years after the (void) foreclosure had been begun] the property owner initiated an action to cancel the mortgage of record, citing expiration of the statute of limitations.

The case now arrives at the startling conclusion. Mindful that for the statute of limitations to run, the mortgage balance had to have become due, notably via acceleration, the foreclosing party argued that because the action was a nullity, so too was the acceleration expressed in that action. The court disagreed. It held that even though the foreclosure was indeed a nullity, that did not revoke, invalidate or otherwise destroy the express invocation of the contractual election to accelerate the debt. In other words, even though the foreclosure was void from the inception, the acceleration contained within that nullified pleading survived – and started the statute of limitations running at the moment the foreclosure complaint was filed. Therefore, any new foreclosure which might be brought would be barred by the six year statute of limitations. Cancelation of the mortgage was granted.

The extraordinary resilience of the declaration of mortgage acceleration has been yet further elevated.

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