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New York's Highest Court Considers Statute of Limitations

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Since the financial crisis, servicers and their counsel have struggled with statute of limitations (SOL) challenges in New York. Longer timelines, frequently dismissed cases and tougher proof standards – even in uncontested cases – have created a toxic mix that can lead to total lien loss. Even worse, inconsistent and sometimes contradictory application of the law by different trial and appellate courts has led to confusion and uncertainty. The same exact fact pattern might yield different results in Brooklyn than it would a mile away in Manhattan, because they are subject to different governing appellate divisions even though both are part of New York City. But relief may be on the way, or it least perhaps some clarity and consistency, because the Court of Appeals (New York's highest court) is currently considering a critical SOL case, *Freedom Mtge. Corp. v. Engel*, 163 A.D.3d 631 (2d Dep't 2018), *lv. app. granted* 103 N.Y.S.3d 12 (APL-2019-00114).

At issue in *Engel* is whether a lender who exercises the right to accelerate through the initiation of foreclosure may revoke that election by voluntarily discontinuing the action at a later date. The Appellate Division, Second Department found that a lender cannot, by discontinuance alone, revoke the election to accelerate a mortgage debt.

Offering no explanation or reasoning, the Second Department held that "the plaintiff's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." 163 A.D.3d at 633.

But this conclusion is not consistent with precedent from the Court of Appeals that goes back well over a hundred years. Addressing the legal effect of the voluntary discontinuance of a prior foreclosure in *Loeb v. Willis*, 100 N.Y. 231 (1885), the Court of Appeals said "[t]he foreclosure action was discontinued, and all the proceedings therein thus annulled. . . . By the discontinuance of the action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been." 100 N.Y. at 235.

The legal principle of annulment through discontinuance has been reiterated in subsequent decisions. For example, in *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 444 (1928), the Court of Appeals affirmed that cases that are discontinued are "as if they had never begun." And, in *Brown v. Cleveland Trust Co.*, 233 N.Y. 399, 406 (1922), the Court noted that "no adjudication" in a discontinued action "b[inds] any one."

Perhaps acknowledging that its decision in *Engel* lacked explanation and reasoning and knowing that the Court of Appeals has taken up that case, the Second Department recently issued a decision through which the majority tried to explain its *Engel* decision. *See Trust v. Barua*, 2020 NY Slip Op 03095 (2d

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Dept. June 3, 2020). In a dissent favorable to our industry's position, Justice Miller called out his colleagues for their "vague references to 'equity'" and the "invocation of one-sided hypotheticals that have no bearings on the facts of this case." *Id*. at p. 8. "Instead of restoring clarity and predictability, the decision to ignore precedent will foster additional confusion in this important area of the law." *Id*.

And so, the battle lines have been drawn. Amicus briefs on both sides have been filed or are planned to be filed shortly in *Engel*, and at least one judge of the Second Department would seemingly welcome a reversal by the Court of Appeals. Such a reversal, and a holding that a voluntary discontinuance annuls a prior election to accelerate, would go a long way in the industry's battle with the SOL given that a significant number of cases with SOL risk involve earlier foreclosures that were voluntarily discontinued.