PROVING DE-ACCELERATION IN A CHANGING LANDSCAPE

New York's statute of limitations to initiate foreclosure has been an ongoing and persistent issue facing the mortgage servicing industry. Courts have shown a disturbing comfort level with deeming mortgages unenforceable on this basis, a problem exacerbated by necessary foreclosure "re-starts" that are aggressively litigated by homeowners.

Adding to the headache is the sheer volume of decisions being handed down—often inconsistent among branches of the appellate division—that consistently move the goalposts.

Despite a spirited industry challenge that sought a contrary ruling,1 it is generally accepted that filing a foreclosure complaint accelerates the mortgage debt and starts the 6-year limitations period running. e.g., *Milone v US Bank N.A.*, 164 A.D.3d 145, 151 (2d Dept. 2018).

Can a loan thereafter be de-accelerated? If so, what is required to de-accelerate? Right now, that depends. A case presently before the Court of Appeals (the highest court in New York), *Freedom Mortg. Corp. v. Engel*, 163 A.D.3d 631, 633 (2d Dept. 2018), *lv to appeal granted*, 103 N.Y.3d 12 (2019),2 should go a long way to resolving that inquiry.

In *Engel*, the lower appellate court found that voluntarily discontinuing a foreclosure does not, by itself, de-accelerate the mortgage debt—even where the foreclosure complaint itself was the accelerating act. The ruling was contrary to the longstanding and widely held view that voluntarily discontinuing a foreclosure does de-accelerate. In doubling down on its *Engel* decision, the same lower appellate court offered several factors that could be considered in assessing a de-acceleration:

I. a demand for the resumption of monthly payments
II. an invoice to the borrower demanding back payments
III. the "voluntary vacatur of a lender's filed lis pendens"
IV. the existence of a forbearance agreement allowing the borrower to reinstate
V. "any other evidence demonstrating that [the lender] was truly seeking to de-accelerate the debt in addition to its discontinuance of the action." *Trust v. Barua*, 184 A.D.3d 140 (2d Dept. 2020).

Proving this is not as simple as it seems. There is often a lack of needed evidence, and what may be thought of as solid evidence can be rendered insufficient by subsequent rulings. For example, many servicers tried to argue that a communication to the borrower seeking only the past due amount rather than the entire loan balance, like a monthly mortgage statement, constitutes a demand for the resumption of monthly payments. But in a very recent decision, *Wells Fargo Bank, N.A. v. Maddaloni*, 186 A.D.3d 1587, 1589 (2d Dept. 2020), the Appellate Division disagreed.

Perhaps the easiest path to proving de-acceleration is through a notice that tells the borrower that the prior acceleration is being revoked and the loan is payable in installments again. But even there, the Appellate Division has cautioned that the notice must not be "pretextual in any way[, ... meaning] the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration . . . [such as] avoid[ing] the statute of limitations." *Milone*, 164 A.D.3d at 154.

Recent decisions support that both the wording of the letter and proof that it was properly mailed are equally important to prevailing. See *Soffer v. U.S. Bank*, N.A., 186 A.D.3d 1443, 1444 (2d Dept. 2020) (affirming propriety of language used in de-acceleration notice); *Assyag v. Wells Fargo Bank, N.A.*, 186 A.D.3d 1303 (2d Dept. 2020) (analyzing mailing component of de-acceleration notice).

These lower appellate rulings may finally receive some well-deserved clarity once *Engel* and its companion cases are decided by New York's highest court. Until that time, prudence suggests advancing as many arguments as possible and hoping one sticks.

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